

**STATE OF NEW HAMPSHIRE
ALTERATION OF TERRAIN
AND
WETLANDS PERMITTING**

**PERFORMANCE AUDIT REPORT
AUGUST 2007**

To The Fiscal Committee Of The General Court:

We have conducted an audit of the Department of Environmental Services' (DES) alteration of terrain and wetlands permitting programs to address the recommendation made to you by the Legislative Performance Audit and Oversight Committee. We conducted our audit in accordance with the standards applicable to performance audits contained in *Government Auditing Standards*, issued by the Comptroller General of the United States. Those standards require we plan and perform the audit to provide a reasonable basis for our findings and conclusions. Accordingly, we have performed such procedures as we considered necessary in the circumstances.

The purpose of the audit was to assess if the DES Water Division is efficient and effective in administering specific permitting functions. The audit period includes State fiscal years 2004-2006.

This report is the result of our evaluation of the information noted above and is intended solely for the information of the DES and the Fiscal Committee of the General Court. This restriction is not intended to limit the distribution of this report, which upon acceptance by the Fiscal Committee is a matter of public record.

Office Of Legislative Budget Assistant

August 2007

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**STATE OF NEW HAMPSHIRE
ALTERATION OF TERRAIN AND WETLANDS PERMITTING**

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ABBREVIATIONS

AoT	Alteration Of Terrain
Corps	U.S. Army Corps Of Engineers
DES	Department Of Environmental Services
LPAOC	Legislative Performance Audit And Oversight Committee
MIE	Minimum Impact Expedited
OIT	Office Of Information Technology
RFMI	Request For More Information
PBN	Permit By Notification
SDF	Standard Dredge And Fill
SFY	State Fiscal Year
SPGP	State Programmatic General Permit
WBD	Wetlands Bureau Database

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SUMMARY

Purpose And Scope Of Audit

This audit was performed at the request of the Fiscal Committee of the General Court consistent with the recommendation of the joint Legislative Performance Audit and Oversight Committee. It was conducted in accordance with generally accepted government auditing standards applicable to performance audits. The purpose was to assess if the Department of Environmental Services (DES) Water Division is efficient and effective in administering specific permitting functions.

Background

Through its alteration of terrain (AoT) and wetlands permitting programs, the DES exercises responsibility for implementing, monitoring, and enforcing State and some federal environmental programs. These programs regulate the scope of construction projects to protect wetlands habitat and provide for anticipated needs in water drainage. The processes through which the Water Division's AoT Section and Wetlands Bureau receive applications and issue permits affect the scope and pace of economic development as well as the level of environmental protection throughout New Hampshire.

The AoT permit is designed to reduce the potential for uncontrolled erosion and sedimentation resulting from construction projects or land alteration that may negatively affect nearby surface waters. AoT permit applications are assessed on the basis of sedimentary controls to be put in place during construction, the effects of prevailing geologic conditions on water movement, and the effects upon water run-off after the creation of new impervious surfaces. Wetlands permits are designed to avoid, or at least minimize, the impacts of proposed projects on the State's wetlands. These areas provide flood storage and wildlife habitat, as well as filtering systems for sediments and contaminants, but may be harmed by construction within or near their boundaries. We focused our review on three types of wetlands permits: Permit By Notification (PBN), Minimum Impact Expedited (MIE), and Standard Dredge and Fill (SDF). The size of the impact on wetlands determines which permit type is required. These permits cover common projects like driveway culverts and the maintenance of docks and retaining walls, to more expansive projects such as malls, roadways, and runways. The wetlands permitting process is among the most complex and contentious activities of DES's Water Division since there can be legitimate differences of opinion, even among DES personnel, over the value and extent of wetlands.

As a result of statutory changes effective at the start of State fiscal year 2004, the Wetlands Bureau must meet certain deadlines in 1) determining whether wetlands applications are administratively complete, 2) finishing the technical review of proposed projects, and 3) making a timely decision based on the submission date of requested information. Failure by the Bureau to meet any of these time limits requires permits to be deemed approved in the case of SDF and MIE applications. In the case of PBNs, lack of DES response within a defined period of time means proposed projects can proceed.

Results In Brief

The Wetlands Bureau has not been successful in meeting permitting deadlines. Our random samples of permit applications found at least 47 percent of MIEs, 30 percent of PBNs, and 19 percent of SDFs were not processed timely. The Bureau failed to implement procedures to inform applicants when deadlines were missed and their SDF and MIE applications were deemed approved.

We found weaknesses in the Wetlands Bureau information system were factors in the Bureau's failure to process applications timely. The Bureau's database has not been reprogrammed to track new statutory time limits and Bureau-developed weekly activities reports have been inaccurate. We also found the administrative rules, policies, and procedures in place for processing wetlands permits were inadequate to ensure the applications were processed within the time limits and, in some cases, even created obstructions for the Bureau to succeed.

The AoT Section and the Wetlands Bureau have not consistently followed the Department's unwritten policy of first in, first out when processing applications, but have provided some degree of preferential treatment for certain applicants. Requests to expedite the review of permit applications have come from property owners, engineering firms, elected officials, and DES Commissioners. Many DES staff felt expedited applications increased under a former Commissioner and expressed concern regarding the permit conditions for the Laconia Airport expansion which had been directly amended by a Commissioner.

Our audit presents 19 observations:

- Three recommend changes in administrative rule or policy to establish protocols for expediting specific AoT and wetlands applications and reducing the risks of issuing substandard permits.
- One recommends the Bureau approve applications when it misses statutorily imposed deadlines.
- Four recommend changes in administrative rule or policies and procedures to clarify ambiguities in the review processes for AoT, SDF, and MIE permit applications.
- Three recommend changes in administrative rule or policies and procedures to allow modifying of applications or permits during the review process.
- One recommends the AoT section reduce its backlog of permit applications.
- Three recommend changes in administrative rule or policies and procedures to ensure adherence to PBN review deadlines and record keeping.
- Four recommend changes in policies and procedures to ensure better data management within the AoT and wetlands permitting programs.

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RECOMMENDATION SUMMARY

Observation Number	Page	Legislative Action May Be Required	Recommendations	Agency Response
1	19	No	Adopt administrative rules for the Department's new policy on expediting permits.	Concur
2	23	Yes	Either implement the statute that automatically approves wetlands permits or seek to amend it.	Concur
3	25	No	Clarify time limits for Minimum Impact Expedited permits and make appropriate changes to rules, policies, and forms.	Concur
4	27	No	Adopt administrative rules for issuing requests for more information.	Concur
5	29	Yes	Seek to amend time limits when conservation commissions intervene.	Concur
6	30	Yes	Seek to amend statutory and administrative rule-based time limits for modified applications.	Concur
7	31	No	Adopt administrative rules for amending permits.	Concur
8	32	No	Write comprehensive policies and procedures for permitting programs.	Concur
9	34	No	Assess resources and prioritize tasks to reduce backlog of Alteration of Terrain applications.	Concur
10	35	No	Seek an Attorney General Opinion to clarify Standard Dredge and Fill fees for applicants.	Concur
11	36	No	Develop policies and procedures to ensure disputed permit decisions are adequately reviewed.	Concur

Recommendation Summary

Observation Number	Page	Legislative Action May Be Required	Recommendations	Agency Response
12	38	Yes	Ensure proper balance between protecting prime wetlands and the public's safety.	Concur
13	41	No	Change Permit By Notification administrative rules and improve procedures.	Concur
14	43	No	Comply with Permit By Notification time limit for information request.	Concur
15	44	No	Be consistent when reclassifying Permits By Notification to other permit types.	Concur
16	45	No	Improve the functionality of the Wetlands Bureau's database.	Concur
17	47	No	Improve the tracking and reporting of Wetlands Bureau data.	Concur
18	49	No	Consistently document application type changes.	Concur
19	50	No	Continue improving Alteration of Terrain Section's management information system.	Concur

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OVERVIEW

In July 2005, the Fiscal Committee adopted a recommendation by the joint Legislative Performance Audit and Oversight Committee (LPAOC) to conduct a performance audit of New Hampshire's Department of Environmental Services' (DES) permitting functions. We held an entrance conference with the DES in February 2006. In May 2006, the LPAOC refocused the audit to determine if certain wetlands permits were meeting time limits and being issued in a fair and equitable manner.

SCOPE, OBJECTIVES, AND METHODOLOGY

This performance audit was conducted in accordance with generally accepted government auditing standards applicable to performance audits and accordingly it included such procedures as we considered necessary in the circumstances.

Scope And Objectives

We designed our audit to answer the following question – **Is the DES Water Division efficient and effective in administering specific permitting functions?** Our audit period included State fiscal years (SFY) 2004 through 2006. Specifically, we examined the following in answering this question:

- DES compliance with relevant State laws and administrative rules regarding wetlands and alteration of terrain (AoT) permitting.
- DES handling of wetlands and AoT permits, especially the agency's effectiveness in meeting statutory time limits.
- Fairness and equity of the DES in the processing of wetlands and AoT permits.

Methodology

We reviewed and analyzed various information, including State laws, administrative rules, Department policies and procedures, Wetlands Council records, prior audit reports, audits of other states' permitting programs, and news articles. We conducted interviews with DES officials and personnel, representatives of private business, the Wetlands Council, the U.S. Army Corps of Engineers, and the Office of Information Technology. To test the Water Division's compliance with State statutes, administrative rules (particularly with regard to time limits), policies, and procedures, we reviewed random samples of 216 Standard Dredge and Fill (SDF) application files, 100 Minimum Impact Expedited (MIE) application files, 100 Permit By Notification (PBN) files, and a judgmental sample of 30 AoT files. We also analyzed the administrative and technical processes associated with the maintenance of both the electronic and paper-based records of the Wetlands Bureau and the AoT Section.

BACKGROUND

RSA 21-O established the DES in 1986 under the direction of a Commissioner and consolidated and reorganized four previously separate agencies: the Air Resources Agency, the Office of Waste Management, the Water Supply and Pollution Control Commission, and the Water Resources Board. The DES is the agency responsible for implementing, monitoring, and enforcing State and some federal environmental programs. According to the Department, its mission is to help sustain a high quality of life for all citizens by protecting and restoring the environment and public health in New Hampshire. The Department strives to realize its mission primarily through the work of three Divisions: Air Resources, Waste Management, and Water. The Divisions are collectively responsible for air pollution control, regulation of waste disposal, water pollution control, water supply protection, maintenance of state-owned dams, and dam inspection. As shown in Figure 1, the Wetlands Bureau and AoT Section are parts of Land Resources Management, a unit within the Water Division. A major function for the DES is issuing 93 types of authorizations, such as permits, letters of approval, and certifications. According to the Department, its permitting programs “are designed to encourage the wise use of natural resources, protect the rights of public and private landowners, complement New Hampshire’s robust economy, and contribute to a healthy and sustainable lifestyle for all residents and visitors.”

Alteration Of Terrain Section

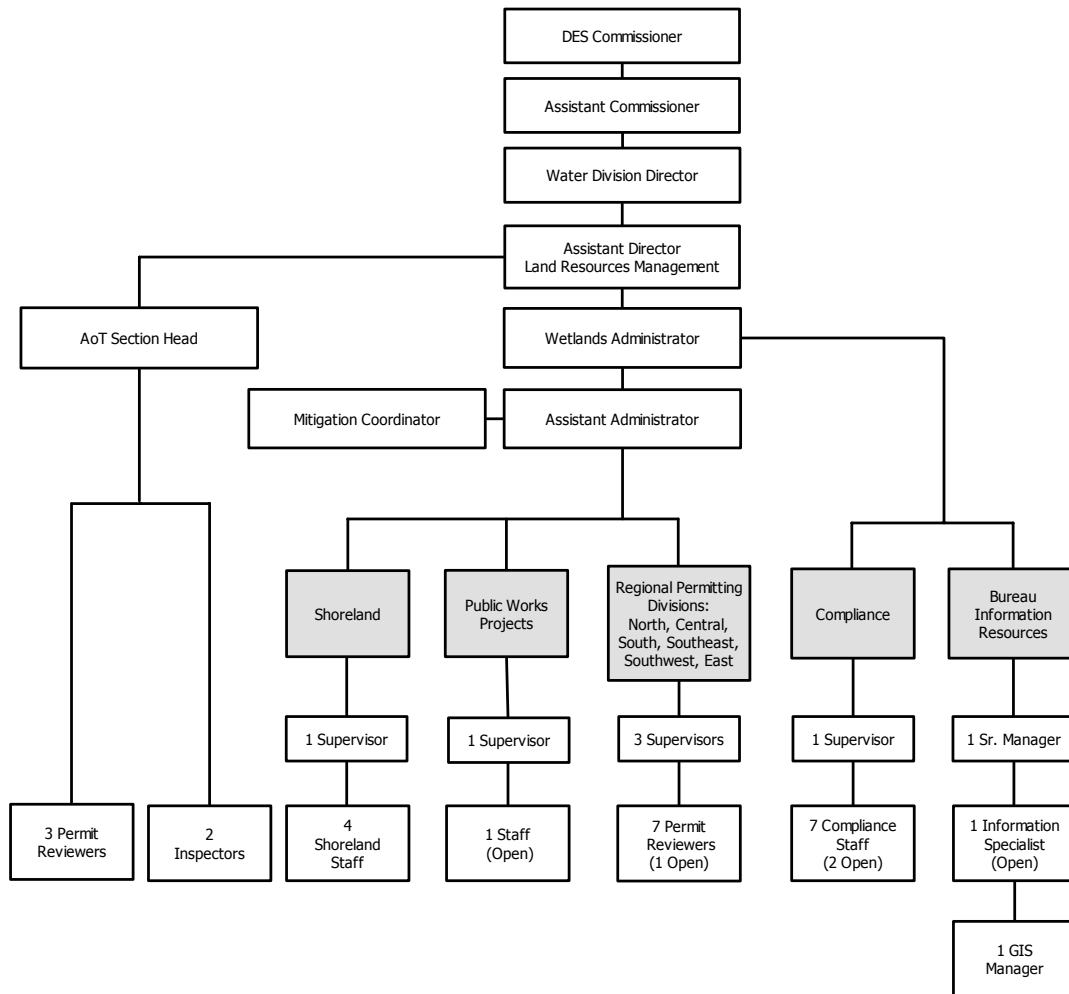
The AoT Section issues permits (commonly known as site specific permits) to control erosion and storm water runoff from construction sites where natural vegetation is otherwise removed or replaced. This permit is designed to reduce the potential for uncontrolled erosion and sedimentation that could negatively affect nearby surface waters. DES rule Env-Ws 415.03 requires a permit for any project involving dredging, excavating, filling, mining, transporting forest products, construction, earth moving, or other significant alteration of the characteristics of the terrain that will occur around the surface waters of the State. The permit is required if the project affects a contiguous area of 100,000 square feet, or 50,000 square feet if it is within an area protected by RSA 483-B, the Comprehensive Shoreland Protection Act. Because the presence of wetlands within the area of an AoT project will prompt the need for a separate wetlands permit, the AoT supervisor stated approximately 75 percent of applicants seeking an AoT permit also submit an application to the Wetlands Bureau. AoT staff coordinates with Wetlands Bureau staff on larger projects.

AoT reviewers assess applications on the basis of three main criteria: 1) inclusion of temporary sediment controls, consistent with best management practices, which may include the installation of silt fences; 2) analysis of hydrogeology, including evaluation of pre- and post-development conditions; and 3) treatment practices for runoff from impervious surfaces such as buildings and parking lots. According to one AoT employee, reviewers first look at hydrogeology reports to make sure water flow after development will not be greater than prior to development. Next, they consider erosion control measures such as silt fences or temporary ponds and ensure development will not occur on more than five acres at a time. Generally, one to two letters may be sent to an applicant seeking further information with regard to a project. Staff use a checklist to record their reviews of projects. One reviewer reported having 20 to 30 applications open at

any one time. The time it takes to actually review a completed application can range from half a day to a few days. Unlike some of the wetlands permits, there are no time limits for processing AoT applications.

Figure 1

**AoT Section And Wetlands Bureau
Organizational Chart, As Of June 2007**



Notes: One AoT permit reviewer also handles wetlands applications and one Wetlands Bureau reviewer conducts inspections for the AoT section.

Shaded boxes represent units within the Wetlands Bureau, unshaded boxes represent positions.

Source: LBA analysis of DES information.

Wetlands Bureau

Wetlands are areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands include, but are not limited to swamps, marshes, bogs, and similar areas. They provide for flood storage and wildlife habitat and function as filtering systems for

sediments and contaminants. Wetlands regulation in New Hampshire focuses upon preserving areas functioning as transition zones between dry land and open water, including underwater habitats, that are identified by the presence of water, hydric soils, and specific patterns of vegetation.

