

Congress of the United States
Washington, DC 20515

September 20th, 2024

Lieutenant General Scott A. Spellmon
Chief of Engineers and Commanding General
U.S. Army Corps of Engineers
441 G Street N.W.
Washington, D.C. 20314-1000

Dear Lieutenant General Spellmon:

We write today as Members of Congress from the Florida Delegation seeking answers relating to the U.S. Army Corps of Engineers' (USACE) Clean Water Act (CWA) Section 404 permitting process. On February 15, 2024, the U.S. District Court for the District of Columbia revoked the U.S. Environmental Protection Agency's (EPA) designation of the State of Florida—which has been in place for the last three years—to process CWA 404 permits for the purpose of “[regulating] the discharge of dredged or fill material into waters of the United States, including wetlands.”¹ As a result of the court's decision, USACE regained stewardship of Section 404 permitting in Florida, and has assumed new and pending applications from Florida Department of Environmental Protection (FDEP)—however, USACE appears unprepared and untransparent regarding the approval or denial of these applications.² We have concerns that the recent court's decision has negatively impacted the economies of Florida and its industries, and provides no greater protection of wildlife or the environment.³ Therefore, we request a staff-level briefing to understand how USACE is processing Section 404 permit applications after the February 15th, 2024 court decision.

USACE's assumption of the Florida 404 program immediately created intense regulatory delays among industries and other applicants trapped in the bureaucratic backlog.⁴ The delays in issuances of permits not only cost tens of millions of dollars in the near term, but also impacts other infrastructure downstream such as commercial spaces, housing, charter schools, and roadways.⁵ Thus, USACE's reluctance to readily approve or deny 404 permit application burdens the growth of the Sunshine State and the prosperity of its people because projects are located in most Florida counties.⁶

Since assuming the 404 permitting program in 2020, FDEP trained approximately 300 additional staff and certified wetland evaluators to formally review 404 applications.⁷ While USACE contends they have the appropriate resources to handle the change of permitting under the 404 program,⁸ we are unsure about this contention. USACE expressed they are “ready to accept permit applications,” however, it is the impression of our offices that the USACE uses their

¹ *Ctr. for Biological Diversity v. Regan*, F. Supp. 3d, 2024 WL 655368 (D.D.C. Feb. 15, 2024); EPA, Section 404 of the Clean Water Act, *Permit Program under CWA Section 404*, available at <https://www.epa.gov/cwa-404/permit-program-under-cwa-section-404> (last visited June 13, 2024).

² *Amici Curiae* Brief of The Florida Chamber of Commerce, et al., in Support of Appellants, *Ctr for Biological Diversity, et al. v. Regan*, No. 24-5101, (D.C. Cir. Filed May 2, 2024).

³ *Id.*

⁴ See Jonathan Huels, *Florida Applicants in “Regulatory Limbo” after D.C. Court Invalidates Florida’s Section 404 Permitting Authority*, LOWNDES (Feb. 29, 2024).

⁵ *Id.*

⁶ Florida State 404 Projects, *Map of 404 Project Applications*, FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, available at <https://fddep.maps.arcgis.com/apps/mapviewer/index.html?webmap=b27d7d9a4fc5488ca227d2519d361f27> (last visited Aug. 15, 2024).

⁷ Letter from Marco Rubio, et al., to Michael S. Regan, Administrator, U.S. EPA, Michael Connor, Asst. Sec’y of the Army – Civil Works, and Shannon Estenoz, Asst. Sec’y for Fish & Wildlife & Parks (Mar. 22, 2024).

⁸ Declaration of Shawn H. Zinszer, *Ctr. for Biological Diversity, et al., v. Regan et al.*, No. 24-5101, (D.C. Cir. Filed Apr 30, 2024).

own, distinct 404 permitting process compared to the process utilized by FDEP.⁹ The February 15th, 2024 court order requires a USACE-specific application, meaning the whole application process restarts from scratch.¹⁰ We question how USACE will be able to restart and lessen the backlog of “well over 1,000 applications” including those applications previously situated on the state’s desk.¹¹

The fiscal year 2024 budget provided for 132 full time staff positions, however, as of April 2024 USACE totaled 126 staff members.¹² This is a modest increase from the fiscal year 2020 USACE budget which provided for approximately 103 staff positions.¹³ Thus, we seek to understand how 132 staff positions could process the same workload in which FDEP hired an additional 300 trained and certified staff members to complete.

Additionally, FDEP’s 404 program had Florida-specifications for applicants “at least as stringent as federal permitting.”¹⁴ We question how USACE is more equipped than FDEP to process 404 applications, since FDEP provided an additional layer of expertise by requiring the state’s Fish and Wildlife Commission’s approval on 404 requests—a feature not required by the USACE or the EPA.¹⁵

The Chief Regulator of the USACE Jacksonville District also noted the additional workload will require the assistance from the South Atlantic Division and the USACE’s headquarters.¹⁶ This would require staff with no knowledge of Florida to issue or deny permits that solely implicate Florida and its resources. In fact, the EPA previously stated that “state and tribal regulators are generally more familiar with local aquatic resources, issues, and needs . . . An efficient state ran program can help reduce delays and save money for applicants.”¹⁷

FDEP provided a transparent process by which to obtain information and permit applications via the Oculus portal.¹⁸ This portal, no longer used due to the assumption of duties by USACE, provided real-time and readily available information to potential applicants. As an additional layer of transparency, Florida’s sunshine laws allowed for stakeholders to gather all information necessary for applications.¹⁹ Thus, we request information on how USACE will keep the 404-process transparent and easily accessible to applicants and industry participants that seek permits.

