

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 Community Affairs

BILL: SB 532

INTRODUCER: Senator Lee

SUBJECT: Wetland Mitigation

DATE: February 28, 2019

REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|---------|----------------|-----------|--------------------|
| 1. | Peacock | Yeatman | CA | Pre-meeting |
| 2. | | | AEG | |
| 3. | | | AP | |

I. Summary:

SB 532 seeks to reinstate an offsite mitigation option that existed in Florida law prior to 2012. The bill amends current law provisions relating to wetland mitigation banking to allow a governmental entity to provide mitigation for a project other than its own if the mitigation credits available from such mitigation are only sold or used when alternative mitigation credits are not available.

II. Present Situation:

Background, Legislative Intent and Purpose

Environmental mitigation, as it relates to wetlands regulatory programs, is generally defined as “the creation, restoration, preservation or enhancement of wetlands to compensate for permitted wetlands losses.”¹ Mitigation banking is a concept designed to increase the success of environmental mitigation efforts and reduce costs to developers of individual mitigation projects.²

Section 404 of the federal Clean Water Act (CWA)³ and early Florida law attempted to regulate wetlands impacts; however, the regulations did not specifically establish a wetlands protection program. The Florida Legislature responded to the lack of both a comprehensive policy and a regulatory framework to handle environmental mitigation efforts with passage of s. 373.4135,

¹ John J. Fumero, *Environmental Law: 1994 Survey of Florida Law – At a Crossroads in Natural Resource Protection and Management in Florida*, 19 Nova L. Rev. 77, 101 (1994), available at <https://nsuworks.nova.edu/cgi/viewcontent.cgi?article=1537&context=nlr> (last visited Feb. 21, 2019).

² *Id.* at 103.

³ 33 U.S.C. s. 1344. Section 404 of the CWA establishes a program to regulate the discharge of dredged or fill material into the waters of the United States, including wetlands. See U.S. Environmental Protection Agency, Section 404 Permit Program, available at <https://www.epa.gov/cwa-404/section-404-permit-program> (last visited Feb. 28, 2019).

F.S., as part of the Florida Environmental Reorganization Act of 1993.⁴ Section 373.4135, F.S., directs the Department of Environmental Protection (DEP)⁵ and the water management districts (WMDs)⁶ to participate in and encourage the establishment of private and public mitigation banks and offsite regional mitigation. The Legislature intended that the provisions for establishing mitigation banks would apply equally to both public and private entities, except for necessary variability for the DEP and each WMD to ensure the construction and perpetual protection of mitigation banks.⁷ Section 373.4135(1), F.S., recognizes the “improved likelihood of environmental success” associated with the establishment of mitigation banks, especially favoring “the restoration and enhancement of degraded ecosystems and the preservation of uplands and wetlands as intact ecosystems . . . through restoration of ecological communities that were historically present.”

Mitigation Banking Process

In 1994, rules governing the establishment and use of mitigation banks were adopted.⁸ The substantive aspects of these rules were later codified⁹ in s. 373.4136, F.S., and further specified in Ch. 62-342, F.A.C.

Mitigation banking is a practice in which an environmental enhancement and preservation project is conducted by a public agency or private entity (banker¹⁰) to provide mitigation for unavoidable wetland impacts within a defined region (mitigation service area). The bank is the site itself, and the currency sold by the banker to the impact permittee is a credit, which represents the wetland ecological value equivalent to the complete restoration of one acre. The number of potential credits permitted for the bank and the credit debits required for impact permits are determined by the permitting agencies. The Uniform Mitigation Assessment Method (UMAM)¹¹ is the method of assessment for banks established after February 2, 2004.¹²

⁴ Fumero, *supra* note 1, at 103. *Also, see* Ch. 93-213, ss. 1 and 29, Laws of Fla.