The New Hampshire Port Authority began regulating coastal wetlands in 1967 and a board of representatives of various State agencies began regulating inland wetlands in 1969. The newly established Wetlands Board took over regulation of wetlands in 1979 and experienced some administrative changes when the DES began operations as the State's first comprehensive environmental agency. The Wetlands Council replaced the Wetlands Board in 1996. While the Council retained the power to hear appeals of permit decisions and to review the policy, performance, and rulemaking of the DES Wetlands Bureau, all permitting decisions were transferred to the DES and implemented through the Wetlands Bureau.

Wetlands Permits

RSA 482-A protects wetlands and surface waters by requiring the DES to issue permits for dredging or filling wetlands. Through the permitting process, the Wetlands Bureau seeks to avoid, or at least minimize, the impacts of proposed projects in wetlands. To make permitting decisions Bureau reviewers may request additional information on the basis of plans and specifications submitted by applicants. Resulting permits issued by the Bureau may alter the size, scope, or exact location of a proposed project and contain special conditions limiting the specific actions allowed on a project. A SDF permit is classified based on the extent of the planned project's impact into one of three levels: minimum, minor, or major. There is also an emergency SDF permit that may be granted to an applicant who notifies the Bureau of immediate work that must be undertaken. The emergency applicant is subsequently required to provide complete information for a SDF permit.

RSA 482-A:11, VI allows the Bureau to establish two alternative permit processes designed for swifter review of smaller project proposals, MIE permits and PBNs. Table 1 identifies the wetlands permits we reviewed. Other permits issued by the Wetlands Bureau, but not reviewed by this audit, include the Minimum Impact Agricultural Permit, Recreational Mineral Dredge Permit, Minimum Impact Forestry/Timber Harvesting Notification, Seasonal Dock Notification for Lakes and Ponds, and Minimum Impact Trail Development Notification.

Starting in July 2003, changes in State law required the DES to meet certain time limits when processing SDF applications. These changes were renewed in early 2006. As a result, the Wetlands Bureau must now determine whether an application is administratively complete within 14 days of receiving it from a town clerk. The Bureau must then complete its technical evaluation within 75 days (or 105 days for some projects of significant impact) or issue a formal request for more information (RFMI) from an applicant. The Bureau has 30 days to take further action after it receives any additional information requested from an applicant. Failure by the DES to meet any of these time limits requires the permit to be deemed approved. The Legislature also increased wetlands application fees in July 2003.

Table 1

Wetlands Permits With Time Limits

Wetlands Permits	Description	Time Limit For Administrative Review	Time Limit To Complete Technical Review
Permit By Notification	Granted to allow for timely review of 14 specific types of construction or maintenance projects considered to have a minimal impact.	Not Applicable	10 days with conservation commission waiver or 25 days from date of town clerk's signature
Minimum Impact Expedited Permit	Certain common projects with impact under 3,000 sq. ft. Example: Installation of a culvert for driveway access to a single-family house.	14 days from receipt by the DES	Complete application must be approved or denied within 30 days of receipt by the DES.
Minimum Impact Standard Dredge and Fill	Impact upon wetlands is less than 3,000 sq. ft. Example: Repair or replacement of a seasonal dock that does not qualify for the Seasonal Dock Notification.	14 days from receipt by the DES	Complete application must be approved or denied within 75 days of completion of administrative review.
Minor Impact Standard Dredge and Fill	Impact upon wetlands is 3,000–20,000 sq. ft. Example: Construction of a fire pond or recreation pond with less than 20,000 sq. ft. of impact to very poorly drained soils or impact to a stream.		
Major Impact Standard Dredge and Fill	Impact upon wetlands is more than 20,000 sq. ft. Examples: Construction of a marina or breakwater in public waters or filling of more than 20,000 sq. ft. of jurisdictional wetlands.		
Emergency Authorization Standard Dredge and Fill	The process begins when a DES official is contacted within five days of the event (generally a natural event after which lands or structures need to be stabilized). The applicant later fills out an after-the-fact application to document work done.	No time limit stipulated by law, rule, or procedure.	Immediate (DES practice)

Source: LBA analysis of State laws, DES rules, and Wetlands Bureau documents.

MIE permit applications were first established under the Wetlands Board in 1994 to facilitate projects of minimal impact such as maintenance, repair, or replacement of existing legal structures or installation of a culvert to a single-family building lot. According to a Bureau publication, “By separating the projects that qualify for this streamlined review from those that are more complex and time-consuming, processing efficiency and customer service for all application types has been enhanced without compromising protection of wetland resources.” Portions of the wetlands application process have been streamlined to lessen the time needed for

Bureau review. Currently, the Bureau is required to approve MIE applications or send notices of deficiency within 30 days of the receipt of applications by the Department. If Bureau reviewers decide proposed projects can only be permitted under the provisions of SDF applications, MIE materials may be upgraded. Applicants who submit their applications and plans in accordance with established criteria are allowed to proceed after 30 days if they have not received notices with listed deficiencies.

By December 2003, the DES established PBN rules and forms. The PBN process is used to facilitate the approval of a specific set of projects with minimal impact including repair or replacement of existing retaining walls, replenishment of existing beaches, and installation of seasonal boatlifts. After filing their materials with town clerks, PBN applicants who have not been informed by the Department their applications are incomplete, or who do not qualify for the PBN process, are allowed to proceed after a limited period of time. They may proceed after ten days if they have received waivers of intervention from local conservation commissions, and after 25 days if no waivers were provided. If PBN applicants are sent notices identifying deficiencies, they must respond within 20 days of the written notices to avoid disqualification. If the specifications of proposed projects fail to correspond to PBN standards, application materials may not be changed to another permit type. However, MIE or SDF applications can be upgraded or downgraded between the two categories, or between SDF impact classifications, so the application types reflect the proposed projects.

While our file reviews evaluated the DES in meeting goals including collecting types of information and issuing responses to applicants within defined periods of time, we were told there is subjectivity in evaluating wetlands applications. Assessing the ecological value of terrain areas and their suitability for construction rely on judgments made by individual reviewers. According to Water Division officials, the wetlands permitting process is among the most complex and contentious activities of the Water Division since there can be legitimate differences of opinion even among DES personnel over the value and extent of wetlands.

Program Data

Table 2 presents the number of wetlands and AoT applications and notifications received by the Water Division since SFY 2004 when processing time limits went into effect. Table 3 presents the Wetlands Bureau and AoT Section revenues and expenditures for SFYs 2001-2006. Substantial changes in revenue reflect legislatively-approved fee increases. Chapter 224, Laws of 2003 increased the AoT application and certain wetlands fees beginning in SFY 2004 and created two more AoT section permitting positions.

State Programmatic General Permit

In 2002, the DES and the U.S. Army Corps of Engineers (Corps) signed an agreement known as a State Programmatic General Permit (SPGP), which streamlined the State and federal permitting processes for wetlands. Under the process, the Corps acts as the coordinator for a variety of federal agencies with authority over projects begun in the State's wetlands. Almost all projects that would have required both federal and State permits now need only go through a State review process that continues to be regularly reviewed by the Corps.

Table 2

**Permit Applications And Notifications Received
State Fiscal Years 2004-2006**

<u>Permit Type</u>	<u>2004</u>	<u>2005</u>	<u>2006</u>	<u>Total</u>
Standard Dredge And Fill ^a	855	887	959	2,701
Minimum Impact Expedited	518	435	422	1,375
Permit By Notification	122 ^b	283	326	731
Alteration Of Terrain	359	397	363	1,119

Notes: ^a Includes minimum, minor, and major SDF applications.

^b The PBN process was established during the middle of SFY 2004.

Source: LBA analysis of AoT Section and Wetlands Bureau data.

Table 3

**Revenues And Expenditures
State Fiscal Years 2001-2006**

	<u>2001</u>	<u>2002</u>	<u>2003</u>	<u>2004</u>	<u>2005</u>	<u>2006</u>
<u>Wetlands Bureau</u>						
<u>Restricted Revenues</u>						
Federal Funds	\$ 231,496	\$ 334,949	\$ 258,508	\$ 329,214	\$ 245,824	\$ 295,514
Wetland Fines	176,078	52,717	398,207	278,870	125,667	74,857
Application Fees	322,765	313,108	309,420	633,013	716,925	778,231
Total Revenues	<u>\$ 730,339</u>	<u>\$ 700,774</u>	<u>\$ 966,135</u>	<u>\$ 1,241,097</u>	<u>\$ 1,088,416</u>	<u>\$ 1,148,602</u>
<u>Expenditures</u>						
Personnel	\$ 991,635	\$ 1,062,517	\$ 1,136,886	\$ 1,086,866	\$ 1,111,949	\$ 1,348,058
Operating	328,477	303,584	289,970	277,949	272,184	435,273
Total Expenditures	<u>\$ 1,320,112</u>	<u>\$ 1,366,101</u>	<u>\$ 1,426,856</u>	<u>\$ 1,364,815</u>	<u>\$ 1,384,133</u>	<u>\$ 1,783,331</u>
<u>AoT Section</u>						
<u>Unrestricted Revenues</u>						
Application Fees	155,871	112,893	104,808	360,646	412,465	400,648
Total Revenues	<u>\$ 155,871</u>	<u>\$ 112,893</u>	<u>\$ 104,808</u>	<u>\$ 360,646</u>	<u>\$ 412,465</u>	<u>\$ 400,648</u>
<u>Expenditures</u>						
Personnel	\$ 177,434	\$ 213,945	\$ 240,855	\$ 325,995	\$ 393,563	\$ 413,997
Allocated Operating	34,182	33,063	34,997	64,875	56,449	101,331
Total Expenditures	<u>\$ 211,616</u>	<u>\$ 247,008</u>	<u>\$ 275,852</u>	<u>\$ 390,870</u>	<u>\$ 450,012</u>	<u>\$ 515,328</u>

Source: DES financial data (unaudited).

Under the SPGP, the State wetlands permit serves as the federal permit for most projects of minimum or minor impact, eliminating the need for separate approval from the Corps for non-controversial projects. When minor and major SDF permits are mailed to applicants, they receive a notice warning them not to start work because the Corps has 30 days to require additional

information or an individual federal permit application. According to New Hampshire's SPGP, the Corps:

reserves the right to take discretionary authority on any project, regardless of impact category, which the Corps determines will have more than minimal environmental impact, or based on a concern for any other factor of the public interest.

The status of a wetlands application as it moves through the review process is recorded in the Wetlands Bureau Database, which generates reports for use within the DES as well as for upload to the Department's *Onestop* website open to public inspection. In addition, Corps personnel visit the Bureau's office to review application materials accompanying permits listed in the Bureau's weekly decision reports.

Significant Achievement

Performance auditing by its nature is a critical process, designed to identify weaknesses in past and existing practices and procedures. Noteworthy management achievements related to the scope of the audit are included here to provide appropriate balance to the report. Significant achievements are considered practices, programs, or procedures that evidence indicates are performing above and beyond normal expectations.

Wetlands Compensatory Mitigation Rules And In-Lieu Fee Program

The DES has developed an in-lieu fee program as one of the mitigation options available for wetlands applicants. In 2005, the DES adopted mitigation rules, then, in 2006, obtained statutory authority for a set of in-lieu fee rules it seeks to have adopted in 2007. According to the Department, when fully implemented in 2007, this will be the most comprehensive compensatory wetlands mitigation program in New England.

In November 2006, the DES adopted interim rules outlining the wetlands in-lieu fee program, these were followed by a final set of proposed rules in March 2007. These rules detail the processes by which applicants or qualified professionals may, after assessing the wetlands impacts of proposed projects and their alternative mitigation options, apply to the Department for acceptance of payment in-lieu of actual mitigation completed. Once in-lieu plans are accepted by the Department, all payments must be received before permits are issued. The Department deposits payments into the Aquatic Resource Compensatory Mitigation Fund where they are credited to watersheds containing the jurisdictional areas experiencing the impacts of the projects. The Aquatic Resource Compensatory Mitigation Fund may be used for a variety of costs related to wetland or stream creation or restoration.

The first deposit to the Fund was a payment of approximately \$52,400 made in January 2007. As of June 6, 2007, seven additional projects had been given approval for a total of approximately \$383,400 in mitigation payments compensating for 133,378 square feet of wetland loss. Applicants are allowed 120 days from the dates of the decisions to make the deposits or the permits are denied. No payments from these seven additional projects were received by July 2007.

**STATE OF NEW HAMPSHIRE
ALTERATION OF TERRAIN AND WETLANDS PERMITTING**

**LBA LOGIC MODELS
FOR
WETLANDS AND AOT PERMITTING**

One of the goals of the Department of Environmental Services (DES) is to manage programs engaged in land-use regulation, such as alteration of terrain (AoT) and wetlands, in a manner that enables and encourages appropriate development, supports a healthy economy, and ensures that long-term, cumulative environmental impacts are better understood and addressed. In other words, the DES strives to balance the public's interests in environmental protection with private rights and economic development within its statutory authority. Our audit evaluated the permitting functions of the Water Division's AoT and wetlands programs with emphasis on the degree to which both programs meet the stipulations of law and rule and process applications in an efficient, effective, and equitable manner.

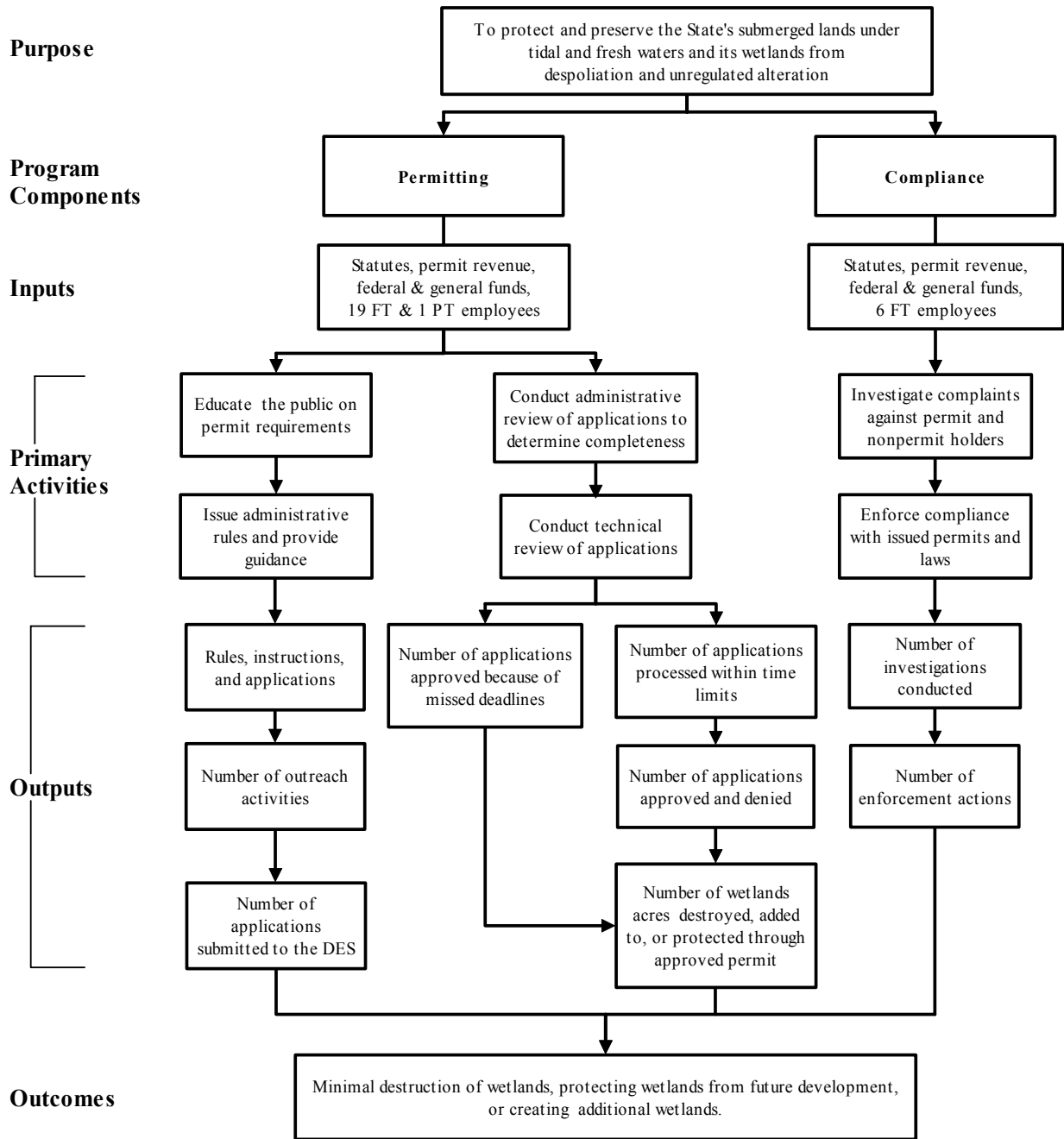
When measuring the performance of a program, one of the more difficult questions to answer is a program's contribution to a department's outcomes. In most cases, there are many factors influencing outcomes in addition to the impact of a program's efforts. Determining the absolute extent to which a government program contributes to a particular outcome is not usually possible. Instead, the aim of performance measurement is to acquire insight and provide some evidence the program is actually having an impact. A tool for determining attribution is a logic model, which illustrates intended relationships.

