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COMMONWEALTH OF PENNSYLVANIA
HOUSE OF REPRESENTATIVES

GAME AND FISHERIES COMMITTEE/ENVIRONMENTAL RESOURCES &
ENERGY COMMITTEE JOINT PUBLIC HEARING

INDIANA UNIVERSITY OF PENNSYLVANIA
167 NORTHPOINTE BOULEVARD
FREEPORT, PENNSYLVANIA

TUESDAY, SEPTEMBER 17, 2013
10:00 A.M.

JOINT PUBLIC HEARING ON HOUSE BILL 1576

GAME & FISHERIES COMMITTEE

BEFORE: HONORABLE MARTIN T. CAUSER, MAJORITY CHAIRMAN
HONORABLE GARTH D. EVERETT
HONORABLE GREG LUCAS
HONORABLE JOHN GALLOWAY
HONORABLE PAM SNYDER

ENVIRONMENTAL RESOURCES & ENERGY COMMITTEE

HONORABLE RON MILLER, MAJORITY CHAIRMAN
HONORABLE MARTIN T. CAUSER
HONORABLE JIM CHRISTIANA
HONORABLE GARTH D. EVERETT
HONORABLE JEFFREY P. PYLE
HONORABLE BRYAN BARBIN
HONORABLE STEVE MCCARTER
HONORABLE PAM SNYDER

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COMMITTEE STAFF PRESENT:
GREG RAFFENSPERGER
MAJORITY EXECUTIVE DIRECTOR, GAME & FISHERIES
COMMITTEE

STEVE MCMULLEN
DEMOCRATIC EXECUTIVE DIRECTOR, GAME & FISHERIES
COMMITTEE

JONATHAN LUTZ
MAJORITY EXECUTIVE DIRECTOR, ENVIRONMENTAL
RESOURCES & ENERGY COMMITTEE

SARAH CLARK
DEMOCRATIC EXECUTIVE DIRECTOR, ENVIRONMENTAL
RESOURCES & ENERGY COMMITTEE

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P R O C E E D I N G S

CHAIRMAN CAUSER: This is a meeting of the House Game & Fisheries Committee and House Environmental Resources & Energy Committee. And I'd like to ask you to join with me in the Pledge of Allegiance.

PLEDGE OF ALLEGIANCE RECITED

CHAIRMAN CAUSER: We're meeting today as a joint --- joint committee meeting --- joint public hearing on House Bill 1576. And I want to thank Chairman Miller for joining with us to make this a joint hearing. And I think that the first thing we should do is introduce ourselves.

ROLL CALL TAKEN

CHAIRMAN CAUSER: Welcome, everyone. I want to, first and foremost, thank Representative Pyle for hosting us this morning and thank the Indiana University of Pennsylvania, Northpointe, for also hosting us here at their --- their fine facility. We're looking forward to the information that is presented this morning on House Bill 1576. And our first testifier is Melody Schell, with the Pennsylvania Federation of Sportsmen's Clubs. Welcome, Melody, and you can proceed.

MS. SCHELL: Good morning. Good morning, Chairman Causer, Chairman Miller, and members of the Committee. My name is Melody Schell. I'm here today on behalf of the Pennsylvania Federation of Sportsmen's Clubs. PFSC's membership is comprised of individuals, clubs and statewide organizations

1 representing more than 70,000 sportsmen and women. Thank you
2 for the opportunity to provide testimony regarding House Bill
3 1576.

4 While few issues elicit a unanimous response from
5 sportsmen, the mention of removing the Game Commission's or the
6 Fish & Boat Commission's limited independence and submitting
7 them to the IRRC process has always resulted in a resounding
8 no. So even though our next board meeting isn't until
9 September 20th, based on past experience related to attempts
10 related to placing the commissions under the IRRC process and
11 the feedback we are receiving from our membership and the board
12 members since introduction of this bill, we can say with utmost
13 confidence that this particular bill will also be opposed by an
14 overwhelming majority of our membership base.

15 The current limited independent structure of our
16 wildlife and fisheries resource agencies was set up by the
17 legislature over a hundred years ago for a reason, to allow the
18 agencies the ability to effectively manage our wildlife and
19 fisheries resources using scientific data combined with input
20 from the views of sportsmen, industry and others, for the best
21 long-term good of our resources. Being separate from IRRC and
22 legislative control, not oversight, is a source of pride to
23 sportsmen and conservationists because it means our wildlife
24 and fisheries management is recognized with the importance it
25 deserves and it is understood it needs to be treated

1 differently.

2 Following the 1973 enactment of the federal
3 Endangered Species Act, your predecessors empowered the
4 agencies to promulgate rules and regulations governing the
5 taking, catching, killing, and possession of endangered
6 species. They understood that protecting species at the state
7 level is the most proactive way to prevent their extinction.
8 Some comments have been made trying to allude it was an
9 oversight that the commissions were kept separate from the IRRC
10 process. However, because of their great foresight, your
11 predecessors set the process up this way specifically to
12 protect not just T&E species but our sporting heritage and our
13 rich wildlife and fisheries resources from the threats of
14 control by anti-hunters, ill-advised politicians, overzealous
15 industry and others based solely on political whims, personal
16 agendas or emotional public opinion polls.

17 Just as our founding fathers had the foresight to
18 include our right to keep and bear arms in the Constitution to
19 prevent overbearing restrictions on gun ownership, your
20 predecessors had the foresight to give the agencies this
21 limited independence on wildlife management decisions to
22 prevent exactly what some are currently now trying to do,
23 politicize it.

24 The Game and Fish and Boat Commission's regulatory
25 process is already open and transparent. Whether or not the

1 process is put through an additional layer of bureaucracy by
2 adding the purview of IRRC, the legislative still retains final
3 oversight over both agencies and every move they make. We see
4 examples of this oversight all the time when members introduce
5 legislation trying to mandate a specific wildlife management
6 regulatory action based on comments and complaints by their
7 constituents or their personal views when they don't agree with
8 a specific regulation or proposal.

9 To be eligible for federal Pittman-Robertson and
10 Dingell-Johnson Grants, states have to have fish and wildlife
11 agencies that have sole discretion over how revenue for fishing
12 and hunting licenses are used. The agencies also have to have
13 the authority to ensure the conservation of fish and wildlife.
14 Section 6 of the Endangered Species Act provides for
15 cooperation with states and allows states to assume a degree of
16 authority and control over endangered species matters. The
17 state signed a cooperative agreement with the U.S. Fish &
18 Wildlife Service confirming this authority.

19 In order for states to be given this power and the
20 federal funding that comes with it, they must demonstrate they
21 have the institutional capacity and legal authority to
22 identify, list, and manage endangered species. If this
23 infrastructure is dismantled, control can revert to the federal
24 government. Changing the current procedures by adding IRRC to
25 the process will be viewed by the U.S. Fish & Wildlife Service

1 as dismantling the current infracture, and will thus void the
2 cooperative agreement and open Pennsylvania up to more federal
3 control and oversight regarding T&E species and cause the
4 potential loss in funding. The threat of lost funding alone is
5 cause for serious concern and opposition to the bill, but there
6 are other reasons as well.

7 Some have mistakenly claimed that no other state has
8 separate, independent fish and wildlife agencies, so why should
9 Pennsylvania? The misconception here is thinking that, just
10 because Pennsylvania has two separate agencies and the other
11 states happen to have their fish and game agencies combined,
12 sometimes within their sister resource agency like our DCNR,
13 that this automatically makes them less independent when it
14 comes to setting regulations for wildlife, aquatics and/or T&E
15 species. Even though they are not separate agencies, most
16 still have their own commissioner-type systems that review and
17 approve regulations. Legislative oversight is no different
18 then Pennsylvania's. A prime example is New York. Their
19 system for T&E species is similar to Pennsylvania's, no
20 legislative oversight --- or control.

21 We often hear anecdotal reports of how the agencies
22 are impediments to business or economic growth; however,
23 critics are hard pressed to come up with specific examples.
24 And when they do provide examples, the problems are almost
25 always the result of a federal regulatory issue or DEP

1 permitting process. The same is true for the reasons being
2 given for why this legislation is needed. When looking into
3 the details of the examples given, one finds most of those
4 problems were related to federal issues as well.

5 Representative Pyle continually refers to a problem with the
6 school and the extra costs because of protected bats. But a
7 letter to the school from the U.S. Fish & Wildlife Service
8 shows that this was a federal issue and not a state issue, so
9 nothing in this so-called corrective legislation would change
10 that particular situation. Just because it may be agency staff
11 providing the boots on the ground for the reviews, studies, et
12 cetera, the guidelines are and will remain federally mandated.

13 Other recurring complaints being expressed and
14 comments in support of the legislation are about the permitting
15 process. The permitting process is controlled by DEP. Putting
16 the commissions under IRRC will not change the DEP permitting
17 process or change federally-mandated regulations and compliance
18 mandates.

19 Some have asked, what's wrong with having one more
20 set of eyes review it? The short answer is, it depends on
21 whose eyes you're referring to and how much extra red tape and
22 time it will add to the process. Because we all know the issue
23 is never the issue. And this issue has nothing to do with
24 having IRRC review the commissions' T&E species listings.

25 The bill also calls for an updated, centralized

1 database. The commissions argue that the database would
2 jeopardize wildlife because it would pinpoint their locations
3 to poachers for the black market. The industry claims it does
4 not cause a problem in other states. If this is true, we are
5 willing to work to help to implement a similar plan that is
6 acceptable to all parties. Mr. Arway has stated that the
7 agencies were already working on a more efficient review
8 process, but they are severely hindered by a lack of funds. So
9 without a way to pay for these upgrades, this legislation is
10 just one more unfunded mandate.

11 We understand there has been some discussion
12 regarding clarification on the intent of other sections of the
13 bill related to acceptable data re-designation,
14 Pennsylvania-specific species, et cetera, and we look forward
15 to the continued dialogue relative to corrective language, but
16 we are still seriously concerned about any additional financial
17 burdens placed on the agencies without some mechanism to cover
18 these added costs.

19 In summary, the PFSC opposes putting the commissions
20 under the IRRC process for any aspect of their regulatory
21 authority. The commissions were purposely set up to be
22 separate from IRRC to keep the politics out of wildlife and
23 aquatic resource management, not just for game species but for
24 all species. Requiring the IRRC process for T&E species is
25 nothing more than the start of the chipping away at the already

1 limited independence of the commissions and is not supported by
2 the sporting and conservation community.

3 Passing this bill would diminish scientific expert
4 recommendations and place them with bureaucratic and political
5 control, thus further politicizing and limiting the ability of
6 our agencies to effectively and efficiently manage and protect
7 our wildlife and aquatic resources, T&E species and wild trout
8 stream designations. It would be a step in the wrong
9 direction. Any changes to the current statute should not
10 undercut the purpose of the law, which is to protect and
11 restore the species so the protections can eventually be
12 removed, not to turn an area into a wildlife museum where the
13 last few numbers can live out their final days. This
14 legislation appears to be nothing more than an attempt to
15 undercut the authority of the two commissions, perhaps only
16 because the very independence of those commissions may be what
17 bothers politicians the most.

18 PFSC's opposition to this legislation is not an
19 attack on industry or an attempt to stifle jobs. The majority
20 of our membership is comprised of blue-collar workers,
21 struggling to make ends meet, but we still care about our
22 resources and we want to find a balance that protects our
23 environment, our resources, our jobs and development. We
24 recognize the need for responsible development and resource
25 extraction and the economic benefits they provide. We also

1 recognize that development and resource extraction will leave a
2 footprint on our environment. In light of these facts, we must
3 continue to work together to minimize the impact to Penn's
4 Woods, whether it's from extracting valuable resources,
5 development, designating wild trout streams or hunting and
6 fishing. We cherish the land and our resources, and we support
7 and promote best management practices to ensure the continued
8 protection of our land and our natural resources. Sportsmen
9 and women are stewards of our resources and our environment.
10 And as your constituents, we ask that you do your duty to
11 protect the interests of sportsmen, our resources and the
12 environment and oppose this legislation as written.

13 In closing, I leave you with this quote from Teddy
14 Roosevelt. Conservation means development as much as it does
15 protection. I recognize the right and duty of this generation
16 to develop and use the natural resources of our land, but I do
17 not recognize the right to waste them, or to rob, by wasteful
18 use, the generations that come after us.

19 Again, thank you for allowing PFSC the time to
20 present their position on this legislation. PFSC looks forward
21 to continued dialogue with the committees, industry and all
22 parties involved to find common ground on ways to improve the
23 current system without destroying it entirely. Thank you.

24 CHAIRMAN CAUSER: Melody, thank you for your
25 testimony. One of the issues that's been brought up at the

1 first hearing and then also at this hearing is the issue of
2 potential loss of federal funds. And I know that you brought
3 that up in your testimony. In doing a little more work on
4 that, we asked our House legal counsel to look at the issue in
5 depth. And in the packets there's a letter from our legal
6 counsel, who gives us an opinion that this legislation does not
7 jeopardize federal funds. And I wanted to point to the last
8 paragraph. It's quite lengthy, but it says, for the foregoing
9 reasons, it is the opinion of this office that House Bill 1576
10 does not jeopardize federal funding. Subjecting an agency to
11 independent regulatory review process cannot, by itself,
12 interfere with the agency's authority to promulgate
13 regulations, rather the process is a means by which regulations
14 are promulgated. Similarly, legislation to require an agency
15 to engage in conduct is not the catalyst for a loss of control.
16 It is the conduct itself that must be examined. So I think
17 there's a difference of opinion and certainly would direct
18 people to take a look at the opinion that's in the packet and
19 --- because it certainly, you know, takes a different approach
20 from what your testimony does. But I appreciate your
21 testimony. Are there other questions by the members?

22 REPRESENTATIVE PYLE: I'll save my questions until
23 the Board, at the end, sir, as I imagine what we will hear will
24 be very similar.

25 CHAIRMAN CAUSER: No further questions? Thank you

1 for your testimony.

2 MS. SCHELL: If I may, I'd just like to, for the
3 record, acknowledge that we have letters from several other
4 sportsmen's groups opposing the legislation as well, the
5 National Wild Turkey Federation, Quality Deer Management
6 Association of Pennsylvania, Pennsylvania Council of Trout
7 Unlimited, and the Lancaster Red Rose Chapter of the Izaak
8 Walton League.

9 CHAIRMAN CAUSER: We'd be glad to put those with the
10 record, also. We've been receiving testimony from multiple
11 organizations. And certainly we could not have all the
12 organizations testify in person, but any organization that
13 wants to submit comments, we're including that for the record.
14 So many of them are in the packets that you received, but if
15 you have additional ones, please get us those copies and we'll
16 ---

17 MS. SCHELL: Will do.

18 CHAIRMAN CAUSER: --- put them with the record.
19 Thank you.

20 MS. SCHELL: Thank you.

21 CHAIRMAN CAUSER: Our next testifier is Mr. Darrel
22 Lewis, with the Allegheny Mineral Corporation and representing
23 the PA Aggregates and Concrete Association. Welcome, sir, and
24 you may proceed.

25 MR. LEWIS: Thank you. Good morning, everyone. I

1 thank the Chairmen of the --- and the members of the Game &
2 Fisheries Committee and the Environmental Resources & Energy
3 Committee for this opportunity to testify on behalf of the
4 Pennsylvania Aggregate and Concrete Association.

5 My name is Darrel K. Lewis. I'm employed by
6 Allegheny Mineral Corporation, based in Kittanning. Right
7 here. Today, I'm testifying on behalf of the aggregates
8 industry, comprised of crushed stone, sand and gravel and slag
9 producers. Pennsylvania has a long mining history, and our
10 state is one of the largest aggregate producers by volume in
11 the United States. Our association represents both smaller
12 producers, that's companies with one quarry or sand and gravel
13 operation, to companies serving multiple markets in and around
14 the Commonwealth. And above all, I'm proud to say that a great
15 share of our membership is family-owned business, with strong
16 roots over many generations in Pennsylvania. And for my
17 company, that includes a family ownership of 72 years.

18 In my capacity as chief engineer at Allegheny
19 Mineral Corporation, I'm responsible for the coordination of
20 all environmental permits required for mining activities. In
21 that role, I have the pleasure of working closely with all
22 state organizations, agencies and commissions, that regulate
23 our industry, including the Pennsylvania Department of
24 Environmental Protection, the Department of Conservation and
25 Natural Resources, the Pennsylvania Fish & Boat Commission and

1 the Pennsylvania Game Commission. Based on my experience over
2 the last 30-plus years, I, along with the Pennsylvania
3 Aggregate and Concrete Association, support House Bill 1576,
4 the Endangered Species Coordination Act.

5 Our industry works closely with all regulators to
6 minimize the impact of our activities on the environment. We
7 take a long-term view on our interaction with the environment,
8 as companies make a generational investment every time we
9 develop a quarry or sand and gravel operation. We understand
10 the importance of balancing the benefits of a business,
11 employment and tax base in our local communities, with the
12 principles of sound environmental practices as we live and
13 appreciate the quality of life in our communities.

14 I believe that our industry truly wants to meet the
15 expectations and regulatory requirements of the agencies
16 overseeing the Pennsylvania Natural Diversity Index process.
17 At the same time, we hope the regulatory review agencies also
18 understand the impact of their policies and regulations on
19 companies that want to invest in Pennsylvania. Today we need
20 to find the balance between environmental protection and
21 economic development.

