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

Dear Florida Department of Environmental Protection:

We appreciate the time you continue to take to meet with stakeholders and strive to develop rule language for Water Quality Enhancement Areas (WQEA). Your efforts will bring impactful solutions for water quality improvements across the state using market-based and data-driven approaches with high standards to ensure the longevity, sustainability, and transparency for buyers of Enhancement Credits and ultimately the public.

In response to the July 2024 draft of the proposed chapter 62-332, F.A.C., update of chapter 62-306, F.A.C., and pursuant to the discussion of the implementation of changes proposed by the Department (DEP) at the July 28, 2024, workshop, RES is providing a summary of proposed changes, concerns, clarifications by topic.

The following summarizes RES's understanding of how the DEP will be moving forward with each of the items discussed by primary theme:

I. Statutory Authority on who, when, and how a WQEA or a WQCT can be transacted for BMAP/RAP entities.

The current draft rules appear to be attempting to integrate/blend the credit trading/transactions process for WQEAs and WQCTs into the same rule (ch. 62-306, F.A.C.) for all "credit" transactions sought by BMAP/RAP entities.

The implementing statutes for WQEA (ch. 373.4134, F.S.) and WQCT (ch. 403.067, F.S.) limit the authority of the creation of a "credit transaction" framework to that which is explicitly defined in each statute. The statutes do not contemplate, require, or authorize, the integration/blending of the two credit market frameworks.

Having separate authorities allows BMAP entities to purchase either an Enhancement Credit from a WQEA following the processes and requirements stated in ch. 373.4134, F.S. or a Water Quality Credit from another BMAP/RAP entity that is exceeding their allocation per ch. 403.067. F.S. There is no requirement in either statute, or authority for the DEP to create a requirement, for:

1) a BMAP/RAP buyer of an Enhancement Credit from a WQEA, or
2) seller of Enhancement Credits from a permitted WQEA, to follow anything in ch. 62-306, F.A.C.

Prior to the passage of HB965 in 2022 that established 373.4134, F.S. (WQEAs), credit trades were limited to point and nonpoint source pollutant contributors identified within a BMAP/RAP, pursuant to Section 403.067, F.S., the statute that established the development of BMAPs and RAPs to meet TMDLs.

Section 403.067, F.S. directed the DEP to develop a rule that allows point and non-point source contributors with allocations to trade between the two entities, only if the entity supplying the credit has met its allocation under the BMAP. 62-306 F.A.C directs DEP to develop a rule to allow for point and nonpoint source contributors to trade between contributors who have allocations (BMAPs) and removal of the limiting condition for trades only between point and non-point source entities with allocations in ch. 62-306, F.A.C., thereby allowing for entities without an allocation to sell a credit, exceeds the authority of sect. 403.067, F.S.

WQEA Statutory authority is Section 373.4134, F.S. It authorized the development of a credit market to satisfy entities regulated under Chapter 373 (ERP - Fl. Stormwater Rule) seeking to meet the net improvement performance standard after the minimum performance standards are met on site. The statute also authorizes entities regulated under Section 403.067, F.S., to use WQEA to satisfy their obligations under the statute that requires the development of BMAPs and authorizes entities to satisfy their obligations using trades.

II. "Hydrologically Connected and Downstream" limiting condition and development of LVF

The current draft language continues to state that the limiting condition on a WQEA is to provide an Enhancement Credit to ERP applicants seeking credits downstream from the WQEA to "avoid hot spots". Further, location valuation factor guidance within the rule is based on this premise and by inclusion, resolves the premise of "hot spot". There is no expressed statutory authority for this limitation and guidance within the implementing authority of ch. 373.4134, F.S. and the premise that a "hot spot" would be created because of a buyer of an Enhancement Credit does not consider the requirements of the buyers that are subject to the updated Stormwater Rule authorized in 2024.

As such, applicants seeking to buy Enhancement Credits must meet the minimum performance standard required by the Stormwater Rule of Pre=Post, therefore they cannot create a "hot spot" without the presumption that all parcels permitted under the previous version of the Stormwater Rule are "hot spot" producers until they comply with the new stormwater rule requirements.

