

THE BATTLE OF DEER CREEK CROSSING:

A Case Study of Rhetorical Exigence and Environmental Controversy

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THE BATTLE OF DEER CREEK CROSSING:  
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This dissertation is a case study that analyzes rhetorical tactics and strategies surrounding the environmental public argument over the fate of Deer Creek Crossing, a proposed commercial development in Western Pennsylvania's Allegheny River valley within three miles of the birthplace of pioneering environmentalist Rachel Carson. Drawing predominantly from primary sources, it contributes to our understanding of how lengthy rhetorical processes evolve and what influences them. The study shows that the analysis of context as manifested in the rhetorical situation and analyzed through a rhetorical history framework can clarify both singular events and prolonged argumentative processes by uncovering aspects of those events and processes which may be less apparent in a more narrowly focused study of individual rhetorical artifacts. The opening chapter provides necessary background and lays out the theoretical foundation supporting the analysis of the Deer Creek Crossing controversy. Chapter two analyzes the use and misuse of public forums, including the press, in governmental decision-making associated with the Deer Creek Crossing case. Chapter three investigates the adaptation of arguments and changes in tone in response to exigencies and constraints arising from the denial of the first permit application. Chapter four reconstructs the rhetorical decision-making process that led to the deployment of Rachel Carson's name, analyzes the argumentation arising in opposition, and

examines the fight for scientific authority. Chapter five evaluates the decision-making processes of regulatory agencies charged with approving environmental permits, as well as the intricate and highly structured legal processes that dominated courtrooms, in which the last and most decisive actions were undertaken. Chapter six explores the implications of the Deer Creek Crossing case for environmental rhetoric and for the effect of particular strategies and tactics on environmental public argument from the perspective of environmental activists, of developers, and for rhetorical scholarship.

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## **1. ACCOMODATING THE RHETORICAL SITUATION**

In this story, there are two Deer Creek valleys, both related to an environmental controversy as prolonged and bitter as any in the recent history of the Greater Pittsburgh, Pennsylvania area. The physical terrain comprises one Deer Creek valley, the watershed created and constantly revitalized by the stream itself as it flows through Harmar Township into the Allegheny River. The other is symbolic, emanating from a clash of perceptions in a familiar form of environmental argument that pitted, at its most basic level, economics against ecology and wise use versus preservation of natural resources. One side looked at the Deer Creek valley and saw a high quality biodiversity area, with woodlands that in places approached the density of forests, with wetlands of exceptional quality, and with a floodplain widely acknowledged as one of the healthiest in the region. The other side conceded the existing ecological value but made a critical distinction between the unspoiled, upstream reaches of Deer Creek and the abused, despoiled lower reach, the last mile or so before the confluence with the Allegheny River. One side fought to protect the entire watershed, both unspoiled and despoiled areas, as a symbolic statement against unrestrained development, while the other side fought to reinvigorate a stagnant local economy by using the less than pristine parts of the Deer Creek valley to initiate much needed economic development. When a developer submitted plans to construct an extensive commercial center on the downstream property, these contradictory images produced deep divisions among the residents of the Allegheny River valley, divisions that continued through a long and torturous seven-year regulatory approval process. Much of the information presented here comes from personal observation of that process.

Looking out from the cliff-top of Mount Washington over the confluence of the three rivers in the heart of the City of Pittsburgh, it is easy to imagine what a wonder of nature it must have been before the Europeans came, when those rivers, hills and valleys, woods and streams were part of the vast Eastern Forest that stretched virtually unbroken from the Atlantic Ocean to the Great Plains. Even today, bearing the imprint of 250 years of industrial, commercial and residential development, Greater Pittsburgh remains among the greenest metropolitan regions in America, partially protected by a challenging topography that has preserved thousands of acres of woodlands, parks, and fields. But the crash of a once booming industrial economy in Greater Pittsburgh, led by the demise of steelmaking in the early 1980s, drove tens of thousands of local residents to emigrate to other cities searching for jobs with a living wage. Municipalities began to compete with one another to solicit commercial development and the towns that lacked the flat open space to attract large-scale enterprise, like Harmar Township, stagnated economically. As modern earthmoving and construction technology advanced, development became feasible where it had not been before, bringing the hope of economic prosperity to places where topography had prevented it. The price of that new prosperity has been the loss of open, green space previously thought to be secure.

Fifteen miles up the Allegheny River from the confluence of Pittsburgh's three rivers lies Springdale, hometown of Rachel Carson, author of Silent Spring and arguably the pivotal figure of the modern American environmental movement. Raised only three miles from the Deer Creek valley, she probably explored the very woods, wetlands and floodplains central to this controversy, developing a love for the natural world that would drive her life's work. Little did the young Carson know that years later her powerful persona would become a key point of



contention in a protracted and bitter dispute regarding plans to convert the land for use in commercial development.

Regarding environmental controversies over the development of land, whether the argument turns on money, on merit, on politics, on public opinion, or on simple perseverance, most of the time the developers win. In the Deer Creek Crossing controversy, the environmentalists scored a rare and tenuous victory by blocking attempts to build a shopping mall. Although environmentalists won the opening battle when regulators rejected the initial development plan, they lost the war as developers gained eventual approval for their plan through persistent accommodation and redesign.

The environmental rules of the development game in Pennsylvania favor accommodation over denial, and therefore the environmentalists' early victory warrants scholarly attention. The Deer Creek Crossing developers, largely through perseverance and deep pockets, finally received the required permits in the summer of 2002. On appeal, Pennsylvania's Commonwealth Court upheld the validity of the permits in December of 2004. Although no earth has yet been turned, it remains likely that a commercial development project will change the conditions of land and water in the Deer Creek Crossing project area.

This dissertation analyzes rhetorical tactics and strategies in the public argument over the fate of Deer Creek, drawing predominantly from primary sources, to contribute to our understanding of how lengthy rhetorical processes evolve and what influences them. My study shows that the analysis of context as manifested in the rhetorical situation can clarify both singular events and prolonged argumentative processes by uncovering aspects of those events and processes which may be less apparent in a more selectively focused study of individual rhetorical artifacts. In this opening chapter, I relate the facts and circumstances of the Deer

Creek Crossing controversy, discuss the utility of rhetorical form and rhetorical history as theoretical tools for making sense of a rich and deep reservoir of rhetorical artifacts, introduce Lloyd Bitzer's rhetorical situation as an overarching framework for analysis, locate the study within the extant body of literature on environmental rhetoric and preview the ensuing chapters of the dissertation.

### **1.1. Understanding the Deer Creek Crossing Case**

W. Duff McCrady is a private real estate developer and member of the Western Pennsylvania Conservancy who has also served on the Board of Directors of Chatham College, alma mater of environmentalist Rachel Carson and home to the Rachel Carson Institute. He owns a large parcel of forested hillside, floodplain, and wetlands in the Allegheny River valley community of Harmar Township. Deer Creek, one of only six streams in Allegheny County clean enough to provide trout habitat, runs directly through the property (US Army Corps of Engineers, Statement of Findings, 39). McCrady's 243 acre property, which contains several acres of wetlands, is part of a larger 1,000 acre biodiversity area (BDA) that the Western Pennsylvania Conservancy identified in 1994 as containing "some of the best wetlands in the county" (WPC, 89) and a wooded floodplain called the "best example of Floodplain Forest in the county" (3).

In 1997, McCrady struck a development deal to build a shopping mall with an out-of-state partnership, ORIX Real Estate Equities of Chicago and the Woodmont Corporation of Fort Worth, Texas. ORIX provided much of the financing, McCrady owned the property, and Woodmont would build the shopping mall. The partnership, designated the ORIX-Woodmont Deer Creek Joint Venture (ORIX-Woodmont), agreed to purchase McCrady's property and construct a shopping center, hotel, office complex and entertainment center. They based their

decision on research that identified the Allegheny River valley as an underserved market.

Original plans called for using 8.5 million cubic yards of fill to bury most of the floodplain and six of the ten acres of delineated wetlands on the property, relocating 2,700 feet of Deer Creek to a concrete channel at the edge of the property, and enclosing 215 feet of stream in a culvert. The developers also proposed constructing nine acres of artificial wetlands to offset the destruction of natural marsh and creating a “Wetlands Conservancy” to be used as an outdoor laboratory by Chatham College. In a notable rhetorical twist, the developers proposed naming the wetlands the “Rachel Carson Wetlands Conservancy.” The strategy of using one of the most revered names in environmental history to promote a shopping mall is a rhetorical maneuver ripe for critique.

The developers argued that the economic benefit of the project outweighed the environmental impact, which they characterized as limited, and that in any case the project overall was environmentally sensitive. In 1999, Allegheny County, in one of the last actions of the old three-person Board of Commissioners form of government (since replaced by an elected County Executive and 15 person County Council), voted to designate the project site as “blighted” and to use an urban redevelopment tool called a TIF (tax increment financing) plan to issue \$25 million dollars in bonds to pay for road improvements leading to the Deer Creek Crossing shopping mall, a cost normally borne by the developer. The developer indicated that the Deer Creek Crossing project would not be economically feasible without the TIF funding (Whitney, 15 June 2000, B6). Because important parts of the developer's community benefit argument used alleged traffic safety problems as a project justification, it was very much in their interest to see the road reconstruction recognized as a safety-related community improvement.

The Harmar Township municipal government strongly supported Deer Creek Crossing, as did the Allegheny Valley School District, the Allegheny County Executive and a significant

number of local residents. The development was strongly opposed by an unusual alliance of federal and state agencies, namely the US Environmental Protection Agency (EPA), the US Fish and Wildlife Service (FWS), the Pennsylvania Fish and Boat Commission (PFBC), by outdoors and sportsman's organizations like Pennsylvania Trout, Trout Unlimited, and Tri-City Trout Club, by environmental and citizen action groups like Clean Water Action and Citizens for Pennsylvania's Future (PennFuture), and by a significant number of local residents. The abnormally contentious relationship between environmental resource agencies (EPA, FWS, PFBC) and environmental regulatory agencies (US Army Corps of Engineers, Pennsylvania Department of Environmental Protection) produced a volatile dynamic that could have had a chilling effect on the permit application, but did not.

Public hearings attracted between 300 and 500 people to Springdale High School on 25 April 2000, when 40 speakers shared their views, most in opposition, and again on 24 October 2001, when 29 out of about 200 attendees spoke, again most in opposition. Allegheny County Council also provided several public forums within Council and committee meetings. Official transcripts recorded the eventual court proceedings.

In order to begin construction, ORIX-Woodmont needed permits from two different agencies: the federal US Army Corps of Engineers (Army Corps), which is responsible for the regulatory protection of wetlands nationally, and the Pennsylvania Department of Environmental Protection (DEP), which is charged with the general protection of environmental resources in the state. In October 2000, the Pennsylvania DEP denied a stream encroachment and obstruction permit to ORIX-Woodmont based principally on the likely "significant adverse environmental impact" to Deer Creek and on the failure of the developer to adequately consider alternative sites to reduce the environmental impact (Duritsa to Machak 1).

The significance of this denial should not be understated because the DEP Southwest Regional Office had never before flatly denied an encroachment permit, preferring to work with developers to redesign site plans to minimize impacts (Hopey, “It’s open season,” A19). Because both state and federal approvals were necessary, the Army Corps -- which from 1996 through 1998 had denied only one of 172 applications for wetlands encroachment permits -- declared its evaluation of the permit application to be moot and suspended consideration (Hopey, “It’s open season,” A18). ORIX-Woodmont appealed to the Pennsylvania Environmental Hearing Board, an appeal they eventually withdrew in favor of the submission of an amended development plan. On 16 July 2002, DEP notified ORIX-Woodmont that the revised plans would not be approved without further accommodation in environmentally sensitive parts of the project area (Duritsa to Coslik). On 17 July 2002, the Army Corps issued a provisional permit contingent on DEP approval of further revised plans, an action that appeared to many as a clear indication that accommodation would slowly but surely prevail. Finally, on 22 August 2002, DEP issued a stream encroachment and obstruction permit for the Deer Creek Crossing development.

The next day, the advocacy group Citizens for Pennsylvania’s Future (PennFuture), representing local outdoors and environmental organizations, filed a lawsuit challenging the tax increment financing plan approved by Allegheny County in 1999, and eventually filed an appeal of the DEP permit approval itself, on environmental grounds, to the Pennsylvania Environmental Hearing Board. ORIX-Woodmont responded in Common Pleas court that PennFuture had challenged the TIF in order to cause undue delay to the development project. In December 2002, a Common Pleas judge agreed and dismissed the challenge as an illegitimate stalling tactic. In addition, he ordered PennFuture to post a \$9.5 million bond to reimburse the developer should

the opposition group eventually lose the legal battle. PennFuture appealed that ruling to Commonwealth Court. The bond ruling was reversed and the original suit reinstated in October 2003. The Environmental Hearing Board heard PennFuture's appeal of the DEP water obstruction permit in September 2003 and, in a very strongly worded opinion, ruled in favor of developer ORIX-Woodmont in 2004. PennFuture appealed this decision to Commonwealth Court which, on 7 December 2004, denied the appeal. Most recently, the Allegheny County Council decided in February 2005 to reauthorize a tax increment financing plan for the Deer Creek Crossing project. This decision has been challenged again in court by a group of private citizens. As of August 2006, no grading or on-site development has yet occurred.

## **1.2. Form, Rhetorical History, and the Rhetorical Situation**

The public argument surrounding Deer Creek Crossing was a complex environmental controversy because it encompassed a wide array of themes including private property rights, economic development, aesthetic and philosophical arguments about conservation and preservation, the rhetoric of "wise use," competing scientific definitions, accusations of political corruption, public safety, and tax increment financing (TIF), as well as local, regional, and national institutional action. This dissertation explores these themes by examining primary texts from the Deer Creek Crossing controversy, including court documents, regulatory and resource agency policy papers and comment letters, public hearing transcripts, depositions, news reports, and original interviews with key players. These texts will be read through a theoretical lens that combines concepts drawn from environmental rhetoric, rhetorical history, and Lloyd F. Bitzer's theory of the rhetorical situation. My hypothesis is that a study of environmental controversy that utilizes rhetorical history to organize artifacts and events can supplement the rhetorical situation as an interpretive tool to help us understand the diachronic rhetorical strategies involved

in influencing the final disposition of environmental controversy in a much deeper and more pragmatic way. The following sections lay out the theoretical commitments that inform my critical approach.

### **1.2.1. Form in Argument**

Environmental controversies often unfold in a recognizable pattern, a process contained within a familiar form. If it can be shown that the form of an argument influences its capacity to persuade, then form does matter. The analysis and examination of form in rhetoric is no less than the search for what a rhetorical act is designed to do, an evaluation of whether it does that, and a consideration of whether the expectations raised in the audience correspond to the meaning that they read into the form. Although form is a rhetorical concept with a strong and generally understood core meaning, it is difficult to find agreement on how best to articulate that meaning. Kenneth Burke thought that form was the process of producing the effect, which correlates to Bitzer's modified rhetorical situation, a partially predictable set of responses to existing conditions that are chosen to produce a certain effect.

How does form work? Why is it persuasive? Audiences recognize forms because they share social knowledge and experiences, and because they come to know and anticipate ways that language and action patterns tend to complete ideas. This leads to recognition and familiarity with forms, which in turn promotes agreement. Form is more than disposition, more than a simple arrangement of arguments. It is an integral and fundamental part of any argument, one that may influence not only how a message is *meant* to be understood but also how a message is *actually* understood. Of course, the message is more important than the form, but because nearly all discourse is carried out through structures, the persuasive power of form must be accounted for. How an argument is organized, while it is subordinate to the content of a

message, is an essential determinant of whether the message is communicated with the desired effect or in fact whether it has any effect at all. People have experiences in common and rhetors may use those points of identification to elicit specific feelings and responses in audiences.

Perhaps the most influential definition of rhetorical form is Kenneth Burke's concept of form as the creation of an appetite in the mind of an audience and the satisfaction of that appetite (Counterstatement 31). That is, form is the progressive modification of an idea through phases of arrangement and structure so as to raise and then to gratify expectations in an audience. In Counterstatement, Burke examines several different manifestations of form: syllogistic progression, qualitative progression, repetitive form, and conventional form. In the syllogistic progressive form, the rhetor constructs a logically progressive argument in which if certain things are true then certain other things will follow. The audience, because they are familiar with the premises, uses the form to support the logical correctness of the conclusion (124). For example, if the audience already believes that the conservation of natural resources is a public good, it would be relatively easy to construct a progressive argument in which land developers are not acting in the public interest. First, the proposed site was a familiar wilderness area. Second, site plans had been submitted which called for the destruction of the area. Third, natural resources would be irreparably lost. Fourth, natural resources should be conserved, not destroyed. Therefore, development was not in the public interest. The form works equally well if the audience believes that economics should be balanced with the protection of natural resources. First, the Allegheny River valley economy was stagnant. Second, site plans had been submitted which promised economic growth. Third, natural resources would be enhanced through on-site mitigation and through preservation of more significant off-site resources. Fourth, the balance between economics and environmental protection was preserved. Therefore,



development was in the public interest. The enthymeme is a common form of syllogistic progressive argument, one that can be highly persuasive in public discourse. An enthymeme is a syllogism based on probabilities that uses the inferences of the audience to connect certain ideas with reasons for believing them and promotes identification in the audience, thereby involving them in the process of their own persuasion.

Burke also discusses the qualitative progressive form in which “the presence of one quality prepares us for the introduction of another” (Counterstatement, 125). ORIX-Woodmont submitted two separate development plans. They presented the first proposal to the public with the attitudes, or qualities, of excitement and confidence. But the first site plan was rejected. ORIX-Woodmont presented the second, revised site plan to the public with the attitudes, or qualities, of compromise and tenacity. Compromise could be expected to replace excitement as their position evolved into a pragmatic retreat from the original goals. Tenacity reinforced confidence as the developer determined what was necessary for plan approval. Excitement and confidence prepared the way for the progression of the new qualities of compromise and tenacity although this connection is more easily observed after the plan submissions than it is predicted ahead of time. With the benefit of hindsight it’s easy to see that an adaptation was necessary to ensure a successful submission. That was not so easily recognized from the middle of the process itself or ORIX-Woodmont would surely have utilized a different approach from the beginning. The determined state of mind followed logically from the positive state of mind that characterized the failed submission (Counterstatement, 125).

Repetitive form is essentially putting things in another way, using different evidence to make the same point (Counterstatement, 125). Throughout the controversy, ORIX-Woodmont consistently used two important arguments in repetitive form: reasonable compromise and

environmental sensitivity. When the developer wanted to show that compromise was a central aspect of their approval strategy, they pointed at different times to different evidence. For instance, when the proposed relocation of Deer Creek triggered strong opposition, the new design eliminated that part of the plan. When opponents objected to the alternative site analysis, ORIX-Woodmont commissioned an entirely new and more comprehensive alternatives analysis. When concern mounted about the destruction of floodplain, they scaled down floodplain filling from 45 acres to 23 acres. In each case, the message was the same: we are reasonable and we will compromise. Using the same repetitive form, the developer claimed to be environmentally sensitive. When they argued that consolidating scattered and degraded wetlands would improve their overall function, when they offered to set aside 93 acres of property as a conservation easement, when they proposed naming that easement the Rachel Carson Wetlands Conservancy, they were making the same point over and over: we are environmentally responsible. It was repetitive form at its most persuasive.

Sometimes, Burke explains, a form is itself predictable, which he calls conventional form. It differs from the other aspects mainly because the audience expects to see a certain structure unfold before it occurs. It is not a process of recognition but of expectation. Burke calls it categorical expectancy: “Whereas the anticipations and gratifications of progressive and repetitive form arise *during the process* of reading, the expectations of conventional form may be *anterior to the reading*” (Counterstatement, 126). The two most striking examples of conventional form in the Deer Creek Crossing case were the regulatory public meetings and the structure of the legal processes. The stated purpose of the public meetings was to elicit citizen comment and thereby discern the public will. Concerned citizens reasonably anticipated an open process where they would be heard and thereby exert some influence on the regulatory process.

But the structure of these meetings was unfamiliar territory to most people. By comparison, the procedures of courts of law were not an open process but rather very constrained and formal. The average person would have been hard-pressed to recognize what rules were governing the legal process. But the lawyers were very familiar with the rules and comfortable with their expectations of what would and would not be allowed to occur within that structure. In one case, the public meetings, the participants had expectations that they would speak but were uncertain what actions the procedures would allow. They did however expect that they would have an effect. In the other case, the participants knew what procedures would govern the presentation of their cases but were equally uncertain of the effect their influence would have.

The manipulation of audience attitudes and the arousal and fulfillment of desires or expectations through careful choice of forms can have profound psychological effects on an audience, encouraging participation and increasing adherence. In short, a rhetor may create expectations in an audience with the establishment of form, including but not limited to simple organization of materials and choice of particular argument structures, based on the overall structure of the rhetorical event, and then move to persuade through the satisfaction of those expectations and the creation of a sense of fulfillment and closure in the audience.

Edwin Black, in Rhetorical Criticism: A Study in Method, argues for a critical method that incorporates form as an essential component. He believes that 1) if there are a limited number of rhetorical situations (by which he means the sum of an equation including the background of the rhetor, the assumptions and beliefs of the audience, and the consequence of the subject), and 2) if there are a limited number of ways in which a rhetor can respond to those situations, and 3) if historical reoccurrences can be shown to provide information on those

chosen responses, then rhetorical events that share characteristics will tend also to share their effect upon audiences (133-134).

Thomas Farrell, in “Knowledge in Time: Toward an Extension of Rhetorical Form,” argues that the form of a rhetorical argument is inescapably historical. A rhetorical act involves the passing of time, whether of the act itself or of the context of the act. Within a time sequence, ideas are developed and modified, adapted to situational and attitudinal changes, used to make comparisons and contrasts, and perhaps moved towards a climactic summary. The historical perspective, or recognition that many things can be understood only diachronically, injects the idea of anticipation into form. When ingrained patterns of response, which as pre-existing conditions are part of the rhetorical situation, are activated through appeals to common experiences, the audience becomes attuned to the rhetor’s arguments and anticipates their effect. Rhetors may establish identification through the familiarity of the audience with the form and through the sequence of ideas that may be shaped to suggest the shared social knowledge implicit in the substance of the argument. Whether a rhetorical act takes its character from the intentions of the rhetor, the perceptions of the observer, from historical context, from the rhetorical situation, or from some combination of these, it still incorporates form as an important part of the persuasive process.

Kenneth Burke argues that one of the primary functions of criticism is to account for form. If form matters to the audience, if it matters to the rhetor, if it exerts influence over the successful communication of the message, then it is rhetorically significant. That significance can be more fully appreciated by understanding the context and patterns of argument offered by a critical approach that frames analysis as rhetorical history. According to Kathleen J. Turner, “rhetorical history seeks to understand the context through messages that reflect and construct

that context” (2). Turner argues that certain rhetorical circumstances constitute processes, not singular events, a formulation that comports well with the seven-year long controversy over Deer Creek Crossing. In the next section, I develop this concept of rhetorical history in order to show how the analysis of extended public arguments can be enriched by an understanding of historical context and how such analysis can contribute significant insight to the historical record.

### **1.2.2. Environmental Public Argument and Rhetorical History**

Public controversies about natural resource use and what constitutes an acceptable level of environmental damage are recurrent. Recurring situations infused with recurring rhetorical strategies imply that analyzing context and process can illuminate the substance of an environmental controversy so as to create an understanding of the whole that is greater than the sum of its parts. The seven-year series of rhetorical events that comprised the Deer Creek Crossing controversy did not contain any one particular episode that defined the disagreement outside of a context within which to understand the component parts. Without a diachronic examination of the totality of the circumstances, each component part – public meetings, media coverage, agency letters and reports, court opinions – stood like individual trees: the most accurate analysis emerges only when we examine the whole forest.

The study of distinct processes with multiple rhetorical components in historical context can deliver what David Zarefsky calls a “theory of the case: a better understanding of an unusual situation important in its own right” (25). The Deer Creek Crossing case supplied a very instructive exemplar of the complex nature of contemporary environmental controversy. It has become rare for these sorts of disagreements to be settled in a single event, such as a public meeting or a legislative action. There are nearly always lead-in and follow-up events that flesh out the larger rhetorical situation. Certainly the first public meeting in the Deer Creek Crossing

case identified the central focus and the germane issues of the controversy. But analysis of that one meeting, regardless of how accurate that analysis might have been, could not provide an understanding of advocacy strategy and tactics across the continuum of this particular controversy. It is very possible to win a public meeting debate but lose the extended argument, as occurred with Deer Creek Crossing. The opposition presented more speakers, provided more audience support, and submitted more written comments. Based on the outcome of the first public meeting, the regulatory agencies ought to have denied environmental permits to the developers. And in fact, they did deny the first permit application. But in context, the developers had expended so much money and effort, ranging from public relations to professional technical reports, that they could not or would not withdraw. Because the regulatory agencies provided specific reasons for the denial, the developers treated the rejection as a valuable learning experience that taught them precisely what accommodations they would need to make to insure that they satisfied the regulations for the second application. Once that occurred, once ORIX-Woodmont could quantify the adjustments necessary for regulatory approval, they reduced their decision process to a cost/benefit formula. The public lost effectiveness as an opposition force and the public argument evolved next into a procedural one and finally into a legal argument.

Of Zarefsky's four senses of rhetorical history, the Deer Creek Crossing case fits comfortably into the last two: historical studies of rhetorical practice and rhetorical studies of historical events (27). As an example of rhetorical practice, discourse surrounding the Deer Creek argument affected similar development proposals in the Greater Pittsburgh region because it changed what Zarefsky calls the "ongoing social conversation" (29). During the controversy and in its aftermath, other commercial developers watched and learned that virtually any

development could win approval through accommodation and that opposition groups with limited resources could only engage in carefully chosen battles. Deer Creek Crossing tested the will and potency of some powerful environmental protection groups, and they lost. Predictably, other large commercial developments have proceeded in the Greater Pittsburgh area, regulatory approvals in hand, virtually without opposition outside of some directly affected resident groups with little access to financial and legal resources. The rhetorical trajectory uncovered by studying the controversy as a process rather than individual events suggests that citizen action has become less effective as developers have become more adept at compromise, accommodation, and co-option of the methods of the environmental movement. This study in rhetorical history analyzes the rhetorical choices of each side over an extended time frame, examines the construction and presentation of messages, and considers their effectiveness. Conclusions emerge not in contradiction to but in combination with other analytical methods. Deer Creek Crossing offered a situation that called for “public persuasion to advance a cause or overcome an impasse” (30). It provided a chance to study the effectiveness of environmental rhetoric on both sides, the arguments and argumentative choices, not to the exclusion of, but in association with, economic, political, social, and scientific perspectives. Just as Burke’s pentad supplies different views of the same event, so the rhetorical history approach enriches our overall understanding of the significance of historical events.

The rhetorical history of the Deer Creek Crossing case grew from four argumentative themes: 1) the pathos of irreplaceable loss, 2) the logos of economic and scientific data, 3) the ethos of expert credibility, and 4) the legal challenge, within which all three classic argument forms are found. Both supporters and the opposition recognized and utilized the first three

themes contemporaneously. In the fourth theme, the defeated opposition originated the legal challenge, and the victorious supporters responded.

Awareness of an environmental controversy may occur slowly through word of mouth or abruptly when regulatory approval begins. In either case, the arousal of public interest is the critical occurrence. For opponents of Deer Creek Crossing, the immensity of the project represented the danger of an irreversible loss of habitat and open green space. Many people argued that the environmental destruction was too great a price which, once paid, could never be recovered. On the other hand, supporters feared a significant loss of economic opportunity. ORIX-Woodmont showed the only current interest in large-scale commercial development in Harmar Township and, in fact, several other developers had considered the property but declined to invest because of the substantial obstacles (McCrary, personal interview).

Both sides reacted. In response to the fear of irreparable environmental damage to Deer Creek and its ecosystem, local trout fishing clubs organized informal opposition based on the loss of wetlands and the fish habitat function of Deer Creek itself. This grass roots activity attracted the attention of more experienced and sophisticated regional organizers like Clean Water Action, which launched a public relations campaign aimed at increasing attendance at public hearings, and PennFuture, which provided professional legal representation and public relations support. On the other hand, in response to the fear of losing economic opportunity, supporting residents organized petition drives and began a campaign to show that public sentiment favored project approval.

In time, while the emotion of arguments about the irreplaceable nature of loss remained important, project opponents began to adapt their arguments to the technical character of the regulatory agency audience and provided competing interpretations of economic costs/benefits



and scientific bases for evaluating the effectiveness of wetlands remediation and protection of stream function. Technical arguments are most credibly presented by expert individuals and organizations. The developers provided scientific evidence that their proposed mitigation plan fulfilled the requirements of federal and state statutes. Environmental groups like the Sierra Club and the Rachel Carson Council, as well as state and federal resource management agencies like the Pennsylvania Fish and Boat Commission, the US Fish and Wildlife Service, and the US EPA, provided evidence that the scientific foundation for the proposed mitigation of environmental impact on Deer Creek failed to reach the level of expertise required by the Clean Water Act. Simultaneously, PennFuture attorneys compiled a list of deficiencies in the permit application that might be vulnerable to legal action. When the regulatory agencies finally issued the required permits, ending the practical effectiveness of grass roots public opposition, PennFuture, representing several local organizations, challenged the legality of the permits in court. ORIX-Woodmont responded in kind.

The value of reading this environmental controversy as rhetorical history is clear. The seven-year long Deer Creek Crossing case created a voluminous record, with an overwhelming number of rhetorical artifacts, literally thousands of pages of transcripts, correspondence, legal briefs and court orders. A rhetorical history of the case provides a means to organize and examine this particularly complex episode in environmental rhetoric. Rhetorical history can be illuminating in ways that examination of singular rhetorical acts may not be. On one side, the development's supporters feared that a rare regional economic opportunity would be lost. ORIX-Woodmont feared a loss of potential profit, which caused the developer to commission an expert compilation of scientific and economic evidence that prepared them for the expected legal challenge. On the other side, fear of irreplaceable loss of ecological resources led to grass roots

public opposition. This attracted experienced and well-funded organizations to the opposition and they developed credible *alternative* interpretations of the scientific and economic data and evidence leading to a formal legal challenge within the boundaries of the official administrative process. These rhetorical and historical elements were dynamically interconnected across an expanded time frame and provide critical insight into the meaning and significance of this rhetorical controversy.

### **1.2.3. Rhetorical Situations: Expository or Mythic?**

In his 1968 article, “The Rhetorical Situation,” Lloyd Bitzer describes the essential character of rhetoric as pragmatic and practical, a tool whose purpose is to change existing conditions or to control potential conditions. He defines a rhetorical situation as “a complex of persons, events, objects, and relations presenting an actual or potential exigence which can be completely or partially removed if discourse introduced into the situation can so constrain human decision or action as to bring about the significant modification of the exigence” (6). Of the three constituents of a rhetorical situation, the exigence is “an imperfection marked by urgency” (6), the audience is “only those persons who are capable of being influenced by discourse and of being mediators of change,” and constraints are “parts of the situation [with] the power to constrain decision and action needed to modify the exigence” (8). Absent the motivation to exert influence, or if no possibility of modification exists, then no *rhetorical* situation exists. Bitzer distinguishes several types of structure for rhetorical situations. In a *simple structure*, relatively few elements interact while in a *complex structure* many elements interact. If the situation is *highly structured* all elements are identified and available. A *loosely structured* situation is weakened by complexity and disorganization (11-12). Bitzer’s most significant claims are that 1) in any situation there are components that exist independently of the human

perception of them, which he calls historical context or publicly observable facts; and 2) because rhetorical situations recur, the components of the situation produce predictable patterns of response. Context and the recognition of patterns comprise the contribution and the value of analyzing events from the perspective of rhetorical history.

As Bitzer admits in later writings, “The Rhetorical Situation” left some ideas incompletely explained or underdeveloped. But as a heuristic engine, it fueled a long running debate over the nature and function of rhetoric. Arthur B. Miller, in “Rhetorical Exigence,” argues that Bitzer was wrong to claim that a particular situation will demand a particular and predictable response. He claims that the intentions of the rhetorical actor are secondary to the understanding of the auditor. While that is probably true, it does not actually reduce the importance of the rhetorical situation. Miller argues that a speaker’s intentions form the speaker’s perceived exigence while an auditor’s expectations form the hearer’s perceived exigence (117). Bitzer would not disagree with that, as he recognized that different interested parties can perceive different exigencies.

Richard E. Vatz, in “The Myth of the Rhetorical Situation,” rejects the idea that a situation invites certain rhetoric, contending that, on the contrary, the rhetoric creates the situation because the only meaningful reality lies in perception. The rhetorical situation is what we *think* it is. “No situation,” he said, “can have a nature independent of the perception of its interpreter or independent of the rhetoric with which he chooses to characterize it” (154). For Vatz, the situation is what the *rhetor* believes it is, and as he or she chooses to describe it. That perception and that description creates the rhetorical situation. But it is problematic to assert that a rhetorical situation can be independent of outside influences. It deemphasizes the legitimate contribution of an auditor’s understanding of the rhetor’s characterization of the meaning of a

rhetorical situation. More likely, aspects of the rhetorical situation are found “in the head of the observer” (154), and as Vatz says, are combined with aspects that exist independently of the perceptions of rhetorical actors -- what Bitzer calls publicly observable facts. Vatz lists a number of Bitzer’s comments and then systematically reverses them: “I would not say ‘rhetoric is situational,’ but situations are rhetorical; not ‘. . . exigence strongly invites utterance,’ but utterance strongly invites exigence” (159). This litany of reversals is not as dramatically contradictory as it seems. There are enough aspects of each perspective in most events so as to make any distinction less significant.

