

HOUSE OF REPRESENTATIVES
COMMONWEALTH OF PENNSYLVANIA

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House Bill 200
Wetlands Issues

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House Environmental Resources & Energy Committee

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Room 418, Minority Caucus Room
Main Capitol Building
Harrisburg, Pennsylvania

Wednesday, January 17, 1996 - 10:20 a.m.

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BEFORE:

Honorable Robert D. Reber, Majority Chairman
Honorable Jerry Birmelin
Honorable Howard L. Fargo
Honorable Brett Feese
Honorable Kenneth M. Jadlowiec
Honorable Albert Masland
Honorable Eugene F. McGill
Honorable Carole Rubley
Honorable Samuel H. Smith
Honorable Jerry A. Stern

KEY REPORTERS

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ORIGINAL

BEFORE: (CONTINUED)

Honorable Camille George, Minority Chairman
Honorable Stanley J. Jarolin
Honorable David K. Levdansky
Honorable Harry A. Readshaw
Honorable Dan A. Surra

ALSO PRESENT:

Fred Taylor
Majority Executive Director

Mark E. Brown
Majority Research Analyst

Richard Thomas
Minority Executive Director

Ginger Hope,
Secretary to the Committee

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1 CHAIRMAN REBER: For the information of
2 all members and guests and witnesses and people
3 in attendance, we are going to obviously just
4 wait a few more moments. There are members that
5 are coming in. We understand the Minority
6 Chairman is on his way, but may very well be
7 somewhat delayed yet so we are going to wait a
8 few minutes yet.

9 We do have a number of committee
10 members present, and Secretary Seif has just
11 arrived on the scene with a number of his staff,
12 so we will just bear a few moments with him and
13 then we will begin to proceed. Thank you.

14 (Brief pause.)

15 CHAIRMAN REBER: I would like to
16 formally call to order the Environmental
17 Resource and Energy Committee for this third in
18 our series of hearings on wetlands issues as
19 they relate to the Commonwealth of Pennsylvania.

20 At this point in time, I would like to
21 have the members of the committee introduce
22 themselves and the respective areas that they
23 represent, starting at my far right with
24 Representative McGill.

25 REP. MCGILL: I am Eugene McGill. I

1 represent part of Montgomery County, the 151st
2 Legislative District.

3 REP. READSHAW: Good morning. My name
4 is Representative Harry Readshaw. I am from
5 Allegheny County. I represent the 36th
6 Legislative District.

7 REP. FEESE: Brett Feese, Lycoming
8 County, 84th Legislative District.

9 REP. STERN: I am Representative Jerry
10 Stern. I represent the 80th Legislative
11 District, Blair and Bedford Counties.

12 REP. FARGO: Good morning.
13 Representative Howard Fargo and I am Mercer,
14 Butler and Armstrong Counties. That is the 8th
15 Legislative District.

16 REP. SMITH: Sam Smith, 66th
17 Legislative District, Jefferson, Indiana and
18 Clearfield Counties.

19 CHAIRMAN REBER: I am Representative
20 Bob Reber, the Majority Chairman, from
21 Montgomery County.

22 REP. GEORGE: Camille George from
23 Clearfield, Centre.

24 REP. JADLOWIEC: Ken Jadowiec, McKean,
25 Cameron and Elk Counties.

1 REP. BIRMELIN: Representative

2 Birmelin, Wayne and Pike Counties.

3 REP. SURRA: Representative Surra, 75th

4 District, Elk and Clearfield Counties.

5 REP. MASLAND: Al Masland from Western

6 Cumberland and Northern York Counties.

7 REP. RUBLEY: Carole Rubley, Chester

8 County, District 157.

9 REP. LEVDANSKY: David Levdansky,

10 Allegheny County, District 39.

11 CHAIRMAN REBER: The Chair thanks the
12 members of the committee and I would like to
13 specifically thank each and every member of the
14 committee for taking the time on this very, very
15 hazardous driving day for attending today's
16 hearing on wetlands.

17 Our first witness today is the
18 Secretary of the Department of Environmental
19 Protection, Secretary James Seif.

20 And, Jim, it is a pleasure to have you
21 here today, and I think I would be remiss if I
22 did not say it is above and beyond the call of
23 duty as a result of the fall that occasioned
24 your coming to this hearing today.

25 SECRETARY SEIF: Good morning, Mr.

1 Chairman and Representative George. Thank you
2 for inviting me this morning. The topic is of
3 great importance to us.

4 This particular wrist problem, I hope,
5 is temporary, as was the last one. I might note
6 that, the last time I was unable to tie a
7 necktie, I had some expert assistance from
8 Representative Masland one morning in July at a
9 speaking engagement.

10 I may be over to your spot shortly, Al.

11 Today is the very first day of the
12 second year of the Ridge Administration. The
13 inauguration was on the 17th last year and we
14 are, therefore, as of last night, completing our
15 first year, and a very busy one it has been.

16 I am accompanied today by: Dr. Hugh
17 Archer, who is Governor Ridge's Deputy Secretary
18 for Water Management at our Department; by Ken
19 Reisinger, who heads the Wetlands Program in our
20 Department.

21 I mentioned we have completed a very
22 productive year. We had some ambitious goals.
23 We wanted to fundamentally transform
24 Pennsylvania's environmental programs from the
25 government knows best philosophy to one which

1 encourages private ingenuity to achieve our
2 mutual environmental goals and we wanted to
3 become a national leader in finding new and
4 innovative ways to protect the environment.

5 The core mission of our agency has not
6 changed, nor will it (we want to protect the
7 environment) but our means will change. The old
8 DER, as many of you know only too well, had
9 become a lightning rod for criticism, some of it
10 justified, and was becoming somewhat of a
11 whipping boy for the public.

12 If we did not change that perception
13 and our approach, we would no longer have been
14 in a position to accomplish our basic mission,
15 which is environmental protection, let alone to
16 make progress.

17 I think the lesson in Washington, that
18 is, as we watch what is happening to EPA, is an
19 important caution for us.

20 Through the bipartisan leadership,
21 epitomized by this committee and your
22 counterpart committee in the Senate, we guided
23 through the split bill, sponsored by Chairman
24 Reber and many others here. And I think we can
25 report this morning that, in six months of

1 operation with two new departments, that bill
2 has proven its worth.

3 We have promoted industrial site
4 cleanup and reuse, and the particular lesson of
5 that is important for this morning because I
6 think the long term result of that policy, among
7 others, will be to put less development pressure
8 on green spaces and other environmental
9 resources like wetlands.

10 We have seen, already, extraordinary
11 interest in that program. We are already
12 nursing officially 30 sites through the process.
13 We have additional interest. We are seeing
14 enormous numbers of people come to the seminars
15 we are holding on how to clean up a site under
16 Act 2.

17 We have instituted, as many of you
18 know, a money-back guarantee for permit reviews.
19 We have, from the first quarter of that, 702
20 permit applications and no returns yet. We will
21 expand that program until all permits are
22 included by the end of this fiscal year. That,
23 too, is a lesson for our wetlands program in the
24 sense that one of the problems with the wetlands
25 permit program was too long a time for

1 processing. We want to bring that to an end.

2 We have begun, as we have reported here
3 as well, the regulatory basics initiative by
4 which we tend to go through each and every page
5 of the regulations, under the statute which the
6 General Assembly has passed, to see to it that
7 they make sense and can be complied with.

8 We have received comments. We will be
9 reporting to you on the results of that
10 initiative. We expect to be completed with some
11 regulatory packages for consideration of the
12 Environmental Quality Board before the end of
13 this year.

14 We set up, and announced yesterday, the
15 establishment of the Office of Pollution
16 Prevention and Compliance Assistance so that we
17 can do the kinds of things outside of the
18 enforcement context that will encourage
19 compliance and improve the environment as well
20 as the economy.

21 We have begun a review of the public
22 participation process which is a very important
23 one for the wetlands area, and we will continue
24 to report to you on that.

25 The reason I have prefaced my remarks

1 on the particular subject of wetlands, or with
2 the review of these other initiatives, is
3 because I think each one pertains to wetlands,
4 getting decisions out quickly, involving more
5 people and the general public in those
6 decisions, and seeing to it that they are
7 consistent with federal standards, protective of
8 the environment.

9 Let me describe how we put some of
10 these principles, particularly the work in the
11 wetlands area.

12 Our Commonwealth has about 400,000
13 acres of wetlands, about one and a half percent
14 of our total land surface. By some estimates,
15 more than half of these wetlands have been lost
16 in Pennsylvania since Colonial times, including
17 some of the most important ones along river
18 banks. This loss points to a need to make a
19 clear public policy decision about the wetlands
20 resources we still have left and to determine
21 how best to encourage restoration of wetlands.

22 Over the last 20 years, the value of
23 wetlands and the need to protect them has become
24 well recognized by the scientific community and
25 the public. What we are discussing this

1 morning, I think, is not the value of wetlands
2 but the methods we have used to protect them and
3 why they may have become controversial in the
4 past.

5 Wetlands were initially regarded as
6 swamps, or bogs, useless unless you filled them
7 in and built something. We now recognize that
8 wetlands serve as indispensable filters for
9 pollutants, critical habitats and as natural
10 flood protection.

11 We have rediscovered the recuperative
12 powers of wetlands in providing our streams and
13 rivers with clean, fresh water -- and, in fact,
14 manmade wetlands are effectively being used to
15 treat acid mine drainage from coal mining, to
16 control non-point source pollution (one of the
17 most important sources of pollution in general
18 in the Commonwealth) and may even be useful in
19 some hazardous waste cleanups.

20 The role of wetlands as a natural flood
21 control mechanism is now well documented and may
22 get a test in the next few weeks, and the
23 preservation of wetlands have been made a key
24 element of some local storm water and flood
25 control plans in parts of the United States and

1 especially in the Chesapeake Basin.

2 Wetlands also serve as unique
3 ecosystems that provide habitats for a vast
4 array of waterfowl, threatened and endangered
5 species and other wildlife. It is the habitat
6 aspect of wetlands which has made sportmen's
7 groups like Duck Unlimited one of the more
8 authoritative organizations in the country on
9 wetland replacement.

10 The conflicts between development and
11 wetlands protection are becoming fewer and fewer
12 as developers routinely factor wetlands
13 protection into their development plans just as
14 they would other national features such as soil
15 conditions, slopes or floodplains. County
16 conservation districts, which are an important
17 frontline warrior in the war of protecting
18 environment, as well as others, have played a
19 key role in this education process.

20 There are some issues and conflicts
21 that remain and the Ridge Administration is
22 attempting to address them in a series of
23 initiatives I announced last June before the
24 Pennsylvania Council of Farm Organizations.
25 These initiatives will (among other things):

1 * provide consistency between state and
2 federal requirements;

3 * simplify permit requirements and
4 focus staff resources on protecting wetlands
5 where such protection affords the most
6 environmental benefit;

7 * provide more options for replacing
8 wetlands that are unavoidably lost;

9 * address particular concerns of
10 farmers and residential lot owners; and

11 * involve the public in shaping our
12 wetlands protection program.

13 We offered these proposals for public
14 comment and received several hundred replies,
15 proving again how interested the public is in
16 wetlands protection.

17 Let me start with public involvement.
18 It was clear that we needed a process to develop
19 a consensus on how the wetlands protection
20 program should proceed. An earlier effort to do
21 that through the use of a wetlands advisory
22 committee was disbanded.

23 We proposed a Wetlands Management
24 Advisory Committee last June and attracted
25 almost 80 people interested in serving. We will

1 shortly be announcing the membership of that
2 committee. It will be composed of a
3 cross-section of landowners, environmentalists,
4 professionals and local government stakeholders
5 in wetlands protection. The committee will help
6 advise and guide the Department in this area.

7 We would like to offer to this
8 committee the assistance of our wetlands
9 advisory group so that we can work together and
10 develop the best programs needed to protect
11 wetlands. As its first order of business, I
12 will direct the group to review wetlands
13 protection legislation now before the General
14 Assembly to increase my knowledge and yours
15 about those issues.

16 I think this could be a very fruitful
17 area of cooperation.

18 Consistency with federal requirements.
19 We have taken a variety of steps to assure that
20 our wetlands protection program are more
21 consistent with federal requirements, without
22 forgetting the needs of Pennsylvania.

23 We are today announcing the final
24 adoption of a common state-federal method for
25 mapping wetlands. This change would help permit

1 applicants to avoid the unnecessary expense of
2 filing duplicate maps with permit applications
3 and will end a long-standing inconsistency
4 between the state and federal methods for
5 delineating wetlands.

6 This policy, the delineation policy,
7 goes out today.

8 We are also announcing the final
9 adoption of a policy to exempt prior converted
10 croplands -- agricultural lands that were in
11 production before 1985 and remain in production
12 -- from state wetlands regulation. This matches
13 a federal policy adopted in 1994. That is this
14 policy (indicating) for the committee to review.

15 Last March, our Department and the
16 Corps of Engineers implemented the Pennsylvania
17 State Programmatic General Permit process, which
18 provides one-stop shopping for more than 80
19 percent of wetland permit applicants. In
20 addition, through delegation agreements with 41
21 county conservation districts, virtually all of
22 the over 4,000 general permits registered with
23 those offices will now automatically receive
24 federal permits as well.

25 The simplification of permit

1 requirements. We learned through a study
2 conducted by the previous administration that
3 our staff spent too much time reviewing permit
4 applications for a relatively insignificant
5 wetlands impacts.

6 In calendar year 1992, for example, 61
7 percent of the wetlands permit applications
8 covered a total of only 22 acres of wetlands,
9 more than half the applications for about 23
10 acres of wetlands. At that time, we ended up
11 approving the filling of 16 and a half acres of
12 those because of insignificant impacts and saved
13 only 6 acres from being filled.

14 Of the 100 to 150 permits that we
15 review every year, 80 percent are for wetlands
16 of one-half acre or less, and most are a quarter
17 acre or less.

18 One way to focus our staff effort is to
19 concentrate on reviewing permits for activities
20 that cause real harm to larger wetlands while
21 giving other activities less review.

22 We are today finalizing a general
23 permit to allow some wetlands to be used for one
24 particular purpose -- the construction of homes
25 by the owners within subdivisions established

1 before November '91. (This the GP 15 policy.)
2 This permit helps solve a long-standing problem
3 for unsuspecting landowners who purchased their
4 lots before wetland requirements were widely
5 known and enforced.

6 As part of the permit, we will require
7 users to minimize impacts on wetlands and
8 contribute to a new Wetlands Replacement Fund
9 that will finance projects to replace those
10 wetlands lost through the use of a permit.
11 On-site wetland replacement will no longer be
12 the only real option.

13 Changes were made to the general permit
14 to deal with several concerns raised during the
15 comment period that we had. First, the permit
16 can only be used to construct a home, driveway
17 and utility access. Conditions added to the
18 permit require the lot owner to avoid creating
19 storm water runoff problems for neighbors.

20 We would also like to enter into
21 agreements with the conservation districts or
22 others to study how these general permits
23 actually operate in the field. If we do
24 determine that storm water or other problems
25 will be created in certain areas by this permit,

1 we will add other conditions or suspend issuing
2 these permits for that area and work with local
3 governments to deal with any potential storm
4 water management problems.

