City of Tallahassee Stormwater Management
Comments RE: Water Quality Enhancement Area Credit Transactions (62-332, F.A.C.)

General Comment:

It's understood that the Department is fulfilling legislative directive as a result of HB965 (2022) and resultant Section 373.4131 F.S.; however, the intent of the collective effort is confusing, unnecessary and has the potential to result in unintended consequences. The ability to implement large scale water quality improvement projects exists under the current regulatory landscape. Water quality credit trading is currently practiced under 62-306, F.A.C., regional stormwater facilities are implemented through the environmental resource permitting program (62-330, F.A.C.) and Public-Private Partnerships (P3) are authorized under 255.065 F.S. It should be recognized that these existing rules and practices fulfill any water quality needs that could be potentially met through the proposed rulemaking. Therefore, understanding the legislative directive but to mitigate any unintended consequences of the legislation and subsequent rulemaking effort, it's recommended that the Department consider potential improvements to the existing and available tools to further encourage implementation. However, based on the current draft the below comments are offered.

62-332.100 Scope and Intent:

- Section 373.4134 F.S. limits the use of WQEA credits to meet BMAPs/RAPs or for generic net improvement 373.4134(3)(b) F.S. The current draft reads (2) *to satisfy the environmental resource permit (ERP) net improvement or performance standard*. It's unclear why the proposed rule expands the legislative intent. Based on this expansion of the legislative intent, the Department should strongly consider a prohibition on the use of grant dollars for WQEA's that sell credits to purchaser's in order meet their respective NPDES or ERP permit obligations.
- Regarding the relation of 62-332 to existing rules, the current draft reads (3) *is supplemental to and does not supersede*. However, we recommend adding additional clarity to ensure current activities allowed under 62-306 F.A.C and 62-330, F.A.C. are not prohibited or limited by the proposed rule. To provide clarity to (3) we recommend the following rewrite: This chapter is supplemental to rules promulgated under Part IV of Chapter 373, F.S., Chapter 62-306 F.A.C., and Chapter 62-330, F.A.C., and does not supersede any requirements therein nor prohibit or limit any activities allowed therefrom.

62-332.200 Definitions:

- The definition of BMP (1) is different in 62-306.200(2) F.A.C.
- The definition of credit (3) is different in 62-306.200(2) F.A.C. Furthermore, the definition references *valuation factors* which are not defined elsewhere. Our understanding is that valuation factors are the Locational Valuation Factor (LVF) defined in 62.332.500(4). Here again, LVF differs from 62-306 which uses location factors (LF) and uncertainty factors (UF) for the same purpose. LVF or LF & UF should be defined in 62.332.200.
- The definition of WQEA service area (10) references *impacts*. The term impact is used throughout 62-332 and appears to refer to different types of impacts. In some sections of 62-332, impact appears to refer to pollutant load in other sections impact appears to refer to impervious area or disturbed area. Clarity is needed in this definition and elsewhere in 62-332 to understand what

impacts are referenced. Also, it is unclear what noun is modified by the final phrase *as determined by the Department*. Presumably, the impacts will be determined by the department. However, if the final phrase refers to the service area itself then the definition conflicts with 62-332.500(2).

- No definition is provided for *value* or *valuation*. In some sections of 62-332, value appears to refer to pollutant load reduction (or environmental value such as 62.332.300(10)) in other sections such as 62-332.400(4), 62-332.500(4)(d), and 62-332.600(7) the term value is less clear in meaning and may be interpreted as monetary cost. The use of value needs to be clarified throughout. Use of *determination* instead of *value* when referencing the load reduction amount for credits may be helpful in providing clarity.
- No definition is provided for *project*. In some sections of 62-332, project refers to the purchase of credit to meet BMAP or RAP requirements whereas in other sections project has a more traditional meaning and refers to a land development project. The use of project needs to be clarified throughout, particularly when potentially referring to the purchase of credits without associated land development activities.
- No definition is provided for *Reasonable Assurance Plan* (RAP) though they are referenced throughout 62-332.

62-332.300 General Requirements:

- (7) expands the legislative intent allowing for governmental entities to meet net improvement or performance standard permit requirements.
- It is unclear why upstream land development projects are not allowed (8). Since the WQEA service area is downstream, requiring projects be located within the service area makes sense when the "project" is a purchase of credit to offset a BMAP or RAP requirement that does not include land development activities. However, requiring the project to be downstream of the WQEA does not make sense when the project is a land development activity. We understand that the credits are reduced to account for instream pollutant load reductions downstream of the WQEA, but it is unclear why land development projects are not allowable within the contributing area to the WQEA in all cases. The allowance is provided for OFWs via 62-332.500(3).
- To enhance clarity, we recommend moving the phrase (10) a*n enhancement credit retains its environmental value only if the activities resulting in its creation continue to provide at least the same level of pollutant load reduction authorized by the Department* to be included in the definition of credit, 62-332.200(3).

62-332.400 Enhancement Credit Generation and Valuation

- To provide clarity to (1)(b) we recommend the following rewrite: The determination of enhancement credits shall consider expected hydrologic or performance variations as well as uncertainty between the numerical models or other analytical tools used to estimate the expected removal of pollutants and the actual pollutant removal from the WQEA. Credits shall be based on the most conservative combination of considerations.
- To provide clarity to (4) we recommend the following rewrite: At a minimum, a WQEA permit application must contain:
    (a) Documentation of the numerical model or analytical tool, inputs, and results, used to establish the efficacy of the WQEA, including all information to support the permit

application required by Rule 62-330.054, F.A.C., and any other information required by this Rule relevant to support credit value.

(b) Site-specific conditions affecting the anticipated performance of the proposed WQEA, including the proposed BMP and expected pollutant load reduction rates.

(c) Credits are based on pollutants removed after the applicant performs all required pollution control activities.

(d) Other expanded items mentioned in 62-332.500 & .600 such as analysis of instream (downstream) reductions.

(e) Any other information required by this Rule or otherwise relevant to support credit value.

- We recommend the Department require pre-application meetings for WQEA permits given the unique complexity of the requirements.

62-332.500 Service Area and Enhancement Credit Location Valuation Factor Adjustments

- Since LVFs are determined at the time of the project permit modification (4)(d), it is unclear how cost negotiations will occur between owner and purchaser prior to permit approval. Furthermore, since the analytical method to determine LVFs is not described in detail, it is difficult for an owner or purchaser to estimate what the LVF determination will require for a given project. It is also unclear how the LVF will be determined for projects outside of the service area, such as allowed under 62-332.500(3).

62-332.600 Enhancement Credit Transactions and Credit Use

- For item (5), we recommend providing additional clarity on what will constitute *reasonable assurance*.

62-332.800 Enhancement Credit Tracking & 62-332.900 Compliance and Enforcement

- All discussion of credit valuation appears to be for load reduction. It is unclear how, when, or by whom a purchase price is established for credits. Presumably this is the owner's privilege, but are there guardrails to prevent price gouging? Can prices vary by customer or credit? For example, can owners increase the cost of credits as they are purchased? Or year-by-year? Municipal purchasers appear to have significant risk.