US Army Corps of Engineers
Kansas City District

CENWK-OD-R and CEMVS-OD-F 7 September 2011

MEMORANDUM FOR RECORD

SUBJECT: Reconsideration of Proffered Missouri River Commercial Dredging Permits

1. Reference the following permit actions:

   a. NWK-2008-l765 (The Master's Dredging Company) - permit denied

   b. NWK-2011-361 (Capital Sand Company, Inc) – proffered permit

   c. NWK-2011-362 (Hermann Sand & Gravel) – proffered permit

   d. NWK-201 1-363 (Holliday Sand & Gravel, LLC) – proffered permit

   e. NWK-2011-364 (Con-Agg of Missouri, LLC) – proffered permit

   f. MVS-2011-0177 (Limited Leasing Company) – proffered permit

   g. MVS-2011-1078 (J.T.R., Inc.)

   h. MVS-2008-193 (Capital Sand Company, Inc.)

2. On 27 February 2011, the Kansas City District (NWK) and St. Louis District (MVS) jointly published the Missouri River Commercial Dredging Final Environmental Impact Statement (FEIS, http://www.nwk.usace.army.mil/regulatory/Dredging/MO/MOdredging.htm) regarding proposed dredging permits. On 31 March 2011, the Districts issued a Record of Decision (ROD, http://www.nwk.usace.army.mil/regulatory/Dredging/MO/MOdredging.htm) and proffered permits to re-authorize previously permitted dredging operations of Holliday Sand & Gravel Company, LLC Enclosure 2); Capital Sand Company, Inc. (Enclosure 3); Hermann Sand and Gravel, Inc. (Enclosure 4); Con-Agg of MO, LLC (Enclosure 5); J.T.R., Inc. (Enclosure 6); and Limited Leasing Company (Enclosure 7) and denied authorization for new dredging operations proposed by The Master's Dredging Company, Inc. (Enclosure 8) and Edward N. Rau Contractor Company (Enclosure 9) and denied authorization for additional tonnage requested by Capital Sand Company in the lower 50 miles of the Missouri River (Enclosure 10). After consulting with the Northwestern Division (NWD) and Mississippi Valley Division (MVD) Administrative Appeals Review Officers (AROs), the Districts had issued the permits as final proffered permits rather than initial proffered permits (the enclosed documents are labeled as initial proffered permits based on the decision described in the following paragraph) because the District Engineers had been integrally involved in the permit decision and reconsideration of the proffered permits by the District Engineers would be unlikely to result in any changes. Con-Agg of Missouri accepted their proffered permit and it was executed on May 19, 2011 (Enclosure 11).

3. Three separate Requests for Appeals (RFA) were received by the Northwestern Division for permit actions evaluated under a single EIS. One appeal (Enclosure 12) submitted by Lathrop & Gage on behalf of Capital Sand Company, Hermann Sand and Gravel, Holliday Sand & Gravel

Company, Con-Agg of Missouri, Limited Leasing Company, and J.T.R. identified common reasons for appeal of the six proffered permits and the Capital Sand Company denial by MVS. In addition, Holiday Sand and Gravel also submitted an independent RFA under representation of Stoel Rives (Enclosure 13). A third, completely independent RFA of a permit denial was received on behalf of The Master's Dredging Company (Enclosure 14).

4. Upon receipt of the RFAs, the MVD and NWD AROs determined (Enclosure 15) that the appeal regulation at 33 C.F.R. § 331.2 specifically states that the first time a permit is sent to the applicant it should be an "initial proffered" permit. By regulation, initial proffered permits are not appealable actions. However, if an applicant objects to the terms or conditions of the initial proffered permit, the applicant may request the District Engineer modify the permit. Permit denials are appealable actions. By letters dated 5 July 2011, the MVD and NWD AROs accepted the RFA from The Master's Dredging Company for their denied permit (Enclosure 16); notified Lathrop & Gage that they would need to submit a revised RFA based only on reasons related to permit denial if Capital Sand Company still wants to appeal the denial of their application by MVS (Enclosure 18); notified Lathrop & Gage that the Con-Agg of Missouri permit was not appealable because it had been accepted by the applicant and executed by NWK (Enclosure 18); and notified the remaining applicants that their RFAs would be returned to the appropriate district for reconsideration by the District Engineer (Enclosure 17 and Enclosure 18).

5. By email dated 13 July 2011 (Enclosure 19), NWK notified the applicants and their agents that NWK and MVS would accept and evaluate the previously submitted RFAs and send final proffered permits as soon as possible.

6. Most of the applicants' objections in their RFAs were previously raised in public comments submitted in response to the Draft and Final EISs and all are addressed in the Final EIS or the ROD. Chapter 10 of the Final EIS addressed each issue regarding the potential environmental consequences of the Proposed and Alternative Actions by summarizing changes made in the Final EIS to address the issue, clarifying where and how the issue was already addressed in the Draft and Final EISs, or explaining why no changes were warranted. Section 3.7 of the ROD addressed each issue regarding what should or should not be authorized in the pending permit decision. The applicants' objections and our responses are listed in Enclosure 1 of this memo. The responses refer to pertinent sections of the Final EIS or ROD, summarize and clarify our response, and emphasize key points. The responses are only a summary. The full analysis of each issue can be found in the appropriate portion of the Final EIS or the ROD.

7. After considering the applicants' objections to our original permit decision, we reaffirm the denial of the permits The Master's Dredging Company and Capital Sand Company (MVS) and will issue final proffered permits, unchanged with one exception, to Capital Sand Company, Hermann Sand and Gravel, Holliday Sand & Gravel Company, Limited Leasing Company, and J.T.R.. We have decided to modify special condition "b", as requested, to require the dredgers to monitor the location, operational status, and extraction rate of their dredges only when they are actively dredging in the Missouri River. To keep permit conditions consistent among all the dredging permits, the already executed Con-Agg of Missouri permit will also be modified accordingly.

8. Any questions concerning the information furnished should be directed to Kansas City District Regulatory Branch Chief Mark Frazier at 816-389-3664.

ANTHONY J. HOFMANN
Colonel, EN
Commanding

CHRISTOPHER G. HALL
Colonel, EN
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19 Enclosures
Enclosure 1. Applicants' Objections and USACE Response
Enclosure 2. 2011-03-31 Holliday Sand Initial Proffered Permit Package
Enclosure 3. 2011-03-31 Capital Sand Initial Proffered Permit Package
Enclosure 4. 2011-03-31 Hermann Sand Initial Proffered Permit Package
Enclosure 5. 2011-03-31 Con-Agg Initial Proffered Permit Package
Enclosure 6. 2011-03-31 JTR Initial Proffered Permit Package
Enclosure 7. 2011-03-31 Limited Leasing Initial Proffered Permit Package
Enclosure 8. 2011-03-31 Masters Dredging Permit Denial Package
Enclosure 9. 2011-03-31 Edward N Rau Permit Denial Package
Enclosure 10. 2011-03-31 Capital Sand MVS Permit Denial Package
Enclosure 11. 2011-05-19 Executed Con-Agg of Missouri Permit
Enclosure 12. 2011-05-31 Shorr Appeal Package
Enclosure 13. 2011-05-31 Holliday Sand Appeal Package
Enclosure 14. 2011-05-31 Master's Appeal Package
Enclosure 15. 2011-06-29 NWD Ripeness Memo
Enclosure 16. 2011-07-05 NWD Letter to Masters
Enclosure 17. 2011-07-05 NWD Letter to Holliday Sand & Gravel Company
Enclosure 18. 2011-07-05 NWD Letter to Shorr
Enclosure 19. 2011-07-13 NWK Email Clarifying the Missouri River Dredging Administrative Appeals Status

Applicants' Objections and USACE Response

Objection	Response
Category: Global Permitting Issues	
1. The applicants appeal the tonnage limits imposed on each individual dredger in the issued permits in that the adoption of these limits is arbitrary and capricious and the limits are based on inaccurate and incomplete data. • The USACE lacked data to conclude that limiting dredging will effect overall bed degradation. • The analysis of bed loads in the EIS is flawed. • The drafters of the EIS rely on inaccurate measurements and methods to conclude that commercial dredging leads to localized bed degradation. • The tonnage caps on dredging based on bed load are unreliable and arbitrary. • The USACE can protect at risk areas while allowing sufficient tonnage.	The decision of overall and localized tonnage limits was not arbitrary and is fully described in Sections 2.4.1 and 3.4.6.3 and Appendix A of the Final EIS. Alternatives to the Proposed Action were identified through review of factors including the record of previous dredging permits, analysis of bed-material load estimates and recent and historical degradation. The USACE estimated the bed-material load using a reasoned approach and the best available information. Rob Jacobson, Research Hydrologist with the U.S. Geological Survey, in response to the Draft EIS public comment period stated "…I think the preparers of this report did a state-of-the-art job of estimating bed-material loads. Using a variety of available models is entirely appropriate to provide some measure of variance."(see comment letter 50 in Appendix F of the Final EIS) The EIS process, which has included public scoping meetings, comment periods, and review and comment on the Draft EIS, has provided a forum for public review and comment. As discussed in Sections 3.4.6.3 and on page 10-116 of the Final EIS, the causes of degradation on the LOMR are complex and vary at different locations along the river. The EIS focused on the contribution of dredging to bed degradation because dredging is the applicants' sole proposed activity and permitting it constitutes the proposed major federal action. The geomorphology analysis found that bed degradation has occurred at most locations where dredging occurs and is most severe in intensely dredged areas near the major sand plants in Kansas City, Jefferson City, and St. Louis/St. Charles (see Figures 3.4-31 and 3.4-32 from the Final EIS). Further, a statistically significant linkage between total dredging amount in a dredging reach, dredging intensity, and bed degradation was identified (see Figures 3.4-34 and 3.4-35) that demonstrates the contribution of dredging to bed degradation. After reconsidering the tonnage limits as requested, we have concluded that the limits we have proposed are not arbitrary or capricious and are necessary to prevent levels of degradation and associated impacts that would be contrary to the public interest. In all river segments other than the Kansas City segment the proffered annual extraction amount is equal to or greater than the average amount extracted annually between 2004 and 2008. In the Kansas City segment, because of the potential economic, public safety, and environmental impacts and in consideration of potential alternative sources to help

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Objection	Response
	meet the public demand for sand, increasing the proffered annual extraction limit would be contrary to the public interest. The annual extraction limits will not be changed in the Final Proffered Permits.
2. The applicants appeal the USACE's adoption and use of segments and fixed segment boundaries for permitting purposes and, specifically, the imposition of an additional tonnage limit within the specific segments.	In August 2007, the USACE issued a Combined Decision Document that concluded that past dredging had contributed to significant bed degradation in the Missouri River and that an EIS would be required for the next dredging permit decision. As discussed on pages 10-113 to 10-116 of the Final EIS, a basic principal of river geomorphology is that a river with a given volume and velocity will have the capacity to carry a specific bed-material load. Bed degradation occurs when a river's sediment transport capacity is greater than the supply of sediment and the effective shear stress of the flowing water is sufficient to erode the bed until the sediment supply is once again in balance with the transport capacity. The addition of sediment from tributaries and the extraction of sand by commercial dredging are two highly variable factors that affect the sediment supply of the LOMR. Also, there are limited locations where sufficient hydrologic and sediment data have been collected to allow computation of sediment bed load estimates. As discussed in Section 3.3 of the Final EIS, the USACE used the best available information to divide the LOMR into segments based on major tributaries, bedrock geology, slope breaks, width of the alluvial floodplain, and the USGS gage locations where the sediment supply was likely to change and could be measured. This would facilitate better and more specific environmental impact assessment and enable the USACE to better determine appropriate dredging levels based on the local bed material load. The USACE then assessed allocations of the segment tonnage among the applicants based on equity considerations as is further discussed in response to Global Issue 10 below. After reconsidering the segmentation of the river as requested, we have concluded that the segment boundaries are not arbitrary or capricious, are necessary to prevent levels of degradation and associated impacts that would be contrary to the public interest, and will not be changed in the Final Proffered Permits. During the current permit cycle and subsequent permits, the USACE will continue to take information as it becomes available relative to allocations and segments. It will use that information to assess the effects of the segment boundaries on degradation and the applicants to determine if any

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	modifications are warranted.
3. The applicants appeal the permit decision because the USACE failed to consider the USACE-controlled river structures, including the BSNP, as part of the analysis of the causes and contributors to bed degradation, which has resulted in disproportionate action against commercial dredging.	The USACE Regulatory Program does not control maintenance of the BSNP and changes to the BSNP are not part of the action proposed by the applicants. Therefore, the BSNP and other potential causes of degradation do not form part of the proposed federal action that is the center of study pursuant to NEPA. To make it thus would add enormous expense and time that would be borne by the applicants and cannot be required by the agency. However, the USACE is required under both NEPA (40 C.F.R. 1508.7) and the 404(b)(1) Guidelines [40 C.F.R. 230.11(a)] to evaluate the cumulative impacts of the proposed federal action on the environment. The agency did analyze the impacts associated with BSNP as part of its cumulative impacts assessment (see Chapter 5 of the Final EIS and Section 4.2.2 of the ROD). The applicants seem to believe that the cumulative impact analysis requires a quantification of the impact of each individual factor (such as the BSNP) that could affect an aspect of the environment (such as river geomorphology), and if the proposed action would cause less impact when compared to all the other past, present, and future causes, then it should be permitted. This interpretation of the requirements to evaluate cumulative impacts is inaccurate. Cumulative impact assessment analyzes the changes that are attributable to the proposed federal action when added to other past, present, and reasonably foreseeable future actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time. The cumulative impact analysis is critical because it helps determine whether the proposed action is going to be the action that causes the cumulative impacts to reach a threshold of unacceptable impacts (in terms of the public interest) to the resources of concern. Even in the presence of other potentially substantial causes to a problem, the proposed federal action may not be in the public interest if it contributes materially to a severely degraded resource. As discussed in Section 3.2.4.2 of the Final EIS, Congress authorized the USACE to construct the BSNP to create a stable navigable waterway that was not aggrading, degrading, or meandering across the floodplain. The BSNP is a system of dikes designed to train and re-direct the river to an alignment engineered for the appropriate gradient and water velocities that will balance the sediment carrying capacity of the river with the sediment supply. However, bed degradation can occur when a variable changes and the river's sediment transport capacity becomes greater than the supply of sediment

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	and the effective shear stress of flowing water is sufficient to erode either the bed or the banks, increasing the sediment supply. Dredging removes a portion of the supply of sediment and will push an aggrading river toward equilibrium and stability, cause a previously stabile river to degrade, and cause an already degrading river to degrade more rapidly (see pages 10-28 and 10-113 to 10-116 of the Final EIS for further discussion of dynamic equilibrium and the potential causes of degradation). Dredging has occurred to various degrees at different locations along the LOMR for the past 75 years but did not exceed 1 million tons per year until 1958 (see Figures 1.5-1 from the Final EIS). Dredging levels in the LOMR surpassed 2 million tons per year in 1965 and peaked at 8.7 million tons per year in 2002. Figure 1.5-2 shows dredging levels by river mile for dredging that has occurred in the last 10 years. Figure 3.4-25 shows the change in the changes in river stages and average bed elevation seen at the Kansas City, Missouri river gage since 1927. Comparison of the three figures reveals that the rate of degradation almost mirrors the level of dredging. Dredging is not one of the project purposes authorized by the 1944 Flood Control Act and the BSNP was not originally designed to accommodate ever increasing levels of dredging. The existing environment of the LOMR reflects the historic changes to the flow regime, the mainstem dams, and the BSNP structures as described throughout Chapter 3 but particularly in Section 3.4.6.3 of the Final EIS. The cumulative impacts of these actions in the past, present, and reasonably foreseeable future have been qualitatively described in Chapter 5 of the Final EIS using the best available data. For several reasons the USACE did not quantify the amount of bed degradation or other environmental impacts caused by each individual factor such as the BSNP. Those reasons are: 1. Neither the law nor regulations require cumulative impacts to be quantified so precisely 2. Data of that precision and accuracy was not available and would be expensive to generate, 3. The purpose of the EIS was to disclose the impacts of dredging, not the causes and solutions of bed degradation, 4. The applicants were unwilling to pay for the additional analysis, and 5. Although it will take several years and its progress is subject to availability of funds, the Corps has begun the Degradation Feasibility Study to look at overall causes and

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	potential solutions to degradation for those factors other than dredging in the MO River. As discussed in Sections 3.4.6.2 and shown on Figures 3.4-31 and 3.4-32 of the Final EIS, bed degradation has occurred at most locations where dredging occurs and is most severe in intensely dredged areas around the sand plants in Kansas City, Jefferson City, and St. Louis/St. Charles. As discussed in Section 3.5 of the Final EIS and Section 4.2.1.1 of the ROD, those most severely degraded reaches are also located in cities with more levees, revetments, drinking water and industrial water intakes, bridges, and pipeline crossings located on the LOMR than occur in rural reaches of those segments or in the Waverly and St. Joseph segments. The Kansas City segment has degraded approximately 12 feet since 1940 and as a result has experienced failed revetments and dikes, collapsed river banks, damaged or disabled water intakes, damaged bridges on tributaries, damaged levee toes, and failed outfalls. Based on the impacts to infrastructure already observed in the most degraded Kansas City segment, it appears likely that other segments, particularly the Jefferson City and St. Charles, would experience adverse impacts with the occurrence of moderate to substantial degradation in the long-term future. Adverse impacts that could be expected include compromised performance of water intakes that provide drinking, cooling, and industrial process water thus requiring expensive modifications to intake structures, premature pump wear, and damage that threaten the reliability of electric generation and public drinking water supply; scouring of existing bridge foundations (particularly on tributaries near the LOMR); exposure of and/or damage to petrochemical, sewer, or water pipelines (and associated accidental releases) under the river; and bank and revetment failure that could impair navigation and threaten the integrity of nearby levees. As discussed in Section 4.2.1.5 of the ROD and Section 4.10 of the Final EIS, the economic effects related to continued river bed degradation are difficult to quantify but would be proportional to the amount of degradation expected to occur. Additional degradation in any segment of the river would result in additional expenditures in those segments for infrastructure repair, maintenance, and replacement and would increase the potential for levee failure and jeopardize billions of dollars in investment protected by the regional levee systems. However, the ROD concluded that the annual extraction limits of the proffered permit, with the dredging concentration limits and a monitoring and adaptive management

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	framework, should result in no more than slight degradation in the short-term and long-term, is the LEDPA, complies with the Section 404(b)(1) Guidelines, and is not contrary to the public interest. After considering this reason for appeal, we have concluded that the Final EIS and ROD have evaluated and considered the cumulative impacts of the USACE-controlled river structures, including the BSNP, using the best available information as required by law. We also conclude that the proffered permit conditions are necessary and practicable and that increasing the authorized extraction limits in any of the segments at this time would be contrary to the public interest.
4. The ROD impermissibly piles assumption upon assumption to reach its flawed alternative sources conclusion.	The analysis of the capacity of alternate sources to meet displaced supplies from the LOMR under the various Project alternatives is presented in Section 2.3.2.1 and Section 2.3.2.2 of the Final EIS. This reason for appeal is similar to public comments given in response to the Draft EIS which are addressed on pages 10-13 and 10-14 of the Final EIS. . Estimates of additional capacity to produce sand and gravel from the Kansas and Mississippi Rivers were based on the difference between maximum permitted levels of existing dredging permits and historical production data reported by the USACE. Based on this information, there is currently authorized, but unused, sand production capacity in these river systems that represents a short-term alternate source of sand and gravel in the region. The Final EIS also estimated the excess capacity of existing sand and gravel mining operations that could potentially serve as alternate sources to material dredged from the LOMR. Actual production data for individual mines were not available from the MDNR, as this information is considered confidential and proprietary. Further, because of confidentiality restrictions, it was not feasible to query mining operators about their available capital and production capacity. As a result, excess capacity was estimated based on the difference between peak production periods and current production levels, and the assumption that sand and gravel production could at least return to peak levels if needed to help offset reductions in LOMR dredging in the short term. As noted above, it was not possible to evaluate each mining operation relative to available capital,

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	operating parameters, and regulatory compliance issues. Accordingly, it is acknowledged that the figures reported in the EIS for available capacity are only planning-level estimates. The alternate source analysis also considered the capacity of alternate sources to meet road construction material specifications as required by the MoDOT. This analysis is based on (1) the estimated quantity of sand and gravel from the LOMR that has been historically used by the MoDOT (i.e., baseline demand); and (2) available capacity at sand and gravel mining operations that have been identified as meeting MoDOT specifications. From a supply perspective, alternate sources that were assumed to provide material meeting MoDOT specifications include the Kansas, Mississippi, and Meramec Rivers, as well as other approved land-based sources of Class A sand identified by the MoDOT. (Final EIS pages 10-13 and 10-14)
5. The ROD failed to quantitatively assess the environmental impacts of its proposed alternative sources solution.	In the Final EIS, the USACE has addressed the relative impacts of commercial dredging in the Missouri River and the impacts of obtaining sand and gravel from alternate sources in each resource section of Chapter 4. The best available information was used. The potential impacts on trucking, agricultural lands, and emissions were addressed along with impacts on other resource areas. The impacts of the use and development of alternate sources were addressed with the available data. By necessity, the analysis was less geographically specific, as it was not possible to identify how production and technology within the market may respond, or to specify the actual locations of expanded or new mining operations.
6. The continuous monitoring requirements included in the permits are overly burdensome, beyond the scope of USACE authority, bear no relation to protecting any USACE interest in dredging, and violate the protections of the Kansas, Missouri and United States constitutions.	The USACE has determined that requiring the applicants to monitor the location, operational status, and extraction rate of their dredges is necessary to ensure compliance with critical special conditions that protect vulnerable public infrastructure, endangered species habitat, and historical and cultural resources. The USACE believes that monitoring 24 hours per day, 365 days per year would be helpful to both the USACE and the applicants when the USACE receives public reports of observed non-compliance. However, the USACE has considered the applicants request and will modify the Final Proffered Permits to require monitoring of the dredges only when they are dredging in the Missouri River. The USACE believes it does have the authority and may require full-time monitoring in the future if it has sufficient reason to question the applicants' compliance with the special permit conditions that exclude dredging from

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Objection	Response
	critical resources at specific locations.
7. There is no basis for the USACE's denial of a 100% carryover of annual authorized tonnage.	The USACE issued dredging permits have historically authorized an approximate annual extraction amount. In 2007 the approximate annual extraction amounts became an absolute annual limit intended to prevent continued escalation of dredging levels and associated bed degradation. When the USACE proposed more restrictive and lower segment dredging limits in the 2011 permit decision after completion of the draft EIS, the applicants suggested the idea of allowing the applicants to save some of their authorized annual extraction amount for a segment and carry it over to be extracted the following year in addition to that years amount. The USACE and the applicants discussed benefits to a potential 10% carryover. The applicants never asked to be able to carryover 100% of the authorized annual extraction amount for a segment, nor did the EIS assess that type of regime and potential impacts associated with it, which could be substantially different. As discussed on page 3-40 of the ROD, the USACE determined that allowing 10% carryover was reasonable and would not be likely to result in more than slight long-term bed degradation or associated impacts. Based on available information, the USACE cannot allow greater quantities of carryover at this time.
8. The USACE's actions are contrary to federal constitutional law in that the USACE, in restricting the applicants' access to river bed material have taken a property right without adequate compensation.	The USACE has followed the applicable statutes and regulations during the permit process and the USACE asserts that these statutes and regulations are not unconstitutional. As explained on page 10-76 of the Final EIS and page 3-31 of the ROD, contrary to the claims of the applicants Section 404 permits do not create vested or unalterable legal rights. They are subject to reevaluation and modification based on available information. In addition, the permits in question have completed their established lifespan. The USACE can provide no assurance of renewal of a permit as it is required to assess the public interest in such an activity. Although dredging has been permitted in the past, the federal action is the proposed reauthorization of dredging and the central question of the associated public interest review is whether or not and under what restrictions dredging should be authorized in the future. The USACE recognizes equity and property considerations as it determines the appropriate way to incorporate the findings of the public interest review, including the EIS, into its Record of Decision and ultimately its permits. As clarified on page 10-107 of the Final EIS, USACE jurisdiction is not limited by

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Objection	**Response**
	property rights or directed at property. Jurisdiction stems from the nature of the proposed activity within waters of the United States (as defined by regulation), regardless of property ownership where those waters are situated or incidental effects that regulating the activity may have on the use of the property. USACE permits do not grant or revoke property rights, although administration of the CWA and Rivers and Harbors Act of 1899 may incidentally affect the use of the property. The USACE acknowledges that the states own both the land and the minerals comprising the river bed, have the responsibility to manage it for the benefit of the public, and can authorize and collect royalties for using that state land or extracting the mineral resource if they choose. The USACE has taken into account comments from the states relative to the values and impacts associated with dredging and the bed of the river Final EIS.
9. The USACE uses and relies upon unpublished data and sources in the ROD and the EIS. the inclusion of such material, which is not available to the applicants and is not subject to external analysis or peer review, is arbitrary and capricious and contrary to law.	As discussed in the Final EIS on pages 10-109 and 10-110, the Draft EIS and its underlying analysis sought to use the best and most current available information. Much of this data is published, but in some cases, these data are unpublished, in development, or in the "grey literature" (i.e., in reports and data files that are not widely known or available, such as agency reports). This does not mean that these reports were draft or unfinished. The use of these types of data in NEPA documents is widely practiced; without the use of unpublished data and reports, a vigorous and comprehensive analysis would not have been possible. The USACE has strived to make it clear when such unpublished data were used and to show the underlying analysis and summary of results in the EIS and the appendices. All data and information cited in the EIS are also compiled within the Administrative Record for the EIS. It is therefore available either in the designated information repositories or upon request through the Freedom of Information Act. The USACE has cited personal communications or unpublished data only as sources of information for its analysis, not as support for conclusions regarding impacts or their significance."

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Objection	**Response**
10. The amount of tonnage reduced in many of the permits is so limited that it cannot be measured to demonstrate or determine an impact on the river bed. The inability to determine a specific impact by a proposed cut in production renders the action speculative and pure conjecture, and therefore arbitrary.	The applicants inaccurately imply that the federal action being proposed is "reducing" dredging levels. By definition the federal action in this case is the proposed reauthorization of dredging and the central question of the associated public interest review is whether or not and under what restrictions dredging should be authorized in the future. The applicants also imply that if evaluated independently, the various dredging operations would have an insignificant and immeasurable impact on the river. However, the USACE is required under both NEPA (40 C.F.R. 1508.7) and the 404(b)(1) Guidelines [40 C.F.R. 230.11(a)] to evaluate the cumulative effects on the environment. Cumulative effects are the changes that are attributable to the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions. Accordingly, the USACE has prepared the combined Final EIS and ROD for all the currently proposed dredging permits. As discussed in the response to the second issue raised by the dredgers, "Global Issue 2," the USACE divided the LOMR into five segments based on physical characteristics and the USGS gage locations where the bed material load was likely to change and could be measured. As discussed in the response to Global Issues 1 and 2, the annual extraction limits for each segment were determined by evaluating previous dredging records, analysis of bed-material load estimates, and recent and historical degradation. The ROD determined that the dredging limits and conditions of the proffered permit should result in no more than slight degradation in the short-term and long-term, is the LEDPA, complies with the Section 404(b)(1) Guidelines, and is not contrary to the public interest. As discussed on pages 3-41 and 3-42 of the ROD, the USACE allocated the annual extraction limit for each segment among the various applicants based on capability, investment, and equity by giving each applicant the percentage of the segment limit that is equal to the percentage of the total average amount extracted from that segment between 2004 and 2008 that was dredged by each applicant. Allocating the annual extraction limit for a segment among the applicants that work in that segment may result in seemingly inconsequential reductions in dredging for the individual permits, but cumulatively among all the applicants the reductions are an essential part of the LEDPA. After considering this reason for appeal, we have concluded that the annual extraction amounts in the permit proffered to each individual applicant are based on the cumulative impacts analysis using the best available data and reasonable analysis methods and are

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Objection	**Response**
	not arbitrary or capricious. We also concluded that the proffered permit conditions are necessary and practicable and that increasing the authorized extraction limits in any of the segments at this time would be contrary to the public interest.
Category: Individual Permitting Issues – J.T.R., Inc., and Limited Leasing Company	
1. Adequate tonnage exists in the lower river to support the request of the applicant. The decision by the USACE in limiting the tonnage in the permit was arbitrary, capricious, and based on insufficient and incorrect data. See Global Issue 1	As discussed in the responses to Global Issues 1, 2, and 10, the annual extraction limits for each segment were determined by evaluating previous dredging records, analysis of bed-material load estimates, and recent and historical degradation. Figures 3.4-21 and 3.4-22 show significant drops in the CRP water surface elevations and the river bed elevations in the St. Charles segment from the 1990s to 2009. Figures 3.4-31 and 3.4-32 are the same figures but also show the cumulative dredging levels from 1998 to 2007. The annual extraction amounts for the St. Charles segment in the proffered permits is equal to the average amount extracted annually from the reach from 2004 to 2008 but requires the applicants to spread the extraction out more and not concentrate all around the sand plants where degradation has been most severe. After considering this reason for appeal, we conclude that the annual extraction amounts proffered in the St. Charles segment are based on the cumulative impact analysis using the best available data and reasonable analysis methods and are not arbitrary or capricious. We also conclude that the limits and conditions of the proffered permits are necessary and practicable and that increasing the authorized extraction limits in the St. Charles segment at this time would be contrary to the public interest.
2. The monitoring provision relating to 24/7, 365 days per year, is unreasonable and unconstitutional. Global Issue 6 is hereby incorporated by reference.	The USACE will modify the Final Proffered Permits to require monitoring of the dredges only when they are dredging in the Missouri River. See the response to Global Issue 6.

Applicants' Objections and USACE Response

Objection	Response
3. The segment amount is arbitrary and capricious, and its distribution and allocation unreasonable. Global Issue 2 is hereby incorporated by reference. In addition to the Global Issue, segment limits in the St. Charles segment inappropriately advance beyond District jurisdictional boundaries creating confusing and differential regulatory positions by the Kansas City District and the St. Louis District. Multiple applicants are forced to overlap operations and "regulate" competitors operations in the segment.	As discussed in the responses to Global Issue 2 and J.T.R./Limited Leasing Company Issue 1, the annual extractions limits for the St. Charles segment was determined by evaluating previous dredging records, analysis of bed-material load estimates, and recent and historical degradation. As discussed on pages 3-41 and 3-42 of the ROD, the USACE allocated the annual extraction limit for each segment among the various applicants based on capability, investment, and equity by giving each applicant the percentage of the segment limit that is equal to the percentage of the total average amount extracted from that segment between 2004 and 2008 that was dredged by each applicant. After considering this reason for appeal, we believe that the segment limit for the St. Charles segment and the requirement to spread extraction out more within the segment are based on a reasonable analysis of the best available data and is not arbitrary or capricious. We also believe that allocation of the segment limit among the applicants was fair and reasonable and not arbitrary or capricious. .
4. The amount of tonnage at the mouth of the Missouri River and reaches allocated to this permit are underestimated. Global Issue 1 is hereby incorporated by reference. The mouth of the river and its interface with the Mississippi River is treated the same as all other areas of the river. The sediment deposition, bed load, hydrology and hydraulics are vastly different than any other portion of the river providing material in excess of the amounts indicated in the ROD and EIS.	See the responses to Global Issue 1 and J.T.R./Limited Leasing Company Issue 1.
5. The permit decision fails to take into account the impact of the Bank Stabilization and Navigation Project. Global Issue 3 is hereby incorporated by reference.	See the response to Global Issue 3.

Applicants' Objections and USACE Response	
Objection	**Response**
6. The permit's limitation of 300,000 tons per 5-mile reach is arbitrary. Global Issues 1 and 2 are hereby incorporated by reference.	The 300,000 tons per 5-mile reach concentration limit is fully discussed in Section 2.7.4 and 3.4.6.3 of the Final EIS (page 2-89) and Section 4.2.3.1.2 of the ROD (page 4-24). Figures 3.4-31 and 3.4-32 from the Final EIS show that bed degradation has occurred at most locations where dredging occurs and is most severe in intensely dredged areas near the major sand plants in Kansas City, Jefferson City, and St. Louis/St. Charles. To estimate potential dredging intensity effects on river bed degradation, historical dredging data were used to determine where dredging occurred and at what intensity. This information was then compared with observed patterns of local bed degradation by analyzing changes in local bed elevations in relation to dredging intensities using linear regression. The results suggest that dredging up to approximately 300,000 tons per 5-miles per year is a level of local dredging intensity that is reasonably unlikely to result in local bed degradation. After reconsidering the 300,000 tons per 5-mile reach concentration limit, we have concluded that it is based on a reasonable analysis of the best available data and is not arbitrary or capricious. We also conclude that without the concentration limit in the designated 5-mile reaches, the remaining limits and conditions of the proffered permits would likely result in a level of bed degradation and associated impacts to other resources that would be contrary to the public interest.
Category: Individual Permitting Issues – Capital Sand Company Sand	
1. Adequate tonnage exists to meet the applicant's request at Washington, Missouri, and in the St. Charles segment. The failure to allow the applicant's request was arbitrary and capricious in that it was not based on accurate or complete data. Global Issue 1 is hereby incorporated by reference. Adequate tonnage exists is this section of the river to support the applicant's request. The decision by the USACE in limiting the tonnage in the permit was arbitrary, capricious, and based on insufficient and incorrect data.	Degradation is occurring in the St. Charles segment as demonstrated in Figures 3.4-21 and 3.4-22 of the Final EIS and discussed in the responses to Global Issues 1 and 2. The USACE has determined that there is not additional material in the Jefferson City segment. As discussed below in the response to Capital Sand Company Issue 8, the USACE will consider future requests to expand dredging reaches in the segments but not the tonnage limits.

Applicants' Objections and USACE Response

Objection	Response
2. Adequate tonnage exists to allow the applicant's request in the Jefferson City segment. The failure to allow the applicant's request was arbitrary and capricious in that it was not based on accurate or complete data. Global Issue 1 is hereby incorporated by reference. Adequate tonnage exists is this section of the river to support the applicant's request. The decision by the USACE in limiting the tonnage in the permit was arbitrary, capricious, and based on insufficient and incorrect data.	Degradation is occurring in the Jefferson City segment as demonstrated in Figures 3.4-21 and 3.4-22 of the Final EIS and discussed in the responses to Global Issues 1 and 2. The USACE has determined that there is not additional material in the Jefferson City segment. As discussed below in the response to Capital Sand Company Issue 8, the USACE will consider future requests to expand dredging reaches in the segments but not the tonnage limits.
3. Adequate tonnage exists to allow for the applicant's request in the Waverly segment. The failure to allow the applicant's request was arbitrary and capricious in that it was not based on accurate or complete data. Global Issue 1 is hereby incorporated by reference. Adequate tonnage exists is this section of the river to support the applicant's request. The decision by the USACE in limiting the tonnage in the permit was arbitrary, capricious, and based on insufficient and incorrect data. The Waverly segment is aggrading and has surplus material. There is no basis to deny the applicants request.	See the response to Global Issue 1. The USACE took into account the bed load and conditions of the Waverly segment and authorized the highest alternative. After considering equity, the USACE proffered a permit to Capital Sand Company for an amount equal to that which it has dredged in the past. Because there is some aggradation in this segment, the USACE may be able to permit additional quantities in future permit cycles based on future river conditions. Based on currently available data, the USACE is not able to permit additional quantities in the segment.
4. The monitoring provision relating to 24/7, 365 days per year, is unreasonable and unconstitutional. Global Issue 6 is hereby incorporated by reference.	The USACE will modify the Final Proffered Permits to require monitoring of the dredges only when they are dredging in the Missouri River. See the response to Global Issue 6.

Applicants' Objections and USACE Response

Objection	Response
5. The USACE's assumption that there are alternative sources of sand available is based on inaccurate information. The USACE failed to complete an adequate analysis to determine if material exists to meet the needs and to determine the environmental impact of acquiring sand from other sources. Global Issues 4 and 5 are hereby incorporated by reference.	See the responses to Global Issues 4 and 5.
6. The impact of the reductions provided in the above permits cannot be accurately measured to determine their direct impacts. The assumption that the reduction will have any correlation to river bed degradation lacks any basis in scientific data, making the decision arbitrary. Global Issue 10 is hereby incorporated by reference.	See the response to Global Issue 10.
7. The permit decision fails to take into account the impact of the Bank Stabilization and Navigation Project. The decision to omit the analysis of the BNSP was arbitrary and capricious and a direct violation of NEP A. Global Issue 3 is hereby incorporated by reference.	See the response to Global Issue 3.
8. Denial of Capital Sand's permit application in the lower 40 miles of the LOMR (MVS-2008-0093). The St. Louis District had sufficient tonnage to allow the applicant's request. The failure to allow the applicant's request was arbitrary and capricious in that it was not based on accurate or complete data.	Degradation is occurring in the lower river as demonstrated in Figures 3.4-21 and 3.4-22 of the Final EIS and discussed in the responses to Global Issues 1 and 2. The USACE has determined that there is not additional material in the St. Charles segments. The applicant had applied to the Kansas City District for reauthorization of their previous permit and had applied to the St. Louis District for a new permit to dredge up to 500,000 tons between river miles 40 and 50. The Kansas City proffered a permit to the applicant to annually dredge up to 370,000 tons from the Waverly segment, up to 1,350,000 tons from the Jefferson City segment, and up to 140,000 of t tones from the St. Charles segment. The St. Louis District denied the request for an additional 500,000 tons in the

Applicants' Objections and USACE Response	
Objection	**Response**
	St. Charles Segment because the additional tonnage would have likely caused a level of bed degradation and associated impacts that would be contrary to the public interest. After considering this reason for appeal, we have concluded that the annual extraction amounts proffered in the St. Charles segment are based on the cumulative impact analysis using the best available data and reasonable analysis methods and are not arbitrary or capricious. We also conclude that the limits and conditions of the proffered permits are necessary and practicable and that increasing the authorized extraction limits in the St. Charles segment at this time would be contrary to the public interest. However, the applicant may submit an application to the St. Louis District for expansion of the authorized dredging area within which the applicant can extract the 140,000 tons authorized for the St. Charles segment..
Category: Individual Permitting Issues – Hermann Sand and Gravel	
1. Adequate material and tonnage exists to fully support applicant's previous amounts and additional tonnage. The failure to allow the applicant's request was arbitrary and capricious in that it was not based on accurate or complete data.	The USACE will not increase the tonnage authorized in the Final Proffered Permit. See the response to Global Issue 1.
2. The impact of the reductions provided in the above permits cannot be accurately measured to determine their direct impacts. The assumption that the reduction will have any correlation to river bed degradation lacks any basis in scientific data, making the decision arbitrary. The applicant's tonnage was reduced by 60,000 tons total, split between two segments. The ability to measure the impact of such small amounts of material on the bed of one of the nation's largest waterways and drainage areas and has not been demonstrated by USACE.	See the response to Global Issues 1, 2, and 10.

Applicants' Objections and USACE Response	
Objection	**Response**
3. Placement of the segment line between the company's operations is arbitrary in nature and creates an effective additional reduction in tonnage. The applicant's previous permits allowed for total tonnage to be split between its Jefferson City and Hermann sand plants. The segment line restricts the ability to continue such a practice with no justification in the record of the ability to measure such insignificant amounts.	See the responses to Global Issues 1, 2 and 10.
4. The amount of tonnage in the Jefferson City and St. Charles segments is so negligible that it should be exempted from all other permit conditions.	See the response to Global Issue 10
5. The monitoring provision relating to 24/7, 365 days per year, is unreasonable and unconstitutional.	The USACE will modify the Final Proffered Permits to require monitoring of the dredges only when they are dredging in the Missouri River. See the response to Global Issue 6.
Category: Individual Permitting Issues – Con-Agg of Missouri, LLC	
1. Adequate material and tonnage exists to fully support applicant's previous amounts and additional tonnage. The failure to allow the applicant's request was arbitrary and capricious in that it was not based on accurate or complete data.	Although Con-Agg accepted and signed their Initial Proffered Permit and is not appealable, the USACE will briefly address the issues raised by Cong-Agg. The USACE will not increase the tonnage authorized in the Final Proffered Permit. See the response to Global Issue 1.

Applicants' Objections and USACE Response	
Objection	**Response**
2. The impact of the reductions provided in the above permits cannot be accurately measured to determine their direct impacts. The assumption that the reduction will have any correlation to river bed degradation lacks any basis in scientific data, making the decision arbitrary. The applicant's tonnage was reduced by 15,000 tons. The ability to measure the impact of such small amounts of material on the bed of one of the nation's largest waterways and drainage areas and has not been demonstrated by USACE.	See the response to Global Issue 10. Con-Agg was authorized an amount equal to their average annual extraction from 2004 to 2008, although their previous permit authorized an additional 15,000 tons per year. Based on the cumulative impacts analysis using the best available data and reasonable analysis method, the ROD determined that the proffered amount was the most that could be authorized and not be contrary to the public interest.
3. The amount of tonnage in the Jefferson City and St. Charles segments is so negligible that it should be exempted from all other permit conditions.	See the response to Global Issue 10
4. The monitoring provision relating to 24/7, 365 days per year, is unreasonable and unconstitutional	The USACE will modify the Final Proffered Permits to require monitoring of the dredges only when they are dredging in the Missouri River. See the response to Global Issue 6.
Category: Individual Permitting Issues – Holliday Sand & Gravel Company	
1. The ROD Is Flawed Because The USACE Failed To Properly Consider The Cumulative Impacts of the BSNP.	See the response to Global Issue 3. The applicant cites a 2 September 2010 letter from seven members of Congress to support their claim that the USACE has not properly considered the cumulative impacts of the BSNP. This and various other letters from state and federal elected officials included in the administrative record express the complaints of the applicant about the Draft EIS and encourage the USACE "to address the impact of your own engineering efforts before considering a further reduction of commercial sand dredging on the Missouri River that will result in reduced availability of the principal material for aggregate within the boundaries of the State of Missouri and parts of the State of Kansas." This letter demonstrates a lack of understanding of and is contrary to the laws governing this issue. Congress authorized the USACE to construct the BSNP to create a

Applicants' Objections and USACE Response	
Objection	**Response**
	stable navigable waterway that was not aggrading, degrading, or meandering across the floodplain. Congress also authorized the construction of the Missouri River Mainstem Reservoir System. Under the 1944 Flood Control Act the Missouri River is actively managed for the authorized purposes of flood control, navigation, irrigation, hydropower, water supply, water quality, recreation, and fish and wildlife. The BSNP is a system of dikes designed to train and re-direct the river to an alignment engineered for the appropriate gradient and water velocities that will balance the sediment carrying capacity of the river with the sediment supply. However, bed degradation can occur when a variable changes and the river's sediment transport capacity becomes greater than the supply of sediment and the effective shear stress of flowing water is sufficient to erode either the bed or the banks, increasing the sediment supply. Dredging removes a portion of the supply of sediment and will push an aggrading river toward equilibrium and stability, cause a previously stabile river to degrade, and cause an already degrading river to degrade more rapidly (see pages 10-28 and 10-113 to 10-116 of the Final EIS for further discussion of dynamic equilibrium and the potential causes of degradation). Dredging levels in the LOMR have increased substantially since the construction of the BSNP but dredging is not one of the project purposes authorized by the 1944 Flood Control Act and the BSNP was not originally designed to accommodate ever increasing levels of dredging. The USACE Regulatory Program does not control maintenance of the BSNP and changes to the BSNP are not part of the action proposed by the applicant so are not within the scope of the EIS. However, with the limited maintenance funds available the USACE NWK Operations Division has made reasonable efforts to adjust the BSNP to adapt to the increasing degradation levels. Additionally, as explained in the 31 August 2010 response from the Assistant Secretary of the Army (Civil Works) to a letter from Representative Ike Skelton, Congress did authorize and appropriate funding for the Missouri River Degradation Reconnaissance Study to look broadly at the causes of and potential solutions to bed degradation. The Degradation Reconnaissance Study demonstrated sufficient evidence to show that there are potentially feasible alternatives that would provide economic benefit such that it is in the federal interest to participate in a cost-shared Degradation Feasibility Study. This feasibility study is now underway. The USACE is required under both NEPA (40 C.F.R. 1508.7) and the 404(b)(1) Guidelines [40 C.F.R. 230.11(a)] to evaluate the cumulative impacts of the federal

Objection	Response
	action on the environment. The applicant seems to believe that the cumulative impact analysis is supposed to quantify the impact of each individual factor (such as the BSNP) that could affect an aspect of the environment (such as river geomorphology) and if the proposed action would cause very little impact when compared to all the other past, present, and future causes, then it should be permitted. This interpretation of the requirements to evaluate cumulative impacts is inaccurate. Cumulative impacts are the changes that are attributable to the proposed federal action when added to other past, present, and reasonably foreseeable future actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time. The cumulative impact analysis is critical because it helps determine whether the proposed action is going to be the action that causes the cumulative impacts to reach a threshold of unacceptable degradation of the resources of concern. The existing environment of the LOMR reflects the historic changes to the flow regime, the mainstem dams, and the BSNP structures as described throughout Chapter 3 but particularly in Section 3.4.6.3 of the Final EIS. The cumulative impacts of these actions in the past, present, and reasonably foreseeable future have been qualitatively described in Chapter 5 of the Final EIS using the best available data. For several reasons the USACE did not quantify the amount of bed degradation or other environmental impacts caused by each individual factor such as the BSNP. Those reasons are: 1. Neither the law nor regulations require cumulative impacts to be quantified so precisely 2. Data of that precision and accuracy was not available and would be expensive to generate, 3. The purpose of the EIS was to disclose the impacts of dredging, not the causes and solutions of bed degradation, 4. The applicant was unwilling to pay for the additional analysis, and 6. The Corps has begun the Degradation Feasibility Study to look at overall causes and potential solutions to degradation for those factors other than dredging in the MO River. As discussed in Section 4.2.1.1 of the ROD and Section 3.5 of the Final EIS, the Kansas City segment has degraded approximately 12 feet since 1940 (the rate of degradation has

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Objection	Response
	increased as dredging levels have increased) and as a result has experienced failed revetments and dikes, collapsed river banks, damaged or disabled water intakes, damaged bridges on tributaries, damaged levee toes, exposed and/or damaged pipelines, and failed outfalls. As discussed in Section 4.2.1.5 of the ROD and Section 4.10 of the Final EIS, the economic effects related to continued river bed degradation are difficult to quantify but would be proportional to the amount of degradation expected to occur. Additional degradation in the Kansas City segment would result in additional expenditures for infrastructure repair, maintenance, and replacement and would increase the potential for levee failure and jeopardize billions of dollars in investment protected by the regional levee systems. However, the ROD concluded that the annual extraction limits of the proffered permit, with the dredging concentration limits and a monitoring and adaptive management framework, should result in no more than slight degradation in the short-term and long-term, is the LEDPA, complies with the Section 404(b)(1) Guidelines, and is not contrary to the public interest. The proffered permit conditions include increasing the annual extraction limit in the St. Joseph and Waverly segments as much as the environmentally preferred alternative allows to somewhat compensate for the reduction in the annual extraction limit in the Kansas City segment and phasing in the Kansas City segment reduction over three years to give Holliday Sand & Gravel Company time to make the changes needed to fully utilize the increased tonnage in the St. Joseph and Waverly segments. We believe the proffered permit conditions are practicable but increasing the tonnage in any of the segments or lengthening the transition period at this time would be contrary to the public interest.
2. Recent Changes To BSNP Dike Levels In Kansas City Have Addressed Degradation And Should Have Been Accounted For In The EIS And ROD. The applicant specifically states that according to USACE responses to a May 2011 FOIA request, 95 dikes from RM 359.6 to 381.9 were lowered in 2009 to adjust to the lowering CRP. The applicant also believes that because these changes completed in March 2009 obviously would not show any improvement in the	Upon assessment of this objection it appears that the Final EIS may have listed the dates when the dikes in the Kansas City segment were lowered to adjust to the lowering CRP incorrectly, as the applicant stated. However, the issue of whether the dikes within the Kansas City segment were lowered in 2007 or 2009 is insignificant and essentially immaterial for four basic reasons as discussed in section 4.2.1.1 of the ROD. 1. The conclusions of the Final EIS are based on degradation trends over various years. As discussed in Section 4.2.3.1.3 of the ROD, monitoring is a practicable and necessary part of the LEDPA. The USACE evaluated existing models for identifying degradation from water surface profiles and hydroacoustic bed elevation surveys and concluded that the state of these models are not advanced sufficiently to

Objection	Response
2007, 2008, or 2009 bed elevation surveys, the EIS's projection of future degradation used to select Alternative A in the Kansas City segment is not accurate and the ROD should be revised in light of these significant changes to the dikes.	accurately identify changes within one year. Accordingly, USACE concluded, based on available information, that the only practicable way to identify degradation trends and to make adaptive changes is to use multiple years of data. The uncertain effects of any recent dike modifications have not yet been demonstrated by monitoring and would not yet warrant revising the current dredging permit decision. The permit decision described in the ROD includes a degradation monitoring plan to document and quantify the results of the new dredging limits. It also includes an adaptive management framework for the evaluation of these results and reassessment of the dredging limits when the permits are reissued for 2016. 2. As discussed in the response to the previous reason for appeal, the Kansas City segment has degraded approximately 12 feet since 1940 and as a result has experienced failed revetments and dikes, collapsed river banks, damaged or disabled water intakes, damaged bridges on tributaries, damaged levee toes, exposed pipelines, and failed outfalls. 3. The Kansas City segment, of all the segments, arguably has the highest amount and value of infrastructure along the river that could be negatively impacted by further bed degradation. 4. Because of the level of degradation and vulnerability of the extensive river infrastructure in the Kansas City segment, bed aggradation and recovery of the river is in the public interest. The Operations and Engineering Divisions of the USACE have modified the dikes and other BSNP structures to stabilize the river and start the recovery. The USACE is also conducting the Degradation Feasibility Study to identify the best way to address the issue over the long term. It would be contrary to the public interest for the USACE Regulatory Branch to authorize a level of dredging that would be expected to nullify other efforts to recover the river.
3. Objections To The Administrative Record And Reservation Of Rights. "Within days of receiving the ROD and Permit, the Dredgers collectively requested to review and copy the administrative record from the Kansas City and St. Louis Districts. There appears to be a disagreement between the USACE and the	The vast majority of the substance behind the decision is available USACE's decision has been available on its website since issuance of the EIS and ROD. The USACE recognized that the administrative record would also include additional email, correspondence, and other documents that were not yet compiled, and has at no time claimed that the administrative record in its entirety is posted on its public website or refused to provide the administrative record. Since the ROD was completed on March 31, 2011, the USACE has been earnestly and actively working to gather and review

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Objection	Response
Dredgers, collectively, and Holliday specifically, as to what comprises the administrative record. Holliday believes that the administrative record likely far exceeds what the USACE has already made available on its public website, and specifically includes internal email and documents developed in the course of the project review by the USACE."	thousands of pages of ancillary documents including emails, correspondence, references used, and other documents, and compile the voluminous administrative record. This task has recently been completed and each applicant has been provided with an electronic copy of the administrative record in PDF format on DVDs. The applicants will have another 60 days following the date of this response to review the administrative record and supplement any reasons for appeal they intend to submit to the Division Appeal Review Officers.
4. The data in the record demonstrates that there is enough material in the Kansas City segment to support at least 1.2 million tons. The USACE's decision to impose further restrictions on Holliday in subsequent is not based on sufficient data and purposefully omitted relevant data and is, therefore, arbitrary and capricious.	The USACE will not increase the tonnage authorized in the Final Proffered Permit. See the response to Global Issue 1. See also Pages 3-37 through 3-39 of the ROD also contains responses to similar comments received in response to the Draft EIS.
5. The USACE's assumption that there are sufficient alternate sources of sand available is based on inaccurate information. The USACE failed to complete an adequate analysis to determine if material exists to meet the needs and to determine the environmental impact of acquiring sand from various other sources.	See the responses to Global Issues 4 and 5.
6. The USACE failed to comply with NEPA in that the ROD failed to properly analyze the environmental impacts resulting from the permitting decision.	See the response to Global Issue 5.

Applicants' Objections and USACE Response	
Objection	**Response**
7. The monitoring provision relating to 24/7,365 days per year is unreasonable and unconstitutional.	The USACE will modify the Final Proffered Permits to require monitoring of the dredges only when they are dredging in the Missouri River. See the response to Global Issue 6.
8. Additional carryover of authorized annual tonnage would reflect present difficult economic circumstances and better protect the River. Dredger's Global Issue 7 is hereby incorporated by reference.	See the response to Global Issue 7
9. The failure of the USACE to evaluate the BSNP constitutes a taking without just and adequate compensation and places the burden and obligation of the USACE to address concerns of the LOMR and to maintain the LOMR structures upon Holliday Sand.	See the responses to Global issues 3 and 8.
10. The use of unpublished data and sources is a violation of NEPA. Dredger's Global Issue 9 is hereby incorporated by reference.	See the response to Global Issue 9.
11. USACE's Review Of Holliday's Application And Final Permitting Decision Based Thereon Is Contrary To The USACE's Permit Application Review Implementing Regulations	See the responses to Global Issues 1, 2, 3, 4, 5, 7, 8, 9, and 10.
Category: Individual Permitting Issues – The Master's Dredging Company, Inc.	
1. The Corps of Engineers' Record of Decision (ROD) gives Holliday Sand a monopoly for sand dredging on the Missouri River from above St. Joseph, MO to below Kansas City (distance of 141 miles from River Mile 498-Rulo, Nebraska to River Mile 357 below	Because the NWD ARO has accepted and is evaluating the appeal of The Master's Dredging Company's denied permit, this response is only a rebuttal of the reasons for appeal to the ARO and is not for a new permit decision. As discussed in the response to Global Issue 2, the annual extraction amounts of the Kansas City and St. Joseph segments were those determined to be necessary to prevent

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Objection	Response
KC). This ROD eliminated smaller sand companies such as the Applicant from competing on the river with Holliday Sand. Because there is no criteria which determine how the COE is to make such a determination as to which of several applying entities get the permit, the decision is arbitrary and capricious.	levels of degradation and associated impacts that would be contrary to the public interest. As discussed on pages 3-41 and 3-42 of the ROD, the USACE allocated the annual extraction limit for each segment among the various applicants based on capability, investment, and equity by giving each applicant the percentage of the segment limit that is equal to the percentage of the total average amount extracted from that segment between 2004 and 2008 that was dredged by each applicant. Holliday Sand & Gravel Company was given all the available tonnage in the Kansas City segment because they were the only applicant previously authorized to dredge there. However, the new amount in the Kansas City segment is less than the amount that Holliday Sand & Gravel Company was previously authorized to dredge. The company was authorized additional tonnage in the St. Joseph and Waverly segments so it could potentially offset part of the reduction in the Kansas City segment but still faces an overall reduction. Holliday Sand & Gravel Company has indicated that they would need three years to acquire the equipment needed to expand their dredging operation in the St. Joseph segment. The proffered permit includes a three year phase in period to give them the time they need and they have requested specific additional reaches in the segment which indicates that they may be taking the steps necessary to expand. It would be unfair to not give Holliday Sand & Gravel Company the chance to adapt. It would also be unfair to give The Master's Dredging company a temporary permit only while Holliday Sand & Gravel Company prepared to expand. This approach is basically the same as that used in the 2007 permit decision. Kaw Valley Sand appealed the denial on this same issue and the USACE's responded in the March 24, 2008 Supplemental Permit Decision Document for Missouri River Commercial Dredging permits (included by reference in the Final EIS and ROD and available at http://www.nwk.usace.army.mil/regulatory/Dredging/MO/MOdredging.htm). The 2008 Supplemental Permit Decision Document was upheld and that reason for appeal was found to be without merit by the Northwestern Division Engineer.

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Objection	Response
2. Holliday Sand will not even be able to dredge the area where Applicant applied for because of logistical and economical feasibility reasons the COE knew or should have known based upon their knowledge or information in the record which Holliday Sand & Gravel Company submitted. The Final EIS contained objections by Holliday Sand to dredge quantity limitations: (1) to extract only 540,000 tons per year in the Kansas City section and (2) to extract only 300,000 tons per 5 mile stretch because they cannot for economic and technical reasons work more than 10 miles from their plants. Holliday Sand admitted it "did not have the equipment and pilots for long towing." Applicant's dredge request was outside of Holliday Sand's ability to dredge and within the guidelines of the ROD.	Consistent with the response above, the USACE determined that because Holliday Sand & Gravel Company is being proffered substantially less tonnage in the Kansas City segment than it has historically extracted, it was most equitable to give it the first opportunity to adapt its dredging operations and shift part of its extraction to previously undredged portions of the St. Joseph and Waverly segments. Even with the increased amount in the St. Joseph and Waverly segments, Holliday Sand & Gravel Company's overall tonnage under the proffered permit would be less than under previous permits. Holliday Sand & Gravel Company had indicated that "Two years would be adequate to obtain additional barges and modify existing towboats and unloading dock necessary to dredge 19 miles upstream from the St. Joseph segment." (see formal correspondence dated December 28, 2010 in the Administrative Record or Letter 107 in Appendix A of the ROD) The proffered permit includes a three year phase in period to give them the time they need and they have requested specific additional reaches in the segment which indicates that they may be taking the steps necessary to expand. However, if Holliday Sand & Gravel Company is unable to utilize the additional tonnage being proffered in the Waverly and St. Joseph segments by the end of 2015, the tonnage would become available to another applicant that is capable of using it.
3. The Applicant's permit seeks to allow it to dredge 19 miles from Holliday's Riverside plant, and 30 miles from Holliday's St. Joseph plant. Because Holliday is limited to 840,000 tons in the St. Joseph stretch, and can only recover 300,000 tons for every 5 miles of river, it effectively can't take more that 600,000 tons without going into areas it admits it cannot reach. Thus, the permit in those areas should be granted to Applicant. The river mile marks of Applicant's dredge request in the St. Joseph section given exclusively to Holliday Sand cannot be economically utilized by Holliday Sand either	See the previous response.

Applicants' Objections and USACE Response

Objection	Response
from its St. Joseph plant or from its Riverside plant. Applicant's permit should have been granted with at least a permit of 300,000 tons per year in this section of the Missouri River that Holliday Sand cannot utilize. This ROD for the Missouri River is against COE precedent to grant river dredging permits to companies who can utilize them and not to grant permits to companies who cannot utilize the permits.	
4. Accordingly, the Permit Denial of Applicant is unreasonable, arbitrary and capricious, contrary to evidence in the record, and constitutes violations of the Commerce Clause, the Equal Protection Clause, The Due Process clause because the process and related laws should be declared void for vagueness and/or arbitrary as applied, and violates the penumbra of fundamental fairness all in the United States Constitution.	The USACE fully disagrees with this conclusion. However, these claims are outside the purview of the appeal.
5. What the Corps has done by giving Holliday Sand the permit which it applied for and cannot use, is allow Holliday Sand to crush its competition in an unfair trade practice, which also results in inflated prices for sand in the Kansas City market because Holliday Sand can charge whatever it wants. As indicated in the record Holliday Sand has almost tripled the price of sand in the last decade.	See the response to the first reason for appeal from The Master's Dredging Company.

Applicants' Objections and USACE Response	
Objection	**Response**
6. Finally, the ROD is void of any rationale or basis as to why it awarded Holliday Sand its permit (for an area it admittedly cannot use) over the request of Applicant. Thus, there is no recorded basis in the record for the decision made and thus it is arbitrary and capricious.	See the response to the first reason for appeal from The Master's Dredging Company

DEPARTMENT OF THE ARMY
KANSAS CITY DISTRICT, CORPS OF ENGINEERS
635 FEDERAL BUILDING
601 E 12TH STREET
KANSAS CITY MO 64106-2824

REPLY TO
ATTENTION OF

MAR 3 1 2011

Regulatory Branch
(NWK-2011-363)

Mr. Mike Odell
Holliday Sand & Gravel, LLC
9660 Legler Road
Lenexa, Kansas 66219

Dear Mr. Odell:

This letter is in response to your application, received on March 19, 2008, to reauthorize your Missouri River commercial dredging operation previously authorized by Department of the Army (DA) permit No. 2001-1431. As requested by your application, this letter includes a new proffered DA permit No. 2011-363, in duplicate, and extends your old DA permit No. 2001-1431.

When executed, the permit will authorize Holliday Sand & Gravel Company to extract sand and gravel per year from the Missouri River with a mobile, floating, hydraulic cutter-head suction dredge plant. Annual extraction in the Kansas City segment (river miles 357.0 to 391.0) will be limited to 1,200,000 tons in 2011; 900,000 tons in 2012; and 850,000 tons in 2013, and 540,000 tons in each of 2014 and 2015. A maximum of 860,000 tons can be dredged each year in the St. Joseph segment (river miles 391.0 to 498) and a maximum of 770,000 tons can be dredged each year in the Waverly segment (river miles 250.0 to 357.0). Water and dredged materials will be passed through onboard screens allowing the desired material to be loaded onto barges and undesired material and water to be discharged back into the river at the dredging location. Filled barges will be transported to existing offloading facilities where a crane or front end loader will unload the material for stockpiling and commercial sale. The permits will be subject to all the special conditions that follow and will expire on December 31, 2015. The 2011 tonnage limits will retroactively apply to all dredging since the beginning of 2011. These tonnage limits are of sand when it is offloaded from the barge with a moisture content of approximately 10%.

A copy of the water quality certifications issued for your work, by the Missouri Department of Natural Resources and the Kansas Department of Health and Environment, have been attached to the enclosed DA permit. As stated in general condition "5" of the enclosed permit document, the conditions presented in the state's water quality certifications are incorporated into the special conditions of the permit by reference.

This letter contains a proffered permit for your commercial dredging permit application. If you object to this decision, you may request an administrative appeal under the U.S. Army Corps of Engineers regulations at 33 Code of Federal Regulations (C.F.R.) Part 331. Enclosed you will find a Notification of Administrative Appeal Options and Process (NAP) and Request for Appeal (RFA) form. If you request to appeal this decision you must submit a completed RFA form to the Northwestern Division Office at the following address:

Division Engineer
ATTN: David W. Gesl
Administrative Appeals Review Officer
U.S. Army Corps of Engineers
P.O. Box 2870
Portland, OR 97208-2870
Telephone: 503-808-3825

In order for an RFA to be accepted, the Corps must determine that it is complete, that it meets the criteria for appeal under 33 C.F.R. Part 331.5, and that it has been received by the Division Office within 60 days of the date of the NAP. Should you decide to submit an RFA form, it must be received at the above address by May 31, 2011.

It is not necessary to submit an RFA form to the Division Office if you do not object to the provisions of your proffered permit. If you wish to accept the permit in its present form, please sign the original and duplicate copy of the enclosed permit document. Each copy of the permit document should be signed on page 3 above the word "Permittee," dated, and returned within 30 days from the date of this letter. Also, the application fee of $100 should be paid by check made payable to USAED-KC and remitted with the permit document. A preaddressed envelope is enclosed for your convenience. Upon receipt of the properly signed documents and the application fee, the permit will be executed and returned to you for your files. Your signature on the standard permit means that you accept the permit in its entirety, and waive all rights to appeal the permit, including its terms and conditions, and approved jurisdictional determinations associated with the permit.

On December 28, 2010, DA permit No. 2001-1431was extended through March 31, 2011 to allow continued dredging during the additional three months needed to complete the Missouri River Commercial Dredging Final EIS (Final EIS) and Record of Decision. We have determined that is in the public interest to extend DA permit No. 2001-1431 to allow you to continue dredging until the Administrative Appeal process described in the previous paragraph is complete for proffered DA permit No. 2011-363, or until it is accepted and executed. This permit extension has been reviewed in accordance with 33 C.F.R. Part 325.7, and with Section 10 of the Rivers and Harbors Act of 1899 (33 United States Code Section (U.S.C.) 403) and Section 404 of the Clean Water Act (33 U.S.C. 1344). It has been determined that the extension and modification of DA permit No. 2001-1431 to include all the limits and permit conditions identified in the Record of Decision will be within the scope of the Final EIS and will comply with the Section 404(b)(1) Guidelines (40 C.F.R. Part 230). Therefore, DA permit No. 2001-1431 will be modified effective April 1, 2011, to include all the dredging limits and general and special conditions attached to proffered DA permit No. 2011-363. DA permit No. 2001-1431 will expire in 60 days, unless an appeal of proffered DA permit 2011-363 is accepted by the Northwestern Division, U.S. Army Corps of Engineers, in which case DA permit No. 2001-1431 will expire 30 days after the final appeal decision.

If you do not agree that the terms and conditions of the modification of DA permit No. 2001-1431 are acceptable and correct, you must notify and may request a meeting with the District Commander by April 10, 2011, or be legally bound by the terms and conditions thereof. This is a legal document. We request that you attach this letter of modification to your copy of DA permit No. 2001-1431 in order to reflect all work authorized under the permit.

Special condition "b" requires you to implement a Dredge Monitoring Plan (DMP) approved by the Regulatory Branch of the Kansas City District. If a DMP has not been previously approved by the Regulatory Branch of the Kansas City District, you must provide within 30 days of execution of the permit a DMP for each individual dredge plant to the Regulatory Branch of the Kansas City District for approval. The DMP must show how you will monitor, record, and report the cutter-head position, cutter-head operating status, extraction tonnage, and the presence of any hard substrates, mussel shells, or unusual concentration of gravel.

Special condition "c" requires all applicants receiving authorization to commercially dredge the Missouri River to collectively have a hydrographic survey completed between June and September of 2014 and submitted to the Regulatory Branch of the Kansas City District, USACE by November 1, 2014. Water surface profiles will also be prepared and evaluated annually by the Kansas City District. The Regulatory Branches of the Kansas City and St. Louis Districts will meet with you and the other authorized dredgers and state and federal agencies in the fall of each year to discuss the condition and trend of the river as shown by the most recent water surface profiles or surveys. As stated in item 5 under "Further Information" on page 3 of all permits, this office may reevaluate its decision on this permit any time significant new information surfaces which this office did not consider in reaching the original public interest decision. Such a reevaluation may result in a determination that it is appropriate to use the suspension, modification, and revocation procedures contained in 33 C.F.R. 325.7

We are interested in your thoughts and opinions concerning your experience with the Kansas City District Regulatory Program. We have placed an automated version of our Customer Service Survey form at: http://per2.nwp.usace.army.mil/survey.html. At your request, we will mail you a paper copy that you may complete and return to us by mail or fax.

A copy of this letter has been sent to Mr. David Shorr. If you have any questions concerning this matter, please contact Mr. Cody S. Wheeler at 816-389-3739 (FAX 816-389-2032).

Sincerely,

Anthony J. Hofmann
Colonel, Corps of Engineers
District Commander

Enclosures

DEPARTMENT OF THE ARMY PERMIT

Permittee: Holliday Sand & Gravel Company, Inc..

