

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF HOME BUILDERS,)

Plaintiff,)

v.)

UNITED STATES ARMY CORPS OF)
ENGINEERS, et al.,)

Defendants)

No.: CV 00-379 (RJL)

NATIONAL STONE, SAND, AND GRAVEL)
ASSOCIATION, et al.,)

Plaintiffs,)

v.)

UNITED STATES ARMY CORPS OF)
ENGINEERS, et al.,)

Defendants)

No.: CV 00-558 (RJL)

NATIONAL FEDERATION OF INDEPENDENT)
BUSINESSES and WAYNE NEWNAM,)

Plaintiffs,)

v.)

UNITED STATES ARMY CORPS OF)
ENGINEERS, et al.,)

Defendants.)

No.: CV 01-404 (RJL)

**PLAINTIFF NATIONAL ASSOCIATION OF HOME BUILDERS'
MEMORANDUM IN OPPOSITION AND REPLY TO
DEFENDANTS' SUPPLEMENTAL MEMORANDUM**

Defendants' response to Plaintiffs' Supplemental Memoranda exemplifies once again the approach that the Corps has taken to the Nationwide Permits throughout the past six years, and demonstrates why the Replacement Permit Rulemaking cannot stand. Despite repeated pleas over the course of this rulemaking to explain the reasoning behind the choices it has made, to justify the layers of conditions and restrictions it has piled upon these permits, and, above all, to define the elusive "minimal effects" standard that has supposedly guided its every decision, the Corps' response has been and continues to be dismissive.¹ As the Corps would have it, Nationwide Permits are creatures of administrative grace, and the public should be grateful for whatever the Corps deigns to issue.

Administrative agencies are not permitted to operate in this manner. Even if the Nationwide Permits are wholly discretionary, the Corps cannot administer the program in an arbitrary or unreasoned way. *See, e.g., Nathan Katz Realty v. NLRB*, 251 F.3d 981, 994 (D.C. Cir. 2001). And without a rational justification for the choices the Corps has made, this Court cannot endorse the Corps' ultimate result. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). NAHB therefore does not ask this Court to "substitute its judgment" for the Corps or to "draw the line" in a place of its own making, as Defendants claim. *See Defs. Supp. Mem. at 5, 6.* NAHB merely asks this Court to require the Corps to offer some sort of reasoned justification for its decisions, rather than operating by fiat.

If a reasoned basis existed for any of the conditions and restrictions to which the Corps continues to cling, one would expect the Corps to have said so somewhere in the hundreds of

¹ To little avail, NAHB has submitted comments at every stage of this rulemaking imploring the Corps to provide some basis for the conditions and restrictions it has imposed on these NWP's, and identifying those elements of the NWP's that are arbitrary and otherwise illegal. *See AR.PRT6-3667; AR.PRT4-1709; AR.PRT2-2780; Supp. AR Doc. 333.*

Federal Register pages it has published or in just one of its filings in this case. It never has. Instead, we are simply told that in the Corps' "considered view . . . the permits strike an appropriate balance, allowing the agency to efficiently authorize those activities — but only those activities — that will cause no more than 'minimal' adverse environmental effects, individually and cumulatively, as allowed by law." Defs. Supp. Mem. at 2. How the Corps arrived at its "considered view" we are left to guess.

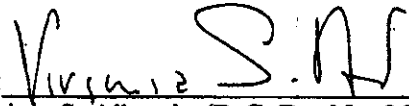
This is apparently of no consequence to the Corps — which goes so far as to scold Plaintiffs for being dissatisfied with whatever small crumbs the Corps chose to throw them in its latest round of rulemaking. *See* Defs. Supp. Mem. at 3. That the Corps finally decided, after years of dismissing Plaintiffs' comments and of defending its restrictions in this Court, that some were so arbitrary or unnecessary that they should finally be eliminated is of little moment when the bulk of the arbitrary, illegal, and unreasoned restrictions remain. Moreover, the crumbs of relief are small indeed. Despite its claims of magnanimity, the Corps can point to only one issue raised by NAHB that the new rulemaking has addressed: the arbitrary public/private linear transportation crossing distinction. NAHB acknowledged as much in its Supplemental Memorandum. *See* Defs. Supp. Mem. at 9. Otherwise, NAHB's claims remain unaffected.

Because the latest rulemaking has not affected NAHB's claims — as all parties appear to acknowledge — the Supplemental Memoranda have not required substantive argument beyond that contained in the parties' original briefs.² Rather than respond point-and-counterpoint to

² The federal Defendants spend much of their overlength brief raising new objections to Plaintiff National Stone, Sand, and Gravel Association's longstanding NEPA claim, including a new challenge to standing. Defendants have never contested NAHB's standing to raise its claims in this case — which in any event is self-evident from the record. *See, e.g.*, Comments of NAHB, cited *supra* at note 1.

Defendants' rehashed responses with its own original arguments and rebuttals, NAHB respectfully relies upon and incorporates its filings to date. For the reasons presented in those Memoranda, the Replacement Permit Rule is arbitrary, unreasoned, and contrary to law. Furthermore, the rule is final and NAHB's challenge is ripe. *See, e.g., General Electric Co. v. EPA*, 290 F.3d 377, 380-81 (D.C. Cir. May 17, 2002) (challenge to agency guidance for applicants seeking approval of alternative sampling methods was final and ripe for review, because it "binds both applicants and the Agency with the force of law"). NAHB respectfully requests that this Court grant its Motion for Summary Judgment and enter an appropriate order restoring the parties to the *status quo ante*.

Respectfully Submitted,

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