5 We feel this is a common sense approach
6 to a very difficult issue. It allows homeowners
7 to use their lots, while at the same time
8 protecting a very valuable resource.

9 Replacement of wetlands, was, in the
10 past, a little bit constricted. DER had few
11 options for replacing wetlands unavoidably lost
12 to projects, and in particular, off-site
13 wetlands replacements.

14 We are today announcing the final
15 adoption of a Wetlands Replacement Fund for
16 permit applicants who are unable to provide
17 replacement wetlands on-site. Applicants
18 needing up to a half an acre of replacement
19 wetlands would qualify to use the Fund. The
20 contributions to it will finance wetland
21 replacement and restoration projects on a larger
22 scale and in locations where the chances of
23 success will be greatly enhanced.

24 We are pleased to tell you that we are
25 having discussions with the Pennsylvania Land

1 Trust Association to manage this Fund. That
2 will be an interesting and I think productive
3 public-private partnership in an important area.

4 As a result of a recommendation from
5 our Agricultural Advisory Board and county
6 conversation districts, last July we established
7 a Wetlands Registry where property owners who
8 want to have wetlands on their property restored
9 or enhanced. The Registry will be made
10 available to permit applicants and organizations
11 seeking available sites for projects. Already
12 two dozen landowners are registered and there
13 are potentially hundreds of them who could
14 benefit from this Registry.

15 We have also worked with individuals
16 and agencies who are interested in establishing
17 wetland mitigation banks on their property as
18 another option for permit applicants. The
19 Pennsylvania Department of Transportation, our
20 Department and the Corps of Engineers are
21 working to develop mitigation banks in a number
22 of PennDOT districts.

23 With this discussion as background,
24 permit me to turn to House Bill 200. If I may,
25 I would like to touch on several key aspects of

1 the bill in these comments: the definition of
2 wetlands, classification and permitting,
3 mapping, mitigation banking, the Wetlands
4 Conservation Fund and finally the takings issue.

5 In our view, a scientifically sound
6 definition of wetlands is a fundamental element
7 of any wetlands protection program. Once we
8 have a sound definition, we can then decide
9 which types of wetlands or activities on those
10 wetlands should be regulated.

11 Recently, the National Academy of
12 Sciences validated the general approach used by
13 regulators to identify wetlands. It relies on
14 hydrology, vegetation and soils information. We
15 believe an approach based on this scientific
16 kind of determination would be within keeping
17 with our Administration's philosophy.

18 With respect to House Bill 200, we have
19 some concern that using terms like critical
20 significance, limited functions and marginal
21 functions in defining or classifying wetlands
22 would lead to further confusion and dispute on
23 the part of the regulated community and DEP in
24 applying those definitions in the real world.

25 In terms of a regulatory program, the

1 classification of wetlands and determining which
2 activities in the wetlands may be harmful are
3 the real meat of the program.

4 We suggest the first step is to
5 identify those wetlands that are totally exempt
6 from permitting requirements because of their
7 location, incidental occurrence or prior use or
8 conversion. Examples would include wetlands
9 that are found in storm water or sedimentation
10 control facilities; wetlands designated as prior
11 converted cropland by the federal government;
12 wetlands in abandoned mine lands; incidental
13 wetlands in developments or industrial,
14 commercial areas that occur because of human
15 influences; wetlands constructed as a treatment
16 facility; and those which have been historically
17 maintained in an unnatural condition for
18 non-wetland purposes, such as lawns and the
19 like.

20 These are the kinds of wetlands already
21 identified in House Bill 200.

22 We support waivers for activities that
23 would not adversely affect the environment when
24 best management practices are followed. These
25 would include: normal farming practices, such as

1 plowing, seeding, cultivating; best management
2 practices for grassed waterways and terraces on
3 agricultural land; maintenance of existing
4 structures, like bridges and roads; installation
5 and maintenance of utility lines and
6 construction of farm and stock ponds.

7 Not all of these exempt activities, or
8 activities which we would recommend for
9 exemption, are now included in House Bill 200.

10 After developing an initial list of
11 those wetlands and activities that will be
12 exempted or waived from permitting requirements,
13 we are essentially left with a choice of how to
14 develop a system of protecting all of the
15 remaining ones.

16 We would favor regulating all other
17 wetlands and activities in wetlands through a
18 sensible permit application process to allow a
19 case-by-case determination of whether impacts
20 are significant or not based on objective
21 criteria.

22 Those review criteria should include a
23 number of factors, some of which are already in
24 House Bill 200. These would include presence of
25 threatened or endangered species, impacts on

1 Exceptional Value or High Quality waters,
2 designated trout streams, scenic rivers and
3 similar sensitive areas. We believe that
4 classification and related provisions requiring
5 certain permit actions contained in the bill
6 could be streamlined to avoid controversies over
7 classification and permit determinations. We
8 are also concerned about the cost of
9 implementing the provisions as written.

10 We would be happy to work with the
11 sponsor of the bill, with whom we have already
12 had many productive discussions, and the members
13 of the committee, to further develop this
14 classification system to sidestep these
15 problems.

16 The mapping issue. The concept of
17 mapping wetlands in the state is a good idea.
18 Early identification of wetlands resources and,
19 indeed, many other kinds of natural resources,
20 will help developers, local governments and
21 others factor them into land development plans.

22 As drafted here, however, we are
23 concerned with the cost and practicality of
24 mapping and classifying wetlands in areas of the
25 state that may not be proposed for development.

1 We would suggest as an alternative,
2 since most land use planning occurs at the local
3 level, it may be more appropriate that funding
4 for mapping could be directed to those counties
5 or municipalities currently under significant
6 development pressure or which are known to have
7 critical wetland areas that must be identified
8 in order to provide adequate and targeted
9 protection.

10 In filling this need, both the state
11 and local government should make better use of
12 geographic information systems that provide easy
13 access, not only to wetlands information, but
14 other natural resource information so that
15 development can proceed sensitively and
16 sensibly.

17 Such a targeted mapping program would
18 target resources where they are most needed.

19 Mitigation banking is something we not
20 only support in concept but have already taken a
21 number of steps to promote as I have noted
22 earlier.

23 The Conservation Fund, we support the
24 creation of an account that would help the
25 agency finance its wetlands protection and

1 restoration activities.

2 Takings. This Administration and
3 Governor Ridge personally have been a strong
4 advocate for protecting property rights and has
5 opposed unreasonable government regulation of
6 property. We support compensation for lost
7 property value where the owner is denied all
8 reasonable use of his land because of government
9 action. The current system provides courts with
10 the ability to make these determinations and we
11 think that is proper.

12 We have concerns about the provisions
13 of House Bill 200 that would automatically
14 require compensation where permits are denied
15 without the opportunity for a court to make
16 individual determinations of a taking.

17 We are very concerned about the amount
18 of funding needed to implement an automatic
19 compensation provision and its impact on the
20 General Fund.

21 We believe that a reasonable wetlands
22 protection program and the reforms we have
23 proposed will protect the private property
24 rights.

25 We believe having a wetlands protection

1 program that protects valuable wetlands and
2 eliminates needless regulations is important to
3 both the environmental and economic future of
4 the Commonwealth.

5 We hope these comments have been
6 helpful in understanding the current status of
7 wetlands protection efforts, the steps we at DEP
8 have taken during this past year to deal with
9 the remaining wetlands problems, and some of the
10 steps we would like to take in the future.

11 We do not oppose this or other
12 constructive proposals that will help us create
13 an effective and fair wetlands protection
14 program in Pennsylvania.

15 We invite the committee's review of our
16 efforts to date and again offer the help of our
17 Wetlands Management Advisory Committee as it is
18 formed in the near future.

19 I want to close with some remarks from
20 a particularly excellent book that just came to
21 my attention. I believe many of you have seen
22 it. It is, Save Our Land, Save Our Towns, by
23 Tom Hylton. He has analyzed Pennsylvania's land
24 development trends, very trenchantly, in my
25 view, and has said that:

1 "Just as a community makes it possible
2 for us to enjoy our property, each community has
3 the right -- the obligation, in fact -- to
4 ensure private property is used in ways that
5 will benefit the long-term public interest."

6 Serving the long-term public interest
7 -- is the foundation of our wetlands
8 initiatives.

9 We would be delighted to discuss this
10 further and answer any questions that the
11 Chairman or members of the committee have, and I
12 thank you again for the opportunity to be here
13 this morning.

14 CHAIRMAN REBER: Thank you very much,
15 Mr. Secretary. I think you have provided us
16 with a number of entrees for us to appropriately
17 digest on this issue, and I would like to
18 personally thank you and your staff for taking
19 the time.

20 As you may recall, we did have some
21 discussion when the committee met down at your
22 offices for an overview from you and your
23 Department heads and gave us some tours of the
24 Department after the signing of House Bill 1400.
25 And at that time, I suggested to you that it

1 would be well worthwhile to concentrate on this
2 wetlands issue from the Department's standpoint
3 and develop some of the things, many of the
4 things, that you have presented and announced to
5 us today. So I want to personally thank you for
6 staying on top of the time frame and the time
7 line that we had earlier discussed. And I think
8 it is a great significance and help to the
9 committee as we review this issue and the
10 legislation attended to this issue that is
11 pending before the committee.

12 SECRETARY SEIF: Thank you, Mr.
13 Chairman.

14 CHAIRMAN REBER: Also, I would be
15 somewhat remiss if I didn't just comment on your
16 reference to Mr. Hylton. He was a former
17 writer, editor with the Pottstown Mercury, the
18 hometown newspaper. He and my wife were
19 co-founders of Old Pottstown Preservation
20 Society. And I know for a number of years,
21 dating back even to my service in the General
22 Assembly, he was a reporter that covered many of
23 the meetings at which I sat in the capacity as
24 solicitor where he got some of his early
25 training -- I would like to think -- on the

1 Municipalities Planning Code and some of the
2 very unique situations that have emanated into
3 the wetlands issue, if you will, and other open
4 space type situations.

5 But it is an excellent book and I have
6 it available in my office for anyone that would
7 like to take a look at it.

8 And I think your comments and
9 references to that particular treatise are well
10 taken.

11 SECRETARY SEIF: I might say that
12 Representative Rubley, Representative Carone,
13 Senator Brightbill and others have been very
14 interested in that book. And I believe we are
15 about to join together -- that group or some
16 combination of us and perhaps yourself -- in
17 seeing to it that all members of the General
18 Assembly take a look at that. It is not a
19 diatribe. It is a very sensible laying out of
20 important issues. And I think as the next
21 decade of environmental regulation unfolds, it
22 will not be part per viewed at the end of pipes
23 so much as it has been the last 20 years, but it
24 will be discussions of how we use what God gave
25 us.

1 CHAIRMAN REBER: With that in mind, I
2 want to also announce that Representative Carole
3 Rubley is present, a member of the committee
4 from Chester County.

5 I am going to look down to my far, far
6 right and see if we have any questions from any
7 of the committee members, beginning with
8 Representative McGill.

9 REP. MCGILL: No.

10 CHAIRMAN REBER: Representative Howard
11 Fargo, who has a sincere interest in this, has
12 legislation pending House Bill 200, has been
13 present with the committee at all our hearings,
14 and at my request has very graciously been
15 present at those hearings and I asked him to
16 again be present today.

17 Howard, I would recognize you for any
18 questions of the Secretary.

19 REP. FARGO: Thank you, Chairman Reber.
20 I appreciate the fact that I can be here. And,
21 certainly, I would not have missed any of the
22 meetings on something that I have spent, I think
23 six years, maybe eight years, in attempting to
24 see some kind of effort made on the state
25 statute to set up some delineation, some

1 definition of wetlands that are people that are
2 concerned about it. The developers, the
3 economists, the economic providers, the real
4 estate sales people and so forth are all, all
5 very concerned about this, and I think that we
6 do need attention to this matter. I appreciate
7 it.

8 I would say, Secretary, thanks. Thanks
9 to you for being here. And, certainly, it is
10 great to have Dr. Archer and Ken here along.
11 And I appreciate what we have done so far on
12 this bill and the meetings that we have had and
13 the opportunity to talk to you about them.

14 It is interesting to note that this is
15 the first anniversary of the new Governor and we
16 have taken up a very important issue here on
17 that first issue.

18 I want to thank you for the major
19 efforts that have been made by the Ridge
20 Administration. Certainly, any effort to speed
21 up the permitting and simplify them and to get
22 rules on the smaller wetlands so that we can
23 kind of get them out of the way and, certainly,
24 trying to coordinate the federal and the state
25 regulations in this area, you have done a good

1 job on it and I appreciate the work that you
2 have done on it and in working with that
3 particular area.

4 As far as my questions here are
5 concerned, first a couple having to do with
6 prior to where you got into the bill itself, but
7 I was interested in the Wetlands Management
8 Advisory Committee that you talked about.

9 Can you give us a little bit more
10 detail as to what your plans are there and what
11 this Advisory Board will do in the way of the
12 meetings, the makeup and so forth?

13 I assume that we are going to attempt
14 to have a very even makeup between different
15 interests in the wetlands area.

16 SECRETARY SEIF: Yes, Representative
17 Fargo, we want evenness, balance. We will have
18 advocates, practitioners from all walks of life
19 and from all around the Commonwealth.

20 The number of persons on the committee,
21 out of the surprisingly high amount of interest
22 that we received, will probably be between 25
23 and 30. I would like there to be fewer, but the
24 level of interest was great.

25 The specific tasks of the committee

1 will be, in part, up to them. But we are going
2 to offer them a review of even these policies
3 which we have announced today as final so that
4 additional comment and intensive effort can be
5 directed to them, as well as to projects that
6 are ongoing, policies that are not yet
7 finalized.

8 We also would like them to help us in
9 working with you in the oversight capacity to
10 help us examine the provisions of the bill that
11 is before you now -- 200 or any others that may
12 come up in this chamber or the Senate -- to make
13 sure that the people who are most directly
14 involved in the effects of the bill will have
15 direct input to the Administration.

16 In this area, and in just about every
17 other area of citizen input, we want to get far
18 more organized and far more diligent about
19 collecting that kind of information before
20 promulgating regs. or making recommendations on
21 legislation.

22 REP. FARGO: That's probably why I was
23 asking. And you indicated here that they would
24 work with us on this bill. And we have worked
25 directly with you and Dr. Archer and Ken in the

1 past. And I am concerned about a timing element
2 here. This is something that is going to happen
3 immediately. That certainly would be. At least
4 in the very near future, certainly would be.

5 And I would also like to know what
6 meetings they are going to have and what your
7 ideas are about the role that they will play in
8 this area. And I think maybe you have kind of
9 detailed that. But there is a timing problem
10 here.

11 SECRETARY SEIF: In your interest, I
12 will commit to appointment of this committee
13 within two weeks from today. I will, as with
14 all the committees that advise the Department.
15 I think now the new DEP has some 20 plus
16 committees that still advise us.

17 We are going to be sure that they are
18 fully staffed, in terms of all the appointments
19 made; that they have public meetings; that they
20 have a product input, a schedule that everyone
21 knows about including members of the General
22 Assembly.

23 Some of them have acted somewhat
24 informally and have not fulfilled their promise.
25 This one will be quite well directed. We will

1 see to it that you and others who are interested
2 learn of their schedule and can have input to
3 the kinds of things they will be looking at.

