

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 521 Wetland Mitigation

SPONSOR(S): Agriculture & Natural Resources Subcommittee, McClure, Overdorf and others

TIED BILLS: **IDEN./SIM. BILLS:** CS/SB 532

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Agriculture & Natural Resources Subcommittee	11 Y, 1 N, As CS	Melkun	Shugar
2) State Affairs Committee	14 Y, 6 N	Melkun	Williamson

SUMMARY ANALYSIS

The Department of Environmental Protection (DEP), through the Environmental Resource Permitting (ERP) Program, regulates activities in, on, or over surface waters or wetlands, as well as any activity involving the alteration of surface water flows. This includes the dredging and filling of wetlands and other surface waters.

Mitigation banking is a practice in which an environmental enhancement and preservation project is conducted by a public agency or private entity (banker) to provide mitigation for unavoidable wetland impacts within a defined region, referred to as a mitigation service area. The bank is the site itself, and the currency sold by the banker to the ERP applicant is a credit. The number of potential credits permitted for the bank and the credit required for ERPs are determined by DEP or a water management district (WMD). Regional offsite mitigation areas (ROMAs) are environmental enhancement projects conducted by DEP, a WMD, or a local government sponsor that serve as mitigation for multiple ERP projects. Permit applicants pay money to the ROMA sponsor, and the collected funds are used toward the implementation of the larger mitigation project.

Currently, a governmental entity is prohibited from creating or providing mitigation for a project other than its own, unless it uses land that was not previously purchased for conservation and provides the same financial assurances as those required for private mitigation banks. Exceptions are provided for mitigation banks and offsite regional mitigation areas permitted before December 31, 2011; mitigation for transportation projects, mining activities, electric utility impacts, or on sovereign submerged lands; mitigation provided for single-family lots or homeowners; or certain authorized entities.

The bill provides legislative findings regarding the availability of mitigation credits and allows, if state and federal mitigation credits are not available, a local government to permit mitigation consisting of the restoration or enhancement of conservation lands purchased and owned by a local government. The bill specifies that such mitigation must conform to certain permitting requirements.

The bill further provides that financial assurances are not required for mitigation areas created by local governments that were awarded mitigation credits pursuant to ch. 62-345, F.A.C., under a permit issued before December 31, 2011, when credits are not available under a mitigation bank permitted under s. 373.4136, F.S.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

The Department of Environmental Protection (DEP) regulates activities in, on, or over surface waters or wetlands, as well as any activity that alters surface water flows, through environmental resource permits (ERPs). ERPs are required for development or construction activities typically involving the dredging or filling of wetlands or other surface waters, construction of flood protection facilities, building dams or reservoirs, or any other activities that affect state waters.¹ ERP applications are processed by either DEP or one of the state's water management districts (WMD) in accordance with the division of responsibilities specified in operating agreements between DEP and the WMDs.²

Mitigation

Mitigation serves as the third step in a sequence of permitting actions,³ which must be followed to offset the adverse impacts to wetlands or other surface waters resulting from the construction activities allowed by an ERP. When evaluating a proposed project for permitting, the Clean Water Act first requires DEP, as the permitting agency, to determine if the project would have an adverse impact. If the project has an adverse impact and there is a practicable alternative, the project must avoid the adverse impacts altogether and be reconfigured using the practicable alternative. If impacts cannot be avoided, appropriate and practicable steps must be taken to minimize the impact. If any unavoidable impacts remain, they require appropriate and practicable mitigation.⁴

Mitigation usually consists of restoration, enhancement, creation, preservation, or a combination thereof and is accomplished by providing onsite mitigation, offsite mitigation, or purchasing mitigation credits from permitted mitigation banks. The ecological benefits of mitigation compensate for the functional loss resulting from the ERP impact.⁵ The Uniform Mitigation Assessment Method (UMAM) provides a standardized procedure for assessing the ecological functions provided by wetlands and other surface waters, the amount that those functions are reduced by a proposed impact, and the amount of mitigation necessary to offset that loss. The UMAM evaluates functions by considering an ecological community's current condition, hydrologic connection, uniqueness, location, fish and wildlife utilization, time lag, and mitigation risk. The UMAM is also used to determine the degree of improvement in ecological value of proposed mitigation bank activities.⁶

