

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASS'N OF HOME BUILDERS,

Plaintiff,

v.

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

Defendants.

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)  
) CIVIL ACTION NO.  
) CV00-379 (TPJ)  
)  
)  
)

NAT'L STONE, SAND & GRAVEL ASS'N,

Plaintiff,

v.

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

Defendants.

)  
) CIVIL ACTION NO.  
) CV 00-558 (TPJ)  
)  
)  
)

NATIONAL FEDERATION OF INDEPENDENT  
BUSINESS, *et al.*,

Plaintiffs,

v.

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

Defendants.

)  
) CIVIL ACTION NO.  
) CV01404 (TPJ)  
)  
)  
)

NATIONAL FEDERATION OF INDEPENDENT BUSINESS'S AND MR.  
NEWNAM'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
THEIR MOTION FOR SUMMARY JUDGMENT

## I. INTRODUCTION

Plaintiffs National Federation of Independent Business ("NFIB") and Wayne Newnam brought their one-count Complaint on June 14, 2000. In it, they claim that Defendants, the United States Army Corps of Engineers (the "Corps"), its Chief of Engineers, and the Secretary of the Army (collectively, the "Defendants"), violated the Regulatory Flexibility Act of 1980,<sup>1</sup> when they developed and implemented a new rule that fundamentally alters the nationwide permit ("NWP") program they administer pursuant to the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.* ("CWA"). The RFA required these Defendants to examine the potential economic impacts of the new rule on small businesses and other small entities and, if these impacts met a threshold level of significance, to undertake a detailed notice and comment process to ascertain if they could ameliorate these impacts.

The Corps entitled its new rule the "Final Notice of Issuance and Modification of Nationwide Permits." See 65 Fed. Reg. 12818 (Mar. 9, 2000) ("Final Rule"); Administrative Record ("A.R."), Prt 1-012. The Final Rule culminated over three years of extensive rulemaking, and yielded new restrictions and limitations on applicants seeking to employ an NWP to conduct activities that discharge dredged or fill material into "headwaters" and "isolated waters." The Corps estimates the Final Rule's new restrictions and limitations will increase direct costs to NWP applicants by about \$20 million. 65 Fed. Reg. at 12819; A.R. Prt 1-013. The Corps also estimates the changes will increase by \$6 million the agency's costs to administer the NWP program. *Id.* (Later Corps estimates increased the potential price tag to the private and public sectors.)

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<sup>1</sup> Pub. L. No. 96-354, 94 Stat. 1164, *codified* at 5 U.S.C. §§ 601-612 ("RFA"), as amended by the Small Business Regulatory Enforcement and Fairness Act of 1996, Pub. L. No. 104-121, Title II, 110 Stat. 864-67 ("SBREFA").

Despite these significant regulatory changes and their attendant economic impacts, Defendants refused to conduct any RFA analysis at all, erroneously justifying their dereliction with the simple claim that this law did not apply because the Corps had not amended "regulations." See Final Rule, 65 Fed. Reg. at 12825; A.R. Prt 1-019. In fact, the Final Rule constitutes a substantive, legislative change in the NWP regulatory program necessitating notice and comment rulemaking and RFA compliance. Because Defendants did not undertake the RFA analyses as required by law, Plaintiffs are entitled to summary judgment. As a remedy, the Court should remand the Final Rule and order Defendants to comply with the RFA. In the meantime, pursuant to the RFA's specific remedial provisions, 5 U.S.C. § 611, the Court should enjoin implementation of the new requirements in the Final Rule as to small entities and order the Corps to utilize the NWP regime for headwaters and isolated waters constituting the *status quo ante* the Final Rule.

## II. STATEMENT OF FACTS

### A. Development of the Corps Clean Water Act-Based NWP Program

Congress enacted the Clean Water Act in 1972 to regulate the discharge of pollutants, including dredged and fill material, into the navigable waters of the United States. The CWA generally proscribes the discharge of any pollutant into waters of the United States, except in compliance with the Act's permit provisions. CWA § 301, 33 U.S.C. § 1311; NFIB's Complaint for Declaratory and Injunctive Relief ("Compl."), ¶ 30. Under Section 404 of the CWA, the Secretary of the Army, acting through the Chief of Engineers, is authorized, "after notice and an opportunity for public hearings," to issue permits for the discharge of dredged or fill material into navigable waters at specified disposal sites. 33 U.S.C. §§ 1344 (a) & (d); Compl., ¶ 31.

In 1977, Congress enacted § 404(e) of the CWA, as Pub. L. No. 95-217. Compl., ¶ 33; 33 U.S.C. § 1344(e). Section 404(e) authorized the Corps, “after [providing] notice and an opportunity for a public hearing,” to issue what are known as **general permits** on a state, regional or nationwide basis “for any category of activities involving discharges of dredged or fill material if the [Corps] determines that the activities in such category are similar in nature, will cause only **minimal adverse environmental effects** when performed separately, and will have only **minimal cumulative adverse effect** on the environment.” Compl., ¶ 33; 33 U.S.C. § 1344(e) (emphasis added). Moreover, each general permit issued by the Corps must “set forth the requirements and standards which shall apply to any activity authorized by such general permit.” 33 U.S.C. § 1344(e)(1).

Upon Section 404(e)’s enactment, the Corps issued new regulations which included the creation of the Corps’ Nationwide Permit (“NWP”) program. A.R. Prt 3-1573. An NWP is a type of Section 404(e) general permit that applies nationwide. Compl., ¶ 34; 33 C.F.R. § 330.1(a)(2000). NWPs “are designed to regulate with little, if any, delay or paperwork certain [discharging] activities having minimal impacts [on the nation’s aquatic environment].” *Id.*

For an activity to be authorized under an NWP, the activity and the permittee must satisfy all the NWP’s terms and conditions. Compl., ¶ 35; 33 C.F.R. § 330.1(c). An NWP’s “terms” are “the limitations and provisions included in the description of the NWP itself.” Compl., ¶ 37; 33 C.F.R. § 330.2(b). An NWP’s “conditions” are the “additional provisions which place restrictions or limitations on all of the NWPs.” *Id.* In addition, certain “conditions” identify a “threshold,” which, if satisfied, requires additional procedures or provisions that the prospective permittee must meet. Compl., ¶ 38; 33 C.F.R. § 330.4(a). “The terms and conditions of general permits are established so that those permits authorize

most activities that result in **minimal adverse effects** on the aquatic environment." Final Rule, 65 Fed. Reg. at 12822 (emphasis added). In contrast, activities that do not qualify for an NWP or other general permit may, in general, proceed only if the applicant can obtain an individual permit, following a detailed application and Corps review and approval process. Compl., ¶ 36; 33 C.F.R. § 330.1(c).

**B. Development of NWP 26**

One of the NWPs issued by the Corps in 1977 was the "isolated and headwaters" NWP, which regulated the discharge of dredged or fill material in the isolated waters and headwaters of the United States. A.R. Prt 3-1573. The Corps define "headwaters" as "non-tidal streams, lakes, and impoundments that are part of a surface tributary system to interstate or navigable waters of the United States with an average annual flow of less than 5 cubic feet per second." "Isolated waters," on the other hand, "are non-tidal waters of the United States that are not part of a surface tributary system to interstate or navigable waters and are not adjacent to such surface tributary systems to interstate or navigable waters." See Final Rule, 65 Fed. Reg. at 12818; A.R. Prt 1-012; Compl., ¶ 8.

Further, each NWP contains specific limitations that the Corps utilizes to limit potential adverse environmental impacts involved in the use of the permit on any project. Compl., ¶ 40. Examples of such restrictions include limits on the maximum acreage of impact authorized by the permit ("acreage ceilings"), bans on the use of certain NWPs in conjunction with other NWPs, and requirements that potential permittees provide the Corps (specifically, the district engineer with jurisdiction) with pre-construction notice ("PCN") of a planned discharging activity that may affect a certain acreage of United States waters. *Id.* The PCN process is

intended to allow the Corps an opportunity to verify on a case-by-case basis that a particular project does not exceed the requirements of an NWP. *Id.*, ¶ 41.

When the Corps developed and implemented the headwaters and isolated waters permit in 1977, it authorized unlimited discharges of dredged or fill materials into non-tidal rivers and streams located above headwaters and into lakes less than 10 acres in size. *Id.*, ¶ 49; A.R. Prt 3-1573. Furthermore, this predecessor to NWP 26 did not require a PCN before a project could proceed. Compl., ¶ 49. Thus, anyone could discharge dredged or fill materials into headwaters or isolated waters of less than 10 acres without first obtaining agency approval.

