IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR BIOLOGICAL DIVERSITY, *et al.*, *Plaintiffs,* v. U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al*. *Defendants.*	Case No. 1:21-cv-0119 (RDM)

THE FLORIDA CHAMBER OF COMMERCE &
THE ASSOCIATION OF FLORIDA COMMUNITY DEVELOPERS
AMICUS BRIEF IN SUPPORT OF
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Giving credit to where it is due, Amici again wholeheartedly endorse the Federal Defendants' thorough dismantling of the Plaintiffs' merits arguments. Simply put, the Plaintiffs' hollow assertions and the applicable law conclusively demonstrate they lack standing to continue this meritless crusade and waste government litigation resources, both the United States' and Florida's. As the Supreme Court recently reiterated, "[r]egulation of land and water use lies at the core of traditional state authority." *Sackett v. EPA*, 143 S. Ct. 1322, 1341 (2023) (citing *Tarrant Regional Water Dist. v. Herrmann*, 569 U.S. 614, 631 (2013); *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers*, 531 U.S. 159, 174

(2001); *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30, 44 (1994)). And nothing the Plaintiffs have offered can justify stripping Florida of its authority to administer the Section 404 permitting authority in the manner that Congress intended.

To be certain, the Florida Department of Environmental Protection is indeed "working cooperatively with the U.S. Environmental Protection Agency (EPA), the U.S. Army Corps of Engineers (Corps), the U.S. Fish and Wildlife Service (FWS), and other federal, state, and local agencies on implementation of the Section 404 program in Florida." ECF No. 102-1 ¶ 9. As a result, Florida "has issued approximately 460 individual permits (including modifications) under the Section 404 program" since assuming ECF No. 102-1 ¶ 9. And despite the reams of paper Plaintiffs have frittered away over this case, they have not, and cannot, point to any environmental concern or impact arising from these issuances that could possibly justify their request that the Court scrap a years' long, successful process of cooperative federalism.

Congress's explicit policy under the Clean Water Act is "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources." 33 U.S.C. § 1251. This includes the implementation of "the permit programs under

section[] . . . 404. *Id.* In other words, Congress prefers the outcome here, Florida wants the responsibility to administer this program, and President Biden's EPA is vigorously defending Florida's right to assume this task. The Plaintiffs remain entirely isolated in their insistence that this Court must act.

But act to redress *what* legally cognizable injuries? The Plaintiffs have *alleged* harm to (1) their "organizations' access to information provided through NEPA review and ESA consultation and access to courts to challenge inadequate environmental protection," and (2) their "members' aesthetic and recreational interests in wild Florida lands, wetlands, and waters where panthers roam and sea turtles nest." ECF. No. 90, at 105. But allegations are no longer enough. Because the elements of standing are "not mere pleading requirements but rather an indispensable part of the [P]laintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Where, as here, the Plaintiffs are responding to "a summary judgment motion," they "can no longer rest on . . . 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts.'" *Id.* (quoting, inter alia, Fed. Rule Civ. Proc. 56(e)).

When this Court declined to dismiss the Plaintiffs' complaint at the motion to dismiss stage, it did so because the State had "offer[ed] no evidence or factual

material beyond the four corners of the complaint in support of its motion." *Ctr. for Biological Diversity v. Regan*, 597 F. Supp. 3d 173, 189 (D.D.C. 2022). Now, however, the State has offered an affidavit from the State Department of Environmental Protection's General Counsel. And that affidavit conclusively demonstrates that the Plaintiffs are suffering no legally cognizable injury whatsoever.

Most directly, the State's affidavit painstakingly shows that the Plaintiffs are likely to receive *more* information *faster* than they would have if Florida had not assumed the Section 404 permitting process. ECF No. 102-1 ¶¶ 16-30. It also shows that any purported injuries to their "members' aesthetic and recreational interests" are wholly speculative and anything but "certainly impending," *see Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013), particularly given the oversight that the EPA retains, ECF No. 102-1 ¶ 31, and Florida's robust enforcement regime, ECF No. 102-1 ¶¶ 32-40. To the extent that the Plaintiffs argue that they are harmed because they must bring future challenges in a different forum, the Court should reject that purported injury for the same reasons it disallowed Amici to intervene as parties. *See* ECF No. 39. And to the extent that the Plaintiffs rely on increased litigation expenses, *see, e.g.*, ECF No. 105, at 99, the D.C. Circuit has been crystal clear that "'an organization's diversion of resources to litigation or to investigation in anticipation of litigation is considered a 'self-inflicted' budgetary choice that

cannot qualify as an injury in fact for purposes of standing.'" *People for the Ethical Treatment of Animals v. United States Dep't of Agric.*, 797 F.3d 1087, 1093 (D.C. Cir. 2015) (quoting *Am. Soc. for Prevention of Cruelty to Animals v. Feld Entm't*, Inc., 659 F.3d 13, 25 (D.C. Cir. 2011)).

These points demonstrate that there is nothing whatsoever to the Plaintiffs' purported injuries. And without anything in the record to support their burden (now at the summary-judgment stage) of demonstrating Article III standing, the Court must go no further. In other words, the Plaintiffs' failure to satisfy this "irreducible constitutional minimum" compels a win for the Defendants. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016).

CONCLUSION

For all these reasons, the Court should grant summary judgment for the Federal Defendants and the State Intervenors.

Dated: July 7, 2023

Respectfully submitted,

/s/ Edward M. Wenger

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Local Rule 7(o)(4) because it does not exceed 25 pages. This brief complies with the typeface requirements of Local Rule 5.1(d) because this brief has been prepared in a proportionally spaced typeface using the Microsoft Office Word processing software in a 14-point Times New Roman type style.

Dated: July 7, 2023

/s/ Edward M. Wenger
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CERTIFICATE OF SERVICE

I hereby certify that on July 7, 2023, I filed this Brief with the United States District Court for the District of Columbia using the CM/ECF system, which will cause it to be served on all counsel of record.

/s/ Edward M. Wenger
Edward M. Wenger (DCB No. 1001704)

NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 24-5101

In the United States Court of Appeals for the District of Columbia Circuit

CENTER FOR BIOLOGICAL DIVERSITY, ET AL.,

Appellees,

v.

MICHAEL S. REGAN,
IN HIS OFFICIAL CAPACITY AS ADMINISTRATOR FOR THE U.S. ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Defendants,

STATE OF FLORIDA AND
THE FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Appellants.

AMICI CURIAE BRIEF OF THE FLORIDA CHAMBER OF COMMERCE, ET AL. IN SUPPORT OF FLORIDA'S MOTION FOR A STAY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA,
NO. 1:21-CV-119-RDM

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, amici provide as follows:

Amici G.L. Homes of Florida Corporation: The parent corporation of G.L. Homes of Florida Corporation is G.L. Homes of Florida Holding Corporation. No publicly held corporation owns 10% or more of the stock of such parent corporation.

Amici Pulte Group: The parent corporation of Pulte Group is PulteGroup, Inc. a Michigan corporation. Pulte Group, Inc., the ultimate parent of the amicus, is a public company listed on NYSE–PHM. Pulte Group, Inc. has two institutions that own more than 10% of its stock (BlackRock and Vanguard).