4 REP. FARGO: Thank you, Secretary. I
5 appreciate also the fact that you have in your
6 testimony here indicated that the wetlands issue
7 will be one of the first issues that they will
8 work on and I appreciate that.

9 Getting into the mapping area that you
10 mentioned here -- and you use a common
11 state-federal method for mapping wetlands, I am
12 not familiar with what you are talking about
13 here -- is it merely going to be a case of
14 mapping it for the determination as to whether
15 they are wetlands? Or, this mapping process
16 that is involved, is it also going to get into
17 delineation and classification?

18 SECRETARY SEIF: It is more in the
19 delineation area.

20 In 1987, the U.S. Army Corps of
21 Engineers, working with others, promulgated a
22 manual which was designed to take existing
23 scientific knowledge and decide what
24 characteristics -- hydrological, soil, flora and
25 fauna -- were defined a wetlands. And where

1 those characteristics existed, it was a wetland;
2 and where they didn't, that was the border.

3 In 1989, additional work was done, a
4 new manual was produced.

5 There has since then been variation
6 between the state's and at the federal
7 government on which of the manual applies.

8 Our view is that, since the federal
9 government has settled on one, we will settle on
10 that one as well so that persons delineating a
11 wetland don't run into the possibility of two
12 different definitions on the same plot of land.

13 REP. FARGO: And what we are talking
14 about here, really, the word mapping, you are
15 not talking about mapping, you are talking about
16 ...?

17 SECRETARY SEIF: No, mapping is a
18 different issue getting into the geographic
19 information systems and the like, which you
20 raised differently in your bill.

21 REP. FARGO: Okay.

22 SECRETARY SEIF: Delineation is what we
23 meant by in that portion of our promulgation of
24 the policies.

25 REP. FARGO: And the final adoption of

1 a common state-federal method for mapping
2 wetlands is more a common state-federal method
3 for delineating it or defining wetlands?

4 SECRETARY SEIF: Yes, sir.

5 REP. FARGO: All right. You use on
6 page four the agricultural lands and your waiver
7 of permitting, 1985, and then you go on down and
8 use construction of homes by owners within
9 subdivisions established before 1991.

10 I am just curious to know why we have a
11 1985 determination.

12 And I think that becomes important
13 because, in the legislation, I can see some
14 reasoning for going back to, i.e., a prior time
15 and saying let's cut this off at this particular
16 point. You seem to have done that here.

17 But you use two different dates and I
18 am wondering why.

19 SECRETARY SEIF: Dr. Archer is going to
20 help us with that one.

21 DR. ARCHER: The two dates are
22 primarily because the 1991 was the cutoff point,
23 wherefore knowledge and enforcement in the
24 wetlands area was very evident to everyone; and
25 it provides a benchmark, where prior to that

1 date, we were not actively taking enforcement,
2 action or compliance options on wetlands. So
3 everything after that date, people should then
4 be aware of what requirements and regulator
5 responsibilities are.

6 The 1985 and the prior agricultural
7 converted wetlands is, it did define by the
8 conservation service who is now going to be
9 responsible for providing the definition as to
10 what constitutes prior converted croplands.

11 SECRETARY SEIF: The 1985 definition is
12 essentially the adoption of a federal action
13 taken.

14 The 1991 date, we have selected simply
15 because that was the time when it can be said
16 that people should know more than they knew
17 before about the value of wetlands and about how
18 to plan around them.

19 REP. FARGO: And it seems like the 1991
20 date is the date that if we do anything within
21 the legislation here, and for grandfathering
22 people, that that's the date that we probably
23 should be using?

24 SECRETARY SEIF: I would hope you would
25 consider that as the right cutoff date for that

1 purpose.

2 REP. FARGO: On the last paragraph
3 there, you have part of the permit will require
4 users to minimize impacts on wetlands. This is
5 part of the permit. What do you mean by
6 minimize at this particular point?

7 SECRETARY SEIF: If you take advantage
8 of a general permit to construct the kinds of
9 structures we have in mind, which is homes,
10 roads, utility access, you should also, if you
11 are going to use that general permit, do such
12 other things as you can do, such as avoiding
13 yards -- which are an environmental negative,
14 generally speaking in my personal opinion, even
15 though I have one -- or avoiding other kinds of
16 structures, land uses, runoff patterns and the
17 like that minimize the value of the wetlands or
18 cause property damage or environmental damage to
19 others.

20 In other words, in effect, in return
21 for the advantage of the general permit, the
22 administrative ease and the permission indeed to
23 proceed, instead of the old way of fighting
24 square foot by square foot and delineating, you
25 have to give something back to the community and

1 the environment -- and those would be defined as
2 we go along, and with the help of the Wetlands
3 Advisory Committee -- different kinds of land
4 use, construction practices and so on that would
5 give that benefit.

6 REP. FARGO: That probably is one of
7 the major concerns that causes this particular
8 bill to have been introduced and that is the
9 concern that, when you say something like that,
10 who is it that is going to make those
11 determinations?

12 In the past, it has been controlled by
13 the field offices and it has been up to them how
14 they made those determinations.

15 Whenever you say to minimize something,
16 who is it that actually is going to determine
17 what has to be done or what doesn't have to be
18 done? If it is going to be left to the field
19 office, it is not going to be tied down, such as
20 we are trying to do in this bill, then I get
21 concerned about those kinds of statements.

22 SECRETARY SEIF: You have surfaced the
23 age-old difficulty of setting a standard and
24 having it sensibly applied as opposed to setting
25 a standard and having it either applied in

1 different places in different parts of the state
2 or applied in a non-common sense kind of a way
3 or too strict a way.

4 In general, as an administrator and
5 even as an attorney, I would come down on the
6 side of flexibility. Every time we have -- even
7 in regulations, let alone in statutes -- put in
8 hard standards, they have led to hard cases.

9 I would prefer to use the Wetlands
10 Advisory Committee in delineating the continued
11 oversight, by this or other committees and
12 individual members such as yourself, to see to
13 it that we -- and the use of conservation
14 districts, which are far more common sensical
15 kind of a group than many of us who have labored
16 so long in government -- in seeing to it that
17 the actual purposes that we share are
18 effectuated rather than setting up strict rules
19 of the road which will generate disputes and
20 problems in the future.

21 REP. FARGO: And I appreciate that. As
22 I say, I think that's the core of the problems
23 that we have had over the last 15 years, as far
24 as ...

25 SECRETARY SEIF: Yes.

1 REP. FARGO: ... as far as wetlands are
2 concerned.

3 Getting into House Bill 200 itself, the
4 purpose behind this primarily has been to take
5 care of two problems. One of them is to define
6 a wetlands, which I don't think has been done
7 well at any particular place, but if we can find
8 a spot (and that, apparently, that, you have in
9 your testimony) or can come to a decision that
10 we can use the National Academy of Sciences
11 definition. And I assume that is the definition
12 that you are going to be using there and that
13 has nothing to do with classification?

14 SECRETARY SEIF: Right.

15 REP. FARGO: The second part of what
16 this bill tries to do is to classify so that the
17 people out there know what they are doing in
18 advance so they don't have to be so concerned
19 about listening to somebody from the Meadville
20 office or somebody from the Scranton office, and
21 so, I am assuming that the National Academy of
22 Science definition that you have is going to be
23 a definition ...

24 SECRETARY SEIF: Yes.

25 REP. FARGO: ... of wetlands.

1 SECRETARY SEIF: I would like to
2 underline your point that the definition of a
3 wetland is not the same thing as a
4 classification of a wetland, and they overlap
5 somewhat.

6 But we would start with the best
7 science we have to decide what a wetland is
8 first: that is, the scientific process. Then we
9 begin the policy, legislative, judgmental
10 process of deciding -- of those classified as
11 wetlands -- what internal classifications are
12 appropriate for what kind of use and what level
13 of protection. That is a different, that is a
14 --

15 REP. FARGO: And we have attempted to
16 do that already in House Bill 200 in terms of a
17 definition of wetlands, and then a scientific
18 definition of wetlands is included, in fact a
19 whole page of it as far as -- And I think we are
20 getting into the same area.

21 And, certainly, I am highly in favor of
22 taking your definition -- if that's the one
23 that, in Pennsylvania, we should be using -- and
24 inserting it in this particular piece of
25 legislation.

1 SECRETARY SEIF: That would be our
2 position, yes, sir.

3 REP. FARGO: And then you use, you
4 indicate a concern here of some of the terms
5 that we use such as critical significance and
6 limited functions and marginal functions and
7 that really was in the classification area. It
8 was not where we were trying to be scientific.
9 We were trying to do something which is going to
10 help with the classifications.

11 And I think that those terminations, at
12 least we were trying to use them in a way to
13 make it easier to classify something as to
14 whether it was going to be A, B or C and what
15 actions should be taken in the future on that
16 area.

17 SECRETARY SEIF: Well, I understand
18 that you did use them in the classification
19 process and not the delineation process. I
20 still think that the ills they bring and the
21 disputes they may generate would be present and
22 I would have some concern about them.

23 REP. FARGO: And I am certainly open to
24 your assistance on that or any input that you
25 have on it.

1 It does appear on page six in which you
2 detail all of the smaller types of wetlands and
3 you indicate that there are other items that
4 really should be built into this legislation,
5 and I agree that we don't have all of these.
6 Since we first introduced the legislation, we
7 have had utilities come to us and then the
8 farmers come to us. And, certainly, I agree
9 wholeheartedly, the more we can get in there to
10 take these out of the picture so that we don't
11 have to be concerned about them, why, the better
12 this legislation will be.

13 Whenever you get finished with that
14 then, you have a statement: we are essentially
15 left with a choice of how to develop a system of
16 protecting the remaining wetlands. So now we
17 get into my classification A and B at that
18 particular point.

19 And, once more, I think that we are in
20 agreement here. We may use different semantics
21 in getting to it. But, I guess the statement,
22 the question I would like to ask of you is, if I
23 look at this, I think that we are on the same
24 wave length and that you favor, from the looks
25 of this, what we are attempting to do in saying

1 that, yes, that's not only they defined it, but
2 let's set them up in classifications so that we
3 can work with those classifications?

4 SECRETARY SEIF: Yes, I have said
5 elsewhere that not all wetlands are the same.
6 Not all music is the same. There is Beethoven
7 and there is Snoop Doggy Dog. And the wetlands
8 may not have as much variation between them as
9 those two, but the fact is we will treat
10 different wetlands differently according to the
11 values that they have.

12 We depart a little bit, though that
13 agreement is an important basic one, that there
14 are classifications that we should identify and
15 different consequences will flow from those
16 identifications.

17 We propose a simpler classification and
18 we propose that the kind of consequences that
19 flow from even the highest classification or any
20 of them are slightly different from the ones
21 that you may have in mind.

22 The automatic nature of delineation of
23 the highest classification that you have,
24 probably when done, will again raise the same
25 kind of litigation and problems and definitional

1 issues that we would like to avoid. Almost any
2 automatic provision will automatically generate
3 not just the answer but the dispute about the
4 answer.

5 We believe that properly directed with
6 proper policy considerations and statutes or
7 regulations that case-by-case determinations of
8 the particular value of a wetlands and the
9 particular context where it is socially,
10 topologically, economically and so on, are
11 probably best for the overall protection that we
12 should have.

13 REP. FARGO: And you would have an A
14 and a B or an A and a C and skip the B and put A
15 and B together as far as my classifications are
16 concerned?

17 SECRETARY SEIF: That would be, yes,
18 one way to put it.

19 REP. FARGO: Okay. You indicate in
20 that area that we are concerned about the cost
21 of implementing the provisions as written. And
22 I know that there is cost and mapping and
23 takings in that area. But what is your concern
24 about the cost as far as the delineation down to
25 that point prior to getting into the mapping?

1 Do you have a concern about the cost of
2 implementing this legislation with the exception
3 of mapping and takings?

4 SECRETARY SEIF: No more than the cost
5 of implementing any legislation. It is not
6 burdensome except, I should point out, in those
7 two areas, especially the takings.

8 REP. FARGO: Okay. The final thing has
9 to do with, of course, the takings itself, which
10 is on the last page of your testimony. And one
11 line under takings that you indicate is where
12 the owner is denied. And going back, we support
13 compensation for lost property value where the
14 owner is denied all reasonable use of their land
15 because of government action.

16 You know that, on the federal level,
17 they have tried to come up with a percentage of
18 loss that would determine that a takings existed
19 and that type of thing. You seem to indicate
20 here that you would only favor something where
21 we have all reasonable use of the land being
22 taken by government action before there is any
23 consideration for takings.

24 SECRETARY SEIF: Yes.

25 REP. FARGO: That means then that

1 essentially you are in agreement with status quo
2 and, that is, that if there is a determination
3 by the owner or the developer that there is a
4 takings that we are not going to -- that it is
5 up to the owner or the person to go to the court
6 and prove that there is takings and do so
7 through the court system.

8 SECRETARY SEIF: Yes. But I would not
9 agree that we are for the status quo. We have
10 just spent the last three hundred and now
11 sixty-six days changing a lot of status quo in
12 this area.

13 REP. FARGO: In the area of takings,
14 though, I am talking about.

15 SECRETARY SEIF: Well, that may be
16 right, yes, in terms of the legal statement.
17 But the fact is that the program we have
18 described, announcements we make here in your
19 presence this morning on the four policy areas
20 we have finalized, I think we have addressed the
21 real problem of administering the wetlands
22 program, such that we are talking about a few
23 hundred acres under review in a whole year in
24 the Commonwealth -- dozens of permits, not
25 hundreds or thousands -- to the point where the

1 problem is simply not the huge problem that it
2 was on its way to be.

3 I think we have -- I can't say put the
4 lid on all the important issues, you have
5 identified some that are very important and
6 still compel your interest -- but we certainly
7 have reduced the nature of the problem. We have
8 certainly redrawn, I think, a sensible balance
9 between all the interest that the public has in
10 wetlands.

11 And I would suggest that instead of
12 forcing the issue now, that we see, with the
13 development of this committee that will come
14 into being in two weeks, we can see whether or
15 not this is working well and to the satisfying
16 of all the interests that are involved before we
17 decide in a hard and fast classification and
18 specific consequences of reaching a, of
19 obtaining a certain classification.

20 REP. FARGO: Well, a classification
21 ends, I can understand, I guess. But the
22 takings end of it, I guess I find a little bit
23 of the problem. For a fact even Thomas Hylton
24 in his statement that you use there bothers me
25 considerably, in that it is to ensure private

1 property used in ways that will benefit the
2 long-term public interest without any concern
3 about the private interest and that bothers me
4 and I think that is what is happening here
5 whenever you say that.

6 Unless you have lost all of what you
7 have, what you own, unless you have lost total
8 value from a government taking, a government
9 decision, regardless of what that decision is,
10 you are not going to have any right, any written
11 right. You are going to have to go out and
12 prove yourself and spend the money that is
13 necessary and take the chances with the court
14 and that you can prove that you are right and,
15 that, to me, seems like the public interest has
16 gone just a little bit further than it should go
17 and we should be a little bit more concerned
18 about the private interest in Pennsylvania and
19 we, in our statutes, should be a little bit more
20 concerned about the private interest in these
21 kinds of dealings.

