

By the Committees on Community Affairs; and Environment and Natural Resources; and Senator Brodeur

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1 A bill to be entitled
2 An act relating to mitigation; amending s. 373.4134,
3 F.S.; revising legislative findings; defining the term
4 "applicant"; revising the entities to whom and
5 purposes for which water quality enhancement credits
6 may be sold; requiring the Department of Environmental
7 Protection or water management districts to authorize
8 the sale and use of such credits to applicants, rather
9 than to governmental entities, to address adverse
10 water quality impacts of certain activities; revising
11 construction; amending s. 373.4135, F.S.; revising
12 legislative findings; providing legislative intent;
13 defining the term "local government"; providing
14 circumstances under which basins are considered to be
15 credit-deficient basins; authorizing local governments
16 with land in credit-deficient basins to consider bids
17 from private-sector applicants to establish mitigation
18 banks on such lands; requiring use agreements that
19 meet certain requirements for such mitigation banks;
20 prohibiting the use of public funds to fund financial
21 assurances for certain purposes; providing that
22 specified factors may not increase the uniform
23 mitigation assessment method location factor
24 assessment and scoring value in determining the number
25 of mitigation bank credits to be awarded; providing
26 that credit deficiency is confirmed at the time of
27 filing a permit application; authorizing the
28 department, in coordination with the water management
29 districts, to adopt rules; reenacting s.

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30 403.9332(1)(a) and (c), F.S., relating to mitigation
31 and enforcement, to incorporate the amendments made to
32 s. 373.4135, F.S., in references thereto; providing an
33 effective date.

34
35 Be It Enacted by the Legislature of the State of Florida:

36
37 Section 1. Present paragraphs (a) through (e) of subsection
38 (2) of section 373.4134, Florida Statutes, are redesignated as
39 paragraphs (b) through (f), respectively, a new paragraph (a) is
40 added to that subsection, and paragraphs (b), (d), and (e) of
41 subsection (1), paragraph (b) of subsection (3), and paragraphs
42 (a) and (j) of subsection (7) of that section are amended, to
43 read:

44 373.4134 Water quality enhancement areas.—

45 (1) LEGISLATIVE FINDINGS AND INTENT.—The Legislature finds
46 that:

47 (b) An expansion of existing authority for regional
48 treatment to include offsite compensatory treatment in water
49 quality enhancement areas to make enhancement credits available
50 for purchase by an applicant ~~governmental entities~~ to address
51 impacts regulated under this part is needed.

52 (d) Water quality enhancement areas are a valuable tool to
53 assist an applicant ~~governmental entities~~ in satisfying the net
54 improvement performance standard under s. 373.414(1)(b)3. to
55 ensure significant reductions of pollutant loadings.

56 (e) Water quality enhancement areas that provide water
57 quality enhancement credits to applicants ~~governmental entities~~
58 seeking permits under this part and to governmental entities

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59 seeking to meet an assigned basin management action plan
60 allocation or reasonable assurance plan under s. 403.067 are
61 considered an appropriate and permissible option.

62 (2) DEFINITIONS.—As used in this section, the term:

63 (a) “Applicant” means a governmental or private sector
64 entity that wishes to purchase water quality enhancement credits
65 to meet an assigned basin management action plan allocation or
66 reasonable assurance plan or for the purpose of achieving the
67 net improvement performance standard under s. 373.414(1)(b)3.

68 (3) WATER QUALITY ENHANCEMENT AREAS.—

69 (b) Water quality enhancement credits may be sold ~~only~~ to
70 applicants ~~governmental entities~~ seeking to meet an assigned
71 basin management action plan allocation or reasonable assurance
72 plan or for the purpose of achieving net improvement performance
73 standards under s. 373.414(1)(b)3. ~~after the governmental entity~~
74 ~~has provided~~ reasonable assurances have been provided for the
75 ~~assurance of meeting department rules for~~ design and
76 construction of all onsite stormwater management, as required by
77 law.