Amici Taylor Morrison Home Corporation: is publicly held (TMHC). No publicly held corporation owns 10% or more of its stock.

All other amici curiae state that they are not publicly held corporations or other publicly held entities, and that they have no parent corporations. No publicly held corporation or other publicly held entity owns ten percent (10%) or more of any of these other amicus organizations.

/s/ Edward M. Wenger
EDWARD M. WENGER

CERTIFICATE AS TO PARTIES, RULINGS & RELATED CASES

A. Parties and Amici

Intervenor-Defendant-Appellants: State of Florida and Florida Department of Environmental Protection.

Federal Defendants: Michael S. Regan, in his official capacity as Administrator for the U.S. Environmental Protection Agency; Radhika Fox, in her official capacity as Assistant Administrator for the Office of Water of the U.S. Environmental Protection Agency; Jeffrey Prieto, in his official capacity as General Counsel for the U.S. Environmental Protection Agency; Lawrence Starfield, in his official capacity as Acting Assistant Administrator for the Office of Enforcement and Compliance Assurance for the U.S. Environmental Protection Agency; John Blevins, in his official capacity as Acting Administrator for Region 4 of the U.S. Environmental Protection Agency; Leopoldo Miranda-Castro, in his official capacity as Regional Director for the U.S. Fish and Wildlife Service; Martha Williams, in her official capacity as Principal Deputy Director for the U.S. Fish and Wildlife Service; Scott Spellmon, in his official capacity as Chief of Engineers and Commanding General of the U.S. Army Corps of Engineers; James Booth, in his official capacity as District Commander of the Jacksonville District for the U.S. Army Corps of Engineers; U.S. Environmental Protection Agency; U.S. Army Corps of Engineers; and U.S. Fish and Wildlife Service.

Plaintiff-Appellees: Center for Biological Diversity; Defenders of Wildlife; the Sierra Club; the Conservancy of Southwest Florida; Florida Wildlife Federation; Miami Waterkeeper; and St. Johns Riverkeeper.

Additional Parties Before the District Court: Tarpon Blue Silver King I, LLC, doing business as Collier Enterprises, Ltd.

Amici Before the District Court: Association of Florida Community Developers, Incorporated; Florida Chamber of Commerce; Cameratta Companies LLC; CAM7-SUB, LLC; Lennar Corporation; G.L. Homes; Greenpoint Holdings; KB Home; Pulte Group; Taylor Morrison; Florida Transportation Builders Association; Florida State Hispanic Chamber of Commerce; and Associated Industries of Florida.

Amici Before this Court: The Florida Chamber of Commerce; the Association of Florida Community Developers, Inc.; the Mosaic Company; the Florida Home Builders Association; The Florida Transportation Builders' Association; the Leading Builders of America; the Associated Industries of Florida; the Lennar Corporation; G.L. Homes of Florida Corp.; Greenpoint Holdings; KB Home; Pulte Group; Taylor Morrison Home Corp; Florida State Hispanic Chamber of Commerce.

B. Rulings Under Review

The State of Florida and the Florida Department of Environmental Protection have appealed the district court's February 15, 2024 order, as amended on April 12,

2024. That order was made final and appealable on April 12, 2024, when the district court entered a final judgment under Federal Rule of Civil Procedure 54(b).

C. Related Cases

None.

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STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Amici are well poised to speak on the tremendous disruption that would arise in the absence of a stay. They include production homebuilders currently operating across the entire State. Indeed, they provide the lion share of new housing. They are:

The Florida Chamber of Commerce.

The Association of Florida Community Developers, Inc.

The Mosaic Company.

The Florida Home Builders Association.

The Florida Transportation Builders' Association.

The Leading Builders of America.

The Associated Industries of Florida.

The Lennar Corporation.

G.L. Homes of Florida Corp.

Greenpoint Holdings.

KB Home.

Pulte Group.

[1] In accordance with Federal Rule of Appellate Procedure 29(a)(2), counsel for all parties have provided consent for Amici Curiae to submit this brief for the Court's consideration. No party's counsel authored this brief in whole or in part, and no one besides Amici Curiae contributed money to fund the brief's preparation or submission.

Taylor Morrison Home Corp.

Florida State Hispanic Chamber of Commerce.

INTRODUCTION & SUMMARY OF THE ARGUMENT

As they did before the district court, Amici offer the following to underscore the extent to which the public interest would benefit immensely from a stay of the district court's vacatur. As representatives from the industries most directly reliant on the 404-permitting process, they can speak from the clearest vantage point regarding the havoc that the district court's order has wrought on the State of Florida. Given that the district's court order will result in looming economic upheaval, provides no discernable benefit to any Florida wildlife (endangered, threatened, or otherwise), and quite mistakenly assumes that the U.S. Army Corps of Engineers is poised to seamlessly pick up the reigns that the district court yanked out of the State's hands, the Court should enter the stay requested by the State.

ARGUMENT

I. A DECISION NOT TO STAY THE DISTRICT COURT'S ORDER WOULD INFLICT CATASTROPHE ON INDUSTRIES THROUGHOUT FLORIDA.

For the past three years, the Florida Department of Environmental Protection has administered the Section 404 permitting process. During that time, thousands of Section 404 permits have issued, facilitating a tremendous number of construction projects throughout one of the Nation's fastest growing states. Without question, Florida's assumption of the Section 404 permitting program has allowed the State's construction industry to flourish while being highly protective of the environment.

The district court's order, flawed as it was, is poised to swing the pendulum far in the opposite direction. Just as Florida's cooperative-federalism initiative benefited its populace, the district court's interference with it will work a tremendous detriment, if this Court allows the vacatur order to take effect. Although the court below gave short shrift to the disruptive consequences that it was duty-bound to consider, *see e.g.*, *Weinberger v. RomeroBarcelo*, 456 U.S. 305, 312 (1982), this Court need not repeat that mistake. Indeed, the public interest weighs heavily in favor of State's request for a stay.

Should the Court decline Florida's request, one effect will arise immediately—screeching delays throughout Florida's construction industry. And as night follows day, these delays will devastate Florida's construction industry (directly) while slashing the State's economy (as a downstream effect), exacerbating an already-worsening affordable housing crisis along the way. Amici represent many Section 404 permit applicants, and many of the permits submitted by those applications are set out in the exhibit attached to the State's motion for a stay. See Dkt. No. 166-2 (Ex. B). They can attest that 404 permits are essential to just about every land disturbing activity—vacatur will be cataclysmic. Even a six-month delay would cost tens of millions collectively, and this appeal will likely not be resolved within a years' time. Over that span, not only would housing starts decline

precipitously, but land prices, building materials, and labor would rise even further than they have in recent years, making affordability a daunting challenge.

Florida's land developers are not the only ones with a dog in this fight. Halting a construction project cascades to third parties, like contractors, suppliers, consultants, local government, and the public. All trades, manual labor, and other work forces will suffer, including many small and minority-owned businesses. And Amici would be remiss if they failed to note that environmentally friendly projects would also grind to a halt. As shown by the preliminary-injunction intervenors below, see Dkt. No. 146, many pending projects include things like Florida-panther crossing and other environmentally protective enhancements are only possible through required mitigation. These private, yet eco-friendly, ventures would also be delayed (perhaps indefinitely) in the absence of a stay.

