S T A T E O F N E W Y O R K

4514

2009-2010 Regular Sessions

I N A S S E M B L Y

February 4, 2009

Introduced by M. of A. SCHIMMINGER -- Multi-Sponsored by -- M. of A. CLARK, COOK, ESPAILLAT -- read once and referred to the Committee on Environmental Conservation

AN ACT to amend the environmental conservation law, the highway law, the public authorities law, the state finance law, the limited liability company law and the court of claims act, in relation to the creation, maintenance and regulation of freshwater and tidal wetlands mitigation banks

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Subdivision 6 of section 24-0301 of the environmental conservation law, as amended by chapter 654 of the laws of 1977, is amended to read as follows:

6. Except as provided in subdivision eight of this section, the commissioner shall supervise the maintenance of such boundary maps, which shall be available to the public for inspection and examination at the regional office of the department in which the wetlands are wholly or partly located and in the office of the clerk of each county in which each such wetland or a portion thereof is located. The commissioner may readjust the map thereafter to clarify the boundaries of the wetlands, to correct any errors on the map, to effect any additions, deletions or technical changes on the map, and to reflect changes as have occurred as a result of the granting of permits pursuant to section 24-0703 of this article, *THE CREATION OF FRESHWATER MITIGATION BANKS PURSUANT TO ARTICLE TWENTY-SIX OF THIS CHAPTER*, or natural changes which may have occurred through erosion, accretion, or otherwise. Notice of such readjustment shall be given in the same manner as set forth in subdivision five of this section for the promulgation of final freshwater wetlands maps.

S 2. Section 24-0501 of the environmental conservation law is amended by adding a new subdivision 8 to read as follows:

EXPLANATION--Matter in *ITALICS (underscored)* is new; matter in brackets [ ] is old law to be omitted.

LBD08164-02-9

8. UPON THE CREATION OF A MITIGATION BANK FOR WHICH A MITIGATION BANKING PERMIT HAS BEEN OBTAINED PURSUANT TO ARTICLE TWENTY-SIX OF THIS CHAPTER, A LOCAL GOVERNMENT WHEREIN SUCH MITIGATION BANK IS LOCATED WHICH HAS ADOPTED AND IS IMPLEMENTING A LOCAL FRESHWATER WETLANDS PROTECTION LAW OR ORDINANCE SHALL AMEND AND READJUST ITS FRESHWATER WETLANDS MAP TO REFLECT THE DELINEATION OF SUCH MITIGATION BANK AS A FRESHWATER WETLAND ON SUCH MAP.

S 3. Subdivision 1 of section 24-0703 of the environmental conservation law, as amended by chapter 233 of the laws of 1979, is amended to read as follows:

1. Any person proposing to conduct or cause to be conducted a regulated activity upon any freshwater wetland shall file an application for a permit with the clerk of the local government having jurisdiction or the department, as the case may be. Review of the application shall be made by the local government or the commissioner, as the case may be, in accordance with applicable law and such rules hereunder as may be adopted by the commissioner. Such application shall include a detailed description of the proposed activity and a map showing the area of freshwater wetland directly affected, with the location of the proposed activity thereon; A DETAILED EXPLANATION OF THE STEPS TAKEN TO, FIRST, AVOID SIGNIFICANT IMPAIRMENT, AND THEN, MINIMIZE LOSSES OF FRESHWATER WETLAND FOR SUCH REGULATED ACTIVITY AND WHY ANY AND ALL LOSSES WERE UNAVOIDABLE FOR SUCH PROPOSED REGULATED ACTIVITY AND, WHERE REQUIRED, THE APPLICANT'S PLAN INCLUDING THE USE OF MITIGATION BANKING CREDITS FOR MITIGATION OR MINIMIZATION OF THE LOSSES RESULTING FROM THE IMPAIRMENT TO THE AFFECTED FRESHWATER WETLANDS BY REASON OF SUCH REGULATED ACTIVITY. The clerk or commissioner shall cause notice of such application to be mailed to all local governments where the proposed activity or any part of it is located.

S 4. Subdivision 3 of section 24-0705 of the environmental conservation law, as amended by chapter 654 of the laws of 1977, is amended to read as follows:

3. No permit shall be granted under this section unless the proposed activity is consistent with the land use regulations applicable pursuant to section 24-0903 of this article within the boundaries of the local government involved [and], with the policy set forth in section 24-0103 of this article[.], AND UNLESS THE APPLICANT HAS DEMONSTRATED:

(A) THAT THE REGULATED ACTIVITY:

(1) (I) IS WATER DEPENDENT AND REQUIRES ACCESS TO THE FRESHWATER WETLAND AS A CENTRAL ELEMENT OF ITS BASIC FUNCTION; OR

(II) IS NOT WATER DEPENDENT AND HAS NO PRACTICABLE ALTERNATIVE;

(2) WILL MINIMIZE ALTERATION OR IMPAIRMENT OF THE FRESHWATER WETLAND, INCLUDING EXISTING TOPOGRAPHY, VEGETATION, FISH AND WILDLIFE RESOURCES AND HYDROLOGICAL CONDITIONS;

(3) WILL NOT CAUSE OR CONTRIBUTE TO DEGRADATION OF GROUNDWATERS OR SURFACE WATERS; AND,

(4) IS COMPENSATED FOR BY MITIGATION CREDITS THROUGH A MITIGATION BANK OR OTHERWISE AT A RATIO REQUIRED BY THE COMMISSIONER WHICH SHALL NOT BE LESS THAN ONE TO ONE FOR EACH DEBIT (AS DEFINED IN ARTICLE TWENTY-SIX OF THIS CHAPTER) RESULTING FROM THE REGULATED ACTIVITY; AND,

(5) IS CONSISTENT WITH ANY LAND USE REGULATION PLAN FOR FRESHWATER WETLANDS FOR THE AFFECTED AREA DEVELOPED PURSUANT TO THIS ARTICLE AND ANY COMPREHENSIVE WATER MANAGEMENT PLAN FOR THE AFFECTED AREA DEVELOPED PURSUANT TO THIS CHAPTER; AND,

(B) THAT PRACTICABLE ALTERNATIVES HAVE BEEN ANALYZED AND THAT THE REGULATED ACTIVITY HAS NO PRACTICABLE ALTERNATIVE. IN EVALUATING WHETHER

THE PROPOSED REGULATED ACTIVITY HAS A PRACTICABLE ALTERNATIVE THE LOCAL GOVERNMENT OR THE COMMISSIONER AS THE CASE MAY BE SHALL CONSIDER:

(1) WHETHER THE BASIC PROJECT PURPOSE CANNOT PRACTICABLY BE ACCOMPLISHED UTILIZING ONE OR MORE OTHER SITES IN THE SAME GENERAL AREA THAT WOULD AVOID OR RESULT IN LESS ADVERSE IMPACT ON FRESHWATER WETLANDS;

(2) WHETHER A REDUCTION IN THE SIZE, SCOPE, CONFIGURATION OR DENSITY OF THE PROJECT AS PROPOSED AND ALL ALTERNATIVE DESIGNS THAT WOULD RESULT IN LESS IMPACT ON THE FRESHWATER WETLAND WOULD NOT ACCOMPLISH THE BASIC PURPOSE OF THE PROJECT;

(3) IN CASES WHERE THE APPLICANT HAS REJECTED ALTERNATIVES TO THE PROJECT AS PROPOSED DUE TO CONSTRAINTS SUCH AS INADEQUATE ZONING INFRASTRUCTURE, OR PARCEL SIZE, WHETHER THE APPLICANT HAS MADE REASONABLE ATTEMPTS TO REMOVE OR ACCOMMODATE THESE CONSTRAINTS; AND

(4) THE ECONOMIC VALUE OF THE PROPOSED REGULATED ACTIVITY IN MEETING A DEMONSTRATED PUBLIC NEED IN THE AREA AND THE ECOLOGICAL AND ECONOMIC VALUE ASSOCIATED WITH THE FRESHWATER WETLAND.

S 5. Subdivision 2 of section 24-0801 of the environmental conservation law, as added by chapter 654 of the laws of 1977, is amended to read as follows:

2. Where the activities otherwise subject to regulation under this article involve freshwater wetlands located within the boundaries of the Adirondack park, the inquiries referred to and the applications provided for in section 24-0703 of this article shall be made to and filed with the Adirondack park agency at its headquarters office, under such regulations and procedures as the Adirondack park agency may promulgate. The Adirondack park agency shall review the application in place of the commissioner or local government as provided in section 24-0705 of this article, having due regard for the declaration of policy and statement of findings set forth in this article and for the considerations set forth in [subdivision] SUBDIVISIONS one AND THREE of section 24-0705 of this article. The agency shall in addition determine prior to the granting of any permit that the proposed activity will be consistent with the Adirondack park land use and development plan and would not have an undue adverse impact upon the natural, scenic, aesthetic, ecological, wildlife, historic, recreational or open space resources of the park, taking into account the economic and social or other benefits to be derived from the activity. Any person may seek review of a ruling made solely pursuant to the provisions of this article by the Adirondack park agency pursuant to the provisions of title eleven of this article or article seventy-eight of the civil practice law and rules.

S 6. Subdivision 6 of section 25-0201 of the environmental conservation law, as added by chapter 790 of the laws of 1973, is amended to read as follows:

6. The commissioner shall supervise the maintenance of such boundary maps, which shall be available to the public for inspection and examination. The statewide inventory shall be readjusted from time to time as may be necessary to reflect such natural changes as have occurred through erosion, accretion, and otherwise and also to reflect such other changes as have occurred as a result of the granting of permits pursuant to section 25-0403 of this [act] ARTICLE OR THE CREATION AND MAINTENANCE OF TIDAL WETLANDS MITIGATION BANKS PURSUANT TO ARTICLE TWENTY-SIX OF THIS CHAPTER.

S 7. Subdivision 1 of section 25-0402 of the environmental conservation law, as added by chapter 790 of the laws of 1973, is amended to read as follows:

1. Any person proposing to conduct or cause to be conducted an activity regulated under this act upon any inventoried tidal wetland shall file an application for a permit with the commissioner, in such form and containing such information as the commissioner may prescribe. The applicant shall have the burden of demonstrating that the proposed activity will be in complete accord with the policy and provisions of this act. Such application shall include a detailed description of the proposed work and a map showing the area of tidal wetland directly affected, with the location of the proposed work thereon, together with the names of the owners of record of adjacent lands and the known claimants of water rights in or adjacent to the tidal wetlands of whom the applicant has notice AND A DETAILED EXPLANATION OF THE STEPS TAKEN TO FIRST, AVOID SIGNIFICANT IMPAIRMENT, AND THEN, MINIMIZE LOSSES OF TIDAL WETLANDS FOR SUCH REGULATED ACTIVITY AND WHY ANY AND ALL LOSSES WERE UNAVOIDABLE FOR SUCH PROPOSED REGULATED ACTIVITY AND, THE APPLICANT'S PLAN INCLUDING THE USE OF MITIGATION BANKING CREDITS, IF APPLICABLE, FOR MITIGATION OR MINIMIZATION OF THE LOSSES RESULTING FROM THE IMPAIRMENT OF THE AFFECTED TIDAL WETLANDS BY REASON OF SUCH REGULATED ACTIVITY. The commissioner shall cause a copy of such application to be mailed to the chief administrative officer in the municipality where the proposed work or any part of it is located.

S 8. Subdivision 1 of section 25-0403 of the environmental conservation law, as amended by chapter 233 of the laws of 1979, is amended to read as follows:

1. In granting, denying or limiting any permit under this [act] ARTICLE, the commissioner shall consider the compatibility of the proposed activity with reference to the public health and welfare, marine fisheries, shellfisheries, wildlife, flood and hurricane and storm dangers, [and] the land-use regulations promulgated pursuant to section 25-0302 of this [act] ARTICLE, AND WHETHER THE APPLICANT HAS DEMONSTRATED:

(A) THAT THE REGULATED ACTIVITY:

(1) (I) IS WATER DEPENDENT AND REQUIRES ACCESS TO THE TIDAL WETLAND AS A CENTRAL ELEMENT OF ITS BASIC FUNCTIONS; OR,

(II) IS NOT WATER DEPENDENT AND HAS NO PRACTICABLE ALTERNATIVE;

(2) WILL MINIMIZE ALTERATION OR IMPAIRMENT OF THE TIDAL WETLAND INCLUDING EXISTING TOPOGRAPHY, VEGETATION, FISH AND WILDLIFE RESOURCES AND HYDROLOGICAL CONDITIONS;

(3) WILL NOT CAUSE OR CONTRIBUTE TO A DEGRADATION OF GROUNDWATERS, SURFACE WATERS OR TIDAL WATERS;

(4) IS COMPENSATED FOR BY MITIGATION CREDITS THROUGH A MITIGATION BANK OR OTHERWISE AT A RATIO REQUIRED BY THE COMMISSIONER WHICH SHALL NOT BE LESS THAN ONE TO ONE FOR EACH DEBIT (AS DEFINED IN ARTICLE TWENTY-SIX OF THIS CHAPTER) RESULTING FROM THE REGULATED ACTIVITY; AND,

(5) IS CONSISTENT WITH THE COMMISSIONER'S LAND-USE REGULATIONS FOR THE AFFECTED TIDAL WETLANDS DEVELOPED PURSUANT TO SECTION 25-0302 OF THIS ARTICLE, AND ANY COASTAL ZONE MANAGEMENT PLAN OR COMPREHENSIVE WATER MANAGEMENT PLAN FOR THE AFFECTED AREA DEVELOPED PURSUANT TO THIS CHAPTER; AND,

(B) THAT PRACTICABLE ALTERNATIVES HAVE BEEN ANALYZED AND THAT THE REGULATED ACTIVITY HAS NO PRACTICABLE ALTERNATIVE. IN EVALUATING WHETHER THE PROPOSED REGULATED ACTIVITY HAS A PRACTICABLE ALTERNATIVE THE COMMISSIONER SHALL CONSIDER:

(1) WHETHER THE BASIC PROJECT PURPOSE CANNOT PRACTICABLY BE ACCOMPLISHED UTILIZING ONE OR MORE OTHER SITES IN THE SAME GENERAL AREA THAT WOULD AVOID OR RESULT IN LESS ADVERSE IMPACT ON TIDAL WETLANDS;

(2) WHETHER A REDUCTION IN THE SIZE, SCOPE, CONFIGURATION OR DENSITY OF THE PROJECT AS PROPOSED AND REASONABLE ALTERNATIVE DESIGNS THAT WOULD RESULT IN LESS IMPACT ON THE FRESHWATER WETLAND WOULD NOT ACCOMPLISH THE BASIC PURPOSE OF THE PROJECT;

(3) IN CASES WHERE THE APPLICANT HAS REJECTED ALTERNATIVES TO THE PROJECT PROPOSED DUE TO CONSTRAINTS SUCH AS INADEQUATE ZONING INFRASTRUCTURE, OR PARCEL SIZE, WHETHER THE APPLICANT HAS MADE REASONABLE ATTEMPTS TO REMOVE OR ACCOMMODATE THESE CONSTRAINTS; AND,

(4) THE ECONOMIC VALUE OF THE PROPOSED REGULATED ACTIVITY IN MEETING A DEMONSTRATED PUBLIC NEED IN THE AREA AND THE ECOLOGICAL AND ECONOMIC VALUE ASSOCIATED WITH THE TIDAL WETLAND.

