

By Senator Forman

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1 A bill to be entitled
 2 An act relating to mitigation banking; amending
 3 s. 373.403, F.S.; redefining the term "offsite
 4 regional mitigation"; amending s. 373.4136,
 5 F.S.; requiring the adoption of a uniform
 6 functional assessment methodology rule;
 7 revising standards for determining the
 8 boundaries of a mitigation service area;
 9 providing for the processing of mitigation bank
 10 permits; amending s. 373.414, F.S.; requiring a
 11 mitigation bank permit before the acceptance of
 12 a cash donation in certain instances; providing
 13 for consideration of cumulative impacts;
 14 providing an effective date.

15
 16 Be It Enacted by the Legislature of the State of Florida:

17
 18 Section 1. Subsection (22) of section 373.403, Florida
 19 Statutes, is amended to read:

20 373.403 Definitions.--When appearing in this part or
 21 in any rule, regulation, or order adopted pursuant thereto,
 22 the following terms mean:

23 (22) "Offsite regional mitigation" means mitigation on
 24 an area of land off the site of an activity permitted under
 25 this part, where an applicant proposes to mitigate the adverse
 26 impacts of only the applicant's specific activity as a
 27 requirement of the permit, which provides regional ecological
 28 value, and which is not a mitigation bank permitted under s.
 29 373.4136. Offsite regional mitigation cannot be used to offset
 30 impacts from more than one environmental resource permit
 31 applicant. Offsite regional mitigation or the use of donated

1 moneys to fund offsite regional mitigation cannot be used to
2 circumvent the permitting requirements of s. 373.4136.

3 Section 2. Subsections (4), (6), and (11) of section
4 373.4136, Florida Statutes, are amended and subsection (12) is
5 added to that section to read:

6 373.4136 Establishment and operation of mitigation
7 banks.--

8 (4) MITIGATION CREDITS.--After evaluating the
9 information submitted by the applicant for a mitigation bank
10 permit and assessing the proposed mitigation bank pursuant to
11 the criteria in this section, the department or water
12 management district shall award a number of mitigation credits
13 to a proposed mitigation bank or phase of such mitigation
14 bank. An entity establishing and operating a mitigation bank
15 may apply to modify the mitigation bank permit to seek the
16 award of additional mitigation credits if the mitigation bank
17 results in an additional increase in ecological value over the
18 value contemplated at the time of the original permit
19 issuance, or the most recent modification thereto involving
20 the number of credits awarded. The number of credits awarded
21 shall be based on the degree of improvement in ecological
22 value expected to result from the establishment and operation
23 of the mitigation bank as determined using a functional
24 assessment methodology. Each water management district and the
25 department shall adopt a functional assessment methodology by
26 rule no later than May 1, 2000. This functional assessment
27 methodology shall be used by the department and water
28 management districts to award credits and to deduct credits
29 from a mitigation bank. However, an entity that has received a
30 mitigation bank permit before the adoption of the functional
31 assessment methodology shall have credits deducted from its

1 bank pursuant to the credit assessment method in place when
2 the bank was permitted, unless the entity elects to have
3 credits deducted pursuant to the functional assessment
4 methodology. Before the adoption of the functional assessment
5 methodology rule and at the request of the holder of a
6 mitigation bank permit, impact sites for which credits from
7 that mitigation bank are proposed for use as mitigation to
8 offset the impacts must be assessed using the same functional
9 assessment methodology as that used to assess and assign
10 credits to the mitigation bank, and the environmental resource
11 permit rule mitigation ratios may not be used to determine
12 mitigation bank credit requirements for those impact sites.
13 The functional assessment methodology must, at a minimum,
14 evaluate ~~In determining the degree of improvement in~~
15 ~~ecological value,~~ each of the following factors, ~~at a minimum,~~
16 ~~shall be evaluated:~~

17 (a) The extent to which target hydrologic regimes can
18 be achieved and maintained.

19 (b) The extent to which management activities promote
20 natural ecological conditions, such as natural fire patterns.

