



Bob Brace's Takings Case Comes to Trial

Four years ago, Bob Brace started the last leg of his long journey through the maze of Federal wetlands regulation enforcement which has destroyed a 60 acre parcel of his prime land near Waterford. He filed a regulatory takings compensation case in the United States Court of Claims in Washington D.C. This effort to salvage 10 years worth of hard work and investment to improve his farmland, consumed another 15 years in the "Tucker Act Shuffle."

Bob is seeking compensation for the property which cannot be farmed or developed for other economical use because of permanent restrictions imposed on it by the United States. The property, which, if put to its highest and best use, could have a value in excess of \$3,000,000.

The EPA and the Army Corps of Engineers descended in 1987 and ordered Bob, under the guise of wetlands protection, to surrender his property to the government.

Readers of the *Landowner* are familiar with the arrogance and abusive practices of the Federal government in those days. A decision had been made in Washington, D.C. to expand federal jurisdiction over normal farming far beyond anything ever contemplated by

Congress, and for that matter, DER, which had kept its hands off traditional farming. Not the Feds. They came on like gangbusters and threatened bankrupting civil penalties, or jail time, if their enforcement target didn't knuckle under.

Readers may not be as familiar with some of the legal snares and pitfalls which confront landowners, like Bob, who wish to challenge federal enforcement orders. Unlike Pennsylvania, there is no appeal of the type of order the Feds issued to Bob. In those situations, the landowner has to wait until the United States files an enforcement action to challenge the order and run the risk of incurring crushing civil penalties if he doesn't comply in the meantime. That risk alone is enough to make ordinary citizens back off if they happen to be the targets of selective enforcement (in the early days the few who spoke out against or challenged the expansion of federal power were selected as enforcement targets).

In Bob's case, the enforcement orders were issued in 1987, the enforcement action wasn't filed until 1992, and the case didn't come to trial until 1994 (the government typically

uses every litigation tool in the box, including time consuming, expensive discovery, asking the most detailed questions about personal finances and the like, and filing complex motions for summary judgment.)

Bob, however, had the courage to persist in his challenge of the power of the government to dictate that he and his family could not farm his land. At first, he won. Federal District Court Judge Mencer ruled that the federal government did not have the authority to do what it did and dismissed the enforcement orders. That should have been the end of the story. The Brace family should have been able to go back to using the land for farming. It didn't happen that way. The government appealed and Mr. Brace was dragged down to the Federal Appeals Court in Philadelphia where three Judges reversed Judge Mencer on a clever, hyper-technical interpretation of federal wetlands regulations advocated by inside-the-Beltway government lawyers involving "incidental fallback" (of soil from Mr. Brace's ditch cleaning) and "side casting" (of the same soil cleaned from the ditches back onto the same farmland). As an ironic footnote, both

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A Message from the President

Forest Legacy

As promised, I'll start out with an update on the Federal Forest Legacy Program. Last Fall, the first series of properties were submitted to the Forest Service for their approval. These properties were not the 100-200 acre parcels surrounded by shopping malls and urban sprawl that we were led to believe would be targeted. They were all larger properties – mainly over one thousand acres – or a group of smaller parcels lumped into one proposal.

My first question was, how can the DCNR and the Forest Service determine development threats on such large parcels? One property was land-locked (no road frontage) and another three-thousand acre property had what appeared to be a large stream cutting through the center of it. I asked how these specific pieces could be accessed, let alone be developed.

The responses from the State and Federal employees sitting at the table were incredible. One DCNR employee stated "that the developers can plop a road down anywhere they want." Another government employee stated that the stream wasn't a problem either because developers would simply bridge the stream and start selling lots. It became very obvious that these folks had never worked in the private sector and had to deal with the regulators.

What if the stream had a EV or HQ status? What if the land-locked parcel could not get a permanent roadway built due to zoning or other regulations? What if a large section of the property is classified as forested, wetlands, or off limits to development? Remember the Forest Legacy Program funnels federal dollars to the state for distribution to Land Trusts and Conservancies to purchase development rights on private property. Why would government buy development rights to land that could not be legally developed? Do you recall my article a few issues back called "Sewage Scam?" If there is no public sewage on a property, you must have sewage approval for every lot in order to legally subdivide a property in Pennsylvania. So think of this – thousands of acres submitted for inclusion in the Forest Legacy Program – how will the Forest Service know if the soils will pass for an on lot sewage system?

I guarantee that the sponsoring organizations, (mainly Land Trust and Conservancies), will not be hiring backhoes to dig hundreds of holes on each property to determine soil suitability. Therefore, there will be a lot of tax dollars being paid to landowners to not develop land that couldn't be legally developed in the first place. It is quite obvious as this program progresses, those opposed to this program were right on the money with our concerns. There was one reason for the Forest Legacy Program to be initiated in Pennsylvania – to develop another piggy bank for Conservancies and Land Trusts to dip into at tax payers expense. All we can do is continue to expose this program, and others like it, to our legislators and the media.

