**Testimony Regarding House Bill 281 P.N. 2677 - Environmental Policy Participation Act**

**Submitted on Behalf of the Pennsylvania Coal Association**

Good morning. My name is Henry Ingram. I am a practicing attorney in the Commonwealth of Pennsylvania. My practice has been concentrated in environmental and land use law affecting the development of natural resources. I thank the Judiciary Committee for the opportunity to state the views of the Pennsylvania Coal Association on HB 281. PCA has serious reservations about this legislation.

The Bill addresses SLAPP suits - Strategic Lawsuits Against Public Participation. The fundamental premise of the Bill appears to be that SLAPP suits are on the rise in Pennsylvania and that a legislative adjustment is necessary to remedy some perceived imbalance between the rights of citizens to participate in public debate and petition to the government, particularly on land use or environmental issues, and the interests of developers, businesses and others who are believed by some to be motivated by a desire to chill citizen's participation and input in policy debate and regulatory proceedings over public issues arising from environmental

regulation of land use and development and other regulated economic activities. As a lawyer who has represented members of the regulated community for over 25 years in Pennsylvania, frequently in proceedings in which citizen involvement and public participation is common and indeed encouraged by statute or government policy particularly under Governor Ridge's initiative to expand and formalize such participation. I have not had any first hand experience, on either side, as counsel in what I would recognize as SLAPP litigation. Thus, my comments are based on my observations as a lawyer practicing in the field but I believe them to be well informed.

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

Admittedly, it may be difficult to recognize all SLAPP suits because the claims or causes of action asserted in them are likely to be

expressed in conventional legal terms or nomenclature such as defamation, tortuous interference, abuse of process or invasion of privacy. Nevertheless, whether there has been a dramatic increase, some increase or any increase , I believe remains to be seen. I am simply not aware of any upsurge in SLAPP suits in Pennsylvania.

There is inevitable tension between a litigant's right to petition the courts and an individual's right to participate in the public process. The question is, does the existing system in Pennsylvania adequately resolve that tension. I believe that it does.

There has, however, been no decrease in the amount of citizens' involvement and public participation in the environmental regulatory process in Pennsylvania. In fact the opposite is true. Almost every major permitting action or environmental policy decision by regulatory agencies is replete with such participation. Frankly, I have observed no chilling of full and free expression of opinions, views, beliefs and even speculation by individual citizens or groups. The participation and right of such citizens to be involved is well respected by the DEP which is regularly and increasingly required to consider, investigate and deal with commentary and input by citizens and

citizen's groups. In Pennsylvania, the climate for public participation is friendly, not hostile. It has become a fact of life.

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

In the circumstances, PCA believes that HB 281 may be a solution in search of a real problem or stated another way, the legislation is directed at a perceived problem. It assumes that the existing legal system cannot deal with vexatious or improperly not wanted litigation. That is not the case.

If we assume, and not all commentators agree, that SLAPP suits are, by definition, intended to achieve no other result than to chill public participation by citizens, Pennsylvania law already provides adequate

remedies. One such remedy is demonstrated by the Cowder case, which appears to be the poster child for the advocates of this legislation. In that case Al Hamilton Contracting Co. v. Cowder, now reported in 434 Pa. Super 491 (1994), the defendant filed a conventional preliminary objection asserting that plaintiff had failed to state a cause of action. The objection was sustained and the suit was dismissed and the dismissal was affirmed by the Superior Court.

If a suit has no other purpose but to chill an individual's participation, a cause of action for wrongful use of civil proceedings is already available to the defendant. See 42 Pa. C.S. §§ 8351-8354, a copy of which is attached. Wrongful use of civil proceedings is a tort which arises when a person institutes civil proceedings with a malicious motive and lacking probable cause. To succeed in a cause of action for wrongful use of civil process a person must allege and prove that (i) the underlying proceedings were terminated in their favor; (ii) defendant instituted the underlying proceedings without probable cause; and (iii) the proceedings were instituted primarily for an improper cause.

The damages already available in a wrongful use of civil proceedings case include:

(1) damages for interference with advantageous use of land or other property;

(2) harm to the reputation of the defendant in the underlying proceedings;

(3) costs and attorneys fees in defending in the proceedings;

(4) specific pecuniary loss that has resulted from the proceedings;

(5) damages for emotional distress; and

(6) punitive damages according to law in appropriate cases.

These strong remedies are superior to the remedies in HB 281. Thus in egregious instances of SLAPP suits, the existing procedures and remedies are adequate to address them. Finally, a stay of discovery is available while the preliminary objection is being considered by the court. Finally, a SLAPP suit defendant can recover damages, including costs and attorneys fees in defending the suit if action is demonstrated to entirely vexatious or frivolous.

It also appears that HB 281 UNINTENDED CONSEQUENCES may inadvertently repeal the statutory cause of action for wrongful use of civil proceedings. Section 8 of HB 281 repeals all acts and parts of acts which are inconsistent with it. Thus, it might be argued that the statutory cause of action and remedies for wrongful use of civil proceedings has been repealed because they are inconsistent with the procedures, burdens of proof, etc., of HB 281.

The principle substantive effect of HB 281 is to create a broad immunity for participation and speech by citizens in the context of environmental regulatory decision and policy making. The grant of immunity gives citizens an almost unlimited license to express opinions against the interests of members of the regulated community and raises the bar for the exercise of recognized legal actions to remedies for active misrepresentation and conduct intended to cause harm to members of the regulated community.

The fundamental problem with the grant of immunity contained in Section 3 is its breadth. To me it appears to immunize speech which may irresponsibly misleading or without factual foundation. This goes too far and

even defeats one of the fundamental purposes of public participation in the first place -- to make sure that the government has available to it and acts on reliable, factual information.

From my own experience, I can tell you that in today's world, broad license is already given to citizens and citizen's groups to advance arguments and theories about why something shouldn't be permitted by an environmental agency. To the extent Section 3 diminishes the need for good faith belief that the allegations made in such public discourse are true and correct, it sends the wrong message and establishes a bad policy. It also can create a burden on the government agency or the regulated entity to rebut or disprove unfounded or irresponsible assertions.

The new procedures established in HB 281 conflict with the existing rules of civil procedure. This is a technicality but nevertheless true. The motion to strike is a recognized pleading but not at the stage of proceedings as contemplated by the legislation. Under HB 281, the motion to strike could come much later in the proceedings than it would under existing procedures and serve to delay the disposition of the litigation.

Another potentially significant problem with HB 281 involves Section 7 which authorizes the Environmental Hearing Board ("EHB") to award costs and attorney fees if the EHB determines that an appeal is frivolous or taken solely for delay or that the conduct of the appellant is dilatory or vexatious. PCA supports appropriate sanctions against frivolous or vexatious appeals. However, Section 7 is not limited to the SLAPP suit situation. It is broad enough to potentially be applicable in all appeals before the EHB. It could result in much more confrontation in EHB proceedings. Also, it could be used by the DEP to chill appeal rights of any appellant in a case where an assertion could be made that an appeal is frivolous or taken solely for delay or where the conduct of the appellant is alleged to be dilatory or vexatious. It goes too far if it is intended to apply only to SLAPP suit situations. If it is intended to be a broad grant of authority for the EHB to award attorney fees to deter frivolous appeals and dilatory or vexatious behavior, then it should allow for awards against any party that engages in such conduct, including the Department.

## CONCLUSION

For the reasons stated above, I don't believe HB 281 is needed because the problem it is intended to fix is not pervasive or chronic. I am concerned that, if enacted, the Bill would have unintended consequences and the potential to unduly limit and confuse conventional legal remedies.

Thank you for your interest.