The notion that a "hot spot" is created by an applicant seeking to use a WQEA credit when they must get an Environmental Resource Permit (ERP) under the updated Stormwater Rule does not consider the protections created within the updated Stormwater Rule. Any applicant seeking to buy an Enhancement Credit must meet the minimum performance standards in the Stormwater Rule, Pre=Post. Further, because of the Pre=Post minimum requirement in the updated Stormwater Rule, the conditions in each water body, water segment, cannot ever be worse than they are today.

More likely, applicants seeking improvements are more likely to seek improved density, or an improvement that would increase runoff volumes beyond pre-condition runoff. As a result, additional storage will likely be needed on-site, and therefore attenuation of greater volumes would need to occur, which improves water quality conditions more than what was in the Pre-project condition. Therefore, under the new stormwater rule, even if an Enhancement Credit is sought, water quality improvements are more than likely occurring at rates greater than pre-conditions.

The July 2024 draft of both the WQEA and WQCT rules refer to a new calculation for the development of the location value factors (LVF). For WQEA, prior to stating the numerical equation by which applicants should determine the LVF, the section of the rule provides for an applicant to determine LVF by numerical calculation or model. It is unclear what the Department's intent is for LVF determination.

The Department also appears to have imparted the limitation of only being able to sell Enhancement Credits to buyers downstream of the WQEA through the LVF. However, as stated previously in this letter, there is no expressed statutory authority creating this limitation and LVF should be changed to accommodate sales anywhere within the service area permitted for the WQEA.

The LVF numerical calculation proposed by the Department requires using Arithmetic Mean and Annual Geometric Mean Concentrations to develop the Variability Factor (VF) in the equation. While these may be appropriate for some springs and lakes, these means are not used consistently across all water bodies in the state for establishing whether a water body has met its TMDL or target reductions for impaired systems. The calculations should be consistent with and considerate of all the TMDLs/impaired systems, for which some are determined via Arithmetic Mean Concentration, Annual Geometric Mean Concentration, or load based, mass balance equations and flow weighted mean concentrations.

It is also important for the LVF to be considerate of the process in ch. 62-330, F.A.C for determining water quality improvements required to be made by ERP applicants, which is mass-balance load based.

To resolve the inconsistency of methods used across the state as documented in ch. 62-304, F.A.C. *Total Maximum Daily Loads* and ch. 62-330, F.A.C., we recommend omitting a specific numerical equation and allowing applicants to demonstrate the LVF through models and numerical calculations that are consistent with the practices and methods for measuring improvements in the impaired water body(ies) which the Enhancement Credit should serve.

III. Generation of Perpetual Credits

In accordance with ch. 373.4134, F.S., the sale of an Enhancement Credit is perpetual. The financial assurances and reasonable assurances requirements for a WQEA allow the sale of an Enhancement Credit to be considered perpetual. This is primarily achieved by developing a WQEA permitting process as described in Section 373.4134, F.S., and modeled after the wetland mitigation banking rule, chapter 62-342, F.A.C., which includes the necessary site-specific review and approval, financial assurances, verification of ecological performance criteria, and long-term stewardship.

As a result of a sale of a perpetual Enhancement Credit, the buyers shall not be held responsible for the failure of a WQEA, which is consistent with the perpetual nature of the ERP's Operations and Maintenance. In the July 2024 draft of the WQEA and updated WQCT, this concept is contradicted by requiring WQEA transactions for BMAP/RAP entities to be subject to the liabilities required under ch. 62-306, F.A.C. which in the event of a WQEA failure the buyer must seek another way to satisfy its requirements.

As stated previously in this letter, this integration of actions between rules is inconsistent with the statutory authority of ch. 373.4134, F.S. It is also inconsistent with ch. 403.067, F.S. (7)(a)7.(4), which limits the water quality credit trading framework to "point or nonpoint sources that will achieve greater pollutant reductions than required by an adopted TMDL or wasteload allocation to generate, register, and trade water quality credits for the excess reductions to enable other sources to achieve their allocation;" .

Trades of water quality credits under the WQCT Rule are for "limited durations" as there is a "life of the trade", Section 62-306.300 and .800. Therefore, the WQCT Rule may provide for an annual credit, limited term, option for point and non-point source contributors within BMAPs or RAPs looking for a temporary solution to satisfy their BMAPs or RAP allocation, which is consistent with ch. 403.067, F.S.