S 9. The environmental conservation law is amended by adding a new article 26 to read as follows:

ARTICLE 26
ESTABLISHMENT AND OPERATION OF BOTH FRESHWATER WETLANDS AND TIDAL WETLANDS MITIGATION BANKS

SECTION 26-0101. SHORT TITLE.
26-0103. LEGISLATIVE FINDINGS.
26-0105. DEFINITIONS.
26-0107. WETLANDS MITIGATION BANKING COMMISSION.
26-0109. MITIGATION BANK PERMITS.
26-0111. RIGHT OF APPEAL.
26-0113. MITIGATION BANK CRITERIA.
26-0115. MITIGATION BANK PHASES AND ADDITIONS.
26-0117. MITIGATION BANKING JOINT VENTURES, LIMITED LIABILITY COMPANIES AND LIMITED LIABILITY PARTNERSHIPS.
26-0119. MITIGATION BANK PERMIT APPLICATIONS.
26-0121. ESTABLISHMENT OF MITIGATION CREDITS.
26-0123. CONTRIBUTION OF LANDS.
26-0125. CONTRIBUTION OF FUNDS.
26-0127. MITIGATION SERVICE AREAS.
26-0129. LAND USE RESTRICTIONS ON MITIGATION BANKS.
26-0131. FINANCIAL RESPONSIBILITY.
26-0133. MITIGATION BANK PERMIT AND MITIGATION BANK CONCEPTUAL APPROVAL.
26-0135. SURRENDER, TRANSFER OR MODIFICATION OF MITIGATION BANK PERMITS.
26-0137. USE OF CERTAIN FUNDS RECEIVED FROM A PUBLIC OR A PUBLIC-PRIVATE MITIGATION BANK.
26-0139. CONTRACTS FOR ARCHITECTURAL, ENGINEERING AND SURVEYING SERVICES FOR PUBLIC WETLANDS MITIGATION BANKS.
26-0141. TAX ABATEMENT.
26-0143. PRIOR APPLICATIONS AND PERMITS.
26-0145. SEVERABILITY.

S 26-0101. SHORT TITLE.

THIS ARTICLE SHALL BE KNOWN AND MAY BE CITED AS THE "WETLANDS MITIGATION BANKING ACT".

S 26-0103. LEGISLATIVE FINDINGS.

THE LEGISLATURE FINDS THAT THE ADVERSE IMPACTS OF ACTIVITIES REGULATED UNDER ARTICLES 24 AND 25 OF THIS CHAPTER, INCLUDING THE LOSS OF THE CHEMICAL, PHYSICAL AND BIOLOGICAL FUNCTIONS OF FRESHWATER WETLANDS, TIDAL WETLANDS AND OTHER AQUATIC RESOURCES MAY BE OFFSET THROUGH THE CREATION AND OPERATION OF WETLAND MITIGATION BANKS FOR FRESHWATER WETLANDS AND TIDAL WETLANDS RESPECTIVELY, THAT WOULD RESTORE, ENHANCE OR IN EXCEPTIONAL CIRCUMSTANCES, PRESERVE SUCH WETLANDS AND/OR OTHER AQUAT-

IC RESOURCES FOR THE PURPOSE OF PROVIDING COMPENSATORY MITIGATION IN ADVANCE OF AUTHORIZED IMPACTS TO SIMILAR RESOURCES AND PROVIDE GREATER FLEXIBILITY TO PERSONS NEEDING TO COMPLY WITH SUCH MITIGATION REQUIREMENTS AND CAN HAVE SEVERAL ADVANTAGES OVER INDIVIDUAL MITIGATION PROJECTS INCLUDING, BUT NOT LIMITED TO THOSE LISTED BELOW:

1. IT MAY BE MORE ADVANTAGEOUS FOR MAINTAINING THE INTEGRITY OF THE AQUATIC ECOSYSTEM TO CONSOLIDATE COMPENSATORY MITIGATION INTO A SINGLE LARGE PARCEL OR CONTIGUOUS PARCELS WHEN ECOLOGICALLY APPROPRIATE;

2. ESTABLISHMENT OF A MITIGATION BANK CAN BRING TOGETHER FINANCIAL RESOURCES, PLANNING AND SCIENTIFIC EXPERTISE NOT PRACTICABLE TO MANY PROJECT SPECIFIC COMPENSATORY MITIGATION PROPOSALS. THIS CONSOLIDATION OF RESOURCES CAN INCREASE THE POTENTIAL FOR THE ESTABLISHMENT AND LONG-TERM MANAGEMENT OF SUCCESSFUL MITIGATION THAT MAXIMIZES OPPORTUNITIES FOR CONTRIBUTING TO BIODIVERSITY AND/OR WATERSHED FUNCTION;

3. USE OF MITIGATION BANKS MAY REDUCE PERMIT PROCESSING TIMES AND PROVIDE MORE COST-EFFECTIVE COMPENSATORY MITIGATION OPPORTUNITIES FOR PROJECTS THAT QUALIFY;

4. COMPENSATORY MITIGATION IS TYPICALLY IMPLEMENTED AND FUNCTIONING IN ADVANCE OF PROJECT IMPACTS, THEREBY REDUCING THE TEMPORAL LOSSES OF AQUATIC FUNCTIONS AND UNCERTAINTY OVER WHETHER THE MITIGATION WILL BE SUCCESSFUL IN OFFSETTING PROJECT IMPACTS;

5. CONSOLIDATION OF COMPENSATORY MITIGATION WITHIN A MITIGATION BANK INCREASES THE EFFICIENCY OF LIMITED AGENCY RESOURCES IN THE REVIEW AND COMPLIANCE MONITORING OF MITIGATION PROJECTS, AND THUS IMPROVES THE RELIABILITY OF EFFORTS TO RESTORE, CREATE OR ENHANCE WETLANDS FOR MITIGATION PURPOSES; AND,

6. THE EXISTENCE OF MITIGATION BANKS CAN CONTRIBUTE TOWARDS ATTAINMENT OF THE GOAL FOR NO OVERALL NET LOSS OF THE STATE'S WETLANDS BY PROVIDING OPPORTUNITIES TO COMPENSATE FOR AUTHORIZED IMPACTS WHEN MITIGATION MIGHT NOT OTHERWISE BE APPROPRIATE OR PRACTICABLE.

S 26-0105. DEFINITIONS.

THE WORDS AND PHRASES SET FORTH IN THE FOLLOWING SUBDIVISIONS OF THIS SECTION WHEN USED IN THIS ARTICLE SHALL HAVE THE MEANING DEFINED IN SUCH SUBDIVISIONS FOR THE PURPOSES OF THIS ARTICLE, UNLESS OTHERWISE APPARENT FROM, OR, REQUIRED BY, THE CONTEXT:

1. "FRESHWATER WETLANDS" SHALL MEAN FRESHWATER WETLANDS AS DEFINED IN SUBDIVISION 1 OF SECTION 24-0107 OF THIS CHAPTER AND SUBDIVISION 68 OF SECTION 802 OF THE EXECUTIVE LAW.

2. "FRESHWATER WETLANDS MAP" SHALL MEAN A MAP PROMULGATED BY THE DEPARTMENT PURSUANT TO SUBDIVISION 2 OF SECTION 24-0301 OF THIS CHAPTER.

3. "BOUNDARIES OF A FRESHWATER WETLAND" SHALL MEAN BOUNDARIES OF A FRESHWATER WETLAND AS DEFINED IN SUBDIVISION 3 OF SECTION 24-0107 OF THIS CHAPTER.

4. "TIDAL WETLANDS" SHALL MEAN TIDAL WETLANDS AS DEFINED IN SUBDIVISION 1 OF SECTION 25-0103 OF THIS CHAPTER.

5. "TIDAL WETLANDS INVENTORY" SHALL MEAN THE INVENTORY OF TIDAL WETLANDS COMPILED BY THE COMMISSIONER PURSUANT TO SECTION 25-0201 OF THIS CHAPTER.

6. "TIDAL WETLANDS BOUNDARY MAPS" SHALL MEAN THE TIDAL WETLANDS BOUNDARY MAPS COMPILED AND MAINTAINED BY THE COMMISSIONER PURSUANT TO SECTION 25-0201 OF THIS CHAPTER.

7. "BANKER" SHALL MEAN AN ENTITY THAT CREATES, OPERATES, MANAGES, OR MAINTAINS A MITIGATION BANK PURSUANT TO A MITIGATION BANK PERMIT.

8. "BOARD" SHALL MEAN THE FRESHWATER APPEALS BOARD.

9. "COMMISSION" SHALL MEAN THE WETLANDS MITIGATION BANKING COMMISSION.

10. "COMMISSIONER" SHALL MEAN THE COMMISSIONER OF ENVIRONMENTAL CONSERVATION.

11. "COMPENSATORY MITIGATION" SHALL MEAN THE RESTORATION, CREATION, ENHANCEMENT, OR IN EXCEPTIONAL CIRCUMSTANCES, PRESERVATION OF FRESHWATER WETLANDS, TIDAL WETLANDS AND/OR OTHER AQUATIC RESOURCES, AS THE CASE MAY BE, FOR THE PURPOSE OF COMPENSATING FOR UNAVOIDABLE ADVERSE IMPACTS TO SUCH WETLANDS OR OTHER AQUATIC RESOURCES WHICH REMAIN AS A RESULT OF PERMITTED ACTIVITY AFTER ALL APPROPRIATE AND PRACTICABLE AVOIDANCE AND MINIMIZATION HAS BEEN ACHIEVED.

12. "CONSENSUS" SHALL MEAN THE RESULT OF A PROCESS BY WHICH THE COMMISSION, AS DEFINED IN SUBDIVISION 9 OF THIS SECTION, SYNTHESIZES ITS CONCERNS AND IDEAS TO ATTEMPT TO FORM A COLLABORATIVE AGREEMENT ACCEPTABLE TO ALL MEMBERS, BUT WHICH, IF SUCH UNANIMITY CANNOT BE ACHIEVED, UPON THE MOTION OF THE CHAIR OF THE COMMISSION IS ACCEPTED BY A MAJORITY OF THE COMMISSION.

13. "CREATION" SHALL MEAN THE ESTABLISHMENT OF A FRESHWATER WETLAND, TIDAL WETLAND OR OTHER AQUATIC RESOURCE, AS THE CASE MAY BE, WHERE ONE DID NOT FORMERLY EXIST.

14. "DEBIT" SHALL MEAN A UNIT OF MEASURE REPRESENTING THE LOSS OF AQUATIC FUNCTIONS AT AN IMPACT OR PROJECT SITE.

15. "DEPARTMENT" SHALL MEAN THE DEPARTMENT OF ENVIRONMENTAL CONSERVATION.

16. "ECOLOGICAL VALUE" SHALL MEAN THE VALUE OF FUNCTIONS PERFORMED BY UPLANDS, WETLANDS, OTHER SURFACE WATERS OR TIDAL WATERS TO THE ABUNDANCE, DIVERSITY, AND HABITATS OF FISH, WILDLIFE, AND LISTED SPECIES. THESE FUNCTIONS INCLUDE, BUT ARE NOT LIMITED TO, PROVIDING COVER AND REFUGE; BREEDING, NESTING, DENNING, AND NURSERY AREAS; CORRIDORS FOR WILDLIFE MOVEMENT; FOOD CHAIN SUPPORT; AND NATURAL WATER STORAGE, NATURAL FLOW ATTENUATION, AND WATER QUALITY IMPROVEMENT, WHICH ENHANCES FISH, WILDLIFE AND LISTED SPECIES UTILIZATION.

17. "ENHANCEMENT" SHALL MEAN ACTIVITIES CONDUCTED IN EXISTING FRESHWATER WETLANDS, TIDAL WATER WETLANDS, OR OTHER AQUATIC RESOURCES WHICH INCREASE ONE OR MORE AQUATIC FUNCTIONS.

18. "LOCAL GOVERNMENT" SHALL MEAN A VILLAGE, TOWN, CITY, OR COUNTY.

19. "MITIGATION" SHALL MEAN SEQUENTIALLY AVOIDING IMPACTS, MINIMIZING IMPACTS, AND COMPENSATING FOR REMAINING UNAVOIDABLE IMPACTS.

20. "MITIGATION BANK" SHALL MEAN A SITE WHERE FRESHWATER WETLANDS, TIDAL WETLANDS AND/OR OTHER AQUATIC RESOURCES (AS THE CASE MAY BE) ARE PERMITTED TO BE RESTORED, CREATED, ENHANCED, OR IN EXCEPTIONAL CIRCUMSTANCES, PRESERVED FOR THE PURPOSE OF PROVIDING COMPENSATORY MITIGATION IN ADVANCE OF AUTHORIZED IMPACTS TO SIMILAR RESOURCES MITIGATION.

21. "PRIVATE MITIGATION BANK" SHALL MEAN A MITIGATION BANK OWNED BY A PERSON OR PERSONS THAT ARE NOT FROM THE PUBLIC SECTOR.

22. "PUBLIC MITIGATION BANK" SHALL MEAN A MITIGATION BANK OWNED BY A PERSON OR PERSONS THAT ARE FROM THE PUBLIC SECTOR.

23. "PUBLIC-PRIVATE MITIGATION BANK" SHALL MEAN A MITIGATION BANK OWNED IN PART BY A PERSON OR PERSONS FROM THE PRIVATE SECTOR AND IN PART BY A PERSON OR PERSONS FROM THE PUBLIC SECTOR, WHETHER IN THE FORM OF A PARTNERSHIP, JOINT VENTURE OR LIMITED LIABILITY COMPANY.

24. "MITIGATION BANKING" SHALL MEAN THE ESTABLISHMENT AND OPERATION OF ONE OR MORE MITIGATION BANKS FOR THE PURPOSE OF PROVIDING COMPENSATION CREDITS FOR LOSSES TO FRESHWATER WETLANDS OR TIDAL WETLANDS AND/OR OTHER AQUATIC RESOURCES (AS THE CASE MAY BE) FROM FUTURE ACTIVITIES AND IMPACTS AUTHORIZED BY PERMIT UNDER THIS ARTICLE.

25. "MITIGATION BANKING INSTRUMENT" SHALL MEAN A MITIGATION BANK PERMIT.

26. "MITIGATION BANK PERMIT" SHALL MEAN A PERMIT ISSUED TO A BANKER TO CONSTRUCT, OPERATE, MANAGE AND MAINTAIN A MITIGATION BANK.

27. "MITIGATION CREDIT" AND "MITIGATION BANK CREDIT" SHALL MEAN A UNIT OF MEASURE WHICH REPRESENTS THE INCREASE IN ECOLOGICAL VALUE RESULTING FROM WETLANDS RESTORATION, ENHANCEMENT, PRESERVATION OR CREATION ACTIVITIES.

28. "MITIGATION SERVICE AREA" SHALL MEAN THE DESIGNATED GEOGRAPHIC AREA OR PREDEFINED RADIUS (E.G. WATERSHED OR COUNTY) WHEREIN A MITIGATION BANK CAN REASONABLY BE EXPECTED TO PROVIDE APPROPRIATE COMPENSATION FOR IMPACTS TO WETLANDS AND/OR OTHER AQUATIC RESOURCES SO THAT MITIGATION CREDITS FROM SUCH MITIGATION BANK MAY BE USED TO OFFSET ADVERSE IMPACTS OF ACTIVITIES REGULATED UNDER THIS ARTICLE.

29. "MUNICIPALITY" SHALL MEAN A VILLAGE, TOWN, CITY, OR COUNTY.

30. "NOT-FOR-PROFIT CORPORATION" SHALL MEAN A CORPORATION FORMED PURSUANT TO THE NOT-FOR-PROFIT CORPORATION LAW AND WHICH QUALIFIES FOR TAX EXEMPT STATUS UNDER THE FEDERAL INTERNAL REVENUE CODE.

31. "OFFSITE REGIONAL MITIGATION" SHALL MEAN MITIGATION ON AN AREA OF LAND OFF THE SITE OF AN ACTIVITY PERMITTED UNDER THIS ARTICLE, WHERE AN APPLICANT PROPOSES TO MITIGATE THE ADVERSE IMPACTS OF ONLY THE APPLICANT'S SPECIFIC ACTIVITY AS A REQUIREMENT OF THE PERMIT, WHICH PROVIDES REGIONAL ECOLOGICAL VALUE, AND WHICH IS NOT A MITIGATION BANK PERMITTED PURSUANT TO THIS ARTICLE.

