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February 26, 2024

Mr. Borja Crane-Amores
Division of Water Resource Management
Stormwater & Technical Services Program
Florida Department of Environmental Protection
Via E-mail: Borja.CraneAmores@FloridaDEP.gov

RE: Florida Mitigation Banking Industry Comments Regarding Rulemaking as directed by Section 1 of Chapter 2022-215, Laws of Florida: Water Quality Enhancement Areas (WQEAs)

Dear Mr. Crane-Amores,

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 "Water Quality Enhancement Area Credit Transactions." In general, FAMB is highly supportive of the permitting of WQEAs to allow use of water quality enhancement credit to provide offsite compensatory treatment under Section 373.4134, Florida Statutes (F.S.) and as permitted under Chapter 62-330, F.A.C., Environmental Resource Permitting. Our industry consists of private-sector companies with the resources and expertise to execute this public program and we look forward to assisting with its implementation.

Wetland Mitigation

FAMB does have concerns regarding language in lines 110-112 of the Draft WQEA Rule (October 2023), which states,

(11) WQEAs may not be located within areas established for mitigation, restoration, or reclamation 111 by state law or permit, or within areas purchased for conservation pursuant to the Florida Forever Act or 112 the Florida Preservation 2000 Act.

This language seems to prohibit any WQEA from serving as a mitigation site and vice versa, regardless of the timing of site establishment for mitigation. We believe that wetland mitigation projects can serve as a WQEA for the purpose of generating water quality benefits under both programs. We understand the concerns regarding "double dipping" or the re-crediting of the same nutrient-removal function already accounted for in the functions and values provided by the wetland mitigation. As such, we are offering the following suggestions to avoid that pitfall.



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Credit Stacking on Wetland Mitigation and WQEs Projects

As other state and national mitigation policies, a single unit of a mitigation site could “provide compensation for two or more spatially overlapping ecosystem functions or services that are grouped together into a single credit type and used as a single commodity to compensate for a single permitted action.” However, “the project proponent cannot unstack the stacked credits to provide mitigation for more than one permitted impact action even if all resources included in the stacked credit are not needed for that action” (FWS 2023).

These stacked credits cannot be unbundled. A credit producer should not be able to sell the same environmental benefit twice. The traditional wetland credit provides the best example of an ecosystem credit, a credit that encompasses multiple functions or services. The wetland credit, based on area, typically consists of water quality, flood control, species habitat, and other functions. Thus, from a policy or ecological perspective, the producer of a wetland credit should not be able to sell a separate water quality credit from the same unit. That water quality function has already been accounted for in the wetland credit and has already been used to offset impacts. If the water quality credit is traded separately (after the wetland credit has been sold), this would result in an environmental loss (Gardner 2013).

In Georgia, guidance states that once a credit is traded, the same pollutant-specific load reduction cannot be traded again, even if for another purpose. If a credit-generating activity results in load reductions for multiple pollutants, the credit-generator can generate credits for multiple pollutants and/or wetland mitigation. However, credits that have been sold for a certain pollutant load and/or wetland mitigation purpose cannot also be sold again even if initially sold for only one purpose (GAEPD 2023).

As another example, we recommend reviewing the U.S. Army Corps of Engineers Jacksonville District’s Guidance for Establishment of Multipurpose Mitigation Banks and In-Lieu Fee Programs (August 9, 2022). This guidance defines a multi-purpose compensatory mitigation project as those designed to address environmental requirements of multiple regulatory programs through the generation of credits. The Corps guidance is intended to eliminate “double dipping.” With regards to federal compensatory mitigation banks, 33 CFR § 332.3 (j)(1)(ii) states that “Under no circumstances may the same credits be used to provide mitigation for more than one permitted activity. However, where appropriate, compensatory mitigation projects, including mitigation banks and in-lieu fee projects, may be designed to holistically address requirements under multiple programs and authorities for the same activity.” “Where mitigation banks and ILF projects are designed to holistically address requirements under multiple programs and authorities, different credit types can be generated on the same, spatially overlapping unit of land or on geographically distinct units of land within the same project. Credits are considered “stacked,” when they represent spatially overlapping ecosystem functions or services... Similarly, a mitigation bank or ILF program sponsor may use a given unit of land to generate Section 404/ERP stacked



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credits and use those stacked credits to offset the impacts of an activity that needs both Section 404 and ERP credits or to offset an activity that needs either Section 404-only or ERP-only credits. However, when one of those stacked credits is used to offset a Section 404-only impact or an ERP-only impact, the Corps will require that the linked (i.e., stacked) credit be retired and not used for any other purpose” (USACE 2021).

How it Works?

