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MODEL STATE WETLAND STATUTE
TO
CLOSE THE GAP CREATED BY SWANCC

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INTRODUCTION

Thirty-six states have limited or no wetland regulations applying to isolated wetlands. These states either lack state statutory enabling authority or (if they have authority pursuant to water quality statutes) have not established wetland permitting systems due to lack of funds, staff, perceived need and/or political will. In many states, independent regulation of isolated wetlands was considered unnecessary until recently because the U.S. Army Corps of Engineers (Corps) was regulating many of these wetlands and the states reviewed and conditioned Corps permits pursuant to Section 401 of the Clean Water Act. On January 9, 2001, the U.S. Supreme Court in SWANCC reduced the scope of the Corps Section 404 regulatory program as it applies to isolated wetlands and waters. This also reduced the scope of state Section 401 review. See J. Kusler, The SWANCC Decision and State Regulation of Wetlands which is posted at the ASWM web site, <http://www.aswm.org/>.

Some State Options

States with little or no regulation for isolated wetlands have four principal options for regulating such wetlands (and other wetlands if they wish):

Option 1. A State pollution control agency with an existing Section 401 program could fund and staff a wetland regulatory initiative for isolated wetlands pursuant to existing water quality statutes. Some states with broad pollution control statutes and an existing Section 401 program may be able to exert the authority administratively to control discharges of fill and other material into isolated wetlands without new adoption of new legislation or administrative regulations. However, additional staff and funding would be needed, at a minimum, in most states.

A state legislature could help implement Option 1 by providing funding. This could not only provide necessary financial support but send an important message that the legislature wishes wetlands to be regulated as a part of a pollution control program. There are a number of potential limitations, however, with attempting to regulate isolated wetlands pursuant to existing pollution control statutes:

--Pollution control statutes typically regulate the discharge of pollutants into state waters. It may be legally possible to interpret "fills" as pollutants and "state waters" as including "wetlands" but there may be political opposition to such broad interpretation. It would be much

more difficult to interpret these statutes to regulate drainage or other activities not clearly involving a discharge.

--Section 401 state water quality programs have not, to date, usually involved detailed, multiobjective evaluation of proposed activities in wetlands, issuance of permits, mapping of wetlands, the monitoring of permits, and the conduct of public and landowner education efforts. Many would need to start from scratch in establishing a wetland program (in contrast with conditioning and approving federal Section 404 permits) as part of a pollution control effort. Without new funding, this would require a shift in budgets and program priorities.

Option 2. The State legislature could amend the state water quality statute to explicitly require permits for discharges into wetlands and provide funding and staffing. State legislatures could adopt statutory amendments to state pollution control statutes and regulations to include wetlands where existing water quality statutes may not be sufficiently broad or where state legislatures wish to avoid ambiguity and provide clear guidance. Such statutory changes might include a redefinition of “water” to specifically include “wetlands” and a redefinition of “pollutants” to include discharges of “fill” and other material into wetlands. The goals of the statutes could also be amended to include the goal of protecting habitats and the goal of “no net loss of wetland functions and acreage”. “Drainage might be addressed through the definition of regulated activities. Along with amending the water quality statute, the legislature would also provide funding for the regulatory agency to issue, monitor, and enforce wetland permits.

Legislative adoption of an amendment has several advantages over Option 1. Adoption of an amendment would clarify legislative intent. This is important to regulatory agencies and the regulated community. It is also important to courts in interpreting regulations. The legislature may also be able to more easily provide funding for a clearly defined program.

But, even with statutory amendments there will likely be limitations with efforts to protect and restore wetlands through a pollution control program. These limitations have been described in Option 1 above.

