

March 10, 2009

Douglas J. Austen, Ph.D.
Executive Director
Pennsylvania Fish and Boat Commission
P.O. Box 67000
Harrisburg, PA 17106-7000

Re: Proposed Rulemaking Relating to Threatened and Endangered Species

Dear Dr. Austen:

I am a citizen of Pennsylvania and therefore have an interest in assuring that businesses within my state are not placed at a competitive disadvantage by proposed regulations. My comments are relate to the Rayed Bean mussel, which is proposed for "threatened" status in Pennsylvania.

The basis for proposing the Rayed Bean for "threatened" status in Pennsylvania is the conclusion of the Commission Staff that this species is likely to experience a greater than or equal to 80% population reduction within the next 10 years or 3 generations.

However, a 2002 report done for the U.S. Fish and Wildlife Service concluded that "based on historical collections, it would appear that [in Pennsylvania] the rayed bean is more abundant now that it was historically."

For Pennsylvanians, the issue must be whether a species is in need of protection within this Commonwealth, not elsewhere. It is for others to assess the need for "national" protection of a species.

I urge the Commission to not list the rayed bean mussel as "threatened" or otherwise in need of protection at this time.

Very truly yours,


Douglas Anderson

Office of Executive Director	
MAR 18 2009	
S:	
Coordinate	Fisheries
Assist	
Assist	
Reply for Dir's Signature	
Reply Direct	
Comments/Return	
cc:/Info	public comment

TIMOTHY J. SOLOBAY, MEMBER
48TH LEGISLATIVE DISTRICT

CAPITOL OFFICE:
G-14 IRVIS OFFICE BUILDING
P.O. BOX 202048
HARRISBURG, PENNSYLVANIA 17120-2048
PHONE: (717) 787-1188 • FAX: (717) 705-1887
E-MAIL: TSOLOBAY@PAHOUSE.NET
WEB SITE: WWW.PAHOUSE.NET/SOLOBAY

CONSTITUENT SERVICE OFFICES:
CANONSBURG BOROUGH BUILDING
ROOM 205
CANONSBURG, PENNSYLVANIA 15317
PHONE: (724) 746-3762 • FAX: (724) 746-3509
GEORGE WASHINGTON HOTEL
60 SOUTH MAIN STREET, SUITE 207
WASHINGTON, PENNSYLVANIA 15301
PHONE: (724) 223-2114 • FAX: (724) 223-2117



House of Representatives
COMMONWEALTH OF PENNSYLVANIA
HARRISBURG

March 16, 2009

COMMITTEES

VETERANS AFFAIRS AND EMERGENCY PREPAREDNESS,
SUBCOMMITTEE CHAIRMAN: SECURITY AND
EMERGENCY RESPONSE
POLICY, DEPUTY CHAIRMAN
TRANSPORTATION, SUBCOMMITTEE CHAIRMAN:
HIGHWAYS AND BRIDGES
AGRICULTURE AND RURAL AFFAIRS
CONSUMER AFFAIRS
PROFESSIONAL LICENSURE
DEPUTY WHIP -- DEMOCRATIC CAUCUS
DEMOCRATIC REPRESENTATIVE TO PEMA COUNCIL
DEMOCRATIC MEMBER OF PIAA ADVISORY BOARD

CAUCUSES

SOUTHWEST - VICE CHAIRMAN
FIREFIGHTERS - CHAIRMAN
LUPUS - CHAIRMAN
LOCAL TAX REFORM • STEEL • COAL
SPORTSMEN'S • ITALIAN

Pennsylvania Fish and Boat Commission
Douglas J. Austen, Executive Director
P.O. Box 67000
Harrisburg, PA 17106-7000

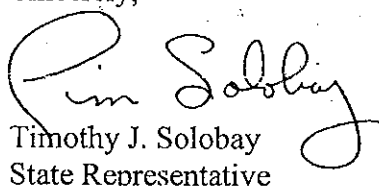
Dear Dr. Austen,

I am writing in regards to the proposed addition of the Salamander Mussel and Rayed Bean Mussel to the list of threatened and endangered species in Pennsylvania. I have received a well researched letter of opposition, and have enclosed it for your review.

