

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 Transportation

BILL: CS/SB 1104

INTRODUCER: Transportation Committee and Senator Brandes

SUBJECT: Environment

DATE: March 22, 2013 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Price	Eichin	TR	Fav/CS
2.			EP	
3.			AP	
4.				
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:

CS/SB 1104 revises various provisions relating to mitigation for environmental impacts of transportation projects; revises an exemption relating to public information systems located on water management district property; revises provisions relating to Florida Department of Transportation (FDOT) purchases of plant materials for roadside landscaping; and revises the responsibilities of FDOT, a county, or a city to improve or maintain a road that provides access to property within the state park system;.

This bill substantially amends the following sections of the Florida Statutes: 335.06, 373.4137, and 373.618.

II. Present Situation:

Environmental Mitigation for Transportation Projects

Under existing law, 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 water management districts (WMDs) to develop and implement mitigation plans. The mitigation plan is developed by the WMDs and is

ultimately approved by the Department of Environmental Protection (DEP). The ability to exclude a project from the mitigation plan is provided to FDOT, a participating transportation authority, or a WMD.

More specifically s. 373.4137, F.S., enacted in 1996,¹ created mitigation requirements for specified transportation projects. Historically, the statute directed FDOT and transportation authorities² to fund, and the WMD to develop and implement, mitigation plans to mitigate these impacts. In 2012, HB 599³ modified the statute to reflect that adverse impacts may be offset by the use of mitigation banks or any other option that satisfies state and federal requirements. “Other” mitigation options include FDOT’s payment of funds to develop and implement mitigation plans. The mitigation plan is based on an environmental impact inventory created by FDOT reflecting habitats that would be adversely impacted by transportation projects listed in the next three years of FDOT’s tentative work program. FDOT provides funding in its work program to DEP or WMDs for its mitigation requirements. To fund the programs, the statute directs DOT and the authorities to pay \$75,000, as adjusted by a calculation using the CPI, per impacted acre.⁴

The statute provides that WMD-developed mitigation plans should use sound ecosystem management to address significant water resource needs and focus on activities of DEP and WMDs in wetlands and surface waters, including preservation, restoration and enhancement, as well as control of invasive and exotic vegetation. WMDs must also consider the purchase of credits from public and private mitigation banks when such purchase provides equal benefit to water resources and is the most cost effective option. Before each transportation project is added to the WMD mitigation plan, FDOT must investigate the use of mitigation bank credits considering cost-effectiveness, time saved, transfer of liability and long-term maintenance. The WMD mitigation plans are annually updated to reflect the most recent FDOT work program and transportation authority project list and may be amended throughout the year. Each update and amendment of the mitigation plan is submitted to the governing board of the WMD or its designee for approval. Final approval of the mitigation plan rests with DEP.

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

Current law provides for exclusion of specific transportation projects from the mitigation plan at the discretion of FDOT, participating transportation authorities, and the WMDs.

Water Management District Public Information Systems

SB 1986, passed by the 2012 Florida Legislature⁵ and approved by the Governor, authorizes public information systems to be located on property owned by water management districts,

¹Ch. 96-238-L.O.F.

²The statute applies to transportation authorities created in ch. 348 or 349, F.S.

³Ch. 2012-174, L.O.F.

⁴The current cost per acre is \$107,457.

⁵The provisions specific to water management district public information systems were inserted into the budget conforming bill by the conference committee amendment.

when certain terms and conditions are met. The system must display messages to the general public concerning water management services, activities, events, and sponsors, as well as other public service announcements, including watering restrictions, severe weather reports, amber alerts, and other essential information needed by the public. The law expressly prohibits use of water management district funds to pay the cost to acquire, develop, construct, operate, or manage a public information system and requires that any necessary funds for a public information system be paid for and collected from private sponsors who may display commercial messages.

Current s. 479.02, F.S., charges FDOT with the duty to “administer and enforce the provisions of this chapter and the agreement between the state and the United States Department of Transportation relating to the size, lighting, and spacing of signs in accordance with Title 1 of the Highway Beautification Act of 1965 and Title 23, United State Code, and federal regulations in effect as of the effective date of this act.” The federal-state agreement and s. 479.07, F.S., with limited exception, prohibit a person from erecting, operating, using, or maintaining any sign *on the State Highway System outside an urban area or on any portion of the interstate or federal-aid primary highway system*⁶ without first obtaining a permit for the sign and paying an annual fee.