Clean and Green Ruling Reinforces Need for Legal Advice



Keith Klingler
PLA President

Clean and Green is a voluntary program which reduces tax burdens for owners of farmland, forestland and open space by basing taxes on the property's actual use rather than its potential market value. Landowners agree to keep the property in agriculture, agricultural reserve or forest reserve in return for the preferential tax treatment. Over six million acres in Pennsylvania are enrolled in this farmland preservation program which was established in 1974 with the Pennsylvania Farm Bureau's support.

Recent court rulings in Pennsylvania may surprise many landowners who think they understand their rights and obligations under the state's Clean and Green Act.

"The Court decisions reemphasize the need for landowners enrolled in Clean and Green to consult with an attorney before making any significant changes or subdivisions of Clean and Green land," said John Bell, Pennsylvania Farm Bureau's Governmental Affairs Counsel.

Bell provided the following analysis of the recent Clean and Green court ruling:

"In *Allegheny Partners v. McKean County Board of Assessment Appeals*, the McKean County Common Pleas Court ruled against the landowner and in favor of the county's action to terminate the Clean and Green assessment of nearly 36,500 acres of forested land.

Similar to other forest owners, the landowner established a program to lease portions of the Clean and Green-enrolled forested land to groups and clubs for recreational uses such as hunting, fishing, hiking, horseback riding and snowmobiling. The landowner received a rental fee based on the acreage used by the group or club. "Many landowners who conduct recreational leasing consider it to be a substantial source of supplemental income and an important tool to manage and protect their lands from damage by deer and other animals," commented Bell.

Notwithstanding the land management benefits the leasing program provided, the McKean County Court concluded that the use of land and lease income was not directly related to forest production and therefore not an authorized use of Clean and Green land.

"Although this case does not establish a statewide legal precedent, it should give landowners in other counties who have established programs to supplement income through public access and use of their properties a cause for concern," said Bell.

"Both cases underscore the need for landowners enrolled in Clean and Green to get legal advice before they take any action to subdivide their property or change how their property is being used," he added.

This was good advice and the case graphically illustrates the unintended consequences of government programs which appear to benefit landowners. PLA

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of the “technicalities” used by the government to persuade the Federal Appeals Court to reverse Judge Mercer have since been largely discredited by other Courts.

The United States Supreme Court refused to even hear Brace’s appeal. Mr. Brace then had to go back to Federal District Court for enforcement of the original orders, dismantle the farm’s drainage system and turn 60 acres of highly productive farmland into a useless swamp in perpetuity.

Only then did his so-called Tucker Act remedy fully “ripen.” Next, he had to file the lawsuit in the Court of Claims for an award of compensation. You would have expected that Mr. Brace would receive a “speedy” trial and prompt decision, but it didn’t turn out that way. The government put up every conceivable road block and defense to Mr. Brace’s Tucker Act claim, more discovery and, not just one, but three, unsuccessful motions for summary judgment. Now the case will now proceed to trial on the takings and compensation issues in November 2003 in Erie.

Ever since the Feds showed up at his farm in 1987, Bob Brace has devoted any time he has had available, after working long, hard hours to provide for his family, to two objectives: First, working within the confines of the system, to defend his land by fighting the lengthy Court battle challenging the federal government’s takeover of normal farming in rural Erie County. And second, by speaking out against the erosion and ultimate destruction of Constitutionally protected private property rights resulting from environmental regulation when it goes too far, seducing and encouraging landowners to stand up for their rights. Bob’s efforts led to the formation of PLA and gave a voice to property rights in Pennsylvania

Brace and his family have been vilified and ridiculed in the media and by regulatory bureaucrats and those who make a living off regulation or “go along to get along.” He has also been abandoned by political leaders who early jumped on his bandwagon when it was perceived to be politically expedient and even by friends and early supporters who can’t understand why he won’t give up.

For the last two decades, Bob Brace has been an outspoken voice for the Constitutional rights of ordinary citizens, not only in Pennsylvania, but throughout the nation. He has been a beacon of hope to the little guy who is being overwhelmed by government regulation. He has traveled throughout Pennsylvania and the United States to carry his message to landowners and ordinary citizens and received recognition and awards for his unflinching defense of property rights.

He has also played by the rules and continued to speak out against injustice and the erosion of our Constitutional rights.

The question is now before the United States Court of Claims. Can the Federal Government lock up your land for some bureaucratically-contrived public purpose without compensating you? Does the takings clause mean what it says? Does the Tucker Act really provide a meaningful remedy when all economically viable use of a parcel of property is destroyed by government regulation? Bob Brace hopes that the bedrock principles in which he so strongly believes will at last be vindicated. **PLA**

(For context, see “Charting the Course”, next page)

PENNSYLVANIA LANDOWNERS’ ASSOCIATION, INC.

The Honorable Mary Jo White
Senate of Pennsylvania
Senate P. O. Box 203021
Harrisburg, PA 17120-3021

Senator White:

The Pennsylvania Landowners’ Association would like to go on record as strongly opposing the confirmation of Kathleen McGinty as Secretary of the Department of Environmental Protection (“DEP”).

Her past record of advocating and implementing a radical expansion of centralized, command and control, regulation of both private property and public land resources demonstrates a philosophy which is hostile to PLA’s fundamental values and her leadership of DEP would take us in a direction Pennsylvania does not need to go.

