

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Committee Code Not Found

BILL: CS/SB 1532

INTRODUCER: Environment and Natural Resources Committee and Senator Brodeur

SUBJECT: Mitigation

DATE: January 17, 2024

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Barriero</u>	<u>Rogers</u>	<u>EN</u>	<u>Fav/CS</u>
2.	_____	_____	<u>CA</u>	_____
3.	_____	_____	<u>RC</u>	_____

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 1532 expands the water quality enhancement credit program to allow private entities to purchase credits. Currently, only governmental entities may purchase water quality enhancement credits under the program. Specifically, the bill provides that water quality enhancement credits may be sold to private and governmental entities seeking to meet an assigned basin management action plan allocation or reasonable assurance plan or for the purpose of achieving net improvement performance standards after reasonable assurances have been provided for the design and construction of all onsite stormwater management required by law.

Regarding mitigation banking, the bill provides that a governmental entity may, through a public procurement process, solicit proposals from private-sector sponsors for a mitigation bank project on public lands purchased for conservation. The bill provides that, if such a mitigation bank is to be established and operated on public land, the governmental entity and private-sector sponsor must enter into an agreement requiring the private sector sponsor to serve as the sponsor of the project. The bill also requires the private-sector sponsor to pay a usage fee to the governmental entity which reflects the market value of the public land, as determined by a competitive process in accordance with state law or such other method of assuring that the cost of the use of the public land is fully accounted for in the pricing of mitigation credits.

The bill provides that, in determining the number of mitigation bank credits assigned to a mitigation bank, the Department of Environmental Protection (DEP) or water management districts (WMDs) must reflect the conservation status of the land in the location factor set forth

in the uniform mitigation assessment method. The bill provides that these requirements apply to drainage basins or corresponding hydrologic units if the private-sector sponsor demonstrates to DEP or WMDs that in-kind credits are not available.

II. Present Situation:

Mitigation Banking

Mitigation may be required to offset the adverse impacts caused by regulated activities.¹ Mitigation usually consists of restoration, enhancement, creation, or preservation of wetlands, other surface waters, or uplands.² Mitigation can be conducted on-site, off-site, through the purchase of credits from a mitigation bank, or through a combination of approaches, as long as it offsets anticipated adverse impacts to wetlands and other surface waters.³ Offsite regional mitigation is mitigation on an area of land off the site of a permitted activity, where an applicant proposes to mitigate the adverse impacts of only the applicant's specific activity as a requirement of the permit, which provides regional ecological value and which is not a mitigation bank.⁴

Mitigation banking is a practice in which an environmental enhancement and preservation project is conducted by a public agency or private entity to provide mitigation for unavoidable wetland impacts within a defined mitigation service area.⁵ Mitigation banks are alternative to permittee-responsible mitigation.⁶ Permittee-responsible mitigation refers to mitigation undertaken by the permittee to provide compensatory mitigation for which the permittee retains full responsibility.⁷ If mitigation credits are not available, state law allows permittee-responsible mitigation consisting of the restoration and enhancement of lands conservation lands owned by a local government.⁸

In mitigation banking, the bank is the site itself, and the currency sold by the banker to the impact permittee is a credit, representing the wetland ecological value equivalent to the complete restoration of one acre.⁹ The permitting agencies determine the number of potential credits permitted for the bank and the credit debits required for impact permits.¹⁰

The Uniform Mitigation Assessment Method (UMAM) was established to fulfill the mandate of s. 373.414(18), F.S., which requires the establishment of a uniform mitigation assessment method to determine the amount of mitigation needed to offset adverse impacts to wetlands and

¹ DEP, *ERP Applicant's Handbook, Vol. I*, s. 10.3 (2020), available at <https://www.flrules.org/gateway/reference.asp?No=Ref-12078>.

² *Id.* at s. 10.3.1.

³ *Id.* at s. 10.3.1.2.

⁴ Section 373.403(22), F.S.

⁵ DEP, *Mitigation and Mitigation Banking*, <https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/mitigation-and-mitigation-banking> (last visited Jan. 11, 2024). "Mitigation service area" means the geographic area within which mitigation credits from a mitigation bank may be used to offset adverse impacts of activities regulated under this part. Section 373.403(21), F.S.

⁶ Section 373.4135(1)(b), F.S.

⁷ EPA, *Mechanisms for Providing Compensatory Mitigation under CWA Section 404*, <https://www.epa.gov/cwa-404/mechanisms-providing-compensatory-mitigation-under-cwa-section-404> (last visited Jan. 11, 2024).

⁸ Section 373.4135(1)(b), F.S.

⁹ DEP, *Mitigation and Mitigation Banking*.

