

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

595-03346-24

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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 applicability; providing circumstances under which
15 basins are considered to be credit-deficient basins;
16 authorizing local governments with land in credit-
17 deficient basins to consider bids from private-sector
18 applicants to establish mitigation banks on such
19 lands; requiring use agreements that meet certain
20 requirements for such mitigation banks; prohibiting
21 the use of public funds to fund financial assurances
22 for certain purposes; providing that specified factors
23 may not increase the uniform mitigation assessment
24 method location factor assessment and scoring value in
25 determining the number of mitigation bank credits to
26 be awarded; providing that credit deficiency is
27 confirmed at the time of filing a permit application;
28 authorizing the department, in coordination with the
29 water management districts, to adopt rules; reenacting

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30 s. 403.9332(1) (a) and (c), F.S., relating to
31 mitigation and enforcement, to incorporate the
32 amendments made to s. 373.4135, F.S., in references
33 thereto; providing an 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), paragraphs (b) and (c) of subsection (3), and
42 paragraphs (a) and (j) of subsection (7) of that section are
43 amended, to 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 or a governmental entity ~~entities~~
51 to address impacts regulated under ss. 373.403-373.443 ~~this part~~
52 is needed.

53 (d) Water quality enhancement areas are a valuable tool to
54 assist an applicant ~~governmental entities~~ in providing a
55 ~~satisfying the~~ net improvement of the water quality in a
56 receiving waterbody that does not meet standards or in
57 satisfying the environmental resource permit performance
58 standard under s. 373.414(1) (b)3. to ensure significant

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59 reductions of pollutant loadings.

60 (e) Water quality enhancement areas that provide water
61 quality enhancement credits to applicants ~~governmental entities~~
62 seeking permits under ss. 373.403-373.443 ~~this part~~ and to
63 governmental entities seeking to meet an assigned basin
64 management action plan allocation or reasonable assurance plan
65 under s. 403.067 are considered an appropriate and permissible
66 option.

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

68 (a) "Applicant" means a governmental entity that seeks to
69 purchase water quality enhancement credits to meet an assigned
70 basin management action plan allocation or reasonable assurance
71 plan or a governmental entity or a private sector entity that
72 seeks to purchase water quality enhancement credits for the
73 purpose of achieving net improvement under s. 373.414(1)(b)3. or
74 satisfying environmental resource permit performance standards.

75 (3) WATER QUALITY ENHANCEMENT AREAS.—

76 (b) Water quality enhancement credits may be sold ~~only~~ to
77 governmental entities seeking to meet an assigned basin
78 management action plan allocation or reasonable assurance plan
79 or to applicants for the purpose of achieving net improvement or
80 meeting environmental resource permit performance standards
81 under s. 373.414(1)(b)3. after the governmental entity has
82 provided reasonable assurances have been provided for the
83 assurance of meeting department rules for design and
84 construction of all onsite stormwater management, as required by
85 law.

86 (c) A water quality enhancement area must be used to
87 address contributions of one or more pollutants or other

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88 constituents in the watershed, basin, sub-basin, targeted
89 restoration area, waterbody, or section of waterbody, as
90 determined by the department, in which the water quality
91 enhancement area is located that do not meet applicable state
92 water quality standards or environmental resource permit
93 performance standards ~~criteria~~.

94 (7) ENHANCEMENT CREDITS.—

95 (a) The department or water management district shall
96 authorize the sale and use of enhancement credits to applicants
97 ~~governmental entities~~ to address adverse water quality impacts
98 of activities regulated under ss. 373.403-373.443 ~~this part~~ or
99 to assist governmental entities seeking to meet required
100 nonpoint source contribution reductions assigned in a basin
101 management action plan or reasonable assurance plan under s.
102 403.067.

103 (j) Notwithstanding any other law, this section does not
104 limit or restrict the authority of the department to deny the
105 use of enhancement credits when the department is not reasonably
106 assured that the use of the credits will not cause or contribute
107 to a violation of water quality standards, even if the project
108 being implemented by the applicant ~~governmental entity~~ is within
109 the enhancement service area. The department may allow the use
110 of enhancement credits if the department receives a request for
111 the use of enhancement credits and determines that such use will
112 not cause or contribute to a violation of water quality
113 standards.