I am requesting that the Pennsylvania Fish and Boat Commission consider alternative methods for addressing this issue so that important transportation projects are not obstructed. The Pennsylvania Department of Transportation, Tetra Tech, Inc. (an international environmental consulting firm), and several others are opposed to this proposed rulemaking. It would have adverse affects on many residents of our Commonwealth by hampering a number of transportation projects.

I appreciate your looking into this matter. If you have any questions, please let me know.

Sincerely,


Timothy J. Solobay
State Representative

TJS:jp
Enclosure
Cc: Thomas Bryan

Office of Executive Director
MAR 18 2009
S:
Coordinate Fisheries
Assist _____
Assist _____
Reply for Dir's Signature _____
Reply Direct _____
Comments/Return _____
cc/Info public comment
G. Moore

SATELLITE OFFICE (FRIDAY):
BENTLEYVILLE BOROUGH BUILDING - 1 PM TO 4 PM

Tri-State Materials, Inc.
P.O. Box 218
Beaver, PA 15009
412/973-9006

March 11, 2009

Honorable Timothy j. Solobay
Canonsburg Borough Building
Room 205
Canonsburg, PA 15317

Re: Proposed Rulemaking Amending 58 Pa.Code, Chapter 75
(Relating to Threatened and Endangered Species)

Dear Sir:

The Pennsylvania Fish and Boat Commission is proposing to add several new mussel species to its list of "threatened" and "endangered" species. The addition of at least two of these species, the Rayed Bean and the Salamander Mussel, will have an immediate and drastic impact on the Western Pennsylvania dredging industry's ability to continue to operate. Attached for your information are comments submitted to the Commission by the Pennsylvania Department of Transportation opposing this proposal.

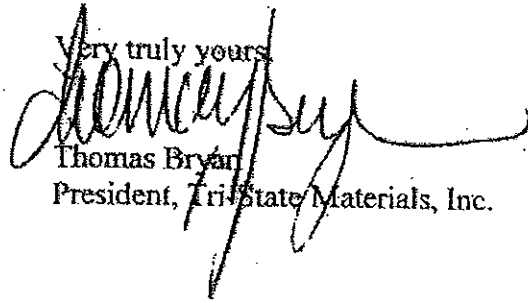
Also enclosed is a copy of technical comments prepared on behalf of Western Pennsylvanian businesses that would be affected by the proposal which were prepared by a nationally recognized consulting firm.

Finally, I ask that you consider, as but one example of the short-sightedness of this proposal, that the Commission proposes declare one mussel, the Rayed Bean, as "threatened" in our State even though in a 2002 report prepared for the U.S. Fish and Wildlife Service the author concluded: "based on historical collections, it would appear that **[in Pennsylvania] the rayed bean is more abundant now that it was historically.**" See: <http://www.gov/midwest/Endangered/clams/pdf/rayed-bean-sa.pdf>, page 13 of this Report.

For Pennsylvanians, particularly those whose jobs are at risk, the issue must be whether a species is in need of protection within this Commonwealth, not elsewhere. It is for others to assess the need for "national" protection of a species.

I urge you to contact the Commissions of the Fish and Boat Commission (their addresses are enclosed) and its Executive Director and indicate to them that the above proposal should be defeated when considered by the Commission at its April 2009 meeting.

Very truly yours,

A handwritten signature in black ink, appearing to read "Thomas Bryan", written over the typed name and title.

Thomas Bryan
President, Tri-State Materials, Inc.



MEMO

DATE: January 21, 2009

SUBJECT: Proposed Rulemaking 58 PA. Code Ch. 75, 38 PaB. 6617
Saturday, December 6, 2008

TO: Dr. Douglas J. Austen, Ph.D.
Executive Director
Pennsylvania Fish and Boat Commission

FROM: Brian G. Thompson, P.E. /s/
Director
Bureau of Design

This letter is in response to the above referenced Proposed Rulemaking by the Fish and Boat Commission which expands the state listing of threatened and endangered species to include five additional species of mussels.