Finally, we request the formal definition used by USACE in determining Waters of the United States (WOTUS) and its relationship to state 404 permitting moving forward. Due to USACE assuming authority over state 404 permitting, applicants must now ask whether their projects will impact the WOTUS as modified by *Sackett v. EPA*.²⁰ Previously, under Florida’s permitting authority, applicants were able to select the state’s wetland designation. Florida’s wetland line in the 404 program is more expansive than the current WOTUS interpretation.²¹ Because of the lack of current guidance on how *Sackett* modifies WOTUS, these determinations are being made on a case-by-case basis until clarity is provided by USACE and, ultimately, the EPA.²² Florida still provides other state wetlands

⁹ *Supra*, n.2.

¹⁰ *Id.*

¹¹ Declaration of Justin Wolfe, In Support of Limited Stay, *Ctr for Biological Diversity, et al. v. Regan*, No.1:21-cv-00119 (RDM), (D.D.C. Cir. Filed Feb 26,2024).

¹² *Supra*, n.8.

¹³ *Id.*

¹⁴ EPA, EPA in Florida, *Florida’s Clean Water Act §404 Permit Program*, available at <https://www.epa.gov/fl/floridas-clean-water-act-ss404-permit-program> (last visited Aug. 13, 2024).

¹⁵ *Supra*, n.2.

¹⁶ *Supra*, n.8.

¹⁷ *Supra*, n.14.

¹⁸ Florida Dep’t of Environmental Protection, *State 404 Program Annual Report, Division of Water Resource Management July 1, 2022 – June 30, 2023*, at 6 (Feb. 1, 2024).

¹⁹ *Id.*

²⁰ Michelle Diffenderfer and Katherine L. Hupp, *Fate of Florida’s 404 Program Heads to Appeals Court*, LEWIS, LONGMAN, WALKER (Apr. 18, 2024).

²¹ *Id.*

²² *Id.*; See also Division of Water Resource Management, Information Required for a WOTUS Determination in State-assumed Waters, Florida Dep’t of Environmental Protection, available at <https://floridadep.gov/water/submerged-lands-environmental-resources->

permits under state waters, however, now there is additional confusion for applicants who affect assumable WOTUS.²³ We require further understanding of USACE’s interpretation and implementation of WOTUS as applied to state 404 permits, and how lack of clarity impacts applicants.

Considering the above concerns, we ask that USACE provide information on its efforts to timely issue permits, provide transparency, and address the challenges created by the D.C. District Court order from February 2024.

To assist the undersigned Members of Congress’ concerns on this matter, please make arrangements to schedule a staff level briefing no later than October 4th, 2024. This briefing should include information about any ongoing audits or preparations of USACE in handling current or future section 404 permitting in Florida, as assumed by USACE. To schedule the briefing, please contact the office of Congressman Byron Donalds at 202-225-2536.

Sincerely,



Byron Donalds (FL-19)
Member of Congress



Michael Waltz (FL-06)
Member of Congress



Anna Paulina Luna (FL-13)
Member of Congress



Mario Díaz-Balart (FL-26)
Member of Congress



Vern Buchanan (FL-16)
Member of Congress



Gus M. Bilirakis (FL-12)
Member of Congress



Scott Franklin (FL-18)
Member of Congress



Daniel Webster (FL-11)
Member of Congress



Aaron Bean (FL-04)
Member of Congress



Carlos Giménez (FL-28)
Member of Congress



Brian Mast (FL-21)
Member of Congress



María Salazar (FL-27)
Member of Congress



W. Gregory Steube (FL-17)
Member of Congress



Kat Cammack (FL-03)
Member of Congress



John Rutherford (FL-05)
Member of Congress



Cory Mills (FL-07)
Member of Congress



Bill Posey (FL-09)
Member of Congress



Laurel Lee (FL-15)
Member of Congress



Neal P. Dunn, M.D. (FL-02)
Member of Congress



Matt Gaetz (FL-01)
Member of Congress

cc: Congressman James Comer, Chairman, House Oversight and Accountability Committee
Congressman Jamie Raskin, Ranking Member, House Oversight and Accountability Committee

coordination/documents/information-required-wotus (last visited Aug. 15, 2024); See also Revised Definition of “Waters of the United States,” *Department of the Army, Corps of Engineers*, 33 C.F.R. pt. 328., *Environmental Protection Agency*, 40 C.F.R. pt. 120.

²³ Florida Intervenor’s Motion for Limited Stay of February 15, 2024 Vacatur Order, *Ctr. for Biological Diversity, et al. v. Regan*, No. 21-119 (RDM) (D.D.C. Filed Feb. 26, 2024).