

By Representative Alexander

1 A bill to be entitled
2 An act relating to wetlands mitigation;
3 amending s. 373.4135, F.S.; prohibiting certain
4 local government denial of a permitted
5 mitigation bank or offsite regional mitigation;
6 amending s. 373.4136, F.S.; requiring the
7 Department of Environmental Protection and
8 certain water management districts to adopt a
9 single uniform functional assessment
10 methodology, by rule, by a specified date;
11 encouraging local government use of the
12 methodology; providing conditions and
13 procedures for use of the methodology;
14 prohibiting use of environmental resource
15 permit rule mitigation ratios when the
16 methodology is used; revising provisions
17 relating to size of the mitigation service
18 area; providing for use of regional watersheds
19 to guide establishment of mitigation service
20 areas; requiring satisfaction of cumulative
21 impact considerations; providing rulemaking
22 authority; providing that mitigation bank
23 permit applications are subject to certain
24 established processing procedures; amending s.
25 373.414, F.S.; revising provisions relating to
26 money donated as wetlands mitigation; requiring
27 either a mitigation bank permit or a memorandum
28 of agreement between the department and the
29 applicable water management district, and a
30 federal mitigation bank instrument or
31 memorandum of agreement, for new mitigation

1 projects receiving such money undertaken after
2 a specified date; providing an exception;
3 requiring certain reporting; providing an
4 effective date.

5
6 Be It Enacted by the Legislature of the State of Florida:

7
8 Section 1. Subsection (2) of section 373.4135, Florida
9 Statutes, is amended to read:

10 373.4135 Mitigation banks and offsite regional
11 mitigation.--

12 (2) Local governments shall not deny the use of a
13 mitigation bank or offsite regional mitigation due to its
14 location outside of the jurisdiction of the local government.

15 If the United States Army Corps of Engineers and the
16 department or applicable water management district issue
17 permits approving the use of a mitigation bank or offsite
18 regional mitigation located outside of the jurisdiction of the
19 local government, the local government shall not deny the use
20 of such mitigation when reviewing an application for approval
21 under this chapter, chapter 125, chapter 163, or any other
22 source of authority.

23 Section 2. Subsections (4), (6), and (11) of section
24 373.4136, Florida Statutes, are amended, and subsection (12)
25 is added to said section, to read:

26 373.4136 Establishment and operation of mitigation
27 banks.--

28 (4) MITIGATION CREDITS.--After evaluating the
29 information submitted by the applicant for a mitigation bank
30 permit and assessing the proposed mitigation bank pursuant to
31 the criteria in this section, the department or water

1 management district shall award a number of mitigation credits
2 to a proposed mitigation bank or phase of such mitigation
3 bank. An entity establishing and operating a mitigation bank
4 may apply to modify the mitigation bank permit to seek the
5 award of additional mitigation credits if the mitigation bank
6 results in an additional increase in ecological value over the
7 value contemplated at the time of the original permit
8 issuance, or the most recent modification thereto involving
9 the number of credits awarded. The number of credits awarded
10 shall be based on the degree of improvement in ecological
11 value expected to result from the establishment and operation
12 of the mitigation bank as determined using a functional
13 assessment methodology. The department and each water
14 management district that has responsibility for reviewing and
15 taking final agency action on mitigation bank permit
16 applications pursuant to the operating agreements adopted
17 under s. 373.046 shall adopt a single uniform functional
18 assessment methodology by rule no later than July 1, 2001.
19 This uniform functional assessment methodology may account for
20 different ecological communities in different areas of the
21 state. This uniform functional assessment methodology shall be
22 used by the department and those water management districts to
23 award credits and to deduct credits from a mitigation bank. A
24 local government which operates an independent wetland
25 regulatory program is not required, but is encouraged, to use
26 this uniform functional assessment methodology for its
27 program. An entity that has received a mitigation bank permit
28 before the adoption of the uniform functional assessment
29 methodology shall have credits deducted from its bank pursuant
30 to the credit assessment method in place when the bank was
31 permitted, unless the entity elects to have credits deducted

1 pursuant to the uniform functional assessment methodology. The
2 environmental resource permit rule mitigation ratios may not
3 be used to determine mitigation bank credit requirements for
4 those impact sites where the uniform functional assessment
5 methodology is used. The uniform functional assessment
6 methodology must, at a minimum, evaluate ~~In determining the~~
7 ~~degree of improvement in ecological value,~~ each of the
8 following factors, ~~at a minimum, shall be evaluated:~~
9 (a) The extent to which target hydrologic regimes can
10 be achieved and maintained.
11 (b) The extent to which management activities promote
12 natural ecological conditions, such as natural fire patterns.
13 (c) The proximity of the mitigation bank to areas with
14 regionally significant ecological resources or habitats, such
15 as national or state parks, Outstanding National Resource
16 Waters and associated watersheds, Outstanding Florida Waters
17 and associated watersheds, and lands acquired through
18 governmental or nonprofit land acquisition programs for
19 environmental conservation; and the extent to which the
20 mitigation bank establishes corridors for fish, wildlife, or
21 listed species to those resources or habitats.
22 (d) The quality and quantity of wetland or upland
23 restoration, enhancement, preservation, or creation.
24 (e) The ecological and hydrological relationship
25 between wetlands and uplands in the mitigation bank.
26 (f) The extent to which the mitigation bank provides
27 habitat for fish and wildlife, especially habitat for species
28 listed as threatened, endangered, or of special concern, or
29 provides habitats that are unique for that mitigation service
30 area.
31

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

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

6 (i) Any special designation or classification of the
7 affected waters and lands.