President Obama has released his intent to initiate economic stimulus legislation that includes the greatest infrastructure investment since the Interstate Highway Program was initiated during the Eisenhower administration. The President and Governor Rendell have both indicated that advancing projects that are "shovel ready" and fast-tracking other projects will be critical to providing the desired "jump-start" to the economies of the Nation and the Commonwealth. Additionally, in July of 2008, Governor Rendell implemented the *Rebuild Pennsylvania Initiative* which involves replacing 1145 bridges over the next three years. The 1145 bridges constitute just the initial phase of a long-term commitment to repair or replace 6,000 PennDOT-owned structurally deficient bridges.

PennDOT is tasked with advancing these projects to letting and overseeing their delivery through construction. The magnitude and importance of these ventures presents PennDOT with significant challenges which will require enhanced state agency partnerships, the development of new technologies and processes and creative ingenuity.

The Proposed Rulemaking generates two areas of concern to PennDOT. The first concern relates to the environmental review and permitting processes required to bring a transportation project to letting. In evaluating the impact of the proposed listings we have determined that these species predominantly overlap the distribution of the two currently federally listed animals, northern riffleshell and clubshell mussels. Additionally our assessment regarding the physical boundaries of impact is such that these species would have limited occurrences within the surveys. This overlap in distribution and the limited occurrences results in an anticipated insignificant level of impact on letting bridge projects from an environmental review process.

Dr. Douglas J. Austen, Ph.D.
Executive Director
Pennsylvania Fish and Boat Commission
January 21, 2009
Page 2

Mussel surveys would already be required in these waters as a result of the federally listed species and we would expect that one of these species will be rarely encountered.

The second concern relates to the availability of aggregates for our construction projects. River gravels dredged from the Allegheny and Ohio Rivers are a valuable source of PennDOT's highest rated skid resistant level aggregate and Type A fine aggregate. Skid resistant level aggregate (SRL-B) is used for asphalt pavement and Type A fine aggregate is used for cement concrete.

Approximately 2.1 million tons of river-dredged aggregates from the Allegheny and Ohio Rivers are used for PennDOT projects annually. The 2.1 million tons represents approximately 20% of the total aggregates used annually by PennDOT. If these sources were restricted by the presence of the additional endangered or threatened mussel species, the availability of high quality aggregates would be impacted. More specifically, a substantial supply of aggregates for projects in three of PennDOT's western District offices, Districts 10, 11, and 12, would have to be obtained from sources outside the local region. On the average, it is expected that a transport distance of 90 to 100 miles would be added to the delivery of aggregates, increasing the unit cost to \$10.40/ton, which is 30% above current costs. The 30% increase is based on current price of fuel and would be higher if fuel prices were to increase.

With consideration of increased transportation costs, the Proposed Rulemaking would have adverse fiscal impact to PennDOT, which is contrary to *Section G. Fiscal Impact* in the Preamble to the Proposed Rulemaking which indicates no adverse fiscal impact on the Commonwealth. Similarly, the Fiscal Note issued by the Office of the Budget states: "This action will not result in a loss of revenue or an increase in program costs to the Commonwealth or its political subdivisions." PennDOT estimates the overall increase in program costs to be \$5 to \$6 million annually based on current material usage. The cost impact could grow substantially with the addition of projects associated with the economic stimulus legislation, and/or with higher fuel costs. In addition, the ability of other sources to produce, at least in the short term, material quantities lost from river-dredging is a significant concern to PennDOT.

In the consideration of a proposed rulemaking it behooves the Commission to consider not only the specific direct costs incurred to comply with the rulemaking, but also the adverse monetary impacts to the Commonwealth and to its taxpayers who ultimately bear the cost of the Commonwealth's transportation improvements. Fewer improvement projects can be funded if the cost of materials for those projects is significantly increased by the final promulgation of this rulemaking. Therefore, PennDOT respectfully requests that the threatened and endangered species lists not be amended to include the salamander, rabbitsfoot, snuffbox, sheeppose, and rayed beam mussels at this time.

