

HOUSE OF REPRESENTATIVES  
COMMONWEALTH OF PENNSYLVANIA

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House Bill 281

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House Judiciary Subcommittee on Courts

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Room 140, Majority Caucus Room  
Main Capitol Building  
Harrisburg, Pennsylvania

Tuesday, August 13, 1996 - 9:30 a.m.

\* \* \* \* \*

BEFORE

Honorable Daniel Clark, Majority Chairman  
Honorable Thomas Caltagirone, Minority Member

KEY REPORTERS

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1 ALSO PRESENT:  
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3 Honorable Peter Daley  
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17 Minority Research Analyst  
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20  
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1 MR. CHAIRMAN: Good morning. This is the House  
2 Judiciary Subcommittee on Courts of which I'm the  
3 Subcommittee Chairman. My name is Representative Dan Clark.  
4 I'm from the 82nd Legislative District which is about an  
5 hour West of here on Route 22/322.

6 We're here today to receive testimony with respect to  
7 House Bill 281 which has been introduced by Representative  
8 George. And he will be the first individual to testify in  
9 front of the Committee this morning.

10 Initially, I'd like to go through and have all the  
11 other legislators in attendance indicate their name and  
12 district number, and then we can begin with the taking of  
13 testimony. Start off with my right Representative Maitland.

14 REPRESENTATIVE MAITLAND: Good morning. I'm  
15 Representative Steve Maitland from the 91st District which  
16 is most of Adams County, and I live in Gettysburg.

17 MR. MANN: My name is James Mann and I'm the  
18 Legislative Research Analyst on the House Judiciary  
19 Committee.

20 REPRESENTATIVE CALTAGIRONE: Representative  
21 Caltagirone, Democratic Chairman, Berks County.

22 MR. ANDRING: Bill Andring, I'm Democratic Legal  
23 Counsel for the Committee.

24 REPRESENTATIVE DALEY: I'm Representative Pete Daley  
25 of Washington/Fayette County.

1 MR. CHAIRMAN: Representative George?

2 REPRESENTATIVE GEORGE: Good morning, Mr. Chairman,  
3 Members of the Committee. I'm pleased to present the  
4 following testimony on House Bill 281, commonly referred to  
5 as the Anti-SLAPP bill. I introduced a similar version of  
6 this legislation last session which passed the House of  
7 Representatives unanimously. It was never considered by the  
8 State Senate.

9 Before I get into my testimony, I want to relate a  
10 short story to you about an event that occurred in my  
11 district. An elderly widow who had lived in her home for  
12 decades, noticed that red water began seeping into her  
13 basement sometime after a major mining operation began  
14 adjacent to her home. Eventually, the water in her basement  
15 reached six feet high, and she was forced to move out of her  
16 home. She contacted the legislator and the Department of  
17 Environmental Resources to have this matter investigated and  
18 to find a responsible party. In the course of the  
19 investigation, the department ordered the mining operator to  
20 set up equipment to determine if the seep into the woman's  
21 basement was as a result of their operation.

22 Rather than obeying the order, the mining operator  
23 decided to file suit against this widow and her son for  
24 interference with their business. Her crime? Contacting  
25 her elected representative and an executive agency for help.

1 Not wanting to make it easy for this woman, the case was  
2 filed in Pittsburgh, so that the woman would be  
3 inconvenienced as well as being intimidated. After seven  
4 years and legal costs and expenses in excess of \$27,000, the  
5 Court urged both parties to settle the matter. My question  
6 is "Could we in the General Assembly do anything to put an  
7 end to this type of abuse of our legal system?"

8 What is a SLAPP suit?

9 What I just described to you is one example of a SLAPP  
10 suit. There are thousands more. SLAPP is an abbreviation  
11 for Strategic Lawsuit Against Public Participation.  
12 However, you'll never go to a Court docket and find a  
13 "SLAPP" suit filed. They take the form of defamation and  
14 libel suits, interference with commerce suits, or a host of  
15 other legal challenges. All that can be said is that SLAPP  
16 suits most often involve disputes surrounding environmental  
17 and developmental matters, and that they can be devastating  
18 to those that are targets. House Bill 281 takes direct aim  
19 at those cases which involve environmental issues that may  
20 include zoning disputes, and those issues where a permit or  
21 a license from the Department of Environmental Protection is  
22 required.

23 SLAPP suits, by their very definition, are designed to  
24 get individuals or groups to stop their opposition to a  
25 particular project or operation. They are designed to stop

1 persons from exercising their 1st Amendment rights of free  
2 speech and petitioning the government for redress of  
3 grievances. Plain and simple, they're designed to  
4 intimidate people and to shut them up.

5         The sad part of this is in order to win, an entity  
6 that files a SLAPP suit doesn't have to actually win in  
7 court. In fact, the vast majority of cases never get to  
8 court. Oftentimes, the case is settled out of court, with  
9 part of the agreement stating that the opposition to the  
10 project must cease and a gag order imposed on all sides. In  
11 that case, the person filing the suit has ultimately won.  
12 In any event, simply filing the suit may cause the  
13 individual to back off of their opposition.

14         Another way that an entity can "win" a SLAPP suit is  
15 to keep the case open for many months or even years. In  
16 research done by George Pring and Penelope Canan, the  
17 country's pre-eminent SLAPP experts, they found that the  
18 average duration of a SLAPP suit was 36 months. By dragging  
19 out the process, the filer causes the defendant to use up  
20 resources defending themselves. That alone may be enough to  
21 get an individual or group to cease their opposition.

22         One other trick to intimidate people that is used by  
23 those entities filing SLAPP suits is to file the suit, and  
24 then hall in anyone even remotely involved with the  
25 particular group for a deposition. In the course of the

1 deposition, the filers' attorney will ask questions such as  
2 "what is the value of your property?" Or what is your  
3 family's net worth?" It's simply another tactic to scare  
4 people off.

5 Elements of House Bill 281.

6 House Bill 281 contains three important elements that  
7 are necessary to deter the promulgation of SLAPP suits.

8 First, the legislation provides for immunity from liability  
9 for an individual who acts in the furtherance of their first  
10 Amendment rights, unless the intent of their communication  
11 is not genuinely aimed at procuring a favorable governmental  
12 action. This provision aims directly at the heart of this  
13 matter. It states that you cannot be held liable for  
14 exercising your First Amendment Rights.

15 Second, the bill provides that a cause of action  
16 against an individual who is exercising their First  
17 Amendment rights shall be subject to a special motion to  
18 strike, unless the Court determines that the plaintiff has  
19 established that there is a substantial likelihood that they  
20 will prevail on the merits of the case. It further provides  
21 that the Court shall advance any motion to strike so that it  
22 may be heard and determined with as little delay as  
23 possible. This section of the bill is designed to allow a  
24 Court to dispose of a case quickly, before the defendant has  
25 expended a great deal of their financial resources.



1           Finally, the bill states that a person who  
2 successfully defends themselves against a SLAPP suit shall  
3 be awarded reasonable attorneys fees and costs of  
4 litigation. This section is aimed at making it less  
5 attractive to an entity to file a SLAPP suit in the first  
6 place, since they may be responsible for attorneys fees if  
7 they lose.

#### 8 SLAPP Legislation In Other States

9           SLAPP Legislation has become law in nine other states  
10 (California, Delaware, Massachusetts, Minnesota, Nebraska,  
11 Nevada, New York, Rhode Island and Washington).  
12 Additionally, SLAPP bills are being considered in Florida,  
13 Georgia, New Jersey, Tennessee and Texas. The actual  
14 language in each statute is slightly different, however, the  
15 key elements discussed before are part of those statutes

16           While this type of legislation is relatively new, a  
17 number of challenges, including challenges to its  
18 constitutionality, have been heard by states' highest  
19 courts, and it has been upheld in each case. To date, no  
20 statute has been declared unconstitutional. In fact, the  
21 most recent challenge occurred to the Rhode Island Law in  
22 Hometown Properties Inc. versus Nancy HSU Fleming (NO.  
23 94-606-M.P. Decided June 25, 1996). In this classic SLAPP  
24 suit, an individual, Ms. Fleming protested to Rhode Island's  
25 Department of Environmental Management that a landfill near

1 her home was polluting the groundwater. In 1992, she was  
2 "slapped" with a lawsuit from Hometown Properties, the owner  
3 of the landfill, for interference with contractual relations  
4 and defamation. Her attorneys made a motion to have the  
5 case dismissed, but the judge ruled against her motion.  
6 After this action, the Rhode Island SLAPP Legislation was  
7 signed into law. She refiled her motion to dismiss, and  
8 this time the court ruled in her favor. After that, the  
9 landfill company brought the suit to the Rhode Island  
10 Supreme Court, asking that it be declared unconstitutional.  
11 The court strongly supported the constitutionality of the  
12 law, ruling that the statute "was consistent with the  
13 independence and individualism that led this state's  
14 earliest settlers to create a free community of seekers of  
15 the truth."

#### 16 Summary

17 In summary, until such time as legislation such as  
18 House Bill 281 is signed into law, cases like the one I  
19 described earlier will continue affecting thousands of our  
20 constituents. If they don't have the money, they'll go into  
21 debt defending themselves. If they do, their money will be  
22 squandered rather than put to productive use.

23 One final point, my legislation will not prohibit the  
24 legitimate use of the court system by anyone, including a  
25 business entity that feels that they have been aggrieved.

1 It simply affirms the individual's right to express their  
2 views in accordance with the First Amendment to the United  
3 States Constitution and Sections 7 and 20 of the  
4 Pennsylvania Constitution.

5 Committee, I appreciate the opportunity to present my  
6 thoughts on this important piece of legislation, and I would  
7 be happy to attempt to answer any of your questions that any  
8 of the Members would have, Mr. Chairman.

9 MR. CHAIRMAN: Thank you very much, Representative  
10 George. I have one question. In looking over the  
11 legislation, there's a section here which allows the  
12 Environmental Hearing Board to award costs, etc., when the  
13 Board determines and feels frivolous or etc. So this  
14 legislation would not only apply to the judicial system but  
15 would also apply to those administrative procedures in front  
16 of that Board?

17 REPRESENTATIVE GEORGE: Mr. Chairman, I neither oppose  
18 or support this statement or amendment that was placed into  
19 the legislation at the insistence of DEP. This is their  
20 language, Mr. Chairman. I thought that the significance of  
21 the legislation was so important to all of us. We're the  
22 ones that make the law and we were forced to agree with the  
23 contents of that language.

24 MR. CHAIRMAN: Okay. Can you give me some idea or  
25 background as to why they wanted that wording put into the

1 legislation?

2 REPRESENTATIVE GEORGE: Well, it would be my opinion,  
3 Mr. Chairman, that there are many cases in which even  
4 entities of great size and great worth might apply for a  
5 permit of such. And after it had been struck down after  
6 reasonable research by the Department, and then the first  
7 effort to hold back would be for that entity to go to the  
8 Environmental Board to see whether or not they could  
9 overturn that decision.

10 And then what would ensue then would be some type of  
11 format in which the Department felt might be not in the best  
12 interest of the Department after they insisted that they  
13 have done the best they could in making a decision that  
14 wasn't favorable to that individual.

15 MR. CHAIRMAN: Okay. And your position is you have no  
16 position on that?

17 REPRESENTATIVE GEORGE: Mr. Chairman, to you and the  
18 other fine Members of your Committee, I stand committed to  
19 SLAPP Legislation. It had been passed different than this  
20 one statement that you're mentioning. I think the Committee  
21 can make a decision whether it's in the best interest to  
22 treat the matter.

23 If I may remind all of us, DEP has recently changed  
24 its name. I supported that concept with the Governor. This  
25 SLAPP suit that you talk about and that I've talked about

1 has been settled at this time thanks greatly by the  
2 Secretary of DEP who went forward and said to this so-called  
3 operator, you know, this can't continue. You've cost this  
4 woman money, you know that you refused to abide by our  
5 ruling. We've insisted you do this. And I'm grateful at  
6 this time that there has been a resolve.

7 But the truth of the matter is that this is going to  
8 happen, Mr. Chairman, to any individual who has a concern  
9 such as with the thought that New York is going to be coming  
10 into Pennsylvania with all of their waste. And every time  
11 an individual feels that they want to speak up that there's  
12 a possibility of groundwater contamination and things of  
13 this sort, the first time that anybody complains and if that  
14 company takes action such as a SLAPP suit, no one else is  
15 going to come forward.

16 I think that what we're doing here, even though the  
17 room isn't filled and there are naturally many who thinks  
18 this is not important, you're going to see the significance  
19 of the need of this type of legislation very soon in  
20 Pennsylvania.

21 MR. CHAIRMAN: And I tend to agree with you. And I  
22 somewhat favor this section. And the situation that comes  
23 to my mind is an individual is given a permit to install an  
24 in-ground septic system, and that a large wealthy landowner  
25 beside this piece of ground doesn't want development there.

1 And then he starts appealing the issuance of this permit,  
2 gets in front of the hearing board and can basically drag  
3 this matter out for -- until it's just not feasible to build  
4 a house on a piece of ground. And I'm wondering if that  
5 situation would be addressed by this paragraph also.

6 REPRESENTATIVE GEORGE: Mr. Chairman, as I look up at  
7 those of you that are my colleagues, I recognize all of you  
8 but your two assistants. And I'm sure they're attorneys as  
9 well as you people are. And we both know that there are  
10 suits and some of them are frivolous and some of them are  
11 legitimate. And when a suit is legitimate, it's the way of  
12 law. The law that people like you before you placed into  
13 statute.

14 But when the suits are frivolous and aimed at  
15 intimidation and things of this nature where it removes an  
16 individual's right to speak up. You mentioned about the  
17 permits, Mr. Chairman. I've been Chairman of the  
18 Conservation Committee now called the Environmental  
19 Committee for 16 years. I've been all around this country  
20 and I've taken depositions so to speak. And we've had  
21 public hearings, and we've even had new investigated  
22 administrations.

23 The truth of the matter is that those of us who placed  
24 DEP into format, it's the charge of the legislature. We put  
25 them in to be. In this case, I mentioned they took action.

1 Even they are stymied by action. But there are other things  
2 that must be considered. And the only way to consider them  
3 is to start at the bottom to see whether or not hopefully  
4 legislation like this will assure those of you that might be  
5 sitting as jurists some day whether or not this is frivolous  
6 and whether it's going to take time up and if it's going to  
7 remove the right of an individual's day in court. That's my  
8 main concern.

