BAKER STERCHI COWDEN & RICE L.L.C.

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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:<br>DISTRICT ENGINEER<br>**Attn: Mark D. Frazier**<br>**Chief, Regulatory Branch**<br>**U.S. Army Engineer District, Kansas City**<br>**601 E. 12th Street, Suite 402**<br>**Kansas City, MO 64106-2896**<br>**Telephone: 816-389-3990**<br>(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:<br>DIVISION ENGINEER<br>**Attn: David W. Gesl**<br>**Administrative Appeals Review Officer**<br>**U.S. Army Engineer Division, Northwestern Division**<br>**P.O. 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. | Date:<br>5/26/2011 | Telephone number:<br>(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.