Her past efforts promoting the American Heritage Rivers program is just one of many examples. Others are her past involvement in the Federal Ecosystem Management Plan, laid out during the Clinton Administration, and the Roadless agenda for our National Forests. These initiatives graphically illustrate her philosophical approach to land use regulation.

Pennsylvania’s strong forest products industry will surely suffer under the policy direction of Ms. McGinty. Other resource based industries will be placed at risk, in a time of economic downturn, and the progress that has been made with DEP will be in jeopardy.

When Governor Ridge broke up the DER, calling it a “job crushing regulatory nightmare,” private landowners were encouraged and optimistic that better times were ahead. Even though we still have further to go to achieve a fair and reasonable balance in environmental regulation in Pennsylvania, (mandatory compensation for the taking of private property, and curbing the Commonwealth’s voracious appetite to convert more land from private to public ownership being at the top of the list), we still have a better relationship with DEP than in the past.

The confirmation of Ms. McGinty would undermine the progress that has been made toward compliance assistance, rather than rigid enforcement, and cooperation between landowners and DEP and other regulatory agencies, rather than confrontation over mandates from on high.

Thank you for your serious consideration of PLA’s concerns.

Sincerely,

Keith Klingler, President
Pennsylvania Landowners’ Association, Inc.

Charting the Course for Pennsylvania

2003 promises to be an exciting year in Harrisburg as our new Governor and the General Assembly face the challenge of dealing with the budget in a faltering economy and resulting shrinkage in state tax revenue.

Fortunately for Pennsylvania, our Constitutional structure prohibits runaway deficit spending or stated more positively, requires a balanced budget. Put another way, the state government can't try to spend more than its revenues during the particular budget year.

As a result, Governor Rendell has presented a budget to the General Assembly which cuts spending substantially across the board although you could almost feel his pain when he says "I hate this budget."

For obvious political reasons, revenue enhancement measures (i.e., tax increases) are not being mentioned just now, but you know they're coming. Too many powerful groups and people have a vested interest in maintaining and increasing government programs and spending for their particular special interests and constituent agendas. And remember, there are legitimate and real public needs that state government has to address – health care, public assistance, state share of school funding (although you can certainly question increased spending, as such, really improves Pennsylvania's education system) and maintenance of public infrastructure – particularly highways, and amenities such as state parks and forests (hopefully luxuries such as Growing Greener grants will go by the boards for awhile).

The bottom line is that Pennsylvania has to continue to carry out its mandated responsibilities to its citizens and fund those programs with a diminishing revenue stream. If it is not politically feasible to raise taxes yet, spending has to be cut, and that is what Governor Rendell has proposed in his first budget.*

The Republican controlled Senate and House has responded by saying "Cuts in spending look okay to us. We'll pass your budget." That way the "pain" of spending cuts can be laid on the Governor's doorstep and the red hot potato of tax increases can be avoided for the moment.

Now, the Governor has had to veto his own budget! The politics of it all is very interesting. The pundits and political junkies will talk it to death, but the ordinary citizens of Pennsylvania, busy confronting their own problems with this faltering economy and with real concerns over the dual spectres of terrorism at home, and fighting a war in the Middle East – can do little more than pray that their elected representatives will behave responsibly and do what is best for Pennsylvania (and continue to say their prayers).

PLA has a real concern, however, that landowners' property rights issues will be shoved even further back on the burner this year. You have to remember, that through the economic expansion or "boom" of the last decade and a half, when governments at all levels were (comparatively speaking) flush with cash, there was money available for "discretionary government spending" on all kinds of luxuries, such as greenways, environmental buffers and natural heritage inventories. Conservancies and preservation organizations could tap into the Growing Greener pipeline and obtain grants for consultants just to think about ways to control sprawl, centrally plan and limit economic growth and dictate the private use and development of land in areas they wished to protect.

During that period, when "discretionary" money was available, efforts to achieve one of PLA's enduring goals – to provide a statutory mechanism to see that just compensation is promptly paid to private landowners who lost the economically viable use of their land

because of environmental restrictions (e.g., wetlands preservation, endangered species habitat protection, suspension of reversionary interests in abandoned railroad rights of ways, to name just a few) – never really got off the ground.

For awhile, providing a user friendly mechanism for prompt compensation for regulatory takings – instead of the Tucker Act shuffle – was all the rage. Tom Ridge jumped on the bandwagon when he was running for Governor, but jumped right back off after he was elected. At one of our Annual Meetings, Senator Santorum gave PLA a tutorial on political deflection when he told us that he supported the concept of compensation for regulatory takings, but that it was a budget buster which he couldn't support at the time because of his concerns over deficits. He really said "No," but made us think that he supported the concept and was against deficits. Very astute of him.

Whatever political traction the regulatory takings compensation concept had developed, seems to have evaporated, and the issue has fallen off the radar screen to a large degree. Indeed, an article in the Spring 2002 *Landowner* bemoaned the fact that it is getting harder and harder to get Republicans to stay interested in protecting property rights at all.

Landowners and PLA can "bemoan" and "rue" all they want but they must face up to political realities. One of these brutal realities is that successful politicians have an uncanny knack, or instinct, of being able to stand in the back of a crowd, see which direction it is heading and then run to the front of that crowd to make it appear that they are leading the crowd in that direction.

