

**ADMINISTRATIVE APPEAL DECISION**  
**FILE NO. NWK-2008-1765**  
**KANSAS CITY DISTRICT**  
**SECTION 10 & 404 AUTHORITY**

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

**Appellant:** The Master's Dredging Company, Inc. (Master's), represented by Jim Jarrow of Baker Sterchi Cowden & Rice LLC.

**Authority:** Rivers and Harbors Act of 1899, 33 USC § 403 and Clean Water Act (CWA), 33 USC 1344

**Date Notification of Administrative Appeal Options and Process (NAP) was provided to the Appellant:** March 31, 2011.

**Receipt of Request for Appeal (RFA):** May 27, 2011.

**Appeal Conference:** September 28, 2011. The Conference was convened by the RO, and attended by Mark Frazier, Regulatory Chief ; David Hibbs, Assistant Regulatory Chief; Matt Jeppson, Assistant District Council; Cody Wheeler, Regulatory Project Manager from the Kansas City District; Lucius Duerksen, NWD Regulatory Board Leadership Detailee; Dave Penny, owner of Master's and Jim Jarrow, Counsel for Master's.

**Summary of Appeal Decision:**

Master's challenged the District's decision to deny its permit request for commercial sand/gravel dredging in the Missouri River. Master's argues that the District's process in awarding permits is arbitrary and capricious and that the permit denial constitutes violations of the Commerce Clause, the Equal Protection Clause and the Due process Clause of the United States Constitution.

Master's assertion that the permit denial violates the Constitution "because the process and related laws should be declared void..." is not a valid basis for an administrative appeal.

It is determined that the District's decision is not arbitrary and capricious. However, the decision is not supported by substantial evidence in the Administrative Record (AR) and remand is warranted. The District should further document the AR with its reasoning and basis for sand allocation, including incorporation of appropriate clarifying information that was provided during the appeal.

**Background Information:**

The Kansas City and St. Louis Districts 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). Activities include dredging of river sediments from the navigable waters of the LOMR, extraction of suitable sand and gravel, and discharge of some of the dredged material back into the river.

The Project Area, consisting of the lower 498 miles of the LOMR, was 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. 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).

Sand and gravel extracted from the LOMR for commercial purposes is processed and distributed at sand plants adjacent to the river; there currently are 18 such plants. Master's does not currently operate in the LOMR. Master's proposal differed from other dredgers in that it would involve hydraulically dredging and pumping sand to a proposed on-shore facility, rather than mechanically dredging and transportation via barge to an on-shore facility.

Master's requested authorization to operate in the uppermost portion of the Kansas City segment; their operation would be centered at Waldron (RM 388) with a dredging stretch from RM 386 to RM 390.<sup>1</sup> Master's permit proposal included establishment of a sand plant at Waldron to support their hydraulic dredging operation.

The table below shows the previously authorized, 2004-2008 annual average, and proposed dredging quantities by river segment and dredging company. The table also shows the four alternatives considered in the Final Environmental Impact Statement (FEIS); the shaded alternative in each segment is the District's Environmentally Preferred (permitted) Alternative.

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<sup>1</sup> Addition of booster pumps could expand Master's dredging stretch to RM 384 to RM 392.

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
<b>Total by Alternative</b>		<b>7,733,250</b>	<b>7,003,287</b>	<b>13,350,000</b>	<b>0</b>	<b>2,190,000</b>	<b>5,050,000</b>	<b>7,010,000</b>
<b>Environmentally Preferred Alternative Total</b>							<b>5,880,000</b>	

\* This is the target quantity, following a three year phasing-in period.

Holliday Sand and Gravel, LLC (Holliday) currently operates, and proposes to continue operating in the Kansas City segment, as well as in the St. Joseph segment. Historically, Holliday dredged in the Kansas City Segment within 10 miles upriver and 3 miles downriver from its Riverside (RM 372) and Randolph (RM 360) sand plants located in the Kansas City Segment. Holliday also has an existing operation in the St. Joseph Segment (RM 447) where they also historically dredge within 10 miles upriver and 3 miles downriver of their sand processing facility.

Although Master's is an established dredging company, they currently do not operate in the LOMR. Master's permit request to establish a new operation between RM 383 and RM 390 of the Kansas City segment was denied following the FEIS and ROD. Concerns that commercial dredging contributes to river bed degradation (the lowering of the elevation of the river bottom) were treated in the FEIS and ROD and were central in the decisions on all eleven permit applications.

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 were required to insure individual projects were not contrary to 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 extracted from any five (5) mile reach.

The allocation among dredgers is derived from and generally proportional to the recent (2004-2008) averages, with the exception of Holliday. The Holliday allocation in the Kansas City segment was 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 was greater than the recent averages.

**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 zone of discretion delegated to the District Engineer by Corps regulations. 33 C.F.R. § 331.9.