Logic models are presented as flow charts describing functions in a way that facilitates developing relevant measures by portraying intended causal relationships between activities, outputs, and outcomes. The flow chart thus illustrates how a program intends to solve identified problems. Individual program activities, outputs, and outcomes are arranged in rows. Relationships between the various activities, outputs, and outcomes are arranged vertically on the page according to the sequential flow of program logic. The arrows linking the program elements signify the intended flow of the program.

Figure 2 presents our logic model of the Wetlands Bureau's permitting and compliance activities. The Wetlands Bureau's purpose is included at the top of the page as a reference point to show the rationale of the program. The activities describe what the Bureau does to produce permitting outputs. The outcomes represent what the program hopes to change. Therefore, program outcomes, or the intended impact of the program, should be linked to the purpose of the program. Figure 3 presents our logic model of the AoT Section permitting and compliance activities.

Figure 2

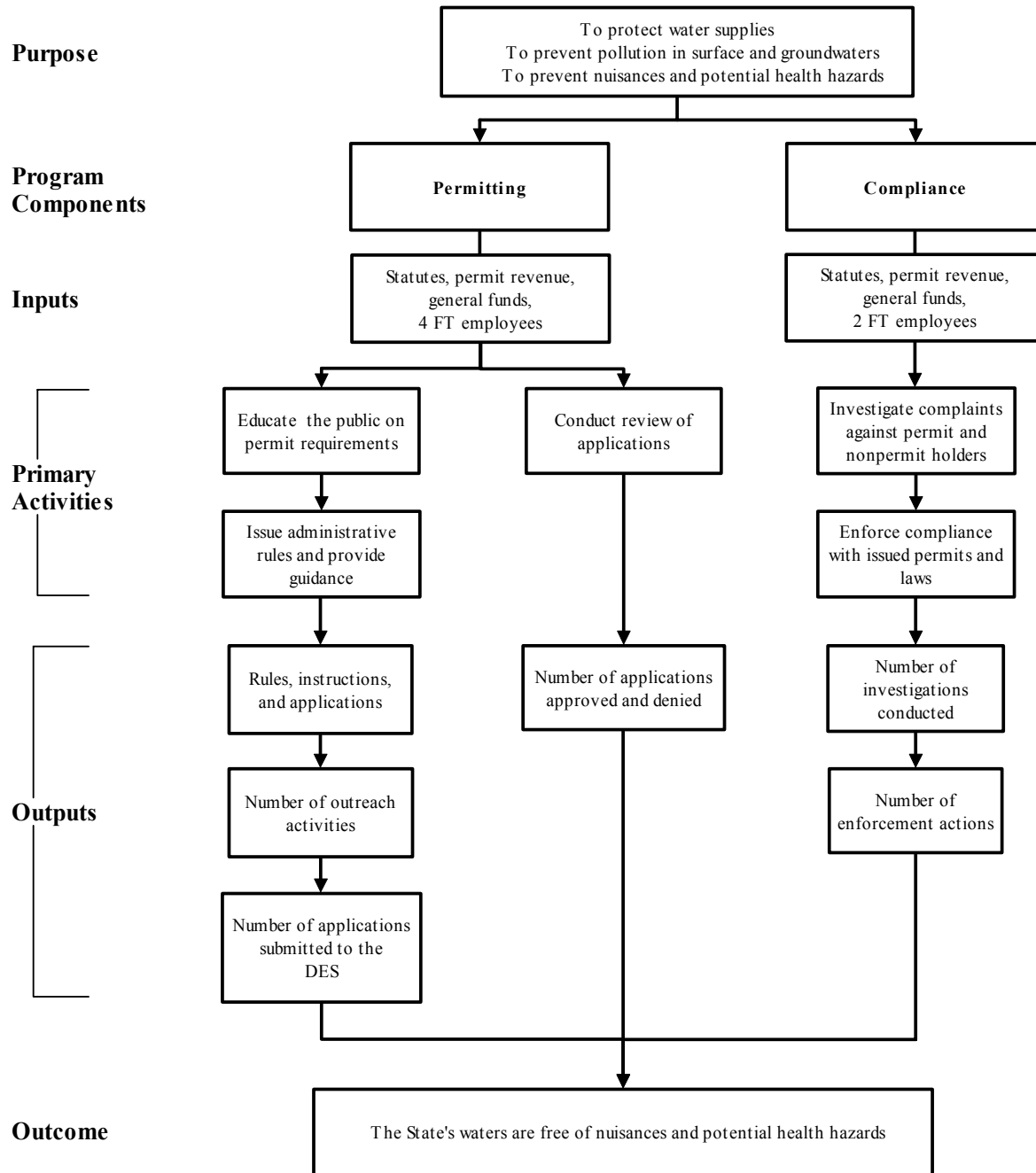
LBA Wetlands Bureau Permitting Logic Model



Source: LBA analysis of DES information.

Figure 3

LBA AoT Section Permitting Logic Model



Source: LBA analysis of DES information.

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**STATE OF NEW HAMPSHIRE
ALTERATION OF TERRAIN AND WETLANDS PERMITTING**

EXPEDITED APPLICATION REVIEW

We found the Alteration of Terrain (AoT) Section and the Wetlands Bureau have always provided some degree of preferential treatment for certain applicants by reviewing their permit applications ahead of other applications. Even though first in, first out has been the unwritten policy for processing applications, DES personnel acknowledge a long-standing practice of expediting some projects, such as schools and municipal buildings, because they provide a public benefit. As a result, non-expedited applications that had been submitted earlier waited even longer to be reviewed. Expedited permit application review is advantageous to the applicant because the sooner the applicant receives a permit, the sooner work can begin on their project.

Expedited application reviews have existed for years. Applications are expedited for a variety of reasons which may be associated with a project that has a public benefit. The number of expedited applications can also change with turnover in DES leadership. Because there were no laws, administrative rules, or written policies for these expedited applications, these requests could be honored by the DES at its own discretion.

In State fiscal year (SFY) 2005, the AoT staff started tracking expedited applications in a new data field in the AoT database. Table 4 shows the categories AoT staff gave to these expedited applications. Fifty-one percent of the expedited applications were provided this preferential treatment based on AoT staff judgment and the historic practice of expediting public benefit projects. We compared the 152 applications identified as expedited to the remaining 608 non-expedited applications filed between SFYs 2005 and 2006. Figure 4 shows the median number of days taken to issue permits for expedited and non-expedited applications.

According to two AoT officials, almost all applications require more information from the applicant after the initial review. It is important to note, while the Department is significantly responsible for the time taken to conduct the initial review of an application, the applicants' or their agents' responses to requests for more information are a significant factor in the number of days taken to issue a permit. According to AoT staff, reviewing responses to requests for information is easy and can be handled quickly because the hard work has already been done during the initial review of the application.

Unlike the AoT Section, the Wetlands Bureau does not track expedited applications. Therefore, we did not have the ability to quantify the extent of the issue. However, during interviews Bureau staff acknowledged expediting wetlands applications for similar reasons, which resulted in other applications being delayed.

Table 4

**Expedited AoT Permit Applications
State Fiscal Years 2005-2006**

<u>Categories</u>	<u>Applications</u>	<u>Percentage</u>
Public Benefit Projects ¹	45	30%
AoT Staff Decision ²	32	21%
DES Commissioner Request	17	11%
Wetlands Bureau Request	9	6%
Applicant Request	8	5%
Utility Company Request	7	5%
NH Department of Resource Economic and Development Request	6	4%
Unknown Reason	<u>28</u>	<u>18%</u>
Total³	<u>152</u>	<u>100%</u>

Notes: ¹ Schools, colleges, hospitals, and municipal projects.

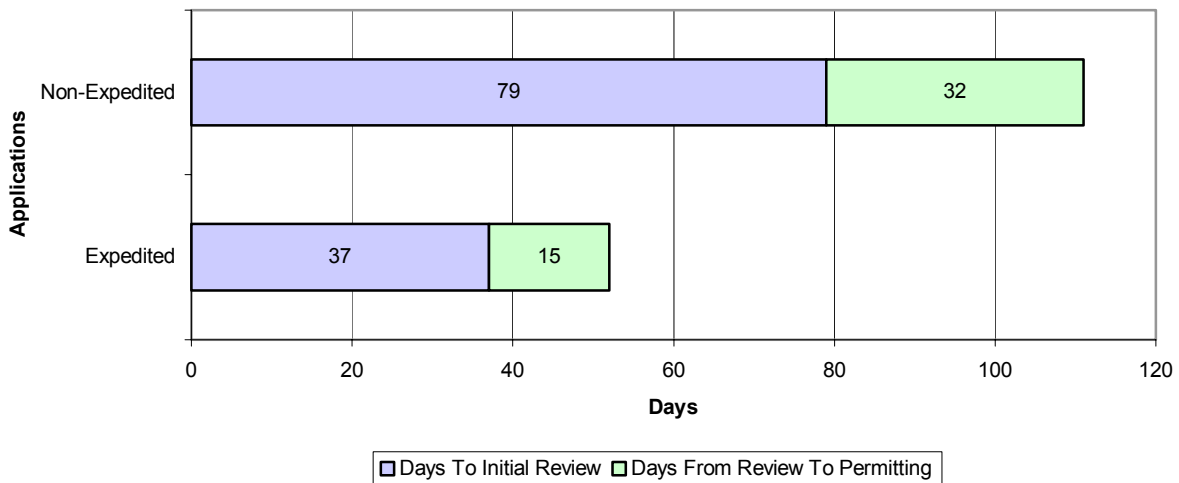
² Simple projects, violations, and second applications.

³ The 152 expedited applications represented 20 percent of 760 applications received by the AoT Section.

Source: LBA analysis of AoT Section data.

Figure 4

**Median Number Of Days Processing
AoT Applications
State Fiscal Years 2004-2006**



Source: LBA analysis of AoT Section data.

New Policy On Processing Of Applications

In February 2007, the DES Commissioner issued a Department-wide standard operating procedure, which stated in part:

In the absence of any statutory provision to the contrary, applications for any permit, license, certification, waivers, or other approval issued by the Department will be considered on a first-in, first-out basis.... If the Commissioner determines that an expedited review is necessary to (a) further an important public interest, including but not limited to promoting economic development or improving environmental conditions, (b) avoiding significant hardship, or (c) for other good cause shown, and that no applicant for whom an application is already pending will be unreasonably disadvantaged, the Commissioner may direct that the application that is the subject of the request be reviewed ahead of some or all of the pending applications....

Observation No. 1

Write Rules For Expediting Permits

Expedited treatment for certain applications is not sanctioned or prohibited in State law or DES administrative rules. In practice, expediting some applications provides special treatment that is not commonly known and therefore not readily available to all applicants. Many DES officials and staff members acknowledged a long-standing practice of expediting wetlands and terrain alteration applications, especially when the projects are considered of public benefit. While it may be reasonable to expedite applications for certain public projects, the practice of providing preferential treatment without guidance from written or published policies is not prudent, creates the potential for abuse, and may be seen as favoritism.

The Department's appointed leadership has an interest in meeting the needs of elected officials and the public. This may compel an agency to be more considerate or accountable to the citizenry. Elected officials have a legitimate interest in helping their constituents in the permitting process. There is seemingly nothing wrong with elected officials contacting the Department to help a constituent obtain information about an application; in fact, elected officials may help improve communication between the Department and applicants. However, when elected officials, who may have some say in approving DES appointments, passing budgets, or changing legislation, call the Department to ask about the status of a permit application, they may be intentionally or unintentionally exerting pressure on DES officials and personnel to quickly approve a particular project ahead of other applications.

The public deserves to know why and when the DES provides expedited service for terrain alteration and wetlands permit applications. Lacking such openness on how applications are handled and decisions made, DES officials may give an appearance of favoritism or abuse of power. In February 2007, the DES Commissioner issued a written policy on how and why applications may be expedited; however, this policy is not readily available to the public, nor can the public tell when or why an application was expedited.

Recommendation:

The Water Division should adopt administrative rules for the Department's new policy on expediting permit applications. Rules would have the benefit of Legislative input and

approval by the Joint Legislative Committee on Administrative Rules and, when adopted, have the force of law.

Auditee Response:

We concur.

DES is committed to a complete review and revision to the wetlands and alteration of terrain rules by June 30, 2008. Proposed revisions will include adoption of rules establishing protocols for expediting permit applications consistent with the February 2007 policy issued by the DES Commissioner.

STATE OF NEW HAMPSHIRE
ALTERATION OF TERRAIN AND WETLANDS PERMITTING

PERMIT APPLICATION PROCESSING

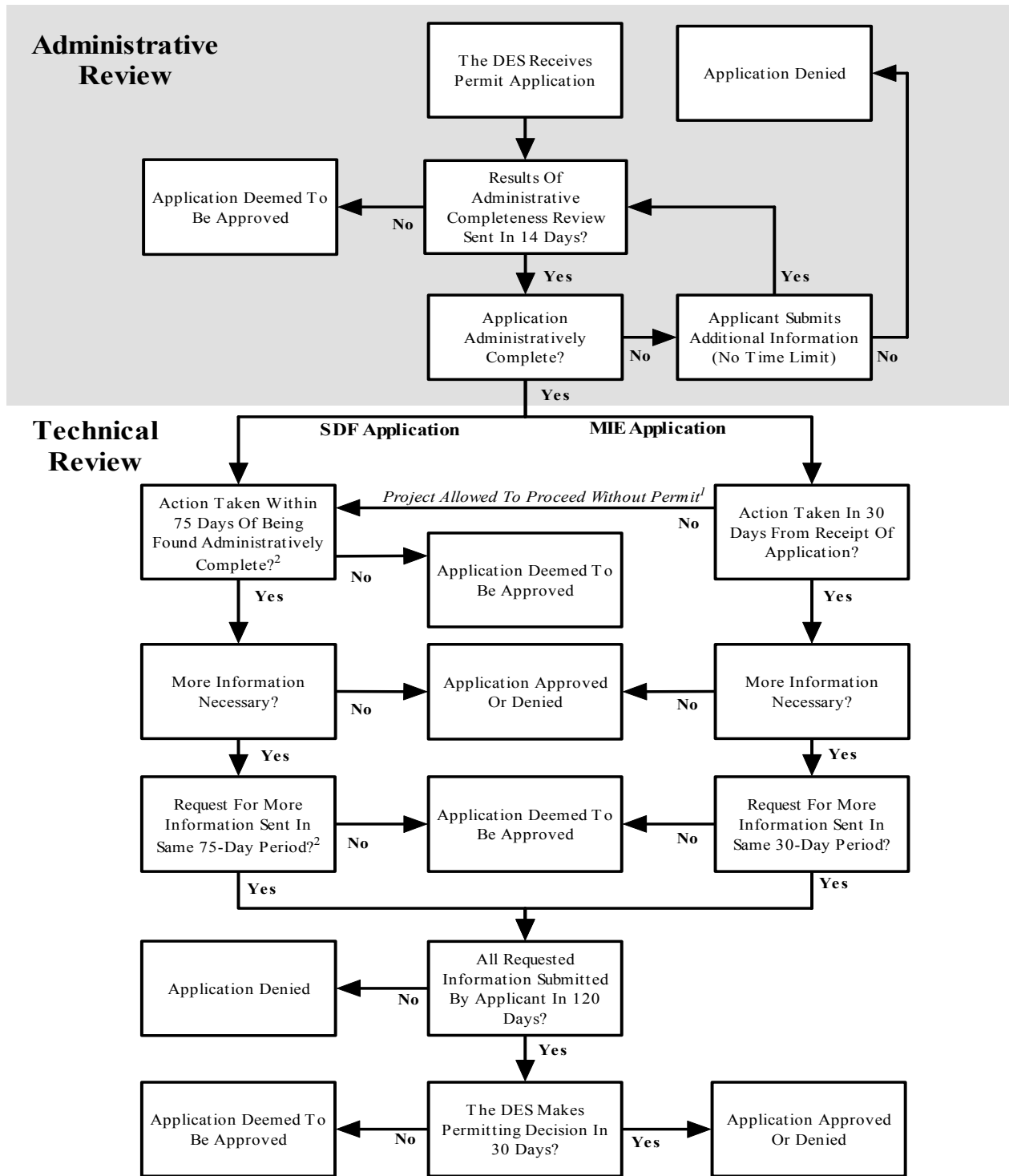
The core responsibility of the Wetlands Bureau and Alteration of Terrain (AoT) Section is regulating activities that can have a negative effect on State waters. This is accomplished through permitting programs designed to balance the rights of landowners and the public. A permit is the Department of Environmental Services' (DES) written authorization allowing an applicant to do something regulated by the State or, in some cases, the federal government.

