

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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NATIONAL ASSOC. OF HOME BUILDERS,

Plaintiff,

v.

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

Defendants.

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) CIVIL ACTION NO.  
) CV00-379 (TPJ)  
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NAT'L STONE, SAND, & GRAVEL ASS'N,

Plaintiff,

v.

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

Defendants.

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) CIVIL ACTION NO.  
) CV 00-558 (TPJ)  
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NATIONAL FEDERATION OF INDEPENDENT  
BUSINESS, *et al.*,

Plaintiffs,

v.

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

Defendants.

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) CIVIL ACTION NO.  
) CV 01-404 (TPJ)  
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**PLAINTIFFS NFIB'S AND NEWNAM'S REPLY TO DEFENDANTS'S OPPOSITION TO  
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND OPPOSITION  
TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT**

## I. INTRODUCTION

Plaintiffs National Federation of Independent Business (“NFIB”) and Wayne Newnam (“Mr. Newnam”) (collectively, “Plaintiffs”) respectfully submit their reply to Defendants’ Opposition to Plaintiffs’ Motion for Summary Judgment, and their Opposition to Defendants’ Cross-Motion for Summary Judgment.

In their summary judgment motion, Plaintiffs demonstrated that Defendants violated the Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq.*, as amended (the “RFA”), by failing to perform required regulatory flexibility analyses in connection with their promulgation and implementation of the “Final Notice of Issuance and Modification of Nationwide Permits,” 65 Fed. Reg. 12818 (March 9, 2000) (the “Final Rule”). Specifically, Plaintiffs demonstrated that the United States Army Corps of Engineers (the “Corps”) peremptorily dismissed its statutorily mandated obligations to evaluate and consider moderating the potential impact of the Final Rule on small entities when, in a one sentence explanation, it blithely announced, “[w]e are not required to provide an initial regulatory flexibility analysis because we proposed to issue new and modified NWP’s, not change our regulations.” 65 Fed. Reg. at 12825. As Plaintiffs demonstrated, the Corps’ explanation for not performing the requisite regulatory flexibility analyses is not only erroneous, but it also misperceives the RFA’s trigger mechanism requiring an agency to determine whether its proposed rule has a significant economic impact on a substantial number of small entities, and, if so, to conduct an initial regulatory flexibility analysis (“IRFA”) and a final regulatory flexibility analysis (“FRFA”).

Congress set forth the RFA’s trigger mechanism in a consistent way throughout the RFA. Under 5 U.S.C. § 603(a), an agency must perform an IRFA whenever it “is required by section 553 of this title, or any other law, to publish general notice of proposed rulemaking for

any proposed rule.” Similarly, 5 U.S.C. § 604(a) provides that the agency must perform a FRFA whenever it “promulgates a final rule under section 553 of this title, after being required by that section or any other law to publish a general notice of proposed rulemaking.” The RFA defines a “rule” as “any rule for which the agency publishes a general notice of proposed rulemaking pursuant to section 553(b) of this title, or any other law.” 5 U.S.C. § 601(2).

In this case, the Corps did not perform either an IRFA or a FRFA in connection with the Final Rule’s promulgation. The Corps also failed to consider the anterior RFA analysis, whether, pursuant to 5 U.S.C. § 605(b), the Final Rule “will . . . have a significant economic impact on a substantial number of small entities.” If the agency certifies under Section 605(b) the requisite impact does not exist, it need not prepare an IRFA or FRFA.

The RFA’s judicial review provisions expressly provide that both an agency’s compliance with section 604(a) (the FRFA requirement) and with section 605(b) (the “significant economic impact” determination) are subject to judicial review. *See* 5 U.S.C. § 611(a)(1)&(2). In addition, courts have reviewed an agency’s compliance with Section 603(a)’s IRFA requirements via section 604(a). *See Southern Offshore Fishing Ass’n v. Daley*, 995 F.Supp. 1411, 1436 (M.D. Fla. 1998) (“NMFS could not possibly have complied with § 604 by summarizing and considering comments on an IRFA that NMFS never prepared.”)

By focusing only on whether the Final Rule constitutes a change in its “regulations,” the Corps misinterpreted its obligations under the RFA. The Corps should have, in accordance with the RFA’s explicit requirements, assessed first whether Section 553 or any other law, namely the Clean Water Act, 33 U.S.C. § 1251 *et. seq.* (“CWA”), obligated it to publish a general notice of proposed rulemaking in connection with its promulgation of the Final Rule.

The Corps also should have determined whether it in fact was promulgating a final rule under Section 553, which would also trigger the RFA's requirements.

Indeed, had the Corps employed the requisite analysis in this case, it would have found that it was obligated to publish general notice of proposed rulemaking and, hence, comply with the RFA. The Final Rule is a "a statement of general applicability and legal effect." It added five new nationwide permits (NWP) to the Corps' NWP program, modified six other NWPs, added two new NWP general conditions, and modified nine existing NWP conditions. Moreover, it was implemented pursuant to an express delegation of legislative authority. Further, by imposing new conditions on obtaining an NWP, the Final Rule creates new obligations and duties on the regulated community and the Corps. It also helps fill in a legislative gap in Section 404(e) of the CWA, and it effectively amends a prior legislative rule, namely, the several previous Corps publications construing Section 404(e)'s "minimal adverse effects" standard. As such, the Final Rule is substantive or legislative rule that carries "the force of law." Therefore, the Final Rule represents a "rule" under the APA and the RFA. See Plaintiffs NFIB's and Newnam's Memorandum of Points and Authorities Supporting their Motion for Summary Judgment ("Plaintiffs Memo."), at 23-35.

Faced with these compelling facts, the Defendants have scrambled to recast their justification for not performing the required RFA analyses. In their opposition and cross-motion for summary judgment, Defendants completely ignore their simple one-sentence explanation set forth in the Final Rule. Indeed, conspicuously absent from Defendant's opposition is any argument referencing the Corps' contention that an IRFA was not performed because the Corps did not "change its regulations." See 65 Fed. Reg. at 12825. Instead, Defendants now propose five new justifications, set out in just six pages of their brief, that are

predicated on a tortured reading of the RFA, as well as mischaracterizations of Plaintiffs' positions. Moreover, in their opposition, Defendants completely ignore the D.C. Circuit's recent ruling in *Appalachian Power Co. v. EPA*, 203 F.3d 1015 (D.C. Cir. 2000), finding that, regardless of how an agency labels its action, if it changes or adds compliance duties and obligations on the regulated public or adds compliance costs, the action implicates the APA's notice and comment requirements, *see* 203 F.3d at 1026-27, plus "the various procedural requirements of the Small Business Regulatory Enforcement Fairness Act, 5 U.S.C. §§ 601-612." *Id.* at 1028 n.27.

