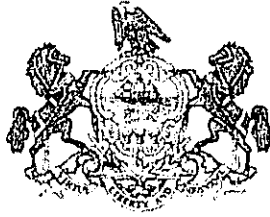


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*House of Representatives*  
Commonwealth of Pennsylvania  
Harrisburg

September 16, 2013

The Honorable Martin T. Causer, Chairman  
Game and Fisheries Committee  
Pennsylvania House of Representatives  
41B East Wing, P.O. Box 202067  
Harrisburg, PA 17120-2067

The Honorable Jeffrey P. Pyle  
State Representative, 60<sup>th</sup> Legislative District  
147B East Wing, P.O. Box 202060  
Harrisburg, PA 17120-2060

***SUBJECT: House Bill 1576 and Federal Funding - Opinion***

Chairman Causer and Representative Pyle:

You requested a review of House Bill 1576 and its effect on the Commonwealth's ability to receive federal funding via the Pittman-Robertson Wildlife Restoration Program. Specifically, you asked that I address the assertions made by the Pennsylvania Game Commission (PGC) that the provisions of House Bill 1576 (which subject these agencies to the requirements of the Independent Regulatory Review Act; require the agencies to maintain a centralized database for threatened or endangered species; and to develop and provide mitigation measures and best practices), "*may affect the PGC's and PFBC's eligibility to receive federal funding.*" (PGC Letter to the Chairmen, dated August 14, 2013).

For the forgoing reasons, it is my opinion that the provisions of House Bill 1576 mentioned above do not have any effect on these agencies' eligibility to receive federal funding pursuant to the Pittman-Robertson Wildlife Restoration Program.

**A. Game Commission Position:**

In a letter to the majority and minority chairmen of the House Game and Fisheries Committee, Carl G. Roe, Commission Executive Director, stated:

*As a condition to receiving [federal funding], the FWS must determine that the agency has full authority to issue regulations regarding wildlife and has control of its own funding. The FWS has determined that this bill may affect the PGC and PFBC in those areas, and thus make either, or both, agency ineligible for federal funding.*

*Id.*

In support of its assertion, the agency solicited, and received, an opinion from the US Department of the Interior, Fish and Wildlife Service (FWS), dated August 9, 2013. In their opinion letter, the FWS states:

*If the Game Commission's (and Fish and Boat Commission's) authority to issue regulations necessary to maintain compliance with the provisions of 50 CFR Part 80 are interfered with, Pennsylvania risks losing eligibility to receive funding under the Pittman-Robertson Wildlife Restoration Program (and Dingell-Johnson Sport Fishing Restoration Program).*

FWS Letter to Carl Roe, dated August 8, 2013.

In their correspondence to PGC Executive Director Roe, the FWS takes issue with two other provisions in House Bill 1576:

- a. The requirement that any fish, wildlife, or plant species listed as threatened or endangered species be maintained in a centralized database.
- b. The requirement that the agencies develop and provide mitigation measures and best practices.

For both of these provisions, the FWS argues that federal regulations under 50 C.F.R. § 80.10 require the State fish and wildlife agency to control expenditures of license revenues. According to the FWS, because there is no additional funding provided in the bill, “[either of these provisions] could constitute a loss of control over expenditure of funds.” *Id.*

#### **B. Independent Regulatory Review Commission Advice:**

In an effort to bring some clarity to the impact of House Bill 1576, Representative Pyle submitted an inquiry to IRRC.

Representative Pyle asked the two basic questions at the core of the PGC and FWS argument relating to HB 1576 IRRC requirements – whether a review requirement for a promulgating agency’s regulations by an independent agency constitutes “usurpation” of its authority; and, whether any Commonwealth agency has been denied federal funding on the basis of the regulatory review process.

On September 11, 2013, the Commission responded, "*While [the IRRA] and [the regulatory review] process have been repeatedly upheld by Pennsylvania Courts, to our knowledge no Pennsylvania Court has directly or indirectly addressed the question of agency autonomy as it relates to federal funding in connection with the law.*" The Commission was not aware of any state agency being denied federal funding on the basis of the regulatory review process, but noted that this "*is not something that we would necessarily be informed of.*" (IRRC Letter to Representative Pyle, dated September 11, 2013).

The Commission also suggested that Representative Pyle reach out to Caucus counsel (i.e. this office), or the various Committees, to provide a legal opinion on the matter. *Id.*

### **C. Discussion:**

#### **1. The Agencies.**

The PGC and the Pennsylvania Fish and Boat Commission (PFBC) are the agencies in the Commonwealth statutorily empowered to manage (protect, conserve and enhance) the State's wildlife and aquatic resources; and to provide hunting, fishing and boating opportunities. Their authority begins and ends with that which is provided in statute by the General Assembly. They are among the many state and territorial agencies throughout the United States that work in partnership with the FWS and coordinate their efforts to manage fish and wildlife resources.

