

By Senator Richter

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1 A bill to be entitled
2 An act relating to mitigation banks; amending s.
3 373.4135, F.S.; requiring that rules of the Department
4 of Environmental Protection and the water management
5 districts relating to mitigation banks be consistent
6 with federal regulations; amending s. 373.414, F.S.;
7 requiring the Department of Environmental Protection
8 to adopt a uniform process for obtaining a formal
9 assessment determination for potential mitigation bank
10 establishment; providing that a formal assessment
11 determination is binding for a specified period and
12 constitutes final agency action; requiring the
13 department to provide training and guidance on the
14 application of the assessment method; providing an
15 effective date.

16
17 WHEREAS, wetland mitigation banks in Florida must be
18 authorized by permit issued by the Department of Environmental
19 Protection or a water management district and by a mitigation
20 bank instrument executed by the United States Army Corps of
21 Engineers and other involved federal agencies, and

22 WHEREAS, in order to obtain such authorizations, wetland
23 mitigation banks must undergo rigorous review by both state and
24 federal agencies to ensure that the mitigation banks have valid
25 technically suitable mitigation plans, mitigation service areas
26 delineating the territory where the mitigation bank can be used,
27 adequate conservation easements or other real property
28 mechanisms ensuring perpetual preservation of the mitigation
29 bank property, and financial mechanisms to ensure that the

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30 mitigation bank is successfully implemented and managed in
31 perpetuity, and

32 WHEREAS, mitigation banks must meet these requirements
33 before they can be used to offset impacts, and

34 WHEREAS, because these requirements are imposed on
35 mitigation banks, they generally involve less risk and
36 uncertainty than other forms of wetland mitigation, and

37 WHEREAS, various studies performed at the national level
38 regarding the effectiveness of mitigation options, including the
39 National Academy of Sciences study, "Compensating for Wetland
40 Losses under the Clean Water Act," dated June 2001; the United
41 States General Accounting Office study, "Wetlands Protection:
42 Assessments Needed to Determine Effectiveness of In-Lieu-Fee
43 Mitigation," dated May 2001; the United States Army Corps of
44 Engineers study, "Review and Analysis of In Lieu-Fee-Mitigation
45 in the CWA Section 404 Permitting Program," dated November 2000;
46 and the February 2004 position paper by the Society of Wetland
47 Scientists have found or noted that wetland mitigation banks
48 offer advantages over other forms of wetland mitigation due to
49 superior mitigation plans, advanced implementation, and a
50 watershed related mitigation approach, and

51 WHEREAS, various studies of wetland mitigation in Florida,
52 including Kevin Erwin's study, "An evaluation of wetland
53 mitigation in the South Florida Water Management District," Vol.
54 1, Contract #C89-0082-A1, South Florida Water Management
55 District, West Palm Beach, FL, USA 1991; and Ann Redmond's
56 study, "How Successful is Mitigation?" National Wetlands
57 Newsletter, Environmental Law Institute, Jan./Feb. 1992, have
58 concluded that mitigation on the site of a wetland impact is

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59 often not successful due to unsuitable adjacent land use
60 conditions or hydrology, and

61 WHEREAS, the United States Army Corps of Engineers and the
62 Environmental Protection Agency adopted new rules in 2008
63 regarding wetland mitigation, which provide a preference for
64 mitigation bank credits in order to offset an impact where the
65 activity causing the impact is in the service area of an
66 approved bank that has the appropriate types of mitigation
67 credits available, and

68 WHEREAS, Florida's current rules regarding the use of
69 mitigation banks are not consistent with rules of the United
70 States Army Corps of Engineers and the Environmental Protection
71 Agency because Florida's rules provide a preference for onsite
72 mitigation within the service area of an approved mitigation
73 bank that has the appropriate types of credits available, NOW,
74 THEREFORE,

75
76 Be It Enacted by the Legislature of the State of Florida:

77
78 Section 1. Paragraph (b) of subsection (1) of section
79 373.4135, Florida Statutes, is amended to read:

80 373.4135 Mitigation banks and offsite regional mitigation.—

81 (1) The Legislature finds that the adverse impacts of
82 activities regulated under this part may be offset by the
83 creation, maintenance, and use of mitigation banks and offsite
84 regional mitigation. Mitigation banks and offsite regional
85 mitigation can enhance the certainty of mitigation and provide
86 ecological value due to the improved likelihood of environmental
87 success associated with their proper construction, maintenance,

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88 and management. Therefore, the department and the water
89 management districts are directed to participate in and
90 encourage the establishment of private and public mitigation
91 banks and offsite regional mitigation. Mitigation banks and
92 offsite regional mitigation should emphasize the restoration and
93 enhancement of degraded ecosystems and the preservation of
94 uplands and wetlands as intact ecosystems rather than alteration
95 of landscapes to create wetlands. This is best accomplished
96 through restoration of ecological communities that were
97 historically present.

