

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 2162

SPONSOR: Natural Resources Committee and Senator Forman

SUBJECT: Mitigation banking

DATE: April 24, 2000

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Branning	Voigt	NR	Favorable/CS
2.				
3.				
4.				
5.				

I. Summary:

This bill is intended to implement the findings and recommendations of the Office of Program Policy Analysis and Governmental Accountability's report regarding wetland mitigation. Provides that an environmental creation, preservation, enhancement, or restoration project, for which money is donated or paid as mitigation, which is sponsored by the Department of Environmental Protection (DEP), a water management district, or a local government and which provides mitigation for five or more applicants for permits under part IV, ch. 373, F.S., or 35 or more acres of adverse impacts, is to be established and operated under a memorandum of agreement (MOA). Provides that the MOA does not have to be adopted by rule. Specifies what the MOA must address. Provides that an MOA may authorize more than one project or categories of projects. These provisions do not apply to contracts between the DEP, the water management districts, or local governments with a private entity to establish a mitigation bank. Provides other options for single-family lots or homeowners.

Provides that a mitigation service area may be larger or smaller than the regional watershed under certain conditions. Requires the DEP and the water management districts to report to the Executive Office of the Governor once a year all cash donations accepted for mitigation during the preceding calendar year. Specifies what the report must contain.

Requires the development of a uniform wetland mitigation assessment method by the DEP and the water management districts. Requires the DEP to adopt the method by rule by January 31, 2002. The method will be binding on the DEP, the water management districts, local governments, and any other governmental agencies and shall be the sole means to determine the mitigation needed to offset adverse impacts and to award and deduct mitigation credits. The application of the uniform wetland mitigation assessment method is not subject to s. 70.001, F.S., the Bert J. Harris, Jr. Private Property Rights Protection Act.

Requires the Office of Program Policy Analysis and Government Accountability to conduct a study on cumulative impact consideration and issue a report by July 1, 2001.

This bill amends ss. 373.4135, 373.4136, and 373.414, F.S.

II. Present Situation:

In 1992, the U.S. Environmental Protection Agency (EPA) issued a document entitled “Mitigation Banking Guidance.” This document established procedural guidance on the appropriate creation, operation and use of mitigation banks for unavoidable losses of wetland and other aquatic habitats associated with projects reviewed by the EPA under section 404 of the Clean Water Act. As defined in the EPA guidance document, “mitigation banking is the creation, restoration, or enhancement of wetland or other aquatic habitats expressly for the purpose of providing compensatory mitigation in advance of proposed discharges into waters of the United States, including wetlands, where generally complete and satisfactory mitigation cannot be achieved at the site of the impact.”

In 1993, the Legislature directed the Department of Environmental Protection (DEP) and the water management districts to encourage the establishment of regional mitigation areas and mitigation banks, and provided permitting criteria for activities in surface waters and wetlands. (ch. 93-213, L.O.F.) The DEP and the water management districts were required to adopt rules by January 1, 1994, governing the use of mitigation banks. Chapter 62-342, F.A.C., is the DEP’s rule regarding mitigation banks. Only three of the five water management districts have adopted mitigation bank rules: South Florida Water Management District, Southwest Florida Water Management District, and the St. Johns River Water Management District. The DEP’s mitigation banking rules apply in the Suwannee River Water Management District and the Northwest Florida Water Management District.

In 1996, the Legislature amended the statutory provisions regarding mitigation banking. Chapter 96-371, L.O.F., provided that wetland mitigation measures may include, but not be limited to, onsite mitigation, offsite mitigation, offsite regional mitigation, and the purchase of mitigation credits from mitigation banks. Mitigation banks and offsite regional mitigation should emphasize the restoration and enhancement of degraded ecosystems rather than alteration of landscapes to create wetlands. The DEP and the water management districts were authorized to accept cash donations as mitigation under certain circumstances.

The DEP and the water management districts may allow the use of a mitigation bank or offsite regional mitigation in combination with other forms of mitigation.

In 1999, the Legislature amended s. 373.414, F.S., to require the Office of Program Policy Analysis and Governmental Accountability (OPPAGA) to conduct a study of wetlands mitigation, including mitigation banking and report back to the Legislature by January 31, 2000. The study was to consider the effectiveness and costs of the current mitigation options in offsetting adverse effects to wetlands and wetland functions, including the application of cumulative impact considerations, and identify, as appropriate, recommendations for statutory or rule changes to increase the effectiveness of mitigation strategies.

In its report, *Policy Review: Wetland Mitigation*, Report No. 99-40, March 2000, OPPAGA concluded that the state has made improvements to regulatory practices and permit conditions. However, the Department of Environmental Protection and the water management districts need

to take additional measures to ensure that mitigation fully offsets functions lost at impacted wetlands. The report included the following recommendations:

- The Legislature should require the department and the districts to develop and adopt a statewide mitigation assessment methodology by June 30, 2001.
- Independent third parties should approve memorandums of agreement for public offsite regional mitigation areas, specifying the responsibilities of all parties involved and contain specific requirements.
- The Legislature should require the department and the districts to provide additional regulatory guidance for cumulative impact assessment and, where necessary, redelineate drainage basins.
- The Legislature should amend state law to require the department and districts to develop rules addressing a new mitigation option for single-family landowners.
- The Legislature should amend state law to require the department and the districts to each file an annual report of permitted wetland activities following certain criteria.

