

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1335 Seagrass Mitigation Banks

SPONSOR(S): Sirois

TIED BILLS: **IDEN./SIM. BILLS:** SB 1668

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Environment, Agriculture & Flooding Subcommittee	13 Y, 3 N	Gawin	Moore
2) Agriculture & Natural Resources Appropriations Subcommittee			
3) State Affairs Committee			

SUMMARY ANALYSIS

Seagrasses are grass-like flowering plants that live completely submerged in marine and estuarine waters. Seagrasses occur in protected bays and lagoons as well as in deeper waters along the continental shelf in the Gulf of Mexico. The depth at which seagrasses occur is limited by water clarity because most species require high levels of light. The Board of Trustees of the Internal Improvement Trust Fund (the Board) is responsible for acquiring and managing state-owned lands in a manner that serves the public interest. Among the Board's responsibilities is the duty to preserve and regenerate seagrass as an essential ecosystem for Florida's oceans, estuaries, and shorelines.

The Department of Environmental Protection (DEP) regulates activities in, on, or over surface waters, 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 surface waters, construction of flood protection facilities, building dams or reservoirs, or any other activities that affect state waters. Environmental impact mitigation is required under certain circumstances to offset the adverse impacts to surface waters resulting from the construction activities allowed by an ERP.

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 environmental 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.

Sovereign submerged lands include, but are not limited to, tidal lands, islands, sandbars, shallow banks, and lands waterward of the ordinary or mean high water line, beneath navigable fresh water or beneath tidally-influenced waters. The Board is responsible for determining whether a sale of sovereign submerged lands or a permit related to an activity conducted on sovereign submerged lands is within the public interest on a case by case basis. Before conveying submerged lands, the Board must consider the extent such conveyance would interfere with the conservation of fish, marine life and other wildlife, or other natural resources.

The bill authorizes the Board to establish seagrass mitigation banks to ensure the preservation and regeneration of seagrass and to offset the unavoidable impacts of projects when seagrass banks meet the public interest requirements related to state-owned lands.

The bill may have an indeterminate fiscal impact on the state.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Seagrasses

Seagrasses are grass-like flowering plants that live completely submerged in marine and estuarine waters.¹ Seagrasses occur in protected bays and lagoons as well as in deeper waters along the continental shelf in the Gulf of Mexico.² The depth at which seagrasses occur is limited by water clarity because most species require high levels of light.³ Florida's approximately 2.2 million acres of seagrasses perform many significant functions, including maintenance of water clarity, stabilization of the ocean bottom, shelter for marine life, and food for many marine animals and water birds.⁴

The Board of Trustees of the Internal Improvement Trust Fund (Board) is vested and charged with the duty to acquire, administer, manage, control, supervise, conserve, protect, and dispose of lands owned by the state.⁵ This duty extends to the preservation and regeneration of seagrass as an essential ecosystem for Florida's oceans, estuaries, and shorelines.⁶ Current law requires the Board to manage state-owned lands in a manner that serves the public interest.⁷

Environmental Impact Mitigation

Mitigation Regulations

The Department of Environmental Protection (DEP) regulates activities in, on, or over surface waters, 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 surface waters, construction of flood protection facilities, building dams or reservoirs, or any other activities that affect state waters.⁸ ERP applications are processed by either DEP or one of the state's water management districts (WMDs) in accordance with the division of responsibilities specified in operating agreements between DEP and the WMDs.⁹

Mitigation serves as the third step in a sequence of permitting actions,¹⁰ which must be followed to offset the adverse impacts to 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 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.¹¹

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

¹ DEP, *Florida Seagrasses*, <https://floridadep.gov/rcp/seagrass> (last visited Mar. 8, 2021).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ Section 253.03, F.S.

⁶ Section 253.04(3)(a), F.S.

⁷ Section 253.034, F.S.

⁸ South Florida Water Management District, *Environmental Resource Permits*, <https://www.sfwmd.gov/doing-business-with-us/permits/environmental-resource-permits> (last visited Mar. 9, 2021).

⁹ DEP, *Submerged Lands and Environmental Resources Coordination Program*, <https://floridadep.gov/water/submerged-lands-environmental-resources-coordination> (last visited Mar. 9, 2021).

¹⁰ 40 C.F.R. § 230.

