Florida Association of Mitigation Bankers

FAMB

www.floridamitigationbanking.org

June 10, 2026

Mr. Borja Crane-Amores
Timothy Rach
Florida Department of Environmental Protection

RE: Florida Mitigation Banking Industry Comments Regarding Rulemaking on Chapter 62-332, F.A.C. pertaining to Water Quality Enhancement Areas (WQEAs)

Dear Mr. Crane-Amores and Mr. Rach,

The Florida Association of Mitigation Bankers (FAMB) is pleased to provide comments to the Florida Department of Environmental Protection (DEP) regarding Draft Rule: Chapter 62-332 on Water Quality Enhancement Areas. In general, FAMB is highly supportive of the use of WQEAs 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 program and we look forward to assisting with its implementation.

As requested, FAMB has developed a red-line version ("FAMB revisions") of the rule with FAMB's suggested language (Attachment 1). Comments are also included in bullets regarding specific language. Additionally, FAMB has some broad areas of concern:

I. DEP MUST NOT EXCEED SPECIFIC STATUTORY AUTHORITY GRANTED BY THE LEGISLATURE

There are some sections where DEP's proposed language is not consistent with statutory language. In other sections, FAMB feels that DEP's proposed language exceeds its rule making authority. These instances are noted in the FAMB revisions and FAMB requests that these items be addressed before DEP promulgates another draft of the WQEA Rule.

II. THERE IS NO STATUTORY AUTHORITY FOR A LOCATION VALUE FACTOR

Authority for the use of a Location Value Factor (LVF) was not provided by the Legislature. By contrast, for mitigation banking, the Legislature provided specific language and authority for the use of the proximity factor. FAMB believes that if the Legislature had intended for a LVF to be used in this Rule, the Legislature would have included such language in the Statute, just as they did for the proximity factor. FAMB feels that the language regarding the LVF must be deleted because the language lacks specific legislative authority.

III. FINANCIAL ASSURANCES SHOULD CONTINUE TO BE ADDRESSED IN THE MITIGATION BANK RULE DOCKET.

The financial assurance language should continue to be developed as part of the current DEP mitigation bank rule development on this subject. Consideration of financial assurances in this Rule will be similarly controversial and will prevent timely rule adoption of the WQEA Rule. Also, addressing financial assurances in two separate Rules creates the potential for inconsistent results. Therefore, we suggest the section on financial assurances be removed, and the Applicant be required to comply with 62-342.700, F.A.C., as amended.

FAMB has also included our previous February 2024 letter (Attachment 2). While some issues were addressed in this version of the draft Rule and in statute, some of the issues addressed in that letter remain unresolved.

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,

Ryan Deibler
Florida Association of Mitigation Bankers

JUNE 5 FAMB COMMENTS 7:57 pm

CHAPTER 62-332

WATER QUALITY ENHANCEMENT AREAS

62-332.100 Scope and Intent.

(1) The Department finds that, in certain instances, the improvement of water quality and adverse water quality impacts of activities regulated under Part IV of Chapter 373, Florida Statutes (F.S.), may be addressed by the construction, operation, maintenance, and long-term management of water quality enhancement areas that provide offsite compensatory treatment. This chapter establishes the requirements of an environmental resource permit ("ERP") for water quality enhancement areas that would be permitted under Chapter 62-330, F.A.C., and the generation, valuation, award, release, and use of water quality enhancement credits providing offsite compensatory treatment under Section 373.4134, F.S. This chapter establishes applicable requirements for a water quality enhancement area permit under Chapter 62-330, F.A.C., Environmental Resource Permitting.

(2) The water quality enhancement credit transactions authorized in this chapter are intended to provide flexibility to ERP applicants for the purpose of purchase applicant or a governmental entity to address impacts regulated under ss. 373.403-373.443

(3) The responsibilities for authorizing the use of enhancement credits by the credit purchaser are described in Operating and Delegation Agreements between the Department of Environmental Protection ("Department") and the water management districts ("Districts"). The Agreements are incorporated by reference in subsection 62-113.100(3), F.A.C.