Over time, Defendants repeatedly revised their views of what dredging and filling activities have minimal adverse effects on the aquatic environment and thereupon have, in stages, limited the dredging and filling activity that could qualify for a general permit. For example, Defendants issued NWP 26 in 1984. NWP 26 restricted maximum per-project headwaters or isolated waters discharges to ten acres, and required PCN to the Corps for any project that would affect greater than one acre. Compl., ¶ 50; 49 Fed. Reg. 39478, 39480 (1984). Regarding the PCN requirement, the Corps had 20 days to review and respond to the PCN, or the permittee could proceed under NWP 26. *Id.* The Corps published NWP 26 and its terms and conditions in the Code of Federal Regulations at 33 C.F.R. § 330.5(a)(26) (1985).

In 1986 and 1991, Defendants reissued NWP 26 for successive five-year periods, each time adding more conditions and limitations on its use in individual instances. Compl., ¶ 51. As in 1984, the Corps published the reissued NWP 26 and its terms and conditions in the C.F.R. See 33 C.F.R. § 330.5(a)(26) (1987) and § 330, App. A, Prt B.26 (1992).

On December 13, 1996, Defendants commenced the instant rulemaking when they published a "Final Notice of Issuance, Reissuance, and Modification of Nationwide Permits," pursuant to 33 U.S.C. §1344(e). 61 Fed. Reg. 65874; Compl., ¶ 52. In the 1996 Final Notice, Defendants announced they were reissuing all existing NWP conditions, some with modifications, for a period of two years. 61 Fed. Reg. 65874; Compl., ¶ 53. Defendants also lowered the acreage ceiling for NWP 26 from 10 acres to 3 acres, and reduced the PCN requirement from 1 acre to 1/3 acre. *Id.* The Corps also announced its intention to review NWP 26 for possible revocation. *Id.*

On July 1, 1998, Defendants published their proposal to replace NWP 26 and began the process to seek comments on their proposal. 63 Fed. Reg. 3604 ("Proposed Rule"); A.R. Prt 7-0002; Compl., ¶ 55. More specifically, the Proposed Rule announced the Corps' intention to increase its regulation over the isolated waters and headwaters of the United States by prohibiting the use of a general permit to authorize a large share of activities for which NWP 26 previously either provided a blanket authorization or subjected to PCN process. *Id.* In its Proposed Rule, the Corps proposed to issue six new NWPs, modify six existing NWPs, add one NWP condition, and modify six existing NWP conditions. *Id.* According to the Proposed Rule, the new changes would become effective when NWP 26 expired, which expiration date the Corps extended to March 28, 1999. *Id.* The Proposed Rule also reiterated that the principal objective of the new NWPs and conditions was to confine the issuance of general permits only to activities which comported with Defendants' yet-again revised view of what activities caused minimal impacts on the aquatic environment. *Id.*

On March 9, 2000, the Corps promulgated the Final Rule, announcing that NWP 26 would expire on June 5, 2000, and that NWP 26 would be replaced by: the addition of five

new NWP; the modification of six existing NWPs; the modification of nine NWP general conditions; and the addition of two new general conditions. 65 Fed. Reg. 12818; A.R. Prt 1-012; Compl., ¶ 61.<sup>2</sup> The Final Rule reduced the maximum acreage limits for most of the new and modified NWPs from 3 acres to ½ acre. 65 Fed. Reg. 12818; A.R. Prt 1-012; Compl., ¶ 63. In addition, the new and modified NWPs increased the scope of the PCN requirement to include proposed activities resulting in the loss of greater than 1/10 acre of United States waters. *Id.* Further, the two new general conditions were designed to “limit activities in designated critical resource waters and fills in water of the United States within 100-year floodplains.” 65 Fed. Reg. 12819; A.R. Prt. 1-013. In this regard, the two new conditions prohibit all above-grade fill within the FEMA-mapped 100-year floodplain below the headwaters of any stream, and within the headwaters, prohibit above-grade fill within the FEMA-mapped regulatory floodway. *Id.*

The Corps acknowledged that, “the terms and conditions of the new and modified NWPs may cause some activities with minimal adverse effects on the aquatic environment to be subject to the individual permit process.” 65 Fed. Reg. at 12820; A.R. Prt 1-014. In addition, the new terms and conditions come at a significant cost. According to the Corps:

All of these substantial improvements will increase costs to applicants to some degree and will increase the funding needed by the Corps to maintain our current level of service to the public. Based on a report prepared by the Corps Institute for Water Resources (IWR) in response to the Corps FY 2000 Appropriations Act, the changes to the NWP program announced today will increase direct costs for permit applicants by about \$20 million per year. Further, based on the IWR report, the Corps would need about \$6 million in additional funding to maintain current levels of service to the public. We believe the changes are necessary to ensure the statutory requirement

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<sup>2</sup> By subsequent Notice, the Corps announced that the new date for the expiration of NWP 26 and the implementation of the Final Rule was June 7, 2000. Compl., ¶ 62; 65 Fed. Reg. 14255.

**[under Section 404(e)] that general permits, including NWP's, will have no more than minimal adverse effects on the aquatic environment.**

65 Fed. Reg., at 12819 (emphasis added); A.R. Prt 1-013.

The Corps received several comments notifying it of its obligations under the RFA to perform a regulatory flexibility analysis. 65 Fed Reg. at 12825; A.R. Prt 1-019. The Corps responded that the RFA did not apply (and thus no regulatory flexibility analysis was required) because "we proposed to issue new and modified NWP's, not change our regulations." *Id.*

### **III. ARGUMENT**

#### **A. PLAINTIFFS ASSERT IMPORTANT INTERESTS THAT CONGRESS DIRECTED TO BE PROTECTED<sup>3</sup>**

Plaintiffs brought this action pursuant to the RFA's recently enacted judicial review provisions, 5 U.S.C. § 611. In 1996, SBREFA amended the RFA to, among other things, subject an agency's compliance with certain of that Act's provisions to judicial review. *See* 5 U.S.C. § 611(a)(1). SBREFA's legislative history explained judicial review had become necessary because, "Many small business owners believe that agencies have given lip service at best to RFA, and small entities have [heretofore] been denied legal recourse to enforce the Act's requirements." *See* 142 Cong. Rec. S3242, S3245 (daily ed., Mar. 29, 1996) (SBREFA - Joint Managers' Statement of Legislative History and Congressional Intent).<sup>4</sup>

<sup>3</sup> Defendants have not contested Plaintiffs' standing or the Court's jurisdiction. Plaintiffs address this issue because it helps explain SBREFA's creation of a cause of action for an RFA violation.

<sup>4</sup> Senator Christopher S. Bond, the cognizant committee chair, floor manager, and a SBREFA co-author, explained in a Senate floor statement that the above-quoted Joint Managers' Statement, along with a companion insertion into the record for the House of Representatives, represent "the best legislative history of the legislation as finally enacted." *See* 142 Cong. Rec. S3242 (daily ed., Mar. 29, 1996) (statement of Sen. Bond). SBREFA's congressional managers inserted that Act's final legislative history into the Congressional Record because a conference report for SBREFA was not prepared. *Id.*

The RFA states:

For any rule 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 chapter 7 [of the Administrative Procedure Act]. . . .

5 U.S.C. § 611(a)(1).<sup>5</sup>

For his part, Plaintiff Newnam is a small entity. The RFA defines the term "small entity" to include a "small business." 5 U.S.C. § 601(6). The RFA, in turn, defines a "small business" to have "the same meaning as the term 'small business concern' under section 3 of the Small Business Act . . . ." 5 U.S.C. § 601(3). The Small Business Act defines the term small business concern as "one which is independently owned and operated and which is not dominant in its field of operations." 15 U.S.C. § 632(a)(1).

Plaintiff Wayne Newnam is a "small business concern" as the Small Business Act defines the term; Mr. Newnam owns a family-owned and operated (and hence independent) home building business with three employees located in Troy, Ohio. Newnam Dec. ¶ 2 (attached hereto as Exhibit 1). Mr. Newnam's small home building company is not in any way dominant in its field of operation. Newnam Dec. ¶ 4. Mr. Newnam qualifies as a "small entity" under the RFA standing provision. Newman Dec. ¶ 4.

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<sup>5</sup> Plaintiffs' case also involves Defendants' alleged violations of at least one of the sections of the RFA for which a small entity may seek judicial review, according to the provisions quoted above. For example, Plaintiffs allege Defendants failed to comply with the threshold mandatory economic significance inquiry contained in 5 U.S.C. § 605(b), when they developed and implemented the Final Rule. Compl., ¶¶ 70, 77, 82. Defendants also failed to comply with 5 U.S.C. § 604 because they did not prepare a final regulatory flexibility analysis for the Final Rule. Compl., ¶ 75, 77, 82.

