

**ADMINISTRATIVE APPEAL DECISION
HOLLIDAY SAND & GRAVEL APPEAL**

**RIVERS & HARBORS ACT AND CLEAN WATER ACT
MISSOURI RIVER, KANSAS AND MISSOURI
KANSAS CITY DISTRICT**

DATE: 10/31/2013.

Review Officer: Thomas J. Cavanaugh, U.S. Army Corps of Engineers (Corps), South Pacific Division, San Francisco, California

Appellant: Holliday Sand & Gravel, NWK-2011-00363, Mike Odell

Counsel Representing Appellant: Aaron Courtney, Stoel Rives, and
John Nelson, Holliday Sand General Counsel

Authority: Rivers and Harbors Act of 1899, 33 USC § 403 and Clean Water Act (33 U.S.C. 1344)

Receipt of Request for Appeal: November 7, 2011

Receipt of Administrative Record: November 18, 2011

Appeal Conference: April 11, 2012

Site Visit Date: April 12, 2012

Kansas City District Representatives: Mark Frazier, Regulatory Branch Chief,
David Hibbs, Regulatory Project Manager,
Cody Wheeler, Regulatory Project Manager, and
Matthew Jeppson, Office of Counsel

Summary of Decision: The Appellant submitted a Request for Appeal (RFA) on November 7, 2011. The Appellant objected to conditions, such as those lowering dredging tonnage limits relative to previous year's allocations and imposing other limitations. In addition, the Appellant incorporated by reference several of the ten global reasons for appeal from the appeal of five denied or declined permits by the Missouri River Dredgers Group, also received on November 7, 2011.

This Appeal of a declined proffered permit does not have merit. No further action is required of the District.

Background Information: The Kansas City District (NWK), which is part of the Northwestern Division (NWD), and the St. Louis District, which is part of the Mississippi Valley Division

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(MVD), considered eleven (11) permit applications from eight (8) commercial sand and gravel dredging companies requesting authorization of new or continued sand and gravel extraction operations in the Missouri River from its confluence with the Mississippi River (river mile [RM] 0) upstream to Rulo, Nebraska (RM 498). A separate but related appeal decision has been completed in response to a combined request for appeal from JTR, Limited Leasing, Hermann Sand & Gravel, Capital Sand, collectively referred to as the Missouri River Dredgers Group (hereinafter “Dredgers”). As stated above, this administrative appeal decision covers the appeal of a declined proffered permit by Holliday Sand & Gravel (hereinafter “Appellant”) to NWD. Many of the Dredger’s reasons for appeal have been incorporated by reference by the Appellant into their reasons for appeal. A statement of incorporation by reference is included with each of the reasons for appeal where such incorporation by reference has occurred.

The District’s consideration of the proposed dredging project is detailed in the “Missouri River Commercial Dredging Final Environmental Impact Statement”, February 2011 (FEIS). The Record of Decision (ROD) was signed on 31 March 2011 by Colonel Anthony J. Hofmann, NWK District Commander. Both the ROD and the FEIS were included in the administrative record. The ROD concluded that permits will be granted to Holliday Sand & Gravel Company, LLC; Capital Sand Company, Inc.; Hermann Sand and Gravel, Inc.; Con-Agg of MO, LLC; J.T.R., Inc.; and Limited Leasing Company. Further, the conclusion reached in the ROD is that requests for authorizations for Master’s Dredging Company, Inc. and Edward N. Rau Contractor Company, and for Capital Sand Company, Inc. to expand their operations between river miles 40 and 50, are denied, based on the analyses and resulting conclusions, which are contained in the ROD’s supporting documentation.

Activities to be conducted under the permits include dredging of river sediments from the navigable waters of the lower Missouri River (LOMR), extraction of suitable sand and gravel, and return (discharge) of some of the dredged material into the river. These activities are regulated under Section 10 of the Rivers and Harbors Act. Discharge of dredged material into a navigable water of the United States is also regulated under Section 404 of the Clean Water Act (CWA).

The Project Area, as described in Section 1.3 and 2.2 of the FEIS, consists of the lower 498-mile reach of the LOMR. This reach is divided into five segments for defining alternatives and conducting environmental analysis. The segments were based primarily on the intersection of the LOMR with major tributaries, bedrock geology, slope breaks, width of the alluvial floodplain, and the USGS gage locations where the sediment supply was likely to change and could be measured, in order to facilitate a more specific environmental impact assessment and enable the USACE to better determine the appropriate dredging level for each segment based on the local bed material load. The segments include St. Joseph (RM 391 – RM 498), Kansas City (RM 357 – RM 391), Waverly (RM 250 – RM 357), Jefferson City (RM 130 – RM 250), and St. Charles (RM 0 – RM 130). Holliday Sand & Gravel’s dredging operations occur in the St. Joseph, Kansas City, and Waverly segments, as shown in the table below.

Commercial sand and gravel extracted from the LOMR is processed and distributed at sand plants adjacent to the river, some of which are owned and operated by dredgers; there are 18

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existing plants. Holliday Sand & Gravel owns and operates three of those sand plants. Holliday has a sand plant in the St. Joseph segment, near river mile 345. Holliday also has two sand plants in the Kansas City segment, the Riverside operation, near river mile 373, and the Randolph operation, near river mile 360.

The table below¹ lists the previously authorized, 2004-2008 annual average and proposed dredging quantities by river segment and dredging company. The table also lists the four alternatives considered in the FEIS; the shaded alternative in each segment is the District's Environmentally Preferred (permissible) Alternative.

Segment		Previously Authorized	Annual Average (2004-2008)	Proposed Action	No Action Alternative	Alternative A	Alternative B	Alternative C
St. Joseph	Total	360,000	326,928	1,150,000	0	350,000	860,000	330,000
	Holliday Sand	360,000	326,928	1,150,000	0	350,000	860,000	330,000
Kansas City	Total	1,300,000	2,520,107	4,060,000	0	540,000*	1,230,000	2,520,000
	Holliday Sand	1,300,000	2,520,107	3,060,000	0	540,000*	1,230,000	2,520,000
	Master's Dredging	0	0	1,000,000	0	0	0	0
Waverly	Total	1,254,492	815,505	1,005,600	0	500,000	1,140,000	820,000
	Holliday Sand	500,000	446,385	340,000	0	270,000	770,000	450,000
	Capital Sand	754,492	369,120	665,600	0	230,000	370,000	370,000
Jefferson City	Total	1,286,736	1,633,852	2,750,000	0	430,000	980,000	1,630,000
	Capital Sand	1,017,292	1,354,427	2,000,000	0	360,000	810,000	1,350,000
	Con-Agg	175,000	159,571	250,000	0	40,000	100,000	160,000
	Hermann Sand	94,444	119,854	500,000	0	30,000	70,000	120,000
St. Charles	Total	3,532,022	1,706,895	4,384,400	0	370,000	840,000	1,710,000
	Capital Sand	576,466	136,463	1,034,400	0	30,000	70,000	140,000
	Hermann Sand	205,556	118,666	500,000	0	30,000	60,000	120,000
	Jotori Dredging	1,550,000	461,704	1,550,000	0	100,000	230,000	460,000
	Limited Leasing	1,200,000	990,062	1,200,000	0	210,000	480,000	990,000
	Edward N. Rau	0	0	100,000	0	0	0	0
Total by Alternative		7,733,250	7,003,287	13,350,000	0	2,190,000	5,050,000	7,010,000
Environmentally Preferred Alternative Total							5,880,000	

* This is the target quantity, following a three year phase in.

The District's August 2009, "Missouri River Bed Degradation Reconnaissance Study Report" concluded that recent changes in average water surface and river bed elevations have occurred along major portions of the LOMR. The District noted that the greatest degradation had taken place in those portions of the LOMR that had experienced the greatest amount of dredging.

¹ From document prepared by NWK staff, on 21 December 2010, titled "Draft MO River Dredging Permit Decision"

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Commercial dredging contributions to river bed degradation (the lowering of the elevation of the river bottom) were treated in the FEIS and ROD and were a central factor in the decisions on all eleven permit applications considered in the FEIS, including the permit decision that is the subject of this appeal. Factors other than commercial dredging that are related to degradation such as reduction in sediment loads by dams, flow modification by regulation, major flood events, dikes and structures, river cutoffs, and commercial dredging for sand and aggregate were also considered in the FEIS and ROD.

The ROD concluded that limitations on the quantity by segment, and also strict requirements to disperse or spread-out operations over a wider geographic area would ensure commercial dredging projects on the LOMR are in the overall public interest and in compliance with the CWA Section 404(b)(1) Guidelines. The District's decision included a limit on the amount of sediments extracted from any five (5) mile reach by the Appellants.

The allocations among dredgers in the proffered or denied permits are derived from and generally proportional to the recent (2004-2008) averages, with the exception of Holliday. The Holliday allocation in the Kansas City segment is less than the recent average (540,000 tons vs. 2,520,000 tons), whereas, the Holliday allocation in the adjacent St. Joseph (860,000 vs. 327,000 tons) and Waverly (1,140,000 vs. 816,000 tons) segments is greater than the recent averages.