## **APPEAL EVALUATION, FINDINGS AND INSTRUCTIONS TO THE KANSAS CITY DISTRICT ENGINEER:**

**REASON 1.** The District's decision is arbitrary and capricious because there are no criteria which determine how the Corps is to make a determination as to which of several permit applicants get permits.

**FINDING:** The decision is not arbitrary and capricious, but there is merit in this reason for appeal.

**ACTION:** Based upon clarifying information that was presented during the Appeal Process, the District's decision is not arbitrary and capricious. However, the decision is not supported by substantial evidence in the AR and remand is warranted. The District should further document the AR with its reasoning and basis for sand allocation, including incorporation of appropriate clarifying information that was provided during the appeal. It is also recommended the District address any relevant new information that has become available since the NAP.

**DISCUSSION:** Master's argues the District's decision gives Holliday Sand a monopoly for sand dredging on the LOMR from above St. Joseph to below Kansas City. It further argues that Holliday Sand will not be able to dredge the area where Master's was denied because of economical, logistical, and technical feasibility reasons. Master's contends

the ROD is void of any rationale or basis as to why the district awarded Holliday Sand its permit over the request of Master's. Master's position is there is no recorded basis in the record for the decision made and therefore it is arbitrary and capricious

Master's indicated its proposal was to dredge 19 miles (upstream) from Holliday's Riverside plant and 30 miles (downstream) from Holliday's St. Joseph plant. Master's maintains that the St. Joseph segment extraction limit (840,000 tons) and the 300,000 ton per five mile (reach) limit would require Holliday to operate in "areas it admits it cannot reach", and therefore, that Master's should be granted authorization to extract sand in those areas. Master's also contends the ROD is contrary to "COE precedent to grant river dredging permits to companies who can utilize them and not grant permits to companies who cannot utilize the permits."

Master's October 5, 2011 response to RO questions pointed to correspondence from Holliday to the Corps that discusses issues associated with Holliday operating 19 miles or more upstream (into the St. Joseph Segment) from its existing facility in the Kansas City Segment. Master's also highlighted that a March 25, 2011 Holliday letter states RM 383 is as far as Holliday has dredged from its Riverside facility, and that Holliday has dredged very little above RM 380. The practicability issues Holliday raised in the correspondence focus on operating in the upstream St. Joseph Segment, not on operating in Kansas City Segment, where Master's is challenging the District's allocation decision.

Master's also provided an e-mail thread that was initiated by Holliday on April 4, 2011. The appeal is limited to the information contained in the AR by the date of the NAP, which is March 31, 2011. This information cannot be considered in this Appeal. 33 C.F.R. § 331.7(f)

The District clarified at the Appeal Conference and in a response to RO questions, the annual extraction limit of the least environmentally damaging practicable alternative (LEDPA) identified in the ROD was based on the geomorphology analysis from the FEIS and is less than the average annual extraction between 2004 and 2008 in the Kansas City segment. The District determined further reductions to the previously authorized dredgers would likely cause extreme hardship on the dredgers to remain economically viable, therefore, the new extraction limit was fully allocated among the previously authorized dredgers and none was available to authorize new permits or for additional tonnage requested by previously authorized dredgers. The District discussed that currently authorized dredgers have existing infrastructure and ongoing operations which rely on sand and gravel extraction from the river, and to force them to close in order to allow new applicants to receive a portion of the limited amounts in the LEDPA would not be equitable. Master's, who does not have an existing operation in the Kansas City Segment of the LOMR, was denied a permit to establish a new operation in that area.<sup>2</sup>

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<sup>2</sup> In conjunction with the Appeal Conference, the RO questioned if there is a mechanism (e.g. permit condition) that would "forfeit" unused allocation(s) in any segment. The District explained neither the ROD nor the EIS spell out specific time frames, limits, or mechanisms by which unused allocations in any segment would be forfeited and reassigned to another applicant. The District pointed out the Standard Permit FORM states:

The District's consideration(s) included that Holliday "is in the business of dredging from the Missouri River" and has been authorized to dredge since at least 1997. Therefore it has invested in the land, infrastructure, and equipment needed to extract sand from the LOMR; it has "investment based expectations" to continue their operation. Master's did not previously have a permit to dredge in the Missouri River and did not have the same "investment based expectations". The District clarified their position that Holliday be given the chance to modify their operation to comply with the segment and reach extraction quantity limits of the LEDPA before Master's is given the opportunity to establish a new operation, because of Holliday's substantial investment based on a reasonable expectation of continued authorization to dredge while Master's has made investments based only on the speculation that they might be authorized.

