

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: The Professional Staff of the Committee on Environment and Natural Resources

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BILL: SB 492

INTRODUCER: Senator McClain

SUBJECT: Mitigation Banking

DATE: March 10, 2025

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Barriero	Rogers	EN	<b>Pre-meeting</b>
2.			AEG	
3.			FP	

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**I. Summary:**

SB 492 provides a standardized schedule for releasing mitigation credits and removes the requirement that the Department of Environmental Protection (DEP) and water management districts determine the credit release schedule on a case-by-case basis pursuant to statutorily enumerated factors. The bill provides that credits must be released as follows:

- 30 percent upon recording a conservation easement and establishing financial assurances (or 100 percent for preservation-only banks).
- 30 percent after completing initial construction activities.
- 20 percent upon meeting interim performance criteria.
- 20 percent upon meeting final success criteria.

Additionally, the bill allows freshwater wetland creation credits to be released earlier, after initial construction success criteria are met.

The bill also allows project applicants to use mitigation credits from outside a mitigation service area when an insufficient number or type of credits are available within the impacted area. DEP or a water management district must verify the lack of appropriate credits within the regional watershed before approving credits outside the service area. The bill provides that the following multipliers would apply to credits outside the service area:

- 1.5 multiplier if credits are from an adjacent regional watershed.
- An additional 0.5 multiplier for each watershed beyond the adjacent one.
- An additional 0.75 multiplier for use of out-of-kind mitigation which does not match the impacted wetland or surface water type.

The bill also requires mitigation banks to submit annual reports detailing the number and type of available credits for sale. DEP and water management districts must compile these reports and provide an annual assessment of the state's mitigation banking system to the Legislature.

## II. Present Situation:

### Environmental Resource Permits (ERP)

Part IV of chapter 373, F.S., and chapter 62-330 of the Florida Administrative Code regulate the statewide ERP program, which governs the construction, alteration, operation, maintenance, repair, abandonment, and removal of stormwater management systems, dams, impoundments, reservoirs, appurtenant works, and other works such as docks, piers, structures, dredging, and filling located in, on, or over wetlands or other surface waters.<sup>1</sup> ERP applications are processed by either the Department of Environmental Protection (DEP) or one of Florida's five water management districts.<sup>2</sup>

Permit applicants must demonstrate that the regulated activity will not be harmful to the water resources or will not be inconsistent with the overall objectives of the water management district.<sup>3</sup> Applicants must provide reasonable assurance that state water quality standards will not be violated and that the proposed activity is not contrary to the public interest.<sup>4</sup> If a proposed activity significantly degrades or is within an Outstanding Florida Water,<sup>5</sup> the applicant must provide reasonable assurance that the proposed activity will be clearly in the public interest.<sup>6</sup> In determining whether an activity is contrary to the public interest or clearly in the public interest, the water management district or DEP must consider and balance the following criteria:

- Whether the activity will adversely affect the public health, safety, or welfare or the property of others;
- Whether the activity will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats;
- Whether the activity will adversely affect navigation or the flow of water or cause harmful erosion or shoaling;
- Whether the activity will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity;
- Whether the activity will be of a temporary or permanent nature;
- Whether the activity will adversely affect or will enhance significant historical and archaeological resources; and
- The current condition and relative value of functions being performed by areas affected by the proposed activity.<sup>7</sup>

If the applicant is unable to otherwise meet this criteria, DEP or the governing board of a water management district, in deciding to grant or deny a permit, must consider measures proposed by

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<sup>1</sup> Fla. Admin. Code R. 62-330.010(2).

<sup>2</sup> DEP, *Environmental Resource Permitting Coordination, Assistance, Portals*, [https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/environmental-resource-permitting#:~:text=The%20Environmental%20Resource%20Permit%20\(ERP,alteration%20of%20surface%20water%20flow](https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/environmental-resource-permitting#:~:text=The%20Environmental%20Resource%20Permit%20(ERP,alteration%20of%20surface%20water%20flow) (last visited Mar. 5, 2025).

<sup>3</sup> Section 373.414(1), F.S.

