



**Testimony on House Bill 1576 – the Endangered Species Coordination Act
to the Pennsylvania House of Representatives
Environmental Resources & Energy Committee and Game & Fisheries Committee
Presented by John Arway, Executive Director
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Good afternoon, Chairmen Causer, Haluska, Miller, and Vitali and members of the Environmental Resources & Energy Committee and Game & Fisheries Committee. For those who don't know me, my name is John Arway, and I am the Executive Director of the Pennsylvania Fish and Boat Commission (PFBC). On behalf of our Board of Commissioners, thank you for the opportunity to explain our agency's effective and efficient procedures for conserving Pennsylvania's most vulnerable species and the streams that produce and sustain trout better than any hatchery ever could.

In my 33 years with the agency, this is the first time that I can recall an Executive Director being asked to testify before a joint hearing of your two committees. I can think of no issue more important and fundamental to our mission than that which we are discussing today.

The PFBC lists and de-lists threatened and endangered (T&E) species and designates wild trout streams pursuant to authority included in the Fish and Boat Code. This authority and supporting policies and regulations have fulfilled the dual purposes of protecting rare species and wild trout streams while allowing for responsible business and growth.

Since our founding in 1866, the Pennsylvania Fish and Boat Commission has worked judiciously to protect, conserve, and enhance our Commonwealth's aquatic resources. The executive and legislative branches have always looked to us for our scientific and professional expertise, vesting us with the responsibility to look after the welfare of our waters and to conserve Pennsylvania's fish, reptiles, amphibians, and other aquatic organisms.

In 1974, your predecessors had the foresight to empower our agency to, and I quote, "promulgate rules and regulations governing the taking, catching, killing, and possession of endangered species within the classifications of fish, amphibians and reptiles." This action was Pennsylvania's necessary follow-up to the 1973 enactment of the federal Endangered Species Act (ESA). In 1980, the General Assembly adopted the current definitions of threatened and endangered species in the Fish and Boat Code. I would argue that our state legislation is even more important than the federal ESA, since protecting species at the state level is the most proactive way for us to prevent their extinction.

Because House Bill 1576 appears to provide protection only to federally listed T&E species, species that are rare within Pennsylvania but not globally rare would not be protected. Effectively conserving species at the state level prevents regional and range-wide declines that require federal listings. The same is true at the state scale. It is important to provide state protection because most state-listed species are located on the edges of their respective ranges.

Many experts, including myself and my staff, believe that if the states properly protected the rare species within our state borders, there would be no need for the federal ESA. Again, your predecessors in the House got it right 39 years ago when they voted 186-1 (followed by a unanimous Senate vote) to give our agency the authority to take action to prevent the need to resort to the more costly, time-consuming, and difficult federal requirements.

While the threatened and endangered species actions of our agency are important first lines of defense to keep species off the federal list, it is also significant to note that a whole host of other Commonwealth environmental laws and regulations are predicated on our protection of those species under our jurisdiction. Laws specifically mentioning threatened and endangered species include the Pesticide Control Act, the Interstate Wildlife Violator Compact, and the Wild Resource Conservation Act. The habitats of T&E species are also required to be considered in the development of the State Water Plan. Regulations with a link to T&E species include ones related to mineral resources; waste management, environmental clean-up, and brownfields; and water resources, including regulations promulgated under the Dam Safety and Encroachments Act. For example, under section 105.17, wetlands that serve as habitat for threatened or endangered fauna or flora are considered exceptional value. The Department of Environmental Protection's (DEP) own *Policy for Pennsylvania Natural Diversity Inventory (PNDI) Coordination During Permit Review and Evaluation (PNDI Policy)* includes a list of citations for specific regulations that call out the conservation of threatened and endangered species. Changing the rules on the way these rare species are listed essentially removes the foundation from which all these other state laws and regulations were promulgated.

We take our responsibility to protect T & E species very seriously, and we are committed to determining the appropriate listing levels for all species under our jurisdiction. In fulfilling this charge, we are constantly refining the lists based on sound scientific data. This leads to removing as well as adding species. During the last five years, we have added 13 new species,

but have also de-listed 11 species from the state threatened, endangered, and candidate species lists.

