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

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

The current limited independent structure of our wildlife and fisheries resource agencies was set up by the legislature over a hundred years ago for a reason, to allow the agencies the ability to effectively manage our wildlife and fisheries resources using scientific data combined with input from the views of sportsmen, industry and others, for the best long-term good of our resources. Being separate from IRRC and legislative control, not oversight, is a source of pride to sportsmen and conservationists because it means our wildlife and fisheries management is recognized with the importance it deserves and it is understood it needs to be treated
Following the 1973 enactment of the federal Endangered Species Act, your predecessors empowered the agencies to promulgate rules and regulations governing the taking, catching, killing, and possession of endangered species. They understood that protecting species at the state level is the most proactive way to prevent their extinction. Some comments have been made trying to allude it was an oversight that the commissions were kept separate from the IRRC process. However, because of their great foresight, your predecessors set the process up this way specifically to protect not just T&E species but our sporting heritage and our rich wildlife and fisheries resources from the threats of control by anti-hunters, ill-advised politicians, overzealous industry and others based solely on political whims, personal agendas or emotional public opinion polls.

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

The Game and Fish and Boat Commission's regulatory process is already open and transparent. Whether or not the
process is put through an additional layer of bureaucracy by adding the purview of IRRC, the legislative still retains final oversight over both agencies and every move they make. We see examples of this oversight all the time when members introduce legislation trying to mandate a specific wildlife management regulatory action based on comments and complaints by their constituents or their personal views when they don't agree with a specific regulation or proposal.

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

In order for states to be given this power and the federal funding that comes with it, they must demonstrate they have the institutional capacity and legal authority to identify, list, and manage endangered species. If this infrastructure is dismantled, control can revert to the federal government. Changing the current procedures by adding IRRC to the process will be viewed by the U.S. Fish & Wildlife Service
as dismantling the current infracture, and will thus void the
cooperative agreement and open Pennsylvania up to more federal
control and oversight regarding T&E species and cause the
potential loss in funding. The threat of lost funding alone is
cause for serious concern and opposition to the bill, but there
are other reasons as well.

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

We often hear anecdotal reports of how the agencies
are impediments to business or economic growth; however,
critics are hard pressed to come up with specific examples.
And when they do provide examples, the problems are almost
always the result of a federal regulatory issue or DEP
permitting process. The same is true for the reasons being
given for why this legislation is needed. When looking into
the details of the examples given, one finds most of those
problems were related to federal issues as well.
Representative Pyle continually refers to a problem with the
school and the extra costs because of protected bats. But a
letter to the school from the U.S. Fish & Wildlife Service
shows that this was a federal issue and not a state issue, so
nothing in this so-called corrective legislation would change
that particular situation. Just because it may be agency staff
providing the boots on the ground for the reviews, studies, et

cetera, the guidelines are and will remain federally mandated.

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

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

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

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

In summary, the PFSC opposes putting the commissions under the IRRC process for any aspect of their regulatory authority. The commissions were purposely set up to be separate from IRRC to keep the politics out of wildlife and aquatic resource management, not just for game species but for all species. Requiring the IRRC process for T&E species is nothing more than the start of the chipping away at the already
limited independence of the commissions and is not supported by
the sporting and conservation community.

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

PFSC's opposition to this legislation is not an
attack on industry or an attempt to stifle jobs. The majority
of our membership is comprised of blue-collar workers,
struggling to make ends meet, but we still care about our
resources and we want to find a balance that protects our
environment, our resources, our jobs and development. We
recognize the need for responsible development and resource
extraction and the economic benefits they provide. We also
recognize that development and resource extraction will leave a footprint on our environment. In light of these facts, we must continue to work together to minimize the impact to Penn's Woods, whether it's from extracting valuable resources, development, designating wild trout streams or hunting and fishing. We cherish the land and our resources, and we support and promote best management practices to ensure the continued protection of our land and our natural resources. Sportsmen and women are stewards of our resources and our environment. And as your constituents, we ask that you do your duty to protect the interests of sportsmen, our resources and the environment and oppose this legislation as written.

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

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

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

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

**CHAIRMAN CAUSER:** No further questions? Thank you
for your testimony.

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

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

MS. SCHELL: Will do.

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

MS. SCHELL: Thank you.

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

MR. LEWIS: Thank you. Good morning, everyone. I
thank the Chairmen of the --- and the members of the Game & Fishery Committee and the Environmental Resources & Energy Committee for this opportunity to testify on behalf of the Pennsylvania Aggregate and Concrete Association.

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

In my capacity as chief engineer at Allegheny Mineral Corporation, I'm responsible for the coordination of all environmental permits required for mining activities. In that role, I have the pleasure of working closely with all state organizations, agencies and commissions, that regulate our industry, including the Pennsylvania Department of Environmental Protection, the Department of Conservation and Natural Resources, the Pennsylvania Fish & Boat Commission and
the Pennsylvania Game Commission. Based on my experience over
the last 30-plus years, I, along with the Pennsylvania
Aggregate and Concrete Association, support House Bill 1576,
the Endangered Species Coordination Act.

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

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

Economic development and our ability to be
responsible to our customers, including state agencies like the
Pennsylvania Department of Transportation, depend on receiving
timely approvals and responses from the regulatory review
agencies. The existing Environmental Review Screening Tool administered by the Pennsylvania Natural Heritage Program is useful in identifying whether a potential or actual impact for the planned activity exists under the jurisdiction of any of the review agencies within the project area. However, it does not have the ability to offer what the exact species of concern is in cases or their specific locations. In addition, it does not have the program capability to coordinate among the various agencies or offer mitigation options. Under these circumstances, sometimes it feels like the blind are leading the blind. Industry is told to perform surveys because the agencies are unsure but wish to play it safe. The financial investment for those surveys is considerable, and it appears that it serves no other purpose than to test the resolve of the company to bring good-paying jobs and benefits to the communities seeking a steady employer.

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

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

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

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

CHAIRMAN CAUSER: Thank you, sir, for your
testimony. We've been joined by two additional members, Representative Galloway and Representative Christiana. So thank you very much for joining us today.

Our stenographer is here with us now.

OFF RECORD DISCUSSION

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

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

MR. LEWIS: Well, that process is a function of our experience in the industry, but it can vary. But generally, what we have to do now is immediately run a check through the --- through the system to see if there's --- if there's some kind of a hit that shows up on the track before you do anything. Because you make investments, large investments, in properties, and even though they may appear to be perfectly adequate, the same as you're doing --- you know, you just --- you don't know what's over there. So you have to run a search
on those properties and try to figure out if there's --- if there's something there that's going to be a major roadblock in the process. And even ones that don't appear to be sometimes are. And you get hits, you get tentative hits. You don't get always a complete rendering from any of the agencies on what you're exactly up against. So that commences the process of searching through and corresponding with agencies to flesh out exactly what's there. And then doing studies to prove or disprove that is also necessary. These things can take upwards of a year. If you miss a deadline, you could be out for a year. If you find something that only blooms in August and it's now, you know, you're going to wait.

