

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY

BERNIE’S CONCHS, LLC &)	
CHARLES AUMAN,)	
)	
PLAINTIFFS,)	
)	
v.)	Civil Action No. 06A-12-005-RFS
)	
STATE OF DELAWARE, DEPARTMENT)	
OF NATURAL RESOURCES &)	
ENVIRONMENTAL CONTROL, and)	
JOHN HUGHES, State of Delaware,)	
Secretary of Division of Natural Resources)	
and Environmental Control)	
)	
DEFENDANTS.)	
)	

AMICUS CURIAE BRIEF OF THE
NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION
SUPPORTING PLAINTIFFS’ MOTION FOR SUMMARY JUDGEMENT REGARDING
THEIR DELAWARE REGULATORY FLEXIBILITY ACT CAUSE OF ACTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE..... 1

STATEMENT OF THE QUESTIONS PRESENTED 5

SUMMARY OF THE ARGUMENT 5

ARGUMENT..... 6

 I. THE FEDERAL REGULATORY FLEXIBILITY ACT 6

 A. Background 6

 B. The Purposes of the Regulatory Flexibility Act 6

 C. Regulatory Flexibility Act Analysis..... 8

 II. DELAWARE’S REGULATORY FLEXIBILITY ACT 10

 A. Background and Analysis Required..... 10

 B. Application of the Delaware Regulatory Flexibility Act 11

 1. *Department of Natural Resources and Environmental Control’s*
 Pre-Regulation Analysis11

 2. *The Department of Natural Resources and Environmental*
 Control’s Post-Regulation Analysis.....12

 3. *The Post Hoc Analysis Was Inadequate*14

 4. *The Department of Natural Resources and Environmental*
 Control’s Improper Consideration of Alternatives.....17

 III. DETERMINATION OF A PROPER ANALYSIS..... 19

CONCLUSION..... 22

TABLE OF AUTHORITIES

Cases

<i>Cataract Surgery Ctr. v. Health Care Cost Containment Bd.</i> , 581 S. 2d 1359 (Fla. Dist. Ct. App. 1991)	12, 13
<i>Farmers Reservoir & Irrigation Co. v. McComb</i> , 337 U.S. 755, 762 (U.S. 1949)	15
<i>Marsh v. Oregon Natural Res. Council</i> , 490 U.S. 360, 378 (1989))	10
<i>Nat’l Ass’n Home Builders v. U.S. Army Corps</i> , 368 U.S. App. D.C. 23 (2005)	2
<i>Nat’l Ass’n of Psychiatric Health Sys. v. Shalala</i> , 120 F. Supp. 2d 33, 42 (D.D.C. 2002).....	10
<i>North Carolina Fisheries Ass’n v. Daley</i> , 27 F. Supp. 2d 650 (E.D. Va. 1998).....	21, 22, 23
<i>Northwest Mining Ass’n v. Babbitt</i> , 5 F. Supp. 2d 9, 15 (D.D.C. 1998).....	8
<i>Oceana, Inc. v. Evans</i> , 384 F. Supp. 2d 203, 212 (D.D.C. 2005).....	10
<i>U.S. Telecomm. Ass’n v. FCC</i> , 400 F.3d 29, 42 (D.C. Cir. 2005).	2

Statutes

Delaware Regulatory Flexibility Act, 29 Del. C. § 10401 et seq.	passim
Regulatory Flexibility Act (“RFA”), 5 U.S.C. § 601 et seq. (2006).....	passim
Small Business Regulatory Enforcement Fairness Act (“SBREFA”) of 1996. Pub. L. No. 104-121, 110 Stat. 857 (1996)	6, 7

Other Authorities

BLACKS LAW DICTIONARY 1209, 68 (6th ed. 1990).....	15
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STATEMENT OF THE CASE

I. Nature and Stage of Proceedings

This *Amicus Curiae* Brief is submitted by Order of the Court, which order followed the motion of the National Federation of Independent Business Legal Foundation (“NFIB Legal Foundation”) to participate in this action *amicus curiae* with respect to the Delaware Regulatory Flexibility Act Cause of Action of Plaintiffs, Bernie’s Conchs, LLC and Charles Auman, in the matter *sub judice*. Plaintiffs allege that Defendant John Hughes, State of Delaware, Secretary of Division of Natural Resources and Environmental Control (hereinafter the “Secretary”), through designees at the Defendant Department of Natural Resources and Environmental Control (“DNREC”), violated the Delaware Regulatory Flexibility Act, 29 *Del. C.* § 10401, *et. seq.* (“DRFA”), when promulgating Secretary’s Order No. 2006-F-0047 and its implementing order, Regulation 3215, by failing to consider possible exemptions or less stringent standards for compliance by small business.

