



# Pennsylvania Landowner

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## PRESERVATION vs CONSERVATION



Representative Tom Ridge speaking to an interested audience on 1992 Wetland Reform and H.R. 1330.

### A MESSAGE TO MEMBERS ATTENDING 5th ANNUAL MEMBERSHIP MEETING

Nearly 700 PLA members and their guests attended the 5th Annual Membership Meeting held in Waterford, Pennsylvania. The meeting, which took place on February 17, 1992, attracted members statewide including guests from Ohio and New York, as well as several state and federal legislators.

The evening's central theme focused on land use issues such as wetlands, endangered species and scenic river designations, all environmental policies seeking "preservation" of private land as opposed to "conservation" of natural resources. Guest speaker for the evening was Congressman Tom Ridge (R-21), sponsor of H.R. 1330. The Comprehensive Wetlands Conservation

and Management Act, his presentation focused on the progress made to date surrounding the wetland controversy, but also stressed the critical importance of 1992. "Time is of the essence," Ridge stated, "this is the year to complete the task."

The Clean Water Act, which regulates wetlands, is up for reauthorization in Congress. Therefore, changes to wetland policy will occur this year and it is imperative that property owners concerns are addressed. It is likely that what is not achieved in 1992 will have to wait another 5 years before the Act is again up for reauthorization.

Members were also updated on the Endangered Species Act, also up for reauthorization, in 1992 as well

as the current status of rivers targeted for inclusion into the national Wild and Scenic Rivers bill. A new video presentation was also shown entitled "Wetlands: Our Environment, Whose Property?" (Part 2) . . . "A Call to Action." The film presented status updates on wetland victims depicted in the first film, as well as new wetland stories and important messages from Representative Jimmy Hayes (D-LA), sponsor of H.R. 1330 and Representative Tom Ridge (R-PA). Copies of the new video will be available for educational purposes sometime near mid March. Interested individuals may contact the PLA office for further information, or to order a videotape copy.

## MEMBER ACTIVISM IS WHAT IT TAKES !

PLA member, Bob Zimmerman, practices what is preached when it comes to letter writing. In the last edition of PA *Landowner*, members were encouraged to write EPA in support of a definition change to identifying wetlands. Many members were helpful in soliciting support in completing the questionnaires regarding the federal manual changes.

**THANK YOU MEMBERS FOR YOUR PARTICIPATION! ACTIVISM WORKS!**

Dear Sir:

**A**s a member of the Landowners' Association and having the privilege of owning some 38 acres in Pennsylvania, I have a personal stake in the unilateral decisions taken by the bureaucracy of federal and state agencies. It is my belief that the government was established to serve the people. I fought in only one war to try to assure that the government of the people would be sustained. Now I find that many citizens are being denied the right to develop their own land, in a way that is consistent with local land use codes, where such decisions logically should be made.

Forcing private citizens to spend tremendous sums of money to comply with regulation interpretation where no law has been passed by representatives of the people is not democratic. It can only be termed as dictatorial. You have the opportunity, as a part of that bureaucracy, to make a difference in how the federal government acts toward and on behalf of its citizens. Section 404 of the Federal Water Pollution Control Act was never intended by Congress to be a vehicle for wetland control. A substantial portion of the so-called wetlands that the agents of federal and state governments are regulating by the incorrect interpretation of this act are nowhere near bodies of water or flowing streams.

***Forcing private citizens to spend tremendous sums of money to comply with regulation interpretation where no law has been passed by representatives of the people is not democratic.***

When a person owning a "wetland" created by a plugged drain and water diverted to his property by a state highway had to spend \$20,000 to obtain a permit to develop a one

acre section of land, and then be required to mitigate the so-called loss of an accidental wetland, then the entire system is a failure. Any system that forces such outrageous costs for engineers, soil scientists, and lawyers on a private citizen so he can expand his business to create jobs is not just a failure, it is a travesty.

When a community is forced to spend over \$80,000 to mitigate the use of 4 acres of garbage "wetland" caused by ruts made by vehicles traversing an upland twenty or more years ago, and when the surface runoff over the compacted land is polluting a stream, then the interpretation of the regulations is not only wrong, it is bizarre.

***If common sense was actually a common commodity, no bureaucrat in Washington would have even attempted to define wetlands.***

The thousands of examples of bureaucratic "overkill" that have been cited in the media should be reason enough for the bureaucrats to seek a legal ground for legislation to bring reason to this process. All wetlands were not, and are not, created equal and all those who have been selected to enforce the regulations conceived outside the law have not been and may never be trained to consistently interpret the complex, convoluted manual that has been proposed to delineate wetlands.

The bureaucrats should recognize the logic and equity proposed in the Comprehensive Wetlands Conservation and Management Act (H.R. 1330 and S. 1463) and support the concepts presented. Since wetlands are not created equal, as cited in the above examples, it is incumbent on the bureaucrats that they support reason over emotion.

Wetland location must receive serious consideration in any manual

of delineation or any law or regulation promulgated. Wetlands in and around industrial complexes and other developed areas cannot possibly serve the same function as those in rural areas that provide ground water recharge.

It is also my firm belief that uplands can and do serve many of the same functions that most of the inland wetlands serve. Thus, the myriad of definitions you in the bureaucracy are proposing are without merit regarding millions of acres in Pennsylvania. Perhaps all of us would be better served if you first defined what uplands are and what constitutes upland vegetation and how much of that land provides the cleansing and remediation for our watersheds, before you look to save every "pothole" from being filled. Yes, save the marshes, the swamps, the kettle bogs, our pristine streams, and the delta lands from being dredged and filled, but beyond that you have no mandate.