Amici Lennar Homes, for instance, has a project that clearly elucidates the chaos that the district court's vacatur is about inflict. One of Lennar Homes' projects involves a multi-use development project in Pasco County. Lennar Homes' 404 permit application was pending before the Corps in 2019. When Florida assumed the Section 404-permitting regime, Lennar Homes was forced to begin its application from scratch. It did, and just as it reached the brink of approval, the district court suspended Florida's authority. Now, Lennar Homes will be forced to begin from square one *again*, which means that the residential structures,

commercial spaces, public-trail system, charter school, and significant roadway network that it has been trying to build are stalled indefinitely. The current vacatur renders the future of this project and investment in public infrastructure uncertain, even though it is uncontested that the federal and state agencies have determined that this project will not adversely impact any endangered species.

The destructive impact that vacatur will inflict manifestly outweighs the far-more-speculative harm that the Plaintiffs suggest (especially given Florida's demonstrated commitment to endangered- and threatened-species protection). A stay is thus warranted.

II. RETURNING 404 PERMITTING TO THE U.S. ARMY CORPS OF ENGINEERS WILL NOT JEOPARDIZE ANY WILDLIFE (ENDANGERED OR OTHERWISE).

Distilled to its core, the district court's issue with Florida's 404 permitting regime is its belief that Florida's system provides inadequate protection to endangered species compared to the protection from the inter-agency process led by the Corps of Engineers. This ignores the fact that the state led process leads to the same level of species protection. Indeed, a perusal of the permits the State has issued shows that federally listed species enjoy as much—if not more—protection than when the Corps issued 404 permits in the State. It is literally the same personnel in the U.S. Fish and Wildlife Service that review the state-issued 404 permits.

Throughout the three years that Florida has been allowed to issue 404 permits, all applications were reviewed by the U.S. Fish and Wildlife Service as well as the

State Fish and Wildlife Commission. Many were designated by the U.S. Fish and Wildlife Service as either a "No Effect" projects, or "May Affect, Not Likely to Adversely Affect" ("MANLAA") projects. These designations resulted from Section 7 "informal consultation." By the terms of Florida's 404 regime, this informal consultation arises when Florida and a 404-permit applicant seek technical assistance from the U.S. Fish and Wildlife Service for species review. If after reviewing the application, the U.S. Fish and Wildlife Service determines a project will result in a No Effect or a MANLAA, there arises no need for Section 7 formal consultation because the federal government has already concluded that take is unlikely. Informal consultation through technical assistance (and No Effect/MANLAA designations) arises whether the Florida or the Corps make the determination.

Critically, both the Corps and the State require that all 404 permits include binding conditions that protect any listed species. Indeed, Florida adds an extra layer of protection—State Fish and Wildlife Commission review, which is separate and apart from the U.S. Fish and Wildlife Service's review. And in the event that a project appears like it might result in take, *both* the federal and state agencies conduct a case-by-case review, and *both* will add conditions to address or mitigation any potential, incidental take.

Accordingly, the district court's vacatur has the perverse effect of *reducing* protection to listed species. Not only does it inject tremendous regulatory uncertainty; it also removes an added layer of protection that the State imposes when projects represent a risk to endangered species. Insofar as the district court had a concern with endangered-species protection, the conclusions in its order are precisely backwards.

Permitting conditions to do not end at permit issuance. The required deliverables between the State and the permittee assure that the State's program protects listed species. State-imposed permit conditions include monitoring and reporting species information to the State, as well as recording conservation easements (with the State as the beneficiary) to protect species habitat. The regulatory void created by the district court's vacatur means that *no* agency (federal or state) is either monitoring or enforcing these conditions. The State cannot, by virtue of the vacatur. And the Corps, for its part, has provided no guidance to permittees regarding permit conditions. Either way, the order has detracted from, rather than augmented, the protection that Florida's wildlife enjoyed while the State was administering the Section 404 permitting system.

III. DESPITE ITS ASSERTIONS TO THE CONTRARY, THE U.S. ARMY CORPS OF ENGINEERS IS NOT PREPARED TO HANDLE THE DELUGE OF FLORIDIAN 404 PERMIT APPLICATIONS.

To be sure, Amici have no desire to impugn the U.S. Army Corps of Engineers, particularly given the role they play in the permitting process writ large. That said, facts are facts, and facts do not lie. And the facts, as experienced by Amici, demonstrate that the Corps is not at all prepared to pick up where the State left off without terrific disruption to the Section 404 permitting process.

The district court was made aware of the problems that would ensue if it disturbed Florida's assumption of the 404-permitting regime. At hearing conducted on April 4, 2024, counsel for the State implored the court to allow the State to continue processing permits. Counsel explained that over 1,000 applications remained in regulatory paralysis since the court had determined that certain parts of Florida's assumption violated the Endangered Species Act. Dkt 181, at 4 (Apr. 4, 2024 Hrg. Tr.).

The district court was unpersuaded, Dkt 181 at 26, and expressed confidence that the Corps stood at the "ready to accept permit applications right now." *Id*. at 27. It did so in reliance on the federal defendants' assurance that the Corps "ha[d] identified and allocated resources to process those permits" and was prepared to being processing them. *Id*.at 28-29. In fact, Counsel for the Corps "emphasize[d] that a project will not go to the back of the line just because the applicant had

previously applied to Florida." Dkt 181 at 30. The district bought those assurances, dismissing the State's concerns due to its belief that "the Corps stands ready and able to process the outstanding permit applications." Dkt. 183 at 10. And for good measure, the Corps doubled down on its confidence, asserting that "the Corps is administering 404 permitting in a way that serves the public," "is diligently processing permit applications," and "will continue to do so to mitigate any disruption and delay to applicants." Dkt. 188 at 1. The Federal Defendants have told this Court that applicants will "not go to the back of the line." Doc. #2052135 at 10.

Amici, respectfully, can represent without equivocation that the Corps' confidence is not borne out on the ground. Amici represent a wide cross section of businesses that have sought 404 permits both before and after the State assumption. Since the district court vacated Florida's program, they have had repeated interactions with the state and federal agencies. Unfortunately, they can report that the Corps is *not* "open for business" in the manner necessary to respond to this new task. Dkt 181 at 31.

To be certain, the Corps is not inept. The fact remains, however, that the State and the Corps have their own distinct 404-permit processes. Assuming that the Corps will be provided the full permit application files from the State and pick up where Florida left oft vastly underestimates the complexity of the transfer ordered by the district court. *Every* Florida permit applicant must start from the beginning and

submit a new Corps-specific permit application, which means the process must begin from scratch. The system simply cannot operate otherwise.

Adding to the chaos is that the Corps field offices have made clear that they are not prioritizing applications that were previously reviewed by the State. These applications are treated like any other new permit request; i.e., they are reviewed in the order they are received (including those that were pending before the Corps before Florida assumed the Section 404 permitting process). As it stands now, the Corps is working through the applications that it currently has in the system, which have swelled to create a 2022-application backlog.

