

December 5, 2023

Borja Crane-Amores
Program Administrator, NPDES Stormwater Program
Department of Environmental Protection
2600 Blair Stone Road
Tallahassee, Florida 32399-2400
Via email: Borja.CraneAmores@dep.state.fl.us

Re: Comments on the Draft Water Quality Enhancement Area Credit Transactions Rule, 62-332

Dear Mr. Crane-Amores,

Audubon Florida appreciates the opportunity to comment on the proposed rule detailing the credit program for water quality enhancement areas (WQEAs). It is our understanding that this rule is predicated on the ratification of the stormwater rule certified by the Department of Environmental Protection (DEP) last year. We suggest DEP clarify what would happen with this rule if the updated stormwater rule is not ratified by the legislature.

General Comments

Relationship of this rule to 62-306, Florida Administrative Code

It would be helpful to have a summary explaining differences in the scope and requirements of this rule and the existing Water Quality Credit Trading rule.

Use of the term credits throughout the rule

Credits are referred to frequently; in terms of credits generated by the WQEA, in terms of credits needed to be purchased by a project, and as both when talking about transactions. It may help to draw a firm distinction between the credits “produced” by the WQEA that may or may not be adjusted based on performance, and the credits “needed” by the purchaser’s projects that may be adjusted by Locational Valuation Factors. Sections of the rule that discuss amounts of credits or adjustments to credits should be very clear to what they are referring.

Acceptable locations for projects requiring credits

The rule requires all credit-purchasing projects to be downstream of the WQEA per the definition of WQEA service area discussed further below. DEP should consider expanding the establishment of WQEA service areas to include locations immediately upstream of the WQEA (considering hydrological connectivity and likelihood of negative water quality impacts occurring between the purchaser’s discharge site and the WQEA). This configuration more closely resembles the post-discharge nutrient removal approach common in many treatment system designs and could be beneficial if the rule is written to preclude water quality violations between the discharge and WQEA sites. Another approach would be to include projects that are immediately upstream of the WQEA in the list of projects eligible to use the WQEA in Section 62-332.500(3).

Locational valuation factor adjustments

The rule states that Locational Valuation Factors (LVFs) will be determined as part of the WQEA permitting to account for pollutant uptake over distance. Given the modeling needs already required for purchasers, it may be more precise and not overly burdensome to determine the adjustment factor for each project as it is permitted. This would avoid the need for creating LVF maps that are either too finely detailed and somewhat confusing or perhaps too coarse and less effective.

Additional uses of WQEAs

Many water quality treatment areas in Florida that utilize natural systems are also valuable recreational resources. Will DEP consider recreational amenities within WQEA permits or do any barriers to such inclusions exist?

Specific Comments

62-332.200 Definitions

Several terms in this section have different definitions than are provided in 373.4134, Florida Statutes. Sections (5), (8), and (9) should probably use the clearer versions in statute.

Section (3) "Enhancement credit." The last sentence in this section states, "When used as part of a transaction pursuant to this chapter, enhancement credits shall be adjusted using appropriate valuation factors." This sentence seems unnecessary and should be removed to avoid confusion. Section 62-332.500(4)(b) states that the locational valuation factors are applied to the pollutant removal needs of the project (not the "enhancement credits") to determine the "Number of Credits Needed."

Section (5) "Natural system." The definition should use "constructed" rather than "man-made." Also, this definition leaves out relatively undisturbed natural systems. It could reference, "constructed, altered, or undisturbed ecological systems..." Or, again, the simpler definition from statute could be substituted.

Section (10) "Water quality enhancement service area." This definition refers to downstream waters only. As stated earlier, DEP could consider expanding the service areas to include some extent of upstream locations. Our understanding of the rule requires service areas to be unique to each WQEA since they only include waters downstream from each WQEA location and will have a unique downstream extent beyond which credits from the WQEA are no longer a feasible solution for a project. Audubon supports this approach (as compared to using predefined service areas similar to mitigation banking) given the need to ensure water quality between the WQEA and project discharge site.

62-332.300 General Requirements

Section (1). The meaning of the following language should be clarified, "only if approved by the Department utilizing natural systems, ..." This section should be rewritten to clearly state the conditions required by the applicant.

Section (8). This section states the purchaser's project and the WQEA must be in same service area. It would be clearer to state, "purchaser's project must be within the service area of the WQEA generating the credits purchased."