Mitigation Banking

Mitigation banking is a practice in which an environmental enhancement and preservation project is conducted by a public agency or private entity (banker) to provide mitigation for unavoidable wetland impacts within a defined region referred to as a mitigation service area. The bank is the site itself, and the currency sold by the banker to the ERP applicant is a credit. The number of potential credits permitted for the bank and the credit required for ERPs are determined by DEP or a WMD. Mitigation

¹ South Florida Water Management District, *Environmental Resource Permits*, available at <https://www.sfwmd.gov/doing-business-with-us/permits/environmental-resource-permits> (last visited Mar. 4, 2019).

² DEP, *Submerged Lands and Environmental Resources Coordination Program*, available at <https://floridadep.gov/water/submerged-lands-environmental-resources-coordination> (last visited Jan. 31, 2019).

³ 40 C.F.R. § 230; see also DEP, *Applicant's Handbook Volume 1*, 10.3, available at <https://www.flrules.org/gateway/reference.asp?No=Ref-09390> (last visited Jan. 31, 2019).

⁴ EPA, *Wetlands Compensatory Mitigation*, available at https://www.epa.gov/sites/production/files/2015-08/documents/compensatory_mitigation_factsheet.pdf (last visited Jan. 31, 2019).

⁵ DEP, *Mitigation*, available at <https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/mitigation> (last visited Jan. 31, 2019); r. 62-330.010(4)(a), F.A.C.

⁶ DEP, *The Uniform Mitigation Assessment Method (UMAM)*, available at <https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/uniform-mitigation-assessment> (last visited Feb. 6, 2019).

banks are authorized by a state permit, which is issued by either a WMD or DEP depending on the location of the bank and the activity it mitigates, and by the United States Army Corps of Engineers.⁷

To obtain a mitigation bank permit, the applicant must provide reasonable assurance that the mitigation bank will: improve ecological conditions of the regional watershed; provide viable and sustainable ecological and hydrological functions for the proposed mitigation service area; be effectively managed in perpetuity; not destroy areas with high ecological value; achieve mitigation success; and, be adjacent to lands that will not adversely affect the long-term viability of the mitigation bank due to unsuitable land uses or conditions.⁸

The applicant must also provide reasonable assurances that any surface water management system to be constructed, altered, operated, maintained, abandoned, or removed within a mitigation bank will meet the requirements of part IV, ch. 373, F.S., and adopted rules; it has sufficient legal or equitable interest in the property to ensure perpetual protection and management of the land within a mitigation bank; and it can meet the financial responsibility requirements prescribed for mitigation banks.⁹

Four distinct types of mitigation banks have developed. Single user banks are typically started by large entities, like utility companies, to offset their own development activities. In for-profit banks, private investors provide the necessary capital to preserve and restore wetlands (e.g., plug old drainage ditches and remove exotic species) and if done properly, the WMD awards credits to the bank investors, who then sell the credits to developers to mitigate for unavoidable wetland impacts. Public banks also generate credits for sale that are operated by the government on public lands. Finally, in-lieu or fee-based banks are a widely used form of public mitigation bank funded by impact fees collected by a permitting agency for the purpose of acquiring or restoring large-scale wetlands.¹⁰

Historically, the predominate form of mitigation was the creation of onsite wetlands. To build onsite wetlands, applicants convert a portion of their property into a wetland by moving earth to achieve the necessary hydrology and planting the proper vegetation. However, problems plagued the early onsite mitigation efforts because the science of wetlands creation was in its infancy, leading to poor design and construction of wetlands. Also, early onsite wetlands suffered from a lack of proper monitoring and maintenance necessary to ensure ecological survival and success. Studies showed many onsite wetlands failed to meet permit conditions and that permit enforcement was weak. Due to these factors, agencies began to consider offsite mitigation.¹¹