Another reality is, politicians have to be convinced that there is a crowd out there worth jumping to the head of and leading. In the early days of PLA, posting was a good way to convince politicians that there was a crowd out

* A closer look at that budget as it applies to DEP and DCNR, reveals some interesting things which will be mentioned later.

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there. Now the trick is to get the politicians to recognize where this crowd is interested in heading and entice them into wanting to lead us there.

Hopefully, PLA's expanded posting program will have its desired effect, i.e., let politicians know there is a crowd out there. In combination with that, landowners have to keep the heat on. They have to let their elected representatives know – in no uncertain terms – where it is that the crowd wants to go.

The PLA Board has decided that a good place to start is to reaffirm PLA's property rights agenda and develop and implement a program to assure that legislation to advance that agenda is introduced, and that legislation antithetical to the property rights agenda, is opposed (and certainly not passed by "default") because legislators are able to claim that they weren't aware of their constituents' opposition, another classic political deflection ploy. Carefully crafted legislation, tailored to landowners' legitimate concerns over property rights, might even have a chance of getting passed! At least the PLA agenda will become part of the debate. PLA's agenda has to be clearly defined, identified and called to the attention of our Senators and Representatives. They must be told where the PLA crowd wants to go.

Over the years, PLA has had support from a number of Pennsylvania legislators who are interested in the PLA agenda. That support and interest is recognized by PLA's "Legislator of the Year Award." That recognition is entirely appropriate, but landowners need more interest and more support for property rights... and some accountability on the part of legislators. To achieve this, PLA will announce a modest legislative agenda at the Annual Meeting, communicate that agenda to each Senator and Representative, seek their support for the agenda, and report to the membership on each legislator's response (or lack of response). PLA will keep track and the scorecard will be posted on the PLA webpage and communicated to our membership. This way, we'll at least know where everyone stands on PLA issues.

PLA has two "legislative" issues right out-of-the box. First is the Senate vote on the confirmation of Katy McGinty as Secretary of DEP. PLA is "on record" as strongly opposed to her confirmation for reasons well stated by President Klingler whose letter to Senator White appears in this issue on page 4. Keeping score on this one is pretty easy. It should be interesting.

In the longer term, House Resolution 15 passed the House 199-1 in November. It calls for legislative consideration of options for how to

restructure the Fish and Boat Commission and the Game Commission. PLA has developed and carefully articulated its positions on needed reforms and structural changes in these agencies and legislation has been prepared and is ready to be introduced. The House has now created a forum for debate on these reforms and this provides a platform for PLA to present the views of landowners and calls for reform of the Commissions by the General Assembly. PLA will keep score on this one as well.

Finally, in the furor over the Governor's budget, it is easy to lose sight of some of its details. DEP and DCNR were both cut, but not as much as other agencies, and some of the "amenity" or "luxury" spending will continue. This tells you where the Governor is coming from, just as the nomination of Ms. McGinty for DEP Secretary and the appointment of Joanne Densworth (she of 10,000 Pennsylvanians fame) as Rendell's policy advisor tells us where he is going. Mesdames McGinty and Densworth are talented, capable and effective. But that is the problem. More later. **PLA**

(See President Klingler's letter to Representative Mary Jo White on page 4 regarding this issue.)

The Fish Commission Under Stress

Recent articles in the Pittsburgh *Post Gazette* have publicized the current financial difficulties and political problems of the Pennsylvania Fish and Boat Commission.

For example, Deborah Weisburg, the *Post Gazette* fishing writer, reported that there is a \$51 million backlog on critical repairs needed for three commission hatcheries. The deterioration of these facilities has resulted in significant water pollution, in addition to creating a potential to disrupt Pennsylvania's recreational

fishing industry. Weisburg reported that hatchery repairs would far exceed the Commission budget, which is funded almost entirely by license sales, except for a few million dollars in federal grants. "Besides failing to meet effluent (discharged waste) standards, some hatcheries have water source problems and are old and outmoded," she said.

Apparently, the Commission has no money to make the repairs. It's a \$51 million "if," according to Pennsylvania Fish and Boat Commission deputy

executive director Dennis Guise, that legislators and the new administration will be asked to resolve – a feat that fell flat last year....

Her story went on to quote interviews with legislative leaders on the Commission's funding and political problems:

"State representative Dave Levdansky (D-Elizabeth), a member of the House Game and Fisheries Committee, said he and his

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colleagues will revisit the tipping fee and bond sale issues in the next couple of months, seeking support from Gov. Ed Rendell....

He said they'll also consider a license fee increase - a move some lawmakers, including the chair of the committee, Rep. Bruce Smith (R-York), say they'll stonewall until Pete Colangelo is removed as the PAFBC's executive director.

'We'll continue to ask the commissioners for a change,' Smith said. 'Senator [Edward] Helfrick (R-Northumberland) and I chose not to sponsor the license [fee] increase due to on-going problems with Colangelo and Guise. They did not adequately prepare for the crisis now being experienced at the hatcheries. They sat on their hands.'

It's mind-boggling why they didn't put money aside, why they didn't plan for the future."

