



## Florida's 404 Program Denied Again

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

On Monday May 20, 2024, a three-judge panel for the D.C. Circuit Court of Appeals ("D.C. Circuit") denied Florida's request to reinstate its Clean Water Act Section 404 assumed permitting program. As a result, the United States Army Corps of Engineers ("Corps") will continue to process 404 permit applications in Florida. This will be the status quo until the D.C. Circuit opines on the lower court's decision to vacate Florida's permitting program. Florida stated it will be seeking an expedited briefing schedule from the Court in order to move the case along.

On April 25, 2024—just two days after the District Court denied Florida's request for stay—Florida requested the D.C. Circuit grant a full stay of the District Court's decision pending appeal. Florida argued that it is likely to succeed on the merits in showing that the District Court improperly invalidated the Biological Opinion (BiOp) and Incidental Take Statement (ITS) that the Environmental Protection Agency (EPA) relied on when approving Florida's assumption. In support, Florida relied on a Second Circuit case called *Cooling Water*. Florida contends that its assumed program used a Programmatic BiOp that relies on a deferred technical assistance process like the one approved by the court in *Cooling Water*. In addition, Florida argued that it is likely to succeed in showing that the environmental groups "lack standing [specifically harm] in this programmatic context where federal agencies maintain substantial oversight" over the permit program.

Plaintiff environmental groups filed a response in opposition to Florida's motion for a full stay pending appeal. The Plaintiffs argued that they do have standing because of the violations of the Endangered Species Act (ESA), and also argue that the *Cooling Water* case is distinguishable on the facts and its holding is contrary to the ESA. The Federal Defendants responded taking no position on the Motion for a full stay. However, the Federal Defendants included in their response a statement that the Corps has the resources to take back permitting authority over state-assumed waters, and it is currently diligently processing permit applications.

In considering Florida's Motion, the D.C. Circuit assessed Florida's likelihood of success on appeal, the irreparable harm to Florida absent a stay, and whether the balance of harms and the public interest supported a stay. The D.C. Circuit was unpersuaded by Florida's arguments and denied the request to resume the 404-program pending appeal.





Stay tuned for more updates as we continue to follow the case. For more on the history and development of this case, check out LLW's prior articles:

- [Florida Files Motion with the D.C. Circuit Court of Appeals to Revive the State 404 Program](#), April 30, 2024
- [Fate of Florida's 404 Program Heads to Appeals Court](#), April 18, 2024
- [Federal Judge Indicates He Will Confer with Parties on April 4th Before Deciding the Parameters of the Stay of Florida's 404 Program](#), March 15, 2024
- [Florida Files Request for Limited Stay to Resume 404 Permit Program; Feds Counter That the Clean Water Act Does Not Allow for a Partial Program](#), February 27, 2024
- [Federal Judge Vacates Florida's Assumption of EPA's 404 Permitting Program based on Potential for Impacts to Listed Species](#), February 19, 2024

#### In The News

- Featured in POLITICO: [Appeals Court Denies Florida Request for Wetlands Permitting Stay](#), May 20, 2024
- Featured in POLITICO: [Permitting 'Chaos': Florida DEP to Seek Stay of Judge's Wetlands Ruling](#), February 23, 2024

#### About the Authors



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