May 31, 2011

AARON C. COURTNEY
*Direct (503) 294-9411*
accourtney@stoel.com

**VIA EMAIL TRANSMISSION**
**DAVID.W.GESL@USACE.ARMY.MIL**

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<br>US Army Corps of Engineers<br>St. Louis District (OD-F)<br>1222 Spruce Street<br>St. Louis, MO 63103-2833<br>Phone: (314)331-8583 Fax: (314)331-8741 | Division Engineer<br>ATTN: David W. Gesl<br>Administrative Appeals Review Officer<br>US Army Corps of Engineers<br>PO Box 2870<br>Portland, OR 97208-2870<br>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:


L. John Nelson IV
Assistant General Counsel
Holliday Sand & Gravel, LLC
11011 Cody Street
Overland Park, KS 66210
Direct: (913) 319-6003
Email: john.nelson@ashgrove.com

Aaron C. Courtney
STOEL RIVES LLP
900 S.W. Fifth Ave, Suite 2600
Portland, OR 97204-1268
Direct: (503) 294-9411
Fax: (503) 220-2480
Email: accourtney@stoel.com


**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.

## TABLE OF CONTENTS

**Page**


STANDARD OF REVIEW ..... 1

STATEMENT OF REASONS FOR APPEAL ..... 1

I. Introduction ..... 1

II. The ROD Is Flawed Because The USACE Failed To Properly Consider The Cumulative Impacts of the BSNP ..... 6

III. Recent Changes To BSNP Dike Levels In Kansas City Have Addressed Degradation And Should Have Been Accounted For In The EIS And ROD ..... 11

IV. Objections To The Administrative Record And Reservation Of Rights ..... 19

V. Statement Of Joinder And Incorporation of Dredger's Arguments ..... 21

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 ..... 21

B. The USACE's assumption that there are sufficient alternate sources of sand available is based on inaccurate information ..... 22

C. The USACE failed to comply with NEPA in that the ROD failed to properly analyze the environmental impacts resulting from the permitting decision ..... 24

D. The monitoring provision relating to 24/7, 365 days per year, is unreasonable and unconstitutional ..... 24

E. Additional carryover of authorized annual tonnage would reflect present difficult economic circumstances and better protect the River ..... 24

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 ..... 24

G. The use of unpublished data and sources is a violation of NEPA ..... 25

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 ..... 25

## 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.

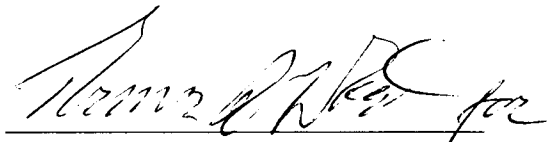
As described above, the USACE's permitting decision in this instance is not supported by the administrative record and is arbitrary and capricious. The ROD and issued permits are accordingly in contravention of the USACE's regulatory mandates for reviewing permit applications. Specifically, the USACE's 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*