IV. Consistent Terminology Will Avoid Confusion

Previous conversations with the Department have confirmed that the terms "trade" and "trading" are not used in section 373.4134, F.S. because Enhancement Credits are not "traded", they are transactions that occur because of a sale. Therefore, the terms "trade" and "trading" should be reserved for the WQCT Rule where the terms are referenced in the enabling statute, section 403.067, F.S.

It was also agreed that the simple term of "credit" should not be used in the WQEA Rule to ensure clarity for the reader because there are three rules, WQEA Rule, WQCT Rule, and the mitigation banking rule (chapter 62-342), that each address some form of "credit". The term "enhancement credit" is defined in section 373.4134, F.S. and should be used in lieu of "credits" for the transacted units under the WQEA Rule.

V. Permitting and Ledger Management Process - The Rule Does Not Acknowledge the Role of the Water Management Districts (WMD)

Most ERP applications are processed and issued through one of five WMDs. The rule draft as proposed requires the DEP to maintain and administer the ledgers/enhancement credits of the WQEAs. The draft rule also effectively has DEP performing a review of the ERP application for suitability for Enhancement Credit use before the applicant submits the ERP application to the WMD. The process as proposed places additional burden on DEP and adds extra administrative activities for the applicants, which may be avoided with some modifications to procedures to be more consistent with the process in which the wetland mitigation bank credits are withdrawn from available credits on the mitigation bank credit ledger, through WMDs.

From previous conversation with the Department, we understood that a more functional solution for processing of permits for ERP applicants seeking to purchase an Enhancement Credit from a WQEA would follow a process like what is provided here:

> *1) Applicant's seeking to purchase an Enhancement Credit will work with WQEA provider to determine approximate number of credits needed to satisfy the regulatory requirement using the DEP WQEA permit approved, and applicable model/calculations.*
>
> *2) Upon receipt of a "reservation" from the WQEA Enhancement Credit provider that outlines the total Enhancement Credit demand resulting from the applicant's project, the applicant, with or without the WQEA Enhancement Credit provider, will seek a pre-application meeting with the DEP to review the reservation of the proposed quantity of Enhancement Credits, which may include a review of the applicable calculations / model results used to determine the Enhancement Credit demand.*
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> *3) Following a confirmation from the DEP that the reserved Enhancement Credits will satisfy the applicant's regulatory requirement, the DEP shall "approve" the reservation letter and provide copy of the "approved" reservation letter from the WQEA Enhancement Credit Provider to the WMD responsible for issuing an ERP to the applicant.*
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> *4) DEP shall issue the copy of the approved reservation letter within 10 business days following the receipt of the ERP application number from the applicant to ensure WMD ERP review time clock requirements can be met.*

VI. Generation and sale of credits/allocations from non WQEA/WQCTs

The Department in previous conversations with RES confirmed that chapter 62-330, F.A.C. Applicant's Handbook Vol. 1,9.7.3 *Regional Stormwater Management Systems (RSMS),* does not authorize RSMS to generate or sell "credits".

The Department also confirmed that RSMS are only to be used to collect and treat runoff from parcels that are connected to the RSMS directly, and that do not discharge first to a publicly owned, operated, and maintained "regional system". RSMS is the facility perpetually responsible for the treatment of the runoff that it collects, and under chapter 62-330, F.A.C. ratified in 2024, there is no financial assurance mechanism for owners of RSMS to guarantee the performance of a RSMS. Failure of these systems places the full technical and financial burden on the public to remedy the issues resulting from the failure of an RSMS, ultimately leaving waterbodies unprotected.

The current practice of additional "allocations" sold as "credits" in an RSMS is further exacerbated by the reporting policy required under ch. 62-330, F.A.C. for each RSMS, where form 62-330.311 must be completed annually by the RSMS owner and submitted to the Department to affirm conditions. The annual form submitted by the RSMS is limited to only a "structural inspection" and confirming changes in inflow volumes over an annual period compared to the allocations authorized under permit. There is no evaluation requirement for water quality treatment performance, other than a presumption that the RSMS is providing a nominal level of water quality improvement.

Should an RSMS fail, it is unclear what process exists between the Department and WMDs, RSMS permit holders, and ERP applicant/purchasers to ensure the environmental resource is being restored. Buyers believe that they are purchasing "perpetual credits/allocations", but there is no establishment of performance standards or financial assurances to provide long term success guarantees.