¹¹ EPA, *Wetlands Compensatory Mitigation*, available at https://www.epa.gov/sites/production/files/2015-08/documents/compensatory_mitigation_factsheet.pdf (last visited Dec. 10, 2020).

from permitted mitigation banks. The ecological benefits of mitigation compensate for the functional loss resulting from the ERP impact.¹² The Uniform Mitigation Assessment Method (UMAM) provides a standardized procedure for assessing the ecological functions provided by 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.¹³

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 environmental 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 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.¹⁴

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.¹⁵

The applicant must also provide reasonable assurances that:

- Any surface water management system that will be constructed, altered, operated, maintained, abandoned, or removed within a mitigation bank will meet the requirements of part IV of ch. 373, F.S., which regulates management and storage of surface waters, and adopted rules;
- The applicant has sufficient legal or equitable interest in the property to ensure perpetual protection and management of the land within a mitigation bank; and
- The applicant can meet the financial responsibility requirements prescribed for mitigation banks.¹⁶

Four distinct types of mitigation banks have developed. Single user banks are typically started by large entities, such as 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 impacts. Public banks are used to generate credits for sale that are operated by the government on public lands. Finally, in-lieu, or

¹² DEP, *Mitigation*, <https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/mitigation> (last visited Dec. 10, 2020).

¹³ DEP, *The Uniform Mitigation Assessment Method (UMAM)*, <https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/uniform-mitigation-assessment> (last visited Dec. 10, 2020).

¹⁴ DEP, *Mitigation and Mitigation Banking*, <https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/mitigation-and-mitigation-banking> (last visited Dec. 10, 2020).

¹⁵ Section 373.4136(1), F.S.; r. 62-342.400, F.A.C.

¹⁶ *Id.*; see also r. 62-340.700, F.A.C.

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.¹⁷

Sovereign Submerged Lands

Sovereign submerged lands include, but are not limited to, tidal lands, islands, sandbars, shallow banks, and lands waterward of the ordinary or mean high water line, beneath navigable fresh water, or beneath tidally-influenced waters.¹⁸ Pursuant to Article X, section 11 of the Florida Constitution the state holds title to land under navigable waters, including beaches below mean high water lines, in trust for all the people. Sale of such lands may be authorized by law, but only when in the public interest.¹⁹ Additionally, the private use of portions of such lands may be authorized by law, but only when not contrary to the public interest.²⁰ The Board is responsible for determining whether a sale of sovereign submerged lands or a permit related to an activity conducted on sovereign submerged lands is within the public interest on a case by case basis.²¹ Before conveying sovereign submerged lands, the Board must consider the extent such conveyance would interfere with the conservation of fish, marine life and other wildlife, or other natural resources.²²

Effect of the Bill

The bill authorizes the Board to establish seagrass mitigation banks to ensure the preservation and regeneration of seagrass and to offset the unavoidable impacts of projects when seagrass banks meet the public interest requirements related to state-owned lands.

The bill specifies that it does not prohibit mitigation for impacts to seagrass or other habitats on sovereignty or non-sovereignty submerged lands, upon the approval of the Board.

B. SECTION DIRECTORY:

Section 1. Amends s. 253.03, F.S., to authorize the Board to establish seagrass mitigation banks.

Section 2. Provides an effective date of July 1, 2021.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill may have an indeterminate positive fiscal impact on state revenue associated with the ability to establish seagrass mitigation banks for which credits can be sold.

2. Expenditures:

The bill may have an indeterminate negative fiscal impact on the Board and DEP associated with the costs of creating and maintaining a seagrass mitigation bank.

¹⁷ 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), http://www.leg.state.fl.us/data/Publications/2000/House/reports/interim_reports/pdf/wetlnds.pdf (last visited Mar. 17, 2021).

¹⁸ DEP, *Sovereign Submerged Lands (SSL) - Proprietary Authority versus Regulatory Authority in Chapter 18-21, F.A.C.*, <https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/sovereign-submerged-lands-ssl> (last visited Mar. 9, 2021).

¹⁹ Art. X Sec. 11, Fla. Const.

²⁰ Art. X Sec. 11, Fla. Const.

²¹ Section 253.12, F.S.

²² Section 253.12(2)(a), F.S.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may have an indeterminate fiscal impact on the private sector by allowing private entities to purchase mitigation credits from the state to offset their projects' unavoidable impacts to seagrasses.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not Applicable. This bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.