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# WETLANDS REGULATION AND MITIGATION AFTER THE FLORIDA ENVIRONMENTAL REORGANIZATION ACT OF 1993

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The Florida Environmental Reorganization Act of 1993<sup>1</sup> (Reorganization Act) embraced the belief that mitigation banking offers the most promising means of preserving Florida's wetlands. That the Reorganization Act would have such enthusiasm for wetlands banking was expected, given the success of mitigation in decreasing the total acreage of wetlands potentially destroyed through dredging, filling, or draining.<sup>2</sup> Mitigation includes any type

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The nature of this project was such that it would be inappropriate to attempt to acknowledge all of the persons who have contributed. The risk of inadvertent omission would be too great. Thus, we do not list by name the practitioners, regulators, scientists, professors, and librarians who contributed to this work. Rather, we thank them as a group for their counsel, which has been invaluable.

The assistance offered by a few individuals, however, must be recognized. Bill Hyde of the firm of Earl, Blank, Kavanaugh & Stotts, Tallahassee, provided insights into the history and administrative law aspects of dredge and fill permitting. Professor Donna Christie, Tammi Berden, Wendy Russell Wiener, Steve Lewis of the firm of Messer, Vickers, Caparello, Madsen & Lewis, Tallahassee, and Rebecca Cunningham of the *Journal* kindly reviewed the work in progress, and the final version greatly benefited from their observations. Of course, any errors remaining are the authors' alone.

1. Fla. CS for CS for HB 1751 (1993) (Second Engrossed), Ch. 93-213, 1993 Fla. Laws 2129, 1993 Fla. Sess. Law Serv. 1652 (West) [hereinafter *Reorganization Act*]. For the convenience of those using different legislative services, citation to the Act will be by section and page number of the second engrossed version of House Bill 1751, followed by a parallel cite to West's session law publication. At press time, Florida's official session law compilation was only in galley form.

The Act is one of the largest environmental trains to come out of recent sessions, and by far the most comprehensive reorganization act since 1975. See Ch. 75-22, 1975 Fla. Laws 42 (forming the Department of Environmental Regulation and the Department of Natural Resources). The Reorganization Act deals with far more than just wetlands permitting. This article considers only the wetlands mitigation provisions of the Act; however, some commentators have shown the ambition to summarize and digest the entirety of House Bill 1751. At press time, the best so far comes from Mr. Bibeau of the Florida Bar. See Brian H. Bibeau, 1993 *Legislative Update and 1994 Forecast*, in 2 ANNUAL ENVIRONMENTAL AND LAND USE LAW UPDATE AND SECTION ANNUAL MEETING 20.1-20.21 (Aug. 1993).

2. DAVID SALVESEN, WETLANDS: MITIGATING AND REGULATING DEVELOPMENT IMPACTS 3 (Nigel Quinney ed., 1990). Of course, the overall success of mitigation in preserving wetlands does not mean that all mitigation projects are successful. See *infra* notes 159-210 and accompanying text.

of activity performed to minimize the degradation of wetlands, particularly through their restoration, enhancement, or creation.<sup>3</sup>

Despite the recent endorsement of these practices, however, the Legislature has yet to resolve conflicts over the development and preservation of wetlands. Critics of mitigation, particularly projects proposing the construction of new wetlands, view the creation of natural wetlands as nearly impossible.<sup>4</sup> Indeed, wetlands are dynamic ecosystems with complex soils, hydrology, and vegetation.<sup>5</sup> These critics, however, often fail to compromise, or even acknowledge instances where mitigation has worked.<sup>6</sup> They thereby deny the reality that development, along with the filling of wetlands, will persist.

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3. SALVESEN, *supra* note 2, at 3. The term "mitigation" is never clearly defined in statute. Use of the term by the antiquated Henderson Wetlands Protection Act, FLA. STAT. §§ 403.91-403.938 (1991 & Supp. 1992) (Henderson Act), supplanted by Reorganization Act, *supra* note 1, suggests that mitigation only minimizes the adverse impact on wetlands, and does not shield them from development. See FLA. STAT. § 403.918(2)(b) (1991 & Supp. 1992) (requiring consideration of means to "mitigate adverse effects which may be caused by the project"). To similar effect, the Department has defined by rule what mitigation is and is not:

"Mitigation" means an action or series of actions that will offset the adverse impacts on the waters of the state that cause a proposed dredge and fill project to be not permissible. "Mitigation" does not mean:

(a) avoidance of environmental impacts by restricting, modifying or eliminating the proposed dredging and filling.

(b) cash payments, unless payments are specified for use in a previously identified, Department endorsed, environmental or restoration project and the payments initiate a project to supplement an ongoing project. The project shall be sponsored by a governmental agency and the adverse impacts of the dredge and fill project shall be offset by that previously identified project.

FLA. ADMIN. CODE ANN. r. 17-312.310(6) (1989).

Accordingly, one could not say that mitigation prevents the destruction of wetlands. Rather, mitigation provides an alternative to their complete loss.

4. SALVESEN, *supra* note 2, at 4.

5. ENVIRONMENTAL DEFENSE FUND & WORLD WILDLIFE FUND, HOW WET IS A WETLAND? THE IMPACTS OF THE PROPOSED REVISIONS TO THE FEDERAL WETLANDS DELINEATION MANUAL 10-13 (1992) [hereinafter ENVIRONMENTAL DEFENSE FUND] (Copies of this publication may be obtained by phoning the Environmental Defense Fund's Membership office at (212) 505-2100 or the World Wildlife Fund at (202) 778-9688).

The difficulty in defining wetlands appears even in the Reorganization Act. The Act provides an interim definition, but requires its further development through rulemaking. *Reorganization Act, supra* note 1, § 21, at 20-21, 1993 Fla. Sess. Law Serv. 1652, 1658 (West) (to be codified at FLA. STAT. § 373.019(17) (1993)); see *infra* note 241 and accompanying text.

6. See generally Jon East, *Wetlands Washout*, ST. PETERSBURG TIMES, Feb. 24, 1991, at D1 (noting that some environmentalists have concern that mitigation banking is "a codeword for checkbook regulation; developers simply write a check and start the bulldozer"). One commentator noted the frustrating tone of the wetlands mitigation debate:

Many of the articles which appeared, and most, if not all of the editorials on the subject of mitigation, have sensationalized the issue and led to the inevitable and self-fulfilling prophecy and conclusion that mitigation is an abysmal failure and that man is wholly incapable of recreating or restoring that which the Deity has placed on the earth.

Frank E. Matthews, *Mitigation*, THE FLORIDA CHAMBER'S ENVIRONMENTAL NETWORK, Nov. 7, 1991, at 4 (on file with authors).

As a result, developers, preservationists, and most importantly, wetlands scientists must work to refine and select mitigation techniques that yield the most promising results.<sup>7</sup> The preservation of existing wetlands will likely depend on the success of future mitigation projects. In addition, critics of mitigation must acknowledge development as inevitable in Florida, and realize that mitigation represents a tool for the preservation of wetlands and an alternative to their destruction. Conversely, developers must recognize that despite evidence of success, the need for mitigation improvement continues.

This article provides an informative overview of wetlands mitigation in light of the 1993 Reorganization Act. The following discussion rests on the assumption, implicit in the Act,<sup>8</sup> that mitigation offers the most viable means of preserving wetlands in Florida. Part I outlines the inherent conflict between developers and preservationists, furnishing insight into the perspectives of the two factions. Part II examines the history of wetlands regulation that lead to the 1993 Act. Close attention is given to the origins of the Reorganization Act, with particular reference to documents that form the primary intent behind the legislation.

Part III reviews the portions of the Reorganization Act dealing with wetlands, offering commentary and analysis. The discussion notes the consolidation of dredge and fill permitting into a single environmental resource permit; the delegation of permitting authority; the creation of a unified wetlands definition; and the codification of cumulative impact analysis. The section also offers a critical view of the new permit criteria, and an analysis of the Department of Environmental Protection's<sup>9</sup> (Department) urgent need to create water quality criteria for wetlands.

Part IV looks at mitigation theory and practice, and notes the prominent role mitigation banking<sup>10</sup> will have under the regulatory

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7. See SALVESEN, *supra* note 2, at 4.

8. See *Reorganization Act*, *supra* note 1, § 29, at 31, 1993 Fla. Sess. Law Serv. 1652, 1663 (West) (to be codified at FLA. STAT. § 373.4135 (1993)) (embracing mitigation with the legislative finding that "the adverse impacts of activities regulated under this part may be offset by the creation and maintenance of regional mitigation areas or mitigation banks").

9. The Reorganization Act merged the Department of Environmental Regulation with the Department of Natural Resources. See *Reorganization Act*, *supra* note 1, §§ 3, 8, at 10-11, 16-17, 1993 Fla. Sess. Law Serv. 1652, 1655, 1657 (West). The new agency is called the Department of Environmental Protection (DEP). *Id.* Because the Legislature still awaits a reviser's bill codifying House Bill 1751, see *id.* § 14, at 18, 1993 Fla. Sess. Law Serv. 1652, 1658 (West) (directing creation of same), this article refers to DEP and DER interchangeably. See *infra* note 85.

10. At press time, the Department of Environmental Protection is well into the creation of wetlands banking rules, as required by the Legislature. See *Reorganization Act*, *supra* note 1, § 29, at 31, 1993 Fla. Sess. Law Serv. 1652, 1663 (West) (to be codified at FLA. STAT. § 373.4135 (1993)). This article considers rulemaking developments as of August, 1993, but leaves for others the

scheme created by the Reorganization Act. Since the Act carries forward many provisions of existing regulations, Florida case law on mitigation is also reviewed throughout the article.

## I. DEVELOPMENT VERSUS PRESERVATION: THE RECURRING CONFLICT

Although an arsenal of laws and programs exist to reduce adverse impacts on wetlands, all signs indicate that pressure to develop wetlands will only increase.<sup>11</sup> Demographic trends illustrate increasing migration to areas located near water, particularly coastlines and other wetlands.<sup>12</sup> In Florida, the vast majority of undeveloped land includes wetlands. One Florida consultant has stated that "[i]t's hard to walk 200 yards without bumping into a wetland."<sup>13</sup> The state's high annual growth rate forces these pristine lands to remain under constant threat of development. Strict federal, state, and local regulatory programs, combined with the difficulty in avoiding wetlands, provide for constant conflict between wetlands preservation and development.<sup>14</sup>

The following sections briefly summarize the two general perspectives on wetlands development: those of the developers and preservationists. These perspectives partially illustrate the recurring and inherent conflict between the two camps.

### A. *The Developer's Perspective*

Generally, landowners and investors are more inclined to support the conversion of wetlands to more economically productive uses, such as residential or commercial developments. Furthermore, landowners frequently assert that wetland regulations are unnecessarily restrictive, unpredictable, and constitute a taking of their property in violation of the Fifth Amendment.<sup>15</sup> To understand more completely the perspectives of today's landowners, it may be helpful to explore the federalist ideas advocated by James Madison and the republican views espoused by Thomas Jefferson. Remnants

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post-mortem on the final banking rules, due in January of 1994. *Id.*; see *infra* notes 417-51 and accompanying text.

11. SALVESEN, *supra* note 2, at 2.

12. *Id.* In 1984, roughly 40% of the United States population resided within 50 miles of the coast. Population estimates show that 75% will live near the coast by the mid-1990s. *Id.*

13. *Id.*

14. See *id.*

15. U.S. CONST. amend. V; SALVESEN, *supra* note 2, at 2. For a recent and informative overview of the wetlands taking issue in Florida, see *Chira v. Seminole County*, No. 88-4946-CA-13-E, slip op. (Fla. 18th Cir. Ct. 1992) (holding that Seminole County wetlands ordinance as applied to plaintiff's property constitutes a taking).

of the federalist and republican ideologies continue to underpin the arguments advanced by landowners.

Federalists, like Madison, viewed property from a Lockean perspective,<sup>16</sup> equating the protection of property rights with the respect owed to individual rights.<sup>17</sup> Madison proposed the portion of the Fifth Amendment prohibiting the taking of property without just compensation.<sup>18</sup> Overall, federalists largely opposed governmental interference.<sup>19</sup> Landowners who adamantly resist wetlands regulations seem to follow the federalist perspective.<sup>20</sup>

Republicans, similar to Jefferson, favored the sacrifice of individual rights to the greater public good, yet still acknowledged that some protection of private property was essential to maintain personal independence.<sup>21</sup> Jefferson believed that the land itself was the common stock of the public, but also recognized the necessity for individuals to be productive with their property.<sup>22</sup> Today's landowners, emulating the republican perspective, recognize the local, state, and national importance of wetlands.

### B. The Preservationist's Perspective

Preservationists strive to maintain wetlands in their natural state.<sup>23</sup> Like developers, they are often critical of wetlands protection laws. Preservationists, however, claim that the laws have broad loopholes, which allow pristine wetlands to be damaged or destroyed.<sup>24</sup> Not surprisingly, some preservationists would extend the public trust doctrine to cover all wetlands.<sup>25</sup> One commentator,

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16. According to John Locke, the central purpose of government is the protection of private property. Jerry L. Anderson, *Takings and Expectations: Toward a "Broader Vision" of Property Rights*, 37 KAN. L. REV. 529, 531-32 (1989).

17. *Id.* at 534.

18. *Id.*

19. *Id.*

20. For information on groups advocating property rights and free enterprise, see Mary Beth Regan, *Backlash Builds Against Environmentalism*, TALLAHASSEE DEMOCRAT, May 17, 1992, at B1; Kirstin Downey, *A Conservative Supreme Court Addresses Property Rights*, WASH. POST, Feb. 16, 1992 at H1 (referring to "an increasingly militant property rights movement").

21. Anderson, *supra* note 16, at 532.

22. *Id.*

23. SALVESEN, *supra* note 2, at 2.

24. *Id.* Florida alone has lost approximately 9.3 million acres of wetlands within the past 200 years. THOMAS E. DAHL, *WETLANDS LOSSES IN THE UNITED STATES: 1780'S TO 1980'S* at 5 (1990).

25. An additional protection against the depletion of the nation's wetlands may lie in the public nuisance/noxious use exception to the Fifth Amendment's Takings Clause. A state, through regulations, may prohibit all economically beneficial use of a person's land, provided the restrictions inhere in the state's law of property and nuisance. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2897 (1992). The dredging and filling of wetlands were prohibited under this exception in *Claridge v. New Hampshire Wetlands Bd.*, 485 A.2d 287, 292

for example, asserts that "[o]nly the public trust doctrine is sufficiently comprehensive to address the broad range of threats to wetlands."<sup>26</sup>

The scope of the public trust doctrine is indeed broad, enabling states to maintain certain natural resources in trust for the people.<sup>27</sup> In *Phillips Petroleum Co. v. Mississippi*,<sup>28</sup> the Supreme Court held that land beneath navigable waters, including land subject to the ebb and flow of the tide, was within the scope of the public trust doctrine.<sup>29</sup> Prior to *Phillips Petroleum Co.*, the Court stated in *Illinois Central Railroad Co. v. Illinois*<sup>30</sup> that the doctrine was intended to ensure that people of a state "may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties."<sup>31</sup>

The commentator noted above advocates that the doctrine should cover non-navigable wetlands because their resource value is similar to protected navigable waterways.<sup>32</sup> Without doubt, expanding the

(N.H. 1984) (prohibiting owner, without compensation, from dredging and filling wetlands, because the dredging and filling would damage the wetlands' ability to produce coastal habitats and marine fisheries).

26. Mary K. McCurdy, *Public Trust Protection for Wetlands*, 19 ENVTL. L. 683, 703 (1989).

27. *Id.* at 683. The doctrine was a product of English common law, and has been accepted by most jurisdictions in the United States. See *Shively v. Bowlby*, 152 U.S. 1 (1894).

28. 484 U.S. 469 (1988).

29. *Id.* at 479-80. The doctrine had its first clear expression in *Illinois Central R.R. v. Illinois*, 146 U.S. 387 (1892), where the Court voided a grant giving control of a harbor bottom to a private company:

[T]he abdication of the general control of the State over lands under the navigable waters of an entire harbor or bay, or of a sea or lake . . . is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public. . . . The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without substantial impairment of the public interest in the lands and waters remaining.

146 U.S. at 452-53. Thus, although the title to submerged lands could be alienated, the right to control the lands remained with the state.

Florida courts have added substantially to these early federal pronouncements. For example, the definition of navigability appears to have a local custom. In *Odom v. Deltona Corp.*, 341 So. 2d 977, 988 (Fla. 1977), the court stated that the issue of whether a particular lake was navigable when Florida entered the Union, thus vesting sovereignty title in the state, depends on "the water body's potential for commercial use in its ordinary and natural condition" at that time. The principle that sovereignty lands are held by the state according to common law is affirmed in the Florida's Constitution, which provides: "The title to lands under navigable waters, within the boundaries of the state, which have not been alienated, including beaches below mean high water lines, is held by the state, by virtue of its sovereignty, in trust for all the people." FLA. CONST. art. X, §11.

30. 146 U.S. 387 (1892).

31. *Id.* at 452.

32. McCurdy, *supra* note 26, at 703. This broadening of the public trust doctrine would appear to be foreclosed by Florida's Constitution, which places title to "lands under navigable waters" in the state "in trust for all the people." FLA. CONST. art. 10, § 11 (emphasis added).

public trust doctrine to include such wetlands would arm preservationists with a constitutional tool equal to the Takings Clause. But expanding the public trust to include non-navigable wetlands would be contrary to *Illinois Central Railroad Co.* and its progeny.

The authors submit that to a large extent the debate over the public trust doctrine is a mere quodlibet. Courts and practitioners in Florida simply have not made the expansion of the public trust doctrine anything more than an academic proposition.<sup>33</sup> And with good reason. Invoking the public trust doctrine does not offer any answers to the tension between private property rights and the needs of the community.

Indeed, expanding the public trust doctrine would merely give a new vocabulary to the recurring conflicts over wetlands preservation. Instead of balancing private property rights and the limits of the police powers, courts would alternatively weigh the Takings Clause against the public trust doctrine. At best, this would merely shift the tempest to another teapot. At worst, expansion of the public trust doctrine would only exacerbate the tensions between developers and preservationists.

A more practical approach—one that both developers and preservationists must now take—comes from the administrative remedies offered by the Reorganization Act. The philosophies of the preservationists and developers discussed above will never be resolved outside of proceedings devoted to direct constitutional claims. In contrast, the proceedings under the Reorganization Act will provide solutions, and will have a direct impact on activities in wetlands. The focus of this article, therefore, appropriately avoids further discussion of the historical, sociological or philosophical differences between developers and preservationists. It is enough to note the competing tensions between the two schools. The following sections consider closely the new regulatory scheme that governs activities in wetlands and mitigation practices.

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33. Cf. *Board of Trustees of the Internal Improvement Trust Fund v. Lost Tree Village Corp.*, 600 So. 2d 1240 (Fla. 1st DCA 1992) (declining to hold that public trust doctrine exempted agency from requirements of administrative procedures act). One should not ignore, however, the importance the public trust doctrine has in several other states. See, e.g., *California v. Superior Court of Lake County*, 625 P.2d 239 (Cal. 1981) (expanding public trust doctrine); *California v. Superior Court of Placer County*, 625 P.2d 256 (Cal. 1981) (same). See generally Janice Lawrence, Note, *Lyon and Fogerty: Unprecedented Extensions of the Public Trust*, 70 CAL. L. REV. 1138 (1982).



## II. A BRIEF HISTORY OF FLORIDA'S REGULATION OF ACTIVITIES IN WETLANDS

Very few works offer a comprehensive history of Florida's dredge and fill regulations.<sup>34</sup> Nonetheless, it is necessary to examine Florida's history of wetlands regulation to better understand its future direction. The following sections present a history of Florida's wetland regulations in three parts: early origins, the development of the Warren S. Henderson Wetlands Protection Act<sup>35</sup> (Henderson Act), and the 1993 Reorganization Act.<sup>36</sup>

The first era of Florida's wetland regulation is characterized by statutes aimed at economic development, and the reclamation of swamp and overflowed lands. Efforts to encourage the dredge and fill of wetlands began to turn around in the 1950s as reclamation soon gave way to conservation.

Florida's second era of wetlands regulation began with early dredge and fill rules and matured with the passage of the Henderson Act in 1984. The Act responded to enormous wetlands loss<sup>37</sup> and codified Florida's first comprehensive program for the regulation of dredge and fill activities.

The ambitious changes made by the 1993 Reorganization Act mark the start of Florida's third era of dredge and fill regulation. The Reorganization Act dramatically reworked the Henderson Act, redistributing its provisions to various agencies, and endorsing a stronger reliance on mitigation. Since much of the Reorganization Act merely recites existing provisions of the Henderson Act, an understanding of the present statutory scheme comes from a review of its predecessors.

### A. *Early History of Wetlands Regulation*

It is all too easy to look at Florida's wetlands regulations prior to the Henderson Act as a great mass of destructive, pro-development regulation. While much of Florida's history was concerned with

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34. By far, the best efforts come from two books by Dean Maloney and a lengthy article on the Henderson Act. See FRANK E. MALONEY, SHELDON J. PLAGER, RICHARD C. AUSNESS, & BRAM D.E. CANTER, *FLORIDA WATER LAW 1980* (1980) [hereinafter *WATER LAW 1980*]; FRANK E. MALONEY, SHELDON S. PLAGER, & FLETCHER N. BALDWIN, JR., *WATER LAW AND ADMINISTRATION: THE FLORIDA EXPERIENCE 347-404* (1968) [hereinafter *WATER LAW AND ADMINISTRATION*]; Mary F. Smallwood, Silvia Morell Alderman, & Martin R. Dix, *The Warren S. Henderson Wetlands Protection Act of 1984: A Primer*, 1 J. LAND USE & ENVTL. LAW 210, 251 (1985).

35. FLA. STAT. §§ 403.91-403.929 (1991 & Supp. 1992).

36. *Reorganization Act*, *supra* note 1, 1993 Fla. Sess. Law Serv. 1652 (West).

37. Between 1953 and 1973, an average of 77,000 acres of wetlands per year were lost. Staff of Fla. S. Comm. on Approp., CS for CS for HB (1984) Staff Analysis (rev. May 23, 1984) (on file with authors).

reclamation, early wetlands regulations actually embraced a variety of goals. With a close look at these regulations, one can see the evolution of policy from reclamation, to flood control, to conservation/recreation, and finally to environmental preservation. The history of this policy development, therefore, exposes many of the tensions and competing interests inherent in Florida's current regulations.

### 1. *The Era of Drainage and Reclamation*

Florida's earliest efforts at statutory environmental regulation were generally aimed at promoting commerce and development.<sup>38</sup> The Riparian Act of 1856, for example, vested riparian owners with title to shores and beaches for the purposes of promoting the construction of wharves and docks.<sup>39</sup> The statute was significant not only because it gave riparian owners the right to fill, alter or otherwise improve their waterfront lots, but also because it purported to vest title to public lands in private individuals.<sup>40</sup> However, the Act only granted an interest in tidal lands up to the low watermark,<sup>41</sup> and conveyed no such title to fresh water riparian owners.<sup>42</sup>

Once the United States Supreme Court clearly stated the limits of the public trust doctrine in *Illinois Central Railroad Co. v. Illinois*,<sup>43</sup> however, the Florida Supreme Court was obliged to narrow the broad meaning of the 1856 Act by holding that it conveyed a mere easement to use public tidal lands.<sup>44</sup> Moreover, the Florida court also held that the public right of access would not be disturbed by even a complete grant of title. As the trust doctrine became more ingrained in Florida jurisprudence, the "title" to shore lands promised by the 1856 Act became only a qualified right.

Further inland, Florida also encouraged the reclamation of wetland areas throughout the 1800s. Early legislation was invariably concerned with the drainage and development of swamps. The Swamp and Overflowed Lands Act of 1850 is perhaps most typical of this policy.<sup>45</sup>

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38. MALONEY, WATER LAW 1980, *supra* note 34, at 457.

39. Ch. 791, Laws of Fla. (1856).

40. *Geiger v. Filor*, 8 Fla. 325 (1859).

41. *Rivas v. Solary*, 18 Fla. 122 (1881).