II. NFIB Legal Foundation’s Statement of Interest

The National Federation of Independent Business (“NFIB”) is the nation’s oldest and largest, non-profit, national organization dedicated to representing the interests of small-business owners throughout all 50 states, including nearly a thousand members in the state of Delaware. NFIB’s national membership consists of independently-owned and operated businesses that have non-dominant market positions within their industry. The majority of NFIB members have an average of five employees and annual net profits of approximately \$50,000.

In 2000, NFIB established the NFIB Legal Foundation to help ensure that federal and state agencies comply with the law, in their treatment of small businesses. The NFIB Legal Foundation is an Internal Revenue Code § 501 (c)(3) public interest law firm created to protect

the rights of America's small-business owners by ensuring that the voice of small business is heard in the nation's courts.

One of the NFIB Legal Foundation's primary concerns is agency compliance with the Regulatory Flexibility Act ("RFA"), 5 *U.S.C.* § 601 *et seq.* (2006), the federal law charged with protecting small businesses from onerous regulations. With the proliferation of state RFA laws, the NFIB Legal Foundation's focus expanded into this area as well. Specifically, the NFIB Legal Foundation has filed over 20 comments with various federal agencies on RFA compliance matters. The D.C. Court of Appeals recently acknowledged the RFA's importance in federal rulemaking when it held that an agency's failure to undertake required regulatory flexibility analysis is not an error that can be considered "harmless." *U.S. Telecomm. Ass'n v. FCC*, 400 F.3d 29, 42 (D.C. Cir. 2005). In addition to the submission of comments to agencies, the NFIB Legal Foundation has vindicated its member's interests in RFA compliance in court. *Nat'l Ass'n Home Builders v. U.S. Army Corps*, 368 U.S. App. D.C. 23 (2005) (NFIB prevailed on RFA's application to Clean Water Act nationwide permit rulemaking).

The interests of the NFIB Legal Foundation in a meaningful and thorough regulatory flexibility analysis are harmed by Regulation 3215. This regulation was promulgated without adherence to the requirements of the DRFA — a law modeled after the federal RFA. Specifically, the Secretary refused to adequately consider the effects of the rule and possible exemptions or less stringent standards for compliance by small businesses.

The purpose of this brief is to assist the court by providing several important factual and policy considerations for its review. First, the brief summarizes the history, need for and relevant provisions of the federal RFA, the parent statute to Delaware's state act, the DRFA. Second, the brief addresses the policy behind the DRFA and reviews the statutory requirements

that an agency must follow to comply with the law. Finally, by applying the DRFA requirements to the case at hand and using a persuasive federal case as a guide, the brief explores the inadequacy of the Secretary's rulemaking.

III. Statement of Facts

On November 20, 2006, the Secretary issued Secretary's Order No. 2006-F-0047 ("First Order") approving proposed Regulation 3215 as a final regulation. A copy of the First Order which includes Regulation 3215 as Appendix B is included in the addendum hereto at Tab "A." Regulation 3215, which took effect on January 1, 2007, imposes a two-year moratorium on the harvesting of horseshoe crabs.

Prior to the Secretary's issuance of the First Order, the DNREC's Division of Fish and Wildlife ("DFW") prepared two regulatory options for the DNREC to consider as final regulations, both of which allowed for Delaware to comply with its federal responsibilities as established by the Atlantic States Marine Fisheries Commission ("ASMFC"). First Order at 1. The first option prepared by the DFW provided for a reduced harvest of male-only horseshoe crabs over the next two years. First Order at 1-2. The second option prepared by the DFW imposed a two-year moratorium on all horseshoe crab harvesting in Delaware. *Id.* In adopting the second option before engaging in the statutorily required DRFA analysis, the Secretary stated that "Option 2 ensures that Delaware has undertaken the maximum regulatory effort to protect the horseshoe crab population and the migratory bird population that depends on horseshoe crabs for food." *Id.* Noticeably absent in the First Order was any consideration of the impacts of this regulation on small business.

On February 5, 2007, the Secretary issued Secretary's Order No. 2007-F-0004 ("Second Order") engaging in a post hoc DRFA analysis after the two-year moratorium on the harvesting

of horseshoe crabs had already adversely affected those that were intended to be protected by the Act. A copy of the Second Order is included in the addendum hereto at Tab “B.” The Secretary supported his earlier failure to engage in a legally required DRFA analysis by deciding that small businesses engaged in the agricultural production of horseshoe crabs were actually *not* small businesses *nor* engaged in agricultural production. Second Order at 2.

The Secretary then made a mockery of his legal obligations under the DRFA by attempting to discharge his requirements under the Act with a short paragraph discussing his belief that denying a small business the opportunity to conduct its business produces no regulatory burdens and, in fact, produces cost savings. Second Order at 3.

