

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 Committee on Environmental Preservation and Conservation

BILL: CS/SB 1104

INTRODUCER: Transportation Committee and Senator Brandes

SUBJECT: Environment

DATE: April 8, 2013 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Price	Eichin	TR	Fav/CS
2.	Gudeman	Uchino	EP	Favorable
3.			AP	
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

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|------------------------------|-------------------------------------|---|
| 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:

CS/SB 1104 revises various provisions relating to mitigation for environmental impacts of transportation projects. Specifically CS/SB 1104:

- Provides an exception from the current requirement that the Florida Department of Transportation (FDOT) purchase all landscaping plant materials from Florida commercial nursery stock on a uniform competitive basis where such purchases are prohibited by federal law;
- Revises the responsibilities of the FDOT, a county, or a city to improve or maintain a road that provides access to property within the state park system;
- Specifies that mitigation be implemented in an efficient, timely, and cost effective manner;
- Provides requirements for the development of environmental impact inventories;
- Requires the FDOT to consider using credits from a permitted mitigation bank before projects are identified for inclusion in a water management district (WMD) plan;
- Requires specific conditions for the FDOT to implement the mitigation option identified in the environmental impact inventory;
- Provides specific funding requirements for mitigation;

- Requires the projected amount of mitigation to be reconciled with the actual amount of mitigation each quarter;
- Allows the FDOT to purchase mitigation credits or other mitigation options under certain circumstances and exempts the FDOT from continuing responsibility;
- Provides specific conditions, requirements, and dates for a WMD or the Department of Environmental Protection (DEP) to invoice the FDOT;
- Provides specific invoice requirements for a WMD or the DEP for mitigation projects that occur on existing WMD or DEP mitigation sites;
- Provides specific criteria to be included in the record of costs;
- Provides specific requirements for funds identified in the FDOT's work program or participating transportation authorities' escrow account;
- Provides specific requirements for the WMDs annual mitigation plan;
- Requires the WMDs to maintain specified records of costs incurred and payments received for providing mitigation services;
- Requires the mitigation plan to be submitted to the DEP following the approval of a WMD's governing board;
- Provides reimbursement provisions to the WMDs in certain circumstances;
- Allows for the FDOT to exclude certain projects from mitigation plans if mitigation credits prove to be more efficient and cost effective;
- Provides specific circumstances under which the use of mitigation credits is required;
- Requires mitigation plans to be in compliance with federal requirements;
- Directs the FDOT to consider mitigation credits over amending mitigation plans for new projects; and
- Specifies the public information system is subject to approval by the FDOT and the Federal Highway Administration and revises an exemption relating to public information systems located on WMD property.

CS/SB 1104 amends s. 334.044, 335.06, 373.4137, and 373.618 of the Florida Statutes.

II. Present Situation:

Roadside Enhancement and Maintenance Requirements

The FDOT is responsible for enhancing environment benefits, preventing roadside erosion, conserving natural roadside growth and scenery, and providing for the implementation and maintenance of roadside conservation, enhancement, and stabilization programs.¹ The FDOT is required to purchase all plant materials from Florida Commercial nursery stock on a uniform competitive basis. This provision conflicts with federal requirements that specify a state transportation department cannot require the use of materials produced in state or restrict the use of materials produced out of state.² Failure to comply with federal requirements for purchases of plant material for roadside landscaping may subject the FDOT to a significant federal funds penalty, generally 10 percent of annual highway constructions funds.³

¹ See s. 334.044(26), F.S.

² See 23 C.F.R. s. 635.409.

³ See 23 U.S.C. s. 131(b).

The FDOT is currently required to maintain any road that is part of the State Highway System and provides access to property within the state park system. Local governments are required to maintain roads that are part of the county road or city street system.⁴

Environmental Mitigation for Transportation Projects

Pursuant to s. 373.4137, F.S., the FDOT and participating transportation authorities offset adverse environmental impacts of transportation projects through the use of mitigation banks and other mitigation options, including the payment of funds to the WMDs to develop and implement mitigation plans. The mitigation plan is developed by the WMDs and is ultimately approved by the DEP. The ability to exclude a project from the mitigation plan is provided to the FDOT, a participating transportation authority, or a WMD.

