

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 1073 Mitigation

SPONSOR(S): Infrastructure Strategies Committee, Water Quality, Supply & Treatment Subcommittee, Truenow

TIED BILLS: **IDEN./SIM. BILLS:** CS/CS/CS/SB 1532

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Water Quality, Supply & Treatment Subcommittee	15 Y, 0 N, As CS	Guy-Hudson	Curtin
2) Agriculture & Natural Resources Appropriations Subcommittee	13 Y, 0 N	Byrd	Pigott
3) Infrastructure Strategies Committee	22 Y, 0 N, As CS	Guy-Hudson	Harrington

SUMMARY ANALYSIS

There are a number of tools available to address negative impacts to waters and wetlands. Mitigation banking is a practice in which an environmental enhancement and preservation project is conducted by a public agency or private entity to mitigate unavoidable environmental impacts to wetlands and other surface waters associated with a permitted project. There are currently 131 state-authorized mitigation banks in Florida that cover 227,496 acres. Water Quality Enhancement Areas (WQEA) provide regional treatment and address pollutants in a watershed, basin, sub-basin, targeted restoration area or waterbody in which the WQEA is located that do not meet applicable state water quality criteria. The Department of Environmental Protection (DEP) awards water quality enhancement credits, each of which represent a quantity of pollutant removed. Currently, credits may only be sold to governmental entities.

The bill creates a process for the establishment and operation of a private mitigation bank using local government-owned land, including lands acquired for conservation, when such land is located in a credit-deficient basin as defined in the bill. Habitat type credits provided by the private mitigation bank would be used to address the unavailability or deficiency of certain habitat type credits.

The bill requires the local government to execute a use agreement with the private applicant at which time the credit deficiency is confirmed. However, once the use agreement is executed the mitigation bank application may proceed, even if the credit deficiency is relieved. Among other things, the use agreement requires the private applicant to provide financial assurance which will be used for long-term management of the land and agree to operate and maintain the private mitigation bank until final permit success criteria are met. When determining the number of mitigation bank credits to award to a private mitigation bank, the bill prohibits increasing the location factor assessment and scoring value in the uniform mitigation assessment method (UMAM) when the proposed private mitigation bank is located in or adjacent to the local government's conservation lands. The bill authorizes DEP, in coordination with the water management districts (WMD), to adopt rules to implement the requirements of the bill relating to mitigation banking.

The bill authorizes private sector entities to apply to purchase water quality enhancement credits and authorizes the use of WQEAs for certain areas where environmental resource permit performance standards are not being met.

The bill will have an indeterminate fiscal impact on state and local government. See Fiscal Analysis.

The bill provides an effective date of July 1, 2024.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Wetlands are transitional areas between land and deep water, and they are sufficiently inundated with water so that they support vegetation which grows in saturated soils.¹ “Florida wetlands generally include swamps, marshes, bayheads, bogs, cypress domes and strands, sloughs, wet prairies, riverine swamps and marshes, hydric seepage slopes,² tidal marshes, mangrove swamps and other similar areas.”³ Prior to development, wetlands covered approximately one half of Florida.⁴ Today, approximately 11 million acres of wetlands cover Florida and the state boasts more wetlands than any of the other 47 conterminous States.⁵

Regulation of Activities in Wetlands

The Clean Water Act (CWA) is the primary federal law that regulates water pollution in the United States and it prohibits the discharge of any pollutant⁶ into waters of the United States (WOTUS).⁷ The discharge of dredged or fill material into WOTUS, including wetlands, is regulated by a program established in Section 404 of the CWA.⁸ States may apply to the U.S. Environmental Protection Agency (EPA) to assume the federal dredge and fill permitting program; Florida assumed the 404 permitting program in 2020.⁹ On February 15th of this year a judge in the United States District Court for the District of Columbia vacated the EPA’s approval of Florida’s assumption package as violative of the Endangered Species Act.¹⁰ The ruling applies to pending and future 404 permit applications; however, the State 404 Program may be preserved for those applications which are not likely to adversely affect listed species.¹¹

DEP regulates surface water flows via the Environmental Resource Permit (ERP) Program, a permitting process that addresses and regulates impacts to the landscape including clearing, grading, construction of structures and filling and dredging, whether the work occurs in uplands, wetlands or other surface waters.¹² An ERP permit may be issued by DEP, a WMD or a local government to which DEP delegated ERP permitting authority.¹³ ERPs are designed to prevent flooding, protect wetlands and other surface waters and protect Florida’s water quality from stormwater pollution.¹⁴

¹ Melanie R. Darst, Helen M. Light, and Benjamin F. McPherson, U.S. Geological Survey (USGS) Water-Supply Paper 2425, *Florida Wetland Resources*, <https://www.fws.gov/media/wetland-resources-florida>, p. 153 (last visited Jan. 25, 2024); S. 373.019(27), F.S.