Finally, in their opposition, Defendants fail to address that, in addition to section 553 of the APA, the CWA also required the Corps to publish general notice of proposed rulemaking in connection with the Final Rule's promulgation. As Plaintiffs explained above and demonstrated in their summary judgment memorandum, *see* Plaintiffs' Memo. at 36-38, the RFA applies when Section 553(b) of the APA or "any other law" requires an agency to publish a general notice of proposed rulemaking for any proposed or final rule. Plaintiffs showed that, in this case, the process employed by the Corps in accordance with CWA section 1344(e) and its implementing regulations mirrored the APA's rulemaking requirements. In fact, the Corps acknowledged this fact in the Final Rule, when it stated "[our] notice and comment process [under the CWA] is virtually the same as the APA process," *see* 65 Fed. Reg. at 12825. As a result, the Corps was required to comply with the RFA because the CWA also obligated it to publish general notice of proposed rulemaking.

Defendants' five new contentions that attempt to justify why the Corps did not perform any regulatory flexibility analyses in connection with the Final Rule's promulgation are merely impermissible *post hoc* (indeed, post-record) rationalizations designed to mask their initial

misperception of the RFA's triggering requirements. As such, this Court should refuse to consider them. See *MCI Telecommunications Corp. v. FCC*, 842 F. 2d, 1296, 1300 (D.C. Cir. 1988) ("*post hoc* rationalization advanced to remedy inadequacies in the agency's record or its explanation are bootless") (quoting *City of Brookings Mun. Tel. Co. v. FCC*, 822 F.2d 1153, 1165 (D.C. Cir. 1987); see also *Marshall v. Lansing*, 839 F.2d 933, 943 (3d Cir. 1988) ("when reviewing an administrative agency's decision, a court is generally not seeking some hypothetical rational support for the agency's action. A court must review the agency's actual on-the-record reasoning process.")

To the extent the Court elects to review Defendants' five *post hoc* rationalizations, Plaintiff address them in order below. As Plaintiffs show, these new claims are erroneous and should be rejected by the Court.

## II. ARGUMENT

### A. Standard of Review

Initially, Defendants misstate the appropriate standard of review to be applied to Plaintiffs NFIB's and Mr. Newnam's RFA-based claims. Defendants contend that "the Corps' factual determinations are entitled to substantial deference," see Defendants' Opp. at 21, because "Plaintiffs' claims are brought under the Administrative Procedure Act ("APA"), which specifies that agency action may be overturned only where it is found to be 'arbitrary and capricious.'" Defendants' Memorandum of Points and Authorities in Support of their Cross-Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment ("Defendants' Opp.") at 19.

Contrary to Defendants' assertions, Plaintiffs NFIB and Wayne Newnam brought their claims pursuant to the RFA, not the APA. See Plaintiff's Complaint at 2 and 16-17; Plaintiffs'

Memo. at 2, 9-12, 15-16. Moreover, as Plaintiffs previously explained, the Corps' interpretation of the RFA's legal requirements is not entitled to deference because construction of the RFA and its legal requirements is "outside [the Corps] particular expertise." The Corps is not entrusted with the authority to administer the RFA. See Plaintiffs' Memo. at 16-18. As such, the Corps is not entitled to the deference it seeks as to Plaintiffs NFIB's and Mr. Newnam's claims.<sup>1</sup>

**B. The Final Rule Constitutes Final Agency Action**

Defendants first contend that the Final Rule does not constitute "final agency action" under the APA and, therefore, is not reviewable under either the APA or the RFA. See Defendants' Opp., at 23-24, 69.

Defendants' contention is meritless. The Final Rule satisfies applicable finality standards. The RFA's judicial review provisions provide in relevant part:

For any rules subject to this chapter, a small entity that is adversely affected or aggrieved by **final agency action** is entitled to judicial review of agency compliance with the requirements of sections 601, 604, 605(b), 608(b), and 610 in accordance with [the APA].

5 U.S.C. §611(a)(1) (emphasis added).

The RFA does not specifically define "final agency action;" however, Congress employed the same term in the APA, at 5 U.S.C. § 704, and it has a settled judicial construction, determined through application of a two-part test. "The action must first mark the 'consummation' of the decisionmaking process, and second must determine 'rights or

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<sup>1</sup> The issues of what the RFA means and whether it applies in a given case are distinct from whether the Corps performed an adequate Section 605(b) economic impact analysis or Section 604 FRFA, the latter two of which would, in general, appropriately be reviewed under the arbitrary and capricious standard. See *Southern Offshore Fishing Ass'n v. Daley*, 995 F. Supp. 1411, 1433-34 (M.D. Fla. 1998).

obligations' or cause 'legal obligations.'" See, e.g., *Arizona v. Shalala*, 121 F.Supp.2d 40, 48 (D.D.C. 2000) (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78, (1997)). This standard also has been applied in an RFA case. See *National Propane Gas Assoc. v. Dep't of Transportation*, 43 F.Supp.2d 665, 675 (N.D. Tex. 1999) (finding the agency actions were final under the RFA, in that they "are definitive statements of defendants' position and have the status of law").

The Final Rule satisfies both prongs of the finality test. First, the Army Corps' implementation of the Final Rule represents the "consummation" of its intensive two-year decision-making process to overhaul its NWP program and replace NWP 26. The Supreme Court recently discussed the considerations that evidence the consummation of an agency's decision-making process in *Whitman v. American Trucking Ass'n.*, 531 U.S. 457, 121 S.Ct. 903, 149 L.Ed.2d (2001). In *American Trucking*, the plaintiffs challenged the EPA's implementation policy for revised ozone National Ambient Air Quality Standards (NAAQS). EPA argued that the implementation policy was not final action. The Court concluded, however, that the EPA's implementation policy marked consummation of EPA's decision-making process in that it represented the "last word on the matter" which began with "the initial 1996 proposal, continued with the reception of public comments and concluded when the agency in light of [these comments] . . . adopted the interpretation at issue here." 121 S. Ct. at 915.

As in *American Trucking*, the Corps' implementation of the Final Rule constitutes the Corps' "last word" on its new changes to its NWP program. First, the Final Rule is explicitly labeled as final. See "Final Notice of Issuance and Modification of Nationwide Permits," 65 Fed. Reg. 12818 (March 9, 2000). Moreover, as in *American Trucking*, the Final Rule marks

the culmination of the Corps' years-long regulatory development process to replace the NWP 26 program. In brief, on July 1, 1998, the Corps initially proposed to replace NWP 26 (which initially was to expire on December 13, 1998), and revamp its NWP program. The Final Rule's publication on March 9, 2000, followed several earlier drafts and supplementary proposed rules. *See, e.g.*, 63 Fed. Reg. 36040 (July 1, 1998); 63 Fed. Reg. 55095 (October 14, 1998); and 64 Fed. Reg. 39252 (July 21, 1999). In addition, the Corps repeatedly solicited comments on its proposals, while also repeatedly extending NWP 26's expiration date from December 13, 1998, to, ultimately, June 5, 2000. *See* 63 Fed. Reg. 36040 (July 1, 1998); 63 Fed. Reg. 55095 (October 14, 1998); 64 Fed. Reg. 39252 (July 21, 1999); and 64 Fed. Reg. 48386 (September 3, 1999).<sup>2</sup>

