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 Appropriations Subcommittee on Agriculture, Environment, and General Government

BILL:	PCS/CS/SB 1426 (666660)
INTRODUCER:	Appropriations Subcommittee on Agriculture, Environment, and General Government; Environment and Natural Resources Committee; and Senator Burgess
SUBJECT:	Environmental Management
DATE:	February 18, 2022 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Carroll	Rogers	EN	**Fav/CS**
2.	Reagan	Betta	AEG	**Recommend: Fav/CS**
3.			AP	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

PCS/CS/SB 1426 creates the concept of water quality enhancement areas (WQEAs). A WQEA is a natural system that is constructed, operated, managed, and maintained pursuant to a permit to provide offsite, compensatory, regional treatment within an identified enhancement service area and enhancement credits.

The bill provides that construction, operation, management, and maintenance of a WQEA must be approved through the environmental resource permitting (ERP) process. The bill sets out requirements for a water quality credit program based on the development of WQEAs and authorizes the Department of Environmental Protection (DEP) to develop rules to implement the program. Water quality enhancement credits may be sold only to governmental entities.

The bill makes clarifications regarding incentives for the use of graywater technologies.

According to the DEP, the department would incur costs from operating the WQEA program, as the program would need eight additional staff members and associated travel. The total financial impact for these positions including salaries, benefits, expenses, and travel costs would be approximately $878,275 annually.

II. Present Situation:

Water Quality and Nutrients

Phosphorous and nitrogen are naturally present in water and are essential nutrients for the healthy growth of plant and animal life.[1] The correct balance of both nutrients is necessary for a healthy ecosystem; however, excessive amounts can cause significant water quality problems.

Phosphorous and nitrogen are derived from natural and human-made sources. Human-made sources include sewage disposal systems (wastewater treatment facilities and septic systems), overflows of storm and sanitary sewers (untreated sewage), agricultural production and irrigation practices, and stormwater runoff.[2]

Excessive nutrient loads may result in harmful algal blooms, nuisance aquatic weeds, and the alteration of the natural community of plants and animals. Dense, harmful algal blooms can also cause human health problems, fish kills, problems for water treatment plants, and impairment of the aesthetics and taste of waters. Growth of nuisance aquatic weeds tends to increase in nutrient-enriched waters, which can impact recreational activities.[3]

Total Maximum Daily Loads

A total maximum daily load (TMDL), which must be adopted by rule, is a scientific determination of the maximum amount of a given pollutant that can be absorbed by a waterbody and still meet water quality standards.[4] Waterbodies or sections of waterbodies that do not meet the established water quality standards are deemed impaired. Pursuant to the federal Clean Water Act, the Department of Environmental Protection (DEP) must establish a TMDL for impaired waterbodies.[5] A TMDL for an impaired waterbody is the sum of the individual waste load allocations for point sources and the load allocations for nonpoint sources and natural background.[6] Point sources are discernible, confined, and discrete conveyances including pipes, ditches, and tunnels. Nonpoint sources are unconfined sources that include runoff from agricultural lands or residential areas.[7]

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[1] U.S. Environmental Protection Agency (EPA), *Sources and Solutions*, https://www.epa.gov/nutrientpollution/sources-and-solutions (last visited Jan. 26, 2022).
[2] *Id.*
[3] EPA, *The Issue*, https://www.epa.gov/nutrientpollution/problem (last visited Jan. 26, 2022).
[4] Department of Environmental Protection (DEP), *Total Maximum Daily Loads Program*, https://floridadep.gov/dear/water-quality-evaluation-tmdl/content/total-maximum-daily-loads-tmdl-program (last visited Jan. 26, 2022).
[5] Section 403.067(1), F.S.
[6] Section 403.031(21), F.S.
[7] Fla. Admin. Code R. 62-620.200(37). "Point source" is defined as "any discernible, confined, and discrete conveyance, including any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, landfill leachate collection system, vessel or other floating craft from which pollutants are or may be discharged." Nonpoint sources of pollution are sources of pollution that are not point sources. Nonpoint sources can include runoff from agricultural lands or residential areas; oil, grease and toxic materials from urban runoff; and sediment from improperly managed construction sites.

Basin Management Action Plans and Best Management Practices

The DEP is the lead agency in coordinating the development and implementation of TMDLs.[8] Basin management action plans (BMAPs) are one of the primary mechanisms DEP uses to achieve TMDLs. BMAPs are plans that address the entire pollution load, including point and nonpoint discharges,[9] for a watershed or a specific waterbody. BMAPs generally include:

- Permitting and other existing regulatory programs, including water quality based effluent limitations;
- Best management practices (BMPs) and non-regulatory and incentive-based programs, including cost-sharing, waste minimization, pollution prevention, agreements, and public education;
- Public works projects, including capital facilities; and
- Land acquisition.[10]

