

House Games and Fisheries  
and  
Environmental Resources  
and Energy Committee  
Joint Hearing on HB1576

Tuesday, September 17, 2013  
Indiana University of Pennsylvania Northpointe  
Freeport, PA  
10:00 a.m.

George Ellis  
President  
Pennsylvania Coal Alliance  
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Good Morning. My name is George Ellis and I am President of the Pennsylvania Coal Alliance, the principal trade organization representing underground and surface bituminous coal operators in the Commonwealth and the businesses that service and supply the industry. With me today is Kevin Garber, a partner with Babst Calland law firm who also serves as General Counsel for the Alliance.

PCA appreciates this opportunity to testify today in support of Representative Pyle's Endangered Species Coordination Act (ESCA).

This measure, HB1576, comprehensively addresses what we consider to be fundamental flaws associated with the listing process for Endangered and Threatened Species (E or T) and Wild Trout Streams (WTS), while providing a degree of regulatory certainty that species so listed truly merit higher levels of protection.

### Regulatory Review Process

Under House Bill 1576, E or T and WTS designations could only be made through the rulemaking process and would be subject to review by the Independent Regulatory Review Commission (IRRC) and jurisdictional House and Senate standing committees.

Among other things, the legislative intent of the Regulatory Review Act was to create a process for ongoing and effective legislative review and oversight and to foster regulatory accountability. Only two state agencies are currently excluded from this process of accountability and oversight: The Pennsylvania Fish and Boat Commission and the Pennsylvania Game Commission. Consequently, the commissions' species designations are neither subject to a separate review by any standing legislative committee nor are they subject to any scrutiny by IRRC or any other reviewing governmental body for that matter.

This lack of oversight and accountability runs counter to recent trends for open and transparent rulemaking procedures as a guarantee that all stakeholders are treated fairly and as a check against the arbitrary use of power.

Accordingly, PCA supports these provisions of House Bill 1576, requiring E or T and WTS designations to undergo the same level of public review and accountability as required of all other state agencies.

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

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

The species and WTS designation processes do not currently inspire confidence by permit applicants in its end result.

Attached to my testimony is a case study of a number of Wild Trout Stream listings recently made by the Pennsylvania Fish and Boat Commission (FBC) that illustrates how this process militates against

open and meaningful public review and comment.

The process in question proposed to designate 99 streams as WTS in one filing and gave the public 30 days to respond. About two thirds of those streams were located in the Pennsylvania bituminous coalfields and the public notice advertising the proposal was short of details other than identifying the counties in which the streams were located.

We petitioned the FBC, along with a number of other groups, to extend the deadline for comments, which they did reluctantly but only for 30 additional days.

PCA also asked the FBC for supporting data upon which it based its decision for the 68 streams in the coalfields but received it incrementally over a staggered time frame.

In short, of the 68 streams that we requested data for, we received the FBCs final reports for only eight of those streams. Undaunted we pressed ahead with our comments on the eight streams, which were summarily dismissed by the Commission without a written response and the Commission approved the proposed listing.

The permitting impact of that decision by the FBC was to automatically classify any wetland located in or along the floodplain of the reach of those streams as "exceptional value." This classification dramatically raises the threshold for receiving a mining permit.

Again, do not misread these comments as opposing protection for exceptional value wetlands. However, industry needs to be scientifically assured through an open and meaningful public review process that what it is required to protect warrants that level of protection.

The only way to provide that assurance is to include a check and balance system like IRRC at the end of the designation process.

#### Access to information

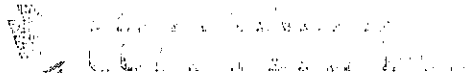
The bill also would allow specified "persons" access to certain information on listed species. Such information includes the specific areas of each listed species and their critical habitat areas in the buffer zones created to protect the species. The information is subject to confidentiality provisions and the bill includes a civil penalty for violating those provisions.

This is important to our industry since the Commissions use buffer zones to disguise precise locations of E or T species, making it very difficult to anticipate permitting problems that we may encounter prior to making a substantial investment in a permit application.

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

On behalf of PCA, I want to thank Representative Pyle for introducing HB1576 and for these two committees to vet its provisions through public hearings.

Thank you.