Permit No.: 2011-363

Issuing Office: U.S. Army Engineer District, Kansas City

NOTE: The term "you" and its derivatives, as used in this permit, means the permittee or any future transferee. The term "this office" refers to the appropriate district or division office of the Corps of Engineers having jurisdiction over the permitted activity or the appropriate official of that office acting under the authority of the commanding officer.

You are authorized to perform work in accordance with the terms and conditions specified below, and with the plans and drawings attached hereto which are incorporated in and made a part of this permit.

Project Description: You are authorized to extract sand and gravel per year from the Missouri River with a mobile, floating, hydraulic cutter-head suction dredge plant. Annual extraction in the Kansas City segment (river miles 357.0 to 391.0) will be limited to 1,200,000 tons in 2011; 900,000 tons in 2012; and 850,000 tons in 2013, and 540,000 tons in each of 2014 and 2015. A maximum of 860,000 tons can be dredged each year in the St. Joseph segment (river miles 391.0 to 498) and a maximum of 770,000 tons can be dredged each year in the Waverly segment (river miles 250.0 to 357.0). Water and dredged materials will be passed through onboard screens allowing the desired material to be loaded onto barges and undesired material and water to be discharged back into the river at the dredging location. Filled barges will be transported to existing offloading facilities where a crane or front end loader will unload the material for stockpiling and commercial sale. The permits will be subject to all the special conditions that follow and will expire on December 31, 2015. The 2011 tonnage limits will retroactively apply to all dredging since the beginning of 2011. These tonnage limits are of sand when it is offloaded from the barge with a moisture content of approximately 10%.

Permit Drawings: Please use the location maps from the 2007 permit decision, and the electronic authorized dredging zone shape files with any modifications sent to you in subsequent permit extensions. We will send you updated maps and/or electronic shape files with the execution of the permit or sooner if possible. The maps and electronic shape files are just a visual representation of where you can or cannot dredge. The legal and authoritative source regarding where you can or cannot dredge, is contained in the project description, project location, and special conditions of this permit.

Project Location: You may dredge in the following general reaches of Missouri River (this may or may not exclude all the resource protection zones): river miles 320.00-330.90, 331.65-336.00, 338.00-339.15, 350.00-356.30, 356.50-356.90, 356.90-358.16, 358.36-359.24, 359.44-360.17, 360.37-361.20, 361.44-362.15, 362.35-364.25, 364.45-364.64, 364.84-365.43, 365.79-366.02, 366.30-367.00, 367.90-373.30, 374.20-375.10, 375.30-377.81, 378.90-379.70, 380.70-386.00, 445.00-447.75, 448.25-456.75, and 457.25-458.75

Permit Conditions:

General Conditions:

1. The time limit for completing the work authorized ends on 31 December 2015. If you find that you need more time to complete the authorized activity, submit your request for a time extension to this office for consideration at least one month before the above date is reached.

2. You must maintain the activity authorized by this permit in conformance with the terms and conditions of this permit. You are not relieved of this requirement if you abandon the permitted activity, although you may make a good faith transfer to a third party in compliance with General Condition 4 below. Should you wish to cease to maintain the authorized activity or should you desire to abandon it without a good faith transfer, you must obtain a modification of this permit from this office, which may require restoration of the area.

3. If you discover any previously unknown historic or archeological remains while accomplishing the activity authorized by this permit, you must immediately notify this office of what you have found. We will initiate the Federal and state coordination required to determine if the remains warrant a recovery effort or if the site is eligible for listing in the National Register of Historic Places.

4. If you sell the property associated with this permit, you must obtain the signature of the new owner in the space provided and forward a copy of the permit to this office to validate the transfer of this authorization.

5. If a conditioned water quality certification has been issued for your project, you must comply with the conditions specified in the certification as special conditions to this permit. For your convenience, a copy of the certification is attached if it contains such conditions.

6. You must allow representatives from this office to inspect the authorized activity at any time deemed necessary to ensure that it is being or has been accomplished in accordance with the terms and conditions of your permit.

Special Conditions:

See continuation sheets, pages 4 - 8, of this document.

Further Information:

1. Congressional Authorities: You have been authorized to undertake the activity described above pursuant to:

(X) Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403).

(X) Section 404 of the Clean Water Act (33 U.S.C. 1344).

( ) Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972 (33 U.S.C. 1413).

2. Limits of this authorization.

a. This permit does not obviate the need to obtain other Federal, state, or local authorization required by law.

b. This permit does not grant any property rights or exclusive privileges.

c. This permit does not authorize any injury to the property or rights of others.

d. This permit does not authorize interference with any existing or proposed Federal project.

3. Limits of Federal Liability. In issuing this permit, the Federal Government does not assume any liability for the following:

a. Damages to the permitted project or uses thereof as a result of other permitted or unpermitted activities or from natural causes.

b. Damages to the permitted project or uses thereof as a result of current or future activities undertaken by or on behalf of the United States in the public interest.

c. Damages to persons, property, or to other permitted or unpermitted activities or structures caused by the activity authorized by this permit.

d. Design or construction deficiencies associated with the permitted work.

e. Damage claims associated with any future modification, suspension, or revocation of this permit.

4. Reliance on Applicant's Data: The determination of this office that issuance of this permit is not contrary to the public interest was made in reliance on the information you provided.

5. Reevaluation of Permit Decision. This office may reevaluate its decision on this permit at any time the circumstances warrant. Circumstances that could require a reevaluation include, but are not limited to, the following:

a. You fail to comply with the terms and conditions of this permit.

b. The information provided by you in support of your permit application proves to have been false, incomplete, or inaccurate (See 4 above).

c. Significant new information surfaces which this office did not consider in reaching the original public interest decision.

Such a reevaluation may result in a determination that it is appropriate to use the suspension, modification, and revocation procedures contained in 33 CFR 325.7 or enforcement procedures such as those contained in 33 CFR 326.4 and 326.5. The referenced enforcement procedures provide for the issuance of an administrative order requiring you to comply with the terms and conditions of your permit and for the initiation of legal action where appropriate. You will be required to pay for any corrective measures ordered by this office, and if you fail to comply with such directive, this office may in certain situations (such as those specified in 33 CFR 209.170) accomplish the corrective measures by contract or otherwise and bill you for the cost.

6. Extensions. General condition 1 establishes a time limit for the completion of the activity authorized by this permit. Unless there are circumstances requiring either a prompt completion of the authorized activity or a reevaluation of the public interest decision, the Corps will normally give favorable consideration to a request for an extension of this time limit.

Your signature below, as permittee, indicates that you accept and agree to comply with the terms and conditions of this permit.

_____ _____

(PERMITTEE) (DATE)

This permit becomes effective when the Federal official, designated to act for the Secretary of the Army, has signed below.

_____ _____

(DISTRICT ENGINEER) (DATE)
ANTHONY J. HOFMANN, COLONEL
BY: Mark D. Frazier
Chief, Regulatory Branch
Operations Division

When the structures or work authorized by this permit are still in existence at the time the property is transferred, the terms and conditions of this permit will continue to be binding on the new owner(s) of the property. To validate the transfer of this permit and the associated liabilities associated with compliance with its terms and conditions, have the transferee sign and date below.

_____ _____

(TRANSFEREE) (DATE)

Special Conditions:

a. You understand and agree that, if future operations by the United States require the removal, relocation, or other alteration, of the structure or work herein authorized, or if, in the opinion of the Secretary of the Army or his authorized representative, said structure or work shall cause unreasonable obstruction to the free navigation of the navigable waters, you will be required, upon due notice from the U.S. Army Corps of Engineers (USACE), to remove, relocate, or alter the structural work or obstructions caused thereby, without expense to the United States. No claim shall be made against the United States on account of any such removal or alteration.

b. You must implement a Dredge Monitoring Plan (DMP) approved by the Regulatory Branch of the Kansas City District, USACE. If a DMP has not been previously approved by the Regulatory Branch, USACE, Kansas City District, you must provide within 30 days of execution of the permit a DMP for each individual dredge plant to the Regulatory Branch of the USACE, Kansas City District for approval. The DMP must show how you will monitor, record, and report the cutter-head position, cutter-head operating status, extraction tonnage, and the presence of any hard substrates, mussel shells, or unusual concentration of gravel in an impartial, unbiased, reliable, and accurate manner. The DMP must include the specifications of the process and the Dredge Monitoring System (DMS) including sensors, hardware, software, communications devices the permittee will use to: gather data; perform quality control on those data; calibrate, test, and repair sensors when they fail; and transfer the data to the Regulatory Branch of the Kansas City District, USACE. The DMS must include automated differential Global Positioning System (DGPS) equipment (or other comparable system) operating with a minimum accuracy level of 1-3 meters horizontal Circular Error Probable with horizontal positions tied into the UTM Zone 15 NAD 83 (feet) coordinate system recorded to the nearest foot. The DMS must always be on, recording cutter-head position and operating status every 5 minutes, 24-hours a day, 365 days a year, even when the dredge is not operating. The data logged each month must be submitted by email to cody.s.wheeler@usace.army.mil at the Regulatory Branch of the Kansas City District, USACE by the 7th day of the following month. If you do not receive an email confirmation that the report was received, you must contact the Regulatory Branch of the Kansas City District, USACE at 816-389-3990 for revised instructions for filing the monthly report. The extracted material must be measured by one of the methods described in the attached Standard Operating Procedure for Hydrographic Surveying and Dredge Monitoring. If the tonnage is measured by scale at the off-loading facility, the DMP should also describe how the operation will record the date, time, river mile, coordinates, and approximate tonnage of each barge loaded in one location. If a barge is partially filled at one anchor setting then completed at a new anchor setting, the tonnage should be estimated separately for each location. This information must be provided monthly by email on the attached Missouri River Commercial Dredging Location/Volume Report spreadsheet to cody.s.wheeler@usace.army.mil at the Regulatory Branch of the Kansas City District, USACE by the 7th day of the following month. If you do not receive an email confirmation that the report was received, you must contact the Regulatory Branch of the Kansas City District, USACE at 816-389-3990 for revised instructions for filing the monthly report. Faulty sensors or other components identified in the DMP must be repaired within 96 hours. The DMS must not be inoperable more than 5 percent of the time. You must install an approved DMS and have it inspected by the Regulatory Branch of the Kansas City District, USACE within 120 days of execution of the permit or you must cease dredging operations until it is installed and inspected or you submit a justification of the delay and an installation schedule and get an extension of this deadline in writing from the Regulatory Branch of the Kansas City District, USACE.

c. The USACE periodically surveys the river as part of the management and operation of the Bank Stabilization and Navigation Project. If, for any reason, the USACE has not surveyed the river in the fourth year (2014) of the five-year permit cycle, the authorized dredging companies must have the lower 498 miles of the LOMR surveyed during the summer months in accordance with the Standard Operating Procedures for Hydrographic Surveying and Dredge Monitoring. The survey shall be completed between June and September of 2014 and submitted to the Regulatory Branch of the Kansas City District, USACE by November 1, 2014.

d. If any part of the authorized work is performed by a contractor, before starting work you must discuss the terms and conditions of this permit with the contractor and must give a copy of this entire permit to the contractor. After the initial 120 days of this permit, any contracted dredges or barges must also be equipped with and operate in accordance with an approved DMP as required in Special Condition "b". The DMP and system must be approved by the Regulatory Branch of the Kansas City District, USACE prior to starting work.

e. Until the dredges and barges are equipped with the DMS required by Special Condition "b", you must, for each dredge operated, record Global Positioning System (GPS) coordinates, tons of material removed, and the presence of any hard substrates or unusual concentration of gravel daily. If the dredge moves more than 100 feet in any one day then the amount of material removed from each location must be recorded separately. The operators may use hand-held GPS devices or automatically recording devices, but with which ever system used, must identify the device make/model and recording location. This information must be recorded on the attached Missouri River Commercial Dredging Location/Volume Report in an electronic spreadsheet. You must furnish a copy of the completed monthly report by email to cody.s.wheeler@usace.army.mil at the Regulatory Branch of the Kansas City District, USACE by the 7th day of the following month. If you do not receive an email confirmation that the report was received, you must contact the Regulatory Branch of the Kansas City District, USACE at 816-389-3990 for revised instructions for filing the monthly report.

f. No more than 300,000 tons of material shall be extracted within one year from each five-mile reach of the Missouri River between river miles 15 to 20, 25 to 35, 90 to 100, 140 to 150, 355 to 395, and 445 to 455. When the dredge report database of the Regulatory Branch of the Kansas City District, USACE indicates that extraction in a five-mile reach has reached 300,000 tons, all dredgers authorized to operate within that reach will be notified that it is closed to further dredging for the remainder of the calendar year unless a waiver is requested and received in writing from the Regulatory Branch of the Kansas City District, USACE.

g. Up to 10% of your authorized annual tonnage for each segment may be carried over each year to be extracted within that segment the following year. Annual tonnage with carryover may never exceed 110% of annual authorized tonnage of each segment. At the end of each year you must notify the Regulatory Branch of the Kansas City District, USACE in your annual tonnage report of any unextracted tonnage that you intend to carryover.

h. In permit conditions that specify a linear distance exclusion zone adjacent to a river feature, "dredging" refers to the operation of hydraulic cutter-head suction dredging. The exclusion zone distances will apply to and be measured from the end of the cutter head, rather than from a general point on the dredge.

i. You must confine dredging to between the Rectified Channel Lines (RCL) with the following restrictions. Dredging must be conducted in such a manner to preserve the structural integrity of the landmass landward of the RCL. This must be accomplished by maintaining an adequate "no dredging

or discharging" zone riverward of the RCL so that material will stabilize into the dredging area at its natural angle of repose. This slope will vary depending upon river location and the type of material being dredged, but it is your responsibility to ensure that this shallow water interface landward of the RCL be maintained.

j. You must not dredge within 500 feet of any levee centerline, pipeline or submerged utility crossing, bridge pier or abutment; nor within 200 feet of any dike, revetment, or other structure built or authorized by the U.S. Government; nor within 100 feet of any normal bank line or island, without special authorization. When dredging is performed adjacent to river stabilization structures, the dredging may be conducted only in the present streambed of the river at the authorized locations. This condition represents only the minimum distances away from structures and natural features that you can conduct dredging and does not relieve you from liability for damage arising from dredging. You must be satisfied that dredging to these limits will not cause damage to public and private property.

k. You must not conduct dredging operations in a zone extending 4,000 feet upstream and 500 feet downstream from any municipal drinking water intake structures located along either bank of the river unless you obtain an exemption to this condition in writing from the Regulatory Branch of the Kansas City District, USACE.

l. You must not conduct dredging operations in a zone extending 1,000 feet upstream and 1,000 feet downstream from any municipal drinking water horizontal collector wells located along either bank of the river unless you obtain an exemption to this condition in writing from the Regulatory Branch of the Kansas City District, USACE.

m. You must not conduct dredging operations in a zone extending 500 feet upstream and 500 feet downstream from any other water intake structures other than those used for municipal drinking water unless you obtain an exemption to this condition in writing from the Regulatory Branch of the Kansas City District, USACE.

n. You may discharge back into the Missouri River material spilled off the conveyer belts and unusable material separated out in the on-shore sand washing and handling facility. To subtract that tonnage from your annual extraction limit, you must follow a plan approved in writing by the Regulatory Branch of the Kansas City District, USACE. This plan must show where and how the material will be discharged and how the amount of dredged material discharged back into the river will be measured and reported to the Regulatory Branch of the Kansas City District, USACE. The total extraction tonnage will equal the tonnage extracted and barged to shore minus that amount intentionally returned to the Missouri River.

o. You may return unwanted dredged material and river water (but not garbage)extracted from the Missouri River back to the Missouri River. You must not dispose of waste materials, water, or garbage below the ordinary high water mark of any other water body, in a wetland area, or at any location where the materials could be introduced into the water body or an adjacent wetland as a result of runoff, flooding, wind, or other natural forces.

p. You must comply with all U.S. Coast Guard, State of Missouri, State of Kansas (river mile 367 to 490), and USACE regulations concerning the prevention of navigation obstructions in navigable waters of the United States.

q. You must conduct operations in the Missouri River such that there will be no unreasonable interference with navigation by the existence or use of the activity authorized herein.

r. To avoid impacting endangered species and cultural resources, you must confine dredging to the specified reaches listed on page 1 of the permit document. If you desire to expand or relocate your dredging operation outside the specified reaches, you must submit a request to the Regulatory Branch of the Kansas City District, USACE identifying the proposed new limits, in river miles and the location of the unloading facility to be employed.. Approval of the requests, if granted, will be provided in writing with modified reaches identified on the Missouri River Hydrographic Survey. Copies of the relocation requests must be furnished to the following agencies:

1. U.S. Fish and Wildlife Service, Columbia Field Office
2. Missouri Department of Natural Resources, Water Pollution Control Program
3. Missouri Department of Natural Resources, State Historic Preservation Office
4. Kansas Department of Health and Environment, Bureau of Water (for operations extending upstream of river mile 367)
5. Kansas State Historical Society, State Historic Preservation Office (for operations extending upstream of river mile 367)
6. Corps of Engineers, Kansas City District, Hydrologic Engineering Branch

s. You must not conduct dredging operations within the reaches identified in the following table as Pallid Sturgeon habitat features.

Missouri River Miles (including 0.25 mile buffer)		**Pallid Sturgeon Habitat Feature**
Downstream	Upstream	
44.25	44.85	RDB Centaur Chute
49.15	50.05	RDB Centaur Chute
56.85	59.05	LDB Chute/Island
58.55	61.25	RDB Chute/Island
89.75	91.10	RDB Island
89.90	91.45	LDB Loutre Slough
91.20	93.55	LDB Lunch Island
103.00	104.95	Both Gasconade Confluence and Dike Field
105.20	106.25	RDB Dike Field
115.20	115.95	RDB Island
118.40	119.15	RDB Dike Field
119.35	119.85	RDB St. Aubert Island/Chute
124.35	124.95	RDB St. Aubert Island/Chute
126.05	126.90	LDB Dike Field
127.50	130.20	Both Osage River Confluence and Dike Field
157.00	158.45	LDB Island
176.40	178.35	LDB Island/RDB Tadpole Island Chute
180.15	180.65	RDB Tadpole Island Chute
184.75	185.65	RDB Chute
186.90	188.20	RDB Chute and Dike Field
193.40	195.75	RDB Dike Field/Island
202.10	202.75	RDB Lamine River Confluence
210.00	219.65	Lisbon/Jameson Complex
226.95	227.55	LDB Little Chariton Confluence

238.40	239.10	LDB Chariton River Confluence
249.65	250.30	LDB Grand River Confluence
269.85	271.35	RDB Shallow/Island
280.40	282.05	RDB Island
297.90	299.05	RDB Island
300.00	301.05	LDB Island
367.00	367.75	RDB Kansas River Confluence
390.85	391.45	LDB Platte River Confluence
456.75	457.25	LDB Worthwine Chute
458.75	459.25	LDB Worthwine Chute
462.65	463.25	LDB Nodaway River Confluence
478.55	479.15	RDB Wolf Creek Confluence
494.55	495.20	RDB Big Nemaha River Confluence

t. You must discharge only suitable dredged material that is free from toxic pollutants in other than trace quantities.

u. You must investigate for water supply intakes or other activities which may be affected by suspended solids and turbidity increases caused by work in the watercourse and give sufficient notice to the owners of affected activities to allow preparation for any changes in water quality. You must furnish the Regulatory Branch of the Kansas City District, USACE with a copy of any written notification provided in accordance with this condition.

v. You must employ measures to prevent dredged materials stored or disposed of on shore from running off or eroding into wetlands or tributaries to the Missouri River.

w. You must employ measures to prevent or control spilled fuels or lubricants from entering the waters of the United States.

x. You must store all construction materials, equipment, and/or petroleum products that are part of the on-shore operation, when not in use, above anticipated high water levels.

Bureau of Water
Watershed Management Section
1000 SW Jackson, Suite 420
Topeka, KS 66612-1367

Kansas

Phone: 785-296-4195
Fax: 785-296-5509
nps@ks.gov
www.kdheks.gov/water

Robert Moser, MD, Secretary

Department of Health & Environment

Sam Brownback, Governor

March 22, 2011

Mr. Cody S. Wheeler
Kansas City District, Corps of Engineers
Regulatory Branch
635 Federal Building
601 E. 12th Street
Kansas City, MO 64106-2824

RE: USACE request for Missouri River Dredging Section 401 Water Quality Certification 2nd extension for Holliday Sand and Gravel Company, 2001-01431 for 60 days after March 31, 2011.

Mr. Wheeler:

Per our conversation March 17, 2011, the Final Environmental Impact Statement (EIS) prepared by the USACE has been completed and the Record of Decision and Initial Proffered Permits ready and signed by March 31, 2011. Holliday Sand and Gravel Company is currently dredging under permit number 2001-1431 which was extended in December 2010 through March 31, 2011. To allow the dredgers to continue to work under the new limitations and permit conditions identified by the FEIS and ROD while giving them the opportunity to appeal the decision you intend to proffer a new permit numbered 2011-363 that would be valid through the end of 2015 if accepted, while at the same time you will modify the permit numbered 2001-1431 to incorporate all the new limits and conditions and extend that permit for 60 days (the deadline for submitting an appeal), unless an appeal of proffered DA permit 2011-363 is accepted by the Northwestern Division, U.S. Army Corps of Engineers, in which case DA permit No. 2001-1431 will expire 30 days after the final appeal decision. The new permit limitations and conditions were spelled out in the request for 401certification you sent to KDHE on February 17, 2011. Since that time Holiday Sand and Gravel Company has demonstrated that they cannot practicably increase extraction levels in the St. Joseph segment or develop alternate sources on the floodplain of the LOMR in less than three years and they need at least 850,000 tons in the Kansas City segment to remain viable during this three-year period. The USACE has decided to allow a three year transition period to the 540,000 Environmentally Preferred Alternative. Annual extraction will be limited to 1,200,000 tons in 2011; 900,000 tons in 2012; 850,000 tons in 2013, and 540,000 tons in each of 2014 and 2015.

The KDHE has determined that no relatively significant changes have occurred in either state regulations or additional KDHE permitted/monitored facilities since the 1st extension of the 401 water quality certification was issued December 9, 2010. The KDHE agrees to extend the referenced Section 401 Water Quality Certification issued. Therefore, the Holiday Sand and Gravel Company dredging activities on the Missouri River will remain under the referenced Section 401 WQC until further notice by the USACE.

Questions concerning this certification may be directed to Mr. Scott Satterthwaite, 785-296-5573 or by email at: ssattert@kdhe.state.ks.us.

Sincerely,

Scott L. Satterthwaite

Scott L. Satterthwaite, M.S.
Non-point Source Pollution Control Specialist
Bureau of Water-Watershed Management Section

STATE OF MISSOURI
Jeremiah W. (Jay) Nixon, Governor • Sara Parker Pauley, Director
DEPARTMENT OF NATURAL RESOURCES
www.dnr.mo.gov

MAR 23 2011

Mr. Mike Odell
Holliday Sand & Gravel Company
6811 West 63rd St.
Overland Park, KS 66202

Dear Mr. Odell:

Please replace the Clean Water Act Section 401 Water Quality Certification (certification) dated March 17, 2011, with the enclosed certification.

If you have any questions, please feel free to contact me by phone at (573) 751-7023, by e-mail at carrie.schulte@dnr.mo.gov or by mail at Missouri Department of Natural Resources, Water Protection Program, NPDES Permits and Engineering Section, P.O. Box 176, Jefferson City, MO 65102-0176. Thank you for working with the Department to protect our environment.

Sincerely,

WATER PROTECTION PROGRAM

Carrie M. Schulte

Carrie M. Schulte, Chief
401 Water Quality Certification and Stormwater Unit

CMS/pc

Enclosure

c: Mr. Cody Wheeler, Army Corps of Engineers, Kansas City District
Mr. Charles Frerker, Army Corps of Engineers, St. Louis District
Ms. Dorothy Franklin, Kansas City Regional Office
Mr. Jimmy Coles, Kansas City Regional Office
File Copy

Recycled Paper

STATE OF MISSOURI
Jeremiah W. (Jay) Nixon, Governor • Sara Parker Pauley, Director
DEPARTMENT OF NATURAL RESOURCES
www.dnr.mo.gov

MAR 23 2011

Mr. Mike Odell
Holliday Sand & Gravel Company
6811 West 63rd St.
Overland Park, KS 66202

Various Counties
Permit Number 2011-363
CEK006762

Dear Mr. Odell:

The Missouri Department of Natural Resources' Water Protection Program (Department) is in receipt of the U.S. Army Corps of Engineers' (Corps) letter dated February 17, 2011, requesting that your Clean Water Act Section 401 Water Quality Certification (certification) be issued for Corps' Permit Number 2011-363. The Department understands that Holliday Sand & Gravel Company will abide by the certification and the Corps issued Clean Water Act Section 404 Permit (permit) for commercial dredging operations in the Missouri River.

This letter also serves as an extension of the certification issued for Permit Number 2001-1431 for an additional 60 days, unless an appeal of proffered Department of the Army Permit 2001-1431 is accepted by the Corps' Northwestern Division, in which case the 2001 certification would expire 30 days after the final appeal decision.

This office certifies that the ongoing activities apparently will not cause the general or numeric criteria to be exceeded nor impair beneficial uses established in Water Quality Standards, 10 CSR 20-7.031, provided the following condition is met:

- The U.S. Army Corps of Engineers permit decision and all conditions are followed as authorized by the Corps under Section 404 of the Clean Water Act (33 USC 1344). The implementing regulation for this Act is found at 33 CFR 320-330.

Missouri Clean Water Law, Chapter 644.052.9 RSMo, gives the Department the authority to collect a fee for the issuance of a certification. As of January 1, 2011, this authority has expired, which means the Department no longer has statutory authority to collect water permit fees. This includes the certification fee. Please do not send a payment to the Department.

If you were affected by this decision, you may appeal to have the matter heard by the Administrative Hearing Commission (commission). To appeal, you must file a petition with the commission within thirty (30) days after the date this decision was mailed or the date it was delivered, whichever date was earlier. If any such petition is sent by registered mail or certified mail, it will be deemed filed on the date it is mailed. If it is sent by any method other than registered mail or certified mail, it will be deemed filed on the date it is received by the commission.

Recycled Paper

Water Quality Standards must be met during any operations authorized by these permits. If you have any questions, please contact Ms. Carrie M. Schulte by phone at (573) 751-7023, by e-mail at carrie.schulte@dnr.mo.gov, or by mail at Missouri Department of Natural Resources, Water Protection Program, NPDES Permits and Engineering Section, P.O. Box 176, Jefferson City, MO 65102-0176. Thank you for working with the Department to protect our environment.

Sincerely,

WATER PROTECTION PROGRAM

Refaat Mefrakis, P.E., Chief
NPDES Permits and Engineering Section

RM:csp

c: Mr. Cody Wheeler, Army Corps of Engineers, Kansas City District
Mr. Charles Frerker, Army Corps of Engineers, St. Louis District
Ms. Dorothy Franklin, Kansas City Regional Office
Mr. Jimmy Coles, Kansas City Regional Office
File Copy

NOTIFICATION OF ADMINISTRATIVE APPEAL OPTIONS AND PROCESS AND REQUEST FOR APPEAL

Applicant: Holliday Sand & Gravel, LLC		File Number: 2011-363	Date: Mar. 31, 2011
Attached is:			See Section below
	A. INITIAL PROFFERED PERMIT (Standard Permit or Letter of Permission)		A
XX	B. PROFFERED PERMIT (Standard Permit or Letter of Permission)		B
	C. PERMIT DENIAL		C
	D. APPROVED JURISDICTIONAL DETERMINATION		D
	E. PRELIMINARY JURISDICTIONAL DETERMINATION		E

SECTION I - The following identifies your rights and options regarding a modification, reconsideration, or administrative appeal of the above decision. Additional information may be found at http://www.usace.army.mil/inet/functions/cw/cecwo/reg or Corps regulations at 33 CFR Part 331.

A: INITIAL PROFFERED PERMIT: You may accept or request modification of the permit.

- ACCEPT: If you received a Standard Permit, you may sign the permit document and return it to the District Engineer for final authorization. If you received a Letter of Permission (LOP), you may accept the LOP and your work is authorized. Your signature on the Standard Permit or acceptance of the LOP means that you accept the permit in its entirety, and waive all rights to appeal the permit, including its terms and conditions, and approved jurisdictional determinations associated with the permit.
- REQUEST MODIFICATION: If you object to the permit (Standard or LOP) because of certain terms and conditions therein, you may request that the permit be modified accordingly. You must complete Section II of this form and return the form to the District Engineer. Your objections must be received by the District Engineer within 60 days of the date of this notice, or you will forfeit your right to appeal the permit in the future. Upon receipt of your letter, the District Engineer will evaluate your objections and may: (a) modify the permit to address all of your concerns, (b) modify the permit to address some of your objections, or (c) not modify the permit having determined that the permit should be issued as previously written. After evaluating your objections, the District Engineer will send you a proffered permit for your reconsideration, as indicated in Section B below.

B: PROFFERED PERMIT: You may accept or appeal the permit.

- ACCEPT: If you received a Standard Permit, you may sign the permit document and return it to the District Engineer for final authorization. If you received a Letter of Permission (LOP), you may accept the LOP and your work is authorized. Your signature on the Standard Permit or acceptance of the LOP means that you accept the permit in its entirety, and waive all rights to appeal the permit, including its terms and conditions, and approved jurisdictional determinations associated with the permit.
- APPEAL: If you choose to decline the proffered permit (Standard or LOP) because of certain terms and conditions therein, you may appeal the declined permit under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the Division Engineer (address on page 2). This form must be received by the Division Engineer within 60 days of the date of this notice.

C: PERMIT DENIAL: You may appeal the denial of a permit under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the Division Engineer (address on page 2). This form must be received by the Division Engineer within 60 days of the date of this notice.

D: APPROVED JURISDICTIONAL DETERMINATION: You may accept the approved JD, appeal the approved JD, or submit new information and request reconsideration of the approved JD.

- ACCEPT: You do not need to notify the Corps to accept an approved JD. Failure to notify the Corps within 60 days of the date of this notice, means that you accept the approved JD in its entirety, and waive all rights to appeal the approved JD.
- APPEAL: If you disagree with the approved JD, you may appeal the approved JD under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the Division Engineer (address on page 2). This form must be received by the Division Engineer within 60 days of the date of this notice.
- RECONSIDERATION BASED ON NEW INFORMATION: You may submit new information to the District Engineer for reconsideration of an approved JD. You must submit the information within 60 days of the date of this notice.

E: PRELIMINARY JURISDICTIONAL DETERMINATION: You do not need to respond to the Corps regarding the preliminary JD. The preliminary JD is not appealable. If you wish, you may request an approved JD (which may be appealed), by contacting the Corps district for further instruction. Also you may provide new information for further consideration by the Corps to reevaluate the JD.

SECTION II –Fill out this section and return this form to the appropriate office only if submitting a request for modification or reconsideration to the District Engineer, or if submitting a request for Administrative Appeal to the Division Engineer. All such submittals must be made within 60 days of the date of this notice.

Submit the following requests to the District Engineer

A. Modification of an INITIAL PROFFERED PERMIT (Item A).
D. Reconsideration of an APPROVED JURISDICTIONAL DETERMINATION based on NEW INFORMATION (Item D RECONSIDERATION).

Submit the following requests to the Division Engineer

B. Administrative Appeal of a PROFFERED PERMIT (Item B).
C. Administrative Appeal of a PERMIT DENIAL (Item C).
D. Administrative Appeal of an APPROVED JURISDICTIONAL DETERMINATION (Item D APPEAL) (for reasons other than reconsideration of an approved JD based on new information).

(Note: Preliminary Jurisdictional Determinations (Item E) are not appealable. If you have concerns regarding a preliminary Jurisdictional Determination, you can request an approved Jurisdictional Determination).

REASONS FOR APPEAL OR OBJECTIONS: (Describe your reasons for appealing the decision or your objections to an initial proffered permit in clear concise statements. You may attach additional information to this form to clarify where your reasons or objections are addressed in the administrative record.)

SUBMITTAL OF NEW OR ADDITIONAL INFORMATION: The District Engineer may accept and consider new information if you request a modification to an initial proffered permit (Part A), or a reconsideration of an approved JD (Part D). An administrative appeal to the Division Engineer is limited to a review of the administrative record, the Corps memorandum for the record of the appeal conference or meeting, and any supplemental information that the review officer has determined is needed to clarify the administrative record. Neither the appellant nor the Corps may add new information or analyses to the administrative record. However, you may provide additional information to clarify the location of information that is already in the administrative record.

POINT OF CONTACT FOR QUESTIONS OR INFORMATION:

If you have questions regarding this decision and/or the appeal process you may contact: DISTRICT ENGINEER **Attn: Mark D. Frazier** **Chief, Regulatory Branch** **U.S. Army Engineer District, Kansas City** **601 E. 12th Street, Suite 402** **Kansas City, MO 64106-2896** **Telephone: 816-389-3990** (Use this address for submittals to the District Engineer)	If you wish to submit an appeal or have questions regarding the appeal process you may contact: DIVISION ENGINEER **Attn: David W. Gesl** **Administrative Appeals Review Officer** **U.S. Army Engineer Division, Northwestern Division** **P.O. Box 2870** **Portland, OR 97208-2870** **Telephone: 503-808-3825**

RIGHT OF ENTRY: Your signature below grants the right of entry to Corps of Engineers personnel, and any government consultants, to conduct investigations of the project site during the course of the appeal process. You will be provided a 15 day notice of any site investigation, and will have the opportunity to participate in all site investigations.

_____ Signature of appellant or agent.	Date:	Telephone number:

DEPARTMENT OF THE ARMY
KANSAS CITY DISTRICT, CORPS OF ENGINEERS
635 FEDERAL BUILDING
601 E 12TH STREET
KANSAS CITY MO 64106-2824

REPLY TO
ATTENTION OF

MAR 3 1 2011

Regulatory Branch
(NWK-2011-361)

Mr. Ray Bohlken
Capital Sand Company, Inc.
PO Box 104990
Jefferson City, Missouri 65110-4990

Dear Mr. Bohlken:

This letter is in response to your application, received on March 21, 2008, to reauthorize your Missouri River commercial dredging operation previously authorized by Department of the Army (DA) permit No. 2001-1429. As requested by your application, this letter includes a new proffered DA permit No. 2011-361, in duplicate, and extends your old DA permit No. 2001-1429.

When executed, the permit will authorize you to extract up to 1,860,000 tons of sand and gravel per year from the Missouri River with a mobile, floating, hydraulic cutter-head suction dredge plant. A maximum of 370,000 tons can be dredged in the Waverly segment (river miles 249.9 to 356.9), a maximum of 1,350,000 tons can be dredged in the Jefferson City segment (river miles 129.9 to 249.9), and a maximum of 140,000 tons in the portion of the St. Charles segment regulated by the Kansas City District (river miles 50.0 to 129.9). Water and dredged materials will be passed through onboard screens allowing the desired material to be loaded onto barges and undesired material and water to be discharged back into the river at the dredging location. Filled barges will be transported to existing offloading facilities where a crane or front end loader will unload the material for stockpiling and commercial sale. The permits will be subject to all the special conditions that follow and will expire on December 31, 2015. The 2011 tonnage limits will retroactively apply to all dredging since the beginning of 2011. These tonnage limits are of sand when it is offloaded from the barge with a moisture content of approximately 10%.

A copy of the water quality certification issued for your work, by the Missouri Department of Natural Resources, has been attached to the enclosed DA permit. As stated in general condition "5" of the enclosed permit document, the conditions presented in the state's water quality certification are incorporated into the special conditions of the permit by reference.

This letter contains a proffered permit for your commercial dredging permit application. If you object to this decision, you may request an administrative appeal under the U.S. Army Corps of Engineers regulations at 33 Code of Federal Regulations (C.F.R.) Part 331. Enclosed you will find a Notification of Administrative Appeal Options and Process (NAP) and Request for Appeal (RFA) form. If you request to appeal this decision you must submit a completed RFA form to the Northwestern Division Office at the following address:

Division Engineer
ATTN: David W. Gesl
Administrative Appeals Review Officer
U.S. Army Corps of Engineers
P.O. Box 2870
Portland, OR 97208-2870
Telephone: 503-808-3825

In order for an RFA to be accepted, the Corps must determine that it is complete, that it meets the criteria for appeal under 33 C.F.R. Part 331.5, and that it has been received by the Division Office within 60 days of the date of the NAP. Should you decide to submit an RFA form, it must be received at the above address by May 31, 2011.

It is not necessary to submit an RFA form to the Division Office if you do not object to the provisions of your proffered permit. If you wish to accept the permit in its present form, please sign the original and duplicate copy of the enclosed permit document. Each copy of the permit document should be signed on page 3 above the word "Permittee," dated, and returned within 30 days from the date of this letter. Also, the application fee of $100 should be paid by check made payable to USAED-KC and remitted with the permit document. A preaddressed envelope is enclosed for your convenience. Upon receipt of the properly signed documents and the application fee, the permit will be executed and returned to you for your files. Your signature on the standard permit means that you accept the permit in its entirety, and waive all rights to appeal the permit, including its terms and conditions, and approved jurisdictional determinations associated with the permit.

On December 28, 2010, DA permit No. 2001-1429 was extended through March 31, 2011 to allow continued dredging during the additional three months needed to complete the Missouri River Commercial Dredging Final EIS (Final EIS) and Record of Decision. We have determined that is in the public interest to extend DA permit No. 2001-1429 to allow you to continue dredging until the Administrative Appeal process described in the previous paragraph is complete for proffered DA permit No. 2011-361, or until it is accepted and executed. This permit extension has been reviewed in accordance with 33 C.F.R Part 325.7, and with Section 10 of the Rivers and Harbors Act of 1899 (33 United States Code Section (U.S.C) § 403) and Section 404 of the Clean Water Act ((33 U.S.C. § 1344). It has been determined that the extension and modification of DA permit No. 2001-1429 to include all the limits and permit conditions identified in the Record of Decision will be within the scope of the Final EIS and will comply with the Section 404(b)(1) Guidelines (40 C.F.R. Part 230). Therefore, DA permit No. 2001-1429 will be modified effective April 1, 2011, to limit your annual extraction of sand and gravel from the Missouri River to 1,860,000 tons per year subject to all the general and special conditions attached to proffered DA permit No. 2011-361. DA permit No. 2001-1429 will expire in 60 days, unless an appeal of proffered DA permit 2011-361 is accepted by the Northwestern Division, U.S. Army Corps of Engineers, in which case DA permit No. 2001-1429 will expire 30 days after the final appeal decision.

If you do not agree that the terms and conditions of the modification of DA permit No. 2001-1429 are acceptable and correct, you must notify and may request a meeting with the District Commander by April 10, 2011, or be legally bound by the terms and conditions thereof. This is a legal document. We request that you attach this letter of modification to your copy of DA permit No. 2001-1429 in order to reflect all work authorized under the permit.

Special condition "b" requires you to implement a Dredge Monitoring Plan (DMP) approved by the Regulatory Branch of the Kansas City District. If a DMP has not been previously approved by the Regulatory Branch of the Kansas City District, you must provide within 30 days of execution of the permit a DMP for each individual dredge plant to the Regulatory Branch of Kansas City District for approval. The DMP must show how you will monitor, record, and report the cutter-head position, cutter-head operating status, extraction tonnage, and the presence of any hard substrates, mussel shells, or unusual concentration of gravel.

Special condition "c" requires all applicants receiving authorization to commercially dredge the Missouri River to collectively have a hydrographic survey completed between June and September of 2014 and submitted to the Regulatory Branch of the Kansas City District, USACE by November 1, 2014. Water surface profiles will also be prepared and evaluated annually by the Kansas City District. The Regulatory Branches of the Kansas City and St. Louis Districts will meet with you and the other authorized dredgers and state and federal agencies in the fall of each year to discuss the condition and trend of the river as shown by the most recent water surface profiles or surveys. As stated in item 5 under "Further Information" on page 3 of all permits, this office may reevaluate its decision on this permit any time significant new information surfaces which this office did not consider in reaching the original public interest decision. Such a reevaluation may result in a determination that it is appropriate to use the suspension, modification, and revocation procedures contained in 33 C.F.R. 325.7

We are interested in your thoughts and opinions concerning your experience with the Kansas City District Regulatory Program. We have placed an automated version of our Customer Service Survey form at: http://per2.nwp.usace.army.mil/survey.html. At your request, we will mail you a paper copy that you may complete and return to us by mail or fax.

A copy of this letter has been sent to Mr. David Shorr. If you have any questions concerning this matter, please contact Mr. Cody S. Wheeler at 816-389-3739 (FAX 816-389-2032).

Sincerely,

Anthony J. Hofmann
Colonel, Corps of Engineers
District Commander

Enclosures

DEPARTMENT OF THE ARMY PERMIT

Permittee: Capital Sand Company, LLC.

Permit No.: 2011-361

Issuing Office: U.S. Army Engineer District, Kansas City

NOTE: The term "you" and its derivatives, as used in this permit, means the permittee or any future transferee. The term "this office" refers to the appropriate district or division office of the Corps of Engineers having jurisdiction over the permitted activity or the appropriate official of that office acting under the authority of the commanding officer.

You are authorized to perform work in accordance with the terms and conditions specified below, and with the plans and drawings attached hereto which are incorporated in and made a part of this permit.

Project Description: You are authorized to extract up to 1,860,000 tons of sand and gravel per year from the Missouri River with a mobile, floating, hydraulic cutter-head suction dredge plant. A maximum of 370,000 tons can be dredged in the Waverly segment (river miles 249.9 to 356.9), a maximum of 1,350,000 tons can be dredged in the Jefferson City segment (river miles 129.9 to 249.9), and a maximum of 140,000 tons in the portion of the St. Charles segment regulated by the Kansas City District (river miles 50.0 to 129.9). Water and dredged materials will be passed through onboard screens allowing the desired material to be loaded into barges and undesired material and water to be discharged back into the river at the dredging location. Filled barges will be transported to existing offloading facilities where a crane or front end loader will unload the material for stockpiling and commercial sale. The 2011 tonnage limits retroactively apply to all dredging since the beginning of 2011. These tonnage limits are of sand when it is offloaded from the barge with a moisture content of approximately 10%..

Permit Drawings: Please use the location maps from the 2007 permit decision, and the electronic authorized dredging zone shape files with any modifications sent to you in subsequent permit extensions. We will send you updated maps and/or electronic shape files with the execution of the permit or sooner if possible. The maps and electronic shape files are just a visual representation of where you can or cannot dredge. The legal and authoritative source regarding where you can or cannot dredge, is contained in the project description, project location, and special conditions of this permit.

Project Location: You may dredge in the following general reaches of Missouri River (this may or may not exclude all the resource protection zones): river miles 62.00-75.00, 109.00-115.20, 115.95-118.40, 119.15-119.35, 119.85-124.35, 124.95-126.05, 126.90-127.50, 130.20-157.00, 158.45-164.00, 172.00-176.40, 178.35-180.15, 180.65-184.75, 185.65-186.90, 188.20-192.00, 193.00-193.40, 195.75-202.10, 202.75-210.00, 220.00-226.95, 227.55-230.00, 245.00-249.65, 250.30-265.00, 283.00-297.90, 301.05-303.00, and 314.00-328.00.

Permit Conditions:

General Conditions:

1. The time limit for completing the work authorized ends on 31 December 2015. If you find that you need more time to complete the authorized activity, submit your request for a time extension to this office for consideration at least one month before the above date is reached.

2. You must maintain the activity authorized by this permit in conformance with the terms and conditions of this permit. You are not relieved of this requirement if you abandon the permitted activity, although you may make a good faith transfer to a third party in compliance with General Condition 4 below. Should you wish to cease to maintain the authorized activity or should you desire to abandon it without a good faith transfer, you must obtain a modification of this permit from this office, which may require restoration of the area.

3. If you discover any previously unknown historic or archeological remains while accomplishing the activity authorized by this permit, you must immediately notify this office of what you have found. We will initiate the Federal and state coordination required to determine if the remains warrant a recovery effort or if the site is eligible for listing in the National Register of Historic Places.

4. If you sell the property associated with this permit, you must obtain the signature of the new owner in the space provided and forward a copy of the permit to this office to validate the transfer of this authorization.

5. If a conditioned water quality certification has been issued for your project, you must comply with the conditions specified in the certification as special conditions to this permit. For your convenience, a copy of the certification is attached if it contains such conditions.

6. You must allow representatives from this office to inspect the authorized activity at any time deemed necessary to ensure that it is being or has been accomplished in accordance with the terms and conditions of your permit.

Special Conditions:

See continuation sheets, pages 4 - 8, of this document.

Further Information:

1. Congressional Authorities: You have been authorized to undertake the activity described above pursuant to:

(X) Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403).

(X) Section 404 of the Clean Water Act (33 U.S.C. 1344).

( ) Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972 (33 U.S.C. 1413).

2. Limits of this authorization.

a. This permit does not obviate the need to obtain other Federal, state, or local authorization required by law.

b. This permit does not grant any property rights or exclusive privileges.

c. This permit does not authorize any injury to the property or rights of others.

d. This permit does not authorize interference with any existing or proposed Federal project.

3. Limits of Federal Liability. In issuing this permit, the Federal Government does not assume any liability for the following:

a. Damages to the permitted project or uses thereof as a result of other permitted or unpermitted activities or from natural causes.

b. Damages to the permitted project or uses thereof as a result of current or future activities undertaken by or on behalf of the United States in the public interest.

c. Damages to persons, property, or to other permitted or unpermitted activities or structures caused by the activity authorized by this permit.

d. Design or construction deficiencies associated with the permitted work.

e. Damage claims associated with any future modification, suspension, or revocation of this permit.

4. Reliance on Applicant's Data: The determination of this office that issuance of this permit is not contrary to the public interest was made in reliance on the information you provided.

5. Reevaluation of Permit Decision. This office may reevaluate its decision on this permit at any time the circumstances warrant. Circumstances that could require a reevaluation include, but are not limited to, the following:

a. You fail to comply with the terms and conditions of this permit.

b. The information provided by you in support of your permit application proves to have been false, incomplete, or inaccurate (See 4 above).

c. Significant new information surfaces which this office did not consider in reaching the original public interest decision.

Such a reevaluation may result in a determination that it is appropriate to use the suspension, modification, and revocation procedures contained in 33 CFR 325.7 or enforcement procedures such as those contained in 33 CFR 326.4 and 326.5. The referenced enforcement procedures provide for the issuance of an administrative order requiring you to comply with the terms and conditions of your permit and for the initiation of legal action where appropriate. You will be required to pay for any corrective measures ordered by this office, and if you fail to comply with such directive, this office may in certain situations (such as those specified in 33 CFR 209.170) accomplish the corrective measures by contract or otherwise and bill you for the cost.

6. Extensions. General condition 1 establishes a time limit for the completion of the activity authorized by this permit. Unless there are circumstances requiring either a prompt completion of the authorized activity or a reevaluation of the public interest decision, the Corps will normally give favorable consideration to a request for an extension of this time limit.

Your signature below, as permittee, indicates that you accept and agree to comply with the terms and conditions of this permit.

_____ _____

(PERMITTEE) (DATE)

This permit becomes effective when the Federal official, designated to act for the Secretary of the Army, has signed below.

_____ _____

(DISTRICT ENGINEER) (DATE)
ANTHONY J. HOFMANN, COLONEL
BY: Mark D. Frazier
Chief, Regulatory Branch
Operations Division

When the structures or work authorized by this permit are still in existence at the time the property is transferred, the terms and conditions of this permit will continue to be binding on the new owner(s) of the property. To validate the transfer of this permit and the associated liabilities associated with compliance with its terms and conditions, have the transferee sign and date below.

_____ _____

(TRANSFEREE) (DATE)

Special Conditions:

a. You understand and agree that, if future operations by the United States require the removal, relocation, or other alteration, of the structure or work herein authorized, or if, in the opinion of the Secretary of the Army or his authorized representative, said structure or work shall cause unreasonable obstruction to the free navigation of the navigable waters, you will be required, upon due notice from the U.S. Army Corps of Engineers (USACE), to remove, relocate, or alter the structural work or obstructions caused thereby, without expense to the United States. No claim shall be made against the United States on account of any such removal or alteration.

b. You must implement a Dredge Monitoring Plan (DMP) approved by the Regulatory Branch of the Kansas City District, USACE. If a DMP has not been previously approved by the Regulatory Branch, USACE, Kansas City District, you must provide within 30 days of execution of the permit a DMP for each individual dredge plant to the Regulatory Branch of the USACE, Kansas City District for approval. The DMP must show how you will monitor, record, and report the cutter-head position, cutter-head operating status, extraction tonnage, and the presence of any hard substrates, mussel shells, or unusual concentration of gravel in an impartial, unbiased, reliable, and accurate manner. The DMP must include the specifications of the process and the Dredge Monitoring System (DMS) including sensors, hardware, software, communications devices the permittee will use to: gather data; perform quality control on those data; calibrate, test, and repair sensors when they fail; and transfer the data to the Regulatory Branch of the Kansas City District, USACE. The DMS must include automated differential Global Positioning System (DGPS) equipment (or other comparable system) operating with a minimum accuracy level of 1-3 meters horizontal Circular Error Probable with horizontal positions tied into the UTM Zone 15 NAD 83 (feet) coordinate system recorded to the nearest foot. The DMS must always be on, recording cutter-head position and operating status every 5 minutes, 24-hours a day, 365 days a year, even when the dredge is not operating. The data logged each month must be submitted by email to cody.s.wheeler@usace.army.mil at the Regulatory Branch of the Kansas City District, USACE by the 7th day of the following month. If you do not receive an email confirmation that the report was received, you must contact the Regulatory Branch of the Kansas City District, USACE at 816-389-3990 for revised instructions for filing the monthly report. The extracted material must be measured by one of the methods described in the attached Standard Operating Procedure for Hydrographic Surveying and Dredge Monitoring. If the tonnage is measured by scale at the off-loading facility, the DMP should also describe how the operation will record the date, time, river mile, coordinates, and approximate tonnage of each barge loaded in one location. If a barge is partially filled at one anchor setting then completed at a new anchor setting, the tonnage should be estimated separately for each location. This information must be provided monthly by email on the attached Missouri River Commercial Dredging Location/Volume Report spreadsheet to cody.s.wheeler@usace.army.mil at the Regulatory Branch of the Kansas City District, USACE by the 7th day of the following month. If you do not receive an email confirmation that the report was received, you must contact the Regulatory Branch of the Kansas City District, USACE at 816-389-3990 for revised instructions for filing the monthly report. Faulty sensors or other components identified in the DMP must be repaired within 96 hours. The DMS must not be inoperable more than 5 percent of the time. You must install an approved DMS and have it inspected by the Regulatory Branch of the Kansas City District, USACE within 120 days of execution of the permit or you must cease dredging operations until it is installed and inspected or you submit a justification of the delay and an installation schedule and get an extension of this deadline in writing from the Regulatory Branch of the Kansas City District, USACE.

c. The USACE periodically surveys the river as part of the management and operation of the Bank Stabilization and Navigation Project. If, for any reason, the USACE has not surveyed the river in the fourth year (2014) of the five-year permit cycle, the authorized dredging companies must have the lower 498 miles of the LOMR surveyed during the summer months in accordance with the Standard Operating Procedures for Hydrographic Surveying and Dredge Monitoring. The survey shall be completed between June and September of 2014 and submitted to the Regulatory Branch of the Kansas City District, USACE by November 1, 2014.

d. If any part of the authorized work is performed by a contractor, before starting work you must discuss the terms and conditions of this permit with the contractor and must give a copy of this entire permit to the contractor. After the initial 120 days of this permit, any contracted dredges or barges must also be equipped with and operate in accordance with an approved DMP as required in Special Condition "b". The DMP and system must be approved by the Regulatory Branch of the Kansas City District, USACE prior to starting work.

e. Until the dredges and barges are equipped with the DMS required by Special Condition "b", you must, for each dredge operated, record Global Positioning System (GPS) coordinates, tons of material removed, and the presence of any hard substrates or unusual concentration of gravel daily. If the dredge moves more than 100 feet in any one day then the amount of material removed from each location must be recorded separately. The operators may use hand-held GPS devices or automatically recording devices, but with which ever system used, must identify the device make/model and recording location. This information must be recorded on the attached Missouri River Commercial Dredging Location/Volume Report in an electronic spreadsheet. You must furnish a copy of the completed monthly report by email to cody.s.wheeler@usace.army.mil at the Regulatory Branch of the Kansas City District, USACE by the 7th day of the following month. If you do not receive an email confirmation that the report was received, you must contact the Regulatory Branch of the Kansas City District, USACE at 816-389-3990 for revised instructions for filing the monthly report.

f. No more than 300,000 tons of material shall be extracted within one year from each five-mile reach of the Missouri River between river miles 15 to 20, 25 to 35, 90 to 100, 140 to 150, 355 to 395, and 445 to 455. When the dredge report database of the Regulatory Branch of the Kansas City District, USACE indicates that extraction in a five-mile reach has reached 300,000 tons, all dredgers authorized to operate within that reach will be notified that it is closed to further dredging for the remainder of the calendar year unless a waiver is requested and received in writing from the Regulatory Branch of the Kansas City District, USACE.

g. Up to 10% of your authorized annual tonnage for each segment may be carried over each year to be extracted within that segment the following year. Annual tonnage with carryover may never exceed 110% of annual authorized tonnage of each segment. At the end of each year you must notify the Regulatory Branch of the Kansas City District, USACE in your annual tonnage report of any unextracted tonnage that you intend to carryover.

h. In permit conditions that specify a linear distance exclusion zone adjacent to a river feature, "dredging" refers to the operation of hydraulic cutter-head suction dredging. The exclusion zone distances will apply to and be measured from the end of the cutter head, rather than from a general point on the dredge.

i. You must confine dredging to between the Rectified Channel Lines (RCL) with the following restrictions. Dredging must be conducted in such a manner to preserve the structural integrity of the landmass landward of the RCL. This must be accomplished by maintaining an adequate "no dredging

or discharging" zone riverward of the RCL so that material will stabilize into the dredging area at its natural angle of repose. This slope will vary depending upon river location and the type of material being dredged, but it is your responsibility to ensure that this shallow water interface landward of the RCL be maintained.

j. You must not dredge within 500 feet of any levee centerline, pipeline or submerged utility crossing, bridge pier or abutment; nor within 200 feet of any dike, revetment, or other structure built or authorized by the U.S. Government; nor within 100 feet of any normal bank line or island, without special authorization. When dredging is performed adjacent to river stabilization structures, the dredging may be conducted only in the present streambed of the river at the authorized locations. This condition represents only the minimum distances away from structures and natural features that you can conduct dredging and does not relieve you from liability for damage arising from dredging. You must be satisfied that dredging to these limits will not cause damage to public and private property.

k. You must not conduct dredging operations in a zone extending 4,000 feet upstream and 500 feet downstream from any municipal drinking water intake structures located along either bank of the river unless you obtain an exemption to this condition in writing from the Regulatory Branch of the Kansas City District, USACE.

l. You must not conduct dredging operations in a zone extending 1,000 feet upstream and 1,000 feet downstream from any municipal drinking water horizontal collector wells located along either bank of the river unless you obtain an exemption to this condition in writing from the Regulatory Branch of the Kansas City District, USACE.

m. You must not conduct dredging operations in a zone extending 500 feet upstream and 500 feet downstream from any other water intake structures other than those used for municipal drinking water unless you obtain an exemption to this condition in writing from the Regulatory Branch of the Kansas City District, USACE.

n. You may discharge back into the Missouri River material spilled off the conveyer belts and unusable material separated out in the on-shore sand washing and handling facility. To subtract that tonnage from your annual extraction limit, you must follow a plan approved in writing by the Regulatory Branch of the Kansas City District, USACE. This plan must show where and how the material will be discharged and how the amount of dredged material discharged back into the river will be measured and reported to the Regulatory Branch of the Kansas City District, USACE. The total extraction tonnage will equal the tonnage extracted and barged to shore minus that amount intentionally returned to the Missouri River.

o. You may return unwanted dredged material and river water (but not garbage)extracted from the Missouri River back to the Missouri River. You must not dispose of waste materials, water, or garbage below the ordinary high water mark of any other water body, in a wetland area, or at any location where the materials could be introduced into the water body or an adjacent wetland as a result of runoff, flooding, wind, or other natural forces.

p. You must comply with all U.S. Coast Guard, State of Missouri, State of Kansas (river mile 367 to 490), and USACE regulations concerning the prevention of navigation obstructions in navigable waters of the United States.

q. You must conduct operations in the Missouri River such that there will be no unreasonable interference with navigation by the existence or use of the activity authorized herein.

r. To avoid impacting endangered species and cultural resources, you must confine dredging to the specified reaches listed on page 1 of the permit document. If you desire to expand or relocate your dredging operation outside the specified reaches, you must submit a request to the Regulatory Branch of the Kansas City District, USACE identifying the proposed new limits, in river miles and the location of the unloading facility to be employed.. Approval of the requests, if granted, will be provided in writing with modified reaches identified on the Missouri River Hydrographic Survey. Copies of the relocation requests must be furnished to the following agencies:

1. U.S. Fish and Wildlife Service, Columbia Field Office
2. Missouri Department of Natural Resources, Water Pollution Control Program
3. Missouri Department of Natural Resources, State Historic Preservation Office
4. Kansas Department of Health and Environment, Bureau of Water (for operations extending upstream of river mile 367)
5. Kansas State Historical Society, State Historic Preservation Office (for operations extending upstream of river mile 367)
6. Corps of Engineers, Kansas City District, Hydrologic Engineering Branch

s. You must not conduct dredging operations within the reaches identified in the following table as Pallid Sturgeon habitat features.

Missouri River Miles (including 0.25 mile buffer)		**Pallid Sturgeon Habitat Feature**
Downstream	Upstream	
44.25	44.85	RDB Centaur Chute
49.15	50.05	RDB Centaur Chute
56.85	59.05	LDB Chute/Island
58.55	61.25	RDB Chute/Island
89.75	91.10	RDB Island
89.90	91.45	LDB Loutre Slough
91.20	93.55	LDB Lunch Island
103.00	104.95	Both Gasconade Confluence and Dike Field
105.20	106.25	RDB Dike Field
115.20	115.95	RDB Island
118.40	119.15	RDB Dike Field
119.35	119.85	RDB St. Aubert Island/Chute
124.35	124.95	RDB St. Aubert Island/Chute
126.05	126.90	LDB Dike Field
127.50	130.20	Both Osage River Confluence and Dike Field
157.00	158.45	LDB Island
176.40	178.35	LDB Island/RDB Tadpole Island Chute
180.15	180.65	RDB Tadpole Island Chute
184.75	185.65	RDB Chute
186.90	188.20	RDB Chute and Dike Field
193.40	195.75	RDB Dike Field/Island
202.10	202.75	RDB Lamine River Confluence
210.00	219.65	Lisbon/Jameson Complex
226.95	227.55	LDB Little Chariton Confluence

238.40	239.10	LDB Chariton River Confluence
249.65	250.30	LDB Grand River Confluence
269.85	271.35	RDB Shallow/Island
280.40	282.05	RDB Island
297.90	299.05	RDB Island
300.00	301.05	LDB Island
367.00	367.75	RDB Kansas River Confluence
390.85	391.45	LDB Platte River Confluence
456.75	457.25	LDB Worthwine Chute
458.75	459.25	LDB Worthwine Chute
462.65	463.25	LDB Nodaway River Confluence
478.55	479.15	RDB Wolf Creek Confluence
494.55	495.20	RDB Big Nemaha River Confluence

t. You must discharge only suitable dredged material that is free from toxic pollutants in other than trace quantities.

u. You must investigate for water supply intakes or other activities which may be affected by suspended solids and turbidity increases caused by work in the watercourse and give sufficient notice to the owners of affected activities to allow preparation for any changes in water quality. You must furnish the Regulatory Branch of the Kansas City District, USACE with a copy of any written notification provided in accordance with this condition.

v. You must employ measures to prevent dredged materials stored or disposed of on shore from running off or eroding into wetlands or tributaries to the Missouri River.

w. You must employ measures to prevent or control spilled fuels or lubricants from entering the waters of the United States.

x. You must store all construction materials, equipment, and/or petroleum products that are part of the on-shore operation, when not in use, above anticipated high water levels.

STATE OF MISSOURI
Jeremiah W. (Jay) Nixon, Governor • Sara Parker Pauley, Director
DEPARTMENT OF NATURAL RESOURCES
www.dnr.mo.gov

MAR 23 2011

Mr. Steve Bohlken
Capital Sand Co., Inc.
P.O. Box 104990
Jefferson City, MO 65110-4990

Dear Mr. Bohlken:

Please replace the Clean Water Act Section 401 Water Quality Certification (certification) dated March 17, 2011, with the enclosed certification.

If you have any questions, please feel free to contact me by phone at (573) 751-7023, by e-mail at carrie.schulte@dnr.mo.gov or by mail at Missouri Department of Natural Resources, Water Protection Program, NPDES Permits and Engineering Section, P.O. Box 176, Jefferson City, MO 65102-0176. Thank you for working with the Department to protect our environment.

Sincerely,

WATER PROTECTION PROGRAM

Carrie M. Schulte

Carrie M. Schulte, Chief
401 Water Quality Certification and Stormwater Unit

CMS/pc

Enclosure

c: Mr. Charles Frerker, Army Corps of Engineers, St. Louis District
Mr. Cody Wheeler, Army Corps of Engineers, Kansas City District
Ms. Dorothy Franklin, Kansas City Regional Office
Mr. Jimmy Coles, Kansas City Regional Office
Mr. Lantz Tipton, Northeast Regional Office
File Copy

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STATE OF MISSOURI
Jeremiah W. (Jay) Nixon, Governor • Sara Parker Pauley, Director
DEPARTMENT OF NATURAL RESOURCES
www.dnr.mo.gov

MAR 23 2011

Mr. Steve Bohlken
Capital Sand Co., Inc.
P.O. Box 104990
Jefferson City, MO 65110-4990

Various Counties
Permit Number 2011-361
CEK006761 & CES002561

Dear Mr. Bohlken:

The Missouri Department of Natural Resources' Water Protection Program (Department) is in receipt of the U.S. Army Corps of Engineers' (Corps) letter dated February 17, 2011, requesting that your Clean Water Act Section 401 Water Quality Certification (certification) be issued for the Corps' Permit Number 2011-361. The Department understands that Capital Sand Co., Inc. will abide by the certification and the Corps issued Clean Water Act Section 404 Permit (permit) for commercial dredging operations in the Missouri River.

This letter also serves as an extension of the certification issued for Permit Number 2001-1429 for an additional 60 days, unless an appeal of proffered Department of the Army Permit 2001-1429 is accepted by the Corps' Northwestern Division, in which case the 2001 certification would expire 30 days after the final appeal decision.

This office certifies that the ongoing activities apparently will not cause the general or numeric criteria to be exceeded nor impair beneficial uses established in Water Quality Standards, 10 CSR 20-7.031, provided the following condition is met:

- The U.S. Army Corps of Engineers permit decision and all conditions are followed as authorized by the Corps under Section 404 of the Clean Water Act (33 USC 1344). The implementing regulation for this Act is found at 33 CFR 320-330.

Missouri Clean Water Law, Chapter 644.052.9 RSMo, gives the Department the authority to collect a fee for the issuance of a certification. As of January 1, 2011, this authority has expired, which means the Department no longer has statutory authority to collect water permit fees. This includes the certification fee. Please do not send a payment to the Department.

If you were affected by this decision, you may appeal to have the matter heard by the Administrative Hearing Commission (commission). To appeal, you must file a petition with the commission within thirty (30) days after the date this decision was mailed or the date it was delivered, whichever date was earlier. If any such petition is sent by registered mail or certified mail, it will be deemed filed on the date it is mailed. If it is sent by any method other than registered mail or certified mail, it will be deemed filed on the date it is received by the commission.

Recycled Paper

Water Quality Standards must be met during any operations authorized by these permits. If you have any questions, please contact Ms. Carrie M. Schulte by phone at (573) 751-7023, by e-mail at carrie.schulte@dnr.mo.gov or by mail at Missouri Department of Natural Resources, Water Protection Program, NPDES Permits and Engineering Section, P.O. Box 176, Jefferson City, MO 65102-0176. Thank you for working with the Department to protect our environment.

Sincerely,

WATER PROTECTION PROGRAM

Refaat Mefrakis, P.E., Chief
NPDES Permits and Engineering Section

RM:csp

c: Mr. Charles Frerker, Army Corps of Engineers, St. Louis District
Mr. Cody Wheeler, Army Corps of Engineers, Kansas City District
Ms. Dorothy Franklin, Kansas City Regional Office
Mr. Jimmy Coles, Kansas City Regional Office
Mr. Lantz Tipton, Northeast Regional Office
File Copy

NOTIFICATION OF ADMINISTRATIVE APPEAL OPTIONS AND PROCESS AND REQUEST FOR APPEAL

Applicant: Capital Sand Company, Inc.		File Number: 2011-361	Date: Mar. 31, 2011
Attached is:			See Section below
	A. INITIAL PROFFERED PERMIT (Standard Permit or Letter of Permission)		A
XX	B. PROFFERED PERMIT (Standard Permit or Letter of Permission)		B
	C. PERMIT DENIAL		C
	D. APPROVED JURISDICTIONAL DETERMINATION		D
	E. PRELIMINARY JURISDICTIONAL DETERMINATION		E

SECTION I - The following identifies your rights and options regarding a modification, reconsideration, or administrative appeal of the above decision. Additional information may be found at http://www.usace.army.mil/inet/functions/cw/cecwo/reg or Corps regulations at 33 CFR Part 331.

A: INITIAL PROFFERED PERMIT: You may accept or request modification of the permit.

- ACCEPT: If you received a Standard Permit, you may sign the permit document and return it to the District Engineer for final authorization. If you received a Letter of Permission (LOP), you may accept the LOP and your work is authorized. Your signature on the Standard Permit or acceptance of the LOP means that you accept the permit in its entirety, and waive all rights to appeal the permit, including its terms and conditions, and approved jurisdictional determinations associated with the permit.
- REQUEST MODIFICATION: If you object to the permit (Standard or LOP) because of certain terms and conditions therein, you may request that the permit be modified accordingly. You must complete Section II of this form and return the form to the District Engineer. Your objections must be received by the District Engineer within 60 days of the date of this notice, or you will forfeit your right to appeal the permit in the future. Upon receipt of your letter, the District Engineer will evaluate your objections and may: (a) modify the permit to address all of your concerns, (b) modify the permit to address some of your objections, or (c) not modify the permit having determined that the permit should be issued as previously written. After evaluating your objections, the District Engineer will send you a proffered permit for your reconsideration, as indicated in Section B below.

B: PROFFERED PERMIT: You may accept or appeal the permit.