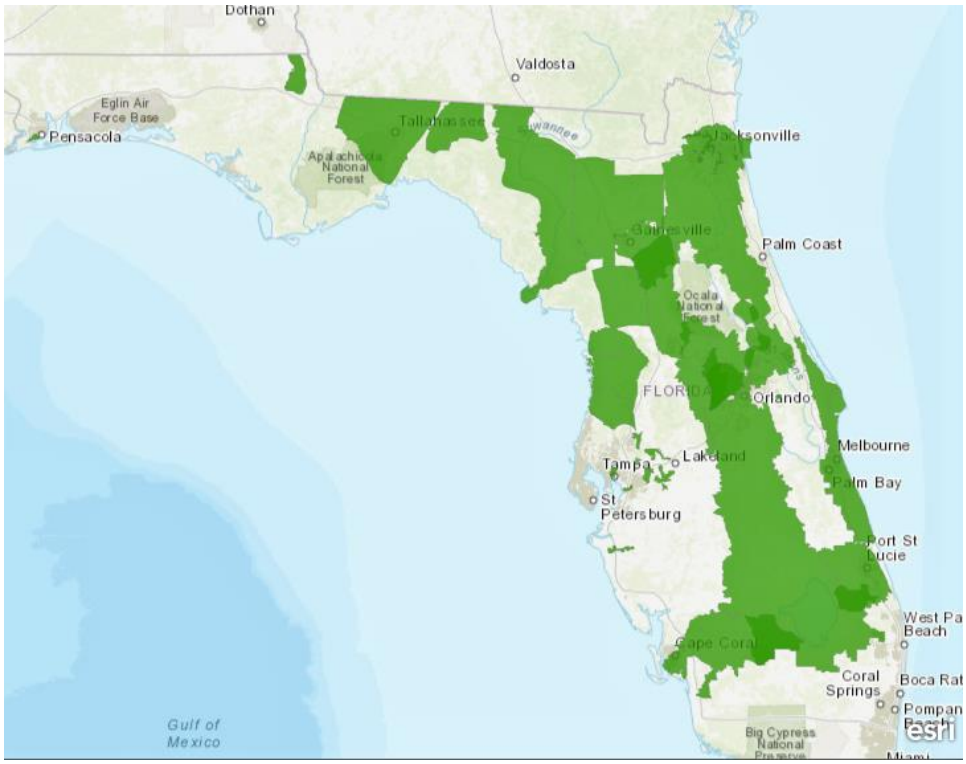
A BMAP equitably allocates pollutant reductions to individual basins, to all basins as a whole, or to each identified point source or category of nonpoint sources.[11] Then, the BMAP establishes the schedule for implementing projects and activities to meet the pollution reduction allocations. The BMAP development process provides an opportunity for local stakeholders, local government, community leaders, and the public to determine and share water quality cleanup responsibilities collectively.[12]

BMAPs must include milestones for implementation and water quality improvement.[13] They must also include an associated water quality monitoring component sufficient to evaluate whether reasonable progress in pollutant load reductions is being achieved over time. An assessment of progress toward these milestones must be conducted every five years, and revisions to the BMAP must be made as appropriate.[14]

Producers of nonpoint source pollution included in a BMAP must comply with the established pollutant reductions by either implementing the appropriate BMPs or by conducting water quality monitoring.[15] A nonpoint source discharger may be subject to enforcement action by the DEP or a water management district (WMD) based on a failure to implement these requirements.[16] BMPs are designed to reduce the amount of nutrients, sediments, and pesticides

[8] Section 403.061, F.S. DEP has the power and the duty to control and prohibit pollution of air and water in accordance with the law and rules adopted and promulgated by it. Furthermore, s. 403.061(21), F.S., allows DEP to advise, consult, cooperate, and enter into agreements with other state agencies, the federal government, other states, interstate agencies, etc.
[9] Fla. Admin. Code R. 62-620.200(37). "Point source" is defined as "any discernible, confined, and discrete conveyance, including any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, landfill leachate collection system, vessel or other floating craft from which pollutants are or may be discharged." Nonpoint sources of pollution are sources of pollution that are not point sources.
[10] Section 403.067(7), F.S.
[11] *Id*.
[12] DEP, *Basin Management Action Plans (BMAPs)*, https://floridadep.gov/dear/water-quality-restoration/content/basin-management-action-plans-bmaps (last visited Dec. 4, 2019).
[13] Section 403.067(7)(a)6., F.S.
[14] *Id.*
[15] Section 403.067(7)(b)2.g., F.S. For example, BMPs for agriculture include activities such as managing irrigation water to minimize losses, limiting the use of fertilizers, and waste management.
[16] Section 403.067(7)(b)2.h., F.S.

that enter the water system and to help reduce water use. BMPs are developed for agricultural operations as well as for other activities, such as nutrient management on golf courses, forestry operations, and stormwater management.[17] The graphic below shows the state's BMAPs.[18]