III. Effect of Proposed Changes:

This bill is intended to implement the findings and recommendations of the Office of Program Policy Analysis and Governmental Accountability's report regarding wetland mitigation.

Section 1: Section 373.4145, F.S., is amended to provide that an environmental creation, preservation, enhancement, or restoration project, including regional offsite mitigation areas, for which money is donated or paid as mitigation, which is sponsored by the Department of Environmental Protection (DEP), a water management district, or a local government and which provides mitigation for five or more applicants for permits under part IV of ch. 373, F.S., or 35 or more acres of adverse impacts, is to be established and operated under a memorandum of agreement (MOA). The MOA does have to be adopted by rule. The MOA is between the governmental entity proposing the mitigation project and the DEP or water management district, as appropriate. For purposes of this provision, one creation, preservation, enhancement, or restoration project shall mean one or more parcels of land with similar ecological communities which are intended to be created, preserved, enhanced, or restored under a common scheme.

For certain ongoing creation, preservation, enhancement, or restoration projects and regional offsite mitigation areas sponsored by the DEP, a water management district, or a local government, and for which money was or is paid as mitigation, the governmental entity sponsoring the project shall submit a draft MOA to the water management district or the DEP within 1 year after submittal. The governmental entity sponsoring the project may continue to receive moneys donated or paid toward the project as mitigation if certain provisions are met.

The MOA shall establish criteria that each environmental creation, preservation, enhancement, or restoration project must meet. At a minimum, the MOA must address the following for each project authorized:

1. A description of the work that will be conducted on the site and timeline for completion of such work;
2. A timeline for obtaining any required environmental resource permit;
3. The environmental success criteria that the project must achieve;
4. The monitoring and long-term management requirements that must be undertaken for the project;
5. An assessment of the project in accordance with s. 373.4136(a)-(i), F.S., until the adoption of the uniform wetland mitigation assessment method pursuant to s. 373.414(18), F.S.;
6. A designation of the entity responsible for the successful completion of the mitigation work;
7. A definition of the geographic area where the project may be used as mitigation established using the criteria of s. 373.4136(6), F.S.;
8. Full cost accounting of the project, including annual review and adjustment;
9. Provision and timetable for the acquisition of any lands necessary for the project;
10. Provision for preservation of the site;
11. Provision for application of all moneys received solely to the project for which they were collected; and
12. Provision for termination of the agreement and cessation of use of the project as mitigation if any material contingency of the agreement has failed to occur.

A single MOA may authorize more than one environmental creation, preservation, enhancement, or restoration projects or categories of projects if certain elements are met for each project.

Mitigation projects covered under an MOA are generally subject to the provisions of s. 373.414(1)(b), F.S., which provides that the mitigation must offset the adverse effects caused by the regulated activity.

The provisions of this section (s. 373.4145, F.S.) do not apply if the DEP, the water management district, or local government establishes, or contracts with a private entity to establish a mitigation bank. These provisions also do not apply to other entities that establish offsite regional mitigation.

The DEP, the water management districts, and local governments may elect to establish and manage mitigation sites, including regional offsite mitigation areas, or contract with permitted mitigation banks to provide mitigation options for private single-family lots or homeowners. The DEP, water management districts, and local governments shall provide a written notice of their election under this provision by U.S. mail to those individuals who have requested, in writing, to receive such notice. The use of mitigation options established in this section are not subject to the

full-cost accounting provision of s. 373.414(1)(b)1., F.S. To use this mitigation option, the applicant for a permit under part IV, ch. 373, F.S., must be a private, single-family lot or homeowner, and the land upon which the adverse impact is located must be intended for use as a single-family residence by the current owner. The applicant must not be a corporation, partnership, or other business entity. However, these provisions do not apply to other entities that establish offsite regional mitigation as defined in s. 373.4135, F.S., and s. 373.403, F.S.

Section 2: Section 373.4136, F.S., is amended to delete language which addresses when a mitigation service area may be larger or smaller than the regional watershed. This issue is readdressed elsewhere in the section. In determining the boundaries of the mitigation service area, the DEP or the water management district shall consider the characteristics, size, and location of the mitigation bank, and, at a minimum, the extent to which the mitigation bank may, among other things, be reasonably expected to offset specific types of wetland impacts within a specific geographic area. A mitigation bank need not be able to offset all expected impacts within its service area.

The DEP and the water management districts shall use regional watersheds to guide the establishment of mitigation service areas. Drainage basins may be used as regional watersheds if they are established based on the hydrologic or ecological characteristics of the basin. A mitigation service area may extend beyond the regional watershed in the bank is located into all or part of other regional watersheds if the mitigation bank has the ability to offset adverse impacts outside that regional watershed. Similarly, a mitigation service area may be smaller than the regional watershed in which the mitigation bank is located if adverse impacts throughout the regional watershed cannot reasonably be expected to be offset by the mitigation bank because of local ecological or hydrological conditions.

