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Insights

Florida Applicants in "Regulatory Limbo" after D.C. Court Invalidates Florida's Section 404 Permitting Authority

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On February 15, 2024, the U.S. District Court for the District of Columbia issued an opinion invalidating the State of Florida's (State) partial assumption of the Section 404 permitting program under the Clean Water Act (State 404 Program) from the U.S. Army Corps of Engineers. The court ultimately decided that the infirmities within the documents that served as the foundation for the United States Environmental Protection Agency's (EPA) approval of the State's partial assumption in 2020 could not be fixed by any further clarifications or adjustments and that a full vacation of that action was warranted. Specifically, the court reasoned that the Biological Opinion and Incidental Take Permit issued by the United States Fish and Wildlife Service in support of the State's assumption were so fatally flawed that they could not support the EPA's approval of the State 404 Program.

As a result of this court's decision, the State has been stripped of its authority under the State 404 Program, with all Section 404 permitting in Florida being shifted back to the Army Corps of Engineers. It is anticipated that this abrupt change in the Section 404 permitting process will cause major delays and additional costs to current and future applicants seeking such permits.

However, the court recognized the magnitude of the disturbance caused by immediately unwinding the State 404 Program and gave the State, EPA and other federal regulators ten (10) days to request a limited stay of the ruling that would exempt from its scope permit applications that do not impact protected species. The court clarified that the stay would not apply to pending and future permit applications that "may affect" any listed species. Further, the court requested that the motion for a stay should detail a mechanism to determine which permits "may affect" listed species. The limited stay is designed for governing agencies to "chart a new course" so that the proper transitions can occur to minimize the disruption.

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The State filed its Motion for Limited Stay on February 26, 2024. In the Motion, the State announced they "intend to move forward on efforts to ensure that the FDEP [Florida Department of Environmental Protection] continues to implement the State 404 Program to the fullest extent." Consistent with the bounds set by the court, the State is seeking to continue to process applications under the State 404 Program, except those which "may affect" listed species or designated critical habitat.

The State also requested in its Motion that at least one "may affect" situation would remain under the review of the FDEP namely where a project "has been, is, or necessarily will be subject to a Section 7 consultation process (e.g., for a project requiring an additional federal action triggering Section 7 consultation procedures) or a Section 10 Incidental Take Permit process (e.g., for a project where the applicant has voluntarily decided to obtain a Section 10 permit)" under the Endangered Species Act.

The State currently estimates that only around 15% of State 404 Program permit applications qualify for a "may affect" finding and thus a majority of applications would remain under the State 404 Program if the limited stay was granted. The State requested that the limited stay be in effect for at least six (6) months, with the possibility of extensions granted by the court to allow changes to be incorporated into the framework of the State 404 Program to resolve the infirmities noted in the opinion.

On February 26, 2024, the EPA filed its own Supplemental Brief Regarding the Limited Stay in which it requested that the court not enter a partial stay of its vacatur. The EPA reasons that "bifurcated program would be impractical and inconsistent with the Clean Water Act, [and] a limited stay of the court's order is neither 'desirable nor workable.'"

So now what?

With the EPA having filed its competing request, it is less likely that the court will grant the State's Motion of Limited Stay. With over 1,000 pending State 404 Program applications, applicants now find themselves in "regulatory limbo with no clear timeline or expectation for a permit decision," as is succinctly stated in the State's Motion for a Limited Stay. We will continue to monitor this dynamic situation and provide updates as they become available.

If you have additional questions on permits impacted by this ruling or any environmental real property rights, land use, zoning and business matters, please contact **Jonathan Huels** (jonathan.huels@lowndes-law.com).