(4) The requirements for the use of water quality enhancement credits to meet the allocations of an adopted Basin Management Action Plan (BMAP) or adopted Reasonable Assurance Plan (RAP) are set forth in Chapter 62-306, F.A.C.

(5) This chapter is supplemental to the 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. Rule 62-330.010, F.A.C., incorporating the Applicant’s Handbook Volume I and Volume II for each Water Management District is incorporated by reference herein.

Rulemaking Authority 373.4134, 403.805 FS. Law Implemented 373.4134, FS. History–New ________.

62-332.200 Definitions.

(1 (1) “Conservation Easement” is defined and the requirements set forth in section 704.06, Fla. Stat.

(2) “Credit Purchaser” means an entity that seeks to purchase water quality enhancement credits for the purpose of achieving net improvement under Section 373.414(1)(b)3., F.S., or satisfying ERP performance standards, or a governmental entity that seeks to purchase water quality enhancement credits to meet an assigned BMAP allocation or RAP.

(3) “Department” means the Florida Department of Environmental Protection.

(43) “District” means a water management district as established in Chapter 373, F.S.

(54) “Endowment Holder” means an entity authorized to hold endowments and manage the long-term stewardship of the endowment funds, whose operations are regulated and examined by a federal agency or an agency of the State of Florida.

(6) “Enhancement credit” or “credit” means the standard unit of measure that represents a quantity of pollutant removed.

(7) “Investment Manager” means an entity or individual that is a Registered Investment Adviser (RIA) with the U.S. Securities and Exchange Commission (SEC) or state securities regulatory agency and whose operations are regulated and examined by a federal agency or an agency of the State of Florida. The Water Quality Enhancement Area applicant shall provide documentation evidencing proof of such regulation and examination to the Department.

(8) “Natural system” means an ecological system supporting aquatic and wetland-dependent natural resources, including fish, and aquatic and wetland-dependent

wildlife habitats.

(9) “Release” means a permit modification by the Department wherein enhancement credits are awarded to the Water Quality Enhancement Area ledger and are made available for withdrawal.

(10) “Target Waterbody” means the Hydrologic Unit Code (“HUC”) 12 subwatershed that contains the Credit Purchaser’s project.

(11) “Water quality enhancement area” or (“WQEA”) means a natural system, constructed, operated, managed, and maintained for the purpose of providing offsite regional treatment for which enhancement credits may be provided pursuant to a water quality enhancement area permit.

(12) "Water quality enhancement area permit" or “WQEA permit” means an ERP issued under Part IV of Chapter 373, F.S., and this chapter for a water quality enhancement area which authorizes the construction, operation, management, and maintenance of a water quality enhancement area and the purchase and sale of enhancement credits from the permitted WQEA in accordance with this chapter.

(13) “Withdrawal” means a permit modification approved by the Department wherein released enhancement credits are deducted from the WQEA ledger.

(14) “WQEA Construction Phase” or “Construction Phase” means the period necessary to implement the permitted work including, but not limited to, implementing site security measures; construction and installation of water quality treatment systems; installation of hydrologic control devices, technologies, and best management practices; and conducting initial earth moving and land management activities. This phase begins with implementation of any permit required activities and ends with the Department’s acceptance of the As-Built Certification, if required.

(15) “WQEA Operation and Maintenance Phase” or “Operation and Maintenance Phase” means the phase following the WQEA Construction Phase when permitted activities are conducted to achieve water quality improvement conditions and enhancement credit generation described in the WQEA Permit performance and success criteria monitoring and verification plan in accordance with Rule 62-332.800, F.A.C. This phase ends with a Department determination that the defined success criteria and targets set forth in the WQEA Permit have been met and all enhancement credits have been released.

(16) “ “Sponsor ” means an entity that is responsible for establishing the WQEA that has received a permit to construct, operate, maintain, and be responsible for the perpetual management of a water quality enhancement area.

(17) “WQEA Perpetual Management Phase” or “Perpetual Phase” means the phase following full implementation of the construction phase and operation and maintenance phase – where the WQEA has achieved success and all enhancement credits have been released as prescribed in the WQEA permit. Perpetual water quality improvements and land management activities shall be implemented and maintained in accordance with the WQEA permit and this rule.