21 (c) The proximity of the mitigation bank to areas with
22 regionally significant ecological resources or habitats, such
23 as national or state parks, Outstanding National Resource
24 Waters and associated watersheds, Outstanding Florida Waters
25 and associated watersheds, and lands acquired through
26 governmental or nonprofit land acquisition programs for
27 environmental conservation; and the extent to which the
28 mitigation bank establishes corridors for fish, wildlife, or
29 listed species to those resources or habitats.

30 (d) The quality and quantity of wetland or upland
31 restoration, enhancement, preservation, or creation.

1 (e) The ecological and hydrological relationship
2 between wetlands and uplands in the mitigation bank.

3 (f) The extent to which the mitigation bank provides
4 habitat for fish and wildlife, especially habitat for species
5 listed as threatened, endangered, or of special concern, or
6 provides habitats that are unique for that mitigation service
7 area.

8 (g) The extent to which the lands that are to be
9 preserved are already protected by existing state, local, or
10 federal regulations or land use restrictions.

11 (h) The extent to which lands to be preserved would be
12 adversely affected if they were not preserved.

13 (i) Any special designation or classification of the
14 affected waters and lands.

15 (6) MITIGATION SERVICE AREA.--The department or water
16 management district shall establish a mitigation service area
17 for each mitigation bank permit. The department or water
18 management district shall notify and consider comments
19 received on the proposed mitigation service area from each
20 local government within the proposed mitigation service area
21 that operates a wetlands regulatory program. Except as
22 provided herein, mitigation credits may be withdrawn and used
23 only to offset adverse impacts in the mitigation service area.
24 The boundaries of the mitigation service area shall depend
25 upon the geographic area where the mitigation bank could
26 reasonably be expected to offset adverse impacts. The
27 boundaries of a mitigation service area shall be guided by the
28 ecosystem management areas set forth in the publication
29 entitled "Ecosystem Management Implementation Strategy" dated
30 September 1995, which is on file with the department. The
31 boundaries of a mitigation service area shall be no smaller

1 than the ecosystem management area in which the bank is
2 located. The boundaries of a mitigation service area may be
3 larger than the ecosystem management area in which the bank is
4 located if the mitigation bank provides ecological value to
5 the extent that adverse impacts outside the ecosystem
6 management area could reasonably be expected to be offset by
7 the mitigation bank.~~A mitigation service area may be larger~~
8 ~~than the regional watershed if the mitigation bank provides~~
9 ~~exceptional ecological value such that adverse impacts outside~~
10 ~~the regional watershed could reasonably be expected to be~~
11 ~~adequately offset by the mitigation bank. A mitigation service~~
12 ~~area may be smaller than a regional watershed if adverse~~
13 ~~impacts throughout the regional watershed cannot reasonably be~~
14 ~~expected to be offset by the mitigation bank because of local~~
15 ~~ecological or hydrological conditions.~~Mitigation service
16 areas may overlap, and mitigation service areas for two or
17 more mitigation banks may be approved for an ecosystem
18 management area ~~a regional watershed.~~

19 (a) In determining the extent to which a mitigation
20 bank provides ~~exceptional~~ ecological value such that adverse
21 impacts outside the regional ecosystem management area
22 ~~watershed~~ could reasonably be expected to be adequately offset
23 by the mitigation bank, the department or the water management
24 district shall consider the characteristics, size, and
25 location of the mitigation bank and, at a minimum, the extent
26 to which the mitigation bank:

- 27 1. Will promote a regional integrated ecological
28 network;
- 29 2. Will significantly enhance the water quality or
30 restoration of an offsite receiving water body that is
31 designated as an Outstanding Florida Water, a Wild and Scenic

1 River, an aquatic preserve, a water body designated in a plan
2 adopted pursuant to s. 373.456 of the Surface Water
3 Improvement and Management Act, or a nationally designated
4 estuarine preserve;

5 3. Will provide for the long-term viability of
6 endangered or threatened species or species of special
7 concern; and

8 4. Is consistent with the objectives of a regional
9 management plan adopted or endorsed by the department or water
10 management districts.

