DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, NORTHWESTERN DIVISION
PO BOX 2870
PORTLAND OR 97208-2870

REPLY TO ATTENTION OF

Program Support Division

FEB 0 2 2009

Mr. Eric Rau
Edward N. Rau Contractor Company
2809 State Road A, Suite A
Washington, Missouri 63090

Dear Mr. Rau

I have completed my review of your May 13, 2008 Request for Appeal of the Kansas City District's decision to deny your permit request to dredge sand/gravel from the Missouri River, File NWK-2001-01435. After evaluating the information provided in the Request for Appeal and the District's administrative record, I have determined that the appeal does not have merit.

Enclosed is a copy of the Administrative Appeal Decision document, which provides the details of my findings for the appeal. A copy will be furnished to the Kansas City District.

If you have any questions about the appeal decision, you may contact my Administrative Appeal Review Officer, Mr. David Gesl, at (503) 808-3825.

Sincerely,

William E. Rapp, P.E.
Brigadier General, US Army
Division Commander

Enclosure

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ADMINISTRATIVE APPEAL DECISION
FILE NO. NWK-2001-01435 & NWK 2001-01430
KANSAS CITY DISTRICT
SECTION 10 & 404 AUTHORITY

FEB 2 2009

Review Officer (RO): David W. Gesl, U.S. Army Corps of Engineers, Northwestern Division (NWD), Portland, Oregon.

Appellants: Edward N. Rau Contractor Company (Rau) and Hermann Sand and Gravel, Inc (Hermann Sand).

Receipt of Request For Appeal (RFA): Rau-May 21, 2008 (Encl 1), Hermann-May 20, 2008 (Encl 2).

Site Visit and Appeal Conference: Separate Appeal Conferences were held on December 10 and 11, 2008 for Rau (Encl 3) and Hermann (Encl 4). A site visit of Hermann's land based receiving/processing/distribution facility also occurred on December 10, 2008.

Summary of Appeal Decision:

The Kansas City District (District) combined the evaluation of ten (10) permit proposals, each from independent companies, in a Combined Decision Document and in a subsequent Supplemental Decision Document. The ten proposals involved commercial sand/gravel dredging in the Missouri River. The final outcome of the evaluation included denial of a permit to Edward N. Rau Contractor Company and a proffered permit for Hermann Sand and Gravel, Inc.

Both requested Appeal of the District's decision for similar reasons and, therefore, the appeals have been evaluated concurrently in a consolidated decision document. Both appellants challenged the District's decision to limit annual dredging to an amount equal to the actual quantity dredged in 2006. Additionally, Hermann Sand challenged a special condition requiring submission of an annual hydrographic survey of each authorized dredging reach.

It was determined that the District's decision was supported by substantial evidence in the Administrative Record (AR) and that the District's determination was reasonable and within the zone of discretion delegated to the District by Corps regulations. Therefore, the reasons for appeal do not have merit.

Background Information:

Current Requests For Appeal

On May 20, 2008, Hermann Sand requested an appeal of the Corps of Engineers, District's decision to proffer a permit to Hermann Sand with special conditions. Hermann Sand originally requested authorization to dredge 500,000 tons but was proffered a permit to dredge 300,000 tons of material from the Missouri River. Hermann Sand is appealing the District's decision to 1) include a special condition requiring Hermann Sand to submit an annual hydrographic survey of each authorized dredging reach, and 2) to limit annual dredging to an amount equal to the actual quantity dredged in 2006.

On May 21, 2008, Rau requested appeal of the District's denial of their permit request to dredge 100,000 tons of material from the Missouri River.

NWD reviewed both appeals concurrently and is herein making a consolidated decision on both RFA's.

The AR was provided by the District. A Memorandum for Record dated June 20, 2008 (SUBJECT: *Administrative Appeals of Permit Decision for Missouri River Commercial Dredging by Edward N. Rau Contractor Company and Hermann Sand and Gravel, Inc.*) was provided to the RO and to the applicant on August 20, 2008. Elements within this Memo were not contained in the record on the date of the Notification of Administrative Options and Process form and therefore cannot be considered in this Appeal Decision.