Rulemaking Authority 373.4134 FS. Law Implemented 373.4134 FS. History–New ______.

62-332.300 General Requirements.

(1) A WQEA Sponsor shall generate and maintain enhancement credits in perpetuity by constructing and operating water quality improvement projects utilizing natural systems including, but not limited to, constructed wetlands or minor impoundments that reduce pollutants to a receiving waterbody or water segment.

(2) The construction, operation, management, and maintenance of a WQEA shall be permitted by the Department through the ERP process pursuant to Chapter 62-330, F.A.C., and this chapter.

(3) Enhancement credits must be generated and sold by a WQEA Sponsor in accordance with this chapter and the conditions of the WQEA permit.

(4) A governmental entity may be a WQEA and use the credits generated by the WQEA permit for its own water quality needs, such as, but not limited to, providing offsite water quality compensation for that government's owndevelopment projects. However, a governmental entity may not act as a Sponsor to construct, operate, manage, or maintain a water quality enhancement area or market enhancement credits to third parties. Sponsor , fund, or otherwise

(5) No portion of a WQEA shall be authorized to meet the mitigation, water quality treatment, or compensatory requirements of any other permit or regulatory program, except for BMAPs and RAPs and as otherwise authorized in this chapter.

(6) Reductions in pollutant loading required under any state regulatory program are not eligible to generate enhancement credits.

(7) WQEAs may not be established on lands purchased for conservation pursuant to the Florida Forever Act or the Florida Preservation 2000 Act.

WQEAs shall not be constructed in such a manner that the system severs a portion of a surface water.

(9) As provided by s. 373.4134(7)(j), F.S., the agency may deny the use of enhancement credits when the agency is not reasonably assured that the use of the credits will not cause or contribute to a violation of water quality standards, even if the project being implemented by the applicant is within the WQEA service area. The agency will approve the use of enhancement credits if the agency receives a request for the use of enhancement credits and the credit purchaser applicant reasonably assures the agency through modeling, or other evaluations, or a combination thereof, that such use will not cause or contribute to a violation of water quality standards.

(10) The issuance of a WQEA permit does not eliminate the Sponsor's obligation to comply with all requirements of Chapter 62-330, F.A.C., pertaining to adverse impacts to water quantity, water quality, and adjacent lands or wetlands.

(11) The issuance of a WQEA permit does not preclude the responsibility of the Sponsor to obtain other applicable federal, state, and local permits for construction activities associated with the WQEA.

Rulemaking Authority 373.4134, 403.805 FS. Law Implemented 373.4134, FS. History–New ____________.

62-332.350 WQEA Permit and WQEA Conceptual Approval Permit Applications.

(1) A WQEA Applicant proposing to establish a WQEA must apply for a WQEA Permit. An application for a WQEA Permit shall also constitute an application for an ERP under Chapter 62-330, F.A.C. WQEA Permit applications shall be processed according to Chapter 62-330, F.A.C. The Department will process and take action on all permit applications under Part IV of Chapter 373, F.S., necessary for the implementation of a WQEA.

(2) A person or entity may apply for a WQEA Conceptual Approval permit to obtain estimates of the legal and financial requirements necessary for the WQEA, information necessary for evaluation of the WQEA Permit application, and potential enhancement credits to be awarded pursuant to the WQEA Permit. The WQEA Conceptual Approval permit does not authorize the use or withdrawal of enhancement credits or any construction within the proposed WQEA. The level of detail provided in the WQEA Conceptual Approval permit will depend on the level of detail submitted with the application.

(3) A WQEA Permit shall automatically expire five years from the date of issuance if the WQEA Sponsor has not recorded a conservation easement, over the real property within the WQEA in accordance with the WQEA Permit or if construction has not been completed pursuant thereto. Except as provided above, a WQEA Permit shall be perpetual unless revoked.