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

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

**REPRESENTATIVE PYLE:** Well, I guess the question I'm asking, maybe I didn't phrase it well enough, let's use an...
example like your quarry out there. You find a seam of a
mineral that you want to go after, okay. Would you first have
to buy that and then subject your studies for endangered
species to the Game Commission, or is it the other way around,
or ---?

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

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

CHAIRMAN CAUSER: Thank you, Representative Pyle.

Representative McCarter?

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

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

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

MR. LEWIS: Yes.

REPRESENTATIVE MCCARTER: And consequently, then this bill, because it has a de-regula --- or de-listing procedure, if those species were knocked off, there would still be other species that are in the pipeline, from what you're suggesting, that could still cause that problem?
MR. LEWIS: There may be -- there's species in the pipeline all the time, but they're -- they're not actually out in the open.

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

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

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

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

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

MR. LEWIS: Not necessarily no species listed, but they would be listed in a more understandable process. But we have species now. We all know we have certain species that we have to address. We don't always know where. That's the guesswork or the luck of the draw, as to where these are going to be identified. But we do know they're on the list. If you
have species that aren't really on an official list but they're on someone's radar, they're on their wish list, then those are the ones that show up, and that causes additional headache and difficulty.

**REPRESENTATIVE MCCARTER:** Thank you very much.

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

**MR. JUGOVIC:** Obviously not a Croatian representative.

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

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

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

We're also the National Wildlife Federation state's affiliate for Pennsylvania. And as such, we represent thousands of supporters, sportsmen and women, anglers and
hunters, that are dedicated to protecting our ecosystems for
the most critical of the native plants and wildlife that are at
risk in Pennsylvania. We oppose the passage of HB 1576 in its
current form because we think it will grievously harm the
Commonwealth's ability to conserve habitat to support native
plants and wildlife.

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

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

They're difficult decisions for many reasons.
Protecting rare endangered species imposes costs on business.
We understand that. These are businesses that provide
employment in your districts. These are businesses that pay
taxes and support your campaigns, both Democrat and Republican.
Streams, plants and animals do not vote. And the substantial
economic benefit that they have provided in past generations and will provide in future generations, if our environment is protected, is difficult --- more difficult to measure than the balance sheet of a coal mine or a gas company, but it is exactly that reason why this legislation is a bad idea.

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

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

The Endangered Species Act is designed to conserve, not preserve species. There's an important difference --- it's an important issue --- point to understand. The Endangered
Species Act is not about protecting individual species of wildlife, whether it be bats or snails or squirrels or plants. The Endangered Species Act is not the Endangered Protection Act, which it was named at one point in time. It's the Endangered Species Act because it defines --- it seeks to protect habitat. It recognizes that --- and this is still true today, habitat destruction is the single most significant cause of species extinction in the world, including the United States. So what the Endangered Species Act is all about is about protecting habitat. And it's not about protecting that one species that's left. Because what's important about species, if you understand, and I'm sure many of you do, having served so long on these committees, it's --- what's important about our ecosystem, about protecting species, it's the interdependence of all the species together that is critical for us to have a healthy ecosystem. It's not about protecting that one last bat. It's not about protecting that one last salamander. It's about protecting its relationship to other species so that --- you have bats that eat thousands of mosquitos. Last week --- and I'm going to get to this later in my testimony, but I'm going to digress now, if you may. Last week, a woman in Pennsylvania died of West Nile Virus. There's still seven persons in critical condition. We spend millions of dollars trying to control mosquitos because they pass along to humans the West Nile Virus and other diseases. The brown
bat eats a thousand mosquitos a night. A brown bat female carrying pups can eat up to a thousand mosquitos an hour. So when we talk about protecting one little furry creature, it's not about preserving it. It's about preserving its relationship and interrelationship to other critters like mosquitos, their --- what balance they provide and what protection they ultimately provide us.

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

HB 1576 also violates the Public Trust Doctrine in the Pennsylvania Constitution. 1576 would prevent the commissions from listing the species as threatened or endangered unless its population was limited throughout its entire range. By obligating the commissions to consider the
species' entire range rather than the portion in Pennsylvania, it prevents the commissions from conserving wildlife populations at risk in Pennsylvania but not elsewhere. So species could be lost in Pennsylvania. As long as they survive in Ohio, West Virginia and New York in adequate populations, they would not be able to be listed by the commissions under this bill as threatened or endangered in Pennsylvania. And the reason that violates the Public Trust Doctrine is --- in the Pennsylvania Constitution is to understand --- it's important to understand that you do not own the wildlife and native plants in Pennsylvania, nor do I, nor do the commissions, nor does the executive branch of the Governor. Under our Constitution, our natural resources are held in trust by you, in trust by the commissions, and in trust by the executive branch for the population, both current generations and future generations. That's what Article I, Section 27 means. That's what the Public Trust Doctrine encompasses. And so, if you prevent the commissions from managing and conserving our species and our --- in Pennsylvania, unless they also exist in Ohio, West Virginia, New York, we're giving up that authority. We're preventing the commissions from doing their job under the Constitution, from protecting our species in Pennsylvania.

HB 1576 does not impose an affirmative obligation on persons to protect species the way the Endangered Species Act is. And I'm just going to summarize this section of my written
testimony. The point here is that the Endangered Species Act imposes an extraordinary obligation on individuals to --- and corporations to be responsible for their own --- for their own conduct. It does --- and HB 1576 does just the opposite. It says you can close your eyes to your own conduct, whether you're an individual or a corporation unless the government permitting agency tells you affirmatively that they have data that shows that there is species there that you need to worry about. That is a huge shift in terms of burden. Not one of you I believe on this committee would raise their children to say, you know what, I don't have to be responsible for my own conduct unless the government tells me that what I'm doing is wrong. Who would want to give that responsibility to the government; right? So why would we want to do that in this circumstance when we're talking about endangered species? Persons and individuals and companies have an obligation to be responsible and look out for the consequences of their conduct in this particular circumstance, where we're talking about threatened and endangered species.

Finally, I just want to make the point that this is actually about economics. It's about people. But maybe not in the way that we often think about it. You know, it's not about saving the pretty plant. It's not about saving the fuzzy critter. In 1973, Congress --- U.S. Congress, after extensive hearings, found that protecting threatened and endangered
species is vital for not just aesthetic and ecologic reasons but also educational reasons, historic regions --- reasons, recreation reasons, economic and scientific reasons, all of the --- threatened and endangered species have all of --- provide all of those values to our nation. There are many scholars that will testify to this, persons that are more learned than myself. I would urge you to accept the testimony on that issue.