42. *Dumas v. Garnett*, 12 So. 464, 466 (Fla. 1893) ("[A]ll riparian or littoral lands not on a stream, or on a bay of the sea, or on a harbor, are beyond the terms and spirit of the law, however navigable the waters washing their shores may be.")

43. 146 U.S. 387 (1892); *see supra* note 29 and accompanying text.

44. *Brickell v. Trammell*, 82 So. 221 (Fla. 1919).

45. 9 U.S. Stat. 519 (September 28, 1850).

When Florida was admitted to the Union in 1845,<sup>46</sup> it became sovereign of all lands under the navigable waters within the State.<sup>47</sup> It was further vested with some 500,000 acres of land as part of its entry into the Union.<sup>48</sup> Despite these large acquisitions by the State, much of Florida's lands were still held by the federal government, including millions of acres of submerged swamp lands. In 1850, however, Congress passed the Swamp and Overflowed Lands Act to encourage the reclamation of wetlands. Under the Act, states could acquire title to the overflowed lands for the purpose of drainage and reclamation.<sup>49</sup>

The following year, the Florida Legislature acted to accept these lands into trust.<sup>50</sup> The trust that the lands were held in was unlike the common law doctrine of public trust. The only condition on the use of these lands was that proceeds from their sale had to be applied exclusively, insofar as was necessary, towards reclamation by means of levees and drains.<sup>51</sup> With this, some 20,000,000 acres of swamp land were patented to the State of Florida.<sup>52</sup>

To deal with the windfall of state lands acquired from the United States as part of the Swamp and Overflowed Lands Act of 1850, the Florida Legislature created the Board of Trustees of the Internal Improvement Trust Fund<sup>53</sup> (Board). The Board was composed of judicial and executive officers, and accepted as its mission the creation of "plans for the reclamation of swamp lands and [appraisal of] the value of said lands . . . ."<sup>54</sup> The original board was unable to accomplish its mission,<sup>55</sup> however, and was reorganized in 1855 along with the creation of an Internal Improvement Trust Fund.<sup>56</sup> Composed of the Governor and some of his cabinet, the Board's newly stated mission was the reclamation and drainage of the overflowed lands granted in 1850 and their administration for the common good.<sup>57</sup> Although the Board was later given title to sovereignty lands,<sup>58</sup> the area acquired under the Swamp and Overflowed Lands Act of 1850 remained part of a distinct trust with

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46. 5 U.S. Stat. 742 (March 3, 1845).

47. *Martin v. Busch*, 112 So. 274 (Fla. 1927).

48. 5 U.S. Stat. 455 (September 4, 1841).

49. 9 U.S. Stat. 519, 520 (September 28, 1850).

50. Ch. 332, Laws of Fla. (1851).

51. *Trustees of the Internal Improvement Fund v. Root*, 51 So. 535 (Fla. 1910).

52. *Everglades of Florida*, S. DOC. NO. 89, 62d Cong., 1st Sess. 7 (1911).

53. Ch. 332, Laws of Fla. (1851).

54. *Id.*

55. The early history of the Board is detailed in *Everglades of Florida*, *supra* note 52, at 8-10.

56. Ch. 610, Laws of Fla. (1855).

57. *Coastal Petroleum Corp. v. American Cyanamid, Inc.*, 492 So. 2d 339, 342 (Fla. 1986).

58. Ch. 7891, § 1, Laws of Fla. (1919).

the federal government. By accepting the lands from the United States, Florida had agreed to drain and reclaim most of south Florida.

The State's best efforts to reclaim Florida's vast interiors included private and public drainage ventures. The first public approach was on a local level. The Drainage of Swamps and Overflowed Lands Act of 1893 provided for county level administration of reclamation projects:

The board of county commissioners of any county in this state, when conducive to the public health, convenience or welfare, or where the same will be of public benefit or utility, may cause to be constructed, as hereinafter provided, any drain, ditch or water course within said county.<sup>59</sup>

The Drainage by Counties Act of 1901<sup>60</sup> reaffirmed much of this legislation, but allowed for local projects unrestricted by size limitations. The purpose of these two acts was the creation of local or neighborhood drainage projects.

On a larger scale, the Legislature also created individual drainage districts by special act. The success of these districts lead to a much greater delegation of power to local drainage districts under the General Drainage Act of 1913.<sup>61</sup> This complex legislation allowed either the county commission or residents of an area to petition for the creation of a special taxing district for the construction and maintenance of canals and levees. Judging from later amendments, nothing in the Act allowed for conservation or protection of natural resources.<sup>62</sup>

Back on the coasts, reclamation and economic development continued as well. The original provisions of the Riparian Act of 1856 were revived in 1921 when the Florida Legislature passed the "Butler Bill," which confirmed the grant of riparian rights in submerged lands.<sup>63</sup> The Riparian Act of 1921 largely resembled the Riparian Act of 1856, but worked two important changes. First, the 1921 legislation confirmed the grant of submerged lands under the 1856 Act, but noted that they were "subject to any inalienable trust under which the state holds said lands."<sup>64</sup> The added qualification had the effect of recognizing and approving of the Florida Supreme Court's

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59. FLA. STAT. § 156.01 (1991).

60. FLA. STAT. ch. 157 (1971).

61. Ch. 6458, Laws of Fla. (1913), *codified as amended*, FLA. STAT. ch. 298 (1991).

62. For example, see chapter 72-291, 1972 Fla. Laws 1041, 1041, which stated in recitation:

Whereas the present drainage laws of Florida enacted in 1913 are hopelessly outmoded to effectively accomplish the conservation, protection, management and control of the waters of the state . . .

63. Ch. 8537, Laws of Fla. (1921).

64. *Id.* § 1.

interpretation of the public trust doctrine. Second, the 1921 Act applied only to submerged lands which had been bulkheaded, filled, or otherwise improved by the riparian owner.<sup>65</sup> Thus, an owner's interest in the submerged lands were contingent upon the exercise of riparian rights.<sup>66</sup>

## 2. *The Era of Flood Control & Conservation*

In the late 1920s, the focus of the special districts and other drainage efforts began to shift from reclamation to flood control following a pair of deadly hurricanes. To protect development in southern and central Florida, the Legislature created in 1929 the Okeechobee Flood Control District,<sup>67</sup> which worked with the United States Army Corps of Engineers in the creation of flood control structures around Lake Okeechobee. Later, the federal government pledged to the creation of a comprehensive flood control system with the Flood Control Act of 1948.<sup>68</sup> The Florida Legislature responded to this pledge with additional flood control enabling acts, allowing districts "[t]o cooperate with the United States in the manner provided by Congress for flood control, reclamation, conservation and allied purposes."<sup>69</sup> With this, Florida's regulation of wetlands had moved from drainage, to flood control, and finally to resource management and conservation.

That same year, the Legislature created by special act the Central and Southern Florida Flood Control District<sup>70</sup> (C&SFFCD). The powers and duties of the Okeechobee Flood Control District were transferred to C&SFFCD, and the agency served as the primary contact with the U.S. Army Corps of Engineers. With the funding and engineering assistance of the U.S. Government, the C&SFFCD oversaw the creation of the largest flood control project in the world, spanning most of south Florida. Construction work on the project continues to this day, though the agency's focus appears to have shifted from reclamation to conservation.

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65. *Id.*

66. The Butler Bill proved to be an enduring source of rights. In 1933, the Florida Supreme Court discussed in *Pembroke v. Peninsular Terminal Co.*, 146 So. 249 (1933), the standard under which riparian act grants of sovereign lands would be reviewed. The court stated that only serious impediments to commerce and public fisheries would constitute a breach of the public trust. In later cases, the court easily upheld grants under the riparian acts based on the "immeasurable benefits" gained from increases in commerce. *Holland v. Fort Pierce Financing & Construction Co.*, 27 So. 2d 76 (Fla. 1946).

67. Ch. 13711, Laws of Fla. (1929).

68. 62 U.S. Stat. 1175 (1948).

69. Ch. 25209, Laws of Fla. (1949).

70. Ch. 25270, Laws of Fla. (1949).

### 3. *The Era of Conservation & Preservation*

Although comprehensive wetlands preservation laws would not come until the 1980s, Florida began its early conservation efforts by dismantling the antiquated drainage and reclamation regulations. The first to go was the Butler Bill. The Butler Bill was eroded somewhat by legislation in 1951,<sup>71</sup> and was expressly repealed by the Legislature in 1957 with the passage of the Bulkhead Act.<sup>72</sup>

The Bulkhead Act was an attempt to correct some of the excesses of the past. Since the Butler Bill's reaffirmation of the 1856 Riparian Act, the Legislature had learned that

Uncontrolled and indiscriminate filling can cause irreparable damage to the bay as well as the contiguous upland property. Tidal and other hydrological characteristics may be altered, wildlife habitats destroyed, navigation aggravated, and numerous other deleterious effects manifested. As long as there is granted a right to fill without imposing any restrictions as to where the fill shall be located and how and in what shape it shall be constructed, these adverse effects are inevitable.<sup>73</sup>

The first two riparian acts had initiated Florida's coasts into a pattern of incredible, uncontrolled growth. To control this growth, the Bulkhead Act reaffirmed the State's title to all submerged lands,<sup>74</sup> established a uniform procedure for the setting of bulkhead lines, gave the board of commissioners in affected counties crude dredge and fill permitting authority,<sup>75</sup> and prohibited the unpermitted filling of navigable waters.<sup>76</sup> Although effective only at controlling growth along Florida's coast, some viewed the Act as a means of providing for more general environmental and aesthetic protection.<sup>77</sup>

The Act also created uniform bulkheading procedures and redefined the standard for measuring alleged breaches of the public

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71. Ch. 26776, Laws of Fla. (1951). The legislation returned to the Trustees of the Internal Improvement Trust Fund title to all submerged lands, with minor exceptions, and gave nonriparian owners the right to purchase submerged lands. Previously all tidal land between the upland and the nearest navigable channel were subject to riparian control.

72. Ch. 57-362, 1957 Fla. Laws 806.

73. Memorandum from W. Turner Wallis & Ney C. Landrum to the Trustees of the Internal Improvement Trust Fund 1 (Apr. 22, 1958), reprinted in MALONEY, ET AL., *WATER LAW AND ADMINISTRATION*, *supra* note 34, at 368-69.

74. Ch. 57-362, § 1(1), 1957 Fla. Laws 806, 806 ("[T]he title to all sovereignty tidal and submerged bottom lands, . . . is vested in the trustees of the internal improvement trust fund.")

75. *Id.* § 2(1), 1957 Fla. Laws 806, 808.

76. *Id.* § 3, 1957 Fla. Laws 806, 810.

77. Op. Att'y. Gen. 58-72 (February 27, 1958) ("The purpose of the bulkhead provision of Ch. 57-362 is to set an exterior boundary beyond which no sales will be made and no fill operations permitted. This not only insures protection of the people's trust in navigable waters, but also prevents uneven, unattractive shorelines.")

trust. Whereas under *Pembroke v. Peninsular Terminal Co.*<sup>78</sup> and its daughter cases, the public trust was deemed violated only when significant injury was done to commerce, the Bulkhead Act legislatively declared that such injury occurred when land beyond the set bulkhead line was filled. Filling beyond the bulkhead line was "deemed an interference with the servitude in favor of commerce and navigation with which the navigable waters of this state are inalienably impressed."<sup>79</sup> Subsequent Florida Supreme Court opinions expanded on this notion, holding that bulkhead lines could also be used to regulate privately held submerged lands.<sup>80</sup>

The Bulkhead Act of 1957 made uniform the regulation and use of sovereign lands, as well as the procedures for defining violations of the public trust, and constituted Florida's first comprehensive, statewide dredge and fill legislation. The Act was the beginning of Florida's efforts to regulate its vast water front.

In 1965, the Florida Legislature increased the regulation of coastal areas with the passage of the Beach and Shore Preservation Act.<sup>81</sup> The Act made four significant changes in the administration of Florida's coasts. First, it required permits of anyone wishing to make any kind of coastal construction below the mean high water line.<sup>82</sup> Second, it gave agency authority to remove any existing shore structure "which serves no public purpose, or which is dangerous to or in any way endangers human life, health, or welfare, or which proves to be undesirable or becomes unnecessary, as determined by the board . . . ." <sup>83</sup> Third, it provided for state participation in federal erosion control and beach renourishment projects. Fourth, it authorized the creation of special beach and shore preservation districts, complete with ad valorem taxing and bonding powers.

The Act built on the progress made in the Bulkhead Act of 1957 to weaken riparian ownership of sovereign lands, and significantly strengthened the State's control of its shores. Although cases following the Bulkhead Act of 1957 held that the State could regulate sovereign lands improved under the 1856 and 1921 Riparian Acts, the Beach and Shore Preservation Act codified this, and further granted agency authority to remove any harmful structures. The Act essentially restored to the State the full powers over shores first

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78. 146 So. 249 (Fla. 1933); *see supra* note 66.

79. Ch. 57-362, § 1, 1957 Fla. Laws 806, 806-08.

80. *Gies v. Fischer*, 146 So. 2d 361 (Fla. 1962) (upholding constitutionality of statute establishing bulkhead lines); *Cortez Co. v. Manatee*, 159 So. 2d 871 (Fla. 1964).

81. Ch. 65-408, 1965 Fla. Laws 1435.

82. *Id.* § 1, 1965 Fla. Laws 1435, 1435.

83. *Id.*

acquired under the 1821 treaty with Spain.<sup>84</sup> Florida's coastal control authority finally had come full circle.

In 1975, the Department of Pollution Control<sup>85</sup> (Department) adopted rules to regulate dredge and fill activities above the mean or ordinary high-water line. The rule required permits for

those dredging and/or filling activities which are to be conducted in or connected directly or via an excavated waterbody or series of excavated waterbodies to the following categories of waters of the state (including the submerged lands of such waters and transitional zone of a submerged land) . . . .<sup>86</sup>

The rule thereby defined two types of zones subject to state jurisdiction. The first zone, called simply "submerged land," was identified by the dominance of certain plant communities.<sup>87</sup> The second zone extended landward to the "transitional zone" of a submerged land.<sup>88</sup> Activities taking place in the waterward quarter or the first fifty feet of the transitional zone, whichever was greater,<sup>89</sup> had to be permitted. The rules were remarkable for their time because jurisdictional lands were determined with reference to a vegetative index—a guide for measuring the predominance of "wetland indicator" plant species. In effect, the rules constituted the first wetlands definition based on hard science.

The vegetative index was subject to challenge in 1975. The Joint Administrative Procedures Committee objected<sup>90</sup> that the Department did not have statutory authority to define "waters" in its rules—a necessary ingredient for Department jurisdiction. Ultimately, the

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84. On February 19, 1821, the United States ratified the Treaty of Amity, Settlement and Limits, with Spain, 8 U.S. Stat 252, which transferred possession of East and West Florida from the Spanish Crown to the United States. Later that year, the laws of the United States became applicable to the territory. See *Trustees of Internal Improvement Trust Fund v. Root*, 58 So. 371 (Fla. 1912). Under the Treaty, the lands under the navigable waters, including shores, were held for the benefit of the people, and were to go to the future State of Florida for the use of all people. *Ellis v. Gerbing*, 47 So. 353 (Fla. 1908); *Brickell v. Trammell*, 82 So. 221 (Fla. 1919); *Apalachicola Land & Development Co. v. McRae*, 98 So. 505, *error dismissed* 269 U.S. 531, *overruled on other grounds*, *First National Bank v. Filer*, 145 So. 204 (Fla. 1933), *as stated in Rupp v. Bryant*, 417 So. 2d 658 (Fla. 1982).

85. That same year, the Department of Pollution Control became the Department of Environmental Regulation, the predecessor of today's Department of Environmental Protection. Ch. 75-22, § 4, 1975 Fla. Laws 42, 44. Accordingly, this article refers to all three agencies as "the Department." See *supra* note 9.

86. FLA. ADMIN. CODE ANN. r. 17-4.28(2) (1975).

87. The types of indicator species were listed in the rule, but later covered in a separate Department publication. See DEPARTMENT OF ENVIRONMENTAL REGULATION, GUIDE TO THE WETLAND PLANTS OF SUBMERGED AND TRANSITIONAL ZONE LANDS (rev. Oct. 1981) (orig. ed. Oct. 1979) (on file with authors).

88. *Id.* at r. 17-4.02(19) (1975).

89. *Id.* at r. 17-4.02(17) (1981); accord Sylvia M. Alderman, *Water Pollution Control Law*, in FUNDAMENTALS OF ENVIRONMENTAL AND LAND USE LAW (Fla. Bar CLE ed., 1981).

90. 1 FLA. ADMIN. WEEKLY 28 (July 18, 1975).



Legislature cured this infirmity in the Department rules by codifying the index in statute.<sup>91</sup>

Two administrative challenges in the early 1980s also increased pressure for the Legislature to create wetlands regulations. First, in *Deltona Corp. v. Department of Environmental Regulation*,<sup>92</sup> a hearing officer held that the Department had no authority to regulate lands as opposed to waters. Accordingly, the Department was obliged to alter its dredge and fill rule, changing the terms "submerged land" and "transitional zone of submerged land" to "landward extent of waters of the state."<sup>93</sup>

In the second administrative proceeding, the hearing officer affirmed the Department's jurisdiction over "intermittent water courses which act as tributaries only following the occurrence of rainfall and which normally do not contain contiguous areas of standing water."<sup>94</sup> Opponents of the Department's position claimed that the opinion significantly expanded the Department's jurisdiction beyond the original 1975 rule.<sup>95</sup> Environmentalists also began to worry about a regulatory scheme operating without the grace of authorizing legislation.<sup>96</sup> Both parties saw a common interest in approaching the Legislature.

### B. The Warren S. Henderson Act

To resolve lingering problems with the Department's rule-based regulation of wetlands, the Legislature passed the Warren S. Henderson Act of 1984.<sup>97</sup> The Act matured Florida's early

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91. FLA. STAT. § 403.817(3) (1983).

92. 2 Fla. Admin. L. Rep. 1302-A (Recommended Order of Oct. 22, 1980).

93. FLA. ADMIN. CODE ANN. r.17-4.02(17) 1982). The hearing officer's finding stated that: The language used in the definition contained in the two challenged rules is invalid . . . . [T]he language on its face illustrates that DER is attempting to exercise jurisdiction over lands, as opposed to waters. . . . [T]he challenged rules goes (sic) on to include lands contiguous to said waters where certain vegetational species constitute the dominant plant community. . . . Thus it is clear on the face of the rule that the definition of "submerged land" includes areas which are not the waters of the State.

*Deltona Corp.*, 2 Fla. Admin. L. Rep. at 1305-A.

94. *Occidental Chem. Co. v. Department of Env'tl. Regulation*, 2 Fla. Admin. L. Rep. 1302-A (DOAH Recommended Order, Aug. 11, 1980) (final order entered May 23, 1980), *aff'd* 411 So. 2d 388 (Fla. 1st DCA 1981) (per curiam). In a twin rule challenge case, the hearing officer validated the Department's rule. *Occidental Chem. Co. v. Department of Env'tl. Regulation*, 3 Fla. Admin. L. Rep. 1-A (DOAH Recommended Order, Jan. 12, 1981) (final order entered Nov. 26, 1980), *aff'd* 411 So. 2d 388 (Fla. 1st DCA 1981) (per curiam).

95. E.g., Sylvia M. Alderman, *Phosphate, Dredge and Fill and the Constitutionality of Chapter 403: The Occidental Cases*, 56 FLA. BAR J. 543 (1982).

96. Smallwood, et al., *supra* note 34, at 215.

97. Ch. 84-79, 1984 Fla. Laws 202, *codified as amended at* FLA. STAT. §§ 403.91-403.938 (1991 & Supp. 1992).

experiments with the regulation of dredge and fill, and created the first comprehensive statutory-based regulatory scheme for dredge and fill permitting.

The golden rule of the Henderson Act stated that "[n]o person shall dredge or fill in, on, or over surface waters without a permit from the department . . ."<sup>98</sup> However, a person could be exempted from the permit requirement by statute or Department rule.<sup>99</sup> Exemptions were guaranteed for certain residential development,<sup>100</sup> and specific mining<sup>101</sup> and agricultural activities.<sup>102</sup>

### 1. Permitting

The Henderson Act also provided a list of criteria governing the issuance of permits.<sup>103</sup> The Act created two hurdles for applicants. First, a permit applicant had to provide the Department with

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98. FLA. STAT. § 403.913(1) (1991). The Henderson Act defined wetlands for purposes of dredge and fill activities as areas within the jurisdiction of the Department pursuant to section 403.817. Section 403.817, *Florida Statutes*, in turn authorized the use of a vegetation index, comprising approximately 275 plant species, to define the landward extent of waters of the state, and thus DER's wetlands jurisdiction. In addition, the Henderson Act allowed the Department to "exert its jurisdiction to the ordinary or mean high-water line of waters whenever the landward extent . . . occurs waterward of the ordinary or mean high-water line." *Id.* § 403.913(2). Under the Henderson Act, the Department maintained general jurisdiction over wetlands which are part of rivers, streams, bays, natural lakes, the Gulf of Mexico, and the Atlantic Ocean. FLA. ADMIN. CODE ANN. r. 17-312-030(2)(a)-(f) (1989); STAFF OF FLA. S. COMM. ON NAT. RESOURCES & CONSER., REVIEW OF WETLANDS PERMITTING ACTIVITIES OF THE DEPARTMENT OF ENVIRONMENTAL REGULATION AND THE WATER MANAGEMENT DISTRICTS 24 (1990) (on file with comm.) [hereinafter REVIEW OF WETLANDS PERMITTING].

99. FLA. STAT. § 403.913(1) (1991).

100. *Id.* § 403.913(6).

101. *Id.* § 403.913(8).

102. *Id.* § 403.927(2).

103. Procedurally, the Florida permitting application process occurs in concert with permit consideration at the federal level by the U.S. Army Corps of Engineers. The following is a brief explanation of the federal permitting process.

Initially, the Department processes the permit application. The permit is then forwarded to the Corps of Engineers where it undergoes the federally mandated permit process. 33 U.S.C. § 1344(a) (1987). The Corps, in determining whether to issue a permit must consider the public interest review, 33 C.F.R. § 320.4 (1991), and must apply guidelines developed in conjunction with the Environmental Protection Agency (EPA). 33 U.S.C. § 1344(b). These § 404(b)(1) guidelines, 40 C.F.R. pt. 230 (1991), largely provide the environmental criteria employed when assessing § 404 activities in addition to the "water-dependency" and "practicable alternatives" tests designed to deter wetlands development. Virginia S. Albrecht, *Update on Federal Wetlands Regulation*, in ALI-ABA LAND USE INSTITUTE: PLANNING, REGULATION, LITIGATION, EMINENT DOMAIN, AND COMPENSATION 57, 65 (ALI-ABA Course of Study Materials Vol. 1 1991). The guidelines require an analysis of alternatives, consideration of significant degradation, consideration of possible mitigation, and an analysis of the water quality certification. 40 C.F.R. § 230.10(a)-(d) (1991).

After complying with the mandated procedure, the Corps may decide in favor of issuing the permit; the EPA may, however, object if it determines that the project will have an unacceptable impact upon the environment. 33 U.S.C. § 1344(c) (1987). For a more detailed overview of the federal wetlands regulatory process, see Albrecht, *supra*.

"reasonable assurance that [state] water quality standards will not be violated."<sup>104</sup> Second, the applicant needed to provide the Department "with reasonable assurance that the project [was] not contrary to the public interest."<sup>105</sup> Further, a permit applicant for a project which significantly degraded or was situated in an Outstanding Florida Water<sup>106</sup> was required to "provide reasonable assurance that the project will be clearly in the public interest."<sup>107</sup> The public interest test of the second hurdle amounted to a balancing process, with consideration given to the following criteria:

1. Whether the project will adversely affect the public health, safety, or welfare or the property of others;
2. Whether the project will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats;
3. Whether the project will adversely affect navigation or the flow of water or cause harmful erosion or shoaling;
4. Whether the project will adversely affect the fishing or recreational values or marine productivity in the vicinity of the project;
5. Whether the project will be of a temporary or permanent nature;
6. Whether the project will adversely affect or will enhance significant historical and archeological resources; and
7. The current condition and relative value of functions being performed by areas affected by the proposed activity.<sup>108</sup>

## 2. Mitigation

Under the Henderson Act, failure to pass the two hurdles would not ordinarily end the permitting process. By statute, the Department

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104. FLA. STAT. § 403.918(1) (1991).

