

CHAPTER 2024-144

Committee Substitute for Committee Substitute for Committee Substitute for Senate Bill No. 1532

An act relating to mitigation; amending s. 373.4134, F.S.; revising legislative findings; defining the term “applicant”; revising the entities to whom and purposes for which water quality enhancement credits may be sold; requiring the Department of Environmental Protection or water management districts to authorize the sale and use of such credits to applicants, rather than to governmental entities, to address adverse water quality impacts of certain activities; revising construction; amending s. 373.4135, F.S.; revising legislative findings; providing legislative intent; defining the term “local government”; providing applicability; providing circumstances under which basins are considered to be credit-deficient basins; authorizing local governments with land in credit-deficient basins to consider bids from private-sector applicants to establish mitigation banks on such lands; requiring use agreements that meet certain requirements for such mitigation banks; prohibiting the use of public funds to fund financial assurances for certain purposes; providing that specified factors may not increase the uniform mitigation assessment method location factor assessment and scoring value in determining the number of mitigation bank credits to be awarded; providing that credit deficiency is confirmed at the time of filing a permit application; authorizing the department, in coordination with the water management districts, to adopt rules; reenacting s. 403.9332(1)(a) and (c), F.S., relating to mitigation and enforcement, to incorporate the amendments made to s. 373.4135, F.S., in references thereto; providing an effective date.

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

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

373.4134 Water quality enhancement areas.—

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

(b) An expansion of existing authority for regional treatment to include offsite compensatory treatment in water quality enhancement areas to make enhancement credits available for purchase by an applicant or a governmental entity entities to address impacts regulated under ss. 373.403-373.443 ~~this part~~ is needed.

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

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

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

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

(3) WATER QUALITY ENHANCEMENT AREAS.—

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

(c) A water quality enhancement area must be used to address contributions of one or more pollutants or other constituents in the watershed, basin, sub-basin, targeted restoration area, waterbody, or section of waterbody, as determined by the department, in which the water quality enhancement area is located that do not meet applicable state water quality standards or environmental resource permit performance standards criteria.

(7) ENHANCEMENT CREDITS.—

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

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

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

373.4135 Mitigation banks and offsite regional mitigation.—

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

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

(b) The Legislature recognizes the importance of mitigation banks as an appropriate and allowable mitigation alternative to permittee-responsible mitigation. However, the Legislature also recognizes that certain timing and geographical constraints could result in the unavailability of mitigation bank credits for a certain project upon completion of the project's application. If state and federal mitigation credits are not available to offset the adverse impacts of a project, a local government may allow permittee-responsible mitigation consisting of the restoration or enhancement of lands purchased and owned by a local government for conservation purposes, and such

mitigation must conform to the permitting requirements of s. 373.4136. Except when a local government has allowed a public or private mitigation project to be created on land it has purchased for conservation purposes pursuant to this paragraph, a governmental entity may not create or provide mitigation for a project other than its own unless the governmental entity uses land that was not previously purchased for conservation and unless the governmental entity provides the same financial assurances as required for mitigation banks permitted under s. 373.4136. This paragraph does not apply to:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

conservation easement or substantially similar recordable instrument acceptable to the permitting agency does not already exist; and

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

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

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

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

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

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

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

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

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

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

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

403.9332 Mitigation and enforcement.—

(1)(a) Any area in which 5 percent or more of the trimmed mangrove trees have been trimmed below 6 feet in height, except as provided in s. 403.9326(1)(c), (d), (f), (g), and (h), destroyed, defoliated, or removed as a result of trimming conducted under s. 403.9326 or s. 403.9327 must be restored or mitigated. Restoration must be accomplished by replanting mangroves, in the same location and of the same species as each mangrove destroyed, defoliated, removed, or trimmed, to achieve within 5 years a canopy area equivalent to the area destroyed, removed, defoliated, or trimmed; or mitigation must be accomplished by replanting offsite, in areas suitable for mangrove growth, mangroves to achieve within 5 years a canopy area equivalent to the area destroyed, removed, defoliated, or trimmed. Where all or a portion of the restoration or mitigation is not practicable, as determined by the department or delegated local government, the impacts resulting from the destruction, defoliation, removal, or trimming of the mangroves must be offset by donating a sufficient amount of money to offset the impacts, which must be used for the restoration, enhancement, creation, or preservation of mangrove wetlands within a restoration, enhancement, creation, or preservation project approved by the department or delegated local government; or by purchasing credits from a mitigation bank created under s. 373.4135 at a mitigation ratio of 2-to-1 credits to affected area. The donation must be equivalent to the cost, as verified by the department or delegated local government, of creating mangrove wetlands at a 2-to-1, created versus affected ratio, based on canopy area. The donation may not be less than \$4 per square foot of created wetland area.

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

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

Approved by the Governor May 6, 2024.

Filed in Office Secretary of State May 6, 2024.