

By the Committee on Environmental Protection and  
Representative Alexander

1                                   A bill to be entitled  
2           An act relating to wetlands mitigation;  
3           amending s. 373.4135, F.S.; requiring  
4           establishment and operation of mitigation  
5           projects under a memorandum of agreement, under  
6           certain conditions; providing requirements and  
7           exclusions; authorizing certain mitigation  
8           options for private single-family lots or  
9           homeowners; providing for notice; amending s.  
10          373.4136, F.S.; revising provisions relating to  
11          size and characteristics of the mitigation  
12          service area; providing for use of regional  
13          watersheds to guide establishment of mitigation  
14          service areas; requiring satisfaction of  
15          cumulative impact considerations; amending s.  
16          373.414, F.S.; revising reporting requirements  
17          relating to money donated as wetlands  
18          mitigation; specifying conditions under which  
19          proposed mitigation shall satisfy cumulative  
20          impact considerations for a regulated activity;  
21          requiring the Department of Environmental  
22          Protection and certain water management  
23          districts to adopt a single uniform wetland  
24          mitigation assessment method, by rule, by a  
25          specified date; directing local government use  
26          of the assessment method; providing conditions  
27          and procedures for use of the assessment  
28          method; deleting obsolete language; directing  
29          study by the Office of Program Policy Analysis  
30          and Government Accountability on mitigation  
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1 cumulative impact considerations; providing an  
2 effective date.

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

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

8 373.4135 Mitigation banks and offsite regional  
9 mitigation.--

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

27 (a) For any ongoing creation, preservation,  
28 enhancement, or restoration project and regional offsite  
29 mitigation area sponsored by the department, a water  
30 management district, or a local government, for which money  
31 was or is paid as mitigation, that was begun prior to the

1 effective date of this subsection and has operated as of the  
2 effective date of this subsection, or is anticipated to  
3 operate, in excess of the mitigation thresholds provided in  
4 this subsection, the governmental entity sponsoring such  
5 project shall submit a draft memorandum of agreement to the  
6 water management district or department by October 1, 2000.  
7 The governmental entity sponsoring such project shall make  
8 reasonable efforts to obtain the final signed memorandum of  
9 agreement within 1 year after such submittal. The governmental  
10 entity sponsoring such project may continue to receive moneys  
11 donated or paid toward the project as mitigation, provided the  
12 requirements of this paragraph are met.

13 (b) The memorandum of agreement shall establish  
14 criteria that each environmental creation, preservation,  
15 enhancement, or restoration project must meet. These criteria  
16 must address the elements listed in paragraph (c). The entity  
17 sponsoring such project, or category of projects, shall submit  
18 documentation or other evidence to the water management  
19 district or department that the project meets, or individual  
20 projects within a category meet, the specified criteria.

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

23 1. A description of the work that will be conducted on  
24 the site and a timeline for completion of such work.

25 2. A timeline for obtaining any required environmental  
26 resource permit.

27 3. The environmental success criteria that the project  
28 must achieve.

29 4. The monitoring and long-term management  
30 requirements that must be undertaken for the project.

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1           5. An assessment of the project in accordance with s.  
2 373.4136(4)(a)-(i), until the adoption of the uniform wetland  
3 mitigation assessment method pursuant to s. 373.414(18).

4           6. A designation of the entity responsible for the  
5 successful completion of the mitigation work.

6           7. A definition of the geographic area where the  
7 project may be used as mitigation established using the  
8 criteria of s. 373.4136(6).

9           8. Full cost accounting of the project, including  
10 annual review and adjustment.

11           9. Provision and a timetable for the acquisition of  
12 any lands necessary for the project.

13           10. Provision for preservation of the site.

14           11. Provision for application of all moneys received  
15 solely to the project for which they were collected.

16           12. Provision for termination of the agreement and  
17 cessation of use of the project as mitigation if any material  
18 contingency of the agreement has failed to occur.

19           (d) A single memorandum of understanding may authorize  
20 more than one environmental creation, preservation,  
21 enhancement, or restoration project, or category of projects,  
22 as long as the elements listed in paragraph (c) are addressed  
23 for each project.

24           (e) Projects governed by this subsection, except for  
25 projects established pursuant to subsection (7), shall be  
26 subject to the provisions of s. 373.414(1)(b)1.

27           (f) The provisions of this subsection shall not apply  
28 to mitigation areas established to implement the provisions of  
29 s. 373.4137.

30           (g) The provisions of this subsection shall not apply  
31 when the department, water management district, or local

1 government establishes, or contracts with a private entity to  
2 establish, a mitigation bank permitted under s. 373.4136. The  
3 provisions of this subsection shall not apply to other  
4 entities that establish offsite regional mitigation as defined  
5 in this section and s. 373.403.