According to information from the International Association of Fish and Wildlife Agencies, most states manage their fish and wildlife resources through departments or divisions maintained within specific departments (e.g. a state Department of Conservation and Natural Resources, Department of Environmental Conservation or Bureau of Wildlife Management). Few states appear to manage their fish or wildlife resources through an "independent" commission like PGC or PFBC. (See <http://www.fws.gov/offices/statelinks.html>).

#### **2. The Process.**

It is also useful to note that most states subject their agencies to a regulatory review process that is similar to the Commonwealth's IRRA. According to a report from the Institute for Policy Integrity, Pennsylvania is among sixteen (16) states that require the state Attorney General to review regulations for form and legality; among thirty (30) states that require a similar review by an executive level office or the Governor of the state; and, among forty-two (42) states that provide for legislative review, either by the standing committees or by a "review committee" established specifically for that purpose. Jason A. Schwartz, Institute for Policy Integrity, *52 Experiments with Regulatory Review*, Report No. 6 (2010).

While Pennsylvania's process has been maligned as "cumbersome" and "slow" (and could certainly be improved), the above-mentioned independent analysis shows it to be substantially better than most states. According to the Institute for Policy Integrity, and based on their review of each state's quality of their review process, Pennsylvania's IRRC process

receives one of their higher grades (B-). The highest grade among states was a B while most states received a C or below. The average grade for states in this report was a D+. *Id.*

In a nutshell, the IRRC process itself entails a structured process which includes the publication of regulations by the promulgating agency in “draft” form; provides for standing committee and public comment; review by the Office of General Counsel and the Office of Attorney General for form and legality; a second publication of the regulations by the agency in “final” form with changes to reflect the comments or concerns presented or an explanation of why suggested changes were not made in the “final” form regulation; and either approval or disapproval of the final form regulation.

The PGC regulatory process, by contrast, includes two periods of public comment and two separate votes by the Board of Commissioners. Their regulatory action must be “*in accordance with the Game and Wildlife Code, the Sunshine Act, the Commonwealth Documents Law, the Commonwealth Attorneys Act and is subject to judicial review.*” (PGC Letter to the Chairmen, dated August 14, 2013).

### **3. The Federal Regulations.**

The regulations referred to by the FWS (50 CFR Part 80) provide States with guidance as to permissible uses for, and eligibility to receive, Pittman-Robertson Wildlife Restoration Program funds. The FWS refer specifically to 50 C.F.R. § 80.10 for the proposition that a State fish and wildlife agency is required “to control expenditures of license revenues.”

This section provides:

*States acting through their fish and wildlife agencies are eligible for benefits of the Acts only if they pass and maintain legislation that:*

- (a) Assents to the provisions of the Acts;*
- (b) Ensures the conservation of fish and wildlife; and*
- (c) Requires that revenue from hunting and fishing licenses be:*
  - (1) Controlled only by the State fish and wildlife agency; and*
  - (2) Used only for administration of the State fish and wildlife agency, which includes only the functions required to manage the agency and the fish- and wildlife-related resources for which the agency has authority under State law.*

50 C.F.R. § 80.10.

Another section, 50 C.F.R. § 80.21, addresses the question of “What if a State diverts license revenue from the control of its fish and wildlife agency?” This section states:

*The Director may declare a State to be in diversion if it violates the requirements of § 80.10 by diverting license revenue from the control of its fish and wildlife agency to purposes other than the agency's administration. The State is then ineligible to receive benefits under the relevant Act from the date the Director*

*signs the declaration until the State resolves the diversion. Only the Director may declare a State to be in diversion, and only the Director may rescind the declaration.*

50 C.F.R. § 80.21.

50 C.F.R. § 80.50 is important to this discussion as it answers the question “What activities are eligible for funding under the Pittman–Robertson Wildlife Restoration Act?”