The italicized phrase above is further defined in that section to mean “a sign located within the controlled area (*i.e.*, 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 highway system outside an urban area) which is visible from any portion of the main-traveled way (*i.e.*, the traveled way of a highway on which through traffic is carried; and the traveled way of each of the separate roadways for traffic in opposite directions, in the case of a divided highway; but not such facilities as frontage roads, turning roadways which specifically include on-ramps or off-ramps to the interstate highway system) of such system.”⁷

Certain signs, commonly referred to as “on-premise” signs, are expressly exempted by s. 479.16, F.S., from the requirement to obtain a permit, if the signs comply with the provisions of s. 479.11(4)-(8), F.S. However, that section expressly specifies that the following types of messages shall not be considered information regarding government services, activities, events, or entertainment:

- Messages which specifically reference any commercial enterprise;
- Messages which reference a commercial sponsor of any event;
- Personal messages; and,
- Political campaign messages.

To the extent that any water management district public information system is not located within a “controlled area,” the provisions of SB 1986 have no effect resulting from the requirements of ch. 479, F.S. However, to the extent that any public information system is located within a “controlled area” and contains commercial messages or corporate sponsorship, such system

⁶ Also includes the national highway system pursuant to 23 U.S.C. 131(t) and s. 479.01(9), F.S.

⁷ See ss. 479.01(6) and (13), F.S.

violates both the federal-state agreement and certain provisions of ch. 479, F.S., which potentially subjects FDOT to an annual loss of 10% of federal highway funding as a result of loss of control of outdoor advertising.

Highway Beautification

FDOT is currently charged with the duty of enhancing environment benefits, preventing roadside erosion, conserving natural roadside growth and scenery, and providing for implementation and maintenance of roadside conservation, enhancement, and stabilization programs.⁸ In carrying out this duty, FDOT has for some time been statutorily directed to purchase all plant materials from Florida Commercial nursery stock in this state on a uniform competitive basis. This direction, however, conflicts with the provisions of federal regulation. Specifically, 23 C.F.R. s. 635.409 provides:

“No requirement shall be imposed and no procedure shall be enforced by any State transportation department in connection with a project which may operate:

“(a) To require the use of or provide a price differential in favor of articles or materials produced within the State, or otherwise to prohibit, restrict or discriminate against the use of articles or material shipped from or prepared, made or produced in any State, territory or possession of the United States; or

“(b) To prohibit, restrict or otherwise discriminate against the use of articles or materials of foreign origin to any greater extent than is permissible under the policy of the [United States] Department of Transportation as evidenced requirements and procedures prescribed by the FHWA Administrator to carry out such policies.”

On March 11, 2013, FDOT received an email⁹ from the Federal Highway Administration Florida Division Office advising that “...in-state material preferences are prohibited. Therefore, this specification will have to be revised for federally funded projects.” Failure to comply with federal requirements for purchases of plant material for roadside landscaping may subject FDOT to a significant federal funds penalty, generally 10 percent of annual highway constructions funds.

Access Roads to State Parks

FDOT is currently required to maintain any road that provides access to property within the state park system if the road is a part of the State Highway System.¹⁰ If the access road is part of the county road or city street system, the appropriate local government is required to maintain the road.

III. Effect of Proposed Changes:

Environmental Mitigation for Transportation Projects

The bill amends s. 373.4137, F.S., to provide that mitigation take place in an efficient, timely, and cost-effective manner. Development of environmental impact inventories for transportation projects proposed by FDOT or a transportation authority is required as follows:

⁸ Section 334.044(26), F.S.

⁹ On file in the Senate Transportation Committee.

¹⁰ Section 335.06, F.S.

- By July 1 of each year, FDOT or a participating transportation authority¹¹ must submit to the WMDs a list of its projects in its adopted work program, an environmental impact inventory of habitat impacts, and the proposed amount of mitigation needed to offset the impacts. The environmental impact inventory must be based on the rules adopted pursuant to part IV of ch. 373, F.S.¹², s. 404 of the Clean Water Act¹³ and FDOT's plan of construction for transportation projects in the next three years of the tentative work program. FDOT or a transportation authority may also include in the inventory the habitat impacts and proposed amount of mitigation needed for any future transportation project. FDOT and each transportation authority may use current year funds to fund mitigation activities for future projects.
- The environmental impact inventory must (along with the currently required habitat impacts, including location, acreage, and type), describe the proposed amount of mitigation needed based on the functional loss as determined through the Uniform Mitigation Assessment Method (UMAM)¹⁴ (under which the potential number of mitigation credits needed for the impacted site are identified), and identify the proposed mitigation option, in addition to currently required descriptions of state water quality classification of impacted wetlands and other surface waters; any other state or regional designations for these habitats; and a list of threatened species, endangered species, and species of special concern affected by the proposed project.