Defendants have violated Mr. Newnam's RFA-based rights, in that "the [RFA] procedures in question are designed to protect some threatened concrete interest of his . . . ." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 n.8 (1992). As explained, *infra*, in Part III, B, the RFA provides concrete, salutary benefits to small entities, including Mr. Newnam's. Congress specifically designed and intended the RFA to require an agency, such as the Defendant Corps, to ensure the interests of small entities, such as Mr. Newnam's, are carefully considered during significant rulemaking proceedings pursuant to a detailed, carefully-conceived statutory protocol.

Mr. Newnam's interest is, moreover, both particular to himself, as a small business owner subject to the Final Rule, and different from the average citizen. The Final Rule will cause Mr. Newnam's business and other similarly situated small businesses 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. Newnam Dec. ¶ 5.<sup>6</sup> Defendants' failure to comply with the RFA caused them to promulgate a Final Rule that did not take the needs and concerns of small businesses into account in the way the law requires.

For its part, Plaintiff NFIB is comprised of approximately 600,000 members who are the owners of a wide variety of America's small businesses, from mom-and-pop grocery stores to bowling alleys to construction firms. Sullivan Dec. ¶ 4 (attached hereto as Exhibit 3). In fact, over 17,500 NFIB members own small construction firms, and over 8,300 of these small-

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<sup>6</sup> Mr. Newnam is also a member of Plaintiff National Association of Home Builders ("NAHB"). Newnam Dec. ¶ 3. Plaintiff NAHB submitted a series of comments during the Final Rule rulemaking process that explained and demonstrated in detail the adverse economic impacts that the Final Rule will have. Plaintiff NAHB also specifically raised Defendants' failure to comply with the RFA in their comments. See Oct. 7, 1999, letter from NAHB to the Corps, at page 41, attached in pertinent part hereto as Exhibit 2. As such, Plaintiff NAHB submitted these comments on behalf of Mr. Newnam and its other members.

business owners are home builders. Sullivan Dec. ¶ 5. Many of these small-business owners who belong to NFIB -- many of whom also belong to Plaintiff NAHB -- will be impacted by the increased compliance costs and delays associated with obtaining a permit as a result of the Final Rule. Sullivan Dec. ¶ 6. Finally, Plaintiff NFIB recently established a Legal Foundation to help ensure that federal agencies comply with the law in their treatment of small businesses. One of the NFIB Legal Foundation's specific concerns was agency RFA compliance. Sullivan Dec. ¶ 3.

This Court can provide effective relief in this case. Plaintiffs have asked the Court to remand the Final Rule to the Corps for compliance with the RFA. Further, Plaintiffs request that the Court order Defendants to suspend the Final Rule's applicability 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. Congress specifically enumerated these remedies to redress violations of the RFA. *See* 5 U.S.C. § 611(a)(4)(A) & (B).

**B. THE RFA'S SALUTARY PURPOSES**

In repeatedly using the mandatory term "shall," *see* 5 U.S.C. §§ 603-604, the RFA imposes on an agency the duty to conduct careful and detailed analyses of the impacts of, and potential alternatives to, a proposed and final regulation and to solicit public comment on these important issues. RFA compliance is not optional; it is "require[d]," unless the agency can make the threshold "no significant impact" certification pursuant to 5 U.S.C. § 605(b). *See Northwest Mining Ass'n v. Babbitt*, 5 F. Supp.2d. 9, 15 (D.D.C. 1998).

More specifically, the RFA requires an agency to conduct an initial regulatory flexibility analysis ("IRFA") pursuant to 5 U.S.C. § 603 and a final regulatory flexibility

analysis ("FRFA") pursuant to 5 U.S.C. § 604, following notice and comment on the IRFA.

The RFA provides detailed guidance. The Act states that an IRFA:

. . . shall . . . contain a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities. Consistent with the stated objectives of applicable statutes, the analysis shall discuss significant alternative such as –

- (1) the establishment of differing compliance or reporting standards or timetables that take into account the resources available to small entities;
- (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for small entities;
- (3) the use of performance rather than design standards; and
- (4) an exemption from coverage of the rule, or any part thereof, for such small entities.

5 U.S.C. § 603(c).

The Senate's 1980 "Description of the Issues for the Regulatory Flexibility Act"<sup>7</sup>

further explained:

Agencies are not limited to the alternatives listed in this subsection when they search for means to accomplish their statutory mandates while reducing the impact of a rule on small entities. **In fact, it is expected that agencies will seek and discover other innovative techniques of tailoring regulations to**

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<sup>7</sup> As was the case with SBREFA, Congressional Record submissions by the RFA's floor managers serve as that Act's most authoritative legislative history. The RFA changed substantially during floor consideration in each house and subsequently in conference. On the Senate side, the Senate Judiciary Committee prepared S. Rep. No. 96-878, 96<sup>th</sup> Cong., 2d Sess 1980, to accompany S. 299, the Senate bill entitled, "The Regulatory Flexibility Act." S. 299 did not, however, obtain Senate passage. Rather, the Senate passed a substitute version of the bill – Unprinted Amendment No. 1502 – on August 6, 1980. The latter referenced measure made significant changes to S. 299. See 126 Cong. Rec. S21449. The Senate document entitled "Discussion of Major Issues and a Section-by-Section Analysis of Substitute for S. 299," inserted into the Congressional Record at 126 Cong. Rec. S10934-43 (daily ed., Aug. 6, 1980) [hereinafter, "Senate Description of Major RFA Issues"], during Senate consideration of the substitute Unprinted Amendment 1502 is intended to supplement S. Rep. No. 96-878. See 126 Cong. Rec. S21452.

**small entities consistent with the stated objectives of the underlying statute authorizing the rule.**

126 Cong. Rec. S21459 (Aug. 6, 1980) (emphasis added).

The agency's solicitation of public comment relating to a proposed rule's economic impact, as well as to alternatives that may achieve statutory objectives with reduced impacts on small businesses, represent absolutely vital components of the RFA process. Indeed, the "Discussion of the Issues" inserted into the Congressional Record during the House's floor debate leading to the passage of the Senate version of the RFA,<sup>8</sup> emphasized that:

[The RFA] is quite explicit about the direct involvement of affected smaller entities in rulemaking. The participation of affected small entities in an agency's deliberations regarding flexible alternatives is an absolutely essential responsibility of an agency under this legislation. **Such public participation will doubtlessly produce numbers of significant contributions to an agency's search for the least burdensome regulatory strategy consistent with its mandate.**

126 Cong. Rec. H24589-90 (Sep. 8, 1980) (emphasis added).

The D.C. Circuit has underscored the importance of APA notice and comment proceedings generally, which remarks apply equally here:

The purposes of according notice and comment opportunities were twofold: "to reintroduce public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies," *Batterton v. Marshall*, 648 F.2d 694, 703 (D.C. Cir. 1980), and to "assure[] that the agency will have before it the facts and information relevant to a particular administrative problem, as well as suggestions for alternative solutions." *Guardian Federal Savings and Loan Ass'n v. Federal Savings and Loan Insurance Corp.*, 589 F.2d 658, 662 (D.C. Cir. 1978).

*American Hospital Ass'n v. Bowen*, 834 F.2d 1037, 1044 (D.C. Cir. 1987).

<sup>8</sup> Definitive legislative history materials were inserted into the Congressional Record during debate on the House side on the final version of the RFA, following the House-Senate conference on competing regulatory flexibility proposals. This step was taken because, following conference, the House considered and passed the Senate substitute measure that became numbered S. 299 pursuant to a suspension of House rules. See n. 7, *supra*.

Moreover, especially with administrative regimes now so pervasive, "Public rulemaking procedures increase the likelihood of administrative responsiveness to the needs and concerns of those affected. And the procedure for public participation tends to promote acquiescence in the result even when objections remain as to substance." *Guardian Federal*, 589 F.2d at 662.

The RFA then requires the agency to prepare a final regulatory flexibility analysis ("FRFA"), and to publish the FRFA along with the final rule. Among other things, each FRFA must include:

. . . a summary of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a summary of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments. . . .

5 U.S.C. § 604(a)(2). Each FRFA must also include:

. . . a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.

5 U.S.C. § 604(a)(5).

Defendants did not conduct any of these important and specific RFA analyses,<sup>9</sup> even though their NWP program modifications were comprehensive and have legal effect, and even though public comments and Defendants' own analyses showed these programmatic changes would have a great impact on the regulated community, including small businesses.

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<sup>9</sup> These RFA analyses are sufficiently specific that they are not generally subsumed in a general APA notice and comment process, such as the Corps conducted for the Final Rule.

In sum, Defendants' non-compliance with the RFA demonstrates its view that the RFA constitutes a hollow procedural hoop through which an agency must jump. That simply is not the case. The House Discussion of Significant RFA Issues explained that, "Although these more inclusive interpretations may result in additional effort for the agencies in the short run, such inconvenience should be viewed in light of the final rule's long-term advantages: more just application of the laws and more equitable distribution of economic costs, which will ultimately serve both the society's and the government's best interests." 126 Cong. Rec. H24589 (Sep. 8, 1980).