8 (6) MITIGATION SERVICE AREA.--The department or water
9 management district shall establish a mitigation service area
10 for each mitigation bank permit. The department or water
11 management district shall notify and consider comments
12 received on the proposed mitigation service area from each
13 local government within the proposed mitigation service area
14 that operates a wetlands regulatory program. Except as
15 provided herein, mitigation credits may be withdrawn and used
16 only to offset adverse impacts in the mitigation service area.
17 The boundaries of the mitigation service area shall depend
18 upon the geographic area where the mitigation bank could
19 reasonably be expected to offset adverse impacts. A
20 ~~mitigation service area may be larger than the regional~~
21 ~~watershed if the mitigation bank provides exceptional~~
22 ~~ecological value such that adverse impacts outside the~~
23 ~~regional watershed could reasonably be expected to be~~
24 ~~adequately offset by the mitigation bank. A mitigation service~~
25 ~~area may be smaller than a regional watershed if adverse~~
26 ~~impacts throughout the regional watershed cannot reasonably be~~
27 ~~expected to be offset by the mitigation bank because of local~~
28 ~~ecological or hydrological conditions.~~Mitigation service
29 areas may overlap, and mitigation service areas for two or
30 more mitigation banks may be approved for a regional
31 watershed.

1 (a) In determining the size of the mitigation service
2 area extent to which a mitigation bank provides exceptional
3 ecological value such that adverse impacts outside the
4 regional watershed could reasonably be expected to be
5 adequately offset by the mitigation bank, the department or
6 the water management district shall consider the
7 characteristics, size, and location of the mitigation bank
8 and, at a minimum, the extent to which the mitigation bank:

9 1. Is part of a larger regional ecosystem;

10 ~~2.1.~~ Will promote a regional integrated ecological
11 network;

12 ~~3.2.~~ Will significantly enhance the water quality or
13 restoration of an offsite receiving water body that is
14 designated as an Outstanding Florida Water, a Wild and Scenic
15 River, an aquatic preserve, a water body designated in a plan
16 adopted pursuant to s. 373.456 of the Surface Water
17 Improvement and Management Act, or a nationally designated
18 estuarine preserve;

19 ~~4.3.~~ Will provide for the long-term viability of
20 endangered or threatened species or species of special
21 concern; and

22 ~~5.4.~~ Is consistent with the objectives of a regional
23 management plan adopted or endorsed by the department or water
24 management districts.

25 (b) The department and water management districts
26 shall use regional watersheds to guide the establishment of
27 mitigation service areas. However, a mitigation service area
28 shall not necessarily be limited to the regional watershed in
29 which the mitigation bank is located, but shall be larger than
30 that regional watershed if adverse impacts outside the
31 regional watershed could reasonably be expected to be

1 adequately offset by the mitigation bank. Similarly, a
2 mitigation service area may be smaller than a regional
3 watershed in which the mitigation bank is located if adverse
4 impacts throughout the regional watershed cannot reasonably be
5 expected to be offset by the mitigation bank because of unique
6 local ecological or hydrological conditions. In delineating
7 regional watersheds pursuant to this subsection, the
8 department and water management districts shall delineate the
9 largest areas that have hydrological or ecological
10 connectivity to recognize the regional benefits provided by
11 mitigation banks. Use of a mitigation bank for impacts
12 occurring within the bank's mitigation service area shall
13 satisfy cumulative impact considerations as set forth in s.
14 373.414(8).

15 (c)(b) Once a mitigation bank service area has been
16 established by the department or a water management district
17 for a mitigation bank, such service area shall be accepted by
18 all water management districts, local governments, and the
19 department.

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

- 25 1. Projects with adverse impacts partially located
26 within the mitigation service area.
- 27 2. Linear projects, such as roadways, transmission
28 lines, distribution lines, pipelines, or railways.
- 29 3. Projects with total adverse impacts of less than 1
30 acre in size.

