

1 A bill to be entitled
2 An act relating to mitigation; amending s. 373.4137,
3 F.S.; revising legislative intent to encourage the use
4 of other mitigation options that satisfy state and
5 federal requirements; providing the Department of
6 Transportation or a transportation authority the
7 option of participating in a mitigation project;
8 requiring the Department of Transportation or a
9 transportation authority to submit lists of its
10 projects in the adopted work program to the water
11 management districts; requiring a list rather than a
12 survey of threatened or endangered species and species
13 of special concern affected by a proposed project;
14 providing conditions for the release of certain
15 environmental mitigation funds; prohibiting a
16 mitigation plan from being implemented unless the plan
17 is submitted to and approved by the Department of
18 Environmental Protection; providing additional factors
19 that must be explained regarding the choice of
20 mitigation bank; removing a provision requiring an
21 explanation for excluding certain projects from the
22 mitigation plan; providing criteria that the
23 Department of Transportation must use in determining
24 which projects to include in or exclude from the
25 mitigation plan; amending s. 373.4135, F.S.;
26 authorizing a governmental entity to create or provide
27 mitigation for projects other than its own under
28 specified circumstances; providing applicability;

29 providing an effective date.

30

31 Be It Enacted by the Legislature of the State of Florida:

32

33 Section 1. Subsections (1) and (2), paragraph (c) of
 34 subsection (3), and subsections (4) and (5) of section 373.4137,
 35 Florida Statutes, are amended to read:

36 373.4137 Mitigation requirements for specified
 37 transportation projects.—

38 (1) The Legislature finds that environmental mitigation
 39 for the impact of transportation projects proposed by the
 40 Department of Transportation or a transportation authority
 41 established pursuant to chapter 348 or chapter 349 can be more
 42 effectively achieved by regional, long-range mitigation planning
 43 rather than on a project-by-project basis. It is the intent of
 44 the Legislature that mitigation to offset the adverse effects of
 45 these transportation projects be funded by the Department of
 46 Transportation and be carried out by ~~the water management~~
 47 ~~districts, including~~ the use of mitigation banks and any other
 48 mitigation options that satisfy state and federal requirements
 49 ~~established pursuant to this part.~~

50 (2) Environmental impact inventories for transportation
 51 projects proposed by the Department of Transportation or a
 52 transportation authority established pursuant to chapter 348 or
 53 chapter 349 shall be developed as follows:

54 (a) By July 1 of each year, the Department of
 55 Transportation or a transportation authority established
 56 pursuant to chapter 348 or chapter 349 which chooses to

57 participate in the program shall submit to the water management
 58 districts a list ~~copy~~ of its projects in the adopted work
 59 program and an environmental impact inventory of habitats
 60 addressed in the rules adopted pursuant to this part and s. 404
 61 of the Clean Water Act, 33 U.S.C. s. 1344, which may be impacted
 62 by its plan of construction for transportation projects in the
 63 next 3 years of the tentative work program. The Department of
 64 Transportation or a transportation authority established
 65 pursuant to chapter 348 or chapter 349 may also include in its
 66 environmental impact inventory the habitat impacts of any future
 67 transportation project. The Department of Transportation and
 68 each transportation authority established pursuant to chapter
 69 348 or chapter 349 may fund any mitigation activities for future
 70 projects using current year funds.

71 (b) The environmental impact inventory shall include a
 72 description of these habitat impacts, including their location,
 73 acreage, and type; state water quality classification of
 74 impacted wetlands and other surface waters; any other state or
 75 regional designations for these habitats; and a list ~~survey~~ of
 76 threatened species, endangered species, and species of special
 77 concern affected by the proposed project.

78 (3)

79 (c) Except for current mitigation projects in the
 80 monitoring and maintenance phase and except as allowed by
 81 paragraph (d), the water management districts may request a
 82 transfer of funds from an escrow account no sooner than 30 days
 83 before ~~prior to~~ the date the funds are needed to pay for
 84 activities associated with development or implementation of the

