

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 Environment and Natural Resources

BILL: CS/SB 1668

INTRODUCER: Environment and Natural Resources Committee and Senator Rodriguez

SUBJECT: Seagrass Mitigation Banks

DATE: March 29, 2021

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Schreiber	Rogers	EN	Fav/CS
2.			CA	
3.			AP	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 1668 authorizes the Board of Trustees of the Internal Improvement Trust Fund to authorize leases for seagrass mitigation banks to:

- Ensure the preservation and regeneration of seagrass; and
- Offset the unavoidable impacts of projects when seagrass banks meet the public interest criteria related to state-owned lands and state parks and preserves.

The bill states that this authorization does not prohibit mitigation for impacts to seagrass or other habitats on sovereignty submerged lands, upon approval of the Board of Trustees.

The bill requires the Department of Environmental Protection to modify rules on mitigation banking to remove any duplicative financial assurance requirements and ensure that permitted seagrass mitigation banks comply with the federal mitigation banking rules.

II. Present Situation:

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

¹ DEP, *Florida Seagrasses*, <https://floridadep.gov/rcp/seagrass> (last visited Mar. 24, 2021).

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 maintaining water clarity, stabilizing the bottom, sheltering marine life, and providing food for many marine animals and water birds.⁴

The Board of Trustees of the Internal Improvement Trust Fund (Board),⁵ comprised of the Governor and Cabinet, generally owns and administers all state-owned lands in Florida, unless otherwise specified.⁶ The Board has a duty to conserve and improve state-owned land, which includes the preservation and regeneration of seagrass, deemed by the Legislature to be essential to the oceans, gulfs, estuaries, and shorelines of the state.⁷ The term “seagrass” is defined in statute to mean any of seven specified species of seagrass.⁸

Sovereign Submerged Lands

Sovereign submerged lands are owned by the state and they include, but are not limited to, tidal lands, islands, sandbars, shallow banks, and lands waterward of the ordinary or mean high water line,⁹ beneath navigable fresh water or tidally-influenced waters.¹⁰ Under the State Constitution, the title to all sovereign submerged lands is held by the state in trust for the people.¹¹ The sale of such lands may be authorized by law when in the public interest, and the private use of portions of such lands may be authorized by law when not contrary to the public interest.¹²

The Board generally holds title to all sovereign submerged lands in the state.¹³ The Board is authorized to sell and convey sovereign submerged lands if determined by the Board to be in the public interest.¹⁴ Before conveying sovereign submerged lands, the Board must determine to what extent such conveyance would interfere with the conservation of wildlife, natural resources,

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ The Governor and Cabinet, *Structure of the Florida Cabinet*, <http://www.myflorida.com/myflorida/cabinet/structurehistory.html> (last visited Mar. 9, 2021).

⁶ *See* s. 253.03, F.S.

⁷ Section 253.04(3), F.S.

⁸ Section 253.04(3)(a)1., F.S. These species are: “Cuban shoal grass (*Halodule wrightii*), turtle grass (*Thalassia testudinum*), manatee grass (*Syringodium filiforme*), star grass (*Halophila engelmannii*), paddle grass (*Halophila decipiens*), Johnson's seagrass (*Halophila johnsonii*), or widgeon grass (*Ruppia maritima*).”

⁹ *See* ss. 177.27(15), (16) and 177.28, F.S. The mean high water line is the point on the shore marking the average height of the high waters over a 19-year period, and it is the boundary between the state-owned foreshore (land alternately covered and uncovered by the tide) and the dry area above the mean high water line that is subject to private ownership.

¹⁰ Fla. Admin. Code R. 18-21.003(65). “Sovereignty submerged lands” are defined as “those lands including but not limited to, tidal lands, islands, sand bars, shallow banks, and lands waterward of the ordinary or mean high water line, beneath navigable fresh water or beneath tidally-influenced waters, to which the State of Florida acquired title on March 3, 1845, by virtue of statehood, and which have not been heretofore conveyed or alienated. For the purposes of this chapter sovereignty submerged lands shall include all submerged lands title to which is held by the Board.”

¹¹ FLA. CON., art. X, s. 11.

¹² *Id.*

¹³ Section 253.03, F.S.