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

Consider the --- that Pennsylvania has spent millions of dollars on the West Nile Virus, as I had mentioned, spraying for black flies and mosquitoes, and that they are naturally controlled by species that we --- are now being
decimated. Consider that it was a lonely mold that gave us penicillin, a discovery that saved the lives of thousands of soldiers during and after World War II. Threatened and endangered species protection is patriotic.

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

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

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

CHAIRMAN CAUSER: Thank you for your testimony. We've also been joined by Representative Bryan Barbin and welcome him, thank him for coming.

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

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

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

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

CHAIRMAN CAUSER: Questions, Representative Pyle?

REPRESENTATIVE PYLE: Thank you for coming, Mr.

Jugovic. And I do have a lot of Croats in my hometown. Sound
science, that's a --- that's a very operative phrase. How is
that science currently propagated in identifying endangered
species?

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

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

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

REPRESENTATIVE PYLE: Do these experts include
college students electrofishing for species?

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

REPRESENTATIVE PYLE: It is possible.

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

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

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

REPRESENTATIVE PYLE: Sure.

MR. JUGOVIC: --- but my understanding is that they didn't, quote, cure it. The Brown --- the bat that live in hibernacula in Europe actually adapted to live with white-nosed syndrome. So they actually do --- are exposed and do get white-nosed syndrome, but for whatever reason, through years of
adaptation, they are not affected by it the way the bats are here.

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

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

MR. JUGOVIC: What migrates?

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

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

REPRESENTATIVE PYLE: Little Browns do?

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

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

MR. JUGOVIC: I appreciate it.

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

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

REPRESENTATIVE PYLE: Sure.

MR. JUGOVIC: That's why they're called scientists, right. And ultimately, someone has to make a decision on which science --- which --- you know, which studies are valid and which studies aren't valid. Plainly, somebody has to be responsible for that. Under the federal law, that would be the National Marine Fisheries Service or National --- or Fish & Wildlife Service, depending on whether you're talking about, you know, the oceans or whether you're talking about wildlife. That goes through a regulatory process. But then because of
the legal standard that applies, that it has to be solely based on science. You know, you have deference, of course, that's granted to the agencies. But what's critical is that it can be challenged in court and that issue can be litigated, whether they base their decision solely on sound science and whether they had substantial evidence to support their decision that they made. And obviously, they're humans, but you put controls on that by limiting what they can consider and what cannot be considered in the listing decision. And what's different about that in HB 1576 is you cannot consider economics on the federal level in the listing decision, and you cannot consider --- have political considerations come into play in the initial listing decision. And that --- you know, that was --- is my primary concern with 1576. The Game Commissions are --- well, you all know that they're not completely isolated from politics; right? I mean, you know, they have to come to you if they want a permit, want to raise their permit fees.

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

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

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

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

MR. JUGOVIC: Absolutely.

REPRESENTATIVE PYLE: Thank you, Chairman.

CHAIRMAN CAUSER: Thank you, Representative Pyle.

MR. JUGOVIC: Thank you.

CHAIRMAN CAUSER: Chairman Miller?

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

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

CHAIRMAN MILLER: Thank you.

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

CHAIRMAN MILLER: It almost appears to me that you believe that in the IRRC process they do look at proposed regulations, no matter which body it's coming from, and make judgments on the science that was used?
MR. JUGOVIC: I don't know what basis they use to modify regulations. What I know is this legislation does not limit their discretion on why they could --- what basis they can use to change the regulation.

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

It's kind of interesting because I'm now in the House, in my eighth term. Do you know how many IRRC-approved regulations we have disapproved through the legislative process? If you can find one, let me know. Because I don't know of a single one in 16 years, 15 years. It's not something that commonly occurs. It's a difficult process. It can be done. But I believe there's a lot of concern that is unfounded out there with the role of the legislature in this, to the point that I would actually suggest, by IRRC review, we avoid that conflict, where the legislature feels compelled to weigh in and say, you know what, this was just a bad regulation that got posted, and we're going to introduce legislation. As was noted before, we can do that, and overturn this, you know, create a new law. I would suggest that the IRRC process and the submission to the committees actually acts as a backstop to
stop that from happening and actually does lead to better regulations being created, only if it's the concern that we could overrule it somehow. So I find that argument just to be a bit too much. But I appreciate your testimony. It was --- you know, I really appreciate it. It was very good. Thank you.

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

CHAIRMAN MILLER: I think there's other members.

There are.

CHAIRMAN CAUSER: Thank you, Chairman Miller.

Representative McCarter?

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

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

MR. JUGOVIC: It's true.

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

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

REPRESENTATIVE MCCARTER: But ultimately the
destruction of habitat ---

MR. JUGOVIC: Correct.

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

MR. JUGOVIC: Right.

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

MR. JUGOVIC: I think that's correct.

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

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

CHAIRMAN CAUSER: Thank you. Representative Everett?

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

MR. JUGOVIC: So whenever --- that's funny --- it's a very good question. So whenever I first wrote my testimony and it was drafted, I actually used that term like that this violates the Endangered Species Act, but you don't find that in my testimony anymore because I don't think that's the issue. The Endangered Species Act --- looking at it as an attorney, the Endangered Species Act isn't written that way. There's nothing that you could enact as legislation that would, quote, violate the Endangered Species Act. What it would do is undercut the purposes and be in conflict with some of the premises that was used to pass the federal Endangered Species Act. So that's why I tried to sort of make my testimony a bit more nuanced and make that point.
REPRESENTATIVE EVERETT: Okay, that's great. And I think this is --- I think this is, you know, the crux of the discussion. And you used the Brown Bat as an example. And the thing is that we're not losing Brown Bats because of lack of habitat in Pennsylvania. We're losing them for another reason. And the question in my mind is, going forward, when we do things in Pennsylvania, whatever they may be, whether it's somebody building a house or whatever it may be, how much habitat --- and we'll just keep using the Brown Bat, how much brown bat habitat do we have to have in Pennsylvania? Do we never destroy another acre of property that a Brown Bat could live on? And where does ---? And that's the balance that I think that we need to find out there, and that's the balance that I'm seeking as we go through this legislation. And I think this is really focused on the discussion that we need to have about this bill. You know, everybody is focusing on the IRRC process. And as you've brought forward, when federal species go through their analysis, they go through the same regulatory process that any other federal regulation goes through. And that's all this proposes to do is put these regulatory decisions through exactly the same process that DCNR and DEP have to make when they're --- and DCNR are required to use science when they make their decisions; is that correct?

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

REPRESENTATIVE EVERETT: If it has to do with the
Species Act ---.

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

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

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

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

MR. JUGOVIC: Thank you for recognizing that. I don't think that's the issue. I don't think anyone could challenge this law like in the court and say that violates the Endangered Species Act. It's not whether it would stand up to --- it would be considered a violation of the Endangered Species Act. The federal government could look at it and say this doesn't fulfill your responsibilities under the Endangered
Species Act and, therefore, we're going to cut off your funding. I could challenge this law and say I think it violates the Public Trust Doctrine in certain respects and it could be --- of the Pennsylvania Constitution. I don't think the issue was ever does this actually violate the federal Endangered Species Act.