Vatz used the Cuban Missile crisis to support his position, claiming in that case that “acts of rhetorical creation took place which created a political crisis as well” (159). He is correct that the political choice to emphasize the crisis nature of the Cuban Missile crisis was certainly rhetorical and contributed immensely to the character of the situation. But from a practical perspective, the danger that operational nuclear missiles in Cuba could destroy the city of Miami was not entirely rhetorical. If a missile had been launched, that act could not have been rhetorically undone. And if the situation could not have been rhetorically reversed, then it could not be exclusively rhetorical in nature. Some other non-rhetorical characteristics must have contributed to it.

Likewise, in the Deer Creek Crossing case, while the intention to permanently alter the conditions of the land and water existed as a perception, there were also real world manifestations of those perceptions that helped to create a rhetorical situation prior to, or at least contemporaneous with, any characterization of the situation by a rhetor. Examples of this included the actual *submission* of the permit application to regulatory agencies as opposed to the expectation of it, the *holding* of public hearings as opposed to what was said in them, the

*existence* of public statements of support and opposition as opposed to what was argued in them, each of which contributed to the identification of a real world situation, not one that existed merely in the minds of observers. The threat is real even before the first shovelful of earth is turned.

An event's rhetorical situation becomes observable as the intentions and meanings of interested parties are discerned. Certainly, as Vatz argues, the meaning of the situation for each actor emerges from his perceptions, which align the arguments. But the historical conditions are the context in which the perceptions are created and therefore are an autonomous and influential aspect of the rhetorical situation. In short, the situation is partly created or defined by actual events and conditions and partly by the more subjective influence of perceptions, like attitudes, beliefs, traditions, and especially arguments. The historical context of certain situations will tend to provoke certain responses but those responses contain an individuality that reflects the internal influences on rhetorical actors. If, even within that individuality, similar responses tend to recur in similar situations, then the importance of rhetorical history as an organizing and interpretive structure increases.

Whether or not the world has any meaningful existence outside of our perception of it, we *act* as if things have meaningful existence, and therefore rhetoric can influence that which we agree is reality. Whether that reality exists independently of human perception, or if it is psychologically and socially constructed, is of limited *practical* significance. We still have to live each day so we *assign* meaning and in that way create a context for our attempts to influence our reality. The rhetorical perspective is based on finding practical ways of living in a highly contextualized world. Meaning may be dependent on perceptions and intentions and not be

intrinsic to events but, for purposes of everyday life, we need the historical facts as well as rhetorical interpretations on which to base choices.

If rhetoric is all about practical utility, would it have any practical utility to say that, because no disturbance of the conditions of the land and water in Deer Creek had yet occurred, the rhetorical situation existed only in the perceptions of observers and therefore no action was necessary? The threat of disturbance existed as a historical condition that had occurred in the past and that was recognizable because of recurring actions: parties spent money, applied for permits, organized support and opposition, initiated a process for public debate, and those actions provided precedent to project the outcome. These publicly observable facts contributed significantly to the construction of the rhetorical situation, even if it is granted that the perceptions of observers contributed to a greater degree. If it is true that the nature of a rhetorical situation depends more on the competing interpretations of observations than on the publicly observable facts themselves, that doesn't make Bitzer's argument less valid. There can be expected responses to rhetorically created perceptions, which are certainly repeatable.

For example, suppose a tribe of Native Americans lived on the floodplain of a river. The river flooded. The reaction of the tribe would be rhetorical in the sense that it identified the exigence of avoiding the floodwaters. The tribe members' responses — where to go, how long to stay, when, or even if, to return, why they thought the flooding occurred — would be constrained by perceptions, attitudes, beliefs, even by the prominence of certain individuals in the tribe. But their responses would also have been influenced by the actual condition of flooding, which would have imposed publicly observable facts on the tribe that affected its decisions as much as its perceptions did. They would not be in danger simply because they

*thought* the rising waters threatened them. They would be in danger because the waters *would* drown them if they didn't act. That is also a part of the rhetorical situation.

In 1980, in response to the ongoing debate, Lloyd Bitzer wrote "Functional Communication: A Situational Perspective," in which he revises and expands on many of the ideas in situational theory. He reiterates his belief that rhetoric is essentially pragmatic. "The situational view, however, seeks to discover the fundamental conditions of rhetoric – of pragmatic communication – in the interaction of man with environment" (22). He argues that human interaction with *both* the physical and mental processes of life -- that is, both the world and the world as we perceive it -- is an essential and undeniable condition of existence. Clearly, it is equally as constraining to predicate rhetorical meaning purely on perception as it is to predicate it purely on publicly observable conditions. Bitzer realizes that and accommodates his arguments accordingly, as did Vatz to a lesser degree. "No situation can have a nature independent of the perception of its interpreter" (Vatz 154). If Vatz means that the perception of the interpreter is a *necessary* condition of determining the character of a rhetorical situation, then that is an accurate and probative statement. It is not, however, a sufficient condition. As central as the interpreter's perception might be to the creation of a rhetorical situation, other historical, factual, and contextual conditions also contribute to the rhetorical situation.

Regarding the criticisms made of his earlier treatment of the rhetorical situation -- that publicly observable conditions exist independently of perception and that recurring components of the situation make responses predictable -- Bitzer refines his position. Situational theory does not claim to provide universal explanations. It is simply a framework within which to apprehend the meaning of rhetorical action. If perceptions can be different for different participants, if they can be understood or misunderstood, noted or not noted, then perceptions are relative. If

perceptions of the meaning of a situation can change with the perspective of individual observers and participants, and yet responses to situations remain at least partially predictable, then something else must be exerting an influence -- namely actual conditions, publicly observable facts, the elements of the situation that are fixed. Both actual conditions and perceptions are caught up in what Bitzer calls “the streams of history” (24). Can rhetorical action emerge from pure perception? Bitzer would not call that discourse absent some connection to observable conditions. It is a dual process. Rhetorical actors respond to their perceptions of exigence, but they do so by reacting, at least in part, to the actual conditions of the objective world. “The total environment,” he writes, “within which we live and constantly interact is clearly a massive and complex mixture of the physical and the mental” (23). There occurs a continuous balancing of the subjective world of perception with the objective world of observable conditions. Together they create for the observer the elements of a rhetorical situation that in turn provides the framework through which we assign meaning. There can be expected responses from rhetorically created perceptions, which are certainly repeatable. The situation exists. The context is real. In short, the situation invites change.

In the Deer Creek Crossing case, the conditions of land and water were threatened with change. How each side characterized that threat of change, and the possibility that they could influence it, was part of what made the situation rhetorical. But those characterizations were defined and constrained at least partly by the publicly observable facts. The impending environmental damage existed as physical artifacts in the form of professionally engineered development plans, expert consultant scientific reports, signed letters of intent from prospective tenants, even the actual permit application itself. They existed not only as rhetorical elements but as physical representations of proposed alterations to the Deer Creek ecosystem that, when



coupled with the actual experiences of previous land development, became historically observable facts. That set of historical conditions indicated a real, not merely rhetorical, danger to the stream and watershed and created an exigence for environmentalists that called forth a rhetorical response.

The opposition rhetoric created an exigence for supporters of Deer Creek Crossing. Outside of the historical context of land development precedent, there would have been no reasonable expectation of physical damage. Without that threat, no opposition would have been called forth. Without that opposition rhetoric, there would have been no necessity of response from ORIX-Woodmont. The publicly observable facts and the perceptions of interested parties connected to shape the controversy. A combination of Bitzer and Vatz's views helps explain the rhetorical situation in the case study at hand.

Bitzer's main theme is that situations create expectations of responses, which is essentially Burke's definition of form (the creation and satisfaction of expectations in the audience), and it does not seem practically significant whether that situation is more historically real or more rhetorically constructed. Historical conditions contribute to the rhetorical creation of meaning. Recurring conditions can be expected to produce similar responses and meanings.

Bitzer's four-stage evolution of situations -- which includes origination, maturation, deterioration, and disintegration -- is particularly well-suited for defining the nature of confrontation in the Deer Creek Crossing controversy. In the first stage, a situation originated as someone recognized an exigence and developed a constituency. Initially, as the Deer Creek situation unfolded, it was purely a local issue and the arguments were shaped for local sensitivities. For instance, supporters represented the project to be entirely in the interest of local people -- both economically sound, as illustrated by the promise of job creation and immense

increase in property tax base, and environmentally sensitive, as illustrated by the newly created wetlands conservancy and the careful relocation of existing wetlands. Opposition focused on local attachments to a familiar natural area and the danger of irreversible loss. At this point, the audience was only beginning to coalesce and the regional character of future opposition had not yet formed.

In the second stage, the situation matured as constituents recognized both the existence of, and their own ability to influence, the exigencies. The Deer Creek public approval process provided a forum for the presentation of both the developer's position and the surprisingly stiff opposition. As advisory resource agencies -- EPA, FWS, and PFBC -- aligned their expert credibility against the development, the regulatory agencies -- DEP and the Army Corps -- administered the process in an unusual atmosphere of media interest and public attention. The rhetoric got fiery and emotional and lines were drawn between opponents creating obstacles that eventually become insurmountable.

In the third stage, deterioration began as modification of the exigence became increasingly more difficult. In the Deer Creek Crossing case, the situation began to deteriorate after the permits were finally approved and the opportunity for modification through active public resistance virtually disappeared. When public involvement diminished, opponents fell back to their last line of defense, the legal challenge. When the appeals process was exhausted and the means of opposition evaporated, the situation disintegrated, creating the fourth and final stage in which no exigence existed because no expectation of modification existed (*Functional Communication* 34-35).

The rhetorical situation was fluid, dynamic and complex. Many exigencies and constraints appeared and developed within the overall conflict. Eventually, each side in the Deer

Creek Crossing case navigated through an intertwined spiral of actions and reactions. The situation drove the antagonists to speak to assert control over the rhetorical exigence of the situation and thereby control the terms of debate, yet each claimed a different interpretation of the conflict. Interestingly, ORIX-Woodmont could not define their perception of the exigence as openly as could the opponents of development. Supporters wanted to make the claim that the inevitable destruction of valuable natural wetlands would be more than offset by the creation of artificial wetlands and a large conservation area. But they were constrained by the general public's inherent skepticism that any particular development project could actually function to protect the environment. When the developers attempted to co-opt the ethos of environmental history by attaching Rachel Carson's name to the new wetlands, the tactic backfired. Instead of increasing credibility, it produced a sense of outrage among opponents, who claimed that the developers acted not out of environmental sensitivity, but purely from a profit motive. The developers had to be careful not to seem too powerful or unreasonable when they rebutted that accusation. Their willingness to redesign the development plan and compromise with the opposition strengthened their image of reasonableness.

On the other hand, the opponents of development could be aggressively straightforward in accusing the developers of being driven by a desire for profit and by the exigence of overcoming unexpectedly stiff opposition. Opponents claimed that developers spoke to protect their investment, not to protect the environment. And in a real sense, the developer's rhetorical exigence did arise more from the mere *existence* of major opposition than from its effectiveness. If there were no opposition, the developers likely would not have addressed any environmental concerns beyond those minimally required to satisfy regulatory requirements. But the claim of protestors that environmental destruction was imminent produced an exigence that necessitated a

response. That response was partially embodied in a "greenwash" strategy that contained a serious danger of tactical reversal.

Bitzer's theory of the rhetorical situation provides a useful and relevant framework upon which to construct an analysis of the arguments supplied by both sides in the struggle for control of the debate in the Deer Creek Crossing case. Understanding how this case unfolded requires discerning the competing motivations for rhetorical action. Careful analysis of the contest for control of these exigencies presents the best chance to evaluate the Deer Creek case, and in a larger way to learn to adapt to the political realities of environmental controversy. Motivation grew out of the rhetorical situation through the rise, maturation, and occasional decay, of a controlling exigence and several discrete, less powerful exigencies within the greater debate. Actions were constrained in a number of ways that involved political influence, corporate inertia, public activism, local resentment of outsiders, redevelopment laws and regulations, and close print media attention. The audience was both specific -- in the sense that only certain regulatory, judicial, and political bodies had any formal decision-making power -- and general in the sense that the Deer Creek battle was merely one public manifestation of a larger environmental struggle. Because this rhetorical situation recurs endlessly over the length and breadth of America, close examination of how it happened and what worked in this case can provide valuable lessons in tactics and strategy that should be applicable to other environmental controversies.

### **1.3. Rhetorical Analysis of Environmental Issues**

The literature on environmental rhetoric experienced a spurt of growth in the early to mid- 1990s. I review here the articles most relevant to the Deer Creek controversy and connect key theoretical concepts to an analysis of conditions at play in the Deer Creek case. The first

group of articles focuses on theory and methodological issues in environmental rhetoric, followed by several case studies.

### **1.3.1. Theoretical Approach**

In "The Die Is Cast: Topical and Ontological Dimensions of the *Locus* of the Irreparable," rhetorical scholar J. Robert Cox examines the irreparable choice, the basis of its appeal and its implications for social judgment. By irreparable choice, he means a decision that is claimed not to be repeatable or rescindable and the consequences of which may include irreplaceable loss. He starts with Chaim Perelman's observation that values often change when attention moves from general concepts to specific issues. Perelman offers a series of premises to establish values: loci of quantity, quality, order, the existing, essence, and the person. They serve as a structured approach to Aristotle's query about how people decide between things of apparently equal value or how they show the advantage of something initially thought to be of lesser value (Cox 2-3)..

For Perelman, the irreparable is evaluated through the loci of quality, that is, something which is unique or exceptional, the antithesis of the common or usual. These arguments are organized around three things: 1) uniqueness, 2) precariousness, and 3) timeliness (Cox 3-5). Uniqueness, Cox explains, means to Perelman something that, once destroyed, cannot be restored. The disagreement over the value of artificial versus natural wetlands serves as a good example in the Deer Creek Crossing case. Each side defined the importance of wetlands protection in terms of their perception of the uniqueness of the wetlands in question. For the opposition, all the threatened wetlands were irreplaceable: they were unique in Perelman's sense of the word, meaning that while there may be many wetlands, there was only one of each particular wetland. For the developer, only high quality wetlands were irreplaceable. In their

view, road berm wetlands were degraded and unnatural but replacement wetlands were important additions to the natural environment. Environmentalists devalued the replacement wetlands as nothing more than storm water management, parking lot catch basins, while the endangered wetlands were natural and hence unique and irreplaceable. Many current and former residents spoke out in public meetings to identify the Deer Creek terrain as an irreplaceable element in the quality of local life. On the other hand, the imminent threat for some existed less to the environment than to the future of their community without economic growth.

Cox suggests four strategic implications of argument from the locus of the irreparable: 1) expanded time frame, 2) heightened information seeking, 3) the minimum condition rule for choice, and 4) a warrant for extraordinary measures. First, given that an irreparable decision is irreversible, incremental decision-making provides an expanded time frame. For instance, in the Deer Creek controversy, one opposition tactic called on the Allegheny County Council to instruct the County Redevelopment Authority not to issue bonds to pay for the tax increment financing (TIF) package already approved by the previous County government, at least until the current Council acted on a motion to rescind the TIF, thereby preventing immediate action. Second, heightened information seeking allows for a more complete decision process, with irreversible decisions made only with a complete information data set. The citizen's group PennFuture hired a certified public planner to provide evidence that the economic benefit of the TIF was in actuality far less than that indicated by planners employed by the developer and local government. Third, the minimum condition rule for choice states that if consequences are unacceptable then any choice must be remediable, at least to the extent that it preserves future choice. Fourth, any warrant for extraordinary measures taken in cases of irreparable loss -- that is, ones that might surpass any ordinary expectation of public approval -- should include

awareness of irreversible consequences, evaluation of alternatives with consequences, sufficient time for consideration, and absence of coercion (Cox 7-11).

Michael Spangle, an environmental communication scholar, and David Knapp, a communication consultant, in “Ways We Talk About the Earth: An Exploration of Persuasive Tactics and Appeals in Environmental Discourse,” classify perspectives on the environment and assess persuasive tactics and appeals. They construct categories along a continuum that reflect a radical functionalist perspective (pro-business/development), a combined resource functionalist/resource environmentalist perspective, and a radical environmentalist perspective (Spangle and Knapp 8-19). The *radical functionalists* view progress as more important than the risk of environmental damage (8-11). For instance, the willingness of the developer to sacrifice environmental resources for profit, and of their supporters for the potential increased economic viability, illustrated this perspective at work in the Deer Creek Crossing case.

The *resource functionalists* hold that progress is necessary but recognize environmental damage as a problem in need of remediation (11-14). While tending towards a centrist position, they support compromise favoring development. In following this pattern of argument, the Deer Creek developers and their supporters in local government strove to project an image of reasonableness and compromise. They were willing to redesign the proposal but less from a sense of environmental responsibility than to enlist public support as well as secure regulatory approval.

The *resource environmentalists* insist on including the non-human perspective when evaluating environmental damage (15-19). While also tending towards a centrist position, they support compromise favoring the least environmentally damaging alternatives and question science as an objective judge of the ramifications of development. The *radical environmentalists*

view nature as sacred. They evaluate all human activity for its effect on the natural world and favor eliminating anything that is detrimental. The primary opposition groups in the Deer Creek controversy fell somewhere between resource and radical environmentalist categories since, while they were not against development *per se*, they believed that no such massive development should be permitted on this particular site. They did propose alternative sites as acceptable.

For Spangle and Knapp, the business, or radical functionalist, perspective is predicated on certain indicators (8-11). First, proponents of this view focus on economic self-interest. Second, the business perspective applies moderating adjustment and capitulation strategies. Accordingly, in the Deer Creek controversy, the developers redesigned the project to reduce stream enclosure and highlighted the proposed 90-acre wetlands conservation area, a strategy denounced by the opposition as misleading and disingenuous. Third, the business perspective downplays risk. The Deer Creek developers claimed that valley wetlands were degraded and the stream itself was already severely impacted by abandoned mine drainage while the opposition cited the stream as one of only a few in Allegheny County clean enough to be stocked with trout.

Some environmentalists exhibit a combination of resource functionalist and resource environmentalist perspectives, working first within the system by adopting a persona of “defender of public interest.” They focus on pragmatic solutions based on reasonable and practical compromise. In contrast, radical environmentalists tend to base appeals on fear in order to demonstrate the danger of loss and stage dramatic and newsworthy events. These appeals are designed to trigger guilt and anger, both strong psychological motivators. The radical environmentalists use contrasting and polarizing language to create urgency and focus blame for consequences. Finally they practice no-threshold appeals, now called zero-tolerance, in which



*any* environmental effect is identified as significant and detrimental. All three positions use a blending of science and ethics (Spangle and Knapp 15-19).

In the introduction to the anthology Green Culture, English professor Carl G. Herndl and rhetorical critic Stuart C. Brown discuss how they believe that the environment is given meaning and definition by a social construction process involving use of language. Values, they maintain, are assigned through public argument (Herndl and Brown 3). They argue that it is a mistake to define environmental issues as romantic or spiritual, because that reduces or eliminates practical strategies. A spiritual perspective is personal and reflective and therefore difficult to relate to “real world” environmental argument patterns: science, economics, and institutional conditions. Herndl and Brown’s model for analysis of environmental rhetoric identifies three distinct positions. First, the ethnocentric -- or nature as resource -- position includes the business/economic perspective as well as regulatory discourse and may be characterized by arguments that use appeals from ethos. Second, the anthropocentric --or nature as object -- position focuses on scientific and legal discourse and often evinces reasoning based on logos. Third, the ecocentric -- or nature as spirit -- position includes poetic, spiritual, philosophical, and emotional discourse and frequently surfaces in the form of appeals from pathos (Herndl and Brown 10-12). There seems to have been remarkably little spiritual argument going on in the Deer Creek controversy. One person who made such a statement during a public meeting stood out not for the inarguable sincerity of his words, but for the isolation in which he cast the issue. The vast majority of statements focused on practical questions or quality of life issues, not spirituality.

In “Millennial Ecology: The Apocalyptic Narrative from Silent Spring to Global Warming,” English scholar M. Jimmie Killingsworth and education researcher Jacqueline S.

Palmer argue that, rather than attack the ideology of progress and topple big business, big government and big science, the apocalyptic environmental arguments that have the most effect are those that seek broad emotional and philosophical adherence, that are less confrontational and more passionate. In their account, the stridency of apocalyptic environmental writing reflects contemporaneous cultural context and manifests less as specific predictions than as broad based appeals for adherence and support. They involve arguments from pathos. The obstacle in environmental public argument has been the ingrained dominant ideological position implied in the ultimate term: progress. Millennial ecology aims to replace the ideology of progress with a refined and expanded ideology of environmentalism (Killingsworth and Palmer 21-26). To show this, Killingsworth and Palmer examine several principal works of environmental jeremiadic rhetoric, including Rachel Carson's Silent Spring. They argue that the focus of apocalyptic environmental writers has not been on predicting the future but on trying to change it. They identify two important implications of their study for environmental rhetoric: first, form always produces effect, and second, the ability to "move" audiences is historically and contextually driven (41-42). In highlighting the role of argument form and context in shaping patterns of public discourse, their approach resonates with the rhetorical history approach of this case study.

Political scientist and environmentalist Phil Brick, in "Determined Opposition: The Wise Use Movement Challenges Environmentalism," details how the anti-environmental wise use movement co-opts rhetorical strategies successfully employed by environmentalists, combining populist rhetoric with corporate organizing and financing. He asserts that to some extent environmentalism has become a victim of its own success because the air is cleaner and the water is less polluted than it used to be and that has resulted in a diminished sense of urgency. Point sources of pollution -- outflow pipes and smokestacks, for instance -- have been widely

reduced or controlled, although certainly not eliminated. Non-point sources -- abandoned mine drainage and car exhaust, for instance -- have been less popular to remedy because the burden rests not on the few but on the many. The wise use movement offered the first politically organized and ideologically coherent opposition to environmentalism, combining fear of big government with support for private property rights, cemented with politically conservative glue.

Brick proposes three political issues as key to the wise use movement's success. First, environmental regulations can be too easily associated with governmental interference. Environmentalists have been put in the difficult position of defending government intrusion in order to retain regulatory protections (Brick 200). In the Deer Creek case, an ORIX-Woodmont representative wrote a long letter to the Secretary of the Pennsylvania Department of Environmental Protection complaining in part of the potential for "myopic assessments" by technocrat biologists (Howell to Ridge). Opposition arguments objecting to this characterization were somewhat defused by the implication of overreaching government regulations.

Second, the public dispute over private property rights is a red-hot issue, with extreme views being very common (Brick 201). McCrady, the Deer Creek property owner, stood to receive compensation for the land amounting to many times its currently assessed value. This reduced sympathy for ownership rights but did not negate it entirely. A property owner had still been put in the position of being told what may or may not be done on private property and that was not a popular view in traditionally individualistic Southwestern Pennsylvania. No doubt the potential legal issue of an uncompensated government property "taking" would have arisen had this development proposal been denied. Third, the loss of potential jobs and tax base was a central focus of Deer Creek supporters, corresponding to the last of three key political issues in Brick's schema (201-202).

Brick suggests that the way to convert strong public support for environmental protection laws into effective public policy entails refocusing attention away from environmental regulations and towards market-based solutions and local environmental group leadership. He points to the loss in membership and influence of many national environmental groups, and argues that the ones that remain strong are those that focus on market-based solutions. The Environmental Defense Fund, for instance, has increased membership and influence largely because of innovative and practical initiatives allowing highly efficient industries to sell air pollution credits to less efficient companies, thereby increasing the economic motivation to control pollution (Brick 203). Brick sheds light on the rhetorical dynamics involved in co-option and elucidates how particular aspects of the argumentative background are shaped by political factors. This approach informs study of the Deer Creek case, as several of these same features played prominently in the controversy.

In “Saving the Great Lakes: Public Participation in Environmental Policy,” rhetorical critic Craig Waddell begins by describing four models of public participation in environmental and science policy disputes. First, in the technocratic model, decisions are left to technical experts in science, engineering, industry, and government with no role for public participation. The danger with this approach, Waddell feels, is that the absence of a critical evaluation of moral and emotional ramifications can corrupt the decision-making process.

Second, in the one-way Jeffersonian model, the public has the right to participate in environmental decisions that affect their well-being. If it appears that the public does not understand the issues, rather than withdrawing their right to participate, scientific experts can institute a one-way educational process in which the experts transfer to the public the knowledge that they believe is necessary for good decision-making on any particular issue. This is a

monological process in the sense that no corresponding transfer of knowledge flows back from the public to the experts.

Third, the interactive Jeffersonian model provides for technical information to flow from experts to the public but also enables a reverse flow of value judgments and emotional reactions from the public to the experts, each adapting to and accommodating the other (Waddell, "Saving the Great Lakes," 141-144).

Waddell's preferred method is the fourth in his schema -- the social constructionist model -- in which he argues that values and emotion often and perhaps nearly always color expert testimony. While devaluing scientific objectivity to some degree, this model recognizes that the public can and often does provide technical scientific data, usually in anecdotal form, to experts. In this value-laden exchange and analysis of information, decisions are socially constructed (Waddell, "Saving the Great Lakes," 142). Waddell applies this model to analyze the controversy over public participation in hearings about water quality in the Great Lakes. He searches for answers to three important questions: 1) Was public participation merely cathartic or genuinely influential to the eventual decision? 2) What role did emotion play in the decision versus technical expertise? 3) What role did egocentric, homocentric, and ecocentric appeals play in the decision (144)? He concludes that argumentation in the Great Lakes case matches his social constructionist model because experts admitted in interviews that, to varying degrees, the emotion and sincerity of lay testimony genuinely affected the decision and that the public provided certain scientific data through what Waddell calls "folk epidemiology." Waddell then argues for growth in mechanisms whereby the public can supply technical information to experts, who can subject it to rigorous scientific review, which creates a greatly increased

recognition of the role of value judgments and emotion in both public and expert testimony (157-159).

This article raises some interesting questions about the decision process in the Deer Creek Crossing case. The final decision appeared at first to rest exclusively with the Army Corps of Engineers and the Department of Environmental Protection scientific experts, but in the end the courts had the last word. How much did the often emotional and value-laden public testimony affect the final decision? Only one hearing was held before the first denial and one hearing for the re-application. On the other hand, both the DEP and the Army Corps encouraged written testimony and provided an extensive window for submission. Did emotion and subjectivity exert any influence on the decisions of judges?

### **1.3.2. Case Studies**

A different vector of scholarship in environmental rhetoric focuses on the substance of specific cases. While these efforts lack the programmatic theoretical detail of the preceding works, the case study approach yields useful insight for the present analysis. Two English scholars, Steven B. Katz and Carolyn R. Miller, in “The Low-Level Radioactive Waste Siting Controversy in North Carolina,” study the effect of community activism on government decision-making. Specifically, they warn that an uncritical appropriation of the Shannon and Weaver engineering model of communication can turn what ought to be constructive dialogue into merely public relations and education campaigns. In the North Carolina waste siting controversy, Katz and Miller find that models of risk communication in government are characterized by four attitudes: 1) belief in the importance of control over the process, rules, and agenda; 2) faith in the power of information and education to shape public adherence; 3) a severely restricted understanding of the dynamics of communication; and, 4) a subtext of

contempt for the non-technically sophisticated public (123-131). They argue that, too often, government agencies control the deliberation process by creating rules, focused on the engineering model of communication, and disseminate information as education without interaction. According to this view, if members of the public are presented with the facts of the case they will tend to acquiesce and see the wisdom of depending on technical expertise. Katz and Miller view criticism as methodology, a detailed analysis of text and events to determine what arguments worked and why.

Finally, two essays discuss different aspects of the same controversy regarding the spotted owl in the Pacific Northwest. Jonathon Lange's article, "The Logic of Competing Information Campaigns: Conflict over Old Growth and the Spotted Owl," argues that the perception of resource scarcity is an essential and necessary condition of environmental conflict and that language and discourse strategies shape how environmental controversies unfold (125-126). In the spotted owl controversy, both sides engaged in spiral-like mirror behaviors in which they responded to each other's moves by changing strategies and tactics, relying largely on media coverage to inform their evolving strategies.

Lange observes two interesting phenomena in the public debate on the spotted owl: reciprocated diatribe, in which each action produced a louder, more shrill, less informative reaction; and parallel vilification, in which each side alternatively demonized the other. This process leads to very adversarial conditions with little or no direct interaction, a recipe for impasse (Lange 139-140). While there was little direct interaction in Deer Creek, as the legal process continued some personal animosity emerged on the part of land owner McCrady, who vilified PennFuture attorneys in the news media for misusing the legal system in order to unfairly

delay the project. With a few exceptions, the parties adopted the antagonistic character of debate described by Lange.

Framing/reframing involves offering alternative interpretation of data and conditions to support opposing positions (Lange 132-133). This is of course a general condition of debate on virtually any issue. It appeared in the Deer Creek case most notably when advocates framed the dispute as a jobs/economic benefits issue versus an environment/quality of life issue. In the vilify/ennoble strategy (134-136), Deer Creek developers were identified as outsiders, destroyers of nature and local community values, even as environmentalists were also identified as outsiders who were willing to sacrifice potential economic benefits for a community in which most of them did not reside.

In a second article on the spotted owl controversy, "Constructing Irreconcilable Conflict: The Function of Synecdoche in the Spotted Owl Controversy," Mark P. Moore argues that different synecdochal representations of the spotted owl contained competing social constructions that supplied much of the substance of public argument. In one version, the owl, as an indicator species, stood for the deep forest ecosystem and implied the health or lack of health of the old growth forest. In the competing version, the owl stood as scapegoat and represented the economic damage done to the local, timber-dependent economy, an especially potent symbol when used to support arguments about loss of jobs and economic value to local families. These competing representations obscured the larger issues of preservation and extinction and created a separate scene for debate, which impeded resolution of the controversy (148-153). Moore argues that the competing representations of the owl as indicator of ecosystem health and as a scapegoat for economic damage were irreconcilable and that irreconcilable conflict has serious political implications that manifest in lessened expectations for compromise



and solution (154-156). The representations reduced and distorted the underlying, far more important issues of life – as in the health of the old growth forest – and human liberty (Moore 156-158).

The preceding survey has covered recent case studies in environmental rhetoric. Not all of the theoretical concepts examined have relevance for the Deer Creek Crossing case, but several provide excellent support for my analysis. In particular, the subsequent chapters draw upon Spangle and Knapp's continuum of environmental protection and Lange's categories of argument patterns (especially mirror and match, reciprocated diatribe, parallel vilification, select high/low, and framing/reframing). These critical tools, drawn from mid-level theory on environmental rhetoric, supplement my overall theoretical framework that positions the analysis as a rhetorical history highlighting the dynamics of argument form in rhetorical situations.

#### **1.4. The Organization of Analysis**

This opening chapter has provided necessary background and laid out the theoretical foundation supporting my analysis of the Deer Creek Crossing controversy. Chapter two analyzes the use and misuse of public citizen forums, including the press, in governmental decision-making associated with the Deer Creek case. The Pennsylvania Department of Environmental Protection (DEP) and the Army Corps of Engineers held two public hearings on the proposed Deer Creek Crossing development, one on 25 April 2000 and the other on 24 October 2001. In addition, Allegheny County Council discussed the Deer Creek Tax Increment Financing plan in several public meetings, including economic development committee meetings. Members of the public got to speak at the Council meetings but not at the committee meetings. In Chapter two, I draw from personal observation, interviews and public documents to evaluate if and how the public input affected the decision-making process.

In order for a development project of this type to proceed, Section 404 of the Clean Water Act requires that the US Army Corps of Engineers issue a permit. The Army Corps is responsible for regulating the discharge of dredge or fill materials into the waters of the United States. In addition, under PA Code 25, section 105, the Pennsylvania Department of Environmental Protection must issue a Water Obstruction and Encroachment Permit. While these two agencies made the final decision on the permit applications, they were required to invite and consider outside comment, both from the general public and from other state and federal agencies.

In the case of Deer Creek Crossing, the US Environmental Protection Agency, the US Fish and Wildlife Service, and the Pennsylvania Fish and Boat Commission submitted written comments on several occasions that were so strongly oppositional, so strident in language, that it was difficult to believe that these resource agencies were evaluating the same physical property as the Army Corps and DEP. While the regulatory agencies remained focused on revision and accommodation, they received many letters from the resource agencies recommending denial. In the end, DEP and the Army Corps issued the required permits even though two of the three other environmental agencies continued to recommend flat denial.

Chapter three investigates the adaptation of arguments and changes in tone in response to exigencies and constraints arising from the denial of the first permit application. This vector of analysis steers attention to shifting patterns of press coverage, as well as public comment at Allegheny County Council meetings. The Army Corps' Statement of Findings identified a shift in concerns raised by the opposition speakers between the 2000 public hearing and the 2001 public hearing, while statements of support remained essentially the same from original plan to revised plan. At the second public hearing on 24 October 2001, regarding the revised

submission, the Army Corps statement noted that 150 people attended, 18 speaking in opposition and 11 in favor of the project (22). As a result of the unexpected success opposing the first application, speakers in opposition sharpened their focus to include a more prominent examination of specific impacts to wetlands and the Deer Creek floodplain. The real objection of the opposition was that the project ought not to be done at all. But the offer by the developer of reasonable accommodation weakened that position, and ultimately paved the way for the regulatory agencies to green light the development plans.