Regional Offsite Mitigation Areas

Regional offsite mitigation areas (ROMAs) are environmental enhancement projects conducted by DEP, a WMD, or a local government sponsor that serve as mitigation for multiple ERP projects. Permit applicants required to mitigate for their projects pay money to the ROMA sponsor, and the collected funds are used toward the implementation of the larger mitigation project. A ROMA that serves as mitigation for more than five permits or 35 acres of impact is operated under a Memorandum of Agreement (MOA), similar to a mitigation bank permit.¹²

Per s. 373.4135, F.S., ROMA MOAs must identify the mitigation site(s); describe the work that will be conducted on the site(s); include a timeline for completing the work; define a geographic service area; provide environmental success criteria, provide monitoring and long-term management plans; and assess credit potential. In addition, ROMA instruments must ensure that mitigation costs provide for the

⁷ DEP, *Mitigation and Mitigation Banking*, available at <https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/mitigation-and-mitigation-banking> (last visited Jan. 31, 2019); r. 62-330.010(4)(a), F.A.C.

⁸ Section 373.4136(1), F.S., and r. 62-342.400, F.A.C.

⁹ *Id.*; see also, r. 62-340.700, F.A.C.

¹⁰ Florida House of Representatives Resource & Land Management Council, *Issues Pertaining to the Office of Program Policy Analysis and Government Accountability's Study on Wetlands Mitigation Options* (Nov. 1999), available at http://www.leg.state.fl.us/data/Publications/2000/House/reports/interim_reports/pdf/wetlnds.pdf (last visited Jan. 31, 2019).

¹¹ *Id.*

¹² DEP, *Regional Offsite Mitigation Areas*, available at <https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/regional-offsite-mitigation-areas> (last visited Jan. 31, 2019); r. 62-330.010(4)(a), F.A.C.

full cost accounting of the project, including the project activities, land costs, and administration. However, for ROMAs designated for mitigation use by private, single-family residential construction (not incorporated residential development), the full cost accounting provision is not required. In either case, moneys received for a ROMA project may only be used for that project, and no other purpose.¹³

The primary differences between a publicly sponsored ROMA and a mitigation bank are:

- The banker must own or have sufficient legal interest in the property, whereas, property acquisition can be part of the ROMA plan;
- A credit release schedule is not required for ROMAs;
- Fewer financial responsibility requirements are required up front for ROMAs since they are run by governmental entities, but they are required to provide detailed financial tracking and accounting. For example, all funds go toward mitigation, and mitigation is entirely paid for by the permittee, except as stipulated in statute for single-family homeowners.
- Some ROMAs will not need an ERP or Wetland Resource Permit, depending on the activity, whereas a bank always requires a mitigation bank permit to operate the bank.¹⁴

Legislative History

In 1993, the Legislature enacted s. 373.4135, F.S., recognizing that mitigation banks and offsite regional mitigation could be used to offset wetland impacts. The statute directed the DEP and WMDs to participate in and encourage the establishment of private and public banks and offsite regional mitigation. In 1996, the Legislature enacted s. 373.4136, F.S., to further address mitigation bank requirements, including permit requirements for the establishment, operation, and management of mitigation banks. In 2000, the Legislature created an in-lieu-fee program by amending s. 373.4135, F.S., to allow DEP, the WMDs, and local governments to sponsor ROMA projects that are paid for by monies accepted as mitigation.