78 (7) ENHANCEMENT CREDITS.—

79 (a) The department or water management district shall
80 authorize the sale and use of enhancement credits to applicants
81 ~~governmental entities~~ to address adverse water quality impacts
82 of activities regulated under this part or to assist
83 governmental entities seeking to meet required nonpoint source
84 contribution reductions assigned in a basin management action
85 plan or reasonable assurance plan under s. 403.067.

86 (j) Notwithstanding any other law, this section does not
87 limit or restrict the authority of the department to deny the

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88 use of enhancement credits when the department is not reasonably
89 assured that the use of the credits will not cause or contribute
90 to a violation of water quality standards, even if the project
91 being implemented by the applicant ~~governmental entity~~ is within
92 the enhancement service area. The department may allow the use
93 of enhancement credits if the department receives a request for
94 the use of enhancement credits and determines that such use will
95 not cause or contribute to a violation of water quality
96 standards.

97 Section 2. Subsection (1) of section 373.4135, Florida
98 Statutes, is amended, and subsection (8) is added to that
99 section, to read:

100 373.4135 Mitigation banks and offsite regional mitigation.—

101 (1) The Legislature finds that the adverse impacts of
102 activities regulated under this part may be offset by the
103 creation, maintenance, and use of mitigation banks and offsite
104 regional mitigation. Mitigation banks and offsite regional
105 mitigation can enhance the certainty of mitigation and provide
106 ecological value due to the improved likelihood of environmental
107 success associated with their proper construction, maintenance,
108 and management. Therefore, the department and the water
109 management districts are directed to ~~participate in and~~
110 encourage the establishment of private ~~and public~~ mitigation
111 banks and offsite regional mitigation on lands owned by a local
112 government, when such lands are located in a credit-deficient
113 basin as defined in paragraph (8) (a) and the proposed mitigation
114 bank or offsite regional mitigation would provide one or more of
115 the deficient habitat type credits described in subparagraph
116 (8) (a)2. Mitigation banks and offsite regional mitigation should

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117 emphasize the restoration and enhancement of degraded ecosystems
118 and the preservation of uplands and wetlands as intact
119 ecosystems rather than alteration of landscapes to create
120 wetlands. This is best accomplished through restoration of
121 ecological communities that were historically present.

122 (a) The Legislature intends that the provisions for
123 establishing mitigation banks apply equally to both public and
124 private entities, except that the rules of the department and
125 water management districts may set forth different measures
126 governing financial responsibility, and different measures
127 governing legal interest, needed to ensure the construction and
128 perpetual protection of a mitigation bank.

129 (b) The Legislature recognizes the importance of mitigation
130 banks as an appropriate and allowable mitigation alternative to
131 permittee-responsible mitigation. However, the Legislature also
132 recognizes that certain timing and geographical constraints
133 could result in the unavailability of mitigation bank credits
134 for a certain project upon completion of the project's
135 application. If state and federal mitigation credits are not
136 available to offset the adverse impacts of a project, a local
137 government may allow permittee-responsible mitigation consisting
138 of the restoration or enhancement of lands purchased and owned
139 by a local government for conservation purposes, and such
140 mitigation must conform to the permitting requirements of s.
141 373.4136. Except when a local government has allowed a public or
142 private mitigation project to be created on land it has
143 purchased for conservation purposes pursuant to this paragraph,
144 a governmental entity may not create or provide mitigation for a
145 project other than its own unless the governmental entity uses

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146 land that was not previously purchased for conservation and
147 unless the governmental entity provides the same financial
148 assurances as required for mitigation banks permitted under s.
149 373.4136. This paragraph does not apply to:

150 1. Mitigation banks permitted before December 31, 2011,
151 under s. 373.4136;

152 2. Offsite regional mitigation areas established before
153 December 31, 2011, under subsection (6) or, when credits are not
154 available at a mitigation bank permitted under s. 373.4136,
155 mitigation areas created by a local government which were
156 awarded mitigation credits pursuant to the uniform mitigation
157 assessment method as provided in chapter 62-345, Florida
158 Administrative Code, under a permit issued before December 31,
159 2011;

160 3. Mitigation for transportation projects under ss.
161 373.4137 and 373.4139;

162 4. Mitigation for impacts from mining activities under s.
163 373.41492;

164 5. Mitigation provided for single-family lots or homeowners
165 under subsection (7);

166 6. Entities authorized in chapter 98-492, Laws of Florida;

167 7. Mitigation provided for electric utility impacts
168 certified under part II of chapter 403; or

169 8. Mitigation provided on sovereign submerged lands under
170 subsection (6).