(4) To provide the Department with reasonable assurances that the proposed WQEA will meet the criteria in Section 373.4134, F.S., and in this chapter, and that any proposed system will meet conditions of issuance and applicable criteria of Chapter 62-330, F.A.C., each WQEA Permit application submitted to the Department shall include the information required under Chapter 62-330, F.A.C., as applicable, and the information specified below as appropriate for the proposed project:

(a) Description of the location of the proposed WQEA which shall include:

1. Map at regional scale showing the project area in relation to the regional watershed and proposed WQEA service area;

2. Vicinity map showing the project area in relation to adjacent lands and offsite areas of ecologic or hydrologic significance which could affect the perpetual viability or ecological and hydrological value of the WQEA;

3. Aerial photograph identifying boundaries of the project area;

4. Map or survey showing legal access to the WQEA for site inspection; and

5. Legal description of the proposed WQEA.

(b) Description and assessment of current site conditions affecting the anticipated performance of the proposed water quality enhancement area, including the proposed treatment type and the anticipated associated reduction rates, as demonstrated by the performance of other areas where the treatment type has been established and operating over a minimum of two consecutive wet and dry seasons, which shall include, as appropriate:

1. Soils map of the project area;

2. Topographic map of the project area and adjacent hydrologic contributing and receiving areas;

3. Hydrologic features map of the project area and adjacent hydrologic contributing and receiving areas;

4. Geotechnical report of the project area within or adjacent to sensitive karst areas;

5. Vegetation description and map of the project area;

6. Existing ecological and hydrological conditions of the regional watershed that includes the project area;

7. Adjacent lands, including existing land uses and conditions, projected land uses according to comprehensive plans adopted pursuant to Chapter 163, F.S., by local governments having jurisdiction, and any special designations or classifications associated with adjacent lands or waters; and

8. Disclosure by the WQEA Applicant of any material fact that would affect the contemplated use of the property.

(c) Description of the ecological and hydrological benefits of the proposed WQEA to the regional watershed in which it is located.

(d) Identify and document the numerical model or analytical tool, inputs, and results, used to establish the efficacy of the WQEA as described in Rules 62-332.400, F.A.C., and 62-332.500, F.A.C.

(e) Assessment of anticipated pollutant load reductions or other nutrients to be removed on a 10-year average annual basis from the WQEA.

(f) A plan describing the actions proposed to establish and construct the WQEA which shall include, as applicable:

1. Construction drawings detailing proposed topographic alterations, and all structural components associated with proposed activities;

2. Proposed construction activities, including a detailed schedule for implementation;

3. The proposed vegetation planting scheme and detailed schedule for implementation; and

4. Measures to be implemented during and after construction to avoid adverse impacts related to proposed activities.

(g) Proposed performance and success criteria monitoring and verification plan in accordance with Rule 62-332.800, F.A.C.

(h) Detailed perpetual management plan comprising all aspects of continued water quality improvements and land management activities such as, but not limited to, maintenance and replacement of hydrologic control devices, structures, vegetation establishment, exotic and nuisance species control, fire management, and control of access to ensure long-term pollutant reduction.

(i) Evidence of sufficient legal or equitable interest in the property which is to become the WQEA meeting the requirements of Rule 62-330.060, F.A.C.

(j) Draft documentation of financial responsibility meeting the requirements of Rule 62-332.550, F.A.C. and 62-342.700, F.A.C.; and

(k) Draft documentation of the conservation easement which shall, at a minimum, meet the requirements and restrictions of Section 704.06, F.S., and Rule 62-332.530, F.A.C.

Rulemaking Authority 373.4134, 403.805, FS. Law Implemented 373.4134, , FS. History—New .

62-332.400 Establishment of Enhancement Credits.

(1) The Department will award enhancement credits to the WQEA, or phases thereof, based upon the standard numerical models or analytical tools that establish the ability of the water quality enhancement area to remove pollutants or constituents, which satisfy the requirements of subsection 373,4134(c) and

information submitted in the WQEA permit application and the following as set forth in 373.4134(c)

The WQEA applicant must provide for the assessment, valuation and award of credits based on units of pollutant removed.