85 approved mitigation plan described in subsection (4) for the
86 current fiscal year, including, but not limited to, design,
87 engineering, production, and staff support. Actual conceptual
88 plan preparation costs incurred before plan approval may be
89 submitted to the Department of Transportation or the appropriate
90 transportation authority each year with the plan. The conceptual
91 plan preparation costs of each water management district will be
92 paid from mitigation funds associated with the environmental
93 impact inventory for the current year. The amount transferred to
94 the escrow accounts each year by the Department of
95 Transportation and participating transportation authorities
96 established pursuant to chapter 348 or chapter 349 shall
97 correspond to a cost per acre of \$75,000 multiplied by the
98 projected acres of impact identified in the environmental impact
99 inventory described in subsection (2). However, the \$75,000 cost
100 per acre does not constitute an admission against interest by
101 the state or its subdivisions and ~~nor~~ is not ~~the cost~~ admissible
102 as evidence of full compensation for any property acquired by
103 eminent domain or through inverse condemnation. Each July 1, the
104 cost per acre shall be adjusted by the percentage change in the
105 average of the Consumer Price Index issued by the United States
106 Department of Labor for the most recent 12-month period ending
107 September 30, compared to the base year average, which is the
108 average for the 12-month period ending September 30, 1996. Each
109 quarter, the projected acreage of impact shall be reconciled
110 with the acreage of impact of projects as permitted, including
111 permit modifications, pursuant to this part and s. 404 of the
112 Clean Water Act, 33 U.S.C. s. 1344. The subject year's transfer

113 of funds shall be adjusted accordingly to reflect the acreage of
114 impacts as permitted. The Department of Transportation and
115 participating transportation authorities established pursuant to
116 chapter 348 or chapter 349 are authorized to transfer such funds
117 from the escrow accounts to the water management districts to
118 carry out the mitigation programs. Environmental mitigation
119 funds that are identified for or maintained in an escrow account
120 for the benefit of a water management district may be released
121 if the associated transportation project is excluded in whole or
122 part from the mitigation plan. For a mitigation project that is
123 in the maintenance and monitoring phase, the water management
124 district may request and receive a one-time payment based on the
125 project's expected future maintenance and monitoring costs. Upon
126 disbursement of the final maintenance and monitoring payment,
127 the escrow account for the project established by the Department
128 of Transportation or the participating transportation authority
129 may be closed. Any interest earned on these disbursed funds
130 shall remain with the water management district and must be used
131 as authorized under this section.

132 (4) Before ~~Prior to~~ March 1 of each year, each water
133 management district, in consultation with the Department of
134 Environmental Protection, the United States Army Corps of
135 Engineers, the Department of Transportation, participating
136 transportation authorities established pursuant to chapter 348
137 or chapter 349, and other appropriate federal, state, and local
138 governments, and other interested parties, including entities
139 operating mitigation banks, shall develop a plan for the primary
140 purpose of complying with the mitigation requirements adopted

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141 pursuant to this part and 33 U.S.C. s. 1344. In developing such
142 plans, the districts shall use ~~utilize~~ sound ecosystem
143 management practices to address significant water resource needs
144 and shall focus on activities of the Department of Environmental
145 Protection and the water management districts, such as surface
146 water improvement and management (SWIM) projects and lands
147 identified for potential acquisition for preservation,
148 restoration, or enhancement, and the control of invasive and
149 exotic plants in wetlands and other surface waters, to the
150 extent that the ~~such~~ activities comply with the mitigation
151 requirements adopted under this part and 33 U.S.C. s. 1344. In
152 determining the activities to be included in the ~~such~~ plans, the
153 districts shall ~~also~~ consider the purchase of credits from
154 public or private mitigation banks permitted under s. 373.4136
155 and associated federal authorization and shall include the ~~such~~
156 purchase as a part of the mitigation plan when the ~~such~~ purchase
157 would offset the impact of the transportation project, provide
158 equal benefits to the water resources than other mitigation
159 options being considered, and provide the most cost-effective
160 mitigation option. The mitigation plan shall be submitted to the
161 water management district governing board, or its designee, for
162 review and approval. At least 14 days before ~~prior to~~ approval,
163 the water management district shall provide a copy of the draft
164 mitigation plan to any person who has requested a copy. The plan
165 may not be implemented until it is submitted to and approved by
166 the Department of Environmental Protection.

