

Committee Substitute for House Bill No. 2365

An act relating to wetlands mitigation; amending s. 373.083, F.S.; authorizing a water management district governing board to delegate its powers, duties, and functions; amending s. 373.4135, F.S.; requiring establishment and operation of mitigation projects under a memorandum of agreement, under certain conditions; providing requirements and exclusions; authorizing certain mitigation options for private single-family lots or homeowners; providing for notice; amending s. 373.4136, F.S.; revising provisions relating to size and characteristics of the mitigation service area; providing for use of regional watersheds to guide establishment of mitigation service areas; requiring satisfaction of cumulative impact considerations; amending s. 373.414, F.S.; revising reporting requirements relating to money donated as wetlands mitigation; specifying conditions under which proposed mitigation shall satisfy cumulative impact considerations for a regulated activity; requiring the Department of Environmental Protection and certain water management districts to adopt a single uniform wetland mitigation assessment method, by rule, by a specified date; directing local government use of the assessment method; providing conditions and procedures for use of the assessment method; deleting obsolete language; directing study by the Office of Program Policy Analysis and Government Accountability on mitigation cumulative impact considerations; directing the St. Johns River Water Management District to classify the Lake Jesup Basin as a separate and distinct basin for certain purposes, and to treat it as a vested basin; creating s. 373.200, F.S.; specifying the role of the Seminole Tribe Water Rights Compact; amending s. 20.255, F.S.; requiring the Governor to provide reasonable representation from all sections of the state in making appointments to the Environmental Regulation Commission; amending s. 287.042, F.S.; providing specific procurement powers for water management districts; providing an effective date.

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

Section 1. Subsection (5) is added to section 373.083, Florida Statutes, to read:

373.083 General powers and duties of the governing board.—In addition to other powers and duties allowed it by law, the governing board is authorized to:

(5) Execute any of the powers, duties, and functions vested in the governing board through a member or members thereof, the executive director, or other district staff as designated by the governing board. The governing board may establish the scope and terms of any delegation. However, if the governing board delegates the authority to take final action on permit applications under part II or part IV, or petitions for variances or waivers of permitting requirements under part II or part IV, the governing board shall

provide a process for referring any denial of such application or petition to the governing board to take final action. The authority in this subsection is supplemental to any other provision of this chapter granting authority to the governing board to delegate specific powers, duties, or functions.

Section 2. Subsections (6) and (7) are added to section 373.4135, Florida Statutes, to read:

373.4135 Mitigation banks and offsite regional mitigation.—

(6) An environmental creation, preservation, enhancement, or restoration project, including regional offsite mitigation areas, for which money is donated or paid as mitigation, that is sponsored by the department, a water management district, or a local government and provides mitigation for five or more applicants for permits under this part, or for 35 or more acres of adverse impacts, shall be established and operated under a memorandum of agreement. The memorandum of agreement shall be between the governmental entity proposing the mitigation project and the department or water management district, as appropriate. Such memorandum of agreement need not be adopted by rule. For the purposes of this subsection, one creation, preservation, enhancement, or restoration project shall mean one or more parcels of land with similar ecological communities that are intended to be created, preserved, enhanced, or restored under a common scheme.

(a) For any ongoing creation, preservation, enhancement, or restoration project and regional offsite mitigation area sponsored by the department, a water management district, or a local government, for which money was or is paid as mitigation, that was begun prior to the effective date of this subsection and has operated as of the effective date of this subsection, or is anticipated to operate, in excess of the mitigation thresholds provided in this subsection, the governmental entity sponsoring such project shall submit a draft memorandum of agreement to the water management district or department by October 1, 2000. The governmental entity sponsoring such project shall make reasonable efforts to obtain the final signed memorandum of agreement within 1 year after such submittal. The governmental entity sponsoring such project may continue to receive moneys donated or paid toward the project as mitigation, provided the requirements of this paragraph are met.

(b) The memorandum of agreement shall establish criteria that each environmental creation, preservation, enhancement, or restoration project must meet. These criteria must address the elements listed in paragraph (c). The entity sponsoring such project, or category of projects, shall submit documentation or other evidence to the water management district or department that the project meets, or individual projects within a category meet, the specified criteria.