¹⁴ Section 253.12, F.S.; *see* s. 258.42, F.S.

and marine ecosystems.¹⁵ Florida law authorizes the Board to adopt rules to administer sovereign submerged lands.¹⁶

Chapter 18-21 of the Florida Administrative Code, Sovereign Submerged Lands Management, lists the various forms of authorization necessary for specified activities on sovereign submerged lands.¹⁷ The Department of Environmental Protection (DEP) and the Department of Agriculture and Consumer Services (DACS) generally act as staff to the Board in the review of proposed uses of sovereign submerged lands.¹⁸ DEP is responsible for environmental permitting of activities and water quality protection on sovereign submerged lands, while DACS is responsible for managing aquacultural activities on sovereignty submerged lands.¹⁹

Mitigation Banking

A mitigation bank is a wetland, stream, or other aquatic resource area that has been restored, established, or preserved for the purpose of providing compensation for unavoidable impacts to aquatic resources permitted under certain federal, state, or local programs.²⁰ In Florida, mitigation banking is part of separate permitting programs at the federal and state levels.

At the federal level, the U.S. Army Corps of Engineers (USACE) administers permitting under section 404 of the Clean Water Act, which establishes a program to regulate the discharge of dredged or fill material in waters of the United States, including wetlands.²¹ In 2020, DEP assumed permitting authority under the State 404 Program for certain “assumed waters,” but USACE will retain such permitting authority for all other waters in the state.²²

The U.S. Environmental Protection Agency and USACE promulgate federal regulations establishing environmental criteria, and mechanisms for compensatory mitigation, under section 404.²³ The regulations require a permit applicant to take all appropriate and practicable steps to avoid and minimize adverse impacts to waters of the United States.²⁴ For unavoidable impacts, as the last step in a sequence after avoidance and minimization, compensatory mitigation may be required to replace the loss of wetland and aquatic resource functions in the watershed.²⁵ The

¹⁵ Section 253.12(2)(a), F.S.

¹⁶ Sections 253.03(7) and 253.73, F.S.

¹⁷ Fla. Admin. Code R. 18-21.005.

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. 24, 2021); DACS, *Aquaculture Submerged Land Leasing*, <https://www.fdacs.gov/Agriculture-Industry/Aquaculture/Aquaculture-Submerged-Land-Leasing> (last visited Mar. 24, 2021).

¹⁹ Fla. Admin. Code R. 18-21.002.

²⁰ U.S. EPA, *Mitigation Banks under CWA Section 404*, <https://www.epa.gov/cwa-404/mitigation-banks-under-cwa-section-404> (last visited Mar. 25, 2021).

²¹ 33 U.S.C. s. 1344; U.S. EPA, *Wetland Regulatory Authority*, https://www.epa.gov/sites/production/files/2015-03/documents/404_reg_authority_fact_sheet.pdf (last visited Mar. 24, 2021).

²² DEP, *State 404 Program*, <https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/state-404-program> (last visited Mar. 24, 2021); see DEP, *State 404 Program Applicant's Handbook*, <https://www.flrules.org/gateway/reference.asp?No=Ref-12064> (last visited Mar. 24, 2021).

²³ 40 C.F.R. pt. 230 and 33 C.F.R. pt. 322.

²⁴ 40 C.F.R. s. 230.91(c) and 33 C.F.R. s. 322.1(c).

²⁵ U.S. EPA, *Wetlands Compensatory Mitigation*, available at https://www.epa.gov/sites/production/files/2015-08/documents/compensatory_mitigation_factsheet.pdf (last visited Mar. 24, 2021).

federal regulations establish requirements and create mechanisms for mitigation approved by an interagency review team, including mitigation banks allowing permittees to purchase credits to meet federal requirements for compensatory mitigation.²⁶

At the state level, DEP regulates activities in, on, or over surface waters, as well as any activity that alters surface water flows, through environmental resource permits (ERPs).²⁷ ERPs are required for certain development or construction activities, typically involving the dredging or filling of wetlands or surface waters, construction of flood protection facilities, building dams or reservoirs, or any other activities that affect state waters.²⁸ ERP applications are processed by either DEP or one of the water management districts in accordance with the division of responsibilities specified in operating agreements between DEP and the water management districts.²⁹

Florida's ERP criteria generally require that, for proposed activities that will result in adverse impacts to wetland or surface water functions, applicants must implement practicable design modifications to reduce or eliminate such adverse impacts.³⁰ After such requirements have been completed, mitigation is required to offset the adverse impacts.³¹ Mitigation under the ERP program is evaluated in light of the programmatic goal of no net loss of wetland and other surface water functions.³² Florida law authorizes DEP and the water management districts to require permits authorizing the establishment and use of mitigation banks.³³ DEP has adopted rules that serve as the basis for mitigation bank permitting done by DEP and the water management districts.³⁴

Creation of a mitigation bank in Florida requires both a permit from DEP or a water management district, and federal authorization from several agencies led by USACE, in a joint state/federal interagency review team.³⁵ Through this process, depending on agency approval, mitigation banks may provide mitigation for permittees under both the federal and state permitting programs.