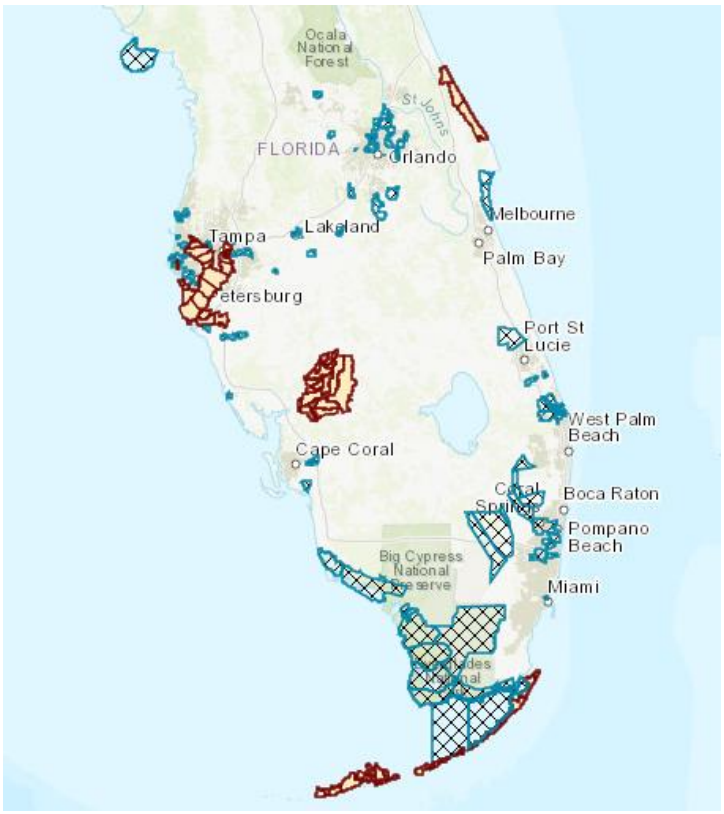
Reasonable Assurance Plans

The U.S. Environmental Protection Agency allows states to place certain impaired waterbodies into Category 4b for Clean Water Act section 303(d) reporting purposes, meaning that the establishment of a TMDL is not required for an impaired waterbody if other required control measures are expected to result in the attainment of water quality standards in a reasonable period of time.[19]

A Reasonable Assurance Plan (RAP) is a control measure that the DEP may implement for Category 4b impaired waterbodies.[20] The DEP first determines if a waterbody is impaired or may be reasonably expected to become impaired within the next five years.[21] If a waterbody fits this criteria, the DEP evaluates whether existing or proposed technology-based effluent limitations and other pollution control programs are sufficient to result in the attainment of water quality

[17] DEP, *NPDES Stormwater Program*, https://floridadep.gov/Water/Stormwater (last visited Jan. 26, 2022).
[18] DEP, *Impaired Waters, TMDLs, and Basin Management Action Plans Interactive Map*, https://floridadep.gov/dear/water-quality-restoration/content/impaired-waters-tmdls-and-basin-management-action-plans (last visited Jan. 26, 2022).
[19] *Id.*; EPA, *EPA Integrated Reporting (IR) Categories and How ATTAINS Calculates Them*, 1 (Aug. 31, 2018) *available at* https://www.epa.gov/sites/default/files/2018-09/documents/attains_calculations_of_epa_ir_categories_2018-08-31.pdf (last visited Jan. 27, 2022).
[20] DEP, *Alternative Restoration Plans*, https://floridadep.gov/DEAR/Alternative-Restoration-Plans (last visited Jan. 27, 2022).
[21] Fla. Admin. Code R. 62-303.600.

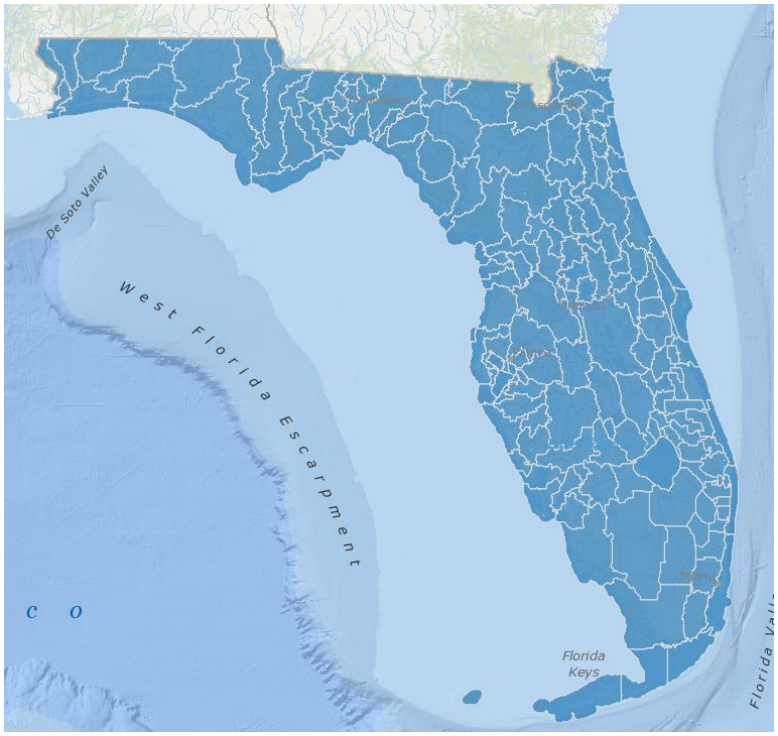
standards. If the waterbody is expected to attain water quality standards in the future and to make reasonable progress towards attainment of those standards in a certain timeframe, the waterbody will not require a TMDL. The DEP's decision must be based on a plan that provides reasonable assurance that proposed pollution control mechanisms and expected water quality improvements in the waterbody will attain water quality standards.[22] The graphic on the right shows the RAP boundaries in the outlined areas without a grid.[23]



