

**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.)

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Prepared By: The Professional Staff of the Committee on Environment and Natural Resources

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BILL: SB 198

INTRODUCER: Senator Rodriguez

SUBJECT: Seagrass Mitigation Banks

DATE: January 14, 2022

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Collazo</u>	<u>Rogers</u>	<u>EN</u>	<u>Pre-meeting</u>
2.	_____	_____	<u>CA</u>	_____
3.	_____	_____	<u>AP</u>	_____

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**I. Summary:**

SB 198 authorizes the Board of Trustees of the Internal Improvement Trust Fund (Board of Trustees) to establish seagrass mitigation banks to ensure the preservation and regeneration of seagrass and to offset the unavoidable impacts of projects, so long as the seagrass mitigation banks meet the public interest criteria enshrined in state law. The bill clarifies that it does not prohibit mitigation for impacts to seagrass or other habitats on sovereignty or non-sovereignty submerged lands, upon approval of the Board of Trustees.

**II. Present Situation:**

**Seagrasses**

Seagrasses are grass-like flowering plants that live completely submerged in marine and estuarine waters.<sup>1</sup> Seagrasses occur throughout the coastal waters in Florida, including in protected bays and lagoons as well as in deeper waters along the continental shelf in the Gulf of Mexico.<sup>2</sup> The depth at which seagrasses occur is limited by water clarity because most species require high levels of light.<sup>3</sup> Seagrasses perform many important functions, including maintaining water clarity, stabilizing the bottom of aquatic habitats, providing habitat for marine life, and providing food for many marine animals and water birds.<sup>4</sup> There are seven different species of seagrasses found in Florida's waters.<sup>5</sup>

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<sup>1</sup> Florida Dep't of Environmental Protection (DEP), *Florida Seagrasses*, <https://floridadep.gov/rcp/seagrass> (last visited Jan. 11, 2022).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* 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*)." Section 253.04(3)(a)1., F.S.

Along Florida's coastline and within its estuaries, there are more than 2 million acres of seagrass.<sup>6</sup> The state and its partners map and monitor seagrass abundance, and while efforts to promote seagrasses have led to positive outcomes in places like Tampa Bay and Sarasota Bay, certain areas have experienced recent losses of seagrasses, such as Florida's Big Bend, Florida Bay, and the Indian River Lagoon.<sup>7</sup> Seagrasses face several threats, including events that reduce water clarity and decrease the amount of light reaching the bottom, such as algae blooms, as well as physical damage, such as from boat propeller scarring or dredging.<sup>8</sup> In many cases a person operating a vessel outside a marked channel that causes "seagrass scarring" within an aquatic preserve commits a noncriminal infraction.<sup>9</sup>

### **Sovereign Submerged Lands**

Sovereign submerged lands are owned by the state and include, but are not limited to, tidal lands, islands, sandbars, shallow banks, and lands waterward of the ordinary or mean high water line,<sup>10</sup> beneath navigable fresh water or tidally-influenced waters.<sup>11</sup> Under the State Constitution, the title to all sovereign submerged lands is held by the state in trust for the people.<sup>12</sup> This generally provides the public with the right to use sovereign submerged lands for traditional recreational purposes such as swimming, boating, and fishing.<sup>13</sup>

The Board of Trustees of the Internal Improvement Trust Fund (Board of Trustees), comprised of the Governor and Cabinet, holds title to all sovereign submerged lands in the state.<sup>14</sup> The Board of Trustees has a duty to preserve and regenerate seagrass in these areas, and the Legislature has recognized seagrasses as essential to the oceans, gulfs, estuaries, and shorelines of the state.<sup>15</sup> The Board of Trustees may sell sovereign submerged lands when it determines it to be in the public interest, and the Board of Trustees may authorize private use of sovereign submerged lands when it determines it to be not contrary to the public interest.<sup>16</sup> The Board of Trustees' consideration of what is in the public interest includes determining to what extent such conveyance would interfere with the conservation of wildlife, marine ecosystems, and other

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<sup>6</sup> Florida Fish and Wildlife Conservation Commission, *Seagrass FAQ*, <https://myfwc.com/research/habitat/seagrasses/information/faq/> (last visited Jan. 11, 2022).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Section 253.04(3), F.S. (2021).

