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
Commanding

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