105. *Id.* § 403.918(2). If a project benefited endangered or threatened species, it was presumed to be "not contrary to the public health, safety, and welfare." *American Littoral Soc'y, Inc. v. City of Boca Raton*, 10 Fla. Admin. L. Rep. 3139, 3149 (DOAH Recommended Order, May 3, 1988).

106. Outstanding Florida Waters (OFW) "include waters in national and state parks, wildlife refuges and state wilderness areas, wild and scenic rivers, aquatic preserves, some waters within national forests, lands purchased with certain acquisition funds, and other special waters of exceptional recreational, aesthetic, and ecological significance." Robin Lewis et al., *Introduction to Dredge and Fill, Stormwater and Surface Water Management Permitting*, in EIGHTH ANNUAL ENVIRONMENTAL PERMITTING SHORT COURSE 392 (1992). Unless specifically designated, a tributary to a designated waterbody is not an OFW. *Chipola Basin Protective Group, Inc. v. Department of Env'tl. Regulation*, 11 Fla. Admin. L. Rep. 467 (DER Final Order, Dec. 20, 1988).

107. FLA. STAT. § 403.918(2) (1991 & Supp. 1992); 1800 Atl. Developers v. Department of Env'tl. Regulation, 552 So. 2d 946, 948-49 (1st DCA 1989), *rev. denied*, 562 So. 2d 345 (Fla. 1990).

108. FLA. STAT. § 403.918(2)(a) (1991 & Supp. 1992). The seven statutory criteria are sometimes referred to as "the seven dwarves" by specialists in wetlands permitting.

was required to explore various project modifications that would reduce or eliminate adverse environmental impacts and allow the issuance of a permit.<sup>109</sup> If the project still could not meet the Department's requirements following the consideration of all practicable alternatives, the agency would then accept mitigation measures to offset the remaining adverse impacts.<sup>110</sup>

The Department would, however, only consider mitigation when a proposed project failed to surmount one of the two statutory hurdles.<sup>111</sup> In regard to the water quality hurdle, the Henderson Act stated that the Department had to consider mitigation measures proposed by or acceptable to the applicant that generated net improvement of the water quality in the receiving body of water for only those areas which already fail to meet applicable standards.<sup>112</sup> As for the public interest test of the second hurdle, the Department had to consider mitigation measures proposed by or acceptable to the applicant to offset the effects that would likely occur as a result of the project.<sup>113</sup>

### 3. Cumulative Impacts

The Henderson Act additionally required the consideration of cumulative impacts as part of the permitting process.<sup>114</sup> Cumulative impacts refer to potential impacts from the additive effects of many similar projects. The role of the cumulative impact analysis was to insure that the Department would consider "the cumulative impacts of similar projects which are existing, under construction, or reasonably expected in the future."<sup>115</sup> The analysis was also intended "to distribute equitably that amount of dredging and filling activity

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109. SALVESEN, *supra* note 2, at 51. Note, however, that the burden of coming forward with these mitigation plans rested with the applicant, although the Department could make suggestions. See FLA. STAT. § 403.918(2)(b) (1991 & Supp. 1992) ("If the applicant is otherwise unable to meet the criteria set forth in this subsection, the department, . . . shall consider measures proposed by or acceptable to the applicant to mitigate adverse effects . . .").

110. FLA. STAT. § 403.918(2)(b) (1991 & Supp. 1992).

111. *Id.*

112. *Id.*

113. *Id.*

114. FLA. STAT. § 403.919 (1991). Although the Henderson Act did not expressly refer to cumulative impacts, many refer to section 403.919 as the "cumulative impact statute." E.g., Deborah A. Getzoff, *Department of Environmental Regulation: Current Policies and Procedures*, in WETLANDS PERMITTING '88: ISSUES AND PROBLEMS—A PRACTICAL APPROACH § 4 II.A. (Fla. Bar CLE 1988) [hereinafter WETLANDS PERMITTING '88].

115. *The Conservancy, Inc. v. A. Vernon Allen Builder, Inc.*, 580 So. 2d 772, 778 (1st DCA), *rev. denied*, 591 So. 2d 631 (Fla. 1991) (citing *Peebles v. Department of Env'tl. Regulation*, 12 Fla. Admin. L. Rep. 1961, 1965-66 (Fla. 1st DCA 1990)).

which may be done without resulting in violations of water quality standards and without being contrary to the public interest."<sup>116</sup>

Under section 403.919, *Florida Statutes*, the Department had to consider the impact of a proposed project,<sup>117</sup> the impact of existing projects or those under construction,<sup>118</sup> and the impact of projects currently under review, approved, or vested in accordance with section 380.06, *Florida Statutes*.<sup>119</sup> The Department analyzed the cumulative impact of a proposed project on a case-by-case basis.<sup>120</sup>

#### 4. Secondary Impacts

The Henderson Act also allowed the Department to use a secondary impact analysis. This analysis took into consideration impacts that could result in the immediate future from the proposed project. The Department's Secretary, in *McCormick v. City of Jacksonville*,<sup>121</sup> explained that this analysis required a consideration of "what will be at the end of the bridge or road" and not an exploration of those activities or impacts which were too remote in time or relation to the dredge and fill activity.<sup>122</sup>

The secondary impact analysis had its perceived origins in *del Campo v. Department of Environmental Regulation*.<sup>123</sup> The *del Campo* decision involved a dredge and fill application to construct a bridge to an undeveloped island. Although construction of the bridge itself would not have severe environmental consequences, the Department was obligated to consider the impact of other development that would inevitably follow. Thus, the *del Campo* court reversed the hearing officer's exclusion of evidence of so-called "secondary impacts."<sup>124</sup>

Perhaps because of the unique facts of the case, the *del Campo* decision limited the use of secondary impact analysis to situations where "the likelihood of future development is highly probable"<sup>125</sup>

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116. *Id.* (citing *Peebles*, 12 Fla. Admin. L. Rep. at 1967).

117. FLA. STAT. § 403.919(1) (1991).

118. *Id.* § 403.919(2). This subsection also allows consideration of projects for which jurisdictional determinations have been requested. *Id.*

119. *Id.* § 403.919(3). In addition, consideration shall be given to projects the Department reasonably expects to be located within jurisdictional waters. *Id.*

120. Getzoff, WETLANDS PERMITTING '88, *supra* note 114, at § 4 II.C.

121. 12 Fla. Admin. L. Rep. 960 (DER Final Order, Jan. 22, 1990), *aff'd*, 559 So. 2d 252 (Fla. 1st DCA 1990).

122. *Id.* at 981.

123. 452 So. 2d 1004 (Fla. 1st DCA 1984).

124. *Id.* at 1006.

125. *The Conservancy, Inc. v. Florida Audubon Society*, 1990 Envtl. Rep. Fla. Admin. L. Rep. 90:114, at 3, *reversed in part*, 580 So. 2d 772, 778 (1st DCA), *rev. denied*, 591 So. 2d 631 (Fla. 1991).

and not where other impacts were merely likely<sup>126</sup> or speculative.<sup>127</sup> This limitation on secondary impact analysis was affirmed in *The Conservancy, Inc. v. A. Vernon Allen Builder, Inc.*<sup>128</sup> Following *The Conservancy*, consideration of secondary impacts was required only when a proposed project could have a devastating effect on the surrounding environment.<sup>129</sup>

### B. Mitigation Rules Under the Henderson Act

Department rules pertaining to the mitigation of dredge and fill activities were lodged in Part III of chapter 17 of the *Florida Administrative Code*.<sup>130</sup> The rules defined mitigation as "an action or series of actions that will offset the adverse impacts on the waters of the state that cause a proposed dredge and fill project to be not permissible."<sup>131</sup> The definition of mitigation did not include "avoidance of environmental impacts by restricting, modifying or eliminating the proposed dredging and filling, [or] cash payments, unless payments are specified for use in a previously identified, Department endorsed, environmental or restoration project and the payments initiate a project or supplement an ongoing project."<sup>132</sup>

The intent of Part III was to establish criteria for evaluating proposals to mitigate adverse impacts from dredging and filling which cause a project not to be permissible.<sup>133</sup> The Department had to first explore project modifications that would reduce or eliminate the impacts of the proposed project and suggest modifications, either in addition to or in lieu of mitigation.<sup>134</sup> A permit applicant would propose, or the Department might suggest, mitigation only where the proposed dredging and filling would otherwise be unable to meet the

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126. See *Caloosa Property Owners Ass'n v. Department of Env'tl. Regulation*, 462 So. 2d 524 (Fla. 1st DCA 1985) (holding that Department need not consider secondary impacts where there is a mere reasonable likelihood of prospective development).

127. See *Chippola Basin Protective Group v. Department of Env'tl. Regulation*, 11 Fla. Admin. L. Rep. 467, 476 (DER Final Order, Dec. 29, 1988) (holding that speculative evidence of future development does not trigger need for cumulative impact analysis).

128. 580 So. 2d 772, 779 (1st DCA), *rev. denied*, 591 So. 2d 631 (Fla. 1991).

129. *Id.*

130. Part III of chapter 17 of the *Florida Administrative Code* implements § 403.918(2)(b). See FLA. ADMIN. CODE ANN. r. 17-312.300(1) (1989). The rules will soon be revised by the Department. See *Reorganization Act*, *supra* note 1, § 30, at 40, 1993 Fla. Sess. Law Serv. 1652, 1666 (West) (to be codified at FLA. STAT. § 373.414(9) (1993)). Accordingly, this section refers to the rules in the past tense, even though they will still be in force for some time.

131. FLA. ADMIN. CODE ANN. r. 17-312.310(6).

132. *Id.* at r. 17-312.310(6)(a)-(b).

133. *Id.* at r. 17-312.300(1).

134. *Id.* at r. 17-312.300(3).

criteria of sections 403.918(1) and 403.918(2)(a), *Florida Statutes*, and Rule 17-312.080, *Florida Administrative Code*.<sup>135</sup>

Once the Department became aware that the adverse impacts of a dredge and fill project would result in a permit denial, a developer could submit an appropriate mitigation proposal for review.<sup>136</sup> The goal of such a proposal was to offset the apparent future impacts of the project which rendered it unpermissible, thus making the project not contrary to the public interest, or clearly in the public interest in cases affecting Outstanding Florida Waters.<sup>137</sup> Mitigation proposals submitted to the Department involving the creation, enhancement, or preservation of a specific type of waters of the state had to be in writing and include a description of the mitigation area,<sup>138</sup> a description of the reference waters,<sup>139</sup> a description of proximal habitat,<sup>140</sup> a monitoring plan,<sup>141</sup> a mitigation cost estimate,<sup>142</sup> and proof of sufficient legal interest.<sup>143</sup>

The Department evaluated each mitigation proposal on a case-by-case basis.<sup>144</sup> The Department first determined the likelihood that the proposed mitigation would offset the actual adverse impacts caused by the project, including cumulative impacts.<sup>145</sup> In addition, the permit applicant had to provide reasonable assurances that the mitigation would meet designated success criteria,<sup>146</sup> and comply with the various applicable standards.<sup>147</sup>

The success criteria were covered within Rule 17-312.350, *Florida Administrative Code*, which provided that the proposal would be evaluated on an ad hoc basis due to the broad range of projects used to create or enhance existing waters.<sup>148</sup> The success criteria constituted the minimum requirements necessary to obtain a favorable determination. For instance, the Department considered wetland vegetation coverage, natural wetland reproduction, and target water quality standards.<sup>149</sup> A mitigation plan would be

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135. The Department could not require mitigation. *Id.* at r. 17-312.300(4).

136. *Id.* at r. 17-312.330. Of course, the developer could anticipate this outcome, and propose mitigation at the time the permit was filed.

137. *Id.*

138. *Id.* at r. 17-312.330(1).

139. *Id.* at r. 17-312.330(2).

140. *Id.* at r. 17-312.330(3).

141. *Id.* at r. 17-312.330(4).

142. *Id.* at r. 17-312.330(5).

143. *Id.* at r. 17-312.330(6).

144. *Id.* at r. 17-312.340.

145. *Id.*

146. *Id.*

147. Examples of standards which may be applicable include ratios for created or enhanced waters of the state. *Id.* at r. 17-312.340(2), (3).

148. *Id.* at r. 17-312.350(1).

149. *Id.*

successful if "[a]ll applicable water quality standards are met[,] [t]he mitigation project has a hydrologic regime sufficient to sustain it in a viable condition[,] and [t]he specific success criteria contained in the permit are met."<sup>150</sup>

Rule 17-312.390, *Florida Administrative Code*, covered financial responsibility. An applicant for a dredge and fill permit involving mitigation had to provide evidence of economic resources to conduct mitigation measures, mitigation monitoring, and any necessary corrective action indicated by this monitoring.<sup>151</sup> The assurances provided by the applicant had to be equal to 110% of the cost estimate of the mitigation plan.<sup>152</sup> The following methods, at the discretion of the applicant, were used to assure financial responsibility: cash or cash equivalent;<sup>153</sup> letter of credit;<sup>154</sup> performance bond;<sup>155</sup> a financial statement of the permittee provided by a certified public accountant which shows that the permittee has a tangible net worth at a minimum equal to 110% of the cost of the mitigation plan;<sup>156</sup> a demonstration that the permittee meets specific financial tests and corporate guarantees;<sup>157</sup> or a demonstration that the permittee meets certain self-bonding provisions.<sup>158</sup>

### C. *The Origins of Change: The Intent Behind the 1993 Reorganization Act*

Despite the great advances in the regulation of wetlands offered by the Henderson Act, problems continued. Deficiencies in the Henderson Act included an inadequate wetlands definition, complications presented by the overlapping jurisdictional authority of various agencies, and unsuccessful use of mitigation techniques. This section identifies these problems as the primary motivation for the Florida Environmental Reorganization Act of 1993. The following sections look at items that form the primary intent behind the legislation.

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150. *Id.* at r. 17-312.350(1)(a)-(c). When evaluating the success of waters created or enhanced, the Department must take into consideration extreme or unusual climatic conditions. *Id.* at r. 17-312.350(2).

151. *Id.* at r. 17-312.390(1)(a).

152. *Id.* at r. 17-312.390(2).

153. *Id.* at r. 17-312.390(4)(a).

154. *Id.* at r. 17-312.390(4)(b).

155. *Id.* at r. 17-312.390(4)(c).

156. *Id.* at r. 17-312.390(4)(d).

157. *Id.* at r. 17-312.390(4)(e).

158. *Id.* at r. 17-312.390(4)(f).



### 1. Permitted Mitigation in Florida: The Department's 1991 Mitigation Report

The status of permitted mitigation in Florida under the Henderson Act was evaluated in 1991 by the Department's *Report on the Effectiveness of Permitted Mitigation*<sup>159</sup> (Report). The 1990 Legislature requested that the Department's Report "assess the use and effectiveness of mitigation in wetland resource regulation."<sup>160</sup> The Report studied the variety of mitigation practices historically used by the Department. Mitigation was first used as a permit condition in 1979.<sup>161</sup> The Henderson Act later required the Department to consider mitigation proposed by a permit applicant.<sup>162</sup> The Department's wetland resource program generally used two types of mitigation: creation and enhancement.<sup>163</sup> However, an additional type of mitigation, termed preservation, was sometimes recognized.<sup>164</sup>

The Department's Report evaluated the success of these types of mitigation programs by reviewing the status of numerous permits. The Report revealed the shortcomings of past mitigation efforts. As a result, the Report's findings and recommendations contributed to the call for legislative reform.<sup>165</sup>

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159. Department of Environmental Regulation, Report on the Effectiveness of Permitted Mitigation (1991) (unpublished manuscript, on file with authors) [hereinafter, *Effectiveness Report*].

160. *Id.* at 2. Specifically, the Legislature directed the Department to [i]ndicate the acreage of wetlands statewide permitted to be created or enhanced; [and] [a]nalyze a representative number of different types of mitigation sites, indicating the effectiveness of each type; the reasons observed for success or failure; [and] any legislation needed to improve the permitting, compliance and enforcement process to protect the state's wetlands, including proposed sources of funds.

*Id.*

161. *Id.*

162. See *supra* text accompanying notes 43-45.

163. Successfully created or enhanced wetlands are those which regain their lost natural functions and become self-sustaining. *Effectiveness Report, supra* note 159, at 1.

A fourth type of mitigation was also used by the Department, albeit rarely. In some cases, mitigation could be accomplished by protecting the area from the general public. Fla. Admin. Code Ann. r. 17-312.340(11) (4) (1989). Since there is a threshold presumption that people will obey the law, an applicant proposing to mitigate through the protection of wetlands need only post signs. *Haffert v. St. Joe Paper Co.*, 12 Fla. Admin. L. Rep. 4972, 4988 (DOAH Recommended Order, Oct. 26, 1990). This unusual type of mitigation is not considered in this article.

164. Preservation is normally included in a mitigation package that contains creation or enhancement. *Id.*

165. See Frank Matthews, *Mitigation*, THE FLORIDA CHAMBER'S ENVIRONMENTAL NETWORK at 21 (March 1991) (noting that the report "purports to establish a dismal track record for mitigation activities [and] is a likely lightning rod for [reform] legislation") (on file with authors).

### a. Findings

The Report provided an estimate of the acres of wetlands lost, created, enhanced, and preserved between January 1, 1985, and December 6, 1990.<sup>166</sup> The Department totaled these acres through its Groundwater Management System--a tracking system containing data on wetland resource permits. Of the 1,262 permits studied, 988 indicated total losses of 3,305.42 acres.<sup>167</sup> To make up for these losses, "837 permits required the creation of 3,344.90 acres of wetlands, 425 permits required enhancement of 7,300.90 acres of wetlands, [and] 370 permits required 7,587.54 acres of wetlands to be preserved from development."<sup>168</sup>

#### 1. Creation

A critical portion of the Report examined 119 mitigation sites required by sixty-three permits.<sup>169</sup> The sites included twenty-six forested wetland sites, thirty-four freshwater herbaceous wetland sites, fifty-five mangrove sites, and eleven salt marsh sites.<sup>170</sup> At each site, the Report examined permit compliance, ecological success of the mitigation,<sup>171</sup> and the Department's jurisdiction over the mitigation site.<sup>172</sup> Other evaluations involved the completeness of permit documents and the periodic reporting requirements of the mitigation process.<sup>173</sup>

Of the thirty-four permits requiring the creation of freshwater wetlands,<sup>174</sup> only one was found to be in total compliance.<sup>175</sup> The Report did state, however, that three permits could be considered in compliance by focusing only on the permit requirements that are vital to the likelihood of the mitigation's success.<sup>176</sup> Problems with

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166. Effectiveness Report, *supra* note 159, at 3 and Appendix, Table 1.

167. *Id.* at 3.

168. *Id.* at 4.

169. The sites examined were chosen according to whether some or all of the mitigation required by a permit had been built. *Id.* Note that the Department's guideline for the ratio of creation-to-loss is 2:1; however, this guideline is required primarily for preliminary planning. FLA. ADMIN. CODE ANN. r. 17-312.340(2) (1989).

170. Herbaceous and forested components were present in seven sites. Effectiveness Report, *supra* note 159, at 4.

171. As used here, ecological success "means that the wetland site is or seems likely to become a functional wetland of the intended mitigation wetland type based on vegetation, soils, hydrology, and faunal usage." *Id.* at 8.

172. *Id.* at 4.

173. *Id.*

174. Twenty permits included forested wetlands and 17 included herbaceous wetlands. *Id.* at 5.

175. *Id.*

176. *Id.*

compliance included topography, configuration, soils, and vegetation.<sup>177</sup>

In the ecological success category, no difference was found between forested and herbaceous wetlands. Originally, the Department believed herbaceous wetlands were easier to create than forested wetlands. The thirty-four permits reviewed indicated that one attained ecological success, three showed positive trends toward success, and twenty-six showed probable failure.<sup>178</sup> Finally, the Report concluded that fourteen of the thirty-four permits "either are successful, or possibly could be made successful with some small additional effort."<sup>179</sup>

The Report also considered two types of salt water systems, salt marshes,<sup>180</sup> and mangrove forests<sup>181</sup> required by some twenty-nine permits.<sup>182</sup> Permit compliance was satisfied in three of the permits examined. As with freshwater projects, reasons for noncompliance related to topographic, configuration, and vegetation inadequacies.<sup>183</sup> In the ecological success category, "[four] were successful, [nine] showed trends toward success, [six] require more time before success [could] be evaluated, and the remaining [ten] were not successful."<sup>184</sup>

The Report also evaluated each permit included in the study. Permit applicants were responsible for certain permit conditions and permit site drawings when performing a wetland resource project. The thoroughness and clarity of these documents affected the permitted work's implementation and the Department's ability to guarantee compliance. The complexity of the work demanded that permit conditions be described with specificity.<sup>185</sup> And yet only

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177. *Id.* at 5-7.

178. *Id.* at 8. Four permits required more time before an adequate evaluation could be administered. *Id.*

179. *Id.*

180. The creation of 11 salt marshes were mandatory in seven permits. Salt marsh construction is often performed "by scraping uplands adjacent to existing salt marsh down to appropriate elevations with respect to tidal amplitude, then planting with nursery stock." *Id.* at 12.

181. The creation of 55 mangrove sites were necessary in 24 permits. Mangrove wetlands are normally constructed "by scraping uplands adjacent to existing mangrove systems down to appropriate elevations with respect to tidal amplitude, then planting with mangrove seedlings or propagules." *Id.*

182. Salt marshes and forest sites were included in two permits. *Id.* at 11.

183. *Id.*

184. *Id.* at 12. The report suggested that at least three of the permits should be successful subsequent to simple remedial action. *Id.*

185. *Id.* at 14. Note that the Department may not enforce alleged requirements not included in a permit. *Id.* Conditions in a mitigation plan should entail the agreed-upon elements, such as planting, soils and substrate, schedule, monitoring, and reporting. Permit site drawings supplement the information of permit conditions, and they are helpful in providing site location, configuration, depths of soil and planting plan layouts. *Id.*

sixteen of the specific conditions out of the sixty-three permits reviewed in this study were considered thorough and enforceable.<sup>186</sup>

## 2. Enhancement

The wetlands enhancement portion of the Report examined two projects. One involved replacing the wetland's native vegetation.<sup>187</sup> This project received only minimal effort and appeared unsuccessful.<sup>188</sup> The second project involved stopping the routine mowing of the wetland in order to allow the vegetation to recover.<sup>189</sup> This also was unsuccessful, because the wetland ultimately reverted to upland species.<sup>190</sup>

## 3. Preservation

Wetlands preservation received brief attention in the Report. The Department's preservation policy was promulgated by former Secretary Twachtmann in June of 1988.<sup>191</sup> The policy evolved in response to permit applicants who had offered to donate off-site wetlands to the State or to convey particular property rights to preserve the wetlands as mitigation.<sup>192</sup> Specifically, the policy provided factors to be used in determining acceptance of a conveyance and establishment of its value, including:

[w]hether or not the parcel is under consideration for purchase and management as a conservation area or is immediately adjacent to one, or is of such high quality as to provide clear benefit to the state as preserved land; [t]he current degree of threat to the parcel; and [t]he condition of the property as a result of previous activities, such as the disposal of hazardous or solid waste.<sup>193</sup>

The policy also provided factors to determine a conveyance's relative value, including the existence of rare habitat or endangered species,

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186. *Id.* Inadequate success criteria primarily caused the poor specific conditions and, in addition, contributed to difficulties in enforcement. *Id.*

187. *Id.* at 20. The Department allows the ratio of enhancement-to-loss to range from 5:1 to 20:1. High ratios are particularly important since enhancement concerns functional losses rather than acreage losses. Enhancement, rather than creation, is suggested by the Department as a mitigation strategy in situations where an applicant plans to damage wetlands that take a long time to successfully establish, like forested wetlands. *Id.* at 19.

188. *Id.*

189. *Id.*

190. *Id.* at 20.

191. In the past, preservation was used only after on-site wetland creation or enhancement, or both were considered sufficient to warrant the issuance of a permit. According to the Department's report, preservation is normally used to address cumulative effects issues. *Id.* at 21.

192. See Memorandum from Dale Twachtmann, Dep't of Env'tl. Reg., to Randy Armstrong, Dir., Div. of Permitting 1 (June 20, 1988) (on file with authors) [hereinafter Memorandum from Dale Twachtmann].