<sup>4</sup> *Id.*

<sup>5</sup> An Outstanding Florida Water is a water designated worthy of special protection because of its natural attributes. DEP, *Outstanding Florida Waters*, <https://floridadep.gov/dear/water-quality-standards/content/outstanding-florida-waters> (last visited Feb. 7, 2025); see Fla. Admin. Code R. 62-302.700(2) and (9).

<sup>6</sup> Section 373.414(1), F.S.

<sup>7</sup> Section 373.414(1)(a), F.S.

or acceptable to the applicant to mitigate adverse effects of the regulated activity.<sup>8</sup> Such measures may include onsite mitigation, offsite mitigation, offsite regional mitigation, and the purchase of mitigation credits from mitigation banks.<sup>9</sup>

In deciding whether to grant or deny a permit for an activity that affects surface waters or wetlands, DEP or the water management district must consider the cumulative impacts of:

- The proposed activity;
- Other projects that already exist, are under construction, or have applied for permits or formal wetland or surface water determinations;
- Activities related to developments of regional impact<sup>10</sup> which are under review, approved, or vested, or other activities regulated under Part IV of chapter 373, F.S., which may reasonably be expected to be located within surface waters or wetlands in the same drainage basin based upon a local government's comprehensive plans.<sup>11</sup>

These cumulative impacts must be evaluated within the same drainage basin as the proposed activity.<sup>12</sup>

### **Overview of Mitigation Banking**

Mitigation banking is a practice in which an environmental enhancement and preservation project is conducted by a public agency or private entity to provide mitigation for unavoidable wetland impacts within a defined mitigation service area.<sup>13</sup> Mitigation banks are alternative to permittee-responsible mitigation.<sup>14</sup> Permittee-responsible mitigation refers to mitigation undertaken by the permittee to provide compensatory mitigation for which the permittee retains full responsibility.<sup>15</sup>

In mitigation banking, the bank is the site itself, and the currency sold by the banker to the impact permittee is a credit, representing the wetland ecological value equivalent to the complete restoration of one acre.<sup>16</sup> Creation of a mitigation bank in Florida typically requires both a permit from DEP or a water management district and federal approval of a mitigation bank instrument from several agencies led by the U.S. Army Corps of Engineers (USACE), in a joint state/federal interagency review team.<sup>17</sup> Requirements for mitigation bank permits differ between mitigation

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<sup>8</sup> Section 373.414(1)(b), F.S.

<sup>9</sup> *Id.*

<sup>10</sup> "Development of regional impact" means any development that, because of its character, magnitude, or location, would have a substantial effect upon the health, safety, or welfare of citizens of more than one county. Section 380.06(1), F.S.

<sup>11</sup> Section 373.414(8)(a), F.S.

<sup>12</sup> *Id.*

<sup>13</sup> DEP, *Mitigation and Mitigation Banking*, <https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/mitigation-and-mitigation-banking> (last visited Feb. 17, 2025). "Mitigation service area" means the geographic area within which mitigation credits from a mitigation bank may be used to offset adverse impacts of activities regulated under this part. Section 373.403(21), F.S.

<sup>14</sup> Section 373.4135(1)(b), F.S.

<sup>15</sup> EPA, *Mechanisms for Providing Compensatory Mitigation under CWA Section 404*, <https://www.epa.gov/cwa-404/mechanisms-providing-compensatory-mitigation-under-cwa-section-404> (last visited Feb. 17, 2025).

<sup>16</sup> DEP, *Mitigation and Mitigation Banking*, <https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/mitigation-and-mitigation-banking> (last visited Feb. 17, 2025).

<sup>17</sup> DEP, *Mitigation Banking Rule and Procedure Synopsis*, <https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/mitigation-banking-rule-and> (last visited Feb. 17, 2025).

bank instruments issued by USACE and state permits issued by DEP or water management districts.