Furthermore, the Final Rule is not "of a merely tentative or interlocutory nature." *Bennett*, 520 U.S. at 177-78. Instead, it represents "a definitive pronouncement" by the Corps, *see Arizona*, 121 F.Supp.2d at 48, indicating that the agency "has completed its decisionmaking process." *Id.* (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992)). It commands the application of new and modified NWPs and NWP terms and conditions by the Corps district and division engineers in reviewing NWP applications, including reducing the threshold acreage impact limit to one-half acre of waters and mandating preconstruction district engineer review of all potential discharges in excess of one-tenth acre of waters. *See* 65 Fed. Reg. at 12818-12819. Equally salient, prospective permittees and permittees seeking to dredge

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<sup>2</sup> Nor, by any means, is this list of Federal Register public notices and public comment solicitations exhaustive. A synopsis of all the Corps' various publications regarding NWP 26 replacement issues is set out in the Final Rule. *See* 65 Fed. Reg. 12818.

and fill within isolated waters and headwaters must obtain and comply with the new NWP's and their terms and conditions.

Defendants, without citing to any legal support, erroneously attempt to equate these Plaintiffs' challenge with a dispute over the approval or denial of a permit application in an individual case. They argue that, "in the permitting context, the relevant 'consummation' of the agency's decision making process comes when a person or entity is allowed or disallowed, as the case may be, to proceed with a project." See Defendants' Opp. at 23-24.<sup>3</sup>

Defendants, however, mischaracterize Plaintiffs' claims. Plaintiffs do not challenge a specific permit issued or disallowed by the Corps. Instead, Plaintiffs are contesting the Corps' failure to comply with the RFA in consummating its overhaul of the entire NWP 26 headwaters and isolated waters program through the promulgation and implementation of new and modified NWP's and NWP terms and conditions in the Final Rule.

The D.C. Circuit's decision in *Appalachian Power* confirms Plaintiffs need not wait to bring their challenge until an individual permit action. In *Appalachian Power*, Plaintiffs challenged the EPA's "Guidance Document," which, among other changes, imposed new permit conditions that placed additional monitoring requirements on States in connection with their implementation of their permit programs under the Clean Air Act. The EPA claimed that there were certain aspects of the Guidance Document that were not binding, and therefore, the Guidance Document was not final agency action. 208 F.3d at 1022. The D.C. Circuit

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<sup>3</sup> The Intervenor's make a similar argument in their brief. According to Intervenor's, "the issuance of the Replacement Permits Package was not a final denial of authorization to discharge." Intervenor-Defendants' Cross-Motion for Summary Judgment ("Intervenor's Memo.") at 39.

rejected the EPA's argument. It found the Guidance Document was binding and marked the consummation of the EPA's decision-making process. The D.C. Circuit concluded the Guidance Document represented final agency action because it "reflect[ed] a settled agency position which has legal consequences both for State agencies administering their permit programs and for companies like those represented by petitioners who **must obtain Title V permits in order to continue operating.**" *Id.* at 1023 (emphasis added). The case was decided prior to petitioners' obtaining permits in an individual instance.

Also, pertinent to the Corps' argument referenced directly above, the court observed, "whatever EPA may think of its Guidance generally, the elements of the Guidance petitioners challenge consist of the agency's settled position, a position it plans to follow in reviewing State-issued permits, a position it will insist State and local authorities comply with **in setting the terms and conditions of permits issued to petitioners, a position EPA officials in the field are bound to apply.**" *Id.* at 1022 (emphasis added). Accordingly, and contrary to the Corps' and Intervenors' argument, the *Appalachian Power* petitioners were not required to await individual permit proceedings to make their claims about adjustments to the Clean Air Act regulatory regime.

Finally, the court employed the same finality standard under the RFA. It stated that the EPA, unless it found no significant economic impact under the RFA, 5 U.S.C. § 605(b), "must also comply with the various procedural requirements of the Small Business Regulatory Enforcement Fairness Act." *Id.* at 1028 n. 27.<sup>4</sup>

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<sup>4</sup> Significantly, in their 90-page brief, Defendants elected not to discuss, refute, or even just distinguish the applicability of *Appalachian Power* to the present case. Defendants should not be able to pretend this Circuit did not recently criticize and invalidate agency efforts to re-

Just as in *Appalachian Power*, the Corps' Final Rule constitutes its settled position as to the new and modified NWP's and NWP terms and conditions that Army Corps regional officials and district engineers will apply in the field to headwaters and isolated waters NWP permit applicants and permittees. Thus, the Final Rule does, in fact, mark the consummation of the Corps' decision-making process about what the new and modified NWP's and their terms and conditions are to be. It therefore satisfies the first prong of *Bennett's* finality test.

The Final Rule also satisfies the second element of *Bennett's* finality test in that it creates "legal obligations" and/or "legal consequences." In *Bennett*, the Supreme Court considered the legal obligations or consequences created by the "Biological Opinion and accompanying Incidental Take Statement" issued by the Bureau of Reclamation and implemented by the U.S. Fish and Wildlife Service. The BiOp and Incidental Take Statement imposed new water level restrictions on certain bodies of water in Oregon that reduced the quantity of available water plaintiffs could use for irrigation purposes. According to the Court, "the Biological Opinion's Incidental Take Statement constitutes a permit authorizing the action agency to 'take' the endangered or threatened species so long as it respects the Service's 'terms and conditions.'" 520 U.S. at 170. The Court found that these new restrictions had legal consequences and/or created legal obligations because they "alter[ed] the legal regime to which the agency action is subject, authorizing it [the Bureau] to take the endangered species if (but only if) it complies with prescribed conditions." *Id.* at 178.

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characterize and re-package their actions to try to avoid applicable Title 5 rulemaking requirements.

Similarly, in *Appalachian Power*, the D.C. Circuit found that the EPA's Guidance Document created "obligations on the part of State regulators and those they regulate" by "requiring State permitting authorities to search for deficiencies in existing monitoring regulations and **replace them through the terms and conditions of a permit.**" 208 F.3d at 1023 (emphasis added).

As in *Bennett* and *Appalachian Power*, the Final Rule creates new obligations by altering the legal regime under which the district engineers and NWP applicants and permittees must conduct and review headwaters and isolated waters dredging and filling operations under the five new NWPs, six modified NWPs, nine modified NWP general conditions, and two new NWP general conditions. The Defendants explicitly state they expect these changes to the NWP legal regime to have the tangible effects of "substantially increasing protection of the aquatic environment, while efficiently authorizing activities with minimal adverse effects on the aquatic environment." 65 Fed. Reg. at 12818.