Chapter four examines the struggle for environmental ethos through the mobilization of expert testimony, competing scientific claims, and deployment of the spirit and persona of Rachel Carson as a tool for “greenwashing”, as well as the dynamics of some surprisingly emotional opposition opinions that emerged from environmental resource agencies, agencies that have traditionally responded in more rational, scientific terms. One of the most creative and provocative pro-development arguments involved realigning the ethos of seminal environmentalist Rachel Carson and of the Western Pennsylvania Conservancy (WPC), the oldest conservation organization in the Pittsburgh area. Although the Deer Creek Crossing development plan required a massive reconfiguration of the 243-acre site such that the environmental impact would be devastating regardless of any mitigation measures, the Woodmont Corporation, in conjunction with the Allegheny Valley School District, announced at a public informational meeting on January 6, 2000 that a portion of the McCrady property (at first 13 acres but growing eventually to 93 acres) would be set aside as an educational wetlands outdoor laboratory to be called "The Rachel Carson Conservancy." The accompanying ORIX-Woodmont press release boldly declared that "if she were alive today, the pioneer environmentalist could watch an environmental preserve and a living laboratory taking shape as

part of a master-planned development in Harmar Township, just a few miles from her childhood home in Springdale, Pennsylvania" (ORIX-Woodmont 1).

Chapter four reconstructs the rhetorical decision-making process that led to deployment of Carson's name, analyzes the argumentation arising in opposition, and examines the fight for scientific authority. At the 24 October 2001 public hearing, one speaker took issue with ORIX-Woodmont's usurpation of the Carson persona: "If she (Rachel Carson) was here tonight, she would be the first to say that this (development) is unsound" (Kruth, qtd. in DEP 2000a, 223). Diana Post, executive director of the Rachel Carson Council, a Maryland research center and advocacy group, wrote in a letter to the US Army Corps of Engineers, "If Rachel Carson could express her opinion, we feel certain that she would speak out against the development. Since she cannot, we . . . will do it for her" (Post to Hans, 3 December 1999). The attachment, she argued, of Rachel Carson's name to the Deer Creek development "demonstrates gross disrespect to her legacy" (Spangler 2). Even the US Fish and Wildlife Service wrote, in a 3 December 1999 letter to the Corps, "It is ironic, given the name that the applicant (ORIX-Woodmont) has chosen for this (the conservancy) area, that its sources of water will be stream overflow, runoff from 141 acres of parking lots and buildings, and two storm sewers from the Pennsylvania Turnpike" (Densmore to Ridenour 6).

Not all reaction was negative, however. Ronald Wasilak, at that time Superintendent of the Allegheny Valley School District, offered strong support. The above mentioned ORIX-Woodmont press release quoted Esther Barrazone, President of Chatham College, as saying that faculty "very much anticipates the opportunity . . . to study in and research this unique outdoor environmental laboratory" (1). Landowner McCrady was an active supporter and contributor to both Chatham College and to the Western Pennsylvania Conservancy and believed strongly that

Deer Creek Crossing plans were environmentally sensitive (personal interview). Co-opting the opposition's arguments can be an effective technique, if ethically problematic. In Chapter four, I evaluate how effective these techniques were in the Deer Creek Crossing controversy. This line of analysis also affords an opportunity to focus on how principal advocates for each side in this controversy framed their arguments. I distinguish between arguments about values and emotions (aesthetic and spiritual versus property rights and cost of living for instance), about science and technical expertise, and about laws and regulations.

Chapter five evaluates the decision-making structures and processes of regulatory agencies charged with approving environmental permits, as well as the intricate and highly structured legal processes that dominated courtrooms, in which the last and most decisive actions were undertaken. The pattern of arguments in court did not follow the same arc as the open public arguments. I examine the evolution of the legal opposition as it moved from jurisdiction to jurisdiction, pitting lawyers against lawyers in a frenetic yet strangely detached dance of competing positions and influence, superficially objective but unavoidably affected by human subjectivity.

From each starting point, I will build outward to explore the richness of a heuristic rhetorical situation. A tremendous level of opposition arose to the Deer Creek Crossing development, emanating from resource agencies, citizen advocacy groups, environmental groups and average citizens. The regulatory agencies were required by law to consider all of these opinions when reaching a decision whether or not to issue environmental permits. The Pennsylvania Department of Environmental Protection in particular weathered a stormy internal process, with a great deal of field-level operative opposition to the project as too damaging to the environment for approval. DEP did in fact deny the first application but, possibly in reaction to

Central office political pressure, they approved the revised second application. Most criticism arose from the effect that the development plan revisions would have on the environmental integrity of the Deer Creek valley. Some thought that the process had worked as designed and the impact of development had been reduced. Others thought that the DEP decision betrayed their responsibility to protect Pennsylvania natural resources.

The Army Corps of Engineers, on the other hand, stayed as far from the center of the controversy as possible and managed to tightly control its portion of the decision process, mostly by ceding principal jurisdiction -- and responsibility -- to DEP. Despite the very strong resource agency statements of opposition, the Corps rationalized approval of the permit application in their July 2002 Statement of Findings by reporting that the destruction of wetlands and habitat was either sufficiently mitigated or did not rise to a level that would be contrary to the public interest. "The Corps' position on fish and wildlife values is that given consideration of all proposed mitigation measures there will still be adverse impacts on aquatic and terrestrial species and habitat. . . . (but) the mitigation measures, monitoring, and bonding requirements can minimize these impacts to a level that they are not contrary to the public interest" (41).

Opposition arguments that focused on public concern about irreplaceable environmental loss, or on scientific reason, or on the credibility of expert opinion, or even on political expediency were all beaten back by a persistent developer strategy of accommodation. Each tactic offered opportunities for adjustment that reduced the effect of environmental destruction enough to make it palatable. The conclusion explores the implications of this particular case for environmental rhetoric and for the effect of particular strategies and tactics on environmental public argument from the perspective of environmental activists, developers, and rhetorical scholarship.

## 2. PUBLIC FORUMS AND RHETORICAL PASSION

How public are public decisions? What motivates a citizen to take public action in support of a particular cause? Are people convinced by facts, persuaded by the credibility of experts, or moved by emotion? When a public interest controversy compels a public hearing, is the citizen's voice a significant element in decision-making? Or is it a political façade erected to provide only the appearance of meaningful contribution?

Sharon Beder, an Australian Science and Technology scholar, argues that public hearings are often less about public input than about manipulating public acceptance (169). In this case, for developer ORIX-Woodmont Deer Creek Venture (ORIX-Woodmont), public acceptance was a very consequential exigence. ORIX-Woodmont labored hard to persuade the public that Deer Creek Crossing made good economic sense and would be done in an environmentally responsible manner. The opposition worked equally hard to rouse public opinion against the project. Both sides appeared to believe that developing public support generated political support and that regulatory agencies were vulnerable to political pressure — a significant constraint on the decision-making process. Although in the beginning of the process, regulatory agencies were the only audiences with official decision-making power, both sides endeavored to influence the public audience because the support of the public could be transformed directly into the support of elected officials. Ultimately, this calculation seemed insightful — politicians did seem to exert a substantial if circuitous effect on regulatory decisions in this case. This chapter begins construction of the rhetorical history of the case by elucidating the basic terms of the public argument as it unfolded in the first official public hearing and in the early press accounts of the controversy.

## 2.1. Rules of Engagement

The Army Corps of Engineers (Army Corps), which shared with the Pennsylvania Department of Environmental Protection (DEP) the statutory obligation to gather public comment about Deer Creek Crossing, deferred to DEP regarding a final decision. The Army Corps seemed content to withdraw from a prominent role and let DEP take the lead and bear the brunt of public criticism, which in effect combined two decision-making audiences into one. When DEP denied the first application, the Army Corps declared its own consideration to be moot and suspended the approval process. When DEP announced that it would approve the second application contingent on satisfaction of certain conditions, the Army Corps immediately issued project approvals but also made its action conditional on the developer's compliance with all DEP requirements. For ORIX-Woodmont, this allowed their procedural focus to stay on DEP evaluators. However, there were indications that the scientists and administrators of the DEP Southwestern regional office, the *de facto* decision makers, viewed the Deer Creek Crossing development plan with considerable skepticism. The most obvious evidence for this was the flat denial of the first application. But internal DEP communications indicated that the technical staff wanted to deny the second application as well. In a June 2002 internal DEP Briefing Paper, Water Manager Tim Dreier concluded, "On the basis of overwhelming public comment, overwhelming environmental agency objections, and the anticipated adverse environmental impacts which are not offset by equal or greater public benefit, the Region recommends this application, like its predecessor, be denied" (Dreier 6). The Central Office responded to this recommendation by assigning a high ranking staffer, Division Chief Ken Reisinger, to review the regional recommendation. During the first application process, an adversarial relationship had existed between the applicant, ORIX-Woodmont, and DEP regional staffers. When the DEP



Central office increased its direct involvement in the second application process, it significantly moderated this relationship.

Nevertheless, DEP did not attempt to use the public hearings as a masking device to generate public acceptance. For DEP, public hearings simply fulfilled one of the required procedural steps. Here, Katz and Miller's characterization of risk communication played out, with bureaucrats focusing on lines of argument informed by rules and procedures (123). The approval procedures mandated public hearings and therefore DEP held public hearings.

The hearings also were not an authentic attempt to gather data from the public. The DEP did not, as environmental scientists, have much faith in the public's ability to provide valid technical and scientific data. DEP staff experts provided the definitive scientific analysis by drawing upon their own expertise, state and federal resource agency recommendations, and developer-generated expert technical reports. The data used in the decision-making process did not incorporate public input. There is no indication in its Statement of Findings that the Army Corps enlisted any scientific or economic experts of its own, instead depending on the expert reports provided by other sources. And, in a Briefing Paper dated 5 July 2002, the Army Corps flatly stated that public comments "do not provide detailed scientific analysis or other quality based or quantifiably based information" (3). That attitude reflected the disdain for the regulatory usefulness of public participation described by Waddell as the one-way Jeffersonian model ("Saving the Great Lakes," 142).

### **2.1.1. The Oblique Influence of Public Relations**

ORIX-Woodmont realized that getting permits from regulatory agencies involved a complicated but predictable process of negotiation and compromise. Public acceptance of the plan to develop Deer Creek Crossing proved more difficult to manage. Presentations in the first

hearing by Joseph Howell, a Woodmont executive, and in the second hearing by Terry Bossert, a former DEP attorney who represented ORIX-Woodmont, sought to cast the economic, educational, and even ecological effects of the development in the most positive possible light. The political power of public acceptance to influence regulatory decisions acted as a constraint on the approval process and offered a chance to exert indirect influence. Concern with the intensity of and even the very existence of coordinated opposition was the exigence that drew ORIX-Woodmont to create a strong appeal to the public. Although they were certainly aware that by law the regulatory agencies could base permit decisions only on the applicant's compliance with relevant regulations, and further that public input officially functioned only as an advisory, procedural requirement, ORIX-Woodmont officials focused significant attention on winning the support of the general public. Public relations produced more than good will. Favorable public reaction generated favorable media coverage. Politicians responded to the perceived disposition of their constituency.

The Allegheny River valley's struggling economy provided the inspiration for the developer's most persuasive rhetoric. The promise of jobs and property tax relief excited many local residents, as did the convenience of a major shopping mall near at hand. The compelling factor for many local supporters lay in that concrete condition, the existing economic imperfection. They believed that the act of approving Deer Creek Crossing would modify that exigence. Allegheny Valley School District strongly supported ORIX-Woodmont because of the projected millions of dollars in future tax revenue but also because of the environmental education potential of the donated conservancy land. This strategy provided its own justification. The Allegheny River valley needed economic development. Deer Creek Crossing delivered it. Approval through accommodation provided the likelihood of progress with the least

environmental disruption, severe though it still may be, and the creation of a new and protected conservancy area offered an undeniably positive consequence. Given these choices, local and regional political bodies like the Allegheny Valley School District, the Harmar Township Board of Supervisors, and even the Allegheny County Council framed an approval compromise as the best possible outcome and chose to speak at hearings based on that interpretation of the rhetorical situation. The promise of economic prosperity, educational enhancement, and environmental sensitivity shaped ORIX-Woodmont's three-pronged approval strategy. The opposition reframed approval not as a compromise but as a failure in the regulatory process, a differing data interpretation strategy, as described by Lange (132).

Both public hearings, in 2000 and 2001, began with statements from the Army Corps and DEP regarding decision criteria. Each regulatory agency's representative recited a long list of "policies for evaluating the permit application" (qtd. in DEP, 2001a, 6) that included "public interest factors that may be relevant to the proposal . . . conservation, economics, aesthetics, general environmental concerns, wetlands, cultural values, fish and wildlife values . . . cumulative effects and, in general, the needs and welfare of the people" (7). The list of criteria was so broad and long that it became meaninglessly generic. It was liable to be manipulated to fit the decision rather than guiding and informing the decision. Instead of the project being required to fit the criteria, the criteria could be adapted to fit virtually any project, providing only that some attempt at negotiation and accommodation occurred. Both agencies viewed the public hearing as an informative process, more concerned with acquainting the public with the details of the proposed development than with using the public comments as a resource to affect the eventual decision, a condition consistent with Waddell's analysis of official rhetorical moves in the regulatory process ("Saving the Great Lakes," 142). At the start of each hearing, the Army

Corps described its procedural obligation to receive public comments and to have them “evaluated and considered” (qtd. in DEP 2000a, 10). Likewise, DEP promised to “take into consideration . . . the public comments provided tonight” (13). Neither agency offered any explanation regarding how public comments would be “considered” nor what influence that consideration might have on the decision. Therefore, the interested public -- those who came to the meetings or submitted written commentary -- did not know what influence, if any, their opinions might have. Even though by law the application process recognized public interest as a central decision criterion, determining the impact and effect of the Deer Creek Crossing development on that public interest would be entirely the prerogative of state and federal government agencies, an approach to risk communication that reflected the technocratic model described by Katz and Miller (123).

### **2.1.2. Issue Education as a One-Way Flow**

In each public meeting, after opening statements by DEP and the Army Corps, a representative of ORIX-Woodmont presented a thirty-minute overview of the development plan. Members of the public received five minutes each to speak, with the time limit strictly enforced. When the moderator announced that the procedural rules would allow for “no cross-examination or questioning of any witness, either from the floor or from the chair” (qtd. in DEP 2000a, 38), the DEP and the Army Corps increased the sense that the hearing was an exercise in control and informative education rather than open debate. This position was reinforced by the comments of Dr. Ronald Wasilak, Superintendent of the Allegheny Valley School District, who said, referring to the absence of direct rebuttal of the developer’s presentation: “I submit to you that that’s significant educational procedure, because it’s very difficult to discuss any item without first of all understanding what it might be, irrespective of the presenter’s bias” (168-169). Because there

was no direct interactive discussion, arguments and rebuttals were often disconnected from each other in time and order. In fact, there was no point during the public portion of the application process when open and vigorous debate took place, no chance for the public to ask specific questions and receive specific answers, except in court proceedings where it was limited to PennFuture's attorneys.

The general public could use public forums to comment or to pose questions. But no one had to answer them. The developer could choose to discuss opposing views or not to discuss them, to address citizens' concerns or to ignore them. When issues raised by either side were directly engaged it happened because members of the public both asked the questions and provided the answers, not the developer and not the regulatory agencies. The absence of a meaningful, interactive debate process constituted an actual objective condition of the rhetorical situation which existed outside of the perception of participants and that drew from both sides certain rhetorical strategies. For instance, both sides recognized the existence of an effect that reached beyond the official regulatory audience, namely, the influence of public opinion on politicians and legislative bodies. This resulted in argumentative positions meant to *directly* influence public opinion in order to *indirectly* influence regulatory agency decisions. The procedural requirement to elicit public comment coupled with the choice to constrain interactive debate is a common feature of environmental regulatory processes and plays a strong role in shaping arguments about proposed development projects.

Uncertain if their comments exerted any real influence, opponents adopted cynical attitudes. This contrasted with a public democratic tradition that encouraged participation because public opinion did matter, a perspective that reflected another of Waddell's models of public participation, the interactive Jeffersonian model (142). The Deer Creek Crossing approval

process never reached that level. But despite conflicting expectations arising from the structure of the public forum, participants in the hearings responded to the rhetorical situation's most critical actual condition. For better or worse, ORIX-Woodmont had initiated an approval process in which the hearings were the *only* formal opportunity to support or oppose the Deer Creek Crossing development.

## **2.2. Reconnaissance: The First Public Hearing**

The scene of the first public meeting, held at Springdale High School on 25 April 2000, contributed to an already emotionally charged atmosphere because Springdale was the birthplace of environmentalist Rachel Carson, a source of great pride to many local residents. Some speakers cited her legacy and contrasted the unavoidable destruction intrinsic to large-scale earth moving with the portrayal by ORIX-Woodmont of Deer Creek Crossing as environmentally sensitive. "Think about that for a minute. We're going to build a mall to increase public awareness about conservation" (Mike Pavlik, qtd. in DEP 2000a, 75). Obviously, Deer Creek Crossing opponents and supporters had different conceptions of environmental sensitivity. For the environmentalists, parks and green public spaces were environmentally sensitive developments. Shopping malls were not, even those designed with green parking lot separators, grass and tree-plantings. For project supporters, economic development that provided "walking trails for pedestrians" and "signage to promote environmental education and awareness" were proof of environmental sensitivity (Howell, qtd in DEP 2000a, 35). Land use that sacrificed the economic and social needs of a community to environmental extremism was not. On one hand, the looming environmental destruction spurred condemnation at a level of intensity that opponents believed ought to act as a significant constraint on the permit decision. On the other, the potential loss of economic opportunity produced such a spirited defense of economic

progress that supporters believed it ought to act as a significant constraint on the permit decision. This divergence in concept definition was another manifestation of Lange's framing/reframing argumentative strategy in which "interpretations are contextualized to discursively construct a reality favorable to one's rhetorical goals" (132).

Although Pittsburgh's two major newspapers estimated the total number of attendees to be between 300 and 500 people, only 196 signed in for the public hearing. Of these, 40 spoke and had their comments recorded *verbatim* in transcript by a court reporter, 15 in support and 25 in opposition. An additional 22 gave private testimony to a stenographer, four in support and 18 in opposition. Both sides submitted petitions, with 1,891 names in support and 118 in opposition (US Army Corps, Statement of Findings, 13). The public participation numbers, which showed that the opposition constituted the majority of those actually present while supporters carried a huge advantage in petition signatures, suggested a basic difference in strength and strategy. Supporters claimed significant backing from the local population, many of whom signed petitions but did not attend the hearings. Clearly, supporters were very efficient at finding people who did support Deer Creek Crossing but were not motivated to act publicly. Opponents, on the other hand focused less on petitions and more on activists who were willing to physically testify. The implication was that support among actual residents of Harmar Township was considerably stronger than opposition. The Army Corps noted in its Statement of Findings that "Although some of the opposition to the project has been within the immediate community, the majority of concerns have been raised by non-residents of Harmar Township" (45).

Once the comment period began, it became apparent that the absence of direct rebuttals and any sort of question and answer format seriously diminished the vitality of the public hearing. It was not a lively, dynamic debate, with questions drawing answers that raised more

questions until the audience achieved some sense of expository satisfaction. Instead, locked into the severely restricted pattern of communication identified by Katz and Miller as emblematic of government risk communication (129), the procedure restricted critical discourse and introduced a significant constraint to the rhetorical situation. This structure worked to the benefit of ORIX-Woodmont officials because they could postulate the most favorable interpretations without any direct refutation, claiming a position of environmental sensitivity that likely would not have easily tolerated an aggressive cross-examination. The structure also made the opposition counterarguments often seem disconnected from their sources, which were the original claims and warrants of the developer and supporters. In order to reconstruct the substance of the argument that unfolded, I have reordered the comments to allow for more direct comparison and analysis.

### **2.2.1. Nature, Economics and Irreparable Loss**

In the first public meeting, Woodmont executive Howell, using a colorful and professional slide show, laid out the developer's plans prior to the citizen comment period. "We welcome this opportunity" he said, "to clarify a lot of misinformation that's been floating around" (qtd. in DEP 2000a, 37). Misinformation arguably meant to ORIX-Woodmont the public dissemination of points of view that weakened the developer's position. Howell responded to the exigence of unfavorable terms of debate. Opposition strategy had been focused mainly, although not exclusively, on the wetlands destruction issue. Howell attacked that concern as misguided because development drawings showed that the "high quality wetlands that were identified in the 1994 Allegheny Heritage (sic) report done by the Western Pennsylvania Conservancy will remain undisturbed and intact" (27). In fact, the development plans called for the highest quality wetland, Wetland Seven, to be surrounded by an earthen dike. Although it is



questionable whether a wetland which has been cut off from the floodplain that created it can continue to operate in a natural capacity, Howell maintained that leaving the wetlands “untouched by the developer” preserved their natural function.

Lifelong Allegheny River valley resident Denise Miller disagreed with the developer’s position: “How is it possible that this pristine wetland area of 3.6 acres will remain intact if everything around them is changing?” (qtd. in DEP 2000b, 28). Allegheny River valley resident Michael Pavlik argued that the wetlands loss was irreplaceable, regardless of mitigation, and that fact alone should constrain the decision: “The surrounding wetlands, regardless of their quality, will be destroyed. Once this is done, the natural environment cannot be replicated with the proposed artificial wetlands” (qtd. in DEP 2000a, 72). Those pleas can best be understood by reference to Cox’s contention that in a severe risk situation, the minimum condition rule should be applied: “a course of action whose consequences turn out to be ‘unacceptable’ must be remediable” (9).

But University of Pittsburgh biologist Dr. Anthony H. Bledsoe offered significant support to ORIX-Woodmont in written testimony that its mitigation plan should result in an overall enhancement of the wetlands on the Deer Creek site: “Six of the seven wetlands currently on the development site are fragmented and degraded to the degree that restoration of wetlands continuous with the intact, seventh site not to be developed would significantly enhance wetland integrity” (Bledsoe, 2000, 2-3). The exigence for Bledsoe lay in the disturbed existing condition of the wetlands and the constraint in the temporary, and therefore urgent, opportunity to permanently expand and enhance the Deer Creek wetlands with the creation of the new conservancy area.

Howell further maintained that the six remaining wetlands had been identified in the Allegheny County National Heritage Inventory as “fragmented and degraded . . . by such . . . previous impacts as logging, mining, utility installation and off road vehicles” (qtd in DEP 2000a, 27-28). ORIX-Woodmont’s mitigation plan called for the consolidation of the fragmented wetlands to create “a large continuous mass of wetlands . . . to filter upstream discharges . . . The existing fragmented and degraded wetlands scattered and located away from the stream have little chance of performing this natural function” (34). Actually, the Inventory had referred to the entire project area as “somewhat . . . fragmented and disturbed” (WPC 3), not the wetlands specifically. It did recognize that, outside of Wetland Seven, which everyone agreed was a high quality site, the remaining wetlands were degraded by acid mine drainage, but nevertheless stated that these wetlands “provide significant habitat for reptiles, amphibians, and many invertebrates. They, therefore, also add to the overall character and biological diversity of the site” (WPC 89). Howell framed that scientifically objective report as proof of reduced ecological value while opponents reframed the report to bolster the argument that “reduced” value did not mean without value.

Other speakers agreed that Deer Creek Crossing development plans were environmentally sensitive. School Board member Glenna Renaldi recognized that storm water management from such an extensive area of water-impervious parking lot paving constituted a serious challenge. But she argued, “A series of pipes will direct the run-off toward a catch basin where the water . . . will be processed and eventually released into the waterways” (qtd in DEP 2000a, 198). Further, “A close view of the plans for the complex reveal that there are plans for green areas . . . which will assist in the absorption of excess water . . . [and result in] no change to the make up of the waterways” (198-199). She essentially argued that the final environmental

effect of Deer Creek Crossing would be insignificant at worst and a positive gain at best. Her comments reflected the traditional civil engineering view of environmental sensitivity, in which the goal is not minimizing environmental damage but mitigating it to the extent possible *within* the constraints of project requirements. It may be argued that the dominance of that perspective has created the threat to ecological resources of which Deer Creek Crossing was a typical example. Renaldi's position can best be characterized as a wise use perspective corresponding to Spangle and Knapp's resource functionalist viewpoint, which supports development but recognizes that progress creates environmental damage that requires remediation (7).

Howell disagreed with the opposition characterization of development activities. Seeking again to control the terms of the debate, he argued that scattered wetlands would not be destroyed but consolidated, that their function would not be reduced but improved, that Deer Creek would not be damaged but lengthened: "2750 feet of the stream (will be) relocated . . . 3710 feet of new stream being created, adding nearly a thousand feet of new stream channel" (qtd. in DEP 2000a, 36), he stated, even while acknowledging that "there will be minor impacts to the existing riparian zone concurrent with the stream location" (34). Howell's position mobilized the argumentative strategies of the business-oriented radical functionalist. He downplayed the risk by focusing on promised environmental enhancements (Spangle and Knapp, 10). He did not comment on the destructive ecological effect of moving more than a mile of streambed from one place to another aside from describing it as an environmental improvement, nor did he explain how the destruction and reconstruction of an entire riparian zone could be characterized as minor. It was a staggering oversimplification, a tactic which Lange isolates as widespread in environmental controversy (136). Howell highlighted the list of supporters of Deer Creek Crossing but only indirectly referenced the opponents, implying they had dishonestly

supplied misinformation. An example of Lange's parallel vilification strategy appeared in response, as opponents questioned the honesty of the developers as well. PA Fish and Boat fisheries biologist David Spotts remarked to newspaper writer Ron DaParma: "The major reason they want to make the stream longer is so it will go along the perimeter of . . . the property so they can maximize the development of their shopping mall" ("Battle brewing," 14 December 1999).

Howell summarized the developer's message by appealing to a sense of fairness: "I hope that after hearing the facts, you'll see that this is not a developer versus environmental community issue. What we have here is a project that blends the need for intelligent growth with sound environmental planning" (Howell, qtd. in DEP 2000a, 37). Spangle and Knapp call this tactic adjustment and capitulation, a radical functionalist understanding that "if being 'green' contributes to public acceptance, they must appear to be 'green'" (10).

Lifelong Harmar Township resident Frederick Domaratz supported Howell's arguments when he pointed out that Deer Creek's reputation as a "so-called trout stream" was completely dependent on artificial fish stocking: "Trout exist only through the Fish Commission stocking. Several months after that, those trout are gone" (qtd. in DEP 2000a, 118). Domaratz believed the economic opportunities far outweighed the environmental cost, which drew from him a predictable defense: these environmental amenities are vastly overrated.

On the other hand, Howell's claims that mitigation would create better functioning wetlands drew from some environmentalists the same accusation of disseminating misinformation with which Howell had painted the opposition. Addressing the Howell claim that the mitigation plan would improve conditions because previous stream relocations had already damaged the Deer Creek ecosystem, environmentalist Stan Sattinger noted: "the implication of

the developer is that further disruption is going to make the resources even better” (qtd. in DEP 2000a, 150). The two principal tactics of the public debate emerged from this first meeting: accommodation and the various manifestations of the mirror and match strategies discussed by Lange (131-139).

As opposing positions emerged, the strategy of labeling to influence public perceptions also appeared. When project supporters evaluated Deer Creek as fish habitat, artificial stocking emerged as a deficiency to discount, but when evaluating the value of replacement wetlands, artificial mitigation became beneficial. These claims were based on a presumptive ability to artificially recreate the functions of a natural riparian stream or wetland system. According to the Allegheny County Natural Heritage Inventory, Deer Creek “has been recognized as one of the more important streams in Allegheny County . . . [and] . . . presently supports a diversity of fish species which indicates improving water quality . . . the stream itself supports a number of natural communities that together comprise . . . the Deer Creek Valley BioDiversity Area” (WPC, 88). Unless the entire streambed were lifted up intact and laid back down in another place, no human reconstruction could recreate that complex a natural ecosystem. Even an admittedly pro-development Springdale contractor, John Malarik, doubted the wisdom of such a devastating relocation: “I really seriously doubt whether we can afford the price that we would have to pay for this type of progress . . . The fact that the stream has been desecrated twice does not by any stretch of the imagination justify desecrating it again” (qtd. in DEP 2000a, 217). Malarik seemed to recognize that any decision ought to be constrained by an acceptance that the impending ecological disturbance would be devastating regardless of present conditions.

Third generation Harmarville native Gerald Kruth ridiculed the position that moving Deer Creek and filling in - but recreating - wetlands could possibly be environmentally sensitive.

“I would say national environmental attention is being focused upon this issue and the notion that it’s an environmental improvement is a laughingstock . . . it’s an embarrassment” (qtd. in DEP 2000a, 223). The disagreement regarding the ability of the developer to destroy and then artificially recreate natural ecosystems approached impasse as the two sides circled each other in a “reciprocated diatribe,” with successive speakers sounding more and more surprised that the other side could adopt such unreasonable positions (Lange, 139).

Brian Hill, speaking for the Pennsylvania Environmental Council (PEC), pointed out that a formal Memorandum of Agreement between the Army Corps and the US Environmental Protection Agency stated that “mitigation may not be used as a method to reduce environmental impacts in the evaluation of the least environmentally damaging practicable alternative” (qtd. in DEP 2000a, 107). Hill raised publicly the possibility that ORIX-Woodmont had not chosen the project site that would cause the least environmental damage, as regulations required, but instead found their favored site and sought to sell the mitigation design as satisfying the most reasonable alternative requirement, directly contravening the above referenced memorandum. This position would eventually become the foundation of an appeal filed by Citizens for Pennsylvania’s Future (PennFuture), which argued that if another site provided the developer with the conditions necessary to fulfill the project purpose, and would involve less environmental damage, then the law said that site must be chosen over the McCrady property. Many existing environmental regulations, if properly enforced, offer effective protection. But it may be argued that they are not enforced. Hill’s comment placed at center stage the practice of regulatory agencies to negotiate and accommodate developers until an acceptable compromise can be reached that permits the project based mainly on a reduction in environmental damage.

Allegheny County Councilman Dave Fawcett objected to another aspect of Deer Creek Crossing site preparation: the effects on the environment of modern earthmoving techniques. “My most serious concern is with the environment. It seems to me that one of the beautiful things about Pittsburgh is its topography, its rivers, and its wetlands” (qtd. in DEP 2000a, 53). Opposition organizers had focused on the environmental damage to wetlands because that offered the most promising challenge to permit approval. Fawcett focused on general site devastation resulting from massive earthmoving. A steep forested hillside along Deer Creek and its attendant floodplain and wetlands dominated existing project site topography. The 8.5 billion cubic yards of earth that would be used to bury the wetlands would not be transported from another site. Instead, the top of the forested hillside would be dug out and dumped onto the wetlands, the floodplain valley and the stream, requiring the relocation of Deer Creek and the reconstruction of the buried wetlands. Fawcett said: “We’re talking about really re-shaping the hillside . . . about eliminating not only a couple of acres of wetlands . . . but a big natural area.” He was the first speaker to comment on the irreparable consequences of modern earthmoving: “I think we need to be very, very careful . . . because I think we’re talking about a very long-term effect, an irreversible effect” (qtd. in DEP 2000a, 54). US Fish and Wildlife Service (FWS) aquatic biologist Ed Perry also argued the irreplaceable nature of the endangered wetlands when he paraphrased the Federal Clean Water Act of 1972: “no permit can be issued if there is a project that would cause significant degradation to the waters of the United States, and . . . we think this project does that because the mitigation cannot compensate for those losses” (qtd. in DEP 2000a, 141-142). Perry contended that the effects of this development would be irreversible and took the unusual step of traveling from the FWS office in central Pennsylvania to testify in person rather than simply issuing advisory comment letters. “Streams,” he said,

“that have lost their connection with the floodplain and riparian corridor . . . are streams in name only and they have lost nearly all their ecological value” (138). Lifelong resident Mark Vidra, who lived virtually next door to the project site, also felt the sense of impending loss. “All I can say is the biggest threat to the outdoors and wildlife nowadays is development. So they develop [Deer Creek Crossing] and once that land is developed, it’s gone forever” (qtd. in DEP 2000b, 31). These remarks in opposition to Deer Creek Crossing took the form of pathos-driven arguments based on irreparable loss. The speakers sought to portray the alteration of Deer Creek wetlands as a unique act that could not be undone, that once they were destroyed the resources were gone forever. Cox’s criteria of precariousness and timeliness were also implied in the context of these statements. The fact that tangible development plans existed made the situation precarious, according to Cox’s framework. And the fact that the approval process had commenced fulfilled the timeliness criterion. Urgency of action existed (Cox, 3-5).

A few speakers opposed to Deer Creek Crossing also discussed the social effects of modern commercial retailing. Jim Valimont, a Harmar Township chemical engineer, lamented the loss of connection to small town community life. “Our lives are becoming set up around islands of society. . . We go to work in a business park. . . [It’s] an island . . . We go shopping in a shopping mall . . . It’s an island . . . And we live in little communities that are islands of homes” (qtd. in DEP 2000a, 184). The archetype of small towns co-existing and enhancing each other’s vitality, the life that had produced Rachel Carson and affected the worldwide environmental movement, was disappearing. For opponents, Deer Creek Crossing stood *synechdochally*, in the way that Moore discussed (146), for that loss of innocence and simplicity that modern life has become, impersonal and fractured.