While Amici do not question the sincerity of the Corps' commitment to process diligently the 1,000 applications that the State had on its desk, the State hired 300 employees upon assuming the 404-permitting regime for a very good reason. Processing 404 permits is a time- and labor-intensive process. Doing so involves at a minimum completeness review, confirmation of jurisdiction (and probable site visits), public notice, consideration of comments, consultation with the U.S. Fish and Wildlife Service, drafting permit terms and conditions, and review under the National Environmental Policy Act. In Amici's well-informed and hard-earned view, it will take years for the Corps to review individual 404 permits, even for those permits that were on the verge of issuance by when they were pending before the State (some of which started with the Corps and were sent to the state in 2020).

And those are just the permits that remain pending at the application stage. Of equal consequence are the thousands of permits already issued by the State, which, as noted above, now have (apparently) *no* agency (federal or State) monitoring them for compliance or enforcing them where they are violated. In the absence of a stay, the Corps will be responsible this role. But when (if?) they begin this process, they will do so without *any* institutional knowledge (and, currently, without *any* files). no files in front of them), the agency will have minimal ability to step into the shoes of FDEP.

Simply put, "open for business"[2] means exactly what it says—and no more. Even assuming that the Corps is be prepared to accept 404 permit applications, Amici can attest that the Corps is not ready to process and issue permits without tremendous growing pains. When Florida assumed the program (following a lengthy preparation period), it issued no permits for five months and only eleven after the State began approving them.[3] Under the current circumstances, in which both the federal and state agencies were blindsided by the district court's order, it defies belief that re-transiting the 404 program to the Corps will result in anything short of a total fiasco.

[2] 4/4/24 Hr'g Tr. at 31.

[3] Dkt. 166 at 6 n.7

In its recent filing/declaration, the Corps maintains its vague "we got this" position without anything concrete to allay the Amici's concerns. "Mak[ing] short- and long-term plans" is cold comfort. Zinser Dec. ¶ 10. So too is its ability to process roughly *6 percent* (10 permits authorized divided by 156 applications received). *Id*. ¶ 12. And dismissiveness regarding the "Florida-specific process[]" training that the Corps will need to commence underestimates tremendously the complexity that such training will involve, given Florida's inimitable ecosystem. *Id*. ¶ 10. If anything, the Corps "no position" filing provides additional support for why a stay must issue, lest calamity ensure throughout the State.

CONCLUSION

For the foregoing reasons, Amici urge the Court to great the State's motion for a stay.

Dated: May 2, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume and word-count limits of Federal Rule of Appellate Procedure 27(d) because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), this document contains 2,598 words.

2. This document complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 27(d) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

/s/ Edward M. Wenger
EDWARD M. WENGER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 2nd day of May, 2024, a true copy of the Brief of Amicus Curiae was filed electronically with the Clerk of Court using the Court's CM/ECF system, which will send by email a notice of docketing activity to the registered Attorney Filer on the attached electronic service list.

/s/ Edward M. Wenger
EDWARD M. WENGER

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR BIOLOGICAL DIVERSITY, et al., Plaintiffs, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, et al., Defendants, and TARPON BLUE SILVER KING I, LLC d/b/a COLLIER ENTERPRISES, Defendant-Intervenor.	Case No. 1:21-cv-00119 (RDM)

COLLIER ENTERPRISES'S RESPONSE TO
FLORIDA'S MOTION FOR ENTRY OF FINAL JUDGMENT

Collier emphasized the importance of regulatory certainty when it appeared before this Court on January 30, 2024. Applicants for section 404 permits, like the overall economy in which they operate, depend on clear and reliable rules. Collier will comply with any application framework that reasonably implements Clean Water Act and Endangered Species Act requirements. It just needs to know the rules. That regulatory certainty will not exist until this litigation progresses, which (given indications one or more parties will appeal) requires an appealable order.

Section 404 permitting in Florida has been thrown into disarray since this Court's February 15 decision. That decision prevents the State from issuing any of over 1,000 section 404 permits on applications previously pending before it, about 85% of which are expected to have no effect on listed species. Doc 166-1 at 3. But the Corps, the State, and applicants do not yet know whether the Corps must absorb the entire universe of pending State section 404 permit applications (which would join applications already pending before the Corps and others yet to be filed), or whether only applications that "may affect" listed species will proceed before the Corps.[1] Florida plans to appeal and seek "near-term relief", Doc 171 at 3, potentially returning all section 404 permitting to the State, but that appeal cannot go forward until this Court enters at least a partial final judgment. The upshot is that Collier and over 1,000 other section 404 permit applicants intending to construct housing, hospital, school, grid, road and other projects remain

[1] Plaintiffs acknowledge their own (and apparently this Court's) confusion about State section 404 permitting procedures and concepts, noting they incorrectly said section 404 permit applications in New Jersey are transferred to the Corps when a "may affect" determination is made, when in fact such transfers occur in a more limited set of circumstances. *See* Doc 169 at 9 n.4; Doc 171 at 2 n.2. They likewise acknowledge the term "federalization" has been confusingly used to describe not only the transfer of state section 404 permit applications to the Corps for processing, but also federal review of state 404 applications (akin to that in Florida). *See* Doc 169 at 9 n.4; Doc 171 at 2 n.2.

in regulatory limbo, uncertain as to who must decide their permit applications, much less when or how those applications will be processed.

The current posture of this case prevents appellate review under 28 U.S.C. § 1292(a)(1), and further delays in issuance of final judgment prevent appellate review under § 1291. The Court has functionally granted Plaintiffs the preliminary injunctive relief they sought, but in a manner that prevents the appeal Florida plans to file and leaves section 404 permit applicants in limbo. At a minimum, partial final judgment is warranted because plaintiffs have now received complete relief on their Endangered Species Act claims.[2]

Collier supports the Florida Intervenors' motion. The Court should promptly decide the stay motion and enter an appealable order.

[2] Specifically, the Corps must now process all section 404 permits that "may affect" listed species, even if the Court issues the partial stay it is contemplating, which plaintiffs have repeatedly said would remedy their ESA claims. *See* Transcript of October 19, 2023 summary judgment hearing at 22-23 (stating that "New Jersey shifted its program so that any permit that may affect species would go through the federal agencies" and agreeing with this Court regarding the "bottom line" that such an approach would be acceptable in Florida); Plaintiffs' PI Motion, Doc 135 at 36 (requesting, as an alternative to a preliminary injunction against two named projects, "an order restoring authority to the Corps over permits that may affect ESA species"); Plaintiffs' Reply in Support of PI Motion, Doc 153 at 53 (Plaintiffs request, as an alternative, "an expedited ruling on Plaintiffs' ESA-related claims with … an order restoring authority to the Corps over permits that may affect ESA-listed species"); Transcript of January 30, 2024 PI hearing at 97-98 (Plaintiffs' statement that, if the Court rules in their favor on the ITS, an "alternative remedy" that "all parties have had the opportunity to brief" would be for "state permits that may affect species to go to the Corps" via an "off-ramp already built in", and agreeing with the Court that "the Corps could simply issue the permit in consultation with the Fish and Wildlife Service; and to the extent the Fish and Wildlife Service has already made determinations with respect to what it thinks the take limitation could be, they could just incorporate it that way"); Plaintiffs Remedy Brief, Doc 161 at 2 ("any remedy would have to require that prospective permits that may affect ESA-listed species undergo Section 7 review"); *id.* at 7 ("Vacatur of the BiOp and ITS, and injunctive relief that restores the Corps' authority over permits that may affect ESA-listed species, would ensure that those permits receive the review required by the ESA").

