

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 599 Mitigation Requirements for Transportation Projects

SPONSOR(S): Pilon

TIED BILLS: None **IDEN./SIM. BILLS:** SB 824

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Transportation & Highway Safety Subcommittee	12 Y, 0 N, As CS	Kiner	Kruse
2) Agriculture & Natural Resources Subcommittee	13 Y, 1 N	Deslatte	Blalock
3) Transportation & Economic Development Appropriations Subcommittee			
4) Economic Affairs Committee			

SUMMARY ANALYSIS

The bill relates to environmental mitigation efforts to offset the impacts of transportation projects proposed by the Florida Department of Transportation ("DOT"). The bill amends current Florida law to provide DOT the option to choose between water management districts ("WMDs") and private mitigation banks when undertaking mitigation efforts for transportation projects. The bill makes this change by:

- Revising legislative intent to encourage the use of public and private mitigation banks and other mitigation options that satisfy state and federal requirements;
- Providing an opt-out clause authorizing DOT (and WMDs and participating transportation authorities) to exclude projects from the statutory mitigation plan carried out by WMDs provided specified criteria have been met and specified investigations have been conducted;
- Providing that funds held in escrow for the benefit of a WMD may be released if the associated transportation project is excluded in whole or in part from the mitigation plan;
- Requiring that mitigation plans be approved by the Florida Department of Environmental Protection ("DEP"), in addition to current WMD approval, before implementation; and
- Revising the circumstances under which a governmental entity may create or provide mitigation for a project other than its own.

The bill has a potentially negative fiscal impact on local government. Although the proposed change does not appear to apply to transportation projects, mitigation banks and offsite regional mitigation areas permitted prior to December 31, 2011, mitigation for mining activities, and single family lots or homeowners, the proposed language appears to place additional financial assurance requirements on local governmental entities. The bill has a potentially negative fiscal impact for state government. The DOT must provide a cost-effectiveness analysis when determining which projects to include in or exclude from the mitigation plan, and the DEP must approve a WMD's mitigation plan before it can be implemented.

The bill is effective upon becoming a law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Background, Legislative Intent and Purpose

Environmental mitigation as it relates to wetlands regulatory programs is generally defined as the creation, restoration, preservation or enhancement of wetlands to compensate for permitted wetlands losses.¹ Mitigation banking is a concept designed to increase the success of environmental mitigation efforts and reduce costs to developers of individual mitigation projects.²

Section 373.4135, F.S., as part of the Environmental Reorganization Act of 1993, directs the Florida Department of Environmental Protection (“DEP”) and water management districts (“WMDs”) to participate in and encourage the establishment of private and public mitigation banks and offsite regional mitigation.³ Section 404 of the federal Clean Water Act⁴ and early Florida law attempted to regulate wetlands impacts. However, these pieces of legislation did not specifically establish a wetlands protection program. As such, the Florida Legislature responded to the lack of both a comprehensive policy and a regulatory framework to handle environmental mitigation efforts with passage of s. 373.4135, F.S.⁵ With few exceptions, it was intended that the provisions for establishing mitigation banks, creating and providing mitigation would apply equally to both public and private entities.⁶ Among the exceptions is that DEP and the WMDs may treat public (or governmental) and private entities differently, by rule, with respect to financial assurances required.⁷

Mitigation Banking Process

In 1994, rules were adopted to govern the establishment and use of mitigation banks.⁸ The substantive aspects of these rules, which were later codified⁹ in s. 373.4136, F.S., and further specified in Ch. 62-342.700, F.A.C., address the following:

- The establishment of mitigation banks by governmental, nonprofit or for-profit entities;
- Requirements to ensure the financial responsibility of nongovernmental, private entities¹⁰ proposing to develop mitigation banks – including the requirement that these entities show financial responsibility (effective prior to release of any mitigation credits) through a surety or performance bond, irrevocable letter of credit, or trust fund for the construction, implementation and perpetual management phases of the project (equal to 110% of the cost);
- Requirements to ensure the financial responsibility of governmental entities¹¹ proposing to develop mitigation banks – including the requirement that a governmental entity provide

¹ John J. Fumero, *Environmental Law: 1994 Survey of Florida Law – At a Crossroads in Natural Resource Protection and Management in Florida*, 19 Nova L. Rev. 77, 101 (1994).

² Id. at 103.

³ Section 29., Ch. 93-213, Laws of Florida.

⁴ 33 U.S.C. s. 1344

⁵ John J. Fumero, *Environmental Law: 1994 Survey of Florida Law – At a Crossroads in Natural Resource Protection and Management in Florida*, 19 Nova L. Rev. 77, 103 (1994).