9 MR. CHAIRMAN: Thank you very much. Any additional  
10 questions?

11 REPRESENTATIVE MAITLAND: I don't have a question but  
12 just a couple comments. First of all, Mr. George, I'm not  
13 an attorney, however, no offense was taken. Secondly --

14 REPRESENTATIVE GEORGE: If you'll permit me this  
15 observation.

16 MR. CHAIRMAN: I think you're two and two up here as  
17 far as attorneys up here.

18 REPRESENTATIVE GEORGE: I apologize. I know the  
19 gentleman Mr. Daley is an attorney and the gentleman on his  
20 right. So I'm sorry if that isn't so, but I didn't mean it  
21 in any manner other than in great pride.

22 REPRESENTATIVE MAITLAND: I'd just like to say that as  
23 a co-sponsor of the bill, I'm very supportive of it. And  
24 unless I hear some other testimony today that would lead me  
25 to believe that there's some serious flaws in the

1 legislation, I'll continue to be very supportive.

2 I've had constituents that have suffered SLAPP suits  
3 and concerned citizens who are responsible for developments  
4 and are sued for civil rights violations by bible conference  
5 seeking to develop in my County. And also sued were two  
6 townships in the County of Adams, the planning commission  
7 and various individuals. And I think there is great need  
8 for this kind of legislation. And I look forward to the  
9 testimony today. And thank you for introducing that.

10 MR. CHAIRMAN: Representative Daley?

11 REPRESENTATIVE DALEY: Thank you, Mr. Chairman.  
12 Representative George, Section 4, motion to strike, could  
13 you explain to me the difference between a motion to strike  
14 and a -- what is commonly referred to as a 12D6 summary  
15 judgment motion that is presently available as a remedy  
16 through the courts?

17 REPRESENTATIVE GEORGE: You might have to correct me  
18 but I'm advised that this was drafted that this makes it a  
19 special motion that allows this to take place in this  
20 instance, just it's normal what you would be use to. But  
21 because of the fact that there has to be some effort in  
22 order to eliminate all of the frivolous parts of this motion  
23 put in by the legislature. Your own separate district would  
24 be not only acceptable but constitutional as well. And the  
25 courts would abide by it. You would know better than I.



1 REPRESENTATIVE DALEY: Well, my understanding under  
2 the rules of civil procedure is that there is a mechanism in  
3 place that would afford someone a motion for summary  
4 judgment; in essence basically what you're doing in this  
5 language under current law, under rules of civil procedure.  
6 Am I correct? Can someone correct me or --

7 MR. CHAIRMAN: I think the difference is that summary  
8 judgment can follow depositions and discovery and a lot of  
9 lengthy and costly, you know, information finding. Whereas,  
10 the motion to strike would come much more quicker in the  
11 process. And therefore, there would be less delay and less  
12 cost incurred.

13 REPRESENTATIVE DALEY: Well, let me ask you this  
14 question then, Mr. Chairman, and I know you're very adapt to  
15 this information. But a motion for summary judgment can  
16 come at any time, however, the window for that opportunity  
17 does rest somewhere -- it could rest somewhere further in  
18 this process but it can be early in the process if the  
19 defendant wishes to exercise that right. Am I correct?

20 MR. CHAIRMAN: Well, yeah, that's correct. It can  
21 come earlier in the process or later in the process.  
22 Representative George's Legislation provides that this  
23 special motion be found within 60 days of service of the  
24 complaint or at a later time at the court's discretion.

25 And I think that this would expedite a decision on

1 whether it's a frivolous suit or a suit brought to be  
2 factious in nature without going through the delay, the  
3 depositions, etc. I think if you -- if you would move for a  
4 summary judgment within 60 days, the court may say, well,  
5 you know, we have discovery procedures, and we have  
6 interrogatories, and let's not just let this process go  
7 through discovery before I make a decision.

8 I think we're giving these types of suits special  
9 status that the legislature, if this passes and becomes law,  
10 wants to give those suits because of the inherent nature of  
11 them.

12 REPRESENTATIVE DALEY: Okay. Thank you, Mr. Chairman.  
13 My second question would be I know there appears to be a  
14 ground swell and a rush to protect those citizens among us  
15 that have certain constitutional rights that we want to  
16 obviously protect in these types of situations. But what  
17 happens to those entities that also have the same  
18 constitutional rights that may be afforded by this type of  
19 legislation? And I'm concerned about that. Does this  
20 legislation take into consideration for those circumstances?

21 REPRESENTATIVE GEORGE: Mr. Daley -- I was going to  
22 say Mr. Chairman. I just lost it for a moment. I've known  
23 you well and I didn't lose your name. I was trying to hear  
24 what you said and talk to the gentleman to my right. you  
25 know better than I that this does not eliminate anyone from

1 bringing forth a suit. I apologize in that the gentleman --  
2 the Chairman answered the first question much better than I.  
3 This is what we were told when we had done such extensive  
4 research, Mr. Daley, that the purpose of this is if there is  
5 a legitimate suit, then let's get at it within that 60 days.

6 Any judge can ask for information should he be  
7 favorable to the plaintiff and carry this out for years.  
8 And that's where the problem is. No one is saying that  
9 someone shouldn't have their right to sue. But when they  
10 sue for frivolous motion, when they sue to intimidate, when  
11 they sue to cause great grief and cost to an individual to  
12 remove a legitimate objection to a condition that has arisen  
13 that's contrary to the issuance of a permit by the  
14 Department, then who are we to say that the plaintiff should  
15 always have his right. And the defendant has no right  
16 simply because we insist that we're going to break him  
17 before he even gets there. And that's the only answer I  
18 have, Mr. Daley.

19 MR. DALEY: I understand that, Mr. Chairman. Mr.  
20 George is the Chairman of one of the Committees. I'm  
21 concerned about the language where we're talking about the  
22 furtherance of First Amendment rights and the intent of  
23 their communications on generally procuring -- and this is  
24 what I'm reading from your writing -- a favorable government  
25 action.

1           And Section 3 deals with immunities from suits and so  
2 forth. I'm concerned about that language because there are  
3 things that are really very hard to find. And it's up to  
4 the discretion of the court to define intent and try to  
5 measure one's intent.

6           So I wanted you to know that I do have concern about  
7 those two issues. And I'll do my research to determine if  
8 it merits my support.

9           MR. CHAIRMAN: Let's explore something that  
10 Representative Daley touched on. Would this legislation  
11 apply both ways? Okay. Let's say you have a small business  
12 who wants to get a permit from DER for some reason and you  
13 end up with a well-financed citizens group. And DER goes  
14 through the review process and they grant this gentleman a  
15 permit. And then you have a well-financed non-profit  
16 organization or whatever who will then begin to appeal the  
17 issuance of that permit in order to have the small or less  
18 financial individual say, well, this isn't worth it, I'm  
19 going to give my permit up.

20           REPRESENTATIVE GEORGE: Let me say this, we had  
21 discussed a moment ago, Mr. Chairman, the language insisted  
22 upon by the Department that I think would touch on what you  
23 just said. Embarrassingly, I'm not as knowledgeable as those  
24 of you that have spoken in regard to the law. That's why  
25 I've never been sued. So I haven't experienced that kind of

1 harassment. But to be sued when you're right, in my  
2 opinion, is harassment.

3 And this law that we propose to you and your Committee  
4 doesn't remove the right from the affluent. For an example,  
5 in my home town, 14 years ago, the water supply was ruined  
6 for 12,000 people. It took 12 years for the Environmental  
7 Hearing Board to adjudicate in their mind and insist that  
8 the operator was guilty. The moment that that decision was  
9 reached, the operator then took that decision to the  
10 Commonwealth Court. It's been ongoing for three years.

11 Now, those of us that know very little about law but  
12 yet read the pretentious language about the matter of a  
13 judicial decision should be appropriate and should be  
14 quickly that all decisions should be fathomed. Then how  
15 does a person have his day in Court when on this side you  
16 have the affluent that can carry it and appeal it. And you  
17 have this poor little old lady who is on Social Security and  
18 didn't know that she was doing wrong when she went to this  
19 legislator to say look at my basement, my furnace is out.  
20 There is six foot of water. And we walked with two  
21 secretaries of DEP, the one now, his predecessor and we  
22 could see the lawn rolling up like a carpet. It was  
23 violated so greatly with iron and manganese.

24 Now, if, in fact, we have lawsuits, rightfully so.  
25 But when they're pretentious and when they're only placed in

1 position so as to intimidate and harass, then I leave it up  
2 to you of legal mind to find the true answer to protect the  
3 people who have those rights. And if, in fact, they don't  
4 have those rights, then we fail them miserably. I thank  
5 you, Mr. Chairman.

6 MR. CHAIRMAN: Thank you. Any more questions,  
7 Representative Daley?

8 REPRESENTATIVE DALEY: No. Thank you, Mr. Chairman.

9 MR. CHAIRMAN: Representative Caltagirone?

10 REPRESENTATIVE CALTAGIRONE: Thank you, Mr. Chairman.

11 I did want to recognize two of my staff researchers that are  
12 here with us today; Sandra Dui and Galina Milohov.

13 Mr. Chairman, George, the Pennsylvania Chamber of  
14 Business and Industry had sent us some information about  
15 this particular legislation. I had read it last night. And  
16 I'd like to ask you; they make a quote here and I'd like to  
17 share it with you. And I'd like to find out what your  
18 reaction to this quote is.

19 And of course, they elaborate on some of the issues  
20 that are raised in this legislation. But one of the things  
21 in the beginning of this literature that they had sent to  
22 the Members of the Committee, they say and I quote, "we are  
23 unaware, however, as recited in the legislation of any  
24 disturbing increase of lawsuits brought primarily to chill  
25 the valid exercise of the constitutional rights of freedom

1 of speech." I take it from that comment, whoever put this  
2 together from the Chamber, that they're unaware of, from  
3 their point of view, of the disturbing number of increases  
4 in lawsuits.

5 REPRESENTATIVE GEORGE: Well, I don't think that if  
6 we're going to categorize, as I said much earlier in my  
7 testimony, you won't see anything on the docket that says  
8 SLAPP suit. Naturally, the Chamber has an awesome  
9 responsibility to go to bat for those that pay their dues  
10 for members and etc.

11 I want to say this in clarity, I've been a Member of  
12 this General Assembly for 22 years. And God willing, I'll  
13 be here for another two years. And it's never been my  
14 purpose even though some might blame me of being again in  
15 the industry. If the cold industry wasn't viable, my family  
16 business wouldn't prosper. Anyone that would bite off his  
17 own nose despite his ears is either pretty dumb or doesn't  
18 know where he comes from.

19 This legislator has never imposed this legislation.  
20 And I want those in prisons to hear that it made it  
21 difficult to mine coal or to contain any other type of  
22 industry or whatever.

23 But in my opinion, those that we take issue such as  
24 the Chamber, those things that we call reserves, those  
25 things that we call resources, I think they're a major put

1 down in place so that we could take advantage of the  
2 utilization. But he also put things like water in the same  
3 resource equally important. And if we're going to mine or  
4 produce and at the same time ruin another resource, then  
5 we're wrong. And if we're not wrong, then we should go back  
6 and take DER or DEP out of business because we're the ones  
7 that put them in.

8         And we said this shall be your task. It shall be to  
9 make sure that you maintain the integrity of the  
10 environment, water, air, whatever. Also, it gives us that  
11 protection in the law to people's person and property. So  
12 they can say that they're not aware of it. But we know of  
13 nine states and six more that are going after it. We've got  
14 five of those type of retorts now. And I'll guarantee you  
15 they'll be others coming forth and say to you, yes, we have  
16 been bludgeon to this type of action. The Chairman said it  
17 better than I. This doesn't do anything to remove a  
18 possibility of a legitimate suit.

19         The Chamber, I understand their position. I'm only  
20 sad that they don't understand the position of the masses  
21 and that we don't legislate for the vested interest, we  
22 legislate for the common interest.

23         REPRESENTATIVE CALTAGIRONE: Thank you, Mr.  
24 Commissioner. Thank you, Mr. Chairman.

25         MR. CHAIRMAN: Any questions, Counsel Andring?



1 COUNSEL ANDRING: You had mentioned the lawsuit that  
2 had been filed in Pittsburgh. Do you know if that was filed  
3 in State Court or Federal Court?

4 REPRESENTATIVE GEORGE: It was in Federal Court.

5 COUNSEL ANDRING: That then I think raises something  
6 that you might want to consider; the question of how you  
7 actually develop an effective deterrent for these suits that  
8 are bought in the Federal Court system. The legislature as  
9 I read it would apply to State Court actions.

10 If I were an attorney advising someone who wished to  
11 pursue a vexatious lawsuit against someone in these  
12 circumstances, and I was unscrupulous to the extent that I  
13 would pursue that on their behalf, and this type of law were  
14 in affect in the state, the first thing I would do is go to  
15 Federal Court and file it under the pretext of some sort of  
16 Federal violation.

17 So I simply raise that point with the thought that  
18 perhaps we need to incorporate within the bill something  
19 more in terms of additional penalties, be it civil fines, be  
20 it punitive damage actions for those people who would bring  
21 such a groundless suit to Federal Court and have them  
22 subject them to a further action in State Court as a  
23 deterrent to their actions.

24 REPRESENTATIVE GEORGE: If I may respond, Mr.  
25 Chairman, I don't know what we can do to deter actions with

1 the Federal Court. But I know our responsibility is to  
2 deter these type of activities in the State Court. And when  
3 this case was first initiated, that I bring forth to you, it  
4 went into the Common Pleas and the judge, after reviewing  
5 it, kicked it out; not being deterred then the operator went  
6 forth.

7 But what if it would have been in the Court of Common  
8 Pleas or for some reason the judge would have felt for some  
9 reason that the case was legitimate, they would have gone  
10 and expect the same kind of money in a state system. That's  
11 my concern. Thank you.

12 MR. CHAIRMAN: Okay. Seeing no further questions, we  
13 thank you very much for your testimony this morning and  
14 bringing this matter before the Subcommittee. And if you  
15 and your staff would like to join us up here if your  
16 schedule permits.

17 REPRESENTATIVE GEORGE: If it's okay with you, we'll  
18 just sit here.

19 MR. CHAIRMAN: Okay. Fine. Thank you. The next  
20 individual to testify on House Bill 281 will be Professor  
21 Robert D. Richards. He is the Director of the Pennsylvania  
22 Center for the First Amendment Penn State University,  
23 University Park, Pennsylvania. Professor Richards?

24 PROFESSOR RICHARDS: Thank you very much. Chairman  
25 Clark and Members of the Judiciary Committee, let me begin

1 this morning by thanking for the opportunity to be here and  
2 testify on House Bill 281 which provides for the protection  
3 of public participation in environmental matters.

4 As you just heard, I'm the Founding Director at the  
5 center of Penn State called the Center for the First  
6 Amendment. And we have been particularly interested in  
7 tracking SLAPP suits for the past five years.