The Uniform Mitigation Assessment Method (UMAM) was established as a way to determine the amount of mitigation needed to offset adverse impacts to wetlands and other surface waters and to award and deduct mitigation bank credits.<sup>18</sup> UMAM provides a standardized procedure for assessing the ecological functions provided by wetlands and other surface waters, the amount that those functions are reduced by a proposed impact, and the amount of mitigation necessary to offset that loss.<sup>19</sup> UMAM evaluates functions through consideration of an ecological community's current condition, hydrologic connection, uniqueness, location, fish and wildlife utilization, and mitigation risk.<sup>20</sup> This standardized methodology is also used to determine the degree of improvement in ecological value of proposed mitigation bank activities.<sup>21</sup>

### **State Mitigation Banking Regulations**

To obtain a mitigation bank permit, the applicant must provide reasonable assurance that the mitigation bank will:

- Improve ecological conditions of the regional watershed;
- Provide viable and sustainable ecological and hydrological functions for the proposed mitigation service area;
- Be effectively managed in perpetuity;
- Not destroy areas with high ecological value;
- Achieve mitigation success; and
- Be adjacent to lands that will not adversely affect the long-term viability of the mitigation bank due to unsuitable land uses or conditions.<sup>22</sup>

The applicant must also provide reasonable assurances that:

- Any surface water management system that will be constructed, altered, operated, maintained, abandoned, or removed within a mitigation bank will meet ERP requirements and related rules;
- The applicant has sufficient legal or equitable interest in the property to ensure perpetual protection and management of the land within a mitigation bank; and
- The applicant can meet the financial responsibility requirements prescribed for mitigation banks.<sup>23</sup>

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<sup>18</sup> See section 373.414(18), F.S.

<sup>19</sup> DEP, *The Uniform Mitigation Assessment Method (UMAM)*, <https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/uniform-mitigation-assessment> (last visited Feb. 17, 2025).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Section 373.4136(1), F.S.

<sup>23</sup> *Id.*; Fla. Admin. Code R. 62-342.400.

### ***Mitigation Bank Credits***

After evaluating the permit application, the permitting agency awards mitigation credits to a proposed mitigation bank or phase of such mitigation bank.<sup>24</sup> The number of credits awarded is based on the degree of improvement in ecological value expected to result from the establishment and operation of the mitigation bank as determined using a functional assessment methodology.<sup>25</sup> In determining the degree of improvement in ecological value, specific factors must be evaluated, including, among other things, the ecological and hydrological relationship between wetlands and uplands in the mitigation bank and the proximity of the mitigation bank to areas with regionally significant ecological resources or habitats, and the extent to which the mitigation bank provides habitat for fish and wildlife.<sup>26</sup>

After awarding mitigation credits to a mitigation bank, the permitting agency establishes a schedule for the release of those credits in the mitigation bank permit.<sup>27</sup> A mitigation credit that has been released may be sold or used to offset adverse impacts from a regulated activity.<sup>28</sup> A portion of the mitigation credits can be released for sale or use prior to meeting all the performance criteria specified in the mitigation bank permit.<sup>29</sup> However, the permitting agency will only release the full amount of awarded credits after all success criteria are met.<sup>30</sup>

The permitting agency determines the number of credits and schedule for release based on the performance criteria for the mitigation bank and the success criteria for each mitigation activity.<sup>31</sup> The release schedule for a specific mitigation bank or phase thereof is related to the actions required to implement the bank, such as site protection, site preparation, earthwork, removal of wastes, planting, removal or control of nuisance and exotic species, installation of structures, and annual monitoring and management requirements for success. In determining the specific release schedule for a bank, the permitting agency must consider, at a minimum, the following factors:

- Whether the mitigation consists solely of preservation or includes other types of mitigation.
- The length of time anticipated to be required before a determination of success can be achieved.
- The ecological value to be gained from each action required to implement the bank.
- The financial expenditure required for each action to implement the bank.<sup>32</sup>

However, no credit can be released for freshwater wetland creation until the success criteria included in the mitigation bank permit are met.<sup>33</sup>

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<sup>24</sup> Section 373.4136(4), F.S., An entity establishing and operating a mitigation bank may apply to modify the mitigation bank permit to seek the award of additional mitigation credits if the mitigation bank results in an additional increase in ecological value over the value contemplated at the time of the original permit issuance, or the most recent modification thereto involving the number of credits awarded. *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> Section 373.4136(4), F.S.

<sup>27</sup> Section 373.4136(5), F.S.

<sup>28</sup> *Id.*

<sup>29</sup> Section 373.4136(5)(a), F.S.

<sup>30</sup> *Id.*

<sup>31</sup> Section 373.4136(5)(b), F.S.

<sup>32</sup> Section 373.4136(5)(b), F.S.

<sup>33</sup> Section 373.4136(5)(c), F.S.

