Fate of Florida's 404 Program Heads to Appeals Court

by Michelle Diffenderfer and Katherine L. Hupp

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The Federal Judge who vacated Florida's Clean Water Act (CWA) Section 404 Dredge and Fill Program based on Endangered Species Act (ESA) claims, has denied Florida's request for a limited stay of the ruling. As a result, all pending 404 applications must be transferred to the United States Army Corps of Engineers (Corps) to continue the permitting process.

The Judge also entered a partial final judgment, rendering all claims except the Plaintiffs' claim regarding what waters are retained versus assumed under the Rivers and Harbors Act (RHA) immediately appealable.

Florida has appealed the decision to the D.C. Circuit Court of Appeals (D.C. Circuit). Meanwhile Florida has filed its obligatory request with the D.C. District Court for a stay pending appeal. Florida requested the D.C. District Court take action on its Motion by April 23, 2024. This is a different request than the previously denied request for a limited stay and is required in order for Florida to request a stay from the D.C. Circuit. The D.C. District Court Judge has ordered parties to respond to Florida's Motion by 3:00 pm on April 22nd. Assuming the Judge denies the request consistent with his prior rulings, Florida would then be able to move forward in asking the D.C. Circuit for a full stay pending its decision on the merits.

Denial of a Limited Stay

A week after hearing arguments from the parties at a status conference on April 4th, the Judge issued an Order denying Florida's motion for limited stay. As discussed in our prior article, Florida presented two options for a limited stay in its request. Florida's aim was to continue to administer the 404 program in some semblance while ensuring ESA coordination that would address the invalidation of the Biological Opinion. Florida noted the number of permits that are currently sitting in "regulatory limbo" with the Florida Department of Environmental Protection (FDEP) which would need to start anew with the Corps. Florida argued that starting the permit process anew with the Corps will cause added delays and costs for projects including Everglades Restoration, affordable housing, and medical facilities. In addressing this concern, counsel for the Federal Defendants assured the Judge that the Corps is ready and adequately staffed to receive the influx of permit applications, stating "there are more people in the Jacksonville district today to process section 404 permits than there were before state assumption . . . a couple dozen more." Dkt 181 at 29 (Apr. 4, 2024 Hrg. Tr.).

The Judge's Order denying a limited stay reasoned that Florida's proposed options were legally dubious and unworkable and noted the Federal agencies opposition to same.

Entry of Partial Final Judgment

In addition to the ruling on a limited stay, the Judge addressed Florida's motion for entry of final judgment or partial final judgment. Florida argued that because the Plaintiffs were afforded complete relief in the Judge's vacatur of Florida's 404 program, there is no longer a case or controversy, and therefore, the Judge should dismiss the remaining four claims as moot and enter final judgment so that Florida could immediately seek relief from an appellate court.

Plaintiffs argued against entry of final judgment, asserting that their remaining claims are not moot because they are intertwined and not distinct from the decided claims, and that it would be best for judicial economy for the case to be appealed on all of the merits.

The Judge ultimately entered partial final judgment, reserving judgment on Claim 7 regarding the validity of the Corps' retained waters list which was submitted as part of Florida's application for assumption of the 404 program. The Plaintiffs contend that the retained waters list was inadequate and in violation of the CWA, RHA, and the Administrative Procedure Act because the Corps arbitrarily and capriciously omitted certain Section 10 navigable waters from the list. This, the Plaintiffs argue, unlawfully rendered certain waters assumable. The Judge found this claim distinct from the other claims because it concerned an action by the Corps which was not a part of the other claims. The Judge reasoned Claim 7 is "supported by an entirely distinct legal theory arising under the [RHA]," not the CWA or ESA. Dkt 183 at 21.

What It Means

Since Judge Moss's February 15th Vacatur Decision, Florida has not had authority to process 404 permit applications. However, Florida and some applicants did not move the applications to the Corps in the hope that the Court would stay the decision. The Judge's April 12th decision makes it ***clear that all 404 applications must be processed by the Corps for the foreseeable future. Applicants with 404 applications currently with FDEP will need to move their applications to the Corps. It is not clear if Florida will transfer the pending applications or rely on applicants to do that. The good news is that the Corps has stated to the Court that it is willing to offer expedited review for those applications that have substantially moved through the permitting process at FDEP.***

". . . I want to emphasize that a project will not go to the back of the line just because the applicant had previously applied to Florida. The idea here is that the Corps will, as much as possible, pick up where Florida left off, to the extent that the information submitted to Florida satisfies the Corps' requirements. And I think the Corps' hope here is that a project that got pretty close to the end of the line in Florida, because of the work that went into preparing the documents for Florida, will get through the Corps' process faster. That is the hope. But I just want to emphasize again . . . the Corps' intention here is not to make people start from square one, it is to do this as efficiently as possible."
Dkt 181 at 28-31 (Apr. 4, 2024 Hrg. Tr.).

WOTUS

The Corps' renewed authority over the entire 404 program in Florida raises the issue for applicants as to whether their projects impact "waters of the United States" (WOTUS) under the pre-2015 regulations as modified by the *Sackett v. EPA* decision.[1] Under Florida's assumption program, applicants could choose to accept the state wetland line for 404 purposes. This line is more expansive than the current interpretation of WOTUS. If an applicant wanted to go through the "No Permit Required" process with Florida arguing no WOTUS on site, they were facing a lengthy process with FDEP and so many applications were relying on the state line to keep their applications moving. In addition, the WOTUS definition that was in place at the time that Florida assumed the 404 Program was the Navigable Waters Protection Rule (NWPR), which has since been struck down, but was still being applied by Florida due to an argument that they could rely on the rule in place at time of assumption for a certain period of time. As a result, you should consider whether your permit application that is pending with the State for 404 permitting needs to go to the Corps. Especially if the application was pending with FDEP solely based on the Florida state wetland line and there is no WOTUS present. Notably, for projects that were relying on a NWPR analysis, the Corps will not be able to use that methodology but will need to rely on a line that at least covers WOTUS as identified in the pre-2015 regulations as modified by *Sackett*. The Corps has not released general guidance on how *Sackett* alters the pre-2015 regime, so jurisdictional determinations are being made on a case-by-case basis.[2] For more on WOTUS please see our prior article on the most recent but now enjoined WOTUS rule and *Sackett* decision.

Finally, the District Court case will continue on with regard to whether the Corps' retained waters list relied upon in the State's assumption is valid.

Meanwhile, legislation to codify Florida's 404 Program and the BiOp and ITS recently passed the United States House of Representatives and is currently in the Senate. It is unlikely that H.R. 7023 will become law because it needs Senate and Presidential approval. President Biden has indicated that he will veto the legislation as proposed. However, if it did become law, it would make the pending litigation moot.

To learn more about the history of this case and how we got here, check out LLW's recent articles, Federal Judge Vacates Florida's Assumption of EPA's 404 Permitting Program based on Potential for Impacts to Listed Species and Federal Judge Indicates He Will Confer with Parties on April 4th Before Deciding the Parameters of the Stay of Florida's 404 Program. Make sure to connect with LLW to keep informed of further developments.

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[1] Due to a preliminary injunction of the Biden WOTUS rule issued by a North Dakota Federal District Court, the Corps is prohibited from administering the Biden WOTUS rule, as amended, in Florida, and must instead apply the pre-2015 WOTUS regime, as modified by *Sackett*.

[2] Corps Headquarters has published three "Field Memos Implementing the Pre-2015 Regulatory Regime Consistent with *Sackett*." These memoranda evaluate specific draft jurisdictional determinations completed in other Corps Districts under the current pre-2015/*Sackett* standard.

About the Authors

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