These high-sounding words will, moreover, have tangible legal consequences for prospective permittees. For instance, an applicant for a Clean Water Act-based headwaters and isolated waters dredge and fill permit must now follow a different legal process to obtain authority to dredge or fill between one-half and three acres. Before the culmination of the instant rulemaking process, a prospective permittee could have used the expedited NWP process for activities affecting between one-half and three acres; since the new rule became effective, it cannot. *See, e.g., Arizona*, 121 F. Supp. 2d at 48 (concluding that the Department of Health and Human Services action transmittal had legal consequences because it had "immediate consequences on those subject" to it) (*quoting International Union, United Auto.*,

*Aerospace & Agric. Implement Workers of America v. Brock*, 783 F. 2d 237, 239 (D.C. Cir. 1986)).

Also, prior to the Final Rule, a prospective permittee could have availed itself of the pre-construction notification process ("PCN") when it planned to discharge dredged or fill materials resulting in the loss of less than one-third of an acre; under the new rule, a prospective permittee may only employ the PCN process if one-tenth of an acre of dredged or fill material is to be involved. The Corps explained the goal of this change in legal requirement was "to ensure that any activity that potentially may have more than minimal adverse effects on the aquatic environment is reviewed by a district engineer on a case-by-case basis." 65 Fed. Reg. at 12819. In this respect, the Final Rule not only imposes new requirements on the public, but creates new obligations for Corps district engineers who review the NWP applications. *See Appalachian Power*, 208 F. 3d at 1023 (finding the EPA's Guidance Document, which "commands," "requires," "orders," and "dictates," to have created legal obligations, in that it obligated "permitting authorities to search for deficiencies in existing monitoring regulations and replace them through terms and conditions of a permit").

Thus, the Final Rule satisfies both prongs of *Bennett's* finality test. It marks the consummation of the Corps' two year process to replace NWP 26, while also creating new obligations for the Corps' field representatives and those that they regulate. The Final Rule, therefore, constitutes final agency action.

**C. Plaintiffs NFIB and Wayne Newnam are Adversely Affected or Aggrieved by the Final Rule**

The Defendants' second meritless argument is that, "Plaintiffs are not 'adversely affected or aggrieved' by the issuance of permits that allow them, under appropriate

circumstances, to avoid the necessity of going through the individual permit process.” Def.’s Opp., at 69.<sup>5</sup> According to Defendants, “Plaintiffs cannot be considered aggrieved by a purely discretionary agency action that provides relief from regulatory burdens rather than imposes new requirements.” Defendants’ Opp., at 70.

As an initial matter, Defendants’ actions are not “purely discretionary.” Congress specifically commanded the development of the NWP regime when it passed CWA Section 404(e) in 1977.

Further, Defendants’ contention that Plaintiffs are not adversely affected or aggrieved misses the point<sup>6</sup> of this RFA-based challenge: Plaintiffs are aggrieved because Defendants

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<sup>5</sup> Once again, Intervenors raise a similar argument. Intervenors contend that “the new and modified permits ‘themselves impose no regulations on small entities.’” See Interv. Memo., at 39 (quoting the Government’s argument in *American Trucking Ass’n v. Browner*, 175 F.3d 1027, 1046 (D.C. Cir.1999)). This construction is too facile by half. Unlike the revised NAAQS at issue in *American Trucking Ass’n*, which “a state may, if it chooses, avoid imposing upon small entities,” 175 F. 3d at 1044, the new rulemaking package in this case changes the regulatory regime applicable to prospective CWA permittees by directly imposing new mandatory requirements (*i.e.*, conditions) for small entities seeking to obtain an NWP. The Final Rule has the effect, therefore, of limiting the situations in which prospective permittees are now eligible for expedited Corps review under the nationwide permit process and by imposing additional conditions on the activity they can conduct under such a nationwide permit, to the extent they can still qualify.

<sup>6</sup> Defendants’ own statements in the record also belie, as a factual matter, their assertion that the Final Rule does not impose new requirements on Plaintiffs and the rest of the regulated community. Indeed, the Corps expressly states in the Final Rule that the purpose of the new NWP general conditions is to “increase protection of designated critical resource waters and waters of the United States within the 100-year floodplains.” See 65 Fed. Reg. at 12818. As explained above, the Final Rule has reduced the acreage limit from three acres to one-half and dropped the district engineer PCN standard from one-third acre to one-tenth acre. These are indisputably new regulatory requirements. Nor can the Corps plausibly contend the Final Rule provides relief from regulatory burdens. The Corps explicitly states in the Final Rule that:

All of these substantial improvements will increase costs to applicants to some degree. . . . Based upon a report prepared by the Corps to Institute for Water Resources (IWR) in response to the Corps FY 2000 Appropriations Act, the

failed to comply with the RFA. In an analogous context, the APA employs the “adversely affected or aggrieved” standard in its provisions according standing to qualifying plaintiffs. Specifically, the APA provides that, “A person suffering legal wrong because of an agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.” 5 U.S.C. § 702.

A plaintiff bringing an action under the APA is “adversely affected and aggrieved,” and thus has standing to bring an APA claim, if the plaintiff has alleged an Article III “‘case’ or ‘controversy’” and has “an interest sought to be protected [that] . . . is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.” *Ass’n of Data Processing Service Orgs., Inc. v. Camp*, 397 U.S. 150, 153, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970). Regarding the “zone of interests” inquiry, the D.C. Circuit has explained that, “we have viewed parties as showing a protected interest if either they were intended by Congress as ‘beneficiaries’ of the statute or we could infer that Congress intended them as a ‘suitable challenger.’” *Fed. for Immigration Reform, Inc. v. Reno*, 93 F.3d 897, 900 (D.C. Cir. 1996) (quoting *Hazardous Treatment Council v. EPA*, 861 F.2d 277, 283 (D.C. Cir. 1988)).

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(“continued”)

changes to the NWP program announced today will increase direct costs for permit applicants by about \$20 million per year.

See 65 Fed. Reg. at 12819. The Corps also fails to mention in its argument the increased indirect compliance costs that the regulated public will now incur, including “the opportunity costs that result from increase in permit processing times,” which, based upon a previous Corps study, showed an annual increase in opportunity costs. See 65 Fed. Reg. at 12820.

Analogizing the APA's "zone of interests" test, Mr. Newnam's small business, as are the small businesses represented in this action by Plaintiff NFIB, are within the "zone of interests" that the RFA seeks to protect; these small businesses are the direct and intended "beneficiar[ies]" of the RFA. Congress specifically designed and intended the RFA to require an agency, such as the Defendant Army Corps, to ensure that the interests of these small businesses are not only carefully considered during significant rulemaking proceedings, but that they are considered pursuant to a detailed, carefully-conceived statutory protocol. *See* "Discussion of Major Issues and a Section-by-Section Analysis of Substitute for S. 299," 126 Cong. Rec. at 21452, 21453 (Aug. 6, 1980), attached hereto as Exhibit 1.<sup>7</sup>

These Plaintiffs are also "suitable challengers." The Final Rule will cause Mr. Newnam and other similarly situated small businesses represented by Plaintiff NFIB to incur higher costs and construction delays that they are ill-equipped to absorb when they seek to undertake activities formerly permitted under NWP 26. *See, e.g.*, Newnam Dec. ¶ 5 (attached as Exhibit 1 to Plaintiffs' Memo.). The RFA program is designed to ascertain if such regulatory burdens can be modified or better configured to accommodate the special needs and circumstances of these very small businesses.

