

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

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

Prepared By: The Professional Staff of the Budget Subcommittee on Transportation, Tourism, and Economic Development Appropriations

BILL: CS/CS/SB 824

INTRODUCER: Environmental Preservation and Conservation Committee; Transportation Committee; and Senators Dean and Gaetz

SUBJECT: Mitigation

DATE: February 17, 2012      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Looke	Buford	TR	<b>Fav/CS</b>
2.	Uchino	Yeatman	EP	<b>Fav/CS</b>
3.	Carey/Smith	Meyer, R.	BTA	<b>Pre-meeting</b>
4.			BC	
5.				
6.				

**Please see Section VIII. for Additional Information:**

- |                              |                                     |   |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes        |
| B. AMENDMENTS.....           | <input type="checkbox"/>            | Technical amendments were recommended   |
|                              | <input type="checkbox"/>            | Amendments were recommended             |
|                              | <input type="checkbox"/>            | Significant amendments were recommended |

**I. Summary:**

The Committee Substitute (CS) amends s. 373.4137, F.S., to allow the Florida Department of Transportation (FDOT) more freedom in choosing between various mitigation methods when mitigation is required for transportation projects by:

- changing the legislative intent to include the use of “any other mitigation options that satisfy state and federal requirements.”
- allowing the release of funds that are identified or maintained in escrow for the Water Management Districts (WMDs) if the transportation project falls outside, in whole or in part, of the WMD mitigation plan.
- allowing FDOT to elect whether or not to incorporate its mitigation efforts into the planning structure detailed under this section.
- requiring FDOT, when making such an election, to:
  - investigate the use of credits from permitted private mitigation banks; and
  - create a written analysis of cost-effectiveness which considers certain factors.

The CS requires the Department of Environmental Protection (DEP) to approve a mitigation plan, in whole or in part, before it is submitted to the appropriate WMD for approval and implementation.

The CS amends s. 373.4135, F.S., to prohibit a governmental entity from creating or providing mitigation unless it does so for its own project, or it uses non-conservation lands and provides the same financial assurances as specified mitigation banks. The CS exempts certain mitigation banks or areas permitted or established before December 31, 2012, and other specified mitigation types from provisions in the CS.

The CS substantially amends ss. 373.4137 and 373.4135 of the Florida Statutes.

## II. Present 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.”<sup>1</sup> Mitigation banking is a concept designed to increase the success of environmental mitigation efforts and reduce costs to developers of individual mitigation projects.<sup>2</sup>

Section 373.4135, F.S., as part of the Environmental Reorganization Act of 1993, directs the DEP and WMDs to participate in and encourage the establishment of private and public mitigation banks and offsite regional mitigation.<sup>3</sup> Section 404 of the federal Clean Water Act<sup>4</sup> and early Florida law attempted to regulate wetlands impacts; however, the regulations 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.<sup>5</sup> The Legislature intended that the provisions for establishing mitigation banks would apply equally to both public and private entities, except for necessary variability for the DEP and each WMD to ensure the construction and perpetual protection of mitigation banks.<sup>6</sup>

### Mitigation Banking Process

In 1994, rules governing the establishment and use of mitigation banks were adopted.<sup>7</sup> The substantive aspects of these rules, codified in s. 373.4136, F.S., address the following:<sup>8</sup>

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<sup>1</sup> 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).

<sup>2</sup> *Id.* at 103.

<sup>3</sup> Chapter 93-213, s. 29, Laws of Florida.

<sup>4</sup> 33 U.S.C. s. 1344.

<sup>5</sup> Fumero, *supra* note 1, at 103.

<sup>6</sup> Section 373.4135(1)(a), F.S.

<sup>7</sup> The rules have been amended several times and are incorporated in Rule 62-342.700, F.A.C., effective May 2001.

<sup>8</sup> 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 DEP, *Mitigation and Mitigation Banking*,

- the establishment of mitigation banks by governmental, nonprofit or for-profit entities;
- requirements to ensure the financial responsibility of nongovernmental entities proposing to develop mitigation banks;
- the appropriateness or desirability of mitigation banking when onsite mitigation is determined not to have the comparable long-term viability and ecological value of a mitigation bank;
- 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;
- measurements 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.<sup>9</sup>

A “banker” is an entity that creates, operates, manages or maintains a mitigation bank.<sup>10</sup> A banker must apply for a mitigation bank permit before establishing and operating a mitigation bank.<sup>11</sup> Mitigation banks are permitted by the DEP or one of the WMDs that has 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.<sup>12</sup> The mitigation bank permit authorizes the establishment and operation of the mitigation bank and sets forth the rights and responsibilities, including financial responsibilities, of the banker and the DEP for its implementation, management, maintenance and operation.<sup>13</sup> Specific state mitigation bank permit requirements are contained in s. 373.4136, F.S., and Rules 62-342.450 and 62-342.700, Florida Administrative Code (F.A.C.). Mitigation banks must also go through a federal permitting process administered by the United States Army Corps of Engineers (Corps).