According to Weisburg, at that time, Representatives Smith and Levdansky apparently denied any current plans to reform the system (by merging the Fish Commission and Game Commission with DCNR) to create a stream of general funding (hopefully to take care of the hatcheries rather than fund more fishing and hunting "luxuries" in time of budget crunch).

But the heat stayed on because on February 16, 2003, *Post Gazette*

Outdoor Editor, Ben Moyer reported the passage of a House Resolution dealing with reform and reorganization of the Commission:

"Voting 199-1, the Pennsylvania House of Representatives, Tuesday passed an amended and broadened version of Rep. Bruce Smith's (York) resolution to hold hearing on the feasibility of merging the Game Commission and the Fish and Boat Commission into one agency. The House Game and Fisheries Committee will hold the hearings, and is instructed by the resolution to report its findings to the full House by Nov. 30.

Smith's original version of House Resolution 15, proposed that hearings consider only the option of combining the two commissions into one similarly administered independent commission, with dual responsibility for fish and game. The amendments, offered by Rep. David Levdansky (Allegheny), authorize the Game and Fisheries Committee to 'explore a broad range of options with regard to how to structure our wildlife agencies to best manage the wildlife resources of this Commonwealth.'"

Moyer noted Representative Smith's conclusion that Pennsylvania is the only state that has separate agencies for managing Fish and Game:

"In 49 states, hunting, trapping, fishing and recreational boating are

regulated by one agency," said Smith, chairman of the House Game and Fisheries Committee. "We are the last holdout. What do the other state know that we don't."

Other unique and dubious features of the Pennsylvania setup are the broad authority given to the Fish Commission to enforce environmental regulations and statutes, its virtual veto power over DEP permits, its right to challenge DEP permit actions by appealing them, its unparalleled freedom (or independence) from legislative oversight and the lack of stringent control over spending of the Commission's dedicated funding source, proceeds from license sales.

You could easily conclude that the abuse of this freedom and independence and lack of controls has led to the Commission problems reported by Weisberg and Moyer, which now apparently will be investigated, hopefully thoroughly, by the House.

Readers are aware that PLA and other statewide organizations have long called for reform of all of the so-called independent commissions, particularly the Fish Commission. It now appears that the time is ripe to renew these calls as the House conducts its investigation and holds hearings.

The House's Resolution and a summary of PLA's legislative proposal follow this article. Copies of the actual bills are available on our web-page. **PLA**

The General Assembly of Pennsylvania House Resolution No. 15 Session of 2003

Introduced by B. Smith, Staback, Forcier, Haluska, Phillips, J. Evans, Feese, Readshaw, Fairchild, Sather, Gabig, Shaner, Pistella, Walko, Tigues, Fleagle, Creighton, Washington, Lewis, Hennessey, Harris, Hershey, Horsey, Mackereth, Marisco, Rohrer, Saylor, Stern, E. Z. Taylor, Watson, Youngblood, Geist, True, Dally, Bunt, Scrimenti, Reichley, Solobay, S. Miller and Harper, January 30, 2003

As amended, House of Representatives, February 11, 2003

A RESOLUTION

Directing the Game and Fisheries Committee of the House of Representatives to investigate the combining of the Pennsylvania Game Commission and the Pennsylvania Fish and Boat Commission to create a new independent agency responsible for managing the fish, boating and wildlife explore a broad range of options with regard to how to structure our wildlife agencies to best manage the wildlife resources of this Commonwealth and to investigate funding options; and directing the Legislative Budget and Finance Committee to update its report to the General Assembly which was filed pursuant to House Resolution 291 of 1988.

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WHEREAS, The Commonwealth is the only State in the nation to have separate, independently funded Game and Fish and Boat Commissions; and

WHEREAS, Both the Pennsylvania Game Commission and the Pennsylvania Fish and Boat Commission have begun to experience a shortage of operating and reserve funds; and

WHEREAS, The public demands on the fish, boating and wildlife resources of this Commonwealth are increasing; and

WHEREAS, The Game Commission and the Fish and Boat Commission need to increase revenues or severely curtail programs; and

WHEREAS, The sportsmen and sportswomen of this Commonwealth deserve to receive the greatest benefit in programs for every dollar expended; therefore be it dollar expended; and

WHEREAS, the Legislative Budget and finance Committee, in accordance with house Resolution 291 of 1988, investigated the financial feasibility, impacts, costs and savings, due to elimination of duplication of personnel and services, of combining the

Pennsylvania Game Commission and the Pennsylvania Fish Commission, and filed a report of its findings with the General Assembly, and

WHEREAS, it would be invaluable if the Legislative Budget and Finance Committee Report of 1988 were updated and the updated information were provided to the Game and Fisheries Committee of the House of Representatives as it undertakes the study mandated under this resolution;

THEREFORE BE IT RESOLVED, that the Game and Fisheries Committee of the House of Representatives examine the financial feasibility, impact, costs and savings, by eliminating duplications of personnel and services, of combining the Pennsylvania Game Commission and the Pennsylvania Fish and Boat Commission;

AND BE IT FURTHER RESOLVED, that the Legislative Budget and Finance Committee update its report to the General Assembly which was filed pursuant to the House Resolution 291 of 1988;

AND BE IT FURTHER RESOLVED, that the Committee explore a broad range of options with regard to how to structure our wildlife agencies to

best manage the wildlife resources of this Commonwealth;

AND BE IT FURTHER RESOLVED, that the Committee study current and future funding trends and investigate various options of funding, including 2003H001540202 Public Funding, to determine which would provide the wildlife agencies of this Commonwealth with adequate funding;

AND BE IT FURTHER RESOLVED, that the committee have the power to hold public hearings as it deems necessary;

AND BE IT FURTHER RESOLVED, that the committee report to the House of Representatives on its findings and recommendations no later than November 30, 2003.