Planning Units

A planning unit is either an individual large tributary basin or a group of smaller adjacent tributary basins with similar characteristics.[24] Planning units help organize information and management strategies around prominent watershed characteristics, and they provide a more detailed geographic basis for identifying and assessing water quality improvement activities.[25] The graphic on the next page shows the state's planning units.[26]

[22] *Id.*
[23] DEP, *Restoration Plans*, https://fdep.maps.arcgis.com/apps/View/index.html?appid=5a34b0e9d46447559b52d8267083596f (last visited Jan. 28, 2022).
[24] DEP, *TMDL Planning Units*, https://geodata.dep.state.fl.us/datasets/c97e066f49044131a13a79f5beeeaf40_6/about (last visited Jan. 27, 2022).
[25] *Id.*
[26] DEP, *TMDL Planning Units, Geospatial Open Data*, https://geodata.dep.state.fl.us/datasets/FDEP::total-maximum-daily-load-tmdl-planning-units/explore?location=27.664924%2C-83.725800%2C7.00 (last visited Jan. 28, 2022).



Stormwater Management

Stormwater is the flow of water resulting from, and immediately following, a rainfall event.[27] When stormwater falls on pavement, buildings, and other impermeable surfaces, the runoff flows quickly and can pick up sediment, trash, chemicals, and other pollutants.[28] Stormwater is a major source of water pollution in Florida.[29]

The regulatory programs that address reductions in water quality caused by stormwater are the federal National Pollution Discharge Elimination System (NPDES), which regulates discharges of pollutants into waters of the United States,[30] and the state Environmental Resource Permitting (ERP) Program, which regulates activities involving the alteration of surface water flows.[31]

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[27] DEP and Water Management Districts, *Environmental Resource Permit Applicant's Handbook Volume I (General and Environmental)*, 2-10 (June 1, 2018), *available at* https://www.swfwmd.state.fl.us/sites/default/files/medias/documents/Appliicant_Hanbook_I_-_Combined.pd_0.pdf.

[28] DEP, *Stormwater Management*, 1 (2016), *available at* https://floridadep.gov/sites/default/files/stormwater-management_0.pdf. When rain falls on fields, forests, and other areas with naturally permeable surfaces the water not absorbed by plants filters through the soil and replenishes Florida's groundwater supply.

[29] DEP, *Stormwater Support*, https://floridadep.gov/water/engineering-hydrology-geology/content/stormwater-support (last visited Oct. 6, 2021); DEP, *Nonpoint Source Program Update*, 10 (2015), *available at* https://floridadep.gov/sites/default/files/NPS-ManagementPlan2015.pdf.

[30] National Pollutant Discharge Elimination System (NPDES), 33 U.S.C. s. 1342 (2019); 40 C.F.R. pt. 122; Under the Clean Water Act, the U.S. Environmental Protection Agency authorizes the NPEDS permit program to state, tribal, and territorial governments, enabling them to perform many of the permitting, administrative, and enforcement aspects of the program. EPA, *About NPDES*, https://www.epa.gov/npdes/about-npdes#overview (last visited Jan. 27, 2022).

[31] Chapter 373, pt. IV, F.S.; Fla. Admin. Code Ch. 62-330.

The NPDES regulates stormwater pollution from certain municipal storm sewer systems and runoff from certain construction and industrial activities.[32] The state's ERP program regulates activities that create stormwater runoff, as well as dredging and filling in wetlands and other surface waters.[33] ERPs aim to prevent flooding, protect wetlands and other surface waters, and protect water quality from stormwater pollution.[34] The DEP, the WMDs, and local governments implement the ERP program.[35]

The DEP and the WMDs may require ERPs and impose reasonable conditions:

- To ensure that construction or alteration of stormwater management systems and related structures is consistent with applicable law and not harmful to water resources;[36] and
- For the maintenance or operation of such structures.[37]

The DEP's stormwater rules are technology-based effluent limitations, rather than water quality-based effluent limitations.[38] This means that stormwater rules rely on design criteria for BMPs to achieve a performance standard for pollution reduction, rather than specifying the amount of a specific pollutant that may be discharged to a waterbody and still ensure that the waterbody attains water quality standards.[39] The rules contain minimum stormwater treatment performance standards, which require design and performance criteria for new stormwater management systems to achieve at least 80 percent reduction of the average annual load of pollutants that would cause or contribute to violations of state water quality standards.[40]

The DEP and the WMDs require applicants to provide reasonable assurance that state water quality standards will not be violated.[41] If a stormwater management system is designed in accordance with the stormwater treatment requirements and criteria adopted by the DEP or the WMDs, then the system design is presumed not to cause or contribute to violations of applicable state water quality standards.[42] If a stormwater management system is constructed, operated, and maintained for stormwater treatment in accordance with a valid permit or exemption, then the

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[32] Stormwater can be either a point source or a nonpoint source of pollution. EPA, *Monitoring and Evaluating Nonpoint Source Watershed Projects*, 1-1, *available at* https://www.epa.gov/sites/production/files/2016-02/documents/chapter_1_draft_aug_2014.pdf; DEP, *Nonpoint Source Program Update*, 9 (2015), *available at* https://floridadep.gov/sites/default/files/NPS-ManagementPlan2015.pdf; *See generally* EPA, *NPDES Stormwater Program*, https://www.epa.gov/npdes/npdes-stormwater-program (last visited Jan. 26, 2022).