(b) The determination of the award of enhancement credits generated by a WQEA shall be based on standard numerical models or analytical tools that establish the ability of the WQEA to remove pollutants or their constituents

(c)

(d) Credits must be based on a standard unit of measure of the specific pollutants removed on a 10-year average annual basis,

(2) The valuation of enhancement credits will be stated in the WQEA permit. The number of credits and schedule for release shall be based upon the performance criteria for the WQEA and the success criteria for each activity as specified in the WQEA permit. The final release of all enhancement credits awarded will only occur after the WQEA meets all of the success criteria specified in the permit for the WQEA Operation and Maintenance Phase. No credits shall be released until the Sponsor records the required conservation easement and provides the required financial assurances to the Department.

(3) If the WQEA is located within a BMAP or adopted RAP, the applicant must use the most recent numerical models or analytical tools used for that BMAP or adopted RAP in the WQEA permit application, except as provided in subsection (4) below.

(4) If the WQEA is not located within a BMAP or adopted RAP, , the WQEA Applicant must either:

(a) use another standard numerical model or analytical tool that has been approved by the Department or

(b) propose and submit a numerical model or analytical tool for Department review and approval for the proposed WQEA.

(5) A WQEA Permit application must identify and document 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 chapter relevant to substantiate the level of pollutant load reduction generated. At a minimum, the application must contain:

(a) Rainfall data over the longest period of record available, either from the National Centers for Environmental Information or collected from the closest site to the proposed WQEA, preferably within the same drainage basin.

(b) Anticipated average annual water quality and quantity inflows to the proposed water quality enhancement area, based on published local data collected over a period of record that most closely matches the rainfall data collected under this paragraph.

(c) Site-specific conditions affecting the anticipated performance of the proposed WQEA, including the proposed treatment type and the anticipated associated reduction rates as demonstrated by the performance of other areas where the treatmenttype has been established and has operated over a minimum of two consecutive wet and dry seasons.

(d) Data provided under this subsection must be from monitoring stations the Department deems sufficient to determine flows and local water quality conditions.

(e)

Rulemaking Authority 373.4134, 403.805 FS. Law Implemented 373.4134, FS. History–New .

62-332.500 Service Area and Enhancement Credits.

(1) The boundaries of the WQEA service area shall depend upon the geographic area in which the water quality enhancement area could reasonably be expected to address adverse impacts and must, at a minimum, consist of a Hydrologic Unit Code 8 (HUC 8) sub-basin as set forth by the United States Geological Survey.that cause or contribute to the failure of the waterbody or water segment to meet applicable water quality criteria. Service areas may overlap, and more than one service area may be approved within a regional watershed.

(2) The geographical boundaries of the water quality enhancement service area will be determined by modeling provided by the WQEA   Aplicant outlining the area within which the WQEA could reasonably be expected to reduce impacts given the attenuation of the applicable pollutants. .

(3) Numerical models or other analytical tools must be capable of evaluating the fate and transport of the pollutant(s) of concern within the HUC 8 and shall be reviewed and approved by the Department at the time of application.

(4) The Credit Purchaser’s project must be located within the water quality enhancement service area..

(5) The Applicant shall provide reasonable assurance that the WQEA’s credited pollutant load reduction will be achieved on a 10-year average annual basis.

Rulemaking Authority 373.4134,, 403.805 FS. Law Implemented 373.4134, FS. History–New .

62-332.530 Perpetual Protection of Water Quality Enhancement Areas

(1) Before enhancement credits may be released to a WQEA or any phase of a WQEA, the WQEA Sponsor   shall cause a conservation easement to be conveyed to the Department. The grantor of a conservation easement may convey a conservation easement to additional grantees, but such conveyance shall be subordinate to the conservation easement granted to the Department.