The D.C. Circuit has held that a small business suing under the APA to require the FCC to comply with that portion of the agency's organic statute, 49 U.S.C. § 309(j), that was designed to promote opportunities for small businesses was within the relevant zone of interests and had standing to challenge the FCC's compliance with these small business provisions.

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<sup>7</sup> Plaintiffs identify this legislative history document at page 13 n.7 of their original Memorandum. Plaintiffs include here a citation to the permanent rather than the temporary, (daily edition) Congressional Record, which they had previously cited.

*Omnipoint Corp. v. F.C.C.*, 78 F.3d 620, 628 (D.C. Cir. 1996). *Omnipoint's* resolution of the "zone of interests" issue is fully analogous to the case at bar.

Turning to Article III standing, the D.C. Circuit has explained that "a plaintiff may secure constitutional standing if he can 'show injury in fact that is fairly traceable to the defendant's action and is redressable by the relief requested'" *Omnipoint*, 78 F.3d at 628 (quoting *Animal Legal Defense Fund, Inc. v. Espy*, 23 F.3d 496, 498 (D.C. Cir. 1994)). These Plaintiffs meet the Article III test.

Plaintiffs have suffered an injury in fact. An injury in fact is one that is (a) concrete and particularized, and (b) actual or imminent, not conjectural and hypothetical. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Plaintiffs have suffered a "concrete and particularized injury" by Defendants' failure to comply with the RFA. Defendants' violation of Plaintiffs' RFA-based "procedural rights" represents an injury in fact because "the [RFA] procedures in question are designed to protect some threatened concrete interest of theirs that is the ultimate basis of their standing." *Defenders of Wildlife*, 504 U.S. at 573 n.8. As Plaintiffs explained in detail in their opening brief, the RFA provides specific salutary benefits to small entities, including Mr. Newnam's, by requiring an agency to specifically consider the interests and needs of small businesses in connection with the agency's development and promulgation of a rule. *See generally* 5 U.S.C. §§ 603-605.

Plaintiffs' injuries are also "imminent." The injury in fact "imminence" prong is designed to ensure that "the alleged injury is not too speculative for Article III purposes – that the injury is 'certainly impending,'" *Defenders of Wildlife*, 504 U.S. at 564 n.2 (emphasis in original) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)), and that the court "does not render an advisory opinion in a 'case in which no injury would have occurred at all.'"

*Animal Legal Defense Fund*, 23 F.3d at 500 (quoting *Defenders of Wildlife*, 504 U.S. at 564 n.2). Plaintiffs' claims are not speculative – they claim Defendants should have complied with the RFA when they developed and promulgated the Final Rule, which Defendants did not do. Nor have Plaintiffs requested an advisory opinion; they seek an injunction to suspend the Final Rule (and return to the *status quo ante*) as to small entities.

Plaintiffs' injury in fact from Defendants' failure to comply with the RFA is "fairly traceable" to the Defendants' actions in failing to comply with the RFA. In fact, it is directly traceable to such failure.

Finally, Plaintiffs' injury is redressable. Plaintiffs have asked the Court to order Defendants to suspend applicability of the Final Rule as to small entities and enforce the pre-existing NWP 26 regime as to small entities, while Defendants re-open the rulemaking and comply with the RFA. In fact, the RFA specifically enumerates suspension of a rule's applicability as a remedy for violation of that statute. 5 U.S.C. § 611(a)(4)(A) & (B). See, e.g., *Northwest Mining Ass'n v. Babbitt*, 5 F. Supp.2d 9, 15-16 (D.D.C. 1998); *Southern Offshore Fishing Ass'n v. Daley*, 55 F. Supp.2d 1336, 1346-47 (M.D. Fla. 1999) (both suspending regulations for failure to comply with, *inter alia*, the RFA).<sup>8</sup>

**D. The RFA's FRFA Requirement Under 5 U.S.C. § 604 Applies to the Corps' Issuance of NWP's**

Defendants also assert that RFA's FRFA requirement, set forth at 5 U.S.C. § 604, does not apply to the Corps' issuance of NWPs. See Defendants' Opp. at 70. According to Defendants, § 604(a) requires a FRFA "[w]hen an agency promulgates a final rule under

<sup>8</sup> The Court's order in *Southern Offshore Fishing Ass'n* subsequently was vacated upon settlement by the parties. See *Southern Offshore Fishing Ass'n v. Mineta*, 2000 WL 33171005 (M.D. Fla. 2000).

section 553 of this title, after being required by that section or any other law to publish a general notice of proposed rulemaking.” *Id.* (emphasis in Defendants’ Opp.). Defendants contend that the Corps was not required to perform a FRFA because, “the issuance of the nationwide permits was not undertaken pursuant to 5 U.S.C. § 553 (the rulemaking provision of the APA), but rather pursuant to section 404(e)(2) of the Clean Water Act, 33 U.S.C. § 1344(e)(1). *Id.* at 70-71 (emphasis in Defendants’ Opp.).

Defendant’s argument does not withstand scrutiny. It completely misperceives the triggering requirements for conducting a FRFA under Section 604(a) and would create a non-sensical result. It is based on a sleight of hand that seeks to equate the term “under,” as used in 5 U.S.C. § 604(a), with “pursuant to” as used at pages 70-71 of Defendants’ Opposition Memorandum. As we have demonstrated, a final rule is “promulgated under section 553 of this title. . . .,” as that term is used in 5 U.S.C. § 604(a), when an agency conducts a rulemaking in accordance with Section 553’s general rulemaking requirements, either because the agency opts to undertake satisfaction of the Section 553 requirements or is required by statute (the APA or some other law) to satisfy the Section 553 requirements. *See* Plaintiffs’ Memo. at 19-20.

Defendants’ reading of the statute would create a non-sensical result. It would carve out an exception to part--and only part--of the RFA for any rule that obtains its authority for promulgation from other than 5 U.S.C. § 553(b). Such a result would be incongruous in at least two important respects. First, under the Government’s reading, a subset of rules would be excepted from the requirement for a FRFA, but would be subject to every other provision of the RFA: Such an agency action would be subject to the definition of “rule” in 5 U.S.C. § 601(2); such an agency action would be subject to the requirements set forth at 5 U.S.C. §

605(b)<sup>9</sup> that the agency determine whether the rule had a “significant economic impact on a substantial number of small entities;” such a rule would require the agency to prepare an IRFA under 5 U.S.C. § 603, to publish the IRFA, and, finally, to subject it to notice and comment. Any such agency action would be subject to each of these requirements because the other provisions of the RFA do not contain the language upon which Defendant relies to make its argument. Under Defendant’s mistaken argument, after all of these proceedings, for a particular subset of rules promulgated by an agency under authority other than 5 U.S.C. § 553, an agency would, incongruously, not be required, to sum the RFA process up with a FRFA. This result makes no sense.