Following the receipt of the initial proffered permits and the denial from NWK and MVS, the dredgers submitted RFAs to NWD and MVD. The RFAs were forwarded to and evaluated by the Districts as a request for reconsideration, in accordance with the requirements of 33 C.F.R. § 331.2. That reevaluation is described in the joint NWK and MVS *District Reconsideration Memorandum*, Memorandum for Record, Subject: Reconsideration of Proffered Missouri River Commercial Dredging Permits, 7 September 2011 (Reconsideration Memorandum)². Proffered permits were provided to the Appellants following reconsideration with changes described in the Reconsideration Memorandum.

The Appellants' RFA was received by NWD on November 7, 2011.

Appeal Review Standards: In accordance with the Corps Administrative Appeals Process, the Division Engineer will disapprove the entirety of or any part of the District Engineer's decision only if he determines that the decision on some relevant matter was arbitrary, capricious, an abuse of discretion, not supported by substantial evidence in the AR, or plainly contrary to a requirement of law, regulation, an Executive Order, or officially promulgated Corps policy guidance. The Division Engineer will not attempt to substitute his judgment for that of the District Engineer regarding a matter of fact, so long as the District Engineer's determination was supported by substantial evidence in the AR, or regarding any other matter if the District Engineer's determination was reasonable and within the discretion delegated to the District Engineer by Corps regulations, 33 C.F.R. § 331.9.

² The Reconsideration Memorandum memorializes the District's evaluation of the Appellant's request for reconsideration of conditions it found objectionable following the receipt of the District's initial proffered permit.

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“Relief Requested”: The Appellant requested that the Review Officer disapprove of the ROD, instruct the District Engineer to reconsider and issue the ROD in accordance with their appeal, and grant the Appellant the tonnage amounts requested in the original permit application. Alternatively, at a minimum, the Appellant requested that the Review Officer instruct the District Engineer to issue the Appellant permits authorizing tonnage amounts no less than the Appellants previously authorized dredging levels.

**APPEAL EVALUATION, FINDINGS, and INSTRUCTIONS to the KANSAS CITY
DISTRICT ENGINEER (DE)**

Information Received and its Disposal During the Appeal Review:

33 C.F.R. § 331.3(a) sets the authority of the Division Engineer to make the final decision on the merits of appeals. The Division Engineer does not have authority under the appeal process to make a final decision to issue or deny any particular permit; that authority remains with the District Engineer. Upon appeal of the District Engineer's decision, the Division Engineer or his RO conducts an independent review of the AR to address the reasons for appeal cited by the Appellant. The AR is limited to information contained in the record by the date of the NAP. Pursuant to 33 C.F.R. § 331.2, no new information may be submitted on appeal. Neither the Appellant nor the District may present new information. To assist the Division Engineer in making a decision on the appeal, the RO may allow the parties to interpret, clarify, or explain issues and information already contained in the AR. Such interpretation, clarification, or explanation does not become part of the District's AR, because the District Engineer did not consider it in making the decision on the permit action. However, in accordance with 33 C.F.R. § 331.7(f), the Division Engineer may use such interpretation, clarification, or explanation in determining whether the AR provides an adequate and reasonable basis to support the District Engineer's decision.

The administrative appeal was evaluated on the District's administrative record, the Appellant's Request for Appeal, and discussions at the appeal conference and site visit with the Appellant and the District.

REASON 1 (Part III of Appellant's RFA): The USACE violated its own regulations and NEPA by failing to properly consider the impacts of recent changes to the Bank Stabilization and Navigation Project (BSNP).

FINDING: This reason for appeal does not have merit.

ACTION: No action is required.³

DISCUSSION: In the RFA, the Appellant asserted that the District is required under its own regulations and NEPA to properly evaluate the existing environmental baseline and to consider

³ However the District has indicated that they are committed to carefully reviewing information as it becomes available during the permit cycle and considering whether changes can be made to dredging amounts in response to that information.

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the cumulative impacts of a proposed project. The Appellant asserted that the District failed to adequately account for the cumulative impacts caused by the BSNP and failed to account for the recent and reasonably foreseeable future improvements to the BSNP, which have resulted in bed aggradation.

The Appellant stated in the RFA that, had the District considered the future impacts of the reduced the volume of the proposed dredging in the context of the major role played by the BSNP in bed degradation (and aggradation), the record would have supported Alternative B⁴, rather than the selection of Alternative A⁵. The Appellant stated that their review, which was completed by Dr. Charles Patterson, PhD, PE, CFM, Senior Hydro Engineer, with Allgeier, Martin and Associates, Inc., of USACE's guidance manuals and records of river operation concluded that the USACE's management of the BSNP is the dominant factor in controlling degradation, though other factors could contribute. Further, the Appellant stated that the District failed to incorporate Dr. Patterson's report in the administrative record, and even after recognizing that the report may provide "new information," the USACE did not adequately consider and account for the impacts attributable to the BSNP, and has failed to accurately evaluate the cumulative effects and baseline of the proposed action.

The District stated, in response to questions asked at the appeal conference, that on August 31, 2011, just prior to completing the Reconsideration Memorandum, that the District received Dr. Patterson's report. Dr. Patterson's report evaluated dike operations in the Kansas City area relative to stage, flow rate, velocity, and surface water field measurements for the Missouri River gage at Kansas City, Missouri from 2002 to 2006. The District indicated that, although Dr. Patterson's report was new to the District, the issue and underlying principles were not. The District stated that, in written comments sent in response to the Draft Environmental Impact Statement (DEIS), FEIS, and ROD and again in their request for reconsideration of the initial proffered permits, the Appellant had claimed that the District had failed to consider the Corps controlled river structures, including the BSNP, as part of the analysis of the causes and contributors to bed degradation.

The District's consideration of the effects of the upstream dams and reservoirs and the BSNP as potential contributors to bed degradation is discussed as part of the existing environment in Chapter 3 of the FEIS as well as part of cumulative impacts described in Chapter 5 of the FEIS. Specific consideration of the effects of the BSNP is found in Section 5.2 of the FEIS.

Sections 3.4.6.2 and shown on Figures 3.4-31 and 3.4-32 of the FEIS, indicate that bed degradation has occurred at most locations where dredging occurs and is most severe in intensely dredged areas around the sand plants in Kansas City, Jefferson City, and St. Louis/St. Charles. In Section 3.5 of the FEIS and Section 4.2.1.1 of the ROD, it is indicated that the most severely degraded reaches are also located in cities with more levees, revetments, drinking water and

⁴ Alternative B dredging limits are shown in the table above, from the document prepared by NWK staff, on 21 December 2010, titled "Draft MO River Dredging Permit Decision"

⁵ Alternative A dredging limits are shown in the table above, from the document prepared by NWK staff, on 21 December 2010, titled "Draft MO River Dredging Permit Decision"

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industrial water intakes, bridges, and pipeline crossings located on the LOMR than occur in rural reaches of those segments or in the Waverly and St. Joseph segments. The Kansas City segment, according to the FEIS, has degraded approximately 12 feet since 1940, which has resulted in failed revetments and dikes, collapsed river banks, damaged or disabled water intakes, damaged bridges on tributaries, damaged levee toes, and failed outfalls. Based on the impacts to infrastructure already observed in the most degraded Kansas City segment, the FEIS concluded that it is likely that other segments, particularly the Jefferson City and St. Charles segments, would experience adverse impacts with the occurrence of moderate to substantial degradation in the long-term future. The FEIS indicates that expected adverse impacts include compromised performance of water intakes that provide drinking, cooling, and industrial process water, which would require expensive modifications to intake structures, premature pump wear, and damage that threatens the reliability of electric generation and public drinking water supply; scouring of existing bridge foundations (particularly on tributaries near the LOMR); exposure of and/or damage to petrochemical, sewer, or water pipelines (and associated accidental releases) under the river; and bank and revetment failure that could impair navigation and threaten the integrity of nearby levees. Section 4.2.1.5 of the ROD and Section 4.10 of the FEIS conclude that the economic effects related to continued river bed degradation would be proportional to the amount of degradation expected to occur. Further the FEIS states that additional degradation in any segment of the river would result in additional expenditures in those segments for infrastructure repair, maintenance, and replacement and would increase the potential for levee failure and jeopardize billions of dollars in investment protected by the regional levee systems.

As stated and further explained below, in reason 6, the District's consideration of the effects of the upstream dams and reservoirs and the BSNP as potential contributors to bed degradation is discussed as part of the existing environment in Chapter 3 of the FEIS as well as part of cumulative impacts described in Chapter 5 of the FEIS. Specific consideration of the effects of the BNSP, upstream dams, and other structures is found in Section 5.2 of the FEIS.

Section 3.5.2.4 of the FEIS describes the BSNP structures and indicates that, while the river essentially has been stabilized into a single channel that is self-maintained by the BSNP infrastructure, individual flood events and river bed degradation trigger review of BSNP structure elevations and comparison to the Construction Reference Plane (CRP), which is the imaginary sloping plane that extends the length of the LOMR and is used by the USACE as a benchmark for building and maintaining structures in the river (Section 3.4.6.1 of the FEIS). It is indicated that when these events result in channel degradation and navigation season flows cannot meet the previous CRP elevations, the infrastructure, including the BSNP features, must be altered to maintain the design water surface elevations in a given river segment.