On the other hand, supporters of development also deployed arguments based on pathos, tapping into the fear of steady economic decline in the Allegheny River valley. Retired Harmar Township resident Paul Messich thought that local business districts might already be casualties and that Deer Creek Crossing offered the only viable solution for revitalizing regional commerce. “Let’s face it, New Kensington, Cheswick, Springdale, they’re already lost . . . I wish they could survive but they’re not. It’s like the horse and buggy. It’s not going to happen” (qtd. in DEP 2000a, 214). Project supporters were overwhelmingly concerned with being left out of economic revitalization, with being relegated to second class regional status in Allegheny County. Tom Benecki, executive director of the Allegheny Valley North Council of Governments (COG) offered this warning: “Unless we move to make our region a better place to live and work with a broader base of opportunity for everyone, that end will not be as long in coming as we might believe” (qtd. in DEP 2000a, 157). These appeals to the fear of lost economic opportunity reflected both the radical functionalist viewpoint, which privileges economic self-interest, and the resource functionalist perspective, which is associated with the persona of defender of the public interest (Spangle and Knapp, 9, 12).

What is the importance of present owners’ rights of usage relative to the rights of future owners? It may be argued that there are responsibilities or obligations. Legally, Article 1, Section 27 of the Constitution of the Commonwealth of Pennsylvania declares that “Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people” (PA Const.). But what does that mean exactly in terms of enforcement? Clearly, it doesn’t mean that the present generation may *not* use natural resources. Nor, conversely, does it mean that the present generation may use *all* of the natural

resources. So it must mean that the present generation may use some of the natural resources but must leave some for future generations. How much should the regulatory agencies allow us to use?

A related question also loomed in the background at the first public hearing: Can there be any justifiable moral restraints on current property owners? Diane Post, executive director of the Rachel Carson Council in Maryland, warned that this was a dangerous and imminently relevant concern. “Policy makers,” she explained, “tend to behave as though the survival of most nonhuman organisms is an amenity, one that future generations of humans can live without. Everything scientists are learning about the earth’s life support processes argues against this view” (qtd. in DEP 2000a, 179-180). Rachel Carson named an early chapter in Silent Spring, “The Obligation to Endure.” In it, she warned us that thoughtless, selfish actions, undertaken in an era “in which the right to make a dollar at whatever cost is seldom challenged,” imperiled not only ourselves but our posterity (13). The prospect that a few generations of humans could poison the earth and thereby endanger all of humanity’s future filled her with the deepest, darkest dread. She knew that “the history of life on earth has been a history of interaction between living things and their surroundings” (5).

This interconnectedness lay at the heart of opposition arguments to Deer Creek Crossing, within the idea that consequences of development on this scale simply could not be predicted. The only certainty was that life in the Allegheny River valley would undergo significant change. Whether that change was positive or negative was the engine that drove public debate. But the irreparable nature of the change framed the argument for many in emotional terms. Carson wrote, “The rapidity of change and the speed with which new situations are created follow the impetuous and heedless pace of man rather than the deliberate pace of nature” (7).

That is a radical departure from the normal course of human progress. Traditionally, property rights in the US have been nearly absolute and people have paid the price for the excesses of any particular generation. If someone owned property and wanted to maximize the revenue generated by that property, they were constrained only by zoning and development regulations. Because those regulations have been frequently ineffective or successfully challenged, development has been nearly unrestrained and a great deal has been lost that cannot be recovered. For Joe Pugach, representing the two local Trout Unlimited chapters, that sort of proprietary thinking was archaic, resulting in many years of large scale, ecologically devastating development “that destroyed thousands of acres of wetlands and miles of some of our finest streams before we realized the value of wetlands and the irreplaceable nature of our streams” (qtd. in DEP 2000a, 89). The current proposal, he argued, “. . . amounts to the obliteration of this section of Deer Creek and its riparian corridor” (87). Aquatic biologist Perry offered a provocative warning about the inadvisability of traditional, economy-based development strategies: “Channelizing streams and killing wetland acreage was once a fairly common activity used to facilitate development . . . We have come a long way from those days, yet today we are faced with the same kind of project” (qtd. in DEP 2000a, 138).

Both sides tended to argue as if the functionality of wetlands could be clearly separated into categories of protection, worthy or not worthy, a version of the traditional Western ethic that the earth’s resources existed to serve human purposes. Growing out of that attitude, Americans habitually identified desirable wetlands as marshes and extended protection to them, while wetlands that were barriers to development were labeled “swamps” and not protected. As a practical matter, though, even protected wetlands enjoyed only a tenuous level of security so long as the accommodation mentality controlled the regulatory agency philosophy.

Opposition speakers, especially those representing organizations that had previously opposed other Woodmont development projects, struck hard at the credibility of the developer's mitigation record. Their belief that ORIX-Woodmont would not successfully mitigate the proposed environmental damage arose from their previous Western Pennsylvania mitigation failures, which opponents hoped would act as a constraint on the regulatory decision. Clean Water Action's Myron Arnowitt raised the example of Cranberry Commons -- a Woodmont project in Western Pennsylvania in which mitigation goals were not reached -- as the best indication of whether or not to trust that Deer Creek Crossing mitigation proposals would be effective: "In past projects, they haven't done what they said they were going to do. That's why they were fined \$45,000 by the EPA for illegally filling in several acres of wetlands in the Cranberry project" (qtd. in DEP 2000a, 135). Opponents vilified the developer based on evidence pulled from actual past practices, historical context, publicly observable facts. Wealthy corporations often consider environmental enforcement penalties to be simply a cost of doing business. This condition magnified the power of the opposition's appeal and created a strong argument for caution. "How do we know," asked Arnowitt, "that they're going to preserve the wetlands they say they are going to preserve when they didn't do it before? Sure, they'll pay the fine, but the damage will be done" (qtd. in DEP 2000a, 136). Biologist Perry testified that from a scientific perspective, the best predictor of how well the developer would be able to fulfill mitigation requirements was to examine the record, specifically Cranberry Commons. "There's 3,000 feet of stream and three-and-a-half acres of wetlands now buried under 20 feet of fill . . . the stream and these wetlands have lost all of their ecological value. And we expect based on that record . . . this will also be the same situation in Deer Creek" (qtd. in DEP 2000a, 141).

Opponents painted ORIX-Woodmont as an organization that promised mitigation when they had to, but did not deliver on that promise.

But supporters of the project, especially supporters of the new conservancy area, professed faith in ORIX-Woodmont's promise to build an environmentally sensitive development and to construct viable replacement wetlands, although they never addressed the past failures argument. Most people who indicated trust in the credibility of ORIX-Woodmont spoke in support of the educational benefits.

The most public -- and probably most effective -- advocate for the community benefits of Deer Creek Crossing was Dr. Ronald Wasilak, the Superintendent of the Allegheny Valley School District. Referring to the promised donation by landowner W. Duff McCrady of a substantial parcel of property to serve as an outdoor student laboratory, Dr. Wasilak argued: "This should be certified as a major commitment to the environment and education by a developer who is willing to invest the additional monies to make this area a reality" (qtd in DEP 2000a, 171).

The opposition argued that the development's only educational value would be in the hard lessons learned. Environmental policy studies Professor Stephen Farber argued in written testimony that, far from being an educational resource, Deer Creek Crossing promised to teach hard lessons about the wrong way to create sustainable development. "The only educational values of this project," he wrote, "will be: What should we *not* do to our streams and wetlands? Why do engineered wetlands *not* replace the functional value of natural systems? How do we create urban sprawl?" (Farber, 2, emphasis added).

This sort of mirror and match, framing/reframing tactic permeated the public participation part of the permit approval process. For every doubt that the promised mitigation

could not be accomplished, there was a corresponding anticipation of the usefulness of the mitigation if it was successful. A letter from a Chatham College biologist, Dr. Mary S. Kostalos, referenced by Dr. Wasilak, confirmed that the wetlands conservancy area and replacement wetlands on the development site had significant educational value. Kostalos wrote: “The Deer Creek area could be used for field trips, laboratory projects, independent studies . . . Since a substantial amount of baseline data exists for the wetland . . . comparisons could be done between the natural and constructed areas” (Kostalos to McCrady, 2). For Chatham College, the exigence for this position emerged from the opportunity to associate biology programs with the natural wetlands contained within the proposed conservancy area. It suggested that the destruction and reconstruction of the wetlands on the development site offered a research opportunity -- through before-and-after comparisons -- to measure if the mitigation plan would actually work.

But in direct refutation of the previous attacks on the developer’s credibility, Dr. Wasilak explicitly pronounced his trust in the integrity of the offer. “We have his word and his plan has been revealed” (qtd. in DEP 2000a, 171).

### **2.2.2. Taxpayer Subsidies for Greenfield Development**

One of the most persistent arguments presented by development supporters concerned dangerous road conditions on Route 910, which intersects the project site. Because plans called for a massive reconstruction of the road, the perception grew that support for the mall would produce safer roads. ORIX-Woodmont’s Howell mobilized traffic safety as a strong argument for the Deer Creek Crossing project by combining statistics with the pathos of narrative example. “There have been,” he said, “over 199 accidents in this area (the approach and intersection of Route 910 and Route 28) between 1993 and 1997 . . . more than ten times the national average”

(qtd. in DEP 2000a, 25). In rebuttal a member of the Indiana Township Planning Commission, Harmar Township's adjacent northern neighbor, argued that the traffic safety arguments failed a simple mathematical test: "I would like to ask Mr. Muse how increasing the traffic flow on Route 910 from 15,000 cars per day, the present traffic flow, to 50,000 cars per day, the projected traffic flow, is going to cut down on traffic accidents?" (Teresa Rudolph, qtd. in DEP 2000a, 92)

County Councilman Fawcett also objected to the assertion that a causal link existed between preventing traffic accidents and supporting Deer Creek Crossing. He suggested that dangerous roads should simply be fixed. "I think there's something improper," he said, "about tying safety to this development" (qtd. in DEP 2000a, 55). In this claim, Fawcett reacted to the objective condition within the rhetorical situation that Route 910 was dangerous, but he rejected the conversion of that condition into a warrant to approve development.

Once Howell had established himself with narrative evidence as sympathetic to traffic danger, he claimed that \$25 million dollars would be invested in new infrastructure to "improve safety, alleviate congestion and reduce traffic delays" (qtd. in DEP 2000a, 32-33). Howell implied that ORIX-Woodmont would be spending \$25 million of its own dollars. He did not mention at this time that the money for infrastructure improvements would be generated by a Tax Increment Financing plan (TIF), which meant that local and regional taxpayers would provide the \$25 million, not ORIX-Woodmont.

Clean Water organizer Robert Silber argued vigorously that local tax dollars, not developer investment dollars would fund the TIF road improvements. Furthermore, based on a common sense perspective, Silber called into question the honesty of using the TIF urban redevelopment law to destroy undeveloped land. "The county has made the argument that this

particular piece of property is blighted” (qtd. in DEP 2000a, 67). Citing a convoluted legal reasoning process that permitted open green space to be declared blighted on the basis that current use of the land might be considered economically undesirable, Silber showed how that enabled TIFs to be used to support new development on undeveloped land, not just redevelopment. The opposition argued that legislators never meant for the law to be used in such a fashion.

This dispute might have been the single most obvious example of the framing/reframing tactic in the entire controversy. Project proponents simply brushed off valid arguments by rhetorically redefining the intent of the legislation. Opponents characterized the Deer Creek TIF as a corruption of the law that promoted destruction of undeveloped open green space.

The audience for the set of appeals embodied in the TIF dispute was not the environmental regulatory agencies -- DEP and the Army Corps -- but the Allegheny County Council. The three-member Allegheny County Board of Commissioners had granted the TIF before being reorganized in 1999 into a 15-member County Council. Opponents had identified the TIF early on as one of the most vulnerable parts of the development plan and the best chance to scuttle Deer Creek Crossing (Silber, personal interview).

Clean Water Action’s Silber, arguing that the TIF bestowed an unfair economic advantage on ORIX-Woodmont, contended: “This law is being abused to create a subsidy to the developer and the property owner.” A shopping mall would undeniably increase tax revenues for the township, the school district, and the county. But if the test of blight, Silber argued, is the maximization of tax revenues, then “we could essentially call all of Allegheny County blighted because it’s not generating the tax revenue that a very, very large development would” (qtd. in DEP 2000a, 68). Evincing Spangle and Knapp’s resource environmentalist approach, Silber



presented himself as a defender of the public interest, an interest endangered by misuse of a normally useful redevelopment law. Responding from a resource functionalist approach, Timothy Basilone, president of the Allegheny Valley School Board, called for pragmatic compromise and rejected Silber's characterization as simplistic, because it ignored the huge differential in tax revenues. Simple maximization of tax revenues should not ordinarily trigger a blighted designation, he agreed, but when the disparity is so great as to have a real effect on the economic health of an entire region, then improving economically undesirable land use is a legitimate reason for taxpayer subsidy. "This property currently generates \$4,381 in combined property taxes . . . Deer Creek Crossing at build out will generate a combined real estate tax revenue of four million dollars . . . If there are any questions that this area is blighted . . . this information should answer them" (Basilone, qtd. in DEP 2000a, 192-193).

Other residents were worried that promises to generate new commerce would, in practice, result merely in the relocation of commerce, a shift of consumer spending from old businesses to new ones with little or no real growth. "It will close your local businesses," warned local activist Arlene Mercurio, "It will close your local shopping centers. It is part of the throw-away mentality of this generation that is using up the resources that will be needed by future generations" (qtd. in DEP 2000a, 101). The public disagreement on the importance of Deer Creek Crossing to job growth and the overall economic well-being of the Allegheny Valley illustrated clearly how the same facts and statistics could be interpreted and reinterpreted to support different arguments. Muse, intimately familiar with local economic problems as a Harmar Township supervisor, argued that Deer Creek Crossing was critical for the stimulation of the regional economy. "Deer Creek will create a \$4 million tax base in Allegheny County and 4,000 jobs, 1500 construction jobs and 2500 permanent jobs" (qtd in DEP 2000a, 45). While

these arguments carried substantial political weight, they were also relevant for the regulatory agencies because the public interest arguably comprised one of the primary concerns of the permit approval process.

The job creation argument commanded a lot of attention from Deer Creek Crossing supporters. Political scientist Phil Brick observes that the wise use movement's "greatest success has been to frame key environmental disputes in terms of 'jobs versus the environment'" (201). That was a particularly trenchant tactic in the Allegheny River valley. Family wage jobs were not plentiful, and while opponents argued that this particular development offered little increase in the number of high-paying jobs in the area, jobs was a powerful word for older communities locked in a pattern of population loss. Silber of Clean Water Action contradicted the developer's claim of significant job creation by distinguishing job creation from job relocation. "[These are] not new jobs. This is not new economic development. This is merely shifting the economic development" (qtd. in DEP 2000a, 67). Proponents pointed out that the development plan called for office and professional buildings, not just commercial retail space. Large office buildings could house businesses that would pay high salaries. "All of these people that occupy these buildings are not low paid people," argued Harmar Township Commissioner Jack Burns (50). This exchange reflected the sort of reciprocal manipulation of figures, projections, and statistics that Lange (13-34) describes as the select high/select low strategy.

The exchange of public comment regarding the real meaning of Deer Creek Crossing in terms of employment produced honest but conflicting responses. The widespread problem of keeping young people from leaving the area concerned School Board member Renaldi. "The homing instinct is strong, but there have to be jobs to support those who wish to remain in the area" (qtd. in DEP 2000a, 202). County Councilman Fawcett worried that the development

could actually have a detrimental effect on the regional economy, citing a “real concern about the taking of business from existing businesses from neighboring areas” (qtd. in DEP 2000a, 52). How much, opponents wondered, could the commercial retail market be stretched in a region like Western Pennsylvania, which is experiencing significant and sustained population decline? “I predict,” said Harmar Township’s Valimont, “that if this mall is built, within a few years a lot of local businesses are going to close” (qtd. in DEP 2000a, 184). The possibility that existing jobs could be in danger did worry people. Could this project cause not only job relocation but also current job elimination? Benecki attempted to assuage such fears by arguing that the Deer Creek Crossing project would increase jobs: “Some fear this project will prove predatory to the existing business districts in the valley communities, some of which . . . continue to deteriorate . . . We would argue instead that development such as the Deer Creek Crossing project is more likely to hold people in the valley to do their shopping and draw others” (qtd. in DEP 2000a, 155-156). Both sides looked at the same data, the same promises, the same statistics, yet reached radically different conclusions arising from different exigencies. On one side, the creation of jobs and the expansion of economic opportunity focused more on local than regional economic needs and described, although no one used this phrase, a wise use approach to conservation. On the other side, the relocation of jobs and the transfer of economic opportunity focused on broader regional economic needs as the available means of persuasion and described a version of Spangle and Knapp’s resource environmentalist approach to conservation, which includes the nonhuman perspective (7).

School Board President Basilone argued that the Deer Creek property had too much potential economic value to be wasted, a wise use position on environmental protection. He acknowledged the possibility of economic damage to other local businesses, but considered that

a necessary price to pay for progress in the Allegheny River valley. “We need to remember that competition is the engine which drives the economy and produces growth in production and wages. There is no security in standing still” (qtd. in DEP 2000a, 196). Opponents called that inconsistent reasoning, and argued that if the playing field were level, the free market would be allowed to determine success, not government assistance. On the other hand, Deer Creek supporters admitted to no contradiction in offering a taxpayer-financed TIF aid to a private, profit-making enterprise, a condition that reflected a decidedly non-free market perspective. One local resident said, “If we truly let market forces do their job, then this project wouldn’t stand a chance of succeeding” (Kathy McCauley, qtd. in DEP, 2000b, 10). In the end, supporters adopted a “totality of the circumstances” defense to the inconsistencies in their position. Any economic dissonance experienced by supporters regarding the conflict between free market forces and government subsidies yielded to the perceived general economic good that Deer Creek Crossing promised.

### **2.2.3. The Ecological and Economic Impact of Magnitude**

For many residents, the sheer size of the whole development plan portrayed economic ambition beyond anything the local population had seen before. Nothing similar to Deer Creek Crossing existed near Harmar Township. The proposed size, coupled with the destruction of a familiar open natural area, produced many comments that indicated a significant sense of shock and fear of change, a sort of “what-exactly-is-happening-here-and-why-are-we-going-so-fast?” response. ORIX-Woodmont’s Howell chose to explain the selection of the location in economic terms: “Market research indicated that the market was underretailed. This is where our retailers wanted to be” (qtd. in DEP 2000a, 22). As required by state and federal guidelines, the developer contended that many other sites in the Allegheny River valley had been evaluated and

eliminated. After “thoroughly” examining 30 sites in the market area, he argued that 29 sites had to be excluded for various logistical and practical purposes (qtd. in DEP 2000a, 23). ORIX-Woodmont settled on the Deer Creek site only after an exhaustive search for less environmentally disruptive alternatives, Howell claimed, although PennFuture attorneys would eventually base their legal challenge on the deficiencies in that alternative search. Noting that Harmar Township itself had targeted the Deer Creek site for commercial development, Howell argued: “This was the only site in the market area that met the project’s purpose from the applicant’s perspective” (qtd. in DEP 2000a, 24). ORIX-Woodmont consistently tried to project an attitude of compromise. A company with a radical functionalist philosophy had successfully painted themselves as reasonable and accommodating resource functionalists engaged in a search for pragmatic solutions.

Attorney Paul Gutermann, representing ORIX-Woodmont, reiterated the importance of the applicant’s definition of the project purpose. Permit regulations required, he contended, that the feasibility and practicality of any alternative site be considered by the regulatory agencies from the applicant’s perspective. The developer’s definition of project purpose determined what was practical (qtd. in DEP 2000a, 79). Whether opponents thought the project was too big or in the wrong place or not economically necessary were all irrelevant considerations for the regulatory agencies, he argued, because alternative site analysis depends on the applicant’s purpose. ORIX-Woodmont, stated Gutermann, “submitted an extremely detailed 50-page alternatives analysis that went well beyond what’s required in the regulations. It demonstrated that there is no practical alternative that meets . . . the project purpose [as] defined by the applicant” (qtd. in DEP 2000a, 80). This was another example of the select high/select low tactic deployed with remarkable success. The applicant argued that it set the parameters for what

constituted an acceptable alternative site. Eliminating all sites except the preferred site might simply have been a process of designing the project purpose around the McCrady site rather than designing the project and then searching for the right site to accommodate it. Pennsylvania Environmental Council's Hill contended that the applicant's perspective far exceeded the legitimate project needs. "The applicant has shown no evidence why reduction in size and scope of the project, presumably leading to lower environmental impacts, will not meet the project needs." Project purpose should not, he argued, without a rigorous examination of the process, be arbitrarily defined by the developer to effectively eliminate all but the preferred site (qtd. in DEP 2000a, 110).

For many, it was the environmental devastation associated with Deer Creek Crossing that made the project untenable and proved it was not in the public interest. Biologist Perry again cited the damaging potential effect of the development, doubting "the appropriateness of locating such a large scale development along the riparian corridor of one of the last streams in Allegheny County capable of supporting cold and cool water fisheries" (qtd. in DEP 2000a, 137). Many opponents found the price in environmental damage simply too high to pay, even while they acknowledged the dire state of the Allegheny County economy. At times, opponents' arguments seemed almost apologetic, as if they agreed that economic revitalization was crucial to the area, but that it was just unacceptable in this place, the Deer Creek valley.

ORIX-Woodmont seemed prepared to deal with objections to the location of the proposed development, but appeared completely unprepared for objections to its size. Howell and other project supporters made virtually no mention of the scale, other than to define it as a master-planned, mixed-use development that required a certain size for profitability. The large site drawings and photographs of the Deer Creek property and the project schematics seemed to

surprise most meeting attendees: “I think this project in its current scale is an abomination. It’s simply too big and in the wrong place” (Kruth, qtd. in DEP 2000a, 220). In an effort to strike a compromising tone, Silber of Clean Water Action advised that “economically and environmentally, the communities would be much better served with a different type of development . . . a smaller development on the upper part of the property” (qtd. in DEP 2000a, 66). Considering the intensity of opposition to the Deer Creek site, his suggestion appeared to amount to implicit recognition that Deer Creek Crossing would be built and that size reduction was the most realistic opposition strategy. Speakers seemed to suggest that if ORIX-Woodmont would simply accommodate the project to the site more people would find it acceptable. But ORIX-Woodmont’s accommodation efforts were directed more at compromise with regulatory agencies than with public demands.

Many who otherwise would have supported the cause of local economic development balked at the size and location of Deer Creek Crossing. Lifelong Springdale resident Malarik, said “Deer Creek has a very special spot in my heart,” and as a contractor, he called himself “very pro development” but added: “I really, seriously doubt whether we can pay the price for this type of progress” (qtd. in DEP 2000a, 216-217). Many local resident opponents seemed to be caught up in a crisis-of-conscience because they knew that the Allegheny River valley needed development and economic expansion but they could not justify it at the expense of the destruction of the Deer Creek valley.

One theme reappeared consistently in public testimony: sprawl. Out-of-state developer ORIX-Woodmont was especially vulnerable to demonization strategies and sprawl provided a broad brush attack on their record. The Woodmont Company’s headquarters were located in Texas and many opponents used comparisons to Texas and Texas cities to imply poor

environmental practices. Economist Pavlik noted that, according to the US Agriculture Department: “Pennsylvania was second only to Texas, interestingly enough, in the development of crop lands, forests and open spaces. This is deplorable and short-sighted” (qtd. in DEP 2000a, 76). Extending the Texas analogy, conservationist Curt Larson worried that “We’re headed in a direction if we allow these kinds of developments where we’re going to be living in a place like Houston or Dallas, where a developer says, okay, it’s just another farm. Let’s keep going, keep going” (qtd. in DEP 2000a, 160). A number of other Deer Creek Crossing opponents mobilized the emotional power of the word sprawl.

Brian Hill: “This is sprawl with a capital S” (qtd in DEP 2000a, 113).

Elizabeth Pillsbury: “The proposed Deer Creek development will eliminate valuable wetlands and floodplains in favor of a massive sprawling development” (228).

Steve Loevner: “Our region should be promoting smart growth, not encouraging such unwanted examples of environmentally destructive commercial sprawl” (qtd. in DEP 2000b, 25).

James B. Anderson: “It’s just too much of a sprawl” (35).

The word sprawl has become more than simply a descriptive term. It has become what Richard Weaver calls a “devil-term,” a term with destructive rhetorical force (222). Everyone was against sprawl. The argument coalesced around whether Deer Creek Crossing constituted sprawl or progress. Proponents of the project did not react directly to the sprawl attack. After all, it was ORIX-Woodmont’s business to develop commercial shopping projects and they did not consider that to be sprawl, but rather important economic expansion. Howell said: “What we have here is a project that blends the need for intelligent growth with sound environmental planning and it addresses the social and economic needs of the region” (qtd. in DEP 2000a, 37). Supporters argued that Deer Creek Crossing was not sprawl but well-planned economic growth,



and that the proof emerged from the willingness of the developer to revise and redesign the project. Nevertheless, with government commissions around the country producing reports warning of the dangers of unbridled development, no project of this size could escape the sprawl accusation. It unavoidably exerted some constraint on the decision process.

ORIX-Woodmont responded by ignoring the emotional aspects of the sprawl argument and focusing on the economics and the satisfaction of regulatory criteria. They knew that this process would likely be decided in the courts, and that the critical factor there would be the question of due diligence to their duties under the relevant regulations.

Howell chose to include an appeal to cooperation. “We welcome this opportunity this evening to present testimony to clarify a lot of misinformation that’s been floating around and hope that at the end of the evening, you’ll share our enthusiasm for this unique project” (qtd. in DEP 2000a, 37-38). The cooperation theme became, for project supporters, the emotional antithesis of the sprawl theme. Everyone opposed sprawl, but everyone embraced cooperation. Cooperation was inclusive, not divisive. The School Board Vice President echoed this sentiment: “Of course, it is hoped that environmental groups would also cooperate in the educational and preservation aspects of this project” (Pollick, qtd. in DEP 2000a, 210).

But cooperation also implied compromise, which concerned opponents because any compromise would result in some level of environmental destruction. Dr. Wasilak went a step further and warned that lack of cooperation, by which he seemed to mean accommodation, would injure the Allegheny River valley in the end. “I submit to you that we can no longer be antagonistic environmentalists versus the developers. There has to be a way for us to work out problems” (qtd. in DEP 2000a, 169). Committed environmental activists rejected cooperation as supporters defined the term. Other residents did not share supporter’s hope for cooperation and

accommodation but instead felt betrayed by what they perceived as the failure of the regulatory agencies to protect the right to clean air and water guaranteed to every citizen of Pennsylvania by the state constitution (PA Const. sec. 27). The sense that regulatory agencies were too willing to accommodate developers regardless of the threat of environmental destruction, and regardless of the warnings and unanimous recommendation for denial from the resource agencies, lent an air of desperation to the end of the first public meeting. Myron Arnowitt of Clean Water Action, one of the first organizations to take note of and support the grassroots public opposition to Deer Creek Crossing, objected to the lack of balance in public meeting procedures that provided a long period for the developer to present a positive portrayal of the project, but restricted opposition comments to five minutes. “I think that this hearing did a disservice to the public in informing them about this project by having such a one-sided presentation at the beginning?” (qtd. in DEP 2000a, 135, 133) For Arnowitt, the process seemed unfairly weighted in favor of the developer, even to the point of sacrificing the objectivity and efficiency of the regulatory agencies’ mission of protection to the expedience of negotiation and compromise: “The DEP and the Army Corps of Engineers seem willing to accommodate the developer in a way that I find a little disturbing” (qtd. in DEP 2000a, 134). Another local resident expressed frustration with the apparent impotence of laws and agencies charged with protecting the constitutional rights of Pennsylvanians to enjoy clean air and water. “If environmental laws can’t protect Deer Creek, one of the healthiest waterways in Allegheny County and the surrounding wetlands, then it seems no piece of land is safe from the wishes of local landowners and out-of-state developers who care only about profit” (India Loevner, qtd. in DEP 2000b, 26). Emotional tones fluctuated between pleading and angry. “There is something desperately wrong with a process . . . that requires the everyday citizen . . . to be here defending the law. . . Is the DEP and Army Corps so

weak or afraid that they buckle to the demands of any saber rattling developer, regardless of safety or law?” (Sheila Harris, qtd. in DEP 2000b, 15-16).

### **2.3. Politics and Press Clippings**

While the Deer Creek Crossing controversy was largely ignored by local television and radio media, newspapers followed it closely. Participants on both sides used the newspapers to wage a critical public relations battle on various aspects of the anticipated benefits and consequences of the mall project. Both major Pittsburgh daily newspapers wrote periodic stories that helped to inform the population of Harmar Township and adjacent areas as well as alert the environmentally interested public in the wider Allegheny County region. Public opposition arose in large part as a result of these early articles, which described the development plans more as an attack on natural resources than an economic improvement. Combined with wide circulation, the tone of the coverage contributed significantly to the unexpected size of the opposition, its intensity, and its notable county-wide character, all of which played an important part in attracting state and regional activist groups. Their participation raised the Deer Creek Crossing profile from a strictly local issue to a prominent regional one.

One of the first and most provocative articles appeared on 14 November 1999 in the Pittsburgh Post-Gazette under the incendiary headline: “What Price Progress? A Mall in Harmar Would Obliterate What’s Called One of the County’s Best Wetlands,” along with a half-page picture of a beautiful stream, lined with graceful trees, flowing under 50-foot high cliffs. Readers with an existing environmental sympathy could be expected to respond to that without even knowing anything about the particular site. It was not just any wetland, the headline proclaimed. It was one of the best. And a shopping mall threatened to obliterate it. Post-Gazette environmental writer Don Hopey began the piece with a blunt warning: “About seven

acres of the best marshland in Allegheny County and a half-mile of the pretty little stream that runs through the middle of it could soon be buried beneath 8.5 million cubic yards of fill” (A18). Hopey quoted some experts who added more inflammatory language in their opinions of the ecological consequences of Deer Creek Crossing. Pennsylvania Fish and Boat Commission (PFBC) biologist Ron Tibbot called the proposal “a ludicrous environmental disgrace the likes of which have never been permitted in Pennsylvania” (A18). Donald Orłowski, executive director of the Tri-County Trout Club cautioned: “If the mall is built, the impact on fish and other aquatic life . . . would be devastating” (A18). Obliterate, disgrace, devastate. These are vivid and alarming words that successfully communicated the urgent tone of the article. Hopey quoted some mall supporters but cast doubt on their credibility. He noted that Allegheny County, Harmar Township and the Allegheny Valley School District favored the development, but all were institutions that would benefit from a huge increase in property tax revenue. In other words, supporters favored Deer Creek Crossing for economic reasons, not environmental ones. Hopey questioned the warrant of some supporting arguments. He quoted ORIX-Woodmont spokesman Howell as saying that “You can’t compare the value of a fish to a human life that might be saved by road improvements,” but then quickly pointed out that Pennsylvania’s Department of Transportation “does not list the Route 910 interchange as a high-priority problem area for traffic or safety” (A18). The editorial decision to assign this story to the paper’s environmental reporter set the tone for coverage: the newspaper would cover it primarily as an environmental story. Hopey’s sympathies crept into the text of this article. At the very least, it alerted environmental activists from outside the immediate area and that wider interest guaranteed the high regional profile of the Deer Creek Crossing controversy. Other stories in the Post-Gazette and the Tribune-Review also used incendiary headlines: “It’s Open Season for

Wetland Development,” “US: Harmar Project Could Hurt Wetlands,” “Battle Brewing over Future of Wetlands,” and “Debate Heats up over Deer Creek Mall Project.” The early press coverage can fairly be characterized as exhortative. People were aroused, and that captured the attention of regional activists who managed environmental protection by fanning publicity into controversy.

### **2.3.1. Editorial Skirmishes**

Property owner Duff McCrady, who generally kept a low profile, quickly responded to two editorials that appeared in the weeks immediately following the first official public meeting in April 2000, one in favor of and one against Deer Creek Crossing. The first, “Trashed Wetland” (A18), appeared in the Post-Gazette on 28 April 2000 and supported the approval of the environmental permits. The editorial sounded a tone of resignation, but also included some critical evaluation of opposition arguments. Admitting that the tragic flaw in Pennsylvania’s environmental protection strategy is the lack of “sensible, regionally based planning,” the editors recognized that developers were free to make deals with landowners with no consideration for planning other than that dictated by the market. Although they noted problems with the current environmental permit approval process, they commented that “a rubber stamp it is not.” They identified a two-fold weakness in the opposition arguments against Deer Creek Crossing. First, while the upstream riparian zones of Deer Creek in fact contained beautiful natural terrain, the downstream sections where the development would be located had already been severely disturbed and degraded by human interference. Second, opponents nevertheless described the proposed downstream project site as if it were in the same condition as the upstream area. “Some project opponents,” they wrote, “create the impression that the affected stream area is pristine and undisturbed.” The Allegheny County Natural Heritage Inventory’s description of

the Deer Creek valley provided the warrant for opponents to make this claim. But the editors called the inventory “one of the most selectively quoted documents in this debate.” It should be noted that the Inventory does distinguish between disturbed and undisturbed areas, that the project site includes much of the disturbed area, and that the lower part of the stream had undeniably been relocated before within the project site for purposes of road, sewer, and utility construction. But the editors admitted that the Inventory recommended that the disturbed areas be allowed to recover. But as arguments for protection of natural resources, they wrote: “There are wetlands and there are wetlands.” And the developers proposed relocating only disturbed wetlands. Absent any regional planning oversight restrictions, the editors favored the economic advantages over the environmental disadvantages, which they felt had been misrepresented. “Sign the permits,” they recommended, “and let the work begin” (A-18).