A decision is arbitrary and capricious if it relied on factors which Congress has not intended to be considered, entirely failed to consider an important aspect of the problem, offered an explanation that runs counter to the evidence in the record, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

The District clarified during the appeal conference that its approach was to first apply its technical expertise and judgment to determine an acceptable level of extraction. The allocation for that limited quantity was to follow a hierarchy that gave preference to existing LOMR dredging operations over new operations that had not been active in the LOMR. The District applied a reason based method to allocate a limited resource. There is a rational connection between the facts found and the choice made that is not counter to the evidence or so implausible that it could not be ascribed to a reasonable difference of opinion. Therefore, the decision is not arbitrary and capricious.

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*"This office may reevaluate its decision on this permit at any time the circumstances warrant. Circumstances that could require a reevaluation include, but are not limited to, the following:*

- a. You fail to comply with the terms and conditions of this permit.*
- b. The information provided by you in support of your permit application proves to have been false, incomplete, or inaccurate (See 4 above).*
- c. Significant new information surfaces which this office did not consider in reaching the original public interest decision.*

*Such a reevaluation may result in a determination that it is appropriate to use the suspension, modification, and revocation procedures contained in 33 CFR 325.7..."*

This is a legitimate mechanism for reconsideration of any permit decision. The District also pointed out that 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." Corps Memorandum for Record dated September 7, 2011

The issue of a mechanism(s) to evaluate and possibly re-assign a sand allocation or portion thereof is an important question. However, it was not challenged in Master's RFA and, therefore, will not be treated in this Appeal.

However, the District's AR is not sufficient to support their decision; the AR should be further documented with the substantial clarifying information that was provided during the Appeal regarding the reasoning and decision making process for allocation of sand and gravel extraction quantities. It is also recommended the District address any relevant new information that has become available since the NAP.

**REASON 2.** The permit denial constitutes violations of the Commerce Clause, the Equal Protection Clause, and the Due Process Clause because the process and related laws should be declared void for vagueness and/or arbitrary as applied, and violates the penumbra of fundamental fairness all in the United States Constitution.

**FINDING:** The assertion that the permit denial violates the Constitution "because the process and related laws should be declared void..." is not a valid basis for an administrative appeal.

**ACTION:** No further action is needed by the District.

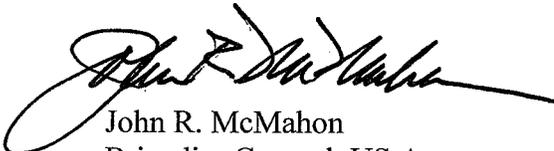
**DISCUSSION:** Only the Judicial Branch may declare duly enacted laws void for Constitutional reasons; an Executive Branch agency is required to follow the laws and to follow its own formally published regulations. This is consistent with the following description of "actions not appealable" in 33 C.F.R. § 331.5(b)(4): "A permit denial without prejudice or a declined permit, where the controlling factor cannot be changed by the Corps decision maker (e.g., the requirements of a binding statute, regulation, state Section 401 water quality certification, state coastal zone management disapproval, etc.)." Consequently, the Constitutionality of the applied laws and published regulations cannot be considered in this appeal.

#### **INFORMATION RECEIVED AND 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. 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.

1. The District provided a copy of the AR to the RO and the Appellant. The AR is limited to information contained in the record by the date of the NAP, March 31, 2011.
2. The District provided a Memorandum for Record, Subject: Reconsideration of Proffered Missouri River Commercial Dredging Permits, dated September 7, 2011. This MFR is the District's action in response to other dredgers appeals (directed to the District Engineer) of initially proffered permits. A portion of its Enclosure 1 (pages 24-28) pertains directly to Master's Appeal and was considered during this decision.
3. An Appeal Conference was held on September 28, 2011. In conjunction with the Conference, the RO provided an opportunity to submit a response to three questions. The Conference and the response to those questions are deemed clarifying information.
4. Master's provided an Appeal Conference Notebook at the Appeal Conference (Notebook). The Notebook contained maps showing the LOMR segments that were analyzed and the locations of current and proposed dredging sand plants in the St. Joseph and Kansas City segments. The Notebook also provided copies of the Public Notice of Availability of the FEIS for the Proposed Missouri River Commercial Dredging Permits, along with the Executive Summary, Chapter 2 - Proposed Action and Alternatives from the FEIS, and a Table showing the Currently Authorized, Annual Average (2004-2008), Proposed Action, and LEDPA Alternative quantities of excavated sand for each of the 5 LOMR segments. This information is all part of the AR for the District's decision and was considered in the appeal decision.
5. Master's Appeal Conference Notebook also contained an excerpt from an RFA that was filed on behalf of several dredgers operating in the LOMR (Tab 2). That document was not contained in the AR by the date of the NAP and cannot be considered in this Appeal. 33 C.F.R. § 331.7(f)

**OVERALL CONCLUSION:** After reviewing and evaluating information provided by the appellant, the District's AR, and the information obtained during the appeal conferences, I find that one of the reasons for appeal set forth by the Appellant has merit.



John R. McMahon  
Brigadier General, US Army  
Division Commander

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