(EDITOR'S NOTE: PLA has requested an opportunity to testify at upcoming hearings on H.R. 15 to be held by the House Game and Fisheries Committee and will use the Independent Agency Reform Act of 2003 as a platform from which to address PLA concerns about the Fish Commission. PLA is also circulating the bill summary to legislators who have supported the PLA agenda and shown an interest in preserving property rights so that they will be aware of the views of PLA landowners on reform and reorganization of the Commission.)

Summary of PLA's Independent Agency Reform Act of 2003

INTRODUCTION

This Bill would amend four statutes for the purpose of limiting and streamlining the roles, functions and responsibilities of three independent commissions, the Fish & Boat Commission, the Game Commission and the History and Museum Commission, in connection with environmental regulation and enforcement, expediting permitting activities of the Department of Environmental Protection and modifying policies and initiatives of the three independent commissions which

impede land use and development of natural resources in Pennsylvania.

- The Bill would amend the Regulatory Review Act to subject the Fish and Boat Commission and the Game Commission to the regulatory review process under that Act and subject their regulations to full review by the Independent Regulatory Review Commission.
- The Bill would amend the Fish & Boat Code as follows:
- It would require listing of endangered species of fish and reptiles by formal

- rulemaking and eliminate the automatic incorporation by reference in the Pennsylvania list, the entire federal list which greatly expands the Commission's enforcement power.
- It would prohibit political activity by Fish Commission employees while on duty or in uniform.
- It would subject the Commission to the same procedures as are imposed by the History Code on the History and Museum Commission in the DEP permitting process and require the Commission to respond or comment on permit applications within 30 days

- of receiving notice of the application.
- It would preclude the Commission from appealing or otherwise challenging in any legal proceeding any action or permit by any Commonwealth agency authorizing a regulated activity.
- It would limit the authority of Waterways Patrolman and Deputy Waterways Patrolman to enforce other [environmental] laws of the Commonwealth to publicly owned lands only.
- It would prohibit fishing from privately owned land without the express, advance consent of the owner or lessee of the land abutting the stream or water body.
- It would add the element of intent to the misdemeanor in the Fish and Boat Code for killing, etc. of endangered and threatened species.
- It would require the Commission to promulgate formal regulations when designating certain waters for specific purposes, e.g. Wilderness Trout Streams.
- It would deem failure or refusal to obtain consent of the owner to fish on or from privately owned lands to be unlawful conduct.
- It would create an exception to prohibition against altering or disturbing streams or fish habitats for any activities arising from lawful activity by other land users, including farming, mining, forestry practices and recreation.
- It would clarify Section 2504 of the Fish and Boat Code to assure that activities authorized by DEP permit would not constitute pollution under the Fish and Boat Code.
- It would provide that in criminal prosecutions for water pollution injurious to fish, the Commission would have to establish that the pollution poses a significant and substantial risk of death or damage to a particular fish species.
- It would make fishing from private property without first obtaining the

consent of the owner of the property violation of the Code which would result in a suspension of license.

The Bill would amend the Game and Wildlife Code as follows:

- It would provide that lands enrolled in the Commission's cooperative hunting programs are not to be deemed to be lands controlled by the Commission thus extending the Commission's regulatory jurisdiction over such lands.
- The authority of Wildlife Conservation Officers to enforce other environmental laws of the Commonwealth would be limited to publicly owned lands.
- Political activity while on duty or in uniform would be prohibited.
- It would subject the Game Commission to the same procedures as are imposed in the History Code in the DEP permitting process and require the Commission to respond or comment on permit applications within 30 days of receiving notice of the application (or be deemed to have waived any objections).
- It would preclude the Commission from appealing or otherwise challenging in any legal proceeding any action or permit by any Commonwealth agency authorizing a regulated activity.
- The authorization of landowners to kill game or wildlife which are destroying crops or livestock on private property would be expanded to apply to destruction of natural or manmade drainage and water control facilities which would enable landowners to deal with the problems of wildlife such as beavers creating wetlands.
- The prohibition against transporting, capturing or killing wildlife or endangered or threatened species would be circumscribed so that it would not be criminal to cause impacts without intention to cause the harm so as to eliminate the possibility of having lawful activities which

intentionally have some incidental impact on wildlife become a criminal violation.

