

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/CS/HB 965 Environmental Management

**SPONSOR(S):** Agriculture & Natural Resources Appropriations Subcommittee, Environment, Agriculture & Flooding Subcommittee, Truenow

**TIED BILLS:** **IDEN./SIM. BILLS:** CS/SB 1426

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Environment, Agriculture & Flooding Subcommittee	16 Y, 1 N, As CS	Gawin	Moore
2) Agriculture & Natural Resources Appropriations Subcommittee	12 Y, 0 N, As CS	White	Pigott
3) State Affairs Committee			

### SUMMARY ANALYSIS

The Department of Environmental Protection (DEP) regulates activities in, on, or over surface waters, as well as any activity that alters surface water flows, through environmental resource permits (ERPs). ERPs are required for development or construction activities typically involving the dredging or filling of surface waters, construction of flood protection facilities, building dams or reservoirs, or any other activities that affect state waters. The federal Clean Water Act (CWA) requires states to maintain the quality of their waters. In Florida, water quality is addressed through water quality standards, total maximum daily loads, basin management action plans (BMAPs), and permits. Water quality trading is a market-based approach that can be used to attain water quality improvements. Water quality trading allows one source of pollution to control a pollutant at levels greater than required and sell credits to another source, the buyer, which uses the credits to supplement their level of water treatment in order to comply with regulatory requirements.

The bill authorizes the creation of water quality enhancement areas (WQEAs), which are defined as natural systems constructed, operated, managed, and maintained under an ERP permit for the purpose of providing offsite, compensatory regional treatment within an identified enhancement service area for which enhancement credits may be provided. In addition, the bill requires the construction, operation, management, and maintenance of a WQEA to be approved through an ERP permit and requires a WQEA to address the contributions of pollutants in an enhancement service area that does not meet state water quality standards.

To obtain a WQEA permit, the bill requires an applicant to provide certain reasonable assurances about the proposed WQEA. The bill also requires that the WQEA permit provide for the assessment, valuation, and award of credits based on units of pollutants removed.

The bill specifies that a WQEA may only provide enhancement credits in an enhancement service area, with certain exceptions, and specifies that enhancement credits may only be sold to governmental entities. The bill requires DEP or the water management districts to authorize the sale and use of enhancement credits to offset adverse water quality impacts of permitted activities or to assist governmental entities seeking to meet an assigned BMAP allocation or Reasonable Assurance Plan (RAP). The bill prohibits enhancement credits from being used by point source dischargers to satisfy regulatory requirements other than those necessary to obtain an ERP for construction and operation of the surface water management system of the site.

The bill specifies that whether or not a dwelling is owner occupied is not an eligibility criterion for a developer or homebuilder to receive density or intensity bonuses for implementing graywater technologies.

The bill provides an appropriation of nine full-time equivalent positions with associated salary rate of 479,000 and \$878,275 in recurring funds from the General Revenue Fund to DEP to implement the bill.

The bill provides an effective date of July 1, 2022.

### FULL ANALYSIS

This document does not reflect the intent or official position of the bill sponsor or House of Representatives .

STORAGE NAME: h0965c.ANR

DATE: 2/15/2022

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Background

##### Environmental Resource Permits

State law provides that a water management district (WMD) or the Department of Environmental Protection (DEP) may require an environmental resource permit (ERP) and impose reasonable conditions necessary to assure the construction or alteration of any stormwater management system,<sup>1</sup> dam,<sup>2</sup> impoundment,<sup>3</sup> reservoir,<sup>4</sup> appurtenant work,<sup>5</sup> or works<sup>6</sup> complies with state law and applicable rules and will not be harmful to water resources.<sup>7</sup> A person proposing such construction or alteration must apply to the WMD or DEP for an ERP permit authorizing the construction or alteration. The application must contain the applicant's name and address, the name and address of the owner of the land where the works are to be constructed, a legal description of the land, location of the work, sketches of construction, name and address of the person who prepared the plans and specifications of construction, and the person who will construct the proposed work, general purpose of the proposed work, and other information as DEP or the WMD may require.<sup>8</sup>

##### Water Quality

The CWA requires states to adopt water quality standards (WQS) for navigable waters.<sup>9</sup> The CWA also requires states to develop lists of water bodies that do not meet WQS, which are called impaired waters. States must then develop a total maximum daily load (TMDL) for the particular pollutants causing the impairment. The TMDL is the maximum allowable amount of the pollutants the water body can receive while still maintaining WQS.<sup>10</sup>