32. "PAYMENT SCHEDULE" SHALL MEAN A MINIMUM SCHEDULE OF PER ACRE MITIGATION CREDIT PAYMENT AMOUNT ESTABLISHED BY THE MITIGATION BANK AND CERTIFIED BY THE COMMISSION TO BE SUFFICIENT TO MEET THE FINANCIAL RESPONSIBILITY REQUIREMENTS OF THE MITIGATION BANK, AND WHICH PAYMENT AMOUNT IS BASED, AT LEAST IN PART, ON THE ECOLOGICAL FUNCTIONS AND VALUES OF WETLANDS PERMITTED TO BE LOST AND ON THE COST OF RESTORING OR CREATING OR PRESERVING WETLANDS CAPABLE OF PERFORMING THE SAME OR SIMILAR FUNCTIONS, INCLUDING DIRECTLY RELATED COSTS OF WETLANDS RESTORATION PLANNING, LONG-TERM MONITORING AND MAINTENANCE OF A MITIGATION BANKING PROJECT PERMITTED PURSUANT TO THIS ARTICLE.

33. "PERSON" SHALL MEAN ANY PUBLIC, PRIVATE, NOT-FOR-PROFIT CORPORATION, LIMITED LIABILITY COMPANY, PROFESSIONAL CORPORATION, FIRM, PARTNERSHIP, ASSOCIATION, TRUST, ESTATE, JOINT VENTURE, ONE OR MORE INDIVIDUALS, AND ANY UNIT OF STATE GOVERNMENT OR AGENCY, DEPARTMENT OR BUREAU THEREOF, OR ANY POLITICAL SUBDIVISION OF THE STATE, ANY INTERNATIONAL AUTHORITY, BI-STATE AUTHORITY, STATE AUTHORITY, LOCAL PUBLIC AUTHORITY, PUBLIC BENEFIT CORPORATION, SCHOOL DISTRICT, SUPERVISORY DISTRICT, DISTRICT CORPORATION, IMPROVEMENT DISTRICT WITHIN A COUNTY, CITY, TOWN, OR VILLAGE, ANY MUNICIPALITY AS DEFINED IN SUBDIVISION 29 OF THIS SECTION, OR INDIAN NATION OR TRIBE RECOGNIZED BY THE STATE OR THE UNITED STATES WITH A RESERVATION WHOLLY OR PARTLY WITHIN THE BOUNDARIES OF NEW YORK STATE, OR ANY OTHER LEGAL ENTITY WHATSOEVER, OR, PURSUANT TO SECTION 26-0117 OF THIS ARTICLE, ANY COMBINATION THEREOF.

34. "PERSON FROM THE PUBLIC SECTOR" SHALL MEAN ANY PERSON THAT IS A PUBLIC CORPORATION, A LIMITED LIABILITY COMPANY FORMED PURSUANT TO SECTION 1105 OF THE LIMITED LIABILITY COMPANY LAW, ANY UNIT OF STATE GOVERNMENT OR AGENCY, DEPARTMENT OR BUREAU THEREOF, OR ANY POLITICAL SUBDIVISION OF THE STATE, ANY INTERNATIONAL AUTHORITY, BI-STATE AUTHORITY, STATE AUTHORITY, LOCAL PUBLIC AUTHORITY, PUBLIC BENEFIT CORPORATION, SCHOOL DISTRICT, SUPERVISORY DISTRICT, DISTRICT CORPORATION, IMPROVEMENT DISTRICT WITHIN A COUNTY, CITY, TOWN, OR VILLAGE, ANY MUNICIPALITY AS DEFINED IN SUBDIVISION 29 OF THIS SECTION, AND INDIAN NATION OR TRIBE RECOGNIZED BY THE STATE OR THE UNITED STATES WITH A RESERVATION WHOLLY OR PARTLY WITHIN THE BOUNDARIES OF NEW YORK STATE, OR ANY OTHER BODY

CREATED BY THE STATE OF NEW YORK OR THE UNITED STATES FOR A PUBLIC PURPOSE; FOR THE PURPOSE OF THIS SECTION THE CREATION AND APPROVAL OF A PRIVATE NOT-FOR-PROFIT ORGANIZATION SUBJECT TO THE APPROVAL OF THE SUPREME COURT OR OTHER GOVERNMENTAL BODY SHALL NOT BE CONSIDERED THE CREATION OF A BODY FOR A PUBLIC PURPOSE.

35. "PERSON FROM THE PRIVATE SECTOR" SHALL MEAN ALL PERSONS AS DEFINED IN SUBDIVISION 33 OF THIS SECTION WHICH ARE NOT DEFINED AS PERSONS FROM THE PUBLIC SECTOR IN SUBDIVISION 34 OF THIS SECTION.

36. "POLLUTION" SHALL MEAN THE PRESENCE IN THE ENVIRONMENT OF CONDITIONS OR CONTAMINANTS IN QUANTITIES OR CHARACTERISTICS WHICH ARE OR MAY BE INJURIOUS TO HUMAN, PLANT, OR MARINE LIFE, WILDLIFE, OR OTHER ANIMAL LIFE, OR TO PROPERTY, OR WHICH UNREASONABLY INTERFERE WITH THE COMFORTABLE ENJOYMENT OF LIFE AND PROPERTY THROUGHOUT FRESHWATER OR TIDAL WETLANDS AS MAY BE AFFECTED THEREBY.

37. "PRACTICABLE" SHALL MEAN AVAILABLE AND CAPABLE OF BEING DONE AFTER TAKING INTO CONSIDERATION COST, EXISTING TECHNOLOGY AND LOGISTICS IN THE LIGHT OF OVERALL PROJECT PURPOSES.

38. "REGIONAL WATERSHED" SHALL MEAN A WATERSHED AS DELINEATED IN THE OFFICIAL FRESHWATER WETLANDS MAP OF THE STATE, OR OF ANY SELECTED SECTION OR REGION THEREOF.

39. "SUCCESS" SHALL MEAN WHEN A MITIGATION BANK MEETS THE SUCCESS CRITERIA PROVIDED IN THE MITIGATION BANK PERMIT.

S 26-0107. WETLANDS MITIGATION BANKING COMMISSION.

1. THERE IS HEREBY CREATED WITHIN THE DEPARTMENT, A COMMISSION TO BE KNOWN AS THE WETLANDS MITIGATION BANKING COMMISSION. THE PURPOSE OF THE COMMISSION WILL BE TO OVERSEE THE ESTABLISHMENT, USE AND OPERATION OF MITIGATION BANKS ESTABLISHED PURSUANT TO THIS ARTICLE INCLUDING THE ALLOCATION AND ASSIGNMENT OF MITIGATION BANK CREDITS AND DEBITS TO EACH MITIGATION BANK, AND TO ASSIST AS AUTHORIZED BY THIS ARTICLE, THE STATE, AND ITS POLITICAL SUBDIVISIONS, IN THE CREATION, RESTORATION, ENHANCEMENT AND PRESERVATION OF WETLANDS AND OTHER ECOLOGICAL BENEFITS FOR AFFECTED COMMUNITIES.

2. THE COMMISSION SHALL CONSIST OF TWENTY-ONE MEMBERS INCLUDING THE COMMISSIONERS OF ENVIRONMENTAL CONSERVATION, HEALTH AND AGRICULTURE AND MARKETS OR THEIR DESIGNEES, THE REGIONAL DIRECTOR OF EACH OF THE REGIONS OF THE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, OR THEIR DESIGNEES; THE SECRETARY OF STATE, OR THE SECRETARY OF STATE'S DESIGNEE; AND, EIGHT PERSONS TO BE APPOINTED BY THE GOVERNOR FROM THE GENERAL PUBLIC, TWO OF WHOM SHALL BE APPOINTED UPON THE RECOMMENDATION OF THE TEMPORARY PRESIDENT OF THE SENATE, TWO OF WHOM SHALL BE APPOINTED UPON THE RECOMMENDATION OF THE SPEAKER OF THE ASSEMBLY, ONE OF WHOM SHALL BE APPOINTED UPON THE RECOMMENDATION OF THE MINORITY LEADER OF THE SENATE AND ONE OF WHOM SHALL BE APPOINTED UPON THE RECOMMENDATION OF THE MINORITY LEADER OF THE ASSEMBLY. OF THE PERSONS APPOINTED FROM THE GENERAL PUBLIC, ONE SHALL BE APPOINTED FROM PERSONS RECOMMENDED BY RECOGNIZED ENVIRONMENTAL AND CONSERVATION ORGANIZATIONS, ONE FROM PERSONS RECOMMENDED BY RECOGNIZED BUILDING AND DEVELOPMENTAL ORGANIZATIONS, ONE FROM PERSONS RECOMMENDED FROM RECOGNIZED AGRICULTURAL ORGANIZATIONS, ONE PERSON RECOMMENDED BY RECOGNIZED COMMERCIAL FISHING INDUSTRY ORGANIZATIONS, ONE RECOMMENDED BY RECOGNIZED FISH AND WILDLIFE SPORTING ORGANIZATIONS, ONE FROM RECOGNIZED MUNICIPAL GOVERNMENT ORGANIZATIONS, ONE FROM THE BUSINESS COUNCIL OF THE STATE OF NEW YORK AND ONE RECOMMENDED BY THE NEW YORK STATE BAR ASSOCIATION.

EACH OF THE MEMBERS APPOINTED FROM THE GENERAL PUBLIC SHALL SERVE FOR A TERM OF THREE YEARS AND UNTIL A SUCCESSOR IS APPOINTED AND QUALIFIED. ALL VACANCIES IN THE OFFICES OF THE MEMBERS APPOINTED FROM THE GENERAL

PUBLIC, EXCEPT THOSE CREATED THROUGH THE EXPIRATION OF TERM, SHALL BE FILLED FOR THE UNEXPIRED TERM ONLY, AND IN THE SAME MANNER, AND WITH A MEMBER HAVING THE SAME CLASS, AS THE ORIGINAL APPOINTMENT. EACH MEMBER SHALL BE ELIGIBLE FOR REAPPOINTMENT, BUT MAY BE REMOVED BY THE GOVERNOR FOR CAUSE. NO MEMBER APPOINTED FROM THE GENERAL PUBLIC SHALL BE AN OFFICER OR EMPLOYEE OF ANY STATE DEPARTMENT OR AGENCY AND NO SUCH MEMBER MAY APPOINT A DESIGNEE TO TEMPORARILY OR PERMANENTLY ASSUME HIS OR HER PLACE ON THE COMMISSION.

3. THE COMMISSIONER OR HIS OR HER DESIGNEE SHALL SERVE AS CHAIR OF THE COMMISSION AND THE COMMISSION SHALL ELECT A VICE CHAIR FROM AMONG THE APPOINTED MEMBERS TO PRESIDE IN THE ABSENCE OF THE CHAIR.

4. IN ORDER TO OFFSET IN PART, THE OVERHEAD COSTS INCURRED BY THE MEMBERS OF THE COMMISSION APPOINTED FROM THE GENERAL PUBLIC SUCH MEMBERS SHALL RECEIVE COMPENSATION FOR THEIR SERVICES AS MEMBERS OF THE COMMISSION AT THE RATE OF TWENTY DOLLARS PER HOUR (INCLUDING TRAVEL TIME), NOT TO EXCEED ONE HUNDRED SIXTY DOLLARS FOR EACH DAY OF SERVICE ON OFFICIAL BUSINESS OF THE COMMISSION BUT NOT TO EXCEED TWELVE THOUSAND DOLLARS FOR ANY ONE CALENDAR YEAR AND EACH OF THE MEMBERS OF THE BOARD SHALL BE ALLOWED THE NECESSARY AND ACTUAL EXPENSES WHICH EACH SHALL OCCUR IN THE PERFORMANCE OF THEIR DUTIES UNDER THIS ARTICLE.

5. FOR THE PURPOSES OF THIS SECTION, THE MEMBERS OF THE COMMISSION APPOINTED FROM THE GENERAL PUBLIC SHALL BE CONSIDERED OFFICERS OR EMPLOYEES OF PUBLIC ENTITIES AND SHALL BE AFFORDED SUCH DEFENSE AND INDEMNIFICATION PROVIDED PURSUANT TO SECTION 18 OF THE PUBLIC OFFICERS LAW.

6. A MAJORITY OF THE MEMBERSHIP OF THE COMMISSION SHALL CONSTITUTE A QUORUM FOR THE TRANSACTION OF COMMISSION BUSINESS. WHILE THE COMMISSION SHALL STRIVE TO SEEK A CONSENSUS FOR ITS ACTIONS, ACTION MAY BE TAKEN AND MOTIONS AND RESOLUTIONS ADOPTED BY THE COMMISSION AT ANY MEETING THEREOF BY THE AFFIRMATIVE VOTE OF A MAJORITY OF THE FULL MEMBERSHIP OF THE COMMISSION.

7. THE COMMISSION MAY APPOINT SUCH STAFF OR HIRE SUCH EXPERTS AS IT MAY REQUIRE WITHIN THE LIMITS OF APPROPRIATIONS MADE FOR THESE PURPOSES.

8. THE COMMISSION MAY CALL TO ITS ASSISTANCE SUCH EMPLOYEES AS ARE NECESSARY AND MADE AVAILABLE TO IT FROM THE DEPARTMENT AND ANY OTHER AGENCY OR DEPARTMENT OF THE STATE, ITS POLITICAL SUBDIVISIONS OR AUTHORITIES.

9. THE COMMISSION, IN CONSULTATION WITH THE DIRECTOR OF THE BUDGET SHALL SET A SCHEDULE OF FEES AND A PROCEDURE FOR COLLECTING THE SAME, FOR THE WORK PERFORMED IN CONNECTION WITH THE PERMITS AND APPROVALS REQUESTED OF THE COMMISSION. SUCH SCHEDULE OF FEES SHALL BE REFLECTIVE OF THE COST ASSOCIATED WITH THE SERVICE REQUIRED FOR THE PROCESSING AND HANDLING OF THE VARIOUS MATTERS FOR WHICH THE FEE SCHEDULE IS ADOPTED INCLUDING THE COST OF THE MEETINGS OF THE COMMISSION AND SHALL BE SUFFICIENT TO OFFSET AS MUCH OF THE EXPENSES OF THE COMMISSION AND ITS WORK AS IS PRACTICABLE WITHIN THE LEGISLATIVE INTENT OF THIS ACT TO ENCOURAGE THE CREATION, RESTORATION, MAINTENANCE AND, WHERE APPROPRIATE, USE OF WETLANDS MITIGATION BANKS.

10. THE COMMISSION MAY ADOPT, PURSUANT TO THE STATE ADMINISTRATIVE PROCEDURE ACT, AND IN CONSULTATION WITH THE DEPARTMENT, ANY RULES AND REGULATIONS NECESSARY TO CARRY OUT ITS RESPONSIBILITIES.

S 26-0109. MITIGATION BANK PERMITS.

ANY PERSON SEEKING TO OBTAIN A MITIGATION BANK PERMIT, IN THE EVENT THE MITIGATION BANK PERTAINS TO THE MITIGATION OF FRESHWATER WETLANDS, SHALL APPLY FOR SUCH A PERMIT, AS A REGULATED ACTIVITY PURSUANT TO ARTICLE 24 OF THIS CHAPTER, OR, IN THE EVENT THAT THE MITIGATION BANK PERMIT

PERTAINS TO MITIGATION OF TIDAL WATER WETLANDS, SHALL APPLY FOR SUCH A PERMIT AS A REGULATED ACTIVITY PURSUANT TO ARTICLE 25 OF THIS CHAPTER, PROVIDED, HOWEVER THAT THE APPROVAL OF ANY APPLICATION FOR A MITIGATION BANK PERMIT PURSUANT TO EITHER ARTICLE 24 OR ARTICLE 25 OF THIS CHAPTER, SHALL BE ADVISORY ONLY TO THE COMMISSION AND SHALL NOT ASSIGN MITIGATION BANK CREDITS TO THE MITIGATION BANK WHICH SHALL BE THE RESPONSIBILITY OF THE COMMISSION, AND SUCH PERMIT SHALL BE EFFECTIVE ONLY UPON THE FURTHER APPROVAL OF THE COMMISSION IN ACCORDANCE WITH APPLICABLE LAW AND UNDER SUCH RULES AS MAY BE ADOPTED BY THE COMMISSION AND FURTHER SUBJECT TO ANY OTHER STATE OR FEDERAL APPROVAL REQUIRED BY ANY OTHER FEDERAL OR STATE LAW.