Nor, moreover, does the RFA’s legislative history identify any such exception to the FRFA requirement that the Corps posits here. The Senate’s RFA legislative history describes the triggering requirements for a FRFA under § 604(a), as follows:

Section 604(a) requires an agency to prepare a final regulatory flexibility analysis when it publishes a final rule which was subject to a legal requirement to publish a general notice of proposed rulemaking.

*See Senate Description of Major RFA Issues*, 126 Cong. Rec. at 21459 (attached hereto as Exhibit 1).

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<sup>9</sup> Defendant’s argument would not, in any event, provide a defense to the Corps’ failure to ascertain whether its proposed rule had a “significant economic impact on a substantial number of small entities” under Section 605(b). SBREFA’s judicial review provisions subject an agency’s compliance (or, in this case, non-compliance) with Section 605(b) to judicial review. *See* 5 U.S.C. § 611(a)(1)-(2). Plaintiffs allege that Defendant failed to prepare any of the required RFA analyses, including the threshold Section 605(b) impacts analysis. Complt., ¶ 82. Required analysis include those set forth at 5 U.S.C. §§ 603, 604, and 605(b). *See id.* at ¶¶ 70, 73-75. Courts have recognized the critical importance of the Section 605(b) economic impact analysis. *See Southern Offshore Fishing Ass’n v. Daley*, 995 F. Supp. 1411, 1436 (M.D. Fla. 1998); *North Carolina Fishing Ass’n, Inc. v. Daley*, 16 F. Supp. 2d 647, 653 (E.D. Va. 1997) & 27 F. Supp. 2d 650 (E.D. Va. 1998).

Consistent with the legislative history, a court in this district recently explained, “when an agency promulgates a final rule, after being required either by the APA or another law to publish a general notice of proposed rulemaking, it must also prepare a final regulatory flexibility analysis (FRFA).” *National Ass’n for Home Care v. Shalala*, 134 F.Supp.2d 161, 163 (D.D.C. 2001).

In fact, the only potential situation the legislative history identifies where an agency would not prepare both an IRFA and a FRFA would arise if the agency concluded, during rulemaking proceedings, that a proposed rule actually had a “significantly economic impact on a substantial number of small entities” and thereupon prepared a FRFA, even though it had not prepared an IRFA. *See* 126 Cong. Rec. at 21459.<sup>10</sup> Accordingly, the RFA’s legislative history does not contemplate a subset of rules for which an agency would, as Defendants argue to this Court, be required to prepare every aspect of the RFA analysis, except the summing-up FRFA.

Furthermore, Defendant’s reading is non-sensical to the extent that it would render superfluous the part of Section 604(a) stating “or any other law.” If an agency were obligated to perform a FRFA only for those rules promulgated pursuant to the general rulemaking authority contained in 5 U.S.C § 553(b), there would be no need for the RFA to include in

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<sup>10</sup> The Senate RFA document thus noted, “Even if an agency was not required to publish an initial regulatory flexibility analysis, it may later determine, on the basis of comments received or other reasons, that the rule would have a significant economic impact on a substantial number of small entities. If so, the agency must publish a final regulatory flexibility analysis. The analysis must contain a statement of the need for and objectives of the rule; a summary of the significant issues raised by the public and of the agency assessment of those issues; and an explanation of any changes made in the rule in response to public comments.” *Id.*

Section 604(a) an agency's publication of a "general notice of proposed rulemaking" under "any other law." A court should not accept a reading of a statute that would render part of the statute superfluous. *Asiana Airlines v. FAA*, 134 F.3d 393, 398 (D.C. Cir. 1998) (citing *C.F. Communications Corp. v. FCC*, 128 F.3d 735, 739 (D.C. Cir. 1997)).

Accordingly, the relevant focus under section 604(a) for determining whether the Corps was obligated to perform an FRFA is not on the source of authority for the Corps' issuance of the new and modified NWP conditions, as Defendants contend. Rather, the appropriate focus is whether, under the APA or any other law, the agency was required to publish a general notice of proposed rulemaking for the final agency action at issue--the touchstone set forth repeatedly in the RFA, at 5 U.S.C. §§ 601(2), 603(a), and 604(a).

As Plaintiffs demonstrated at length in their original summary judgment memorandum, and as they explain in part E below, the answer to this inquiry is in the affirmative. *See* Plaintiffs' Memo. at 18, 23-41. The Final Rule was a "rule" subject to the RFA, as the term is defined in 5 U.S.C. § 601(2), in that: (1) the Corps published a general notice of proposed rulemaking for the Final Rule under the APA standards set forth at 5 U.S.C. § 553(b); (2) Section 553(b) of the APA "required" the Corps to publish a general notice of proposed rulemaking for the Final Rule (*see* 5 U.S.C. §§ 603(a) & 604(a)), because the Final Rule represents and contains a substantive or legislative rule as that term is defined in APA jurisprudence; and/or (3) the Clean Water Act, at 33 U.S.C. § 1344(e), required the Corps to publish a general notice of proposed rulemaking for the Final Rule (*see* 5 U.S.C. §§ 603(a) & 604(a)). *See* Plaintiffs' Memo. at 23-40. Accordingly, Defendants' claim should be rejected.

**E. The Final Rule is a "Rule" under RFA §§ 611(a)(1) and 604(a)**

Defendants also claim that the Corps' failure to perform either an IRFA or a FRFA (Defendants do not mention their failure to perform a Section 605(b) economic impact analysis) did not violate the RFA because the Final Rule is not a "rule" within the meaning of RFA's standing provisions, 5 U.S.C. § 611(a)(1). Citing to the FRFA provision, 5 U.S.C. § 604(a), they also claim the Final Rule is not a "rule" within the meaning of RFA. *See* Defendants' Opp. at 71. In support of these contentions, Defendants raise three points: (1) "the Corps did not publish a notice of proposed rulemaking or engage in rulemaking here;" (2) the Final Rule was not published in the Federal Register in either the "PROPOSED RULES" or "RULES AND REGULATIONS" categories; and (3) "the nationwide permits do not appear in the CFR." *See* Defendants' Opp. at 71-73.