As shown in the following excerpts from the EIS, the District stated that the Corps adjusts the dike heights to the changing CRP when funds are available to do so. The excerpts also show that the District knows of and considers modifications made by the Corps in 2009 to dikes in the Kansas City segment.

Section 4.3.3.5 (page 4.3-19) of the FEIS states that continuing river bed degradation and individual flood events result in ongoing maintenance of BSNP structures. There it states that the

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USACE maintenance program for dikes focuses on maintaining the dikes at their minimum design elevations measured against the CRP.

Section 4.3.3.5 (page 4.3-21), of the FEIS states that degradation levels between 2 and 4 feet over the next 5 years and up to 4 feet or more over the next 20 years throughout the Kansas City segment under the Proposed Action pose risks to dikes, rock revetments, and levees. The FEIS further states that this risk would need to be countered with regular inspections, maintenance, and repairs to maintain the required factor of safety and that mechanical removal of material from the top of existing dikes may be required in the long term.

The following excerpts from the FEIS show that the District included the effects of the BSNP in the cumulative effects analysis, but did not specifically discuss the potential effect of the 2009 dike modifications on sediment supply or sediment transport in the Kansas City segment.

Section 5.2.2.2 (page 5-5) of the FEIS states that the BSNP structures (i.e., revetments, dikes, and levees) were constructed to restrict lateral movement of the river channel with the intent of maintaining a navigation channel (see also Section 3.2.4.2). The section indicates that construction and maintenance of the BSNP have resulted in channelization of the river and straighter and faster flows, leading to a reduced amount of sediment dispersal and reduced accumulation in the channel bottom. The section further indicates that these factors have contributed to lowering of the river bed and lowering of the average water surface elevations with associated main channel and tributary river bed degradation, which contributes to river bank erosion, tributary headcutting, loss of shoreline habitat, and impacts to infrastructure.

Section 5.3.2 (page 5-15) of the FEIS states that a number of factors have caused and will continue to cause changes in the balance of river sediment in the Missouri River basin and corresponding changes in channel form, geometry, and fluvial habitats. The section indicates that these factors include, but are not limited to, development and operation of reservoirs, creation of the navigation channel, increased water use, periods of flood and drought, commercial dredging of sand and gravel, and changes in land use. The section indicates that the ongoing and reasonably foreseeable projects evaluated for potential cumulative impacts on geomorphology are those with the potential to change the sediment supply or sediment transport and that are likely to interact with commercial dredging of sand and gravel. It further indicates that the most significant project in terms of potential for changes in sediment availability is the Shallow Water Habitat Program mandated by the 2003 Biological Opinion and embodied in the Missouri River Recovery Program (MRRP). The FEIS indicates that if the Shallow Water Habitat Program continues to be constructed to meet the goals described in the MRRP, construction of shallow-water habitat, dike notching, and side channel construction could substantially affect sediment loads and channel geometry, and have the potential to affect river bed and water surface elevations.

The District selected Alternative A as the Least Environmentally Damaging Practicable Alternative (LEDPA) in the Kansas City segment. Support for the District's selection of Alternative A is found in Section 4.3.6.5, (FEIS, page 4.3-38). In that section, the District indicated that potential effects on BSNP structures (such as exposure of the tops of dikes caused

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by river bed degradation rates that are more rapid than erosion rates) would generally be greater under Alternative B than under current conditions, and likely would require implementation of countermeasures to ensure the required factor of safety, including regular inspections, maintenance, and repairs. Further that section states that the potential for erosion at the toe of revetments would be greater under Alternative B than under current conditions. The District concluded that potential costs to reinforce or repair BSNP structures in the St. Joseph, Kansas City, Jefferson City, and St. Charles segments could be substantial.

The District's main rationale for the selection of Alternative A, rather than Alternative B for the Kansas City segment is described in Section 4.3.6.5, "Impacts to Bank Stabilization and Navigation Project Structures" (page 4.3-38 of the FEIS). That section states that the potential effects on BSNP structures (such as exposure of the tops of dikes caused by river bed degradation rates that are more rapid than erosion rates) would generally be greater under Alternative B than under current conditions. The section further states that selection of Alternative B would likely require implementation of countermeasures to ensure the required factor of safety. These countermeasures would include more frequent inspections, maintenance, and repair. It is further indicated that the potential for erosion at the toe of revetments would be greater under Alternative B than under current conditions.

The District concluded, as stated in the ROD, that Alternative A (the LEDPA) complies with the Section 404(b)(1) Guidelines⁶, and is not contrary to the public interest.

The AR shows that the Districts fulfilled requirements of both NEPA (40 C.F.R. 1508.7) and the CWA 404(b)(1) Guidelines (40 C.F.R. 230.11(a)), to evaluate the cumulative impacts of the proposed federal action on the environment. The District analyzed the impacts associated with BSNP as part of its cumulative impacts assessment in Chapter 5 of the FEIS and Section 4.2.2 of the ROD. There are no identifiable procedural or substantive reasons to remand the decision.

Therefore, this reason for appeal does not have merit.

REASON 2 (Part IV of Appellant's RFA): The USACE Violated NEPA by Failing to Properly Respond to Comments Submitted on the Draft EIS.

FINDING: This reason for appeal does not have merit.

ACTION: No action is required.

DISCUSSION: In the RFA, the Appellant asserted that there are inaccurate statements from the District within the Response to Comments. The Appellant asserted that the District did not respond to Dr. Patterson's report, which was provided to the District during the District's

⁶ The 404(b)(1) Guidelines developed by the Administrator of the Environmental Protection Agency in conjunction with the Secretary of the Army acting through the Chief of Engineers under section 404(b)(1) of the Clean Water Act (33 U.S.C. 1344). The Guidelines are applicable to the specification of disposal sites for discharges of dredged or fill material into waters of the United States.

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reconsideration of the initially proffered permit, and include it in the administrative record and that the District failed to correct or address clear factual errors in the record in response to comments on the Draft EIS.

The District's Response to Comments, on Page 10-34, of the FEIS states that, as described in Section 3.4.6.3, several factors are likely contributing to bed degradation in the Kansas City segment. Those factors include commercial dredging and BSNP structures. The response further indicates that, if the river bed degrades (and dike elevations remain the same), higher flows are directed into the navigation channel, increasing the likelihood of scour and degradation. It also states that the USACE has reduced the height of the dikes in the Kansas City segment twice since the year 2000 in response to degradation in the reach. Finally, the District indicated that, since the aggradation is not confined to the times and locations where the dike modification occurred, it is more likely due to increased flows in the past few years in combination with reduced commercial dredging.

The District's Response to Comments on Page 10-42 of the FEIS, states that the CRP elevations were developed in 1973 and updated in 1982, 1990, 2002, 2005, and 2010. The District indicated that the 2002 CRP and 2002 water surface profiles show significant degradation compared to the 1990 CRP and 1990 water surface profiles, respectively. From that the District concluded that the degradation in the Kansas City reach was not an established trend until 2002. The District indicated that water surface profiles since 2002 show a significant downward trend until 2006, with minor recovery above RM 368 after 2006, and minor degradation or stability below RM 368 after 2006.

The District's Response to Comments on Page 10-116 of the FEIS indicates that, in response to the dynamics of the LOMR system, the USACE has periodically updated the dike configurations and that the most recent changes to dike heights in the Kansas City segment occurred in 2004 and 2009. Dike notching has also been implemented to erode sediment that has accumulated due to degradation and low flows since the early 1990s.

The District asserted, as detailed above under Reason 1, that Dr. Patterson's report, provided by Holliday Sand & Gravel Company after both the EIS and ROD were complete, does not warrant a change to the EIS. The District stated that, although Dr. Patterson's report was new to the District, the issue and underlying principles were not. The District position is that, while Dr. Patterson's report concluded that lowering the dikes as was done in 2009 would "increase the possibility of deposition and would therefore reduce bed degradation", Dr. Patterson's report did not quantify the potential effects of lowering the dikes or conclude that it would cause aggradation.

The AR shows that the District fulfilled requirements of both NEPA and the CWA 404(b)(1) Guidelines (40 C.F.R. 230.11(a)), to evaluate the cumulative impacts of the proposed federal action on the environment. The District analyzed the impacts associated with BSNP as part of its cumulative impacts assessment in Chapter 5 of the FEIS and Section 4.2.2 of the ROD. There are no identifiable procedural or substantive reasons to remand the decision.

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It is clear from the ample discussion in the AR relative to dike and sill modifications, that the District was aware of dike and sill lowering as well as other modifications. The record reflects that the District utilized the best available information to come to the conclusion of what was reasonably foreseeable to result relative to degradation and aggradation. Additionally, the AR shows that the District has provided thorough responses to comments received during its evaluation.

Therefore, this reason for appeal does not have merit.

REASON 3 (Part V of Appellant's RFA): Objections to the Administrative Record and Reservation of Rights

FINDING: This reason for appeal does not have merit.

ACTION: No action is required.