² Seepage slopes are wetlands located on the sides of rolling hills. “Unusual hydrology and frequent fires combine to create an environment that supports a variety of carnivorous and other sun-loving herbaceous plants” and “there are many rare or endemic species . . . that can be found in seepage slopes in the Florida Panhandle.” UF, IFAS Extension, *Florida’s Seepage Slope Wetlands* (Apr. 11, 2018), <https://edis.ifas.ufl.edu/publication/UW367> (last visited Jan. 25, 2024).

³ S. 373.019(27), F.S.; see also Department of Environmental Protection (DEP), *Wetland Evaluation and Delineation* (last updated Feb. 17, 2023), <https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/wetland-evaluation-and> (last visited Jan. 25, 2024).

⁴ Darst, *supra* note 1.

⁵ *Id.*

⁶ 33 U.S.C. § 1311(a). The definition of the term “pollutant” is quite broad. 33 U.S.C. § 1362(6).

⁷ 33 U.S.C. § 1362(12)(A). “The term ‘navigable waters’ means the waters of the United States, including the territorial seas.” 33 U.S.C. § 1362(7).

⁸ EPA, *Section 404 of the Clean Water Act, Permit Program under CWA Section 404* (last updated Mar. 31, 2023), <https://www.epa.gov/cwa-404/permit-program-under-cwa-section-404> (last visited Jan. 25, 2024).

⁹ 40 C.F.R. § 233.1. See also DEP, *State 404 Program* (last updated Oct. 17, 2023), <https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/state-404-program> (last visited Jan. 25, 2024).

¹⁰ *Ctr. for Biological Diversity v. Regan*, No. 21-119 (D.C. Feb. 15, 2024), on file with the Water Quality, Supply & Treatment Subcommittee.

¹¹ *Id.*

¹² DEP, *Environmental Resource Permitting Online Help* (last updated Feb. 8, 2022), <https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/environmental-resource-0> (last visited Jan. 25, 2024).

¹³ *Id.*

¹⁴ *Id.*

While the State 404 Program and the ERP Program are separate programs, approximately 85 percent of review requirements of the two programs overlap.¹⁵ DEP's Submerged Lands and Environmental Resources Coordination Program is responsible for the consistent implementation of both the State 404 Program and the ERP Program.¹⁶ Both programs require avoidance and minimization measures to reduce impacts to wetlands and any remaining adverse impacts to be offset by mitigation. The methodology ratified by the Legislature for identifying and delineating the extent of wetlands and surface waters¹⁷ is also the methodology used to establish the boundary of state-assumed waters under the State 404 Program.¹⁸ Provisions of state law that conflict with federal requirements under the CWA do not apply to state-administered 404 permits.¹⁹

ERP permitting is governed by s. 373.4131, F.S. DEP implements this section of law in ch. 62-330, F.A.C., which provides for the permitting rules, application process and standards by which applications are considered and approved or denied. The ERP Applicant's Handbook, which is incorporated by reference into DEP rules, provides guidance on DEP's ERP program, which includes all permitted activities governed by ch. 373, part IV, F.S., relating to management and storage of surface waters.²⁰ Applicants for an ERP must adhere to requirements in both the ERP Applicant's Handbook, Vol. I, which governs general permitting while WMD-specific permitting requirements are contained in the ERP Applicant's Handbook, Vol. II, for which there is one per WMD.²¹

Mitigation Banks

Some permitted projects result in unavoidable adverse impacts to wetlands and other surface waters. Mitigation activities for such projects include activities that preserve, create, enhance and/or restore wetlands and other surface waters.²² Mitigation banking is a practice in which an environmental enhancement and preservation project is conducted by a public agency or private entity to provide mitigation for unavoidable environmental impacts within a defined region referred to as a mitigation service area.²³

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.²⁴ Mitigation banks are an alternative to permittee-responsible mitigation.²⁵ Permittee-responsible mitigation refers to mitigation undertaken by the permittee to provide compensatory mitigation for which the permittee retains full responsibility.²⁶ If mitigation credits are not available, state law allows permittee-responsible mitigation consisting of the restoration and enhancement of lands owned by a local government.²⁷

State law directs DEP and the WMDs "to participate in and encourage the establishment of private and public mitigation banks and offsite regional mitigation."²⁸ In general, a governmental entity may not

¹⁵ DEP, *State 404 Program*, *supra* note 9.

