

# Got your Fill? The Section 404 Permit Confusion in Florida

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As a result of a federal district court's decision to vacate Florida's Clean Water Act (the "CWA") Section 404 assumed permitting program, the United States Army Corps of Engineers (the "Corps") is once again processing Section 404 permits in Florida. Stakeholders are keen to understand whether Florida's 404 Program will be reinstated, and how the Corps is handling the influx of permit applications.

## Background

The CWA prohibits the discharge of dredged and fill material in waters of the United States without a permit.<sup>1</sup> In Florida, which is, by any definition, a "wet" state, federal dredge and fill permitting touches a broad segment of our population and economy. Dredge and fill permits are needed for construction projects including residential, commercial, and transportation facilities; waterway modifications including stream channelization and dredging for navigation; wetland restoration projects; utility projects; mining projects; and certain agricultural activities.

The Corps typically administers the Section 404 Dredge and Fill permit program. However, Section 404(g) of the CWA provides that states can apply to the United States Environmental Protection Agency (the "EPA") to administer the CWA Section 404 Permit Program in "assumable waters"—waters not "retained" by the Corps. Retained waters are those "waters which are presently used, or are susceptible to use . . . as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark . . . including wetlands adjacent thereto."<sup>2</sup> In Florida, assumable waters are a large subset of the state's wetlands and smaller water bodies.

Only three states, including Florida, have assumed the CWA Section 404 program. Florida, which has a robust wetlands and surface waters protection regulatory program under Chapter 373 of Florida Statutes,

became interested in assumption because of the potential opportunities for streamlining state and federal permitting. In 2018, the Florida State Legislature authorized 404 assumption and the Florida Department of Environmental Protection's ("FDEP") adoption of rules to carry out assumption.<sup>3</sup> Florida then began working with the EPA, the Corps, and other federal agencies to adopt memorandums of agreement/understanding to implement the state program, which the CWA requires to be at least as stringent as the federal program.<sup>4</sup>

At that time, the EPA's position was that approval of a state 404 assumption was a non-discretionary decision which did not require consultation with the United States Fish and Wildlife Service ("FWS") and the National Marine Fisheries Service to ensure no jeopardy to listed species and critical habitat under the Endangered Species Act ("ESA"). However, at Florida's request, EPA later changed its position. On August 27, 2020, EPA issued a memorandum stating its revised position that approval of a state assumption is discretionary and subject to ESA Section 7 consultation.<sup>5</sup> Florida argued for this approach to ensure listed species take liability protection for the state and individual state 404 permittees through what is called a programmatic Biological Opinion ("BiOp") and Incidental Take Statement ("ITS"). In its final decision, the EPA explained that the "streamlined permitting process" that the programmatic BiOp and ITS would put in place "would reduce costs and duplication of efforts by state . . . and federal authorities and facilitate more effective and efficient state . . . CWA Section 404 program."<sup>6</sup>

Accordingly, EPA initiated consultation with FWS on Florida's assumption. The FWS signed a programmatic BiOp and ITS on November 17, 2020. Instead of including a detailed species-specific impacts analysis, the BiOp outlined a process where FWS would provide technical assistance at the individual permit level to ensure no jeopardy to listed species or critical

habitat. FWS reasoned it was not feasible to quantify species-specific impacts "[b]ecause the precise number and locations of future state 404 permit applications are unknown, the exact effects to ESA-species cannot be accurately determined."<sup>7</sup> The ITS did not set forth specific take limits.

The EPA deemed Florida's assumption application complete on August 28, 2020, and the EPA published its decision approving Florida's program in the Federal Register on December 22, 2020.