8 As I begin this morning, I'd like to also commend  
9 Representative George and Representative Maitland and  
10 several other sponsors of House Bill 281 for introducing  
11 this important measure into the General Assembly. The bill  
12 is a corrective measure. It helps to correct an injustice  
13 that has been occurring in this Commonwealth and, indeed,  
14 cross the United States.

15 Thousands of individuals have been sued for speaking  
16 out against an activity of business in their communities.  
17 Typically, as you heard in Representative George's  
18 testimony, the cause of action is defamation or interference  
19 with a business relationship, professional disparagement,  
20 and even civil conspiracy. These reputation and business  
21 torts encroach upon an area of long-established  
22 constitutional doctrine---the Petition Clause of the First  
23 Amendment. Legal Scholars have coined the acronym  
24 SLAPP---Strategic Lawsuits Against Public Participation.

25 It's no secret that the founders of this nation

1 intended for the citizens to have an ability to communicate  
2 with their representatives. Moreover, I think I can safely  
3 say today that our founders never envisioned the use of  
4 legal process for the sole purpose of thwarting that vital  
5 communication between constituents and their government.  
6 But that's precisely what's happening with SLAPP suits.  
7 Individuals and groups who attempt to have their voices and  
8 opinions heard are figuratively "clubbed" into submission by  
9 onerous protracted litigation, or even just by the threat of  
10 it.

11 SLAPPs have stemmed from citizens appearing before  
12 governmental bodies, such as this one. They have also been  
13 triggered by letters to the editor, events staged by  
14 activists and community drives. Citizens have been sued for  
15 calling their government officials, criticizing government  
16 actions or policies. SLAPP suits clearly have a negative  
17 impact on the target, but they also have a "chilling effect"  
18 on others who might have the urge to contact government. In  
19 fact, a common tactic of the SLAPP plaintiff is to file the  
20 case against a named defendant or defendants and an  
21 additional number of "John Does." For example, in one case  
22 in which I was involved in Maryland as a "friend of the  
23 court," the caption included "100 John Does." The  
24 additional "John Does" is a subtle reminder to the other  
25 citizens in the community that they, too, may be added to

1 the lawsuit should they choose to speak out---that is,  
2 should they exercise their rights under the First Amendment.

3         Nine states have enacted legal protections against  
4 these harassing lawsuits. In measures such as the one  
5 before us here today, underscore the importance of the  
6 citizens' right to communicate their views to the  
7 government. They also send a strong message, even by their  
8 very enactment, to those who plan to use litigation  
9 improperly. The citizens of this Commonwealth should feel  
10 comfortable speaking out on an issue, without fear of a  
11 multi-million dollar lawsuit draining their energies and  
12 their financial resources.

13         The problem nationwide has become so widespread that  
14 three years ago the Attorney General for the State of  
15 Florida did a study of Slapps in that state. The conclusion  
16 of the report, prepared by Attorney General Robert  
17 Butterworth's office, was that "many Floridians believe that  
18 their public participation activities, particularly in  
19 opposition to development proposals, have resulted in actual  
20 or threatened SLAPP lawsuits." The report went on to say  
21 that as Florida grows, SLAPPS too will increase and the  
22 challenge for the "state will be to ensure that the right to  
23 participate in the democratic process is not subverted  
24 through the use of litigation tactics whose sole purpose is  
25 to silence opposition."

1           That report prompted me to investigate further the  
2 situation there because Florida is a state with a high  
3 degree of land-use activity, and such states are typically  
4 fertile ground for SLAPP suits. In one such lawsuit, a  
5 lawyer representing an environmental group was sued  
6 personally, along with the members of the group. The  
7 lawsuit against him was dismissed on summary judgment, but  
8 he reported to me that because the SLAPP plaintiff named him  
9 personally in the lawsuit, his legal malpractice carrier  
10 dropped him after the suit ended, despite the favorable  
11 ruling. These "below-the-belt" tactics are the trademark of  
12 the SLAPP filer.

13           My work on Slapps has put me in contact with numerous  
14 families who have been targeted in these lawsuits. I can  
15 attest to the fact that these families have experienced  
16 undue hardship and have been placed under great stress by  
17 the burden of protracted litigation. In a case from  
18 Frederick County, Maryland, just over the Pennsylvania  
19 border, a number of citizens were subpoenaed for depositions  
20 in a SLAPP case. These citizens had shown up at a meeting  
21 because they were opposed to a trash hauler who was trying  
22 to bring trash imported from other states into an area  
23 landfill. As might be expected, the citizens were worried  
24 about the impact of such waste hauling on their small  
25 community's resources.

1           During the depositions, the plaintiff's attorney asked  
2 these citizens questions concerning the value of their  
3 homes, the value of their automobiles, and other questions  
4 directly related to their personal assets. This line of  
5 questioning was designed solely to scare these citizens (and  
6 others in the community) and to intimidate them into quiet  
7 submission.

8           Unfortunately, the intimidation works. Many community  
9 groups have been fractured by the stress of litigation. As  
10 one SLAPP target recounted to me, soon people become so  
11 engrossed by the lawsuit, that they forgot about the issue  
12 at hand. Citizens who once were actively involved in an  
13 issue distance themselves from the named defendants in the  
14 hope that they will avoid the lawsuit. As the case drags  
15 on, the legal expenses continue to climb for the SLAPP  
16 targets, often forcing them to capitulate to the terms of  
17 the filer. That typically translates into an agreement not  
18 to oppose the project. In one such Florida case, the  
19 settlement of the SLAPP included an injunction (approved by  
20 the court) against the citizen forbidding her "from any  
21 participation at any homeowners' meeting regarding any  
22 claims she had made in the past...." The woman said a lack  
23 of funds to continue fighting forced her to settle the case  
24 and give up certain of her First Amendment rights "by  
25 agreement of the parties."

1           It is somewhat ironic that we in the United States  
2 recoil when see governments of other countries suppress the  
3 speech rights of their citizens. Yet, there has been  
4 relatively little public outcry about the use of legal  
5 process in this country to accomplish the same goal. I  
6 submit to you that the reason is the public, in large part,  
7 is unaware the nature of this problem. Judges and lawyers  
8 need further education about it. This year, for the first  
9 time to my knowledge, the issue was a topic in a  
10 Pennsylvania Bar Institute continuing legal education  
11 program. I know this to be true because I taught the  
12 course. But there is still much more to do.

13           That is one of the reasons House Bill 281 is a vitally  
14 important piece of legislation. It contains several  
15 provisions that go directly to the heart of using process as  
16 a weapon. Section Four---Motion to Strike is just such a  
17 provision. It requires a court to strike the lawsuit  
18 "unless the court determines that the plaintiff has  
19 established that there is a substantial likelihood that the  
20 plaintiff will prevail on the case." This imposes a proper  
21 burden on the plaintiff essentially to prove up front that  
22 there is merit to the claim. We cannot stop SLAPP  
23 plaintiffs from filing these lawsuits, but we can ensure  
24 that a meritless lawsuit is not allowed to continue down the  
25 litigation track and thereby drain the targets financially



1 and emotionally.

2 Another important piece of this bill is Section Five,  
3 which permits recovery of attorneys fees and the costs of  
4 litigation. The costs associated with defending a SLAPP can  
5 be extraordinary. The Florida woman I mentioned previously  
6 had to give up her fight because she ran out of money. A  
7 Pennsylvania woman who won her SLAPP case at trial with  
8 legal representation is now preparing to defend the  
9 business's appeal of the verdict, without the aid of counsel  
10 because she ran out of funds. Courts can clearly be a level  
11 playing field, if individuals can afford the price of  
12 admission. These citizens are putting their modest  
13 resources up against the vast resources of corporations. At  
14 the end of the day, the citizens will prevail, but it may  
15 have cost them their life savings in the process. This  
16 provision does indeed help level the playing field in SLAPP  
17 actions.

18 The third and perhaps most important part of House  
19 Bill 281 is Section three--Immunity from Suit. Substantive  
20 immunity for remarks made<sup>4</sup> in furtherance of their First  
21 Amendment rights is the only way to truly ensure citizens  
22 the full scope of protection. Earlier in my remarks I  
23 suggested that Pennsylvania's citizens should feel secure in  
24 communicating their views to government---safe in the  
25 knowledge that they will not lose their life's assets for

1 simply exercising their constitutional rights. This  
2 provision helps accomplish that and is therefore an  
3 essential part of the legislation.

4 As I see it, House Bill No. 281 serves a three-fold  
5 mission. First, it provides the citizens of Pennsylvania  
6 with the protection they need to operate as shareholders in  
7 the democracy. Second, it helps educate all of us who may  
8 be unaware that Slapps are becoming all too common. And  
9 third, it sends a strong warning to those who intend to use  
10 legal process for bad faith purposes.

11 In closing, let me say that Representative George and  
12 the other sponsors of this bill have taken an important step  
13 in safeguarding the free-speech rights of all  
14 Pennsylvanians. I hope this Committee will, too. I thank  
15 you for inviting me here this morning, and I will be happy  
16 to answer any questions that you may have.

17 MR. CHAIRMAN: All right. Thank you very much,  
18 Professor Richards. Any questions of the Professor?  
19 Counsel Andring?

20 COUNSEL ANDRING: Just one very brief question. Is it  
21 your experience that these suits are generally based on  
22 state law actions as opposed to being phrased in terms of  
23 some federal constitutional violation?

24 PROFESSOR RICHARDS: While I don't have figures in  
25 front of me, clearly the cases that I have examined over the

1 years have been state court actions. Typically because  
2 they're in the community, there's no provision that allows  
3 them to move into federal court unless there's some type of  
4 diversity issue that can get them in there. For the most  
5 part, they're filed in State Courts.

6 MR. CHAIRMAN: Representative Daley?

7 REPRESENTATIVE DALEY: Yes. Professor, your  
8 familiarity with some of the other standing acts in other  
9 states, under Section Three, do other states have the same  
10 language as they have in line 29 and 30 where it says, in so  
11 many words, that a person who acts in furtherance of the  
12 person's right of petition or free speech under the  
13 constitution shall be immune from civil liability in any  
14 action regardless of intent or purpose?

15 PROFESSOR RICHARDS: This is language that comes  
16 actually from a model bill that we support for SLAPP suits  
17 across the country. It has been -- it has been adopted in  
18 several states that have the anti-SLAPP Legislation. And it  
19 is I think a good -- it's good language because it does  
20 provide the right of the citizens. It gives them the secure  
21 feeling that they know that when they petition their  
22 government, they're protected. They're protected by the  
23 First Amendment's Petition Clause, by the State  
24 Constitution's Petition Clause.

25 And in this case now, if this is adopted, they'd be

1 protected by Section Three given that immunity which is what  
2 they need. It is what lawmakers have when they're on the  
3 House of Representatives. There's an immunity that you  
4 can -- gives you that feeling that you can speak out, that  
5 you can say what you need to say without worrying about  
6 being dragged into court to answer really what are frivolous  
7 charges in these cases.

8 REPRESENTATIVE DALEY: Does this also give the citizen  
9 the right to say anything they want to say?

10 PROFESSOR RICHARDS: No, it doesn't because the second  
11 page adopts some language which has been brought out in U.S.  
12 Supreme Court cases. And they usually drive some anti-trust  
13 litigation. If the citizen is trying to perpetrate a sham,  
14 and I use that as a legal term of art, then the immunity  
15 here would dissolve. If their action is not genuinely aimed  
16 at procuring a favorable government action, then the  
17 immunity does dissolve.

18 So I think there's adequate protection for business  
19 here. As Representative George said in his testimony this  
20 morning, there's nothing in this legislation that's designed  
21 to stop -- to take away any rights of business. They can  
22 file. If they have a legitimate claim, they can proceed.

23 What this bill does is help to stop the claims that  
24 are not legitimate. That's what we mean by a SLAPP suit.  
25 Suits that are strategically planted against people to stop

1 their public participation. That's not a legitimate aim of  
2 litigation. The courts are not open so that people can use  
3 the courts as a club, as a weapon. They're there to resolve  
4 legitimate disputes. And there's nothing in this  
5 legislation that will stop legitimate suits of business from  
6 going forth.

7 REPRESENTATIVE DALEY: I still fail to see how the  
8 exception really validates the opening language of that  
9 paragraph that -- my concern is the language is not  
10 generally aimed at procuring a favorable government action.  
11 I think anyone can say I'm generally concerned about that.  
12 However, it may not be their intent whatsoever.

13 PROFESSOR RICHARDS: Well, the law has certain ways to  
14 prove intent. Intent is an element in most defamation  
15 cases. Any public figure defamation case, you have to prove  
16 the intent of the defendant. So there are -- there  
17 certainly is a long-established tradition in law approving  
18 intent.

19 That would have to be done in such a case to prove  
20 that the communication is not generally aimed at procuring a  
21 favorable government action. What's meant by that in  
22 anti-trust litigation is if you have a group that's coming  
23 in trying to maybe get the same advantage that the group  
24 that is petitioning or that is trying to get a permit or  
25 trying to get a license or something like that. Let's say a

1 second group comes in and wants that license and so they  
2 file all these actions or they try to halt or delay the  
3 process so that they can get in there and get the favorable  
4 result.

5 That's what this type of language ensures that doesn't  
6 have it. The rights of citizens to appear before the  
7 government body is as old as the democracy itself. That's  
8 how this -- that's the meaning of a democracy. That is  
9 where these types of disputes should be solved. They should  
10 be solved in rooms like this. They should be solved in  
11 rooms such as planning boards all across the Commonwealth.  
12 They should not be handled in courtrooms where the vast  
13 resources of a corporation to file discovery; end less  
14 discovery, depositions, interrogatories, go up against  
15 someone who now has to secure counsel, who now has to pay  
16 for it.

17 I've talked to numerous people; some of whom have  
18 spent literally tens of thousands of dollars defending a  
19 case that is eventually dismissed on a summary judgment or  
20 at trial and is favorably disposed in trial in their favor.  
21 And so what do they win? They win the lawsuit. They  
22 prevail. But in the process, an ordinary citizen, just like  
23 everybody in this Commonwealth, has lost an enormous amount  
24 of money in defending that right. That shouldn't happen.  
25 That should not be the way democracy is supposed to

1 function.

2           People should feel that they can go to a zoning board  
3 hearing. They can go to a planning commission meeting and  
4 speak out the way they feel appropriate for them, and not  
5 have to worry about a summons being handled by a process  
6 server to them in the ensuing weeks for a several million  
7 dollar lawsuit which they now have to get an attorney to  
8 defend.