¹⁶ DEP, *Submerged Lands and Environmental Resources Coordination Program*, <https://floridadep.gov/water/submerged-lands-environmental-resources-coordination> (last visited Jan. 25, 2024).

¹⁷ S. 373.4211, F.S.

¹⁸ R. 62-331.010(3), F.A.C.

¹⁹ S. 373.4146(3), F.S.

²⁰ DEP, *Environmental Resource Permit Applicant's Handbook Volume I (General and Environmental)*, p. 1-4 (Dec. 22, 2020) Modified Document, 1/6/2021, <https://www.flrules.org/gateway/reference.asp?No=Ref-12078> (last visited Jan. 21, 2024).

²¹ DEP, *ERP Stormwater* (last updated June 7, 2022), [ERP Stormwater | Florida Department of Environmental Protection](https://www.floridadep.gov/water/erp-stormwater) (last visited Jan. 25, 2024).

²² DEP, *Mitigation and Mitigation Banking* (last updated May 31, 2023), <https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/mitigation-and-mitigation-banking> (last visited Jan. 24, 2024).

²³ *Id.* "Mitigation service area" means the geographic area within which mitigation credits from a mitigation bank may be used to offset adverse impacts of activities regulated under this part. S. 373.403(21), F.S.

²⁴ EPA, *Mitigation Banks under CWA Section 404* (last updated Oct. 31, 2023), [Mitigation Banks under CWA Section 404 | US EPA](https://www.epa.gov/cwa-404/mitigation-banks-under-cwa-section-404) (last visited Jan. 25, 2024).

²⁵ S. 373.4135(1)(b), F.S.

²⁶ EPA, *Mechanisms for Providing Compensatory Mitigation under CWA Section 404* (last updated Apr. 6, 2023), <https://www.epa.gov/cwa-404/mechanisms-providing-compensatory-mitigation-under-cwa-section-404> (last visited Jan. 25, 2024).

²⁷ S. 373.4135(1)(b), F.S.

²⁸ S. 373.4135(1), F.S.

create or provide mitigation for a project other than its own except when a local government has allowed a public or private mitigation project to be created on land it purchased for conservation purposes.²⁹

The mitigation bank is the site itself and the currency sold by the banker to the impacted permittee is a credit, representing the wetland ecological value equivalent to the complete restoration of one acre.³⁰ The permitting agencies determine the number of potential credits permitted for the bank and the credit debits required for impact permits.³¹

Mitigation banks are authorized by an ERP permit issued by DEP, the St. Johns River WMD, the Southwest Florida WMD, and/or the South Florida WMD, depending on the location of the bank and the Operating and Delegation Agreements between DEP and the WMDs.³² DEP is responsible for permitting mitigation banks within the Northwest Florida WMD and the Suwannee River WMD.³³ Mitigation banks also require federal authorization³⁴; a number of agencies are involved in processing the federal authorization³⁵ - called a Mitigation Banking Instrument - and the U.S. Army Corps of Engineers (USACE) typically serves as the lead agency.³⁶

Requirements for mitigation bank permits differ between mitigation bank instruments issued by the USACE and state permits issued by DEP or the WMDs. Under the federal process, a mitigation banking instrument serves as the legal document for the establishment, operation and use of a mitigation bank.³⁷ They are approved by an interagency review team, through procedures involving public notice and comment.³⁸ Mitigation banking instruments must include certain detailed elements, such as a comprehensive mitigation plan including financial assurances and a credit release schedule that is tied to the achievement of specific milestones.³⁹

Once mitigation credits have been awarded to a mitigation bank, the permitting agency is required to establish a schedule, in the permit, for the release of credits.⁴⁰ Once a credit is released it may be sold or used to offset adverse impacts associated with a permitted project.⁴¹ The permitting agency is prohibited from releasing all of a mitigation bank's credits until the bank meets the mitigation success criteria established in its mitigation bank permit.⁴² In addition, with certain exceptions, credits may only be withdrawn and used to offset impacts in the mitigation service area.⁴³

²⁹ S. 373.4135(1)(b), F.S.

³⁰ DEP, *Mitigation and Mitigation Banking*, *supra* note 22.

³¹ *Id.*

³² R. 62-342.100(2), F.A.C.; DEP, *Mitigation Banking Rule and Procedure Synopsis* (last updated Feb. 17, 2023),

<https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/mitigation-banking-rule-and> (last visited Dec. 20, 2023).

³³ DEP, *Mitigation Banks and Mitigation Banking* (last updated Feb. 17, 2023), <https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/mitigation-and-mitigation-banking> (last visited Jan. 25, 2024).