114 Section 2. Subsection (1) of section 373.4135, Florida
115 Statutes, is amended, and subsection (8) is added to that
116 section, to read:

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117 373.4135 Mitigation banks and offsite regional mitigation.-

118 (1) The Legislature finds that the adverse impacts of
119 activities regulated under this part may be offset by the
120 creation, maintenance, and use of mitigation banks and offsite
121 regional mitigation. Mitigation banks and offsite regional
122 mitigation can enhance the certainty of mitigation and provide
123 ecological value due to the improved likelihood of environmental
124 success associated with their proper construction, maintenance,
125 and management. Therefore, the department and the water
126 management districts are directed to ~~participate in and~~
127 encourage the establishment of private ~~and public~~ mitigation
128 banks and offsite regional mitigation on lands owned by a local
129 government, when such lands are located in a credit-deficient
130 basin as defined in paragraph (8)(a) and the proposed mitigation
131 bank or offsite regional mitigation would provide one or more of
132 the deficient habitat type credits described in subparagraph
133 (8)(a)2. Mitigation banks and offsite regional mitigation should
134 emphasize the restoration and enhancement of degraded ecosystems
135 and the preservation of uplands and wetlands as intact
136 ecosystems rather than alteration of landscapes to create
137 wetlands. This is best accomplished through restoration of
138 ecological communities that were historically present.

139 (a) The Legislature intends that the provisions for
140 establishing mitigation banks apply equally to both public and
141 private entities, except that the rules of the department and
142 water management districts may set forth different measures
143 governing financial responsibility, and different measures
144 governing legal interest, needed to ensure the construction and
145 perpetual protection of a mitigation bank.

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146 (b) The Legislature recognizes the importance of mitigation
147 banks as an appropriate and allowable mitigation alternative to
148 permittee-responsible mitigation. However, the Legislature also
149 recognizes that certain timing and geographical constraints
150 could result in the unavailability of mitigation bank credits
151 for a certain project upon completion of the project's
152 application. If state and federal mitigation credits are not
153 available to offset the adverse impacts of a project, a local
154 government may allow permittee-responsible mitigation consisting
155 of the restoration or enhancement of lands purchased and owned
156 by a local government for conservation purposes, and such
157 mitigation must conform to the permitting requirements of s.
158 373.4136. Except when a local government has allowed a public or
159 private mitigation project to be created on land it has
160 purchased for conservation purposes pursuant to this paragraph,
161 a governmental entity may not create or provide mitigation for a
162 project other than its own unless the governmental entity uses
163 land that was not previously purchased for conservation and
164 unless the governmental entity provides the same financial
165 assurances as required for mitigation banks permitted under s.
166 373.4136. This paragraph does not apply to:

167 1. Mitigation banks permitted before December 31, 2011,
168 under s. 373.4136;

169 2. Offsite regional mitigation areas established before
170 December 31, 2011, under subsection (6) or, when credits are not
171 available at a mitigation bank permitted under s. 373.4136,
172 mitigation areas created by a local government which were
173 awarded mitigation credits pursuant to the uniform mitigation
174 assessment method as provided in chapter 62-345, Florida

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175 Administrative Code, under a permit issued before December 31,
176 2011;

177 3. Mitigation for transportation projects under ss.
178 373.4137 and 373.4139;

179 4. Mitigation for impacts from mining activities under s.
180 373.41492;

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

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

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

186 8. Mitigation provided on sovereign submerged lands under
187 subsection (6).

188 (c) It is the further intent of the Legislature that
189 mitigation banks and offsite regional mitigation be considered
190 appropriate and a permittable mitigation option under the
191 conditions specified by the rules of the department and water
192 management districts.

193 (d) Offsite mitigation, including offsite regional
194 mitigation, may be located outside the regional watershed in
195 which the adverse impacts of an activity regulated under this
196 part are located, if such adverse impacts are offset by the
197 offsite mitigation.

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

202 (f) When an applicant seeking ~~for~~ a permit under ~~the~~
203 ~~provisions of~~ this part other than this section and s. 373.4136

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204 submits more than one mitigation proposal to the department or a
205 water management district, the department or water management
206 district shall, in evaluating each proposal, ensure that such
207 proposal adequately offsets the adverse impacts.

208 (8) It is the intent of the Legislature to allow limited
209 use of local government land, including lands acquired for
210 conservation, for private sector mitigation banks, provided that
211 the private mitigation banks are located in credit-deficient
212 basins and would produce the habitat type credits that are
213 unavailable or insufficient in such basins. As used in this
214 subsection, the term "local government" includes a county,
215 municipality, or special district as those terms are defined in
216 s. 165.031. This subsection does not apply to lands owned by the
217 state or a water management district.

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

221 1. At least one mitigation bank has been permitted and
222 established on lands not owned by a governmental entity, and
223 that mitigation bank no longer has one of the habitat type
224 credits listed in subparagraph 2. available for purchase;

225 2. There is a documented shortage of either forested
226 freshwater, non-forested freshwater, forested saltwater, or non-
227 forested saltwater habitat type credits; and

228 3. Pending mitigation bank applications on private land or
229 pending credit releases from mitigation banks on nongovernmental
230 land are unlikely to alleviate the credit shortage.