(2) All conservation easements shall be granted in perpetuity without encumbrances, unless such encumbrances do not adversely affect the hydrology and water quality improvement effectiveness of the WQEA. All conservation easements shall be of a form and content sufficient to ensure protection of the WQEA according to the permit, and

shall, at a minimum, meet the requirements and restrictions of Section 704.06, F.S., except as provided in subsection 62-332.530(7), F.A.C. Forms for a conservation easement are incorporated by reference in Rule 62-330.301, F.A.C., which is incorporated by reference herein. The conservation easement shall also provide that the WQEA Applicant shall have access to the property and the authority to perform all acts necessary to ensure compliance with the WQEA Permit (unless the WQEA Applicant is the fee owner of the property), and that the Department shall have access and the authority to perform these acts if the WQEA Sponsor fails to do so.

(3) As part of providing reasonable assurance that the WQEA site will be protected in perpetuity, the grantor of the conservation easement shall provide the following unless the Department determines during the permit review process such items are not necessary to ensure protection of the WQEA according to the permit:

(a) A boundary survey of the real property interest being conveyed. The survey must be certified, by a land surveyor and mapper, registered in the State of Florida, to meet the requirements of the Department and the minimum technical standards set forth by the Florida Board of Professional Surveyors and Mappers in Rules 5J-17.050 through 5J-17.052, F.A.C., under Section 472.027, F.S.

(b) A certified appraisal, documentation from the county property appraiser or other equivalent documentation demonstrating the market value of the interest to be conveyed to determine the appropriate amount of title insurance.

(c) A marketable title commitment issued to the Department as beneficiary in an amount at least equal to the fair market value, as established in paragraph 62-332.530(3)(b), F.A.C., of the interest being conveyed. An owner's title insurance policy (ALTA Form B) naming the Department as beneficiary shall be issued to the Department within the time frames specified by the permit. The coverage, form and exceptions of the title insurance policy shall ensure that the WQEA will be protected according to the WQEA Permit.

(d) A current Phase I environmental site assessment identifying any environmental problems which may affect the liability of the Department and any additional site assessments as are necessary to ensure that the Department is not subject to liability under federal or state laws relating to the treatment or disposal of hazardous substances or ownership of land upon which hazardous substances are located, or to ensure that there are no hazardous substances present on the property which would adversely affect construction, operation, and perpetual management of the WQEA.

(4) The Department shall require additional documentation or actions from the grantor of the conservation easement if necessary to ensure that the WQEA will be protected in accordance with the WQEA Permit.

(5) The WQEA permittee shall pay the documentary revenue stamp tax and all other taxes or costs associated with the conveyance, including the cost of recording the conservation easement and any other recordable instruments required by the Department, unless prohibited or exempt by law, as a condition of the receipt of the conveyance.

(6) All real estate taxes and assessments which are or which may become a lien against the property shall be satisfied of record by the Owner of the property where the WQEA is located before recording the conservation easement. If necessary, the Owner of the property where the WQEA is located shall, in accordance with Section 196.295, F.S., place funds in escrow with the county tax collector. The WQEA or Owner of the property where the WQEA is located shall also provide the Department with annual documentation demonstrating that such taxes and

assessments have been paid.

(7) As a condition of receipt of the conveyance, the WQEA shall remove all abandoned personal

property, solid waste, or hazardous substances from the property that the Department determines: will reduce the proposed hydrology and water quality improvement efficiency of the property; will adversely affect the construction, operation, or management of the WQEA; or will adversely affect the construction, alteration, operation, maintenance, abandonment or removal of any surface water management system to be constructed in the WQEA.

(8) The Owner of the property where the WQEA is located shall record the conservation easement required in the WQEA Permit. The WQEA Owner of the property where the WQEA is located shall submit to the Department the original recorded conservation easement as soon as such document is returned from the public records office.

Rulemaking Authority 373.4134, 403.805 FS. Law Implemented 373.4134 FS. History–New ______.

62-332.550 Financial Responsibility.

(1) WQEA may provide financial assurances through the use of endowments.

(2) The provisions of Rule 62-342.700 shall apply to WQEA.

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62-332.600 Enhancement Credit Transactions and Credit Use.

(1) The Agency that is reviewing the Credit Purchaser's ERP application will verify the number of enhancement credits necessary to meet the permitting criteria under Chapter 62-330, F.A.C., and will confirm that the appropriate enhancement credits are available for use at the selected WQEA. The required number of enhancement credits shall be calculated based on appropriate location valuation factors (LVFs) as described in Rule 62-332.500, F.A.C.

