October 7, 2024

John Coates, P.E., Director
Division of Water Resource Management
Florida Department of Environmental Protection
2600 Blair Stone Rd, MS 3595 Tallahassee, Florida 32399

Subject: Comments on Draft Rules 62-332 and 62-306, Florida Administrative Code

Dear Mr. Coates:

Sustainable Water Infrastructure Group, LLC, (SWIG) appreciates the efforts Governor DeSantis, the Legislature, and the Florida Department of Environmental Protection ("Department") have taken to develop plans, programs, legislation, and appropriations to improve water resources and water quality across the state of Florida. We also appreciate the Department's rulemaking efforts for the development of a private, market and data driven, approach to improving water resources through Water Quality Enhancement Areas (WQEAs), which demonstrates the Department's commitment to, and recognition of, the private sector's ability to develop and sustain impactful, innovative solutions. WQEAs provide one more "tool in the toolbox" to help move the needle on water quality improvements. WQEA also allows private capital and business to business and business to government transactions to put projects in action not just quickly, but cost-effectively and responsibly. Without the private sector's entry into the solution, SWIG believes the water quality concerns of today will continue into tomorrow because the government cannot do it all, despite its best efforts. There simply isn't enough government funding, land, or staff for the Department and the water management districts to resolve this important issue alone.

While we are excited to see the incorporation of the private sector's projects and contributions to the improvement of water quality and water quantity, we want to ensure that a successful and productive offsite compensatory water quality treatment marketplace thrives. This includes a market where "credits" sold means a guarantee for performance has been made to both the buyer and taxpayer. The market should provide reasonable assurances for the perpetual improvement in water quality from the off-site compensatory treatment. The framework created, through the rulemaking, must allow the marketplace to function reasonably, effectively, and responsibly, and the system developed must be transparent and fair.

A fair market provides for better projects that the public and buyers seeking credits can rely on. Critical components to ensuring responsibility and reliability are built into the WQEA credit market by s. 373.4134, F.S. These include requiring practices and standards in the rule that are consistent with the statute, including adequate long-term maintenance and stewardship structures and financial assurances. These practices and high standards are a cornerstone to the most successful and protective environmental credit/allocation-based systems across the county where "performance" is the "commodity" being sold. With these protections in place, the performance expected by both the credit buyer and taxpayer is secured.

In response to the July 2024 draft of proposed chapter 62-332, F.A.C., the update of chapter 62-306, F.A.C., and pursuant to the discussion of the implementation of changes proposed by the Department at the July 28, 2024, workshop, SWIG provides a summary of proposed changes.

1. **<u>THE STATUTORY AUTHORITY FOR THE WQEA RULES IS SECTION 373.4134, F.S., NOT SECTION 403.067, F.S.</u>**

a. The statutory authority for the development of a WQEA rule is s.373.4134, F.S. The draft rule inaccurately sets forth s.403.067, F.S. as additional statutory authority over WQEA. Section 403.067, F.S. is the Florida Watershed Protection Act in which the Florida legislature directed the Department to evaluate state waters and establish Total Maximum Daily Loads ("TMDLs") for waters with impaired water quality. Under the authority of this rule, the Department may develop basin management plans ("BMAPs") to achieve these TMDLs and promulgate rules establishing best management practices. This section of 403, F.S. only provides the Department authority to develop a rule for a credit trading framework for trades 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…."[s.403.067(7)(a)7., F.S.]. The Section does not provide authority for the adoption of WQEA rules.

With the passing of s.373.4134 F.S., a framework for credit generation and sale from a WQEA was authorized, so that the credits generated could be sold to "applicants seeking permits under ss. 373.403-373.443 and to governmental entities seeking to meet an assigned basin management action plan allocation or reasonable assurance plan under s. 403.067, F.S." Section 403.067, F.S. is only referenced for the purpose of clarifying what is a basin management action plan allocation or reasonable assurance plan. It is not intended to provide authority for the development of a WQEA program or market framework.