Option 3. The state legislature could amend floodplain, critical area, sensitive area, river protection, public water, watershed management and other programs to include protection of wetlands. State legislatures could at least partially protect isolated wetlands by adding wetland protection criteria and permitting goals into floodplain regulations which typically apply to the 100 year floodplain, critical area statutes, sensitive area statutes, watershed management statutes, and other resource management statutes. This would encourage integration of wetland protection efforts with other resource management activities and could, to some extent, “piggyback” upon existing staffing and funding. But, protection for isolated wetlands would also often be “spotty” due to the piecemeal coverage of these programs. Lack of staff with expertise in wetland protection and restoration may also be a problem.

Option 4. The state legislature could adopt a more comprehensive wetland statute. Such statutes have been adopted in Minnesota, New York, Massachusetts, New Hampshire, Maine, or other states to protect isolated and other wetlands. Such statutes could include goals, legislative findings of fact, definitions, wetland mapping and delineation requirements, permitting

procedures, penalty and enforcement provisions and other provisions such as mitigation bank provisions, and real estate tax incentives. Adoption of a comprehensive statute may be particularly appropriate in a state with large acreages of wetlands. The state legislature would need to not only adopt a comprehensive statute but also provide funding.

The rest of this memorandum sets forth such a model comprehensive wetland statute.

MODEL STATE WETLAND PROTECTION ACT

Introduction to Model

This model draws upon concepts and statutory language contained in the wetland statutes of Massachusetts, Connecticut, New York, Michigan, Maryland, Oregon and other states. It reflects lessons learned with state wetland programs over a period of years. See generally, Kusler, Jon et. al. 1995. State Wetland Regulation: Status of Programs and Emerging Trends, Association of State Wetland Managers, Berne, N.Y. 12023; Kusler, Jon and Richard Hamann. 1985. Wetland Protection: Strengthening the Role of the States. Proceedings of a National Symposium. Univ. of Florida College of Law, Gainesville. Association of State Wetland Managers, Berne, N.Y. 12023; Kusler, Jon. 1977. Strengthening State Wetland Regulations. U.S. Fish and Wildlife Service, Biological Services Program. For description of state programs see also Want, William. 1989 and 2000 revised edition The Law of Wetland Regulation. Clark Boardman, New York, New York. World Wildlife Fund. 1992. Statewide Wetlands Strategies, A Guide to Protecting and Managing the Resource. Island Press, Washington, D.C.

The model will need to be tailored to state needs and preferences.

As written, the model establishes a comprehensive wetland protection program regulating a broad range of activities in for freshwater and coastal wetlands. It could be easily limited to apply only to freshwater wetlands by qualifying the definition of wetland.

The model is designed as a “stand alone” statute like the wetland statutes of the states indicated above rather than an amendment to a water pollution or public water statute. It envisages wetland regulation in a state as a cooperative effort by the state, local government, and federal agencies. The statute vests primary regulatory authority in an existing state agency (the legislature would need to specify which agency). Permitting is primarily at the state level but the agency is authorized to delegate state permitting powers to local governments with wetland protection programs which equal or exceed in stringency the state program. It is provided as a “model” and states will need to tailor the model for their state.

The regulatory agency is given considerable discretion to develop a state wetland protection and restoration program including more specific criteria pertaining to mapping, delineation, permitting, and the use of restoration.

The model statute is designed to reduce duplication and inconsistencies with the federal Section 404 program by using the same wetland definition used in the Clean Water Act’s Section 404 program. It also authorizes the state regulatory agency to adopt joint permit processing

procedures with the Corps in implementing the Section 404 program. The statute also provides the state regulatory agency with broad regulatory powers which could qualify the state for a state programmatic general permit (SPGP) from the Corps or state assumption of Section 404 powers. However, the scope of SPGPs and State Assumption are impacted by SWANCC and the extent of waters that are included in these programs is currently uncertain.

The statute establishes a regulatory framework whereby any person or organization wishing to carry out a regulated activity in a regulated wetland must first obtain a permit. The person or organization must submit a permit application that complies with permit criteria. The regulatory agency may issue, deny, or conditionally deny a permit. The statute provides administrative and judicial appeal procedures and enforcement provisions.

