

## CHAPTER 2013-146

### Committee Substitute for Committee Substitute for House Bill No. 713

An act relating to water quality credit trading; reenacting s. 373.4595(1)(n), F.S., relating to water quality credit trading, to incorporate the amendments made to s. 403.067, F.S., in a reference thereto; amending s. 403.067, F.S.; authorizing the department to implement water quality credit trading in adopted basin management action plans on an ongoing basis; deleting a requirement that voluntary trading of water credits be limited to the Lower St. Johns River Basin; authorizing additional water quality protection programs to participate in water quality credit trading; revising provisions relating to rulemaking for water quality credit trading programs; eliminating a requirement that water quality credit trading be limited to the Lower St. Johns River Basin as a pilot project; deleting a required report; making technical changes; reenacting s. 403.088(2)(e), F.S., relating to water pollution operation permits, to incorporate the amendments made to s. 403.067, F.S., in a reference thereto; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. For the purpose of incorporating the amendment made by this act to section 403.067, Florida Statutes, in a reference thereto, paragraph (n) of subsection (1) of section 373.4595, Florida Statutes, is reenacted to read:

373.4595 Northern Everglades and Estuaries Protection Program.—

(1) FINDINGS AND INTENT.—

(n) It is the intent of the Legislature that the coordinating agencies encourage and support the development of creative public-private partnerships and programs, including opportunities for water storage and quality improvement on private lands and water quality credit trading, to facilitate or further the restoration of the surface water resources of the Lake Okeechobee watershed, the Caloosahatchee River watershed, and the St. Lucie River watershed, consistent with s. 403.067.

Section 2. Paragraphs (a) and (b) of subsection (7) and subsections (8) through (14) of section 403.067, Florida Statutes, are amended to read:

403.067 Establishment and implementation of total maximum daily loads.—

(7) DEVELOPMENT OF BASIN MANAGEMENT PLANS AND IMPLEMENTATION OF TOTAL MAXIMUM DAILY LOADS.—

(a) Basin management action plans.—

1. In developing and implementing the total maximum daily load for a water body, the department, or the department in conjunction with a water management district, may develop a basin management action plan that addresses some or all of the watersheds and basins tributary to the water body. Such a plan must integrate the appropriate management strategies available to the state through existing water quality protection programs to achieve the total maximum daily loads and may provide for phased implementation of these management strategies to promote timely, cost-effective actions as provided for in s. 403.151. The plan must establish a schedule ~~for~~ implementing the management strategies, establish a basis for evaluating the plan's effectiveness, and identify feasible funding strategies for implementing the plan's management strategies. The management strategies may include regional treatment systems or other public works, where appropriate, and, ~~in the basin listed in subsection (10) for which a basin management action plan has been adopted,~~ voluntary trading of water quality credits to achieve the needed pollutant load reductions.

2. A basin management action plan must equitably allocate, pursuant to paragraph (6)(b), pollutant reductions to individual basins, as a whole to all basins, or to each identified point source or category of nonpoint sources, as appropriate. For nonpoint sources for which best management practices have been adopted, the initial requirement specified by the plan must be those practices developed pursuant to paragraph (c). Where appropriate, the plan may take into account the benefits of pollutant load reduction achieved by point or nonpoint sources that have implemented management strategies to reduce pollutant loads, including best management practices, ~~before~~ prior to the development of the basin management action plan. The plan must also identify the mechanisms that will address potential future increases in pollutant loading.

3. The basin management action planning process is intended to involve the broadest possible range of interested parties, with the objective of encouraging the greatest amount of cooperation and consensus possible. In developing a basin management action plan, the department shall assure that key stakeholders, including, but not limited to, applicable local governments, water management districts, the Department of Agriculture and Consumer Services, other appropriate state agencies, local soil and water conservation districts, environmental groups, regulated interests, and affected pollution sources, are invited to participate in the process. The department shall hold at least one public meeting in the vicinity of the watershed or basin to discuss and receive comments during the planning process and shall otherwise encourage public participation to the greatest practicable extent. Notice of the public meeting must be published in a newspaper of general circulation in each county in which the watershed or basin lies not less than 5 days nor more than 15 days before the public meeting. A basin management action plan does ~~shall~~ not supplant or otherwise alter any assessment made under subsection (3) or subsection (4) or any calculation or initial allocation.

4. The department shall adopt all or any part of a basin management action plan and any amendment to such plan by secretarial order pursuant to chapter 120 to implement the provisions of this section.