SWIG recommends honoring the intent of the implementing statutes by maintaining two separate frameworks with separate structures. Two systems provide options to applicants and BMAP/RAP entities needing allocations to meet water quality requirements that may otherwise be impracticable or cost prohibitive on-site or unattainable from a public funding perspective. The separate frameworks expand opportunities to make impactful improvements in Florida's water resources.

b. Section 403.067, F.S. limits the sale of credits from/between point and non-point source contributors with allocations, and only if the entity supplying the credit has met its allocation under the BMAP. The July 2024 draft of chapter 62-306(1), F.A.C., General Requirements, appears to attempt to lift this limitation by omitting the requirement for credit generators and trades to be between "detailed allocations to point sources and detailed or categorical allocations to nonpoint sources" and replacing with language that allows trades between "individual entities.

SWIG recommends the Department maintain the previous language to ensure consistency with the statutory authority.

2. **<u>THE "HYDROLOGICALLY CONNECTED AND DOWNSTREAM" LIMITATION IS NOT AUTHORIZED IN STATUTE</u>**

The July 2024 draft of chapter 62-332, F.A.C. continues to require Enhancement Credits Buyers to be "hydrologically connected and downstream". This limitation exceeds the enabling statute. When buyers are authorized to purchase an Enhancement Credit within their Environmental Resource Permit (ERP), they are required to satisfy the minimum performance standard of post project water quality is equal to or greater than pre project water quality. Therefore, all ERP applicants who have met the minimum performance standard and seek to satisfy the net improvement standard through the purchase of Enhancement Credits, are "compliant" with the ERP rules. As a result, no "hot spots" are created, which the Department has stated on multiple occasions during public workshops is the premise for the language "hydrologically connected and downstream". As a result, Location Valuation Factors (LVF)s should be applied to WQEAs and Enhancement Credit buyer projects in the same way they are applied in the July 2024 draft of chapter 62-306, F.A.C. between project and the impaired waterbody. The LVF assures that the spatial, time, and distance (attenuation) are properly accounted for to balance credits needed to credits sold.

SWIG requests language in chapter 62-332, F.A.C. be limited to what is authorized in statute by removing the language "hydrologically connected and downstream" throughout the chapter.

3. LOCATION VALUE AND VARIABILITY FACTORS

The equations for calculating LVF within the July 2024 draft of chapter 62-306, F.A.C. and ch.62-332, F.A.C. use Arithmetic Mean (AM) and Annual Geometric Mean (AGM) concentrations to develop the Variability Factor (VF) in the LVF equation. AM and AGM concentrations are not used across all TMDLs within the state. Mass loading and Flow Weighted Mean Concentrations are used in some TMDLs but are not represented with the LVF equation provided in the July drafts. The LVF equation also is inconsistent with the methodology used to determine the required nutrient reduction for Applicants under ch.62-330, F.A.C. ERP Applicant's Handbook volume I refers applicants to event mean concentrations and mass loadings.

> *"**9.2 Calculating Nutrient Loading** Applicants shall determine the stormwater annual runoff volume for the corresponding predevelopment and post-development conditions for the project area, and determine the associated annual stormwater runoff mass loading for pollutants of interest. Sections 9.2.1 and 9.2.2 below describe acceptable concentration-based loading calculations; however, the applicant may provide alternative calculations or modeling results, where those calculations or results provide an equivalent or greater degree of supporting information and reliability for estimating annual stormwater runoff mass loading. The annual stormwater mass loading shall be determined for the project area and any offsite contributing areas as denoted below in Section 9.6."*
>
> *"**9.2.2 Calculating Predevelopment and Post-development Stormwater Nutrient Loading.***
>
> *a. To calculate the predevelopment and post development loadings before treatment of the annual mass loadings for TN and TP, multiply the predevelopment annual runoff volume (derived in Section 9.2.1) by the land use specific runoff characterization data (event mean concentrations or EMCs) for TN and TP. Applicants must use the most up-to-date verified EMC values, where available and incorporated by reference pursuant to rule 62.330.301(4), for their project region…." (Environmental Resource Applicant's Handbook vol. 1, 2024)*