⁵ The DEP is the state’s lead agency for environmental management and stewardship, protecting the state’s air, water and land. *See* About DEP, available at <https://floridadep.gov/about-dep> (last visited Feb. 22, 2019). The head of DEP is the secretary appointed by the Governor, with the concurrence of three members of the Cabinet. The secretary must be confirmed by the Florida Senate and serves at the pleasure of the Governor. *See* s. 20.255, F.S.

⁶ Florida’s five WMDs include the Northwest Florida Management Water District, the Suwannee River Water Management District, the St. John’s Water Management District, the Southwest Florida Water Management District, and the South Florida Water Management District. The DEP exercises general supervisory authority over the WMDs through a cooperative working relationship and guidance memos. *See* Florida DEP, Divisions, Office of Water Policy, Water Management Districts, available at <https://floridadep.gov/water-policy/water-policy/content/water-management-districts> (last visited Feb. 27, 2019).

⁷ Section 373.4135(1)(a), F.S.

⁸ The rules have been amended several times and are incorporated in Ch. 62-342, F.A.C.

⁹ In 1996, the Legislature revised the statutes on mitigation banking and the substantive sections of the rules were placed in s. 373.4136, F.S. *See* Ch. 96-371, Laws of Fla.

¹⁰ Rule 62-342.200(1), F.A.C., defines “banker” as an entity that creates, operates, manages, or maintains a Mitigation Bank pursuant to a Mitigation Bank Permit.

¹¹ The UMAM provides a standardized procedure for assessing the ecological values and functions of wetlands and other surface waters. *See* Florida DEP, Division of Water Resource Management, Submerged Lands and Environmental Resources Coordination Program, Wetlands Mitigation, available at <https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/mitigation> (last visited Feb. 26, 2019).

¹² *See* Florida DEP, Division of Water Resource Management, Submerged Lands and Environmental Resources Coordination Program, Mitigation and Mitigation Banking available at <https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/mitigation-and-mitigation-banking> (last visited Feb. 26, 2019).

A banker must apply for a mitigation bank permit before establishing and operating a mitigation bank.¹³ 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.¹⁴

Also, the applicant for a mitigation bank must provide reasonable assurances that:

- Any surface water management system to be constructed, altered, operated, maintained, abandoned, or removed within the mitigation bank will meet the requirements of part IV, ch. 373, F.S., and the rules adopted thereunder;
- 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.¹⁵

Mitigation banks are permitted by the DEP or one of the WMDs that has adopted rules, based on the location of the bank and activity-based considerations.¹⁶ Additionally, a mitigation bank requires federal authorization in the form of a Mitigation Bank Instrument (MBI) signed by several agencies, with the U.S. Army Corps of Engineers as lead. The DEP strongly encourages the mitigation bank applicant to have at least one pre-application meeting with an Interagency Review Team (IRT), consisting of all state and federal agencies that will be involved in processing the permit. The agencies that would generally make up the IRT are:

- U.S. Army Corps of Engineers, Jacksonville District (Corps.)
- National Marine Fisheries Services (NMFS)
- U.S. Fish and Wildlife Service (FWS)
- U.S. Environmental Protection Agency (EPA)
- Florida Fish and Wildlife Conservation Commission (FWC)
- Florida Department of Environmental Protection (DEP) or
- St. Johns River Water Management District or
- South Florida Water Management District or
- Southwest Florida Water Management District.¹⁷

¹³ Section 373.4136(1), F.S., and Rule 62-342.450, F.A.C.

¹⁴ Section 373.4136(1), F.S., and Rule 62-342.400, F.A.C.

¹⁵ *Id.* Also, see Rule 62-342.700, F.A.C.

¹⁶ See Florida DEP, Division of Water Resource Management, Submerged Lands and Environmental Resources Coordination Program, Mitigation Banking Rule and Procedure Synopsis, available at <https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/mitigation-banking-rule-and> (last visited Feb. 27, 2019).