- ACCEPT: If you received a Standard Permit, you may sign the permit document and return it to the District Engineer for final authorization. If you received a Letter of Permission (LOP), you may accept the LOP and your work is authorized. Your signature on the Standard Permit or acceptance of the LOP means that you accept the permit in its entirety, and waive all rights to appeal the permit, including its terms and conditions, and approved jurisdictional determinations associated with the permit.
- APPEAL: If you choose to decline the proffered permit (Standard or LOP) because of certain terms and conditions therein, you may appeal the declined permit under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the Division Engineer (address on page 2). This form must be received by the Division Engineer within 60 days of the date of this notice.

C: PERMIT DENIAL: You may appeal the denial of a permit under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the Division Engineer (address on page 2). This form must be received by the Division Engineer within 60 days of the date of this notice.

D: APPROVED JURISDICTIONAL DETERMINATION: You may accept the approved JD, appeal the approved JD, or submit new information and request reconsideration of the approved JD.

- ACCEPT: You do not need to notify the Corps to accept an approved JD. Failure to notify the Corps within 60 days of the date of this notice, means that you accept the approved JD in its entirety, and waive all rights to appeal the approved JD.
- APPEAL: If you disagree with the approved JD, you may appeal the approved JD under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the Division Engineer (address on page 2). This form must be received by the Division Engineer within 60 days of the date of this notice.
- RECONSIDERATION BASED ON NEW INFORMATION: You may submit new information to the District Engineer for reconsideration of an approved JD. You must submit the information within 60 days of the date of this notice.

E: PRELIMINARY JURISDICTIONAL DETERMINATION: You do not need to respond to the Corps regarding the preliminary JD. The preliminary JD is not appealable. If you wish, you may request an approved JD (which may be appealed), by contacting the Corps district for further instruction. Also you may provide new information for further consideration by the Corps to reevaluate the JD.

SECTION II – Fill out this section and return this form to the appropriate office only if submitting a request for modification or reconsideration to the District Engineer, or if submitting a request for Administrative Appeal to the Division Engineer. All such submittals must be made within 60 days of the date of this notice.

Submit the following requests to the District Engineer

A. Modification of an INITIAL PROFFERED PERMIT (Item A).
D. Reconsideration of an APPROVED JURISDICTIONAL DETERMINATION based on NEW INFORMATION (Item D RECONSIDERATION).

Submit the following requests to the Division Engineer

B. Administrative Appeal of a PROFFERED PERMIT (Item B).
C. Administrative Appeal of a PERMIT DENIAL (Item C).
D. Administrative Appeal of an APPROVED JURISDICTIONAL DETERMINATION (Item D APPEAL) (for reasons other than reconsideration of an approved JD based on new information).

(Note: Preliminary Jurisdictional Determinations (Item E) are not appealable. If you have concerns regarding a preliminary Jurisdictional Determination, you can request an approved Jurisdictional Determination).

REASONS FOR APPEAL OR OBJECTIONS: (Describe your reasons for appealing the decision or your objections to an initial proffered permit in clear concise statements. You may attach additional information to this form to clarify where your reasons or objections are addressed in the administrative record.)

SUBMITTAL OF NEW OR ADDITIONAL INFORMATION: The District Engineer may accept and consider new information if you request a modification to an initial proffered permit (Part A), or a reconsideration of an approved JD (Part D). An administrative appeal to the Division Engineer is limited to a review of the administrative record, the Corps memorandum for the record of the appeal conference or meeting, and any supplemental information that the review officer has determined is needed to clarify the administrative record. Neither the appellant nor the Corps may add new information or analyses to the administrative record. However, you may provide additional information to clarify the location of information that is already in the administrative record.

POINT OF CONTACT FOR QUESTIONS OR INFORMATION:

If you have questions regarding this decision and/or the appeal process you may contact: DISTRICT ENGINEER **Attn: Mark D. Frazier** **Chief, Regulatory Branch** **U.S. Army Engineer District, Kansas City** **601 E. 12th Street, Suite 402** **Kansas City, MO 64106-2896** **Telephone: 816-389-3990** (Use this address for submittals to the District Engineer)	If you wish to submit an appeal or have questions regarding the appeal process you may contact: DIVISION ENGINEER **Attn: David W. Gesl** **Administrative Appeals Review Officer** **U.S. Army Engineer Division, Northwestern Division** **P.O. Box 2870** **Portland, OR 97208-2870** **Telephone: 503-808-3825**

RIGHT OF ENTRY: Your signature below grants the right of entry to Corps of Engineers personnel, and any government consultants, to conduct investigations of the project site during the course of the appeal process. You will be provided a 15 day notice of any site investigation, and will have the opportunity to participate in all site investigations.

_____ Signature of appellant or agent.	Date:	Telephone number:

DEPARTMENT OF THE ARMY
KANSAS CITY DISTRICT, CORPS OF ENGINEERS
635 FEDERAL BUILDING
601 E 12TH STREET
KANSAS CITY MO 64106-2824

REPLY TO
ATTENTION OF

MAR 3 1 2011

Regulatory Branch
(NWK-2011-362)

Mr. Steve Engemann
Hermann Sand & Gravel, Inc.
RR 3 Box 261
Hermann, Missouri 65041-9803

Dear Mr. Engemann:

This letter is in response to your application, received on March 19, 2008, to reauthorize your Missouri River commercial dredging operation previously authorized by Department of the Army (DA) permit No. 2001-1430. As requested by your application, this letter includes a new proffered DA permit No. 2011-362, in duplicate, and extends your old DA permit No. 2001-1430.

When executed, the permit will authorize you to extract up to 240,000 tons of sand and gravel per year from the Missouri River with a mobile, floating, hydraulic dredge plant. A maximum of 120,000 tons can be dredged in the Jefferson City segment (river miles 129.9 to 249.9) and a maximum of 120,000 tons in the portion of the St. Charles segment regulated by the Kansas City District (river miles 50.0 to 129.9). Water and dredged materials will be passed through onboard screens allowing the desired material to be loaded onto barges and undesired material and water to be discharged back into the river at the dredging location. Filled barges will be transported to existing offloading facilities where a crane or front end loader will unload the material for stockpiling and commercial sale. The permits will be subject to all the special conditions that follow and will expire on December 31, 2015. The 2011 tonnage limits will retroactively apply to all dredging since the beginning of 2011. These tonnage limits are of sand when it is offloaded from the barge with a moisture content of approximately 10%.

A copy of the water quality certification issued for your work, by the Missouri Department of Natural Resources, has been attached to the enclosed DA permit. As stated in general condition "5" of the enclosed permit document, the conditions presented in the state's water quality certification are incorporated into the special conditions of the permit by reference.

This letter contains a proffered permit for your commercial dredging permit application. If you object to this decision, you may request an administrative appeal under the U.S. Army Corps of Engineers regulations at 33 Code of Federal Regulations (C.F.R). Part 331. Enclosed you will find a Notification of Administrative Appeal Options and Process (NAP) and Request for Appeal (RFA) form. If you request reconsideration of this decision you must submit a completed RFA form to the Northwestern Division Office at the following address:

Division Engineer
ATTN: David W. Gesl
Administrative Appeals Review Officer
U.S. Army Corps of Engineers
P.O. Box 2870
Portland, OR 97208-2870
Telephone: 503-808-3825

In order for an RFA to be accepted, the Corps must determine that it is complete, that it meets the criteria for appeal under 33 C.F.R. Part 331.5, and that it has been received by the Division Office within 60 days of the date of the NAP. Should you decide to submit an RFA form, it must be received at the above address by May 31, 2011.

It is not necessary to submit an RFA form to the Division Office if you do not object to the provisions of your proffered permit. If you wish to accept the permit in its present form, please sign the original and duplicate copy of the enclosed permit document. Each copy of the permit document should be signed on page 3 above the word "Permittee," dated, and returned within 30 days from the date of this letter. Also, the application fee of $100 should be paid by check made payable to USAED-KC and remitted with the permit document. A preaddressed envelope is enclosed for your convenience. Upon receipt of the properly signed documents and the application fee, the permit will be executed and returned to you for your files. Your signature on the standard permit means that you accept the permit in its entirety, and waive all rights to appeal the permit, including its terms and conditions, and approved jurisdictional determinations associated with the permit.

On December 28, 2010, DA permit No. 2001-1430 was extended through March 31, 2011 to allow continued dredging during the additional three months needed to complete the Missouri River Commercial Dredging Final EIS (Final EIS) and Record of Decision. We have determined that is in the public interest to extend DA permit No. 2001-1430 allow you to continue dredging until the Administrative Appeal process described in the previous paragraph is complete for proffered DA permit No. 2011-362, or until it is accepted and executed. This permit extension has been reviewed in accordance with 33 C.F. R. Part 325.7, and with Section 10 of the Rivers and Harbors Act of 1899 (33 United States Code Section (U.S.C.) 403) and Section 404 of the Clean Water Act (33 U.S.C. 1344). It has been determined that the extension and modification of DA permit No. 2001-1430 to include all the limits and permit conditions identified in the Record of Decision will be within the scope of the Final EIS and will comply with the Section 404(b)(1) Guidelines (40 C.F.R. Part 230). Therefore, DA permit No. 2001-1430 will be modified effective April 1, 2011, to limit your annual extraction of sand and gravel from the Missouri River to 240,000 tons per year subject to all the general and special conditions attached to proffered DA permit No. 2011-362. DA permit No. 2001-1430 will expire in 60 days, unless an appeal of proffered DA permit 2011-362 is accepted by the Northwestern Division, U.S. Army Corps of Engineers, in which case DA permit No. 2001-1430 will expire 30 days after the final appeal decision.

If you do not agree that the terms and conditions of the modification of DA permit No. 2001-1430 are acceptable and correct, you must notify and may request a meeting with the District Commander by April 10, 2011, or be legally bound by the terms and conditions thereof. This is a legal document. We request that you attach this letter of modification to your copy of DA permit No. 2001-1430 in order to reflect all work authorized under the permit.

Special condition "b" requires you to implement a Dredge Monitoring Plan (DMP) approved by the Regulatory Branch of the Kansas City District. If a DMP has not been previously approved by the Regulatory Branch of the Kansas City District, you must provide within 30 days of execution of the permit a DMP for each individual dredge plant to the Regulatory Branch of the Kansas City District for approval. The DMP must show how you will monitor, record, and report the cutter-head position, cutter-head operating status, extraction tonnage, and the presence of any hard substrates, mussel shells, or unusual concentration of gravel.

Special condition "c" requires all applicants receiving authorization to commercially dredge the Missouri River to collectively have a hydrographic survey completed between June and September of 2014 and submitted to the Regulatory Branch of the Kansas City District, USACE by November 1, 2014. Water surface profiles will also be prepared and evaluated annually by the Kansas City District. The Regulatory Branches of the Kansas City and St. Louis Districts will meet with you and the other authorized dredgers and state and federal agencies in the fall of each year to discuss the condition and trend of the river as shown by the most recent water surface profiles or surveys. As stated in item 5 under "Further Information" on page 3 of all permits, this office may reevaluate its decision on this permit any time significant new information surfaces which this office did not consider in reaching the original public interest decision. Such a reevaluation may result in a determination that it is appropriate to use the suspension, modification, and revocation procedures contained in 33 C.F.R. 325.7

We are interested in your thoughts and opinions concerning your experience with the Kansas City District Regulatory Program. We have placed an automated version of our Customer Service Survey form at: http://per2.nwp.usace.army.mil/survey.html. At your request, we will mail you a paper copy that you may complete and return to us by mail or fax.

A copy of this letter has been sent to Mr. David Shorr. If you have any questions concerning this matter, please contact Mr. Cody S. Wheeler at 816-389-3739 (FAX 816-389-2032).

Sincerely,

Anthony J. Hofmann
Colonel, Corps of Engineers
District Commander

Enclosures

DEPARTMENT OF THE ARMY PERMIT

Permittee: Hermann Sand and Gravel, Inc.

Permit No.: 2011-362

Issuing Office: U.S. Army Engineer District, Kansas City

NOTE: The term "you" and its derivatives, as used in this permit, means the permittee or any future transferee. The term "this office" refers to the appropriate district or division office of the Corps of Engineers having jurisdiction over the permitted activity or the appropriate official of that office acting under the authority of the commanding officer.

You are authorized to perform work in accordance with the terms and conditions specified below, and with the plans and drawings attached hereto which are incorporated in and made a part of this permit.

Project Description: You are authorized to extract up to 240,000 tons of sand and gravel per year from the Missouri River with a mobile, floating, hydraulic dredge plant. A maximum of 120,000 tons can be dredged in the Jefferson City segment (river miles 129.9 to 249.9) and a maximum of 120,000 tons in the portion of the St. Charles segment regulated by the Kansas City District (river miles 50.0 to 129.9). Water and dredged materials will be passed through onboard screens allowing the desired material to be loaded into barges and undesired material and water to be discharged back into the river at the dredging location. Filled barges will be transported to existing offloading facilities where a crane or front end loader will unload the material for stockpiling and commercial sale. The 2011 tonnage limits retroactively apply to all dredging since the beginning of 2011. These tonnage limits are of sand when it is offloaded from the barge with a moisture content of approximately 10%.

Permit Drawings: Please use the location maps from the 2007 permit decision, and the electronic authorized dredging zone shape files with any modifications sent to you in subsequent permit extensions. We will send you updated maps and/or electronic shape files with the execution of the permit or sooner if possible. The maps and electronic shape files are just a visual representation of where you can or cannot dredge. The legal and authoritative source regarding where you can or cannot dredge, is contained in the project description, project location, and special conditions of this permit.

Project Location: You may dredge in the following general reaches of Missouri River (this may or may not exclude all the resource protection zones): river miles 56.00-56.85, 61.25-66.00, 70.00-80.00, 80.50-89.75, 93.55-101.70, 109.00-115.20, 115.95-118.40, 146.00-157.00, and 158.45-164.00

Permit Conditions:

General Conditions:

1. The time limit for completing the work authorized ends on 31 December 2015. If you find that you need more time to complete the authorized activity, submit your request for a time extension to this office for consideration at least one month before the above date is reached.

2. You must maintain the activity authorized by this permit in conformance with the terms and conditions of this permit. You are not relieved of this requirement if you abandon the permitted activity, although you may make a good faith transfer to a third party in compliance with General Condition 4 below. Should you wish to cease to maintain the authorized activity or should you desire to abandon it without a good faith transfer, you must obtain a modification of this permit from this office, which may require restoration of the area.

3. If you discover any previously unknown historic or archeological remains while accomplishing the activity authorized by this permit, you must immediately notify this office of what you have found. We will initiate the Federal and state coordination required to determine if the remains warrant a recovery effort or if the site is eligible for listing in the National Register of Historic Places.

4. If you sell the property associated with this permit, you must obtain the signature of the new owner in the space provided and forward a copy of the permit to this office to validate the transfer of this authorization.

5. If a conditioned water quality certification has been issued for your project, you must comply with the conditions specified in the certification as special conditions to this permit. For your convenience, a copy of the certification is attached if it contains such conditions.

6. You must allow representatives from this office to inspect the authorized activity at any time deemed necessary to ensure that it is being or has been accomplished in accordance with the terms and conditions of your permit.

Special Conditions:

See continuation sheets, pages 4 - 8, of this document.

Further Information:

1. Congressional Authorities: You have been authorized to undertake the activity described above pursuant to:

(X) Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403).

(X) Section 404 of the Clean Water Act (33 U.S.C. 1344).

( ) Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972 (33 U.S.C. 1413).

2. Limits of this authorization.

a. This permit does not obviate the need to obtain other Federal, state, or local authorization required by law.

b. This permit does not grant any property rights or exclusive privileges.

c. This permit does not authorize any injury to the property or rights of others.

d. This permit does not authorize interference with any existing or proposed Federal project.

3. Limits of Federal Liability. In issuing this permit, the Federal Government does not assume any liability for the following:

a. Damages to the permitted project or uses thereof as a result of other permitted or unpermitted activities or from natural causes.

b. Damages to the permitted project or uses thereof as a result of current or future activities undertaken by or on behalf of the United States in the public interest.

c. Damages to persons, property, or to other permitted or unpermitted activities or structures caused by the activity authorized by this permit.

d. Design or construction deficiencies associated with the permitted work.

e. Damage claims associated with any future modification, suspension, or revocation of this permit.

4. Reliance on Applicant's Data: The determination of this office that issuance of this permit is not contrary to the public interest was made in reliance on the information you provided.

5. Reevaluation of Permit Decision. This office may reevaluate its decision on this permit at any time the circumstances warrant. Circumstances that could require a reevaluation include, but are not limited to, the following:

a. You fail to comply with the terms and conditions of this permit.

b. The information provided by you in support of your permit application proves to have been false, incomplete, or inaccurate (See 4 above).

c. Significant new information surfaces which this office did not consider in reaching the original public interest decision.

Such a reevaluation may result in a determination that it is appropriate to use the suspension, modification, and revocation procedures contained in 33 CFR 325.7 or enforcement procedures such as those contained in 33 CFR 326.4 and 326.5. The referenced enforcement procedures provide for the issuance of an administrative order requiring you to comply with the terms and conditions of your permit and for the initiation of legal action where appropriate. You will be required to pay for any corrective measures ordered by this office, and if you fail to comply with such directive, this office may in certain situations (such as those specified in 33 CFR 209.170) accomplish the corrective measures by contract or otherwise and bill you for the cost.

6. Extensions. General condition 1 establishes a time limit for the completion of the activity authorized by this permit. Unless there are circumstances requiring either a prompt completion of the authorized activity or a reevaluation of the public interest decision, the Corps will normally give favorable consideration to a request for an extension of this time limit.

Your signature below, as permittee, indicates that you accept and agree to comply with the terms and conditions of this permit.

_____ _____

(PERMITTEE) (DATE)

This permit becomes effective when the Federal official, designated to act for the Secretary of the Army, has signed below.

_____ _____

(DISTRICT ENGINEER) (DATE)
ANTHONY J. HOFMANN, COLONEL
BY: Mark D. Frazier
Chief, Regulatory Branch
Operations Division

When the structures or work authorized by this permit are still in existence at the time the property is transferred, the terms and conditions of this permit will continue to be binding on the new owner(s) of the property. To validate the transfer of this permit and the associated liabilities associated with compliance with its terms and conditions, have the transferee sign and date below.

_____ _____

(TRANSFEREE) (DATE)

Special Conditions:

a. You understand and agree that, if future operations by the United States require the removal, relocation, or other alteration, of the structure or work herein authorized, or if, in the opinion of the Secretary of the Army or his authorized representative, said structure or work shall cause unreasonable obstruction to the free navigation of the navigable waters, you will be required, upon due notice from the U.S. Army Corps of Engineers (USACE), to remove, relocate, or alter the structural work or obstructions caused thereby, without expense to the United States. No claim shall be made against the United States on account of any such removal or alteration.

b. You must implement a Dredge Monitoring Plan (DMP) approved by the Regulatory Branch of the Kansas City District, USACE. If a DMP has not been previously approved by the Regulatory Branch, USACE, Kansas City District, you must provide within 30 days of execution of the permit a DMP for each individual dredge plant to the Regulatory Branch of the USACE, Kansas City District for approval. The DMP must show how you will monitor, record, and report the cutter-head position, cutter-head operating status, extraction tonnage, and the presence of any hard substrates, mussel shells, or unusual concentration of gravel in an impartial, unbiased, reliable, and accurate manner. The DMP must include the specifications of the process and the Dredge Monitoring System (DMS) including sensors, hardware, software, communications devices the permittee will use to: gather data; perform quality control on those data; calibrate, test, and repair sensors when they fail; and transfer the data to the Regulatory Branch of the Kansas City District, USACE. The DMS must include automated differential Global Positioning System (DGPS) equipment (or other comparable system) operating with a minimum accuracy level of 1-3 meters horizontal Circular Error Probable with horizontal positions tied into the UTM Zone 15 NAD 83 (feet) coordinate system recorded to the nearest foot. The DMS must always be on, recording cutter-head position and operating status every 5 minutes, 24-hours a day, 365 days a year, even when the dredge is not operating. The data logged each month must be submitted by email to cody.s.wheeler@usace.army.mil at the Regulatory Branch of the Kansas City District, USACE by the 7th day of the following month. If you do not receive an email confirmation that the report was received, you must contact the Regulatory Branch of the Kansas City District, USACE at 816-389-3990 for revised instructions for filing the monthly report. The extracted material must be measured by one of the methods described in the attached Standard Operating Procedure for Hydrographic Surveying and Dredge Monitoring. If the tonnage is measured by scale at the off-loading facility, the DMP should also describe how the operation will record the date, time, river mile, coordinates, and approximate tonnage of each barge loaded in one location. If a barge is partially filled at one anchor setting then completed at a new anchor setting, the tonnage should be estimated separately for each location. This information must be provided monthly by email on the attached Missouri River Commercial Dredging Location/Volume Report spreadsheet to cody.s.wheeler@usace.army.mil at the Regulatory Branch of the Kansas City District, USACE by the 7th day of the following month. If you do not receive an email confirmation that the report was received, you must contact the Regulatory Branch of the Kansas City District, USACE at 816-389-3990 for revised instructions for filing the monthly report. Faulty sensors or other components identified in the DMP must be repaired within 96 hours. The DMS must not be inoperable more than 5 percent of the time. You must install an approved DMS and have it inspected by the Regulatory Branch of the Kansas City District, USACE within 120 days of execution of the permit or you must cease dredging operations until it is installed and inspected or you submit a justification of the delay and an installation schedule and get an extension of this deadline in writing from the Regulatory Branch of the Kansas City District, USACE.

c. The USACE periodically surveys the river as part of the management and operation of the Bank Stabilization and Navigation Project. If, for any reason, the USACE has not surveyed the river in the fourth year (2014) of the five-year permit cycle, the authorized dredging companies must have the lower 498 miles of the LOMR surveyed during the summer months in accordance with the Standard Operating Procedures for Hydrographic Surveying and Dredge Monitoring. The survey shall be completed between June and September of 2014 and submitted to the Regulatory Branch of the Kansas City District, USACE by November 1, 2014.

d. If any part of the authorized work is performed by a contractor, before starting work you must discuss the terms and conditions of this permit with the contractor and must give a copy of this entire permit to the contractor. After the initial 120 days of this permit, any contracted dredges or barges must also be equipped with and operate in accordance with an approved DMP as required in Special Condition "b". The DMP and system must be approved by the Regulatory Branch of the Kansas City District, USACE prior to starting work.

e. Until the dredges and barges are equipped with the DMS required by Special Condition "b", you must, for each dredge operated, record Global Positioning System (GPS) coordinates, tons of material removed, and the presence of any hard substrates or unusual concentration of gravel daily. If the dredge moves more than 100 feet in any one day then the amount of material removed from each location must be recorded separately. The operators may use hand-held GPS devices or automatically recording devices, but with which ever system used, must identify the device make/model and recording location. This information must be recorded on the attached Missouri River Commercial Dredging Location/Volume Report in an electronic spreadsheet. You must furnish a copy of the completed monthly report by email to cody.s.wheeler@usace.army.mil at the Regulatory Branch of the Kansas City District, USACE by the 7th day of the following month. If you do not receive an email confirmation that the report was received, you must contact the Regulatory Branch of the Kansas City District, USACE at 816-389-3990 for revised instructions for filing the monthly report.

f. No more than 300,000 tons of material shall be extracted within one year from each five-mile reach of the Missouri River between river miles 15 to 20, 25 to 35, 90 to 100, 140 to 150, 355 to 395, and 445 to 455. When the dredge report database of the Regulatory Branch of the Kansas City District, USACE indicates that extraction in a five-mile reach has reached 300,000 tons, all dredgers authorized to operate within that reach will be notified that it is closed to further dredging for the remainder of the calendar year unless a waiver is requested and received in writing from the Regulatory Branch of the Kansas City District, USACE.

g. Up to 10% of your authorized annual tonnage for each segment may be carried over each year to be extracted within that segment the following year. Annual tonnage with carryover may never exceed 110% of annual authorized tonnage of each segment. At the end of each year you must notify the Regulatory Branch of the Kansas City District, USACE in your annual tonnage report of any unextracted tonnage that you intend to carryover.

h. In permit conditions that specify a linear distance exclusion zone adjacent to a river feature, "dredging" refers to the operation of hydraulic cutter-head suction dredging. The exclusion zone distances will apply to and be measured from the end of the cutter head, rather than from a general point on the dredge.

i. You must confine dredging to between the Rectified Channel Lines (RCL) with the following restrictions. Dredging must be conducted in such a manner to preserve the structural integrity of the landmass landward of the RCL. This must be accomplished by maintaining an adequate "no dredging

or discharging" zone riverward of the RCL so that material will stabilize into the dredging area at its natural angle of repose. This slope will vary depending upon river location and the type of material being dredged, but it is your responsibility to ensure that this shallow water interface landward of the RCL be maintained.

j. You must not dredge within 500 feet of any levee centerline, pipeline or submerged utility crossing, bridge pier or abutment; nor within 200 feet of any dike, revetment, or other structure built or authorized by the U.S. Government; nor within 100 feet of any normal bank line or island, without special authorization. When dredging is performed adjacent to river stabilization structures, the dredging may be conducted only in the present streambed of the river at the authorized locations. This condition represents only the minimum distances away from structures and natural features that you can conduct dredging and does not relieve you from liability for damage arising from dredging. You must be satisfied that dredging to these limits will not cause damage to public and private property.

k. You must not conduct dredging operations in a zone extending 4,000 feet upstream and 500 feet downstream from any municipal drinking water intake structures located along either bank of the river unless you obtain an exemption to this condition in writing from the Regulatory Branch of the Kansas City District, USACE.

l. You must not conduct dredging operations in a zone extending 1,000 feet upstream and 1,000 feet downstream from any municipal drinking water horizontal collector wells located along either bank of the river unless you obtain an exemption to this condition in writing from the Regulatory Branch of the Kansas City District, USACE.

m. You must not conduct dredging operations in a zone extending 500 feet upstream and 500 feet downstream from any other water intake structures other than those used for municipal drinking water unless you obtain an exemption to this condition in writing from the Regulatory Branch of the Kansas City District, USACE.

n. You may discharge back into the Missouri River material spilled off the conveyer belts and unusable material separated out in the on-shore sand washing and handling facility. To subtract that tonnage from your annual extraction limit, you must follow a plan approved in writing by the Regulatory Branch of the Kansas City District, USACE. This plan must show where and how the material will be discharged and how the amount of dredged material discharged back into the river will be measured and reported to the Regulatory Branch of the Kansas City District, USACE. The total extraction tonnage will equal the tonnage extracted and barged to shore minus that amount intentionally returned to the Missouri River.

o. You may return unwanted dredged material and river water (but not garbage)extracted from the Missouri River back to the Missouri River. You must not dispose of waste materials, water, or garbage below the ordinary high water mark of any other water body, in a wetland area, or at any location where the materials could be introduced into the water body or an adjacent wetland as a result of runoff, flooding, wind, or other natural forces.

p. You must comply with all U.S. Coast Guard, State of Missouri, State of Kansas (river mile 367 to 490), and USACE regulations concerning the prevention of navigation obstructions in navigable waters of the United States.

q. You must conduct operations in the Missouri River such that there will be no unreasonable interference with navigation by the existence or use of the activity authorized herein.

r. To avoid impacting endangered species and cultural resources, you must confine dredging to the specified reaches listed on page 1 of the permit document. If you desire to expand or relocate your dredging operation outside the specified reaches, you must submit a request to the Regulatory Branch of the Kansas City District, USACE identifying the proposed new limits, in river miles and the location of the unloading facility to be employed.. Approval of the requests, if granted, will be provided in writing with modified reaches identified on the Missouri River Hydrographic Survey. Copies of the relocation requests must be furnished to the following agencies:

1. U.S. Fish and Wildlife Service, Columbia Field Office
2. Missouri Department of Natural Resources, Water Pollution Control Program
3. Missouri Department of Natural Resources, State Historic Preservation Office
4. Kansas Department of Health and Environment, Bureau of Water (for operations extending upstream of river mile 367)
5. Kansas State Historical Society, State Historic Preservation Office (for operations extending upstream of river mile 367)
6. Corps of Engineers, Kansas City District, Hydrologic Engineering Branch

s. You must not conduct dredging operations within the reaches identified in the following table as Pallid Sturgeon habitat features.

Missouri River Miles (including 0.25 mile buffer)		**Pallid Sturgeon Habitat Feature**
Downstream	Upstream	
44.25	44.85	RDB Centaur Chute
49.15	50.05	RDB Centaur Chute
56.85	59.05	LDB Chute/Island
58.55	61.25	RDB Chute/Island
89.75	91.10	RDB Island
89.90	91.45	LDB Loutre Slough
91.20	93.55	LDB Lunch Island
103.00	104.95	Both Gasconade Confluence and Dike Field
105.20	106.25	RDB Dike Field
115.20	115.95	RDB Island
118.40	119.15	RDB Dike Field
119.35	119.85	RDB St. Aubert Island/Chute
124.35	124.95	RDB St. Aubert Island/Chute
126.05	126.90	LDB Dike Field
127.50	130.20	Both Osage River Confluence and Dike Field
157.00	158.45	LDB Island
176.40	178.35	LDB Island/RDB Tadpole Island Chute
180.15	180.65	RDB Tadpole Island Chute
184.75	185.65	RDB Chute
186.90	188.20	RDB Chute and Dike Field
193.40	195.75	RDB Dike Field/Island
202.10	202.75	RDB Lamine River Confluence
210.00	219.65	Lisbon/Jameson Complex
226.95	227.55	LDB Little Chariton Confluence

238.40	239.10	LDB Chariton River Confluence
249.65	250.30	LDB Grand River Confluence
269.85	271.35	RDB Shallow/Island
280.40	282.05	RDB Island
297.90	299.05	RDB Island
300.00	301.05	LDB Island
367.00	367.75	RDB Kansas River Confluence
390.85	391.45	LDB Platte River Confluence
456.75	457.25	LDB Worthwine Chute
458.75	459.25	LDB Worthwine Chute
462.65	463.25	LDB Nodaway River Confluence
478.55	479.15	RDB Wolf Creek Confluence
494.55	495.20	RDB Big Nemaha River Confluence

t. You must discharge only suitable dredged material that is free from toxic pollutants in other than trace quantities.

u. You must investigate for water supply intakes or other activities which may be affected by suspended solids and turbidity increases caused by work in the watercourse and give sufficient notice to the owners of affected activities to allow preparation for any changes in water quality. You must furnish the Regulatory Branch of the Kansas City District, USACE with a copy of any written notification provided in accordance with this condition.

v. You must employ measures to prevent dredged materials stored or disposed of on shore from running off or eroding into wetlands or tributaries to the Missouri River.

w. You must employ measures to prevent or control spilled fuels or lubricants from entering the waters of the United States.

x. You must store all construction materials, equipment, and/or petroleum products that are part of the on-shore operation, when not in use, above anticipated high water levels.

STATE OF MISSOURI
Jeremiah W. (Jay) Nixon, Governor • Sara Parker Pauley, Director
DEPARTMENT OF NATURAL RESOURCES
www.dnr.mo.gov

MAR 23 2011

Mr. Steve Engemann
Hermann Sand & Gravel, Inc.
Route 3, Box 261
Hermann, MO 65041

Dear Mr. Engemann:

Please replace the Clean Water Act Section 401 Water Quality Certification (certification) dated March 17, 2011, with the enclosed certification.

If you have any questions, please feel free to contact me by phone at (573) 751-7023, by e-mail at carrie.schulte@dnr.mo.gov or by mail at Missouri Department of Natural Resources, Water Protection Program, NPDES Permits and Engineering Section, P.O. Box 176, Jefferson City, MO 65102-0176. Thank you for working with the Department to protect our environment.

Sincerely,

WATER PROTECTION PROGRAM

Carrie M. Schulte

Carrie M. Schulte, Chief
401 Water Quality Certification and Stormwater Unit

CMS/pc

Enclosure

c: Mr. Cody Wheeler, Army Corps of Engineers, Kansas City District
Mr. Charles Frerker, Army Corps of Engineers, St. Louis District
Ms. Dorothy Franklin, Kansas City Regional Office
Mr. Jimmy Coles, Kansas City Regional Office
Ms. Donna Riebeling, St. Louis Regional Office
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STATE OF MISSOURI
Jeremiah W. (Jay) Nixon, Governor • Sara Parker Pauley, Director
DEPARTMENT OF NATURAL RESOURCES
www.dnr.mo.gov

MAR 23 2011

Mr. Steve Engemann
Hermann Sand & Gravel, Inc.
Route 3, Box 261
Hermann, MO 65041

Various Counties
Permit Number 2011-362
CEK006763

Dear Mr. Engemann:

The Missouri Department of Natural Resources' Water Protection Program (Department) is in receipt of the U.S. Army Corps of Engineers' (Corps) letter dated February 17, 2011, requesting that your Clean Water Act Section 401 Water Quality Certification (certification) be issued for the Corps' Permit Number 2011-362. The Department understands that Hermann Sand & Gravel, Inc. will abide by the certification and the Corps issued Clean Water Act Section 404 Permit (permit) for commercial dredging operations in the Missouri River.

This letter also serves as an extension of the certification issued for Permit Number 2001-1430 for an additional 60 days, unless an appeal of proffered Department of the Army Permit 2001-1430 is accepted by the Corps' Northwestern Division, in which case the 2001 certification would expire 30 days after the final appeal decision.

This office certifies that the ongoing activities apparently will not cause the general or numeric criteria to be exceeded nor impair beneficial uses established in Water Quality Standards, 10 CSR 20-7.031, provided the following condition is met:

- The U.S. Army Corps of Engineers permit decision and all conditions are followed as authorized by the Corps under Section 404 of the Clean Water Act (33 USC 1344). The implementing regulation for this Act is found at 33 CFR 320-330.

Missouri Clean Water Law, Chapter 644.052.9 RSMo, gives the Department the authority to collect a fee for the issuance of a certification. As of January 1, 2011, this authority has expired, which means the Department no longer has statutory authority to collect water permit fees. This includes the certification fee. Please do not send a payment to the Department.

If you were affected by this decision, you may appeal to have the matter heard by the Administrative Hearing Commission (commission). To appeal, you must file a petition with the commission within thirty (30) days after the date this decision was mailed or the date it was delivered, whichever date was earlier. If any such petition is sent by registered mail or certified mail, it will be deemed filed on the date it is mailed. If it is sent by any method other than registered mail or certified mail, it will be deemed filed on the date it is received by the commission.

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Water Quality Standards must be met during any operations authorized by these permits. If you have any questions, please contact Ms. Carrie M. Schulte by phone at (573) 751-7023, by e-mail at carrie.schulte@dnr.mo.gov or by mail at Missouri Department of Natural Resources, Water Protection Program, NPDES Permits and Engineering Section, P.O. Box 176, Jefferson City, MO 65102-0176. Thank you for working with the Department to protect our environment.

Sincerely,

WATER PROTECTION PROGRAM

Refaat Mefrakis, P.E., Chief
NPDES Permits and Engineering Section

RM:csp

c: Mr. Cody Wheeler, Army Corps of Engineers, Kansas City District
Mr. Charles Frerker, Army Corps of Engineers, St. Louis District
Ms. Dorothy Franklin, Kansas City Regional Office
Mr. Jimmy Coles, Kansas City Regional Office
Ms. Donna Riebeling, St. Louis Regional Office
File Copy

NOTIFICATION OF ADMINISTRATIVE APPEAL OPTIONS AND PROCESS AND REQUEST FOR APPEAL

Applicant: Hermann Sand & Gravel, Inc.		File Number: 2011-362	Date: Mar. 31, 2011
Attached is:			See Section below
	A. INITIAL PROFFERED PERMIT (Standard Permit or Letter of Permission)		A
XX	B. PROFFERED PERMIT (Standard Permit or Letter of Permission)		B
	C. PERMIT DENIAL		C
	D. APPROVED JURISDICTIONAL DETERMINATION		D
	E. PRELIMINARY JURISDICTIONAL DETERMINATION		E

SECTION I - The following identifies your rights and options regarding a modification, reconsideration, or administrative appeal of the above decision. Additional information may be found at http://www.usace.army.mil/inet/functions/cw/cecwo/reg or Corps regulations at 33 CFR Part 331.

A: INITIAL PROFFERED PERMIT: You may accept or request modification of the permit.

- ACCEPT: If you received a Standard Permit, you may sign the permit document and return it to the District Engineer for final authorization. If you received a Letter of Permission (LOP), you may accept the LOP and your work is authorized. Your signature on the Standard Permit or acceptance of the LOP means that you accept the permit in its entirety, and waive all rights to appeal the permit, including its terms and conditions, and approved jurisdictional determinations associated with the permit.
- REQUEST MODIFICATION: If you object to the permit (Standard or LOP) because of certain terms and conditions therein, you may request that the permit be modified accordingly. You must complete Section II of this form and return the form to the District Engineer. Your objections must be received by the District Engineer within 60 days of the date of this notice, or you will forfeit your right to appeal the permit in the future. Upon receipt of your letter, the District Engineer will evaluate your objections and may: (a) modify the permit to address all of your concerns, (b) modify the permit to address some of your objections, or (c) not modify the permit having determined that the permit should be issued as previously written. After evaluating your objections, the District Engineer will send you a proffered permit for your reconsideration, as indicated in Section B below.

B: PROFFERED PERMIT: You may accept or appeal the permit.

- ACCEPT: If you received a Standard Permit, you may sign the permit document and return it to the District Engineer for final authorization. If you received a Letter of Permission (LOP), you may accept the LOP and your work is authorized. Your signature on the Standard Permit or acceptance of the LOP means that you accept the permit in its entirety, and waive all rights to appeal the permit, including its terms and conditions, and approved jurisdictional determinations associated with the permit.
- APPEAL: If you choose to decline the proffered permit (Standard or LOP) because of certain terms and conditions therein, you may appeal the declined permit under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the Division Engineer (address on page 2). This form must be received by the Division Engineer within 60 days of the date of this notice.

C: PERMIT DENIAL: You may appeal the denial of a permit under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the Division Engineer (address on page 2). This form must be received by the Division Engineer within 60 days of the date of this notice.

D: APPROVED JURISDICTIONAL DETERMINATION: You may accept the approved JD, appeal the approved JD, or submit new information and request reconsideration of the approved JD.

- ACCEPT: You do not need to notify the Corps to accept an approved JD. Failure to notify the Corps within 60 days of the date of this notice, means that you accept the approved JD in its entirety, and waive all rights to appeal the approved JD.
- APPEAL: If you disagree with the approved JD, you may appeal the approved JD under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the Division Engineer (address on page 2). This form must be received by the Division Engineer within 60 days of the date of this notice.
- RECONSIDERATION BASED ON NEW INFORMATION: You may submit new information to the District Engineer for reconsideration of an approved JD. You must submit the information within 60 days of the date of this notice.

E: PRELIMINARY JURISDICTIONAL DETERMINATION: You do not need to respond to the Corps regarding the preliminary JD. The preliminary JD is not appealable. If you wish, you may request an approved JD (which may be appealed), by contacting the Corps district for further instruction. Also you may provide new information for further consideration by the Corps to reevaluate the JD.

SECTION II – Fill out this section and return this form to the appropriate office only if submitting a request for modification or reconsideration to the District Engineer, or if submitting a request for Administrative Appeal to the Division Engineer. All such submittals must be made within 60 days of the date of this notice.

Submit the following requests to the District Engineer

A. Modification of an INITIAL PROFFERED PERMIT (Item A).
D. Reconsideration of an APPROVED JURISDICTIONAL DETERMINATION based on NEW INFORMATION (Item D RECONSIDERATION).

Submit the following requests to the Division Engineer

B. Administrative Appeal of a PROFFERED PERMIT (Item B).
C. Administrative Appeal of a PERMIT DENIAL (Item C).
D. Administrative Appeal of an APPROVED JURISDICTIONAL DETERMINATION (Item D APPEAL) (for reasons other than reconsideration of an approved JD based on new information).

(Note: Preliminary Jurisdictional Determinations (Item E) are not appealable. If you have concerns regarding a preliminary Jurisdictional Determination, you can request an approved Jurisdictional Determination).

REASONS FOR APPEAL OR OBJECTIONS: (Describe your reasons for appealing the decision or your objections to an initial proffered permit in clear concise statements. You may attach additional information to this form to clarify where your reasons or objections are addressed in the administrative record.)

SUBMITTAL OF NEW OR ADDITIONAL INFORMATION: The District Engineer may accept and consider new information if you request a modification to an initial proffered permit (Part A), or a reconsideration of an approved JD (Part D). An administrative appeal to the Division Engineer is limited to a review of the administrative record, the Corps memorandum for the record of the appeal conference or meeting, and any supplemental information that the review officer has determined is needed to clarify the administrative record. Neither the appellant nor the Corps may add new information or analyses to the administrative record. However, you may provide additional information to clarify the location of information that is already in the administrative record.

POINT OF CONTACT FOR QUESTIONS OR INFORMATION:

If you have questions regarding this decision and/or the appeal process you may contact: DISTRICT ENGINEER **Attn: Mark D. Frazier** **Chief, Regulatory Branch** **U.S. Army Engineer District, Kansas City** **601 E. 12th Street, Suite 402** **Kansas City, MO 64106-2896** **Telephone: 816-389-3990** (Use this address for submittals to the District Engineer)	If you wish to submit an appeal or have questions regarding the appeal process you may contact: DIVISION ENGINEER **Attn: David W. Gesl** **Administrative Appeals Review Officer** **U.S. Army Engineer Division, Northwestern Division** **P.O. Box 2870** **Portland, OR 97208-2870** **Telephone: 503-808-3825**

RIGHT OF ENTRY: Your signature below grants the right of entry to Corps of Engineers personnel, and any government consultants, to conduct investigations of the project site during the course of the appeal process. You will be provided a 15 day notice of any site investigation, and will have the opportunity to participate in all site investigations.

_____ Signature of appellant or agent.	Date:	Telephone number:

DEPARTMENT OF THE ARMY
KANSAS CITY DISTRICT, CORPS OF ENGINEERS
635 FEDERAL BUILDING
601 E 12TH STREET
KANSAS CITY MO 64106-2824

REPLY TO
ATTENTION OF

MAR 3 1 2011

Regulatory Branch
(NWK-2011-364)

Mr. Larry W. Moore
Con-Agg of Missouri, LLC
2604 North Stadium Boulevard
Columbia, Missouri 65202-1271

Dear Mr. Moore:

This letter is in response to your application, received on March 19, 2008, to reauthorize your Missouri River commercial dredging operation previously authorized by Department of the Army (DA) permit No. 2001-1434. As requested by your application, this letter includes a new proffered DA permit No. 2011-364, in duplicate, and extends your old DA permit No. 2001-1434.

When executed, the permit will authorize you to extract up to 160,000 tons of sand and gravel per year from the Jefferson City segment (river miles 129.9 to 249.9) of the Missouri River with a mobile, floating, hydraulic dredge plant. Water and dredged materials will be passed through onboard screens allowing the desired material to be loaded onto barges and undesired material and water to be discharged back into the river at the dredging location. Filled barges will be transported to existing offloading facilities where a crane or front end loader will unload the material for stockpiling and commercial sale. The permits will be subject to all the special conditions that follow and will expire on December 31, 2015. The 2011 tonnage limits will retroactively apply to all dredging since the beginning of 2011. These tonnage limits are of sand when it is offloaded from the barge with a moisture content of approximately 10%.

A copy of the water quality certification issued for your work, by the Missouri Department of Natural Resources, has been attached to the enclosed DA permit. As stated in general condition "5" of the enclosed permit document, the conditions presented in the state's water quality certification are incorporated into the special conditions of the permit by reference.

This letter contains a proffered permit for your commercial dredging permit application. If you object to this decision, you may request an administrative appeal under the U.S. Army Corps of Engineers regulations at 33 Code of Federal Regulations (C.F.R.) Part 331. Enclosed you will find a Notification of Administrative Appeal Options and Process (NAP) and Request for Appeal (RFA) form. If you request to appeal this decision you must submit a completed RFA form to the Northwestern Division Office at the following address:

Division Engineer
ATTN: David W. Gesl
Administrative Appeals Review Officer
U.S. Army Corps of Engineers
P.O. Box 2870
Portland, OR 97208-2870
Telephone: 503-808-3825

In order for an RFA to be accepted, the Corps must determine that it is complete, that it meets the criteria for appeal under 33 C.F.R. Part 331.5, and that it has been received by the Division Office within 60 days of the date of the NAP. Should you decide to submit an RFA form, it must be received at the above address by May 31, 2011.

It is not necessary to submit an RFA form to the Division Office if you do not object to the provisions of your proffered permit. If you wish to accept the permit in its present form, please sign the original and duplicate copy of the enclosed permit document. Each copy of the permit document should be signed on page 3 above the word "Permittee," dated, and returned within 30 days from the date of this letter. Also, the application fee of $100 should be paid by check made payable to USAED-KC and remitted with the permit document. A preaddressed envelope is enclosed for your convenience. Upon receipt of the properly signed documents and the application fee, the permit will be executed and returned to you for your files. Your signature on the standard permit means that you accept the permit in its entirety, and waive all rights to appeal the permit, including its terms and conditions, and approved jurisdictional determinations associated with the permit.

On December 28, 2010, DA permit No. 2001-1434 was extended through March 31, 2011 to allow continued dredging during the additional three months needed to complete the Missouri River Commercial Dredging Final EIS (Final EIS) and Record of Decision. We have determined that is in the public interest to extend DA permit No. 2001-1434 to allow you to continue dredging until the Administrative Appeal process described in the previous paragraph is complete for proffered DA permit No. 2011-364, or until it is accepted and executed. This permit extension has been reviewed in accordance with 33 C.F.R. Part 325.7, and with Section 10 of the Rivers and Harbors Act of 1899 (33 United States Code Section (U.S.C.) 403) and Section 404 of the Clean Water Act (33 U.S.C. 1344). It has been determined that the extension and modification of DA permit No. 2001-1434 to include all the limits and permit conditions identified in the Record of Decision will be within the scope of the Final EIS and will comply with the Section 404(b)(1) Guidelines (40 C.F.R. Part 230). Therefore, DA permit No. 2001-1434 will be modified effective April 1, 2011, to limit your annual extraction of sand and gravel from the Missouri River to 160,000 tons per year subject to all the general and special conditions attached to proffered DA permit No. 2011-364. DA permit No. 2001-1434 will expire in 60 days, unless an appeal of proffered DA permit 2011-364 is accepted by the Northwestern Division, U.S. Army Corps of Engineers, in which case DA permit No. 2001-1434 will expire 30 days after the final appeal decision.

If you do not agree that the terms and conditions of the modification of DA permit No. 2001-1434 are acceptable and correct, you must notify and may request a meeting with the District Commander by April 10, 2011, or be legally bound by the terms and conditions thereof. This is a legal document. We request that you attach this letter of modification to your copy of DA permit No. 2001-1434 in order to reflect all work authorized under the permit.

Special condition "b" requires you to implement a Dredge Monitoring Plan (DMP) approved by the Regulatory Branch of the Kansas City District. If a DMP has not been previously approved by the Regulatory Branch of the Kansas City District, you must provide within 30 days of execution of the permit a DMP for each individual dredge plant to the Regulatory Branch of the Kansas City District for approval. The DMP must show how you will monitor, record, and report the cutter-head position, cutter-head operating status, extraction tonnage, and the presence of any hard substrates, mussel shells, or unusual concentration of gravel.

Special condition "c" requires all applicants receiving authorization to commercially dredge the Missouri River to collectively have a hydrographic survey completed between June and September of 2014 and submitted to the Regulatory Branch, Kansas City District, USACE by November 1, 2014. Water surface profiles will also be prepared and evaluated annually by the Kansas City District. The Regulatory Branches of the Kansas City and St. Louis Districts will meet with you and the other authorized dredgers and state and federal agencies in the fall of each year to discuss the condition and trend of the river as shown by the most recent water surface profiles or surveys. As stated in item 5 under "Further Information" on page 3 of all permits, this office may reevaluate its decision on this permit any time significant new information surfaces which this office did not consider in reaching the original public interest decision. Such a reevaluation may result in a determination that it is appropriate to use the suspension, modification, and revocation procedures contained in 33 C.F.R. 325.7

We are interested in your thoughts and opinions concerning your experience with the Kansas City District Regulatory Program. We have placed an automated version of our Customer Service Survey form at: http://per2.nwp.usace.army.mil/survey.html. At your request, we will mail you a paper copy that you may complete and return to us by mail or fax.

A copy of this letter has been sent to Mr. David Shorr. If you have any questions concerning this matter, please contact Mr. Cody S. Wheeler at 816-389-3739 (FAX 816-389-2032).

Sincerely,

Anthony J. Hofmann
Colonel, Corps of Engineers
District Commander

Enclosures

DEPARTMENT OF THE ARMY PERMIT

Permittee: Con-Agg of Missouri, LLC.

Permit No.: 2011-364

Issuing Office: U.S. Army Engineer District, Kansas City

NOTE: The term "you" and its derivatives, as used in this permit, means the permittee or any future transferee. The term "this office" refers to the appropriate district or division office of the Corps of Engineers having jurisdiction over the permitted activity or the appropriate official of that office acting under the authority of the commanding officer.

You are authorized to perform work in accordance with the terms and conditions specified below, and with the plans and drawings attached hereto which are incorporated in and made a part of this permit.

Project Description: You are authorized to extract up to 160,000 tons of sand and gravel per year from the Jefferson City segment (river miles 129.9 to 249.9) of the Missouri River with a mobile, floating, hydraulic cutter-head suction dredge plant. Water and dredged materials will be passed through onboard screens allowing the desired material to be loaded into barges and undesired material and water to be discharged back into the river at the dredging location. Filled barges will be transported to existing offloading facilities where a crane or front end loader will unload the material for stockpiling and commercial sale. The 2011 tonnage limits retroactively apply to all dredging since the beginning of 2011. These tonnage limits are of sand when it is offloaded from the barge with a moisture content of approximately 10%.
Permit Drawings: Please use the location maps from the 2007 permit decision, and the electronic authorized dredging zone shape files with any modifications sent to you in subsequent permit extensions. We will send you updated maps and/or electronic shape files with the execution of the permit or sooner if possible. The maps and electronic shape files are just a visual representation of where you can or cannot dredge. The legal and authoritative source regarding where you can or cannot dredge, is contained in the project description, project location, and special conditions of this permit.

Project Location: You may dredge in the following general reaches of Missouri River (this may or may not exclude all the resource protection zones): river miles 178.35-184.75, 185.65-186.90, 188.20-192.00, 193.00-193.40, 195.75-196.50, 196.70-197.00, 198.50-199.15, and 199.40-201.95.

Permit Conditions:

General Conditions:

1. The time limit for completing the work authorized ends on 31 December 2015. If you find that you need more time to complete the authorized activity, submit your request for a time extension to this office for consideration at least one month before the above date is reached.

2. You must maintain the activity authorized by this permit in conformance with the terms and conditions of this permit. You are not relieved of this requirement if you abandon the permitted activity, although you may make a good faith transfer to a third party in compliance with General Condition 4 below. Should you wish to cease to maintain the authorized activity or should you desire to abandon it without a good faith transfer, you must obtain a modification of this permit from this office, which may require restoration of the area.

3. If you discover any previously unknown historic or archeological remains while accomplishing the activity authorized by this permit, you must immediately notify this office of what you have found. We will initiate the Federal and state coordination required to determine if the remains warrant a recovery effort or if the site is eligible for listing in the National Register of Historic Places.

4. If you sell the property associated with this permit, you must obtain the signature of the new owner in the space provided and forward a copy of the permit to this office to validate the transfer of this authorization.

5. If a conditioned water quality certification has been issued for your project, you must comply with the conditions specified in the certification as special conditions to this permit. For your convenience, a copy of the certification is attached if it contains such conditions.

6. You must allow representatives from this office to inspect the authorized activity at any time deemed necessary to ensure that it is being or has been accomplished in accordance with the terms and conditions of your permit.

Special Conditions:

See continuation sheets, pages 4 - 8, of this document.

Further Information:

1. Congressional Authorities: You have been authorized to undertake the activity described above pursuant to:

(X) Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403).

(X) Section 404 of the Clean Water Act (33 U.S.C. 1344).

( ) Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972 (33 U.S.C. 1413).

2. Limits of this authorization.

a. This permit does not obviate the need to obtain other Federal, state, or local authorization required by law.

b. This permit does not grant any property rights or exclusive privileges.

c. This permit does not authorize any injury to the property or rights of others.

d. This permit does not authorize interference with any existing or proposed Federal project.

3. Limits of Federal Liability. In issuing this permit, the Federal Government does not assume any liability for the following:

a. Damages to the permitted project or uses thereof as a result of other permitted or unpermitted activities or from natural causes.

b. Damages to the permitted project or uses thereof as a result of current or future activities undertaken by or on behalf of the United States in the public interest.

c. Damages to persons, property, or to other permitted or unpermitted activities or structures caused by the activity authorized by this permit.

d. Design or construction deficiencies associated with the permitted work.

e. Damage claims associated with any future modification, suspension, or revocation of this permit.

4. Reliance on Applicant's Data: The determination of this office that issuance of this permit is not contrary to the public interest was made in reliance on the information you provided.

5. Reevaluation of Permit Decision. This office may reevaluate its decision on this permit at any time the circumstances warrant. Circumstances that could require a reevaluation include, but are not limited to, the following:

a. You fail to comply with the terms and conditions of this permit.

b. The information provided by you in support of your permit application proves to have been false, incomplete, or inaccurate (See 4 above).

c. Significant new information surfaces which this office did not consider in reaching the original public interest decision.

Such a reevaluation may result in a determination that it is appropriate to use the suspension, modification, and revocation procedures contained in 33 CFR 325.7 or enforcement procedures such as those contained in 33 CFR 326.4 and 326.5. The referenced enforcement procedures provide for the issuance of an administrative order requiring you to comply with the terms and conditions of your permit and for the initiation of legal action where appropriate. You will be required to pay for any corrective measures ordered by this office, and if you fail to comply with such directive, this office may in certain situations (such as those specified in 33 CFR 209.170) accomplish the corrective measures by contract or otherwise and bill you for the cost.

6. Extensions. General condition 1 establishes a time limit for the completion of the activity authorized by this permit. Unless there are circumstances requiring either a prompt completion of the authorized activity or a reevaluation of the public interest decision, the Corps will normally give favorable consideration to a request for an extension of this time limit.

Your signature below, as permittee, indicates that you accept and agree to comply with the terms and conditions of this permit.

_____ _____

(PERMITTEE) (DATE)

This permit becomes effective when the Federal official, designated to act for the Secretary of the Army, has signed below.

_____ _____

(DISTRICT ENGINEER) (DATE)
ANTHONY J. HOFMANN, COLONEL
BY: Mark D. Frazier
Chief, Regulatory Branch
Operations Division

When the structures or work authorized by this permit are still in existence at the time the property is transferred, the terms and conditions of this permit will continue to be binding on the new owner(s) of the property. To validate the transfer of this permit and the associated liabilities associated with compliance with its terms and conditions, have the transferee sign and date below.

_____ _____

(TRANSFEREE) (DATE)

Special Conditions:

a. You understand and agree that, if future operations by the United States require the removal, relocation, or other alteration, of the structure or work herein authorized, or if, in the opinion of the Secretary of the Army or his authorized representative, said structure or work shall cause unreasonable obstruction to the free navigation of the navigable waters, you will be required, upon due notice from the U.S. Army Corps of Engineers (USACE), to remove, relocate, or alter the structural work or obstructions caused thereby, without expense to the United States. No claim shall be made against the United States on account of any such removal or alteration.

b. You must implement a Dredge Monitoring Plan (DMP) approved by the Regulatory Branch of the Kansas City District, USACE. If a DMP has not been previously approved by the Regulatory Branch, USACE, Kansas City District, you must provide within 30 days of execution of the permit a DMP for each individual dredge plant to the Regulatory Branch of the USACE, Kansas City District for approval. The DMP must show how you will monitor, record, and report the cutter-head position, cutter-head operating status, extraction tonnage, and the presence of any hard substrates, mussel shells, or unusual concentration of gravel in an impartial, unbiased, reliable, and accurate manner. The DMP must include the specifications of the process and the Dredge Monitoring System (DMS) including sensors, hardware, software, communications devices the permittee will use to: gather data; perform quality control on those data; calibrate, test, and repair sensors when they fail; and transfer the data to the Regulatory Branch of the Kansas City District, USACE. The DMS must include automated differential Global Positioning System (DGPS) equipment (or other comparable system) operating with a minimum accuracy level of 1-3 meters horizontal Circular Error Probable with horizontal positions tied into the UTM Zone 15 NAD 83 (feet) coordinate system recorded to the nearest foot. The DMS must always be on, recording cutter-head position and operating status every 5 minutes, 24-hours a day, 365 days a year, even when the dredge is not operating. The data logged each month must be submitted by email to cody.s.wheeler@usace.army.mil at the Regulatory Branch of the Kansas City District, USACE by the 7th day of the following month. If you do not receive an email confirmation that the report was received, you must contact the Regulatory Branch of the Kansas City District, USACE at 816-389-3990 for revised instructions for filing the monthly report. The extracted material must be measured by one of the methods described in the attached Standard Operating Procedure for Hydrographic Surveying and Dredge Monitoring. If the tonnage is measured by scale at the off-loading facility, the DMP should also describe how the operation will record the date, time, river mile, coordinates, and approximate tonnage of each barge loaded in one location. If a barge is partially filled at one anchor setting then completed at a new anchor setting, the tonnage should be estimated separately for each location. This information must be provided monthly by email on the attached Missouri River Commercial Dredging Location/Volume Report spreadsheet to cody.s.wheeler@usace.army.mil at the Regulatory Branch of the Kansas City District, USACE by the 7th day of the following month. If you do not receive an email confirmation that the report was received, you must contact the Regulatory Branch of the Kansas City District, USACE at 816-389-3990 for revised instructions for filing the monthly report. Faulty sensors or other components identified in the DMP must be repaired within 96 hours. The DMS must not be inoperable more than 5 percent of the time. You must install an approved DMS and have it inspected by the Regulatory Branch of the Kansas City District, USACE within 120 days of execution of the permit or you must cease dredging operations until it is installed and inspected or you submit a justification of the delay and an installation schedule and get an extension of this deadline in writing from the Regulatory Branch of the Kansas City District, USACE.

c. The USACE periodically surveys the river as part of the management and operation of the Bank Stabilization and Navigation Project. If, for any reason, the USACE has not surveyed the river in the fourth year (2014) of the five-year permit cycle, the authorized dredging companies must have the lower 498 miles of the LOMR surveyed during the summer months in accordance with the Standard Operating Procedures for Hydrographic Surveying and Dredge Monitoring. The survey shall be completed between June and September of 2014 and submitted to the Regulatory Branch of the Kansas City District, USACE by November 1, 2014.

d. If any part of the authorized work is performed by a contractor, before starting work you must discuss the terms and conditions of this permit with the contractor and must give a copy of this entire permit to the contractor. After the initial 120 days of this permit, any contracted dredges or barges must also be equipped with and operate in accordance with an approved DMP as required in Special Condition "b". The DMP and system must be approved by the Regulatory Branch of the Kansas City District, USACE prior to starting work.

e. Until the dredges and barges are equipped with the DMS required by Special Condition "b", you must, for each dredge operated, record Global Positioning System (GPS) coordinates, tons of material removed, and the presence of any hard substrates or unusual concentration of gravel daily. If the dredge moves more than 100 feet in any one day then the amount of material removed from each location must be recorded separately. The operators may use hand-held GPS devices or automatically recording devices, but with which ever system used, must identify the device make/model and recording location. This information must be recorded on the attached Missouri River Commercial Dredging Location/Volume Report in an electronic spreadsheet. You must furnish a copy of the completed monthly report by email to cody.s.wheeler@usace.army.mil at the Regulatory Branch of the Kansas City District, USACE by the 7th day of the following month. If you do not receive an email confirmation that the report was received, you must contact the Regulatory Branch of the Kansas City District, USACE at 816-389-3990 for revised instructions for filing the monthly report.

f. No more than 300,000 tons of material shall be extracted within one year from each five-mile reach of the Missouri River between river miles 15 to 20, 25 to 35, 90 to 100, 140 to 150, 355 to 395, and 445 to 455. When the dredge report database of the Regulatory Branch of the Kansas City District, USACE indicates that extraction in a five-mile reach has reached 300,000 tons, all dredgers authorized to operate within that reach will be notified that it is closed to further dredging for the remainder of the calendar year unless a waiver is requested and received in writing from the Regulatory Branch of the Kansas City District, USACE.

g. Up to 10% of your authorized annual tonnage for each segment may be carried over each year to be extracted within that segment the following year. Annual tonnage with carryover may never exceed 110% of annual authorized tonnage of each segment. At the end of each year you must notify the Regulatory Branch of the Kansas City District, USACE in your annual tonnage report of any unextracted tonnage that you intend to carryover.

h. In permit conditions that specify a linear distance exclusion zone adjacent to a river feature, "dredging" refers to the operation of hydraulic cutter-head suction dredging. The exclusion zone distances will apply to and be measured from the end of the cutter head, rather than from a general point on the dredge.

i. You must confine dredging to between the Rectified Channel Lines (RCL) with the following restrictions. Dredging must be conducted in such a manner to preserve the structural integrity of the landmass landward of the RCL. This must be accomplished by maintaining an adequate "no dredging

or discharging" zone riverward of the RCL so that material will stabilize into the dredging area at its natural angle of repose. This slope will vary depending upon river location and the type of material being dredged, but it is your responsibility to ensure that this shallow water interface landward of the RCL be maintained.

j. You must not dredge within 500 feet of any levee centerline, pipeline or submerged utility crossing, bridge pier or abutment; nor within 200 feet of any dike, revetment, or other structure built or authorized by the U.S. Government; nor within 100 feet of any normal bank line or island, without special authorization. When dredging is performed adjacent to river stabilization structures, the dredging may be conducted only in the present streambed of the river at the authorized locations. This condition represents only the minimum distances away from structures and natural features that you can conduct dredging and does not relieve you from liability for damage arising from dredging. You must be satisfied that dredging to these limits will not cause damage to public and private property.

k. You must not conduct dredging operations in a zone extending 4,000 feet upstream and 500 feet downstream from any municipal drinking water intake structures located along either bank of the river unless you obtain an exemption to this condition in writing from the Regulatory Branch of the Kansas City District, USACE.

l. You must not conduct dredging operations in a zone extending 1,000 feet upstream and 1,000 feet downstream from any municipal drinking water horizontal collector wells located along either bank of the river unless you obtain an exemption to this condition in writing from the Regulatory Branch of the Kansas City District, USACE.

m. You must not conduct dredging operations in a zone extending 500 feet upstream and 500 feet downstream from any other water intake structures other than those used for municipal drinking water unless you obtain an exemption to this condition in writing from the Regulatory Branch of the Kansas City District, USACE.

n. You may discharge back into the Missouri River material spilled off the conveyer belts and unusable material separated out in the on-shore sand washing and handling facility. To subtract that tonnage from your annual extraction limit, you must follow a plan approved in writing by the Regulatory Branch of the Kansas City District, USACE. This plan must show where and how the material will be discharged and how the amount of dredged material discharged back into the river will be measured and reported to the Regulatory Branch of the Kansas City District, USACE. The total extraction tonnage will equal the tonnage extracted and barged to shore minus that amount intentionally returned to the Missouri River.

o. You may return unwanted dredged material and river water (but not garbage)extracted from the Missouri River back to the Missouri River. You must not dispose of waste materials, water, or garbage below the ordinary high water mark of any other water body, in a wetland area, or at any location where the materials could be introduced into the water body or an adjacent wetland as a result of runoff, flooding, wind, or other natural forces.

p. You must comply with all U.S. Coast Guard, State of Missouri, State of Kansas (river mile 367 to 490), and USACE regulations concerning the prevention of navigation obstructions in navigable waters of the United States.

q. You must conduct operations in the Missouri River such that there will be no unreasonable interference with navigation by the existence or use of the activity authorized herein.

r. To avoid impacting endangered species and cultural resources, you must confine dredging to the specified reaches listed on page 1 of the permit document. If you desire to expand or relocate your dredging operation outside the specified reaches, you must submit a request to the Regulatory Branch of the Kansas City District, USACE identifying the proposed new limits, in river miles and the location of the unloading facility to be employed.. Approval of the requests, if granted, will be provided in writing with modified reaches identified on the Missouri River Hydrographic Survey. Copies of the relocation requests must be furnished to the following agencies:

1. U.S. Fish and Wildlife Service, Columbia Field Office
2. Missouri Department of Natural Resources, Water Pollution Control Program
3. Missouri Department of Natural Resources, State Historic Preservation Office
4. Kansas Department of Health and Environment, Bureau of Water (for operations extending upstream of river mile 367)
5. Kansas State Historical Society, State Historic Preservation Office (for operations extending upstream of river mile 367)
6. Corps of Engineers, Kansas City District, Hydrologic Engineering Branch

s. You must not conduct dredging operations within the reaches identified in the following table as Pallid Sturgeon habitat features.

Missouri River Miles (including 0.25 mile buffer)		**Pallid Sturgeon Habitat Feature**
Downstream	Upstream	
44.25	44.85	RDB Centaur Chute
49.15	50.05	RDB Centaur Chute
56.85	59.05	LDB Chute/Island
58.55	61.25	RDB Chute/Island
89.75	91.10	RDB Island
89.90	91.45	LDB Loutre Slough
91.20	93.55	LDB Lunch Island
103.00	104.95	Both Gasconade Confluence and Dike Field
105.20	106.25	RDB Dike Field
115.20	115.95	RDB Island
118.40	119.15	RDB Dike Field
119.35	119.85	RDB St. Aubert Island/Chute
124.35	124.95	RDB St. Aubert Island/Chute
126.05	126.90	LDB Dike Field
127.50	130.20	Both Osage River Confluence and Dike Field
157.00	158.45	LDB Island
176.40	178.35	LDB Island/RDB Tadpole Island Chute
180.15	180.65	RDB Tadpole Island Chute
184.75	185.65	RDB Chute
186.90	188.20	RDB Chute and Dike Field
193.40	195.75	RDB Dike Field/Island
202.10	202.75	RDB Lamine River Confluence
210.00	219.65	Lisbon/Jameson Complex
226.95	227.55	LDB Little Chariton Confluence

238.40	239.10	LDB Chariton River Confluence
249.65	250.30	LDB Grand River Confluence
269.85	271.35	RDB Shallow/Island
280.40	282.05	RDB Island
297.90	299.05	RDB Island
300.00	301.05	LDB Island
367.00	367.75	RDB Kansas River Confluence
390.85	391.45	LDB Platte River Confluence
456.75	457.25	LDB Worthwine Chute
458.75	459.25	LDB Worthwine Chute
462.65	463.25	LDB Nodaway River Confluence
478.55	479.15	RDB Wolf Creek Confluence
494.55	495.20	RDB Big Nemaha River Confluence

t. You must discharge only suitable dredged material that is free from toxic pollutants in other than trace quantities.

u. You must investigate for water supply intakes or other activities which may be affected by suspended solids and turbidity increases caused by work in the watercourse and give sufficient notice to the owners of affected activities to allow preparation for any changes in water quality. You must furnish the Regulatory Branch of the Kansas City District, USACE with a copy of any written notification provided in accordance with this condition.

v. You must employ measures to prevent dredged materials stored or disposed of on shore from running off or eroding into wetlands or tributaries to the Missouri River.

w. You must employ measures to prevent or control spilled fuels or lubricants from entering the waters of the United States.

x. You must store all construction materials, equipment, and/or petroleum products that are part of the on-shore operation, when not in use, above anticipated high water levels.