## The Challenge

The Center for Biological Diversity and other environmental conservation groups immediately challenged the EPA's decision approving the State's assumption of 404 permitting authority alleging that the federal agencies involved violated the Administrative Procedure Act (the "APA"), the CWA, the ESA, and the Rivers and Harbors Act ("RHA").<sup>8</sup> On February 15, 2024, the United States District Court for the District of Columbia vacated Florida's assumption of the 404 Program. The District Court granted summary judgment on several of the plaintiffs' claims, striking down Florida's program for failure to comply with Section 7 consultation provisions under the ESA. Specifically, the Court found that the EPA and the FWS failed to properly evaluate the impact of the State's permitting program on listed species and critical habitat. The ruling concluded that the unique approach in using a programmatic BiOp and ITS did not provide adequate species-specific analyses or set clear standards for the incidental take of species. On April 12, 2024, the Judge entered partial final judgment. Having ruled substantively on the APA and ESA claims, the Court dismissed the CWA claims as moot. The Judge did not rule on the RHA claim regarding whether or not the Corps' retained waters list which was relied on for Florida's assumption was sufficient, so that issue is still pending before the District Court.

The vacatur decision halted the State's ability to process assumed

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404 dredge and fill permits in a large number of wetlands and other waters—“assumed waters”—throughout Florida, prompting a deluge of questions from stakeholders.

### The Appeal

Florida immediately appealed the decision to the United States Court of Appeals for the District of Columbia (the “D.C. Circuit”). The three issues that Florida has raised on appeal are:

1. Whether the district court erred in determining that Plaintiff-Appellees had standing;
2. Whether the district court erred in vacating the FWS’ programmatic BiOp and ITS that the EPA relied upon in approving Florida’s permitting program; and
3. Whether the district court erroneously vacated federal approval of Florida’s entire permitting program under Section 404 of the CWA.

The crux of the second and third issue will be whether the appeals court finds that the “technical assistance” process that the FWS included in its programmatic BiOp is an acceptable substitute for the site-specific species analysis required as part of federal agencies’ consultation obligations under Section 7 of the ESA. As of the date of this writing, the Federal Defendants have not decided whether to appeal.

### Florida’s Push for Expedited Review

Since the vacatur, Florida has requested a stay of the District Court’s decision three times to avoid what it calls a continued “state of disarray” as a result of the vacatur.<sup>9</sup> According to FDEP, over 1,000 permit applications were pending with the agency at the time of vacatur. Florida claimed processing times for these permits will be further delayed as a result of immediate transfer of authority to the Corps. The pending applications include permits for Everglades restoration work, transportation facilities, healthcare facilities, and land development. The Corps has maintained that it is ready and able to process

the surge of permit applications, noting that its Jacksonville District staff numbers exceed what they were pre-assumption.<sup>10</sup>

The District Court and D.C. Circuit denied Florida’s stay requests. Florida then filed a Motion to Expedite Consideration of the Appeal proposing a briefing schedule ending in late August of this year and requesting oral argument as soon as possible. The pending motion to expedite is opposed by both the Federal Defendants and the Plaintiff-Appellees.

### Current Regulatory Landscape

The Corps is now processing all 404 permit applications in Florida. It is yet to be seen how efficiently it will do this. Florida has called into question the Corps’ ability to expeditiously process the expected influx of over 1,000 permit applications because, as Florida states, the Corps Jacksonville District’s 126 staff members “pales in comparison to the over 300 certified wetlands evaluators and other staff available to administer Florida’s program.”<sup>11</sup> The Corps, however, has assured that it has a plan to train additional 404 personnel from other Corps District offices across the country to process Florida 404 permits.<sup>12</sup>

Additionally, Florida expressed concerns that the Corps will “reprocess all permits and independently evaluate them from scratch—no matter how far along those permits were in the Florida program.”<sup>13</sup> Florida also raises concerns about state-issued permit violations going unenforced. A Declaration from Justin Wolfe, General Counsel for FDEP, explains that at the time of the vacatur order, Florida was investigating over 100 potential violations of the 404 program, and that “[g]iven the limited resources and staff of the federal agencies in Florida, it is likely that many, if not most, of those potential violations would go unenforced as a result of the vacatur order.”<sup>14</sup>

### Which WOTUS Line Is It?

Another significant question raised is how the vacatur will impact jurisdictional determinations made at the state level. The “waters of the United States” (“WOTUS”) definition in place at the time that Florida assumed the 404 Program in 2020 was the Navigable Waters Protection Rule

