

STORAGE NAME: hb2365.ep
DATE: April 14, 2000

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
ENVIRONMENTAL PROTECTION
ANALYSIS**

BILL #: HB 2365
RELATING TO: Wetlands Mitigation
SPONSOR(S): Representative Alexander
TIED BILL(S): None

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) ENVIRONMENTAL PROTECTION
 - (2) GENERAL GOVERNMENT APPROPRIATIONS
 - (3)
 - (4)
 - (5)
-

I. SUMMARY:

(**Note:** This bill analysis is drawn to the strike-everything-after-the-enacting clause amendment to be offered by Rep. Alexander in the Environmental Protection Committee.)

HB 2365 implements many of the recommendations of a March 2000 report by the Office of Program Policy Analysis and Governmental Accountability (OPPAGA) regarding the utilization and success of wetlands mitigation in Florida. *Policy Review: Wetlands Mitigation Report No. 99-40* concluded that it is difficult to determine whether Florida's policy of "no net loss of wetlands function" is being followed because of the lack of a statewide, uniform methodology establishing mitigation requirements. OPPAGA's research indicates that the Department of Environmental Protection (DEP) and the water management districts (WMDs) can not provide reasonable assurances that the loss of wetland functions is being offset by creation, restoration, enhancement or preservation of other wetlands. The report also indicates that there is a lack of accountability and documentation regarding the data collected by DEP and the WMDs.

The legislation directs DEP and the WMDs to develop, by October 1, 2001, a uniform functional assessment methodology for determining the appropriate mitigation requirements to offset adverse impacts of activities. DEP must adopt the methodology by rule no later than January 31, 2002; the WMDs and other governmental entities who plan to use it don't have to first adopt it be rule. Implementation of the new method shall not trigger a s. 70.001, F.S., action. The state agencies also are directed to consult with the federal agencies, who already use a functional assessment to determine mitigation, in developing Florida's method so that the two will be consistent.

In addition, HB 2365 requires more accountability from DEP, the WMDs and local governments in how they spend the funds they receive as donations from permit applicants for mitigation. These entities would have to enter into memoranda of agreement specifying the particulars of the projects for which these funds are to be used, and demonstrating that the mitigation will be successful.

Finally, HB 2365 directs DEP and the WMDs to develop less-expensive mitigation options for single-family property owners, and requires OPPAGA to take a more-in-depth look at the issue of how best to mitigate cumulative impacts.

HB 2365 has a minimal fiscal impact on governmental entities, but potential financial benefits for the private sector. It raises no apparent constitutional or legal issues.

The legislation would take effect upon becoming a law.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|------------------------------|-----------------------------|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

B. PRESENT SITUATION:

Development of wetlands mitigation as a regulatory tool

In general terms, the term "wetlands" applies to land areas saturated or flooded with groundwater or surface waters, at least part of the year, and which have particular soils and vegetation that has adapted to thrive in the wet conditions. Florida's regulatory definition of "wetlands" is much more specific:

"For the sole purpose of serving as the basis for the unified statewide methodology adopted pursuant to s. 373.421(1), as amended, "wetlands" means those areas that are inundated or saturated by surface water or groundwater at a frequency and a duration sufficient to support, and under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soils. Soils present in wetlands generally are classified as hydric or alluvial, or possess characteristics that are associated with reducing soil conditions. The prevalent vegetation in wetlands generally consists of facultative or obligate hydrophytic macrophytes that are typically adapted to areas having soil conditions described above. These species, due to morphological, physiological, or reproductive adaptations, have the ability to grow, reproduce, or persist in aquatic environments or anaerobic soil conditions. Florida wetlands generally include swamps, marshes, bayheads, bogs, cypress domes and strands, sloughs, wet prairies, riverine swamps and marshes, hydric seepage slopes, tidal marshes, mangrove swamps and other similar areas. Florida wetlands generally do not include longleaf or slash pine flatwoods with an understory dominated by saw palmetto. Upon legislative ratification of the methodology adopted pursuant to s. 373.421(1), as amended, the limitation contained herein regarding the purpose of this definition shall cease to be effective." [Section 373.019(22), F.S.]