In 2012, a governmental entity was prohibited from creating or providing mitigation for a project other than its own unless it used land that was not previously purchased for conservation and provided the same financial assurances as those required for private mitigation banks.¹⁵ Exceptions are provided for mitigation banks and ROMAs permitted before December 31, 2011; mitigation for transportation projects, mining activities, electric utility impacts, or on sovereign submerged lands; mitigation provided for single-family lots or homeowners; or entities authorized in ch. 98-492, Laws of Fla.¹⁶

Conservation Land Acquisition

Florida has a long history of conserving the natural lands to preserve the ecosystems that provide clean air, clean and sufficient water, and recreational opportunities for residents, visitors, and future generations. The Division of State Lands within DEP manages the Florida Forever program to acquire and manage conservation land. Through the program and its predecessor, Preservation 2000, the state has purchased and protected 2.4 million acres of land with the specific goal of preserving those natural and cultural resources essential to a healthy economy and quality of life.¹⁷

The state has also purchased land for restoration and conservation through the Comprehensive Everglades Restoration Plan (CERP), a state-federal partnership. The intent of the CERP is to restore

¹³ DEP, *Regional Offsite Mitigation Areas*, available at <https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/regional-offsite-mitigation-areas> (last visited Jan. 31, 2019); s. 373.4135, F.S.

¹⁴ DEP, *ROMA Plan Example*, available at <https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/documents/roma-plan-example> (last visited Mar. 6, 2019).

¹⁵ Chapter 2012-174, Laws of Fla.

¹⁶ Chapter 98-492, Laws of Fla., is the Greater Orlando Aviation Authority Act; s. 373.415(1)(b), F.S.

¹⁷ DEP, *About the Division of State Lands*, available at <https://floridadep.gov/lands/lands/content/about-division-state-lands> (last visited Mar. 4, 2019).

and preserve South Florida's natural ecosystems. Because of the high cost to restore and manage conservation land, many lands purchased have yet to be restored.¹⁸

Effect of Proposed Changes

The bill amends s. 373.4135, F.S., to provide legislative findings regarding the availability of mitigation credits and allows, if state and federal mitigation credits are not available, a local government to authorize mitigation consisting of the restoration or enhancement of conservation lands purchased and owned by a local government. The bill specifies that such mitigation must conform to the permitting requirements of s. 373.4136, F.S.

Finally, the bill specifies that financial assurances are not required for mitigation areas created by local governments that were awarded mitigation credits pursuant to ch. 62-345, F.A.C., under a permit issued before December 31, 2011, when credits are not available under a mitigation bank permitted under s. 373.4136, F.S.

B. SECTION DIRECTORY:

Section 1 amends s. 373.4135, F.S., to allow local governments to authorize mitigation on lands purchased for conservation.

Section 2 provides an effective date of July 1, 2019.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill may have an indeterminate positive impact on local government revenues because local governments could provide mitigation for other entities that would generate revenue for conservation lands or reduce costs to local governments for the restoration of conservation lands.

2. Expenditures:

The bill may have an indeterminate impact on local government expenditures related to financial requirements, permits, and staff resources should a local government choose to use conservation lands for mitigation.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may have an indeterminate positive fiscal impact on the private sector because when mitigation credits are not available for a permittee, the project is on hold until mitigation credits become available. These delays can create significant costs to the project owner. The bill would provide an alternative mitigation option for projects thereby reducing additional costs to a project.

D. FISCAL COMMENTS:

¹⁸ The Florida Bar Journal, *Everglades Ecosystem Restoration: A Watershed Approach by the Legislature* (Oct. 2000), available at <https://www.floridabar.org/the-florida-bar-journal/everglades-ecosystem-restoration-a-watershed-approach-by-the-legislature/> (last visited Mar. 9, 2019).

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditures of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 12, 2019, the Agriculture & Natural Resources Subcommittee adopted a strike all amendment and reported the bill favorably as a committee substitute. The amendment provided legislative findings on the availability of mitigation credits and allowed local governments to authorize mitigation on lands purchased for conservation.

This analysis is drafted to the committee substitute as approved by the Agriculture & Natural Resources Subcommittee.