98 (b) It is the further intent of the Legislature that
99 mitigation banks and offsite regional mitigation be considered
100 appropriate and a permittable mitigation option under the
101 conditions specified by the rules of the department and water
102 management districts. Therefore, such rules must provide a
103 preference for the use of mitigation banks which is consistent
104 with 33 C.F.R. s. 332.3(b)(2).

105 Section 2. Subsection (18) of section 373.414, Florida
106 Statutes, is amended to read:

107 373.414 Additional criteria for activities in surface
108 waters and wetlands.—

109 (18) The department and each water management district
110 responsible for implementation of the environmental resource
111 permitting program shall develop and adopt by rule a uniform
112 mitigation assessment method for wetlands and other surface
113 waters. ~~The department shall adopt the uniform mitigation~~
114 ~~assessment method by rule no later than July 31, 2002.~~ The rule
115 must ~~shall~~ provide an exclusive and consistent process for
116 determining the amount of mitigation required to offset impacts

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117 to wetlands and other surface waters, and, once effective,
118 supersedes ~~shall supersede~~ all rules, ordinances, and variance
119 procedures from ordinances that determine the amount of
120 mitigation needed to offset such impacts. Upon adoption ~~Once the~~
121 ~~department adopts the uniform mitigation assessment method by~~
122 ~~rule,~~ the uniform mitigation assessment method is ~~shall be~~
123 binding on the department, the water management districts, local
124 governments, and any other governmental agencies and becomes
125 ~~shall be~~ the sole means for determining ~~to determine~~ the amount
126 of mitigation needed to offset adverse impacts to wetlands and
127 other surface waters and for awarding ~~to award~~ and deducting
128 ~~deduct~~ mitigation bank credits. A water management district and
129 any other governmental agency subject to chapter 120 may apply
130 the uniform mitigation assessment method without adopting the
131 rule ~~the need to adopt it~~ pursuant to s. 120.54. If the rule is
132 deemed invalid, the applicable rules related to establishing
133 needed mitigation in existence before the adoption of the
134 assessment method, including those adopted by a county that
135 administers an approved local program under s. 403.182, and the
136 method described in paragraph (c) for existing mitigation banks,
137 shall be authorized for use by the department, water management
138 districts, local governments, and other state agencies.

139 (a) The ~~It shall be~~ a goal of the department and water
140 management districts shall be for ~~that~~ the uniform mitigation
141 assessment method to developed be practicable for use within the
142 timeframes provided in the permitting process and result in a
143 consistent process for determining mitigation requirements and
144 to. ~~It shall be recognized that any Such method shall~~ require
145 the application of reasonable scientific judgment. The ~~uniform~~

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146 ~~mitigation~~ assessment method must determine the value of
147 functions provided by wetlands and other surface waters
148 considering the current conditions of these areas, ~~utilization~~
149 ~~by~~ fish and wildlife use, location, uniqueness, and hydrologic
150 connection, and, ~~if~~ when applied to mitigation banks, the
151 factors listed in s. 373.4136(4). The ~~uniform mitigation~~
152 assessment method must ~~shall~~ also account for the expected time-
153 lag associated with offsetting impacts and the degree of risk
154 associated with the proposed mitigation. The ~~uniform mitigation~~
155 assessment method must ~~shall~~ account for different ecological
156 communities in different areas of the state. In developing the
157 ~~uniform mitigation assessment~~ method, the department and water
158 management districts shall consult with approved local programs
159 under s. 403.182 which have an established mitigation program
160 for wetlands or other surface waters. The department and water
161 management districts shall consider the recommendations
162 submitted by such approved local programs, including any
163 recommendations relating to ~~the adoption by the~~ department's
164 ~~department~~ and water management districts' adoption ~~districts~~ of
165 ~~any~~ uniform mitigation methodology that has been adopted and
166 used by an approved local program in its established mitigation
167 program for wetlands or other surface waters. Environmental
168 resource permitting rules may establish categories of permits or
169 thresholds for minor impacts under which the use of the ~~uniform~~
170 ~~mitigation~~ assessment method is ~~will~~ not ~~be~~ required. The
171 application of the ~~uniform mitigation~~ assessment method is not
172 subject to s. 70.001. ~~In the event the rule establishing the~~
173 ~~uniform mitigation assessment method is deemed to be invalid,~~
174 ~~the applicable rules related to establishing needed mitigation~~

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175 ~~in existence prior to the adoption of the uniform mitigation~~
176 ~~assessment method, including those adopted by a county which is~~
177 ~~an approved local program under s. 403.182, and the method~~
178 ~~described in paragraph (b) for existing mitigation banks, shall~~
179 ~~be authorized for use by the department, water management~~
180 ~~districts, local governments, and other state agencies.~~

181 (b)(a) In developing the uniform mitigation assessment
182 method, the department shall seek input from the United States
183 Army Corps of Engineers in order to promote consistency in the
184 mitigation assessment methods used by the state and federal
185 permitting programs.