22 SECRETARY SEIF: I see the issue. I
23 think we do depart from each other a little bit.

24 I would just say again that, when you
25 say what is happening here, I am suggesting of

1 what is happening here is very rare, is no
2 longer a genuine problem throughout the
3 Commonwealth, especially with the reform we have
4 and will continue to implement.

5 REP. FARGO: All right. I appreciate
6 it, Mr. Secretary. But, it is very rare.
7 That's all the more reason why we should be
8 taking care of the rare decision. It kind of
9 then sort of releases the total cost that is
10 involved.

11 Well, I want to say that I, that I
12 thank you for what you have done in the past.
13 And above all else and the point that I missed
14 before is the attitude that I think has improved
15 drastically in the DER, in my dealings and
16 through my constituency; and, for that, more
17 than anything else, I think that the DEP ought
18 to be, ought to be congratulated. I am looking
19 forward to working with you.

20 And I still firmly believe that we need
21 a statute to define and to classify and also to
22 take into consideration the rights of the
23 private people.

24 And thanks for being here.

25 SECRETARY SEIF: We appreciate the fact

1 that, as Chairman Reber has said, you have
2 joined in this public policy debate. It has
3 been very valuable and enlightening to us and we
4 will continue to work together.

5 REP. FARGO: Thank you.

6 CHAIRMAN REBER: Thank you,
7 Representative Fargo.

8 Representative George is recognized.

9 REP. GEORGE: Good morning, Jim.

10 SECRETARY SEIF: Good morning, Mr.
11 George.

12 REP. GEORGE: Just a couple of
13 questions so we can get the tempo of this going.
14 I won't be long or even belabored.

15 Should the size of the wetlands be any
16 part of the legislative proposal?

17 SECRETARY SEIF: Yes, but certainly not
18 the only part.

19 REP. GEORGE: That isn't what I am
20 trying to get at. I am trying to get at, if it
21 is minuscule, can it be in some ways, unless it
22 is proven that it has worth, while for use as
23 far as has been at that time and that can it be
24 eliminated so we don't have to have it on a
25 plan, we don't have to have it permitted and we

1 don't have to really take up your time?

2 SECRETARY SEIF: Yes. And I think that
3 is what GP 15 does.

4 REP. GEORGE: Yes, that is the purpose
5 of the question.

6 As far as compensation, I heard the
7 gentleman and you discussing it and I am
8 somewhat in the dark on it. And we are on page
9 seven.

10 You suggest that there should be just
11 compensation, but then a little further, we are
12 not talking about compensation. So if I can
13 just put it in this manner: if, in fact,
14 compensation is going to be a part of this
15 legislation, will there be review, honest,
16 legitimate review, to make sure that
17 compensation isn't being paid for a piece of
18 land that has been worthless until we look
19 around and see a piece of legislation that now
20 seems to make it important and worthwhile?
21 That's my question to you, Mr. Secretary.

22 SECRETARY SEIF: You have identified
23 the core issue of any takings mechanism, which
24 is what value was there to begin with and then
25 what of it was taken. And if a land has really

1 no value at all until, until it is declared --

2 REP. GEORGE: Secretary, we would
3 establish in Clearfield County the worth of a
4 property in their different classifications in
5 which it is taxed. If, in fact, it is taxed as
6 wasteland, then I have trouble trying to decide
7 why there would be those that now say we want to
8 put a venture on here when they know they can
9 get compensated for it and a venture won't be
10 allowed. That was the purpose of my question.

11 SECRETARY SEIF: I didn't realize that
12 Pennsylvania had any waste. And since Act 2, I
13 don't believe it does have any wastelands.

14 REP. GEORGE: Do you support the
15 concept of reduced tax assessment on property
16 identified as wetlands?

17 SECRETARY SEIF: Perhaps you could ask
18 the Secretary of Revenue that. I would prefer
19 not to get into local government and tax issues.
20 It is not an area of expertise for me.

21 REP. GEORGE: Do any of your
22 subordinates have a figure on what percentage
23 of permit requests for activities on wetlands
24 are denied? Does anybody have those? Is it
25 extensive?

1 MR. REISINGER: No.

2 SECRETARY SEIF: Ken Reisinger.

3 MR. REISINGER: We have not denied a
4 permit, to my knowledge, in probably close to
5 two years.

6 REP. GEORGE: So the engineers and the
7 federal have taken the initiative in those
8 things?

9 MR. REISINGER: Yes. Basically with
10 our permit application process, there is enough
11 leeway in there that we are able to work with
12 applicants to avoid -- avoidance and
13 minimization and appropriate compensation.

14 REP. GEORGE: According to the
15 legislation and what I heard the Secretary say,
16 that, in part, eliminating the bureaucracy makes
17 everything more founded. So with the
18 legislation at whatever type, it would be the
19 intent of the Administration to take over and
20 make these decisions rather than placing people
21 in a delicate or expensive venture dealing with
22 the federal.

23 SECRETARY SEIF: Right.

24 REP. GEORGE: Is that true?

25 SECRETARY SEIF: That's right. You

1 should not have to deal with two different
2 governments using different standards, and we
3 would like to get away from that occurrence.

4 REP. GEORGE: Mr. Secretary, would you
5 support the idea of codifying existing general
6 permits and exemptions? Because if your answer
7 is yes, I have had drafted, for the perusal of
8 myself and my colleague, Mr. Reber, that we will
9 be working at, and I offered to him, and that,
10 in my opinion, if it is going to be legislation,
11 it would be more helpful to you to codify these
12 regulations and issues. If you are supportive
13 of such, we will see to it that your designee is
14 made aware of what is contained in that
15 amendment.

16 SECRETARY SEIF: Well, I would like to
17 review it. I haven't reached a conclusion on
18 whether we should codify that particular area.

19 In general, where there is a dispute
20 between whether something should be in a
21 statute, a regulation, a policy: my personal
22 view, as a practitioner of the law, is to reduce
23 the formalities, wherever possible, to go with a
24 reg. instead of a statute or policy instead of a
25 reg. I appreciate that other people have a

1 quite different view on those issues.

2 REP. GEORGE: My first question, I hope
3 can be answered by the gentleman on your right,
4 in which I asked whether minuscule areas or
5 square footage could be eliminated. And I am --
6 hope to see that you were in partial agreement.

7 SECRETARY SEIF: (Nods head
8 affirmatively.)

9 REP. GEORGE: Another question I would
10 have would be the location of an area, that
11 whether or not it would be minuscule in size.
12 For example, Mr. Secretary, an area where a
13 building has been built 50 years and only 25
14 feet to the right in an area a hundred feet to
15 the left where there is habitation that has been
16 there for a hundred years and then somebody
17 comes in and says, hey, you can't build on this
18 property. You have owned it for years and have
19 had a facility on it that was tore down, it was
20 habitat, can that be eliminated automatically
21 under your treatise?

22 SECRETARY SEIF: Those are the kinds of
23 things that are both in House Bill 200 and in
24 our policies that we would like to address, yes.

25 REP. GEORGE: I am suggesting now in

1 your policy now where we are, you are going to
2 attempt it.

3 SECRETARY SEIF: Yes.

4 REP. GEORGE: I thank you for your
5 time.

6 SECRETARY SEIF: Thank you.

7 CHAIRMAN REBER: Thank you, Mr.
8 Chairman.

9 Representative Smith.

10 REP. SMITH: Thank you, Mr. Chairman.

11 It is good to see you, Secretary.

12 Just one comment. Representative Fargo
13 had asked you a little bit about the Wetlands
14 Advisory Board that you are going to be
15 creating. I would suggest, perhaps, that you
16 look at some of the other advisory boards that
17 are already a part of the Department's decision
18 making process; for instance, the Mine
19 Reclamation Advisory Board, which you are and I
20 am pretty active and you are familiar with. You
21 know those related issues in wetland issues may
22 exist in some other board and, perhaps, you
23 wouldn't overlook coordinating a member or two
24 off of each those boards just to help, you know,
25 keep us informed, too.

1 SECRETARY SEIF: That is a good idea.
2 As you know, the Deputy Secretary Dolenze and I
3 are actively involved in the explorations, a
4 Pennsylvania green technology, if you will, of
5 these kinds of passing wetland systems, to solve
6 what, as many of us realize, is one of
7 Pennsylvania's major environmental problems.

8 An additional benefit of my point of
9 view of having some success in that area would
10 be further education of the public of the value
11 of wetlands in that and many other contexts.

12 REP. SMITH: I mean, you are familiar
13 with what the MRAB interest is?

14 SECRETARY SEIF: Yes, I am.

15 REP. SMITH: And you mentioned those in
16 passing and I think it would be best to keep us
17 coordinated in that aspect.

18 One area of question I had regarding
19 the Replacement Fund: initially, I wasn't sure
20 if we were talking about the replacement in
21 terms of I buy five, six acres of land over here
22 or I give you cash for the fund. Quickly, in
23 reading through some of this, I gather it is the
24 type of situation where I would pay money into a
25 fund that would then be used to supposedly

1 create wetlands elsewhere or preserve wetlands
2 elsewhere?

3 SECRETARY SEIF: Yes.

4 REP. SMITH: Is there any recognition
5 within that fund of a watershed area?

6 Currently, I am involved in a proposal,
7 I would say, or at least a consideration, of
8 something in which a mine acid treatment plant
9 or facility is existing and it doesn't -- it
10 treats the water where it is, but it goes
11 downstream just a little bit and it is
12 repolluted suddenly. And what is being
13 reconsidered is: could that money be spent
14 better within that watershed to create a better,
15 you know, a better use of the money that is
16 being spent on treatment? And I guess I am
17 concerned or interested in whether the
18 Replacement Fund would also look at watersheds
19 as kind of a parochial aspect of this issue.

20 SECRETARY SEIF: Yes, I don't think the
21 public support for the fund would be very great
22 if money paid for loss of wetlands in a given
23 had no benefit in either that watershed or
24 vicinity or at least the same kind of land use.
25 No, I think for that reason, and for the even

1 more important ecological reason, we should be
2 attentive to if watersheds is the right focus
3 for how to target wetlands mitigation, wetlands
4 construction or other projects. That makes a
5 lot of sense to me.

6 What we do get away from is the
7 absolute requirement of on-site mitigation,
8 which has really tied up a lot of people in
9 knots and has produced wetlands values which
10 aren't as great as they could be, if we had just
11 stepped outside the box but maybe stayed inside
12 the watershed, if you will, to do that work.

13 REP. SMITH: Okay. Thanks. I
14 appreciate hearing that because I think that it
15 is important to sometimes look, as you say, just
16 outside the box, because maybe there is a really
17 good solution just awaiting you, you know, right
18 around the corner.

19 And I think that is also important, for
20 a lot of our areas in the rural areas where we
21 have the acid mine drainage problem of the past,
22 you know, that maybe this could be used to
23 supplement some of those problems. And I think
24 that, you know, that is a major, a major
25 interest.

1 SECRETARY SEIF: I am sorry to
2 interrupt.

3 REP. SMITH: Sure.

4 SECRETARY SEIF: Some of the work that
5 we are already beginning to do with Secretary
6 Mallory and PennDOT, in which PennDOT's
7 districts are used, is also a way in which we
8 can focus in areas where impacts are
9 experienced, and that is appropriate use of the
10 resource, whether it is money or wetlands or
11 administrative attention or whatever.

12 REP. SMITH: My last question is about
13 the definition. Representative Fargo was
14 discussing that with you at some point and I was
15 a little bit confused.

16 In your testimony on page five, you
17 reference the National Academy of Science
18 validated this general approach which rely on
19 the scientific aspects. And then in the
20 wetlands delineation handout, the statement
21 references the definition of wetlands and it is
22 promulgated in the PA Code and it is specified
23 there. Is that the definition we are talking
24 about?

25 SECRETARY SEIF: The 1987 manual and

1 the 1989 manual, which are complicated
2 delineation manuals, are based on the kind of
3 National Academy of Science criteria: hydrology,
4 soil type, and flora concerns and so they are
5 the same.

6 REP. SMITH: But is that this
7 definition that is listed here?

8 SECRETARY SEIF: Yes, yes.

9 REP. SMITH: That is their definition
10 that you, you --

11 SECRETARY SEIF: I see what you mean.
12 I should have made that clear. The answer is
13 yes.

14 REP. SMITH: That's why I was a little
15 bit confused because you reference the
16 definition here, but then it is specified here
17 and I was not sure if that was at this time.

18 SECRETARY SEIF: I certainly don't want
19 to introduce a third category, classification.

20 REP. SMITH: I thank you very much, Mr.
21 Secretary, Mr. Chairman.

22 CHAIRMAN REBER: Thank you very much.
23 Representative Birmelin.

24 REP. BIRMELIN: Secretary Seif, I thank
25 you for coming here this morning and I know that

1 you are not only here to answer questions this
2 morning and I know that you have concerns in
3 this matter and I appreciate that.

4 I also have a couple of questions for
5 you. The first is that, in agreement with
6 Representative Howard Fargo, I too am concerned
7 about property rights and I am concerned that
8 they are eroding, not only in Pennsylvania but
9 in the United States; that often times, public
10 use and public good is paramount, and sometimes
11 it seems the only consideration, and that
12 private property rights are very much under
13 attack in our country and diminishing.

14 So I too would just echo for your
15 edification the fact that, I think we need to
16 realize that people do and should have property
17 rights.

18 I am not saying they are exclusive of
19 all other rights or that they are paramount in
20 all situations, but I find that they are
21 diminishing considerably in our country and I
22 think we need to make that an equal
23 consideration.

24 There are very few people who stand up
25 and fight for property rights. There is an

1 awful lot of people who are concerned in
2 environmental issues and other areas -- and
3 often times with our own tax dollars, who work
4 against our property rights -- and so I think we
5 need to speak up for those people.

6 And, secondly, while I acknowledge and
7 appreciate the role that regulations and policy
8 play, I, unlike you, would prefer that we had
9 laws to determine where we are going, what we
10 should do.

11 One thing is true, lawmakers come and
12 go and this institution is no exception to that
13 rule. It is easier and under less public
14 scrutiny, I believe, to change regulations and
15 policy than it is to change the law and that a
16 greater general consensus has to be reached on
17 law through the legislative process, which is
18 directly accountable to the public, than to its
19 device, regulation and policy, which is, in your
20 case, formulated by the Department of
21 Environmental Protection which is not directly
22 responsible to the public and, therefore, may
23 not have the greater acceptability or approval
24 of the public as a whole. And in past
25 circumstances, I believe was institutions such

1 as DER were more susceptible to pressure by some
2 smaller -- if I can use the politically
3 incorrect term -- special interest groups than
4 it was by the general public.

5 And so, I guess I am going to disagree
6 with you and basically say that I think that law
7 should be paramount in the setting of public
8 policy, not legislation and not policy.
9 Although, they have a place in the overall
10 scheme of things.

11 That having been said, let me ask you a
12 few questions in two particular areas. The
13 first is in delineation. These are basically
14 technical questions.

15 The first question I have for you under
16 the delineation area is, are all of the federal
17 agencies now unified in their delineation
18 guidelines: Army Corps of Engineers, Fish and
19 Wildlife Services or anyone else who may be
20 involved?