DISCUSSION: In the RFA, the Appellant asserted that there is a disagreement between the District and the Appellant as to what comprises the administrative record. The Appellant believes that the administrative record likely far exceeds what the District made available on its public website and provided when it reissued the dredgers' permits, and specifically includes internal email and documents developed in the course of the project review by the USACE.

The guidance concerning preparation of the administrative record that was in place at the time the RFA was received was Northwestern Division's (Division), October 30, 2008, "Preparing the Administrative Record for Review" (AR Guidance). That document, in Part III, "Administrative Record", cites the Department of Justice 1999 Guidance to Federal Agencies on Compiling the Administrative Record, and states that "The administrative record consists of all documents and materials directly or indirectly considered by the agency decision maker in making the challenged decision. It is not limited to documents and materials relevant only to the merits of the agency's decision. It includes documents and materials relevant to the process of making the agency's decision." The AR Guidance further indicates that District Counsel should be consulted to help identify and redact/remove materials subject to privilege and prohibitions against disclosure. Such prohibitions include, but are not limited to, attorney-client privilege, attorney work-product privilege, National Historic Properties Act Section 304, Privacy Act, deliberative or mental processes, executive, and confidential business information.

As asserted by the Appellant, the administrative record exceeds that which was made available on the District's public website and provided to the Appellants with the proffered permit, following the District's reconsideration of the initially proffered permit, and specifically includes internal email and documents developed in the course of the project review by the USACE. The remainder of the administrative record was provided to the Appellants in PDF format, on DVDs, after the RFA was submitted. That AR included email, correspondence, and other documents. Review of the AR leads to the conclusion that when the Districts utilized documents in its analysis, that the information from those sources is summarized in the FEIS and that those

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documents have been included in the administrative record. Therefore, the administrative record was determined to be sufficient and to have been provided in compliance with requirements of regulation and guidance pertaining to the administrative record.

In the RFA, the Appellant requested a hearing before the Review Officer specifically to determine the status of the administrative record and to assist Holliday in pursuing the documents that it is due through the FOIA and its governing regulations. Further, the Appellant indicated that it maintains its request for a full copy of the District's administrative record and a log of all documents withheld by the District. Finally, the Appellant asserted that it reserves the right to supplement its statement of reasons after having an opportunity to review the full record.

As indicated above, the administrative record was determined to be sufficient and to have been provided in compliance with requirements of regulation and guidance. In response to the Appellant's assertion that it reserves the right to supplement its statement of reasons, the Corps regulations, at 33 C.F.R. § 331.7, detail the procedures for determining the acceptability of reasons for appeal and for clarifying reasons for appeal. While there are provisions for allowing an appellant the opportunity to clarify reasons for appeal following the receipt of an RFA, received in a timely manner, there are no provisions in the regulation for the appellant to provide supplemental reasons for appeal following review of the administrative record.

In response to the Appellant's requests concerning its FOIA request to the District, it must be pointed out that, while the FOIA and Regulatory permit appeal processes are both administered by the Department of the Army, the processes are separate and distinct administrative procedures. The Division does not have a role in the Appellant's specific FOIA request, beyond ensuring the proper administration of the FOIA process by the District.

Therefore, this reason for appeal does not have merit.

REASON 4 (Part VI of Appellant's RFA): The Inclusion of an Apparently New Permit Condition Regarding Forfeiting Unused Dredging Allocations for Failure to Use in Any Given Year Is a Violation of Holliday's Due Process Rights and the Corps' Implementing Regulations.

FINDING: This reason for appeal does not have merit.

ACTION: No action is required.

DISCUSSION: In the RFA, the Appellant asserted that the District's response to a comment received from Master's Dredging Company, seeking any additional tonnage not allocated to Holliday is an apparently new permit condition regarding forfeiting unused dredging allocations. In particular, the Appellant is concerned with the language that states: "However, if Holliday... is unable to utilize the additional tonnage being proffered in the Waverly and St. Joseph segments by the end of 2015, the tonnage would become available to another applicant that is capable of using it." The Appellant asserted that this condition is a new condition that Holliday did not have a chance to comment upon during the EIS and the ROD and that it is now improperly included in the Final Proffered Permit. The Appellant asserted that there was no

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mention of such a use-it-or-lose-it condition in the ROD. The Appellant objected to this new condition because of procedural irregularity, because it is not clear what this condition means, or whether 2015 means the expiration of the current permits.

The comment that the Appellant referred to as a condition was not included in the proffered permit as a condition, but was rather included within the response to the Masters' second comment in Enclosure 1, "Applicants Objections and USACE Response", of the District's Reconsideration Memorandum, on page 26, which asserted that the Appellant would not be able to dredge a portion of the area, in which the proffered permit would allow it to dredge. The response stated that:

Holliday Sand & Gravel Company had indicated that "Two years would be adequate to obtain additional barges and modify existing towboats and unloading dock necessary to dredge 19 miles upstream from the St. Joseph segment." (see formal correspondence dated December 28, 2010 in the Administrative Record or Letter 107 in Appendix A of the ROD) The proffered permit includes a three year phase in period to give them the time they need and they have requested specific additional reaches in the segment which indicates that they may be taking the steps necessary to expand. However, if Holliday Sand & Gravel Company is unable to utilize the additional tonnage being proffered in the Waverly and St. Joseph segments by the end of 2015, the tonnage would become available to another applicant that is capable of using it.

It is not a condition of the proffered permit, nor is the language contained within the FEIS or the ROD. As the proffered permits were envisioned to expire on December 31, 2015, it is clear that the District is indicating that allocations of tonnage could be revisited after the expiration of the current proffered permit, if the Appellant is not able to obtain additional barges and modify existing towboats and unloading dock necessary to dredge 19 miles upstream from the St. Joseph segment, as it indicated it could.

Therefore, this reason for appeal does not have merit.

REASON 5 (Part VII.A of Appellant's RFA): 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 Is Not Based on Sufficient Data and Purposefully Omitted Relevant Data and Is, Therefore, Arbitrary and Capricious. (Dredgers' Global Issue⁷ 1, incorporated by reference with minor changes)

⁷ The term "global issues" was introduced by the Missouri River Dredgers RFA, and refers to the reasons for appeal that applied to all of the parties associated with the combined Missouri River Dredgers Appeal (as opposed to the individual permitting issues for each of those parties). The Missouri River Dredgers Appeal is a 5-party combined appeal which is separate from the current Holliday Sand & Gravel Appeal, but related through the EIS as discussed above in the "Background Information" section of this document. The Appellant, Holliday Sand & Gravel, incorporated by reference a number of 'reasons for appeal' cited in the Missouri River Dredgers, *Memorandum in Support of Request for Appeal*, as noted throughout this appeal decision document.

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FINDING: This reason for appeal does not have merit.

ACTION: No action is required.

DISCUSSION: In the RFA, the Appellants argue that: 1) The calculations and rationale upon which the imposed tonnage limits were based are incorrect or used incomplete data; 2) Data concerning the cause of river degradation was omitted; 3) The tonnage limits were based upon unsupported and incorrect presumptions; and 4) Long term river degradation cannot be attributed to commercial dredging and that limiting commercial dredging would not positively impact bed degradation.

The appellant asserted that Alternative B, rather than Alternative A, was the appropriate choice for dredging in the Kansas City segment. The Appellant further asserted that the selection of Alternative A was overly conservative, lacked a sufficient factual basis, and was arbitrary.

During the appeal conference, the Appellants clarified their assertion that the District's analysis is flawed because it compares the dredgers' output to the bed load measured for only one particular year (2007), thus comparing the river as it existed at one point in time to dredging over a ten-year span (1998-2007). The Appellants asserted that, in order to establish any correlation between dredging practices and flow amounts, the District should have compared annual dredging numbers with the measurement of the river for the correlating year.

First, the District's calculations and rationale are contained in Sections 2.4.1, 3.4.6.3, and Appendix A of the FEIS. The Appellants raised concerns regarding the calculations and rationale upon which tonnage limits were based during the permit evaluation and the District addressed these concerns in Section 3 of the ROD. While the Appellants dispute the District's methodology, the District's analysis was reasoned and supported in the record.

Further, Section 3.4.6.2, "Changes in River Bed Elevations and Surface Water Profiles", indicates, under the "Kansas City Segment" heading, that this segment of the river has experienced more degradation than anywhere else in the project area and that it is also one of the most developed segments of the river and consequently has been studied extensively due to potential risks and costs to infrastructure in the Kansas City metropolitan area. Further, that section states that the average annual river bed elevations have been declining at the Kansas City gage since approximately 1940 and have dropped approximately 12 feet since that time and that, although elevation increased in 2008 and 2009 (Figure 3.4-25), the rate of decline in average river bed elevation appears to have been relatively steady from 1955 until the 1993 flood event. At that time, the river bed dropped 4 feet, then recovered 2 feet, and then stabilized for a few years before continuing its downward trend after 2000.

Second, the AR in Appendix A of the FEIS describes the data sources and methods used to analyze potential impacts of dredging on river bed degradation. This includes an analysis performed to estimate bed material load as a component of the sediment budget, the analysis of hydroacoustic bed elevation data, and an analysis to determine whether segments at three gage

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locations were in equilibrium. The District included data and details that support the geomorphic descriptions and analyses in Sections 3.4 and 4.2 of the FEIS.