5. The basin management action plan must include milestones for implementation and water quality improvement, and an associated water quality monitoring component sufficient to evaluate whether reasonable progress in pollutant load reductions is being achieved over time. An assessment of progress toward these milestones shall be conducted every 5 years, and revisions to the plan shall be made as appropriate. Revisions to the basin management action plan shall be made by the department in cooperation with basin stakeholders. Revisions to the management strategies required for nonpoint sources must follow the procedures set forth in subparagraph (c)4. Revised basin management action plans must be adopted pursuant to subparagraph 4.

6. In accordance with procedures adopted by rule under paragraph (9)(c), basin management action plans, and other pollution control programs under local, state, or federal authority as provided in subsection (4), may allow point or nonpoint sources that will achieve greater pollutant reductions than required by an adopted total maximum load or wasteload allocation to generate, register, and trade water quality credits for the excess reductions to enable other sources to achieve their allocation; however, the generation of water quality credits does not remove the obligation of a source or activity to meet applicable technology requirements or adopted best management practices. Such plans must allow trading between NPDES permittees, and trading that may or may not involve NPDES permittees, where the generation or use of the credits involve an entity or activity not subject to department water discharge permits whose owner voluntarily elects to obtain department authorization for the generation and sale of credits.

7. The provisions of the department's rule relating to the equitable abatement of pollutants into surface waters ~~do not apply shall not be applied~~ to water bodies or water body segments for which a basin management plan that takes into account future new or expanded activities or discharges has been adopted under this section.

(b) Total maximum daily load implementation.—

1. The department shall be the lead agency in coordinating the implementation of the total maximum daily loads through existing water quality protection programs. Application of a total maximum daily load by a water management district must be consistent with this section and does ~~shall~~ not require the issuance of an order or a separate action pursuant to s. 120.536(1) or s. 120.54 for the adoption of the calculation and allocation previously established by the department. Such programs may include, but are not limited to:

a. Permitting and other existing regulatory programs, including water-quality-based effluent limitations;

b. Nonregulatory and incentive-based programs, including best management practices, cost sharing, waste minimization, pollution prevention, agreements established pursuant to s. 403.061(21), and public education;

c. Other water quality management and restoration activities, for example surface water improvement and management plans approved by water management districts or basin management action plans developed pursuant to this subsection;

d. Trading of water quality credits or other equitable economically based agreements;

e. Public works including capital facilities; or

f. Land acquisition.

2. For a basin management action plan adopted pursuant to paragraph (a), any management strategies and pollutant reduction requirements associated with a pollutant of concern for which a total maximum daily load has been developed, including effluent limits set forth for a discharger subject to NPDES permitting, if any, must be included in a timely manner in subsequent NPDES permits or permit modifications for that discharger. The department may ~~shall~~ not impose limits or conditions implementing an adopted total maximum daily load in an NPDES permit until the permit expires, the discharge is modified, or the permit is reopened pursuant to an adopted basin management action plan.

a. Absent a detailed allocation, total maximum daily loads must ~~shall~~ be implemented through NPDES permit conditions that provide for a compliance schedule. In such instances, a facility's NPDES permit must allow time for the issuance of an order adopting the basin management action plan. The time allowed for the issuance of an order adopting the plan may ~~shall~~ not exceed 5 years. Upon issuance of an order adopting the plan, the permit must be reopened or renewed, as necessary, and permit conditions consistent with the plan must be established. Notwithstanding the other provisions of this subparagraph, upon request by an NPDES permittee, the department as part of a permit issuance, renewal, or modification may establish individual allocations before ~~prior to~~ the adoption of a basin management action plan.

b. For holders of NPDES municipal separate storm sewer system permits and other stormwater sources, implementation of a total maximum daily load or basin management action plan must be achieved, to the maximum extent practicable, through the use of best management practices or other management measures.

c. The basin management action plan does not relieve the discharger from any requirement to obtain, renew, or modify an NPDES permit or to abide by other requirements of the permit.

d. Management strategies set forth in a basin management action plan to be implemented by a discharger subject to permitting by the department

must be completed pursuant to the schedule set forth in the basin management action plan. This implementation schedule may extend beyond the 5-year term of an NPDES permit.

e. Management strategies and pollution reduction requirements set forth in a basin management action plan for a specific pollutant of concern are ~~shall~~ not be subject to challenge under chapter 120 at the time they are incorporated, in an identical form, into a subsequent NPDES permit or permit modification.