Section (9) "The credited pollutant load reduction must result in at least an equivalent water quality improvement at the purchaser's point of discharge." This language is repeated in Section 62-332.500(4) and both are confusing. As mentioned earlier, many of the references to credits in the rule should be reviewed for consistency. New language should clarify that the number of credits needed (i.e., purchased) should ensure the required pollutant load reduction is achieved at the purchaser's point of discharge.

Section (11). There are conservation efforts beyond those in the Florida Forever Act or the Florida Preservation 2000 Act that should be included in the protections of this section. The language should be broadened to include "areas purchased for conservation through state or local government programs."

62-332.400 Enhancement Credit Generation and Valuation

Section (1)(b). Given the history of water quality issues in the state, we support the use of conservative valuations for WQEA enhancement credits.

62-332.500 Service Area and Enhancement Credit Locational Value Factor Adjustments

Section (1). Again, we suggest the language be clarified such as, “purchaser’s project must be within the service area of the WQEA generating the credits purchased.”

Section (3). As mentioned earlier, DEP could consider projects that are immediately upstream of a WQEA (such that no “hotspot” or other water quality issues would occur between the project and the WQEA).

Sections (3)(a) and (3)(b) should clarify the extent to which such projects could offset their impacts using credits. Would credits from a specific WQEA only be allowed to offset the portion of discharges within the service area?

Section (3)(d). We recommend removal of this exception. WQEAs involve credit trading and are written as a zero-sum effort. I.e., they do not provide any additional water quality restoration beyond what would be already required through the ERP process or other water quality rules. The inclusion of an OFW in a service area does not appear to offer a particular benefit that would suggest an exception to the normal restrictions on project location should be offered. Upstream projects have the potential downside of worsening water quality between the project and the WQEA.

However, there could be an exception for projects to be located upstream of a WQEA if modeling shows there is little chance of a degradation in water quality between the project and the WQEA. This would allow some upstream projects – perhaps only those immediately upstream or with particular hydrological connections.

Section (4). There appear to be two different requirements discussed in this section. The rule states the credits needed by a project will be adjusted, “to provide reasonable assurance... that no localized water quality violations will occur at the location of the purchaser’s permitted discharge.” It further states the “credited pollutant load reduction must result in at least an equivalent water quality improvement at the purchaser’s point of discharge.” Perhaps the language could be clarified to show how these two requirements relate to one another.

Also, this section repeats the language from Section 62-332.300(9) that we commented on earlier. “The credited pollutant load reduction must result in at least an equivalent water quality improvement at the purchaser’s point of discharge.” New language should clarify that the number of credits needed (i.e., purchased) should ensure the required pollutant load reduction is achieved at the purchaser’s point of discharge.

Section (4)(d). As mentioned in our comments on the definition of enhancement credit, the language in this section is similarly confusing. It states DEP will apply LVFs to determine the final value of the credits from the WQEA **and** the number of credits needed (implies these are 2 separate calculations). Our understanding is that the credits produced by the WQEA will be calculated based on the specific details of the WQEA project and will be determined when the WQEA is permitted. When the governmental entity project is permitted, the LVFs will be applied to the project’s pollution reduction needs to determine the number of credits needed from the WQEA. If the credits from the WQEA are being adjusted based on a review of WQEA performance this should be made clear.

62-332.600 Enhancement Credit Transactions and Credit Use

Section (6). This section should be reviewed for grammar and clarity.

Section (7). The intent of this statement is not clear. Does the “final value of the enhancement credits for the purchaser’s use” refer to the “Number of Credits Needed” or something else?

62-332.700 Enhancement Monitoring and Continuing Credit Verification

Section (2). This section should describe the procedures DEP will follow (or require from permittees) to ensure water quality monitoring is accurately reflecting treatment success. That is, monitoring protocols should be designed to avoid short-term variations due to environmental or other factors.

62-332.900 Compliance and Enforcement

Given that the purchaser of credits will no longer be liable for water quality reductions after permitting, it is imperative that the financial responsibility rules are robust. Otherwise, failed WQEAs will leave water quality impacts with little recourse for correction.

Thank you for considering our comments; we look forward to participating further in this rulemaking process. Please contact us if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Beth Alvi", with a stylized flourish at the end.

Beth Alvi
Director of Policy
Audubon Florida