

Wisconsin Wetlands Association
Testimony before the Joint Legislative Committee on Audits
On the matter of a proposed wetland regulatory program audit
Presented April 5, 2006 by Erin L. O'Brien

Good afternoon. My name is Erin O'Brien. I work as a Wetland Policy & Conservation Specialist for the Wisconsin Wetlands Association and I am here to testify on behalf of my organization and our 1,000 members. The Wisconsin Wetlands Association is dedicated to the protection, restoration and enjoyment of wetlands and associated ecosystems through science-based programs, education and advocacy. We are a 501(c)(3) non-profit organization. A substantial number of our members are wetland professionals, many of whom work in the private sector as wetland consultants. Wetland consultants serve as a liaison between the regulated community and the regulators. Their clients include home-builders, commercial and industrial developers, private landowners, road and airport builders and others and their job is to help their clients navigate the wetland regulatory and permitting process in order to move projects forward. We point this out to demonstrate that, in addition to our internal expertise on wetland regulations and regulatory concerns, we represent a professional community with extensive wetland ecology training and substantial hands-on experience with the administration, implementation and enforcement of federal, state, and local wetland regulations.

Because of our organization's specialized focus on wetland concerns, we have many seasoned insights on the causes of wetland regulatory tensions and problems with the administration of Wisconsin's wetland regulations. Some of these we'll share today, however if this audit does proceed we want to participate along the way and believe our participation will be useful to the inquiry.

Section 404(b) of the federal Clean Water Act and NR 103, Wisconsin's water quality standards for wetlands, require developers to first avoid and then minimize wetland impacts in their project design. Permit applicants must first locate the wetland boundaries on their property following a process outlined in the *1987 Army Corps of Engineers Wetlands Delineation Manual*, and then conduct an alternatives analysis to explore options for meeting project goals without filling wetlands. Permission to fill a wetland can only be granted in cases where the project sponsor has demonstrated that no upland alternative exists, and even then only if the wetland-fill will not have a significant adverse impact on the environment. These are our laws, passed by federal and state legislators and delegated to the U.S. Army Corps of Engineers and the Wisconsin Department of Natural Resources to implement and enforce.

Proponents of this audit raise questions about how DNR balances the need for wetlands preservation with responsible development practices, and the consistency of DNR's implementation of wetland regulations between regions. We are here today because some legislators believe we need to relax wetland regulations to create a more business-friendly Wisconsin. We have seen evidence this legislative session to suggest that we are also here due to the tensions created when people mistake their own lack of understanding of wetland ecology and the wetland regulatory process for administrative inflexibility or inconsistency.

The Legislative Audit Bureau's job is to evaluate state agency operations to determine whether programs are administered effectively, efficiently, and in accordance with the policies of the

Legislature and the Governor. We interpret this to mean that if this audit moves forward, it will provide a balanced review of the rules and regulations the DNR is charged to implement and enforce and the job they are doing in meeting this responsibility. Though an evaluation of the popularity of wetland regulations is outside the scope of this inquiry, the gaps in public understanding of the requirements for their implementation is most certainly linked to the efficiency of DNR's activities. We urge the committee to explore this phenomenon and are available to assist at your request.

The citizens of Wisconsin have repeatedly demonstrated their support for strong wetland protection laws, most recently when they successfully urged the state legislature to pass emergency legislation (WI Act 6) to protect isolated wetlands left vulnerable by a federal Supreme Court decision in 2001. We believe the people of Wisconsin would welcome an investment of public resources to evaluate the degree to which wetlands are still being lost, but would certainly not support an audit designed solely to evaluate the speed and ease with which one is able to obtain permission to fill a wetland or any subsequent recommendations to relax Wisconsin's standards. The legislators requesting this audit did so with the concerns of Wisconsin's business community in mind. The citizens of the state of Wisconsin expect that this audit will also consider their interests in wetland regulatory issues, including but not limited to their right to the water quality improvement, drinking water protection, flood protection and wildlife habitat benefits that wetlands provide.

An April 22nd Legislative Audit Bureau background memo outlined six items a wetland regulatory audit might review. Please consider the following recommendations to ensure the inquiry into each of those items remains focused on the public's interests and DNR's activities within the boundaries of existing state and federal laws and standards.

1. **Review trends in fee revenues, expenditures, and staffing levels;** The evaluation will be more meaningful if tied to the legal obligations of the program and whether the agency has the resources and authority needed to meet them. We encourage you to evaluate each subcategory of WDNR wetland regulatory operations (e.g., permit review, wetland mapping inventory, mitigation (including compliance monitoring), & enforcement) and to examine how staff and budget cuts interfere with the efficient operation of these programs.

2. **Review changes in the permitting process resulting from the passage of Act 118;** Wisconsin Act 118 did not specifically address wetland permitting requirements, however, it may have led to an increase in illegal wetland fills (due to the perception that wetland permits are not required for certain fill activities) and a reallocation of wetland enforcement resources to Act 118 compliance monitoring. We welcome an examination of these issues.