(2) Enhancement credits that have been released may only be used to address adverse water quality impacts of activities regulated under ss. 373.403-373.443 or for meeting the allocations of an adopted BMAP or adopted RAP under Section 403.067, F.S.

(3) To use enhancement credits, the Credit Purchaser must submit to the Agency permitting the impact a Reservation Letter from the WQEA Sponsor demonstrating that enhancement credits have been reserved, sold, or transferred to the Credit Purchaser. If the Agency permitting the Credit Purchaser's ERP determines that use of the enhancement credits proposed by the Credit Purchaser is appropriate to offset the adverse impacts, the Agency permitting the impact shall require the sufficient number and type of enhancement credits be withdrawn prior to the issuance of the Credit Purchaser's permit or as a condition of the Credit Purchaser's permit.

(4) An enhancement credit included in a previously authorized credit transaction is not available for another

transaction.

(5) Enhancement credits may not be used by point source dischargers to satisfy regulatory requirements other than those necessary to obtain an ERP for construction and operation of a surface water management system.

(6) Purchase of enhancement credits is voluntary.

Rulemaking Authority 373.4134, 403.067(9), 403.805 FS. Law Implemented 373.4134, 403.067 FS. History–New .

62-332.700 Enhancement Credit Tracking.

(1) The Department shall maintain a ledger of the enhancement credits available at each WQEA.

(2) The ledger shall include all WQEA credit transactions involving enhancement credits under this Chapter or trades under Chapter 62-306, F.A.C.

(3) WQEA credit transactions shall be processed as a no-fee minor modification of the WQEA Permit.

(4) Within 60 days of receiving the full payment for the credits and a request from the Credit Purchaser, or as required by the WQEA permit, the Sponsor shall submit a minor modification application requesting the enhancement credits be withdrawn from the official ledger.

(5) The ledger shall include the following information:

(a) The amount and type of credits generated in the WQEA.

(b) A brief description of actions or activities that generated the release of credits.

(c) The date credits become available for purchase.

(d) The date of the most recent inspection of the WQEA.

(e) The Credit Purchaser's name.

(f) Credit Purchaser's permit number and date of issuance.

(g) Credit Purchaser's BMAP or RAP allocation issuance and expiration date for trades.

(h) The Credit Purchaser's permitting Agency.

(i) The amount and type of credits sold in each purchase.

(j) The balance of the amount and type of credits available after purchase or credit generation in the WQEA.

(k) The date the WQEA ledger is updated.

Rulemaking Authority 373.4134, 403.805 FS. Law Implemented 373.4134, FS. History–New .

62-332.800 Enhancement Credit Monitoring and Continuing Credit Verification.

(1) The Sponsor must demonstrate the achievement of pollutant reductions, on a 10- year average annual basis, of no less than the number of credits sold.

(2) The WQEA Sponsor must implement a performance and success criteria monitoring and verification plan approved by the Department, including protocols and monitoring frequency, to be implemented once the WQEA is permitted and operational.

(a) Enhancement credits shall be directly measured by the WQEA Sponsorr in accordance with the Department-approved monitoring and verification plan in accordance with the WQEA permit.

(b) The plan must be sufficient to demonstrate that the WQEA meets defined performance criteria for pollutant reductions on which enhancement credits are based and the success criteria for each activity.

(c) The WQEA Sponsor must implement the approved monitoring and verification plan in perpetuity.

(3) The monitoring and verification protocols must be able to measure the difference in water quality compared to baseline condition in order to accurately demonstrate the WQEA's pollutant reductions and ensure that all released enhancement credits have been achieved.

Rulemaking Authority 373.4134, 403.805 FS. Law Implemented 373.4134, FS. History–New .

62-332.900 Compliance and Enforcement.

(1) The WQEA Sponsor must certify and submit annually to the Department that the control devices and systems, technologies, best management practices, or other activities on which the enhancement credits are based continue to be fully implemented and properly operated and maintained, and that the 10-year average annual pollutant load reductions continue to be achieved.

