Memorandum

MIAMI-DADE COUNTY

Date: October 4, 2011

Agenda Item No. 8(P)(1)(RRR)

To: Honorable Chairman Joe A. Martinez
and Members, Board of County Commissioners

From: Carlos A. Gimenez
Mayor

Subject: Mitigation Credit Purchase and Sale Agreement with the Florida Power & Light Company for the Purchase and Sale of 1.14 Freshwater Herbaceous Mitigation Credits at a Cost of $96,900 to Fulfill the Mitigation Requirements for SW 147 Avenue from SW 11 Street to SW 17 Street Project (Segment One)

RECOMMENDATION

It is recommended that the Board of County Commissioners (Board) approve the attached resolution authorizing the execution of a Mitigation Credit Purchase and Sale Agreement (Agreement) between Miami-Dade County and the Florida Power & Light Company (FPL), a Florida Corporation. The Agreement establishes the purchase of up to a maximum of 1.14 Freshwater Herbaceous Mitigation Credits (mitigation credits) by the County from FPL to fulfill the mitigation requirements of a project to construct two new lanes of a four lane divided roadway along SW 147 Avenue from SW 11 Street to SW 17 Street.

The entire project stretches along SW 147 Avenue from SW 10 Street to SW 22 Street. However, the project has been divided in three portions for the purpose of environmental permitting, each with a separate agreement before the Board for consideration:

- Phase One from SW 10 Street to SW 11 Street,
- Segment One from SW 11 Street to SW 17 Street for which approval is sought through this resolution, and
- Segment Two from SW 17 Street to SW 22 Street.

SCOPE

This project consists of widening SW 147 Avenue, which is in Commission District 11, from two to four lanes. Work also includes raised median, sidewalks, curbs & gutter, pavement markings and signing, roadway lighting, and a continuous storm drainage system.

FISCAL IMPACT/FUNDING SOURCE

The County has allocated $3.405 million for permitting and construction of the entire project. An amount of $300,000 from road impact fees is allocated for the purchase of the required mitigation credits, of which $96,900 will be used to purchase up to 1.14 in mitigation credits needed for this second portion of the project. A total of $3.105 million is allocated from Secondary Gas Tax to construct the roadway. Funding will be derived from Index Code CPE04C.BCC11C.RWIDEN.

DELEGATION OF AUTHORITY

No additional authority is being requested within the body of this contract.

TRACK RECORD/MONITOR

The Public Works Department (PWD) Project Manager responsible for monitoring this project is Francisco Leon, P.E., Project Manager, Highway Division, Plans Review Section.

BACKGROUND

Currently, SW 147 Avenue from SW 11 Street to SW 17 Street is a two-lane roadway and the proposed roadway project will widen the existing road to four-lanes with raised median.

Existing wetlands will be unavoidably impacted by the proposed roadway construction. In order to fulfill the mitigation requirements from the South Florida Water Management District and the Miami-Dade Department of Environmental Resources Management, the County must obtain mitigation credits. FPL has obtained authorization to construct and maintain the Everglades Mitigation Bank (Mitigation Bank) in Miami-Dade County and can transfer credits from the Mitigation Bank to satisfy the mitigation requirements of this project. With Board approval of this item, the County will be authorized to purchase up to 1.14 in mitigation credits to complete the environmental permitting for the second portion between SW 11 Street and SW 17 Street.

County Manager/Deputy Mayor

MEMORANDUM

(Revised)

TO: Honorable Chairman Joe A. Martinez
and Members, Board of County Commissioners

DATE: October 4, 2011

FROM: R. A. Cuevas, Jr.
County Attorney

SUBJECT: Agenda Item No. 8(P)(1)(RRR)

Please note any items checked.

