

By the Committees on Environmental Preservation and Conservation; and Transportation; and Senators Dean and Gaetz

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1 A bill to be entitled
2 An act relating to mitigation; amending s. 373.4137,
3 F.S.; revising legislative intent to encourage the use
4 of other mitigation options that satisfy state and
5 federal requirements; providing the Department of
6 Transportation or a transportation authority the
7 option of participating in a mitigation project;
8 requiring a transportation authority that chooses to
9 participate in the program to submit lists of its
10 projects in the adopted work program to the water
11 management districts; requiring a list rather than a
12 survey of threatened or endangered species and species
13 of special concern affected by a proposed project;
14 providing conditions for the release of certain
15 environmental mitigation funds; prohibiting a
16 mitigation plan from being implemented unless the plan
17 is submitted to and approved, in part or in its
18 entirety, by the Department of Environmental
19 Protection; providing additional factors that must be
20 explained regarding the choice of mitigation bank;
21 removing a provision requiring an explanation for
22 excluding certain projects from the mitigation plan;
23 providing criteria that the Department of
24 Transportation must use in determining which projects
25 to include or exclude in the mitigation plan; amending
26 s. 373.4135, F.S.; limiting the circumstances under
27 which a governmental entity may create or provide
28 mitigation for a project other than its own project;
29 specifying certain exceptions; providing an effective

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30 date.

31
32 Be It Enacted by the Legislature of the State of Florida:

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

37 373.4137 Mitigation requirements for specified
38 transportation projects.—

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

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

55 (a) By July 1 of each year, the Department of
56 Transportation, or a transportation authority established
57 pursuant to chapter 348 or chapter 349 which chooses to
58 participate in the program, shall submit to the water management

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

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

79 (3)

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

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

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117 chapter 348 or chapter 349 are authorized to transfer such funds
118 from the escrow accounts to the water management districts to
119 carry out the mitigation programs. Environmental mitigation
120 funds that are identified for or maintained in an escrow account
121 for the benefit of a water management district may be released
122 if the associated transportation project is excluded in whole or
123 part from the mitigation plan. For a mitigation project that is
124 in the maintenance and monitoring phase, the water management
125 district may request and receive a one-time payment based on the
126 project's expected future maintenance and monitoring costs. Upon
127 disbursement of the final maintenance and monitoring payment,
128 the escrow account for the project established by the Department
129 of Transportation or the participating transportation authority
130 may be closed. Any interest earned on these disbursed funds
131 shall remain with the water management district and must be used
132 as authorized under this section.

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

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

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

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175 mitigation, and long-term maintenance ~~to the extent practicable.~~

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

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

191 1. The investigation shall include the cost-effectiveness
192 of private mitigation bank credits.

193 2. The cost-effectiveness analysis must be in writing and
194 consider:

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

198 b. The value of complying with federal transportation
199 policies for federal aid projects;

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

203 d. The value that private mitigation banks provide to the

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204 state and its residents as a result of the state and federal
205 liability for the success of the mitigation transferring to the
206 private mitigation bank when credits are purchased from the
207 private mitigation bank.

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

219 Section 2. Present paragraphs (b) through (e) of subsection
220 (1) of section 373.4135, Florida Statutes, are redesignated as
221 paragraphs (c) through (f), respectively, and a new paragraph
222 (b) is added to that subsection, to read:

223 373.4135 Mitigation banks and offsite regional mitigation.—

224 (1) The Legislature finds that the adverse impacts of
225 activities regulated under this part may be offset by the
226 creation, maintenance, and use of mitigation banks and offsite
227 regional mitigation. Mitigation banks and offsite regional
228 mitigation can enhance the certainty of mitigation and provide
229 ecological value due to the improved likelihood of environmental
230 success associated with their proper construction, maintenance,
231 and management. Therefore, the department and the water
232 management districts are directed to participate in and

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233 encourage the establishment of private and public mitigation
234 banks and offsite regional mitigation. Mitigation banks and
235 offsite regional mitigation should emphasize the restoration and
236 enhancement of degraded ecosystems and the preservation of
237 uplands and wetlands as intact ecosystems rather than alteration
238 of landscapes to create wetlands. This is best accomplished
239 through restoration of ecological communities that were
240 historically present.

241 (b) Notwithstanding the provisions of this section, a
242 governmental entity may not create or provide mitigation for a
243 project other than its own unless the governmental entity uses
244 land that was not previously purchased for conservation and
245 unless the governmental entity provides the same financial
246 assurances as required for mitigation banks permitted under s.
247 373.4136. This paragraph does not apply to:

248 1. Mitigation banks permitted before December 31, 2011,
249 under s. 373.4136;

250 2. Offsite regional mitigation areas established before
251 December 31, 2011, under subsection (6);

252 3. Mitigation for transportation projects under ss.
253 373.4137 and 373.4139;

254 4. Mitigation for impacts from mining activities under s.
255 373.41492;

256 5. Mitigation provided for single-family lots or homeowners
257 under subsection (6);

258 6. Mitigation provided for electric utility impacts
259 certified under part II of chapter 403; or

260 7. Mitigation provided on sovereignty submerged lands under
261 subsection (6).

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Section 3. This act shall take effect upon becoming a law.