



## Florida Files Motion with the D.C. Circuit Court of Appeals to Revive the State 404 Program

by [Michelle Diffenderfer](#) and [Katherine L. Hupp](#)

On April 23<sup>rd</sup>, Federal District Court Judge Moss denied [Florida's Motion for a Full Stay](#) of the Judge's decision to vacate Florida's assumed Clean Water Act 404 Dredge and Fill Permitting Program. The Judge found that Florida did not carry the heavy burden of showing necessary elements that would support the court delaying the effectiveness of its decision on the merits until an appeals court decides the matter. Judge Moss specifically noted that Florida did not show a likelihood of success on the merits because the Endangered Species Act (ESA) is explicit in its requirements for elements of a Biological Opinion (BiOp) and Incidental Take Statement (ITS), and those elements were completely missing in Florida's Programmatic BiOp and ITS.

Judge Moss also said that Florida will not face irreparable harm in the form of alleged permitting delays as a result of all pending State 404 permit applications being moved to the United States Army Corps of Engineers (Corps) for processing. The Judge relied on the Corps' representations that it will move expeditiously to process pending applications, and "that 'a project will not go to the back of the line just because the applicant had previously applied to Florida;' and that, 'as much as possible,' the Corps intends to 'pick up where Florida left off, to the extent that the information submitted to Florida satisfies the Corps' requirements.'" Dkt 190 at 11-12.

In addition, the District Court Judge stated that it was not clear whether Florida was only requesting a stay of the vacatur of Florida's 404 Program or was also seeking a stay of the vacatur of the BiOp and ITS. The distinction, the Judge noted, is significant.

With no stay having been granted, ***all 404 permit applications in Florida will continue to be processed by the Corps for the foreseeable future.***

### What's Next?

In its next move, Florida filed a Motion with the United States Court of Appeals for the District of Columbia (D.C. Circuit), in Case No. 24-5101, seeking a full stay of the District Court's February 15th Order of vacatur. Florida's Motion argues that it is likely to succeed on the merits by showing that the District Court erroneously vacated the BiOp and ITS. Florida relies on the Second Circuit's *Cooling Water* case to support the programmatic BiOp and ITS, and urges the D.C. Circuit to allow Florida's 404 Program to resume. Florida also argues that it is likely to succeed in showing that the plaintiffs do not have standing to challenge Florida's program on ESA grounds because of the federal government's retained enforcement role for species protection in Florida's 404 program. Florida has requested that the D.C. Circuit decide whether to grant a stay by May 21st.

Make sure to [connect with LLW](#) to keep informed of further developments.





## About the Authors



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