Also give the scientist in the field a consistent and repeatable guide for choices to be made. Set the standing water criteria to require that water be on or above the surface for a significant time period. Err on the conservative side. A strict criteria that applies in all places in the United States is illogical! The heavens place the rain in an extremely inconsistent manner, and now mere man is trying to decide for eternity that the rainfall will consistently provide for hydrological patterns that will be repetitious enough to define, in a God-like manner, that if the soil is wet for "x" number of days a year in a highly variable growing season, state by state, then we have a wetland. Who is kidding who?

If common sense was actually a common commodity, no bureaucrat in Washington would have even attempted to define wetlands.

Sincerely,  
Robert J. Zimmerman

## PLA LEGAL ADVISOR APPOINTED TO NATIONAL COAL COUNCIL



Senior Attorney John D. Ward of Buchanan Ingersoll's Harrisburg office has been appointed to the National Coal Council by James D. Watkins, U.S. Secretary of Energy.

The council advises the U.S. Department of Energy on national issues, and is comprised of high level

coal policies and coal-related energy business executives, labor officials, regulators, state and federal legislators, academics, and scientists.

Ward, a member of Buchanan Ingersoll's Environmental and Natural Resources Law Section, is an authority on land-use problems and mineral rights issues and has assisted Pennsylvania Landowners' Association since 1989 in seeking legislative land-use reforms, particularly in the area of wetlands. He has served in high-level public and private-sector roles, including a 1984 appointment by President Ronald Reagan to Director of the Office of Surface Mining. Ward also served as a U.S. delegate for the International Labor Organization Conference in Geneva,

Switzerland, and as Special Assistant to the Commissioner, U.S. Bureau of Reclamation, advising and planning public policies on environmental issues.

Ward is admitted to practice before the United States District Court and the Courts of the States of Colorado and Pennsylvania. He obtained a law degree from the University of Denver (1962) and a bachelor of science degree in mining engineering from Pennsylvania State University (1955).

He holds memberships in the American Institute of Mining Engineers, Rocky Mountain Mineral Law Institute, and Committee on Surface Mining and Reclamation (National Academy of Sciences).

## Extremists Effecting The Allegheny National Forest

By Keith Klingler

As Dave Wright, the man in charge of the Allegheny National Forest put it, "We need your help and we need it now." That was just one of the many hard hitting statements echoed by the management team from the ANF at the recent meeting held at Kane Hardwoods in Kane, PA.

### LOOK WHAT'S NEW !! ECO-LOGIC

A new monthly publication is being offered to organizational members of our national affiliate, The Environmental Conservation Organization (ECO). This unique publication will enhance the networking capabilities among the 300 organizations who are currently utilizing the resources found in ECO-LOGIC. PLA members can also receive ECO-LOGIC which includes the most current environmental and economic information for only \$15.00 annually. This timely data will be extremely helpful for individuals and small groups to use as a basis for meetings and programs. Call the PLA office for further information or to subscribe to ECO-LOGIC.

A large group was on hand to hear about some of the major problems facing the current forest management plan. "The most urgent concern," stated Wright, "is the appeal of every timber sale that has been proposed." The most surprising fact about the appeal process is that anyone can make an appeal, and it can be just one sentence in an envelope with a 29 cent stamp stuck on it. The sad news is that for every appeal filed \$5,000 of taxpayers money is needed to review each sale. Most appeals are submitted by people from the east coast and are the result of misinformation. Wright confirmed that many appeals contain material that pertains to forests in the mid-west and Rocky Mountain areas and are not really relevant to the ANF.

Other areas of concern for the ANF are biodiversity, endangered species, and animal rights activists. ANF officials agree that the animal rights interests will be harassing hunters next season.

The harvest of timber has already

been reduced from 90 million to 60 million board feet and will continue to drop if the preservationists and others get their way.

The group attending this coalition meeting consisted of school district personnel, township supervisors, county commissioners and other concerned members of the business community. It was reported that schools and local municipalities have already lost thousands of dollars, not to mention the effect on the local economy. As additional restrictions continue to be imposed regarding wise-use conservation of our national forests, local economies as well as the ANF, will continue to degrade. The current manner in which the ANF is being managed is very impressive and dedicated professionals have certainly made it a multiple use forest.

To get more information or to voice your support contact the ANF in Warren, PA . . .

*Keith Klingler serves as a board member for the PA Landowners' Association and is a property owner residing in Titusville, PA.*



Reprinted with permission of Farm and Dairy, January, 1993.

## COURT PAVES WAY FOR 'TAKING' COMPENSATION

PARK RIDGE, ILL — The United States Claims Court has cleared the way for landowners to seek compensation when abandoned railroad lines are converted to recreational trails.

The court recently ruled in favor of Paul Preseault, a Vermont landowner, in his case against the United States. The court ruled that Preseault had a valid private property interest in the railroad right of way which had been converted to trail use. The court ruling paves the way for a "taking" of property requiring compensation.

The Preseault case went to the U.S. Supreme Court in 1990. At that time, the court ruled the appropriate remedy was compensation through the Claims Court. The Preseaults were the first to file such an action.

The American Farm Bureau Federation (AFBF) had filed a 'friend of the court' brief on behalf of the landowners when the matter was heard by the Supreme Court. The New England Legal Foundation represented the Preseaults in the latest action.

"The action sets the stage for final resolution of the rails-to-trails matter," said Richard Krause, AFBF assistant counsel.

"After more than four years of uncertainty, it seems we have finally reached

*the merits of the issue - whether this amounts to a 'taking' that requires compensation. Consideration of the compensation issue will have an impact on every rails-to-trails situation in every state."*

The controversy stems from a 1983 federal statute which prevents abandoned railroad rights-of-way from reverting to private ownership, instead of allowing the strip of land to be used for recreational trail use without the consent of the abutting landowners. Farm Bureau and others charged the action amounted to a "taking" without compensation.

Landowner objections have been based on historic easement agreements, protected by state law, which specify that when a rail line is abandoned the rights revert to the adjacent landowners. Congress muddied the waters in 1983 by passing legislation which considered recreational trails a form of "railroad use."

