HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1291 Mitigation Banks
SPONSOR(S): Murzin
TIED BILLS: **IDEN./SIM. BILLS:** SB 2360

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Environmental Regulation (Sub)		Camechis	Lotspeich
2) Natural Resources			
3) Appropriations			
4)			
5)			

SUMMARY ANALYSIS

This bill provides that established mitigation bank service areas are not subject to the cumulative impact analysis on the release of credits to certain persons, and provides that proposed mitigation which offsets an adverse impact in the mitigation bank service area is considered to meet the cumulative impact requirements even if the mitigation occurs outside the drainage basin in which the impact is located.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

1. Reduce government?	Yes[X]	No[]	N/A[]
2. Lower taxes?	Yes[]	No[]	N/A[X]
3. Expand individual freedom?	Yes[]	No[]	N/A[X]
4. Increase personal responsibility?	Yes[]	No[]	N/A[X]
5. Empower families?	Yes[]	No[]	N/A[X]

For any principle that received a "no" above, please explain:

B. EFFECT OF PROPOSED CHANGES:

Present Situation

What is "mitigation"?

The Department of Environmental Protection ("DEP") and four water management districts ("WMDs") jointly administer the Environmental Resource Permitting Program to regulate activities that alter surface water flows, contribute to water pollution, and affect wetlands.[1] The goal of the program is to ensure that regulated activities do not violate water quality standards, cause flooding, or degrade surface waters and wetlands functions.

Wetlands and other surface waters serve many important functions, such as providing flood protection, aquifer recharge, contributing to the preservation of water quality, and supplying fish and wildlife habitat. In some locations, surface waters are also essential to the agricultural, domestic, and industrial water supply. Surface waters also provide recreational and economic opportunities for Florida's residents and visitors. With certain statutory exceptions, an Environmental Resource Permit ("ERP") is required before the initiation of construction for an activity that could affect wetlands, alter surface water flows, or contribute to water pollution.[2] Section 373.414, F.S., requires each ERP applicant to provide reasonable assurance that the proposed activity is not contrary to the public interest. The permitting agency is required to consider and balance certain criteria in making this determination, including whether the activity will adversely impact water resources or the conservation of fish and wildlife or their habitats, and the current condition and relative value of functions provided to fish and wildlife by the effected wetlands and surface waters. If the applicant is unable to otherwise meet the criteria, the DEP and the WMD must consider measures proposed by or acceptable to the applicant to mitigate and offset adverse affects that may be caused by the proposed activity. Those measures may include onsite mitigation, offsite mitigation, offsite regional mitigation, and the purchase of mitigation credits from permitted mitigation banks. Mitigation actions can include creating new wetlands, restoring existing wetlands that have previously been damaged, enhancing the functions of wetlands, or preserving wetlands or associated uplands.

[1] The DEP issues permits for activities related to solid and hazardous waste facilities, mines, power plants, single-family dwellings on five acres or less, marinas and docks greater than nine boat slips, and open water projects. WMDs review and issue permits for most other types of development activity.
[2] s. 373.413, F.S.

What are cumulative impact assessments?

In 2001, the Office of Program Policy Analysis and Governmental Accountability ("OPPAGA") completed a legislatively directed review of the cumulative impact policy. OPPAGA noted that Florida's environmental policy recognizes that problems often result from the accumulation of many actions over time, rather than from one specific action. OPPAGA concluded that such problems, referred to as "cumulative impacts," pose a threat to Florida's natural environment, including its surface waters and wetlands.[3]

Section 373.414(8)(a), F.S., requires the DEP and WMDs to "consider cumulative impacts upon surface waters and wetlands…within the same drainage basin" in deciding whether to grant an ERP for a regulated activity. Permitting rules require applicants to provide reasonable assurance that the proposed activity will not cause an unacceptable cumulative impact within the same basin that the activity is located. Cumulative impacts are considered unacceptable when the proposed activity, in addition to past, present, and anticipated future impacts of regulated activities, would violate water quality standards or cause significant adverse effects on wetland functions or surface waters in the basin.