Plaintiffs addressed Defendant's points extensively in their opening brief. *See* Plaintiffs' Memo. at 20-22. Conspicuously absent, moreover, from the Defendants' analysis is any reference to the Final Rule's binding effect. Plaintiffs do not dispute that an agency's characterization of its action in its public documents, as well as its publication or failure to publish the action in the Federal Register or the Code of Federal Regulations, are all factors that courts have from time to time considered in determining whether a given action constitutes a "rule" under the APA. *See Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 537-39 (D.C. Cir. 1986); *see also Community Nutrition Inst. v. Young*, 818 F.2d 943, 946-48 (D.C. Cir. 1987). However, a principal factor that courts also consider, which Defendants fail to raise or address, is whether the language used in the agency regulatory document evidences the potential "binding effect" of the action on interested parties and the agency. *See Community Nutrition Inst.*, 818 F.2d at 947; *Cathedral Bluffs*, 796 F.2d at 537 (description of measure's

binding effect is "of far greater importance"). Indeed, given how agencies have been trying to promulgate measures with pervasive effect in less and less formal ways, the D.C. Circuit in *Appalachian Power* recently confirmed the question of an action's binding nature virtually the litmus test for whether an agency represents a "rule" subject to the APA's Section 553 requirements. *See* 208 F.3d at 1020-21.

In this case, the Final Rule establishes new, binding requirements on interested parties and the Corps. As explained in detail above, the Final Rule obligates, it directs, it specifically "requires" NWP applicants to limit and modify their dredging and filling activities in order to obtain and use certain NWPs in the future. *See Appalachian Power*, 208 F.3d at 1023. For instance, the Final Rule introduced a new general condition that now requires prospective NWP applicants to reduce the potential discharges generated from their activities to no more than one-half acre (from a previous level of three acres) in order to obtain "most of the new and modified NWPs." 65 Fed. Reg. at 12818. Indeed, throughout the "Final Notice," the Corps itself repeatedly refers to a one-half acre "limit," another word with a binding and limiting meaning and effect. *See* 65 Fed. Reg. at 12818, 12819 ("we have established a [new] ½ acre limit") (emphasis added).

The Final Rule also imposed other binding requirements through new and modified general conditions. For example, a second, new general condition on NWP applicants introduced in the Final Rule "requires"-- the Corps' choice of verb -- prospective NWP applicants to provide preconstruction notification ("PCN") to district engineer for activities resulting in the loss of greater than one-tenth acre of United States waters. *Id.* Along these same lines, modified General Condition ("GC") 9 "requires" a water quality management plan for certain NWP activities, unless the impacts to water quality have been addressed in either a

state or tribal certification process. *See* 65 Fed. Reg. at 12820. Similarly, modified GC 11 “requires” non-Federal permittees to notify the district engineer if any listed species or designated critical habitat might be affected or is in the vicinity of the project. *Id.* at 12828. In addition, modified GC 19 “requires” permittees to avoid and minimize discharges into waters of the United States on-site to the maximum extent practicable, and also provides that district engineers can “require” compensatory mitigation to ensure that the authorized work results in minimal adverse effects on the aquatic environment. *Id.* at 12830. Finally, GC 26 “prohibits” discharges of dredged or fill material into waters of the United States within 100 year floodplains of stream segments below headwaters, *id.* at 12840, and “requires” notice to the district engineer and a demonstration of FEMA-compliance. *Id.* at 12845. Thus, the words the Corps uses to implement and describe these new and modified “requirements” under the Final Rule’s new NWP headwaters and isolated waters regime leave no question but that they are binding.<sup>11</sup>

In addition, with respect to the factors Defendants did address in their Opposition, the fact that the Corps did not publish a general notice of proposed rulemaking in connection with its promulgation of the Final Rule, and therefore did not characterize the Final Rule as a rule or regulation, “is not overwhelming.” *Cathedral Bluffs*, 796 F.2d at 537; *see also Citizens to*

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<sup>11</sup> Further, the fact that the Corps previously published changes to its NWP program in the Code of Federal Regulations shows that the Corps considered such actions to have “general applicability and legal effect.” *See* 33 CFR § 330.5(a) and (b) (1984), (1985), and (1991); 33 C.F.R. § 330, Appendix A, Part B.26 (1992); *see also American Mining Congress v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1109 (D.D.C. 1993) (stating that agency publication of a rule in the Code of Federal Regulations is limited to rules “having general applicability and legal effect”) (*quoting Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 539 (D.C. Cir. 1986)). Nothing has changed about the binding nature of the NWP process since or because of Corps’ decision not to publish the NWPs and NWP general conditions in the CFRs.

*Save Spencer County v. EPA*, 600 F.2d 844, 879 n. 171 (D.C. Cir.1979) (finding that the “label that the particular agency puts upon its given exercise of administrative power is not, for our purposes, conclusive; rather it is what the agency does in fact”) (quoting *Lewis-Mota v. Secretary of Labor*, 469 F.2d 478, 481-82 (2d Cir.1972)). See also *Appalachian Power*, 208 F.3d at 1021.

Furthermore, the Corps’ decision to promulgate this fundamental alteration of the NWP program under the rubric of a mere “Notice” is inconsistent with its previous characterization of such changes in past proceedings. Indeed, as Plaintiffs highlighted in their original summary judgment brief, when the Corps implemented such changes to its NWP program in the past, it classified its actions in the “rules and regulations” and/or “proposed rules categories.” For instance, when the Corps adopted NWP 26 in 1984 as a modification of its existing headwaters and isolated waters general permit, the Corps issued a “Proposed Rule” under the APA, see 49 Fed. Reg. 12660 (1984), and then a “Final Rule,” see 49 Fed. Reg. 39478 (1984). In fact, the Corps even conducted an RFA inquiry and certified pursuant to 5 U.S.C. § 605(b) that the proposed rule would not have the threshold significant impact. See 49 Fed. Reg. at 39481.

Similarly, in 1991, when the Corps proposed additional changes to the NWP program, it again conducted what it labeled an APA rulemaking proceeding. See 56 Fed. Reg. 14598 (1991) (“Proposed Rule”); 56 Fed. Reg. 59110 (1991) (“Final Rule”). The Corps has identified nothing that would enable it to contend fairly that this Final Rule, which adds several new NWPs and NWP conditions, and modifies several other NWPs and NWP conditions, is now, *mirabile dictu*, merely a “miscellaneous document applicable to the public.”