In the 1970s, as scientific research confirmed the benefits of wetlands for flood control, water quality, aquifer recharge, and wildlife habitat, the federal and state governments enacted laws to regulate activities within wetlands. Congress passed three federal laws that included requirements for obtaining permits from the U.S. Army Corps of Engineers to dredge, fill or otherwise disturb wetlands. Among these laws was Section 404 of the U.S. Clean Water, which remains applicable to the most activities proposed in wetlands. Florida, meanwhile, passed laws in Chapter 253 and Chapter 403, F.S., giving the state's lead environmental agency authority to issue dredge-and-fill permits for proposed projects adjacent to surface water bodies, in mangrove stands, on sovereign submerged lands, or in

other “waters of the state.” In general, the state’s jurisdiction ended at the landward extent of these waters. Later, after the water management districts (WMDs) were created and fully functional, Chapter 373, F.S., gave these agencies authority to issue “management and storage of surface water” (MSSW) permits regulating activities in wetlands, as well as dredge-and-fill permits for projects proposed to impact isolated wetlands, which aren’t connected to surface waters and thus were outside of the state’s jurisdiction at the time.

By 1979, state and WMD regulators were regularly including mitigation of adverse impacts to wetlands as a condition of these permits, although there was no statutory recognition of a statewide mitigation policy. Creation of wetlands -- on or adjacent to a mining or development project -- was the typical type of mitigation attempted.

Complaints by property owners that the wetlands permitting laws were confusing and duplicative, and by regulators and environment advocates that the laws were ineffective, spurred the Legislature in 1984 to pass the Warren S. Henderson Wetlands Protection Act (Chapter 84-79, Laws of Florida). The Henderson Act consolidated the state’s wetlands permitting authority within chapter 403, F.S., and, among other things, expanded the criteria by which the state could evaluate project proposals and allowed mitigation considerations. The next significant change in wetlands permitting law occurred in 1993, when the Legislature merged the state’s dredge-and-fill permitting program with the WMDs’ MSSW program, to create the “Environmental Resource Permit” (ERP) program. Among the goals of the ERP program (chapter 93-213, Laws of Florida) was to create consistent wetlands regulations, including a definition of “wetlands” applicable throughout the state. DEP and four of the five WMDs operate the ERP program; a hybrid wetlands regulatory program solely within the Northwest Florida WMD is administered by DEP.

Over the years, as wetlands law has changed, so has Florida’s wetlands protection policy: from “no net loss of wetlands” to “no net loss of wetland functions.”

The beginning of mitigation banking

In the early 1990s, studies compiled by the former Department of Environmental Regulation (now DEP), the South Florida WMD and the St. Johns River WMD revealed mixed success of the mitigation projects associated with wetlands permitting. Lack of compliance with the mitigation requirements, as well as poor siting or design of the projects, were common factors in the failures.

Federal and state agency staff, environmental advocates and property owners began to reassess the effectiveness of on-site mitigation, in light of these studies. In addition, there was a growing interest in regional approaches to environmental protection. For example, a 1988 report by the National Wetlands Policy Forum championed the establishment of “mitigation banks” to which wetland-impact permittees could contribute as a way to satisfy their mitigation requirements.

“Mitigation banks” are parcels of land where wetlands are restored, enhanced, preserved or created. For their efforts, bank owners (called bankers) are awarded “credits” which they may use for their personal wetlands development projects, or may sell to other ERP applicants who have to provide mitigation as a permit condition. The credits are supposed to represent the ecological value of creating, restoring, enhancing or preserving a wetland.

In 1991, the Florida Environmental Regulation Commission, which oversees the development of state environmental rules, created a Mitigation Banking Task Force, comprised of a cross-section of interest groups. The task force concluded that mitigation

banks were a feasible and acceptable alternative, as long as the emphasis was on wetlands restoration, enhancement or preservation, and not creation. The same 1993 legislation that created the ERP program also directed DEP and the WMDs to adopt rules by January 1, 1994, governing the use, establishment and permitting of mitigation banks. The agencies met their deadline; chapter 62-342, Florida Administrative Code, details the criteria for establishing a mitigation bank, the process by which mitigation credits are awarded, how a bank's service area is drawn, and each bank's financial responsibility requirements.

Mitigation banks also must obtain a federal Mitigation Banking Instrument before they can begin selling credits. Mitigation bank applicants are encouraged to meet with the joint state-federal Interagency Mitigation Bank Review team before submitting their paperwork for permits, in order to expedite and streamline the permitting process. However, because state and federal mitigation regulations have some differences -- most crucial among them how credits are "valued" -- some mitigation banks in Florida have to keep two ledgers, one reflecting their available credits under their state permit and the other reflecting their federally approved credits.

