

Testimony of John J. Truitt, Deputy Secretary of the Florida Department of Environmental Protection, before the U.S. House of Representatives Committee on Natural Resources

Subcommittee on Water, Wildlife and Fisheries

September 16, 2026

Chair Hageman, Ranking Member Hoyle and members of the Subcommittee on Water, Wildlife, and Fisheries, my name is John Truitt, and I am the Deputy Secretary for Regulatory Programs at the Florida Department of Environmental Protection (FDEP). I am honored to address this Subcommittee concerning H.R. 9017, the “Restore Florida Water Independence Act of 2026.”

This bipartisan legislation represents a vital and responsible step forward in restoring FDEP’s Clean Water Act (CWA) Section 404 permit program. Florida successfully administered its Section 404 program for several years prior to an adverse court ruling that jeopardizes the ability of Florida – and all other states with significant wetlands and endangered species – to administer this program as Congress intended. At the outset, FDEP wishes to express our gratitude to Representative Byron Donalds for introducing H.R. 9017 and for his leadership on this important issue for the State of Florida.

Florida’s Longstanding Efforts to Protect Wetlands and Wildlife

Florida is one of the most ecologically rich states with more wetlands than any other state (except Alaska), tens of thousands of lakes and ponds, and many rivers and innumerable streams, creeks, and springs. Our state is also home to abundant fish and wildlife species. Under the Florida Constitution, “It shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made by law for the abatement of air and water pollution ... and for the conservation and protection of natural resources.” Fla. Const. art. II, § 7(a). As such, Florida has long required state-issued permits – known as “Environmental Resource Permits” (or ERPs) – for dredging (excavating from) and filling (depositing in) wetlands or waters in the state. Florida has administered its ERP program for almost a half-century. Florida also administers its own state endangered species laws and programs.

Similarly, Section 404 of the Clean Water Act creates a federal permit program for dredging and filling the Nation’s surface waters. Specifically, CWA Section 404 requires a permit to discharge any pollutant into the “waters of the United States.” This Subcommittee is likely very familiar with the longstanding controversies associated with federal efforts to define the “waters of the United States” – a term that has been entangled in litigation for decades. In Florida, we protect the broader “waters of the state,” a term that does not get mired in nearly as much controversy over its jurisdictional limits because the authority of states to regulate the environment, under our federalism system of government, is not nearly as limited as federal agencies. Under the U.S. Constitution, states have primary responsibility for protecting the environment. Yet, given Florida’s extensive oceans, rivers, lakes, rivers and wetlands, large swaths of the state have been viewed as jurisdictional waters for purposes of the federal Section 404 program. Thus, the federal Section 404 program and state ERP program apply to many of the same dredge or fill activities within Florida, such as single-family residences; commercial

developments; utility projects; environmental restoration and enhancement; linear transportation projects; governmental development; certain agricultural and silvicultural activities; and in-water work within assumed freshwater bodies such as docks, piers, marinas, living shorelines, and other shoreline stabilization. For decades, federal and Florida permitting officials had to process separate permits under separate procedures for the exact same projects. This has been duplicative and inefficient.

In Florida's experience, federal permitting programs generally have been slower, more bureaucratic, and often less resourced than Florida programs. The Corps of Engineers must administer the program nationally and often without the ability to prioritize permit programs in particular states. As a state that seeks to protect its environmental resources while also encouraging economic opportunities for our citizens, Florida has been willing to dedicate the effort and resources needed to ensure a well-trained permitting staff to review and process permits in a timely manner. This helps protect the environment while also allowing for smart development that is necessary to ensure housing, hospitals, schools, energy infrastructure, and a host of other projects that often require Section 404 and ERP permitting.

State Assumption under CWA Section 404

Although the Corps of Engineers is the default authority for issuing Section 404 permits, the CWA allows states to assume the Section 404 program subject to federal oversight. 33 U.S.C. § 1344(g). In fact, the CWA expresses Congress's strong preference for state administration of the permitting program. *Id.* § 1251(b). It bears repeating that, when Congress enacted Section 404, it declared it **"the policy of Congress that the States . . . implement the [CWA] permit programs,"** 33 U.S.C. § 1251(b), and, in 1977, Congress created a process by which a state may assume that authority. Florida accepted this congressional invitation, spending many years and significant resources building a Section 404 program in partnership with the federal government.

From Florida's perspective, state assumption of the 404 program provides an opportunity for a streamlined permitting procedure where both federal and state requirements are addressed by state permits. This approach – based on the fundamental principle of cooperative federalism reflected in the Clean Water Act – provides greater certainty to the regulated community, conserves resources of both applicant and regulator, and affords the state greater control over its natural resources while complying with federal law. Thus, in 2018, the Florida Legislature passed section 373.4146, Florida Statutes, providing FDEP with the "power and authority to assume . . . the dredge and fill [Section 404] permitting program." To fulfill this statutory mandate, FDEP adopted Chapter 62-331, Florida Administrative Code, including the State 404 Program Applicant's Handbook, and undertook the significant effort to prepare a comprehensive application for the Section 404 program.

