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Should Preservation Be Used as Mitigation in Wetland Mitigation Banking Programs?: A Florida Perspective

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COMMENTS

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I. INTRODUCTION

Over 200 years ago, wetlands encompassed approximately 221 million acres of land in the United States.¹ Since the days of colonial America, our nation's wetlands have been "drained, dredged, filled, leveled and flooded"² to the point that twenty-two states have lost at least half of their original wetlands.³ Almost fifty percent of the nation's total wetlands inventory has been lost.⁴ Many of the nation's "land poor but people rich"⁵ communities, under pressure to expand as their populations increased, turned to development of wetlands.⁶

Florida, with an area encompassing 39.5 million acres,⁷ has not been spared.⁸ The State's environmental "report card" reveals that Florida has followed the national trend and has turned to development of its wetlands. Since Florida achieved statehood in 1845, "Florida's story has been one of man's battle against water."⁹ Indeed, because approximately seventy-four percent of the nation's wetlands can be found on private property,¹⁰ the battle lines among the government, environmentalists, private property owners, and developers have been drawn. New incentives are needed immediately to preserve the largest remaining tracts of privately-owned wetlands. However, there is a simple and inexpensive way to change the ratio of privately-to-publicly-held wetlands and to get most of the large tracts of undeveloped wetlands in Florida out of the developer's hands and into the safety of the public's arms. There is a

1. Thomas E. Dahl & Craig E. Johnson, *Status and Trends of Wetlands in the Coterminous United States, mid-1970's to mid-1980's*, U.S. Dep't. of the Interior, Fish and Wildlife Service, 28 at 3 (1991).

2. *Id.*

3. 6 U.S.C. § 3931(a) indicates that in the mid 1970's there were an estimated 105.9 million acres of wetlands in the coterminous United States and only 103.3 million in the mid 1980's, a net loss of over 2.6 million acres. *Id.*; see also Marc Carey, et al., *A Permanent Wetland Reserve, Analysis of a New Approach to Wetland Protection*. U.S. Dep't of Agric., Econ. Res. Service, Agric. Info. Bull. No. 610, at 1-2 (1990).

4. W.E. Frayer & J.M. Hefner, *Florida Wetlands Status and Trends, 1970's to 1980's*. U.S. Fish and Wildlife Service, 5 (1991). Approximately 87% of the national estimated losses between 1954 and 1974 are attributed to "agricultural conversion" with additional losses due to residential and commercial projects, including dredging of ports and harbors, creation of roads, water development projects, natural erosion and inundation, mining, and livestock grazing. *National Wetlands Priority Conservation Plan*. U.S. Dep't of the Interior, Fish and Wildlife Service 7 (1989) [hereinafter *Priority Conservation Plan*].

5. DAVID SALVENSEN, URB. LAND INST., WETLANDS, MITIGATING AND REGULATING DEVELOPMENT IMPACTS I (1990).

6. *Id.* Washington D.C., large portions of New York City, New Orleans, Philadelphia, Boston, San Francisco, and Seattle were built on wetlands. *Id.*

7. Frayer & Hefner, *supra* note 4, at 2. This figure includes offshore areas involved in the U.S. Fish and Wildlife wetland study.

8. *Id.* at 7.

9. *Id.*

10. *Priority Conservation Plan.*, *supra* note 4, at iii.

system that will expedite Florida's relentless efforts to purchase environmentally sensitive, privately-owned wetlands and save Florida taxpayers hundreds of millions of dollars in the process. There is a way to get landowners and developers to literally line up at the doors in Tallahassee to donate vast acreage of wetlands to the public. The answer is *wetland mitigation banking*, a form of land use planning recently adopted in Florida.¹¹ Wetland mitigation banking is a development credit system, similar to Transfer of Development Rights (TDRs) programs.¹²

Around the country, preservationists and private property owners are debating wetland mitigation banking as a remedy to the nation's rapid loss of wetlands. After several failed efforts to formally create a state-wide mitigation banking system,¹³ the Florida legislature has finally embraced wetland mitigation banking as an environmental land planning tool.

With the passage of the Florida Environmental Reorganization Act of 1993 (FERA)¹⁴ and the creation of section 373.4135 of the Florida Statutes entitled "Mitigation and Mitigation Banking,"¹⁵ Florida is at a unique threshold in the battle to preserve its remaining wetlands. Under FERA, the newly formed Department of Environmental Protection (DEP) and Florida's Water Management Districts (WMDs) were charged with creating and implementing rules for Florida's mitigation banking program.¹⁶ After the formation of a Wetland Mitigation Banking Team, preparation of a draft rule and numerous public hearings around the state, the result was the creation of Florida Administrative Code Chapter 62-342 entitled "Mitigation Banks" (Mitigation Banking Rules or Rules).¹⁷ To effectively achieve the legislative directive, the new Mitigation Banking Rules, which were hurriedly drafted and adopted in a short six months,¹⁸ should be amended to take advantage of

11. See FLA. STAT. § 93-213 (1993).

12. See *infra* part IV(B).

13. See, e.g., Fla. H.B. 1931, §§ 3-4, 1992 Reg. Sess. (creating Fla. Environmental Mitigation Bank Trust Fund and authorizing creation of other mitigation banks; died in Committee on Natural Resources).

14. FLA. STAT. § 93-213 (1993). For an analysis of the various provisions of the Act, see generally John J. Fumero, *Permit Streamlining: A New Age for Environmental Regulation in Florida*, 67-11 FLA. B.J. 62 (1993).

15. FLA. STAT. § 373.4135 (1993).

16. See FLA. STAT. § 373.4135 (1993). The Act directed the adoption of rules to govern the creation and use of mitigation banks to offset adverse impacts caused by dredge and fill activities regulated under Part IV of Chapter 373, FLA. STAT. See FLA. ADMIN. CODE r. 62-342.100(1)(1995).

17. See FLA. ADMIN. CODE r. 62-342.100 *et seq.* (1995).

18. See FLA. STAT. § 373.4135 (1993) (directing the DEP and WMDs to adopt rules by January 1, 1994).

this unique opportunity to place most of Florida's remaining large tracts of privately-owned wetlands into the banking program.

This Comment proposes that preservation of existing large tracts of privately-owned wetlands should be a primary focus of mitigation banks in Florida and that Florida should amend the new wetland Mitigation Banking Rules to place a heavier emphasis on preservation as mitigation. Although the new Mitigation Banking Rules open the preservation as mitigation door wider than ever before in Florida's historical battle to save its wetlands,¹⁹ the Rules continue to cast a doubtful view eye on preservation as a preferred method of mitigation. Under such an amended wetland mitigation banking system, private entities, with government cooperation, will have increased incentives to pay to preserve and enhance large tracts of the most valuable, privately-owned wetlands and environmental treasures in the state, and to place them in the public's hands for safekeeping.

The days of short-sighted land development in Florida are long gone. The interplay between wetlands and regional and state ecosystems has become a real due diligence concern for even the smallest development projects. Investors who purchased wetlands in Florida and placed the deeds in non-interest bearing "lower left hand desk drawers" now realize that "use it or lose it" also applies to wetlands and private property rights. As one author noted, "changes are [indeed] in the wind."²⁰

Most of the remaining undeveloped land in Florida, a state with one of the fastest growth rates in the country, contains wetlands.²¹ Although private real estate development accounts for less than ten percent of net wetland losses nationally,²² Florida's privately owned wetlands are at a greater risk due to increased pressures to drain and develop them. While restrictive regulations abound on both the federal and state level,²³ Floridians continue to "prefer to convert wetlands to more economically productive uses."²⁴ Private wetland owners are forced between the "rock" of regulations aimed at preventing wetland development and the

19. See, e.g. FLA. ADMIN. CODE r. 62-342.500 (1995) (providing rules for contribution of lands to a mitigation bank). This section of the new Mitigation Ranking Rules, however, does not directly address preservation as mitigation and is ambiguous at best. It is not clear if this section of the Rules allows as acceptable mitigation the creation of banks which contain only wetlands to be preserved.

20. See generally Valerie F. Settles, *Wetlands Mitigation: Changes in the Wind?*, 65-8 FLA. B.J. 53 (1991). The author extends a sincere thank you to Mrs. Settles for her advice and help in locating research materials for this comment.

21. See SALVENSEN, *supra* note 5, at 2.

22. *Id.* at 3; see also *Priority Conservation Plan.*, *supra* note 4.

23. See discussion *infra* parts V-VI.

24. SALVENSEN, *supra* note 5, at 2.

"hard place" of a market that depresses the value of lands containing wetlands. They often seek to develop wetlands to realize *some* economic value on their investment.

A regulatory taking in violation of the Fifth Amendment to the United States Constitution may be found when regulations deprive wetland owners of *substantially all* viable economic uses of their property.²⁵ The government has been charged with finding a way to allow normal growth and development to take place without regulating to the point of inversely condemning a property.²⁶ At the same time, conservation and preservation of our nation's remaining inventory of wetlands is primarily achieved through regulations. It is a delicate juggling act.

Wetland mitigation provides a middle ground and promises the "best of both worlds."²⁷ Wetland mitigation describes action taken to minimize, avoid, restore, enhance, create, or preserve wetlands,²⁸ in order to obtain a dredge and fill permit to develop an existing, less environmentally sensitive or endangered wetland. Much like developmental impact fees consistent with growth management laws,²⁹ developers who want to drain, dredge, or fill wetlands must pay the "price" of mitigating unavoidable losses of wetlands.

Although mitigation is no substitute for a complete cessation of wetland development, it is the most logical starting point. Indeed, mitigation, in various forms, is the primary tool of current national and statewide wetland policies aimed at slowing the hemorrhaging trend of net wetland losses.³⁰ As the Florida legislature has finally realized, a formal wetland mitigation banking program is the next logical step to save the wetlands that traditional mitigation efforts have failed to save.

The few mitigation banking systems that have been sporadically employed in Florida before the adoption of the new Mitigation Banking Rules focused primarily on the creation and restoration of wetlands. Florida has studied the continued viability of these types of mitigation³¹

25. See *infra* part IX.

26. See generally Exec. Order No. 12630, 53 Fed. Reg. 8859 (1988); see also *infra* part IX.

27. SALVENSEN, *supra* note 5, at 3.

28. See generally Memorandum of Agreement between the Environmental Protection Agency and the Department of the Army Concerning the Determination of Mitigation under the Clean Water Act Section 404(b)(1) Guidelines, 55 Fed. Reg. 9210 (1990) [hereinafter MOA]. Although avoidance is perhaps the best method to mitigate damages to wetlands, in many cases avoidance is impossible. The most controversial method for mitigation of wetlands is the creation of new "virgin" wetlands in exchange for wetlands lost to development. Many experts, however, view the creation of new wetlands as mitigation as a hoax. See SALVENSEN, *supra* note 5, at 4.

29. SALVENSEN, *supra* note 5, at 3.

30. See generally MOA, *supra* note 28; SALVENSEN, *supra* note 5. See also Margot Zallen, *The Mitigation Agreement — A Major Development in Wetland Regulation*, 7 NAT. RESOURCES & ENV'T 19 (1992).

31. See *infra* parts VII.B.2. and VII.D.1. and accompanying text.

because of high rates of failure and a general non-compliance among such projects. The time is ripe for some new ideas. As former President Bush said, “[w]e must bring the private and public sector together, at the local and state levels, to find ways to conserve wetlands.”³² Florida recognized that ecologically insignificant wetlands and small, isolated wetlands in highly developed areas were disappearing fast, despite regulations aimed at preserving them. Wetland mitigation banking rules do not promote the development of such wetlands, but rather provide an alternative to traditional mitigation solutions which have not been successful. Wetland mitigation banking provides a mechanism for private developers, not taxpayers, to pay to establish banks of lands of greater environmental, ecological, and public importance than the wetlands that otherwise are destined to be developed.

Florida Governor Lawton Chiles noted, at the confirmation hearing of Carol M. Browner as Administrator of the Environmental Protection Agency, that the ultimate goal of a mitigation banking system is to allow Florida “to preserve . . . large bod[ies] of land that [have] great ecological significance. And everybody is . . . happy. The environmentalists are happy. [The developer] is happy. It means that construction and building will go forward in . . . our state.”³³ Wetland mitigation banking emphasizing preservation as mitigation also means that conservation and preservation of Florida’s pristine resources will be achieved for the enjoyment and benefit of future generations of Floridians, while at the same time private property rights will be respected and protected.

II. THE NATIONAL WETLANDS POLICY — “NO NET LOSS”

In 1989, President Bush announced his “No Net Loss”³⁴ wetlands

32. President’s Message to the Congress Transmitting the Fiscal Year 1990 Budget, “Building a Better America”, 25 WEEKLY COMP. PRES. DOC. 184 (February 9, 1989) [hereinafter President’s Message].