11 (b) Once a mitigation bank service area has been
12 established by the department or a water management district
13 for a mitigation bank, such service area shall be accepted by
14 all water management districts, local governments, and the
15 department.

16 (c) If the requirements in s. 373.4135(1)(b) are met,
17 the following projects or activities regulated under this part
18 shall be eligible to use a mitigation bank, regardless of
19 whether they are ~~notwithstanding the fact that they are not~~
20 ~~completely~~ located within that bank's ~~the~~ mitigation service
21 area:

22 1. Projects with adverse impacts partially located
23 within the mitigation service area.

24 2. Linear projects, such as roadways, transmission
25 lines, distribution lines, pipelines, or railways.

26 3. Projects with total adverse impacts of less than 1
27 acre in size.

28 (11) RULES.--The department and water management
29 district may adopt rules to implement the provisions of s.
30 373.4135 and this section, which shall include, but not be
31 limited to, provisions:

1 (a) Requiring financial responsibility for the
2 construction, operation, and long-term management of a
3 mitigation bank;

4 (b) For the perpetual protection and management of
5 mitigation banks; and

6 (c) For the use of the uniform functional assessment
7 methodology referenced in this section ~~Establishing a system~~
8 ~~and methodology for the valuation, assessment, and award of~~
9 ~~mitigation credits.~~

10 (12) PROCESSING.--Mitigation bank permit applications
11 are subject to s. 373.4141.

12 Section 3. Paragraph (b) of subsection (1) and
13 subsection (8) of section 373.414, Florida Statutes, are
14 amended to read:

15 373.414 Additional criteria for activities in surface
16 waters and wetlands.--

17 (1) As part of an applicant's demonstration that an
18 activity regulated under this part will not be harmful to the
19 water resources or will not be inconsistent with the overall
20 objectives of the district, the governing board or the
21 department shall require the applicant to provide reasonable
22 assurance that state water quality standards applicable to
23 waters as defined in s. 403.031(13) will not be violated and
24 reasonable assurance that such activity in, on, or over
25 surface waters or wetlands, as delineated in s. 373.421(1), is
26 not contrary to the public interest. However, if such an
27 activity significantly degrades or is within an Outstanding
28 Florida Water, as provided by department rule, the applicant
29 must provide reasonable assurance that the proposed activity
30 will be clearly in the public interest.

31

1 (b) If the applicant is unable to otherwise meet the
2 criteria set forth in this subsection, the governing board or
3 the department, in deciding to grant or deny a permit, shall
4 consider measures proposed by or acceptable to the applicant
5 to mitigate adverse effects that may be caused by the
6 regulated activity. Such measures may include, but are not
7 limited to, onsite mitigation, offsite mitigation, offsite
8 regional mitigation, and the purchase of mitigation credits
9 from mitigation banks permitted under s. 373.4136. It shall
10 be the responsibility of the applicant to choose the form of
11 mitigation. The mitigation must offset the adverse effects
12 caused by the regulated activity.

13 1. The department or water management districts may
14 accept the donation of money as mitigation only where the
15 donation is specified for use in a duly noticed environmental
16 creation, preservation, enhancement, or restoration project
17 that has received a mitigation bank permit pursuant to s.
18 373.4136 and that, endorsed by the department or the governing
19 board of the water management district, which offsets the
20 impacts of the activity permitted under this part. However,
21 the provisions of this subsection shall not apply to projects
22 undertaken pursuant to s. 373.4137 or chapter 378. Local
23 governments may accept the donation of money as mitigation
24 only for impacts authorized under this part if a mitigation
25 bank permit has been issued for the project that is the
26 subject of the cash donation. ~~Where a permit is required under~~
27 this part to implement any project endorsed by the department
28 or a water management district, all necessary permits must
29 have been issued prior to the acceptance of any cash donation.
30 After the effective date of this act, when money is donated to
31 either the department or a water management district to offset

