PAVESE LAW FIRM est. 1949

February 27, 2024

D.C. JUDGE ISSUES IMMEDIATE HALT TO FLORIDA 404 PROGRAM

On February 15, 2024, at 11:42pm EST, a judge presiding over the case of *Center for Biological Diversity et al. vs. U.S. Environmental Protection Agency*, et al., issued a decision immediately vacating Florida Department of Environmental Protection's (FDEP) programmatic biological opinion and essentially upending Florida's 404 permitting process.

Beginning in 2018, Florida started the process to assume the permitting authority of the Army Corps of Engineers (Corps) under Section 404 of the Clean Water Act. U.S. Fish and Wildlife Service reviewed the delegation request and generated a programmatic biological opinion and incidental take statement to assure compliance with the Endangered Species Act. In December of 2020, the Environmental Protection Agency (EPA) approved the delegation of authority to Florida. Prior to 2020, applicants were required to pursue either a Section 7 or Section 10 permit.

In January of 2021, Plaintiffs, Center for Biological Diversity, Sierra Club, Conservancy of Southwest Florida, and others filed a lawsuit challenging the delegation of authority. Plaintiffs did not seek a stay of Florida's 404 program or otherwise ask that Florida stop receiving or processing permits.

EPA and Florida urged the U.S. District Court for the District of Columbia against vacating the biological opinion and incidental take statement the agency relied on when it approved the state's assumption, calling instead for a remand that would avoid severe regulatory uncertainty resulting from Plaintiffs' requests. In ruling against the EPA and Florida, the judge did not seem concerned with any economic consequences to applicants that could result from "flipflopping" policies.

The decision was accompanied by a Memorandum Opinion advising that as of February 15, 2024, Florida has no authority to issue a Section 404 permit to any applicant. All Section 404 permitting authority in Florida vests immediately with the Army Corps of Engineers.

Applicants seeking 404 permits, including those presently under review, are now thrust into uncharted territory. In the February 15th decision, Defendants, EPA, FDEP, USDOJ, etc. were provided ten (10) days to seek a limited stay of the decision for any pending or future applications that are not expected to affect

any listed species. Conversely, for all pending and future permits that "may affect" listed species, no possible stay of the decision is available.

Logistically, it is unclear whether the Corps is prepared to immediately receive these permits. The EPA stated any bifurcation of the program would be impractical and inconsistent with the Clean Water Act, opting to advise the Court that a limited stay of the Court's vacatur is neither "desirable or workable". Conversely, Florida's brief regarding a limited stay focused on temporarily modeling Florida's program after Michigan and New Jersey's emphasizing it would avoid the Corps being inundated with new permits to process. Further, Florida expressed concerns regarding whether it retains primary enforcement authority for all violations considering the complete divestiture of authority. On February 26th Plaintiffs were given ten (10) days to respond to the Defendants' briefs.

Absent further direction by the courts, the only certainty of this judge's decision is "even if those permittees were willing to risk ESA liability without the protection of the ITS or Section 10 permit, (FDEP) will lack authority under Section 404 to issue those permits."

Pavese's litigation team was allowed to intervene on behalf of a pending applicant and will continue to be involved in determining the rights and interests of our clients seeking clarity on this decision.

A link to the Order and Memorandum Opinion is below.

2024_02_15 Memorandum Opinion

2024_02_15 Order re MSJ

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