*"In order to further the case, the Preseaults had to prove that they had a valid property interest in the right-of-way," Krause said. He also stated, "The Claims Court ruled that they had such an interest and could proceed with their claim that the property interest was 'taken' by the Rails-to-Trails law. We expect other cases to move forward based on this ruling."*

## Interview: R. J. Smith of Cato Institute Talks about Endangered Species

*Reprinted with permission of Land Rights Letter, February 1993.*

**LRL:** Mr. Smith, you have previously made the statement that the Endangered Species Act of 1973 (ESA) is "the single most powerful law ever passed," how so?

Well, the reason I have called it the single most powerful law ever passed is that this act essentially takes precedence over everything else that the public or private sector does. The heads of all governmental agencies are required to see that nothing they do puts any listed species, whether threatened or endangered, into jeopardy. It takes precedence over the decisions of the Department of Agriculture as to how they are going to cut trees, it takes precedence over highway administration decisions when building roads, or it takes precedence over building dams or almost anything the government does. In theory, in the event of war, it could even prevent United States military actions that might jeopardize the survival of threatened or endangered species. It's an extraordinarily powerful law.

**LRL:** Briefly, describe for our readers the history of the ESA beginning with the 1966 act?

The United States has a long history of protecting wildlife. The first time that we gave specific attention to protecting rare, threatened, or endangered species was in 1966 with the passage of the Endangered Species Conservation Act, and a similar act was passed in 1969 which slightly broadened the protections of the 1966 act. The 1966 and 1969 acts essentially did little more than recognize the importance and concern over declining species, and gave the Department of Interior authority to spend a limited amount of money from the Land and Water Conservation Fund to acquire habitat for threatened and endangered species.

These acts were insufficient for the environmental community and there were demands in the early '70's for a massive overhaul of the act — to make it a far more reaching act. In President Nixon's environmental message to the Congress in 1972, he called for the passage of an endangered species act that would have more teeth to it and do more to protect species before they became endangered. So, what we got was the 1973 act, which was a whole new ballgame for wildlife.

*(continued on Page 3)*

**LRL: What are the key provisions of the Endangered Species Act of 1973?**

The first element of the act is the listing of species in two categories, either as threatened or endangered. The listing process is an open process where essentially anyone in the United States who is concerned about the fate of a particular species, whether a plant or an animal, can put a 29 cent stamp on a letter and petition the Department of Interior (DOI) requesting that they consider listing this particular species. If the petitioner makes a sufficiently convincing case then the DOI is required to appoint a committee to investigate the issue and determine whether the species merits listing.

**THE CURRENT LIST OF ENDANGERED AND THREATENED WILDLIFE AND PLANTS IS AVAILABLE BY WRITING TO: PUBLICATIONS UNIT, U.S. FISH & WILDLIFE SERVICE, ARLSQ-130, WASHINGTON, D.C. 20240.**

Once the DOI determines that a species merits listing then they place a notice in the Federal Register and have a comment period. After the comment period they issue a final rule in the Federal Register at which point the species is officially listed. Subsequently, the DOI must determine what the critical habitat of the species is. They must then publish and list the critical habitat, except in cases where the species might be jeopardized by collectors of, for example, rare plants.

The third step is to create a recovery plan which starts with the present condition of the species and looks down the road to all the steps that would have to be done in order to guarantee that the species would recover and to reach a certain population level that would allow it to be delisted. This is the purported goal of the ESA.

**LRL: Is the Endangered Species Act saving species?**

If you look very critically at the act, what has happened in the nearly 20 years we have had the ESA, the one conclusion you can come to is that as a mechanism for effecting the recovery of threatened or endangered species the act has pretty much been a failure. But, as a mechanism for achieving land use control and stopping development the act has been a resounding success.

If you look at the act from its intent, practically nothing has been achieved in the way of successfully delisting species.

All the action with the ESA is at the listing end. Nothing has happened in the way of recoveries. It is always hard to prove or determine intent, but because there has been so little emphasis on recovery and so few success stories it gives one good reason to think that, if not the original intent at least the intent now, is to use the act, not to affect recovery of species, but to use the act as a land use mechanism and just stop projects. Everyone in the country knows that this is the game that is played.

**LRL: I've heard the "shoot, shovel, and shut-up" comment made, is that sentiment out there? Are landowners scared to death to find an endangered species on their property?**

The problem that arises from the ESA and listing of the species for private property owners is that Section 9 of the ESA defines what is called "taking" a species. To "take" a species means to do anything that will kill, harm or harass the species. The definition has also been expanded to say that even a modification to the habitat constitutes a "taking" of the species. If you are found guilty of "taking" a species you face a substantial fine and possible jail term. Because of that, everyone who is a private landowner and sees the prospect of a species being listed that occurs on his land or might use his land during some part of its life-cycle is at considerable risk. The government can just step in and take your land or regulate it and this is a frightening prospect to a landowner. There is then a tendency for landowners to accelerate the use of their land or otherwise modify habitat so that it is no longer attractive to an endangered species.

They (the government and environmentalists) have created a situation where no rational person wants to do anything that would help maintain wildlife habitat or help protect endangered species, and most of all, nobody is going to do anything to attract an endangered species to his land. If we are worried about species disappearing the first thing we would want to do would be to create incentives to encourage public land managers and private landowners to make their land attractive to endangered species.

As for "shoot, shovel and shut-up," it is a philosophy that everyone knows is out there. If the government is going to take away your livelihood, take away your property, and you are defending yourself, and you can't get redress in the courts this is the situation that happens.

**LRL: If you say the ESA is not working, that it is creating disincentives, how would you help rare species recover, absent the ESA?**

People are doing things that are not helping endangered species and that is because of the disincentives of this act. That's what must be changed.