Generally, 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

²⁶ *Id.* In addition to mitigation banking, mechanisms for mitigation include permittee-responsible mitigation and in-lieu fee mitigation; 33 C.F.R. pt. 322.

²⁷ DEP, *Submerged Lands and Environmental Resources Coordination Program*, <https://floridadep.gov/water/submerged-lands-environmental-resources-coordination> (last visited Mar. 24, 2021).

²⁸ South Florida Water Management District, *Environmental Resource Permits*, <https://www.sfwmd.gov/doing-business-with-us/permits/environmental-resource-permits> (last visited Mar. 24, 2021).

²⁹ DEP, *Submerged Lands and Environmental Resources Coordination Program*, <https://floridadep.gov/water/submerged-lands-environmental-resources-coordination> (last visited Mar. 24, 2021).

³⁰ DEP, *ERP Applicant's Handbook Volume I*, 10-2, 10-24–10-33 (2020), available at <https://www.flrules.org/gateway/reference.asp?No=Ref-12078> (last visited Mar. 24, 2021).

³¹ *Id.*

³² *Id.* at 10-1, 10-24.

³³ Sections 373.4135 and 373.4136, F.S.

³⁴ Fla. Admin. Code Ch. 62-342.

³⁵ DEP, *Mitigation Banking Rule and Procedure Synopsis*, <https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/mitigation-banking-rule-and> (last visited Mar. 25, 2021).

mitigation for unavoidable wetland impacts within a defined region (mitigation service area).³⁶ The bank is the site itself, and the currency sold by the banker to the impact permittee is a credit, representing the wetland ecological value equivalent to the complete restoration of one acre.³⁷ The number of potential credits permitted for the bank, and the credit debits required for impact permits, are determined by the permitting agencies.³⁸

Mitigation usually consists of restoration, enhancement, creation, and/or preservation, and may include onsite mitigation, offsite mitigation, regional offsite mitigation areas, or purchasing mitigation credits from permitted mitigation banks.³⁹ Generally, mitigation preferably involves enhancing or preserving ecological communities or types of resources that are similar to those being impacted by the permitted activities; however different types of communities or resources may be found environmentally acceptable.⁴⁰ During the permitting of a mitigation bank, the permitting agencies and interagency review team will determine the mitigation service area: the geographic region within which the bank could reasonably be expected to offset impacts.⁴¹ Determining the boundaries of a mitigation services area generally starts with the regional watershed in which the bank lies. The service area may be larger or smaller depending upon the ecological and hydrological location and value.⁴² The impact permitting agency determines whether a particular mitigation bank has sufficient credits and appropriate types of mitigation.⁴³

The Uniform Mitigation Assessment Method (UMAM)⁴⁴ 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.⁴⁵ 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.⁴⁶ The UMAM is also used to determine the degree of improvement in ecological value of proposed mitigation bank activities.⁴⁷

Under Florida law, 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;

³⁶ DEP, *Mitigation and Mitigation Banking*, <https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/mitigation-and-mitigation-banking> (last visited Mar. 25, 2021).

³⁷ *Id.*

³⁸ *Id.*

³⁹ DEP, *Mitigation*, <https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/mitigation> (last visited Mar. 25, 2021).

⁴⁰ DEP, *ERP Applicant's Handbook Volume I*, 10-25 (2020), available at <https://www.flrules.org/gateway/reference.asp?No=Ref-12078> (last visited Mar. 24, 2021); 33 C.F.R. s. 332.3(e).

⁴¹ DEP, *Mitigation Banking Rule and Procedure Synopsis*, <https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/mitigation-banking-rule-and> (last visited Mar. 25, 2021).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Fla. Admin. Code Ch. 62-345.

⁴⁵ DEP, *The Uniform Mitigation Assessment Method (UMAM)*, <https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/uniform-mitigation-assessment> (last visited Mar. 25, 2021).

