

THE GENERAL ASSEMBLY OF PENNSYLVANIA

HOUSE BILL

No. 2950 Session of
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INTRODUCED BY FARGO, VROON, LEH, BROWN, BIRMELIN, HANNA, BARLEY,
SAURMAN, S. H. SMITH, NOYE, HERSHEY, CARLSON, GEIST, KING,
BOYES, JADLOWIEC, BUSH AND ARNOLD, SEPTEMBER 29, 1992

REFERRED TO COMMITTEE ON CONSERVATION, SEPTEMBER 29, 1992

AN ACT

1 Providing for wetlands conservation and management; further
2 providing for eminent domain; providing for penalties and
3 remedies; establishing the Wetlands Conservation Fund;
4 conferring powers and duties upon the Department of
5 Environmental Resources; and making an appropriation.

6 TABLE OF CONTENTS

7 Chapter 1. Preliminary Provisions
8 Section 101. Short title.
9 Section 102. Declaration of policy.
10 Section 103. Definitions.
11 Chapter 3. Conservation and Management
12 Section 301. Prohibition.
13 Section 302. Permits.
14 Section 303. Wetlands identification and classification.
15 Section 304. Inverse condemnation.
16 Chapter 5. Enforcement
17 Section 501. Administrative penalty.
18 Section 502. Injunction.
19 Chapter 7. Administration

1 Section 701. Fund.

2 Section 702. Administrative provisions.

3 Chapter 21. Miscellaneous Provisions

4 Section 2101. Preemption.

5 Section 2102. Appropriation.

6 Section 2103. Effective date.

7 The General Assembly of the Commonwealth of Pennsylvania
8 hereby enacts as follows:

9 CHAPTER 1

10 PRELIMINARY PROVISIONS

11 Section 101. Short title.

12 This act shall be known and may be cited as the Wetlands
13 Conservation and Management Act.

14 Section 102. Declaration of policy.

15 The General Assembly finds and declares as follows:

16 (1) Wetlands play an integral role in maintaining the
17 quality of life through material contributions to economy,
18 food supply, water supply and quality, flood control, fish,
19 wildlife and plant resources. Wetlands are critical to the
20 health, safety, recreation and economic well-being of
21 citizens of this Commonwealth.

22 (2) Wetlands serve important ecological and natural
23 resource functions, such as providing essential nesting and
24 feeding habitat for waterfowl, other wildlife and many rare
25 and endangered species; providing fisheries habitat;
26 enhancement of water quality; and natural flood control.

27 (3) Much of the Commonwealth's resource has sustained
28 significant degradation, resulting in the need for effective
29 programs to limit the loss of ecologically significant
30 wetlands and for long-term restoration and enhancement of the

wetlands resource base.

(4) An effective wetlands conservation and management program must reflect a balanced approach that conserves and enhances important wetlands values and functions while observing private property rights; recognizes the need for essential public infrastructure, such as highways, ports, airports, sewer systems and public water supply systems; and provides the opportunity for sustained economic growth.

(5) While wetlands provide many varied economic and environmental benefits, they also present health risks in some instances where they act as breeder grounds for insects that are carriers of human and animal diseases.

(6) Variations in wetlands values or functions should be considered in determining the character and extent of regulation of activities occurring in wetlands areas.

(7) Sufficient regulatory incentives are required for conservation, restoration or enhancement activities.

(8) Conservation of resources on an ecosystem basis should be encouraged to the fullest extent practicable.

(9) Public and private interests should be balanced in determining the conditions under which activity in wetlands areas may occur.

Section 103. Definitions.

The following words and phrases when used in this act shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"Activity in wetlands." Any of the following:

(1) Discharge of dredged or fill material into wetlands.

(2) Draining, channelization or excavation of wetlands.

"Creation of wetlands." Bringing a wetland into existence at

1 a site where it did not formerly occur for the purpose of
2 compensation.

3 "Department." The Department of Environmental Resources of
4 the Commonwealth.

5 "Enhancement of wetlands." Increasing the value of wetlands'
6 functions.

7 "Fastlands." Lands located behind permitted human-made
8 structures.

9 "Fund." The Wetlands Conservation Fund established in
10 section 701.

11 "Growing seasons." For each plant hardiness zone, the period
12 between the average date of last frost in spring and the average
13 date of first frost in autumn.

14 "Incidentally created wetlands." Lands that exhibit wetlands
15 characteristics where any characteristic is the unintended
16 result of human-induced alterations of hydrology.

17 "Maintenance." Activities undertaken to assure continuation
18 of a wetland or the accomplishment of project goals after a
19 restoration or creation of wetlands has been technically
20 completed. The term includes water level manipulations and
21 control of nonnative plant species.

22 "Mitigation banking." Restoration of wetlands, enhancement
23 of wetlands, preservation of wetlands or creation of wetlands
24 for the purpose of providing compensation for wetland
25 degradation or loss.