(the “NWPR”). Accordingly, FDEP began using the NWPR definition for WOTUS determinations when it assumed the program. That rule was subsequently vacated by a federal district court on August 30, 2021.<sup>15</sup> Soon thereafter, the Corps released a statement that it would no longer be relying on NWPR for new permit decisions.<sup>16</sup>

However, FDEP continued to apply the NWPR when making state 404 jurisdictional determinations relying on a CWA provision allowing an assumed program to use the rules in place at time of assumption for one to two years after a modification to federal regulations, depending on the circumstance.<sup>17</sup>

Then on January 18, 2023, the Biden Administration published a new WOTUS definition.<sup>18</sup> This rule was soon revised in August of 2023 to fix elements of the rule that were invalidated by the Supreme Court’s decision in *Sackett v. EPA*, primarily the removal of the significant nexus standard.<sup>19</sup> FDEP then started applying the NWPR as modified by *Sackett*. The Biden rule’s revised definition has been preliminarily enjoined in Florida and a number of other states by a North Dakota federal district court. While that case is pending, the EPA and the Corps are applying the pre-2015 regulatory regime as modified by the *Sackett* decision in Florida.<sup>20</sup>

As a result of the vacatur of Florida’s 404 program, pending permit applications with FDEP that are transferred to or start anew with the Corps may not be subject to the same jurisdictional definition that was previously applied by FDEP. The Corps will not rely on a FDEP formal determination that used the NWPR. As a result, an independent wetland determination by the Corps will likely be required. Conversely, for applications that were relying on the Florida wetland line instead of the WOTUS line, the applicant and the Corps will need to determine whether there really is federal jurisdiction by way of WOTUS on the property.

Significantly, state-issued No Permit Required Letters (“NPRs”) and formal determinations finding no WOTUS that were done in conjunction with state ERP are not binding



on the federal agencies. EPA retained enforcement authority over Florida's 404 program, and the Corps now resumes its enforcement authority as a result of the vacatur. Any projects relying on NPRs or state determinations using NWPR or the Florida wetland line may be at risk of impacting WOTUS as defined under the pre-2015 regime as modified by *Sackett*. Therefore, applicants may want to discuss their options with the Corps.

### Conclusion

The D.C. Circuit will now decide whether Florida's program was improperly vacated based on noncompliance with the ESA. In addition to the tremendous impact in Florida, the outcome of the appeal has significant ramifications for other states that are interested in assuming the CWA Section 404 program. Only two other states—Michigan and New Jersey—have assumed the 404 program, but neither of these programs provided incidental take liability protection under the ESA.

As we await the D.C. Circuit's ruling, the Corps will continue to process all 404 permit applications in Florida. The Corps' reclaimed jurisdiction will likely further delay project approvals as the Corps works out the transition, especially if the Corps requires new wetland determinations for many of the state applications that are transferred to the Corps. The Corps is working to streamline the process and clear the backlog, but applicants should prepare for delays.

Meanwhile, the District Court is still considering the plaintiff environmental groups' claim that the retained waters list relied on for Florida's assumed program was inadequate. This could be an additional and independent basis to strike down

the Florida program, regardless of what happens in the current appeal.<sup>21</sup> Furthermore, a separate challenge to Florida's assumption filed by the Miccosukee Tribe of Indians of Florida in the Southern District of Florida could be another means by which the program is invalidated, if the case is not rendered moot by the outcome of the D.C. Circuit case.<sup>22</sup> As a result, Florida stakeholders will need to continue to wade through the murky waters of the 404 litigation until the case is resolved.

### Endnotes

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1 33 U.S.C. §§ 1311(a), 1344(a)(1).

2 33 U.S.C. § 1344(g)(1).

3 SB 1402/HB 7043; Chapter No. 2018-88; § 373.4146, Fla. Stat.

4 33 U.S.C. § 1344(h)(1)(A); 40 C.F.R. § 233.1(d).

5 *Memorandum on Endangered Species Act Section 7(a)(2) Consultation for State and Tribal Clean Water Act Section 404 Program Approvals*, U.S. ENV'T PROT. AGENCY (Aug. 27, 2020), [https://www.epa.gov/sites/default/files/2020-08/documents/esa\\_consultation\\_policy\\_for\\_404g.pdf](https://www.epa.gov/sites/default/files/2020-08/documents/esa_consultation_policy_for_404g.pdf).