Third, the AR provides ample and compelling evidence that degradation is occurring. The AR shows, in Section 2.4.1 of the FEIS, “Rationale for Setting Alternative Dredging Amounts”, that available evidence suggests that commercial dredging has exacerbated river bed degradation on the Missouri River. In addition, the FEIS and ROD clearly identified multiple factors contributing to degradation and do not attribute degradation to dredging only. Section 3.4.6.3 of the FEIS, “Potential Causes of River Bed Degradation”, identified several factors that may be contributing to degradation in the Kansas City and other segments of the LOMR. These include reduction in sediment loads by dams, flow modification by regulation, major flood events, dikes and structures, river cutoffs, and commercial dredging for sand and aggregate. Each of these factors is then discussed in that section of the FEIS. Based on the FEIS conclusions, the District concluded that there is evidence that dredging has contributed to degradation at several locations on the LOMR. The analyses show a strong correlation between the locations, time frames, and quantities of dredging in the LOMR and degradation of the river bed. The District concluded that dredging contributes to degradation by removing considerable amounts of sediment from the river bed relative to the available annual bed material load.

In the ROD, under “General Comments”, page 3-32, the District cites the Missouri River Bed Degradation Reconnaissance Study (Reconnaissance Study). Congress authorized and appropriated general investigation funds through the Energy and Water Development Appropriations Act of 2008 for the Reconnaissance Study. The Reconnaissance Study, completed in 2009, evaluated effects of degradation on federal and non-federal infrastructure along the LOMR. The study looked broadly at the causes of and potential solutions to river bed degradation of the Missouri River between Rulo, Nebraska and St. Louis, Missouri. The findings demonstrated that river bed degradation in the lower 498 miles of the Missouri River is the result of a combination of causes. The study concluded that data collected over the previous 15 years suggest that the increased dredging take, working in concert with the Missouri River Bank Stabilization and Navigation Project (BSNP), has become the dominant cause of river bed degradation.(p.25) The District’s EIS for the Appellants’ projects evaluated five separate and distinct river segments: St. Charles (river mile [RM] 0 – RM 130; Mississippi River to Osage River); Jefferson City (RM 130 – RM 250; Osage River to Grand River); Waverly (RM 250 – RM 357; Grand River to Blue River); Kansas City (RM 357 – RM 391; Blue River to Platte River); and St. Joseph (RM 391 – RM 498; Platte River to Rulo, Nebraska).

During the appeal conference the Kansas City District explained, as detailed in the FEIS (Section 3.4.6.3 of the FEIS, “Potential Causes of River Bed Degradation”) that there is a strong correlation between the historic level of dredging and the rate of degradation. The FEIS, Environmentally Preferable Alternative⁸ was determined to be the highest level of dredging that was expected to result in no more than slight degradation in the future.

⁸ The Environmentally Preferable Alternative must be identified in the ROD. The “environmentally preferable” alternative, in the context of 40 C.F.R. § 1505.2(b), refers to the alternative that will promote the national environmental policy as expressed in NEPA Section 101. Ordinarily, this means the alternative that causes the least damage to the biological and physical environment; it also means the alternative which best protects, preserves and enhances historic, cultural and natural resources. It may or may not be the LEDPA.

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Further, the District concluded that the annual extraction limits of the proffered permits would result in no more than slight degradation in the short-term and long-term. As discussed in Sections 4.2.1.1, 4.2.1.2, and 4.2.1.3 of the ROD, the effects of dredging on infrastructure, federally listed species, and cultural resources are directly related to the amount of degradation that is expected to occur. If degradation is limited to “no more than slight in the short-term and long-term”, then the effects on these three resource areas are expected to be minimal. The District concluded and the record shows that more than slight degradation in any segment of the river would result in additional expenditures in those segments for infrastructure repair, maintenance, and replacement and would increase the potential for levee failure and jeopardize billions of dollars in investment protected by the regional levee systems. The conclusion reached in the ROD shows that the alternative that resulted in no more than slight degradation is the LEDPA, in compliance with the Section 404(b)(1) Guidelines of the CWA, and is not contrary to the public interest.

The District’s main rationale for the selection of Alternative A, rather than Alternative B for the Kansas City segment is described in Section 4.3.6.5, “Impacts to Bank Stabilization and Navigation Project Structures” (page 4.3-38 of the FEIS). That section states that the potential effects on BSNP structures (such as exposure of the tops of dikes caused by river bed degradation rates that are more rapid than erosion rates) would generally be greater under Alternative B than under current conditions. The section further states that selection of Alternative B would likely require implementation of countermeasures to ensure the required factor of safety. These countermeasures would include more frequent inspections, maintenance, and repair. It is further indicated that the potential for erosion at the toe of revetments would be greater under Alternative B than under current conditions.

The AR shows that the District’s position on imposing constraints on dredging, even though it is only one of many contributing factors to degradation, is a reasonable conclusion based on the analysis of the FEIS.

Finally, the fourth part of this reason for appeal is the Appellants’ contention that the District did not demonstrate that limiting commercial dredging will positively impact bed degradation. The District concluded, in Section 4.2.2.2 of the FEIS that aggradations could occur in areas affected by past dredging when proposed dredging would be less than past dredging. Further, the District found that additional analysis of historic dredging data suggested that if dredging in degraded areas around the existing sand plants was reduced, that dredging levels might be allowed to increase somewhat outside the degraded areas. The District’s decision of overall and localized tonnage limits is supported in Sections 2.4.1, 3.4.6.3, and Appendix A of the FEIS.

While Section 4.2.2.2 of the FEIS concludes that aggradations could occur in areas affected by past dredging when proposed dredging would be less than past dredging, it goes on to state that because the Missouri River Bank Stabilization and Navigation Project (BSNP) was designed to maintain a self scouring navigation channel that reduces deposition, the BSNP may prevent a degraded reach from recovering even if commercial dredging is reduced. Even so, the AR shows that the District has outlined a course of action to monitor data and information as it becomes

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available during the permit and dredging cycle in order to determine whether dredging tonnages can be increased incrementally within some or all segments.

While the Appellants have suggested that the adoption of tonnage limits is arbitrary and capricious and that limits are based on inaccurate and incomplete data with differing considerations and potential conclusions (along with proposing a different approach to the analysis), we find that the District's analysis was reasonable and supported in the AR. Although competing methodologies exist, the methodology used by the District had a rational basis and took into consideration the relevant factors.

Under the "arbitrary and capricious" standard, a finding will be given deference unless it has no reasonable basis. In other words, to be "arbitrary and capricious" there would be an absence of a rational connection between the facts found and the choice made. There would be a clear error of judgment; an action not based upon consideration of relevant factors, an abuse of discretion, failure to be in accordance with law, or failure to observe a procedure required by law. [Natural Resources Defense Council, Inc. v. United States EPA, 966 F.2d 1292, 1297 (9th Cir. 1992)]

The District's decision was not arbitrary and capricious. The AR shows a rational connection between the facts found and the District's conclusions and decision. There is no identifiable procedural or substantive reason to remand the decision on this reason for appeal.

As a result, this reason for appeal does not have merit.

REASON 6 (Part VII.B of Appellant's RFA): The Failure of the USACE to Evaluate the BSNP Constitutes a Taking Without Just and Adequate Compensation and Places the Burden and Obligation on the USACE to Address Concerns of the LOMR and to Maintain the LOMR Structures upon Holliday Sand (The Appellant incorporated by reference the Dredgers' Global Issue 3.)

FINDING: This reason for appeal does not have merit.

ACTION: No action is required

DISCUSSION: In the RFA, the Appellant indicated that the District did not consider the effects of the BSNP, upstream dams, and other structures that reduce water flow and contribute to bed degradation in determining tonnage limits for the dredgers. The Appellant asserted that the construction of dams, reservoirs, and other structures that reduce water flow under the Flood Control Act of 1944 and the creation of the BSNP are major contributors to river degradation. The Appellant asserted that the District was arbitrary in limiting the scope of the FEIS and refusing to consider these structures, which are controlled by the District, in their analysis of river bed degradation. The Appellant stated that, without considering all major causes of bed degradation, it is impossible for the District to assign a causal risk relationship due to dredging activities or determine whether reducing dredging activities will have any significant benefit to reducing bed degradation. The Appellant argued that the District has a mandate under the BSNP

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to properly maintain the dikes and structures along the Missouri River, including the Kansas City area and that, by failing to maintain the dikes and structures in the Kansas City area, and thereby reduce the impact of bed degradation, the District has placed the entire burden of bed degradation improvements on the back of the Appellant.

The District's consideration of the effects of the upstream dams and reservoirs and the BSNP as potential contributors to bed degradation is discussed as part of the existing environment in Chapter 3 of the FEIS as well as part of cumulative impacts described in Chapter 5 of the FEIS. Specific consideration of the effects of the BNSP, upstream dams, and other structures is found in Section 5.2 of the FEIS.