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

**MR. JUGOVIC:** That's correct.

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

**MR. JUGOVIC:** Thank you.

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

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

**CHAIRMAN CAUSER:** Thank you, Representative.

Representative Barbin?

**REPRESENTATIVE BARBIN:** Thank you. I appreciate your testimony this morning. And I do understand there's two parts to this thing. There's the --- you know, additional species being put on Endangered Species for Pennsylvania
purposes, and then there's this issue of how do we go about deciding how much habitat is enough. Do you have any question in your mind that, constitutionally, the Department of Natural --- Conservation and Natural Resources is somehow less competent than the Fish & Game Commission to make scientific decisions?

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

REPRESENTATIVE BARBIN: Fish or Game to make scientific decisions.

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

REPRESENTATIVE BARBIN: Okay. All right.

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

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

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

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

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

REPRESENTATIVE BARBIN: --- either representing the Commonwealth or filing appeals in Commonwealth Court from government agency actions. So from my perspective, this isn't a constitutional question at all. All this really is, is what rules are going to be in place before we put additional burdens on businesses or individuals as it relates to endangered species.
Now, I personally don't believe that the scientists for the Game Commission or the scientists for the Fish & Boat Commission have any more knowledge or less knowledge than someone that works for the Department of Natural Conservation and Natural Resources. So my question is only does the legislature --- and this is my theory of government. Should we have a check and balance? If we should, if this applies to all other agency decisions and you can appeal it to Commonwealth Court, then what gives you the right or any interest group the right to say that the same rules that apply to every other agency decision won't apply to the Fish & Boat Commission or won't apply to the Game Commission? Because, to me, that's the crux of this issue here.

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

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

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

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

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

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

REPRESENTATIVE BARBIN: This isn't the federal
legislation. This is Pennsylvania. And a group of people are
saying we have the right to list additional endangered species,
and there's nothing that the legislature can do to review it.
And that, to me, isn't what I was taught in law school. That's not how it works. The law sets forth the rule ---

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

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

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

    REPRESENTATIVE BARBIN: Well, then submit ---

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

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

    MR. JUGOVIC: The issue is ---.

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

    MR. JUGOVIC: Well, I appreciate that that's your opinion, that you think it doesn't help. I would suggest to you that if you understand the purposes and the dialogue that...
went behind the Endangered Species Act in 1973, that was the
intent of my testimony. And this law does not just say that
the Fish & Game Commission's regulatory process must abide by
the law. The issue is what does the law say. And the law does
not say that the decision must be based solely on sound
science. That's the critical distinction.

REPRESENTATIVE BARBIN: We have a federal law.

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

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

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

REPRESENTATIVE BARBIN: All right. Well, then
again, and with respect, if you have a specific question or you
believe there's a specific line in this bill that should be
changed, it would be helpful if you specifically set that out
in a letter to the committees so that we could look at that as
we're amending the bill. Because I think this bill will be
voted on.
MR. JUGOVIC: Perfect. I appreciate the invitation. And as I said, I would welcome the opportunity to have a continued dialogue as this moves forward.

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

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

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

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

This measure comprehensively addresses what we consider to be fundamental flaws associated with the listing process for endangered and threatened species and wild trout streams while providing a degree of regulatory certainty that species so listed truly merit higher level of protections. Under House Bill 1576, endangered or threatened and wild trout stream designations are to be made through the rulemaking
proces, subject to review by the Independent Regulatory Review Commission and the jurisdictional House and Senate standing committees. Among other things, the legislative intent of the Regulatory Review Act, which spawned IRRC, was to create a process for ongoing and effective legislative review and oversight --- that's what we're talking about --- and to foster regulatory accountability.

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

Do not misinterpret my testimony. I am not suggesting that the duly-enacted laws under which the mining industry must operate are improper or without merit, and we are certainly not trying to destroy the habitat. We are simply
trying to rid ourselves --- we are not simply trying to rid
ourselves of statutory obligations to protect vulnerable
species. On the contrary, we recognize our legal and social
responsibility to extract coal safely while minimizing our
environmental footprint.

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

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

This is not anecdotal and certainly not something
required of the federal government. This is a state issue.
The process in question proposes to designate 99 streams as
wild trout streams in one file, one notice to the Bulletin, and
it gave the public 30 days to respond. About two-thirds of
those streams were located in the Pennsylvania bituminous coal
fields. And the public notice advertising the proposal was
short of details other than simply identifying the counties in
which the streams were located. PCA petitioned the Fish & Boat Commission to extend the deadline for comments. Grudgingly, they did so, but they only provided an additional 30 days.

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

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

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

Again, don't misread these comments as opposing protection for exceptional value wetlands. However, industry needs to be scientifically assured through an open and meaningful public review process that what it is required to protect warrants that level of protection. That is what we're
asking for. The only way to provide the assurances is to include a check and balance system like IRRC at the end of the designation process, as required of other state --- of all other state agencies.

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

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

In conclusion --- and I want to be clear because there is a lot of misinformation being spread about the bill. PCA views the intent of House Bill 1576 as simply letting the sun shine on the process of designation. That's it. We have an obligation to protect these species. We understand it, and
we do it. We just want to ensure that the process by which the
designations are made are done so properly, justifiable and are
part and parcel of the legislative oversight process, as every
other state rulemaking.

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

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

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

Now, granted, in western Pennsylvania natural
resource recovery is big industry and employs an awful lot of
people. Well, my intention in framing this bill is not to
identify species on a website so people can go out and catch them and we see them show up in the pet stores. It could not be further from the truth.

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

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

REPRESENTATIVE PYLE: For coal, specifically.

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

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

MR. ELLIS: It depends. It varies. I mean, it ranges all over. I mean, it's not --- there's not ---.
REPRESENTATIVE PYLE: There's not a consistency?

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

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

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

REPRESENTATIVE PYLE: For the same piece of land?

MR. ELLIS: That's correct. Depending upon the industry, yes. At least that's what we have found using --- using the diversity and then going to the commission and asking them. And that's an answer we can't get. Why is the mining --- and invariably, the mining industry's buffer zones are more --- are longer than other industries and, you know, it's why, but we can't get an answer.
REPRESENTATIVE PYLE: That's the end of my questions, but Mr. Chairman, I think that really kind of exemplifies why we need IRRC in this process. I'm not sure how that doesn't abrogate the uniformity clause. Laws must apply equally to all.

CHAIRMAN CAUSER: Thank you, Representative.

REPRESENTATIVE PYLE: Thank you, Mr. Chairman.

CHAIRMAN CAUSER: Thank you, Representative Pyle.

Representative McCarter?

REPRESENTATIVE MCCARTER: Thank you, Mr. Chairman.

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

MR. ELLIS: Right.