S 26-0111. RIGHT OF APPEAL.

ANY PERSON AGGRIEVED BY THE APPROVAL OR DENIAL OF A MITIGATION BANK PERMIT PURSUANT TO ARTICLE 24 OF THIS CHAPTER SHALL HAVE THE RIGHT TO APPEAL SUCH DECISION AS PROVIDED IN SECTION 24-1101 AND SECTION 24-1105 OF THIS CHAPTER; ANY PERSON AGGRIEVED BY THE APPROVAL OR DENIAL OF A MITIGATION BANK PERMIT PURSUANT TO ARTICLE 25 OF THIS CHAPTER SHALL HAVE THE RIGHT TO APPEAL SUCH DECISION PURSUANT TO SECTION 25-0404 OF THIS CHAPTER. IN ORDER TO PROVIDE FOR POLICY CONSISTENCY AND UNIFORMITY IN ENFORCEMENT OF THIS ACT, THE COMMISSION SHALL BE NOTIFIED OF ANY SUCH APPEAL AND SHALL PROVIDE AN ADVISORY OPINION TO THE REVIEWING AUTHORITY SETTING FORTH THE COMMISSION'S POSITION AND POLICY WITH REFERENCE TO THE SUBJECT MATTER OF EACH APPEAL. ANY PERSON AGGRIEVED BY THE ISSUANCE, DENIAL, SUSPENSION, OR REVOCATION OF A MITIGATION BANK PERMIT APPROVED BY THE COMMISSION MAY WITHIN THIRTY DAYS FROM THE DATE OF THE COMMISSION'S WRITTEN APPROVAL OR ORDER SEEK JUDICIAL REVIEW PURSUANT TO ARTICLE 78 OF THE CIVIL PRACTICE LAW AND RULES IN THE SUPREME COURT FOR THE COUNTY IN WHICH THE WETLANDS AFFECTED ARE LOCATED. NOTHING HEREIN SHALL PREVENT THE COMMISSION FROM PROVIDING BY ITS OWN RULE AND REGULATION AN APPEAL PROCEDURE WITHIN THE COMMISSION TO PROCESS OR REVIEW ANY APPROVAL, DENIAL, SUSPENSION OR REVOCATION OF A MITIGATION BANK PERMIT BUT IN SUCH EVENT THE COMMISSION SHALL FIRST RENDER AN INTERLOCUTORY DECISION WHICH UNLESS APPEALED AS PROVIDED IN THE COMMISSION'S RULE WITHIN THIRTY DAYS SHALL BE FINAL, AND SUCH DECISION SHALL BE APPEALABLE EVEN IF THE AGGRIEVED PARTY DID NOT AVAIL THEMSELVES OF THE OPPORTUNITY TO UTILIZE THE INTERNAL APPEAL PROCEDURE AFFORDED BY THE COMMISSION'S RULES.

S 26-0113. MITIGATION BANK CRITERIA.

TO OBTAIN A MITIGATION BANK PERMIT, THE APPLICATION AT A MINIMUM MUST PROVIDE REASONABLE ASSURANCES THAT:

1. THE PROPOSED MITIGATION BANK WILL IMPROVE ECOLOGICAL CONDITIONS OF THE REGIONAL WATERSHED OR COASTAL AREA AS THE CASE MAY BE;

2. THE PROPOSED MITIGATION BANK WILL PROVIDE VIABLE AND SUSTAINABLE ECOLOGICAL AND HYDROLOGICAL FUNCTIONS FOR THE PROPOSED MITIGATION SERVICE AREA;

3. THE PROPOSED MITIGATION BANK WILL BE EFFECTIVELY MANAGED IN PERPETUITY;

4. THE PROPOSED MITIGATION BANK WILL NOT DESTROY AREAS WITH HIGH ECOLOGICAL VALUE;

5. THE PROPOSED MITIGATION BANK WILL ACHIEVE MITIGATION SUCCESS;

6. THE PROPOSED MITIGATION BANK WILL BE ADJACENT TO LANDS WHERE THE EXISTING OR PROPOSED LAND USES THAT ARE PRESENTLY PERMITTED BY LAW WILL NOT ADVERSELY AFFECT THE PERPETUAL VIABILITY OF THE MITIGATION BANK DUE TO UNSTABLE LAND USES OR CONDITIONS;

7. ANY SURFACE WATER MANAGEMENT SYSTEM TO BE CONSTRUCTED, ALTERED, OPERATED, MAINTAINED, ABANDONED, OR REMOVED WITHIN THE MITIGATION BANK

WILL MEET THE REQUIREMENTS OF THIS ARTICLE AND THE RULES ADOPTED THEREUNDER;

8. IT HAS SUFFICIENT LEGAL AND EQUITABLE INTEREST IN THE PROPERTY TO ENSURE PERPETUAL PROTECTION AND MANAGEMENT OF THE LANDS WITHIN A MITIGATION BANK; AND

9. IT CAN MEET THE FINANCIAL RESPONSIBILITY REQUIREMENTS PRESCRIBED FOR MITIGATION BANKS.

S 26-0115. MITIGATION BANK PHASES AND ADDITIONS.

1. A MITIGATION BANK MAY BE ESTABLISHED AND OPERATED IN PHASES IF EACH PHASE INDEPENDENTLY MEETS THE REQUIREMENTS FOR THE ESTABLISHMENT AND OPERATION OF A MITIGATION BANK. THE NUMBER OF MITIGATION CREDITS ASSIGNED TO A PHASE OF A MITIGATION BANK MAY BE LESS THAN WOULD BE ASSIGNED TO THAT PHASE UPON COMPLETION OF ALL PHASES OF THE MITIGATION BANK. IN SUCH CASE THE COMMISSION SHALL INCREASE THE NUMBER OF MITIGATION CREDITS AWARDED TO SUBSEQUENT PHASES OF THE MITIGATION BANK.

2. A MITIGATION BANK MAY APPLY FOR AN AMENDMENT TO ITS PERMIT TO PERMIT THE ADDITION OF LAND TO A PERMITTED MITIGATION BANK IN THE SAME MANNER AS IT APPLIED FOR ITS MITIGATION BANK PERMIT AND SUCH ADDITION SHALL BE ALLOWED WHEN IT IS APPROPRIATE TO DO SO AND THE ADDITION OF THE LAND RESULTS IN AN INCREASE IN THE ECOLOGICAL VALUE OF THE EXISTING MITIGATION BANK. ANY SUCH ADDITION SHALL BE ACCOMPLISHED THROUGH A MODIFICATION TO THE PERMIT WHICH REFLECTS THE CORRESPONDING INCREASE IN THE TOTAL NUMBER OF MITIGATION CREDITS ASSIGNED TO THE BANK.

S 26-0117. MITIGATION BANKING JOINT VENTURES, LIMITED LIABILITY COMPANIES AND LIMITED LIABILITY PARTNERSHIPS.

NOTWITHSTANDING ANY GENERAL, SPECIAL OR LOCAL LAW, TO THE CONTRARY, TWO OR MORE PERSONS MAY ENTER INTO A JOINT VENTURE, OR FORM A LIMITED LIABILITY COMPANY, OR A LIMITED LIABILITY PARTNERSHIP TO CREATE, ESTABLISH, OPERATE AND MAINTAIN ONE OR MORE PRIVATE, PUBLIC OR PUBLIC-PRIVATE MITIGATION BANK OR BANKS AND TO ACT AS THE BANKER THEREFOR.

S 26-0119. MITIGATION BANK PERMIT APPLICATIONS.

ANY PERSON OR ENTITY PROPOSING TO ESTABLISH A MITIGATION BANK MUST APPLY FOR A MITIGATION BANK PERMIT. SUCH APPLICATION SHALL BE MADE TO THE COMMISSION, AND, IF FOR A FRESHWATER MITIGATION BANK TO THE COMMISSIONER OR THE LOCAL GOVERNMENT AS REQUIRED BY ARTICLE 24 OF THIS CHAPTER OR, IF FOR A TIDAL WATER WETLANDS MITIGATION BANK, TO THE COMMISSIONER AS REQUIRED BY ARTICLE 25 OF THIS CHAPTER. AN APPLICATION FOR A MITIGATION BANK PERMIT SHALL ALSO CONSTITUTE AN APPLICATION FOR A PERMIT TO CONDUCT A REGULATED ACTIVITY ON EITHER FRESHWATER WETLANDS, PURSUANT TO ARTICLE 24 OF THIS CHAPTER, OR TIDAL WETLANDS, PURSUANT TO ARTICLE 25 OF THIS CHAPTER, AS THE CASE MAY BE, AND THE APPLICANT SHALL SUBMIT AS PART OF ITS APPLICATION, THE INFORMATION REQUIRED BY ARTICLE 24 OR ARTICLE 25 OF THIS CHAPTER, AS THE CASE MAY BE, TO CONDUCT A REGULATED ACTIVITY ON THE SPECIFIED WETLANDS, THE INFORMATION SPECIFIED BELOW, AS APPROPRIATE FOR THE PROJECT (EXCEPT FOR ANY SUCH INFORMATION THAT MAY BE WAIVED OR MODIFIED BY THE COMMISSION IN A SPECIFIC PROJECT FOR GOOD CAUSE SHOWN), AND SUCH OTHER INFORMATION AS REQUIRED BY THE COMMISSION, COMMISSIONER, OR WHERE APPLICABLE UNDER ARTICLE 24 OF THIS CHAPTER, THE LOCAL GOVERNMENT:

1. A DESCRIPTION OF THE LOCATION OF THE PROPOSED MITIGATION BANK WHICH SHALL INCLUDE:

(A) A MAP AT REGIONAL SCALE SHOWING THE PROJECT AREA IN RELATION TO THE REGIONAL WATERSHED AND PROPOSED MITIGATION SERVICE AREA;

(B) A VICINITY MAP SHOWING THE PROJECT AREA IN RELATION TO ADJACENT LANDS AND OFFSITE AREAS OF ECOLOGICAL OR HYDROLOGIC SIGNIFICANCE WHICH COULD EFFECT THE LONG-TERM VIABILITY OR ECOLOGICAL VALUE OF THE BANK;

(C) AN AERIAL PHOTOGRAPH IDENTIFYING BOUNDARIES OF THE PROJECT AREA;
(D) A HIGHWAY MAP SHOWING POINTS OF ACCESS TO THE MITIGATION BANK FOR SITE INSPECTION; AND
(E) A LEGAL DESCRIPTION OF THE PROPOSED MITIGATION BANK.
2. A DESCRIPTION OF THE ECOLOGICAL SIGNIFICANCE OF THE PROPOSED MITIGATION BANK TO THE REGIONAL WATERSHED IN WHICH IT IS LOCATED.
3. A DESCRIPTION AND ASSESSMENT OF CURRENT SITE CONDITIONS WHICH SHALL INCLUDE:
(A) A SOILS MAP OF THE PROJECT AREA;
(B) A TOPOGRAPHIC MAP OF THE PROJECT AREA AND ADJACENT HYDROLOGIC CONTRIBUTING AND RECEIVING AREAS;
(C) A HYDROLOGIC FEATURES MAP OF THE PROJECT AREA AND ADJACENT HYDROLOGIC CONTRIBUTING AND RECEIVING AREAS;
(D) CURRENT HYDROLOGIC CONDITIONS IN THE PROJECT AREA;
(E) A VEGETATION MAP OF THE PROJECT AREA;
(F) ECOLOGICAL BENEFITS CURRENTLY PROVIDED TO THE REGIONAL WATERSHED BY THE PROJECT AREA;
(G) ADJACENT LANDS, INCLUDING EXISTING OR PROPOSED LAND USES AND CONDITIONS, AND LAND USE REGULATIONS PROMULGATED FOR FRESHWATER WETLANDS PURSUANT TO ARTICLE 24 OF THIS CHAPTER, WHERE APPLICABLE, OR TIDAL WETLANDS REGULATIONS PROMULGATED PURSUANT TO ARTICLE 25 OF THIS CHAPTER, WHERE APPLICABLE, AND ANY SPECIAL DESIGNATIONS OR CLASSIFICATIONS ASSOCIATED WITH ADJACENT LANDS OR WATERS; AND
(H) A DISCLOSURE BY THE APPLICANT OF ANY MATERIAL FACT WHICH WOULD AFFECT THE CONTEMPLATED USE OF THE PROPERTY.
4. A MITIGATION PLAN DESCRIBING THE ACTIONS PROPOSED TO ESTABLISH, CONSTRUCT, OPERATE, MANAGE AND MAINTAIN THE MITIGATION BANK WHICH SHALL INCLUDE:
(A) A DESCRIPTION OF THE ENVIRONMENTAL ENGINEERING FIRM, OR FIRMS OR IN HOUSE EMPLOYEES TO BE ENGAGED IN THE PLANNING, CONSTRUCTION, OPERATION AND OVERSIGHT OF THE MITIGATION BANK, THEIR EXPERIENCE AND EXPERTISE IN SUCH WORK;
(B) A COPY OF THE CONSTRUCTION-LEVEL DRAWINGS DETAILING PROPOSED TOPOGRAPHIC ALTERATIONS AND ALL STRUCTURAL COMPONENTS ASSOCIATED WITH PROPOSED ACTIVITIES;
(C) PROPOSED CONSTRUCTION ACTIVITIES, INCLUDING A DETAILED SCHEDULE FOR IMPLEMENTATION;
(D) THE PROPOSED VEGETATION PLANTING SCHEME AND DETAILED SCHEDULE FOR IMPLEMENTATION;
(E) MEASURES TO BE IMPLEMENTED DURING AND AFTER CONSTRUCTION TO AVOID ADVERSE IMPACTS RELATED TO PROPOSED ACTIVITIES;
(F) A DETAILED LONG-TERM MANAGEMENT PLAN COMPRISING ALL ASPECTS OF OPERATION AND MAINTENANCE, INCLUDING WATER MANAGEMENT PRACTICES, VEGETATION ESTABLISHMENT, EXOTIC AND NUISANCE SPECIES CONTROL, FIRE MANAGEMENT, AND CONTROL OF ACCESS; AND
(G) A PROPOSED MONITORING PLAN TO DEMONSTRATE MITIGATION SUCCESS.
5. AN ASSESSMENT OF IMPROVEMENT OR CHANGES IN ECOLOGICAL VALUE ANTICIPATED AS A RESULT OF PROPOSED MITIGATION ACTIONS WHICH SHALL INCLUDE:
(A) A DESCRIPTION OF ANTICIPATED SITE CONDITIONS IN THE MITIGATION BANK AFTER THE MITIGATION PLAN IS SUCCESSFULLY IMPLEMENTED;
(B) A COMPARISON OF CURRENT FISH AND WILDLIFE HABITAT TO EXPECTED HABITAT AFTER THE MITIGATION PLAN IS SUCCESSFULLY IMPLEMENTED; AND
(C) A DESCRIPTION OF THE EXPECTED ECOLOGICAL BENEFITS TO THE REGIONAL WATERSHED.

6. EVIDENCE OF SUFFICIENT LEGAL OR EQUITABLE INTEREST IN THE PROPERTY WHICH IS TO BECOME THE MITIGATION BANK TO MEET THE REQUIREMENTS OF SECTION 26-0129 OF THIS ARTICLE.

7. DRAFT DOCUMENTATION OF FINANCIAL RESPONSIBILITY MEETING THE REQUIREMENTS.

8. ANY ADDITIONAL INFORMATION WHICH MAY BE NECESSARY TO EVALUATE WHETHER THE PROPOSED MITIGATION BANK MEETS THE CRITERIA OF THIS SECTION.

S 26-0121. ESTABLISHMENT OF MITIGATION CREDITS.