21 SECRETARY SEIF: The federal government
22 has gotten its definition to the common one, the
23 1987 manual.

24 REP. BIRMELIN: Okay. The second
25 question then is -- and you have already said it

1 and I will ask for forgiveness if I didn't
2 listen carefully enough -- the wetlands
3 delineation process for DEP now is currently
4 going to be the federal delineation policy?

5 SECRETARY SEIF: That same one.

6 REP. BIRMELIN: Has it been approved
7 yet or is this pending this handout that you
8 gave us?

9 SECRETARY SEIF: It is today's policy
10 announcement.

11 REP. BIRMELIN: Oh, it has just been
12 announced, okay, so hasn't been approved yet.

13 And how long do you think it will take
14 before it is? And do you -- I assume you expect
15 it will be?

16 SECRETARY SEIF: It is approved. I am
17 announcing it today.

18 REP. BIRMELIN: And then my last
19 question in this delineation area is, what role
20 does the Fish and Boat Commission play since
21 this policy is only effective in DEP? Do they,
22 are they going to be operating under the same
23 delineation standards that you and the federal
24 government is?

25 SECRETARY SEIF: I don't know if they

1 have any particular responsibilities in this
2 area. They don't have permitting authority and
3 that's where the need for the delineation and
4 definition comes in.

5 REP. BIRMELIN: They don't have
6 permitting authority, but it is my understanding
7 they do have some say in the matter, because I
8 know of at least one particular case in my
9 district where they were involved in the issue
10 and they held up a permit.

11 SECRETARY SEIF: Yes, we are obliged to
12 consult with them on these things. I guess that
13 is a question we will have to get back to you
14 on. I don't know what their particular approach
15 is.

16 Ken, do you?

17 MR. REISINGER: Well, I would say in
18 the broadest sense, the Department is
19 responsible for setting up the procedures for
20 identifying delineating wetlands and then the
21 other state agencies follow suit.

22 As far as Fish and Boat Commission,
23 they do have direct input to the permit
24 application and they can advise the Department
25 on any environmental concerns that they may

1 have, is taken under consideration. That is
2 done by -- as a requirement of the statute, I
3 believe. I know by regulation. I also believe
4 under the Dam, Safety and Encroachments Act,
5 that is a requirement.

6 As far as actually delineating
7 wetlands, though, on the ground, that is all
8 most exclusively either done by DEP
9 representatives or county conservation
10 districts. And we have an active education and
11 training program and we constantly go out and
12 work with these individuals to make sure they
13 are up to our latest guidance. And with the
14 adoption of the '87 manual, we will be
15 reinvigorating that entire process here this
16 spring and this summer to make sure everybody is
17 up on it.

18 REP. BIRMELIN: I guess what I am
19 hearing you say then is the Fish and Boat
20 Commission only has an advisory role?

21 MR. REISINGER: Right.

22 REP. BIRMELIN: They do not have any
23 power of veto over the --

24 MR. REISINGER: No, they do not have
25 any power of veto over our permit process.

1 REP. BIRMELIN: In the area of takings.
2 Just as a background, I represent the Poconos
3 area, at least a portion of it. Back in the
4 1970s and in the early 1980s, we had a real
5 boom, if you will, in selling off third-acre
6 lots without central water, without central
7 sewage. And, quite frankly, a lot of homes were
8 built on those lots and probably shouldn't have
9 been, because of the requirements for soil
10 testing, you know, perc ability of soils, etc.
11 They were allowed to build.

12 Those requirements changed over the
13 years and got a little more stiffer. And,
14 consequently, a lot of these building lots were
15 no longer buildable.

16 We have a mess of sorts up there, where
17 we have literally thousands and thousands of
18 building lots, a third acre, half acre, sitting
19 there. The people have abandoned them. The
20 local governments are saddled with them. They
21 are not buildable. You can't sell them because
22 nobody will buy them. Why buy something that
23 you can't use, at least use it very much for
24 anything?

25 So my question to you is, should it

1 matter -- this is probably a policy question --
2 should it matter to DEP that when you change
3 your regs., or we as legislators change the law,
4 should it matter when you bought the land as to
5 what the law will now apply to you or how it
6 would apply to you if you have bought it after
7 those regs. were changed, the law was changed?

8 SECRETARY SEIF: That general issue,
9 the effective date of the law, always comes up
10 because that defines whose ox gets gored by the
11 new state of affairs.

12 Yes, I think those dates do matter.
13 And we could argue endlessly about how to fix
14 any particular date because it would vary from
15 one community to the other when the building
16 boom was or when the subdivisions occurred or
17 whatever. All of that argues for a far more
18 comprehensive and sensible approach to the use
19 of land in our Commonwealth than the one we have
20 now.

21 REP. BIRMELIN: We passed legislation
22 and I don't know where it is today currently,
23 and for what condition, but something to the
24 effect that the 10-acre rule, the 10-acre
25 exclusion rule, applied to certain property

1 owners, if the property was owned before a
2 certain date, and I frankly don't remember the
3 date. '87, perhaps, somewhere around there?

4 SECRETARY SEIF: Yes.

5 REP. BIRMELIN: And we have had a
6 running battle here in the Legislature with DER
7 in the past over how to apply that. And it is
8 my understanding that, in essence, what had
9 happened was that, through the regulatory
10 process, DER blocked the intention of the
11 General Assembly in the 10-acre exclusionary
12 rule. I don't know that we will ever ferret
13 that out.

14 But my last question to you would be,
15 do you feel that there is any proposal, any
16 solution that you could offer to people in the
17 Poconos, not only in this problem that I have
18 already illustrated with the third acre that no
19 longer is qualified for sewage, but in the
20 wetlands issue?

21 Because a lot of the Poconos are
22 wetlands and that's one of the reasons why many
23 people weren't able to build, thought they could
24 have and probably could have if they would have
25 built in the '70s before some of the regulations

1 were changed.

2 Do you have anything other than your
3 GP 15 adjusting for a solution for what
4 essentially has become thousands of acres of
5 abandoned land?

6 SECRETARY SEIF: Open space and
7 abandoned land may be two different ways of
8 looking at the same land. That is not
9 automatically useless just because it is not
10 used for some specific purpose.

11 Indeed, in the Poconos, some of the
12 most priceless wetlands on our continent, let
13 alone in our Commonwealth, exist. They have the
14 source of the wildlife and the other natural
15 characteristics that draw people there in the
16 first place.

17 I would regret it if it were up to me
18 or even our Department or even the General
19 Assembly to be dictating land use to the people
20 in the Poconos, but I would hope that people
21 there, most of whom recognize these kinds of
22 issues, would be able to grapple with it
23 themselves.

24 I don't have a particular solution,
25 except GP 15 that we are now promulgating today,

1 for the broader problem you describe.

2 REP. BIRMELIN: Just an invitation,
3 then. The next time you are going to be in the
4 northeast, I would appreciate it if you would
5 let me know and give me the opportunity to spend
6 a day with you to show you the problem
7 firsthand.

8 I don't know whether it is unique to us
9 or not. I don't hear about it in the rest of
10 the state, but ...

11 SECRETARY SEIF: I believe it is fairly
12 unique. I would love to do it. If you will
13 wait until either the land or pavement is less
14 slippery up there, I will be glad to show up.

15 REP. BIRMELIN: We have about four feet
16 of snow as well. And I would say, at this rate,
17 I will be seeing you in July as well.

18 SECRETARY SEIF: Well, I would like it
19 to be a lot sooner than that, and I appreciate
20 your invitation.

21 REP. BIRMELIN: I would appreciate if
22 you could do that, if you would let me know in
23 advance. I and maybe some of our local
24 officials would love to have the opportunity to
25 at least let you see what the problem is.

1 I am not asking you to come up and
2 waive your magic wand and give us a solution,
3 but, quite frankly, the regulations were changed
4 under DER and so, to some extent, they are
5 culpable. But I am not saying they didn't do it
6 for a good reason. But we have a problem and we
7 need your help in solving that problem. So if
8 you would be so gracious as to do that, I would
9 appreciate it. Thank you very much for being
10 here today.

11 SECRETARY SEIF: Thank you.

12 CHAIRMAN REBER: Thank you very much.
13 I am going to suggest to the members of the
14 committee, so as not to see the Artic icecap
15 melt before we conclude the questioning of the
16 Secretary, that we begin to narrow down the
17 focus of our particular questioning. And I am
18 not being critical of anyone, but we do have a
19 few other witnesses, and in keeping with former
20 Majority Chairman George's charge of limiting
21 questions to a two only, I would ask that we
22 zero in to some extent on that spirit and we
23 will go from there.

24 Representative Surra.

25 REP. SURRA: Thank you, Mr. Chairman.

1 And my questions will be brief and should be
2 easy to answer.

3 Under the Wetlands Management Advisory
4 Committee that is planned, will the Pennsylvania
5 Fish and Boat Commission have a seat on that?

6 SECRETARY SEIF: We haven't
7 contemplated that.

8 Is that your suggestion?

9 REP. SURRA: Yes.

10 SECRETARY SEIF: We will consider that.
11 Thank you.

12 REP. SURRA: Thank you.

13 And while I applaud your efforts to try
14 to speed up this very small land size-wise, like
15 a tenth of an acre permit that the company that
16 has a ditch with cattails in it and would hold
17 up development for months and months, I am a
18 little bit concerned about the new direction
19 that the Department may be taking.

20 And maybe you can clear me up on this.
21 Let's say there is an acre and a half or two
22 acres of wetland that feed an exceptional value,
23 a high quality trout stream, how would that be
24 handled by the Department? Would that be looked
25 at a little differently than the -- not

1 necessarily -- important wetland?

2 SECRETARY SEIF: Yes, I think that is
3 the entire purpose of the debate or discussion
4 we have had about classification, and, indeed,
5 in House Bill 200, and there were some
6 additional suggestions in testimony here. There
7 are categories like the cattails in the ditch
8 that I think we must treat differently even to
9 the point of leaving out of the regulatory
10 system altogether.

11 REP. SURRA: And then it is the
12 Department's intention then, just because it is
13 a small wetland, doesn't necessarily mean it is
14 not an important wetland, is that correct?

15 SECRETARY SEIF: Yes, that was the
16 additional point: size. It could be, you can
17 have a very small wetland that has very, very
18 high environmental and ecological value.

19 REP. SURRA: That's enough. Thank you
20 very much.

21 CHAIRMAN REBER: Representative
22 Masland.

23 REP. MASLAND: Thank you, Mr. Chairman.

24 I just have a brief comment really made
25 for balance purposes, not to open up a huge

1 debate, which this could be on. But I think
2 that in your quote of Thomas Hylton, you
3 obviously raised the eyebrows of a couple of our
4 colleagues up here and raised their concern as
5 to what you mean by public interest and will
6 that be paramount to private interest and
7 private property rights.

8 And I don't sit here as one that does
9 not believe in private property rights, but I
10 think the point you were getting at, which I
11 agree with, is that we have to consider the
12 concept of stewardship.

13 We have to consider the fact that there
14 are certain resources that we may own today, but
15 they will outlast us and outlive us and
16 certainly be around for generations to come,
17 hopefully be around for generations to come.

18 I didn't really see that as being a
19 problem. What I really see that as is a
20 principle that has to be applied. And as such,
21 applying a principle, I think it would be
22 difficult to have one hard and fast law that we
23 could put down on the books and say, as
24 Representative Birmelin might like, this is it,
25 this is the way it will be applied in all cases

1 period.

2 I think that that is difficult because
3 the concept of stewardship does not mean on the
4 one hand that you just sit there and watch
5 things grow. I mean, you do have a right to use
6 it and to use it wisely; but, on the other hand,
7 I think in keeping that in mind, we have to
8 realize that it is a principle to be applied and
9 it is not something that we can necessarily
10 reduce to a few paragraphs, a few pages or even
11 a few volumes.

12 Thank you.

13 CHAIRMAN REBER: Thank you,
14 Representative Masland.

15 Representative Rubley, any questions?

16 REP. RUBLEY: No. Thank you.

17 CHAIRMAN REBER: Representative
18 Levdansky?

19 REP. LEVDANSKY: Thank you, Mr.
20 Chairman.

21 I have one set of two questions. I
22 have one question and perhaps one comment.

23 Mr. Secretary, this is a complicated,
24 critical piece of legislation, especially in the
25 area of definition of wetlands, classification

1 and permitting and the whole issue of takings.
2 Will the Department, under your stewardship,
3 measure or evaluate the cumulative impact of
4 these three critical components of House Bill
5 200?

6 SECRETARY SEIF: The cumulative impact
7 issue is an extremely important and thorny one,
8 both scientifically and from a policy point of
9 view, but it cannot be ignored and we will be
10 concerned with it.

11 REP. LEVDANSKY: I mean, recognizing
12 that when you develop wetlands, very few
13 wetlands are ever created, but my fear is that
14 once they are developed, they are gone, they are
15 forever gone. I mean, this is an area, I think,
16 that we need to -- This is an area that we need
17 to tread very lightly.

18 And just, finally, the issue in the
19 legislation of using -- I think Representative
20 Fargo talked a little earlier about -- using
21 1985 as a benchmark to delineate croplands and
22 things like that. I am glad to see your
23 advocacy of benchmarking. It is something that
24 I would have liked to have seen perhaps a year
25 ago when we looked at Senate Bill 1.

1 And also just following up on
2 Representative Masland's issue of stewardship --
3 your testimony and your view of the whole issue
4 of takings -- it is a very sensitive issue. And
5 your words here today at least have caused me to
6 think that you are approaching this from the
7 right perspective. I, as a legislator for 12
8 years, I have never seen it a problem where the
9 private interest have had difficulty in having
10 access in the legislative process.

11 My concern is that the public interest
12 is often underrepresented, grossly, in the
13 lawmaking process, and I think that is something
14 that you and I and everybody charged with public
15 responsibility needs to look at.

16 But I look forward and am actually
17 encouraged by your remarks on takings and maybe
18 we could work forward towards a compromise on
19 the other critical issues in the Senate and
20 House Bill 200.

21 Thank you.

22 SECRETARY SEIF: Thank you.

23 CHAIRMAN REBER: The Chair thanks the
24 gentleman.

25 Mr. Secretary, a bit of procedural

1 housekeeping. First of all, for my edification
2 and for the members of the committee, what
3 exactly are the procedural ramifications
4 relative to these particular pronouncements,
5 these four particular pronouncements that you
6 have presented to us today?

7 When, in fact, will they become law, if
8 you will, in the sense of defining the
9 regulatory procedural scheme? Will it be
10 Saturday's publication?

11 SECRETARY SEIF: Yes. Whether it is
12 this Saturday or not ...

13 MR. REISINGER: February 3rd.

14 SECRETARY SEIF: The February 3rd
15 publication. But we have finalized them for
16 publication and they'll take effect on that
17 date.

18 CHAIRMAN REBER: On that date, okay.

19 Secondly, did I understand you, in
20 response to questioning from Representative
21 Fargo, that you would be moving posthaste, I
22 think within a two to some week period from this
23 date ...

