

By Senator McClain

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1 A bill to be entitled
2 An act relating to mitigation banking; amending s.
3 373.4136, F.S.; revising the schedule to which the
4 Department of Environmental Protection and water
5 management districts are required to adhere for the
6 release of credits awarded by a mitigation bank
7 permit; prohibiting the release of mitigation credits
8 for freshwater wetland creation until certain criteria
9 are met; requiring that a mitigation bank service area
10 established by the department or a water management
11 district for a mitigation bank be considered to have
12 met specified requirements; authorizing certain
13 projects or activities to use credits released from a
14 bank to offset impacts if certain requirements are
15 met; authorizing a project applicant to use credits
16 released from a mitigation bank outside a mitigation
17 service area to offset impacts if an insufficient
18 number or type of credits have been released in the
19 proposed project area under certain circumstances;
20 requiring the department and water management
21 districts to apply a certain multiplier in granting
22 the out-of-service area credits; declaring that use of
23 the multipliers meets the requirements for addressing
24 certain impacts; requiring the department or water
25 management district to contact all mitigation banks
26 within a specified area in a specified number of days
27 after an applicant requests to use credits from a
28 mitigation bank outside a specified area; requiring
29 such mitigation banks to provide an accounting within

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30 a specified number of days; requiring the department
31 or water management district to make a certain
32 determination upon receipt of the accounting and
33 notify the applicant of such determination;
34 authorizing the applicant to rely on the determination
35 for a specified period of time; requiring mitigation
36 banks to submit annual reports to the department or
37 the districts which contain specified information;
38 requiring the department and each district to compile
39 the reports into an annual assessment and provide it
40 to the Legislature; reenacting ss. 373.403(19),
41 373.4135(1)(b), (3), (4), (5), (6)(c) and (g), and
42 (8)(c), 373.41365, and 373.414(1)(b), F.S., relating
43 to definitions, mitigation banks and offsite regional
44 mitigation, adoption and modification of rules to
45 ensure financial assurances for long-term management
46 of mitigation under ss. 373.4136 and 373.414, F.S.,
47 and additional criteria for activities in surface
48 waters and wetlands, respectively, to incorporate the
49 amendment made to s. 373.4136, F.S., in references
50 thereto; providing an effective date.

51
52 Be It Enacted by the Legislature of the State of Florida:

53
54 Section 1. Subsection (5) and paragraphs (c) and (d) of
55 subsection (6) of section 373.4136, Florida Statutes, are
56 amended, and paragraphs (e) through (h) are added to subsection
57 (6) of that section, to read:

58 373.4136 Establishment and operation of mitigation banks.—

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59 (5) SCHEDULE FOR CREDIT RELEASE.—After issuing ~~awarding~~
60 ~~mitigation credits to~~ a mitigation bank permit, the department
61 or the water management district shall adhere to the credit
62 release schedule set forth in paragraph (a) ~~set forth a schedule~~
63 for the release of ~~these~~ credits awarded under ~~in~~ the mitigation
64 bank permit. A mitigation credit that has been released may be
65 sold or used to offset adverse impacts from an activity
66 regulated under this part.

67 (a) Credit release schedule.—

68 1. Thirty percent of awarded credits for the recording of
69 the conservation easement and establishment of financial
70 assurances required by the mitigation bank permit, or 100
71 percent in the case of a preservation-only bank.

72 2. Thirty percent of awarded credits following completion
73 of initial construction activities as established by the
74 mitigation bank permit.

75 3. Twenty percent of awarded credits upon meeting interim
76 performance criteria established by the mitigation bank permit,
77 in increments as monitoring indicates success.