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

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

2. A timeline for obtaining any required environmental resource permit.
 3. The environmental success criteria that the project must achieve.
 4. The monitoring and long-term management requirements that must be undertaken for the project.
 5. An assessment of the project in accordance with s. 373.4136(4)(a)-(i), until the adoption of the uniform wetland mitigation assessment method pursuant to s. 373.414(18).
 6. A designation of the entity responsible for the successful completion of the mitigation work.
 7. A definition of the geographic area where the project may be used as mitigation established using the criteria of s. 373.4136(6).
 8. Full cost accounting of the project, including annual review and adjustment.
 9. Provision and a timetable for the acquisition of any lands necessary for the project.
 10. Provision for preservation of the site.
 11. Provision for application of all moneys received solely to the project for which they were collected.
 12. Provision for termination of the agreement and cessation of use of the project as mitigation if any material contingency of the agreement has failed to occur.
- (d) A single memorandum of understanding may authorize more than one environmental creation, preservation, enhancement, or restoration project, or category of projects, as long as the elements listed in paragraph (c) are addressed for each project.
- (e) Projects governed by this subsection, except for projects established pursuant to subsection (7), shall be subject to the provisions of s. 373.414(1)(b)1.
- (f) The provisions of this subsection shall not apply to mitigation areas established to implement the provisions of s. 373.4137.
- (g) The provisions of this subsection shall not apply when the department, water management district, or local government establishes, or contracts with a private entity to establish, a mitigation bank permitted under s. 373.4136. The provisions of this subsection shall not apply to other entities that establish offsite regional mitigation as defined in this section and s. 373.403.
- (7) The department, water management districts, and local governments may elect to establish and manage mitigation sites, including regional off-site mitigation areas, or contract with permitted mitigation banks, to provide mitigation options for private single-family lots or homeowners. The

department, water management districts, and local governments shall provide a written notice of their election under this paragraph by United States mail to those individuals who have requested, in writing, to receive such notice. The use of mitigation options established under this subsection are not subject to the full-cost-accounting provision of s. 373.414(1)(b)1. To use a mitigation option established under this subsection, the applicant for a permit under this part must be a private, single-family lot or homeowner, and the land upon which the adverse impact is located must be intended for use as a single-family residence by the current owner. The applicant must not be a corporation, partnership, or other business entity. However, the provisions of this subsection shall not apply to other entities that establish offsite regional mitigation as defined in this section and s. 373.403.

Section 3. Subsection (6) of section 373.4136, Florida Statutes, is amended to read:

373.4136 Establishment and operation of mitigation banks.—

(6) MITIGATION SERVICE AREA.—~~The department or water management district shall establish a mitigation service area for each mitigation bank permit. The department or water management district shall notify and consider comments received on the proposed mitigation service area from each local government within the proposed mitigation service area that operates a wetlands regulatory program. Except as provided herein, mitigation credits may be withdrawn and used only to offset adverse impacts in the mitigation service area. The boundaries of the mitigation service area shall depend upon the geographic area where the mitigation bank could reasonably be expected to offset adverse impacts. A mitigation service area may be larger than the regional watershed if the mitigation bank provides exceptional ecological value such that adverse impacts outside the regional watershed could reasonably be expected to be adequately offset by the mitigation bank. A mitigation service area may be smaller than a regional watershed if adverse impacts throughout the regional watershed cannot reasonably be expected to be offset by the mitigation bank because of local ecological or hydrological conditions. Mitigation service areas may overlap, and mitigation service areas for two or more mitigation banks may be approved for a regional watershed.~~

(a) ~~In determining the boundaries of the mitigation service area extent to which a mitigation bank provides exceptional ecological value such that adverse impacts outside the regional watershed could reasonably be expected to be adequately offset by the mitigation bank, the department or the water management district shall consider the characteristics, size, and location of the mitigation bank and, at a minimum, the extent to which the mitigation bank:~~

1. Contributes to Will promote 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 s. 373.456 of 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; ~~and~~
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.

(b) The department and water management districts shall use regional watersheds to guide the establishment of mitigation service areas. Drainage basins established pursuant to s. 373.414(8) may be used as regional watersheds when they are established based on the hydrological or ecological characteristics of the basin. 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. 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.

~~(c)~~(b) Once a mitigation bank service area has been established by the department or a water management district for a mitigation bank, such service area shall be accepted by all water management districts, local governments, and the department.