Date: March 18, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on March 18, 2024, I electronically filed the foregoing response with the Clerk of the Court for the U.S. District Court for the District of Columbia via the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by that system.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR BIOLOGICAL DIVERSITY, et al.,

Plaintiffs,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Defendants,

and

STATE OF FLORIDA, et al.,

Defendant-Intervenors,

CIVIL CASE NO.: 1:21-cv-119 (RDM)

CAMERATTA'S RESPONSE TO FLORIDA INTERVENORS' MOTION FOR ENTRY OF FINAL JUDGMENT

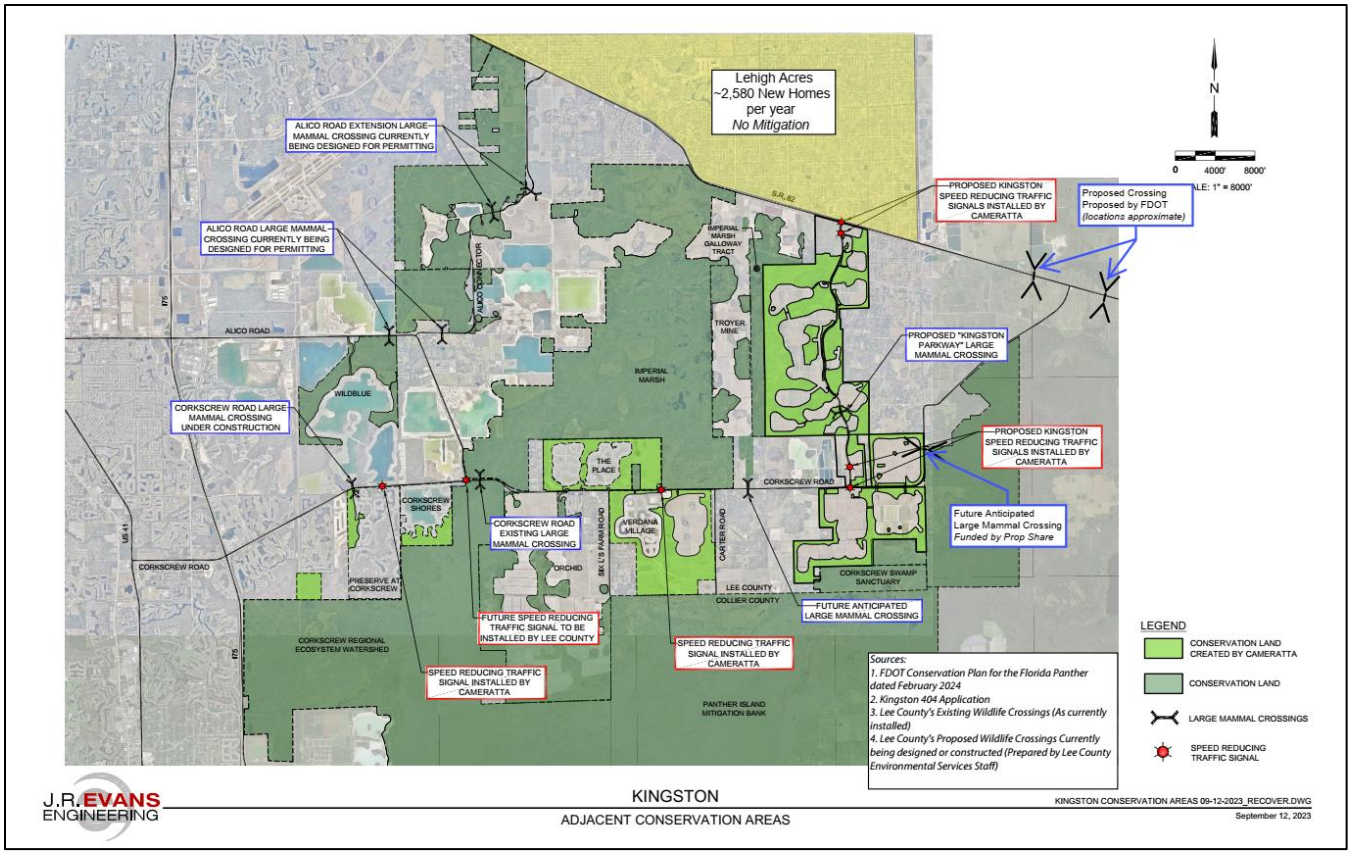
COMES NOW Intervenors, CAMERATTA COMPANIES, LLC and CAM7-SUB, LLC (hereinafter "Cameratta") pursuant to this Court's Order of March 12, 2024, directing certain parties to file responses to the Florida Intervenor's Motion for Entry of Final Judgment with Request for Expedited Consideration. (Dkt. No. 171).

Cameratta fully supports the Florida Intervenor's Motion for Entry of Final Judgment with Request for Expedited Consideration. (Dkt. No. 171). Incredibly, Plaintiffs have recently admitted that they made misrepresentations to the Court in their filings and oral arguments. (Dkt. 169 at 9 n.4). Such "confusion", whether deliberate or not, calls into question Plaintiffs' assertion that there is no choice but full vacatur and undercuts their attempts to downplay the effects of the

relief that they seek. Whether Plaintiffs acknowledge it nor not, vacatur of the 404 program will cause untold disruptive consequences to the State of Florida.

Delay has real consequences for permittees. As set forth in the Declaration of Joseph Cameratta, (Dkt. No. 146-3), the Kingston project was nearing final approval – after two years of review – when it became the subject of the Plaintiffs' request for a TRO. The only remaining step was confirmation from USEPA that they did not object to permit issuance, which was withheld only because of Plaintiffs' TRO motion. The delay caused by this suit places Cameratta's investment at substantial risk. As explained by the *Amici* in this matter, (Dkt. No. 168), such delay has a collateral impact on each and every company that has an interest in land development in Florida. It is essential that innocent parties that have been swept into this litigation have a fair opportunity to seek appellate relief.

Delay impacts broad public interests. While Plaintiffs would have the Court believe that the 404 program has a negative impact on panthers, the simple truth is that vacatur and delay in permit issuance will have the ironic impact of delaying habitat restoration and panther crossings. As discussed in oral argument, because of the stringent permit conditions, projects such as Cameratta's result in a net gain of usable panther habitat and millions of dollars for other work. The below exhibit, from the Cameratta permit file that Plaintiffs have put at issue, shows a number of panther crossings and other traffic mitigation efforts that will be blocked in just one area of Lee and Hendry Counties.