It does not appear that any statutory authority exists to allow for the generation and sale of perpetual or annual credits or allocations by an RSMS to offset ERP applicant water quantity or water quality requirements. RSMS sell unauthorized "credits" to buyers, and the Department, and the District continue to authorize permits for public and private entities to increase storage/treatment capacities, timing of discharges, and increase attenuation and then sell "credits" or allocation to others.

While the permit modifications are legally issued, the sale of a "credit" or an allocation with the equivalency of a WQEA Enhancement Credit is not authorized but may be currently occurring across several regions. Clarity should be provided through the current rule development and update, to ensure buyers can distinguish between a permanent offset for the water quality and quantity requirements that otherwise must be managed on site.

Furthermore, the ponds used as RSMS are not covered by a conservation or preservation easement and there is no guarantee they will remain. And should these sites be modified or eliminated because the road is moved, there is no guarantee for the continued treatment of the water to meet the "credits" previously sold. This leaves not only the buyer at risk, but also the DEP and public since the water quality improvements will now need to be created using public funds.

VII. Off-site compensatory treatment definition and application

RES and the Department do not have agreement on:

1) how chapter 62-330 F.A.C., Applicant's Handbooks vol. 1, 9.7, governs the application and use of WQEAs, RSMS, and authority to sell "credits" and enforcement of the sale of "credits", and
2) the Department's interpretation of section 373.4134, F.S. and its relationship to chapter 62-330 F.A.C., Applicant's Handbooks vol. 1, 9.7.2, limiting the sale of Enhancement Credits from WQEAs to downstream ERP applicants.

Section 373.4134, F.S. refers to the phrase "offsite compensatory treatment" to describe a regional stormwater management system or facility that performs water quality treatment off site for impacts of activities regulated under Chapter 373.4134, F.S.

At the time the WQEA statute was enacted, the term "off-site compensatory treatment" was not in chapter 62-330, F.A.C. and therefore, the attempted use of definitions and sections of chapter 62-330, F.A.C regarding "offsite compensatory treatment", "off-site compensating treatment", "off-site compensation", "compensating stormwater", is inconsistent with the legislative intent for the use of "offsite compensatory treatment" in Section 373.4134, F.S. and should not apply to WQEAs.

VIII. Limitations on Locations for WQEAs exceeding statutory authority

The Department continues to place prohibitions in the WQEA rule on locations where WQEAs can be located. The prohibitions added by the Department in the draft WQEA rule exceed the prohibitions authorized under sect. 373.4134, F.S. The unauthorized prohibition in proposed ch. 62-332, F.A.C.: "WQEAs may not be located within areas designated for conservation, mitigation, restoration, or reclamation by state law or permit." The statute only prohibits WQEAs "located within areas purchased for conservation pursuant to Florida Forever Act or the Florida Preservation 2000 Act".

IX. Unnecessary Provisions

RES identified that section 373.4134 (4)(a)6, F.S. is written to "Provide for permanent preservation of the water quality enhancement area that meets the requirements of section.704.06". Section 704.06 F.S. is the enabling statute for the development of a variety of preservation and conservation easements. Proposed 62-332, F.A.C, draft WQEA rule, appears to limit, and/or further define and redefine, what constitutes a conservation easement.

The limitations and redefinition of what is authorized under sect. 704.06 F.S., created by the language added by the Department in the draft WQEA rule surrounding conservation easements, exceed the Department's authority and are not practical for all water quality improvement solutions that may be submitted by ERP applicants seeking a permit to develop a WQEA. But for this added language, the applications can satisfy the regulatory requirements of section 704.06, F.S.

The use of "preservation of the water quality enhancement area" allows a WQEA applicant to provide a variety of system solutions and satisfy requirements of section 704.06 F.S., as required under section 373.4134 F.S. RES has stated in previous conversations that many of the State's own projects providing water quality treatment where similar methods could be used to create a WQEA, would not meet the definition of conservation easement as drafted in the draft WQEA rule. The Department has agreed to reconsider the language to be more consistent with section 373.4134 (4)(a)6., F.S.

We appreciate your time and consideration and look forward to moving a productive rule forward for all stakeholders.

Sincerely,

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