171 (c) It is the further intent of the Legislature that
172 mitigation banks and offsite regional mitigation be considered
173 appropriate and a permittable mitigation option under the
174 conditions specified by the rules of the department and water

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175 management districts.

176 (d) Offsite mitigation, including offsite regional
177 mitigation, may be located outside the regional watershed in
178 which the adverse impacts of an activity regulated under this
179 part are located, if such adverse impacts are offset by the
180 offsite mitigation.

181 (e) The department or water management district may allow
182 the use of a mitigation bank or offsite regional mitigation
183 alone or in combination with other forms of mitigation to offset
184 adverse impacts of activities regulated under this part.

185 (f) When an applicant seeking for a permit under ~~the~~
186 ~~provisions of~~ this part other than this section and s. 373.4136
187 submits more than one mitigation proposal to the department or a
188 water management district, the department or water management
189 district shall, in evaluating each proposal, ensure that such
190 proposal adequately offsets the adverse impacts.

191 (8) It is the intent of the Legislature to allow limited
192 use of local government land, including lands acquired for
193 conservation, for private sector mitigation banks, provided that
194 the private mitigation banks are located in credit-deficient
195 basins and would produce the habitat type credits that are
196 unavailable or insufficient in such basins. As used in this
197 subsection, the term "local government" includes a county,
198 municipality, or special district as those terms are defined in
199 s. 165.031.

200 (a) A basin is considered to be a credit-deficient basin if
201 it is a drainage basin or a corresponding hydrologic code, and
202 has all of the following features:

203 1. At least one mitigation bank has been permitted and

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204 established on lands not owned by a governmental entity, and
205 that mitigation bank no longer has one of the habitat type
206 credits listed in subparagraph 2. available for purchase;

207 2. There is a documented shortage of either forested
208 freshwater, non-forested freshwater, forested saltwater, or non-
209 forested saltwater habitat type credits; and

210 3. Pending mitigation bank applications on private land or
211 pending credit releases from mitigation banks on nongovernmental
212 land are unlikely to alleviate the credit shortage.

213 (b) A local government with land in a credit-deficient
214 basin may, through the public procurement processes identified
215 in chapter 287 or other established competitive procurement
216 processes, consider a proposal from a private entity applicant
217 for the right to establish a mitigation bank on the local
218 government land, including such lands purchased for conservation
219 purposes, provided acquisition encumbrances do not exist to the
220 contrary.

221 (c) If such a mitigation bank is to be established and
222 operated on local government land, the local government and
223 private applicant must enter into a use agreement that meets the
224 requirements of this paragraph and that requires the private
225 applicant to establish and operate the mitigation bank in
226 conformance with the permitting requirements of s. 373.4136, and
227 the rules adopted thereunder. The use agreement must:

228 1. Include a requirement that the local government
229 landowner assume the role of long-term steward of the property,
230 and state that the landowner will grant a conservation easement
231 or substantially similar recordable instrument pursuant to s.
232 704.06, in favor of the permitting agency, if a conservation

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233 easement or substantially similar recordable instrument
234 acceptable to the permitting agency does not already exist; and
235 2. Include a requirement for the private applicant to do
236 all of the following:

237 a. Provide bid and performance security instruments for a
238 minimum of 5 percent of the total bid amount, to ensure that a
239 use agreement with the local government is executed and a
240 mitigation bank permit is applied for by the private applicant.

241 b. Operate and maintain the mitigation bank until final
242 permit success criteria are met, as permitted by the department
243 or water management district.