33. *Hearing of the Senate Environment and Public Works Committee, Confirmation of Carol M. Browner as Environmental Protection Agency Administrator*, Fed. News Service, Jan. 11, 1993 (Testimony of Florida Governor Lawton Chiles, commenting on then EPA Administrator-Designate Browner’s engineering of an agreement between the State of Florida and the Walt Disney Company wherein Disney agreed to a \$20-25 million dollar commitment to buy and preserve one of the largest single pieces of unspoiled Florida land from development). See *Land Swap: Disney to Build Community, Buy Wilderness Area*, Greenwire, November 19, 1992 (LEXIS, Envirm Library, GRNWRE File). The deal would protect the environmentally sensitive 8,500-acre Walker Ranch in Polk County, Florida, as mitigation for Disney’s right to develop 600 acres of wetlands for a planned community, called Celebration City, in nearby Osceola County, Florida. Disney will donate half of the Walker Ranch property, which contains valuable wetlands, forests and scrub lands as well as several endangered species such as 10 bald eagles and one of the largest wood stork rookeries in the state, to the non-profit Nature Conservatory and deed the remaining half to it over the next 20 years. *Id.*

34. President’s Message, *supra* note 32.

policy: "I believe this should be our national goal — no net loss of wetlands. We can't afford to lose the half of America's wetlands that still remains."³⁵

With this challenge, the President invited the country "to get serious about wetlands conservation."³⁶ He set the tone for a national re-visitation of the ecological, economic, and historical value that wetlands play in our hemisphere.

You may remember my pledge, that our national goal would be no overall net loss of wetlands. Together, we're going to deliver on the promise of renewal. I will keep that pledge. . . . I want to ask you today what the generations to follow will say of us forty years from now. It could be that they will report the loss of many millions acres more of wetlands . . . [o]r they could report that, sometime around 1989, things began to change And that, in that year, the seeds of a new policy about our valuable wetlands were sown — a policy summed up in three simple words: 'no net loss'.³⁷

The goal is lofty. The task of achieving it is daunting and suspect. In August of 1991, President Bush recognized the difficulty the nation was having in implementing his "no net loss" policy. He issued a proposed revision to this policy and acknowledged that in achieving his goal, the government "confront[s] . . . a head on collision between natural systems and their protection, on the one hand, and property owners' expectations about their ability to develop their land, on the other."³⁸ Among the various revisions the President outlined for the wetland preservation process was a proposal to study a "market-oriented" mitigation banking system designed to "provide adequate incentives for . . . private . . . mitigat[ion of] the effects of developed wetlands."³⁹

III. THE PROBLEM

A. *Some Statistics — Florida Wetland Losses Continue*

Despite the efforts of government and private interests, losses of wetlands across the country and in Florida have increased at a dramatic

35. *Id.*

36. U.S. DEP'T OF THE INTERIOR U.S. FISH AND WILDLIFE SERVICE, WETLANDS, MEETING THE PRESIDENT'S CHALLENGE, 1990 WETLANDS ACTION PLAN 11 (1990) [hereinafter WETLANDS ACTION PLAN].

37. *Id.* (quoting President Bush's speech to Ducks Unlimited, Sixth International Waterfowl Symposium, June 6, 1989).

38. *Statements by President Bush and Environmental Protection Agency Administrator William Reilly, along with the White House Fact Sheet, on Proposed Wetlands Policy, Released August 9, 1991 (Text)*, 155 DAILY REP. FOR EXEC. M-1 (Aug. 12, 1991) [hereinafter *1991 Wetlands Policy*].

39. *Id.* at White House fact sheet.

rate.⁴⁰ Large drainage projects began in Florida in 1881 when Hamilton Diston purchased four million acres of land in South Florida.⁴¹ From the mid 1950s to the mid 1970s, Florida's wetlands were destroyed at an average of 72,000 acres per year.⁴² For example, wetland destruction in the Everglades reduced its original 3,600 square mile wetland area by sixty-five percent.⁴³ Channelization of the Kissimmee River, north of Lake Okeechobee, destroyed roughly seventy-five percent of the river basin's original 40,000 plus acres of wetlands and degraded the wetland quality of a large portion of the remaining river marshes.⁴⁴ One project, located along the border of Everglades National Park in Collier County, drained a 173 square mile area consisting almost entirely of wetlands.⁴⁵ Moreover, over a period of fifty years, sixty two percent of the 289,200 acres of wetlands within the flood plains of the St. John's River were "ditched, drained, and diked"⁴⁶ for pasture and crop production. More recently, over forty percent of the mangroves and over eighty percent of the seagrass in the Tampa Bay area were destroyed.⁴⁷ In 1992, approximately six square miles — or over 23,000 acres — of Florida marshes were lost to farming, mining, and general urban development with the largest loss of 1,599 acres coming from South Florida.⁴⁸ The rapid loss of wetlands in Florida continues despite regulations and acquisition programs aimed at slowing the pace.

B. *Frequently-Stated Reasons for the Continued Loss of Wetlands*

Among the frequently-stated reasons for the continued loss of wetlands in Florida and the United States are:

- 1) Economic and public policies have historically encouraged and promoted conversions of wetlands to agricultural or developmental use (both in the public and private sectors).⁴⁹
- 2) Benefits of wetland conservation primarily accrue to the general public while the cost of regulatory preservation rests on the shoulders of private wetland owners.⁵⁰
- 3) Legislation aimed at protecting wetlands may be inadequate to

40. See generally Frayer & Hefner, *supra* note 4.

41. *Id.* at 7.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. In *Florida, Tallahassee, Wetlands Lost*, THE MIAMI HERALD, Feb. 26, 1993, at 5B.

49. See WETLANDS ACTION PLAN, *supra* note 36, at 13; see also *infra* notes 75-83 and accompanying text.

50. Wetlands Action Plan, *supra* note 36, at 13.

prevent net losses and may be improperly implemented and enforced.⁵¹

4) Authority for regulation of wetlands is shared by federal, state, and local agencies. "[N]o single legislative authority addresses all the facets of wetland protection or use."⁵²

5) Traditionally, rules governing mitigation, after first mandating loss minimization and avoidance, focus on creation of new wetlands. The wetland creation process has often been called a "hoax" due to the general failure of creation projects.⁵³

C. *Incentives Needed for Private Preservation*

Preserving large tracts of wetlands and other environmentally-valuable private acreage is left primarily to regulations and public preservation programs.⁵⁴ Currently, these programs sorely lack private incentives. The logical result of extensive land use regulations in the absence of private incentives may be regulatory takings rather than preservation.⁵⁵ Public preservation programs cost taxpayers hundreds of millions of dollars and cannot keep pace with current wetland losses.

Preserving large tracts of wetlands through private donations in a mitigation bank may better serve the public's goals.⁵⁶ Alternative methods of mitigating wetland losses have achieved less effective results. Incentives to preserve privately-owned wetlands, particularly large tracts such as those in Florida, are needed desperately and should be implemented as part of any mitigation banking system.

IV. WHAT IS MITIGATION BANKING?

A. *Definition*

Wetland mitigation banking is "wetland restoration, creation, enhancement or preservation undertaken expressly for the purpose of providing compensation for wetland losses from future development activities."⁵⁷ Mitigation banks join public and private efforts to identify

51. *Id.*

52. *Priority Conservation Plan*, *supra* note 4, at 1. *But see* Florida Environmental Reorganization Act of 1993, FLA. STAT. § 93-213(19) (1993) (Under the Act, the existing multiple state permitting levels will be consolidated "into a single type of permit, which shall be known as an 'environmental resource permit.'"); *see also* Fumero, *supra* note 14, at 62-3.

53. SALVENSEN, *supra* note 5, at 4; *see also infra* text accompanying notes 202-203.

54. *See infra* part VIII (B)-(C).

55. *See infra* part IX.

56. *See* Dale Twachtman, Fla. Dep't of Env'tl. Reg., *Policy for "Wetlands Preservation-as-Mitigation"* (June 20, 1988) (Official policy memorandum presented as Exhibit E to FLA. DEP'T OF ENVTL. REG., REPORT ON THE EFFECTIVENESS OF PERMITTED MITIGATION, FLORIDA DEPARTMENT OF ENVIRONMENTAL REGULATION (March 5, 1991)).

57. ROBERT M. RHODES ET AL., FLORIDA ENVIRONMENTAL REGULATION COMMISSION MITIGATION BANKING TASK FORCE, MITIGATION BANKING, REPORT AND RECOMMENDATIONS OF

suitable off-site acreage within which wetlands could be either enhanced, restored, created or preserved⁵⁸ to "minimize mitigation uncertainty associated with traditional mitigation practices and provide greater assurance of mitigation success."⁵⁹ These lands are placed into a "Mitigation Bank"⁶⁰ as "Mitigation Credits"⁶¹ to be withdrawn "in satisfaction of the mitigation requirements of federal, state or local permits"⁶² for projects that need to drain, fill or develop existing wetlands.⁶³ Withdrawn credits are generally donated to the state.⁶⁴

B. Concept Similar to Transferable Development Rights

The concept of mitigation banking is similar to a transfer of development rights (TDR) program, a system that has been widely accepted by both governmental agencies and developers.⁶⁵ Under a typical TDR system, developers are awarded rights to increase the densities of projects in the more developed infill areas of a community. In exchange, the developers donate fee title or conservation easements in vacant, open land areas in more rural or undeveloped areas.⁶⁶ The public benefits from the preservation of open areas at private expense, while the developer can expand a project that otherwise could not be developed further.

THE ENVIRONMENTAL REGULATION COMMISSION MITIGATION BANKING TASK FORCE 2 (Jan. 7, 1992) [hereinafter TASK FORCE REPORT].

58. See SALVENSEN, *supra* note 5, at 4-6; See generally Robert D. Sokolove & Pamela D. Huang, *Privatization of Wetland Mitigation Banking*, 7 NAT. RESOURCES & ENV'T 36 (1992);

59. FLA. ADMIN. CODE r. 62-342.100(3) (1995).

60. The new Mitigation Banking Rules defines a "Mitigation Bank" as "a project undertaken to provide for the withdrawal of mitigation credits to offset adverse impacts." See FLA. ADMIN. CODE r. 62-342.200(8) (1995).

61. The new Mitigation Banking Rules contain two definitions of a Mitigation Credit. The definitional section of the Rules defines a "Mitigation Credit" as "a unit of measure which represents the increase in ecological value resulting from restoration, enhancement, preservation, or creation activities." See FLA. ADMIN. CODE r. 62-342.200(5) (1995). The provisions in the Rules on the establishment of Mitigation Credits further states that a "Mitigation Credit is equivalent to the ecological value gained by the successful creation of on acre of wetland." See FLA. ADMIN. CODE r. 62-342.470(2) (1995). While a list of factors to be used to determine the degree of improvement in ecological value is provided in the Rules; unfortunately, no ratios are provided. See *Id.*

62. William J. Haynes II and Royal C. Gardner, *The Value of Wetlands as Wetlands: The Case for Mitigation Banking*, 23 ENVTL. L. REP. 10261 (1993).

63. See SALVENSEN, *supra* note 5, at 5.

64. See, e.g., FLA. ADMIN. CODE r. 62-342.650 (1995). Either a fee interest in, or a conservation easement on, the property is to be conveyed. See *Id.*

65. Sokolove & Huang, *supra* note 58, at 37.

66. *Id.* In addition to being used as incentives, TDRs may also be used as part of zoning ordinances designed to limit development. Development rights may be restricted, but transferable to other properties. See, e.g., *infra* text accompanying notes 271-274 In such restrictive zoning cases, the existence of a TDR program may provide an alternative value for the property that precludes a claim for inverse condemnation or a regulatory taking. See *infra* part IX.L.2.

C. Numerous Candidates for Mitigation Banks Exist

A mitigation banking system provides similar balancing opportunities for development and preservation to peacefully co-exist. There are numerous examples of candidates for mitigation banking. For example, in the public arena, the State of Florida may be planning a new turnpike interchange that will adversely impact a wetland at the interchange site.⁶⁷ Similarly, in the private sector, a large planned community may have a small parcel of wetlands in the middle of the development which cannot be mitigated efficiently on-site. On a much smaller scale, "mom and pop" owners may have portions of their property classified as wetlands in areas where the threat of development is great and the ability to mitigate the destruction of the wetland is minimal.⁶⁸ The "consolidation of multiple mitigation projects into larger contiguous areas will provide greater assurance that the mitigation will yield long term, sustainable regional ecological benefits."⁶⁹

D. Benefits Offered by Wetland Mitigation Banking

Wetland mitigation banking can:

- 1) Promote the goal of "no net loss"⁷⁰ and preserve large tracts of existing pristine wetlands by providing incentives and easy access for private landowners and public agencies to mitigate wetland losses.
- 2) Reduce the delay between mitigation of wetland losses and the alteration or destruction of wetlands⁷¹ by providing banks of lands pre-authorized for mitigation purposes.
- 3) "[H]elp reduce the federal government's risk of being sued for taking private property"⁷² by providing an alternative value for wetlands where the denial of a permit might otherwise result in a reduction of substantially all of the property's value.⁷³

67. See, e.g., SALVENSEN, *supra* note 5, at 5. The Florida Legislature curiously provided a mechanism for the creation of public mitigation banks. See FLA. STAT. § 373.435(2) (1993); see also FLA. ADMIN. CODE r. 62-342.850 (1995) (establishing rules for the creation of publicly owned mitigation banks). The creation of such publicly owned mitigation banks in Florida appears to defeat the goal of "no net loss" as such banks would compete with privately-owned mitigation banks and would arguably be formed with lands already owned, and reportedly already preserved, by the state.

