

By Senator Dean

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1 A bill to be entitled
2 An act relating to mitigation requirements for
3 transportation projects; amending s. 373.4137, F.S.;
4 revising legislative intent to encourage the use of
5 other mitigation options that satisfy state and
6 federal requirements; providing the Department of
7 Transportation or a transportation authority the
8 option of participating in a mitigation project;
9 requiring the Department of Transportation or a
10 transportation authority to submit lists of its
11 projects in the adopted work program to the water
12 management districts; requiring a list rather than a
13 survey of threatened or endangered species and species
14 of special concern affected by a proposed project;
15 providing conditions for the release of certain
16 environmental mitigation funds; prohibiting a
17 mitigation plan from being implemented unless the plan
18 is submitted to and approved by the Department of
19 Environmental Protection; providing additional factors
20 that must be explained regarding the choice of
21 mitigation bank; removing a provision requiring an
22 explanation for excluding certain projects from the
23 mitigation plan; providing criteria that the
24 Department of Transportation must use in determining
25 which projects to include or exclude in the mitigation
26 plan; prohibiting a governmental entity from providing
27 or creating mitigation except under specified
28 circumstances; providing an effective date.
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30 Be It Enacted by the Legislature of the State of Florida:

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32 Section 1. Subsections (1) and (2), paragraph (c) of
33 subsection (3), and subsections (4) and (5) of section 373.4137,
34 Florida Statutes, are amended, and subsection (10) is added to
35 that section, to read:

36 373.4137 Mitigation requirements for specified
37 transportation projects.—

38 (1) The Legislature finds that environmental mitigation for
39 the impact of transportation projects proposed by the Department
40 of Transportation or a transportation authority established
41 pursuant to chapter 348 or chapter 349 can be more effectively
42 achieved by regional, long-range mitigation planning rather than
43 on a project-by-project basis. It is the intent of the
44 Legislature that mitigation to offset the adverse effects of
45 these transportation projects be funded by the Department of
46 Transportation and be carried out by ~~the water management~~
47 ~~districts, including~~ the use of mitigation banks and any other
48 mitigation options that satisfy state and federal requirements
49 ~~established pursuant to this part.~~

50 (2) Environmental impact inventories for transportation
51 projects proposed by the Department of Transportation or a
52 transportation authority established pursuant to chapter 348 or
53 chapter 349 shall be developed as follows:

54 (a) By July 1 of each year, the Department of
55 Transportation or a transportation authority established
56 pursuant to chapter 348 or chapter 349 which chooses to
57 participate in the program shall submit to the water management
58 districts a list ~~copy~~ of its projects in the adopted work

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59 program and an environmental impact inventory of habitats
60 addressed in the rules adopted pursuant to this part and s. 404
61 of the Clean Water Act, 33 U.S.C. s. 1344, which may be impacted
62 by its plan of construction for transportation projects in the
63 next 3 years of the tentative work program. The Department of
64 Transportation or a transportation authority established
65 pursuant to chapter 348 or chapter 349 may also include in its
66 environmental impact inventory the habitat impacts of any future
67 transportation project. The Department of Transportation and
68 each transportation authority established pursuant to chapter
69 348 or chapter 349 may fund any mitigation activities for future
70 projects using current year funds.

71 (b) The environmental impact inventory shall include a
72 description of these habitat impacts, including their location,
73 acreage, and type; state water quality classification of
74 impacted wetlands and other surface waters; any other state or
75 regional designations for these habitats; and a list ~~survey~~ of
76 threatened species, endangered species, and species of special
77 concern affected by the proposed project.

78 (3)

79 (c) Except for current mitigation projects in the
80 monitoring and maintenance phase and except as allowed by
81 paragraph (d), the water management districts may request a
82 transfer of funds from an escrow account no sooner than 30 days
83 before ~~prior to~~ the date the funds are needed to pay for
84 activities associated with development or implementation of the
85 approved mitigation plan described in subsection (4) for the
86 current fiscal year, including, but not limited to, design,
87 engineering, production, and staff support. Actual conceptual

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88 plan preparation costs incurred before plan approval may be
89 submitted to the Department of Transportation or the appropriate
90 transportation authority each year with the plan. The conceptual
91 plan preparation costs of each water management district will be
92 paid from mitigation funds associated with the environmental
93 impact inventory for the current year. The amount transferred to
94 the escrow accounts each year by the Department of
95 Transportation and participating transportation authorities
96 established pursuant to chapter 348 or chapter 349 shall
97 correspond to a cost per acre of \$75,000 multiplied by the
98 projected acres of impact identified in the environmental impact
99 inventory described in subsection (2). However, the \$75,000 cost
100 per acre does not constitute an admission against interest by
101 the state or its subdivisions and ~~nor~~ is not ~~the cost~~ admissible
102 as evidence of full compensation for any property acquired by
103 eminent domain or through inverse condemnation. Each July 1, the
104 cost per acre shall be adjusted by the percentage change in the
105 average of the Consumer Price Index issued by the United States
106 Department of Labor for the most recent 12-month period ending
107 September 30, compared to the base year average, which is the
108 average for the 12-month period ending September 30, 1996. Each
109 quarter, the projected acreage of impact shall be reconciled
110 with the acreage of impact of projects as permitted, including
111 permit modifications, pursuant to this part and s. 404 of the
112 Clean Water Act, 33 U.S.C. s. 1344. The subject year's transfer
113 of funds shall be adjusted accordingly to reflect the acreage of
114 impacts as permitted. The Department of Transportation and
115 participating transportation authorities established pursuant to
116 chapter 348 or chapter 349 are authorized to transfer such funds

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117 from the escrow accounts to the water management districts to
118 carry out the mitigation programs. Environmental mitigation
119 funds that are identified for or maintained in an escrow account
120 for the benefit of a water management district may be released
121 if the associated transportation project is excluded in whole or
122 part from the mitigation plan. For a mitigation project that is
123 in the maintenance and monitoring phase, the water management
124 district may request and receive a one-time payment based on the
125 project's expected future maintenance and monitoring costs. Upon
126 disbursement of the final maintenance and monitoring payment,
127 the escrow account for the project established by the Department
128 of Transportation or the participating transportation authority
129 may be closed. Any interest earned on these disbursed funds
130 shall remain with the water management district and must be used
131 as authorized under this section.