[33] DEP, *DEP 101: Environmental Resource Permitting*, https://floridadep.gov/comm/press-office/content/dep-101-environmental-resource-permitting (last visited Jan. 26, 2022).

[34] South Florida Water Management District, *Environmental Resource Permits*, https://www.sfwmd.gov/doing-business-with-us/permits/environmental-resource-permits (last visited Jan. 26, 2022).

[35] Fla. Admin. Code R. 62-330.010(3).

[36] Section 373.413, F.S.; *see* s. 403.814(12), F.S.

[37] Section 373.416, F.S.

[38] DEP, *ERP Stormwater*, https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/erp-stormwater (last visited Jan. 26, 2022).

[39] See generally, EPA, *National Pollutant Discharge Elimination System (NPDES)*, www.epa.gov/npdes/npdes-permit-limits (last visited Jan. 26, 2022).

[40] Fla. Admin. Code R. 62-40.432(2).

[41] Section 373.414(1), F.S.; *see* s. 373.403(11), F.S.; *see* Fla. Admin. Code Ch. 62-4, 62-302, 62-520, and 62-550.

[42] Section 373.4131(3)(b), F.S. Fla. Admin. Code R. 62-40.432(2); *see also* DEP, *ERP Stormwater*, https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/erp-stormwater (last visited Jan. 27, 2022) (stating that a key component of the stormwater rule is a "rebuttable presumption that discharges from a stormwater management system designed in accordance with the BMP design criteria will not cause harm to water resources").

stormwater discharged from the system is presumed not to cause or contribute to violations of applicable state water quality standards.[43] If an applicant is unable to meet water quality standards because existing ambient water quality does not meet standards, the DEP or a WMD must consider mitigation measures that cause a net improvement of the water quality in the waterbody that does not meet the standards.[44]

2020 Stormwater Rulemaking

In 2020, the Florida Legislature passed CS/SB 712, the Clean Waterways Act, to address known sources of nutrient pollution in waterways and to strengthen regulatory requirements.[45] The Clean Waterways Act required the DEP and the WMDs to update stormwater regulations to reflect the latest scientific information. In response, the DEP created the Clean Waterways Act Stormwater Rulemaking Technical Advisory Committee (TAC). The TAC's goal is to develop and provide consensus stormwater rulemaking recommendations for the DEP and the WMDs.[46] The TAC's initial discussion topics were as follows:

- Options for identifying stormwater design criteria and BMPs that are effective for increasing nutrient removal from stormwater runoff;
- Measures for consistent application of the net improvement performance standard to ensure significant reductions of any pollutant loadings to a waterbody thought to be impaired by stormwater runoff; and
- Changes to improve existing stormwater operation regulations to ensure water resources are protected by the rulemaking directed under the Clean Waterways Act.[47]

Water Quality Credit Trading

Water quality credit trading is a market-based approach to water quality improvements that can be used to control pollutants from sources that collectively worsen water quality conditions.[48] Water quality credit trading allows one source of pollution to control a pollutant at levels greater than required and to sell the resulting water quality credits to another source to supplement its level of treatment to comply with pollutant regulations.[49] This practice must result in water quality that is as good as or better than what would be achieved through meeting pollutant level requirements and must not create pollutant hotspots.[50] Water quality credit trades may result in a broad area of water quality improvement, while causing acute or chronic localized effects, or hotpots.[51]

The Florida Statutes provide a framework for water quality credit trading in the state. The DEP is the agency responsible for authorizing water quality credit trading in adopted BMAPs and for

[43] Section 373.4131(3)(c), F.S.
[44] Section 373.414(1)(b)3., F.S.
[45] DEP, *Clean Waterways Act Stormwater Rulemaking Technical Advisory Committee (TAC)*, https://floridadep.gov/CWA-TAC (last visited Feb 1, 2022).
[46] *Id.*
[47] *Id.*
[48] EPA, *Water Quality Trading*, https://www.epa.gov/npdes/water-quality-trading (last visited Jan. 26 2022).
[49] *Id.*
[50] *Id.*
[51] *Id.*

establishing the pollutant load reduction value of water quality credits.[52] The DEP cannot participate in the establishment of water quality credit prices. Water quality credit sellers are responsible for achieving the load reductions on which the water quality credits are based and complying with the terms of the DEP authorization and any trading agreements into which they have entered; buyers are responsible for complying with the terms of the DEP water discharge permit.[53] Land set-asides and land use modification not otherwise required by state law or a permit, including constructed wetlands or other water quality improvement projects, that reduce nutrient loads into impaired surface waters may be used for water quality credit trading.[54] In the past, water quality credits have been traded in the state, however there are no water quality credits available for trade as of January 28, 2022.[55]

Mitigation Banking

Generally, 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.[56] 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.[57] The number of potential credits permitted for the bank, and the credit debits required for impact permits, are determined by the permitting agencies.[58]

Creation of a mitigation bank in Florida requires both a permit from the 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.[59] Through this process, depending on agency approval, a mitigation bank may provide mitigation for permittees under both the federal and state permitting programs.