_____ **"3-Day Rule" for committees applicable if raised**

_____ **6 weeks required between first reading and public hearing**

_____ **4 weeks notification to municipal officials required prior to public hearing**

_____ **Decreases revenues or increases expenditures without balancing budget**

_____ **Budget required**

_____ **Statement of fiscal impact required**

_____ **Ordinance creating a new board requires detailed County Manager's report for public hearing**

_____ **No committee review**

_____ **Applicable legislation requires more than a majority vote (i.e., 2/3's ____, 3/5's ____, unanimous_____) to approve**

_____ **Current information regarding funding source, index code and available balance, and available capacity (if debt is contemplated) required**

Approved _____ Mayor
Veto _____
Override _____

Agenda Item No. 8(P)(1)(RRR)
10-4-11

RESOLUTION NO. _____

RESOLUTION APPROVING EXECUTION OF A MITIGATION CREDIT PURCHASE AND SALE AGREEMENT BETWEEN MIAMI-DADE COUNTY AND THE FLORIDA POWER & LIGHT COMPANY, A FLORIDA CORPORATION FOR THE PURCHASE AND SALE OF 1.14 FRESHWATER HERBACEOUS MITIGATION CREDITS AT A COST OF $96,900 TO FULFILL THE MITIGATION REQUIREMENTS FOR SW 147 AVENUE FROM SW 11 STREET TO SW 17 STREET PROJECT (SEGMENT ONE); AUTHORIZING THE COUNTY MAYOR OR COUNTY MAYOR'S DESIGNEE TO EXERCISE THE PROVISIONS THEREIN

WHEREAS, this Board desires to accomplish the purposes outlined in the accompanying memorandum, a copy of which is incorporated herein by reference; and

WHEREAS, both the Florida Power and Light Company and Miami-Dade County wish to facilitate the purchase of mitigation credits for wetland impacts for the SW 147 Avenue Segment One roadway construction,

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF COUNTY COMMISSIONERS OF MIAMI-DADE COUNTY, FLORIDA, that this Board approves the Mitigation Credit Purchase and Sale Agreement between Miami-Dade County and the Florida Power and Light Company for the purchase and sale of the mitigation credits to fulfill the mitigation requirements for the construction of the SW 147 Avenue Segment One, in substantially the form attached hereto and made a part hereof; authorizing the County Mayor or County Mayor's designee to execute same for and on behalf of Miami-Dade County and to exercise the provisions contained therein.

The foregoing resolution was offered by Commissioner , who moved its adoption. The motion was seconded by Commissioner and upon being put to a vote, the vote was as follows:

Joe A. Martinez, Chairman
Audrey M. Edmonson, Vice-Chairwoman

Bruno A. Barreiro	Lynda Bell
Esteban L. Bovo, Jr	Jose "Pepe" Diaz
Sally A. Heyman	Barbara J. Jordan
Jean Monestime	Dennis C. Moss
Rebeca Sosa	Sen. Javier D. Souto
Xavier L. Suarez	

The Chairperson thereupon declared the resolution duly passed and adopted this 4th day of October, 2011. This resolution shall become effective ten (10) days after the date of its adoption unless vetoed by the Mayor, and if vetoed, shall become effective only upon an override by this Board.

MIAMI-DADE COUNTY, FLORIDA
BY ITS BOARD OF
COUNTY COMMISSIONERS

HARVEY RUVIN, CLERK

By:_____
Deputy Clerk

Approved by County Attorney as
to form and legal sufficiency. JEB

Jason E. Bloch

EVERGLADES MITIGATION BANK
MITIGATION CREDIT PURCHASE AND SALE AGREEMENT

THIS MITIGATION CREDIT PURCHASE AND SALE AGREEMENT ("**Agreement**") is made on this 25 day of MAY, 2011, by and between Florida Power & Light Company, a Florida corporation ("**FPL**") and Miami-Dade County Public Works for SW 147 Ave Segment One ("**Purchaser**").