Sections 3.4.6.2 and shown on Figures 3.4-31 and 3.4-32 of the FEIS, indicate that bed degradation has occurred at most locations where dredging occurs and is most severe in intensely dredged areas around the sand plants in Kansas City, Jefferson City, and St. Louis/St. Charles. In Section 3.5 of the FEIS and Section 4.2.1.1 of the ROD, it is indicated that the most severely degraded reaches are also located in cities with more levees, revetments, drinking water and industrial water intakes, bridges, and pipeline crossings located on the LOMR than occur in rural reaches of those segments or in the Waverly and St. Joseph segments. The Kansas City segment, according to the FEIS, has degraded approximately 12 feet since 1940, which has resulted in failed revetments and dikes, collapsed river banks, damaged or disabled water intakes, damaged bridges on tributaries, damaged levee toes, and failed outfalls. Based on the impacts to infrastructure already observed in the most degraded Kansas City segment, the FEIS concluded that it is likely that other segments, particularly the Jefferson City and St. Charles segments, would experience adverse impacts with the occurrence of moderate to substantial degradation in the long-term future. The FEIS indicates that adverse impacts that could be expected include compromised performance of water intakes that provide drinking, cooling, and industrial process water, which would require expensive modifications to intake structures, premature pump wear, and damage that threatens the reliability of electric generation and public drinking water supply; scouring of existing bridge foundations (particularly on tributaries near the LOMR); exposure of and/or damage to petrochemical, sewer, or water pipelines (and associated accidental releases) under the river; and bank and revetment failure that could impair navigation and threaten the integrity of nearby levees. Section 4.2.1.5 of the ROD and Section 4.10 of the FEIS conclude that the economic effects related to continued river bed degradation are difficult to quantify but would be proportional to the amount of degradation expected to occur. Further the FEIS states that additional degradation in any segment of the river would result in additional expenditures in those segments for infrastructure repair, maintenance, and replacement and would increase the potential for levee failure and jeopardize billions of dollars in investment protected by the regional levee systems. However, the ROD's conclusion that the annual extraction limits of the proffered permits, with the dredging concentration limits and a monitoring and adaptive management framework, should result in no more than slight degradation in the short-term and long-term, is the LEDPA, complies with the Section 404(b)(1) Guidelines, and is not contrary to the public interest.

The AR shows that the District fulfilled requirements of both NEPA (40 C.F.R. 1508.7) and the CWA 404(b)(1) Guidelines (40 C.F.R. 230.11(a)), to evaluate the cumulative impacts of the

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proposed federal action on the environment. The District analyzed the impacts associated with BSNP as part of its cumulative impacts assessment in Chapter 5 of the FEIS and Section 4.2.2 of the ROD. There are no identifiable procedural or substantive reasons to remand the decision.

Therefore, this reason for appeal does not have merit.

REASON 7 (Part VII.C of Appellant's RFA): 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 (The Appellant incorporated by reference the Dredgers' Global Issue 4, with minor changes).

FINDING: This reason for appeal does not have merit.

ACTION: No action is required.

DISCUSSION: In the RFA, the Appellant indicated that the District relied on improper assumptions regarding alternate sources of sand. The Appellant asserted that the District assumed, without evidence, that pit mines can be constructed to replace the decreased production from Missouri River dredging. The Appellant contends that the District's assumption that dredging on the Kansas and Mississippi Rivers could supplement supplies from the Missouri is not supported by evidence provided by the various parties engaged in dredging on those rivers. The Appellant further asserted that the District failed to consider the detrimental impact to Holliday's Riverside plant. Finally, the Appellant asserted that the District's decision will result in even greater reliance on non-renewable sources to replace the lost production from the LOMR in the Kansas City market and increased environmental impacts associated with hauling materials longer distances.

The District's analysis of the capacity of alternate sources to replace reduced supplies from the LOMR under the various project alternatives is presented in Section 2.3.2.1 and Section 2.3.2.2 of the FEIS. Responses to public comments on the subject, given in the Draft EIS, are addressed on pages 10-13 and 10-14 of the FEIS. The District stated that estimates of additional capacity to produce sand and gravel from the Kansas and Mississippi Rivers were based on the difference between maximum permitted levels of existing dredging permits and historical production data reported by the District. The District's conclusion, based on this information, was that there is currently authorized, but unused, sand production capacity in these river systems that represents a short-term alternate source of sand and gravel in the region. The FEIS also estimated the excess capacity of existing sand and gravel mining operations that could potentially serve as alternate sources to material dredged from the LOMR. The FEIS stated that actual production data for individual mines were not available from the Missouri Department of Natural Resources (MDNR), as this information is considered confidential and proprietary. Further, because of confidentiality restrictions, the District stated that it was not feasible to query mining operators about their available capital and production capacity. As a result, the District estimated excess

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capacity based on the difference between peak production periods and current production levels, and the assumption that sand and gravel production could at least return to peak levels if needed to help offset reductions in LOMR dredging in the short term. The District acknowledged that the figures reported in the EIS for available capacity are only planning-level estimates. The District also considered the capacity of alternate sources to meet road construction material specifications as required by the Missouri Department of Transportation (MoDOT). This analysis is based on (1) the estimated quantity of sand and gravel from the LOMR that has been historically used by the MoDOT (i.e., baseline demand); and (2) available capacity at sand and gravel mining operations that have been identified as meeting MoDOT specifications. The District concluded that alternate sources which could provide material meeting MoDOT specifications include the Kansas, Mississippi, and Meramec Rivers, as well as other approved land-based sources of Class A sand identified by the MoDOT (FEIS pages 10-13 and 10-14).

The District concluded, based on the FEIS analyses, that these existing sources would be able to produce the amount of replacement sand and gravel supplies needed under all the alternatives, including the No Action Alternative in the near term. The FEIS acknowledged that depending more on the existing open-pit mines and quarries would deplete the reserves of those non-renewable operations at a faster rate, could stress the renewable Kansas and Mississippi River sources, and would result in the need for new mining operations to restore long-term equilibrium in the sand and gravel market in Missouri. This is more fully discussed under Global Permitting Issue 4 in the Reconsideration Memorandum, and in Section 2.3.2 of the FEIS.

As stated above, in response to reason 1, while the Appellant has suggested different conclusions, the District's analysis was reasonable and supported in the FEIS. The District's conclusion that alternate sources of sand could produce sufficient sand to make up for the reduction in dredging in the lower Missouri River in the near term was reasonably supported.

Therefore, this reason for appeal does not have merit.

REASON 8 (Part VII.D of Appellant's RFA): The USACE Failed to Comply with NEPA in That the ROD Failed to Properly Analyze the Environmental Impacts Resulting from the Permitting Decision (The Appellant incorporated by reference the Dredgers' Global Issue 5).

FINDING: This reason for appeal does not have merit.

ACTION: No action is required.

DISCUSSION: In the RFA, the Appellant argued that the District did not adequately consider the adverse environmental consequences of pit mining versus the risk of bed degradation from the dredgers' proposed operations. The Appellant asserted that the District was obligated to consider increases in air pollution and truck transportation under NEPA and the practicability and environmental impact of any alternatives considered. Further, the Appellant asserted that, given that the Kansas City area already exceeds National Ambient Air Quality Standards, the District's decision to not perform a comprehensive investigation into the associated

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environmental impacts of increased open-pit mining operations and truck traffic is directly contrary to its obligations under NEPA.

The District addressed the relative impacts of commercial dredging in the Missouri River and the impacts of obtaining sand and gravel from alternate sources in each resource section of Chapter 4 of the FEIS. The potential impacts on trucking, agricultural lands, and emissions were addressed along with impacts on other resource areas. The impacts of the use and development of alternate sources were addressed with the available data. The District indicated that, by necessity, the analysis was less geographically specific, as it was not possible to identify how production and technology within the market may respond, or to specify the actual locations of expanded or new mining operations.

The AR shows that relative impacts of commercial dredging in the Missouri River and the impacts of obtaining sand and gravel from alternate sources were considered in the resource section of Chapter 4 of the EIS. The District's conclusions were supported and there is no procedural reason to remand the decision.

Therefore, this reason for appeal does not have merit.

REASON 9 (Part VII.E of Appellant's RFA): The USACE Failed to Properly Characterize Cumulative Impacts of Its Permitting Decisions (The Appellant incorporated by reference the Missouri River Commercial Dredgers Group⁹ (Dredgers Group) Global Issue 6).

FINDING: This reason for appeal does not have merit.

ACTION: No action is required.

DISCUSSION: In the RFA, the Appellant stated that the District's cumulative effects analysis does not provide a sufficiently detailed assessment of past, present, and future projects that would be appropriate to consider, relative to dredging operations in the Missouri River. The Appellant asserted that the cumulative impacts analysis in the FEIS is simply a list of the types of programs that could potentially affect the lower Missouri River.

