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To: Wisconsin Legislators
From: Wisconsin Wetlands Association
Subject: Wetland Bill (LRB 2803/1)

In response to multiple requests from Senate and Assembly offices, we have prepared this memorandum/preliminary analysis to help you understand the implications of the proposed wetlands bill (LRB 2803/1), and Wisconsin Wetlands Association's reaction. We cannot support the bill, as drafted, but believe our concerns are easily addressed. Our recommendations are contained in this memo.

There are many provisions in this bill that we support and we commend Senators Kedzie and Schultz, Representative Mursau, and their staff, for their efforts to understand and address ways to improve the state's current wetland regulatory framework without harming wetland resources. Examples of the positive, common sense provisions in the bill include:

1. Establishing one permit system for all wetlands.
2. Creating a more efficient review and approval process for routine projects with minor impacts (i.e., general permits) *as already provided for* under current federal approvals for WI projects.
3. Modifying statutes relating to public input on and enforcement of wetland permits to be consistent with current or proposed WI statutes for lakes, rivers, and streams.
4. Authorizing the DNR to establish an in-lieu fee mitigation program in collaboration with the U.S. Army Corps of Engineers.

Despite these positive program modifications, there are other provisions that substantially change existing wetland protections. We do not believe it was the intention of the authors to fundamentally weaken wetland protections in the state, but the practical implications of some sections of this bill do just that.

We believe these concerns are easily addressed with modest amendments. For each concern raised we offer constructive solutions that will help to either alleviate conflicts with the federal wetland permit approval process, will prevent impacts to exceptional wetland resources and critical wildlife habitat, and will help to set reasonable expectations for when and where wetland impacts are likely to be approved. Throughout this process we have worked hard to identify solutions that will also be palatable to development interests and continue to be willing to do so.

With the recommended corrections, Wisconsin Wetlands Association will support the bill and encourage citizens to support it as well. Without them, we must strongly oppose.

We thank you for your consideration of this input and are available to meet at your convenience if you would like to discuss any of these concerns or recommendations in more detail. You can reach our Policy Director, Erin O'Brien, or Executive Director, Tracy Hames at 608-250-9971.

Wisconsin Wetlands Association Analysis and Recommendations for LRB 2803/1

I. Recognition and protection of high quality, rare, or imperiled wetlands.

A stated objective of the bill is to create more and better wetlands. This is difficult to do if we allow the highest quality wetlands to be filled. The bill eliminates all references to *Areas of Special Natural Resource Interest* but fails to include either a comprehensive list of wetland community types that may be of exceptional quality and/or highly threatened, or clear criteria for their identification. Impacts to these types of wetlands are, and should be, the least likely to be approved under current state laws and rules. It is imperative that Wisconsin's wetland statutes recognize that development will be off-limits or difficult to approve if it will impact exceptional wetland resources.

Recommendation #1: Add the following item to the *Standards for issuing permits* (pg 28 lines 13-24):

4. The proposed project will not result in any impact to an exceptional wetland resource unless the exceptional wetland resource will be restored to its pre-project condition within 90-days after such impact is initiated.

Recommendation #2: Define "exceptional wetland resource" as: Exceptional wetland resources include but are not limited to those wetlands determined by the department to be high quality, globally or regionally rare, historically intact, or difficult to replace.

We recommend this approach rather than inserting a list of wetland types because there is no meaningful way to create one list that adequately captures the regional differences in the abundance, quality, and conservation status of Wisconsin's 12 wetland types.

Without the above recommendations, the bill overlooks an important objective of Wisconsin's wetland conservation strategy.

II. Individual Permits:

As written, the bill unacceptably weakens state review criteria in two fundamental ways:

1. It eliminates the requirement for developers to avoid wetland impacts by limiting the alternatives that must be considered to those that are on or adjacent to their preferred site (page 27 lines 12-24).
2. It requires DNR to consider "up-front" the benefits of any proposed mitigation regardless of the type of wetland impacted, how close the restoration is to the site of discharge, or what type of wetland is restored (pg 28 lines 10-12).

These provisions also create different application requirements and review criteria for state and federal permits. These differences will lead to confusion for applicants and controversy over wetland policies, and have the potential to substantially increase unnecessary wetland development.

If left unaddressed, these provisions equate to major rollbacks in Wisconsin's wetland protection laws. This concern can easily be addressed, however, by narrowing the circumstances where the above described provisions apply as follows:

Recommendation #3: Modify *Review Limits* (pg 27 lines 17 to 24) to read: "The department shall limit its review to those practicable alternatives that are located at the site of the discharge and that are located adjacent to that site if the applicant has demonstrated that all of the following apply:

- a. There is a demonstrable public economic benefit (this phrase should be defined).
- b. The project is an expansion of an existing facility or located in an existing industrial park.
- c. The wetland is not an exceptional wetland resource (as defined above).
- d. The wetland is highly degraded and disturbed.

This language recognizes that off-site expansions of existing facilities are generally not practicable and allows for a somewhat limited review for *planned* industrial development. It also recognizes that alternative, non-wetland sites are generally available. Historically the applicant has the opportunity and burden to rebut this presumption in their application. The recommended language is supported in federal statute and case law.