68. See, e.g., SALVENSEN, *supra* note 5, at 5.

69. FLA. ADMIN. CODE r. 62-342.100 (1995).

70. *Environment, Mitigation Banking Would Reduce Risk Of Property Takings Suits Army Counsel Says*, 97 BNA DAILY REP. FOR EXEC. d49, (May 19, 1992) (quoting William J. Haynes II, General Counsel for the Department of the Army, addressing the District of Columbia Bar Association) [hereinafter *Haynes Address*].

71. *Id.*

72. *Id.*; see also discussion *infra* part IX.L.

73. See discussion *infra* part IX.K.

V. WETLAND REGULATION — A BRIEF HISTORICAL PERSPECTIVE

In order to get a better picture of the gradual, national change in the perception of wetlands, it is necessary to review some of the important federal regulatory acts governing wetlands.⁷⁴

A. Pre-1972

In the Swamp Land Acts of 1849-1860,⁷⁵ the federal government deeded approximately sixty-five million acres of land to fifteen states with the condition that the proceeds from the sale of the land be used to convert wetlands to farmlands.⁷⁶

In 1899, under the authority of the Commerce Clause of the Constitution,⁷⁷ Congress passed the Rivers and Harbors Appropriations Act (Rivers and Harbors Act).⁷⁸ The Rivers and Harbors Act sought to insure the unobstructed navigation of interstate waters and delegated authority over “navigable waters of the United States” to the United States Army Corps of Engineers (Corps).⁷⁹ Unfortunately, the Rivers and Harbors Act did not define the term “navigable waters,”⁸⁰ an omission which led to considerable confusion and subsequent litigation.⁸¹

In 1944, the Flood Control Act⁸² authorized the Corps to build major projects for the draining of agricultural and farm lands.⁸³

B. The Federal Water Pollution Control Act Amendments of 1972

Only recently has the country begun to appreciate the “ecological,

74. For a list of wetlands acts illustrating how the national wetlands policy has changed over time, see Carey et al., *supra* note 3, at 3.

75. 43 U.S.C. §§ 982-984 (1850).

76. Carey et al., *supra* note 3, at 3.

77. U.S. CONST. art. I, § 8, cl. 3.

78. Rivers and Harbors Appropriations Act of 1899, ch. 425 § 9, 30 Stat. 1121, (1899) (current version at 33 U.S.C. § 401 (1988)). The Corps limited its considerations under the fill permitting sections 9 and 10 of the Act to the protection of navigation of the country's waters. *Id.* at 1151. In 1968, in response to heightened awareness and concern for environmental issues in the country, the Corps expanded its application review process to include such factors as ecology, pollution, wildlife and fish conservation, esthetics, and general public interests. See Bertil Heimer, Chief of Permits Branch, U.S. Army Corps of Engineers, *Summary of the Corps Regulatory Program, Historical Background 2* (Feb. 1988) [hereinafter Heimer] (unpublished article presented to CLE International Wetlands Conference on March 21, 1991, on file with author). The addition of these criteria to the Corps's permitting process was upheld by *Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971) (denial of permit based on factors other than navigation, holding that “the Corps not only had the right, but the obligation” to deny the permit).

79. Rivers and Harbors Appropriations Act of 1899, *supra* note 78, at § 10.

80. See generally *id.* at § 9 - § 13.

81. See, e.g., *infra* discussion part V.D.

82. Flood Control Act of 1944, ch. 665, 58 Stat. 887 (1944).

83. See generally *id.*

social and economic values of wetlands.”⁸⁴ A heightened awareness about how many acres of wetlands have been converted or damaged since the late 1700s has emerged.⁸⁵ In 1972, the Congress passed the Federal Water Pollution Control Act Amendments (FWPCA)⁸⁶ to “restore and maintain the chemical, physical and biological integrity of the Nation’s waters.”⁸⁷

C. Section 404 Dredge & Fill Permits Established

The most important feature of the FWPCA for wetlands was section 404⁸⁸ which established a permitting process to regulate the discharge of dredge or fill materials into “navigable waters of the United States.”⁸⁹ “Navigable waters” remained undefined.

Congress designed the section 404 permitting program to be within the jurisdiction of the Corps.⁹⁰ The FWPCA also gave the Environmental Protection Agency (EPA) authority to prohibit or restrict the discharge of dredge or fill materials⁹¹ that could cause unacceptable adverse effects on municipal water supplies, shellfish beds, fisheries, wildlife, or recreational areas.⁹² In short, the Corps issues the permits, but the EPA has veto power.⁹³

D. Federal Jurisdiction — “Navigable Waters” under the FWPCA after 1972

Due to the lack of a Congressionally supplied definition of “navigable waters,” the courts defined the term as it applied to section 404 from 1972 to 1974. This definition of “navigable waters” was broader than the Corps’s understanding of the term. For example, in *United States v. Holland*,⁹⁴ a case brought by the EPA to enjoin unlawful filling of mangrove wetlands in St. Petersburg, Florida, the court defined “navigable waters” under the FWPCA to include wetland areas landward of the

84. Dahl & Johnson, *supra* note 1, at 3.

85. *Id.*; see also *supra* notes 1-6 and accompanying text.

86. Federal Water Pollution Control Act Amendments of 1972, Pub. L. 92-500, 86 Stat. 816 (1972) (codified as 33 U.S.C. §§ 1251-1376 (1988)) [hereinafter FWPCA]. The Act was later amended and renamed the “Clean Water Act of 1977.” 33 U.S.C. § 1251 (1977).

87. 33 U.S.C. § 1251(a) (1988); see also Heimer, *supra* note 78, at 4.

88. FWPCA, *supra* note 86, § 404; see also 33 U.S.C. § 1344 (1988).

89. 33 U.S.C. § 1344 (1988).

90. *Id.*

91. *Id.* § 1344(c). Interestingly, the Senate version of the bill designated the EPA, not the Corps, as the authority to issue dredge and fill permits.

92. See *Id.*

93. *Id.*

94. 373 F. Supp. 665 (M.D. Fla. 1974).

mean high water boundary line.⁹⁵ Similar cases appeared throughout the country, each variously interpreting the meaning of “navigable waters.”

In April of 1974, the Corps published changes to its dredge and fill permitting regulations.⁹⁶ The new regulations included a plan “to adopt a wetlands policy that would protect wetlands within the Corps[’s] jurisdiction from unnecessary destruction.”⁹⁷ However, the new regulations retained the Corps’s section 404 interpretation of “navigable waters and not the interpretation adopted by the courts.”⁹⁸ Subsequently, the Corps’s apparent refusal to expand its jurisdiction to comply with the judicial interpretations of “navigable waters” under the FWPCA was challenged.⁹⁹

E. *The Clean Water Act Today — The Corps’s New Focus*

The FWPCA, now known as the Clean Water Act, was amended again in 1977.¹⁰⁰ By that time, the Corps was on the bandwagon and was asserting its authority over large portions of newly-defined “wetlands” that had not been historically “subject to federal control.”¹⁰¹ The original goal of the Corps’s regulations was to preserve the “navigability” of the Nation’s waterways. The main focus has been broadened over the years through expanded regulations and amendments since the FWPCA’s enactment to encompass a broad spectrum of environmental objectives and concerns.¹⁰² As one commentator on the Clean Water Act noted, “[l]ike the amphibian, the program has gradually crawled from the navigable waters and now operates in areas where the ship’s keels have never ventured.”¹⁰³

F. *The Memorandum of Agreement — Mitigation Banking Formally Recognized*

The EPA has veto power under section 404(c)¹⁰⁴ over the Corps’s issuance of dredge and fill permits. The EPA is also charged with estab-

95. *Id.* at 676.

96. 39 Fed. Reg. 12,115 (1974).

97. Heimer, *supra* note 78, at 6.

98. *See generally* 39 Fed. Reg. 12,115 (1974).

99. *See* National Resource Defense Council v. Callaway, 524 F.2d 79 (2nd Cir. 1975) (suit brought against Secretary of the Navy and other federal officials by environmental group seeking relief against further dumping of polluted dredge materials in Long Island Sound).

100. Clean Water Act of 1977, 33 U.S.C. § 1251 (1977).

101. *Id.*; see also Gary E. Parish & J. Michael Morgan, *History, Practice and Emerging Problems of Wetlands Regulation: Reconsidering Section 404 of the Clean Water Act*, 16 LAND & WATER L. REV. 43, 50 (1982).

102. Parish & Morgan, *supra* note 101, at 44.

103. *Id.* at 45.

104. 33 U.S.C. § 1344(c) (1988).

lishing guidelines for the issuance of permits under section 404(b)(1).¹⁰⁵ After first requiring applicants to consider "practicable alternatives"¹⁰⁶ to filling wetlands, the EPA's regulations¹⁰⁷ require an applicant to "minimize" any potential adverse effects and losses that development would cause.¹⁰⁸

As a prerequisite for the issuance of a section 404 permit, the regulations also require mitigation of unavoidable wetland losses as compensation to the environment.¹⁰⁹ Once again, however, definitional problems arose. The EPA and the Corps did not agree on what constituted "proper compensation" to the environment for the loss of wetlands. The difference between the Corps's interpretation of acceptable mitigation and the EPA's interpretation was similar to the problem of the Corps's previous interpretation of "navigable waters" under the FWPCA/Clean Water Act.

As a result, on November 15, 1989, the EPA and the Corps signed the *Memorandum of Agreement between the Environmental Protection Agency and the Department of the Army Concerning the Determination of Mitigation under the Clean Water Act Section 404(b)(1) Guidelines*.¹¹⁰ The agreement came to be known simply as the "MOA."

The MOA went into effect on February 7, 1990, after two efforts by the White House to delay its effective date¹¹¹ and to make several changes to its coverage.¹¹² Notably, section II.C.3. of the MOA, entitled *Compensatory Mitigation*, includes the following provisions regarding mitigation banking:

Mitigation banking may be an acceptable form of compensatory mitigation under specific criteria designed to ensure an environmentally successful bank. Where a mitigation bank has been approved by the EPA and the Corps for purposes of providing compensatory mitigation for specific identified projects, use of that mitigation bank for those particular projects is considered as meeting the objectives of Section II.C.3. of this MOA, regardless of the practicability of other forms of compensatory mitigation. Additional guidance on mitigation banking will be provided. Simple purchase or "preservation" of

105. *Id.* § 1344(b)(1). Regulations codified at 40 C.F.R. § 230 *et seq.* (1989).

106. *Id.* § 230.10(a).

107. *See* 40 C.F.R. § 230 *et seq.* (1989).

108. *Id.* § 230.10(d).

109. *Id.* § 230.75(d).

110. *See* MOA, *supra* note 28.

111. *See* William L. Want, *The Army-EPA Agreement on Wetlands Mitigation*, 20 ENVTL. L. REP. 10209 (1990).

112. *See Id.* at 10210-11. The MOA as implemented on Feb. 7, 1990 was revised to make clear that "it is not mandatory in all circumstances" but is simply meant to be used as a guide. *Id.* at 10211.

existing wetlands resources may in only exceptional circumstances be accepted as compensatory mitigation. EPA and Army will develop specific guidance for preservation in the context of compensatory mitigation at a later date.¹¹³

The MOA was intended to help fulfill the White House's announced policy of "no net loss."¹¹⁴ However, it is important to see that the MOA was not intended by the EPA or the Corps to be the instrument to directly accomplish that goal.¹¹⁵ Rather, the MOA acknowledged that it would further the "no net loss" policy, but that "no net loss" was not a realistic goal on a permit-by-permit basis.¹¹⁶

For the first time, the MOA and subsequent regulations acknowledged that off-site mitigation would be allowed.¹¹⁷ Thus, the foundation for using off-site lands as mitigation credits in a wetland mitigation banking program was established by the MOA.

VI. THE FLORIDA WETLAND REGULATORY PERSPECTIVE

The history of state wetland regulation in Florida leading up to the exploration of wetland mitigation banking parallels the federal history. Much of wetland losses in Florida occurred during a period when wetlands values were not greatly appreciated.¹¹⁸

Florida developed a dredge and fill permitting program during the 1970s¹¹⁹ which distinguished between navigable and non-navigable bodies of water.¹²⁰ Prior to the passage of the Warren S. Henderson Wetlands Protection Act of 1984,¹²¹ no Florida law was aimed specifically at the preservation and protection of the remaining inventory of wetlands in the state.¹²² Under the Act, the distinction between navigable and non-navigable wetlands was removed.¹²³

113. MOA, *supra* note 28, § II.C.3 (emphasis added).

114. See Royal C. Gardner, *The Army-EPA Mitigation Agreement: No Retreat from Wetlands Protection*, 20 ENVTL. L. REP. 10337, 10340-42 (1990); see also Want, *supra* note 111, at 1210-11.