22 Economic development and our ability to be
23 responsible to our customers, including state agencies like the
24 Pennsylvania Department of Transportation, depend on receiving
25 timely approvals and responses from the regulatory review

1 agencies. The existing Environmental Review Screening Tool
2 administered by the Pennsylvania Natural Heritage Program is
3 useful in identifying whether a potential or actual impact for
4 the planned activity exists under the jurisdiction of any of
5 the review agencies within the project area. However, it does
6 not have the ability to offer what the exact species of concern
7 is in cases or their specific locations. In addition, it does
8 not have the program capability to coordinate among the various
9 agencies or offer mitigation options. Under these
10 circumstances, sometimes it feels like the blind are leading
11 the blind. Industry is told to perform surveys because the
12 agencies are unsure but wish to play it safe. The financial
13 investment for those surveys is considerable, and it appears
14 that it serves no other purpose than to test the resolve of the
15 company to bring good-paying jobs and benefits to the
16 communities seeking a steady employer.

17 The proposed legislation, the Endangered Species
18 Coordination Act, sets out a consistent framework for review
19 that would complement the goals and objectives of the
20 regulators and the regulated. For the resource agencies, it
21 upholds their regulatory authority. The bill continues to
22 highlight the importance of identifying and protecting the
23 state's endangered and threatened species and habitats. It
24 allows the oversight agencies the opportunity to eliminate
25 duplicative reviews, saves costs and offers a unified platform

1 to make communication and interaction more seamless.

2 For our industry, we welcome the uniform framework
3 for each review by utilizing a single centralized database and
4 a single point of contact to coordinate the searches and
5 responses. Even more importantly, it offers the additional
6 requirement to assist us in the preparation of avoidance and
7 mitigation measures during the planning process. Furthermore,
8 the introduction of the Independent Regulatory Review
9 Commission and the promulgation of regulation strengthens the
10 citizens' engagement with this process and offers an oversight
11 procedure mandated by law for all other state agencies.

12 In summary, by enacting this legislation, the
13 longstanding requirements of the Endangered Species Act would
14 be met. The agencies and the industry would realize benefits
15 from a streamlined review process and, above all, mitigation
16 implementation. The Commonwealth would benefit by pooling
17 knowledge and information of all agencies into a single
18 repository for the exclusive protection of endangered and
19 threatened species in Pennsylvania and their habitats.

20 Lastly, our members would have the ability to
21 identify challenges in the planning process and be able to make
22 the necessary investments at the onset of development, and thus
23 achieve better predictability for our investment in
24 communities. Thank you for this opportunity.

25 CHAIRMAN CAUSER: Thank you, sir, for your

1 testimony. We've been joined by two additional members,
2 Representative Galloway and Representative Christiana. So
3 thank you very much for joining us today.

4 Our stenographer is here with us now.

5 OFF RECORD DISCUSSION

6 CHAIRMAN CAUSER: Are there any questions by the
7 members? Representative Pyle?

8 REPRESENTATIVE PYLE: Mr. Lewis, thanks for being
9 here today. You operate Allegheny Mineral, out in west
10 Franklin Township, not too far from here. You brought up
11 something that I think we need to flesh out a little bit more.
12 In the current process --- if you all wanted to expand the
13 quarry, you found more gravel somewhere contiguous to what you
14 have, what is the step by step? First you would what, go out
15 and obtain the land or would you apply to Fish --- or Game
16 Commission first or ---? How does that work?

17 MR. LEWIS: Well, that process is a function of our
18 experience in the industry, but it can vary. But generally,
19 what we have to do now is immediately run a check through the
20 --- through the system to see if there's --- if there's some
21 kind of a hit that shows up on the track before you do
22 anything. Because you make investments, large investments, in
23 properties, and even though they may appear to be perfectly
24 adequate, the same as you're doing --- you know, you just ---
25 you don't know what's over there. So you have to run a search

1 on those properties and try to figure out if there's --- if
2 there's something there that's going to be a major roadblock in
3 the process. And even ones that don't appear to be sometimes
4 are. And you get hits, you get tentative hits. You don't get
5 always a complete rendering from any of the agencies on what
6 you're exactly up against. So that commences the process of
7 searching through and corresponding with agencies to flesh out
8 exactly what's there. And then doing studies to prove or
9 disprove that is also necessary. These things can take upwards
10 of a year. If you miss a deadline, you could be out for a
11 year. If you find something that only blooms in August and
12 it's now, you know, you're going to wait.

13 REPRESENTATIVE PYLE: You're going to have to wait
14 until next August to see if it blooms.

15 MR. LEWIS: Right, do that. The same way with some
16 of the reptiles and animal species. You have time frames for
17 studies that are --- you know, you have to wait. So they don't
18 --- they're not always conducive. Wintertime is a bad time to
19 start something, so --- unless you're --- you've got a ---.
20 And you know, believe me, we --- the company's been in business
21 70 years. We do long-range planning and --- but it still
22 becomes very, very difficult even to keep ahead at --- on all
23 the operations.

24 REPRESENTATIVE PYLE: Well, I guess the question I'm
25 asking, maybe I didn't phrase it well enough, let's use an

1 example like your quarry out there. You find a seam of a
2 mineral that you want to go after, okay. Would you first have
3 to buy that and then subject your studies for endangered
4 species to the Game Commission, or is it the other way around,
5 or ---?

6 MR. LEWIS: It has become --- it's now the --- the
7 first step is to do the investigation with the commissions,
8 because otherwise you --- you're going to waste your time and
9 money. We have purchased property speculatively, then to find
10 out that you're up against some sort of endangered species.
11 And again, you don't always find that on the first go-around.
12 You can get different levels of hits. You know, it's a
13 constant process. This takes several years. So the --- it's
14 come to the --- it's not just a business decision now to --- I
15 want to buy Mr. Smith's property, because we know it tests out
16 well. We have to go through this --- the review process with
17 the PNDI system.

18 REPRESENTATIVE PYLE: Thank you, Mr. Chairman. And
19 thank you, Mr. Lewis.

20 CHAIRMAN CAUSER: Thank you, Representative Pyle.
21 Representative McCarter?

22 REPRESENTATIVE MCCARTER: Yes. Thank you very much
23 for your testimony. I'd like to follow up on that last point,
24 if I could, for a second. Under this bill, what --- how do you
25 see this bill changing that process that would help you

1 organize --- your businesses?

2 MR. LEWIS: It gives us the surety that the species
3 are going to go through the proper process. We found that
4 we're getting hits and roadblocks on things that aren't listed,
5 but the DEP, Department of Environmental Protection, the
6 permit-issuing agency, normally and almost --- well, 99 point
7 something percent, defers to the resource agencies for
8 decisions on how things are to be addressed. So we have not
9 just endangered plant or animal, we have five other categories
10 of things that become --- that carry the same weight. And we
11 need for those --- those and all future candidates to go
12 through the process of --- through the IRRC process, which is
13 --- this act would require.

14 REPRESENTATIVE MCCARTER: So you're suggesting then
15 that the current listings that are on there are not the only
16 problem. These are other species that you're now concerned
17 about that are blocking somehow in terms of the time frame
18 that's your ability to be able to not only purchase land but go
19 ahead and do the extraction from those particular items?

20 MR. LEWIS: Yes.

21 REPRESENTATIVE MCCARTER: And consequently, then
22 this bill, because it has a de-regula --- or de-listing
23 procedure, if those species were knocked off, there would still
24 be other species that are in the pipeline, from what you're
25 suggesting, that could still cause that problem?

1 MR. LEWIS: There may be --- there's species in the
2 pipeline all the time, but they're --- they're not actually out
3 in the open.

4 REPRESENTATIVE MCCARTER: But you referenced five
5 other categories that are causing you difficulty. That's what
6 I'm trying to get to, I guess.

7 MR. LEWIS: Yes, categories like where or species of
8 concern or unknown, those are just impossible to deal with.

9 REPRESENTATIVE MCCARTER: But this bill doesn't
10 address that.

11 MR. LEWIS: This bill would eliminate those from
12 being able to be considered as an item to be addressed in the
13 permitting process.

14 REPRESENTATIVE MCCARTER: So you're --- oh, you're
15 suggesting then that --- but again, that would be up to a
16 two-year process to be able to get that to take place. So
17 you're looking down the road many years, if I understand your
18 testimony then, to try to get to the point that there would be
19 no species listed. Is that what you're saying?

20 MR. LEWIS: Not necessarily no species listed, but
21 they would be listed in a more understandable process. But we
22 have species now. We all know we have certain species that we
23 have to address. We don't always know where. That's the
24 guesswork or the luck of the draw, as to where these are going
25 to be identified. But we do know they're on the list. If you

1 have species that aren't really on an official list but they're
2 on someone's radar, they're on their wish list, then those are
3 the ones that show up, and that causes additional headache and
4 difficulty.

5 REPRESENTATIVE MCCARTER: Thank you very much.

6 CHAIRMAN CAUSER: Any additional questions? Thank
7 you, sir, for your testimony. Our next testifier is Mr. George
8 Jugovic, General Counsel with Penn Future.

9 MR. JUGOVIC: Obviously not a Croatian
10 representative.

11 CHAIRMAN CAUSER: Welcome. And you may proceed when
12 you're ready.

13 MR. JUGOVIC: It's Jugovic (different
14 pronunciation). And I thank you for having me here. If I can
15 make my technology work, I'll be prepared to testify. Thank
16 you, Chairman Causer, Chairman Miller and members of the
17 Committee for the opportunity to testify on HB 1576.

18 I've represented Penn Future for the past 15 years.
19 We've advocated for a healthy environment and clean energy. We
20 try to position ourselves relatively in the middle in terms of
21 environmental organizations because we promote both a strong
22 economy and a strong environment.

23 We're also the National Wildlife Federation state's
24 affiliate for Pennsylvania. And as such, we represent
25 thousands of supporters, sportsmen and women, anglers and

1 hunters, that are dedicated to protecting our ecosystems for
2 the most critical of the native plants and wildlife that are at
3 risk in Pennsylvania. We oppose the passage of HB 1576 in its
4 current form because we think it will grievously harm the
5 Commonwealth's ability to conserve habitat to support native
6 plants and wildlife.

7 I have focused my testimony on a comparison between
8 this bill and the federal Endangered Species Act to illustrate
9 both the very real possibility that federal funds could be lost
10 if this bill, in its current form, is passed, but also to
11 illustrate some of the background and thinking that went into
12 the Endangered Species Act and why the provisions exist the way
13 they do in that law.

14 I do understand and think it's important for the
15 Representatives here to know that we understand that it's ---
16 these are difficult decisions, listing decisions, that they
17 compromise and that it would be tempting to take the
18 independence of the Fish & Game Commissions away and interject
19 politics into these decisions.

20 They're difficult decisions for many reasons.
21 Protecting rare endangered species imposes costs on business.
22 We understand that. These are businesses that provide
23 employment in your districts. These are businesses that pay
24 taxes and support your campaigns, both Democrat and Republican.
25 Streams, plants and animals do not vote. And the substantial

1 economic benefit that they have provided in past generations
2 and will provide in future generations, if our environment is
3 protected, is difficult --- more difficult to measure than the
4 balance sheet of a coal mine or a gas company, but it is
5 exactly that reason why this legislation is a bad idea.

6 When enacting the Endangered Species Act in 1973,
7 Congress extensively debated the role that economics and
8 politics should play in listing decisions. And that's why in
9 Section Four of the Endangered Species Act it required the
10 responsible agencies to make their decisions based solely on
11 the best scientific and commercial data available, without
12 regard to economics and politics.

13 I would note that Congress did strike a balance and
14 allow consideration of economics to be considered in the
15 definition of critical habitat. When the agency goes and makes
16 that secondary decision after a species is listed to define the
17 boundaries of critical habitat, economics are allowed under
18 federal law to be considered, but not in the initial listing
19 decision. We believe House Bill 1576 unwisely interjects
20 considerations other than science into that initial decision,
21 and that's one of the primary reasons we're opposed to this
22 legislation.

23 The Endangered Species Act is designed to conserve,
24 not preserve species. There's an important difference --- it's
25 an important issue --- point to understand. The Endangered

1 Species Act is not about protecting individual species of
2 wildlife, whether it be bats or snails or squirrels or plants.
3 The Endangered Species Act is not the Endangered Protection
4 Act, which it was named at one point in time. It's the
5 Endangered Species Act because it defines --- it seeks to
6 protect habitat. It recognizes that --- and this is still true
7 today, habitat destruction is the single most significant cause
8 of species extinction in the world, including the United
9 States. So what the Endangered Species Act is all about is
10 about protecting habitat. And it's not about protecting that
11 one species that's left. Because what's important about
12 species, if you understand, and I'm sure many of you do, having
13 served so long on these committees, it's --- what's important
14 about our ecosystem, about protecting species, it's the
15 interdependence of all the species together that is critical
16 for us to have a healthy ecosystem. It's not about protecting
17 that one last bat. It's not about protecting that one last
18 salamander. It's about protecting its relationship to other
19 species so that --- you have bats that eat thousands of
20 mosquitos. Last week --- and I'm going to get to this later in
21 my testimony, but I'm going to digress now, if you may. Last
22 week, a woman in Pennsylvania died of West Nile Virus. There's
23 still seven persons in critical condition. We spend millions
24 of dollars trying to control mosquitos because they pass along
25 to humans the West Nile Virus and other diseases. The brown

1 bat eats a thousand mosquitos a night. A brown bat female
2 carrying pups can eat up to a thousand mosquitos an hour. So
3 when we talk about protecting one little furry creature, it's
4 not about preserving it. It's about preserving its
5 relationship and interrelationship to other critters like
6 mosquitos, their --- what balance they provide and what
7 protection they ultimately provide us.

8 So getting back to conservation versus preservation.
9 The point here is that the way --- though it's somewhat
10 unclear, the phraseology right now in the current legislation,
11 but the --- but it seems to define critical habitat to mean
12 either only that area currently occupied by the species or only
13 critical habitat already designated under the federal
14 Endangered Species Act. If it's the prior, only that area
15 currently occupied by the species, it entirely undercuts the
16 premise of the federal Endangered Species Act, which is to
17 define a critical habitat large enough to allow those species
18 to recover and get off the list. That's the point. Because
19 it's the habitat that's affected that's preventing the species
20 from surviving.

21 HB 1576 also violates the Public Trust Doctrine in
22 the Pennsylvania Constitution. 1576 would prevent the
23 commissions from listing the species as threatened or
24 endangered unless its population was limited throughout its
25 entire range. By obligating the commissions to consider the

1 species' entire range rather than the portion in Pennsylvania,
2 it prevents the commissions from conserving wildlife
3 populations at risk in Pennsylvania but not elsewhere. So
4 species could be lost in Pennsylvania. As long as they survive
5 in Ohio, West Virginia and New York in adequate populations,
6 they would not be able to be listed by the commissions under
7 this bill as threatened or endangered in Pennsylvania. And the
8 reason that violates the Public Trust Doctrine is --- in the
9 Pennsylvania Constitution is to understand --- it's important
10 to understand that you do not own the wildlife and native
11 plants in Pennsylvania, nor do I, nor do the commissions, nor
12 does the executive branch of the Governor. Under our
13 Constitution, our natural resources are held in trust by you,
14 in trust by the commissions, and in trust by the executive
15 branch for the population, both current generations and future
16 generations. That's what Article I, Section 27 means. That's
17 what the Public Trust Doctrine encompasses. And so, if you
18 prevent the commissions from managing and conserving our
19 species and our --- in Pennsylvania, unless they also exist in
20 Ohio, West Virginia, New York, we're giving up that authority.
21 We're preventing the commissions from doing their job under the
22 Constitution, from protecting our species in Pennsylvania.

23 HB 1576 does not impose an affirmative obligation on
24 persons to protect species the way the Endangered Species Act
25 is. And I'm just going to summarize this section of my written

1 testimony. The point here is that the Endangered Species Act
2 imposes an extraordinary obligation on individuals to --- and
3 corporations to be responsible for their own --- for their own
4 conduct. It does --- and HB 1576 does just the opposite. It
5 says you can close your eyes to your own conduct, whether
6 you're an individual or a corporation unless the government
7 permitting agency tells you affirmatively that they have data
8 that shows that there is species there that you need to worry
9 about. That is a huge shift in terms of burden. Not one of
10 you I believe on this committee would raise their children to
11 say, you know what, I don't have to be responsible for my own
12 conduct unless the government tells me that what I'm doing is
13 wrong. Who would want to give that responsibility to the
14 government; right? So why would we want to do that in this
15 circumstance when we're talking about endangered species?
16 Persons and individuals and companies have an obligation to be
17 responsible and look out for the consequences of their conduct
18 in this particular circumstance, where we're talking about
19 threatened and endangered species.

20 Finally, I just want to make the point that this is
21 actually about economics. It's about people. But maybe not in
22 the way that we often think about it. You know, it's not about
23 saving the pretty plant. It's not about saving the fuzzy
24 critter. In 1973, Congress --- U.S. Congress, after extensive
25 hearings, found that protecting threatened and endangered

1 species is vital for not just aesthetic and ecologic reasons
2 but also educational reasons, historic regions --- reasons,
3 recreation reasons, economic and scientific reasons, all of the
4 --- threatened and endangered species have all of --- provide
5 all of those values to our nation. There are many scholars
6 that will testify to this, persons that are more learned than
7 myself. I would urge you to accept the testimony on that
8 issue.

9 The total impact of extinction is difficult to
10 predict. We know it is clear that conserving diversity, again,
11 that interdependence I was talking about, is essential to
12 maintaining a healthy ecosystem. The key's not to protecting
13 the one but protecting the many that are interdependent on one
14 another. It benefits society and it benefits our economy.
15 When someone complains about increased costs of conserving the
16 small, furry bat or native plant, consider that at least 25
17 percent of all prescription drugs dispensed in the United
18 States today contain active principals that are still extracted
19 from wild plants, 25 percent. Our drug industry is a big
20 industry. It's about economics, also. Protection is about
21 economics.

22 Consider the --- that Pennsylvania has spent
23 millions of dollars on the West Nile Virus, as I had mentioned,
24 spraying for black flies and mosquitoes, and that they are
25 naturally controlled by species that we --- are now being

1 decimated. Consider that it was a lonely mold that gave us
2 penicillin, a discovery that saved the lives of thousands of
3 soldiers during and after World War II. Threatened and
4 endangered species protection is patriotic.