The District consolidated the evaluation of 10 permit proposals to continue and/or initiate commercial sand/gravel dredging in the lower Missouri River in order to formulate a comprehensive decision. The 10 companies that requested permits are either currently active in the Missouri River commercial sand industry, hold permits but are not active dredgers, or are new applicants. In at least one case (Rau), a company would subcontract actual dredging of the quantity for which they requested authorization; their business plan was to utilize or market the sand for construction upon delivery. As a result of the District's consolidated evaluation, the final decision was to deny 6 permits and to proffer 4 permits with special conditions and terms. Table 1 shows the 10 applicants and the amount of dredged material requested, previously authorized, dredged in 2006, and currently authorized.

The District concluded that there is a very strong correlation between commercial dredging and riverbed degradation in the lower Missouri River. The District has indicated that this is most evident in the Kansas City reach of the River, where bed degradation has already impacted municipal water intake structures, revetments, tributary bed stability, and levees. Based on their finding that commercial dredging at current levels will result in the potential for significant impacts, the District determined that an

Table 1. Outcome of the Kansas City District combined evaluation of proposed dredging permits.

Application Number	Applicant Name and Location	Annual Tons of Dredged Material Requested	Annual Tons of Dredged Material Previously Authorized	Tons of Material Dredged in 2006	Annual Tons of Material Authorized by This Permit
2001-01429 (Renewal of 1996-01648)	**Capital Sand Company, Inc. (Capital Sand)** Jefferson City, Missouri	2,500,000	1,500,000	2,253,862 (Also Dredged for Con-Agg)	2,255,000
2001-01430 (Renewal of 1996-01654)	**Hermann Sand and Gravel, Inc. (Hermann Sand)** Hermann, Missouri	500,000	100,000	301,034	300,000
2001-01431 (Renewal of 1996-01649)	**Holliday Sand and Gravel Company (Holliday Sand)** Overland Park, Kansas	3,800,000			450,000 in 2008 and 900,000 in 2009
			2,450,000	3,395,525	3,400,000 in 2007 2,950,000 in 2008 2,500,000 in 2009
			Kansas City		
			St. Joseph	364,830	360,000
			Total	3,760,355	3,760,000
2001-01432 (Renewal of 1996-01655)	**Washington Sand Company, Inc. (Washington Sand)** Washington, Missouri	130,000	130,000	0	Permit Denied
2001-01433 (Renewal of 1996-01680)	**St. Charles Sand Company (St. Charles Sand)** Bridgeton, Missouri	200,000	200,000	0	Permit Denied
2001-01434 (Renewal of 1996-01652)	**Con-Agg of MO, L.L.C. (Con-Agg)** Columbia, Missouri	250,000	250,000	175,000 (Dredged by Capital Sand)	250,000
2001-01435 (Renewal of 1996-01656)	**Edward N. Rau Contractor Company (Rau)** Washington, Missouri	100,000	100,000	0	Permit Denied
2001-01436 (Renewal of 1996-01650)	**Kaw Valley Sand and Gravel, Inc. (Kaw Valley Sand)** Kansas City, Kansas	1,000,000	300,000	0	Permit Denied
2003-01640 (New Applicant)	**85th Street, Inc. (Lafarge)** Kansas City, Missouri	1,300,000	0	0	Permit Denied
2004-00378 (New Applicant)	**Muenks Bros. Quarries (Muenks Bros.)** Loose Creek, Missouri	600,000	0	0	Permit Denied
TOTAL		10,380,000	980,000	6,490,251	6,490,000

Environmental Impact Statement (EIS) is required by the National Environmental Policy Act (NEPA) before commercial dredging in the Missouri River can be re-authorized in 2010. The focus of the EIS is to evaluate the affects of current dredging practices and alternatives to those practices on the human environment and to identify the future course of action having the least impact. The EIS will not evaluate or mitigate the impacts of other contributors to bed degradation, is scheduled to be completed by the end of 2009, and is being funded by the commercial dredging permit applicants.

The District concluded that profferance of a permit to Hermann Sand and Gravel and two other active dredging companies to extract sand and gravel from the Missouri River, limited to the annual extraction levels reported in 2006 and with special conditions including a requirement that annual hydrographic surveys be submitted, will not have a significant adverse effect on the environment. Therefore, they may be permitted to dredge at these levels for the limited permit period without the completion of an EIS; the permits expire December 31, 2009. The District also concluded that any dredging in excess of these quantities, time periods, and other limits could have a significant adverse effect on the quality of the human environment, and would require the filing of an EIS. Rau was previously authorized to dredge from 1996 through 2007 but never extracted any material during that time; Rau was not re-authorized to dredge in the Missouri River.