Plaintiffs' litigation strategy of selectively pulling two applications into the suit painted a distorted picture of this process. Cameratta was brought into the litigation at quite literally the eleventh hour through Plaintiffs' TRO.[1] Despite this project specific TRO, Cameratta was limited in the information that could be presented.[2] While, this Court granted the Motion permitting Cameratta to present limited argument on the Kingston project at the hearing on January 30, 2024, (Order, January 24, 2024), that hearing focused on the pending Motions for Summary Judgment. As a result, Cameratta was afforded little opportunity to defend a 500-million-dollar project that

[1] The more appropriate route would have been to seek an injunction at the outset of the litigation. It is agreed upon that it took Florida a number of months to have its 404 Program up and running. That would have been the opportune time to seek the injunction with the least amount of disruption.

[2] The Court initially struck Cameratta's Declarations, (Dkt. 146-3; 146-4), attached to its amicus brief (Order, January 22, 2024), necessitating Cameratta's Motion to Intervene. (Dkt. 150).

has been in progress for two (2) years. *See* Declaration of Joseph Cameratta at ¶ 3, 11, 22 (Dkt. 146-3).

As was stressed in Cameratta's briefing, the same people who review a permit under a Section 7, are the same people who review it under a state 404 application. Hence, Cameratta's 404 application has already been reviewed by USFWS to prevent jeopardy.

> Florida Fish and Wildlife Conservation Commission (FWC) staff reviewed the above referenced State 404 permit application and provided the following comments, recommendation, and the permit conditions pursuant to Chapter 62-331, Florida Administrative Code, Chapter 373, Florida Statutes (FS), and in accordance with FWC's authorities under Chapter 379, FS. **These comments have been coordinated with the U.S. Fish and Wildlife Serviced (USFWS) to ensure the conservation of Florida's federally and state-listed wildlife and their habitats.**

(Dkt. No. 149-2; pg. 508) (emphasis added) At the conclusion of the review by both FWC and USFWS, Kingston was found "not likely to jeopardize" any listed species. (Dkt. No. 149-2; pg. 510). Further, it was determined the Kingston project would,

> reduce the likelihood that smaller, non-Federally reviewed actions will be needed to meet the commercial and residential needs of the rapidly growing human population in this area regardless of whether these 404 projects are authorized. The Service believes the conservation measures included in these 404 projects will provide greater benefits to panthers compared to non-Federally reviewed projects because they include measures to maintain high quality habitats that are connected, install fencing and crossings to reduce roadway mortality and are planned to reduce human and wildlife conflicts.

(Dkt. 149-2; pg. 564).

Finally, in the interest of transparency, FWC and USFWS placed a caveat on its take number stating, "we do not expect the actual number of panthers killed by vehicles to reach the estimated value for the reasons stated above." (Dkt. 149-2; pg. 566-567). Because this Court's February 15, 2024, decision has a direct and immediate effect on Kingston the foregoing findings of both FWC and USFWS are critical to the discussion of the Expedited Final Judgment and Stay.

Cameratta firmly believes that there is a workable solution that both protects species and does not cause the substantial harm of shutting down the permitting process in Florida. The Plaintiffs have done an irreparable disservice to this litigation by distorting the Florida program and the previous efforts of Michigan and New Jersey. As explained by FDEP, the Florida, New Jersey and Michigan programs have similarities in that no state 404 permit would be issued that jeopardizes a species because any such permit must be objected to (and if the objection is not resolved by avoiding jeopardy, the permit must be federalized by transfer to the Corps). (Dkt. No. 170 at 6). The Kingston project is an example of that process. It has extensive requirements for habitat restoration, wildlife crossings and purchases of millions of dollars of mitigation credits in order to ensure that there will be no jeopardy. Cameratta Dec. at ¶¶ 12-16 (Dkt. No. 146-3) See also Declaration of Shane Johnson at ¶ 22 (Dkt. No. 146-4). It would likely be issued under the New Jersey model.

Both the Stay and the Expedited Final Judgment are important to mitigating present misconceptions and to avoid the incredible disruption of permitting that Plaintiffs seek. In sum, it is essential for the regulated community that there both a continuing program and final resolution of this matter. While Cameratta cannot forecast how the Court will now address the request for a partial Stay, it appears that appellate review is more essential than ever. There is no just reason for delay.

Date: March 18, 2024

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR BIOLOGICAL DIVERSITY, *et al.*, *Plaintiffs*, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*, *Defendants*, and STATE OF FLORIDA, *et al.*, *Defendant-Intervenors*.	Civil Action No. 21-119 (RDM) Brief of *Amici Curiae* Supporting Florida Defendants' Request for a Stay

BRIEF OF *AMICI CURIAE*
IN SUPPORT OF
THE FLORIDA DEFENDANTS' REQUEST FOR A STAY[1]

[1] Amici include the Florida Chamber of Commerce; the Association of Florida Community Developers, Inc.; Lennar Corporation; G.L. Homes of Florida Corporation; GreenPointe Holdings; KB Home; Pulte Group; Taylor Morrison; the Florida Transportation Builders' Association, Inc.; the Florida State Hispanic Chamber of Commerce, Leading Builders of America; and the Associated Industries of Florida.

INTRODUCTION & INTEREST OF *AMICI CURIAE*

Sensing the disruptive consequences of vacatur, the Court's Order of February 15, 2023, invited the Defendants to request a limited stay, so long as their proposals exempted all pending and future permit applications that "may affect" any listed species under the jurisdiction of the United States Fish and Wildlife Service or the National Marine Fisheries Service. *See* Dkt. No. 163, at 96. The Court further requested that the Defendants propose a mechanism for determining which permit applications "may affect" listed species, noting that "the Court will leave it to the administrative agencies to determine, at least in the first instance, whether any such stay is desirable and workable, and, if so, how it should work." *See* Dkt. No. 163, at 96.

The Florida Defendants moved for a limited stay based on a "may affect" concept referenced by the Court, and they have set out the way in which the State will implement the Section 404 permitting process during a potential stay. *See* Dkt. No. 166, at 2. But recognizing the "partial assumption" concerns raised by the Federal Defendants, *see* Dkt. No. 165, Florida also proposed an alternative: allowing for a regime consistent with the New Jersey/Michigan models. *See* Dkt. No. 166, at 2. Given Florida's experience with the Section 404 permitting process, as well as the cascading economic calamity that will befall the State if the Court adopts the Federal

Defendants' all-or-nothing approach, Amici respectfully submit that the Court should defer to Florida's judgment on the workability of a modified program.

Because affordable-housing construction requires a stable regulatory environment and economies of scale, these homebuilders plan meticulously for large residential subdivisions, and they rely on long-term projections to bring a home to the market. Large communities in particular require coordination of an astonishing number of permits, entitlements, and contracts. Delay of any essential permit snowballs through all subsequent planning and coordination aspects. The result: production delays, which increase costs for *all* parties—large and small—in the construction industry.