STATE OF MISSOURI
Jeremiah W. (Jay) Nixon, Governor • Sara Parker Pauley, Director
DEPARTMENT OF NATURAL RESOURCES
www.dnr.mo.gov

MAR 23 2011

Mr. Larry W. Moore
Con-Agg of MO, LLC
2604 North Stadium Blvd.
Columbia, MO 65202

Dear Mr. Moore:

Please replace the Clean Water Act Section 401 Water Quality Certification (certification) dated March 17, 2011, with the enclosed certification.

If you have any questions, please feel free to contact me by phone at (573) 751-7023, by e-mail at carrie.schulte@dnr.mo.gov or by mail at Missouri Department of Natural Resources, Water Protection Program, NPDES Permits and Engineering Section, P.O. Box 176, Jefferson City, MO 65102-0176. Thank you for working with the Department to protect our environment.

Sincerely,

WATER PROTECTION PROGRAM

Carrie M. Schulte

Carrie M. Schulte, Chief
401 Water Quality Certification and Stormwater Unit

CMS/pc

Enclosure

c: Mr. Cody Wheeler, Army Corps of Engineers, Kansas City District
Mr. Charles Frerker, Army Corps of Engineers, St. Louis District
Ms. Dorothy Franklin, Kansas City Regional Office
Mr. Jimmy Coles, Kansas City Regional Office
Mr. Lantz Tipton, Northeast Regional Office
File Copy

Recycled Paper

STATE OF MISSOURI
Jeremiah W. (Jay) Nixon, Governor • Sara Parker Pauley, Director
DEPARTMENT OF NATURAL RESOURCES
www.dnr.mo.gov

MAR 23 2011

Mr. Larry W. Moore
Con-Agg of MO, LLC
2604 North Stadium Blvd.
Columbia, MO 65202

Various Counties
Permit Number 2011-364
CEK006764

Dear Mr. Moore:

The Missouri Department of Natural Resources' Water Protection Program (Department) is in receipt of the U.S. Army Corps of Engineers' (Corps) letter dated February 17, 2011, requesting that your Clean Water Act Section 401 Water Quality Certification (certification) be issued for Permit Number 2011-364. The Department understands that Con-Agg of MO, LLC will abide by the certification and the Corps issued Clean Water Act Section 404 Permit (permit) for commercial dredging operations in the Missouri River.

This letter also serves as an extension of the certification issued for Permit Number 2001-1434 for an additional 60 days, unless an appeal of proffered Department of the Army Permit 2001-1434 is accepted by the Corps' Northwestern Division in which case the 2001 certification would expire 30 days after the final appeal decision.

This office certifies that the ongoing activities apparently will not cause the general or numeric criteria to be exceeded nor impair beneficial uses established in Water Quality Standards, 10 CSR 20-7.031, provided the following condition is met:

- The U.S. Army Corps of Engineers permit decision and all conditions are followed as authorized by the Corps under Section 404 of the Clean Water Act (33 USC 1344). The implementing regulation for this Act is found at 33 CFR 320-330.

Missouri Clean Water Law, Chapter 644.052.9 RSMo, gives the Department the authority to collect a fee for the issuance of a certification. As of January 1, 2011, this authority has expired, which means the Department no longer has statutory authority to collect water permit fees. This includes the certification fee. Please do not send a payment to the Department.

If you were affected by this decision, you may appeal to have the matter heard by the Administrative Hearing Commission (commission). To appeal, you must file a petition with the commission within thirty (30) days after the date this decision was mailed or the date it was delivered, whichever date was earlier. If any such petition is sent by registered mail or certified mail, it will be deemed filed on the date it is mailed. If it is sent by any method other than registered mail or certified mail, it will be deemed filed on the date it is received by the commission.

Recycled Paper

Water Quality Standards must be met during any operations authorized by these permits. If you have any questions, please contact Ms. Carrie M. Schulte by phone at (573) 751-7023, by e-mail at carrie.schulte@dnr.mo.gov or by mail at Missouri Department of Natural Resources, Water Protection Program, NPDES Permits and Engineering Section, P.O. Box 176, Jefferson City, MO 65102-0176. Thank you for working with the Department to protect our environment.

Sincerely,

WATER PROTECTION PROGRAM

Refaat Mefrakis, P.E., Chief
NPDES Permits and Engineering Section

RM:csp

c: Mr. Cody Wheeler, Army Corps of Engineers, Kansas City District
Mr. Charles Frerker, Army Corps of Engineers, St. Louis District
Ms. Dorothy Franklin, Kansas City Regional Office
Mr. Jimmy Coles, Kansas City Regional Office
Mr. Lantz Tipton, Northeast Regional Office
File Copy

NOTIFICATION OF ADMINISTRATIVE APPEAL OPTIONS AND PROCESS AND REQUEST FOR APPEAL

Applicant: Con-Agg of Missouri, LLC		File Number: 2011-364	Date: Mar. 31, 2011
Attached is:			See Section below
	A. INITIAL PROFFERED PERMIT (Standard Permit or Letter of Permission)		A
XX	B. PROFFERED PERMIT (Standard Permit or Letter of Permission)		B
	C. PERMIT DENIAL		C
	D. APPROVED JURISDICTIONAL DETERMINATION		D
	E. PRELIMINARY JURISDICTIONAL DETERMINATION		E

SECTION I - The following identifies your rights and options regarding a modification, reconsideration, or administrative appeal of the above decision. Additional information may be found at http://www.usace.army.mil/inet/functions/cw/cecwo/reg or Corps regulations at 33 CFR Part 331.

A: INITIAL PROFFERED PERMIT: You may accept or request modification of the permit.

- ACCEPT: If you received a Standard Permit, you may sign the permit document and return it to the District Engineer for final authorization. If you received a Letter of Permission (LOP), you may accept the LOP and your work is authorized. Your signature on the Standard Permit or acceptance of the LOP means that you accept the permit in its entirety, and waive all rights to appeal the permit, including its terms and conditions, and approved jurisdictional determinations associated with the permit.
- REQUEST MODIFICATION: If you object to the permit (Standard or LOP) because of certain terms and conditions therein, you may request that the permit be modified accordingly. You must complete Section II of this form and return the form to the District Engineer. Your objections must be received by the District Engineer within 60 days of the date of this notice, or you will forfeit your right to appeal the permit in the future. Upon receipt of your letter, the District Engineer will evaluate your objections and may: (a) modify the permit to address all of your concerns, (b) modify the permit to address some of your objections, or (c) not modify the permit having determined that the permit should be issued as previously written. After evaluating your objections, the District Engineer will send you a proffered permit for your reconsideration, as indicated in Section B below.

B: PROFFERED PERMIT: You may accept or appeal the permit.

- ACCEPT: If you received a Standard Permit, you may sign the permit document and return it to the District Engineer for final authorization. If you received a Letter of Permission (LOP), you may accept the LOP and your work is authorized. Your signature on the Standard Permit or acceptance of the LOP means that you accept the permit in its entirety, and waive all rights to appeal the permit, including its terms and conditions, and approved jurisdictional determinations associated with the permit.
- APPEAL: If you choose to decline the proffered permit (Standard or LOP) because of certain terms and conditions therein, you may appeal the declined permit under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the Division Engineer (address on page 2). This form must be received by the Division Engineer within 60 days of the date of this notice.

C: PERMIT DENIAL: You may appeal the denial of a permit under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the Division Engineer (address on page 2). This form must be received by the Division Engineer within 60 days of the date of this notice.

D: APPROVED JURISDICTIONAL DETERMINATION: You may accept the approved JD, appeal the approved JD, or submit new information and request reconsideration of the approved JD.

- ACCEPT: You do not need to notify the Corps to accept an approved JD. Failure to notify the Corps within 60 days of the date of this notice, means that you accept the approved JD in its entirety, and waive all rights to appeal the approved JD.
- APPEAL: If you disagree with the approved JD, you may appeal the approved JD under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the Division Engineer (address on page 2). This form must be received by the Division Engineer within 60 days of the date of this notice.
- RECONSIDERATION BASED ON NEW INFORMATION: You may submit new information to the District Engineer for reconsideration of an approved JD. You must submit the information within 60 days of the date of this notice.

E: PRELIMINARY JURISDICTIONAL DETERMINATION: You do not need to respond to the Corps regarding the preliminary JD. The preliminary JD is not appealable. If you wish, you may request an approved JD (which may be appealed), by contacting the Corps district for further instruction. Also you may provide new information for further consideration by the Corps to reevaluate the JD.

SECTION II – Fill out this section and return this form to the appropriate office only if submitting a request for modification or reconsideration to the District Engineer, or if submitting a request for Administrative Appeal to the Division Engineer. All such submittals must be made within 60 days of the date of this notice.

Submit the following requests to the District Engineer

A. Modification of an INITIAL PROFFERED PERMIT (Item A).
D. Reconsideration of an APPROVED JURISDICTIONAL DETERMINATION based on NEW INFORMATION (Item D RECONSIDERATION).

Submit the following requests to the Division Engineer

B. Administrative Appeal of a PROFFERED PERMIT (Item B).
C. Administrative Appeal of a PERMIT DENIAL (Item C).
D. Administrative Appeal of an APPROVED JURISDICTIONAL DETERMINATION (Item D APPEAL) (for reasons other than reconsideration of an approved JD based on new information).

(Note: Preliminary Jurisdictional Determinations (Item E) are not appealable. If you have concerns regarding a preliminary Jurisdictional Determination, you can request an approved Jurisdictional Determination).

REASONS FOR APPEAL OR OBJECTIONS: (Describe your reasons for appealing the decision or your objections to an initial proffered permit in clear concise statements. You may attach additional information to this form to clarify where your reasons or objections are addressed in the administrative record.)

SUBMITTAL OF NEW OR ADDITIONAL INFORMATION: The District Engineer may accept and consider new information if you request a modification to an initial proffered permit (Part A), or a reconsideration of an approved JD (Part D). An administrative appeal to the Division Engineer is limited to a review of the administrative record, the Corps memorandum for the record of the appeal conference or meeting, and any supplemental information that the review officer has determined is needed to clarify the administrative record. Neither the appellant nor the Corps may add new information or analyses to the administrative record. However, you may provide additional information to clarify the location of information that is already in the administrative record.

POINT OF CONTACT FOR QUESTIONS OR INFORMATION:

If you have questions regarding this decision and/or the appeal process you may contact: DISTRICT ENGINEER **Attn: Mark D. Frazier** **Chief, Regulatory Branch** **U.S. Army Engineer District, Kansas City** **601 E. 12th Street, Suite 402** **Kansas City, MO 64106-2896** **Telephone: 816-389-3990** (Use this address for submittals to the District Engineer)	If you wish to submit an appeal or have questions regarding the appeal process you may contact: DIVISION ENGINEER **Attn: David W. Gesl** **Administrative Appeals Review Officer** **U.S. Army Engineer Division, Northwestern Division** **P.O. Box 2870** **Portland, OR 97208-2870** **Telephone: 503-808-3825**

RIGHT OF ENTRY: Your signature below grants the right of entry to Corps of Engineers personnel, and any government consultants, to conduct investigations of the project site during the course of the appeal process. You will be provided a 15 day notice of any site investigation, and will have the opportunity to participate in all site investigations.

_____ Signature of appellant or agent.	Date:	Telephone number:

DEPARTMENT OF THE ARMY
ST LOUIS DISTRICT, CORPS OF ENGINEERS
1222 SPRUCE STREET
ST LOUIS MO 63103-2833

REPLY TO
ATTENTION OF

March 31, 2011

Regulatory Branch
(MVS-2011-178, P-2789)

Mr. Tony Giordano
J.T.R., Inc.
2320 Creve Coeur Mill Road
Maryland Heights, Missouri 63043

Dear Mr. Giordano:

This letter is in response to your application, received on March 25, 2008, to reauthorize your Missouri River commercial dredging operation previously authorized by Department of the Army (DA) permits numbered P-2339, P-2340, and P-2341. As requested by your application, this letter includes a new proffered DA permit No. P-2789 (ORM account number MVS-2011-178), in duplicate, and extends your old DA permit.

When executed, the permit will authorize you to extract up to 460,000 tons of sand and gravel per year from the portion of the St. Charles segment of the Missouri River regulated by the St. Louis District (river miles 0.0 to 49.8) with a mobile, floating, hydraulic dredge plant. Water and dredged materials will be passed through onboard screens allowing the desired material to be loaded onto barges and undesired material and water to be discharged back into the river at the dredging location. Filled barges will be transported to existing offloading facilities where a crane or front end loader will unload the material for stockpiling and commercial sale. The permits will be subject to all the special conditions that follow and will expire on December 31, 2015. The 2011 tonnage limits will retroactively apply to all dredging since the beginning of 2011. These tonnage limits are of sand when it is offloaded from the barge with a moisture content of approximately 10%.

A copy of the water quality certification issued for your work, by the Missouri Department of Natural Resources, has been attached to the enclosed DA permit. As stated in general condition "5" of the enclosed permit document, the conditions presented in the state's water quality certification are incorporated into the special conditions of the permit by reference.

This letter contains a proffered permit for commercial dredging permit application. If you object to this decision, you may request an administrative appeal under the U.S. Army Corps of Engineers regulations at 33 Code of Federal Regulations (C.F.R). Part 331. Enclosed you will find a Notification of Administrative Appeal Options and Process (NAP) and Request for Appeal (RFA) form. If you request to appeal this decision you must submit a completed RFA form to the Northwestern Division Office at the following address:

Division Engineer
ATTN: David W. Gesl
Administrative Appeals Review Officer
U.S. Army Corps of Engineers
P.O. Box 2870
Portland, OR 97208-2870
Telephone: 503-808-3825

In order for an RFA to be accepted, the Corps must determine that it is complete, that it meets the criteria for appeal under 33 C.F.R. Part 331.5, and that it has been received by the Division Office within 60 days of the date of the NAP. Should you decide to submit an RFA form, it must be received at the above address by May 31, 2011.

It is not necessary to submit an RFA form to the Division Office if you do not object to the provisions of your proffered permit. If you wish to accept the permit in its present form, please sign the original and duplicate copy of the enclosed permit document. Each copy of the permit document should be signed on page 3 above the word "Permittee," dated, and returned within 30 days from the date of this letter. Also, the application fee of $100 should be paid by check made payable to **FAO St. Louis USACE** and remitted with the permit document. Upon receipt of the properly signed documents and the application fee, the permit will be executed and returned to you for your files. Your signature on the standard permit means that you accept the permit in its entirety, and waive all rights to appeal the permit, including its terms and conditions, and approved jurisdictional determinations associated with the permit.

On December 28, 2010, DA permits P-2339 through P-2341 were extended through March 31, 2011to allow continued dredging during the additional three months needed to complete the Missouri River Commercial Dredging Final EIS (Final EIS) and Record of Decision. We have determined that is in the public interest to extend DA permits P-2339 through P-2341 to allow you to continue dredging until the Administrative Appeal process described in the previous paragraph is complete for initial proffered DA permit No. P-2789, or until it is accepted and executed. This permit extension has been reviewed in accordance with 33 C.F.R. Part 325.7, and with Section 10 of the Rivers and Harbors Act of 1899 (33 United States Code Section (U.S.C.) 403) and Section 404 of the Clean Water Act (33 U.S.C. 1344). It has been determined that the extension and modification of DA permits P-2339 through P-2341 to include all the limits and permit conditions identified in the Record of Decision will be within the scope of the Final EIS and will comply with the Section 404(b)(1) Guidelines (40 C.F.R. Part 230). Therefore, DA permits P-2339 through P-2341 will be modified effective April 1, 2011, to limit your annual extraction of sand and gravel from the Missouri River to 160,000 tons per year subject to all the general and special conditions attached to initial proffered DA permit No. P-2789. DA permits P-2339 through P-2341 will expire in 60 days, unless an appeal of proffered DA permit 2011-P-2789 is accepted by the Northwestern Division, U.S. Army Corps of Engineers, in which case DA permits P-2339 through P-2341 will expire 30 days after the final appeal decision.

If you do not agree that the terms and conditions of the modification of DA permits P-2339 through P-2341 are acceptable and correct, you must notify and may request a meeting with the District Engineer by April 10, 2011 or be legally bound by the terms and conditions thereof. This is a legal document. We request that you attach this letter of modification to your copy of DA permits P-2339 through P-2341 in order to reflect all work authorized under the permit.

Special condition "b" requires you to implement a Dredge Monitoring Plan (DMP) approved by the Regulatory Branch of the Kansas City District. If a DMP has not been previously approved by the Regulatory Branch of the Kansas City District, you must provide within 30 days of execution of the permit a DMP for each individual dredge plant to the Regulatory Branch of the Kansas City District for approval. The DMP must show how you will monitor, record, and report the suction-head position, suction-head operating status, extraction tonnage, and the presence of any hard substrates, mussel shells, or unusual concentration of gravel.

Special condition "c" requires all applicants receiving authorization to commercially dredge the Missouri River to collectively have a hydrographic survey completed between June and September of 2014 and submitted to the Regulatory Branch of the Kansas City District, USACE by November 1, 2014. Water surface profiles will also be prepared and evaluated annually by the Kansas City District. The Regulatory Branches of the Kansas City and St. Louis Districts will meet with you and the other authorized dredgers and state and federal agencies in the fall of each year to discuss the condition and trend of the river as shown by the most recent water surface profiles or surveys. As stated in item 5 under "Further Information" on page 3 of all permits, this office may reevaluate its decision on this permit any time significant new information surfaces which this office did not consider in reaching the original public interest decision. Such a reevaluation may result in a determination that it is appropriate to use the suspension, modification, and revocation procedures contained in 33 CFR 325.7

The St. Louis District Regulatory Branch is committed to providing quality and timely service to our customers. In an effort to improve customer service, please take a moment to complete the enclosed postage paid card or go to our Customer Service Survey found on our web site at http://per2.nwp.usace.army.mil/survey.html.

A copy of this letter has been sent to Mr. David Shorr. If you have any questions concerning this matter, please contact Mr. Charles Frerker at 314-331-8583 (FAX 314-331-8741).

Sincerely,

Danny D. McClendon

Danny D. McClendon
Chief, Regulatory Branch

Enclosures

NOTIFICATION OF ADMINISTRATIVE APPEAL OPTIONS AND PROCESS AND REQUEST FOR APPEAL

Applicant: J.T.R. Inc. (Jotori Dredging)		File Numbers: **P-2789**	Date: **3-31-2011**
Attached is:			See Section below
	INITIAL PROFFERED PERMIT (Standard Permit or Letter of permission)		A
X	PROFFERED PERMIT (Standard Permit or Letter of permission)		B
	PERMIT DENIAL		C
	APPROVED JURISDICTIONAL DETERMINATION		D
	PRELIMINARY JURISDICTIONAL DETERMINATION		E

SECTION I - The following identifies your rights and options regarding an administrative appeal of the above decision. Additional information may be found at http://usace.army.mil/inet/functions/cw/cecwo/reg or Corps regulations at 33 CFR Part 331.

A: INITIAL PROFFERED PERMIT: You may accept or object to the permit.

- ACCEPT: If you received a Standard Permit, you may sign the permit document and return it to the district engineer for final authorization. If you received a Letter of Permission (LOP), you may accept the LOP and your work is authorized. Your signature on the Standard Permit or acceptance of the LOP means that you accept the permit in its entirety, and waive all rights to appeal the permit, including its terms and conditions, and approved jurisdictional determinations associated with the permit.

- OBJECT: If you object to the permit (Standard or LOP) because of certain terms and conditions therein, you may request that the permit be modified accordingly. You must complete Section II of this form and return the form to the district engineer. Your objections must be received by the district engineer within 60 days of the date of this notice, or you will forfeit your right to appeal the permit in the future. Upon receipt of your letter, the district engineer will evaluate your objections and may: (a) modify the permit to address all of your concerns, (b) modify the permit to address some of your objections, or (c) not modify the permit having determined that the permit should be issued as previously written. After evaluating your objections, the district engineer will send you a proffered permit for your reconsideration, as indicated in Section B below.

B: PROFFERED PERMIT: You may accept or appeal the permit

- ACCEPT: If you received a Standard Permit, you may sign the permit document and return it to the district engineer for final authorization. If you received a Letter of Permission (LOP), you may accept the LOP and your work is authorized. Your signature on the Standard Permit or acceptance of the LOP means that you accept the permit in its entirety, and waive all rights to appeal the permit, including its terms and conditions, and approved jurisdictional determinations associated with the permit.

- APPEAL: If you choose to decline the proffered permit (Standard or LOP) because of certain terms and conditions therein, you may appeal the declined permit under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the division engineer. The division engineer must receive this form within 60 days of the date of this notice.

C: PERMIT DENIAL: You may appeal the denial of a permit under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the division engineer. The division engineer must receive this form within 60 days of the date of this notice.

D: APPROVED JURISDICTIONAL DETERMINATION: You may accept or appeal the approved JD or provide new information.

- ACCEPT: You do not need to notify the Corps to accept an approved JD. Failure to notify the Corps within 60 days of the date of this notice, means that you accept the approved JD in its entirety, and waive all rights to appeal the approved JD.

- APPEAL: If you disagree with the approved JD, you may appeal the approved JD under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the division engineer. This form must be received by the division engineer within 60 days of the date of this notice.

E: PRELIMINARY JURISDICTIONAL DETERMINATION: You do not need to respond to the Corps regarding the preliminary JD. The Preliminary JD is not appealable. If you wish, you may request an approved JD (which may be appealed), by contacting the Corps district for further instruction. Also you may provide new information for further consideration by the Corps to reevaluate the JD.

SECTION II - REQUEST FOR APPEAL or OBJECTIONS TO AN INITIAL PROFFERED PERMIT

REASONS FOR APPEAL OR OBJECTIONS: (Describe your reasons for appealing the decision or your objections to an initial proffered permit in clear concise statements. You may attach additional information to this form to clarify where your reasons or objections are addressed in the administrative record.)

ADDITIONAL INFORMATION: The appeal is limited to a review of the administrative record, the Corps memorandum for the record of the appeal conference or meeting, and any supplemental information that the review officer has determined is needed to clarify the administrative record. Neither the appellant nor the Corps may add new information or analyses to the record. However, you may provide additional information to clarify the location of information that is already in the administrative record.

POINT OF CONTACT FOR QUESTIONS OR INFORMATION:

If you have questions regarding this decision and/or the appeal process you may contact:

Charles F. Frerker, PM
US Army Corps of Engineers
St. Louis District (OD-F)
1222 Spruce Street
St. Louis, MO 63103-2833
Phone: (314) 331-8583 Fax: (314) 331-8741

If you only have questions regarding the appeal process you may also contact:

Division Engineer
ATTN: David W. Gesl
Administrative Appeals Review Officer
U.S. Army Corps of Engineers
P.O. Box 2870
Portland, OR 97208-2870
Telephone: 503-808-3825

RIGHT OF ENTRY: Your signature below grants the right of entry to Corps of Engineers personnel, and any government consultants, to conduct investigations of the project site during the course of the appeal process. You will be provided a 15 day notice of any site investigation, and will have the opportunity to participate in all site investigations.

	Date:	Telephone number:
Signature of appellant or agent.		

DEPARTMENT OF THE ARMY PERMIT

Permittee: **J.T.R., Inc.**

Permit No.: **P-2789** (ORM No. MVS-2011-178)

Issuing Office: **U.S. Army Engineer District, St. Louis**

NOTE: The term "you" and its derivatives, as used in this permit, means the permittee or any future transferee. The term "this office" refers to the appropriate district or division office of the Corps of Engineers having jurisdiction over the permitted activity or the appropriate official of that office acting under the authority of the commanding officer.

You are authorized to perform work in accordance with the terms and conditions specified below, and with the plans and drawings attached hereto which are incorporated in and made a part of this permit.

Project Description: You are authorized to extract up to 460,000 tons of sand and gravel per year from the portion of the St. Charles segment of the Missouri River regulated by the St. Louis District (river miles 0.0 to 49.8) with a mobile, floating, hydraulic dredge plant. Water and dredged materials will be passed through onboard screens allowing the desired material to be loaded onto barges and undesired material and water to be discharged back into the river at the dredging location. Filled barges will be transported to existing offloading facilities where a crane or front end loader will unload the material for stockpiling and commercial sale. The permits will be subject to all the special conditions that follow and will expire on December 31, 2015. The 2011 tonnage limits will retroactively apply to all dredging since the beginning of 2011. These tonnage limits are of sand when it is offloaded from the barge with a moisture content of approximately 10%.

Permit Drawings: Please use the location maps from the 2007 permit decision, and the electronic authorized dredging zone shape files with any modifications sent to you in subsequent permit extensions. We will send you updated maps and/or electronic shape files with the execution of the permit or sooner if possible. The maps and electronic shape files are just a visual representation of where you can or cannot dredge. The legal and authoritative source regarding where you can or cannot dredge, is contained in the project description, project location, and special conditions of this permit.

Project Location: You may dredge in the following general reaches of Missouri River (this may or may not exclude all the resource protection zones): river miles 1.00-4.00, 6.00 -12.00, 14.00-24.00, and 30.00-35.00.

Permit Conditions:

General Conditions:

1. The time limit for completing the work authorized ends on 31 December 2015. If you find that you need more time to complete the authorized activity, submit your request for a time extension to this office for consideration at least one month before the above date is reached.

2. You must maintain the activity authorized by this permit in conformance with the terms and conditions of this permit. You are not relieved of this requirement if you abandon the permitted activity, although you may make a good faith transfer to a third party in compliance with General Condition 4 below. Should you wish to cease to maintain the authorized activity or should you desire to abandon it without a good faith transfer, you must obtain a modification of this permit from this office, which may require restoration of the area.

3. If you discover any previously unknown historic or archeological remains while accomplishing the activity authorized by this permit, you must immediately notify this office of what you have found. We will initiate the Federal and state coordination required to determine if the remains warrant a recovery effort or if the site is eligible for listing in the National Register of Historic Places.

4. If you sell the property associated with this permit, you must obtain the signature of the new owner in the space provided and forward a copy of the permit to this office to validate the transfer of this authorization.

5. If a conditioned water quality certification has been issued for your project, you must comply with the conditions specified in the certification as special conditions to this permit. For your convenience, a copy of the certification is attached if it contains such conditions.

6. You must allow representatives from this office to inspect the authorized activity at any time deemed necessary to ensure that it is being or has been accomplished in accordance with the terms and conditions of your permit.

Special Conditions:

See continuation sheets, pages 4 - 8, of this document.

Further Information:

1. Congressional Authorities: You have been authorized to undertake the activity described above pursuant to:

(X) Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403).

(X) Section 404 of the Clean Water Act (33 U.S.C. 1344).

( ) Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972 (33 U.S.C. 1413).

2. Limits of this authorization.

a. This permit does not obviate the need to obtain other Federal, state, or local authorization required by law.

b. This permit does not grant any property rights or exclusive privileges.

c. This permit does not authorize any injury to the property or rights of others.

d. This permit does not authorize interference with any existing or proposed Federal project.

3. Limits of Federal Liability. In issuing this permit, the Federal Government does not assume any liability for the following:

a. Damages to the permitted project or uses thereof as a result of other permitted or unpermitted activities or from natural causes.

b. Damages to the permitted project or uses thereof as a result of current or future activities undertaken by or on behalf of the United States in the public interest.

c. Damages to persons, property, or to other permitted or unpermitted activities or structures caused by the activity authorized by this permit.

d. Design or construction deficiencies associated with the permitted work.

e. Damage claims associated with any future modification, suspension, or revocation of this permit.

4. Reliance on Applicant's Data: The determination of this office that issuance of this permit is not contrary to the public interest was made in reliance on the information you provided.

5. Reevaluation of Permit Decision. This office may reevaluate its decision on this permit at any time the circumstances warrant. Circumstances that could require a reevaluation include, but are not limited to, the following:

a. You fail to comply with the terms and conditions of this permit.

b. The information provided by you in support of your permit application proves to have been false, incomplete, or inaccurate (See 4 above).

c. Significant new information surfaces which this office did not consider in reaching the original public interest decision.

Such a reevaluation may result in a determination that it is appropriate to use the suspension, modification, and revocation procedures contained in 33 CFR 325.7 or enforcement procedures such as those contained in 33 CFR 326.4 and 326.5. The referenced enforcement procedures provide for the issuance of an administrative order requiring you to comply with the terms and conditions of your permit and for the initiation of legal action where appropriate. You will be required to pay for any corrective measures ordered by this office, and if you fail to comply with such directive, this office may in certain situations (such as those specified in 33 CFR 209.170) accomplish the corrective measures by contract or otherwise and bill you for the cost.

6. Extensions. General condition 1 establishes a time limit for the completion of the activity authorized by this permit. Unless there are circumstances requiring either a prompt completion of the authorized activity or a reevaluation of the public interest decision, the Corps will normally give favorable consideration to a request for an extension of this time limit.

Your signature below, as permittee, indicates that you accept and agree to comply with the terms and conditions of this permit.

_____ _____

(PERMITTEE) (DATE)
J.T.R. Inc., Jotori Dredging
Mr. Tony Giordano
2320 Creve Coeur Mill Road, P.O. Box 2501
Maryland Heights, Missouri 63043-8501

This permit becomes effective when the Federal official, designated to act for the Secretary of the Army, has signed below.

_____ _____

(DISTRICT ENGINEER) (DATE)
Thomas E. O'Hara, Jr.
Colonel, U.S. Army
By: Danny D. McClendon
Chief, Regulatory Branch

When the structures or work authorized by this permit are still in existence at the time the property is transferred, the terms and conditions of this permit will continue to be binding on the new owner(s) of the property. To validate the transfer of this permit and the associated liabilities associated with compliance with its terms and conditions, have the transferee sign and date below.

_____ _____

(TRANSFEREE) (DATE)

Special Conditions:

a. You understand and agree that, if future operations by the United States require the removal, relocation, or other alteration, of the structure or work herein authorized, or if, in the opinion of the Secretary of the Army or his authorized representative, said structure or work shall cause unreasonable obstruction to the free navigation of the navigable waters, you will be required, upon due notice from the U.S. Army Corps of Engineers (USACE), to remove, relocate, or alter the structural work or obstructions caused thereby, without expense to the United States. No claim shall be made against the United States on account of any such removal or alteration.

b. You must implement a Dredge Monitoring Plan (DMP) approved by the Regulatory Branch of the Kansas City District, USACE. If a DMP has not been previously approved by the Regulatory Branch, USACE, Kansas City District, you must provide within 30 days of execution of the permit a DMP for each individual dredge plant to the Regulatory Branch of the USACE, Kansas City District for approval. The DMP must show how you will monitor, record, and report the cutter-head position, cutter-head operating status, extraction tonnage, and the presence of any hard substrates, mussel shells, or unusual concentration of gravel in an impartial, unbiased, reliable, and accurate manner. The DMP must include the specifications of the process and the Dredge Monitoring System (DMS) including sensors, hardware, software, communications devices the permittee will use to: gather data; perform quality control on those data; calibrate, test, and repair sensors when they fail; and transfer the data to the Regulatory Branch of the Kansas City District, USACE. The DMS must include automated differential Global Positioning System (DGPS) equipment (or other comparable system) operating with a minimum accuracy level of 1-3 meters horizontal Circular Error Probable with horizontal positions tied into the UTM Zone 15 NAD 83 (feet) coordinate system recorded to the nearest foot. The DMS must always be on, recording cutter-head position and operating status every 5 minutes, 24-hours a day, 365 days a year, even when the dredge is not operating. The data logged each month must be submitted by email to cody.s.wheeler@usace.army.mil at the Regulatory Branch of the Kansas City District, USACE by the 7th day of the following month. If you do not receive an email confirmation that the report was received, you must contact the Regulatory Branch of the Kansas City District, USACE at 816-389-3990 for revised instructions for filing the monthly report. The extracted material must be measured by one of the methods described in the attached Standard Operating Procedure for Hydrographic Surveying and Dredge Monitoring. If the tonnage is measured by scale at the off-loading facility, the DMP should also describe how the operation will record the date, time, river mile, coordinates, and approximate tonnage of each barge loaded in one location. If a barge is partially filled at one anchor setting then completed at a new anchor setting, the tonnage should be estimated separately for each location. This information must be provided monthly by email on the attached Missouri River Commercial Dredging Location/Volume Report spreadsheet to cody.s.wheeler@usace.army.mil at the Regulatory Branch of the Kansas City District, USACE by the 7th day of the following month. If you do not receive an email confirmation that the report was received, you must contact the Regulatory Branch of the Kansas City District, USACE at 816-389-3990 for revised instructions for filing the monthly report. Faulty sensors or other components identified in the DMP must be repaired within 96 hours. The DMS must not be inoperable more than 5 percent of the time. You must install an approved DMS and have it inspected by the Regulatory Branch of the Kansas City District, USACE within 120 days of execution of the permit or you must cease dredging operations until it is installed and inspected or you submit a justification of the delay and an installation schedule and get an extension of this deadline in writing from the Regulatory Branch of the Kansas City District, USACE.

c. The USACE periodically surveys the river as part of the management and operation of the Bank Stabilization and Navigation Project. If, for any reason, the USACE has not surveyed the river in the fourth year (2014) of the five-year permit cycle, the authorized dredging companies must have the lower 498 miles of the LOMR surveyed during the summer months in accordance with the Standard Operating Procedures for Hydrographic Surveying and Dredge Monitoring. The survey shall be completed between June and September of 2014 and submitted to the Regulatory Branch of the Kansas City District, USACE by November 1, 2014.

d. If any part of the authorized work is performed by a contractor, before starting work you must discuss the terms and conditions of this permit with the contractor and must give a copy of this entire permit to the contractor. After the initial 120 days of this permit, any contracted dredges or barges must also be equipped with and operate in accordance with an approved DMP as required in Special Condition "b". The DMP and system must be approved by the Regulatory Branch of the Kansas City District, USACE prior to starting work.

e. Until the dredges and barges are equipped with the DMS required by Special Condition "b", you must, for each dredge operated, record Global Positioning System (GPS) coordinates, tons of material removed, and the presence of any hard substrates or unusual concentration of gravel daily. If the dredge moves more than 100 feet in any one day then the amount of material removed from each location must be recorded separately. The operators may use hand-held GPS devices or automatically recording devices, but with which ever system used, must identify the device make/model and recording location. This information must be recorded on the attached Missouri River Commercial Dredging Location/Volume Report in an electronic spreadsheet. You must furnish a copy of the completed monthly report by email to cody.s.wheeler@usace.army.mil at the Regulatory Branch of the Kansas City District, USACE by the 7th day of the following month. If you do not receive an email confirmation that the report was received, you must contact the Regulatory Branch of the Kansas City District, USACE at 816-389-3990 for revised instructions for filing the monthly report.

f. No more than 300,000 tons of material shall be extracted within one year from each five-mile reach of the Missouri River between river miles 15 to 20, 25 to 35, 90 to 100, 140 to 150, 355 to 395, and 445 to 455. When the dredge report database of the Regulatory Branch of the Kansas City District, USACE indicates that extraction in a five-mile reach has reached 300,000 tons, all dredgers authorized to operate within that reach will be notified that it is closed to further dredging for the remainder of the calendar year unless a waiver is requested and received in writing from the Regulatory Branch of the Kansas City District, USACE.

g. Up to 10% of your authorized annual tonnage for each segment may be carried over each year to be extracted within that segment the following year. Annual tonnage with carryover may never exceed 110% of annual authorized tonnage of each segment. At the end of each year you must notify the Regulatory Branch of the Kansas City District, USACE in your annual tonnage report of any unextracted tonnage that you intend to carryover.

h. In permit conditions that specify a linear distance exclusion zone adjacent to a river feature, "dredging" refers to the operation of hydraulic cutter-head suction dredging. The exclusion zone distances will apply to and be measured from the end of the cutter head, rather than from a general point on the dredge.

i. You must confine dredging to between the Rectified Channel Lines (RCL) with the following restrictions. Dredging must be conducted in such a manner to preserve the structural integrity of the landmass landward of the RCL. This must be accomplished by maintaining an adequate "no dredging

or discharging" zone riverward of the RCL so that material will stabilize into the dredging area at its natural angle of repose. This slope will vary depending upon river location and the type of material being dredged, but it is your responsibility to ensure that this shallow water interface landward of the RCL be maintained.

j. You must not dredge within 500 feet of any levee centerline, pipeline or submerged utility crossing, bridge pier or abutment; nor within 200 feet of any dike, revetment, or other structure built or authorized by the U.S. Government; nor within 100 feet of any normal bank line or island, without special authorization. When dredging is performed adjacent to river stabilization structures, the dredging may be conducted only in the present streambed of the river at the authorized locations. This condition represents only the minimum distances away from structures and natural features that you can conduct dredging and does not relieve you from liability for damage arising from dredging. You must be satisfied that dredging to these limits will not cause damage to public and private property.

k. You must not conduct dredging operations in a zone extending 4,000 feet upstream and 500 feet downstream from any municipal drinking water intake structures located along either bank of the river unless you obtain an exemption to this condition in writing from the Regulatory Branch of the Kansas City District, USACE.

l. You must not conduct dredging operations in a zone extending 1,000 feet upstream and 1,000 feet downstream from any municipal drinking water horizontal collector wells located along either bank of the river unless you obtain an exemption to this condition in writing from the Regulatory Branch of the Kansas City District, USACE.

m. You must not conduct dredging operations in a zone extending 500 feet upstream and 500 feet downstream from any other water intake structures other than those used for municipal drinking water unless you obtain an exemption to this condition in writing from the Regulatory Branch of the Kansas City District, USACE.

n. You may discharge back into the Missouri River material spilled off the conveyer belts and unusable material separated out in the on-shore sand washing and handling facility. To subtract that tonnage from your annual extraction limit, you must follow a plan approved in writing by the Regulatory Branch of the Kansas City District, USACE. This plan must show where and how the material will be discharged and how the amount of dredged material discharged back into the river will be measured and reported to the Regulatory Branch of the Kansas City District, USACE. The total extraction tonnage will equal the tonnage extracted and barged to shore minus that amount intentionally returned to the Missouri River.

o. You may return unwanted dredged material and river water (but not garbage)extracted from the Missouri River back to the Missouri River. You must not dispose of waste materials, water, or garbage below the ordinary high water mark of any other water body, in a wetland area, or at any location where the materials could be introduced into the water body or an adjacent wetland as a result of runoff, flooding, wind, or other natural forces.

p. You must comply with all U.S. Coast Guard, State of Missouri, State of Kansas (river mile 367 to 490), and USACE regulations concerning the prevention of navigation obstructions in navigable waters of the United States.

q. You must conduct operations in the Missouri River such that there will be no unreasonable interference with navigation by the existence or use of the activity authorized herein.

r. To avoid impacting endangered species and cultural resources, you must confine dredging to the specified reaches listed on page 1 of the permit document. If you desire to expand or relocate your dredging operation outside the specified reaches, you must submit a request to the Regulatory Branch of the Kansas City District, USACE identifying the proposed new limits, in river miles and the location of the unloading facility to be employed.. Approval of the requests, if granted, will be provided in writing with modified reaches identified on the Missouri River Hydrographic Survey. Copies of the relocation requests must be furnished to the following agencies:

1. U.S. Fish and Wildlife Service, Columbia Field Office
2. Missouri Department of Natural Resources, Water Pollution Control Program
3. Missouri Department of Natural Resources, State Historic Preservation Office
4. Kansas Department of Health and Environment, Bureau of Water (for operations extending upstream of river mile 367)
5. Kansas State Historical Society, State Historic Preservation Office (for operations extending upstream of river mile 367)
6. Corps of Engineers, Kansas City District, Hydrologic Engineering Branch

s. You must not conduct dredging operations within the reaches identified in the following table as Pallid Sturgeon habitat features.

Missouri River Miles (including 0.25 mile buffer)		**Pallid Sturgeon Habitat Feature**
Downstream	Upstream	
44.25	44.85	RDB Centaur Chute
49.15	50.05	RDB Centaur Chute
56.85	59.05	LDB Chute/Island
58.55	61.25	RDB Chute/Island
89.75	91.10	RDB Island
89.90	91.45	LDB Loutre Slough
91.20	93.55	LDB Lunch Island
103.00	104.95	Both Gasconade Confluence and Dike Field
105.20	106.25	RDB Dike Field
115.20	115.95	RDB Island
118.40	119.15	RDB Dike Field
119.35	119.85	RDB St. Aubert Island/Chute
124.35	124.95	RDB St. Aubert Island/Chute
126.05	126.90	LDB Dike Field
127.50	130.20	Both Osage River Confluence and Dike Field
157.00	158.45	LDB Island
176.40	178.35	LDB Island/RDB Tadpole Island Chute
180.15	180.65	RDB Tadpole Island Chute
184.75	185.65	RDB Chute
186.90	188.20	RDB Chute and Dike Field
193.40	195.75	RDB Dike Field/Island
202.10	202.75	RDB Lamine River Confluence
210.00	219.65	Lisbon/Jameson Complex
226.95	227.55	LDB Little Chariton Confluence

238.40	239.10	LDB Chariton River Confluence
249.65	250.30	LDB Grand River Confluence
269.85	271.35	RDB Shallow/Island
280.40	282.05	RDB Island
297.90	299.05	RDB Island
300.00	301.05	LDB Island
367.00	367.75	RDB Kansas River Confluence
390.85	391.45	LDB Platte River Confluence
456.75	457.25	LDB Worthwine Chute
458.75	459.25	LDB Worthwine Chute
462.65	463.25	LDB Nodaway River Confluence
478.55	479.15	RDB Wolf Creek Confluence
494.55	495.20	RDB Big Nemaha River Confluence

t. You must discharge only suitable dredged material that is free from toxic pollutants in other than trace quantities.

u. You must investigate for water supply intakes or other activities which may be affected by suspended solids and turbidity increases caused by work in the watercourse and give sufficient notice to the owners of affected activities to allow preparation for any changes in water quality. You must furnish the Regulatory Branch of the Kansas City District, USACE with a copy of any written notification provided in accordance with this condition.

v. You must employ measures to prevent dredged materials stored or disposed of on shore from running off or eroding into wetlands or tributaries to the Missouri River.

w. You must employ measures to prevent or control spilled fuels or lubricants from entering the waters of the United States.

x. You must store all construction materials, equipment, and/or petroleum products that are part of the on-shore operation, when not in use, above anticipated high water levels.

STATE OF MISSOURI
Jeremiah W. (Jay) Nixon, Governor • Sara Parker Pauley, Director
DEPARTMENT OF NATURAL RESOURCES
www.dnr.mo.gov

MAR 23 2011

Mr. Thomas Dunne Sr.
J.T.R. Inc. (Jotori Dredging)
2320 Creve Coeur Mill Rd.
Maryland Heights, MO 63043

Various Counties
Permit Number 2011-178/P-2789
CES002566

Dear Mr. Dunne:

The Missouri Department of Natural Resources' Water Protection Program (Department) is in receipt of the U.S. Army Corps of Engineers' (Corps) letter dated February 17, 2011, requesting that your Clean Water Act Section 401 Water Quality Certification (certification) be issued for the Corps' Permit Number 2011-178. The Department understands that J.T.R. Inc. (Jotori Dredging) will abide by the certification and the Corps issued Clean Water Act Section 404 Permit (permit) for commercial dredging operations in the Missouri River.

This letter also serves as an extension of the certification issued for Permit Number P-2339 for an additional 60 days, unless an appeal of proffered Department of the Army Permit P-2339 is accepted by the Corps' Northwestern Division, in which case the certification for P-2339 would expire 30 days after the final appeal decision.

This office certifies that the ongoing activities apparently will not cause the general or numeric criteria to be exceeded nor impair beneficial uses established in Water Quality Standards, 10 CSR 20-7.031, provided the following condition is met:

- The U.S. Army Corps of Engineers' permit decision and all conditions are followed as authorized by the Corps under Section 404 of the Clean Water Act (33 USC 1344). The implementing regulation for this Act is found at 33 CFR 320-330.

Missouri Clean Water Law, Chapter 644.052.9 RSMo, gives the Department the authority to collect a fee for the issuance of a certification. As of January 1, 2011, this authority has expired, which means the Department no longer has statutory authority to collect water permit fees. This includes the certification fee. Please do not send a payment to the Department.

If you were affected by this decision, you may appeal to have the matter heard by the Administrative Hearing Commission (commission). To appeal, you must file a petition with the commission within thirty (30) days after the date this decision was mailed or the date it was delivered, whichever date was earlier. If any such petition is sent by registered mail or certified mail, it will be deemed filed on the date it is mailed. If it is sent by any method other than registered mail or certified mail, it will be deemed filed on the date it is received by the commission.

Recycled Paper

Water Quality Standards must be met during any operations authorized by these permits. If you have any questions, please contact Ms. Carrie M. Schulte by phone at (573) 751-7023, by e-mail at carrie.schulte@dnr.mo.gov or by mail at Missouri Department of Natural Resources, Water Protection Program, NPDES Permits and Engineering Section, P.O. Box 176, Jefferson City, MO 65102-0176. Thank you for working with the Department to protect our environment.

Sincerely,

WATER PROTECTION PROGRAM

Refaat Mefrakis, P.E., Chief
NPDES Permits and Engineering Section

RM:csp

c: Mr. Cody Wheeler, Army Corps of Engineers, Kansas City District
Mr. Charles Frerker, Army Corps of Engineers, St. Louis District
Ms. Donna Riebeling, St. Louis Regional Office
File Copy

DEPARTMENT OF THE ARMY
ST LOUIS DISTRICT, CORPS OF ENGINEERS
1222 SPRUCE STREET
ST LOUIS MO 63103-2833

REPLY TO
ATTENTION OF

March 31, 2011

Regulatory Branch
(MVS-2011-177, P-2788)

Mr. Brian Viehmann
Limited Leasing Company
1777 Highway 79 South
Old Monroe, Missouri 63369

Dear Mr. Viehmann:

This letter is in response to your application, received on March 19, 2008, to reauthorize your Missouri River commercial dredging operation previously authorized by Department of the Army (DA) permit No. P-2342. As requested by your application, this letter includes a new proffered DA permit No. P-2788, in duplicate, and extends your old DA permit No. P-2342.

When executed, the permit will authorize you to extract up to 990,000 tons of sand and gravel per year from the portion of the St. Charles segment of the Missouri River regulated by the St. Louis District (river miles 0.0 to 49.8) with a mobile, floating, hydraulic dredge plant. Water and dredged materials will be passed through onboard screens allowing the desired material to be loaded onto barges and undesired material and water to be discharged back into the river at the dredging location. Filled barges will be transported to existing offloading facilities where a crane or front end loader will unload the material for stockpiling and commercial sale. The permits will be subject to all the special conditions that follow and will expire on December 31, 2015. The 2011 tonnage limits will retroactively apply to all dredging since the beginning of 2011. These tonnage limits are of sand when it is offloaded from the barge with a moisture content of approximately 10%.

A copy of the water quality certification issued for your work, by the Missouri Department of Natural Resources, has been attached to the enclosed DA permit. As stated in general condition "5" of the enclosed permit document, the conditions presented in the state's water quality certification are incorporated into the special conditions of the permit by reference.

This letter contains a proffered permit for your commercial dredging permit application. If you object to this decision, you may request an administrative appeal under the U.S. Army Corps of Engineers regulations at 33 Code of Federal Regulations (C.F.R.) Part 331. Enclosed you will find a Notification of Administrative Appeal Options and Process (NAP) and Request for Appeal (RFA) form. If you request to appeal this decision you must submit a completed RFA form to the Northwestern Division Office at the following address:

Division Engineer
ATTN: David W. Gesl
Administrative Appeals Review Officer
U.S. Army Corps of Engineers
P.O. Box 2870
Portland, OR 97208-2870
Telephone: 503-808-3825

In order for an RFA to be accepted, the Corps must determine that it is complete, that it meets the criteria for appeal under 33 C.F.R. Part 331.5, and that it has been received by the Division Office within 60 days of the date of the NAP. Should you decide to submit an RFA form, it must be received at the above address by May 31, 2011.

It is not necessary to submit an RFA form to the Division Office if you do not object to the provisions of your proffered permit. If you wish to accept the permit in its present form, please sign the original and duplicate copy of the enclosed permit document. Each copy of the permit document should be signed on page 3 above the word "Permittee," dated, and returned within 30 days from the date of this letter. Also, the application fee of $100 should be paid by check made payable to **FAO St. Louis USACE** and remitted with the permit document. A preaddressed envelope is enclosed for your convenience. Upon receipt of the properly signed documents and the application fee, the permit will be executed and returned to you for your files. Your signature on the standard permit means that you accept the permit in its entirety, and waive all rights to appeal the permit, including its terms and conditions, and approved jurisdictional determinations associated with the permit.

On December 28, 2010, DA permit No. P-2342 was extended through March 31, 2011to allow continued dredging during the additional three months needed to complete the Missouri River Commercial Dredging Final EIS (Final EIS) and Record of Decision. We have determined that is in the public interest to extend DA permit No. P-2342 allow you to continue dredging until the Administrative Appeal process described in the previous paragraph is complete for initial proffered DA permit No. P-2788, or until it is accepted and executed. This permit extension has been reviewed in accordance with 33 C.F.R. Part 325.7, and with Section 10 of the Rivers and Harbors Act of 1899 (33 United States Code Section (U.S.C.) 403) and Section 404 of the Clean Water Act (33 U.S.C. 1344). It has been determined that the extension and modification of DA permit No. P-2342 to include all the limits and permit conditions identified in the Record of Decision will be within the scope of the Final EIS and will comply with the Section 404(b)(1) Guidelines (40 C.F.R. Part 230). Therefore, DA permit No. 2001-P-2342 will be modified effective April 1, 2011, to limit your annual extraction of sand and gravel from the Missouri River to 990,000 tons per year subject to all the general and special conditions attached to initial proffered DA permit No. P-2788. DA permit No. P-2342 will expire in 60 days, unless an appeal of proffered DA permit No. P-2788 is accepted by the Northwestern Division, U.S. Army Corps of Engineers, in which case DA permit No. 2001-P-2342 will expire 30 days after the final appeal decision.

If you do not agree that the terms and conditions of the modification of DA permit No. P-2342 are acceptable and correct, you must notify and may request a meeting with the District Engineer by April 10, 2011 or be legally bound by the terms and conditions thereof. This is a legal document. We request that you attach this letter of modification to your copy of DA permit No. P-2342 in order to reflect all work authorized under the permit.

Special condition "b" requires you to implement a Dredge Monitoring Plan (DMP) approved by the Regulatory Branch of the Kansas City District. If a DMP has not been previously approved by the Regulatory Branch of the Kansas City District, you must provide within 30 days of execution of the permit a DMP for each individual dredge plant to the Regulatory Branch of the Kansas City District for approval. The DMP must show how you will monitor, record, and report the suction-head position, suction-head operating status, extraction tonnage, and the presence of any hard substrates, mussel shells, or unusual concentration of gravel.

Special condition "c" requires all applicants receiving authorization to commercially dredge the Missouri River to collectively have a hydrographic survey completed between June and September of 2014 and submitted to the Regulatory Branch, Kansas City District, USACE by November 1, 2014. Water surface profiles will also be prepared and evaluated annually by the Kansas City District. The Regulatory Branches of the Kansas City and St. Louis Districts will meet with you and the other authorized dredgers and state and federal agencies in the fall of each year to discuss the condition and trend of the river as shown by the most recent water surface profiles or surveys. As stated in item 5 under "Further Information" on page 3 of all permits, this office may reevaluate its decision on this permit any time significant new information surfaces which this office did not consider in reaching the original public interest decision. Such a reevaluation may result in a determination that it is appropriate to use the suspension, modification, and revocation procedures contained in 33 CFR 325.7

The St. Louis District Regulatory Branch is committed to providing quality and timely service to our customers. In an effort to improve customer service, please take a moment to complete the enclosed postage paid card or go to our Customer Service Survey found on our web site at http://per2.nwp.usace.army.mil/survey.html.

A copy of this letter has been sent to Mr. David Shorr. If you have any questions concerning this matter, please contact Mr. Charles Frerker at 314-331-8583 (FAX 314-331-8741).

Sincerely,

Danny D. McClendon

Danny D. McClendon
Chief, Regulatory Branch

Enclosures

NOTIFICATION OF ADMINISTRATIVE APPEAL OPTIONS AND PROCESS AND REQUEST FOR APPEAL

Applicant: Limited Leasing Company		File Numbers: **P-2788**	Date: **3-31-2011**
Attached is:			See Section below
	INITIAL PROFFERED PERMIT (Standard Permit or Letter of permission)		A
X	PROFFERED PERMIT (Standard Permit or Letter of permission)		B
	PERMIT DENIAL		C
	APPROVED JURISDICTIONAL DETERMINATION		D
	PRELIMINARY JURISDICTIONAL DETERMINATION		E

SECTION I - The following identifies your rights and options regarding an administrative appeal of the above decision. Additional information may be found at http://usace.army.mil/inet/functions/cw/cecwo/reg or Corps regulations at 33 CFR Part 331.

A: INITIAL PROFFERED PERMIT: You may accept or object to the permit.

- ACCEPT: If you received a Standard Permit, you may sign the permit document and return it to the district engineer for final authorization. If you received a Letter of Permission (LOP), you may accept the LOP and your work is authorized. Your signature on the Standard Permit or acceptance of the LOP means that you accept the permit in its entirety, and waive all rights to appeal the permit, including its terms and conditions, and approved jurisdictional determinations associated with the permit.
- OBJECT: If you object to the permit (Standard or LOP) because of certain terms and conditions therein, you may request that the permit be modified accordingly. You must complete Section II of this form and return the form to the district engineer. Your objections must be received by the district engineer within 60 days of the date of this notice, or you will forfeit your right to appeal the permit in the future. Upon receipt of your letter, the district engineer will evaluate your objections and may: (a) modify the permit to address all of your concerns, (b) modify the permit to address some of your objections, or (c) not modify the permit having determined that the permit should be issued as previously written. After evaluating your objections, the district engineer will send you a proffered permit for your reconsideration, as indicated in Section B below.

B: PROFFERED PERMIT: You may accept or appeal the permit

- ACCEPT: If you received a Standard Permit, you may sign the permit document and return it to the district engineer for final authorization. If you received a Letter of Permission (LOP), you may accept the LOP and your work is authorized. Your signature on the Standard Permit or acceptance of the LOP means that you accept the permit in its entirety, and waive all rights to appeal the permit, including its terms and conditions, and approved jurisdictional determinations associated with the permit.
- APPEAL: If you choose to decline the proffered permit (Standard or LOP) because of certain terms and conditions therein, you may appeal the declined permit under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the division engineer. The division engineer must receive this form within 60 days of the date of this notice.

C: PERMIT DENIAL: You may appeal the denial of a permit under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the division engineer. The division engineer must receive this form within 60 days of the date of this notice.

D: APPROVED JURISDICTIONAL DETERMINATION: You may accept or appeal the approved JD or provide new information.

- ACCEPT: You do not need to notify the Corps to accept an approved JD. Failure to notify the Corps within 60 days of the date of this notice, means that you accept the approved JD in its entirety, and waive all rights to appeal the approved JD.
- APPEAL: If you disagree with the approved JD, you may appeal the approved JD under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the division engineer. This form must be received by the division engineer within 60 days of the date of this notice.

E: PRELIMINARY JURISDICTIONAL DETERMINATION: You do not need to respond to the Corps regarding the preliminary JD. The Preliminary JD is not appealable. If you wish, you may request an approved JD (which may be appealed), by contacting the Corps district for further instruction. Also you may provide new information for further consideration by the Corps to reevaluate the JD.

SECTION II - REQUEST FOR APPEAL or OBJECTIONS TO AN INITIAL PROFFERED PERMIT

REASONS FOR APPEAL OR OBJECTIONS: (Describe your reasons for appealing the decision or your objections to an initial proffered permit in clear concise statements. You may attach additional information to this form to clarify where your reasons or objections are addressed in the administrative record.)

ADDITIONAL INFORMATION: The appeal is limited to a review of the administrative record, the Corps memorandum for the record of the appeal conference or meeting, and any supplemental information that the review officer has determined is needed to clarify the administrative record. Neither the appellant nor the Corps may add new information or analyses to the record. However, you may provide additional information to clarify the location of information that is already in the administrative record.

POINT OF CONTACT FOR QUESTIONS OR INFORMATION:

If you have questions regarding this decision and/or the appeal process you may contact:

Charles F. Frerker, PM
US Army Corps of Engineers
St. Louis District (OD-F)
1222 Spruce Street
St. Louis, MO 63103-2833
Phone: (314) 331-8583 Fax: (314) 331-8741

If you only have questions regarding the appeal process you may also contact:

Division Engineer
ATTN: David W. Gesl
Administrative Appeals Review Officer
U.S. Army Corps of Engineers
P.O. Box 2870
Portland, OR 97208-2870
Telephone: 503-808-3825

RIGHT OF ENTRY: Your signature below grants the right of entry to Corps of Engineers personnel, and any government consultants, to conduct investigations of the project site during the course of the appeal process. You will be provided a 15 day notice of any site investigation, and will have the opportunity to participate in all site investigations.

	Date:	Telephone number:
_____ Signature of appellant or agent.		

DEPARTMENT OF THE ARMY PERMIT

Permittee: **Limited Leasing Company**

Permit No.: **P-2788** (ORM No. MVS-2011-177)

Issuing Office: **U.S. Army Engineer District, St. Louis**

NOTE: The term "you" and its derivatives, as used in this permit, means the permittee or any future transferee. The term "this office" refers to the appropriate district or division office of the Corps of Engineers having jurisdiction over the permitted activity or the appropriate official of that office acting under the authority of the commanding officer.

You are authorized to perform work in accordance with the terms and conditions specified below, and with the plans and drawings attached hereto which are incorporated in and made a part of this permit.

Project Description: You are authorized to extract up to 990,000 tons of sand and gravel per year from the portion of the St. Charles segment of the Missouri River regulated by the St. Louis District (river miles 0.0 to 49.8) with a mobile, floating, hydraulic dredge plant. Water and dredged materials will be passed through onboard screens allowing the desired material to be loaded onto barges and undesired material and water to be discharged back into the river at the dredging location. Filled barges will be transported to existing offloading facilities where a crane or front end loader will unload the material for stockpiling and commercial sale. The permits will be subject to all the special conditions that follow and will expire on December 31, 2015. The 2011 tonnage limits will retroactively apply to all dredging since the beginning of 2011. These tonnage limits are of sand when it is offloaded from the barge with a moisture content of approximately 10%

Permit Drawings: Please use the location maps from the 2007 permit decision, and the electronic authorized dredging zone shape files with any modifications sent to you in subsequent permit extensions. We will send you updated maps and/or electronic shape files with the execution of the permit or sooner if possible. The maps and electronic shape files are just a visual representation of where you can or cannot dredge. The legal and authoritative source regarding where you can or cannot dredge, is contained in the project description, project location, and special conditions of this permit.

Project Location: You may dredge in the following general reaches of Missouri River (this may or may not exclude all the resource protection zones): river miles 0.00-12.00, 20.00-35.00, and 40.00-47.00.

Permit Conditions:

General Conditions:

1. The time limit for completing the work authorized ends on 31 December 2015. If you find that you need more time to complete the authorized activity, submit your request for a time extension to this office for consideration at least one month before the above date is reached.

2. You must maintain the activity authorized by this permit in conformance with the terms and conditions of this permit. You are not relieved of this requirement if you abandon the permitted activity, although you may make a good faith transfer to a third party in compliance with General Condition 4 below. Should you wish to cease to maintain the authorized activity or should you desire to abandon it without a good faith transfer, you must obtain a modification of this permit from this office, which may require restoration of the area.

3. If you discover any previously unknown historic or archeological remains while accomplishing the activity authorized by this permit, you must immediately notify this office of what you have found. We will initiate the Federal and state coordination required to determine if the remains warrant a recovery effort or if the site is eligible for listing in the National Register of Historic Places.

4. If you sell the property associated with this permit, you must obtain the signature of the new owner in the space provided and forward a copy of the permit to this office to validate the transfer of this authorization.

5. If a conditioned water quality certification has been issued for your project, you must comply with the conditions specified in the certification as special conditions to this permit. For your convenience, a copy of the certification is attached if it contains such conditions.

6. You must allow representatives from this office to inspect the authorized activity at any time deemed necessary to ensure that it is being or has been accomplished in accordance with the terms and conditions of your permit.

Special Conditions:

See continuation sheets, pages 4 - 8, of this document.

Further Information:

1. Congressional Authorities: You have been authorized to undertake the activity described above pursuant to:

(X) Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403).

(X) Section 404 of the Clean Water Act (33 U.S.C. 1344).

( ) Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972 (33 U.S.C. 1413).

2. Limits of this authorization.

a. This permit does not obviate the need to obtain other Federal, state, or local authorization required by law.

b. This permit does not grant any property rights or exclusive privileges.

c. This permit does not authorize any injury to the property or rights of others.

d. This permit does not authorize interference with any existing or proposed Federal project.

3. Limits of Federal Liability. In issuing this permit, the Federal Government does not assume any liability for the following:

a. Damages to the permitted project or uses thereof as a result of other permitted or unpermitted activities or from natural causes.

b. Damages to the permitted project or uses thereof as a result of current or future activities undertaken by or on behalf of the United States in the public interest.

c. Damages to persons, property, or to other permitted or unpermitted activities or structures caused by the activity authorized by this permit.

d. Design or construction deficiencies associated with the permitted work.

e. Damage claims associated with any future modification, suspension, or revocation of this permit.

4. Reliance on Applicant's Data: The determination of this office that issuance of this permit is not contrary to the public interest was made in reliance on the information you provided.

5. Reevaluation of Permit Decision. This office may reevaluate its decision on this permit at any time the circumstances warrant. Circumstances that could require a reevaluation include, but are not limited to, the following:

a. You fail to comply with the terms and conditions of this permit.

b. The information provided by you in support of your permit application proves to have been false, incomplete, or inaccurate (See 4 above).

c. Significant new information surfaces which this office did not consider in reaching the original public interest decision.

Such a reevaluation may result in a determination that it is appropriate to use the suspension, modification, and revocation procedures contained in 33 CFR 325.7 or enforcement procedures such as those contained in 33 CFR 326.4 and 326.5. The referenced enforcement procedures provide for the issuance of an administrative order requiring you to comply with the terms and conditions of your permit and for the initiation of legal action where appropriate. You will be required to pay for any corrective measures ordered by this office, and if you fail to comply with such directive, this office may in certain situations (such as those specified in 33 CFR 209.170) accomplish the corrective measures by contract or otherwise and bill you for the cost.

6. Extensions. General condition 1 establishes a time limit for the completion of the activity authorized by this permit. Unless there are circumstances requiring either a prompt completion of the authorized activity or a reevaluation of the public interest decision, the Corps will normally give favorable consideration to a request for an extension of this time limit.

Your signature below, as permittee, indicates that you accept and agree to comply with the terms and conditions of this permit.

_____ _____

(PERMITTEE) (DATE)
Limited Leasing Company
Mr. Brian Viehmann
1777 Highway 79 South
Old Monroe, Missouri 63369

This permit becomes effective when the Federal official, designated to act for the Secretary of the Army, has signed below.

_____ _____

(DISTRICT ENGINEER) (DATE)
Thomas E. O'Hara, Jr.
Colonel, U.S. Army
By: Danny D. McClendon
Chief, Regulatory Branch

When the structures or work authorized by this permit are still in existence at the time the property is transferred, the terms and conditions of this permit will continue to be binding on the new owner(s) of the property. To validate the transfer of this permit and the associated liabilities associated with compliance with its terms and conditions, have the transferee sign and date below.