McCrary wrote an appreciative letter to the editor in response to the editorial. The newspaper’s coverage, which had started out with a noticeable bias against the development, had become more balanced in the months leading up to the 25 April 2000 public meeting. McCrary, noting the emotionally charged atmosphere surrounding Deer Creek Crossing, claimed that strong feelings had clouded the reasoning process and compromised any rational public evaluation of the environmental permit application. He felt that the Post-Gazette editorial helped to counterbalance what he called “many of the pseudo-issues raised by opponents of the development” and praised the Post-Gazette editorial as a “superb example of a newspaper reaching a well-reasoned decision after impartial examination of an issue” (PG is a Voice of Reason, A14). Perhaps because McCrary chose to use the editorial as an opportunity for a public relations boost, he ignored the subtext that suggested a conclusion dictated by the flaws in the rhetorical situation. As the editorial argued, it was a lack of vision and the absence of any

overarching planning process that set conditions in which a part of the Deer Creek valley had sustained previous damage, and *that* made the development environmentally acceptable. Had that damage not occurred, had there been in place an effective regional planning strategy, the editorial might not have reached the same conclusion. The editor's position turned on the current environmental condition. McCrady argued, "There is no environmental issue – and if there is it is that the area will be environmentally enhanced by upgrading the wetlands" (A14). Nothing in the editorial encouraged the general public to adopt that view. Rather, the tone was one of pragmatic resignation. Shortly thereafter, McCrady responded to a much more critical Tribune-Review article with considerably more energy.

On 3 May 2000, Lou Ransom wrote an editorial called "Debating Deer Creek." While suspicion and skepticism dominated Ransom's tone, he also set out a list of grounds to justify his skepticism. Somewhat sardonically, he remarked on the "impressive array of politicians and others . . . (who) seem to have bought – hook, line, and sinker – the boasting" of ORIX-Woodmont and McCrady. He questioned their credibility: "They've fished out a litany of supposed benefits without offering any real assurances that their rosy predictions will hold any water" (A6). Coming so soon after the first public meeting, at which considerable criticism had been leveled at Deer Creek Crossing, and at which a major theme of the project supporters had been the dissemination of misinformation by the opposition, a negative editorial by a major area newspaper really could not be ignored by development supporters. The rhetorical situation called forth an appropriate and predictable reply. One week later, McCrady published an editorial rebuttal, "The Harmar project: Just the facts." McCrady attacked Ransom's analysis, point by point. He clearly felt frustrated that the public accepted as fact so much that he thought

was misleading, writing that the editorial “included a number of errors that cannot go without a response.”

Ransom warned against accepting the promise of millions of dollars in increased property tax revenue connected with the Deer Creek Crossing project: “We’ve seen municipalities hung out to dry by overreaching politicians too willing to swallow the tax-benefit promise of developers” (A6). McCrady countered that the projections were supported by “hard research into demographics, buying habits and retail capacity in the northeastern part of Allegheny County” (“The Harmar project,”). McCrady argued that if the regulatory agencies granted the permits then the tax benefits would inescapably follow actual construction. Ransom also cast doubt on the projected number of jobs that the development might create. “We’ve heard such predictions before. Without a list of tenants, those are wishful projections” (A6). McCrady retorted that revealing such a tenant list would be competitive folly. He further suggested that national developers would not be expending the time, effort and money to pursue a project that would not be profitable: “The jobs that will be created from this project are real” (“The Harmar project”).

Both Ransom and McCrady agreed that the traffic safety issue needed to be addressed. But Ransom did not believe it was necessary to tie project approval to the road improvements, while McCrady stated that they were unavoidably connected. Without the \$25 million TIF, the road improvements wouldn’t happen, claimed McCrady, because the state had no money available for this highway. The rhetorical terrain got a bit tricky here for McCrady as a principal justification for the project and attendant highway upgrade was based on the dangerous current traffic conditions. But if the state did not consider the conditions dangerous enough to redesign



the highway without the development, that seriously weakened the traffic safety element of the project justification.

Ransom raised the irreplaceable loss environmental argument when he noted that the “project also could irreparably harm what some consider to be the most impressive wetlands in Pennsylvania.” Although the developers would mitigate the loss with reconstructed wetlands, he agreed with the resource agencies’ doubts about the developer’s ability to do that: “They don’t trust the developers to recreate these natural resources” (A6). Distortions, retorted McCrady. Again he argued that the high quality wetlands would not be touched, only the “fragmented and low-value wetlands,” and those would be enhanced by the reconstruction.

Ransom finished by commenting that any reasonable and practical measure of worth should include a cost/benefit analysis. In the Deer Creek Crossing debate, “it’s the latter that outweigh the former” (A6). Not true, wrote McCrady. He summarized by stating that the developers had provided the regulatory agencies with fact-based data about the environmental and economic benefits of Deer Creek Crossing, supported with professional market analyses that confirmed the tax and job predictions, the traffic safety benefit, and the environmental improvements. “Those are the facts,” he wrote, “not rosy predictions” (“The Harmar project,”).

The comparison and contrast between McCrady’s reactions to these disparate editorials reinforces Bitzer’s claim that the rhetorical situation calls forth predictable arguments and responses. The public understood the Deer Creek Crossing situation imperfectly, and these editorials spoke to that imperfect understanding, one favorably and one unfavorably. And they very possibly affected the beliefs of the interested public audience who, although without direct decision-making power, substantially influenced the politicians, who in turn influenced the

regulatory agencies. McCrady's exigence predictably drew him to attempt to apply constraints by encouraging the "facts" and discouraging the "misinformation."

Using Deer Creek Crossing as the vehicle, another set of point/counterpoint editorials pitted market-based control of development against regionally-planned, sustainable development. Jack Norris, CEO of the commercial real estate firm that located and recommended the McCrady property to ORIX-Woodmont, argued in a Pittsburgh Business Times op-ed piece on 19 May 2000 that the need for retail commercial development in the Allegheny River valley arose not from wishful thinking but from hard market research. "Some people think developers operate on the 'field of dreams' model: 'build it and they will come.' That simply is not the case. Shopping centers are built where the demand is. There is little speculative development in today's lending environment, certainly none of this scale" (Norris, "Deer Creek project"). For Norris, it was inconceivable that any commercial developer would risk such an enormous investment without near certainty that the development would succeed. And he argued that a successful development offered major economic benefits to the region, which explained the substantial support from local politicians and the Allegheny River valley community, support that was fully warranted by the "proven positive effects the infusion of such massive amounts of capital has upon the local and regional economies." He offered some startling statistics regarding those effects: one of 10 non-farm employees work at shopping centers; typically, 94% of American adults buy at a shopping center in any given month; shopping centers account for around half of national retail consumption. In short, "Shopping centers are enormous economic engines" (Norris, "Deer Creek project"). Given the sluggish economy in the Allegheny River valley, Norris offered the proven economic impact of large commercial development as the most important warrant of support for Deer Creek Crossing.

Court Gould, head of the community group Sustainable Pittsburgh, recognized the need for economic development but warned of the detrimental effects that unplanned development would have on the overall quality of life and on the region's capacity to attract new people. Allegheny County, he argued in an op-ed piece in the Pittsburgh Post-Gazette on 13 September 2000, conducted business without the necessary planning tools to manage economic growth to ensure a sustainable and positive outcome, without even so basic a document as a Comprehensive Plan. "Deer Creek Crossing: newest instance of hodgepodge development" represented "the old slash and burn development technique" that often carried counterproductive consequences. Gould's position rested on a long-ranged, more expansive and inclusive view of economic development. He knew that municipalities, under current control procedures, answered only to themselves regarding land use issues and were not required to consider the effects of development within the municipality on surrounding communities. "Without municipal willingness and incentives to plan together across boundaries, each of the 130 municipalities in Allegheny County is, theoretically, fair game for a mall" (N3). That sort of fragmented and uncoordinated planning results in negative social and economic effects as well as positive effects, he maintained. For Gould, market forces alone did not offer the safeguards to ensure that development produced the greatest good for the greatest number: "We cannot build a wall around ourselves in a futile attempt to keep away modern retailing" (N3). Only regional planning, cooperation and coordination between municipalities provided the proper environment to ensure that new development could be sustained and beneficial over the long run so that the region can "attract the talent we need to be competitive in the New Economy. Market forces alone, no matter how credibly researched will not provide that" (N3).

These editorialists wrote to expound a particular point of view and directed it at the interested public, that is, those who would be likely to read anything regarding Deer Creek Crossing. That would include residents of the Allegheny River valley, anyone interested in economic development, and those from outside of the valley who nevertheless felt drawn to the controversy as a matter of personal conviction. None of these audiences exercised direct control on the decision-making process, but they could influence elected officials who in turn could affect, indirectly, the process. The propriety of that sort of indirect pressure gave rise to a subordinate controversy regarding campaign contributions and influence peddling, accusations that the media found irresistibly newsworthy.

### **2.3.2. Political Counterattacks**

Woodmont's Howell tried to exercise his political influence very early in the approval process, and his intended audience personified Bitzer's characterization of audience as those that can be influenced and can change conditions. In a letter dated 20 September 1999 -- addressed to then Secretary of the Pennsylvania Department of Environmental Protection James M. Seif, the single individual best positioned to exert direct internal influence on the regulatory process -- Howell recounted meetings, which he characterized as "excellent," with several federal officials including US Senator Rick Santorum and US Congressman Mike Doyle. Rather than claim direct support from these officials, Howell instead intimated approval by association. If the meetings occurred and Howell thought they were "excellent," then that implied some showing of support. Once he had established familiarity with powerful politicians, Howell moved to the substance of the letter, which was getting the DEP to reign in field personnel, or as he described them "myopic . . . maverick technocrats" (Howell to Seif), who had indicated serious concern with the environmental damage attached to Deer Creek Crossing. He singled out two operatives

in particular -- Larry Busack of the DEP and Ron Tibbott of the Pennsylvania Fish and Boat Commission -- who had been especially candid and public in opposition. He suggested that a meeting would be appropriate to “broaden the vision of the field biologists who are going to be doing the technical review.” His proposed list of attendees included Busack, Nancy Rackham [the DEP biologist heading up the review team], Tibbott, Tibbott’s supervisor, and “anyone else you might suggest” (Howell to Seif). That he did not even know the name of Tibbott’s supervisor but wanted the supervisor present indicated that intimidation was the real purpose of the meeting. It was not to broaden anyone’s vision but to ensure that everyone understood that they should take their cues from supervisory and upper level personnel, who presumably could be subjected to substantial external pressure from elected officials favorably disposed to Deer Creek Crossing. Howell finished with an appeal that Secretary Seif inform him if there were any state legislators that could be invited into the process who might have specific influence with the Fish and Boat Commission. State Senator Melissa Hart, whose district included Harmar Township, had already indicated strong support, claimed Howell. But Hart’s support was about to be challenged by accusations of inappropriate *quid pro quo* campaign contributions for influence.

In a 26 April 2000 article, Valley News Dispatch writer Brett Taylor reported that Hart listed in her year-end campaign donation statement a \$5,000 donation from the Builders Political Action Committee (Build PAC) made on 12 October 1999. On 13 October 1999, Build PAC received a \$5,000 donation from Woodmont’s Howell. Both Hart and Howell are members of Build PAC. On 3 December 1999, a public relations firm faxed to the Army Corps of Engineers Pittsburgh field office a letter with Senator Hart’s signature recommending that they “speedily approve” the Deer Creek Crossing wetlands encroachment permits (qtd. in Taylor, “Hart backs

project”). Her election opponent revealed the donations and implied influence buying. Hart called the accusation “ludicrous,” but it nevertheless further tainted a Deer Creek approval process that appeared more and more to have a significant political aspect. While there was no proof of a *quid pro quo*, the timing damaged the already shaky credibility of developer ORIX-Woodmont, and the opposition latched onto the incident as further indication that the project approval process suffered from shadowy, back-room politics. Hart’s opponent revealed the incident as a political maneuver unrelated to the Deer Creek Crossing controversy, but project opponents recognized the opportunity to undermine the indirect political influence of the developer. Howell tried to distance himself and ORIX-Woodmont from the political fall-out by denying that he had ever donated any money to Melissa Hart, which was technically true because the donation came from Build PAC.

Valley News Dispatch reporter Taylor followed up with a story on 29 April 2000 that a statewide environmental advocacy group, the Pennsylvania Environmental Council (PEC) wanted a federal elections investigation and had asked Hart to return the donation. Taylor reported that PEC had a concern that “Hart’s support gives developers political clout in getting Army Corps approval for Deer Creek Crossing” (“Group seeks inquiry”). PEC’s president, Andrew McIlwaine, questioned whether the fundamental fairness of the approval process had been damaged. Drawn to the opportunity that the rhetorical situation presented at that moment, he appealed to the general public sense that any development of this scale ought to be above political influence, and now Deer Creek Crossing was not. “I’m perfectly willing to go head to head with the developer in a fair fight. I feel that I have less than a fair fight” (qtd. in Taylor, “Group seeks inquiry”). A story by Hopey on the same day in the Pittsburgh Post-Gazette

reported that Hart's campaign manager found the accusation to be "laughable" ("Environment Group," A12).

It became less laughable when, in a 3 July 2000 Tribune-Review article, staff writer Veronica Whitney uncovered further questionable campaign contributions made by Howell to Mike Dawida, who had been one of three Allegheny County Commissioners in the old government structure replaced by the 15-member County Council. While a commissioner, Dawida received a \$1,000 campaign contribution from Howell in May 1999, and a \$2,000 contribution from property owner McCrady. In October 1999, the old Board of Commissioners voted to award the \$25 million dollar Tax Increment Financing package to ORIX-Woodmont for the Deer Creek Crossing project. Silber of Clean Water Action implied that only more influence-buying could explain why a "builder from Texas (would) be contributing in a county election in another state" (qtd. in Whitney, "Project finances"). The Tribune-Review's Whitney attempted to contact both Dawida and McCrady for comments. Neither returned her calls.

One other political incident of note involved newly-elected Allegheny County Executive Jim Roddey. In February 2000, he wrote a letter of project support written to US Senator Rick Santorum and US Congressman Ron Klink at the request of McCrady reported the Post-Gazette's Hopey on 17 April 2000. The letter recommended approval of Deer Creek Crossing based largely on the prospect of increased traffic safety on Route 910, on which there had been "numerous recent fatal accidents" (Roddey, 1). A check of PennDOT traffic records "from 1989 to the present found one fatal accident in the area." Confronted with the official statistics, Roddey replied that "I didn't research that myself. McCrady asked me to write the letter and my staff prepared it, relying on information [project officials] gave us." McCrady denied giving Roddey's staff that information (Hopey, "Wetlands plan," A1).

Tribune-Review business writer Colin McNickle commented on 7 July 2000 that the Dawida incident was disturbing. “Campaign finance records show Mr. Dawida received a total of \$3,000 from the developer of the proposed (and controversial) Deer Creek Crossing mall in Harmar Township and the owner of the property, then voted for a tax increment financing package for the development. No, it's not a lot of money. But, yes, the appearance of a conflict is there” (“Laurels and lances”).

In isolation none of these political episodes were significant but taken together they revealed a suspicious side of the Deer Creek Crossing controversy, one not meant for general public consumption. Together they further cemented the ORIX-Woodmont corporate persona as radical functionalist, with a core belief that progress was more important than environmental damage (Spangle and Knapp, 7). Examination of this less than public aspect of the approval process contextualized the comment of Pennsylvania Fish and Boat Commission biologist Tibbott: “I’ve never seen a permit like this approved in my 23 years of doing this job. But the developer seems to have the money and the influence. Now, I wouldn’t bet against it” (qtd. in Hopey, “What price progress?” A18).

### **2.3.3. Threats and Feints**

Given the adversarial nature of the dialogue in the Deer Creek Crossing controversy, most participants believed that the decision would end up in court. Headed for impasse, the controversy fell into the patterns of parallel vilification and reciprocated diatribe (Lange, 134). Eventually, the escalation and demonization created such rancor that larger issues became obscured and any sort of negotiated settlement became less and less likely. For both sides, the stakes were high. Submitting a wetlands encroachment permit was a hugely expensive undertaking (McCrary, personal interview). ORIX-Woodmont could only recoup their



investment and realize the potential profits if construction proceeded. Property owner McCrady anticipated a profit from the land sale alone that exceeded \$10 million. McCrady also stood to become a development partner in the event of a successful sale, which would position him to share in the profits of Deer Creek Crossing (Renwand, 10). Given the size of the construction investment, estimated to be in the \$170 million range, profits were projected to be enormous. Clearly, ORIX-Woodmont needed to win project approval and would be very likely to file appeals and other legal action in the event of permit denial.

For opponents, the stakes were equally as high although not principally financial in nature. The losses would be irreplaceable: loss of the natural area, loss of the aesthetics, loss of the natural functions of wetlands, streams and floodplain, loss of habitat. The opposition's will to resist grew from their belief that once destroyed, the Deer Creek valley ecosystem would be gone forever. Stiffened in their resolve by this fear, opponents could be expected to avail themselves of any and all possible resistance strategies. When organizations with significant resources, like Clean Water Action and PennFuture, joined the original grass roots opponents, appeals and other legal action became viable. These conditions of the rhetorical situation precipitated the legal challenge. Both sides began to use the threat of lawsuits to persuade agencies and legislative bodies, with both direct and indirect influence, that they were not going away.

Tribune-Review writer Michael Yeomans, in a 15 June 2000 article, reported that the economic development committee of Allegheny County Council had requested that County Solicitor Terry McVerry offer an opinion as to whether Council could legally withdraw the Deer Creek Crossing tax increment financing offer. The uncharted territory became more confusing because this Council had not awarded the TIF. The three member Board of Commissioners had

done that in 1999, months before a referendum had replaced the Board with a larger Council. None of the three Board members served as representatives on Council. McVerry responded that they could legally dissolve the TIF but several complications might result. First, the County Executive, Jim Roddey, would have to agree, and he remained a Deer Creek supporter. Second, even if the county withdrew its TIF award, the Allegheny Valley School District and Harmar Township remained free to use the Allegheny County Redevelopment Authority to issue bonds without the county's participation so that withdrawal would not necessarily eliminate, but only reduce, the TIF. And third, McVerry "cautioned that such an action could leave the county exposed to a lawsuit" (qtd. in Yeomans, "Conservation parcel," B6).

ORIX-Woodmont responded that County Council risked a great deal if they attempted to rescind the TIF. In the same 15 June 2000 edition of the Tribune-Review, Veronica Whitney reported that Joseph Howell had warned County Council that the developer "would be forced to take legal action against Allegheny County" ("Developer threatens," B6). County Council was barely six months into its existence and already faced significantly divisive issues and legal hazards. Support for Deer Creek on Council was not particularly strong because many saw the TIF as an obligation of the former Board of Commissioners. Some Council representatives supported the development on economic benefit grounds, others because they represented districts in or near to the Allegheny River valley. Some opposed the development on environmental grounds, others because they feared the loss of commercial activity in existing shopping areas to the new mall, and others because they agreed that the labeling of the McCrady property as blighted stretched the intended meaning of the redevelopment law too far. But nearly all were very leery of engaging in an ugly legal battle. Howell stressed that rescinding the TIF at this late date would have serious repercussions for the viability of Deer Creek Crossing.

Whitney reported that Howell commented “The county would put itself into enormous legal exposure. We've told our tenants we have the TIF (financing). The damages of the county rescinding this are huge. We can't do the project without the TIF. It's not economically feasible” (qtd. in Whitney, “Developer threatens,” B6).

The threats and feints regarding legal action resurfaced in a 22 September 2000 Tribune-Review article by Michael Yeomans, “Threats of lawsuits hang over Deer Creek Crossing project.” This time it was the opposition that warned of impending legal consequences if the project were approved, especially if the TIF remained attached. John Hanger, president of PennFuture, said bluntly, “The law clearly states that TIFs are to be used only for urban blighted areas, not suburban wetlands. If the permits are granted and the county and the developer proceed, they can expect to see us in court” (qtd. in Yeomans, “Threats,”). In response, Howell raised the ante with an ominous caution that individual Council members could be sued if the TIF award were rescinded. Harmar Township Board of Supervisor’s Chair Muse added that “he would research a lawsuit against council if it revokes the tax plan approved unanimously by his board, the county and the Allegheny Valley School District” (qtd. in Yeomans, “Threats,”).

So in the weeks and months leading up to the decision by the regulatory agencies on the first permit application for the development of Deer Creek Crossing, the mirror and matching, framing/reframing, cascading threats created a mood that resembled a simmering caldron, with both sides ready to boil over. With the permit submission complete, public meetings concluded, newspapers on record, people agitated, and threats and feints in place, the controversy awaited only the imminent decision. When it came, the effect vibrated throughout the regional environmental community. To the surprise of many skeptics, on 12 October 2000, the Department of Environmental Protection denied the ORIX-Woodmont wetlands encroachment

permit application to develop Deer Creek Crossing. Above the signature of Charles Duritsa, Director of the DEP Southwest Regional Office, the decision letter denied the application based on “significant adverse environmental impacts” and on a failure “to demonstrate that there is no practicable alternative to the proposed project” (Duritsa to Machak). The rejection of the Deer Creek Crossing permit application marked the high point for the opposition. A rare local land use victory for environmentalists drew considerable attention to the Deer Creek Crossing project and raised the hopes of environmental activists that resistance strategies could actually work. It wouldn’t last long. ORIX-Woodmont immediately appealed the decision to the Pennsylvania Environmental Hearing Board. In due course, accommodation being the preferred negotiation tactic with both DEP and the Army Corps, they withdrew the appeal in favor of a completely new and substantially redesigned permit application, thereby setting the stage for the second front in the Battle of Deer Creek Crossing.

### 3. PUBLIC FORUMS AND DESPERATION RHETORIC

No publicly observable fact, no historical context, no single event affected the Deer Creek Crossing controversy more than the unexpected denial of the ORIX-Woodmont Deer Creek Joint Venture's (ORIX-Woodmont) first permit application. This Chapter examines how that denial created a much different rhetorical situation and how public hearing participation changed in response, focusing mainly on the regulatory hearing but also including political hearings convened by the Allegheny County Council. It examines the role and objectivity of the press, including principal reporters and the editorial stance of newspapers.

With the straight denial of the environmental permit application, the rhetorical situation changed substantially. ORIX-Woodmont faced a critical strategic choice at this point: whether to appeal the denial in an attempt to force approval of the existing development plan, or to begin the entire process over again. An enormous amount of money had been expended to compile the first application and the urge to press for approval on appeal must have been strong. In fact, ORIX-Woodmont did file an appeal. But they withdrew the appeal and decided to submit a revised application following what the US Army Corps of Engineers' (Army Corps) Statement of Findings described as "continued coordination" with the regulatory agencies (16).

Presumably, the developers determined that it was more likely that a second application would succeed if compiled in consultation with the regulatory agencies than that they would win an appeal of the denial of the first application, given the strength of the opposing objections. The additional costs to resubmit, compared with the potential profit of a successful development, made for an acceptable cost/benefit analysis.

The revision amounted to an entirely new application and was even assigned a new application number, although a substantial portion of the first application was incorporated by reference. Consideration of the revised application occurred under the same rules as

consideration of the original. A new public meeting was required and new advisory input from the resource agencies mandated. The advantage to ORIX-Woodmont was that they were now equipped with a working knowledge of precisely what deficiencies caused the first application to fail. The second time around, they knew what accommodations would increase the chances for approval of the revised application.

The next event was public comment on the second permit application and that occurred within the altered context. As new lines of battle developed they mapped closely on to Spangle and Knapp's functional model, which distinguishes categories of environmental advocacy based on degree of intensity. The out-of-town development partners -- ORIX Real Estate Equities of Chicago and the Woodmont Corporation of Texas -- exemplified the radical functionalist perspective, a business-oriented approach that held progress to be more important than environmental concerns. Clearly, it was in the best economic interest of the Deer Creek Crossing developers -- represented initially by Woodmont executive Joseph Howell and attorney Terry Bossert, and later by Woodmont Company CEO Stephen Coslik -- to complete this highly profitable project. In addition, they tried to tap into the economic self-interest of the local population with promises of job creation that would revitalize a stagnant economy and create an increased tax base to relieve the property tax burden on senior citizens. These were persuasive arguments and many local supporters adopted this position, including Harmar Township Supervisor Don Muse, who rarely missed a chance to publicly support Deer Creek Crossing. For Muse, the public argument turned on economic benefits, that is, on job creation and tax relief. To the extent that he addressed environmental concerns at all, he approached them as obstacles and not as intrinsically important considerations. At all times, of course, these radical functionalists sought to appear reasonable and amenable to compromise. But in the end they

seemed to compromise only as much as necessary to obtain regulatory approval and not out of environmental concerns.

Property owner W. Duff McCrady did not fit quite so cleanly into Spangle and Knapp's categories. He certainly wanted the project to be approved as it was originally designed and that suggested the radical functionalist perspective. But he possessed some credible environmental credentials as a longtime supporter of the Western Pennsylvania Conservancy and as a trustee of Chatham College, home of the Rachel Carson Institute. These credentials also suggested some resource functionalist sympathies (Spangle and Knapp, 7).

In his few public statements, McCrady effectively refuted the opposition's misrepresentation of the part of Deer Creek valley within the actual project area as pristine. Previous activities had undeniably damaged and degraded the project area and it contained, he claimed in a personal interview, as many as 15 major utility and road easements. The strategy of downplaying risk is characteristic of Spangle and Knapp's radical functionalist perspective (9). When describing the project area, opposition speakers would somewhat disingenuously refer either to the condition of the Deer Creek ecosystem upstream of the project site where the land could be fairly characterized as unspoiled or to the actual project site as it existed many years ago. An Army Corps document confirmed this misrepresentation, noting that "although there have been numerous comments about the environmental integrity and value of this site, the site was obviously not in a pristine or classic natural condition" (US Army, "Briefing Paper," 3). While McCrady could point to the designated 93-acre conservancy area as an indicator of his environmental sensitivity -- and by extension that of the other development partners -- there was no mention of a land easement donation before significant Deer Creek Crossing opposition appeared and then it was limited to 13 acres. As opposition increased, accommodation increased

and the developers enlarged the conservation donation to 93 acres. In this way, they appeared more reasonable and willing to compromise, a moderating adjustment strategy that also reflected the radical functionalist perspective (Spangle and Knapp, 9). McCrady's environmental credentials suggested that he did not find the land donation itself objectionable. But he did say that he felt unduly coerced into a *quid pro quo* exchange, trading the easement donation for project approval. In addition, McCrady did actually believe, and he was not alone in this, that the reconstructed wetlands represented a significant improvement over the existing fragmented and degraded wetlands (personal interview).

Citizen's for Pennsylvania's Future (PennFuture) attorney Jody Rosenberg, a former Department of Environmental Protection (DEP) attorney, seemed exasperated by the rush to condemn the disturbed marshlands. "We should be seeking to restore degraded wetlands," she wrote in a letter to DEP, "not eliminate them completely" (Rosenberg to Dreier). The Proffitt Foundation's Joseph Turner struck a similar chord: "The project proponents claim that the wetlands are not worth protecting since they have been [disturbed]. If this is the reason for filling these wetlands, then we may as well draw a circle with a 25-mile radius around Pittsburgh and allow all the aquatic resources to be eliminated" (Turner to Sorocco). These two appeals were based primarily on raising the fear of further destruction, a slippery slope argument characteristic of a radical environmentalist position bolstered with a subtext of irreparable loss.

McCrady, though a financial supporter of Western Pennsylvania Conservancy, did not subscribe to a no-growth philosophy, but believed that all development inevitably causes some environmental damage. So he was not so much surprised by the *existence* of public opposition as by what he termed the *unfairness* of it. He argued that it was unethical for PennFuture to oppose Deer Creek Crossing so vigorously but to ignore another nearby development, Pittsburgh



Mills, with an even larger environmental footprint, because that effectively granted a distinct economic advantage to the latter. Even though it began an application process much later than Deer Creek Crossing, absent the hindrance of an organized opposition, Pittsburgh Mills moved forward in development much faster and had actually opened for business before Deer Creek Crossing even broke ground. PennFuture, McCrady felt, wanted an environmental victory and chose arbitrarily to achieve it in Harmar Township (personal interview). Jody Rosenberg, for her part, did not altogether disagree with McCrady's analysis. Deer Creek Crossing, she said, became a symbolic test. PennFuture got involved in the movement originally because of the spontaneous public opposition to the development as well as the massive environmental damage it threatened. They employed strategic lawsuits because they believed that the ORIX-Woodmont permit application was fundamentally flawed and that they could muster a strong legal case to support that belief. Once engaged in the case, resources could only be stretched so far and active opposition to other regional commercial developments, admittedly as damaging as Deer Creek Crossing, became financially prohibitive (Rosenberg, personal interview).

Leaning even more toward the environmental position, Allegheny Valley School Superintendent Ronald Wasilak recognized that the desirable consequences of Deer Creek Crossing included both a significant environmental education opportunity and an immense increase in school property tax revenue. But Clean Water Action's Robert Silber argued that the tax increment financing (TIF) agreement allotted 60% of the property taxes for 20 years to repay the \$25 million bond issue, which significantly reduced the direct benefit to taxpayers (qtd. in DEP 2001, 62). Nevertheless, the remaining 40% still provided a substantial increase in tax revenue. Dr. Wasilak argued that the property, currently producing just over \$4,000 in revenue to all three taxing bodies combined, promised to increase property tax income to \$3.6 million,

40% of which would be about \$1.5 million -- a lot of new revenue even after the TIF bond payment. Although they evaluated the same statistical figures, Silber emerged pessimistic and Wasilak optimistic. Contradictory interpretation of the same information, Lange's mirror and match strategy of frame/reframe, appeared regularly in the Deer Creek Crossing controversy and is a recurring element of virtually every environmental controversy (Lange, 132).

Wasilak adopted a pragmatic public persona, and recognized the advantages of the development and the accommodations made by the developers. Like Muse, he reliably appeared at nearly every Deer Creek public meeting. Tending more toward the middle ground resource functionalist position, Dr. Wasilak weighed the environmental damage against the economic, ecological and educational potential and decided that it was a trade worth making. In fairness to the Deer Creek Crossing developers they did -- voluntarily or not -- retreat farther environmentally than any other recent regional commercial developers. While any developer would have been required to remediate the wetland destruction, the private gift of a 93-acre easement of riparian forest, stream channel and high quality wetlands was, as Dr. Wasilak accurately described it, "in a word, unprecedented" in southwestern Pennsylvania construction practice (qtd. in DEP 2001, 44).

Not everyone agreed with Wasilak's cost/benefit analysis, of course. Peter Wray of the Sierra Club stated simply: "The unacceptable harm to the environment associated with this project as proposed is not in the public interest" (95). Defending the public interest was, interestingly enough, a resource environmentalist view in opposition to Wasilak's resource functionalist view, although both the pragmatist and the defender of the public interest were middle ground positions, according to Spangle and Knapp (12).

Principal opposition figures -- notably Clean Water Action organizer Silber and PennFuture attorney Rosenberg -- fell into the resource environmentalist category, favoring the least environmentally damaging alternative. Expecting accommodation to be a customary procedure in Pennsylvania environmental regulation policy, they wanted to relocate the development to a more suitable, less environmentally destructive site, or to significantly reduce the size and environmental damage footprint. The eventual decision to build one prong of the legal challenge around the improper use of a tax increment financing package was intended to force relocation to another site or even result in outright termination of the project. The developers resisted any reduction in size because that would inevitably result in reduced profit. Project supporters fought against relocation, fearing Harmar Township and the Allegheny Valley School District would lose large potential tax revenues if the project moved out of their jurisdiction. Property owner McCrady stood to lose an enormous profit from the land sale if ORIX-Woodmont switched sites. A Clean Water Action flyer argued the injustice of using \$25 million of taxpayer revenue to help new private businesses compete against established businesses. "That's about \$20 stolen from every man woman and child in the county so Duff McCrady can make a \$10 million profit on a \$1 million investment. He gets the money -- we get the traffic and a degraded environment" (Clean Water Action, 1).

Although forced by political circumstances to depend on resource environmentalist arguments around reduction and relocation, Robert Silber and Jody Rosenberg really wanted to stop the project altogether, a distinctly radical environmentalist agenda (personal interviews). And for the radical environmentalist, zero damage was the only acceptable level of damage. Few opponents defended this position publicly, most tolerating the inevitability of compromise in the actual practice of Pennsylvania environmental regulation. But some did. For instance, the

Proffitt Foundation wrote to the Army Corps, declaring surprise that so little support for environmental protection seemed to emanate from the federal agency charged with regulatory enforcement. “Frankly, it’s hard to believe that nearly 30 years after the passage of the Clean Water Act, we are still entertaining a proposal to fill six acres of wetlands and over 20 acres of floodplain” (Turner to Sorocco). And it was easy to read the frustration permeating Silber’s e-mail to DEP on 13 December 2001. He had begun to fear that the series of reconciliation meetings between ORIX-Woodmont and DEP were bound to result in the production of an approvable permit application. “Is a floodplain ecosystem that has evolved over thousands of years to be forever altered for a commercial project that will exist for 20 years . . . What right do a handful of men have to visit such damage upon the earth and her waters, damage that will far outlive the lifetimes of these men?” (Silber to Keane) These are the words and values of a radical environmentalist, seeping out through frustration fault lines in Silber’s public façade as a reasonable and moderate opponent.