STATEMENT OF THE QUESTIONS PRESENTED

- I. Whether the Secretary of the Department of Natural Resources and Environmental Control's failure to engage in a Regulatory Flexibility Act analysis prior to implementing Regulation 3215 as required by 29 Del. C. § 10404(a), requires this Court to set aside the agency's action?**

SUMMARY OF THE ARGUMENT

The DRFA requires an agency to consider whether it is lawful, feasible and desirable for the agency to exempt small businesses from the effect a rule or regulation prior to its issuance. 29 Del C. § 10404(a). In addition, the DRFA requires an agency to consider promulgating a rule or regulation which sets less stringent standards for compliance by small businesses prior to its issuance. *Id.* These requirements ensure that agencies consider the impact of their proposed regulations on individuals and small businesses.

Since the Secretary did not follow the DRFA's pre-promulgation requirements, the First Order implementing Regulation 3215 must be set aside. In addition, the Secretary's post hoc analysis of Regulation 3215's effects on small business was legally inadequate and thus did not cure the Secretary's failure to engage in the required DRFA analysis prior to adopting the rule (Regulation 3215). The background and purposes of the DRFA necessitates that the term "costs" be construed to include all economic costs. By limiting the meaning of the term "costs" to monies that must be expended, the DNREC incorrectly attempts to truncate its obligations under the DRFA into virtual nullities. Therefore, the First Order and Regulation 3215 should be set aside, and the DNREC and the Secretary should be required to analyze all economic costs to small businesses before issuing a final regulation.

ARGUMENT

I. THE FEDERAL REGULATORY FLEXIBILITY ACT

A. Background

The costs of regulatory compliance are often constant and fixed, with no consideration of the size of the entity being regulated. Nevertheless, an entity's size determines its ability to comply with onerous regulations while continuing to invent, produce and compete. In September 1980, Congress passed the RFA to address these concerns. 5 *U.S.C.* §§ 601-612. The RFA was not intended to create special treatment for small businesses. Instead, it was designed to ensure that agencies consider the possible anti-competitive effects their regulations might have on small businesses. In March 1996, Congress strengthened the RFA through an amendment known as the Small Business Regulatory Enforcement Fairness Act ("SBREFA") of 1996. Pub. L. No. 104-121, 110 Stat. 857 (1996). The passage of the federal RFA and the SBREFA prompted several states to reevaluate their approach to regulation and its effect on small business. Of these states, Delaware was one of the first to create regulatory flexibility provisions to protect small businesses at the state level.¹

B. The Purposes of the Regulatory Flexibility Act

Small businesses face a disproportionate burden in complying with federal regulations.² These businesses often have a smaller volume of production over which to spread the costs of compliance. The RFA was intended to ease the burdens faced by small businesses in complying with federal regulations. It achieved this objective by increasing both agency awareness and

¹ See generally DEL. CODE ANN. TIT. 29 §§ 10401-08 (enacted 1983); VT. STAT. ANN. § 832(a) (enacted 1985); N.J. STAT. ANN. § 52:14B-1, § 52:14B-19 (enacted 1986); N.Y. A.P.A. LAW § 202-b (enacted 1991); MD. CODE ANN. § 2-1505.2 (enacted 1996); R.I. GEN. LAWS § 42-35-3.3 (enacted 2004); VA. CODE ANN. § 2.2-4007.1 (enacted 2005); S.C. CODE ANN. § 1-23-270, et. seq. (enacted 2005); GA. CODE ANN. § 50-13-4(a)(3) (enacted 2006); CONN. GEN. STAT. 4-168(a) (enacted 2006)

² See W. MARK CRAIN, *THE IMPACT OF REGULATORY COSTS ON SMALL FIRMS* 4 (2005) (in 2005, small firms paid \$7,647 per employee to comply with federal regulations – 45% more than the \$5,282 spent by large firms.)

agency understanding of the impact of expansive regulations on small businesses. Congress explained that the RFA was designed to:

establish as a principle of regulatory issuance that agencies *shall* endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation. To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration.

RFA, Congressional Findings and Declaration of Purposes, Pub. L. No. 96-354, 94 Stat. 1164, § 2(b) (codified at 5 U.S.C. § 601) (emphasis added).

The RFA places the onus of performing regulatory analyses on the regulating agencies. In performing this task, agencies must identify and publicize the cost consequences of a proposed regulatory action. This facilitates communication between the agency and those affected by the proposed action. Requiring agencies to analyze and consider the impacts on small businesses also serves to evoke alternative regulations — such as extending timelines, imposing different requirements on different entities based on a specified standard, or foregoing regulation of these businesses — that can serve the dual purposes of meeting the regulatory goal and protecting small businesses against impulsive regulations.