_____ _____

(TRANSFEREE) (DATE)

Special Conditions:

a. You understand and agree that, if future operations by the United States require the removal, relocation, or other alteration, of the structure or work herein authorized, or if, in the opinion of the Secretary of the Army or his authorized representative, said structure or work shall cause unreasonable obstruction to the free navigation of the navigable waters, you will be required, upon due notice from the U.S. Army Corps of Engineers (USACE), to remove, relocate, or alter the structural work or obstructions caused thereby, without expense to the United States. No claim shall be made against the United States on account of any such removal or alteration.

b. You must implement a Dredge Monitoring Plan (DMP) approved by the Regulatory Branch of the Kansas City District, USACE. If a DMP has not been previously approved by the Regulatory Branch, USACE, Kansas City District, you must provide within 30 days of execution of the permit a DMP for each individual dredge plant to the Regulatory Branch of the USACE, Kansas City District for approval. The DMP must show how you will monitor, record, and report the cutter-head position, cutter-head operating status, extraction tonnage, and the presence of any hard substrates, mussel shells, or unusual concentration of gravel in an impartial, unbiased, reliable, and accurate manner. The DMP must include the specifications of the process and the Dredge Monitoring System (DMS) including sensors, hardware, software, communications devices the permittee will use to: gather data; perform quality control on those data; calibrate, test, and repair sensors when they fail; and transfer the data to the Regulatory Branch of the Kansas City District, USACE. The DMS must include automated differential Global Positioning System (DGPS) equipment (or other comparable system) operating with a minimum accuracy level of 1-3 meters horizontal Circular Error Probable with horizontal positions tied into the UTM Zone 15 NAD 83 (feet) coordinate system recorded to the nearest foot. The DMS must always be on, recording cutter-head position and operating status every 5 minutes, 24-hours a day, 365 days a year, even when the dredge is not operating. The data logged each month must be submitted by email to cody.s.wheeler@usace.army.mil at the Regulatory Branch of the Kansas City District, USACE by the 7th day of the following month. If you do not receive an email confirmation that the report was received, you must contact the Regulatory Branch of the Kansas City District, USACE at 816-389-3990 for revised instructions for filing the monthly report. The extracted material must be measured by one of the methods described in the attached Standard Operating Procedure for Hydrographic Surveying and Dredge Monitoring. If the tonnage is measured by scale at the off-loading facility, the DMP should also describe how the operation will record the date, time, river mile, coordinates, and approximate tonnage of each barge loaded in one location. If a barge is partially filled at one anchor setting then completed at a new anchor setting, the tonnage should be estimated separately for each location. This information must be provided monthly by email on the attached Missouri River Commercial Dredging Location/Volume Report spreadsheet to cody.s.wheeler@usace.army.mil at the Regulatory Branch of the Kansas City District, USACE by the 7th day of the following month. If you do not receive an email confirmation that the report was received, you must contact the Regulatory Branch of the Kansas City District, USACE at 816-389-3990 for revised instructions for filing the monthly report. Faulty sensors or other components identified in the DMP must be repaired within 96 hours. The DMS must not be inoperable more than 5 percent of the time. You must install an approved DMS and have it inspected by the Regulatory Branch of the Kansas City District, USACE within 120 days of execution of the permit or you must cease dredging operations until it is installed and inspected or you submit a justification of the delay and an installation schedule and get an extension of this deadline in writing from the Regulatory Branch of the Kansas City District, USACE.

c. The USACE periodically surveys the river as part of the management and operation of the Bank Stabilization and Navigation Project. If, for any reason, the USACE has not surveyed the river in the fourth year (2014) of the five-year permit cycle, the authorized dredging companies must have the lower 498 miles of the LOMR surveyed during the summer months in accordance with the Standard Operating Procedures for Hydrographic Surveying and Dredge Monitoring. The survey shall be completed between June and September of 2014 and submitted to the Regulatory Branch of the Kansas City District, USACE by November 1, 2014.

d. If any part of the authorized work is performed by a contractor, before starting work you must discuss the terms and conditions of this permit with the contractor and must give a copy of this entire permit to the contractor. After the initial 120 days of this permit, any contracted dredges or barges must also be equipped with and operate in accordance with an approved DMP as required in Special Condition "b". The DMP and system must be approved by the Regulatory Branch of the Kansas City District, USACE prior to starting work.

e. Until the dredges and barges are equipped with the DMS required by Special Condition "b", you must, for each dredge operated, record Global Positioning System (GPS) coordinates, tons of material removed, and the presence of any hard substrates or unusual concentration of gravel daily. If the dredge moves more than 100 feet in any one day then the amount of material removed from each location must be recorded separately. The operators may use hand-held GPS devices or automatically recording devices, but with which ever system used, must identify the device make/model and recording location. This information must be recorded on the attached Missouri River Commercial Dredging Location/Volume Report in an electronic spreadsheet. You must furnish a copy of the completed monthly report by email to cody.s.wheeler@usace.army.mil at the Regulatory Branch of the Kansas City District, USACE by the 7th day of the following month. If you do not receive an email confirmation that the report was received, you must contact the Regulatory Branch of the Kansas City District, USACE at 816-389-3990 for revised instructions for filing the monthly report.

f. No more than 300,000 tons of material shall be extracted within one year from each five-mile reach of the Missouri River between river miles 15 to 20, 25 to 35, 90 to 100, 140 to 150, 355 to 395, and 445 to 455. When the dredge report database of the Regulatory Branch of the Kansas City District, USACE indicates that extraction in a five-mile reach has reached 300,000 tons, all dredgers authorized to operate within that reach will be notified that it is closed to further dredging for the remainder of the calendar year unless a waiver is requested and received in writing from the Regulatory Branch of the Kansas City District, USACE.

g. Up to 10% of your authorized annual tonnage for each segment may be carried over each year to be extracted within that segment the following year. Annual tonnage with carryover may never exceed 110% of annual authorized tonnage of each segment. At the end of each year you must notify the Regulatory Branch of the Kansas City District, USACE in your annual tonnage report of any unextracted tonnage that you intend to carryover.

h. In permit conditions that specify a linear distance exclusion zone adjacent to a river feature, "dredging" refers to the operation of hydraulic cutter-head suction dredging. The exclusion zone distances will apply to and be measured from the end of the cutter head, rather than from a general point on the dredge.

i. You must confine dredging to between the Rectified Channel Lines (RCL) with the following restrictions. Dredging must be conducted in such a manner to preserve the structural integrity of the landmass landward of the RCL. This must be accomplished by maintaining an adequate "no dredging

or discharging" zone riverward of the RCL so that material will stabilize into the dredging area at its natural angle of repose. This slope will vary depending upon river location and the type of material being dredged, but it is your responsibility to ensure that this shallow water interface landward of the RCL be maintained.

j. You must not dredge within 500 feet of any levee centerline, pipeline or submerged utility crossing, bridge pier or abutment; nor within 200 feet of any dike, revetment, or other structure built or authorized by the U.S. Government; nor within 100 feet of any normal bank line or island, without special authorization. When dredging is performed adjacent to river stabilization structures, the dredging may be conducted only in the present streambed of the river at the authorized locations. This condition represents only the minimum distances away from structures and natural features that you can conduct dredging and does not relieve you from liability for damage arising from dredging. You must be satisfied that dredging to these limits will not cause damage to public and private property.

k. You must not conduct dredging operations in a zone extending 4,000 feet upstream and 500 feet downstream from any municipal drinking water intake structures located along either bank of the river unless you obtain an exemption to this condition in writing from the Regulatory Branch of the Kansas City District, USACE.

l. You must not conduct dredging operations in a zone extending 1,000 feet upstream and 1,000 feet downstream from any municipal drinking water horizontal collector wells located along either bank of the river unless you obtain an exemption to this condition in writing from the Regulatory Branch of the Kansas City District, USACE.

m. You must not conduct dredging operations in a zone extending 500 feet upstream and 500 feet downstream from any other water intake structures other than those used for municipal drinking water unless you obtain an exemption to this condition in writing from the Regulatory Branch of the Kansas City District, USACE.

n. You may discharge back into the Missouri River material spilled off the conveyer belts and unusable material separated out in the on-shore sand washing and handling facility. To subtract that tonnage from your annual extraction limit, you must follow a plan approved in writing by the Regulatory Branch of the Kansas City District, USACE. This plan must show where and how the material will be discharged and how the amount of dredged material discharged back into the river will be measured and reported to the Regulatory Branch of the Kansas City District, USACE. The total extraction tonnage will equal the tonnage extracted and barged to shore minus that amount intentionally returned to the Missouri River.

o. You may return unwanted dredged material and river water (but not garbage)extracted from the Missouri River back to the Missouri River. You must not dispose of waste materials, water, or garbage below the ordinary high water mark of any other water body, in a wetland area, or at any location where the materials could be introduced into the water body or an adjacent wetland as a result of runoff, flooding, wind, or other natural forces.

p. You must comply with all U.S. Coast Guard, State of Missouri, State of Kansas (river mile 367 to 490), and USACE regulations concerning the prevention of navigation obstructions in navigable waters of the United States.

q. You must conduct operations in the Missouri River such that there will be no unreasonable interference with navigation by the existence or use of the activity authorized herein.

r. To avoid impacting endangered species and cultural resources, you must confine dredging to the specified reaches listed on page 1 of the permit document. If you desire to expand or relocate your dredging operation outside the specified reaches, you must submit a request to the Regulatory Branch of the Kansas City District, USACE identifying the proposed new limits, in river miles and the location of the unloading facility to be employed.. Approval of the requests, if granted, will be provided in writing with modified reaches identified on the Missouri River Hydrographic Survey. Copies of the relocation requests must be furnished to the following agencies:

1. U.S. Fish and Wildlife Service, Columbia Field Office
2. Missouri Department of Natural Resources, Water Pollution Control Program
3. Missouri Department of Natural Resources, State Historic Preservation Office
4. Kansas Department of Health and Environment, Bureau of Water (for operations extending upstream of river mile 367)
5. Kansas State Historical Society, State Historic Preservation Office (for operations extending upstream of river mile 367)
6. Corps of Engineers, Kansas City District, Hydrologic Engineering Branch

s. You must not conduct dredging operations within the reaches identified in the following table as Pallid Sturgeon habitat features.

Missouri River Miles (including 0.25 mile buffer)		**Pallid Sturgeon Habitat Feature**
Downstream	Upstream	
44.25	44.85	RDB Centaur Chute
49.15	50.05	RDB Centaur Chute
56.85	59.05	LDB Chute/Island
58.55	61.25	RDB Chute/Island
89.75	91.10	RDB Island
89.90	91.45	LDB Loutre Slough
91.20	93.55	LDB Lunch Island
103.00	104.95	Both Gasconade Confluence and Dike Field
105.20	106.25	RDB Dike Field
115.20	115.95	RDB Island
118.40	119.15	RDB Dike Field
119.35	119.85	RDB St. Aubert Island/Chute
124.35	124.95	RDB St. Aubert Island/Chute
126.05	126.90	LDB Dike Field
127.50	130.20	Both Osage River Confluence and Dike Field
157.00	158.45	LDB Island
176.40	178.35	LDB Island/RDB Tadpole Island Chute
180.15	180.65	RDB Tadpole Island Chute
184.75	185.65	RDB Chute
186.90	188.20	RDB Chute and Dike Field
193.40	195.75	RDB Dike Field/Island
202.10	202.75	RDB Lamine River Confluence
210.00	219.65	Lisbon/Jameson Complex
226.95	227.55	LDB Little Chariton Confluence

238.40	239.10	LDB Chariton River Confluence
249.65	250.30	LDB Grand River Confluence
269.85	271.35	RDB Shallow/Island
280.40	282.05	RDB Island
297.90	299.05	RDB Island
300.00	301.05	LDB Island
367.00	367.75	RDB Kansas River Confluence
390.85	391.45	LDB Platte River Confluence
456.75	457.25	LDB Worthwine Chute
458.75	459.25	LDB Worthwine Chute
462.65	463.25	LDB Nodaway River Confluence
478.55	479.15	RDB Wolf Creek Confluence
494.55	495.20	RDB Big Nemaha River Confluence

t. You must discharge only suitable dredged material that is free from toxic pollutants in other than trace quantities.

u. You must investigate for water supply intakes or other activities which may be affected by suspended solids and turbidity increases caused by work in the watercourse and give sufficient notice to the owners of affected activities to allow preparation for any changes in water quality. You must furnish the Regulatory Branch of the Kansas City District, USACE with a copy of any written notification provided in accordance with this condition.

v. You must employ measures to prevent dredged materials stored or disposed of on shore from running off or eroding into wetlands or tributaries to the Missouri River.

w. You must employ measures to prevent or control spilled fuels or lubricants from entering the waters of the United States.

x. You must store all construction materials, equipment, and/or petroleum products that are part of the on-shore operation, when not in use, above anticipated high water levels.

STATE OF MISSOURI
Jeremiah W. (Jay) Nixon, Governor • Sara Parker Pauley, Director
DEPARTMENT OF NATURAL RESOURCES
www.dnr.mo.gov

MAR 23 2011

Mr. Brian J. Viehmann
Limited Leasing Company
1777 Highway 79 South
Old Monroe, MO 63369

Various Counties
Permit Number 2011-177/P-2788
CES002563

Dear Mr. Viehmann:

The Missouri Department of Natural Resources' Water Protection Program (Department) is in receipt of the U.S. Army Corps of Engineers' (Corps) letter dated February 17, 2011, requesting that your Clean Water Act Section 401 Water Quality Certification (certification) be issued for the Corps' Permit Number 2011-177. The Department understands that Limited Leasing Company will abide by the certification and the Corps issued Clean Water Act Section 404 Permit (permit) for commercial dredging operations in the Missouri River.

This letter also serves as an extension of the certification issued for Permit Number P-2342 for an additional 60 days, unless an appeal of proffered Department of the Army Permit P-2342 is accepted by the Corps' Northwestern Division, in which case the certification for P-2342 would expire 30 days after the final appeal decision.

This office certifies that the ongoing activities apparently will not cause the general or numeric criteria to be exceeded nor impair beneficial uses established in Water Quality Standards, 10 CSR 20-7.031, provided the following condition is met:

- The U.S. Army Corps of Engineers permit decision and all conditions are followed as authorized by the Corps under Section 404 of the Clean Water Act (33 USC 1344). The implementing regulation for this Act is found at 33 CFR 320-330.

Missouri Clean Water Law, Chapter 644.052.9 RSMo, gives the Department the authority to collect a fee for the issuance of a certification. As of January 1, 2011, this authority has expired, which means the Department no longer has statutory authority to collect water permit fees. This includes the certification fee. Please do not send a payment to the Department.

If you were affected by this decision, you may appeal to have the matter heard by the Administrative Hearing Commission (commission). To appeal, you must file a petition with the commission within thirty (30) days after the date this decision was mailed or the date it was delivered, whichever date was earlier. If any such petition is sent by registered mail or certified mail, it will be deemed filed on the date it is mailed. If it is sent by any method other than registered mail or certified mail, it will be deemed filed on the date it is received by the commission.

Recycled Paper

Water Quality Standards must be met during any operations authorized by these permits. If you have any questions, please contact Ms. Carrie M. Schulte by phone at (573) 751-7023, by e-mail at carrie.schulte@dnr.mo.gov or by mail at Missouri Department of Natural Resources, Water Protection Program, NPDES Permits and Engineering Section, P.O. Box 176, Jefferson City, MO 65102-0176. Thank you for working with the Department to protect our environment.

Sincerely,

WATER PROTECTION PROGRAM

Refaat Mefrakis, P.E., Chief
NPDES Permits and Engineering Section

RM:csp

c: Mr. Cody Wheeler, Army Corps of Engineers, Kansas City District
Mr. Charles Frerker, Army Corps of Engineers, St. Louis District
Ms. Donna Riebeling, St. Louis Regional Office
File Copy

DEPARTMENT OF THE ARMY
KANSAS CITY DISTRICT, CORPS OF ENGINEERS
635 FEDERAL BUILDING
601 E 12TH STREET
KANSAS CITY MO 64106-2824

REPLY TO
ATTENTION OF

MAR 3 1 2011

Regulatory Branch
(NWK-2008-1765)

Mr. David Penny
The Master's Dredging Company, Inc.
P.O. Box 9
Lawrence, Kansas 66044

Dear Mr. Penny:

This letter concerns your application No. 2008-1765, dated March 24, 2008, requesting Department of the Army (DA) permit authorization to extract up to 1,000,000 tons of sand and gravel per year from the Missouri River with a mobile, floating, hydraulic cutter-head, suction dredge plant.

I have reviewed the recently completed Final EIS for Missouri River Commercial Dredging (Final EIS), the Record of Decision (ROD) and all other available information regarding your current proposal along with the proposals of other commercial sand dredgers on the Missouri River. I have concluded that authorization of dredging from the lower 498 miles of the Missouri River in excess of the annual tonnage of aggregate outlined in the Least Environmentally Damaging Practicable Alternative (LEDPA) of the ROD, would result in unacceptable impacts on the aquatic environment of the Missouri River. I have determined that issuance of any permits for extraction of aggregate in excess of the LEDPA annual tonnage would be contrary to the public interest because less environmentally damaging practicable alternatives are available which would meet your objectives of obtaining sand and gravel. Annual extraction and past authorized amounts have exceeded the LEDPA annual tonnage in recent years so even the currently authorized dredgers face reduced extraction limits, hence, there is no additional available tonnage. Therefore, I am denying your request for authorization to extract up to 1,000,000 tons of sand and gravel per year from the Missouri River.

Please note that the Corps of Engineers has published an administrative appeal regulation at 33 Code of Federal Regulations (C.F.R.) Part 331. The purpose of this regulation is to establish administrative appeals policies and procedures for final Corps of Engineers' geographic jurisdictional determinations and permit denials with prejudice. The appeals process allows you to pursue an administrative appeal of a final Corps of Engineers' decision or determination with which you disagree. The Final EIS and Record of Decision used to evaluate your proposed activity can be viewed and downloaded at:
http://www.nwk.usace.army.mil/regulatory/Dredging/MO/MOdredging.htm.

This letter contains a permit denial for your commercial dredging permit application. If you object to this decision, you may request an administrative appeal under Corps regulations at 33 C.F.R. 331. Enclosed you will find a Notification of Administrative Appeal Options and Process (NAP) and Request for Appeal (RFA) form. If you request to appeal this decision you must submit a completed RFA form to the Northwestern Division Office at the following address:

Division Engineer
ATTN: David W. Gesl
Administrative Appeals Review Officer
U.S. Army Corps of Engineers
P.O. Box 2870
Portland, OR 97208-2870
Telephone: 503-808-3825

In order for an RFA to be accepted, the Corps must determine that it is complete, that it meets the criteria for appeal under 33 C.F.R. 331.5, and that it has been received by the Division Office within 60 days of the date of the NAP. Should you decide to submit an RFA form, it must be received at the above address by May 31, 2011.

It is not necessary to submit an RFA form to the Division Office if you do not object to the decision in this letter.

We are interested in your thoughts and opinions concerning your experience with the Kansas City District Regulatory Program. We have placed an automated version of our Customer Service Survey form at: http://per2.nwp.usace.army.mil/survey.html. At your request, we will mail you a paper copy that you may complete and return to us by mail or fax.

If you have any questions concerning this matter, please contact Mr. Cody S. Wheeler at 816-389-3739 (FAX 816-389-2032).

Sincerely,

Anthony J. Hofmann
Colonel, Corps of Engineers
District Commander

Enclosure

NOTIFICATION OF ADMINISTRATIVE APPEAL OPTIONS AND PROCESS AND REQUEST FOR APPEAL

Applicant: The Master's Dredging Company, Inc.	File Number: 2008-1765	Date: Mar. 31, 2011
Attached is:		See Section below
	A. INITIAL PROFFERED PERMIT (Standard Permit or Letter of Permission)	A
	B. PROFFERED PERMIT (Standard Permit or Letter of Permission)	B
XX	C. PERMIT DENIAL	C
	D. APPROVED JURISDICTIONAL DETERMINATION	D
	E. PRELIMINARY JURISDICTIONAL DETERMINATION	E

SECTION I - The following identifies your rights and options regarding a modification, reconsideration, or administrative appeal of the above decision. Additional information may be found at http://www.usace.army.mil/inet/functions/cw/cecwo/reg or Corps regulations at 33 CFR Part 331.

A: INITIAL PROFFERED PERMIT: You may accept or request modification of the permit.

- ACCEPT: If you received a Standard Permit, you may sign the permit document and return it to the District Engineer for final authorization. If you received a Letter of Permission (LOP), you may accept the LOP and your work is authorized. Your signature on the Standard Permit or acceptance of the LOP means that you accept the permit in its entirety, and waive all rights to appeal the permit, including its terms and conditions, and approved jurisdictional determinations associated with the permit.
- REQUEST MODIFICATION: If you object to the permit (Standard or LOP) because of certain terms and conditions therein, you may request that the permit be modified accordingly. You must complete Section II of this form and return the form to the District Engineer. Your objections must be received by the District Engineer within 60 days of the date of this notice, or you will forfeit your right to appeal the permit in the future. Upon receipt of your letter, the District Engineer will evaluate your objections and may: (a) modify the permit to address all of your concerns, (b) modify the permit to address some of your objections, or (c) not modify the permit having determined that the permit should be issued as previously written. After evaluating your objections, the District Engineer will send you a proffered permit for your reconsideration, as indicated in Section B below.

B: PROFFERED PERMIT: You may accept or appeal the permit.

- ACCEPT: If you received a Standard Permit, you may sign the permit document and return it to the District Engineer for final authorization. If you received a Letter of Permission (LOP), you may accept the LOP and your work is authorized. Your signature on the Standard Permit or acceptance of the LOP means that you accept the permit in its entirety, and waive all rights to appeal the permit, including its terms and conditions, and approved jurisdictional determinations associated with the permit.
- APPEAL: If you choose to decline the proffered permit (Standard or LOP) because of certain terms and conditions therein, you may appeal the declined permit under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the Division Engineer (address on page 2). This form must be received by the Division Engineer within 60 days of the date of this notice.

C: PERMIT DENIAL: You may appeal the denial of a permit under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the Division Engineer (address on page 2). This form must be received by the Division Engineer within 60 days of the date of this notice.

D: APPROVED JURISDICTIONAL DETERMINATION: You may accept the approved JD, appeal the approved JD, or submit new information and request reconsideration of the approved JD.

- ACCEPT: You do not need to notify the Corps to accept an approved JD. Failure to notify the Corps within 60 days of the date of this notice, means that you accept the approved JD in its entirety, and waive all rights to appeal the approved JD.
- APPEAL: If you disagree with the approved JD, you may appeal the approved JD under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the Division Engineer (address on page 2). This form must be received by the Division Engineer within 60 days of the date of this notice.
- RECONSIDERATION BASED ON NEW INFORMATION: You may submit new information to the District Engineer for reconsideration of an approved JD. You must submit the information within 60 days of the date of this notice.

E: PRELIMINARY JURISDICTIONAL DETERMINATION: You do not need to respond to the Corps regarding the preliminary JD. The preliminary JD is not appealable. If you wish, you may request an approved JD (which may be appealed), by contacting the Corps district for further instruction. Also you may provide new information for further consideration by the Corps to reevaluate the JD.

SECTION II - Fill out this section and return this form to the appropriate office only if submitting a request for modification or reconsideration to the District Engineer, or if submitting a request for Administrative Appeal to the Division Engineer. All such submittals must be made within 60 days of the date of this notice.

Submit the following requests to the District Engineer

A. Modification of an INITIAL PROFFERED PERMIT (Item A).
D. Reconsideration of an APPROVED JURISDICTIONAL DETERMINATION based on NEW INFORMATION (Item D RECONSIDERATION).

Submit the following requests to the Division Engineer

B. Administrative Appeal of a PROFFERED PERMIT (Item B).
C. Administrative Appeal of a PERMIT DENIAL (Item C).
D. Administrative Appeal of an APPROVED JURISDICTIONAL DETERMINATION (Item D APPEAL) (for reasons other than reconsideration of an approved JD based on new information).

(Note: Preliminary Jurisdictional Determinations (Item E) are not appealable. If you have concerns regarding a preliminary Jurisdictional Determination, you can request an approved Jurisdictional Determination).

REASONS FOR APPEAL OR OBJECTIONS: (Describe your reasons for appealing the decision or your objections to an initial proffered permit in clear concise statements. You may attach additional information to this form to clarify where your reasons or objections are addressed in the administrative record.)

SUBMITTAL OF NEW OR ADDITIONAL INFORMATION: The District Engineer may accept and consider new information if you request a modification to an initial proffered permit (Part A), or a reconsideration of an approved JD (Part D). An administrative appeal to the Division Engineer is limited to a review of the administrative record, the Corps memorandum for the record of the appeal conference or meeting, and any supplemental information that the review officer has determined is needed to clarify the administrative record. Neither the appellant nor the Corps may add new information or analyses to the administrative record. However, you may provide additional information to clarify the location of information that is already in the administrative record.

POINT OF CONTACT FOR QUESTIONS OR INFORMATION:

If you have questions regarding this decision and/or the appeal process you may contact: DISTRICT ENGINEER **Attn: Mark D. Frazier** **Chief, Regulatory Branch** **U.S. Army Engineer District, Kansas City** **601 E. 12th Street, Suite 402** **Kansas City, MO 64106-2896** **Telephone: 816-389-3990** (Use this address for submittals to the District Engineer)	If you wish to submit an appeal or have questions regarding the appeal process you may contact: DIVISION ENGINEER **Attn: David W. Gesl** **Administrative Appeals Review Officer** **U.S. Army Engineer Division, Northwestern Division** **P.O. Box 2870** **Portland, OR 97208-2870** **Telephone: 503-808-3825**

RIGHT OF ENTRY: Your signature below grants the right of entry to Corps of Engineers personnel, and any government consultants, to conduct investigations of the project site during the course of the appeal process. You will be provided a 15 day notice of any site investigation, and will have the opportunity to participate in all site investigations.

_____ Signature of appellant or agent.	Date:	Telephone number:

DEPARTMENT OF THE ARMY
KANSAS CITY DISTRICT, CORPS OF ENGINEERS
635 FEDERAL BUILDING
601 E 12TH STREET
KANSAS CITY MO 64106-2824

REPLY TO
ATTENTION OF

MAR 3 1 2011

Regulatory Branch
(NWK-2001-1435)

Mr. Eric E. Rau
Edward N. Rau Contractor Company
2809 State Road A, Suite A
Washington, Missouri 63090-6442

Dear Mr. Rau:

This concerns your application No. 2001-1435, dated March 19, 2008, requesting Department of the Army (DA) permit authorization to extract up to 100,000 tons of sand and gravel per year from the Missouri River with a mobile, floating, hydraulic suction dredge plant.

I have reviewed the recently completed Final EIS for Missouri River Commercial Dredging (Final EIS), the Record of Decision (ROD) and all other available information regarding your current proposal along with the proposals of other commercial sand dredgers on the Missouri River. I have concluded that authorization of dredging from the lower 498 miles of the Missouri River in excess of the annual tonnage of aggregate outlined in the Least Environmentally Damaging Practicable Alternative (LEDPA) of the ROD, would result in unacceptable impacts on the aquatic environment of the Missouri River. I have determined that issuance of any permits for extraction of aggregate in excess of the LEDPA annual tonnage would be contrary to the public interest because less environmentally damaging practicable alternatives are available which would meet your objectives of obtaining sand and gravel. Annual extraction and past authorized amounts have exceeded the LEDPA annual tonnage in recent years so even the currently authorized dredgers face reduced extraction limits, hence, there is no additional available tonnage. Therefore, I am denying your request for authorization to extract up to 100,000 tons of sand and gravel per year from the Missouri River.

Please note that the Corps of Engineers has published an administrative appeal regulation at 33 Code of Federal Regulations (C.F.R.) Part 331. The purpose of this regulation is to establish administrative appeals policies and procedures for final Corps of Engineers' geographic jurisdictional determinations and permit denials with prejudice. The appeals process allows you to pursue an administrative appeal of a final Corps of Engineers' decision or determination with which you disagree. The Final EIS and Record of Decision used to evaluate your proposed activity can be viewed and downloaded at:
http://www.nwk.usace.army.mil/regulatory/Dredging/MO/MOdredging.htm.

This letter contains a permit denial for your commercial dredging permit application. If you object to this decision, you may request an administrative appeal under Corps regulations at 33 C.F.R. 331. Enclosed you will find a Notification of Administrative Appeal Options and Process (NAP) and Request for Appeal (RFA) form. If you request to appeal this decision you must submit a completed RFA form to the Northwestern Division Office at the following address:

Division Engineer
ATTN: David W. Gesl
Administrative Appeals Review Officer
U.S. Army Corps of Engineers
P.O. Box 2870
Portland, OR 97208-2870
Telephone: 503-808-3825

In order for an RFA to be accepted, the Corps must determine that it is complete, that it meets the criteria for appeal under 33 C.F.R. 331.5, and that it has been received by the Division Office within 60 days of the date of the NAP. Should you decide to submit an RFA form, it must be received at the above address by May 31, 2011.

It is not necessary to submit an RFA form to the Division Office if you do not object to the decision in this letter.

We are interested in your thoughts and opinions concerning your experience with the Kansas City District Regulatory Program. We have placed an automated version of our Customer Service Survey form at: http://per2.nwp.usace.army.mil/survey.html. At your request, we will mail you a paper copy that you may complete and return to us by mail or fax.

If you have any questions concerning this matter, please contact Mr. Cody S. Wheeler at 816-389-3739 (FAX 816-389-2032).

Sincerely,

Anthony J. Hofmann
Colonel, Corps of Engineers
District Commander

Enclosure

NOTIFICATION OF ADMINISTRATIVE APPEAL OPTIONS AND PROCESS AND REQUEST FOR APPEAL

Applicant: Edward N. Rau Contractor Company		File Number: 2001-1435	Date: Mar. 31, 2011
Attached is:			See Section below
	A. INITIAL PROFFERED PERMIT (Standard Permit or Letter of Permission)		A
	B. PROFFERED PERMIT (Standard Permit or Letter of Permission)		B
XX	C. PERMIT DENIAL		C
	D. APPROVED JURISDICTIONAL DETERMINATION		D
	E. PRELIMINARY JURISDICTIONAL DETERMINATION		E

SECTION I - The following identifies your rights and options regarding a modification, reconsideration, or administrative appeal of the above decision. Additional information may be found at http://www.usace.army.mil/inet/functions/cw/cecwo/reg or Corps regulations at 33 CFR Part 331.

A: INITIAL PROFFERED PERMIT: You may accept or request modification of the permit.

- ACCEPT: If you received a Standard Permit, you may sign the permit document and return it to the District Engineer for final authorization. If you received a Letter of Permission (LOP), you may accept the LOP and your work is authorized. Your signature on the Standard Permit or acceptance of the LOP means that you accept the permit in its entirety, and waive all rights to appeal the permit, including its terms and conditions, and approved jurisdictional determinations associated with the permit.
- REQUEST MODIFICATION: If you object to the permit (Standard or LOP) because of certain terms and conditions therein, you may request that the permit be modified accordingly. You must complete Section II of this form and return the form to the District Engineer. Your objections must be received by the District Engineer within 60 days of the date of this notice, or you will forfeit your right to appeal the permit in the future. Upon receipt of your letter, the District Engineer will evaluate your objections and may: (a) modify the permit to address all of your concerns, (b) modify the permit to address some of your objections, or (c) not modify the permit having determined that the permit should be issued as previously written. After evaluating your objections, the District Engineer will send you a proffered permit for your reconsideration, as indicated in Section B below.

B: PROFFERED PERMIT: You may accept or appeal the permit.

- ACCEPT: If you received a Standard Permit, you may sign the permit document and return it to the District Engineer for final authorization. If you received a Letter of Permission (LOP), you may accept the LOP and your work is authorized. Your signature on the Standard Permit or acceptance of the LOP means that you accept the permit in its entirety, and waive all rights to appeal the permit, including its terms and conditions, and approved jurisdictional determinations associated with the permit.
- APPEAL: If you choose to decline the proffered permit (Standard or LOP) because of certain terms and conditions therein, you may appeal the declined permit under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the Division Engineer (address on page 2). This form must be received by the Division Engineer within 60 days of the date of this notice.

C: PERMIT DENIAL: You may appeal the denial of a permit under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the Division Engineer (address on page 2). This form must be received by the Division Engineer within 60 days of the date of this notice.

D: APPROVED JURISDICTIONAL DETERMINATION: You may accept the approved JD, appeal the approved JD, or submit new information and request reconsideration of the approved JD.

- ACCEPT: You do not need to notify the Corps to accept an approved JD. Failure to notify the Corps within 60 days of the date of this notice, means that you accept the approved JD in its entirety, and waive all rights to appeal the approved JD.
- APPEAL: If you disagree with the approved JD, you may appeal the approved JD under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the Division Engineer (address on page 2). This form must be received by the Division Engineer within 60 days of the date of this notice.
- RECONSIDERATION BASED ON NEW INFORMATION: You may submit new information to the District Engineer for reconsideration of an approved JD. You must submit the information within 60 days of the date of this notice.

E: PRELIMINARY JURISDICTIONAL DETERMINATION: You do not need to respond to the Corps regarding the preliminary JD. The preliminary JD is not appealable. If you wish, you may request an approved JD (which may be appealed), by contacting the Corps district for further instruction. Also you may provide new information for further consideration by the Corps to reevaluate the JD.

SECTION II –Fill out this section and return this form to the appropriate office only if submitting a request for modification or reconsideration to the District Engineer, or if submitting a request for Administrative Appeal to the Division Engineer. All such submittals must be made within 60 days of the date of this notice.

Submit the following requests to the District Engineer

A. Modification of an INITIAL PROFFERED PERMIT (Item A).
D. Reconsideration of an APPROVED JURISDICTIONAL DETERMINATION based on NEW INFORMATION (Item D RECONSIDERATION).

Submit the following requests to the Division Engineer

B. Administrative Appeal of a PROFFERED PERMIT (Item B).
C. Administrative Appeal of a PERMIT DENIAL (Item C).
D. Administrative Appeal of an APPROVED JURISDICTIONAL DETERMINATION (Item D APPEAL) (for reasons other than reconsideration of an approved JD based on new information).

(Note: Preliminary Jurisdictional Determinations (Item E) are not appealable. If you have concerns regarding a preliminary Jurisdictional Determination, you can request an approved Jurisdictional Determination).

REASONS FOR APPEAL OR OBJECTIONS: (Describe your reasons for appealing the decision or your objections to an initial proffered permit in clear concise statements. You may attach additional information to this form to clarify where your reasons or objections are addressed in the administrative record.)

SUBMITTAL OF NEW OR ADDITIONAL INFORMATION: The District Engineer may accept and consider new information if you request a modification to an initial proffered permit (Part A), or a reconsideration of an approved JD (Part D). An administrative appeal to the Division Engineer is limited to a review of the administrative record, the Corps memorandum for the record of the appeal conference or meeting, and any supplemental information that the review officer has determined is needed to clarify the administrative record. Neither the appellant nor the Corps may add new information or analyses to the administrative record. However, you may provide additional information to clarify the location of information that is already in the administrative record.

POINT OF CONTACT FOR QUESTIONS OR INFORMATION:

If you have questions regarding this decision and/or the appeal process you may contact: DISTRICT ENGINEER **Attn: Mark D. Frazier** **Chief, Regulatory Branch** **U.S. Army Engineer District, Kansas City** **601 E. 12th Street, Suite 402** **Kansas City, MO 64106-2896** **Telephone: 816-389-3990** (Use this address for submittals to the District Engineer)	If you wish to submit an appeal or have questions regarding the appeal process you may contact: DIVISION ENGINEER **Attn: David W. Gesl** **Administrative Appeals Review Officer** **U.S. Army Engineer Division, Northwestern Division** **P.O. Box 2870** **Portland, OR 97208-2870** **Telephone: 503-808-3825**

RIGHT OF ENTRY: Your signature below grants the right of entry to Corps of Engineers personnel, and any government consultants, to conduct investigations of the project site during the course of the appeal process. You will be provided a 15 day notice of any site investigation, and will have the opportunity to participate in all site investigations.

_____ Signature of appellant or agent.	Date:	Telephone number:

Department of the Army
St. Louis District, Corps of Engineers
1222 Spruce Street
St. Louis, Missouri 63103-2833

APR 12 2011

Regulatory Branch
(MVS-2008-00193)

Mr. Ray Bohlken
Capitol Sand Company, Inc.
P.O. Box 104990
Jefferson City, Missouri 65110-4990

Dear Mr. Bohlken:

This letter concerns your application No. MVS-2008-00193, dated March 21, 2008, requesting Department of the Army (DA) permit authorization to extract up to 500,000 tons of sand and gravel per year from the Missouri River between river miles 40 and 50 with a mobile, floating, hydraulic suction dredge plant.

I have reviewed the recently completed Final EIS for Missouri River Commercial Dredging (Final EIS), the Record of Decision (ROD) and all other available information regarding your current proposal along with the proposals of other commercial sand dredgers on the Missouri River. I have concluded that authorization of dredging from the lower 50 miles of the Missouri River in excess of the annual tonnage of aggregate outlined in the Least Environmentally Damaging Practicable Alternative (LEDPA) of the ROD, would result in unacceptable impacts on the aquatic environment of the Missouri River. I have determined that issuance of any permits for extraction of aggregate in excess of the LEDPA annual tonnage would be contrary to the public interest because less environmentally damaging practicable alternatives are available which would meet the objectives of your proposed dredging. Annual extraction and past authorized amounts have exceeded the LEDPA annual tonnage in recent years so even the currently authorized dredgers face reduced extraction limits, hence, there is no additional available tonnage. Therefore, I am denying your request for authorization to extract up to 500,000 tons of sand and gravel per year from the Missouri River between river miles 40 and 50.

Please note that the Corps of Engineers has published an administrative appeal regulation at 33 Code of Federal Regulations (C.F.R.) 331. The purpose of this regulation is to establish administrative appeals policies and procedures for final Corps of Engineers' geographic jurisdictional determinations and permit denials with prejudice. The appeals process allows you to pursue an administrative appeal of a final Corps of Engineers' decision or determination with which you disagree. The Final EIS and Record of Decision used to evaluate your proposed activity can be viewed and downloaded at:
http://www.nwk.usace.army.mil/regulatory/Dredging/MO/MOdredging.htm.

Frerker/8583
Claudia/8575

This letter contains a permit denial for your commercial dredging permit application. If you object to this decision, you may request an administrative appeal under Corps regulations at 33 C.F.R. Part 331. Enclosed you will find a Notification of Administrative Appeal Options and Process (NAP) and Request for Appeal (RFA) form. If you request to appeal this decision you must submit a completed RFA form to the Northwestern Division Office at the following address:

Division Engineer
ATTN: David W. Gesl
Administrative Appeals Review Officer
U.S. Army Corps of Engineers
P.O. Box 2870
Portland, OR 97208-2870
Telephone: 503-808-3825

In order for an RFA to be accepted, the Corps must determine that it is complete, that it meets the criteria for appeal under 33 C.F.R. Part 331.5, and that it has been received by the Division Office within 60 days of the date of the NAP. Should you decide to submit an RFA form, it must be received at the above address by May 31, 2011.

It is not necessary to submit an RFA form to the Division Office if you do not object to the decision in this letter.

The St. Louis District Regulatory Branch is committed to providing quality and timely service to our customers. In an effort to improve customer service, please take a moment to complete the enclosed postage paid card or go to our Customer Service Survey found on our web site at http://per2.nwp.usace.army.mil/survey.html.

If you have any questions concerning this matter, please contact Mr. Charles Frerker at 314-331-8583.

Sincerely,
Signed:
Thomas E. O'Hara, Jr.
Colonel, U.S. Army
District Commander
Thomas E. O'Hara, Jr.
Colonel, U.S. Army
District Commander

Enclosure

FRERKER
OD-F
CF 4/6/11
for MCCLENDON
OD-F
ODLX
FINNKE
O'BRIAN
OD
for LEMINS 4/6
OC
KELLETT
DD
ZINO
DX
BITNER
DD
O'HARA
DC

NOTIFICATION OF ADMINISTRATIVE APPEAL OPTIONS AND PROCESS AND REQUEST FOR APPEAL

Applicant: **Capitol Sand Company, Inc.**		File Numbers: **2008-4990**	Date: **4-12-2011**
Attached is:			See Section below
	INITIAL PROFFERED PERMIT (Standard Permit or Letter of permission)		A
	PROFFERED PERMIT (Standard Permit or Letter of permission)		B
X	PERMIT DENIAL		C
	APPROVED JURISDICTIONAL DETERMINATION		D
	PRELIMINARY JURISDICTIONAL DETERMINATION		E

SECTION I - The following identifies your rights and options regarding an administrative appeal of the above decision. Additional information may be found at http://usace.army.mil/inet/functions/cw/cecwo/reg or Corps regulations at 33 CFR Part 331.

A: INITIAL PROFFERED PERMIT: You may accept or object to the permit.

- ACCEPT: If you received a Standard Permit, you may sign the permit document and return it to the district engineer for final authorization. If you received a Letter of Permission (LOP), you may accept the LOP and your work is authorized. Your signature on the Standard Permit or acceptance of the LOP means that you accept the permit in its entirety, and waive all rights to appeal the permit, including its terms and conditions, and approved jurisdictional determinations associated with the permit.
- OBJECT: If you object to the permit (Standard or LOP) because of certain terms and conditions therein, you may request that the permit be modified accordingly. You must complete Section II of this form and return the form to the district engineer. Your objections must be received by the district engineer within 60 days of the date of this notice, or you will forfeit your right to appeal the permit in the future. Upon receipt of your letter, the district engineer will evaluate your objections and may: (a) modify the permit to address all of your concerns, (b) modify the permit to address some of your objections, or (c) not modify the permit having determined that the permit should be issued as previously written. After evaluating your objections, the district engineer will send you a proffered permit for your reconsideration, as indicated in Section B below.

B: PROFFERED PERMIT: You may accept or appeal the permit

- ACCEPT: If you received a Standard Permit, you may sign the permit document and return it to the district engineer for final authorization. If you received a Letter of Permission (LOP), you may accept the LOP and your work is authorized. Your signature on the Standard Permit or acceptance of the LOP means that you accept the permit in its entirety, and waive all rights to appeal the permit, including its terms and conditions, and approved jurisdictional determinations associated with the permit.
- APPEAL: If you choose to decline the proffered permit (Standard or LOP) because of certain terms and conditions therein, you may appeal the declined permit under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the division engineer. The division engineer must receive this form within 60 days of the date of this notice.

C: PERMIT DENIAL: You may appeal the denial of a permit under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the division engineer. The division engineer must receive this form within 60 days of the date of this notice.

D: APPROVED JURISDICTIONAL DETERMINATION: You may accept or appeal the approved JD or provide new information.

- ACCEPT: You do not need to notify the Corps to accept an approved JD. Failure to notify the Corps within 60 days of the date of this notice, means that you accept the approved JD in its entirety, and waive all rights to appeal the approved JD.
- APPEAL: If you disagree with the approved JD, you may appeal the approved JD under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the division engineer. This form must be received by the division engineer within 60 days of the date of this notice.

E: PRELIMINARY JURISDICTIONAL DETERMINATION: You do not need to respond to the Corps regarding the preliminary JD. The Preliminary JD is not appealable. If you wish, you may request an approved JD (which may be appealed), by contacting the Corps district for further instruction. Also you may provide new information for further consideration by the Corps to reevaluate the JD.

SECTION II - REQUEST FOR APPEAL or OBJECTIONS TO AN INITIAL PROFFERED PERMIT

REASONS FOR APPEAL OR OBJECTIONS: (Describe your reasons for appealing the decision or your objections to an initial proffered permit in clear concise statements. You may attach additional information to this form to clarify where your reasons or objections are addressed in the administrative record.)

ADDITIONAL INFORMATION: The appeal is limited to a review of the administrative record, the Corps memorandum for the record of the appeal conference or meeting, and any supplemental information that the review officer has determined is needed to clarify the administrative record. Neither the appellant nor the Corps may add new information or analyses to the record. However, you may provide additional information to clarify the location of information that is already in the administrative record.

POINT OF CONTACT FOR QUESTIONS OR INFORMATION:

If you have questions regarding this decision and/or the appeal process you may contact:	If you only have questions regarding the appeal process you may also contact:
Charles F. Frerker, PM US Army Corps of Engineers St. Louis District (OD-F) 1222 Spruce Street St. Louis, MO 63103-2833 Phone: (314) 331-8583 Fax: (314) 331-8741	Division Engineer ATTN: David W. Gesl Administrative Appeals Review Officer U.S. Army Corps of Engineers P.O. Box 2870 Portland, OR 97208-2870 Telephone: 503-808-3825

RIGHT OF ENTRY: Your signature below grants the right of entry to Corps of Engineers personnel, and any government consultants, to conduct investigations of the project site during the course of the appeal process. You will be provided a 15 day notice of any site investigation, and will have the opportunity to participate in all site investigations.

	Date:	Telephone number:
_____ Signature of appellant or agent.		

DEPARTMENT OF THE ARMY
KANSAS CITY DISTRICT, CORPS OF ENGINEERS
635 FEDERAL BUILDING
601 E 12TH STREET
KANSAS CITY MO 64106-2824

REPLY TO
ATTENTION OF

May 19, 2011

Regulatory Branch
Operations Division
(NWK-2011-364)

Mr. Larry W. Moore
Con-Agg of Missouri, LLC
2604 North Stadium Boulevard
Columbia, Missouri 65202-1271

Dear Mr. Moore:

Permit No. NWK-2011-364 has been executed. One copy is enclosed for your records and one copy has been retained for our files. The permit is subject to all the special conditions in the permit and will expire on December 31, 2015. The 2011 tonnage limits retroactively apply to all dredging since the beginning of 2011. These tonnage limits are of sand when it is offloaded from the barge with a moisture content of approximately 10%.

We are interested in your thoughts and opinions concerning your experience with the Kansas City District, Corps of Engineers Regulatory Program. We have placed an automated version of our Customer Service Survey form at: http://www.nwk.usace.army.mil/regulatory/survey.pdf. At your request, we will mail you a paper copy that you may complete and return to us by mail or fax.

If you have any questions concerning this matter, please feel free to write me or to call Mr. Cody S. Wheeler at 816-389-3739 (FAX 816-389-2032).

Sincerely,

Mark D. Frazier
Chief, Regulatory Branch
Operations Division

Enclosure

Copies Furnished (electronically w/enclosure):

Environmental Protection Agency,
Water Resources Protection Branch
U.S. Fish and Wildlife Service, Columbia, Missouri
Missouri Department of Natural Resources
Missouri Department of Conservation

DEPARTMENT OF THE ARMY PERMIT

Permittee: Con-Agg of Missouri, LLC.

Permit No.: 2011-364

Issuing Office: U.S. Army Engineer District, Kansas City

NOTE: The term "you" and its derivatives, as used in this permit, means the permittee or any future transferee. The term "this office" refers to the appropriate district or division office of the Corps of Engineers having jurisdiction over the permitted activity or the appropriate official of that office acting under the authority of the commanding officer.

You are authorized to perform work in accordance with the terms and conditions specified below, and with the plans and drawings attached hereto which are incorporated in and made a part of this permit.

Project Description: You are authorized to extract up to 160,000 tons of sand and gravel per year from the Jefferson City segment (river miles 129.9 to 249.9) of the Missouri River with a mobile, floating, hydraulic cutter-head suction dredge plant. Water and dredged materials will be passed through onboard screens allowing the desired material to be loaded into barges and undesired material and water to be discharged back into the river at the dredging location. Filled barges will be transported to existing offloading facilities where a crane or front end loader will unload the material for stockpiling and commercial sale. The 2011 tonnage limits retroactively apply to all dredging since the beginning of 2011. These tonnage limits are of sand when it is offloaded from the barge with a moisture content of approximately 10%.
Permit Drawings: Please use the location maps from the 2007 permit decision, and the electronic authorized dredging zone shape files with any modifications sent to you in subsequent permit extensions. We will send you updated maps and/or electronic shape files with the execution of the permit or sooner if possible. The maps and electronic shape files are just a visual representation of where you can or cannot dredge. The legal and authoritative source regarding where you can or cannot dredge, is contained in the project description, project location, and special conditions of this permit.

Project Location: You may dredge in the following general reaches of Missouri River (this may or may not exclude all the resource protection zones): river miles 178.35-184.75, 185.65-186.90, 188.20-192.00, 193.00-193.40, 195.75-196.50, 196.70-197.00, 198.50-199.15, and 199.40-201.95.

Permit Conditions:

General Conditions:

1. The time limit for completing the work authorized ends on 31 December 2015. If you find that you need more time to complete the authorized activity, submit your request for a time extension to this office for consideration at least one month before the above date is reached.

2. You must maintain the activity authorized by this permit in conformance with the terms and conditions of this permit. You are not relieved of this requirement if you abandon the permitted activity, although you may make a good faith transfer to a third party in compliance with General Condition 4 below. Should you wish to cease to maintain the authorized activity or should you desire to abandon it without a good faith transfer, you must obtain a modification of this permit from this office, which may require restoration of the area.

3. If you discover any previously unknown historic or archeological remains while accomplishing the activity authorized by this permit, you must immediately notify this office of what you have found. We will initiate the Federal and state coordination required to determine if the remains warrant a recovery effort or if the site is eligible for listing in the National Register of Historic Places.

4. If you sell the property associated with this permit, you must obtain the signature of the new owner in the space provided and forward a copy of the permit to this office to validate the transfer of this authorization.

5. If a conditioned water quality certification has been issued for your project, you must comply with the conditions specified in the certification as special conditions to this permit. For your convenience, a copy of the certification is attached if it contains such conditions.

6. You must allow representatives from this office to inspect the authorized activity at any time deemed necessary to ensure that it is being or has been accomplished in accordance with the terms and conditions of your permit.

Special Conditions:

See continuation sheets, pages 4 - 8, of this document.

Further Information:

1. Congressional Authorities: You have been authorized to undertake the activity described above pursuant to:

(X) Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403).

(X) Section 404 of the Clean Water Act (33 U.S.C. 1344).

( ) Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972 (33 U.S.C. 1413).

2. Limits of this authorization.

a. This permit does not obviate the need to obtain other Federal, state, or local authorization required by law.

b. This permit does not grant any property rights or exclusive privileges.

c. This permit does not authorize any injury to the property or rights of others.

d. This permit does not authorize interference with any existing or proposed Federal project.

3. Limits of Federal Liability. In issuing this permit, the Federal Government does not assume any liability for the following:

a. Damages to the permitted project or uses thereof as a result of other permitted or unpermitted activities or from natural causes.

b. Damages to the permitted project or uses thereof as a result of current or future activities undertaken by or on behalf of the United States in the public interest.

c. Damages to persons, property, or to other permitted or unpermitted activities or structures caused by the activity authorized by this permit.

d. Design or construction deficiencies associated with the permitted work.

e. Damage claims associated with any future modification, suspension, or revocation of this permit.

4. Reliance on Applicant's Data: The determination of this office that issuance of this permit is not contrary to the public interest was made in reliance on the information you provided.

5. Reevaluation of Permit Decision. This office may reevaluate its decision on this permit at any time the circumstances warrant. Circumstances that could require a reevaluation include, but are not limited to, the following:

a. You fail to comply with the terms and conditions of this permit.

b. The information provided by you in support of your permit application proves to have been false, incomplete, or inaccurate (See 4 above).

c. Significant new information surfaces which this office did not consider in reaching the original public interest decision.

Such a reevaluation may result in a determination that it is appropriate to use the suspension, modification, and revocation procedures contained in 33 CFR 325.7 or enforcement procedures such as those contained in 33 CFR 326.4 and 326.5. The referenced enforcement procedures provide for the issuance of an administrative order requiring you to comply with the terms and conditions of your permit and for the initiation of legal action where appropriate. You will be required to pay for any corrective measures ordered by this office, and if you fail to comply with such directive, this office may in certain situations (such as those specified in 33 CFR 209.170) accomplish the corrective measures by contract or otherwise and bill you for the cost.

6. Extensions. General condition 1 establishes a time limit for the completion of the activity authorized by this permit. Unless there are circumstances requiring either a prompt completion of the authorized activity or a reevaluation of the public interest decision, the Corps will normally give favorable consideration to a request for an extension of this time limit.

Your signature below, as permittee, indicates that you accept and agree to comply with the terms and conditions of this permit.

(PERMITTEE) (DATE) 4/19/11

This permit becomes effective when the Federal official, designated to act for the Secretary of the Army, has signed below.

(DISTRICT ENGINEER) (DATE) MAY 19, 2011
ANTHONY J. HOFMANN, COLONEL
BY: Mark D. Frazier
Chief, Regulatory Branch
Operations Division

When the structures or work authorized by this permit are still in existence at the time the property is transferred, the terms and conditions of this permit will continue to be binding on the new owner(s) of the property. To validate the transfer of this permit and the associated liabilities associated with compliance with its terms and conditions, have the transferee sign and date below.

(TRANSFEREE) (DATE)

Special Conditions:

a. You understand and agree that, if future operations by the United States require the removal, relocation, or other alteration, of the structure or work herein authorized, or if, in the opinion of the Secretary of the Army or his authorized representative, said structure or work shall cause unreasonable obstruction to the free navigation of the navigable waters, you will be required, upon due notice from the U.S. Army Corps of Engineers (USACE), to remove, relocate, or alter the structural work or obstructions caused thereby, without expense to the United States. No claim shall be made against the United States on account of any such removal or alteration.

b. You must implement a Dredge Monitoring Plan (DMP) approved by the Regulatory Branch of the Kansas City District, USACE. If a DMP has not been previously approved by the Regulatory Branch, USACE, Kansas City District, you must provide within 30 days of execution of the permit a DMP for each individual dredge plant to the Regulatory Branch of the USACE, Kansas City District for approval. The DMP must show how you will monitor, record, and report the cutter-head position, cutter-head operating status, extraction tonnage, and the presence of any hard substrates, mussel shells, or unusual concentration of gravel in an impartial, unbiased, reliable, and accurate manner. The DMP must include the specifications of the process and the Dredge Monitoring System (DMS) including sensors, hardware, software, communications devices the permittee will use to: gather data; perform quality control on those data; calibrate, test, and repair sensors when they fail; and. transfer the data to the Regulatory Branch of the Kansas City District, USACE. The DMS must include automated differential Global Positioning System (DGPS) equipment (or other comparable system) operating with a minimum accuracy level of 1-3 meters horizontal Circular Error Probable with horizontal positions tied into the UTM Zone 15 NAD 83 (feet) coordinate system recorded to the nearest foot. The DMS must always be on, recording cutter-head position and operating status every 5 minutes, 24-hours a day, 365 days a year, even when the dredge is not operating. The data logged each month must be submitted by email to cody.s.wheeler@usace.army.mil at the Regulatory Branch of the Kansas City District, USACE by the 7th day of the following month. If you do not receive an email confirmation that the report was received, you must contact the Regulatory Branch of the Kansas City District, USACE at 816-389-3990 for revised instructions for filing the monthly report. The extracted material must be measured by one of the methods described in the attached Standard Operating Procedure for Hydrographic Surveying and Dredge Monitoring. If the tonnage is measured by scale at the off-loading facility, the DMP should also describe how the operation will record the date, time, river mile, coordinates, and approximate tonnage of each barge loaded in one location. If a barge is partially filled at one anchor setting then completed at a new anchor setting, the tonnage should be estimated separately for each location. This information must be provided monthly by email on the attached Missouri River Commercial Dredging Location/Volume Report spreadsheet to cody.s.wheeler@usace.army.mil at the Regulatory Branch of the Kansas City District, USACE by the 7th day of the following month. If you do not receive an email confirmation that the report was received, you must contact the Regulatory Branch of the Kansas City District, USACE at 816-389-3990 for revised instructions for filing the monthly report. Faulty sensors or other components identified in the DMP must be repaired within 96 hours. The DMS must not be inoperable more than 5 percent of the time. You must install an approved DMS and have it inspected by the Regulatory Branch of the Kansas City District, USACE within 120 days of execution of the permit or you must cease dredging operations until it is installed and inspected or you submit a justification of the delay and an installation schedule and get an extension of this deadline in writing from the Regulatory Branch of the Kansas City District, USACE.

c. The USACE periodically surveys the river as part of the management and operation of the Bank Stabilization and Navigation Project. If, for any reason, the USACE has not surveyed the river in the fourth year (2014) of the five-year permit cycle, the authorized dredging companies must have the lower 498 miles of the LOMR surveyed during the summer months in accordance with the Standard Operating Procedures for Hydrographic Surveying and Dredge Monitoring. The survey shall be completed between June and September of 2014 and submitted to the Regulatory Branch of the Kansas City District, USACE by November 1, 2014.

d. If any part of the authorized work is performed by a contractor, before starting work you must discuss the terms and conditions of this permit with the contractor and must give a copy of this entire permit to the contractor. After the initial 120 days of this permit, any contracted dredges or barges must also be equipped with and operate in accordance with an approved DMP as required in Special Condition "b". The DMP and system must be approved by the Regulatory Branch of the Kansas City District, USACE prior to starting work.

e. Until the dredges and barges are equipped with the DMS required by Special Condition "b", you must, for each dredge operated, record Global Positioning System (GPS) coordinates, tons of material removed, and the presence of any hard substrates or unusual concentration of gravel daily. If the dredge moves more than 100 feet in any one day then the amount of material removed from each location must be recorded separately. The operators may use hand-held GPS devices or automatically recording devices, but with which ever system used, must identify the device make/model and recording location. This information must be recorded on the attached Missouri River Commercial Dredging Location/Volume Report in an electronic spreadsheet. You must furnish a copy of the completed monthly report by email to cody.s.wheeler@usace.army.mil at the Regulatory Branch of the Kansas City District, USACE by the 7th day of the following month. If you do not receive an email confirmation that the report was received, you must contact the Regulatory Branch of the Kansas City District, USACE at 816-389-3990 for revised instructions for filing the monthly report.

f. No more than 300,000 tons of material shall be extracted within one year from each five-mile reach of the Missouri River between river miles 15 to 20, 25 to 35, 90 to 100, 140 to 150, 355 to 395, and 445 to 455. When the dredge report database of the Regulatory Branch of the Kansas City District, USACE indicates that extraction in a five-mile reach has reached 300,000 tons, all dredgers authorized to operate within that reach will be notified that it is closed to further dredging for the remainder of the calendar year unless a waiver is requested and received in writing from the Regulatory Branch of the Kansas City District, USACE.

g. Up to 10% of your authorized annual tonnage for each segment may be carried over each year to be extracted within that segment the following year. Annual tonnage with carryover may never exceed 110% of annual authorized tonnage of each segment. At the end of each year you must notify the Regulatory Branch of the Kansas City District, USACE in your annual tonnage report of any unextracted tonnage that you intend to carryover.

h. In permit conditions that specify a linear distance exclusion zone adjacent to a river feature, "dredging" refers to the operation of hydraulic cutter-head suction dredging. The exclusion zone distances will apply to and be measured from the end of the cutter head, rather than from a general point on the dredge.

i. You must confine dredging to between the Rectified Channel Lines (RCL) with the following restrictions. Dredging must be conducted in such a manner to preserve the structural integrity of the landmass landward of the RCL. This must be accomplished by maintaining an adequate "no dredging

or discharging" zone riverward of the RCL so that material will stabilize into the dredging area at its natural angle of repose. This slope will vary depending upon river location and the type of material being dredged, but it is your responsibility to ensure that this shallow water interface landward of the RCL be maintained.

j. You must not dredge within 500 feet of any levee centerline, pipeline or submerged utility crossing, bridge pier or abutment; nor within 200 feet of any dike, revetment, or other structure built or authorized by the U.S. Government; nor within 100 feet of any normal bank line or island, without special authorization. When dredging is performed adjacent to river stabilization structures, the dredging may be conducted only in the present streambed of the river at the authorized locations. This condition represents only the minimum distances away from structures and natural features that you can conduct dredging and does not relieve you from liability for damage arising from dredging. You must be satisfied that dredging to these limits will not cause damage to public and private property.

k. You must not conduct dredging operations in a zone extending 4,000 feet upstream and 500 feet downstream from any municipal drinking water intake structures located along either bank of the river unless you obtain an exemption to this condition in writing from the Regulatory Branch of the Kansas City District, USACE.

l. You must not conduct dredging operations in a zone extending 1,000 feet upstream and 1,000 feet downstream from any municipal drinking water horizontal collector wells located along either bank of the river unless you obtain an exemption to this condition in writing from the Regulatory Branch of the Kansas City District, USACE.

m. You must not conduct dredging operations in a zone extending 500 feet upstream and 500 feet downstream from any other water intake structures other than those used for municipal drinking water unless you obtain an exemption to this condition in writing from the Regulatory Branch of the Kansas City District, USACE.

n. You may discharge back into the Missouri River material spilled off the conveyer belts and unusable material separated out in the on-shore sand washing and handling facility. To subtract that tonnage from your annual extraction limit, you must follow a plan approved in writing by the Regulatory Branch of the Kansas City District, USACE. This plan must show where and how the material will be discharged and how the amount of dredged material discharged back into the river will be measured and reported to the Regulatory Branch of the Kansas City District, USACE. The total extraction tonnage will equal the tonnage extracted and barged to shore minus that amount intentionally returned to the Missouri River.

o. You may return unwanted dredged material and river water (but not garbage)extracted from the Missouri River back to the Missouri River. You must not dispose of waste materials, water, or garbage below the ordinary high water mark of any other water body, in a wetland area, or at any location where the materials could be introduced into the water body or an adjacent wetland as a result of runoff, flooding, wind, or other natural forces.

p. You must comply with all U.S. Coast Guard, State of Missouri, State of Kansas (river mile 367 to 490), and USACE regulations concerning the prevention of navigation obstructions in navigable waters of the United States.

q. You must conduct operations in the Missouri River such that there will be no unreasonable interference with navigation by the existence or use of the activity authorized herein.

r. To avoid impacting endangered species and cultural resources, you must confine dredging to the specified reaches listed on page 1 of the permit document. If you desire to expand or relocate your dredging operation outside the specified reaches, you must submit a request to the Regulatory Branch of the Kansas City District, USACE identifying the proposed new limits, in river miles and the location of the unloading facility to be employed.. Approval of the requests, if granted, will be provided in writing with modified reaches identified on the Missouri River Hydrographic Survey. Copies of the relocation requests must be furnished to the following agencies:

1. U.S. Fish and Wildlife Service, Columbia Field Office
2. Missouri Department of Natural Resources, Water Pollution Control Program
3. Missouri Department of Natural Resources, State Historic Preservation Office
4. Kansas Department of Health and Environment, Bureau of Water (for operations extending upstream of river mile 367)
5. Kansas State Historical Society, State Historic Preservation Office (for operations extending upstream of river mile 367)
6. Corps of Engineers, Kansas City District, Hydrologic Engineering Branch

s. You must not conduct dredging operations within the reaches identified in the following table as Pallid Sturgeon habitat features.

Missouri River Miles (including 0.25 mile buffer)		**Pallid Sturgeon Habitat Feature**
Downstream	Upstream	
44.25	44.85	RDB Centaur Chute
49.15	50.05	RDB Centaur Chute
56.85	59.05	LDB Chute/Island
58.55	61.25	RDB Chute/Island
89.75	91.10	RDB Island
89.90	91.45	LDB Loutre Slough
91.20	93.55	LDB Lunch Island
103.00	104.95	Both Gasconade Confluence and Dike Field
105.20	106.25	RDB Dike Field
115.20	115.95	RDB Island
118.40	119.15	RDB Dike Field
119.35	119.85	RDB St. Aubert Island/Chute
124.35	124.95	RDB St. Aubert Island/Chute
126.05	126.90	LDB Dike Field
127.50	130.20	Both Osage River Confluence and Dike Field
157.00	158.45	LDB Island
176.40	178.35	LDB Island/RDB Tadpole Island Chute
180.15	180.65	RDB Tadpole Island Chute
184.75	185.65	RDB Chute
186.90	188.20	RDB Chute and Dike Field
193.40	195.75	RDB Dike Field/Island
202.10	202.75	RDB Lamine River Confluence
210.00	219.65	Lisbon/Jameson Complex
226.95	227.55	LDB Little Chariton Confluence

238.40	239.10	LDB Chariton River Confluence
249.65	250.30	LDB Grand River Confluence
269.85	271.35	RDB Shallow/Island
280.40	282.05	RDB Island
297.90	299.05	RDB Island
300.00	301.05	LDB Island
367.00	367.75	RDB Kansas River Confluence
390.85	391.45	LDB Platte River Confluence
456.75	457.25	LDB Worthwine Chute
458.75	459.25	LDB Worthwine Chute
462.65	463.25	LDB Nodaway River Confluence
478.55	479.15	RDB Wolf Creek Confluence
494.55	495.20	RDB Big Nemaha River Confluence

t. You must discharge only suitable dredged material that is free from toxic pollutants in other than trace quantities.

u. You must investigate for water supply intakes or other activities which may be affected by suspended solids and turbidity increases caused by work in the watercourse and give sufficient notice to the owners of affected activities to allow preparation for any changes in water quality. You must furnish the Regulatory Branch of the Kansas City District, USACE with a copy of any written notification provided in accordance with this condition.

v. You must employ measures to prevent dredged materials stored or disposed of on shore from running off or eroding into wetlands or tributaries to the Missouri River.

w. You must employ measures to prevent or control spilled fuels or lubricants from entering the waters of the United States.

x. You must store all construction materials, equipment, and/or petroleum products that are part of the on-shore operation, when not in use, above anticipated high water levels.

STATE OF MISSOURI
Jeremiah W. (Jay) Nixon, Governor • Sara Parker Pauley, Director
DEPARTMENT OF NATURAL RESOURCES
www.dnr.mo.gov

MAR 23 2011

Mr. Larry W. Moore
Con-Agg of MO, LLC
2604 North Stadium Blvd.
Columbia, MO 65202

Dear Mr. Moore:

Please replace the Clean Water Act Section 401 Water Quality Certification (certification) dated March 17, 2011, with the enclosed certification.

If you have any questions, please feel free to contact me by phone at (573) 751-7023, by e-mail at carrie.schulte@dnr.mo.gov or by mail at Missouri Department of Natural Resources, Water Protection Program, NPDES Permits and Engineering Section, P.O. Box 176, Jefferson City, MO 65102-0176. Thank you for working with the Department to protect our environment.

Sincerely,

WATER PROTECTION PROGRAM

Carrie M. Schulte

Carrie M. Schulte, Chief
401 Water Quality Certification and Stormwater Unit

CMS/pc

Enclosure

c: Mr. Cody Wheeler, Army Corps of Engineers, Kansas City District
Mr. Charles Frerker, Army Corps of Engineers, St. Louis District
Ms. Dorothy Franklin, Kansas City Regional Office
Mr. Jimmy Coles, Kansas City Regional Office
Mr. Lantz Tipton, Northeast Regional Office
File Copy

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STATE OF MISSOURI
Jeremiah W. (Jay) Nixon, Governor • Sara Parker Pauley, Director
DEPARTMENT OF NATURAL RESOURCES
www.dnr.mo.gov

MAR 23 2011

Mr. Larry W. Moore
Con-Agg of MO, LLC
2604 North Stadium Blvd.
Columbia, MO 65202

Various Counties
Permit Number 2011-364
CEK006764

Dear Mr. Moore:

The Missouri Department of Natural Resources' Water Protection Program (Department) is in receipt of the U.S. Army Corps of Engineers' (Corps) letter dated February 17, 2011, requesting that your Clean Water Act Section 401 Water Quality Certification (certification) be issued for Permit Number 2011-364. The Department understands that Con-Agg of MO, LLC will abide by the certification and the Corps issued Clean Water Act Section 404 Permit (permit) for commercial dredging operations in the Missouri River.

This letter also serves as an extension of the certification issued for Permit Number 2001-1434 for an additional 60 days, unless an appeal of proffered Department of the Army Permit 2001-1434 is accepted by the Corps' Northwestern Division in which case the 2001 certification would expire 30 days after the final appeal decision.

This office certifies that the ongoing activities apparently will not cause the general or numeric criteria to be exceeded nor impair beneficial uses established in Water Quality Standards, 10 CSR 20-7.031, provided the following condition is met:

- The U.S. Army Corps of Engineers permit decision and all conditions are followed as authorized by the Corps under Section 404 of the Clean Water Act (33 USC 1344). The implementing regulation for this Act is found at 33 CFR 320-330.

Missouri Clean Water Law, Chapter 644.052.9 RSMo, gives the Department the authority to collect a fee for the issuance of a certification. As of January 1, 2011, this authority has expired, which means the Department no longer has statutory authority to collect water permit fees. This includes the certification fee. Please do not send a payment to the Department.

If you were affected by this decision, you may appeal to have the matter heard by the Administrative Hearing Commission (commission). To appeal, you must file a petition with the commission within thirty (30) days after the date this decision was mailed or the date it was delivered, whichever date was earlier. If any such petition is sent by registered mail or certified mail, it will be deemed filed on the date it is mailed. If it is sent by any method other than registered mail or certified mail, it will be deemed filed on the date it is received by the commission.

Recycled Paper

Water Quality Standards must be met during any operations authorized by these permits. If you have any questions, please contact Ms. Carrie M. Schulte by phone at (573) 751-7023, by e-mail at carrie.schulte@dnr.mo.gov or by mail at Missouri Department of Natural Resources, Water Protection Program, NPDES Permits and Engineering Section, P.O. Box 176, Jefferson City, MO 65102-0176. Thank you for working with the Department to protect our environment.

