

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 Environment and Natural Resources

BILL: SB 1426

INTRODUCER: Senator Burgess

SUBJECT: Water Quality Enhancement Areas

DATE: January 28, 2022

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Carroll	Rogers	EN	Pre-meeting
2.			AEG	
3.			AP	

I. Summary:

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 sets out requirements for a water quality credit program based on the development of WQEAs and requires the Department of Environmental Protection (DEP) to develop rules to implement the program. The credits will not compensate for wetland or other surface water impacts.

The bill provides that an environmental resource permit (ERP) issued by DEP under the provisions of law relating to the management and storage of surface waters must authorize the construction, operation, management, and maintenance of a WQEA.

A WQEA must:

- Address contributions of pollutants in an enhancement area that do not meet state water quality standards.
- Use, create, or improve natural systems in order to improve water quality.

A governmental entity may use, but not create or market credits for a WQEA. A local government may not require a permit or otherwise impose regulations governing the operation of a WQEA. However, 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.

The bill specifies that a WQEA permit must provide reasonable assurances that the WQEA will:

- Meet the requirements of an ERP;
- Benefit water quality within an enhancement service area (based on the boundary developed by the basin management action plan, reasonable assurance plan, or planning unit);
- Achieve defined performance criteria for the reduction of pollutants;
- Ensure long-term pollution reduction through operation and maintenance in perpetuity with financial assurances;
- Ensure perpetual protection and management of the land within the WQEA; and
- Preserve the site through a conservation easement.

The WQEA permit must include specified data for the assessment, valuation, and award of credits based on units of pollutant removed.

A WQEA may provide credits outside of an enhancement service area in certain circumstances.

DEP or a water management district may authorize the sale and use of credits. DEP must keep a ledger that tracks the award, release, and use of credits. The bill specifies that credits may not be used by point source dischargers in most cases and that use of credits is voluntary.

The bill also defines terms and creates Legislative findings relating to the benefits of WQEAs.

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

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).

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, 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

Basin Management Action Plans and Best Management Practices

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

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.

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.

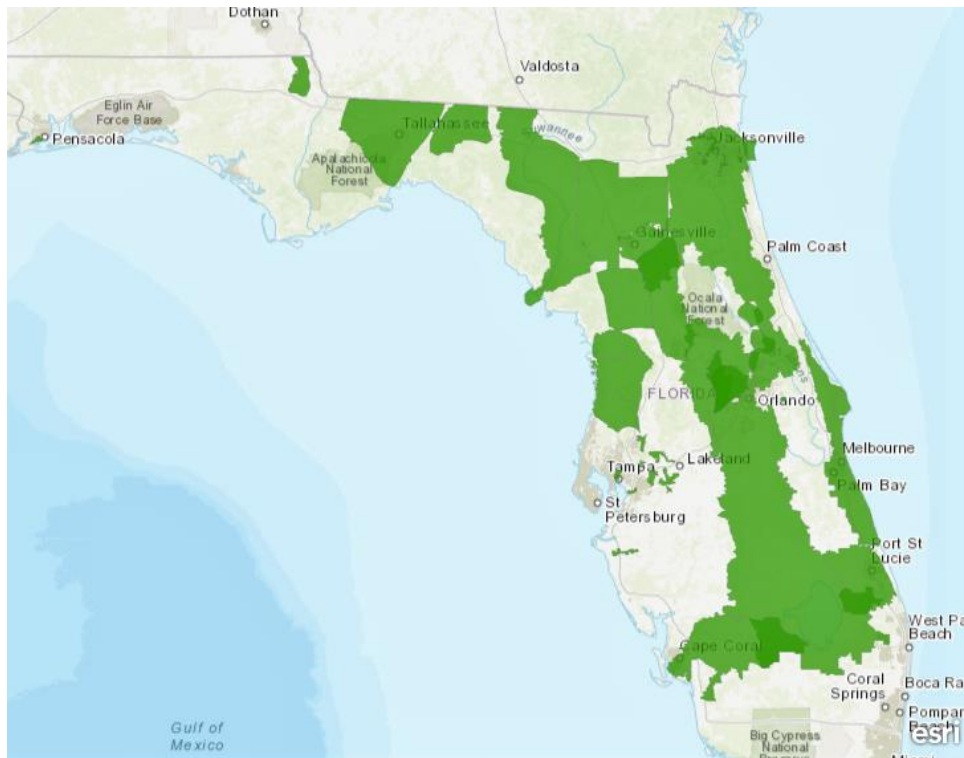
¹⁰ Section 403.067(7), F.S.

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).

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 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



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.

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).

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 DEP may implement for Category 4b impaired waterbodies.²⁰ 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, 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 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. 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



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).