f. For nonagricultural pollutant sources not subject to NPDES permitting but permitted pursuant to other state, regional, or local water quality programs, the pollutant reduction actions adopted in a basin management action plan must ~~shall~~ be implemented to the maximum extent practicable as part of those permitting programs.

g. A nonpoint source discharger included in a basin management action plan must demonstrate compliance with the pollutant reductions established under subsection (6) by ~~either~~ implementing the appropriate best management practices established pursuant to paragraph (c) or conducting water quality monitoring prescribed by the department or a water management district. A nonpoint source discharger may, in accordance with department rules, supplement the implementation of best management practices with water quality credit trades in order to demonstrate compliance with the pollutant reductions established under subsection (6).

h. A nonpoint source discharger included in a basin management action plan may be subject to enforcement action by the department or a water management district based upon a failure to implement the responsibilities set forth in sub-subparagraph g.

i. A landowner, discharger, or other responsible person who is implementing applicable management strategies specified in an adopted basin management action plan may ~~shall~~ not be required by permit, enforcement action, or otherwise to implement additional management strategies, including water quality credit trading, to reduce pollutant loads to attain the pollutant reductions established pursuant to subsection (6) and shall be deemed to be in compliance with this section. This subparagraph does not limit the authority of the department to amend a basin management action plan as specified in subparagraph (a)5.

(8) WATER QUALITY CREDIT TRADING.—

(a) Water quality credit trading must be consistent with federal law and regulation.

(b) Water quality credit trading must be implemented through permits, including water quality credit trading permits, other authorizations, or other legally binding agreements as established by department rule.

(c) The department shall establish the pollutant load reduction value of water quality credits and ~~is~~ shall be responsible for authorizing their use.

(d) A person ~~who that~~ acquires water quality credits (“buyer”) shall timely submit to the department an affidavit, signed by the buyer and the credit generator (“seller”), disclosing the term of acquisition, number of credits, unit credit price paid, and any state funding received for the facilities or activities that generate the credits. The department ~~may~~ shall not participate in the establishment of credit prices.

(e) Sellers of water quality credits are responsible for achieving the load reductions on which the credits are based and complying with the terms of the department authorization and any trading agreements into which they may have entered.

(f) Buyers of water quality credits are responsible for complying with the terms of the department water discharge permit.

(g) The department shall take appropriate action to address the failure of a credit seller to fulfill its obligations, including, as necessary, deeming the seller’s credits invalid if the seller cannot achieve the load reductions on which the credits were based in a reasonable time. If the department determines duly acquired water quality credits to be invalid, in whole or in part, thereby causing the credit buyer to be unable to timely meet its pollutant reduction obligations under this section, the department shall issue an order establishing the actions required of the buyer to meet its obligations by alternative means and a reasonable schedule for completing the actions. The invalidation of credits ~~does~~ shall not, in and of itself, constitute a violation of the buyer’s water discharge permit.

(h) The department may authorize water quality credit trading in adopted basin management action plans. Participation in water quality credit trading is entirely voluntary. Entities that participate in water quality credit trades shall timely report to the department the prices for credits, how the prices were determined, and any state funding received for the facilities or activities that generated the credits. The department may not participate in the establishment of credit prices.

(9) RULES.—The department ~~may~~ is authorized to adopt rules pursuant to ss. 120.536(1) and 120.54 for:

(a) Delisting water bodies or water body segments from the list developed under subsection (4) pursuant to the guidance under subsection (5).

(b) Administering of funds to implement the total maximum daily load and basin management action planning programs.

(c) Water quality credit trading among the pollutant sources to a water body or water body segment. ~~By September 1, 2008, rulemaking must be initiated which provides~~ The rules must provide for the following:

1. The process to be used to determine how credits are generated, quantified, and validated.
2. A publicly accessible water quality credit trading registry that tracks water quality credits, trading activities, and prices paid for credits.
3. Limitations on the availability and use of water quality credits, including a list of eligible pollutants or parameters and minimum water quality requirements and, where appropriate, adjustments to reflect best management practice performance uncertainties and water-segment-specific location factors.
4. The timing and duration of credits and allowance for credit transferability.
5. Mechanisms for determining and ensuring compliance with trading procedures, including recordkeeping, monitoring, reporting, and inspections.

At the time of publication of the draft rules on water quality credit trading, the department shall submit a copy to the United States Environmental Protection Agency for review.

(d) The total maximum daily load calculation in accordance with paragraph (6)(a) immediately upon the effective date of this act, for those eight water segments within Lake Okeechobee proper as submitted to the United States Environmental Protection Agency pursuant to subsection (2).

