Federal Judge Vacates Florida's Assumption of EPA's 404 Permitting Program based on Potential for Impacts to Listed Species

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On February 15, a Washington D.C. District Judge invalidated Florida's assumption of the Section 404 Clean Water Act (CWA) permitting program.

As a result, the United States Army Corps of Engineers now has jurisdiction over all 404 permitting in Florida. A 404 permit is required for any impacts to waters of the United States. 404 permit applicants include but are not limited to homeowners, developers, 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 WOTUS.

In the 97-page ruling, D.C. District Judge Randolph Moss agreed with the Plaintiffs, a number of national and local non-government organizations (NGOs) with environmental and species focus, that the United States Environmental Protection Agency (EPA) relied on a United States Fish and Wildlife Service (FWS) Biological Opinion (BiOp) and Incidental Take Statement (ITS) that violated both the Administrative Procedure Act (APA) and the Endangered Species Act (ESA). The Judge also agreed that the EPA failed to consult with the National Marine Fisheries Service (NMFS) as to indirect impacts to listed marine species.

Thursday's ruling is a blow to EPA, FWS, NMFS, the State of Florida and the 404 permit applicants going through the permitting process in Florida. The Judge vacated the BiOp, ITS, and Florida's assumption of the Section 404 CWA permit program. The Judge stated that he would allow the State and Federal Agencies ten days to submit requests for a limited stay of the decision. The Judge made clear however that any request for a stay of the ruling should not include any pending or future permit applications that may affect listed species. Those applications will need to be processed by the United States Army Corps of Engineers (Corps) for the foreseeable future. It is not clear whether EPA will re-initiate consultation with the Services to fix the issues the Judge raised with the Programmatic BiOp or work with Florida on other potential options for the program to comply with the ESA, as referenced in Judge Moss's opinion and used in New Jersey and Michigan, the other two States which have assumed the 404 permitting program.

Background

In 2021, the Plaintiffs immediately challenged EPA's approval of Florida's assumption of the 404 program, alleging that the assumption violated the APA, CWA, ESA, and Rivers and Harbors Act. The focus of the Judge's February 15th ruling was as to the ESA and APA claims.

The Plaintiffs claimed that EPA's reliance on the FWS BiOp and ITS when approving Florida's assumption was arbitrary and capricious and contrary to law. Dkt 77 at 49-56. Section 7 of the ESA requires that federal agencies consult with the FWS on actions they take that may affect listed species or critical habitat to ensure that the agency's contemplated action "is not likely to jeopardize the continued existence of any endangered or threatened species." 16 U.S.C. § 1536(a)(2). Accordingly, when the Corps issues individual 404 permits, it must abide by this ESA requirement. However, a state issuing an assumed 404 permit is not a federal action subject to Section 7. Therefore, in a State with an assumed permit program, in order to avoid ESA liability a permit applicant can apply for a Section 10 incidental take permit. Alternatively, the State or EPA can federalize the application that has the potential for listed species impacts, which transmits it to the Corps for processing. Florida sought to avoid putting that burden on permit applicants and requested that ESA Section 7 consultation be done by EPA and FWS programmatically to cover the entire permitting program and all permits issued thereunder. This was a novel concept. In the two prior State 404 assumption applications, ESA consultation occurred for one and not the other based on EPA's determination as to whether its act was discretionary or not. The Court in this case did not have to address the discretionary issue because the parties agreed to stipulate that EPA's action on Florida's application was discretionary and therefore needed ESA consultation. What the Court took issue with was the programmatic approach to the consultation and the resulting BiOp and ITS which he found to be flawed. The consultation produced a "programmatic BiOp" which included a finding of "no jeopardy" to listed species and incorporated a "technical assistance" process whereby individual permits would be reviewed by FWS. FWS also produced a "programmatic ITS" for incidental taking of species resulting from the program assumption.

The NGOs challenging Florida's assumption argued that in their complaint and subsequent Motion for Summary Judgment that the FWS's finding of "no jeopardy" in its BiOp was based on vague, not stringent, analysis and outlined an illegal "technical assistance" process that would take place at the individual permit level rather than a detailed jeopardy determination at the programmatic level. Dkt 1 at 35-45. The Plaintiffs also claimed that the ITS issued by FWS improperly failed to specify a limit on incidental take. Dkt 1 at 39. The Judge agreed. The Judge also agreed with the Plaintiffs' claims that EPA failed to consult with the National Marine Fisheries Service (NMFS) as to indirect effects to listed marine species. In finding that to be in error the Judge noted that EPA's consultation with NMFS only started after the case was filed and was still ongoing.

