

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF HOME BUILDERS,)
)
 Plaintiff,)
 v.)
 UNITED STATES ARMY CORPS OF ENGINEERS,)
 FRANCIS J. HARVEY, Secretary of the Army,)
 and LT. GENERAL CARL S. STROCK, Chief of)
 Engineers, United States Army Corps of Engineers,)
)
 Defendants.)
 _____)

Case No. 1:00CV00379-RJL
and consolidated cases

MOTION FOR PARTIAL CONSENT JUDGMENT

The United States Army Corps of Engineers, Francis J. Harvey, Secretary of the Army, and Lt. General Carl S. Strock, Chief of Engineers (jointly referred to as “the Corps”), the National Association of Home Builders (“NAHB”), and the National Federation of Independent Business (“NFIB”), hereby move the Court to enter a declaratory judgment to resolve all claims pursuant to the Regulatory Flexibility Act (“RFA”), 5 U.S.C. §§ 601-11, in these consolidated matters. Each of the consolidated cases seeks judicial review of the Corps publication of the Final Notice of Issuance and Modification of Nationwide Permits, 65 Fed. Reg. 12,818 (Mar. 9, 2000) (“NWPs”). The complaint in *National Federation of Independent Business v. United States Army Corps of Engineers*, Civil Action No. 00-01404-RJL (“NFIB”), asserts only an RFA claim. The complaint in *National Association of Home Builders v. United States Army Corps of Engineers*, Civil Action No. 00-00379-RJL asserts one claim under the RFA, as well as other claims under different statutes. The third case consolidated herein, *National Stone Sand and Gravel Association v. United States Army Corps of Engineers*, Civil Action No. 00-0558-RJL, does not contain an RFA claim.

The United States Court of Appeals for the District of Columbia Circuit, in deciding an appeal in these consolidated actions, held that “the Corps’ issuance of the NWP’s constitutes final agency action in the form of a legislative rule” and so is subject to the requirements of the RFA, 5 U.S.C. §§ 604-05. *National Ass’n of Home Builders v. United States Army Corps of Engineers*, 417 F.3d 1272, 1285-86 (D.C. Cir. 2005). In relevant part, the D.C. Circuit reversed this Court’s grant of summary judgment to the Corps on the RFA claims and remanded the matter for further proceedings consistent with the appellate court’s decision. *Id.* at 1289.

The Corps, NFIB, and NAHB believe that the interests of all parties and the Court are best served by resolving the RFA claims without further litigation. Accordingly, these parties request that the Court enter a declaratory judgment incorporating the holding of the D.C. Circuit as a final judgment in *NFIB* and on the RFA claim in *NAHB*. The parties agree that no further remedy is necessary with respect to the NWP’s at issue in this matter, which will expire in 2007.

While NFIB asserts only an RFA claim, NAHB has asserted other claims as well. Rule 54(b) allows for the Court to direct entry of final judgment on one of several claims in a matter where there is no just reason for delay in the entry of final judgment. Because NAHB and the Corps have consented to the proposed judgment, there is no reason for delay. Therefore, NAHB and the Corps request that final judgment be entered on the RFA claim in Civil Action Number 1:00CV00379-RJL pursuant to Rule 54(b).

Counsel for plaintiffs in *National Stone Sand and Gravel Association v. United States Army Corps of Engineers*, Civil Action No. 00-0558-RJL does not object to this motion. Counsel for Natural Resources Defense Council (“NRDC”) and Sierra Club, intervenor-defendants in all of these consolidated matters, represents as follows: “Without consenting to any

judgment against NRDC and Sierra Club, without endorsing the characterizations contained in the motion for partial consent judgment and accompanying proposed order, and without waiving any rights, NRDC and Sierra Club do not oppose the relief requested in said motion.”

FOR NATIONAL FEDERATION OF
INDEPENDENT BUSINESSES

Respectfully submitted,

/s/ DAVID EARL FRULLA
COLLIER SHANNON SCOTT, PLLC
3050 K Street, NW
Suite 400
Washington, DC 20007
(202) 342-8400
Fax: (202) 342-8484
Email: dfrulla@colliershannon.com

FOR NATIONAL ASSOCIATION OF
HOME BUILDERS

/s/ VIRGINIA S. ALBRECHT
HUNTON & WILLIAMS
1900 K Street, NW
Suite 1200
Washington, DC 20006
(202) 955-1943
Fax: 202-778-2201
Email: valbrecht@hunton.com

FOR UNITED STATES ARMY
CORPS OF ENGINEERS and
LT. GENERAL CARL S. STROCK

SUE ELLEN WOOLDRIDGE
Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice

/s/ EILEEN T. McDONOUGH
Environmental Defense Section
L'Enfant Plaza Station
P.O. Box 23986
Washington, D.C. 20026-3986
(202) 514-3126
eileen.mcdonough@usdoj.gov

January 5, 2006

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF HOME BUILDERS,)
)
 Plaintiff,)
 v.)
 UNITED STATES ARMY CORPS OF ENGINEERS,)
 FRANCIS J. HARVEY, Secretary of the Army,)
 and LT. GENERAL CARL S. STROCK, Chief of)
 Engineers, United States Army Corps of Engineers,)
)
 Defendants.)
 _____)

Case No. 1:00CV00379-RJL
and consolidated cases

ORDER

Upon consideration of the motion for a consent judgment, it is hereby ordered that the motion is granted. Pursuant to 28 U.S.C. § 2201, the Court declares that the Corps was required to comply with the Regulatory Flexibility Act (“RFA”), 5 U.S.C. §§ 601-11, before issuing Final Notice of Issuance and Modification of Nationwide Permits, 65 Fed. Reg. 12,818 (Mar. 9, 2000).

The complaint in *National Federation of Independent Business v. United States Army Corps of Engineers*, Civil Action No. 00-01404-RJL is dismissed with prejudice in its entirety. The RFA claim asserted in *National Association of Home Builders v. United States Army Corps of Engineers*, Civil Action No. 00-00379-RJL is dismissed with prejudice. Pursuant to Fed. R. Civ. P. 54(b), the Court finds that there is no just reason for delay in the entry of final judgment against these defendants on the RFA claim in Civil Action No. 00-00379-RJL and so directs the Clerk of this Court to enter final judgment dismissing all RFA claims against them.

Executed this _____ day of _____, 2006.

HON. RICHARD J. LEON
UNITED STATES DISTRICT JUDGE