9           It's an unfortunate situation. What's more  
10 unfortunate is it's a growing situation that Representative  
11 Daley had a question earlier for -- or I think it's  
12 Representative Caltagirone who might have read the business  
13 and industry statement, and they're not aware of it.

14           Well, I can certainly point them to some research that  
15 has been done by the political litigation project at the  
16 University of Denver which can document the numbers of these  
17 lawsuits and the fact that they are growing. It's  
18 unfortunate.

19           It's a double edge sword any time I go out to appear  
20 before a body like this, to do a talk show appearance or  
21 even teach a -- I think the real double edge sword is when I  
22 did the PBI session because there were an awful lot of  
23 attorneys in that audience who were taking copious notes  
24 because they knew that's what they wanted to go back and  
25 file. They represented businesses and said, yeah, that's

1 not a bad idea. I can use this in -- and I get those kinds  
2 of calls believe it or not. And even when I'm doing a radio  
3 talk show or doing a piece in the newspaper, I'll get -- a  
4 piece I did in the Washington Post several years ago ended  
5 up at a land-use lawyer's conference saying, hey, this isn't  
6 a bad idea.

7 This is how you keep some of these troublemakers  
8 quiet. So it's a double-edge sword. I don't have the power  
9 that you ever to enact some legislation that will stop that  
10 type of use. So I hope that you can use that power and help  
11 the citizens of this Commonwealth.

12 REPRESENTATIVE DALEY: Thank you, Mr. Chairman.  
13 Counsel Preski?

14 COUNSEL PRESKI: Professor, I have just a few  
15 questions. One of the things I heard when you discussed  
16 this bill before the Committee is that why are we giving  
17 special protection to environmental speech? There's been  
18 debates in this General Assembly so far concerning issues  
19 such as Workmen's Comp, school vouchers and other issues.

20 My question is in this bill we give special protection  
21 to speech that is environmental. Given your comments that  
22 you've made now and responsive questions from Representative  
23 Daley, you said basically that the impetus for the company  
24 in filing a lawsuit against a private citizen is that the  
25 private citizen does not have the resources to defend



1 properly the suit. And then if they are victorious or if  
2 they are successful, all that they get is the hollow victory  
3 of the dismissal.

4 My question is given that this Bill 281 is rather  
5 limited in its focus to environmental suits, may it not be  
6 better that this Committee look at legislation that would  
7 allow for the recovery of attorney's fees for people subject  
8 to such suits? Would that added protection give people who  
9 speak on other issues; issues on voting rights, issues on  
10 Workmen's Compensation, the same protection that we seek to  
11 inquire about here?

12 PROFESSOR RICHARDS: A couple of points and they're  
13 very good ones. When I first testified on this bill a  
14 couple of years ago or similar bill a couple of years ago, I  
15 had suggested to the Committee that they change the scope of  
16 the bill to make it wider. That in the states that have  
17 adopted anti-SLAPP legislation, it does not simply provide a  
18 protection for people who are addressing solely  
19 environmental issues. I was pleased to see one of the other  
20 suggestions I had was the substance of immunity which has  
21 appeared in the current bill.

22 Probably the vast majority of these types of lawsuits  
23 do encompass environmental matters in one way or the other.  
24 So for that reason, I'm certainly supportive of it. I would  
25 also support a broadening of the protection and the scope of

1 the bill to cover all citizens involving all matters of  
2 public petition, not just environmental matters.

3           Broadening -- the attorney fees provision here is a  
4 good one and it works to help level the playing field as I  
5 said in my introductory remarks. To revisit attorneys fees  
6 wide scale, it's going to be I think a little bit more  
7 difficult to do. I think we have to look at things  
8 practically speaking. And I think practically this bill  
9 does -- will be very effective for the citizens of  
10 Pennsylvania.

11           Down the line there may be legislation or court  
12 decisions that help broaden the protection of it. I don't  
13 know. But I think what we're dealing with before us today  
14 is a vital piece of legislation that you would certainly be  
15 helping the citizens of the Commonwealth by enacting it.

16           It's certainly not something -- maybe it's not  
17 perfect. Maybe there's better protection or a wider scope  
18 of protection. But I think it is an excellent starting  
19 point to help citizens participate fully in the democracy.

20           COUNSEL PRESKI: Do you have any concerns about the  
21 motion to strike that's set up within this bill that's being  
22 violative of the Supreme Court's rulemaking authority under  
23 the Constitution?

24           PROFESSOR RICHARDS: I don't think so. The motion to  
25 strike -- I think Representative Daley talked about 12B6

1 motions under the Federal Rules of Civil Procedure which  
2 allow for a suit to be dismissed for failure to state a  
3 claim. There's similar provisions in the state laws under  
4 preliminary objections. And you can file demurs and so  
5 forth.

6           What this does, however, is requires a court. It will  
7 make a court take notice of this type of suit. If the  
8 defense, the target, casts the defense in terms of the  
9 lawsuit, raises the -- SLAPP suit rather -- and raises the  
10 statute, they then will have to take notice and handle the  
11 case quickly. A quick disposition of these cases is  
12 essential. That's where these cases --

13           COUNSEL PRESKI: Professor, if I may interrupt.

14           PROFESSOR RICHARDS: Sure.

15           COUNSEL PRESKI: You seem to have estrayed from the  
16 question. A motion to strike is currently not within or any  
17 other motion practice apart from preliminary objections are  
18 not within Pennsylvania law currently. Is that not correct?

19           PROFESSOR RICHARDS: That's correct to my knowledge.

20           COUNSEL PRESKI: Current practice would require the  
21 filing of preliminary objections then a subsequent motion  
22 for summary of judgment. This motion to strike would be  
23 prior to the motion for summary judgment. I assume this  
24 would be a 12B6 motion immediately upon service of the  
25 complaint and before the answer is even -- before the answer

1 is filed.

2 PROFESSOR RICHARDS: The defendant should have to  
3 plead in their pleadings to make sure that the claim is  
4 understood. And as I understand this provision, it would  
5 require the court to take a quick action on it to take  
6 notice.

7 COUNSEL PRESKI: I'm asking your opinion. Do you  
8 think this is pre-answer?

9 PROFESSOR RICHARDS: Do I think it's pre-answer?

10 COUNSEL PRESKI: Motion 12B6?

11 PROFESSOR RICHARDS: I think it can be pre-answer.

12 COUNSEL PRESKI: Okay. Then my question is that given  
13 that Pennsylvania does not have such a practice, do you  
14 think that would be violative of the Supreme Court's  
15 Rulemaking Authority because we would be then in turn almost  
16 adopting a federal practice within Pennsylvania law?

17 PROFESSOR RICHARDS: Well, I think it's a practice  
18 that has been adopted in other states. I think it is  
19 something that is necessary. I think it is something that  
20 in these suits, since the whole goal of these lawsuits is to  
21 drag out the expenses for the targets there has to be  
22 something in there.

23 A summary judgment is not going to be -- is not  
24 enough. A summary judgment is under current law, the  
25 summary judgment generally requires some discovery be taken.

1 That is where these suits are protracted. And that's where  
2 the expenses are brought in. Citizens who have the right to  
3 speak out should not have to wait.

4 And the substantive immunity of this bill then gives  
5 them that right. So as soon as they show up and they start  
6 speaking, they are immune by the very provisions of this  
7 bill. So I don't think it is beyond the scope of the law to  
8 then say if you are given an immunity by the law, then you  
9 should be able to get out of the lawsuit in a very quick  
10 fashion because the lawsuit should not have been filed in  
11 the first place.

12 COUNSEL PRESKI: Thank you, Professor. I presume I'll  
13 be facing those same questions. Thank you.

14 MR. CHAIRMAN: Any further questions of this witness?  
15 Excuse me, let me acknowledge and welcome Representative  
16 Hennessey from Chester County who just walked in and is  
17 seated at the table. Do you have any questions of this  
18 witness?

19 REPRESENTATIVE HENNESSEY: No, thank you.

20 MR. CHAIRMAN: Thank you very much, Professor.

21 PROFESSOR RICHARDS: Thank you.

22 MR. CHAIRMAN: The next individual to testify in front  
23 of this Committee on House Bill 281 is Larry Frankel who is  
24 the Executive Director of the American Civil Liberties Union  
25 in Pennsylvania; commonly known as the ACLU. Mr. Frankel?

1 MR. FRANKEL: That's correct, Chairman Clark. Thank  
2 you very much. And before I get started, let me caution  
3 your fears that my testimony is very lengthy. I attached to  
4 the back copies of all of the statutes passed by other  
5 states. So I would ease somebody's research assignment if  
6 such should be made. And if there's questions about other  
7 states, we have them right here.

8 I appreciate being invited to testify today and  
9 present the ACLU's position on this bill. No right is more  
10 important or more basic than the First Amendment right of  
11 free speech. And yet, that essential right is increasingly  
12 under assault as companies pursuing projects that prompt  
13 opposition adopt aggressive tactics of intimidation to  
14 silence their critics. Ordinary citizens who have spoken  
15 out at meetings or voiced criticism through letters to the  
16 editor published in newspapers are being slapped with  
17 lawsuits designed for no other purpose than to discourage  
18 further opposition.

19 That's what was written by the editorial writers of  
20 the Harrisburg Patriot, Sunday, July 17th, 1994, two years  
21 ago shortly after Representative Bud George first introduced  
22 legislation to combat what has become popularly known as  
23 SLAPPS - Strategic Litigation Against Public Participation.

24 The ACLU of Pennsylvania agreed with the opinion  
25 expressed by the Harrisburg Patriot then, and we continue to

1 support the passage of anti-SLAPP legislation. Such  
2 legislation is necessary to protect the right of free speech  
3 as well as the right to petition the government for redress  
4 of grievances. We think that a careful balance can be  
5 struck between the need to provide legitimate access to our  
6 courts and the interest in preventing lawsuits directed at  
7 inhibiting First Amendment rights.

8           Apparently, the Pennsylvania House of Representatives  
9 also agrees with the sentiments expressed in the Harrisburg  
10 Patriot editorial when it passed House Bill 2971, last  
11 session's version of this legislation, by a vote of 199 to  
12 zero on October 5th, 1994. I would point out that the  
13 first time a bill was supported by the ACLU was adopted  
14 unanimously by the Pennsylvania House of Representatives.

15           MR. CHAIRMAN: Excuse me one minute, I was just going  
16 to say there will be some people taking the temperature that  
17 would agree with the ACLU and the Patriot News than this.

18           MR. FRANKEL: Yes. Well, more unusual things have  
19 happened. As you've already heard, there are nine other  
20 states. I will not repeat what those states are. And  
21 several others are considering them. And I have attached  
22 those statutes as I said.

23           You've also heard from previous witnesses the term  
24 SLAPP was coined by Professors George W. Pring and Penelope  
25 Canan who are considered the experts in the country on this

1 particular issue. They have recently published a book  
2 GETTING SUED FOR SPEAKING OUT. It was actually published by  
3 the Temple University Press in 1996. They had defined a  
4 SLAPP as a civil claim, for monetary damages and/or an  
5 injunction, which is filed against individuals or nonprofit  
6 groups because of the defendants' communications to a  
7 government body or official on an issue that is of public  
8 concern.

9 A typical SLAPP may involve a real estate developer  
10 who sues citizens who have spoken out against a proposed  
11 development. However, SLAPPS have also been filed against  
12 citizens who voice criticism at school board meetings,  
13 report police misconduct or violations of laws to health  
14 authorities, file complaints against their labor unions or  
15 merely attend public meetings. While a great deal of media  
16 attention has been given to SLAPPS arising out of  
17 environmental disputes, this phenomenon is not limited to  
18 that arena.

19 Even before the acronym SLAPP emerged, courts had  
20 addressed the problem posed by intimidating laws. The  
21 Colorado Supreme Court decision in Protect our Mountain  
22 Environment, Inc., versus District Court, in 1984 is an  
23 excellent example of how the judiciary can discourage such  
24 litigation. Protect our Mountain Environment known as POME,  
25 P-O-M-E, had vigorously opposed a large real estate



1 development. They presented testimony at county hearings  
2 and even filed a court appeal challenging the county's  
3 decision to approve the development. The court denied the  
4 environmental group's appeal.

5           Thereafter the developer brought a civil action  
6 against the environmental group and individuals who had  
7 challenged the project. The developer's lawsuit was based  
8 on claims of abuse of process and civil conspiracy. The  
9 defendants moved for a dismissal of the complaint contending  
10 that their challenge to the project was constitutionally  
11 protected activity. The trial court denied the motion to  
12 dismiss. However, the Colorado Supreme Court, in an  
13 unanimous opinion, reversed the trial court and announced a  
14 new rule to govern motions to dismiss in these kinds of  
15 cases.

16           In its opinion, the court noted that suits filed  
17 against citizens for prior administrative or judicial  
18 activities can have a significant chilling effect on the  
19 exercise of the First Amendment right to petition in court  
20 for redress of grievances.

21           But that interest in being able to exercise their  
22 First Amendment right had to be accommodated with the  
23 concern that damages to persons and society do result from  
24 baseless litigation instigated under the pretext of  
25 legitimate petitioning activity.

1           The Colorado Supreme Court tried to balance those two  
2 competing interests by developing and applying a heightened  
3 standard which would be used when ruling on a motion to  
4 dismiss that was raised or the motion to dismiss raised an  
5 absolute defense of the right to petition the government and  
6 that the defendants, therefore, could not be found liable.

7           In such a case where a plaintiff claims misuse or  
8 abuse of the administrative or judicial processes of  
9 government and the defendant asserts his or her  
10 constitutional right to petition: The court stated -- I'm  
11 not going to read the quote because it's lengthy, but I'll  
12 paraphrase it. The plaintiff would be required to make a  
13 sufficient showing at that stage to permit the court to  
14 reasonably conclude that the defendant's First Amendment  
15 petition activities were not protected because they first of  
16 all, were devoid of reasonable factual support, or, if so  
17 supportable, lacked any basis of law for their assertion.  
18 Two, the primary purpose of the petition activity was to  
19 harass the plaintiff or effectuate some other improper  
20 objective. And three, the activity had the capacity to  
21 adversely affect a legal interest of the plaintiff.

22           The Third Circuit Court of Appeals which is the  
23 Federal Court of Appeal that covered Pennsylvania as well as  
24 New Jersey and Delaware applied to standards developed in  
25 that Colorado case in an interesting decision called

1 Brownsville versus Golden Age Nursing Home, Inc. versus  
2 Wells. In that case, a nursing home's license had been  
3 revoked sued private individuals, a state official and  
4 Senator, U.S. Senator John Heinz. The nursing home alleged  
5 defendants had engaged in a civil conspiracy to tortiously  
6 interfere with its business relations.