Section 373.414(8)(b) F.S., specifies that if an applicant proposes mitigation within the same drainage basin as the impact AND the mitigation serves to offset the impacts, the permitting agency must consider the project to have met the cumulative impact requirements. Section 373.414(8)(b), F.S., also specifies that mitigation outside the drainage basin that offsets adverse impacts within the drainage basin is not prohibited. However, even though mitigation at a mitigation bank or any other suitable site outside the drainage basin in which the proposed project is located is permitted by statute, cumulative impacts of the project must be considered pursuant to s. 373.414(8)(a), F.S.

In its 2001 Policy Review, OPPAGA concluded that a state policy that considers the cumulative impact of development is conceptually justified because Florida's surface waters and wetlands have been and continue to be degraded or lost. OPPAGA illustrated its point by stating that, from 1780 to 1980, Florida lost 9.3 million acres or 46% of estimated wetlands acreage. OPPAGA further concluded that loss and degradation of Florida's wetlands and surface waters and their associated functions contribute to problems such as flooding, poor water quality, and habitat loss. For example, the DEP's 2000 Florida Water Quality Assessment indicates that 47% of lake areas, 31% of river miles, and 22% of estuarine areas assessed partially support or do not support their designated use.

Although OPPAGA also concluded that considering the cumulative impacts of development is justified, the report identified two major weaknesses that limit the effectiveness of cumulative impact analysis as a tool for assessing and preventing cumulative impacts to surface waters and wetlands. First, precise determinations of cumulative impacts are not practicable because there is a lack of scientific data and understanding of cause and effect relationships between development activities and their environmental impacts.[4] Secondly, required wetland mitigation may not address cumulative impacts due to limitations in assessing and conducting mitigation.[5]

OPPAGA concluded that there are instances in which mitigation conducted outside a drainage basin may be appropriate but noted that environmental permitting rules specify mitigation is best accomplished when located onsite or close to the affected area. However, state law and permitting rules allow offsite mitigation under certain conditions. For example, it is allowed if an applicant demonstrates that onsite mitigation will not be viable in the long term or offsite mitigation provides greater ecological value.[6] The law also establishes offsite regional mitigation options[7] that increase

[3] OPPAGA Policy Review, *Cumulative Impact Consideration in Environmental Permitting*, Report No. 01-40, p. 1, Sept. 2001
[4] OPPAGA Policy Review, *Cumulative Impact Consideration in Environmental Permitting*, Report No. 01-40, p ii, Sept. 2001.
[5] OPPAGA Policy Review, *Cumulative Impact Consideration in Environmental Permitting*, Report No. 01-40, p. ii, Sept. 2001.
[6] OPPAGA Policy Review, *Cumulative Impact Consideration in Environmental Permitting*, Report No. 01-40, p. 10, Sept. 2001.

regional ecological value and the likelihood of mitigation success. OPPAGA concluded that the primary focus should be the ability of the proposed mitigation to offset adverse impacts, irrespective of where the mitigation occurs.

Whether mitigation outside a drainage basin is appropriate also depends on defining the role the impacted wetland plays in the larger ecosystem. Permit reviewers are currently making this determination on a project-by-project basis. However, OPPAGA concluded that this determination would be better made in a larger forum involving the local community and affected stakeholders, including a plan identifying resources critical to the drainage basin as well as those that are less important. This plan could serve to provide guidance in deciding when mitigation out of the drainage basin in which the impact occurs is appropriate.

What is a mitigation bank?