⁶ Section 373.4135, F.S.

⁷ Section 373.4135(1)(a), F.S.

⁸ The rules have been amended several times and may now be found in Ch. 62-342.700, F.A.C., effective May, 2001.

⁹ In 1996, the Florida Legislature revised the statutes on mitigation banking and the substantive sections of the rules were placed in s. 373.4136, F.S. See the “Legal Authority” section of the Florida Department of Environmental Protection’s website on the Mitigation Banking Rule and Synopsis. This information may be viewed at <http://www.dep.state.fl.us/water/wetlands/mitigation/synopsis.htm> (Last viewed 1/12/2012). Chapter 62-342, F.A.C. was subsequently revised in May, 2001, providing, among other things, specific financial assurance requirements.

¹⁰ These requirements may be found in Ch. 62-342.700(1)-(11), F.A.C.

¹¹ These requirements may be found in Ch. 62-342.700(12), F.A.C.

“reasonable assurances” that it can meet the construction and implementation requirements in the mitigation bank permit and establish a trust fund for the perpetual management of the mitigation bank;

- Circumstances in which mitigation banking is appropriate or desirable: only when onsite mitigation is determined not to have comparable long-term viability and the bank itself would improve ecological value more than on-site mitigation;
- A framework for determining the value of a mitigation bank through the issuance of credits;
- Criteria for withdrawal of mitigation credits by projects within or outside the regional watershed where the bank is located;
- Measures to ensure the long-term management and protection of mitigation banks; and
- Criteria governing the contribution of funds or land to an approved mitigation bank.¹²

A ‘banker’ is an entity that creates, operates, manages, or maintains a mitigation bank.¹³ A banker must apply for a mitigation bank permit before establishing and operating a mitigation bank.¹⁴ Mitigation banks are permitted by DEP or one of the WMDs that have adopted rules based on the location of the bank and activity-based considerations, such as whether the ecological benefits will preserve wetlands losses resulting from development or land use activities or will offset losses to threatened and endangered species.¹⁵ The mitigation bank permit authorizes the implementation and operation of the mitigation bank and sets forth the rights and responsibilities, including financial responsibilities, of the banker and DEP for its implementation, management, maintenance and operation.¹⁶ Specific state mitigation bank permit requirements are contained within s. 373.4136, F.S., Ch. 62-342.450, F.A.C., and Ch. 342.700, F.A.C. Mitigation banks must also go through a federal permitting process overseen by the United States Army Corps of Engineers.

There are separate and distinct requirements for mitigation efforts related to transportation projects.

Mitigation Requirements for Specified Transportation Projects

In 1996,¹⁷ the Florida Legislature found that environmental mitigation efforts related to transportation projects proposed by the Florida Department of Transportation (“DOT”) or transportation authorities could be more effectively achieved through regional, long-range mitigation planning rather than on a project-by-project basis. As such, s. 373.4137, F.S., requires DOT to fund mitigation efforts to offset the adverse impacts of transportation projects on wetlands, wildlife and other aspects of the natural environment. Mitigation efforts are required to be carried out by a combination of WMDs and through the use of mitigation banks.

DOT’s Role in the Mitigation Process

Section 373.4137, F.S., requires DOT (and transportation authorities) to annually submit (by July 1st) a copy of its adopted work program along with an environmental impact inventory of affected habitats (WMDs are responsible for ensuring compliance with federal permitting requirements). The environmental impact inventory must be submitted to the WMDs and must include the following:

- A description of habitats impacted by transportation projects, including location, acreage and type;
- A statement of the water quality classification of impacted wetlands and other surface waters;
- Identification of any other state or regional designations for the habitats; and

¹² John J. Fumero, *Environmental Law: 1994 Survey of Florida Law – At a Crossroads in Natural Resource Protection and Management in Florida*, 19 Nova L. Rev. 77, 104 (1994).

¹³ Ch. 62-342.200(1), F.A.C. (2001).

¹⁴ Ch. 62-342.200(1), F.A.C. (2001).

¹⁵ See the Florida Department of Environmental Protection’s website on the Mitigation and Banking Rule and Procedure Synopsis at <http://www.dep.state.fl.us/water/wetlands/mitigation/synopsis.htm>. (Last viewed 12/9/2011).

¹⁶ *Id.*

¹⁷ Section 1., Ch. 96-238, Laws of Florida

- A survey of threatened species, endangered species and species of special concern affected by the proposed project.