7           Incidentally, Senator Heinz was brought into the suit  
8 because as Representative George -- quite often  
9 Representative George has a bad fate. He was responding to  
10 complaints that he had received from constituents.

11           Something I think all of you probably do on a regular basis  
12 and never perceive that as a basis for possible -- possibly  
13 being brought into a lawsuit. Nevertheless, Senator Heinz  
14 was. Trial court granted summary judgment to pay the  
15 defendant.

16           The Third Circuit affirmed the judgment. Well, I'll  
17 note that was a summary judgment. This was after  
18 depositions were taken in that case. Third circuit never  
19 described this particular lawsuit as a SLAPP, but the case  
20 bore the characteristics of a SLAPP. Private individuals  
21 that complained were a variety of public officials about the  
22 conditions in the nursing home. As a result of those  
23 complaints, the state official and Senator Heinz took  
24 action, and the nursing home's license was revoked and it  
25 loss its Medicare certification. The nursing home

1 instituted its  
2 against again the defendants before the revocation actions  
3 were completed.

4 In affirming what the trial court had done in  
5 dismissing the summary judgment motion, the court found that  
6 liability could not be imposed for damage caused by a person  
7 inducing legislative, administrative or judicial action.  
8 Such conduct is based -- such conduct is actually protected  
9 in a firmly routed principle that they considered important  
10 to Democratic Government, that enactment of and inherence to  
11 law is the responsibility of all. And any other problem  
12 that's not too much citizen involvement but too little. And  
13 that the actions of the defendant in calling the plaintiff's  
14 violations to the attention of state and federal authorities  
15 advances the public interest and could not be the basis of  
16 liability.

17 Interestingly enough, just this last June, the Third  
18 Circuit decision was cited in a case out of the Federal  
19 District Court in the Eastern District of Pennsylvania.  
20 Cases, the Barnes Foundation versus the Township of Lower  
21 Merion, et al. And a decision was issued on June 3rd, 1996  
22 in response to a motion to dismiss.

23 In that case, the Barnes Foundation filed a Federal  
24 lawsuit against the Township of Lower Merion, its  
25 Commissioners. Again, I will point out elected officials

1 and neighbors alleging that they had violated the  
2 foundation's constitutional rights. And how did they do  
3 that? This is what was alleged by the foundation. That the  
4 defendant's had engaged in a discriminatory enforcement of  
5 parking, police, fire and zoning ordinances, interfered with  
6 the reopening of the foundation, ticketed and videotaped  
7 entrance to the foundation, preventing the creation of a  
8 parking lot, interfered with business relationships and  
9 filed a retaliatory action in State Court.

10 In response to the motion to dismiss, Judge Brody  
11 dismissed the individual neighbors from the lawsuit. She  
12 did not dismiss the Township or the commissioners but the  
13 individual neighbors were dismissed. Again, she did not  
14 characterize it as a SLAPP lawsuit, but she did call and  
15 citizens could not be sued for exercising a First Amendment  
16 right to petition the government. In her own opinion, she  
17 cites the book recently published by the two professors.

18 Our office is somewhat familiar with litigation which  
19 can be described as SLAPP; particularly our office in  
20 Pittsburgh. They've been contacted by citizen's groups  
21 against whom a defamation suit was filed. Those of you who  
22 have circulated the petition opposing the hours of operation  
23 at plaintiff's store and the sale of beer at that store.

24 We also have provided assistance to residents who were  
25 sued by a developer because of their opposition to the

1 developer's proposed shopping mall. We believe that  
2 Pennsylvania could be well-served for the General Assembly  
3 to enact legislation similar to what has been enacted in  
4 other states. While some may think that our courts can deal  
5 with this issue, we believe that the legislative branch  
6 should not abdicate to the judiciary all responsibility for  
7 curing this problem. The General Assembly can play an  
8 important role in strengthening the right of Pennsylvania to  
9 petition their government and speak freely on issues of  
10 public concern.

11           And while we support the adoption of anti-SLAPP  
12 legislation and we believe that House Bill 281 is a good  
13 bill, we do have some recommendations for improving the  
14 bill. As Counsel Preski questioned the previous witness  
15 about why it was limited to environmental speech, we don't  
16 believe it should be limited to environmental speech.

17           The right we're seeking to protect is the right of any  
18 citizen to petition the government, to talk about issues of  
19 public concern and not be sued in response. And we believe  
20 that this statute could be broadened to cover a larger range  
21 of citizen participation.

22           For example, the Minnesota statute protects any  
23 "lawful speech -- any speech or lawful conduct that is  
24 genuinely aimed in whole or in part at procuring favorable  
25 government action." House Bill 281 also begins with a

1 recitation of legislative findings. And we believe that  
2 it's problematic that it talks about the "stopping"  
3 lawsuits. We believe citizens have the right to have access  
4 to courts. And really the interest that needs to be  
5 advanced for quick resolution of those kind of suits once  
6 they can be identified. The problem is whether they can be  
7 identified and provide the mechanism for quick resolution,  
8 not stopping litigation from occurring.

9         With respect to the section on immunity which is  
10 Section Three, we believe it provides qualified immunity but  
11 that the final sentence of that Section diverts some  
12 attention from the real issue in these cases. We believe  
13 the focus should be on whether the petition activity would  
14 genuinely direct at procuring a favorable government action,  
15 result or outcome. That language actually comes from a U.S.  
16 Supreme Court decision following -- and I don't want to go  
17 into the whole discussion of the Nora Pennington documents  
18 of the anti-trust suits that the previous witness mentioned.

19         But the language about what is protected in terms of  
20 First Amendment is that which is directed at procuring a  
21 favorable government action. Sham petition is not directed  
22 at that. If the answer to the question is that no the  
23 action was not for that purpose, it still must be determined  
24 whether there's been an actual injury to the plaintiff. And  
25 the plaintiff should be required to demonstrate that. And

1 in my testimony, I have tried to draft a slight revision to  
2 Section Three which we believe addresses our concerns.

3 Several of the other states anti-SLAPP statutes  
4 provide the State Attorney General to be an intervener in  
5 the actions. This bills allows other state agencies, not  
6 specifically list the Attorney General. And we recommend  
7 that that also be added to the suit.

8 Finally, we think that Section 7 should be deleted.  
9 Not necessarily because we believe it's a bad idea, but we  
10 think that it maybe premature to act on that. It's really  
11 different than what the rest of the bill talks about. That  
12 section would allow the Environmental Hearing Board to make  
13 award of costs and counsel fees on matters before them.  
14 Outside of the workers compensation setting, I don't know of  
15 any administrative agency in this state that is allowed to  
16 award attorney's fees. They are unelected officials. For  
17 now, we would still like judges in this state and there is  
18 some accountability by that means.

19 While we think this section should be deleted, we do  
20 not oppose a review of what has been going on in these kind  
21 of proceedings to see if there is some abuses going on and  
22 whether some type of remedy is available.

23 Before I close, I'd like to at least address a couple  
24 of the questions that were raised and maybe offer our  
25 insights. There was a question about what happens to the



1 cases that just get filed in federal court instead, which I  
2 mentioned to you federal cases in my testimony from this  
3 Commonwealth at least. Well, in federal court, there are  
4 sanctions that can be imposed much more easily and much more  
5 readily on plaintiffs who file frivolous lawsuits. Such  
6 sanctions are much more difficult to obtain in state court.

7           One of the benefits of this bill is that it makes it  
8 clear that if you brought this kind of action and the motion  
9 to strike is successful, attorney's fees can be awarded.  
10 This takes us somewhere we're not presently able to go in  
11 state court. People should already be discouraged from  
12 filing such suits in federal court because of the threat of  
13 sanctions. So I would mention that that exists.

14           With regard to the question about motion for summary  
15 judgment and how this differs, I think it's important to  
16 note that in the section on motion to strike it also permits  
17 discovery to be stayed which is the big difference between a  
18 motion for summary judgment, which normally, although not  
19 always, will come after discovery is completed. You  
20 actually have three different stages that I can recall in  
21 Pennsylvania Civil Procedure where you can seek to have an  
22 action terminated by court ruling prior to trial.

23           The first is when the complaint is filed via  
24 preliminary objections stating that either there's immunity  
25 or there's no way this case even states the claim. That is

1 filed prior to an answer. Because of some of the decisions  
2 on what is and is not permissible for a preliminary  
3 objections and because sometimes you have to wait for the  
4 plaintiff to file a response to the answer, you also have  
5 what's called a motion for judgment on the pleadings which  
6 is before discovery is completed but after a complaint and  
7 answer and any response by the plaintiff to the answer is  
8 filed.

9 And you have the motion for summary judgment which is  
10 usually done after discovery because you need to establish a  
11 factual record that there's no disputed fact and, therefore,  
12 the whole thing can be decided as a matter of law. None of  
13 those remedies really fit in and can help on -- at least  
14 under the current case law and statutes and rules in  
15 Pennsylvania.

16 A motion to strike in these kind of cases really is  
17 something different because in the court, it can't alter who  
18 has the burden. It becomes the plaintiff's burden to  
19 demonstrate that even though what their complaining about  
20 appears to be to protect activity, they still have the right  
21 to go forward. None of that exists under any of the motions  
22 that I have and which is why there may need to be some kind  
23 of a procedure.

24 Finally, Counsel Preski again asked, well, why didn't  
25 the court just come in and say that's a procedural rule?

1 No, no, no, you know we're the ones that have to make those  
2 rules and not state legislature. And I'm fully aware of  
3 that problem. And I thought about it when I was preparing  
4 my testimony.

5 And I have a couple thoughts; first, the Supreme Court  
6 hasn't exactly been consistent in applying that standard.  
7 They get rid of rules they don't like and sometimes they  
8 allow what looks like procedural rules to go through. So I  
9 don't think it's necessarily determinative that they would  
10 strike this down as encroachment on the power.

11 Secondly, under the state statute, not the court  
12 rules, attorney's fees can only be awarded in certain  
13 specific situations with a catchall category where otherwise  
14 authorized by law. So by passing this bill, you will have  
15 authorized the awarding of attorney's fees in these kind of  
16 cases. Something the Court has indicated or the legislature  
17 has actually reserved to itself.

18 Under prior statutes, the court has pretty much in  
19 force that unless there's a statute or contractual provision  
20 that provides for attorney's fees, you're not going to get  
21 them. So there may be an out.

22 But I think also it may even prog our courts to do  
23 what Colorado Supreme Court did. They developed a rule in  
24 response to a complaint. Maybe there haven't been enough  
25 cases in state court that have gone all the way through the

1 system. The academics who have studied more of these cases  
2 than we have found that most of them are dismissed and  
3 settled way before trial so they don't go on through appeals  
4 up through the system. It could mean that somebody might  
5 challenge this rule. The court may throw it out at the same  
6 time, adopt a rule that exactly follows what the state  
7 legislature does.

8 The bottom line as far as we're concerned is the  
9 legislature does have the right and the role to speak out  
10 and say we want this kind of litigation to stop. We have an  
11 overburdened court system already. You have enough  
12 questions, you'll have to answer that allocation of  
13 resources for the court systems in Pennsylvania. And you do  
14 not want to see them used for the carrying on of what are  
15 really political disputes over zoning issues or other types  
16 of petitioning and government issues. They want the courts  
17 reserved for disputes that can only be resolved by the  
18 courts.

19 I'd be happy to try and answer any questions. And  
20 thank you for offering me the opportunity to testify today.

21 MR. CHAIRMAN: Thank you, Mr. Frankel. I believe  
22 Representative James has joined us, and we welcome him from  
23 the City of Philadelphia. Mr. Frankel, the idea of this  
24 legislation is to provide a quick resolution to frivolous  
25 lawsuits, not to end frivolous lawsuits. But like you said,

1 to find a quick resolution to them. And you also favor  
2 broadening that approach for a quick resolution of frivolous  
3 lawsuits. How far would you go to broaden that? Would you  
4 go as far as I'd like to and eliminate all frivolous  
5 lawsuits as quickly as possible? And if so, how could you  
6 do that?

7 MR. FRANKEL: It would be nice if we could define  
8 frivolous in an easy manner. But I think that is very  
9 difficult to do. Certainly, we think there's going to be  
10 frivolous lawsuits because they prevent the real lawsuits  
11 from going forward.

12 With regard to this kind of legislation, by setting up  
13 standards that are fairly clear that give the judges the  
14 tools for identifying those lawsuits, that at least creates  
15 a basis and then creates a procedural mechanism so the court  
16 can determine those issues early on.

17 What we have here, and I'll be happy to review the  
18 legislation once again, but I thought it was pretty  
19 specific. The defendants got to be able to raise a motion  
20 that they were exercising their right to petition the  
21 government, their First Amendment free exercise principle.  
22 But there has to be at least some evidence.

23 Now, that may not be in the plaintiff's complaint.  
24 Because obviously if you pass this, the smart plaintiff  
25 lawyers will figure out how to write the complaint. But it

1 will still require some showing by the defendant that what  
2 is at stake here is the right to petition the government.  
3 And that's what's being challenged. And by setting a clear  
4 standard for what is at least subject to a motion to strike,  
5 and in setting a clear standard for when it can be granted,  
6 then I think you can start looking at how frivolous lawsuits  
7 can be discouraged.

8           And that's one of the reasons I believe when I read  
9 the sanction on immunity why I found it confused that it  
10 would -- you know, what I believe would be suggested as a  
11 revision were much clearer and sharper definition of  
12 immunity; so that the courts that have to apply the  
13 standards adopted by this legislature can do so with  
14 confidence that they are following through on their wishes.

15           So a long answer, which I am prone to giving, and I  
16 apologize. But I guess they trained us in law school to do  
17 that. Requires defines clearly what it is you're claiming  
18 is frivolous and that you give the court some pretty clear  
19 standards. And high hurdles to be reached for that  
20 frivolousness to be demonstrated because we don't want to  
21 throw out legitimate lawsuits because 55 percent of the  
22 people think they're frivolous and 45 percent don't.

23           We need the ones where 95 percent of us can agree that  
24 they're frivolous. And if I may be so bold, when I hear  
25 that the legislature wants to ban frivolous lawsuits, I

1 wonder if the citizens want to ban frivolous legislation  
2 because frivolous is in the eye of the beholder sometimes.

3 MR. CHAIRMAN: How is the -- you said the federal  
4 system was much better at sanctions and fairing out  
5 frivolous lawsuits from the state court system. Do they  
6 have different rules or different procedures or just more  
7 prone to get at that?