### **Mitigation Requirements for Specified Transportation Projects**

Mitigation for transportation projects has distinct requirements apart from other types of mitigation. In 1996, the Florida Legislature found that environmental mitigation efforts related to transportation projects proposed by the FDOT or appropriate transportation authorities could be more effectively achieved through regional, long-range mitigation planning rather than on a project-by-project basis.<sup>14</sup> As such, s. 373.4137, F.S., requires the FDOT 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 the WMDs and the use of mitigation banks.

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<http://www.dep.state.fl.us/water/wetlands/mitigation/synopsis.htm> (last visited Feb. 20, 2012). Rule 62-342, F.A.C., was revised in May 2001, providing specific financial assurance requirements.

<sup>9</sup> Fumero, *supra* note 1, at 104.

<sup>10</sup> Rule 62-342.200(1), F.A.C.

<sup>11</sup> *Id.*

<sup>12</sup> DEP, *Mitigation and Mitigation Banking*, <http://www.dep.state.fl.us/water/wetlands/mitigation/synopsis.htm> (last visited Feb. 20, 2012).

<sup>13</sup> *Id.*

<sup>14</sup> Chapter 96-238, s. 1, Laws of Florida

### **FDOT's Role in the Mitigation Process**

Section 373.4137, F.S., requires the FDOT and appropriate transportation authorities to annually submit by July 1 a copy of their adopted work programs along with environmental impact inventories of affected habitats. The 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
- a survey of threatened species, endangered species and species of special concern affected by the proposed project. In practice this is only a list not an actual scientific survey.

### **WMDs Decision to Involve Mitigation Banks in the Mitigation Process**

By March 1 of each year, each WMD must develop a mitigation plan in consultation with the DEP, Corps, FDOT, appropriate transportation authorities and various other federal, state and local governmental entities. The plans must be submitted to each WMD's governing board for review and approval.<sup>15</sup> The plans are, in part, based on the information provided in the environmental impact inventories and compiled in coordination with mitigation bankers.<sup>16</sup> Among other requirements, the WMDs must 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.<sup>17</sup>

For each transportation project with a funding request for the next fiscal year, the mitigation plan must include, to the extent practicable, 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. Currently, factors such as time saved, liability for success of the mitigation and long-term maintenance are not required.

Florida law also provides that specific projects may be excluded from mitigation plans in certain instances if the FDOT, appropriate transportation authorities and WMDs 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.<sup>18</sup> At this time, Florida law does not allow the FDOT or an appropriate transportation authority to elect to opt-out of the WMDs' mitigation plans for certain projects.

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<sup>15</sup> Section 373.4137(4), F.S.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

## Mitigation Credits

Each quarter the FDOT and appropriate 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 their approved mitigation plans. By statute, the amount transferred must correspond to \$75,000 per 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 per acre statutory figure was originally based on estimates of the historical average cost per acre that the FDOT was spending on mitigation on a project-by-project basis in the early 1990s. This mitigation was usually conducted strictly onsite to restore or enhance wetlands directly linked to the impacted area. The amount is adjusted on July 1 each year based on 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.<sup>19</sup> One mitigation credit equals the ecological value gained by successfully creating one acre of wetlands.<sup>20</sup>

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 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, the FDOT’s mitigation expenditures totaled \$169,921,562. The WMDs received \$116,456,080 (68.54 percent) of the total expenditures, while public and private mitigation banks received \$38,107,600 (22.43 percent) of the total expenditures.<sup>21</sup> During this time, the FDOT also carried out its own mitigation in cases where mitigation banks were unavailable or the WMDs could not identify the appropriate amount of mitigation within the existing statutory scheme. These related expenditures amounted to \$15,357,882 (9.04 percent) of total expenditures.

From inception of the FDOT mitigation program in 1996 through the present, many acres of wetlands impacts have been or will be offset across the state. According to its “2011 FDOT Mitigation Plan,” the St. Johns River WMD had, as of September 30, 2010, provided 35,036.68 acres of mitigation to offset 1305 acres of wetlands and other surface water impacts. This total

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<sup>19</sup> Section 373.403(20), F.S.

<sup>20</sup> Rule 62-342.200(5), F.A.C.

<sup>21</sup> According to the FDOT, “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.”

includes the mitigation acreage associated with 132.09 mitigation bank credits. The Southwest Florida WMD, according to its draft “2012 FDOT Mitigation Plan,” has provided for 814 acres of wetlands impacts. 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.<sup>22</sup>

### **Statewide Anticipated Mitigation Inventory for Fiscal Year 2012-2013**

For fiscal year 2012-2013, the total anticipated mitigation inventory is \$20,068,232. It is anticipated that the 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. The FDOT also anticipates it will carry out its own mitigation totaling \$50,000.<sup>23</sup>

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

**Section 1** amends s. 373.4137, F.S., providing the FDOT additional flexibility in choosing mitigation methods to offset transportation project impacts. Specifically, the CS clarifies legislative intent specifying the FDOT may use mitigation banks and other mitigation options that satisfy state and federal requirements. It allows the FDOT or a transportation authority created pursuant to ch. 348 or 349, F.S., to opt-out of the existing mitigation program with the WMDs in favor of a different mitigation method. Participating entities also are required to provide a list of threatened or endangered species, or species of special concern that may be impacted by a proposed project instead of an actual survey. This comports with existing practice. The CS also directs the release of funds that are identified or maintained in escrow for a WMD if the WMD will no longer provide mitigation, in whole or in part, for a planned transportation project.