31

1 (11) RULES.--The department and water management
2 district may adopt rules to implement the provisions of s.
3 373.4135 and this section, which shall include, but not be
4 limited to, provisions:

5 (a) Requiring financial responsibility for the
6 construction, operation, and long-term management of a
7 mitigation bank;

8 (b) For the perpetual protection and management of
9 mitigation banks; and

10 (c) For the use of the uniform functional assessment
11 methodology adopted pursuant to this section ~~Establishing a~~
12 ~~system and methodology for the valuation, assessment, and~~
13 ~~award of mitigation credits.~~

14 (12) PROCESSING.--Mitigation bank permit applications
15 are subject to s. 373.4141.

16 Section 3. Paragraph (b) of subsection (1) of section
17 373.414, Florida Statutes, is amended to read:

18 373.414 Additional criteria for activities in surface
19 waters and wetlands.--

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

1 must provide reasonable assurance that the proposed activity
2 will be clearly in the public interest.

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

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

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

26 2. In allowing the department and water management
27 districts to accept the donation of cash as mitigation, it is
28 the intent of the Legislature to make mitigation affordable
29 and demonstrate accountability by ensuring that mitigation is
30 being carried out so as to offset the loss of wetland
31 functions. Therefore, by January 1, 2001, the department and

1 water management districts shall ensure that either a
2 mitigation bank permit pursuant to s. 373.4136 or a memorandum
3 of agreement between the department and applicable water
4 management district is obtained covering each environmental
5 creation, preservation, enhancement, or restoration project
6 that is endorsed by the department or a water management
7 district and is the recipient of cash donated as mitigation.
8 If a memorandum of agreement is obtained, the memorandum of
9 agreement shall substantially meet the requirements of ss.
10 373.4135 and 373.4136 and the rules adopted thereunder. In
11 addition, by January 1, 2001, the department and water
12 management districts shall ensure that either a mitigation
13 banking instrument or memorandum of agreement is obtained from
14 the United States Army Corps of Engineers. An environmental
15 creation, preservation, enhancement, or restoration project
16 that is endorsed, prior to January 1, 2001, by the department
17 or a water management district and is the recipient of cash
18 donated as mitigation may continue to receive such cash
19 donation. However, beginning January 1, 2001, the department
20 and water management districts may not approve the donation of
21 cash towards a new environmental project not in existence
22 prior to January 1, 2001, unless such project has first
23 obtained either a state mitigation bank permit or memorandum
24 of agreement and has obtained a federal mitigation bank
25 instrument or memorandum of agreement as provided herein. The
26 provisions of this subsection shall not apply to environmental
27 projects undertaken pursuant to the provisions of s. 373.4137.
28 In implementing this subsection, the Legislature directs the
29 department and water management districts to employ innovative
30 measures to keep mitigation affordable and accountable.
31

1 ~~3.2.~~ The department and each water management district
2 shall report to the Executive Office of the Governor by
3 January 31 and July 31 of each year all cash donations
4 accepted during the preceding 6 months for wetland mitigation
5 purposes, which shall include a description of the ~~endorsed~~
6 mitigation projects and identification of the state mitigation
7 bank permit or memorandum of agreement and the federal
8 mitigation bank instrument or memorandum of agreement obtained
9 for such projects.

10 ~~4.3.~~ If the applicant is unable to meet water quality
11 standards because existing ambient water quality does not meet
12 standards, the governing board or the department shall
13 consider mitigation measures proposed by or acceptable to the
14 applicant that cause net improvement of the water quality in
15 the receiving body of water for those parameters which do not
16 meet standards.

17 ~~5.4.~~ If mitigation requirements imposed by a local
18 government for surface water and wetland impacts of an
19 activity regulated under this part cannot be reconciled with
20 mitigation requirements approved under a permit for the same
21 activity issued under this part, the mitigation requirements
22 for surface water and wetland impacts shall be controlled by
23 the permit issued under this part.

24 Section 4. This act shall take effect July 1, 2000.
25
26
27
28
29
30
31

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31

HOUSE SUMMARY

Prohibits certain local government denial of a wetlands mitigation or offsite regional mitigation permitted by the U.S. Army Corps of Engineers and the Department of Environmental Protection or applicable water management district. Requires the department and certain water management districts to adopt a single uniform functional assessment methodology, by rule, by July 1, 2001. Encourages, but does not require, local government use of the methodology. Provides procedures for use of the methodology, and provides that an entity that received a mitigation bank permit prior to its adoption may elect to use the methodology. Prohibits use of environmental resource permit rule mitigation ratios when the methodology is used. Revises provisions relating to size of a mitigation service area. Provides for use of regional watersheds to guide establishment of mitigation service areas, and requires satisfaction of cumulative impact considerations. Provides rulemaking authority. Provides that mitigation bank permit applications are subject to certain established permit processing procedures. Revises provisions relating to money donated as wetlands mitigation for environmental projects to offset adverse impacts. Requires either a mitigation bank permit or a memorandum of agreement between the department and the applicable water management district, and a federal mitigation bank instrument or memorandum of agreement, for new projects receiving such money undertaken after January 1, 2001, and requires certain reporting thereof. Provides an exception for projects for environmental mitigation of the impact of transportation projects.