This section states:

*The following activities are eligible for funding under the Pittman–Robertson Wildlife Restoration Act:*

*(a) Wildlife Restoration program.*

- (1) Restore and manage wildlife for the benefit of the public.*
- (2) Conduct research on the problems of managing wildlife and its habitat if necessary to administer wildlife resources efficiently.*
- (3) Obtain data to guide and direct the regulation of hunting.*
- (4) Acquire real property suitable or capable of being made suitable for:
  - (i) Wildlife habitat; or*
  - (ii) Public access for hunting or other wildlife-oriented recreation.**
- (5) Restore, rehabilitate, improve, or manage areas of lands or waters as wildlife habitat.*
- (6) Build structures or acquire equipment, goods, and services to:
  - (i) Restore, rehabilitate, or improve lands or waters as wildlife habitat; or*
  - (ii) Provide public access for hunting or other wildlife-oriented recreation.**
- (7) Operate or maintain:
  - (i) Projects that the State fish and wildlife agency completed under the Pittman–Robertson Wildlife Restoration Act; or*
  - (ii) Facilities that the agency acquired or constructed with funds other than those authorized under the Pittman–Robertson Wildlife Restoration Act if these facilities are necessary to carry out activities authorized by the Pittman–Robertson Wildlife Restoration Act.**
- (8) Coordinate grants in the Wildlife Restoration program and related programs and subprograms.*

*(b) Wildlife Restoration--Basic Hunter Education and Safety subprogram.*

- (1) Teach the skills, knowledge, and attitudes necessary to be a responsible hunter.*
- (2) Construct, operate, or maintain firearm and archery ranges for public use.*

*\* \* \**

50 C.F.R. § 80.50.

The regulations address whether activities may be eligible for federal funding even if such activity is not explicitly eligible under the regulations. 50 C.F.R. § 80.52 provides as follows:

*An activity may be eligible for funding even if this part does not explicitly designate it as an eligible activity if:*

- (a) The State fish and wildlife agency justifies in the project statement how the activity will help carry out the purposes of the Pittman–Robertson Wildlife Restoration Act or the Dingell–Johnson Sport Fish Restoration Act; and*
- (b) The Regional Director concurs with the justification.*

50 C.F.R. § 80.52.

Finally, as it relates to the federal regulations, it is useful to this analysis to understand what would constitute a “*diversion of license revenue*,” as provided in 50 C.F.R. § 80.51 (above). This section provides that diversion of such revenue would cause the agency to be ineligible to receive Pittman-Robertson funds. According to the regulations, diversion of license funds occurs when the agency diverts “*license revenue from the control of its fish and wildlife agency to purposes other than the agency's administration.*” 50 C.F.R. § 80.51 (emphasis added).

There is limited judicial review of what constitutes “diversion” of funds and typically the legal proceedings involve the use of lands purchased with license funds. For example, in 1999, the US District Court in Colorado held that a state's construction and operation of prison on land acquired in part with hunting and fishing license fee monies was improper use of such revenues and constituted “diversion” under Pittman-Robertson. Sportsmen's Wildlife Defense Fund v. US Dept. of the Interior, 40 F. Supp. 2d 1192 (D. Colo. 1999).

#### **D. Analysis:**

- 1. Does a statutory requirement that a state agency submit to the IRRC process for regulatory review cause the agency to forfeit eligibility to receive federal funding under Pittman-Robertson?**

**Answer:** No. A requirement that an agency submit to a regulatory review process does not cause the agency to forfeit eligibility for such federal funding.

Whether an agency conducts its own regulatory review process - as is currently done by the PGC and PFBC - or the review process is conducted by a separate, independent agency is immaterial to an analysis of whether its eligibility to receive funding is in jeopardy. Rather, the focus of such an analysis should be the content of the regulations promulgated by the agency itself (i.e. the PGC or the PFBC) as a codification of its intended course of conduct.

The Code of Federal Regulations (CFR) cited by the FWS provides that a loss of eligibility to receive funding may occur when revenue from hunting and fishing licenses are used for purposes other than the administration of the state fish and wildlife agency, "*which includes only the functions required to manage the agency and the fish- and wildlife-related resources for which the agency has authority under State law.*" 50 C.F.R. § 80.10. The CFR provides an expansive list of permissible uses of federal funds in 50 C.F.R. § 80.50; and further provides that activities not explicitly designated in the § 80.50 could still be eligible under certain circumstances.

The operative question revolves around the activity being funded, not the means by which the agency's regulations were promulgated.

It's difficult to comprehend how the representative of the FWS can credibly argue that an independent regulatory review process would interfere with the agencies "*authority to issue regulations necessary to maintain compliance with*" the federal law. (FWS Letter to Carl Roe, dated August 8, 2013). This assertion is especially difficult to understand when, by its own admission, the PGC regulatory process is already governed by three (3) other separate bodies of law in addition to the Game Code (i.e. the Sunshine Act, the Commonwealth Documents Law and the Commonwealth Attorneys Act), and subject to judicial review. *Id.*

The purpose of the IRRA is consistent with those of the various laws under which the PGC currently promulgates regulations – transparency, agency accountability, fundamental fairness and assuring due process protections.

