

## DEVELOPERS BEWARE: HOW THE EVOLVING BATTLE OVER WETLAND PERMITTING IS IMPACTING FLORIDA REAL ESTATE PROJECTS

Real estate developers face a complex, evolving landscape for wetland permitting in Florida in light of the loss of the state's permitting authority, combined with recent federal executive actions and changes to Section 404 of the Clean Water Act (the "CWA"). These state and federal developments create challenges for developers seeking to build hospitals, schools or housing in or near wetlands in Florida.

### CONTEXT AND LEGAL BACKGROUND

Section 404 of the CWA regulates the discharge of dredged or fill material into waters of the United States, including wetlands. This federal program, primarily administered by the U.S. Army Corps of Engineers (the "Corps"), requires permits for development activities that may impact these protected waters. For developers, securing these permits can be a time-consuming and complex process, often requiring detailed environmental assessments, mitigation plans and compliance with federal laws like the Endangered Species Act. Section 404(g) of the CWA authorizes eligible States and Tribes to assume, or take over, Section 404 dredged and fill permitting authority in some waters of the United States. By enabling qualified states to administer their own permitting programs, this provision allows for more streamlined processes without compromising environmental protections.

In 2020, about a month before President Donald Trump's first term ended, Florida applied for and was granted authority to issue wetland dredged and fill permits by the U.S. Environmental Protection Agency (the "EPA"). In 2021, Earthjustice filed a lawsuit against the federal government on behalf of several environmental organizations. In *Ctr. for Biological Diversity v. Regan, et al.*, U.S. District Judge Randolph Moss vacated the 2020 decision. Florida and the federal government appealed. Between 2022-2024, the U.S. District Court issued four decisions addressing plaintiffs' claims in *Regan*. In a February, 2024 ruling, Judge Moss found that the actions by the EPA in approving the shift in granting 404 permitting authority to Florida violated the federal Endangered Species Act, and returned the permitting authority to the Corps. Thus, the Corps has resumed control of Section 404 permitting throughout Florida, affecting developers, government projects and any activities requiring dredged and fill permits in state-assumed waters. This decision ended a program that approved more than 1,500 permits within a two-year span and denied 145 in that period.

### RECENT FEDERAL ACTIONS IMPACTING SECTION 404 WETLAND PERMITTING

While nearly half of all States and a few Tribes have expressed some interest in assumption of 404 permitting authority, only two States (Michigan and New Jersey) currently administer the program following Florida's authority was revoked in *Regan*. States and Tribes have expressed that there are several barriers in the program assumption process which have prevented them from assuming the 404 permitting program. To address this issue, the EPA published a final rule clarifying the procedures and requirements for States and Tribes wishing to assume and administer their own Section 404 permitting program in December of 2024. The new amendment to Section 404 of the Clean Water Act, specifically to the Tribal and State program regulations at 40 CFR part 233, went into effect on January 17, 2025. The EPA created this rule "to provide additional clarity on conflict of interest prohibitions, program approval procedures and requirements, permit requirements, program operations, compliance evaluation and enforcement, Federal oversight, and Tribal provisions."

In addition to the recent Section 404 amendment, President Trump has also issued Executive Orders that are targeted at Section 404 permit streamlining. Section 4(a) of Executive Order 14156 "Declaring a National Energy Emergency" specifically directs the Corps to identify within 30 days permit actions that would facilitate the Nation's energy supply for expedited permitting under the nationwide permit program and emergency provisions of the Clean Water Act. Section 5(d) of Executive Order 14154 "Unleashing American Energy" directs the Secretary of Defense and involved agencies to "undertake all available efforts to eliminate all delays within their respective permitting processes, including through, but not limited to, the use of general permitting." Following the issuance of these Executive Orders, the Corps marked more than 600 Section 404 permit applications for fast-track review. Shortly thereafter, the Corps rescinded the list, stating that they planned to spend more time determining which projects meet the criteria set forth in the declaration of a National Energy Emergency. This reversal exemplifies the regulatory uncertainty facing developers, who must now contend with shifting federal priorities and unclear timelines, further complicating planning and financing for development projects nationwide.

## PRACTICAL TAKEAWAYS

Before undertaking to build in Florida, it is important to determine whether the proposed development site falls under the authority of Section 404 of the CWA. If the project includes waters of the United States, including wetlands, it is advisable to set up a pre-application meeting with the Corps to present development plans and seek input on the permitting process.

If the proposed development falls within the jurisdictional oversight of the Corps under Section 404 of the CWA, developers will need to apply for either a general, nationwide permit or an individual permit. A general permit is required if the development will have minimal environmental impacts, while an individual permit must be obtained if the development will have significant environmental impacts. Given the complex regulatory environment surrounding Section 404 permits, developers should consult with legal counsel to help ensure compliance with the Endangered Species Act and other relevant regulations.

As evidenced by recent Executive Orders, it appears that permitting is a top priority for reform with the current administration, which means a variable situation for developers across the nation. Developers with outstanding permits or seeking permits should monitor agency alerts, Federal Register notices and related litigation to stay up to date on the latest developments.

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