24 SECRETARY SEIF: Yes, sir.

25 CHAIRMAN REBER: ... on the Advisory

1 Committee?

2 SECRETARY SEIF: Yes, sir.

3 CHAIRMAN REBER: And if, in the course
4 of that, you might consider checking with both
5 the majority and minority staffs, on both the
6 House and the Senate side, to see if there is
7 any desire for consideration of representation
8 or possibly an ex officio type of consideration
9 that could be given to that particular
10 committee, I would appreciate that kind of
11 input?

12 SECRETARY SEIF: Yes. And we also have
13 Representative Smith's point about checking with
14 our other groups to make sure that those know
15 there is a coordinated approach from all the
16 stakeholders.

17 CHAIRMAN REBER: Very good.

18 And one last question just for
19 clarification purposes. And I don't know if you
20 would be the one to answer this or a member of
21 your staff or one of the departments might.

22 I am referring to the July 1995
23 proposed GP 15 publication and the document that
24 you have presented to us today to be the General
25 Permit 15 final. I note it with interest

1 because it was somewhat confusing, it was
2 causing some consternation in discussions at
3 some of the other hearings -- and that is on
4 page three in the condition section -- relative
5 to the conversion table. That conversion table
6 was not necessarily initially a part of the
7 original proposal as it was advertised?

8 SECRETARY SEIF: Right.

9 CHAIRMAN REBER: Am I correct, that
10 this was an amplification and a clarification as
11 to what goes into the .10 up to the .50 factor?

12 SECRETARY SEIF: Yes.

13 CHAIRMAN REBER: Okay. Because I know
14 that was something that everyone was very
15 concerned about, that people will be coming in
16 for a .5 relief max and we are talking about
17 maybe only a piece of land of .6 or .555 or
18 something of that nature. So there are
19 considerations, as you move away from the .10,
20 that you don't have the same benefit at that
21 level that you will have to have or not have at
22 a higher level of amount of area in question, is
23 that a fair statement?

24 SECRETARY SEIF: That is the purpose of
25 that kind of provision.

1 CHAIRMAN REBER: All right. With that
2 in mind then --

3 SECRETARY SEIF: May I say one final
4 thing? It has to do with Representative
5 Birmelin's point about what should be in a
6 statute and what should be in a reg. and it has
7 been coming up right along here.

8 The Congress has passed a statute
9 called a Resource Conservation and Recovery Act.
10 One of the enormously complicated laws ever,
11 right down to the number of parts per million of
12 particular kinds of chemicals that can come from
13 particular sources and so on. That, I think, is
14 an example of what the legislative, of putting
15 it into law, was way beyond what was necessary
16 to protect the public interest.

17 Occasionally, that is appropriate. In
18 this area, we just disagree on where that should
19 be. But it is a legitimate ongoing debate and a
20 particularly hot one in the environmental area
21 in the last 30 years.

22 CHAIRMAN REBER: Mr. Secretary, with
23 that then, one last comment. I think from my
24 personal perspective, especially on something
25 similar to the wetlands that we are talking

1 about, you have said throughout that when you
2 are dealing in a regulatory scheme, you want to
3 look at it from a common sense standpoint. I
4 tend to agree with that very much.

5 I would certainly like to also
6 emphasize that, from my own perspective,
7 everything that we do at this committee and the
8 way we move always is looked at in an
9 environmentally sensitive manner and in an
10 environmentally sensible manner and I think
11 those two can co-exist and I think that is the
12 kind of direction that certainly this committee,
13 in conjunction with the Department and with the
14 Administration, can move in dealing with this
15 issue in the future. And I appreciate you
16 taking your valuable time today and members of
17 your staff and department heads to be here with
18 us.

19 SECRETARY SEIF: Thank you, Mr.
20 Chairman.

21 CHAIRMAN REBER: Thank you.

22 We will take a two minute recess, and
23 the clock is on, to give the stenographer an
24 opportunity to readjust her digitals, if you
25 will, and then our next witness will be Mr. Gary

1 Setzer, the Program Administrator.

2 (Brief recess taken.)

3 CHAIRMAN REBER: Could the members
4 please return to the desk? I would ask everyone
5 present in the hearing room to please take their
6 seats and ask for order to come to the hearing
7 room. We are about to take the testimony of Mr.
8 Gary Setzer, the Program Administrator for the
9 Wetlands and Waterways Program of the Maryland
10 Department of the Environment.

11 At this time then, I would thank you,
12 Mr. Setzer, for coming to Harrisburg on this
13 very, very nice day that we have out here and
14 ask you to appropriately proceed.

15 MR. SETZER: Okay. Thank you, Mr.
16 Chairman, members of the committee. My name is
17 Gary Setzer. I am the Program Administrator for
18 the Wetlands and Waterways Program in the
19 Maryland Department of the Environment. I would
20 like to thank you for the opportunity to share
21 Maryland's Nontidal Wetlands Protection Program
22 with you this morning.

23 The 1987 Chesapeake Bay Agreement
24 included an agreement to include protection of
25 nontidal wetlands. To honor its commitment,

1 Maryland created a special task force to develop
2 a comprehensive wetland protection policy. Due
3 to continued wetland losses and an existing
4 inefficient regulatory framework, the task force
5 recommended a new state law. In 1989, the
6 Maryland General Assembly endorsed the task
7 force recommendations and enacted the Nontidal
8 Wetlands Protection Act.

9 The law was one of the first state laws
10 to declare a goal of no net loss a wetland
11 acreage and function and to strive for net gain
12 in wetlands over time. Additional legislative
13 goals included:

- 14 * protection of waters of the state;
- 15 * prevention of further degradation and
16 losses of nontidal wetlands;
- 17 * mitigation or compensation for
18 authorized nontidal wetland losses; and
- 19 * expedient project review by
20 instituting a coordinated application review
21 process with application deadlines.

22 Customer service is an important
23 component of the legislation enacted by the
24 Maryland General Assembly. As a result, the
25 important step in the development of Maryland's

1 Nontidal Wetlands Protection Program was permit
2 coordination between the state and federal
3 agencies involved with the regulatory process.
4 To enhance coordination, the following actions
5 were taken:

6 * adoption of the 1987 U.S. Army Corps
7 of Engineers Wetlands Delineation Manual in
8 statute to ensure consistency with federal
9 regulatory jurisdiction;

10 * development of standard operating
11 procedures to clarify respective state and
12 federal roles in permit application review
13 process and reduced duplication;

14 * installation of the RAMS (Regulatory
15 Analysis and Management System) a permit
16 tracking system used by the Corps to ensure a
17 common database and facilitate efficient and
18 effective communication;

19 * Maryland created a Permit Service
20 Center, which receives, logs, and distributes
21 all wetland and waterway applications for both
22 state and federal agencies; and

23 * the issuance of the Maryland General
24 Permit by the Corps on January 31st, 1991, to
25 facilitate the review and authorization of

1 activities with minimal nontidal wetland
2 impacts.

3 Additional activities taken to assist
4 the individual permit applicant was the
5 establishment of a toll-free tracking number and
6 the establishment of regional offices on the
7 Eastern Shore in Salisbury and in Western
8 Maryland in Frostburg.

9 Finally, the Nontidal Wetlands
10 Protection Act allows for delegation of all or
11 part of the state program to local governments
12 and provides for the development of watershed
13 management plans. Watershed management plans,
14 developed in accordance with the Nontidal
15 Wetlands Protection Act and Code of Maryland
16 Regulations, can be used as the basis for
17 regulatory decisions. The plans are developed
18 in cooperation with local governments and
19 specifically protect wetlands by incorporating
20 them into a jurisdiction's land use decisions.
21 To date, watershed management plans have been
22 adopted for the Big Annessex River in Somerset
23 County and initiated in Baltimore, Calvert and
24 Montgomery Counties.

25 From its inception, Maryland's nontidal

1 wetlands protection program was designed to
2 parallel aspects of Section 404 of the Clean
3 Water Act. Activities regulated by Maryland's
4 program include:

5 * removal, excavation, and dredging of
6 soil or materials of any kind;

7 * changing existing drainage or flood
8 retention characteristics;

9 * disturbance of water levels or the
10 water table by drainage, impoundment, or other
11 means;

12 * filling, dumping, discharging of
13 material, driving piles, or placing
14 obstructions;

15 * grading or removal of material that
16 would alter existing topography; and

17 * destruction and removal of plant
18 life.

19 Two aspects of Maryland's law differ
20 from federal regulation: the alteration of
21 vegetation and hydrology and the regulation of a
22 25-foot buffer. In addition, buffer
23 requirements are expanded to 100 feet for
24 nontidal wetlands of special state concern.
25 These wetland areas are designated by regulation

1 and mapped as having exceptional ecological or
2 educational value of statewide significance.
3 These regulatory differences recognize that the
4 benefits provided by wetlands depends on its
5 hydrology and vegetation and that activities
6 immediately adjacent to a wetland may have as
7 much effect on its function as activities in the
8 wetland.

9 There are three major types of project
10 approvals in the Maryland program: a letter of
11 authorization, a permit, and exemptions.
12 Exempted activities do not require MDE
13 authorization. Examples include agricultural
14 and forestry activities. A letter of
15 authorization may be issued for activities
16 impacting less than 5,000 square feet of
17 nontidal wetlands or less than one acre of an
18 isolated nontidal wetland. These activities do
19 not require an alternative site analysis, public
20 notice, or mitigation by the applicant. MDE is
21 responsible for mitigation. Examples include
22 repair activities for utility projects, and
23 construction of private residences on single
24 lots. A permit is required for activities that
25 do not qualify for an exemption or a letter of

1 authorization. An alternative site analysis,
2 public notice, and mitigation by the applicant
3 are required. The state statute and regulations
4 provide for application review time frames for
5 permits.

6 Through the regulatory program, which
7 began in 1991, the goals of the Nontidal
8 Wetlands Protection Act have been achieved. The
9 program continues to achieve its no net loss
10 objective and continues efforts to enhance the
11 efficiency of the regulatory process.

12 Successful streamlining actions have included
13 the merger of Nontidal Wetlands, Floodplain
14 Management, and Water Quality Certification
15 Divisions into the Nontidal Wetlands and
16 Waterways Division, resulting in a consolidated
17 application review process and the issuance of a
18 single permit for activities in floodplains,
19 waters of the state and nontidal wetlands.

20 Maryland's laws and regulations stress
21 the development of a program to obtain a no net
22 loss nontidal wetlands acreage and function, and
23 to strive for a net overall gain. This
24 objective is achieved through a variety of
25 mechanisms including voluntary efforts of

1 private landowners, state initiatives, and
2 regulatory program.

3 Implementing this objective requires
4 consideration of wetland types and values. In
5 the regulatory process, wetland types and values
6 can dictate the extent of avoidance and
7 minimization prior to consideration of
8 compensatory mitigation. Also, as previously
9 mentioned, Maryland's law requires the
10 identification of significantly valuable
11 nontidal wetland areas and their designation as
12 Nontidal Wetlands of Special State Concern.

13 The regulatory program achieves no net
14 loss through two types of mitigation efforts
15 designed to replace lost wetland acreage and
16 function: permittee mitigation and programmatic
17 mitigation. Permittee mitigation represents 60
18 percent of the regulatory efforts and is
19 required for larger wetland losses, generally
20 those exceeding 5,000 square feet. Nontidal
21 wetland creation, restoration, or enhancement is
22 required or, in some instances, the permittee
23 may be eligible to pay a specified amount into
24 the state's Nontidal Wetlands Compensation Fund.
25 Programmatic mitigation, representing 40 percent

1 of our regulatory mitigation efforts, is
2 performed by the state for nontidal wetlands
3 losses generally less than 5,000 square feet or
4 for persons who have paid into the fund. Since
5 its beginning on January 1st, 1991, Maryland's
6 regulatory program has achieved a net gain of
7 nontidal wetlands.

8 The state is constantly striving to
9 improve its mitigation program. Prior to
10 implementation of the state's programs, failure
11 of mitigation projects was largely due to
12 insufficient monitoring for hydrology, poor
13 design, and lack of follow-up by regulatory
14 agencies. The state has analyzed these factors
15 to ensure enhanced success of mitigation
16 projects. To address these issues, the state
17 requires:

18 * monitoring of hydrology to determine
19 suitability of sites;

20 * design review;

21 * five years of postconstruction

22 monitoring; and

23 * 85 percent success rate of vegetative
24 cover; and

25 * long-term protection mechanisms for

1 the site.

2 Another mechanism that must be
3 developed as a mitigation tool is banking, or
4 the restoration, creation or enhancement of
5 wetlands undertaken expressly for the purpose of
6 providing compensation for wetland impacts, for
7 future wetland impacts. In 1993, the Maryland
8 General Assembly enacted legislation to develop
9 standards and adopt regulations for the
10 establishment and operation of nontidal wetlands
11 mitigation banks. In addition, MDE adopted
12 regulations in October of 1994. To date,
13 mitigation banking remains an untapped resource
14 in Maryland's wetland protection program.

15 Today, with the direction of the
16 federal program uncertain, Maryland is focusing
17 on new opportunities to streamline the
18 regulatory process and continue to identify and
19 eliminate redundancies between local, state, and
20 federal permit program. More importantly, we
21 are expending our efforts to take advantage of
22 programs and expertise at all levels of
23 government.

24 At the federal level, we are
25 negotiating a new Maryland State Programmatic

1 General Permit, which will include:

2 * activities conducted in tidal and
3 nontidal wetlands:

4 * alternative analysis, avoidance, and
5 minimization conducted by the state;

6 * nonreporting thresholds; and

7 * suspension of the nationwide permits.

8 The new SPGP, as currently drafted,
9 will rely on the state for approximately 85
10 percent of permit application review. In
11 addition to eliminating state and federal
12 regulatory duplication, the new SPGP will free
13 federal resources so that they can devote some
14 time into areas of wetland protection that are
15 currently being neglected.

16 At the state level, we are developing
17 new state general permits for certain single
18 family home construction; utility line
19 installation; repair and maintenance of road
20 crossings; activities conducted in incidentally
21 created wetlands; and certain agricultural
22 activities.

23 At the local level, we are working on a
24 pilot project with the Montgomery County
25 Department of Transportation, the Maryland

1 National Capital Park and Planning Commission,
2 and the Army Corps to determine ways to use
3 information generated during the development of
4 county comprehensive plans as tools in the
5 permitting process.

6 And I guess in conclusion, I would just
7 like to say that, listening to the testimony
8 from the Secretary and his staff, I think it is
9 certainly easy to say that Maryland is wrestling
10 with the exact same issues that Pennsylvania is.
11 You can tell by the types of general permits
12 that we are trying to develop, working with the
13 Corps of Engineers to streamline the process
14 through state general programmatic permits, that
15 we are very much on the same playing field and
16 going in the same direction as the State of
17 Pennsylvania. Thank you.

18 CHAIRMAN REBER: Thank you, Gary.

19 Looking to my left, Representative
20 Levdansky?

21 REP. LEVDANSKY: No.

22 CHAIRMAN REBER: Representative Rubley.

23 REP. RUBLEY: Thank you, Mr. Chairman,
24 and thank you for hearing today Mr. Setzer. But
25 I just have a couple of questions of

1 clarification.

2 When you talk about, as I understand
3 it, you would need a letter of authorization for
4 construction of a private residence (this is on
5 page three) on a single lot. Do you have
6 restrictions in terms of how much of that lot
7 can be in wetlands and ...?

