

What is an ARNI and Why Should You Care?

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No, ARNI is not a golfer although you may find one or two on what you hope to be your future golf course project. I'm talking about Aquatic Resources of National Importance or as they are fondly called, ARNI's. If you want to get a project permitted in a timely fashion by the U.S. Army Corps of Engineers, you may want to know what exactly an ARNI is and what the process is for resolving a dispute regarding impacts to an ARNI.

In Florida, especially our southwest coast which is under heavy development pressure, we are seeing more and more EPA objection letters commenting on adverse impacts to ARNIs. Similar letters are also being sent by the other sister resource agencies. These letters can end up slowing down the permitting process substantially while the Corps attempts to deal with the various agencies' comments and objections. In addition, we are finding more often than not that the Memorandum of Agreement timeframes for resolving these objections are not being observed. So if you haven't had the pleasure of receiving your first letter invoking the ARNI issue read on as they appear to be on the rise, especially in the heavier permitting regions of the nation.

ARNI's lie at the heart of the August 1992 Memorandum of Agreement (MOA) between the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) which sets out the process and timing for resolving EPA's objections to Corps 404 permitting decisions. The term ARNI is used there for the first time. There are other MOAs between the Corps and its sister resource agencies providing similar procedures and timeframes. Pursuant to the MOA, EPA can comment as to their expectation that unacceptable adverse effects will occur to an ARNI. Basically if the Corps District Engineer decides to issue the permit over EPA's written objections, EPA can request review by the Assistant Secretary of the Army (Civil Works) who can make a higher level decision on the permit.

If the permit is still proposed to be issued at this level, the EPA can take ultimate action to veto the permit decision pursuant to its authority under 404(c). The 404(c) veto is reserved solely to the EPA and is dependent upon the EPA administrator's determination that the discharge "will have unacceptable adverse effects on municipal water supplies, shellfish beds, and fishery areas (including spawning and breeding areas), wildlife, or recreational areas."

So let's get back to our primary question: what then is an ARNI? To a lawyer's dismay there is no definition of an ARNI set forth in either the Clean Water Act (CWA) or the EPA or Corps regulations, or even in the MOA itself. Because there is no definition one has to turn to the permit elevation decision documents and read the discussions of the agencies as to what they considered to be and not to be ARNIs. A close look at these documents reveal a variety of characteristics that make up an ARNI. By way of summary, these include special aquatic

resources which typically provide important, complex functions that benefit plant and wildlife species and their habitats.

The most recent elevation decision document for southwest Florida came out in January 2001 and involved the Naples Reserve project which was elevated by the U.S. Fish and Wildlife Service due to unacceptable adverse impacts to ARNIs. However, in the elevation process and review, the higher level Corps review found that the resources in question were not ARNIs as most of the site had been originally too dry to be jurisdictional and that conversion of the property to agriculture then created artificially inundated areas which had become degraded by invasive exotic vegetation. The Corps also looked at the alternatives analysis and mitigation and found that these were sufficient to protect and increase the high value of the adjacent ecosystems.

A Jan. 24, 2002 Memorandum to the regional administrators from the assistant administrator of EPA further elaborates on the types of resources that can be elevated as ARNIs, comparing them to those cases that would cause resource damages similar in magnitude to cases evaluated under Section 404(c) of the CWA. The Memorandum points out that further discussion of the potential resources of concern under Section 404(c) can be found in the EPA regulations at 40 CFR 230 and 231. These regulations discuss in greater detail Potential Impacts on Special Aquatic Sites and Potential Effects on Human Use Characteristics (Subparts E and F). Subpart F appears particularly helpful in that it describes in more detail the 404(c) categories for veto: municipal and private water supplies, recreational and commercial fisheries, water related recreation and wildlife and recreational areas.

These resources provide only limited guidance as to whether or not your project may involve an ARNI or what can happen if and when an agency proposes to elevate your project due to potential impacts to ARNIs. And that is decided on a case by case basis.