³⁴ DEP, *Mitigation and Mitigation Banking*, *supra* note 22.

³⁵ 33 C.F.R. § 332.8(b)(2).

³⁶ 33 C.F.R. § 332.8(b)(1).

³⁷ 33 C.F.R. s. 332.2.

³⁸ 33 C.F.R. s. 332.8; 40 C.F.R. s. 230.98.

³⁹ *See generally* 33 C.F.R. s. 332.8(d)(6); *see also* 40 C.F.R. s. 230.98(d)(6).

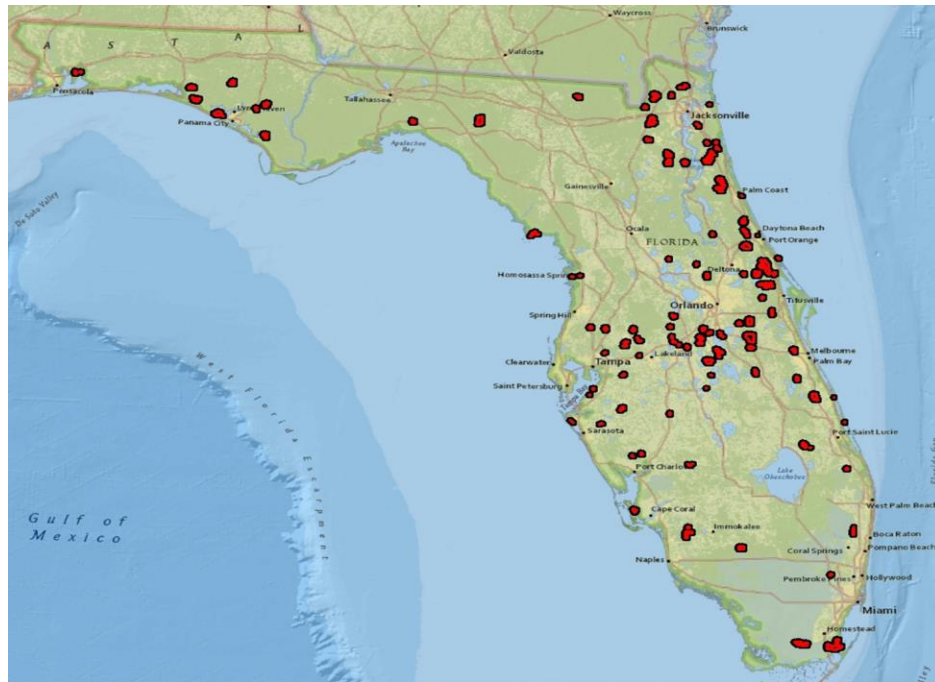
⁴⁰ S. 373.4136(5), F.S.

⁴¹ *Id.*

⁴² S. 373.4136(5)(b), F.S.

⁴³ S. 373.4136(6), F.S.; S. 373.4136(6)(d), F.S.

Currently, there are 131 state-authorized mitigation banks in Florida that cover 227,496 acres.⁴⁴



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Water Quality Credit Trading

Water quality credit trading is a market-based approach that can be used to attain water quality improvements.⁴⁶ Water quality credit 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.⁴⁷ Pollutant reductions achieved through water quality credit trading must result in water quality that is as good as or better than what would be achieved through treatment.⁴⁸

DEP is responsible for regulating water quality credit trading.⁴⁹ Water quality credits⁵⁰ can only be traded within the boundaries of a basin management action plan⁵¹ (BMAP) or a Reasonable Assurance Plan (RAP) area.⁵² 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.⁵³ Additionally, credits cannot be generated from the

⁴⁴ Presentation by Christine Wentzel, Regulatory Manager, Environmental Resource Program, St. Johns River WMD, *Mitigation Banks*, to the House Water Quality, Supply & Treatment Subcommittee (Sept. 19, 2023), <https://www.myfloridahouse.gov/Sections/Documents/loadoc.aspx?PublicationType=Committees&CommitteeId=3251&Session=2024&DocumentType=Meeting+Packets&FileName=wst+9-19-23.pdf>, slide 24, (last visited Jan. 25, 2024).

⁴⁵ *Id.*

⁴⁶ EPA, *Water Quality Trading* (last updated Nov. 28, 2023), <https://www.epa.gov/npdes/water-quality-trading> (last visited Jan. 25, 2024).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ S. 403.067(8), F.S.

⁵⁰ R. 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.

⁵¹ A BMAP is a restoration plan for the watersheds and basins connected to an impaired waterbody. S. 403.067(7)(a)1., F.S.