##### *Total Maximum Daily Loads*

The Florida Watershed Restoration Act guides the development and implementation of TMDLs.<sup>11</sup> TMDLs must include reasonable and equitable pollutant load allocations between or among point sources (e.g., pipes and culverts discharging from a permitted facility, such as a domestic wastewater treatment facility) and nonpoint sources (e.g., agriculture, septic tanks, golf courses) that will alone, or in conjunction with other management and restoration activities, reduce pollutants and achieve WQS.<sup>12</sup> The allocation must consider cost-effective approaches coordinated between contributing point and nonpoint sources of pollution for impaired water bodies and may include both non-regulatory and incentive-based programs.<sup>13</sup> However, under the Florida Watershed Restoration Act, DEP is not

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<sup>1</sup> Section 373.403(10), F.S., defines "stormwater management system" to mean a system designed and constructed or implemented to control discharges which are necessitated by rainfall events, incorporating methods to collect, convey, store, absorb, inhibit, treat, use, or reuse water to prevent or reduce flooding, overdrainage, environmental degradation, and water pollution or otherwise affect the quantity and quality of discharges from the system.

<sup>2</sup> Section 373.403(1), F.S., defines "dam" to mean any artificial or natural barrier, with appurtenant works, raised to obstruct or impound, or which does obstruct or impound, any of the surface waters of the state.

<sup>3</sup> Section 373.403(3), F.S., defines "impoundment" to mean any lake, reservoir, pond, or other containment of surface water occupying a bed or depression in the earth's surface and having a discernible shoreline.

<sup>4</sup> Section 373.403(4), F.S., defines "reservoir" to mean any artificial or natural holding area which contains or will contain the water impounded by a dam.

<sup>5</sup> Section 373.403(2), F.S., defines "appurtenant works" to mean any artificial improvements to a dam that might affect the safety of such dam or, when employed, might affect the holding capacity of such dam or of the reservoir or impoundment created by such dam.

<sup>6</sup> Section 373.403(5), F.S., defines "works" to mean all artificial structures, including, but not limited to, ditches, canals, conduits, channels, culverts, pipes, and other construction that connects to, draws water from, drains water into, or is placed in or across the waters in the state.

<sup>7</sup> Section 373.413(1), F.S.

<sup>8</sup> Section 373.413(2), F.S.

<sup>9</sup> 33 U.S.C. s. 1313.

<sup>10</sup> 33 U.S.C. s. 1313; *see* s. 403.067, F.S.

<sup>11</sup> Section 403.067, F.S.; ch. 99-223, Laws of Fla.

<sup>12</sup> Section 403.067(6)(b), F.S.

<sup>13</sup> Section 403.067(1), F.S.

required to develop a TMDL if there is existing reasonable assurance that there are existing or proposed pollution control mechanisms or programs that will effectively address the impairment.<sup>14</sup>

#### *Basin Management Action Plans*

DEP is the lead agency coordinating the development and implementation of TMDLs.<sup>15</sup> Once a TMDL is adopted,<sup>16</sup> DEP may develop and implement a basin management action plan (BMAP), which is a restoration plan for the watersheds and basins connected to the impaired water body.<sup>17</sup> A BMAP must integrate appropriate management strategies available to the state through existing water quality protection programs to achieve the TMDL.<sup>18</sup> The BMAP must also include milestones for implementation and water quality improvement, and associated water quality monitoring, which determine whether there has been reasonable progress in pollutant load reductions. DEP must assess progress every five years, and revisions to the BMAP must be made as appropriate.<sup>19</sup>

For point source discharges, any management strategies and pollutant reduction requirements associated with a TMDL must be incorporated into subsequent permits or permit modifications. DEP may not impose limits or conditions implementing an adopted TMDL in a permit until the permit expires, the discharge is modified, or the permit is reopened pursuant to an adopted BMAP.<sup>20</sup>

A best management practice (BMP) is a practice or combination of practices adopted by rule by the Department of Agriculture and Consumer Services, DEP, or the applicable WMD as an effective and practicable means for reducing nutrient inputs and improving water quality, taking into account economic and technological considerations.<sup>21</sup> Where there is an adopted BMP for a nonpoint source, the BMAP must require the nonpoint source to implement the applicable BMPs. The nonpoint source discharger must demonstrate compliance with BMP implementation or conduct water quality monitoring prescribed by DEP or the WMD. If the discharger fails to demonstrate compliance, the discharger may be subject to enforcement action.<sup>22</sup>

The adopted BMAPs are illustrated in the graphic below:<sup>23</sup>

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<sup>14</sup> DEP, *Restoration Plan Guidance* (June 2015), 2, available at <https://floridadep.gov/sites/default/files/4b4ePlansGuidance.pdf> (last visited Jan. 24, 2022).