(e) Implementation of other specific provisions.

~~(10) Water quality credit trading shall be limited to the Lower St. Johns River Basin, as defined by the department, as a pilot project. The department may authorize water quality credit trading and establish specific requirements for trading in the adopted basin management action plan for the Lower St. Johns River Basin prior to the adoption of rules under paragraph (9)(c) in order to effectively implement the pilot project. Entities that participate in water quality credit trades shall timely report to the department the prices for credits, how the prices were determined, and any state funding received for the facilities or activities that generated the credits. The department shall not participate in the establishment of credit prices. No later than 24 months after adoption of the basin management action plan for the Lower St. Johns River, the department shall submit a report to the Governor, the President of the Senate, and the Speaker of the House of Representatives on the effectiveness of the pilot project, including the following information:~~

~~(a) A summary of how water quality credit trading was implemented, including the number of pounds of pollutants traded.~~

~~(b) A description of the individual trades and estimated pollutant load reductions that are expected to result from each trade.~~

~~(c) A description of any conditions placed on trades.~~

~~(d) Prices associated with the trades, as reported by the traders.~~

~~(e) A recommendation as to whether other areas of the state would benefit from water quality credit trading and, if so, an identification of the statutory changes necessary to expand the scope of trading.~~

(10)(11) APPLICATION.—The provisions of this section are intended to supplement existing law, and may not ~~nothing in this section~~ shall be construed as altering any applicable state water quality standards or as restricting the authority otherwise granted to the department or a water management district under this chapter or chapter 373. The exclusive means of state implementation of s. 303(d) of the Clean Water Act, Pub. L. No. 92-500, 33 U.S.C. ss. 1251 et seq. shall be in accordance with the identification, assessment, calculation and allocation, and implementation provisions of this section.

(11)(12) CONSTRUCTION.—~~Nothing in~~ This section does not limit ~~shall be construed as limiting~~ the applicability or consideration of any mixing zone, variance, exemption, site specific alternative criteria, or other moderating provision.

(12)(13) IMPLEMENTATION OF ADDITIONAL PROGRAMS.—

(a) The department may ~~shall~~ not implement, without prior legislative approval, any additional regulatory authority pursuant to s. 303(d) of the Clean Water Act or 40 C.F.R. part 130, if such implementation would result in water quality discharge regulation of activities not currently subject to regulation.

(b) Interim measures, best management practices, or other measures may be developed and voluntarily implemented pursuant to paragraph (7)(c) for any water body or segment for which a total maximum daily load or allocation has not been established. The implementation of such pollution control programs may be considered by the department in the determination made pursuant to subsection (4).

(13)(14) RULE CHALLENGES.—In order to provide adequate due process while ensuring timely development of total maximum daily loads, proposed rules and orders authorized by this act are ~~shall be~~ ineffective pending resolution of a s. 120.54(3), s. 120.56, s. 120.569, or s. 120.57 administrative proceeding. However, the department may go forward prior to resolution of such administrative proceedings with subsequent agency actions authorized by subsections (2)-(6) ~~if, provided that~~ the department can support and substantiate those actions using the underlying bases for the rules or orders without the benefit of any legal presumption favoring, or in deference to, the challenged rules or orders.



Section 3. For the purpose of incorporating the amendment made by this act to section 403.067, Florida Statutes, in a reference thereto, paragraph (e) of subsection (2) of section 403.088, Florida Statutes, is reenacted to read:

403.088 Water pollution operation permits; conditions.—

(2)

(e) However, if the discharge will not meet permit conditions or applicable statutes and rules, the department may issue, renew, revise, or reissue the operation permit if:

- 1. The applicant is constructing, installing, or placing into operation, or has submitted plans and a reasonable schedule for constructing, installing, or placing into operation, an approved pollution abatement facility or alternative waste disposal system;
- 2. The applicant needs permission to pollute the waters within the state for a period of time necessary to complete research, planning, construction, installation, or operation of an approved and acceptable pollution abatement facility or alternative waste disposal system;
- 3. There is no present, reasonable, alternative means of disposing of the waste other than by discharging it into the waters of the state;
- 4. The granting of an operation permit will be in the public interest;
- 5. The discharge will not be unreasonably destructive to the quality of the receiving waters; or
- 6. A water quality credit trade that meets the requirements of s. 403.067.

Section 4. This act shall take effect July 1, 2013.

Approved by the Governor June 7, 2013.

Filed in Office Secretary of State June 7, 2013.