



## Cross-Appeals Commence in Florida 404 Case

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

Federal Defendants and Plaintiff environmental nonprofit organizations have now filed their respective Notices of Appeal of the D.C. District Court's decisions regarding Florida's assumption of the Clean Water Act (CWA) Section 404 Dredge and Fill permit program. Florida appealed the vacatur of its 404 Program almost immediately after entry of partial final judgment on April 12, 2024. In contrast, the Federal Defendants and Plaintiffs utilized the entire 60-day period allowed by federal rules to file their respective Notices of Appeal. The Federal Defendants, like Florida, noticed their appeal as to the April 12<sup>th</sup> final judgment. However, the Plaintiffs are appealing the final judgment only as to the District Court's dismissal of three claims. The appeals from both the Plaintiffs and Federal Defendants have been combined with Florida's appeal (Case Nos. 24-5156, 24-5159, 24-5101, respectively).

The Plaintiffs were generally successful at the District Court stage of the case. They prevailed in vacating Florida's program based on insufficient Endangered Species Act (ESA) documentation. However, the District Court Judge did dismiss several of the Plaintiffs' claims, which they are now appealing. The Judge determined that, because he already granted complete relief by vacating Florida's 404 Program due to violations of the ESA, three pending claims should be dismissed as moot. In two of the dismissed claims, Plaintiffs allege that the Environmental Protection Agency's (EPA) decision to approve Florida's 404 program application did not comply with the CWA because the application was not complete and did not show that the program would be at least as stringent as the federal program. The third dismissed claim challenges EPA's determination that Florida's assumption would have "no effect" on protected species under the National Marine Fisheries Service's jurisdiction. A decision by the D.C. Circuit to resurrect these claims would be significant as these claims could be independent reasons to strike down Florida's program.

It is unclear whether the Federal Defendants plan to proceed with an appeal, or if their Notice of Appeal was just to preserve their right to appeal while awaiting a decision from the Solicitor General on whether to pursue the appeal. In the Federal Defendants' June 3<sup>rd</sup> response opposing Florida's Motion to Expedite the Appeal, the Federal Defendants argued that an expedited schedule would not allow them sufficient time to file an initial brief, since the Solicitor General had not determined whether to prosecute an appeal. They stated that "the United States anticipates filing a notice of appeal on June 11 to protect its right to appeal" but that the Solicitor General's decision to prosecute an appeal can continue past that date. Although the Federal Defendants filed a Notice of Appeal on June 11<sup>th</sup>, the Notice did not clarify whether the Solicitor General is still deliberating on prosecuting the appeal or will be progressing with an appeal.

The D.C. Circuit has not ruled on Florida's opposed Motion to Expedite the Appeal. If granted, the briefing of the case would likely conclude in late August, followed by oral argument soon after. In addition, one pending claim remains at the District Court while the remainder are on appeal. The pending claim concerns the adequacy of the United States Army Corps of Engineers' (Corps) preparation of the Rivers and Harbors Act retained waters list, which was relied on by EPA in approving Florida's 404 Program.



Meanwhile, as previously reported, the Corps immediately resumed its 404 permitting role in Florida in February 2024, after Florida’s program was vacated. Applicants are already facing delays in 404 permit processing times.

Make sure to [connect with LLW](#) to keep stay updated on the case as the cross-appeals progress. For a comprehensive history of the case, check out our prior articles:

- [Florida’s 404 Program Denied Again, May 22, 2024](#)
- [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](#)

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