231 (b) A local government with land in a credit-deficient
232 basin may, through the public procurement processes identified

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233 in chapter 287 or other established competitive procurement
234 processes, consider a proposal from a private entity applicant
235 for the right to establish a mitigation bank on the local
236 government land, including such lands purchased for conservation
237 purposes, provided acquisition encumbrances do not exist to the
238 contrary.

239 (c) If such a mitigation bank is to be established and
240 operated on local government land, the local government and
241 private applicant must enter into a use agreement that meets the
242 requirements of this paragraph and that requires the private
243 applicant to establish and operate the mitigation bank in
244 conformance with the permitting requirements of s. 373.4136, and
245 the rules adopted thereunder. The use agreement must:

246 1. Include a requirement that the local government
247 landowner assume the role of long-term steward of the property,
248 and state that the landowner will grant a conservation easement
249 or substantially similar recordable instrument pursuant to s.
250 704.06, in favor of the permitting agency, if a conservation
251 easement or substantially similar recordable instrument
252 acceptable to the permitting agency does not already exist; and

253 2. Include a requirement for the private applicant to do
254 all of the following:

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

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

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262 c. Agree to establish financial assurance for long-term
263 management in an amount agreeable to the local government
264 landowner and as provided for in rules adopted pursuant to this
265 section and s. 373.4136, for use by the local government as the
266 long-term steward of the land, after the mitigation bank final
267 environmental resource permit success criteria are met. The
268 private sector applicant may also use an endowment to provide
269 financial assurances.

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

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

276 (d) Public funds may not be used to fund the financial
277 assurances for construction and implementation of the mitigation
278 bank or for the establishment of the long-term management
279 financial assurances.

280 (e) In determining the number of mitigation bank credits to
281 be awarded to a mitigation bank established pursuant to this
282 subsection, the proposed mitigation bank's location in or
283 adjacent to the local government conservation lands may not
284 increase the uniform mitigation assessment method location
285 factor assessment and scoring value, even if the conservation
286 status of the mitigation bank land is improved due to such
287 location.

288 (f) Credit deficiency is confirmed at the time the use
289 agreement is executed by the parties. Once confirmed, the
290 mitigation bank application may proceed, even if the deficiency

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291 is relieved.

292 (g) While not required, the department, in coordination
293 with the water management districts, may adopt rules to
294 implement this subsection.

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

299 403.9332 Mitigation and enforcement.—

300 (1) (a) Any area in which 5 percent or more of the trimmed
301 mangrove trees have been trimmed below 6 feet in height, except
302 as provided in s. 403.9326(1)(c), (d), (f), (g), and (h),
303 destroyed, defoliated, or removed as a result of trimming
304 conducted under s. 403.9326 or s. 403.9327 must be restored or
305 mitigated. Restoration must be accomplished by replanting
306 mangroves, in the same location and of the same species as each
307 mangrove destroyed, defoliated, removed, or trimmed, to achieve
308 within 5 years a canopy area equivalent to the area destroyed,
309 removed, defoliated, or trimmed; or mitigation must be
310 accomplished by replanting offsite, in areas suitable for
311 mangrove growth, mangroves to achieve within 5 years a canopy
312 area equivalent to the area destroyed, removed, defoliated, or
313 trimmed. Where all or a portion of the restoration or mitigation
314 is not practicable, as determined by the department or delegated
315 local government, the impacts resulting from the destruction,
316 defoliation, removal, or trimming of the mangroves must be
317 offset by donating a sufficient amount of money to offset the
318 impacts, which must be used for the restoration, enhancement,
319 creation, or preservation of mangrove wetlands within a

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320 restoration, enhancement, creation, or preservation project
321 approved by the department or delegated local government; or by
322 purchasing credits from a mitigation bank created under s.
323 373.4135 at a mitigation ratio of 2-to-1 credits to affected
324 area. The donation must be equivalent to the cost, as verified
325 by the department or delegated local government, of creating
326 mangrove wetlands at a 2-to-1, created versus affected ratio,
327 based on canopy area. The donation may not be less than \$4 per
328 square foot of created wetland area.

329 (c) If mangroves are to be trimmed or altered under a
330 permit issued under s. 403.9328, the department or delegated
331 local government may require mitigation. The department or
332 delegated local government shall establish reasonable mitigation
333 requirements that must include, as an option, the use of
334 mitigation banks created under s. 373.4135, where appropriate.
335 The department's mitigation requirements must ensure that
336 payments received as mitigation are sufficient to offset impacts
337 and are used for mangrove creation, preservation, protection, or
338 enhancement.

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