Wetlands Bureau and AoT Section application reviews should ensure action is taken on applications in a timely and efficient manner. We identified a number of problems in permitting programs including not meeting processing deadlines, not automatically approving permits, not having adequate written policies, and needing to clarify various processing rules. We found a number of weaknesses in the statutes, rules, and policies contributed to the Bureau's failure to consistently meet time limits for both Standard Dredge and Fill (SDF) and Minimum Impact Expedited (MIE) applications. In addition, we found the DES needs to ensure applications are reviewed and approved by the appropriate staff.

As shown in Figure 5, there are several time limits that applicants and the Wetlands Bureau need to abide by when processing SDF and MIE permit applications. The time limits for the review process begin when the Bureau receives an application and are reset with any request for more information (RFMI) issued by the Bureau and each applicant's submission of further information. The initial *administrative review* process ensures all components of an application are present and meet Bureau standards, while the subsequent *technical review* process ensures project specifications meet standards established in law and rule. The AoT application process is not subject to specific timelines for review, but has in recent years received staffing increases designed to reduce the backlog of AoT applications waiting for review.

Figure 5

SDF And MIE Permitting Process



Note: ¹ See Observation No. 3.

² The DES has 105 days to take action on SDF applications that have more than one acre of jurisdictional impact.

Source: LBA analysis of State laws, DES administrative rules, and DES information.

Observation No. 2

Amend Or Implement Statute That Automatically Approves Permits

New statutory time limits for MIE and SDF permit applications went into effect on July 1, 2003 in response to Legislative concerns about the ability of the Wetlands Bureau to process permit applications in a timely manner. As part of the new statutory language, applications are deemed to be approved when the Bureau does not meet review deadlines. However, the Bureau has no written rules, policies, or procedures to automatically approve applications and issue permits when deadlines are missed. Instead, the Bureau continues to review these applications according to its normal process, regardless of statutory time limits.

RSA 482-A:3, XIV(f) requires certain wetlands applications be deemed to be approved when the Wetlands Bureau does not meet one of three statutory time limits found in RSA 482-A:3, XIV(a) - (c). These time limits:

- allow the Bureau 14 days from the receipt of an application to inform the applicant if the application is administratively complete,
- establish a 75- or 105-day deadline from the date of administrative completeness for the Bureau to request additional information or make its permitting decision,¹ and
- set a 30-day deadline for the Bureau to act on additional information submitted by the applicant in response to a Bureau request.

According to a Bureau official, an application is deemed approved by law when a time limit has expired, which allows the applicant to begin work without any written approval from the Wetlands Bureau. In practice, the applicant is not informed when the Bureau misses a deadline and the application is approved under State law. We identified 67 instances of the Bureau missing a deadline from our samples of permit files (see Table 5).

While we have tested for, and are reporting on, the Bureau's failure to automatically approve permit applications when it misses deadlines, we also found this statutory directive was:

- essentially meaningless for many applications,
- potentially costly for property owners who implement un-reviewed project plans, and
- possibly detrimental to the environment.

The Legislature and public may believe any statutorily approved applications allow applicants to commence work on projects as planned without any further concerns. However, projects for which permits would be deemed approved are still subject to review by the US Army Corps of Engineers (Corps). The Corps acts as the coordinator for federal agencies, including the Environmental Protection Agency and the U.S. Fish and Wildlife Service, which may initiate a request for an independent federal review of a project. The 2002 State Programmatic General Permit is an agreement between the Corps and the DES eliminating the need for most wetlands permit applicants to seek a separate federal permit after receiving Wetlands Bureau approval.

¹ As discussed in Observation No. 3, MIEs have a 30-day deadline to be processed; however, they cannot be deemed approved until the 75-day deadline.

The current agreement predates implementation of time limits and does not anticipate that permit applications may be deemed approved by statute. The Corps can still deny or require changes to a project approved by the Bureau or by State statute because the Corps is not bound by State permitting decisions. According to a Bureau official, “the federal agencies are not likely to accept a default permit.... Under areas where the federal jurisdiction would not apply, e.g. docks, the permit or approval would be fully controlled by state statute.”

Table 5

**Wetlands Applications With Missed Deadlines
State Fiscal Years 2004-2006**

Permit Type	Sample Size	14-Day Administratively Complete Deadline		75- Or 105-Day Permitting Decision Deadline		30-Day Response To Additional Information Deadline	
		Number	Percentage of Sample	Number	Percentage of Sample	Number	Percentage of Sample
Minimum Impact Expedited	83	10	12%	0	0%	7	8%
Standard Dredge And Fill	180	1	<1%	35	19%	14	8%

Source: LBA analysis of random samples of application files.

We have identified State regulations potentially affecting deemed approved permits. If applicants begin work without a physical permit, they could be violating RSA 482-A:12, which states it is a violation to proceed without posting a permit prominently on site. Also, if a wetlands permit is approved without a thorough review, the resulting work could violate RSA 482-A:11, II, which states “No permit to dredge or fill shall be granted if it shall infringe on the property rights or unreasonably affect the value or enjoyment of property of abutting owners.” Applicants are risking enforcement actions by the Bureau if their projects result in damage to the environment. Wetlands Bureau personnel have reported after a permit is deemed to be approved, they would no longer be able to enforce breaches of statute or rules regulating wetlands impacts within the permit area. However, Administrative Rule Env-Wt 304 sets approval conditions outlining the general conditions to be met for each project type, and RSA 482-A:14-b, I requires anyone failing, neglecting, or refusing to comply with the chapter or rules adopted under the chapter shall be liable for restoration of any wetlands disturbed in connection with the violation. In addition to the Corps and the DES, RSA 482-A:14-b, II allows municipalities to apply for a superior court injunction on existing or pending violations of this chapter. The municipality must inform the Attorney General and the Commissioner, who can then take the case to court or dismiss it.

While one intention of automatically approving applications is to motivate the Wetlands Bureau to process applications in a timely manner, it presents a number of risks. We question whether Bureau mistakes or inefficiencies should put the quality of the State’s environment at risk and potentially increase applicants’ project costs. Applications not meeting State permitting standards can now be approved by statute because of the untimely action of the Bureau. There is an additional risk DES officials or Bureau staff could provide preferential treatment by not acting

on an application in a timely manner, thereby allowing an application to be automatically approved.

Recommendations:

The Bureau should implement rules for applications deemed approved under RSA 482-A:3, XIV(f). These rules and any related forms or instructions should clearly describe this approval process and emphasize the risks the applicant is taking when commencing an unreviewed, but deemed approved, project.

The Legislature may wish to reconsider the merits of deeming permit applications approved when the Wetlands Bureau misses deadlines.

Auditee Response:

We concur.

By October 31, 2007, DES will develop and begin distribution of a letter to inform applicants when the Bureau has missed statutory deadlines for permitting and of the risks of proceeding. DES is committed to substantial revisions to the wetlands rules and expects to make substantial progress on this rulemaking initiative in State Fiscal Year 2008. These revisions will include clarifying procedures for the implementation of the “automatic permit” provisions of RSA 482-A. In conjunction with this rule revision process, we may also identify potential statutory changes that could provide further clarity on this issue.

Observation No. 3

Clarify And Comply With MIE Time Limits

There are inconsistencies between statute, administrative rules, and Wetlands Bureau forms for the processing of MIE permit applications by the Bureau. Based on a sample of MIE application files, we found the Bureau did not meet the 30-day deadline, specified in administrative rule, for 47 percent of the MIE applications (see Table 6). During much of the audit period, Bureau reviewers believed the 30-day time limit started at the administratively complete date and not the receipt date. Even under this more lenient standard, ten percent of the MIE applications were reviewed late.

Starting in SFY 2004, new time limits for processing MIEs were established by RSA 482-A:3, XIV(b); however, existing rules provided for a much shorter time limit. A Bureau official questioned whether the new statutory time limits superseded the rule-based time limit, which affects when the DES should be reviewing MIE applications and how successful the Wetlands Bureau has been at meeting time limits. The new time limits give the Wetlands Bureau 75 days or 105 days (depending on the size of the impact to wetlands) from the date the application is considered administratively complete by the Bureau to render a decision or request more information from the applicant. RSA 482-A:3, XIV(f) says “the time limits prescribed by this paragraph shall supersede any time limits provided in any other provision of law. If the department fails to issue a notice of administrative completeness or render any other decision

within the time limits provided in this paragraph, the application shall be deemed to be approved.”

Table 6

**MIE Applications With Missed Deadlines
State Fiscal Years 2004-2006**

	30 Days From Receipt Of Application	75 Or 105 Day From Administratively Complete Date	30 Days From Administratively Complete Date
Applications With Missed Deadline	47% (39 out of 83)	0% (0 out of 83)	10% (8 out of 77)
Effect Of Missed Deadline	Project Can Proceed	Project Deemed Approved	Project Can Proceed
Authority	Env-Wt 505.02 (b)	RSA 482-A:3	None

Source: LBA analysis of a random sample of MIE applications.

DES rule Env-Wt 505.02 establishes expedited review procedures, and part (b) requires the Wetlands Bureau approve the application or send a notice of deficiency to the applicant within 30 calendar days of receiving the application by the DES. While the statute took effect in 2004, the rules establishing a 30-day timeframe for MIEs were re-adopted in 2005. One wetlands administrator has suggested RSA-A:3, XIV(f) supercedes the rules and therefore gives wetlands inspectors 75 days from the administratively complete date as stipulated in statute, rather than the 30-days from arrival stipulated in rules. If part (f) of the statute gives the Department 75 days from the administratively complete date to complete the permitting process, then the 30-day deadline set in rules is meaningless, which undermines the purpose of creating an expedited review process. A DES lawyer stated that since the rule falls within the requirements of the RSA, the Department is holding itself to a stricter time limit, and should be judged by this time limit (i.e., 30 calendar days from date of receipt). In addition, an official with the Office of Legislative Services, Administrative Rules stated the DES should follow the time limits in the rule because: 1) the rule does not conflict with the purpose of the statute, 2) the rule was re-approved more recently than the statute was enacted, and 3) no court has ruled the statute supercedes this rule.

Assessing performance is problematic because the Bureau was working under an erroneous time limit for three fiscal years. The MIE application form and Notice of Administrative Completeness letter state the Bureau will review the permit application within 30 days from the administratively complete date. In fact, this time limit does not comply with either the statute (which stipulates 75 days from the Administratively Complete date) or rule (30 days from DES receipt). Bureau performance varies greatly depending on which standard is used (the rule or application form). Wetlands Bureau reviewers were under the impression that MIE permits were to be reviewed within 30 days of the administratively complete date. Reviewers were familiar with the Standard Dredge and Fill process, which operates the same way, and were misled by the

MIE application form and Notice of Administrative Completeness form letter, both of which state the application will be reviewed within 30 days of the administratively complete date. One reviewer, believing these forms to be correct, created a spreadsheet calculating review timelines starting from the administratively complete date. This spreadsheet was copied and used by other Wetlands reviewers to prioritize weekly workloads. According to the creator of this spreadsheet, once it was realized that the administrative rules stipulated the 30-day time limit begins at the date of receipt, the spreadsheet was changed and shared with the other Bureau reviewers.

It is not clear if applicants can or should begin work on the planned project when the Wetlands Bureau misses the 30-day time limit. Administrative Rule Env-Wt 505.02 (e), states the applicant can proceed with the project after 30 days if he or she has complied with all application procedures and has not received a notice of deficiency from the Wetlands Bureau, but the MIE permit is not deemed approved by law until the 75-day deadline. Based on our review, 39 of 83 applicants (47 percent) might have proceeded with work before receiving a written permit from the Bureau. Unfortunately, these applicants may have been in violation of RSA 482-A:12, which states applicants cannot proceed without posting a permit prominently on site. In fact, Env-Wt 505.02 does not state the permit is deemed to be approved; therefore, the period between 30 and 75 days is ill-defined in rule.

Recommendation:

The Wetlands Bureau should clarify for applicants and reviewers the time limits in place for processing MIE applications and make the appropriate changes to Bureau rules, policies, and forms.

Auditee Response:

We concur.

DES is committed to substantial revisions to the wetlands rules in State Fiscal Year 2008. These revisions will include clarifying the permit application procedures, standards and time frames for minimum impact expedited permits (MIEs), and making the statutes and rules consistent. Statutory changes will be proposed if needed. Policies and forms will also be revised to be consistent with the statutes and new rules.

Observation No. 4

Rules Needed On Issuing Requests For More Information

Some RFMIs made to SDF applicants do not follow Wetlands Bureau policy and risk creating Bureau non-compliance with statutorily set timelines for review. Our review of 180 SDF applications found Bureau reviewers requested additional information from half of SDF applicants in order to make permitting decisions. When issued within 75 days (or 105 days for projects with significant wetlands impact), RFMIs stop the clock in the review process and establish new deadlines for both applicants and reviewers.

When it sends an RFMI, RSA 482-A:3, XIV(b) requires the Bureau to notify the applicant that the DES will deny the application if the requested information is not received within 120 days of the request. We found applicants were notified about this RFMI deadline in their Notice of Administrative Completeness letters and informed that for any RFMI issued by the Bureau each applicant will “receive a written request outlining the specific items required.” Bureau policies state phone calls seeking further information should be followed up by written RFMIs. Upon receipt of all requested information from an RFMI, RSA 482-A:3, XIV(c) stipulates the Bureau approve, deny, or take further action with regard to an application within 30 days. We found no evidence indicating the Bureau directly informed applicants of the Bureau’s own 30-day deadline.

Our review of SDF files considered both written requests sent to applicants and the written records of telephone calls and e-mails with RFMI in the subject line to meet the provisions of RSA 482-A:3, XIV(b). In the cases of e-mails and memorandums of telephone conversations, notations of RFMI in the subject lines were treated as written or oral statements referring applicants back to warnings of the 120-day response time in their letters of administrative completeness. We identified five out of the 21 files violated review deadlines and contained Bureau communications asking for further information that were not clearly labeled as RFMIs and thus did not stop the clock and establish new sets of review deadlines. In four files, unofficial RFMIs and other factors contributed to review periods violating statute, and in one file, the unofficial RFMI resulted directly in a review time violating statute. In this case, the communication the Bureau believed stopped the clock was one delivered in a face-to-face meeting. In all five cases, the Bureau treated the communications as official RFMIs and contends no review deadlines were missed.

Where information is sought without written RFMIs, applicants may be unaware they are obligated to respond within 120 days or risk having their applications rejected. By not adequately documenting RFMIs, the Bureau runs the risk of applicants challenging permitting decisions made after the initial review deadline, which could result in applications being deemed approved under RSA 482-A:3, XIV(f).

Recommendation:

The Wetlands Bureau should promulgate rules for handling RFMIs, clearly indicating how applicants will receive RFMIs and how such requests for additional information will be documented to ensure Bureau compliance with RSA 482-A:3, XIV(b).

Auditee Response:

We concur.

DES is committed to a complete review and revision to the wetlands rules by June 30, 2008. We expect that these revisions will include adoption of rules for processing Requests for More Information (RFMIs), indicating how applicants will receive RFMIs and how such requests for additional information will be documented to ensure Bureau compliance with RSA 482-A:3, XIV(b).

Observation No. 5

Change Time Limits When Conservation Commissions Intervene

Interventions in the review process by municipal conservation commissions constrain timelines for Wetlands Bureau review of SDF and PBN applications. One Bureau official stated interventions by other government entities are second to issues regarding incomplete applications as the greatest concern in meeting statutory timelines. RSA 482-A:11, III(a) and (b) require the Bureau to suspend action on SDF applications and refrain from making decisions or holding hearings on SDF projects for up to 40 days after a conservation commission intervenes. The Bureau can resume work after the 40-day deadline or as soon as it receives a written report from a conservation commission. The suspension period for SDF applications runs concurrent with the 75- or 105-day time limit found in RSA 482-A:3, XIV(b), in which the Bureau must decide on an application or issue a request for more information. As a result, a conservation commission intervention may significantly limit the amount of time for Bureau staff to review and act upon applications. For a typical SDF application, the Bureau has 75 days to conduct its technical review; but if a conservation commission intervenes, the Bureau must suspend action on the application, thereby reducing its potential review time to as little as 35 days.