House Bill 1576 has the very real potential to severely compromise the Commonwealth's ability to protect species as required by current law. In particular, removing protection from T&E species unless they are redesignated within two years will unnecessarily subject them to pressures that may lead to further population declines. Sixty-two species are currently listed by the PFBC as T&E in Pennsylvania. Re-evaluating listing status within two years will be virtually impossible, which means that many species will go unprotected.

Historically, Pennsylvania has a proud heritage of being a leader in natural resource protection. If the intent of House Bill 1576 is to afford protection to only those species that have been defined as T&E under the federal ESA, Pennsylvania will be one of only a few states in the nation that do not protect species that are T&E within its borders. By protecting federally listed species only, many T&E species may disappear from Pennsylvania's waters, wetlands, and landscape.

Fundamentally, the proposed review of T&E species listings and wild trout stream designations by the Independent Regulatory Review Committee (IRRC) outlined in House Bill 1576 is unnecessary.

Our Board of Commissioners already considers staff reports, all public comments, and summaries of all acceptable data that are the basis for proposed listings and designations. Additional reviews by IRRC and the standing committees will result in the unnecessary delay of listings and stream designations, further endangering species and waters that warrant immediate protection.

The PFBC adopts T&E species listings and de-listings as regulations and accordingly adheres to the Commonwealth Documents Law, which requires publication in the *Pennsylvania Bulletin* and affords the public an opportunity to comment or offer additional data for at least 30 days. Proposed regulations are also reviewed for legality and form by the Attorney General's Office as required by the Commonwealth Attorneys Act. We frankly do not understand why we need to add an additional regulatory review step to a process that currently provides ample opportunity for public comment and review.

Both threatened and endangered species listings and wild trout stream designations are factually based and driven by available data and objective scientific standards.

For PFBC T&E listings, the criteria are based on the International Union for Conservation of Nature (IUCN) method that has been peer-reviewed and published at www.iucn.org. A Wild Resources Conservation Fund grant funded a study conducted by the Pennsylvania Biological Survey (PABS) that examined existing regulatory listing criteria across the country's state T&E species programs. PABS is a nonprofit scientific, educational, and advisory organization that was formed to foster the perpetuation of the natural biological diversity of the Commonwealth. It has a number of technical committees, including committees for fish, reptiles and amphibians, and mussels, and those committees serve in an advisory role to the PFBC's staff. Members of the PABS technical committees are recognized experts in their taxonomic fields.

The report concluded that that the IUCN listing method was the most comprehensive and objective method in the country and modified the existing IUCN criteria for use in Pennsylvania. PFBC staff accepted the IUCN method as modified. Pennsylvania's modifications were based

on Florida's modifications, which adopted the IUCN criteria for use within its political boundaries. The PABS Technical Committees further peer reviewed and refined the criteria to account for regional and taxonomic differences of the different faunal groups.

Unlike most states, which rely solely on expert opinion when making listing decisions, the PFBC's listing method includes both quantitative objective criteria (modified IUCN method) and expert opinion, which assesses threats and endangerment and also includes peer review. The objective criteria are used as a tool to assist in the process for listing but are not the final arbiter in the process.

A few years ago, this process was put to the test when there was a dispute between the PFBC and the commercial sand and gravel dredging industry over mussel species listings in the Ohio River Watershed. We worked with the industry to collaboratively arrive at an agreement whereby the mussels would be protected and the industry could continue to operate. In my 33 years with the PFBC, I cannot cite one example of where we have not been able to resolve a conflict with industry on a T&E species issue.

As you know, these bills are not only limited to changing the PFBC's authority regarding T&E species. They also target the wild trout stream designation process and our ability to properly protect wild trout.

Our Board of Commissioners has adopted statements of policy that set forth the basis for the classification of streams supporting the natural reproduction of trout, including the listing of both wild trout streams and Class A wild trout streams. It is the policy of the PFBC to accurately identify, classify, and manage stream sections supporting naturally reproducing trout populations.