A question that often comes up is that if you charge that the ESA is not working, if it is not helping rare species recover, it is basically being used as a land use control mechanism, how would our nation come up with a policy to save endangered species? What you need to do is simply look at the history of wildlife protection in this country. Right now you can drive almost anywhere in the countryside around Washington and you'll notice the nest boxes, bird boxes, some are small boxes for blue birds, others are larger for sparrow hawks, these have been put up by private individuals who go out on their own initiative to help these birds by putting up nest boxes.

These are the kinds of things that people could do with endangered species except for the fact that if the species is on the endangered species list and if you go out to help it so that it comes on your property, you risk having the government come in and say, o.k., so now you can't use your property, or you can't drive your tractor within a quarter of a mile of the nest box you've put up. So this is a bizarre situation where we have a wildlife act which actually discourages people from helping wildlife. With the ESA nobody is willing to take risks to help endangered wildlife.

**LRL: If you could reform the ESA, how would you approach it?**

I think that the first thing that needs to be addressed in the act is an amendment stating that nothing in this act can result in an uncompensated taking of private property. You must protect the rights of private landowners. Only when you do that will private landowners be willing to do something to help attract endangered species to their land and actually help create more habitat for wildlife. We might even consider positive incentives such as paying landowners to produce more of certain species.

We know that a great many species of wildlife can live on private land along with development and some with a substantial amount of human activity. We have to create a situation where private landowners won't be penalized for having an endangered species on their land. Until we do something to make private landowners feel secure in their property rights the Endangered Species Act is not going to work.

*Robert J. Smith is the Director of Environmental Studies for the Cato Institute, a Washington, D.C. based public policy research organization with a strong voice for individual rights and America's founding ideals. Mr. Smith is also the author of a book, Earth's Resources: Private Ownership vs. Public Waste. He is currently focusing much of his work on endangered species.*

# WHO ARE THESE PEOPLE?

## PENNSYLVANIA ENVIRONMENTAL QUALITY BOARD

By Henry Ingram, Esq.

Much has been written in the *Landowner* about the "wetlands" issue specifically and about environmental regulation affecting privately owned land in general. An earlier article described the role of the Pennsylvania Fish Commission in environmental policy and regulation in Pennsylvania. This article focuses on the critical role of the Pennsylvania Environmental Quality Board in wetlands regulation.

The tentacles of wetlands regulation reach, literally, into our backyards and faceless bureaucrats dictate what we can or cannot do with our land. It goes without saying that wetlands protection regulations continue to be a source of concern and controversy in Pennsylvania. Everyone agrees that wetlands are an important ecological resource. There is considerably less agreement concerning the level of protection to be provided for them, particularly for privately owned wetlands.

Readers of the *Landowner*, however, know the horror stories, either having lived through them personally or having learned about them from friends and neighbors who have been victimized by excessive wetlands protection regulation and enforcement. In the space of a very few years, farming practices and other uses of land, which previously have been entirely lawful and even encouraged and lauded by the government, have somehow become illegal. Citizens engaging in such activities have been subjected not only to civil and criminal sanctions but also to unwarranted attacks in the media by government officials and so-called public interest groups.

The shackles on land use result-

ing from wetlands protection regulation in Pennsylvania are well documented and the problems are beginning to be fully recognized by landowners. Suffice it to say that there exists out there a regulatory maze in which an unwary landowner can easily lose his way.

still needs to be done because advocates of stringent wetlands protection are not satisfied with either the current *status quo* or even the "Bush no net loss" policy. Instead, the wetlands lobby urges an "ambitious long-term program of ecological restoration which would take

TABLE A

The Environmental Quality Board shall consist of:

Secretary, Dept. Environmental Resources  
**Arthur A. Davis**, Chairman

Secretary of Health  
**Dr. Allan S. Noonan**

Secretary of Commerce  
**Andrew T. Greenburg**

Secretary of Transportation  
**Howard Yerusalim**

Secretary of Agriculture  
**Boyd E. Wolff**

Secretary of Labor and Industry  
**Thomas P. Foley**

Secretary of Community Affairs  
**Karen A. Miller**

Executive Director, Fish Commission  
**Edward R. Miller**

Executive Director, Game Commission  
**Peter S. Duncan**

Chairman, Public Utilities Commission  
**William H. Smith**

Executive Director, State Planning Board  
**Joseph Cullen**

Executive Director, Pennsylvania Historical and Museum Commission  
**Brent D. Glass**

Five members of the Citizens Advisory Council

**Mrs. Gail Rockwood**  
**Walter N. Heine**  
**Leonard A. Green**  
**Bernard Hofnar**  
**Roslyn M. Kahler**

Four members of the General Assembly:

**Senator David Brightbill**,  
President Pro Tempore of  
the Senate

**Senator Ray Musto**,  
Minority Leader of the Senate

**Representative Bud George**,  
Speaker of the House  
of Representatives

**Representative George Hasay**,  
Minority Leader of the House  
of Representatives

The Citizens Advisory Council members shall be designated by, and serve at the pleasure of, the Citizens Advisory Council.

One of the General Assembly members shall be designated by, and serve at the pleasure of, the President Pro Tempore of the Senate. One by the Minority Leader of the Senate, one by the Speaker of the House of Representatives and one by the Minority Leader of the House of Representatives. In addition to the heads of the various departments as elsewhere in this act provided, the other members of the board may have named alternates to serve in their stead, the alternates for the members of the board from the Citizens Advisory Council to be selected by that council from members of the council and each other alternate to be selected by that particular member of the board in whose stead he is to serve. No person will serve as alternate for more than one board member.

Eight members of the board shall constitute a quorum.

