

By the Committee on Natural Resources and Senator Forman

312-2167-00

1                                   A bill to be entitled  
2           An act relating to mitigation; amending s.  
3           373.4135, F.S.; requiring a memorandum of  
4           agreement under certain conditions; amending s.  
5           373.4136, F.S.; revising provisions relating to  
6           the size of the mitigation service area;  
7           providing for use of regional watersheds to  
8           guide the establishment of mitigation service  
9           areas; requiring satisfaction of cumulative  
10          impact considerations; providing rulemaking  
11          authority; providing that mitigation bank  
12          permit applications are subject to certain  
13          established processing procedures; amending s.  
14          373.414, F.S.; revising reporting provisions  
15          relating to money donated as wetlands  
16          mitigation; requiring the Department of  
17          Environmental Protection and certain water  
18          management districts to adopt a single uniform  
19          functional assessment methodology, by rule, by  
20          a specified date; directing local government  
21          use of the methodology; providing conditions  
22          and procedures for use of the methodology;  
23          directing a study by the Office of Program  
24          Policy Analysis and Governmental Accountability  
25          on cumulative impacts; providing an effective  
26          date.

27  
28   Be It Enacted by the Legislature of the State of Florida:

29  
30           Section 1.   Subsections (6) and (7) are added to  
31   section 373.4135, Florida Statutes, to read:

1           373.4135 Mitigation banks and offsite regional  
2 mitigation.--

3           (6) An environmental creation, preservation,  
4 enhancement, or restoration project, including regional  
5 offsite mitigation areas, for which money is donated or paid  
6 as mitigation, which is sponsored by the department, a water  
7 management district, or a local government and which provides  
8 mitigation for five or more applicants for permits under this  
9 part, or 35 or more acres of adverse impacts, shall be  
10 established and operated under a memorandum of agreement. Such  
11 memorandum of agreement need not be adopted by rule. The  
12 memorandum of agreement shall be between the governmental  
13 entity proposing the mitigation project and the department or  
14 water management district, as appropriate. For the purposes of  
15 this subsection, one creation, preservation, enhancement, or  
16 restoration project shall mean one or more parcels of land  
17 with similar ecological communities which are intended to be  
18 created, preserved, enhanced, or restored under a common  
19 scheme.

20           (a) For ongoing creation, preservation, enhancement,  
21 or restoration projects and regional offsite mitigation areas  
22 sponsored by the department, a water management district, or a  
23 local government, and for which money was or is paid as  
24 mitigation, which were begun prior to the effective date of  
25 this subsection, and which have operated as of the effective  
26 date of this subsection, or are anticipated to operate, in  
27 excess of the thresholds listed above, the governmental entity  
28 sponsoring such project shall submit a draft memorandum of  
29 agreement to the water management district or department by  
30 October 1, 2000. The governmental entity sponsoring such  
31 project shall make reasonable efforts to obtain the final

1 signed memorandum of agreement within 1 year after submittal.  
2 The governmental entity sponsoring the project may continue to  
3 receive moneys donated or paid toward the project as  
4 mitigation if the provisions of this paragraph are met.

5 (b) The memorandum of agreement shall establish  
6 criteria that each environmental creation, preservation,  
7 enhancement, or restoration project must meet. These criteria  
8 must address the elements listed in paragraph (c). The entity  
9 sponsoring such project or categories of projects shall submit  
10 documentation or other evidence to the water management  
11 district or department that the project meets, or individual  
12 projects within that category meet, the specified criteria.

13 (c) At a minimum, the memorandum of agreement must  
14 address the following for each project authorized:

15 1. A description of the work that will be conducted on  
16 the site and timeline for completion of such work;

17 2. A timeline for obtaining any required environmental  
18 resource permit;

19 3. The environmental success criteria that the project  
20 must achieve;

21 4. The monitoring and long-term management  
22 requirements that must be undertaken for the project;

23 5. An assessment of the project in accordance with s.  
24 373.4136(4)(a)-(i), until the adoption of the uniform wetland  
25 mitigation assessment method pursuant to s. 373.414(18);

26 6. A designation of the entity responsible for the  
27 successful completion of the mitigation work;

28 7. A definition of the geographic area where the  
29 project may be used as a mitigation established using the  
30 criteria of s. 373.4136(6);

31

1           8. Full cost accounting of the project, including  
2 annual review and adjustment;

3           9. Provision and timetable for the acquisition of any  
4 lands necessary for the project;

5           10. Provision for preservation of the site;

6           11. Provision for application of all moneys received  
7 solely to the project for which they were collected; and

8           12. Provision for termination of the agreement and  
9 cessation of use of the project as mitigation if any material  
10 contingency of the agreement has failed to occur.