Importantly, when a state administers the Section 404 program, significant federal oversight remains in place. More specifically, while the Corps of Engineers conducts Section 404 permitting in the absence of a state's request, 33 U.S.C. § 1344(a), assumption transfers no federal authority to the state. Rather, the Corps ceases operating its program, 40 C.F.R. § 233.15(h), leaving the state-law program operating in lieu of the federal one, *see* Clean Water Act Section 404 Tribal and State Assumption Program, 89 Fed. Reg. 103,454, 103,484 (Dec. 18, 2024). Federal

oversight continues, however, on a permit-by-permit basis: EPA reviews proposed permits, may object, and may block issuance until its objections are resolved. 33 U.S.C. § 1344(j); 40 C.F.R. § 233.50(f). And as explained further below, U.S. Fish and Wildlife Service (USFWS) plays a key role in reviewing state permits to ensure protection of species listed under the Endangered Species Act (ESA).

Florida's Programmatic Approach to Protecting Species

Because Florida has extensive wetlands and many species protected under the ESA, FDEP worked closely with federal agencies to address ESA requirements concerning potential effects on listed species before assuming Section 404 permitting authority. The ESA—like the CWA—explicitly calls for “federal agencies [to] cooperate with [s]tate and local agencies to resolve water resource issues in concert with conservation of endangered species.” 16 U.S.C. § 1531(c)(2). And Section 7 of the ESA requires EPA to consult with USFWS (and, regarding marine species, the National Marine Fisheries Service) when approving state 404 programs.

When FDEP sought EPA approval of the state's 404 program, EPA initiated a “programmatic consultation” with USFWS under ESA Section 7. For several decades, the USFWS's position has been that state Section 404 assumption requests should be reviewed as programmatic consultations, so this was not a new concept. As part of this programmatic consultation approach, Florida and EPA integrated a binding technical assistance process to facilitate and require ongoing cooperative efforts to protect species. Under this technical assistance process, FDEP, the Florida Fish and Wildlife Conservation Commission, and the USFWS coordinate on permit reviews to protect listed species, with oversight by EPA. The safeguards included:

- joint federal-state training and coordination
- mandatory referral of every application to U.S. Fish & Wildlife Service for review
- USFWS review of every permit to ensure compliance with ESA standards
- a requirement that Florida either adopt USFWS protective measures or deny the permit
- EPA veto authority over any permit affording insufficient protection

This technical assistance process was a key part of USFWS's issuance of a Programmatic Biological Opinion (BiOp) evaluating whether EPA's approval of Florida's program would jeopardize listed species or destroy critical habitat, using the “best scientific and commercial data available.” 16 U.S.C. § 1536(a)(2). Because the effects of future permits could not be predicted in advance, USFWS evaluated the technical assistance process through which state and federal agencies would conduct project- and species-specific reviews. USFWS found that this process would adequately protect species. The BiOp itself is a voluminous report¹ with extensive biological information covering affected species. The BiOp described the project action and action area, the programmatic approach to assessing impacts, the status of species in Florida listed under the ESA,

¹ A copy of the USFWS Programmatic Biological Opinion is available at <https://www.regulations.gov/document/EPA-HQ-OW-2018-0640-0642>. Additionally, a copy of the 297-page Biological Evaluation, submitted by EPA in support of Florida's Section 404 program, is available at <https://www.regulations.gov/document/EPA-HQ-OW-2018-0640-0649>.

the environmental baseline, cumulative effects of the program, and the possibility of incidental take of species under permitted projects, among other things.

Florida's Incidental Take Statement

Because the BiOp found that EPA's approval of Florida's program would not jeopardize listed species, the ESA required USFWS to also issue an "incidental take statement" (ITS). 16 U.S.C. § 1536(b)(4)(C)(i)-(iv). An ITS protects federal agencies, state agencies, and individual permittees who comply with federally approved conditions from incurring liability under the ESA. This is a pivotal feature of the ESA regulatory regime. Ordinarily, an ITS specifies the amount or extent of permitted take, and consultation must resume if that limit is exceeded. 50 C.F.R. § 402.14(i)(1)(i), (5). Because future permits and their effects were unknown, USFWS did not set numeric limits in advance. Instead, the BiOp required Florida and the federal agencies to establish limits on a permit-by-permit basis through the cooperative federal-state technical assistance process, while USFWS tracked species "take" and retained authority to reinstate consultation if the program's safeguards or key assumptions proved inadequate. Setting limits in this manner is a much more effective means of protecting species than trying to predict in advance what specific impacts would occur far off into the future for innumerable projects and species.