The AR shows that, in section 5 of the FEIS, the District evaluated the incremental impact of the proposed dredging on the environment along with the other past, present, and reasonably foreseeable future actions. Considering the past, present, and reasonably foreseeable future actions is required by NEPA and provides a context for assessing cumulative impacts. The inclusion of other actions occurring in proximity to the proposed action is a necessary part of evaluating cumulative effects. Past, present, and future actions discussed included the following: the Master Water Control Manual; the BSNP; the 2003 biological opinion on the operation of the Missouri River Mainstem Reservoir System; operation of the Missouri River Bank Stabilization and Navigation Project; and operation of the Kansas River reservoir system; the Missouri River Recovery Program; the Missouri River Ecosystem Restoration Plan; the Missouri River Fish and

⁹ The appeal of five denied or declined permits by the Missouri River Commercial Dredgers Group, Request for Appeal (RFA), received November 7, 2011; final appeal decision signed 9 July 2013.

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Wildlife Mitigation Project; the Big Muddy National Fish and Wildlife Refuge expansion; levee construction; transportation improvement projects; energy development projects; the Missouri River Bed Degradation Feasibility Study; the Missouri River Recovery and Associated Management Study; the Missouri River Authorized Purposes Study; and the Lewis and Clark Sediment Management Study. The resources evaluated in the EIS for potential cumulative affect included geomorphology, water quality, aquatic resources, economics, cultural resources, infrastructure, and greenhouse gas emissions and climate change. The EIS described past, present, and future actions that have affected geomorphology (primarily changes in surface water levels and river bed degradation). The EIS also concluded that the effects on water quality, aquatic resources, cultural resources, and infrastructure were generally directly related to the geomorphology effects. In addition, the EIS concluded the proposed dredging would result in an additive impact on river bed degradation that is not insignificant. Finally, the EIS assessed cumulative impacts associated with the sand and gravel mining industry of different levels of dredging and economic impacts along with an incremental impact of the proposed dredging on the environment. The AR shows a discussion of these concerns in response to Global Permitting Issue 3, in the Reconsideration Memorandum and in Chapter 5 of the FEIS.

The AR shows that the District's cumulative impact assessment evaluated changes that are attributable to the proposed dredging activities when added to other past, present, and reasonably foreseeable future actions. The District's assessment included consideration of those cumulative impacts that can result from individually minor but collectively significant actions taking place over a period of time. The District's stated understanding of the purpose of cumulative impact analysis is correct in that it helps determine whether the proposed action is going to be the action that causes the cumulative impacts to reach a threshold of unacceptable impacts (in terms of the public interest) to the resources of concern. The District's execution of this analysis uses accurate and available information. Even in the presence of other potentially substantial causes to a problem, such as those mentioned by the Appellant, the District's method of assessment was reasonable and supported their selection of alternatives.

As a result, this reason for appeal does not have merit.

REASON 10 (Part VII.F of Appellant's RFA): Additional Carryover of Authorized Annual Tonnage Would Reflect Present Difficult Economic Circumstances and Better Protect the River (The Appellant incorporated by reference the Dredgers' Global Issue 7).

FINDING: This reason for appeal does not have merit.

ACTION: No action is required.

DISCUSSION: In the RFA, the Appellant asserted that the decision of the District to restrict the dredgers to a 10% carryover of authorized annual tonnage is not supported by facts in the administrative record. The Appellant contends that allowing the dredgers to carry over their allotted tonnage to the following permit year keeps sand resources in the river until actually needed and therefore promotes the interests of both dredgers and USACE.

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The Appellant stated that they had asked for a carryover option whereby each dredger is afforded the discretion to carry over to the next business year any amount of its unused authorized allotment, which they believed strikes a true balance between economic demand for material and any concerns over bed degradation. The Appellant asserted that the District's rejection of this suggestion is illogical, and only encourages the mining of material from the Missouri River for storage as opposed to allowing the dredgers to leave material in the river until it is actually needed. They believe that, without citing any facts or studies, the District summarily concluded that carrying over more than 10% would likely result in moderate to substantial bed degradation.

In the FEIS ROD, the District concluded that leaving unneeded sand in the river would help degraded reaches recover. The District further concluded that carrying over a large amount of sand in one or more years could result in the extraction of an amount that is larger than the bed load can accommodate and cause more than slight degradation. The District used the LEDPA for the St. Charles segment as an example, as it authorized extraction of the highest percentage of any segment. The District concluded that, if 10% of the segment limit could be carried over, that would equate to 4.5% of the bed load in the St. Charles segment and less for all others. The District indicated that, if more was carried over in all of the segments, the analysis behind the selected alternatives would no longer support permitting the overall allotted amounts. The District stated that carrying over more than this would likely result in moderate to substantial bed degradation. The District concluded that this level of bed degradation could cause potentially increased significant impacts on resources including, but not limited to, water intakes, navigation, flood control, endangered species, and cultural resources and would be contrary to the public interest. The District determined that up to 10% of each dredger's authorized annual tonnage may be carried over each year as a *de minimis* amount to be extracted the following year but the annual tonnage extracted with carryover may never exceed 110% of annual authorized tonnage.

During the appeal conference, the District indicated that following a request from the dredgers after the EIS analysis was substantially complete, it assessed whether the information would support some amount of carryover. As described in the preceding paragraph, the District determined that carrying over 10% of the annual segment limit each year would be a *de minimis* amount and therefore would not have a significant effect. The District concluded that there was not sufficient information available to allow more than what was determined to be a *de minimis* amount of carry-over. The District stated that it addressed this issue in the response to Global Permitting Issue 7 in the Reconsideration Memorandum and on page 3-40 of the ROD.

The District's conclusions are supported in the AR. Therefore, this reason for appeal does not have merit.

REASON 11 (Part VII.G of Appellant's RFA): The USACE's Actions Are Contrary to Federal Constitutional Law, in that the USACE, in restricting the Dredgers' Access to River Bed Material, has taken a Property Right without Adequate Compensation (The Appellant incorporated by reference the Dredgers' Global Issue 8).

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FINDING: This reason for appeal does not have merit.

ACTION: No action is required.

DISCUSSION: In the RFA, the Appellant stated that the District exceeded their congressional authority and violated the Tenth Amendment, failed to comply with Executive Order 12630 [regarding the Fifth Amendment], and claimed that placing a burden on private industry without adequate compensation infringes on due process rights. The Appellant also listed five additional sub-points under this reason for appeal that moves beyond constitutional law toward a question of whether the District applied current laws, regulations or officially promulgated policies.

As documented in the administrative record, the District followed the applicable statutes and regulations during the permit evaluation process, per 33 CFR Parts 320-331. The Constitutionality of the applied laws and published regulations is beyond the criteria which can be considered in this Regulatory administrative appeal and therefore lacks merit.

The Appellant noted five sub-points in this reason, as follows:

a. “Degradation to the riverbed and surrounding structures is severe, yet the District has failed or refused, despite congressional requests, to request funding to study and correct problems with the river or revise the BSNP to decrease the risk of degradation.”

As discussed above, under Reason(s) for Appeal Nos. 1 and 3, the proposed action was not to study river bed degradation system-wide, but to evaluate permit proposals to dredge material from the river, The presence or absence of funding for a separate study on the BSNP is not relevant to the District’s permit evaluation, nor did it prevent the District from considering the relevant factors of river degradation as a part of the evaluation for Applicants’ permits.

b. “The District’s analysis failed to consider the impact caused by the BSNP.”

This point was addressed above in this document under Reason(s) for Appeal Nos. 1 and 3.

c. “The District’s analysis failed to address the issue of property rights in the river, in that the river and the materials in the river are owned by the States of Kansas and Missouri, not the federal government.”

Corps jurisdiction and the requirement for a particular activity to obtain a Department of the Army permit stems from the nature of the proposed activity within waters of the United States, as defined at 33 CFR 328, regardless of property title, where those waters are situated, or incidental effects that regulating the activity may have on the use of the property. Authorization of work or structures by DA does not convey a property right, nor authorize any injury to property or invasion of other rights (33 CFR 320.4(g)), although administration of the Clean Water Act and Rivers and Harbors Act of 1899 may incidentally affect the use of the property.

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d. “The District failed to meet the requirements of NEPA.”

This point was addressed above in this document under Reason(s) for Appeal 1, 2, 3, 4, 5, and 6.

e. Section 10 of the Rivers and Harbors Act provides that the District must permit dredging activities and that USACE authority is limited to reviewing water quality by Section 404 of the Clean Water Act and navigability by Section 10 of the Rivers and Harbors Act. The Appellant asserts that the record concludes there are no Clean Water Act issues and that USACE has not articulated any legitimate threat to navigability caused by dredging.

33 CFR §325.8 (b) of the Corps’ regulations gives District Engineers the authority to issue or deny permits pursuant to sections 9 and 10 of the Rivers and Harbors Act of 1899 and section 404 of the Clean Water Act. These sections indicate that, in cases where permits are denied for reasons other than navigation or failure to obtain required local, state, or other federal approvals or certifications, the Statement of Findings must conclusively justify a denial decision. These sections further indicate that District Engineers are authorized to deny permits without issuing a public notice or taking other procedural steps where required local, state, or other federal permits for the proposed activity have been denied or where he determines that the activity will clearly interfere with navigation. Additionally, 33 CFR § 325.4 (a) authorizes District Engineers to add special conditions to Department of the Army permits when such conditions are necessary to satisfy legal requirements or to otherwise satisfy the public interest requirement. Permit conditions will be directly related to the impacts of the proposal, appropriate to the scope and degree of those impacts, and reasonably enforceable. Given the clear language of the regulations, there is no basis for the Appellant’s assertions as to the limits of the Corps authority under either Section 10 or 404.