**C. Standards of Review**

Summary judgment is appropriate where there is no genuine issue of material fact, and, when viewing the evidence in the light most favorable to the nonmoving party, the movant is entitled to prevail as a matter of law. Fed. R. Civ. P. 56(c); *Edmonds Institute v. Babbitt*, 93 F. Supp. 2d 63, 66 (D.D.C. 2000). In the present case, the undisputed material facts establish that the Plaintiffs are entitled to summary judgment because the Defendants did not comply with the RFA when they were required to do so. See *Northwest Mining Ass'n*, 5 F. Supp.2d at 16 (granting summary judgment to plaintiff for agency RFA violation).

The Court owes no deference to the Defendants' legal conclusion that the RFA does not apply to the Final Rule. The RFA states that judicial review shall be "in accordance with Chapter 7" of the APA. 5 U.S.C. § 611(a)(1). Neither the RFA nor Chapter 7 of the APA require deference to the Corps's decision to eschew RFA compliance. Rather, under the APA, a court applies differing levels of review depending upon the issue at suit. See, e.g., *Chevron, USA v. Natural Resources Defense Council*, 467 U.S. 837, 842-44 (1984). A court does not generally defer to an agency's determination of an issue that is not within the agency's

particular expertise. *See Airlines Traffic Offices, Inc. v. Department of Defense*, 87 F.3d 1356, 1361 (D.C. Cir. 1996) (stating that *Chevron* deference is inappropriate where agency has not been entrusted to administer the statute in question); *Professional Reactor Operator Society v. United States N.R.C.*, 939 F.2d 1047, 1051 (D.C. Cir. 1991) (stating that no *Chevron* deference owed to agency interpretation of statutes "outside the agency's particular expertise and special charge to administer"). In a controlling decision, the D.C. Circuit in *American Trucking Ass'ns, Inc. v. EPA*, refused to accord *Chevron* deference either to EPA (the agency administering the substantive statute) or the Small Business Administration's Chief Counsel for Advocacy (who seeks to assure government-wide RFA understanding and compliance, *see* 5 U.S.C. § 612), in determining whether and how the RFA applied. *See* 175 F.3d 1027, 1044 (D.C. Cir. 1999), *modified on other grounds*, 195 F.3d 4 (D.C. Cir. 1999), *cert. granted*, 120 S. Ct. 2003 & 2193 (2000.)

Nor, more generally, do courts defer to an agency's resolution of the operative questions in this action, to wit, whether an agency action represents a "rule" and whether an agency is required to conduct a rulemaking pursuant to the standards set forth at 5 U.S.C. § 553(b). *See National Family Planning and Reproductive Health Ass'n v. Sullivan*, 979 F.2d 227, 230-31 (D.C. Cir. 1992) (*Chevron* deference inapplicable in determining "whether [the agency] followed proper procedure in implementing" a regulatory change).

Likewise, the RFA's legislative history cautioned against deference to narrow agency constructions of the RFA's scope. The House of Representatives' Discussion of RFA Issues directed, "The legislation is intended to be as inclusive as possible, and doubts about its applicability should be resolved in favor of complying with the provisions of the Act." 126 Cong. Rec. at H24589 (Sep. 8, 1980) (emphasis added). A court would not resolve all

doubts in favor of the RFA's applicability if it deferred to an agency's determination that the RFA did not apply in an ambiguous or unclear case. For these reasons, this Court owes no deference to Defendants' erroneous resolution of the threshold legal issue whether the RFA applies to the Proposed and Final Rule and should review the matter *de novo*.

**D. When the RFA Applies**

An agency is, in general, exempt from the requirement that it prepare an IRFA and then a FRFA for a rule, as the RFA defines that term, 5 U.S.C. § 601(2), only if the agency can certify the rule does not meet Section 605(b)'s threshold significant economic impact standard. According to the RFA, a "rule" is defined as:

[A]ny rule for which the agency publishes a general notice of proposed rulemaking pursuant to section 553(b) of this title, or any other law.

*See* 5 U.S.C. § 601(2). The RFA also states that an agency shall prepare an initial regulatory flexibility analysis whenever the agency "is required by section 553 of this title, or any other law, to publish general notice of proposed rulemaking for any proposed rule." 5 U.S.C. § 603(a). The agency also shall perform a final regulatory flexibility analysis whenever it promulgates a final rule in accordance with the same publication requirements. 5 U.S.C. § 604(a).

In the present case, Defendants were required to perform the RFA analyses because: (1) the Final Rule was a "rule," as the term is defined in 5 U.S.C. § 601(2), in that 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

used in APA jurisprudence; and/or (3) the Clean Water Act, 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)).

**E. The Corps Misinterpreted the RFA's Standard for When It Applies**

As an initial matter, the Corps misinterpreted the RFA's requirements when it erroneously sought to rationalize away its failure to comply with any aspect of this important law. In the Final Rule, the Corps claimed that no regulatory flexibility analysis whatsoever was required "because we proposed to issue new and modified NWP's, not change our regulations." 65 Fed. Reg. 12825; A.R. Prt 1-019.<sup>10</sup>

The RFA's applicability does not depend, however, on whether an agency classifies its final action as a "regulation." Rather, as explained above, the RFA is triggered whenever, as here, the agency either publishes a "general notice of proposed rulemaking" for a proposed rule, *see* 5 U.S.C. § 601(2), or is required under the APA or any other law to publish a "general notice of proposed rulemaking" for a proposed rule, *see* 5 U.S.C. §§ 603(a) & 604(a). Under the Sections 603(a) & 604(a) prong of RFA applicability, instead of engaging in a superficial labeling exercise, the Corps should have considered the purpose and effect of the Proposed Rule and determined whether, under the APA or any other law, it was required to publish general notice of proposed rulemaking. As explained herein, the changes proposed in the Proposed Rule, and then implemented in the Final Rule, constitute "substantive" or

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<sup>10</sup> By "regulations," the Corps apparently is referring to its regulations set forth at 33 C.F.R. Part 330.

“legislative” rulemaking subject to the APA’s Section 553(b) notice and comment procedures.<sup>11</sup> Accordingly, the Corps was required to comply with the RFA.

F. **The Corps Can Only Assert Its Erroneous Rationalization for Failing to Comply with the RFA Because It Changed How It Handled Its NWP Rulemaking Proceedings In 1996, When It Announced Its Intention to Discard NWP 26**

It is disingenuous for the Corps to try to disclaim RFA applicability with the rationale that it did not propose to change its “regulations,” because, until this rulemaking began in 1996, the Corps published all its NWPs and NWP general conditions in the Code of Federal Regulations. Indeed, up until 1991, the Corps actually published these NWPs and NWP general conditions as federal regulations. See 33 CFR § 330.5(a) and (b) (1984), (1985), and (1991), attached hereto as Exhibits 4, 5, and 6. On November 22, 1991, the Corps moved the NWPs and NWP general conditions within the Code of Federal Regulations, to 33 C.F.R. part 330, appendix A. See 33 C.F.R. § 330, Appendix A, Part B.26 (1992) (attached hereto as Exhibit 7). Thus, the *non sequitur* the Corps offers to justify its failure to comply with the RFA (that the Final Rule did not change “regulations”) is not only erroneous, but is the product of an agency flip-flop in how it handles promulgation and amendment of NWPs and their general conditions.

More specifically, on December 13, 1996, when the Corps announced that it would be revamping its NWP 26 headwaters and isolated waters permitting program, and six months

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<sup>11</sup> It is interesting to note that the Corps, in summarily concluding that a regulatory flexibility analysis was not required in this case, based its decision on the fact that “we proposed to issue new and modified NWPs.” The Corps ignores, however, that the Final Rule also changed various NWP terms and conditions, which may have a greater impact on the regulated public in that these terms and conditions serve as the binding prerequisites for acquiring an NWP, while also serving as the prerequisites for any potential enforcement actions by the Corps. See 33 U.S.C. §§ 1344 (e) and (s), and discussion, *infra*, at 32-33.

after SBREFA's effective date of June 27, 1996, *see Assoc. Fisheries of Maine Inc. v. Daley*, 127 F.3d 104, 112 (1<sup>st</sup> Cir. 1997), the Corps announced that its NWP and 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." 61 Fed. Reg. at 65874. Nowhere did the Corps explain that it was making this change because the nature of its NWP and NWP general conditions had changed. They had not. Simply no principled basis supports the one reason the Defendants proffered for evading the RFA.