The Wetlands Bureau cited one or more factors affecting its ability to meet statutory timelines in 23 of the 51 SDF applications we identified as having missed a deadline; conservation commission intervention occurred in 11 of these applications. Several of the 11 applications contained ongoing exchanges of information between the applicant, the Bureau, and the conservation commission. Some created a notable effect on the overall application review time. Most notable was a three-month delay created as a commission prepared a report for an application. In another delayed case, the DES requested the applicant respond to the concerns of the local commission. In this case the commission promised, but failed to deliver, information to the Bureau. The overall review time for the application was 213 days from the date of administrative completeness to the final decision date; the Bureau did not meet the 75-day deadline and therefore the permit should have been automatically approved. A Bureau official stated extensions can add to the difficulties of meeting statutory timelines.

Conservation commission interventions may also play a significant role in disrupting Bureau reviews of PBN applications. Conservation commission interventions in PBN applications are assumed unless commissions have specifically signed the application forms. In this case, suspended Bureau action is reduced to 21 days. However, since PBN applicants may proceed with their projects after 25 days, potential Bureau action is confined to a narrow four-day window.

Recommendation:

The Wetlands Bureau should seek to amend RSA 482-A:3, XIV and Env-Wt 506.02 to allow its reviewers adequate time to review permit applications when conservation commissions intervene.

Auditee Response:

We concur.

In 2008, DES will propose amendments to RSA 482-A to enable allowances for delays beyond Wetlands Bureau control caused by conservation commission interventions. DES is also committed to making major revisions to the wetlands permit rules in FY 2008. These will include amendments to modify review time limits to the extent allowed after consideration of proposed amendments to RSA 482-A by the Legislature.

Observation No. 6

Amend Statutory And Rule-Based Time Limits To Account For Modified Applications

Neither statute or administrative rule provide exceptions to time limits for Wetlands Bureau reviews when applicants submit major changes to applications or changes in permitting categories outside of the RFMI process. Review time limits include the statutory 75- or 105-day review periods for SDF applications, as well as the 30-day MIE and ten or 25-day PBN review periods. One Bureau reviewer expressed concern that consultants for applicants may be gaming the SDF application system by securing a place in the review queue through intentionally submitting applications with insufficient information. These applicants start the clock ticking with the initial substandard application and then complete their analyses and submit all the required information to the Bureau.

Our reviews of MIE and SDF application files revealed three instances (3 percent) in which unrequested information submitted by an applicant may have contributed to the Wetlands Bureau missing a review deadline. In one of the 50 SDF application files violating statutory timelines for review, the applicant submitted a revised set of plans six days after a notice of administrative completeness had been sent and without an RFMI having been issued. In a second SDF file, the Bureau received a letter from the engineering contractor with an alternative location for one part of the project after all other information had apparently been submitted. In one of the 39 MIE application files the Bureau reviewed past the 30-day deadline, the applicant sent an amended plan (not requested by the Bureau) in the midst of the review process. In theory, PBNs could also be affected by applicants seeking to amend the notification. According to a Wetlands Bureau official, this might be rare because the review time limits are so short.

Recommendation:

The Wetlands Bureau should seek to amend RSA 482-A:3, XIV, Env-Wt 505.02, and Env-Wt 506.02 to allow its reviewers adequate time to review permit applications substantially amended by applicants.

Auditee Response:

We concur.

DES will propose amendments to RSA 482-A to enable exceptions to time limits when applicants submit major project changes or changes in permitting categories. DES is also committed to making major revisions to the wetlands permit rules in FY 2008. These will include amendments to Env-Wt 505.02, Expedited Review Procedures, and Env-Wt 506.02, Permit by Notification Procedures for Qualifying Projects, to the extent allowed after statutory amendments are considered by the Legislature.

Observation No. 7

Rules Needed For Amending Permits

The DES lacks administrative rules and formal policies and procedures for amending AoT and SDF permits. Water Division reviewers consider amendments for both AoT and SDF permits. Amendments are changes to the conditions of a permit or an applicant's permitted activities that generally do not require submitting a new application but may, at the discretion of the reviewer, require including specific information not in the original application. Amendments are not governed by statute, rule, or formal written policies and procedures. According to both AoT and Wetlands staff there are no written policies or procedures regarding amendments. Nonetheless, the 2002 DES publication *Guidebook for Environmental Permits in New Hampshire* states the following:

- An AoT permit, “may be modified by submitting revised design plans with all supporting data and documentation (including an in-depth explanation of the need for the changes) at any time during the two-year duration of the existing permit.” In addition, any “modification must be reviewed and approved by DES.”
- A SDF permit amendment “...may be requested by writing to the DES Wetlands Bureau, with a copy to the municipal conservation commission (or board of selectmen if there is no conservation commission). The request should provide an explanation of the requested amendment and why it is needed. An additional fee and new plans may be necessary. The amendment must be designated for work that is directly related to the purpose of the original permit. A request for permit modification will trigger a reassessment of the federal permit status by the Army Corps.”

According to a disclaimer in the *Guidebook*, this document “is not intended to replace or otherwise substitute for the more comprehensive and formal administrative procedures that govern the permitting program....” Yet, for amending AoT and SDF permits, the *Guidebook* is the only written guidance available to the public.

AoT reviewers provided amendments for approximately 13 percent of permits granted between SFYs 2004 and 2006. Wetlands Bureau reviewers provided amendments for at least 12 percent of the sampled SDF permits in our file review. The files for amended permits included in the AoT file review indicate applicants submitted written requests, revised plans, and additional fees in seeking amendments to their permits. The files for amended permits included in the SDF file review indicate most applicants sought small increases in the scope of projects permitted. Permits were amended for a variety of reasons including name changes, a revised mitigation plan, and new information provided with respect to historical preservation. In at least one instance, an amended SDF permit increased the number of square feet of impact from 1,660 to

3,025; however, no additional fees appear to have been submitted for this New Hampshire Department of Transportation project.

Without rules, written policies, or procedures governing the handling of amendment requests, Water Division staff risk evaluating project changes in an inconsistent manner. Permits whose terms are amended may significantly increase the environmental impact of their respective projects and may not have their terms re-evaluated for environmental impact in the same fashion as applications being reviewed the first time.

Recommendation:

The Water Division should write rules and implement policies and procedures for amending permits to ensure:

- **amendments are handled consistently among staff,**
- **new permits are sought if changes are substantially beyond the scope of the original permit, and**
- **increased environmental impacts are minimal, and correct fees are applied and collected.**

Auditee Response:

We concur.

DES is committed to include revisions to establish procedures for permit amendments to the alteration of terrain rules and wetlands rules by June 30, 2008.

Observation No. 8

Establish Comprehensive Policies And Procedures

Wetlands Bureau management has not finalized comprehensive written policies and procedures for its permitting activities. Absence of comprehensive written policies and procedures risks inconsistency in both the administrative handling of wetlands applications and their technical review by Bureau staff. The Wetlands Bureau currently maintains a paper-based policies and procedures manual composed of three sections. The first part includes the *Final Drafts* of policies established between 1999 and 2003, the second part includes the *Drafts* of policies and procedures developed between 1996 and 2003, and the third part includes policies *Not in Draft or Final Folder* as well as miscellaneous letters and forms related to Bureau operations. The policies have not been prepared in a consistent format, but are composed rather of copies of e-mail communications, inter-office or inter-departmental memos, and general printed announcements detailing what Bureau managers have stated are the correct steps to be taken at various stages of the review process. A hand-written cover sheet with a table of contents has been attached to each part of the policies and procedures.

According to the New Hampshire Wetlands Council, the regulated community has voiced concerns about DES policies. To some, it appears the Bureau follows ever-changing unwritten

policies with regard to administrative procedures and the review of project-specific data. An industry representative reported the informal and unwritten policies of the Wetlands Bureau are strengthened when developers and applicants who are anxious for their permits to be issued accept a series of permit conditions placed upon them. These conditions then become part of the informal requirements followed by the Wetlands staff in the future. Such practices may result in inconsistent treatment of applicants. According to an industry representative, efficiency and turnaround times in the permitting process are all adversely affected by the use of unwritten policies. In some cases, a Bureau reviewer can look at an application and say it is permitted and another reviewer can say it is not. According to a Bureau official, another example of an inconsistent policy is whether the Bureau accepts a single application fee or multiple fees for multiple projects submitted by a town.

We also note the AoT Section does not have comprehensive policies and procedures. According to an AoT staff member, the Section has five standard operating procedures available electronically on its server's shared drive. The effort to provide these started about a year ago; however, like the Wetlands' policies, they are not standardized.

A well-designed policies and procedures manual is an effective form of communication to assist in thorough and timely review of permit applications. In addition to properly communicating the restrictions of rule and law, a manual helps to clarify the specific authority and responsibility of individual employees and administrators' expectations of what actions are needed for the Bureau to comply with rules and laws. A manual provides the essential foundation necessary for establishing employee accountability. It is important to have the agency's policies and procedures documented; unwritten policies and procedures are risky, especially when an agency experiences employee turnover. Manuals also serve as a reference tool for employees seeking guidance on the proper handling of less frequently encountered conditions associated with permit applications.

Recommendation:

The Water Division should produce well-organized and written comprehensive policies and procedures for its permitting programs.

Auditee Response:

We concur.

DES is committed to undertaking a complete review and revision of the wetlands rules and we expect to make substantial progress on this initiative in State Fiscal Year 2008. As part of this process, DES will complete a comprehensive review of all Wetlands Bureau policies and procedures to ensure consistency with statutory authority. This will include incorporation of existing policies, as appropriate, into rules or standard operating procedures (SOPs). DES has already developed SOPs for some activities, such as consideration of requests to expedite applications, and will develop SOPs for others, both in the Wetlands Bureau and AoT program. SOPs will be incorporated into a procedures manual in 2008. Development of rules and SOPs

will continue to occur in consultation with the Wetlands Council and Water Council, as appropriate, on an ongoing basis.

Observation No. 9

Reduce Backlog Of AoT Applications

The AoT Section has experienced an increase in its backlog of AoT permit applications waiting for review. Both the number of applications and the time it takes to review them have increased. According to AoT staff, the backlog has resulted in: 1) limits on the number of site visits reviewers can make in order to better understand projects, 2) an increase in the number of calls from applicants with questions about their pending permits, and 3) an increase in the number of requests for expediting applications.

The backlog of applications increased even with the addition of new positions. AoT Section personnel increased by 50 percent from four to six (four reviewers, two inspectors) beginning in SFY 2004, while only experiencing an average six percent increase in the number of applications over the audit period. The new positions were added to address delays in reviewing terrain alteration permit applications and were funded by an increased statutory application fee. The average amount of time between filing a permit application and the AoT Section's initial review had increased, reportedly, from around 30 days in the 1990s to 75 days or more in 2003. The Section made a substantial push to reduce the backlog of initial reviews when all the positions were filled in 2004; this came, according to AoT officials, at the expense of duties such as rule writing, public outreach, and other administrative functions. The Section experienced a short-term decrease in its review time. However, at the end of SFY 2006 the delay had increased to 121 days. We calculated it took the Section an average of 90 days (median = 79 days) to conduct an initial review of non-expedited applications between SFYs 2005-2006. This is the Section's most labor-intensive and time-consuming task, according to the Section supervisor.

The Section has not kept up with the number of AoT applications submitted. One AoT staff member reported the depth of permit application review is currently greater than when the Section had fewer staff; the Section Supervisor reported the current amount of review is sufficient compared to previous practices. During SFYs 2005 and 2006, AoT data shows the Section received 397 and 363 AoT permit applications, respectively, for a total of 760 submitted applications. This was a greater number of applications than the Section reviewed. The Section also had an average of 69 applications waiting to be reviewed (i.e., the backlog) during these years. In addition, AoT enforcement inspectors reported having insufficient time to respond to all complaints and make necessary visits to permitted sites. One inspector reported having a two-week backlog of sites to inspect.

Recommendation:

The AoT Section should attempt to reduce the review backlog. The Section should assess its capacity to review and issue permits, handle enforcement cases, and continue its other administrative and public outreach activities. It should work with DES management to prioritize these tasks given the Section's resources.

Auditee Response:

We concur.

During the 2007 Legislative Session, AoT permit application fees were increased and two engineering positions were added to the AoT Program. Statutory deadlines for AoT permit application reviews (50 days for initial applications) effective January 2008, were also added. The statutory deadlines are attainable with the addition of the new positions, so backlogs will be reduced consistent with the Audit Report recommendation. AoT Program funding was also shifted so that the program is now fully funded by application fees rather than from the state general fund.

Observation No. 10

Clarify SDF Fees For Applicants

The non-shoreline structure SDF fees established by statute are inconsistent with those identified in Wetlands Bureau application forms and fee schedules. These inconsistencies are confusing and have resulted in overpayment by SDF applicants. Application fees for SDF permits are generally based upon the estimated number of square feet of impact and increase as the size and potential environmental impacts of projects increase. RSA Chapter 482-A governing dredge and fill in wetlands was revised by Chapter 224, Laws of 2003, to establish increased fee assessments effective during SFYs 2004-2006. These fee assessments were extended by the Legislature in 2006. The revised fee assessments outlined in RSA 482-A:3, I state:

The permit application fee shall be \$100 for minimum impact projects under this chapter. The permit application fee for minor and major shoreline structure projects shall be \$100 plus an impact fee, based on the area of dredge, fill, or dock surface area proposed, or a combination. The shoreline structure impact fee shall be \$1 per square foot for permanent dock surface area; \$.50 per square foot for seasonal dock surface area; and \$.10 per square foot for dredge or fill surface area or both. *The permit application fees for minor or major projects shall be \$.10 per square foot of proposed impact for all other projects under this chapter (emphasis added).*

The final sentence indicates that applications for all minor and major SDF projects not involving shoreline projects are to be levied with a fee of \$.10 per square foot of proposed impact, but it is silent on a \$100 application fee. A DES official agreed that RSA 482-A:3 does not seem to give the Department the authority to collect a base application fee for non-shoreline SDF permits; however, the official added the intent of legislation may have been to establish an application fee encompassing a \$100 minimum fee plus \$.10 per square foot of proposed impact for all SDF applications.

Application fees as outlined in official DES documents create further ambiguity for applicants. The Department's *Fee Schedule for NHDES Wetlands Permit Applications and Notifications (Effective July 1, 2003)* and *Worksheet A* accompanying the SDF application both indicate applicants are to pay at least a \$100 fee for all minor and major projects. The *Fee Schedule*

states: “Standard Dredge and Fill Application (for minor or major impact projects that do not propose shoreline structures)...\$100 minimum fee plus \$0.10 per square foot beyond 1,000 sq. ft. of impact.” *Worksheet A* requires applicants to multiply the total area of impact to wetlands or other jurisdictional areas by \$.10 and then to pay the larger of either the resulting calculated fee or \$100.

Evidence from our reviews of 180 randomly selected SDF files indicates all applicants paid at least a \$100 application fee. However, several applicants who received minor or major permits requesting under 1,000 square feet of approved impact not involving shoreline structures may have overpaid since, according to statute, their fees should have been under \$100. We identified seven applicants (four percent) who may have overpaid a total of \$402.50. In addition, we found five applicants (three percent) for SDF projects not associated with shoreline structures may be calculating permit application fees by including both a \$100 minimum fee and a fee based on \$.10 per square foot of proposed impact. This calculation of fees may be due to applicants assessing fees for non-shoreline structure SDF projects in the same fashion as projects involving shoreline structures.

Recommendation:

The DES should seek to clarify the intent of RSA 482-A:3 with regard to a minimum fee for all SDF applications by requesting an opinion from the N.H. Attorney General.

Auditee Response:

We concur.

House Bill 2, as enacted at the close of the 2007 Legislative Session, contained an amendment that removed ambiguity identified by the LBA Audit Division by clarifying the minimum application fee that can be charged.

Observation No. 11

Ensure Disputed Permit Decisions Are Adequately Reviewed

While Wetlands Bureau and AoT reviewers are responsible for reviewing applications and issuing permits, six reviewers told us they had refused to sign permits and instead forwarded them to supervisors or administrators for signatures. Reviewers associate their refusal to sign some permits with pressure to approve projects they do not believe meet approval criteria. This may occur when reviewers are not confident applicants are providing complete or accurate information, or when the requested work does not seem allowable. Although refusals may result from reasonable differences of opinion between reviewers and their supervisors, they can be a warning to the Water Division that certain applications or permits are inadequate and warrant further attention.

A DES official said staff were told if they felt uncomfortable signing permits they could pass them along to their supervisors. This official said there have been only a limited number of such permits issued. This official's stated goal was to ensure there was enough justification for

permits to be issued when the limits of certain criteria were pushed. Another DES official tells staff it is the Department, not the reviewer, who issues a permit; the official's own signature is just as good as the reviewer's. This official will accept certain differences of priorities and philosophies from reviewers because wetlands permitting is subjective, but indicated there is still science involved and it is the Department's mission to issue permits. One reviewer said there have been a handful of permits the reviewer chose not to sign in which pressure was exercised. In the reviewer's opinion, some of the permits were not in accordance with rule or law. Another reviewer who has asked a supervisor to sign two permits said, "I've definitely written permits for things where not everything was up front" and which contained conditions on which the Wetlands staff was required to follow up.