115. See Gardner, *supra* note 114 at 10340.

116. See *id.* at 10341.

117. See *e.g.*, 55 Fed. Reg. 9210, 9212.

118. Mary F. Smallwood et al., *The Warren S. Henderson Wetlands Protection Act of 1984: A Primer*, 1 J. LAND USE & ENVTL. L. 211 (1985).

119. See Frank E. Matthews, *Will the 1991 Florida Legislature Change the Rules?*, in WETLANDS REGULATION AND MITIGATION, WHICH AGENCY WILL REGULATE HOW, WHERE, WHEN. . . 4.1 (The Florida Bar, Environmental and Land Use Law Section ed., January 25, 1991).

120. See, *e.g.* FLA. ADMIN. CODE. r 17-312(150) & 17-12160 (1992); see also Matthews, *supra* note 119.

121. FLA. STAT. § 403.91-403.929 (1984) (Portions repealed by FLA. STAT. § 93-213 (1993)).

122. See Smallwood, *supra* note 118, at 211. For an overview of Florida's regulatory history prior to the passage of the Act, see generally *id.* at 212, part II.

123. See *id.* at 218.

A. Federal Jurisdiction in Florida

As a result of the 1977 Clean Water Act, an estimated nine million acres of Florida wetlands came within the federal regulatory control of the section 404 permitting process.¹²⁴ Of particular importance was whether or not rock mining (limestone mining) and "rock plowing" (farming activities) fell within the Corps's jurisdiction.¹²⁵ The Corps determined that any proposal that would change a wetland from its natural state to an agricultural use was a "change in use." Such changes in use fell within the Corps's jurisdiction and were subject to the federal permitting process.¹²⁶ The Corps used this reasoning to stop rock plowing without a permit in the East Everglades.¹²⁷ Similarly, rock mining, a growth industry in Florida, was interpreted to fall within the federal permitting process because it involved a "discharge of material as a result of the mining process."¹²⁸

In the late 1970s, in an effort to avoid a complete shut down of the Florida rock mining industry, three-year permits for existing, active rock mining operations were issued.¹²⁹ Since then, permits for rock mining within designated areas usually have been issued, provided that the operator produces adequate mitigation as part of the proposal package.¹³⁰ However, the extended permits in Florida are scheduled to expire in 1995 unless they are further extended.¹³¹

Given the proliferation of rock mining in Florida, its importance to the economy, and the increasing demand for inexpensive construction materials in Florida, it is clear that rock mining presents one of the major opportunities to utilize mitigation banks.

B. State and Local Jurisdiction

While the federal government has jurisdiction over much of Florida's wetlands, numerous state, regional, and local agencies exercise concurrent jurisdiction.¹³² The list includes the DEP, Florida's five local

124. See Heimer, *supra* note 78, at 9. An additional three million acres was added to the federal regulatory authority under § 404 due to the addition of "birds" to interstate commerce by the EPA, effectively establishing that waters of the United States subject to federal wetland jurisdiction included habitats for birds protected by Migratory Bird Treaties, other migratory birds which cross state lines, and "endangered species." *Id.* at 11.

125. *Id.* at 9.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. See *Rock Pits May Become Big Chain of Public Lakes*, THE MIAMI HERALD, June 15, 1992, at 1B.

132. See generally Matthews, *supra* note 119.

water management districts, and other local agencies.

State authorized mitigation, such as a mitigation banking credit under the state permitting process, may also be acceptable mitigation for the same property under the federal permitting process. For example, President Bush's revised plan would have allowed increased state participation in the federal wetland permit issuing process. This would be accomplished through federal delegation and greater use of regional and state permitting programs.¹³³ State programs that achieved the same basic environmental benefits as the federal program would be approved.¹³⁴ Given the regional nature of wetland ecosystems, approved state wetland mitigation banks are more likely than other forms of mitigation to also qualify as acceptable mitigation under a required federal permit.

1. THE NEW DEPARTMENT OF ENVIRONMENTAL PROTECTION

The DER and the Department of Natural Resources (DNR)¹³⁵ have been merged into the Department of Environmental Protection (DEP) under FERA.¹³⁶ Under FERA, the multiple state permitting levels were consolidated "into a single type of permit, which is known as an 'environmental resource permit.'"¹³⁷

2. DEPARTMENT OF ENVIRONMENTAL REGULATION

The DER was the primary state permitting agency in Florida.¹³⁸ DER's jurisdiction included natural surface waterways and bodies of water within the state, including the Everglades.¹³⁹ It also included wetlands adjacent to, or connected to, any of the listed "surface waters."¹⁴⁰ In contrast to the Corps's jurisdiction and as a "political compromise" to limit the DER's permitting authority,¹⁴¹ the DER's jurisdiction did *not* include isolated wetlands nor wetlands unconnected to any listed surface water.¹⁴²

133. See *1991 Wetlands Policy*, *supra* note 38; see also Clean Water Act § 404(g) (EPA can delegate administration of section 404 permitting program to states for non-navigable waters); SALVENSEN, *supra* note 5, at 43-44.

134. *Id.*

135. The Department of Natural Resources' jurisdiction was based on sovereignty submerged lands. See Mary F. Smallwood, *State Jurisdiction over Wetlands* 19 (unpublished article presented to CLE International Wetlands Conference on March 21-22, 1991, on file with author).

136. See FLA. STAT. § 93-213(7) & (8) (1993) (amending FLA. STAT. § 370.017).

137. See FLA. STAT. § 93-213(19) (1993); see also Fumero, *supra* note 14, at 62-3 (discussing permit streamlining).

138. Matthews, *supra* note 119, at 4.1.

139. FLA. ADMIN. CODE r. 17.312.030 (1990).

140. *Id.* (listed waters include natural or artificial surface waters).

141. See Smallwood, *supra* note 135, at 5.

142. *Id.*

3. FLORIDA WATER MANAGEMENT DISTRICTS

The jurisdiction of Florida's Water Management Districts over wetlands more closely resembled the jurisdiction of the Corps's and included isolated wetlands.¹⁴³ Because the districts did not use a uniform definition of wetlands, they often disagreed as to their jurisdiction and coverage. In addition, local agencies such as the Department of Environmental Resource Management in Dade County may get in the act and exercise authority over local wetland permitting. By layering the permitting process with added state and local reviews, in apparent furtherance of the "no net loss" policy, Florida presented a regulatory minefield through which potential permittees had to maneuver. Fortunately, FERA authorized interagency agreements to simplify the process.¹⁴⁴ Under FERA, a unified statewide definition of wetlands was established.¹⁴⁵ The objective is to create a one-stop state permitting process.¹⁴⁶ Ultimately, this one-stop permitting process will also include simultaneous federal review, if federal jurisdiction is also asserted. Carefully created mitigation banks, pre-authorized as both acceptable state and federal mitigation, may hold the key to a total, one stop federal, state, and local permit program.

VII. PRESERVATION AS MITIGATION IN FLORIDA

A. *Why has Preservation not been Unanimously Embraced as Wetland Mitigation in Florida?*

1. PRESERVATION IS LOW IN MITIGATION SEQUENCING SCHEME

Much controversy has surrounded the concept of preservation of critical wetlands as mitigation for less environmentally sensitive wetlands because "granting credit for the mere preservation of wetlands, thereby allowing a permit applicant to destroy other wetlands, results in a net loss of wetlands."¹⁴⁷ The priority of preservation as mitigation in the mitigation sequencing scheme has historically been very low. Nevertheless, as illustrated below, the reasoning behind objections to increasing the priority of preservation as mitigation in the mitigation sequencing scheme is suspect. Because of such suspect reasoning, mitigation has focused primarily on the creation of new wetlands, restoration and enhancement of degraded wetlands, rather than focusing on preservation of large tracts of existing pristine wetlands.

143. *Id.* at 18.

144. See FLA. STAT. § 93-213(19) (1993); see also FLA. STAT. § 373.046(4) (1993) (authorizing interagency agreements).

145. See FLA. ADMIN. CODE r. 62-340.200(19) (1995) (codifying a definition of wetlands).

146. See Fumero, *supra* note 14, at 62-3 (discussing permit streamlining).

147. Haynes & Gardner, *supra* note 62, at 10261.

2. DEP & WMDs GIVEN POWER TO CHANGE THE RULES

The debate has direct application to Florida's mitigation banking system. The DEP and the WMDs, charged with coming up with rules for Florida's new mitigation banking system under FERA,¹⁴⁸ have provided little guidance on the use of preservation as mitigation under the new Mitigation Banking Rules.

Florida spends a considerable amount of public money advancing preservation goals.¹⁴⁹ Florida's environment and economy depends on the delicate ecological balance that its wetlands supply. The DEP and the WMDs missed a unique opportunity to place most of Florida's remaining large tracts of pristine wetlands into the banking system. The DEP and the WMDs should amend the mitigation banking rules and place heavy emphasis on preservation as mitigation to effectively achieve their legislative directive.

3. THE ANTI-PRESERVATION-AS-MITIGATION ARGUMENT

The main objection to accepting preservation of existing wetlands as mitigation proceeds as follows:

*If a wetland, no matter how pristine, is currently so regulated by federal, state or local laws that it is in little or no danger of ever being drained or developed due to such regulations, then why should its preservation be accepted as mitigation when it is already effectively preserved through regulation?*¹⁵⁰

This argument forms the basis of most objections to preservation as mitigation. However, the argument is short-sighted. When its logic is dissected and viewed in light of current national and statewide land preservation goals, recent regulatory takings decisions,¹⁵¹ continued destruction of wetlands,¹⁵² and inadequacy of the science of creating or enhancing wetlands,¹⁵³ it is evident that preservation presents the best of all worlds to private wetland owners, environmentalists, and government. Indeed, as illustrated below in part IX, this argument against accepting preservation as mitigation may lead to the classic regulatory takings scenario.

148. See FLA. STAT. § 373.4135 (1993).

149. See *infra* part VIII discussing existing preservation programs in Florida.

150. See, e.g., FLA. ADMIN. CODE r. 62-342.470(2)(g) (1995).

151. See *infra* part IX.

152. See *supra* part III.

153. See *infra* notes 169-177 & 202-203 and accompanying text.

B. DER Embraced Preservation over Creation of New Wetlands as Mitigation

1. DER RULES

No portions of the DER's rules promulgated under the recently repealed section 403.918(2)(b) of the Florida Statutes directly dealt with mitigation banking.¹⁵⁴ However, mitigation banking was generally authorized in dealing with cash payments for implementing a mitigation plan,¹⁵⁵ including criteria for locations of mitigation areas¹⁵⁶ and provisions for pre-construction mitigation.¹⁵⁷ Accordingly, prior to the passage of FERA, mitigation banks had been considered and used for several years in Florida's wetland and permitting regulatory processes at both the state and regional levels.¹⁵⁸

Until the enactment of FERA, section 403.918 of the Florida Statutes governed criteria for granting or denying permits for activities in wetlands.¹⁵⁹ Section 403.918 provided that the DER, in considering whether to grant or deny a permit, "shall consider measures proposed by or acceptable to the applicant to mitigate adverse effects which may be caused by the project."¹⁶⁰ DER dredge and fill rules promulgated in accordance with this section provided that, in addition to creation and enhancement as mitigation, property "conveyances may be considered as mitigation when they . . . [are] in waters of the State that may be subject to future dredge and fill permit applications."¹⁶¹

As indicated in part V.F above, the MOA provides that "[s]imple purchase or 'preservation' of existing wetlands resources may in only exceptional circumstances be accepted as compensatory mitigation."¹⁶² A 1992 Mitigation Banking Task Force, established by the Florida Environmental Regulation Commission, issued a position paper on wetland mitigation banking in Florida.¹⁶³ The Task Force concluded that, as under the MOA, "[p]reservation should be recognized only in *unusual* circumstances, and in combination with creation, restoration or enhance-

154. See generally FLA. ADMIN. CODE r. 17-312.300 part III (1990).

155. FLA. ADMIN. CODE r. 17-312.390 (1990).

156. FLA. ADMIN. CODE r. 17-312.340(6) (1990).

157. FLA. ADMIN. CODE r. 17-312.360 (1990).

158. See ANN REDMOND ET AL., FLORIDA DEPARTMENT OF ENVIRONMENTAL REGULATION, SOUTH FLORIDA WATER MANAGEMENT DISTRICT, ST. JOHN'S RIVER WATER MANAGEMENT DISTRICT, SOUTHWEST FLORIDA WATER MANAGEMENT DISTRICT, AND CENTER FOR GOVERNMENTAL RESPONSIBILITY, THE USE OF MITIGATION BANKS IN FLORIDA (1992) [hereinafter DER & FLA. WMD'S MITIGATION BANK REPORT].