<sup>15</sup> Section 403.061, F.S. DEP has the power and the duty to control and prohibit pollution of air and water in accordance with the law and rules adopted and promulgated by it. Section 403.061(22), F.S., allows DEP to advise, consult, cooperate, and enter into agreements with other state agencies, the federal government, other states, interstate agencies, etc.

<sup>16</sup> Section 403.067(6)(c), F.S.

<sup>17</sup> Section 403.067(7)(a)1., F.S.

<sup>18</sup> *Id.*

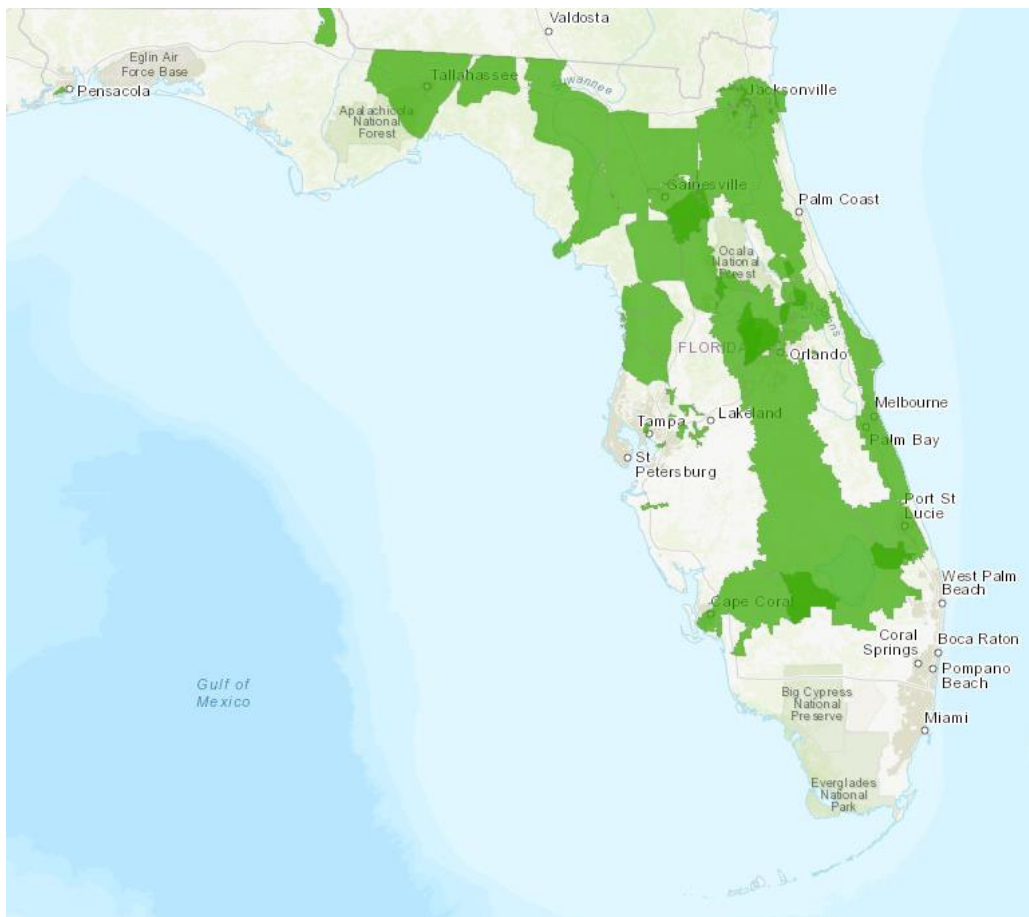
<sup>19</sup> Section 403.067(7)(a)6., F.S.

<sup>20</sup> Section 403.067(7)(b)2., F.S.

<sup>21</sup> Rule 62-306.200(2), F.A.C.; defines “best management practice” as a practice or combination of practices adopted by rule by the Department of Agriculture and Consumer Services, DEP, or the applicable WMD as an effective and practicable means for reducing nutrient inputs and improving water quality, taking into account economic and technological considerations.

<sup>22</sup> Sections 403.067(7)(b)2.g. and 2.h., F.S.

<sup>23</sup> DEP, *Impaired Waters, TMDLs, and Basin Management Action Plans Interactive Map*, available at <https://floridadep.gov/dear/water-quality-restoration/content/impaired-waters-tmdl-and-basin-management-action-plans> (last visited Jan. 23, 2022).