193. *Id.* at 2.

the type and existence of management authority, and water quality. Finally, the policy set forth the ratios for enhancement mitigation.<sup>194</sup>

The Report observed that permits involving preservation only included those requiring the preservation of natural wetlands and the preservation of mitigation areas.<sup>195</sup> Although not addressed in the Report, wetlands preservation has been criticized as a mitigation strategy contributing to a net loss of wetlands. Those who criticize this strategy find creation or restoration to be more viable in the overall mission to conserve wetlands.<sup>196</sup>

The Report provided a pessimistic outlook on wetlands creation. At best, the Report concluded, Florida's mitigation program had achieved minimal success.<sup>197</sup> Of sixty-three permits reviewed for the study, only four were in full compliance with their mitigation requirements. In addition, no mitigation had been performed in roughly thirty-four percent of the permits, despite the occurrence of wetland losses.<sup>198</sup>

#### b. Recommendations

The Department's Report also provided recommendations to improve the effectiveness of wetlands mitigation, particularly the high degree of noncompliance. These recommendations fall into three categories: legislation; agency policy and rulemaking; and methods to improve program permitting.

##### 1. Recommendations for the Legislature

The Department's legislative recommendations were aimed primarily at remedying the high rate of permit noncompliance, a major factor contributing to mitigation failure.<sup>199</sup> The Report suggested that a more effective monitoring program could reduce noncompliance. The Department also noted that it lacked sufficient resources to adequately monitor existing projects involving mitigation<sup>200</sup> and recommended that the Legislature authorize the Department to assess compliance fees at the time a permit is issued in

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194. The Department will allow a range of ratios between 10:1 and 100:1 depending upon the quality of the conveyance. A ratio larger than 100:1 is considered an inappropriate method of mitigation. *Id.* at 3.

195. Effectiveness Report, *supra* note 159, at 21.

196. Interview with William Leary, Staff Dir., Fla. H.R. Comm. on Nat. Resources (May 14, 1992) [hereinafter Interview with William Leary].

197. Department of Environmental Regulation Office of the Inspector General, Operational and Compliance Audit of Mitigation In The Wetland Resource Regulation Permitting Process 4 (1991) (unpublished manuscript, on file with authors).

198. Effectiveness Report, *supra* note 159, at Executive Summary 1.

199. *Id.* at 22.

200. *Id.*

order to expand monitoring capabilities.<sup>201</sup> Other recommendations included authorization to assess administrative fines for noncompliance with permit conditions,<sup>202</sup> and authorization for seventeen additional compliance and enforcement staff positions.<sup>203</sup> Finally, the Report requested a step pay raise, giving program professionals regular, incremental increase above base pay.<sup>204</sup>

## 2. Recommendations for Agency Policy and Rulemaking

The Report assertively expressed the importance of avoiding wetlands and minimizing the adverse effects of permitted activities on wetlands. The Department's proposed strategy considered mitigation options in the following sequence: enhance degraded wetlands, or restore historic wetlands; preserve other wetlands in conjunction with other forms of mitigation; and create new wetlands.<sup>205</sup> The Report recommended wetlands enhancement guidelines, and stated that preservation of other wetlands as mitigation should be used only in conjunction with wetland enhancement, restoration, and creation. Finally, the Report recommended that the permitting agency examine an applicant's compliance record before issuing a permit,<sup>206</sup> and reject mitigation proposals with the potential to eliminate other habitats.<sup>207</sup>

## 3. Recommendations for Program Improvement

The Report listed a number of recommendations for improving the wetland permitting program, expressing the general need for more careful consideration of mitigation proposals, including amplified consideration of soil characteristics or exotic species present on a mitigation site.<sup>208</sup> In particular, the Report strongly asserted the need for a central tracking system for compliance, enforcement, and information management.<sup>209</sup>

The Department's Report, as requested by the Legislature, outlined the areas in need of improvement. The task of upgrading mitigation next fell into the hands of the Legislature. But even before

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201. *Id.*

202. *Id.*

203. *Id.* at 23. In response to the report, the Legislature approved 10 new enforcement and compliance positions as part of the Department's annual budget. Valerie F. Settles, *Wetlands Mitigation: Changes in the Wind?*, FLA. B.J., July/Aug. 1991, at 53, 54.

204. Effectiveness Report, *supra* note 159, at 23.

205. *Id.* at 23-24. The Department emphasized that creation should only be considered in situations where success is certain. *Id.* at 24.

206. *Id.* at 25.

207. *Id.* at 24.

208. *Id.* at 25.

209. *Id.*

the Report became public, leading environmental legislative committees<sup>210</sup> already had been at work on the problem.

## 2. *The 1991 & 1992 Sessions: Increased Momentum for Change*

After the Department's mitigation study became public, pressure increased for the reform of wetlands regulation. The interim period between the 1991 and 1992 legislative sessions rang with discussion and debate on how to improve Florida's mitigation program. During the summer of 1991, the Department's secretary, Carol Browner, proposed to delegate the federal permitting system to the State and asserted the need for a single definition of wetlands and a single methodology for their delineation.<sup>211</sup> Regarding proper permitting methodology, the Secretary expressed that wetlands first be avoided, that any necessary wetlands impacts be minimized, and that mitigation only be a last resort.<sup>212</sup>

Specifically regarding mitigation, the Secretary voiced a preference for wetlands restoration over creation, and the need for some type of measure to ensure that creation would work, such as performance bonds. Receiving little response, the Secretary also requested legislation that would identify when the Department could refuse to allow activities in particular wetlands.<sup>213</sup>

Through the fall and winter of 1991, significant discussion concerning the feasibility and desirability of allowing mitigation for wetland impacts continued. The regulated interests voiced their support for maintaining mitigation while regulators requested increased monitoring and enforcement in addition to some form of financial responsibility for certain projects.<sup>214</sup>

The staff of the House of Representatives Natural Resources Committee, in addition to drafting legislation, raised a number of important mitigation issues, specifically: "How can mitigation be most effectively employed to advance wetlands protection?" and "Should mitigation continue to be authorized by statute as an

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210. For instance, the House of Representatives Natural Resources Committee and the Senate Natural Resources & Conservation Committee.

211. Lawrence N. Curtin & Lawrence E. Sellers, Jr., *Florida Legislative Update: Wetlands*, FLA. ENVTL. & LAND USE LETTER 1 (Aug. 1991).

212. *Id.*

213. *Id.*

214. Lawrence N. Curtin, *Florida Legislative Update: Wetlands*, FLA. ENVTL. & LAND USE LETTER 1, 2 (Oct. 1991). Both the Senate Natural Resources & Conservation Committee and the House of Representatives Natural Resources Committee seemed to favor the regulators' requests.

alternative to meeting permitting criteria?"<sup>215</sup> According to committee staff, requiring consideration of mitigation under section 403.918(2)(b), *Florida Statutes*, when a permit applicant fails to meet the permitting criteria, made those criteria purposeless.<sup>216</sup> Overall, the staff found necessary legislative policy determinations regarding what role mitigation should play in conserving wetlands. Ideally, the staff reasoned mitigation should be considered for a project after the project has been approved according to the statutory criteria.<sup>217</sup>

The House Natural Resources Committee's comprehensive wetlands package, Proposed Committee Bill 01 (PCB), provided a section on mitigation; however, the PCB failed to survive the legislative process. Subparagraph one provided legislative intent language, specifically "that mitigation of adverse impacts on surface waters be considered only after all practicable efforts have been made to minimize unavoidable adverse impacts."<sup>218</sup> In addition, the section included a no net loss policy.<sup>219</sup> Subparagraph two mandated the adoption of rules involving the mitigation of adverse impacts.<sup>220</sup> The rules were designated to cover specific one-to-one ratios for wetland losses,<sup>221</sup> the requirement of early mitigation,<sup>222</sup> financial surety for mitigation,<sup>223</sup> mitigation success criteria,<sup>224</sup> and certification of a mitigation project.<sup>225</sup> Other issues covered in the PCB included on-site and off-site mitigation,<sup>226</sup> in addition to wetlands creation.<sup>227</sup>

Despite commendable efforts on the part of the Committee, obstacles in the legislative process prevented the passage of the PCB. The issue of solid waste drew the focus away from wetlands conservation throughout the 1992 session.<sup>228</sup> Also, environmental groups and development interests chose not to forcefully push the

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215. Staff of Fla. H.R. Comm. on Nat. Resources, *Issues In Wetlands Protection 10* (1991) (on file with authors). The Senate Natural Resources & Conservation Committee's work product is not considered here.

216. *Id.* Approximately half of the standard form dredge and fill permits that have been issued since the Henderson Act passed have involved some form of mitigation. Without mitigation, these permits would not have been issued. *Id.* at 11.

217. *Id.* at 11-12.

218. Fla. H.R. Comm. on Nat. Resources, PCB 01 at 13 (2d released draft 1992).

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.* The PCB also included a mitigation banking subparagraph which allowed for mitigation banking when it would serve as a greater environmental benefit than traditional mitigation. *Id.*

228. Interview with William Leary, *supra* note 196.



issue. Finally, the Governor's interest in reorganizing state government totally removed the issue from the legislative agenda.<sup>229</sup>

### III. THE FLORIDA ENVIRONMENTAL REORGANIZATION ACT OF 1993

The forces working for change in Florida's wetlands regulation finally prevailed in the 1993 session. Those working to improve wetlands regulation may have gotten even more than they hoped for with the 1993 Reorganization Act. The Act made fundamental changes to all of Florida's environmental regulation, and not just dredge and fill regulation. True to its name, the Florida Environmental Reorganization Act of 1993,<sup>230</sup> integrated and transferred various responsibilities under the Henderson Act.

Whether the Reorganization Act actually did away the Henderson Act has become a source of some confusion. Two sections of the Reorganization Act expressly repealed the Henderson Act, and yet the regulatory powers of the old act are now scattered over various sections of *Florida Statutes*.<sup>231</sup> One commentator observed this feature of the Reorganization Act by saying that the Act "effectively repeals and transfers relevant sections" of the old wetlands act.<sup>232</sup> This much can be confirmed by referring to a section of the Act declaring an intent to transfer the Henderson Act:

It is the intent of the Legislature to transfer the protection of wetlands and the permitting of wetlands impacts encompassed by the Warren S. Henderson Wetlands Protection Act of 1984 to chapter 373, Florida Statutes.<sup>233</sup>

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229. *Id.* The Legislature did pass one bill, involving dredge and fill permitting. Ch. 92-132, 1993 Fla. Sess. Law Serv. 872 (West) (codified at FLA. STAT. §§ 403.031-403.918 (Supp. 1992)). This bill primarily benefits phosphate, limestone, heavy mineral, and fullers' earth mining interests. Section 20 of the bill amended § 403.918, *Florida Statutes*, to allow a variance from state water quality standards for particular mining activities and special considerations for mitigating adverse impacts to wetlands caused by specific mining activities. Staff of Fla. H.R. Comm. on Nat. Resources, CS for CS for SB 2122 (1992), Staff Analysis 16 (final Apr. 1, 1992) (on file with comm.). Notably, the language allowed reclamation to be a form of mitigation. FLA. STAT. § 403.918(5)(b)-(c) (1991 & Supp. 1992).

230. *Reorganization Act*, *supra* note 1.

231. *Reorganization Act*, *supra* note 1, §§ 45, 46, 1993 Fla. Sess. Law Serv. 1652, 1673 (West). The Reorganization Act created or modified the following list of statutes: FLA. STAT. §§ 20.25, 20.261, 253.002, 253.781-253.783, 259.035, 288.514, 367.081, 370.017, 370.025-370.029, 373.016, 373.019, 373.046, 373.079, 373.109, 373.114, 373.129, 373.403, 373.4135, 373.414, 373.421, 373.422, 373.430, 373.441, 373.536, 403.031-403.061, 403.086, 403.087, 403.0876, 403.088-403.0885, 403.111, 403.201, 403.5055, 403.506, 403.511, 403.707, 403.805, 403.811, 403.817, 403.8171, 403.905, 403.91-403.931, 403.9311-403.938 (1991 & Supp. 1992).

232. Bibeau, *supra* note 1, at 20.3.

233. *Reorganization Act*, *supra* note 1, § 19, at 19, 1993 Fla. Sess. Law Serv. 1652, 1658 (West).

Given this, one may safely consider the Henderson Act to be replaced, even though some of the mechanics of the transfer must await a reviser's bill.<sup>234</sup>

The Reorganization Act contains almost one-hundred pages of new or revised statutory language and intent.<sup>235</sup> This article does not endeavor to provide an in-depth analysis of the entire Act's history. Instead, special attention is given below to specific wetlands provisions in the Act.

#### A. Consolidation of Permits

The Reorganization Act consolidates dredge and fill permits, management and storage of surface water permits, and permits for the alteration of mangroves into a single "environmental resource permit."<sup>236</sup> The impetus for this change appears to come from the deliberations of the Partners for a Better Florida Advisory Council.<sup>237</sup> The Council's study of the redundancies in environmental regulation led the call for "streamlining" the permitting process.<sup>238</sup> Another motivation for the consolidation of permits came from the judiciary. In a recent case, a panel of the Fifth District Court of Appeal noted the problems associated with Florida's old regulatory structure:

This case illustrates the problems encountered by citizens who must deal with multiple agencies with overlapping jurisdictions and frequently conflicting requirements. This problem could be alleviated by consolidating the permitting process into a single agency. However, that is a matter to be addressed by the legislature.<sup>239</sup>

The Act's consolidation of the three resource permits into a single regulatory package will help reduce the jurisdictional checkerboard that characterized Florida's past regulations. For example, any sizable

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234. *Id.* § 14, at 18, 1993 Fla. Sess. Law Serv. 1652, 1658 (directing creation of same).

235. The second engrossed version of HB 1751 is 100 pages, including recitations. West's session law service managed to squeeze it into 39 pages.

236. *Reorganization Act*, *supra* note 1, § 19, at 19, 1993 Fla. Sess. Law Serv. 1652, 1658 (stating intent to consolidate permits).

237. Bibeau, *supra* note 1, at 20.3.

238. See Bill Moss, *Merger looms; will it mean anything?* ST. PETERSBURG TIMES, June 28, 1993, at 1B. Further evidence of the Legislature's dissatisfaction with the current regulatory patch quilt comes from statements of Senator Dantzler in support of the Reorganization Act:

[U]nless we do something in terms of trying to define wetlands, there will be conflicting jurisdictional calls by the various agencies all across the state and this is the one thing that we really need to do if we are to end up with a one-stop permitting system and a system which eliminates so much of the contention.

Fla. S., tape recording of proceedings (Apr. 2, 1993) (on file with Secretary) (discussion of Fla. CS for CS for HB 1751).

239. *Vatalaro v. Department of Env'tl. Regulation*, 601 So. 2d 1223, 1124 n.2 (5th DCA), *rev. denied*, 613 So. 2d 3 (Fla. 1992).

project involving construction around mangroves would have in the past almost certainly required a dredge and fill permit (from either the Department's main office or subdistrict, depending on the size, or from a water management district holding delegation), a permit for the alteration of mangroves (from the Department), and a third permit for the storage of surface waters (from the appropriate water management district). Under the Reorganization Act, the same project would require a single environmental resource permit. The Act provides the same protections to the environment, but eliminates much of the duplication. The Legislature gave the affected agencies until July 1, 1994 to develop rules for this consolidated resource permit.<sup>240</sup>

### *B. Unified Wetlands Definition and Delineation Methodology*

The Reorganization Act's most important provision is the statutory definition of a wetland. The Act declares a wetland to be:

those areas that are inundated or saturated by surface water or ground water at a frequency and a duration sufficient to support, and under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soils. Soils present in wetlands generally are classified as hydric or alluvial, or possess characteristics that are associated with reducing soil conditions. The prevalent vegetation in wetlands generally consists of facultative or obligate hydrophytic macrophytes that are typically adapted to areas having soil conditions described above. These species, due to morphological, physiological, or reproductive adaptations, have the ability to grow, reproduce or persist in aquatic environments or anaerobic soil conditions. Florida wetlands generally include swamps, marshes, bayheads, bogs, cypress domes and strands, sloughs, wet prairies, riverine swamps and marshes, hydric seepage slopes, tidal marshes, mangrove swamps and other similar areas. Florida wetlands generally do not include longleaf or slash pine flatwoods with an understory dominated by saw palmetto.<sup>241</sup>

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240. *Reorganization Act*, *supra* note 1, § 30, at 40, 1993 Fla. Sess. Law Serv. 1652, 1666 (West) (to be codified at FLA. STAT. § 373.414(9) (1993)).

241. *Reorganization Act*, *supra* note 1, § 21, at 20-21, 1993 Fla. Sess. Law Serv. at 1658-59 (West) (to be codified at FLA. STAT. § 373.019(17) (1993)). One commentator suggested an alternative means of defining a wetland:

[T]he best way to delineate a wetland is simply to put in boundary stakes where the permit applicant's lawyers, anxious for the well-being of their wingtips and pumps, stop walking on site visits.

Peter Shelley, *Losing Our Wetlands, Science, and Credibility*, NATIONAL WETLANDS NEWSLETTER, Nov./Dec. 1991, at 14 (attributing definition to a "curmudgeonly New England environmentalist").

Consistent with the streamlining provisions noted above,<sup>242</sup> the Legislature provided the wetlands definition "for the sole purpose of serving as the basis for the unified statewide methodology."<sup>243</sup> The definition stands, however, for only as long as it takes the Environmental Regulatory Commission<sup>244</sup> (ERC) to create an alternative wetland delineation methodology. By January 1, 1994, the ERC must "adopt a unified statewide methodology for the delineation of the extent of wetlands . . ."<sup>245</sup> Once approved by the Legislature, the methodology will supersede all other definitions currently in use.<sup>246</sup>

The new wetlands definition should help both regulators and developers. One of the threshold controversies in all dredge and fill cases is the determination of jurisdictional wetlands. Since the Henderson Act allowed the Department and districts to exercise jurisdiction only over wetlands, what constitutes such an area has led to the creation of numerous rules,<sup>247</sup> and a growing body of case law.<sup>248</sup> On the eve of the Reorganization Act, numerous agencies had overlapping jurisdiction over wetlands, all using different definitions.<sup>249</sup> Agencies and local governments assumed jurisdiction based on a variety of methodologies. The Reorganization Act's unified methodology should help remove much of the confusion surrounding this jurisdictional scheme.

Despite the directions to create a "unified statewide methodology" for wetlands delineation, the Legislature also required the ERC to account for "regional differences in the types of soils and vegetation

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242. See *supra* notes 236-40 and accompanying text.

243. *Id.* § 21, 1993 Fla. Sess. Law Serv. 1652, 1658 (West).

244. The Environmental Regulatory Commission (ERC) exercises the exclusive standard-setting authority of the Department. See FLA. STAT. § 403.804(1) (1991). The Reorganization Act reaffirmed the ERC's role in standard-setting, and placed it within the newly formed Department of Environmental Protection. *Reorganization Act, supra* note 1, § 4, at 14, 1993 Fla. Sess. Law Serv. 1652, 1656 (West).

245. *Id.* § 31, at 44, 1993 Fla. Sess. Law Serv. 1652, 1667-68 (West) (amending FLA. STAT. § 373.421(1) (1991)); see also *supra* note 14 and accompanying text.

246. *Id.* § 31, at 44, 1993 Fla. Sess. Law Serv. 1652, 1668 (West).

247. The vegetative index is a good example of the complexity of the Henderson Act regulations. In 1987, the Vegetative Index Review Committee ("VIRC") completed a two-year study of a means to define wetlands based on the dominance of certain vegetation. See W. Michael Dennis, *Vegetation and Soils Indices Review—Current Status*, in WETLANDS PERMITTING '88, *supra* note 114, at 3.1. The legislature then modified and approved of the index. See FLA. STAT. § 403.8171 (1991). A discussion of the vegetative index appears above in notes 85-96. Although the Henderson Act allowed for the use of declaratory statements to determine jurisdiction, FLA. STAT. § 403.914 (1991), the delineation methodology almost always required the assistance of consultants and experts.

248. *E.g.*, Department of Env'tl. Regulation v. Goldring, 477 So. 2d 532 (Fla. 1985) (holding that the Department may assert wetlands jurisdiction even in absence of a two-way exchange of water between wetlands and other waters).

249. See *infra* note 326 and accompanying text.

that may serve as indicators of the extent of wetlands. . . .<sup>250</sup> This will certainly complicate the ERC's mission, and tends to run counter to the goal of creating a single, unified definition. Nonetheless, whatever balance the ERC strikes between uniformity and local diversity will help resolve most problems with jurisdictional determinations; the Reorganization Act promises that the ERC's ratified delineation methodology "shall be binding on the department, the water management districts, local governments and any other governmental entities."<sup>251</sup>

### C. Codification of Cumulative Impact Considerations

The Reorganization Act also explicitly grants the Department authority to consider a project's cumulative impact on the surrounding area.<sup>252</sup> Under the Henderson Act, the Department enjoyed implied authority to use cumulative impacts in the review of permit applications.<sup>253</sup> Case law confirmed the Department's authority, but lacked express legislative sanction for this practice. The resulting body of administrative and case law was therefore capable of misapplication.

The explicit approval of cumulative impact methodology in the Reorganization Act can be taken as a codification of several basic principles in the case law. After the Act, practitioners should consider the following points as settled law:

- The consideration of cumulative impacts is required by all permitting agencies.<sup>254</sup>
- The cumulative impact consideration is not a third test for dredge and fill applicants; rather, the cumulative impact test factors into an applicant's ability to provide "reasonable assurances" that water quality will not be violated.<sup>255</sup>

250. *Reorganization Act*, *supra* note 1, § 31, at 44, 1993 Fla. Sess. Law Serv. 1652, 1667-68 (West).

251. *Id.*, 1993 Fla. Sess. Law Serv. 1652, 1667 (West).

252. *Id.*, § 30, at 39, 1993 Fla. Sess. Law Serv. 1652, 1666 (West) (to be codified at FLA. STAT. § 373.414(8) (1993)).

253. See FLA. STAT. § 403.919 (1991). The Henderson Act never explicitly stated that the Department could consider the "cumulative" impact of a project, allowing instead consideration of existing and reasonably anticipated development. See *supra* notes 114-19 and accompanying text. This authorization eventually came to stand for a cumulative impact analysis.

254. *Reorganization Act*, *supra* note 1, § 30, at 39, 1993 Fla. Sess. Law Serv. 1652, 1666 (to be codified at FLA. STAT. § 373.414(8) (1993)).

255. *Barringer v. E. Speer & Assocs.*, 14 Fla. Admin. L. Rep. 3660, 3709 (DOAH Recommended Order, June 16, 1992), *approved*, 14 Fla. Admin. L. Rep. 3660, 3661, 3674 (DER Final Order, July 27, 1992).

- The policy behind the cumulative impact analysis is a policy of equitable distribution; its purpose being the distribution of permitted activities without violating water quality standards and without being contrary to the public interest.<sup>256</sup>
- The determination of reasonable assurances remains a question of law.<sup>257</sup>

Although the Reorganization Act appears to have codified the above points, the Act did leave unresolved the status of secondary impacts. As discussed above,<sup>258</sup> secondary impacts are rarely a required consideration, having importance only in cases where the disputed project inevitably would cause (and not merely contribute to) additional development.<sup>259</sup> The Act does not mention secondary impacts, although elsewhere the Legislature did approve of cumulative impact analysis.

One provision of the Act, however, does suggest that the secondary impact analysis was left unchanged by the 1993 session. The Act cautions that:

This section shall not be construed to diminish the jurisdiction or authority granted prior to the effective date of this act to the water management districts or the department pursuant to this part, including their jurisdiction and authority over isolated wetlands. The provisions of this section shall be deemed supplemental to the existing jurisdiction and authority under this part.<sup>260</sup>

Although not directly on point, this provision demonstrates the Legislature's desire to maintain as much as possible the jurisdictional status quo. Importantly, the Act also preserves the portion of the Henderson Act that allowed consideration of activities that "may reasonably be [sic] expected" in conjunction with a given project.<sup>261</sup>

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256. *Id.*; *The Conservancy, Inc. v. A. Vernon Allen Builder, Inc.*, 580 So. 2d 772, 778 (1st DCA), *rev. denied*, 591 So. 2d 631 (Fla. 1991).