Strong arguments were raised that the Deer Creek Crossing proposal violated principles of fairness and American values. Silber declared that those who will benefit from economic activity ought to bear the risk of investment: “Most of us in this country believe in democracy and the free market economic system. We believe in hard work and being rewarded for hard work, right? That is not what this is about. This tax increment financing deal is taking money out of our pockets, the taxpayers of Allegheny County, and subsidizing a development” (qtd. in DEP 2001, 65). Silber and others who organized their resistance around the TIF believed that the objectives of the redevelopment law were never intended to include the destruction of undeveloped green spaces. They argued that the Deer Creek Crossing TIF plan was fundamentally unjust because it used tax money from all the taxpayers of Allegheny County to

develop revenue that would benefit only a very small part of the county and might even, if it caused the closing of businesses in other areas, be detrimental to the county's overall economic prosperity. (Silber, personal interview)

By the second public meeting, even some development supporters had adopted the emotional appeal. One particularly potent description of the economic and social decline of the Allegheny River valley featured a death metaphor. Supporters were desperate for the injection of energy and vitality that Deer Creek Crossing promised to provide, and they very much feared that loss of the opportunity would cause significant harm. This was particularly true of the old-timers, the lifelong residents, who believed that they had been waiting in vain for the valley to cycle out of economic decline. Harmar Township Supervisor Muse adapted an old folk maxim to illustrate the distress he felt for the Allegheny River valley: "In short, we're talking about death and taxes. Our valley is dying without development and our residents need tax relief. This project will bring both . . . stopping the slow death of our valley" (qtd. in DEP 2001, 35). Both sides were feeling the frustration of insecurity, supporters fearing that the vocal and probably litigious opposition would somehow scuttle the opportunity presented by the mall project, and the opposition fearing that a cloud of compromise and accommodation was about to cast a giant and destructive shadow over the Deer Creek valley.

### **3.1. Reinforcements: The Second Public Hearing**

ORIX-Woodmont wisely adjusted their presentation strategy to reflect the new rhetorical context and highlighted their preferred position of compromise and accommodation. They retained former DEP chief counsel Terry Bossert to represent the new Deer Creek Crossing design at the second public hearing, convened at Springdale High School on 24 October 2001. Principal opposition players PennFuture and Clean Water Action also noted the shift in public

perception. They converted much of their focus on environmental damage to more pragmatic claims like the deficiency of alternatives analysis and the improper use of tax increment financing. Opposition speakers advanced the common sense argument that the project could be done elsewhere with less environmental damage, hoping that such a basic appeal would be more likely to resonate with the public. Why not, they asked, make a decision that protects both economic opportunity and the environment? Framing the controversy as a choice between denial and relocation did have a legal basis. PennFuture attorney Joan Miles argued that “by law the developer has the burden of proving that . . . a reduction in size, scope, or configuration of the project would not accomplish the basic purpose of the project. Without such proof, the Department cannot grant the permit” (qtd. in DEP 2001, 119).

The issue of determining who defined the basic project purpose carried critical argumentative significance. If ORIX-Woodmont defined the purpose, they could do it so as to eliminate the possibility of either a reduction in size or relocation to another site. Early in the first application process, attorney Paul Gutermann, representing ORIX-Woodmont, had written to DEP biologist Nancy Rackham that “regulations mandate that the analysis of alternatives turns on the “. . . ‘basic purpose of the project’ *as established by the permit applicant*” (Gutermann to Rackham, emphasis added). He quoted the “basic purpose” clause directly from Chapter 105 of the Pennsylvania Dam Safety and Encroachment Act and then added the last phrase outside of the quote, implying that it too was a part of the regulatory rules. PennFuture attorney Amy Sinden refuted that interpretation. In a 22 September 2000 letter to then DEP Secretary James Seif, she asserted that “there is nothing in Chapter 105 that provides that the basic purpose of the project is to be “established by the permit applicant” rather than DEP.” Attorney Gutermann did not supply any legal citation to support his conclusion. Sinden, on the other hand, cited

precedents that rebutted the contention that the project purpose must be “viewed from ORIX-Woodmont’s perspective” (Gutermann, 2). As the US Court of Appeals for the 9<sup>th</sup> Circuit stated in a 1989 case (Sylvester v. US Army Corps of Engineers 882 F.2d 407, 409): “an applicant cannot define a project in order to preclude the existence of any alternative sites and thus make what is practicable appear impracticable” (qtd. in Sinden to Sief, 5).

This exchange can best be understood through Herndl and Brown’s model of the social construction of discourse on the environment. The category they call anthropocentric casts nature -- and discourse about nature -- as a function of reasoned processes, especially scientific and legal processes. The disagreement over defining Deer Creek Crossing’s basic project purpose illustrated the interpretation of language as contradictory social constructions. Those interpretations were crucial to the controversy because so much of the regulatory process depended on exactly who defined the basic purpose of the project (Herndl and Brown, 11-12).

Senior vice-president of the CB Richard Ellis company Roger Edwards, the realtor who had first marketed the McCrady property to the Woodmont Company and arranged the financial partnership with ORIX Real Estate Equities, argued in an 11 June 2003 memorandum to ORIX-Woodmont attorney Mark Bradshaw that the project purpose was a function not of regulations, but of economics, controlled by “the demand of retailers who want to locate there” (Edwards to Bradshaw, 2). The demand from retailers in this instance, he claimed, created a project purpose that effectively eliminated all other alternatives from consideration. This is a distinctively radical functionalist point of view.

Sinden saw a fundamental problem with DEP’s uncritical acceptance of interpretations provided by consultants who were professionally retained by the developer: “Obviously, if the developer is given carte blanche to define the project’s purpose, it can define it in such a way as

to preclude all alternatives. Such an interpretation would deprive the alternatives analysis of all meaning, however” (Sinden to Seif, 4). She also cited a 1994 decision by the U.S. Court of Appeals for the federal 8<sup>th</sup> Circuit (National Wildlife Federation v. Whistler, 27 F.3d 1341, 1346), in which this precise issue elicited a warning from the court that “the cumulative destruction of our nations wetlands that would result if developers were permitted to artificially constrain the Corps alternatives analysis by defining the project’s purpose in an overly narrow manner would frustrate the statute and its accompanying regulatory scheme” (qtd. in Sinden to Seif, 5).

Although opposing attorneys repeatedly cited case law to the contrary, attorneys for ORIX-Woodmont largely succeeded in creating a public perception that the developer properly defined a project’s basic purpose. This perception hampered the opposition all the way through the appeals process when, as PennFuture attorney Rosenberg claimed, the administrative judge acted as though he agreed that defining the basic project purpose was a prerogative of the developer and conducted the Environmental Hearing Board trial as if it were a factual claim (personal interview). Opponents argued that DEP -- not ORIX-Woodmont -- properly defined the basic project purpose and further that regulations required proof that the developer had satisfied the examination of alternatives requirement. When DEP finally did decide that the alternatives analysis was satisfactory, legal action became the only remaining remedy.

During the first public hearing, many opposition speakers had questioned the need for another shopping center at all, but by the second public hearing -- reflecting the changing rhetorical situation -- speakers’ concerns shifted to the need for a project of such immense size. This was a fundamental change in attitude in response to the perception that the decision-makers favored accommodation over straight denial. PennFuture’s Joan Miles commented that ORIX-



Woodmont's insistence on a big development created great risk for the local and regional community because the opposition doubted that enough tenants had committed to fill so much commercial space. Warning DEP against taking irreversible action without certainty, she said, "It would be disastrous if the Department granted this application only to find that the valuable wetlands were permanently destroyed" for a development that was not viable (qtd. in DEP 2001, 119).

For the second public meeting, DEP and the Army Corps made no procedural changes, retaining the same rules structure used in the first public meeting that stifled interactive debate. For the DEP -- and even more so for the strictly formal rules-centered protocols of the Army Corps -- the changing political and rhetorical situation did not translate into an alteration of the hearing process even though the opposing parties had made substantial argumentative adjustments. But the consistency of the hearing protocols did not yield an objective decision-making process, as that process became more dynamic as political pressures appeared. Groups were allowed one representative speaker, and DEP limited everyone to 5 minutes with the exception of the applicant, ORIX -Woodmont. The representatives of the regulatory agencies asked no questions, and speakers were not permitted to cross examine other speakers. It remained entirely the choice of any particular speaker whether to respond or not to respond to questions and arguments. Once again, the result of this structure was to leave claims, evidence and rebuttals disconnected from each other. Each speaker had only one chance to present arguments, so a talent for anticipation was critical to effective refutation. By this point the active participants on each side were thoroughly familiar with the circumstances of the controversy and were likely responding to previously revealed positions. The hearing context reflected a newly

defined rhetorical situation in which the public felt some heightened sense of empowerment arising from the previous permit denial.

The developer's strategy at the second hearing also evidenced recognition of the new emphasis on accommodation. Terry Bossert replaced Woodmont executive Joseph Howell on behalf of ORIX-Woodmont and immediately adopted a different approach to public persuasion. Where Howell had been excitable and somewhat confrontational, Bossert's style was quiet and low-key. Where Howell's presentation had been polished if melodramatic, Bossert's presentation relied on a carefully structured, logically progressive, even enthymematic, set of arguments. ORIX-Woodmont's adaptive strategy promoted their preferred development plan by continuing to highlight the advantages that local residents would find most attractive, but also by carefully demonstrating how the plan had been altered to respond to regulatory concerns.

If ORIX-Woodmont had considered the general public to be the main audience for the first public meeting, they focused the second presentation principally on the regulatory agencies. By demonstrating how their design changes made the proposed development more reasonable and accommodating, they showed just the characteristics that the agencies would find most persuasive politically. The developer's exigence for the first public meeting arose from the appearance of strong opposition and from the importance of gaining the kind of public support that would translate into political pressure. For the second public meeting, their exigence evolved into showing how the new plan reconciled both the concerns of the interested public and the regulatory requirements with the necessary conditions of a successful commercial development. That reconciliation provided evidence to the regulatory agencies that the developers would adequately accommodate changes. ORIX-Woodmont centered their attention not on the public, a tactic that had failed in the first process, but on the regulators.

### **3.1.1. Accommodation as a Tactical Maneuver**

The developer's strategy of moving away from the constraints of the public arena to an exigence incorporating arguments about conflicting views of science was a tactical maneuver that took advantage of the agencies' political tendency toward accommodation. It also enabled the developers to frame the public emotional response within a rational context, appearing to accommodate citizen concerns when in fact they had already begun the process of shutting out the public.

The opposition seemed to recognize the developer's goal of minimizing the importance of public participation, which to this point had been a valuable asset used by the opposition to garner widespread support and its potential for political influence. They responded from a position of the defender of public interest in brokering an open exchange of ideas, criticizing the agencies' procedures. Clean Water Action's Silber complained that exceptionally short notice had been given for the public hearing (qtd. in DEP 2001, 61). PennFuture's Joan Miles voiced disappointment that DEP had rejected the request for a postponement based on insufficient notice to the public because that reduced the likelihood that many interested parties would be available to testify. She further argued that while the public hearing served the purpose of providing DEP with input, it also "provides citizens an opportunity to hear and understand other's views. However, by insisting on this premature hearing, the Department has curtailed this important opportunity" (qtd. in DEP 2001, 116). Building her objections around an accusation that DEP had essentially deprived the public of the full impact of a hearing, Miles reinforced the image of the opposition as the defender of the public interest in brokering an open exchange of ideas. Any conditions that reduced attendance at public meetings presented obstacles to the opposition because their overall strategy depended on general public

dissatisfaction and their willingness to voice their disagreement both in public forums and to politicians. Without a large turnout, the claim of public outrage lost potency. Silber argued that people given fair notice would involve themselves in the controversy for the strongest possible reason: self-interest: “We all have an obligation as citizens to find out as much as possible about something that’s going to have such an enormous impact on our lives and on the lives of our children” (qtd. in DEP 2001, 61).

Although the opposition used one possible explanation for the decreased presence of the public at the second hearing, it was just as likely that issue-exhaustion reduced public attendance as much as did insufficient notification procedures. The greatest problem for a grass roots opposition movement in any political controversy is keeping people sufficiently involved. Developers can and do make good use of the strategy of attrition -- wear down the opposition and it will inevitably lose intensity. The developer and its consultants were engaged in this controversy professionally, not sacrificing time from other parts of their life as were volunteer opponents who were employed outside of the controversy. As a result, citizens can find themselves “issue-exhausted” when a struggle continues for an extended period of time, as the Deer Creek Crossing controversy did. By attributing decreased public attendance to insufficient notice, however, the opposition not only painted the situation in the best possible light for their position before the developer and regulatory agencies, but also took advantage of an opportunity to reinvigorate the public by encouraging outrage at their exclusion.

The developer, meanwhile, focused through Bossert on strengthening the image of ORIX-Woodmont as reasonable and open by recounting the reconciliation meetings that took place between the rejection of the first Deer Creek Crossing application and the submission of the second. In addition to the customary meetings with regulatory agencies DEP and the Army

Corps, he said, “we’ve also met with (resource agencies) US Fish and Wildlife Service, the US EPA, and the Pennsylvania Fish and Boat Commission,” all three of which continued to declare unswerving opposition to Deer Creek Crossing. Bossert also noted that PennFuture representatives had been present at many of those meetings and that the developer had even met separately with PennFuture, reinforcing ORIX-Woodmont’s appearance of reasonable compromise. “All of these meetings had been undertaken with one aim, and that is, to come up with a revised project that met the basic project purposes but also met the environmental concerns” (qtd. in DEP 2001, 19). This was a fairly direct appeal to DEP culture: accommodate, don’t obstruct.

Just prior to Bossert’s testimony, DEP water pollution biologist Nancy Rackham had noted that the Deer Creek Crossing permit application had been submitted in an incomplete condition and remained incomplete (qtd. in DEP 2001, 11). Obviously, no one seriously doubted that the application would be satisfactorily completed because no business would put so large a financial investment at risk through sloppy paperwork, but it did offer the opposition an opportunity to reduce the developer’s image as reasonable and co-operative. Although a technical issue, of marginal general interest, it was a good indication that the regulatory agencies had displaced the general public as the primary ORIX-Woodmont audience. The regulatory agencies defined their mission through a constructive model meant not to halt environmentally damaging development but to soften it, to negotiate the damage downward to an acceptable level more in balance with economic benefits. Every act of redesign and compromise that ORIX-Woodmont could offer increased pressure on the DEP field level operatives, the scientists who actually carried out the evaluation, to massage this project into acceptable shape.

Gauging highway safety as a general interest issue, Bossert recited the already familiar promise of TIF-funded road improvements: new roads with lower accident rates at no expense to taxpayers. He cited results of studies conducted by ORIX-Woodmont consultants that indicated that substandard traffic conditions would continue to deteriorate even without development. The Sierra Club's Peter Wray asked suspiciously: "Is the proposed relocation and enlargement of Route 910 necessary to revise highway safety or has it been designed to better accommodate the interests of the applicant?" (qtd. in DEP 2001, 94) ORIX-Woodmont's posture on road improvements was aimed at the majority of local residents who might never visit natural areas, but who certainly drove to the store regularly. In fairness, the developer's selection of highway safety data was not much different than the opposition's misleading characterization of the project area as being commensurate in environmental quality with the rest of the Deer Creek biodiversity area. Both were examples of strategic exaggeration. Reducing the terms of debate to admittedly important but nevertheless mundane issues like roads and taxes worked to create support from residents with little interest in environmental problems. Although environmentalists are among the most vocal and dedicated of political activists, environmental advocacy remains a topic of minor interest to the general public.

Perhaps the argument most threatening to the Deer Creek Crossing plan approval revolved around the possible existence of viable alternative sites. Regulations required that if an alternative project site existed that met the project purpose and would cause less environmental damage, then that alternative must be chosen. However, the applicant's paid consultant had performed the alternatives analysis, which led to criticism that the study merely provided what the client expected. Realistically, the results of a developer-funded analysis are not likely to be entirely objective. While any consultant must protect his reputation as competent and

professional, in actual practice consultants who do not remain sensitive to the needs of clients inevitably reduce the market for their services. In that sense consultant reports are usually both scientifically factual *and* rhetorical, involving expert testimony credibility.

Critics argued that the developer-generated reports were less an objective analysis of alternatives than a systematic elimination of alternatives. The client was aware of, even dependent on, the rhetorical pliancy of expert consultant reports. Skeptics criticized this attitude because they believed it was based on greed. As one local sportsman put it: “three to four other developers . . . looked at this current project” and decided not to attempt development of this site because it would “not only be environmentally challenging but also very difficult and costly to develop in a responsible manner. The bottom line is, the people that think this plan is feasible are the ones that will benefit from it monetarily” (Frank Sparrow, qtd. in DEP 2001, 128).

Bossert asserted that ORIX-Woodmont’s consultant, as a result of concerns raised in the first application process, conducted a second “complete reanalysis of the practicable alternatives,” (qtd. in DEP 2001, 23) constrained by the expediency of the developer’s definition of the basic project purpose. Not surprisingly, the same consultant again concluded that “there was no available alternative location which met the basic purpose of the project and had less impact on the environment including, in our definition of the environment, impact on human beings” (Bossert, qtd. in DEP 2001, 24). Rhetorically, the implication that any evaluation of environmental impacts must include human costs probably resonated with most of the general public who agreed that compromise and accommodation characterized the most realistic balance of humanity and nature. Bossert attempted to align ORIX-Woodmont’s needs with the needs of the average community, like Harmar Township. It was a reasonable and attractive compromise position.

### **3.1.2. The Wisdom of Strategic Retreat**

The single greatest change in the revised plan, and this should not be underestimated in its effect on eventual project approval, was the elimination of any relocation of Deer Creek. That accommodation substantially changed the rhetorical situation and strategies. The developers mobilized the ethos of expert credibility and their rhetoric was more persuasive to the regulatory agencies than that of the opposition. No one, not even the developers, thought that an entire creek bed could be reconstructed without immense damage to the riparian ecosystem created by it. ORIX-Woodmont, in the first application process, defended the relocation plan by contending that the reconstruction would leave the creek close to its original length and functioning nearly as normal. That was a very difficult argument to make, both to the public -- who knew by common sense that artificially recreating a naturally functioning stream was extraordinarily ambitious if not impossible -- and to the regulatory agencies, who knew on a scientific basis that stream function would be unavoidably impaired. So Terry Bossert anticipated a positive response when he announced, “the project has been redesigned to leave Deer Creek undisturbed and in place” (qtd. in DEP 2001, 24). In order to do that, planners had to design three stream crossings, two bridges and a culvert. Because this could be done only at considerable expense, ORIX-Woodmont argued that the compromise was another indication of their willingness to respond to public opinion, at least to the extent that they could adapt while maintaining their basic project purpose. Herndl and Brown would characterize that shift as an ethnocentric choice, in which nature was a resource, albeit a wisely used resource (11).

Clarifying that the new plan would leave Deer Creek “undisturbed”, Bossert explained that because the bridges would be very high, there would be “no environmental impact on the stream” (qtd. in DEP 2001, 25). The opposition remained skeptical of that claim. PennFuture



attorney Rosenberg argued strenuously in a letter to DEP that the posture of compromise struck by ORIX-Woodmont regarding the Deer Creek stream between the first denied application and the submission of the second redesigned application was notably disingenuous. “Contrary to what some supporters of the proposed Deer Creek Crossing development seem to think,” she wrote, “the developers did not *agree* not to move the stream, they were told by DEP that they *could not* move the stream” (Rosenberg to Dreier, 10, emphasis in original).

The culvert presented a greater public relations challenge than the bridges. To the public, a culvert meant a relatively small, enclosed pipe-like structure which, as there was no soil streambed but only a concrete bottom, had distinctly unnatural stream functions. Bossert set out to recreate the image of a culvert as one in which a stream could be contained but continue functioning with minimal environmental impact. He listed several reasons why this particular culvert would be more acceptable than a normal stream enclosure. First, the culverted stream crossing would carry a much safer, reconstructed Route 910 highway and was therefore a desirable adaptation. The Deer Creek valley already contained a number of road crossings -- including major arteries like the Pennsylvania Turnpike and Route 28, both high-speed, limited access highways -- so some transportation-related environmental impairment was unavoidable, the argument went, concluding that, if a culvert was ever appropriate, this was the time. Second, Bossert explained, the design called for “a 42-foot wide, open bottom, arch top culvert which is specially designed to follow the existing curve of Deer Creek and has a specially designed foundation to avoid (or) minimize any impacts on Deer Creek.” This description contained several phrases that implied environmental sensitivity and/or developer compromise. The culvert would be “42 feet wide,” which certainly can not fairly be characterized as merely a concrete pipe. The bottom would be “open” and presumably envelope a soil streambed, and the

top “arched”, stressing the image of an uncovered stream. It would be “specially designed to follow the existing curve” of Deer Creek, which implied less intrusive disturbance and further reinforced the cooperative character of the decision to abandon stream relocation. Bossert also pointed out that the culverted portion of Deer Creek would be located in an area that had already been severely disrupted by previous stream relocations, attacking once more the perception of the project site as pristine green space (Bossert, qtd. in DEP 2001, 25). These words were carefully chosen, driven by the exigence that the construction of Deer Creek Crossing should involve as little environmental disruption as possible and embodying a publicly palatable “we’re-doing-the-best-that-we-can” argument. For the opposition though, “the-best-that-we-can” fell far short of good enough. Bossert did not mention the length of the proposed culvert, which at 330 feet exceeded the length of a football field. Most of the stream within it would be deprived of the natural sunlight necessary to a viable aquatic habitat. Rosenberg, in a letter to the Army Corps, warned that the regulatory agencies “should not view a “better” application as legally acceptable merely because the applicant has made some concessions to the demands of the law” (Rosenberg to Hans, 2).

ORIX-Woodmont’s new Deer Creek Crossing design also promised to “maintain a significant portion of the existing vegetated riparian zone” and that, where it would be necessary to add fill, the new stream banks would be sloped at an angle to protect them from erosion. The soil would be seeded to stabilize them -- a standard construction technique -- but then they would be “planted with deciduous vegetation to create approximately 19 acres of forested slopes” -- which is not a standard construction technique (Bossert, qtd. in DEP 2001, 28). As a departure from the original development plans, these changes acted as powerful evidence of compromise.

But the Sierra Club's Wray retorted that even without relocating the stream, the new plan still carried the "potential for serious degradation of the creek's physical integrity" because it would squeeze the channel "between two massive slopes of fill (and) eliminate 17 of the 48 acres of floodplain" (qtd. in DEP 2001, 90). A briefing paper issued by the Army Corps immediately following project approval would substantiate Wray's position. The Army Corps found that 55%, over 5,000 feet, of Deer Creek within the project area had high walls, in excess of 20 feet.

"As a result of the project," wrote the Army Corps, "the total length of Deer Creek with high walls associated with it would increase to 7,288 feet (75%)." Describing the grading and fill plan's "canyon effect," the Army Corps noted that the high walls surrounding Deer Creek would increase in height "from 20 to 70 feet in most areas and from 40 to 90 feet in some areas" (US Army, "Briefing Paper," 1). In short, the Army Corps admitted the environmental effects of Deer Creek Crossing would be remarkably consequential for a project that they approved.

PennFuture's Rosenberg commented in the Pittsburgh Post-Gazette: "A promise not to move the creek doesn't mean much if the developer instead places the stream in a deep, man-made canyon, surrounds it with concrete and disrupts its relationship with the surrounding wetlands" (qtd. in Hopey, "Developer trying again," B11). Local fisherman and opposition organizer Joe Mercurio observed that to channelize the stream would eliminate functioning floodplain and when Deer Creek reached flood stage, as it inevitably would, there would be nowhere for the excess water to go. The channel would become a giant storm drain, causing "a turbulent scouring of the bottom of the stream. Any aquatic life . . . (and) habitat that now exists on the bottom of the stream would then be flushed into the Allegheny River" (Mercurio, qtd. in DEP 2001, 85). The opposition ridiculed the contention that the stream could, under the new plan, remain undisturbed. No watercourse ecosystem exists independently of the surrounding

areas. If the streambanks, floodplains and wetlands suffered damage that reduced their functionality that loss would unavoidably affect Deer Creek. No reasonable claim, they argued, could be made that simply because Deer Creek was not relocated it remained undisturbed. But ORIX-Woodmont succeeded in convincing many people of just that. The stream obviously would suffer less damage under the new plan than the old plan, because a long stretch of Deer Creek would not be destroyed and rebuilt. And that reduction -- voluntary or not -- made available to ORIX-Woodmont the claim that the stream would be undisturbed.

Bossert briefly addressed the question of wetlands on the project site, mentioning only that seven acres of new wetlands would be constructed and that the fiercely debated “3.75 acres of wetland on site [Wetland Seven], that is of the highest quality will be left undisturbed” (qtd. in DEP 2001, 26-27). School Superintendent Wasilak endorsed this contention about Wetland Seven. “Undisturbed, this nearly four-acre plot will continue to function as it has in the ecosystem” (qtd. in DEP 2001, 44). Peter Wray disputed the contention that there would be no disturbance to Wetland Seven. He explained that it “would be enclosed on all sides by fill slopes as high as 100 feet. It is only reasonable to assume that the existing ecological functions performed by this wetland would be substantially compromised” (qtd. in DEP 2001, 91). Pennsylvania Environmental Council’s John Walliser concurred with that conclusion and noted that the designed isolation of Wetland Seven’s 3.75 acres from the Deer Creek floodplain meant in practical terms that it should be considered a *de facto* casualty of the project and included in mitigation calculations. “As this will surely eliminate their value for aquatic and terrestrial wildlife, there is no reason to distinguish them from those that will be filled” (Walliser to Dreier, 3).

The wetlands were the central focus of expert testimony offered by Anthony Bledsoe, Ph.D., Department of Biological Sciences, University of Pittsburgh. Dr. Bledsoe carried out a professional, on-site inspection of the wetlands and determined that they were, with the exception of 3.75 acre Wetland Seven, “significantly degraded and fragmented.” His credentials were impressive, with extensive experience studying wetlands and with special expertise in Western Pennsylvania (qtd. in DEP, 2001, 74). His description of the existing wetlands contradicted the representation that they were important habitat, or even that they were natural features. Saying that he was not convinced that the smaller wetlands had existed at all before the previous highway and utility disturbances changed the ecological make-up of the project site, he argued: “Species that should be there, both plant and animal, are not there. Species that shouldn’t be there, particularly non-native invasive plants, are there” (75).

PEC’s John Walliser contended that the current condition of any of the subject wetlands was irrelevant to the regulatory process under appropriate federal guidelines (40 C.F.R. Section 230.10), which “does not distinguish or subordinate wetlands that have been affected or degraded prior to a proposed project” (Walliser to Dreier, 4). That dispute created another example of conflicting interpretations of the same data. It further confirmed the intrinsically rhetorical nature of the controversy, but also supported Bitzer’s account of the importance of the “publicly observable facts” by highlighting a rhetorical disagreement about the character of a physical object. Dr. Wasilak argued in a 19 September 2001 letter to DEP that the existing, degraded wetlands were worth trading in return for the opportunities offered by the redesigned application: “As for the wetlands that are in the path of construction, they are small, scattered areas of degraded wetlands which have resulted from mining, sewer line relocation and deforestation in the past” (1). By connecting the causes of presumptively desirable conditions,

specifically wetlands, with presumptively undesirable conditions, specifically mining abuses, deforestation and sewer construction, he sought to emphasize the perception that the small wetlands were undesirable, or at least expendable. For Wasilak, all wetlands were not equally valuable or worth protecting. Many environmentalists would acknowledge the disparities in wetland values but disagree about the level of protection. A degraded wetland, they would contend, still provides a functioning ecosystem and must enjoy at least the level of protection accorded to them by law. Jody Rosenberg worried that recognizing classes of wetlands and then attaching value judgments as to their worth put too much at risk. It presented “a slippery slope – [if] taken to its logical conclusion, any compromised natural resource will be in peril” (Rosenberg to Dreier, 3). Although Bledsoe believed that the mitigation would create artificial wetlands that would be “significantly better than the grade of wetlands currently onsite” (qtd. in DEP 2001, 73), Wray argued that the “replacement acreage would be consolidated in a small area of the overall site . . . (and) it is only reasonable to conclude that the creek would not continue to receive the original water filtering effects of the original wetlands” (93).

The debate over whether the wetlands mitigation would increase or reduce overall function illustrated the hardened positions of both Deer Creek Crossing supporters and the opposition, which made it less likely to be subject to compromise, much as described by Mark Moore. The issue had created an emotional impasse, an irreconcilable conflict based on competing definitions of wetland viability. (Moore, 147).

Neither side could influence the other, nor could they understand how the other side thought its position was reasonable. Yet several supporters requested cooperation from the opposition in reaching a solution and asked that opponents accept a role in implementing the environmental conservation aspects of the Deer Creek Crossing plan. Dr. Wasilak in particular

hoped to involve conservationists. “This proposal is an opportunity to embark upon a project which would include the cooperative efforts of many groups. There’s the option of working with environmental groups to preserve wetlands and to develop a large conservation district adjacent to the site” (qtd. in DEP 2001, 43).

Woodmont CEO Stephen Coslik held a less optimistic but probably more realistic opinion about reconciliation between adversaries in the Deer Creek Crossing controversy. PennFuture, after the July 2002 approval of the revised ORIX-Woodmont application, became the principal ORIX-Woodmont adversary in the new arena, the courtroom. A year later, in May 2003, still prevented by that legal challenge from beginning construction, Coslik addressed Harmar Township’s Board of Supervisors to assure them that the project would go forward. Fearing that the lawsuit would continue to frustrate the process, he lamented the philosophical gulf that had been created between the developer and PennFuture. “Unfortunately we alienated during the first process PennFuture. Because of that we are not sure we can ever bring them back to middle ground” (Coslik, Testimony, 1).

Many supporters held the opinion that the costs of development were worth the benefits. And they also hoped to mend the wounds suffered by a community engaged in a divisive and intensely passionate battle, a battle that pitted neighbor against neighbor. For project supporters in the community, the key to healing and cooperation manifested in the opportunity to share in the management of and benefits from the conservation easement offered by landowner McCrady. As Dr. Wasilak expressed the opportunity: “We can protect the environment as a whole while making adjustments to accommodate modern growth patterns” (Wasilak to DEP, 3), an adaptation of the wise use philosophy that political scientist Phil Brick warned was usurping the environmental movement’s claim to represent the public interest. (Brick, 198).

Upstream of the project site and originally intended to be named the Rachel Carson Wetlands Conservancy, this 93-acre property was the crown jewel of the new and revised Deer Creek Crossing plan. While there were some ecological disturbances in the easement area from motorized recreation and past mining activities, most of this property was in beautiful, natural condition. According to the Army Corps' Statement of Findings, the 93-acre easement included 3,900 linear feet of Deer Creek, 18 acres of high-quality wetlands, and nearly 20 acres of forested riparian floodplain (US Army Corps, 42). In contrast, the Deer Creek project site, a 243 acre parcel, contained less than ten acres of wetlands, with less than four acres rated high quality. For those who applied an environmental cost/benefit analysis to the Deer Creek Crossing controversy, there was a powerful incentive to consider whether protection of higher quality green spaces might not indeed be worth the environmental loss on the project site.

Dr. Bledsoe adopted precisely that position, calling the conservation easement an opportunity "to get what is a true gem in Allegheny County . . . pristine, virtually undegraded natural wetlands" (qtd. in DEP 2001, 76). They were better, he argued, than any other wetlands in the county, the same descriptive terminology contained in the Western Pennsylvania Conservancy's Natural Heritage Inventory and earlier mobilized as an opposition argument. The contradiction arose from the blurred distinction between the project site wetlands and the conservation area wetlands, a confusion rhetorically exploited by the opposition. Bledsoe was unequivocal in his analysis: "From a strictly environmental perspective, not to take advantage of the opportunity to preserve wetlands that are truly rare in Allegheny County . . . that's a mistake" (qtd. in DEP 2001, 76).

ORIX-Woodmont attorney Terry Bossert noted that the conservation easement prevented development within the easement boundaries in order that it could function as an environmental



education site. It would also be available “for just plain fishing and recreation”, an attractive offer to many local people who had played near and explored Deer Creek in their youth (qtd, in DEP 2001, 27). They liked being reasonably sure that the easement property would be protected from the sort of commercial development that threatened the Deer Creek Crossing project site. Of course, a high quality natural area like the conservation easement would be a very good thing for everyone interested in the environment, recreation, or education. But like the highway improvements it would only happen if the project received approval. Many supporters found these advantages to be persuasive. Dr. Wasilak explained it this way: “Is this gift tied to the approval of Deer Creek Crossing? The answer is yes. Can we afford to let this opportunity go by? The answer is a resounding no” (qtd. in DEP 2001, 46). Accommodation is a powerful persuasive strategy. The appearance of reasonable positions - adaptable, cooperative - made it more likely that the general public would reconcile the consequences with the benefits. It also had a reinforcing effect on regulatory agencies already trying not unduly to obstruct development. For Dr. Bledsoe, the redesigned project plan embodied that collaborative spirit. “It’s my reading of the revised proposal for the Deer Creek project, that compromise and consensus has been achieved, [insofar] as responsible development and responsible environmental protection can be achieved” (qtd. in DEP 2001, 73).

Speaking at the second public meeting, architect Jay Sukowski maintained that regulatory cost/benefit analysis was too often based on “a shell game of incentives towards development” and not on long term effects (qtd. in DEP 2001, 105). “Development would make sense if the payoff benefited ourselves and our communities. But, in the long run, they undercut economic and environmental gains” (106). The traffic studies indicated that daily use of Route 910 would rise from the current 15,000 cars to 50,000 cars a day (Steve Ludner, DEP 2001, 133-134). All

sides agreed that increased traffic would be an inevitable effect of the development but they disagreed on the implications this posed for the well being of the community. The opposition saw the increase as impinging on the general quality of public life, while supporters thought it meant increased economic activity and opportunity. Once again, both sides framed the same statistical projections as support for different conclusions.