Sincerely,

WATER PROTECTION PROGRAM

Refaat Mefrakis, P.E., Chief
NPDES Permits and Engineering Section

RM:csp

c: Mr. Cody Wheeler, Army Corps of Engineers, Kansas City District
Mr. Charles Frerker, Army Corps of Engineers, St. Louis District
Ms. Dorothy Franklin, Kansas City Regional Office
Mr. Jimmy Coles, Kansas City Regional Office
Mr. Lantz Tipton, Northeast Regional Office
File Copy

LATHROP & GAGE LLP

DAVID A. SHORR
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314 E. HIGH STREET
JEFFERSON CITY, MISSOURI 65101
PHONE: 573.893.4336
FAX: 573.893.5398

May 31, 2011

VIA E-MAIL TRANSMISSION
David.W.Gesl@usace.army.mil
AND FEDERAL EXPRESS

Division Engineer
Attn: David W. Gesl
Administrative Appeals Review Officer
U.S. Army Engineer Division, Northwestern Division
PO Box 2870
1125 NW Couch Street
Portland, OR 97209

Re: **REQUEST FOR APPEAL**

Appeal of Record of Decision for Authorization of Commercial Sand and Gravel Dredging on the Lower Missouri River signed and dated March 31, 2011, by Anthony J. Hofmann, Colonel, EN Commanding

Appeal of Proffered Permits:
St. Louis District:
J.T.R., Inc.(Permits P-2789, P-2339, P-2340, P-2341)
Limited Leasing Company (Permits P-2788, P-2342)
Kansas City District:
Capital Sand Company, Inc. (Permits 2011-361, 2001-1429)
Hermann Sand & Gravel (Permits 2011-362, 2001-1430)
Con-Agg of Missouri, LLC (Permits 2011-364, 2001-1434)
Holliday Sand & Gravel, LLC (Permits 2011-363, 2001-1431)

Appeal of Denied Permit Application:
Capital Sand Company, Inc. Application No. MVS-2008-00193

Dear Mr. Gesl:

The undersigned represents the above companies and on their behalf hereby submits Section II of the Notification of Administrative Appeals Options and Process and Request for Appeal form. The basis for our request for appeal is attached.

Besides the form, we submit a detailed Request for Appeal and include a brief in support of our request for consideration. We believe our request for appeal, along with its brief, are sufficient to constitute a complete request with merit.

This request for appeal is for

A. Appeal of the Record of Decision for Authorization of Commercial Sand and Gravel Dredging on the Lower Missouri River;

B. Appeal of all the proffered permits to the various dredgers currently existing on the Lower Missouri River; and

C. Appeal of the denial for a new permit on behalf of Capital Sand Company rejected by the St. Louis District based upon the contents of the Record of Decision.

The permittee appellants request a formal conference consistent with Section 33 CFR Part 331.7 of the Federal Rules.

In addition, as more fully stated, we request a complete copy of the Administrative Record, including all internal agency communications relating to the Environmental Impact Statement for Commercial Sand and Gravel Dredging on the Lower Missouri River and information pertaining to the care, operation, maintenance, and engineering relating to the Bank Stabilization and Navigation Project and the project's direct or indirect impact on the accrual of sands and bottom materials of the bed.

It is our understanding that the St. Louis District, the Kansas City District, and the Division have provided modification to existing permits for dredging on the Missouri River to allow ongoing operations, albeit consistent with the proffered permit. While we object to the terms and conditions of the proffered permit, we acknowledge that no temporary restraining order, preliminary injunction, or permanent injunction is necessary during the pendency of this appeal. As such, the above dredgers will continue operations on the river during the pendency of your review. If this is not your understanding, we would appreciate confirmation so we may seek other legal remedies.

On behalf of the above permittee appellants, I remain

Very truly yours,

LATHROP & GAGE LLP

By: David A. Shorr

DAS/jf

Enclosures:
- Section II Form – Permit Appeals
- Section II Form – Permit Denial
- Request for Appeal
- Memorandum in Support of Request for Appeal

cc w/enclosures via U.S. Mail:
- Col. Anthony J. Hofmann, Kansas City District
- Col. Thomas E. O'Hara, Jr., St. Louis District
- Sara Parker Pauley, Director, MDNR
- John Mitchell, Director of Environment, Kansas Department of Health & Environment
- J.T.R., Inc.
- Limited Leasing Company
- Capital Sand Company, Inc.
- Hermann Sand & Gravel
- Con-Agg of Missouri, LLC
- Holliday Sand & Gravel, LLC

SECTION II - Fill out this section and return this form to the appropriate office only if submitting a request for modification or reconsideration to the District Engineer, or if submitting a request for Administrative Appeal to the Division Engineer. All such submittals must be made within 60 days of the date of this notice.

Submit the following requests to the District Engineer:

A. Modification of an INITIAL PROFFERED PERMIT (Item A).
D. Reconsideration of an APPROVED JURISDICTIONAL DETERMINATION based on NEW INFORMATION (Item D RECONSIDERATION).

Submit the following requests to the Division Engineer:

B. Administrative Appeal of a PROFFERED PERMIT (Item B).
C. Administrative Appeal of a PERMIT DENIAL (Item C).
D. Administrative Appeal of an APPROVED JURISDICTIONAL DETERMINATION (Item D APPEAL) (for reasons other than reconsideration of an approved JD based on new information).

(Note: Preliminary Jurisdictional Determinations (Item E) are not appealable. If you have concerns regarding a preliminary Jurisdictional Determination, you can request an approved Jurisdictional Determination).

REASONS FOR APPEAL OR OBJECTIONS: (Describe your reasons for appealing the decision or your objections to an initial proffered permit in clear concise statements. You may attach additional information to this form to clarify where your reasons or objections are addressed in the administrative record.)

Basis for objections and appeal are more fully stated in the attached Request for Appeal, Memorandum in Support of Request for Appeal, and a related appeal of Holliday Sand & Gravel, LLC separately submitted.

SUBMITTAL OF NEW OR ADDITIONAL INFORMATION: The District Engineer may accept and consider new information if you request a modification to an initial proffered permit (Part A), or a reconsideration of an approved JD (Part D). An administrative appeal to the Division Engineer is limited to a review of the administrative record, the Corps memorandum for the record of the appeal conference or meeting, and any supplemental information that the review officer has determined is needed to clarify the administrative record. Neither the appellant nor the Corps may add new information or analyses to the administrative record. However, you may provide additional information to clarify the location of information that is already in the administrative record.

POINT OF CONTACT FOR QUESTIONS OR INFORMATION:

If you have questions regarding this decision and/or the appeal process you may contact: DISTRICT ENGINEER **Attn: Mark D. Frazier** **Chief, Regulatory Branch** **U.S. Army Engineer District, Kansas City** **601 E. 12th Street, Suite 402** **Kansas City, MO 64106-2896** **Telephone: 816-389-3990** (Use this address for submittals to the District Engineer)	If you wish to submit an appeal or have questions regarding the appeal process you may contact: DIVISION ENGINEER **Attn: David W. Gesl** **Administrative Appeals Review Officer** **U.S. Army Engineer Division, Northwestern Division** **P.O. Box 2870** **Portland, OR 97208-2870** **Telephone: 503-808-3825**

RIGHT OF ENTRY: Your signature below grants the right of entry to Corps of Engineers personnel, and any government consultants, to conduct investigations of the project site during the course of the appeal process. You will be provided a 15 day notice of any site investigation, and will have the opportunity to participate in all site investigations.

Signature of appellant or agent. David A. Shorr	Date: May 31, 2011	Telephone number: (573) 893-4336

SECTION II - REQUEST FOR APPEAL or OBJECTIONS TO AN INITIAL PROFFERED PERMIT

REASONS FOR APPEAL OR OBJECTIONS: (Describe your reasons for appealing the decision or your objections to an initial proffered permit in clear concise statements. You may attach additional information to this form to clarify where your reasons or objections are addressed in the administrative record.)

1. Adequate tonnage exists to substantiate this request.

2. The Record of Decision on which this is based is in error.

3. Adequate tonnage exists within the St. Charles segment to support this request.

4. Additional information is attached as part of the over-arching appeal of the Record of Decision for Authorization of Commercial Sand and Gravel Dredging on the Lower Missouri River.

ADDITIONAL INFORMATION: The appeal is limited to a review of the administrative record, the Corps memorandum for the record of the appeal conference or meeting, and any supplemental information that the review officer has determined is needed to clarify the administrative record. Neither the appellant nor the Corps may add new information or analyses to the record. However, you may provide additional information to clarify the location of information that is already in the administrative record.

POINT OF CONTACT FOR QUESTIONS OR INFORMATION:

If you have questions regarding this decision and/or the appeal process you may contact:

Charles F. Frerker, PM
US Army Corps of Engineers
St. Louis District (OD-F)
1222 Spruce Street
St. Louis, MO 63103-2833
Phone: (314) 331-8583 Fax: (314) 331-8741

If you only have questions regarding the appeal process you may also contact:

Division Engineer
ATTN: David W. Gesl
Administrative Appeals Review Officer
U.S. Army Corps of Engineers
P.O. Box 2870
Portland, OR 97208-2870
Telephone: 503-808-3825

RIGHT OF ENTRY: Your signature below grants the right of entry to Corps of Engineers personnel, and any government consultants, to conduct investigations of the project site during the course of the appeal process. You will be provided a 15 day notice of any site investigation, and will have the opportunity to participate in all site investigations.

Signature of appellant or agent. David A. Shorr	Date: May 31, 2011	Telephone number: (573) 893-4336

BEFORE THE UNITED STATES ARMY CORPS OF ENGINEERS
NORTHWESTERN DIVISION

St. Louis District
Kansas City District

Regarding the Permit Requests of:

St. Louis District	USACE File Nos:
J.T.R., Inc. (Permits P-2789, P-2339, P-2340, P-2341)	MVS-2011-178, P-2789
Limited Leasing Company (Permits P-2788, P-2342)	MVS-2011-177, P-2788
Kansas City District	
Capital Sand Company, Inc. (Permits 2011-361, 2001-1429)	NWK-2011-361
Hermann Sand & Gravel (Permits 2011-362, 2001-1430),	NWK-2011-362
Con-Agg of Missouri, LLC (Permits 2011-364, 2001-1434)	NWK-2011-364
Capital Sand Company, Inc. (Application No. MVC-2008-0093)	MVS-2008-00193

Appeal Conference:

The Missouri River Dredgers Group requests that the Review Officer conduct an appeal conference in either Jefferson City, Missouri, St. Louis, Missouri, or Kansas City, Missouri.

Relation of this Appeal to Other Appeals:

Holliday Sand & Gravel, LLC, a member of the Missouri River Dredgers Group, has filed a separate appeal of the commercial sand dredging permits issued by the United States Army Corps of Engineers ("USACE") on March 31, 2011.

Relief Requested:

The Missouri River Dredgers Group requests that the Review Officer reverse the Record of Decision, and grant the Dredgers the tonnage amounts requested in their original permit applications. Alternatively, and at a minimum, the Missouri River Dredgers Group requests that

the Review Officer issue commercial sand dredging permits with tonnage amounts no less than the Dredgers' previously authorized permit levels.

REQUEST FOR APPEAL

J.T.R, Inc., Limited Leasing Company, Capital Sand Company, Inc., Hermann Sand & Gravel, and Con-Agg of Missouri, LLC (collectively the "Missouri River Dredgers Group" or the "Dredgers"), pursuant to 33 C.F.R. Part 331, submit the following Request for Appeal of the March 31, 2011 Record of Decision ("ROD") prepared by the U.S. Army Corps of Engineers St. Louis and Kansas City Districts and of the individual Permits (collectively the "Permits") issued as a result of the ROD's conclusions. In support of this Request of Appeal, the Missouri River Dredgers identify below the global and individual permitting issues for appeal as to the March 31, 2011 ROD and the Final Environmental Impact Statement ("EIS"), upon which the ROD was based. Additionally, the Dredgers are contemporaneously filing a Memorandum in Support of Request for Appeal, which provides additional argument and support for the issues identified in the Request for Appeal.[1]

[1] Prior to filing this Request for Appeal and Memorandum in Support of the Request for Appeal, the Missouri River Dredgers' Group did not have access to the full and complete administrative record. Within days of receiving the ROD and Permit, the Dredgers collectively requested to review and copy the administrative record from the Kansas City and St. Louis Districts. There appears to be a disagreement between the USACE and the Dredgers as to what comprises the administrative record. The Dredgers maintain that the administrative record likely far exceeds what the USACE has already made available on its public website, and specifically includes internal email and documents developed in the course of the project review by the USACE. Because the administrative record has not been fully accessible, this has impacted the Dredgers' ability to establish errors committed by the USACE. Accordingly, the Dredgers reserve the right to supplement this appeal as other portions of the record become available through these proceedings.

GLOBAL PERMITTING ISSUES

I. The Dredgers Appeal The Tonnage Limits Imposed On Each Individual Dredger In The Issued Permits In That The Adoption Of These Limits Is Arbitrary And Capricious And The Limits Are Based On Inaccurate And Incomplete Data.

The calculations and rationale upon which the tonnage limits imposed on each of the individual Dredgers were based upon incorrect or incomplete data. Even more problematic, material data as to the causes of river bed degradation was intentionally omitted from consideration. The USACE has imposed tonnage limits based upon the unsupported and incorrect presumption that long term river bed degradation exists and can be attributed to commercial dredging and that limiting commercial dredging will positively impact river bed degradation. Basing tonnage limits on these improper assumptions without appropriate factual support was arbitrary and capricious.

II. The Dredgers Appeal The USACE's Adoption And Use Of Segments And Fixed Segment Boundaries For Permitting Purposes And, Specifically, The Imposition Of An Additional Tonnage Limit Within The Specific Segments.

The segment boundaries are arbitrary and bear little to no relation to the risk of degradation, or the operational characteristics of dredging as an industry. The Corps has adopted duplicative and punitive tonnage caps in each of the segments based upon unproven hypotheses of the distribution of "bed load and wash load". Dredgers that hold a permit in more than one segment of the river cannot substitute tonnage from one location to another as the segment limits are absolute fixed boundaries. There appears to be no logical basis behind the restriction of segment tonnage and boundaries, other than to limit dredging overall. The adoption of segment lines is arbitrary, and it is contrary to the USACE's stated policy position of reducing concentrated dredging in areas of the LOMR.

III. The Dredgers Appeal the Improper Permit Decision the USACE Failed to Consider the USACE-controlled River Structures, Including the BNSP, as Part of the Analysis of the Causes and Contributors to Bed Degradation, Which Has Resulted in Disproportionate Action Against Commercial Dredging.

The data before the USACE is clear that the construction of dams, reservoirs, and other structures that reduce water flow under the Flood Control Act of 1944 and the creation of the Missouri River Bank Stabilization and Navigation Project (BNSP) are major contributors to river bed degradation. The USACE acted arbitrarily by limiting the scope of the EIS and refusing to consider these structures, which are controlled by the USACE, in its analysis of the causes of river bed degradation. Without considering all major causes of bed degradation, it is impossible for the USACE to assign a causal risk relationship due to dredging activities or determine whether reduction in dredging activities will have any significant benefit to reducing bed degradation. By refusing to consider the overall causes, the USACE has failed to take the "hard look" required by NEPA at the environmental effects of the proposed permit action.

IV. The ROD Impermissibly Piles Assumption Upon Assumption To Reach Its Flawed Alternative Sources Conclusion.

The economic analysis presented in the EIS and carried forward to the ROD, relies on improper assumptions regarding alternative sources for sand. The rationale that the USACE adopts assumes, without evidence, that there are adequate alternative sources for sand in the areas served by the applicants' within the borders of the states of Missouri and Kansas. The USACE assumes that pit mines for sand can be constructed to supplant the decreased production from the river. USACE's determination supplants its public policy presumption in place of that of the Missouri and Kansas General Assemblies and usurps the state police power with that of USACE. The permitting and location of pit mines is a manner for State and local governments and is not the province of the Corps to decide. The presumption fails to consider

that pit mining is unreliable and non-renewable. Further, there is no evidence that such an option would be available or allowed.

The economic analysis also assumes the availability of capacity on the Kansas and Mississippi Rivers to supplement sand supplies lost from Missouri River production reductions. The evaluation ignores evidence submitted by the various parties dredging on those rivers that surplus sands are not available, are not economically viable or in the short or long term able to acquire the necessary permits from the regulatory agencies.

V. The ROD Failed To Quantitatively Assess The Environmental Impacts Of Its Proposed Alternative Sources Solution.

The decision to impose tonnage caps fails to consider the environmental consequences of an increase in pit mining versus the risk of bed degradation. This violated NEPA's "hard look" requirements, which mandates proper investigation into the increased air pollutants resulting from greater pit mining operations and truck transportation.

VI. The Continuous Monitoring Requirements Included In The Permits Are Overly Burdensome, Beyond The Scope Of USACE Authority, Bear No Relation To Protecting Any USACE Interest In Dredging, And Violate The Protections Of The Kansas, Missouri and United States Constitutions.

The new permits require all permit holders to run specific monitoring equipment 24 hours a day, 7 days per week and 365 days per year. The dredgers accept that some monitoring is of value to determine location of dredging and volumes of material. The 24/7/365 day requirement is intrusive, conflicts with the powers and authority of the U.S. Coast Guard without such a request from that agency, is beyond the scope of the legal authority of the USACE under the Clean Water Act and the Rivers and Harbor Act, and violates the constitutional protections of the Dredgers. All appropriate information can be gained by monitoring during periods of actual dredging. There is no evidence in the record that the permit

holders have not truthfully and accurately reported their dredging activities and, therefore, no reason for additional monitoring exists.

VII. There Is No Basis For The USACE's Denial Of A 100% Carryover of Annual Authorized Tonnage.

The ROD's provision restricting the Dredgers to a 10% carryover of their authorized annual tonnage to the next permitted year is unsupported by any facts in the record. Allowing the Dredgers to carryover up to 100% of its allotted tonnage to the following permit year keeps unneeded sand resources in the river and thus promotes the interests of both the Dredgers and the USACE.

VIII. The USACE's Actions Are Contrary To Federal Constitutional Law In That The USACE, In Restricting The Dredgers' Access To River Bed Material Have Taken A Property Right Without Adequate Compensation.

In restricting the applicants' permits, the USACE presented an argument that the risk of degradation to the riverbed and the surrounding structures is severe. Yet, the USACE has failed or refused, despite requests from members of Congress, to ask for funding to study and/or correct the problems with the river or to revise the BSNP to decrease the risk of degradation. The USACE's position that the risk to the river structures is far from convincing when the USACE is unwilling to examine or alter its own practices to minimize the risk. Further, the notion that the USACE can place the burden on correcting the degradation problem on private industry without adequate compensation potentially infringes on due process rights. The river and the materials in the river are owned by the States of Kansas and Missouri, not the federal government. As such, the analysis fails to consider the impact of or caused by the BSNP, fails to address the issue of property rights in the river, and fails to meet the requirements of NEPA and Executive Order 12630.

IX. The USACE Uses And Relies Upon Unpublished Data And Sources In The ROD And The EIS. The Inclusion Of Such Material, Which Is Not Available To The Dredgers And Is Not Subject To External Analysis Or Peer Review, Is Arbitrary And Capricious And Contrary To Law.

The ROD and EIS are flawed because of their extensive reliance on unpublished data and sources, which are not peer reviewed are not subject to any external analysis by the Dredgers or others.

X. The Amount Of Tonnage Reduced In Many Of The Permits Is So Limited That It Cannot Be Measured To Demonstrate Or Determine An Impact On The River Bed. The Inability To Determine A Specific Impact By A Proposed Cut In Production Renders The Action Speculative And Pure Conjecture, And Therefore Arbitrary.

While the proposed cuts will have devastating effects to the Dredgers' businesses, the USACE lacks sufficient data to demonstrate, with any reasonable level of certainty, that the proposed cuts to commercial dredging will have any measurable effect on the LMOR as a whole.

INDIVIDUAL PERMITTING ISSUES

I. J.T.R., INC., PERMIT NO. P-2789

Limited operates a contracting dredging operation in the St. Charles segment.

A. The tonnage available in the permit can and should be increased.

Global Issue 1 is hereby incorporated by reference. Adequate tonnage exists in the lower river to support the request of the applicant. The decision by the USACE in limiting the tonnage in the permit was arbitrary, capricious, and based on insufficient and incorrect data.

B. The monitoring provision relating to 24/7, 365 days per year, is unreasonable and unconstitutional.

Global Issue 6 is hereby incorporated by reference. Based upon the monitoring theory presented J.T.R. boats and equipment would be required, under this Missouri River permit, to report activities and operations on the Mississippi River. No such requirements exist in any

Mississippi River dredging permit. The Mississippi River is outside the jurisdiction of this action and the jurisdiction of this ROD for the Missouri River. This provision requiring "tracking" of boats and dredges is outside the legal authority of USACE and wholly vested in the Coast Guard legal domain. This provision is also unconstitutional as more fully stated in Global Issue 6.

C. The segment amount is arbitrary and capricious, and its distribution and allocation unreasonable.

Global Issue 2 is hereby incorporated by reference. In addition to the Global Issue, segment limits in the St. Charles segment inappropriately advance beyond District jurisdictional boundaries creating confusing and differential regulatory positions by the Kansas City District and the St. Louis District. Multiple applicants are forced to overlap operations and "regulate" competitors operations in the segment.

D. The amount of tonnage at the mouth of the Missouri River and reaches allocated to this permit are underestimated.

Global Issue 1 is hereby incorporated by reference. The mouth of the river and its interface with the Mississippi River is treated the same as all other areas of the river. The sediment deposition, bed load, hydrology and hydraulics are vastly different than any other portion of the river providing material in excess of the amounts indicated in the ROD and EIS.

E. The permit decision fails to take into account the impact of the Bank Stabilization and Navigation Project.

Global Issue 3 is hereby incorporated by reference.

F. The permit's limitation of 300,000 tons per 5-mile reach is arbitrary.

Global Issues 1 and 2 are hereby incorporated by reference.

II. LIMITED LEASING COMPANY, PERMIT NO. P-2788

Limited operates a contracting dredging operation in the St. Charles segment.

A. The tonnage available in the permit can and should be increased.

Global Issue 1 is hereby incorporated by reference. Adequate tonnage exists in the lower river to support the request of the applicant. The decision by the USACE in limiting the tonnage in the permit was arbitrary, capricious, and based on insufficient and incorrect data.

B. The monitoring provision relating to 24/7, 365 days per year, is unreasonable and unconstitutional.

Global Issue 6 is hereby incorporated by reference. Based upon the monitoring theory presented Limited Leasing boats and equipment would be required, under this Missouri River permit, to report activities and operations on the Mississippi River. No such requirements exist in any Mississippi River dredging permits. The Mississippi River is outside the jurisdiction of this action and the jurisdiction of this ROD for the Missouri River. This provision requiring "tracking" of boats and dredges is outside the legal authority of USACE and wholly vested in the Coast Guard legal domain. This provision is also unconstitutional as more fully stated in Global Issue 6.

C. The segment amount is arbitrary and capricious, and its distribution and allocation unreasonable.

Global Issue 2 is hereby incorporated by reference. In addition to the Global Issue, segment limits in the St. Charles segment inappropriately advance beyond District jurisdictional boundaries creating confusing and differential regulatory positions by the Kansas City District and the St. Louis District. Multiple applicants are forced to overlap operations and "regulate" competitors operations in the segment.

D. The amount of tonnage at the mouth of the Missouri River and reaches allocated to this permit are underestimated.

Global Issue 1 is hereby incorporated by reference. The mouth of the river and its interface with the Mississippi River is treated the same as all other areas of the river. The sediment deposition, bed load, hydrology and hydraulics are vastly different than any other portion of the river providing material in excess of the amounts indicated in the ROD and EIS.

E. The permit decision fails to take into account the impact of the Bank Stabilization and Navigation Project.

Global Issue 3 is hereby incorporated by reference.

F. The permit's limitation of 300,000 tons per 5-mile reach is arbitrary.

Global Issues 1 and 2 are hereby incorporated by reference.

III. CAPITAL SAND COMPANY, INC., PERMIT NOS. 2011-361, 2001-1429 & MVC-2008-0093

Capital Sand operates and is permitted in the St. Charles, Jefferson City and Waverly segments. They operate sand off loading docks, storage and processing facilities in Washington, Jefferson City, Boonville, Glascow, Carrollton, Brunswick, and Lexington, Missouri.

A. Adequate tonnage exists to meet the applicant's request at Washington, Missouri, and in the St. Charles segment. The failure to allow the applicant's request was arbitrary and capricious in that it was not based on accurate or complete data.

Global Issue 1 is hereby incorporated by reference. Adequate tonnage exists is this section of the river to support the applicant's request. The decision by the USACE in limiting the tonnage in the permit was arbitrary, capricious, and based on insufficient and incorrect data.

B. Adequate tonnage exists to allow the applicant's request in the Jefferson City segment. The failure to allow the applicant's request was arbitrary and capricious in that it was not based on accurate or complete data.

Global Issue 1 is hereby incorporated by reference. Adequate tonnage exists is this section of the river to support the applicant's request. The decision by the USACE in limiting the tonnage in the permit was arbitrary, capricious, and based on insufficient and incorrect data.

C. Adequate tonnage exists to allow for the applicant's request in the Waverly segment. The failure to allow the applicant's request was arbitrary and capricious in that it was not based on accurate or complete data.

Global Issue 1 is hereby incorporated by reference. Adequate tonnage exists is this section of the river to support the applicant's request. The decision by the USACE in limiting the tonnage in the permit was arbitrary, capricious, and based on insufficient and incorrect data. The Waverly segment is aggrading and has surplus material. There is no basis to deny the applicants request.

D. The monitoring provision relating to 24/7, 365 days per year, is unreasonable and unconstitutional.

Global Issue 6 is hereby incorporated by reference.

E. The USACE's assumption that there are alternative sources of sand available is based on inaccurate information. The USACE failed to complete an adequate analysis to determine if material exists to meet the needs and to determine the environmental impact of acquiring sand from other sources.

Global Issues 4 and 5 are hereby incorporated by reference.

F. The impact of the reductions provided in the above permits cannot be accurately measured to determine their direct impacts. The assumption that the reduction will have any correlation to river bed degradation lacks any basis in scientific data, making the decision arbitrary.

Global Issue 10 is hereby incorporated by reference.

G. The permit decision fails to take into account the impact of the Bank Stabilization and Navigation Project. The decision to omit the analysis of the BNSP was arbitrary and capricious and a direct violation of NEPA.

Global Issue 3 is hereby incorporated by reference.

H. Specific denial of Capital Sand's Washington, Missouri permit (MVC-2008-0093).

The St. Louis District had sufficient tonnage to allow the applicant's request. The failure to allow the applicant's request was arbitrary and capricious in that it was not based on accurate or complete data. The denial is attached hereto as **Exhibit A** and made part hereof.

IV. HERMANN SAND & GRAVEL, LLC, PERMIT NOS. 2011-362 & 2001-1430

Hermann Sand operates and is permitted in the St. Charles and Jefferson City segments. They operate sand off loading docks, storage and processing facilities in Hermann and Jefferson City, Missouri.

A. Adequate material and tonnage exists to fully support applicant's previous amounts and additional tonnage. The failure to allow the applicant's request was arbitrary and capricious in that it was not based on accurate or complete data.

Global Issue 1 is hereby incorporated by reference. Adequate tonnage exists is this section of the river to support the applicant's request. The decision by the USACE in limiting the tonnage in the permit was arbitrary, capricious, and based on insufficient and incorrect data.

B. The impact of the reductions provided in the above permits cannot be accurately measured to determine their direct impacts. The assumption that the reduction will have any correlation to river bed degradation lacks any basis in scientific data, making the decision arbitrary.

The applicant's tonnage was reduced by 60,000 tons total, split between two segments. The ability to measure the impact of such small amounts of material on the bed of one of the nation's largest waterways and drainage areas and has not been demonstrated by USACE.

C. Placement of the segment line between the company's operations is arbitrary in nature creates an effective additional reduction in tonnage.

The applicant's previous permits allowed for total tonnage to be split between its Jefferson City and Hermann sand plants. The segment line restricts the ability to continue such a practice with no justification in the record of the ability to measure such insignificant amounts.

D. The amount of tonnage in the Jefferson City and St. Charles segments is so negligible that it should be exempted from all other permit conditions.

Global Issue 10 is hereby incorporated by reference.

E. The monitoring provision relating to 24/7, 365 days per year, is unreasonable and unconstitutional.

Global Issue 6 is hereby incorporated by reference.

V. CON-AGG OF MISSOURI, LLC, PERMIT NOS. 2011-364 & 2001-1434

A. Adequate material and tonnage exists to fully support applicant's previous amounts and additional tonnage. The failure to allow the applicant's request was arbitrary and capricious in that it was not based on accurate or complete data.

Global Issue 1 is hereby incorporated by reference. Adequate tonnage exists is this section of the river to support the applicant's request. The decision by the USACE in limiting the tonnage in the permit was arbitrary, capricious, and based on insufficient and incorrect data.

B. The impact of the reductions provided in the above permits cannot be accurately measured to determine their direct impacts. The assumption that the reduction will have any correlation to river bed degradation lacks any basis in scientific data, making the decision arbitrary.

The applicant's tonnage was reduced by 15,000 tons. The ability to measure the impact of such small amounts of material on the bed of one of the nation's largest waterways and drainage areas and has not been demonstrated by USACE

C. The amount of tonnage in the Jefferson City and St. Charles segments is so negligible that it should be exempted from all other permit conditions.

Global Issue 10 is hereby incorporated by reference.

D. The monitoring provision relating to 24/7, 365 days per year, is unreasonable and unconstitutional.

Global Issue 6 is hereby incorporated by reference.

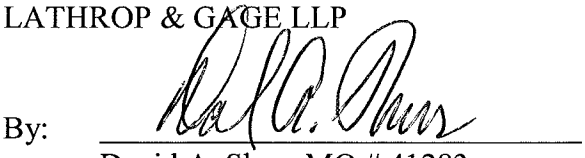
CONCLUSION

For all of the reasons set forth above and in the contemporaneously-filed Memorandum in Support of Request for Appeal, the Record of Decision's proposed commercial sand dredging permits are arbitrary and capricious, and contrary to law. Accordingly, the Missouri River Dredgers Group respectfully asks the Review Officer to reverse the Record of Decision, and grant the Dredgers the tonnage amounts requested in their original applications. Alternatively, and at a minimum, the Missouri River Dredgers Group requests that the Review Officer issue commercial sand dredging permits with tonnage amounts no less than the Dredgers' previously authorized permit levels. Finally, the Missouri River Dredgers Group requests such other and further relief as the Review Officer deems fair, just and equitable.

Dated: May 31, 2011

Respectfully submitted,

LATHROP & GAGE LLP

By: 

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Attorneys for the Missouri River Dredgers Group

DEPARTMENT OF THE ARMY
ST. LOUIS DISTRICT, CORPS OF ENGINEERS
1222 SPRUCE STREET
ST. LOUIS, MISSOURI 63103-2833

APR 12 2011

REPLY TO
ATTENTION OF:

Regulatory Branch
(MVS-2008-00193)

Mr. Ray Bohlken
Capitol Sand Company, Inc.
P.O. Box 104990
Jefferson City, Missouri 65110-4990

Dear Mr. Bohlken:

This letter concerns your application No. MVS-2008-00193, dated March 21, 2008, requesting Department of the Army (DA) permit authorization to extract up to 500,000 tons of sand and gravel per year from the Missouri River between river miles 40 and 50 with a mobile, floating, hydraulic suction dredge plant.

I have reviewed the recently completed Final EIS for Missouri River Commercial Dredging (Final EIS), the Record of Decision (ROD) and all other available information regarding your current proposal along with the proposals of other commercial sand dredgers on the Missouri River. I have concluded that authorization of dredging from the lower 50 miles of the Missouri River in excess of the annual tonnage of aggregate outlined in the Least Environmentally Damaging Practicable Alternative (LEDPA) of the ROD, would result in unacceptable impacts on the aquatic environment of the Missouri River. I have determined that issuance of any permits for extraction of aggregate in excess of the LEDPA annual tonnage would be contrary to the public interest because less environmentally damaging practicable alternatives are available which would meet the objectives of your proposed dredging. Annual extraction and past authorized amounts have exceeded the LEDPA annual tonnage in recent years so even the currently authorized dredgers face reduced extraction limits, hence, there is no additional available tonnage. Therefore, I am denying your request for authorization to extract up to 500,000 tons of sand and gravel per year from the Missouri River between river miles 40 and 50.

Please note that the Corps of Engineers has published an administrative appeal regulation at 33 Code of Federal Regulations (C.F.R.) 331. The purpose of this regulation is to establish administrative appeals policies and procedures for final Corps of Engineers' geographic jurisdictional determinations and permit denials with prejudice. The appeals process allows you to pursue an administrative appeal of a final Corps of Engineers' decision or determination with which you disagree. The Final EIS and Record of Decision used to evaluate your proposed activity can be viewed and downloaded at:
http://www.nwk.usace.army.mil/regulatory/Dredging/MO/MOdredging.htm.

EXHIBIT
tabbies
A

Printed on Recycled Paper

This letter contains a permit denial for your commercial dredging permit application. If you object to this decision, you may request an administrative appeal under Corps regulations at 33 C.F.R. Part 331. Enclosed you will find a Notification of Administrative Appeal Options and Process (NAP) and Request for Appeal (RFA) form. If you request to appeal this decision you must submit a completed RFA form to the Northwestern Division Office at the following address:

Division Engineer
ATTN: David W. Gesl
Administrative Appeals Review Officer
U.S. Army Corps of Engineers
P.O. Box 2870
Portland, OR 97208-2870
Telephone: 503-808-3825

In order for an RFA to be accepted, the Corps must determine that it is complete, that it meets the criteria for appeal under 33 C.F.R. Part 331.5, and that it has been received by the Division Office within 60 days of the date of the NAP. Should you decide to submit an RFA form, it must be received at the above address by May 31, 2011.

It is not necessary to submit an RFA form to the Division Office if you do not object to the decision in this letter.

The St. Louis District Regulatory Branch is committed to providing quality and timely service to our customers. In an effort to improve customer service, please take a moment to complete the enclosed postage paid card or go to our Customer Service Survey found on our web site at http://per2.nwp.usace.army.mil/survey.html.

If you have any questions concerning this matter, please contact Mr. Charles Frerker at 314-331-8583.

Sincerely,

Thomas E. O'Hara, Jr.
Colonel, U.S. Army
District Commander

Enclosure

BEFORE THE UNITED STATES ARMY CORPS OF ENGINEERS
NORTHWESTERN DIVISION

St. Louis District
Kansas City District

Regarding the Permit Requests of:

St. Louis District	USACE File Nos:
J.T.R., Inc. (Permits P-2789, P-2339, P-2340, P-2341)	MVS-2011-178, P-2789
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MEMORANDUM IN SUPPORT OF REQUEST FOR APPEAL

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INTRODUCTION

There are six companies that comprise the Missouri River Dredgers Group: J.T.R, Inc., Limited Leasing Company, Capital Sand Company, Inc., Hermann Sand & Gravel, Con-Agg of Missouri, LLC, and Holliday Sand & Gravel, LLC (collectively the "Missouri River Dredgers" or the "Dredgers"). Together, these companies dredge 100 percent of the commercial sand on the Missouri River. Without question commercial sand dredging plays a critical role on the Missouri River. Dredging yields significant benefits to the citizens of the State of Missouri, providing a high quality, low cost product which helps build roads, homes and infrastructure within the State, as well as valuable jobs to residents in numerous communities. While commercial sand is the Dredgers' livelihood, the resource has far-reaching impacts throughout the regional economy.

On March 31, 2011, the United States Army Corp of Engineers ("USACE") issued its Record of Decision ("ROD"), arbitrarily narrowing the availability of commercial sand on the Missouri River. The ROD, in conjunction with the final Environmental Impact Statement ("EIS"), imposed illogical tonnage limits on permits based on uniformed standards; unilaterally adopted segments with no relationship to the risk of bed degradation; improperly ignored the Missouri River Bank Stabilization and Navigation Project's ("BSNP") significant role in causing bed degradation to the detriment of the Dredgers; offered flawed assumptions about the availability of alternate sources of sand and gravel; exceeded its authority in requiring continuous 24/7 monitoring of the Dredgers' operations; unlawfully deprived the States of Kansas and Missouri access to their own natural resources; and underestimated, and in some cases disregarded, the economic and environmental consequences of reducing dredging operations on the Missouri River.

Although the Dredgers certainly understand that the USACE is responsible for managing the Missouri River, its permitting decisions must still be based on concrete facts obtained after conducting a thorough and objective investigation. Whether the Dredgers' appellate issues are viewed independently or in totality, the ROD and its associated permitting decisions cannot withstand any level of scrutiny, let alone an arbitrary and capricious review.

STANDARD OF REVIEW

The Review Officer ("RO") "will conduct an independent review of the administrative record to address the reasons for the appeal cited by the applicant in the RFA." 33 C.F.R. § 331.3. "In addition, to the extent that it is practicable and feasible, the RO will also conduct an independent review of the administrative record to verify that the record provides an adequate and reasonable basis supporting the district engineer's decision, that facts or analysis essential to the district engineer's decision have not been omitted from the administrative record, and that all relevant requirements of law, regulations, and officially promulgated Corps policy guidance have been satisfied."

Agency action is unlawful and may be set aside if it is arbitrary, capricious, an abuse of discretion, not supported by substantial evidence in the administrative record, or otherwise contrary to a law, regulation, executive order, constitutional right, or officially promulgated USACE policy. 5 U.S.C. § 706; 33 C.F.R. § 331.9(b). A decision is arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983).

GLOBAL PERMITTING ISSUES

I. The Dredgers Appeal The Tonnage Limits Imposed On Each Individual Dredger In The Issued Permits In That The Adoption Of These Limits Is Arbitrary And Capricious And The Limits Are Based On Inaccurate And Incomplete Data.

In the March 31, 2011 ROD, the USACE considered and imposed certain tonnage limits that would restrict how much material each of the Dredgers may remove from each segment of the LOMR in which that Dredger holds a permit. In the proposed Permits, the USACE effectively adopted two caps on the amount of material that may be taken from the river. First, the USACE adopted a segment limit, which limits all commercial dredging in each segment to a percentage of the USACE's estimate of how much material the river purportedly holds. Second and in addition, the USACE adopted a limit in certain areas of the LOMR that the USACE views as vulnerable to over dredging. These limits provide that, in protected areas, the Dredgers may not remove more than 300,000 tons of material per year per five mile stretch.

The adoption of the dual tonnage limits is arbitrary in that the caps are based on inaccurate information and conclusory findings. The USACE has embraced these caps under the unproven assumption that commercial dredging is the cause of river degradation. The USACE then assumes, without any data in support, that limiting commercial dredging will lessen or eliminate bed degradation. The USACE arbitrarily adopted these overly conservative caps on dredging even when its own data demonstrates that the LOMR will yield much more material than the proposed Permits would allow.

A. The USACE lacked data to conclude that limiting dredging will effect overall bed degradation.

In the ROD, USACE asserts that dredging leads to overall bed degradation without sufficient analysis or evidence to support that conclusion. The EIS, which was paid for by the Dredgers as a condition for seeking these permits, acknowledges, but refuses to consider, that

there are other substantial factors that contribute to the perceived bed degradation in the LOMR. The drafters of the EIS make the faulty presumption, which is eagerly adopted by the USACE, that the issue of bed degradation can be controlled or even alleviated by limiting commercial dredging operations. There is no support for this presumption in the record.

The drafters of the EIS attempted to calculate the capacity of the LOMR for commercial dredging operations and then translated these numbers into an acceptable limit, as measured by annual tons, for commercial dredging in each segment. The source of these calculations is not clear from either the ROD or the EIS, but appears that the drafters compared estimates of the bed load of the LOMR in 2007 to the average amount taken by the Dredgers over the years 1998 and 2007. ROD (2-16). The observation taken in the ROD is that this comparison demonstrates that areas with *acute* river bed degradation show concentrated dredging of 46-53% of the estimated bed load, while in areas with slight or stable degradation, dredging was limited to 10% of the estimated bed load. ROD (2-7). From this point, the ROD makes the leap in logic that *overall* bed degradation can be controlled by limiting the dredging intensity as a percentage of the bed load dredged. This simplistic approach ignores the very different characteristics of each of the segments. The drafters of the EIS were obligated to rely on this correlation methodology rather than to develop an actual sediment model. Without a reliable sediment model, however, it is impossible to predict the effects of varying levels of dredging over hundreds of miles of diverse river and the EIS must be viewed as inconclusive – answering many questions, but answering none. In light of the lack of any scientific certainty, the ROD's strict adherence to the EIS Preferred Alternatives, and the decision to impose strict tonnage limits on commercial dredging, is arbitrary and capricious in that it is based on insufficient and inconclusive information.

B. The analysis of bed loads in the EIS is flawed.

Further, the analysis of the bed loads of the LOMR is flawed and based on inaccurate data. The drafters of the EIS admit that the USACE's knowledge about the Missouri River is incomplete. EIS (ES-6). There is a lack of sufficient data available regarding the sediment loads of the river over the time period, so those values must be estimated. EIS (Appendix A, A.4). The estimates were taken from data taken in 2007 from gage sites in St. Joseph, Kansas City, and Hermann. EIS (Appendix A, A.4.2). Loads in the other two segments were estimated based on the readings from the other segments. *Id.* As pointed out by Charles Patterson, the engineer that commented on the EIS on behalf of the Dredgers, this initial analysis in the EIS is based upon inappropriate hydrologic and geomorphologic presumptions and analysis. C. Patterson comment letter ("Patterson"), March 22, 2011.

The first flaw in the bed load analysis is the comparison of a ten year average of the Dredgers' output to the estimated load measured for one particular year (2007). Comparing the river as it existed at one point in time to dredging over a ten-year span (1998-2007), lends no relevant information. Water flow levels vary greatly from year to year, even month to month, which the EIS's analysis does not take into account. Patterson, March 22, 2011. To establish any correlation between dredging practices and flow amounts, the authors of the EIS would have needed to compare annual dredging numbers with the measurement of the river for the correlating year. Patterson, March 22, 2011. As the USACE admits, it lacks the information to make such a comparison.

Further, the choice to use 2007 flow numbers to estimate the capacity of the LOMR, rather than available numbers from 2009, was arbitrary. Historical data indicates that the 2009 data more accurately represents the historical flow rates for the river. Patterson, March 22, 2011. 2007 marked the last of seven years of record low river levels caused by drought. EIS (3.4.4).

Higher water flow levels create more material in the river. Patterson, March 22, 2011. By electing to use the historically low 2007 numbers, the USACE has intentionally underestimated the bed load in the river, and has then used these numbers to bolster this attempt to curtail commercial dredging on the LOMR.

The USACE conducted a similar analysis of bed loads in 1999 when it was considering removing 3.5 million cubic yards of material from the river to construct a levee. The EIS acknowledges that the estimates of bed loads of the LOMR were much greater than the current numbers. EIS (Appendix A, A.5.2). The EIS tries to explain the discrepancy by stating that in 1999, the Corps included larger material in its bed load analysis. *Id.* More accurately, the comparison demonstrates that the USACE estimates the capacity of the river differently when it serves the purpose of its own projects.

The second flaw in the bed load analysis is that there is simply more material in the LOMR than the drafters of the EIS or the USACE are admitting. The data in figure 3.4-22 in the final EIS shows that there was actually *aggradation* of the 500 mile length of the river for the time periods of 1998 to 2007 and 1998 to 2009. Patterson, March 22, 1011. In addition, the EIS estimates that an additional 37 million tons of sediment (mostly sands) could be a released each year as the result of restoration projects that are ongoing and/or planned for the LOMR under the Missouri River Recovery Plan ("MRRP").[1] EIS (3.2.3). The EIS notes that this upswing in

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[1] The MRRP is an ongoing effort by the USACE, authorized by Congress, to comply with the 2003 Amended Biological Opinion on the Operation of the Missouri River Main Stem Reservoir System, Operation and Maintenance of the Missouri River Bank Stabilization and Navigation Project and Operation of the Kansas River Reservoir System (BIOP) developed with the U.S. Fish and Wildlife Service. The MRRP is the implementing program to comply with the Endangered Species Act in an effort to preserve the endangered pallid sturgeon in the LOMR. The MRRP is required to develop shallow water habitat (chutes and other still water structures) to enhance pallid sturgeon propagation and recovery. These projects are estimated to provide 37 million tons of sediment related materials to the LOMR over the 15 years of implementation. The 2012 Presidents Budget for the MRRP is between $70 and $80 million. By contrast, the USACE funding in the 2012 Presidents Budget for maintenance and improvement of the BSNP on the LOMR is $3.5 million.

sediment may last only fifteen years because the river is expected to reach equilibrium after construction. EIS (3.2.3). This limitation, however, is irrelevant to the current permits, which are only five years in, length and, frankly represents the only long-term consideration found in the EIS. If this additional material is in the river and is there for the taking, denying access to the Dredgers is arbitrary. Overall, the data that the EIS relies on to support its conclusion that the bed is degrading is incomplete and the EIS failed to determine whether the LOMR was aggrading or degrading overall. Patterson, March 22, 2011.

C. The drafters of the EIS rely on inaccurate measurements and methods to conclude that commercial dredging leads to localized bed degradation.

The EIS's attempt to link commercial dredging to localized river degradation is also contrived. The drafters of the EIS attempted to measure river bed levels in the areas where commercial dredgers were most active and to determine which of those areas of the river were more degraded than others. The conclusions of this study are flawed, however, because of the method that the drafters used to measure the river. The measurements of the water levels were taken during active dredging season, meaning that the Dredgers' boats were out on the LOMR, excavating material. It is predictable that when a dredge barge removes material from a location along the river bed, the bed will be lower, at least for some time. The dynamics of the river are such, however, that over a short period of time, river material will fill in the dredge holes. Multiple investigations have shown that the bed will quickly recover from dredging activities. Measuring the bed during active dredging season creates a likelihood that the measurements included at least some active or recently active dredge holes, which had not had time to fill in. This likelihood skews the results and suggest localized degradation when, in fact, none exists. Patterson, March 22, 2011. To appropriately measure localized degradation, the analysis should be performed when the river is at stasis.

Another flaw in the localized bed degradation analysis is that drafters used the actual length of the permitted reach, rather than what was actually dredged, to form their measurements. This method would attribute any degradation in the reach to commercial dredging, whether or not there had been dredging activities in the area. An example of this is the Kansas City reach, where an area of maximum degradation, river mile 385, is actually several miles above from where Holliday actually dredges, although the company is permitted in the area. The degradation there is automatically attributed to dredging activities when, in fact, the area has not been dredged. This is yet another example of how the USACE's correlations lack any actual causation.

The Drafters of the EIS studied historical dredging data local bed elevations and came to the conclusion that "dredging up to approximately 60,000 tons/mile/year is a level of local dredging intensity that is reasonably unlikely (95% certain) to result in local bed degradation." EIS (2-90); ROD (4-14). The Drafters determined that reducing dredging to the level of 30,000 tons/mile/year would be certain to result in no further degradation. EIS (3.4-99). These calculations were again limited to 1998-2007 levels to exclude what the USACE deemed "above average" water flows, but what historical data suggests is far closer to average. *See* EIS (3.4.-35); Patterson, March 22, 2011.

While the Dredgers contend that the analysis is flawed and the conclusions as to the existence and extent of localized bed degradation are exaggerated, the Dredgers have agreed that some limits on concentrated dredging are appropriate. For this reason, the Dredgers do not challenge the imposition of the 300,000 tons/year per five mile limitation on areas where the USACE has determined that past dredging appears to be too concentrated. What the Dredgers challenge as arbitrary, however, is the imposition of the segment caps in addition to this number,

which, in effect, prohibit the Dredgers from taking material that, by the USACE's own numbers, is available, to meet the Dredgers' *current* needs.

D. The tonnage caps on dredging based on bed load are unreliable and arbitrary.

The ROD concludes that that, because there has been less measurable degradation in areas of the LOMR where the commercial dredgers have removed a smaller percentage of the theoretical bed loads, then limiting dredging to a smaller percentage of these purported loads will hold degradation at bay. This theory has not been tested. There has been no scientific analysis in the record or otherwise to demonstrate that that these limits will have any effect of slowing bed degradation in the impacted areas of the LOMR.

The ROD acknowledges that the USACE's knowledge of the LOMR and the causes of bed degradation is incomplete. ROD (4-14). The USACE's recent Reconnaissance Study (USACE 2009b) concluded that further study of the causes and contributors to degradation in the LOMR is needed. ROD (3-33). The USACE has requested millions of dollars and several years to complete this analysis. Yet, in this permit process, it has arbitrarily determined that it can pinpoint the cause of river bed degradation and compromise a private industry in doing so when it has no evidence that *any cap* will have any positive impact. Indeed, the evidence before the USACE is that the river is now aggrading generally, and that additional material is presently available for the Dredgers. Patterson, March 22, 2011.

In the ROD, the USACE considered three alternatives for each segment in the LOMR and then set the segment cap based on what it considered to be the "Environmentally Preferred Alternative" for each segment, with the goal being no more than slight to moderate river degradation. The USACE then divided this capped amount among the Dredgers holding permits in each segment, with no explanation as to the methodology behind the allocations.

Alternative A was purported to be 10% of the estimated bed load for below average water flows. EIS (ES 5.3). It is the level of dredging that has occurred in the St. Joseph segment. The application of Alternative A to other segments results in up to a 74 to 78% reduction from the annual average taken by the Dredgers between 2004 and 2008. *Id.* As the Dredgers have pointed out, Alternative A would not allow sufficient material to justify a full time dredging operation and is the economic equivalent of denying the permit. Comment letter of D. Shorr ("Shorr"), September 7, 2010, p. 18. The USACE contends that adopting Alternative A will result in a "slight risk" of degradation. Absent a sediment model and comprehensive study of the causes and contributors of bed degradation, this is but a presumptive theory. Alternative A is not based on facts and, therefore, consideration and adoption of the cap is arbitrary.

Alternative B was purported to be 15% of the estimated bed load for average water flows. EIS (ES 5.3). It represents a 30% cut from 2004 to 2008 averages. Again, Alternative B does not meet the purpose and need statement made by the Dredgers in applying for these permits. Shorr, September 7, 2010, p. 12. Alternative B was proposed to represent a "slight to moderate risk" of degradations in all segments but Waverly. Again, this assumption presumes that the USACE has studied the causes of degradation and can scientifically link commercial dredging to overall bed degradation. It has not and it cannot. Thus, Alternative B is an arbitrary number.

And while Alternative C is the most generous alternative, the analysis was neither based on the availability of the resource nor the current or future demands of the Dredgers. Alternative C is a number approximate to the negotiated amounts removed from the LOMR by the permitted Dredgers between 2004-2008. EIS (ES-5). The ROD and the EIS deemed the risk of degradation to be "moderate to substantial," when, in fact, there was little to no analysis to suggest that allowing dredging operations to continue at current permit levels would have any

measureable effect on river bed degradation. Further, despite its consideration of Alternative C, which was not resource based, the USACE unreasonably and arbitrarily refused to consider or evaluate the tonnage limits requested by the Dredgers or the no-cap "mine and relax" approach that was also proposed. EIS (ES-5).

E. The USACE can protect at risk areas while allowing sufficient tonnage.

As set forth above, there has not been any study that would demonstrate that capping tonnage based on river bed loads, real or estimated, will have any effect on river bed degradation. The difference in the amount requested in the permits and the amount allowed is immeasurable as far as the overall size and amount of material in the river. Any claim that these limits will have any impact on the broader issue of bed degradation is arbitrary, capricious, and contrary to law.

The only study that exists, while flawed, is the limit on the material that can be removed per river mile to avoid localized bed degradation. This 60,000 number serves as the basis of the limits that the USACE imposed on what it views to be the areas of the LOMR that are most at risk. Neither the ROD nor the EIS provide a sufficient explanation as to why the Dredgers should not be allowed to remove material from the river in other areas at the same volume that is allowed in the most protected areas at will.

The arbitrary nature of the USACE's tonnage limits is best demonstrated in the Waverly segment. According to the EIS, there has been a one foot aggradation in Waverly between 1998-2007 and a 1.7 foot aggradation between 1998-2009. EIS (3.4-80). Yet the USACE limited the tonnage for Waverly to 1,140,000 collective tons annually and denied Capital Sand's request to take 500,000 tons of material in the Waverly segment. ROD (4-23-24). Using the 60,000 ton/mile/year number, which the EIS says, with 95% certainty, will not result in localized bed degradation, the Waverly segment, at 107 miles in length, would yield 6,420,000 tons of material

each year. Adopting the more conservative number of 30,000 ton/mile/year, the segment still would have 3,210,000 tons of material that can be used each year without risk of bed degradation. Similarly, the St. Joseph segment, another 107 mile reach that has been deemed to be stable, was limited to 860,000 tons per year. Like Waverly, the reach should yield 6,420,00 tons under the 60,000 ton/mile/year number or 3,210,000 tons a year at 30,000.

According to the EIS analysis, the Jefferson City and St. Charles segments each have signs of degradation, all of which are more prominent in areas where dredging activity has been concentrated. EIS (3.4-80-82). Those areas have been designated as protected in the Permits, however, and the appropriate limits have been set. The USACE has not demonstrated, however, the need for such a conservative limits in areas that are not endangered. To do so would be counterintuitive, because the Dredgers would not have any incentive to spread out their practices. The Jefferson City segment is limited under the current permits to 1,630,000 tons annually. The 120-mile segment should yield 7,200,000 tons a year under the 60,000 tons/mile/year number and 3,600,000 a year if that number were cut in half. The St. Charles segment is 130 miles, which should allow 7,800,000 tons of material a year, or 3,900,000 at the more conservative rate. Instead, the USACE arbitrarily limited the four active dredgers to a collective 1,710,000 tons a year, less than half of the most conservative estimate that would protect the segment from degradation from over-dredging.

Even the Kansas City segment, which is the most heavily engineered portion of the LOMR, yields more material using this analysis. The entire Kansas City segment has been designated as protected and the 300,000 tons/year per five mile reach. This protection alone should be sufficient to ensure that commercial dredging does not result in further degradation in the Kansas City segment. The USACE instead imposed the harshest limits on the Kansas City

segment, starting at 1,200,000 tons and decreasing to 540,000 tons in 2014, which are far below current levels and below the level that is economically sustainable to keep the Riverside plant open. The 34 mile segment should yield 2,040,000 tons each year at the 60,000 per segment mile number. Half of that number is close to the 1,200,000 ton level set for 2011 and suggests that allowing that number to be taken each year is sufficient.

II. The Dredgers Appeal The USACE's Adoption And Use Of Segments And Fixed Segment Boundaries For Permitting Purposes And, Specifically, The Imposition Of An Additional Tonnage Limit Within The Specific Segments.

In the proposed Permits, the USACE has imposed segment-based tonnage limits, which restrict the amount of material that each Dredger may remove from each segment in which the Dredger holds a permit. This is a departure from previous permitting cycles, where the USACE restricted dredging to specific reaches, but the Dredgers were free to take material from any reach of the river that the Dredgers' permits allowed. The Dredgers accept that their permits will be tied to reaches for administrative purposes and that some limits to dredging activities are necessary for certain protections, such as cultural resource surveys and the protection of habitats. The adoption of segment-based tonnage limits in addition to the reach limits, however, serves no factual or logical purpose and, therefore, is arbitrary.

The USACE adopted the segment lines as a tool to study and evaluate the river. While dividing up the river for study may have its purpose, these segment lines are fictional divisions of a single, fluid river, and have no utility for permitting purposes, other than as a means to further curtail commercial dredging. Indeed, neither the EIS nor the ROD offer any authority for imposing segment-based tonnage limits. Because there are no actual measurements of the amount of sediment in the LOMR (EIS (A-36)), the segment-based tonnage limits are based on the EIS' incomplete and flawed estimates of the bed loads in each segment. (Section 1, supra). The bed loads for some of these segments are not based on any measurements or other hard data

at all, rather they are estimates based on other estimates in the other segments. *See generally,* EIS (A-4). Without a proper factual basis, the USACE's imposition of these segment-based tonnage limits for each specific section of the LOMR is arbitrary.

Further, the segment-based tonnage limits are not needed to protect areas in the LOMR that the USACE views as vulnerable to overdredging. That concern is addressed by the 300,000 per five mile reach limitations that the USACE placed on those sections of the river that it believes to be at risk. ROD (4.24). The Dredgers agreed that this limit was protective while data demonstrated otherwise was being gathered. *Id.* According to the USACE and the drafters of the EIS, these limits should protect areas where there is concern that concentrated dredging will lend to bed degradation. ROD (4-24).

The segment-based tonnage limits are contrary to USACE's stated goal of encouraging the Dredgers to spread out their operations across the LOMR and to discourage overly localized dredging efforts. *See* EIS (2-89-90). Under these new Permits, the Dredgers who hold permits in more than one segment are tethered by the segment-based tonnage limits, which encourages those Dredgers to dredge in a specific location, rather than to adjust their operations based upon the amount of material available in specific areas in the river. Now that the segment-based tonnage limits are absolute, fixed boundaries, the Dredgers will be forced to take the material according to these arbitrary segment lines rather than to adjust to the availability of the resource.

Further, the Dredgers are now in the position where they are competing for tonnage within a specific segment. As the USACE agrees, it is better to allow the Dredgers to leave material in the river until such time as it is needed. *See* ROD (3-40). These segment-based tonnage limits discourage this practice, as the Dredgers are now motivated to aggressively

remove the most accessible material early and often, because they might not be able to get it later or in another place. The move is counterintuitive to river conservation.

Finally, the segment-based tonnage limits are arbitrary in that they bear no relationship to the existing operations of the Dredgers or to reasonable future practices. The segment-based tonnage limits do not take into account market demands, which may drive the decision on where a Dredger chooses to remove material from the river. The segment-based tonnage limits are inflexible and do not accommodate the differences in dredging practices, marketing, and transportation between the Dredgers. The USACE has imposed the segment-based tonnage limits for its own convenience and not for the purposes of the Dredgers or the river. As such, the decision was arbitrary.

III. The Dredgers Appeal the Improper Permit Decision the USACE Failed to Consider the USACE-controlled River Structures, Including the BSNP, as Part of the Analysis of the Causes and Contributors to Bed Degradation, Which Has Resulted in Disproportionate Action Against Commercial Dredging.

The Dredgers appeal the USACE's refusal to consider the BSNP and the dams, reservoirs, and other structures on the Missouri River as causes or major contributors to bed degradation. This refusal is a voluntary omission of information, which is material to the analysis of the effect of proposed permits. *See* 33 C.F.R. Part 331. The omission also violates NEPA's requirement that an agency take a "hard look" at the environmental consequences of a proposed action. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971). Because the USACE refused to consider an issue that is essential to any credible analysis of the causes or cures to river bed degradation, and also failed to properly respond to the concerns of the Dredgers and others commenting on this topic, the USACE acted arbitrarily and capriciously, in that it relied on inaccurate and insufficient analyses and it failed to follow the requirements of NEPA.

As part of the review of the Dredgers' applications for permits to conduct dredging operations on the LOMR, the USACE purported to consider the environmental impact of commercial dredging, including the issue of river bed degradation. The USACE adopted substantial limits on the amount material that the Dredgers would be allowed to remove from the LOMR. The USACE justified these extensive cuts under the presumption that reducing the amount of material removed from the river over amounts allowed under previous permits would have a positive impact on the purported issue of river bed degradation. This presumption cannot be supported, however, because of the USACE's failure to analyze how the BSNP or other river structures cause or contribute to bed degradation.

The USACE readily admits that the dams, reservoirs, and other river structures, including the BSNP, which reduce or restrict the river's water flow, are major contributors to river bed degradation. EIS (1.5.3). The EIS did not determine how much of the perceived bed degradation problem had been caused by each contributing factor. ROD (3-30). The USACE acted arbitrarily by purposefully limiting the scope of the EIS and refusing to consider their own structures, despite comments to the contrary by both the applicants and USEPA (USEPA, March 24, 2011 comment letter, p. 3) in its analysis of the causes of river bed degradation. Without considering all major causes of bed degradation, it is impossible for the USACE to assign any risk or assess the proportional impact of commercial dredging activities. The analysis of the BSNP's impact upon bed degradation is a task that should have been done years ago when degradation pressures first began to increase. By refusing to consider the overall condition and cause of degradation, the USACE has willingly failed to take the "hard look" required by NEPA at the environmental effects of the proposed permit action.

NEPA is a law of procedure, which dictates the steps that any federal agency must follow in considering the environmental impact of a proposed action. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989). NEPA "places the obligation on the reviewing agency to consider every significant aspect of the environmental impact of the proposed action" and "ensures that the agency will inform the public that it has indeed considered environmental concerns in its decision making process." *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97 (1983) (citations omitted). One element of the hard look analysis is that the EIS must be based on complete and reliable information. If there is incomplete information relevant to the agency's review of the impact of a reasoned choice and the costs of obtaining the information are not exorbitant, the agency is required to include that information in the environmental impact statement. 40 C.F.R. § 1502.22. The USACE is the steward and the keeper of all knowledge relating to the BSNP and its consequences. It alone has the ability to determine the design effects or defects the BSNP has on bed degradation, and the sole ability to share that information.

Proper challenges under NEPA examine whether "the agency has taken a 'hard look' at the environmental consequences." *Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976). If the agency's analysis is arbitrary or capricious or "contrary to the procedures required by law", a reviewing Court may conclude that the agency failed to take the required "hard look." *Kleppe*, 427 U.S. at 410 n. 21. Instead of taking a broad analysis, the USACE used the EIS as a tool to shift the burden of the bed degradation issue to commercial dredging with no scientific proof that dredging, on its own, has any measureable impact on the LOMR. The USACE offers cuts to commercial dredging as a band-aid solution to the greater problems with of the river structures and the BSNP. The EIS and the subsequent ROD attempt to loosely correlate an increase in bed

degradation with an increase in commercial dredging over the past fifteen years. During this same period, however, significant modifications to the BSNP structures were completed. *See* EIS (3.2.4.2.-8-9). And, as detailed below, other needed modifications to the BSNP structures were delayed. Not by chance, the Kansas City segment, where the most degradation is claimed, is also one of the most developed sections of the river. *See* EIS (3.4-84). Additionally, not all areas in where commercial dredgers have operation are degraded, and in turn, degradation is not limited to areas dredged. *See* EIS (Figure 3.4-22, 3.4-33). As such, from the start the USACE lacks sufficient or persuasive data to support their alleged correlation and their conclusion of commercial dredging as the guilty party. This conclusion has not been adequately peer reviewed nor adequately addressed by public study transparent to all. Further, significant new data and analysis was included in the Final EIS. Patterson, March 22, 2011. The practical effect of this procedural oversight by the USACE is that the data and analysis cannot be evaluated by the public in the proper context and no comments can have any effect on the decision-making of the USACE except by appeal.

Despite this oddly circumscribed analysis by the USACE, there is a broad consensus that the river structures controlled by the USACE are significant contributors to the perceived degradation problem. Indeed, river degradation is a predictable consequence of the tremendous extent of engineering that has been applied to the Missouri River, and in fact some scouring the river bed to maintain navigation depths is a specific purpose of the BSNP dike structures. The construction of the various dams, reservoirs, and other river structures has highly altered every aspect of the LOMR. EIS (1.5.1). Prior to construction of the dams and other structures, sediment was plentiful in the LOMR. EIS (1.5.2). The addition of these structures has limited

the available sources of sediment to the tributaries that feed into the river and the erosion of river banks. EIS (1.5.2).

The BSNP, which began in 1912 and was completed in 1981, changed the historical river into an engineered structure. EIS (2.7.4). The BSNP, by design, created a deeper river, with faster flow, which decreased the sediment loans. The BSNP is an effort to engineer a natural resource, which directly leads to river bed degradation. Water flow and sediment levels in the LOMR have changed substantially since the construction of the BSNP. EIS (3.4.5.2). A natural river can react to various environmental factors by changing bed elevations, locations, water flows. An engineered river, in contrast, cannot adjust itself. The only way an engineered river responds, absent modification to the structures, is by degrading the bed. EIS (3.4.6.3). Since the completion of the river structures and the BSNP, which created straighter channels and faster water flows, there has been a marked drop in sediment levels, along with the river's elevation. EIS (2.7.4). Because of the dynamics of the existing BSNP structures, degradation will continue to be a factor **whether or not commercial dredging exists in the LOMR**.

The degradation of the river bed can be attributed to the BSNP structures, as they are designed to channelize and cut a navigation channel during low flow periods. Many of the dike structures built were designed to be overtopped by water 75% of the time, moving sediments that accumulate at low flows that would otherwise constrict the channel. If the dikes are too high, or if there are extended periods of drought, the material builds up behind the dikes, constricting the channel and increasing channel depth, bed forces, and degradation. In fact, the 1993 flood, followed by the drought that began in 1999 and ended in 2007 created record low water flows, which resulted in almost five feet of degradation. (MRCD EIS Figure 3.4-25, page 3.4-77). Because lowering the bed (degradation) has the same effect as raising the elevation of the dikes,

the dikes are topped less and less resulting in a non-linear cycle of channel constriction and accelerated degradation. Dredging has existed on the river for over 130 years, long before the construction of the dams, reservoirs and the BSNP were authorized by Congress. The sands and bed of the river are the property of the states of Kansas and Missouri. The operation of the USACE modified river must include adjustment for dredging as an important use and allow for the reasonable extraction of the state's resources as part of the BSNP management.

The USACE, in its management of the BSNP and other river structures, controls the water flow of the Missouri River. EIS (3.2.5). These water flows, in turn, dictate how much material is in the river. The USACE, in essence, "operates" the river and can control river degradation, particularly in response to specific events like the 1993 flood and the extensive drought that occurring after that event. EIS (3.2.5). USACE guidelines for structure maintenance of the BSNP express that the BSNP requires "constant monitoring of the project and its environs" and that BSNP structures can and should be modified to address excessive degradation. April 5, 1988 USACE Memo; Missouri River Navigation Project Design Criteria, January 1994. Modifications can include lowering, shortening, or removing sill dikes when needed to reduce excessive scouring action or address a sediment imbalance. *Id.* Unfortunately, the USACE has not always adhered to these standards. In practice, including the critical low water period from 1999-2007, the USACE has either lacked the awareness, initiative or the resources to control the bed degradation issue through maintenance and adjustments to these structures.[2] The USACE, in its current permit decision, continues this practice, and shifts the

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[2] The 2012 Presidents Budget for the MRRP is between $70 and $80 million. By contrast, the USACE funding in the 2012 Presidents Budget for maintenance and improvement of the BSNP on the LOMR is $3.5 million.

responsibility for evaluating, maintaining, and controlling their river structures from the USACE to the Dredgers.