- It would clarify the Code so that lawful activities including mining, farming, forestry practices, recreation and other such lawful land use activity would not be deemed unlawful conduct.
- The Bill would make it unlawful for any person to hunt on privately owned lands without the express advance consent of the owner.
- The Bill would make it in violation of a hunting license to hunt without the express advance consent of the owner of posted, privately owned lands which would begin to bring Pennsylvania in line with other states.
- The Bill would require the Game Commission and its Wildlife Conservation Officers on complaint of the landowner to enforce the new no trespassing provisions in the Game and Wildlife Code.
- The Bill would amend the History Code to eliminate giving the History & Museum Commission "two bites at the apple" when it reviews applications for permits issued by both DEP and a federal agency. Under current state law, the Commission must render a determination as to whether or not an "archeological" investigation is necessary for a particular property specified within the History Code or be "deemed" to have no objection to the permit being sought. There have been several recent instances where the History and Museum Commission has failed to act within those time periods, thereby being deemed to waive objection to the permit, but where acting as the State Historic Preservation Office under federal laws dealing with mining and wetlands, subsequently objected to the federal permit thereby delaying it or causing it to be denied. This Bill would preclude the Commission from circumventing these "deemer" provisions. **PLA**

PLA Meets the Press

PLA frequently receives inquiries from journalists for the print and electronic media, typically investigative reporters who are doing stories on issues which involve property rights, requesting comments on some government initiative, or seeking PLA's position on particular legislation. PLA welcomes such inquiries because it provides an opportunity to articulate PLA property rights philosophy and get our message out to a broader spectrum of the public.

One such freelance journalist, from southeastern Pennsylvania, Allan Gregory, interviewed PLA regarding a column he was doing about the debate over Water Resources Management legislation, which was enacted at the very end of the Ridge/Schweiker Administration. Since journalists often put a particular "spin" on such interviews, and "pick and choose" snippets from the interview, or "selectively" quote PLA to make a particular point, it is always a challenge when being interviewed to assure that the PLA philosophy, and agenda, is not distorted or taken out of context.

PLA's responses to Mr. Gregory's questions provide an interesting illustration:

Question: Where do you stand on riparian rights of landowners?

Answer: PLA believes that riparian rights vested in landowners are a critical component of the bundle of rights which comprise private property, and as such, are protected by the Constitution. The most recent edition of PLA's *Landowner* has a feature article on the issue, and I sent a copy to you as additional background.

Question: Do you support water resources management legislation that would require water users to register with the DEP?

Answer: PLA would likely oppose it because any such legislation involves another layer of DEP regulation, and would not be limited to "registration." PLA believes in less, not more, regulation as a general principle. The Devil is usually in the details of laws and regulations. You ask about "registration" in water resources "management" legislation which, of course, makes it clear that "someone" is going to "manage" something, and the big question is what? If the registration you are inquiring about is the kind that is in DEP's current version of that legislation, PLA opposes it strongly.

Question: Do you think water management legislation would lead to a situation where DEP would be allocating water in disregard of riparian owners' rights or otherwise violating riparian owners' rights?

Answer: Yes. Obviously, if DEP allocates water in disregard of riparian owners rights, those rights are violated. PLA believes that generally any water resources "management" legislation poses a serious threat to private riparian owners' rights, and some versions of such legislation is actually intended to curtail, or divest, such rights, although the proponents of such legislation will say its "only" registration.

Question: What is the Pennsylvania Landowners Association's position on non-riparian owners (such as longwall mining companies) infringing on the riparian rights of landowners?

Answer: PLA doesn't like to see anyone infringe on another's rights, but we think there are some faulty assumptions in your questions which we can discuss. If we do that, you will have to be more precise and specific in identifying "infringement" in this context. I would say, PLA is most concerned about government action or regulation which infringes on the rights of landowners, including their riparian rights.

Question: Can you point out examples where the PLA supported landowners who were seeking to limit, or even stop, inappropriate development?

Answer: Yes. PLA has supported landowners who sought to limit, or stop, inappropriate development. A good example is where the government uses, or threatens to use, the power of eminent domain to acquire another's private land for the benefit of one private entity (usually a politically powerful developer) over another private entity, when there is no true public use in the development.

Question: Do you support landowners only when they are limited by government from developing their property?

Answer: No. PLA would support landowners in other ways, but PLA is vitally and primarily concerned about government imposed limitations on landowners' use and enjoyment of their property. One of PLA's primary objectives is to educate landowners about threats to private property and erosion of property rights resulting from government regulation.

Question: Would a private property owner who wanted to preserve his property in its natural state (through purchase of development rights, conservation easements, farmland

preservation programs, etc.) get that same support from you?

Answer: If a private property owner made a voluntary and fully informed decision to preserve his property in a natural state through mechanisms such as purchase of development rights, conservation easements, farmland preservation programs, etc., PLA would support that individual's right to make that choice. PLA may not like the mechanisms you mentioned, and PLA certainly has concerns about the state's voracious appetite to acquire, or restrict the use of more and more land, and opposes taxpayer funding of such acquisitions and government coercion, but if a landowner wants to do it, that's his choice. It's better than having some agency hold a gun to his head to make him do it, as is the case in many of these programs.

Question: Have you done any work to support the riparian and other property rights of landowners in southwestern Pennsylvania whose homes and water supplies have been damaged by longwall mining?