### *Reasonable Assurance Plans*

The U.S. Environmental Protection Agency (EPA) allows states to place certain impaired waterbodies into Category 4b for Clean Water Act section 303(d) reporting purposes, meaning that the establishment of a TMDL is not required for an impaired waterbody if other required control measures are expected to result in the attainment of WQS in a reasonable period of time.<sup>24</sup>

A Reasonable Assurance Plan (RAP) is a control measure that DEP may implement for Category 4b impaired waterbodies.<sup>25</sup> DEP first determines if a waterbody is impaired or may be reasonably expected to become impaired within the next five years.<sup>26</sup> If a waterbody fits this criterion, DEP evaluates whether existing or proposed technology-based effluent limitations and other pollution control programs are sufficient to result in the attainment of WQS. If the waterbody is expected to attain WQS in the future and to make reasonable progress towards attainment of those standards in a certain timeframe, the waterbody will not require a TMDL. DEP's decision must be based on a plan that provides reasonable assurance that proposed pollution control mechanisms and expected water quality improvements in the waterbody will attain WQS.<sup>27</sup> Currently, RAPs exist for the Florida Keys; Lake Seminole; Shell, Prairie, and Joshua Creeks; Tampa Bay Estuary; and Mosquito Lagoon.<sup>28</sup>

### *Planning Units*

Planning units provide a more detailed geographic basis for identifying and assessing water quality improvement activities. A planning unit is either an individual large tributary basin or a group of smaller

<sup>24</sup> EPA, *EPA Integrated Reporting (IR) Categories and How ATTAINS Calculates Them*, 1 (Aug. 31, 2018) available at [https://www.epa.gov/sites/default/files/2018-09/documents/attains\\_calculations\\_of\\_epa\\_ir\\_categories\\_2018-08-31.pdf](https://www.epa.gov/sites/default/files/2018-09/documents/attains_calculations_of_epa_ir_categories_2018-08-31.pdf) (last visited Jan. 28, 2022).

<sup>25</sup> DEP, *Alternative Restoration Plans*, <https://floridadep.gov/DEAR/Alternative-Restoration-Plans> (last visited Jan. 28, 2022).

<sup>26</sup> Rule 62-303.600, F.A.C.

<sup>27</sup> Rule 62-303.600, F.A.C.

<sup>28</sup> DEP, *Reasonable Assurance Plans (RAPs) Category 4b Assessments and Documentation*, <https://floridadep.gov/dear/alternative-restoration-plans/content/reasonable-assurance-plans-raps-category-4b-assessments> (last visited Jan. 26, 2022).

adjacent tributary basins with similar characteristics.<sup>29</sup> Planning units help organize information and management strategies around prominent watershed characteristics, and they provide a more detailed geographic basis for identifying and assessing water quality improvement activities.<sup>30</sup>

### Stormwater Management

Stormwater is the flow of water resulting from, and immediately following, a rainfall event.<sup>31</sup> When stormwater falls on pavement, buildings, and other impermeable surfaces, the runoff flows quickly and can pick up sediment, trash, chemicals, and other pollutants.<sup>32</sup> Stormwater is a major source of water pollution in Florida.<sup>33</sup>

The regulatory programs that address reductions in water quality caused by stormwater are the federal National Pollution Discharge Elimination System (NPDES), which regulates discharges of pollutants into waters of the U.S.,<sup>34</sup> and the state's ERP program.<sup>35</sup> NPDES regulates stormwater pollution from certain municipal storm sewer systems and runoff from certain construction and industrial activities.<sup>36</sup> The state's ERP program regulates activities that create stormwater runoff, as well as dredging and filling in wetlands and other surface waters.<sup>37</sup> ERPs aim to prevent flooding, protect wetlands and other surface waters, and protect water quality from stormwater pollution.<sup>38</sup> DEP, the WMDs, and local governments implement the ERP program.<sup>39</sup>

DEP and the WMDs may require ERPs and impose reasonable conditions to ensure that construction or alteration of stormwater management systems and related structures is consistent with applicable law and not harmful to water resources<sup>40</sup> and is for the maintenance or operation of such structures.<sup>41</sup>

DEP's stormwater rules are technology-based effluent limitations, rather than water quality-based effluent limitations.<sup>42</sup> This means that stormwater rules rely on design criteria for BMPs to achieve a performance standard for pollution reduction, rather than specifying the amount of a specific pollutant

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<sup>29</sup> DEP, *TMDL Planning Units*, [https://geodata.dep.state.fl.us/datasets/c97e066f49044131a13a79f5bbeeaf40\\_6/about](https://geodata.dep.state.fl.us/datasets/c97e066f49044131a13a79f5bbeeaf40_6/about) (last visited Jan. 28, 2022).