8 MR. SETZER: The letter of
9 authorization for activities impacting less than
10 5,000 square feet: it does not require that the
11 applicant perform an alternative analysis, but
12 it does require us to work with the applicant to
13 avoid a minimized nontidal wetland impact. And
14 part of that is the selfish reason on the
15 state's part: we are responsible for the
16 mitigation on those, for those activities. So
17 to the extent that we are able to minimize the
18 impact, it is less mitigation that the state is
19 responsible to fund.

20 REP. RUBLEY: The mitigation is
21 required.

22 Does the homeowner have to put monies
23 into a fund such as Pennsylvania's?

24 MR. SETZER: No, ma'am.

25 REP. RUBLEY: No.

1 As far as the mitigation process, do
2 you require that the mitigation occur within the
3 same watershed where the wetlands have been
4 lost?

5 MR. SETZER: We have the same
6 sequencing concerns as Pennsylvania. We look on
7 site first, we look in the watershed, and then
8 we move, we radiate outward from there to look
9 for appropriate sites.

10 One thing I had mentioned was watershed
11 management plans. If there is a watershed
12 management plan in the watershed, it provides us
13 additional flexibility for mitigation sites and
14 we can target areas that have been targeted in
15 the specific watershed plan for mitigation
16 activity.

17 REP. RUBLEY: Thank you very much.

18 CHAIRMAN REBER: The Chair thanks the
19 lady.

20 Representative Masland?

21 REP. MASLAND: No.

22 CHAIRMAN REBER: Representative
23 Bermilin.

24 REP. BIRMELIN: No.

25 CHAIRMAN REBER: Sam?

1 REP. SMITH: No.

2 CHAIRMAN REBER: Representative Fargo.

3 REP. FARGO: Real quickly.

4 Do I understand that when you have an
5 authorization for a small wetlands or just for
6 building, whether there is wetlands or not, you
7 have to file the same kind of an authorization
8 form if you are building a house?

9 MR. SETZER: If there are no wetlands
10 on the property?

11 REP. FARGO: Yes.

12 MR. SETZER: No, sir, there is no
13 application.

14 REP. FARGO: So if there is a wetlands
15 and the person who is building the house has to
16 make that determination, when it is a small
17 area, as to whether there might be a wetlands
18 and they could ask for an authorization?

19 MR. SETZER: Yes, sir, they are
20 required to delineate the wetlands and file an
21 application.

22 REP. FARGO: And the state is, through
23 banking or something, in determining or trying
24 to mitigate those, the losses that might be true
25 for those small losses of wetlands?

1 MR. SETZER: For activities that are
2 authorized under 5,000 square feet, the state
3 mitigates for those activities. We do it to the
4 extent that we can on public property, on public
5 land, and try to use, network our funds with
6 other programs, Partners of Wildlife and those
7 types of activities, so that we can develop the
8 largest mitigation site possible. We also
9 target our programmatic mitigation, the state
10 required mitigation, to watersheds that have
11 been impacted, and we keep track of the losses
12 by watershed and try to direct funding,
13 accordingly.

14 REP. FARGO: A nationwide permit, what
15 is that?

16 MR. SETZER: Nationwide permits?

17 REP. FARGO: Yes, that you are trying
18 to expend.

19 MR. SETZER: That is the Federal Corps
20 of Engineers Nationwide Permit Program,
21 Nationwide 29, which was just issued.

22 What we found, through our five years
23 of our first programmatic general permit with
24 the Corps of Engineers, was that, there were so
25 many different options for the Corps to use to

1 authorize a project, it practically was
2 confusing.

3 So what we are intending to do -- and
4 there is some opposition even in the development
5 community and we are trying to work through that
6 -- but what we would like to see, is that, for
7 the Corps of Engineers, they have two options:
8 1) they can either go through an individual
9 permit review for a project; or 2) they issue a
10 state programmatic general permit to authorize
11 the project and rely on the state program to
12 minimize and avoid impacts.

13 REP. FARGO: Finally, the aerial
14 photography groundtruthing, how accurate is
15 that? Can you actually inventory wetlands with
16 that kind of technology?

17 MR. SETZER: We have had limited
18 success. It is not in my particular program.
19 When the Nontidal Wetlands Protection Act was
20 first passed in 1989, it required the state to
21 develop guidance maps. We used National
22 Wetlands Inventory Digital Data and overlaid
23 that on satellite imagery and we have made that
24 available to all the counties.

25 What we have done since then is taken

1 that mapping effort and developed it into a very
2 comprehensive GIS program, and that group is
3 continually trying to pull in different data
4 sets for wetlands delineation, whether it is the
5 National Wetlands Inventory, Satellite Imagery.
6 They have used about a half a dozen different
7 types of wetland mapping information and
8 overlaid those and then they go out and see
9 what type of job those maps do in terms of
10 defining the resource. And, at best, it has
11 been a mixed bag, as far as the results.

12 REP. FARGO: So far, it is not a
13 reliable way to determine wetlands? I mean, on
14 a --

15 MR. SETZER: Well, if you talk to the
16 regulatory people in Fish and Wildlife, they are
17 certainly concerned that it misses many
18 wetlands.

19 If you are going to go to regulatory
20 maps, you almost have to make that decision up
21 front, is that, you are going to miss some
22 wetlands.

23 REP. FARGO: Thank you, Mr. Setzer.

24 CHAIRMAN REBER: Thank you,
25 Representative Fargo.

1 On page two of your testimony, you
2 reference the Maryland General Permit which
3 facilitates the review and authorization of
4 minor activities with minimal nontidal wetland
5 impacts.

6 MR. SETZER: Yes, sir.

7 CHAIRMAN REBER: Could you amplify a
8 little bit what that encompasses, what may be
9 some of the conditions or the requirements,
10 criteria, that go to that, if you know?

11 MR. SETZER: Well, initially, we had
12 hoped, when the Corps of Engineers issued that
13 permit, that the state would be the sole
14 reviewer for projects five acres and under.
15 Through its implementation over the past five
16 years, that hasn't been the case. It has been a
17 limited success.

18 The Corps reviews projects jointly with
19 us -- it does not necessarily rely on a state
20 program -- and provides us either with a
21 nationwide permit for the authorization or, in
22 fact, they may put the project under the general
23 permit. That permit is currently under
24 renegotiation. And the way it looks now is that
25 the new permit will actually put the state in

1 the position of being the sole reviewer for
2 approximately 85 percent of the applications
3 that we receive. So we are making progress and
4 we have made progress over the last five years.

5 CHAIRMAN REBER: On the last page of
6 your testimony, the second to last paragraph,
7 you referenced that you are developing new state
8 general permits for single family home
9 construction. Have you had an opportunity to
10 review, at all, this Pennsylvania proposed
11 General Permit 15?

12 MR. SETZER: No, sir.

13 CHAIRMAN REBER: Okay. I was just
14 curious whether you had.

15 Let me ask you this then: in what
16 direction is this new state general permit
17 taking relative to single family residential in
18 Maryland?

19 MR. SETZER: As a starting point, we
20 are looking at the Nationwide 29 Permit that was
21 recently issued by the Corps.

22 One of our major concerns with that is
23 that it does not require mitigation. And since
24 our statute directs us for no net loss, that is
25 a concern to us.

1 We are also probably looking at less
2 than a half acre of impact in terms of what
3 would be authorized under a general permit. At
4 this point, I would suspect somewhere between a
5 quarter and a third of an acre.

6 CHAIRMAN REBER: Okay.

7 Any further questions?

8 (No response.)

9 CHAIRMAN REBER: Thank you very much.

10 MR. SETZER: Thank you.

11 CHAIRMAN REBER: The next individual
12 scheduled to present testimony to the committee
13 is Turner R. Odell, Jr., the Pennsylvania Office
14 Staff Attorney with the Chesapeake Bay
15 Foundation.

16 While Turner is coming to the
17 microphone, I would note for the record that we
18 have invited Professor Joseph Larsen of the
19 nationally reknowned Environmental Institute of
20 the University of Massachusetts to testify
21 today. He is unable to attend, but will be
22 providing testimony to be incorporated as part
23 of the record and we will see that all members
24 of the committee obviously are apprized of that
25 and the testimony is made available.

1 Additionally, we attempted to secure a
2 representative, or representatives, of the Army
3 Corps of Engineers to testify today.

4 Unfortunately, they were unable to accommodate
5 that request, but will be submitting testimony
6 and similarly that testimony will be
7 incorporated as part of the record and made
8 available to the members of the committee.

9 With that reference for the record, I
10 would turn to Mr. Odell and ask him to proceed.

11 Thank you. Welcome.

12 MR. ODELL: Thank you. Chairman Reber,
13 members of the committee, good morning. My name
14 is Turner Odell and I am a staff attorney for
15 the Harrisburg, Pennsylvania office of the
16 Chesapeake Bay Foundation. With me is Jean
17 Watts, staff scientist for the Foundation,
18 specializing in wetland science. On behalf of
19 the Foundation, we would like to thank you for
20 giving us the opportunity to testify on an issue
21 of great significance to the Commonwealth.

22 At the outset, let me deeply apologize
23 for not having copies of this testimony for
24 everyone. I was detained by an ice flow at my
25 apartment this morning and I had the only copy

1 of the final testimony and I had to come
2 directly here. So I promise that within a mere
3 hour or two of the close of this hearing, I will
4 provide a copy to each of the members and the
5 Department and anyone else who cares to have a
6 copy.

7 CHAIRMAN REBER: You didn't by any
8 chance work for the Rose law firm at any time,
9 did you?

10 MR. ODELL: Well, we are still looking
11 for those records.

12 The Chesapeake Bay Foundation is the
13 largest non-profit organization working to save
14 the Bay. CBF has programs in resource,
15 protection, environmental education, and land
16 management. Founded in 1966, CBF now has
17 offices in three states and more than 85,000
18 members nationwide.

19 With more than half of the freshwater
20 entering the Bay, flowing through Pennsylvania's
21 watersheds, the resource policies and programs
22 of the Commonwealth have a significant and
23 direct effect upon the health of the Bay.
24 Wetland conservation has long been a high
25 priority for the Foundation.

1 Over the years, the Foundation has
2 amassed considerable experience and expertise in
3 wetland policy and science. CBF regularly
4 provides input to state and federal regulatory
5 processes and there are a number of examples of
6 our recent testimony and comments that are
7 listed in the written testimony which you will
8 receive.

9 In 1988, the Chesapeake Bay Executive
10 Council, including the Governor of Pennsylvania
11 at the time, agreed to establish an immediate
12 goal of no net loss with a long-term goal of a
13 net resource gain as a means of recovering the
14 values of wetlands already lost over years of
15 inadequate protection. We are here today to
16 help the committee, the General Assembly, and
17 the Commonwealth as a whole meet this important
18 goal in the most effective and efficient manner
19 possible.

20 In undertaking the legislature to
21 regulate with respect to wetlands, it is
22 essential to understand why we bother to
23 regulate or protect wetlands at all. Although I
24 am certain that the members of the committee are
25 well-informed on this issue, many other citizens

1 are not and, indeed, wonder why they should not
2 fill or drain any wetland they may find.

3 Many people do understand that wetlands
4 are an important habitat for varieties of
5 plants, birds, fish, and other wildlife. What
6 many people do not recognize is that wetlands
7 function in ways that benefit people more
8 directly: wetlands protect the quality of the
9 surface waters that the public uses by filtering
10 out sediments, nutrients, and other pollutants
11 that would otherwise run-off unimpeded.

12 This water quality function also
13 reduces the cost to downstream dischargers that
14 must meet water quality standards.

15 In fact, wetlands, as mentioned in
16 earlier testimony, are often constructed
17 specifically for water quality treatment
18 purposes.

19 Wetlands are also essential to some
20 citizens that rely on groundwater either through
21 individual wells or through municipal water
22 systems by providing not only better quality
23 groundwater but providing points of groundwater
24 recharge that otherwise might not be available.

25 Finally, and sometimes most

1 significantly, wetlands protect nearby and
2 downstream property owners from flood damage.
3 Wetlands detain flood water, releasing it slowly
4 over time into surface waters, groundwater, and
5 the atmosphere. By reducing its slowing flood
6 peaks, wetlands mitigate the destructive force
7 of flood waters downstream.

8 By filling a wetland, a landowner, in
9 essence, expels naturally occurring water from
10 his or her property at the peril of those
11 nearest and downstream.

12 The significance of wetlands
13 destruction and precipitating downstream flood
14 damage has been well demonstrated. And, again,
15 there are a number of examples listed in the
16 written testimony that I won't go into here.

17 The fact is that wetlands have
18 measurable economic value. Some of that value
19 stems from the recreational and commercial
20 activities that thrive on the fish, fowl and
21 other wildlife that depends on wetland habitat.

22 The value of wetlands also lies,
23 however, in the cost that would be inflicted on
24 individuals and communities when wetlands are
25 degraded or destroyed. These avoided costs for

1 water quality control, drinking water supply,
2 flood control and damages, among others, are
3 imposed on others when wetlands are filled.

4 The point is that wetland regulation
5 does not simply preserve a desirable land use.
6 Wetland regulation protects the health, safety,
7 and property rights of neighbors and downstream
8 users from the harm that would otherwise be
9 inflicted by landowners that fill wetlands.

10 It makes sense that Pennsylvania
11 regulate activities in wetlands under the Dam,
12 Safety and Encroachments Act. That Act's stated
13 purpose is to provide for the regulation of
14 encroachments. Encroachments being defined as
15 structures or activities that change the shape
16 of any body of water, specifically including
17 wetlands.

18 It is further the explicit purpose of
19 the Act to, quote, protect the health, safety,
20 and welfare of the people and property, and to,
21 quote, protect the natural resources,
22 environmental rights and values secured by the
23 Pennsylvania Constitution, and conserve the
24 water quality, natural regime, and carrying
25 capacity of water courses.

1 The wetland protection scheme outlined
2 in Chapter 105 of the Pennsylvania Code, as
3 currently formulated, is a relatively sensible
4 and scientifically sound approach to regulating
5 wetlands as required by the Act.

6 Most everyone will agree, however, that
7 implementation of the program has been less than
8 ideal. The media and many legislators have been
9 treated to a parade of horror stories about
10 landowners jailed or otherwise harassed by
11 regulators over the filling of a wetland.

12 Certainly, there have been some
13 problems, but the magnitude of the problem may
14 be overblown. DEP's own statistics show that,
15 in 1992, approximately 90 percent of all wetland
16 permit applications were granted. And I gather
17 from earlier testimony by the Department that
18 there has not even been a permit denial in the
19 last two years. So I guess we are a little
20 closer to a hundred percent now.

21 Many of the horror stories involve
22 individuals that deliberately ignore the
23 requirement to obtain a permit or a stop work
24 order and proceed with a project that has
25 unacceptable impacts, resulting in enforcement.

1 If such an individual had gone through
2 the permit process, the process itself may well
3 have helped the individual design a project with
4 less severe impacts that would have been
5 approved.

6 DEP's statistics show that the permit
7 process as a whole, in 1992, at any rate, had
8 obtained a 50 percent reduction in final impacts
9 as compared to the amount of impacts originally
10 requested, all of that while maintaining a 90
11 percent approval level.