11           (d) A single memorandum of agreement may authorize  
12 more than one environmental creation, preservation,  
13 enhancement, or restoration projects or categories of projects  
14 if the elements in paragraph (c) are met for each project.

15           (e) Projects governed by this subsection, except for  
16 projects established pursuant to s. 373.4137(7), are subject  
17 to s. 373.414(1)(b)1.

18           (f) This subsection does not apply to mitigation areas  
19 established to implement s. 373.4137.

20           (g) This subsection does not apply if the department,  
21 water management district, or local government establishes, or  
22 contracts with a private entity to establish, a mitigation  
23 bank permitted under s. 373.4136. This subsection does not  
24 apply to other entities that establish offsite regional  
25 mitigation as defined in this section and s. 373.403.

26           (7) The department, water management districts, and  
27 local governments may elect to establish and manage mitigation  
28 sites, including regional offsite mitigation areas, or  
29 contract with permitted mitigation banks to provide mitigation  
30 options for private single-family lots or homeowners. The  
31 department, water management districts, and local governments

1 shall provide a written notice of their election under this  
2 subsection by United States mail to those individuals who have  
3 requested, in writing, to receive such notice. The use of  
4 mitigation options established under this section are not  
5 subject to the full-cost accounting provision of s.  
6 373.414(1)(b)1. To use a mitigation option established under  
7 this section, the applicant for a permit under this part must  
8 be a private, single-family lot or homeowner, and the land  
9 upon which the adverse impact is located must be intended for  
10 use as a single-family residence by the current owner. The  
11 applicant must not be a corporation, partnership, or other  
12 business entity. However, this subsection does not apply to  
13 other entities that establish offsite regional mitigation as  
14 defined in this section and s. 373.403.

15 Section 2. Subsection (6) of section 373.4136, Florida  
16 Statutes, is amended to read:

17 373.4136 Establishment and operation of mitigation  
18 banks.--

19 (6) MITIGATION SERVICE AREA.--The department or water  
20 management district shall establish a mitigation service area  
21 for each mitigation bank permit. The department or water  
22 management district shall notify and consider comments  
23 received on the proposed mitigation service area from each  
24 local government within the proposed mitigation service area  
25 ~~that operates a wetlands regulatory program.~~ Except as  
26 provided herein, mitigation credits may be withdrawn and used  
27 only to offset adverse impacts in the mitigation service area.  
28 The boundaries of the mitigation service area shall depend  
29 upon the geographic area where the mitigation bank could  
30 reasonably be expected to offset adverse impacts. ~~A mitigation~~  
31 ~~service area may be larger than the regional watershed if the~~

1 ~~mitigation bank provides exceptional ecological value such~~  
2 ~~that adverse impacts outside the regional watershed could~~  
3 ~~reasonably be expected to be adequately offset by the~~  
4 ~~mitigation bank. A mitigation service area may be smaller than~~  
5 ~~a regional watershed if adverse impacts throughout the~~  
6 ~~regional watershed cannot reasonably be expected to be offset~~  
7 ~~by the mitigation bank because of local ecological or~~  
8 ~~hydrological conditions.~~ Mitigation service areas may overlap,  
9 and mitigation service areas for two or more mitigation banks  
10 may be approved for a regional watershed.