WMDs Decision to Involve Mitigation Banks in the Mitigation Process

By March 1st of each year, each WMD must develop a mitigation plan in consultation with DEP, the United States Army Corps of Engineers, DOT, transportation authorities and various other federal, state and local governmental entities and submit the plan to its governing board for review and approval.¹⁸ This plan is, in part, based off of the information provided in the environmental impact inventory and compiled in coordination with mitigation bankers.¹⁹ Among other things, WMDs are required to consider the purchase of credits from properly permitted public or private mitigation banks when developing the plan and shall include this information in the plan when the purchase would:

- Offset the impact of the transportation project;
- Provide equal benefits to the water resources than other mitigation options being considered; and
- Provide the most cost-effective mitigation option.²⁰

For each transportation project with a funding request for the next fiscal year, the mitigation plan must include a brief explanation of why a mitigation bank was or was not chosen as a mitigation option, including an estimation of identifiable costs of the mitigation bank and nonbank options to the extent practicable. Currently, factors such as time saved, liability for success of the mitigation and long-term maintenance are not required.

Florida law also provides that a specific project may be excluded from the mitigation plan in certain instances if DOT, the applicable transportation authority and WMD agree that the efficiency or timeliness of the planning or permitting process would be hampered were the project included. Additionally, a WMD may unilaterally exclude a project from the mitigation plan if appropriate mitigation for the project is not identifiable.²¹ At this time, Florida law does not allow DOT to unilaterally elect which projects to include or exclude from the mitigation plan.

Mitigation Credits

Each quarter, DOT and transportation authorities must transfer sufficient funds into escrow accounts within the State Transportation Trust Fund to pay for mitigation of projected acreage impacts resulting from projects identified in the approved mitigation plan. By statute, the amount transferred must correspond to \$75,000/acre of acreage projected to be impacted and must be spent down through the use of 'mitigation credits' throughout the fiscal year. This \$75,000/acre statutory figure was originally based on estimates of the historical average cost per acre that DOT was spending on mitigation on a project-by-project basis in the early 1990's (usually this mitigation was conducted strictly on-site to restore or enhance wetlands directly linked to the impacted area). Over time, the process has changed. Now, this amount is adjusted on July 1st of each year based on the percentage change in the average of the Consumer Price Index. For fiscal year 2011-2012, the adjusted amount is \$104,701 per acre. As defined by statute, a 'mitigation credit' is a unit of measure which represents the increase in ecological value resulting from mitigation efforts on a proposed project or projects.²² One mitigation credit equals the ecological value gained by successfully creating one acre of wetlands.²³

At the end of each quarter, the projected acreage impacts are compared to the actual acreage impacts and escrow balances are adjusted accordingly. Pursuant to the process, and with limited exceptions, WMDs may request a release of funds from the escrow accounts no sooner than 30 days prior to the

¹⁸ Section 373.4137(4), F.S.

¹⁹ Section 373.4137(4), F.S.

²⁰ Id.

²¹ Id.

²² Section 373.403(20), F.S.

²³ Ch. 62-342.200(5), F.A.C.

date the funds are needed to pay for costs associated with the development or implementation of the mitigation efforts. Associated costs relate to, but are not limited to, the following:

- Design costs;
- Engineering costs;
- Production costs; and
- Staff support.

Mitigation Expenditures

From 2007 to 2011, DOT's mitigation expenditures have totaled \$169,921,562. WMDs have received \$116,456,080 (68.54%) of the total expenditures, while public and private mitigation banks have received \$38,107,600 (22.43%) of the total expenditures.²⁴ During this time, DOT also carried out its own mitigation in cases where mitigation banks were unavailable or the WMD could not identify the appropriate amount of mitigation within the existing statutory scheme. These related expenditures amount to \$15,357,882 (9.04%) of total expenditures.

From inception of the DOT mitigation program in 1996 through present time, many acres of wetlands impacts have been – or plan to be – offset across the state. According to its 2011 DOT Mitigation Plan, the St. John's River Water Management District has, as of September 30, 2010, provided 35,036.68 acres of mitigation to offset 1305 acres of wetlands and other surface waters impacts. This total includes the mitigation acreage associated with 132.09 mitigation bank credits. The Southwest Florida Water Management District, according to its draft 2012 DOT Mitigation Plan, has provided (including proposed projects) a total of 814 acres of wetlands impacts.²⁵ This total includes mitigation acreage associated with 44.01 mitigation bank credits purchased from four mitigation banks and two local government regional off-site mitigation areas.²⁶

Statewide Anticipated Mitigation Inventory for Fiscal Year 2012-2013

For fiscal year 2012-2013,²⁷ the total anticipated mitigation inventory is \$20,068,232. It is anticipated that WMDs will receive \$10,374,303 of the total, while public and private mitigation banks are anticipated to receive \$9,643,929 of the total. DOT also anticipates it will carry out its own mitigation totaling \$50,000.