In 2012, HB 599 modified s. 373.413, F.S., to reflect that adverse impacts may be offset by the use of mitigation banks or the payment of funds to develop and implement mitigation plans. The mitigation plan is based on an environmental impact inventory that is created by the FDOT and reflects habitats that would be adversely impacted by transportation projects listed in the next three years of the FDOT's tentative work program. The FDOT provides funding in its work program to the DEP or the WMDs for its mitigation requirements. To fund the programs, the statute directs the FDOT and the authorities to pay \$75,000 per impacted acre, adjusted by a calculation using the Consumer Product Index (CPI).⁵

Pursuant to s. 373.4137, F.S., mitigation plans developed by the WMDs must consider water resource needs and focus on activities in wetlands and surface waters, including preservation, restoration and enhancement, as well as control of invasive and exotic vegetation. The WMDs must also consider the purchase of credits from public and private mitigation banks if the purchase provides equal benefit to water resources and is the most cost effective option. Before transportation projects are added to the WMDs mitigation plans, the FDOT must consider if using mitigation bank credits will be more cost-effective and efficient. The WMD mitigation plans are updated annually to reflect the most recent FDOT work program and transportation authority project list and may be amended throughout the year. The mitigation plans are submitted to the governing board of the WMD or its designee for approval, and to the DEP for final approval.⁶

The FDOT and the participating expressway authorities are required to transfer funds each year to pay for mitigation of the projected impact acreage resulting from projects identified in the inventory. The projected impact acreage and costs are reconciled quarterly with the actual impact acreage, and the costs and balances are adjusted.⁷

Section 373.4137, F.S., provides for exclusion of specific transportation projects from the mitigation plan at the discretion of the FDOT, participating transportation authorities, and the WMDs.

⁴ See s. 335.06, F.S.

⁵ See s. 373.4137 F.S.

⁶ *Id.*

⁷ *Id.*

Public Information Systems

Pursuant to s. 373.618, F.S., public information systems may be located on WMD property, provided certain terms and conditions are met. The systems must display messages to the general public concerning water management services, activities, events, watering restrictions, severe weather reports, amber alerts, and other essential public information. The law prohibits the use of WMDs funds to acquire, develop, construct, operate, or manage a public information system. Commercial messages are to be paid for by private sponsors.⁸

Section 479.02, F.S., requires the FDOT to regulate the size, height, lighting, and spacing of signs on the interstate highway system in accordance with state and federal regulations. A permit and annual fee are required by any individual that proposes to erect, operate, use, or maintain any sign on the State Highway System outside an urban area or on any portion of the interstate or federal-aid primary highway system. Certain signs do not require a permit as long as the signs are in compliance with the provisions in s. 479.11(4)-(8), F.S.⁹

Section 479.16, F.S., specifies that signs owned by a municipality or county that contain messages related to any commercial enterprise, a commercial sponsor of an event, personal messages, or political messages, are not considered information regarding government services. The FDOT may potentially be subject to an annual loss of 10 percent of federal highway funding if these signs are located within a “controlled area.”¹⁰

III. Effect of Proposed Changes:

Section 1 amends s. 334.044, F.S., to provide that the FDOT purchase all plant materials from Florida commercial nursery stock in this state on a uniform competitive bid basis, except as prohibited by applicable federal law or regulation. This will ensure compliance with federal regulation.

Section 2 amends s. 335.06, F.S., to allow the FDOT to improve and maintain a road that is part of the State Highway System and within a state park. If the FDOT does not maintain a county or city road that is part of the county road system or city street system and provides access to the state park, then the road must be maintained the appropriate county or municipality.

Section 3 amends s. 373.4137, F.S., to provide that mitigation take place in an efficient, timely, and cost-effective manner. The bill requires the following for the development of environmental impact inventories for transportation projects proposed by the FDOT or a transportation authority:

- The FDOT must submit an environmental impact inventory of habitat impacts and the proposed amount of mitigation needed to offset the impacts to the WMDs by July 1, and the proposed amount of mitigation needed for future projects; and

⁸ See s. 373.918, F.S.

⁹ See s. 479.11(4)-(8), F.S.

¹⁰ “Controlled area” means 660 feet or less from the nearest edge of the right-of-way of any portion of the State Highway System, interstate, or federal-aid primary system and beyond 660 feet of the nearest edge of the right-of-way of any portion of the State Highway System, interstate, or federal-aid primary system outside an urban area. See s. 479.01, F.S.