Requirements for permitting mitigation banks differ between mitigation bank instruments issued by the USACE and state permits issued by the DEP or the WMDs. Under the federal process, a mitigation banking instrument serves as the legal document for the establishment, operation, and use of a mitigation bank.[60] They are approved by an interagency review team, through procedures involving public notice and comment.[61] Mitigation banking instruments must include

[52] Section 403.067(8), F.S.
[53] Water quality credit trading must be implemented through permits, including water quality credit trading permits, other authorizations, or other legally binding agreements as establish by DEP rule. *Id.*
[54] *Id.*
[55] DEP, *Florida Water Quality Credit Trading Registry*, https://floridadep.gov/dear/water-quality-restoration/content/florida-water-quality-credit-trading-registry (Jan. 17, 2022); DEP, *Credits Traded Document* (Sept. 7, 2018) *available at* http://publicfiles.dep.state.fl.us/DEAR/DEARweb/BMAP/DEP%20WQCT%20Spreadsheet.pdf (last visited Jan. 27, 2022).
[56] DEP, *Mitigation and Mitigation Banking*, https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/mitigation-and-mitigation-banking (last visited Jan. 26, 2022).
[57] *Id*.
[58] *Id*.
[59] DEP, *Mitigation Banking Rule and Procedure Synopsis*, https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/mitigation-banking-rule-and (last visited Jan. 26, 2022).
[60] 33 C.F.R. s. 332.2.
[61] 33 C.F.R. s. 332.8; 40 C.F.R. s. 230.98.

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.[62]

Under Florida 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.[63]

The applicant must also provide reasonable assurance 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 ch. 373, F.S., which regulates management and storage of surface waters, and rules adopted thereunder;
- 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.[64]

Graywater, Residential Systems, and Development Incentives

Graywater is the part of domestic sewage that is not carried off by toilets, urinals, and kitchen drains. It includes waste from the bath, lavatory, laundry, and sink, except for kitchen sink waste.[65] Graywater installations occur in both residential and non-residential installations and the capture, treatment, and reuse of graywater yields usable water that would otherwise be directed to the sewer.[66] Reusing graywater also reduces the use of potable water for non-potable needs and conserves fresh water.[67]

The Florida Building Code specifies that graywater may only be used for flushing of toilets and urinals. Any discharge from the building must be connected to a public sewer or an onsite sewage treatment and disposal system in accordance with Department of Health regulations in

[62] *See generally* 33 C.F.R. s. 332.8(d)(6); *see also* 40 C.F.R. s. 230.98(d)(6).
[63] Section 373.4136(1), F.S.
[64] *Id*.; Fla. Admin. Code R. 62-342.400.
[65] Section 381.0065(2)(e), F.S.
[66] Alliance for Water Efficiency, *Graywater Systems*, https://www.allianceforwaterefficiency.org/resources/topic/graywater-systems (last visited Jan. 31, 2022).
[67] Martinez, Christopher J., *Gray Water Reuse in Florida*, University of Florida IFAS Extension, https://edis.ifas.ufl.edu/ae453#:~:text=Gray%20water%20must%20be%20filtered,to%20the%20sanitary%20drainage%20system (last visited Jan. 31, 2022).

chapter 64E-6 of the Florida Administrative Code.[68] Graywater systems in Florida have several requirements: the graywater must be filtered, disinfected, and dyed; and storage reservoirs must have drains and overflow pipes which must be indirectly connected to the sanitary drainage system.[69]

To encourage adoption of residential graywater reuse, states, counties, municipalities, or special districts are required to implement incentives for the use of graywater technologies.[70] To do this, they must authorize the use of residential graywater technologies in their respective jurisdictions and provide specific density or intensity bonuses to developers or homebuilders if a certain percentage of a proposed or existing development will have a graywater system installed.[71]

III. Effect of Proposed Changes:

Section 1 creates s. 373.4134, F.S. to authorize the creation of water quality enhancement areas (WQEAs). The bill lists the following legislative findings:

- Water quality will be improved and adverse water quality impacts of activities regulated under provisions of law relating to the management and storage of surface waters may be offset by WQEAs that provide offsite compensatory treatment;
- An expansion of existing authority for regional treatment to include offsite compensatory treatment in WQEAs to make water quality enhancement credits available for purchase by governmental entities to address impacts regulated by provisions of law relating to the management and storage of surface waters is needed;
- WQEAs will improve the certainty and long-term viability of water quality treatment systems;
- WQEAs are a valuable tool to assist governmental entities in satisfying the net improvement performance standard[72] to ensure significant reductions of pollutant loadings; and
- WQEAs that provide credits to governmental entities seeking permits under this bill and governmental entities seeking to meet an assigned basin management action plan (BMAP) allocation or reasonable assurance plan (RAP) are considered an appropriate and permittable option.