<sup>10</sup> Fla. Admin. Code R. 18-21.003(67). 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. *See ss.* 177.27(14), (15) and 177.28(1), F.S.

<sup>11</sup> Fla. Admin. Code R. 18-21.003(67).

<sup>12</sup> FLA. CONST. art. X, s. 11.

<sup>13</sup> Fla. Admin. Code R. 18-21.004(2)(a); *see also* 5F, LLC v. Hawthorne, 317 So. 3d 220, 223 (Fla. 2d DCA 2021) (identifying the same traditional uses).

<sup>14</sup> Sections 253.03 and 253.12(1), F.S.

<sup>15</sup> Section 253.04(3), F.S.

<sup>16</sup> FLA. CONST. art. X, s. 11; s. 253.12(2), F.S.; *see also* Fla. Admin. Code R. 18-21.003(54). The rule defines public interest as meaning "demonstrable environmental, social, and economic benefits which would accrue to the public at large as a result of a proposed action, and which would clearly exceed all demonstrable environmental, social, and economic costs of the proposed action. In determining the public interest in a request for use, sale, lease, or transfer of interest in sovereignty lands or severance of materials from sovereignty lands, the board shall consider the ultimate project and purpose to be served by said use, sale, lease, or transfer of lands or materials." Fla. Admin. Code R. 18-21.003(54).

natural resources.<sup>17</sup> If objections are filed and it appears the conveyance of submerged lands would result in the destruction of grass flats suitable as nursery or feeding grounds for marine life, the Board of Trustees must withdraw the lands from sale.<sup>18</sup>

Florida law authorizes the Board of Trustees to adopt rules to administer sovereign submerged lands.<sup>19</sup> 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.<sup>20</sup> The Department of Environmental Protection (DEP) and the Department of Agriculture and Consumer Services (DACS) act as staff to the Board of Trustees in the review of proposed uses of sovereign submerged lands.<sup>21</sup> 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.<sup>22</sup>

In determining whether an activity is not contrary to the public interest or is in the public interest, DEP must consider and balance the following criteria:

- Whether the activity will adversely affect the public health, safety, or welfare or the property of others;
- Whether the activity will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats;
- Whether the activity will adversely affect navigation or the flow of water or cause harmful erosion or shoaling;
- Whether the activity will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity;
- Whether the activity will be of a temporary or permanent nature;
- Whether the activity will adversely affect or will enhance significant historical and archaeological resources under the provisions of s. 267.061; and
- The current condition and relative value of functions being performed by areas affected by the proposed activity.<sup>23</sup>

## Mitigation

### *Federal Mitigation*

The U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers (USACE) promulgate federal regulations establishing environmental criteria, and mechanisms for compensatory mitigation, under Section 404. The regulations require a permit applicant to take

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<sup>17</sup> Section 253.12(2)(a), F.S.

<sup>18</sup> Section 253.12(4)(e), F.S.

<sup>19</sup> Sections 253.03(7) and 253.73, F.S.

<sup>20</sup> See Fla. Admin. Code R. 18-21.005.

<sup>21</sup> 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 Jan. 11, 2022); see also Dep't of Agriculture and Consumer Services, *Aquaculture Submerged Land Leasing*, <https://www.fdacs.gov/Agriculture-Industry/Aquaculture/Aquaculture-Submerged-Land-Leasing> (last visited Jan. 11, 2022).

<sup>22</sup> Fla. Admin. Code R. 18-21.002(1).