### *Mitigation Service Area*

During the permitting of a mitigation bank, the permitting agency (DEP or a water management district) determines the mitigation service area, which is the geographic region within which the bank could reasonably be expected to offset impacts.<sup>34</sup> In determining the boundaries of the mitigation service area, the permitting agency must consider the characteristics, size, and location of the mitigation bank and, at a minimum, the extent to which the mitigation bank:

- Contributes to a regional integrated ecological network;
- 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 approved pursuant to the Surface Water Improvement and Management Act, or a nationally designated estuarine preserve;
- Will provide for the long-term viability of endangered or threatened species or species of special concern;
- Is consistent with the objectives of a regional management plan adopted or endorsed by the department or water management districts; and
- Can reasonably be expected to offset specific types of wetland impacts within a specific geographic area. A mitigation bank need not offset all expected impacts within its service area.<sup>35</sup>

DEP and water management districts use regional watersheds to guide the establishment of mitigation service areas.<sup>36</sup> 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.<sup>37</sup> 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.<sup>38</sup>

In general, mitigation credits may only be used to offset adverse impacts in the mitigation service area.<sup>39</sup> However, if certain requirements are met, the following projects may be eligible to use a mitigation bank regardless of whether they are located within the mitigation service area:

- Projects with adverse impacts partially located within the mitigation service area.
- Linear projects, such as roadways, transmission lines, distribution lines, pipelines, railways, or certain seaports.
- Projects with total adverse impacts of less than one acre in size.<sup>40</sup>

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<sup>34</sup> DEP, *Mitigation Banking Rule and Procedure Synopsis*, <https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/mitigation-banking-rule-and> (last visited Feb. 13, 2025); section 373.4136(6), F.S.

<sup>35</sup> *Id.*

<sup>36</sup> Section 373.4136(6)(b), F.S. Regional watersheds within each water management district are specifically delineated in DEP rules. *See* Fla. Admin. Code R. 62-342.200(9).

<sup>37</sup> Section 373.4136(6)(b), F.S.

<sup>38</sup> *Id.*

<sup>39</sup> Section 373.4136(6), F.S.

<sup>40</sup> Section 373.4136(6)(d), F.S.

## Federal Mitigation Banking Regulations

For projects requiring a federal permit, a USACE district engineer determines the mitigation to be required in a mitigation bank permit based on what is practicable and capable of compensating for the aquatic resource functions that will be lost as a result of the permitted activity.<sup>41</sup> When evaluating options for mitigation, USACE considers the type and location options in the following order (commonly referred to as the mitigation preference hierarchy):

- Mitigation bank credits;
- In-lieu fee program credits;<sup>42</sup>
- Permittee-responsible mitigation under a watershed approach;<sup>43</sup>
- Permittee-responsible mitigation through on-site and in-kind<sup>44</sup> mitigation; or
- Permittee-responsible mitigation through off-site and/or out-of-kind<sup>45</sup> mitigation.<sup>46</sup>

In general, the required mitigation should be located within the same watershed as the impact site and where it is most likely to successfully replace lost functions and services, taking into account watershed scale features as aquatic habitat diversity, habitat connectivity, relationships to hydrologic sources, trends in land use, ecological benefits, and compatibility with adjacent land uses.<sup>47</sup> When compensating for impacts to marine resources, the location of the mitigation site should be chosen to replace lost functions and services within the same marine ecological system (e.g., reef complex, littoral drift cell).<sup>48</sup> Compensation for impacts to aquatic resources in coastal watersheds should also be located in a coastal watershed where practicable.<sup>49</sup>

### *Mitigation Bank Credits*

When permitted impacts are located within the service area of an approved mitigation bank, and the bank has the appropriate number and resource type of credits available, the permittee's compensatory mitigation requirements may be met by securing those credits from a mitigation bank.<sup>50</sup> An approved instrument (including an approved mitigation plan and appropriate real estate and financial assurances) must be in place before credits can be used to compensate for

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<sup>41</sup> 33 C.F.R. 332.3(a)(1).