Mitigation banks are large tracts of land permitted by the DEP or a WMD to offset adverse impacts to wetlands caused by development. A "mitigation bank" is defined as a "project permitted under s. 373.4136 undertaken to provide for the withdrawal of mitigation credits to offset adverse impacts authorized by a permit…."[8] Section 373.4135(1), F.S., provides that the adverse impacts of regulated activities may be offset by the creation, maintenance, and use of mitigation banks, and that mitigation banks can enhance the certainty of mitigation and provide ecological value[9] due to the improved likelihood of environmental success associated with their proper construction, maintenance, and management. Section 373.4135(1), F.S., also directs the DEP and WMDs to participate in and encourage the establishment of private and public mitigation banks. That section further requires that mitigation banks should emphasize the restoration and enhancement of degraded ecosystems and the preservation of uplands and wetlands as intact ecosystems rather than alteration of landscapes to create wetlands, and that this is best accomplished through restoration of ecological communities that were historically present.

Therefore, mitigation banks are intended to restore, enhance, or preserve wetlands. Mitigation banks may address the immediate adverse impact caused by development, or may be off-site regional projects where multiple permitted developers must purchase the required number of mitigation credits to offset their proposed impacts. Mitigation activities can be performed by public entities such as the DEP, or WMD, or through a private entity. According to DEP, 29 mitigation banks are operating in Florida.[10] Section 373.4135, (1)(a), F.S., sets forth the Legislature's intent that the provisions for establishing a mitigation bank apply equally to public and private entities with the exception of certain measures.

Section 373.4136(11), F.S., authorizes the DEP and WMD to adopt rules implementing the statutes regulating mitigation banks, and requires that the rules include provisions to:

---

[7] Section 373.403(22), F.S., defines "regional offsite mitigation" as mitigation on an area of land off the site of an activity permitted under this part, where an applicant proposes to mitigate the adverse impacts of only the applicant's specific activity as a requirement of the permit, which provides regional ecological value, and which is not a mitigation bank permitted under s. 373.4136." (emphasis added).

[8] s. 373.403(19), F.S.

[9] Section 373.403(18), F.S., defines "ecological value" as "the value of functions performed by uplands, wetlands, and other surface waters to the abundance, diversity, and habitats of fish, wildlife, and listed species. These functions include, but are not limited to, providing cover and refuge; breeding, nesting, denning, and nursery areas; corridors for wildlife movement; food chain support; and natural water storage, natural flow attenuation, and water quality improvement, which enhances fish, wildlife, and listed species utilization."

[10] http://www.dep.state.fl.us/water/wetlands/mitigate/mitbanks.htm

(a) Require financial responsibility for the construction, operation, and long-term management of a mitigation bank;

(b) Provide for the perpetual protection and management of mitigation banks; and

(c) Establish a system and methodology for the valuation, assessment, and award of mitigation credits.

How are mitigation banks permitted?

Sections 373.4136, F.S. and 62-342.400, F.A.C., set forth requirements for establishing a mitigation bank. Mitigation banking permits may be issued by either DEP or a WMD after an applicant provides reasonable assurances that the proposed mitigation bank will result in ecological improvements, viable and sustainable hydrological functions, and achievement of mitigation success as well as other important assurances.[11] The permitting agency is required to review and request additional information from an applicant within 30 days of the application's receipt, request additional information within the next 30 days, and approve or deny the application within 90 days after receipt of the original application, the last item of timely requested additional information, or the applicant's written request to being the permitting process.[12] During the mitigation bank permitting process, the permitting agency determines the "mitigation service area" of the applicant bank and the number of credits assigned to the bank. However, the statute does not require the permitting agency to consider the cumulative impacts of future projects that may be mitigated by the applicant bank.

What is a "mitigation service area," a "drainage basin," and a "watershed"?

A "mitigation service area" is defined as "the geographic area within which mitigation credits from a mitigation bank may be used to offset adverse impacts…."[13] A "drainage basin" is defined as "a subdivision of a watershed," and "watershed" is defined as "the land area which contributes to the flow of water into a receiving body of water."[14] Drainage basins may be used as regional watersheds when they are established based on the hydrological or ecological characteristics of a basin.[15] Drainage basins are separated from adjacent drainage basins by topographic boundaries, and are established in rules adopted by the DEP and WMDs.