159. FLA. STAT. § 403.918 (1990) (Repealed by FLA. STAT. § 93-213 (1993)).

160. FLA. STAT. § 403.918 (2)(a)7(b)(1990).

161. FLA. ADMIN. CODE r. 17-312.370(1)(b) (1990).

162. MOA, *supra* note 28, § II.C.3 (emphasis added).

163. See TASK FORCE REPORT, *supra* note 57.

ment.”¹⁶⁴ Preservation of uplands associated with the wetlands system may be also be considered.¹⁶⁵

2. THE DER POLICY & THE DER MITIGATION EFFECTIVENESS REPORT
SHED SOME LIGHT ON THE PROBLEM

A DER policy on preservation as mitigation, promulgated in 1988 and attached to a 1991 report to Florida Governor Lawton Chiles on the effectiveness of permitted mitigation, further stressed that preservation of existing wetlands should be considered as mitigation.¹⁶⁶

The Florida Legislature directed the DER to conduct a study of wetland mitigation in the state¹⁶⁷ to:

1) Identify the size, location, and nature of wetlands permitted in the state to be created or enhanced as mitigation;¹⁶⁸

2) Study a statistically representative number of various mitigation projects and report:

- the effectiveness of each type;
- the reasons observed for success or failure;
- any legislation needed to improve the permitting, compliance, and enforcement process to protect the state’s wetlands, including proposed sources of funds.¹⁶⁹

The 1991 DER *Report on the Effectiveness of Permitted Mitigation* focused on whether mitigation in Florida had been successful under the then current dredge and fill regulatory permitting scheme.¹⁷⁰ The report covered a six-year period from January, 1985 to December, 1990 and studied over twelve hundred permits that included preservation, creation, and enhancement of wetlands as mitigation.¹⁷¹ Approximately 7500 acres of land were permitted to be preserved, 7300 enhanced, and 3300 created as mitigation for the loss of approximately 3300 acres of existing wetlands.¹⁷² The study determined that projects permitted to use creation as mitigation had a “high rate of noncompliance.”¹⁷³ A large number of creation projects permitted during the study period had never even been

164. *Id.* at 2.

165. *Id.*; see also FLA. ADMIN. CODE r. 17-312.370(1)(b) (1990).

166. See Twachtmann, *supra* note 56, at 2.

167. FLA. STAT. § 403.918(2)(b) (1990).

168. FLA. DEP’T OF ENVTL. REG., REPORT ON THE EFFECTIVENESS OF PERMITTED MITIGATION, FLORIDA DEPARTMENT OF ENVIRONMENTAL REGULATION 2 (March 5, 1991) [hereinafter DER REPORT].

169. *Id.*

170. *Id.*

171. *Id.* at Executive Summary.

172. *Id.* at Table 1.

173. *Id.* at Executive Summary.

started.¹⁷⁴ Perhaps the continued loss of large tracts of wetlands and the general failure of wetland creation projects presents the right mix of “unusual circumstances” that the Florida Environmental Regulation Commission Mitigation Banking Task Force had in mind.¹⁷⁵

The DER study began with the prerequisite that for mitigation to be successful, developments that create new wetlands or enhance existing wetlands, must become “self-sustaining wetland systems.”¹⁷⁶ Such new or enhanced systems will essentially replace the wetland functions lost by the natural wetlands.¹⁷⁷ Theoretically, such mitigation will achieve the goal of “no net loss.”

In the *Policy for “Wetland’s Preservation as Mitigation”* memorandum, the DER Secretary observed that his experience on the Land Acquisition Selection Committee of the Conservation and Recreation Lands Program (CARL)¹⁷⁸ proved that Florida needed to seriously contemplate preservation as mitigation. The Secretary stated that Florida “is paying high prices for environmentally unique and threatened lands.”¹⁷⁹ He set out a policy providing that “if it is possible to obtain similar lands by donation—as mitigation—it is *environmentally and economically necessary to seriously consider it.*”¹⁸⁰

3. DER REPORT PLACED CREATION AT END OF MITIGATION LIST

The MOA and the ERC task force report placed preservation last in the sequencing scheme of mitigation. The DER report placed preservation before creation. “*Creation should only be accepted if review of the creation proposal indicates that it includes features to ensure that it will be successful.*”¹⁸¹ Despite this otherwise obvious prerequisite, the general failure of wetland creation projects as mitigation indicates that this prerequisite is difficult or hard to enforce.

The DER report notes that while mitigation efforts have focused mainly on creation and enhancement of wetlands, “*preservation of natural wetlands also plays an important role—normally as part of a mitigation package that also includes wetland creation or enhancement.*”¹⁸² “Mitigation Credits,” the “currency” in a mitigation bank, are defined under the Rules as “a unit of measure which represents the increase in

174. *Id.* at 3.

175. *See supra* notes 163-64 and accompanying text.

176. DER REPORT, *supra* note 168, at 1.

177. *Id.*

178. *See infra* part VIII.C.

179. Twachtman, *supra* note 56, at 2.

180. *Id.* (emphasis added).

181. DER REPORT, *supra* note 168, at Executive Summary (emphasis added).

182. *Id.* at 1 (emphasis added).

ecological value resulting from restoration, enhancement, preservation, or creation activities.”¹⁸³ Neither FERA nor the new Mitigation Banking Rules mandates or establishes a hierarchy of preferred mitigation techniques. The Rules do state that no mitigation credits “shall be available for freshwater wetland creation until the success of the created wetlands is demonstrated.”¹⁸⁴ However, the emphasis in the new Mitigation Banking Rules is clearly on restoration and enhancement of existing wetlands, rather than on preservation.¹⁸⁵

4. DER REPORT CHIPS AWAY AT ANTI-PRESERVATION-AS-MITIGATION ARGUMENT

The DER report chips away at the anti-preservation-as-mitigation argument and should have been considered by the DEP and the WMDs in the new Mitigation Banking Rules. The Rules do recognize that creation of new wetlands as mitigation has not been successful and should only be considered as a last alternative.¹⁸⁶ Under the Rules, mitigation banks “should . . . emphasize restoration and enhancement of degraded ecosystems and the preservation of uplands and wetlands as intact ecosystems rather than alteration of landscapes to create wetlands.”¹⁸⁷ Preservation should now be considered before creation.¹⁸⁸

However, the Rules should have considered that:

1) The preservation of wetlands through publicly-funded programs is expensive. The programs’ goals could be accomplished more readily by accepting private donations of existing wetlands as mitigation.¹⁸⁹ The Mitigation Banking Rules allow a wetland permit applicant to “contribute” land to a mitigation bank under certain conditions.¹⁹⁰ However, the Rules do not specifically address whether banks consisting primarily of existing wetlands may be created in the first place;

2) The preservation of existing environmentally valuable properties, such as wetlands and uplands, provides reduced risk and greater assurances for mitigation purposes.¹⁹¹ As the DER policy notes:

Since [sic] the conveyance of property for mitigation presumes that the environmental resources of the land . . . are reasonably intact and would be protected we know what we are getting and the risk is much

183. See FLA. ADMIN. CODE r. 62-342.200(5) (1995).

184. See FLA. ADMIN. CODE r. 62-342.470(3) (1995).

185. See generally FLA. ADMIN. CODE r. 62-342.100 *et seq.* (1995).

186. See generally FLA. ADMIN. CODE r. 62-342.100(3) (1995).

187. *Id.*

188. DER REPORT, *supra* note 168, at Executive Summary.

189. See Twachtman, *supra* note 56, at 3.

190. See FLA. ADMIN. CODE r. 62-342.500 (1995).

191. See Twachtman, *supra* note 56, at 3.

reduced. Thus, the ratios for these conveyances can be done with more confidence than "created" or "enhanced" projects.¹⁹²

The Rules do not address any ratios as suggested by the DER policy; and

3) Most importantly, "[M]itigation banking's dominant value may be its potential to reduce the risk of effecting compensable takings."¹⁹³ Although the DER Report did not address this point, as illustrated below, this critical facet of mitigation banking can best be achieved through use of preservation as mitigation.

C. *Central Florida Beltway Mitigation Legislation Codified Mitigation Banking, Accepted Preservation*

In 1990, the Florida legislature passed the Central Florida Beltway Mitigation legislation.¹⁹⁴ This Act was the first Florida codification of the concept of mitigation banking and involved a state roadway project in the Orlando area. The legislation provided that the "adverse environmental effects" of the Central Florida Beltway should be "mitigated through the *acquisition* of [environmentally sensitive] lands,"¹⁹⁵ as well as through creation and enhancement of wetlands. "The Legislature finds that . . . acquisition of such lands is reasonably necessary for and constitutes appropriate mitigation for securing applicable environmental permits."¹⁹⁶ The Florida legislature recognized that in a project of this magnitude, traditional mitigation efforts might "not provide adequate wetlands functions to offset [the adverse] impacts" of the Beltway.¹⁹⁷ The legislation also provided that "[t]he lands identified for acquisition shall be or have the potential to be of regional environmental importance."¹⁹⁸

Primary responsibility for creating and implementing the mitigation bank was given to the St. Johns River Water Management District (SJRWMD), the South Florida Water Management District (SFWMD) and the Central Florida Beltway Environmental Advisory Group.¹⁹⁹ The bank's incorporation of preservation as mitigation is a perfect example of the "innovative mitigation policies"²⁰⁰ that should be incorporated into the new Mitigation Banking Rules.

192. *Id.*

193. Haynes & Gardner, *supra* note 62, at 10262.

194. 1990 FLA. LAWS ch. 90-227; *see also* FLA. STAT. § 333.250 (1990).

195. FLA. STAT. § 338.250(1) (1990) (emphasis added).

196. *Id.*

197. DER & FLA. WMDs MITIGATION BANK REPORT, *supra* note 158, at 10.

198. FLA. STAT. § 338.250(2)(d) (1990).

199. *See* FLA. STAT. § 338.250(2)(b-c) (1990).

200. DER & FLA. WMDs MITIGATION BANK REPORT, *supra* note 158, at 9.

D. *The Florida Water Management Districts Cautiously Approached Preservation as Mitigation*

1. THE SOUTH FLORIDA WATER MANAGEMENT DISTRICT

The jurisdiction of the SFWMD includes the areas encompassing the Everglades and the vast Water Conservation Areas in West Dade, Broward, and Palm Beach Counties. Large tracts of Dade, Broward, and Palm Beach Counties' Water Conservation Areas are in private hands and are perfect candidates for preservation as mitigation. The SFWMD began to include mitigation requirements in its permits in 1984. However, the district promulgated few criteria for mitigation and required no monitoring of mitigation sites.²⁰¹ When the district began exploring the concept of mitigation banking in 1989, it initiated a study and found a "high rate of failure for traditional, on-site and in-kind mitigation."²⁰² Part of this failure was because the SFWMD was understaffed and was not able to conduct follow-up inspections to gauge compliance.²⁰³

The SFWMD then focused its attention on restoring regional upland and wetland, systems through a process known as Master Mitigation Planning or Regional Mitigation Planning.²⁰⁴ Regional mitigation is aimed at protecting the upland/wetland system as a whole, as opposed to the "up-front, in-kind wetland creation"²⁰⁵ of traditional mitigation banking systems. It focuses on enhancing, restoring, and preserving the regional wetland/upland systems, not on individual, isolated local wetlands that have little regional significance. This regional planning process lends itself perfectly to acceptance of off-site preservation as mitigation under a banking system.

As illustrated by the SFWMD's participation in the Central Florida Beltway mitigation bank, the SFWMD appeared to merge the two concepts by allowing preservation of off-site lands as part of the regional mitigation process. The SFWMD's regional mitigation strategy could be advanced through banking rules that focus on preservation as opposed to the "in-kind" wetland creation that the district previously referred to as the "mythical answer to the wetlands regulatory problems."²⁰⁶ The SFWMDs focus was incorporated into the intent provisions of the new Mitigation Banking Rules,²⁰⁷ but no guidance has been provided in the Rules on how to achieve preservation goals.

201. *Id.* at 3 (current mitigation projects require extensive monitoring).

202. *Id.* at 4.

203. *Id.* at 3.

204. *Id.* at 4.

205. *Id.*

206. *Id.* at 3.

207. See FLA. ADMIN. CODE r. 62-342.100(3) (1995).

2. THE SOUTHWEST FLORIDA WATER MANAGEMENT DISTRICT

The Southwest Florida Water Management District (SWFWMD) has utilized mitigation banking since 1984.²⁰⁸ The SWFWMD regulates the management and storage of surface waters for fifteen counties in west-central Florida. Prior to the enactment of Florida's wetland mitigation banking system, the SWFWMD had experience with at least eighteen mitigation banks within the district.²⁰⁹ Eleven projects are public sector mitigation banks associated with public activities such as roadways, landfills, water pipelines, etc.²¹⁰ Seven banks are tied to private sector projects including agricultural, commercial, and residential developments.²¹¹

The SWFWMD has had more success with wetland creation mitigation projects than other districts. It introduced additional incentives for dredge and fill permittees to keep mitigation projects "in good condition at least until all proposed wetland impacts" are finished.²¹² The district views the "construction and demonstration of successful progress" as a prerequisite to withdrawal of credits from a wetland mitigation bank.²¹³ This concept was incorporated into the Wetland Mitigation Banking Rules.²¹⁴ Moreover, to compensate for a project's unavoidable impacts to wetlands in the SWFWMD, "other appropriate wetland compensation measures may be allowed"²¹⁵ in addition to traditional mitigation.