<sup>42</sup> An in-lieu fee program is a program involving the restoration, establishment, enhancement, and/or preservation of aquatic resources through funds paid to a governmental or non-profit natural resources management entity to satisfy compensatory mitigation requirements for DA permits. Similar to a mitigation bank, an in-lieu fee program sells compensatory mitigation credits to permittees whose obligation to provide compensatory mitigation is then transferred to the in-lieu program sponsor. However, the rules governing the operation and use of in-lieu fee programs are somewhat different from the rules governing operation and use of mitigation banks. 33 C.F.R. 332.2.

<sup>43</sup> Permittee-responsible mitigation means an aquatic resource restoration, establishment, enhancement, and/or preservation activity undertaken by the permittee (or an authorized agent or contractor) to provide compensatory mitigation for which the permittee retains full responsibility. 33 C.F.R. 332.2.

<sup>44</sup> In-kind means a resource of a similar structural and functional type to the impacted resource. 33 C.F.R. 332.2.

<sup>45</sup> Out-of-kind means a resource of a different structural and functional type from the impacted resource. 33 C.F.R. 332.2.

<sup>46</sup> See 33 C.F.R. 332.3(b).

<sup>47</sup> 33 C.F.R. 332.3(b)(1).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> 33 C.F.R. 332.3(b)(1).

authorized impacts.<sup>51</sup> Mitigation bank credits are not released until specific milestones associated with the mitigation bank site's protection and development are achieved.<sup>52</sup>

If USACE determines that mitigation is necessary to offset unavoidable impacts to aquatic resources, the amount of required mitigation must be, to the extent practicable, sufficient to replace lost aquatic resource functions.<sup>53</sup> USACE requires a mitigation ratio greater than one-to-one where necessary to account for (1) the distance between the affected aquatic resource and the compensation site, (2) the method of mitigation (e.g., preservation), (3) the likelihood of success, (4) differences between the functions lost at the impact site and the functions expected to be produced by the mitigation project, (5) temporal losses of aquatic resource functions, and/or (5) the difficulty of restoring or establishing the desired aquatic resource type and functions.<sup>54</sup>

### ***Mitigation Service Area***

Under federal law, the mitigation service area is the watershed, ecoregion,<sup>55</sup> physiographic province, or other geographic area within which the mitigation bank is authorized to provide compensatory mitigation required by USACE permits.<sup>56</sup> The service area must be appropriately sized to ensure that the aquatic resources provided will effectively compensate for adverse environmental impacts across the entire service area.<sup>57</sup> For example, in urban areas, a U.S. Geological Survey 8-digit hydrologic unit code (HUC)<sup>58</sup> watershed or a smaller watershed may be an appropriate service area.<sup>59</sup> In rural areas, several contiguous 8-digit HUCs or a 6-digit HUC watershed may be an appropriate service area.<sup>60</sup> Delineation of the service area must also consider any locally-developed standards and criteria that may be applicable.<sup>61</sup> The economic viability of the mitigation bank may also be considered in determining the size of the service area.<sup>62</sup>

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<sup>51</sup> 33 C.F.R. 332.3(b)(2).

<sup>52</sup> *Id.*

<sup>53</sup> 33 C.F.R. 332.3(f)(1).

<sup>54</sup> 33 C.F.R. 332.3(f)(2).

<sup>55</sup> Ecoregions are areas where ecosystems (and the type, quality, and quantity of environmental resources) are generally similar. A Roman numeral classification scheme has been adopted for different hierarchical levels of ecoregions, ranging from general regions to more detailed: Level I - 12 ecoregions in the continental U.S.; Level II - 25 ecoregions in the continental U.S.; Level III - 105 ecoregions in the continental U.S.; Level IV - 967 ecoregions in the conterminous U.S. EPA, *Ecoregions*, <https://www.epa.gov/eco-research/ecoregions> (last visited Feb. 14, 2025).

<sup>56</sup> 33 C.F.R. 332.8(d)(6)(ii)(A).