11 (a) In determining the boundaries of the mitigation  
12 service area ~~extent to which a mitigation bank provides~~  
13 ~~exceptional ecological value such that adverse impacts outside~~  
14 ~~the regional watershed could reasonably be expected to be~~  
15 ~~adequately offset by the mitigation bank,~~ the department or  
16 the water management district shall consider the  
17 characteristics, size, and location of the mitigation bank  
18 and, at a minimum, the extent to which the mitigation bank:

19 1. Contributes to ~~Will promote~~ a regional integrated  
20 ecological network;

21 2. Will significantly enhance the water quality or  
22 restoration of an offsite receiving water body that is  
23 designated as an Outstanding Florida Water, a Wild and Scenic  
24 River, an aquatic preserve, a water body designated in a plan  
25 adopted pursuant to s. 373.456 of the Surface Water  
26 Improvement and Management Act, or a nationally designated  
27 estuarine preserve;

28 3. Will provide for the long-term viability of  
29 endangered or threatened species or species of special  
30 concern; ~~and~~

31

1           4. Is consistent with the objectives of a regional  
2 management plan adopted or endorsed by the department or water  
3 management districts; and-

4           5. Can reasonably be expected to offset specific types  
5 of wetland impacts within a specific geographic area. A  
6 mitigation bank need not be able to offset all expected  
7 impacts within its service area.

8           (b) The department and water management districts  
9 shall use regional watersheds to guide the establishment of  
10 mitigation service areas. Drainage basins established pursuant  
11 to s. 373.414(8) may be used as regional watersheds if they  
12 are established based on the hydrologic or ecological  
13 characteristics of the basin. A mitigation service area may  
14 extend beyond the regional watershed in which the bank is  
15 located into all or part of other regional watersheds if the  
16 mitigation bank has the ability to offset adverse impacts  
17 outside that regional watershed. Similarly, a mitigation  
18 service area may be smaller than the regional watershed in  
19 which the mitigation bank is located if adverse impacts  
20 throughout the regional watershed cannot reasonably be  
21 expected to be offset by the mitigation bank because of local  
22 ecological or hydrological conditions.

23           (c)~~(b)~~ Once a mitigation bank service area has been  
24 established by the department or a water management district  
25 for a mitigation bank, such service area shall be accepted by  
26 all water management districts, local governments, and the  
27 department.

28           (d)~~(c)~~ If the requirements in ss. 373.414(1)(b) and  
29 373.414(8)~~s. 373.4135(1)(b)~~ are met, the following projects  
30 or activities regulated under this part shall be eligible to  
31 use a mitigation bank, regardless of whether notwithstanding

1 ~~the fact that~~ they are ~~not completely~~ located within the  
2 mitigation service area:

3       1. Projects with adverse impacts partially located  
4 within the mitigation service area.

5       2. Linear projects, such as roadways, transmission  
6 lines, distribution lines, pipelines, or railways.

7       3. Projects with total adverse impacts of less than 1  
8 acre in size.

9       Section 3. Subsections (1), (8), and (18) of section  
10 373.414, Florida Statutes, are amended, and subsection (19) is  
11 added to that section, to read:

12       373.414 Additional criteria for activities in surface  
13 waters and wetlands.--

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

28       (a) In determining whether an activity, which is in,  
29 on, or over surface waters or wetlands, as delineated in s.  
30 373.421(1), and is regulated under this part, is not contrary  
31 to the public interest or is clearly in the public interest,



1 the governing board or the department shall consider and  
2 balance the following criteria:

- 3 1. Whether the activity will adversely affect the  
4 public health, safety, or welfare or the property of others;
- 5 2. Whether the activity will adversely affect the  
6 conservation of fish and wildlife, including endangered or  
7 threatened species, or their habitats;
- 8 3. Whether the activity will adversely affect  
9 navigation or the flow of water or cause harmful erosion or  
10 shoaling;
- 11 4. Whether the activity will adversely affect the  
12 fishing or recreational values or marine productivity in the  
13 vicinity of the activity;
- 14 5. Whether the activity will be of a temporary or  
15 permanent nature;
- 16 6. Whether the activity will adversely affect or will  
17 enhance significant historical and archaeological resources  
18 under the provisions of s. 267.061; and
- 19 7. The current condition and relative value of  
20 functions being performed by areas affected by the proposed  
21 activity.