REPRESENTATIVE MCCARTER: You go to an ophthalmologist.

MR. ELLIS: That's correct.

REPRESENTATIVE MCCARTER: You hope that that ophthalmologist, and you probably rely upon his expertise when it comes to areas such as glaucoma, macular degeneration and other particular areas as a trained individual to do that, and yet part of this process that we're now talking about, under sound science, you would subject, if, in fact, you had to go
before the IRRC Commission, to someone who is not trained in
those areas to make a final determination as to a treatment
possibly that you would have, the same as I would.

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

You know, if I can, Mr. Chairman, the legislature
about four years ago passed comprehensive mine safety
legislation. There's probably nothing more complex,
expertise-driven, than an underground mine and probably nothing
more important than the protection of miners' safety. Now, the
bill, which was worked on by the legislature, the UMW and PCA,
in terms of a regulatory review process, we decided that ---
this was everybody, that we would give this --- invest the
regulatory process in kind of a quasi body, consisting of coal
operators, UMW and DEP, under --- under the guise that these
are the stakeholders. I mean, nobody in the state knows more
about them than them. And if they can reach a conclusion, it's
probably right. Despite that, there was also an insistence by
everybody that those regs go through the regulatory review
process. And lo and behold, some of their regulations --- and
again, I can't tell you how eso --- maybe esoteric isn't the
right word, how complicated it is, but it went through the IRRC
process. And IRRC made a number of changes that neither the
operators nor the mine workers or DEP considered and made that
a better rulemaking. So there's always room for improvement.
You know, sometimes --- I don't know what it is, you can't see
the forest before the trees or something like that? That
happens all the time. And all we're saying here is, you know,
treat the endangered and threatened specie designation process
the way you treat the health and welfare of the citizens, the
stream use designations by DEP. Why be selective? That's all
we're saying.

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

   MR. ELLIS: Right.

   REPRESENTATIVE MCCARTER: --- and whether, in fact,
we see the people who are the, quote, experts as experts or not as experts. Or as you're suggesting, the people who are engaged in mining, obviously in coal mining, should be treated as the experts in terms of that. As a former teacher, you know, as teachers, we always wanted to be treated as the experts in education. But, unfortunately, there's things called legislators and other things that get in the way of those particular determinations, as we all know.

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

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

MR. ELLIS: Yes.

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

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

MR. ELLIS: Thank you.

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

SHORT BREAK TAKEN

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

MR. ARWAY: Good morning, Chairman Causer and Miller and members of the Environmental Resources & Energy Committee and the Game & Fisheries Committee. My name again is John Arway. I'm Executive Director of the Pennsylvania Fish & Boat Commission. I'd just like to acknowledge two Commissioners we have in the audience, Commissioner Rocco Ali, as well as Commissioner Bill Sabatose. They're actually the decision makers that make the decisions about threatened and endangered
species and wild trout stream designations that we're here to
discuss today. They, along with eight other board members, we
have a total of ten on our board, make those regulatory
decisions that we're about to talk about.

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

REPRESENTATIVE PYLE: Thank you.

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

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

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

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

With respect to legislative intent, there are other provisions of the bill that are equally troubling, particularly Section Six and Section Nine. Section Six provides, quote, when reviewing applications for permit --- permits, approvals or other authorizations or taking actions, state and local government agencies shall consider impacts only to listed species and their critical habitats included in the centralized database. This section goes on to state, quote, permits, approvals, authorizations or regulations shall not require
persons to conduct field surveys or other activities to
determine or evaluate the presence of species or their habitats
unless acceptable data exists indicating the presence of a
listed species in the area, end quote. This approach deviates
from the current practice and law. The current centralized
database, known as the Pennsylvania Natural Diversity
Inventory, PNDI, includes records of both federal and state
listed T&E species. However, PNDI also contains thousands of
records pertaining to unlisted but otherwise rare species in
Pennsylvania that warrant protection based on current law and
regulation. And these rare unlisted species, often referred to
as species of special concern, are given consideration, and
thus protection, under numerous Department of Environmental
Protection statutes, regulations and policies. And I cite
those in my testimony.

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

I would like to repeat a point that I made in my
prior testimony. If we effectively conserve species at the
state level, we can prevent regional and range-wide declines
that necessitate federal listings which lead to more costly,
time consuming and difficult federal requirements. In my previous testimony I also note that it would be virtually impossible to reevaluate the listing status of 62 threatened and endangered species under our agency's jurisdiction within two years. The listing process we employ includes scientific data collection by staff or our contractors, running the species through the International Union for Conservation of Nature Model, peer review by the Pennsylvania Biological Survey, public involvement, and action by the Commission's Board at two public meetings. The same staff who performed these duties also performed the PNDI searches and assists industry with consultation, site reviews and negotiations. Reevaluating 62 species within two years, using current methods, is simply not feasible. In addition to the administrative and public involvement steps in the listing process, it can take three to five years to assess the status of one species. Some species with large ranges within the Commonwealth take closer to a decade to understand their current status. It took 40 years to evaluate the 62 species on the list. And in recent years, we have removed almost as many that have been added --- as have been added.

The workload to add or remove one species following the current method is already significant. The workload to complete the two-year process required in House Bill 1576 would overwhelm our agency. This would not serve conservation or
society but would bog down the process and whittle away the species from the list, thereby eliminating any change for effective protection and conservation. Again, this could make federal listings more likely, since federal level listings are, in part, based on the sufficiency of the state program to protect those varied species.

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

I have briefed the Game & Fisheries Committee and spoke with many of you personally about our agency's need for alternative funding to implement the duties assigned to us by you. I am hopeful that one positive outcome of the public debate sparked by House Bill 1576 will be a renewed commitment to replicating the models we have in place under Act 13 for Marcellus Shale permit reviews, the Pennsylvania Department of Transportation for transportation project reviews, and with DEP for coal mining reviews. In each of those three cases, we
worked directly with other agencies and industry from the start of the permit process through pre-application and project scoping field reviews. And this allows the resource and regulatory agencies to work with applicants to discuss project details, seek clarification, and gain insights into potential regulatory concerns before permits are applied for but consistent with our laws and regulations. This early coordination leads to more timely and better permit decisions consistent with the laws and regulations that we have.

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

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

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

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

In closing, threatened and endangered species and wild trout streams deserve the utmost protection, and the current --- and the current listing and designation systems should not be changed. These decisions about our most vulnerable natural resources are already being made based on sound science with the utmost attention paid to detail analysis and data and completed using an open and transparent public process. To pass House Bill 1576 would be to reverse 40 years of scientific collaborative and cooperative species
conservation and the work that your predecessors produced
during their tenure with our General Assembly. Thank you again
for the chance to join you today, and we'd welcome and we'd be
happy to answer any questions you may have.