1. BASED UPON THE INFORMATION SUBMITTED BY THE APPLICANT, AND AN ASSESSMENT OF THE PROPOSED MITIGATION BANK PURSUANT TO THE CRITERIA IN THIS SECTION, THE COMMISSION WILL ASSIGN A NUMBER OF MITIGATION CREDITS TO THE PROPOSED MITIGATION BANK, OR PHASES THEREOF.

2. A MITIGATION CREDIT IS A UNIT OF MEASURE WHICH REPRESENTS THE INCREASE IN ECOLOGICAL VALUE RESULTING FROM RESTORATION, ENHANCEMENT, PRESERVATION, OR CREATION ACTIVITIES. THE NUMBER OF CREDITS AVAILABLE FROM THE BANK WILL BE DETERMINED BY THE COMMISSION AS WELL AS THE METHODOLOGY TO DETERMINE APPROPRIATE CREDIT WITHDRAWAL FROM THE BANK FOR EACH INDIVIDUAL PROJECT THAT WILL APPLY FOR USE OF THE FUNCTIONING MITIGATION BANK. IN DETERMINING THE DEGREE OF IMPROVEMENT IN ECOLOGICAL VALUE THE FOLLOWING FACTORS WILL BE CONSIDERED:

(A) THE EXTENT TO WHICH TARGET HYDROLOGIC REGIMES CAN BE ACHIEVED AND MAINTAINED.

(B) THE EXTENT TO WHICH MANAGEMENT ACTIVITIES PROMOTE NATURAL ECOLOGICAL CONDITIONS, INCLUDING NATURAL FIRE PATTERNS.

(C) THE PROXIMITY TO AREAS OF NATIONAL, STATE, OR REGIONAL ECOLOGICAL SIGNIFICANCE, SUCH AS NATIONAL OR STATE PARKS, AND OTHER REGIONALLY SIGNIFICANT ECOLOGICAL RESOURCES OR HABITATS, SUCH AS LANDS ACQUIRED OR TO BE ACQUIRED THROUGH GOVERNMENTAL OR NON-PROFIT LAND ACQUISITION PROGRAMS FOR ENVIRONMENTAL CONSERVATION, AND THE ESTABLISHMENT OF CORRIDORS TO THOSE RESOURCES OR HABITATS.

(D) THE QUALITY AND QUANTITY OF WETLAND OR UPLAND RESTORATION, ENHANCEMENT, PRESERVATION, OR CREATION.

(E) WHERE APPLICABLE, THE ECOLOGICAL AND HYDROLOGICAL RELATIONSHIP BETWEEN WETLANDS AND UPLANDS IN THE MITIGATION BANK.

(F) THE EXTENT TO WHICH THE MITIGATION BANK PROVIDES HABITAT FOR FISH AND WILDLIFE, ESPECIALLY HABITAT FOR SPECIES LISTED AS THREATENED, ENDANGERED OR OF SPECIAL CONCERN, OR PROVIDES HABITATS WHICH ARE UNIQUE FOR THAT MITIGATION SERVICE AREA.

(G) THE EXTENT TO WHICH THE LANDS THAT ARE TO BE PRESERVED ARE ALREADY PROTECTED BY EXISTING STATE, LOCAL OR FEDERAL REGULATIONS OR LAND USE RESTRICTIONS.

(H) THE EXTENT TO WHICH THE LANDS THAT ARE TO BE PRESERVED WOULD BE ADVERSELY AFFECTED IF THEY WERE NOT PRESERVED.

(I) ANY SPECIAL DESIGNATION OR CLASSIFICATION OF THE AFFECTED WATERS AND LANDS.

3. NO CREDIT SHALL BE AVAILABLE FOR EITHER FRESHWATER OR TIDAL WATER WETLAND CREATION UNTIL THE SUCCESS OF THE CREATED WETLANDS IS DEMONSTRATED.

4. SOME MITIGATION CREDITS MAY BE WITHDRAWN PRIOR TO MEETING ALL OF THE PERFORMANCE CRITERIA SPECIFIED IN THE MITIGATION BANK PERMIT. THE NUMBER OF CREDITS AND SCHEDULE FOR RELEASE SHALL BE DETERMINED BASED UPON THE PERFORMANCE CRITERIA FOR THE MITIGATION BANK, AND THE SUCCESS CRITERIA FOR EACH MITIGATION ACTIVITY. A MITIGATION BANK WILL BE CREDITED WITH ITS MAXIMUM NUMBER OF MITIGATION CREDITS ONLY AFTER MEETING THE MITIGATION SUCCESS CRITERIA SPECIFIED IN THE PERMIT.

5. MITIGATION CREDITS WHETHER OF PUBLIC, PRIVATE OR PUBLIC-PRIVATE MITIGATION BANKS AVAILABLE FOR WITHDRAWAL MAY BE TRANSFERRED, OR SOLD TO, OR USED BY PUBLIC, PRIVATE OR PUBLIC-PRIVATE ENTITIES, SUBJECT TO THE PROVISIONS OF THIS SECTION.

6. IF AT ANY TIME THE COMMISSION DETERMINES THAT THE BANKER IS NOT IN MATERIAL COMPLIANCE WITH THE TERMS OF THE MITIGATION BANK PERMIT, NO MITIGATION CREDITS MAY BE WITHDRAWN. MITIGATION CREDITS SHALL AGAIN BE AVAILABLE FOR WITHDRAWAL IF THE BANKER COMES BACK INTO COMPLIANCE.

7. THE MITIGATION BANK PERMIT SHALL CONTAIN A LEDGER LISTING THE NUMBER AND TYPE OF MITIGATION CREDITS IN THE MITIGATION BANK. THE LEDGER WILL PROVIDE THE MAXIMUM NUMBER AND TYPE OF MITIGATION CREDITS WHICH WOULD BE AVAILABLE FOR WITHDRAWAL WHEN THE MITIGATION BANK MEETS ALL OF THE PERFORMANCE CRITERIA IN THE PERMIT.

8. MITIGATION CREDITS MAY BE SOLD WHOLE OR IN PART AT THE BANKER'S DISCRETION. MITIGATION CREDITS MAY BE SOLD OR RESOLD, (IN THE EVENT THEY WERE SOLD BUT NOT USED OR NO LONGER USED), UNTIL THEY ARE ALL USED TO OFFSET ADVERSE IMPACTS.

9. THE COMMISSION SHALL MAINTAIN A LEDGER OF THE MITIGATION CREDITS AVAILABLE IN EACH MITIGATION BANK. MITIGATION CREDITS SHALL BE WITHDRAWN AS A MINOR MODIFICATION OF THE MITIGATION BANK PERMIT. TO WITHDRAW MITIGATION CREDITS, THE IMPACT PERMIT APPLICANT MUST SUBMIT TO THE PARTY GRANTING SUCH PERMIT, DOCUMENTATION FROM THE BANKER DEMONSTRATING THAT MITIGATION CREDITS HAVE BEEN RESERVED, SOLD OR TRANSFERRED TO THE PERMIT APPLICANT, AND REQUESTING THAT THE MITIGATION CREDITS BE WITHDRAWN FROM THE MITIGATION BANK. IF THE PARTY PERMITTING THE IMPACT DETERMINES THAT USE OF THE MITIGATION CREDITS PROPOSED BY THE APPLICANT IS APPROPRIATE TO OFFSET THE ADVERSE IMPACTS, IT SHALL NOTIFY THE COMMISSION. UPON RECEIPT OF THIS NOTICE, THE COMMISSION SHALL DETERMINE IF A SUFFICIENT NUMBER AND TYPE OF MITIGATION CREDITS ARE AVAILABLE, WITHDRAW THE MITIGATION CREDITS, AND NOTIFY THE PARTY PERMITTING THE IMPACT AND THE BANKER BY LETTER OF THE WITHDRAWAL OF THE MITIGATION CREDITS AND THE REMAINING BALANCE OF MITIGATION CREDITS.

10. THE COMMISSION SHALL ANNUALLY SUBMIT A REPORT OF THE MITIGATION CREDITS SOLD, TRANSFERRED, OR USED FROM EACH MITIGATION BANK TO THE COMMISSIONER AND ANY OTHER PARTY INVOLVED IN APPROVING FRESHWATER WETLANDS IMPACTS PERMITS UNDER ARTICLE 24 OF THIS CHAPTER AND TIDAL WATER WETLANDS IMPACTS UNDER ARTICLE 25 OF THIS CHAPTER.

S 26-0123. CONTRIBUTION OF LANDS.

A PERMIT APPLICANT MAY CONTRIBUTE LAND TO A MITIGATION BANK IF:

1. THE ADVERSE IMPACTS TO BE OFFSET BY THE LAND DONATION ARE WITHIN THE MITIGATION SERVICE AREA OF THE MITIGATION BANK, EXCEPT AS PROVIDED;

2. THE LAND WILL OFFSET ADVERSE IMPACTS OF THE PROPOSED PROJECT;

3. THE LAND IS ADJACENT TO OR WILL BECOME A COMMISSION APPROVED MITIGATION BANK;

4. THE LAND WILL IMPROVE OR ENHANCE THE ECOLOGICAL VALUE OF A COMMISSION APPROVED MITIGATION BANK;

5. THE LAND WILL BE ENCUMBERED WITH A CONSERVATION EASEMENT OR CONVEYED IN FEE SIMPLE PURSUANT TO THE REQUIREMENT; AND

6. THE GRANTEE OF THE CONSERVATION EASEMENT OR FEE SIMPLE INTEREST AGREES TO ACCEPT SUCH CONVEYANCE.

S 26-0125. CONTRIBUTION OF FUNDS.

FUNDS MAY BE CONTRIBUTED TO A MITIGATION BANK BY PURCHASING MITIGATION CREDITS FROM THE BANKER.

S 26-0127. MITIGATION SERVICE AREAS.

1. A MITIGATION SERVICE AREA WILL BE ESTABLISHED FOR EACH MITIGATION BANK INCLUDED IN THE MITIGATION BANK PERMIT. EXCEPT AS PROVIDED HEREIN,

MITIGATION CREDITS MAY ONLY BE WITHDRAWN TO OFFSET ADVERSE IMPACTS IN THE MITIGATION SERVICE AREA. THE EXTENT OF THE MITIGATION SERVICE AREA WILL DEPEND UPON WHETHER ADVERSE IMPACTS WITHIN THE MITIGATION SERVICE AREA CAN BE ADEQUATELY OFFSET BY THE MITIGATION BANK.

2. IN THE CASE OF A FRESHWATER WETLANDS MITIGATION BANK SUCH MITIGATION SERVICE AREA MAY BE LARGER THAN THE REGIONAL WATERSHED IF ADVERSE IMPACTS TO WETLANDS OUTSIDE THE REGIONAL WATERSHED COULD BE ADEQUATELY OFFSET BY THE MITIGATION BANK BECAUSE OF LOCAL ECOLOGICAL OR HYDROLOGICAL CONDITIONS, OR SMALLER THAN THE REGIONAL WATERSHED, SUCH AS IN AN AQUATIC PRESERVE, IF ADVERSE IMPACTS THROUGHOUT THE REGIONAL WATERSHED COULD NOT BE OFFSET BY THE MITIGATION BANK BECAUSE OF LOCAL ECOLOGICAL OR HYDROLOGICAL CONDITIONS. IN THE CASE OF A TIDAL WATERS WETLANDS MITIGATION BANK, SUCH MITIGATION SERVICE AREA MAY BE LARGER THAN THE REGIONAL COASTAL AREA IF ADVERSE IMPACTS TO WETLANDS OUTSIDE THE REGIONAL COASTAL AREA COULD BE ADEQUATELY OFFSET BY THE MITIGATION BANK BECAUSE OF LOCAL ECOLOGICAL OR HYDROLOGICAL CONDITIONS OR SMALLER THAN THE REGIONAL COASTAL AREA SUCH AS IN AN AQUATIC PRESERVE, IF ADVERSE IMPACTS THROUGHOUT THE REGIONAL COASTAL AREA COULD NOT BE OFFSET BY THE MITIGATION BANK BECAUSE OF LOCAL ECOLOGICAL OR HYDROLOGICAL CONDITIONS.

3. MITIGATION SERVICE AREAS MAY OVERLAP AND MULTIPLE MITIGATION SERVICE AREAS MAY BE APPROVED FOR A REGIONAL WATERSHED IN THE CASE OF A FRESHWATER MITIGATION BANK OR FOR A REGIONAL COASTAL AREA IN THE CASE OF A TIDAL WATER MITIGATION BANK.

4. IN ADDITION TO PROJECTS LOCATED WHOLLY WITHIN THE MITIGATION SERVICE AREA OF A MITIGATION BANK, THE FOLLOWING PROJECTS ARE ELIGIBLE TO USE A MITIGATION BANK IF THE REQUIREMENTS ARE MET:

(A) PROJECTS WITH ADVERSE IMPACTS PARTIALLY LOCATED WITHIN THE MITIGATION SERVICE AREA.

(B) LINEAR PROJECTS, SUCH AS ROADWAYS, TRANSMISSION LINES, DISTRIBUTION LINES, PIPELINES, OR RAILWAYS.

(C) PROJECTS WITH TOTAL ADVERSE IMPACTS OF LESS THAN ONE-HALF ACRE IN SIZE.

5. WHEN MITIGATION CREDITS ARE APPLIED TO OFFSET ADVERSE IMPACTS WITHIN THE REGIONAL WATERSHED, OR COASTAL AREA, THE MITIGATION CREDIT REQUIREMENT SHALL BE THE SAME AS THAT SPECIFIED FOR MITIGATION ON THE PROJECT SITE.

6. WHEN MITIGATION CREDITS ARE APPLIED TO OFFSET ADVERSE IMPACTS OUTSIDE THE REGIONAL WATERSHED, OR COASTAL ZONE, THE MITIGATION CREDIT REQUIREMENT MAY BE HIGHER THAN THAT SPECIFIED FOR MITIGATION ON THE PROJECT SITE, EXCEPT FOR LINEAR PROJECTS, AS REFERENCED IN PARAGRAPH (B) OF SUBDIVISION 4 OF THIS SECTION, WHEN THE IMPACT OF BEING OFFSET IS WITHIN THE MITIGATION SERVICE AREA OF THE MITIGATION BANK TO BE USED.

S 26-0129. LAND USE RESTRICTIONS ON MITIGATION BANKS.

1. BEFORE MITIGATION CREDITS MAY BE USED FROM A MITIGATION BANK OR ANY PHASE OF A MITIGATION BANK, THE BANKER SHALL EITHER (A) CAUSE A FEE INTEREST TO BE CONVEYED TO THE COMMISSION, THE DEPARTMENT, OR THE STATE, OR (B) CAUSE A CONSERVATION EASEMENT TO BE CONVEYED TO THE COMMISSION, THE DEPARTMENT OR THE STATE AND SUCH FEE OR EASEMENT INTEREST MAY BE JOINTLY CONVEYED TO SUCH ADDITIONAL GRANTEES AS THE GRANTOR SHALL DECIDE WITH THE RIGHT OF SUCH GRANTEE TO CONVEY THEIR INTEREST TO SUCCESSORS IN INTEREST IN THE PROPERTY WHERE THE CREDITS HAVE BEEN OR ARE TO BE USED TO OFFSET WETLAND IMPACTS. MITIGATION BANKS ON FEDERALLY OWNED LAND SHALL BE ENCUMBERED IN PERPETUITY BY CONSERVATION EASEMENTS OR OTHER MECHANISMS ENSURING PRESERVATION IN ACCORDANCE WITH THE MITIGATION BANK PERMIT.

2. ALL CONSERVATION EASEMENTS SHALL BE GRANTED IN PERPETUITY WITHOUT ENCUMBRANCES, UNLESS SUCH ENCUMBRANCES DO NOT ADVERSELY AFFECT THE ECOLOGICAL VIABILITY OF THE MITIGATION BANK. ALL CONSERVATION EASEMENTS SHALL BE OF A FORM AND CONTENT SUFFICIENT TO ENSURE PRESERVATION OF THE MITIGATION BANK ACCORDING TO THE PERMIT, AND SHALL, AT A MINIMUM, BE CONSISTENT WITH ALL THE REQUIREMENTS AND RESTRICTIONS.