~~(d)~~(e) If the requirements in s. 373.414(1)(b) and (8) 373.4135(1)(b) are met, the following projects or activities regulated under this part shall be eligible to use a mitigation bank, ~~regardless of whether notwithstanding the fact that they are not completely~~ located within the mitigation service area:

1. Projects with adverse impacts partially located within the mitigation service area.
2. Linear projects, such as roadways, transmission lines, distribution lines, pipelines, or railways.
3. Projects with total adverse impacts of less than 1 acre in size.

Section 4. Paragraph (b) of subsection (1) and subsections (8) and (18) of section 373.414, Florida Statutes, are amended, and subsection (19) is added to said section, to read:

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

(1) As part of an applicant's demonstration that an activity regulated under this part will not be harmful to the water resources or will not be inconsistent with the overall objectives of the district, the governing board or the department shall require the applicant to provide reasonable assurance that state water quality standards applicable to waters as defined in

s. 403.031(13) will not be violated and reasonable assurance that such activity in, on, or over surface waters or wetlands, as delineated in s. 373.421(1), is not contrary to the public interest. However, if such an activity significantly degrades or is within an Outstanding Florida Water, as provided by department rule, the applicant must provide reasonable assurance that the proposed activity will be clearly in the public interest.

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

1. The department or water management districts may accept the donation of money as mitigation only where the donation is specified for use in a duly noticed environmental creation, preservation, enhancement, or restoration project, endorsed by the department or the governing board of the water management district, which offsets the impacts of the activity permitted under this part. However, the provisions of this subsection shall not apply to projects undertaken pursuant to s. 373.4137 or chapter 378. Where a permit is required under this part to implement any project endorsed by the department or a water management district, all necessary permits must have been issued prior to the acceptance of any cash donation. After the effective date of this act, when money is donated to either the department or a water management district to offset impacts authorized by a permit under this part, the department or the water management district shall accept only a donation that represents the full cost to the department or water management district of undertaking the project that is intended to mitigate the adverse impacts. The full cost shall include all direct and indirect costs, as applicable, such as those for land acquisition, land restoration or enhancement, perpetual land management, and general overhead consisting of costs such as staff time, building, and vehicles. The department or the water management district may use a multiplier or percentage to add to other direct or indirect costs to estimate general overhead. Mitigation credit for such a donation shall be given only to the extent that the donation covers the full cost to the agency of undertaking the project that is intended to mitigate the adverse impacts. However, nothing herein shall be construed to prevent the department or a water management district from accepting a donation representing a portion of a larger project, provided that the donation covers the full cost of that portion and mitigation credit is given only for that portion. The department or water management district may deviate from the full cost requirements of this subparagraph to resolve a proceeding brought pursuant to chapter 70 or a claim for inverse condemnation. Nothing in this section shall be construed to require the owner of a private mitigation bank, permitted under s. 373.4136, to include the full cost of a mitigation credit in the price of the credit to a purchaser of said credit.

2. The department and each water management district shall report to the Executive Office of the Governor by January 31 ~~and July 31~~ of each year all cash donations accepted under subparagraph 1. during the preceding calendar year 6 months for wetland mitigation purposes, ~~which shall include a description of the endorsed mitigation projects.~~ The report shall exclude those contributions pursuant to s. 373.4137. The report shall include a description of the endorsed mitigation projects and, except for projects governed by s. 373.4135(6), shall address, as applicable, success criteria, project implementation status and timeframe, monitoring, long-term management, provisions for preservation, and full cost accounting.

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

4. If mitigation requirements imposed by a local government for surface water and wetland impacts of an activity regulated under this part cannot be reconciled with mitigation requirements approved under a permit for the same activity issued under this part, including application of the uniform wetland mitigation assessment method adopted pursuant to subsection (18), the mitigation requirements for surface water and wetland impacts shall be controlled by the permit issued under this part.

(8)(a) The governing board or the department, in deciding whether to grant or deny a permit for an activity regulated under this part shall consider the cumulative impacts upon surface water and wetlands, as delineated in s. 373.421(1), within the same drainage basin as defined in s. 373.403(9), of:

1.(a) The activity for which the permit is sought.

2.(b) Projects which are existing or activities regulated under this part which are under construction or projects for which permits or determinations pursuant to s. 373.421 or s. 403.914 have been sought.