5 Consider that when President Ronald Reagan, who was
6 nearly assassinated and fighting for his life, his blood
7 pressure was stabilized with a drug derived from an Amazonian
8 Bush Viper. So I understand the pressure to increase
9 employment and reduce costs on business, but the risk and
10 reward here is high.

11 The cost of being wrong about our decision, about
12 allowing a species to be extinguished, is extraordinary. That
13 is why we insulate persons responsible for making these
14 decisions from politics. That is why we require that they make
15 the decision based solely on sound science.

16 You'll be asked to cast a vote on this legislation
17 at some time. And when you are, I would ask that each of you
18 ask yourselves are you that confident that you're the one who
19 can accurately predict whether that plant or animal is not
20 worth saving. Thank you again for inviting me to participate
21 in this hearing. I hope that I have provided you with some
22 thoughts and some information worth considering. We would be
23 pleased to continue to work with you to resolve the issues that
24 you see are of concern with the current process and to modify
25 the legislation in a way that would preserve the independence

1 of the commissions but also try to address your concerns.

2 Thank you.

3 CHAIRMAN CAUSER: Thank you for your testimony.

4 We've also been joined by Representative Bryan Barbin and
5 welcome him, thank him for coming.

6 Through your testimony you mentioned numerous times
7 the listing of plants. And there's a lot of misinformation
8 about this legislation, a lot of misinformation in the media.
9 One of the things that strikes me is, you know, the listing of
10 plants is already done through the IRRC process, with the
11 Department of Conservation and Natural Resources. So I want to
12 point that out, that this legislation doesn't have anything to
13 do with that.

14 MR. JUGOVIC: And I appreciate that. For me, it is
15 --- their process is of concern, but the --- you know, you
16 notice that I actually, in my testimony, did not mention the
17 IRRC process, per se. The federal government lists their
18 species through regulations, also; right? But the issue ---
19 what this legislation does differently is that it does not tie
20 IRRC or the review committees, the General Assembly, to making
21 the listing decision based on sound science alone. If those
22 agencies and this body could not interfere with a decision that
23 was based on sound science, and that then could be appealed by
24 persons who assert that something other than science was
25 interjected in the process, then I think that that would

1 preserve, you know, insulate the decision, which is the
2 critical aspect here, the basis ---.

3 CHAIRMAN CAUSER: But I'm pointing out in your
4 testimony you specifically say that House Bill --- in the third
5 paragraph, House Bill 1576, because it will grievously harm the
6 Commonwealth's ability to conserve native plants, and that this
7 has nothing to do with that.

8 MR. JUGOVIC: But the other --- the other aspects of
9 the bill would apply.

10 CHAIRMAN CAUSER: Questions, Representative Pyle?

11 REPRESENTATIVE PYLE: Thank you for coming, Mr.
12 Jugovic. And I do have a lot of Croats in my hometown. Sound
13 science, that's a --- that's a very operative phrase. How is
14 that science currently propagated in identifying endangered
15 species?

16 MR. JUGOVIC: The Game Commission & the Fish
17 Commission use --- my understanding is that they use --- make
18 their decisions based on science.

19 REPRESENTATIVE PYLE: How is that science formulated
20 is what I'm asking? What is the source of that science?

21 MR. JUGOVIC: I would imagine that they do
22 literature sources, as well as use their own experts to ---
23 they also accept public comment on --- throughout their
24 process.

25 REPRESENTATIVE PYLE: Do these experts include

1 college students electrofishing for species?

2 MR. JUGOVIC: I would think that that might be
3 possible, that they would gather information ---

4 REPRESENTATIVE PYLE: It is possible.

5 MR. JUGOVIC: --- that they would gather information
6 that way.

7 REPRESENTATIVE PYLE: Sorry for the rhetoric. How
8 do we deal with endangered or threatened species that are
9 avian? You had mentioned that it's more about the habitat,
10 it's about protecting the range. And just to use your example,
11 the --- I forget, the small, furry brown bat or something. I'm
12 aware there's a white-nosed syndrome that we did not cause.
13 The leading theory is it was brought over by cave explorers in
14 Europe, where they dealt with this 30 years ago. Sound
15 science, using existing known points and building from there,
16 any idea how did Europe cure the white-nosed syndrome?

17 MR. JUGOVIC: I don't think that they cured it. My
18 understanding --- and I'm not a biologist, although I have a
19 biology background, ---

20 REPRESENTATIVE PYLE: Sure.

21 MR. JUGOVIC: --- but my understanding is that they
22 didn't, quote, cure it. The Brown --- the bat that live in
23 hibernacula in Europe actually adapted to live with white-nosed
24 syndrome. So they actually do --- are exposed and do get
25 white-nosed syndrome, but for whatever reason, through years of

1 adaptation, they are not affected by it the way the bats are
2 here.

3 REPRESENTATIVE PYLE: A beneficial gene mutation
4 allowed them to adapt to this disease and survive. Now, in
5 Pennsylvania I'm aware that this white-nosed syndrome's
6 currently dropped about 90 percent of the bats. Got guys at
7 Penn State and all over the place working on this. And being
8 viral in its nature, it defies our science and continues its
9 lethal march.

10 Now, back to the identification of habitat. How do
11 you declare a range on an avian species that migrates? Do we
12 just declare like --- I mean, I know --- and I'll save this
13 question for Mr. Arway later. They migrate.

14 MR. JUGOVIC: What migrates?

15 REPRESENTATIVE PYLE: Bats, ducks, all avian species
16 do with the weather. Seeing as how our science has not been
17 able to cure this scourge upon their species, do we just write
18 off what common --- the little brown bat lives in houses and
19 trees.

20 MR. JUGOVIC: Actually, they're --- it depends on
21 what portion of the species, but they live in hibernacula
22 naturally, and that's where they get the ---

23 REPRESENTATIVE PYLE: Little Browns do?

24 MR. JUGOVIC: --- white-nosed syndrome.

25 REPRESENTATIVE PYLE: That's because of their

1 instinctive --- to maintain body heat, they mass together in a
2 ball to conserve heat within, like you said, hibernacula. It
3 could be caves, trees, houses. You know, Mr. Chairman, I'm
4 going to reserve the next question because I think it's better
5 suited for our friends with the Game Commission, ---

6 MR. JUGOVIC: I appreciate it.

7 REPRESENTATIVE PYLE: --- on how they deal with
8 those identifications. But back to the sound silence. Who
9 actually does these studies? If we're going to rest our case
10 --- and I'm with you. I grew up here. I like the animals
11 here, all of them. How do we know we're using sound science?
12 Who propagates that science?

13 MR. JUGOVIC: Look, I mean, someone has to
14 ultimately make that decision. I mean, there are scientists
15 that propagate science.

16 REPRESENTATIVE PYLE: Sure.

17 MR. JUGOVIC: That's why they're called scientists,
18 right. And ultimately, someone has to make a decision on which
19 science --- which --- you know, which studies are valid and
20 which studies aren't valid. Plainly, somebody has to be
21 responsible for that. Under the federal law, that would be the
22 National Marine Fisheries Service or National --- or Fish &
23 Wildlife Service, depending on whether you're talking about,
24 you know, the oceans or whether you're talking about wildlife.
25 That goes through a regulatory process. But then because of

1 the legal standard that applies, that it has to be solely based
2 on science. You know, you have deference, of course, that's
3 granted to the agencies. But what's critical is that it can be
4 challenged in court and that issue can be litigated, whether
5 they base their decision solely on sound science and whether
6 they had substantial evidence to support their decision that
7 they made. And obviously, they're humans, but you put controls
8 on that by limiting what they can consider and what cannot be
9 considered in the listing decision. And what's different about
10 that in HB 1576 is you cannot consider economics on the federal
11 level in the listing decision, and you cannot consider --- have
12 political considerations come into play in the initial listing
13 decision. And that --- you know, that was --- is my primary
14 concern with 1576. The Game Commissions are --- well, you all
15 know that they're not completely isolated from politics; right?
16 I mean, you know, they have to come to you if they want a
17 permit, want to raise their permit fees.

18 REPRESENTATIVE PYLE: Or hunting license or fishing
19 license. And being a member of those committees for ten years,
20 I can remember it once.

21 MR. JUGOVIC: And you could --- and you could call
22 them in front of you to testify on decisions that they make,
23 and you can hold hearings like this; right? I mean, so it's
24 the idea that they are completely insulated and sort of in a
25 black box and responsive to no one in the community is I think

1 a mischaracterization by those that sort of try to portray it
2 that way.

3 Also, most importantly, the reason they were set up
4 that way is to be responsive to us, right, to hunters, to
5 anglers, who provide them their budget by buying licenses.

6 REPRESENTATIVE PYLE: I know a few other of my
7 colleagues who couldn't make the trip west that would differ
8 greatly in that assessment, sir, respectfully.

9 MR. JUGOVIC: Absolutely.

10 REPRESENTATIVE PYLE: Thank you, Chairman.

11 CHAIRMAN CAUSER: Thank you, Representative Pyle.

12 MR. JUGOVIC: Thank you.

13 CHAIRMAN CAUSER: Chairman Miller?

14 CHAIRMAN MILLER: Thank you. In your testimony,
15 with House Bill 1576 would interject politics and other
16 non-science-based considerations into listing decisions made by
17 the commissions in stark contrast to the federal ESA. Can you
18 just walk us briefly through the federal ESA? Is there no
19 oversight? If somebody at the federal level says this is
20 endangered species, they put it on the list and there is no
21 oversight by any agency within the federal government?

22 MR. JUGOVIC: Thank you for the question. I'll try
23 my best to answer it succinctly.

24 CHAIRMAN MILLER: Thank you.

25 MR. JUGOVIC: There are two federal agencies

1 responsible for listing decisions under the federal Endangered
2 Species Act. One is the National Marine Fisheries Service, and
3 they have responsibilities for whales and fish and tuna and
4 salmon. I went to law school at Lewis and Clark in Portland,
5 Oregon, so salmon was a big deal, right. And then the Fish &
6 Wildlife Service, and they have responsibility for basically
7 the land species, right, and birds. They get their regulatory
8 process, a listing decision that's published as --- published
9 for comment, you know, and then the regulation is finalized.
10 But the Endangered Species Act requires that that decision
11 based --- be based solely on the best scientifically commercial
12 data available. So whenever that decision is made, the review
13 that occurs is not by Congress and is not by a --- something
14 equivalent to IRRC. It would be by the courts. But the courts
15 are bound by that same standard, too. So then if someone
16 challenges the listing, then the courts make the judgment did
17 the agencies, whether it be the National Marine Fishery Service
18 or Fish & Wildlife Service, did they follow the law? Did they
19 base their decision solely on the best scientific and
20 commercial data available? So the check is in the third branch
21 of government, in the courts, not through the --- Congress.

22 CHAIRMAN MILLER: It almost appears to me that you
23 believe that in the IRRC process they do look at proposed
24 regulations, no matter which body it's coming from, and make
25 judgments on the science that was used?

1 MR. JUGOVIC: I don't know what basis they use to
2 modify regulations. What I know is this legislation does not
3 limit their discretion on why they could --- what basis they
4 can use to change the regulation.

5 CHAIRMAN MILLER: I just have a slight concern
6 because it appears that many people believe there's going to be
7 this legislative oversight with --- through IRRC and then the
8 legislature will weigh in and make, I don't know --- some of
9 the comments are kind of antagonistic, but uninformed specious
10 decisions, whatever.

11 It's kind of interesting because I'm now in the
12 House, in my eighth term. Do you know how many IRRC-approved
13 regulations we have disapproved through the legislative
14 process? If you can find one, let me know. Because I don't
15 know of a single one in 16 years, 15 years. It's not something
16 that commonly occurs. It's a difficult process. It can be
17 done. But I believe there's a lot of concern that is unfounded
18 out there with the role of the legislature in this, to the
19 point that I would actually suggest, by IRRC review, we avoid
20 that conflict, where the legislature feels compelled to weigh
21 in and say, you know what, this was just a bad regulation that
22 got posted, and we're going to introduce legislation. As was
23 noted before, we can do that, and overturn this, you know,
24 create a new law. I would suggest that the IRRC process and
25 the submission to the committees actually acts as a backstop to

1 stop that from happening and actually does lead to better
2 regulations being created, only if it's the concern that we
3 could overrule it somehow. So I find that argument just to be
4 a bit too much. But I appreciate your testimony. It was ---
5 you know, I really appreciate it. It was very good. Thank
6 you.

7 MR. JUGOVIC: Thank you very much. I appreciate it.
8 And as we said, we're --- as an organization, we're more than
9 willing to continue the dialogue if it would be useful.

10 CHAIRMAN MILLER: I think there's other members.
11 There are.

12 CHAIRMAN CAUSER: Thank you, Chairman Miller.
13 Representative McCarter?

14 REPRESENTATIVE MCCARTER: Thank you, Mr. Chairman.
15 If I could go back for one second. Again, thank you very, very
16 much for your testimony. The question that you raised in the
17 basic nature of the shift that's taking place from the
18 responsibility from the individual, if we could explore that a
19 little bit.

20 It's my understanding that, really, corporations and
21 businesses are treated the same as persons under the law. And
22 as a result, that shift, I think you made the point, is
23 basically not only for the individuals who engage in all the
24 activities and the agencies, but this would be true also then
25 for the corporations and the businesses that are impacted. Is

1 that true?

2 MR. JUGOVIC: It's true.

3 REPRESENTATIVE MCCARTER: So that the responsibility
4 then for anyone who works for these corporations then would be
5 protected as a shift in this legislation so that they could not
6 be penalized, criminalized, anything relative to this
7 particular act in Pennsylvania. Would that be true?

8 MR. JUGOVIC: It's true. I think, you know, it's
9 easy to sort of think of the extremes where you're talking
10 about like criminalizing something or imposing a penalty on
11 someone, but for me, that's part of it. But part of it is
12 actually sort of the precautionary principle; right? I mean,
13 when you have some indication that there's a species that we're
14 trying to protect, that we've decided is important, and that
15 we're losing, and often we're not sure why at that point, the
16 point is to --- that it's better --- you know, the
17 precautionary principle says that it's better for us to take
18 precautions to ensure that our conduct doesn't adversely affect
19 something. And you know, you could use this principle in
20 business or elsewhere, but that it --- that we never get to the
21 point where you're worried about criminalizing someone or
22 imposing a penalty or a civil penalty. So it really has to do
23 with basically taking that initial precaution around your
24 conduct.

25 REPRESENTATIVE MCCARTER: But ultimately the

1 destruction of habitat ---

2 MR. JUGOVIC: Correct.

3 REPRESENTATIVE MCCARTER: --- you know, is the
4 issue, ---

5 MR. JUGOVIC: Right.

6 REPRESENTATIVE MCCARTER: --- as I think you made
7 very clear in your testimony. And it worries me very much that
8 this particular legislation, and moving down the path that we
9 are, would put it into the vein that, again, anyone taking
10 action to destroy that habitat would not be treated in the same
11 way as a responsibility as currently we look upon that within
12 the agencies and individuals that work for the agencies as
13 well.

14 MR. JUGOVIC: I think that's correct.

15 REPRESENTATIVE MCCARTER: And one other point, Mr.
16 Chairman, if I could. I want to thank you for broadening the
17 view here in your testimony, that this is not about individual
18 species. It's not about Little Brown Bats or it's not about
19 toads or it's not about other species that we could be talking
20 about. There is an interaction that takes place within the
21 ecosystem of all these species. And as I think you've stated,
22 that we don't know always what the relationships are between
23 individual species and that overall pattern but that, you know,
24 our forebearers and so forth who have passed this legislation
25 took very, very seriously the nature of that interaction and

1 that that's really what we're all responsible for in a
2 Commonwealth, in a sense of bringing that together to protect.
3 And again, I want to thank Penn Future for their efforts here
4 in terms of all the organizations that are making that point.
5 Thank you.

6 CHAIRMAN CAUSER: Thank you. Representative
7 Everett?

8 REPRESENTATIVE EVERETT: Yes. Thank you. And I
9 don't want to drag this out, but I think this is a great
10 discussion on the real issues in this bill. And I just want to
11 ask you, do you feel from your analysis of 1576 that there's
12 anything in this that violates the federal ESA?

13 MR. JUGOVIC: So whenever --- that's funny --- it's
14 a very good question. So whenever I first wrote my testimony
15 and it was drafted, I actually used that term like that this
16 violates the Endangered Species Act, but you don't find that in
17 my testimony anymore because I don't think that's the issue.
18 The Endangered Species Act --- looking at it as an attorney,
19 the Endangered Species Act isn't written that way. There's
20 nothing that you could enact as legislation that would, quote,
21 violate the Endangered Species Act. What it would do is
22 undercut the purposes and be in conflict with some of the
23 premises that was used to pass the federal Endangered Species
24 Act. So that's why I tried to sort of make my testimony a bit
25 more nuanced and make that point.

1 REPRESENTATIVE EVERETT: Okay, that's great. And I
2 think this is --- I think this is, you know, the crux of the
3 discussion. And you used the Brown Bat as an example. And the
4 thing is that we're not losing Brown Bats because of lack of
5 habitat in Pennsylvania. We're losing them for another reason.
6 And the question in my mind is, going forward, when we do
7 things in Pennsylvania, whatever they may be, whether it's
8 somebody building a house or whatever it may be, how much
9 habitat --- and we'll just keep using the Brown Bat, how much
10 brown bat habitat do we have to have in Pennsylvania? Do we
11 never destroy another acre of property that a Brown Bat could
12 live on? And where does ---? And that's the balance that I
13 think that we need to find out there, and that's the balance
14 that I'm seeking as we go through this legislation. And I
15 think this is really focused on the discussion that we need to
16 have about this bill. You know, everybody is focusing on the
17 IRRC process. And as you've brought forward, when federal
18 species go through their analysis, they go through the same
19 regulatory process that any other federal regulation goes
20 through. And that's all this proposes to do is put these
21 regulatory decisions through exactly the same process that DCNR
22 and DEP have to make when they're --- and DCNR are required to
23 use science when they make their decisions; is that correct?