¹⁰ *Id.*

other surface waters and to award and deduct mitigation bank credits. UMAM provides a standardized procedure for assessing the ecological functions provided by wetlands and other surface waters, the amount that those functions are reduced by a proposed impact, and the amount of mitigation necessary to offset that loss.¹¹ UMAM evaluates functions through consideration of an ecological community's current condition, hydrologic connection, uniqueness, location, fish and wildlife utilization, and mitigation risk.¹² This standardized methodology is also used to determine the degree of improvement in ecological value of proposed mitigation bank activities.¹³

Creation of a mitigation bank in Florida requires both a permit from DEP or a WMD and federal approval of a mitigation bank instrument from several agencies led by the U.S. Army Corps of Engineers (USACE), in a joint state/federal interagency review team.¹⁴ Requirements for mitigation bank permits differ between mitigation bank instruments issued by the USACE and state permits issued by DEP or WMDs. Under the federal process, a mitigation banking instrument serves as the legal document for the establishment, operation, and use of a mitigation bank.¹⁵ They are approved by an interagency review team, through procedures involving public notice and comment.¹⁶ Mitigation banking instruments must include certain detailed elements, such as a comprehensive mitigation plan including financial assurances, and a credit release schedule that is tied to the achievement of specific milestones.¹⁷

Under state law, to obtain a mitigation bank permit, the applicant must provide reasonable assurance that the mitigation bank will:

- Improve ecological conditions of the regional watershed;
- Provide viable and sustainable ecological and hydrological functions for the proposed mitigation service area;
- Be effectively managed in perpetuity;
- Not destroy areas with high ecological value;
- Achieve mitigation success; and
- Be adjacent to lands that will not adversely affect the long-term viability of the mitigation bank due to unsuitable land uses or conditions.¹⁸

The applicant must also provide reasonable assurances that:

- Any surface water management system that will be constructed, altered, operated, maintained, abandoned, or removed within a mitigation bank will meet the requirements of Part IV of Chapter 373, F.S., which regulates management and storage of surface waters, and rules adopted thereunder;

¹¹ DEP, *The Uniform Mitigation Assessment Method (UMAM)*, <https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/uniform-mitigation-assessment> (last visited Jan. 12, 2024).

¹² *Id.*

¹³ *Id.*

¹⁴ DEP, *Mitigation Banking Rule and Procedure Synopsis*, <https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/mitigation-banking-rule-and> (last visited Jan. 11, 2024).

¹⁵ 33 C.F.R. s. 332.2.

¹⁶ 33 C.F.R. s. 332.8; 40 C.F.R. s. 230.98.

¹⁷ See generally 33 C.F.R. s. 332.8(d)(6); see also 40 C.F.R. s. 230.98(d)(6).

¹⁸ Section 373.4136(1), F.S.

- The applicant has sufficient legal or equitable interest in the property to ensure perpetual protection and management of the land within a mitigation bank; and
- The applicant can meet the financial responsibility requirements prescribed for mitigation banks.¹⁹

Water Quality Credit Trading

Water quality credit trading is a market-based approach to attaining water quality improvements and is used to control and mitigate pollutants from multiple sources that collectively impact water quality conditions.²⁰ When more stringent regulatory standards are put in place, water quality trading allows one source of pollution to control a pollutant at levels greater than required and sell “credits” to another source, which uses the credits to supplement their level of treatment in order to comply with regulatory requirements. Pollutant reductions achieved through water quality trading should result in water quality that is as good as—or better than—what would be achieved through treatment and must not create pollutant hot spots.²¹

Water quality trading can encourage private investment capital, provide additional resources for conservation, and serve as a catalyst for developing innovative, practical solutions for improving water quality at a lower cost.²² Water quality trading has played a critical role in implementing TMDLs and other water quality-based permit requirements.²³

The Florida Statutes provide a framework for water quality credit trading in the state. DEP is the agency responsible for authorizing water quality credit trading in adopted BMAPs and for establishing the pollutant load reduction value of water quality credits.²⁴ However, DEP cannot participate in the establishment of credit prices.²⁵ Sellers of credits are responsible for achieving the load reductions on which the credits are based and complying with the terms of DEP’s authorization and any trading agreements into which they have entered; buyers are responsible for complying with the terms of the water discharge permit.²⁶ Land set-asides and land use modification not otherwise required by state law or a permit that reduce nutrient loads into impaired surface waters may be used for water quality credit trading.²⁷

¹⁹ *Id.*; Fla. Admin. Code R. 62-342.400.

²⁰ EPA, *Water Quality Trading*, <https://www.epa.gov/npdes/water-quality-trading> (last visited Jan. 10, 2024).