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

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

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

It was stated several times during the hearing that
the Game Commission decisions are made in secret and there is
no mechanism to appeal them. The Commission process for
promulgating a regulation is wholly transparent, requiring
notice to be published in the Pennsylvania Bulletin and two
separate votes at two separate meetings. Additionally, our
agenda is placed on our website about two weeks prior to the
Commission meeting for the public to, in fact, view those things that are being proposed.

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

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

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

To continue on this important point, in conversations with members about this bill, I have heard rumors of shakedowns and blackmail. Stories are circulating about the Commission forcing applicants to build roads, buy land or do the Commission's bidding to win approval. I emphatically say that these rumors are false. Not only does the Commission not have approval authority, but to act in that manner runs counter to all we do to fulfill our special mandate. Our interests are in working with the applicant on ways to identify the presence
of T&E species and then to minimize the impacts to those species. Any rumors you have heard to the contrary are simply not true.

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

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

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

CHAIRMAN MILLER: Thank you, Chairman Causer. A quick question. The scientific data in the review, look, gentlemen, I believe if I call either one of you, you will make
your scientists available to me. It's been that way through
the past. But at what point is the scientific data that you
use public information? At what point does the public know
what your scientists have looked at and what they base their
decisions upon? Is it open records? Is it subject to being
open to the public? And at what point does that occur?

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

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

We do keep certain information confidential pursuant
to the act that you passed, the Right to Know Act, but there's
other information about other more common species or less rare
species that we open up for public disclosure. So it could be
a combination of the two. And a lot depends upon the
importance of keeping that information confidential and
protected pursuant to Right to Know.
I would also like to point out that, you know, it's not just our scientists that collect the information. I think it's ironic that we hold this hearing at IUP, because a lot of the information that we have to base some of our decisions about state-listed herps, herptiles, reptiles and amphibians, was produced by a professor here at IUP by the name of Dr. Art Hulse, who wrote a herpitological atlas that describes the locations of rare herps across Pennsylvania. And that came out as a publication of the Pennsylvania Biological Survey. So that scientific information is produced by people like Mel Zimmerman and Peter Petokas at Lycoming College and Fred Brenner at Grove City and Dr. Carline and Wagner and Stauffer at Penn State, Todd Hurd at Shipp, Ed Masteller at Penn State Behrend. Professors all around the network of academic universities around our state are really our scientifics, our state scientifics that add to the database that we use to make these critical decisions. So it's not just agency scientists who contributed. Industry scientists contributed through consulting firms that do surveys for various industries over time. All that information is collected. Certain information is released. Other information is kept confidential because of security reasons for the species.

MR. ROE: And I would add, in the case of the three bats that were --- that generated a lot of this interest, that was brought to us by the Pennsylvania Biological Survey. They
provided the initial data, and we were, in fact, going out and verifying that data and what the best management practices might be able to do to accommodate that.

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

MR. ARWAY: If I can speak to it quickly, Representative Barbin talked about the court being a backstop. The court's already a backstop to the system, so having IRRC involved in the process doesn't create another backstop. Our decisions could be appealed to Commonwealth Court just like any
decision. So very rarely do we get challenged on those
decisions because they're based on sound science.

    I liken this process as to trying to overhaul a
motor by going through the exhaust pipe. It really doesn't
matter --- you could probably do it. I'm not sure if you can
or --- but you can probably do it, but the reality of it is
IRRC is necessary for certain purposes. And those purposes are
to do a public interest review and look at social and economic
considerations and making sure that the decisions that we're
making as a government are consistent with what the public
wants. However, the decisions that we're making are just based
on science alone. In and of themselves, a listing of a species
that's threatened and endangered doesn't affect anything else
unless DEP or another regulatory agency develops a rule that
talks about how we need to protect those species. Those rules
go through IRRC, those public ---. So if we put out --- we
decide wetlands within the flood plain of a wild trout stream
need to be protected as EB, those rules went through IRRC, and
the public decided they were properly --- properly done. The
listing of the species themselves have absolutely no
implications to the public until those other rules are
promulgated. So, with that, I think we have a process to
promulgate those rules through our Board of Commissioners. It
would be redundant to do it again through a process like IRRC.
And furthermore, it's unnecessary to do it through the process
because, as George Jugovic testified, those decisions are based on sound science. And economics and social considerations shouldn't have an influence about whether or not a species is rare or not, because it's based on the science of the species, not about what the public wants or doesn't want. The public --- whatever the public wants or doesn't want goes through IRRC through the DEP rulemaking process and the other laws that we have, like the 105 --- the Dam Safety and Water --- and Encroachments Act and the coal mining regulatory --- SMCRA, Oil and Gas Act. All those rules that DEP promulgates actually go through IRRC and serve as the screen for making sure society protects those species the way we expect to protect them.

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

CHAIRMAN MILLER: Interesting perspective.

REPRESENTATIVE PYLE: That is interesting.

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

CHAIRMAN CAUSER: Thank you, Mr. Chairman.

Representative McCarter?

REPRESENTATIVE MCCARTER: Thank you, Mr. Chairman.
Just to clarify on a couple of points, if this bill passes in its current form, would it --- what would be the impact on the hundreds of species I assume that are going through the process right now of consideration, you know, either the biological teams or others have identified? What would happen to the process for those particular species that are being considered through both departments?

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

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

MR. AWAY: Correct.

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

MR. ROE: No.

REPRESENTATIVE MCCARTER: There's also ---.

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

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

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

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

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

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

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

REPRESENTATIVE MCCARTER: Thank you.

CHAIRMAN CAUSER: Representative Pyle?

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

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

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

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

REPRESENTATIVE PYLE: College students?

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

REPRESENTATIVE PYLE: Are those students dependent on grades from those professors whether or not they do or do
not find these species?

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

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

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

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

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

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

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

MR. ARWAY: A few more species, yes.
REPRESENTATIVE PYLE: Quite a few?

MR. ARWAY: Yeah.

REPRESENTATIVE PYLE: What about river otters?

MR. ARWAY: No, that's Carl.

MR. ROE: That's mine.

REPRESENTATIVE PYLE: Are they endangered?

MR. ROE: No.

REPRESENTATIVE PYLE: What do they eat?

MR. ROE: A lot of fish.

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

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

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

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

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

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

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

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

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

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

 REPRESENTATIVE PYLE: Under Freeport, right.

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

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

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

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

    Now, I understand that there's a lot of supposition.
And I don't mean to put our federal problems on our local guys
because I think for your mission you're very good at what you
do. You go find them and then draw a circle around them and
say don't disturb them. How big's that circle? I come back to
the original question. Because I've got seemingly every
endangered species of river mussel on earth living in Pool Six in great abundance. Now, I'm aware that a few of those species have been found up above Pool Nine. So again I ask how big is the circle? How long is the range? Any answer?

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

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

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

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

REPRESENTATIVE PYLÉ: So maybe we could get back to
that state-exclusive list. Could I go log onto a website right
now and see this thing?

MR. ROE: Oh, absolutely.