22 (b) If the applicant is unable to otherwise meet the  
23 criteria set forth in this subsection, the governing board or  
24 the department, in deciding to grant or deny a permit, shall  
25 consider measures proposed by or acceptable to the applicant  
26 to mitigate adverse effects that may be caused by the  
27 regulated activity. Such measures may include, but are not  
28 limited to, onsite mitigation, offsite mitigation, offsite  
29 regional mitigation, and the purchase of mitigation credits  
30 from mitigation banks permitted under s. 373.4136. It shall  
31 be the responsibility of the applicant to choose the form of

1 mitigation. The mitigation must offset the adverse effects  
2 caused by the regulated activity.

3           1. The department or water management districts may  
4 accept the donation of money as mitigation only where the  
5 donation is specified for use in a duly noticed environmental  
6 creation, preservation, enhancement, or restoration project,  
7 endorsed by the department or the governing board of the water  
8 management district, which offsets the impacts of the activity  
9 permitted under this part. However, the provisions of this  
10 subsection shall not apply to projects undertaken pursuant to  
11 s. 373.4137 or chapter 378. Where a permit is required under  
12 this part to implement any project endorsed by the department  
13 or a water management district, all necessary permits must  
14 have been issued prior to the acceptance of any cash donation.  
15 After the effective date of this act, when money is donated to  
16 either the department or a water management district to offset  
17 impacts authorized by a permit under this part, the department  
18 or the water management district shall accept only a donation  
19 that represents the full cost to the department or water  
20 management district of undertaking the project that is  
21 intended to mitigate the adverse impacts. The full cost shall  
22 include all direct and indirect costs, as applicable, such as  
23 those for land acquisition, land restoration or enhancement,  
24 perpetual land management, and general overhead consisting of  
25 costs such as staff time, building, and vehicles. The  
26 department or the water management district may use a  
27 multiplier or percentage to add to other direct or indirect  
28 costs to estimate general overhead. Mitigation credit for  
29 such a donation shall be given only to the extent that the  
30 donation covers the full cost to the agency of undertaking the  
31 project that is intended to mitigate the adverse impacts.

1 However, nothing herein shall be construed to prevent the  
2 department or a water management district from accepting a  
3 donation representing a portion of a larger project, provided  
4 that the donation covers the full cost of that portion and  
5 mitigation credit is given only for that portion. The  
6 department or water management district may deviate from the  
7 full cost requirements of this subparagraph to resolve a  
8 proceeding brought pursuant to chapter 70 or a claim for  
9 inverse condemnation. Nothing in this section shall be  
10 construed to require the owner of a private mitigation bank,  
11 permitted under s. 373.4136, to include the full cost of a  
12 mitigation credit in the price of the credit to a purchaser of  
13 said credit.

14         2. The department and each water management district  
15 shall report to the Executive Office of the Governor by  
16 January 31 ~~and July 31~~ of each year all cash donations  
17 accepted under subparagraph 1. during the preceding calendar  
18 year 6 months for wetland mitigation purposes, ~~which shall~~  
19 ~~include a description of the endorsed mitigation projects.~~ The  
20 report must exclude contributions made pursuant to s.  
21 373.4137. The report must include a description of the  
22 endorsed mitigation projects and, except for projects governed  
23 by s. 373.4135(6), shall address, as applicable, success  
24 criteria, project implementation status and timeframe,  
25 monitoring, long-term management, provisions for preservation,  
26 and full-cost accounting.

27         3. If the applicant is unable to meet water quality  
28 standards because existing ambient water quality does not meet  
29 standards, the governing board or the department shall  
30 consider mitigation measures proposed by or acceptable to the  
31 applicant that cause net improvement of the water quality in

1 the receiving body of water for those parameters which do not  
2 meet standards.

3 4. If mitigation requirements imposed by a local  
4 government for surface water and wetland impacts of an  
5 activity regulated under this part cannot be reconciled with  
6 mitigation requirements approved under a permit for the same  
7 activity issued under this part, including application of the  
8 uniform wetland assessment method adopted pursuant to  
9 subsection (18), the mitigation requirements for surface water  
10 and wetland impacts shall be controlled by the permit issued  
11 under this part.