<sup>57</sup> *Id.*

<sup>58</sup> "HUC" means the hydrologic cataloging unit assigned to a geographic area representing a surface watershed drainage basin. Each unit is assigned a two- to 12-digit number that uniquely identifies each of the six levels of classification within six two-digit fields. United States Geological Survey (USGS), *Hydrologic Unit Codes (HUCs) Explained*, <https://nas.er.usgs.gov/hucs.aspx> (last visited Mar. 3, 2025). Eight-digit HUCs are used for large watersheds known as subbasins; 10-digit HUCs divide the large subbasins into watersheds; and 12-digit HUCs divide watersheds into subwatersheds that capture local tributary systems. EPA, *Hydrologic Unit Codes: HUC 4, HUC 8, and HUC 12*, available at <https://enviroatlas.epa.gov/enviroatlas/datafactsheets/pdf/Supplemental/HUC.pdf>; DEP, *About the Florida National Hydrography Dataset*, <https://floridadep.gov/dear/watershed-services-program/content/about-florida-national-hydrography-dataset> (last visited Mar. 3, 2025).

<sup>59</sup> 33 C.F.R. 332.8(d)(6)(ii)(A).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*



### ***USACE Proximity Factor Tool***

USACE developed a proximity factor tool that may be used when there are insufficient mitigation credits within the approved mitigation bank service area. The tool is used to assess the number of credits required for any compensatory mitigation proposed outside of approved mitigation bank service areas.<sup>63</sup> The proximity factor is based on ratio multipliers for multiple variables.<sup>64</sup> The tool is only applied when USACE has determined that mitigation outside of the approved mitigation service area is the most environmentally preferable mitigation option.<sup>65</sup>

The proximity factor tool applies the following multipliers:

- No multiplier if the impact site is outside of a mitigation bank service area boundary, but within the same 8-digit HUC that contains the mitigation bank location.
- 1.5 multiplier if the impact site is outside of a mitigation bank service area boundary and one 8-digit HUC away from the mitigation bank service area boundary.
- 0.25 multiplier for each additional 8-digit HUC away from the mitigation bank location.
- 0.75 multiplier if mitigation entails out-kind replacement (there is no multiplier if the mitigation entails in-kind replacement).
- 0.25 multiplier if mitigation occurs within a different EPA Level IV Ecoregion.<sup>66</sup>

The sum of the applicable multipliers provides the proximity factor.<sup>67</sup> The resulting proximity factor is then multiplied by the number of credits required by USACE to compensate for unavoidable adverse effects to aquatic resources (e.g., via application of an approved functional assessment such as UMAM).<sup>68</sup> USACE has the discretion to consider and approve use of the proximity factor tool on a case-by-case basis.<sup>69</sup>

Mitigation should be performed within the same 6-digit HUC.<sup>70</sup> When assessing the location of the mitigation site relative to the impact site, the calculation starts at the 8-digit HUC that contains the mitigation bank site.<sup>71</sup>

### **III. Effect of Proposed Changes:**

**Section 1** amends s. 373.4136, F.S., regarding the establishment and operation of mitigation banks. Currently, the Department of Environmental Protection (DEP) and water management districts are authorized to set the schedule for releasing mitigation credits to each mitigation bank

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<sup>63</sup> USACE, *Standard Operating Procedure—Assessing a Proximity Factor for Compensatory Mitigation Required to Offset Unavoidable Impacts to Waters of the United States*, 1 (2023), available at <https://usace.contentdm.oclc.org/utis/getfile/collection/p16021coll15/id/1998>.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 3.

<sup>66</sup> *Id.*

<sup>67</sup> USACE, *Standard Operating Procedure—Assessing a Proximity Factor for Compensatory Mitigation Required to Offset Unavoidable Impacts to Waters of the United States* at 1, 4, available at <https://usace.contentdm.oclc.org/utis/getfile/collection/p16021coll15/id/1998>.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 5.

<sup>70</sup> *Id.* at 5.

<sup>71</sup> *Id.*

on a case-by-case basis based on the performance criteria for the mitigation bank, the success criteria for each mitigation activity, and other enumerated factors.<sup>72</sup>

The bill requires DEP and water management districts to adhere to the following credit release schedule:

- 30 percent of awarded credits for the recording of the conservation easement and establishment of financial assurances required by the mitigation bank permit, or 100 percent in the case of a preservation-only bank.
- 30 percent of awarded credits following completion of initial construction activities as established by the mitigation bank permit.
- 20 percent of awarded credits upon meeting interim performance criteria established by the mitigation bank permit, in increments as monitoring indicates success.
- 20 percent of awarded credits upon meeting final success criteria established by the mitigation bank permit

Currently, credits cannot be released for freshwater wetland creation until the success criteria included in the mitigation bank permit are met. The bill allows these types of credits to be released sooner, after the success criteria for initial construction activities are met.