Prior Precedent Supporting Florida's Approach

The programmatic BiOp, ITS, and technical assistance process was not invented here for this purpose. Instead, it mirrored an approach used by EPA during the Obama Administration in an analogous context involving cooling water intake permits issued by state environmental agencies in at least 46 states. That program likewise used federal-state coordination in a technical assistance process to protect listed species and extended a programmatic ITS to take arising from state-issued permits. A unanimous Second Circuit panel upheld the consultation process and the resulting BiOp and ITS. *Cooling Water Intake Structure Coalition v. EPA*, 905 F.3d 49 (2d Cir. 2018). Importantly, the programmatic BiOp, ITS, and technical assistance process adopted here has been supported and defended by the Obama Administration, the first Trump Administration, the Biden Administration, and now the second Trump Administration, and it has been upheld as lawful by the U.S. Court of Appeals for the Second Circuit.

Florida's Successful 404 Program

In December 2020, EPA approved Florida's assumption of Section 404 permitting authority—only the third such handoff in the program's half-century history. When the program was approved, FDEP was fully prepared. Florida made considerable investments into the technical assistance process, including hiring and training hundreds of staff while maintaining close coordination with the federal government. Under the technical assistance process, Florida was bound to send all permit applications to USFWS for review, at which point USFWS would be obligated to provide information if it would disconfirm Florida's preliminary effects determination. Florida was mandated to accept USFWS's "determinative" conclusions, along with any conditions USFWS imposed on a permit for purposes of ESA compliance. EPA also retained

the right to review the permit applications preliminarily approved by Florida and could veto permits with insufficient species or habitat protections.

Florida's program worked. For more than three years, Florida administered Section 404 permitting under continuous, permit-by-permit federal oversight. It hired and trained more than 300 certified wetlands evaluators and support staff, received more than 8,760 applications, issued over 600 individual permits, denied 270 applications, conducted more than 470 compliance inspections, and executed 22 enforcement consent orders. USFWS reviewed the permit applications, and Florida incorporated USFWS's conclusions on species effects and permit conditions into its state-issued permits.

Litigation

Regrettably, as so often occurs, the federal approval here resulted in protracted litigation in the federal courts. A group of environmental plaintiffs challenged EPA's approval of Florida's program in the U.S. District Court for the District of Columbia. Florida intervened in the case to help ensure that its perspective was heard. In 2024, the district court in D.C. found that EPA's approval of Florida's program did not comply with the Endangered Species Act and vacated the approval. *Ctr. for Biological Diversity v. Regan*, 734 F. Supp. 3d 1, 24 (D.D.C. 2024). To the frustration of FDEP, thousands of permittees, and the federal agencies, this court decision caused the Section 404 program to need to be immediately returned to the Corps of Engineers.

The United States and the State of Florida appealed to the D.C. Circuit, and a divided panel affirmed the district court's vacatur. *Ctr. for Biological Diversity v. Zeldin*, 171 F.4th 356 (D.C. Cir. 2026). At the D.C. Circuit, Judge Karen Henderson authored a strong dissent explaining why Florida should have been allowed to continue administering this important program. Judge Henderson directly endorsed the unanimous decision in *Cooling Water* that formed the basis of Florida's program, defended the BiOp's validity, and characterized the majority's species-specific requirement as an "atextual legal rule" that "distort[s] the underlying statutory text, impose[s] unnecessary burdens on litigants, and cause[s] confusion for courts." 171 F.4th at 394. Sadly, the ongoing litigation has upended this well-functioning state-federal partnership.

FDEP is continuing to fight in court to win back the Section 404 program. On August 7, 2026, the State of Florida and FDEP filed a petition for rehearing en banc with the U.S. Court of Appeals for the D.C. Circuit. Additionally, the U.S. Department of Justice, joined by the U.S. Environmental Protection Agency and the U.S. Fish and Wildlife Service, filed its own en banc rehearing petition. As has been the case throughout this process, the federal government and the State of Florida – across administrations of different parties – have coordinated closely on making sure that Florida can administer this vital program. Florida continues to greatly appreciate the support of the federal agencies on this important issue.

H.R. 9017 - "Restore Florida Water Independence Act of 2026"

While Florida is continuing to pursue relief from the courts, Congress has the constitutional authority to restore Florida's Section 404 program's robust ESA protections on its own accord. H.R. 9017, sponsored by Representative Byron Donalds, would do just that. This straightforward

legislation would endorse the approach adopted by the U.S. Court of Appeals for the Second Circuit in *Cooling Water* – which reflects the view of harmonizing the ESA and CWA as endorsed by the last four presidential administrations – by codifying that the Florida Section 404 Program’s Biological Opinion “is deemed to be compliant with ... the requirements of the Endangered Species Act...,” and that “no additional [ESA] consultation” is required. This codification also endorses the incidental take statement, which is a key part of the programmatic approach.

FDEP strongly encourages Congress to pass this legislation. Doing so will help to end protracted litigation and allow FDEP to get back to the important work of administering the Section 404 permit program in coordination with the state ERP program. We applaud the work of this Subcommittee, Representative Donalds, and the bipartisan co-sponsors of this important legislative proposal. We stand ready to offer technical assistance to this Subcommittee as it considers this legislation.