3. ST. JOHN'S RIVER WATER MANAGEMENT DISTRICT

As evidenced by its leading role in the Central Florida Beltway mitigation bank, the St. John's River Water Management District (SJRWMD) is one of the leading *public* proponents of preservation as mitigation. Its policy is that the acquisition of wetlands or lands which act as buffers to wetlands offers "the advantage of providing the ability to exercise proprietary controls over land use, in addition to the general police powers of government."²¹⁶

The district has stressed a preference for on-site mitigation in the form of creation, enhancement, or restoration. However, the SJRWMD noted that, while permitting agencies "have been cautious [of] the con-

208. DER & FLA. WMDs MITIGATION BANK REPORT, *supra* note 158, at 4.

209. *Id.*

210. *Id.* at 4-5.

211. *Id.*

212. *Id.*

213. *Id.* at 8.

214. See FLA. ADMIN. CODE r. 62-342.470(3) (1995).

215. DER & FLA. WMDs MITIGATION BANK REPORT, *supra* note 158, at 8.

216. *Id.*

cept of preservation as mitigation"²¹⁷ because recent studies²¹⁸ have shown poor success ratios in standard mitigation techniques, "innovative mitigation policies [such as preservation] are being developed."²¹⁹

The SJRWMD noted that the WMDs are in a unique position to implement creative mitigation using "investments" such as preservation.²²⁰ The SJRWMD views this regional investment approach as an opportunity for the multiple levels of permitting agencies to escape the restrictive applications of the "no net loss" policy. Using this regional investment strategy, the more realistic goals of preserving our primary "regionally significant wetlands and related natural systems"²²¹ can be accomplished.

While individual, smaller wetlands should not be ignored, as Governor Chiles observed, the ultimate goal of a mitigation banking system is to allow Florida "to preserve . . . large bod[ies] of land that [have] great ecological significance."²²² Under the new single-level environmental resource permit,²²³ such goals may become a reality.

VIII. EXISTING PRESERVATION PROGRAMS IN FLORIDA

A. *DER and WMDs Agreed to use Existing Preservation Programs to Identify Potential Mitigation Sites*

The former DER and the WMDs recently agreed that they should take a more active role in identifying lands that could potentially be used as mitigation bank sites.²²⁴ They agreed that existing programs such as the Surface Water Improvement and Management (SWIM) program and local government comprehensive planing processes should be used as resources to identify appropriate sites.²²⁵ The Environmental Regulation Commission Mitigation Banking Task Force also reported that, due to limited funding, "projects on land acquisition priority lists such as [CARL and SOR] should be encouraged as mitigation bank sites."²²⁶ Privately owned wetlands within Florida's Water Conservation Areas, lands often left off of such lists due to reasoning similar to the anti-preservation-as-mitigation argument, should also be targeted. However, until the Florida legislature acknowledges the inverse condemnation and

217. *Id.* at 9.

218. *See, e.g.*, the DER REPORT, *supra* note 168.

219. DER & FLA. WMDs MITIGATION BANK REPORT, *supra* note 158, at 9.

220. *Id.* at 12.

221. *Id.*

222. *See supra* note 33 and accompanying text.

223. *See* FLA. STAT. § 93-213(19) (1993).

224. DER & FLA. WMDs MITIGATION BANK REPORT, *supra* note 158, at 12-13.

225. *Id.*

226. *See* TASK FORCE REPORT, *supra* note 57, at 7.

takings risks associated with excessive regulations and the continued acceptance of the "anti-preservation-as-mitigation argument," such lands will continue to remain in private hands and could conceivably be developed one day.

B. *Federal Involvement in Preservation*

Numerous federal acquisition programs are aimed at preserving Florida's wetlands. For example, Congress passed the 1986 Emergency Wetlands Resources Act²²⁷ to "promote the conservation of our Nation's wetlands by intensifying cooperative efforts among private interests and local, State and Federal governments for the conservation, management and/or acquisition of wetlands."²²⁸ Section 301 of the Act requires the Secretary of the Department of the Interior to establish a national wetlands priority conservation plan that specifies lands that should receive priority for federal and state acquisition.²²⁹ The United States Fish and Wildlife Service, creator and administrator of the plan, noted that the plan is merely one tool in the fight to save wetlands.²³⁰ Similarly, in 1990, The United States Department of Agriculture proposed that a national "permanent wetland reserve could be an important part of a 'no net loss' . . . policy"²³¹ and "could build on current programs"²³² aimed at preserving existing wetland resources.

C. *The Conservation and Recreation Lands Program*

Over the last two decades, Florida taxpayers have spent over one billion dollars to conserve and preserve over one million acres of sensitive land, including wetlands.²³³ Programs such as the Conservation and Recreation Lands program (CARL),²³⁴ the Environmentally Endangered Lands program (EEL), Save Our Coasts and Save Our Rivers all pre-

227. Emergency Wetlands Resources Act of 1986, Pub. L. 99-645, 16 U.S.C. 3901 *et seq.* (1986).

228. PRIORITY CONSERVATION PLAN, *supra* note 4, at iv.

229. The Emergency Wetlands Resources Act of 1986, Pub. L. 99-645, § 301 (1986).

230. PRIORITY CONSERVATION PLAN, *supra* note 4, at vii.

231. Carey, *supra* note 3, at 14.

232. *Id.* at 8.

233. FLA. DEP'T OF NAT. RESOURCES, CONSERVATION AND RECREATION LANDS, ANNUAL REPORT 33 (1992) [hereinafter CARL].

234. The CARL program publishes an annual report that containing the "CARL Priority List," a wish list of acquisition sites. *See id.* at 35. CARL's acquisition targets are approved, ranked, and re-ranked according to a complex system administered by a Land Acquisition Advisory Council and monitored by the Governor and Cabinet acting as the Board of Trustees of the Internal Improvement Trust Fund. *Id.* at 1. The DNR previously sat on the Advisory Council. Under the Florida Environmental Reorganization Act of 1993, FLA. STAT. § 93-213 (1993), the DEP will replace the DNR on the Council. *See* FLA. STAT. § 259.035(1) (1993).

serve private lands, including wetlands, through public funds.²³⁵ A mitigation banking system that emphasizes preservation as mitigation holds the key to Florida's efforts to conserve environmentally sensitive, privately-owned lands without using public funds.

CARL alone has spent more than \$475 million since 1980 to acquire approximately 230,000 acres of land.²³⁶ EEL,²³⁷ which acquired over 363,000 acres of Florida land at a cost of approximately \$200 million,²³⁸ was merged into CARL in 1979. EEL's main purpose was to conserve lands containing:

- 1) unique ecosystems;²³⁹
- 2) habitats critical to or providing protection for endangered or threatened plants or animals;²⁴⁰ and
- 3) unusual, outstanding, or unique geological features.²⁴¹

CARL added the goal of acquiring other Florida lands that were in the public interest including:

- 1) lands that could be used and protected as "natural floodplain, marsh or estuary, if the protection and conservation of such lands are necessary to enhance or protect water quality or quantity or . . . wildlife habitat which cannot adequately be accomplished through local, state and federal regulatory programs;"²⁴²
- 2) lands "[f]or use as state parks, recreation areas, public beaches, state forests, wilderness areas or wildlife management areas;"²⁴³
- 3) lands that could be used "for restor[ing]. . . altered ecosystems to correct environmental damage that has already occurred;"²⁴⁴ or
- 4) lands that should be preserved as "significant archeological or historical sites."²⁴⁵

In 1990, the Florida legislature passed the Preservation 2000 Act²⁴⁶ which proposed to raise approximately \$3 billion over the next ten years to fund Florida's various land acquisition programs.²⁴⁷ Appropriations for the combined 1990-91 and 1991-92 Fiscal Years included \$300 million for CARL, \$180 million for the Water Management Lands Trust

235. See CARL, *supra* note 233, at 1.

236. *Id.* (Including wetland and non-wetland environmentally sensitive and endangered lands).

237. *Id.* at 1.

238. *Id.* at 3.

239. *Id.* at 1.

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. FLA. STAT. § 259.101 (1990); 1990 FLA. LAWS. ch. 90-217.

247. CARL, *supra* note 233, at 1.

Fund (SOR/SWIM) and approximately \$120 million for various other Florida programs and agencies involved in the acquisition of Florida lands for conservation purposes.²⁴⁸

D. *Florida Should Link Preservation Program Goals with Wetland Mitigation Banking*

Conservation and preservation programs such as CARL have been relatively successful, but their goals could be accomplished more rapidly and at considerably less public expense if the DEP and WMDs combined them with wetland mitigation banks. The Fish and Wildlife Habitat Trust Fund²⁴⁹ is one program that is similar to a bank using preservation as mitigation. The Florida legislature established the Trust Fund in 1990 to acquire and manage lands important to the conservation of fish and wildlife.²⁵⁰ Pursuant to section two of the statute, the Florida Game and Freshwater Commission established an upland wildlife habitat acquisition program which allows contributions to the fund "in lieu of [any] onsite mitigation" of wildlife habitat that may be required under a Development of Regional Impact.²⁵¹

The DEP and WMDs should follow the recommendations of the DEP's ancestor, the DER, as well as those of the WMDs themselves,²⁵² i.e., they should use existing acquisition programs as starting points to name lands for inclusion in Florida's mitigation banks. The Florida Environmental Regulation Commission Mitigation Banking Task Force also recommended identifying potential mitigation banking sites utilizing such a procedure.²⁵³ As the former Florida Department of Natural Resources noted in its concluding paragraph to the 1992 CARL report:²⁵⁴

The CARL program is continually being reevaluated and modified to achieve the state's goals and objectives for conserving its dwindling natural . . . resources. The development pressures under which these resources are continually subjected are intensifying as the population within the State of Florida continues to grow at the annual rate of

248. *Id.* at 24.

249. FLA. STAT. § 372.074 (1990).

250. *Id.* § (1)(a).

251. Robert M. Rhodes & Cathy M. Sellers, *Mitigation Banking* 12, (unpublished article presented to CLE International Wetlands Conference on March 21-22, 1991, on file with author); see also FLA. STAT. § 372.074(2) (1990). A "Development of Regional Impact" is a comprehensive regional planning process required for Florida development projects that are large enough to impact regional ecosystems, economies, transportation, water sewer systems, etc. See generally FLA. STAT. § 380.06 (1991).

252. See DER & FLA. WMDs MITIGATION BANK REPORT, *supra* note 158, at 13.

253. See *supra* text accompanying note 226.

254. CARL, *supra* note 233, at 33.

nearly 1,000 new residents each day. The CARL program, alone, cannot compete with these ever increasing pressures. Thus, the concerted efforts of state, federal and local governments . . . are required in order to accomplish the goals and objectives of the state's land acquisition programs.²⁵⁵

The existing preservation and conservation programs in Florida are uniquely suited to complement mitigation banks. With the DEP now on the state's Land Acquisition Advisory Council,²⁵⁶ acquisition of hundreds of thousands of acres of privately-owned wetlands could be accomplished at little or no cost to taxpayers if the preservation of such lands could be used as credits in Florida's mitigation banking system.

The lands in such programs have already been carefully identified as warranting preservation. The risk of failure and non compliance associated with the creation of new wetlands as mitigation, and enhancement of degraded wetlands, is non-existent when preservation of such existing wetlands is used as mitigation. Payment for land acquisitions through mitigation banks comes primarily from private funds (unless a public project is involved).²⁵⁷ Public funds would not be required to acquire vast tracts of valuable wetlands. This savings could reduce the burden on taxpayers and simultaneously increase the effectiveness of the acquisition programs — a win/win proposition.

IX. THE REGULATORY TAKINGS ISSUE — PRESERVATION AS MITIGATION OFFERS ALTERNATIVE VALUE TO HIGHLY REGULATED WETLANDS

A. *Private Property Rights Must be Considered in the Wetlands Regulatory Process*

The Fifth Amendment of the United States Constitution provides that private property shall not "be taken for public use, without just compensation."²⁵⁸ The wetland permitting process, layered with numerous regulations and controls, raises the issue of whether denial of a dredge and fill permit constitutes a regulatory taking. As one Congressman noted, "[a]ny discussion of wetlands regulation also must include private property rights."²⁵⁹ As the chairman of the Council on Environmental Quality noted, "[i]f three-quarters of wetlands are in private hands, we are simply not going to achieve no-net-loss without the participation

255. *Id.*

256. See FLA. STAT. § 259.035(1) (1993).

257. See FLA. ADMIN. CODE r. 62-342.850 (1995) (providing rules for public mitigation banks that may be set up by the WMDs).

258. U.S. CONST. amend. V.

259. *Roe Backs Wetland Banking Plan*, 41 ENV'T WEEK (Oct. 17, 1991).

of private land owners."²⁶⁰ Because of this disproportionate ratio of privately-versus-publicly-owned wetlands, the wetland "regulatory program often collides with private property interests."²⁶¹ Decisions concerning wetlands have had a profound impact on current regulatory takings jurisprudence.

