AQUATIC RESOURCES OF NATIONAL IMPORTANCE (ARNI)

Legal Research Summary

(Prepared October 2010 by Paula Maccabee, Counsel for WaterLegacy)

Although the EPA does not customarily have authority to evaluate individual Army Corps permits that have no policy implication, under a Memorandum of Agreement reached by the EPA and the U.S. Army in 1992 pursuant to Section 404(q) of the Clean Water Act, 33 U.S.C. § 1344(q)(2010), the EPA can place a higher level of scrutiny on permits that affect "aquatic resources of national importance" or "ARNI." Where permits affect ARNIs, the EPA can elevate review to the national Department of the Army and, if the agencies disagree, refer the dispute to the Council on Environmental Quality.

Designation of ARNI also establishes EPA authority for individual permit review that can result in EPA veto of a Section 404 Army Corps of Engineers permit where the permitted activities will result in unacceptable impacts on unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas. 33 U.S.C. § 1344(c)(2010).

Resources that can be elevated as ARNIs are identified in rules and may include wetlands (40 C.F.R. § 230.41), mud flats in riverine systems (40 C.F.R. § 230.42) and vegetated shallows in freshwater rivers (40 C.F.R. § 230.43). They may be large or small geographically, so long as they possess "special ecological characteristics of productivity, habitat, wildlife protection, or other important and easily disrupted ecological values." These areas "are generally recognized as significantly influencing or positively contributing to the general overall environmental health or vitality of the entire ecosystem of a region." 40 C.F.R. § 230.3(q-1)(2010).

> From a national perspective, the degradation or destruction of special aquatic sites, such as filling operations in wetlands, is considered to be among the most severe environmental impacts covered by these Guidelines. The guiding principle should be that degradation or destruction of special sites may represent an irreversible loss of valuable aquatic resources. 40 C.F.R. § 230.1(d)(2010).

Federal rules require consideration of both direct and secondary impacts on special aquatic resources. Potential impacts on wetlands can include but are not limited to smothering, dewatering, altering substrate elevation or water movement, destroying wetland vegetation, impairing nutrient exchange, degrading water quality by obstructing circulation, flushing wetland systems, interfering with filtration or changing aquifer recharge capability. Discharges can change wetland habitat value for fish and wildlife and modify the capacity of wetlands to retain and store floodwaters. 40 C.F.R. § 230.41(b).

Impacts to mud flats resulting in loss of values can include changes in water circulation patterns that may permanently flood or dewater the mud flat or disrupt periodic inundation, depleting mud flat biota, foraging areas, and nursery areas and changing productivity of habitat. 40 C.F.R. § 230.42(b). Vegetated shallows can be impacted when discharge of dredged or fill material creates unsuitable conditions for

rooted aquatic vegetation or freshwater river species through changing water circulation patterns or by "releasing chemicals that adversely affect plants and animals," among other impacts. 40 C.F.R. § 230.43(b).

The EPA has previously designated as ARNI 15 acres of the Klatt patterned peat bog that would be excavated and backfilled by a residential development,[1]17 acres of vernal pools and seasonal wetlands in Churchill Downs, California,[2] 2.4 acres of submerged aquatic vegetation in the Magothy River,[3] wetlands impacted by 9 acres of fill proposed by a resort in Diablo Grande,[4] 8.8 acres of wetlands and vegetated shallows and a riverine system that would be affected by a dam and reservoir in the Hughes River of West Virginia,[5] 241 acres of forested wetlands in the Hillsborough River potentially impacted by a power line,[6] a wetlands, salt march and mud flats area in Valdez, Alaska potentially impacted by a petroleum transfer facility[7] and 80 acres of wetlands on Point au Fer Island in Louisiana, potentially impacted by levees.[8]

Designation of receiving waters as an ARNI is a factual determination. The September 14, 2010 letter from WaterLegacy to the U.S. Environmental Protection Agency seeking designation of the receiving waters of the PolyMet NorthMet open pit sulfide mine as ARNI details features of the wetlands quality, wildlife habitat, water quality and national and international concern for the Lake Superior Basin ecology that support designation as ARNI.

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[1] *See* EPA Elevation Request, http://www.epa.gov/owow/wetlands/pdf/KlattBogElevationRequest.pdf
[2] *See* EPA Elevation Request, http://www.epa.gov/wetlands/pdf/ChurchillDownsElevationRequest.pdf
[3] *See* Army Response, http://www.epa.gov/owow/wetlands/pdf/MagothyRiverArmyResponse.pdf
[4] *See* EPA Elevation Request, http://www.epa.gov/owow/wetlands/pdf/DiabloGrandeElevationRequest.pdf follow up to Army Response, http://www.epa.gov/owow/wetlands/pdf/DiabloGrandeEPAFollow-up.pdf
[5] *See* EPA Elevation Request, http://www.epa.gov/owow/wetlands/pdf/HughesRiverElevationRequest.pdf
[6] *See* EPA Elevation Request, http://www.epa.gov/owow/wetlands/pdf/FloridaPowerElevationRequest.pdf
[7] *See* EPA Elevation Request, http://www.epa.gov/owow/wetlands/pdf/Petro-StarElevationRequest.pdf
[8] *See* EPA Elevation Request, http://www.epa.gov/owow/wetlands/pdf/PointAuFerElevationRequest.pdf