Effect of Proposed Changes

The bill amends current Florida law to provide DOT the option to choose between water management districts ("WMDs") and private mitigation banks when undertaking mitigation efforts for transportation projects. The bill makes this change by:

- Revising legislative intent to encourage the use of public and private mitigation banks and other mitigation options that satisfy state and federal requirements;
- Providing an opt-out clause authorizing DOT (and WMDs and participating transportation authorities) to exclude projects from the statutory mitigation plan carried out by WMDs provided specified criteria have been met and specified investigations have been conducted;
- Providing that funds held in escrow for the benefit of a WMD may be released if the associated transportation project is excluded in whole or in part from the mitigation plan;
- Requiring that mitigation plans be approved by the Florida Department of Environmental Protection ("DEP"), in addition to current WMD approval, before implementation; and

²⁴ According to DOT, "itemizing mitigation bank purchases by project is not readily available because of the ability to purchase advance mitigation credits and the ability to lump various projects within a single mitigation bank credit purchase."

²⁵ This plan is projected to be approved by the Southwest Florida Water Management District Governing Board on January 31, 2012. The draft plan may be viewed at <http://www.swfwmd.state.fl.us/projects/mitigation/> (Last viewed 1/5/2012).

²⁶ Id.

²⁷ According to DOT, these figures are current as of 11/17/2011 and are subject to change based on DOT work program changes and/or coordination with WMDS and the U.S. Army Corps of Engineers

- Revising the circumstances under which a governmental entity may create or provide mitigation for a project other than its own.

Revising Legislative Intent to Encourage the Use of Public and Private Mitigation Banks

The bill amends s. 373.4137(1), F.S., by revising legislative intent to encourage the use of public and private mitigation banks and any other mitigation options that satisfy state and federal requirements. The effect of the proposed change is a removal of legislative intent specifically referencing that mitigation projects be carried out by WMDs. However, the proposed change does not completely remove WMDs from the process. WMDs will still be involved in the statutory program to the following extent:

- The Department of Transportation must submit to the WMDs a list of projects in DOT's adopted work program (along with an environmental impact inventory) which may be impacted by DOT's plan of construction for transportation projects in the next 3 years of the tentative work program;
- The Department of Transportation and participating transportation authorities will still transfer funds held in escrow to the WMDs to carry out mitigation efforts;
- Water management districts will still develop mitigation plans in consultation with DOT and various other agencies;
- The governing board(s) of the WMDs will still be required to review and approve the mitigation plan(s);
- Mitigation plans will require approval by DEP, which has supervisory authority²⁸ over all WMDs, before the plans may be implemented;
- Water management districts will be given authority to elect to opt-out of the statutory program provided specified criteria has been met and specified investigations have been conducted; and
- Water management districts will be required to ensure that DOT's environmental impact inventory and implementation of the mitigation plan meet federal permitting requirements.

Legislative intent related to DOT's funding of these projects is left unchanged.

Release of Funds Held in Escrow for the Benefit of WMDs When Projects are Excluded

The bill amends s. 373.4137(3)(c), F.S., providing that funds identified for or maintained in an escrow account for the benefit of a WMD may be released if the associated transportation project is excluded in whole or in part from the mitigation plan. The proposed change is in line with the opt-out clause authorizing DOT, a participating transportation authority or a WMD to unilaterally exclude a project from the mitigation plan.

DEP Approval of Mitigation Plan before Implementation

The bill amends s. 373.4137(4), F.S., to require mitigation plans to be submitted to and approved by DEP before implementation. The effect of the proposed change adds an additional requirement that the plan be approved above and beyond the already required approval from the governing board of the applicable WMD. DEP approval of the mitigation plan was a requirement eliminated during the 2005 Regular Legislative Session.²⁹

Opt-out Clause Allowing Projects to be Excluded from the Mitigation Plan(s)

The bill amends s. 373.4137(4)(b), F.S., to provide an opt-out clause authorizing DOT, an applicable transportation authority or the appropriate WMD to unilaterally choose to exclude a project from the mitigation plan provided specified criteria has been met and specified investigations have been conducted. The proposed change strikes the condition precedent that an agreement be reached among DOT, an applicable transportation authority and the appropriate WMD that the efficiency of the planning or permitting process would be hampered were a specified project included. The proposed change also

²⁸ Section 373.026(7), F.S.