B. *Doctrine Established* — *Pennsylvania Coal Company v. Mahon*

The doctrine that governmental regulation of private property could lead to a de-facto taking was first introduced in 1922 by the Supreme Court's decision in *Pennsylvania Coal Company v. Mahon*.²⁶² *Pennsylvania Coal* involved a government regulation which effectively prohibited the Pennsylvania Coal Company from mining coal from its property.²⁶³ The Court held that when regulations of private property reach "a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the [regulatory] act [W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."²⁶⁴ Writing for the majority, Justice Holmes noted that "[w]e are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."²⁶⁵

C. *The "Landmark" Takings Case* — *Penn Central Transport Company v. City of New York*

In 1978, the Supreme Court in *Penn Central Transport Company v. City of New York*²⁶⁶ held that the New York City Landmarks Preservation Law, which effectively prohibited Penn Central from developing its air rights above Penn Central Station, did not constitute a regulatory taking.²⁶⁷ The Court set out criteria for evaluating regulatory takings, including the economic impact of the regulation, the extent to which the regulation has interfered with the distinct investment-backed expectations, and the character of the governmental action.²⁶⁸

The Court did not find a taking because it determined that Penn

260. *Id.* (Quoting Michael Deland, Chairman of the Council on Environmental Quality (CEQ)).

261. Haynes & Gardner, *supra* note 62, at 10262.

262. 260 U.S. 393 (1922) (Holmes, J.).

263. *Id.* at 412.

264. *Id.* at 413-15.

265. *Id.* at 416.

266. 438 U.S. 104 (1978).

267. *See generally id.*

268. *Id.* at 124.

Central could continue to use the terminal as it existed.²⁶⁹ The Court focused on the value of the air rights.²⁷⁰ The preservation law allowed for transferable developments rights (TDRs) of the air rights.²⁷¹ The Court determined that, although the value of Penn Central's air rights was diminished²⁷² and the TDR program was "far from ideal,"²⁷³ the air rights were not abrogated and still retained a residual value in their transferability under the TDR system.²⁷⁴

D. *The Two Part Test* — *Agins v. City of Tiburon*

Expanding the reasoning of *Penn Central*, the U.S. Supreme Court created a two-part takings test in *Agins v. City of Tiburon*.²⁷⁵ *Agins* involved a challenge to an open space land use zoning ordinance which restricted a landowner's use of his five-acre property to no more than five single-family residences.²⁷⁶ The Court held that applying a general zoning law to a particular property creates a taking if "the ordinance does not substantially advance legitimate state interests"²⁷⁷ or if the ordinance "denies an owner economically viable use of his land."²⁷⁸ In other words, a regulation advancing a legitimate state interest constitutes a taking if it denies an owner of all viable economic use of his land. The Court held that the general public, *not private individuals*, should "bear the burden of an exercise of state power in the public interest."²⁷⁹

E. *Agins Test applied to Wetlands* — *Deltona Company v. United States*

Penn Central and *Agins* established the foundation for asserting a regulatory takings claim for denial of section 404 permits. In the 1981 case of *Deltona Co. v. United States*,²⁸⁰ the United States Court of Claims applied the two-part test of *Agins* and determined that a denial of a section 404 permit for development of a portion of Deltona's property did not constitute a taking.²⁸¹

269. *Id.* at 137.

270. *Id.*

271. *Id.*; see also *supra* note 65-66 and accompanying text (discussing a typical TDR system).

272. *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 131 (1978).

273. *Id.* at 137.

274. *Id.*

275. 447 U.S. 255 (1980).

276. *Id.* at 257.

277. *Id.* at 260 (citations omitted).

278. *Id.* (citations omitted).

279. *Id.*

280. 657 F.2d 1184 (Cl. Ct. 1981), *cert. denied*, 455 U.S. 1017 (1982).

281. Permits were previously granted for the first two of five phases of the 10,000 acre development. *Id.* at 1188.

The court viewed the development as a whole in assessing the second prong of the *Agins* test. It determined that, like the regulation in *Penn Central*, denial of the permit to develop a *portion* of the entire property did not “deprive Deltona of the economically viable use of its land.”²⁸² Deltona still had 111 acres of uplands property in the tracts for which permits were denied which it could develop without a permit.²⁸³ By viewing all of Deltona’s property as a whole, the court found that there was a residual, although significantly diminished, value which saved the property from being inversely condemned by the permit denial.²⁸⁴ Although application of the “parcel as a whole” rule of *Deltona* was later restricted,²⁸⁵ the court’s *Penn Central*-type residual value reasoning is still important for wetland mitigation banks.²⁸⁶

F. *Agins* Test Partially Bifurcated — Keystone Bituminous Coal Association v. DeBenedictis

The *Agins* test was partially bifurcated in *Keystone Bituminous Coal Association v. DeBenedictis*,²⁸⁷ a case that created the “nuisance exception” to regulatory takings and confirmed the “whole parcel” reasoning used in *Deltona*.²⁸⁸ In *Keystone*, the Court ruled that an act which required fifty percent of the coal beneath certain buildings to be kept in place to provide surface support did not constitute a regulatory taking.²⁸⁹ The Court found that the act was in the public’s interest because it “merely restrain[ed] uses of property that are tantamount to public nuisances.”²⁹⁰ The Court reasoned that, as in *Penn Central*, the complainant was not divested of its entire mining rights. Although its investment-backed expectations were abridged, as in *Penn Central*, they were not entirely abrogated.²⁹¹

282. *Id.* at 1192.

283. *Id.*

284. *Id.*

285. *See, e.g., infra* notes 304-309 and accompanying text.

286. *See infra* part IX.K.

287. 480 U.S. 470 (1987).

288. *But see* *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886, 2899 (1992) (*Keystone* “nuisance exception” is inapplicable “[w]here the State seeks to sustain regulation that deprives land of all economically beneficial use” (emphasis added)); *see also infra*, part IX.K.

289. *See generally* *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470 (1987).

290. *Id.* at 491.

291. *Id.* at 498-501.

G. *Can a Dredge and Fill Permit Denial Ever Lead to a Regulatory Taking?* Florida Rock Industries, Inc. v United States
Says Yes!

*Florida Rock Industries, Inc. v. United States*²⁹² was the first United States Claims Court case to find a taking in a section 404 permit denial. The court held that denial of a section 404 permit to mine lime-rock from a ninety-eight acre tract of wetlands in a tract of more than 1000 acres left the property owner with no economically viable uses for the subject wetland property and constituted a regulatory taking.²⁹³ Unlike *Deltona*, the court focused solely on the tract for which a permit was denied, rather than focusing on the applicant's entire acreage.

On appeal, the United States Court of Appeals for the Federal Circuit, using a different analysis, found that the Corps denied the permit *not* to prevent harm to the surrounding environment, but rather to inure a benefit to the general public by preserving the wetlands for aesthetic and recreational concerns.²⁹⁴ The denial of the permit solely to prevent harm to the surrounding environment might have been allowed under the nuisance exception set out in *Keystone*.²⁹⁵ However, under *Florida Rock*, the *Keystone* nuisance exception is inapplicable in cases where, in essence, regulatory preservation is found.²⁹⁶

The court reasoned that because the *public* would benefit from the preservation of the wetlands, the *public*, not the owner, should pay to maintain them.²⁹⁷ On remand, the court ordered the government to pay Florida Rock over \$1,000,000 for the regulatory taking of the ninety-eight acres of wetlands.²⁹⁸

H. *Safe Harbor for Property Rights Found in Loveladies Harbor, Inc. v. United States*

Florida Rock was not the only safe harbor for applicants who were denied permits and were left with no other economic value for their properties. *Loveladies Harbor, Inc. v. United States*²⁹⁹ provided additional Constitutional shelter. In *Loveladies*, the United States Claims

292. 8 Cl. Ct. 160 (1985), *aff'd in part and vacated in part*, 791 F.2d 893 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987), and *aff'd on remand* 21 Cl. Ct. 161 (1990).

293. *Id.* at 165.

294. *See Florida Rock Indus., Inc. v. United States*, 791 F.2d 893, 904 (Fed. Cir. 1989).

295. *But see Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886, 2899 (1992) (creating categorical rule and narrow nuisance exception); *see also infra*, part IX.K.

296. *See Florida Rock Indus., Inc. v. United States*, 791 F.2d 893, 904 (Fed. Cir. 1989).

297. *Id.*

298. *See Florida Rock Indus., Inc. v. United States*, 21 Cl. Ct. 161 (1990). This figure amounts to over \$10,000 per acre.

299. *Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153 (1990).

Court relied on *Florida Rock* and found that a denial of a section 404 permit to fill wetlands diminished the value of a twelve and a half acre parcel of wetlands by ninety-nine percent and constituted a taking.³⁰⁰ Loveladies Harbor had originally purchased 250 acres of vacant land and had sold off or developed 199 acres.³⁰¹ The remaining fifty-one acres could not be developed due to the enactment of state and federal wetland regulations.³⁰² After obtaining state approval on eleven and one-half acres, the owners were denied a federal permit.³⁰³ The Claims Court concluded that the "parcel as a whole" analysis of *Deltona* could "not be read to require a rigid rule that the parcel as a whole must include all land originally owned by" the party denied the permit.³⁰⁴ Furthermore, the court determined that *Keystone* did not require courts "to include all the property which was held at the time of the original purchase."³⁰⁵ Instead, the court created a new standard and looked only to the particular acreage in question for which a permit was denied.³⁰⁶ The court concluded that "the value of the property . . . [was] *eradicated* as a result of the government action,"³⁰⁷ and ordered the government to compensate Loveladies Harbor based on the value of the land *before* the taking.³⁰⁸ The court stated that "[w]hen property is taken by the government, the proper measure of just compensation is . . . the property's fair market value at the time of the taking."³⁰⁹

I. *The Government is on the Takings Defensive*

The federal government did not ignore the rush of takings cases,³¹⁰ as President Reagan's reaction to two important taking cases illustrates.

1. *NOLLAN V. CALIFORNIA COASTAL COMMISSION*

In *Nollan v. California Coastal Commission*,³¹¹ a beach front property owner was required to dedicate public beach access in front of his property in order to obtain a permit to rebuild a private beach front

300. *Id.* at 160.

301. *See* Loveladies Harbor, Inc. v. United States, 15 Cl. Ct. 381, 383 (1988).

302. *Id.*

303. *Id.* at 384.

304. *Id.* at 392.

305. *Id.*

306. *Id.* at 384.

307. Loveladies Harbor, Inc. v. United States, 21 Cl. Ct. 153, 160 (1990) (emphasis added).

308. *Id.*

309. *Id.* at 161.

310. For a thorough discussion of the federal takings cases in denial of wetland section 404 permits, concluding that the United States Claims Court has "skewed its analysis" towards private owners, see Thomas Hanley, *A Developer's Dream: The United States Claims Court's New Analysis to Section 404 Takings Challenges* 19 B. C. ENVTL. AFF. L. REV. 317 (1991).

311. 483 U.S. 825 (1987).

house.³¹² The Supreme Court found no reasonable relationship between the permit application and the governmental imposition of the permit condition requiring the dedication of the public access right of way. The Court found that the condition attached to the permit was not a legitimate state interest.³¹³ It held that the parcel was inversely condemned just as if the state had required Nollan to dedicate an easement on his property without compensation, irrespective of the permit sought.³¹⁴ The Court cautioned that government should use the public power of eminent domain if it wants to effectuate a "public purpose."³¹⁵

2. *FIRST ENGLISH EVANGELICAL LUTHERAN CHURCH OF GLENDALE V. COUNTY OF LOS ANGELES*

In *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*,³¹⁶ a church wanted to reconstruct destroyed buildings on its property.³¹⁷ An "interim" ordinance³¹⁸ prevented building in the area. The Supreme Court held the "invalidation of the ordinance [that restricted use of the property] without payment of fair value for the use of the property during this period of time would be a constitutionally insufficient remedy."³¹⁹ *First English* was the first Supreme Court decision to hold that the Constitution requires payment of monetary damages for periods of "temporary taking."³²⁰

3. EXECUTIVE ORDER NO. 12360-THE GOVERNMENT RESPONDS

In early 1988, in response to *Nollan* and *First English*, President Ronald Reagan signed Executive Order No. 12360 entitled *Governmental Actions and Interference With Constitutionally Protected Rights*.³²¹ The order acknowledged that "governmental actions that do not formally invoke the condemnation power, including regulations, may result in a taking for which just compensation is required."³²² The order required that formal procedures be created to ensure that executive agencies and departments carefully review their actions to avoid takings that are not

312. *Id.* at 829.

313. *Id.* at 837.

314. *Id.*

315. *Id.* at 841-42.

316. 482 U.S. 304 (1987).

317. *Id.* at 307.

318. *Id.*

319. *Id.* at 322.

320. *Id.* The Court held that "temporary takings. . . which deny a landowner of all use of his property, are not different in kind from permanent takings for which the Constitution clearly requires compensation." *Id.* at 318.