The bill provides that once a mitigation bank service area has been established by DEP or a water management district, such service area must be considered to have met the cumulative impact requirements of s. 373.414(8)(a), F.S.,<sup>73</sup> for impacts permitted within any regional watershed included in the mitigation bank service area.

Currently, only certain projects can use credits from a mitigation bank outside the mitigation service area.<sup>74</sup> The bill expands this provision to provide that any project that meets the requirements set forth in the bill may use credits from a mitigation bank outside the mitigation service area to offset impacts resulting from such projects or activities.

The bill provides that, when the requirements of s. 373.414(1)(a), F.S.,<sup>75</sup> are met and an insufficient number or type of credits have been released within the mitigation bank service area in which the impacts associated with a proposed project are located, the project applicant may use credits released from a mitigation bank outside such mitigation service area to offset impacts.

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<sup>72</sup> Section 373.4136(5)(b), F.S. The factors include (1) whether the mitigation consists solely of preservation or includes other types of mitigation; (2) the length of time anticipated to be required before a determination of success can be achieved; (3) the ecological value to be gained from each action required to implement the bank; and (4) the financial expenditure required for each action to implement the bank. *Id.*

<sup>73</sup> Section 373.414(8)(a), F.S., provides that, in deciding whether to grant a permit for an activity that affects surface waters or wetlands, the permitting agency must consider the cumulative impacts of (1) the proposed activity; (2) other projects that already exist, are under construction, or have applied for permits or formal wetland or surface water determinations; and (3) activities related to developments of regional impact which are under review, approved, or vested, or other activities regulated under Part IV of chapter 373, F.S., which may reasonably be expected to be located within surface waters or wetlands in the same drainage basin based upon a local government's comprehensive plans.

<sup>74</sup> This includes (1) projects with adverse impacts partially located within the mitigation service area; (2) linear projects, such as roadways, transmission lines, distribution lines, pipelines, railways, or seaports; and (3) projects with total adverse impacts of less than one acre in size. Section 373.4136(6)(d), F.S.

<sup>75</sup> Section 373.414(1)(a), F.S., delineates the balancing test DEP or water management districts must use to determine whether an ERP activity is not contrary to the public interest or clearly in the public interest.

The project applicant may only use out-of-service area credits once DEP or a water management district verifies that mitigation banks within the regional watershed where the adverse impacts are located lack the appropriate credit type to offset impacts associated with the proposed project.

The bill provides that, if the number of released credits within a mitigation service area only partially offsets the impacts associated with a proposed project in that mitigation service area, the project applicant may use out-of-service area credits to account for the difference between the released credits available in the mitigation bank service area and the credits required to offset the impacts associated with the proposed project. The bill requires DEP and water management districts to follow the following guidelines to apply a proximity factor to determine adequate compensatory mitigation by using the following process:

- A multiplier may not be applied for use of out-of-service area credits located within the same regional watershed as the proposed impacts.
- A 1.5 multiplier must be applied for use of out-of-service area credits located within a regional watershed immediately adjacent to the regional watershed in which the proposed impacts are located.
- When credits are not available in the regional watershed immediately adjacent to the regional watershed in which the proposed impacts are located, an additional 0.50 multiplier must be applied for each additional regional watershed away from the regional watershed immediately adjacent to the regional watershed in which the proposed impacts are located.
- An additional 0.75 multiplier must be applied if the mitigation used to offset impacts entails an out-of-kind replacement which does not replace the same type of wetland or surface water impacted.

The bill provides that the use of these multipliers meets the requirements for addressing cumulative impacts.

The bill provides that, once a project applicant requests to use credits from a mitigation bank outside the mitigation service area in which the proposed impacts will occur, DEP or the water management district must contact all mitigation banks within a mitigation service area encompassing the location of the proposed impacts within three business days after the request from the project applicant and request an accounting of available credits, which may not include credits reserved for other project applicants. The mitigation banks contacted must provide such accounting within five business days after the request.

Upon receipt of the accounting from the mitigation banks, DEP or the water management district must determine if sufficient credits exist to offset impacts associated with the proposed project and notify the project applicant of such determination. The applicant may rely on the determination for a period of one year after such determination.