The bill provides the following definitions:

- "Enhancement credit" means a standard unit of measure which represents a quantity of pollutant removed;
- "Governmental entities" means any political subdivision of this state, including any state agency, department, county, municipality, special district, school district, utility authority, or other authority or instrumentality, agency, unit, or department thereof;

[68] 2020 Florida Building Code – Plumbing, Seventh Edition (Dec. 2020), *available at* https://codes.iccsafe.org/content/FLPC2020P1.
[69] *Id*.
[70] Section 403.892(2), F.S.
[71] *Id*.
[72] If the applicant is unable to meet water quality standards because existing ambient water quality does not meet standards, the governing board or DEP shall 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. Section 373.414(1)(b)3., F.S.

- "Natural system" means an ecological system supporting aquatic and wetland-dependant natural resources, including fish and aquatic and wetland –dependant wildlife habitats;
- "Water quality enhancement area" means a natural system constructed, operated, managed, and maintained pursuant to a permit issued under this part for the purpose of providing offsite, compensatory, regional treatment within an identified enhancement service area, for which enhancement credits may be provided; and
- "Water quality enhancement area permit" means a permit issued for a WQEA which authorizes its construction, operation, management, and maintenance and the purchase and sale of credits.

The bill provides that the construction, operation, management, and maintenance of a WQEA must be approved through the environmental resource permitting (ERP) process. Department of Environmental Protection (DEP) rules pertaining to ERPs apply to WQEAs and credits. The bill provides that WQEA credits may be sold only to governmental entities. It provides that a WQEA must address contributions of pollutants or other constituents for those parameters in an enhancement service area that do not meet state water quality criteria. Further, the bill requires that a WQEA must use, create, or improve natural systems to improve water quality.

The bill allows a governmental entity to use a WQEA for its own water quality needs. However it may not act as a sponsor to construct, operate, manage, maintain, or market credits to third parties. Further, the bill prevents a local government from requiring a permit or otherwise regulating the operation of WQEAs. It provides that the issuance of a WQEA permit does not preclude the responsibility of an applicant to obtain other applicable federal, state, and local permits for the construction activities associated with the WQEA.

To obtain a WQEA permit, the bill directs an applicant to 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.

The bill requires a WQEA permit to provide for the assessment, valuation, and award of credits based on units of pollutant removed. It requires the DEP to base its determination of the award of enhancement credits on standard numerical models or analytical tools that establish the WQEAs ability to remove pollutants or constituents.

The bill requires that if a BMAP exists for the watershed in which the WQEA is located, the applicant must use the same numerical models or analytical tools used for the BMAP in WQEA

permit application. If a BMAP does not exist for the watershed in which the WQEA is located, the bill provides that the applicant, with the approval of the DEP, may submit as part of the permit application model parameters and results used by the DEP to develop a BMAP for a watershed with similar characteristics and pollutants as that where the WQEA is to be located. The bill requires that if the DEP determines that its numerical model or analytical tool used for a BMAP is not appropriate for the proposed WQEA, the applicant must use a standard numerical model of analytical tool for the WQEA.

It requires a WQEA application to include the following information to assist the DEP in determining credits:

- Rainfall data over the longest period of record available collected from the closest site to the proposed WQEA, preferably within the same drainage basin;
- Anticipated average annual water quality and quantity inflows to the proposed WQEA, based on published local data collected over a period of record that most closely matches the rainfall data;
- Site-specific conditions affecting the anticipated performance of the proposed WQEA, including the proposed treatment type and anticipated associated reduction rates, as demonstrated by the performance of other areas where the treatment type has been established and operating over a minimum of two consecutive wet and dry seasons; and
- Data from collection stations approved by the DEP in sites that the DEP deems sufficient to determine flows and local water quality conditions.

The bill provides that an issuance of a WQEA permit does not preclude the responsibility of an applicant to obtain other applicable federal, state, and local permits for the construction activities associated with the WQEA.

The bill provides that an applicant for a WQEA permit must propose a performance and success criteria monitoring and verification plan, with protocols to be implemented once 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 the credits were awarded by the DEP.

The bill provides that if a permittee fails to comply with the conditions of a WQEA permit, the DEP must revoke the permittee's ability to sell enhancement credits until the WQEA is compliant with the permit conditions.

The bill directs the DEP or the water management districts to authorize the sale and use of credits to governmental entities to offset adverse water quality impacts of activities regulated under the bill or to assist entities seeking to meet an assigned BMAP allocation or RAP. The bill allows an applicant to 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 the DEP. The bill provides that a WQEA may not be located on lands purchased for conservation thorough the Florida Forever Act or Florida Preservation 2000 Act. The bill directs the DEP to provide for and maintain a ledger that tracks the award, release, and use of credits. In furtherance of the ledger requirement, the bill directs a WQEA operator to notify the DEP of the amount of credits sold or used within 30 days of the date the credits transaction is completed. It also directs a water management district that authorizes credit use to report to the DEP the amount of credits used by an applicant.

The bill provides that reductions in pollutant loading required under any state regulatory program are not eligible to be considered as credits. It specifies that 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. The bill provides that use of credits is voluntary, and any landowner, discharger, or other responsible person implementing applicable management strategies specified in a BMAP or RAP may not be required to use credits to reduce pollutant loads to achieve pollutant reductions. Further, the bill provides that a local government may not deny the use of credits due to the location of the WQEA outside the jurisdiction of the local government.