SWIG recommends valuations and LVF be established for the WQEA by the WQEA owner, with approval by the Department during WQEA permit review. The WQEA owner should be responsible for determining the appropriate LVF equation and must support that within their application to the Department. It is important that LVF equations are consistent with the methodologies used to establish:

1) when a TMDL is met, as provided for in chapter 62-304, F.A.C *Total Maximum Daily* Loads, for consistency with how BMAP/RAP entities are assessed and will use an enhancement credit, and

2) the required nutrient reduction for an ERP Applicant established in chapter 62-330, F.A.C., ERP Applicant's Handbook volume I for consistency in how an ERP Applicant will need to use/apply a credit.

The methodology used to establish the LVF equation for the WQEA should be the same equation that is used to establish the LVF for the Applicant's project, or entity's location if the credit is intended to meet an allocation of a BMAP/RAP. The LVFs should then be used to determine ultimate credit purchase requirement using the similar ratio method as provided within July 2024 draft of ch.62-306, F.A.C., *(Number of Pounds or Kilograms needed for reduction) x (LVF Buyer's)/(LVF for Seller).*

4. INEQUITY ACROSS PROGRAMS

SWIG continues to see inequity in credit "value" that will be available for sale, meaning that the Enhancement Credit suppliers and market will have a significant responsibility, in perpetuity, under Ch. 62-332, F.A.C., compared to the little to no responsibility and accountability placed on acting sellers of "credits" and "allocations" today under section 9.7.3, ERP Applicant's Handbook Volume I.

SWIG believes a high standard of excellence in performance, responsibility, and accountability should be expected of all suppliers of "credits" or "allocations" sold to an ERP Applicant or public entity, to be consistent with the expectations of the public has for that credit buyer. The public expects that the ERP applicant and WQEA perform perpetually. Unfortunately, these requirements for responsible and accountable performance and financial assurance are not being currently placed on all off-site water quality compensatory treatment providers. All suppliers of off-site water quality compensation must ensure that off-site water quality treatment is maintained in perpetuity. Financial assurances help to ensure that the failure of any owner to perform is not passed to Florida taxpayers, and ultimately the Department, to resolve. There are not any financial assurances or "backstops" for the public when "credits" or "allocations are traded under ch62-306, F.A.C. or are sold under the guise of a Regional Stormwater Management Systems (RSMS).

Failure of a WQCT provider to perform may result in the need for public funding to replace the credit/allocation that the entity (government/utility) previously purchased that is no longer performing. An RSMS that has sold "credits" or "allocations" to entities off-site that first connect to a publicly controlled drainage system prior to reaching the RSMS has sold capacity in a stormwater management system (SWMS) that has no financial assurances to ensure perpetual performance of that SWMS and cannot effectively guarantee perpetual performance to the "credit"/"allocation" buyer. Failure of the RSMS to perform transfers the full responsibility to improve the water body and segment back on the public.

SWIG recommends improving the language in ch.62-306, F.A.C. to require non-governmental (typically a utility) entities generating and selling credits to, at a minimum, provide to the buyer and the Department a financial assurance instrument, such as a bond, to ensure the performance of the credits for the duration of the credit purchase.

SWIG also highly recommends that the Department clarify in rule or through formal guidance memo to ERP applicants and Water Management District regulatory staff the proper application of RSMS: Any RSMS seeking to provide "credits" or "allocations" to applicants seeking to meet their pollutant reduction requirements off-site, or to a BMAP/RAP entity, must 1) Be permitted as a WQEA. Or, 2) the RSMS must comply with Section 9.7.2, ERP Applicant's Handbook volume I, pertaining to Off-Site Compensation, which may require the permit of the RSMS to be modified and will require legal interest over the Off-Site Compensation area to be provided to the buyer. Section 9.7.2, ERP Applicant's Handbook volume I, requires:

(a) The permittee must have legal authorization over the off-site treatment area in accordance with sections 1.5.6. and 4.2.3(d) of this volume;