<sup>30</sup> *Id.*

<sup>31</sup> DEP and Water Management Districts, *Environmental Resource Permit Applicant's Handbook Volume I (General and Environmental)*, 2-10 (June 1, 2018), available at [https://www.swfwmd.state.fl.us/sites/default/files/medias/documents/Applicant\\_Hanbook\\_I\\_-\\_Combined.pdf](https://www.swfwmd.state.fl.us/sites/default/files/medias/documents/Applicant_Hanbook_I_-_Combined.pdf). (last visited Jan. 28, 2022).

<sup>32</sup> DEP, *Stormwater Management*, 1 (2016), available at [https://floridadep.gov/sites/default/files/stormwater-management\\_0.pdf](https://floridadep.gov/sites/default/files/stormwater-management_0.pdf). (last visited Jan. 28, 2022). When rain falls on fields, forests, and other areas with naturally permeable surfaces the water not absorbed by plants filters through the soil and replenishes Florida's groundwater supply.

<sup>33</sup> DEP, *Stormwater Support*, <https://floridadep.gov/water/engineering-hydrology-geology/content/stormwater-support> (last visited Jan. 28, 2022); DEP, *Nonpoint Source Program Update*, 10 (2015), available at <https://floridadep.gov/sites/default/files/NPS-ManagementPlan2015.pdf>. (last visited Jan. 28, 2022).

<sup>34</sup> National Pollutant Discharge Elimination System (NPDES), 33 U.S.C. s. 1342 (2019); 40 C.F.R. pt. 122; Under the CWA, the EPA authorizes the NPDES permit program to state, tribal, and territorial governments, enabling them to perform many of the permitting, administrative, and enforcement aspects of the program. EPA, *About NPDES*, <https://www.epa.gov/npdes/about-npdes#overview> (last visited Jan. 28, 2022).

<sup>35</sup> Chapter 373, pt. IV, F.S.; Rule 62-330, F.A.C.

<sup>36</sup> Stormwater can be either a point source or a nonpoint source of pollution. EPA, *Monitoring and Evaluating Nonpoint Source Watershed Projects*, 1-1, available at [https://www.epa.gov/sites/production/files/2016-02/documents/chapter\\_1\\_draft\\_aug\\_2014.pdf](https://www.epa.gov/sites/production/files/2016-02/documents/chapter_1_draft_aug_2014.pdf); (Last visited Jan 28, 2022); DEP, *Nonpoint Source Program Update*, 9 (2015), available at <https://floridadep.gov/sites/default/files/NPS-ManagementPlan2015.pdf> (last visited Jan. 28, 2022); See generally EPA, *NPDES Stormwater Program*, <https://www.epa.gov/npdes/npdes-stormwater-program> (last visited Jan. 28, 2022).

<sup>37</sup> DEP, *DEP 101: Environmental Resource Permitting*, <https://floridadep.gov/comm/press-office/content/dep-101-environmental-resource-permitting> (last visited Jan. 26, 2022).

<sup>38</sup> South Florida Water Management District, *Environmental Resource Permits*, <https://www.swfwmd.gov/doing-business-with-us/permits/environmental-resource-permits> (last visited Jan. 26, 2022).

<sup>39</sup> Rule 62-330.010(3), F.A.C.

<sup>40</sup> Section 373.413, F.S.; see s. 403.814(12), F.S.

<sup>41</sup> Section 373.416, F.S.

<sup>42</sup> DEP, *ERP Stormwater*, <https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/erp-stormwater> (last visited Jan. 28, 2022).

that may be discharged to a waterbody and still ensure that the waterbody attains WQS.<sup>43</sup> The rules contain minimum stormwater treatment performance standards, which require design and performance criteria for new stormwater management systems to achieve at least 80 percent reduction of the average annual load of pollutants that would cause or contribute to violations of state WQS.<sup>44</sup>

DEP and the WMDs require applicants to provide reasonable assurance that state WQS will not be violated.<sup>45</sup> If a stormwater management system is designed in accordance with the stormwater treatment requirements and criteria adopted by DEP or the WMDs, then the system design is presumed not to cause or contribute to violations of applicable state WQS.<sup>46</sup> If a stormwater management system is constructed, operated, and maintained for stormwater treatment in accordance with a valid permit or exemption, then the stormwater discharged from the system is presumed not to cause or contribute to violations of applicable state WQS.<sup>47</sup> If an applicant is unable to meet WQS because existing ambient water quality does not meet standards, DEP or a WMD must consider mitigation measures that cause a net improvement of the water quality in the waterbody that does not meet the standards.<sup>48</sup>