The PFBC's designation of wild trout streams and Class A wild trout streams has regulatory implications under DEP's regulations. The PFBC first generated the wild trout stream list in 1992, following the adoption of the regulatory definition of "wild trout stream" by the Environmental Quality Board in 1991. DEP defines the term wild trout stream as a stream identified as supporting naturally reproducing trout populations by the Fish and Boat Commission. This term has regulatory significance under Chapter 105, because wetlands that are located in or along the floodplains of wild trout streams and their tributaries are considered exceptional value wetlands and are thus entitled to the highest level of protection. Again, this shows the importance and relationship of PFBC actions in informing DEP's permit decisions.

The PFBC's designation of a stream as a wild trout stream also has implications under DEP's Chapter 93 water quality regulations. A stream that is designated simply as a wild trout stream receives minimal protection under the protected use category, "Cold Water Fishes." However, a stream that is designated by the PFBC as a Class A wild trout stream receives special protection under the category, "High Quality – Cold Water Fishes."

Within the umbrella of wild trout streams, there are a series of classifications (Classes A through E), which define the wild trout population found within the wild trout stream. Each classification defines the density of wild trout found within the stream. Simply put, the more fish the higher the classification. Class A wild trout streams support the greatest density of wild trout. They are the best of our best wild trout streams and account for only between 5 and 10% of all wild trout streams and 0.5% of all streams in our Commonwealth.

In the case of new wild trout stream and Class A wild trout stream designations, we post preliminary results from surveys on our website (www.fishandboat.com) indicating which streams may be eligible for consideration as wild trout streams or Class A wild trout streams.

We invite interested individuals to join us on follow-up surveys and also encourage those with their own data regarding the streams to share the data with us to help inform our analysis.

Before a stream designation is formally presented to the PFBC's Board for consideration, the proposed designation is published in the *Pennsylvania Bulletin* at least 60 days before the Board takes action at a quarterly meeting to provide opportunity for public comment.

This process for wild trout stream designations was also put to the test – and, I believe, improved – in response to concerns raised by the coal industry. As we did with the mussel listings, we were able to work out a solution that protected the streams while giving the industry more opportunity to comment. This solution provided industry the certainty they needed to make informed business decisions.

These and countless other experiences over the years show that the PFBC is responsive to public comments and has exercised a balanced approach in adjusting and modifying listings and designations accordingly. We work with businesses and our sister agencies to find solutions for how to protect our Commonwealth's natural resources, consistent with Article 1, Section 27 of our Commonwealth's Constitution, while allowing businesses to continue to grow and T&E species to be protected throughout Pennsylvania.

You and your colleagues in the Senate embraced this model when you included the PFBC in Act 13, enabling us to establish a new Natural Gas Section with regionally based staff dedicated to permit review for Marcellus-related activities. We work directly with DEP regional staff and industry from the start of the permit process, through pre-application and project scoping field views. This allows the resource and regulatory agencies to work with applicants to discuss project details, seek clarification, and gain insight into potential regulatory concerns

before permits are applied for. This early coordination leads to more timely and better permit decisions consistent with the laws and regulations that apply to this specific industry.

The old notion of environmental protection competing with economic prosperity has proven to be unfounded. In his 1992 and 1993 papers entitled *Environmentalism and Economic Prosperity*¹, Steven Meyer a professor of political science from the Massachusetts Institute of Technology observed, “After examining five primary indicators of economic growth and prosperity that figured most prominently in the public policy debate . . . no negative effects could be detected. It was simply not true that states with stronger environmental standards fared less well than those with weaker environmental standards. . . . [T]he analysis uncovered a consistent and systematic *positive* correlation between stronger state environmentalism and stronger economic performance.”

From our experience, the same is true here in Pennsylvania. While my staff and I sometimes hear anecdotal reports of how we are impediments to business, critics are hard-pressed to come up with specific examples.

A common thread throughout this testimony is that the PFBC uses the best scientifically available data and methods to list threatened and endangered species and designate wild trout streams, and we are open and transparent with the information used to inform our decisions.