24 MR. JUGOVIC: It is not DCNR ---.

25 REPRESENTATIVE EVERETT: If it has to do with the

1 Species Act ---.

2 MR. JUGOVIC: DCNR and DEP obviously are
3 science-based organizations, but their decisions are not based
4 solely on science. In fact, all of DEP's decisions, for
5 example, under the Clean Streams Law and under Solid Waste
6 Management Act, when they issue permits or regulations or set
7 technological standards for cleanup of our streams, for
8 example, all of those laws allow DEP to consider economics to
9 one degree or another and to take in other social and economic
10 considerations. That's not the case for the federal Endangered
11 Species Act. And that's one of our issues with this bill.

12 REPRESENTATIVE EVERETT: So again, do you --- do you
13 think that this bill would stand up to a constitutional
14 challenge as being violative of the ESA because it brings other
15 concerns into consideration?

16 MR. JUGOVIC: I think that's ---.

17 REPRESENTATIVE EVERETT: And I know you're not on
18 the Supreme Court or anything, but just your opinion.

19 MR. JUGOVIC: Thank you for recognizing that. I
20 don't think that's the issue. I don't think anyone could
21 challenge this law like in the court and say that violates the
22 Endangered Species Act. It's not whether it would stand up to
23 --- it would be considered a violation of the Endangered
24 Species Act. The federal government could look at it and say
25 this doesn't fulfill your responsibilities under the Endangered

1 Species Act and, therefore, we're going to cut off your
2 funding. I could challenge this law and say I think it
3 violates the Public Trust Doctrine in certain respects and it
4 could be --- of the Pennsylvania Constitution. I don't think
5 the issue was ever does this actually violate the federal
6 Endangered Species Act.

7 REPRESENTATIVE EVERETT: I just want to be clear
8 that that's not exactly what you're alleging at this point.

9 MR. JUGOVIC: That's correct.

10 REPRESENTATIVE EVERETT: And yeah, I think that's
11 great. I think we'll have other opportunities. But I think
12 you --- I really think you brought forward some very good
13 points for us to discuss and really get our minds wrapped
14 around ---

15 MR. JUGOVIC: Thank you.

16 REPRESENTATIVE EVERETT: --- the really important
17 part of this statute. Thank you.

18 MR. JUGOVIC: That's what the hearing is supposed to
19 be for; right?

20 CHAIRMAN CAUSER: Thank you, Representative.
21 Representative Barbin?

22 REPRESENTATIVE BARBIN: Thank you. I appreciate
23 your testimony this morning. And I do understand there's two
24 parts to this thing. There's the --- you know, additional
25 species being put on Endangered Species for Pennsylvania

1 purposes, and then there's this issue of how do we go about
2 deciding how much habitat is enough. Do you have any question
3 in your mind that, constitutionally, the Department of Natural
4 --- Conservation and Natural Resources is somehow less
5 competent than the Fish & Game Commission to make scientific
6 decisions?

7 MR. JUGOVIC: Do I think that DCNR is
8 constitutionally less competent than either of the ---?

9 REPRESENTATIVE BARBIN: Fish or Game to make
10 scientific decisions.

11 MR. JUGOVIC: No, I wouldn't think so.

12 REPRESENTATIVE BARBIN: Okay. All right.

13 MR. JUGOVIC: I mean, I would think that ---.

14 REPRESENTATIVE BARBIN: Is there any question in
15 your mind ---?

16 MR. JUGOVIC: I would think that they would ---

17 REPRESENTATIVE BARBIN: I've spent 30 years ---

18 MR. JUGOVIC: --- all have ---.

19 REPRESENTATIVE BARBIN: --- either representing the
20 Commonwealth or filing appeals in Commonwealth Court from
21 government agency actions. So from my perspective, this isn't
22 a constitutional question at all. All this really is, is what
23 rules are going to be in place before we put additional burdens
24 on businesses or individuals as it relates to endangered
25 species.

1 Now, I personally don't believe that the scientists
2 for the Game Commission or the scientists for the Fish & Boat
3 Commission have any more knowledge or less knowledge than
4 someone that works for the Department of Natural ---
5 Conservation and Natural Resources. So my question is only
6 does the legislature --- and this is my theory of government.
7 Should we have a check and balance? If we should, if this
8 applies to all other agency decisions and you can appeal it to
9 Commonwealth Court, then what gives you the right or any
10 interest group the right to say that the same rules that apply
11 to every other agency decision won't apply to the Fish & Boat
12 Commission or won't apply to the Game Commission? Because, to
13 me, that's the crux of this issue here.

14 There's regulations that have been proposed by the
15 people's representatives, not some appointed board but the
16 people who actually got elected in this country to make policy
17 decisions. And they have scientists. And if the rules that
18 come out of the agencies don't meet those scientific standards,
19 we got a court --- you admitted, even in the federal system,
20 that the court will be the backstop for whether or not the
21 decision is a right or wrong decision. It won't be the head of
22 the Fish & Boat Commission. It won't be the head of the Game
23 Commission. It won't be Bryan Barbin. It won't be Martin
24 Causer. It will be the court. So what tells us that we --- as
25 elected policymakers, we should be putting up a barricade that

1 says you won't abide by the same rules that every other agency
2 abides by?

3 MR. JUGOVIC: Sir, what rules are you talking about?

4 REPRESENTATIVE BARBIN: Well, this says the IRC will
5 have the right to make sure that the regulation is in
6 accordance with the law.

7 MR. JUGOVIC: This says much, much more than that.

8 REPRESENTATIVE BARBIN: Okay. Well, then --- but
9 you didn't do that. Your testimony didn't say I want to change
10 paragraph seven or page two, lines 7 through 12. That should
11 change. What you said was we shouldn't interfere, as the
12 people's representatives, with the idea that the current system
13 puts up obstacles on habitat and puts up obstacles on listing
14 additional endangered species. Now, if we're not supposed to
15 do that in a constitutional system, who is?

16 MR. JUGOVIC: With due respect, that's not what my
17 testimony says. What my testimony says is that the listing
18 decision under the federal Endangered Species Act is solely ---
19 to be based solely on sound science and is not --- does not
20 allow for the interjection of political --- politics or
21 economics into the listing decision. This legis ---.

22 REPRESENTATIVE BARBIN: This isn't the federal
23 legislation. This is Pennsylvania. And a group of people are
24 saying we have the right to list additional endangered species,
25 and there's nothing that the legislature can do to review it.

1 And that, to me, isn't what I was taught in law school. That's
2 not how it works. The law sets forth the rule ---

3 MR. JUGOVIC: It's how it works if that's what the
4 law says.

5 REPRESENTATIVE BARBIN: --- the regula --- wait a
6 second. The regulation is consistent or not consistent with
7 the law. If it's not consistent with the law, it's unlawful.
8 And it's not up for the legislature to determine that. It's up
9 for the court to determine that. All we're doing here today is
10 saying should the Fish & Game Commission abide by the rules
11 that apply to all other agencies. That's it.

12 MR. JUGOVIC: With due respect, that's not just it.

13 REPRESENTATIVE BARBIN: Well, then submit ---

14 MR. JUGOVIC: That's not it. The issue ---.

15 REPRESENTATIVE BARBIN: --- comments to the
16 Committee ---

17 MR. JUGOVIC: The issue is ---.

18 REPRESENTATIVE BARBIN: --- that say what
19 specifically should change in the law. Don't say to the
20 Committee we don't think you're abiding by the spirit of the
21 federal Endangered Species Act, because that doesn't help
22 anybody.

23 MR. JUGOVIC: Well, I appreciate that that's your
24 opinion, that you think it doesn't help. I would suggest to
25 you that if you understand the purposes and the dialogue that

1 went behind the Endangered Species Act in 1973, that was the
2 intent of my testimony. And this law does not just say that
3 the Fish & Game Commission's regulatory process must abide by
4 the law. The issue is what does the law say. And the law does
5 not say that the decision must be based solely on sound
6 science. That's the critical distinction.

7 REPRESENTATIVE BARBIN: We have a federal law.

8 MR. JUGOVIC: I'm talking about the state law.

9 REPRESENTATIVE BARBIN: That federal law will have
10 to be contested in Federal Court. We have state laws. Those
11 laws have to be contested in State Court. The only purpose of
12 this hearing is to say whether state law should require the IRC
13 --- or the IRRC to be applicable to decisions that are made if
14 we're going to list another species in Pennsylvania as
15 endangered. And that's what we need guidance on. And I don't
16 know from your ---.

17 MR. JUGOVIC: With due respect, that's not the only
18 thing that this law does. And that's ---.

19 REPRESENTATIVE BARBIN: All right. Well, then
20 again, and with respect, if you have a specific question or you
21 believe there's a specific line in this bill that should be
22 changed, it would be helpful if you specifically set that out
23 in a letter to the committees so that we could look at that as
24 we're amending the bill. Because I think this bill will be
25 voted on.

1 MR. JUGOVIC: Perfect. I appreciate the invitation.
2 And as I said, I would welcome the opportunity to have a
3 continued dialogue as this moves forward.

4 CHAIRMAN CAUSER: Thank you, Representative Barbin.
5 Thank you, sir, for your testimony.

6 MR. JUGOVIC: Okay. Thank you very much. I
7 appreciate it.

8 CHAIRMAN CAUSER: Our next testifier is Mr. George
9 Ellis from the Pennsylvania Coal Alliance. Welcome, sir, and
10 you may proceed when you're ready.

11 MR. ELLIS: My pleasure. Good morning, Chairman
12 Causer, Chairman Miller, members of both the Environmental
13 Resources and Game & Fisheries Committee. My name is George
14 Ellis, and I'm president of the Pennsylvania Coal Association.
15 With me today is Kevin Garber, a partner with Babst Calland law
16 firm, who also serves as general counsel to PCA. And we
17 certainly appreciate this opportunity to testify in support of
18 Representative Pyle's House Bill 1576.

19 This measure comprehensively addresses what we
20 consider to be fundamental flaws associated with the listing
21 process for endangered and threatened species and wild trout
22 streams while providing a degree of regulatory certainty that
23 species so listed truly merit higher level of protections.
24 Under House Bill 1576, endangered or threatened and wild trout
25 stream designations are to be made through the rulemaking

1 proces, subject to review by the Independent Regulatory Review
2 Commission and the jurisdictional House and Senate standing
3 committees. Among other things, the legislative intent of the
4 Regulatory Review Act, which spawned IRRC, was to create a
5 process for ongoing and effective legislative review and
6 oversight --- that's what we're talking about --- and to foster
7 regulatory accountability.

8 Only two state agencies are currently included from
9 --- excluded from this process of accountability and oversight,
10 the Pennsylvania Fish & Boat Commission and the Pennsylvania
11 Game Commission. Consequently, the species --- the
12 commissions' species designations are neither subject to a
13 separate review by any standing legislative committee nor any
14 governmental body, for that matter, as are every other state
15 rulemaking. This lack of oversight and accountability runs
16 counter to recent trends for open and transparent rulemaking
17 procedures as a guarantee that all stakeholders are treated
18 fairly and as a check against the arbitrary use of power.
19 Accordingly, PCA supports these provisions and encourages that
20 these designations undergo the same level of public review and
21 accountability, as required of all other state agencies.

22 Do not misinterpret my testimony. I am not
23 suggesting that the duly-enacted laws under which the mining
24 industry must operate are improper or without merit, and we are
25 certainly not trying to destroy the habitat. We are simply

1 trying to rid ourselves --- we are not simply trying to rid
2 ourselves of statutory obligations to protect vulnerable
3 species. On the contrary, we recognize our legal and social
4 responsibility to extract coal safely while minimizing our
5 environmental footprint.

6 In PCA's opinion, though, IRRC has proven to be
7 invaluable in bringing state agencies to recognize certain
8 problems with their rulemaking that they would have otherwise
9 not recognized and simply requiring another set of eyes by an
10 independent body, as is every other rulemaking.

11 The species and wild trout designation process ---
12 wild trout stream designation process do not currently inspire
13 confidence by permit applicants and its end result. Attached
14 to my testimony is a case study of a number of wild trout
15 stream listings recently made by the Fish & Boat Commission
16 that illustrate how this process militates against open and
17 meaningful public review and comment.

18 This is not anecdotal and certainly not something
19 required of the federal government. This is a state issue.
20 The process in question proposes to designate 99 streams as
21 wild trout streams in one file, one notice to the Bulletin, and
22 it gave the public 30 days to respond. About two-thirds of
23 those streams were located in the Pennsylvania bituminous coal
24 fields. And the public notice advertising the proposal was
25 short of details other than simply identifying the counties in

1 which the streams were located. PCA petitioned the Fish & Boat
2 Commission to extend the deadline for comments. Grudgingly,
3 they did so, but they only provided an additional 30 days.

4 We also asked the Commission for supporting data
5 upon which it based its decision for the 68 streams and the
6 coal fields so we can do our own internal assessment, but we
7 received that information incrementally over a staggered time
8 period.

9 In short, of the 68 streams that we requested data
10 for that were listed as proposed, we received the FBC's, the
11 Fish & Boat Commission's final reports for only eight of those
12 streams. Undaunted, we pressed ahead with our comments on the
13 eight streams, but we were dismissed by the Commission, who
14 proposed the proposed listing as final.

15 The permitting impact of this --- of that decision
16 by the Fish & Boat Commission was to automatically classify any
17 wetland located in or along the flood plain of the reach of
18 those streams as exceptional value. This classification
19 dramatically raises the threshold for receiving a mining
20 permit.

21 Again, don't misread these comments as opposing
22 protection for exceptional value wetlands. However, industry
23 needs to be scientifically assured through an open and
24 meaningful public review process that what it is required to
25 protect warrants that level of protection. That is what we're

1 asking for. The only way to provide the assurances is to
2 include a check and balance system like IRRC at the end of the
3 designation process, as required of other state --- of all
4 other state agencies.

5 The bill also would allow specified persons access
6 to certain information on listed species. Such information
7 includes the specific areas of each listed species and the
8 critical habitat areas and the buffer zones created to protect
9 the species. The information is subject to confidentiality
10 provisions and the bill includes a civil penalty for violating
11 these provisions. This is important to our industry since the
12 commissions use buffer zones to disguise precise locations of
13 an endangered or threatened specie, making it very difficult to
14 anticipate permitting problems that we may encounter prior to
15 making a substantial investment in permit application.

16 Knowing the location of species could provide us
17 with options to either reconfigure the permit application to
18 avoid impacting the species and go around it, or frankly, to
19 decide, based on a cost/benefit analysis, whether to pursue a
20 permit application for the particular site.

21 In conclusion --- and I want to be clear because
22 there is a lot of misinformation being spread about the bill.
23 PCA views the intent of House Bill 1576 as simply letting the
24 sun shine on the process of designation. That's it. We have
25 an obligation to protect these species. We understand it, and

1 we do it. We just want to ensure that the process by which the
2 designations are made are done so properly, justifiable and are
3 part and parcel of the legislative oversight process, as every
4 other state rulemaking.

5 On behalf of PCA, I want to thank Representative
6 Pyle for introducing House Bill 1576 and for these two
7 committees to have the hearing on it. And we'll try and answer
8 your questions.

9 CHAIRMAN CAUSER: Thank you for your testimony.
10 First question, Representative Pyle?

11 REPRESENTATIVE PYLE: Thank you, Mr. Chairman. Not
12 so much a question, but the testifier just identified something
13 that I've heard as a recurrent theme in this hearing,
14 misinformation being put out. I was recently questioned by a
15 member of media out on the other end of the state that wanted
16 to know if it was my intent, as the prime sponsor of this bill,
17 to put an online website for everybody to be able to look at a
18 map of Pennsylvania and be able to go out and identify where
19 these endangered species are. Quite the contrary, Mr.
20 Chairman. I don't know where that came from. It's nowhere
21 within the legislative intent of this bill to assail any of our
22 endangered species.

23 Now, granted, in western Pennsylvania natural
24 resource recovery is big industry and employs an awful lot of
25 people. Well, my intention in framing this bill is not to

1 identify species on a website so people can go out and catch
2 them and we see them show up in the pet stores. It could not
3 be further from the truth.

4 Now, I do have a question for you, Mr. Ellis. You
5 identify --- and that speaks to my first question,
6 confidentiality provisions. This is not a come one, come all,
7 see where all these species are bill. Quite the contrary. I
8 feel this bill actually establishes greater protection and
9 keeping safe what we need to keep safe. You brought up a real
10 interesting point of this, buffer zones. Could you more
11 clearly explain that for the members of the Committee? What
12 ---?

13 MR. ELLIS: Buffer zones are like no mining zones
14 for us, okay.

15 REPRESENTATIVE PYLE: For coal, specifically.

16 MR. ELLIS: Right. And the --- the commissions use
17 those. The Fish Commission, in particular, uses those.
18 Instead of giving us precise locations of the species because
19 of their concern to release the information, they say if we're
20 going to be mining in this area, then the buffer zones --- this
21 is off limits. You can't mine there.

22 REPRESENTATIVE PYLE: Well, what are we talking,
23 like a mile or a quarter-mile ---?

24 MR. ELLIS: It depends. It varies. I mean, it
25 ranges all over. I mean, it's not --- there's not ---.

1 REPRESENTATIVE PYLE: There's not a consistency?

2 MR. ELLIS: There is no consistency. Talking to
3 other industries, there's no consistency within the industries
4 either. So it might be five miles for the coal industry. It
5 might be six miles for builders. It might be two miles for
6 gas. There doesn't seem to be any set uniform determination on
7 it that we know, that they've made public, for how they create
8 their buffer zones.