3.(c) Activities which are under review, approved, or vested pursuant to s. 380.06, or other activities regulated under this part which may reasonably be expected to be located within surface waters or wetlands, as delineated in s. 373.421(1), in the same drainage basin as defined in s. 373.403(9), based upon the comprehensive plans, adopted pursuant to chapter 163, of the local governments having jurisdiction over the activities, or applicable land use restrictions and regulations.

(b) If an applicant proposes mitigation within the same drainage basin as the adverse impacts to be mitigated, and if the mitigation offsets these adverse impacts, the governing board and department shall consider the regulated activity to meet the cumulative impact requirements of paragraph (a). However, this paragraph may not be construed to prohibit mitigation outside the drainage basin which offsets the adverse impacts within the drainage basin.

(18) MITIGATION STUDIES.—The department and each water management district responsible for implementation of the environmental resource permitting program shall develop a uniform wetland mitigation assessment method no later than October 1, 2001. The department shall adopt the uniform wetland mitigation assessment method by rule no later than January 31, 2002. Once the department adopts the uniform wetland mitigation assessment method by rule, the uniform wetland mitigation assessment method shall be binding on the department, the water management districts, local governments, and any other governmental agencies and shall be the sole means to determine mitigation needed to offset adverse impacts and to award and deduct mitigation bank credits. A water management district and any other governmental agency subject to chapter 120 may apply the uniform wetland mitigation assessment method without the need to adopt it pursuant to s. 120.54. It shall be a goal of the department and water management districts that the uniform wetland mitigation assessment method developed be practicable for use within the timeframes provided in the permitting process and result in a consistent process for determining mitigation requirements. It shall be recognized that any such method shall require the application of reasonable scientific judgment. The uniform wetland mitigation assessment method must determine the value of functions provided by wetlands and other surface waters considering the current conditions of these areas, utilization by fish and wildlife, location, uniqueness, and hydrologic connection, in addition to the factors listed in s. 373.4136(4). The uniform wetland mitigation assessment method shall also account for the expected time-lag associated with offsetting impacts and the degree of risk associated with the proposed mitigation. The uniform wetland mitigation assessment method shall account for different ecological communities in different areas of the state. In developing the uniform wetland mitigation assessment method, the department and water management districts shall consult with approved local programs under s. 403.182 which have an established wetland mitigation program. The department and water management districts shall consider the recommendations submitted by such approved local programs, including any recommendations relating to the adoption by the department and water management districts of any uniform wetland mitigation methodology that has been adopted and used by an approved local program in its established wetland mitigation program. Environmental resource permitting rules may establish categories of permits or thresholds for minor impacts under which the use of the uniform wetland mitigation assessment method will not be required. The application of the uniform wetland mitigation assessment method is not subject to s. 70.001. In the event the rule establishing the uniform wetland mitigation assessment method is deemed to be invalid, the applicable rules related to establishing needed mitigation in existence prior to the adoption of the uniform wetland mitigation assessment method, including those adopted by a county which is an approved local program under s. 403.182, and the method described in paragraph (b) for existing mitigation banks, shall be authorized for use by the department, water management districts, local governments, and other state agencies.

(a) In developing the uniform wetland mitigation assessment method, the department shall seek input from the United States Army Corps of

Engineers in order to promote consistency in the mitigation assessment methods used by the state and federal permitting programs.

(b) An entity which has received a mitigation bank permit prior to the adoption of the uniform wetland mitigation assessment method shall have impact sites assessed, for the purpose of deducting bank credits, using the credit assessment method, including any functional assessment methodology, which was in place when the bank was permitted; unless the entity elects to have its credits redetermined, and thereafter have its credits deducted, using the uniform wetland mitigation assessment method.

~~(a) For impacts resulting from activities regulated under this part, the Legislature finds that successful mitigation performed by the public and private sectors has helped to preserve the state's natural resources.~~

~~(b) The Office of Program Policy Analysis and Government Accountability shall study the mitigation options as defined by paragraph (1)(b), implemented from 1994 to the present, and issue a report by January 31, 2000. The study shall consider the effectiveness and costs of the current mitigation options in offsetting adverse effects to wetlands and wetland functions, including the application of cumulative impact considerations, and identify, as appropriate, recommendations for statutory or rule changes to increase the effectiveness of mitigation strategies.~~

(19) The Office of Program Policy Analysis and Government Accountability shall study the cumulative impact consideration required by s. 373.414(8) and issue a report by July 1, 2001. The study shall address the justification for the cumulative impact consideration, changes that can provide clarity and certainty in the cumulative impact consideration, and whether a practicable, consistent, and equitable methodology can be developed for considering cumulative impacts within the environmental resource permitting program.

