Federal Judge Indicates He Will Confer with Parties on April 4th Before Deciding the Parameters of the Stay of Florida's 404 Program

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On Friday, March 8th Judge Randolph Moss, who previously issued an Order vacating Florida's Clean Water Act (CWA) Section 404 Program, ordered parties to meet for a status conference on April 4th to discuss next steps. Following Judge Moss's February 15th decision to vacate Florida's 404 Program, Florida, Federal Defendants, and the Plaintiffs submitted clashing pleadings on whether a limited stay of the vacatur should be granted.

"Upon consideration of Florida's motion to stay, and the related memoranda of the Federal Defendants and the Plaintiffs," the Judge wrote, "it is hereby ORDERED that the parties appear for a status conference on April 4, 2024," and that "the parties should be prepared to discuss next steps in the litigation." The Judge's directive signals to stakeholders that any decision regarding a limited stay will be deferred until after the conference on April 4th. Therefore, all pending State 404 permit applications remain on hold and in "regulatory limbo."

As detailed in LLW's prior article, the Judge's vacatur order invited parties to submit arguments on whether he should allow for a limited stay splitting 404 permitting between Florida and the United States Army Corps of Engineers (Corps). The limited stay as envisioned by the Court would divide authority depending on whether the proposed activities in state assumed waters of the United States (WOTUS) may impact listed species under the Endangered Species Act (ESA). This split was proposed by Florida in a briefing advising the Court as to potential remedies if the Court found that the Biological Opinion and Incidental Take Statement for the program assumption were invalid.

In response, the Federal Defendants filed a short brief on February 26th, arguing that a stay of this nature would violate the CWA's prohibition on partial assumption. Florida filed a motion for limited stay on the same day, requesting that the Court allow it to continue processing State 404 permits that do not pose the reasonable potential for affecting listed species or habitat, and for the remaining State 404 permit applications to be processed by the Corps.

Alternatively, and in response to Federal Defendants' partial assumption concerns, Florida asked that the Court grant it permitting authority over the entire State 404 program if Florida supplements its current technical assistance process with ESA procedures used by the two other states that have assumed Section 404 programs.

On March 7th, Plaintiffs, a group of environmental non-governmental organizations (NGOs), filed a response to Florida's Motion opposing the State's request for a limited stay as undesirable and unworkable. The NGOs contend that a limited stay at this juncture would lead to more confusion because there are still pending claims in the case that the Judge has not yet ruled on. However, the NGOs recognized that "a limited stay is an equitable remedy within the Court's discretion pending its final determination on the merits." Therefore, the NGOs argue alternatively that should the Court allow a limited stay and split of authority, the Corps should be the entity making the decision as to whether an application "may affect" listed species. Accordingly, Plaintiffs argue that any order of limited stay should require that all State 404 permit applications go to the Corps, and only applications that the Corps deems to have "no effect" on listed species be processed by FDEP.

Plaintiffs also characterize Florida's request to supplement its technical assistance process with a New Jersey-Michigan model as an attempt to get the Court to authorize modifications of its program without notice and comment or EPA's approval.

Finally, Plaintiffs state that there is no reasonable basis for Florida to request a stay of at least six months. Presumably, this time frame is requested to give the State time to fix the ESA issues with the program, but the Plaintiffs note that six months would not be nearly enough time for the State to engage in adequate ESA consultation, submit a new assumption application, and adopt new state 404 regulations.

Most recently, on March 11th Florida filed a motion to dismiss the Plaintiffs' pending claims as moot and for entry of final judgment. In its motion, Florida recognizes that the Court would consider entry of final judgment after deciding whether to grant a limited stay. However, Florida argues that delaying consideration of final judgment until after a status conference is held on April 4th is "untenable". Florida contends that the Plaintiffs' remaining claims are moot because they were awarded complete relief in the Judge's decision vacating the entire program. Florida reasons that because of the vacatur, there is no longer a case or controversy for the Court to resolve and that the Court should proceed to final judgment on all claims. Florida alternatively requests that the Court issue a partial final judgment as to the ESA claims. Entry of final judgment makes an order immediately appealable. In its motion, Florida states that it intends "to move for a stay of the vacatur order pending appeal" and "depending on the nature of [the] Court's appealable order," Florida "may also seek a stay of the District Court proceedings pending appeal." Florida asserts that a status conference is not necessary before final judgment is issued but if one is required by the Court, Florida requests that it be held earlier than April 4th. Florida argues, "To defer ruling on the stay motion while also holding back final judgment would deprive the state of Florida of near-term relief from the severe disruptions caused by vacatur while also deferring indefinitely Florida's opportunity to seek appellate review for what is, in all respects, already a final decision."

Federal Defendants have until March 18th to file their response to Florida's motion. Plaintiffs requested and received an extension of time to file a response. Plaintiffs' response is due March 21st.

Unless the Judge rules sooner, we are likely to be in a holding pattern until after the parties meet on April 4th. During this period, no State 404 permit applications are being processed and, accordingly, many people are in limbo as to whether to file their permit applications anew with the Corps or wait on relief from the Court.

In support of the State's request for a limited stay, the Florida Chamber of Commerce and other developers' groups filed an amici curiae brief which emphasized the economic ramifications of continued permitting delays, noting that "[d]elay of any essential permit" leads to "production delays, which increase[s] costs for all parties in the construction industry," including "homeowners, buyers, and renters" who are currently struggling "with high housing costs due to lack of supply, lack of developable land, issues with material availability, persistently high borrowing costs, and other economic impediments."

To that end, Collier Enterprises filed a brief asking the Court to, while it is considering a limited stay, clarify that for State 404 permit applications proposing activities that "may affect" ESA-listed species, FDEP may either: (1) continue State 404 permit processing if ESA section 7 consultation is completed on a related federal action, or (2) immediately transfer their applications to the Corps for processing based on the vacatur. Collier stresses that "persons with State 404 applications . . . should have a fair and certain path toward completion of 404 permitting that does not leave them in regulatory limbo."

To learn more about the history of this case and how we got here, check out LLW's recent article, Federal Judge Vacates Florida's Assumption of EPA's 404 Permitting Program based on Potential for Impacts to Listed Species. Make sure to connect with LLW to keep informed of further developments.

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