9 REPRESENTATIVE PYLE: Mr. Chairman, he just churned
10 up about ten more questions, but I'm not mentally organized
11 here. So you're saying --- just say Game Commission, you know,
12 plug in Fish Commission, if you like. If John has a --- is a
13 builder and Garth cuts timber, and they're both --- and they're
14 looking at a deal where he's going to go cut the timber, and
15 he's going to build houses when he's done, they can be playing
16 with two different sets of these buffer zones?

17 MR. ELLIS: That's correct, for the same parcel.

18 REPRESENTATIVE PYLE: For the same piece of land?

19 MR. ELLIS: That's correct. Depending upon the
20 industry, yes. At least that's what we have found using ---
21 using the diversity and then going to the commission and asking
22 them. And that's an answer we can't get. Why is the mining
23 --- and invariably, the mining industry's buffer zones are more
24 --- are longer than other industries and, you know, it's why,
25 but we can't get an answer.

1 REPRESENTATIVE PYLE: That's the end of my
2 questions, but Mr. Chairman, I think that really kind of
3 exemplifies why we need IRRC in this process. I'm not sure how
4 that doesn't abrogate the uniformity clause. Laws must apply
5 equally to all.

6 CHAIRMAN CAUSER: Thank you, Representative.

7 REPRESENTATIVE PYLE: Thank you, Mr. Chairman.

8 CHAIRMAN CAUSER: Thank you, Representative Pyle.
9 Representative McCarter?

10 REPRESENTATIVE MCCARTER: Thank you, Mr. Chairman.
11 Thank you, Mr. Ellis, for your testimony. And again, not to be
12 argumentative, but if I can understand a little bit on the
13 idea, and again, going back to the sound science piece that
14 we've heard, talked about it a little bit today, you wear
15 glasses like I do.

16 MR. ELLIS: Right.

17 REPRESENTATIVE MCCARTER: You go to an
18 ophthalmologist.

19 MR. ELLIS: That's correct.

20 REPRESENTATIVE MCCARTER: You hope that that
21 ophthalmologist, and you probably rely upon his expertise when
22 it comes to areas such as glaucoma, macular degeneration and
23 other particular areas as a trained individual to do that, and
24 yet part of this process that we're now talking about, under
25 sound science, you would subject, if, in fact, you had to go

1 before the IRRC Commission, to someone who is not trained in
2 those areas to make a final determination as to a treatment
3 possibly that you would have, the same as I would.

4 MR. ELLIS: It's simply not that easy, though,
5 Representative. I have the option that if I think my eye
6 doctor --- if I think my eye doctor isn't helping me, I can go
7 to somebody else. And we don't have an option, okay. We have
8 to live with one body's decision in which there is no
9 oversight. And everybody's --- there's this assumption that
10 the science is definitive, okay, but I think --- and I think
11 the --- the commissions are going to follow me on this. God
12 help my reputation, but they will follow me on this. And I
13 think they will even tell you that a lot of what they do is
14 based on professional judgment. Professional judgment is good,
15 but it is subjective, too, and so --- that's all we're saying
16 about this bill is another set of eyes.

17 You know, if I can, Mr. Chairman, the legislature
18 about four years ago passed comprehensive mine safety
19 legislation. There's probably nothing more complex,
20 expertise-driven, than an underground mine and probably nothing
21 more important than the protection of miners' safety. Now, the
22 bill, which was worked on by the legislature, the UMW and PCA,
23 in terms of a regulatory review process, we decided that ---
24 this was everybody, that we would give this --- invest the
25 regulatory process in kind of a quasi body, consisting of coal

1 operators, UMW and DEP, under --- under the guise that these
2 are the stakeholders. I mean, nobody in the state knows more
3 about them than them. And if they can reach a conclusion, it's
4 probably right. Despite that, there was also an insistence by
5 everybody that those regs go through the regulatory review
6 process. And lo and behold, some of their regulations --- and
7 again, I can't tell you how eso --- maybe esoteric isn't the
8 right word, how complicated it is, but it went through the IRRC
9 process. And IRRC made a number of changes that neither the
10 operators nor the mine workers or DEP considered and made that
11 a better rulemaking. So there's always room for improvement.
12 You know, sometimes --- I don't know what it is, you can't see
13 the forest before the trees or something like that? That
14 happens all the time. And all we're saying here is, you know,
15 treat the endangered and threatened specie designation process
16 the way you treat the health and welfare of the citizens, the
17 stream use designations by DEP. Why be selective? That's all
18 we're saying.

19 REPRESENTATIVE MCCARTER: Okay. And I appreciate
20 that. I really do. And I thank you for your answer on that.
21 I think you've raised, you know, in a sense the --- again, the
22 broader issues involved here of how we treat science, in
23 general, ---

24 MR. ELLIS: Right.

25 REPRESENTATIVE MCCARTER: --- and whether, in fact,

1 we see the people who are the, quote, experts as experts or not
2 as experts. Or as you're suggesting, the people who are
3 engaged in mining, obviously in coal mining, should be treated
4 as the experts in terms of that. As a former teacher, you
5 know, as teachers, we always wanted to be treated as the
6 experts in education. But, unfortunately, there's things
7 called legislators and other things that get in the way of
8 those particular determinations, as we all know.

9 MR. ELLIS: Well, incidentally --- incidentally,
10 IRRC also does academic standards, too.

11 REPRESENTATIVE MCCARTER: Thank you on that. The
12 point is, though, I think that the eyes that have to look upon
13 this, again, have to be those that have some expertise.

14 MR. ELLIS: Yes.

15 REPRESENTATIVE MCCARTER: The IRRC process, and even
16 in their testimony that they submitted for the hearing today,
17 have innumerable questions really about this legislation and
18 whether, in fact, they can carry it out. And in fact, one of
19 their phrases is basically we're not sure how the listings take
20 place in looking at this legislation. So they're the experts
21 in terms of their own process, yet they don't understand the
22 process that's being used here. So there are lots of
23 questions. A lot of that centers around --- again, I think we
24 go back to the idea of whether we trust science or we don't
25 trust science. Thank you.

1 MR. ELLIS: Thank you.

2 CHAIRMAN CAUSER: Thank you, Representative
3 McCarter. And thank you, Mr. Ellis, for your testimony.

4 MR. ELLIS: Thank you.

5 CHAIRMAN CAUSER: We're going to take a five-minute
6 break.

7 SHORT BREAK TAKEN

8 CHAIRMAN CAUSER: Our five minutes having expired,
9 we'll call the meeting back to order. And our next testifiers
10 include our agency panel, Mr. John Arway, the Executive
11 Director of the Pennsylvania Fish & Boat Commission, and Mr.
12 Carl Roe, the Executive Director of the Pennsylvania Game
13 Commission. Both gentlemen testified at our first hearing and
14 have requested to testify at this hearing, also. And I
15 understand that you have additional information to supply the
16 two committees, so we look forward to your testimony. So I
17 guess we'll start with Mr. Arway.

18 MR. ARWAY: Good morning, Chairman Causer and Miller
19 and members of the Environmental Resources & Energy Committee
20 and the Game & Fisheries Committee. My name again is John
21 Arway. I'm Executive Director of the Pennsylvania Fish & Boat
22 Commission. I'd just like to acknowledge two Commissioners we
23 have in the audience, Commissioner Rocco Ali, as well as
24 Commissioner Bill Sabatose. They're actually the decision
25 makers that make the decisions about threatened and endangered

1 species and wild trout stream designations that we're here to
2 discuss today. They, along with eight other board members, we
3 have a total of ten on our board, make those regulatory
4 decisions that we're about to talk about.

5 Thank you for the opportunity to join you again and
6 address some of the points that I did not have time to cover on
7 August 26th, when we were in Pottsville. In the spirit of
8 Representative Pyle's earlier opening remarks --- I was
9 listening, Jeff, ---

10 REPRESENTATIVE PYLE: Thank you.

11 MR. ARWAY: --- I guess you can tell --- you can
12 call this testimony the remaining four-and-a-half yards out of
13 the full nine.

14 It appears that many members support this bill
15 because of their concerns over federally-listed species,
16 specifically the Indiana Bat. If that is the case, we don't
17 understand why the legislature would want to change the state
18 program that is intended to keep species off the federal list.

19 At the first hearing on this issue, Representative
20 Pyle clarified that his intent with House Bill 1576 was not to
21 limit protection to only federally-listed species but to allow
22 agencies to designate rare species within our borders as
23 threatened or endangered as well. While we appreciate that
24 clarification, we are still concerned that the bill, as
25 written, could remove the agency's authority to list state

1 species.

2 The intent to allow the continued listing of state
3 threatened and endangered species is not mirrored in the
4 structure laid out by the bill, which runs counter to the
5 effective program that is already in place. I've covered many
6 of these deficiencies in my previous remarks. The one thing I
7 did not emphasize is that the adequacy of state programs is
8 part of the calculus for federal listings. A state with
9 greater conservation measures in place is looked upon more
10 favorably by federal decision makers since it gives them a
11 higher level of confidence that the species will not become
12 threatened or endangered locally and contribute to the need for
13 a federal listing. Therefore, a weakening of Pennsylvania's
14 T&E species program would only increase the chance of the very
15 federal intervention that contributed to the introduction of
16 this bill in the first place.

17 With respect to legislative intent, there are other
18 provisions of the bill that are equally troubling, particularly
19 Section Six and Section Nine. Section Six provides, quote,
20 when reviewing applications for permit --- permits, approvals
21 or other authorizations or taking actions, state and local
22 government agencies shall consider impacts only to listed
23 species and their critical habitats included in the centralized
24 database. This section goes on to state, quote, permits,
25 approvals, authorizations or regulations shall not require

1 persons to conduct field surveys or other activities to
2 determine or evaluate the presence of species or their habitats
3 unless acceptable data exists indicating the presence of a
4 listed species in the area, end quote. This approach deviates
5 from the current practice and law. The current centralized
6 database, known as the Pennsylvania Natural Diversity
7 Inventory, PNDI, includes records of both federal and state
8 listed T&E species. However, PNDI also contains thousands of
9 records pertaining to unlisted but otherwise rare species in
10 Pennsylvania that warrant protection based on current law and
11 regulation. And these rare unlisted species, often referred to
12 as species of special concern, are given consideration, and
13 thus protection, under numerous Department of Environmental
14 Protection statutes, regulations and policies. And I cite
15 those in my testimony.

16 Section Nine of House Bill 1576, however, repeals
17 all acts or parts of acts insofar as they are inconsistent with
18 the Endangered Species Coordination Act. Therefore, this
19 repeal or provision will effectively revoke DEP's ability to
20 protect not only these rare and unlisted species but also
21 common species, such as our state fish, the Brook Trout.

22 I would like to repeat a point that I made in my
23 prior testimony. If we effectively conserve species at the
24 state level, we can prevent regional and range-wide declines
25 that necessitate federal listings which lead to more costly,

1 time consuming and difficult federal requirements. In my
2 previous testimony I also note that it would be virtually
3 impossible to reevaluate the listing status of 62 threatened
4 and endangered species under our agency's jurisdiction within
5 two years. The listing process we employ includes scientific
6 data collection by staff or our contractors, running the
7 species through the International Union for Conservation of
8 Nature Model, peer review by the Pennsylvania Biological
9 Survey, public involvement, and action by the Commission's
10 Board at two public meetings. The same staff who performed
11 these duties also performed the PNDI searches and assists
12 industry with consultation, site reviews and negotiations.
13 Reevaluating 62 species within two years, using current
14 methods, is simply not feasible. In addition to the
15 administrative and public involvement steps in the listing
16 process, it can take three to five years to assess the status
17 of one species. Some species with large ranges within the
18 Commonwealth take closer to a decade to understand their
19 current status. It took 40 years to evaluate the 62 species on
20 the list. And in recent years, we have removed almost as many
21 that have been added --- as have been added.

22 The workload to add or remove one species following
23 the current method is already significant. The workload to
24 complete the two-year process required in House Bill 1576 would
25 overwhelm our agency. This would not serve conservation or

1 society but would bog down the process and whittle away the
2 species from the list, thereby eliminating any change for
3 effective protection and conservation. Again, this could make
4 federal listings more likely, since federal level listings are,
5 in part, based on the sufficiency of the state program to
6 protect those varied species.

7 Our staff is constantly looking for ways to improve
8 program efficiency, both internally and as an active member of
9 the Pennsylvania Natural Heritage Partnership, or PNHP.
10 Whether through workload analysis or proactive improvements to
11 environmental review systems, we seek to make the most of
12 limited staff and financial resources while being responsive to
13 industry. When we hear about an issue or a problem that needs
14 to be fixed, we deal with it head on. The reality is that this
15 is becoming increasingly difficult as we face dwindling
16 resources and reduced staff budgets.

17 I have briefed the Game & Fisheries Committee and
18 spoke with many of you personally about our agency's need for
19 alternative funding to implement the duties assigned to us by
20 you. I am hopeful that one positive outcome of the public
21 debate sparked by House Bill 1576 will be a renewed commitment
22 to replicating the models we have in place under Act 13 for
23 Marcellus Shale permit reviews, the Pennsylvania Department of
24 Transportation for transportation project reviews, and with DEP
25 for coal mining reviews. In each of those three cases, we

1 worked directly with other agencies and industry from the start
2 of the permit process through pre-application and project
3 scoping field reviews. And this allows the resource and
4 regulatory agencies to work with applicants to discuss project
5 details, seek clarification, and gain insights into potential
6 regulatory concerns before permits are applied for but
7 consistent with our laws and regulations. This early
8 coordination leads to more timely and better permit decisions
9 consistent with the laws and regulations that we have.

10 Our permit review times bear this out. While it
11 takes our staff an average of 30 days to complete PNDI reviews,
12 in general, Marcellus reviews average less than 20 days. And
13 PennDOT reviews average less than 15 days. And because of
14 these dedicative funding streams, we can also expedite Chapter
15 105 reviews, which take an average of 15 days for Marcellus and
16 9 days for PennDOT. Our track record shows that we are not the
17 obstacle that some have claimed us to be.

18 We would welcome the chance to talk with you about a
19 similar system to enhance the services we provide to other
20 industries that don't pay their way, which continue to account
21 for the bulk of our permit review workload, yet those permit
22 reviews are paid for by angler and boater dollars rather than
23 being incorporated as a cost of doing business in Pennsylvania.
24 While much of the media attention is focused on T&E species, we
25 remain equally concerned about the prospect of subjecting wild

1 trout stream designations to the provisions of the bill.

2 The unnecessary delays and potential politization of
3 these science-based decisions would have ramifications to
4 individuals beyond those who care about wild trout. To
5 postpone or never require the levels of protection dictated by
6 scientific data could lead to increased water quality
7 degradation in headwater areas where most wild trout streams
8 are found, which would impact downstream communities, most
9 notably those which rely on these streams as sources of their
10 drinking water supply.

11 We were happy to have Committee Members Gabler and
12 Heffley join us in the field on recent wild trout stream
13 surveys and want all of you to know that you have an open
14 invitation to join us in the field to see the rigor with which
15 these streams are assessed. That's how we produce the science
16 that we use to make these decisions.

17 In closing, threatened and endangered species and
18 wild trout streams deserve the utmost protection, and the
19 current --- and the current listing and designation systems
20 should not be changed. These decisions about our most
21 vulnerable natural resources are already being made based on
22 sound science with the utmost attention paid to detail analysis
23 and data and completed using an open and transparent public
24 process. To pass House Bill 1576 would be to reverse 40 years
25 of scientific collaborative and cooperative species

1 conservation and the work that your predecessors produced
2 during their tenure with our General Assembly. Thank you again
3 for the chance to join you today, and we'd welcome and we'd be
4 happy to answer any questions you may have.

5 CHAIRMAN CAUSER: Thank you, Mr. Arway. We'll hold
6 the questions until the end. So I'll ask Mr. Roe to proceed.

7 MR. ROE: Chairman Causer, Chairman Miller, members
8 of the committees. It's a pleasure to be here. I provided a
9 letter last week, and I'll just paraphrase some of those issues
10 that I provided in those letters.

11 I would like to take this opportunity to offer
12 comment regarding several statements that were made at the
13 recent hearing on the committees on House Bill 1576. This
14 legislation is a significant measure that not only alters
15 current regulatory procedures but also strikes at a fundamental
16 relationship between the natural resource agencies, state
17 government and the legislature. With that in mind, facts do
18 matter.

19 It was stated several times during the hearing that
20 the Game Commission decisions are made in secret and there is
21 no mechanism to appeal them. The Commission process for
22 promulgating a regulation is wholly transparent, requiring
23 notice to be published in the Pennsylvania Bulletin and two
24 separate votes at two separate meetings. Additionally, our
25 agenda is placed on our website about two weeks prior to the

1 Commission meeting for the public to, in fact, view those
2 things that are being proposed.

3 Each meeting is separated by a period of about three
4 months, in which time we receive public comment through emails,
5 through letters and directly by people appearing before the
6 Board of Commissioners to present their testimony. Then, at
7 the second meeting, when the regulation is finally promulgated,
8 I would offer that the --- the Independent Regulatory Review
9 Commission for game issues makes that vote. The agency cannot
10 promulgate a regulation on its own. So in essence, we are
11 following the same process as DCNR, as other state agencies.
12 We just use a different Independent Regulatory Review
13 Commission that is nominated by the Governor and ratified by
14 the Senate, but it's a little bit different than how IRRC
15 members are, in fact, appointed.

16 Once a regulation has been adopted, any citizen may
17 challenge its validity. An appeal may be brought directly to
18 the Commission or to the Commonwealth Court. If a regulation
19 is appealed, the Commission must be able to provide evidence
20 indicating that the regulation was not arbitrary or capricious
21 or an abuse of discretion. Throughout my tenure as Executive
22 Director, there were instances in which regulations were
23 challenged in court, and the Commission's regulations were
24 found to meet the legal standard and were upheld.

