

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
31 cumulative impact considerations; directing the

1 St. Johns River Water Management District to
2 classify the Lake Jesup Basin as a separate and
3 distinct basin for certain purposes, and to
4 treat it as a vested basin; creating s.
5 373.200, F.S.; specifying the role of the
6 Seminole Tribe Water Rights Compact; providing
7 an effective date.

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

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

13 373.4135 Mitigation banks and offsite regional
14 mitigation.--

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

1 (a) For any ongoing creation, preservation,
2 enhancement, or restoration project and regional offsite
3 mitigation area sponsored by the department, a water
4 management district, or a local government, for which money
5 was or is paid as mitigation, that was begun prior to the
6 effective date of this subsection and has operated as of the
7 effective date of this subsection, or is anticipated to
8 operate, in excess of the mitigation thresholds provided in
9 this subsection, the governmental entity sponsoring such
10 project shall submit a draft memorandum of agreement to the
11 water management district or department by October 1, 2000.
12 The governmental entity sponsoring such project shall make
13 reasonable efforts to obtain the final signed memorandum of
14 agreement within 1 year after such submittal. The governmental
15 entity sponsoring such project may continue to receive moneys
16 donated or paid toward the project as mitigation, provided the
17 requirements of this paragraph are met.

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

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

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

30 2. A timeline for obtaining any required environmental
31 resource permit.

1 3. The environmental success criteria that the project
2 must achieve.

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

5 5. An assessment of the project in accordance with s.
6 373.4136(4)(a)-(i), until the adoption of the uniform wetland
7 mitigation assessment method pursuant to s. 373.414(18).

8 6. A designation of the entity responsible for the
9 successful completion of the mitigation work.

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

13 8. Full cost accounting of the project, including
14 annual review and adjustment.

15 9. Provision and a timetable for the acquisition of
16 any lands necessary for the project.

17 10. Provision for preservation of the site.

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

20 12. Provision for termination of the agreement and
21 cessation of use of the project as mitigation if any material
22 contingency of the agreement has failed to occur.

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

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

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1 (f) The provisions of this subsection shall not apply
2 to mitigation areas established to implement the provisions of
3 s. 373.4137.

4 (g) The provisions of this subsection shall not apply
5 when the department, water management district, or local
6 government establishes, or contracts with a private entity to
7 establish, a mitigation bank permitted under s. 373.4136. The
8 provisions of this subsection shall not apply to other
9 entities that establish offsite regional mitigation as defined
10 in this section and s. 373.403.

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

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

3 373.4136 Establishment and operation of mitigation
4 banks.--

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

29 (a) In determining the boundaries of the mitigation
30 service area ~~extent to which a mitigation bank provides~~
31 ~~exceptional ecological value such that adverse impacts outside~~

1 ~~the regional watershed could reasonably be expected to be~~
2 ~~adequately offset by the mitigation bank,~~ the department or
3 the water management district shall consider the
4 characteristics, size, and location of the mitigation bank
5 and, at a minimum, the extent to which the mitigation bank:

6 1. Contributes to ~~Will promote~~ a regional integrated
7 ecological network;

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

15 3. Will provide for the long-term viability of
16 endangered or threatened species or species of special
17 concern; ~~and~~

18 4. Is consistent with the objectives of a regional
19 management plan adopted or endorsed by the department or water
20 management districts; ~~and~~

21 5. Can reasonably be expected to offset specific types
22 of wetland impacts within a specific geographic area. A
23 mitigation bank need not be able to offset all expected
24 impacts within its service area.

25 (b) The department and water management districts
26 shall use regional watersheds to guide the establishment of
27 mitigation service areas. Drainage basins established pursuant
28 to s. 373.414(8) may be used as regional watersheds when they
29 are established based on the hydrological or ecological
30 characteristics of the basin. A mitigation service area may
31 extend beyond the regional watershed in which the bank is

1 located into all or part of other regional watersheds when the
2 mitigation bank has the ability to offset adverse impacts
3 outside that regional watershed. Similarly, a mitigation
4 service area may be smaller than the regional watershed in
5 which the mitigation bank is located when adverse impacts
6 throughout the regional watershed cannot reasonably be
7 expected to be offset by the mitigation bank because of local
8 ecological or hydrological conditions.

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

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

20 1. Projects with adverse impacts partially located
21 within the mitigation service area.

22 2. Linear projects, such as roadways, transmission
23 lines, distribution lines, pipelines, or railways.

24 3. Projects with total adverse impacts of less than 1
25 acre in size.