Finally, the RFA seeks to remove barriers to the marketplace and foster continued growth of small businesses. Monies spent on complying with cumbersome regulations cannot also be spent expanding the business, hiring additional employees or providing existing employees with greater benefits. Thus, enforcing the RFA is paramount to removing the regulatory barriers to entrepreneurial success.

C. Regulatory Flexibility Act Analysis

The first step in any RFA analysis is to identify the universe of small entities, including small businesses, affected by the rule. 5 U.S.C. § 603. Procedural manipulation of that affirmative duty should not be tolerated by an agency under judicial review. *See Northwest Mining Ass'n v. Babbitt*, 5 F. Supp. 2d 9, 15 (D.D.C. 1998) (invalidating rule for failure to identify correct universe of small mining businesses affected by new regulatory bonding requirement).

The RFA, as amended by SBREFA, requires agencies to consider the economic impact that a proposed rulemaking will have on small entities. 5 U.S.C. § 603. The head of an agency may certify that a proposed rule will not have a “significant economic impact on a substantial number of small entities,” (“SEISNE”), but otherwise, the agency must prepare an initial regulatory flexibility analysis (IRFA) and final regulatory flexibility analysis (FRFA) that comports with specific requirements. *See Id.*, § 605(b). The mandatory elements for a legally adequate IRFA, as set forth in 5 U.S.C. § 603(b), must include *inter alia*: (1) a description of the need for the regulation, (2) a statement of the proposed rule’s objectives, (3) a description and estimate of the number of small entities affected by the rule, and (4) a description of the proposed reporting, recordkeeping, and other compliance requirements, including additional professional skills necessary, to abide by the rule. The analysis must also include a description of any significant and equally effective alternatives to the proposed rule that would minimize the impact on small entities. *Id.*, § 603(c). Such alternatives include differing compliance requirements, extended timetables for compliance, simplification of compliance requirements, use of performance rather than design standards or an exemption from coverage. *Id.*

After receiving public comment on the IRFA, the agency must prepare a FRFA. *Id.*, § 604. In the FRFA, the agency may provide either a quantifiable or numerical description of the effects of a proposed rule or alternatives to the proposed rule or more general descriptive statements if quantification is not practical or reliable. *Id.*, § 607. This requirement ensures that an Agency cannot avoid its substantive obligations under the RFA by mere procedural compliance. The RFA requires more than an agency simply “checking the appropriate procedural boxes” as it proceeds through the rulemaking. A FRFA must provide “a meaningful, easily understood analysis that covers each requisite component dictated by the statute and makes the end product — whatever form it reasonably may take — readily available to the public.” *Nat’l Ass’n of Psychiatric Health Sys. v. Shalala*, 120 F. Supp. 2d 33, 42 (D.D.C. 2002).

Judicial review of an agency’s compliance with the RFA is performed under the “arbitrary and capricious” standard. *See* 5 U.S.C. § 611. Along with the other RFA elements, an agency’s Section 605(b) certification and the agency’s compliance with Section 604 in completing the FRFA are also judicially reviewable actions. *Id.*, §§ 611(a)(1)-(2). While judicial review under Administrative Procedures Act standards is limited, it is more than merely perfunctory. *Oceana, Inc. v. Evans*, 384 F. Supp. 2d 203, 212 (D.D.C. 2005)(“[T]his Court undertakes a ‘searching and careful’ examination ...”)(quoting *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 378 (1989)). For any rule which fails to comport with the RFA requirements, the court may grant several forms of relief including (1) remanding the rule to the agency, (2) deferring the enforcement against small entities, (3) staying the rule or any portion thereof or (4) any other relief the court feels appropriate. 5 U.S.C. § 611.

II. DELAWARE’S REGULATORY FLEXIBILITY ACT

A. Background and Analysis Required

The failure of Delaware’s agencies to promulgate regulations in a fair and proportionate manner drove the passage of the Delaware Regulatory Flexibility Act (DRFA) in 1983. 29 *Del. C.* § 10403 *et seq.* Delaware’s General Assembly found that “numerous instances of obtaining compliance with state regulatory and reporting requirements impose[d] inequitable demands on individuals of limited means and on small businesses.” *Id.*, § 10402(a)(1). Thus, to remedy the disconnect between effective state legislation and the welfare of Delaware’s small businesses, the General Assembly enacted the DRFA, requiring agencies to consider the impact of their rulemaking on individuals and/or small businesses. *Id.*, § 10402(b). Specifically, the DRFA states:

prior to the issuance of any rule or regulation an agency shall consider whether it is lawful, feasible and desirable for the agency to exempt individuals and small business from the effect of the rule or regulation or whether the agency may and should promulgate a rule or regulation which sets less stringent standards for compliance by individuals and/or small businesses. *Id.*, § 10404(a).