⁵² R. 62-306.300(1), F.A.C. A Reasonable Assurance Plan is a control measure the DEP may implement for Category 4b impaired waterbodies. DEP, *Alternative Restoration Plans*, [Alternative Restoration Plans | Florida Department of Environmental Protection](#) (last visited Jan. 25, 2024).

⁵³ R. 62-306.400(2)(a), F.A.C.

implementation of best management practices (BMP)⁵⁴ that are required under a BMAP or RAP.⁵⁵ 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.⁵⁶ In the past, water quality credits have been traded in the state; however, currently there are no water quality credits available for trade.⁵⁷

Water Quality Enhancement Areas⁵⁸

Water quality enhancement areas (WQEA) are “natural systems constructed, operated, managed, and maintained for the purpose of providing offsite regional treatment for which enhancement credits may be provided pursuant to a WQEA permit”⁵⁹ Awarded by DEP, an enhancement credit represents a quantity of pollutant removed.⁶⁰ An enhancement credit may be sold only to governmental entities seeking to meet an assigned BMAP or RAP, or for the purpose of achieving net improvement of water quality when existing, ambient water quality does not meet standards.⁶¹ It may be sold only after the governmental entity provides reasonable assurance of meeting DEP rules for design and construction of all onsite stormwater management.⁶²

A WQEA is used to address pollutants in a watershed, basin, sub-basin, targeted restoration area or waterbody in which the WQEA is located that do not meet applicable state water quality criteria.⁶³ Construction, operation, management and maintenance of a WQEA must be approved through the ERP permit process⁶⁴ and must be used to create, improve or use natural systems to improve water quality.⁶⁵ A WQEA permit provides for the assessment, valuation and award of credits based on units of pollutants removed.⁶⁶ DEP must base its determination of the award of enhancement credits on standard numerical models or analytical tools that establish the WQEA's ability to remove pollutants or constituents.⁶⁷ If the watershed within the WQEA has a BMAP, then the applicant must use the BMAP numerical models and analytical tools.⁶⁸

“To obtain a WQEA permit, the applicant must provide reasonable assurances that the proposed WQEA will be used to:

- Meet the requirements for issuance of an ERP;
- Benefit water quality in the watershed in which the WQEA is located;
- Meet defined performance or success criteria for the reduction of one or more pollutants or other constituents that prevent receiving waters from meeting applicable state water quality criteria;

⁵⁴ The EPA's National Pollutant Discharge Elimination System (NPDES) regulations include a definition of BMPs as applied to water quality protection to mean, “[s]chedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of ‘waters of the United States.’ BMPs also include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage.” 40 C.F.R. §122.2

⁵⁵ R. 62-306.400(2)(b), F.A.C.

⁵⁶ R. 62-306.400(4), F.A.C.

⁵⁷ DEP, *Florida Water Quality Credit Trading Registry* (last updated Feb. 21, 2023), <https://floridadep.gov/dear/water-quality-restoration/content/florida-water-quality-credit-trading-registry> (last visited Feb. 19, 2024).

⁵⁸ The Water Quality Enhancement Area Program (Program) was created in Ch. 2022-215, Laws of Fla., and required DEP to initiate rulemaking to implement the Program. DEP held one rule development workshop on Nov. 8, 2023. DEP, *Water Quality Enhancement Area Rulemaking* (last updated Dec. 7, 2023) [Water Quality Enhancement Area Rulemaking | Florida Department of Environmental Protection](#) (last visited Feb. 19, 2024). Until rules are adopted, the Program is not operational.

⁵⁹ S. 373.4134(2)(d), F.S.

⁶⁰ S. 373.434(2)(a), F.S.

⁶¹ S. 373.4134(3)(b), F.S.

⁶² *Id.*

⁶³ S. 373.4134(3)(c), F.S.

⁶⁴ S. 373.4134(3)(a), F.S.

⁶⁵ S. 373.4134(3)(d), F.S.

⁶⁶ S. 373.4134(4)(b), F.S.

⁶⁷ S. 373.4134(4)(c), F.S.

⁶⁸ S. 373.4134(4)(c)1., F.S.