- The environmental impact inventory must include the proposed amount of mitigation needed based on the Uniform Mitigation Assessment Method (UMAM).

The CS requires FDOT to consider using credits from a permitted mitigation bank before projects are identified for inclusion in a WMD plan, taking into account state and federal requirements, maintenance, and liability.

The CS allows FDOT to implement the mitigation option identified in the environmental impact inventory by:

- Purchasing credits for current and future use directly from a mitigation bank;
- Purchasing mitigation services through the WMDs or the DEP;
- Conducting its own mitigation; or
- Using other mitigation options that meet state and federal requirements.

The CS requires funding for the identified mitigation option in the inventory to be included in FDOT's work program under s. 339.135, F.S. The CS specifies that FDOT include funding for the identified mitigation option and the amount programmed each year to correspond to an estimated cost of \$150,000 per mitigation credit, multiplied by the projected number of credits identified in the inventory. The estimated cost per credit will be adjusted every two years by FDOT based on the average cost per UMAM credit.

The CS specifies that for mitigation implemented by the WMDs or the DEP, the amount paid each year must be based on mitigation services provided by the WMD or the DEP pursuant to an approved WMD mitigation plan. The WMDs or DEP may request payment no sooner than 30 days before the date the funds are needed.

The CS requires that each quarter, the projected amount of mitigation must be reconciled with the actual amount of mitigation needed for projects as permitted. The programming of funds must be adjusted to reflect the mitigation as permitted.

FDOT may use the associated funds for the purchase of mitigation bank credits or any other mitigation option that satisfies the requirements, if the WMD:

- Excludes a project from an approved WMD mitigation plan;
- Cannot timely permit a mitigation site to offset the impacts of an FDOT project identified in the inventory; or
- The proposed mitigation does not meet state and federal requirements.

The CS specifies that WMD or DEP, as appropriate, has continuing responsibility for the mitigation project upon final payment for mitigation and FDOT's or the participating transportation authority's obligation is satisfied.

The CS requires each WMD or the DEP to invoice the FDOT for mitigation services to offset only the impacts of an FDOT project identified in the inventory, beginning with the March 2014 WMD plans. If the WMD identifies the use of mitigation bank credits to offset an FDOT impact, the WMD must exclude that purchase from the mitigation plan and the FDOT must purchase the bank credits.

The CS requires that for mitigation activities occurring on existing WMD or DEP mitigation sites initiated with FDOT mitigation funds prior to July 1, 2013, the WMD or the DEP is required to invoice FDOT at \$75,000 per acre multiplied by the projected acres of impact. The cost per acre must be adjusted by a calculation using the CPI.

The WMD must maintain records of the costs incurred including:

- Land acquisition;
- Design and construction;
- Staff support, long-term maintenance and monitoring of the mitigation site; and
- Other costs necessary to meet federal requirements pursuant to 33 U.S.C. s. 1344 and 33 C.F.R. s. 332.

The CS requires the funds identified in the FDOT's work program or participating transportation authorities' escrow accounts, for preparing and implementing the mitigation plans, adopted by the WMDs on or before March 1, 2013, to correspond to \$75,000 per acre multiplied by the projected acres of impact, adjusted by the CPI. The WMD must maintain records of the costs incurred in implementing the mitigation. If monies paid to a WMD exceed the amount spent by the WMD to implement the mitigation, the funds must be refunded to FDOT or the participating transportation authority. This provision expires June 30, 2014.

The CS requires each WMD to develop a plan to offset only the impacts of transportation projects in the inventory for which a WMD is implementing mitigation. The WMD plan must identify the site where the WMD will mitigate, the scope of the mitigation activities at each mitigation site, and the functional gain at each mitigation site as determined using UMAM. The mitigation plan must be submitted to the WMD's governing board for review and approval. The bill requires that the WMD provide a copy of the draft mitigation plan to the DEP at least 14 days before governing board approval. The plan may not be implemented until it is subsequently approved by the DEP.

The CS also requires the plan to describe how the mitigation offsets the impacts of each transportation project, and provides a schedule for the mitigation services.