Section 373.4136(6), F.S., requires the agency reviewing an application for a mitigation bank permit to establish the "mitigation service area" for the permit, and requires the permitting agency to use regional watersheds, which may include more than one drainage basin, to guide the establishment of service areas. A mitigation service area may extend beyond the regional watershed in which the bank is located into all or part of other regional watersheds when the mitigation bank has the ability to offset adverse impacts outside that regional watershed.[16] Similarly, a mitigation service area may be smaller than the regional watershed in which the mitigation bank is located when adverse impacts throughout the regional watershed cannot reasonably be expected to be offset by the mitigation bank because of local ecological or hydrological conditions. Service areas may overlap, and mitigation service areas for two or more mitigation banks may be approved for a regional watershed.[17]

Section 373.413(6)(a), F.S., provides that in determining the boundaries of a mitigation service area, the permitting agency must consider the characteristics, size, and location of the mitigation bank and, at a minimum, the extent to which a bank:

[11] s. 373.4136(1), F.S.
[12] s. 373.4141, F.S.
[13] s. 373.403(21), F.S.
[14] ss. 373.403(9), (12), F.S.
[15] s. 373.4136(6)(b), F.S.
[16] s. 373.4136, (6)(b), F.S.
[17] s. 373.4136(6), F.S.

1. Contributes to a regional integrated ecological network;

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

3. Will provide for the long-term viability of endangered or threatened species or species of special concern;

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

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

The review criteria does not, however, address the bank's ability or inability to offset cumulative impacts of future projects located within the entire service area but outside of the drainage basin in which the bank is located.

According to DEP, most of the currently permitted mitigation banks in the state have mitigation service areas that include a geographic area greater than the specific drainage basin in which they are located. As a result, a proposed project with adverse impacts may be within the mitigation service area of a bank, but not within the same drainage basin as the mitigation bank. In such circumstances, s. 373.414(8)(a), F.S., requires the permitting agency to consider cumulative impacts of proposed projects located outside the drainage basin in which the bank is located.

What is a "mitigation credit"?

A "mitigation credit" is defined as "a standard unit of measure which represents the increase in ecological value resulting from restoration, enhancement, preservation, or creation activities."[18] Unless otherwise provided by statute, mitigation credits may be withdrawn and used only to offset adverse impacts in a bank's mitigation service area.[19]

After evaluating a mitigation bank permit application, the permitting agency awards a number of credits to the bank "based on the degree of improvement in ecological value expected to result from the establishment and operation of the mitigation bank as determined using a functional assessment methodology."[20] The credits are assigned as a standard unit of measure representing the increase in value on one acre of land. Once a bank is permitted and the credits released by the permitting agency, applicants for an Environmental Resource Permit can purchase credits from the bank and the fees paid for credits are used to perform mitigation activities as well as provide for a profit in the case of private mitigation banks.

How are mitigation credits withdrawn by a mitigation banker?

Mitigation credits that have been released to the banker by the permitting agency are available to be withdrawn by the bank for use by the bank or sale to applicants for Environmental Resource Permits (ERP). Because the withdrawals must be accomplished through a permit modification, only the mitigation banker can authorize the use of credits from the bank by an entity proposing to purchase

[18] s. 373.403(20), F.S.
[19] s. 373.4136(6), F.S.
[20] s. 373.4136(4), F.S.

credits to offset an adverse impact of a proposed project. Mitigation credits may not be withdrawn if, at any time, a banker is not in material compliance with the terms of its mitigation bank permit. Mitigation credits are available for withdrawal after the banker complies with the terms of its permit.