A number of residents of Harmar Township's adjacent northern neighbor, Indiana Township, spoke at both public meetings to express concern for how Deer Creek Crossing would affect them. But concern for the effects of the development on neighboring communities seemed to be a low priority for the municipal leaders of Harmar Township. Harmar Township Supervisor John Burns actually implied in the second public meeting that outsiders should not be involved in a controversy that he considered to be the internal business of township government. "I hear a lot of comments from people in this room tonight who aren't even a part of Harmar Township, from Oakmont, from Indiana" (qtd. in DEP 2001, 139). Burns' parochial attitude is not uncommon in Western Pennsylvania. No existing municipal zoning code makes any allowance for the effects that one community's development decisions have on neighboring communities, especially downstream communities. In an area suffering from more and more catastrophic flooding caused by poorly planned upstream development, such insular attitudes are problematic. Communities certainly have the right to control land usage and development within their borders, but they should not be able to exercise that right to the detriment of other communities. Clean Water Action's Silber applied this idea to the extant case: "Mr. McCrady as a property owner is certainly entitled to develop his property, but he doesn't have a right to degrade something that belongs to all of us" (qtd. in DEP 2001, 64).

Overall, the second public meeting had a different tone than the first, reflecting the adjusted rhetorical situation. For ORIX-Woodmont, the first public meeting had been an exercise in enthusiasm and public relations as they anticipated wide public support growing out of their promise of economic opportunity. By the second meeting, that tone had shifted to one of determination and compromise as they battled unexpectedly fierce opposition. For municipal and citizen supporters of Deer Creek Crossing, exuberance had given way to frustration and some desperation as that opposition attacked the consequences of the development, an unwarranted attack in the eyes of supporters. They believed that in addition to the economic advantages, the promised ecological improvements and conservation easement would leave the already damaged project site in better condition than it was presently. And for the opposition, the level of desperation and frustration rose as they came to realize that 1) despite the passion of dedicated activists, the general public simply did not react to impending environmental danger with sufficient fervor to actually halt development projects, and 2) that the regulating agencies interpreted their mission to be more damage control than protection.

### **3.2. Frustration and Philippic: County Council Public Meetings**

In addition to the two public meetings convened by DEP and the Army Corps as part of the permit application process, several Allegheny County Council meetings attracted crowds of frustrated people from both sides. After a period of time in which the developer's exigence arose from determining the arguments most effective with the regulatory agencies, the reinsertion of the public once again brought emotion back into the process and reclaimed the attention of the media, redefining the developer's exigence with an infusion of public relations concerns. Although the Allegheny County Council had no formal role in the environmental evaluation of Deer Creek Crossing, they had been involved in certain economic aspects of the controversy

since 1999, when the redevelopment TIF was first approved. County involvement faded into the background during the time that the DEP and Army Corps hearings were occurring, but never ceased altogether. While the opposition focused mainly on environmental issues, the TIF played out as a constant subtext to the principal regulatory arguments. After regulatory approval of the development plan in August 2002, PennFuture's first legal action was not an environmental appeal of the permits but an economics-based challenge to the TIF. An appeal to the Environmental Hearing Board followed, but many in the opposition thought that the best chance of derailing Deer Creek Crossing lay in convincing Allegheny County Council to rescind the TIF. Council's importance increased after the regulatory agencies approved the environmental permits because the TIF package became the last procedurally active option available to opponents of the development. Every other avenue of opposition had been lost and now turned on legal appeals rather than regulatory decisions. Only the TIF was undecided.

That debate presented a more difficult obstacle for ORIX-Woodmont. Where the ethos of their consultant credibility and their logical, rule-following behavior had the advantage with DEP and the Army Corps, the opposition had a more credible, more logical case regarding the TIF. PennFuture attorneys argued that since the TIF had originally been awarded, the project had undergone sufficiently extensive changes that a new TIF application and a new County Council approval process should be instituted. The irony of the situation disturbed many supporters of Deer Creek Crossing who watched in amazement as the very project improvements meant to make the development more environmentally sensitive were used by the opposition to create justification for attacking the TIF. Yes, the opponents seemed to say, it's a better plan now, not so damaging to the environment. But the changes make it different enough to require a new TIF approval which we oppose. They successfully challenged the TIF in court and forced

reconsideration in County Council. Because public hearings were a requirement of tax increment financing, citizens got another chance to voice their opinions in February 2005 very late in the process.

### **3.2.1. Natural Blight**

Citizens who spoke in opposition to the Deer Creek Crossing TIF at Allegheny County Council meetings focused on three points: 1) that the area in question was not in fact “blighted” as defined by the TIF statute, but an undeveloped natural green space; 2) that supplying assistance from tax revenues collected from the whole of Allegheny County to help fund a development that would affect only a small part of the county was an unwise use of tax dollars, especially given the many truly blighted urban areas that existed in the County; and 3) that the developers who stood to reap the economic reward of a successful development should also assume the economic risk of investment. The opposition attack was based principally on the misapplication of the term “blighted.” Green space, they argued, cannot be designated blighted within the original intent of urban redevelopment law. Declaring the project area blighted for the sole purpose of making it eligible for the TIF would be illegal, they maintained. This battle gained its significance from the public statements of the developer that without the TIF, Deer Creek Crossing would not be economically viable (Whitney, “Developer,” B6).

Structurally, the Council meetings were somewhat more open and interactive than the regulatory hearings. While public speakers were still limited in time allotted and still had no ability to directly question other speakers, individual Council members did. When Council representatives asked questions, they required answers. When they wished to make a comment, they did so. That bit of interaction alone distinguished the Council hearings from the regulatory hearings. People were more familiar with feeling anger towards politicians, so County Council

hearings tended to be considerably more pathos-driven. No transcripts were produced, so all observations, including direct quotations, are from the author's field notes unless otherwise cited.

A 2 February 2002 regular meeting of the Allegheny County Council dramatized the public belief that the intent of the Urban Redevelopment law, the enabling legislation for tax increment financing, had been distorted into subsidizing the destruction of greenfields. Blight designation required that only one of seven possible conditions be present and the Deer Creek property, argued the proponents of the development, had satisfied two: 1) economically undesirable land uses, because the undeveloped land was not "achieving its full economic potential," and 2) faulty street and lot layout, because the "existing interior roadways . . . (were) inadequate for supporting future development" (Redevelopment Authority of Allegheny County, 38a). PennFuture attorney Joan Miles pleaded with council members to listen to their constituents, who had mailed hundreds of postcards objecting to the misuse of the term blight. Robert Silber argued that greenfield TIFs unfairly drained money from areas with real blight and went on to characterize tax increment financing in general as anti-free market.

Some council representatives seemed honestly concerned that something improper had occurred. "Is the TIF being misused?" asked Councilman Mike Crossey. Council President James Simms had serious concerns about the economic effect that a new taxpayer-subsidized development might have on existing commercial centers. And Councilman Dave Fawcett expressed concern that ORIX-Woodmont continued to move forward with development plans in reliance on the TIF even though that was now in contention. He urged them to stop activity until Council settled this matter. This meeting occurred early in the Deer Creek Crossing TIF process, before anyone knew how long a period of time -- nearly three years -- would pass before Council

did in fact settle the matter. At this point, there was considerable sympathy from several Council members for the opponents of Deer Creek Crossing.

A month later, County Council's Economic Development committee heard Harmar Township Supervisor Don Muse argue that new evidence of blight had appeared. Citing an article in the Valley News Dispatch, he noted DEP spokeswoman Betsy Mallison's warning that a mining company bankruptcy had raised the real possibility that a flooded local mine could "break out" [overflow] into stream tributaries, one of which was Deer Creek. If that happened, DEP warned: "Deer Creek could turn orange and pollution would kill the aquatic life, including trout stocked there" (Start, "LTV bankruptcy," 1). A dead stream, argued Muse, would surely be an irrefutable indication of blight. Because the designation of the project site as blighted was the single weakest link in the chain of TIF support, Muse felt compelled to circulate as evidence a *potential* indication of blight.

In the most obvious Deer Creek Crossing example of Moore's framing/reframing strategy, PennFuture hired Thomas Bartnick, a professional urban planner, to provide a competing economic analysis of the projected benefits of the shopping mall. Bartnik argued that the Deer Creek Crossing TIF plan met neither the spirit nor the letter of the redevelopment law. Open green space, he contended, could not reasonably be designated as undesirable and therefore blighted. Nor could a faulty street and lot layout, the second element that justified the TIF, provide evidence of blight on open green space. Responding to a direct question from Councilman Tom Shumaker as to whether the county ought not to defer to local authority in matters within municipal borders, Bartnik explained that he was questioning economic projections and assumptions, not the authority of local government. Although the interaction was limited, with only Council representatives permitted to ask questions, this was a good

example of how much more open these hearings were. Councilman Shumaker, an attorney who represented the district that contained the Deer Creek Crossing project area, used this opportunity to conduct a somewhat adversarial cross-examination of Bartnik's opposition position. He quizzed Bartnik pretty sharply about his economic predictions and why they differed so much from the ORIX-Woodmont analysis. Competing consultant analyses of the same problem produced conflicting conclusions. But the Allegheny County Council seemed not to respond to the scientific and economic credibility of the experts so much as to the political implications of their decision, and that also differentiated these hearings from the regulatory hearings.

Bartnik had originally been retained by PennFuture to evaluate the actual project development plan during the second environmental permit application process. In a 7 June 2002 letter to DEP's Tim Dreier, he had constructed a highly critical review of the Deer Creek Crossing economic and market projections as well as of the developer's alternative site analysis. But he didn't stop with a critical review. In addition, he offered an alternate development plan, which he labeled the "Win-Win Alternative." It adopted what had been until now a developer strategy: compromise and accommodation, a mirroring and matching strategy. Bartnik contended that ORIX-Woodmont could construct the shopping mall in a far less environmentally destructive way and still develop over one million square feet of commercial space, and he supplied construction drawings purporting to prove it. This was a pivotal argument for the opposition because if the basic project purpose could be accomplished using a less environmentally damaging option, the law required that it must be done that way. Bartnik contended that the win-win alternative offered that option. In response, ORIX-Woodmont CEO Stephen Coslik wrote a letter of refutation, dated 19 June 2002. Coslik asserted that Bartnik based his win-win alternative on a series of "false assumptions and unrealistic solutions," not the



least of which was that property owner McCrady would agree to a drastic reduction in the purchase price (Coslik to Dreier). Bartnik defended the proposed price reduction by pointing out that the lower price “would still represent a net gain of more than 10 times the amount paid for the land and more than 35 times the property’s current assessment” (Bartnick to Dreier, 4-5). Dismissing as absurd the notion that a landowner who was already donating nearly a hundred acres of adjacent land for a conservation easement would have any interest in voluntarily reducing the purchase price by nearly one-half, Coslik attacked Bartnik’s win-win alternative as grossly speculative and generally unsupported by the facts (Coslik to Dreier).

Bartnik protested that the development plan was unnecessarily destructive to the environment and that “it is the burden of the developer to demonstrate why it is necessary to . . . brutalize the topography to such excessive extremes.” The developer, contended Bartnik, had not demonstrated the economic necessity of that level of environmental devastation, regardless of the extent of any mitigation plans. He argued that the win-win alternative offered an acceptable and economically viable alternative (Bartnick to Dreier, 6). These arguments, so transparently speculative to Coslik yet appearing so accommodating in character, served only to exasperate the developer and harden already rigid positions. Coslik attacked the language used by Bartnik to describe the Deer Creek Crossing development plan and the motivation of the developer. “A document,” said Coslik, “which uses expressions like “brutalize the topography” and “arbitrarily creating private corporate wealth” can hardly be seen as an objective analysis. The win-win alternative, he argued, was unrealistic and should not provide any basis for delay (Coslik to Dreier, 1). This indirect exchange constituted the most vivid example of Lange’s reciprocated diatribe in the entire controversy. Neither side could understand how the other’s

position could be defended. Instead, the escalation showed how positions were hardening into irreconcilable conflict.

Coslik most objected to what Bartnik called the fundamental flaw in the Deer Creek Crossing development plan: “It attempts to superimpose a two-dimensional plan on a three-dimensional site and then deal with the topography and natural features as an afterthought” (Bartnik to Dreier, 3). Coslik neatly reversed the language and fired it right back at Bartnik: “The most fundamental problem with the [Bartnik] Letter, however, is that it sets forth a two-dimensional sketch for a three-dimensional site and uses that unrealistic scenario to draw inaccurate conclusions” (Coslik to Dreier, 3). Overall, the Bartnik-Coslik debate accomplished very little in the way of the rapprochement probably envisioned by Bartnik when he developed the win-win alternative. By that point in the process, ORIX-Woodmont had successfully captured the high ground in the compromise and accommodation battle. With two separate, and very expensive, permit applications that had reduced the environmental footprint of Deer Creek Crossing, many people had begun to consider the matter essentially closed. Further opposition was encumbered by the perception that bad faith and unrealistic expectations motivated the opposition. While persistence was a virtue, excessive persistence became antagonism, a vice. Rosenberg disagreed. “This is not a case,” she wrote in a letter to DEP, “of persistent environmentalists blocking a legal project. It is a case of persistent developers trying to push a square development into a round hole” (Rosenberg to Dreier, 10).

Direct questioning by Council representatives continued at the regular Council meeting of 16 April 2002. Attorney Rosenberg tried to allay the fears of some members that rescission of the Deer Creek Crossing TIF could expose them to legal action. No liability existed, argued Rosenberg, when a developer chose to proceed knowing that the TIF was under challenge.

Shumaker immediately demanded to know if Rosenberg could guarantee that no liability existed, which of course she could not do given the substantial discretion that judges enjoy. To the surprise of average citizens who get involved in legal challenges to political decisions, there is little certainty in judicial interpretation of the law.

Just as Supervisor Muse had previously tried bracketing the definition of blight between imperfect lot plans and potential water pollution, now Dr. Wasilak attempted to connect the blight designation to the economic distress of the nearby towns of Cheswick and Springdale. Both were in the Allegheny Valley School District, but neither contained the TIF district. While there were disagreements about whether the subject property was properly designated as blighted, there was no question that the nearby towns had blighted areas. When Wasilak suggested that the development site's eligibility for tax increment financing should include property that was merely geographically close to blighted areas, he only illustrated the weakness of the Deer Creek Crossing TIF. Supporters would have been better served to stand behind the relative stability of the conditions that had permitted the blight designation in the first place: undesirable land use and faulty street and lot layout. Stretching the definition made them vulnerable to common sense refutations that only served to make Deer Creek Crossing opponents appear more reasonable. Nothing substantial emerged from these early meetings. The issue simmered in the background, moving at a typically glacial political pace, until it finally concluded almost two years later.

### **3.2.2. The Public's Last Stand**

Meanwhile, on the legal front, PennFuture had finally convinced a court that the Deer Creek Crossing development had changed enough to nullify the original TIF award, and County Council took up the question of whether to reauthorize the award. In the final Allegheny County

Council public meeting regarding the Deer Creek Crossing TIF, on 2 January 2005, the legal fiction that the project site was blighted received a ferocious pounding. Unless otherwise noted, all following observations, including direct quotations, are taken from the author's field notes. Many of the speakers were by now familiar names, having faithfully attended nearly every public meeting about Deer Creek Crossing in the last seven years. But some, from both sides, were new faces who came to participate in a last, desperate attempt either to secure or to forestall the Harmar Township development. New opposition speakers sounded especially incredulous and frustrated by the conflicting definitions of blight. Private citizen Paul Brown expressed disbelief that a well-intentioned redevelopment law had been corrupted and contended that project supporters did not see it because they did not want to see it. "It is intellectually dishonest," he fumed, "for county government to have declared undeveloped green areas such as Deer Creek . . . as blighted." Another new voice, James Georgalas, seemed amazed that the blighted designation could be applied to property for which the owner, McCrady, was poised to collect an enormous sum of money. Under what contorted definition of blight, he wondered, could property under contract for sale at the price of \$9.8 million dollars be considered blighted?

These were points that had previously been made at other meetings by opposition speakers. Words and definitions had been twisted and distorted by both sides to serve the purposes of their respective arguments. What does blighted really mean, asked the opposition, if it can be misused like this? What does pristine really mean, countered supporters, if it can be misapplied to degraded property? Representing a local ecumenical group, Jean Zang noted that language works socially only to the extent that we agree on the meaning of words. "We all know exactly what blight means. No one in this room gets an image of a wooded hillside in their head

when they hear the word blighted . . . (but) some politicians decided to take that word and twist it in deceptive ways . . . we voters can clearly see how dishonest this is.”

Not everyone interpreted the spirit of the redevelopment law the way opposition speakers did. Dr. Wasilak, who had by this time retired as superintendent of the Allegheny Valley School District, adopted a strict constructionist view that privileged the letter over the spirit of the law. “It [the TIF] is in compliance with the law, irrespective of what one might think the intent of the law is.” This was a technical argument that indicated that the trade-off between economic opportunity and environmental loss was a transaction that he vigorously supported.

The process and the public’s place in it, especially the public from outside the Allegheny River valley, remained a divisive topic, with Harmar Township’s Muse complaining of “the opposition of special interest groups,” and Dr. Wasilak remarking that during the long approval process he had listened closely and “heard all the outsiders.” These observations arose from frustration with how incredibly long it had taken to reach this last hurdle, and out of a nagging fear that somehow, someday, the threat of derailment still hung ominously over the project, embodied by those same outside, special interest groups. Cheswick resident Larry Pollick worried that too much public input might skewer the greater community good. “I’ve seen how small groups of people can compromise the political process,” he said. On the other side, PennFuture’s Heather Sage thought that “public participation has made the project better.” Certainly it seemed that the public had exerted a substantial effect on the project design. Even Woodmont CEO Coslik admitted that the developers had “listened and adapted” and that project plans had undergone significant environmental changes.

Time and again, opponents returned to their strongest argument, the questionable application of the term blight to the Deer Creek site. They argued that TIFs were authorized by a

law designed to help once highly industrialized areas such as Allegheny County turn their old mills and factories into new economic opportunities by encouraging developers to take on the cost of cleaning up these “brownfields.” There is little question that local brownfields remain of secondary interest to developers because of the potential cost of environmental clean-up stemming from the region’s highly industrialized past. But Sage reminded Council that Allegheny County had established goals aimed at developing brownfields as well as revitalizing urban centers. “We shall not succeed if the tools and incentives that we have are wasted on projects like Deer Creek Crossing where there is no blight,” she warned. Wray of the Sierra Club also argued that the Deer Creek Crossing TIF jeopardized taxpayer dollars because during the years that the ORIX-Woodmont developers had spent in contention over the environmental permits, the rival Pittsburgh Mills commercial center had neared completion. “Is not the taxpayer taking a significant risk in betting on the economic viability of the Deer Creek development? What are the chances of Harmar Township being left with a white elephant in ten years time?” Property owner McCrady used this argument to undermine the credibility of the opposition, arguing that the targeting of Deer Creek Crossing for an all-out assault by environmental groups who did not similarly oppose the Pittsburgh Mills development had resulted in an unfair economic advantage that produced the very circumstances to which Peter Wray referred.

Convictions regarding unfair economic advantages offered the opposition a compelling argument. How was free enterprise served by providing tax increment financing to Deer Creek Crossing? Clearly, it would help both ORIX-Woodmont and land owner McCrady to reduce construction costs and increase profit by transferring financial responsibility for road improvements to Allegheny County taxpayers. But opposition speakers did not think that was

where the financial responsibility ought to be. They argued that the investors who would extract the profit should assume the risk as well. “Since when,” asked the Sierra Club’s Chris Seymour, “did capitalism need subsidies?” If the project was economically untenable without taxpayer participation then it was simply economically untenable and ought not to be done, opponents argued, contending that it was less likely that ORIX-Woodmont *could not* proceed without the TIF than that they *preferred* not to. The TIF would decrease their capital investment by nearly \$25 million dollars and would logically increase their potential profit by the same amount. Understandably, the developer greatly desired public investment. But that alone, argued the opposition, should not pressure the County Council into an action that might have negative consequences for other parts of the county. Several speakers thought that could very well be the result of the Deer Creek Crossing TIF. Myron Arnowitt of Clean Water Action identified that as the central question of the TIF debate: “That is the critical issue. Are we just stealing it [taxpayer money] from someone else?”

Throughout this controversy, both sides interpreted conditions so as to support their position, even to the extent that consistency sometimes became a casualty of argument. The use and misuse of the words “pristine” and “blighted” was one example. Another appeared in the battle over the TIF. Supporters wanted free enterprise and market forces to drive the decision but only to the extent that they did not interfere with government subsidies. Opponents wanted the TIF denied ostensibly because of the risk to taxpayers, but actually as a tactic to derail the whole Deer Creek Crossing development. Nor was Allegheny County itself immune to charges of holding conflicting positions. Regional environmental leader Stan Sattinger pointed out that Allegheny County had paid for the Natural Heritage Inventory, the very study that had determined that the Deer Creek valley was an important biodiversity area deserving of a high

level of protection. Now ten years later the county seemed to be engaged in paying part of the cost of destroying it.

As the controversy continued, year after year, meeting after meeting, the place of irony in public environmental argument became more apparent. With sufficient repetition fixed positions came to seem so fundamental that people adopted obviously counterintuitive arguments in an effort to protect their interests. The new superintendent of the Allegheny Valley School District, Dr. Charles J. Territo attempted to persuade opponents of Deer Creek Crossing -- most of whom based their opposition on environmental objections -- that the educational potential of the 93 acre easement should override all concern for the existing environmental value of the project site itself. "We will be teaching students," he said, "the kinds of things that they will need to know to support the environment *in the future*" (emphasis added).

### **3.3. Measured Observation in the Press**

As the primary audience shifted from the general public to the regulatory agencies themselves, the use of the press as a conduit for the dissemination of arguments and influence declined. Public opposition had been aroused to the extent possible. Interested parties were aware of the controversy. Those that were inclined to engage were already engaged, and those not inclined were not. With the second public meeting concluded, the control of public opinion devolved from a central opposition goal to one of secondary importance: legitimizing the activist groups now leading the fight. The most visible opponents stayed visible, but the time had passed when public opposition, declining in intensity, could affect the regulatory decision. Well-funded activist groups may be essential to successful grass roots political action, but their presence tends to reduce the engagement of the general public. The more the groups stepped into the lead, the less individual citizens felt compelled to remain active, although they certainly



remained aware. But if organized group involvement eventually had a chilling effect on public activity, it also offered the most realistic chance of successful opposition once the public input component of the permit application had concluded. Once the environmental permits had been issued in August 2002, the battle moved from the court of public opinion to courts of law, and only well-funded opposition groups like PennFuture could compete there.

### **3.3.1. Objectivity Versus Conviction**

Newspapers remained the primary source of news coverage and the only media source for in-depth coverage. Television and radio stations broadcast only the most significant activity and even then presented very brief, one or two sentence reports. Pittsburgh Post-Gazette environmental writer Don Hohey spent far more time writing about Deer Creek Crossing than any other single reporter, with more than 25 newspaper articles under his byline between 1999 and 2005. Hohey remained very skeptical of the claims made by ORIX-Woodmont, and his articles continued to focus on the danger to natural resources. That is not to suggest that he did not strive for objectivity, only that given his specialty he examined the developer's claims critically. Though other Post-Gazette staff reporters also covered the story, they had less of an environmental background and adopted a more general approach. Virtually every Hohey article emphasized the environmental damage that could be expected from construction of Deer Creek Crossing. When recounting the support offered by Harmar Township and the Allegheny Valley School District, he unfailingly cited the substantial increases in property tax revenue as their primary motivation. Even in the article reporting the DEP denial of the first permit application, a clear if temporary victory for the opposition, he used words and phrases intended to keep the public alert and aware of the controversy. DEP, he wrote, rejected the application by the developers to "fill in a *popular* fishing stream and wetlands . . . under 8.5 million cubic yards of

rock fill and dirt.” He implied that there was continuing public use of Deer Creek, “a popular fishing stream,” and used stunningly large numbers to describe the proposed rock and earth fill proposals (“Deer Creek Crossing,” C1, emphasis added). In fact, Hopey wrote very few articles about Deer Creek Crossing in which those numbers did not appear. He kept the healthy ecological condition of most of Deer Creek in the forefront, often mentioning that a fish survey of the stream within the actual project area had found “a variety of game fish indicative of good water quality and habitat.” He reported that the resource agencies considered proposed mitigation plans to be “inadequate and poorly conceived” (“Developer appeals”, C9). Hopey was a reporter struggling to be objective while his own convictions tugged him toward the side of environmental protection. His comprehensive coverage of the controversy played a significant role in sustaining public interest.

During the period between September 2001, when DEP announced that another public hearing would be held to discuss the revised Deer Creek Crossing application, and August 2002, when DEP announced approval of the revised permit, Hopey wrote six articles about the controversy for the Post-Gazette. In most of them, he repeated several facts meant to trigger a public response: 7 or 8 million cubic yards of fill would be dumped onto the Deer Creek floodplain; studies had shown that Deer Creek currently supported game fish; Deer Creek Crossing’s major supporters expected significant increases in tax revenue; and the opposition included highly credible and well-known agencies and organizations. Hopey understood that once the second public meeting of October 2001 had ended, the public was effectively shut out from influencing the regulatory decision process, except insofar as pressure might be brought to bear on elected regional and state politicians. While other newspapers were reporting only new facts and new developments, Hopey consistently repeated established details that cast doubt on

the wisdom of approving Deer Creek Crossing. By this time, given the penchant of the regulatory agencies to protect through accommodation, he surely was expecting DEP to approve some sort of revised development plan. The most realistic chance at preventing that approval appeared to reside in political pressure. If the regulatory agencies believed that the political response to public pressure would see denial as protection rather than obstruction, they would probably deny it. Therefore, Hopey kept the interested public aware of the significance of the proposed project.

In the 24 October 2001 article announcing the public meeting for the second, revised Deer Creek Crossing permit application, Hopey quoted PennFuture president John Hanger: “The new proposal, instead of moving the stream, just entombs it in concrete, and still does real violence to important wetlands.” In choosing a fairly inflammatory quote to describe a revised proposal that was less destructive than the original, Hopey undermined the presumption that accommodation would eliminate most of the environmental damage (“Revised Deer Creek plan,” D3). In the summer of 2002, Hopey wrote that DEP had issued a “pre-denial letter” to ORIX-Woodmont warning that without further revision the second application also would be denied. He portrayed PennFuture attorney Jody Rosenberg as cautiously optimistic. “I think DEP clearly agrees that Deer Creek has immeasurable and irreplaceable value and it’s leaning toward a second denial” (“Deer Creek developer, A9). But Hopey reported some troubling statements as well. Charles Duritsa, DEP Southwestern Regional Director seemed pleased when he said, “It was clear that this application is much improved over the first proposal.” Stephen Coslik, Woodmont CEO, related that DEP had “shared its concerns . . . and suggested changes.” Duritsa’s remarks reinforced the strategy of accommodation and compromise as the surest route to DEP permit approval. Coslik confirmed that when he related that unnamed DEP officials had

told him bluntly that “if the developer can satisfactorily address the issues, a permit could be issued” (Deer Creek developer,” A9).

One day after DEP released the pre-denial letter, the US Army Corps of Engineers announced that it had issued a permit for Deer Creek Crossing, provisional on contingent on the developer complying with the DEP conditions. Because construction could not start until both regulatory agencies had approved a permit, the Army Corps had effectively shifted the responsibility to DEP (“Deer Creek project gets boost”, B8). A week later Hopey wrote about another set of revisions that ORIX-Woodmont offered in the spirit of cooperation and compromise. The new plan would reduce the development footprint from 105 to 100 acres, although site preparation and road construction would still affect virtually the entire 243-acre parcel. The principle of accommodation percolated deeper and deeper into the Deer Creek situation and permit approval began to look more and more likely. So ingrained into the regulatory process was this principle that DEP officials seemed to feel no conflict in assisting the developers to design plans aimed not at environmental protection but at minimizing the damage. “We are continuing to work with the DEP staff,” said a confident Stephen Coslik, “to make the changes that will allow this project to go forward.” Hopey agreed and wrote that, “shrinking the development to accommodate the protections for the popular fishing creek and its riparian habitat could pave the way for state approval” (“Deer Creek mall site plan revised”, B4).

It is natural to search for compromise when an impasse exists. The two sides in the Deer Creek Crossing controversy remained at impasse, utterly at odds with each other, each unable or unwilling to understand the contrary position. ORIX-Woodmont, by initially submitting a proposal with colossal ecological impact and then making continuous alterations, succeeded in appropriating the image of a reasonable, compromising developer.

Hopey reported on the political aspects of the controversy as well. He repeatedly referred to the “politically connected Texas developer” and very often listed by name those politicians and administrators contacted by the developer, a list ranging from DEP officials and state politicians to US Senators and Congressmen, to local and county politicians. He wondered why “the developer’s former point man, Joseph S. Howell III, a resident of Texas . . . contributed money to several local Pennsylvania politicians” (“Developer trying again,” B11). And he never referred to Howell’s replacement as spokesman for the ORIX-Woodmont without noting that Terry Bossert was a former DEP chief counsel, intimately familiar with the customary approval procedures within the regulatory agency and acquainted with what strategies worked and why. The presence in a newspaper article of any of these constituent elements -- the environmental damage, the existing healthy ecosystem, the opposition of resource agencies, the political connections, the local political contributions by an out-of-stater, or the tactical choice of spokesman -- could be understood as diligent and comprehensive reporting. But when they were repeatedly emphasized it reduced the appearance of impartiality. Hopey never overtly mentioned his own opinion of the project, which would be more appropriate to editors and columnists, but the choices he made regarding what was reportable revealed his environmental sympathies.

On 22 August 2002, DEP approved the Deer Creek Crossing development plan. DEP had reached the point where, despite resistance from field-level operatives, the administrators felt they had to reach an agreement, that they had minimized the effects of Deer Creek Crossing to the extent that they could without being labeled as obstructionist. DEP Regional Director Charles Duritsa summed up very concisely the DEP official position: “The approved plans will allow protection of the Deer Creek aquatic habitat while allowing the shopping center project to

be built” (Hopey, State OK’s Deer Creek complex, B1). The difficulty of making those two conditions occur simultaneously seemed not to enter the decision calculations.

Deer Creek Crossing, Hopey reported, was named for the creek that ran through the center of it. The irony of Deer Creek Crossing destroying the Deer Creek ecosystem seemed lost in the supporters’ jubilation and the disappointment of the opposition. Most local people were probably just glad to end such a divisive episode. But of course it wasn’t over. As Hopey reported, “Construction could be delayed, however, by legal challenges to the permit decisions by one or more of the 20 sportsmen’s, environmental and citizens groups that opposed the development” (“State OK’s,” B1.) And it was, nearly instantly. The day after DEP approved the ORIX-Woodmont application, PennFuture filed a lawsuit to stop it. Jody Rosenberg boldly proclaimed: “Clearly DEP’s previous insistence that the developers protect the environment was simply a legal fig leaf to cover their shameless failure to do their duty . . . We intend to take legal action to stop this development from destroying the area” (qtd. in Hopey, “State OK’s”, B1). Hopey concluded his report on the approval by quoting Ron Tibbott, fisheries biologist for the Pennsylvania Fish and Boat Commission: “It remains the Fish and Boat Commission’s position that this section of Deer Creek is a public resource much too valuable to risk its degradation by authorizing the proposed encroachments” (“State OK’s”, B1).

### **3.3.2. Conflicting Values as Benchmarks**

Soon after the second public meeting, two other reports appeared in the Post-Gazette, neither written by Don Hopey. A different staff writer, Susan Jacobs, reported on the results of the hearing although she had not been involved in the story to that point. As Jacobs struggled in October 2001 to get up to speed on the controversy, she repeated a lot of facts already familiar to anyone who had been following the Deer Creek Crossing controversy. She determined that there

was actually a lot of agreement on both sides regarding the consequences that might be expected from the construction of Deer Creek Crossing. The real disagreement involved whether the damage was worth the reward. Deer Creek Crossing would bring “big box stores, new jobs and more tax money to the community and surrounding areas. But the 107-acre development . . . would also destroy wetlands, route a creek through a concrete culvert and possibly drive locally owned stores out of business” (“Latest Deer Creek,” N4). Were new stores worth lost wetlands? Were new jobs worth culverting a stream? Were new taxes worth losing old businesses? These questions and others framed the controversy and she chose quotes that illustrated that dichotomy. Harmar Township Supervisor Don Muse said yes, it was worth it. “Our valley is dying without development and our residents need tax relief.” Dr. Wasilak said yes, long range vision compelled approval: “The future is beckoning and will pass by if there is not a positive response to this project.” But Clean Water Action’s Silber said no, the future was actually threatened by the looming environmental devastation. “What is a wetland now, wasn’t necessarily 100 or a 1,000 years ago. They shift over time. The point is really the floodplain. It contains the potential for wetlands” (all qtd. in “Latest Deer Creek ,” N4) Jacobs saw little disagreement on the effects of Deer Creek Crossing, only on the value of those effects. Once again, the argument turned on conflicting interpretations of the same facts. It seemed strange that the same data set produced such diametrically opposed positions, but that is not uncommon when dealing with questions of value.