167 (a) For each transportation project with a funding request
168 for the next fiscal year, the mitigation plan must include a

169 brief explanation of why a mitigation bank was or was not chosen
170 as a mitigation option, including an estimation of identifiable
171 costs of the mitigation bank and nonbank options and other
172 factors such as time saved, liability for success of the
173 mitigation, and long-term maintenance ~~to the extent practicable.~~

174 (b) Specific projects may be excluded from the mitigation
175 plan, in whole or in part, and are ~~shall not be~~ subject to this
176 section upon the election ~~agreement~~ of the Department of
177 Transportation, ~~or~~ a transportation authority if applicable, or
178 and the appropriate water management district ~~that the inclusion~~
179 ~~of such projects would hamper the efficiency or timeliness of~~
180 ~~the mitigation planning and permitting process. The water~~
181 ~~management district may choose to exclude a project in whole or~~
182 ~~in part if the district is unable to identify mitigation that~~
183 ~~would offset impacts of the project.~~

184 (c) When determining which projects to include in or
185 exclude from the mitigation plan, the Department of
186 Transportation shall investigate using credits from a permitted
187 private mitigation bank before those projects are submitted to,
188 or are allowed to remain in, the plan.

189 1. The investigation shall include the cost-effectiveness
190 of private mitigation bank credits.

191 2. The cost-effectiveness analysis must be in writing and
192 consider:

193 a. How the nominal cost of the private mitigation bank
194 credits compares with the nominal cost for any given project to
195 be included in the plan;

196 b. The value of complying with federal transportation

197 policies for federal aid projects;

198 c. The value that private mitigation bank credits provide
 199 as the result of the expedited approvals by the Army Corps of
 200 Engineers when private mitigation banks are used; and

201 d. The value that private mitigation banks provide to the
 202 state and its residents as a result of the state and federal
 203 liability for the success of the mitigation transferring to the
 204 private mitigation bank when credits are purchased from the
 205 private mitigation bank.

206 (5) The water management district shall ensure ~~be~~
 207 ~~responsible for ensuring~~ that mitigation requirements pursuant
 208 to 33 U.S.C. s. 1344 are met for the impacts identified in the
 209 environmental impact inventory described in subsection (2), by
 210 implementation of the approved plan described in subsection (4)
 211 to the extent funding is provided by the Department of
 212 Transportation, or a transportation authority established
 213 pursuant to chapter 348 or chapter 349, if applicable. During
 214 the federal permitting process, the water management district
 215 may deviate from the approved mitigation plan in order to comply
 216 with federal permitting requirements.

217 Section 2. Paragraphs (b) through (e) of subsection (1) of
 218 section 373.4135, Florida Statutes, are redesignated as
 219 paragraphs (c) through (f), respectively, and a new paragraph
 220 (b) is added to that subsection to read:

221 373.4135 Mitigation banks and offsite regional
 222 mitigation.—

223 (1) The Legislature finds that the adverse impacts of
 224 activities regulated under this part may be offset by the

225 creation, maintenance, and use of mitigation banks and offsite
226 regional mitigation. Mitigation banks and offsite regional
227 mitigation can enhance the certainty of mitigation and provide
228 ecological value due to the improved likelihood of environmental
229 success associated with their proper construction, maintenance,
230 and management. Therefore, the department and the water
231 management districts are directed to participate in and
232 encourage the establishment of private and public mitigation
233 banks and offsite regional mitigation. Mitigation banks and
234 offsite regional mitigation should emphasize the restoration and
235 enhancement of degraded ecosystems and the preservation of
236 uplands and wetlands as intact ecosystems rather than alteration
237 of landscapes to create wetlands. This is best accomplished
238 through restoration of ecological communities that were
239 historically present.

240 (b) Notwithstanding subsection (5), a governmental entity
241 may not create or provide mitigation for a project other than
242 its own unless the governmental entity uses land that was not
243 previously purchased for conservation and unless the
244 governmental entity provides the same financial assurances as
245 required for mitigation banks permitted under s. 373.4136 and
246 regional offsite mitigation areas permitted under subsection
247 (6). This paragraph does not apply to:

248 1. Mitigation banks permitted prior to December 31, 2011,
249 under s. 373.4136;

250 2. Offsite regional mitigation areas established prior to
251 December 31, 2011, under subsection (6);

252 3. Mitigation for transportation projects under ss.

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253 373.4137 and 373.4139;

254 4. Mitigation for impacts from mining activities under s.

255 373.41492; or

256 5. Mitigation provided for single-family lots or

257 homeowners under subsection (7).

258 Section 3. This act shall take effect upon becoming a law.