

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 Transportation Committee

BILL: SB 824

INTRODUCER: Senator Dean

SUBJECT: Mitigation Requirements for Transportation Projects

DATE: January 12, 2012 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Looke	Buford	TR	Pre-meeting
2.			EP	
3.			BC	
4.				
5.				
6.				

I. Summary:

This bill 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.
- Requires FDOT, when making such an election, to:
 - investigate the use of credits from permitted private mitigation banks;
 - and create a written cost-effectiveness analysis which considers several enumerated factors.

This bill requires that mitigation plans under this section be approved by the Department of Environmental Protection (DEP), as well the appropriate WMD, before implementation.

This bill requires that a governmental entity not create or provide mitigation unless it is part of the plan established under this section, it is providing mitigation for its own project, or it:

- uses new land not previously purchased for conservation;

- does not compete with private mitigation banks;
- and has all of its current and future liabilities prefunded in a cash account, or other equivalent financial instrument typically used by private mitigation banks, and established solely for that purpose.

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.”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 DEP and 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

Mitigation Banking Process

In 1994, rules were adopted to govern the establishment and use of mitigation banks.⁷ The substantive aspects of these rules, which were later codified⁸ in s. 373.4136, F.S., address the following:

- 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;

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. § 1344

⁵ Fumero, *supra* note 1 at 103.

⁶ s. 373.4135, F.S.

⁷ The rules have been amended several times and may now be found in Ch. 62-342.700, F.A.C., effective May, 2001.

⁸ 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 specific financial assurance requirements.

- 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.⁹

A ‘banker’ is an entity that creates, operates, manages, or maintains a mitigation bank.¹⁰ A banker must apply for a mitigation bank permit before establishing and operating a mitigation bank.¹¹ 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.¹² 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.¹³ 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, the Florida Legislature found that environmental mitigation efforts related to transportation projects proposed by the FDOT or transportation authorities could be more effectively achieved through regional, long-range mitigation planning rather than on a project-by-project basis.¹⁴ As such, s. 373.4137, F.S., requires 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 WMDs and through the use of mitigation banks.

FDOT’s Role in the Mitigation Process

Section 373.4137, F.S., requires FDOT (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

⁹ Fumero, *supra* note 1 at 104.

¹⁰ Ch. 62-342.200(1), F.A.C. (2011).

¹¹ Ch. 62-342.200(1), F.A.C. (2011).

¹² 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).

¹³ *Id.*

¹⁴ Section 1., Ch. 96-238, Laws of Florida

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.

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, FDOT, transportation authorities and various other federal, state and local governmental entities and submit the plan to its governing board for review and approval.¹⁵ This plan is, in part, based off of the information provided in the environmental impact inventory and compiled in coordination with mitigation bankers.¹⁶ 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.¹⁷

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 FDOT, 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.¹⁸ At this time, Florida law does not allow FDOT to unilaterally elect which projects to include or exclude from the mitigation plan.

¹⁵ s. 373.4137(4), F.S.

¹⁶ s. 373.4137(4), F.S.

¹⁷ *Id.*

¹⁸ *Id.*

Mitigation Credits

Each quarter, FDOT 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 FDOT 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.¹⁹ One mitigation credit equals the ecological value gained by successfully creating one acre of wetlands.²⁰

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, FDOT’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.²¹ During this time, FDOT 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 FDOT 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 FDOT 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

¹⁹ s. 373.403(20), F.S.

²⁰Ch. 62-342.200(5), F.A.C.

²¹ According to 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.”

credits. The Southwest Florida Water Management District, according to its draft 2012 FDOT Mitigation Plan, has provided (including proposed projects) a total of 814 acres of wetlands impacts.²² 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.²³

Statewide Anticipated Mitigation Inventory for Fiscal Year 2012-2013

For fiscal year 2012-2013,²⁴ 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. FDOT also anticipates it will carry out its own mitigation totaling \$50,000.

III. Effect of Proposed Changes:

FDOT opt-out clause:

This bill amends s. 373.4137, F.S., to allow 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 WMD 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.
- Requires FDOT, when making such an election, to:
 - investigate the use of credits from permitted private mitigation banks;
 - and create a written cost-effectiveness analysis which considers several enumerated factors.

This provision of the bill allows FDOT to bypass the WMD in choosing which mitigation method is the most efficient and cost-effective, according to the criteria listed in this section. Also, this provision overrides the effective veto power that the WMD has under current law over mitigation plans proposed by FDOT.

DEP approval of mitigation plans:

This bill requires that mitigation plans under this section be approved by the DEP, as well the appropriate WMD, before implementation. This adds an extra layer of scrutiny to plans created under the current statute.

²² 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).

²³ *Id.*

²⁴ According to FDOT, these figures are current as of 11/17/2011 and are subject to change based on FDOT work program changes and/or coordination with WMDS and the U.S. Army Corps of Engineers

Mitigation by governmental entities:

This bill requires that a governmental entity not create or provide mitigation unless it is part of the plan established under this section, it is providing mitigation for its own project, or it:

- uses new land not previously purchased for conservation;
- does not compete with private mitigation banks;
- and has all of its current and future liabilities prefunded in a cash account, or other equivalent financial instrument typically used by private mitigation banks, and established solely for that purpose.

This provision disallows government competition with private mitigations banks and brings the requirements placed on governmental entities that provide mitigation more in line with those placed on private mitigation banks.

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:

This bill could have a positive but indeterminate impact on private mitigation banks which now may benefit from extra business and will no longer have to compete with governmental entities.

C. Government Sector Impact:

This bill could have a positive impact on FDOT granting it the ability to choose the most cost-effective mitigation method that it finds appropriate. This bill could also have a negative impact on both the WMDs, should FDOT opt-out of their mitigation plan, and on local governments who are prohibited from competing with private mitigation banks.

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.)

None.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