In order to determine the feasibility of creating an exemption or less burdensome rule, the agency must first pay proper consideration to the effects the proposed rule will have on small businesses and/or individuals. *Id.*, § 10404(b). Proper consideration requires the agency to determine the nature and cost of

- (1) the rule’s reporting requirements,
- (2) any investment necessary to comply with the rule, and
- (3) the legal, consulting or accounting expenses associated with compliance.

Id., § 10404(b)(1-3).

The agency must then determine whether individuals and small businesses could absorb those costs “without suffering economic harm and without adversely affecting competition in the

marketplace.” *Id.*, § 10404(b)(4). The agency must also calculate the additional costs, if any, to the agency by promulgating a less burdensome rule. *Id.*, § 10404(b)(5). Finally, the agency must consider the impact on the public interest by creating an exception or lower compliance standards. *Id.*, § 10404(b)(6).

Only after the agency has performed this analysis is it able to determine the plausibility of creating a rule that is less economically detrimental to small businesses and/or individuals. *See Id.*, § 10406. If, after proper consideration, the analysis indicates that a less burdensome rule can both further the public interest and preserve the viability of small businesses, the agency then must create an exemption to the rule or install lower compliance standards. *Id.*, § 10406. Without a proper analysis, it is impossible for the agency, or reviewing court, to determine whether these statutorily mandated requirements have been met. *See Cataract Surgery Ctr. v. Health Care Cost Containment Bd*, 581 S. 2d 1359, 1364 (Fla. Dist. Ct. App. 1991) (“Where, as here, the agency has apparently ignored its statutory duty [to consider small businesses], it is impossible for the hearing officer or this court to determine that there is no economic impact or that the agency fully considered the statutorily mandated factor.”)

B. Application of the Delaware Regulatory Flexibility Act

1. The DNREC's Pre-Regulation Analysis

Prior to implementing a rule, an agency must analyze its proposed rulemaking in order to determine its effects on small businesses and individuals. 29 *Del. C.* § 10404. The requirement that the analysis be performed prior to implementing a rule ensures that agencies fully consider the impact of their proposed regulations and forces them to explore regulations that are equally effective yet less harmful. *See Cataract Surgery Ctr.*, 581 So. 2d at 1362 (“The purpose of an economic impact statement is to promote agency introspection in administrative rulemaking; to

ensure a comprehensive and accurate analysis of economic factors, which factors will work together with social factors and legislative goals underlying agency action; to direct agency attention to key considerations and thereby facilitate informed decision making.”)

Despite this policy and statutory mandate, the Secretary failed to fulfill his obligations under the DRFA. First and foremost, the Secretary did not engage in any pre-regulation review of Regulation 3215’s effect on the Delaware small business community most affected by the moratorium. In the First Order, the Secretary states that one of the proposed options would “result in a Delaware economic impact;” however, contrary to his statutory obligations, the Secretary did not analyze this economic impact as it relates to small businesses and/or individuals. *See* First Order at 4. The Secretary failed to consider whatsoever the nature and cost associated with compliance, reporting and investment as required by the DRFA.

Failure to flesh out these costs and determine the effect of Regulation 3215 on small businesses logically prevents the Secretary from complying with the second prong of the analysis required by the DRFA — addressing the feasibility of exemptions or reduced compliance requirements. *See* 29 *Del. C.* § 10406. This disregard for the DRFA leaves Delaware’s small businesses, including Plaintiffs, vulnerable to the disproportionate regulatory burden that the DRFA was designed to prevent. *See Id.*, § 10402.

2. *The DNREC’s Post-Regulation Analysis*

The first attempts of the Secretary to address the requirements of the DRFA do not appear in the record until the Second Order (No. 2007-F-0004), two months after he signed the regulation into effect and a full month after the moratorium began. A perfunctory analysis performed after-the-fact does not comply with the spirit or the text of the DRFA. The text explicitly mandates that a regulatory flexibility analysis be performed prior to the issuance of any

rule or regulation. *Id.*, § 10404(a). The post hoc efforts by the Secretary to circumvent the prescribed legal duty placed on his office strips small businesses of the beneficial protections established by the DRFA.