Neither statute nor rule prohibits administrative or supervisory staff from either assuming responsibility for signing permits or superseding the decisions of reviewers regarding individual permits. However, there are several risks associated with forwarding application files to supervisors or DES administrators for final permit approval when the specifics of the applications have raised concerns among review staff:

- Administrative personnel may lack the expert knowledge and the first-hand experiences of permitting integral to making sound judgments upon proposed projects.
- Administrative and supervisory decisions overriding those of staff members may undermine staff morale and the authority of staff members in dealing with the concerns, complaints, or arguments of applicants.
- Applicants may begin to seek intervention or relief through administrators rather than respect decisions of staff reviewers.

While management has the authority to make permitting decisions, the Water Division can reduce its risk of issuing substandard permits if deliberations over disputed permits are well documented and reviewed by a qualified higher level of management.

Recommendation:

The Water Division should develop policies and procedures to ensure:

- **reviewers document their reasons for refusing to sign permits, and**
- **there is an additional level of documented review and approval by supervisory or management personnel when disputed permits are approved, including reasons for the approval.**

Auditee Response:

We concur.

While the focus of the LBA review was on two Water Division programs, Department-wide standard operating procedures (SOPs) will be developed and implemented for all programs that issue permits. By December 31, 2008, DES will develop SOPs to ensure that: (1) original permit reviewers document their reasons for refusing to sign permits, and; (2) there is an additional

level of documented review and approval by supervisory or management personnel when disputed permits are approved. As noted in the Audit Report, these SOPs will serve to address a situation that occurs quite infrequently at DES.

Observation No. 12

Maintain Appropriate Balance Between Public Safety And Mitigation Requirements

In 2006, the DES Commissioner personally issued a major impact SDF permit that did not require the applicant to provide full mitigation for the planned filling of wetlands by a date certain. The Laconia Airport Authority's application for runway safety improvements identified 14.5 acres of wetlands to be filled. Our review of the resulting SDF permit found the DES did not require the correct amount of mitigation from the applicant. We estimate the permit conditions compensate for 74 percent of the affected wetlands (10.8 out of 14.5 acres). We also found the permit was signed by the Commissioner when Wetlands Bureau personnel would not sign it.

This permit was unique in many ways:

- There was an impending deadline for a \$7.7 million federal airport improvement grant.
- The permit was issued as a result of the New Hampshire Wetlands Council's first-ever declaratory ruling.
- Two permits were signed by the DES Commissioner; the first was rescinded by the Commissioner after conferring with the Wetlands Council Chairman regarding special conditions contained in the permit.
- The permit allowed for destruction of prime wetlands.

Based on RSA 482-A:11, IV, the Wetlands Bureau determined it could not issue a permit for the Laconia Airport's January 2006 application due to the applicant's failure to meet statutory criteria for the destruction of prime wetlands. The Laconia Airport, the DES, the State Department of Transportation's Bureau of Aeronautics, and the Federal Aviation Administration petitioned the Wetlands Council for a declaratory ruling. The petition sought a special regulatory interpretation of RSA 482-A:11, IV and RSA 482-A, IX, stating these provisions create "an unintended regulatory conundrum that pits responsible provision for the public's safety against the Statute's mandate to preserve Prime Wetlands." The Wetlands Council decided the Wetlands Bureau could issue the permit without any special conditions, finding the improvement in public safety justified waiving the statutory protection of prime wetlands.² In its ruling the Council states "the NH Legislature should consider a modification of RSA 482-A:11 to address similar conflicts that may arise in the future."

² The New Hampshire Attorney General's review of the declaratory ruling found the Council had made some mistakes in handling its first declaratory ruling, but the Council had the authority to make the ruling. The Attorney General also informed the Wetlands Council it had no authority to waive statutes, as it did in this declaratory ruling, and it had inappropriately gone into non-public session during its hearing. However, there were no appeals made to the Wetlands Board on the final permit and the U.S. Army Corps of Engineers accepted it under the State Programmatic General Permit.

We found the permit's mitigation conditions did not require compensation for 3.7 acres (26 percent) of the 14.5 acres of impacted wetlands. The Airport proposed 142 acres of mitigation in its application, of which 95.5 acres were accepted as appropriate by the DES in both the initial and final permits. Both versions of the permit also required the Airport to create or restore 1.8 acres of wetlands. The initial permit was prepared by Wetlands Bureau personnel but they would not sign it. Instead, the permit was signed and then rescinded by the DES Commissioner. The initial permit required the Airport to submit new plans to meet the balance of the State mitigation standards for DES approval. An Airport official believed the Federal Aviation Administration would not accept this permit because it was contingent upon receiving DES approval after the grant deadline. The Commissioner reported to us he did not want the Department to be responsible for delays in safety improvements at the Airport. Therefore, the Commissioner deleted a number of conditions from the initial permit, eliminating the need for additional mitigation requirements. The final permit then also required 95.5 acres of mitigation, but contained a vague statement about supplementing the mitigation "as possible in the future."

By deleting additional mitigation requirements from the permit and writing that future mitigation be supplemented as possible, the Commissioner did not hold the Laconia Airport Authority to the same mitigation standards required of all wetlands permits. In fact, the vague language seeking additional mitigation does not specify when, nor does it indicate how much more, mitigation is required. Our assessment of the permit's mitigation discrepancy is strictly quantitative and does not include any assessment of the relative functions and values of the mitigation proposal.

There is nothing in State law preventing the DES Commissioner from directly issuing permits. In fact, given the uniqueness of this situation it was reasonable for the Commissioner to be involved with the decision. However, due to the Commissioner's changes, the permit did not ensure full mitigation would ever be realized. According to DES administrative rules Wt 802 and 803, only a qualified professional (i.e., "an individual with a combination of education and experience regarding identification and understanding of hydric soils, hydrophytic vegetation, and wetland hydrology, sufficient to enable the individual to evaluate wetland systems and to create the conditions necessary to sustain a wetland ecosystem") can prepare compensatory mitigation plans for an application. The DES requires similar education and experience for its personnel responsible for reviewing, approving, and issuing permits for these plans. The Commissioner was reportedly not professionally qualified to modify and approve such plans. While the Commissioner and other Department managers can modify and issue wetlands permits, they do so at a risk of issuing permits not meeting statutory and Department requirements. Ultimately, permits not meeting statutory standards can result in a loss of environmental value for the State. We note DES rules establish a procedure and criteria for granting waivers to rules to accommodate those situations where strict adherence would not be in the best interest of the public or the environment; however, the applicant did not request such a waiver in this case.

Recommendations:

The Legislature may consider amending State laws to clarify whether, and to what extent, public safety issues may be considered when permit applications involve prime wetlands.

DES managers not personally qualified to review and approve certain permit applications, even if statutorily authorized, should not deviate from the recommendations of qualified DES personnel without seeking legal advice on the potential consequences of their decisions.

Auditee Response:

We concur.

DES assigns qualified staff to review and recommend actions on wetlands permit application decisions. DES will follow the LBA Audit Division recommendation on this matter.

**STATE OF NEW HAMPSHIRE
ALTERATION OF TERRAIN AND WETLANDS PERMITTING**

PERMIT BY NOTIFICATION

The Permit By Notification (PBN) process is intended to simplify the permitting process for both the Wetlands Bureau and applicants. Projects that normally result in minimal environmental impact if they are conducted in accordance with PBN rules and instruction booklets are allowed to proceed either ten days or 25 days after being filed with the local municipality. The Wetlands Bureau can only disqualify a project before the deadline is reached. We found the Bureau has not consistently met these deadlines.

Observation No. 13

Change PBN Rules And Improve Procedures

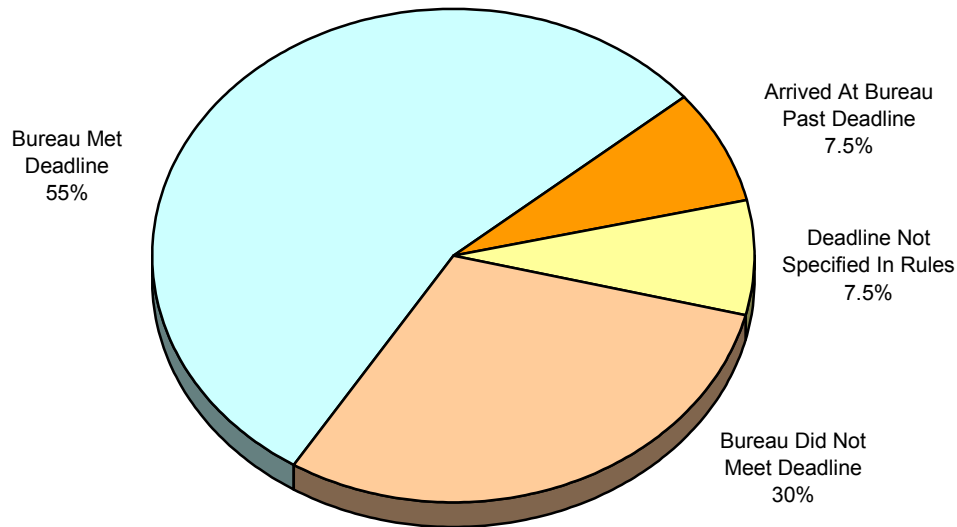
Some PBN rules impede the Wetlands Bureau's ability to meet review deadlines. For a majority of the PBNs, the Bureau has ten days to review the application from the date of the required town clerk's signature; for the other PBNs, the Bureau has 25 days. As shown in Figure 6, seven and a half percent of the 96 PBNs we sampled arrived at the Bureau past the review deadlines, giving Bureau reviewers no opportunity to officially review or disqualify them. Another 30 percent of the PBNs were approved, disqualified, or sent a request for more information past the review deadline.

Wetlands Bureau reviewers have expressed discontent with not being able to meet the PBN review deadlines. Because rules establish the start date for the ten-day and 25-day deadlines from the day of the town clerk signature, the amount of time the Bureau has to review them depends upon the town clerk's timeliness in mailing PBN applications and the speed of delivery. We found 25 percent of PBNs arrive at the Bureau six days or more after the date of the town clerk's signature. Upon arrival at the Bureau, a PBN is entered into a database and the project site is reviewed using the Water Division's geographic information system. Together these steps typically take one day, or perhaps longer if intake personnel are out of the office. For PBNs going to the seacoast, it can take a number of days for the application to reach Bureau reviewers stationed there. According to reviewers, PBNs should be low-risk and low-impact projects and therefore should be able to be given low priority. If a PBN and a major project both need to be reviewed, the major project is more critical. One reviewer said PBNs are initially checked for notable issues in order to send a request for more information as soon as possible. If there are no large issues, the PBN may be put aside and entered into the database as approved at a later date.

In our sample, seven of the PBN applications were originally submitted to the Wetlands Bureau without a conservation commission waiver, only to have the waiver arrive at the Bureau later. According to a Bureau official, reviewers might proceed as though they have ten days for review from the arrival of the late waiver. However, administrative rules do not address this situation, therefore it is unclear which review deadline (ten-day or 25-day) should be applied to these seven PBNs.

Figure 6

**PBNs Meeting Review Deadline
State Fiscal Years 2004-2006**



Source: LBA analysis of a random sample of 96 out of 731 PBN files.

Recommendation:

The Wetlands Bureau should:

- **change its rules to provide the Bureau reviewers a reasonable and consistent period to adequately review PBNs,**
- **clarify which time limit will be used when handling PBNs with late conservation commission waivers, and**
- **improve its procedures to ensure PBNs are processed within the time limits.**

Auditee Response:

We concur.

DES is committed to a complete review and revision to the wetlands rules by June 30, 2008. Revisions will include improvements to the rules for Permit by Notification (PBN). Statutory revisions that might need to be proposed in 2008 will also be identified during the rules review. Wetlands Bureau will also develop revised procedures to attain improved compliance with PBN time frames in FY 2008.

Observation No. 14

Adhere To PBN Time Limit For Information Requests

Our review of 89 PBNs found about one-third (30) required the Wetlands Bureau to send a request for more information (RFMI) to the applicant. We found Bureau reviewers are examining PBNs after statutory review deadlines have passed and they do not always automatically disqualify late submissions of requested information. DES administrative rules do not specifically allow for Bureau review, request for more information, or disqualification of a PBN after the review deadline has passed.

According to DES rule Env-Wt 506.02 (e), if the Wetlands Bureau determines a submitted PBN application is incomplete, it must send a RFMI to the applicant and the local governing body identifying deficiencies and notifying the applicant not to proceed with the project. Depending on whether the local conservation commission signed off on the PBN, the Bureau has either ten or 25 days to make a decision from the date of the town clerk's signature. However, the Bureau issued RFMIs after the review deadline for 11 PBNs (two of which had already arrived at the Bureau after the deadline – see Observation No. 13). According to the instructions for PBNs, "After the appropriate review time has passed, and if DES has not disqualified the PBN, it is valid for 5 years from the Town Clerk signature date."

According to Env-Wt 506.02 (g) and (h), if the applicant does not respond to the RFMI within 20 days the project is disqualified from the PBN process, and the application must be re-filed to be considered again. The Bureau failed to disqualify five PBNs where the applicants responded to the RFMI after the 20-day deadline. In addition, there is no indication in the files that the Bureau received a complete response to RFMIs from the applicants for two PBNs, yet the PBNs were not disqualified.

Recommendation:

The Wetlands Bureau should comply with PBN time limit rules when issuing and reviewing RFMIs.

Auditee Response:

We concur.

DES is committed to a complete review and revision to the wetlands rules by June 30, 2008. Statutory revisions that might need to be proposed in 2008 will also be identified during the rules review. Revisions will include improvements to the rules for Permit by Notification (PBN). Wetlands Bureau will also develop revised procedures to attain improved compliance with PBN time frames in FY 2008.

Observation No. 15

Reclassify PBNs Consistently

Not all PBN applicants are required to submit new applications and pay additional filing fees when their projects are reclassified as Minimum Impact Expedited (MIE) or Standard Dredge and Fill (SDF) projects. Administrative Rule Env-Wt 506.02 (h) states an application disqualified from the PBN process should be re-filed with a new PBN form or filed as either an MIE or SDF project. Therefore, if an application arrives as a PBN, but does not qualify for the PBN process, it should not be reclassified as a different application type using the original PBN form, filing fee, or permit number. Inconsistent application of this rule by the Bureau leads to inequity in the permitting process.

Only PBN applicants are required to re-file if Bureau reviewers determine their projects require an MIE or SDF permit. MIE applicants are not required to re-file if their projects need to obtain a SDF permit. Wetlands reviewers have stated they recommend applicants file MIE applications instead of PBN applications to avoid loss of money and time if the applications turn out not to qualify for the PBN process.

Six of the PBN files we reviewed were re-classified as MIE or SDF projects. Some Bureau reviewers were unaware re-classification of PBN applications is not allowed. Other reviewers were aware but still re-classified applications and told applicants the extra fee was waived. In four of the six instances, no new application form or fee was requested or received, nor were any of the files assigned a new permit number. In one case, the application was re-submitted on a new form, but no new fee was requested or sent, and the project was not assigned a new permit number. In the final instance, the PBN file was completely closed and re-opened as an MIE permit file with a new permit number, application form, and filing fee.

Recommendation:

The Wetlands Bureau should adhere to its rules and not reclassify PBN projects without new applications or change its PBN rules to allow more flexibility for reclassification.

Auditee Response:

We concur.

The Wetlands Bureau Administrator will provide staff with guidance on PBN project reclassification by August 31, 2007. We will also consider amendments to the PBN rules for inclusion in major revision of the wetlands rules that DES is committed to propose in FY 2008.

**STATE OF NEW HAMPSHIRE
ALTERATION OF TERRAIN AND WETLANDS PERMITTING**

MANAGEMENT INFORMATION SYSTEMS

Management controls are weakened by inadequate information systems and undocumented policies and procedures to support consistent system use. Proper controls over information provide assurance an organization is accurately recording its performance, meeting its goals, and safeguarding public resources. These controls are integral to organizational operation and provide some assurance operations are effective and efficient, financial reporting is reliable, and entities comply with applicable laws and regulations. Controls over information include policies and procedures management has implemented to reasonably ensure valid and reliable data are obtained, maintained, and reported.

