**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)