1 impacts authorized by a permit under this part, the department
2 or the water management district shall accept only a donation
3 that represents the full cost to the department or water
4 management district of undertaking the project that is
5 intended to mitigate the adverse impacts. The full cost shall
6 include all direct and indirect costs, as applicable, such as
7 those for land acquisition, land restoration or enhancement,
8 perpetual land management, and general overhead consisting of
9 costs such as staff time, building, and vehicles. The
10 department or the water management district may use a
11 multiplier or percentage to add to other direct or indirect
12 costs to estimate general overhead. Mitigation credit for
13 such a donation shall be given only to the extent that the
14 donation covers the full cost to the agency of undertaking the
15 project that is intended to mitigate the adverse impacts.
16 However, nothing herein shall be construed to prevent the
17 department or a water management district from accepting a
18 donation representing a portion of a larger project, provided
19 that the donation covers the full cost of that portion and
20 mitigation credit is given only for that portion. The
21 department or water management district may deviate from the
22 full cost requirements of this subparagraph to resolve a
23 proceeding brought pursuant to chapter 70 or a claim for
24 inverse condemnation. Nothing in this section shall be
25 construed to require the owner of a private mitigation bank,
26 permitted under s. 373.4136, to include the full cost of a
27 mitigation credit in the price of the credit to a purchaser of
28 said credit.

29 2. The department and each water management district
30 shall report to the Executive Office of the Governor by
31 January 31 and July 31 of each year all cash donations

1 accepted during the preceding 6 months for wetland mitigation
2 purposes, which shall include a description of the ~~endorsed~~
3 mitigation projects.

4 3. If the applicant is unable to meet water quality
5 standards because existing ambient water quality does not meet
6 standards, the governing board or the department shall
7 consider mitigation measures proposed by or acceptable to the
8 applicant that cause net improvement of the water quality in
9 the receiving body of water for those parameters which do not
10 meet standards.

11 4. If mitigation requirements imposed by a local
12 government for surface water and wetland impacts of an
13 activity regulated under this part cannot be reconciled with
14 mitigation requirements approved under a permit for the same
15 activity issued under this part, the mitigation requirements
16 for surface water and wetland impacts shall be controlled by
17 the permit issued under this part.

18 (8) The governing board or the department, in deciding
19 whether to grant or deny a permit for an activity regulated
20 under this part shall consider the cumulative impacts upon
21 surface water and wetlands, as delineated in s. 373.421(1),
22 within the same drainage basin as defined in s. 373.403(9),
23 of:

24 (a) The activity for which the permit is sought.

25 (b) Projects which are existing or activities
26 regulated under this part which are under construction or
27 projects for which permits or determinations pursuant to s.
28 373.421 ~~or s. 403.914~~ have been sought.

29 (c) Activities which are under review, approved, or
30 vested pursuant to s. 380.06, or other activities regulated
31 under this part which may reasonably be expected to be located

1 within surface waters or wetlands, as delineated in s.
2 373.421(1), in the same drainage basin as defined in s.
3 373.403(9), based upon the comprehensive plans, adopted
4 pursuant to chapter 163, of the local governments having
5 jurisdiction over the activities, or applicable land use
6 restrictions and regulations.

7
8 When a mitigation bank permitted under s. 373.4136 is proposed
9 as mitigation, and the impacts will occur within the bank's
10 mitigation service area, the cumulative-impacts consideration
11 shall be confined to that bank's mitigation service area and
12 any cumulative impacts shall be considered fully offset by the
13 use of the mitigation bank. Furthermore, use of a mitigation
14 bank to mitigate wetland impacts within the bank's mitigation
15 service area shall not be prohibited due to the bank's
16 location outside the watershed or drainage basin in which the
17 impacts will occur, nor shall greater mitigation be required
18 than if the impact site and the mitigation bank were located
19 in the same watershed or drainage basin.

20 Section 4. This act shall take effect upon becoming a
21 law.

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24 SENATE SUMMARY

25 Provides restrictions on offsite regional mitigation.
26 Requires the Department of Environmental Protection and
27 the water management districts to adopt a single uniform
28 functional assessment methodology rule to assess
29 mitigation credits. Provides for the processing of
30 permits and guidelines for determining the boundaries of
31 mitigation service areas. Requires a mitigation bank
permit before accepting cash donations in certain cases.
Provides for consideration of cumulative impacts.