The statute also authorizes the state wetland regulatory agency to facilitate wetland restoration efforts.

This is not however, a comprehensive model wetlands statute. States have other tools available for protecting conserving and managing wetlands. This statute primarily addresses wetland regulation.

Commentary on Model Statute

Section by section commentary on the model statute follows:

Section 1. Title

Comment: The title proposed here is simple. The title could, of course, be changed to a state's liking or to reflect changes in the statute. For example, the title could be the "Freshwater Wetlands Act" if the state wished to confine coverage to freshwater wetlands. The title could be "Wetlands and Watershed Management Act" if the state wished to link wetlands to watershed management as is now being done in many state programs.

Section 2. Statement of Legislative Finding

Legislative findings of fact and statements of policy set forth here can help guide regulatory agencies in implementing the statute. Findings and policy can also help courts interpret legislative intent and enforce statutes and regulations. The findings and policy contained in the model need to be modified to reflect state wetland losses (acreage figure should be included).

It is to be noted that a "no net loss of functions and acreage" goal is included in the statute. Many state programs have formally or informally adopted such a goal. Such a goal has proven very useful in permitting and in establishing standards for mitigation and compensation. The "acreage" as well as function requirement is included because regulatory agencies and permit applicants often have considerable difficulty in evaluating wetland functions in a specific context. Maintaining wetland acreage helps maintain functions even if they are not precisely known and discourages complicated and often unsuccessful efforts to manipulate functions.

Section 3. Definitions

The definitions of wetlands are particularly important because they establish the scope of the regulatory program. With the broad definitions for “wetland” and “regulated activities” proposed in this model, most activities which will damage wetlands within a state will be regulated.

The draft includes a broad definition for wetlands which is identical to the Corps of Engineers Section 404 definition. This will facilitate consistency and coordination with the Section 404 program for wetlands adjacent to navigable waters and their tributaries. This definition is, however, somewhat different than the definition used by the National Wetland Inventory. If a state uses Wetland Inventory Maps, there will be some differences between the mapped wetlands and regulated areas. Nevertheless, Wetland Inventory Maps can be used on a presumptive basis to suggest wetland boundaries. Providing more detailed and specific wetland delineation criteria are available to refine boundaries and settle disputes. See Section 4.

It is to be noted that the present draft also provides a broad definition of “regulated activities”. Virtually all activities which may impact wetlands are included. Many existing statutes partially exempt agriculture and, in some instances, other activities.

Section 4. Implementation of a Wetland Program

This section broadly authorizes the state wetland regulatory agency to establish and implement a wetland protection and restoration program in cooperation with other state agencies, federal agencies (e.g. the Section 404 programs), and local governments. The agency may adopt more specific guidelines and policies pertaining to a variety of matters including permitting criteria, water quality standards for wetlands, mapping and delineation, standards for local government programs, and guidelines for restoration. These include both criteria and procedures for “general” permits and “individual” permits.

Section 5. Mapping and Delineation

This section requires a state agency to map wetlands for regulatory purposes. It allows the agency to use National Wetland Inventory Maps as regulatory maps but requires the regulatory agency to provide procedures for more precisely delineating boundaries on a case-by-case basis utilizing the wetland definition included in the Act. The agency may adopt the 1987 Corps of Engineers Manual for jurisdictional wetlands or adopt its own manual.

Section 6. Permits for Regulated Activities

This section requires a permit for any regulated activity within a wetland. It requires the person or organization proposing such a permit to provide a notification to the appropriate local government (the state will need to specify which type of local government), and adjacent landowners. The section specifies the general types of information required in a permit application but also allows the regulatory agency to require additional information to determine compliance with permit criteria. It requires the regulatory agency to notify other agencies with jurisdiction over the permit application. The regulatory agency is to hold a public hearing if the

proposed activity may have substantial impact upon the wetland or the agency otherwise believes that such a hearing is needed. The section sets forth time deadlines for permit processing.