3. ALL REAL PROPERTY CONVEYANCES SHALL BE IN FEE SIMPLE AND BY STATUTORY WARRANTY DEED, SPECIAL WARRANTY DEED, OR OTHER DEED, WITHOUT ENCUMBRANCES THAT ADVERSELY AFFECT THE INTEGRITY OF THE BANK AND ARE ACCEPTABLE TO THE COMMISSION. THE COMMISSION WILL ACCEPT A QUIT CLAIM DEED TO AID THE CLEARING OF MINOR TITLE DEFECTS OR OTHERWISE RESOLVE A BOUNDARY QUESTION IN THE MITIGATION BANK.

4. THE GRANTOR OF THE PROPERTY OR CONSERVATION EASEMENT SHALL PROVIDE THE FOLLOWING UNLESS THE COMMISSION DETERMINES SUCH ITEMS ARE NOT NECESSARY TO ENSURE PRESERVATION OF THE MITIGATION BANK ACCORDING TO THE PERMIT:

(A) A SURVEY OF PROPERTY OR THE AREA WITHIN THE CONSERVATION EASEMENT. THE SURVEY MUST BE CERTIFIED, BY A LAND SURVEYOR REGISTERED IN THE STATE OF NEW YORK, TO MEET THE REQUIREMENTS OF THE COMMISSION, AND THE MINIMUM TECHNICAL STANDARDS SET FORTH BY THE NEW YORK BOARD OF PROFESSIONAL LAND SURVEYORS.

(B) A CERTIFIED APPRAISAL OF THE MARKET VALUE OF THE PROPERTY OR INTEREST TO BE CONVEYED TO DETERMINE THE APPROPRIATE AMOUNT OF TITLE INSURANCE.

(C) ASSURANCE OF THE MARKETABILITY OF THE INTEREST IN REAL PROPERTY BEING ACQUIRED IN THE FORM OF A MARKETABLE TITLE COMMITMENT AND OWNER'S TITLE POLICY IN AN AMOUNT AT LEAST EQUAL TO THE FAIR MARKET VALUE. THE COVERAGE, FORM AND EXCEPTIONS OF THE TITLE INSURANCE POLICY SHALL ENSURE THAT THE MITIGATION BANK WILL BE PRESERVED ACCORDING TO THE MITIGATION BANK PERMIT.

(D) IF A FEE SIMPLE INTEREST IS BEING CONVEYED, A PHASE I ENVIRONMENTAL AUDIT IDENTIFYING ANY ENVIRONMENTAL PROBLEMS WHICH MAY AFFECT THE LIABILITY OF THE STATE AND COMMISSION AND ANY ADDITIONAL AUDITS AS ARE NECESSARY TO ENSURE THAT THE STATE AND THE COMMISSION WILL NOT BE LIABLE FOR THOSE ENVIRONMENTAL PROBLEMS.

5. THE DEPARTMENT SHALL REQUIRE ADDITIONAL DOCUMENTATION OR ACTIONS FROM THE GRANTOR OF THE CONSERVATION EASEMENT OR FEE INTEREST IF SUCH ADDITIONAL DOCUMENTATION OR ACTIONS ARE NECESSARY TO ENSURE THAT THE MITIGATION BANK WILL BE PRESERVED ACCORDING TO THE MITIGATION BANK PERMIT.

6. THE GRANTOR SHALL PAY THE DOCUMENTARY REVENUE STAMP TAX AND ALL OTHER TAXES OR COSTS ASSOCIATED WITH THE CONVEYANCE, INCLUDING THE COST OF RECORDING THE DEED OR EASEMENT AND ANY OTHER RECORDABLE INSTRUMENTS REQUIRED BY THE COMMISSION, UNLESS PROHIBITED OR EXEMPT BY LAW, AS A CONDITION OF THE RECEIPT OF THE CONVEYANCE.

7. ALL REAL ESTATE TAXES AND ASSESSMENTS WHICH ARE OR WHICH MAY BECOME A LIEN AGAINST THE PROPERTY SHALL BE SATISFIED OF RECORD BY THE GRANTOR BEFORE OR AT CLOSING. IF NECESSARY, THE GRANTOR SHALL PLACE FUNDS IN ESCROW WITH THE APPROPRIATE MUNICIPAL TAX COLLECTOR.

8. THE GRANTOR SHALL REMOVE ALL ABANDONED PERSONAL PROPERTY AND SOLID WASTE FROM THE PROPERTY THAT REDUCES THE PROPOSED ECOLOGICAL VALUE OF THE PROPERTY, THAT ADVERSELY AFFECTS THE CONSTRUCTION, IMPLEMENTATION OR MANAGEMENT OF THE BANK, OR THAT POSES A SUBSTANTIAL RISK OF LIABILITY TO THE STATE OR COMMISSION AS A CONDITION OF RECEIPT OF THE CONVEYANCE.

9. THE GRANTOR SHALL PROVIDE IN THE CONSERVATION EASEMENT THAT THE BANKER, THE STATE AND THE COMMISSION SHALL HAVE ACCESS TO THE PROPERTY

TO PERFORM ALL ACTS NECESSARY TO ENSURE COMPLIANCE WITH THE MITIGATION BANK PERMIT AND ANY PERMITS ISSUED UNDER THIS ARTICLE.

10. THE BANKER SHALL RECORD THE CONSERVATION EASEMENT OR PROPERTY DEED WITHIN THIRTY DAYS OF ISSUANCE OF THE MITIGATION BANK PERMIT, OR AS OTHERWISE REQUIRED IN THE MITIGATION BANK PERMIT. THE BANKER SHALL SUBMIT TO THE COMMISSION A CERTIFIED COPY OF THE RECORDED CONSERVATION EASEMENT OR PROPERTY DEED WITHIN THIRTY DAYS OF RECORDING.

S 26-0131. FINANCIAL RESPONSIBILITY.

1. REQUIRED PROOF OF FINANCIAL RESPONSIBILITY. TO PROVIDE REASONABLE ASSURANCES THAT THE PROPOSED MITIGATION BANK WILL MEET THE REQUIREMENTS OF THIS SECTION AND THE ASSOCIATED PERMIT CONDITIONS, BANKERS OF PRIVATE MITIGATION BANKS SHALL PROVIDE PROOF OF FINANCIAL RESPONSIBILITY FOR: (A) THE CONSTRUCTION AND IMPLEMENTATION PHASE OF THE BANK, AND (B) THE LONG-TERM MANAGEMENT OF THE BANK, AS REQUIRED IN THIS SECTION. BANKERS OF PUBLIC MITIGATION BANKS AND PUBLIC-PRIVATE MITIGATION BANKS SHALL PROVIDE PROOF OF FINANCIAL RESPONSIBILITY. THE AMOUNT OF FINANCIAL RESPONSIBILITY PROVIDED IN THE MECHANISMS REQUIRED IN THIS SECTION SHALL BE BASED ON THE COST ESTIMATES DETERMINED.

2. FINANCIAL RESPONSIBILITY DOCUMENTATION OF REQUIRED MECHANISMS. THE APPLICANT SHALL PROVIDE DRAFT DOCUMENTATION OF THE REQUIRED FINANCIAL RESPONSIBILITY MECHANISMS DESCRIBED BELOW WITH THE PERMIT APPLICATION, AND SHALL SUBMIT TO THE COMMISSION THE EXECUTED OR FINALIZED DOCUMENTATION WITHIN THE TIME FRAMES SPECIFIED IN THE PERMIT. THE PROVISIONS OF THIS SECTION SHALL ALSO APPLY FOR ANY MODIFICATIONS TO THE MITIGATION BANK PERMIT.

3. GENERAL TERMS FOR FINANCIAL RESPONSIBILITY MECHANISMS. IN ADDITION TO THE SPECIFIC PROVISIONS REGARDING FINANCIAL RESPONSIBILITY MECHANISMS FOR CONSTRUCTION, IMPLEMENTATION AND LONG-TERM MANAGEMENT, THE FOLLOWING TERMS SHALL BE COMPLIED WITH:

(A) THE FINANCIAL RESPONSIBILITY MECHANISMS SHALL NAME THE COMMISSION AS SOLE BENEFICIARY OR SHALL BE PAYABLE TO THE COMMISSION. THE FINANCIAL RESPONSIBILITY MECHANISM SHALL BE RETAINED BY THE COMMISSION IF IT IS OF A TYPE WHICH IS RETAINED BY THE BENEFICIARY ACCORDING TO INDUSTRY STANDARDS.

(B) THE FINANCIAL RESPONSIBILITY MECHANISMS SHALL BE ESTABLISHED WITH A STATE OR NATIONAL BANK, SAVINGS AND LOAN ASSOCIATION, OR OTHER FINANCIAL INSTITUTION, LICENSED IN THIS STATE. IN THE CASE OF LETTERS OF CREDIT, THE LETTER OF CREDIT MUST BE ISSUED BY AN ENTITY WHICH HAS AUTHORITY TO ISSUE LETTERS OF CREDIT AND WHOSE LETTER OF CREDIT OPERATIONS ARE REGULATED AND EXAMINED BY A FEDERAL OR STATE AGENCY. IN THE CASE OF A SURETY BOND, THE SURETY BOND MUST BE ISSUED BY A SURETY COMPANY REGISTERED WITH THIS STATE.

(C) NO PERSON SHALL WITHDRAW OR TRANSFER ANY PORTION OF THE MONEYS PROVIDED FOR FINANCIAL RESPONSIBILITY WITHOUT FIRST OBTAINING PRIOR WRITTEN APPROVAL FROM THE COMMISSION, WHICH WILL BE GRANTED ONLY IF SUCH WITHDRAWAL OR TRANSFER DOES NOT REDUCE THE AMOUNT OF FINANCIAL RESPONSIBILITY BELOW THE COST REQUIREMENTS.

(D) THE FINANCIAL RESPONSIBILITY MECHANISMS SHALL NOT EXPIRE OR TERMINATE PRIOR TO COMPLETION OF THE APPLICABLE PERMIT CONDITIONS.

(E) THE FINANCIAL RESPONSIBILITY MECHANISMS SHALL NOT BE TERMINATED OR CANCELED BY THE BANKER. WITHIN NINETY DAYS OF RECEIPT OF A NOTICE OF CANCELLATION OF A FINANCIAL RESPONSIBILITY MECHANISM OR OTHER ACTUAL OR CONSTRUCTIVE NOTICE OF CANCELLATION, THE BANKER SHALL PROVIDE AN ALTERNATE FINANCIAL RESPONSIBILITY MECHANISM WHICH MEETS THE REQUIREMENTS OF THIS SECTION.

(F) IF THE MITIGATION BANK HAS FAILED TO COMPLY WITH THE TERMS AND CONDITIONS OF THE PERMIT, THE COMMISSION UPON REASONABLE NOTICE MAY DRAW UPON THE FINANCIAL MECHANISM.

4. FINANCIAL RESPONSIBILITY FOR CONSTRUCTION AND IMPLEMENTATION. (A) NO FINANCIAL RESPONSIBILITY SHALL BE REQUIRED WHERE THE CONSTRUCTION AND IMPLEMENTATION OF THE MITIGATION BANK, OR A PHASE THEREOF, IS COMPLETED AND SUCCESSFUL PRIOR TO THE WITHDRAWAL OF ANY CREDITS.

(B) FINANCIAL RESPONSIBILITY FOR THE CONSTRUCTION AND IMPLEMENTATION OF EACH PHASE OF THE MITIGATION BANK MAY BE ESTABLISHED BY GUARANTEE BONDS, PERFORMANCE BONDS, INSURANCE CERTIFICATES, IRREVOCABLE LETTERS OF CREDIT, TRUST FUND AGREEMENTS, OR SECURITIES. IF BONDS OR AN IRREVOCABLE LETTER OF CREDIT ARE USED AS THE FINANCIAL MECHANISM, A STANDBY TRUST FUND SHALL BE ESTABLISHED, IN A FORM MEETING STANDARD INDUSTRY PRACTICES, IN WHICH ALL PAYMENTS UNDER THE BONDS OR IRREVOCABLE LETTER OF CREDIT SHALL BE DIRECTLY DEPOSITED.

(C) THE AMOUNT OF FINANCIAL RESPONSIBILITY ESTABLISHED SHALL EQUAL THE COST OF CONSTRUCTION AND IMPLEMENTATION OF EACH PHASE OF THE MITIGATION BANK WHICH IS BEING IMPLEMENTED. WHEN A CURRENT PHASE HAS BEEN COMPLETELY CONSTRUCTED, IMPLEMENTED, AND TRENDING TOWARD SUCCESS IN COMPLIANCE WITH THE PERMIT, THE RESPECTIVE AMOUNT OF FINANCIAL RESPONSIBILITY SHALL BE RELEASED.

(D) THE FINANCIAL RESPONSIBILITY MECHANISM SHALL BECOME EFFECTIVE AT LEAST SIXTY DAYS PRIOR TO INITIATION OF CONSTRUCTION OF THE NEXT PHASE OF THE MITIGATION BANK, OR AS OTHERWISE REQUIRED BY THE MITIGATION BANK PERMIT PRIOR TO INITIATION OF IMPLEMENTATION AND CONSTRUCTION OF THE SUBJECT PHASE.

5. FINANCIAL RESPONSIBILITY FOR LONG-TERM MANAGEMENT. (A) A BANKER SHALL ESTABLISH A TRUST FUND AGREEMENT TO PROVIDE FINANCIAL RESPONSIBILITY FOR THE LONG-TERM MANAGEMENT OF THE MITIGATION BANK, OR PHASE THEREOF. TRUST FUND AGREEMENTS SHALL BE SUBMITTED IN A FORMAT WHICH MEETS STANDARD INDUSTRY PRACTICES.

(B) THE AMOUNT OF FINANCIAL RESPONSIBILITY SHALL EQUAL THE COST OF LONG-TERM MANAGEMENT, PURSUANT TO PARAGRAPH (C) OF SUBDIVISION 6 OF THIS SECTION FOR ALL PREVIOUSLY CONSTRUCTED PHASES AND THE CURRENT PHASE FOR WHICH CREDITS HAVE BEEN APPROVED FOR WITHDRAWAL.

(C) THE TRUST FUND AGREEMENT SHALL BE EFFECTIVE AND FULLY FUNDED AT LEAST SIXTY DAYS PRIOR TO THE WITHDRAWAL OF CREDITS FROM THE MITIGATION BANK, OR PHASE THEREOF, OR AS OTHERWISE PROVIDED IN THE MITIGATION BANK PERMIT PRIOR TO THE WITHDRAWAL OF CREDITS.

6. COST ESTIMATES. (A) FOR THE PURPOSES OF DETERMINING THE AMOUNT OF FINANCIAL RESPONSIBILITY THAT IS REQUIRED IN THIS SECTION, THE BANKER SHALL SUBMIT A DETAILED WRITTEN ESTIMATE, IN CURRENT DOLLARS, OF THE TOTAL COST OF CONSTRUCTION AND IMPLEMENTATION AND LONG-TERM MANAGEMENT OF THE MITIGATION BANK.

(B) THE COST ESTIMATE FOR CONSTRUCTION AND IMPLEMENTATION SHALL INCLUDE ALL COSTS ASSOCIATED WITH COMPLETING CONSTRUCTION AND IMPLEMENTATION OF THE MITIGATION BANK, OR PHASE THEREOF, INCLUDING EARTHMOVING, PLANTING, STRUCTURE INSTALLATION, CONSULTANT FEES, MONITORING ACTIVITIES AND REPORTS.