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ Section 403.067(8), F.S.

²⁵ Section 403.067(8)(h), F.S.

²⁶ Section 403.067(8), F.S. Water quality credit trading must be implemented through permits, including water quality credit trading permits, other authorizations, or other legally binding agreements as established by DEP rule. *Id.*

²⁷ *Id.*

Water Quality Enhancement Areas (WQEAs)

Section 373.4134, F.S., regulates water quality enhancement areas.²⁸ A WQEA is a natural system²⁹ designed to provide offsite, compensatory, regional treatment within an identified enhancement service area, for which enhancement credits may be provided.³⁰ A WQEA must use, create, or improve natural systems to improve water quality and must address contributions of pollutants or other constituents in the watershed, basin, sub-basin, targeted restoration area, waterbody, or section of waterbody in which the WQEA is located that do not meet applicable state water quality criteria.³¹

The construction, operation, management, and maintenance of a WQEA must be approved through the state's environmental resource permitting (ERP) process.³² Part IV of Chapter 373, F.S., and Chapter 62-330 of the Florida Administrative Code regulate the statewide ERP program, which is the primary tool used by DEP and water management districts (WMDs) for preserving natural resources and fish and wildlife, minimizing degradation of water resources caused by stormwater discharges, and providing for the management of water and related land resources. The program governs the construction, alteration, operation, maintenance, repair, abandonment, and removal of stormwater management systems, dams, impoundments, reservoirs, appurtenant works, and other works such as docks, piers, structures, dredging, and filling located in, on, or over wetlands or other surface waters.³³

To obtain a WQEA permit, an applicant must provide reasonable assurances that the proposed WQEA will:

- Meet the requirements for issuance of an ERP;
- Benefit water quality in the enhancement service area;
- Achieve defined performance or success criteria for the reduction of pollutants or other constituents that prevent receiving waters from meeting state water quality criteria;
- Ensure long-term pollutant reduction through effective operation and maintenance in perpetuity by designation of a responsible long-term maintenance entity supported by an endowment or other long-term financial assurance sufficient to assure perpetual operation and maintenance;
- Demonstrate sufficient legal or equitable interest in the property to ensure access and perpetual protection and management of land within the WQEA; and
- Provide for permanent preservation of the site through a conservation easement.³⁴

²⁸ This section of law may only be implemented after DEP has adopted applicable rules. Section 373.4134(9), F.S. DEP initiated WQEA rulemaking in November 2023. DEP, *WQEA Rulemaking*, <https://floridadep.gov/water/engineering-hydrology-geology/content/water-quality-enhancement-area-rulemaking> (last visited Jan. 11, 2024).

²⁹ "Natural system" means an ecological system supporting aquatic and wetland-dependent natural resources, including fish and aquatic and wetland-dependent wildlife habitats. Section 373.4134(2)(c), F.S.

³⁰ Section 373.4134(2)(d), F.S.

³¹ Section 373.4134(3)(c) and (d), F.S.

³² Section 373.4134(3)(a), F.S.

³³ Fla. Admin. Code R. 62-330.010(2).

³⁴ Section 373.4134(4)(a), F.S.

WQEA permits must provide for the assessment, valuation, and award of credits based on units of pollutant removed.³⁵ DEP determines the award of enhancement credits based on standard numerical models or analytical tools that establish the WQEA's ability to remove pollutants or constituents.³⁶ WQEA applications must include the following information to assist DEP in determining credits:

- Rainfall data over the longest period of record available collected from the closest site to the proposed WQEA;
- Anticipated average annual water quality and quantity inflows to the proposed WQEA;
- Site-specific conditions affecting the anticipated performance of the proposed WQEA; and
- Data from collection stations approved by DEP in sites that DEP deems sufficient to determine flows and local water quality conditions.³⁷

WQEA enhancement credits³⁸ may only be sold to governmental entities³⁹ seeking to meet an assigned basin management action plan allocation or reasonable assurance plan,⁴⁰ or for the purpose of achieving net water quality improvement under s. 373.414(1)(b)3., F.S.,⁴¹ after the governmental entity has provided reasonable assurance of meeting DEP rules for the design and construction of all onsite stormwater management.⁴²

An applicant seeking a WQEA permit is required to submit a plan detailing the monitoring and verification of performance and success criteria, with protocols to be implemented once the WQEA is operational.⁴³ The protocols must be appropriate for the WQEA and sufficient to demonstrate that the area is meeting defined performance or success criteria for the reduction of pollutants or contaminants for which credits are awarded by DEP.⁴⁴

An applicant may use water quality improvement projects that use natural systems or land use modifications, including constructed wetlands or minor impoundments that reduce pollutants to a receiving water body, to generate credits if approved by DEP.⁴⁵ A WQEA may not be located on

³⁵ Section 373.4134(4)(b), F.S.