⁴⁶ *Id.*

⁴⁷ *Id.*

- 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.⁴⁸

The applicant must also provide reasonable assurance 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 rules adopted thereunder;
- 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.⁴⁹

Four distinct types of mitigation banks have developed.⁵⁰ Single user banks are typically started by large entities, such as utility companies, to offset their own development activities.⁵¹ For-profit banks are where private investors provide the necessary capital to preserve and restore wetlands (e.g., plug old drainage ditches and remove exotic species) and then credits are awarded to the bank investors, who then sell the credits to developers to mitigate for unavoidable impacts.⁵² Public banks are operated by the government on public lands.⁵³ 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.⁵⁴

III. Effect of Proposed Changes:

Section 1 amends s. 253.03, F.S., which generally vests the title to state lands in the Board of Trustees of the Internal Improvement Trust Fund (Board) and authorizes the Board to administer state-owned lands and adopt rules accordingly.

The bill authorizes the Board to authorize leases for seagrass mitigation banks⁵⁵ to ensure the preservation and regeneration of seagrass,⁵⁶ and to offset the unavoidable impacts of projects

⁴⁸ Section 373.4136(1), F.S.

⁴⁹ *Id.*; Fla. Admin. Code R. 62-342.400.

⁵⁰ 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*, 7 (Nov. 1999), http://www.leg.state.fl.us/data/Publications/2000/House/reports/interim_reports/pdf/wetlnds.pdf (last visited Mar. 17, 2021).

⁵¹ *Id.*

⁵² *Id.* at 7-8.

⁵³ *Id.* at 8.

⁵⁴ *Id.*

⁵⁵ Section 373.4136, F.S. The bill authorizes the seagrass mitigation banks under this statute, which provides the Department of Environmental Protection and water managements districts permitting authority for the establishment and use of mitigation banks.

⁵⁶ Section 253.04(3)(a), F.S. The bill defines "seagrass" using this paragraph.

when seagrass banks meet the public interest criteria under chapters of the Florida Statutes related to state-owned lands and state parks and preserves.⁵⁷ The bill states that this authorization does not prohibit mitigation for impacts to seagrass or other habitats on sovereignty submerged lands, upon approval of the Board.

Section 2 requires the Department of Environmental Protection to modify rules on mitigation banking,⁵⁸ in order to remove any duplicative financial assurance requirements and to ensure permitted seagrass mitigation banks comply with the federal mitigation banking rules.

Section 3 provides an effective date of July 1, 2021.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill may result in a positive, indeterminate fiscal impact for private entities that acquire leases to create and operate seagrass mitigation banks.

⁵⁷ Chapters 253 and 258, F.S. The bill references the public interest criteria under these chapters, which pertain to state lands, and state parks and preserves, respectively.

⁵⁸ Section 373.4136, F.S. The bill requires DEP to modify rules adopted pursuant to this section of law.

C. Government Sector Impact:

The bill may result in increased costs for the Board of Trustees of the Internal Improvement Trust Fund and the Department of Environmental Protection. Rulemaking, and potentially establishment of a new program, may be necessary to implement the requirements contained in the bill.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The Department of Environmental Protection's (DEP) bill analysis on SB 1668 discusses how traditional public uses of sovereign submerged lands may not be consistent with mitigation banks.⁵⁹ DEP also discusses concerns that offsetting the loss or degradation of seagrass resources with existing protected seagrasses may lead to a net loss of seagrass resources.⁶⁰

VIII. Statutes Affected:

This bill substantially amends section 253.03 of the Florida Statutes.

IX. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Environment and Natural Resources Committee on March 29, 2021:

- Authorizes the Board of Trustees of the Internal Improvement Trust Fund to authorize leases for seagrass mitigation banks, instead of authorizing the Board to establish seagrass mitigation banks.
- Removes nonsovereignty submerged lands from the areas of seagrass or other habitats impacts to which are not prohibited by the bill.
- Requires the Department of Environmental Protection to modify rules on mitigation banking, in order to remove any duplicative financial assurance requirements and ensure permitted seagrass mitigation banks comply with the federal mitigation banking rules.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

⁵⁹ DEP, *2021 Legislative Session, Bill #: SB 1668, 1-2 (2021)*(on file with the Florida Senate Environment and Natural Resources Committee).

⁶⁰ *Id.* at 2.