257. *Coscan Florida, Inc. v. Department of Env'tl. Regulation*, 12 Fla. Admin. L. Rep. 1359 (DER Final Order, March 9, 1990), *reversed on other grounds sub nom.*, *Metropolitan Date County v. Coscan Florida, Inc.*, 609 So. 2d 644 (Fla. 3d DCA 1992); *Florida Power Corp. v. Department of Env'tl. Regulation*, 1991 Env'tl. Rep. Fla. Admin. L. Rep. 91:056 (DER Order of Remand, April 11, 1992); *see also* 1800 Atl. Developers v. Department of Env'tl. Regulation, 552 So. 2d 946 (Fla. 1st DCA 1989).

258. *See supra* notes 121-29 and accompanying text.

259. *See supra* notes 125-29 and accompanying text.

260. *Reorganization Act*, *supra* note 1, § 30, at 39, 1993 Fla. Sess. Law Serv. 1652, 1665-66 (West) (to be codified at FLA. STAT. § 373.414(7) (1993)).

261. *Compare* FLA. STAT. § 403.919(3) (1991) (allowing consideration of "projects which may reasonably be expected to be located with the jurisdictional extent of waters" *with Reorganization*

By extension, these sections constitute legislative acquiescence to judicial expansion of the Henderson Act. Accordingly, the better practice would be to assume that the secondary impact analysis persists after the Act, even through it received no mention.

#### D. Criteria for the Issuance of a Permit

Another important feature of the Reorganization Act is the creation of criteria for dredge and fill permits issued by the water management districts.<sup>262</sup> Under the Henderson Act, water management districts had permitting authority over so-called "isolated wetlands."<sup>263</sup> Adding to the confusion, each district created their own standards for the alteration of isolated wetlands.<sup>264</sup> Under the Reorganization Act, however, districts have responsibility for all but the most complex dredge and fill proposals.<sup>265</sup>

In keeping with its goal of simplifying wetlands regulation, the Act reiterates much of the operative language of the Henderson Act.<sup>266</sup> Indeed, the Act requires that the Department and water management districts create dredge and fill rules "relying primarily on the existing rules."<sup>267</sup> Further requirements of the Act assure a smooth transition from the Henderson Act:

Such rules shall seek to achieve a statewide, coordinated and consistent permitting approach to activities regulated under this part. Variations in permitting criteria in the rules of individual

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*Act, supra* note 1, § 30, at 39, 1993 Fla. Sess. Law Serv. 1652, 1666 (to be codified at FLA. STAT. § 373.414(8)(c) (1993) (identical language)).

<sup>262</sup> *Reorganization Act, supra* note 1, § 30, at 33-34, 1993 Fla. Sess. Law Serv. 1652, 1663 (West) (to be codified at FLA. STAT. § 373.414 (1993)).

<sup>263</sup> See FLA. STAT. § 373.414(1) (1991), *superseded, Reorganization Act, supra* note 1, § 30, at 33-44, 1993 Fla. Sess. Law Serv. 1652, 1664 (West). The former section 373.414 read in part:

By March 31, 1987, . . . each district shall adopt a rule which establishes specific permitting criteria for certain small isolated wetlands which are not within the jurisdiction of the department for purposes of regulation or dredging and filling.

*Id.*

<sup>264</sup> *Id.*

<sup>265</sup> *Reorganization Act, supra* note 1, § 22, at 21-22, 1993 Fla. Sess. Law Serv. 1652, 1659 (West) (to be codified at FLA. STAT. § 373.046(4) (1993)) (approving of delegation to water management districts, but keeping the Department responsible for projects which "because of their complexity and magnitude, need to be economically and efficiently evaluated at the state level"); see also *infra* notes 317-40 and accompanying text.

<sup>266</sup> Compare FLA. STAT. § 403.918(1) (1991 & Supp. 1992) with *Reorganization Act, supra* note 1, § 30, at 33, 1993 Fla. Sess. Law Serv. 1652, 1663 (West) (to be codified at FLA. STAT. § 373.414(1) (1993)).

<sup>267</sup> *Reorganization Act, supra* note 1, § 30, at 40, 1993 Fla. Sess. Law Serv. 1652, 1666 (West) (to be codified at FLA. STAT. § 373.414(9) (1993)).

water management districts or the department shall only be provided to address differing physical or natural characteristics.<sup>268</sup>

Given the Reorganization Act's pains to preserve the status quo, one may safely presume that the case law interpreting the Henderson Act's permitting criteria was carried forward.

Although the Reorganization Act repeats much of the Henderson Act's permitting criteria, it does change the wording of a few provisions. Most of these differences are inconsequential; however, one change may help the districts resolve existing confusion<sup>269</sup> surrounding the public interest standard. The section of the Reorganization Act that prescribes the burden of a permit applicant recites the same two hurdles found under the Henderson Act.<sup>270</sup> The first clause of the 1993 legislation seems to qualify the public interest standard:

As part of an applicant's demonstration that an activity regulated under this part will not be harmful to the water resources *or will not be inconsistent with the overall objectives of the districts*, the governing board or the department shall require the applicant to provide reasonable assurance that state water quality standards . . . will not be violated and reasonable assurance that such activity in, on, or over surface waters or wetlands, . . . is not contrary to the public interest.<sup>271</sup>

The italicized language above was added by the Legislature to existing language found in the Henderson Act. The requirement that projects not be inconsistent with district objectives is newly minted since the term "consistency" never appeared in the Henderson Act.

One may argue that this consistency language qualifies the public interest standard, just as the preceding phrase "harmful to the water resources" correlates to the water quality hurdle. After all, the italicized language appears nowhere in the old provisions of the Henderson Act. Moreover, unlike water quality criteria, the standards for the public interest are not capable of refinement through the Department's rulemaking authority.<sup>272</sup> It would appear, therefore, that the Legislature attempted to expand upon the seven public interest criteria by adding a consistency element. One could

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268. *Id.*

269. *E.g.*, 1800 Atl. Developers v. Department of Envtl. Regulation, 552 So. 2d 946 (1st DCA 1989), *rev. denied*, 562 So. 2d 345 (Fla. 1990).

270. Compare FLA. STAT. § 403.918(1) (1991 & Supp. 1992) with *Reorganization Act*, *supra* note 1, § 30, at 33, 1993 Fla. Sess. Law Serv. 1652, 1663 (West) (to be codified at FLA. STAT. § 373.414(1) (1993)).

271. *Reorganization Act*, *supra* note 1, § 30, at 33, 1993 Fla. Sess. Law Serv. 1652, 1663 (West) (to be codified at FLA. STAT. § 373.414(1) (1993)).

272. 1800 Atl. Developers, 552 So. 2d at 954 ("Setting the criteria for determining what constitutes the 'public interest' is not delegated to DER's exercise of its rulemaking power . . .").



even argue that the quoted language adds yet another condition to the original seven criteria found in the Henderson Act.<sup>273</sup>

But whether one finds that the consistency provision of the new section 373.414 adds an eighth condition, or merely adds color to the existing seven, it is clear that dredge and fill applicants will now have to become familiar with the "overall objectives of the district." This raises the obvious question: What are the goals of the districts? Scattered portions of chapter 373, *Florida Statutes*, provide some answers.

First, one could identify the mission of a district by looking at the declarations of policy in part I of chapter 373, *Florida Statutes*.<sup>274</sup> There, the Legislature finds that "[t]he waters of the state are among its basic resources" that "have not heretofore been conserved or fully controlled so as to realize their full beneficial use."<sup>275</sup> To accomplish this goal, the statute declares a public purpose in water management, conservation, storage regulation, the prevention of erosion, the reduction of the degradation of water resources due to stormwater discharges, the preservation of natural resources, the development of recreation, and the maintenance of navigability of rivers and harbors.<sup>276</sup> These goals duplicate many of the seven public interest criteria, but also address the consumption of water. Thus, to the extent that a proposed activity in wetlands requires the future consumption of water resources, these goals may be relevant to the public interest inquiry. This consistency language in the new section 373.414 should prove to be a gold mine for preservationists and others concerned about the impact of growth on water quantity issues.<sup>277</sup>

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273. Granted, arguing that the Act creates an eighth permit criteria would appear at odds with other provisions of the Reorganization Act that prescribe the status quo. See *Reorganization Act, supra* note 1, § 30, at 39, 40, 43, 1993 Fla. Sess. Law Serv. 1652,1664, 1665, 1666 (West) (to be codified at FLA. STAT. §§ 373.414(7) (noting that jurisdiction is not amended), 373.414(14) (grandfathering permits pending before the new district rules take effect), 373.414(9) (requiring districts and Department to create new dredge and fill rules based primarily on existing rules) (1993)).

Nonetheless, the better view would appear to be that the language "not . . . inconsistent with the overall objectives of the district" expresses the legislature's view of what the public interest test should include. Thus, in addition to the seven criteria listed by statute, practitioners should be prepared to show that their proposed project compares to district objectives. Controversy over what this language means will have to await the new dredge and fill rules from the districts and the Department.

274. FLA. STAT. §§ 373.012-373.197 (1991). Part I of chapter 373, *Florida Statutes*, is entitled the "State Water Resource Plan."

275. FLA. STAT. § 373.016(1) (1991).

276. *Id.* at § 373.016(2).

277. An example makes this clear. Suppose that an applicant for a dredge and fill permit seeks to alter freshwater wetlands in order to build a planned community. The developer designs the community so that it must draw its water supply from the remaining wetlands. Under the prior Henderson Act, the permitting agency could only consider (absent a secondary or cumulative impact analysis under section 403.919, *Florida Statutes* (1991)) whether the

A second "overall objective" of the water management districts comes from the permit requirements of part II of chapter 373, *Florida Statutes*.<sup>278</sup> Interestingly, part II allows the issuance of consumptive use permits with "such reasonable conditions as are necessary to assure that such use is consistent with the overall objectives of the district or department."<sup>279</sup> The pole-star for permits under this part of chapter 373 is the "reasonable-beneficial use" standard.<sup>280</sup> The standards attending the issuance of a consumptive use permit seem relevant to the new dredge and fill permits not only because they echo the language calling for consistency with "overall district objectives," but also because the Reorganization Act attempts to consolidate various types of permits into a single environmental resource permit.<sup>281</sup> Although the Act does not fold consumptive use permits into the activities regulated by part IV of chapter 373, *Florida Statutes*, the general approach evinced in the reasonable-beneficial use standard may assist a public interest inquiry under the revised section 373.414.<sup>282</sup>

A third and more useful source to consult when examining the general objectives of a water management district comes from the State Water Policy, currently lodged in chapter 17-40 of the *Florida*

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destruction of wetlands served the public interest or violated water quality standards. Only when the applicant sought a permit under part II of chapter 373 could an agency consider water quantity issues associated with the development.

Under the regulatory structure of the Reorganization Act, however, the permitting agency would pose the same water quality inquiry, but would also consider the project's relationship to the district's objectives, including the inevitable need for a consumptive use permit. Thus, in the context of a dredge and fill application, the permitting agency can consider whether the project is not inconsistent with the reasonable beneficial use standard—one of the district's overall goals and objectives. In a purely legal sense, due process would still require two separate proceedings with adequate points of entry. See *Hopwood v. Department of Env'tl Regulation*, 402 So. 2d 1296 (Fla. 1st DCA 1981) (seminal case); *The Conservancy, Inc. v. A. Vernon Allen Builder, Inc.*, 580 So. 2d 772, 774 (1st DCA), *rev. denied*, 591 So. 2d 631 (Fla. 1991). In a practical sense, however, district objectives will begin to influence the outcome of dredge and fill applications. Water quality and quantity impacts might therefore be reviewed in the same permit proceeding, and do not necessarily have to wait until the developer seeks a consumptive use permit.

278. FLA. STAT. §§ 373.203-373.249 (1991). Part II of chapter 373, *Florida Statutes*, is entitled "Permitting of Consumptive Uses of Water."

279. FLA. STAT. § 373.219(1) (1991).

280. FLA. STAT. § 373.223(1) (1991). See generally Frank E. Maloney, Lynne C. Capehart & Robert S. Hoofman, *Florida's "Reasonable Beneficial" Water Use Standard: Have East and West Met?*, 31 U. FLA. L. REV. 253, 253-54 (1979) (the seminal article on the consumptive use standard; noting the Water Resources Act's "hydrologically sound basis" for permitting water use).

281. *Reorganization Act*, *supra* note 1, § 19, at 19, 1993 Fla. Sess. Law Serv. 1652, 1658 (West).

282. It may be interesting reading to compare the reasonable-beneficial use standard, which requires water use to be in the public interest, reasonable in degree, and not wasteful, to the seven public interest criteria for dredge and fill permits. The authors have not attempted this, but strongly suspect that the two are similar expressions of a common policy of resource allocation and conservation.

*Administrative Code.*<sup>283</sup> The Water Policy is the coordinating rule of the Department that assures the periodic review and consistency of water management policies. The Water Policy requires the enforcement of water quality standards,<sup>284</sup> the protection of minimum flow levels,<sup>285</sup> surface water protection and management,<sup>286</sup> and the creation of District Water Management Plans.<sup>287</sup>

The Reorganization Act's requirement that applicants show a proposed project is not inconsistent with the district's overall objectives adds a significant twist to the Henderson Act's seven criteria.<sup>288</sup> Even the most charitable reading of the changes made by the 1993 Act will require dredge and fill permit applicants to consider at least the three district objectives identified above. But as with other elements of the Reorganization Act, how serious one takes this consistency requirement will have to await the district and Department's forthcoming changes to the dredge and fill rules.

#### *E. Mandate for the Creation of Wetlands Water Quality Criteria*

Another important provision of the Reorganization Act is the mandate that the Department create water quality rules that take into account the special nature of wetlands. This provision of the Act is nothing new. The Henderson Act required that "[t]he department, by rule, shall establish water quality criteria for wetlands within its jurisdiction, which criteria give appropriate recognition to the water quality of such wetlands in their natural state."<sup>289</sup> This mandatory rulemaking requirement is repeated twice in the Reorganization Act.<sup>290</sup>

Astonishingly, the Department has never adopted the water quality rules required by the Henderson Act.<sup>291</sup> Instead, the

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283. At press time, the Department has issued draft revisions to the State Water Policy. See Memorandum from Virginia B. Wetherell, DEP Secretary to Interested Parties, at 1 (July 30, 1993). The proposed changes, as yet unrefined by workshops, are significant, and cannot be summarized easily. Of significance to this analysis, they increase protection for natural resources, and mandate the use of minimum flow levels in permitting. *Id.* at 13.

284. FLA. ADMIN. CODE ANN r. 17-40.403 (Dec. 5, 1988).

285. *Id.* at r. 17-40.405.

286. *Id.* at r. 17-40-420.

287. *Id.* at r. 17-40.501. At present, the Department and water management districts are revising draft water use plans.

288. See *supra* note 108 and accompanying text.

289. FLA. STAT. § 403.918(1) (1991 & Supp. 1992).

290. *Reorganization Act*, *supra* note 1, § 30, at 41 (to be codified at FLA. STAT. § 373.414(10) (1993)), § 36, at 52 (to be codified at FLA. STAT. § 403.061(11)(c) (1993)), 1993 Fla. Sess. Law Serv. 1652, 1666, 1667 (West).

291. This the Department freely admits:

Department simply applied the existing rules at chapter 17-302, *Florida Administrative Code*. None of the existing water quality rules cite<sup>292</sup> the Henderson Act as specific or implemented authority, although the anti-degradation rule<sup>293</sup> relies on section 403.918, as does the Department's list of classified water bodies.<sup>294</sup> The fact remains: the Department has never created water quality rules for wetlands as required by the Legislature.<sup>295</sup>

Commentators on the Henderson Act have noticed this rulemaking requirement, even if the Department has not. The leading article discussing the Henderson Act, for example, found great significance in the rulemaking requirement:

The other major change affecting water quality is the requirement in the Act that [the Department] adopt rules establishing water quality criteria for wetlands "which give appropriate recognition to the water quality of such wetlands in their natural state." This provision recognizes that for certain parameters, dissolved oxygen, for example, natural background water quality in wetlands may be different than in areas of open water. Previously, no such distinction was made.<sup>296</sup>

Other commentators have similarly noted the Department's failure to adopt appropriate standards.<sup>297</sup> The Reorganization Act will perhaps finally lead to wetlands water quality criteria.

The absence of wetlands water quality criteria places the Department in an unusual posture. First, the failure to initiate the

The State of Florida has not adopted wetland-specific water quality numeric criteria (since wetlands are included as waters of the State). Instead, wetlands are regulated using the same standards as are applied to surface waters . . .

DEPARTMENT OF ENVIRONMENTAL REGULATION, STATE WATER MANAGEMENT PLAN 180-81 (Draft, Oct. 20, 1992). Note that at the time the parenthetical statement quoted above was made, wetlands were not defined as waters of the state. The Reorganization Act, however, now defines them as such. *Reorganization Act, supra* note 1, § 35, at 51, 1993 Fla. Sess. Law Serv. 1652, 1670 (West) (to be codified at FLA. STAT. § 403.031(13) (1993)).

292. The failure of the Department to cite as implemented authority the Henderson Act's wetlands water quality rulemaking requirement is more than a mere oversight. The authors have taken the position that this oversight may prove absolutely fatal to the Department's ability to enforce or apply the rules in a dredge and fill case. Case law is quite clear that if the Department neglects to create rules, or fails to cite a statute as specific or implemented authority, it cannot rely on the statute in proceedings. *Department of Env'tl. Regulation v. Manasota-88, Inc.*, 584 So. 2d 133, 134 (Fla. 1st DCA 1991) (stating that an agency's failure to cite to legal authority will subsequently prevent the agency from relying on the neglected statute in defending its rule in a 120.56 challenge); see *Capeletti Bros., Inc. v. Department of Transp.*, 499 So. 2d 855, 857 (Fla. 1st DCA 1986) (stating that "these statutes are not cited as statutory authority for the rule and do not give DOT the power to implement" their rule).

293. FLA. ADMIN. CODE ANN. r. 17-302.300 (Apr. 25, 1993).

294. *Id.* at r. 17-302.600 (Apr. 25, 1993).

295. By contrast, the Department has created water quality criteria for predominantly marine and freshwaters. See FLA. ADMIN. CODE ANN. r. 17-302.530 (Apr. 24, 1993).

296. Smallwood, et al., *supra* note 34, at 251 (footnotes omitted).

297. E.g., Getzoff, WETLANDS PERMITTING '88, *supra* note 114, at 4.3-4.4.

rulemaking required by the Henderson Act makes the water quality criteria vulnerable to a section 120.535 broadside.<sup>298</sup> Second, the lack of wetlands water quality rules may shift the burden of proof in challenged proceedings. If the Department further delays rulemaking, it ultimately may be unable to effectively require mitigation. A close examination of the mitigation process shows how this is possible.

Normally, the need for mitigation arises where the applicant fails to provide reasonable assurances that water quality rules will not be violated.<sup>299</sup> Since the applicant carries the burden of showing compliance with water quality standards, the Department does not necessarily have to expend additional resources (e.g., staff time, funds) to carefully screen the potential effects of dredge and fill projects. Instead, the applicant must provide the information (or "reasonable assurances") concerning the need for mitigation.<sup>300</sup>

This allocation of the burden of proof is critical to the Henderson Act and the administrative structure of the Reorganization Act. In close cases, the Department is better able to extract<sup>301</sup> mitigation measures from an applicant. In effect, with the burden placed on the applicant, the Department gains assurances that at the very least, most large scale projects would require mitigation.

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298. See FLA. STAT. § 120.535 (1991) (requiring agencies to engage in rulemaking as soon as practicable and feasible; offering relief to those affected by incipient policies capable of maturation into rules). Although at one time courts would not force an agency into rulemaking, e.g., *McDonald v. Department of Banking & Finance*, 346 So. 2d 569 (Fla. 1st DCA 1977), it is now the law that "[r]ulemaking is not a matter of agency discretion." FLA. STAT. § 120.535(1) (1991).

Florida's mandatory rulemaking requirement stands in marked contrast to federal administrative procedures, which do not penalize agencies for sluggish responses to rulemaking. E.g., *Pulido v. Heckler*, 758 F.2d 503, 506 (10th Cir. 1985) ("[A]s a general rule, an administrative agency is not required to promulgate detailed rules interpreting every statutory provision that may be relevant to its actions.") (citing *SEC v. Chenery Corp.*, 332 U.S. 194 (1947)); *WWHT, Inc. v. Federal Communications Comm'n*, 656 F.2d 807, 813 (D.C. Cir. 1981) ("The mere filing of a petition does not require an agency to grant it, or to hold a hearing, or engage in any other public rule making proceedings."); accord ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 38-39 (1947) reprinted in JACOB A. STEIN, ET AL. 1 ADMINISTRATIVE LAW App. 1C-75 (1977).

299. See FLA. STAT. § 403.918(1) (1991); *Reorganization Act*, supra note 1, § 30, at 33, 1993 Fla. Sess. Law Serv. 1652, 1663 (to be codified at FLA. STAT. § 373.414(1) (1993)).

300. We do not mean to imply that the Department can require mitigation. The agency's rules clearly state that it cannot. See FLA. ADMIN. CODE ANN. r. 17-312.300(4) (Jan. 3, 1989) ("Mitigation may be proposed by a permit applicant, or suggested by the Department . . . . However, mitigation may not be required by the Department.").

301. Again, the Department can never require mitigation. See *id.* However, the realpolitik of a permit application gives the Department the power to "leverage" mitigation measures from an applicant. See generally Memorandum from Chuck Allen, et al., to Mitigation Banking Task Force at 2 (Nov. 6, 1991) (candidly stating that Department staff may "decide that the project is permissible and that no mitigation is necessary. However, most likely if the project is determined to be permissible, mitigation will be required.") (emphasis added) (on file with authors).

But the Department's failure to create wetlands water quality rules disturbs the allocation of this burden. Under the *Anheuser-Busch* line of cases, agencies that do not respond to rulemaking incentives carry the burden of proof.<sup>302</sup> Since the Department has failed to respond to the requirement and invitation to create rules reflecting the "water quality of . . . wetlands in their natural state,"<sup>303</sup> it therefore continues

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<sup>302</sup> See *Southpointe Pharmacy v. Department of Health & Rehabilitative Servs.*, 596 So. 2d 106 (Fla. 1st DCA 1992); *St. Francis Hospital, Inc. v. Department of Health & Rehabilitative Servs.*, 533 So. 2d 1351 (Fla. 1st DCA 1989) (requiring agency to carry burden of proving incipient policy). The requirement that agencies carry the burden of proving their application of non-rule policy is sometimes referred to as the *Anheuser-Busch* line of cases, because of its perceived origins in *Anheuser-Busch, Inc. v. Department of Business*, 393 So. 2d 1177 (Fla. 1st DCA 1981). Actually, the principle was first announced in *McDonald v. Department of Banking and Finance*, 346 So. 2d 569 (Fla. 1st DCA 1977), but courts tend to cite to *Anheuser-Busch*. Since then, however, *St. Francis Hospital* seems to have eclipsed *Anheuser-Busch* as the leading case on the agency's burden to defend incipient policy. With the slight exception of *Florida Cities Water Co. v. Public Service Com'n*, 384 So. 2d 1280, 1282 (Fla. 1980) (citing with approval *McDonald*, *supra*) this standard has eluded Florida Supreme Court review.

Nonetheless, the policy is firmly embedded in Florida's administrative jurisprudence. See *National Healthcorp, L.P. v. Department of Health & Rehabilitative Services*, 560 So. 2d 1184 (Fla. 1st DCA 1989). The purpose of imposing such a burden is to encourage agencies to "structure their discretion progressively by vague standards, then definite standards, then broad principles, [and] then rules." *Florida Cities Water Co.*, 384 So. 2d at 1282. "When the agency opts for non-rule or adjudicative policy making . . . the agency's final order and the record must contain a predicate to support the policy." *Rabren v. Department of Professional Regulation*, 568 So. 2d 1283 (Fla. 1st DCA 1990).