Moreover, there are relatively few jurisdictions that establish commissions similar to PGC and PFBC. Most jurisdictions empower departments, or divisions within departments, to manage their fish and wildlife. While some of these jurisdictions handle their rulemaking as the Pennsylvania commissions (i.e. in-house), many more must be subject to a rulemaking process similar to the IRRC process. An argument that Pennsylvania "risks losing eligibility" to receive federal funding is tantamount to arguing that a substantial number of fish and wildlife agencies in other jurisdictions *have already lost their eligibility*. I believe it is worth noting that neither the FWS' August 9, 2013, letter; the PGC's August 14, 2013, letter; nor the PGC's September 12, 2013, letter provide any examples of agencies in other states who lost Pittman-Robertson funds as a result of participation in a state-level regulatory review process.

- 2. Does a statutory requirement for the agency to list threatened or endangered species in a centralized database, even when there is no funding provided for implementing the database, take "control away from the agency" and constitute a "loss of control over expenditure of funds?"**

**Answer:** No. A statutory requirement for the agency to list threatened or endangered species in a centralized database, even when there is no funding provided for implementing the database, does not take "control away from the agency" and constitute a "loss of control over expenditure of funds."

As there are any number of reasonable justifications for the creation of a centralized database relating to the mission of the agencies to manage fish and wildlife related resources, the argument of the PGC and the FWS in this regard strains credulity. Arguably, the agency may be justified in using licensing revenues for this purpose under the provisions of 50 C.F.R. § 80.10 (administration of fish and wildlife management); or, federal funds to administer such a database under the provisions of 50 C.F.R. § 80.50 or § 80.52.

The PGC states that “*natural resource agencies already maintain a database on the location of threatened and endangered species in the Commonwealth.*” (PGC Letter to the Chairmen, dated August 14, 2013). Such a statement begs the obvious questions of whether the PGC expends any of its resources in the creation and maintenance of such a database; and, if so, why the PGC’s on-going course of conduct doesn’t already jeopardize the agency’s eligibility to receive federal funds as the FWS would argue.

**3. Does a statutory requirement for an agency to develop and provide mitigation practices and best practices, even when there is no funding provided for the requirement, constitute a “loss of control over expenditure of funds?”**

**Answer:** No. A statutory requirement for an agency to develop and provide mitigation practices and best practices, even when there is no funding provided for the requirement, does not constitute a “loss of control over expenditure of funds.”

For the same reasons as provided above, this argument from PGC and FWS is equally puzzling.

The underpinnings of the FWS concerns seem to stem from a misapprehension of where the PGC and PFBC obtain authority to maintain fish and wildlife in the Commonwealth. The FWS focuses on the statutory requirement to engage in certain conduct by the General Assembly (regardless of the content of the mandate) as cause for the agencies to possibly lose “*control over expenditure of funds.*” The PGC asserts that they must have “*full authority to issue regulations regarding wildlife.*” (PGC Letter to the Chairmen, dated August 14, 2013) (emphasis added).

In point of fact, authority for all PGC and PFBC conduct (including the promulgation of regulation) must be rooted in statutory law. To engage in conduct without statutory authorization is the very definition of the “*ultra vires doctrine.*” When an agency engages in such conduct, the agency is typically branded as “rogue,” not rewarded with federal funding.

In sharp contrast to the holding in Sportsmen’s Wildlife Defense Fund, which involved the use of lands purchased with licensing revenue for purposes totally unrelated to fish and wildlife conservation and maintenance (i.e. building a prison on game lands), the conduct required *vis-a-vis* this legislation is directly and substantially related to the PGC and PFBC missions and the means by which the agency promulgates regulations. It simply does not implicate any “*loss of control*” or interfere with the agencies’ ability to comply with the Pittman-Robertson Wildlife Restoration Program.



**E. Conclusion:**

For the forgoing reasons, it is the opinion of this office that House Bill 1576 does not jeopardize federal funding. Subjecting an agency to the independent regulatory review process cannot, by itself, interfere with the agency's authority to promulgate regulations. Rather, the process is a means by which such regulations are promulgated. Similarly, legislation to require an agency to engage in conduct is not the catalyst for a "loss of control." It is the conduct itself that must be examined.

Thank you for your attention to this correspondence. If you have any questions or concerns regarding the content of this opinion, please do not hesitate to contact me.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "James G. Mann". The signature is written in a cursive style with a prominent loop at the end.

James G. Mann, Esquire  
Chief Counsel to the Republican Leader

JGM/ljo