The Secretary utilized the perfunctory analysis set forth in the Second Order to unilaterally limit the scope of the DRFA's protections. The DRFA applies to businesses engaged in any phase of manufacturing, agricultural production or personal service, regardless of the form of its organization. *Id.*, § 10403(3). The Secretary attempts to circumvent the requirements of the DRFA entirely by declaring the business of harvesting and selling horseshoe crabs to be outside the definition of a small business. Second Order at 2. However, a straightforward interpretation of the term "agricultural production" proves otherwise. "Production" is defined as the fruit of one's labor and "agriculture" is defined as the science or art of the production of plants and animals useful to man. BLACKS LAW DICTIONARY 1209, 68 (6th ed. 1990). The combination of these terms in the plain language of the DRFA would include the labor the Plaintiffs put forth to obtain the animals known as horseshoe crabs for sale and use in their respective businesses. Agriculture is not as limiting a term as the Secretary would lead this Court to believe. The U.S. Supreme Court has recognized:

agriculture, as an occupation, includes more than the elemental process of planting, growing and harvesting crops. There are a host of incidental activities which are necessary to that process. Whether a particular type of activity is agricultural depends, in large measure, upon the way in which that activity is organized in a particular society. The determination cannot be made in the abstract. *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755, 762 (U.S. 1949).

This statement unequivocally applies to the mid-Atlantic states and their affiliation with, and social and economic dependence on the coastal environment.

The Secretary's attempt to exclude all horseshoe crab harvesters, including Plaintiffs, from the definition of a "small business" is flawed. Plaintiff Charles Auman is a sole proprietor and makes a living from the harvesting and selling of horseshoe crabs for bait in conching and eeling. By all colloquial standards, Mr. Auman's operations would qualify as a small business, including under the DRFA. *See 29 Del. C. § 10403*. The availability of horseshoe crabs from the Delaware Bay is obviously of vital importance to the continued operation and success of his small business and others similarly situated.

The Secretary's post hoc Order claims that even if the definition of small business in the DRFA covered Plaintiffs' operations, the DNREC would still reach the same conclusion as reached by the Secretary. Second Order at 2. This claim is both irrelevant and unsupported. Whether or not an analysis under the DRFA would have produced such a conclusion, the purposes of the DRFA require that an analysis be performed prior to the passage of such a regulation and not after-the-fact. *29 Del. C. § 10404*. As a procedural requirement, an agency must prepare the DRFA analysis prior to implementing the final rule. The Secretary clearly failed to comply with this requirement prior to promulgating Regulation 3215. The result of his failure must be invalidation of Regulation 3215.

3. The Post Hoc Analysis Was Inadequate

The Secretary's regulatory flexibility analysis was not only untimely, but it was also inadequate. As previously discussed, the DRFA protects small businesses, like those impacted by the moratorium, by prescribing a detailed, specific set of considerations by which state agencies must assess the impacts of regulatory proposals on individuals and small businesses and then develop and consider exemptions or less stringent standards for compliance by individuals and/or small businesses. *Id.*, §§ 10404-06. The factors an agency should evaluate in a regulatory

flexibility analysis stand as indicators of an unfair or imbalanced regulatory scheme, and should only be supplemented, not supplanted.

For its part, the DNREC has incorrectly attempted to truncate its and this Court's obligations under the RFA into virtual nullities. The analysis offered of the small business impact of this regulation is inadequate to satisfy the level of consideration as prescribed by state law. It is undisputed that there are no reporting requirements associated with the current moratorium. However, the Secretary's analysis of the nature and estimated cost of the other measures and investments that would be required is contorted and contradictory.

The Secretary claims that there is no cost to comply with the Order, and even claims that there could be cost savings. Second Order at 3. Though no direct administrative compliance costs result from "not harvesting," such a characterization is merely circular reasoning employed in markedly uncreative manner to try and manufacture support for a pre-determined conclusion. There is a clear regulatory cost to small businesses that would directly result from the enforcement of Regulation 3215. Obviously, a proprietor that relies on the horseshoe crab harvest as his sole source of income would need to take drastic measures and make substantial investments in other endeavors to support himself. It is illogical to think that by enacting the DRFA, the General Assembly envisioned small businesses going out of business as a means to comply with a regulation. *See 29 Del. C. § 10402(a)(3)* ("[T]he scope and volume of regulations already in effect have created high entry barriers in many small industries and has discouraged potential entrepreneurs from introducing beneficial products and processes.")

Moreover, the suggestion in the Second Order that engaging in alternative activities could be beneficial to Plaintiffs is not only dismissive, it is directly contradictory to the claim that no costs of other measures or investments would be required by individuals and small businesses in

complying with Regulation 3215. *See* Second Order at 3. The suggestion that the moratorium “could even result in greater income production for those affected” is not supported by any evidence and rests on the speculation and narrow possibility that alternative activities or bait substitutions can be found before irreparable harm has been done to small businesses already under the restrictions of the moratorium. *Id.* The Order forces small businesses to wait for a “possible artificial substitute” until such time when a “promising scientific development fully is implemented.” First Order at 4. In the meantime, Regulation 3215 imposes a complete moratorium on one’s livelihood without the possibility of a currently available alternative. No reasoned analysis could lead the Secretary to conclude that individuals and small businesses can abandon current business operations and adopt alternative activities at some unspecified time, in some unspecified way, and at no cost.