8 MR. FRANKEL: Well, there's two reasons I can think  
9 of; one of which I think applies in general and the other  
10 may be a more Southeastern Pennsylvania issue. The one in  
11 general that I would say is there is a federal rule that  
12 allows for sanctions to be imposed upon a plaintiff and  
13 plaintiff's attorney for the filing of what's deemed to be  
14 frivolous. Such sanctions to my mind can rarely be obtained  
15 in state court. So that's one reason.

16 MR. CHAIRMAN: Is that because we don't have that rule  
17 or we don't apply that rule?

18 MR. FRANKEL: That's because we don't have that rule.  
19 I will say though I think attorneys can do a better job in  
20 terms of asking for some kind of attorney's fees or  
21 sanctions. I know that I got a judge to award attorney's  
22 fees at one point by claiming that the action was taken for,  
23 you know, I forget the phrase you use, but to show that it  
24 was done merely for delaying. And the court did actually  
25 impose that attorneys could ask for them more.

1 I don't know if there's a cleaning out problem.  
2 Judges have to get more use to the fact that that inherent  
3 power exists. In fact, I believe I got 40 -- it's Title 42  
4 of Purdon's Section 2503, Subsection 6 allows the court to  
5 impose counsel fees as part of the taxable cause.

6 Another participant for violation of any general rule  
7 which especially prescribes the award of counsel fees as a  
8 sanction for dilatory obdurate or vexatious conduct during  
9 the pendency of any matter. That exists. I think lawyers  
10 don't use it. I think judges don't impose it. That being  
11 one reason.

12 The second reason that I'm aware of at least from the  
13 years that I did practice law which was in Southeastern  
14 Pennsylvania in federal court in cases assigned to the judge  
15 right of way. The judge is going to hear the case, hear any  
16 motions, try the case, they get it early, they want to get  
17 rid of it early if they can.

18 Now, I don't know what other counties do, but it's my  
19 recollection that in the larger counties in Southeastern  
20 Pennsylvania and Philadelphia particularly, they don't have  
21 that practice. And so, you know, there's a judge rush to  
22 hear all the motions. So probably on a daily basis he's  
23 getting stacks of papers like that. It's not the same  
24 incentive. They may get afraid they're going to get  
25 reversed if they actually knock the case out early.



1           So moving to systems where the judge has more control  
2 of the case early on may expedite the matter in a way  
3 similar to what goes on in federal court. The judge really  
4 makes a deadline for cases to move and may call them in  
5 early to try and figure out more of what the case is about  
6 and may actually force the case to settle.

7           Finally, there are, at least for diversity  
8 jurisdiction, the amount that one claims has to be pretty  
9 high. And so that tends to discourage some of the frivolous  
10 litigation also because the lawyers aren't going to want to  
11 bring the claims they're not going to get any money for in  
12 the federal court system and just try and be in there. It  
13 does discourage them that way.

14           MR. CHAIRMAN: Can you elaborate on opposing the  
15 Section 7 Environmental Hearing Board? I don't know if you  
16 were here earlier but I talked about the situation where  
17 someone gets a septic permit or a permit to install a septic  
18 system and because the adjoining landowner doesn't want a  
19 house built, the begin the appeal process. And time wise  
20 and cost wise, eventually the fellow is better off if he  
21 walked away and bought another building some place. And  
22 when I read that section, I thought that would be a step to  
23 help some of those situations.

24           MR. FRANKEL: If you will recall, the reason the  
25 opposition is because it is we have an unelected body

1 awarding the attorney's fees which seems to be moving in a  
2 new direction in this state.

3 MR. CHAIRMAN: Seems to be moving in what?

4 MR. FRANKEL: A new direction seems to have unelected  
5 officials making awards of attorney's fees. And it's not  
6 clear, based on how the section is written, how one would  
7 take an appeal from such a decision except possibly back  
8 into courts. And could the courts award attorney's fees  
9 for, you know, frivolous appeals in those situations?

10 It seems to us that this is bringing in a new element.  
11 As I indicated earlier, this legislation is the first  
12 session. It's actually the second session. It's other  
13 states that have moved forward with anti-SLAPP Legislation.  
14 Let's move forward with that and let's take this other issue  
15 and study it more closely.

16 I believe the situation you described exists. I have  
17 no doubt about it. But I also don't know how many of those  
18 that are. And are we going to get a situation where, you  
19 know, we'll take the reverse where it's the big company that  
20 wanted the permit and the citizens object, and then they  
21 have a legitimate objection. But they see the possibility  
22 of a board awarding attorney's fees. Are we going to  
23 discourage them from continuing to pursue the process?

24 Now, if their appeal is frivolous and merely for  
25 delay, that's one thing. But it's unclear what kind of

1 chilling effect just the prospect may have. It may have  
2 none. It may have some. We don't know what other states  
3 do. The difference between this section and the bill as  
4 originally drafted was that we know what other state's  
5 experience has been with SLAPP Suits and the development of  
6 legislation.

7 We have some antidotal evidence that there may be some  
8 problems with the Environmental Hearing Board. But in  
9 broadening this in an amendment without any hearings  
10 beforehand or without any, you know, compilation of  
11 statistics of how many cases are before the Environmental  
12 Hearing Board, how many do they deny, how many are granted,  
13 and a sense of uncertainty about that.

14 So the suggestions that I have is let's take it out  
15 now because I think it's going so slow everything down as  
16 long as it's out there because it is a new notion of  
17 unelected officials making losers pay. And go ahead with  
18 what seems to be a consensus and go back and study the  
19 Environmental Hearing Board issues.

20 MR. CHAIRMAN: What about the issue of these frivolous  
21 lawsuits or appeals working in the other way where you have  
22 a poor permit owner or less affluent individual out for a  
23 permit and then you have the citizen's group that bans  
24 together and has influential and wealthy people in the  
25 citizen's group and tends to appeal to the point that the

1 fellow granted the permit gives up the concern. Is that  
2 less of a problem or not a problem? How do we address that?

3 MR. FRANKEL: I think it's a very legitimate concern,  
4 and I think it's something that should be looked at. What I  
5 do not find both two years ago when this was first proposed  
6 and even in preparation for today and in the interval, any  
7 real discussion other than hearing stories occasionally  
8 about the problem you've described which doesn't mean it  
9 doesn't exist.

10 But I cannot myself go out and look at a body both of  
11 research and court cases that have demonstrated the problem.  
12 So I think maybe we do need to look at the issue. I'm not  
13 saying dismiss it completely and never come back.

14 My concern is, you know, not only the Environmental  
15 Hearing Board, but what if we decide -- I wish I knew more  
16 of the state agencies that do make adjudicatory decisions,  
17 that all of them are all of the sudden going to be allowed  
18 to award attorney's fees. And then we all the sudden have  
19 all sorts of unelected officials making that profound  
20 impact. So I think there's a lot of questions that are  
21 raised, and maybe there needs to be a procedure for courts  
22 to make some of those determinations.

23 MR. CHAIRMAN: Thank you very much. Representative  
24 Hennessey?

25 REPRESENTATIVE HENNESSEY: Thank you, Mr. Chairman.

1 Mr. Frankel, Section 3 immunizes citizens who speak out  
2 against -- generally against corporate activity and accuse  
3 the corporation of doing something to damage the  
4 environment, correct?

5 MR. FRANKEL: That is the most common situation but  
6 not the only situation.

7 REPRESENTATIVE HENNESSEY: Okay. In that situation,  
8 the person who spoke out, the citizen would be granted  
9 immunity?

10 MR. FRANKEL: Qualified immunity.

11 REPRESENTATIVE HENNESSEY: If the corporation decided  
12 to go on the offensive in its own defense and accused the  
13 person of distorting the facts of having -- of becoming  
14 paranoid or psychotic or doing something else that might  
15 otherwise be slanderous conduct on the part of the  
16 corporation, doesn't Section 3 immunize the corporation as  
17 well or does the corporation say its just trying to either  
18 ward off or obtain favorable action in this lawsuit?

19 MR. FRANKEL: Again, I will say that I believe that  
20 this provides qualified immunity, not absolute immunity.  
21 And that, yes, if the person or group against whom the  
22 corporation is making statements filed a claim against the  
23 corporation for statements made, the corporation could  
24 conceivably file the motion to strike. But the question  
25 would become was their statements against the individual or

1 group made to procure the favorable government action or to  
2 just discourage that group from speaking out? And that  
3 would be for a court to determine.

4 Furthermore, and there may be a real problem for all  
5 parties involved in that. I've suggested that there should  
6 be a requirement that there be some legally cognizable  
7 damages shown by the party that's bringing the complaint or  
8 claim that the other side has injured it.

9 In many cases with these SLAPP suits, there is no --  
10 there is no causal effect that this is actually injured  
11 especially if there's a proceeding going on. Often times,  
12 the suits are filed while the zoning board is making its  
13 decision, while the zoning appeal is on appeal. And I would  
14 say that you're going to have difficulty for the citizens  
15 who the corporations may be defaming actually getting into  
16 court early on until there's a resolution of all these  
17 matters and then a Court could determine on the motion to  
18 strike by the corporation whether those statements they made  
19 about the citizen or this group were made to try and obtain  
20 a favorable government action through legitimate means or to  
21 try to shut the group up. And if this was merely to try to  
22 shut the group up, then they wouldn't qualify for immunity.

23 MR. CHAIRMAN: But I guess the problem that I see is  
24 that almost any statement that's made is not going to be  
25 made merely to shut someone up. Certainly the corporation

1 or the party that's making that statement is going to say, I  
2 wasn't just trying to shut up the people that were  
3 criticizing me. I was trying to win. I was trying to get  
4 out my message. I was trying to set the record straight.  
5 And it seemed to me that the way that the bill was drafted  
6 leaves open a rather large loophole for people to drive  
7 through and say, well, I might have slandered somebody, I  
8 might have defamed them, but it really doesn't make a whole  
9 lot of difference here because I was trying to get my point  
10 across.

11 And it seems to me that we need to create some rather  
12 tight standards as to when and whether -- we might not  
13 balance whether or not it's more -- the intention is more to  
14 shut the person up then to get the point across. But it  
15 seems to me, as its written, as long as you can say that you  
16 were trying to get your point across, you can perceive that  
17 it is. And it may -- this proposal may really have an  
18 adverse effect on what was intended.

19 MR. FRANKEL: It may. But I think your alternative is  
20 if you leave the courts to sort this out, you end up -- what  
21 has happened in other places where these suits that are  
22 called SLAPPS are filed and then the people who are slapped,  
23 slap back with a counter claim. And you just end up having  
24 this big brawl in court.

25 If we can tighten standards and demonstrate that this

1 legislative body is telling the citizens and the courts, we  
2 don't want you to be filing these things in our courthouse.  
3 And if you do, you may have to pay attorney's fees that we  
4 may, indeed, discourage that.

5 In addition, I would say, Representative Hennessey,  
6 that my reading of the literature does not indicate that one  
7 of the tools being used by the corporations or the  
8 developers is real attempts to slander the individuals. No  
9 they go into the court with a lawsuit. That's the tool  
10 they're using.

11 REPRESENTATIVE HENNESSEY: And the effect being just  
12 somebody's fear of trying to pay their attorney to defend  
13 the suit?

14 MR. FRANKEL: Well, it's the fear of having to pay  
15 the expense, the time that is spent, you know, both finding  
16 the attorney, going to the attorney, having their  
17 depositions taken, being involved in the whole litigation  
18 process that in many of the lawsuits they name dozens of  
19 John Does. So people who already haven't been named, but  
20 maybe have taken interest in the issue, all of the sudden  
21 become afraid to get involved because that John Doe is going  
22 to be amended to be them.

23 It diverts the attention and resources from a  
24 community group from being involved in the political process  
25 to being, you know, some of their volunteer time going into



1 the legal process. So it isn't just the fear of the ability  
2 to pay the attorneys or maybe a fear of the ultimate  
3 judgment, but it's also just a diversion of their time and  
4 energy away because one of the real goals is to get these --  
5 get the plaintiff to have the defendants consume with the  
6 litigation rather than the pending application, permit,  
7 whatever the political process that is going on.

8 REPRESENTATIVE HENNESSEY: Thank you. Thank you, Mr.  
9 Chairman.

10 MR. CHAIRMAN: Any more questions? Counsel Preski?

11 COUNSEL PRESKI: Mr. Frankel, one of the questions I  
12 have is in Section 3 from immunity of suit. It states that  
13 the person shall be immune from civil liability in any  
14 action regardless of intended purpose except where the  
15 communication is aimed at procuring a favorable government  
16 result.

17 My concern is this and I'll express it in a  
18 hypothetical. Assuming that I am the Chairman of the  
19 Environmental Committee for the legislative body, my  
20 meetings are anti-environmental. They have always been  
21 publicly stated as such. An environmental group determines  
22 that the best way to procure a favorable governmental result  
23 is for them to have me removed from this chairmanship  
24 position because I will not let environmental bills go  
25 through the Committee.

1           They then in turn decide to attack my character  
2 through various statements regardless of the truth of  
3 falsity of those statements. They covered themselves by  
4 prolific memo writing that this is their intention. Their  
5 intension is to procure favorable environmental legislation  
6 based upon removing me from the position of Chairman.

7           If they then, prior to an election, state anything  
8 scandalous, impertinent, whatever, would that conduct or  
9 would that communication be immune from suit?

10           MR. FRANKEL: It's my recollection -- I was going to  
11 ask you if there was an election related to what all was  
12 going on. It's my recollection that almost anything that is  
13 said with respect to an election is immune for suit.

14           COUNSEL PRESKI: Well, regardless --

15           MR. FRANKEL: I think you made it a more difficult  
16 question if there isn't an election, you're just trying to  
17 create an atmosphere where the leadership --

18           COUNSEL PRESKI: Would remove me from my chairmanship.

19           MR. FRANKEL: The person has to be removed. But I  
20 would say that the question poses the same kind of  
21 evidentiary issue that some employment discrimination cases  
22 pose. People know how to cover their tail from liability by  
23 writing the right kind of memos and what other evidence can  
24 be brought in to demonstrate to the Court through the finder  
25 of fact. At least at this stage on the motion to strike

1 that that may be what they wrote. But they also -- and we  
2 know they said this, this and this. They said to the press  
3 we're going to do anything we can to get this man out of  
4 office. Is there other either documentary evidence or some  
5 other evidence from which inferences can be made that that's  
6 really just a sham and a cover for the real intensive  
7 purpose.

8           So in drafting any of this, one has to make sure that  
9 the courts understand it isn't whether somebody can say we  
10 had a good motive but they must be able to demonstrate that  
11 it was a proper motive and not just what they assert in  
12 their memos to file.

