

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.

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) CIVIL ACTION NO.
) CV01404 (RJL)
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**PLAINTIFFS NFIB'S AND WAYNE NEWNAM'S
SUPPLEMENTAL MOTION FOR SUMMARY JUDGMENT**

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

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NATIONAL FEDERATION OF INDEPENDENT
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**PLAINTIFFS NATIONAL FEDERATION OF INDEPENDENT BUSINESS'S AND
WAYNE NEWNAM'S MEMORANDUM OF LAW IN SUPPORT OF THEIR
SUPPLEMENTAL MOTION 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 support of their supplemental motion for summary judgment. On January 15, 2002, the Defendants promulgated another rulemaking that again altered the Clean Water Act-based Nationwide ("NWP") Permit Program by extending for two years the new and modified NWP's and NWP General Conditions that they implemented in their "Final Notice of Issuance and Modification of Nationwide Permits," 65 Fed. Reg. 12818 (Mar. 9, 2000) (the "Replacement Permit Rule"), which Plaintiffs previously challenged in this action. As in the previous rulemaking, which Defendants projected would increase direct costs by approximately \$20 million for permit applicants (such as Plaintiff Mr. Newnam and NFIB's members), Defendants in this latest rulemaking again neglected to perform any of the analyses required by the Regulatory Flexibility Act (the "RFA"), as amended by the Small Business Regulatory Enforcement and Fairness Act ("SBREFA"). *See* 5 U.S.C. §§ 603-605.

Defendants instead have again chosen to ignore completely their RFA/SBREFA obligations. Accordingly, and for reasons set forth by Plaintiffs in their initial summary judgment motion, Plaintiffs respectfully request that this Court grant them summary judgment for Defendants' violation of the RFA/SBREFA in their promulgation of the Replacement Permit Rule and this latest 2002 rulemaking.

II. FACTUAL BACKGROUND

On August 9, 2001, the Defendants commenced a new NWP rulemaking, in which they proposed to reissue all existing NWPs and NWP General Conditions, including those promulgated in the Replacement Permit Rule, for five years. *See* Notice of Intent and Request for Comments, 66 Fed. Reg. 42070 (Aug. 9, 2001).

Approximately five months later, on January 15, 2002, the Corps published the final rule for this rulemaking. *See* Final Notice, 67 Fed. Reg. 2020 (the “2002 Rule”). In the 2002 Rule, Defendants reissued “all the existing Nationwide Permits (NWPs), General Conditions and definitions, with some modifications,” as well as issued one new general condition. *Id.* All of the NWPs and NWP general conditions, including those promulgated by the Replacement Permit Rule, for a five-year period commencing on March 18, 2002 and expiring on March 19, 2007. *Id.* The 2002 Rule, therefore, extends the duration of the Replacement Permit Rule’s new and modified NWP’s and NWP General Conditions for two years longer than as provided for in the Replacement Permit Rule. *See* 65 Fed. Reg. at 12818.

Significantly, the 2002 Rule reissued the new and modified NWPs and NWP general conditions implemented by the Replacement Permit Rule, including the ½ acre impact limit and the 1/10-acre PCN threshold. *See* 67 Fed. Reg. at 2021, 2023, and 2024. As Plaintiffs previously demonstrated, these limits have substantial impacts on small entities.

The 2002 Rule, however, is void of any analyses required by the RFA/SBREFEA, such as an Initial Regulatory Flexibility Analysis (“IRFA”) (*see* 5 U.S.C. § 603) and a Final Regulatory Flexibility Analysis (“FRFA”) (*see* 5 U.S.C. § 604). Nor does the 2002 Rule contain a Section 605(b) certification that the proposed changes would not have a significant

impact on a substantial number of small entities that, if appropriate, would obviate the requirement to prepare an IRFA and FRFA. 5 U.S.C. § 605(b).

III. ARGUMENT

Defendants Continue To Neglect the Requirements of the RFA/SBREFEA

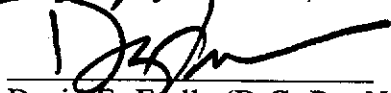
Defendants, thus, still have not complied with the RFA in connection with their NWP Program revisions. Defendants' promulgation of the 2002 Rule, like their promulgation of the Replacement Permit Rule, should have contained either an IRFA and a FRFA, or else a certification under § 605(b) that the 2002 Rule would not have a significant economic impact on a substantial number of small entities. *See* 5 U.S.C. §§ 603-605. The rulemaking documents for the 2002 Rule, however, make no reference to the Regulatory Flexibility Act at all. As such, the Replacement Permit Rule's RFA violations continue unabated to the present. Even worse, Defendants, in the 2002 Rule, have decided to extend the Replacement Permit Rule's onerous and costly NWP and NWP general condition modifications for an additional two years. *See* 67 Fed. Reg. at 2020.

IV. 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: June 19, 2002

Respectfully submitted,



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