WITNESSETH

WHEREAS, FPL has obtained authorization to construct and maintain the Everglades Mitigation Bank, located in Miami-Dade County, Florida ("**Mitigation Bank**"); and

WHEREAS, FPL has obtained Mitigation Bank Permit Nos. 132622449, 132637449 and 0193232-001 from the Florida Department of Environmental Protection ("**FDEP**"), pursuant to Chapter 62-342, Florida Administrative Code ("**FDEP Permits**"); Permit Nos. 199500155 (IP-GS) and SAJ-1995-155 (IP-TKW) from the U.S. Army Corps of Engineers ("**ACOE**") pursuant to the Clean Water Act Section 404, 33 U.S.C. § 1344 ("**ACOE Permits**"); and Permit No. CC96-303/FW95-035 from the Miami-Dade County Department of Environmental Resources Management ("**DERM Permit**") to construct, operate, manage, and maintain the Mitigation Bank; and

WHEREAS, FPL has obtained a Mitigation Banking Instrument ("MBI") from the ACOE, U.S. Fish and Wildlife Service ("USFWS"), U.S. Environmental Protection Agency ("EPA") and National Marine Fisheries Service ("NMFS") to transfer credits from the Mitigation Bank ("**Mitigation Credits**") to satisfy the mitigation requirements of third parties; and

WHEREAS, for the benefit of the Purchaser, Purchaser is in the process of obtaining the following permits (collectively "**Purchaser's Permit**") from the following agencies to impact wetlands under that agency's regulatory jurisdiction which requires the Purchaser to provide mitigation: (a) Permit Application Number 100128-14 from the South Florida Water Management District (SFWMD) and Permit Number FW10-003 from the Miami-Dade County Department of Environmental Resources Management (DERM). SFWMD and DERM shall collectively be referred to as "**Agency**"; and

WHEREAS, the Purchaser is in the process of obtaining Agency approval or the Agency has approved the use of Mitigation Credits from the Mitigation Bank to fulfill the mitigation requirements of Purchaser's Permits;

NOW, THEREFORE, in consideration of the premises herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

1. **Purchase Price.**

FPL hereby agrees to allocate to Purchaser up to a maximum of 1.14 Freshwater Herbaceous Mitigation Credits in the Mitigation Bank to partially or totally fulfill the mitigation requirements of the Purchaser's Permit in consideration of a total sum of Ninety Six Thousand Nine Hundred Dollars ($96,900.00) (**"Purchase Price"**), payable in U.S. dollars in cash or immediately available funds, subject to the terms herein. The Purchase Price shall be payable as follows:

a) Payment of Ninety Six Thousand Nine Hundred Dollars ($96,900.00) due upon the execution of the Agreement.

The Purchase Price is nonrefundable, except as provided in this Paragraph and in Paragraph 3 and 12 hereof. In the event it is determined by the Purchaser that the Mitigation Credits are not needed, or cannot be utilized, Purchaser shall have the option to apply the deposit, or purchase price to future purchases of Mitigation Credits. If the Agencies determine that Purchaser needs less than 1.06 Mitigation Credits, Purchaser shall notify FPL of the number of Mitigation Credits that Purchaser requires, and the parties shall reduce the Purchase Price based on a price of $85,000.00 per Mitigation Credit. In such event, Purchaser shall be entitled to receive a corresponding refund of the Purchase Price paid and FPL shall retain those Mitigation Credits for which Purchaser received the refund. If the Agencies differ in their determination of the number of Mitigation Credits to be purchased, then the Purchase Price shall be governed by the individual Agency determination reflecting the highest Mitigation Credit required.

2. **FPL's Obligations under this Agreement.**

a. FPL shall cooperate with the Purchaser and with the Agencies and other applicable regulatory agencies to facilitate and expedite the transfer of the Mitigation Credits to the Purchaser to fulfill the mitigation requirements of Purchaser's Permit.

b. Upon FPL's receipt of Purchase Price and Purchaser providing to FPL the Purchaser's Permit, FPL shall assume the responsibility for fulfilling the mitigation requirements of Purchaser's Permit. This responsibility will be met by FPL's compliance with the terms and conditions of its FDEP Permits, ACOE Permits, and DERM Permit. Except as provided in Paragraph 3 below, FPL bears no responsibility or obligation relating to Purchaser's efforts to secure all necessary construction permits.