Hermann Sand is authorized to dredge in several reaches of the Missouri River, in the general vicinity of Hermann, Washington, and Jefferson City, Missouri. Rau had proposed dredging in two reaches near Washington. A map showing the authorized dredging reach for each permit and the reach Rau proposed to operate in is attached.

History of Decisions and Appeals:

The District first issued a Combined Decision Document addressing the 10 applications on August 20, 2007. The District determined that issuance of any permits for extraction of material in excess of the amount extracted in 2006 would be contrary to the public interest and would result in the potential for significant environmental impacts. The District proffered four permits with special conditions and dredging limits defined by the actual amount dredged in 2006.

In October 2007, Rau, Muenks Bros., and Kaw Valley Sand requested appeal of the denial of their permits to NWD in accordance with the Administrative Appeals Process (33 C.F.R. Part 331). Several companies, including Hermann Sand, requested the District reconsider the terms and conditions contained in the District's initial proffered permits. Because the District had consolidated the evaluation of the 10 permit proposals, NWD recommended that the District also reconsider the appeals in a combined re-evaluation. Appeals of denied permits are typically addressed by the Northwestern Division Engineer, but continued evaluation of all dredging proposals collectively was warranted.

On March 24, 2008, the District completed a Supplemental Permit Evaluation and Decision Document (Supplement). The Supplement generally reaffirmed the original decision.

- The District again denied Rau's permit request to dredge 100,000 tons of material from the Missouri River on March 24, 2008.

- The District reaffirmed the decision to proffer Hermann a permit with conditions, to extract up to 300,000 tons of sand and gravel per year from the Missouri River.

Other studies/efforts:

There are five Missouri River Studies and Programs ongoing that are related to sediment in the River, including the Environmental Impact Statement the District's Regulatory Office is undertaking. A Regulatory Information Paper describing the Regional Sediment Management Program, the Missouri River Degradation Study, the National Academy of Sciences/National Research Council Study, and the Missouri River Stage Trends Study details these various related efforts (Encl 6).

APPEAL EVALUATION, FINDINGS AND INSTRUCTIONS TO THE KANSAS CITY DISTRICT ENGINEER (DE):

Reason 1 (Hermann Sand only) – As detailed in the Hermann Sand RFA, the appellant is appealing the inclusion of a special condition that requires an annual hydrographic survey on the basis that it is unnecessary and creates a financial burden on their business.

FINDING: This reason for appeal does not have merit.

ACTION: No further action is needed by the District.

DISCUSSION:

The 404(b) Guidelines for Specification of Disposal Sites for Dredged or Fill Material and the NEPA regulations recognize that there may be incomplete or unavailable information when evaluating reasonably foreseeable adverse impacts. In such cases, the agency must include a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment, and must evaluate such impacts based upon theoretical approaches or research methods generally accepted in the scientific community. The NEPA regulations also provide that if the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.[1]

[1] 40 C.F.R. § 1502.22

The District Engineer is required to add special conditions to Department of the Army Permits, when such conditions are necessary to satisfy the public interest requirement. Permit conditions must be directly related to the impacts of the proposal, appropriate to the scope and degree of those impacts, and reasonably enforceable.[2]

The District's decision to include a special condition requiring annual hydrographic surveys by the permittee's is addressed in section 2.2.4 of the Supplement where it is stated "The Corps has determined that hydrographic surveys in 2008 and 2009 are necessary to prepare the EIS for 2010." In Section 2.5.4.2, the District acknowledged the financial burden on Hermann Sand of conducting the surveys and balanced that burden against what it termed a "vital" need to include the condition. The Supplement indicates "the hydrographic surveys are a vital condition of our Finding of No Significant Impact (FONSI) because they will alert us if significant degradation occurs during the next permit cycle despite all the permit conditions designed to minimize the degradation and will provide information for the future EIS."

The District acknowledges that their "understanding of the effects of dredging on bed degradation is incomplete and that a comprehensive study needs to be done" in Section 2.1.2 of the Supplement. In the same section, they also state "the studies done to date sufficiently indicate that degradation is occurring and is potentially affected by current dredging practices." The District noted the studies they relied upon in making a determination that degradation was occurring were "peer reviewed for technical accuracy."

The District's documentation in determining the need to include the special condition is consistent with the regulatory approach of the Corps of Engineers, that being consideration of the full public interest by balancing the favorable impacts against the detrimental impacts in reaching a decision.[3] The District acted within its discretion in authorizing the work, subject to the inclusion of this special condition.