25 It was apparent at the hearing that there was

1 confusion regarding the environmental review process and
2 specifically the Game Commission's role in it. The Game
3 Commission does not approve or deny permits for construction on
4 natural resources development in the Commonwealth. By law,
5 that responsibility falls under the purview of the Department
6 of Environmental Protection. One of the criteria DEP will
7 consider when evaluating a permit is whether the proposed
8 project will have an impact on threatened or endangered
9 species. To assist in that role, the Game Commission will work
10 with the applicants on identifying the presence of T&E species
11 and will provide best management practices on how to avoid or
12 minimize any detrimental impacts. The Commission's role, in
13 essence, is similar to that of a consultant. As we earlier
14 stated, the PGC cannot deny a permit. The PGC cannot force an
15 applicant to take action. Whether or not the permit is
16 approved or denied is wholly the decision of DEP.

17 To continue on this important point, in
18 conversations with members about this bill, I have heard rumors
19 of shakedowns and blackmail. Stories are circulating about the
20 Commission forcing applicants to build roads, buy land or do
21 the Commission's bidding to win approval. I emphatically say
22 that these rumors are false. Not only does the Commission not
23 have approval authority, but to act in that manner runs counter
24 to all we do to fulfill our special mandate. Our interests are
25 in working with the applicant on ways to identify the presence

1 of T&E species and then to minimize the impacts to those
2 species. Any rumors you have heard to the contrary are simply
3 not true.

4 Many of the issues related at the last hearing were
5 related to the Indiana Bat, a federally listed species. The
6 issues described were from the U.S. Fish & Wildlife Service,
7 not the Pennsylvania Game Commission. This legislation would
8 not change any of those issues.

9 It is also important to note that this permit review
10 process that is now working presently would be unchanged by
11 House bill 1576 if it became law. DEP would still require an
12 applicant to work with the PGC on identifying and protecting
13 threatened and endangered species. As I have stated
14 previously, the Commission has significant reservations about
15 House Bill 1576, specifically the impact it would have on our
16 ability to protect the most vulnerable species in the
17 Commonwealth, as well as the potential loss of federal funds.
18 I appreciate your attention on our effort to correct the
19 record, and I'll be glad to answer any questions.

20 CHAIRMAN CAUSER: Thank you to both of you gentlemen
21 for your testimony. Multiple members have questions. I'll go
22 to Chairman Miller first.

23 CHAIRMAN MILLER: Thank you, Chairman Causer. A
24 quick question. The scientific data in the review, look,
25 gentlemen, I believe if I call either one of you, you will make

1 your scientists available to me. It's been that way through
2 the past. But at what point is the scientific data that you
3 use public information? At what point does the public know
4 what your scientists have looked at and what they base their
5 decisions upon? Is it open records? Is it subject to being
6 open to the public? And at what point does that occur?

7 MR. ROE: Well, for us, we had hoped that the
8 research and everything would be concluded so we can draw a
9 conclusion. And in my mind, at that point in time it's
10 available to the public. The majority of our information is on
11 our website.

12 MR. ARWAY: I guess it was recognized in the recent
13 changes to the Right to Know Act that that information can be
14 kept confidential because of certain species information that
15 could be --- we got species like the bog turtle that have black
16 market value. And we don't want to reveal those locations
17 because those populations would be exploited by illegal
18 collection. They are a federally-listed species.

19 We do keep certain information confidential pursuant
20 to the act that you passed, the Right to Know Act, but there's
21 other information about other more common species or less rare
22 species that we open up for public disclosure. So it could be
23 a combination of the two. And a lot depends upon the
24 importance of keeping that information confidential and
25 protected pursuant to Right to Know.

1 I would also like to point out that, you know, it's
2 not just our scientists that collect the information. I think
3 it's ironic that we hold this hearing at IUP, because a lot of
4 the information that we have to base some of our decisions
5 about state-listed herps, herptiles, reptiles and amphibians,
6 was produced by a professor here at IUP by the name of Dr. Art
7 Hulse, who wrote a herpitological atlas that describes the
8 locations of rare herps across Pennsylvania. And that came out
9 as a publication of the Pennsylvania Biological Survey. So
10 that scientific information is produced by people like Mel
11 Zimmerman and Peter Petokas at Lycoming College and Fred
12 Brenner at Grove City and Dr. Carline and Wagner and Stauffer
13 at Penn State, Todd Hurd at Shipp, Ed Masteller at Penn State
14 Behrend. Professors all around the network of academic
15 universities around our state are really our scientifics, our
16 state scientifics that add to the database that we use to make
17 these critical decisions. So it's not just agency scientists
18 who contributed. Industry scientists contributed through
19 consulting firms that do surveys for various industries over
20 time. All that information is collected. Certain information
21 is released. Other information is kept confidential because of
22 security reasons for the species.

23 MR. ROE: And I would add, in the case of the three
24 bats that were --- that generated a lot of this interest, that
25 was brought to us by the Pennsylvania Biological Survey. They

1 provided the initial data, and we were, in fact, going out and
2 verifying that data and what the best management practices
3 might be able to do to accommodate that.

4 CHAIRMAN MILLER: And based on your testimony at
5 both hearings, I understand you have some issues with the way
6 some of the language is written, but I guess what I keep coming
7 back to is this whole IRRC review. You view it as an added
8 layer. But based on the IRRC review process and the time that
9 it takes and the fact that you heard me mention before, in the
10 15 years in the legislature, I don't know of any IRRC-approved
11 regulation being overturned by the legislature. I actually
12 think it helps to backstop the process. I guess you don't
13 agree with that. But it does because of the fact I think
14 there's another set of eyes looking at it, and it crosses ---
15 it just forces everybody to dot their Is, cross their Ts. And
16 IRRC basically doesn't look at the scientific data. They look
17 at the consistency of how the regulations are written. So it
18 really is not that we're trying to take on scientific people
19 and assign them that role. So I don't quite understand what
20 the objection is.

21 MR. ARWAY: If I can speak to it quickly,
22 Representative Barbin talked about the court being a backstop.
23 The court's already a backstop to the system, so having IRRC
24 involved in the process doesn't create another backstop. Our
25 decisions could be appealed to Commonwealth Court just like any

1 decision. So very rarely do we get challenged on those
2 decisions because they're based on sound science.

3 I liken this process as to trying to overhaul a
4 motor by going through the exhaust pipe. It really doesn't
5 matter --- you could probably do it. I'm not sure if you can
6 or --- but you can probably do it, but the reality of it is
7 IRRC is necessary for certain purposes. And those purposes are
8 to do a public interest review and look at social and economic
9 considerations and making sure that the decisions that we're
10 making as a government are consistent with what the public
11 wants. However, the decisions that we're making are just based
12 on science alone. In and of themselves, a listing of a species
13 that's threatened and endangered doesn't affect anything else
14 unless DEP or another regulatory agency develops a rule that
15 talks about how we need to protect those species. Those rules
16 go through IRRC, those public ---. So if we put out --- we
17 decide wetlands within the flood plain of a wild trout stream
18 need to be protected as EB, those rules went through IRRC, and
19 the public decided they were properly --- properly done. The
20 listing of the species themselves have absolutely no
21 implications to the public until those other rules are
22 promulgated. So, with that, I think we have a process to
23 promulgate those rules through our Board of Commissioners. It
24 would be redundant to do it again through a process like IRRC.
25 And furthermore, it's unnecessary to do it through the process

1 because, as George Jugovic testified, those decisions are based
2 on sound science. And economics and social considerations
3 shouldn't have an influence about whether or not a species is
4 rare or not, because it's based on the science of the species,
5 not about what the public wants or doesn't want. The public
6 --- whatever the public wants or doesn't want goes through IRRC
7 through the DEP rulemaking process and the other laws that we
8 have, like the 105 --- the Dam Safety and Water --- and
9 Encroachments Act and the coal mining regulatory --- SMCRA, Oil
10 and Gas Act. All those rules that DEP promulgates actually go
11 through IRRC and serve as the screen for making sure society
12 protects those species the way we expect to protect them.

13 MR. ROE: And I would only offer it's just redundant
14 government. I mean, the Board of Commissioners of both
15 agencies are an Independent Regulatory Review Commission, by
16 definition, by statute. So we're having an Independent
17 Regulatory Review Commission review the actions of another
18 Independent Regulatory Review Commission.

19 CHAIRMAN MILLER: Interesting perspective.

20 REPRESENTATIVE PYLE: That is interesting.

21 CHAIRMAN MILLER: Thank you. Thank you, Mr.
22 Chairman.

23 CHAIRMAN CAUSER: Thank you, Mr. Chairman.
24 Representative McCarter?

25 REPRESENTATIVE MCCARTER: Thank you, Mr. Chairman.

1 Just to clarify on a couple of points, if this bill passes in
2 its current form, would it --- what would be the impact on the
3 hundreds of species I assume that are going through the process
4 right now of consideration, you know, either the biological
5 teams or others have identified? What would happen to the
6 process for those particular species that are being considered
7 through both departments?

8 MR. ARWAY: It would stop because our view of the
9 bill in its current form would just --- it's just that it would
10 only apply to federally-listed species. If we would look at
11 the global range rather than the Pennsylvania range, like we
12 had talked before, unless that's changed, it would only leave
13 us with the federal list.

14 REPRESENTATIVE MCCARTER: So all of that work that's
15 been done over the last several decades, in some cases, would
16 be put on hold, nothing would happen with those particular ---

17 MR. AWAY: Correct.

18 REPRESENTATIVE MCCARTER: --- species? If I could
19 go back then for a second point, to the IRRC problems, I'd like
20 to follow up on the Chairman's questions there. IRRC has
21 submitted testimony that suggests, for instance, that there are
22 different definitions within this bill and in the IRRC process.
23 Those definitions cause conflict in how, in fact, they would
24 look at the criteria. They have criteria that are different
25 than are laid out in this particular bill. Do you have any

1 suggestions as to how that would be resolved?

2 MR. ROE: No.

3 REPRESENTATIVE MCCARTER: There's also ---.

4 MR. ROE: I don't. I mean, it's --- it's a --- it
5 was a quite compelling document I thought in reading it. It
6 --- it's --- it can be very confusing to figure out how you
7 would minimize those differences.

8 MR. ARWAY: And really I think that goes to the roof
9 of misinformation. Nobody really fully understands the
10 implications to this legislation because it does have --- if
11 you read it, you can read it from a variety of perspectives.
12 And we all read it from our own perspective, which is why you
13 hear the different testimonies that everyone has about the
14 differences in the bill.

15 REPRESENTATIVE MCCARTER: And in enforcement issues
16 they also raise that concern also within their testimony, that
17 there's no set criteria for the agencies for enforcement and
18 who would take over that role. At the present moment, in terms
19 of enforcement, how does that work?

20 MR. ARWAY: Well, we have independent enforcement
21 authority for the animals under our jurisdiction. And that was
22 assigned to us by you, by the General Assembly.

23 REPRESENTATIVE MCCARTER: But this legislation would
24 put that in jeopardy then.

25 MR. ARWAY: It would.

1 REPRESENTATIVE MCCARTER: And the last point, I
2 guess, is the question really of, you know, how in the IRRC
3 process they raise the question --- let me see if I can quote
4 it exactly here. How would listings occur under this
5 legislation?

6 MR. ARWAY: I would say they wouldn't.

7 REPRESENTATIVE MCCARTER: Thank you.

8 CHAIRMAN CAUSER: Representative Pyle?

9 REPRESENTATIVE PYLE: Thanks, Chairman. I got a few
10 questions. Scientific review, sound science, how exactly does
11 one locate and identify an endangered species for Fish & Boat?
12 What's the actual boots-on-the-ground process?

13 MR. ARWAY: Well, I mentioned some of the colleges
14 and universities who we work with.

15 REPRESENTATIVE PYLE: Can you more clearly define
16 colleges and universities? I mean, I respect learned academia
17 as much as anybody. Are you saying there's university
18 professors standing in the streams looking for stream trout?

19 MR. ARWAY: Absolutely, and hellbenders and
20 dragonflies and Bog Turtles?

21 REPRESENTATIVE PYLE: College students?

22 MR. ARWAY: They're assisted by their students, yes.
23 They all collect ---.

24 REPRESENTATIVE PYLE: Are those students dependent
25 on grades from those professors whether or not they do or do

1 not find these species?

2 MR. ARWAY: I think you'd have to ask the
3 professors.

4 REPRESENTATIVE PYLE: I think it's ---.

5 MR. ARWAY: We're here at an academic university. I
6 think you could ask the professors that are here. But you
7 know, the professors are responsible for the data that they
8 submit to us for review.

9 REPRESENTATIVE PYLE: Are those people contracted by
10 you? Do they volunteer? What do they do?

11 MR. ARWAY: A little --- we have volunteers. We
12 have contracted studies that go on based on the animals that
13 we're interested in learning more about.

14 REPRESENTATIVE PYLE: And what your assertion is and
15 what I felt one of the pitches --- the good pitches of this
16 bill was is we ask you to show proof. Show us those things are
17 actually there where you say they are. Using that example in
18 the current system, I can prove every aquatic species in the
19 state is extinct, because they're not right there.

20 Let's take the Allegheny River as an example. Pool
21 Six, the one I live on, we have --- this is just off the top of
22 my head, and a while since I've dealt with it, sheepnose
23 mussel, rabbitsfoot mussel, salamander mussel, rayed bean
24 mussels --- am I missing any?

25 MR. ARWAY: A few more species, yes.

1 REPRESENTATIVE PYLE: Quite a few?

2 MR. ARWAY: Yeah.

3 REPRESENTATIVE PYLE: What about river otters?

4 MR. ARWAY: No, that's Carl.

5 MR. ROE: That's mine.

6 REPRESENTATIVE PYLE: Are they endangered?

7 MR. ROE: No.

8 REPRESENTATIVE PYLE: What do they eat?

9 MR. ROE: A lot of fish.

10 REPRESENTATIVE PYLE: A lot of river mussels, too,
11 don't they?

12 MR. ROE: I'm sure. I mean, they ---.

13 REPRESENTATIVE PYLE: So what do we do in a case
14 where we have two endangered species competing for the same
15 habitat? What do we do? Do we just back away and, as the
16 earlier testimony brought up, we create a buffer zone? How big
17 would a buffer zone for that be? Because I live about three
18 blocks off the river.

19 MR. ROE: Well, first of all, otters aren't
20 endangered, so ---.

21 REPRESENTATIVE PYLE: So they can hunt the
22 endangered species with impunity?

23 MR. ROE: No, otters are not available to be taken
24 right now. But as a result of our management plan that's being
25 done right now, I would offer in the next few years you may see

1 an otter season.

2 REPRESENTATIVE PYLE: No. I'm saying these otters
3 hunt and aggressively eat river mussels, as was the case on the
4 Freeport Bridge project not too long ago, if I'm not mistaken.

5 MR. ARWAY: Yeah. But typically, when mussels are
6 rare, it's hard for otters to find them. They find the common
7 mussels to eat more frequently than they find the rare mussels.
8 And we've got a saying in the science that says the presence of
9 absence doesn't indicate the absence of presence. So using
10 your ---.

11 REPRESENTATIVE PYLE: So we can use imaginary
12 figures? Even though we have no evidence that they are there,
13 we can still assume they're there?

14 MR. ARWAY: Oh, absolutely not. For example, let's
15 just talk about Pool Five, which is just downstream at your
16 ---.

17 REPRESENTATIVE PYLE: Under Freeport, right.

18 MR. ARWAY: On the Allegheny, right here. And just
19 this week the Fish & Wildlife Service found a rayed bean in
20 Pool Five. We didn't know the rayed bean was there before as a
21 federally-listed threatened and endangered species. So now
22 that we know the rayed bean is there, new rules apply to what
23 goes on in Pool Five, the Allegheny River, because of the
24 federal rules that come with the listing of a federal species
25 and the finding --- the new finding of it. Prior to that, we

1 didn't know the rayed bean was in Pool Five, but we do now.

2 REPRESENTATIVE PYLE: Well, that brings up an
3 interesting question. What would happen if you'd find these
4 rayed beans, which I'm told looks like a piece of gravel with a
5 stripe essentially, not much bigger, what would happen if you'd
6 find them up in Ten or Nine? Does that still mean Six is like
7 their exclusive habitat?

8 MR. ARWAY: No. It's about their range, you know,
9 how far they extend up and down the river and the range of
10 habitats that they occupy, not just about a specific location
11 where they're found.

12 REPRESENTATIVE PYLE: Okay. Applying that standard,
13 what is the range? Because I'm curious. They shut my river
14 down, and I'm mad about it. I really am. The Allegheny River
15 that I grew up on had a nine-foot channel. We haven't been
16 able to dredge it for 30 years, which has caused it to silt in,
17 and that channel is now at four or less. Okay. I get in a
18 pontoon boat with my buddy Cal (phonetic) and we can drive to
19 Kittanning. We can't cross the river from side to side.

20 Now, I understand that there's a lot of supposition.
21 And I don't mean to put our federal problems on our local guys
22 because I think for your mission you're very good at what you
23 do. You go find them and then draw a circle around them and
24 say don't disturb them. How big's that circle? I come back to
25 the original question. Because I've got seemingly every

1 endangered species of river mussel on earth living in Pool Six
2 in great abundance. Now, I'm aware that a few of those species
3 have been found up above Pool Nine. So again I ask how big is
4 the circle? How long is the range? Any answer?

5 MR. ARWAY: Well, it depends on the species because
6 some circles vary depending upon the range. For example, a
7 plant can't move, so the circle around a plant would be much
8 smaller than around a bog turtle, which can move from wetland
9 to wetland maybe in a two-mile radius. But a fish, for
10 example, can swim farther than a bog turtle can. So a lot
11 depends upon the species. A bat can fly farther than a fish
12 can swim. So it depends on the species.