Management information systems used by the Alteration of Terrain (AoT) Section and the Wetlands Bureau are not meeting the needs of their programs. Outdated systems affect the ability of management and staff to determine if statutory time limits are being met and if staff time is used efficiently in processing applications and investigating compliance issues. Poor reporting capabilities create more work for staff and limit management oversight of the permitting programs. Management controls are also weakened by lack of clear policies and procedures to follow for review and compliance functions. Conflicting, inadequate, or non-existent policies and procedures at the review level may lead to inconsistent administrative and substantive functioning among staff.

Observation No. 16

Improve Wetlands Bureau Database

The Wetlands Bureau Database (WBD) no longer fully meets the management and reporting needs of the Bureau. The current version of the WBD is not programmed to track and use important time-sensitive data providing needed information for efficiently and effectively managing the Bureau's workload. Wetlands Bureau management is responsible for ensuring program operations comply with all applicable laws, regulations, and policies. Management needs the appropriate information for timely processing of wetlands applications. However, the Bureau's inability to easily track application deadlines makes it difficult to ensure applications will be processed timely and could expose DES permitting decisions to legal challenges.

Chapter 224, Laws of 2003 instituted time limits beginning in SFY 2004 for DES processing of certain wetlands permit applications. However, the WBD was not updated to calculate important statutory deadlines using the date when the application is considered administratively complete. Bureau personnel keep track of due dates and prioritize their own workloads.

Wetlands Bureau staff have developed at least two workaround methods to monitor permitting timeliness. Both track how long a permit remains in the Bureau until approval or denial. One Bureau reviewer designed an Excel spreadsheet, shared among several of the permitting staff, which generates an *Outstanding File List* using information downloaded from the WBD. Bureau administrators and staff also enter information into a separate Excel spreadsheet called *Beans* that tracks receipt and review of Wetlands applications by individual inspectors and their permitting regions. This second means of working around WBD weaknesses generates

misleading information due to incomplete reporting activities by individual reviewers (see Observation No. 17). Reportedly, DES administrators, in cooperation with the Office of Information Technology, have begun efforts to patch WBD operations so the database may provide inspectors and administrators with information regarding where an application file is in the review process and who currently possesses it.

The DES needs to improve the Wetlands Bureau's management information system used in processing permit applications. It also has to prepare to transfer the WBD to a new database software program that will allow applicants to electronically submit applications using web-based technology (i.e., e-permitting). The DES must consider the costs (and risks) of doing nothing, the costs of patching the old system, the costs of improving the alternative information management methods staff members have developed, and the time it may take to implement the new database system for e-permitting.

Recommendation:

The DES should assess the Wetlands Bureau's database to identify limitations in providing useful information and perform a cost benefit analysis for meeting the Bureau's data needs. In the meantime, the Bureau should improve its ability to track time-sensitive applications and accurately report Bureau activity.

Auditee Response:

We concur.

Wetlands Bureau project and data management systems require a substantial upgrade to better track permit timelines, provide management with better data, provide the public with more timely information, and provide better data on environmental impacts. This will be accomplished through either the DES e-permitting initiative or other means when resources allow. A schedule for these improvements is not available at this time since this effort will likely require significant resources that are currently not available.

Office Of Information Technology Response:

We concur.

The OIT currently supports and maintains the existing wetlands data management system. We will provide technical and business analysis support to the Wetlands Bureau and the agency in their efforts to address the issues identified in the audit, and we will work collaboratively with the agency to secure the financial and staff resources needed for this work. This will be accomplished as part of an overall evaluation and redesign of the Wetlands Bureau business processes and the data management systems to support these business processes. In the short term, OIT staff are currently working with Wetlands Bureau staff on enhancements to the existing wetlands database that would make more detailed and more timely permit status information available to the public via the DES OneStop web site.

Observation No. 17

Improve Permit Tracking And Reporting Data

The Microsoft Excel workbook file called *Beans*, developed by Wetlands Bureau staff, does not allow managers to collect, analyze, and maintain adequate data on Bureau activities or to generate accurate reports. *Beans* was developed, in part, to collect pertinent weekly information on Bureau permitting activities. Nonetheless, we found *Beans* data entry was inconsistent and staff were unfamiliar with spreadsheet formulas that were prone to both errors and omissions. As a result, management does not have accurate data to make well-informed decisions.

The *Beans* file is stored on a local server and unwritten procedure requires Bureau reviewers to enter updated information on a weekly basis for their geographic region or permit category. The *Beans* file contains 37 worksheets, most of which are used to measure: 1) the number of applications assigned to the Bureau's permitting regions, 2) the numbers and types of actions taken by Wetlands staff, and 3) the numbers of days application files have been waiting in the Bureau's review queue. The *Beans* file can provide weekly assessments of the application review queue for Wetlands Bureau administrators. Summary sheets provide basic statistics showing weekly Bureau activity at the regional and statewide levels.

Several revisions have been made to the *Beans* file to correct for changes in both the kind of permits issued by the Bureau and the responsibilities of Bureau staff. Individual worksheets were initially labeled to correspond to staff members, but are now labeled to correspond to region names. Introduction of Minimum Impact Expedited permits and Permits By Notification led to the creation of separate tracking worksheets. The provisions of RSA 483-B, the Comprehensive Shoreland Protection Act, prompted the creation of new worksheets for tracking waterfront permits. Changes in geographic permitting regions led to creation of additional individual worksheets in May and August of 2005. Bureau staff charged with supervising *Beans* have little understanding of the functions underlying the spreadsheet's calculations and of overall changes to the spreadsheet carried out in the years before they assumed their positions. The Bureau currently seeks technical support for *Beans* from a Water Division staff member.

Summary data generated by the file are substantially inaccurate due to a failure to update formulas in accord with changes in permitting regions. For example, the formulas used to generate the Bureau Aged worksheet, a summary sheet used to assess the review queue, do not include numbers entered for recently created regions. As a result, 249 files out of 1,718 (14 percent) were unreported between January 2004 and March 2006. The Bureau presented this incomplete data of its permitting review queue to the New Hampshire Senate Environment and Wildlife Committee in January 2006. In addition to formula problems, staff members did not consistently input the number of files in their review queues, resulting in inaccurate summary statistics. Table 7 shows how inconsistently queue data were updated for five inspector regions and one permit category.

Table 7**Weekly Data On The Number Of Files In Review Queue
State Fiscal Years 2005-2006**

<u>Worksheet Name</u>	<u>Percent Updated</u>
NORTH	100
CENTRAL	98
SO. CENTRAL	91
SO. WEST	76
NHDOT	37
SHORE1	21

Source: LBA analysis of Beans file.

According to Bureau officials, incomplete reporting in the CENTRAL, SO. CENTRAL, SO. WEST, and SHORE1 regions was due partly to inattention by staff and staff turnover. Incomplete reporting of NHDOT data was due to administrative staff deciding to discontinue reporting Department of Transportation (DOT) data, since the renegotiation of deadlines between the DES and the DOT provided misleading information regarding the length of time files were in the Bureau's possession prior to review.

Personnel who designed and implemented the *Beans* workbook file no longer work in the Wetlands Bureau and the file contains several functions not actively used by current administrators. Bureau reviewers reported it was difficult to allot time for inserting data into the file during a busy week, and some chose not to enter any data at all. The file relies on weekly data input from reviewers who keep individual records of types and numbers of files for which they are responsible in the permitting queue. Changes to spreadsheet functions, which reflect the current data gathering goals of the Bureau, have been carried out on a piecemeal basis with no consistent monitoring of spreadsheet functions.

Recommendation:

We recommend Wetlands Bureau managers:

- **establish written data input procedures,**
- **document and verify formulas used in Beans tables and graphs, and**
- **provide greater oversight to ensure data are collected and reported consistently and accurately.**

Auditee Response:

We concur.

The Wetlands Bureau continues to work to improve the accuracy of permit activity tracking. In July 2007, Wetlands Bureau management set clearer performance expectations for the timely

and accurate reporting of the status of all pending applications. More training will be provided to Bureau staff in the proper use of the system in the Fall, 2007. However, in the long term, there is the need for a new project management system to more accurately track permit timelines, provide management with better data on backlogs, and provide the public with more timely information. This will be accomplished through either the DES e-permitting initiative or other means when resources allow. A schedule for development of a new project management system is not available at this time since this effort will likely require significant resources that are currently not available.

Observation No. 18

Document Changes To Application Type Consistently

Wetlands Bureau personnel are not consistent when documenting changes to application permit types in the Wetlands Bureau Database (WBD). During the permitting process, an application can be reclassified from its initial category to a category designating a lower or higher level of impact as a result of a Bureau reviewer's assessment. For instance, an application initially submitted for a Minimum Impact Expedited (MIE) permit may be changed to an application for one of the three levels of a Standard Dredge and Fill (SDF) permit (minimum, minor, or major). The WBD contains three fields related to project classification:

- Application Type – application form submitted by applicant,
- Preliminary Category – initial type of project Bureau reviewers assess the project to be, and
- Project Category – type of permit issued for the project.

We found when an application is reclassified to another permit type the Application Type data field is not always changed to reflect the reclassification. We identified 14 MIE and SDF reclassified applications out of our review of 278 application files. For nine of these files, the Application Type remained consistent with the Preliminary Category despite the project being approved as a different permit type. Meaning, the Application Type was not changed to match how the project was permitted. For four other files, the Application Type matched the Project Category but not the Preliminary Category, indicating the Wetlands Bureau reviewer changed the Application Type when the project category changed during the permitting process. One file had an Application Type that differed from the Preliminary Category, but had no Final Category since the application was denied.

The Bureau is not consistent in documenting reclassified Permit By Notification (PBN) applications in its database. Three out of a random sample of 89 PBN files were re-classified as MIE or SDF projects, but the Application Type remained as a PBN in the database. We also identified three permits out of a judgmental sample of 25 files taken from Bureau file cabinets that were originally submitted as PBNs, but were later processed as another project type, and found that the Application Type for these files was changed in the database to match the final Project Category.

The Bureau should have policies and procedures to ensure program data obtained, maintained, and then presented in reports are valid and reliable. If the Application Type matches either the

preliminary or the final category only a portion of the time, information on the DES public access *OneStop* search engine is inconsistent and possibly confusing. As a result, DES managers and those outside the Department querying the database by Application Type could be misled. *OneStop* does not allow searches by either Preliminary or Project Category listings.

US Army Corps of Engineers (Corps) personnel have relied upon a Bureau-produced weekly decision report when coordinating its review of State wetlands permitting under the State Programmatic General Permit. However, during 2006, the Bureau asked federal agencies to use its website's *OneStop* search engine to identify files the agencies want to review before the State's review is concluded. If federal agencies search *OneStop* using the Application Type Standard Dredge and Fill, it is possible they will not access all permits that arrived at DES with a low-impact classification but were later changed to higher impact category. For example, we identify one permit that arrived at DES as a PBN, but was switched to Major Impact SDF when the reviewer realized work was to be in prime wetlands. The application type did not change, so the permit would not have been listed with other major projects if the federal agencies searched *OneStop* by Application Type.

Recommendation:

The Wetlands Bureau should implement policies and train staff on input procedures to provide reliable application information in its database and website.

Auditee Response:

We concur.

By September 30, 2007, the Wetlands Bureau staff will be provided with additional guidance and training on the input and modification of application information in its database and on its website.

Observation No. 19

Continue Improving AoT Management Information Systems

The AoT Section has lacked sufficient information systems for managing and reporting on terrain alteration applications, permits, and enforcement actions throughout the audit period (SFYs 2004-2006). Improvements have been made to the Section's database, some procedures have been documented, and an end-user application is being used to track monthly program outputs and queued applications. Since 2003, one AoT staff member has had the responsibility of collecting program data and making improvements to the two information systems. Over time, it appears AoT staff have been more diligent in providing the monthly program data. However, the Section's information systems are inadequately documented and lack comprehensive policies to ensure complete and accurate program information is collected and reported. In addition, key data for assessing and reporting program effectiveness are not always collected.

The Section uses a DES-developed Microsoft Access database called the Alteration of Terrain Database to collect and compile application information. This database does not collect certain

information useful for managing and reporting on program activities. It does not track the timeliness of processing AoT applications or the timeliness of contacts with applicants. In addition, there are few controls over the database; all AoT staff can add or delete any data related to all records within the database. Starting in 2003, improvements made to the database included adding more fields to track relevant information, drop-down boxes for data entry, monthly reviews for missing data, and regular backups of program data.

The AoT database does not track and report site inspections. AoT inspectors visit sites and sometimes take enforcement actions against the owners of the properties. Nonetheless, such actions are not tracked, and in some cases, the properties may not be in the database because the property owner never applied for an AoT permit. As a result, inspectors must rely on their memory of prior enforcement actions at these sites.

The Section uses a DES-developed Microsoft Excel workbook file called SSTRACK to collect and report on reviewers' activities and on the number of applications waiting for review (i.e., the backlog). The SSTRACK file has eight worksheets containing tables and graphs used to collect, organize, and report monthly program information. AoT reviewers manually enter the monthly data into SSTRACK. Data used to determine the number of permits waiting for initial review, applications reviewed, and permits issued come from the AoT Database as well as physical counts of pending permit applications. SSTRACK is an undocumented end-user application, meaning there are no written policies, procedures, or instructions explaining exactly what data should be collected and what the various tables and graphs do with the data. Instead, the Section relies on one person to manage the file.

The Department plans for the AoT permitting process to incorporate e-permitting. According to an Office of Information Technology (OIT) official, after the Water Division's Subsurface Section and the Wetlands Bureau implement e-permitting, the AoT Section will be next (i.e., phase III). This official envisions the information in the AoT Database being transferred to a new Oracle system, similar to what will be happening to the Division's other databases. While there are some immediate improvements that should be made to the Section's information systems, DES management will have to decide what improvements can wait until the new Oracle database is developed sometime in the future.

Recommendation:

The AoT Section should assess its management and reporting needs and develop a plan for prioritizing those needs that can be submitted for DES management's approval. The plan should take into consideration the time and resources available from the Section and OIT for:

- **documenting and providing instructions for the current information systems,**
- **improving the current information systems, and**
- **improving the systems when the database is upgraded for e-permitting.**

Auditee Response:

We concur.

The AoT data management system requires improvement. In July, 2007, better guidance for the use of the existing spreadsheet-based system was developed and presented to the AoT staff. In the long term, as with the Wetlands Bureau, the AoT database needs to be upgraded as part of the DES e-permitting initiative or a separate initiative, as resources allow. A schedule for major improvements is not available at this time since this effort will likely require significant resources that are not currently available.

Office Of Information Technology Response:

We concur.

The Alteration of Terrain (AoT) Program is part of the Land Resource Protection Programs group in DES, along with the Wetlands Bureau, and their data management needs are overlapping. While OIT does not currently support the existing data management system used by the AoT Program, we have been asked by the DES and have agreed to support the development of a new and improved system. The evaluation and redesign effort regarding the Wetlands Bureau processes will also consider the needs of the AoT Program, and the development of a new data management system for Wetlands will incorporate the needs of the AoT Program.

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OTHER ISSUES AND CONCERNS

In this section, we present issues not developed into formal observations, but we consider noteworthy. The Department of Environmental Services (DES) and the Legislature may consider these issues and concerns deserving of further study or action.

Consider Permits By Notification Issues

In the Permit By Notification (PBN) process, applicants notify the Wetlands Bureau of their intention to do work, and are required to submit information regarding the scopes and locations of their projects. If applicants do not receive notices of deficiency from the Bureau within certain time limits (either ten or 25 days), they can begin work as planned. Applicants are not sent permits. This process allows proposed projects considered to have the least impact to proceed quickly.

While users in the building industry we spoke with generally support the use of PBNs, we identified the following as concerns of Wetlands Bureau personnel:

- The lack of physical permits can make PBNs confusing for the public. According to RSA 482-A:12, “Project approval by the department shall be in the form of a permit, a copy of which the applicant shall post in a secured manner in a prominent place....” The statute goes on to direct law enforcement officers to be watchful for violations. According to PBN instruction booklet, notification forms are intended to serve as permits and must be posted at project sites. Nonetheless, because PBN postings are copies of forms submitted to the Wetlands Bureau, nothing would alert law enforcement officers if the Bureau had disqualified the PBN application.
- RSA 482-A:3, VI states each permit must be recorded in the registry of deeds for the county, and the permit shall not be effective until recorded. The PBN form is intended to be used for these recording purposes, but because it is a copy of the form submitted to the Wetlands Bureau, nothing would alert county officials if the permit had been disqualified. According to a Wetlands staff person, the PBN process is a problem for the public because they do not have a permit to show potential homebuyers. For example, real estate agents and lawyers for homebuyers want to see existing docking structures and retaining walls were permitted, but there is nothing for the seller to show them. The permit for a PBN is just a piece of paper in the instruction booklet; it is not issued by the DES. According to a Bureau administrator, most developers and contractors apply for Minimum Impact Expedited (MIE) permits instead of PBNs, believing MIE permits add value to the property because a physical permit is recorded at the registry of deeds.