The bill provides that the authority granted to the DEP by this bill is supplemental to the authority granted under the statutes regulating water quality credit trading. It authorizes the DEP to adopt rules to implement WQEAs.

Section 2 amends s. 403.892, F.S., to add to a condition to qualify for graywater technology use incentives that each residence forming part of a multifamily project must be serviced by its own residential graywater system or a master graywater collection and re-use system for the entire project. The bill also clarifies that the maintenance of the graywater system is the responsibility of the owner. The bill provides that the graywater technology use incentives do not apply to multifamily projects that are more than five stories and clarifies that whether a dwelling is occupied by an owner is not an eligibility criterion for a developer or homebuilder to receive incentives. The bill also corrects a reference.

Section 3 directs the DEP to adopt and modify rules relating to mitigation banks and activities in surface waters and wetlands to ensure that required financial assurances are equivalent and sufficient to provide for the long-term management of mitigation measures. The bill requires the DEP, in consultation with the water management districts, to include this required rulemaking in existing active rulemaking or to complete rule development by June 30, 2023.

Section 4 provides that the bill will take effect upon becoming law.

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.

E. Other Constitutional Issues:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Indeterminate.

C. Government Sector Impact:

Local governments may experience a negative fiscal impact from loss of permit application fees for stormwater treatment due to the bill preventing local governments from requiring water quality treatment to be located within their jurisdiction.[73] Other fiscal effects are indeterminate.

The state government may experience revenue increases from WQEA permit application fees. These fees would be based on acreage and would likely range from $420 to $14,000. The number of applicants is unknown. The new permit application fees would be deposited into the Permit Fee Trust Fund.[74]

According to the Department of Environmental Protection (DEP), it would incur costs from operating the WQEA program, because it would need eight additional staff members and associated travel. The total financial impact for these positions including salaries, benefits, expenses, and travel costs would be approximately $878,275 annually.[75]

VI. Technical Deficiencies:

None.

[73] DEP, *House Bill 965 Legislative Analysis* (Jan. 7, 2022) (on file with the Senate Committee on Environment and Natural Resources).
[74] *Id.*
[75] *Id.*

VII. Related Issues:

The Department of Environmental Protection has identified numerous issues, as provided in its analysis.[76]

VIII. Statutes Affected:

This bill creates section 373.4134 of the Florida Statutes and substantially amends section403.892 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

Recommended CS by Appropriations Subcommittee on Agriculture, Environment, and General Government on February 16, 2022:
The committee substitute:

- Removes definitions for "enhancement service area" and "planning unit" from the underlying bill.
- Adds definition for "natural system".
- Adds that the DEP must use standard numerical models that establish a WQEA's ability to remove pollutants in its determination of the award of credits. The models may be based on basin management action plan (BMAP) numerical models for the watershed where the WQEA is located, a similar numerical model if no BMAP exists for a particular watershed, or a standard numerical model if a similar model is not appropriate.
- Removes from the underlying bill the provision that an enhancement service area must be based on a BMAP, reasonable assurance plan, or planning unit.
- Requires a WQEA permit applicant to propose a performance and success criteria monitoring and verification plan.
- Requires the DEP to revoke a permittee's ability to sell enhancement credits if the permittee fails to comply with WQEA permit conditions until the WQEA is in compliance.
- Removes exceptions in the underlying bill that would allow a WQEA to provide credits outside of an enhancement service area.
- Adds that before approving the use of enhancement credits, the DEP or water management district must determine that the enhancement credits are appropriate for a specific permit use.
- Adds that WQEAs may not be located on lands purchased for conservation pursuant to the Florida Forever Act or the Florida Preservation 2000 Act.
- Removes the section in the underlying bill authorizing the DEP to enter into agreements and contracts with public and private entities to accept and expand donations, grants of funds, and payments to expedite the evaluation of the entity's application for a dredge and fill permit or an environmental resource permit.

[76] *Id.*

- Deletes the $2.04 million appropriation for 24 full-time equivalent positions in the underlying bill.

CS by Environment and Natural Resources on February 1, 2022:
The committee substitute:

- Specifies that only governmental entities may purchase and use water quality enhancement (WQEA) credits.
- Defines "governmental entity" as 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.
- Removes the prohibition against water quality enhancement credits being used to compensate for wetland or other surface water impacts.
- Deletes the exception that allows water quality enhancement credit use outside of the enhancement service area for projects with total adverse impacts of less than one acre.
- Adds that DEP may enter into agreements and contracts with public or private entities to accept and expend donations, grants, and payments to expedite the evaluation of the entity's application for dredge and fill or environmental resource permits.
- Amends a condition to qualify for incentives for the use of graywater technologies to add that each residence that is part of a multifamily project will be serviced by either its own residential graywater system or a master graywater collection and reuse system for the entire project.
- Directs DEP to adopt and modify rules relating to mitigation banks and activities in surface waters and wetlands to ensure that required financial assurances are equivalent and sufficient to provide for the long-term management of mitigation measures.
- Appropriates $2.04 million in recurring funds, effective July 1, 2022, from the Grants and Donations Trust Fund to DEP and authorizes 24 full-time positions to evaluate dredge and fill and environmental resource permits for entities with which DEP has entered into agreements or contracts.

B. Amendments:

None.