244 c. Agree to establish financial assurance for long-term
245 management in an amount agreeable to the local government
246 landowner and as provided for in rules adopted pursuant to this
247 section and s. 373.4136, for use by the local government as the
248 long-term steward of the land, after the mitigation bank final
249 environmental resource permit success criteria are met. The
250 private sector applicant may also use an endowment to provide
251 financial assurances.

252 d. Acknowledge that denial of the state mitigation bank
253 permit application will terminate the use agreement.

254 e. Acknowledge that failure to obtain the mitigation bank
255 permit within 2 years after the use agreement execution date
256 will terminate the use agreement, unless it is extended for good
257 cause by the local government.

258 (f) Public funds may not be used to fund the financial
259 assurances for construction and implementation of the mitigation
260 bank or for the establishment of the long-term management
261 financial assurances.

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262 (g) In determining the number of mitigation bank credits to
263 be awarded to a mitigation bank established pursuant to this
264 subsection, the proposed mitigation bank's location in or
265 adjacent to the local government conservation lands may not
266 increase the uniform mitigation assessment method location
267 factor assessment and scoring value, even if the conservation
268 status of the mitigation bank land is improved due to such
269 location.

270 (h) Credit deficiency is confirmed at the time the use
271 agreement is executed by the parties. Once confirmed, the
272 mitigation bank application may proceed, even if the deficiency
273 is relieved.

274 (i) While not required, the department, in coordination
275 with the water management districts, may adopt rules to
276 implement this subsection.

277 Section 3. For the purpose of incorporating the amendment
278 made by this act to section 373.4135, Florida Statutes, in
279 references thereto, paragraphs (a) and (c) of subsection (1) of
280 section 403.9332, Florida Statutes, are reenacted to read:

281 403.9332 Mitigation and enforcement.—

282 (1) (a) Any area in which 5 percent or more of the trimmed
283 mangrove trees have been trimmed below 6 feet in height, except
284 as provided in s. 403.9326(1)(c), (d), (f), (g), and (h),
285 destroyed, defoliated, or removed as a result of trimming
286 conducted under s. 403.9326 or s. 403.9327 must be restored or
287 mitigated. Restoration must be accomplished by replanting
288 mangroves, in the same location and of the same species as each
289 mangrove destroyed, defoliated, removed, or trimmed, to achieve
290 within 5 years a canopy area equivalent to the area destroyed,

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291 removed, defoliated, or trimmed; or mitigation must be
292 accomplished by replanting offsite, in areas suitable for
293 mangrove growth, mangroves to achieve within 5 years a canopy
294 area equivalent to the area destroyed, removed, defoliated, or
295 trimmed. Where all or a portion of the restoration or mitigation
296 is not practicable, as determined by the department or delegated
297 local government, the impacts resulting from the destruction,
298 defoliation, removal, or trimming of the mangroves must be
299 offset by donating a sufficient amount of money to offset the
300 impacts, which must be used for the restoration, enhancement,
301 creation, or preservation of mangrove wetlands within a
302 restoration, enhancement, creation, or preservation project
303 approved by the department or delegated local government; or by
304 purchasing credits from a mitigation bank created under s.
305 373.4135 at a mitigation ratio of 2-to-1 credits to affected
306 area. The donation must be equivalent to the cost, as verified
307 by the department or delegated local government, of creating
308 mangrove wetlands at a 2-to-1, created versus affected ratio,
309 based on canopy area. The donation may not be less than \$4 per
310 square foot of created wetland area.

311 (c) If mangroves are to be trimmed or altered under a
312 permit issued under s. 403.9328, the department or delegated
313 local government may require mitigation. The department or
314 delegated local government shall establish reasonable mitigation
315 requirements that must include, as an option, the use of
316 mitigation banks created under s. 373.4135, where appropriate.
317 The department's mitigation requirements must ensure that
318 payments received as mitigation are sufficient to offset impacts
319 and are used for mangrove creation, preservation, protection, or

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320 enhancement.

321 Section 4. This act shall take effect July 1, 2024.