

Feds and Florida Face Off on 404 in Diverging Appeals

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In the ongoing litigation over Florida's Clean Water Act (CWA) 404 permitting program, the federal agencies involved in the approval of Florida's 404 program disagree with the State of Florida on whether the Environmental Protection Agency's (EPA) approval of Florida's 404 permitting program fully complied with the Endangered Species Act (ESA). This disagreement has complicated the appeal process, potentially prolonging the vacatur of Florida's program. Significantly, federal agencies still support the approach used by EPA in consultation with the United States Fish and Wildlife Service (USFWS) to ensure protection of terrestrial listed species and to avoid liability for harming those species. However, unlike Florida, EPA believes it should have also considered the impact of Florida's program on marine species.

Background on the Case

On February 15, 2024, a federal district court invalidated Florida's assumption of the CWA Section 404 Dredge and Fill permit program due to non-compliance with the ESA. As a result, all permitting authority shifted back to the U.S. Army Corps of Engineers (Corps). Florida and the plaintiffs, consisting of environmental nonprofit organizations, each appealed different parts of the court's ruling. Florida appealed the court's decision to vacate its 404 program and the ESA consultation documentation relied upon for program approval, while the plaintiffs appealed the court's dismissal of certain claims.

The Department of Justice (DOJ), representing the EPA, Corps, and USFWS, revealed its position on appeal in its brief filed on September 16. Significantly, the federal government defends the novel ESA consultation approach used to consider potential effects of Florida's assumed program on land-based species under the jurisdiction of the USFWS. Rather than including a site-specific species impact analysis for all future Florida permitting activity, the programmatic Biological Opinion for Florida's assumption outlined the process by which the State of Florida would consider species impacts as part of the regulatory review of individual state 404 applications. This process is known as the "technical assistance" process and involved coordination with USFWS on a project-by-project basis. The district court's rejection of the "technical assistance" approach was the basis of the court's decision to vacate Florida's program.

While EPA consulted with USFWS prior to approving Florida's assumption of the 404 program, it did not consult with the National Marine Fisheries Service (NMFS) based on its initial finding that the program would have no effect on marine species. In its September briefing, DOJ acknowledged that EPA should have also consulted with NMFS regarding indirect effects on marine species.

As for a remedy, DOJ requests that the D.C. Circuit partially reverse the lower court's ruling on the USFWS consultation issue and remand the case back to the district court to address the issue of EPA's failure to consult with NMFS.

While this litigation has been ongoing, EPA separately began consultation with NMFS about indirect effects on three marine species: Atlantic sturgeon, short-nosed sturgeon, and smalltooth sawfish. In a

Biological Evaluation completed in July of 2023, EPA asked NMFS to concur that Florida's assumption of the permitting program "may affect but is not likely to adversely affect" those species. If NMFS concludes that Florida's program won't harm these species, this part of the case could become moot.

As an aside, despite agreeing with Florida that the programmatic consultation was sufficient under the ESA, the federal agencies did not hold back on criticizing Florida's implementation of the 404 program as inconsistent with elements of the CWA. This includes Florida's interpretation of "waters of the United States" and what constitutes jurisdictional waters under the CWA. EPA retains the power to pull back an assumed program if a state is not acting consistently with the CWA; the federal agencies' criticisms could be a nod toward this power.

Potential Outcomes

The federal government's stance introduces further uncertainty about when or if Florida's program will be reinstated. A ruling in favor of the federal government – reversal on the USFWS consultation issue and remand for remedy on the NMFS consultation issue – could mean Florida's program will remain vacated as the lower court decides whether the lack of NMFS consultation justifies vacating the program, again. However, if the D.C. Circuit is persuaded by Florida's arguments, it may reinstate Florida's program.

Also in the mix are three bills currently in Congress that could each revive Florida's 404 program if passed.

A decision from the appeals court or Congress on the issues in the case will shape how ESA consultations are handled in the future for state assumption of federal programs. In fact, 19 states have filed an amicus brief in the appeal in support of Florida's program, arguing that the CWA's cooperative federalism structure should be understood as allowing the ESA consultation approach taken for Florida's program.

On the Ground Implications

[As we previously reported](#), the Corps resumed processing all 404 permit applications in Florida in February after the state's program was vacated. At that time, applicants pending with Florida could ask for their application to be transferred to the Corps, or else they could file anew with the Corps. In July, Florida transferred the permit applications it still had in its system to the Corps.

The Corps has been using regulatory staff from various offices across the country to process the increased volume of applications resulting from the vacatur. The learning curve for training regulatory staff in other offices on Florida-specific permitting processes has led to permit processing delays. For example, the program as administered by the Corps requires ESA Section 7 consultation for all applications, which can lead to delays because Corps regulatory staff from offices outside of Florida are unfamiliar with USFWS and NMFS Florida offices' consultation processes.

Given the delays, members of Congress from the Florida delegation sent the Corps a letter on September 20 requesting a staff-level briefing by October 4 on how the Corps is handling the increased workload. In addition, the Congressmembers are asking for clarity on how the Corps is interpreting what constitutes "waters of the United States."



In summary, the outcome of this appeal will affect how long the Corps will retain permitting authority for activities in what were previously state-assumed waters. More broadly, it will inform the permissible process for state assumption of permitting programs across the United States.

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:

- [Cross-Appeals Commence in Florida 404 Case](#), June 18, 2024
- [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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