In addition to the overwhelming amount of decisional case law on this point, there is some evidence to suggest that the legislature also has approved of this burden shift. For example, a 1982 staff analysis by the Senate noted that agencies were prodded towards rulemaking because of the burden they bear in defending their adjudication. FLA. S. CMTE. ON GOV. OPERATIONS, REPORT ON AGENCY USE OF NON-RULE POLICY 26 (Nov. 1982). Further, during the creation of the mandatory rulemaking provision, FLA. STAT. § 120.535 (1991), House staff noted that agencies carry the burden in formal challenges to incipient policies. See FLA. H. CMTE. ON GOV. OPERATIONS, STAFF ANALYSIS & ECONOMIC IMPACT STATEMENT PCB GO 90-29 at 5 (January 22, 1990).

Arguably, therefore, section 120.535, *Florida Statutes*, codifies the *Anheuser-Busch* line of cases because it places the burden of showing that rulemaking is not feasible on the agency. FLA. STAT. § 120.535(1)(a) (1991) ("[r]ulemaking shall be presumed feasible unless the agency proves that . . ."); see also *id.* at § 120.535(2)(b) ("If a hearing is held and the petition proved the allegations of the petition, the agency shall have the burden of proving that rulemaking is not feasible and practicable . . ."). By not disturbing this judicially created allocation of the burden of proof, the legislature in effect has approved of this practice.

Interestingly, the Department has often recognized that it bears the burden of defending its non-rule policies in a hearing. For example, in gathering materials for the 1982 Senate Committee report, Senate staff polled all major state agencies with rulemaking authority. The Department responded to their inquiries by stating that they "wholeheartedly agree with the approach the courts have taken in recent years." Letter from Mary F. Clark, DER General Counsel, to Maury Kolchakian, Senate Analyst 1 (Sept. 8, 1982) (on file with authors). This allocation of the burden of proof has also been endorsed by the late Professor Dore in her response to the survey. See Letter from Patricia A. Dore, Professor of Law, Florida State University, to Maury Kolchakian, Senate Analyst 1 (Oct. 21, 1982) (on file with authors).

<sup>303</sup> FLA. STAT. § 403.918(1) (1991 & Supp. 1992); accord *Reorganization Act*, *supra* note 1, § 30, at 41 (to be codified at FLA. STAT. § 373.414(10) (1993)), § 36, at 52 (to be codified at FLA. STAT. § 403.061(11)(c) (1993)), 1993 Fla. Sess. Law Serv. 1652, 1666, 1667 (West).

to review dredge and fill applications only by incipiating the application of chapter 17-302 criteria.<sup>304</sup> For failing to respond to the Legislature's rulemaking requirement, the Department instead would have to carry the burden of showing a violation of state water quality standards.<sup>305</sup>

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304. FLA. ADMIN. CODE ANN. r. 17-302.530 (Apr. 24, 1993). In other words, instead of creating wetlands water quality rules as required by the Legislature, the Department has created an incipient policy of applying an otherwise inapplicable set of water quality rules (located in chapter 17-302, *Florida Administrative Code*) to dredge and fill regulation. This modification or expansion of the existing criteria in chapter 17-302 is itself a rule, cognizable in a variety of administrative proceedings. See FLA. STAT. § 120.52(16) (1991) (defining a "rule" as a statement of general applicability that implements, interprets, or prescribes law or policy, along with "the amendment or repeal of a rule").

A more charitable view of the Department's failure to create water quality rules for wetlands comes from a close reading of the antidegradation policy. See FLA. ADMIN. CODE ANN. r. 17-302.300 (Apr. 24, 1993). The rule states in relevant part that:

Pollution which causes or contributes to new violations of water quality standards or to continuation of existing violations is harmful to the waters of this State and shall not be allowed. Waters having water quality below the criteria established for them shall be protected and enhanced. However, the Department shall not strive to abate natural conditions.

*Id.* at r. 17-302.300(5). The antidegradation rule therefore creates a "cause or contribute" standard that recognizes natural conditions. One commentator familiar with the agency's practices noted that although the Department had not created Henderson wetlands water quality rules, it does use a "cause or contribute" policy. Getzoff, WETLANDS PERMITTING '88, *supra* note 114, at 4.4.

Although this flexibility seems to comply with the essential requirements of the Henderson Act (e.g., the requirement that applicants not be required to abate natural conditions), the antidegradation rule elsewhere states that

Projects permitted under Part VIII of Chapter 403, F.S., shall be considered in compliance with this subsection if those projects comply with the requirements of Section 403.918(2), F.S.

*Id.* at r. 17-302.300(7). The rule therefore employs a very circular reasoning.

In order to get a dredge and fill permit, an applicant must first show that the project will not result in a violation of state water quality standards. FLA. STAT. § 403.918(1) (1991 & Supp. 1992). Under the "cause or contribute" clause of the antidegradation rule, a violation of state water quality standards occurs where the activity lowers the water quality below natural levels. But under rule 17-302.300(7), *Florida Administrative Code*, the applicant can show compliance with the antidegradation rule by satisfying the requirements of section 403.918(2), *Florida Statutes*—the second hurdle of the Henderson Act! If rule 17-302.300(7) is to be taken seriously, and the antidegradation rule is truly the Department's answer to the rulemaking requirement of the Henderson Act, then an applicant can show compliance with the first hurdle (water quality) by showing compliance with the second. Clearly, this is not the sort of wetlands water quality rules the legislature asked for. The authors have taken the position that nothing in chapter 17-302, *Florida Administrative Code* satisfies the rulemaking requirements of the Henderson Act.

305. As note above, *supra* note 302, agencies bear the burden of defending their policies when they choose to act outside of existing rules. The allocation of the burden of proof to the Department would have dire consequences. The Department processes a staggering load of applications annually, and at present only the largest dredge and fill cases receive any significant staff attention from the Department. See Walker, *State Regulatory Standards for Mitigation and Restoration*, in MITIGATION OF IMPACTS AND LOSSES 79, 80 (J. Kusler, M. Quammen & G. Brooks eds. 1986) ("It has been suggested that we get together to negotiate these projects and be reasonable. From the perspective of my agency [DER], where we work with about 6,000 dredge and fill applications each year, that is not feasible."). Of course, this burden shift would

This reasoning shows the problems inherent in the Department's failure to respond to rulemaking requirements. If the Department further neglects to create wetlands water quality rules, it may<sup>306</sup> have to assume the applicant's burden of demonstrating compliance with the unpromulgated wetland water quality rules. As a practical matter, this means the Department could lose the close cases, and settle many others.<sup>307</sup>

Thus, the Department has good incentive to proceed with rulemaking under the Reorganization Act. Further discussion of the effect these forthcoming water quality rules would have on wetlands mitigation must await the Department's workshops. A close reading of the Reorganization Act, however, shows that the forthcoming rules will be shaped by the following factors:

- The Department will have to conduct rulemaking in consultation with the water management districts.<sup>308</sup>
- The wetlands rules must reflect ambient conditions for wetlands in their natural state.<sup>309</sup>

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only affect cases turning on water quality violations. Other public interest issues remain the applicant's burden.

306. The decision to apply the *Anheuser-Busch* line of cases and give the Department the burden of proof in a challenged proceeding rests with the hearing officer. Cf. *McDonald v. Department of Professional Regulation*, 582 So. 2d 660, 673 (Fla. 1st DCA 1991) (stating that an agency "has no authority to formulate or promulgate an evidentiary presumption [shifting the burden of persuasion] as it did in this case").

307. Curiously, research has not disclosed any reported opinion to date discussing the Department's failure to create water quality rules applicable to wetlands. The authors suggest that perhaps practitioners merely assumed that the existing rules in chapter 17-302, *Florida Administrative Code*, satisfied the Henderson Act rulemaking requirement. Yet such an assumption cannot be correct because no standard in chapter 17-302 cites section 403.918 as implemented authority. See *Department of Env'tl. Regulation v. Manasota-88, Inc.*, 584 So. 2d 133, 134 (Fla. 1st DCA 1991) (stating that an agency's failure to cite to legal authority will subsequently prevent the agency from relying on the neglected statute in defending its rule in a 120.56 challenge). Moreover, in creating the water quality standards in 1979, the Department did not use hard empirical data and instead merely adopted vast portions of the EPA's "redbook". See *Environmental Regulation Commission, Meeting Minutes 23-24* (March 1-2, 1978) (noting reliance on ENVIRONMENTAL PROTECTION AGENCY, QUALITY CRITERIA FOR WATER (1978)).

A more plausible explanation for the lack of reported cases comes from the fact that the Department seldom denies an application because of water quality concerns alone. Instead, the usual intent to deny issued by the Department alleges that the applicant failed to meet every aspect of the permit requirements. The Department's "shotgun" approach to denials thereby tends to prevent parties from focusing exclusively on water quality issues. Hopefully, the Department will respond to the Reorganization Act's rulemaking requirement—first articulated nearly ten years ago—and create water quality rules that reflect ambient conditions in Florida's wetlands.

308. *Reorganization Act*, *supra* note 1, § 30, at 41 (to be codified at FLA. STAT. § 373.414(10) (1993)), § 36, at 52 (to be codified at FLA. STAT. § 403.061(11)(c) (1993)), 1993 Fla. Sess. Law Serv. 1652, 1666, 1671 (West).



- Since the Legislature placed the wetlands rulemaking requirement in section 403.061, *Florida Statutes*,<sup>310</sup> the requirement that water quality criteria give consideration to the ambient condition of wetlands constitutes a specific restriction on the Department's general rulemaking authority. Thus, if and when the Department creates water quality criteria for wetlands, the standards will apply not only to applicants for an environmental resource permit, but to all matters within the Department's jurisdiction.<sup>311</sup>
- The wetlands criteria would logically become a special section within the current Class III criteria (currently split between predominantly marine and freshwaters).<sup>312</sup> In any event, the development of these wetlands criteria will require EPA approval under the provisions of the Clean Water Act.<sup>313</sup>

More than the wetlands delineation methodology, the wetlands water quality rules have the potential to significantly change dredge

309. See also FLA. STAT. § 403.021(11) (1991). Section 403.021(11) was added by the Legislature in 1986, see Ch. 86-213, 1986 Fla. Laws 1577, as a check on the Department's ability to create water quality standards. See FLA. LEGIS., SUMMARY OF GENERAL LEGISLATION: 1986 at 89-90 (1986) (reciting the general intent that "the Department of Environmental Regulation may not consider deviations from water quality standards as violations when the deviations would occur in the absence of any man-induced discharges or alterations of the water body"). The section provides as its first warning:

It is the intent of the Legislature that water quality standards be reasonably established and applied to take into account the variability occurring in nature.

1986 Fla. Laws 1577, 1579, Ch. 86-213 § 3 (1986), codified at FLA. STAT. § 403.021(11) (1991).

310. Section 403.061(10) gives the Department the power to classify waters of the state, "in accordance with the present and future most beneficial uses." FLA. STAT. § 403.061(10) (1991 & Supp. 1992). The Department also has the authority to establish "ambient . . . water quality standards for the state as a whole or any part thereof . . ." FLA. STAT. § 403.061(11) (1991 & Supp. 1992). These provisions are the primary authority for all of Florida's water quality rules. The location of the wetlands water quality rulemaking requirement in section 403.061, therefore, can only be seen as a restriction on the Department's general rulemaking authority. Thus, the forthcoming wetlands water quality rules will apply to all waters, and not just those at issue in a dredge and fill case.

311. On this point, it is interesting to note that the Reorganization Act also amended the definition of "waters" in section 403.031, *Florida Statutes*, to include wetlands. *Reorganization Act*, supra note 1, § 35, at 51, 1993 Fla. Sess. Law Serv. 1652, 1670 (West) (to be codified at FLA. STAT. § 403.031(13) (1993)).

312. See FLA. ADMIN. CODE ANN. r. 17-302.530 (Apr. 24, 1993).

313. 33 U.S.C. §§ 1251-1387 (1988). States are required by the Clean Water Act to create water quality classifications that "protect the public health or welfare, enhance the quality of water and serve the purpose" of the legislation. Federal Water Pollution Control Act of 1965, P.L. 89-234 § 5, 79 Stat. 903, 908, codified as amended at 33 U.S.C. § 1313(2)(A). State water quality regulations require EPA approval.

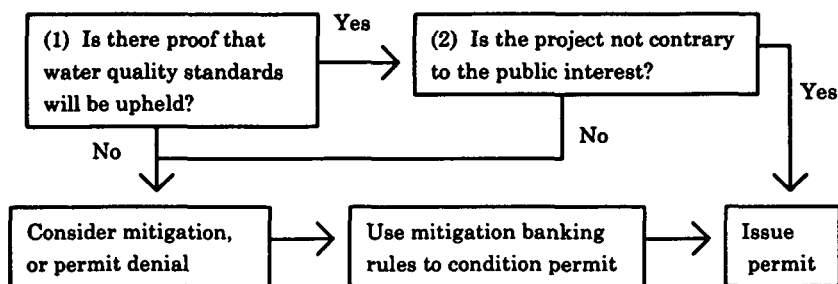
and fill practices in Florida.<sup>314</sup> The wetlands delineation rules<sup>315</sup> will merely make threshold jurisdictional determinations—i.e., what constitutes a wetland. The water quality rules, however, will perform a more important function: the determination of the need for mitigation.<sup>316</sup> Stringent wetlands water quality criteria will require more mitigation, and place greater reliance on mitigation banking. Relaxed water quality criteria for wetlands will allow more development, and make it easier for developers to create "bankable" mitigation projects. Accordingly, environmentalists, landowners seeking to develop wetlands, practitioners specializing in dredge and fill work, and environmental consulting firms trained in wetlands mitigation, will all have to watch the wetlands water quality rulemaking closely.

314. The Reorganization Act gives the Department, through the Environment Regulation Commission, a unique opportunity to coordinate various wetlands rules. In just over a dozen months, the Department and Commission will work on mitigation banking rules, a uniform wetlands delineation methodology, and (one presumes) the wetlands water quality rules. Conceivably, each body of rules would rely on provisions contained in the other. For example, the wetlands water quality rule will only apply to those areas defined in the delineation rule. Additionally, the mitigation banking rules will come to rely on the water quality criteria as a means of judging the credit value of created or enhanced wetlands. Consistent with the Reorganization Act's goal of creating consistency and uniformity in environmental regulation, the Department should coordinate development of all three sets of rules.

315. See *supra* notes 241-51 and accompanying text.

316. A diagram makes this clear. The two hurdles a dredge and fill applicant must face are shown as decision cells, each with a consequence for a particular outcome. One traces the course of a dredge and fill application by proceeding from the first cell to the second. The model assumes that the proposed project is not entirely objectionable, and could be permitted. Additionally, the model does not reflect the possibility of other permit modifications.

In cases where the applicant has the burden of answering the water quality question posed by the first cell, close cases tend to be resolved in the negative. Thus, where the applicant and Department have evenly matched science, studies, expert testimony, and other instruments of "reasonable assurances," one may safely assume that mitigation will be necessary.



Where the Department bears the burden of answering the water quality question posed by the first cell, however, close cases are answered in the affirmative. This means that where the Department and applicant have an equally strong case, the tendency will be for the inquiry to proceed to the second cell, and ultimately issuance of the permit without mitigation. Of course, only an empirical model would show how many dredge and fill projects would succeed without necessary mitigation. Nonetheless, the diagram shows the potential problems posed by a burden shift resulting from a continued absence of rules.

*F. Delegation of Wetlands Regulation to the Water  
Management Districts*

Another important element of the Reorganization Act is the delegation of dredge and fill jurisdiction to the water management districts.<sup>317</sup> In the past, the Department exercised the primary authority over dredge and fill projects, although it was encouraged (but not required) to delegate this authority to the water management districts.<sup>318</sup> Some dredge and fill authority was successfully delegated under the Henderson Act. The Reorganization Act specifically approves of these programs, and encourages further decentralization.<sup>319</sup>

*1. Prior Cooperation Between the Department And Water  
Management Districts*

The Department has not stood alone in Florida's wetland regulatory process. The water management districts (WMDs),<sup>320</sup> pursuant to Part IV of Chapter 373, *Florida Statutes*, have authority to regulate the construction or alteration of surface water management systems, dams, reservoirs, impoundments, and appurtenant work or works.<sup>321</sup> In addition, the WMDs enjoyed the authority to regulate dredge and fill activities in certain small isolated wetlands not under the Department's jurisdiction.<sup>322</sup> As a result of this authority, most improvements to real property, such as changes to the topography

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317. *Reorganization Act*, *supra* note 1, § 22, at 21, 1993 Fla. Sess. Law Serv. 1652, 1659 (West) (to be codified at FLA. STAT. § 373.046 (1993)).

318. FLA. STAT. § 373.026 (1991).

319. *Reorganization Act*, *supra* note 1, § 22, at 21, 1993 Fla. Sess. Law Serv. 1652, 1659 (West) (to be codified at FLA. STAT. § 373.046 (1993)).

320. Florida's WMDs include the Northwest Florida Water Management District, Suwannee River Water Management District, St. Johns River Water Management District, Southwest Florida Water Management District, and South Florida Water Management District. FLA. STAT. § 373.069(1) (1991).

321. FLA. STAT. § 373.413(1) (1991). Regulatory measures are conducted through a permitting process. *Id.*

322. *Id.* § 373.414 (1991). The Department has provided the St. Johns River Water Management District with additional dredge and fill regulatory responsibilities but has been cautious in doing so with the other four WMDs. For a good discussion on the delegation of wetland resource permitting from the Department to the St. Johns River Water Management District, see REVIEW OF WETLANDS PERMITTING, *supra* note 98, at 17-18. See generally Randy L. Armstrong, *Shifting Permits—Delegation of Wetlands Programs*, in 2 ANNUAL ENVIRONMENTAL AND LAND USE LAW UPDATE AND SECTION ANNUAL MEETING 20.1 - 20.21 (Aug. 1993).

that control, divert, or impound surface waters, have fallen within the WMDs' jurisdiction.<sup>323</sup>

The Senate Committee on Natural Resources and Conservation recently published a report reviewing the permitting activities of the Department and WMDs.<sup>324</sup> The report heavily focused on both agencies' duplicative efforts in the dredge and fill permitting process, and their dissimilar definitions of wetlands.<sup>325</sup> In addition, the report criticized several areas of duplication, specifically jurisdiction, standards for approval, and mitigation requirements. The report noted the difficulties created by the numerous agencies involved in wetlands regulation, including the following: the Department of Environmental Regulation, the Department of Natural Resources, the WMDs, the U.S. Army Corps of Engineers, the U.S. Environmental Protection Agency, and local governments.<sup>326</sup> Finally, the report recommended the transfer of the Department's statutory dredge and fill permitting authority to the WMDs.<sup>327</sup>

The report's criticism regarding the different wetlands definitions was based on the finding that they contributed to the problems associated with the duplicative permit activities.<sup>328</sup> Under the Henderson Act, the Department primarily maintained jurisdiction over wetlands connected to waters of the state.<sup>329</sup> The WMDs, however, exerted jurisdiction over isolated wetlands which were not hydrologically connected to jurisdictional wetlands.<sup>330</sup>

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323. Getzoff, WETLANDS PERMITTING '88, *supra* note 114, at § 4 IV. Local governments in Florida are also given the opportunity to adopt wetlands regulations; however, they must first be approved by the Department. FLA-STAT. § 403.916(3) (1991).

324. REVIEW OF WETLANDS PERMITTING, *supra* note 98.

325. The dissimilar definitions are likely caused by the Department's and the WMDs' different jurisdictions; for instance, the WMDs primarily regulate isolated wetlands which are not hydrologically connected to the Department's jurisdictional wetlands. *Id.* at 24. Furthermore, definitions differ between the WMDs.

326. *Id.* at 15. One instance where all these regulators may be involved is when a permit applicant wants to place an easement across designated wetlands which connect two lake bodies. The Department of Natural Resources will be involved because of the easement portion of the project; some or all of the additional regulators will be involved because of the easement's impact on the wetlands. Interview with Richard A. Lotspeich, Att'y, Landers & Parsons (May 8, 1992). Florida's Fifth District Court of Appeal recently criticized a related situation in *Vatalaro v. Department of Envtl. Regulation*, 601 So. 2d 1223, 1224 n.2 (5th DCA), *rev. denied*, 613 So. 2d 3 (Fla. 1992).

327. REVIEW OF WETLANDS PERMITTING, *supra* note 98, at 15.

328. *Id.* at 3.

329. *Id.* at 24.

330. *Id.* The WMDs definition of wetlands is very similar to the federal definition of wetlands used by the EPA and Corps. *Id.* at 25. The federal definition, emphasizing hydrology, vegetation, and saturated soils, includes "[t]hose areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas." 40 C.F.R. § 230.3 (1991); 33 C.F.R. § 328.3 (1991).

Another complicating factor arose in the efforts of the Department to delegate some of its dredge and fill permitting authority to the various districts.<sup>331</sup> On the eve of the Reorganization Act, the Department had delegated such authority to the South Florida Water Management District,<sup>332</sup> the Southwest Florida Water Management District,<sup>333</sup> and the St. John's Water Management District.<sup>334</sup> Because there was no uniform definition of wetlands, there was considerable confusion in the permitting process, inaccuracy in the reporting of wetlands gains and losses, and poor wetlands management.<sup>335</sup>

## 2. Changes in Delegation Under the Reorganization Act

The Reorganization Act addresses many of the problems cited by the Senate committee. In addition to the unified wetlands definition noted above,<sup>336</sup> the Reorganization Act encourages the delegation of authority to the water management districts, and approves of the existing dredge and fill delegations.<sup>337</sup> To assure consistency with other provisions of the Reorganization Act, the Department retains paramount rulemaking authority, although the districts may set their own fee schedule.<sup>338</sup>

Much of the promise of efficiency found in the Reorganization Act will have to await further rulemaking and interagency agreement between the Department and districts.<sup>339</sup> The Legislature has asked for a report from the Department to monitor progress.<sup>340</sup>

## IV. WETLANDS MITIGATION

The preceding sections have discussed in close detail many of the provisions of the Reorganization Act that will indirectly influence wetlands mitigation. This section takes a close look at mitigation practices, and notes how the Reorganization Act changes strategies

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331. By statute, the Department is required to delegate as much of its authority as possible. See FLA. STAT. § 373.026 (1991).

332. FLA. ADMIN. CODE ANN. r. 17-101.040(12)(a)(1) (Nov. 1992).

333. *Id.* at r. 17-101.040(12)(a)(2).

334. *Id.* at r. 17-101.040(12)(a)(3).

335. REVIEW OF WETLANDS PERMITTING, *supra* note 98, at 26.

336. See *supra* note 241 and accompanying text.

337. *Reorganization Act*, *supra* note 1, § 22, at 21, 1993 Fla. Sess. Law Serv. 1652, 1659 (West) (to be codified at FLA. STAT. § 373.046 (1991)).

338. FLA. STAT. § 373.109 (1993).

339. *Reorganization Act*, *supra* note 1, § 22, at 21, 1993 Fla. Sess. Law Serv. 1652, 1659 (West) (to be codified at FLA. STAT. § 373.046 (1993)) ("The Legislature authorizes the water management districts and the department to modify the division of responsibilities referenced in this section and enter into further interagency agreements by rulemaking.")

340. *Id.* For an excellent discussion of the current status of Department-district delegation, see Armstrong, *supra* note 322.

for developers. Discussion begins with an overview of mitigation techniques, followed by a study of the applicable rules.

#### A. *Mitigation Theory and Practice*

The mitigation process holds no guarantees or steadfast rules. Because standardized mitigation plans are practically nonexistent, every plan must be uniquely organized for the particular site.<sup>341</sup> Some basic guidelines for successful mitigation, however, may be helpful for the developer of a project requiring dredge and fill activities.

A developer should first try to avoid dredging and filling. The best approach, environmentally and economically, is to follow the Council on Environmental Quality's sequence of mitigation steps: avoid where feasible; minimize harmful impacts; and compensate for all environmental damage.<sup>342</sup> Most states, including Florida, and the federal regulatory agencies recommend this strategy.<sup>343</sup>

After recognizing the existence of wetlands on a development site, developers should meet with federal and state agencies to discern the regulatory agencies' views on the project and what may be required. In Florida, the Department is an excellent source of information. Most importantly, developers should thoroughly communicate their project plans and mitigation strategies to the agencies regulating their projects.<sup>344</sup> Nor should developers spare expense when hiring a mitigation crew.<sup>345</sup> Accurate planning is essential for successful wetlands mitigation; all wetlands demand particular plant types, hydrology, and elevation. General construction crews are normally unaware of the complexities involved.<sup>346</sup> Finally, developers need to prepare a mitigation plan at the start of the project. Plan detail is crucial for success. A mitigation plan should include seven basic components:

1. A clear statement of the objectives of the mitigation.
2. An assessment of the wetlands values or resources that will be lost as a result of the fill and of those that will be replaced.
3. A statement of the location, elevation, and hydrology of the new site.
4. A description of what will be planted where and when.
5. A monitoring and maintenance plan.
6. A contingency plan.