12 Nevertheless, some of the complaints
13 about the system ring true and the question
14 remains how best to address the problems
15 legislatively or through the administrative
16 process.

17 The proposed legislation, House Bill
18 200, and others, currently pending before this
19 committee, has some fundamental problems and
20 would not provide a scientifically sound basis
21 for regulating wetlands. The delineation and
22 ranking scheme proposed by both bills does not
23 provide a scientifically sound basis for
24 evaluating wetlands. Comparisons or
25 distinctions between wetlands based on their

1 size, their origin, the use to which they might
2 otherwise be put, and the aesthetics of the
3 surrounding landscape, do not inform a decision
4 as to the importance of that wetland in its
5 unique environment.

6 The notion of ranking wetlands, while
7 seemingly convenient for legislating broad
8 categories of protected and unprotected
9 wetlands, really misses the point of a
10 permitting process.

11 The relevant question is not one of
12 rank or comparison, but rather one of appraisal
13 of wetland functions and values. An appraisal
14 should assess both the intrinsic functions of
15 the wetland type and, more importantly, the
16 extrinsic values of that wetland based on its
17 position in the landscape and the surrounding
18 land uses.

19 In addition to measuring the intrinsic
20 and extrinsic functions of a wetland, an
21 appraisal system, a regulatory system, must
22 determine the relative weight that should be
23 given to each variable and how that weight might
24 change dependent on site specific circumstances.

25 Sometimes a single extrinsic factor,

1 protection of an important drinking water source
2 or flood protection, for example, might simply
3 outweigh all other factors in certain
4 circumstances.

5 Finally, the appraisal process must
6 examine the nature of the proposed impact to the
7 wetland, individually and cumulatively, and
8 determine whether any unavoidable impacts can be
9 adequately mitigated through replacement of the
10 wetland functions that would be lost.

11 We are not saying that all wetlands
12 require equal protection; simply that all should
13 get equal attention and scrutiny at the outset.

14 Although it is far from perfect, the
15 Chapter 105 Program already attempts to
16 undertake this very sort of appraisal process.
17 The structure proposed by the pending
18 legislation would abandon the scientifically
19 grounded approach and severely impair wetland
20 protection in the Commonwealth.

21 And after we are done with the written
22 testimony here, Jean can probably answer some of
23 the more specific questions about that, the
24 particulars of the ranking scheme.

25 Another fundamental problem with the

1 proposed legislation, is that, the notion that
2 landowners should be compensated if they are
3 denied a permit to impact wetlands.

4 As I have already stated, wetland
5 regulations protect individuals and the public
6 from the individual and cumulative harm to
7 persons and property that occurs when wetlands
8 are destroyed.

9 While the Constitution does, indeed,
10 protect property owners from the taking of
11 property for public use without just
12 compensation, wetland regulation, in general,
13 does not take property within the meaning of the
14 Constitution. It is a simple but sometimes
15 difficult truth that a landowner never has a
16 right to use his or her property in a manner
17 that harms others. If a person's property
18 happens to hold water in the form of a wetland,
19 a landowner can make some use of that property,
20 of course, but he is not permitted to expel or
21 evacuate that water or otherwise change the
22 hydrology in a manner that individually or
23 cumulatively might cause harm to others or their
24 property.

25 In some cases, regulation of private

1 property may, indeed, go so far as to work a
2 complete deprivation of all use or value for a
3 property. In such circumstances, the courts
4 remain the appropriate form for deciding when
5 compensation is due.

6 In short, legislated compensation to
7 landowners, when wetlands are regulated, is not
8 necessary or appropriate. It may well be
9 appropriate, however, to adjust the tax
10 treatment of property that is affected by a
11 wetland's regulation, as has been proposed by
12 some legislation.

13 An approach better suited to fixing
14 what problems may exist in the Commonwealth's
15 wetland protection program is to make
16 administrative reforms directly to the program.
17 Secretary Seif and the new DEP are to be
18 commended for proposing a wetlands initiative
19 that includes many good concepts for improvement
20 of the program, some of the particular proposals
21 CBF can readily support, including:

22 * the creation of a Wetland Advisory
23 Committee and the Wetland Replacement Registry;

24 * the proposal to change DEP policy so
25 that the Commonwealth uses the same wetland

1 delineation manual, as the federal government,
2 is also an excellent example of where it makes
3 sense to match the federal policy;

4 * and as pointed out in earlier
5 testimony, the NAS study supports this method as
6 a scientific approach to delineating wetlands;

7 * and, of course, the agreement between
8 the Commonwealth and the Corps on a state
9 programmatic general permit has greatly and
10 significantly improved and streamlined the
11 permit process.

12 Despite some good ideas, others of the
13 Department's proposals have serious problems.
14 The Foundation has met with Secretary Seif and
15 his staff to discuss our concerns, some of which
16 I will share with the committee.

17 The proposed GP 15 for residential
18 construction in wetlands embodies some good
19 concepts, but its particulars are seriously
20 flawed.

21 CBF is not opposed in principle to a
22 general permit narrowly tailored to deal with a
23 very specific set of circumstances; that is,
24 where individuals have invested in property with
25 the intent eventually to build their own private

1 residence and, subsequent to the purchase,
2 legislation or regulation passes that prevents
3 construction.

4 While the proposed general permit may
5 be conceptually appropriate to address a certain
6 problem, as drafted, it is far broader than
7 necessary to accomplish its legitimate goals
8 and, as a result, allows significant individual
9 and cumulative adverse impacts on the
10 Commonwealth's wetlands.

11 Unless the permit is significantly
12 modified, CBF must strenuously oppose it.

13 First, availability of the permit must
14 depend on the date of purchase, not the date of
15 subdivision. The permit should be constructed
16 to protect individual landowners who invested
17 before regulations were in place. Subsequent
18 and current purchasers do not purchase their
19 lots with the same expectations as those
20 individuals that purchased prior to regulation
21 and, therefore, do not warrant the special
22 dispensation provided by this general permit.
23 Of course, such purchasers of wetlands lots now
24 and in the future may always apply for an
25 individual permit under the standard procedure

1 and criteria.

2 Second, to take advantage of the
3 general permit, the owner must have purchased
4 the property prior to October of 1984. Passage
5 of the Dam, Safety and Encroachments Act in 1978
6 brought activities in wetlands within the scope
7 of regulation by the Commonwealth, and by
8 October of 1984, DER's regulatory program had
9 spent several years becoming fully functional.
10 Sellers and buyers were on notice that, in
11 Pennsylvania, residential construction in
12 subdivisions would not be suffered in wetlands
13 without a permit from the appropriate
14 authorities.

15 In addition to unnecessarily wide
16 availability, GP 15 has other problems: the half
17 acre cap is far in excess of the area necessary
18 to construct a residence; the registration
19 requirements are inadequate to measure the
20 impacts and ensure compliance; and the permit,
21 as originally drafted at any rate, allows the
22 placement of septic systems in wetlands, among
23 other problems. And I have not looked at the
24 very latest draft in its entirety to know if all
25 of those are still true.

1 The net result, however, is that the
2 permit will result in a tremendous cumulative
3 impact to Pennsylvania's wetlands. In the
4 Poconos alone, as this committee has heard in
5 other testimony, GP 15 could result in the
6 destruction of thousands of acres of wetlands.

7 Along with the GP 15, DEP proposes the
8 creation of a fund into which a permittee might
9 pay money in lieu of actual replacement of
10 destroyed wetlands. While this may be
11 appropriate for use with an appropriately
12 structured GP 15, it is not appropriate and
13 violates the mitigation requirements of Chapter
14 105 as applied to individual wetland permits
15 under the program.

16 Avoidance and minimization of impacts
17 remain the best forms of mitigation. The
18 existense of the fund would emphasize
19 replacement of wetlands, which is frequently
20 problematic.

21 Finally, CBF opposes the Department's
22 proposal to exempt prior converted, or PC,
23 wetlands from the Commonwealth's Wetland
24 Protection Program, a proposal that is also
25 embodied in some of the legislative proposals.

1 This proposal is scientifically and
2 ecologically unjustified and may cause a
3 substantial loss of wetland resources in the
4 Commonwealth.

5 Prior converted wetlands is a concept
6 originally used in the 1985 Food Security Act
7 (hence the 1985 date associated with it) and it
8 was later incorporated into the wetland
9 protection program under Section 404 of the
10 Clean Water Act. The term is used to designate
11 wetland areas that were converted to cropland
12 use before December 23rd, 1985. This cropland
13 was cleared, drained, or otherwise altered to
14 make it possible to produce crops. Under
15 current state law, these types of wetlands can
16 continue to be used to produce agricultural
17 commodities, and drainage maintenance is
18 allowed.

19 But despite these alterations, many --
20 not all -- but many of these areas would still
21 delineate as wetlands. Using the 1987 manual as
22 DEP has proposed today, these areas would be
23 considered disturbed. However, those PC
24 wetlands that still meet the hydrology and soils
25 criteria of the manual would qualify as

1 jurisdictional wetlands. This is especially
2 true for wetlands that would be considered PC
3 merely because they had been cleared.

4 CBF is not aware of, nor has DEP
5 presented to our knowledge, any scientific
6 evidence to show that many PC wetlands are not
7 providing valuable wetland functions. Rather,
8 experience suggests that many of these altered
9 wetlands do perform valuable functions,
10 especially flood control.

11 The Department's proposed change in
12 policy will remove functioning PC wetlands from
13 the Chapter 105 Wetlands Protection Program,
14 resulting in the unmitigated loss of possibly
15 thousands of acres of wetlands throughout the
16 Commonwealth. The Department again cites
17 consistency with the federal policy as the sole
18 rationale for this policy change.

19 This rationale does not justify the
20 wasting of a valuable public resource, nor the
21 violation of law by the Department. In fact,
22 the Department has stated that consistency with
23 federal law is not appropriate, for
24 circumstances dictate that Pennsylvania should
25 be more protective of its resources.

1 In conclusion, the Foundation believes
2 that necessary improvements to the wetland
3 program can best be accomplished
4 administratively without legislation.

5 Certainly, legislation is not necessary
6 now. The new DEP deserves the opportunity to
7 engineer appropriate changes and make the
8 program effective, efficient, and user friendly.
9 If the Department keeps the interest of the
10 public in mind, and does not blindly follow a no
11 stricter than federal approach, wetland
12 protection in Pennsylvania could improve in all
13 respects.

14 If the General Assembly feels compelled
15 to legislate with respect to wetlands, there are
16 some areas where it could do some good. It is
17 possible that legislation could be crafted that
18 would more clearly authorize Pennsylvania's
19 wetland protection program. Legislation that
20 would, in essence, authorize the basic structure
21 of the existing Chapter 105 program.

22 CBF would be willing to assist the
23 committee in drafting such legislation. And the
24 legislature could certainly be of tremendous
25 help in providing additional resources for the

1 Department to use in implementing their
2 programs. Additional resources would allow DEP
3 more swiftly to move permit applications, or
4 also giving individual applicants closer
5 scrutiny and assistance in developing an
6 acceptable project.

7 The Commonwealth might also benefit
8 from the creation of an office devoted
9 exclusively to carefully tracking losses and
10 gains in all the wetland resources of the
11 Commonwealth, and to wetland restoration and
12 conservation, independent of the permitting and
13 mitigation requirements. Such an office could
14 be located either in DEP or in the Department of
15 Conservation and National Resources.

16 Furthermore, CBF could support an
17 appropriately structured wetland acquisition or
18 conservation program, additional to the current
19 permitting program. So long as such programs
20 were independent from the program and its
21 mitigation requirements, there is no reason that
22 the Commonwealth should not set about
23 preserving, through acquisition, those wetlands
24 it found especially desirable. In fact, an
25 innovative restoration and conservation program

1 would be important in achieving the state and
2 regional goal of a net gain in wetlands,
3 assuming the permit program can only achieve a
4 no net loss status quo.

5 Another way to accomplish additional
6 wetland compensation might be to structure a tax
7 incentive for the donation of wetlands to
8 conservation in perpetuity. There is, however,
9 no reason the state should ever be required to
10 purchase wetlands for which a permit is denied.

11 The Chesapeake Bay Foundation remains
12 committed to improving Pennsylvania's Wetland
13 Protection Program. We are prepared to work
14 with you, Mr. Chairman, and with all the members
15 of this committee, and with the Department to
16 identify and implement effective reforms.

17 Thank you again for the opportunity to
18 present the Foundation's views. And we would be
19 happy to answer any questions, you may have, to
20 the best of our ability.

21 CHAIRMAN REBER: Thank you very much,
22 Mr. Odell.

23 I will look to my far right.

24 Representative Rubley.

25 REP. RUBLEY: No. Thank you.

1 CHAIRMAN REBER: Let me just clarify.
2 You did not have an opportunity, when
3 you were commenting on GP 15, to look at this
4 most recent?

5 MR. ODELL: That is correct, I have
6 not.

7 I did briefly note that there are some
8 changes from the original one. Wherein, that
9 sort of 40 percent rule, that appears to be
10 added to that number, I would say that looks
11 like a step in the right direction, but I am not
12 sure it is adequate to ensure that GP 15 won't
13 have some serious cumulative impacts.

14 CHAIRMAN REBER: Your last statement to
15 the effect that, in your opinion, there should
16 never be any purchasing by the state of wetland?

17 MR. ODELL: I believe the statement --

18 CHAIRMAN REBER: That's pretty
19 remarkable that we should be put in that kind of
20 box where, in fact, we could or would be, might
21 want to put ourselves in a position to go out
22 and take the most exceptional wetland you can
23 think of and hopefully have the financial
24 resources to acquire it and to, in essence,
25 protect it for perpetuity sake, is that really

1 what you meant?

2 MR. ODELL: No. I may not have made
3 myself particularly clear.

4 I said that the state should never be
5 required to purchase wetlands for which it
6 denies a development permit.

7 CHAIRMAN REBER: Okay.

8 MR. ODELL: Now, we would support,
9 possibly, depending on how it was structured, a
10 program, independent of the permit program, that
11 was initiated to acquire valuable wetland
12 properties. So long as it remains independent
13 of the permit requirement and the requirement
14 that any impacts be mitigated, I don't think we
15 would object to that. Although, I would have to
16 take a look at that, the terms of that.

17 CHAIRMAN REBER: I understand. I just
18 wanted to clarify that because, at least and
19 partly what you said, I am in agreement that we
20 ought to be given that latitude ...

21 MR. ODELL: Um-hum.

22 CHAIRMAN REBER: ... if, in fact, we
23 want to go in that direction for a particular
24 program.

25 Any other questions?

1 (No response.)

2 CHAIRMAN REBER: Okay. The Chair
3 thanks you very much.

4 MR. ODELL: Thank you very much, Mr.
5 Chairman.

6 CHAIRMAN REBER: At this time then,
7 seeing no further desire of any members of the
8 committee to address this issue, this hearing is
9 adjourned.

10 (Whereupon, the public hearing was
11 adjourned at 12:45 p.m.)

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I hereby certify that the proceedings
and evidence are contained fully and accurately
in the notes taken by me on the within
proceedings, to the best of my ability, and that
this copy is a correct transcript of the same.



Roxy Cressler, Reporter
Notary Public