Section 7. Criteria for Issuance of Permits

This section sets forth factors which the regulatory agency is to consider in deciding whether to issue a permit. This criteria quite closely parallels the permit criteria contained in the Section 404 regulations.

Section 8. Administrative Appeals

This section is optional but provides an administrative procedure for addressing potential taking problems.

Section 9. Judicial Appeals

This section provides a court appeal procedure.

Section 10. Penalties and Enforcement

This section provides penalties for violation of regulations, including fines and jail sentences. The regulatory agency may also order restoration of a wetland illegally filled and may undertake restoration and charge a violator.

Section 11. Local Regulations of Wetlands; State/Local Roles

This section specifically authorizes local governments to regulate wetlands to serve the objectives of this act pursuant to broader land and water use regulatory statutes. It also authorizes the state regulatory agency to authorize local governments which have adopted and administered local regulations which meet or exceed state standards to issue permits in lieu of state permitting for certain types of activities.

Section 12. Restoration and Creation, Use of Mitigation Banks

This section directs the state regulatory agency to facilitate wetland restoration in the state by providing technical assistance and developing guidance. The regulatory agency may also allow permit applicants to utilize mitigation banks under certain conditions.

Model Statute Provisions

Section 1. Title

This act may be cited as the Wetlands Act of (State Name).

Section 2. Statement of Legislative Finding

Wetlands of the State of (State Name) are indispensable but fragile resources. In their natural state, wetlands reduce pollution and nutrients from a broad range of terrestrial sources, store and convey flood waters, reduce wave heights and erosion, provide waterfowl nesting and feeding areas, provide fish habitat, provide habitat for rare and endangered plant and animal species, provide bird watching and outdoor recreation opportunities, and provide food chain support and education and scientific study opportunities. Wetlands play critical roles in water resource protection and watershed management.

More than acres of these important resources have been lost, despoiled, or impaired by filling, draining, dredging and other activities in the State of (State Name) with resulting loss of wetland functions. In addition, development located in altered wetlands is often subject to flood, erosion, soil bearing capacity, onsite waste disposal and other problems. Fill or drainage of wetlands in one area can cause increased flooding and erosion on adjacent lands.

It is, therefore, the policy of the State of (State Name) to insure that no further loss of wetland functions and acreage occur and that net wetland increases occur over time. It is the policy to insure that activities in wetlands will not increase hazards. It is the policy to reduce duplication and insure coordination in wetland programs. It is the policy to encourage the integration of wetland protection and restoration into local comprehensive land management and watershed management programs including floodplain and storm water, pollution control, source water and other programs. Protection and restoration of wetland resources shall be a joint responsibility of the State, local units of government, the federal government, and private citizens.

Section 3. Definitions

The following definitions shall apply throughout this act:

“Person” means any individual, group of individuals, association, firm, partnership, corporation, trust, estate, organization, or legal entity of any kind including governmental corporations.

“Regulated activity” means any activity conducted within a wetland or a regulated buffer area which may decrease wetland functions including discharge of fill material, bulkheading, mining, excavating, draining, and dredging.

“Wetland” means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted to live in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

Section 4. Implementation of a Wetland Program

The (State Agency) shall implement a program for the protection and restoration of state wetlands consistent with the goals, procedures, and criteria set forth in this act. This program shall be carried out cooperatively with other state agencies, federal agencies, local governments, land trusts, landowners and other interested groups and organizations. In carrying out this program the (State Agency) may:

- (a) Adopt wetland maps as set forth in Section 5 below.*
- (b) Adopt more specific rules setting forth procedures and criteria for issuance of wetland permits pursuant to Sections 6 and 7 below including water quality standards for wetlands. These may include procedures and criteria for general as well as individual permits. Best management practices may be proscribed for activities which will not ordinarily require an individual permit due to their limited impacts.*
- (c) Provide technical assistance and training to help local governments develop wetland protection and restoration programs and to help local governments integrate wetland protection and restoration into comprehensive land planning and management efforts including floodplain and stormwater management, pollution control, source water planning, greenway, open space and other efforts.*
- (d) Adopt more specific rules setting forth procedures and criteria for approval of local government wetland regulatory programs in lieu of direct state permitting as provided in Section 10.*
- (e) Encourage and provide guidance with regard to the restoration of wetlands as provided in Section 11.*
- (f) Adopt joint permit processing procedures with other federal, state, and local agencies with jurisdiction over wetlands and take other measures to improve coordination and reduce duplication between the regulatory agency and other state agencies, federal agencies, and local governments.*

Section 5. Mapping and Delineation

The (State Agency) shall adopt wetland maps for the (State Name). In this effort, the (State Agency) may utilize on an interim or longer term basis National Wetland Inventory Maps for all or a portion of the state. It may also use maps prepared by other groups or organizations or undertake independent mapping with federal agencies, other state agencies, local governments or other groups or organizations. The (State Agency) may separately adopt wetland maps for various regions of the state.

The (State Agency) shall adopt more specific guidance for delineation of wetlands on the ground consistent with the definition of wetlands set forth in Section 2. In this effort, the (State Agency) may adopt the Corps of Engineers 1987 Manual for the Delineation of Jurisdictional Wetlands or prepare another guidance document.

The (State Agency) shall, upon the written request of a landowner whose land may be included in a regulated wetland, delineate more precisely the wetland boundary line on the

ground applying delineation criteria. The (State Agency) may request information from the landowner or other agencies or organizations to aid such a delineation effort.

Section 6. Permits for Regulated Activities

No person may conduct or cause to conduct a regulated activity within a wetland without a permit from the (State Agency). Any person proposing to conduct or cause to conduct such an activity shall file an application for such a permit with the (State Agency). A copy shall be simultaneously submitted to the (...Municipality, County, Town, Village). The applicant shall within ten days of filing a permit application provide a written notice of the permit application to owners of each tract of adjacent property. The applicant shall also post a notice of the proposed permit within ten days in a local newspaper of general circulation.

A permit applicant shall ordinarily include the following information in a permit application unless the (State Agency) determines that a portion of this information is unnecessary:

- (a) A map of the area which will be affected by the activity including wetland and water boundaries for areas affected and existing uses and structures.*
- (b) A description of the proposed activity including its purpose, the location and dimensions of any structures, grading or fills, drainage, roads, sewers and water supply, parking lots, storm water facilities, discharge of pollutants, and onsite waste disposal.*
- (c) A description of any public benefit to be derived from the proposed project.*
- (d) A description with a sketch map of the entire parcel owned by the applicant and the location of the wetland on the parcel.*
- (e) A description of any natural hazards at the site including flood, erosion, and soil bearing capacity hazards and how the applicant will avoid increasing hazards on adjacent lands or avoid hazard losses associated with the proposed activity.*
- (f) An explanation why the proposed activity cannot be located at other sites and why other alternatives cannot be used to fulfill the desired purpose of the proposed activity.*
- (g) The names and addresses of adjacent landowners as determined by the current tax assessment roles and a description of adjacent uses and their distance from the proposed activity.*
- (h) Proposed measures to reduce the impact of the proposed activity on wetland functions and values and to compensate for impacts.*

The (State Agency) may require additional information where such additional information is needed to determine the compliance of the proposed activity with criteria for issuance of a permit set forth in Section 7 or adopted by the (State Agency).

Upon receipt of a permit application, the (State Agency) shall notify, within ten days, other state, federal, and local government entities which may have jurisdiction over the proposed activity. These entities will have thirty days to provide comments to the (State Agency).

The (State Agency) shall also hold a public hearing upon the permit application if the proposed activity may have significant impact upon wetland resources or the agency believes that such a public hearing is otherwise needed.