(b) The proposed off-site area must be located within a HUC 12 subwatershed containing the proposed project, unless the applicant provides justification demonstrating that the proposed off-site area would provide the same degree of compensating treatment for a common downstream receiving waterbody without causing or contributing to any localized adverse impact to any downstream waters. The proposed off-site area must be hydrologically connected to the same or a downstream waterbody as the proposed project, unless otherwise noted by the applicable special basin criteria;

(c) The applicant shall use modeling techniques to provide reasonable assurance that the off-site treatment system provides an equivalent amount of pollutant reductions at the point of discharge for the project as if all of the treatment was performed on-site; and

(d) Where the operation and maintenance entity does not own the area proposed to be used for offsite treatment, legal authorization shall be granted to the operation and maintenance entity, as required in Section 12.4 of this volume, for the area to allow for perpetual operation and maintenance access to the off-site treatment area.

5. DETERMINATION OF THE NUMBER OF CREDITS NEEDED BY AN IMPACT APPLICANT

The July 2024 draft of chapter 62-332, F.A.C. requires the Department to determine the number of Enhancement Credits needed by an impact applicant, even for permits being reviewed and issued by a water management district. This will place an incredible burden upon the Department, since it will be required to review a portion of the permit that the water management districts would otherwise review under the terms of the Operating Agreements between the Department and each water management district.

SWIG recommends that the Department reconsider the review process to prevent an overburden on the Department and also to limit buyers from being bounced between agencies.

It is also important to clarify that the Department, or final review agency, will not and does not need to determine the number of Enhancement Credits needed, but will only be verifying and confirming the number of Enhancement Credits the Applicant has stated are appropriate for their project.

6. ALL ENTITIES THAT SELL CREDITS OR ALLOCATIONS PROVIDING COMPENSATING TREATMENT OFF-SITE SHOULD ADHERE TO THE REQUIREMENTS OF CHAPTER 62-332, F.A.C.

a. Ch. 62-330, F.A.C. Applicant's Handbook Vol. 1 (Handbook), s. 9.7.3 *Regional Stormwater Management Systems (RSMS),* does not authorize RSMS to generate and sell "credits" or "allocations" for the collection, storage, and treatment of runoff to parcels that are directly, hydrologically connected to the RSMS. However, RSMS are openly advertising that they have "credits" and "allocations" available for sale for this purpose.

   SWIG recommends RSMS seeking to generate and sell "credits" or "allocations" be subject to the entirety of Ch. 62-332, F.A.C. if it is the intent of the Department to allow the generation and sale of "credits" and/or "allocations" from RSMS. Further, without this requirement, reasonable assurances of perpetual water quality treatment or storage are not ensured and there are no financial assurances provided to the Department, taxpayers, or buyers to resolve performance of any failed RSMS, placing publicly managed water resource systems at a severe disadvantage. Applying the requirements from Ch. 62-332, F.A.C. ensures market participants are developing and performing to a consistent level established through standards for the generation and sale of perpetual and annual "credits/allocations". Importantly, financial assurances and technical standards reduce, and possibly eliminate, the risks associated with failed, underperforming systems, provide for preservation of the system, ensures fair competition among providers, and provides assurances for the long-term performance of the off-site compensatory water quality area for the public.

b. Any entity that sells a "credit" or "allocation" to applicants seeking permits under s. 373.403-373.443, F.S., for the purpose of achieving net improvement or meeting environmental resource permit performance standards under s. 373.414(1)(b)3, F.S., is considered a provider of off-site compensatory treatment, and therefore should be subject to WQEA requirements. Additionally, any private entity that sells a "credit" or "allocation" to applicants seeking to meet BMAP/RAP allocations is also subject to WQEA requirements per s.373.4134, F.S.