<sup>23</sup> Section 373.414(1)(a), F.S.

all appropriate and practicable steps to avoid and minimize adverse impacts to waters of the U.S.<sup>24</sup> 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.<sup>25</sup>

There are three basic types of compensatory mitigation under Section 404:

- Mitigation banks — a mitigation bank sells compensatory mitigation credits to permittees whose obligation to provide compensatory mitigation is then transferred to the mitigation bank sponsor. Mitigation banking is the preferred method of compensatory mitigation under the federal regulations. Reasons for this include that the banks have an approved mitigation plan and financial assurances, credits are not released until specific milestones are achieved, and banks typically involve larger, more ecologically valuable parcels.
- In-lieu fee programs — funds are paid to a governmental or non-profit entity for natural resources management. Similar to a bank, an in-lieu fee program sells credits to permittees whose obligation is then transferred to the in-lieu program sponsor. However, the rules governing in-lieu fee programs are somewhat different, and their operation and use are governed by an in-lieu fee program instrument.
- Permittee-responsible mitigation — activities are undertaken by the permittee, or an authorized agent or contractor, to provide compensatory mitigation for which the permittee retains full responsibility.<sup>26</sup>

### *State Mitigation*

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).<sup>27</sup> 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.<sup>28</sup> ERP applications are processed by either DEP or one of the water management districts in accordance with the division of

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<sup>24</sup> 40 C.F.R. s. 230.91(c); *see generally* 40 C.F.R. pt. 230 and 33 C.F.R. pt. 322. USACE administers permitting under Section 404 of the Clean Water Act, which generally requires a permit for any discharge of dredged or fill material into waters of the U.S., including wetlands. 33 U.S.C. s. 1344 (2021); U.S. Environmental Protection Agency (EPA), *Wetland Regulatory Authority*, available at [https://www.epa.gov/sites/production/files/2015-03/documents/404\\_reg\\_authority\\_fact\\_sheet.pdf](https://www.epa.gov/sites/production/files/2015-03/documents/404_reg_authority_fact_sheet.pdf) (last visited Jan. 11, 2022). 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. DEP, *State 404 Program*, <https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/state-404-program> (last visited Jan. 11, 2022); DEP, *State 404 Program Applicant’s Handbook*, § 1.1, available at <https://www.flrules.org/gateway/reference.asp?No=Ref-12064> (last visited Jan. 11, 2022).

<sup>25</sup> EPA, *Wetlands Compensatory Mitigation*, available at [https://www.epa.gov/sites/production/files/2015-08/documents/compensatory\\_mitigation\\_factsheet.pdf](https://www.epa.gov/sites/production/files/2015-08/documents/compensatory_mitigation_factsheet.pdf) (last visited Jan. 11, 2022).

<sup>26</sup> EPA, *Mechanisms for Providing Compensatory Mitigation under CWA Section 404*, <https://www.epa.gov/cwa-404/mechanisms-providing-compensatory-mitigation-under-cwa-section-404> (last visited Jan. 11, 2022); *see also* 40 C.F.R. s. 290.93(b).

<sup>27</sup> DEP, *Submerged Lands and Environmental Resources Coordination Program*, <https://floridadep.gov/water/submerged-lands-environmental-resources-coordination> (last visited Jan. 11, 2022).

<sup>28</sup> South Florida Water Management District, *Environmental Resource Permits*, <https://www.sfwmd.gov/doing-business-with-us/permits/environmental-resource-permits> (last visited Jan. 11, 2022).

responsibilities specified in operating agreements between DEP and the water management districts.<sup>29</sup>

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.<sup>30</sup> After such requirements have been completed, mitigation is required to offset the adverse impacts.<sup>31</sup> Mitigation under the ERP program is evaluated in light of the programmatic goal of no net loss of wetland and other surface water functions.<sup>32</sup> Mitigation can be conducted on-site, off-site, or through the purchase of credits from a mitigation bank, or through a combination of approaches.<sup>33</sup> Off-site mitigation is preferred when on-site mitigation is not expected to have long-term viability, or when off-site mitigation will provide greater improvement in ecological value.<sup>34</sup>

Florida law authorizes DEP and the water management districts to require permits authorizing the establishment and use of mitigation banks.<sup>35</sup> DEP has adopted rules that serve as the basis for mitigation bank permitting done by DEP and the water management districts.<sup>36</sup>

### **Mitigation Banking**

Generally, mitigation banking is a practice in which an environmental enhancement and preservation project is conducted by a public agency or private entity to provide mitigation for unavoidable wetland impacts within a defined mitigation service area.<sup>37</sup> 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.<sup>38</sup> The number of potential credits permitted for the bank, and the credit debits required for impact permits, are determined by the permitting agencies.<sup>39</sup>

Creation of a mitigation bank in Florida requires both a permit from DEP or a water management district, and federal approval of a mitigation bank instrument from several agencies led by USACE, in a joint state/federal interagency review team.<sup>40</sup> Through this process, depending on agency approval, a mitigation bank may provide mitigation for permittees under both the federal and state permitting programs.