Dr. Douglas J. Austen, Ph.D.
Executive Director
Pennsylvania Fish and Boat Commission
January 21, 2009
Page 3

PennDOT appreciates the opportunity to review and comment on the proposed rulemaking. If you have any questions, please contact me at (717)787-3310.

4380/GCF-BGT/kl/ Proposed Rulemaking 58 PA. Code Ch. 75, 38 PaB. 6617
Saturday, December 6, 2008

Cc: Allen D. Biehler, P.E., 8th Floor, CKB
Richard H. Hogg, P.E., 8th Floor, CKB
Tucker L. Ferguson, P.E. 7th Floor, CKB
Danielle K. Spila, Policy Office, 8th Floor, CKB

Oral Testimony for Jerry Diamond, Ph.D., Tetra Tech, Inc.
March 2, 2009

My name is Jerry Diamond and I am a Director of aquatic ecology and toxicology at Tetra Tech, Inc., an international environmental consulting firm well-respected by resource agencies throughout the U.S. I have a doctorate in aquatic ecology and prior to joining Tetra Tech, I served as a Fisheries Biologist at the Oregon Department of Fish and Wildlife Research Section and at the US Forest Service. For the past 12 years, I have served as the lead scientist on the approved Environmental Impact Statement released by the Pittsburgh District Army Corps involving commercial sand and gravel dredging in the navigable Allegheny and Ohio Rivers in western Pennsylvania. In this capacity, I have become very familiar with the issues surrounding sampling methods, data interpretation, and life histories of native mussels in these rivers. In addition, I have had direct technical experience with native mussel ecology, distribution, and threat assessments via projects with EPA, the Army Corps, and several state agencies.

I have reviewed and evaluated the Commissions' Proposed Rule for listing five mussel species in Pennsylvania, as well as supporting information supplied by Commission staff. I urge the Commission to disapprove the proposed status change for at least the Salamander and Rayed Bean mussels. The staff's methodology is seriously flawed and biased towards a finding of threatened or endangered status. In addition, the methodology is not consistent with scientific or conservation practice elsewhere, and the data on which staff relied for these species is extremely unreliable.

The IUCN Red List methodology, which staff modified, is intended to be a transparent and repeatable regional or global assessment of a species' status, based on quantitative information, with all uncertainties clearly identified and incorporated into the assessment. The Commission staff's modification meets none of these requirements, with the result that a species is more likely to be assessed as threatened or endangered using the staff's procedure than if they used the Red List methodology. The following summarizes critical flaws in the staff methodology and highlights why the Commission should not accept recommendations resulting from this methodology.

First point: Staff applied their method to western Pennsylvania only, and further, to only certain streams and rivers in western PA. This is not how the Red List methodology was intended to be used. Mussel species do not recognize state boundaries. Trying to assess a species status based on state boundaries, or even worse, part of a state, is ludicrous. For at least the Salamander mussel, there is ample scientific information to show that this species was never abundant in Pennsylvania because this area is at the northern extent of its range. They are very unlikely to ever be abundant in western PA no matter what conservation and protection measures are taken.

Second point: As commission staff has admitted, they have very little quantitative data upon which to base either current or historic abundance or distribution of these mussel species, or trends over time in PA. Until very recently, field collection methods used by US Fish & Wildlife, PA DEP, and others were not meant to sample the

species proposed for listing. The Rayed Bean mussel, for example, is so small and well camouflaged that it has generally escaped collection by mussel divers, even in places later found to harbor this species. The "data" relied on by Commission staff in this proposed ruling are insufficient for listing species according to any accepted methodology of which I am aware.