There is evidence in the record to suggest that making adjustments to the BSNP has long been known to be an effective method of controlling degradation, and that these adjustments are necessary to protect the integrity of the river. (Missouri River Navigation Project Design Criteria, page 4). The USACE's own Design Criteria for the BSNP, at, paragraph D. TYPICAL PROBLEMS/CONCERNS, states: "The impact of underwater sills on velocities in the navigation portion of the channel can be significant, therefore, the degree of contraction should be closely observed; and the length of sills modified or adjusted as necessary." EIS (3.4.3.2.); Missouri River Navigation Project Design Criteria, January 1994.

The USACE's criteria suggest that the Corp should, from time to time, modify current or build new structures to adjust to current water conditions. Missouri River Navigation Project Design Criteria, January 1994. The experience of recent years (1999-2007), in which the LOMR has experienced low water conditions of record proportions, is that those adjustments did not happen. Following the 1993 flood, these dikes sat well above the correct design criteria, two feet below the CRP, resulting in further degradation. In 2009, the USACE finally took corrective action and lowered the dike heights in the Kansas City segment. It is acknowledged by the USACE that the Kansas City segment had aggraded in the years leading up to the 2009 changes. EIS (3.4-78). The USACE, inexplicably, has refused to evaluate or acknowledge the increased sediment levels since the 2009 changes or to include that analysis in the EIS. This omission is arbitrary.

The EIS drafters' failure to consider the 2009 changes to the BSNP is also material for the purposes of 33 C.F.R. 331.5. The drafters claim, citing unpublished communications with

USACE officials, that the 2009 changes to the Kansas City segment were one of many continuous and periodic modifications to the BSNP. EIS (10-115,116). This assertion fails to appreciate the marked difference between the 2009 modifications and the prior USACE actions in this area, which have been limited to repairs, environmental notching, and partial remedies performed throughout the river. The work in 2009 marked the first time that the USACE excavated sill dikes to the correct height according to BSNP criteria. It is improper not to acknowledge the existence of and the effect that these actions have on the cross section, flow conveyance and scouring energy in the river, and whether the failure to make such appropriate modifications at an earlier date is, in fact, the primary cause of the accelerated degradation seen in the Kansas City reach after the 1993 Flood and the severe drought from 1999 to 2007.

Further, these 2009 changes to the dike structures were made at the same time the EIS was being conducted and the river cross sections were being surveyed with the purpose of comparison to the prior baseline surveys of 2007 and 2008. The refusal to assess or account for this material change to the structures of the LOMR brings the validity of many of the conclusions of the EIS into question. The omission also makes it impossible for the USACE to measure the effectiveness of the restrictions placed on the Dredgers under the 2007 permit cycle.

The CRP was updated in 2010 and available data shows aggradation of the river in 2008 and 2009. EIS (3.4-78). Additional changes to the LOMR can be expected to improve bed degradation. For example, the planned MRRP projects are being conducted by the USACE to comply with requirements of the biological opinion to preserve endangered pallid sturgeon populations, and will reconnect channels and will improve fish and wildlife habitat. EIS (2.7.4). This project is also expected to dramatically improve increase sediment bed load and reduce overall degradation. EIS (3.2-12). In contexts other than the EIS and the current ROD, the

USACE seems to acknowledge that the BSNP can be adjusted to protect the river. In the recent Reconnaissance study, the USACE determined that it did not have sufficient information to pinpoint the causes of degradation. The USACE has asked for funds to study the causes. EIS (3.2-160; ROD (3-33). One of the factors that must be is what changes to the BSNP have and still need to be made to address river bed degradation and to preserve the river and surrounding structures without endangering private industry.

The Dredgers timely challenged the failure to address the BSNP. Shorr comment letter, September 7, 2010. The Dredgers were not the only party that has asked the USACE to assess the impact that the BSNP has on river bed degradation. On September 2, 2010, seven members of Congress from Missouri and Kansas, in response to the draft EIS, urged that the USACE consider all causes of bed degradation before reducing commercial dredging:

> It is our understanding that the two principal reasons for bed degradation in the lower channel are: (1) the retention of sediment behind the major dams and, (2) the design of the BSNP to assure a "self-scouring channel." While we acknowledge that commercial dredging may have an influence on bed degradation, the substantial differences, namely scope and scale, between the removal of seven million tons of sand and the major engineering efforts of USACE to modify the behavior of the river are indisputable. We recognize and understand the need to address the impact of commercial dredging; however, when placed in the context of the significant engineering projects by USACE, we cannot reconcile an impact on this private commercial industry without an examination of the impact of your own actions that result in potential bed degradation.
>
> Accordingly, we are troubled to learn of the potential for the reduction or elimination of commercial sand dredging on the Missouri River when USACE has not yet evaluated the impact of the retention of sediment behind the damns and has failed to analyze whether modifications to the BSNP are necessary to reduce the risk of bed degradation.
>
> To that end, we encourage you to address the impact of your own engineering efforts before considering a further reduction of commercial sand dredging on the Missouri River that will result in reduced availability of the principal material for aggregate within the boundaries of the State of Missouri and parts of the State of Kansas. Until such time as USACE has evaluated the implications of its own

> actions, we cannot support further reductions based on conjectures and possible correlations.

September 2, 2010 letter to the Honorable Jo-Ellen Darcy and Colonel Anthony J. Hofmann. The Members of Congress requested that the USACE respond with a schedule as to when the USACE would reevaluate its own actions and that the Dredgers' permits be reissued at current levels. *Id.* Several state and local governmental officials, trade associations, and other interested commentators expressed similar opinions during the EIS comment period. *See, e.g.,* September 6, 2010 comments from Missouri Levee and Drainage District Association; September 3, 2010 Comments from the City of Lexington, Missouri; September 3, 2010 comments from Missouri Department of Natural Resources; September 2, 2010 letter from Missouri State Senator K. Schaefer; September 2, 2010 letter from Montgomery County, Missouri; August 12, 2010 letter from City of Washington, Missouri; September 1, 2010 letter from City of Herman Missouri; September 3, 2010 letter from the Coalition to Protect the Missouri River. The Dredgers joined in this request.

The USACE dismissed the concerns of Congress, the Dredgers, and others, stating that the analysis was seen as beyond the scope of the EIS and the ROD. ROD (3-32). But the USACE had a legal obligation, as part of NEPA's "hard look" requirement, to determine the true environmental impact of the proposed action. Part of this analysis required the USACE to establish true causation between commercial dredging and river bed degradation. By omitting a known contributor to the problem from the analysis, the USACE put on blinders as to the causes and potential solutions to river bed degradation. In doing so, the permit analysis omitted material facts and violated NEPA's "hard look" requirement. As such, the permit decision by the USACE was arbitrary and capricious as a matter of law.

IV. The ROD Impermissibly Piles Assumption Upon Assumption To Reach Its Flawed Alternative Sources Conclusion.

Relying solely on the statements contained in the final EIS, the ROD summarily concludes that "the sand and gravel resources in the region appear to be sufficient as a substitute for displaced supplies from the LOMR in the short term[.]" ROD (4-12) & ROD (2-10 to 2-13). According to the ROD, the reduced levels of extraction in the LOMR "will not have significant cumulative impacts on the regional economy because existing and planned sand mining operations have ample reserves of sand that meets the requirements and can fulfill the market needs now and in the future." ROD (4-16). Upon a closer inspection of the EIS, however, one inescapable conclusion remains: the alternative sources analysis impermissibly consists of estimates based on flawed assumptions that are based on more estimates and assumptions. This chain of faulty reasoning cannot withstand any level of scrutiny. The USACE's decision to blindly adopt the EIS's alternative sources analysis results in a purely arbitrary judgment about far-reaching matters which will negatively impact the region both economically and environmentally. At the end of the day, there are simply no hard facts or data to demonstrate that enough material is available to fill the void left by the USACE's permits.

A. The proposed short-term solutions are unfounded.

The final EIS expressly recognizes that "supplies dredged from the LOMR represent the majority of sand and gravel used in the primary market area in proximity to the river[.]" EIS (2-27). To absorb the substantial and immediate decreases in LOMR dredging, the EIS first relies on short-term existing sources to handle the regional demand for sand and gravel while long-term sources are being developed and permitted over the next 5-10 years. EIS (2-28). With this initial assumption firmly established, the EIS declares that existing mining operations "**may** be available to provide immediate replacement supplies." EIS (2-28) (emphasis added). More

specifically, the EIS identifies four categories of sand and gravel mining operations to respond market pressures until new long-term sources are developed: the Kansas and Mississippi Rivers; open pit mines; instream mining; and manufactured sand. *Id.* None of these sources provide a viable replacement for LOMR dredging. Any argument to the contrary by the EIS (and USACE) rests on a foundation of speculation and surmise—not fact.

1. Kansas and Mississippi Rivers.

The EIS states that the most comparable alternate source of sand and gravel is material dredged from the Kansas and Mississippi Rivers. EIS (2-28). It even labels these sources as the "clear option to offset changes in Missouri River supplies[.]" *Id.* (2-29). However, in the Kansas and Mississippi Rivers, commercial dredging of sand and gravel is authorized by permits issued by the USACE. *Id.* Neither river is a sustainable alternative in the short or long term.

To determine the available capacity of dredging operations in these two rivers, the EIS focused on the difference between the maximum permitted amounts and the current production (demand). EIS (2-39). The EIS concluded that the total amount of sand and gravel authorized to be mined from the Mississippi River is approximately 2.2 million tons per year, while current production is approximately 1.1 million tons per year. *Id.* (2-39). The EIS then estimated that approximately 1.2 million tons of additional sand and gravel can be extracted from the Mississippi River annually and used to serve the primary market area currently served by the LOMR. *Id.* (2-39). Likewise, with respect to the Kansas River, the EIS stated that up to approximately 2.2 million tons can be annually extracted from the Kansas River based on existing permits. Using what it identified as existing and historical annual production numbers in the Kansas River of approximately 1.4 million tons per year, the EIS surmised that the available capacity in the Kansas River is about 757,000 tons annually. *Id.* (2-39).

Reliance on either the Kansas or Mississippi Rivers to provide the necessary short-term alternative sources is unrealistic. In recent years, permitted quantities in the Kansas River have been reduced or suspended due to concerns of river bed degradation. EIS (2-30). Despite this fact, this source is expected to generate 0.8 million tons of sand and gravel per year, over 10 percent of the total projected shortfall. Once the economy recovers, the Kansas River sand will be needed in its local market. This sand is also located too far from the LOMR market to be cost efficient. Similarly, the Mississippi River is expected to generate an additional 1.2 million tons per year despite that fact that there have been no new commercial dredging permits approved since 2007. Indeed, Limited Leasing has had a pending Mississippi River permit since 1999 that remains unfulfilled. It is extremely naïve to assume that these alternative sources of supply are certain.

Another issue which is glossed over by the EIS is that the quality of sand and gravel from the LOMR meets specifications for Class A fine aggregate, which is required for road construction projects undertaken by the MoDOT and KDOT. EIS (2-39). For major construction projects, the Kansas and Mississippi Rivers will likely be the only sources still available to satisfy state specifications. Moreover, MoDOT further requires that all sand for a project come from a single plant. A single instream or open pit mine subject to the less than 5,000 ton production limit would be precluded from even bidding on MoDOT contracts. A letter from MoDOT confirms the State's preference is material from the Missouri River because of its abundant availability, high quality, and minimal processing. In 2010, sixty percent of the natural sand used on MoDOT projects came from Missouri River sand. No less important, material from the Missouri River allows the State's taxpayers to receive the greatest value for every dollar spent on transportation improvements. It would cost taxpayers millions of additional dollars in the form of added project cost due to the loss of the State's most economical sand resource. Significant gaps in the EIS analysis plainly exist.

Finally, the EIS expressly concedes that the Kansas and Mississippi Rivers are not sustainable in the long-term due to authorized tonnage limits, NEPA compliance, and additional permit review. EIS (2-39). The EIS explains that these rivers are unlikely to expand their capacity, and their "longevity is unknown and maybe even not very likely." EIS (10-13). Any conclusion that available volume from the Kansas and Mississippi Rivers will fulfill the material demand is erroneous.

2. Floodplain open pit mines, instream mining and manufactured sand.

The lack of reliable data to support the alternative sources hypothesis continues with the following finite or nonrenewable sources: open pit mines; instream mining; and manufactured sand. At the outset, the EIS acknowledges that "the suitability, availability, and cost of production of these sources vary widely." EIS (2-28). The EIS then expressly concedes, as it must, that its methodology to calculate available capacity is grounded on mere estimates and assumptions:

> The available (or unused) capacity of alternate sources of construction sand and gravel is difficult to estimate because production data and operating parameters of individual mining operations are not known and often are considered proprietary information. Therefore, estimates of available capacity have been developed using the best available data and a set of analytical assumptions that are prescribed here.

Id. (2-38). Based on this concession alone, USACE's alternate sources analysis must be rejected as arbitrary.

i. <u>Open-pit mining operations.</u>

The EIS asserts that, based on its "assumptions," approximately 4.4 million tons of sand is annually available from open pit mines throughout Missouri. EIS (2-40). Individual pit mine outputs and capacities are unknown, leaving the EIS to rely exclusively on estimates using a

series of debatable assumptions. Simply put, there is a total lack of factual information utilized by the EIS to calculate the capacity of pit mines with any level of certainty.

Open pit mining operations for sand and gravel are permitted by the MDNR Land Reclamation Program, the Kansas State Conservation Commission, and the Illinois Department of Natural Resources. EIS (2-30, 2-35). Some open pit mines are permitted with limits of 5,000 tons, while others have no limit. Only Kansas has publicly available information on existing production levels for sand and gravel mines. EIS (2-41). Provided with actual data, the EIS estimated an available capacity of "only 38,000 tons per year" from Kansas mines. The EIS estimated 532,000 tons of available capacity in Illinois. EIS (2-41).

Actual production data was not available from the MDNR. As the information is considered confidential and proprietary, the EIS conceded that it was not feasible to query mining operators about their available capital and production capacity. The EIS further admitted that "it was not possible to evaluate each mining operation relative to available capital, operating parameters, and regulatory compliance issues" and that the "figures reported in the EIS for available capacity are only planning-level estimates." EIS (10-14). Refusing to shy away from this set of circumstances, the EIS boldly concludes an available capacity of 4.4 million tons exists throughout Missouri.

Remarkably, the EIS reaches this estimate despite not knowing the statewide production level of open pit mines in Missouri beyond 2007 or the production of sand and gravel at individual pit mines in Missouri. Instead, the EIS extrapolates from national trends and then subtracts the Dredgers' production in 2009 from the national trends figure to ultimately conclude that 4.5 million tons of sand and gravel were produced from existing open pit mines permitted by MDNR. EIS (2-40). After making this series of presumptions, the EIS then assumes that

existing MDNR-permitted operations can produce at least as much sand and gravel as was produced in 2006. *Id.* Following this tortured logic, the EIS concludes that open-pit mines have the capacity to increase production by 4.4 million tons, or almost doubling their current 4.5 million production level: "Based on these assumptions, an estimated 4.4 million tons of available capacity are present in open-pit mines throughout Missouri." *Id.*

Available capacity from pit mines in Missouri is based on nothing more than mere surmise, an avenue that is certainly inadequate for the monumental decision proposed by the USACE. Essentially, the EIS assumed that aggregate output equal to the pit mines' 2006 peak production level is attainable by either increasing the output per acre or increasing the number of acres in production. The potential output of individual mines was then estimated by allocating the aggregate capacity based upon the relative size of individual mines. In other words, the EIS relies on the faulty premise that since alternate sources produced more in 2006 than they did in 2009, then there is 4.4 million tons of production available. The EIS fails to appreciate that in 2006 the Dredgers and all the alternative sources, including pit mines, were functioning at maximum production efforts. Present levels of demand, however, are obviously not permanent. Once the economy recovers and demand returns, there will simply be no excess capacity. By failing to allocate for long-term growth or a return to long-term averages of construction, the short-term plan of the EIS will create shortages of sand in Missouri.

The EIS's open-pit mine estimates also lack any credibility based on several other erroneous assumptions. First, the EIS estimate presumes that the number of mines have remained at the 2006 level, which is simply not correct. The number of mines has decreased since 2006. Second, the EIS assumes, albeit incorrectly, that the potential supply from open- pit mines have not been exhausted. Third, the EIS guesses that the permitted values for the mines

with capacity limits are actually indicative of their potential output. Fourth, it is the bare assumption that these other operations produce sand and gravel that is suitable for most applications other than road construction specifications required by MoDOT. EIS (10-17).

The probability that all of these assumptions are true, let alone accurate, is certainly remote. Pit mines are not a sustainable source and will not produce the volume and quality necessary to absorb the loss of the LOMR material. Pit sand will cost the customer $4 per ton more due to the added costs of wasted fine sand, land reclamation costs, and increased cement content because of the finer gradation. Delivery costs will be $3 to $4 a ton greater because of the added 10 to 20 mile haul to sites. In the future, pits will not be within the commercial zone so load capacities will be a third less, increasing delivery costs another third. Sand pits are not closer to the end user or market, and sands hauled on country roads will destroy those roads and require significant expenditures to rebuild them.

ii. <u>Instream mining activity.</u>

Instream mining activity, which also requires a permit, is not a practical alternative at all. In Missouri, regulations governing operation of these facilities limit their operation to certain areas and to certain times of the year. As the EIS admits, the "combined limited area and limited time of operation restrict the overall production of sand and gravel available from this type of resource." EIS (2-37).

iii. <u>Manufactured sand.</u>

Manufactured sand operations are not typically developed and operated independently; rather, manufactured sand is generally a part of a rock quarry or a sand and gravel operation. EIS (2-38). The EIS hardly ascribes a positive outlook to this resource. Instead, it notes that these operations generate additional air emissions (primarily particulate matter from material handling), waste water, and noise (from crushing). *Id.* Raising additional questions about the

feasibility of manufactured sand, the EIS also observes that "[t]he use of manufactured sand in the construction industry in Missouri has been relatively limited based on the abundance of other sand sources, including natural river sand." *Id.* It also notes that manufactured sand, unlike river sand, is not conducive to finishing applications, and that there are concerns associated with the use of manufactured limestone sands in concrete mixes because of chemical reactions. *Id.* The bottom line is that manufactured sand cannot be seriously considered as an available alternate source.

B. The proposed long-term solutions are based on pure speculation.

According to the EIS, "[i]n the long term, new sources likely would be developed in proximity to existing facilities and urban centers, which represent the largest sources of demand for construction sand and gravel." EIS (2-28). The EIS represents that new mining operations could be located in the floodplain adjacent to the Missouri River, but only if: (1) suitable sand deposits can be located on available land; and (2) the required permits can be obtained from local communities, counties, and levee/drainage districts. EIS (2-28). Cementing the absurdity of any reliance on new long-term sources, the EIS concedes that it is "not within the scope of the EIS to provide a comprehensive evaluation of the effects of new operations. Such an evaluation would be speculative without knowing the type, size, location and operational characteristics of the new operations." EIS (10-18). The EIS thus recognizes that it is not even possible to predict the location or production capacity at potential new mining operations. EIS (4.10-2).

From top to bottom, the EIS merely assumes that new sources of sand will be developed in the long run in or near major demand centers to minimize transportation costs. The probability that such supply sources could ever be developed is, at best, afforded scant attention by the USACE. In reality, development of new alternate sources will require the resolution of a number of issues, including acquisition of land with reserves of suitable grades of sand and gravel that are

accessible for extraction; availability of adequate capital for expanding existing sand and gravel operations; acquisition of permits and approvals from federal, state, and local government agencies; local landowner resistance to project development during the permitting process; the inherent risks and delay associated with extended litigation; feasible site reclamation following closure; and other environmental compliance issues. *See, e.g.*, EIS (2-43). A period of 5-10 years or more is typically required for project permitting and development, including the delivery and installation of the necessary production equipment.

With respect to the USACE's assumption that pit mines for sand can be constructed to supplant the decreased production from the river, the USACE ignores the significant difficulties in purchasing and zoning pits anywhere near the Kansas City metro area and the substantial operation cost increases with pit mines. The bottom line is that the permitting and location of pit mines is a matter for state and local governments and is not the province of the USACE to decide. The USACE fails to consider that these governmental branches may view the availability of inexpensive material from local sources that provide jobs to be of more importance than the risk of river degradation. Equally disturbing, the USACE's position fails to consider the environmental impact of pit mining versus the risk of bed degradation. The EIS admits that "the specific locations that would provide supplies are not known and impacts related to the geomorphology of associated rivers and streams cannot be determined." EIS (4.2-48). While the EIS believes that the expected impacts to the geomorphology of any streams and rivers is expected to be minimal in the short term, it remarks that there may be an impact in the long term. EIS (4.2-48). This is hardly the "hard look" one would expect the USACE to perform under NEPA. There is no evidence that construction of new pit mines is an available long term option.

Finally, the long-term analysis of the EIS wholly ignores that new sources of sand would be finite. While the LOMR provides a replenishable source of sand, new pit mine operations

would not. Contrary to the picture portrayed by the EIS, the probability that new, replenishable supply sources will exist and be developed in the major metro and urban areas in Missouri is extremely small. In the long run, off-river mining will result in higher costs for sand, concrete, and asphalt. The long-term analysis provided by the EIS falls far short of the reasoned rationale required to sustain the USACE's permitting decision for the Dredgers.

C. The USACE's trucking and hauling presumptions are inaccurate.

Another flaw permeating throughout the alternative sources theory is that the transportation distance between supply sources and demand sources was based on straight-line distance (as the bird flies) rather than the distance travelled along the existing road work. EIS (4.10-6). Because the location of alternate sand and gravel sources are more distant to demand centers, this will result in even greater increases in the delivered costs of construction sand and gravel than accounted for by the EIS. EIS (4.10-29). With the availability of sophisticated technology to calculate the distance between supply points and demand centers, this is a shortcoming that should have been addressed because it is critical to the calculation of the delivered cost of sand and the associated environmental impacts.

To this end, the choice by the EIS to define the primary market area using a standard 25 mile circle results in a mischaracterization of the true travel distances and costs by 20 to 25 percent for most of the pit mines—especially considering the limited number of bridges in Missouri outside of the St. Louis and Kansas City metro areas. The primary market area calculation is a complete misnomer. There are different business models for urban, suburban, and rural sand supply chains. The market area is larger in all circumstances, and the market areas serving the rural counties is especially larger where transportation is longer with greater frequency. A market area of 65 miles or greater is common for rural use. To utilize a single criterion for geographic areas that are very dissimilar is perplexing and arbitrary. As a consequence, the entire

EIS analysis takes on a strong urban bias that has significant implications for the study's findings and conclusions.

D. The USACE disregards the sand and gravel distinction.

Notably absent from the EIS alternative capacity analysis is any effort to accurately distinguish between the supply and demand for sand versus the supply and demand for gravel. Although gravel is a plentiful commodity in Missouri, sand is not. In the absence of this acknowledgement, the entire section of the EIS attributed to alternative sources of supply and capacity is irrelevant and arbitrary. There is no reasonable certainty that alternative sources of sand are available in Missouri to replace the estimated 6.4 million tons produced from the LOMR. Consequently, sand will have to be shipped from even greater distances than those contemplated by the EIS. The end result is (again) higher delivery and transportation costs passed on to the citizens of the State of Missouri.

Alternative sources of construction sand are very limited and certainly far less than the nearly 6.4 million tons that are dredged from the LOMR. The gravel produced from the LOMOR (approximately 517,000 tons per year) is not used primarily for construction purposes, but rather for more specialized purposes such as landscaping and in drainage fields for septic systems. The analysis of alternative sources should be entirely focused upon the availability and use of sand.

E. The economic impact of the EIS is not hypothetical.

The economic evaluation of alternate sand resources may be the most irresponsible and arbitrary part of the EIS. The economic impact analysis contained in the EIS fails to quantify the effects upon the concrete manufacturing and construction industries—the two industries most seriously impacted. The increase prices would be devastating to the Missouri economy—gross state product would decline by over $300 million with concomitant losses in earnings and jobs of $86 million.

This is not merely an academic exercise. These decisions will have serious short term and long-term consequences for not only the construction mining industry in Missouri, but more importantly, for the construction and transportation industries in the State. As it stands, the EIS recognizes that the volume, grade and quality of alternative sand and gravel sources, their distance to markets, and the ability of existing sources to increase production beyond what is required to meet existing demand, are all important variables in the alternative sources equation. EIS (2-39). Any shifts will impact the cost of sand and gravel to consumers in the short term (mainly because of changes in transportation costs from alternate sources) and in the long term (based on the relative differences in production costs between existing potential new sources developed in the region). EIS (4.10-1). At a minimum, real and reliable data must be used to reach these decisions. To hold otherwise, as the EIS did, falls squarely in the realm of an arbitrary outcome.

V. The ROD Failed To Quantitatively Assess The Environmental Impacts Of Its Proposed Alternative Sources Solution.

An agency must consider all of the direct and indirect impacts of its decision. 40 C.F.R. §§ 1508.9, 1508.8; *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 97 (1983) (agency must "consider every significant aspect" of proposed action's environmental impact). The USACE cannot narrowly focus on bed degradation without also addressing air quality and global warming. But that is exactly the USACE's chosen course of action, as its analysis excluded the potential environmental impact of two classes of pollutants: diesel particulate matter (DPM) and greenhouse gas (GHG) emissions. Throughout the ROD, the USACE repeatedly recognized that its permit decisions would shift the burden of sand production to alternative sources, and cause increased pit mining operations and transportation of sand by truck. ROD (3-40). The USACE's choice to favor increased truck traffic emissions over the baseline movement of sand by water barges (with minimal truck transportation) obligated the USACE to perform a specific quantitative—as

opposed to general qualitative—assessment of any potential environmental impacts. The USACE completely jettisoned that duty, resulting in an arbitrary decision and an incomplete record.

A. DPM emissions were not evaluated.

Diesel-powered vehicles and equipment emit diesel exhaust, which contains DPM. The USACE did not quantitatively assess the health risks associated with DPM. *See also* 40 C.F.R. § 1508.8 (EA is to consider all direct and indirect effects of a project, including "reasonably foreseeable" impacts). While the EIS acknowledges that increased health risks can result from prolonged exposure to elevated DPM concentrations, it summarily concludes that a quantitative analysis of health risks is not appropriate. EIS (4.14-3 through 4.14-5). According to the EIS, "[w]ithout detailed information on the locations of new and existing alternate sources, or on the location of sensitive receptors and the length of dredging operations, it is difficult to determine whether DPM concentrations would result in adverse health effects." EIS (4.14-18).

The USACE, however, bears the ultimate statutory responsibility for complying with NEPA. *Calvert Cliffs' Coordinating Comm. Inc., v. United States Atomic Energy Comm.*, 449 F.2d 1109, 1122–23 (D.C. Cir. 1971); *see N. Carolina v. Fed. Aviation Admin.*, 957 F.2d 1125, 1129 (4th Cir. 1992) (explaining that an agency does not satisfy NEPA "by simply relying on another agency's conclusions about a federal action's impact on the environment"). Scientific uncertainties on how to quantify risks—especially uncertainties that can be resolved through obtainable information—cannot be used as a basis to avoid the required environmental analysis. *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 733 (9th Cir. 2001) (stating that an agency's repeated statement that effects were "unknown" does not constitute the requisite "hard look" mandated by NEPA). "The purpose of an EIS is to obviate the need for speculation . . . ." *Ocean Advocates v. United States Army Corps of Eng'rs*, 402 F.3d 846, 870 (9th Cir. 2005). The USACE's comments on DPM amount to pure speculation.

B. GHG emission were not evaluated.

Similarly, the USACE failed to quantify potential GHG emissions. The transportation sector, which includes the movement of goods by train and truck, is a source of GHGs, including CO2. The USACE's permitting decision will result in increased GHG emissions; the only question is by how much. Indeed, the EIS recognizes that increased sand and gravel operations generate increased GHG emissions, but it refuses to take the required hard look at the issue. *See, e.g.*, EIS (4.14-18; 4.14-25; and Table 4.14-6). This response is wholly inadequate. *See, e.g.*, *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 971-72 (9th Cir. 2006) ("[a] proper consideration of the cumulative impacts of a project requires some quantified or detailed information; general statements about possible effects and some risk do not constitute a hard look absent a justification regarding why more definitive information could not be provided.").

While NEPA allows agencies to recognize uncertainty in their analysis, the statute does not sanction the use of uncertainty to avoid a required environmental assessment. An agency's inability to ascertain the "precise" extent of a project's effects simply does not provide a justification for failing to estimate "what those effects might be before irrevocably committing to the activity." *Conner v. Burford*, 848 F.2d 1441, 1450 (9th Cir. 1988). For instance, in *Davis v. Mineta*, the agency asserted that its EA need not discuss certain environmental impacts created by a highway construction project on the basis that such impacts "will occur with or without the project." 302 F.3d 1104, 1123 (10th Cir. 2002). The Tenth Circuit rejected this view, holding that "Defendants' refusal to study the possibility that the relatively unspoiled nature of this local area might be due, at least in part, to the present lack of a major roadway through it is arbitrary and capricious . . ." *Id.* Moreover, in *Ocean Advocates*, the Ninth Circuit rejected claims by British Petroleum and the USACE that an EA need not consider increased vessel traffic and associated oil spills created by a dock extension project because "market forces" as opposed to the project would dictate whether vessel traffic

increased. 402 F.3d at 867-68. The Court stated that if a "reasonably close causal relationship exists between the [USACE's] issuance of the permit, the environmental effect of increased vessel traffic, and the attendant increased risk of oil spills, the [USACE] had a duty to explore this relationship further in an EIS." *Id* at 868 (citation omitted).

Ignoring for the moment that the EIS inappropriately narrows the availability of the LOMR using inaccurate economic presumptions and analysis (as detailed before), the USCAE's apparent preference to increase truck transportation and fuel consumption to supplant the significant loss of commercial dredging in the LOMRE cannot be divorced from the associated environmental consequences. There will be added emissions from increased pit mining operations, including more fuel burning trucks hauling sand at longer distances. In fact, average shipping distances would increase from 16.3 miles to 103.9 miles, and total shipping distances for sand would increase by 558 million miles. The added trucking and dirt stripping, hauling and mining will cause a significant increase in DPM and GHG emissions, a tremendous increase in fuel consumption, as well as the additional traffic and road wear. Opening new pit mines will result in substantial land disturbance, including impacts to wetlands, streams and groundwater. The USACE disregarded the immediate and long-term environmental consequences of alternative sand and gravel supplies, and therefore, it failed to consider an "important aspect of the problem" before issuing its permits. *Ross v. Fed. Hwy. Admin.*, 162 F.3d 1046, 1050-52 (10th Cir. 1998).

Shifting the burden of sand and gravel production must be quantitatively studied in an EIS. The USACE's failure to quantify emissions means that potentially significant air emissions have not been considered. With little explanation, the USCE simply states that it does not expect dredging associated diesel engines to actually materially contribute to air pollutants. ROD (3-32). Accordingly, a more detailed review must be conducted by the USACE to evaluate the environmental impacts of substantial increases in sand production by open pit mines, along with

the corresponding increases in truck transportation to move the sand from these remote locations. The USACE's decision warrants additional and more detailed investigation. Otherwise, it stands as both an arbitrary and unlawful outcome.

VI. The Continuous Monitoring Requirements Included In The Permits Are Overly Burdensome, Beyond The Scope Of USACE Authority, Bear No Relation To Protecting Any USACE Interest In Dredging, And Violate The Protections Of The Kansas, Missouri and United States Constitutions.

The Dredgers recognize that monitoring is a practicable and necessary part of the permitting process. Indeed, they have consistently and uniformly agreed that requiring the monitoring of locations when dredge pumps are actually operational is reasonable. But the ROD's demand that the Dredgers continually monitor 24 hours, 7 days a week, 365 days per year—regardless of whether the dredge pumps are operational—is completely unnecessary, unduly burdensome, and entirely arbitrary.

The ROD requires the Dredgers to implement a Dredge Monitoring Plan (DMP) showing how each dredger will monitor, record and report the cutter-head position, cutter-head operating status, extraction tonnage, and the presence of any hard substrates, mussel shells, or unusual concentration of gravel in an "impartial, unbiased, reliable and accurate manner." ROD (6-8). The DMP must also include the specifications of the Dredge Monitoring System (DMS), including sensors, hardware, software, and communications devices the dredger will use to gather data. *Id.* The DMS then must contain automated differential Global Positioning System (DGPS) equipment (or other comparable system). *Id.* While the Dredgers contend that there must be some flexibility with regard to the equipment used to obtain data on location and amount of tonnage,[3] the ROD unquestionably crosses the line separating reasonable and excessive when

[3] As set forth in the specific dredger appeal sections, Limited Leasing Company and J.T.R., Inc. vigorously dispute the ROD's expensive monitoring system requirements. Cost-effective equipment supplying the same data on location and amount of tonnage are suitable alternatives, and should be acceptable to the USACE.

it mandates that the "DMS must always be on, recording cutter-head position and operating status every 5 minutes, 24-hours a day, 365 days a year, **even when the dredge is not operating**." ROD (6-8) (emphasis added); ROD (Biological Assessment 3-19 to 3-20).

The 24/7 continuous monitoring requirement is not supported by any basis in the record, let alone any rational basis. Without question the USACE has the right to know when the impellers of the dredges are active. Some monitoring is of value to determine the location of dredging operations and the volume of materials taken. Monitoring may assist the USACE in identifying any degradation trends and evaluating their relationship to dredging activity. ROD (Biological Assessment 3-9). To require the Dredgers to collect monitoring data for USACE during periods when the boats and vessels are not even operational, however, is wholly unwarranted.

The USACE's permitting requirement also fails to appreciate that not all of the dredgers confine their operations to the Missouri River. For instance, Limited Leasing Company owns four dredges (one of which has not operated in two years due to the poor economy). Limited Leasing moves its dredges between the Missouri and Mississippi Rivers as needed and required. To comply with the monitoring requirement, Limited Leasing is faced with the uncalled-for decision of either outfitting all of its dredges with monitoring equipment, or equipping only some of its dredges and then restricting those dredges to the Missouri River. The first option is cost prohibitive, and the second option unduly restricts its business operations. In any event, the permit as written may be construed by the USACE as requiring monitoring even when the dredges are not operating on the Missouri River—an interpretation, which if intended, is obviously unconscionable on its face.

The USCAE's monitoring directive is extreme in all respects. Notwithstanding the highly intrusive nature of 24/7 monitoring, such a requirement is unduly punitive considering the additional equipment, increased fuel consumption and extra manpower necessary to comply with the ROD's mandate, not to mention the high collection and data processing costs. There is absolutely no evidence in the record that the permit holders have not truthfully and accurately reported their dredging activities. No scientific or regulatory value for such a requirement is offered by the USACE, nor has the United States Coast Guard (or any other federal agency) requested the USACE to implement this inherently invasive regulation.

An agency's decision must be supported by findings that are supported by substantial evidence, and the agency must articulate a "rational connection between the facts found and the choices made." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). The USACE's 24/7 monitoring requirement is nowhere close to satisfying this standard. When the impellers of the dredges are running, USACE jurisdiction has merit. All appropriate information can be gained by monitoring during the actual dredging process. As it stands, the 24/7 monitoring requirement constitutes the hallmark of arbitrary decision-making. This degree of monitoring lacks evidentiary support and common sense rationale, falls beyond the scope of the USACE's authority under the Clean Water Act and Rivers and Harbor Act, and violates the Dredgers' constitutional due process and privacy rights. The bottom line is that monitoring requirements must be reasonable. Accordingly, the Dredgers request the Review Officer to completely invalidate the ROD's 24/7 continuous monitoring requirement.

VII. There Is No Basis For The USACE's Denial Of A 100% Carryover of Annual Authorized Tonnage.

As part of the permitting decision, the USACE "has determined that up to 10% of each Dredger's authorized annual tonnage may be carried over each year as a de minimis amount to be

extracted the following year but the annual tonnage extracted with carryover may never exceed 110% of annual authorized tonnage." ROD (3-40). Under this provision, for example, if a particular permit authorized a Dredger to remove 50,000 tons per year, the Dredger is afforded the discretion to remove only 45,000 tons of material. The Dredger may then carry over the remaining 5,000 tons (or 10%), resulting in a total capacity of 55,000 tons of material (50,000 tons plus 5,000 tons) for the next business year. The Dredgers, however, proposed a 100% carryover whereby the Dredger is afforded the discretion to carry over to the next business year any amount of its unused allotment, which strikes a true balance between economic demand of material and any concerns over bed degradation. The USACE's rejection of this proposal is illogical, and only encourages the mining of material from the Missouri River for storage as opposed to allowing the Dredgers to leave material in the river until it is actually needed. There is simply no basis to reject the carryover of unused tonnage to the following business year, as requested by the Dredgers.

The USACE "agrees that it would generally be good for the river if Dredgers leave sand that they could dredge but don't need in the river. Leaving this quantity would help degraded reaches recover." ROD (3-40). But in the same breath, the USACE rejects the Dredgers' proposed 100% carryover option. Without citing any facts or studies, the USACE summarily contends that carrying over more than 10% would likely result in moderate to substantial bed degradation. ROD (3-40). There is no evidence in the record showing that there is any measureable difference in bed degradation, or difference in risk of bed degradation, if a dredger with a 50,000 ton annual permit: (1) removes 50,000 tons in business year 1 and 50,000 in business year 2; (2) removes 10,000 tons in business year 1 and 90,000 tons in business year 2; or (3) removes 40,000 in business year 1 and 60,000 in business year 2.

Failure to adopt a 100% carryover option creates a "warehousing" policy whereby the Dredgers must dredge to the full limits of their applicable permits every year regardless of their current demand for material and then store the surplus. This "use it or lose it" scenario is cemented by the USACE's focus on the Dredgers' prior tonnage use and permitted limits to determine the Dredgers' future permitted limits. If a Dredger fails to use all of its permitted tonnage because there is no current demand for that amount of material, then it will risk a lower permitted amount in future USACE permitting decisions (when the demand, of course, is much higher). It is a classic Hobson's choice.

The USACE's rejection of the 100% carryover option is directly at odds with the undisputed principles that preserving unneeded tonnage in the river would help degraded reaches recover, and that Dredgers should only remove the material needed on any given year up to their permitted limit. The end result is a non-judicious outcome which ultimately benefits neither the Dredgers' business model nor the USACE's bed degradation priorities. When a poor economic cycle exists, just like the last few years, an individual dredger may only need 50% of its allotted permit limit, and the flexibility to carryover the other 50% to the next year when tonnage beyond the permitted amount may be needed is an eminently reasonable preservation of the riverbed resource. No matter the state of the economy, a dredger with a 50,000 tonnage limit will never be able to remove more than 100,000 tons in a two-year period because the carryover is limited to one year. The USACE's position to the contrary lacks support in the record, and establishes a contradictory policy for bed degradation.

VIII. The USACE's Actions Are Contrary To Federal Constitutional Law In That The USACE, In Restricting The Dredgers' Access To River Bed Material Have Taken A Property Right Without Adequate Compensation.

The permits issued by the USACE amount to an unlawful taking that was not evaluated properly by the EIS.[4] The BSNP is a creature of law, requiring a channelized portion of the river from mile 0 to 750, or from the mouth near St. Louis, Missouri to near Sioux City, Iowa. The BSNP prevents bank erosion and channel meandering, thereby providing reliable Missouri River navigation. In restricting the Dredgers' permits, the USACE presented an argument that the risk of degradation to the riverbed and the surrounding structures is severe. Yet the USACE has failed or refused, despite requests from members of Congress, to ask for funding to study the problems with the river or to revise the BSNP to decrease the risk of degradation. Unwilling to examine or alter its own practices to minimize the risk, the USACE has unilaterally decided to adopt a public policy of joint and several liability for bed degradation, and place the full burden of remedying the risk on the Missouri Dredgers regardless of its actual contribution. Not only does this amount to an unlawful taking of the Missouri Dredgers' business without just compensation, but it also deprives the States of Kansas and Missouri—the undisputed owners of the river bed—access to its resources.

The law is clear: the States of Missouri and Kansas, not the federal government, own the beds of navigable waterways, including the minerals contained therein and that make up the bed of the waterways. *See* 43 U.S.C. §§ 1301(a)(1), 1301(e), 1311(a) (confirming ownership of lands below navigable waters to be vested with the states). The States permit the dredging of the river and the removal of material. The Dredgers remove state-owned material from the river with

[4] Notably, the USCAE's permitting authority is grounded upon two statutes: the Rivers and Harbors Act and the Clean Water Act. The former provides the USACE authority to protect navigation, while the latter grants the USACE authority to prevent the contamination or removal of wetlands. By attempting to fix bed degradation through the permitting process, the USACE has exceeded its authority under both statutes. The river beds belong to the states, and the Dredgers are authorized to harvest this resource. The USACE is dictating a resource that they lack the authority to police.

the permission of the State and for the benefit of the state in that the Dredgers supply needed material for public improvements. Kansas is even paid a royalty on amounts dredged from the river.

The notion that the USACE can place the entire burden on correcting the degradation problem on private industry without adequate compensation potentially infringes on due process rights and the Tenth Amendment. The USACE also does not have the authority to take away property, or access to property, without adequate compensation. As such, the USACE's analysis fails to consider the impact of degradation caused by the BSNP, fails to address the issue of property rights in the river, and fails to meet the requirements of NEPA and Executive Order 12630—the latter of which governs governmental interference with constitutionally protected property rights and aims to ensure that the federal government's actions are undertaken on a well-reasoned basis with due regard for fiscal accountability.

Responsible fiscal management and fundamental principles of good government require that government decision-makers evaluate carefully the effect of their administrative, regulatory, and legislative actions on constitutionally protected property rights. The failure of Congress to adequately fund USACE' activities for mandated purposes under the BSNP is the proximate cause of the bed degradation problem. The USACE, therefore, must actually contribute to the solution in a fair, equitable, and proportionate manner. By shifting the responsibility to the Dredgers, the USACE is denying the State of Missouri access to its assets and taking private property (the Missouri Dredgers' business) without just compensation or the requisite due process protections.

IX. The USACE Uses And Relies Upon Unpublished Data And Sources In The ROD And The EIS. The Inclusion Of Such Material, Which Is Not Available To The Dredgers And Is Not Subject To External Analysis Or Peer Review, Is Arbitrary And Capricious And Contrary To Law.

Both the ROD and the EIS are arbitrary, capricious, and flawed because of the extensive reliance on unpublished data and sources. Patterson, March 22, 2011. While federal agencies are allowed to incorporate materials into an EIS by reference to cut down the bulk of the document, "no material may be incorporated by reference unless it is reasonably available for inspection by potentially interested persons within the time allowed for comment." 40 C.F.R. § 1502.21. These unpublished reports and communications, which the EIS and the ROD reference frequently, are not peer-reviewed and are not subject to external analysis by the Dredgers or others and lend credence to a presumption of bias.

By way of example, the USACE relies repeatedly on internal comments by Michael Chapman, of the USACE, regarding the correlation between commercial dredging and degradation and regarding the USACE's policies and past practices regarding the BSNP structures (EIS 10-115). These statements are cited as fact and no other source is provided to verify their accuracy. The Drafters and other interested parties have no way to know what, precisely, was said in the communications or to verify their accuracy.

The Drafters criticized this practice in their comments to the draft EIS. Shorr, September 7, 2010; Shorr, March 24, 2010. The response to the criticism was, "the USACE has cited personal communications or unpublished data only as sources of information for its analysis, not as support for conclusions regarding impacts or their significance" EIS, Response to Comments. Not only is this defense nonsensical, it's inaccurate. If the unpublished information was not used for conclusions, why is it even mentioned and what, if any supporting material was relied upon in its place? It is clear from the text of the EIS that the drafters relied on these communications

as the basis for information that was vital to its analysis. The reliance on material that is not available for review by all interested parties, suggests that the process lacks transparency and taints the reliability of the underlying analysis in the ROD and EIS. This practice violates the guidelines of NEPA and renders the USACE's decision arbitrary and capricious.

X. The Amount Of Tonnage Reduced In Many Of The Permits Is So Limited That It Cannot Be Measured To Demonstrate Or Determine An Impact On The River Bed. The Inability To Determine A Specific Impact By A Proposed Cut In Production Renders The Action Speculative And Pure Conjecture, And Therefore Arbitrary.

The EIS and the ROD state impose strict limits on commercial dredging under the theory that the cuts to dredging will have some favorable impact on the issue of bed degradation in the LOMR. The reality is that that the USACE will not be able to measure the difference in the river from the reduction in tonnage from previous permits, let alone to determine whether the proposed cuts to commercial dredging will have any benefit or detriment to the overall well-being of the river. Absent any science to suggest that these cuts can be evaluated or whether they would have any discernable effect, the reductions in tonnage from the previous permits are arbitrary.

The question is how the USACE, or any other entity, can measure the difference of a few thousand tons of material over a five-hundred-mile stretch of river. The obvious answer is that it cannot be done. While the proposed cuts will have devastating effects to the Dredgers' businesses, the USACE lacks sufficient data to demonstrate, with any reasonable certainty, that the cuts will have any measurable effect on the LOMR as a whole.

For the smaller dredging operations, the cuts are particularly absurd. For instance, Con-Agg of Missouri, LLC, an entity that is now permitted in the Jefferson City segment, was reduced from 175,000 tons per year to 160,000 tons per year. The cut will be significant to Con-Agg's operations. But to the 120-mile Jefferson City segment, the difference that of fifteen

thousand tons has on the river cannot be measured or evaluated. The USACE had no reason to cut an amount that is so insignificant from such a small producer, as it will never be able to determine the impact of this reduction.

Similarly, Hermann Sand & Gravel, Inc., which is also permitted in the Jefferson City, but also in St. Charles, had its tonnage split between these two segments, which as discussed in Section 2, limits its ability to mine material, and then was cut a total of sixty thousand tons, from 300,000 tons to 240,000 tons overall. This cut represents a cut of twenty percent to Hermann's small operation, a threat to the viability of its business. The USACE, in contrast, will not be able to appraise the difference this cut will have on the issue of river bed degradation.

The cuts to the larger Dredgers, while the numbers are bigger, likely cannot be determined to have any positive or negative difference on the issue of river bed degradation. . Given the imprecise measurements relied upon to reach these arbitrary segment limits (Section 1, supra), the refusal to consider other factors that are significant, if not controlling, influences on river bed degradation (Section 5, supra), and the lack of any data to correlate these cuts with any net effect as to bed degradation, the proposed cuts to the Dredgers' operations will not be calculable. Thus, the USACE's imposition of these cuts was arbitrary and capricious.

INDIVIDUAL PERMITTING ISSUES

I. J.T.R., INC., PERMIT NO. P-2789

J.T.R., Inc. operates a contracting dredging operation in the St. Charles segment.

A. The tonnage available in the permit can and should be increased.

Global Issue 1 is hereby incorporated by reference. Adequate tonnage exists in the lower river to support the request of the applicant. The decision by the USACE in limiting the tonnage in the permit was arbitrary, capricious, and based on insufficient and incorrect data.

B. The monitoring provision relating to 24/7, 365 days per year, is unreasonable and unconstitutional.

Global Issue 6 is hereby incorporated by reference. Based upon the monitoring theory presented J.T.R. boats and equipment would be required, under this Missouri River permit, to report activities and operations on the Mississippi River. No such requirements exist in any Mississippi River dredging permit. The Mississippi River is outside the jurisdiction of this action and the jurisdiction of this ROD for the Missouri River. This provision requiring "tracking" of boats and dredges is outside the legal authority of USACE and wholly vested in the Coast Guard legal domain. This provision is also unconstitutional as more fully stated in Global Issue 6.

C. The segment amount is arbitrary and capricious, and its distribution and allocation unreasonable.

Global Issue 2 is hereby incorporated by reference. In addition to the general argument, segment limits in the St. Charles segment inappropriately advance beyond District jurisdictional boundaries creating confusing and differential regulatory positions by the Kansas City District and the St. Louis District. The first fifty miles of the St. Charles Segment are regulated and controlled by the St. Louis. District of the USACE. The remaining 70 miles are regulated by Kansas City. The five Dredgers that hold permits in the St. Charles segment are controlled by segment caps placed by the USACE, as well as several zones designated as protected areas, which are subject to the limit of 300,000 tons per five mile reach. The Dredgers' reaches in this segment also overlap. All of these restrictions on the dredging practices are arbitrary and capricious, in that the Dredgers find themselves competing for the same tonnage and are required to coordinate their efforts and "regulate" their competitors in the segment in order to assure compliance with the permit conditions.

D. The amount of tonnage at the mouth of the Missouri River and reaches allocated to this permit are underestimated.

Global Issue 1 is hereby incorporated by reference. The mouth of the river and its interface with the Mississippi River is treated the same as all other areas of the river. The sediment deposition, bed load, hydrology and hydraulics are vastly different than any other portion of the river providing material in excess of the amounts indicated in the ROD and EIS.

E. The permit decision fails to take into account the impact of the Bank Stabilization and Navigation Project.

Global Issue 3 is hereby incorporated by reference.

F. The permit's limitation of 300,000 tons per 5-mile reach is arbitrary.

Global Issues 1 and 2 are hereby incorporated by reference. JTR dredges in the St. Charles Segment. The Dredgers who hold permits in this segment share reaches, many of which are subject to the 300,000 ton per five mile reach limitation. This restriction places the Dredgers in the position where they are competing for the same tonnage and that they are required to coordinate their efforts and "regulate" their competitors in a segment n order to ensure compliance with permit conditions.

II. LIMITED LEASING COMPANY, PERMIT NO. P-2788

Limited operates a contracting dredging operation in the St. Charles segment.

A. The tonnage available in the permit can and should be increased.

Global Issue 1 is hereby incorporated by reference. Adequate tonnage exists in the lower river to support the request of the applicant. The decision by the USACE in limiting the tonnage in the permit was arbitrary, capricious, and based on insufficient and incorrect data.

B. The monitoring provision relating to 24/7, 365 days per year, is unreasonable and unconstitutional.

Global Issue 6 is hereby incorporated by reference. Based upon the monitoring theory presented Limited Leasing boats and equipment would be required, under this Missouri River permit, to report activities and operations on the Mississippi River. No such requirements exist in any Mississippi River dredging permits. The Mississippi River is outside the jurisdiction of this action and the jurisdiction of this ROD for the Missouri River. This provision requiring "tracking" of boats and dredges is outside the legal authority of USACE and wholly vested in the Coast Guard legal domain. This provision is also unconstitutional as more fully stated in Global Issue 6.

C. The segment amount is arbitrary and capricious, and its distribution and allocation unreasonable.

Global Issue 2 is hereby incorporated by reference. In addition to the Global Issue, segment limits in the St. Charles segment inappropriately advance beyond District jurisdictional boundaries creating confusing and differential regulatory positions by the Kansas City District and the St. Louis District. Multiple applicants are forced to overlap operations and "regulate" competitors operations in the segment.

D. The amount of tonnage at the mouth of the Missouri River and reaches allocated to this permit are underestimated.

Global Issue 1 is hereby incorporated by reference. The segment analysis in the ROD and the EIS are inapplicable for the portion of the LOMR in which Limited mines. Limited is permitted in the lower portion of the St. Charles segment, which is the mouth of the Missouri river. The EIS failed to consider that the sediment deposition, bed load, hydrology and hydraulics at the mouth of the river are vastly different from the other portions of the river. The model for calculating bed loads and for determining river degradation did not factor in these

differences, nor did it consider that the river yields additional material at the mouth. The omission of the variables from the EIS's model is an omission of material fact that brings the conclusions of the ROD into question. Therefore, it is inequitable and arbitrary for the USACE to impose caps on Limited's operations in the St. Charles segment that have not taken to account the nature of the LOMR in that segment.

E. The permit decision fails to take into account the impact of the Bank Stabilization and Navigation Project.

Global Issue 3 is hereby incorporated by reference.

F. The permit's limitation of 300,000 tons per 5-mile reach is arbitrary.

Global Issues 1 and 2 are hereby incorporated by reference. Limited dredges in the St. Charles Segment. The Dredgers who hold permits in this segment share reaches, many of which are subject to the 300,000 ton per five mile reach limitation. This restriction places the Dredgers in the position where they are competing for the same tonnage and that they are required to coordinate their efforts and "regulate" their competitors in a segment in order to ensure compliance with permit conditions.

III. CAPITAL SAND COMPANY, INC., PERMIT NOS. 2011-361 & 2001-1429

Capital Sand operates and is permitted in the St. Charles, Jefferson City and Waverly segments. They operate sand off loading docks, storage and processing facilities in Washington, Jefferson City, Boonville, Glascow, Carrollton, Brunswick, and Lexington, Missouri.

A. Adequate tonnage exists to meet the applicant's request at Washington, Missouri, and in the St. Charles segment. The USACE's refusal to allow Capital Sand's request for tonnage was arbitrary and capricious in that it was not based on accurate or complete data.

Global Issue 1 is hereby incorporated by reference. Under its 2007 permits, Capital had no segment-based tonnage cap, but had previously dredged around 300,000 tons each year at Washington. 2007 Permit 2001-1429. The proposed Permit would limit Capital to 140,000 tons

per year in the St. Charles Segment. Using the 60,000 ton per mile per year number, which the EIS says with 95% confidence will not result in localized bed degradation, would yield 600,000 tons for the ten-mile segment adjacent to Capital Sand's Washington, Missouri operations. *See* EIS (3.4-35). The 80-mile portion of the St. Charles Segment in which Capital is permitted should yield 4,800,000 tons of material each year.

The USACE's own analysis demonstrates that the resource can provide the amount requested by the applicant and its reduction is a decision which is arbitrary and capricious.

B. Adequate tonnage exists to allow the applicant's request in the Jefferson City segment. The failure to allow the applicant's request was arbitrary and capricious in that it was not based on accurate or complete date.

Global Issue 1 is hereby incorporated by reference. There is also more material available in the Jefferson City segment than the USACE's permits allow. Using the 60,000 ton per mile per year number, which the EIS says with 95% certainty will not result in localized bed degradation, the Jefferson City segment, which is 120 miles long, could provide 7,200,000 tons of material. *See* EIS (3.4-35). The USACE in the current permit reduced the tonnage to 1,350,000, 150,000 fewer tons than Capital has averaged in Jefferson City in recent years.

We note that the previous standard provided in the 2001 permit was a limit of 1.2 million tons per ten-mile reach. *See* 2007 Permit 2001-1429. The presumption above assumes a limit of 300,000 tons per five-mile reach. This sufficiently addresses concerns of the parties regarding the overconcentration of dredging. The decision to further reduce tonnage in the Jefferson City segment is arbitrary and capricious.

C. Adequate tonnage exists to allow the applicant's request in the Waverly segment. The failure to allow applicant's request was arbitrary and capricious in that it was not based on accurate or complete date.

Global Issue 1 hereby incorporated by reference. As the USACE admits, the Waverly segment is aggrading. EIS (3.7). As discussed in Global Issue 1, the Waverly segment's 107

mile length would yield 6,420,000 tons of material each year using the 60,000 ton per mile per year number, which the EIS says with 95% certainty will not result in localized bed degradation. Adopting the more conservative number of 30,000 ton per mile per year, which the USACE states would pose zero risk to localized degradation, the segment would still have 3,210,000 tons of material that can be used each year without risk of bed degradation. In 2008, Capital Sand removed almost 565,000 tons of material from the Waverly segment. In the current permit, Capital Sand's total tonnage in the segment was limited to 370,000 tons. Holliday Sand's total tonnage was increased in the Waverly segment by 770,000 tons for a total of 1,140,000 tons allowed in the segment, despite its aggrading status, and despite the USACE's own numbers that suggest that the requested material is readily available in this segment. Instead, Capital Sand's request was reduced by almost 200,000 tons from 2008 levels.

The decision of the USACE to **cut** Capital Sands' request in the Waverly segment, where its stewardship has resulted in an aggraded segment, is arbitrary and capricious and its request for an additional 500,000 tons should be awarded to Capital Sand in the Waverly segment.

D. The monitoring provision relating to 24/7, 365 days per year is unreasonable and unconstitutional.

Global Issue 6 is hereby incorporated by reference.

E. The USACE assumption that there are alternative sources of sand available is based on inaccurate information. The USACE failed to complete an adequate analysis to determine if material exists to meet the needs and to determine the environmental impact of acquiring sand from other sources.

Global Issues 4 and 5 are hereby incorporated by reference. The USACE's erroneous reliance on the primary market area definition or 25 mile radius is compounded with respect to Capital Sand, the largest dredge operator in the Jefferson City segment. Capital Sand provided ENTRIX with detailed statistics and maps of their market area which spans **43** counties in Missouri. Applying a uniform 25 mile radius is completely arbitrary given the widespread

geographic area of Capital Sand's operations. A uniform 25 mile radius ignores market realities and results in a skewed urban bias. Accordingly, the USACE's entire alternative sources analysis as applied to Capital Sand is infected by this invalid assumption.

F. The impact of the reductions provided in the above permits cannot be accurately measured to determine their direct impacts. The assumption that the reduction will have any correlation to river bed degradation lacks any basis in scientific data, making the decision arbitrary.

Global Issue 10 is hereby incorporated by reference.

G. The permit decision fails to take into account the impact of the Bank Stabilization and Navigation Project. The decision to omit the analysis of the BSNP was arbitrary and capricious and a direct violation of NEPA.

Global Issue 3 is hereby incorporated by reference.

H. Specific denial of Capital Sand's Washington, Missouri permit by the St. Louis District.

The St. Charles segment has sufficient tonnage to allow the Capital Sand's request for a permit. The failure to allow the Capital Sand's request was arbitrary and capricious in that it was not based on accurate or complete data.

The St. Charles segment is 130 miles long. The St. Louis District oversees the lower 50 miles of the segment, which is where Capital was denied a permit. Applying the 60,000 ton per mile per year number, which the EIS says with 95% certainty will not result in localized bed degradation, the St. Charles segment can support 7,800,000 tons of material, 3,000,000 in the lower 50 miles alone. *See* EIS (3.4-35). This amount could support all four dredging interests at their average production WITH an additional 300,000 tons as requested by Capital's Washington permit application. In addition, as stated in subpart 3.A., using the 60,000 ton per mile per year number, which the EIS says with 95% certainty will not result in localized bed degradation, the removal of 600,000 tons in the areas designated would NOT result in localized bed degradation. Therefore, the St. Louis District was arbitrary and capricious in determining that insufficient

material existed to allow for the request of Capital Sand for their Washington, Missouri operations.

IV. HERMANN SAND & GRAVEL, LLC, PERMIT NOS. 2011-362 & 2001-1430

Hermann Sand operates and is permitted in the St. Charles and Jefferson City segments. They operate sand off loading docks, storage and processing facilities in Hermann and Jefferson City, Missouri.

A. Adequate material and tonnage exists to fully support applicant's previous amounts and additional tonnage. The failure to allow the applicant's request was arbitrary and capricious in that it was not based on accurate or complete data.

Global Issue 1 is hereby incorporated by reference. Adequate tonnage exists is this section of the river to support the applicant's request.

The St. Charles segment is 4,800,000 miles long. The portion of the segment that is regulated by the Kansas City branch of the USACE is 80 miles long. Using the 60,000 ton per mile per year number, which the EIS says with 95% confidence will not result in localized bed degradation, the entire St. Charles segment has 7,800,000 tons of material, while the Kansas City portion of the St. Charles segment should produce 4,800,000 tons. In the proposed Permits, the USACE restricts the entire St. Charles segment to 1,710,000 tons, and only 260,000 tons for the upper 80 miles of the segment. Even with four dredgers operating in the segment, there is plenty of available material, under the USACE's adopted standard, to support the requested dredging amounts.

Hermann Sand is the only entity that operates near Hermann, Missouri. The tonnage demand for Hermann is limited and the reduction amount so small when compared to the size and volume of the Missouri River it will be impossible to measure and determine the impact of the reduction to Hermann Sand's permits on the bed.

The Jefferson City segment is 120 miles long. Using the 60,000 ton per mile per year number, which the EIS says with 95% certainty will not result in localized bed degradation, the Jefferson City segment should provide 7,200,000 tons of material. Under the prior permits, there were no segment-based caps. *See* 2007 Permit 2001-1430. The USACE in the current permit reduced Hermann's tonnage in Jefferson City to 120,000 tons per year, less than Hermann's average in the area. Again, the tonnage demand for Hermann is so limited, and the reduction so small, that it would be impossible to determine the impact that granting or denying the request would have on the bed.

We note that the previous standard provided in the 2001 permit was a limit of 1.2 million tons per ten-mile reach. *See* 2007 Permit 2001-1430. The presumption above assumes a limit of 300,000 tons per five-mile reach. This sufficiently addresses concerns of the parties regarding the overconcentration of dredging. The decision to further reduce tonnage in the Hermann area of the St. Charles segment and in the Jefferson City segment is arbitrary and capricious and based on insufficient and incorrect data.

B. The impact of the reductions provided in the above permits cannot be accurately measured to determine their direct impacts. The assumption that the reduction will have any correlation to river bed degradation lacks any basis in scientific data, making the decision arbitrary.

The applicant's tonnage was reduced by 60,000 tons total, split between two segments. The ability to measure the impact of such small amounts of material on the bed of one of the nation's largest waterways and drainage areas and has not been demonstrated by USACE.

C. Placement of the segment line between the company's operations is arbitrary in nature and creates an effective additional reduction in tonnage.

The applicant's previous permits allowed for total tonnage to be split between its Jefferson City and Hermann sand plants. The segment line restricts the ability to continue such a

practice with no justification in the record of the ability to measure such insignificant amounts or their impact.

D. The amount of tonnage in the Jefferson City and St. Charles segments is so negligible that it should be exempted from all other permit conditions.

Global Issue 10 is hereby incorporated by reference.

E. The monitoring provision relating to 24/7, 365 days per year, is unreasonable and unconstitutional.

Global Issue 6 is hereby incorporated by reference.

V. CON-AGG OF MISSOURI, LLC, PERMIT NOS. 2011-364 & 2001-1434

Con-Agg operates and is permitted in the Jefferson City segment. They operate sand off loading docks, storage and processing facilities in Rocheport, Missouri. Their tonnage is dredged by agreement with Capital Sand.

A. Adequate material and tonnage exists to fully support Con-Agg's previous amounts and additional tonnage. The failure to allow Con-Agg's request was arbitrary and capricious in that it was not based on accurate or complete data.

Global Issue 1 is hereby incorporated by reference. Adequate tonnage exists is this section of the river to support the applicant's request.

The Jefferson City segment is 120 miles long. Using the 60,000 ton per mile per year number, which the EIS says with 95% certainty will not result in localized bed degradation, the Jefferson City segment should provide 7,200,000 tons of material each year. The USACE in the current permit has reduced this tonnage to 160,000 tons per year. *See* Permit 2011-364. This is a reduction from Con-Agg's average annual tonnage of 175,000 per year. The tonnage demand by Con-Agg, however, is limited and the reduction amount so small when compared to the size and volume of the Missouri River it will be impossible to measure and determine the impact of Con-Agg on the bed.

The decision by the USACE in limiting the tonnage in the permit was arbitrary, capricious, and based on insufficient and incorrect data.

B. The impact of the reductions provided in the above permits cannot be accurately measured to determine their direct impacts. The assumption that the reduction will have any correlation to river bed degradation lacks any basis in scientific data, making the decision arbitrary.

The applicant's tonnage was reduced by 15,000 tons. The ability to measure the impact of such small amounts of material on the bed of one of the nation's largest waterways and drainage areas and has not been demonstrated by USACE

C. The amount of tonnage in the Jefferson City segments is so negligible hat it should be exempted from all other permit conditions.

Global Issue 10 is incorporated by reference.

D. The monitoring provision relating to 24/7, 365 days per year, is unreasonable and unconstitutional.

Global Issue 6 is hereby incorporated by reference.

CONCLUSION

For all of the reasons set forth above, the Record of Decision's proposed commercial sand dredging permits are arbitrary and capricious, and contrary to law. Accordingly, the Missouri River Dredgers Group respectfully asks the Review Officer to reverse the Record of Decision, and grant the Dredgers the tonnage amounts requested in their original applications. Alternatively, and at a minimum, the Missouri River Dredgers Group requests that the Review Officer issue commercial sand dredging permits with tonnage amounts no less than the Dredgers' previously authorized permit levels. Finally, the Missouri Dredgers Group requests such other and further relief as the Review Officer deems fair, just and equitable.

Dated: May 31, 2011

Respectfully submitted,

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May 31, 2011

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Division Engineer
Attn: David W. Gesl
Administrative Appeals Review Officer
U.S. Army Engineer Division, Northwestern Division
1125 NW Couch Street
Portland, OR 97209

Re: REQUEST FOR APPEAL

Appeal of Record of Decision for Authorization of Commercial Sand and Gravel Dredging on the Lower Missouri River signed and dated March 31, 2011, by Anthony J. Hofmann, Colonel, EN Commanding

Appeal of Kansas City District Permit Nos. 2011-363 and 2001-1431 Issued to Holliday Sand & Gravel, LLC

Dear Mr. Gesl:

The undersigned represents Holliday Sand & Gravel, LLC ("Holliday"), a sand and gravel operation currently existing on the Lower Missouri River. On Holiday's behalf, we hereby submit this request for:

A. Appeal of the Record of Decision for Authorization of Commercial Sand and Gravel Dredging on the Lower Missouri River; and

B. Appeal of Permit Nos. 2011-363 and 2001-1431 issued to Holliday.

The permittee appellant requests a formal conference consistent with Section 33 CFR § 331.7.

Section II of the Notification of Administrative Appeals Options and Process Request for Appeal form was concurrently filed this date by David A. Shorr, counsel for the Missouri River Dredgers group, on behalf of Missouri River Dredgers as a group and on behalf of Holliday in its individual capacity as a separate appellant. We incorporate by reference the Section II Request for Appeal form as it relates to Holliday. We also include an Section II Request for Appeal form specific to Holliday.

Included with this Request for Appeal is a detailed a brief in support of our request. We believe our Request for Appeal, along with the attached brief, are sufficient to constitute a complete request with merit.

We join the Missouri River Dredgers group in its request for a complete copy of the Administrative Record, including all internal agency communications relating to the Environmental Impact Statement for Commercial Sand and Gravel Dredging on the Lower Missouri River and information pertaining to the care, operation, maintenance, and engineering relating to the Bank Stabilization and Navigation Project and the project's direct or indirect impact on the accrual of sands and bottom materials of the bed.

It is our understanding that the Kansas City District and the Division have provided modification to existing permits for dredging on the Missouri River to allow ongoing operations, albeit consistent with the proffered permit. While we object to the terms and conditions of the proffered permit, we understand that no temporary restraining order, preliminary injunction, permanent injunction or other action is necessary in order for Holliday to continue operations on the river during the pendency of your review. If this is not your understanding, we would appreciate your informing us immediately so we may seek other legal remedies.