Moreover, the Corps' rationalization for not complying with the RFA is inconsistent with how it has acted in past rulemaking proceedings. 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, 49 Fed. Reg. 12660 (1984), and then a "Final Rule," 49 Fed. Reg. 39478 (1984). Significantly, in 1984, 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 26 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"). It was only after the change of Administration in 1992 that the Corps began to re-categorize its NWP rulemaking proceedings in different terms. *See* 61 Fed. Reg. 65874 (1996) (referring to the issuance of new and modified NWPs and NWP conditions as a "Final Notification").

The D.C. Circuit recently explained that agencies should not so "quickly and inexpensively" be able to disclaim rulemaking requirements. According to the D.C. Circuit:

The phenomenon we see in this case is familiar. Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards and the like. Then as years pass, the agency issues circulars or guidance or memoranda, explaining, interpreting, defining and often expanding the commands in the regulations. One guidance document may yield another and then another and so on. Several words in a regulation may spawn hundreds of pages of text as the agency offers more and more detail regarding what its regulations demand of regulated entities. Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations. With the advent of the Internet, the agency does not need these official publications to ensure widespread circulation; it can inform those affected simply by posting its new guidance or memoranda or policy on its web site. An agency operating in this way gains a large advantage.

*Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020 (D.C. Cir. 2000) (citation and internal quotations omitted).

While the Corps in this case did publish both the Proposed and Final Rules in the Federal Register for notice and comment under the APA, thus providing an opportunity for public participation in the rulemaking process, the Corps did not follow the statutorily prescribed procedures set forth in the RFA. As a result, the Corps was able to issue and amend its real rules, namely the NWP's and NWP terms and conditions, and thus make new law, without incurring the time and expense of performing the requisite regulatory flexibility analysis to determine the potential impact of the Final Rule on small entities and to seek to ameliorate any significant impacts. Thus, this case evidences the RFA variant of the short-cutting "phenomenon" the D.C. Circuit decried in *Appalachian Power*.<sup>12</sup>

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<sup>12</sup> Other Corps documents show the agency may be following the same misguided tack as the EPA in *Appalachian Power*. Previously, on its Internet website, the Corps had stated "[n]ationwide general permits are issued by the Corps of Engineers through the Federal Register rulemaking process." See U.S. Army Corps of Engineers "Regulatory Program Overview" (emphasis added), attached hereto as Exhibit 8. However, beginning in March 1, 2000, the Corps removed all reference to "rulemaking" from its website, stating "nationwide general permits are issued by the Chief of Engineers and are published in the Federal Register and can be found on the Internet at <http://www.usace.army.mil/inet/functions/cw/cecwo/reg/>."

**G. The RFA Applies Because the APA, 5 U.S.C. § 553(b), Required the Corps to Publish General Notice of Proposed Rulemaking for the Final Rule**

The APA sets forth at 5 U.S.C. § 553(b) the standards governing an agency's publication in the Federal Register of a general notice of proposed rule making. An agency must in general must comply with Section 553(b) whenever it promulgates, amends, or modifies a "rule." See *American Hospital Ass'n*, 834 F.2d at 1044. The APA "broadly defines an agency rule to include nearly every statement an agency may make." *Batterton*, 648 F.2d at 700; see also *Appalachian Power*, 208 F.3d at 1021 n.13 (quoting *Batterton*). To this end, the APA defines a "rule," in pertinent part, as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy. . . ." 5 U.S.C. § 551(4). The APA further defines "rule making" as the "agency process for formulating, amending, or repealing a rule." 5 U.S.C. § 551(5).

**1. The Final Rule is a "rule" under the APA's express terms**

The Final Rule represents and includes "a statement of general applicability and future effect," 5 U.S.C. § 551(4), and is thus a "rule." More specifically, as the Corps readily acknowledges, the changes the Final Rule will implement are designed to alter its overall nationwide permit program (thus having "general applicability," 5 U.S.C. § 551(4)), by creating new and modified nationwide permits and imposing new and modified restrictions, limitations, and conditions on acquiring and using nationwide permits (hence having "future effect," *id.*).

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("continued") See U.S. Army Corps of Engineers "Corps Facts," at page 26 n.11, attached hereto as Exhibit 9. The Corps thus also appears to be ready in time to sidle away from the APA, as well as the RFA.

The Final Rule also is designed to “implement . . . or prescribe law or policy,” 5 U.S.C. § 551(4), to wit, the former Administration’s wetlands policy. According to the Corps, the new and modified NWP’s and NWP conditions “[w]ill help implement the President’s Wetlands Plan, which was issued by the White House Office on Environmental Policy on August 24, 1993,” and “[a] major goal of this plan is that Federal wetlands protection programs be fair, flexible, and effective.” 63 Fed. Reg. at 36041 (“Notice of intent and request for comments”); A.R. Prt 7-0002.<sup>13</sup>

**2. The Final Rule represents and includes a “substantive” or “legislative” rule and is thus subject to the APA’s Section 553(b) rulemaking requirements**

The APA requires notice and comment rulemaking under 5 U.S.C. § 553(b), for rules that are “substantive” or “legislative.” See *Paralyzed Veterans of America v. D.C. Arena, L.P.*, 117 F.3d 579, 587 (D.C. Cir. 1997) (stating that the APA’s notice and comment requirements apply to a “substantive rule” having the force of law); *Batterton*, 648 F.2d at 701 (stating that advance notice and public participation pursuant to the APA is required for “legislative” or “substantive” rules).<sup>14</sup>

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<sup>13</sup> *National Wildlife Federation v. Marsh*, 568 F. Supp. 985 (D.D.C. 1983), concluded that a “permit decision-making proceeding is clearly adjudication rather than rule making.” 568 F. Supp. at 992 n.12. In that case, however, the plaintiffs challenged a specific permit issued by the Corps to an energy company to perform certain work in the Chesapeake Bay. *Id.* at 989-991. In contrast to *NWF*, these Plaintiffs are not challenging a Corps decision to obtain and utilize a specific permit at a specific site; instead, they are challenging the Corps decision to issue new regulatory standards and conditions for the NWP program as a whole. Unlike the site-specific permit proceedings at issue in *NWF*, the Final Rule relates to regulatory standards and conditions of general applicability.

<sup>14</sup> Courts in this Circuit use the terms “substantive” and “legislative” interchangeably. See *Batterton*, 648 F.2d at 701 (discussing agency actions that carry the force of law as “legislative or substantive rules”); *American Mining Congress v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1109 (D.C. Cir. 1993) (describing a substantive rule as having force

a. What is a substantive or legislative rule?

Substantive or legislative rules are those rules that "carry the force of law." *Batterton*, 648 F.2d at 701. They "grant rights, impose obligations, or produce other significant effects on private interests," *American Hospital Ass'n*, 834 F.2d at 1045, or "effect a change in existing law or policy." *Alcaraz v. Block*, 746 F.2d 593, 613 (9th Cir.1984) (quoting *Powderly v. Schweiker*, 704 F.2d 1092, 1098 (9th Cir.1983)); see also *American Mining Congress*, 995 F.2d at 1109 (D.C. Cir. 1993) (substantive rules "have the force and effect of law") (quoting Attorney General's Manual on the Administrative Procedure Act (1947)); *United States v. Picciotto*, 875 F.2d 345, 348 (D.C. Cir. 1989) ("we have found rules that grant rights and impose obligations to be substantive"); *Citizens to Save Spencer County v. EPA*, 600 F.2d 844, 876 (D.C. Cir. 1979) ("substantive rules and legislative rules are those which create law, usually complementary to an existing law") (quoting *Gibson Wine Co. v. Snyder*, 194 F.2d 329, 331 (D.C. Cir. 1952)).

In *American Mining Congress* the D.C. Circuit set forth four questions governing whether a particular agency rule has "legal effect," which are:

- (1) whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties,
- (2) whether the agency has published the rule in the Code of Federal Regulations,
- (3) whether the agency has explicitly invoked its general legislative authority, or
- (4) whether the rule effectively amends a prior legislative rule.

995 F.2d 1106, 1112 (D.C. Cir. 1993). *American Congress* explained a rule has legal effect and, therefore, is legislative if any of these four questions has an affirmative answer. *Id.*

And, in *Batterton*, the Court of Appeals for the D.C. Circuit observed that:

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("continued") of law where the agency intended to exercise power pursuant to a congressional delegation of legislative power).