186 (c)(b) An entity that ~~which~~ has received a mitigation bank
187 permit before ~~prior to~~ the adoption of the uniform mitigation
188 assessment method shall have impact sites assessed, for the
189 purpose of deducting bank credits, using the credit assessment
190 method, including any functional assessment methodology, which
191 was in place when the mitigation bank was permitted, ~~7~~ unless the
192 entity elects to have its credits redetermined, and thereafter
193 have its credits deducted, using the uniform mitigation
194 assessment method.

195 (d) The department shall, by rule, provide a process for
196 obtaining a formal assessment determination of land for
197 potential mitigation bank establishment pursuant to the uniform
198 mitigation assessment method. The rule must specify the
199 information that must be provided to obtain the assessment and
200 may require that authority to enter the property be granted. The
201 rule must also establish procedures for applying for,
202 processing, and issuing a formal assessment determination. Once
203 the rule is adopted, a water management district may receive and

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204 take final agency action on petitions for formal assessment
205 determinations under the rule without adopting the rule pursuant
206 to s. 120.54. By interagency agreement, the department and each
207 water management district shall determine which agency shall
208 implement the formal assessment determination process within the
209 district. Upon rule adoption, any person or entity may petition
210 for such determination with the written consent of the person or
211 entity that has sufficient legal or equitable interest in the
212 property to grant agency staff access to the property for
213 assessment purposes. If a petitioner does not provide
214 information regarding the potential impacts or mitigation
215 activities for the property, the water management district or
216 the department shall assess only the property's current
217 condition or the without-mitigation condition. The district's
218 governing board may authorize its executive director to issue
219 formal assessment determinations. The water management district
220 or the department may establish a fee by rule to cover the costs
221 of processing and acting upon a petition for an assessment
222 determination. A water management district or the department may
223 publish or require the petitioner to publish, at the
224 petitioner's expense, notice of the intended agency action on
225 the petition in a newspaper of general circulation within the
226 affected area.

227 1. A formal assessment determination is binding for up to 5
228 years if, for the current conditions or without the mitigation
229 portion of the assessment, physical conditions on the property,
230 other than changes that have been authorized by a permit issued
231 pursuant to this part, which alter the ecological conditions of
232 the uplands, wetlands, or other surface waters assessed do not

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233 change, and, for the proposed condition portion of the
234 assessment, the proposed impacts or proposed mitigation have not
235 changed. Within 60 days before the expiration of a formal
236 assessment determination, the holder of the determination, with
237 the written consent of the property owner, may petition for a
238 new assessment determination for the same parcel of property.
239 Such determination approving the same uniform mitigation
240 assessment shall be issued if: physical conditions on the
241 property, other than changes that have been authorized by a
242 permit issued pursuant to this part, which alter the ecological
243 condition of the uplands, wetlands, or other surface waters have
244 not changed; the uniform mitigation assessment methodology has
245 not been amended since the previous formal assessment
246 determination; or, for the proposed conditions portion of the
247 assessment, the proposed impacts or proposed mitigation have not
248 changed. The application fee for a subsequent petition must be
249 less than the application fee for the original assessment
250 determination. A holder of a formal assessment determination may
251 also apply for a modification of a determination to reflect
252 changed physical conditions on the property or new or modified
253 proposed impacts or mitigation.

254 2. The governing board or the department may revoke a
255 formal assessment determination if it finds that the petitioner
256 has submitted inaccurate information.

257 3. A formal assessment determination obtained under this
258 section is final agency action and is in lieu of a declaratory
259 statement regarding the application of the uniform mitigation
260 assessment method obtainable under s. 120.565. Sections 120.569,
261 120.57, and 373.4141 apply to formal assessment determinations

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262 under this section. A formal assessment may be sought alone or
263 in combination with a formal determination of the extent of
264 wetlands or other surface waters pursuant to s. 373.421.

265 (e) The department shall provide training and guidance on
266 application of the assessment method to ensure consistency and
267 shall be available to address questions regarding the method's
268 application.

269 Section 3. This act shall take effect July 1, 2010.