House Bill 1576 includes a statutory definition of “acceptable data” which is unnecessary, since we have and will always continue to rely on scientifically valid and

¹ *Environmentalism and Economic Prosperity: Testing the Environmental Impact Hypothesis*, 1992, and *Environmentalism and Economic Prosperity: An Update*, 1993, Stephen M. Meyer, Professor in Political Science, Massachusetts Institute of Technology, Project on Environmental Politics and Policy, Cambridge, MA 02139.

defensible data and methods when listing threatened and endangered species or designating wild trout streams. As previously noted, when listing T&E species, we rely on independent, technical peer reviews by scientists to inform our decisions. These scientists represent various interests including government, academia, and industry. Similarly, our wild trout stream designations are based on collection methods and protocols that are grounded in science.

This reliance on science is at the heart of national environmental policy and dates back to one of our country's foremost conservationists – President Teddy Roosevelt. The next time you pass the marker in the state capitol commemorating Roosevelt's trip to Harrisburg, remember that he believed that only the best available science should be used to make natural resource management decisions. That is exactly what we do.

The Fish and Boat Commission is concerned about the data sharing provisions of House Bill 1576, and we believe that we should retain the authority to manage data and make recommendations for species under our jurisdiction. As the agency with statutory responsibility for fish, reptiles, amphibians, and other aquatic organisms, we have staff specialists with the required levels of expertise to make decisions about the use of data and the steps needed to protect Pennsylvania's aquatic resources.

House Bill 1576 would take a step backwards by transferring the Fish and Boat Commission's authority to the Department of Conservation and Natural Resources (DCNR) regarding when to grant access to T&E species location information without input from the PFBC, the agency with jurisdictional responsibility for these species. The Commonwealth has spent considerable monetary and staff resources to develop and update the current Pennsylvania Natural Diversity Inventory (PNDI) system. All of the resource agencies (DCNR, the

Pennsylvania Game Commission, the U.S. Fish and Wildlife Service, and our agency) currently use the PNDI system to conduct environmental review for potential impacts to listed species in Pennsylvania. The PNDI tool is used by the public and industry for free, and it is considered one of the most advanced, and arguably the best, environmental review systems in the country. In fact, a natural gas company has used this very system as a model for its own internal environmental review system. There is no need to replace it.

We are also concerned that House Bill 1576 effectively eliminates the exemption under the Right to Know Law that protects T&E species location information from disclosure. This could allow virtually anyone to pinpoint the precise locations where a rare species is found, thereby facilitating exploitation for any number of harmful purposes such as illegal pet trade.

Among the most troubling aspects of House Bill 1576, allowing open access to this confidential information would empower others to make critical decisions about protection, avoidance, and mitigation techniques without consulting with PFBC staff for an opinion. The locations of T&E species are not static, nor are the locations of all species known. Currently, where necessary, permit applicants consult with PFBC specialists to cooperatively evaluate and avoid potential impacts to species and their habitats. DEP's *PNDI Policy* embraces the merits of coordination with the PFBC in both protecting species and giving certainty to applicants. This process would be removed under the bill, further endangering the species and removing the ability of agency experts to advise businesses upfront about how to develop their projects with the least potential impact.

Ultimately, subjecting the PFBC's listings and designations to review by outside entities will have the effect of eroding our agency's status as an independent administrative agency and

allow others to influence how our Commonwealth's aquatic resources are protected and managed.

In closing, no one has been able to explain to me what the problems are with Pennsylvania's system for protecting threatened and endangered species and designating wild trout streams. If there are issues that need to be addressed, we have repeatedly shown that we are always ready and willing to work with legislators, businesses, and other partners to find solutions. I leave you with a final conclusion from Dr. Meyer's paper which reads "...those who live and work in states that have vigorously pursued environmental quality and are now contemplating rolling back environmental standards as a quick fix to jump-starting their economies out of recession should reconsider. Based on evidence there is no reason to expect that loosening environmental standards will have any effect on the pace of state economic growth."

Thank you again for the opportunity to share our perspectives. I welcome your questions both today and after this hearing. I would also welcome the chance to have you join us in the field sometime to see our staff experts in action.