**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