78 4. Twenty percent of awarded credits upon meeting final
79 success criteria established by the mitigation bank permit ~~The~~
80 ~~department or the water management district shall allow a~~
81 ~~portion of the mitigation credits awarded to a mitigation bank~~
82 ~~to be released for sale or use prior to meeting all of the~~
83 ~~performance criteria specified in the mitigation bank permit.~~
84 ~~The department or the water management district shall allow~~
85 ~~release of all of a mitigation bank's awarded mitigation credits~~
86 ~~only after the bank meets the mitigation success criteria~~
87 ~~specified in the permit.~~

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88 ~~(b) The number of credits and schedule for release shall be~~
89 ~~determined by the department or water management district based~~
90 ~~upon the performance criteria for the mitigation bank and the~~
91 ~~success criteria for each mitigation activity. The release~~
92 ~~schedule for a specific mitigation bank or phase thereof shall~~
93 ~~be related to the actions required to implement the bank, such~~
94 ~~as site protection, site preparation, earthwork, removal of~~
95 ~~wastes, planting, removal or control of nuisance and exotic~~
96 ~~species, installation of structures, and annual monitoring and~~
97 ~~management requirements for success. In determining the specific~~
98 ~~release schedule for a bank, the department or water management~~
99 ~~district shall consider, at a minimum, the following factors:~~

100 ~~1. Whether the mitigation consists solely of preservation~~
101 ~~or includes other types of mitigation.~~

102 ~~2. The length of time anticipated to be required before a~~
103 ~~determination of success can be achieved.~~

104 ~~3. The ecological value to be gained from each action~~
105 ~~required to implement the bank.~~

106 ~~4. The financial expenditure required for each action to~~
107 ~~implement the bank.~~

108 ~~(e)~~ Notwithstanding the provisions of this subsection, no
109 credit shall be released for freshwater wetland creation until
110 the success criteria established ~~included~~ in the mitigation bank
111 permit for initial construction activities are met.

112 ~~(c)~~~~(d)~~ The withdrawal of mitigation credits from a
113 mitigation bank shall be accomplished as a minor modification of
114 the mitigation bank permit. A processing fee shall not be
115 required by the department or water management district for this
116 minor modification.

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117 (6) MITIGATION SERVICE AREA.—The department or water
118 management district shall establish a mitigation service area
119 for each mitigation bank permit. The department or water
120 management district shall notify and consider comments received
121 on the proposed mitigation service area from each local
122 government within the proposed mitigation service area. Except
123 as provided herein, mitigation credits may be withdrawn and used
124 only to offset adverse impacts in the mitigation service area.
125 The boundaries of the mitigation service area shall depend upon
126 the geographic area where the mitigation bank could reasonably
127 be expected to offset adverse impacts. Mitigation service areas
128 may overlap, and mitigation service areas for two or more
129 mitigation banks may be approved for a regional watershed.

130 (c) Once a mitigation bank service area has been
131 established by the department or a water management district for
132 a mitigation bank, such service area shall be accepted by all
133 water management districts, local governments, and the
134 department and shall be considered to have met the cumulative
135 impact requirements of s. 373.414(8) (a) for impacts permitted
136 within any regional watershed included in such mitigation bank
137 service area.

138 (d) If the requirements in s. 373.414(1) (b) and (8) are
139 met, the following projects or activities regulated under this
140 part shall be eligible to use credits released from a mitigation
141 bank to offset impacts resulting from such projects or
142 activities, regardless of whether they are located within the
143 mitigation service area:

144 1. Projects with adverse impacts partially located within
145 the mitigation service area.

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146 2. Linear projects, such as roadways, transmission lines,
147 distribution lines, pipelines, railways, or seaports listed in
148 s. 311.09(1).

149 3. Projects with total adverse impacts of less than 1 acre
150 in size.

151 4. Projects that meet the requirements of s. 373.414(1)(b)
152 and the criteria set forth in paragraphs (e), (f), and (g).

153 (e) When the requirements of s. 373.414(1)(a) are met and
154 an insufficient number or type of credits have been released
155 within the mitigation bank service area in which the impacts
156 associated with a proposed project are located, the project
157 applicant may use credits released from a mitigation bank
158 outside such mitigation service area to offset impacts pursuant
159 to s. 373.414(1)(b). The project applicant may only use out-of-
160 service area credits once the department or a water management
161 district verifies that mitigation banks within the regional
162 watershed where the adverse impacts are located lack the
163 appropriate credit type to offset impacts associated with the
164 proposed project, as established by the procedure detailed in
165 paragraph (h). If the number of released credits within a
166 mitigation service area only partially offsets the impacts
167 associated with a proposed project in that mitigation service
168 area, the project applicant may use out-of-service area credits
169 to account for the difference between the released credits
170 available in the mitigation bank service area and the credits
171 required to offset the impacts associated with the proposed
172 project. When implementing this paragraph, the department and
173 water management districts shall follow the following guidelines
174 to apply a proximity factor to determine adequate compensatory

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175 mitigation by using the following process:

176 1. A multiplier may not be applied for use of out-of-
177 service area credits located within the same regional watershed
178 as the proposed impacts.