Spearheaded by Pennsylvania Landowners' Association, efforts at the state and federal level to obtain relief from some of the more onerous requirements are beginning to show results. However, much work

*the Nation beyond no net loss and result in a net gain of 10 million acres of wetlands by 2010."*

1. "Gain in Wetlands Acreage is Urged," by William K. Sterns, *New York Times*, December 12, 1991.

These same people also decry the recently proposed modifications of the federal Wetlands Delineation Manual, arguing that use of the revised Manual will allow farmers and developers to put more of **their own** land to productive use! Just a few years ago you could confront such arguments by asking "*what is so wrong about using and developing our land for productive,*

## THE TENTACLES OF WETLANDS REGULATION REACH, LITERALLY, INTO OUR BACKYARDS AND FACELESS BUREAUCRATS DICTATE WHAT WE CAN OR CANNOT DO WITH OUR LAND

should they, in efforts to make *their own* land productive, encounter swampy areas.

Many landowners have experienced firsthand the often arrogant

Agency, the Army Corps of Engineers, the Fish and Wildlife Service, the Fish Commission or the DER. And, as legal counsel and the courts have told us, the requirements that these "enviro-police" are

enforcing are official, "on the books" regulations and not something dreamed up by a few rogue bureaucrats who have run amok.

By now, we know that each of the federal and state government agencies mentioned above has a role in the enforcement of wetlands regulations. We all know now that federal agencies have far-reaching jurisdiction over wetlands which is in addition to that of the DER and the Fish Commission. We are aware that all the agencies use the Federal Manual when it suits their purposes. Some of us know about Joint Permits, 401 Certifications, Swampbuster Exemptions and MOUs. Very few of us, however, know or understand how the regulations the government is enforcing came into being.

For something that has such a dramatic impact on the use of privately owned land, logic tells us that wetlands protection policy and resulting regulation was established and clearly articulated by duly elected, legislative representatives of the people; either by the Congress or by the General Assembly of Pennsylvania. However, in today's world, logic does not always apply. It will probably surprise many readers that the word "wetlands" did not appear at all in the federal or Pennsylvania statutes which are the asserted authority for the Draconian wetlands enforcement actions and severe land-use restrictions with which we are all becoming so familiar. The entire wetlands protection scheme and the burgeoning wetlands protection bureaucracy was spawned by regulations with scant involve-

(Continued page 8)

TABLE B

The Citizens Advisory Council shall consist of:

Secretary, Dept. Environmental Resources  
**Arthur A. Davis**

Six members who shall be appointed by the Governor, no more than three of whom shall be of the same political party:

**Ms. Margaret E. Bunce**  
**Ms. Cynthia L. Mengel**  
**Mrs. Gail Rockwood**  
**Roslyn Kahler**  
**Maurice J. Forrester**  
**S. Pat Lupo**

Six members who shall be appointed by the President Pro Tempore of the Senate, no more than three of whom shall be of the same political party:

**Leonard A. Green**  
**Calvin E. Levis**  
**Bernard Hoffnar**  
**Walter N. Heine**  
**Ms. Nancy J. Cubbon**  
**Richard W. Wand**

Six members who shall be appointed by the Speaker of the House of Representatives, no more than three of whom shall be of the same political party:

**Marc Volavka**  
**John C. Oliver, III**  
**Randall J. Brubaker**  
**Charles W. Kirkwood**  
**Brian Hill**  
**James M. Seif**

The appointed members of the council shall be citizens of the State, who, during their respective terms, shall hold no other State office to which any salary is attached except that of membership on the Environmental Quality Board.

The term of office of each appointed member shall be three years, measured from the third Tuesday of January of the year in which he takes office, or until his successor has been appointed; except that in the initial appointments of the members of the council, the respective appointing authorities shall appoint two members for terms of one year each, two members for terms of two years each, and two members for terms of three years each.

The Citizens Advisory Council shall include persons knowledgeable in fields related to the work of the Department of Environmental Resources such as, but not limited to, ecology, limnology, toxicology, pharmacology, organiculture and industrial technology.

The council shall annually elect one of its appointed members as chairman and shall elect a secretary who need not be a member of the council. Meetings of the council shall be held at least quarterly or at the call of the chairman.

The council shall have power to employ and fix the compensation of such experts, stenographers, and assistants as may be deemed necessary to carry out the work of the council, but due diligence shall be exercised by the council to enlist such voluntary assistance as may be available from citizens, research organizations, and other agencies in Pennsylvania or elsewhere, generally recognized as qualified to aid the council.

*economically beneficial and non-polluting purposes."* Now, landowners are expected to abandon use or development of **their own** land -- with their heads hung in shame for even suggesting it --

and dictatorial manner by which front-line enforcement officials seek to impose wetlands land use restrictions. It doesn't seem to make any difference if these officials are from the Environmental Protection

## LANDOWNERS ARE EXPECTED TO ABANDON USE OR DEVELOPMENT OF THEIR OWN LAND -- WITH THEIR HEADS HUNG IN SHAME FOR EVEN SUGGESTING IT -- SHOULD THEY, IN EFFORTS TO MAKE THEIR OWN LAND PRODUCTIVE, ENCOUNTER SWAMPY AREAS.

ment by elected legislators. The Pennsylvania wetlands regulations<sup>2</sup> are ultimately the work and responsibility of the Environmental Quality Board ("EQB"), the rule-making arm of DER.

By now, most all of us know that Congressman Ridge along with many of his colleagues in Congress, have jumped into the wetlands issue in a big way and he is one of the leading advocates for federal legislative reform. Similarly, we have heard that State Senator Brightbill is advocating and has introduced reform legislation for Pennsylvania. Both pieces of proposed legislation would assure protection of truly valuable and important wetlands but would also provide some relief from the excesses of the present regulatory scheme.

We also know that in Pennsylvania a broad spectrum of organizations representing landowners, farmers, timbermen, homebuilders, manufacturers and mineral developers, has formed a coalition to attempt to bring more balance into wetlands regulatory policy. It is encouraging that some legislators and officials are taking a hard look at wetlands policy.