   SWIG recommends the Department provide clarity through the WQEA rule and the accompanying workshops that any non-governmental entity that generates and sells credits or allocations to ERP applicants or to a BMAP/RAP entity in perpetuity, shall be required to follow the WQEA rule.

c. The term "hydrologically connected" is inconsistently applied by the Department across the three separate systems addressed throughout this letter: WQEA (ch.62-332, F.A.C.), RSMS (ch.62-330, F.A.C.), and WQCT (ch.62-306, F.A.C.). From observation, it appears that the term was removed from the July 2024 draft of the WQCT rule, however, was added to the July 2024 draft of the WQEA rule in multiple locations, and emphasis was placed on the term in the last workshop by the Department that the term referred to WQEA and Applicant's project being "on the same reach" of a waterbody/water segment. The term is not a part of the implementing statute for either WQCT or WQEA.

   "Hydrologically Connected" has been referenced by the Department in relationship to describing the "drainage area" or "land or development that is served by or contributes stormwater to a regional system," (Handbook, s. 9.7.3) when discussing the water that is contributing to a RSMS's allocation. It appears that the interpretation of the extent of the "drainage area" as defined for RSMS, referenced above, is not interpreted consistently.

SWIG recommends the Department clearly define the phrase "hydrologically connected" for consistency when used and applied appropriately and remove the phrase from rule language where inconsistent with implementing statutes.

d. It is SWIG's understanding that the Department's interpretation of how an RSMS functions is that the runoff collected by an RSMS should not have first been discharged to a publicly owned, operated, and maintained system, often referred to as the "regional system", "MS4 network", "secondary/298 system", prior to reaching the RSMS. The RSMS is to serve only those properties where compensation is considered "on-site" as RSMS is not defined as an "off-site compensatory treatment" system per Handbook, s. 9.7.3. The runoff of the parcels connected to the RSMS is only permitted to discharge at the discharge point of the RSMS, and therefore must be directly connected. It does not appear this interpretation of the definition is being applied across the state consistently.

   SWIG recommends the Department provide a formal guidance memo to ensure appropriate application of RSMS and consistency in permitting across the different water management district

7. **THE STATUTORY AUTHORITY FOR LIMITING WHERE WQEAS MAY BE LOCATED IS CLEAR IN STATUTE AND SHOULD NOT BE REDEFINED IN THE RULE.**

   The implementing statute for WQEAs, 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". However, the proposed rule attempts to further limit where WQEAs may not be located. The proposed rule states: "WQEAs may not be located within areas designated for conservation, mitigation, restoration, or reclamation by state law or permit," This limitation significantly exceeds the statutory authority. SWIG requests that the limits in the statute not be exceeded in the rule.

8. **EASE OF IMPLEMENTATION OF THE PERMIT PROCESS ENSURES CONSISTENCY AND ACCURACY.**

   Chapter 62-332, F.A.C. once enacted requires it to be integrated into the ERP process for a seamless process and to ensure it is effective for buyers and taxpayers. The draft rule does not clearly convey the process by which Applicant permits seeking to use off-site compensatory treatment options - Handbook s.9.72., s.9.7.3, or WQEA Enhancement Credits – should follow to accurately and expeditiously be processed through the ERP review.

   To facilitate a better understanding of the issues raised in this comment letter, SWIG has developed and included two enclosures to this letter that provide 1) A decision matrix for users of the Handbook and regulators on when and how each of the off-site compensatory treatment options may be used, and 2) a flow chart of the ERP process when an Applicant seeks to use a WQEA Enhancement Credit. We believe these enclosures represent an accurate interpretation of how the Handbook recognizes and distinguishes between the different off-site compensatory treatment options available to Applicants, and how the current draft of ch. 62-332, F.A.C. guides Applicants and Regulators through the review process when an Applicants elects to use a WQEA Enhancement Credit to satisfy the ERP net improvement requirements or environmental resource performance standards (s. 373.4134(1)d. and (2)(a)).

SWIG is pleased to be a part of this monumental rulemaking that will create a robust market for participants and the public at large. We appreciate the Department taking our comments into consideration as you continue to shape the rule language to ensure it is high functioning, responsible, reasonable, and available for all to fairly participate.

If you have any questions, we are happy to connect at your convenience and hope to set up some time with your team to address our comments.