As of February 2000, 24 mitigation banks in Florida have received their state construction permits, and six others have received conceptual permits. An estimated 10 of the banks with state construction permits have some form of federal authorization to sell mitigation credits.

Lingering Mitigation Issues

Under Florida's mitigation banking rule, one mitigation bank credit is equal to 1 acre of successful onsite wetlands creation. However, DEP and the WMDs, under their general wetlands permitting rules, determine the amount of mitigation required to offset adverse impacts by use a ratio approach that takes into account such factors as the quality of the wetland functions being impacted and the expected success of the proposed mitigation. The ratios, expressed as acres mitigated:acres impacted, have broad ranges:

- o For created or restored marshes, the ratios vary from 1.5 acres mitigated for every 1 acre impacted, to 4 acres mitigated for every 1 acre impacted. This is expressed as 1.5:1 to 4:1.
- o For wetland enhancement, the ratios range from 4:1 to 20:1.
- o For wetlands preservation, the ratios range from 10:1 to 60:1.

The ranges are intended to capture the quality of the wetlands impacted and wetlands to be mitigated, the location of the mitigation, the likelihood of success, and the time it is expected for the created, restored or enhanced wetlands to begin functioning at a higher level. DEP and the WMD staff say they use their best professional judgment and experience when applying the ratios.

The federal guidance memorandum used by the U.S. Army Corps of Engineers focuses on a science-based functional assessment of the anticipated improvements to the wetlands by the bank, and assign credits on that basis. The Corps uses the same formula when determining mitigation requirements of applicants seeking to dredge and fill in wetlands. The Corps' functional assessment approach includes a time factor of up to 10 years for

when the mitigated wetland's functions are expected to replace those that were destroyed, and a risk factor anticipating possible failure of the mitigation.

For the last four years, the Corps, DEP, the WMDs and other interested parties have been working to develop a wetlands mitigation assessment that can be consistently applied.

Consistency in the application of mitigation requirements, in general, is an issue among the regulatory agencies, private land owners, development interests, environmental advocates, and mitigation bankers. Not only are there regional differences in how the agencies put numbers to mitigation requirements, critics say, but there also appear to be differences in application among the mitigation options -- that those applicants who buy credits from entrepreneurial banks aren't treated the same as those who contribute to a government-owned bank or restoration project, or those who do their own mitigation.

OPPAGA Findings and Recommendations

Legislation filed for the 1999 session sought to address a number of wetlands mitigation issues, including the lack of consistency in application of mitigation requirements, the extent of bank service areas, and the role of banks in ameliorating adverse cumulative impacts of wetlands projects. Sufficient consensus wasn't reached on all the issues, so the Legislature decided to direct OPPAGA to research a number of mitigation issues and report back by January 1, 2000. OPPAGA was to study the effectiveness of current mitigation options in offsetting adverse impacts to wetlands and their functions; evaluate the costs of these options; and to identify potential statutory or rule changes that would increase the success of these mitigation options.

OPPAGA's *Policy Review: Wetland Mitigation, Report No. 99-40 (March 2000)* made the following findings and recommendations:

- o While regulatory agencies have shown improvement in implementing state wetlands policies, limitations and inconsistencies in methodology and data systems prevents a more accurate and complete evaluation. OPPAGA recommends statutory direction to DEP and the WMDs requiring the reporting of specific information and consolidating it into a central database.
- o Compliance with mitigation requirements of ERPs has increased in recent years.
- o The current use of mitigation ratios does not provide a clear picture of the extent to which mitigation activities have offset the loss of wetland functions, because the ratios do not quantitatively measure wetlands functions at the mitigation site or the impact site. The use of ratios also is inconsistently applied in the state. OPPAGA recommends that DEP and the WMDs develop and adopt a functional assessment methodology that would allow for a more accurate measurement of wetlands functions lost and gained.
- o Since most public offsite regional mitigation projects do not require a permit for the work to be performed, there isn't the same level of accountability -- as there is with private mitigation projects -- that the mitigation is appropriate or successful. OPPAGA recommends that the Legislature require a memorandum of agreement for public offsite regional mitigation projects. For example, DEP would evaluate and approve a memorandum of agreement for a WMD-sponsored mitigation project that specifies the responsibilities of each party involved in the project and the minimum standards governing the use and operation of the mitigated area.