12 (c) Where activities for a single project regulated  
13 under this part occur in more than one local government  
14 jurisdiction, and where permit conditions or regulatory  
15 requirements are imposed by a local government for these  
16 activities which cannot be reconciled with those imposed by a  
17 permit under this part for the same activities, the permit  
18 conditions or regulatory requirements shall be controlled by  
19 the permit issued under this part.

20 (8)(a) The governing board or the department, in  
21 deciding whether to grant or deny a permit for an activity  
22 regulated under this part shall consider the cumulative  
23 impacts upon surface water and wetlands, as delineated in s.  
24 373.421(1), within the same drainage basin as defined in s.  
25 373.403(9), of:

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

27 2.(b) Projects which are existing or activities  
28 regulated under this part which are under construction or  
29 projects for which permits or determinations pursuant to s.  
30 373.421 or s. 403.914 have been sought.

31

1           3.(c) Activities which are under review, approved, or  
2 vested pursuant to s. 380.06, or other activities regulated  
3 under this part which may reasonably be expected to be located  
4 within surface waters or wetlands, as delineated in s.  
5 373.421(1), in the same drainage basin as defined in s.  
6 373.403(9), based upon the comprehensive plans, adopted  
7 pursuant to chapter 163, of the local governments having  
8 jurisdiction over the activities, or applicable land use  
9 restrictions and regulations.

10           (b) If an applicant proposes mitigation within the  
11 same drainage basin as the adverse impacts to be mitigated,  
12 and if the mitigation offsets these adverse impacts, the  
13 governing board and department shall consider the regulated  
14 activity to meet the requirements of paragraph (a). However  
15 this paragraph does not prohibit mitigation outside the  
16 drainage basin which offsets the adverse impacts within the  
17 drainage basin.

18           (18) MITIGATION STUDIES.--The department and each  
19 water management district responsible for implementation of  
20 the environmental resource permitting program shall develop a  
21 uniform wetland mitigation assessment method no later than  
22 October 1, 2001. The department shall adopt the uniform  
23 mitigation assessment method by rule no later than January 31,  
24 2002. Once the department adopts the uniform wetland  
25 mitigation assessment method by rule, the uniform wetland  
26 mitigation assessment method shall be binding on the  
27 department, the water management districts, local governments,  
28 and any other governmental agencies, and shall be the sole  
29 means to determine the mitigation needed to offset adverse  
30 impacts and to award and deduct mitigation credits. A water  
31 management district and any other governmental agency subject

1 to chapter 120 may apply the uniform wetland mitigation  
2 assessment method without the need to adopt it pursuant to s.  
3 120.54. It shall be a goal of the department and water  
4 management districts that the uniform wetland mitigation  
5 assessment method developed be practical for use within the  
6 timeframes provided in the permitting process and results in a  
7 consistent process for determining mitigation requirements. It  
8 shall be recognized that any such method will require the  
9 application of reasonable scientific judgment. The uniform  
10 wetland mitigation assessment method must determine the value  
11 of functions provided by wetlands and other surface waters  
12 considering the current conditions of these areas, use by fish  
13 and wildlife, location, uniqueness, and hydrologic connection,  
14 in addition to the factors listed in s. 373.4136(4). The  
15 uniform wetland mitigation assessment method shall also  
16 account for the expected time lag associated with offsetting  
17 impacts and the degrees of risk associated with the proposed  
18 mitigation. The uniform wetland mitigation assessment method  
19 may account for different ecological communities in different  
20 areas of the state. Environmental resource permitting rules  
21 may establish categories of permits or thresholds for minor  
22 impacts under which the use of the uniform wetland mitigation  
23 assessment method will not be required. The application of the  
24 uniform wetland mitigation assessment method is not subject to  
25 s. 70.001. If the rule establishing the uniform wetland  
26 mitigation assessment method is deemed to be invalid, the  
27 applicable rules related to establishing needed mitigation in  
28 existence prior to the adoption of the uniform wetland  
29 mitigation assessment method and the method described in  
30 paragraph (b) for existing mitigation banks shall be  
31

1 authorized for use by the department, water management  
2 districts, local governments, and other state agencies.