- Though filing requirements for MIE permits and PBNs are similar, PBN application requirements are sometimes more stringent than those for MIE applications. For example, PBNs require a professional engineer's signature for wetlands delineation, while MIE applications do not. The purpose of such stringency is to enable Wetlands Bureau reviewers to streamline their review of the PBN application. Unfortunately, applicants may file under the impression it will be easy for them to submit a PBN, but can become frustrated when they find they must send additional documentation.
- Bureau reviewers are frustrated because PBNs are designed to be simple and to address low-priority projects, meaning reviewers should not need to spend a lot of time reviewing them. However, reviewers must look at them closely in case the proposed projects should be submitted as MIE or Standard Dredge and Fill (SDF) permits. Similarly, because no physical permits are issued, reviewers cannot put specific conditions on PBNs and may be forced to tell applicants their applications must be re-submitted under different classifications. For a PBN, this would require a new application form and filing fee.

We suggest the Wetlands Bureau consider these issues and work with stakeholders and the Legislature to improve upon the PBN process.

Consider Expanding Use Of Multi-Program Positions

Both the alteration of terrain (AoT) and wetlands programs have had problems with either backlogs or meeting deadlines for processing permit applications. Staff turnover, emergencies such as floods, and seasonal increases in permit applications can intensify these problems. The Water Division has assigned some staff to work in more than one program area. For example, the Division has assigned an AoT reviewer to handle major wetlands permits in one region of the State. This allows two different applications to be processed at the same time by the one reviewer. On the seacoast, there is a Wetlands Bureau reviewer who also conducts inspections for the AoT section. In addition, a reviewer from the Subsurface Bureau has intermittently reviewed AoT permits to help reduce the backlog.

Terrain alteration and wetlands permitting are two distinct activities requiring different skills from reviewers. According to a number of Water Division staff, terrain alteration carries very specific rules and often involves black and white decision-making, while wetlands permitting relies upon more subjective and complex decision-making and requires consideration of the hydrology and biology of wetlands, wildlife impacts, and aesthetics. Nonetheless, there are overlapping issues of wetlands protection and proper drainage that are integral to the review of both types of permit applications. According to a Water Division official, there has been a long-standing desire within the Division to cross train employees to allow them to review multiple permit applications for a particular project. Some applicants may be provided better service because there would be a single DES employee, who has an overall understanding of the planned project, reviewing multi-program applications. The Division does cross train staff to be able to identify compliance problems in other Division programs.

A case can be made that because multi-program positions require knowledge, skills, and abilities for two or more program areas, they may justify higher labor grades. By increasing the labor grades of staff members who gain training in multiple Water Division programs, the DES may 1) retain highly skilled employees, 2) encourage current employees to increase their education and professional skills to apply for this type of position, and 3) attract qualified professionals to State service.

The administrative overlap between AoT, Wetlands and Subsurface, and the preliminary cross training already in place between Wetlands and AoT, should be reinforced with more cross training among review staff in the three areas to achieve increased efficiency and productivity. DES officials stated they have been interested in the concept of multi-program positions and have a long-term goal of cross training the staff. The current DES Commissioner reported administrators see the AoT, Subsurface, and Wetlands programs all operating together.

Positions allowing individual personnel to develop and use skills across programs would provide the Water Division with flexibility to more efficiently address application processing backlogs, coverage problems caused by staff turnover, and emergencies such as flooding. However, one official cautioned it may not be workable statewide given the Water Division's current staffing and workload levels.

We suggest the Water Division seek to expand cross training reviewers to provide increased flexibility to the Division in balancing resource needs among its programs and increase the labor grades of multi-program positions to reflect fully the skills needed in those positions.

Address Backlog Of Uninspected Septic System Sites

The DES has identified approximately 3,600 septic system sites, dating from the early 1970s to the present, with unknown operational status. Applicants or contractors associated with these systems were required to make changes after their systems were initially inspected by Subsurface Systems Bureau staff. Nonetheless, the Bureau failed to follow-up on whether the changes occurred. DES administrators have identified a number of reasons for this failure:

- lack of follow-up by licensed installers,
- consolidation of regional Subsurface Bureau offices,
- changes in regional inspectors and their individual organizational techniques,
- increased development in the State,
- several currently open positions in the Bureau, and
- lack of septic system verification by individual towns.

The DES generally becomes aware of the indeterminate status of systems when new buyers seek verification of operational approval or when septic haulers seek information on the exact locations of septic tanks they cannot find. Administrators have not identified any environmental hazards associated with these systems. We note the DES has already identified this weakness and determined the extent of the problem.

We suggest the DES take steps to verify the status of all indeterminate septic systems to ensure compliance with all State regulations concerning the construction and operation of septic systems.

Reevaluate Quality Control System

Bureau reviewers are responsible for all permitting within distinct geographic regions and generally have charge of permits from the time they are declared administratively complete until the time the permit is issued. A system of peer/supervisory review appears to have been in place under a previous Wetlands Bureau administrator with the goal of ensuring consistency among Wetlands applications. However, one Bureau staff commented that some DES managers may have seen these reviews as a waste of time.

Fifty-two files (29 percent) out of the 180 SDF files we tested were reviewed by a Wetlands Bureau supervisor. Bureau staff do not have a clear understanding of the degree to which a system of peer or administrative review is currently in place. One DES administrator said all larger projects and projects slated for denial are peer reviewed, but nonetheless emphasized very little is denied. Another Bureau staff member, noting concerns among applicants in private industry about consistency in permitting, reported being worried peer review only takes place after a permit has already been issued.

Improved reviews could alleviate inconsistencies in the permitting process and ensure:

- new permitting staff receive the oversight of more experienced staff,
- proper documentation of all steps undertaken in the review process including issuance and response to requests for more information,
- accurate calculation of review deadlines,
- proper use of permit application type, and
- more consistent permitting decisions among Bureau personnel.

We suggest the Wetlands Bureau reevaluate how it reviews permitting functions to ensure staff follow Bureau policies and procedures, deadlines are met, and accurate information is entered into the Bureau database.

Maintain Adequate Controls Over Wetlands Permit Files To Prevent Misplacement

Effective internal controls over application files are important in safeguarding permit information. Our review of randomly selected Wetlands Bureau files sought 100 PBN, 100 MIE, and 216 SDF applications. The Bureau was unable to locate six (1.4 percent) of these files; three SDF, two MIE, and 1 PBN. Bureau paper files are stored either in file cabinets at the Bureau office in Concord or at the DES coastal office located at the Pease International Tradeport in Portsmouth. Inspectors also keep some files on their desks while they work on them.

We suggest the Wetlands Bureau maintain proper controls over its paper files to ensure they are accurately tracked and available to both reviewers and outside parties on an ongoing basis. We also suggest the DES investigate alternatives to paper file storage, such as document imaging or other electronic means.

Review DES Fee Setting

There is little consistency in why some DES permits, certifications, letters of approval, and licenses (collectively known as authorizations) require fees and how they are determined. State laws direct the DES to set these fees in a number ways. As shown in Table 8, we identified 93 authorizations issued by the Department and found 66 (71 percent) are allowed to charge a fee. As the table shows, nine of the 93 authorizations are required to recover DES costs through the fee and with additional charges; another five authorizations may recover costs.

Originally, one objective of this audit was to determine if permit fees covered actual DES costs. The audit was refocused after we reported most authorizations were not required to charge for the actual costs of related programs. The DES is not required by statute to set fees to fully recover its costs for its wetlands and AoT permits.

Table 8

Number Of DES Authorizations Allowed To Charge A Fee State Fiscal Year 2006		
	<u>Total</u>	<u>Percent</u>
No Statutory Authority To Charge A Fee	27	29
Fee Authorized In Statute		
<i>Fee Required To Recover Costs</i>	5	5
<i>Set Fee With Additional Costs Charged To Applicant</i>	4	4
<i>May Recover Reasonable Costs</i>	5	5
<i>Reasonable Fee Set In Rule</i>	9	10
<i>Fee Set In Rule</i>	10	11
<i>Limit Set On Fee</i>	1	1
<i>Fee Set In Statute</i>	<u>32</u>	<u>35</u>
Subtotal Of Authorizations With Fees	<u>66</u>	<u>71</u>
Total	<u>93</u>	<u>100</u>

Source: LBA analysis of State laws, DES administrative rules, and DES information.

The Legislature has not used a consistent, Department-based approach to set authorization fees. In fact, the varying fee structures may be partly the result of how the water, air, and waste management programs were initially established and then combined to form the DES. While consistency in how fees are set within one Department might be a goal, we note there may be valid reasons for having differing methodologies for charging fees. How the DES is funded is

ultimately a policy decision that belongs to the Legislature. The more information the Legislature has the better it can assess if certain permits should be funded from the State General Funds (i.e., the general public) or by applicants through application fees.

We suggest the DES review its fee structures and make any recommendation for changes to the Legislature.

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CONCLUSION

The Department of Environmental Services (DES) must be more efficient, effective, and equitable in reviewing alteration of terrain (AoT) and wetlands permit applications. Our review of wetlands application files found weaknesses in the Permit By Notification, Minimum Impact Expedited, and Standard Dredge and Fill permitting processes. The Wetlands Bureau has not consistently complied with State permitting laws and administrative rules, especially in meeting statutory time limits for wetlands permits. While we found the Bureau did not follow State law and simply approve applications when it failed to meet deadlines, we must also report there are potentially harmful effects to the environment and applicants if applications are automatically approved. In addition, we found:

- the Bureau did not have adequate policies and procedures to ensure applications were reviewed in a timely or acceptable manner;
- laws, administrative rules, and policies created situations which contributed to the Wetlands Bureau's failure to comply with time limits; and
- Water Division information systems were not adequate for managing and reporting on permitting activities.

We found the Water Division reviewed some applications ahead of applications submitted earlier for 20 percent of the AoT applications between State fiscal year 2005-2006. Lack of Wetlands Bureau data prevented us from determining the number of wetlands applications provided expedited reviews; however, testimonial evidence from DES staff and officials indicated wetlands applications were also reviewed out of order. First-in, first-out, the DES's formerly unwritten policy, was occasionally superseded by other unwritten policies, such as expediting applications for projects considered to be for the public benefit. Without written policies, DES leaders and staff expedited permit applications at their discretion, thereby allowing some projects to get reviewed and permitted sooner at the expense of delaying the review of other applications. We believe there can be compelling reasons for expediting applications for certain projects, but such treatment should be regulated and made transparent for the public so as not to give the appearance of favoritism. This lack of written guidance can be detrimental to the principle that applicants be treated equally.

We did not attempt to assess the quality of Wetlands Bureau decisions but can report an Environmental Protection Agency official intimately familiar with the Bureau's work positively commented on the competency of the Department's application reviewers. According to a longtime Wetlands Council member who has firsthand knowledge of appeals to Bureau decisions brought before the Council:

- the quality of the Bureau's permits is excellent;
- the Bureau is very careful, even defensive, in issuing permits and does a good job assessing environmental risks and mitigation plans; and
- Bureau reviewers are technically very good.

The DES can improve its handling of AoT and Wetlands permit applications by implementing the recommendations of this report. Specifically, the Department must be forthcoming and exact

in the policies and procedures used to review applications, more efficient in tracking and reviewing applications, and more effective in meeting time limits. We also identified a number of changes in administrative rule and State laws that should be made. Along with improved data management, these steps will help ensure the DES Water Division is efficient, effective, and equitable in administering the specific permitting functions associated with the maintenance of New Hampshire's inland water resources.

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APPENDIX A



DEPARTMENT RESPONSE TO AUDIT
The State of New Hampshire
DEPARTMENT OF ENVIRONMENTAL SERVICES



Thomas S. Burack, Commissioner
August 13, 2007

The Honorable Marjorie Smith, Chair
Fiscal Committee
Legislative Office Building Room 202
Concord, NH 03301

**RE: State of New Hampshire Alteration of Terrain and Wetlands Permitting
Performance Audit Report, August 2007**

Dear Chairman Smith:

Thank you for the opportunity to comment on the "Alteration of Terrain and Wetlands Permitting Performance Audit Report, August 2007" (Audit Report) written by the Legislative Budget Assistant's Audit Division (LBA-Audit Division).

First, I would like to express the Department of Environmental Services' sincere appreciation for the excellent work of the LBA-Audit Division. DES and the LBA-Audit Division staff maintained a cordial and open relationship throughout this process. The LBA-Audit Division team, led by Jay Henry, Senior Audit Manager, is to be commended for the professionalism and thoroughness that is reflected in the quality of the Audit Report.

As the Audit Report also recognizes, it is important to acknowledge that the Wetlands Bureau and Alteration of Terrain (AoT) Program are staffed by dedicated professionals who perform high quality work. The Audit Report specifically makes note of this fact in the conclusions, where a Wetlands Council member is quoted as follows: *"the quality of the Bureau's permits is excellent; the Bureau is very careful, even defensive in issuing permits and does a good job assessing environmental risks and mitigation plans; and Bureau reviewers are technically very good."* The issues raised by the audit relate to the application of complex (and sometimes conflicting) statutes and rules, program procedures, review time frames, and data management systems, and do not reflect on the dedication or quality of the staff in these programs.

DES concurs with the final audit findings. We are committed to implementing the Audit Report recommendations in the context of our overall initiative to make improvements to the Wetlands and AoT Programs. Over the next year, DES will be engaged in a process of outreach to the public and regulated community in an effort to identify ways to improve the statutes, rules and program operations for our regulatory programs that deal with wetlands, shorelands, stormwater and other land development activities. The audit results clearly complement this effort and will ultimately provide important inputs to our analysis.

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Chair, Fiscal Committee
August 13, 2007

Our course of actions to address the Audit Report recommendations will include the following:

- *DES will propose amendments to RSA 482-A consistent with the LBA Audit recommendations.* With respect to statutory changes, it is our intent to propose a comprehensive package of changes to RSA 482-A, after receipt and consideration of public comments on the wetlands program. To address the audit findings, we anticipate that proposed changes will include amendments to RSA 482-A:3, XIV to provide for adequate review time when conservation commissions intervene or applications are substantially amended by applicants. Alternatives to changing RSA 482-A to clarify how public safety issues affect permitting projects involving prime wetlands will also be considered. We will also engage in discussions with the public and Legislature as to the merits of deeming permit applications approved when deadlines are missed; as noted in the Audit Report “deemed approved” permits present both potential benefits and problems for project owners.
- *DES will complete a review of wetlands rules, and propose changes in 2008, to improve the overall structure and content of the rules, as well as to make the improvements proposed in the Audit Report.* Revisions to address Audit Report concerns will include rules to clarify procedures on issuing requests for more information (RFMIs), the consideration of expedited review requests, processing permit amendments, informing applicants when statutory deadlines have passed, “deemed approved” applications, and implementation of permit by notifications (PBNs) for qualifying projects.
- *DES will improve the accuracy of the wetlands permit tracking system by (1) providing better guidance, training and oversight to Wetlands Bureau staff in system use and, (2) in the longer term, by the development and implementation of an upgraded project management system.* We recognize the need to improve the tracking of permit applications and processing timelines, provide management with better data on backlogs, and provide the public with more timely information. We also need to provide a higher level of assurance that statutory deadlines are being met. Guidance to staff has already been provided and more detailed training and oversight will follow. DES is also further assess the resources needed to upgrade the wetlands data management system and will shortly develop a strategy to fund and implement long term improvements.
- *DES will reduce permit application review backlogs in the Alteration of Terrain (AoT) Program 50 days or fewer by December 31, 2007.* During the 2007 legislative session, AoT Program fee increases were enacted that enabled DES to create two additional engineering positions that we are in the process of filling. A statutory deadline (50 days) was also imposed for initial permit application reviews starting in January 2008, and the program was converted fully to a non-lapsing, fee-funded program from a general fund

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program. The statutory deadline is attainable with the addition of the proposed new positions, so backlogs will be reduced.

- *The AoT data management system for permit applications will be upgraded.* Better guidance has already been developed for using the existing spreadsheet-based system and keeping it current. In the long term, the AoT data management system will be upgraded along with the Wetlands Bureau data base.

In closing, the Department's participation in the development of the Audit Report has been a very productive exercise. The recommendations contained in the report provide an excellent framework for long term program improvement for the Wetlands and AoT Programs that we will use as part of our broader efforts to improve these programs. Again, we thank the LBA-Audit Division for its excellent work on the Audit Report.

Thank you again for your consideration. If you have any questions concerning our response to the Audit Report, please do not hesitate to contact me at 271-2958 or by e-mail at tburack@des.state.nh.us.

Sincerely yours,



Thomas S. Burack
DES Commissioner

cc: Michael L. Buckley, Legislative Budget Assistant