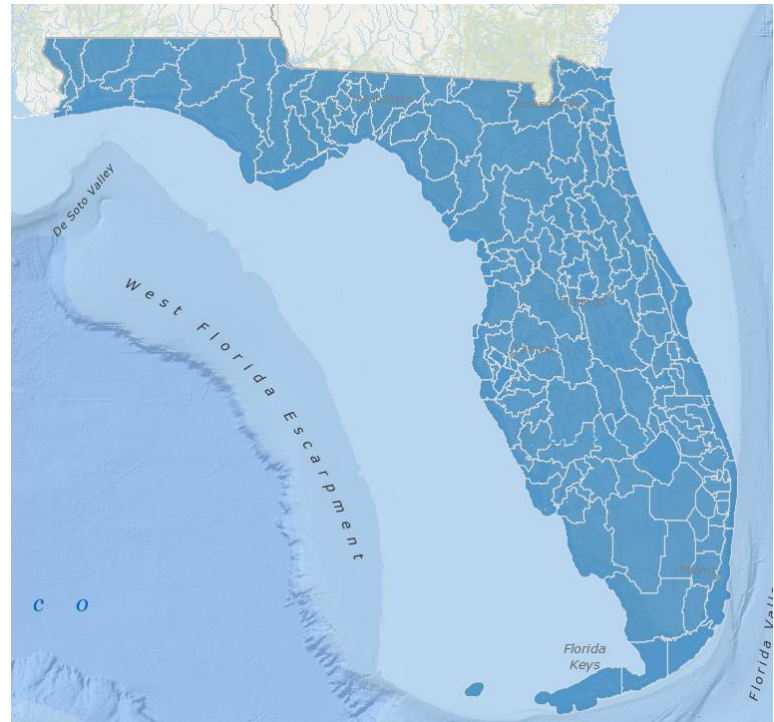
²¹ Fla. Admin. Code R. 62-303.600.

²² Fla. Admin. Code R. 62-303.600.

²³ DEP, *Restoration Plans*, <https://fdep.maps.arcgis.com/apps/View/index.html?appid=5a34b0e9d46447559b52d8267083596f> (last visited Jan. 28, 2022).

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 right shows the state's planning units.²⁶



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

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).

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/Applicant_Hanbook_I_-_Combined.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/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 NPDES 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.

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 DEP, the WMDs, and local governments implement the ERP program.³⁵

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

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

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 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 stormwater

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”).

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, 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 DEP and the WMDs to update stormwater regulations to reflect the latest scientific information. In response, 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 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 hotspots.⁵¹

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

⁴³ Section 373.4131(3)(c), F.S.

⁴⁴ Section 373.414(1)(b)3., F.S.

⁴⁵ *Clean Waterways Act Stormwater Rulemaking Technical Advisory Committee (TAC)*, Florida Department of Environmental Protection <https://floridadep.gov/CWA-TAC> (last visited Sept. 15, 2021).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ U.S. Environmental Protection Agency, *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 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 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 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

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 to offset 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 applicants in satisfying the net improvement performance standard⁶⁵ to ensure significant reductions of pollutant loadings.

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 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.

- WQEAs that provide credits to applicants seeking permits under this bill and entities seeking to meet an assigned basin management action plan (BMAP) allocation or reasonable assurance plan (RAP) are considered an appropriate and permissible option.

The bill provides the following definitions:

- “Enhancement credit” means a standard unit of measure which represents a quantity of pollutant removed;
- “Enhancement service area” means the geographic area where the water quality enhancement area can reasonably be expected to offset adverse water quality impacts;
- “Planning unit” means the total maximum daily load (TMDL) planning unit that is an individual tributary basin or a group of smaller adjacent tributary basins with similar characteristics;
- “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;
- “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 an environmental resource permit (ERP) issued by the Department of Environmental Protection (DEP) pursuant to provisions of law relating to the management and storage of surface waters must authorize the construction, operation, management, and maintenance of a WQEA. DEP rules pertaining to environmental resource permits apply to WQEAs and credits. The bill provides that a WQEA must address contributions of pollutants for those parameters in an enhancement service area that do not meet state water quality standards. Further, the bill requires that a WQEA must use, create, or improve natural systems to improve water quality. It prevents a WQEA from providing credits to compensate for wetland or other surface water impacts.

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, management, 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. The bill 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 standards;
- Assure 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 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 a WQEA application to 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, 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;
- Proposed data collection sites or DEP-approved data collection stations if DEP deems sites insufficient to determine flows and local water quality conditions;

The bill provides that an enhancement services area must be based on a BMAP or RAP boundary adopted by DEP, or the planning unit if DEP does not adopt a BMAP or RAP. The bill allows a WQEA to only provide credits in an enhancement service area, except for:

- Projects with adverse impacts located partially within the enhancement service area;
- Linear projects, such as roadways, transmission lines, distribution lines, pipelines, railways, or certain seaports; and
- Projects with total adverse impacts of less than one acre in size.

The bill directs DEP or water management districts to authorize the sale and use of credits 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 DEP. The bill directs 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 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 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 environmental resource permit 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 DEP by this bill is supplemental to the authority granted under the statutes regulating water quality credit trading. It directs DEP to adopt rules to implement WQEAs.

Section 2 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:

The Department of Environmental Protection may experience a negative fiscal impact in implementing this new program.

VI. Technical Deficiencies:

On lines 60 and 70 the word “part” should be changed to “section,” as these requirements appear to be only for water quality enhancement areas, not all permits issued under the part.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates section 373.4134 of the Florida Statutes.

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

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

None.

B. Amendments:

None.