To withdraw mitigation credits, the impact permit applicant, the impact permitting agency, the banker and the ledger-holding agency must communicate to ascertain whether sufficient numbers and types of mitigation are available for the ERP's applicant's use. The decision as to whether credits from a mitigation bank can offset a specific impact is decided during the impact permit evaluation. The agency reviewing the impact must receive verification from the agency that issued the mitigation bank permit that sufficient numbers and types of mitigation credits are available before the impact permit is issued in order to provide reasonable assurance that adequate mitigation is available to offset otherwise unpermittable impacts.

The permitting agencies use mitigation ratios specified in rule to define the amount of mitigation acreage needed to offset a specific impact. One mitigation bank credit is equal to 1 acre of successful onsite wetlands creation.[21] DEP and the WMDs, under their general wetlands permitting rules, determine the amount of mitigation required to offset adverse impacts by use of the ratio approach that considers such factors as the quality of the wetland functions being impacted and the expected success of the proposed mitigation. The ratios, expressed as "acres mitigated:acres impacted," have broad ranges and are intended to capture the quality of the wetlands impacted and wetlands to be mitigated, the location of the mitigation, the likelihood of success, and the time it is expected for the created, restored, or enhanced wetlands to begin functioning at a higher level.

The use of ratios does not explicitly measure the amount of wetland functions lost by the proposed activity or gained by mitigation. The ratios vary depending upon the type of mitigation conducted. The ratios ("acres mitigated:acres impacted") generally range between: 1.5:1 to 4:1 for created or restored marshes; 2:1 to 5:1 for created or restored forested wetlands; 4:1 to 20:1 for wetland enhancement; and 10:1 to 60:1 for wetland preservation. In determining the value of wetland functions, the agency must consider the current condition, location in relation to its surroundings, hydrologic connection, uniqueness, and use by fish and wildlife.

Is mitigation successful?

In its 2001 report, OPPAGA concluded that mitigation projects are sometimes unsuccessful in fully offsetting adverse effects. Reasons cited by OPPAGA for unsuccessful mitigation projects include poor design, lack of oversight, and failure to construct, monitor, and report on mitigation sites. OPPAGA noted that up to one-third of all mitigation projects did not comply with permit requirements, which often limited the project's ability to mitigate for wetland impacts.[22] Permittees with permits out of compliance are required to take corrective actions, such as replanting vegetation or regrading of land. The regulatory agency may also levy fines if corrective actions are not sufficient to bring the permit into compliance.

Recent legislative changes may improve the ability of the regulatory agencies to ensure that mitigation is sufficient to offset wetland losses. The 2000 Legislature adopted OPPAGA's recommendation that the DEP and WMDs develop a statewide wetland assessment methodology by February 2002. This wetland assessment methodology is intended to provide a consistent approach for assessing wetland functions lost and gained, accounting for time lag[23] and risk. However, given data limitations and scientific uncertainty, agencies still have an inadequate basis for determining whether a new activity's proposed mitigation will offset its adverse cumulative effects.[24]

---

[21] Rule 62-342.470, F.A.C.

[22] OPPAGA Policy Review, *Cumulative Impact Consideration in Environmental Permitting*, Report No. 01-40, p. 9, Sept. 2001.

[23] Time lag refers to the amount of time anticipated before the loss of wetland functions is offset by the mitigation.

[24] OPPAGA Policy Review, *Cumulative Impact Consideration in Environmental Permitting*, Report No. 01-40, p..9, Sept. 2001.

Effect of Proposed Changes

The bill amends s. 373.4136(6)(c), F.S., to exempt permitted mitigation banks from the cumulative impact analysis on the release of credits to any qualified applicant for an Environmental Resource Permit. However, the bill does not extend the exemption to any other entity seeking to mitigate adverse impacts. The bill also amends s. 373.414(8)(c), F.S., to provide that the DEP and WMDs must consider a regulated activity to meet the cumulative impact requirements of s. 373.414, F.S., if:

1. An applicant for an ERP proposes mitigation within the same **mitigation service area** as the adverse impact to be mitigated:
2. The mitigation offsets the adverse impacts; and
3. The mitigation service area has been established as part of a permitted mitigation bank.

