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Florida Files Request for Limited Stay to Resume 404 Permit Program; Feds Counter That the Clean Water Act Does Not Allow for a Partial Program

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On Monday, the State of Florida and the Florida Department of Environmental Protection (together, "Florida") filed a motion for a limited stay of Judge Moss' February 15th Order invalidating Florida's assumption of the Clean Water Act (CWA) Section 404 permitting program. The United States Environmental Protection Agency (EPA), the United States Army Corps of Engineers (Corps), and the United States Fish and Wildlife Service (FWS) filed a supplemental brief arguing that a limited stay as envisioned by the Court is "neither desirable nor workable," because the Clean Water Act does not allow for assumption of a partial 404 program.

Florida has not had authority to process 404 permits in Florida since Judge Randolph Moss' Order vacating Florida's assumption of the program on February 15th. Judge Moss gave Florida and the Federal Defendants 10 days to request a limited stay of the vacatur. Dkt 163 at 96. Judge Moss made it clear that he would allow the administrative agencies to work out whether a stay is desirable and workable, but that any stay would not apply to permits that "may affect" endangered species—the Judge left it up to the agencies to offer a definition of "may affect." Dkt 163 at 96. Judge Moss previously found that the programmatic Biological Opinion (BiOp) and Incidental Take Statement (ITS) completed by the FWS as part of Florida's assumption were egregiously noncompliant with the Endangered Species Act (ESA). As such, he held that any State 404 permits that may affect listed species must be handled by the Corps.

Florida's motion for a limited stay is the State's attempt to quickly resume the State's authority to permit projects that do not have the "reasonable potential for affecting endangered or threatened species" for at least six months. Dkt 166 at 9. In its motion, the State also requests that certain 404 applications that may affect listed species be exempt from vacatur. Dkt 166 at 12. Specifically, Florida requests that the State retain permitting authority over projects wherein an additional federal action triggers ESA Section 7 consultation, or where an applicant voluntarily chooses to obtain a Section 10 incidental take permit. Dkt 166 at 12. Florida also asks the Court to include in the limited stay the ability of Florida to enforce Section 404 violations in the State's assumed waters.

Florida claims that "a stay as to issuance of permits that will not affect endangered species would avoid hamstringing a large number of (likely exceeding 1,000) pending and forthcoming permit applications that do not implicate the ESA-based concerns underlying this Court's ruling and vacatur order." Dkt 166 at 4-5. Many of these permit applications are for "projects that benefit the environment and/or the public" such as water quality restoration projects in the Everglades, medical facilities, solar energy projects, transportation and stormwater infrastructure, and new schools. Dkt 166 at 5-6. Florida now estimates that 15% of all *individual and general* 404 permits trigger a "may affect" finding. Dkt 166 at 3,11.

The Federal Defendants, on the other hand, in their 4-page brief, maintain that the form of limited stay that the court said it would entertain is impractical and unlawful, and therefore undesirable and unworkable. Dkt at 1. The Federal Defendants assert that a program under which the Corps processes only permits that "may affect" listed species and Florida processes the remainder "would directly conflict with 40 C.F.R. § 233.1(b), which provides that '[p]artial State programs are not approvable under section 404.'" Dkt 165 at 3.

Florida responds to the Federal Defendants' concern about partial assumption by asserting that their proposal averts that issue but also provides another option; to follow the example of New Jersey and Michigan – the other two states with assumed 404 programs. Dkt 166 at 12, 14. Under Florida's proposed alternative approach, there would be no incidental take liability coverage to permittees. However, it would allow for a species review pursuant to the technical assistance process set out in the FDEP program, as supplemented by the procedures used in New Jersey—i.e., FWS would "review a state 404 permit where a 'may affect' situation exists (but not otherwise)." Dkt 166 at 15; *see also* New Jersey MOA Procedures Section III.A.2.

Florida argues that this is the process being employed by EPA and FWS in New Jersey and Michigan, and it should not pose a problem for partial assumption concerns because the State would process all 404 permits for assumed waters; the permits would not be "federalized," or transferred to the Corps to process. The only way a State 404 permit application would be transferred to the Corps is if, after the State considers feedback from federal agencies while processing a permit, EPA intervenes because the State refuses to deny the permit or otherwise fails to address concerns from the federal agencies. In such an instance, EPA "takes the permit away from the state and hands it to the Corps for processing." Dkt 166 at 16. Under this proposed approach, Florida could "continue to process all 'may affect' permits unless and until [it] refuses to adopt conditions imposed by EPA and/or FWS in a 'jeopardy' or 'minimize incidental take' situation." Dkt 166 at 18.

If the Judge accepts one of Florida's alternative theories for a limited stay and therefore grants Florida's motion, Florida would be able to do the following:

1) resume processing 404 permit applications for assumed waters, with the exception of permits that "may affect" listed species, or

2) resume processing all State 404 permits consistent with the New Jersey-Michigan model.

Florida is asking that either form of limited stay be in place for at least six months with the possibility for extensions. If the Judge sides with the Federal Defendants, however, the Corps will continue to have full 404 permitting authority in Florida for the foreseeable future.

Since February 15th, permit applicants throughout the state have been anxiously awaiting the details of a stay request from the State and a decision by the Federal Government as to whether it desires a stay, in order to give some indication as to where their permit applications may be headed. As noted in Lewis, Longman & Walker's previous article summarizing Judge Moss's ruling, 404 permit applicants include but are not limited to homeowners, developers, and local, state and federal governments. 404 permits are

sometimes needed to build housing, roads, hotels, airports and other necessary infrastructure that occur in and can impact waters of the United States (WOTUS). Florida, by any definition, is a "wet" state containing many WOTUS over which Florida previously assumed permitting authority. Not all waterways and wetlands were assumed by the State—many were retained by the Corps—but the currently vacated State 404 program touches a broad segment of our population and our economy. Whether the Corps is equipped to process the number of permits that will be headed its way is another concern for applicants. Rumors have been circulating to the effect that the Corps is bulking up its 404 regulatory staff, which it previously reduced because of Florida's assumption. It may be doing so by shifting staff from other parts of the country whose workload has decreased due to the reduction in scope of jurisdictional waters under the CWA as a result of the *Sackett* case and new WOTUS rule.

Plaintiffs, who are a number of national and local non-government organizations (NGOs) with environmental and species focus, must respond to the State and Federal Defendants' requests by March 7th. Hopefully, the Judge will rule soon thereafter to provide some much-needed clarity.

Even if a limited stay is granted, plaintiffs alleged several other claims in the case that have yet to be ruled on. Plaintiffs argue that Florida's application to assume the 404 program could not be approved by EPA because the State's application was not complete. Specifically, they argue that Florida's application did not include various aspects of the 404(b)(1) Guidelines which makes the State program less stringent than federal law; in addition they argue that the BiOp was not complete at the time of application submission; and last that the retained waters list that was submitted as part of the application was not sufficient. Furthermore, they argue that EPA's "no effect" determination for NMFS jurisdictional species violated the CWA and Administrative Procedure Act. It is possible that a ruling on these claims could cause further impacts to the 404-permitting program.

Make sure to connect with LLW to keep informed and apprised of next steps in the process.

About the Authors

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