Answer: PLA typically would not be involved in private disputes between private parties. PLA is familiar with the impact of longwall mining in southwestern Pennsylvania and it is not at all clear to me that landowners have any need for, or would want, support from PLA. In the first place, there are numerous other organizations with extensive resources and influence, some of which are taxpayer supported or funded by powerful charitable foundations, which advocate against longwall mining, presumably on behalf of such landowners. Their assets and resources far exceed PLA's. The state and Federal governments also "support" such landowners, and the General Assembly of Pennsylvania and Congress have conferred many new rights on such landowners. It is hard to imagine why they would ask PLA to help them.

Question: The PLA – as its very name implies – promotes the sanctity of private property. Yet, from what I can gather by perusing the PLA's web site, the organization does not go to

bat for individuals whose land and water resources have been damaged by longwall mining.

Answer: Your question assumes that the individuals need someone else to go to bat for them or that the sanctity of private property is an issue in the circumstances you describe. In the case of coal mining, the General Assembly and Congress have adjusted and rearranged common law based, private legal relationships and respective property rights between mining companies and surface owners and provided extensive remedies to individuals whose land and water supplies have been damaged by longwall mining. By self-executing statute, they are entitled to compensation for and/or restoration of subsidence impacts which, at common law, they would not be entitled to.

We haven't heard anymore from Mr. Gregory. PLA

UPDATE ON THE LITTLE JUNIATA RIVER

One Picture Is Worth a Thousand Words!

The recent Special Edition of the LANDOWNER reported the Commonwealth of Pennsylvania's unguided missile attack on riparian landowners along the Little Juniata River. The article – *Pennsylvania Declares War on Private Property ... and Landowners Fight Back* – chronicled the first assault, a sneak attack, and hasty retreat by DEP, DCNR and the Fish Commission, and the backpedalling and retractions posted by Penn Future and the Federation of Sportsmen's Clubs which were constrained to admit that the Little J ownership issue had not and could not be decided by DEP's bureaucratic fiat. PA Council, Trout Unlimited held out for awhile but recently published a retraction in Pennsylvania Trout and on its website, admitting that it didn't have the facts right in its first story and that its earlier pronouncement that the Little J was "public" and open for fishing was erroneous.



Show Your Commitment to Preserve Property Rights!

The membership categories below were initiated with the presumption that those owning higher acreage were, in all probability, relying more on their land as a source of livelihood and therefore, had a much higher stake in the property rights debate. Since PLA relies solely on individual membership dues and contributions to meet its financial needs, we hope you will join under the appropriate category. If however, finances preclude you from meeting the suggested guidelines, your education on private property rights issues is more important than the amount of your membership, therefore, you may enroll in a more affordable classification.

PLA Membership Categories

Please Indicate: New Member Renewal

- Individual I** \$25.00
Any individual supportive of private property rights.
(owning 0 to 15 acres)
- Individual II** \$35.00
(owning 16 to 100 acres)
- Individual III** \$50.00
(owning 101 to 250 acres)
- Individual IV** \$100.00
(owning 251 to 500 acres)
- Individual V** \$200.00
(owning over 500 acres)
- Associate I** \$100.00
Any business entity supporting the free enterprise system
and the principle of private property ownership.
(local businesses in communities.)
- Associate II** \$250.00
Trade Associations
(Organizations supportive of private property rights.)
- Associate III** \$300.00
Major suppliers to land use entities.
(resource development, construction, agriculture.)
- Affiliate** \$50.00
Local or regional grassroots, non-profit organizations.
- Business I** \$750.00
Corporations or entities whose activities involve ownership,
use and/or development of acreage in excess of 100 acres,
but less than 500 acres.
- Business II** \$1,250.00
Same as Business I, but in excess of 500 acres.

Any land owning member (excluding Individual I) purchasing PLA signs and participating in the "Posting for Support" program is entitled to a 50% reduction in membership fees for the current membership year.

Membership dues and contributions may be deductible as a "Business" expense. Please consult your tax advisor regarding your particular situation.

Enclose form with check or money order payable to:

Pennsylvania Landowners' Association
P.O. Box 391
Waterford, PA 16441

Please allow 2 to 4 weeks for your membership card.

PLA Educational Materials

PLA's "Posting for Support" Program

Yes, I wish to become a participant in this program. Please send me _____ signs. I have enclosed 60¢ for each sign ordered.

I am a current participant in the "Posting for Support" program.

I am a new participant in the "Posting for Support" program.

*** NEW! RECENTLY UPDATED! ***

USA v. Brace & Brace Farms Videotape (VHS)

"One farmer's 15 year battle with federal wetlands provisions."

A must see for all land owners and resource providers!
\$15.00 donation.

Wetlands Videotape (VHS) Part I Part II

"Our Environment, Whose Property?"
\$15.00 donation for each part.

Name: _____

Address: _____

County: _____

Acreage Owned: _____

Phone Number: (____) _____

Fax Number: (____) _____

Acres of land posted: _____ acres

Membership Amount: + \$ _____

Less 50% fee reduction if

"Posting for Support" - \$ _____

Amount of signs purchased + \$ _____

Additional Contribution + \$ _____

Total remittance enclosed = \$ _____

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"Nor shall private property be taken for public use without just compensation."

Fifth Amendment, U.S. Constitution