FDOT is required to consider using credits from a permitted mitigation bank before projects are identified for inclusion in a water management district mitigation plan, taking into account certain factors. To implement the mitigation option identified in the environmental impact inventory, FDOT may:

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

Funding for the identified mitigation option in the inventory must be included in FDOT's work program.¹⁵ FDOT is required to include funding for the identified mitigation option as described in the inventory in its work program, and the amount programmed corresponds to an estimated cost per mitigation credit of \$150,000 multiplied by the projected number of credits identified in the inventory.¹⁶ This authority and direction replaces a process under which FDOT is directed to identify funds in an escrow account for the current fiscal year for the benefit of the WMDs to fund development and implementation of mitigation plans for transportation project impacts.

¹¹ A transportation authority established pursuant to ch. 348 or ch. 349 may choose to participate in the program per s. 373.4137(2)(a), F.S.

¹² Part IV of Ch. 373, F.S., relates to the management and storage of surface waters.

¹³ 33 USC s. 1344

¹⁴ UMAM is adopted in ch. 62-345, F.A.C. Information on UMAM is available at: <http://www.dep.state.fl.us/water/wetlands/mitigation/umam.htm> (Last visited February 18, 2013).

¹⁵ FDOT's work program is developed pursuant to s. 339.135, F.S.

¹⁶ FDOT is also directed to adjust this amount every two years based on the average cost per UMAM credit paid through this section.

For mitigation implemented by the WMDs or DEP, the amount paid each year must be based on mitigation services provided by a WMD or 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 to pay for implementation of the permitted mitigation meeting the requirements of law. Each quarter, the projected amount of mitigation must be reconciled with the actual amount of mitigation needed for projects as permitted. The subject year's programming of funds must be adjusted to reflect the mitigation as permitted. 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 if the proposed mitigation does not meet state and federal requirements, FDOT may use the associated funds for the purchase of mitigation bank credits or any other mitigation option that satisfies state and federal requirements. Upon final payment for mitigation of a transportation project as permitted, FDOT's or the participating transportation authority's obligation is satisfied, and the WMD or DEP, as appropriate, has continuing responsibility for the mitigation project.

Beginning with the March 2014 WMD plans, each WMD or DEP is required to invoice FDOT for mitigation services to offset only the impacts of an FDOT project identified in the inventory. When the WMD identifies the use of mitigation bank credits to offset an FDOT impact, the WMD shall exclude that purchase from the mitigation plan, and FDOT must purchase the bank credits. For mitigation activities occurring on existing WMD or DEP mitigation sites initiated with FDOT mitigation funds prior to July 1, 2013, the WMD or DEP is required to invoice FDOT at a cost per acre of \$75,000 multiplied by the projected acres of impact as identified in the inventory. The cost per acre must be adjusted by a calculation using the CPI. When implementing the mitigation activities in the approved mitigation plan, the WMD must maintain records of the costs incurred, including without limitation costs for planning, land acquisition, design, construction, staff support, long-term maintenance and monitoring of the mitigation site, and other costs necessary to meet federal requirements

To prepare and implement mitigation plans to be adopted by the WMDs before March 1, 2013, for transportation impacts based on the July 1, 2012, environmental impact inventory, the funds identified in FDOT's work program or participating transportation authorities' escrow accounts must correspond to a cost per acre of \$75,000 multiplied by the projected acres of impact as identified in the inventory, adjusted by the CPI (the amount paid under current law). Payment is limited to mitigation activities identified in the first year of the 2013 mitigation plan and for which the transportation project is permitted and is in FDOT's adopted work program, or equivalent for a transportation authority. The WMD must similarly maintain records of the costs incurred in implementing the mitigation. To the extent monies paid to a WMD exceed the amount spent by the WMD to implement the mitigation to offset the permitted transportation impacts, these funds must be refunded to FDOT or the participating transportation authority. This provision expires June 30, 2014.