(C) THE COST ESTIMATE FOR THE LONG-TERM MANAGEMENT OF THE MITIGATION BANK SHALL BE BASED ON THE COSTS OF MAINTAINING AND OPERATING ANY STRUCTURES, CONTROLLING NUISANCE OR EXOTIC SPECIES, FIRE MANAGEMENT, CONSULTANT FEES, MONITORING ACTIVITIES AND REPORTS, AND ANY OTHER COSTS ASSOCIATED WITH LONG-TERM MANAGEMENT. THE AMOUNT OF FINANCIAL RESPONSIBILITY SHALL EQUAL THE COST OF LONG-TERM MANAGEMENT FOR ALL PREVIOUSLY

CONSTRUCTED PHASES AND THE CURRENT PHASE FOR WHICH THE WITHDRAWAL OF CREDITS IS IMMINENT.

(D) THE BANKER SHALL SUBMIT THE ESTIMATES, TOGETHER WITH VERIFIABLE DOCUMENTATION, TO THE COMMISSION ALONG WITH THE PROOF OF FINANCIAL RESPONSIBILITY.

(E) THE COSTS SHALL BE ESTIMATED BASED ON A THIRD PARTY PERFORMING THE WORK AT THE FAIR MARKET VALUE OF SERVICES. THE SOURCE OF ANY COST ESTIMATES SHALL BE INDICATED.

7. COST ADJUSTMENTS. (A) THE BANKER SHALL, EVERY TWO YEARS, ADJUST THE AMOUNT OF FINANCIAL RESPONSIBILITY PROVIDED FOR CONSTRUCTION, IMPLEMENTATION, AND LONG-TERM MANAGEMENT. EVERY TWO YEARS THE BANKER SHALL SUBMIT TO THE COMMISSION A COST ADJUSTMENT STATEMENT ACCOMPANIED BY SUPPORTING DOCUMENTATION. CONSTRUCTION, IMPLEMENTATION, AND LONG-TERM MANAGEMENT COSTS SHALL BE LISTED SEPARATELY.

(B) AT EACH COST ADJUSTMENT, THE BANKER SHALL REVISE THE CONSTRUCTION AND IMPLEMENTATION COST ESTIMATE FOR INFLATION AND CHANGES IN THE COSTS TO COMPLETE THE CURRENT PHASE OF THE MITIGATION BANK.

(C) AT EACH COST ADJUSTMENT, THE BANKER SHALL REVISE THE LONG-TERM MANAGEMENT COST ESTIMATE FOR INFLATION AND CHANGES IN THE COSTS TO CARRY OUT THE LONG-TERM MANAGEMENT CONDITIONS OF THE PERMIT.

(D) REVISED COST ESTIMATES SHALL BE USED AS THE BASIS FOR MODIFYING THE FINANCIAL MECHANISM. IF THE VALUE OF THE FINANCIAL MECHANISM IS LESS THAN THE TOTAL AMOUNT OF THE CURRENT CONSTRUCTION AND IMPLEMENTATION AND LONG-TERM MANAGEMENT COST ESTIMATES, THE BANKER SHALL INCREASE THE VALUE OF THE FINANCIAL MECHANISM TO REFLECT THE NEW ESTIMATE WITHIN SIXTY DAYS. IF THE VALUE OF THE FUNDING MECHANISM IS GREATER THAN THE TOTAL AMOUNT OF THE CURRENT COST ESTIMATE, THE BANKER MAY REDUCE THE VALUE OF THE FUNDING MECHANISM TO REFLECT THE NEW ESTIMATE UPON RECEIVING DEPARTMENT APPROVAL.

(E) THE COMMISSION SHALL REQUIRE ADJUSTMENT OF THE AMOUNT OF FINANCIAL RESPONSIBILITY PROVIDED FOR CONSTRUCTION, IMPLEMENTATION OR LONG-TERM MANAGEMENT AT TIMES OTHER THAN THE COST ADJUSTMENT PERIOD WHEN THE COSTS ASSOCIATED WITH COMPLIANCE WITH THE PERMIT CONDITIONS EXCEED THE CURRENT AMOUNT OF FINANCIAL RESPONSIBILITY AND SUCH FINANCIAL ASSURANCES ARE NECESSARY TO ENSURE THAT THE MITIGATION BANK WILL BE CONSTRUCTED ACCORDING TO THE PERMIT.

8. SPECIAL FINANCIAL RESPONSIBILITY REQUIREMENTS FOR PUBLIC AND PUBLIC-PRIVATE MITIGATION BANKS. (A) PUBLIC AND PUBLIC-PRIVATE ENTITIES OTHER THAN THE DEPARTMENT AND THE COMMISSION SHALL DEMONSTRATE REASONABLE ASSURANCES THAT IT CAN MEET THE CONSTRUCTION AND IMPLEMENTATION REQUIREMENTS IN THE MITIGATION BANK PERMIT BY ANY OF THE MECHANISMS IN THE PREVIOUS SUBDIVISIONS OF THIS SECTION, OR BY OTHER FINANCIAL MECHANISMS WHICH ARE SUFFICIENT TO MEET THE REQUIREMENTS OF THIS SECTION.

(B) PUBLIC ENTITIES OTHER THAN THE DEPARTMENT AND COMMISSION SHALL ESTABLISH A TRUST FUND FOR THE LONG-TERM MANAGEMENT OF THE MITIGATION BANK IN ACCORDANCE WITH SUBDIVISION 7 OF THIS SECTION. THE TRUST FUND AGREEMENT FOR LONG-TERM MANAGEMENT MAY BE FUNDED AS MITIGATION CREDITS ARE WITHDRAWN, PROVIDED THAT THE TRUST FUND AGREEMENT IS FULLY FUNDED WHEN ALL MITIGATION CREDITS ARE WITHDRAWN. PUBLIC ENTITIES SHALL COMPLY WITH THE COST ADJUSTMENT PROVISIONS IN SUBDIVISION 7 OF THIS SECTION.

S 26-0133. MITIGATION BANK PERMIT AND MITIGATION BANK CONCEPTUAL APPROVAL.

IF THE MITIGATION BANK PROPOSAL HAS BEEN OTHERWISE APPROVED IN ACCORDANCE WITH ARTICLE 24 OR 25 OF THIS CHAPTER, AS APPLICABLE, FOR A PERMIT, TO CONDUCT AN IMPACTED ACTIVITY AND MEETS THE CRITERIA IN THIS SECTION, THE COMMISSION SHALL ISSUE A MITIGATION BANK PERMIT TO THE BANKER. AN

AUTHORIZATION UNDER THIS SECTION MAY BE ISSUED IN TWO FORMS: A MITIGATION BANK PERMIT OR A MITIGATION BANK CONCEPTUAL APPROVAL.

1. THE MITIGATION BANK PERMIT AUTHORIZES THE IMPLEMENTATION AND OPERATION OF THE MITIGATION BANK AND SETS FORTH THE RIGHTS AND RESPONSIBILITIES OF THE BANKER AND THE COMMISSION FOR THE IMPLEMENTATION, MANAGEMENT, MAINTENANCE AND OPERATION OF THE MITIGATION BANK. THE MITIGATION BANK PERMIT SHALL INCLUDE THE FOLLOWING:

(A) A DESCRIPTION OF THE MITIGATION SERVICE AREA.

(B) THE MAXIMUM NUMBER OF MITIGATION CREDITS AVAILABLE FOR USE WHEN THE MITIGATION BANK, OR PHASE THEREOF, IS DEEMED SUCCESSFUL, THE TYPE OF MITIGATION CREDITS AWARDED, AND THE NUMBER AND SCHEDULE OF MITIGATION CREDITS AVAILABLE FOR USE PRIOR TO SUCCESS.

(C) THE SUCCESS CRITERIA BY WHICH THE MITIGATION BANK WILL BE EVALUATED. "SUCCESS" MEANS WHEN A MITIGATION BANK MEETS THE SUCCESS CRITERIA PROVIDED IN SECTION 26-0113 OF THIS ARTICLE AND IN THE MITIGATION BANK PERMIT.

(D) THE FINANCIAL RESPONSIBILITY MECHANISM OR MECHANISMS WHICH MUST BE EMPLOYED BY THE BANKER, INCLUDING THE PROCEDURE FOR DRAWING ON THE FINANCIAL MECHANISMS BY THE COMMISSION, AND PROVISIONS FOR ADJUSTMENT OF THE FINANCIAL RESPONSIBILITY MECHANISM.

(E) REQUIREMENTS FOR THE EXECUTION AND RECORDING OF THE CONSERVATION EASEMENT OR CONVEYANCE OF THE FEE INTEREST AS PROVIDED IN SECTION 26-0129 OF THIS ARTICLE.

(F) A LEDGER LISTING MITIGATION CREDITS AVAILABLE IN THE MITIGATION BANK.

(G) A SCHEDULE FOR IMPLEMENTATION OF THE MITIGATION BANK, AND ANY PHASES THEREIN.

(H) THE LONG-TERM MANAGEMENT REQUIREMENTS FOR THE MITIGATION BANK.

2. A MITIGATION BANK PERMIT SHALL AUTOMATICALLY EXPIRE FIVE YEARS FROM THE DATE OF ISSUANCE IF THE BANKER HAS NOT RECORDED A CONSERVATION EASEMENT OR CONVEYED FEE SIMPLE INTEREST, AS APPROPRIATE, OVER THE REAL PROPERTY WITHIN THE MITIGATION BANK, OR PHASE THEREOF, IN ACCORDANCE WITH THE MITIGATION BANK PERMIT; OR, WHEN NO PROPERTY INTEREST IS REQUIRED TO BE RECORDED, THE MITIGATION BANK PERMIT SHALL AUTOMATICALLY EXPIRE IF NO CONSTRUCTION HAS BEEN COMMENCED PURSUANT THERETO. EXCEPT AS PROVIDED ABOVE, A MITIGATION BANK PERMIT SHALL BE PERPETUAL UNLESS REVOKED OR MODIFIED.

3. A MITIGATION BANK CONCEPTUAL APPROVAL ESTIMATES THE LEGAL AND FINANCIAL REQUIREMENTS NECESSARY FOR EVALUATION OF THE MITIGATION BANK, INFORMATION NECESSARY FOR EVALUATION OF THE MITIGATION BANK PERMIT APPLICATION, AND POTENTIAL MITIGATION CREDITS TO BE AWARDED PURSUANT TO THE MITIGATION BANK PERMIT. THE MITIGATION BANK CONCEPTUAL APPROVAL DOES NOT AUTHORIZE THE USE OR WITHDRAWAL OF MITIGATION CREDITS, OR ANY CONSTRUCTION WITHIN THE MITIGATION BANK. THE LEVEL OF DETAIL PROVIDED IN THE MITIGATION BANK CONCEPTUAL APPROVAL WILL DEPEND ON THE LEVEL OF DETAIL SUBMITTED WITH THE APPLICATION. A MITIGATION BANK CONCEPTUAL APPROVAL SHALL BE VALID FOR A TERM OF FIVE YEARS FROM THE DATE OF ISSUANCE.

S 26-0135. SURRENDER, TRANSFER OR MODIFICATION OF MITIGATION BANK PERMITS.

1. A BANKER MAY APPLY TO SURRENDER A MITIGATION BANK PERMIT, OR PERMITTED PHASE THEREOF, BY SUBMITTING A WRITTEN REQUEST TO THE COMMISSION. THE WRITTEN REQUEST MUST IDENTIFY WHICH PHASE OF THE MITIGATION WORK PERFORMED IN THAT PHASE, AND DESCRIBE THE CONSERVATION PROPERTY INTEREST ENCUMBERING THAT PHASE. THE COMMISSION SHALL AUTHORIZE RELEASE FROM A MITIGATION BANK PERMIT WHEN NO CREDITS HAVE BEEN SOLD FOR THE

PORTION REQUESTED TO BE RELEASED, AND RELINQUISHMENT OF SUCH PORTION OR PHASE WOULD NOT COMPROMISE THE ECOLOGICAL VALUE OF THE REMAINING PORTIONS OF THE MITIGATION BANK.

2. IF A PROPERTY INTEREST HAS BEEN CONVEYED AS PROVIDED IN SECTION 26-0129 OF THIS ARTICLE FOR A MITIGATION BANK PERMIT WHICH IS SURRENDERED AS PROVIDED ABOVE, THE COMMISSION SHALL CONVEY THE PROPERTY INTEREST BACK TO THE GRANTOR OF THAT INTEREST OF THAT PORTION OF THE PROPERTY, THE RELEASE OF WHICH WOULD NOT COMPROMISE THE ECOLOGICAL VALUE OF THE REMAINING PORTIONS OF THE MITIGATION BANK.

3. IF A SURFACE WATER MANAGEMENT SYSTEM HAS BEEN CONSTRUCTED OR ALTERED WITHIN THE MITIGATION BANK, THE BANKER SHALL OBTAIN ANY PERMITS REQUIRED PURSUANT TO THIS CHAPTER OR THE PUBLIC HEALTH LAW, TO OPERATE OR ABANDON THE SURFACE WATER MANAGEMENT SYSTEM.

4. TO TRANSFER A MITIGATION BANK PERMIT, THE BANKER SHALL MEET THE REQUIREMENTS OF THIS ARTICLE AND THE ENTITY TO WHOM THE PERMIT WILL BE TRANSFERRED MUST PROVIDE REASONABLE ASSURANCES THAT IT CAN MEET THE REQUIREMENTS OF THIS SECTION.

5. A MITIGATION BANK PERMIT CAN BE ISSUED AS A MODIFICATION OF A MITIGATION BANK CONCEPTUAL APPROVAL.

S 26-0137. USE OF CERTAIN FUNDS RECEIVED FROM A PUBLIC OR A PUBLIC-PRIVATE MITIGATION BANK.

A PORTION OF THE FUNDS RECEIVED BY A PUBLIC ENTITY FROM A PUBLIC MITIGATION BANK OR FROM A PUBLIC-PRIVATE MITIGATION BANK FROM THE SALE OF CREDITS SHALL BE DEDICATED FOR THE CONSTRUCTION AND IMPLEMENTATION OF THE MITIGATION BANK, AND A PORTION OF THE FUNDS SHALL BE DEDICATED FOR THE LONG-TERM MANAGEMENT OF THE BANK AS SET FORTH IN THE MITIGATION BANK PERMIT. FUNDS DERIVED BY THE PUBLIC ENTITY FROM THE SALE OF MITIGATION CREDITS WHICH ARE NOT NECESSARY FOR THE CONSTRUCTION, IMPLEMENTATION, AND LONG-TERM MANAGEMENT OF SUCH MITIGATION BANK SHALL BE USED AS FOLLOWS: FIFTY PERCENT OF SUCH FUNDS SHALL BE RETURNED TO THE PUBLIC ENTITY OR ENTITIES WHICH ARE OWNERS OR PART OWNERS OF SUCH MITIGATION BANK FOR THEIR GENERAL PURPOSES AND FIFTY PERCENT OF SUCH FUNDS SHALL BE PAID OVER TO THE ENVIRONMENTAL PROTECTION FUND ESTABLISHED BY SECTION 92-S OF THE STATE FINANCE LAW TO BE USED PURSUANT TO SUBDIVISION 4 OF SUCH SECTION FOR THE PURPOSE OF ASSISTING LOCAL COMMUNITIES IN THE CREATION AND PRESERVATION OF FRESHWATER AND TIDAL WETLANDS BY PROVIDING THE LOCAL CONTRIBUTION, IN WHOLE OR IN PART TO AUGMENT OR SUPPLEMENT OTHER STATE ASSISTANCE FOR SUCH PURPOSES PROVIDED PURSUANT TO TITLE 7 OF ARTICLE 51 OR ARTICLE 54 OR ARTICLE 56 OF THIS CHAPTER, AND TO ASSIST FINANCIALLY IN OTHER WETLANDS PROJECTS UNDERTAKEN BY THE DEPARTMENT OR IN OTHER ENVIRONMENTAL RESTORATION PROGRAMS UNDERTAKEN PURSUANT TO TITLE 7 OF ARTICLE 51 OR ARTICLE 54 OR ARTICLE 56 OF THIS CHAPTER, OR EXPANSION OF OTHER LAND ACQUISITION OR RESTORATION PROJECTS WHICH IMPROVE REGIONAL OR STATE ECOLOGICAL CONDITIONS.