³⁶ Section 373.4134(4)(c), F.S.

³⁷ Section 373.4134(4)(c)4., F.S.

³⁸ "Enhancement credit" means a standard unit of measure that represents a quantity of pollutant removed. Section 373.4134(2)(a), F.S.

³⁹ "Governmental entity" means any political subdivision of the state, including any state agency, department, county, municipality, special district, school district, utility authority, or other authority or instrumentality, agency, unit, or department thereof. Section 373.4134(2)(b), F.S.

⁴⁰ Basin management action plans and reasonable assurance plans are water quality improvement plans designed to reduce or eliminate pollutant loadings and restore specific water bodies to meet state water quality standards. *See generally* DEP, *Basin Management Action Plans (BMAPs)*, <https://floridadep.gov/dear/water-quality-restoration/content/basin-management-action-plans-bmaps> (last visited Jan. 12, 2024); DEP, *Alternative Restoration Plans*, <https://floridadep.gov/DEAR/Alternative-Restoration-Plans> (last visited Jan. 12, 2024).

⁴¹ Section 373.4134(1)(d)3., F.S., provides that if an applicant is unable to meet water quality standards because existing ambient water quality does not meet standards, the governing board or DEP must consider mitigation measures proposed by or acceptable to the applicant that cause net improvement of the water quality in the receiving body of water for those parameters which do not meet standards.

⁴² Section 373.4134(3)(b), F.S.

⁴³ Section 373.4134(6)(a), F.S.

⁴⁴ *Id.*

⁴⁵ Section 373.4134(7)(c), F.S.

lands purchased for conservation through the Florida Forever Act or Florida Preservation 2000 Act.⁴⁶

DEP must establish a service area for each WQEA.⁴⁷ Enhancement credits may only be used to address adverse impacts within the service area. The boundaries of the service area depend upon the geographic areas where it could reasonably be expected to address adverse impacts. Service areas may overlap, and service areas for two or more WQEAs may be approved for a regional watershed.⁴⁸

Reductions in pollutant loading required under state regulatory programs are not eligible to be considered as credits, and credits may not be used by point source dischargers to satisfy regulatory requirements other than those necessary to obtain an ERP for construction and operation of the surface water management system of the site.⁴⁹

III. Effect of Proposed Changes:

Section 1 amends s. 373.403, F.S., which provides definitions for Part IV of Chapter 373, F.S., regarding management and storage of surface waters. The bill defines “private-sector sponsor” as an individual or entity that establishes and operates a wetland mitigation bank project and is responsible for compliance with any permit or authorization, including, but not limited to, funding and undertaking wetland enhancement, restoration or creation activities, and the provision of financial assurances, as well as any required monitoring, reporting, and maintenance of the mitigation bank.

Section 2 amends s. 373.4134, F.S., regarding water quality enhancement areas (WQEAs). Currently, water quality enhancement credits may *only* be sold to governmental entities seeking to meet an assigned basin management action plan (BMAP) allocation or reasonable assurance plan (RAP) or for the purpose of achieving net improvement under s. 373.414(1)(b)3., F.S., after the governmental entity has provided reasonable assurance of meeting the Department of Environmental Protection (DEP) rules for design and construction of all onsite stormwater management.⁵⁰ The bill removes the word “only” and provides that water quality enhancement credits may be sold to governmental entities *or applicants* seeking to meet an assigned BMAP allocation or RAP or for the purpose of achieving net improvement performance standards after reasonable assurances have been provided for the design and construction of all onsite stormwater management required by law. The bill defines “applicants” as a governmental entity or private sector entity that wishes to purchase water quality enhancement credits to meet an assigned basin management action plan allocation or reasonable assurance plan or for the purpose of achieving the net improvement performance standard under s. 373.414(1)(b)3., F.S.

The bill makes other conforming changes to reflect these principles.

Section 3 amends s. 373.4135, F.S., regarding mitigation banks and offsite regional mitigation. The bill directs DEP and water management districts (WMDs) to encourage the establishment of

⁴⁶ *Id.*

⁴⁷ Section 373.4134(5), F.S.

⁴⁸ *Id.*

⁴⁹ Section 373.4134(7)(e) and (f), F.S.

⁵⁰ Section 373.4134(3)(b), F.S.

private mitigation banks and offsite regional mitigation on private and public lands owned by a local government. Currently, this statute directs DEP and WMDs to *participate in* and encourage the establishment of private and *public* mitigation banks and offsite regional mitigation.