However, despite all the hue and cry over the wetlands issue from all corners of Pennsylvania, the reform legislation has not been enacted, and the wetlands lobby is pressing for more protection and restrictions on the use and development of privately owned land. And despite all the controversy, Pennsylvania's wetlands regulations have not been relaxed but have been made more onerous.

How can this be you might ask, particularly since organizations such as Pennsylvania Landowners' Association seem to have made great progress in educating large

segments of the public and numerous legislators about the problems being encountered by ordinary Pennsylvanians confronted by excessive wetlands regulation. A large part of the answer in Pennsylvania can be attributed to what is known as the environmental "rule-making process" i.e. the mechanism for developing and enacting DER's regulations. In Pennsylvania, DER's

### *The EQB makes the rules and regulations which are administered and enforced by DER and which the Fish Commission also enforces.*

environmental regulations are formulated, adopted and promulgated by the Environmental Quality Board ("EQB"). Stated another way, the EQB makes the rules and regulations which are administered and enforced by DER and which the Fish Commission can also enforce.<sup>3</sup>

Regarding wetlands regulation specifically, on October 12, 1991, despite the public controversy and debate, the EQB went ahead and adopted substantial amendments to Chapter 105 of DER's regulations covering wetlands, little concerned that the Senate of Pennsylvania was addressing a wide variety of issues raised by a host of affected landowners and the Wetlands Coalition and the fact that a similar reform effort was underway in Congress.<sup>4</sup> The point is that for whatever reasons the EQB rulemaking process seems to exist in something of a

3. Under Pennsylvania law, regulations issued by an executive branch agency, such as the EQB issues for DER, are given the force and effect of a law enacted by the General Assembly by statute.

4. This is all the more puzzling since Senator Brightbill is a member of the EQB and his reform legislation is in many ways inconsistent with DER's new wetlands regulations.

vacuum, at least on some issues, insulated to a large degree from every day reality and apparently oblivious to issues raised in the well publicized and often acrimonious public debate over wetlands in Pennsylvania and elsewhere.

Most all of us have heard of the EQB. For example, readers of the *Landowner* will recall that our friends from the Fish Commission in effect have two votes on the EQB. However, I doubt that more than a handful of us can name any of the EQB's members or know how they came to their positions. A few of us are familiar with the makeup, structure, and operating

procedures of the EQB. But how many of us truly understand the role, power and importance of the EQB in Pennsylvania?

As will be discussed later, about the only good news appears to be that we can identify the names of the individuals who are statutorily responsible for environmental policies and regulations, and specifically those pertaining to wetlands, in this Commonwealth. The bad news is that, as a practical matter, ordinary citizens have virtually no effective recourse if they disagree with specific policies or regulations established by the EQB.<sup>5</sup>

On Table A, the act of the General Assembly which established the composition or "make-up" of the EQB is reproduced with the names of the present EQB members. Careful readers will note

5. In Pennsylvania, regulations become final and enforceable upon final publication in the *Pennsylvania Bulletin*. There is no practical mechanism for "pre-enforcement review" of new regulations and they can be challenged legally only when they are being enforced or imposed in a specific situation. This involves difficult and costly litigation.

2. The federal regulations are beyond the scope of this article but make an interesting story in themselves.

that only the four legislator members hold their position on the EQB by virtue of having been elected to legislative office by the citizens of Pennsylvania; even those

the Secretary of DER in all probability, and surely the Governor and the Secretary together, can control the EQB. In the vast great majority of rulemaking situations, DER staff

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***A cynic might suggest that a very small group of unelected, largely unknown and unaccountable individuals wield tremendous power in the field of environmental policy and might even question the wisdom of such a system.***

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legislators and all of the other EQB members are political appointees in one way or another.

Readers should also note that an alternate can be appointed for each Board member and that eight members (just over one-third of the twenty-one seats on the EQB) can constitute a quorum to conduct business i.e., to adopt a regulation. A cynic might suggest that a very small group of unelected, largely unknown and unaccountable individuals wield tremendous power in the field of environmental policy and might even question the wisdom of such a system.

It seems clear from the makeup of the EQB that the General Assembly wished to have Pennsylvania environmental policy and regulations formulated in a process in which numerous diverse interests including those advanced and represented by important executive branch departments, independent commissions, the legislative branch and private interests, are taken into account. An idealist would also assume that the EQB was to be independent and deliberative and that choices and decisions would be made on the basis of full discussion of options, complete understanding of technical issues and the balancing of competing values. In reality, the EQB is not all that independent and there are serious questions about its understanding of technical issues and balance.

Although it may not be readily apparent, for all practical purposes,

proposes a particular set of regulations and the Governor's appointee, the Secretary of DER, as both Secretary and Chairman of the EQB, sets and controls the agenda for the rulemaking.<sup>6</sup>

Moreover, because of the technical complexity of modern environmental regulations and the other demands on the time of individual EQB members they must rely heavily on DER staff for summaries, opinions and recommendations when considering proposed regulations. DER's control of the flow of information and the EQB's operating procedure, coupled with the inherent loyalty of cabinet and other political appointees to the Governor, virtually guarantees that the "administration has the votes" on the EQB and that the EOB will adopt whatever policy or regulation the Governor wants.

In the context of wetlands protection regulation, readers of the *Landowner* are aware that Governor

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***Although it may not be readily apparent, for all practical purposes, the Secretary of DER in all probability, and surely the Governor and the Secretary together, can control the EQB.***

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6. We learn from Table A that five members of the EQB come from the Citizens Advisory Council (CAC). Table B contains the most recent names of the members for the CAC as of this writing. These names may change as individual terms expire.

Casey is deadset against compensation for wetlands regulatory takings, vigorously supports "no net loss" and advocates increased protection of wetlands.