Legislative or substantive rules can be issued only if Congress has delegated to the agency the power to promulgate binding regulations in the relevant area. Legislative rules thus implement congressional intent; they effectuate statutory purposes. In so doing, they grant rights, impose obligations, or produce other significant effects on private interests. They also narrowly constrict the discretion of agency officials by largely determining the issue addressed. Finally, legislative rules have substantive legal effect. They cannot be set aside by the courts unless found arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

648 F.2d at 701-02 (internal citations and quotations omitted) (emphasis added).

Finally, the D.C. Circuit in *Appalachian Power* recently explained that an agency action is subject to APA notice and comment requirements, if it changes or adds compliance duties and obligations on the regulated public or adds compliance costs, however the agency chooses to label its action. See 208 F.3d at 1026-27. As detailed below, the Final Rule constitutes a substantive or legislative rule within the meaning of the APA because it literally meets all the tests for a legislative rule set forth in *American Mining, Batterton*, and *Appalachian Power*. Therefore, the Corps was obligated to publish general notice of proposed rulemaking in connection with its promulgation pursuant the APA, 5 U.S.C. § 553(b). *Ergo*, the RFA applies to the Final Rule. See 5 U.S.C. §§ 603(a) & 604(a).

b. **The Final Rule is or contains a substantive or legislative rule because it imposes new duties, obligations, and costs on the regulated community**

In *Appalachian Power*, the EPA issued a document entitled "Periodic Monitoring Guidance," which placed additional requirements on States in connection with their implementation of their permit programs under the Clean Air Act. Although EPA made the Guidance document available over the Internet, it did not conduct an APA notice and comment rulemaking process. The EPA had previously set forth the States' monitoring requirements for these permit programs in 40 C.F.R. § 70.6(a)(3)(i)(B). The petitioners claimed that EPA's

Guidance document was subject to APA, Section 553(b) notice and comment requirements because it set forth requirements for the States beyond those EPA enumerated at 40 C.F.R. § 70.6(a)(3)(i)(B). EPA, on the other hand, claimed the Guidance document was merely an interpretation and not a substantive rule subject to the Section 553(b)'s notice and comment requirements.<sup>15</sup> See *Appalachian Power*, 208 F.3d at 1022 n.14.

The D.C. Circuit concluded that EPA's Guidance document implemented substantive changes to Section 70.6(a)(3)(i)(B) and, therefore, "in effect amended § 70.6(a)(3)(i)(B)." *Id.* at 1028. First, the court found the changes to be substantive. According to the court:

Test methods and the frequency of testing for compliance with emission limitations are surely 'substantive' requirements; they imposed duties and obligations on those who are regulated.

*Id.* at 1027. In addition, the court found that the Guidance document broadened the periodic monitoring requirements (as opposed to simply interpreting the meaning of an existing requirement) and imposed additional costs on the regulated community. As such, the EPA's promulgation of the document required compliance with the APA's notice and comment procedures. *Id.* at 1028.<sup>16</sup>

Like the additional monitoring requirements imposed by EPA in *Appalachian Power*, the new and modified NWP's and NWP general conditions adopted by the Corps in the Final Rule constitute a substantive change of the Corps' requirements, which required notice of proposed rulemaking under the APA. The Final Rule constrains the regulated public's behavior in new ways and thereby imposes additional duties and obligations, including: (1) two

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<sup>15</sup> See 5 U.S.C. § 553(b)(3)(A), which exempts interpretive rules from the APA's notice and comment requirements.

<sup>16</sup> The court also noted that the Guidance document also triggered the RFA. *Id.* at 1028 n.27.

new general conditions for limiting activities in 100-year floodplains; (2) the reduction of the maximum amount of permitted discharge able to qualify for a headwaters and isolated waters NWP from 3 acres to ½ acre; and (3) the reduction of PCN limits for a headwaters and isolated waters NWP from 1/3 acre to 1/10 acre. *See also National Family Planning*, 979 F.2d at 238-39 (finding that a directive issued by the U.S. Department of Health and Human Services, which modified its previous interpretation of Title X and was intended “to have present binding effect on Title X programs” was a legislative rule in that it imposed new obligations on Title X grantees and HHS Regional Health Administrators).

Moreover, these additional duties and obligations come at a hefty cost to the regulated public. According to one study cited by the Corps, “the changes to the NWP program announced today will increase direct costs for permit applicants by about \$20 million per year . . . [and] the Corps would need about \$6 million in additional funding to maintain current levels of service to the public.” 65 Fed. Reg. at 12819. *See Appalachian Power*, 208 F.3d at 1027 (concluding that EPA Guidance document which changed the compliance requirements under the Clean Air Act on permit applicants, and which also imposed a permit condition that increased compliance costs, was a substantive rule requiring an APA rulemaking).<sup>17</sup>

Furthermore, the Corps has imposed these obligations “to ensure that these activities result in minimal adverse effects on the aquatic environment,” 65 Fed. Reg. at 12818, yet it never defines – except by reference to the conduct permitted under the amended NWP program

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<sup>17</sup> *See also Salt Pond Ass'n v. U. S. Army Corps of Engineers*, 815 F.Supp. 766, 781 (D. Del. 1993) (concluding that a memorandum issued by the Corps was a legislative rule because the memorandum “alters existing rights by superimposing a permit requirement for activities that under current statutory and regulatory framework [ ] are not subject to CWA jurisdiction”).

-- what it means by "minimal adverse environmental effects."<sup>18</sup> For these reasons, the Corps' Final Rule, like the EPA's Guidance document, was an amendment of the Corps regulations, which required compliance with the APA's notice and comment procedures.

Further, the D.C. Circuit has held that an agency action imposing additional permit conditions constitutes a legislative rule within the meaning of the APA, requiring agency compliance with the APA's Section 553(b) notice and comment requirements. *United States v. Picciotto*, 875 F.2d 345 (D.C. Cir. 1989), involved a federal park regulation issued by the Regional Director of National Capital Parks, which imposed "additional conditions" on applicants seeking a permit to conduct demonstrations and other special events in Lafayette Park. The Park Service issued the "additional conditions" regulation pursuant to its authority under 36 C.F.R. § 7.96(g)(5)(xiii) (1988) ("clause 13"), to impose reasonable conditions on the use of federal park lands pursuant to a Park Service permit. The action by the Corps in imposing new NWP conditions is not fundamentally different from the action by the Park Service imposing new conditions on permits to demonstrate in Lafayette Park.

Pursuant to clause 13, the Park Service adopted several additional conditions, one of which prohibited the storage of personal property at a demonstration site in excess of that which is reasonably necessary in a twenty-four hour period. 875 F.2d at 346. The appellant in *Picciotto* was arrested and convicted of violating this additional condition.

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<sup>18</sup> In fact, in the Final Rule, the Corps explicitly stated that "[t]he term 'minimal effect' as it is used in the context of general permits, including NWPs, cannot be simply defined. The terms and conditions of general permits are established so that those permits authorize most activities that result in minimal adverse effects on the aquatic environment. . . . The minimal adverse effects criterion must be subjective, due to the complexity of the analysis required." 65 Fed. Reg. at 12822. Nevertheless, through this rulemaking, the Corps has redefined the term minimal effect, and reduced the acreage impact levels and PCN trigger threshold.

The appellant challenged the "additional conditions" regulation as invalid because the Park Service did not publish a general notice of proposed rulemaking in the Federal Register in connection with its promulgation. *Id.* The Park Service, however, claimed that the "additional conditions" regulation was not a substantive rule under the APA, but rather was an interpretive rule exempt from the APA's notice and comment requirements. *Id.*, at 346-347.<sup>19</sup>

The court concluded that the "additional conditions" regulation represented a legislative rule. The court stressed that the regulation imposed an "additional condition," rather than "explaining an existing requirement." *Id.* at 348. The court also noted that the Park Service previously had adopted a similar, but stricter, regulation pursuant to the APA's notice and comment requirements. *Id.*<sup>20</sup>

Like the "additional conditions" issued by the Park Service in *Picciotto*, the general conditions contained in the Final Rule do not merely explain an existing requirement, but instead impose additional conditions on prospective applicants seeking to employ an NWP. Moreover, like the Park Service in *Picciotto*, the Corps had previously complied with 5 U.S.C. § 553(b) in developing NWP 26 in 1984 and amending it in 1991. Finally, as in *Picciotto*, where the Park Service invoked clause 13, the Corps amended NWP 26 and applicable general conditions pursuant to the law (CWA, Section 404(e) and its own regulations). Corps regulations authorize the Corps to issue and modify NWPs and NWP

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<sup>19</sup> See 5 U.S.C. § 553(b)(A), which exempts agency "interpretive rules" from the APA's notice and comment requirements.

<sup>20</sup> In a subsequent decision discussing its ruling in *Picciotto*, the D.C. Circuit stated, "[w]e struck down the disputed condition, as it was not interpretation of the prior regulation but an exercise of the legislative authority reserved by the prior legislative rule." *American Mining Congress*, 995 F.2d at 1110.

general conditions "from time to time." 33 C.F.R. § 330.5; § 330.6(b). Thus, the Final Rule and its general conditions fall four-square within *Picciotto's* formulation of a substantive rule.