3. **Credit Purchase Conditioned on Agency Approval of Use of Mitigation Credits as Mitigation.**

Purchase of the Mitigation Credits under this Agreement is conditioned on the Purchaser obtaining the approval of each Agency for the use of the Mitigation Credits to fulfill the mitigation requirements of Purchaser's Permit. Purchaser shall provide FPL with a copy of the Purchaser's Permit within sixty (60) days of receiving it from the Agency to enable FPL to submit the credit withdrawal request as required in Paragraph 4. If Purchaser's inability to provide FPL with a copy of Purchaser's Permit is due to Agency denial of Purchaser's Permit, then Purchaser shall be entitled to receive a refund of the Purchase Price paid and FPL shall retain all Mitigation Credits reserved or withdrawn on Purchase's behalf. A "denial" shall be deemed to occur in the event the Agency's governing body with the authority to approve or deny

the Purchaser's Permit has taken final agency action after Purchaser has made a good faith effort to obtain the Purchaser's Permit.

4. **Withdrawal of Credits.**

Upon FPL's receipt of the full Purchase Price within the time period required and Purchaser providing to FPL the Purchaser's Permit, FPL shall submit a Mitigation Credit withdrawal request to the FDEP and/or ACOE as appropriate pursuant to the Mitigation Credit withdrawal process established in the Mitigation Bank Permits.

After obtaining approval of the Mitigation Credit withdrawal as provided in the FDEP Permits and/or ACOE Mitigation Banking Instrument, FPL, at closing, shall provide to the Purchaser a Certificate to evidence the transfer of the Mitigation Credits from FPL to the Purchaser (**"Mitigation Credit Certificate"**).

5. **Transfer of Credits to Purchaser.**

The closing of the sale of the Mitigation Bank Credits to the Purchaser will take place within thirty (30) days of FPL's receipt of approval of the Mitigation Credit withdrawal from the FDEP and/or ACOE ledger, whichever occurs first, unless extended by other provisions of this Agreement. The closing may be conducted by mail, at the offices of Florida Power & Light Company, 700 Universe Boulevard, Juno Beach, Florida 33408, or at a mutually agreed upon location. At the closing of the sale, FPL shall deliver to Purchaser a Mitigation Credit Certificate reflecting Purchaser's Permit and the FDEP and/or ACOE approved Mitigation Credit withdrawal. If FPL has not received one agency's Mitigation Credit withdrawal approval at closing, FPL will provide to Purchaser an additional Mitigation Credit Certificate reflecting that agency's withdrawal approval within thirty (30) days after FPL receives the same.

6. **Acceptance of Purchase Agreement**

Purchaser shall execute and return this Agreement to FPL within thirty (30) days of receipt. If Purchaser fails to execute and return this Agreement to FPL within thirty (30) days, then FPL may withdraw its offer to enter into a Purchase Agreement with Purchaser.

7. **Fees**

Any returned checks shall be subject to a $50.00 service charge.

8. **Successors and Assigns.**

This Agreement shall inure to the benefit of and be binding upon the successors and assigns of the parties hereto. This Agreement may be assigned by Purchaser to another party, with the prior written consent of FPL, which consent shall not be unreasonably withheld or delayed.

9. **Applicable Law.**

This Agreement shall be construed and enforced in accordance with the laws of the State of Florida. The exclusive venue for any disputes or legal proceedings arising out of or relating to this Agreement, or the parties' relationship shall be in the state or federal courts in Miami-Dade County.

10. **Notices.**

All notices required or remitted by the Agreement shall be in writing and shall be sent by Certified or Registered Mail, by national overnight courier service, or hand-delivered to the address below. Notices shall be deemed delivered and given when mailed, if mailed; or upon receipt, if delivered by hand or by courier.