²⁹ Chapter 2005-281, Laws of Florida (HB 1681).

eliminates a WMD's authority to unilaterally choose to exclude a project in whole or in part if the WMD is unable to identify mitigation that would offset impacts of the project. Instead, s. 373.4137(4)(c), F.S., provides specified criteria that must be used in determining which projects to include or exclude from the mitigation plan. The specified criteria require the following:

- A cost-effectiveness investigation (including a written analysis), which uses credits from a private mitigation bank and considers various factors, such as the nominal cost of using a private mitigation bank compared to the nominal cost of other included (or proposed) projects;
- The value of complying with federal requirements for federal aid projects;
- The value private mitigation banks provide through expedited approval during the federal permitting process as overseen by the U.S. Army Corps of Engineers; and
- The value private mitigation banks provide with regard to state and federal liability for the success of the mitigation project.

Mitigation by a Governmental Entity for a Project Other Than its Own

The bill creates a new subparagraph (b) in s. 373.4135, F.S., to provide that a governmental entity may not create or provide mitigation for a project other than its own, unless the governmental entity uses land that was not previously purchased for conservation and unless the governmental entity provides the same financial assurances as required for mitigation banks permitted under s. 373.4136, F.S., and regional offsite mitigation areas.

The proposed change only applies when a governmental entity enters the market and acts similarly to a private mitigation bank. To mirror private mitigation bank requirements, a governmental entity must:

- Show financial responsibility (effective prior to release of any mitigation credits) for the construction and implementation phase of the bank, equal to 110% of the cost, through a surety or performance bond, irrevocable letter of credit, or trust fund³⁰;
- Show financial responsibility for the perpetual management phase of the bank through a surety or performance bond, irrevocable letter of credit, trust fund or standby trust fund, in an amount sufficient to be reasonably expected to generate annual revenue equal to the annual cost of perpetual management at an assumed average rate of return of six percent per annum³¹.

The proposed change does not apply to the following:

- Mitigation banks permitted prior to December 31, 2011;
- Off-site regional mitigation areas established prior to December 31, 2011;
- Mitigation for transportation projects proposed by the Department of Transportation;
- Mitigation for impacts from mining activities; or
- Mitigation provided for single family lots or homeowners.

Effective Date

The bill is effective upon becoming a law.

B. SECTION DIRECTORY:

Section 1: Revises legislative intent; provides an opt-out clause authorizing exclusion of projects from the mitigation plan in certain instances; provides for the release of funds held in escrow for excluded projects; requires that mitigation plans be approved by DEP before implementation; revises circumstances under which a governmental entity may create or provide mitigation.

Section 2: Provides an effective date.

³⁰ Rule 62-342.700

³¹ *Id.*

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

Expenditures:

The bill has a potentially negative fiscal impact on the DOT and the DEP. The DOT must provide a cost-effectiveness analysis when determining which projects to include in or exclude from the mitigation plan. The DEP must approve a WMD's mitigation plan before it can be implemented.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

See fiscal Comments.

2. Expenditures:

See Fiscal Comments.

Although the proposed change does not appear to apply to transportation projects, mitigation banks and offsite regional mitigation areas permitted prior to December 31, 2011, mitigation for mining activities, and single family lots or homeowners, the proposed language appears to place additional financial assurance requirements on local governmental entities.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill has a potentially positive fiscal impact for mitigation bankers.

D. FISCAL COMMENTS:

To the extent the bill results in the exclusion of mitigation projects from the statutory mitigation plan carried out by the WMDs that would not otherwise be excluded, the bill will result in a decrease in revenues received by the WMDs from DOT and a corresponding decrease in associated expenditures.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to affect municipal or county government. The bill does not appear to require counties or cities to spend funds or take an action requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On January 11, 2012, the Transportation & Highway Safety Subcommittee adopted one amendment which made the following corrections:

- Made a technical change to correct an error in terminology on line 185. The bill as originally filed referred to “the department” on line 185 and was intended to be a reference to the Department of Transportation. However, “the department” as defined in s. 373.019(4), refers to “the Department of Environmental Protection or its successor agency or agencies.” The adopted amendment corrected this error by changing “the department” to “the Department of Transportation.”
- Moved and revised proposed language prohibiting a governmental entity from creating or providing mitigation outside of the statutory program established by s. 373.4137, F.S., to s. 373.4135, F.S. The revised language now provides the circumstances under which a governmental entity may create or provide mitigation for a project other than its own.
- Changed the effective date from “July 1, 2012,” to “upon becoming a law.”