132 (4) Before ~~Prior to~~ March 1 of each year, each water
133 management district, in consultation with the Department of
134 Environmental Protection, the United States Army Corps of
135 Engineers, the Department of Transportation, participating
136 transportation authorities established pursuant to chapter 348
137 or chapter 349, and other appropriate federal, state, and local
138 governments, and other interested parties, including entities
139 operating mitigation banks, shall develop a plan for the primary
140 purpose of complying with the mitigation requirements adopted
141 pursuant to this part and 33 U.S.C. s. 1344. In developing such
142 plans, the districts shall use ~~utilize~~ sound ecosystem
143 management practices to address significant water resource needs
144 and shall focus on activities of the Department of Environmental
145 Protection and the water management districts, such as surface

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146 water improvement and management (SWIM) projects and lands
147 identified for potential acquisition for preservation,
148 restoration, or enhancement, and the control of invasive and
149 exotic plants in wetlands and other surface waters, to the
150 extent that the ~~such~~ activities comply with the mitigation
151 requirements adopted under this part and 33 U.S.C. s. 1344. In
152 determining the activities to be included in the ~~such~~ plans, the
153 districts shall ~~also~~ consider the purchase of credits from
154 public or private mitigation banks permitted under s. 373.4136
155 and associated federal authorization and shall include the ~~such~~
156 purchase as a part of the mitigation plan when the ~~such~~ purchase
157 would offset the impact of the transportation project, provide
158 equal benefits to the water resources than other mitigation
159 options being considered, and provide the most cost-effective
160 mitigation option. The mitigation plan shall be submitted to the
161 water management district governing board, or its designee, for
162 review and approval. At least 14 days before ~~prior to~~ approval,
163 the water management district shall provide a copy of the draft
164 mitigation plan to any person who has requested a copy. The plan
165 may not be implemented until it is submitted to and approved by
166 the Department of Environmental Protection.

167 (a) For each transportation project with a funding request
168 for the next fiscal year, the mitigation plan must include a
169 brief explanation of why a mitigation bank was or was not chosen
170 as a mitigation option, including an estimation of identifiable
171 costs of the mitigation bank and nonbank options and other
172 factors such as time saved, liability for success of the
173 mitigation, and long-term maintenance ~~to the extent practicable.~~

174 (b) Specific projects may be excluded from the mitigation

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175 plan, in whole or in part, and are ~~shall not be~~ subject to this
176 section upon the election agreement of the Department of
177 Transportation, ~~or~~ a transportation authority if applicable, or
178 ~~and~~ the appropriate water management district ~~that the inclusion~~
179 ~~of such projects would hamper the efficiency or timeliness of~~
180 ~~the mitigation planning and permitting process. The water~~
181 ~~management district may choose to exclude a project in whole or~~
182 ~~in part if the district is unable to identify mitigation that~~
183 ~~would offset impacts of the project.~~

184 (c) When determining which projects to include or exclude
185 from the mitigation plan, the department shall investigate using
186 credits from a permitted private mitigation bank before those
187 projects are submitted to, or are allowed to remain in, the
188 plan.

189 1. The investigation shall include the cost-effectiveness
190 of private mitigation bank credits.

191 2. The cost-effectiveness analysis must be in writing and
192 consider:

193 a. How the nominal cost of the private mitigation bank
194 credits compares with the nominal cost for any given project to
195 be included in the plan;

196 b. The value of complying with federal transportation
197 policies for federal aid projects;

198 c. The value that private mitigation bank credits provide
199 as the result of the expedited approvals by the Army Corps of
200 Engineers when private mitigation banks are used; and

201 d. The value that private mitigation banks provide to the
202 state and its residents as a result of the state and federal
203 liability for the success of the mitigation transferring to the

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204 private mitigation bank when credits are purchased from the
205 private mitigation bank.

206 (5) The water management district shall ensure ~~be~~
207 ~~responsible for ensuring~~ that mitigation requirements pursuant
208 to 33 U.S.C. s. 1344 are met for the impacts identified in the
209 environmental impact inventory described in subsection (2), by
210 implementation of the approved plan described in subsection (4)
211 to the extent funding is provided by the Department of
212 Transportation, or a transportation authority established
213 pursuant to chapter 348 or chapter 349, if applicable. During
214 the federal permitting process, the water management district
215 may deviate from the approved mitigation plan in order to comply
216 with federal permitting requirements.

217 (10) Except when a governmental entity is part of the
218 program established by this section, a governmental entity may
219 not create or provide mitigation unless the mitigation is for
220 the governmental entity's own project, uses new land that has
221 not been previously purchased for conservation, does not compete
222 with any permitted, privately owned mitigation bank, and has all
223 of its current and future liabilities prefunded in a cash
224 account, or other equivalent financial instrument typically used
225 by private mitigation banks, and established solely for that
226 purpose.

227 Section 2. This act shall take effect July 1, 2012.