Along these same lines, the Corps' present failure to publish its NWP's and their general conditions in the Code of Federal Regulations is belied by the very nature of this action. As explained above, the changes implemented in the Final Rule affect the Corps' nationwide permit program and have legal effect as to which dredging and filling activities will be authorized to proceed under nationwide permits, or, instead, will be required to proceed through the more costly and time consuming individual permit process (or, possibly, not obtain a permit at all). And, as Plaintiffs have explained, up until 1991, the Corps actually published all of the NWP's and NWP general conditions in the CFRs as federal regulations. See 33 CFR § 330.5(a) and (b) (1984), (1985), and (1991). On November 22, 1991, the Corps decided to move the NWP's and NWP general conditions within the CFRs to 33 C.F.R. part 330, Appendix A. See 33 C.F.R. § 330, Appendix A, Part B.26 (1992). Then, on December 13, 1996, inexplicably, the Corps announced that it was removing the NWP's and the NWP general conditions from the CFR's. See 61 Fed. Reg. at 65874 (announcing that the NWP's and the NWP general conditions "will no longer appear in the Code of Federal Regulations (CFR) but will be published in the Federal Register and announced, with regional conditions, in the public notices issued by Corps district offices, and included on the Internet"). Nothing about the NWP regime's binding effect changed, however, when the Corps stopped publishing it in the CFR's. Nor did Corps provide an explanation for this sudden shift in its publication policy. But see *Appalachian Power*, 208 F. 3d at 1020 (explaining trend of agencies illegally, to transition to Internet-based regulatory legal regimes, notwithstanding APA requirements).

In summary, Defendants have no basis to claim that the NWP's and NWP conditions no longer apply generally or no longer have legal effect merely because the agency elected to

label them differently in the Federal Register and withdraw them from the CFRs in 1996-- about the time the Corps was first announcing its intention to overhaul NWP 26.<sup>12</sup>

**F. The Corps' Fundamental Alteration of its NWP Program in the Final Rule is not Merely an Informal Adjudication**

Finally, Defendants claim that, "the Corps' permits are informal adjudication, not rulemaking." Defendants' Opp. at 73. According to Defendants, therefore, the Corps was not required to perform an IRFA or a FRFA because the RFA "is inapplicable." *Id.* at 74.

Defendants' analysis equating the Corps' promulgation of the Final Rule to an adjudication is fundamentally flawed. First, Defendants argue that "permit decision-making proceedings" constitute "licensing," which is included in the APA's definition of "adjudication." *See* Defendants' Opp. at 73. However, the Corps' promulgation of the Final Rule is not a "permit decision-making proceeding," wherein an agency determines whether to grant or deny a permit application for a particular project. *See, e.g., Abenaki Nations v. Hughes*, 805 F.Supp. 234, 240 (D.Vt. 1992); *National Wildlife Federation v. Marsh*, 568 F. Supp, 985, 992 n. 12 (D.D.C. 1983). Here, instead, the Corps instead has undertaken a two year process to revamp its overall nationwide permit program, and to issue new and modified nationwide permits and nationwide permit conditions. This process, therefore, markedly differs in scope from the simple permit decision making proceedings Defendants cite to in

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<sup>12</sup> Defendants also claim that the Corps did not engage in rulemaking in promulgating the Final Rule. Defendants' Opp. at 71 n.43. Contrary to Defendants' assertions, however, Plaintiffs do not rely upon the mere fact that the Corps went through notice and comment in promulgating the Final Rule. In their memorandum in support of summary judgment, Plaintiffs described at length the APA-style rulemaking process the Corps followed during the course of the two years that it developed the Final Rule. *See* Plaintiffs' Memo. at 39.

*National Wildlife Federation*, 568 F. Supp. 985, 992 n.12, and *Northwest Env'tl. Defense Ctr. v. Wood*, 947 F. Supp. 1371, 1381 (D. Ore. 1996).

Defendants' reliance upon the analysis set forth in *Abenaki Nations* is similarly unavailing. The plaintiffs in *Abenaki Nations* challenged the Corps' issuance of General Permit 38 "for certain hydroelectric development activities [at a hydroelectric facility] in the New England region," see 805 F.Supp. at 237, which the Corps issued pursuant to a "conditioned authorization" that attached twenty-three special conditions to the permit. *Id.* at 239. As the court in *Abenaki Nations* observed, those plaintiffs' challenge required the court to review a "decision by the Corps to issue [a] permit" and "to authorize the Project **under** [General Permit] 38." *Id.* at 240 (emphasis added). In this case, unlike in *Abenaki Nations*, Plaintiffs are not contesting the Corps' specific authorization of a project **under** a particular nationwide permit. Rather, Plaintiffs are contesting the Corps' decision to change its overall nationwide permit program by "issuing 5 new Nationwide Permits (NWPs) and modifying 6 existing NWPs. . . [and] also modifying nine NWP general conditions and adding two new NWP general conditions," see 65 Fed. Reg. at 12818, which imposes new substantive duties and requirements on Plaintiffs and the Corps.

Furthermore, the D.C. Circuit in *United States v. Picciotto*, 875 F.2d 345, 348 (D.C. Cir. 1989), rejected an agency's talismanic, Euclidean defense that it did not conduct a rulemaking when it added new general permit conditions and requirements that would govern, limit, and condition the issuance and use of general permits in specific cases. *Picciotto*, moreover, post-dates *National Wildlife Federation*, the one (district court) case in this circuit which *Abenaki Nations* cites. More recently, *Appalachian Power* subjected EPA's development of Clean Air Act-based conditions on and other requirements for permits states

could issue to private entities to Section 553(b) rulemaking requirements. *See* 208 F.3d at 1022 (*quoted, infra*, at 4-5, 9-11).

As a result, the cases Defendants rely upon to equate this matter to a simple permit decision-making proceeding are inapposite.

**G. Plaintiffs Properly Seek To Have The Final Rule Remanded To The Corps And To Stay Enforcement Of The Final Rule Against Small Entities Until The Corps Complies With The RFA's Requirements**

Finally, Defendants contend that Plaintiffs are not entitled to the remedy they seek in this case, namely, remanding the Final Rule to the Corps and deferring enforcement of the new and modified NWP conditions and NWP terms and conditions contained in the Final Rule until the Corps complies with the RFA's requirements. *See* Defendants' Opp. at 84-87. According to Defendants, "the challenged conditions could not lawfully be severed from the remainder of any permit." *Id.* at 84. Once again, Defendants misperceive the express dictates of the RFA.

As an initial matter, Plaintiffs do not seek merely to sever the new and modified NWP conditions from the remainder of the permit, as Defendants assert. Rather, Plaintiffs request that the Court remand the Final Rule to the Corps and to defer application of the Final Rule, (that is, the new and modified NWP conditions as well as the new and modified NWP terms and conditions), as against small entities until the Corps complies with the RFA. *See* Plaintiffs' Memo. at 40; Plaintiffs' Complaint at 18. Indeed, such remedies are explicitly provided for in the RFA.

In this regard, the RFA's judicial review provisions expressly state:

(4) In granting any relief in an action under this section, the court shall order the agency to take corrective action consistent with this chapter and chapter 7, including, but not limited to -

(A) remanding the rule to the agency, and

(B) deferring the enforcement of the rule against small entities unless the court finds that continued enforcement of the rule is in the public interest

5 U.S.C. § 611(a)(4)(A) and (B). Thus, Defendants' arguments as to remedy have no force in the RFA context, with its specific statutorily-authorized remedies.

### III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their Motion for Summary Judgment and deny Defendants' Cross-Motion for Summary Judgment.

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Respectfully submitted,



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