3. **Analyze trends in the number of permit applications received, the amount of time taken by DNR for permit determination decisions, the number of acres affected, and permit approval rates;** In addition to tallying how quickly DNR processes permits, this audit needs to consider the wetland types and wetland functions lost when wetlands are filled. Please recognize that any evaluation of permit applications processed by DNR will grossly underestimate the acres of wetlands lost each year because it will exclude wetlands filled under general permits, exemptions, memoranda of agreement with other state and federal agencies and illegal fills. The audit bureau will need to be very careful to ensure data compared between states in this regard is comparable and should consult with the U.S. Army Corps of Engineers for assistance with these comparisons.

Processing of wetland fill permits will take longer than other regulatory actions because the wetland boundaries must be delineated and approved as must the alternatives analysis. Oftentimes, permits that take a long time to process are ones that are difficult to approve. Please consider the possibility that the additional time reflects DNR's effort to work with applicants to modify the project so that it can be approved under state standards.

4. Analyze the effects of the wetland compensatory mitigation program, including changes in the amount and type of wetlands in Wisconsin; Numerous studies have demonstrated that, across the nation, wetland mitigation is resulting in a net loss of wetland acres and functions and the conversion of a diverse array of wetland types to open water ponds. These studies also consistently show that wetland mitigation permit conditions are frequently not met, often because the restoration was not successful, or because the project was never even built. Looking strictly at data such as the number of acres filled and subsequent acres of mitigation required, will not provide an accurate indicator of wetland replacement. You will need to review permit conditions and mitigation compliance monitoring reports to determine whether mitigation projects have successfully replaced the types, acres and functions of the wetlands destroyed. An evaluation of whether mitigated wetlands were replaced in the same sub-watershed as those filled would also be appropriate in this evaluation.

5. Analyze performance differences among DNR's regions; It is likely that this audit will identify outlier projects in every region where the permit review process proved lengthier than average. The question is...why? An evaluation of when and why the permitting review process breaks down may prove more informative for minimizing future costly delays and regulatory tensions than a region-by-region comparison of the efficiency of DNR staff.

Our experience suggests that if every wetland in the state were on a map and every county, city, village and town had access to and used these maps to alert landowners to when they must obtain permits from the DNR before building, fewer costly project delays would occur. Systematic disclosure of the presence of wetlands in real estate transactions would also help.

In addition to looking at when permit review delays occur, this audit should analyze how and when, with DNR's assistance, projects are redesigned to avoid or minimize wetland impacts while meeting project goals. Pre-application meetings prior to the investment of major dollars in project design have proven highly successful for avoiding costly delays and getting projects approved. But it's the applicant's responsibility to initiate such a meeting. This audit should explore the relationship between project delays and the absence of pre-application consultations.

6. Review similar wetland permitting and mitigation programs in a few surrounding states, including Minnesota. The review of other state's programs must consider the ecological impacts of the policies and procedures that differ from Wisconsin's and any available evaluations of the programs' administration and effectiveness protecting wetland resources.

Wisconsin's wetland regulatory programs are integrated with implementation of the federal Clean Water Act which is administered by the U.S. Army Corps of Engineers (Corps). Wisconsin and Minnesota both fall under the jurisdiction of the Corps St. Paul District so will provide the most useful comparison. The Corps of Engineers should be consulted on regional

differences in federal Clean Water Act administration if states in other districts are included in this inquiry.

7. DNR's authority and capacity to respond to illegal wetland fills should be added to the scope of this audit. Most hunters know you can't shoot a deer out of season. Why? Because if you do, you're going to get a visit from a warden and pay a fine. Enforcement is a tool for educating the general public about how to comply with state laws and can be a very effective deterrent to illegal behavior. This audit must look at the efficiency and effectiveness of Wisconsin's wetland regulatory enforcement program. Though DNR can issue tickets for hunting violations, boating violations, Chapter 30 violations, and many others, it currently has no authority to issue citations for illegal wetland fills. By law, wetland enforcement actions must be referred to the Department of Justice. Is it any wonder that, when they do as occurred in one high-profile case this legislative session, that their actions are attacked as draconian? This in contrast to the Massachusetts Department of Environmental Protection that has embraced and funded a program to use aerial photography to identify illegal wetland fill activity and retroactively issue citations and require restoration for fills occurring anytime in the last 5 years.

An audit of DNR's wetland enforcement program should examine how the lack of citation authority increase the time and expense for the agency **and** the violators when DNR initiates enforcement proceedings? How much must DNR pay the Department of Justice to handle enforcement proceedings and does the agency receive any reimbursements from subsequent fines to compensate wardens? Does our current wetland enforcement program successfully educate the general public about wetland laws and deter illegal wetland fills, or is enforcement so sparse that it encourages violators to take calculated risks due to an unlikelihood of getting caught? In the meantime, how many hundreds or thousands of wetland acres are illegally destroyed undetected each year?

Conclusion:

While we recognize the difficult challenge the state must face in balancing wetlands preservation and economic development, it is important to remember that factories and homes built in uplands create jobs too, while destroying wetlands hurts the state's tourism, fishing and hunting economies, the quality of our rivers, lakes and drinking water, and the quality of life for Wisconsin citizens. We've emphasized that the citizens of Wisconsin expect strong wetland preservation policies and we know because we field several inquiries every week from citizens distraught about the proposed wetland impacts of local projects. We sincerely hope that, if this audit proceeds, it will be with the interests of the concerned public and our valuable wetland resources in mind, and that the Legislative Audit Bureau will provide additional opportunities for our involvement.