The (State Agency) shall ordinarily issue, conditionally issue, or deny a permit within ninety days of receipt of a permit application unless the permit applicant has failed to supply needed information or additional information gathering is needed to determine the compliance of the permit with regulatory criteria.

In granting a permit, the (State Agency) may impose conditions required to carry out the goals of this act and the permit criteria. The (State Agency) may suspend or revoke a permit if it finds that the applicant has not complied with the conditions or limitations set forth in the permit. The (State Board) may require a bond in an amount and with surety and conditions sufficient to secure compliance with the conditions and limitations set forth in the permit.

Section 7. Criteria for Issuance of Permits

The (State Agency) shall issue a proposed permit if it finds that the permit is in the public interest. In determining whether a proposed activity is in the public interest, the (State Agency) shall consider the goals of this statute and any more specific criteria for permit issuance adopted by the State Agency pursuant to Section 3. It shall consider the need for the proposed activity and the impact on the landowner of permit denial. To issue a permit, the (State Agency) must find that

- (a) There will be no net loss of wetland function and acreage.*
- (b) There are no practical alternatives to the proposed activity.*
- (c) The proposed activity will not be subject to flooding, erosion, soil limitations onsite waste disposal or other hazards which will threaten adjacent landowners or the public.*
- (d) An adequate upland buffer is provided to protect the wetland from sediment, pollutants and other threats. This buffer must ordinarily be at least 50 feet.*
- (e) The proposed activity will not violate pollution control standards, or violate other Federal, State, or Local regulations*
- (f) The proposed activity will not otherwise threaten health and safety, result in fraud, cause nuisances, impair public rights to the enjoyment and use of public waters, threaten a rare or endangered plant or animal or unique ecosystem.*

In evaluating the impact of the proposed permit, the (State Agency) shall consider the cumulative effective of existing and reasonably anticipated future uses similar to the one proposed upon wetland resources. It shall consider any irreversible and irretrievable commitment of resources that will result from the proposed activity, and the relationship between short-term uses of the environment and the maintenance and enhancement of long-term productivity. It shall consider any proposed impact reduction and compensation measures after determining that there are no practical alternatives to the proposed activity.

Where a permit applicant proposes wetland restoration, creation, or enhancement to compensate for damage to a wetland, the (State Agency) shall consider the risk of failure of any such impact reduction and compensation measures and may require, where such risks are great,

that permit applicant to implement compensation measures prior to undertaking the proposed activity. In deciding whether the compensation ratio proposed by the project applicant is sufficient to provide no net loss of wetland functions and acreage, the (State Agency) shall consider the sensitivity of the wetland type, the success of other efforts to restore this wetland type, the length of time it will take before a compensation wetland will become fully functioning, the degree of difficulty which will be encountered in creating or restoring wetland hydrology in this setting, the adequacy of the overall project design, the threats (if any) posed to the compensation wetland by pollution or other activities, the adequacy of proposed protection and management measures for the proposed compensation wetland, the extent to which monitoring and mid-course correction capabilities are proposed, the extent to which bonds or other assurances are provided to insure long-term success, and other factors the (State Agency) believes to be relevant.

Section 8. Administrative Appeals

The (State Agency) shall establish an Administrative Appeal Board of not less than three nor more than five individuals to act upon petitions as provided in this section.

Any landowner who has been denied a permit and believes that his or her property has been taken without payment of just compensation pursuant to this act may appeal the denial to the administrative appeal board within 60 days of such denial. The Appeal Board shall determine whether the landowner has been denied all reasonable, economic use of his or her entire parcel including but not limited to the wetland portion taking into account the existing and proposed uses for the parcel, purchase cost, landowner expectations at time of purchase, whether the proposed activity will cause a nuisance or otherwise threaten other landowners or the public, taxes and other relevant factors. If the Appeals Board determines that denial will take landowners property without payment of compensation, the (State Agency) will have 60 days to reverse or modify the denial or serve its intent to purchase the property at fair market value.