The bill requires each mitigation bank to submit an annual report to DEP or the applicable water management district with an accounting of the number and type of credits that the mitigation bank has available for sale, but the report may not include names of parties for which credits have been reserved, if any, or the contract price paid for such credits. DEP and each water management district must compile such annual reports and provide an annual assessment of the health of the state's mitigation banking system to the Legislature.

**Section 2** reenacts s. 373.403(19), F.S., regarding mitigation and enforcement, for the purpose of incorporating the amendment the bill makes to s. 373.4136, F.S.

**Section 3** reenacts several subsections of s. 373.4135, F.S., regarding mitigation banks and offsite regional mitigation, for the purpose of incorporating the amendment the bill makes to s. 373.4136, F.S.

**Section 4** reenacts s. 373.41365, F.S., regarding adoption and modification of rules to ensure financial assurances for long-term management of mitigation, for the purpose of incorporating the amendment the bill makes to s. 373.4136, F.S.

**Section 5** reenacts s. 373.414(1)(b), F.S., regarding additional criteria for activities in surface waters and wetlands, for the purpose of incorporating the amendment the bill makes to s. 373.4136, F.S.

**Section 6** provides an effective date of July 1, 2025.

#### **IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None.

#### **V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Indeterminate.

**C. Government Sector Impact:**

None.

**VI. Technical Deficiencies:**

On line 71, the bill provides that “preservation-only” banks will receive 100 percent of awarded credits for the recording of the conservation easement and establishment of financial assurances. However, the bill does not define “preservation-only” bank, and the meaning of this term is unclear.

On lines 134-137, the bill adds language regarding compliance with project-level cumulative impact assessments in a section of law that outlines the requirements for establishing mitigation bank service areas. The language may be more appropriately placed within s. 373.414, F.S., where project-level cumulative impacts are addressed. Specifically, s. 373.474(8)(b), F.S., already has language that states, “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.” If that concept needs clarification, s. 373.414(8)(b), F.S., would be the appropriate place to make that change.

On lines 153-158, the bill provides that project applicants may use credits from a mitigation bank outside the service area “when the requirements of s. 373.414(1)(a), F.S., are met.”<sup>76</sup> However, if the criteria in this section of law are met, an applicant would not be required to consider mitigation measures such as a mitigation bank.<sup>77</sup> Moreover, it is unclear what is meant by “requirements” here and on line 151, as the cited provisions do not clearly establish “requirements” that must be satisfied.

Regarding lines 140-152, existing law in s. 373.4136(6)(d), F.S., limits the use of mitigation bank credits outside the bank’s service area to three specific types of projects. The bill amends this provision by adding a fourth category—projects that use the proximity factor multiplier established in this bill. It also removes the language specifying that the activities listed are the only types of activities that can be mitigated outside of the mitigation services area. With the changes in the bill, there is nothing linking paragraph (6)(d) with an authorization that the mitigation can occur outside the service area. Paragraph (6)(e) could be read to function independently and be the only method for credits to be offered outside of the service area. If that is the intent, then (6)(d) could be deleted.

**VII. Related Issues:**

The proximity factor multipliers in the bill are based on regional watersheds, whereas the federal proximity factor uses 8-digit hydrologic unit code (HUC) and EPA ecoregions. Additionally, the

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<sup>76</sup> Section 373.414(1)(a), F.S., delineates the balancing test criteria DEP or water management districts must use to determine whether an ERP activity is not contrary to the public interest or clearly in the public interest.

<sup>77</sup> Section 373.414(1)(b), F.S.

federal proximity factor provides that mitigation should be performed within the same 6-digit HUC, while the bill does not include such a requirement and would allow the use of credits from a mitigation bank regardless of how far it is from the impact site. These differences may affect the consistency and effectiveness of mitigation efforts and create challenges for permittees who must obtain both state and federal permits.

Additionally, the bill's three- and five-day deadlines for contacting mitigation banks and confirming credit availability may be difficult to meet due to potential administrative constraints and the time required to verify and report accurate credit accounting.

#### **VIII. Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 373.4136, 373.403, 373.4135, 373.41365, and 373.414.

#### **IX. Additional Information:**

- A. **Committee Substitute – Statement of Changes:**  
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

- B. **Amendments:**

None.