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341. See SALVESEN, *supra* note 2, at 105.

342. *Id.* at 105.

343. *Id.*

344. *Id.*

345. *Id.*

346. *Id.*

7. A guarantee that the work will be performed as planned and approved.<sup>347</sup>

Designing an accurate and detailed plan, in addition to following the detailed elements above, will help to avoid mitigation difficulties while at the same time protecting the mitigation plan from unexpected occurrences.<sup>348</sup>

### B. Types of Mitigation

Two types of mitigation traditionally have been practiced by developers: the type performed prior to purchasing a site and the type performed later.<sup>349</sup> Prior to legislative enactments similar to the Henderson Act of 1984, developers often avoided land with topographical liabilities like flood plains or steep slopes; rarely, however, did they choose not to purchase a site because it contained wetlands.<sup>350</sup> Yet the existence of wetlands on a particular site today is more than sufficient to turn away even sophisticated and well financed developers. Many developers, however, have purchased, and intend to develop, property containing wetlands.<sup>351</sup>

These developers need to understand certain aspects of wetlands and the types of mitigation available. Wetlands vary in shape and size; some resemble amoebas while others are geometric. The impact of wetlands on development may also vary according to their location on a site. Those located at the center of a project significantly hinder development, while those situated at the edge of a project present minor restrictions.<sup>352</sup> The choice of mitigation depends primarily "on the type of project, the size of the property, the size, condition, and position of the wetlands, and the regulatory environment."<sup>353</sup> A single choice will not accommodate every site. Developers intending to develop on property containing wetlands should be mindful of four types of mitigation: avoidance/minimization,<sup>354</sup> restoration, enhancement, and creation.<sup>355</sup>

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347. *Id.* at 106-07.

348. See THE CONSERVATION FOUNDATION, THE FINAL REPORT OF THE NATIONAL WETLANDS POLICY FORUM, PROTECTING AMERICA'S WETLANDS: AN ACTION AGENDA 6161 (1988) [hereinafter CONSERVATION FOUNDATION REPORT].

349. SALVESEN, *supra* note 2, at 69.

350. *Id.*

351. *Id.*

352. *Id.*

353. *Id.*

354. Note that avoidance/minimization is not considered an available type of mitigation by the Department.

355. For an informative illustration of each of these mitigation types, see SALVESEN, *supra* note 2, at 70-104.

### 1. Avoidance/Minimization

Florida's agencies first recommend avoiding wetlands when developing.<sup>356</sup> Although the strategy seems simple, it often creates great inconvenience. But the most persuasive reason for avoiding wetlands is probably the cost associated with creating new ones. In general, wetlands cost between \$20,000 and \$75,000 an acre to create.<sup>357</sup> Overall, developing around wetlands not only saves money, time, and aggravation, but also adds to the beauty and value of a project.<sup>358</sup>

The avoidance method, however, is not without shortcomings. A wetland is not an independently functioning ecosystem; changes in a wetland's surroundings significantly affect its well being. For instance, run-off pollution from nearby development may impair or destroy a flourishing wetland.<sup>359</sup> In addition, uplands are destroyed as a result of building around wetlands.<sup>360</sup> Thus, wildlife dependent upon the upland habitat must somehow adapt to the new environment or perish. Recent uplands regulations now limit the destruction of upland habitats.<sup>361</sup>

"Wetland-friendly" construction techniques can decrease these adverse impacts to wetlands and their inhabitants.<sup>362</sup> For instance, a developer could schedule construction around bird mating and nesting seasons. In addition, developers can create low-impact roads and work stations from logs or steel construction to minimize damage caused by heavy machinery.<sup>363</sup>

Avoiding wetlands or minimizing the damage to wetlands when developing is indeed a cost-effective approach. However, the location of wetlands on some sites prevent the application of this strategy. The types of mitigation examined below pertain to those situations.

### 2. Restoration

In general, restoration returns a damaged wetland to its previous ecologically productive state.<sup>364</sup> For developers, it can provide a way

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356. Effectiveness Report, *supra* note 159, at 23.

357. SALVESEN, *supra* note 2, at 70.

358. *Id.* The cluster concept describes one method of avoiding wetlands. By this method, buildings are clustered together while keeping the rest of the project open. This approach minimizes wetland encroachment and saves infrastructure costs. Note that the use of the cluster concept may be limited by local zoning regulations. *Id.*

359. Interview with William Leary, *supra* note 196.

360. *Id.*

361. For a recent article on the regulation of uplands, see Sally B. Mann, *Uplands Regulation: Habitat for Man or Beast?*, 7 J. LAND USE & ENVTL. L. 59 (1991).

362. SALVESEN, *supra* note 2, at 70-71.

363. *See id.* at 71-72.

364. John D. Brady, *Mitigation of Damage to Wetlands in Regulatory Programs and Water Resource Projects*, 41 MERCER L. REV. 893, 931 (1990).



to compensate for the dredging and filling of on-site wetlands. Most states have numerous wetlands which have suffocated from fill and deteriorated from pollution.<sup>365</sup> All states do not, however, view restoration as an effective type of mitigation.<sup>366</sup>

States that support restoration do so because it is less costly and time consuming than creating new wetlands. States opposing restoration are those which find creation, despite its cost, to be more effective in preserving wetlands.<sup>367</sup> The reasoning driving the latter approach is that restoring a damaged wetland in order to fill a wetland causes a net loss in wetlands acreage,<sup>368</sup> while creation of an identical wetland out of upland does not result in a net loss of wetlands acreage.<sup>369</sup> Even though this theory may be accurate, states should not withdraw restoration from available mitigation strategies; restoration is a valuable tool in returning degraded wetlands to their previous healthy status and is generally more successful than creation.<sup>370</sup>

The complexity of restoring a wetland depends primarily on the wetland's characteristics. Restoration may be as easy as removing a dike, drain, or fill that initially caused the degradation of a wetland.<sup>371</sup> On the other hand, it may be extremely difficult and expensive, requiring a water control system to support the wetland's vegetation.<sup>372</sup> In general, unsuccessful restoration projects are the result of several factors: poor preconstruction engineering analysis; insufficient monitoring; and partial completion of required mitigation.<sup>373</sup>

Restoration represents a viable alternative to returning wetlands to their natural, healthy state; however, it is still an imperfect approach to ensuring against a net loss of wetlands.<sup>374</sup> States opposing restoration argue that the filling of healthy wetlands in exchange for restoring damaged wetlands leads to a net loss of

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365. SALVESEN, *supra* note 2, at 77. Note that state and federal law also protect degraded wetlands; however, pristine wetlands are regulated more intensely. *Id.*

366. *Id.*

367. *Id.*

368. *Id.*

369. *Id.* In 1988, President Bush endorsed a "no net loss" wetlands policy. This policy was reaffirmed in a memorandum of agreement between the EPA and Corps. However, on August 9, 1991, the Bush administration advocated proposals to restrict the criteria for identifying a wetland. For a recent update on the status of federal wetlands delineation, see ENVIRONMENTAL DEFENSE FUND, *supra* note 5, at 1.

370. See SALVESEN, *supra* note 2, at 77, 80.

371. *Id.* at 80.

372. *Id.*

373. *Id.* at 80-81.

374. *Id.* at 81.

wetlands, as even damaged wetlands are valuable for wildlife.<sup>375</sup> These losses, however, could be overcome or significantly reduced by requiring the size of a restored area to be proportionally larger than the filled area.<sup>376</sup> This would provide a more equitable approach to mitigation throughout the country; it would allow developers to restore, when feasible, or create. Strictly requiring the latter places an unnecessarily expensive burden on developers.

### 3. *Enhancement*

Wetlands enhancement generally refers to the improvement of wetlands.<sup>377</sup> More specifically, it is the selective enhancement of "a wetland to boost one desirable attribute, such as waterfowl habitat, over another, such as flood control."<sup>378</sup> For example, a typical wetland could be modified to sustain an endangered species.<sup>379</sup>

Arguments opposing wetlands enhancement resemble those against restoration noted above. In addition, enhancement may inequitably support certain wetlands traits over others. Another consideration is the divergent values regulatory agencies place on wetlands qualities. For instance, a water management district may desire to enhance a wetland for water treatment purposes.<sup>380</sup> On the other hand, a fish and game agency may wish to enhance the wetland in order to increase bass or duck populations.<sup>381</sup> Overall, the tradeoffs of enhancement are similar to those of other mitigation types. However, the ability of enhancement to create a more diverse ecosystem uniquely distinguishes it from the other types of mitigation.<sup>382</sup>

### 4. *Creation*

Wetlands creation is described as "creating wetlands from scratch, turning dry woods into swamps, sandy shores into salt marshes."<sup>383</sup> This type of mitigation has generated the most conflict. Environmental groups and biologists believe creation to be a risky and uncertain mitigation alternative. On the other hand, developers, environmental consultants, and the U.S. Army Corps of Engineers support creation. Examples of wetlands creation include newly

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375. *Id.* Note, some wetlands have been degraded to such an extent that any degree of restoration would not be beneficial.

376. *Id.* at 81-82.

377. Effectiveness Report, *supra* note 159, at 19.

378. SALVESEN, *supra* note 2, at 89.

379. *Id.*

380. *Id.*

381. *Id.*

382. *See id.*

383. SALVESEN, *supra* note 2, at 95.

created mangrove flats in Florida, tidal flats in California, and freshwater marshes in Illinois.<sup>384</sup> Although created wetlands differ in degrees of success, one common theme prevails: creation is indeed a complex and costly endeavor.<sup>385</sup>

Wetlands are unique and dynamic systems which appear where natural conditions, like proper soil, climate, and hydrology, promote their formation. They include swamps, bogs, marshes, and other wet ecosystems.<sup>386</sup> Scientifically, wetlands are difficult to create because experts in the field have yet to understand the interdependencies between wetlands vegetation and animals. Also, created wetlands are not identical to natural wetlands. Created wetlands, for example, "may lack the nutrient-cycling capabilities and productivity of a natural wetland."<sup>387</sup> Furthermore, they may not provide water quality maintenance, shoreline protection, or groundwater recharge as do certain pristine wetlands.<sup>388</sup>

One theory of wetlands creation asserts that "simplicity breeds success: the simpler the system, the easier it is to recreate."<sup>389</sup> For instance, marshes are easier to create than bogs, and salt marshes are easier still than freshwater marshes. The creation of marshes requires less effort and can be accomplished in a relatively short time period, possibly a single season.<sup>390</sup> In contrast, forested wetlands represent a more complex hydrological system, involving diverse plant and animal life. Moreover, they take incredibly long to mature when compared to a human's life span. For instance, a bottomland hardwood forest may take fifty years to leave its adolescent stage.<sup>391</sup>

Wetlands creation remains in the developmental stage, demanding continual scientific examination.<sup>392</sup> Most scientists experienced in wetlands creation agree that restoration, and probably avoidance and enhancement, are more easily performed and less costly. Disagreement exists, however, over whether a wetland can actually be created, and over appropriate criteria to determine success. As a result, wetlands creation remains an art in search of scientific certainty.<sup>393</sup>

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384. *Id.*

385. See *supra* text accompanying note 107.

386. See GORDON MEEKS, JR. & L. CHERYL RUNYON, *WETLANDS PROTECTION AND THE STATES* (Karen Page ed., 1990).

387. SALVESEN, *supra* note 2, at 95.

388. MEEKS & RUNYON, *supra* note 386, at 1.

389. SALVESEN, *supra* note 2, at 96.

390. *Id.*

391. *Id.* at 95.

392. See CONSERVATION FOUNDATION REPORT, *supra* note 348, at 61-62.

393. SALVESEN, *supra* note 2, at 99.

### C. *The Rise of Mitigation Banking*

Since the early 1980s, mitigation banking has been used on the state and federal level to compensate for unavoidable habitat losses associated with dredge and fill permitting projects.<sup>394</sup> On the federal level, the laws and regulations addressing mitigation do not expressly allow mitigation banking. However, policies of the EPA and the U.S. Army Corps of Engineers, in addition to case law, favor mitigation banking as a tool for minimizing resource losses through compensation.<sup>395</sup> In Florida, the Department was once only allowed to accept "cash payments specified for use in a previously-identified, [Department]-endorsed" dredge and fill project,<sup>396</sup> although the Reorganization Act now embraces mitigation banking. Recently, Florida's Environmental Regulation Commission appointed a task force to study mitigation banking and to recommend appropriate action. To fully explore the mitigation banking allowed by the Reorganization Act, the following examines mitigation banking and summarizes the report of the appointed task force.

#### 1. *The Mitigation Banking Process*

As the name implies, mitigation banking resembles the maintenance of a bank account.<sup>397</sup> A developer engages in creation, restoration or preservation measures in advance of the expected need for mitigation to offset construction impacts.<sup>398</sup> The developer receives mitigation credits from the appropriate regulatory agency for undertaking these measures which are quantified and recorded in a mitigation bank account. When the developer seeks a permit that involves unavoidable losses of wildlife habitat, the losses are quantified like the credits, and a withdrawal equal to the amount of loss is deducted from the bank. The process can be repeated until the developer's credits are expended.<sup>399</sup>

Mitigation banks are typically designed to accommodate the need for an easier and more effective process for complying with mitigation requirements. Because of this, mitigation banks offer potential advantages and disadvantages over traditional approaches. One advantage of mitigation banks is that they are designed to collect

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394. CATHLEEN SHORT, MITIGATION BANKING 1-2 (1988).

395. Settles, *supra* note 203, at 55.

396. *Id.*; see also FLA. ADMIN. CODE ANN. r. 17-312.310(6)(b) (1989).

397. Two kinds of mitigation banks are generally recognized: (1) programs where an agency does the actual mitigation which is funded by a developer; and (2) programs where a developer funds and performs the mitigation. Settles, *supra* note 203, at 55.

398. Usually, the developer is involved with many projects in the area. *Id.*

399. SHORT, *supra* note 394, at 1.

credits in advance of project impacts; thus, the time between habitat losses at the project site and compensation for those losses is reduced.<sup>400</sup> Restoration and creation projects take several years to establish a functioning wetland. With proper monitoring, regulators can adjust or deny mitigation credits for projects that fall short of a developer's promises. By the same measure, a carefully monitored banking system informs developers before they build of the precise value of their restoration project. The greater certainty this provides could improve a developer's ability to secure project-based financing.

An additional advantage of mitigation banks concerns the consolidation of mitigation for small wetland losses. The creation of a mitigation bank to meet the mitigation requirements of numerous small projects in terms of impacted area "can provide a larger, more environmentally valuable area that is more efficient and more economical to develop and manage than are several scattered sites."<sup>401</sup>

The disadvantages of mitigation banking include a reduction in quality of project planning and a net loss in wetland habitat. Those concerned about neglect in the project planning stage assert that credits will be withdrawn before avoiding and minimizing potential impacts.<sup>402</sup> The net loss argument claims that unless mitigation banks involve wetland creation or restoration, they result in a net loss of wetlands. Methods to control and counter these disadvantages should continue to be incorporated in future mitigation banks.

## 2. *The Mitigation Banking Task Force Report*

The Mitigation Banking Task Force, appointed by the Environmental Regulation Commission, recently published a report on mitigation banking and the manner in which it should be employed in Florida.<sup>403</sup> The report found mitigation banking to be appropriate "only where other mitigation possibilities are either

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400. *Id.* at 3. In effect, the mitigation banking process guarantees that the mitigation is *in fact* carried out.

401. *Id.* at 2.

402. *Id.* at 5. Note, mitigation banks were never intended to act as a substitute for project planning, particularly in the avoidance and minimization of adverse impacts. *Id.*

403. Report And Recommendations Of The Environmental Regulation Comm'n Mitigation Banking Task Force 1 (Jan. 7, 1992) [hereinafter Task Force]. The report defined mitigation banking as wetland restoration, creation, enhancement, or preservation undertaken expressly for the purpose of providing compensation for wetland losses from future development activities. It includes only actual wetland restoration, creation, or enhancement occurring prior to elimination of another wetland as part of a credit program. *Id.* at 2. Success, in regard to mitigation banking, was defined as "achieving established goals, preferably measurable as quantitative values that are determined prior to the establishment of a mitigation bank. Inherent in the concept of 'success' is the incorporation of a properly funded management plan for the mitigation bank site." *Id.*

limited or nonexistent, or where mitigation banking would be more beneficial."<sup>404</sup> In addition, the report recommended that the program work through a credit system<sup>405</sup> and expressed the possibility of credit categories. For instance, "if the impacted area is a sawgrass marsh that requires 6.5 credits for mitigation from an existing successful mitigation bank, that bank would have to offer the same kind of functions as the sawgrass marsh."<sup>406</sup> However, such a program may not be possible for a mangrove system.

In assessing and assigning credits, the report recommended that mitigation banks be located in the same watershed or basin of the impacted wetlands and that the nature of the mitigation sites be similar to the impacted areas.<sup>407</sup> Furthermore, it was suggested that a mitigation bank must exist and satisfy particular agreed upon success criteria in order to qualify for credits. In assigning credits, wetland functions in the mitigation bank site were considered of primary importance.<sup>408</sup> Finally, the report recommended that proper credits be exchanged as mitigation for adverse impacts on a mitigation bank site following evaluation.<sup>409</sup>

Overall, mitigation banking represents a valuable addition to the federal and state wetlands resource permitting process. Expanding its use in Florida should be welcomed by regulators and developers; the process allows for a reduction in both long term agency monitoring of established wetlands and developer uncertainty of mitigation cost and timing.<sup>410</sup> In addition, broadening the use of mitigation banking should force regulators to examine new wetlands habitats and their needs on a systematic basis by agreeing on particular mitigation bank sites. Finally, the advanced planning requirement of mitigation banking should result in a more predictable and efficient permitting process.<sup>411</sup>

### 3. Mitigation Banking After the Reorganization Act

The Reorganization Act directs the Department to participate in and encourage the establishment of private and "regional mitigation

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404. *Id.* at 4.

405. *Id.*; see *supra* text accompanying notes 201-03.

406. Task Force, *supra* note 403, at 5.

407. *Id.* at 5-6. The latter recommendation illustrates a "type for type" credit.

408. The report did not recommend the appropriate weight created, restored or enhanced wetlands should be given, but did express its favor of restoration or enhancement over creation. *Id.* at 6.

409. *Id.* at 7.

410. Settles, *supra* note 203, at 54-55.

411. *Id.*

areas or mitigation banks.<sup>412</sup> While the task of working with mitigation banking is not new to the agencies, this is the first legislative endorsement of this practice.<sup>413</sup>

The Department and districts have until January 1, 1994, to adopt appropriate mitigation banking rules.<sup>414</sup> To assist the agencies in the creation of these rules, the Reorganization Act provides a laundry list of considerations:

(1) Circumstances in which mitigation banking is appropriate or desirable;

(2) Provisions for the establishment of mitigation banks by governmental, nonprofit, or for-profit private entities with sufficient legal or equitable interest in the property proposed for mitigation banking;

(3) Procedures for the review of mitigation banking proposals in a timely manner pursuant to chapter 120;

(4) A framework for determining the value of a mitigation bank, considering the ecological value of the mitigation bank compared to the area where adverse impacts to wetlands or surface waters are proposed. Mitigation banks found to be successful prior to withdrawal of credit shall receive greater credit than mitigation which has not yet achieved success;

(5) Procedures for the administration of bank credits so that accounting responsibilities are not unnecessarily duplicated between a water management district and the department;

(6) Requirements to ensure the financial responsibility of non-governmental entities proposing to develop mitigation banks;

(7) Measures required to ensure the long term management and protection of mitigation banks;

(8) Criteria for the withdrawal of mitigation credits by projects within or outside the regional watershed where the bank is located;

(9) Criteria governing the contribution of funds or land to an approved mitigation bank;

(10) Criteria allowing the withdrawal of credits by parties other than the party creating the bank; and

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412. *Reorganization Act*, *supra* note 1, § 29, at 31, 1993 Fla. Sess. Law Serv. 1652, 1663 (West) (to be codified at FLA. STAT. § 373.4135 (1993)).

413. Florida's agencies have been using mitigation banks for years. Darryl E. Owens, *Agencies Bank on Wetland Account to save Ecosystems*, ORLANDO SENTINEL TRIBUNE, Jan. 24, 1993, K1 (noting Department of Transportation's wetland mitigation banks); *see also Decision You Can Bank On: The County's 'Land Bank' Purchase Is an Innovative Way to Assure the Preservation of Public Land While Permitting Growth Where It's Needed*, ORLANDO SENTINEL, Aug. 2, 1992, K6 (noting local government's use of mitigation banking). The largest and most celebrated use of mitigation banking appropriately comes from none other than Walt Disney World. *See Disney Land Swap Nears Approval*, UNITED PRESS INT'L 1992, Nov. 17, 1992.

414. *Reorganization Act*, *supra* note 1, § 29, at 31, 1993 Fla. Sess. Laws 1652, 1663 (West).

(11) Provisions for the consideration of creation, restoration, enhancement, and preservation of wetlands and uplands as part of a mitigation bank.<sup>415</sup>

In order to meet the rather ambitious deadline of January 1, 1994, the Department and districts formed a committee called the Statewide Mitigation Banking Rule Team.<sup>416</sup> At press time, the team has already issued two drafts of the proposed rules<sup>417</sup> (collectively, Draft Banking Rules). Although a final version of the rules is some ways off, a careful look at each section of the draft rules shows their general intent and direction.

The authors appreciate that the draft rules will undoubtedly change. The following discussion<sup>418</sup> does not endeavor to present a snap-shot of the rules as they existed at press time. Similarly, the discussion does not merely present a detailed historical comparison of the rule drafts. Rather, the headings below point out universal limitations on the Department's rulemaking authority, and offer insight into the permissible bounds of the Draft Banking Rules, no matter how much they change in subsequent drafts or revisions.

#### a. Statement of Intent

Appropriately enough, the Draft Banking Rules begin with a general statement of intent. The first draft stated that "[e]nsuring the long-term viability of regional wetland functional values" represented one of the primary goals, along with the protection and enhancement of ecological resources, although this language was dropped in the second draft.<sup>419</sup> The draft rules state that this policy of preservation can be attained in certain instances more effectively through participation in a "Regional Mitigation Bank."<sup>420</sup> Accordingly,

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415. *Id.* § 29, at 31-33, 1993 Fla. Sess. Laws 1652, 1663 (West).

416. The Rule Team is staffed with the following members: Ann Redmond and David Thulman of the Department; Glenn Lowe and Eric Olsen of the St. Johns Water Management District; Clark Hull and Jan McLean of the Southwest Florida Water Management District; and Terrie Bates, John Femero, and Cecile Ross of the South Florida Water Management District.

417. Memorandum from Mitigation Banking Rule Team to Mailing List, attachment 1 (July 13, 1993) (attaching draft rules) (on file with the authors) [hereinafter Draft Banking Rules I]; Memorandum from Mitigation Banking Rule Team to Mailing List, attachment 1 (Sept. 7, 1993) (attaching draft rules) (on file with the authors) [hereinafter Draft Banking Rules II]

418. The Mitigation Banking Rule Team avoided using rule numbers "to make it easier for the public to comment on." Memorandum from Mitigation Banking Rule Team to Mailing List at 1 (July 13, 1993) (on file with authors). Citation to both drafts of the banking rules is therefore by page number of the July 13 and September 7, 1993 drafts.