Section 9. Judicial Appeals

Any person aggrieved by any regulation, decision, or action made pursuant to this act including a decision of the Administrative Appeals Board may appeal to (County court of common pleas, superior court, etc.) within thirty days of that decision or action.

Section 10. Penalties and Enforcement

Any person who commits, takes part in, or assists in any violation of any provision of this act including regulations promulgated by the (State Agency) is guilty of a (Felony, Misdemeanor) and may be fined up to _____dollars for each offense and subject to imprisonment not exceeding three months or both. Each violation of this act shall be a separate offense, and in the case of continuing violation, each day's continuance shall be deemed to be a separate and distinct offense.

The (State Agency) may terminate a permit for violation of conditions, obtaining a permit by misrepresentation, or failing to disclose relevant facts.

In the event of a violation, the (State Agency) shall have the power to order restoration of the wetland area and to seek a court injunction to compel compliance. If a violator does not restore a wetland within a reasonable time of an order to do so, the (State Agency) shall have the authority to restore the wetland to its condition prior to the violation and the violator shall be liable to the (State Agency) for the cost of restoration.

Any penalty assessed pursuant to this act including costs of wetland restoration and any restoration requirements shall be recorded in the clerk of courts as a lien against the land and shall not be removed until the penalty is paid or the restoration is completed.

All costs, fees and expenses in connection with an enforcement or restoration action shall be assessed as damages against the violator.

Section 11. Local Regulation of Wetlands; State/Local Roles

Cities, counties, towns and villages are authorized to adopt, zoning, subdivision control, and other wetland protection regulations to achieve the objectives set forth in this act pursuant to the procedures set forth in land and water use control statutes of the state of (State Name). In adopting and administering such regulations, local governments are encouraged to utilize the wetland definition set forth in this act and wetland delineation criteria developed by (State Agency) pursuant to Section 4.

Cities, counties, towns, and villages with wetland regulations which equal or exceed in stringency those of the state may apply to the (State Agency) for permission to issue all or a portion of the wetland permits in lieu of direct (State Agency) permitting. The (State Agency) may authorize such a local government to issue all or a portion of wetland permits in lieu of (State Agency) issuance if the (State Agency) finds that the wetland protection provided by local government regulations equals or exceeds the protection provided by the (State Agency) and that the local government has adequate administration and enforcement mechanisms. The (State Agency) shall continue to review permit applications for activities which may affect wetlands of inter-municipality or interstate significance. The (State Agency) may withdraw approval for local issuance of permits in lieu of (State Agency) permit issuance for any local government program which fails to administer and enforce regulations equaling or exceeding those of the (State Agency).

Section 12. Restoration and Creation, Use of Mitigation Banks

The (State Agency) shall encourage private landowners, local governments, other state agencies, land trusts, and others to restore wetlands in order to achieve the long term goal of net gain in wetland resources. The (State Agency) shall provide technical assistance to agencies, organizations, and individuals in planning and carrying out restoration projects. It shall identify possible restoration sites in cooperation with other organizations. The (State Agency) shall adopt guidelines and educational materials for restoration projects and may carry out restoration research and demonstration projects.

The (State Agency) may also authorize, in appropriate circumstances, permit applicants to utilize wetland mitigation banks to compensate for loss of wetland functions where there is no practical onsite alternatives and use of such a bank will provide a net benefit in wetland functions and acreage. However, permit applicants may not be permitted to use a bank where such use will result in increased water pollution, flooding, increased erosion or other nuisances or hazards at the permit application site. Permit applicants shall also not use a bank where landowners or the ecosystem near the permit application site will suffer significant losses in wetland functions. The (State Agency) may permit some combination of onsite impact reduction and compensation measures and the use of offsite mitigation bank to avoid losses and problems.