13           COUNSEL PRESKI: Okay. Then rather than the  
14 legislation leading to evidentiary questions or crafty  
15 draftsmanship in pleadings, do you think there should be a  
16 standard within this section itself that deals with the  
17 truth or falsity of the statement? Much like the New York  
18 Times or a Solomon test where knowing this truth or knowing  
19 false statements would not be granted the same immunity?

20           MR. FRANKEL: There is at least in one of these other  
21 states, and I'm trying to locate it, a knowing recklessness  
22 type of standard in there. But bearing in mind that this is  
23 -- this qualified immunity applies I guess in two different  
24 instances. One is a motion to strike and one is after a  
25 full evidentiary trial. It would seem to me that to get

1 over the motion to strike, the plaintiff would have to  
2 produce evidence that would at least refute to some degree  
3 the defendant's assertion that they were doing it to  
4 favorably provide an outcome. Would that amount of evidence  
5 be any different under a knowingly reckless standard?

6 I mean then I think you're going to need -- I think I  
7 should contemplate that a little more and get back to you  
8 rather than try to answer it on the record. And look at all  
9 the statutes. But the commentators who have viewed these,  
10 and really even the court itself, and I can point to Judge  
11 Brody's opinion in the case where she says that the motive  
12 really was not important. It's whether it was to obtain a  
13 favorable outcome or not. And that was based on the Nora  
14 Pennington doctrine and another Supreme Court case in 1991.

15 So maybe that under the U.S. Supreme Court decisions,  
16 except for determining whether it's directed toward a  
17 government outcome, otherwise the petitioning activity is  
18 protected no matter how malicious and no matter how  
19 intentional. If it's directed at obtaining a favorable  
20 outcome, U.S. Supreme Court would say it's fine.

21 COUNSEL PRESKI: All right. Fine. Thank you.

22 MR. CHAIRMAN: Any additional questions? All right.  
23 We thank you very much, Mr. Frankel, for your testimony  
24 today.

25 MR. FRANKEL: Thank you.

1 MR. CHAIRMAN: And the next individual on the schedule  
2 is Harry Ingram, Esquire from the Pennsylvania Coal  
3 Association.

4 MR. INGRAM: Thank you, Mr. Chairman. It's Henry  
5 Ingram.

6 MR. CHAIRMAN: Henry.

7 MR. INGRAM: Some know me as Hank Ingram, sir.

8 MR. CHAIRMAN: Welcome.

9 MR. INGRAM: Thank you very much. Mr. Chairman,  
10 Members of the Committee, I'm a practicing attorney in the  
11 Commonwealth of Pennsylvania. My practice has been  
12 concentrated in environmental and land use law affecting the  
13 development of natural resources. I thank the Committee for  
14 this opportunity to state the views of the Pennsylvania Coal  
15 Association on House Bill 281. The Pennsylvania Coal  
16 Association has very serious reservations about this  
17 legislation.

18 As an initial matter, I would like to try to clarify  
19 the record, if you will, to some extent. Mr. Frankel, in  
20 his testimony and also in response to questions from the  
21 Committee, as I understood his testimony and answers,  
22 indicated that Section 7 had some problems because it  
23 delegated authority to grant legal expenses such as  
24 attorney's fees and other legal costs to in some cases to  
25 losing parties, to winning parties and so on and so forth.

1 And on that basis, he had some concerns about Section 7. I  
2 would like to point out to the Committee that the  
3 Environmental Hearing Board has been delegated that  
4 authority by the General Assembly under any number of  
5 statutes including virtually all of the mining acts, the  
6 storage tank control acts and so on and so forth. And it is  
7 a practice which the Board is developing and has been  
8 developing expertise since the 1980's.

9 That's not quite an accurate reflection to say the  
10 Pennsylvania law of the Environmental Hearing Board has that  
11 authority and is exercising it and is slowly developing  
12 expertise.

13 I would also like to add that like you, Mr. Chairman,  
14 anything that we can do to eliminate frivolous lawsuits  
15 would be supported I think by any lawyer in the Commonwealth  
16 at least any responsible lawyer. So I'm not sure that's  
17 what HB 281 is doing.

18 But so there's no mistake, the Pennsylvania Coal  
19 Association and other like mandated organizations and most  
20 lawyers that I have the privilege of dealing with support  
21 the elimination of frivolous lawsuits.

22 Turning to 281, it seems to me that the fundamental  
23 premise of the bill is that SLAPP suits as defined are on  
24 the rise in Pennsylvania and that a legislative adjustment  
25 is necessary to remedy some perceived imbalance between the

1 rights of citizens to participate in public debate and  
2 petition to the government, particularly on land use or  
3 environmental issues, and the interests of developers,  
4 businesses and others who are believed by some to be  
5 motivated by a desire to chill citizen's participation and  
6 input in policy debate and regulatory proceedings over  
7 public issues arising from environmental regulation of land  
8 use and development and other regulated economic activities.  
9 As a lawyer who has represented members of the regulated  
10 community for over 25 years in Pennsylvania, maybe longer  
11 than that, frequently in proceedings in which citizen  
12 involvement and public participation is common and indeed  
13 now encouraged by statute and government policy. I have not  
14 had any first-hand experience, on either side, as counsel in  
15 what I would recognize as SLAPP litigation. Thus, my  
16 comments are based on my observations as a practicing lawyer  
17 practicing in the field, but I believe them to be  
18 well-informed.

19 Frankly, I have not observed any pattern of increase  
20 of SLAPP suits in Pennsylvania. Indeed, I believe it would  
21 be difficult to document any such increase or surge in SLAPP  
22 suits. I have reviewed the legal periodical literature  
23 discussing SLAPP litigation and try to keep current on  
24 trends and developments, particularly in the general area of  
25 citizens' suits and participation in regulatory issues, in

1 Pennsylvania law.

2 Admittedly, as Representative George pointed out and  
3 as others pointed out, it may be difficult to recognize all  
4 SLAPP suits because the claims or causes of action asserted  
5 in SLAPP suits are likely to be expressed in conventional  
6 legal terms or nomenclature such as defamation, tortuous  
7 interference, abuse of process or invasion of privacy.  
8 Nevertheless, whether there has been a dramatic increase,  
9 some increase or any increase, I believe it remains to be  
10 seen. I'm simply not aware of any upsurge in SLAPP suits in  
11 Pennsylvania.

12 There is no question that there is inevitable tension  
13 between a litigant's right to petition the courts and  
14 individual's right to participate in the public process.  
15 The question is, does the existing system in Pennsylvania  
16 adequately resolve that tension. I happen to believe that  
17 it does.

18 I'd like to point out that there has been no decrease  
19 in the amount of citizens' involvement and public  
20 participation in the environmental regulatory process in  
21 Pennsylvania. In fact, the opposite is true. Almost every  
22 major permitting action or environmental policy decision by  
23 regulatory agencies is replete with such participation.  
24 Frankly, I have observed no chilling of full and free  
25 expression of opinions, views, beliefs and even speculation



1 by individual citizens or groups. The participation and  
2 right of such citizens to be involved is well respected by  
3 the DEP which is regularly and increasingly required to  
4 consider, investigate with commentary and input by citizens  
5 and citizen's groups. In Pennsylvania, the climate for  
6 public participation is friendly, not hostile. s  
7 become a fact of life in environmental regulations of  
8 Pennsylvania.

9 Pennsylvania Coal Association and other like  
10 organizations do not oppose the rights of individuals who  
11 may be affected by a particular regulated activity to  
12 exercise their rights of speech, petition and association.  
13 They do not advocate the use of SLAPP suits for the purpose  
14 of chilling citizen involvement or public participation.  
15 PCA simply does not perceive an imbalance that warrants  
16 legislative intervention in the present legal system and  
17 judicial process unless a compelling need for such  
18 intervention is demonstrated. We just do not see the need  
19 for legislation.

20 In these circumstances, the Pennsylvania Coal  
21 Association believes that House Bill 281, however  
22 well-motivated, may be a solution in search of a real  
23 problem or stated another way, the legislation is directed  
24 at a perceived problem. It assumes that the existing legal  
25 system cannot deal with vexatious or improperly motivated

1 litigation. I don't believe that's the case.

2           If we assume, and not all commentators agree, that  
3 SLAPP suits are, by definition, intended to achieve no other  
4 result than to chill public participation by citizens,  
5 Pennsylvania law already provides adequate remedies. One  
6 such remedy is demonstrated by the Cowder case, which  
7 appears to be the poster child for the advocates of this  
8 legislation. In that case, the defendant filed a  
9 conventional preliminary objection asserting that plaintiff  
10 had failed to state a cause of action. The objection was  
11 sustained and the suit was dismissed and the dismissal was  
12 affirmed by the Superior Court.

13           If a suit has no other purpose but to chill an  
14 individual's participation, public participation, a cause of  
15 action for wrongful use of civil proceeding is already  
16 available to a defendant. Wrongful use of civil proceedings  
17 is a tort which arises when a person institutes civil  
18 proceedings with a malicious motive and lacking probable  
19 cause. To succeed in a cause of action for wrongful use of  
20 civil process a person must allege and prove that the  
21 underlying proceedings were terminated in their favor, the  
22 defendant instituted the underlying proceedings without  
23 probable cause; and the proceedings were instituted  
24 primarily for an improper cause.

25           The remedies are significant and substantial. The

1 damages include -- may be recovered in such an action  
2 include damages for interference with use of land or other  
3 property; harm to the reputation of the defendant in the  
4 underlying proceedings; costs and attorneys fees in  
5 defending in the proceedings; specific pecuniary loss that  
6 has resulted from the proceedings; damages for emotional  
7 distress; and punitive damages according to law in  
8 appropriate case.

9         So there's a whole pantry of remedies available for  
10 truly speechless and malicious resort to the courts. These  
11 strong remedies are superior to the remedies in House Bill  
12 281. Thus, in egregious situations such as SLAPP suits, the  
13 existing procedures and remedies are adequate to address  
14 them. I think another witness pointed out under our Rules  
15 of Civil Procedure, a stay of discovery is always available  
16 in circumstances where preliminary motions have been filed.  
17 And SLAPP suit defendants can recover damages, including  
18 costs and attorneys fees under the rules if the action is  
19 demonstrated to be entirely vexatious or frivolous. So we  
20 have all the remedies available to us in Pennsylvania. I  
21 guess the question is do the SLAPP suit defendants or the  
22 perceived SLAPP suit defendants avail themselves under  
23 remedies under Pennsylvania law that already exists.

24         Another concern with the bill is that it may have  
25 unintended consequences. It could be argued that it may

1 inadvertently repeal the statutory cause of action for  
2 wrongful use or use of civil proceedings. Section 8 of the  
3 bill repeals all acts and parts of acts which are  
4 inconsistent with it. And I think there are some -- there  
5 is some tension between that repealer language and the two  
6 bills. I guess perhaps the most important problem I'd like  
7 to ask the Committee to dwell on is the principle. The  
8 principle substantive effect is to create a broad immunity  
9 for participation and speech by citizens in the context of  
10 environmental regulatory decision and policy making. It  
11 would be hard to distinguish from a constitutional basis I  
12 think the difference between environmental matters or other  
13 types of matters. And I think that's something we need to  
14 think about.

15           The other issue with respect to the grant of immunity  
16 as it's breadth. To me it appears to immunize speech which  
17 may be irresponsibly misleading or without the factual  
18 foundation. In my opinion this goes too far and even  
19 defeats one of the fundamental purposes of public  
20 participation in the first place -- to make sure that the  
21 government has available to it and acts on reliable, factual  
22 information.

23           From my own experience, I can tell you that in today's  
24 world, broad license is already given to citizens and  
25 citizen's groups to advance arguments and theories about why

1 something shouldn't be permitted by an environmental agency.  
2 To the extent that Section 3 diminishes the need for good  
3 faith belief that the allegations made in such public  
4 discourse are true and correct, it sends the wrong message I  
5 believe and establishes bad policy. It also can create a  
6 burden on the government agency or the regulated entity to  
7 rebut or disprove unfounded or irresponsible allegations or  
8 assertions.

9           The new procedure established in House Bill 281 which  
10 I think has been discussed are also in conflict with the  
11 existing Rules of the Civil Procedure. If House Bill 281  
12 were enacted, it would have to be the integration, the  
13 motion to strike as a recognized pleading an action under  
14 existing rules which comes much earlier in the process than  
15 the motion contemplated which can take place at almost any  
16 time of the process. And in its present form without  
17 integration of the existing rules, I think that leads to  
18 delays in the resolution of litigation.

19           Another potentially significant problem with House  
20 Bill 281 involves Section 7 which does authorize the Board  
21 to award costs and attorney fees if frivolous appeals are  
22 taken. It's not so clear to see how that fits into the  
23 other purposes of the bill which is to eliminate unwarranted  
24 suits that have no substantive or meritorious reason other  
25 than to chill the public effect that it does -- public input

1 and participation. But it does create -- it sort of sticks  
2 out. And I think the Committee should think carefully about  
3 what role an expansion of awards are in the existing role  
4 with regard to awarding of counsel fees is. If it's  
5 intended to be limited to situations where there are SLAPP  
6 suit considerations and proceedings by the Board, it  
7 probably goes too far. If its intended to go as far as it  
8 does, then I think it needs to be carefully reevaluated and  
9 considered.

10 We also think that there are circumstances where the  
11 award of counsel fees should be made against the Department  
12 as they are in existing statutes and programs where the  
13 Board already has the authority to award counsel fees.

14 For all of those reasons, I don't believe that House  
15 Bill 281 is needed in its present form because the problem  
16 it is intended to fix I don't believe is pervasive or  
17 chronic. I am concerned that, if enacted, the bill would  
18 have unintended consequences and the potential to unduly  
19 limit and confuse conventional legal remedies in  
20 Pennsylvania.

21 Thank you for your interest. And I'd be happy to  
22 address any questions.

23 MR. CHAIRMAN: Thank you, Mr. Ingram. I, like  
24 yourself, have been concerned that I've gone to some of  
25 these public meetings and presided over some of the public

1 meetings where the public comes and vents their frustration  
2 over a permit process or the issuance of a permit. And they  
3 can say some pretty outlandish things as they take their  
4 time at the microphone. And that is always a concern to me  
5 except to the point that I feel that it's better for them to  
6 have come, had their say, and go home feeling that they've  
7 had their say. And then let the triers of the fact weigh  
8 whatever they've had to say accordingly.

9 And therefore, I've always been very lenient in having  
10 people voice whatever opinion they might, founded or  
11 unfounded, outlandish or not outlandish, having them go home  
12 rather than have them cutoff or ignored. And then have them  
13 come back and say, well, I didn't get a chance to say what I  
14 wanted to say. And then weigh their comments accordingly  
15 when a decision is being made.