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<sup>29</sup> DEP, *Submerged Lands and Environmental Resources Coordination Program*, <https://floridadep.gov/water/submerged-lands-environmental-resources-coordination> (last visited Jan. 11, 2022).

<sup>30</sup> See generally 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 Jan. 11, 2022).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 10-1, 10-24.

<sup>33</sup> *Id.* at 10-25.

<sup>34</sup> *Id.*

<sup>35</sup> See generally ss. 373.4135 and 373.4136, F.S.

<sup>36</sup> See generally Fla. Admin. Code Ch. 62-342.

<sup>37</sup> DEP, *Mitigation and Mitigation Banking*, <https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/mitigation-and-mitigation-banking> (last visited Jan. 11, 2022).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> DEP, *Mitigation Banking Rule and Procedure Synopsis*, <https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/mitigation-banking-rule-and> (last visited Jan. 11, 2022).

Requirements for permitting mitigation banks differ between mitigation bank instruments issued by the USACE and state permits issued by DEP or the water management districts. Under the federal process, a mitigation banking instrument serves as the legal document for the establishment, operation, and use of a mitigation bank.<sup>41</sup> They are approved by an interagency review team, through procedures involving public notice and comment.<sup>42</sup> Mitigation banking instruments must include certain detailed elements, such as a comprehensive mitigation plan including financial assurances, and a credit release schedule that is tied to the achievement of specific milestones.<sup>43</sup>

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;
- 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.<sup>44</sup>

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.<sup>45</sup>

## **Seagrass Mitigation Banking**

### *Conceptually*

Seagrass mitigation banking is a concept that applies the practices of mitigation banking to seagrass resources, where seagrass resources could be restored, established, enhanced, or preserved in a mitigation bank, which then generates credits that may be used to offset unavoidable impacts to seagrass resources elsewhere. Proponents argue that incentivizing third parties to protect and maintain a large, healthy area of seagrass beds in advance with an off-site

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<sup>41</sup> 33 C.F.R. s. 332.2.

<sup>42</sup> 33 C.F.R. s. 332.8; 40 C.F.R. s. 230.98.

<sup>43</sup> See generally 33 C.F.R. s. 332.8(d)(6); see also 40 C.F.R. s. 230.98(d)(6).

<sup>44</sup> Section 373.4136(1), F.S.

<sup>45</sup> *Id.*; Fla. Admin. Code R. 62-342.400.

mitigation bank can provide better protection of seagrass resources than permittee-responsible mitigation.<sup>46</sup>

### ***Legislation***

In 2008, the Legislature passed a bill authorizing the Board of Trustees to provide for the establishment of seagrass mitigation banks to offset the unavoidable impacts of projects where they meet the applicable public interest test.<sup>47</sup> The bill also stated that the authorization “shall not prohibit mitigation for impacts to seagrass or other habitats on sovereignty submerged lands for other types of projects, or for projects occurring on non-sovereign submerged lands, upon applicable approval of the board of trustees.”<sup>48</sup>

Governor Crist vetoed the 2008 bill.<sup>49</sup> The veto letter stated that authorizing the conveyance of sovereignty submerged lands for a bank selling credits to facilitate the destruction of seagrasses on sovereignty submerged lands elsewhere could fail the constitutional public interest test.<sup>50</sup> The Governor raised concerns about the long-term success of artificially-created seagrass beds, and stated that seagrass mitigation banks would likely result in the net destruction of seagrass beds.<sup>51</sup> In addition to seagrass beds, the letter stated that the legislation allows an applicant to seek approval from the Board of Trustees for any project involving destruction of habitat in sovereignty submerged lands that does not pass the public interest test. Finally, the letter stated that implementing the banks would require excluding the public from the sovereignty submerged lands and contravene the public’s navigation rights.<sup>52</sup>