Homeowners, buyers, and renters currently struggle with high housing costs due to lack of supply, lack of developable land, issues with material availability, persistently high borrowing costs, and other economic impediments. Halting, even briefly, permit approvals (some of which took five years to complete) aggravates these costs tremendously. Given the existing housing shortfall in Florida, vacatur without a stay will devastate Florida's housing supply and the rest of the State's economy.

Halting construction would have other public impacts. For example, local governments assess impact fees on property developers to pay for infrastructure improvements and local concurrency requirements to enhance local public

infrastructure. This funds important public services, including schools, libraries, parks, water and sewerage, police, and fire-protection services. Without impact fees or concurrency approvals, local governments will experience revenue shortfalls while necessary infrastructure projects—including panther crossings and other species-protection enhancements—will stall.

Amici are well poised to speak on the tremendous disruption that would arise in the absence of a stay. They include production homebuilders currently operating across the entire State. Indeed, they provide the lion share of new housing. For example:

The Florida Chamber of Commerce: The Chamber was founded in 1916. As an organization, the Chamber's mission has been to encourage a business-friendly climate to spur private-sector job creation and general economic growth, including through regulatory reform and streamlining of state and federal permitting requirements. The Chamber and its members reflect a cross-section of Florida. Members include businesses of every size from the large multinational companies to the family businesses. Members provide products and services for, among other things, the tourism industry, construction, agriculture, retail, manufacturing, conservation, and space exploration. The Chamber and its members remain committed to science-based policies for water, land use, energy, and growth that prioritize long-term sustainability over short-term gains. The Chamber and its

members remain mindful that Florida is a rapidly growing State; over four million new residents are expected to move to Florida by 2030 with nearly two and a half million new drivers on Florida roads who will need nearly two million new jobs. The Chamber therefore advocates for predictable, streamlined, and effective permitting that balances growth with the preservation of unique ecological treasures like the beaches and wetlands so vital to our economy. In helping Florida grow, Chamber members apply for and obtain Section 404 permits for a wide variety of projects such as community developments (homes, schools, hospitals), environmental restoration projects, and mining operations.

The Association of Florida Community Developers, Inc.: Founded in 1984, the AFCD is dedicated to advocating for policies that support high-quality community development across the State of Florida. The AFCD's mission is to provide a leadership role in the creation of quality community developments and the formulation of responsible approaches to the planning and development of Florida's future. Members of the AFCD advocate for an effective and efficient planning and policy framework to encourage and support economic development while retaining Florida's natural beauty (its beaches and wetlands, for example); this balance, the AFCD believes, helps draw tourists and new residents to Florida.

The Mosaic Company: A member of the Florida Chamber of Commerce, the Mosaic Company is the world's leading integrated producer of concentrated

phosphate and potash, essential nutrients for fertilizer used throughout the world. Mosaic mines phosphate in Florida's Bone Valley, which contains the largest known deposits of phosphate in the United States. Mosaic's mining activities must comply with various federal, state, and local regulations; permits under Sections 404 and 402 of the Clean Water Act are but two of the necessary authorizations needed for Mosaic to mine it in the region and produce agricultural nutrient products. Vacating the Section 404-permitting process in Florida creates needless uncertainty for Mosaic.

The Florida Homebuilders Association: A member of the Florida Chamber of Commerce, the Association represents the interests of Florida's homebuilding industry and, more specifically, its 8,145 members throughout the State. Given Florida's unique geography and topography, homebuilders throughout the State often must obtain permits under Section 404 of the Clean Water Act and the State's analogous permitting scheme under Chapter 373 of the Florida Statutes. Vacating the Section 404-permitting process in Florida would create needless uncertainty for the Association and its members as they continue to meet the needs of a growing State.

The Florida Transportation Builders' Association: The FTBA represents approximately 500 members in the transportation construction industry in Florida. FTBA membership engages in planning, design, construction, and maintenance of

federal and state roadways amounting to 95 percent of all public infrastructure work in Florida.

The Florida State Hispanic Chamber of Commerce: The Florida State Hispanic Chamber represents a diverse business community with millions of fundamental Latino members as well as a cross section of business relationships in Florida.

The Leading Builders of America: LBA is a trade association representing 21 of the largest production home builders in the United States. LBA's members collectively build approximately 35 percent of all new homes in the nation at all price points ranging from $150,000 to over $1,000,000 per home. Their members have sold over 100,000 homes in the past two years that were financed through the FHA or the USDA Rural Housing programs. Approximately 75 percent of these were first-time buyers and more than half were sold to people of color.

The Associated Industries of Florida: AIF is the voice of Florida business and represents the interests of a broad group of corporations, professional associations, partnerships, and proprietorships in all business sectors. It has represented the interests of prosperity and free enterprise before the three branches of state government since 1920. A voluntary association of diversified businesses, AIF was created to foster an economic climate in Florida conducive to the growth, development, and welfare of industry and business and the people of the state. AIF

seeks to lessen the burdens government would place on employers, while seeking solutions to conditions that threaten their success. Dealing with significant changes and revisions to federal water policy has frequently required a broad group of interested parties to appropriately address the variety of viewpoints. To this end, AIF established its H2O Coalition ("H2O") for the specific purpose of bringing stakeholders together to comprehensively address state and federal water policy issues using sound-science and sound policy. H2O's membership also consists of a broad and diverse group of stakeholders including agricultural, industrial, manufacturing, power generation, home building, and county and municipal government. AIF and the H2O Coalition have been involved in federal rulemaking affecting Florida in the past, including the federal Numeric Nutrient Criteria in Florida, the multiple iterations of the rule defining Waters of the United States, and the delegation of federal wetland permitting to the Florida Department of Environmental Protection that preceded this litigation. In April 2022, AIF and H2O submitted an Amicus Curiae brief to the U.S. Supreme Court in *Sackett v. Environmental Protection Agency*. AIF's and H2O's members regularly seek Section 404 permits for all manner of projects related to the agriculture, utility, manufacturing, home development, and transportation sectors.

ARGUMENT

I. VACATUR WITHOUT A STAY WOULD BE DEVASTATING.

As the court has already recognized, it has an obligation to consider the disruptive consequences of the relief it orders. *See e.g., Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982). This includes effects on the parties, third parties, and the general public. *Id*. Despite Plaintiffs' insistence to the contrary, the destructive impact that vacatur without a stay would inflict on the State manifestly outweighs the far-more-speculative harm they suggest (especially given Florida's demonstrated commitment to endangered- and threatened-species protection). A stay is thus warranted.

A. A delay in permitting is inevitable.

To be certain, delays will occur without a stay. Transferring Section 404 permitting authority to the U.S. Army Corps of Engineers will freeze permit processing throughout the State—how long remains unknown. That said, Florida needed five months after assuming the Section 404 permitting process to begin issuing permits, and it only issued eleven between December 2020 and July 2021. Even if the Corps could move twice as fast, the thousands of permit applications currently pending in Florida would begin to petrify.

