

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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 (RJL)
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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 (RJL)
)
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)

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

Plaintiffs,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,
et al.

Defendants.

)
)
) CIVIL ACTION NO.
) CV01404 (RJL)
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)

**PLAINTIFFS NATIONAL FEDERATION OF INDEPENDENT BUSINESS'S AND
WAYNE NEWNAM'S MEMORANDUM OF LAW IN OPPOSITION TO
DEFENDANTS' AND INTERVENOR-DEFENDANTS' SUPPLEMENTAL CROSS-
MOTIONS FOR SUMMARY JUDGMENT**

I. INTRODUCTION

Plaintiffs, the National Federation of Independent Business ("NFIB") and Wayne Newnam ("Mr. Newnam") (collectively, "Plaintiffs"), respectfully submit this memorandum of law in opposition to Defendants' supplemental cross-motions for summary judgment.

II. ARGUMENT

Plaintiffs' RFA Claims Are Justiciable

Intervenor-Defendants Natural Resource Defense Council and Sierra Club appear to sweep these Plaintiffs' claims – brought under the Regulatory Flexibility Act (the "RFA"), as amended by the Small Business Regulatory Enforcement and Fairness Act ("SBREFA") – within Defendants' more general claims that other Plaintiffs' Administrative Procedure Act-based claims are not ripe for judicial review. Plaintiffs have already detailed Defendants' failure to comply with the RFA's requirements. *See* Plaintiff's Memorandum in Support of Their Motion for Summary Judgment at 23-35. Initially, Defendants claimed that they need not perform any RFA analyses because the nationwide permits and their general terms and conditions, that were developed and implemented pursuant to the rulemaking processes at issue in this litigation, did not amount to a "regulation."

These Plaintiffs also addressed Defendants' claims that their promulgation of the NWPs and their general terms and conditions did not represent final agency action. *See* Plaintiffs' Reply to Defendants' Opposition to Plaintiff's Motion for Summary Judgment and Opposition to Defendants' Cross-Motion for Summary Judgment at 7-14. Plaintiffs' demonstration that

they have challenged final agency action applies equally to the subsequent rulemaking phase challenged in the parties' supplemental filings.

Further, Defendants' and Intervenor-Defendant's assertion that these RFA claims are not ripe is meritless. Well-settled case law and the text of the RFA flatly contradict their argument. Plaintiffs NFIB's and Newnam's RFA-based threshold-level challenges do not depend upon, and need not descend to, the details of the implementation of the nationwide permit regime in the case of any individual applicant. The RFA's language itself confirms that the analyses this important law mandates are to consider the cross-section of all affected small entities. For instance, the RFA's threshold inquiry is whether a proposed regulation is expected to have a "significant impact on a substantial **number of small entities.**" 5 U.S.C. § 605(b) (emphasis added). The initial regulatory flexibility analysis ("IRFA") and final regulatory flexibility analysis ("FRFA") analyses also consider impacts and alternatives over the cross-section of small entities that would be affected by the regulation. *See id.* §§ 603 (IRFA must detail, *inter alia*, number of small entities affected by regulation, how they will be affected, and alternatives rejected) & 604 (same, applied to FRFA).

For the purposes of this justiciability analysis, moreover, it is vital to note that Defendants' failure to comply with the RFA's requirements represent procedural errors. *See United States Cellular Corp. v. Fed. Comm. Comm'n*, 254 F.3d 78, 88 (D.C. Cir. 2001) (RFA is "procedural" and requires that an agency file a FRFA demonstrating a "reasonable good-faith effort to carry out [RFA's] mandate"). As such, Plaintiffs' RFA claim became ripe when Defendants failed to comply with the RFA. *See Wyoming Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 51 (D.C. Cir. 1991) (holding that a person who is injured by failure to comply with a procedural requirement may complain at the time the failure takes place).

Courts have repeatedly rejected the Government's efforts to shift litigation of threshold issues relating to the procedures employed in a rulemaking to the case-by-case challenges at the subsequent implementation phase. Like the requirements of the RFA, the National Environmental Policy Act ("NEPA") mandates that an agency analyze the impact of a regulation before promulgating that regulation. *See* 42 U.S.C. § 4332. The environmental analysis required under NEPA is procedurally congruent in time and similar in approach to the review of a regulation's effect on small business mandated by the RFA. *See Assoc. Fisheries of Maine v. Daley*, 127 F.3d 104, 114 (1st Cir. 1997) ("Recognizing the analogous objective of the [RFA and NEPA] we believe that the same rule of reason should apply to judicial review of challenges under RFA § 604.").

Caselaw is legion that an aggrieved party need not wait until the implementation phase to claim a violation of NEPA. Rather, the Supreme Court has held that "a person with standing who is injured by a failure to comply with NEPA procedure may complain of that failure at the time the failure takes place for the claim can never get riper." *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 737 (1998) (emphasis added; internal citations omitted); *see also Sierra Club v. U.S. Dep't of Energy*, ___ F.3d ___ (10th Cir. 2002), 2002 WL 845240 (Apr. 19, 2002) (NEPA and Endangered Species Act challenges to proposed road ripe when DOE granted easement, even though it had not yet approved construction of road); *Heartwood, Inc. v. U.S. Forest Serv.*, 230 F.3d 47, 952-53 (7th Cir. 2002) (finding challenge to agency's list of exclusions under NEPA for failing to follow procedure was ripe notwithstanding the fact that no project had been authorized under any of the proposed exclusions); *West v. Sec'y of Dep't of Transp.*, 206 F.3d 920, 930-32 n.14 (9th Cir. 2000) (procedural claim alleging failure to follow NEPA is ripe when failure to follow NEPA occurs).

In the context of the RFA, a court has held that a plaintiff's RFA challenge was ripe at the time that the defendant agency promulgated an advisory guideline and the plaintiffs alleged hardship. *See Tutein v. Daley*, 116 F. Supp. 2d 205, 209 (D. Mass. 1999). In this instance, the nationwide permits and their general terms and conditions have been promulgated.¹ Plaintiffs in this matter have alleged concrete and imminent injury stemming from Defendants' RFA violation. *See* Plaintiffs' Memorandum in Support of Their Motion for Summary Judgment at 9-12 & Plaintiffs' Reply to Opposition Memorandum at 14-19. Accordingly, neither Plaintiffs' standing to assert the RFA claim nor the ripeness of their claim that Defendants failed to comply with the RFA's mandate is, or can reasonably be, at issue.

III. CONCLUSION

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

Dated: August 2, 2002

Respectfully submitted,

Handwritten signature of David E. Frulla, with a small note "/by ceth" written to the right of the signature.

David E. Frulla (D.C. Bar No. 414170)
Brand & Frulla, P.C.
923 Fifteenth Street, N.W.
Washington, D.C. 20005
Telephone: (202) 662-9700
Facsimile: (202) 737-756
Attorney for Plaintiffs

¹ Intervenor-Defendants' only citation in support of their ripeness argument is *Bennett v. Spear*, 520 U.S. 154, 178 (1997), a case that addressed neither ripeness nor the RFA or NEPA. *See also* Plaintiffs' Reply to Opposition Memorandum at 12-15 (fully addressing *Bennett*).