The EQB rulemaking process is quasi-legislative and involves what is known as public notice and comment. Each proposed regulation or set of regulations is "advertised" in the *Pennsylvania Bulletin* and interested persons are given the opportunity to file written comments on what is being proposed. Based on the nature of the particular regulation, the EQB may or may not conduct a public hearing on the proposal. If a hearing is held it is typically attended by one or just a few EQB members or alternates. Because the process is quasi-legislative (not adjudicatory), no cross-examination of persons testifying is permitted and such persons are usually limited in the amount of time allotted for their testimony.

It is generally understood that EQB voting members usually do not read the often voluminous written comments which are submitted and rarely hear the "live" testimony. Instead, the DER staff prepares a "comment and response" document summarizing particular comments and providing the staff's reaction to the comments. This procedure may separate some of the wheat from the chaff but it also provides a filter which allows DER to control the flow of information to Board members and to put a DER "spin" on the comments and technical data submitted by commentators.

It is recognized that EQB members from the CAC usually have the most in-depth familiarity with DER regulatory proposals and that the CAC itself has thoroughly reviewed them.

Except in limited circumstances, persons wishing to have input in the formulation of a given DER regulation are not permitted

*(Continued page 10)*

to speak at EQB voting meetings at which proposed regulations are discussed and theoretically debated, although true debate is rare.<sup>7</sup>

Oddly, although almost everyone involved is a public servant or supposed to represent some component of the public interest, direct communication or contacts with members on pending regulatory issues is apparently considered to be unseemly and the effectiveness of lobbying individual EQB members is questionable in many instances.

It is enough here to say that the EQB exerts enormous influence over the day-to-day affairs of the citizens of Pennsylvania. Questions naturally arise as to whether the EQB rulemaking process provides a full airing of all sides of particular regulatory issues and whether it is sufficiently responsive to the rights and interests of the public and individual citizens, which can be dramatically affected by DER's regulations.

My own view is that what might be called "pro-environmentalist/anti-development" interests have better access to and influence in the Pennsylvania environmental rulemaking process than do other interest groups and citizens. This is due in part, understandably, to the nature of the DER itself as primarily an environmental protection agency. It has no stake or particular interest in farming, commerce, land and mineral development or manufacturing. In effect, the pro-environmentalist-anti-development advocates are singing to the choir when they talk to DER. Pro-development advocates seem to be viewed as minor irritants to whom

7. In 1982, the General Assembly expressed its concerns about the Pennsylvania rulemaking process generally when it enacted the Regulatory Review Act. This act created the Independent Regulatory Review Commission which reviews all regulations issued by executive branch agencies and provided for legislative oversight of such regulations by appropriate standing committees of the General Assembly. Suffice it to say here that regulatory review and legislative oversight takes place in Harrisburg. Meaningful access to this process is for all practical purposes unavailable to ordinary citizens. It does, however, provides some opportunity to shape regulations before they become final. Again, only a few of us know anything about this aspect of rulemaking.

some "lip-service" (public comments?) must be paid in the rule-making process. This, coupled with what sometimes appears to be a myopic attitude on the part of some EQB members and the highly pro-environmentalist posture of the Casey Administration, creates the perception and perhaps the reality that the EQB is stacked against pro-development interests.

*Governor Casey is deadset against compensation for wetlands regulatory takings, vigorously supports 'no net loss' and advocates increased protection of wetlands.*

To the extent that this state of affairs is of concern to citizens interested in the development and use of land and other natural resources in Pennsylvania, it must be recognized that things are not going to change unless opposing voices are raised and heard. The regulated community creates the jobs, produces the food and energy, builds the houses, pays most of the taxes and elects the governor and the legislators. The public interest surely requires that these interests be accounted for in the environmental rulemaking process by more than lip service.

A good place to start is with the members of the EQB. If you think they are not reading your comments and hearing your testimony at public hearings, you should tell them directly. You pay a majority of them and elect the people who appoint them. Are they listening?

*It must be recognized that things are not going to change unless opposing voices are raised and heard.*

Hank Ingram has practiced natural resources and environmental law in Pennsylvania for over twenty years. He is a member of Buchanan Ingersoll law firm and with John Ward, represents the Association in legal matters. Questions regarding this article or any other environmental matter may be directed to Mr. Ingram in Pittsburgh at (412) 562-1695 or Mr. Ward in Harrisburg at (717) 237-4815.

## Members . . .

Are **Local Businesses** in your area supportive of

### **PRIVATE PROPERTY RIGHTS?**

Are they a **SUPPORTING BUSINESS MEMBER?**

**If not — ask WHY !**

**PLA works to protect their rights as well as yours.**

Their support is needed and should be encouraged.

Make note of businesses in your area who are supporting members and support them with your patronage.

## WANTED

### **Regional Directors**

Are you interested in promoting **PROPERTY RIGHTS ISSUES** in your county or region?

If so, contact the PLA office to find out what you can do.

**Directors and Volunteer Organizers are especially needed**

in the central and northeastern regions of the state.

### **ACTIVISM COUNTS !**

**Do your part and become INVOLVED.**

**YOUR PROPERTY RIGHTS ARE AT STAKE**

# UPDATES

• **PLA MEMBERSHIP RENEWALS** - As spring approaches, and PLA membership renewals are forthcoming, the need to preserve private property rights becomes more apparent each day. Your membership in our organization is very vital as PLA ambitiously works to meet current legislative initiatives at both the state and federal level. Complete application information is very advantageous to our efforts, it is important for every member to accurately fill out the membership application and appropriately include a figure for land acreage owned. This information is held in confidence individually, however, collectively assists our representation of land acreage as our association increases legislative awareness and proceeds in our educating process.