**c. The Corps prepared the Final Rule pursuant to an express congressional delegation of authority**

In promulgating the Final Rule, the Corps specifically invoked and employed its general legislative authority under 33 U.S.C. § 1344(e) [§ 404(e) of the CWA] to issue new and modified NWP's and NWP terms and conditions that provide for streamlined Corps review and permitting of activities projected to have "minimal adverse environmental effects." Under Section 404(e), Congress authorized the Corps to issue, modify and revoke general (nationwide) permits for activities that have a "minimal adverse environmental effects." See 33 U.S.C. § 1344(e)(1)&(2). Pursuant to this delegation of authority, the Corps promulgated the Final Rule to replace NWP 26 with new and modified NWP's and NWP terms and conditions that "ensure that these activities result in minimal adverse effects on the aquatic environment." Final Rule, 65 Fed. Reg. at 12818; A.R. Prt 1-012. See also Proposed Rule, 63 Fed. Reg. at 36041; A.R. Prt 7-0001 (stating that § 404(e) provides "the statutory authority" to develop and issue new and modified NWP's); *id.* at 36042; AR Part 7-0002 (stating that the Corps prescribes NWP terms and conditions to ensure that NWP's comply with § 404(e)'s minimal adverse environmental effects requirement); 61 Fed. Reg. at 65891 (1996) (stating "we will evaluate the types of activities that are currently authorized under NWP 26 and identify appropriate limitations for the activity-specific NWP's to ensure that the minimal adverse effects requirement of Section 404(e) is met").<sup>21</sup> Thus, the Corps' own notices

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<sup>21</sup> The Corps also acted pursuant to its authority to implement the President's 1993 Wetlands Plan. "The replacement of NWP 26 with activity-specific NWP's will help implement

expressly state that it promulgated the Final Rule pursuant to its congressionally delegated authority under Section 404(e) of the Clean Water Act. The Final Rule, therefore, is subject to the APA's 5 U.S.C. § 553(b) rulemaking requirements. See *Batterton*, 648 F.2d at 701-02.

d. The Final Rule has legal effect under the *American Mining Congress* standards

As quoted above, *supra*, at 25, *American Mining Congress* found a rule has legal effect and is thus legislative if any of the four questions it set forth had an affirmative answer. 995 F.2d at 1112. All these questions have an affirmative answer here.

i. The Final Rule helps fill the "legislative gap"

Absent the NWP's and their conditions, including those in the Final Rule, the Corps would lack an adequate legislative basis to confer the benefits of the expedited NWP process that Congress authorized in Section 404(e) of the CWA. The Corps' NWP regulations, purged as they now are of any specific standards governing conduct by the regulated community, simply do not prescribe any actual standards governing what dredging and filling activity is allowed under the NWP program. Agencies' bleeding of content from their regulations is precisely what the D.C. Circuit decried in *Appalachian Power*, 208 F.3d at 1020. The Corps regulations now merely direct that a prospective permittee must comply with the pertinent NWP's terms and conditions, see 33 C.F.R. § 330.1(c). The NWP's and their conditions then fill the "legislative gap" between the authorizing language of CWA Section 404(e) and the regulated community. See *American Mining Congress*, 995 F.2d at 1112. Moreover, neither the CWA nor Corps regulations define the term "minimal adverse environmental impacts," the

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("continued") the President's Wetlands Plan, which was issued by the White House Office on Environmental Policy on August 24, 1993." 63 Fed. Reg. at 36041; A.R. Prt 7-0002.

touchstone for NWP eligibility. The NWPs and their conditions, instead, embody and authorize that conduct Defendants deem to have "minimal adverse environmental impacts."

Further, the Corps could not "ensure the performance" of CWA duties without reference to the NWPs and their conditions. The CWA states that any permittee who is found to have violated "any condition or limitation set forth in a permit" is subject to both civil and criminal liability. See 33 U.S.C. § 1344(s) (emphasis added). See *United States v. Hallmark Const. Co.*, 14 F. Supp.2d 1065, 1068 (N.D. Ill. 1998) (concluding the Corps has the authority under Section 404(s) to bring an enforcement action and to issue compliance orders for permitless discharges); *Reichelt v. U.S. Army Corps of Engineers*, 969 F. Supp. 519 (N.D. Ind. 1996) (finding the Corps has the authority to bring enforcement actions under the CWA for permit violations); *United States v. Kelcourse*, 721 F.Supp. 1472 (D. Mass. 1989) (concluding that the Corps has the authority to refer cases to the United States Department of Justice to bring enforcement actions under Section 404(e) for civil penalties); *Orleans Audubon Society v. Lee*, 742 F.2d 901, 905 (5<sup>th</sup> Cir. 1984) (discussing Corps authority to bring enforcement action under Section 1344(s) for the violation of Section 404(e) permits); *Spires v. U.S. EPA*, 1995 WL 774774, \*2 (D. Or. 1995) (discussing Corps authority to bring Section 1344(s) enforcement action for violation of permit terms and conditions).

ii. The Final Rule amended a prior legislative rule

The answer to the fourth *American Mining Congress* factor also is in the affirmative. The Final Rule amends a prior legislative rule.<sup>22</sup> As discussed above, the 1984 legislative rule

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<sup>22</sup> The Final Rule also meets *American Mining Congress's* second and third prongs. See 995 F.2d at 1112 (*quoted, supra*, at 25). As to the second (publication in the Code of Federal Regulations), that the Corps purported to act legislatively in this case also is evidenced by the way the Corps handled similar amendments in the past. As shown above, when the Corps

that first implemented NWP 26, which was published in the Code of Federal Regulations at 33 C.F.R. § 330.5(a)(26) (1985), imposed a maximum per-project acreage impact of 10 acres, and required PCN for discharging activities resulting in water loss of over 1 acre. *See* 49 Fed. Reg. 39478. This rule represented an early Corps construction of § 404(e)'s "minimal adverse effects" standard as to headwaters and isolated waters. In 1996, the Corps adopted a new construction of the "minimal adverse effects" standards for headwaters and isolated waters by reducing the maximum per-project acreage impact to 3 acres and reducing the PCN level for discharging activities resulting in water losses anticipated to be greater than 1/3 acre. *See* 61 Fed. Reg. at 65891. Although the 1996 legislative rule did not appear in the C.F.R. (because the Corps removed the NWPs and the general conditions from the C.F.R. that year), the 1996 legislative rule amended the 1984 legislative rule, and required the Corps to comply with the APA's notice and comment requirements. Now that the Corps is effecting yet a third construction of the phrase "minimal adverse environmental effects" in the Final Rule, the Corps has again amended its prior legislative rule. As the D.C. Circuit has stated:

When an agency promulgates a legislative regulation by notice and comment directly affecting the conduct of both agency personnel and members of the public, whose meaning the agency announces as clear and definitive to the public. . . . it may not subsequently repudiate that announced meaning and substitute for it a totally different meaning without proceeding through the notice and comment normally required for amendments of a rule. To sanction any other course would render the requirements of § 553 basically superfluous in legislative rulemaking by permitting agencies to alter

("continued") modified or added NWPs and NWP general conditions in 1984 and 1991 (including NWP 26), the NWPs and conditions were published, as amended, in the Code of Federal Regulations. The Corps did not demonstrate that the NWPs and their general conditions changed their character as substantive and legislative when the agency removed them from the C.F.R. in 1996, and these measures clearly have not changed their character. If anything, they have become far more prescriptive since 1991, as the Corps now defines an increasingly small universe of activity as having "minimal adverse environmental effects." As to the third, the Corps repeatedly invoked its general CWA Section 404(e) rulemaking authority in developing and promulgating the Final Rule. *See* discussion, *supra*, at 31.

their requirements for affected public members at will the ingenious device of 'reinterpreting' their own rule.

*National Family Planning and Reproductive Health Assoc. v. Sullivan*, 979 F.2d 227, 231-232 (D.C. Cir. 1992).

For these reasons, the Final Rule represented a legislative rule with "the force of law" subject to the APA Section 553(b) rulemaking requirements, and, therefore, the RFA. See also *Syncor International Corp. v. Shalala*, 127 F.3d 90 (D.C. Cir. 1997) (holding that an FDA regulation published in the Federal Register as a "Notice" was a substantive rule, in that the regulation uses wording consistent only with the invocation of its general rulemaking authority to extend its regulatory reach); *National Family Planning*, 979 F.2d at 231 (holding that an HHS directive which altered the agency's previous interpretation of Title X in a previous regulation was legislative and required APA notice and comment); *Batterton*, 648 F.2d at 701-02 (concluding that the Department of Labor's alteration of the method by which it calculates unemployment statistics for the purpose of distributing federal funds to state and local providers of unemployment programs constituted a legislative rule); and *Pickus v. United States Board of Parole*, 507 F.2d 1107, 1112-13 (D.C. Cir. 1974) (holding that the parole board's use of guidelines establishing specific factors for determining whether parole eligibility that were "calculated to have a substantial effect on ultimate parole decisions" was a legislative rule). Because the Final Rule thus represents a substantive, legislative rule subject to the APA's 5 U.S.C. § 553(b) requirements, Defendants were required to comply with the RFA.

