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**Testimony of Jeff Littlejohn, P.E.
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**United States House of Representatives
Committee on Transportation and Infrastructure
Subcommittee on Water Resources and Environment
Regarding**

State Clean Water Act Section 404 Assumption

Good morning Chairman Gibbs, Ranking Member Bishop, and Members of the Subcommittee. I am Jeff Littlejohn, Deputy Secretary of the Florida Department of Environmental Protection. My responsibilities include administering Florida's federally delegated programs under provisions of the Clean Water Act, Clean Air Act, Safe Drinking Water Act, and other federal laws.

Florida's 1,200 miles of coastline, 11 million acres of wetlands, and 7.7 million acres of sovereign submerged land are essential to our quality of life and economic vitality. We value our beaches and wetlands and have protected them under state law since before 1975, through integrated management of stormwater, landscape alteration, and our state-owned submerged lands. We do this because Floridians know our natural resources better than anyone else. But our commitment to safeguarding Florida's environment results in duplication with the U.S. Army Corps of Engineers and its §404 federal wetlands program. This duplication of effort comes in spite of using joint permit applications with the Corps, implementing a State Programmatic General Permit from the Corps, and integrating §401 water quality certification and Coastal Zone Management consistency into our wetland permitting process.

Congress amended the Clean Water Act in 1977 to enable states to assume the §404 program, with the clear intention of making that assumption possible. Unfortunately, obstacles remain 35 years later, for Florida and 47 other states, to accepting the full §404 program. Without changes—perhaps to federal law and certainly to the federal review process—Florida and the Corps will continue issuing two permits for applicants who are asking to do only one thing. That surely was not Congress's intention.

Two permits for one project might make sense if we were addressing different types of activities or achieving different outcomes. However, my staff just completed an analysis of Corps wetland

permits recently issued in Northeast Florida. Of 31 projects where the Corps and Florida issued a permit for the same activities, the wetland jurisdiction line was identical in all 31 instances, wetland impacts were similar, and Florida required 50% more wetland mitigation overall. This analysis at least suggests that federal permits are not more extensive or more protective than Florida's and, if they are not, it is difficult to make the case that two permits are necessary.

A primary barrier to Florida's full assumption of §404 is that many tidal and other navigable waters subject to the Clean Water Act are also subject to Section 10 of the Rivers and Harbors Act of 1899, and cannot legally be assumed. These waters constitute a large and important part of Florida's aquatic systems, including coastal waters and public trust lands transferred to Florida in 1845 at the time of statehood. This prohibition negates many potential benefits of §404 assumption.

We absolutely respect the Corps of Engineers' vital and distinct role in maintaining navigation. However, by virtue of its sovereignty, Florida has significant proprietary powers, including the authority to maintain navigation. In fact, we have demonstrated, year after year, the ability to protect navigation as we are protecting aquatic resources through comprehensive wetlands and coastal regulatory programs, and federally-approved Coastal Zone Management program. Surely, responsibilities can be better divided to take full advantage of Florida's proven abilities and the Corps' important oversight role. At a minimum, Congress's support for expanded State Programmatic General Permits in traditionally navigable Section 10 waters is warranted. We are ready and eager to assume expanded authority over Section 10 waters under the Corps' watchful eye and guidance.

A second barrier to assumption has been uncertainty in the state and federal roles in administering the Endangered Species Act. In 2010, EPA clarified that consultation under the Endangered Species Act is not required before approval of a state §404 program. This is helpful but not sufficient. Florida has robust state constitutional authority to protect listed species through the Florida Fish and Wildlife Conservation Commission, through which we coordinate all of our wetlands and coastal permitting. The Commission recently amended its rules to mirror the protections afforded to federally-listed species. We believe we can demonstrate the necessary equivalency of Florida's program in this regard.

During past consideration of §404 program assumption by Florida, questions have been raised regarding the "equivalency" of a number of aspects of our program to federal law. The Clean Water Act requires that approved state programs have "adequate authority" to carry out the §404 program in a manner that is no less stringent than federal requirements. This is a reasonable

standard. Certainly, Florida's laws, like those in other states, are not identical to federal law—but that is not the test. In its review of our program, we need EPA to recognize Florida's combination of state constitutional and statutory authorities, along with its suite of rules, that combine to provide comprehensive management of the state's aquatic resources at least equivalent to §404, which itself rests largely on the federal obligation to protect interstate commerce.

We are confident that states like Florida can demonstrate equivalency with §404, provided the reasonable standard of “adequate authority” to carry out the program is appropriately applied. We have proved this in our implementation of the federal National Pollutant Discharge Elimination System (§402 Clean Water Act) program for more than a decade. Whether in the context of our wetland delineation method, regulatory jurisdiction, protections for listed species, water quality standards, mitigation requirements, public participation, procedural rigor, and compliance and enforcement authority, Florida implements substantially equivalent if not greater protections, with more extensive coverage, for our aquatic resources.

In summary, we believe Congress provided for state assumption of §404 because it recognized the additional strength that comprehensive state water and land use management programs would bring to the program and the virtues of a federal-state partnership. Florida is fully committed to preserving its aquatic resources and will continue to carry out science-based, wide-ranging, publicly-supported programs for wetland and water resource management. We hope, with Congress's support, that Florida and the federal government can realize the full potential of §404 program assumption to protect these resources and, at the same time, unburden the public of unnecessary bureaucracy and pointless costs.

Thank you for this opportunity. I am happy to answer questions you may have.