The District acted within its discretion in relying upon the composite professional knowledge and judgment of its Regulatory Program and Hydrology and Hydraulics staff when it concluded that an EIS should be completed and that additional information, including hydrographic surveys, was needed.

This reason for appeal does not have merit.

Reason 2 (Hermann Sand and Rau): As detailed in the RFAs, both appellants are challenging the District's decision to limit authorization(s) to the tonnage actually dredged in 2006. This resulted in limiting the authorized amount in the Hermann Sand permit and precluded issuance of a permit to Rau.

FINDING: This reason for appeal does not have merit.

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[2] 33 C.F.R § 325.4
[3] 33 C.F.R § 320.4(a)

ACTION: No further action is needed by the District.

DISCUSSION:

As detailed in the previous section, the District acted within its discretion in relying upon the composite professional knowledge and judgment of its Regulatory Program and Hydrology and Hydraulics staffs in concluding that channel bed degradation was occurring and that there was a "huge potential cost to society if dredging contributes to bed degradation and the failure of bridges, dikes, levees, revetments, water intakes, and other river structures."

The District also acted within its discretion in relying upon the composite professional knowledge and judgment of its Regulatory Program and Hydrology and Hydraulics staffs in further making a FONSI subject to the total annual extraction limitation to 2006 levels through 2009.

The District evaluates the "financial fairness" of "temporarily" dividing the limited quantity of extractable resource in Sections 2.2.3 and 2.3.4 of the Supplement. In those sections, the District concludes that the "most rational and equitable way to temporarily divide" the available resource during the EIS process is to limit authorization to actual 2006 levels and to active dredgers only. These sections indicate a consideration of impacts to active dredgers, to inactive or new applicants, and the potential effect on the supply of sand and the regional economy. There is no known standard or method that defines how such allocation should take place. The District did not exceed its discretion and their decision is within the rule of reason.

This reason for appeal does not have merit.

INFORMATION RECEIVED AND ITS DISPOSITION 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. However, the Division Engineer does not have authority under the appeal process to make a final decision to issue or deny any particular permit nor to make an approved Jurisdiction Determination; 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 Notification of Administrative Appeal Options and Process (NAP) form. 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 administrative record. 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 administrative record provides an adequate and reasonable basis to support the District Engineer's decision.

1. The District provided a copy of the administrative record to the RO and the Appellant. The administrative record is limited to information contained in the record by the date of the NAP form, which in this case was March 24, 2008.

2. The District provided a Memorandum for Record dated June 20, 2008, along with the Administrative Record. Elements contained within this memo were not contained in the record by the date of the Notification of Administrative Appeal Options and Process (NAP) form. This information cannot be considered in this Appeal Decision.

3. A site visit of Hermann Sand's land operations and an independent Appeal Conference were held on December 10, 2008. The site visit was primarily to clarify the general, overall site conditions and relationships. The visit and conference are deemed clarifying information.

4. Hermann Sand provided three items at the Appeal Conference. Two of those items, a letter to Hermann Sand from John Doyle and Henry Hauck dated January 21, 2007, and a memorandum to Steve Engemann-Herman Sand & Gravel Company by JD-MC Engineering & Construction, dated February 11, 2008, had been considered during the decision process and, thus, were a part of the administrative record. The third, a letter to Steve Engemann from Hermann Sand & Gravel's hydrographic survey contractor dated July 22, 2008, is dated after the decision being appealed was completed; therefore, it is not part of the administrative record for the decision and was not considered in the appeal decision.

5. An Appeal Conference with Eric Rau was held on December 11, 2008. The conference is deemed clarifying information.

OVERALL CONCLUSION: After reviewing and evaluating information provided by the appellant, the District's Administrative Record, and the information obtained during the appeal conferences, I find that the reasons for appeal set forth by the Appellants do not have merit.

WILLIAM E. RAPP, P.E.
Brigadier General, US Army
Division Commander

Enclosures:

1. **Appeal Conference Summary, Hermann Sand and Gravel, dated 29 Jan 09**
2. **Appeal Conference Summary, Edward N. Rau Contractor Company, dated 29 Jan 09**
3. **RFA - Hermann Sand and Gravel, dated 19 May 2008**
4. **RFA – Edward N. Rau, dated 13 May 2008**
5. **Map showing dredging reaches**
6. **Information paper dated 30 Jul 2008**