**PA COAL ALLIANCE**

**FISH & BOAT COMMISSION**  
**WILD TROUT STREAM LISTINGS**

**CASE STUDY**

**September 17, 2013**

## TIMELINE:

- **March 5, 2011** - PA Fish and Boat Commission (FBC) proposes list of 99 streams to be added to the existing list of wild trout streams in the *PA Bulletin*. Time period to review was 30 days. The majority of those proposed are for the entire length of the stream from the headwaters to the mouth.
- **March 18, 2011** - PCA request to FBC for supporting data for those counties in which mining occurs to allow for better understanding of the reasons that led the FBC to move forward with listing these streams, to more fully assess the industry implications to the listing, and to provide meaningful, scientific-based comments on the FBC actions.
  - received incomplete data over staggered timeframe as late as May 16, 2011.
- **April 4, 2011**- PCA submits first set of comments to FBC and FBC Commissioners
  - FBC has provided insufficient scientific support or documentation in the record that would justify the need for these actions.
  - The unrealistic short public comment period precludes proper evaluation, subverting any type of meaningful public review.
  - PCA review of limited data supplied by FBC shows lack of/insufficient/missing fisheries resource data, benthic macroinvertebrate data, correlating chemistry data, historical data and stocking locations.
  - PCA concerns with data integrity due to standard biological protocols not being adhered to.
  - Impact to the coal mining industry is significant due to 25 *PA Code* Chapter 105 regulations. Under 25 *PA Code* Chapter 105.17, once a stream is designated as a “wild trout stream”, all wetlands located in or along the flood plain of the reach of the stream automatically become “exceptional value wetlands.” This designation requires more onerous permitting requirements than non-designated streams and can severely restrict mining activities and land uses while adding time and cost to the permitting process.

Additionally, under Section 7 of the Act (32 P. S. § 693.7), the requirements for a permit are waived for certain structures or activities such as the construction of small dams. However, the designation of a wild trout stream prohibits the construction of these small dams, resulting in a loss of our right to mine where coal exists.
- **April 11, 2011** - PCA requests support data and additional time during public comment period of April 11, 2011 FBC meeting.
- **April 12, 2011** - At request of legislature, Commissioners postpone consideration until May 24, 2011 and request FBC to meet with representatives of coal industry.
- **April 14, 2011** - PCA meeting with FBC

- **April 14, 2011** - PCA followup information request regarding historical data baselines, unassessed water surveys, raw data and reports, FBC policies and guidance on how determinations to list are made.
- **May 23, 2011** - PCA second comment letter to FBC
  - As of this date only 8 of the final reports for the 68 streams requested were received by PCA.
  - Due to time, PCA focused on 8 streams of most importance to members.
  - PCA review revealed FBC's proposed classifications would include broad designations of entire waters as wild trout streams based on minimal sampling.
  - None of the information supplied to PCA for the 8 streams appears to support a broad designation of the stream from sample site to its headwaters.
  - With one exception, no detailed field data available that would allow us to comment on FBC's protocol as to how sampling locations were determined, etc.
  - Due to lack of final reports, PCA could not determine what "examinations" and "exercises of judgment" were taken by stream investigators regarding upstream and downstream reach extent.
- **May 24, 2011** - PCA testimony at FBC meeting
- **May 24, 2011** - Approval by Commissioners to list trout at special FBC meeting. No written response to PCA's testimony was provided.

### **DATA:**

Review of FBC supporting data showed:

- FBC did not perform minimum scientific investigations to justify need for actions.
  - Lack of historical data including previous fisheries and creel surveys, stocking information, water chemistry, watershed assessments
  - Insufficient stream temperature readings
  - Lack of correlating benthic macroinvertebrate data
  - Standard biological protocols not being adhered to, including collecting correlating benthic and chemical data at the same time fish surveys being performed.
  - One snap-shot survey insufficient to determine if trout have been reproducing in a particular stream
- Internal FBC regional draft reports not completed for public review and input in time for end of comment period.

- Lack of external peer-review of all data and reports.

**NO. OF STREAMS WITH FBC ACTION SINCE 2011:**

<b>Proposed (PA Bulletin)</b>	<b>Approved</b>	<b>No. of streams</b>
March 5, 2011	April 2011 FBC mtg	98 (87 were headwaters to mouth)
February 14, 2012	April 2012 FBC mtg	35 (27 were headwaters to mouth)
May 19, 2012	July 2012 FBC mtg	39 (34 were headwaters to mouth)
July 21, 2012	October 2012 FBC mtg	14 (13 were headwaters to mouth)
November 17, 2012	January 2013 FBC mtg	121 (21 were headwaters to mouth)
February 16, 2013	April 2013 FBC mtg	42 (37 were headwaters to mouth)
May 11, 2013	July 2013 FBC mtg	64 (58 were headwaters to mouth)
<b>TOTALS</b>		<b>313 (277 headwaters to mouth)</b>

**IMPACT OF WILD TROUT STREAM DESIGNATIONS ON INDUSTRY PERMITS**

The wild trout streams come into play with respect to our operations' permitting efforts under 25 *PA Code* Chapter 105 Streams and Wetlands. Chapter 105 requires industry, in the permit application, to identify exceptional value wetlands that are located in or along the floodplain of the reach of a wild trout stream.

Under 25 *PA Code* Chapter 105.17, once a stream is designated as a "wild trout stream", all wetlands located in or along the flood plain of the reach of the stream automatically become "exceptional value wetlands." This designation requires more onerous permitting requirements than non-designated streams and can severely restrict mining activities and land uses while adding time and cost to the permitting process.