REPRESENTATIVE PYLE: I could?

MR. ROE: Yeah.

REPRESENTATIVE PYLE: Maps, where they're located?

MR. ARWAY: No.

MR. ROE: No.

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

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

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

MR. ROE: In reality, part of those publications.

We put about 35,000 to 40,000 people through hunter/trapper
education each year, the publication of that document, all the
auxiliary equipment that goes with the instruction, ---

REPRESENTATIVE PYLE: Pencils?

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

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

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

REPRESENTATIVE PYLE: Well, I believe --- I think you
referred to it your internal IRRC. Maybe that was you, Mr.
Arway. I'm not sure. You know, the non-political one. Again,
I want to know what are you going to do with the little Brown
Bat, the common house bat? And here's why I ask. These buffer
zones keep ringing in my head. Now, I've had every enviro
group in the state tell me I've got bats in my belfry. Let's
assume that's correct. Standing right in the middle of 1.4
square miles of Ford City, about eight miles that way, is St.
Mary's Cathedral. Its spire's 150 feet in the air. Now, these
bats, if I'm not mistaken, like to roost in warm, dry places.
Let's assume we find those inside St. Mary's. Are you telling me that, because of these buffer zones, we're going to draw a giant impact radius around a species that is currently being slain by white-nose syndrome that we cannot cure and during that bat's breeding season that our activities within that circle are going to be regulated? Is that correct? Because that's ---

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

REPRESENTATIVE PYLE: --- current practice.

MR. ROE: Well, it's not current practice because we would look at the best management practices we need to put in place to ensure that species doesn't become extirpated. And every maternity colony throughout the state, you could draw a circle around them and it would cover --- probably cover the entire state. That's why we're looking at the best management practices to see where the most important --- we get the biggest bang for the buck. And most likely that will be in hibernacula or large maternal colonies, not when you have small ones in a belfry, but if you have a large one, as we do, in a church --- in an old abandoned church, historic church now, where there are thousands of bats in the maternity colony, that would be significant. The fact that you may have a couple in your attic --- I mean, I'd like to think --- I'd really like to think that we used a reasonable person approach to this. And that's why we haven't listed them yet, because we're still
trying to develop those best management practices. I mean, we could have started three years ago, when the Pennsylvania Biological Survey first petitioned us to put these on, and said you're absolutely right, here are the spots, let's draw circles, and that's the end of it. We're very --- this is a very slow, methodic process that we use because our board demands it of us.

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

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

MR. ROE: The circle hasn't been defined yet. I just said that. We're looking at the best --- how to establish best management practices so it won't be a circle, for one thing, and then how we can, in fact, ensure the protection of
the species either in large maternity colonies, small maternity colonies, or we work some way to mitigate that.

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

MR. ROE: Offset acreage. Offset hibernacula.

REPRESENTATIVE PYLE: Where is this offset acreage?

Pretty much anywhere?

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

REPRESENTATIVE PYLE: That's fair.

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

REPRESENTATIVE PYLE: Well, that's okay. We'll probably have to move, and it really won't be relevant to us by then. Armstrong County has been here since 1803. We're cut out of parts of Lycoming, Westmoreland and Allegheny. We do not have the tremendous commercial development that our
neighbors in Butler have. We do not have 450,000 people like Westmoreland has. What we have is the land and ourselves. We have always made our living off the land. And you don't see giant environmental destruction in this county because we've always worked it responsively.

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

Pardon me for getting a little hot under the collar. I appreciate that the Game Commission and Fish & Boat are very steadfast in their mission of protecting the flora and fauna. And what you call politicizing I call protecting another species, homo sapien. We have to be able to work the land, sir. And right now I just don't see that being possible. I don't. It seems like we're the habitat for every endangered --- we have Bald Eagles fishing that river now. How many
people can say that? Now, if that thing was a big bubbling
acidic soup, as some would have us believe, they wouldn't be
there. Thank you, Mr. Chairman.

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

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

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

REPRESENTATIVE PYLE: Please.

MR. ARWAY: --- sound science. Whatever flows from
that is the laws that you promulgate for DEP and the rules that
they set through regulation that go through IRRC. So the
dredgers are bound by those rules. We just find the species.
Whatever flows from the --- finding the species is not subject
to our jurisdiction. We work with DEP on --- as a consultant,
as Carl explained, to provide the advice to DEP so that they
apply the same rules to the industry equally, but we don't set
the rules which flow from the listings that we make. So
changing the listings really cuts the legs out from under all
the other rules that we have that would --- that would affect
the protection provisions that you all --- the legislature and your predecessors, put in place because society wanted it. So you know, by designating a species as rare or threatened and endangered does not determine the protection standards that apply. You set the protection standards through a whole different statutory approach with other rules and regulations.

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

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

**MR. ARWAY:** Which is fine.

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

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

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

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

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

**MR. ROE:** They are not part of the agency. They are
a separate ---.

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

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

REPRESENTATIVE PYLE: Really?

MR. ROE: Yes.

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

MR. ROE: Yes.

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

MR. ROE: The policy aspect.

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

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

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

REPRESENTATIVE PYLE: Never the public?

MR. ROE: The public has the opportunity.

REPRESENTATIVE PYLE: Never the public.

MR. ROE: Certainly.

REPRESENTATIVE PYLE: Really? I've never seen ---.
MR. ROE: The public testifies at every one of our meetings.

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

And what the bill does is it gives me that hope that I might be able to appeal to an external agency that doesn't have a horse in the race. And I appreciate your expertise. I
truly do. You are much better prepared for these designations and locations and identifications than I am. But what I know is that this county is being impacted by being blessed by God's bounty of all these species, and it's hurting us deeply. And all we're asking for is how about a chance not to wrestle off our back but give us a good honest chance to appeal what we feel is an unrighteous decision.

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

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

CHAIRMAN CAUSER: Okay.

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

MR. ROE: In what sense?

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

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

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

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

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

MR. ROE: Yes.

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

MR. ROE: We ---

REPRESENTATIVE BARBIN: --- expenditures on there?

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

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

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

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

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

REPRESENTATIVE BARBIN: No. All of our
documentation, any expense, any revenue, that's on this computer. Are yours? I believe that you're not.

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

REPRESENTATIVE BARBIN: Okay.

MR. ROE: --- is concerned.

REPRESENTATIVE BARBIN: Is there any other agency in the United States that has a separate Game and Fish Boat ---

Fish & Boat Commission?

MR. ARWAY: No.

REPRESENTATIVE BARBIN: Okay. All right.

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

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

MR. ARWAY: No.

REPRESENTATIVE BARBIN: Okay.