Third point: Commission staff modified the Red List methodology, focusing on what they considered to be trends of individual populations of a mussel species rather than the species as a whole, as the Red List methodology requires. This is scientifically indefensible. By focusing on particular subpopulations within a part of Pennsylvania, rather than the species as a whole, the staff biased the methodology in favor of finding a species threatened or endangered. Staff further biased their approach by defining mussel populations on the basis of watersheds that are between 15 and 60 square miles in area. This scale is more than 100 times larger than that recommended by the IUCN and is totally unsupported by all ecological information regarding the host species for the Salamander or the Rayed Bean mussel. The result of the Staff's procedure is an "undercounting" of mussel populations in the state, which dramatically increases the probability that a species will be assessed as threatened or endangered.

Fourth point: Commission staff changed many of the criteria used by the U.S. and other countries to define threatened or endangered species, making it much easier for a species to be classified as threatened or endangered in PA. For example, Staff defined an endangered species as having less than 1000 individuals; according to the Red List methodology, an endangered species is one that is far less abundant – 250 individuals. No explanation or defense is provided by staff regarding this and several other, more restrictive, changes they made to the Red List methodology.

Fifth point: Not having sufficient quantitative data available, Staff relied heavily on what they refer to as a "threat assessment" for each mussel species. Their threat assessment, however, is extremely general and no analysis of any kind is presented. This is not a threat assessment as the term is used by US Fish & Wildlife, EPA, or any other resource agency with which I have worked. The near complete reliance by staff on what they consider to be apparent threats to the Salamander and Rayed Bean mussel species in particular, is overwhelmingly subjective and biased, and is nothing more than rank speculation regarding the future of these species.

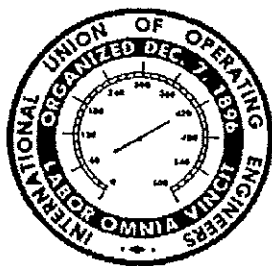
In fact, Commission staff do not present any evidence that there has been a decline in these species in Pennsylvania. Indeed, according to the distribution maps provided by staff, the Salamander mussel is found in more places today than it was historically. The Rayed bean mussel also appears to be more widely distributed today than it was historically. These observations are completely at odds with staff conclusions that these species are in "decline" and that they should be given threatened or endangered status.

Finally, Commission staff failed to consider the preferred habitat for the proposed mussel species in their assessment. This is a critical focus of any listing decision or

conservation plan; ignoring mussel species preferred habitat is a serious fallacy in the staff's procedures and inconsistent with any other methodologies in use.

In conclusion, the Proposed Rulemaking should be withdrawn because there are insufficient data to justify it at this time and further, because it was based upon a flawed methodology that was, without explanation, skewed in a manner which biased findings of vulnerability. At a minimum, there exists no basis to classify the Salamander or Rayed Bean Mussels as "threatened" or "endangered" at this time.

MAR 02 2009



INTERNATIONAL UNION OF OPERATING ENGINEERS

Local Union No. 66,
66-A, B, C, D, O & R
Affiliated with the AFL-CIO

111 Zeta Drive
Pittsburgh, PA 15238-2811

Phone: 412-968-9120
Fax: 412-968-9130

James T. Kunz, Jr.
Business Manager



February 27, 2009

The Honorable Joseph F. Markosek
House of Representatives
Commonwealth of Pennsylvania
314 Irvis Office Building
House Box 202025
Harrisburg, Pa. 17120

RECEIVED

MAR 19 2009

PA FISH AND BOAT COMMISSION
OFFICE OF CHIEF COUNSEL

Dear Representative Markosek:

While the International Union of Operating Engineers Local 66 understands the importance of protecting threatened and endangered species, we also believe that the economic impact of such actions must be given strong consideration before rules are implemented. We do not believe this has occurred regarding the Pennsylvania Fish and Boat Commission's proposed rulemaking to add certain species of mussels to the endangered and threatened species list announced in October 2008.

The Commission staff incorrectly assert that "the proposed rulemaking will have no adverse fiscal impact on the Commonwealth or its political subdivisions", or that "the proposed rulemaking will impose no new costs on the private sector or the general public". On the contrary, over 120 people are employed in the dredging industry in the Pittsburgh area, a number of whom are represented by IUOE Local 66. This proposed rulemaking could cost many, if not all, their jobs.