**H. Even if the APA Does Not Require Notice and Comment Rulemaking, the Corps Also Was Required Under the CWA To Publish What Would Constitute General Notice of Proposed Rulemaking For the Final Rule**

As explained, *supra*, the RFA applies when Section 553(b) or “any other law” requires an agency to publish a general notice of proposed rulemaking for any proposed or final rule. *See* 5 U.S.C. §§ 603(a) & 604(a). In the present case, the Corps also was required to perform a regulatory flexibility analysis because, under CWA Section 1344(e) and the Corps’ regulations implementing the NWP program, the Corps was required to publish what amounted to “general notice of proposed rulemaking” for the Final Rule. *See* 33 U.S.C. 1344(e); 33 C.F.R., Part 330.<sup>23</sup>

As another court in this district recently explained in an RFA case, agency action undertaken pursuant to a general notice of proposed rulemaking entails the following attributes:

(1) advance publication in the Federal Register of the proposed rule or its substance; (2) opportunity for public participation through submission of written comments, with or without oral presentation; and (3) publication of the final rule, incorporating a concise statement of its basis and purpose, thirty days before its effective date.

*American Moving and Storage Assoc., Inc. v. U.S. Dep’t of Defense*, 91 F. Supp.2d 132, 135 (D.D.C. 2000) (quoting *Batterton*, 648 F.2d at 700).

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<sup>23</sup> In this Circuit, “[a]gencies have discretion to add to the procedural requirements designated by Congress,” and courts consider these added processes in determining whether the agency has assumed the obligations of a general rulemaking. *See Batterton*, 648 F.2d at 700 (finding that even though the agency’s actions would have fallen within the § 553(a)(2) interpretive exception to the requirements of § 553(b), the agency had subjected itself to the APA requirements by stating that it would not rely on such an exemption).

The procedural requirements for issuing and modifying an NWP under the CWA and its implementing regulations mirror the APA's requirements.<sup>24</sup> First, the CWA requires "notice" to be given prior to the issuance of an NWP, and also provides for extensive public participation in the issuance or modification of an NWP. *See* 33 U.S.C. § 1344(e)(1) (stating that general permits may be issued only "after notice and an opportunity for public hearing"); 33 U.S.C. § 1344(e)(2) (stating that general permits may be modified only "after notice and an opportunity for public hearing"); *see also* 33 C.F.R. § 330.1(b) (obligating the Corps, prior to issuing or modifying an NWP, to "give[] notice and allow[] the public an opportunity to comment on and request a public hearing regarding the proposals"); 33 C.F.R. § 330.5(b)(2)(i) (requiring the Chief of Engineers to publish a document seeking public comments, including the opportunity to request a public hearing upon the proposed issuance of new NWP's or modification of existing NWP's); 33 C.F.R. § 330.1(b) (stating that "[p]roposed NWP's or modifications to or reissuance of existing NWP's will be adopted only after the Corps gives notice and allows the public an opportunity to comment on and request a public hearing regarding the proposals").<sup>25</sup>

Further, the combination of the CWA and the Corps' implementing regulations require publication of the Final Rule, including what amounts to a statement of basis and purpose. Pursuant to CWA Section 1344(e), the Corps is required to determine whether the category of activities that the general permits would authorize are similar in nature and will result in only

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<sup>24</sup> Indeed, as the Corps has acknowledged, "[our] notice and comment process is virtually the same as the APA process." A.R. Ppt 1-191.

<sup>25</sup> In its preamble, the CWA also provides that "[p]ublic participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan or program established. . . . under this chapter. . . . shall be provided for, encouraged, and assisted by the Administrator and the States." 33 U.S.C. § 1251(e).

“minimal adverse environmental effects,” individually and cumulatively. 33 U.S.C. § 1344(e)(1). This determination also is required for the modification of an NWP. *See* 33 U.S.C. § 1344(e)(2). In addition, upon issuing an NWP, the Corps must “set forth the requirements and standards which shall apply to any activity authorized by such [NWP].” 33 U.S.C. § 1344(e)(1). The Corps implementing regulations also require the Chief of Engineers to consider public comments in making his decision on the NWPs and to “prepare a **statement of findings** outlining his views regarding each NWP and discussing how substantive comments were considered.” 33 C.F.R. § 330.5(b)(3) (emphasis added).

Thus, for these reasons, the Defendants were required to comply with the RFA because they published a general notice of proposed rulemaking for the Final Rule pursuant to “any other law,” to wit, 33 U.S.C. § 1344(e) and the Corps’ implementing regulations.

**I. The Final Rule is Subject to the RFA Because the Corps Employed a Quintessential General Notice of Proposed Rulemaking in Promulgating It**

Finally, the Final Rule represents a “rule” under the RFA’s definition and is thus subject to the RFA’s requirements. As explained above, 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 *Tutein v. Daley*, 116 F. Supp.2d 205 (D. Mass. 1999), the court rejected the agency’s claim that agency action was not subject to the RFA when the agency had proposed and promulgated the measure pursuant to what amounted to a general notice of proposed rulemaking. 116 F.Supp. 2d at 208-09 & 208 n.2. Significantly, *Tutein* held that RFA applied even though the court had previously held that the measure did not represent a substantive rule

under the APA because it did not have the "force and effect of law." *Id.* at 208 n.2; *see also Tutein v. Daley*, 43 F. Supp. 2d 113 (D. Mass. 1998).

However Defendants may want to label the Final Rule, they employed a quintessential APA rulemaking process to promulgate it, and it is subject to the RFA. Indeed, the promulgation of the Final Rule had the following APA-style rulemaking attributes: (1) the Proposed Rule issued a set of proposed regulatory changes; (2) explained the proposed changes, what they were intended to do, and why they were necessary; (3) solicited comments for 60 days from its publication; (4) following the 60-day comment period, the Corps was to hold a public hearing in Washington, D.C. to solicit comments on the Proposed Rule; (5) the Corps also was to conduct an initial review of the comments it received and, upon completion of its review, was to prepare an initial draft of the final NWP and begin agency coordination, which was expected to take two months; (6) after the agency coordination was finished, the Corps was to complete the final version of the NWP for publication in the Federal Register by December 1998; (7) the Corps would then finalize its regional conditions following its state certification process; (8) the Proposed Rule provided for an effective date once development of the Replacement Permit Rule was completed. *See* 63 Fed. Reg. at 36040, 36047. The Corps then completed this process, and issued the Final Rule. *See also* n. 24, *supra* (Corps concludes CWA process "virtually the same" as APA counterpart).

Accordingly, the Final Rule represents a "rule" under the RFA, and the RFA thus applies, because Defendants promulgated it pursuant to what can only be considered a general notice of proposed rulemaking.

## J. REMEDY

The RFA includes specific remedial provisions. The RFA authorizes a court to enjoin the application as to small entities, including small businesses, of a rule promulgated in violation of its requirements. 5 U.S.C. § 611(a)(4)(B). In the instant case, as the RFA also specifically provides, the Court should remand the Final Rule to the Corps and order it to comply with the RFA. 5 U.S.C. § 611(a)(4)(A). In the meantime, the Court should order Defendants to employ the headwaters and isolated waters NWP 26 program already in place before the Final Rule to small entities until the Court concludes Defendants have complied with the RFA. 5 U.S.C. § 611(a)(4)(B). The pre-existing NWP 26 program will ensure that the environment does not go unprotected while the Defendants comply with the law. In fact, a court in this district has held RFA compliance to be so important that it enjoined implementation of BLM requirements as to small business miners for failure to comply with the RFA and relied upon pre-existing environmental protections to maintain environmental protection in the interim. *Northwest Mining*, 5 F. Supp.2d at 15-16. See also *Southern Offshore Fishing Ass'n v. Daley*, 55 F. Supp.2d 1336, 1346-47 (M.D. Fla. 1999) (relying on continuation of pre-existing conservation regime pending agency's RFA compliance).<sup>26</sup>

## IV. CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' motion for summary judgment and order the relief sought in Plaintiffs' complaint and justified herein.

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<sup>26</sup> The cited order was vacated upon settlement of the action. See *Southern Offshore Fishing Ass'n v. Mineta*, Case Nos. 8:97-cv-1134-T-23C, 8:99-cv-1455-T-23C (M.D. Fla., Dec. 7, 2000)(attached hereto as Exhibit 10).

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Respectfully submitted,



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