Florida Association of Mitigation Bankers

October 9, 2024

John Coates
Florida Department of Environmental Protection
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

Re: Draft Rule 62-332, Fla. Admin. Code

Dear Mr. Coates,

The Florida Association of Mitigation Bankers (FAMB) is pleased to provide comments to the Florida Department of Environmental Protection (FDEP) regarding the Draft Rule: Chapter 62-332, F.A.C., pertaining to Water Quality Enhancement Areas (WQEA) and Chapter 62-306, F.A.C. pertaining to Water Quality Trading Credits (WQCT) published on July 30, 2024. As an industry association of professionals including mitigation bankers, environmental consultants, engineers, restoration contractors, and other service-related firms, it is our focus to advocate and support appropriate regulatory policies that ensure ecological restoration banking remains a sustainable and valuable option for providing compensatory mitigation and treatment for some of Florida's most vital natural resources and ecosystems. While FAMB is generally supportive of the draft rule, we are concerned that the current language could potentially result in negative repercussions to the banking industry. We outline our comments and recommendations below.

<u>Need for reasonable assurances consistently required across the board for all off-site compensatory treatment</u>

First and foremost, it is important all sellers of credits or allocations of water quality treatment for the purpose of providing offsite regional treatment satisfy the environmental resource permit performance standard under s. 373.414(1)(b)3, F.S. providing the same degree of protection and improvement to Florida's waters, the public, and the buyers of credits or allocations.

These protections include:

1. The entity supplying credits must have legal authorization over the off-site treatment area as required in rules 1.5.6. and 4.2.3(d), ERP Applicant's Handbook Volume 1 (Handbook);
2. Where the operation and maintenance entity does not own the area proposed to be used for off-site treatment, legal authorization shall be granted to the operation and maintenance entity, as required in Section 12.4 and Section 4.2.3 of the Handbook.

These protections assist in providing the reasonable assurance that the operation and maintenance entity has both access and interest to the property to allow for perpetual operation and maintenance of the off-site treatment area. Without financial assurances, failures of operators or owners selling, operating, and maintaining water quality credits or allocations places the full technical and financial burden on the public to remedy the issues resulting from a failed system, ultimately leaving water bodies unprotected.

<u>Location Value Factor / Modeling</u>

The applicant seeking to satisfy their environmental resource permit performance standard, under s. 373.414(1)(b)3, F.S., should be required to use modeling techniques to provide reasonable assurance that the off-site treatment system provides an equivalent amount of pollutant reductions as what is required by the applicant's project at the point of discharge, as if all the treatment was performed on-site. The LVF, as currently proposed by the DEP within the draft rule, appears inconsistent with the statute's[1] intent. To ensure accuracy and equivalency of pollutant reduction for an applicant's discharge, WQEA owners are required to demonstrate through modeling in the WQEA permit the appropriate LVF for the WQEA and prospective buyers from that WQEA.

<u>Hydrologically connected and downstream is not authorized in s. 373.4134, F.S.</u>

The "hydrologically connected and downstream" limitation is not authorized in statute and must be removed from the draft rule. This imposed limitation is not necessary because the purchase of an Enhancement Credit is not permitted until the ERP minimum performance standard is met; ERP applicants are required to satisfy the minimum standard of pre v. post. As a result, no hot spots are created; the applicant is compliant with their ERP. To further address concerns of accuracy and equivalency of Enhancement Credits to discharge from an Applicant's site, the location valuation factors are applied.

<u>Applying for and reviewing off-site compensation options through the ERP process to gain consistency in implementing and understanding of the available strategies</u>

[1] s.373.4134, F.S.

Off-site compensatory treatment can be provided through a WQEA Enhancement Credit, a permittee responsible “mitigating” solution as described in the Handbook s. 9.7.2, or via an RSMS per s. 9.7.3. Each of these methods have distinctly different requirements to confirm their use is appropriate and consistently implemented and applied by users, providers, and regulating entities.

Over several FDEP workshops in which WQEA has been discussed, it has become apparent the public has not clearly understood 1) the difference between the off-site options and 2) the requirements in the permit process upon the enactment of ch. 62-332, F.A.C ensures a seamless process. such that the Applicant seeking to use an off-site option has used and applied the appropriate off-site compensatory treatment option to satisfy net improvement performance standards required under the Handbook for the Applicant’s site.

FAMB is providing a decision matrix that follows the logic sequence proposed in Handbook and draft ch. 62-332, F.A.C for discerning between the off-site options available to applicants. Please see “Exhibit A” attached.

<u>There is no statutory authority for the conservation land limitation in the draft rule</u>

This has been discussed previously. However, we believe it is noteworthy to reference in the Association’s public comments that FDEP does not have statutory authority to limit WQEA locations on conservation, mitigation, restoration, or reclamation land. S. 373.4134, F.S. only limits the development of WQEAs on areas “purchased for conservation pursuant to Florida Forever Act or the Florida Preservation 2000 Act”. The draft rule limits WQEA location as follows: “WQEAs may not be located within areas designated for conservation, mitigation, restoration, or reclamation by state law or permit”. This is an exceedance of statutory authority and should be removed.