16 MR. INGRAM: May I interject, Mr. Chairman?

17 MR. CHAIRMAN: Sure.

18 MR. INGRAM: I agree with you entirely, and I think  
19 the, generally speaking, that's the officers who administer  
20 those kinds of public proceedings in the permitting process  
21 or other public issues subscribe to that as a person who  
22 typically represents a permittee or businesses involved in  
23 such proceedings. Even though sometimes we have been  
24 tempted to take legal action, normal practice is to accept  
25 the fact that people want to blowoff steam. It's an

1 appropriate exercise. And that does not create problems.  
2 There are problems, however, when you get technically  
3 inaccurate representations made in the context of a  
4 primitive process. And those do create problems.

5 But it requires judgment. It requires concept that  
6 the people who live in those communities that have those  
7 concerns do have the right to air their views. We're going  
8 to be neighbors of them for a long time. And that's -- I  
9 think that's appropriate public participation. We don't  
10 oppose that.

11 MR. CHAIRMAN: Any questions? Seeing none and hearing  
12 none, I thank you very much for your input --

13 MR. INGRAM: Thank you very much, sir.

14 MR. CHAIRMAN: -- and your testimony. Additionally,  
15 to be added to the testimony received today, there will also  
16 be written testimony presented by the Pennsylvania Chamber  
17 of Business and Industry and also the Sierra Club  
18 Pennsylvania Chapter. And as soon as we receive that, the  
19 written testimony, we'll make sure that all Members in  
20 attendance receive a copy of that.

21 **COMMENTS REGARDING HOUSE BILL 281, P.N. 2677**

22 **ENVIRONMENTAL POLICY PARTICIPATION LAW**

23 **Pennsylvania Chamber of Business and Industry**

24 On behalf of the Pennsylvania Chamber of Business and  
25 Industry, we would like to thank the members of the Courts



1 Subcommittee of the House Judiciary Committee for providing  
2 this opportunity to offer our comments and recommendation  
3 regarding House Bill 281, the Environmental Policy  
4 Participation Law.

5 We would like to take this opportunity to offer some  
6 initial comments and recommendations based upon discussions  
7 conducted at our recent Environmental Affairs Committee  
8 Meeting.

9 The general reaction of the Pennsylvania Chamber of  
10 Business and Industry to the proposed legislation is to  
11 support the objective of preserving full and open public  
12 debate regarding environmental issues and to protect  
13 citizens, businesses and others against any abuse of the  
14 legal process intended to stifle legitimate public debate.

15 We are unaware, however, as recited in the legislation  
16 of any "disturbing increase in lawsuits brought primarily to  
17 chill the valid exercise of the constitutional rights of  
18 freedom of speech."

19 We likewise question the validity of the assumption,  
20 which apparently underlies the legislation, that the threat  
21 of litigation has somehow discouraged citizen groups and  
22 others from challenging the decisions of the government  
23 agencies regarding the environmental permits and approvals.  
24 In fact, our members have observed the opposite trend.  
25 Currently a very large number of environmental permits and

1 approvals are being vigorously and effectively contested by  
2 individual citizens, non-profit organizations and  
3 municipalities.

4           The Pennsylvania Chamber strongly opposes any misuse  
5 of the legal process to harass or intimidate individuals and  
6 organizations participating in public debate. We are not  
7 convinced, however, that there is a demonstrated need for  
8 additional legal protections to prevent these activities,  
9 and many of our members are concerned that the legislation  
10 may have unintended adverse consequences which may actually  
11 encourage rather than discourage the improper use of  
12 litigation.

13           House Bill 281 provides immunity from civil liability  
14 when a person "acts in furtherance of the persons's right of  
15 petition or free speech" in connection with the "enforcement  
16 or implementation of environmental law or regulation."

17           Immunity from civil liability is provided "regardless  
18 of [the] intent or purpose" of a communication, except where  
19 the communication "is not genuinely aimed at procuring [a]  
20 favorable governmental action, result or outcome." A  
21 communication...is not genuinely aimed at procuring a  
22 favorable governmental action only if "it is not material or  
23 relevant to the enforcement or implementation of  
24 environmental law or regulation. "The legislation provides  
25 that a communication is deemed to be made in furtherance of

1 a right of petition or free speech if made before a  
2 legislative, executive, judicial or other "official  
3 proceeding authorized by law," made in connection with the  
4 implementation or enforcement of environmental laws or  
5 regulations, or made in a "public forum in connection with  
6 an issue of public interest."

7 House Bill 281 also authorizes the Environmental  
8 Hearing Board to award attorney fees and costs if the Board  
9 determines that an appeal is "frivolous or taken solely for  
10 delay" or is "dilatory or vexatious."

11 Our members strongly support the provisions of this  
12 legislation authorizing the award to any party, including  
13 businesses, of attorney fees and costs for frivolous claims.  
14 We are concerned, however, about the limitation of this  
15 remedy only to proceedings before the Environmental Hearing  
16 Board and only to proceedings in which an appeal itself is  
17 frivolous. Regardless of the forum in which proceedings  
18 occur, attorney fees and costs should be available if  
19 proceedings are frivolous, are undertaken solely for delay,  
20 or are "dilatory or vexatious." In addition, rather than  
21 restricting the award of attorneys fees and costs only to  
22 frivolous appeals, fees and costs should also be available  
23 in the event of frivolous damage claims, requests for  
24 injunctive relief, interventions and other types of  
25 proceedings.

1 In addition, our members have expressed concerns that,  
2 as currently drafted, House Bill 281 has the potential of  
3 inappropriately restricting several types of important legal  
4 remedies currently available in Pennsylvania, including  
5 actions for defamation, invasion of privacy, interference  
6 with contractual relations, wrongful use of process, and  
7 abuse of office.

8 We will briefly summarize our understanding of the  
9 current Pennsylvania law in these areas and explain how  
10 House bill 281 may adversely affect the availability of  
11 important legal remedies.

12 **Defamation.** Under current Pennsylvania law, in order to  
13 successfully initiate a civil action for defamation, a  
14 plaintiff must allege that a defendant published  
15 non-privileged allegations of facts about the plaintiff of a  
16 defamatory character which were actually understood by the  
17 recipients as being defamatory and applying to the plaintiff  
18 and which caused special harm. Generally, a statement which  
19 ascribes to another conduct, character or a condition which  
20 would adversely affect his or her fitness for the proper  
21 conduct of a lawful business, trade or profession is  
22 defamatory.

23 If the plaintiff is a public figure or is classified  
24 as a "limited purpose public figure, "i.e. a person involved  
25 in a matter of public concern, the plaintiff must prove by

1 clear and convincing evidence that the defendant knew the  
2 communication was false or published the alleged facts with  
3 reckless disregard for the truth. Businesses seeking to  
4 obtain environmental permits or approvals are sometimes  
5 classified as public figures or limited purpose public  
6 figures.

7 **Invasion of Privacy.** Even where communications are not  
8 defamatory, a civil action may be initiated for invasion of  
9 privacy if a defendant disseminates publicity which places a  
10 plaintiff in a "false light" in a manner which is highly  
11 offense to a reasonable person by misrepresenting the  
12 plaintiff's character, history, activities or beliefs,  
13 provided that the defendant knew the communication was false  
14 or acted in reckless disregard of the truth. Even if the  
15 material false statements of facts are not made, an action  
16 for invasion of privacy may be maintained if the publication  
17 of selective excerpts or portions of the truth tend to place  
18 the plaintiff in a false light resulting in "mental  
19 suffering, shame or humiliation."

20 **Tortious Interference with Business Relationships.** A civil  
21 action for "tortious interference with business  
22 relationships" may be initiated if there is an existing  
23 contractual relationship; a defendant interferes with  
24 performance of the contract by inducing a breach or  
25 otherwise causing a third party not to perform; the

1 defendant is not privileged to act in the manner alleged;  
2 and the plaintiff suffers pecuniary loss as a result of the  
3 breach.

4 **Wrongful Use of Process.** A civil action for wrongful use of  
5 judicial proceedings may be initiated if a defendant  
6 maliciously institutes judicial proceedings without probably  
7 cause and the proceedings are terminated in favor of the  
8 plaintiff. 42 Pa. C.S. Section 8351.

9 **Abuse of Process.** A civil action for abuse of process may  
10 be initiated if a defendant uses legal processes as a  
11 tactical weapon to coerce a desired result that is not the  
12 legitimate object of the process.

13 **Abuse of Office.** An action can be filed against a public  
14 official for abuse of office where official powers are  
15 exercised in an unlawful manner which violates a plaintiff's  
16 constitutional rights.

17 As currently drafted, House bill 281 appears to confer  
18 immunity upon persons engaging in defamatory conduct or an  
19 invasion of privacy, provided that the defamation is  
20 "genuinely aimed at procuring a favorable governmental  
21 action."

22 In addition, House Bill 281 may provide immunity  
23 against claims of tortious interference with business  
24 relations if communications made "in connection with an  
25 issue under consideration or review by a governmental

1 agency" induce the breach of a contract, but were "genuinely  
2 aimed at procuring a favorable governmental action" or were  
3 "material or relevant to the enforcement or implementation  
4 of environmental law or regulation."

5 The legislation may provide immunity against claims  
6 involving the wrongful use of process or abuse of process,  
7 if statements or claims made in judicial proceedings are  
8 made without probable cause or for the purpose of coercing  
9 or compelling a defendant to take some collateral action for  
10 which judicial proceedings are not designed, but are  
11 nonetheless "relevant to the enforcement or implementation  
12 of environmental law or regulation."

13 Finally, the legislation may immunize otherwise  
14 illegal actions by government officials exercising the  
15 "right of petition or free speech."

16 Providing immunity in such circumstances will  
17 encourage unnecessary and wasteful litigation and further  
18 seriously undermine fundamental civility in the  
19 consideration of difficult and complex environmental issues.  
20 It is simply wrong to provide a license for defamation,  
21 invasion of privacy, interference with contractual  
22 relations, and abuse of process and public office simply  
23 because the issues under consideration involve environmental  
24 matters.

25 To prevent the legislation from immunizing otherwise

1 undesirable conduct, it may be worthwhile to recommend  
2 amendments which narrow the scope of the immunity provided.

3 For example, the immunities should not apply to:

- 4 1. Defamatory communications;
- 5 2. Invasions of privacy;
- 6 3. Actions undertaken for the purpose of interfering  
7 with business relationships;
- 8 4. The malicious initiation of judicial or  
9 administrative proceedings without probable cause;
- 10 5. The initiation of judicial or administrative  
11 proceedings to pursue collateral objectives for which the  
12 proceedings are not intended; or
- 13 6. Any actions which interfere with the exercise of a  
14 person's legal or constitutional rights.

15 We will continue to review and analyze this  
16 legislation and solicit comments and recommendations from  
17 among our members. Once we have completed this process, we  
18 will be happy to share with members of the Committee and  
19 your staff any specific recommendations the Chamber may wish  
20 to offer concerning amendments to House bill 281.

21 Thank you.  
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**SIERRA CLUB PENNSYLVANIA CHAPTER****COMMENTS ON HB281  
PRESENTED TO THE HOUSE JUDICIARY COMMITTEE  
BY THE SIERRA CLUB  
PENNSYLVANIA CHAPTER  
JOHN WILMER, LEGAL CHAIR  
August 14, 1996**

SLAPP stands for Strategic Lawsuits Against Public Persons. It is not a legal cause of action itself, but instead defines a class of conventional lawsuits filed for a different reason. When an industry is not happy with criticism of its environmental practices, it will sue the protestors to inhibit, limit, or silence opposition.

Typical causes of action are trespass, nuisance, harassment, slander, libel, and interference with contract. These actions must have their own legitimate criteria though their purpose is to silence others. Trespass, for example, requires that the violator be on the real property of another, without permission. What makes it a SLAPP lawsuit is the motivation to silence the person, rather than remedy the wrong. The lawsuits are usually filed before local magistrates or in the county courts of common pleas.

The consequences of being sued in this type of action are that a person may lose and be forced to pay damages. The real harm, however, is that even if they are found not liable they still must pay legal bills. Polluters can silence peaceful and legitimate protestors because of legal

1 fees, whether or not they ever win the lawsuit.

2 HB281, sponsored by Rep. Camille "Bud" George is a  
3 bill that would offer some protection by giving immunity  
4 from suit to persons who communicate environmental problems  
5 to the government for purposes of getting the government to  
6 act upon the problem. The bill also provided a special  
7 mechanism for getting this issue resolved before the lawsuit  
8 progresses. It further provided for attorneys' fees and the  
9 right of government intervention. The Sierra Club was in  
10 favor of this bill as introduced.

11 Unfortunately, HB281 was amended in Committee with a  
12 section that would allow the Environmental Hearing Board  
13 (which never hears SLAPP suits) to award costs, including  
14 attorney fees, if it determines that "an appeal is frivolous  
15 or taken solely for delay or that the conduct of the  
16 Appellant is dilatory or vexatious."

17 We cannot support this new section for the following  
18 reasons: This new provision would punish citizens and  
19 public interest groups who are forced to file appeals in 30  
20 days and who frequently do not have or cannot pay lawyers.  
21 Industries appealing DEP actions can afford to carefully  
22 prepare pleadings that pass the legal "frivolous" test.  
23 Citizens, on the other hand, do not read the Pennsylvania  
24 Bulletin regularly (where Notice of these actions appear),  
25 do not understand the complexities of the legal system well

1 enough to sound knowledgeable, and must file something  
2 within the short time allotted or forever lost their rights  
3 of appeal. Thus, a good bill that could have offered some  
4 protection for citizens before local and county courts now  
5 includes a provision that limits citizen rights before the  
6 Environmental Hearing Board.

7 The Sierra Club PA Chapter urges that HB281 be amended  
8 to remove the provision extending the bill to the  
9 Environmental Hearing Board.

10 MR. CHAIRMAN: Having no one further to testify in  
11 front of the Committee and seeing no comment or question  
12 from any of the Members or Counsel, we'll adjourn this  
13 meeting. And again, I thank everyone for their  
14 participation. Thank you very much.

15 (Whereupon, at 11:45 a.m., the hearing adjourned.)  
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C E R T I F I C A T E

I, Amy S. Intrieri, Reporter, Notary Public, duly commissioned and qualified in and for the County of York, Commonwealth of Pennsylvania hereby certify that the foregoing is a true and accurate transcript of my stenotype notes taken by me and subsequently reduced to computer printout under my supervision, and that this copy is a correct record of the same.

This certification does not apply to any reproduction of the same by any means unless under my direct control and/or supervision.

Dated this 12th day of September, 1996.



*Amy S. Intrieri*  
 Amy S. Intrieri/Reporter  
 Notary Public

My Commission expires  
 August 9, 1999.