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# United States Senate

COMMITTEE ON  
ENERGY AND NATURAL RESOURCES

WASHINGTON, DC 20510-6150

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The Honorable Lisa P. Jackson  
Administrator  
Environmental Protection Agency  
1200 Pennsylvania Avenue, NW, Room 3426 ARN  
Washington, DC 20460

Dear Administrator Jackson,

Recent events in Alaska have raised significant questions regarding the Environmental Protection Agency's ("EPA") application of its authority under the Clean Water Act ("CWA."). Specifically, Section 404 of the CWA provides authority to the United States Army Corps of Engineers ("the Corps") to permit the discharge of dredged or fill material into the navigable waters of the United States. Section 404(c) of the CWA gives the EPA Administrator the authority to "prohibit the specification...of any defined area as a disposal site... whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse impact on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas. Before making such determination, the Administrator shall consult with the Secretary. The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection."

I am aware that, in the past, EPA's exercise of its authority under section 404(c) has not been without controversy. Specifically, there have been long-standing issues with regard to how to best coordinate and streamline the operation of these CWA provisions so as to avoid impeding the Corps' ability to permit projects on a timely basis. On August 11, 1992, under the threat of Congressional action, EPA entered into a Memorandum of Agreement ("the MOA") with the Corps, as authorized by section 404(q) of the CWA, to provide coordination procedures for the "elevation" of general policy issues and individual permit decisions to higher levels within the Corps and EPA. The MOA was designed to aid in the resolution of conflicts over a proposed permit, and provide for notification of EPA's intention, if necessary, to proceed under its section 404(c) authority.

The MOA states that "The elevation of specific individual permit cases will be limited to those cases that involve aquatic resource of national importance." (emphasis in original). The MOA further provides that, in order for elevation to occur, EPA must also notify the Corps in writing that the project "may result in substantial and unacceptable impacts to aquatic resources of national importance."

EPA's web site lists 16 cases in which EPA has requested Corps review of a requested permit over the 18 years since the MOA was finalized. However, in addition to this list, over the last 6 months, there have been at least two additional instances in which EPA has intervened with regard to Corps permits in Alaska alone.

Among my chief concerns is the CD-5 project in Northwest Alaska, under review now per the application of Conoco-Phillips Alaska (CPAI). This will be the first ever commercial oil production from the National Petroleum Reserve – Alaska, which Congress designated to supply the United States with oil and natural gas. Despite the law's directive for the expeditious exploration and development of this resource, EPA has declared the Colville River Delta (CRD) an ARNI and



argued that this status precludes the construction of a bridge over the river, despite the fact that the bridging infrastructure is necessary to access CD5 in a commercially viable manner. EPA opposed the bridge, even though the actual users of the CRD, mainly residents of the Native Village of Nuiqsut, had been closely involved in the development of the very plan which this designation undermined. Their historical experience and day-to-day reliance on the CRD for various subsistence and cultural uses cannot be questioned – yet EPA second-guessed the bridge option as their preferred alternative.

Similarly, EPA chose to designate the Tanana River as an ARNI as of less than one month ago. This designation arose after the Alaska Railroad Corporation applied for Construction and Operation of a Rail Line between Fairbanks/North Pole and Delta Junction, Alaska.

EPA was notified of the proposed bridge plan on September 15<sup>th</sup>, but had been aware of the proposed project generally well prior to February of 2009, when EPA provided comments, but no ARNI designation, on the DEIS. Then, EPA asked for more time to consider the proposal on October 7, which the Corps granted on October 14. On November 15, EPA stated that it considers the Tanana River an ARNI and cited the presence of subsistence fish and recreational users as the reason. EPA cites users from Tok, Tanacross, Tetlin, Northway, and Dot Lake as a justification for a threatened elevation and eventual veto of the issuance of a permit to build the bridge.

With less than two months of consideration possible, less than one page of administrative reasoning, and with only one signature from a state-level EPA operations director, a critical rail extension project across the Tanana River has been blocked by EPA's unilateral declaration of the area as an ARNI. While the section 404 guidelines require a showing that the "proposed project alternative is the least environmentally damaging alternative that would accomplish the project purpose", EPA has instead insisted that a "no-build alternative must be presumed to be a practicable alternative to meeting the transportation needs of the area."