6 (7) The department, water management districts, and  
7 local governments may elect to establish and manage mitigation  
8 sites, including regional offsite mitigation areas, or  
9 contract with permitted mitigation banks, to provide  
10 mitigation options for private single-family lots or  
11 homeowners. The department, water management districts, and  
12 local governments shall provide a written notice of their  
13 election under this paragraph by United States mail to those  
14 individuals who have requested, in writing, to receive such  
15 notice. The use of mitigation options established under this  
16 subsection are not subject to the full-cost-accounting  
17 provision of s. 373.414(1)(b)1. To use a mitigation option  
18 established under this subsection, the applicant for a permit  
19 under this part must be a private, single-family lot or  
20 homeowner, and the land upon which the adverse impact is  
21 located must be intended for use as a single-family residence  
22 by the current owner. The applicant must not be a corporation,  
23 partnership, or other business entity. However, the provisions  
24 of this subsection shall not apply to other entities that  
25 establish offsite regional mitigation as defined in this  
26 section and s. 373.403.

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

29 373.4136 Establishment and operation of mitigation  
30 banks.--

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

25           (a) In determining the boundaries of the mitigation  
26 service area ~~extent to which a mitigation bank provides~~  
27 ~~exceptional ecological value such that adverse impacts outside~~  
28 ~~the regional watershed could reasonably be expected to be~~  
29 ~~adequately offset by the mitigation bank,~~ the department or  
30 the water management district shall consider the  
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1 characteristics, size, and location of the mitigation bank  
2 and, at a minimum, the extent to which the mitigation bank:  
3       1. Contributes to ~~Will promote~~ a regional integrated  
4 ecological network;  
5       2. Will significantly enhance the water quality or  
6 restoration of an offsite receiving water body that is  
7 designated as an Outstanding Florida Water, a Wild and Scenic  
8 River, an aquatic preserve, a water body designated in a plan  
9 adopted pursuant to s. 373.456 of the Surface Water  
10 Improvement and Management Act, or a nationally designated  
11 estuarine preserve;  
12       3. Will provide for the long-term viability of  
13 endangered or threatened species or species of special  
14 concern; ~~and~~  
15       4. Is consistent with the objectives of a regional  
16 management plan adopted or endorsed by the department or water  
17 management districts; ~~and~~  
18       5. Can reasonably be expected to offset specific types  
19 of wetland impacts within a specific geographic area. A  
20 mitigation bank need not be able to offset all expected  
21 impacts within its service area.  
22       (b) The department and water management districts  
23 shall use regional watersheds to guide the establishment of  
24 mitigation service areas. Drainage basins established pursuant  
25 to s. 373.414(8) may be used as regional watersheds when they  
26 are established based on the hydrological or ecological  
27 characteristics of the basin. A mitigation service area may  
28 extend beyond the regional watershed in which the bank is  
29 located into all or part of other regional watersheds when the  
30 mitigation bank has the ability to offset adverse impacts  
31 outside that regional watershed. Similarly, a mitigation

1 service area may be smaller than the regional watershed in  
2 which the mitigation bank is located when adverse impacts  
3 throughout the regional watershed cannot reasonably be  
4 expected to be offset by the mitigation bank because of local  
5 ecological or hydrological conditions.

6 (c)~~(b)~~ Once a mitigation bank service area has been  
7 established by the department or a water management district  
8 for a mitigation bank, such service area shall be accepted by  
9 all water management districts, local governments, and the  
10 department.

11 (d)~~(c)~~ If the requirements in s. 373.414(1)(b) and (8)  
12 ~~373.4135(1)(b)~~ are met, the following projects or activities  
13 regulated under this part shall be eligible to use a  
14 mitigation bank, regardless of whether ~~notwithstanding the~~  
15 ~~fact that~~ they are ~~not completely~~ located within the  
16 mitigation service area:

17 1. Projects with adverse impacts partially located  
18 within the mitigation service area.

19 2. Linear projects, such as roadways, transmission  
20 lines, distribution lines, pipelines, or railways.

21 3. Projects with total adverse impacts of less than 1  
22 acre in size.

23 Section 3. Paragraph (b) of subsection (1) and  
24 subsections (8) and (18) of section 373.414, Florida Statutes,  
25 are amended, and subsection (19) is added to said section, to  
26 read:

27 373.414 Additional criteria for activities in surface  
28 waters and wetlands.--

29 (1) As part of an applicant's demonstration that an  
30 activity regulated under this part will not be harmful to the  
31 water resources or will not be inconsistent with the overall



1 objectives of the district, the governing board or the  
2 department shall require the applicant to provide reasonable  
3 assurance that state water quality standards applicable to  
4 waters as defined in s. 403.031(13) will not be violated and  
5 reasonable assurance that such activity in, on, or over  
6 surface waters or wetlands, as delineated in s. 373.421(1), is  
7 not contrary to the public interest. However, if such an  
8 activity significantly degrades or is within an Outstanding  
9 Florida Water, as provided by department rule, the applicant  
10 must provide reasonable assurance that the proposed activity  
11 will be clearly in the public interest.