### Water Quality Credit Trading

Water quality credit trading is a market-based approach that can be used to attain water quality improvements.<sup>49</sup> Water quality trading allows one source of pollution to control a pollutant at levels greater than required and sell credits to another source, the buyer, which uses the credits to supplement their level of water treatment in order to comply with regulatory requirements.<sup>50</sup> Pollutant reductions achieved through water quality trading must result in water quality that is as good as or better than what would be achieved through treatment.<sup>51</sup>

DEP is the agency charged with regulating water quality credit trading in the state.<sup>52</sup> Water quality credits<sup>53</sup> can only be traded within the boundaries of a BMAP or RAP.<sup>54</sup> Credits cannot be generated for a reduction in nutrient loading that is required under a regulatory program, including BMAPs or RAPs, but can be generated if reductions are made beyond what is required in the BMAP or RAP.<sup>55</sup> Additionally, credits cannot be generated from the implementation of BMPs that are required under a BMAP or RAP.<sup>56</sup> An entity must fully comply with its baseline nutrient load to be eligible for credits resulting from management actions that reduce the nutrient load below the baseline.<sup>57</sup> In the past, water quality credits have been traded in the state, however there are no water quality credits available for trade currently.<sup>58</sup>

### Graywater Incentives

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<sup>43</sup> See generally, EPA, *National Pollutant Discharge Elimination System (NPDES)*, [www.epa.gov/npdes/npdes-permit-limits](http://www.epa.gov/npdes/npdes-permit-limits) (last visited Jan. 28, 2022).

<sup>44</sup> Rule 62-40.432(2), F.A.C.

<sup>45</sup> Section 373.414(1), F.S.; see s. 373.403(11), F.S.; see Rules Ch. 62-4, F.A.C., 62-302, F.A.C., 62-520 F.A.C., and 62-550 F.A.C.

<sup>46</sup> Section 373.4131(3)(b), F.S., Rule 62-40.432(2), F.A.C.; see also DEP, *ERP Stormwater*, <https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/erp-stormwater> (last visited Jan. 28, 2022) stating that a key component of the stormwater rule is a “rebuttable presumption that discharges from a stormwater management system designed in accordance with the BMP design criteria will not cause harm to water resources.”

<sup>47</sup> Section 373.4131(3)(c), F.S.

<sup>48</sup> Section 373.414(1)(b)3., F.S.

<sup>49</sup> EPA, *Water Quality Trading*, <https://www.epa.gov/npdes/water-quality-trading> (last visited Jan. 28, 2022).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> Section 403.067(8), F.S.

<sup>53</sup> Rule 62-306.200(3), F.A.C. defines “credit” to mean the amount of an entity’s nutrient load reduction below the baseline that will be available for trading purposes. Credits are in units of pounds per year or kilograms per year.

<sup>54</sup> Rule 62-306.300(1), F.A.C.

<sup>55</sup> Rule 62-306.400(2)(a), F.A.C.

<sup>56</sup> Rule 62-306.400(2)(b), F.A.C.

<sup>57</sup> Rule 62-306.400(4), F.A.C.

<sup>58</sup> DEP, *Florida Water Quality Credit Trading Registry*, <https://floridadep.gov/dear/water-quality-restoration/content/florida-water-quality-credit-trading-registry> (last visited Jan. 28, 2022); DEP, *Credits Traded Document* (Sept. 7, 2018) available at <http://publicfiles.dep.state.fl.us/DEAR/DEARweb/BMAP/DEP%20WQCT%20Spreadsheet.pdf> (last visited Jan. 28, 2022).

In 2021, the Legislature passed SB 64,<sup>59</sup> which required counties, municipalities, and special districts to provide a 25 percent density or intensity bonus to a developer or homebuilder if at least 75 percent of a proposed or existing development will have a graywater system installed or a 35 percent bonus if 100 percent of a proposed or existing development will have a graywater system installed.<sup>60</sup> To qualify for these incentives, a developer or homeowner must make certain assurances to the applicable governmental entity.<sup>61</sup>

### Mitigation Banking

Mitigation banking is a practice in which an environmental enhancement and preservation project is conducted by a public agency or private entity (banker) to provide mitigation for unavoidable environmental impacts within a defined region referred to as a mitigation service area. A mitigation bank consists of a wetland, stream, or other aquatic resource area that has been restored, established, or preserved to offset such environmental impacts. The bank is the site itself, and the currency sold by the banker to the ERP applicant is a credit. The number of potential credits permitted for the bank and the credit required for ERPs are determined by DEP or a WMD. Mitigation banks are authorized by a state permit, which is issued by either a WMD or DEP depending on the location of the bank and the activity it mitigates, and by the United States Army Corps of Engineers.<sup>62</sup>