26 "Normal farming, silviculture, aquaculture and ranching
27 activities." Normal ongoing practices identified by the
28 Department of Agriculture, taking into account existing
29 practices and other practices identified in consultation with
30 the affected industry or community.

1 "Prior converted cropland." Land that:

2 (1) does not serve wetlands functions;

3 (2) has been drained or physically altered to remove
4 excess water; and

5 (3) has been cropped before December 23, 1985.

6 "Restoration." An activity undertaken to return a wetland
7 from a disturbed or altered condition with lesser acreage or
8 fewer wetlands functions to a previous condition with greater
9 acreage or wetlands functions.

10 "Temporary impact." The disturbance or alteration of
11 wetlands caused by activities under circumstances where, within
12 three years following commencement of the activities, the
13 wetlands:

14 (1) are returned to the conditions in existence prior to
15 the commencement of the activity; or

16 (2) display conditions sufficient to ensure that,
17 without human action, they will return to the conditions in
18 existence prior to the commencement of the activity.

19 "Type A wetlands." Wetlands that are of critical
20 significance to the long-term conservation of the ecosystem of
21 which they are a part and which meet the following requirements:

22 (1) The wetlands serve critical wetlands functions,
23 including the provision of critical habitat for a
24 concentration of avian, aquatic or wetland dependent
25 wildlife.

26 (2) The wetlands consist of or may be a portion of ten
27 or more contiguous acres and have an inlet or outlet for
28 relief of water flow.

29 (3) There exists a scarcity within the watershed or
30 aquatic ecosystem of identified ecological functions served

1 by the wetlands such that the use of the wetlands would
2 seriously jeopardize the availability of these identified
3 wetlands functions.

4 (4) There is no overriding public interest in the use of
5 the wetlands for purposes other than conservation.

6 (5) The nature and scope of wetlands functions are such
7 that minimization and compensation are not feasible means for
8 conserving wetlands values and functions.

9 "Type B wetlands." Wetlands that provide habitat for a
10 significant population of avian, aquatic or wetland dependent
11 wildlife or provide other significant wetlands functions,
12 including significant enhancement or protection of water quality
13 and significant natural flood control.

14 "Type C wetlands." Wetlands that:

15 (1) serve limited wetlands functions;

16 (2) serve marginal wetlands functions but which exist in
17 such abundance that regulation of activities is not necessary
18 for conserving important wetlands values and functions;

19 (3) are prior converted cropland;

20 (4) are fastlands; or

21 (5) are wetlands within industrial complexes or other
22 intensely developed areas that do not serve significant
23 wetlands functions as a result of such location.

24 "Wetlands." Lands which have a predominance of hydric soils
25 and which are inundated by surface water at a frequency and
26 duration sufficient to support, and which under normal
27 circumstances do support, a prevalence of vegetation typically
28 adapted for life in saturated soil conditions. The term includes
29 swamps, marshes and bogs.

30 "Wetlands functions." The roles wetlands serve which are of

1 value. The term includes flood water storage, flood water
2 conveyance, ground water discharge, erosion control, wave
3 attenuation, water quality protection, scenic and aesthetic use,
4 food chain support, fishery, wetlands plant habitat, aquatic
5 habitat and habitat for wetland dependent wildlife.

6 CHAPTER 3

7 CONSERVATION AND MANAGEMENT

8 Section 301. Prohibition.

9 (a) General rule.--Except as provided in subsection (b), a
10 person may not undertake an activity in wetlands without a
11 permit from the department.

12 (b) Exception.--The following activities in wetlands do not
13 require a permit:

14 (1) Normal farming, silviculture, aquaculture and
15 ranching activities.

16 (2) Maintenance, including emergency reconstruction of
17 recently damaged parts of currently serviceable structures
18 such as dams, levees, water control structures, causeways,
19 bridge abutments or approaches and transportation structures.

20 (3) Construction or maintenance of farm, stock or
21 aquaculture ponds or irrigation canals and ditches or
22 maintenance of drainage ditches.

23 (4) Construction of temporary sedimentation basins on a
24 construction site which does not include placement of fill
25 material into wetlands.

26 (5) Construction or maintenance of farm roads, forest
27 roads or temporary roads for moving mining equipment, if the
28 roads are constructed and maintained in accordance with best
29 management practices to assure that flow and circulation
30 patterns and chemical and biological characteristics of the

1 waters are not impaired, that the reach of the waters is not
2 reduced and that any adverse effect on the aquatic
3 environment will be otherwise minimized.

4 (6) Activities undertaken on farmed wetlands. If there
5 is a change in the use of farmed wetlands for the purpose of
6 undertaking an activity that is not exempt under this
7 subsection, the exception granted by this paragraph is
8 inapplicable to the extent that the farmed wetlands are
9 classified under section 303.