Section 3: Section 373.414, F.S., is amended to provide that the DEP and the water management districts shall report to the Executive Office of the Governor once a year by January 31 of each year all cash donations for mitigation accepted during the preceding calendar year. Currently, this report must be made twice a year, January 31 and July 31. The report must exclude contributions made pursuant to s. 373.4137, F.S., and must include a description of the endorsed mitigation projects and shall address, as applicable, success criteria, project implementation status and timeframe, monitoring, long-term management, provisions for preservation, and full-cost accounting.

If an applicant proposes mitigation within the same drainage basin as the adverse impacts to be mitigated, and if the mitigation offsets these adverse impacts, the water management district governing board and the DEP shall consider the regulated activity to meet the requirements of s. 373.414(8)(a), F.S. However, mitigation outside the drainage basin which offsets the adverse impacts within the drainage basin is not prohibited.

The DEP and each water management district responsible for implementation of the environmental resource permitting program shall develop a uniform wetland mitigation assessment method no later than October 1, 2001. The DEP shall adopt the uniform mitigation assessment method by rule no later than January 31, 2002. Once the DEP adopts the uniform wetland mitigation assessment method by rule, the uniform wetland mitigation assessment method shall be binding on the DEP, the water management districts, local governments, and any other

governmental agencies, and shall be the sole means to determine the mitigation needed to offset adverse impacts and to award and deduct mitigation credits. A water management district and any other governmental agency subject to ch. 120, F.S., may apply the uniform wetland mitigation assessment method without the need to adopt it by rule. It is a goal of the DEP and the water management districts that the uniform wetland mitigation assessment method developed be practical for use within the timeframes provided in the permitting process and result in a consistent process for determining mitigation requirements. It shall be recognized that any such method will require the application of reasonable scientific judgment.

The uniform wetland mitigation assessment method must determine the value of functions provided by wetlands and other surface waters considering the current conditions of these areas, use by fish and wildlife, location, uniqueness, and hydrologic connection, in addition to the factors listed in s. 373.4136(4), F.S. The uniform wetland mitigation assessment method shall also account for the expected time lag associated with offsetting impacts and the degrees of risk associated with the proposed mitigation. The method may account for different ecological communities in different areas of the state. Environmental resource permitting rules may establish categories of permits or thresholds for minor impacts under which the use of the method will not be required. The application of the uniform wetland mitigation assessment method is not subject to s. 70.001, F.S., the Bert J. Harris, Jr. Private Property Rights Protection Act.

If the rule establishing the uniform wetland mitigation assessment method is deemed to be invalid, the applicable rules related to establishing needed mitigation in existence prior to the adoption of the uniform wetland mitigation assessment methods and the method provided for existing mitigation banks shall be authorized for use by the DEP, water management districts, local governments, and other state agencies.

In developing the uniform wetland mitigation assessment method, the DEP shall seek input from the U.S. Army Corps of Engineers in order to promote consistency in the mitigation assessment methods used by the state and federal permitting programs.

An entity that has received a mitigation bank permit prior to the adoption of the uniform wetland mitigation assessment method shall have the impact sites assessed, using the credit assessment method, including any functional assessment methodology, in place when the bank was permitted, unless the entity elects to have its credits redetermined, and thereafter have its credits deducted, using the uniform wetland mitigation assessment method.

Obsolete language directing the Office of Program Policy Analysis and Government Accountability (OPPAGA) to conduct a study on mitigation options is deleted. OPPAGA is directed to study the cumulative impact consideration and issue a report by July 1, 2001. The study shall address the justification for the cumulative impact consideration; changes that can provide clarity and certainty in the cumulative impact consideration; and whether a practical, consistent, and equitable methodology can be developed for considering cumulative impacts within the environmental resource permitting program.

Section 4: This act takes effect upon becoming a law.

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Department of Environmental Protection and each water management district responsible for implementing the environmental resource permitting program (ERP) are required to develop a uniform functional assessment methodology. Since the Northwest Florida Water Management District does not have the financial resources and has not adopted rules to implement the environmental resource permitting program, this district would not be included in the method development. Currently, the DEP implements the ERP program in this district. The DEP is required to adopt, by rule, no later than January 31, 2002, the uniform mitigation assessment method that is developed. It is not known what the rulemaking costs would be. The adopted uniform wetland mitigation assessment method would be binding on the DEP, the water management districts, local governments, and other governmental agencies and would be the sole means to determine the mitigation needed to offset adverse impacts and to award and deduct mitigation credits.

The Office of Program Policy Analysis and Governmental Accountability (OPPAGA) is required to conduct a study of cumulative impact consideration and issue a report to the Governor and the Legislature. Since the bill provides no funding for this study, OPPAGA will have to bear the costs using existing staff and financial resources.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