13 REPRESENTATIVE PYLE: And it keeps coming back to my
14 original question. How big do we draw the circle?

15 MR. ROE: It depends upon the species and the
16 activity. If I'm putting up a house and I go through a
17 process, the impact of that house on the species or the
18 environment of that species is pretty minimal. And we do it on
19 game land, and we do a 150-acre --- or how should I call it,
20 rehab project for mining across there, rehabilitation, the
21 impact of the 150 acres on a species, and its zone would be
22 much greater. So you can't just say it's a cookie-cutter
23 approach.

24 We're working right now to build polygons rather
25 than circles. We have a major commitment to say, okay, look at

1 this species, look where it is, look at the environment around
2 it. What does that mean? And I'll give you an example of bats
3 and foraging area. Rather than just taking a ten-mile or a
4 five-mile circle and putting it around a bat location, if the
5 bottom half of it is developed property, clearly there's not
6 foraging that much in developed property. If the northern part
7 of that circle was, in fact, forest, where it is foraging
8 activity, it wouldn't be a full circle in the future. It would
9 only be the polygon where the activities or an environmental
10 impact is. So we're working to make this more finite as far as
11 defining what the impact of that species is and the activity on
12 that species. Because we don't like the cookie-cutter approach
13 because, to be very frank with you, federal government used a
14 cookie-cutter approach. And as I've testified before, we have
15 tens of thousands of acres that we deal with that we can't
16 operate on because of the federal restrictions. And we have to
17 go through it, just like industry does, to appeal that activity
18 to U.S. Fish & Wildlife. And sometimes we're successful;
19 sometimes we're not. I've sat with industry with U.S. Fish &
20 Wildlife appealing a process that was great for state bats. In
21 other words, a hibernaculum that was being purchased by a
22 company to remediate a situation, and they couldn't get
23 permission after three-and-a-half hours of negotiation.

24 REPRESENTATIVE PYLE: So maybe we could get back to
25 that state-exclusive list. Could I go log onto a website right

1 now and see this thing?

2 MR. ROE: Oh, absolutely.

3 REPRESENTATIVE PYLE: I could?

4 MR. ROE: Yeah.

5 REPRESENTATIVE PYLE: Maps, where they're located?

6 MR. ARWAY: No.

7 MR. ROE: No.

8 MR. ARWAY: You can make a list ---.

9 REPRESENTATIVE PYLE: No, I appreciate that because
10 that's some misinformation being put out right now. There's
11 folks that seem to think I want to put all these species up on
12 the internet for folks to go out and catch in big nets and sell
13 on eBay, and this bill could not be further from that truth.

14 Second, that we've dealt with forfeiture of
15 Pittman-Robertson funds, which are near and dear to me because
16 they are the ones that pay for a lot of hunter safety ed. Now,
17 I'm curious. When you pull that gun for hunter safety ed, what
18 do you expend that money for? Because I remember a couple of
19 years ago one of my local clubs teaches about 400 kids every
20 cycle, asked me to drive out to Harrisburg and bring back about
21 85 cases of documents for them, which I did. It cost me a
22 U-Haul. Okay. Couldn't fit them all into my Jeep. So what do
23 you expend that money for?

24 MR. ROE: In reality, part of those publications.
25 We put about 35,000 to 40,000 people through hunter/trapper

1 education each year, the publication of that document, all the
2 auxiliary equipment that goes with the instruction, ---

3 REPRESENTATIVE PYLE: Pencils?

4 MR. ROE: --- the computers --- if you want to,
5 pencils, computers, the software packages to keep those systems
6 up. It is a massive volunteer --- and for the most part, it is
7 a voluntary instructor program.

8 REPRESENTATIVE PYLE: Point blank, Mr. Roe, what are
9 you going to do with the little Brown Bat? Because I've had
10 this discussion with you four times in the last three years,
11 and you're still flipping my people out.

12 MR. ROE: And has the little Brown Bat been
13 presented before the Board of Commissioners to be on the
14 Threatened and Endangered Species List yet?

15 REPRESENTATIVE PYLE: Well, I believe --- I think you
16 referred to it your internal IRRC. Maybe that was you, Mr.
17 Arway. I'm not sure. You know, the non-political one. Again,
18 I want to know what are you going to do with the little Brown
19 Bat, the common house bat? And here's why I ask. These buffer
20 zones keep ringing in my head. Now, I've had every enviro
21 group in the state tell me I've got bats in my belfry. Let's
22 assume that's correct. Standing right in the middle of 1.4
23 square miles of Ford City, about eight miles that way, is St.
24 Mary's Cathedral. Its spire's 150 feet in the air. Now, these
25 bats, if I'm not mistaken, like to roost in warm, dry places.

1 Let's assume we find those inside St. Mary's. Are you telling
2 me that, because of these buffer zones, we're going to draw a
3 giant impact radius around a species that is currently being
4 slain by white-nose syndrome that we cannot cure and during
5 that bat's breeding season that our activities within that
6 circle are going to be regulated? Is that correct? Because
7 that's ---

8 MR. ROE: Well, the answer is ---.

9 REPRESENTATIVE PYLE: --- current practice.

10 MR. ROE: Well, it's not current practice because we
11 would look at the best management practices we need to put in
12 place to ensure that species doesn't become extirpated. And
13 every maternity colony throughout the state, you could draw a
14 circle around them and it would cover --- probably cover the
15 entire state. That's why we're looking at the best management
16 practices to see where the most important --- we get the
17 biggest bang for the buck. And most likely that will be in
18 hibernacula or large maternal colonies, not when you have small
19 ones in a belfry, but if you have a large one, as we do, in a
20 church --- in an old abandoned church, historic church now,
21 where there are thousands of bats in the maternity colony, that
22 would be significant. The fact that you may have a couple in
23 your attic --- I mean, I'd like to think --- I'd really like to
24 think that we used a reasonable person approach to this. And
25 that's why we haven't listed them yet, because we're still

1 trying to develop those best management practices. I mean, we
2 could have started three years ago, when the Pennsylvania
3 Biological Survey first petitioned us to put these on, and said
4 you're absolutely right, here are the spots, let's draw
5 circles, and that's the end of it. We're very --- this is a
6 very slow, methodic process that we use because our board
7 demands it of us.

8 REPRESENTATIVE PYLE: Well, maybe I didn't show you
9 all my cards, Mr. Roe. In between me and that river, me and
10 Mr. Arway were talking about is the remains of the old PPG
11 factory. It runs a mile long, five stories high, and it's
12 immense. And every night at dusk my kids and I out on my front
13 lawn watch about a bazillion of these little brown bats come
14 flying out to feed.

15 How this all becomes relevant, Ford City, like many
16 small boroughs, is struggling financially. The pension
17 systems, EPA and DEP have deemed the water supply system out of
18 date and in need of replacement. It's going to be a tremendous
19 cost. One of their solutions is dropping a Marcellus well into
20 the remains of that old PPG factory. That's about three blocks
21 from this belfry. So again I ask you, how big's the circle?

22 MR. ROE: The circle hasn't been defined yet. I
23 just said that. We're looking at the best --- how to establish
24 best management practices so it won't be a circle, for one
25 thing, and then how we can, in fact, ensure the protection of

1 the species either in large maternity colonies, small maternity
2 colonies, or we work some way to mitigate that.

3 REPRESENTATIVE PYLE: Can you flesh that out for
4 everybody here? What do you mean by mitigating? Offset
5 acreage?

6 MR. ROE: Offset acreage. Offset hibernacula.

7 REPRESENTATIVE PYLE: Where is this offset acreage?
8 Pretty much anywhere?

9 MR. ROE: As long as it, in fact, supports the
10 species. But listen, we haven't even gotten to that bridge
11 yet. I guess you're proposing theoretical issues right now.
12 I'm not going to answer any theoretical situation because
13 they're not threatened and endangered yet.

14 REPRESENTATIVE PYLE: That's fair.

15 MR. ROE: And I'll tell you what's even more scary
16 than that is the federal government is going to probably
17 release at the end of the month their review of little brown
18 bats and other bats that have been affected by white-nose
19 syndrome throughout the United States, and this whole issue may
20 be taken out of our hands.

21 REPRESENTATIVE PYLE: Well, that's okay. We'll
22 probably have to move, and it really won't be relevant to us by
23 then. Armstrong County has been here since 1803. We're cut
24 out of parts of Lycoming, Westmoreland and Allegheny. We do
25 not have the tremendous commercial development that our

1 neighbors in Butler have. We do not have 450,000 people like
2 Westmoreland has. What we have is the land and ourselves. We
3 have always made our living off the land. And you don't see
4 giant environmental destruction in this county because we've
5 always worked it responsively.

6 If you remove our ability to log, to mine, to drill,
7 you're kicking us in the teeth. You are making us move from
8 this area, pure and simple. Last week --- and this is for you,
9 Mr. Arway. Last week they sold the last dredge boats on the
10 Allegheny. And you talk to anybody in the Army Corps of
11 Engineers, geologists, anyone, and they'll tell you Pool Six on
12 the Allegheny is a very, very special thing. It's one of two
13 rivers in the entire world of its type, a gravel-bottom river,
14 a product of the glaciers descending upon this county and
15 leaving behind nature's bounty for us. And we have people who
16 worked those boats for 50 years, honorable men that will never
17 be able to do that again because of these river mussels.

18 Pardon me for getting a little hot under the collar.
19 I appreciate that the Game Commission and Fish & Boat are very
20 steadfast in their mission of protecting the flora and fauna.
21 And what you call politicizing I call protecting another
22 species, homo sapien. We have to be able to work the land,
23 sir. And right now I just don't see that being possible. I
24 don't. It seems like we're the habitat for every endangered
25 --- we have Bald Eagles fishing that river now. How many

1 people can say that? Now, if that thing was a big bubbling
2 acidic soup, as some would have us believe, they wouldn't be
3 there. Thank you, Mr. Chairman.

4 MR. ARWAY: Can I just --- at the risk ---.

5 REPRESENTATIVE PYLE: Please do. I'm sorry. I
6 don't mean to take a shot and not let you take one back.

7 MR. ARWAY: At the risk of upsetting you more, I
8 think I need to just say something, and that is the point that
9 I made to Chairman Miller was that, you know, the role of the
10 Fish & Boat Commission and the Game Commission and DCNR are
11 just to determine whether a species is rare or not. We don't
12 do anything more or anything less than that. And we do it
13 based on science --- let me finish, ---

14 REPRESENTATIVE PYLE: Please.

15 MR. ARWAY: --- sound science. Whatever flows from
16 that is the laws that you promulgate for DEP and the rules that
17 they set through regulation that go through IRRC. So the
18 dredgers are bound by those rules. We just find the species.
19 Whatever flows from the --- finding the species is not subject
20 to our jurisdiction. We work with DEP on --- as a consultant,
21 as Carl explained, to provide the advice to DEP so that they
22 apply the same rules to the industry equally, but we don't set
23 the rules which flow from the listings that we make. So
24 changing the listings really cuts the legs out from under all
25 the other rules that we have that would --- that would affect

1 the protection provisions that you all --- the legislature and
2 your predecessors, put in place because society wanted it. So
3 you know, by designating a species as rare or threatened and
4 endangered does not determine the protection standards that
5 apply. You set the protection standards through a whole
6 different statutory approach with other rules and regulations.

7 In and of themselves, listing a species or a wild
8 trout stream as wild trout --- for wild trout or a species for
9 --- as threatened and endangered doesn't require any additional
10 protection until those other rules are promulgated.

11 REPRESENTATIVE PYLE: And the difference being those
12 other agencies you just mentioned, DEP, DCNR, are subject to
13 IRRC, ---

14 MR. ARWAY: Which is fine.

15 REPRESENTATIVE PYLE: --- but you're not.

16 MR. ROE: Oh, I would offer that we are, just a
17 different IRRC.

18 REPRESENTATIVE PYLE: You have your Board of
19 Commissioners, which is what you're referencing as your own
20 internal IRRC.

21 MR. ROE: Well, it's not internal. I would say it
22 is external to the agency as a separate entity.

23 REPRESENTATIVE PYLE: I'm going to need a little bit
24 more clarification on that.

25 MR. ROE: They are not part of the agency. They are

1 a separate ---.

2 REPRESENTATIVE PYLE: The Commissioners are not part
3 of the Game --- of the agency?

4 MR. ROE: Of the agency. They're a separate entity
5 above the Commission, as an Independent Regulatory Review
6 Commission.

7 REPRESENTATIVE PYLE: Really?

8 MR. ROE: Yes.

9 MR. ARWAY: We see them as a governing board.

10 MR. ROE: Yes.

11 MR. ARWAY: They govern the operations of the
12 policies ---

13 MR. ROE: The policy aspect.

14 MR. ARWAY: --- and pass regulations for the agency
15 but don't product the information that those regulations and
16 policies are derived from.

17 REPRESENTATIVE PYLE: So where would somebody who
18 disagreed with that board's findings be able to express their
19 disagreement? Courts of law?

20 MR. ROE: Courts of law and the board, yes.

21 REPRESENTATIVE PYLE: Never the public?

22 MR. ROE: The public has the opportunity.

23 REPRESENTATIVE PYLE: Never the public.

24 MR. ROE: Certainly.

25 REPRESENTATIVE PYLE: Really? I've never seen ---.

1 MR. ROE: The public testifies at every one of our
2 meetings.

3 REPRESENTATIVE PYLE: I've never seen a Game
4 Commissioner or Fish & Boat Commissioner's face on a yard sign
5 anywhere. They're appointed or nominated. And for the
6 reference of everybody sitting here, the House is excluded from
7 this process. The appointments are made by the Governor and
8 confirmed by the Senate. At no time do we have our fingers
9 anywhere on this, which kind of proves one point, we are not
10 trying to take over what species are listed and what are not.
11 That's not our interest. We're trying to add an appeal for
12 someone that disagrees. And I just threw an example to a
13 fellow out in the hall. My family's got a couple hundred acres
14 out back behind Appleby Manor Church. We've held that since
15 there was an Armstrong County. Dairy land. Let's say I want
16 to go build a house up on top of that hill. It's firmly within
17 --- I mean, bats abounding, stream running down through the
18 middle of it. It's the most beautiful piece of land you can
19 imagine. What if we do find these bats there? What if we do
20 find --- you decide it's a trout stream? Does that mean I
21 can't build a house on something my family's owned for 200
22 years?

23 And what the bill does is it gives me that hope that
24 I might be able to appeal to an external agency that doesn't
25 have a horse in the race. And I appreciate your expertise. I

1 truly do. You are much better prepared for these designations
2 and locations and identifications than I am. But what I know
3 is that this county is being impacted by being blessed by God's
4 bounty of all these species, and it's hurting us deeply. And
5 all we're asking for is how about a chance not to wrestle off
6 our back but give us a good honest chance to appeal what we
7 feel is an unrighteous decision.

8 MR. ROE: But again, you're appealing the decision
9 of a permitting process, not the decision of a threatened and
10 endangered species being listed.

11 REPRESENTATIVE PYLE: So how do we --- you know,
12 again, my question to the fellow from Penn Future. And I'll
13 stop, Mr. Chairman. I'm almost done.

14 CHAIRMAN CAUSER: Okay.

15 REPRESENTATIVE PYLE: How do you deal with migratory
16 avian species?

17 MR. ROE: In what sense?

18 REPRESENTATIVE PYLE: How big's the circle you want
19 to draw?

20 MR. ROE: It depends upon the habitat that they're
21 moving from across the state.

22 REPRESENTATIVE PYLE: Interesting. Thank you, Mr.
23 Chairman.

24 CHAIRMAN CAUSER: Thank you, Representative Pyle.
25 Representative Barbin?

1 REPRESENTATIVE BARBIN: Thank you. And first off, I
2 want to --- I don't know if this is on. I want to indicate
3 that I have all the respect in the world for the Game
4 Commissioners. They've put their lives into becoming
5 appointed. And also the same thing with Fish & Boat
6 Commission. And I know you guys do a great job.

7 Here's the problem, though. Does the public have
8 the right to know how you spend your money?

9 MR. ROE: Yes.

10 REPRESENTATIVE BARBIN: Okay. Are you on Penn
11 Portal? Are all your ---

12 MR. ROE: We ---

13 REPRESENTATIVE BARBIN: --- expenditures on there?

14 MR. ROE: --- publish in our Game News an annual
15 report that shows all the monies coming in and where the monies
16 went out, yes.

17 REPRESENTATIVE BARBIN: Okay. All your expenses are
18 on this statewide portal system?

19 MR. ROE: Under the --- in the business operating
20 system, yes. We use the same business operating system ---.

21 REPRESENTATIVE BARBIN: No. I'm asking you our
22 expenses are all on the Portal. Are the Game Commission's or
23 the Fish Commission's on the portal?

24 MR. ARWAY: Do you mean salaries or ---?

25 REPRESENTATIVE BARBIN: No. All of our

1 documentation, any expense, any revenue, that's on this
2 computer. Are yours? I believe that you're not.

3 MR. ROE: Well, we're under the same system as any
4 other state agency as far as financial responsibility ---

5 REPRESENTATIVE BARBIN: Okay.

6 MR. ROE: --- is concerned.

7 REPRESENTATIVE BARBIN: Is there any other agency in
8 the United States that has a separate Game and Fish Boat ---
9 Fish & Boat Commission?

10 MR. ARWAY: No.

11 REPRESENTATIVE BARBIN: Okay. All right.

12 MR. ROE: No other state has our ---.

13 REPRESENTATIVE BARBIN: I didn't ask that. I said
14 does anybody else have anything other than a combined Fish &
15 Boat and Game Commission? Does anybody else? We have separate
16 ones. Does anybody else have separate ones?