S 26-0139. CONTRACTS FOR ARCHITECTURAL, ENGINEERING AND SURVEYING SERVICES FOR PUBLIC WETLANDS MITIGATION BANKS.

NOTWITHSTANDING ANY GENERAL OR SPECIAL LAW TO THE CONTRARY, THE NEW YORK STATE POLICY TO NEGOTIATE CONTRACTS FOR ARCHITECTURAL AND/OR ENGINEERING SERVICES AND/OR SURVEYING SERVICES ON THE BASIS OF DEMONSTRATED COMPETENCE AND QUALIFICATION FOR THE TYPE OF PROFESSIONAL SERVICES REQUIRED AND AT FAIR AND REASONABLE FEES, SET OUT IN SECTION 136-A OF THE STATE FINANCE LAW SHALL BE FOLLOWED BY ALL PUBLIC ENTITIES PROCURING SUCH SERVICE FOR THE PLANNING, CONSTRUCTION AND OPERATION OF PUBLIC WETLANDS MITIGATION BANKS. EXCEPT THAT SUCH ENTITIES MAY USE THE SERVICES OF ANY SUCH PROFESSIONS WHICH ARE UNDER CONTRACT WITH THE DEPARTMENT FOR SIMILAR WORK IN PROGRESS ON ANOTHER SITE OR ON A STANDBY

BASIS FOR SIMILAR WORK WITH THE DEPARTMENT THROUGH THE UTILIZATION OF SUCH STATE CONTRACTS AS PROVIDED BY RULES AND REGULATIONS OF THE DEPARTMENT AND THE OFFICE OF THE COMPTROLLER.

S 26-0141. TAX ABATEMENT.

ANY WETLANDS MITIGATION BANK REGULATED PURSUANT TO THIS ARTICLE SHALL BE DEEMED SUBJECT TO A LIMITATION ON THE USE OF SUCH WETLANDS FOR THE PURPOSES OF PROPERTY TAX EVALUATION, IN THE SAME MANNER AS IF AN EASEMENT OR RIGHT HAD BEEN ACQUIRED PURSUANT TO THE GENERAL MUNICIPAL LAW. ASSESSED VALUE SHALL BE BASED ON THE USES REMAINING TO THE OWNER THEREOF. ANY PUBLIC OR PUBLIC-PRIVATE WETLANDS MITIGATION BANK SHALL NOT BE SUBJECT TO REAL PROPERTY TAXATION BUT SHALL MAKE A YEARLY PAYMENT IN LIEU OF TAXES TO THE TAXING JURISDICTION WHEREIN THE WETLANDS BANK IS LOCATED WHICH SHALL REFLECT THE SERVICES PROVIDED BY SUCH TAXING JURISDICTIONS.

S 26-0143. PRIOR APPLICATIONS AND PERMITS.

ANY APPLICATION FOR A WETLANDS MITIGATION BANK OR OFFSITE MITIGATION PLAN FOR WHICH A PERMIT HAS BEEN GRANTED OR WHICH IS PENDING WITH AND DETERMINED COMPLETE UNDER ARTICLE 24 OR ARTICLE 25 OF THIS CHAPTER, ON OR BEFORE THE EFFECTIVE DATE OF THIS ARTICLE, SHALL CONTINUE TO BE SUBJECT TO THE RULES OF THE AUTHORITY THAT GRANTED THE PERMIT OR BEFORE WHICH THE APPLICATION IS PENDING ON OR BEFORE THE EFFECTIVE DATE OF THIS ARTICLE UNLESS THE APPLICANT OR PERMITTEE ELECTS TO BE SUBJECT TO THIS ARTICLE AND THE RULES ADOPTED SUBSEQUENT TO ITS EFFECTIVE DATE. ANY MODIFICATION TO A MITIGATION BANK WHICH IS APPLIED FOR WITHIN TWENTY YEARS OF THE EFFECTIVE DATE OF THIS ARTICLE AND WHICH DOES NOT INVOLVE THE ADDITION OF NEW LAND THAT WAS NOT PREVIOUSLY INCLUDED IN THE MITIGATION BANK APPROVAL OR PERMIT SHALL BE SUBJECT TO THE RULES WHICH WERE IN EFFECT AT THE TIME SUCH PERMIT WAS GRANTED OR SUCH APPLICATION DEEMED TO BE COMPLETE, UNLESS THE PERMITTEE OR APPLICANT ELECTS TO BE SUBJECT TO THIS ARTICLE AND THE RULES ADOPTED TO IMPLEMENT IT.

S 26-0145. SEVERABILITY.

THE PROVISIONS OF THIS ARTICLE SHALL BE SEVERABLE, AND IF ANY SECTION, CLAUSE, SENTENCE, PARAGRAPH, SUBDIVISION OR PART OF THIS ARTICLE SHALL BE ADJUDGED BY ANY COURT OF COMPETENT JURISDICTION TO BE INVALID, SUCH JUDGMENT SHALL NOT AFFECT, IMPAIR OR INVALIDATE THE REMAINDER THEREOF BUT SHALL BE CONFINED IN ITS OPERATION TO THE SECTION, CLAUSE, SENTENCE, PARAGRAPH, SUBDIVISION OR PART THEREOF DIRECTLY INVOLVED IN THE CONTROVERSY IN WHICH SUCH JUDGMENT SHALL HAVE BEEN RENDERED.

S 10. Section 51-0701 of the environmental conservation law is amended by adding a new subdivision 6 to read as follows:

6. THE MONEYS RECEIVED BY THE STATE AND DEPOSITED IN THE WETLANDS MITIGATION BANK ACCOUNT OF THE ENVIRONMENTAL PROTECTION FUND AS ESTABLISHED BY SUBPARAGRAPH (V) OF PARAGRAPH A OF SUBDIVISION TWO OF SECTION NINETY-TWO-S OF THE STATE FINANCE LAW SHALL BE EXPENDED PURSUANT TO APPROPRIATIONS THEREFOR FOR PROJECTS AUTHORIZED TO BE FUNDED IN THIS TITLE AND RECOMMENDED BY THE WETLANDS BANKING COMMISSION.

S 11. Paragraph b of subdivision 1 of section 51-0711 of the environmental conservation law, as added by chapter 400 of the laws of 1973, is amended to read as follows:

b. An agreement by the commissioner to EITHER pay to the municipality, during the progress of restoration or following completion of restoration as may be agreed upon by the parties, an amount equal to the actual cost of restoration or the estimated reasonable cost whichever is the lesser, OR, UNDERTAKE ON BEHALF OF THE MUNICIPALITY TO HAVE THE WORK PERFORMED THROUGH A PRIVATE CONTRACTOR PURSUANT TO A STATE CONTRACT FOR THE SPECIFIC PROJECT OR THROUGH A STANDBY CONTRACTOR FOR SUCH TYPE OF

WORK UNDER CONTRACT TO THE DEPARTMENT PURSUANT TO THE PROCEDURES ESTABLISHED BY SUBDIVISION (A) OF SECTION ONE HUNDRED THIRTY-SIX OF THE STATE FINANCE LAW AND TO PAY SUCH CONTRACTOR DIRECTLY FOR THE ACTUAL COST OF SUCH WORK AND TO BE ENTITLED TO REIMBURSEMENT FROM SUCH MUNICIPALITY OF ANY FEDERAL ASSISTANCE RECEIVED BY SUCH MUNICIPALITY FOR SUCH PROJECT WORK.

S 12. Section 10 of the highway law is amended by adding a new subdivision 46 to read as follows:

46. THE LEGISLATURE FINDS THAT ENVIRONMENTAL MITIGATION FOR THE IMPACT OF TRANSPORTATION PROJECTS PROPOSED BY THE DEPARTMENT CAN BE MORE EFFECTIVELY ACHIEVED BY REGIONAL LONG RANGE WETLANDS MITIGATION PLANNING INCLUDING THE USE OF WETLANDS MITIGATION BANKS RATHER THAN ON A PROJECT-BY-PROJECT BASIS. THE COMMISSIONER, THEREFORE, SHALL HAVE THE POWER TO ACQUIRE BY GRANT, PURCHASE, OR CONDEMNATION, IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK, ANY PROPERTY WHICH HE DEEMS NECESSARY FOR WETLANDS MITIGATION PROGRAMS INCLUDING OFFSITE MITIGATION, OR WETLANDS MITIGATION BANKS EITHER AS A PUBLIC MITIGATION BANK OR TO ENTER INTO A JOINT VENTURE OR TO CAUSE THE DEPARTMENT TO PARTICIPATE IN A PUBLIC-PRIVATE MITIGATION BANK THROUGH A JOINT VENTURE OR A LIMITED LIABILITY COMPANY ARRANGEMENT FOR THE PURPOSE OF CONSTRUCTING, OWNING AND OPERATING A WETLANDS MITIGATION BANK AS AUTHORIZED BY ARTICLE TWENTY-SIX OF THE ENVIRONMENTAL CONSERVATION LAW AND IN CONFORMANCE THEREWITH. THE COMMISSIONER IS FURTHER AUTHORIZED TO SELL MITIGATION BANK CREDITS FROM SUCH MITIGATION BANK TO A PUBLIC OR PRIVATE ENTITY AFTER THE DEPARTMENT'S OWN NEEDS FOR AT LEAST A TEN YEAR PERIOD ARE ADDRESSED.

S 13. The public authorities law is amended by adding a new section 358-b to read as follows:

S 358-B. ACQUISITION OF PROPERTY FOR WETLANDS MITIGATION PROGRAMS. THE LEGISLATURE FINDS THAT ENVIRONMENTAL MITIGATION FOR THE IMPACT OF TRANSPORTATION PROJECTS PROPOSED BY THE AUTHORITY CAN BE MORE EFFECTIVELY ACHIEVED BY REGIONAL, LONG-RANGE MITIGATION PLANNING INCLUDING THE USE OF WETLANDS MITIGATION BANKS, RATHER THAN ON A PROJECT-BY-PROJECT BASIS. THE AUTHORITY THEREFORE SHALL HAVE THE POWER TO ACQUIRE BY GRANT, PURCHASE OR CONDEMNATION, ANY PROPERTY WHICH IT DEEMS NECESSARY FOR WETLANDS MITIGATION PROGRAMS INCLUDING OFFSITE MITIGATION OR WETLANDS MITIGATION BANKS EITHER AS A PUBLIC MITIGATION BANK OR TO ENTER INTO A JOINT VENTURE OR TO CAUSE THE AUTHORITY TO PARTICIPATE IN A PUBLIC-PRIVATE MITIGATION BANK THROUGH A JOINT VENTURE OR A LIMITED LIABILITY COMPANY ARRANGEMENT FOR THE PURPOSE OF CONSTRUCTING, OWNING AND OPERATING A WETLANDS MITIGATION BANK AS AUTHORIZED BY ARTICLE TWENTY-SIX OF THE ENVIRONMENTAL CONSERVATION LAW AND IN CONFORMANCE THEREWITH. AND THE AUTHORITY IS FURTHER EMPOWERED TO SELL MITIGATION BANK CREDITS FROM SUCH MITIGATION BANK TO A PUBLIC OR PRIVATE ENTITY AFTER THE AUTHORITY'S OWN NEEDS FOR AT LEAST A TEN YEAR PERIOD ARE ADDRESSED.

S 14. Paragraph a of subdivision 2 of section 92-s of the state finance law is amended by adding a new subparagraph (v) to read as follows:

(V) WETLANDS MITIGATION BANK ACCOUNT.

S 15. Section 92-s of the state finance law is amended by adding a new subdivision 4 to read as follows:

4. NOTWITHSTANDING ANY OTHER PROVISION OF LAW, MONEYS DEPOSITED IN THE WETLANDS MITIGATION BANK ACCOUNT PURSUANT TO SECTION 26-0137 OF THE ENVIRONMENTAL CONSERVATION LAW SHALL ALSO BE CONSIDERED PART OF THE ENVIRONMENTAL PROTECTION FUND AND SUCH MONEYS SHALL BE AVAILABLE FOR APPROPRIATION IN THE CAPITAL BUDGET FOR ANY PURPOSE AND PROJECT PERMITTED BY SECTION 26-0137 OF THE ENVIRONMENTAL CONSERVATION LAW.

S 16. The limited liability company law is amended by adding a new section 1105 to read as follows:

S 1105. FORMATION BY PUBLIC-PRIVATE ENTITIES TO CONSTRUCT, ENHANCE OR OPERATE A PUBLIC-PRIVATE WETLANDS MITIGATION BANK. NOTWITHSTANDING ANY GENERAL OR SPECIAL LAW TO THE CONTRARY, ONE OR MORE PUBLIC ENTITIES AS THAT TERM IS DEFINED IN ARTICLE TWENTY-SIX OF THE ENVIRONMENTAL CONSERVATION LAW, MAY JOIN ONE OR MORE PERSONS WHO ARE NOT PUBLIC ENTITIES AS THOSE TERMS ARE DEFINED IN ARTICLE TWENTY-SIX OF THE ENVIRONMENTAL CONSERVATION LAW TO FORM A LIMITED LIABILITY COMPANY OR LIMITED LIABILITY PARTNERSHIP FOR THE CONSTRUCTION, ENHANCEMENT AND OPERATION OF A PUBLIC-PRIVATE WETLANDS MITIGATION BANK AS THAT TERM IS DEFINED IN ARTICLE TWENTY-SIX OF THE ENVIRONMENTAL CONSERVATION LAW. SUCH LIMITED LIABILITY COMPANY SHALL BE A DOMESTIC LIMITED LIABILITY COMPANY AND FORMED AND GOVERNED BY THIS CHAPTER EXCEPT THAT SUCH LIMITED LIABILITY COMPANY SHALL BE SUBJECT TO TAXATION ON ONLY THAT PORTION OF THE COMPANY'S PROFITS THAT INURE TO THE PRIVATE INTERESTS IN THE LIMITED LIABILITY COMPANY AND SUCH COMPANY SHALL BE SUBJECT SOLELY TO THE JURISDICTION OF THE COURT OF CLAIMS WHICH SHALL HAVE EXCLUSIVE JURISDICTION TO HEAR AND DETERMINE ANY CLAIM WHATSOEVER AGAINST SUCH COMPANY OR BETWEEN THE MEMBERS OF SUCH COMPANY AND THE DISSOLUTION OF SUCH COMPANY. SERVICE OF PROCESS, HOWEVER, SHALL BE MADE IN ACCORDANCE WITH THE PROVISION OF THIS CHAPTER AND THE PROVISIONS OF THE COURT OF CLAIMS ACT.

S 17. Section 9 of the court of claims act is amended by adding a new subdivision 2-b to read as follows:

2-B. TO HEAR AND DETERMINE A CLAIM OF ANY PERSON, CORPORATION OR MUNICIPALITY AGAINST ANY PUBLIC-PRIVATE WETLANDS MITIGATION BANK, LIMITED LIABILITY COMPANY OR LIMITED LIABILITY PARTNERSHIP FORMED PURSUANT TO ARTICLE TWENTY-SIX OF THE ENVIRONMENTAL CONSERVATION LAW AND SECTION ELEVEN HUNDRED FIVE OF THE LIMITED LIABILITY COMPANY LAW OR ANY CLAIM BY MEMBERS OF SUCH COMPANY AS BETWEEN SUCH MEMBERS AND TO ENTER A DECREE OF DISSOLUTION OF SUCH COMPANY WHENEVER IT IS NOT REASONABLY PRACTICABLE TO CARRY ON THE BUSINESS IN CONFORMITY WITH THE ARTICLES OF ORGANIZATION OR OPERATING AGREEMENT.

S 18. Severability. The provisions of this act shall be severable, and if any section, clause, sentence, paragraph, subdivision or part of this act shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder thereof but shall be confined in its operation to the section, clause, sentence, paragraph, subdivision or part thereof directly involved in the controversy in which such judgment shall have been rendered.

S 19. This act shall take effect immediately.