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

30 373.414 Additional criteria for activities in surface
31 waters and wetlands.--

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

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

27 1. The department or water management districts may
28 accept the donation of money as mitigation only where the
29 donation is specified for use in a duly noticed environmental
30 creation, preservation, enhancement, or restoration project,
31 endorsed by the department or the governing board of the water

1 management district, which offsets the impacts of the activity
2 permitted under this part. However, the provisions of this
3 subsection shall not apply to projects undertaken pursuant to
4 s. 373.4137 or chapter 378. Where a permit is required under
5 this part to implement any project endorsed by the department
6 or a water management district, all necessary permits must
7 have been issued prior to the acceptance of any cash donation.
8 After the effective date of this act, when money is donated to
9 either the department or a water management district to offset
10 impacts authorized by a permit under this part, the department
11 or the water management district shall accept only a donation
12 that represents the full cost to the department or water
13 management district of undertaking the project that is
14 intended to mitigate the adverse impacts. The full cost shall
15 include all direct and indirect costs, as applicable, such as
16 those for land acquisition, land restoration or enhancement,
17 perpetual land management, and general overhead consisting of
18 costs such as staff time, building, and vehicles. The
19 department or the water management district may use a
20 multiplier or percentage to add to other direct or indirect
21 costs to estimate general overhead. Mitigation credit for
22 such a donation shall be given only to the extent that the
23 donation covers the full cost to the agency of undertaking the
24 project that is intended to mitigate the adverse impacts.
25 However, nothing herein shall be construed to prevent the
26 department or a water management district from accepting a
27 donation representing a portion of a larger project, provided
28 that the donation covers the full cost of that portion and
29 mitigation credit is given only for that portion. The
30 department or water management district may deviate from the
31 full cost requirements of this subparagraph to resolve a

1 proceeding brought pursuant to chapter 70 or a claim for
2 inverse condemnation. Nothing in this section shall be
3 construed to require the owner of a private mitigation bank,
4 permitted under s. 373.4136, to include the full cost of a
5 mitigation credit in the price of the credit to a purchaser of
6 said credit.

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

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

27 4. If mitigation requirements imposed by a local
28 government for surface water and wetland impacts of an
29 activity regulated under this part cannot be reconciled with
30 mitigation requirements approved under a permit for the same
31 activity issued under this part, including application of the

1 uniform wetland mitigation assessment method adopted pursuant
2 to subsection (18), the mitigation requirements for surface
3 water and wetland impacts shall be controlled by the permit
4 issued under this part.

5 (8)(a) The governing board or the department, in
6 deciding whether to grant or deny a permit for an activity
7 regulated under this part shall consider the cumulative
8 impacts upon surface water and wetlands, as delineated in s.
9 373.421(1), within the same drainage basin as defined in s.
10 373.403(9), of:

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

12 2.(b) Projects which are existing or activities
13 regulated under this part which are under construction or
14 projects for which permits or determinations pursuant to s.
15 373.421 or s. 403.914 have been sought.

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

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

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

1 shall also account for the expected time-lag associated with
2 offsetting impacts and the degree of risk associated with the
3 proposed mitigation. The uniform wetland mitigation assessment
4 method shall account for different ecological communities in
5 different areas of the state. In developing the uniform
6 wetland mitigation assessment method, the department and water
7 management districts shall consult with approved local
8 programs under s. 403.182 which have an established wetland
9 mitigation program. The department and water management
10 districts shall consider the recommendations submitted by such
11 approved local programs, including any recommendations
12 relating to the adoption by the department and water
13 management districts of any uniform wetland mitigation
14 methodology that has been adopted and used by an approved
15 local program in its established wetland mitigation
16 program. Environmental resource permitting rules may
17 establish categories of permits or thresholds for minor
18 impacts under which the use of the uniform wetland mitigation
19 assessment method will not be required. The application of the
20 uniform wetland mitigation assessment method is not subject to
21 s. 70.001. In the event the rule establishing the uniform
22 wetland mitigation assessment method is deemed to be invalid,
23 the applicable rules related to establishing needed mitigation
24 in existence prior to the adoption of the uniform wetland
25 mitigation assessment method, and the method described in
26 paragraph (b) for existing mitigation banks, shall be
27 authorized for use by the department, water management
28 districts, local governments, and other state agencies.

29 (a) In developing the uniform wetland mitigation
30 assessment method, the department shall seek input from the
31 United States Army Corps of Engineers in order to promote

1 consistency in the mitigation assessment methods used by the
2 state and federal permitting programs.

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

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

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

26 (19) The Office of Program Policy Analysis and
27 Government Accountability shall study the cumulative impact
28 consideration required by s. 373.414(8) and issue a report by
29 July 1, 2001. The study shall address the justification for
30 the cumulative impact consideration, changes that can provide
31 clarity and certainty in the cumulative impact consideration,

1 and whether a practicable, consistent, and equitable
2 methodology can be developed for considering cumulative
3 impacts within the environmental resource permitting program.

4 Section 4. Under its Environmental Resource Permit
5 program, the St. Johns River Water Management District shall
6 delineate the Lake Jesup basin as a separate and distinct
7 drainage basin and regional watershed as shown in Figure
8 12.2.8-1 and Appendix M, of the St. Johns River Water
9 Management District's Applicants Handbook: Management and
10 Storage of Surface Waters, incorporated by reference in Rule
11 40C-4.091, Florida Administrative Code, effective as of May 1,
12 2000.

13 Section 5. Section 373.200, Florida Statutes, is
14 created to read:

15 373.200 Seminole Tribe Water Rights Compact.--Pursuant
16 to the provisions of s. 285.165, the South Florida Water
17 Management District is authorized to act in accordance with
18 the Seminole Tribe Water Rights Compact incorporated by
19 reference therein.

20 Section 6. This act shall take effect upon becoming a
21 law.