¹⁷ *Id.*

In-Lieu-Fee Program

In 2000,¹⁸ the Legislature created an in-lieu-fee program¹⁹ by amending s. 373.4135, F.S., to allow the DEP, WMDs, and local governments to sponsor regional offsite mitigation area (ROMA) projects that are paid for by monies accepted as mitigation. A memorandum of agreement is required between the sponsoring agency, and the DEP or WMD, as appropriate, for any ROMA used for five or more projects or for more than 35 acres of impact. The major difference between a ROMA and a mitigation bank is that a ROMA can include an acquisition element and does not have to provide the same financial assurances as required in a mitigation bank permit.

Prohibition Under Current Law for Governmental Entities

Prior to 2012, a governmental entity could sponsor a ROMA project paid for by monies accepted as mitigation.

In 2012, the Legislature amended s. 373.4135, F.S.,²⁰ in HB 599. This bill created a new subparagraph (b) in s. 373.4135(1), F.S., to provide that a governmental entity may not create or provide mitigation for a project other than its own unless the governmental entity uses land that was not previously purchased for conservation and unless the governmental entity provides the same financial assurances as required for mitigation banks permitted under s. 373.4136, F.S.

The change made by HB 599 applies when a governmental entity enters the market and acts similarly to a mitigation bank. The governmental entity must comply with the financial responsibility requirements in Rule 62-342.700, F.A.C.²¹ HB 599 exempted certain mitigation banks or areas permitted or established before December 11, 2011, and other specified mitigation types from the prohibition.²²

Mitigation Requirements for Specified Transportation Projects

The Florida Department of Transportation (DOT) and participating transportation authorities²³ offset environmental impacts of transportation projects through the use of mitigation banks and other mitigation options, including the payment of funds to WMDs to develop and implement mitigation plans.²⁴ The mitigation plan is developed by the WMDs and is ultimately approved by

¹⁸ Ch. 2000-133, Law of Fla.

¹⁹ In-lieu fee mitigation occurs in circumstances where a permittee provides funds to an in-lieu-fee sponsor instead of either completing project-specific mitigation or purchasing credits from a wetland mitigation bank. *See Banks and Fees: The Status of Off-Site Wetland Mitigation in the United States*, Environmental Law Institute (Sept. 2002), p. 95, available at https://www.researchgate.net/profile/Christina_Kennedy2/publication/279516639_Banks_Fees_The_Status_of_Off-site_Wetland_Mitigation_in_the_US/links/559460f408ae5d8f392f675d/Banks-Fees-The-Status-of-Off-site-Wetland-Mitigation-in-the-US.pdf?origin=publication_detail (last visited Feb. 28, 2019).

²⁰ Ch. 2012-174, s. 4, Laws of Fla.

²¹ Section 373.4136(11), F.S.

²² Section 373.4135(1)(b), F.S.

²³ Chapters 348 and 349, F.S.

²⁴ Section 373.4137, F.S.

the DEP.²⁵ The ability to exclude a project from the mitigation plan is provided to the DOT, a participating transportation authority, or a WMD.²⁶

III. Effect of Proposed Changes:

Section 1 amends s. 373.4135, F.S., to authorize a governmental entity to create or provide mitigation for a project other than its own if the mitigation credits available from such mitigation are only sold or used when alternative mitigation credits are not available from a mitigation bank permitted under s. 373.4136, F.S., as determined by the DEP or WMD.

Section 2 provides that the bill takes effect July 1, 2019.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill may have a positive impact on the building industry, providing an alternative source of mitigation credits for developers to purchase in the event that private mitigation bank credits are unavailable.

C. Government Sector Impact:

The bill eases restrictions on governmental entities conducting offsite wetland mitigation activities on publicly owned land. The bill may have a positive fiscal impact on

²⁵ *Id.*

²⁶ *Id.*

governmental entities who conduct offsite mitigation activities under the conditions provided in the bill.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 373.4135 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.