The CS requires the DEP to approve a mitigation plan, in whole or in part, before it can be submitted and approved by a WMD. It also directs that for each transportation project with a funding request for the next fiscal year the mitigation plan include an explanation as to why or why not a mitigation bank was not chosen. The CS requires three new details:

- time saved;
- liability for success of the mitigation; and
- long-term maintenance.

The CS allows the FDOT, an appropriate transportation authority or a WMD to elect to exclude specific projects from the mitigation plan. Under current law, the entities involved must come to agreement whether or not to exclude a specific project, with the WMDs being able to unilaterally exclude projects if no mitigation options exist. When choosing to include or exclude projects from the mitigation plan, the CS requires the FDOT to first investigate using private permitted mitigation banks before the project is submitted or allowed to remain in the mitigation plan. The investigation must include a written evaluation of the cost-effectiveness of using private mitigation banks that considers:

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<sup>22</sup> This plan is projected to be approved by the Southwest Florida WMD Governing Board on January 31, 2012. See <http://www.swfwmd.state.fl.us/projects/mitigation/> (last visited Jan. 26, 2012).

<sup>23</sup> According to the FDOT, these figures are subject to change based on FDOT work program changes or coordination with the WMDs and Corps.

- a comparison of costs between using a mitigation bank and including the project in the mitigation plan;
- the value in complying with federal transportation policies for federal aid projects;
- the value of using private mitigation banks credits in expediting approvals by the Corps; and
- the value of transferring liability for successful mitigation from the state to the private mitigation banks when mitigation credits are purchased.

**Section 2** amends s. 373.4135, F.S., requiring that a governmental entity not create or provide mitigation unless it is providing mitigation for its own project. The CS provides exceptions to this provision if the governmental entity uses non-conservation lands and provides the same financial assurances as mitigation banks permitted under s. 373.4136, F.S. The CS specifies that the prohibition on providing mitigation does not apply to:

- governmental mitigation banks permitted before December 31, 2011;
- offsite regional mitigation areas established before December 31, 2011;
- mitigation for transportation projects under ss. 373.4137 and 373.4139, F.S.;
- mitigation for impacts from mining activities under s. 373.41492, F.S.;
- mitigation provided for single-family lots or homeowners;
- mitigation provided for electric utility impacts certified under ch. 403, part II, F.S.; or
- mitigation provided on sovereignty submerged lands.

This provision restricts most governmental entities' ability to run mitigation banks and brings the requirements placed on governmental entities that provide mitigation more in line with those placed on private mitigation banks.

**Section 3** provides the act will take effect upon becoming a law.

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

##### **A. Municipality/County Mandates Restrictions:**

None.

##### **B. Public Records/Open Meetings Issues:**

None.

##### **C. Trust Funds Restrictions:**

None.

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

##### **A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

The CS may have a positive but indeterminate impact on private mitigation banks as they are given a more prominent statutory position in providing mitigation for transportation projects. Private mitigation banks may also be more competitive with governmental entities that provide mitigation given the additional requirements for governmental entities.

**C. Government Sector Impact:**

The CS gives the FDOT additional flexibility to choose the most cost-effective mitigation option; however, the impact is indeterminate but likely positive.

The CS may also result in cost savings for the WMDs who may provide fewer mitigation services for transportation projects. Again, the impact is indeterminate.

The CS provides for additional requirements on governmental entities that provide mitigation for project impacts. Their ability to provide certain mitigation is also restricted which may negatively impact those governmental entities. Likewise the impact is indeterminate.

Finally, the CS requires the DEP to review and approve mitigation plans. The DEP has estimated that the additional costs associated with mitigation plan reviews will be met with existing staff and resources.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Additional Information:****A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS by Environmental Preservation and Conservation on January 30, 2012:**

- Clarifies the FDOT cannot opt out of the entire mitigation planning program;
- Allows the DEP to approve a mitigation plan in whole or in part;
- Applies the “notwithstanding” clause to all of s. 373.4135, F.S.;
- Deletes a cross-reference requiring the same financial assurance as regional offsite mitigation areas as this is not relevant to providing financial assurance; and
- Provides additional exemptions for mitigation for electric utility impacts certified under ch. 403, part II, F.S., and mitigation on sovereignty submerged lands.



**CS by Transportation on January 19, 2012:**

- Deletes subsection (10) of the bill.
- “Section 2” of the CS is similar to the provision in “Section 10” of the original bill, except it amends s. 373.4135, F.S. instead of s. 373.4137, F.S., and:
  - no longer restricts governmental entities from competing with private mitigation banks;
  - references financial obligations in ss. 373.4136 and 373.4135(6), F.S., which governmental entities that provide mitigation must follow, instead of listing them in the CS; and
  - lists specific types of mitigation that are exempt from the newly created paragraph.
- Requires the act to take effect upon becoming a law rather than on July 1, 2012.

**B. Amendments:**

None.