321. Exec. Order No. 12360, 53 Fed. Reg. 8859 (1988).

322. *Id.* § 1(a).

necessary and to account for those regulatory takings that are necessary.³²³ The order and subsequent Attorney General's guidelines issued under the order³²⁴ cover regulatory programs such as the section 404 permit process.³²⁵

J. *Current Takings Jurisprudence and Wetland Permit Denials*

Under current takings jurisprudence, a property owner whose property has been designated as a wetland could apply for a section 404 or state permit for the wetland portion of the property only, have the permit denied, and conceivably win a takings case under a *Florida Rock* and *Loveladies Harbor* analysis. Even if a permit is denied and subsequently issued, a temporary taking could be found under *First English*.

As *Florida Rock* illustrates, Florida is particularly at risk. Many Florida wetlands located outside of urban boundaries are valuable only for their rock mining or agricultural uses. Most of the properties targeted for rock mining in Florida are located in, or border, Water Conservation Areas or critical environmental areas. If development guidelines, growth management laws, and zoning ordinances prohibit other viable uses, then failure to allow rock mining or farming may lead to numerous takings cases like the one in *Florida Rock*.

A significant number of such lands, particularly those within the state's Water Conservation Areas, are not actively or realistically targeted for purchase by land acquisition programs³²⁶ because the threat of their development has been effectively regulated out of existence.³²⁷ Florida, acting through the WMDs, does have outstanding offers to purchase the vast tracts of privately-owned wetlands within the Water Conservation Areas.³²⁸ However, Florida may never be able to purchase the largest remaining privately-owned tracts because it continues to arbitrarily value such lands at only \$100 per acre.³²⁹ As the SFWMD responded in 1994 to a private wetland owner's inquiry concerning what price the SFWMD would pay to purchase lands within the Water Conservation Area, "[t]here has been no change in the District's policy regarding these parcels[T]he current situation regarding acquisition

323. *Id.* § 1(b).

324. See United States Attorney General, Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings, (June 30, 1988).

325. See SALVENSEN, *supra* note 5, at 37.

326. See, e.g., *supra* part VIII.C (discussing Florida's CARL program).

327. See discussion *supra* part VII.A (discussing the anti-preservation-as-mitigation argument).

328. See, e.g., Letter from Stephen L. Johnson, Real Estate Specialist, South Florida Water Management District to Milton L. Weinkle, D.D.S. (June 30, 1994) (on file with author).

329. *Id.*

of WCA lands [in 1994 is the same as it was in] 1990. The \$100 per acre figure is still the value with which we must comply."³³⁰ This \$100 per acre figure was apparently arrived at due to restrictive land use regulations which completely restricts the use of such lands.³³¹ Essentially, Florida continues to act as if it owns such lands and continues to hold firm to the anti-preservation-as-mitigation argument. Florida's failure to target such lands for acquisition at a realistic price exposes it to significant takings risks in light of current takings jurisprudence. "There is no incentive to purchase the land . . . as the government's action ensures that the land will be maintained in its natural state."³³²

K. Lucas v. South Carolina Coastal Council Sets New Takings Standards

In 1992, in *Lucas v. South Carolina Coastal Council*, the United States Supreme Court finally clarified the *Keystone* "nuisance exception" and held that it did not apply to cases "[w]here the State seeks to sustain regulation that deprives land of *all* economically beneficial use."³³³ The Court held that:

the legislature's recitation of noxious-use justification cannot be the basis for departing from [the] categorical rule that total regulatory takings must be compensated. If it were, departure would virtually always be allowed . . . [and] would essentially nullify [*Pennsylvania Coal Company v. Mahon's* affirmation of limits to the noncompensable exercise of the police power].³³⁴

The Court noted that "there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking."³³⁵ The state "may resist compensation only if . . . the proscribed use interests were not part of [the property owner's] title to begin with."³³⁶ The Court held that private property owners do not hold title to land "subject to the 'implied limitations' that the State may subsequently eliminate all economic valuable use."³³⁷ Such an interpretation "is inconsistent with the historical compact recorded in the Takings

330. *Id.*

331. Compare this figure with the over \$10,000 per acre awarded by the Claims Court to Florida Rock. See *supra* note 298 and accompanying text.

332. See Haynes & Gardner, *supra* note 62, at 10263 (citing *Formanek v. United States*, 26 Cl. Ct. 332, 349 (1992)).

333. *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886, 2899 (1992) (emphasis added).

334. *Id.*

335. *Id.* at 2895.

336. *Id.* at 2899.

337. *Id.* at 2900.

Clause that has become part of our constitutional culture."³³⁸ In sum, the Court held that the state, "by *ipse dixit*,³³⁹ may not transform private property into public property without compensation."³⁴⁰

L. *Mitigation Banking Incorporating Preservation Could Solve the Takings Problem*

1. THE PROBLEM UNDER CURRENT TAKINGS JURISPRUDENCE

Restrictive land use regulations, coupled with the anti-preservation-as-mitigation argument, leads directly to the regulatory takings issue. *Florida Rock* found rock mining not to be a nuisance that would warrant a *Keystone* exception to the *Agins* takings test. *Lucas* held that the *Keystone* exception did not apply in cases involving deprivation of all uses previously held by the property owner prior to the enactment of the restrictive regulation. The government may now find itself liable for a regulatory taking anytime private property owners within Water Conservation Areas or other heavily regulated areas are denied wetland permits, if they owned the properties prior to enactment of the permitting requirements.³⁴¹

2. ALTERNATIVE VALUE CREATED — THE *PENN CENTRAL* SOLUTION

The Court's reliance on the existence of the TDR program in *Penn Central* has direct application to this dilemma. In comparison to *Penn Central's* TDR system, as long as *some* viable economic use for a wetland is available, such as a credit value in a mitigation bank, both the requirements of *Lucas* and the second prong of the *Agins* test may be satisfied, justifying denial of a permit. Much like a real banking system, the effect will be greatly multiplied. Properties suitable for development, but requiring mitigation, would have a ready source of wetland "funds" upon which to draw. A great advance toward a realistic "no net loss" policy could be achieved.

3. DEPARTMENT OF THE ARMY GENERAL COUNSEL AGREES

In 1992, William J. Hanes II, then General Counsel for the Department of the Army, publicly supported mitigation banking.³⁴² He indicated that "mitigation banking would help reduce the federal

338. *Id.*

339. A bare assertion resting on the authority of an individual or entity.

340. *Id.* at 2901. (citation omitted).

341. *See, e.g., Lucas*, 112 S.Ct. at 2899.

342. *See Haynes Address, supra* note 70. *See also Haynes & Gardner, supra* note 62, at 10261. Mr. Gardner was an Assistant to the General Counsel of the Department of the Army.

government's risk of being sued for taking private property."³⁴³ By conferring "economic value on privately owned wetlands"³⁴⁴ in a mitigation banking system, Mr. Haynes noted, "denial of a permit [to develop such wetlands] "is less likely to destroy a property's economic value."³⁴⁵ He stressed that a mitigation banking system which emphasizes preservation as mitigation "is necessary if the government is to derive the benefit of protection from takings claim."³⁴⁶ This is so because preservation as mitigation preserves primarily "high value wetlands . . . and these are the wetlands most likely to be involved in a permit denial."³⁴⁷

Ensuring that there is economic value in keeping an environmentally valuable wetland in its natural state is essential to protecting private property interests and the regulatory program from the onslaught of takings cases. Moreover, it must be recognized that the goal of no net loss cannot be achieved on the shoulders of the regulatory program alone; acquisition, education and tax incentives must play substantial roles as well.³⁴⁸

Further, similar to the DER Secretary's rationale in the 1988 Wetland's Preservation-as-Mitigation policy,³⁴⁹ Mr. Haynes agreed that "preservation of wetland sites would go far to alleviate [the] concerns" of the uncertainty of traditional creation, restoration and enhancement mitigation methods.³⁵⁰

4. FLORIDA'S WETLAND MITIGATION BANKING RULES CONTAIN LANGUAGE THAT PROMOTES TAKINGS

One of the factors used in establishing the mitigation credit value of existing wetlands to be preserved as mitigation under the new Mitigation Banking Rules is "[t]he extent to which the lands that are to be preserved are already protected by existing state, local or federal regulations or land use restrictions."³⁵¹ This factor was not one of the factors set out in the DER Secretary's 1988 Wetland's Preservation-as-Mitigation policy.³⁵² In fact, the curious inclusion of this anti-preservation-as-mitigation factor in the Rules violates the canons set forth in President Reagan's *Governmental Actions and Interference With Constitutionally*

343. See *Haynes Address*, *supra* note 70.

344. *Haynes & Gardner*, *supra* note 62, at 10263.

345. *Id.* at 10262.

346. *Id.* at 10263.

347. *Id.*

348. *Id.*

349. See *Twachtmann*, *supra* note 56.

350. *Id.*

351. FLA. ADMIN. CODE r. 62-342.470(2)(g) (1995).

352. See *Twachtmann*, *supra* note 56.

Protected Rights Executive Order³⁵³ and may now expose Florida to a regulatory taking if a private wetland owner is denied a permit for creation of a preservation-only mitigation bank.

5. PROPOSED AMENDMENTS TO THE MITIGATION BANKING RULES

If "it is the policy of this state to establish reasonable regulatory programs which provide for the preservation and protection of Florida's wetlands . . . consistent with private property rights,"³⁵⁴ then the new Wetland Mitigation Rules need to be amended to accomplish this policy. The use of Mitigation Credits is restricted under the Rules. "Mitigation Credits may only be withdrawn [from a mitigation bank] to offset adverse impacts" within a defined Mitigation Service Area.³⁵⁵ A Mitigation Service Area "will typically be coextensive with the regional watershed in which the Mitigation Bank is located,"³⁵⁶ although the Rules provide for exceptions under limited circumstances.³⁵⁷

The following amendments to the Mitigation Banking Rules are proposed:

1) The following language should be added to the Rules: "Mitigation Banks consisting solely or primarily of large tracts of existing privately-owned wetlands may be created and are encouraged. Such Mitigation Banks must initially contain at least 1,000 acres of existing wetlands to be preserved. The Mitigation Credit ratio for such wetlands shall be no less than 10 to 1 and no more than 100 to 1. Mitigation Credits from such Mitigation Banks may be used individually, or in combination with Mitigation Credits from other approved Mitigation Banks."

2) Section 62-342.470(2)(g) of the Rules, requiring "consideration of the extent to which lands that are to be preserved are already protected"³⁵⁸ by regulations, should be deleted.

3) Section 62-342.600(4) of the Rules should be amended to include an exemption from the restrictive regional watershed requirement for projects which propose to preserve a minimum of 500 acres of existing wetlands, regardless of how far away such projects are located from the mitigation bank's regional watershed or Mitigation Service Area.

353. Exec. Order No. 12360, 53 Fed. Reg. 8859 (1988).

354. See FLA. ADMIN. CODE r. 62-312.015(1)(c) (1995) (outlining the foundation that the Florida Legislature intended to provide the DEP with respect to Florida's Dredge and Fill Activities rules).

355. See FLA. ADMIN. CODE r. 62-342.600 (1995).

356. FLA. ADMIN. CODE r. 62-342.600(1) (1995).

357. See FLA. ADMIN. CODE r. 62-342.600(4) (1995).

358. FLA. ADMIN. CODE r. 62-342.470(2)(g) (1995).

X. CONCLUSION

With the passage of the FERA and the creation of a statewide Mitigation Banking program, the day has finally arrived for Florida to embrace preservation as mitigation.

By incorporating preservation as a primary focus of any mitigation banking system, several goals are accomplished simultaneously. First, a large inventory of valuable, pristine wetlands will be protected from development in perpetuity by being transferred from private to public hands. Second, public funds earmarked for land acquisitions will be saved or stretched further than legislators and environmentalists can currently envision. Preservation as mitigation can become a private funding mechanism to supplement and expand existing land acquisition and preservation programs. Third, mitigation through preservation will enhance and complement traditional restoration, enhancement, and creation mitigation methods. Fourth, a regional, large scale approach to mitigation can be accomplished more realistically. Finally, hundreds of thousands of acres of wetlands will be removed from the rosters of potential takings cases.

Florida has made considerable progress toward acceptance of preservation as mitigation. Several large environmentally valuable properties have already been preserved utilizing preservation as mitigation.³⁵⁹

Although the hesitation of preservationists and environmental interests to fully embrace mitigation banking is understandable in light of the poor historical success rate of mitigation projects, preservation as mitigation may prove to be a viable and practical tool in the mitigation banking process.

Preservation as mitigation offers Florida significant advantages over traditional mitigation measures. As Florida's mitigation banks are created and implemented, the DEP and the WMDs should explore preservation as mitigation further and should make preservation of existing privately-owned wetlands a primary objective of Florida's mitigation banks. Properly implemented, Florida's new mitigation banking pro-

359. *See supra* note 33 (discussing preservation of 8500-acre Walker Ranch in Polk County, Florida, as mitigation for Disney's right to develop 600 acres of wetlands for a planned community, called Celebration City, in nearby Osceola County, Florida); *see also supra* notes 159-67 and accompanying text (discussing Central Florida Beltway Mitigation Bank).

gram can be a valuable weapon in the state's war against future wetland destruction and a model of governmental respect for private property rights. Carpe diem, Florida Carpe diem³⁶⁰

CHARLES H. RATNER*

360. Seize the day, Florida Seize the day.

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