179 2. A 1.5 multiplier shall be applied for use of out-of-
180 service area credits located within a regional watershed
181 immediately adjacent to the regional watershed in which the
182 proposed impacts are located.

183 3. When credits are not available in the regional watershed
184 immediately adjacent to the regional watershed in which the
185 proposed impacts are located, an additional 0.50 multiplier
186 shall be applied for each additional regional watershed away
187 from the regional watershed immediately adjacent to the regional
188 watershed in which the proposed impacts are located.

189 4. An additional 0.75 multiplier shall be applied if the
190 mitigation used to offset impacts entails an out-of-kind
191 replacement which does not replace the same type of wetland or
192 surface water impacted.

193 (f) Use of the multipliers in subparagraphs (e)1., 2., 3.
194 and 4. meets the requirements of s. 373.414(8)(a) for addressing
195 cumulative impacts.

196 (g) Once a project applicant requests to use credits from a
197 mitigation bank outside the mitigation service area in which the
198 proposed impacts will occur, the department or the water
199 management district must contact all mitigation banks within a
200 mitigation service area encompassing the location of the
201 proposed impacts within 3 business days after the request from
202 the project applicant and request an accounting of available
203 credits, which may not include credits reserved for other

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204 project applicants. The mitigation banks contacted by the
205 department or the water management district shall provide such
206 accounting within 5 business days after the request. Upon
207 receipt of the accounting from the mitigation banks, the
208 department or the water management district shall determine if
209 sufficient credits exist to offset impacts associated with the
210 proposed project and notify the project applicant of such
211 determination. The applicant may rely on the determination from
212 the department or the water management district for a period of
213 1 year after such determination.

214 (h) Each mitigation bank in this state shall submit an
215 annual report to the department or the applicable water
216 management district with an accounting of the number and type of
217 credits that the mitigation bank has available for sale, but the
218 report may not include names of parties for which credits have
219 been reserved, if any, or the contract price paid for such
220 credits. The department and each water management district shall
221 compile such annual reports and provide an annual assessment of
222 the health of the state's mitigation banking system to the
223 President of the Senate and the Speaker of the House of
224 Representatives.

225 Section 2. For the purpose of incorporating the amendment
226 made by this act to section 373.4136, Florida Statutes, in a
227 reference thereto, subsection (19) of section 373.403, Florida
228 Statutes, is reenacted to read:

229 373.403 Definitions.—When appearing in this part or in any
230 rule, regulation, or order adopted pursuant thereto, the
231 following terms mean:

232 (19) "Mitigation bank" means a project permitted under s.

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233 373.4136 undertaken to provide for the withdrawal of mitigation
234 credits to offset adverse impacts authorized by a permit under
235 this part.

236 Section 3. For the purpose of incorporating the amendment
237 made by this act to section 373.4136, Florida Statutes, in
238 references thereto, paragraph (b) of subsection (1), subsections
239 (3), (4), and (5), paragraphs (c) and (g) of subsection (6), and
240 paragraph (c) of subsection (8) of section 373.4135, Florida
241 Statutes, are reenacted to read:

242 373.4135 Mitigation banks and offsite regional mitigation.-

243 (1) The Legislature finds that the adverse impacts of
244 activities regulated under this part may be offset by the
245 creation, maintenance, and use of mitigation banks and offsite
246 regional mitigation. Mitigation banks and offsite regional
247 mitigation can enhance the certainty of mitigation and provide
248 ecological value due to the improved likelihood of environmental
249 success associated with their proper construction, maintenance,
250 and management. Therefore, the department and the water
251 management districts are directed to encourage the establishment
252 of private mitigation banks and offsite regional mitigation on
253 lands owned by a local government, when such lands are located
254 in a credit-deficient basin as defined in paragraph (8) (a) and
255 the proposed mitigation bank or offsite regional mitigation
256 would provide one or more of the deficient habitat type credits
257 described in subparagraph (8) (a)2. Mitigation banks and offsite
258 regional mitigation should emphasize the restoration and
259 enhancement of degraded ecosystems and the preservation of
260 uplands and wetlands as intact ecosystems rather than alteration
261 of landscapes to create wetlands. This is best accomplished

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262 through restoration of ecological communities that were
263 historically present.

264 (b) The Legislature recognizes the importance of mitigation
265 banks as an appropriate and allowable mitigation alternative to
266 permittee-responsible mitigation. However, the Legislature also
267 recognizes that certain timing and geographical constraints
268 could result in the unavailability of mitigation bank credits
269 for a certain project upon completion of the project's
270 application. If state and federal mitigation credits are not
271 available to offset the adverse impacts of a project, a local
272 government may allow permittee-responsible mitigation consisting
273 of the restoration or enhancement of lands purchased and owned
274 by a local government for conservation purposes, and such
275 mitigation must conform to the permitting requirements of s.
276 373.4136. Except when a local government has allowed a public or
277 private mitigation project to be created on land it has
278 purchased for conservation purposes pursuant to this paragraph,
279 a governmental entity may not create or provide mitigation for a
280 project other than its own unless the governmental entity uses
281 land that was not previously purchased for conservation and
282 unless the governmental entity provides the same financial
283 assurances as required for mitigation banks permitted under s.
284 373.4136. This paragraph does not apply to:

285 1. Mitigation banks permitted before December 31, 2011,
286 under s. 373.4136;

287 2. Offsite regional mitigation areas established before
288 December 31, 2011, under subsection (6) or, when credits are not
289 available at a mitigation bank permitted under s. 373.4136,
290 mitigation areas created by a local government which were

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291 awarded mitigation credits pursuant to the uniform mitigation
292 assessment method as provided in chapter 62-345, Florida
293 Administrative Code, under a permit issued before December 31,
294 2011;

295 3. Mitigation for transportation projects under ss.
296 373.4137 and 373.4139;

297 4. Mitigation for impacts from mining activities under s.
298 373.41492;

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

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

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

304 8. Mitigation provided on sovereign submerged lands under
305 subsection (6).

306 (3) Nothing in this section or s. 373.4136 shall be
307 construed to eliminate or diminish any of the regulatory
308 requirements applicable to applicants seeking permits pursuant
309 to other provisions of this part.

310 (4) Except as otherwise provided herein, nothing in this
311 section or s. 373.4136 shall be construed to diminish or limit
312 the existing authority of the department, water management
313 districts, or local governments.

314 (5) Nothing in this section or s. 373.4136 shall be
315 construed to limit the consideration of forms of mitigation
316 other than mitigation banks and offsite regional mitigation.

317 (6) An environmental creation, preservation, enhancement,
318 or restoration project, including regional offsite mitigation
319 areas, for which money is donated or paid as mitigation, that is

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320 sponsored by the department, a water management district, or a
321 local government and provides mitigation for five or more
322 applicants for permits under this part, or for 35 or more acres
323 of adverse impacts, shall be established and operated under a
324 memorandum of agreement. The memorandum of agreement shall be
325 between the governmental entity proposing the mitigation project
326 and the department or water management district, as appropriate.
327 Such memorandum of agreement need not be adopted by rule. For
328 the purposes of this subsection, one creation, preservation,
329 enhancement, or restoration project shall mean one or more
330 parcels of land with similar ecological communities that are
331 intended to be created, preserved, enhanced, or restored under a
332 common scheme.

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

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

337 2. A timeline for obtaining any required environmental
338 resource permit.

339 3. The environmental success criteria that the project must
340 achieve.

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

343 5. An assessment of the project in accordance with s.
344 373.4136(4)(a)-(i), until the adoption of the uniform wetland
345 mitigation assessment method pursuant to s. 373.414(18).