Very truly yours,

Aaron C. Courtney

ACC:dew

Enclosures:
Memorandum in Support of Request for Appeal

cc w/enclosures via U.S. Mail:
Col. Anthony J. Hofmann, Kansas City District
John Mitchell, Director of Environment, Kansas Department of Health and Environment
Holliday Sand & Gravel, LLC
Mr. John Nelson, Assistant General Counsel
Mr. David A. Shorr, Counsel for Missouri River Dredgers

SECTION II - REQUEST FOR APPEAL or OBJECTIONS TO AN INITIAL PROFFERED PERMIT

REASONS FOR APPEAL OR OBJECTIONS: (Describe your reasons for appealing the decision or your objections to an initial proffered permit in clear concise statements. You may attach additional information to this form to clarify where your reasons or objections are addressed in the administrative record.)

1. Adequate tonnage exists to substantiate this request.

2. The Record of Decision on which this is based is in error.

3. Adequate tonnage exists within the St. Charles segment to support this request.

4. Additional information is attached as part of the over-arching appeal of the Record of Decision for Authorization of Commercial Sand and Gravel Dredging on the Lower Missouri River.

ADDITIONAL INFORMATION: The appeal is limited to a review of the administrative record, the Corps memorandum for the record of the appeal conference or meeting, and any supplemental information that the review officer has determined is needed to clarify the administrative record. Neither the appellant nor the Corps may add new information or analyses to the record. However, you may provide additional information to clarify the location of information that is already in the administrative record.

POINT OF CONTACT FOR QUESTIONS OR INFORMATION:

If you have questions regarding this decision and/or the appeal process you may contact:	If you only have questions regarding the appeal process you may also contact:
Charles F. Frerker, PM US Army Corps of Engineers St. Louis District (OD-F) 1222 Spruce Street St. Louis, MO 63103-2833 Phone: (314)331-8583 Fax: (314)331-8741	Division Engineer ATTN: David W. Gesl Administrative Appeals Review Officer US Army Corps of Engineers PO Box 2870 Portland, OR 97208-2870 Telephone: 503-808-3825

RIGHT OF ENTRY: Your signature below grants the right of entry to Corps of Engineers personnel, and any government consultants, to conduct investigations of the project site during the course of the appeal process. You will be provided a 15 day notice of any site investigation, and will have the opportunity to participate in all site investigations.

Signature of appellant or agent. Aaron C. Courtney	Date: May 31, 2011	Telephone number: 503-294-9411

BEFORE THE UNITED STATES ARMY CORPS OF ENGINEERS

St. Louis District
Kansas City District

Regarding the Permit Requests of:

Holliday Sand & Gravel, LLC (Permits 2011-363, 2001-1431) NWK-2011-363

Decision Date: March 31, 2011

Appeal Date: May 31, 2011

Contact Information: Please direct communication regarding this appeal to:

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Appeal Conference:

Holliday Sand & Gravel, LLC ("Holliday") requests that the Review Officer ("RO") conduct the appeal conference in Kansas City, MO. Kansas City, MO is one of the major cities along the navigable Lower Missouri River ("LOMR" or "River"), and near the home of Holliday's Riverside, MO plant that will be closed unless there is a change to the permit(s) referenced above to allow more dredging of materials in the Kansas City segment. **This is the only commercial sand plant facing closure based upon the commercial dredging permits issued on March 31, 2011.** A hearing in Kansas City is also reasonably convenient for the other commercial sand dredgers who were issued permits at the same time as Holliday, and are all within a reasonable distance of Kansas

City. If requested by the RO, Holliday can provide a suitable meeting room for purposes of conducting the appeal conference in Kansas City, MO

Relation of this Appeal to Other Appeals:

Holliday is referencing, and incorporating by reference in this document several arguments made by other dredgers who are also appealing commercial sand dredging permits issued by the United States Army Corps of Engineers ("USACE") on March 31, 2011. Holliday has chosen to appeal separately because it is the only permittee operating in the Kansas City segment of the River, and has a narrower interest in the Record of Decision ("ROD") issued by the USACE that mostly relates to the USACE operation of the Bank Stabilization and Navigation Project ("BSNP") specifically in the Kansas City segment.

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STANDARD OF REVIEW

Agency action is unlawful and may be set aside if it is: (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or (4) without observance of procedure required by law. 5 U.S.C. § 706. A decision is arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983). To this end, a division engineer/RO will disapprove a permitting decision if it is "arbitrary, capricious, an abuse of discretion, not supported by substantial evidence in the administrative record, or plainly contrary to a requirement of law, regulation, . . . or officially promulgated [USACE] policy guidance." 33 C.F.R. § 331.9(b).

STATEMENT OF REASONS FOR APPEAL

I. Introduction

This administrative appeal is timely filed by Holliday to challenge the dramatic reduction in permitted commercial sand dredging in the Kansas City reach, as determined by the USACE in the ROD for Permits 2011-363, 2001-1431, NWK-2011-363. These permits provide that Holliday will be allotted 1,200,000 tons of material in 2011; 900,000 tons in 2012; 850,000 tons in 2013; and 540,000 tons per year in 2014 and 2015. The ROD itself acknowledges that the limits in 2014-2015 will be a 79% reduction of average

annual dredging from the 2004-2008 time period of 2,520,107 (Table 2-6), and the reduction will in fact be greater as compared to a 10-year average—approximately 83%.

Sections 2 and 3 below provide relevant background and context regarding this appeal, as well as identify the specific grounds for this appeal and provide, "in clear and concise statements," an explanation for these grounds. Section 2 demonstrates that the USACE's explicit failure to sufficiently consider the cumulative impacts of the BSNP's operation renders the ROD flawed. Section 3 explains that the USACE's failure to account for 2009 corrections to the dike levels in the Kansas City segment have rendered the environmental baseline for the USACE's analysis, and the resulting ROD and permits, flawed and contrary to law. These 2009 corrections will allow continued aggradations of sand in the Kansas City segment, and should require the Corps to select Alternative B in the ROD allowing for a segment cap of 1.2 million tons. This statement of reasons for appeal is entirely premised upon the existing administrative record insofar as Holliday has been able to access that record.[1] Section 4 summarizes Holliday's difficulties with obtaining the administrative record for this appeal, and requests additional relief from the RO in this regard. Section 5 identifies what arguments Holliday is joining in the Missouri Sand Dredgers coalition brief, and provides some additional context for how those arguments impact Holliday. Finally, Section 6 provides additional

[1] This Statement of Reasons is based upon and supported by the administrative record as a whole. Citations to the record are meant to be helpful and illustrative; however, these citations are not a comprehensive or exclusive listing of the portions of the record relied upon by Holliday. Where possible, references to the administrative record are made to specific documents. Some documents that are referenced in and are clearly part of the administrative record are not included in the website that the USACE has indicated comprises the administrative record. *See* http://www.nwk.usace.army.mil/regulatory/Dredging/MO/Modredging.htm. More generally, the administrative record is not reasonably accessible to Holliday and has impacted Holliday's ability to establish the errors committed by the USACE in adopting the ROD. *See infra* Section 4. As such, Holliday reserves the right to supplement this appeal as other portions of the administrative record become available either as a response to Holliday's existing FOIA requests or through these proceedings.

explanation of how the permitting decision in this matter is in violation of the laws and regulations governing the USACE.

This dramatic reduction in Holliday's permit allocations beginning in 2014 will make commercial dredging in the Kansas City segment economically impracticable and will not satisfy the purpose and need of the project studied by the Environmental Impact Statement ("EIS"), resulting in the unnecessary regulatory closure of Holliday's Riverside, MO plant, and the loss of 104 quality jobs in a difficult economic climate. The truth, however, is that the purported degradation issue in the Kansas City segment has always been within the control of the USACE, and now that the USACE has decided to fix a problem exacerbated by its untimely responses, sufficient sand is available presently and will be available in the next 5 years to satisfy Holliday's commercial requirements and to protect the River.

The experience of recent years (1998-2007), in which the LOMR has experienced low water conditions of record proportions, is that the USACE failed to make critical adjustments in the dikes of the BSNP in the Kansas City segment, in contradiction to widely-understood guidance on the operation of the BSNP. Hindsight now tells us that the USACE should have completed adjustments to dike levels at the first clear signs of accelerating degradation, no later than 2005. Following the 1993 flood, these dikes projected well above the water surface instead of being submerged.[2] This misalignment with construction reference points ("CRP") resulted in years of no flows overtopping the dikes, excessive periods of low flow channel scouring and the accretion of sediments and vegetation resulting in reduced flow conveyance. This created a much faster LOMR

[2] This criteria was published in the 1980 Potomology report designating the elevations of structures relative to the CRP (Plate 16 Missouri River Navigation Project Structure Height Criteria).

through the Kansas City segment. Consequently, as predicted by the Corps BSNP manual, excessive degradation occurred in the Kansas City segment. *See Maintenance Memo,* at 6.D. In 2009, the USACE finally took corrective action and lowered the dike heights in the Kansas City segment. *See* List of KC Dike Modifications Provided by Chapman (Apr. 25, 2011). It is acknowledged by the USACE that these changes have resulted in an aggrading River. However, the USACE failed to consider the beneficial impact in an EIS completed at roughly the same time as this corrective action, and has failed to consider these fundamental changes to River dynamics in issuing the permits to Holliday. This has resulted in a flawed ROD.

Sand dredged from the Missouri River is a sustainable resource that should be available to the public, and the USACE's decision to force the closure of the Riverside, MO plant will require alternate supplies of sand that will have much more significant environmental impacts. Studies conducted by the USACE in 2007 demonstrate that the LOMR in the Kansas City segment rapidly replenishes itself after commercial dredging. *See* Holliday DEIS Comments 22-23 (Sept. 6, 2010). Further, the ROD itself acknowledges that the options available to Holliday and the construction industry are not entirely clear or easy. Record of Decision for Authorization of Commercial Sand and Gravel Dredging on the Lower Missouri River 4-20 (Mar. 31, 2011) [hereinafter *ROD*]. As acknowledged by the USACE, Holliday does not have the equipment and pilots needed to dredge more sand 20 miles away from its sand plant in Riverside, MO, and Holliday believes that our troubled economy and construction market make it impossible to justify the purchase of expensive equipment. It is also very difficult to ask crews to spend many additional hours on the River to accomplish the same task, requiring

significantly longer shifts and creating many logistics problems.[3] It further remains the case that the speculative alternate sources of sand supply from pit mines identified in the ROD remain speculative, and will certainly face regulatory and permitting hurdles to become available to the Kansas City market.

Holliday also joins many of the arguments of the other Missouri River dredgers issued permits by the USACE on March 31, 2011 as necessary to support its appeal. Specifically, as identified in more detail in Section 5, Holliday generally joins Global Issues 1, 4, 5, 6, 7, 8, and 9 of the Dredger's Request for Appeal to the extent those arguments will allow Holliday additional tonnage in the Kansas City segment under its permit. Holliday, however, is primarily concerned with the severe restrictions imposed on the Kansas City segment, and would be satisfied with the entirety of the ROD if its permit allowances were adjusted so that it can continue operation of its Riverside, MO sand plant in accordance with Alternative B for the Kansas City segment.

Holliday believes that despite the problems with the review of the Kansas City segment in the EIS and ROD, there is no legal requirement to complete a new EIS or necessarily to supplement the EIS, all of which would occur at the expense of Holliday and other commercial sand dredgers, while theoretically creating a situation where no permitted mining would be allowed during the study. This is clearly impracticable and legally suspect. Instead, Holliday believes that the administrative record properly demonstrates that the USACE should select Alternative B for the Kansas City segment, which would allow 1.2 million tons per year to be dredged in the Kansas City segment with appropriate carry-over tonnage, under Holliday's issued permit. This amount would

[3] By this Holliday means it is highly impractical and unnecessary for the USACE to suggest that, as an alternative, Holliday should dredge in the St. Joseph segments, far from its Riverside, MO plant.

allow Holliday to keep its Riverside, MO plant open and would preserve the 104 well-paying jobs of its employees.

While Holliday believes that the Kansas City segment can in fact support significantly higher levels of dredging, the permit level Holliday seeks will prevent economic and social disruption and will not in itself lead to any additional degradation. At the same time, Holliday understands that some restrictions from historic highs may be prudent while channel modifications, such as BSNP dike lowering, are being pursued by the USACE. Further, Holliday understands that the USACE would retain discretion to review the permit of Holliday and other dredgers on an annual basis, and if the River begins to show unexpected degradation levels despite the ongoing work by the USACE to correct the dike levels in accordance with the project's engineering requirements, the USACE could take appropriate action and reduce Holliday's commercial dredging allocation as necessary.

II. The ROD Is Flawed Because The USACE Failed To Properly Consider The Cumulative Impacts of the BSNP.

Holliday appeals the USACE's refusal to consider the BSNP and the dams, reservoirs, and other structures on the LOMR as causes or major contributors to bed degradation. *See* Missouri River Commercial Dredging Final Environmental Impact Statement 10.116 (Feb. 2011) [hereinafter *EIS*]. This refusal is a voluntary omission of information in violation of 33 C.F.R. 331.5, and is material to the analysis of the effect of proposed permits. The omission is also in contrast to NEPA's requirement that an agency take a "hard look" at the environmental consequences of a proposed action. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

As part of the review of the Dredgers' applications for permits to conduct dredging operations on the LOMR, the USACE purported to consider the environmental impact of commercial dredging on the LOMR, including the issue of river bed degradation. The USACE adopted substantial limits on the amount of material that the Dredgers would be allowed to remove from the LOMR. The USACE justified these extensive cuts under the presumption that reducing the amount of material removed from the river below amounts allowed under previous permits would have a positive impact on the purported issue of river bed degradation. This presumption cannot be supported, however, because of the USACE's failure to properly analyze the cumulative impacts of the proposed project.

The USACE readily admits that the dams, reservoirs, and other structures, included in the BNSP, which reduce or restrict the river's water flow are major contributors to river bed degradation. *EIS*, at 1.5.3; 3.4.86-87. The EIS specifically did not determine, however, how much of the perceived bed degradation problem had been caused by each contributing factor. *ROD*, at 3-30. The USACE acted arbitrarily by specifically limiting the scope of the EIS and refusing to consider their own structures, despite comments to the contrary by both the applicants and USEPA.[4] *See e.g., EIS*, at 10.116. Without considering all major causes of bed degradation, it is impossible for the USACE to assign any risk or assess the proportional impact of commercial dredging

[4] Despite this oddly circumscribed analysis by the USACE, there is a broad consensus, however, that the river structures controlled by the USACE are significant contributors to the perceived degradation problem. Indeed, river degradation is a predictable consequence of the tremendous extent of engineering that has been applied to the Missouri River, and in fact some scouring the river bed to maintain navigation depths is a specific purpose of the BSNP dike structures. *See Maintenance Memo,* at 2-6. The construction of the various dams, reservoirs, and other river structures has highly altered every aspect of the LOMR. *EIS,* at 1.5.1. Prior to construction of the dams and other structures, sediment was plentiful in the LOMR. *EIS*, at 1.5.2. The addition of these structures has limited the available sources of sediment to the tributaries that feed into the river and the erosion of river banks. *Id.*

activities. In fact, an analysis of the BSNP's impact upon bed degradation is not a great or tedious task and should have been done years ago when degradation impacts first began to increase. By refusing to consider the overall condition and cause of degradation, the USACE has willingly failed to take the "hard look" required by NEPA at the environmental effects of the proposed permit action for Holliday.

NEPA is a law of procedure, which dictates the steps that any federal agency must follow in considering the environmental impact of a proposed action. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989). NEPA "places the obligation on the reviewing agency to consider every significant aspect of the environmental impact of the proposed action" and "ensures that the agency will inform the public that it has indeed considered environmental concerns in its decision making process." *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87 (1983)(citations omitted). One element of the hard look analysis is that the EIS must be based on complete and reliable information. If there is incomplete information relevant to the agency's review of the impact of a reasoned choice and the costs of obtaining the information are not exorbitant, the agency is required to include that information in the environmental impact statement. 40 C.F.R. § 1502.22. The USACE is the steward and the keeper of all knowledge relating to the BSNP and its consequences. It alone has the ability to determine the design effects or defects the BSNP has on bed degradation, and the sole ability to share that information.

Proper challenges under NEPA examine whether "the agency has taken a 'hard look' at the environmental consequences." *Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976). If the agency's analysis is arbitrary or capricious or "contrary to the procedures

required by law," a reviewing Court may conclude that the agency failed to take the required "hard look." *Kleppe*, 427 U.S. at 410 n. 21. Federal agencies must also consider the cumulative environmental impacts of their actions. 40 C.F.R. § 1508.25(c); *see Grand Canyon Trust v. FAA*, 290 F.3d 339, 341, 345 (D.C. Cir. 2002). Cumulative impacts result from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time. 40 C.F.R. § 1508.7. The USACE, by limiting the EIS to include only commercial dredging activities, and excluding the BSNP and other river structures from any analysis, also failed to adequately consider the cumulative environmental impacts on the river bed. *See Tomac v. Norton*, 433 F.3d 852 (D.C. Cir. 2006) ("The 'cumulative' impacts to which the regulation refers are those outside of the project in question; it is a measurement of the effect of the current project along with any other past, present, or likely future actions in the same geographic area."). The consideration of the BSNP in the ROD and the EIS was cursory, only mentioning their existence and describing why the BSNP was not a part of the study, and was plainly not an attempt to review this project decision in the context of the BSNP.

Instead of this required broad analysis, the EIS and the subsequent ROD attempt to narrowly correlate an increase in bed degradation with an increase in commercial dredging over the past fifteen years. However, not all areas where commercial dredgers have operation are degraded, and in turn, degradation is not limited to areas dredged. *See* Draft Environmental Impact Statement 3.4-91, Fig. 3.4-30 (July 2010).[5] In fact, many

[5] The Figures in the Draft EIS comparing cumulative dredging to CRP drop (Fig. 3.4-30) and Cumulative Dredging (Fig. 3.4-31) were dropped in the Final EIS.

areas within the Kansas City segment that are experiencing degradation are specifically either off-limits to dredging to protect infrastructure in the area or are otherwise beyond the actual areas dredged. As such, from the start the USACE lacks sufficient or persuasive data to support their alleged correlation and their conclusion of commercial dredging as the guilty party. Further, this conclusion has not been adequately peer reviewed, nor adequately addressed by public study transparent to all. *See* Dredger's Global Issue 9.

All the Dredgers timely challenged the failure to address the BSNP. The Dredgers were not the only party that has asked the USACE to assess the impact that the BNSP has on river bed degradation. On September 2, 2010, seven members of Congress from Missouri and Kansas, in response to the draft EIS, urged that the USACE consider all causes of bed degradation before reducing commercial dredging:

> It is our understanding that the two principal reasons for bed degradation in the lower channel are: (1) the retention of sediment behind the major dams and, (2) the design of the BNSP to assure a "self-scouring channel." While we acknowledge that commercial dredging may have an influence on bed degradation, the substantial differences, namely scope and scale, between the removal of seven million tons of sand and the major engineering efforts of USACE to modify the behavior of the river are indisputable. We recognize and understand the need to address the impact of commercial dredging; however, when placed in the context of the significant engineering projects by USACE, we cannot reconcile an impact on this private commercial industry without an examination of the impact of your own actions that result in potential bed degradation.
>
> Accordingly, we are troubled to learn of the potential for the reduction or elimination of commercial sand dredging on the Missouri River when USACE has not yet evaluated the impact of the retention of sediment behind the damns and has failed to analyze whether modifications to the BSNP are necessary to reduce the risk of bed degradation.
>
> To that end, we encourage you to address the impact of your own engineering efforts before considering a further reduction of commercial sand dredging on the Missouri River that will result in reduced availability of the principal material for aggregate within the boundaries of the State of

> Missouri and parts of the State of Kansas. Until such time as USACE has evaluated the implications of its own actions, we cannot support further reductions based on conjectures and possible correlations.

Letter to the Honorable Jo-Ellen Darcy and Colonel Anthony J. Hofmann (Sept. 2, 2010). The Members of Congress requested that the USACE respond with a schedule as to when the USACE would reevaluate its own actions and that the Dredgers' permits be reissued at current levels. *Id.* Several state and local governmental officials, trade associations, and other interested commentators expressed similar opinions during the EIS comment period. *See, e.g.*, Comments From the Missouri Levee and Drainage District Association (Sept. 6, 2010); Comments From the City of Lexington, Missouri (Sept. 3, 2010); Comments from the Missouri Department of Natural Resources (Sept. 3, 2010); Letter From Missouri State Senator K. Schaefer (Sept. 2, 2010); Letter from Montgomery County, Missouri (Sept. 2, 2010); Letter from City of Washington, Missouri (Aug. 12, 2010); Letter from City of Herman Missouri (Sept. 2, 2010); Letter from the Coalition to Protect the Missouri River (Sept. 3, 2010).

The Dredgers, including Holliday, joined in this request and USACE failed to properly respond. Instead, the USACE's response was dismissive and made clear that this type of analysis was seen as beyond the scope of the EIS and the ROD. *See EIS*, at 10.116. In fact, the USACE had a legal obligation to consider the cumulative impacts of the project and related activity, and to take a "hard look" at the environmental consequences of its actions.

III. Recent Changes To BSNP Dike Levels In Kansas City Have Addressed Degradation And Should Have Been Accounted For In The EIS And ROD.

Kansas City is where the most degradation is claimed by the ROD. *EIS*, at 3.4-84. The BSNP, which began in 1912 and was completed in 1981, changed the historical

river into an engineered structure. *EIS*, at 2.7.4. The BSNP, by design, created a deeper river in Kansas City, with faster flow, while at the same time reducing the natural sediment levels. *EIS*, at 3.4.5.2. The BSNP is in effect an effort to engineer a natural resource, which not only directly leads to, but implicitly effects river bed degradation. A natural river can react to various environmental factors by changing bed elevations and course in response to water flows. An engineered river, in contrast, cannot adjust itself. The only way an engineered river responds, absent modification to the structures, is by aggrading or degrading the bed. *EIS*, at 3.4.6.3.

Degradation of the river bed began immediately after the construction of the BSNP structures as they channelized and cut a navigation channel during low flow periods, by design to be 25% of the time. Most significant for this appeal, dikes and more particularly, sill dikes, are the BSNP structures that direct and confine the river and increase channel depths as needed for navigation during lower flows. *Maintenance Memo,* 2-6. Sill dikes were designed by the USACE to be submerged two feet below the CRP, defined to be the low water level or elevation that is exceeded 75% of the time. Decades of dike scour, major floods and the severe drought from 1998 to 2007 have resulted in the lowering of the river bed (degradation) and along with it the CRP. Periodic downward adjustments of the CRP not only indicate degradation, but more importantly signal that structures designed and built at elevations relative to the CRP (-2 feet in the case of sill dikes) are no longer within designed flow exceedence criteria.

By design then, LOMR navigation flows are intended to overtop the dikes 75% of the time removing sediments that accumulate at low flows behind the dikes that otherwise would constrict the channel. If the dikes are too high, or there are extended

periods of drought, the dikes are no longer overtopped 75% of the time, and material builds up behind the dikes, constricting the channel and increasing channel depth, bed forces and degradation. All of this structure, and the consequential pressures, have existed since the 1930's, long before there was any significant commercial dredging. The Kansas City gage showed steady degradation totaling eight feet from 1941 until the 1993 flood which quickly added another four foot drop, the most significant drop ever. The bed refilled two feet in 1994, and then held steady until the beginning of the severe eight year system drought which began in 1998. This drought period ending in 2007 resulted in almost five feet of degradation. *EIS*, at 3.4-77, Fig. 3.4-25. Because lowering the bed (degradation) has the same effect as raising the elevation of the dikes, the dikes were topped less and less during this time period resulting in a non-linear cycle of channel constriction and accelerated degradation.

The USACE, in essence, "operates" the river and can control river degradation, particularly in response to specific events like the 1993 flood and the extensive drought that occurred after that event. *EIS*, at 3.2.5. USACE guidelines for structure maintenance of the BSNP express that the BSNP requires "constant monitoring of the project and its environs" and that BSNP structures can and should be modified to address excessive degradation. *See Maintenance Memo*; *see also* Missouri River Navigation Project Design Criteria (Jan. 1994). Modifications can include lowering, shortening, or removing sill dikes when needed to reduce excessive scouring action or address a sediment imbalance. *Id.* Unfortunately this Memo was not adhered to in conjunction with excessive degradation in the Kansas City segment in the aftermath of the 1993 flood and ensuing severe drought, and indeed not until very recently. During this critical time

period, the USACE has instead lacked the awareness, initiative or the resources to control the bed degradation issue through maintenance and adjustments to these structures.

As noted in the Final EIS and the Response to Comments, the USACE has periodically made adjustments to the dikes in the LOMR, including purportedly "lowering the dikes in 2004 and 2007" in the Kansas City segment. *EIS*, at 10-42, Comment 44-32. This does not appear to be true. Holliday has learned from recent FOIA requests that have attempted to collect documents that should be part of the administrative record, that this response to comments was misleading. *See* Chapman FOIA Response Email (May 11, 2011). In 2004, it appears that numerous "notches" were completed from RM 130 to 498, primarily for habitat purposes for the pallid sturgeon. Such notches are not the same as lowering the dikes to comply with the dike design criteria related to the CRP. Notches allow some water and material to pass through, but they do not achieve the same flow conveyance as lowering the sill dikes. Further, it appears that the lowering that was indicated in 2007 was not actually completed until March of 2009. *Id.*; *EIS*, at 10-116.

In contrast to the environmental notching that was done in 2004, in 2009 it appears that 169 modifications were completed on 95 structures from RM 359.6 to 381.9 (i.e., approximately every .23 miles a modification was completed in the Kansas City segment). In the course of the work completed in 2009, a significant number of dikes in the Kansas City segment were lowered close to 2 feet the CRP on the riverward portion from 50 to 150 feet (most were 150 feet) in length, and another 60' notch, 4 feet below CRP was made 50 feet from the bank (on the opposite end). Further, in the course of this work some dikes were lowered from elev. 722 to elev. 714, an amazing 8 feet. Failure of

the HBED river cross-sections completed in 2007 and 2008 to show aggradation from 2007 to 2009 indicated to the EIS authors that dike lowering made no improvement. *EIS*, at 10-34, Table 10.3-1. Obviously changes completed in March of 2009 would not show up in 2007, and not immediately in 2009. Thus, the Response to Comments does not accurately portray the existing environmental conditions in Kansas City. In other words, the EIS's projection of future degradation, used to select Alternative A in the Kansas City segment, is not accurate and the ROD should be revised in light of these significant changes to the dikes.

Despite the evident confusion regarding the environmental baseline issues during the EIS process and the completion of the ROD, there is evidence in the record to suggest that making adjustments to the BNSP in accordance with the CRP has long been known to be an effective method of controlling degradation, and that timely adjustments are necessary to protect the integrity of the river.[6] *See Maintenance Memo,* at 4.E, 6.D ("The impact of underwater sills on velocities in the navigation portion of the channel can be significant, therefore, the degree of contraction should be closely observed; and the length of sills modified or adjusted as necessary."); *EIS*, at 3.4.3.2; Missouri River Navigation Project Design Criteria (Jan. 1994).

The EIS drafters' failure to consider the environmentally beneficial 2009 changes to the BSNP is material for the purposes of 33 C.F.R. § 331.5 and a violation of NEPA. *See Envtl. Def. Fund v. Marsh*, 651 F.2d 983, 993 (5th Cir. 1981) ("[E]ven if the Corps

[6] Holliday Sand & Gravel has submitted a Freedom of Information Act request to the USACE for all documents regarding past adjustments to the dikes in the Kansas City and St. Louis District offices, including internal communications that are appropriately a part of the administrative record. A partial response has been received by Holliday Sand & Gravel, but additional information has been requested. Because of the timing on this request, Holliday Sand & Gravel may need to submit additional information to supplement this brief once it has had a chance to review the responses of the USACE.

was correct in deciding that the new land use will be beneficial in impact, a beneficial impact must nevertheless be discussed in an EIS, so long as it is significant. NEPA is concerned with all significant environmental effects, not merely adverse ones.") The drafters claimed in response to comments from Holliday, citing unpublished communications with USACE officials, that the 2009 changes to the Kansas City segment were one of many continuous and periodic modifications to the BNSP. *EIS*, at 10-115,116. This assertion fails to appreciate the marked difference between the 2009 modifications and the prior USACE actions in this area, which have been limited to repairs and environmental notching that was done throughout the River. The work completed in 2009 specific to the Kansas City segment marked the first time that the USACE excavated sill dikes to the correct height according to BSNP criteria. It is improper to not consider this significant activity, and the effect that these actions have had on the cross section, flow conveyance and scouring energy in the river, and to consider whether the failure to make such appropriate modifications at an earlier date is, in fact, the primary cause of the accelerated degradation seen in the Kansas City reach after the 1993 Flood and through the severe drought from 1999 to 2007. *See Marsh*, 651 F.2d 983.

Further, these 2009 changes to the dike structures were made at the same time the EIS was being conducted and the river cross sections were being surveyed with the purpose of comparison to the prior baseline surveys of 2007 and 2008. The refusal to assess or account for this concurrent material change to the structures of the LOMR is highly unusual and brings the validity of many of the conclusions of the ROD for the Kansas City segment into question. It appears that the authors were simply not aware of

the actual timing and magnitude of the dike lowering in Kansas City. *See EIS*, at 4.2-36, para. 2; *Id.* at 4.2-35-36. The omission also makes it impossible for the USACE to measure the effectiveness of the restrictions placed on the Dredgers under the 2007 permit cycle.

Since 2007, available data shows aggradation of the river in 2008 and 2009. *EIS*, at App. A, Fig. A-41. Of special note is that this aggradation in the Kansas City segment has occurred at dredging levels equal to and greater than the requested Alternative B (1.2 million tons), and thus contradicts the EIS's modeled projection of slight to moderate degradation in the Kansas City segment. As noted by the EIS, the drought ended in 2007, and there were more normal flows in the River from 2008-2009, but the River is nevertheless aggrading, and this data further does not include the high level flows of 2010. Regardless, one to two feet of aggradation is significantly different than "slight" to "moderate" degradation (2 to 4 feet), and demonstrates that the permit decision to shut Holliday's Riverside, MO plant is overly conservative and should be reconsidered.

Additional changes to the LOMR can be expected to further reduce bed degradation. For example, the MRRP projects are being conducted by the USACE to primarily comply with requirements of the biological opinion to preserve endangered pallid sturgeon populations, and has been dredging side channels connected to the LOMR main channels so as to improve fish and wildlife habitat. *EIS*, at 2.7.4. In 2004 alone, over 2 million cubic yards (2.7 MM tons) were added to the bed of the LOMR. FOIA, 2004 Shallow Water Habitat Work. This entire project is expected to add hundreds of millions of tons of sand back into the main channel, dramatically improving sediment bed load and further reducing degradation pressure. Indeed, in contexts other than the EIS

and the current ROD, the USACE seems to acknowledge that the BSNP can and should be adjusted to protect the River, and that additional work like what was undertaken in 2009 should be completed.

NEPA's requirements are not only designed to inform the decisionmaker of the environmental consequences of and the potential alternatives to a proposed action, but are also designed to notify the public of the action and its likely environmental effects, and to solicit the public's views to "help public officials make decisions that are based on an understanding of environmental consequences, and take actions that protect, restore, and enhance the environment." 40 C.F.R. § 1500.1(c); *Catron County Board of Commissioners, v. U.S. F.W.S.*, 75 F.3d 1429, 1437 (10th Cir. 1996). Accordingly, agencies must make reasoned responses to comments received on draft environmental analyses and must provide a meaningful reference to opposing viewpoints concerning the agency's proposed decision. *See Friends of the Earth v. Hall*, 693 F. Supp. 904 (W.D. Wash. 1988) (EIS inadequate because it failed to include concerns and views of commenting agencies). An agency's failure to directly and accurately respond to comments renders a NEPA analysis invalid. *Utahns v. U.S. DOT, 305 F.3d 1152, 1165* (10th Cir. 2002). By failing to adequately respond to the commenter's concerns including those of Holliday, the USACE violated the requirements of NEPA and the USACE's own governing regulations.

By failing to consider the correct timing and magnitude of the 2009 structural changes to correct the BSNP sill dike structures, the EIS authors and the USACE have failed to evaluate the project's actual environmental baseline. *See* CEQ, Considering Cumulative Effects Under the National Environmental Policy Act 41 (1997), *available at*

http://ceq.hss.doe.gov/nepa/ccenepa/ccenepa.html ("[T]he baseline condition of the resource of concern should include a description of how conditions have changed over time and how they are likely to change in the future without the proposed action."). Further, by not accurately considering and responding to Holliday's comments, the USACE has consequently made inaccurate and overly conservative projections of potential impacts to river bed degradation, and has thus incorrectly concluded that Holliday's requested permit volumes are not available in the Kansas City segment. *See EIS*, at 10-34. This flawed analysis omitted material facts and violated NEPA's "hard look" requirement. This renders the permit decision by the USACE "arbitrary and capricious" as a matter of law.

IV. Objections To The Administrative Record And Reservation Of Rights

Within days of receiving the ROD and Permit, the Dredgers collectively requested to review and copy the administrative record from the Kansas City and St. Louis Districts. There appears to be a disagreement between the USACE and the Dredgers, collectively, and Holliday specifically, as to what comprises the administrative record. Holliday believes that the administrative record likely far exceeds what the USACE has already made available on its public website, and specifically includes internal email and documents developed in the course of the project review by the USACE. Despite the USACE's position on the administrative record, Holliday's position is not a novel legal theory, and is well-established by law. The administrative record consists of all the materials compiled by the agency that were before the agency at the time of the decision at issue. *Sierra Club v. Slater*, 120 F.3d 623, 638 (6th Cir. 1997).

Further, in consideration of the ROD and Permit, Holliday determined that it was necessary to validate statements in the Final EIS that work completed in 2009 was routine

and consistent with prior actions as stated in the ROD, and not intended specifically to account for bed degradation due to design issues. Holliday submitted a FOIA to the USACE on April 29, 2011 seeking

> "all communications, emails and memos relating to lowering any Missouri River BSNP dikes referred to as "rock excavation" in the records provided on 4/25/11, but excluding environmental notching less than 200 feet in length and repairs, with regard to the following:
>
> 1. Evaluations or studies with regard to lowering dikes.
> 2. Directives and approvals to lower the dikes.
> 3. Follow up photos, reports or observations concerning lowering the dikes.
> 4. Current or future plans to lower the dikes
> 5. Condition or elevation of the sill dikes
> 6. Reports related to lowering dikes to structure height criteria
> 7. Documents identifying any need, reason or desire to lower the dikes"

The USACE provided some additional information to Holliday responsive to this request on May 23, 2011. Holliday intends to continue to press for information to allow it to evaluate the USACE's activity in 2009 in regard to lowering the dikes, but does not believe at this point that it has received all information responsive to its request, particularly internal communications and document that explain the activity in 2009. Indeed, only a single email was provided by the USACE in regard to this significant construction project.

Holliday is concerned that the lack of responsiveness by the USACE has compromised its due process rights in this present appeal. Although Holliday believes

that all of these documents are properly a part of the administrative record, it has been forced to go to extraordinary lengths to receive this documentation, and understands that the USACE will assert that no documents provided under these requests are properly part of the administrative record for these permits. Holliday requests a hearing before the RO specifically to determine the status of the administrative record, and to assist Holliday in pursuing the documents that it is legally due through the Freedom of Information Act and the governing regulations of the USACE.

Holliday maintains its request for a full copy of the USACE's administrative record and a log of all documents withheld by the USACE. Holliday reserves the right to supplement its statement of reasons after having a reasonable opportunity to review the full record.

V. Statement Of Joinder And Incorporation of Dredger's Arguments.

A. The data in the record demonstrates that there is enough material in the Kansas City segment to support at least 1.2 million tons. The USACE's decision to impose further restrictions on Holliday in subsequent is not based on sufficient data and purposefully omitted relevant data and is, therefore, arbitrary and capricious.

Dredger's Global Issue 1 is hereby incorporated by reference. Although Holliday does not object to the USACE's development of segments for permitting and administrative purposes, the segment limits are based on insufficient and inaccurate information with no causal connection between commercial dredging and overall bed degradation. There is adequate tonnage in the Kansas City segment to support Holliday Sand's permit request. The decision by the USACE in limiting the tonnage in the permit was arbitrary, capricious, and based on insufficient and incorrect data.

In the ROD, the USACE assigns its most protective status to the entire 34-mile stretch known as the Kansas City reach. This reach is subject to a limit on dredging to no

more than 300,000 tons per year per five-mile stretch. Permit No. 2011-363. This limit is a derivative of the analysis of the EIS that limiting dredging to no more than 60,000 tons of material per river mile will, with a 95% confidence level, lead to no additional localized river bed degradation.

This cap would limit dredging in the 34-mile segment to 2,040,000 tons of material per year. The proposed Permit, however, limits Holliday sand to half of that amount in 2011 and reduces the allowed tonnage down to 540,000 in 2014 and 2015. These limits are arbitrary, when the USACE's own analysis demonstrates that much more material can be removed with 95% confidence of insignificant degradation.

The analysis in the EIS states with certainty that limiting dredging activities to 30,000 tons per river mile would lead not further degradation. Spread over the 34 mile segment, this number is 1,020,000 tons – substantially close to the 2011 permit amount and to Alternative "B" considered by the Corps. Thus, even the EIS' most conservative number suggests that Alternative B is the appropriate choice for dredging in the Kansas City Segment. The USACE's overly-conservative limitations lack a sufficient factual basis and, therefore, the adoption of these limits was arbitrary.

B. The USACE's assumption that there are sufficient alternate sources of sand available is based on inaccurate information. The USACE failed to complete an adequate analysis to determine if material exists to meet the needs and to determine the environmental impact of acquiring sand from various other sources.

Dredger's Global Issue 4 is hereby incorporated by reference. The ROD's decision reduced Holliday's dredging operations from an initial 1.2 million tons a year to 540,000 tons by 2014. When it reduced Holiday's tonnage, the USACE did not specifically analyze whether Holliday would be able to sustain its operations at its specific plants—which it will not. The bottom line is that the USACE's failure to

appreciate the full economic consequences of its decision will result in even greater reliance on non-renewable sources to replace the lost production from the LOMR in the Kansas City market (as well as the environmental impacts associated with hauling materials from longer distances).

There are insufficient alternate sources of sand in the Kansas City area to make up for these reductions. In an apparent effort to refute this position, the USACE pointed exclusively to letters from two competitor companies who hope to profit from reductions in LOMR dredging: the Master's Dredging Company and Missouri Sand Company LLC. More specifically, the USACE claimed that these letters provide "credible information about existing and planned sand mining operations with ample reserves of sand that meets the requirements and can fulfill the market needs now and in the future." *ROD*, at 3-38, 3-40, App. A.

Labeling the letters as "credible information" further highlights the arbitrary and conclusory nature of the USACE's position on alternate sand sources. After sifting through the rank hearsay supplied by the two competitor companies, it is clear that no real information is offered. The lone salient comment found in the letters is that "the largest source of sand and gravel for the Kansas City metro area market is dredging from the Missouri River." *ROD*, at App. A. This simply reaffirms Holliday's position from the beginning that sustainable, economic alternate sources do not exist for the Kansas City market.

In conclusion, the USACE's decision fails to consider the detrimental impact to Holliday's Riverside plant. This fact, coupled with the USACE's heavy reliance on correspondence from two new pit mining companies, confirms that the availability of

alternate supplies has not been properly evaluated by the USACE. No credible evidence exists for the USACE to conclude that existing alternate sources of sand have the capacity to meet any demand not met by the Dredgers—only speculation, surmise, and hearsay. *ROD*, at 3-40.

C. The USACE failed to comply with NEPA in that the ROD failed to properly analyze the environmental impacts resulting from the permitting decision.

Dredger's Global Issue 5 is hereby incorporated by reference. Pointedly, Kansas City is designated as a nonattainment area for ozone, meaning that the area does not meet the national primary or secondary ambient air quality standard for the pollutant. Given that the Kansas City area already exceeds National Ambient Air Quality Standards, the USACE's decision to not perform a comprehensive investigation into the associated environmental impacts of increased open-pit mining operations and truck traffic is directly contrary to its obligations under NEPA.

D. The monitoring provision relating to 24/7, 365 days per year, is unreasonable and unconstitutional.

Dredger's Global Issue 6 is hereby incorporated by reference.

E. Additional carryover of authorized annual tonnage would reflect present difficult economic circumstances and better protect the River.

Dredger's Global Issue 7 is hereby incorporated by reference.

F. The failure of the USACE to evaluate the BSNP constitutes a taking without just and adequate compensation and places the burden and obligation of the USACE to address concerns of the LOMR and to maintain the LOMR structures upon Holliday Sand.

Dredger's Global Issue 8 is hereby incorporated by reference. The USACE's mandate under the BSNP is to properly maintain the dikes and structures along the Missouri River, including the Kansas City area. By failing to maintain the dikes and

structures in the Kansas City area, and thereby reducing the impact of bed degradation, the USACE has improvidently and unlawfully placed the entire burden of bed degradation on the back of Holliday.

G. The use of unpublished data and sources is a violation of NEPA.

Dredger's Global Issue 9 is hereby incorporated by reference.

VI. USACE's Review Of Holliday's Application And Final Permitting Decision Based Thereon Is Contrary To The USACE's Permit Application Review Implementing Regulations.

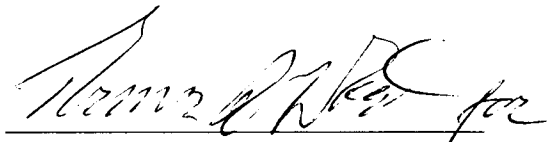
As described above, the USACE's permitting decision in this instance is not supported by the administrative record and is arbitrary and capricious. The ROD and issued permits are accordingly in contravention of the USACE's regulatory mandates for reviewing permit applications. Specifically, the USACE's evaluation of Holliday's application and resultant decision to reduce Holliday's permitted allocations are plainly contrary to the comprehensive review and rationale decision making processes required through the USACE's application of EPA's and the USACE's 404(b)(1) Guidelines (33 C.F.R. § 320.2(f); 40 C.F.R. part 230), the USACE's Public Interest Review (33 C.F.R. § 320.4(a)), and the USACE's application review processes, particularly its NEPA Implementation Procedures (33 C.F.R. part 325, Appendix B). Further, this permit decision is not in compliance with the USACE's implementation of and compliance with Section 404 of the Clean Water Act (33 U.S.C. § 1344) and Section 10 of the Rivers and Harbors Act (33 U.S.C. § 403).

Examples of these fundamental flaws, detailed in the foregoing, include without limitation:

- The USACE's failure to conduct a comprehensive analysis of the current and future state of the LOMR riverbed that accounts for aggradation and overall improvements thereto;
- The USACE's overestimation of potential impacts from Holliday's existing sand dredging operations;
- The insufficient evaluation and consideration given to the significant economic impacts to Holliday's operation arising from the USACE's ultimate permitting decision;
- The USACE's failure to account for the fact that there exists no practicable alternative to Holliday's proposed action.
- The USACE's failure to properly analyze the potentially significant environmental impacts associated with importation of sand supplies into the Kansas City segment from increased air emissions and potential greenhouse gas emissions.

Respectfully submitted this 31st day of May, 2011,

STOEL RIVES LLP



Aaron C. Courtney, OSB 935252
Telephone: (503)294-9411

Attorney for Permittee Appellant
Holliday Sand & Gravel, LLC

BAKER STERCHI COWDEN & RICE L.L.C.

KANSAS CITY
ST. LOUIS
OVERLAND PARK, KS

James R. Jarrow
jarrow@bscr-law.com
Kansas City Office

May 26, 2011

VIA OVERNIGHT DELIVERY

Mr. David Gesl
Administrative Appeals Review Officer
U.S. Army Engineer Division, NW Division
1125 NW Couch St., Suite 500
Portland, OR 97209

Re: Applicant: The Master's Dredging Company, Inc.
File Number 2008-1765

Dear Mr. Gesl:

I am Mr. Penny's attorney/agent. Enclosed please find the appeal for the denial of a permit.

Very truly yours,

BAKER STERCHI COWDEN & RICE, L.L.C.

James R. Jarrow

JRJ/msr
Enclosures

cc: Mr. David Penny

NOTIFICATION OF ADMINISTRATIVE APPEAL OPTIONS AND PROCESS AND REQUEST FOR APPEAL

Applicant: The Master's Dredging Company, Inc.		File Number: 2008-1765	Date: Mar. 31, 2011
Attached is:			See Section below
	A. INITIAL PROFFERED PERMIT (Standard Permit or Letter of Permission)		A
	B. PROFFERED PERMIT (Standard Permit or Letter of Permission)		B
XX	C. PERMIT DENIAL		C
	D. APPROVED JURISDICTIONAL DETERMINATION		D
	E. PRELIMINARY JURISDICTIONAL DETERMINATION		E

SECTION I - The following identifies your rights and options regarding a modification, reconsideration, or administrative appeal of the above decision. Additional information may be found at http://www.usace.army.mil/inet/functions/cw/cecwo/reg or Corps regulations at 33 CFR Part 331.

A: INITIAL PROFFERED PERMIT: You may accept or request modification of the permit.

- ACCEPT: If you received a Standard Permit, you may sign the permit document and return it to the District Engineer for final authorization. If you received a Letter of Permission (LOP), you may accept the LOP and your work is authorized. Your signature on the Standard Permit or acceptance of the LOP means that you accept the permit in its entirety, and waive all rights to appeal the permit, including its terms and conditions, and approved jurisdictional determinations associated with the permit.
- REQUEST MODIFICATION: If you object to the permit (Standard or LOP) because of certain terms and conditions therein, you may request that the permit be modified accordingly. You must complete Section II of this form and return the form to the District Engineer. Your objections must be received by the District Engineer within 60 days of the date of this notice, or you will forfeit your right to appeal the permit in the future. Upon receipt of your letter, the District Engineer will evaluate your objections and may: (a) modify the permit to address all of your concerns, (b) modify the permit to address some of your objections, or (c) not modify the permit having determined that the permit should be issued as previously written. After evaluating your objections, the District Engineer will send you a proffered permit for your reconsideration, as indicated in Section B below.

B: PROFFERED PERMIT: You may accept or appeal the permit.

- ACCEPT: If you received a Standard Permit, you may sign the permit document and return it to the District Engineer for final authorization. If you received a Letter of Permission (LOP), you may accept the LOP and your work is authorized. Your signature on the Standard Permit or acceptance of the LOP means that you accept the permit in its entirety, and waive all rights to appeal the permit, including its terms and conditions, and approved jurisdictional determinations associated with the permit.
- APPEAL: If you choose to decline the proffered permit (Standard or LOP) because of certain terms and conditions therein, you may appeal the declined permit under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the Division Engineer (address on page 2). This form must be received by the Division Engineer within 60 days of the date of this notice.

C: PERMIT DENIAL: You may appeal the denial of a permit under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the Division Engineer (address on page 2). This form must be received by the Division Engineer within 60 days of the date of this notice.

D: APPROVED JURISDICTIONAL DETERMINATION: You may accept the approved JD, appeal the approved JD, or submit new information and request reconsideration of the approved JD.

- ACCEPT: You do not need to notify the Corps to accept an approved JD. Failure to notify the Corps within 60 days of the date of this notice, means that you accept the approved JD in its entirety, and waive all rights to appeal the approved JD.
- APPEAL: If you disagree with the approved JD, you may appeal the approved JD under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the Division Engineer (address on page 2). This form must be received by the Division Engineer within 60 days of the date of this notice.
- RECONSIDERATION BASED ON NEW INFORMATION: You may submit new information to the District Engineer for reconsideration of an approved JD. You must submit the information within 60 days of the date of this notice.

E: PRELIMINARY JURISDICTIONAL DETERMINATION: You do not need to respond to the Corps regarding the preliminary JD. The preliminary JD is not appealable. If you wish, you may request an approved JD (which may be appealed), by contacting the Corps district for further instruction. Also you may provide new information for further consideration by the Corps to reevaluate the JD.

SECTION II - Fill out this section and return this form to the appropriate office only if submitting a request for modification or reconsideration to the District Engineer, or if submitting a request for Administrative Appeal to the Division Engineer. All such submittals must be made within 60 days of the date of this notice.

Submit the following requests to the District Engineer

A. Modification of an INITIAL PROFFERED PERMIT (Item A).
D. Reconsideration of an APPROVED JURISDICTIONAL DETERMINATION based on NEW INFORMATION (Item D RECONSIDERATION).

Submit the following requests to the Division Engineer

B. Administrative Appeal of a PROFFERED PERMIT (Item B).
C. Administrative Appeal of a PERMIT DENIAL (Item C).
D. Administrative Appeal of an APPROVED JURISDICTIONAL DETERMINATION (Item D APPEAL) (for reasons other than reconsideration of an approved JD based on new information).

(Note: Preliminary Jurisdictional Determinations (Item E) are not appealable. If you have concerns regarding a preliminary Jurisdictional Determination, you can request an approved Jurisdictional Determination).

REASONS FOR APPEAL OR OBJECTIONS: (Describe your reasons for appealing the decision or your objections to an initial proffered permit in clear concise statements. You may attach additional information to this form to clarify where your reasons or objections are addressed in the administrative record.) SEE ATTACHED

SUBMITTAL OF NEW OR ADDITIONAL INFORMATION: The District Engineer may accept and consider new information if you request a modification to an initial proffered permit (Part A), or a reconsideration of an approved JD (Part D). An administrative appeal to the Division Engineer is limited to a review of the administrative record, the Corps memorandum for the record of the appeal conference or meeting, and any supplemental information that the review officer has determined is needed to clarify the administrative record. Neither the appellant nor the Corps may add new information or analyses to the administrative record. However, you may provide additional information to clarify the location of information that is already in the administrative record.

POINT OF CONTACT FOR QUESTIONS OR INFORMATION:

If you have questions regarding this decision and/or the appeal process you may contact: DISTRICT ENGINEER **Attn: Mark D. Frazier** **Chief, Regulatory Branch** **U.S. Army Engineer District, Kansas City** **601 E. 12th Street, Suite 402** **Kansas City, MO 64106-2896** **Telephone: 816-389-3990** (Use this address for submittals to the District Engineer)	If you wish to submit an appeal or have questions regarding the appeal process you may contact: DIVISION ENGINEER **Attn: David W. Gesl** **Administrative Appeals Review Officer** **U.S. Army Engineer Division, Northwestern Division** **P.O. Box 2870** **Portland, OR 97208-2870** **Telephone: 503-808-3825**

RIGHT OF ENTRY: Your signature below grants the right of entry to Corps of Engineers personnel, and any government consultants, to conduct investigations of the project site during the course of the appeal process. You will be provided a 15 day notice of any site investigation, and will have the opportunity to participate in all site investigations.

Signature of appellant or agent.	Date: 5/26/2011	Telephone number: (816) 471-2121

ATTACHMENT TO REQUEST FOR APPEAL **Date submitted: May 26, 2011**

Applicant: The Master's Dredging Company, Inc. File Number 2008-1765

REASONS FOR APPEAL:

Applicant submits the following summary of his reasons for appeal:

According to the record, the Corps of Engineers' Record of Decision (ROD) gives Holliday Sand a monopoly for sand dredging on the Missouri River from above St. Joseph, MO to below Kansas City (distance of 141 miles from River Mile 498-Rulo, Nebraska to River Mile 357 below KC). This ROD eliminated smaller sand companies such as the Applicant from competing on the river with Holliday Sand. Because there is no criteria which determine how the COE is to make such a determination as to which of several applying entities get the permit, the decision is arbitrary and capricious.

Moreover, as indicated below Holliday Sand will not even be able to dredge the area where Applicant applied for because of logistical and economical feasibility reasons the COE knew or should have known based upon their knowledge or information in the record which Holliday submitted. See Appendix A to ROD, Correspondence and Comment Letters.

The Final EIS contained objections by Holliday Sand to dredge quantity limitations: (1) to extract only 540,000 tons per year in the Kansas City section and (2) to extract only 300,000 tons per 5 mile stretch because they cannot for economic and technical reasons work more than 10 miles from their plants. Holliday Sand admitted it "did not have the equipment and pilots for long towing." Applicant's dredge request was outside of Holliday Sand's ability to dredge and within the guidelines of the ROD.

The Applicant's permit seeks to allow it to dredge 19 miles from Holliday's Riverside plant, and 30 miles from Holliday's St. Joseph plant. Because Holliday is limited to 840,000 tons in the St. Joseph stretch, and can only recover 300,000 tons for every 5 miles of river, it effectively can't take more that 600,000 tons without going into areas it admits it cannot reach. Thus, the permit in those areas should be granted to Applicant.

The river mile marks of Applicant's dredge request in the St. Joseph section given exclusively to Holliday Sand cannot be economically utilized by Holliday Sand either from its St. Joseph plant or from its Riverside plant. Applicant's permit should have been granted with at least a permit of 300,000 tons per year in this section of the Missouri River that Holliday Sand cannot utilize. This ROD for the Missouri River is against COE precedent to grant river dredging permits to

companies who can utilize them and not to grant permits to companies who cannot utilize the permits.

Accordingly, the Permit Denial of Applicant is unreasonable, arbitrary and capricious, contrary to evidence in the record, and constitutes violations of the Commerce Clause, the Equal Protection Clause, The Due Process clause because the process and related laws should be declared void for vagueness and/or arbitrary as applied, and violates the penumbra of fundamental fairness all in the United States Constitution.

What the Corps has done by giving Holliday Sand the permit which it applied for and cannot use, is allow Holliday Sand to crush its competition in an unfair trade practice, which also results in inflated prices for sand in the Kansas City market because Holliday Sand can charge whatever it wants. As indicated in the record Holliday Sand has almost tripled the price of sand in the last decade.

Finally, the ROD is void of any rationale or basis as to why it awarded Holliday Sand its permit (for an area it admittedly cannot use) over the request of Applicant. Thus, there is no recorded basis in the record for the decision made and thus it is arbitrary and capricious.

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, NORTHWESTERN DIVISION
PO BOX 2870
PORTLAND OR 97208-2870

CENWD-PDS 29 June 2011

MEMORANDUM FOR Chief, Regulatory Branch, Kansas City District

SUBJECT: Appeals of Missouri River Commercial Sand Dredging Permit Actions

1. Reference the following permit actions:
   a. NWK-2008-1765 (The Master's Dredging Company)
   b. NWK-2011-361 (Capital Sand Company, Inc)
   c. NWK-2011-362 (Hermann Sand & Gravel)
   d. NWK-2011-363 (Holliday Sand & Gravel, LLC)
   e. NWK-2011-364 (Con-Agg of Missouri, LLC)
   f. MVS-2011-0177 (Limited Leasing Company)
   g. MVS-2011-1078 (J.T.R., Inc.)
   h. MVS-2008-193 (Capital Sand Company, Inc.)

2. Three separate Requests for Appeals (RFA) were received by Northwestern Division for permit actions evaluated under a single EIS. One appeal, submitted by Lathrop & Gage on behalf of six (6) independent dredging companies, identified common reasons for appeal of seven (7) separate permit actions. Three (3) of those seven (7) permit actions were taken by St. Louis District (MVS), with the remaining four (4) actions being taken by Kansas City District (NWK). In addition, one of the co-appellants (Holiday Sand and Gravel) also submitted an independent RFA under representation of Stoel Rives. A third, completely independent RFA of a permit denial was received (Master's Dredging Company, Inc.).

3. MVS and NWK notified the applicants of permit decisions, identifying several of their actions as "proffered" permits in their Notification of Administrative Appeals Options and Process and Request for Appeal form (NAO/NAP). However, the appeal regulation at 33 C.F.R. § 331.2 specifically states that the first time a permit is sent to the applicant it is an "initial proffered" permit. By regulation, initial proffered permits are not appealable actions. However, if an applicant objects to the terms or conditions of the initial proffered permit, the applicant may request the District Engineer modify the permit. Per regulation at 33 CFR 331.6(b), the District Engineer will then have three options: (1) modify the permit to address all of the applicant's objections, (2) modify the permit to address some, but not all, of the applicant's objections, or (3) not modify the permit. The process for cases where an applicant objects to an initial proffered individual permit, including the need to provide a decision document, can be found at 33 C.F.R. 331.6(b).

4. Permit denials are appealable actions. However, in order for the Review Officer to properly consider those appeals, the appellants must submit a revised RFA(s) based solely on reasons related to those permit denials.

5. The Kansas City District notified the Northwestern Division that on April 19, 2011, one of the co-appellants represented in the Lathrop and Gage RFA, Con-Agg, accepted and signed their permit. Per 33 C.F.R. § 331.5(b)(1) the Con-Agg action is not appealable. Therefore, any reason for appeal solely associated with the Con-Agg permit decision cannot be included in the co-appeal.

6. Kansas City District was the lead for the EIS process. Although three (3) of the permit actions subject under the joint RFA submitted by Lathrop & Gage are within the AOR of the Mississippi Valley Division, initial coordination responsibilities will be assumed by Dave Gesl, the Northwestern Division RO. That coordination will be in close cooperation with Jim Wiseman, the Mississippi Valley Division RO.

7. Both Lathrop & Gage LLP and Stoel Rives submitted timely RFAs to the Northwestern Division and acted in good faith based on the NAO/NAP supplied by both Districts. As such, receipt of the RFA by Northwestern Division within the required 60 days of permit issuance should be considered by MVS and NWK as a timely receipt of a request for reconsideration.

8. Actions:

a. The current RFAs and this MFR will be referred to MVS and NWK by their respective RO's.
b. Mr. David Gesl, RO for Northwestern Division, will inform the appellants' representatives that the current RFAs involving initial proffered permits are not eligible for review by the Division.
c. Mr. Gesl will notify the appellants' representatives that they may submit a revised RFA(s) based only on reasons related to permit denials and/or submit their objections to the terms and conditions of the initial proffered permits to the District for reconsideration. They will also be notified that any reason for appeal solely associated with the Con-Agg permit decision cannot be included in the co-appeal.
d. A memorandum identical to this will be sent to MVS by Mr. Wiseman.

David W. Gesl
Administrative Appeals Review Officer
Northwestern Division.

Concur.
6/29/11

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, NORTHWESTERN DIVISION
PO BOX 2870
PORTLAND OR 97208-2870

JUL 5 2011

Program Support Division

Mr. James Jarrow
Baker Sterchi Cowden & Rice LLC
2400 Pershing Road, Suite 500
Kansas City, Missouri 64108-2533

Dear Mr. Jarrow:

The initial review of your Request for Appeal (RFA) of a permit action by the Kansas City District involving commercial sand dredging in the Missouri River has been completed. The permit denial in question is File No. NWK-2008-1765 (The Master's Dredging Company, Inc). In accordance with 33 C.F.R. § 331.3 (a)(1), the Northwest Division Engineer has appointed the undersigned as the Appeal Review Officer (RO) in this case.

The RFA satisfies the criteria for appeal and is acceptable. The assertions that the permit denial was "...unreasonable, arbitrary and capricious, contrary to evidence in the record..." are valid reasons for an administrative appeal and will be considered. See 33 C.F.R. sec. 331.5(a) (2). On the other hand, the assertion that the permit denial violates the Constitution "because the process and related laws should be declared void..." is not a valid basis for an administrative appeal. Only the Judicial Branch may declare duly enacted laws void for Constitutional reasons; an Executive Branch agency is required to follow the laws and to follow its own formally published regulations. This is consistent with the following description of "actions not appealable" in 33 C.F.R. sec. 331.5(b)(4): "A permit denial without prejudice or a declined permit, where the controlling factor cannot be changed by the Corps decision maker (e.g., the requirements of a binding statute, regulation, state Section 401 water quality certification, state coastal zone management disapproval, etc.)" Consequently, the Constitutionality of the applied laws and published regulations will not be considered in this appeal.

I have requested the Kansas City District provide you a copy of the Administrative Record for the permit denial. Once I have reviewed the Record, I will be contacting you to finalize arrangements for an appeal conference. Should you have any questions, please contact me at (503) 808-3825 or at david.w.gesl@ usace.army.mil. Written correspondence should be directed to me at Northwestern Division, U.S. Army Corps of Engineers, Post Office Box 2870, Portland, Oregon 97208. A copy of this letter will be furnished to Mr. Mark Frazier, Kansas City District.

Sincerely,

David W. Gesl
Appeal Review Officer

cf: CENWK-OD-R (Frazier)
CEMVD-PD-KM (Wiseman)

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, NORTHWESTERN DIVISION
PO BOX 2870
PORTLAND OR 97208-2870

Program Support Division JUL 5 2011

Mr. Aaron C. Courtney
Stoel Rives LLP
900 S.W. Fifth Ave, Suite 2600
Portland, OR 97204-1268

Dear Mr. Courtney:

The initial review of your Request for Appeal (RFA) of a permit action by the Kansas City District involving commercial sand dredging in the Missouri River has been completed. The permit in question is NWK-2011-363 (Holliday Sand & Gravel, LLC). The District's decision is currently not an appealable action.

The District identified its action as a "proffered" permit in the Notification of Administrative Appeals Options and Process and Request for Appeal form (NAO/NAP). However, per the appeal regulation at 33 C.F.R. 331.2, the first time a permit is sent to the applicant, it is an "initial proffered" permit. By regulation, initial proffered permits are not appealable actions. Regulations allow the opportunity to object to the terms and conditions of the initial proffered permit, but require the District to reconsider its decision. If the District then decides a second reconsidered permit is appropriate, it is then defined by regulation as a "proffered" permit and may be appealed to the Division Office.

Please pursue your objections to the terms and conditions of the initial proffered permit with the District. The RFA has been forwarded to the Kansas City District. Please contact Mark Frazier, Kansas City Regulatory Chief at (816) 389-3664, to discuss reconsideration of the initial proffered permit.

If you have any questions, please contact my Appeals Review Officer, Mr. David Gesl, at (503) 808-3825.

Sincerely,

Lorelynn M. Rux

Lorelynn M. Rux
Chief, Program Support Division

cf: CENWK-OD-R (Frazier)
CEMVD-PD-KM (Wiseman)

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, NORTHWESTERN DIVISION
PO BOX 2870
PORTLAND OR 97208-2870

JUL 5 2011

Program Support Division

Mr. David A. Shorr
Lathrop & Gage LLP
314 East High Street
Jefferson City, Missouri 65101

Dear Mr. Shorr:

The initial review of your Request for Appeal (RFA) of permit actions by the Kansas City District and St. Louis District involving commercial sand dredging in the Missouri River has been completed. Those actions include NWK-2011-361 (Capital Sand Company, Inc), NWK-2011-362 (Hermann Sand & Gravel), NWK-2011-363 (Holliday Sand & Gravel, LLC), NWK-2011-364 (Con-Agg of Missouri, LLC), MVS-2008-193 (Capital Sand Company, Inc.), MVS-2011-177 (Limited Leasing Company), and MVS-2011-178 (J.T.R., Inc.). The District's decisions are currently not appealable actions.

The Districts identified their actions as "proffered" permits in the Notification of Administrative Appeals Options and Process and Request for Appeal form (NAO/NAP). However, per the appeal regulation at 33 C.F.R. 331.2, the first time a permit is sent to the applicant, it is an "initial proffered" permit. By regulation, initial proffered permits are not appealable actions. Regulations allow the opportunity to object to the terms and conditions of the initial proffered permit, but require the District to reconsider its decision. If the District then decides a second reconsidered permit is appropriate, it is then defined by regulation as a "proffered" permit and may be appealed to the Division Office.

Your alternatives are to submit a revised RFA(s) based only on reasons related to permit denials, or to pursue the objections to the terms and conditions of the initial proffered permits with the District. The RFA has been forwarded to the appropriate District. Please contact Mark Frazier, the Kansas City Regulatory Chief, at (816) 389-3664, or Danny McClendon, the St. Louis District Regulatory Chief, at (314) 331-8574 to discuss reconsideration of the initial proffered permits.

The District indicated that on April 19, 2011, one of the co-appellants associated with your RFA, Con-Agg, accepted and signed their permit. Per 33 C.F.R. 331.5(b)(1), the Con-Agg action is not appealable. Therefore, any reason for appeal solely associated with the Con-Agg permit action cannot be included in an RFA.

If you have any questions, please contact my Appeals Review Officer, Mr. David Gesl, at (503) 808-3825.

Sincerely,

Lorelynn M. Rux

Lorelynn M. Rux
Chief, Program Support Division

cf: CENWK-OD-R (Frazier)
CEMVS-OD-F (McClendon)
CEMVD-PD-KM (Wiseman)

Wheeler, Cody S NWK

From: Frazier, Mark D NWK
Sent: Wednesday, July 13, 2011 8:13 AM
To: 'David Shorr (dshorr@lathropgage.com)'; 'accourtney@stoel.com'
Cc: 'Tony Giardano (email)'; 'Brian J. Viehmann (email)'; 'Ray Bohlken (rbohlken@capitalsandcompany.com)'; 'Steve Engemann (steve@hermannsand.com)'; 'Mike Odell'; 'trwood@stoel.com'; Jeppson, Matthew P NWK; Hibbs, David R NWK; Frerker, Charles F MVS; Mcclendon, Danny D MVS; Wheeler, Cody S NWK
Subject: Missouri River Dredging Administrative Appeals Clarification
Attachments: 2011-07-05 Shorr Combined.pdf; 2011-07-05 Holiday.pdf

Mr. Shorr and Mr. Courtney, you recently received a letter (PDF attached) from Lorelynn M. Rux, Chief, Program Support Division of the Northwestern Division (NWD) of the USACE. We want to clarify the Kansas City and St. Louis Districts' unified position on the status of the appeals.

First, there were no procedural failings on the part of the dredgers or their agents. You responded to proffered permits as described in our letters of March 31, 2011, which we determined to be appropriate given the District Commanders' integral role in their issuance. Your response to the proffered permits with Requests For Appeal was in line with the regulations. As stated in NWD's July 5, 2011 letters, we are now considering the permits we sent you as initial proffered permits, which require the first step to be a reconsideration of stated objections by the District Commander. We will accept and evaluate your previously submitted Requests for Appeal in the Commander's reconsideration of the Initial Proffered Permits as stated by Ms. Rux, and send you our Final Proffered Permits as soon as possible. As the Districts have already been assessing the reasons for appeal, this reconsideration may take approximately 4 weeks or less. At that point, you will still be able to have your Requests for Appeal handled as an appeal to NWD if no satisfactory change occurs during our reconsideration at the District level. You do not need to submit any additional information for the reconsideration as you have already provided your Requests for Appeal.

Since the appeal process for initial proffered permits and denied applications are slightly different, Ms. Rux's letter explained that should Capital Sand Company wish to proceed at this time with the appeal for the denial of the application to dredge in the lower 50 miles, a revised Request for Appeal based only on reasons related to that permit denial must be resubmitted. Mr. David W. Gesl, NWD Appeals Review Officer, has confirmed that should you wish to wait until the results of the reconsideration are presented in the proffered permits and then appeal those along with the denial, that will be acceptable as well.

Last, the permit extensions issued on March 31, 2011 are still in effect and will continue while we evaluate your objections to our permit decision, and later during the appeal to NWD.

Mark D. Frazier
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