Calculating these costs enables an agency to determine the ability of small businesses to withstand the costs of the proposed regulation without substantial harm. The Secretary concedes that the “ability of individuals and/or small businesses to absorb the loss of income as compared to previous years without suffering economic harm is somewhat unknown.” Second Order at 3. This conclusory statement correctly identifies the complete lack of any in-depth analysis of the consequences to small businesses before or after the implementation of Regulation 3215; however, it incorrectly assumes that no determination of the losses faced by small businesses can be made.

Information regarding the value of horseshoe crab landings was provided to the Secretary (the value of 2005 annual landings for crabs was \$111,970 and \$204,175 for eels and conchs). Secretary’s Second Order at 3. This value multiplied by the duration of the moratorium provides a superficial estimate of the losses that the businesses face. A simple assumption might conclude

that a small business cannot absorb that high of a cost; yet, no assumption need be made. For example, the Secretary could have surveyed one of the 34 horseshoe crab permit holders or asked one of the individuals that attended the hearing. First Order at 4.

The Secretary also implies that such losses are to be expected and understood by those in the industry. Second Order at 4. Whether or not those engaged in the highly-regulated fishing industry expect a great deal of variation from year-to-year, those small businesses were unlikely to expect or adequately prepare for a variation that would result in the complete absence of any horseshoe crab income for a period of two years. Furthermore, businesses and individuals in highly regulated industries are exponentially more vulnerable to abusive regulatory schemes³ and should, therefore, be afforded the maximum amount of protection provided to them by the DRFA.

4. The DNREC's Improper Consideration of Alternatives

Despite the Secretary's untimely and inadequate analysis, there was no lack of reasonable alternatives available for his consideration. The purpose of pre-regulation analysis is to determine the possibility of crafting an equally effective alternative rule that would not unnecessarily repress small businesses and individuals. Such an alternative was presented for consideration that provided for both protection of the horseshoe crab population and foraging red knot birds, as well as the needs of the fishing industry. Despite the show of support for this particular alternative, a reasoned explanation for discarding this approach in favor of the complete moratorium was not provided. Without a reasoned analysis of the justifications behind the selection of a complete moratorium over a less burdensome alternative for small business, the decision by the Secretary is arbitrary and capricious and in violation of state law.

³ See CRAIN, *supra* Note 2 (complying with federal environmental regulations alone costs companies with fewer than 20 employees \$3,296 per employee compared to the \$710 per employee it costs large companies.)

In the same Order that the Secretary expresses his support for any mitigation efforts that could “provide some economic relief to the persons impacted” by the regulation, he disclaims any authority to take proper action to bring about such economic relief. First Order at 4. However, the State of Delaware expressly provided that “agencies be empowered and encouraged to issue regulations which apply differently to individuals and small businesses” in order to ease the regulatory burden on small businesses. 29 *Del. C.* § 10402(b).

Use of an exemption or less stringent compliance standard would provide the necessary economic relief sought by small businesses. The Secretary expresses an inability to “envision how” an exemption could be implemented that could satisfy the interests of both the horseshoe crab and red knot populations along with the interests of small businesses. Second Order at 4. However, such a plan was presented as Option #1 by the DNREC’s Division of Fish and Wildlife. Whether or not Option #1 would have ultimately been the ideal solution has not yet been determined, because no proper DRFA analysis has been performed.

The Secretary also renounced all available alternatives that did not supply the “maximum amount of protection” for the horseshoe crab and red knot populations for fear of federal sanctions. First Order at 3. However, any in-depth analysis would necessarily include a look at how to craft such an exemption without violating federal mandates. Asserting that an exemption should not even be considered because of the fear of federal sanction is both arbitrary and capricious and in violation of the DRFA. Such fear, moreover, is completely unfounded as Option #1 reflected the horseshoe crab management recommendation of the multi-state organization, the Atlantic States Marine Fisheries Commission, to which Delaware belongs; to wit, a two-year moratorium on horseshoe crab harvest between January 1 and June 7 and a male-only harvest for the balance of the year. (Hearing Officer's Rep. at 3, 9-11; Addendum IV at 4).

Regardless of whether the actions implemented by the Secretary's Orders are consistent with the statutory purposes of the DNREC, the DRFA requires those statutory purposes to be weighed against the interests of small businesses before implementing any measures such as Regulation 3215. 29 *Del. C.* § 10404(5). Given the small business interests involved, the refusal of the Secretary to consider anything less than a complete moratorium on harvesting as "grave and potentially devastating" to the public interest is unreasonable. Second Order at 4.

III. DETERMINATION OF A PROPER ANALYSIS

Aside from the statutory text, no precedent or judicial determination of what constitutes a proper analysis under the DRFA is available. Therefore, considering that the DRFA was modeled in part after the federal RFA, an analogous case under that statute may prove insightful.