6 *Id.*

7 U.S. Fish & Wildlife Serv., Biological Opinion, at \*56 (Nov. 17, 2020).

8 *Ctr. for Biological Diversity et al. v. Andrew Wheeler et al.*, Case No. 21-cv-00119 (D.D.C. 2024).

9 Fla. Motion to Expedite Consideration of the Appeal, at \*10 (May 23, 2024).

10 Zinszer Dec., ¶ 8 (Apr. 30, 2024).

11 Fla. Reply in Support of Motion to Stay Pending Appeal at \*14 (May 13, 2024).

12 Zinszer Dec., ¶ 10 (Apr. 30, 2024).

13 Motion to Expedite Consideration of the Appeal, at \*10 (May 23, 2024) (citing Zinszer Dec., ¶¶ 8, 11.).

14 Wolfe Dec., ¶ 18 (Apr. 25, 2024).

15 *Pascua Yaqui Tribe v. United States Env't Prot. Agency*, 557 F. Supp. 3d 949 (D. Ariz. 2021).

16 HQ U.S. Army Corps of Eng'rs Regulatory, January 2022 – Navigable Waters Protection Rule Vacatur (Jan. 5, 2022), [https://www.usace.army.mil/Media/Announcements/Article/2888988/5-january-2022-navigable-waters-protection-rule-vacatur/#:~:text=An%20approved%20jurisdictional%20determination%20\(](https://www.usace.army.mil/Media/Announcements/Article/2888988/5-january-2022-navigable-waters-protection-rule-vacatur/#:~:text=An%20approved%20jurisdictional%20determination%20()

17 Memorandum of Agreement Between FDEP and EPA, IV.C.(5); *see also* 40 C.F.R. § 233.16(b). IV.C.(5). Pursuant to 40 C.F.R. § 233.16(b), FDEP shall revise the State 404 Permit Program as necessary because of a modification to 40 C.F.R. Part 233 or any other applicable Federal statute or regulation. The program shall be revised within one year of the date of promulgation of such regulation, except if the State must amend or enact a statute in order to make the required revision, the revision shall take place within two years.

18 *Revised Definition of "Waters of the United States"*, 88 Fed. Reg. 3004 (Jan. 18, 2023) (to be codified at 33 C.F.R. pt. 328 and 40 C.F.R. pt. 120).

19 *Revised Definition of "Waters of the United States", Confirming*, 88 Fed. Reg. 61964 (Sept. 8, 2023) (to be codified at 33 C.F.R. pt. 328 and 40 C.F.R. pt. 120); *Sackett v. Env't Prot. Agency*, 598 U.S. 651 (2023).

20 Env't Prot. Agency, Definition of "Waters of the United States": Rule Status and Litigation Update, <https://www.epa.gov/wotus/definition-waters-united-states-rule-status-and-litigation-update>. See the EPA and Corps' 2008 guidance interpreting *Rapanos v. United States*, 547 U.S. 715 (2006). U.S. Env't Prot. Agency & U.S. Army Corps of Eng'rs Memorandum, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States*, [https://www.epa.gov/sites/default/files/2016-02/documents/cwa\\_jurisdiction\\_following\\_rapanos120208.pdf](https://www.epa.gov/sites/default/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf). In Florida, the agencies are currently relying on the 2008 guidance as modified by the *Sackett* decision.

21 At the same time, pending legislation that passed the United States House of Representatives on March 22, 2024, titled "Creating Confidence in Clean Water Permitting Act" in its current form would codify Florida's 404 program. However, even if the bill passes the Senate, the Biden Administration has stated that it opposes the bill. Statement of Admin. Pol'y, H.R. 7023 – Creating Confidence in Clean Water Permitting Act (March 18, 2024).

22 *Miccosukee Tribe of Indians of Florida v. Env't Prot. Agency et al.*, Case No. 22-cv-22459-KMM (S.D. Fla. \_\_\_\_).

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