346 6. A designation of the entity responsible for the
347 successful completion of the mitigation work.

348 7. A definition of the geographic area where the project

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349 may be used as mitigation established using the criteria of s.
350 373.4136(6).

351 8. Full cost accounting of the project, including annual
352 review and adjustment.

353 9. Provision and a timetable for the acquisition of any
354 lands necessary for the project.

355 10. Provision for preservation of the site.

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

358 12. Provision for termination of the agreement and
359 cessation of use of the project as mitigation if any material
360 contingency of the agreement has failed to occur.

361 (g) The provisions of this subsection shall not apply when
362 the department, water management district, or local government
363 establishes, or contracts with a private entity to establish, a
364 mitigation bank permitted under s. 373.4136. The provisions of
365 this subsection shall not apply to other entities that establish
366 offsite regional mitigation as defined in this section and s.
367 373.403.

368 (8) It is the intent of the Legislature to allow limited
369 use of local government land, including lands acquired for
370 conservation, for private sector mitigation banks, provided that
371 the private mitigation banks are located in credit-deficient
372 basins and would produce the habitat type credits that are
373 unavailable or insufficient in such basins. As used in this
374 subsection, the term "local government" includes a county,
375 municipality, or special district as those terms are defined in
376 s. 165.031. This subsection does not apply to lands owned by the
377 state or a water management district.

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378 (c) If such a mitigation bank is to be established and
379 operated on local government land, the local government and
380 private applicant must enter into a use agreement that meets the
381 requirements of this paragraph and that requires the private
382 applicant to establish and operate the mitigation bank in
383 conformance with the permitting requirements of s. 373.4136, and
384 the rules adopted thereunder. The use agreement must:

385 1. Include a requirement that the local government
386 landowner assume the role of long-term steward of the property,
387 and state that the landowner will grant a conservation easement
388 or substantially similar recordable instrument pursuant to s.
389 704.06, in favor of the permitting agency, if a conservation
390 easement or substantially similar recordable instrument
391 acceptable to the permitting agency does not already exist; and

392 2. Include a requirement for the private applicant to do
393 all of the following:

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

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

401 c. Agree to establish financial assurance for long-term
402 management in an amount agreeable to the local government
403 landowner and as provided for in rules adopted pursuant to this
404 section and s. 373.4136, for use by the local government as the
405 long-term steward of the land, after the mitigation bank final
406 environmental resource permit success criteria are met. The

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407 private sector applicant may also use an endowment to provide
408 financial assurances.

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

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

415 Section 4. For the purpose of incorporating the amendment
416 made by this act to section 373.4136, Florida Statutes, in a
417 reference thereto, section 373.41365, Florida Statutes, is
418 reenacted to read:

419 373.41365 Adoption and modification of rules to ensure
420 financial assurances for long-term management of mitigation
421 under ss. 373.4136 and 373.414.—The Department of Environmental
422 Protection shall adopt and modify rules adopted pursuant to ss.
423 373.4136 and 373.414 to ensure that required financial
424 assurances are equivalent and sufficient to provide for the
425 long-term management of mitigation permitted under ss. 373.4136
426 and 373.414. The department, in consultation with the water
427 management districts, shall include the rulemaking required by
428 this section in existing active rulemaking, or shall complete
429 rule development by June 30, 2023.

430 Section 5. For the purpose of incorporating the amendment
431 made by this act to section 373.4136, Florida Statutes, in a
432 reference thereto, paragraph (b) of subsection (1) of section
433 373.414, Florida Statutes, is reenacted to read:

434 373.414 Additional criteria for activities in surface
435 waters and wetlands.—

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436 (1) As part of an applicant's demonstration that an
437 activity regulated under this part will not be harmful to the
438 water resources or will not be inconsistent with the overall
439 objectives of the district, the governing board or the
440 department shall require the applicant to provide reasonable
441 assurance that state water quality standards applicable to
442 waters as defined in s. 403.031 will not be violated and
443 reasonable assurance that such activity in, on, or over surface
444 waters or wetlands, as delineated in s. 373.421(1), is not
445 contrary to the public interest. However, if such an activity
446 significantly degrades or is within an Outstanding Florida
447 Water, as provided by department rule, the applicant must
448 provide reasonable assurance that the proposed activity will be
449 clearly in the public interest.