- 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. . . .”⁶⁹

The WQEA permit applicant must propose performance and success criteria monitoring and a verification plan and protocols for once the WQEA is operational.⁷⁰ The protocols must be appropriate for the WQEA and sufficient to demonstrate that the area is meeting defined performance or success criteria for the reduction of pollutants or contaminants for which credits are awarded.⁷¹ Permit applications must include site-specific water data and conditions information to assist DEP in determining the number of credits to issue.⁷² An applicant for a WQEA permit or an applicant proposing to use enhancement credits must comply with all requirements pertaining to adverse impacts to water quality in receiving waters and adjacent lands or wetlands.⁷³ If a permittee fails to comply with the conditions of a WQEA, DEP must revoke the ability of the permittee to sell enhancement credits until the WQEA complies with the conditions of the permit.⁷⁴

DEP must establish a water quality enhancement service area for each WQEA.⁷⁵ Enhancement credits may be withdrawn and used only to address adverse impacts in the enhancement service area.⁷⁶ The boundaries of such enhancement service areas depend on the geographic area in which the WQEA could reasonably be expected to address adverse impacts.⁷⁷

DEP must track the award, release and use of enhancement credits by maintaining a ledger.⁷⁸ If credits are sold or used, the WQEA operator must notify DEP within 30 days after the date the enhancement credit transaction is completed.⁷⁹ A WMD that authorizes applicants seeking permits to use enhancement credits to address water quality impacts must report to DEP the amount of enhancement credits used by the applicants.⁸⁰

A WQEA may not be located on lands purchased for conservation pursuant to the Florida Forever Act or the Florida Preservation 2000 Act.⁸¹ Pollutant loading reductions required under any state regulatory program are not eligible to be considered as enhancement credits.⁸² 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 the surface water management system of the site.⁸³

⁶⁹ S. 373.4134(4)(a)1.-6., F.S.

⁷⁰ S. 373.4134(6)(a), F.S.

⁷¹ *Id.*

⁷² S. 373.4134(4)(C)4., F.S.

⁷³ S. 373.4134(3)(g), F.S.

⁷⁴ S. 373.4134(6)(b), F.S.

⁷⁵ S. 373.4134(5), F.S.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ S. 373.4134(7)(d), F.S.

⁷⁹ S. 373.4134(7)(d)2., F.S.

⁸⁰ S. 373.4134(7)(d)1., F.S.

⁸¹ S. 373.4134(7)(c), F.S.

⁸² S. 373.4134(7)(e), F.S.

⁸³ S. 373.4134(7)(e) and (f), F.S.

Effect of the Bill

The bill authorizes private sector entities to apply to purchase water quality enhancement credits, currently only governmental entities are authorized to make such purchases, and authorizes the use of WQEAs for certain areas where ERP performance standards are not being met.

The bill defines an “applicant” to mean:

- a government entity that seeks to purchase water quality enhancement credits to satisfy an assigned BMAP allocation or RAP; or,
- a governmental entity or private sector entity that seeks to purchase water quality enhancement credits for the purpose of achieving net improvement according to s. 373.414(1)(b)3., F.S.,⁸⁴ or ERP performance standards.

The bill requires that prior to the sale of enhancement credits, an applicant must provide reasonable assurances for the design and construction of all onsite stormwater management, as required by law.

The bill clarifies that water quality enhancement credits are available for permits issued pursuant to ss. 373.403 – 373.443, F.S., and not the whole of ch. 373, pt. IV, F.S.

The bill revises requirements related to mitigation banks and offsite regional mitigation to allow the establishment of a private mitigation bank or offsite regional mitigation on land owned by a local government that is located in a credit-deficient basin and the proposed private mitigation bank would provide one or more of the deficient habitat type credits described below that are unavailable or insufficient in the basin. Local government-owned land which was acquired for conservation may also be used for this purpose.

The bill prohibits DEP and the WMDs from participating in this type of mitigation banking and prohibits private sector mitigation banks from using lands owned by DEP or the WMDs.

The bill defines a “credit-deficient basin” to be a drainage basin or a corresponding hydrologic unit,⁸⁵ with all the following features:

- At least one mitigation bank has been permitted and established on land not owned by a governmental entity and that mitigation bank no longer has available for purchase one of the habitat type credits for which there is a documented shortage;
- There is a documented shortage of either forested freshwater; non-forested freshwater; forested saltwater; or, non-forested saltwater habitat type credits; and
- Pending mitigation bank applications on private land or pending credit releases from mitigation banks on nongovernment land are unlikely to alleviate the credit shortage.

The bill authorizes a local government, with land in a credit-deficient basin, to consider a private entity’s proposal to establish a mitigation bank on the local government land, including land purchased for conservation, if acquisition encumbrances do not exist on such land to the contrary. The local government must use the public procurement process in ch. 287, F.S., or another established, competitive procurement process to accept proposals from a private entity to establish a mitigation bank on local government land.