Currently, this statute provides that, in general, a governmental entity may not create or provide mitigation for a project other than its own except when a local government has allowed a public or private mitigation project to be created on land it has purchased for conservation purposes (other exemptions and criteria apply).⁵¹ The bill clarifies that the exception applies to instances when a local government has allowed a public or private mitigation project, *including permittee-responsible mitigation*,⁵² to be created on land it has purchased for conservation purposes.

The bill provides that a governmental entity may, through a public procurement process, solicit proposals from private-sector sponsors⁵³ for a mitigation bank on public lands purchased for conservation purposes. If such a mitigation bank is to be established and operated on public land, the local government and private-sector sponsor must enter into an agreement requiring the private-sector sponsor to establish and operate the mitigation bank to conform to the permitting requirements of s. 373.4136, F.S., regarding the establishment and operation of mitigation banks. The bill provides that the agreement must require the private-sector sponsor to pay a usage fee to the local government which reflects the market value of the public land, as determined by a competitive process in accordance with state law or such other method of assuring that the cost of the use of the public land is fully accounted for in the pricing of mitigation credits.

The bill provides that, in determining the number of mitigation bank credits assigned to the mitigation bank, DEP or WMDs must reflect the conservation status of the land in the location factor set forth in the uniform mitigation assessment method.

The bill provides that the requirements within this subsection apply to drainage basins or corresponding hydrologic units⁵⁴ if the private-sector sponsor demonstrates to DEP or WMDs that in-kind credits are not available. The bill specifies that rulemaking is not required to implement this subsection.

Sections 4 through 6 make conforming changes.

Section 7 reenacts s. 403.9332(1)(a) and (c), F.S., regarding mitigation and enforcement, for the purpose of incorporating the amendment the bill makes to s. 373.4135, F.S.

⁵¹ Section 373.4135(1)(b), F.S.

⁵² Permittee-responsible mitigation refers to mitigation undertaken by the permittee to provide compensatory mitigation for which the permittee retains full responsibility. EPA, *Mechanisms for Providing Compensatory Mitigation under CWA Section 404*, <https://www.epa.gov/cwa-404/mechanisms-providing-compensatory-mitigation-under-cwa-section-404> (last visited Jan. 11, 2024).

⁵³ As previously discussed, the bill defines “private-sector sponsor” as an individual or entity that establishes and operates a wetland mitigation bank project and is responsible for compliance with any permit or authorization, including, but not limited to, funding and undertaking wetland enhancement, restoration or creation activities, and the provision of financial assurances, as well as any required monitoring, reporting, and maintenance of the mitigation bank.

⁵⁴ A hydrologic unit is a geographic area defined by an area’s natural hydrological properties, primarily its drainage patterns. See generally U.S. Geological Survey (USGS), *Hydrologic Unit Maps*, <https://water.usgs.gov/GIS/huc.html> (last visited Jan. 11, 2024). The U.S. is divided and sub-divided into successively smaller hydrologic units, which are classified into four levels: regions, subregions, accounting units, and cataloging units. *Id.*

Section 8 provides an effective date of July 1, 2024.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

There may be a positive fiscal impact to private entities creating and maintaining mitigation banks on public lands and applicants participating in the expanded water quality enhancement area (WQEA) credit program.

C. Government Sector Impact:

There may be a positive fiscal impact to the state from additional WQEA permit application fees. However, the Department of Environmental Protection may incur costs to implement the expanded the WQEA program.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 373.403, 373.4134, 373.4135, 330.41, 373.414, 373.461, and 403.9332.

IX. Additional Information:**A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Environment and Natural Resources on January 17, 2024:

The amendment changes the bill in several ways:

- Changes the term “sponsor” to “private-sector sponsor”;
- Defines the term “applicant” and provides it includes governmental and private entities;
- Provides that applicants can purchase water quality enhancement credits to meet an allocation pursuant to a basin management action plan or reasonable assurance plan, as well as to achieve net improvement performance standards as the bill currently provides;
- Changes the phrase “as required by rule 62-330, Florida Administrative Code” to “as required by law”;
- Clarifies that the Department of Environmental Protection and water management districts must encourage the establishment of private mitigation banks on private and public lands owned by a local government;
- Removes requirement that governmental entities must consider unsolicited proposals for a mitigation bank and clarifies that a local government may solicit such proposals for public lands purchased for conservation purposes; and
- Clarifies that a governmental entity may create or provide for mitigation for projects other than its own when a local government has allowed a mitigation project, including permittee-responsible mitigation, on conservation lands.

B. Amendments:

None.