The CS requires the WMDs to consider the purchase of credits from public or private mitigation banks as part of determining the activities to be included in the annual mitigation plans. The CS also removes the requirement that for each transportation project with a funding request for the next fiscal year, the mitigation plan must include an explanation of why a mitigation bank was or was not chosen as a mitigation option.

The FDOT or a participating authority is prohibited from excluding a transportation project from the mitigation plan when mitigation is scheduled in the current fiscal year, except if:

- The transportation project is removed from the FDOT's work program or a transportation authority's funding plan;
- The mitigation cannot be timely permitted to offset the impacts of an FDOT project identified in the inventory; or
- The proposed mitigation does not meet state and federal requirements.

If a project is removed from the work program or the mitigation plan, costs incurred by the WMD prior to removal are eligible for reimbursement.

The FDOT is required to exclude a project from the mitigation plan when using mitigation credits results in efficiency, timeliness in project delivery, cost effectiveness, and transfer of liability for success and long-term maintenance.

The CS directs the WMDs to comply with all federal permitting requirements in developing and implementing the mitigation plan. The CS adds to the WMDs' authority to deviate from the approved mitigation plan during the federal permitting process in order to comply with federal permitting requirements. The CS also requires consideration to be given to mitigation banks and other available mitigation options before amending the mitigation plan to include new projects.

Section 4 amends s. 373.618, F.S., to provide that a public information system located on WMD property that is subject to the Highway Beautification Act of 1965 must be approved by the FDOT and the Federal Highway Administration, if such approval is required by federal law.

Section 5 provides an effective date of July 1, 2013.

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:

Private mitigation banks may experience increased opportunities for participation in mitigation of transportation project environmental impacts.

C. Government Sector Impact:

CS/SB 1104 eliminates a potential annual loss of 10 percent of federal highway funding resulting from a violation of federal law prohibiting in-state preferences when purchasing materials for roadside projects.

CS/SB 1104 may benefit state parks as the costs of a selected project to improve or maintain an off-system road that provides access to a state park may be included in FDOT's work program budget submitted annually to the Legislature. However, if the FDOT begins to maintain county or city roads leading to state parks, the state will incur the costs previously borne by local governments.

CS/SB 1104 provides that the FDOT may recoup 10 percent of federal highway funds by regaining control of outdoor advertising.

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 Transportation on March 21, 2013:

The committee adopted two amendments and incorporated them into the original bill as a committee substitute. The amendments:

- Provide an exception from the current requirements that the FDOT purchase all landscaping plant materials from Florida commercial nursery stock on a uniform competitive basis where such purchases are prohibited by federal law;
- Require the FDOT to consider using credits from a permitted mitigation bank before projects are identified for inclusion in a WMD plan;
- Include the purchase of mitigation services through a WMD or the DEP in the FDOT's available mitigation options;
- Direct the FDOT to include funding in its work program for mitigation at an estimated cost of \$150,000 per mitigation credit multiplied by the projected number of credits in the inventory;
- Allow the FDOT's reassign funds if the associated transportation project is excluded from a WMD plan or if the mitigation will no longer be implemented by the DEP and allows the FDOT to use the associated funds for the purchase of mitigation bank credits or any other mitigation option that satisfies the requirements, if the WMD:
 - Excludes a project from an approved WMD mitigation plan;
 - Cannot timely permit a mitigation site to offset the impacts of an FDOT project identified in the inventory; or

- The proposed mitigation does not meet state and federal requirements.
- Require a WMD or the DEP, beginning with the March 2014 WMD plans to invoice the FDOT for mitigation services that offset only the impacts of a FDOT project identified in the inventory;
- Require a WMD to exclude a project from the mitigation plan if a WMD identifies the use of mitigation bank credits to offset a FDOT impact, and require the FDOT in such instance to purchase the bank credits;
- Require the WMD or the DEP to invoice the FDOT at \$75,000 per acre multiplied by the projected acres of impact, adjusted by the CPI, for mitigation activities occurring on existing WMD or DEP mitigation sites initiated with the FDOT mitigation funds prior to July 1, 2013;
- Require each WMD's annual mitigation plan to offset only the impacts of transportation projects in the inventory for which a WMD is implementing mitigation;
- Eliminate specifying in the plan the cost per mitigation credit; and
- Require the WMDs to maintain specified records of costs incurred and payments received for providing mitigation services.

B. Amendments:

None.