



Citizens Advisory Council

to the Department of Environmental Protection

P.O. Box 8459 • Rachel Carson State Office Building

Harrisburg, PA 17105-8459 • 717-787-4527 • Fax 717-772-2291

Please Note: Our New Fax Number is 717-772-5748

May 4, 2000

THIS LETTER WAS SENT TO ALL THE PA SENATORS

«Name»

«DEP_House_Senate»

«PO_Box_Address»

Dear «Formal_Sal»:

The Citizens Advisory Council¹ to the Pennsylvania Department of Environmental Protection has long supported the need to protect participants in environmental decision-making from retaliation either from DEP or those affected by DEP's decisions. Citizens raising reasonable and legitimate concerns should not be subject to threats and lawsuits from permit applicants (Strategic Litigation Against Public Participation, or SLAPP); volunteer advisors should not feel constrained to 'rubber stamp' DEP for fear their committee's activities will be curtailed or their reappointment held up; and participants from the regulated community should be protected from even a hint of retaliation from DEP. We have urged DEP to support legislation that discourages retaliation by the regulated community and adopt a top-down policy that retaliation by DEP will not be tolerated.

HB 393 PN 2864 has been billed as such protective legislation. Council has reviewed this bill and has the following comments:

- The stated intention of HB 393 is anti-SLAPP and it begins with a finding that SLAPP suits are not in the public interest as they are brought primarily to chill the valid exercise by citizens of their constitutional rights to freedom of speech and to petition the government for the redress of grievances. However, the bill then appears to turn civil immunity to such suits on its ear by listing broad exceptions, some of which are so subjective as to actually empower permittees to strike back at citizens.

For example, Chapter 83 provides exceptions from immunity for allegations in an action or communication that are not "relevant," which are made for the sole purpose of interfering with existing or proposed business relationships, or which are later determined to be a "wrongful use of process." These exceptions can indeed have a chilling effect on citizen action, clearly reversing the bill's opening language in lines 8-11. "Relevance" is a subjective term; citizens may be unaware of proposed business relationships. There are already sanctions available

¹ The Council is a legislatively created advisory committee charged with reviewing all environmental issues, legislation, regulations, policies and programs relating to Pennsylvania.



against counsel who bring frivolous lawsuits. Is there something unique about mining law that requires specific attention to this aspect of litigation? Is there data supporting a need for this?

Paradoxically, the bill then places no burdens or hurdles on actions that are intentionally designed to gag appropriate citizen opposition/action. Unfortunately, citizen action is still often a necessary component for correcting environmental wrongs. There are issues of significance that don't get brought to the forefront any other way. The bar to get into the justice system is already high—we need to be very careful about further limiting citizen access to the justice system.

- Amendments to the bill were supposedly intended to address a specific inconsistency with federal language identified by the federal Office of Surface Mining (OSM)². However, the amended bill goes beyond OSM's directive to address two very narrow program changes—to require a demonstration that any person or DEP acted in bad faith for the purpose of harassing or embarrassing the permittee, and a broadening to allow the award of costs in *any* administrative order (not just enforcement actions) issued under the Act. The goal of the legislation should be a narrow correction to the law to address the shortcomings identified by OSM.

Chapter 7707(H) defines 'proceeding' to include only "appeals of final DEP actions before the EHB and judicial review of EHB adjudication." Is this consistent with what OSM has indicated is needed?

- The bill is cumbersome and confusing. Contrary to its stated purpose, the focus of the bill digresses substantially. For example, 7708(C)(4): allows costs to be awarded "to a permittee from any party where the permittee demonstrates that the party, in bad faith and for the purpose of harassing or embarrassing the permittee... participated in such a proceeding in bad faith for the purpose of harassing or embarrassing the permittee." Exactly what does this mean?
- We request clarification on why Title 42, Judiciary and Judicial Procedure, is proposed to be amended rather than SMCRA, which would more directly deal with OSM's directive. We also request clarification on how "environmental law" is defined since it is used in the title of the proposed new chapter. Finally, the repealers contained in 8304 Section 2 are confusing, and perhaps need to be checked for accuracy. The text of these repealers should be incorporated in the bill rather than by reference.

² As stated in a May 6, 1997 letter from Allen D. Klein, Regional Director of OSM to DEP Secretary James Seif: "...the absence of a corresponding provision under state law or regulation with respect to award of costs, including attorney fees, requiring a demonstration that any person or the Department acted "...in bad faith for the purpose of harassing or embarrassing the permittee..." represents a program deficiency that must be corrected. Further, State law and/or regulation must provide award of costs, including attorney fees in any administrative order issued under the Act, including successful challenges to permitting decisions. In either case, the "in bad faith" standard applies to any petition for attorney fees filed by a permittee."

We are puzzled by how difficult this bill is to interpret. As written, it will not accomplish its stated purpose, and in fact may encourage rather than discourage SLAPP suits. This bill, in its current form, is not in the public interest.

Thank you for your consideration of our concerns. Please call Susan Wilson, Council's Executive Director, at 787-4527 if you have any questions.

Sincerely,



Jolene E. Chinchilli
Chairperson
Citizens Advisory Council

Sincerely,



Gail Rockwood
Chair
Administrative Oversight Committee

cc: Secretary Seif
Deputy Secretary Dolence
Greg Mahon
Mining and Reclamation Advisory Board