The application of EPA's authority in these cases raises substantial questions regarding the process used by EPA to take these actions. Therefore, I respectfully request detailed answers to the following questions:

- (1) It appears that the term "ARNI" was created by the MOA. Please describe in detail the genesis and statutory authority for the term.
- (2) Please provide a list of all resources that have been granted ARNI status on or after August 11, 1992.
- (3) Please provide a copy of any regulations, memoranda or other guidance used by EPA that define the term "ARNI" and/or provide guidance as to the criteria for the application of the term by EPA and/or the Army Corps of Engineers.
- (4) Is there any guidance that would allow an applicant for a permit under section 404 of the CWA to make a judgment prior to filing the application as to whether any affected waters may qualify for ARNI status?
- (5) If there is no formal guidance, please provide any and all informal criteria used to judge the threshold for ARNI status, including, but not limited to, ecological, species, economic, subsistence, recreational, national security, and health and safety impacts.
- (6) In order to be designated "nationally important" must a given aquatic resource have direct human uses or users?
- (7) Are there any aquatic resources located within any national parks, wildlife refuges, monuments, or wilderness areas that are not designable as ARNIs?
- (8) Are there any aquatic resources with any hydrological nexus to navigable waters within any national parks, wildlife refuges, monuments, or wilderness areas that are not designable as ARNIs?
- (9) Is there any body of water that does not potentially qualify for ARNI status? If so, please provide a description of characteristics that would cause a body of water to not qualify for ARNI status.



- (10) Do any federal or state agencies other than EPA incorporate the ARNI designation into their decision-making processes?
- (11) EPA's website lists 16 cases in which EPA has formally cited ARNI status as a justification for Corps review of a requested permit over the 18 years since the MOA was finalized. Does EPA use the designation of ARNI status, or the threat thereof, in discussion with the Corps outside of the official permit elevation and veto process? Please provide a list of all cases in which EPA has communicated its views to the Corps on the appropriate alternatives for proposed permits for bodies of water that it believes deserve ARNI status, whether formally or informally.
- (12) Does EPA accept petitions, nominations or comments from any non-EPA entities with regard to ARNI status, either formally or informally?
- (13) Upon receipt of such a petition, nomination or comment, does EPA provide the applicant for the permit affected by the proposed ARNI designation, or any other party, notice and an opportunity to comment on the proposed designation?
- (14) Does the EPA provide any opportunity for public comment on a decision to grant ARNI status to a body of water?
- (15) Please provide any information relied upon by EPA that provides the basis for the decision to grant ARNI status to the Colville and Tanana Rivers, along with the source of such information.
- (16) Please provide any and all communications, formal or informal, including but not limited to electronic mail, petitions, nominations or comments, and responses thereto, that EPA has had with any outside party, including other government entities, regarding the status of the Colville and Tanana Rivers.
- (17) Please provide any request for ARNI status for any other body of water that EPA has received from an outside party since 1992, and provide any documents subsequently prepared by EPA with regard to an ARNI designation for the body of water proposed.
- (18) Is the designation of an ARNI subject to review or reversal by any person, agency, independent organization, or judicial entity outside of EPA?
- (19) Is the designation of an ARNI subject to review or reversal by any official within EPA?
- (20) Is the designation of an ARNI subject to reversal by an Act of Congress, including under the procedures of the Congressional Review Act?
- (21) The presence of subsistence and recreational users seems sufficient to EPA to justify the utmost protections of nearby aquatic resources of the Tanana River. However, their presence seems to fail, in the eyes of EPA, to justify any expanded transportation options. How does EPA quantify a person's subsistence and recreational needs, as compared to their transportation needs?
- (22) The authority of EPA to deny the use of an area for a disposal site is limited to those types of waters listed in the statute, as quoted above. EPA has promulgated regulations — including definitions and criteria — for review of special aquatic sites. EPA's regulations governing special aquatic sites are found at Subpart E of 40 C.F.R., Part 230. The "special aquatic sites" label encompasses: sanctuaries and refuges, 40 C.F.R. §230.40; wetlands, 40 C.F.R. §230.41; mud flats, 40 C.F.R. §230.42; vegetated shallows, 40 C.F.R. §230.43; coral reefs, 40 C.F.R. §230.44; and riffle and pool complexes, 40 C.F.R. §230.45. Has EPA ever designated a site as an ARNI that does not fall within these special aquatic site categories?
- (23) What distinguishes Special Aquatic Sites from ARNIs? In the opinion for *Jones v. Rose*, 2008 WL 552666 (D. Or. 2008) (not published in the *Federal Supplement*), Judge Brown states ARNIs are those resources listed at 40 C.F.R. §§230.40-.45. If there is no difference and no more expansive use of the term ARNI beyond the classification of special aquatic sites, why is the ARNI designation needed?

In general, it appears to an observer that certain highly consequential designations and decisions with regard to the exercise of EPA's authority under the CWA, as interpreted by the agency through its 1993 MOU with the Corps, require no public input, consultation, or even notice. It raises the question of whether the steps to permit important projects do in fact give the applicant

and the public a clear path forward and transparent public record, and a fair opportunity to make their case.

I am confident that the EPA process must be substantially more transparent and predictable than it now appears, particularly with regard to the ARNI designations in Alaska. I hope through the questions above to better understand what currently appears to be an opaque process.

Sincerely,

A handwritten signature in blue ink, appearing to read "Lisa Murkowski". The signature is fluid and cursive, with a large initial "L" and "M".

Lisa A. Murkowski  
Ranking Member