10 (7) Activities undertaken in incidentally created
11 wetlands. This paragraph does not apply to incidentally
12 created wetlands which have exhibited wetlands functions for
13 more than five years.

14 Section 302. Permits.

15 (a) Application.--A person seeking to undertake an activity
16 in wetlands for which a permit is required under section 301(a)
17 shall make application to the department identifying the site of
18 activity and describing the proposed activity. The applicant may
19 also provide such additional information regarding such proposed
20 activity as necessary or appropriate for determining the
21 classification of the wetlands or whether and under what
22 conditions the proposed activity may be permitted to occur. The
23 department may prescribe, by regulation, permit fees.

24 (b) Determination.--

25 (1) Upon application under subsection (a), the
26 department shall classify the wetlands under application as
27 Type A, Type B or Type C.

28 (i) The department is authorized and directed to
29 establish regulations that govern the delineation of
30 lands as wetlands for purposes of this paragraph and

1 section 303. The regulations shall be established after
2 consultation with other State agencies, including the
3 Pennsylvania Fish Commission, and the Pennsylvania Game
4 Commission and Federal agencies, including the United
5 States Fish and Wildlife Service, the Environmental
6 Protection Agency and the United States Soil Conservation
7 Service.

8 (ii) The regulations shall ensure that lands are
9 delineated as wetlands only if the lands are found to be
10 wetlands as defined in this act. The regulations may not
11 cause any of the following results:

12 (A) The delineation of lands as wetlands unless
13 clear evidence of wetland hydrology, hydrophytic
14 vegetation and hydric soil is found to be present
15 during the period in which delineation is made.
16 Delineation shall be conducted during the growing
17 season unless otherwise requested by the applicant.

18 (B) The classification of vegetation as
19 hydrophytic if the vegetation is equally adapted to
20 dry or wet soil conditions or is more typically
21 adapted to dry conditions than wet soil conditions.

22 (C) The classification of lands as wetlands
23 unless some obligate wetlands vegetation is found to
24 be present during the period of delineation except if
25 such vegetation has been removed for the purpose of
26 evading jurisdiction under this section, this clause
27 shall not apply.

28 (D) The conclusion that wetlands hydrology is
29 present unless water is found to be present at the
30 surface of the lands for at least 21 consecutive days

1 during the growing season in which delineation is
2 made and for 21 consecutive days in the growing
3 seasons in a majority of the years for which records
4 are available.

5 (E) The classification of lands as wetlands that
6 are temporarily or incidentally created as a result
7 of an adjacent development activity.

8 (iii) Regulations shall provide that normal
9 circumstances shall be determined on the basis of the
10 factual circumstances in existence at the time of
11 application under subsection (a) or at the time of
12 classification under section 303, whichever is
13 applicable, if those circumstances have not been altered
14 by an activity prohibited under section 301.

15 (2) If the wetlands under application are classified as
16 Type A, the permit shall be denied.

17 (3) If the wetlands under application are classified as
18 Type C, the classification constitutes the permit.

19 (4) If the wetlands under application are classified as
20 Type B, the department shall make a determination on the
21 permit on the basis of the following criteria, to ensure the
22 watershed or aquatic ecosystem of which the wetlands are a
23 part does not suffer significant loss or degradation of
24 wetlands functions:

25 (i) Quality and quantity of ecologically significant
26 functions served by the areas to be affected.

27 (ii) Opportunities to reduce impacts through cost-
28 effective design to avoid or minimize use of wetlands
29 areas.

30 (iii) Costs of mitigation requirements and social,

1 recreational and economic benefits associated with the
2 proposed activity.

3 (iv) Ability of the permittee to mitigate wetlands
4 loss or degradation as measured by wetlands functions.

5 (v) Environmental benefit that may occur through
6 mitigation efforts, including restoring, preserving,
7 enhancing or creating wetlands functions.

8 (vi) Marginal impact of the proposed activity on the
9 watershed of which the wetlands are a part.

10 (5) If the department does not complete the
11 determination under this subsection within 90 days of receipt
12 of the application, the permit shall be deemed granted.

13 (c) Procedure.--The provisions of 2 Pa.C.S. Ch. 5 Subch. A
14 (relating to practice and procedure of Commonwealth agencies)
15 and Ch. 7 Subch. A (relating to judicial review of Commonwealth
16 agency action) shall apply to this section.

17 Section 303. Wetlands identification and classification.

18 (1) The department, in consultation with other Federal
19 and State agencies, shall undertake a project to identify and
20 classify wetlands in this Commonwealth. The department shall
21 complete the project within five years of the effective date
22 of this act under section 2303(2).

23 (2) In conducting the project under this section, the
24 department shall identify and classify wetlands in accordance
25 with standards for delineation of wetlands established under
26 section 302(b)(1).