Supplemental Briefs on Remedy

In supplemental briefs regarding remedy, filed after the Court's hearing on the Motion for Temporary Restraining Order or Preliminary Injunction, the federal Defendants and Florida cited the disruption that would result from vacatur of the entire 404 program assumption. In its brief, Florida emphasized the reliance interest developed as a result of Florida's administration of the program for the last three years. Dkt 158 at 5. The Federal Defendants and Florida argued that vacatur should not result from any invalidation of the BiOp because EPA's approval of Florida's assumption was based on Florida's authority to ensure compliance with the ESA, not the BiOp.

Dkt 158 at 6; Dkt 160 at 6, n.3. Florida and the Federal Defendants asked the Court to, instead of invalidating the entire program assumption, remand without vacatur so that any issues with the ESA portion of Florida's assumption application could be remedied while the permitting program remained with Florida. Dkt 158 at 4; Dkt 160 at 5-6. Florida and the Federal Defendants asked, in the alternative, that if vacatur is the selected remedy, to limit the vacatur ruling in some fashion, such as postponing vacatur for at least six months to allow planning and coordination between the State and federal government to "chart a new course." Dkt 160 at 7; Dkt 158 at 7. Florida also asked the Court to alternatively limit vacatur to only prospective applications, or to the low percentage of 404 applications that fall under the category "may affect, not likely to adversely affect" listed species. Dkt 160 at 7-8.

Supplemental briefs regarding remedy were also filed by the two landowners with pending State 404 permit applications that the Plaintiffs had sought to halt by Motion requesting Temporary Restraining Order or Preliminary Injunction. One landowner asked the Court to allow their permit to remain with the State of Florida and agreed to adhere to certain measures minimizing take. The other landowner argued that the Court should not vacate the assumption but should instead remand for the species issues to be addressed because transferring the entire permitting program back to the Corps would cause increased permitting delays and costs as a result of the uncertainty created regarding a new application process.

Vacatur Decision

Less than two weeks after the supplemental briefs on remedy were filed, Judge Moss issued an Order granting the NGOs' Motion for Summary Judgment on counts related to the ESA and vacating the EPA's assumption decision. Judge Moss also denied the pending Motion for Temporary Restraining Order/Preliminary Injunction as to the two landowner permits as moot as a result of the Order. Dkt 164. The vacatur decision is prospective only, not applying to those who already have 404 permits. Dkt 163 at 91. As to the supplemental briefs on remedy Judge Moss' accompanying Memorandum Opinion allows the State and Federal agencies to seek a limited stay of the vacatur but states, "[a]ny such request should exempt all pending and future permit applications that 'may affect' any listed species . . . and should propose a mechanism for determining which permit applications 'may affect' listed species." Dkt 163 at 96. The Court is leaving it up to the administrative agencies to determine if such a stay is desirable and workable. Dkt 163 at 96.

The Judge's Memorandum Opinion provides an overview of the ESA, and details the inadequacy of the BiOp and ITS, essentially calling them so flagrantly flawed that EPA's decision to approve Florida's assumption based in part on these documents must be vacated. Dkt 163 at 91. Judge Moss was not persuaded by the Federal Defendants' argument that invalidation of the BiOp should not result in vacatur of the assumption because EPA did not rely on the BiOp in approving Florida's program. Judge Moss reasoned that the Section 7 consultation and BiOp were done specifically for EPA's decision to approve Florida's application. Dkt 163 at 90. Furthermore, the

Court weighed the "seriousness of the defects" and "potential disruptive consequences of vacatur" and determined vacatur was the appropriate remedy. Dkt 163 at 96.

What This Means

Unless and until a stay is requested and granted, all current and future 404 permit applications in Florida are immediately under Corps authority. If a stay is granted, it will not include any applications that may affect listed species. Those applications will be under Corps jurisdiction regardless of any decision to stay the vacatur. As of the date of Judge Moss's Order, the Florida Department of Environmental Protection (DEP), the administering agency for the State 404 program, cannot process any in-house State 404 permit applications while a stay is worked out. This will cause delays and increased costs for all pending 404 permit applicants, who can either transfer their applications to the Corps or await DEP's ability to continue processing 404 applications. Assuming the Court's issuance of a limited stay of the vacatur, permit applicants without potential listed species impacts will be able to continue on with DEP pursuant to the State 404 program. However, the Judge has made it clear that all pending and future 404 permit applications with listed species impacts will have to be processed by the Corps under the federal 404 program. This remedy will continue until there is some fix to the flawed ESA documentation allowing for the assumption to be reinstated, or resolution of the case differently on appeal.

Make sure to connect with LLW to keep informed of what comes next.

About the Authors

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