A banker applying for a permit to establish a mitigation bank must provide documentation of financial responsibility and financial assurance mechanisms for the construction and implementation of the bank, and the perpetual management and maintenance of the bank.<sup>63</sup> This can be achieved by obtaining a surety or performance bond, irrevocable letter of credit, or insurance policy. The banker may also create an escrow account, standby escrow account, trust fund, or standby trust fund to fulfill this requirement. Fiscal responsibility mechanisms can be paid to a DEP designee, standby trust, or standby escrow.<sup>64</sup> The banker is required to demonstrate continuous fiscal responsibility until all of the permit conditions are completely satisfied and approved for release by DEP.<sup>65</sup> Further, the financial responsibility mechanisms must guarantee that the banker will perform all of its obligations under the permit.<sup>66</sup>

## **Effect of the Bill**

### Water Quality Enhancement Areas

The bill authorizes the creation of water quality enhancement areas (WQEAs), which are defined as natural systems constructed, operated, managed, and maintained under an ERP permit for the purpose of providing offsite, compensatory regional treatment within an identified enhancement service area for which enhancement credits may be provided. The bill defines an “enhancement credit” to mean a standard unit of measure that represents a quantity of pollutant removed. The bill specifies that such credits may only be sold to governmental entities.

The bill requires the construction, operation, management, and maintenance of a WQEA to be approved through an ERP permit and specifies that DEP rules relating to ERPs must apply to WQEAs and enhancement credits. The bill requires a WQEA to address the contributions of pollutants in an enhancement service area that does not meet state WQS. An “enhancement service area” is defined as the geographic area in which the WQEA can reasonably be expected to offset adverse water quality impacts. Additionally, a WQEA must use, create, or improve natural systems in order to improve water quality.

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<sup>59</sup> Ch. 2021-168, Laws of Fla.

<sup>60</sup> Section 403.892(2)(b), F.S.

<sup>61</sup> Section 403.892(3), F.S.

<sup>62</sup> DEP, *Mitigation and Mitigation Banking*, <https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/mitigation-and-mitigation-banking> (last visited Nov. 19, 2021).

<sup>63</sup> Rule 62-340.700, F.A.C.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

The bill authorizes a governmental entity to use a WQEA for its own water quality needs, but prohibits such entities from acting as a sponsor to construct, operate, manage, or maintain a WQEA or from marketing enhancement credits to third parties.

The bill prohibits a local government from requiring a permit or otherwise imposing regulations governing the operation of a WQEA.

To obtain a WQEA permit, the bill requires the applicant to provide reasonable assurances that the proposed WQEA will:

- Meet the requirements for issuance of an ERP;
- Benefit water quality in the enhancement service area;
- Achieve defined performance or success criteria for the reduction of pollutants or other constituents that prevent receiving waters from meeting state WQS;
- Ensure long-term pollutant reduction through effective operation and maintenance in perpetuity by designation of a responsible long-term maintenance entity supported by an endowment or other long-term financial assurance sufficient to ensure perpetual operation and maintenance;
- Demonstrate sufficient legal or equitable interest in the property to ensure access and perpetual protection and management of the land within the WQEA; and
- Provide for permanent preservation of the WQEA.

The bill requires the WQEA permit to provide for the assessment, valuation, and award of credits based on units of pollutants removed. To assist DEP in determining enhancement credits, the bill requires a WQEA applicant to include the following in its application:

- Rainfall data over the longest period of record available from the closest site to the proposed WQEA, preferably within the same drainage basin;
- Anticipated average annual water quality and quantity inflows to the proposed WQEA, based on published local data collected over a period of record that most closely matches the rainfall data provided above.
- 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 treatment type has been established and operating over a minimum of two consecutive wet and dry seasons.
- Data from collection stations, approved in advance by DEP, in sites that it deems sufficient to determine flows and local water quality conditions.

The bill specifies that the issuance of a WQEA permit does not preclude the responsibility of an applicant to obtain other applicable federal, state, and local permits for construction activities associated with the WQEA.

The bill requires an enhancement service area to be based on a BMAP or RAP boundary adopted by DEP. If DEP does not adopt a BMAP or RAP boundary, the enhancement service area must be the planning unit.

The bill specifies that a WQEA may only provide enhancement credits in an enhancement service area, except for projects with adverse impacts located partially within the enhancement service area and linear projects, such as roadways, transmission lines, distribution lines, pipelines, railways, or seaports.

Once an enhancement service area has been established by DEP, the bill requires the enhancement service area to be accepted by all WMDs and local governments.