Credit stacking or bundling - producing more than one credit type on the same unit of land within a bank or other mitigation project. Stacked/bundled credits are useful as a means to offset a single project that needs both credit types. If a project only needs one of the credit types in the bundle/stack, that credit can be used but the remaining credits in the bundle/stack must also be retired. For clarification, these examples were provided by the Coastal Wetlands Planning, Protection, and Restoration Act (CWPPRA) Task Force approved Guidelines for Environmental Banking in Coastal Louisiana (2020).

Example 1: Geographically distinct credits

- A bank is established in a degraded stream system. Both the main stem of the river and the tributaries are included in the bank.
- The banker wants to provide stream habitat credits and water quality improvement credits.
- The banker establishes two geographically distinct sources for credits: 1) the main stem of the river, and 2) the tributaries.
- Restoration of the main stem of the river generates riverine habitat credits, and restoration of the tributaries generates water quality improvement credits.
- The credits are tracked separately and are not transferable, thereby ensuring credits cannot be debited more than once.

For a real-life example, see Scarborough Riparian Buffer and Nutrient Offset Mitigation Bank.

Example 2: Geographically overlapping credits:

- A bank is established in an area containing degraded wetlands. There are two types of wetlands: 1) vernal pools that are habitat for ESA species, and 2) wetlands that are not habitat for ESA species.
- The banker wants to provide ESA vernal pool credits and 404 wetland credits.
- The credits generated by the wetlands can be used only for 404 wetland debits. The credits generated by the vernal pools can be used for a single project that needs both ESA and 404 or for a project that needs either ESA-only or 404-only wetland debits, but when one of these vernal credits is used for only one purpose, the corresponding credit must be retired. For example, if one of these vernal pool ESA/404 credits is used to offset an ESA-only impact, the corresponding 404 portion of this credit must be retired; it cannot be used for another purpose.
- Assume a bank has the following credit balances:



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- Vernal pool credits (ESA/404) – 20 credits.
- Wetland credits (404 only) – 5 credits.
- A client purchases ten 404 credits.
 - Five of the credits come from the wetland credit balance, which is reduced to 0 (5-5).
 - Five of the credits come from the vernal pool credit balance, which is reduced to 15 (20-5).
 - The bank is left with 15 vernal pool credits to sell for a single project that needs both ESA and
 - 404 or for either ESA-only or 404-only use.

For a real-life example, see Van Vleck Mitigation Bank and Cosumnes Floodplain Mitigation Bank.

In the case of a project delivering nutrient reduction and wetland mitigation on a geographically overlapping area, there would be a conversion factor between the credit types. For example, if a 50-acre wetland restoration project (formerly converted to cropland) generates 10 state approved wetland mitigation credits and the permanent reduction of 40 lbs of nitrogen and 10 lbs of phosphorus, then the conversion rate would be as follows:

1 wetland credit = 4 lbs of nitrogen = 1 lbs of phosphorus

Table 1: Sample Ledger			Credits Required			Credits Debited		
Transaction Type	Permittee	Permit(s)	Wetland (Credits)	Nitrogen (lbs)	Phosphorus (lbs)	Wetland (Credits)	Nitrogen (lbs)	Phosphorus (lbs)
Release						10	40	10
Debit Request	Applicant 1	ERP #	1			1	4	1
Debit Request	Applicant 2	ERP #	2.5		2.5	2.5	10	2.5
Balance						7.5	26	7.5

Review of Multipurpose WQEs/Wetland Mitigation Sites

Finally, FAMB understands that WQEs will be subject to similar requirements as mitigation banks, including but not limited to 62-342.700, F.A.C., 62-342.650, F.A.C., as well as the release schedule and tracking of enhancement credits. Considering the vast similarities in the requirements of WQEs and



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mitigation banks, and the potential to stack credits, it may be advisable for the Mitigation Banking Team to oversee the permitting of WQEAs, especially when they are proposed in concert with traditional wetland mitigation banks. Of course, staffing will be a consideration and FAMB would want to ensure that absorbing this workload does not slow down the review of mitigation bank permits.

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 the FDEP in the future.

Kind Regards,

A handwritten signature in black ink that reads "Kelly Sands". The signature is fluid and cursive, with the first name "Kelly" and last name "Sands" clearly visible.

Kelly Sands

Florida Association of Mitigation Bankers

ksands@westervelt.com

Sources:

Coastal Wetlands Planning, Protection, and Restoration Act (CWPPRA) Task Force, Guidelines for Environmental Banking in Coastal Louisiana (2020). Available at:

<https://www.mvn.usace.army.mil/Portals/56/docs/environmental/cwppra/Announcements/TF%20Approved%20EB%20Guidelines%2029%20Jan%202020.pdf>

Gardner, Royal C. and Jessica Fox, The Legal Status of Environmental Credit Stacking, 40 Ecology L.Q. (2013). Available at:

<http://scholarship.law.berkeley.edu/elq/vol40/iss4/1>

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https://www.fws.gov/sites/default/files/policy/pdfs/FWS-ESA-Compensatory-Mitigation-Policy-amend_1.pdf