

## U.S. Army Corps of Engineers to Process Section 404 Permits While Florida's Appeal is Pending

Article

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On April 12, 2024, U.S. District Court Judge Randolph D. Moss denied the State of Florida's (State) Motion for a Limited Stay of the February 15, 2024, order invalidating the State's partial assumption of the Section 404 permitting program under the Clean Water Act (State 404 Program) from the U.S. Army Corps of Engineers (Corps). For helpful background information see Florida Applicants in "Regulatory Limbo" after D.C. Court Invalidates Florida's Section 404 Permitting Authority.

### Court's Decision and Rationale

After a hearing was held on April 4, 2024, the court sided with the Federal Defendants determining that a limited stay was neither workable nor desirable. Specifically, the court was reluctant to accept the State's argument that the State was capable of cooperating with the Corps to process Section 404 permits. The court also expressed hesitancy in "substituting its judgement for that of an agency" in determining how the program should be administered. The court further conceded that a program designed by the court would likely not, "come dressed for success". Ultimately, the court concluded that allowing the Corps to process all State Section 404 permits would result in greater ease of administration, efficiency, and timeliness.

### State's Response and Appeal

The State quickly responded to the April 12, 2024, order by filing an appeal to the United States District Court of Appeals for the District of Columbia on April 15, 2024. Only one day later, on April 16, 2024, the State returned to the U.S. District Court to motion for yet another stay of the February 15, 2024, vacatur but this time pending their appeal. In the motion, the State argues that they have raised "serious legal questions on the merits." The State laments, "[t]he vacatur order pulled the plug on Florida's 404 program governing water resources throughout the State of Florida after that program had been firmly in place *for over three years*, with thousands of permitting actions throughout the state."

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## **Court's Response and Implications**

On April 23, 2024, the court denied the State's second Motion to Stay asserting that the State failed to carry the heavy burden of satisfying the four relevant factors needed to be satisfied in order to grant the stay request. Specifically, the court focused on two of the factors, namely that the State did not persuade the court they are likely to succeed on the merits of their appeal and that they would experience an irreparable injury absent a stay.

## **Ongoing Developments**

Although the court mandated Section 404 permits are to be evaluated by the Corps, the State has yet to transfer them over. The State has expressed concerns that transferring the pending permit applications to the Corps will elongate the permitting process by forcing the applicants back to "square one." The Corps have taken the position that once they receive the pending permit applications from the State, they will pick up right where the State left off in their review. On April 23, 2024, the court agreed with the Corps yet again that they are ready and able to begin processing all Section 404 permits once the State transfers them.

## **Future Outlook**

Although the State lost its second Motion to Stay, the State's appeal is still pending before the Court of Appeals. In the interim, the Corps have been given authority to process all pending and future Section 404 permits.

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](mailto:jonathan.huels@lowndes-law.com)).