(2) The WQEA Sponsor must report annually to the Department the pollutant loads of their targeted pollutant at the discharge point(s) of the WQEA, in the standard units of measure for the WQEA at a frequency required by the permit to demonstrate pollutant load reduction resulting in credits.

(3) The Sponsor must maintain records demonstrating that any control devices and systems, technologies, best management practices, or other management actions upon which credits are based continue to be fully implemented and properly operated and maintained in perpetuity. The WQEA Sponsor must notify the Department in writing within 30 calendar days of any changes to the size, nature, function, or treatment capabilities of the WQEA. Any such changes may result in a WQEA permit modification to ensure credit transactions maintain at least their approved level of pollutant load reduction. The WQEA Sponsor must allow the Department, or Department's agent, to inspect the records and the control devices and systems, technologies, best management practices, or other management actions during regular business hours.

(4) The WQEA Sponsor is responsible for achieving the pollutant load reductions on which the credits are based and complying with the terms of its permit, including any associated financial assurance instruments and monitoring and verification plan, in perpetuity. In the event the Department determines the purchased released credits are invalid because the WQEA Sponsor has failed to comply with its monitoring and verification plan, has failed to demonstrate that the WQEA is meeting defined performance and success criteria for the reduction of pollutants on which credits are based, or otherwise has failed to meet the conditions of its permit, including financial assurances, the Department

may suspend the authorization to withdraw enhancement credits until such time as the WQEA returns to compliance and credits have been reevaluated.

(5) The WQEA Sponsor shall annually submit a report of the Enhancement Credits sold or used to the Department.

Rulemaking Authority 373.4134, 03.805 FS. Law Implemented 373.4134, FS. History–New .

62-332.920 Surrender or Transfer of Water Quality Enhancement Area Permits.

(1) If no credits have been released or sold, a WQEA Sponsor may apply to surrender a WQEA Permit, or permitted phase thereof, by submitting a written request to the Department. The written request must identify which phase of the WQEA permit will be surrendered, indicate the extent of actions and activities performed in that phase, and describe the conservation property interest encumbering that phase. The Department shall authorize release from a WQEA permit when no credits have been withdrawn. The Department shall authorize the relinquishment of a permitted phase, where no credits associated with that phase have been withdrawn, and the release would not compromise the hydrology and water quality improvement efficiency of the remaining portions of the WQEA. A surrender of a WQEA permit or release of a phase of a WQEA shall be made by permit modification.

(2) If a property interest has been conveyed as provided in Rule 62-332.530, F.A.C., for a WQEA Permit which is surrendered as provided above, the Department shall release the conservation easement.

(3) If a surface water management system has been constructed or altered within the WQEA, the WQEA Sponsor shall obtain any permits required under Part IV of Chapter 373, F.S., and Chapter 62-330, F.A.C., to operate or abandon the surface water management system.

(4) To transfer a WQEA Permit, the WQEA Sponsor shall meet the requirements of Chapter 62-330.340, F.A.C., and the entity to whom the permit will be transferred must provide reasonable assurances that it can meet the requirements of the permit.

Rulemaking Authority 373.4134, , 403.805 FS. Law Implemented 373.4134, FS. History– New .

Florida Association of Mitigation Bankers

FAMB

www.floridamitigationbanking.org

February 26, 2024

Mr. Borja Crane-Amores
Division of Water Resource Management
Stormwater & Technical Services Program
Florida Department of Environmental Protection

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.

Credit Stacking on Wetland Mitigation and WQEAs 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 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.

<u>Example 1: Geographically distinct credits</u>

- 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.

<u>Example 2: Geographically overlapping credits:</u>

- 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:
  - 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 Floodplan 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)
Released			**10**	**40**	**10**			
Withdrawal	Applicant 1	ERP #	1			1	4	1
Withdrawal	Applicant 2	ERP #	2.5		2.5	2.5	10	2.5
Balance						7.5	26	7.5

Review of Multipurpose WQEAs/Wetland Mitigation Sites

Finally, FAMB understands that WQEAs 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 WQEAs and 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,

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