

David Fulla Wins Circuit Court Appeal on Behalf of the National Federation of Independent Businesses

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Washington, DC -- Kelley Drye's [David Fulla](#) achieved a win for the National Federation of Independent Businesses (NFIB) Friday when the District of Columbia Circuit rejected arguments by the Army Corps of Engineers (Corps) and an environmental organization that the Regulatory Flexibility Act of 1980 (RFA) did not apply to the Corps' issuance of nationwide permits under the Clean Water Act (CWA). For its part, the RFA requires federal agencies to measure the impact of their regulatory proposals on small business and consider less burdensome alternatives to proposals that have significant adverse impacts on small businesses.

The ruling reversed a decision by the lower District of Columbia federal court, which had erroneously concluded the Corps' issuance of these nationwide permits did not yet amount to "final agency action" subject to review in court. The benefit of a nationwide permit is that it streamlines the federal CWA approval process for certain dredging and filling activities that are calculated to have not more than a minimal impact overall on the aquatic environment. The decision may have application to a wide range of federal agency environmental permit regimes.

"The Court saw through the regulatory artifice and procedural arguments the Army Corps devised to avoid accountability to small business under the RFA. As the Court found, 'Rules is rules,'" said David Fulla. "This is a textbook example of why Congress was right to provide for judicial review of Federal agency RFA compliance in 1996, with enactment of the Small Business Regulatory Enforcement Fairness Act."

On June 7, 2000, the Corps replaced Nationwide Permit 26, a permit of broad application to a wide range of small scale dredging and filling operations, with a series of activity-specific permits. These new permits authorized a far narrower range of activity than the former Nationwide Permit 26 had done. As a result, many projects that could have been initiated with about a 14-day Corps review and approval process now require delays that, on average, last 104 days. This was a significant blow to small businesses and all businesses that now confront longer delays and increased costs.

"Congress passed the RFA to protect small-business owners at the beginning of the regulatory process," said Elizabeth Gaudio, senior attorney of the NFIB Legal Foundation. "Congress said to government agencies, do your homework, find out if what you propose will hurt small business and, if it does, look for alternatives that are less burdensome."

The Corps' new permits prompted three lawsuits the district court eventually consolidated into one. Together, the three suits claimed the Corps exceeded its statutory authority under the CWA by imposing certain permit conditions; acted arbitrarily and capriciously by failing to provide a rational basis for its permit acreage thresholds; violated the Regulatory Flexibility Act by failing to evaluate

the potential impact of the permits on small businesses; and violated the National Environmental Policy Act by failing to prepare an Environmental Impact Statement for the permits.

This is the third challenge to federal agency rulemaking under the Regulatory Flexibility Act that David has won in recent years. David will also be speaking at the Office of Advocacy's symposium on Small Business and the Regulatory Environment in September to discuss how litigation and building a strong record at the agency level on RFA issues can be important tools for small business.

About David Frulla

David Frulla maintains a litigation and advocacy-focused practice that seeks to develop and implement regulatory approaches to lessen governmental burdens on businesses and other regulated entities. He has a particular expertise in maritime and natural resources-related law, as well as in legislative and regulatory counseling and advocacy before Members and staff of the U.S. Congress, Executive Branch, and administrative agencies. David also has significant experience defending individuals, labor organizations, and corporations in criminal, administrative, and legislative investigations and enforcement proceedings.

About the Litigation Practice Group

Kelley Drye specializes in complex civil and criminal litigation. Our skilled trial lawyers have been a principal foundation of the firm's success for over forty years. We regularly appear in judicial proceedings before federal and state courts across the country, including courts of appeals, the United States Supreme Court, and in administrative litigation before federal and state agencies. We have particular expertise litigating disputes involving the firm's core practice areas, including false advertising and consumer protection, antitrust, intellectual property, international trade, and products liability cases. Our white-collar criminal defense practice represents executives and corporations in high-profile trials and government investigations.

About Kelley Drye

Kelley Drye's Washington, DC office solves competitive problems for Fortune 500 companies, privately held corporations, government entities, and trade associations in the US and abroad. The firm has over 100 attorneys and professionals practicing in the following areas: Advertising and Marketing, Antitrust and Competition, Business Strategies and Transactions, Technology, Environmental, Government Relations and Public Policy, Intellectual Property, International Trade, Litigation, and Trade Associations.