419. Draft Banking Rules I, *supra* note 417, at 1; Draft Banking Rules II, *supra* note 417, at 1.

420. Draft Banking Rules I, *supra* note 417, at 1; Draft Banking Rules II, *supra* note 417, at 1. The term "Regional Mitigation Bank" is elsewhere defined as a banking project for a geographic or mitigation service area, Draft Banking Rules I, *supra* note 417, at 2, and as a project undertaken to acquire credits. Draft Banking Rules II, *supra* note 417 at 3.



mitigation banking complements, but does not replace other rules relating to "mitigation sequencing such as avoidance and minimization."<sup>421</sup>

The intent section also states that the Regional Mitigation Banks are to reduce uncertainty associated with traditional mitigation, and provide greater assurances of ecological success.<sup>422</sup> On this point, the revised draft rules state that:

[i]t is anticipated that the consolidation of multiple mitigation projects for impacts to ~~smaller, isolated or fragmented habitats~~ into larger contiguous areas will provide greater assurances that the mitigation will yield long-term, sustainable, regional, system-wide ecological benefits. Regional Mitigation Banks should emphasize the use of restoration and enhancement of degraded ecosystems in conjunction with the preservation of intact ecosystems as opposed to alteration of landscapes to create wetlands from historic uplands.<sup>423</sup>

In summary, the intent section of the Draft Banking Rules endorses the use of mitigation banking, and finds that it may produce better results. In so many words, the history of the intent section also evidences a belief that mitigation banking is appropriate only after exhausting the potential of other techniques.<sup>424</sup>

If the intent section makes it into the final rule as modified by the second draft, it may have the following impact:

- Disputes over whether on-site mitigation or off-site banking is better for a given project will be partially resolved. The intent section suggests that consolidation of small on-site mitigation projects is preferable, and provides greater assurances of long-term success. The applicant's overall burden of showing the likelihood of success for an off-site banking mitigation is considerably lessened by the draft rule's general endorsement of Regional Mitigation Banks.<sup>425</sup>

421. Draft Banking Rules I, *supra* note 417, at 1. The use of the term "sequencing," although dropped in the second draft of the rules, shows the Department's preference for avoidance and minimization as first alternatives.

422. *Id.*

423. Draft Banking Rules II, *supra* note 417, at 1-2. The underscored above shows language added to the second draft, while ~~stricken~~ words were deleted from the first.

424. *Accord* Memorandum from Chuck Allen, et al., to Mitigation Banking Task Force at 2 (Nov. 6, 1991) (stating that "staff will first determine whether the impacts of the project can be 'minimized' by reducing the scope of the impacts") (on file with authors). This point should adequately address the concerns of those preservationists who feel that mitigation banking is "a codeword for checkbook regulation; developers simply write a check and start the bulldozer." East, *supra* note 6.

425. See also *Reorganization Act*, *supra* note 1, § 29, at 31, 1993 Fla. Sess Law Serv. 1652, 1663 (West) (to be codified at FLA. STAT. § 373.4135 (1993)) (stating that "The Legislature finds that the

- Instead of disputing whether projects are appropriately located on- or off-site, parties will instead have to focus on whether the use of mitigation banking is premature, and whether other techniques, such as minimization, have been used to their fullest.

#### b. Criteria for Establishing a Regional Mitigation Bank

The Draft Banking Rules also describe the means of establishing a Regional Mitigation Bank. The rules provide a check list of criteria for both the bank and the banker.<sup>426</sup> In general, a Regional Mitigation Bank must improve regional ecological conditions, provide viable ecological functions in the geographic service area, be capable of long-term operation with minimal maintenance, not destroy native uplands, "achieve the mitigation success criteria," and be compatible with adjacent land uses. Several of these criteria deserve close study.

The phrase "achieve the mitigation success criteria" will no doubt raise questions. For example: What constitutes reasonable assurances of success? Does this require a stringent standard of proof, or does mere speculation on a project's success satisfy the inquiry? While this factor may be refined through rulemaking, the authors have taken the position that this particular factor poses what is inherently a purely factual inquiry. In the final analysis, hearing officers will be responsible for determining whether a project is likely to succeed for purposes of the rule.

The phrases "compatible with surrounding uses" and "similar or compatible" use in the two drafts also deserve comment. Although

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adverse impacts of activities regulated under this part may be offset by the creation and maintenance of regional mitigation areas or mitigation banks."). In the parlance of administrative law, this constitutes a "legislative fact" or a statement and factual conclusion made in rule or statute that does not require extensive proof by the litigants. Professor Davis explains:

Adjudicative facts are the facts about the parties and their activities, businesses and properties . . . . Legislative facts do not usually concern the immediate parties but are general facts which help the tribunal decide general questions of law and policy and discretion.

1 KENNETH K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.02, at 413 (1980). Florida courts, while rejecting the certainty of the labels, seem to recognize this difference. *Bowling v. Department of Insurance*, 394 So. 2d 165, 174 n.17 (Fla. 1st DCA 1981) ("This court has recently determined to avoid this abstract and unprofitable debate over definitions, preferring to require proof even of 'legislative' facts . . ."). The mitigation rules under the Henderson Act tended to require on-site mitigation. FLA. ADMIN. CODE ANN. r. 17-312-340(6) (1989).

426. A "banker" is defined as "a person or entity who creates, operates, and maintains a Regional Mitigation Bank pursuant to a Regional Mitigation Bank Permit." Draft Banking Rules I, *supra* note 417, at 2; *accord* Draft Banking Rules II, *supra* note 417, at 2. In turn, a "Mitigation Bank Permit" is defined (without the use of the term "Regional") as "a permit issued to a banker to construct and operate a Regional Mitigation Bank." Draft Banking Rules I, *supra* note 417, at 2; Draft Banking Rules II, *supra* note 417, at 3.

perhaps not unconstitutionally vague, the term "compatible" is nonetheless very unhelpful and often the focus of litigation.<sup>427</sup> Unless substantially modified in subsequent drafts, this criteria will certainly draw challenges on the basis that it "fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency."<sup>428</sup>

The first draft of the rules required that banking projects be "consistent with the watershed management objectives" of the District. This requirement was appropriately dropped from the second draft. The use of the term "consistent" was troublesome for two reasons. First, the word "consistent," although simple enough in the abstract, has proved quite troublesome and elusive in other instances. In the context of land use planning, for example, the Legislature states that development orders are consistent if they are "compatible with and further the objectives, [and] policies, . . . [of a comprehensive plan] and if it meets all other criteria enumerated by

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427. Cf. *Nostromo, Inc. v. City of Clearwater*, 594 So. 2d 779, 781 (Fla. 2d DCA 1992) (finding that the requirement that proposed land uses be "compatible with the surrounding area and not impose an excessive burden or have a substantial negative impact on surrounding or adjacent uses or on community facilities or services" was not unconstitutionally vague); *Life Concepts v. Harden*, 562 So. 2d 726 (Fla. 5th DCA 1990) (finding the simple phrase "compatible with the surrounding residential uses" not unconstitutionally vague because the term "compatible" has a common definition). One should keep in mind, however, that the majority of reported cases dealing with the term "compatible" are concerned with local land use regulations. There is certainly still room for argument that the term will receive less deference when it appears in an agency rule. We do not mean to imply that the term "compatible," although perhaps appropriate for home rule powers, similarly complies with the spirit of section 120.54, *Florida Statutes*.

428. FLA. STAT. § 120.52(8)(d) (1991). Other portions of the Draft Banking Rules could have provided some assistance with the interpretation of the term "compatible." For example, applicants are required to provide a "description of the present *and anticipated* surrounding land uses and how they would affect the ecological functions the Regional Mitigation Bank will provide." Draft Banking Rules I, *supra* note 417, at 5 (emphasis added). This language was dropped, however, in the second draft in favor of a requirement that applications merely provide very general information about future land use elements. Draft Banking Rules II, *supra* note 417, at 6 (focusing compatibility inquiry on the general future planning elements provided by a comprehensive plan).

the local government.<sup>429</sup> The seemingly clear definition has only resulted in muddled litigation.<sup>430</sup>

Second, the requirement that proposed mitigation banks be consistent with water management objectives would modify significantly the enabling language of the Reorganization Act. As discussed above,<sup>431</sup> the Act requires applicants to show that a proposed project "will not be inconsistent with the overall objectives of the district."<sup>432</sup> While the change in wording from the statute may seem a slight distinction, it may in some circumstances make a difference.

An example makes this clear. Suppose a water management district has a dozen expressed goals for given watershed. A dredge and fill applicant required to comply with the Reorganization Act must simply show that the proposed project will not violate any of these objectives; that is, that the project *is not inconsistent* with the district goals. Transgressing any one of these goals could be fatal to the application; however, the burden is relatively light.

The same applicant subject to the first version of the Draft Banking Rules, however, would be required to demonstrate that the project furthers all of the district's dozen goals;<sup>433</sup> that is, that the project *is consistent* with (or furthers and advances) the objectives of the agency. By changing the statutory language from a negative burden to an affirmative burden, the original version of the Draft Banking Rules increased an applicant's load.

Obviously, the Legislature settled on the phrase "not inconsistent" with consequence, and the "consistency" criteria in the rules should be

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429. FLA. STAT. § 163.3194(3)(a) (1991). Judge Cowart also provides a celebrated and able definition:

The word "consistent" implies the idea or existence of some type or form of model, standard, guideline, mark or measure as a norm and a comparison of items or actions against that norm. Consistency is the fundamental relation between the norm and the compared item. If the compared item is in accordance with, or in agreement with, or within the parameters specified, or exemplified by the norm, it is "consistent" but if the compared item deviates in any direction or degree from the parameters of the norm, the compared item or action is not "consistent" with the norm.

Cape Canaveral v. Mosher, 467 So. 2d 468, 471 (Fla. 5th DCA 1985) (Cowart, J., concurring).

430. For an overview of the problems with the consistency doctrine, see Robert Lincoln, *Inconsistent Treatment: The Florida Courts Struggle with the Consistency Doctrine*, 7 J. LAND USE & ENVTL. LAW 333 (1992).

431. See *supra* notes 269-88 and accompanying text.

432. *Reorganization Act*, *supra* note 1, § 30, at 33-34, 1993 Fla. Sess. Law Serv. 1652, 1663 (West) (to be codified at FLA. STAT. § 373.414(1) (1993)).

433. This much, at least, was the slant to other parts of the rules. See Draft Banking Rules I, *supra* note 417, at 4 (requiring that all applicants provide information showing "consistency with the watershed management objectives"); see also *id.* at 8 (stating that the value of mitigation credits will vary with the "extent to which the Regional Mitigation Bank furthers watershed management objectives") (emphasis added).

interpreted accordingly. The Draft Banking Rules therefore appropriately abandoned this "consistency" inquiry in the second draft.<sup>434</sup> In any case, a hearing officer should be guided by the statutory requirement of "not inconsistent" over any modifications by the rule.

The Draft Banking Rules contain criteria for the banker as well. A proposed banker must be one who satisfies two criteria: sufficient legal interest in the property and an ability to demonstrate financial responsibility. Separate sections of the rule address both of these requirements. First, the banker must have sufficient interest in the property to convey a fee simple interest or a conservation easement in favor of the agency.<sup>435</sup> Second, the banker must be able to demonstrate an ability to provide for the perpetual upkeep of the mitigation project. Proof of this ability may come from any one of a variety of funding mechanisms.<sup>436</sup>

### c. Contribution of Land and Funds

Other sections of the Draft Banking Rules deals with the contribution of lands and funds.<sup>437</sup> Wetlands resource permit applicants for the management and storage of surface waters (MSSW)<sup>438</sup> can add lands to the Regional Mitigation Bank if the contribution is adjacent to an approved Regional Mitigation Bank, would offset the impact to wetlands, and would improve or enhance the ecological value of the bank.<sup>439</sup> Applicants could also purchase credits in lieu of land contributions.

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434. Draft Banking Rules II, *supra* note 417 at 4 (deleting requirement of "consistency"); cf. FLA. STAT. § 120.52(8)(c) (1991) (defining as an exceedence of delegated legislative authority an agency rule that "enlarges, modifies, or contravenes the specific provisions of law implemented, citations to which is required by s. 120.54(7)") (emphasis added). Interestingly, the functional difference between "consistent" and "not inconsistent" was noticed recently by the Florida Supreme Court. See *Board of County Comm'rs v. Snyder*, 18 Fla. L. Weekly S522, S525 (Fla., Oct. 7, 1993) ("It is not enough simply to be 'consistent'; the proposed change cannot be inconsistent . . .") (quoting *Lee County v. Sunbelt Equities II*, 619 So. 2d 996, 1005-06 (Fla. 2d DCA 1993)).

435. Draft Banking Rules I, *supra* note 417, at 13; Draft Banking Rules II, *supra* note 417, at 4-5.

436. The approved financial tools include surety bonds, performance bonds, certificates of deposit, securities, letters of credit, trust fund agreements, annuities or other financial vehicles." Draft Banking Rules I, *supra* note 417, at 17-18; Draft Banking Rules II, *supra* note 417, at 25. Both drafts expand somewhat upon the criteria listed under the old Henderson Act rules. See FLA. ADMIN. CODE ANN. r. 17-312.390(4) (Oct. 1991).

437. Draft Banking Rules I, *supra* note 417, at 6; Draft Banking Rules II, *supra* note 417, at 16, 17 The contribution of funds was not included in the first draft.

438. On the eve of the Reorganization Act, the Department's rules for the Management and Storage of Surface Waters incorporated by reference the rules developed by each of the water management districts. FLA. ADMIN. CODE ANN. r. 17-330.200 (Dec. 1992).

439. Draft Banking Rules I, *supra* note 417, at 6; Draft Banking Rules II, *supra* note 417, at 16-17.

The section as currently drafted is remarkable only for its coordination with MSSW projects. The Reorganization Act required the consolidation of applications into a single environmental resource permit.<sup>440</sup> Conceivably, applicants for other types of resource permits (e.g., mangrove alteration) could engage in forms of mitigation banking as well. Although not mandated by the Reorganization Act, the contribution section is in keeping with the Act's intent.

#### d. Establishment of Wetland Mitigation Credits

The heart of the mitigation banking rules is a section describing the means by which developers are assigned credit for their contributions to Regional Mitigation Banks.<sup>441</sup> The methods used to assign credit values in the Draft Banking Rules defy easy summary. In general, the Department assigns a value to the mitigation project expressed in units of "Wetland Mitigation Credits."<sup>442</sup> Although the number of credits assigned will vary with the project, the credits themselves are uniform and fungible—an essential characteristic for the creation of a market system.

The factors the Department uses to determine the value of a mitigation project include: the increase in value of the wetlands and uplands preserved, enhanced, restored or created; the extent to which natural hydrologic regimes are maintained; natural fire pattern; proximity to other significant protected areas, or the corridor effect; quality and quantity of the wetland or upland created; protection of adjacent uplands, and the "hydrologic value of those uplands to the wetlands;" habitat for endangered or threatened fish and wildlife, or wildlife unique to the banking area; the likelihood that the lands preserved will be developed without protection; and the classification of the water bodies or land.<sup>443</sup>

The value assigned to a mitigation project seems to vary with the amount of information submitted by the applicant. The more assurances the applicant can provide, the greater the mitigation credit assigned. Thus, this function of the banking rules gives applicants an incentive to provide full information to the Department.

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440. *Reorganization Act*, *supra* note 1, § 19, at 19 (stating intent to consolidate permits); *see supra* notes 236-40 and accompanying text.

441. Draft Banking Rules I, *supra* note 417, at 7; Draft Banking Rules II, *supra* note 417, at 10.

442. Draft Banking Rules I, *supra* note 417, at 7; Draft Banking Rules II, *supra* note 417, at 11. The second draft of the rules attempted to make mitigation credits fungible by defining them as "equivalent to a net gain of one acre of wetlands through creation or restoration." Draft Banking Rules II, *supra* note 417, at 11.

443. Draft Banking Rules I, *supra* note 417, at 7-9; Draft Banking Rules II, *supra* note 417, at 12-13.

After the Department assigns a credit value to a mitigation project, developers can start to move or "bank" their successful projects. There are numerous restrictions, however, on the ability of developers to freely transfer or indulge their credit. For example, no credit becomes available for a freshwater wetland until success is demonstrated.<sup>444</sup> As such projects become partially successful, however, a developer can use portions of their assigned total credit.<sup>445</sup>

Perhaps most importantly, if a permit holder is not in complete compliance with the terms of the mitigation bank permit, no mitigation credits may be withdrawn from the bank.<sup>446</sup> However, the frozen credits become available once the permit returns to compliance.<sup>447</sup> The effect of these provisions is obvious: for the first time, developers have incentives (other than enforcement) to be in compliance.<sup>448</sup> This gives the Department the luxury of low-cost monitoring.

#### e. Geographic & Mitigation Service Area

The Draft Banking Rules also refer to a "geographic service area" or "mitigation service area," defined as the area within which the mitigation credits may be used.<sup>449</sup> By restricting the use of credits within one area, the Draft Banking Rules prevent a particular portion of the state from bearing the brunt of all development, while others enjoy the mitigation. The size of the geographic or mitigation service area is directly related to the ability of the Regional Mitigation Bank to offset losses.<sup>450</sup> Thus, a more efficient and successful Regional Mitigation Bank will issue credits that can be used in a larger area.

444. Draft Banking Rules I, *supra* note 417, at 9; Draft Banking Rules II, *supra* note 417, at 13.

445. Draft Banking Rules I, *supra* note 417, at 9; Draft Banking Rules II, *supra* note 417, at 13.

446. Draft Banking Rules I, *supra* note 417, at 9; Draft Banking Rules II, *supra* note 417, at 14.

447. Draft Banking Rules I, *supra* note 417, at 9; Draft Banking Rules II, *supra* note 417, at 14.

448. One would imagine that each decision to freeze mitigation credits is a separate point of entry for administrative challenge. See generally *Reorganization Act*, *supra* note 1, § 29, at 32, 1993 Fla. Sess. Law Serv. 1652, 1663 (West) (to be codified at FLA. STAT. § 373.4135(3) (1993)) (requiring "[p]rocedures for the review of mitigation banking proposals in a timely manner pursuant to chapter 120").

449. Draft Banking Rules I, *supra* note 417, at 2; Draft Banking Rules II, *supra* note 417, at 3. The phrase "geographic service area" was changed to "mitigation service area" in the second draft. Elsewhere, the rules do allow for minor exceptions in the case of small (half-acre) projects and projects on the border of a geographical service area, see Draft Banking Rules I, *supra* note 417, at 12, and in cases of linear projects, such as transmission lines. Draft Banking Rules II, *supra* note 417, at 19. In such instances, the credits allocated for a mitigation project may be used outside the geographic area, but will be of reduced value.

450. Draft Banking Rules I, *supra* note 417, at 11; Draft Banking Rules II, *supra* note 417, at 17-18.

This in turn will vary with the size and ecological condition of each service area.<sup>451</sup>

f. Discussion.

Although the specifics of the mitigation banking rules will undoubtedly change, the substantive principles discussed above will likely survive intact. Based on the Reorganization Act, practitioners may be assured of the following points, regardless of how the final banking rules turn out:

- Applicants will only have to show that their proposed activity is not inconsistent with the general objectives of the permitting authority.<sup>452</sup> The Department may not require applicants to show how their project is consistent with every objective.
- Permit applicants will have an easier time showing that off-site mitigation banking is preferable, given the legislative endorsement of this practice.<sup>453</sup> In such a case, the applicant's burden is partially slackened by the existence of legislative facts endorsing off-site banking.
- The process by which mitigation credits are assigned, frozen, and approved for transfer will be studded with points of entry.<sup>454</sup>
- Mitigation bankers can always expect partial credit to be available for their mitigation projects; however, unsuccessful projects can expect to receive less credit.<sup>455</sup>
- There will be a market for mitigation credits, regulated by the permitting authority.<sup>456</sup>

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451. Draft Banking Rules I, *supra* note 417, at 11; Draft Banking Rules II, *supra* note 417, at 19.

452. *Reorganization Act*, *supra* note 1, § 30, at 33, 1993 Fla. Sess. Law Serv. 1652, 1663 (West) (to be codified at FLA. STAT. § 373.414(1) (1993)).

453. *Id.* § 29, at 31, 1993 Fla. Sess. Law Serv. 1652, 1663 (West) (to be codified at FLA. STAT. § 373.4135 (1993)) ("The Legislature finds that the adverse impacts of activities regulated under this part may be offset by the creation and maintenance of regional mitigation areas and mitigation banks.").

454. *Id.* § 29, at 32, 1993 Fla. Sess. Law Serv. 1652, 1663 (West) (to be codified at FLA. STAT. § 373.4135(3) (1993)) (requiring "[p]rocedures for the review of mitigation banking proposals in a timely manner pursuant to chapter 120").

455. *Id.* (to be codified at FLA. STAT. § 373.4135(4) (1993)) ("Mitigation banks found to be successful prior to withdrawal of credit shall receive greater credit than mitigation which has not yet achieved success.").

456. *Id.* (to be codified at FLA. STAT. § 373.4135(10) (1993)) (requiring the creation of "[c]riteria allowing the withdrawal of credits by parties other than the party creating the bank").



- Mitigation banking credits can be used in or outside the area served by the regional mitigation bank.<sup>457</sup>

Since all of these points find root in the Reorganization Act, they will remain true no matter how subsequent drafts change.

#### V. CONCLUSION

The Reorganization Act made significant changes to dredge and fill regulation in Florida. Nonetheless, many of the principles found in the Warren S. Henderson Wetlands Protection Act were carried forward. Wetlands regulation, even after the Reorganization Act, is not intended as an "[a]bsolute prohibition of dredge and fill[ ] activity . . . [or] as a means for the state to acquire private land for public purposes . . . ."458 Rather, as the preamble to the Henderson Act stated in part, it remains the "policy of this state to establish reasonable regulatory programs which provide for the preservation and protection of Florida's remaining wetlands to the greatest extent practicable, *consistent with private property rights and the balancing of other state vital interests* . . . ."459 Courts and practitioners should approach the Reorganization Act with the understanding that it preserved the regulatory status quo (with some exceptions), and merely transferred and streamlined functions. Accordingly, the Reorganization Act does not end the great debate over wetlands.

In an ideal world, development would never occur in wetlands; however, as communities seek to grow, and the definition of "wetlands" expands, the filling and loss of wetlands is inevitable. When responsibly performed, wetlands mitigation can accommodate growth, while simultaneously preserving the State's wetlands. Further, mitigation banking offers a promising addition to Florida's mitigation program. The past decade evidences considerable improvement in the practice of wetlands mitigation.<sup>460</sup> As the new field advances, federal and state wetland regulators must adhere to a strict balancing process, weighing the *extent* of the private burden of mitigation regulation against the prevention of a public harm--the destruction of wetlands.

457. *Id.* (to be codified at FLA. STAT. § 373.4135(8) (1993)) (requiring for the creation of "[c]riteria for the withdrawal of mitigation credits by projects within or outside the regional watershed where the bank is located").

458. 1800 Atl. Developers v. Department of Env'tl. Regulation, 552 So. 2d 946, 954 (1st DCA 1989), *rev. denied*, 562 So. 2d 345 (Fla. 1990).

459. Ch. 84-79, 1984 Fla. Laws 202, 204 (emphasis added).

460. National Academy of Sciences Review of Wetlands Delineation: Hearing on H.R. 3578 Before the Subcomm. on Environment of the House of Representatives Comm. on Science, Space, and Technology, 102d Cong., 1st Sess. 763, 766 (1991) (testimony of Kevin L. Erwin).

The current charge is to refine and select mitigation techniques that will yield results "not contrary to the public interest."<sup>461</sup> This charge embodies an inherent conflict. Strict federal, state, and local regulatory programs, coupled with the difficulty experienced by Florida developers in avoiding wetlands, results in constant conflict between wetlands preservation and development. Affected landowners cannot continue the chorus that such regulations are inherently overly burdensome, taking all economically viable use of their property. Preservationists only add to the problem by refusing to acknowledge the very essence of property rights and the United States Constitution's express words: "[N]or shall private property be taken for public use, without just compensation."<sup>462</sup> Hopefully, the new regulations under the Reorganization Act will provide a framework for these two camps to combine responsible, planned growth with effective and successful mitigation.

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461. *Reorganization Act*, *supra* note 1, § 30, at 33, 1993 Fla. Sess. Law Serv. 1652, 1663 (West) (to be codified at FLA. STAT. § 373.414 (1993)).

462. U.S. CONST. amend. V; *accord* FLA. CONST. art. I § 9; *see also* FLA. CONST. art. X § 6 ("No private property shall be taken except for a public purpose and with full compensation therefore paid to each owner . . .").