In 2021, another bill was introduced that authorized the Board of Trustees to establish seagrass mitigation banks, and which expressly did not prohibit mitigation, upon approval of the Board of Trustees, for impacts to other habitats on sovereignty submerged lands or non-sovereignty submerged lands.<sup>53</sup> In its first committee of reference, the bill was amended to specify that the Board of Trustees “may authorize leases” for seagrass mitigation banks, and also to require DEP to modify its rules to remove duplicative financial assurance requirements and ensure permitted seagrass mitigation banks comply with the federal mitigation banking rules.<sup>54</sup> The bill died in its second committee of reference.

In a 2021 analysis, DEP raised several concerns and comments about seagrass mitigation banks.<sup>55</sup> DEP stated that the long-term dedication necessary to establish the banks may conflict with the Board of Trustees’ policy and purpose to allow for public access to sovereignty

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<sup>46</sup> See generally Stephanie A. Broad, *Seagrass Mitigation Banks and the Governor’s Veto*, 39 STETSON L. REV. 285 (2009), available at <https://www.stetson.edu/law/lawreview/media/vol-39-1-broad.pdf> (last visited Jan. 11, 2022).

<sup>47</sup> CS/HB 7059 (Reg. Sess. 2008).

<sup>48</sup> *Id.*

<sup>49</sup> Letter from Governor Charlie Crist to Secretary Kurt S. Browning (June 30, 2008), available at <https://static.votesmart.org/static/vetotext/21176.pdf> (last visited Jan. 11, 2022).

<sup>50</sup> *Id.* at 1.

<sup>51</sup> *Id.* at 2.

<sup>52</sup> *Id.*

<sup>53</sup> SB 1668 (Reg. Sess. 2021).

<sup>54</sup> CS/SB 1668 (Reg. Sess. 2021). The amendment also removed the reference to non-sovereignty submerged lands. See *id.*

<sup>55</sup> DEP, 2021 Legislative Session, Bill #: SB 1668 (2021), available at [https://www.flsenate.gov/Committees/Show/EN/MeetingPacket/5170/9341\\_MeetingPacket\\_5170.29.21.pdf](https://www.flsenate.gov/Committees/Show/EN/MeetingPacket/5170/9341_MeetingPacket_5170.29.21.pdf) (last visited Jan. 11, 2022).

submerged lands, including swimming, boating, and fishing.<sup>56</sup> DEP expressed concern that if state-owned lands that were purchased with bond proceeds were used for seagrass mitigation banks – a revenue-generating activity – it could trigger taxation of the interest on the bonds in violation of the Internal Revenue Service’s regulations and the bond indenture. DEP’s analysis also agreed with the concerns regarding mitigation banks that were raised by the 2008 veto letter, commenting that preserving seagrass resources is not appropriate for compensatory mitigation, because if loss or degradation of seagrass resources are said to be offset by preserving existing seagrasses that are already protected then there will be a net loss of seagrass resources.<sup>57</sup>

### III. Effect of Proposed Changes:

The bill amends s. 253.03, F.S., to authorize the Board of Trustees to establish seagrass mitigation banks consistent with state law, to both ensure the preservation and regeneration of seagrass as defined in state law, and to offset the unavoidable impacts of projects when seagrass mitigation banks meet the public interest criteria in existing law.

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

The bill takes effect on July 1, 2022.

### 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.

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<sup>56</sup> *Id.* at 1.

<sup>57</sup> *Id.* at 2.

**V. Fiscal Impact Statement:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

None.

**C. Government Sector Impact:**

The Board of Trustees may realize a marginal increase in proprietary authorization fees due to the establishment of seagrass mitigation banks on sovereignty submerged lands. The bill may also result in increased costs to the Board of Trustees and DEP because rulemaking, and potentially the establishment of a new program, may be necessary to implement the requirements contained in the bill.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends section 253.03 of the Florida Statutes.

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

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

None.

**B. Amendments:**

None.