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

REPRESENTATIVE BARBIN: Okay. And I understand your funding problems in the past. And you raised funding as an issue, that this bill would somehow make it more expensive for you to do your job. But as I understand your statements to the legislature in the past, most of your problems are pension related. So a combination of your two agencies might reduce
that. What I really have an objection to --- and I still have
the objection. I went to the last hearing. I heard what you
had to say. My objection is you have created, with our help,
and the question is whether we should do anything about it, a
system of government that says our expert scientists, even
though we have other expert scientists, have to be completely
left alone. And if we decide to put a thousand more endangered
species on the list and we decide to have a thousand more
buffer zones, and that decision, because of the way DEP laws
are written, says that there's no piece of land in Pennsylvania
that can be developed, that's okay.

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

And you're saying that it's DEP's fault that somehow
the permit process has now gone to three years, it's not your
fault, that doesn't --- that's not acceptable to me, because I
don't believe that the Federal Drug Administration should take three-and-a-half years. And I don't think you should be doing things without our review that make the permitting process more difficult for people to use their own land. So the question that I have is why --- sitting here, if it is increasing the time that business has to devote resources to, why shouldn't we be saying we need to do something different here?

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

So again, you guys are sitting back here saying we have scientists that provide information, we contract with them, we're not going to show you what that information is, and it's not me, it's the public. You say, well, some stuff's
confidential. Well, I'm a lawyer. The way you handle confidential material isn't to say you can't look at it. The way you handle it is to say here's the phrase in the document that has to be redacted, blacked out. You take a black Magic marker and you take those three words out. You're not letting us, the public, see the scientific information that you've just used to shut down a business project or shut down a person's right to develop their own land. That's the problem.

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

CHAIRMAN CAUSER: Thank you, Representative Barbin. I have a couple follow-up questions, one being that in correspondence and testimony both of your agencies have testified that we've faced the potential loss of federal funds by enacting this legislation. And as I announced at the beginning of our hearing, we have a legal opinion saying that
that's not the case. Can you tell me of any states --- any
other states in the nation who have been placed on diversion by
the U.S. Fish & Wildlife Agency because of an issue like this?

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

CHAIRMAN CAUSER: And I realize courts --- or
attorneys can make different opinions, but there are many, many
other states that have combined agencies, agencies that are
inside other conservation agencies. New York, for example, has
a combined Game & Fish agency, and they're combined inside
their Department of Conservation. They have to go through a
regulatory review process similar to what's being proposed and
yet they're not losing federal funds.
MR. ARWAY: I think my concern is more the unintended consequences of the bill. We talked about the ambiguity in a lot of the provisions and how we read it different ways, depending upon what your perspective is. Coal reads it different than gas than we do. That ambiguity then, it's difficult to translate into what the net effect of this legislation would be if it would pass in the current form and then how that would impact the legislative oversight of the processes.

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

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

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

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

REPRESENTATIVE PYLE: True.

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

MR. ROE: I'm not sure, but other --- as you
mentioned, other states have a regulatory review process. And in many cases, that's another commission above that agency, not necessarily a legislative IRRC review, but a commission review similar to ours that review and promulgate those regulations, just as we do.

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

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

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

MR. ROE: Which begs the question of what's the additional advantage of another --- another process on top of
an independent regulatory review process.

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

MR. ROE: Because it's redundant.

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

MR. ROE: It's redundant.

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

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

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

CHAIRMAN MILLER: It's been a while.

MR. ARWAY: Yeah.

CHAIRMAN CAUSER: Another issue that I wanted to bring up is the timeline for stream designations. And in looking at the testimony from the Coal Association, they put some examples of stream designations whereby --- one, for example, was a designation published in the Pennsylvania Bulletin on March 5th, and then approved at the Fish & Boat Commission meeting the next month, in April. Is that standard
to be able to have a short timeline like this? And this was 98 streams. Ninety-eight (98) streams in a 30-day period?

MR. ARWAY: Yeah. No, that did not happen. One of the things with that rule package was that --- that was very unusual that we brought 98 streams forward in one package. And it was a result of our responsibility to survey those streams and work with colleges and universities around those --- around the state to get those streams surveyed, assessed, and then put on a list so that they would then affect the protection provisions and the DEP rules because they were at risk. We have headwater brook trout streams in the mountains of our Commonwealth that have never been surveyed before. They've never been on a list before because they didn't need to be on a list before. They weren't at risk. But now we have Marcellus wells that are being drilled on top of those mountains and are placing those streams at risk, and they should be afforded the protection provisions that you passed in law and the DEP promulgated and the EQB promulgated in its reg that went through IRRC, because the wetlands that are along the flood plain should be protected as exceptional value wetlands, if, indeed, they're wild trout streams. So we put on a surge to go out and get those streams inventoried because society expects them to be protected. And as a result of that, we developed a list of 98 streams over a period of time. And we agreed with the Coal Association at the time that they should have more
time. Our board extended that review period. We gave them more time. And we also, which wasn't reflected in their testimony, agreed to every time we go out and do a stream survey and we understand it has wild trout in it, even before we advance it to the board we put it on a list on the web so that Coal could access that list as well as anyone else and they can see which streams are pending for board action. So they have plenty of time if they want to replicate the surveys that we've done. So we've --- I thought we worked those --- those issues out with the Pennsylvania Coal Association. And subsequently, we really haven't received any complaints from the Coal Association about that listing process. So it's kind of surprising for me to hear their testimony today, but what I can commit to is we can go back and evaluate that testimony and provide a response to the committee.

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

MR. ARWAY: Well, it depends on when the clock starts. Like I said, I thought we worked out the problem with review time by pre-publishing those streams once we discover
they have trout. You know, by the time we put them on our website until the time the board acts, maybe a year or more. So there's plenty of time for any industry or the public to review what decisions we're going to make in the future. I thought we worked out that problem. The clock doesn't start whenever we go to propose rule any longer. It starts six months or a year before that.

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

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

REPRESENTATIVE MCCARTER: Thank you, Mr. Chairman. I think it's become abundantly clear. And I thank everybody for testifying today, and I have further comments and questions, obviously, of my colleagues as well, but I think it
is abundantly clear what the real meaning of this particular legislation is. And the meaning of this legislation really sets out several different areas that I think have been discussed. What is sound science? What is the nature of the review process? And what really is the role between business and corporations in dealing with the issues of endangered species and what those regulations are that they have to agree upon? And all three of those areas, many of them are not really addressed, as we've heard in the testimony today, by this particular bill. But the legislation calls into question all of those particular areas.

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

In the second issue, that of what we're doing in terms of regulations, it's very clear from the testimony submitted to the Committee already from IRRC that they don't understand how this bill will play out. They don't understand it. So they have great questions, even though we're calling upon them to be the extra set of eyes, which, as we've all
acknowledged, they do not have the scientific background that the people do that are doing that research, whether we trust it or not.

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

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

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

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

MEETING ADJOURNED AT 1:30 P.M.
COMMONWEALTH OF PENNSYLVANIA)
COUNTY OF ALLEGHENY   )

CERTIFICATE

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

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

That the proceeding is herein recorded fully and accurately;

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

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

[Signature]