Sincerely,

Jerome Ryan

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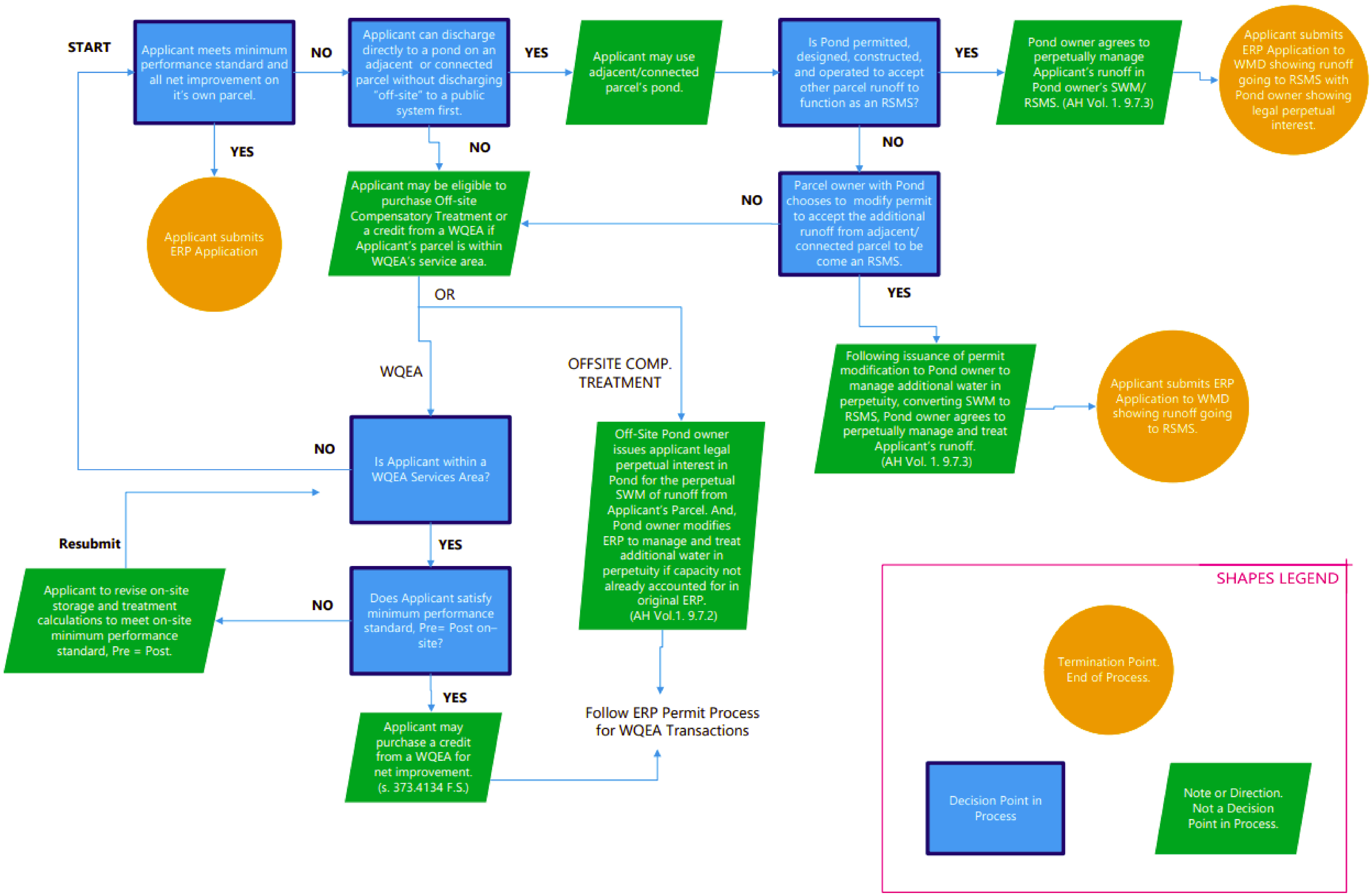
Enclosures (2)

Enclosure 1



Which is the Appropriate Off-Site Compensatory Treatment Solution?

Enclosure 2

Enhancement Credit/ERP Permit Process Flow