Section 5. Under its Environmental Resource Permit program, the St. Johns River Water Management District shall delineate the Lake Jesup basin as a separate and distinct drainage basin and regional watershed as shown in Figure 12.2.8-1 and Appendix M, of the St. Johns River Water Management District's Applicants Handbook: Management and Storage of Surface Waters, incorporated by reference in Rule 40C-4.091, Florida Administrative Code, effective as of May 1, 2000.

Section 6. Section 373.200, Florida Statutes, is created to read:

373.200 Seminole Tribe Water Rights Compact.—Pursuant to the provisions of s. 285.165, the South Florida Water Management District is authorized to act in accordance with the Seminole Tribe Water Rights Compact incorporated by reference therein.

Section 7. Subsection 10 of section 20.255, Florida Statutes, is amended to read:

20.255 Department of Environmental Protection.—There is created a Department of Environmental Protection.

(10) There is created as a part of the Department of Environmental Protection an Environmental Regulation Commission. The commission shall be composed of seven residents of this state appointed by the Governor, subject to confirmation by the Senate. In making appointments, the Governor shall provide reasonable representation from all sections of the state. ~~The commission shall include one, but not more than two, members from each water management district who have resided in the district for at least 1 year, and the remainder shall be selected from the state at large.~~ Membership shall be representative of agriculture, the development industry, local government, the environmental community, lay citizens, and members of the scientific and technical community who have substantial expertise in the areas of the fate and transport of water pollutants, toxicology, epidemiology, geology, biology, environmental sciences, or engineering. The Governor shall appoint the chair, and the vice chair shall be elected from among the membership. The members serving on the commission on July 1, 1995, shall continue to serve on the commission for the remainder of their current terms. All appointments thereafter shall continue to be for 4-year terms. The Governor may at any time fill a vacancy for the unexpired term. The members of the commission shall serve without compensation, but shall be paid travel and per diem as provided in s. 112.061 while in the performance of their official duties. Administrative, personnel, and other support services necessary for the commission shall be furnished by the department.

Section 8. Paragraph (c) of subsection (2) of section 287.042, Florida Statutes, is amended to read:

287.042 Powers, duties, and functions.—The department shall have the following powers, duties, and functions:

(2)

(c) Any person who files an action protesting a decision or intended decision pertaining to contracts administered by the department, a water management district, or a state agency pursuant to s. 120.57(3)(b) shall post with the department, the water management district, or the state agency at the time of filing the formal written protest a bond payable to the department, the water management district, or state agency in an amount equal to 1 percent of the department's, the water management district's or the state agency's estimate of the total volume of the contract or \$5,000, whichever is less, which bond shall be conditioned upon the payment of all costs which may be adjudged against him or her in the administrative hearing in which the action is brought and in any subsequent appellate court proceeding. For protests of decisions or intended decisions of the department pertaining to agencies' requests for approval of exceptional purchases, the bond shall be in an amount equal to 1 percent of the requesting agency's estimate of the contract amount for the exceptional purchase requested or \$5,000, whichever is less. In lieu of a bond, the department, the water management district, or state agency may, in either case, accept a cashier's check or money order in the amount of the bond. If, after completion of the administrative hearing process and any appellate court proceedings, the water management district or agency prevails, it shall recover all costs and charges which shall be included in the final order or judgment, excluding attorney's

fees. This section shall not apply to protests filed by the Minority Business Advocacy and Assistance Office. Upon payment of such costs and charges by the person protesting the award, the bond, cashier's check, or money order shall be returned to him or her. If the person protesting the award prevails, he or she shall recover from the agency or water management district, all costs and charges which shall be included in the final order of judgment, excluding attorney's fees.

Section 9. This act shall take effect upon becoming a law.

Approved by the Governor May 17, 2000.

Filed in Office Secretary of State May 17, 2000.