Notices to FPL shall be sent to: Florida Power & Light Company
700 Universe Blvd., CRE/JB
Juno Beach, FL 33408
Attn: Joseph Sicbaldi

Notices to Purchaser shall be sent to: Esther L. Calas, P.E.
Miami-Dade Public Works
111 NW 1st Street, 16th Floor
Miami, FL 33128

11. **No Third Party Beneficiaries.**

This Agreement does not confer any benefits to persons or entities whom are not either (a) parties to this Agreement, or (b) successors and permitted assigns of the parties to this Agreement.

12. **Remedies.**

Purchaser's failure to make the payments due under this Agreement within the time periods required herein shall constitute the Purchaser's default of this Agreement. In the event of Purchaser's default hereunder and Purchaser's failure to cure such default within 30 business days, FPL shall be entitled to terminate the Agreement and retain the Purchaser's deposits, any Purchase Price paid and all Mitigation Credits reserved or withdrawn on Purchaser's behalf as its sole remedy. If FPL defaults hereunder, Purchaser's sole remedy shall be to terminate this Agreement and obtain a refund of the Purchaser's deposits and any Purchase Price paid. The parties agree and acknowledge that FDEP, the ACOE, and DERM have exclusive jurisdiction to enforce FPL's compliance with the terms and conditions of their respective permits authorizing the Mitigation Bank, and Purchaser agrees it shall not be entitled to sue FPL, and hereby covenants not to sue FPL, to enforce compliance with the terms and conditions of the FDEP Permits, ACOE Permits, or DERM Permit.

13. **Disputes.**

In connection with any legal proceeding between FPL and Purchaser brought to enforce the terms and conditions of this Agreement, the parties shall each pay their own costs and expenses, including without limitation legal and accounting expenses related to the transactions provided for herein.

14. **Brokers.**

Purchaser and FPL represent to each other that neither they nor anyone on their behalf has dealt with or consulted with any broker, agent, or other person in connection with this matter, and that no commission or finder's fee will be payable as a result of the execution of this Agreement or the consummation of the transaction contemplated hereby. In the event a broker, agent, or other person claims to have dealt with one of the parties contrary to the foregoing representation, the party with whom the broker, agent, or other person claims to have dealt or consulted agrees to indemnify and hold the other party harmless against any such claims or demands, including reasonable attorneys' fees and costs incurred by such other party.

15. **Construction.**

This Agreement shall not be construed more strictly against one party than the other by virtue of the fact that it was prepared by counsel for one of the parties.

16. **Interpretation.**

In the interpretation of this Agreement, a single number includes the plural, the words "person" and "party" include corporations, partnerships, firms or associations whenever the context so requires. Captions of paragraphs and sections are for convenience and reference only, and the words contained therein shall in no way be held to explain, modify or amplify or limit the scope or content of the interpretation, construction or meaning of the provisions of this Agreement.

17. **Waiver of Jury Trial.**

Purchaser and FPL agree with each other that each knowingly, voluntarily and intentionally waives the right it may have to a trial by jury in respect of any litigation based hereon, or arising out of, under or in connection with this Agreement, or any document contemplated to be executed in conjunction herewith, or any course of conduct, course of dealing, statement (whether oral or written) or action of the other party.

18. **Entire Agreement.**

The terms and conditions of this Agreement constitute the sole and entire agreement between the parties with respect to the subject matter hereof. This Agreement may be amended, modified or altered only by the written agreement of the parties. This Agreement supersedes any and all previous oral or written agreements and understandings relating to the

subject matter hereof and contains the entire agreement of the parties relating to the subject matter thereof.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be executed the day and year first above written.

By: _____ Date: 8/24/2011

Terry Hicks
Vice President, Corporate Real Estate
Florida Power & Light Company

ATTEST:

HARVEY RUVIN
CLERK OF THE BOARD

MIAMI-DADE COUNTY, FLORIDA,
BY ITS BOARD OF
COUNTY COMMISSIONERS

BY: _____
Deputy Clerk

BY: _____
County Mayor or County Mayor's Designee

Approved by County Attorney
as to form and legal sufficiency _____
County Attorney