With respect to the annually required development of mitigation plans, each WMD is directed to develop a plan to offset only the impacts of transportation projects in the inventory for which a WMD is implementing mitigation meetings state and federal requirements. The water management district mitigation 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 through the UMAM. The bill also requires the plan to describe

how the mitigation offsets the impacts of each transportation project as permitted, and provide a schedule for the mitigation services. The bill removes current direction to 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 bill 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 WMDs must again maintain similar records of payments received and costs incurred for implementing mitigation services.. And again, any overpayments must be refunded to FDOT or a participating transportation authority. As under current law, 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 DEP at least 14 days before governing board approval. The plan may not be implemented until it is subsequently approved by DEP.

The current authorization, upon the election of FDOT, a transportation authority, or the appropriate WMD, to exclude specific projects from the mitigation plan is limited; *i.e.*, 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 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. FDOT is required to exclude a project from the mitigation plan when the currently required investigation of using credits from a permitted bank results in the conclusion that the use of credits from a permitted mitigation bank promotes efficiency, timeliness in project delivery, cost effectiveness, and transfer of liability for success and long-term maintenance.

In an effort to ensure that mitigation requirements are met for the impacts identified by the environmental impact inventory for which the WMD will implement mitigation, the bill directs the WMD to comply with all federal permitting requirements in developing and implementing the mitigation plan. The bill adds to WMD authority to deviate from the approved mitigation plan during the federal permitting process to comply with federal permitting requirements a duty to provide notice and coordinate with FDOT or the participating authority. The bill also requires consideration to be given to mitigation banks and other available mitigation options before amending the mitigation plan to include new projects.

Water Management District Public Information Systems

The bill amends s. 373.618, F.S., to provide that a public information system located on water management district property that is subject to the Highway Beautification Act of 1965 must be approved by FDOT and the Federal Highway Administration if such approval is required by federal law and regulation under the agreement between the state and the USDOT governing outdoor advertising, thereby eliminating a potential annual loss of 10% of federal highway funding as a result of loss of control of outdoor advertising.

Highway Beautification

The bill amends s. 334.044, F.S., to provide that FDOT shall 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, thereby eliminating a potential annual loss of 10% of federal highway funding as a result of violating federal law. The exception would not apply to wholly state-funded purchases.

Access Roads to State Parks

The bill amends s. 335.06, F.S., authorizing FDOT to improve and maintain roads that are part of the county road system or city street system if the roads provide access to a state park. Counties and cities remain responsible for maintaining the roads if FDOT does not.

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:

FDOT authority to improve and maintain roads to state parks may facilitate public access and use of the parks.

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

C. Government Sector Impact:

Section 1: FDOT's potential annual loss of 10% of federal highway funding resulting from violation of federal law prohibiting in-state preferences is eliminated.

Section 2: The costs of a selected project to improve or maintain an off-system road that provides access to a state park would be included in FDOT's work program budget submitted annually to the Legislature for approval. Maintenance of access to state parks facilitates state park revenues.

Section 3: The costs to mitigate for the environmental impacts of transportation projects are included in FDOT work program budget submitted annually to the Legislature for approval.

Section 4: FDOT's potential annual loss of 10% of federal highway funding as a result of loss of control of outdoor advertising is eliminated.

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:

- provides an exception from the current requirement that 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 FDOT to consider using credits from a permitted mitigation bank before projects are identified for inclusion in a water management district plan;
- include the purchase of mitigation services through a WMD or DEP in FDOT's available mitigation options;
- direct FDOT to include funding in its work program for mitigation identified in the environment impact inventory at an estimated cost per mitigation credit of \$150,000 multiplied by the projected number of credits in the inventory;
- replace FDOT authority to reassign funds if the associated transportation project is excluded from a WMD plan or if the mitigation will no longer be implemented by DEP with authority to use the associated funds to purchase mitigation bank credits or any other mitigation option that satisfies state and federal requirements if:
 - the WMD excludes the project from an approved WMD mitigation plan,
 - the WMD cannot timely permit a mitigation site, or
 - the proposed mitigation does not meet state and federal requirements.
- require a WMD or DEP, beginning with the March 2014 WMD plans, to invoice FDOT for mitigation services to offset only the impacts of an 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 an FDOT impact, and require FDOT in such instance to purchase the bank credits;

- require, for mitigation activities occurring on existing WMD or DEP mitigation sites initiated with FDOT mitigation funds prior to July 1, 2013, the WMD or DEP to invoice FDOT at a cost per acre of \$75,000 multiplied by the projected acres of impact identified in the inventory, adjusted by the CPI;
- require each WMD annual mitigation plan to offset only the impacts of transportation projects in the inventory for which a WMD is implementing mitigation meeting state and federal requirements and 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.