In addition, the loss of locally produced river-dredged aggregates would require Penn Dot and other users to go outside of the area for their aggregates resulting in increased delivery costs. This would have a direct adverse impact on PennDot's and other public and privately funded construction and maintenance projects by increasing costs which would reduce the scope and number of projects that could be done.



**INTERNATIONAL
UNION OF
OPERATING
ENGINEERS**
Local Union No. 86.
66-A, B, C, D, O & R

Page two

Therefore, the International Union of Operating Engineers Local 66 respectfully requests that the Pennsylvania Fish and Boat Commission not amend the threatened and endangered species list to include additional mussels at this time and request your assistance in communicating our concerns to the Commission.

Respectfully,

James T. Kunz, Jr.
Business Manager

JTK/nlr
Opeiu - #457

MAR 19 2009

S:

Coordinate Fisheries

Assist [Handwritten]

Assist

Reply for Dir's Signature

Reply Direct

Comments/Return

cc/Info

Public comment

Please fight the sand & gravel
from killing off more
We have to stop destroying species

It's ridiculous how a company can play hard
& cause the destruction of creatures

There has to be better way -
usually companies want to pass a
new plan - all they care about is
making money

We can have both - companies must
be more responsible & future minded

It does not seem right that people are
allowed to destroy our public
rivers, national forests, & public lands

P.S. The Yukon commission needs to continue
to work toward protecting our waters &
its rivers - and listing threatened species
Colleen Babitya



Commissioner Steven M. Ketterer
Pennsylvania Fish and Boat Commission
2627 Duke Street
Harrisburg, PA. 17111

Office of Executive Director

MAR 23 2009

S:

Coordinate Fisheries

Assist _____

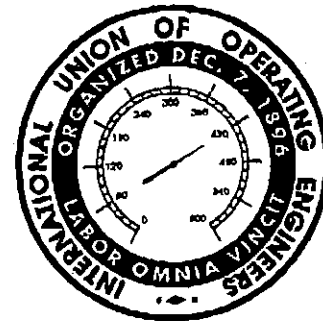
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Reply for Dir's Signature _____

Reply Direct _____

Comments/Return _____

cc/info public comment



March 16, 2009

Dear Commissioner Ketterer;

While the International Union of Operating Engineers Local 66 and the Laborers' District Council of Western Pennsylvania understands the importance of protecting threatened and endangered species, we also believe that the economic impact of such actions must be given strong consideration before rules are implemented. We do not believe this has occurred regarding the Pennsylvania Fish and Boat Commission's proposed rulemaking to add certain species of mussels to the endangered and threatened species list announced in October 2008.

The Commission staff incorrectly asserts that "the proposed rulemaking will have no adverse fiscal impact on the Commonwealth or its political subdivisions", or that "the proposed rulemaking will impose no new costs on the private sector or the general public". On the contrary, over 120 people are employed in the dredging industry in the Pittsburgh area, a number of which are represented by our respective Unions. This proposed rulemaking could cost many of these members, if not all, their jobs.

In addition, the loss of locally produced river-dredged aggregates would require Penn Dot and other users to go outside of the area for their aggregates resulting in increased delivery costs. This would have a direct adverse impact on Penn Dot's and other public and privately funded construction and maintenance projects by increasing material costs, which would reduce the scope and number of projects that could be done.

Therefore, the International Union of Operating Engineers Local 66 and the Laborers' District Council of Western Pennsylvania respectfully request that the Pennsylvania Fish and Boat Commission not amend the threatened and endangered species list to include additional mussels at this time. We are committed to the valuable services of the Commission, but believe that the fiscal impact of this proposal to Pennsylvania, particularly in light of current economic conditions, would be painfully felt throughout the Commonwealth.

Respectfully;

Paul A. Quarantillo
President / Business Manager
Laborers' District Council of Western Pa.

James T. Kunz, Jr.
Business Manager
Operating Engineers Local #66