3 (a) In developing the uniform wetland mitigation  
4 assessment method, the department shall seek input from the  
5 United State Army Corps of Engineers in order to promote  
6 consistency in the mitigation assessment methods used by the  
7 state and federal permitting programs.

8 (b) An entity that has received a mitigation bank  
9 permit prior to the adoption of the uniform wetland mitigation  
10 assessment method shall have impact sites assessed, for the  
11 purpose of deducting bank credits, using the credit assessment  
12 method, including any functional assessment methodology, in  
13 place when the bank was permitted, unless the entity elects to  
14 have its credits redetermined, and thereafter have its credits  
15 deducted, using the uniform wetland mitigation assessment  
16 method.

17 ~~(a) For impacts resulting from activities regulated~~  
18 ~~under this part, the Legislature finds that successful~~  
19 ~~mitigation performed by the public and private sectors has~~  
20 ~~helped to preserve the state's natural resources.~~

21 ~~(b) The Office of Program Policy Analysis and~~  
22 ~~Government Accountability shall study the mitigation options~~  
23 ~~as defined by paragraph (1)(b), implemented from 1994 to the~~  
24 ~~present, and issue a report by January 31, 2000. The study~~  
25 ~~shall consider the effectiveness and costs of the current~~  
26 ~~mitigation options in offsetting adverse effects to wetlands~~  
27 ~~and wetland functions, including the application of cumulative~~  
28 ~~impact considerations, and identify, as appropriate,~~  
29 ~~recommendations for statutory or rule changes to increase the~~  
30 ~~effectiveness of mitigation strategies.~~

31

1           (19) The Office of Program Policy Analysis and  
2 Governmental Accountability shall study the cumulative impact  
3 consideration required by subsection (8) and issue a report by  
4 July 1, 2001. The study shall address the justification for  
5 the cumulative impact consideration; changes that can provide  
6 clarity and certainty in the cumulative impact consideration;  
7 and whether a practical, consistent, and equitable methodology  
8 can be developed for considering cumulative impacts within the  
9 environmental resource permitting program.

10           Section 4. This act shall take effect upon becoming a  
11 law.



1                   STATEMENT OF SUBSTANTIAL CHANGES CONTAINED IN  
2   COMMITTEE SUBSTITUTE FOR  
3   Senate Bill 2162

4     The committee substitute is intended to implement the findings  
5     and recommendations of the Office of Program Policy Analysis  
6     and Governmental Accountability's report regarding wetland  
7     mitigation. The CS provides that an environmental creation,  
8     preservation, enhancement, or restoration project, for which  
9     money is donated or paid as mitigation, which is sponsored by  
10    the Department of Environmental Protection, a water management  
11    district, or a local government and which provides mitigation  
12    for five or more applicants for permits under part IV of ch.  
13    373, F.S., or 35 or more acres of adverse impacts, is to be  
14    established and operated under a memorandum of agreement. The  
15    memorandum of agreement does not need to adopted by rule. The  
16    CS specifies what the memorandum of agreement must address.  
17    These provisions do not apply to contracts between the  
18    department, the water management districts, or local  
19    governments with a private entity to establish a mitigation  
20    bank. Other options are provided for single-family lots or  
21    homeowners

22    The department and the water management districts must report  
23    to the Executive Office of the Governor once a year all cash  
24    donations accepted for mitigation during the preceding  
25    calendar year.

26    The department and the water management districts are to  
27    develop a uniform wetland mitigation assessment method. The  
28    department is required to adopt the method, by rule, by  
29    January 31, 2002. The method will be binding on the  
30    department, the water management districts, local governments,  
31    and other governmental agencies and shall be the sole means to  
32    determine mitigation needed to offset adverse impacts and to  
33    award and deduct mitigation credits. The application of the  
34    uniform wetland mitigation assessment method is not subject to  
35    s. 70.001, F.S., the Bert J. Harris, Jr. Private property  
36    Rights Protection Act.

37    The Office of Program Policy Analysis and Government  
38    Accountability is required to conduct a study on cumulative  
39    impact consideration and issue a report by July 1, 2001.

40  
41  
42  
43  
44  
45  
46  
47  
48  
49  
50  
51  
52  
53  
54  
55