17 MR. ARWAY: No.

18 REPRESENTATIVE BARBIN: Okay.

19 MR. ROE: Not in the same sense, no.

20 REPRESENTATIVE BARBIN: Okay. And I understand your
21 funding problems in the past. And you raised funding as an
22 issue, that this bill would somehow make it more expensive for
23 you to do your job. But as I understand your statements to the
24 legislature in the past, most of your problems are pension
25 related. So a combination of your two agencies might reduce

1 that. What I really have an objection to --- and I still have
2 the objection. I went to the last hearing. I heard what you
3 had to say. My objection is you have created, with our help,
4 and the question is whether we should do anything about it, a
5 system of government that says our expert scientists, even
6 though we have other expert scientists, have to be completely
7 left alone. And if we decide to put a thousand more endangered
8 species on the list and we decide to have a thousand more
9 buffer zones, and that decision, because of the way DEP laws
10 are written, says that there's no piece of land in Pennsylvania
11 that can be developed, that's okay.

12 Now, that's not okay to me because last week I went
13 down to Pittsburgh to see what was called the AlphaLab. And
14 the AlphaLab is where the government of Pennsylvania provides
15 money to businesses that can no longer do businesses in the
16 United States because the FDA has made the rules so complicated
17 that they can't get approval to make an artificial lung in the
18 United States for three years. They can get that same approval
19 in the European Union, all the European countries and Canada,
20 in six months. Now, that isn't the government that I think the
21 Founders thought of. That isn't the government that's subject
22 to the electorate that can be changed.

23 And you're saying that it's DEP's fault that somehow
24 the permit process has now gone to three years, it's not your
25 fault, that doesn't --- that's not acceptable to me, because I

1 don't believe that the Federal Drug Administration should take
2 three-and-a-half years. And I don't think you should be doing
3 things without our review that make the permitting process more
4 difficult for people to use their own land. So the question
5 that I have is why --- sitting here, if it is increasing the
6 time that business has to devote resources to, why shouldn't we
7 be saying we need to do something different here?

8 We need to say that you're going to be subject to
9 the Independent Regulatory Review Commission so that if your
10 expert screws up and his expert is right and his buffer zone's
11 right and yours is wrong, that we can't take care of that
12 problem at the IRC. Why do we have to wait for Commonwealth
13 Court? Because there's a little clever thing that you said in
14 your testimony that isn't really true. If you move through
15 your commissions and you get into Commonwealth Court, there's
16 almost no chance that the Commonwealth Court is going to
17 overturn your position. And that doesn't have anything to do
18 with your science. It has to do with the legal standard for an
19 agency review. The legal standard for an agency review is an
20 abuse of discretion. It's not whether you have the best
21 science. It's a question of whether was there any science.

22 So again, you guys are sitting back here saying we
23 have scientists that provide information, we contract with
24 them, we're not going to show you what that information is, and
25 it's not me, it's the public. You say, well, some stuff's

1 confidential. Well, I'm a lawyer. The way you handle
2 confidential material isn't to say you can't look at it. The
3 way you handle it is to say here's the phrase in the document
4 that has to be redacted, blacked out. You take a black Magic
5 marker and you take those three words out. You're not letting
6 us, the public, see the scientific information that you've just
7 used to shut down a business project or shut down a person's
8 right to develop their own land. That's the problem.

9 And it's a real problem, and it's exactly what
10 happens at the FDA. They got experts, too. And our process
11 now takes three-and-a-half years and Europe's process takes six
12 months. So the guy that comes to Pennsylvania and says give me
13 \$10 million for my great idea, I want to make an artificial
14 lung, he's not making it for us. He's making it for Germany,
15 because they've got enough common sense to say that the process
16 has got to end in a year. His \$10 million can get it done and
17 approved in a year. FDA's takes three years; it can't get
18 done. That's what you're doing to businesses in Pennsylvania,
19 and I object.

20 CHAIRMAN CAUSER: Thank you, Representative Barbin.
21 I have a couple follow-up questions, one being that in
22 correspondence and testimony both of your agencies have
23 testified that we've faced the potential loss of federal funds
24 by enacting this legislation. And as I announced at the
25 beginning of our hearing, we have a legal opinion saying that

1 that's not the case. Can you tell me of any states --- any
2 other states in the nation who have been placed on diversion by
3 the U.S. Fish & Wildlife Agency because of an issue like this?

4 MR. ROE: I can tell you states that have been put
5 on notice that their funds were being diverted if they did not
6 take action. I believe West Virginia was one for wind energy,
7 as a matter of fact, that they failed to apply the appropriate
8 regulatory actions in the decisions on placing of wind energy.
9 I know --- you have an attorney that has an opinion. Fish &
10 Wildlife has an attorney who has an opinion. And this is not
11 to be disparaging for all the attorneys in my office and my own
12 attorney back there, Steve. I can have two attorneys in my
13 office discussing the issue, and I might wind up with three
14 opinions by the end of the day. That's what courts do. My
15 point is I just don't want to take the risk or even venture
16 into that risk environment where, in fact, we may lose that
17 money.

18 CHAIRMAN CAUSER: And I realize courts --- or
19 attorneys can make different opinions, but there are many, many
20 other states that have combined agencies, agencies that are
21 inside other conservation agencies. New York, for example, has
22 a combined Game & Fish agency, and they're combined inside
23 their Department of Conservation. They have to go through a
24 regulatory review process similar to what's being proposed and
25 yet they're not losing federal funds.

1 MR. ARWAY: I think my concern is more the
2 unintended consequences of the bill. We talked about the
3 ambiguity in a lot of the provisions and how we read it
4 different ways, depending upon what your perspective is. Coal
5 reads it different than gas than we do. That ambiguity then,
6 it's difficult to translate into what the net effect of this
7 legislation would be if it would pass in the current form and
8 then how that would impact the legislative oversight of the
9 processes.

10 I talked about how, you know, this legislation talks
11 about permitting agencies not taking actions on species that
12 aren't on the list, whatever the list is going to be. That
13 means all the common species, too. I mentioned brook trout,
14 it's muskie, it's striped bass, it's large-mouth bass. Don't
15 we protect those species either just because they're not on
16 some list? You know, I think the intended consequences of this
17 is to limit it to T&E species. The unintended consequences is
18 that if you read the literal language in the bill, it
19 eliminates DEP's ability to protect all the other species, both
20 common and rare. So those are some of the things that we need
21 to determine how they're going to work before I think Fish &
22 Wildlife Service can even determine whether or not it would
23 place our funding at risk.

24 CHAIRMAN CAUSER: But the Fish & Wildlife Service
25 used pretty strong language in their letter in saying that we

1 risk the threat of losing federal funds. And as a legislative
2 committee, as a legislative body looking at that issue, I think
3 that that's very strong language, and I see it as a threat, to
4 be honest with you. And when I'm looking around the country,
5 seeing other --- other states who are essentially having
6 regulatory review in their process, why would the U.S. Fish &
7 Wildlife Service write to us and say you --- and basically
8 threaten us that if you pass this, you're possibly going to
9 lose federal funds?

10 MR. ARWAY: I think you need to talk to their
11 general counsel in Hadley. I think your general counsel's
12 office needs to talk to their general counsel and talk to them
13 about the true meaning and implications of this legislation,
14 because we're --- we're in the middle. We're not making --- we
15 didn't tell you that. The Fish & Wildlife Service told you
16 that. And they control the money that we receive.

17 CHAIRMAN CAUSER: Well, I think, like I said, I see
18 it as a serious threat and one that we need to push back
19 against because, if by passing this we're in danger of losing
20 federal funds, there's a lot of states that should be losing
21 their federal funds.

22 REPRESENTATIVE PYLE: True.

23 CHAIRMAN CAUSER: Why we would be singled out in
24 that regard?

25 MR. ROE: I'm not sure, but other --- as you

1 mentioned, other states have a regulatory review process. And
2 in many cases, that's another commission above that agency, not
3 necessarily a legislative IRRC review, but a commission review
4 similar to ours that review and promulgate those regulations,
5 just as we do.

6 CHAIRMAN CAUSER: But the IRRC would be another
7 commission that would review your regulations, which is ---.

8 MR. ARWAY: I think that goes to George Jugovic's
9 point about the way ESA was developed in terms of being science
10 driven for the listings, and economics and social factors don't
11 get involved in making decisions about whether a species is
12 rare or not. I think that oversight comes along with Fish &
13 Wildlife Service's decision about whether they can give us
14 money or not to run our state program.

15 CHAIRMAN CAUSER: But it is all about process, and
16 that's where there's a lot of misinformation out there. Many,
17 many newspaper articles around the state have a lot of
18 misinformation in them about the actual intent. And it would
19 still --- it's still about process, and it's still your
20 agencies proposing these regulations. It's not IRRC proposing
21 them. It's not IRRC changing them. It's your agencies
22 proposing them. And as Chairman Miller said, how many have we
23 seen denied?

24 MR. ROE: Which begs the question of what's the
25 additional advantage of another --- another process on top of

1 an independent regulatory review process.

2 CHAIRMAN CAUSER: But it begs the question what's
3 the problem with doing it, ---

4 MR. ROE: Because it's redundant.

5 CHAIRMAN CAUSER: --- for another set of eyes.

6 MR. ROE: It's redundant.

7 CHAIRMAN CAUSER: And it also certainly does bring
8 the legislature into the process.

9 MR. ROE: I don't remember --- I can't imagine any
10 member who's ever been shy about calling me on any issue, so I
11 would offer you're in the process already.

12 MR. ARWAY: I would point out, too, Chairman Miller,
13 that in my career, which is a little longer than yours in state
14 government, I think, the IRRC and the standing committees did
15 overturn the Chapter 102 regs for DEP at one time. So there is
16 a precedent, but it doesn't happen very often.

17 CHAIRMAN MILLER: It's been a while.

18 MR. ARWAY: Yeah.

19 CHAIRMAN CAUSER: Another issue that I wanted to
20 bring up is the timeline for stream designations. And in
21 looking at the testimony from the Coal Association, they put
22 some examples of stream designations whereby --- one, for
23 example, was a designation published in the Pennsylvania
24 Bulletin on March 5th, and then approved at the Fish & Boat
25 Commission meeting the next month, in April. Is that standard

1 to be able to have a short timeline like this? And this was 98
2 streams. Ninety-eight (98) streams in a 30-day period?

3 MR. ARWAY: Yeah. No, that did not happen. One of
4 the things with that rule package was that --- that was very
5 unusual that we brought 98 streams forward in one package. And
6 it was a result of our responsibility to survey those streams
7 and work with colleges and universities around those --- around
8 the state to get those streams surveyed, assessed, and then put
9 on a list so that they would then affect the protection
10 provisions and the DEP rules because they were at risk. We
11 have headwater brook trout streams in the mountains of our
12 Commonwealth that have never been surveyed before. They've
13 never been on a list before because they didn't need to be on a
14 list before. They weren't at risk. But now we have Marcellus
15 wells that are being drilled on top of those mountains and are
16 placing those streams at risk, and they should be afforded the
17 protection provisions that you passed in law and the DEP
18 promulgated and the EQB promulgated in its reg that went
19 through IRRC, because the wetlands that are along the flood
20 plain should be protected as exceptional value wetlands, if,
21 indeed, they're wild trout streams. So we put on a surge to go
22 out and get those streams inventoried because society expects
23 them to be protected. And as a result of that, we developed a
24 list of 98 streams over a period of time. And we agreed with
25 the Coal Association at the time that they should have more

1 time. Our board extended that review period. We gave them
2 more time. And we also, which wasn't reflected in their
3 testimony, agreed to every time we go out and do a stream
4 survey and we understand it has wild trout in it, even before
5 we advance it to the board we put it on a list on the web so
6 that Coal could access that list as well as anyone else and
7 they can see which streams are pending for board action. So
8 they have plenty of time if they want to replicate the surveys
9 that we've done. So we've --- I thought we worked those ---
10 those issues out with the Pennsylvania Coal Association. And
11 subsequently, we really haven't received any complaints from
12 the Coal Association about that listing process. So it's kind
13 of surprising for me to hear their testimony today, but what I
14 can commit to is we can go back and evaluate that testimony and
15 provide a response to the committee.

16 CHAIRMAN CAUSER: So I mean, they've provided
17 multiple examples of a very short timeline for when these are
18 published in the Bulletin and when they're approved. And some
19 of them --- you know, 64 streams, 42 streams, 121 streams, you
20 know, many, many streams being designated. What would you say
21 the normal timeline is? Because you're disputing what they're
22 saying the timeline was.

23 MR. ARWAY: Well, it depends on when the clock
24 starts. Like I said, I thought we worked out the problem with
25 review time by pre-publishing those streams once we discover

1 they have trout. You know, by the time we put them on our
2 website until the time the board acts, maybe a year or more.
3 So there's plenty of time for any industry or the public to
4 review what decisions we're going to make in the future. I
5 thought we worked out that problem. The clock doesn't start
6 whenever we go to propose rule any longer. It starts six
7 months or a year before that.

8 CHAIRMAN CAUSER: Because certainly the opportunity
9 to have sufficient time to comment is something that's very
10 important to all of us. And the IRRC process would guarantee
11 that there was sufficient time to comment and guarantee that
12 every comment received was responded to. So that's something
13 that's --- that I think is very important.

14 There's been a lot of questions proposed here today,
15 a lot of information. As I said, there's been a lot of news
16 media reports that have been inaccurate. The information
17 presented here I think is very helpful for both committees as
18 we move forward, and so I'm appreciative of you --- of both of
19 you gentlemen being here today and answering these questions.
20 Are there any additional questions by the members?

21 Representative McCarter?

22 REPRESENTATIVE MCCARTER: Thank you, Mr. Chairman.
23 I think it's become abundantly clear. And I thank everybody
24 for testifying today, and I have further comments and
25 questions, obviously, of my colleagues as well, but I think it

1 is abundantly clear what the real meaning of this particular
2 legislation is. And the meaning of this legislation really
3 sets out several different areas that I think have been
4 discussed. What is sound science? What is the nature of the
5 review process? And what really is the role between business
6 and corporations in dealing with the issues of endangered
7 species and what those regulations are that they have to agree
8 upon? And all three of those areas, many of them are not
9 really addressed, as we've heard in the testimony today, by
10 this particular bill. But the legislation calls into question
11 all of those particular areas.

12 The sound science piece, I think it's very clear
13 that there is a distrust of many of the scientists that are
14 working on the studies to determine what's best for our
15 ecosystem in contrast to what's best for immediate business
16 needs. As that takes place, whether it's the scientists
17 themselves in the streams or it's their colleagues or whether
18 it's the students who are out there helping as well, there's a
19 distrust that's taking place about the nature of what they do.

20 In the second issue, that of what we're doing in
21 terms of regulations, it's very clear from the testimony
22 submitted to the Committee already from IRRC that they don't
23 understand how this bill will play out. They don't understand
24 it. So they have great questions, even though we're calling
25 upon them to be the extra set of eyes, which, as we've all

1 acknowledged, they do not have the scientific background that
2 the people do that are doing that research, whether we trust it
3 or not.

4 That process also, as we suggest, still ends up
5 potentially in the legislature because it does go to the
6 affected committees. It goes back there through that process
7 as well. That is stated in the bill. And it comes back to us,
8 which is the politicalization of this whole process and making
9 it so that it really becomes more bureaucrats making the
10 decisions instead of the scientists.

11 And the last point of where we go from now I think
12 becomes critically important. It's been stated today, in a
13 sense, we need to look at the broad area of what happens with
14 our ecosystem. The ecosystems need sound science. They need
15 to be protected. The American public knows that, in support of
16 ESA by over 84 percent. They understand that issue. There are
17 issues of how business relates to that. And that's the balance
18 that we seek. This bill, unfortunately, does not provide the
19 balance. It takes away balance. It takes away the scientific
20 portion and gives it back to control, in a sense, to eliminate
21 out of this. I hope, Mr. Chairman, that we find a way to
22 bridge the gap here that's taking place between one extreme and
23 the other side that wants to maintain species and the ecosystem
24 as they exist. Thank you, Mr. Chairman.

25 CHAIRMAN CAUSER: And I would respond to that that

1 no one is taking away the sound science. The purpose of this
2 bill is openness, transparency. It's about the process. It's
3 about ensuring public comment. It's about making sure that
4 adequate public comment is received. And the purpose of these
5 two hearings is to gather information. No one's saying the
6 bill is perfect. We're looking for issues in the bill. We're
7 looking for places that need to be amended, and that is the
8 purpose of having a public meeting. We're fleshing out all
9 these issues, and we're going to be dealing with all the
10 comments that have been submitted, all the suggestions, before
11 moving forward with voting on this legislation.

12 So I want to thank all the testifiers today for
13 coming before the Committee. I think that we've received a lot
14 of good information. I want to thank Representative Pyle for
15 hosting us and thank IUP for allowing us to use their facility
16 and being such gracious hosts. And this meeting's adjourned.
17 Thank you.

18 MEETING ADJOURNED AT 1:30 P.M.

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1 COMMONWEALTH OF PENNSYLVANIA)
2 COUNTY OF ALLEGHENY)

3 CERTIFICATE

4 I, Danielle Ohm, a Notary Public in and for the
5 Commonwealth of Pennsylvania, do hereby certify:

6 That the witness whose testimony appears in the
7 foregoing deposition, was duly sworn by me on said date and
8 that the transcribed deposition of said witness is a true
9 record of the testimony given by said witness;

10 That the proceeding is herein recorded fully and
11 accurately;

12 That I am neither attorney nor counsel for, nor
13 related to any of the parties to the action in which these
14 depositions were taken, and further that I am not a
15 relative of any attorney or counsel employed by the parties
16 hereto, or financially interested in this action.

17 **NOTARIAL SEAL**
DANIELLE S. OHM, Notary Public
Pittsburgh, Allegheny County, PA
My Commission Expires Jan. 16, 2013

20 *Danielle Ohm*
21 _____
22 Court Reporter
23
24
25