- o Mitigation performed outside the drainage basin where the adverse impacts occurred requires the permittee to perform an in-depth cumulative impact assessment. However, because the definition of “drainage basin” is open to varying interpretations, the cumulative impact requirements may not be consistently applied. OPPAGA recommends three options to address this problem. The options range from further research, to enforcing a consistent delineation of drainage basins and specifying the types of cumulative impacts that must be offset inside a specific drainage basin, along with the types of impacts that can be offset even though the mitigation occurs outside the basin.
- o Mitigation is becoming more expensive, particularly for single-family landowners. OPPAGA recommends that the DEP, the WMDs and local governments create for this class opportunities for off-site mitigation that don't have to adhere to the full-cost accounting and other requirements of other options.

C. EFFECT OF PROPOSED CHANGES:

HB 2365 implements many of the findings and recommendations of the March 2000 OPPAGA report. The legislation:

- o Requires DEP, the WMDs and local governments to enter into memoranda of agreement when they establish an offsite environmental restoration project, to be financed by mitigation cash donations from at least five ERP applicants, or which will offset at least 35 acres of adverse impacts to wetlands. An agency involved in this type of project cannot give itself a memorandum of agreement. For example, if a local government is the sponsor, it must apply to the appropriate WMD or DEP; if DEP is the sponsor, it must apply to the appropriate WMD, while a WMD would apply to DEP.

These memoranda of agreement must specify: the location of the project; the type of mitigation and restoration planned; how the donations or payments of money will be spent; the total costs of the project; the time-frame of the project; and how the project will demonstrate its success at mitigation.

For projects that were begun prior to the effective date of HB 2365, the agencies can continue to accept funds donated or paid toward the mitigation efforts, if they apply for a memorandum of agreement by October 1, 2000, and proceed with getting the agreement approved within one year. These provisions do not apply when the agencies establish a mitigation bank pursuant to s. 373.4136, F.S. or contract with a private mitigation bank for assistance with the project, nor to other entities participating in offsite regional mitigation.

- o Allows DEP, the WMDs and local governments to establish environmental restoration projects, that don't need to comply with the full-cost accounting provisions of s. 373.414(1)(b)1., F.S., to be used to mitigate adverse wetlands impacts caused by single-family homeowners on their own property. Specifies that the “single-family homeowner” shall not be a corporation, partnership or other business entity.
- o Requires DEP and the WMDs to develop by October 1, 2001, a uniform wetlands mitigation assessment methodology. This methodology must determine the value of functions provided by wetlands and other surface waters, considering the current conditions of those areas, the utilization by fish and wildlife, their location, uniqueness, and hydrologic connection, in addition to other factors, such as time lag and the degree of risk that it will be successful.

The methodology must be adopted by rule no later than January 31, 2002. Once in place, it will replace all other mitigation methodologies; however, the agencies may develop minimum thresholds or categories of permits, where minor wetlands impacts need not be subject to this functional assessment. Mitigation banks in existence prior to the adoption of the functional assessment have the option to ask their credits be re-evaluated under the new methodology. The application of the uniform wetlands mitigation assessment methodology shall not be subject to s. 70.001, F.S., the Bert J. Harris Private Property Rights Act.

DEP and the other agencies must seek input from the Corps of Engineers, in order to promote consistency in the mitigation methodologies used by the federal and state agencies.

- o Directs DEP and the WMDs to use regional watersheds to guide the establishment of mitigation service areas. Drainage basins also may be used if they are established based on their hydrologic or ecological characteristics.
- o Specifies that a mitigation bank's mitigation service area may extend beyond the regional watershed in which the bank is located, when the bank has the ability to offset adverse impacts outside that watershed. Also specifies that a bank's mitigation service area may be smaller than the regional watershed if the bank cannot reasonably be expected to offset the adverse impacts.
- o Amends current mitigation reporting requirements of the DEP and the WMDs to clarify the types of projects for which cash donations must be listed and the information to be detailed. Cash donations from the state Department of Transportation, used to mitigate adverse wetlands impacts caused by road and bridge projects, would no longer be included in this report because they already are documented in other reports.
- o Directs OPPAGA to study in greater detail the cumulative impact issues related to mitigation banking, and submit a report by July 1, 2001. The bill deletes the language requiring the recently completed study, along with other obsolete provisions.