Once again, current law does not require consideration of the cumulative impact of a specific project at the time a mitigation bank is permitted, and only requires consideration of cumulative impacts of a proposed project at the time an Environmental Resource Permit is sought for a specific activity. This bill precludes consideration of the cumulative impact for all projects located in a mitigation service area established as part of a mitigation bank if the mitigation offsets the adverse impact. Moreover, the proposed mitigation does not have to be performed by a mitigation bank in order to preclude consideration of cumulative impacts as long as the impact is within a mitigation service area of a permitted bank and the mitigation offsets the impact. Therefore, in situations where a bank's mitigation service area encompasses more than one drainage basin, and a proposed impact is located outside the drainage basin in which a bank is located, the cumulative impacts of a proposed project may not be considered by the agency reviewing an application for an Environmental Resource Permit if the proposed impact occurs within the mitigation service area of a bank.

C. SECTION DIRECTORY:

Section 1: Amends s. 373.4136, F.S., to discontinue application of cumulative impact analysis requirements to approved mitigation bank service areas.

Section 2: Amends s. 373.414, F.S., to provide that regulated activities meet the cumulative impact requirements under certain circumstances.

Section 3: Provides an effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues: Indeterminate reduction in the cost of reviewing applications for Environmental Resource Permits due to the elimination of the requirement to consider cumulative impacts in certain circumstances.

2. Expenditures: None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues: None.

2. Expenditures: None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR: There will be an indeterminate reduction in the cost of obtaining Environmental Resource Permits and purchasing mitigation credits. There will also be a potential increase in revenues for permitted mitigation banks due to the increased geographic area in which a bank's credits may be utilized for mitigation.

D. FISCAL COMMENTS:

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision: None.

2. Other: None.

B. RULE-MAKING AUTHORITY: None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Proponents of the bill assert that the permitting agencies perform a cumulative impact analysis at the time the mitigation bank is permitted. Performing a cumulative impact analysis during the bank permitting process would require knowledge of the specific location of the proposed impact. Generally, the location of the impact is determined when an application for Environmental Resource Permit is submitted, which is typically after a bank is permitted, not before. However, in those situations where an applicant for a bank permit proposed to also conduct other activities for which an ERP is required, it may be possible to perform the cumulative impact analysis at the time the bank permit is reviewed. It should be noted, however, that the statute does not require or provide for a cumulative impact analysis during the bank permitting process.

DEP and the WMDs assert that a cumulative impact analysis is not performed during the bank permitting process, and is only performed during a review of an application for ERP when the impact is outside the drainage basin in which the bank is located.

EarthMark Mitigation Banks **supports** the bill and offered the following comments:

> Problem: Regulators are using a "cumulative impact analysis" to determine the number of credits necessary from a mitigation bank to satisfy a wetland impact. The result is that in many cases regulators are not allowing the purchase of bank credits, even though the impact and the credit are within the bank's service area. Since the regulators set the amount of mitigation needed, and control the methods of mitigation, this unnecessary duplicative analysis slows mitigation, costs the taxpayers' dollars for additional work, and makes the overall cost of mitigation higher due to the removal of viable mitigation alternatives.

This analysis has already been done at the permitting stage of the bank, in which the FDEP or WMD considered factors such as: the size of the bank, the type of mitigation the bank will provide…and the distance between the bank and the location of the impact.

Solution: Mitigation banks believe such impacts and subsequent mitigation through a permitted bank are addressed through the bank's initial permitting process, and should not be reapplied to an end user wishing to mitigate through a bank. If a wetland impact occurs within the same service area, all impacts (primary, secondary, tertiary, cumulative, etc.) should be presumed to be satisfied by the use of mitigation bank credits.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

N/A