<u>WQCT and WQEA programs must remain separate and distinct</u>

FDEP appears to be including provisions on WQCT in rule 62-332, F.A.C. These are distinct and independent programs, and it is imperative that WQEA and WQCT remain separate programs. Section 373.4134, F.S., provides statutory authority for WQEAs, not WQCT. Section 403.067, F.S. provides statutory authority for WQCT, not WQEA. S. 403.067, F.S. the Florida Watershed Protection Act:

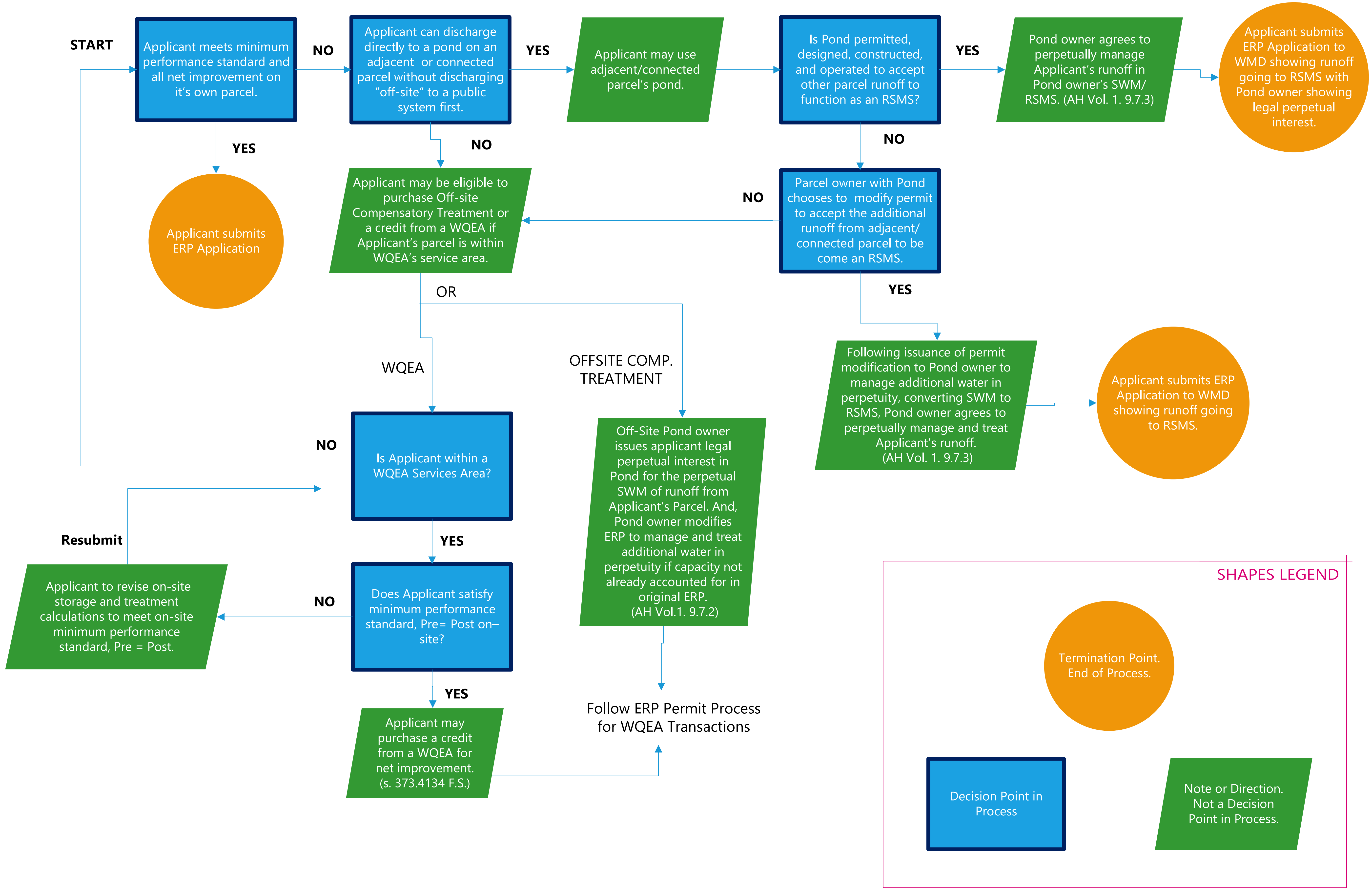
1. Directs FDEP to evaluate state waters and establish TMDLs;
2. Authorizes FDEP to develop BMAPs;

3. Provides FDEP authority to develop a rule for credit trading between “point or nonpoint sources that will achieve greater pollutant reductions than required by an adopted total maximum daily load or waste load allocation to generate, register, and trade water quality credits for the excess reductions to enable other sources to achieve their allocation.”
4. Does not provide authority for development and administration of WQEA rules;
5. Does not require perpetual credits and is not authorized to sell to ERP applicants.

Thank you for your consideration of FAMB’s comments and recommendations. It is our hope this letter offers an industry perspective on important considerations that warrant further evaluation. We look forward to continuing to serve as an industry resource with FDEP in the future.

Sincerely,

David Rathke, Executive Director
Florida Association of Mitigation Bankers



Which is the Appropriate Off-Site Compensatory Treatment Solution??