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

24 1. The department or water management districts may  
25 accept the donation of money as mitigation only where the  
26 donation is specified for use in a duly noticed environmental  
27 creation, preservation, enhancement, or restoration project,  
28 endorsed by the department or the governing board of the water  
29 management district, which offsets the impacts of the activity  
30 permitted under this part. However, the provisions of this  
31 subsection shall not apply to projects undertaken pursuant to

1 s. 373.4137 or chapter 378. Where a permit is required under  
2 this part to implement any project endorsed by the department  
3 or a water management district, all necessary permits must  
4 have been issued prior to the acceptance of any cash donation.  
5 After the effective date of this act, when money is donated to  
6 either the department or a water management district to offset  
7 impacts authorized by a permit under this part, the department  
8 or the water management district shall accept only a donation  
9 that represents the full cost to the department or water  
10 management district of undertaking the project that is  
11 intended to mitigate the adverse impacts. The full cost shall  
12 include all direct and indirect costs, as applicable, such as  
13 those for land acquisition, land restoration or enhancement,  
14 perpetual land management, and general overhead consisting of  
15 costs such as staff time, building, and vehicles. The  
16 department or the water management district may use a  
17 multiplier or percentage to add to other direct or indirect  
18 costs to estimate general overhead. Mitigation credit for  
19 such a donation shall be given only to the extent that the  
20 donation covers the full cost to the agency of undertaking the  
21 project that is intended to mitigate the adverse impacts.  
22 However, nothing herein shall be construed to prevent the  
23 department or a water management district from accepting a  
24 donation representing a portion of a larger project, provided  
25 that the donation covers the full cost of that portion and  
26 mitigation credit is given only for that portion. The  
27 department or water management district may deviate from the  
28 full cost requirements of this subparagraph to resolve a  
29 proceeding brought pursuant to chapter 70 or a claim for  
30 inverse condemnation. Nothing in this section shall be  
31 construed to require the owner of a private mitigation bank,

1 permitted under s. 373.4136, to include the full cost of a  
2 mitigation credit in the price of the credit to a purchaser of  
3 said credit.

4           2. The department and each water management district  
5 shall report to the Executive Office of the Governor by  
6 January 31 ~~and July 31~~ of each year all cash donations  
7 accepted under subparagraph 1. during the preceding calendar  
8 year ~~6 months~~ for wetland mitigation purposes, ~~which shall~~  
9 ~~include a description of the endorsed mitigation projects.~~ The  
10 report shall exclude those contributions pursuant to s.  
11 373.4137. The report shall include a description of the  
12 endorsed mitigation projects and, except for projects governed  
13 by s. 373.4135(6), shall address, as applicable, success  
14 criteria, project implementation status and timeframe,  
15 monitoring, long-term management, provisions for preservation,  
16 and full cost accounting.

17           3. If the applicant is unable to meet water quality  
18 standards because existing ambient water quality does not meet  
19 standards, the governing board or the department shall  
20 consider mitigation measures proposed by or acceptable to the  
21 applicant that cause net improvement of the water quality in  
22 the receiving body of water for those parameters which do not  
23 meet standards.

24           4. If mitigation requirements imposed by a local  
25 government for surface water and wetland impacts of an  
26 activity regulated under this part cannot be reconciled with  
27 mitigation requirements approved under a permit for the same  
28 activity issued under this part, including application of the  
29 uniform wetland mitigation assessment method adopted pursuant  
30 to subsection (18), the mitigation requirements for surface  
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1 water and wetland impacts shall be controlled by the permit  
2 issued under this part.

3           (8)(a) The governing board or the department, in  
4 deciding whether to grant or deny a permit for an activity  
5 regulated under this part shall consider the cumulative  
6 impacts upon surface water and wetlands, as delineated in s.  
7 373.421(1), within the same drainage basin as defined in s.  
8 373.403(9), of:

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

10           ~~2.(b)~~ Projects which are existing or activities  
11 regulated under this part which are under construction or  
12 projects for which permits or determinations pursuant to s.  
13 373.421 or s. 403.914 have been sought.

14           ~~3.(c)~~ Activities which are under review, approved, or  
15 vested pursuant to s. 380.06, or other activities regulated  
16 under this part which may reasonably be expected to be located  
17 within surface waters or wetlands, as delineated in s.  
18 373.421(1), in the same drainage basin as defined in s.  
19 373.403(9), based upon the comprehensive plans, adopted  
20 pursuant to chapter 163, of the local governments having  
21 jurisdiction over the activities, or applicable land use  
22 restrictions and regulations.