The bill requires a “use agreement” to be executed between the local government and the private mitigation bank applicant at which time the credit deficiency must be confirmed. However, once the use

⁸⁴ S. 373.414, F.S., relating to additional criteria for activities in surface waters and wetlands, requires an ERP applicant to provide reasonable assurance that its activities will not be violative of applicable state water quality standards and that such activity is not contrary to the public interest. If an applicant is unable to meet such state water quality standards due to existing, ambient water quality, then DEP or the WMD, as the permitting authority, must consider mitigation strategies the applicant proposes or will accept that produce net improvement of the water quality in the receiving body of water, limited to those elements that do not meet standards. S. 373.414(1)(b)3., F.S.

⁸⁵ A hydrologic unit is a geographic area defined by an area’s natural hydrological properties, primarily its drainage patterns. U.S. Geological Survey (USGS), *Hydrologic Unit Maps* (last updated Jan. 9, 2024), <https://water.usgs.gov/GIS/huc.html> (last visited Jan. 25, 2024). The U.S. is divided and sub-divided into successively smaller hydrologic units which are classified into four levels: regions, subregions, accounting units, and cataloging units. *Id.*

agreement is executed the mitigation bank application may proceed, even if the credit deficiency is relieved. The use agreement requires the local government to be identified as the long-term steward of the property and grant a conservation easement or substantially similar recordable instrument⁸⁶ in favor of the permitting agency, if one does not already exist. The use agreement requires the private applicant to:

- Establish and operate the mitigation bank according s. 373.4136, F.S., relating to mitigation bank permitting requirements.
- Provide bid and performance security instruments for a minimum five percent of the total bid amount to ensure that the use agreement is executed and the private entity applies for a mitigation bank permit.
- Operate and maintain the private mitigation bank until final permit success criteria are met.
- Agree to provide a financial assurance amount for long-term management in an amount agreeable to the local government and pursuant to administrative rules. The financial assurance shall be used by the local government for land management after the ERP permit success criteria are met. An endowment may be used to provide financial assurance; however, public funds may not be used to satisfy this requirement.
- Acknowledge that denial of the permit application will terminate the use agreement.
- Acknowledge that failure to obtain a permit within two years after the agreement has been executed will terminate the use agreement, unless the local government extends it for good cause.

The bill prohibits public funds from being used to fund financial assurances for construction and implementation of the private mitigation bank.

When determining the number of mitigation credits to be awarded to a private mitigation bank established according to the bill's requirements, the bill prohibits increasing the location factor assessment and scoring value in the uniform mitigation assessment method,⁸⁷ when the proposed private mitigation bank's location is in or adjacent to the local government's conservation lands. This prohibition also applies when the conservation status of the private mitigation bank land is improved due to such location.

The bill authorizes DEP, in coordination with the WMDs, to adopt rules to implement the requirements of the bill relating to mitigation banking.

B. SECTION DIRECTORY:

Section 1: Amends s. 373.4134, F.S., relating to water quality enhancement areas.

Section 2: Amends s. 373.4135, F.S., relating to mitigation banks and offsite regional mitigation.

Section 3: Reenacts s. 403.9332, F.S., relating to mitigation and enforcement.

Section 4: Provides an effective date of July 1, 2024.

⁸⁶ S. 704.06, F.S., relating to the creation, acquisition and enforcement of conservation easements describes the instruments and process used to demonstrate title to the property.

⁸⁷ The Uniform Mitigation Assessment Method (UMAM) is a methodology set forth in state law to determine the amount of mitigation needed to offset adverse impacts to wetlands and other surface waters and to award and deduct mitigation bank credits. S. 373.414(18), F.S. See also DEP, *The Uniform Mitigation Assessment Method (UMAM)* (last updated Feb. 8, 2022), <https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/uniform-mitigation-assessment> (last visited Jan. 25, 2024).

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill may have an indeterminate positive fiscal impact to the state from additional WQEA permitting fees.

2. Expenditures:

The bill may have an insignificant negative fiscal impact relating to the expansion of the WQEA Program. DEP indicated the additional workload can be absorbed within existing resources.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill may have an indeterminate positive fiscal impact on local governments from the collection of usage fees from private sector sponsors who operate a mitigation bank.

2. Expenditures:

The bill may have an indeterminate negative fiscal impact on local governments through the additional workload associated with the procurement process and entering into agreements with private sector sponsors.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

There may be a positive fiscal impact to private entities participating in the expanded WQEA program and maintaining mitigation banks on public lands. The fiscal impact is indeterminate.

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:

C. The bill authorizes DEP, in coordination with the WMDs, to adopt rules to implement the requirements of the bill relating to mitigation banking.

D. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

On January 29, 2024, the Water Quality, Supply & Treatment Subcommittee adopted a Proposed Committee Substitute (PCS) and reported the bill favorably as a committee substitute. The PCS:

- Adds a definition of “private sector sponsor” in s. 373.403, F.S., relating to the management and storage of surface waters, and “applicant” to s. 373.4134, F.S., relating to WQEAs, to expand mitigation banking and the Water Quality Enhancement Area Program, respectively, to include private sector entities. For both, the bill requires any participating private sector entities to comply with all laws, regulations, permits and/or authorizations.
 - For a wetland mitigation project permitted pursuant to ch. 373, pt. IV, F.S., the bill requires the private sector sponsor to provide certain financial assurances and any required monitoring, reporting and maintenance of the mitigation bank.
 - For a private entity purchasing WQEA credits, the bill authorizes such an entity to do so to meet an assigned BMAP allocation or RAP or for the purpose of achieving the net improvement performance standard.
- Clarifies that permittee-responsible mitigation may be included in a mitigation project authorized for land a local government purchased for conservation purposes.
- Authorizes a local government, through a public procurement process, to solicit proposals from private-sector sponsors for a mitigation bank on public lands purchased for conservation purposes. If a private-sector sponsor is going to operate a mitigation bank, then the local government and the private-sector sponsor must enter into an agreement that requires the private-sector sponsor to:
 - Establish and operate the mitigation bank according to mitigation banking permitting requirements.
 - Pay a usage fee to the local government which reflects the market value of the public land and assures that the cost of the use of the public land is fully accounted for in the pricing of mitigation credits.
- Reenacts s. 409.9332, F.S., relating to mitigation and enforcement, to incorporate the amendment made by the bill and conforms cross-references in ss. 330.41, 373.414 and 373.461, F.S.

On February 22, 2024, the Infrastructure Strategies Committee adopted a strike-all amendment and reported the bill favorably as a committee substitute. The amendment:

- Removes the definition of “private sector sponsor” in s. 373.403, F.S., relating to the management and storage of surface waters.
- Removes the authorization and associated requirements for a local government to solicit proposals from private-sector sponsors to establish a mitigation bank on public lands purchased for conservation purposes in drainage basins or hydrologic unit codes when the private-sector sponsor demonstrates to DEP or a WMD that in-kind credits are not available.
- Adds a process for the establishment and operation of a private mitigation bank using local government-owned land, including lands acquired for conservation. The bill prohibits the use of state or WMD-owned land for this purpose. Land used for private mitigation banking under the bill must be located in a credit-deficient basin or hydrologic unit code with specific features including a documented shortage of specific habitat type credits.
- Requires the local government and private applicant to execute a use agreement at which time the credit deficiency is confirmed. However, the bill also provides that once the use agreement is executed the mitigation bank application may proceed, even if the credit deficiency is relieved.
- Requires the use agreement to identify the local government as the long-term steward of the property and grant a conservation easement in favor of the permitting agency. Among others, the use agreement requires the private applicant to:
 - Establish and operate the private mitigation bank according to statutory mitigation banking requirements and operate and maintain it until final permit success criteria are met.
 - Provide bid and performance security instruments for a minimum five percent of the total bid amount and financial assurances for the local government’s long-term management and for construction and implementation of the private mitigation bank.
 - The bill prohibits public funds from being used for the required financial assurances.
- Prohibits increasing the location factor assessment and scoring value in the uniform mitigation assessment method (UMAM) when determining the number of mitigation bank credits awarded to a private mitigation bank located in or adjacent to local government-owned conservation land.

- Authorizes DEP, in coordination with the WMDs, to adopt rules to implement the requirements of the bill relating to mitigation banking.
- Removes the definition of “applicant” in s. 373.4134, F.S., relating to WQEAs.
- Removes the authorization for permittee-responsible mitigation to be included in a mitigation project authorized for land purchased by a local government for conservation purposes.
- Authorizes the use of WQEAs for certain areas where ERP performance standards are not being met.
- Authorizes private sector entities to apply to purchase water quality enhancement credits; currently, only governmental entities are authorized to make such purchases.
- Defines an “applicant” for the purchase of water quality enhancement credits to mean:
 - a government entity that seeks to purchase water quality enhancement credits to satisfy an assigned BMAP allocation or RAP; or,
 - a governmental entity or private sector entity that seeks to purchase water quality enhancement credits for the purpose of achieving net improvement over the receiving water body’s current water quality or satisfying ERP performance standards.
- Requires an applicant, prior to the sale of enhancement credits, to provide reasonable assurances for the design and construction of all onsite stormwater management, as required by law.
- Removes conforming cross-references in ss. 330.41, 373.414 and 373.461, F.S.

This analysis is drafted to the committee substitute as approved by the Infrastructure Strategies Committee.