Variants of points c & d were contained in earlier drafts and emphasized by the authors as important sideboards to this section. Their removal substantially broadens the scope and intent of this section of the draft bill and substantially weakens wetland protections in Wisconsin.

Recommendation #4: Amend the *Factors used in review* (pg 28 lines 10-12) to read:

4. The impact on functional values resulting from any on-site or adjacent mitigation.
5. The net positive or negative environmental impact to the proposed discharge site.

Limiting these factors to consideration of on-site or adjacent impacts and enhancements allows for common sense decision making without rolling back current wetland protections. It allows DNR to recognize site-specific scenarios where restoration of adjacent wetland resources may result in a better ecological outcome than protecting the last bits of something that is already highly degraded and fragmented. It also enables the Department to consider and weigh impacts to all of the potential environmental impacts on a site (e.g., woods, rivers, endangered species habitat), not just wetlands.

Because wetland impacts are site specific, these decision criteria do not work in cases where the impacts occur at one site and the mitigation occurs elsewhere in the watershed. This does not mean that impacts won't be approved, or that mitigation won't be allowed elsewhere in the watershed (the draft bill and federal law still allow this). It does recognize that off-site mitigation has no bearing on the significance of the impacts to wetland functions at the project site.

These concerns are easily addressed with the above recommended language. Left unchanged the provision represents a major rollback of existing wetland protection policy.

b. *Timelines* – In the case of both individual and expedited permit reviews, there needs to be language that exempts DNR from prescribed timelines in cases where weather conditions, for

example frozen conditions or floods, prevent the department from making a determination. This language currently appears in Section 281.37(3m)(b) of state statute but was repealed on pg 41 line 24 of the draft bill.

Recommendation #5: Re-insert language from Section 281.37(3m)(b) of state statute to exempt DNR from prescribed timelines in cases where weather conditions prevent the department from making a determination.

III. General Permits:

The bill enables DNR to create, renew or modify General Permits (GP) more efficiently while also maintaining opportunities for public input. The bill also requires DNR to issue GPs for specific types of activities, and allows them to establish GPs for others.

With the exception of local transportation projects, the types of activities and acreage limitations to be covered under GPs are consistent with those already approved for GP coverage under existing federally issued general permits. The provision allowing DNR to prohibit GP approval for discharges into specified wetland types (pg 19-20) is too prescriptive to allow for adequate review of impacts to high quality or threatened wetland resources. It is also inconsistent with criteria on pg 23 which allows DNR to require an individual permit to avoid significant adverse impacts to wetland functions.

The bill also allows presumptive approval of projects covered under General Permits, which we do not support.

We recommend the following corrections:

Recommendation #6: Modify pg 19, lines 13-16 to be consistent with the current federal GP by establishing a 0.1 acre limit for municipal transportation projects.

Recommendation #7: Delete pg 20 lines 3-9 and amend pg 19 line 25 and pg 20 line 1 to read *“As part of a general permit, the department shall prohibit discharges into wetlands that are identified by the department as exceptional wetland resources.”*

Recommendation #8: Eliminate the presumptive approval after 30-days for projects authorized under General Permits (pg 23, line 6-9).

IV. Establishment of a Mitigation Program:

Under federal law, mitigation is a regulatory tool that requires compensation for *unavoidable* wetland impacts. Requiring mitigation and restoration surcharge fees are new state policies that we support with the following caveats:

- a. The science involved in creating and restoring wetland habitats to compensate for impacts to wetland functions is a very technical and complex endeavor.
- b. Studies and decades of on-the-ground experience tell us that failures come easier than successes at both the project and programmatic levels.
- c. “More and better wetlands” is very difficult to achieve in a mitigation context where new losses are authorized.

For these reasons, avoidance and minimization, where practicable, is still the best policy for meeting wetland conservation goals. Mitigation should never *entitle* an applicant to a permit. Where losses are approved, mitigation must be approached in a way that will ensure successful, high quality, wetland restoration projects. Program accountability will be critically important. Whether this new regulatory framework adequately protects our wetland resources will only be known in time with both legislative and public oversight.

We do recommend the following small but important changes to the mitigation sections of this bill:

Recommendation #8: Re-insert language to clarify that mitigation should never entitle an applicant to a permit. Explicit language to this effect is currently contained in Section 281.37(2) of state statute. This language is repealed on pg 38 line 16 of the draft bill.

IV: Public access to wetland mitigation sites: We support requiring public access to mitigation sites as long as adequate protections exist to restrict access to prevent impacts to sensitive resources.

Recommendation #9: Amend page 36 lines 6-7 to read: *"The department may establish reasonable restrictions on the use of the land by the public in order to protect public safety, to protect a unique plant or animal community, or to protect wildlife during critical stages of their lifecycle."*

75% of Wisconsin wildlife depend on wetlands for some portion of their lifecycle, including many economically important game species. Including the recommended provision will ensure that public use plans for wetland mitigation sites do not interfere with the state's ability to seasonally protect and manage other important wildlife (e.g., nesting waterfowl).