23           (b) If an applicant proposes mitigation within the  
24 same drainage basin as the adverse impacts to be mitigated,  
25 and if the mitigation offsets these adverse impacts, the  
26 governing board and department shall consider the regulated  
27 activity to meet the cumulative impact requirements of  
28 paragraph (a). However, this paragraph may not be construed to  
29 prohibit mitigation outside the drainage basin which offsets  
30 the adverse impacts within the drainage basin.

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1           (18) ~~MITIGATION STUDIES.~~ The department and each  
2 water management district responsible for implementation of  
3 the environmental resource permitting program shall develop a  
4 uniform wetland mitigation assessment method no later than  
5 October 1, 2001. The department shall adopt the uniform  
6 wetland mitigation assessment method by rule no later than  
7 January 31, 2002. Once the department adopts the uniform  
8 wetland mitigation assessment method by rule, the uniform  
9 wetland mitigation assessment method shall be binding on the  
10 department, the water management districts, local governments,  
11 and any other governmental agencies and shall be the sole  
12 means to determine mitigation needed to offset adverse impacts  
13 and to award and deduct mitigation bank credits. A water  
14 management district and any other governmental agency subject  
15 to chapter 120 may apply the uniform wetland mitigation  
16 assessment method without the need to adopt it pursuant to s.  
17 120.54. It shall be a goal of the department and water  
18 management districts that the uniform wetland mitigation  
19 assessment method developed be practicable for use within the  
20 timeframes provided in the permitting process and result in a  
21 consistent process for determining mitigation requirements. It  
22 shall be recognized that any such method shall require the  
23 application of reasonable scientific judgment. The uniform  
24 wetland mitigation assessment method must determine the value  
25 of functions provided by wetlands and other surface waters  
26 considering the current conditions of these areas, utilization  
27 by fish and wildlife, location, uniqueness, and hydrologic  
28 connection, in addition to the factors listed in s.  
29 373.4136(4). The uniform wetland mitigation assessment method  
30 shall also account for the expected time-lag associated with  
31 offsetting impacts and the degree of risk associated with the

1 proposed mitigation. The uniform wetland mitigation assessment  
2 method may account for different ecological communities in  
3 different areas of the state. Environmental resource  
4 permitting rules may establish categories of permits or  
5 thresholds for minor impacts under which the use of the  
6 uniform wetland mitigation assessment method will not be  
7 required. The application of the uniform wetland mitigation  
8 assessment method is not subject to s. 70.001. In the event  
9 the rule establishing the uniform wetland mitigation  
10 assessment method is deemed to be invalid, the applicable  
11 rules related to establishing needed mitigation in existence  
12 prior to the adoption of the uniform wetland mitigation  
13 assessment method, and the method described in paragraph (b)  
14 for existing mitigation banks, shall be authorized for use by  
15 the department, water management districts, local governments,  
16 and other state agencies.

17 (a) In developing the uniform wetland mitigation  
18 assessment method, the department shall seek input from the  
19 United States Army Corps of Engineers in order to promote  
20 consistency in the mitigation assessment methods used by the  
21 state and federal permitting programs.

22 (b) An entity which has received a mitigation bank  
23 permit prior to the adoption of the uniform wetland mitigation  
24 assessment method shall have impact sites assessed, for the  
25 purpose of deducting bank credits, using the credit assessment  
26 method, including any functional assessment methodology, which  
27 was in place when the bank was permitted; unless the entity  
28 elects to have its credits redetermined, and thereafter have  
29 its credits deducted, using the uniform wetland mitigation  
30 assessment method.

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

5           ~~(b) The Office of Program Policy Analysis and~~  
6 ~~Government Accountability shall study the mitigation options~~  
7 ~~as defined by paragraph (1)(b), implemented from 1994 to the~~  
8 ~~present, and issue a report by January 31, 2000. The study~~  
9 ~~shall consider the effectiveness and costs of the current~~  
10 ~~mitigation options in offsetting adverse effects to wetlands~~  
11 ~~and wetland functions, including the application of cumulative~~  
12 ~~impact considerations, and identify, as appropriate,~~  
13 ~~recommendations for statutory or rule changes to increase the~~  
14 ~~effectiveness of mitigation strategies.~~

15           (19) The Office of Program Policy Analysis and  
16 Government Accountability shall study the cumulative impact  
17 consideration required by s. 373.414(8) and issue a report by  
18 July 1, 2001. The study shall address the justification for  
19 the cumulative impact consideration, changes that can provide  
20 clarity and certainty in the cumulative impact consideration,  
21 and whether a practicable, consistent, and equitable  
22 methodology can be developed for considering cumulative  
23 impacts within the environmental resource permitting program.

24           Section 4. This act shall take effect upon becoming a  
25 law.