This risk is not speculative, nor can it be assumed that the Corps is ready to hit the ground running. Applications transferred from the State (1,065, according to

the State) must start from square one, no matter how far along the State's review process had progressed. And there is no indication that the Corps is poised to replace the more-than three-hundred State employees who had been hired and trained to implement Florida's 404 program. *See* Dkt. No. 160, at 5. To cover this immediate influx, the federal government will need to identify funding sources, hire staff, and then train those hires to process Florida's pending permits. Common sense dictates that this process will not conclude (or perhaps even commence) without substantial delay, especially given the Corps current workload relating to their responsibility over retained waters.

Granting the State's requested stay will largely obviate these delays. The permits that do not raise concerns will progress in the normal course. And those permit applications that "may affect" a protected species (thus necessitating federal review) would constitute a volume far less monstrous for the Federal Government to handle. Indeed, the State estimates that only 15 percent of all individual and general Section 404 permits trigger a "may affect" finding. *See* Dkt 166, at 3, 11. Given the smaller burden inflicted on the federal government, permit applications falling into *both* categories ("may affect," and "won't affect") will proceed far more efficiently and rapidly.

B. The economic consequences of another reset will be staggering.

The inevitable delay that would arise without a stay would devastate Florida's construction industry (directly) and would wound State's economy (as a downstream effect), exacerbating the affordable housing crisis. Amici represent many Section 404 permit applicants, and many of the permits submitted by those applications are set out in the exhibit attached to the State's motion. *See* Dkt. No. 166-2 (Ex. B). They can attest—a vacatur without a stay would be cataclysmic. Even a six-month delay would cost tens of millions collectively. In turn, not only would mortgage rates spike precipitously, but land prices, building materials, and labor would rise even further than they have in recent years, making affordability a daunting challenge.

The developers are not the only ones with a dog in this fight. Halting a project cascades to third-parties, like contractors, suppliers, consultants, local government, and the public. All trades, manual labor, and other work forces will suffer, including many small and minority-owned businesses. And Amici would be remiss if they failed to note that environmentally friendly projects would also screech to a halt given a vacatur without a stay. As shown by the preliminary-injunction intervenors, *see* Dkt. No. 146, many pending projects include things like Florida-panther crossing and other environmentally protective enhancements. These private, yet eco-friendly, ventures would also be delayed (perhaps indefinitely) in the absence of a stay.

Amici Lennar Homes, has a project that demonstrates the potential chaos that vacatur without a stay would inflict. One of Lennar Homes' projects has been working on obtaining its Section 404 approval for a multi-use development project in Pasco County. The application was pending before the Corps in 2019 when it was transferred to the FDEP in year 2020. This project had to begin from scratch under the FDEP and was again on the brink of receiving its approval when FDEP's authority was suspended. It includes residential, commercial spaces, a public trail system connecting the development to the regional trail system, a charter school, and a significant roadway network providing improved and much needed transportation options within the larger region. The current vacatur renders the future of this project and investment in public infrastructure uncertain, even though it would meet the strictures of the New Jersey model (discussed *infra*), since the FWS determined the project will not adversely impact species or cause jeopardy.

II. THE STATE HAS PROPOSED WORKABLE SOLUTIONS.

As representatives of Florida Section 404 permit applicants, Amici can assure the Court that Florida's proposed solutions are patently workable. This is true whether the Court opts for the detailed proposal that Florida offers, or instead chooses to implement the regimes used in New Jersey or Michigan.

A. The New Jersey/Michigan models are obvious choices.

The easiest way for the Court to avoid the economic disaster that would ensue in the absence of a stay would be to follow the well-trodden paths of Florida's sister states. New Jersey, for instance, issues Section 404 permits for projects that either (1) have no effect on listed species, or (2) may affect, but are not likely to adversely affect, listed species. In both scenarios, Section 404 applicants seek technical assistance (i.e., "informal consultation") from the U.S. Fish and Wildlife Service. If the FWS agrees with either effect determination, New Jersey's process continues, because there is no take of listed species. If FWS anticipates a "may effect, likely to adversely affect" conclusion, then formal consultation under Section 7 of the ESA is triggered and such projects would be transferred to the federal agencies for review. New Jersey has shown that this process works (and has for decades), and it covers the concerns set out in the Court's vacatur order.

Michigan's Section 404 permitting regime would similarly work. Michigan's Memorandum of Agreement with the Federal Government provides that, federal agencies must review projects that impact critical environmental areas, or that involve major discharges, which expressly include "[p]rojects with potential to affect endangered or threatened species as determined by the U.S. Fish and Wildlife Service." Dkt. No. 166, at 17. In other words, Michigan's system works, it has for

decades, and it (like New Jersey's) animates the Clean Water Act's cooperative-federalism spirit while also ensuring Endangered Species Act compliance.

Implementing either (as the State proposes) would alleviate the Court's concerns while preventing tremendous injury on the entirety of Florida's construction industry. Amici wholeheartedly encourage the Court to consider them.

B. Alternatively, the mechanism for determining which permit applications "may affect" listed species is workable.

Given State's unique ecosystems, the State has painstakingly offered the Court a Florida-specific way in which to administer the Section 404 program while the remand remains underway. Despite the Federal Defendants' practicability concerns, Amici are convinced that Florida's proposal is quite administrable. And even if some complexities arise, dealing with those is far superior to full vacatur without a stay, given the economic detriment that will necessarily ensue without it.

The Federal Defendants "practical" concerns are easily assuaged. *See* Dkt. No. 165, at 2. Indeed, the State has addressed all of them. *See* Dkt. No. 166, at 9-14. For example, the Federal Defendants note that Florida and the Corps require applicants for individual Section 404 permits to submit different information. *See* Dkt. No. 165, at 2. But prospective applicants like Amici are more than willing to bear this burden or potential redundancy to avoid a far greater evil: beginning the entire process anew. Indeed, they are used to navigating two different regimes, given the Program's different treatment of permitting for "assumed" and "retained" waters.

In other words, state and federal agencies know how to coordinate and determine at the threshold which entity will process a permit application.

Simply put, Florida's proposed framework harmonizes with the Endangered Species Act (indeed, it is rooted in the ESA Consultation Handbook). It allows all relevant federal agencies to determine whether a permit application has a "reasonable potential for affecting endangered or threatened species or critical habitat" after public notice, *see* Dkt. No 166 at 10-11, which extends *more* protection than the run-of-the-mine Section 7 consultation process (and should thus allay the concerns that resulted in the Court's vacatur order). Finally, Amici stand at the ready to work within that proposed framework, and implementing it via a stay during the remand will work to the best interest of all Floridians (and not just the developers represented here).

CONCLUSION

For the foregoing reasons, the Court should grant the State's motion for a stay.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Local Rule 7(o)(4) because it does not exceed 25 pages. This brief complies with the typeface requirements of Local Rule 5.1(d) because this brief has been prepared in a proportionally spaced typeface using the Microsoft Office Word processing software in a 14-point Times New Roman type style.

Dated: March 2, 2024

/s/ Edward M. Wenger
Edward M. Wenger (DCB No.1001704)

CERTIFICATE OF SERVICE

I hereby certify that on March 2, 2024, I filed this Brief with the United States District Court for the District of Columbia using the CM/ECF system, which will cause it to be served on all counsel of record.

/s/ Edward M. Wenger
Edward M. Wenger (DCB No. 1001704)