One notable federal case, *North Carolina Fisheries Association v. Daley*, parallels the case at hand. 27 F. Supp. 2d 650 (E.D. Va. 1998). In that case, the defendant, the Department of Commerce (DOC), imposed a quota on summer flounder catches in North Carolina. *Id.* at 654. Citing to the federal RFA, the DOC certified that the rule would not have a significant economic impact on small businesses and did not complete a regulatory flexibility analysis. *Id.* at 655. As support for the certification, DOC merely stated that the quota had remained constant from the previous year. *Id.* The District Court originally ruled that the DOC improperly certified the rule and ordered an economic analysis to determine the effect of the rule on small entities. *Id.* DOC submitted the analysis to the court, which addressed whether the action (1) resulted in a certain percentage of revenue loss and (2) would cause a percentage of entities to cease operations. *Id.* at 658.

Upon review, the court addressed the sufficiency of DOC's economic analysis. *Id.* The analysis determined that a majority of the affected vessels would lose more than the allotted

percentage, with most of them losing five times more than permitted under the guideline. *Id.* at 659. Yet despite this determination, DOC concluded that there would be no significant economic impact. *Id.* Recognizing the “patent falsity of such a contention,” the Court concluded that the economic analysis provided was “utterly lacking in compliance with the requirements of the RFA.” *Id.* First, the court likened DOC’s improper categorization and intentional obscuring of the businesses actually affected by the regulations as “willful blindness.” *Id.* at 660. Second, the court rejected DOC’s contention that any economic losses incurred as a result of the restrictive quota would have been alleviated by any alleged past overfishing. *Id.* The court stated that the overall “reasoning itself on an economic or social basis is absurd. Ask anyone whose income is reduced from one year to the next by over 10% whether it resulted in any economic effect.” *Id.* at 659.

DOC’s refusal to recognize the economic impact of its regulatory actions caused the court to “question the agency’s willingness to consider less severe alternatives.” *Id.* at 661. It accused DOC of certifying the rule as a means to avoid preparing a regulatory flexibility analysis or considering any suitable alternatives. *Id.* The court claimed that if DOC believed it could lawfully certify a rule in order to circumvent any consideration of less burdensome alternatives, it could effectively “certify no economic effects when every commercial fisherman in the state [was] in bankruptcy.” *Id.* The court held DOC’s unjustifiable conclusions in clear violation of the court’s prior orders, the RFA and other federal statutory provisions and overturned the quotas. *Id.* at 667.

Like the DOC in *North Carolina Fisheries*, the Secretary relied on conclusory and unsupported facts to circumvent statutory obligations. In addition, the Secretary attempted to re-categorize the affected class out of the purview and protection of the DRFA. Furthermore, the

DRFA mandates that the Secretary rationally consider less burdensome alternatives, keeping small business interests in mind, which he also failed to do. 29 Del. C. § 10406. The Secretary ignores economic realities and justifies his position by asserting the power to remove the “privilege of conducting a business” from those that have “no right to conduct such a business, particularly when it may harm the environment.” First Order at 2. If a five to 25 percent reduction in revenues, like those caused by the *North Carolina Fisheries* quota, is sufficient to cause an economic impact, it is irrational to believe that a complete moratorium would cause no economic impact subject to consideration for DRFA purposes. These actions by the Secretary clearly show the lack of consideration given to small business concerns until after the fact, when back-pedaling was required to try to salvage or legitimize the First Order.

The DRFA is arguably more stringent than the RFA. Primarily, if the analysis of the proposed regulation indicates an alternative regulation that is less harmful to the small entities affected by the regulation, the DRFA *requires* the agency to implement that alternative; yet no such requirement exists in the RFA. If a federal regulator cannot act on impulse when promulgating regulations under the RFA, surely the same regulatory scheme under the DRFA must also fail.

CONCLUSION

The final rule in question (Regulation 3215) would clearly have an adverse affect on small businesses in Delaware. The Secretary failed to comply with the DRFA in his rulemaking and, therefore, the rule is in violation of the law. Moreover, the analysis that the Secretary subsequently prepared relies on inaccurate, conclusory and inadequate statements, rather than reasoned analysis to support his converse decision. His complete disregard for the DRFA's statutory obligations is improper and runs contrary to the state's longstanding policy of protecting small businesses. Modeled in part after the federal RFA, the DRFA requires more than a cursory, post hoc review of small business interests. With all expert and scientific evidence pointing to the contrary, the decision to impose a complete moratorium is arbitrary and capricious. This Court should not sanction attempts by government entities to ignore economic realities, narrowly define terms to suit their particular needs and evade mandated legal obligations imposed on them by the legislature.

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