D. SECTION-BY-SECTION ANALYSIS:

Section 1: Amends s. 373.4135, F.S., to require DEP, the WMDs and local governments to enter into memoranda of agreement for public offsite environmental restoration projects, if the project has received donations from at least five ERP applicants or if the project will offset at least 35 acres of adverse wetlands impacts. Allows ongoing projects to continue, as long as the affected entities enter into memoranda of agreement within a certain time frame. Specifies information to be included in the agreement. Specifies exceptions. Allows governmental entities to create offsite mitigation options for single-family residential property owners that don't include full-cost accounting.

Section 2: Amends s. 373.4136, F.S., to direct DEP and the WMDs to use regional watersheds, or certain drainage basins, when delineating mitigation service areas. Clarifies when a mitigation service area would be extended beyond the regional watershed. Corrects cross-references. Deletes obsolete language.

Section 3: Amends s. 373.414, F.S., to clarify DEP and WMD mitigation reporting requirements. Directs DEP and the WMDs to develop a uniform wetland mitigation assessment method, relying on functional assessments for wetlands. Specifies what the new methodology should address. Gives DEP rulemaking authority. Specifies due dates for

methodology and the implementing rule. Exempts WMDs and other government agencies subject to the Administrative Procedures Act from having to adopt the methodology as rule, pursuant to s. 120.54, F.S., before they can use it. Exempts the rule from Chapter 70, F.S., considerations. Allows mitigation banks to seek re-evaluation of the value of their credits, under the new methodology. Directs OPPAGA to research in more detail the cumulative impacts issues related to mitigation. Deletes obsolete language.

Section 4: Provide that this act shall take effect upon becoming a law.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

Minimal. DEP will incur some costs to develop and implement the new functional assessment methodology. OPPAGA also will likely incur costs to do the follow up report on cumulative impacts, as they relate to mitigation, which their budget will have to absorb.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

Minimal. As with DEP, the WMDs will incur some costs to develop and implement the new functional assessment methodology.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Indeterminate, but likely positive. Single-family homeowners wishing to build on their individual lots, or to otherwise improve their property, and would be required to mitigate for adverse wetlands impacts, should have access to a lower-cost, offsite mitigation option sponsored by their local government, DEP or a WMD. Indeed, all private entities who are required to perform or pay for mitigation, in order to obtain ERPs for their projects, should benefit from the statewide regulatory consistency of a uniform measure determining mitigation requirements. The mitigation bankers also are expected to benefit if the new functional assessment methodology either makes their existing credits more valuable, in terms of offsetting adverse wetlands impacts, or simply results in more credits assigned to their ledgers.

D. FISCAL COMMENTS:

None.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

HB 2365 does not require counties or municipalities to expend funds, or to take actions requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

HB 2365 does not reduce the revenue-raising authority of counties or municipalities.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

HB 2365 does not reduce the amount of state tax shared with counties and municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

None.

B. RULE-MAKING AUTHORITY:

HB 2365 gives DEP the authority to adopt by rule a uniform functional assessment methodology by January 31, 2002. Then, the WMDs and any other governmental entity subject to chapter 120, F.S., may apply the methodology, without having to adopt it as a rule pursuant to s. 120.54, F.S.

C. OTHER COMMENTS:

HB 2365 specifies that the application of the uniform wetland mitigation assessment method is not subject to s. 70.001, F.S. The entities which took the lead in drafting the bill - the mitigation banking industry, the WMDs and DEP -- have said the rule is a refinement of existing rules and is expected to provide positive benefits for property owners, so should not be subject to the Bert J. Harris Private Property Rights Act.

Representatives of the Florida Chamber of Commerce, the Florida Land Council, Florida Cattlemen's Association and other groups have reviewed this language and have told the bill's sponsor they do not oppose it.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

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As mentioned in the "Summary" section, a strike-everything amendment will be offered at the Environmental Protection Committee meeting on Wednesday, April 19, 2000.

VII. SIGNATURES:

COMMITTEE ON ENVIRONMENTAL PROTECTION:

Prepared by:

Staff Director:

Joyce Pugh

Wayne Kiger