27 (3) In conducting the project under this section, the
28 department shall provide notice and an opportunity for a
29 public hearing in each county before the completion of the
30 identification and classification of wetlands in that

1 particular county.

2 (4) After completion of the identification and
3 classification of wetlands, the department shall promptly
4 publish the information on identification and classification
5 in the Pennsylvania Bulletin and in a newspaper of general
6 circulation in each county and take other steps reasonably
7 necessary to ensure that the information is available to the
8 public.

9 (5) The department shall report to the General Assembly
10 on implementation of the project to be conducted under this
11 section within two years after the effective date of this act
12 under section 2303(2) and annually thereafter.

13 (6) The department shall periodically update the
14 wetlands inventory maps and make them available to the
15 public. Notice of updates to the wetlands inventory maps
16 shall be made in the same manner as described in paragraph
17 (4).

18 (7) Any classification of lands as wetlands under this
19 act shall be recorded on the proper records and deeds in the
20 county in which wetlands are located.

21 Section 304. Inverse condemnation.

22 (a) Eligibility.--The denial of a permit under section
23 302(b)(4) constitutes a compensable injury without a declaration
24 of taking within the meaning of section 502(e) of the act of
25 June 22, 1964 (Sp.Sess., P.L.84, No.6), known as the Eminent
26 Domain Code.

27 (b) Limitation of action.--An action under subsection (a)
28 must be brought within two years of receipt of notice of the
29 classification. The provisions of 42 Pa.C.S. § 5527 (relating to
30 six year limitation) and § 5530 (relating to twenty-one year

1 limitation) do not apply to actions under subsection (a).

2 CHAPTER 5

3 ENFORCEMENT

4 Section 501. Administrative penalty.

5 (a) General rule.--If the department determines that a
6 person has intentionally or negligently violated this act, the
7 department may assess an administrative penalty of not more than
8 \$10,000 against the person. Each day of violation constitutes a
9 separate violation under this section.

10 (b) Procedure.--The provisions of 2 Pa.C.S. Ch. 5 Subch. A
11 (relating to practice and procedure of Commonwealth agencies)
12 and Ch. 7 Subch. A (relating to judicial review of Commonwealth
13 agency action) shall apply to this section.

14 Section 502. Injunction.

15 The department or a person aggrieved by a violation of this
16 act may seek an injunction against the violation in a court of
17 competent jurisdiction.

18 CHAPTER 7

19 ADMINISTRATION

20 Section 701. Fund.

21 (a) Establishment.--The Wetlands Conservation Fund is
22 established as a separate fund in the State Treasury.

23 (b) Source.--The source of the fund shall be all of the
24 following:

25 (1) Permit fees under section 302(a).

26 (2) Penalties under section 501.

27 (3) One percent of the Commonwealth's share of the tax
28 under Article XI-C of the act of March 4, 1971 (P.L.6, No.2),
29 known as the Tax Reform Code of 1971.

30 (4) Annual appropriations.

(c) Purpose.--The purposes of the fund are:

(1) To pay for condemnation under section 304.

(2) To administer this act.

Section 702. Administrative provisions.

(a) General rule.--The department shall administer this act and the fund.

(b) Final regulations.--Within one year of the effective date of this act under section 2103(2), the department shall promulgate regulations for the issuance of permits under section 302. The regulations shall, in accordance with this act, provide for all of the following:

(1) Standards and procedures for the classification and delineation of wetlands and procedures for administrative review of any classification or delineation.

(2) Standards and procedures for the individual permit applications under section 2302(a).

(3) General enforcement of this act.

(4) Other matters that the department deems necessary or appropriate to implement requirements of this act.

(5) Requirements governing the establishment of mitigation banks.

(c) Temporary regulations.--The department shall, within 90 days of the effective date of this act under section 2103(2), issue interim regulations consistent with this act to take effect immediately. The interim regulations shall be binding until the issuance of final regulations under subsection (a). The department shall provide adequate procedures for waiver of any provisions of interim regulations to avoid special hardship, inequity or unfair distribution of burdens or to advance the purpose of this section.

1 (d) Fund.--The department shall administer this act and the
2 fund.

3 CHAPTER 21

4 MISCELLANEOUS PROVISIONS

5 Section 2101. Preemption.

6 This act preempts ordinances of political subdivisions which
7 are in conflict with this act.

8 Section 2102. Appropriation.

9 The sum of \$, or as much thereof as may be necessary, is
10 hereby appropriated to the Wetlands Conservation Fund for the
11 fiscal year July 1, 1992, to June 30, 1993. This shall be a
12 continuing appropriation and shall not lapse at the end of the
13 fiscal year.

14 Section 2103. Effective date.

15 This act shall take effect as follows:

16 (1) Section 301 of this act shall take effect in 240
17 days.

18 (2) The remainder of this act shall take effect in 60
19 days.