• **NEW VIDEOTAPES** - While PLA has travelled across the Commonwealth educating and informing the public concerning private property rights, an effective instructional tool has been our videotape, *Wetlands: Our Environment, Whose Property?* Through this videotape, observers witness testimony from landowners across the nation whose plight becomes realistic as viewers discover the problems that landowners are experiencing due to excessive wetland regulation. On numerous occasions, the need for an updated film has been exercised, so PLA is presently in the process of providing Part II, an update to the original videotape. This video will be available for distribution by mid March and may be obtained by calling the PLA office or mail ordered through the back cover of this publication.

As with any venture, the costs have exceeded initial anticipations and anyone who can help defray those expenses through donations would render a tremendous asset toward the protection of private property rights. Won't you consider a contribution to help preserve your Constitutional guarantee?

Also "Nightline" with Ted Koppel recently aired a 1/2 hour program on the "wise use property rights movement" which has begun to gain national attention. Guest speakers were Rush Limbaugh, a



PLA Executive Director, Rhonda McAtee (right) discusses property rights issues with Dr. Dixie Lee Ray (left) and Rep. Jimmy Hayes at the San Antonio ECO Convention.

nationally syndicated radio personality supportive of property rights issues and Senator Al Gore (D-TN) representing the environmental interests. A great debate not to be missed! (Ideal for classroom and meeting purposes.) Call PLA to order your copy today!

• **THE ENVIRONMENTAL CONSERVATION ORGANIZATION (ECO)** recently held its national convention in San Antonio, Texas. An impressive list of guests attended including Congressman James Hayes (D-LA) sponsor of H.R. 1330, The Comprehensive Wetlands Conservation and Management Act, as well as Dixie Lee Ray, former chairman of the Atomic Energy Commission and a former governor of Washington State. Dr. Ray is also the author of "Trashing the Planet," one of the most important books published this century. She is one of the most authoritative voices in America speaking out for balance and common sense in our approach to environmental protection.

Also on hand to update ECO members were several of the individuals portrayed in PLA's videotape "Wetlands: Our Environment, Whose Property?" Providing information on the status of their respective wetland cases with the federal government were Ocie Mills, Victoria Pozsgai (representing her father, John, who is currently serving a three year jail term), Larry Gerbaz, and Rick McGown. PLA Executive Director, Rhonda McAtee, also addressed ECO members and urged their continued "grassroots" participation to ensure that the rights of private property owners were addressed in this year's

reauthorization of the Federal Clean Water Act.

• **PA LAND IMPROVEMENT CONTRACTORS (PLICA)** recently held their annual convention in State College, Pennsylvania. Members were updated on several key land use issues, including pending legislation pertaining to wetlands. Rhonda McAtee, PLA Executive Director, was on hand to inform members on events which had transpired during 1991, as well as to advise individuals on what could be expected in 1992. Also attending the annual convention was Henry Lamb, Executive Vice President of the Environmental Conservation Organization (ECO) our national property rights advocate. Mr. Lamb served as the guest speaker for the evenings main event.

• **A SUPREME COURT** hearing is expected to begin on March 2, 1992, regarding the case of David H. Lucas. Mr. Lucas, a developer who purchased two oceanfront lots for \$975,000, lost the right to build when the state of South Carolina passed a law to halt beach erosion. Lucas contends the law was passed after he bought his properties and prevents him from using the land except to "picnic" on it. He filed a suit for \$1.2 million in compensation from the state of South Carolina to cover interest, legal costs and the market value of his properties, making the claim under the Fifth Amendment to the Constitution. The Supreme Court's decision, if found in favor of the property owner, could prove to be of major importance in the area of "takings" law setting the stage for future land use decisions.

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UNLESS ENVIRONMENTAL REGULATIONS BEGIN MAKING SENSE, YOU MIGHT AS WELL LIVE IN A TREE.

- Current environmental law allows agencies of the government to restrict, and often prevent the use of privately owned land—without compensation to the landowner.
- Every landowner needs to convince Congress that environmental law must respect individual property rights and economic opportunity.
- Join PLA and make sense out of environmental legislation.
- Tell a friend.

"AND IT COMES WITH A GUARANTEED EXEMPTION FROM THE CLEAN WATER ACT..."

## PLEASE ENROLL ME AS A MEMBER OF PLA TO HELP SECURE THE RIGHT OF THE INDIVIDUAL WHILE WE RESPECT THE ENVIRONMENT

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- OBsolete DUES STRUCTURE PLEASE CALL PLA OFFICE FOR UPDATED INFORMATION**
- WETLANDS VIDEOTAPE (VHS)—  Part I  
"Our Environment, Whose Property?"  Part II  
\$15.00 Donation Each  
Please send me a copy of this limited edition PLA video tape.
- "POSTING FOR SUPPORT" program — Yes, I wish to become a participant in this program. Please send me \_\_\_\_\_ signs. I have enclosed 40¢ for each sign ordered.
- PART — Political Action Response Team — Yes, I wish to participate in this program sponsored through PLA's national affiliate ECO. Please put me on the PART mailing list.
- YES, I will help the PLA to continue its fight to put PEOPLE back into the environmental equation, and to uphold the principle of private land ownership. Please first enclosed my contribution of \_\_\_\_\_.

Members are encouraged to participate in one of the following categories:

- INDIVIDUAL MEMBERSHIP** \$25.00  
Any individual supportive of private property rights.
- ASSOCIATE MEMBERSHIP** \$50.00  
Not-for-profit organization supporting property rights issues.
- BUSINESS MEMBERSHIP** \$100.00  
Any business entity supporting the free enterprise system and the principle of private ownership.
- SUSTAINING ASSOCIATE MEMBERSHIP** \$250.00  
Inclusive of any corporate not-for-profit organization.
- CORPORATE MEMBERSHIP**  
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Sustaining \$ 500.00 Gold Club \$ 5,000.00  
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- Enclose form with check or money order payable to:  
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