The bill requires DEP or the WMDs to authorize the sale and use of enhancement credits to governmental entities to offset adverse water quality impacts of permitted activities or to assist governmental entities seeking to meet an assigned BMAP allocation or RAP.

The bill specifies that water quality improvement projects using natural systems or land use modifications, including, but not limited to, constructed wetlands or minor impoundments that reduce



pollutants to a receiving water body, may be used by an applicant to generate enhancement credits if approved by DEP.

The bill requires DEP to provide and maintain a ledger that tracks the award, release, and use of enhancement credits. The bill requires the operator of a WQEA to notify DEP of the amount of enhancement credits sold or used within 30 days after the date the enhancement credit transaction is completed. A WMD that authorizes applicants seeking permits to use enhancement credits to offset water quality impacts must report to DEP the amount of enhancement credits used by the applicant.

The bill specifies that reductions in pollutant loading required under any state regulatory program are not eligible to be considered as enhancement credits.

The bill prohibits enhancement credits from being used by point source dischargers to satisfy regulatory requirements other than those necessary to obtain an ERP for construction and operation of the surface water management system of the site.

The bill specifies that the use of enhancement credits made available by a WQEA is voluntary.

The bill specifies that any landowner, discharger, or other responsible person that is implementing applicable management strategies specified in an adopted BMAP or RAP may not be required by any permit or other enforcement action to use enhancement credits to reduce pollutant loads to achieve the established pollutant reductions.

The bill prohibits a local government from denying the use of enhancement credits due to the location of the WQEA outside the jurisdiction of the local government.

The bill specifies that the authority granted to DEP in the bill is supplemental to the authority granted under the current water quality credit trading program.

The bill authorizes DEP to adopt rules related to implementing WQEAs and credits. Additionally, the bill requires DEP to adopt and modify rules related to ERPs and mitigation banking to ensure that required financial assurances are equivalent and sufficient to provide for the long-term management of mitigation permitted under the ERP program and mitigation regulations. The bill requires DEP, in consultation with the WMDs, to include the rulemaking required by the bill in existing active rulemaking or to complete rule development by June 30, 2023.

#### Graywater Incentives

The bill specifies that whether a dwelling is owner occupied is not an eligibility criterion for a developer or homebuilder to receive density or intensity bonuses for implementing graywater technologies.

#### Appropriation

The bill provides an appropriation of nine full-time equivalent positions with associated salary rate of 479,000 and \$878,275 in recurring funds from the General Revenue Fund to DEP to implement the bill.

### B. SECTION DIRECTORY:

- Section 1. Creates s. 373.4134, F.S., related to WQEAs.
- Section 2. Amends s. 403.892, F.S., related to incentives for graywater technologies.
- Section 3. Directs DEP to adopt and modify rules adopted pursuant to ss. 373.4136, F.S., and 373.414, F.S.
- Section 4. Provides an appropriation.
- Section 5. Provides an effective date of July 1, 2022.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

DEP would need to establish and implement a new statewide regulatory program for WQEAs. It is anticipated that routine travel would be necessary during the permit review process and to perform extensive post-construction monitoring inspections. Routine water quality analysis would also likely be required at the time of application review. The bill provides an appropriation of nine full-time equivalent positions with associated salary rate of 479,000 and \$878,275 in recurring funds from the General Revenue Fund to DEP to implement the bill.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may have an indeterminate positive fiscal impact on entities that establish WQEAs and sell water quality enhancement credits.

### D. FISCAL COMMENTS:

None.

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

### B. RULE-MAKING AUTHORITY:

The bill requires DEP to adopt rules related to implementing WQEAs and credits. Additionally, the bill requires DEP to adopt and modify rules related to ERPs and mitigation banking.

### C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

#### **IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES**

On February 3, 2022, the Environment, Agriculture & Flooding Subcommittee adopted a strike-all amendment and reported the bill favorably as a committee substitute. The amendment:

- Specified enhancement credits may only be sold to governmental entities;
- Removed provisions related to expediting permits under the ERP program and State 404 Program and removed the associated appropriation;
- Added a provision revising the criteria for developers and homebuilders to receive graywater technology incentives; and
- Required DEP to engage in rulemaking to ensure financial assurances are equivalent and sufficient to provide for long-term mitigation.

On February 14, 2022, the Agriculture & Natural Resources Appropriations Subcommittee adopted an amendment and reported the bill favorably as a committee substitute. The amendment provided an appropriation of nine full-time equivalent positions with associated salary rate of 479,000 and \$878,275 in recurring funds from the General Revenue Fund to DEP to implement the bill.

This analysis is drafted to the committee substitute as approved by the Agriculture & Natural Resources Appropriations Subcommittee.