As documented in the administrative record, the District followed the applicable statutes and regulations during the permit evaluation process, per 33 CFR Parts 320-331. As a result, I find this reason for appeal is without merit.

REASON 12 (Part VII.H of Appellant’s RFA): The Use of Unpublished Data and Sources Is a Violation of NEPA (The Appellant incorporated by reference the Dredgers’ Global Issue 9).

FINDING: This reason for appeal does not have merit.

ACTION: No action is required.

DISCUSSION: In the RFA, the Appellant indicated that the District used and relied upon unpublished data and sources cited in the ROD and FEIS that were unavailable to the dredgers, and not subject to external analysis or peer review.

In the RFA and during the appeal conference, the Appellant asserted that the administrative record does not include the full scope of materials from USACE’s Engineering Division which influenced the Regulatory Branch’s ultimate permitting decisions. The Appellant asserted that

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documentation necessarily would include notes, memoranda, emails, preparatory documents, data sets, spreadsheets, or other written or electronic information addressing relevant matters such as the potential risk of infrastructure failure to dikes and levees due to bed degradation, and the District's Engineering Division's feedback on the District Regulatory Branch's proposed permitting alternatives. The Appellant argued that without the ability to obtain and review all materials provided by the District's Engineering Division to the District's Regulatory Branch, the administrative record is factually and legally incomplete. The Appellant asserted that documents memorializing conversations and meetings between members of the two offices were either missing or impossible to find. The Appellant's example was that the USACE relies repeatedly on internal comments by Michael Chapman, of the USACE, regarding the correlation between commercial dredging and degradation and regarding the USACE's policies and past practices regarding the BSNP structures, but the administrative record provides little documentation about Mr. Chapman's internal communications and analysis. The Appellant asserted that, while the District's decision frequently cites personal communications and unpublished data, it did not include these written documents in the AR. The Appellant asserted that, while the District claimed that these sources of information do not encompass the primary foundation supporting their permitting decisions, the District, to some degree, relied on these materials.

The District discussed their underlying analysis in the FEIS, on pages 10-109 and 10-110. The District, in their response to comments in the FEIS and in the Reconsideration Memorandum, which are both contained in the AR, stated that, while much of this data is published, in some cases, these data are unpublished, in development, or in the "grey literature" (i.e., in reports and data files that are not widely known or available, such as agency reports). The District asserted that this does not mean that these reports were draft or unfinished. The District, in their response to comments in the FEIS and in the Reconsideration Memorandum, stated that the use of these types of data in NEPA documents is widely practiced and that, without the use of unpublished data and reports, it would not have been possible to conduct a vigorous and comprehensive analysis. The AR, specifically in the FEIS and the appendices, clearly documents when unpublished data were used and shows the underlying analysis and summary of results. All data and information cited in the EIS are also compiled in the Administrative Record for the EIS and it is therefore available either in the designated information repositories or may be requested through the Freedom of Information Act (FOIA).

The citation of personal communications that the Appellant used as an example is found on page 10-116 of the FEIS and states that, "In response to the dynamics of the LOMR system, the USACE has periodically updated the dike configurations. The most recent changes to dike heights in the Kansas City segment occurred in 2004 and 2009 (Chapman pers. comm.). Dike notching has also been implemented to erode sediment that has accumulated due to degradation and low flows since the early 1990s (Chapman pers. comm.)." In this case the District was citing the verbal indications of when on-going operation and maintenance of the federal project had occurred. The District relied on these communications for information and did not utilize the actual maintenance records in its evaluation.

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While the Appellant has not provided other specific examples of documents they believe are not present in the record, it appears that when the District utilized documents in its analysis, that the information from those sources is summarized in the FEIS and that those documents have been included in the administrative record, which was provided to the Appellant after the RFA was submitted.

The Appellant questioned in their RFA the use of unpublished documents, which the District referred to as “grey literature”. The term “grey literature” commonly refers to technical reports from government agencies and scientific research groups, working papers from research groups, and white papers, among other things.

There is no requirement in the NEPA regulations for sources used in developing an EIS to have been published. Further, the NEPA regulations do not prohibit the use of "grey literature". When relevant and credible, it is appropriate to use internal reports and other documents from the grey literature, which can be made publicly available, if requested. There is no requirement that all sources be published in their entirety in an EIS, either in the main document or as an attachment.

When using any source, agencies must consider the appropriateness of the source, using factors such as the intended purpose of the report, qualifications of the author(s), methodology employed (if applicable), and the overall quality. 40 CFR § 1502.24 requires agencies to “insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements. They shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources rely upon for conclusions in the statement.”

The use of unpublished data was clearly referenced, along with descriptions of underlying analysis and summaries of results in the EIS and its appendices, within the AR. The use of information from the “grey literature” is reasonable, common and necessary. Documents and data used by the District are cited and summarized in the FEIS and its appendices and contained within the AR. Documents such as maintenance records or the analysis that led to maintenance on the BNSP, related to personal communications with Mr. Chapman may be requested through FOIA. Therefore, the District’s documentation, along with a citation in the EIS of personal conversations, for at least the example given, is reasonable and sufficient.

As a result, this reason for appeal does not have merit.

REASON 13 (Part VII.I of Appellant’s RFA): The Amount of Tonnage Reduced in Many of the Permits Is So Limited That It Cannot Be Measured to Demonstrate or Determine an Impact on the River Bed. The Inability to Determine a Specific Impact by a Proposed Cut in Production Renders the Action Speculative and Pure Conjecture, and Therefore Arbitrary (The Appellant incorporated by reference the Dredgers’ Global Issue 10).

FINDING: This reason for appeal does not have merit.

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ACTION: No action is required.

DISCUSSION: In the RFA, the Appellant asserted that the District has not sufficiently documented that reduced removal of tonnage in the Missouri River will have any measurable effect on the Missouri River, as a whole.

The District determined that the proffered permit, with the dredging limits and included conditions, would result in no more than slight degradation over the short-term and long-term, is the LEDPA, complies with the Section 404(b)(1) Guidelines, and is not contrary to the public interest. The ROD, on pages 3-41 and 3-42, discusses the allocated the annual extraction limit for each segment among the various applicants based on capability, investment, and equity by giving each applicant the percentage of the segment limit that is equal to the percentage of the total average amount extracted from that segment between 2004 and 2008 that was dredged by each applicant.

The Appellant asserted that limits are being placed on commercial dredging under the theory that the cuts to dredging will have some favorable impact on the issue of bed degradation in the river. The Appellant further asserted that the District will not be able to measure the difference in the river from the reduction in tonnage from previous permits, let alone to determine whether the proposed cuts to commercial dredging will have any benefit or detriment to the of the river. The Appellant argued that without any science to suggest that these cuts can be evaluated or whether they would have any discernible effect, the reductions in tonnage from the previous permits are arbitrary and capricious.

The District asserted that, while allocating the annual extraction limit for a segment among the applicants that work in that segment may result in seemingly inconsequential reductions in dredging for the individual permits, cumulatively among all the applicants the reductions are an essential part of the LEDPA. The District asserted that the Appellant inaccurately implies that the federal action being proposed is “reducing” dredging levels. The District, however, defined the federal action as the proposed reauthorization of dredging and the central question of the associated public interest review is whether or not and under what restrictions dredging should be authorized in the future. The District indicated that annual extraction limits for each segment were determined by evaluating previous dredging records, analysis of bed-material load estimates, and recent and historical degradation. The District indicated that its analysis showed a clear correlation between dredging quantities and degradation. The District stated that dredging removes sediment from the bed material load and contributes to the disequilibrium of the river. The District asserted that, even if the river is in disequilibrium and is degrading without any dredging; its analysis showed that allowing dredging would exacerbate the problem. The District asserted that there is a strong and clear correlation in their analysis between the location and amount of dredging and the location and amount of bed degradation over time. The District concluded that the annual extraction amounts in the permit proffered to each individual applicant are based on the cumulative impacts analysis using the best available data and reasonable analysis methods and are not arbitrary or capricious. The District also concluded that the

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proffered permit conditions are necessary and practicable and that increasing the authorized extraction limits in any of the segments at this time would be contrary to the public interest.

The District concluded, based on findings in the FEIS and ROD, that dredging beyond that which would be authorized by the proffered permit would unacceptably contribute to the degradation of the LOMR. Further, the District may modify dredging tonnage limits in the future if, through the analysis of monitoring results, conditions warrant an increase.

CONCLUSION: I conclude that the reasons for appeal of this declined proffered Department of the Army permits do not have merit. The District's permit decision was not arbitrary, capricious or an abuse of discretion, and was not plainly contrary to applicable law, regulation, Executive Order, or promulgated policy. The final permit authority for the Holliday Sand & Gravel, NWK-2011-00363 (Declined Permit) remains with the Kansas City District Engineer. This concludes the Administrative Appeal Process.



John S. Kem
Brigadier General, US Army
Division Commander