450 (b) If the applicant is unable to otherwise meet the
451 criteria set forth in this subsection, the governing board or
452 the department, in deciding to grant or deny a permit, must
453 consider measures proposed by or acceptable to the applicant to
454 mitigate adverse effects that may be caused by the regulated
455 activity. Such measures may include, but are not limited to,
456 onsite mitigation, offsite mitigation, offsite regional
457 mitigation, and the purchase of mitigation credits from
458 mitigation banks permitted under s. 373.4136. It is the
459 responsibility of the applicant to choose the form of
460 mitigation. The mitigation must offset the adverse effects
461 caused by the regulated activity.

462 1. The department or water management districts may accept
463 the donation of money as mitigation only where the donation is
464 specified for use in a duly noticed environmental creation,

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465 preservation, enhancement, or restoration project, endorsed by
466 the department or the governing board of the water management
467 district, which offsets the impacts of the activity permitted
468 under this part. However, this subsection does not apply to
469 projects undertaken pursuant to s. 373.4137 or chapter 378.
470 Where a permit is required under this part to implement any
471 project endorsed by the department or a water management
472 district, all necessary permits must have been issued prior to
473 the acceptance of any cash donation. After the effective date of
474 this act, when money is donated to either the department or a
475 water management district to offset impacts authorized by a
476 permit under this part, the department or the water management
477 district shall accept only a donation that represents the full
478 cost to the department or water management district of
479 undertaking the project that is intended to mitigate the adverse
480 impacts. The full cost shall include all direct and indirect
481 costs, as applicable, such as those for land acquisition, land
482 restoration or enhancement, perpetual land management, and
483 general overhead consisting of costs such as staff time,
484 building, and vehicles. The department or the water management
485 district may use a multiplier or percentage to add to other
486 direct or indirect costs to estimate general overhead.
487 Mitigation credit for such a donation may be given only to the
488 extent that the donation covers the full cost to the agency of
489 undertaking the project intended to mitigate the adverse
490 impacts. However, nothing herein may be construed to prevent the
491 department or a water management district from accepting a
492 donation representing a portion of a larger project, provided
493 that the donation covers the full cost of that portion and

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494 mitigation credit is given only for that portion. The department
495 or water management district may deviate from the full cost
496 requirements of this subparagraph to resolve a proceeding
497 brought pursuant to chapter 70 or a claim for inverse
498 condemnation. Nothing in this section may be construed to
499 require the owner of a private mitigation bank, permitted under
500 s. 373.4136, to include the full cost of a mitigation credit in
501 the price of the credit to a purchaser of said credit.

502 2. The department and each water management district shall
503 report by March 1 of each year, as part of the consolidated
504 annual report required by s. 373.036(7), all cash donations
505 accepted under subparagraph 1. during the preceding water
506 management district fiscal year for wetland mitigation purposes.
507 The report must exclude those contributions pursuant to s.
508 373.4137. The report must include a description of the endorsed
509 mitigation projects and, except for projects governed by s.
510 373.4135(6), must address, as applicable, success criteria,
511 project implementation status and timeframe, monitoring, long-
512 term management, provisions for preservation, and full cost
513 accounting.

514 3. If the applicant is unable to meet water quality
515 standards because existing ambient water quality does not meet
516 standards, the governing board or the department must consider
517 mitigation measures proposed by or acceptable to the applicant
518 that cause net improvement of the water quality in the receiving
519 body of water for those parameters which do not meet standards.

520 4. If mitigation requirements imposed by a local government
521 for surface water and wetland impacts of an activity regulated
522 under this part cannot be reconciled with mitigation

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523 requirements approved under a permit for the same activity
524 issued under this part, including application of the uniform
525 wetland mitigation assessment method adopted pursuant to
526 subsection (18), the mitigation requirements for surface water
527 and wetland impacts are controlled by the permit issued under
528 this part.

529 Section 6. This act shall take effect July 1, 2025.