Jacobs wrote again about Deer Creek Crossing two weeks later, this time focusing more on the possible consequences to the people who had not become actively involved but whose lives would actually be changed by the development. Noting the balance of arguments, she characterized the effects as alternatively the “death knell” or the “panacea” for the Allegheny

River valley: “Everyone agrees that the impact of the development . . . would be profound and long lasting” (Opponents clash,” N1). Jacobs talked to local business owners, people who could expect the most “profound and long lasting” effects from Deer Creek Crossing. She found that lack of involvement did not necessarily signal lack of interest. Some local businesses were already losing ground without the influence of a new shopping mall. Deer Creek Crossing wouldn’t affect Richard Tkac, for instance. His Cheswick Foodland grocery store was closing even without the competition from Deer Creek Crossing. Tkac blamed a bad economy, made worse by the New York City terrorist attacks, for his store’s failure. “There is no business here. They’re just not buying” (“Opponents clash,” N1). On the other hand, Springdale music and video store owner Bill DePew wasn’t worried about possible competition from a new mall. In fact, he supported it because he thought the Allegheny River valley needed commercial expansion and that the strongest businesses would survive. “We’re established. We have a very strong clientele. I think the area needs to develop” (“Opponents clash,” N1). Perhaps DePew’s laissez-faire attitude prematurely dismissed the danger to his business of competition from a new, modern, destination-type shopping mall. He showed little sympathy for local businesses that lacked his loyal customer base, if in fact they remained loyal after Deer Creek Crossing opened for business. Hardware store owner Bill Lane reacted to the predicted mall competition from a familiarity forged in the already fierce competitive wars between small businesses and hardware super-stores like Home Depot. He was ready to play the competition game but he did not like local government tilting the playing field by subsidizing the new development with tax-increment financing, some of which came from his own tax dollars. “The only thing that bothers me is that the government is giving them money.” Lane believed that other stores not previously exposed to big-box store competition would be adversely affected. Less concerned with his own



vulnerability, he nevertheless reacted sympathetically to the potential distress of other businesses. “They’re stealing sales from people here that are already established. They’re not creating new sales” (“Opponents clash over retail plan,” N1). Jacobs painted a human face on the controversy, a real-world snapshot of worry and distress. With Hopey writing about the environmental threats and Jacobs looking at the possible human costs, it cannot be said that opponents of Deer Creek Crossing got less than a fair chance to air their views, at least in the print media.

### **3.3.3. More Editorial Skirmishes**

While staff writers tried and often succeeded in reporting with some sense of objectivity, no such restraint could be expected from columnists, op-ed authors and editors, whose job it was to choose sides and defend their choice. Most of the unabashedly partisan pieces in late 2002 and early 2003 were either fully or partially opposed to Deer Creek Crossing. On 24 July 2002, Post-Gazette North edition editor Brian David put his tongue firmly in cheek and wrote sarcastically: “You know, when the mills are closed, jobs are scarce, housing is iffy and the future has more questions than answers, the obvious thing to do is buy smelly good stuff at Bed, Bath and Beyond. A bleak existence dipped in lavender might still be bleak, but at least it smells like a spring evening” (David, 5). Of course, these conditions were precisely those that Deer Creek Crossing supporters claimed would be alleviated by an injection of new commercial activity. But Brian David saw no population base in or near to the Allegheny River valley able to support such a huge new development. Shopping malls were now destinations, he rationalized: “The whole idea is to put them in the middle of nothingness to create somethingness,” a risky proposition at best. David admitted that he might be wrong about that and Deer Creek Crossing could initiate the very economic boom that mall supporters gambled it

would. But don't bet on it, he concluded. "Something could go wrong (or right if you're a Green Party sympathizer). Frankly that's where I'll put my money. This is, after all, the Allegheny Valley we're talking about" (David, 5). Remarkably cynical, Brian David was prepared to grant few if any of the assumptions underlying the economic hopes of Deer Creek Crossing supporters. He played on the sense of inferiority that permeated so many valley residents' attitudes. They automatically expected not to share in the social and economic opportunities that accrued to other regions of Allegheny County. David's cynical editorial did not contain the sense of conviction that legitimated opposition positions.

Straightforward anger and bombast characterized the Raymond Proffitt Foundation's editorial news bulletin "Pollution Update" for 24 August 2002, two days after DEP issued the Deer Creek Crossing permit. "Savvy conservationists have long satirized the state Department of Environmental Protection as the "Don't Expect Protection" agency . . . over the long run, it has handed the rape-and-scrape crowd win after big win" (Gregory, "Don't expect protection") Located in eastern Pennsylvania, the Proffitt Foundation defined its mission as vigorously promoting proper enforcement of environmental protection laws. They had a special interest in Western Pennsylvania's coal mining problems and the protection record of the Pittsburgh office of the US Army Corps of Engineers, which kept them attuned to the local environmental situation. Noting that the Army Corps, "like DEP, hardly a friend to fish and wildlife" had previously issued a provisional permit, the editorial bulletin caustically denounced ". . . DEP's goodbye kiss to Deer Creek, the bulldozer operators now have all they need to begin converting several hundred acres of Pennsylvania into yet another monstrosity of neon lights, plastic food, parking lagoons, and cigarette butt-filled gutters" (Gregory, "Don't expect protection"). If the choice of words seemed especially fierce, it accurately reflected the activist politics of the

Proffitt Foundation, which regularly filed lawsuits to force environmental protection agencies at all levels to carry out their duties. They believed that the importance of environmental vigilance and the possibility that lax protection standards might transfer to other parts of state made the Deer Creek Crossing controversy relevant to state residents.

Not everyone had strong and settled opinions on the consequences of Deer Creek Crossing. Many simply were not sure what social effects new commercial conditions might precipitate. In a letter to the editors of local newspaper the Valley News Dispatch, Debbie Shiring voiced the ambivalence that many people felt about potential development in the Allegheny River valley. “While new developments bring much-needed tax dollars and jobs, progress doesn’t come without a price. The potential for increased noise, crime, traffic and pollution looms large . . . we need to preserve the positive elements that we enjoy here in abundance – scenic green space, low traffic and affordable housing, to name a few.” Shiring worried about the double-edge on the sword of development and argued that no one should automatically assume that the potential effects were all good or all bad. She cautiously supported Deer Creek Crossing but not without considerable trepidation regarding the uncertainty implicit in any significant social change. “Yes,” she worried, “the Alle-Kiski Valley has been discovered. Let’s make sure that in a few years, we’re not longing for the “good ol’ days” when no one knew we existed” (Shiring, “Deer Creek plan”).

If many in the public straddled the controversy or were simply uncertain of which side they preferred, others defended their opinions with singular confidence. Charles J. Territo, Wasilak’s successor as superintendent of the Allegheny Valley School District, emerged as a dedicated and vocal supporter of Deer Creek Crossing. In an op-ed piece published on 8 April 2003 in the Valley News Dispatch, following formal DEP approval of the plan but long before the end of the

legal battles, Territo counseled reconciliation and cooperation in order to progress toward goals that he felt everyone shared. His argument grew out of three uncontested premises: 1) that adequate funding for schools is difficult to secure; 2) that school boards must of necessity be “very sensitive to the tax burden on our citizens, particularly those on fixed incomes”; and 3) that any school board is morally bound to support “substantial and high-quality opportunit[ies] to increase revenue” (Territo, “Deer Creek mall”). If Deer Creek Crossing was arguably an economic engine to increase property tax revenue substantially, then anyone associated with public education should logically conclude that the development constituted a fiscal imperative. Like Wasilak, Territo believed the potential educational benefits were worth accepting the environmental damage. Territo argued that the conservation easement offered the school district an opportunity to become a regional leader in ecological research and education, characterizing the potential uses as limitless. The Deer Creek Crossing project, he argued, “has received more public and governmental scrutiny than any other similar proposal in recent memory.” That comprehensive and concentrated analysis had uncovered a number of legitimate environmental concerns, nearly all of which, Territo thought, had been satisfactorily addressed. The proof lay in the fact that permits had been issued by the state and federal agencies charged with regulating environmental disturbances. Territo conceded that both sides had done what they thought was right, but the time for obstruction had passed. “Further delay,” he wrote, “creates a detriment to both students and taxpayers. Therefore, we call upon all those who have been opposed to this project to let it move forward” (Territo, “Deer Creek mall”). Territo displayed a conciliatory attitude to the opposition that likely resonated with local readers as a reasonable and practical view. Political activism is exhausting. Most people were worn out by the duration and the ferocity of the fight and welcomed some sort of compromise and closure. Territo claimed that

compromise was exactly what the regulatory process had produced. The system had worked as it was designed to work and the time had come for everyone to accept that. Yet that was precisely the opposition's objection. The process *had* worked as it was expected to but not as it was *meant* to. The purpose of environmental protection laws, for the opposition, was not to regulate and minimize damage but to prevent it.

The approval of the second permit application triggered another shift in the rhetorical situation. Local moderates no longer influenced the opposition process. The people and organizations holding the most radical view-- that Deer Creek Crossing would irreparably devastate the stream, aquatic habitat, forest and floodplain of the Deer Creek valley and must not be allowed to go forward under any condition -- now controlled strategic thinking within the opposition. They were in no mood for compromise. PennFuture attorneys announced that they intended to pursue legal remedies to the very fullest extent of the law. The battle of Deer Creek Crossing had been transformed from a local public political action into a synecdochal, environmental "last stand." Other commercial developments of the same magnitude were proceeding throughout the region with little organized opposition and no participation from regional and state activist groups. Professional environmental activists had decided that Deer Creek Crossing would be the great symbolic test case, a reliable indication of the public's ability to exert influence on environmental regulation processes in Western Pennsylvania. Limited resources necessitated hard choices for the environmental movement. Deer Creek Crossing had aroused significant public opposition, captured the attention and assistance of well-funded state and regional citizen groups, offered a strong legal foundation to challenge the regulatory approval process, and had once, if only temporarily, been defeated. That was one more win than most local environmental actions ever had.

So the stage was set for the next act in the Deer Creek drama: county, state and federal courts. Many people were left wondering how the controversy had ever reached this point at all. Two permit approvals had been required from regulatory agencies charged with protecting the environment. Why, if the process had worked properly, was the controversy now headed for court? To place the legal actions in context, the role, responsibility and effectiveness of resource and regulatory agencies should be critically examined.

#### **4. STRUGGLING FOR ENVIRONMENTAL ETHOS**

Although originally coined to refer to certain misleading public relations strategies of transnational corporations, the pejorative term *greenwash*, meaning to disguise destructive environmental behavior behind a façade of environmental concern and responsibility, has now come to include local and regional activity as well. A stylized play on the idea of environmental whitewash, greenwashing has become so common a tactic that it has largely escaped notice and critical evaluation by the general public. Developers have redefined public claims of environmental sensitivity into a persuasive public image tool and a stunningly effective counterpoint to the public distrust of environmental ethics in American business. As a rhetorical expedient, greenwashing is trenchant, decisive, and conspicuously practical. ORIX-Woodmont engaged in greenwashing almost from the beginning of the Deer Creek Crossing development process. In fact, they made it a centerpiece of their approval strategy. Just as accommodation is the key to the environmental approval process in Pennsylvania, so greenwashing is a necessary if not sufficient element of accommodation in environmental controversy.

##### **4.1. Co-opting the Opposition**

If there is one utterly essential element of the Deer Creek Crossing environmental application, without which it was not likely that approvals would have issued, it was the creation of the 93 acre conservancy easement. That single action energized the support of the powerful and influential Allegheny Valley School District, embodied principally in the District Superintendent, Dr. Ronald Wasilak and subsequently Dr. Charles Territo. While potential job creation and an increase in property taxes played key roles in motivating supporters of the application, the enthusiasm and passion with which Dr. Wasilak supported the development

arose mainly from the educational opportunity he anticipated from the conservancy lands (telephone interview).

This chapter explores how Rachel Carson's persona played a powerful role in the Deer Creek Crossing controversy directly -- as in the mobilization of her ethos by both sides, but especially in the developer's choice of greenwashing as a rhetorical tactic -- and indirectly, as an essentially unavoidable subtext in the overall argumentative context. It considers the role of conflicting claims about scientific evidence and examines the prominence of scientific ethos as argument in this case. Finally, it evaluates the contribution and ability of resource agencies like the US Environmental Protection Agency (EPA), the US Fish and Wildlife Service (FWS), and the Pennsylvania Fish and Boat Commission (PFBC), to influence the regulatory agencies charged with determining the acceptability of the Deer Creek Crossing permit applications.

#### **4.1.1. The Taking of Rachel Carson**

Given the location of the controversy, there was no chance of avoiding the shadow of Rachel Carson, who was born and raised in the Allegheny River valley town of Springdale. The opposition did not want to avoid it and the developer -- recognizing an exigence in the power of her reputation -- had no rhetorical choice but to adapt her legacy and try to convert it from an obstacle to an advantage. Part of the ORIX-Woodmont strategy involved creating another, more attractive effect of the Deer Creek Crossing development and then refocusing public attention on the ecologically beneficial aspects of that secondary effect.

When ORIX-Woodmont first proposed the project, they designed the required wetlands mitigation but had no plans to use Rachel Carson's name recognition as a rhetorical device. The idea emerged from an early meeting between Woodmont public spokesman Joseph Howell and James Seif, then Secretary of the PA Department of Environmental Protection (Hopey, "What



Price Progress?”A18). Plans called for the one high quality wetland on the development site, Wetland Seven, to remain untouched by construction activities, although the question of whether or not it would retain its ecological function was hotly debated. The developer also had to create 10 acres of artificial wetlands to replace the on-site wetlands. By destroying and then reconstructing the scattered and degraded wetlands artificially and evaluating them in conjunction with Wetland Seven, the developer contended that overall wetland function on the site would be enhanced. This 13-acre wetlands complex, all within the original-243 acre McCrady property, would be designated as the Rachel Carson Wetlands Conservancy.

The ORIX-Woodmont public relations apparatus immediately began the greenwashing process. Greenwashing, according to science and technology scholar Sharon Beder, means “trying to cover up environmentally and/or socially damaging activities, sometimes just with rhetoric, sometimes with minor or superficial reforms” (“Greenwash”). Redirecting the attention from the general environmental devastation, they focused a significant part of their message on the environmental benefit that would accompany Deer Creek Crossing. One large, interconnected, healthy wetlands complex, they declared, would provide a higher level of function than that which currently existed in the disconnected, degraded wetlands. With such an improvement, the developer claimed even Rachel Carson would approve of the efficiency and environmental sensitivity of Deer Creek Crossing (ORIX-Woodmont press release). Supporters of the development called for a cooperative effort that would bring together developer, property owner, municipality and local environmental groups to guide and maintain the construction of this important, new environmental resource (Wasilak, qtd. in DEP 2001, 43). Chatham College, home of the Rachel Carson Institute offered several suggestions for utilizing the wetlands as an educational resource at the request of property owner and college trustee W. Duff McCrady.

These included use of the wetlands as an outdoor laboratory (Kostas to McCrady, 1). But some argued that no action at all need be taken to reach that goal. “Are not the wetlands and stream already outdoors? Could not they be a ‘laboratory’ if anyone wanted to use them?” (Turner, “Would Rachel Carson Approve?” 2). By turning public attention to the benefits of creating a contiguous 13-acre wetlands complex, ORIX-Woodmont and supporters hoped to obscure the immense environmental destruction that would occur adjacent to the proposed Rachel Carson Wetlands Conservancy, where over seven million cubic yards of earth would be blasted from a forested hillside onto 25 acres of floodplain and into the void left by the planned relocation of Deer Creek itself.

The masking of ecological damage behind ecological benefit is the very essence of greenwashing. This use of Rachel Carson’s name produced a number of sharp declarations of outrage, perhaps none more pointed than that of Dr. Diana Post, executive director of the Rachel Carson Council. “Use of Rachel Carson’s name in conjunction with the planned desecration of a natural area demonstrates gross disrespect to her legacy” (Post to Hans, 1999, 1).

Following denial of the first Deer Creek Crossing environmental application, property owner McCrady decided to raise the importance of the wetlands conservancy offer by increasing the acreage from 13 to 93 acres, 80 of which were separated from the project site by the Pennsylvania Turnpike. This 80-acre parcel had significant ecological value. It was relatively undisturbed. Deer Creek ran through it. And it was heavily forested with substantial areas of high quality wetlands. Everyone on both sides supported Duff McCrady’s donation of a conservation easement on this property. As noted earlier, McCrady has legitimate environmental credentials and that surely accounted for some of his willingness to make this donation. But in a more cynical sense, if the donation enabled approval of the development, and approval of the

development triggered his property sale to ORIX-Woodmont, then he in effect would have sold the easement property for some portion of the \$10 million sales price.

Still, the preservation of the easement property would be a significant environmental accomplishment, one that thrust Superintendent Wasilak and the Allegheny Valley School District onto center stage in support of Deer Creek Crossing. Although the developers quickly retreated from the use of Rachel Carson's name as a validating tool, dropping the idea even before the easement offer expanded to 93 acres, other supporters continued to mobilize the rhetorical power of her reputation. Dr. Wasilak in particular defended the school district's sensitivity to the responsibility of representing Rachel Carson's birthplace. "Every child who graduates from Allegheny Valley School District," he wrote, "has to demonstrate a knowledge of not only Rachel Carson's life, but also the values which she lived" (qtd. in DEP 2000b, 3). Springdale High School has Rachel Carson pictures hanging in its Rachel Carson conference room, which looks out on the Rachel Carson courtyard. For the opposition, though, no amount of reverence or veneration for Rachel Carson's values or ethics could possibly legitimize the Deer Creek Crossing development. It was almost a self-evident truth, for them, that there was no reasonable interpretation of her work that could be manipulated to support the environmental destruction of the Deer Creek valley. But supporters did in fact believe that they could correlate her values and Deer Creek Crossing. Of course, many supporters had only a limited concern for her legacy, preferring to focus on economic justifications. But those that did respond to the Rachel Carson warrant believed that she would have understood modern political realities and welcomed the chance to preserve the 93-acre easement, even at the cost of the destruction of the project site. Wasilak argued that "this district, I believe, more than any other district has really attempted to live the ethic of Rachel Carson . . . It stands to reason that if we didn't value that

ethic, we certainly would not be supporting the Deer Creek Crossing project” (qtd. in DEP 2000b, 4). For Wasilak, it was not the development itself but the ancillary effect – the easement wetlands and green space saved - that illustrated Rachel Carson’s ethic. Yes, extensive environmental damage was the price – “a lot of trees will be knocked down” – but without that sacrifice there would be no 93-acre conservation zone created on property that was much more ecologically valuable than the project site (Wasilak, telephone interview).

Diana Post, executive director of the Rachel Carson Council, wrote a second time in November of 2001 in opposition to the redesigned permit application. Rather than warning that misuse of Rachel Carson’s name would be disrespectful, she conjured up pastoral scenes of the Deer Creek valley in bygone days. “This 200 acre parcel very likely includes the place where Rachel Carson roamed as a young girl with her dog, Pal, experiencing a sense of wonder and recording her encounters with wildlife for all to read” (Post to Hans, 2001, 1). Opponents did not understand how supporters could reasonably claim that something as pedestrian as a shopping mall, regardless of any conservation donation attached to it, could represent the ethics of a near mythic figure in the modern environmental movement. Rachel Carson died young, only 57 years old. Like many symbolic figures that perish early, her reputation grew because she never had a chance to damage it. Although there is nothing in her existing work to suggest it, no one can know whether her attitudes and ethics might have changed to reflect changing political realities, whether she would have become harsher in her environmental criticism or more flexible, whether in fact she would have supported Deer Creek Crossing as a worthwhile trade-off, as some contended. But it was hard to imagine her supporting anything that threatened the existence of the wildness and solitude of nature. Writing about her childhood wanderings, she described her walks through Springdale and the Deer Creek valley: “It was the sort of place that

awes you by its majestic silence, interrupted only by the rustling breeze and the distant tinkle of water” (Brooks, 13). Post argued that destroying one area of natural resource in order to preserve others, and then contending that the result honored the legacy of Rachel Carson, simply could not be defended. She suggested another tack. “We are proposing that the site be preserved as a tribute . . . Kept forever wild in honor of Rachel Carson, the area could serve as an ecological shrine, bringing people from many parts of the world to see and celebrate” (Post to Hans, 2001, 1). She refuted the contention that the donated conservation easement, which was contingent on the construction of Deer Creek Crossing, would serve sufficiently to recognize the seminal importance of Carson to the region and to the environmental movement generally. In a rhetorical reversal, Dr. Post effectively greenwashed the greenwasher. If, as supporters contended, newly constructed artificial wetlands and ecological enhancements signified respect for Rachel Carson’s environmental ethic and influence, how much more respectful would it be to preserve the entire ecosystem in her honor?

As the conservation easement became more and more important to gathering support for Deer Creek Crossing, ORIX-Woodmont and McCrady faced a problem finding an organization willing to accept the easement and the maintenance responsibilities that came with it. The most desirable choice would be an environmental conservation group as that would have increased even further the credibility of the developer’s claim to environmental sensitivity by showcasing cooperation with environmental protection groups. When McCrady and ORIX-Woodmont first made the offer and the proposed wetlands conservancy consisted of Wetland Seven coupled with the replacement wetlands, there was a presumption that the Western Pennsylvania Conservancy (WPC) would accept the donation, given McCrady’s past support (personal interview). But WPC, which generally focuses on acquiring much larger parcels of property with more

significant ecological function than that offered by 13 acres of property next to a shopping mall, declined. When Chatham College indicated an interest in using it for educational purposes, the developer thought that the school might be willing to assume ownership of the easement as well. But the college preferred to limit its involvement to utilizing the easement as an outdoor laboratory. After the donation grew to 93 acres, one of the many addendums to the original sales agreement between ORIX-Woodmont and Duff McCrady named the Allegheny Land Trust (ALT) as recipient of the donation. The parties apparently did not clear this with the ALT Board, because Executive Director Roy Kraynyk wrote in a letter to the Army Corps: “Please be advised that Allegheny Land Trust has not agreed to accept this Conservation Easement and is not involved with the proposed development of Deer Creek Crossing” (Kraynyk to Rogalla). Each of these organizations offered some connection for the developers to environmental conservation, some way to paint the development as environmentally friendly, some opportunity to greenwash Deer Creek Crossing. Chatham College housed the Rachel Carson Institute. The Allegheny Land Trust was a well-known local organization specializing in acquiring and protecting undeveloped property. The Western Pennsylvania Conservancy was the oldest conservation organization in Western Pennsylvania, founded in 1932, and is generally considered the most prestigious environmental group in the region. None of them would accept ownership of the conservation easement, probably because they preferred not to engage their organizations in what had become a very bitter and very public controversy. Finally out of options, supporters abandoned efforts to involve an established conservation group and agreed that the Allegheny Valley School District would assume ownership and responsibility for the easement. Even then, they continued to offer the easement as proof of the environmental awareness and sensitivity that the developers had for the Deer Creek valley. Despite the lack of

direct support from any conservation group, they argued that the overall effect of the development would be a positive gain for the environment.

The circumstances of the Western Pennsylvania Conservancy were particularly interesting from a rhetorical standpoint because it appeared at times that the WPC leadership had failed to grasp the rhetorical situation as reflected in the popular, grass roots opposition to Deer Creek Crossing and had for the most part ignored the development. That failure to stand publicly against a project that most other conservation organizations and government resource agencies adamantly opposed contributed to a sharp internal debate regarding the mission of WPC.

ORIX-Woodmont listed WPC in an early press release as one of the "literally dozens of advocacy, civic and governmental leaders" involved with the project. (ORIX-Woodmont, 1) They apparently believed that the Western Pennsylvania Conservancy supported their mitigation efforts as they wrote in a 2 July 1999 letter to then-Pennsylvania Governor Tom Ridge that "to integrate the protection of the environment with the economic and social needs of the region, we have enlisted the assistance of the Western Pennsylvania Conservancy to restore the wetlands and creek locations" (Howell to Ridge, 2). Judging by the casual and environmentally insignificant suggestions for mitigation of environmental damage contained in a comment letter dated 8 September 1999 from then-WPC President Larry Schweiger to Joseph Howell, it was understandable that the developers thought that WPC support was forthcoming. Seemingly unconcerned with the overall environmental impact of the development, Mr. Schweiger limited his comments to the choice of vegetation for mitigation before noting that a "question was raised about the water quality entering Replacement Area 2 wetland, because it arrives through a culvert from the PA Turnpike" (Schweiger to Howell, 1). This compared poorly with the

strength of objections raised by government resource agencies and environmental advocacy groups. WPC's failure to oppose the Deer Creek Crossing development disappointed some of the field staff at WPC. Jeff Gerson, a WPC staffer for 22 years, quit his job in a very public display of outrage regarding the deficiencies of WPC leadership. "I am leaving because I (along with many others) see an organization that has become inept, wasteful and compromised by politics, money and public image" (Gerson to WPC Board, 1). He specifically listed the failure to oppose Deer Creek Crossing as one example of misguided leadership, declaring WPC's non-opposition a "gutless and cowardly stand" (Gerson to WPC Board, 2). Mr. Schweiger's response to this and other criticism of WPC's perceived failure regarding Deer Creek Crossing centered on the National Heritage Inventory, the same document which first identified the Deer Creek wetlands as the best in Allegheny County. WPC compiled the National Heritage Inventory by contract with the state of Pennsylvania as a county-by-county inventory of environmental resources. Could that relationship lead to a conflict of interest? It certainly led to an interesting e-mail exchange between Schweiger and Clean Water Action organizer Robert Silber, who inquired as to whether Schweiger would be willing to broker a meeting between Silber and property owner McCrady. (Silber to Schweiger, 1). Schweiger responded: "While we are environmental advocates for public policy on a macro-level," WPC does "not get involved in sites like Deer Creek that directly involve our research work. . . . I have an ethical problem with our getting written approval to go on private land for scientific purposes and then turn around and use the information we gather to advocate or generate opposition to the landowner's plans" (Schweiger to Silber, 1). This would be credible if there had been any component of WPC's Mission Statement or Strategic Plan that identified the gathering of objective scientific evidence to be a basic purpose of the organization, but there was not. Schweiger went on to write that WPC



technical staff were often called as expert witnesses in court cases and involvement in land use controversies would damage that function. “Our scientists would be discredited as impartial experts,” he wrote to Silber, “I therefore do not want to get into the middle of the dispute between you and Mr. McCrady” (Schweiger to Silber, 1). This position was confusing. If WPC collected a professional fee for expert testimony, it would be acting more as an environmental consulting firm than an environmental protection organization. Perhaps a conservation organization should not want to be impartial. Advocacy by definition is not impartial and Schweiger stated clearly that WPC does advocacy work on the macro-level.

Gerson recognized that the “Deer Creek Crossing project in Harmar Township was probably one of the most environmentally sensitive issues in quite a few years in Western Pennsylvania (but WPC) policy was not to get actively involved” (Gerson to WPC Board, 2). It is possible that WPC was more actively involved than even they were aware, and certainly more than they had authorized. ORIX-Woodmont believed that the WPC had a cooperative attitude. They were counted as active participants in the mitigation process and the developer admittedly sought their counsel and expertise. Perhaps they also sought to use their environmental credibility. Silber, after he received Schweiger’s response, sent an e-mail to WPC’s Paul Weigmann. “I am bothered by the inconsistency between what Larry Schweiger told me in an e-mail and what the developers said about the WPC role in the development . . . I am concerned that the WPC may have been used for propaganda purposes” (Silber to Weigmann, 1). Certainly, the developers could not have chosen a more prestigious local environmental ally if their interest was to greenwash Deer Creek Crossing. Their special care to mention this connection in correspondence with both Governor Tom Ridge and DEP Secretary James Seif suggested that they were aware of and needed the political influence that cooperation with WPC might

provide, whether or not the leadership of WPC knew about it. Silber believed that the motivation of at least one of the two parties could be legitimately questioned. He wrote: “After reading and rereading the enclosed documents, I am left with a strong impression that either Larry was less than forthright with his e-mail to me, or that the developers lied to Governor Ridge about the WPC’s role in the project” (Silber to Weigmann, 1).

At its most basic level, greenwashing amounts to simply shaping an argument in the way most likely to persuade the audience, in this case, the interested public and the regulatory agencies. Mobilizing the power of Rachel Carson’s reputation and the credibility of the Western Pennsylvania Conservancy provided some evidence for regulators to believe that Deer Creek Crossing would be constructed in the most environmentally sensitive manner possible. For the regulatory agencies, cooperation indicated compromise, and compromise promoted approval. ORIX-Woodmont recognized the exigence of proposing a massive development on a greenfield located next to the hometown of a revered environmental advocate, and also the skepticism of the general public regarding corporate concern for environmental issues. The public needed to be convinced that every possible environmental accommodation had been made by developers who very consciously tried to project an image of environmental responsibility. Greenwashing focused attention onto the ecological benefits of Deer Creek Crossing and away from the scale of the attendant environmental devastation. After the unexpectedly negative reaction to the use of Rachel Carson’s name and reputation, ORIX-Woodmont backed away from that strategy. But other supporters continued to use the ethos of environmental figures and organizations successfully.

#### **4.1.2. The Fight for Scientific Authority**

The Army Corps stated in the introduction to the first public hearing on Deer Creek Crossing that its permit decision would be based on a “national concern for both protection and utilization of important resources” (Qtd. in DEP 2000a, 6). But can one sometimes preclude the other? For instance, the destruction of natural wetlands must be mitigated by developers, usually through the construction of artificial, replacement wetlands. It might be legitimately argued that wetlands are not actually protected through mitigation. It is unsettled as to whether artificial wetlands fulfill the function of natural wetlands. If we are in fact capable of creating artificial wetlands that approach the functional value of natural wetlands, it is reasonable to wonder why we are not creating more of them. When development conflicts with protection, development may win out in Pennsylvania through the tacit acceptance of ineffective mitigation.

In the Deer Creek Crossing case, both sides produced credible scientific evidence for opposing positions, thereby igniting a fight for scientific authority. Scientific authority played a large part in the deliberations of the regulatory agencies, especially DEP, which employed many scientists with specific ecological expertise. Such agencies could be expected to respond favorably to the logos of the logical scientific argument. The comment letters from the US Fish and Wildlife Service (FWS) and the responses from ORIX-Woodmont best illustrated the intensity of the fight for scientific authority. In more public forums, there was little agreement between the parties about current scientific opinion on replacement wetlands generally or on the condition and function of the specific wetlands located on the project site. They could not even agree on the proper descriptive terminology. The opposition referred to replacement wetlands as “artificial” while supporters sometimes called them “replacement” wetlands and sometimes called them reconstructed wetlands. Scientific differences aside, wetlands were not like

buildings that could be dismantled, moved to another place, and rebuilt with no loss of integrity. In fact, the replacement process required the total destruction of existing wetlands and completely new ones built to replace them. There was no disagreement that the *area* of lost wetlands could be replaced or even increased. The debate centered on the question of whether or not artificial or constructed wetlands could replace the *function* of natural ones. In November 1999, when the Deer Creek Crossing controversy was just heating up, the Post-Gazette's Hopey wrote a highly critical article about replacement wetlands. He cited two Pennsylvania studies in which the success of constructed wetlands had been assessed: a 1992 study by the Pennsylvania Department of Transportation (PennDOT) and a 1996 study by DEP itself. PennDOT studied 30 of its own wetland mitigation sites, which were constructed when highway projects destroyed wetlands, and found that only eight of the 30 “adequately compensate for wetland losses.” Four years later, in 1996, DEP assessed 99 wetlands mitigation sites and determined that 59 had failed. The DEP study concluded, wrote Hopey, that “very few replacement sites provide the value and function of a natural wetland” (Hopey, “Its open season,” A19).

Hopey also examined the effect of location on the successful replacement of wetlands function. He interviewed Ed Perry of the U S Fish and Wildlife Service who stated flatly that one of the most serious problems with wetlands replacement was that, even if they were successful, they didn't replace the wetlands function in the same location in which the natural wetlands existed. Constructing rural wetlands to replace urban wetlands added to the total wetland acreage, but the erosion and flood control values of urban wetlands were wasted in rural areas where erosion and flooding are significantly less damaging. The problem, Perry said, was that “almost none of the mitigation is where development is taking place . . . They bear no relation to where the impacts are occurring” (qtd. in Hopey, “Its open season, A19).

Despite the findings of these Pennsylvania studies, ORIX-Woodmont submitted, in support of their environmental application, a letter from Derron L. LaBrake, a wetlands scientist and consultant. LaBrake refuted the contention that replacement wetlands failed to fulfill the function of natural wetlands. “A number of recent studies have shown that constructed wetlands, when correctly designed and built, do provide adequate replacement of the values and functions” (LaBrake to Gutermann, 1). He cited two articles that had appeared in Wetlands, a journal for ecological professionals, which evaluated replacement wetland success. LaBrake noted that one study had assessed the ecosystem function of four replacement wetlands and determined that the success ranged “from medium to high.” No scale of reference was offered to contextualize the categories quantitatively, so what exactly “medium to high” indicated was not clear. The second study determined that a single examined replacement wetland was “functioning as designed.” But there was no indication as to exactly what it was designed to do. If it was meant to replace the function of the natural wetland completely and was functioning as designed, then that comprised strong, favorable evidence for the success of replacement wetlands. On the other hand, if it was designed to replace 50% of the natural function, and was successful at that, then it did not provide strong evidence that replacement wetlands were sufficiently compensatory. LaBrake did not say. He did claim that the citations he used proved that replacement wetlands worked and that comments to the contrary “are contradicted by the literature,” which is a very broad stroke given the disputed nature of this argument. (LaBrake to Gutermann, 1) He could just as credibly have written that replacement wetlands did not work as that conclusion also was supported by selective citation of the literature. His position suffered from comparison with the PennDOT and DEP studies as his references studied only five wetlands while the other studies examined 30 and 99 wetlands, respectively.

Dr. Anthony Bledsoe, a biologist who supported Deer Creek Crossing, wrote an assessment letter to DEP in October of 2001. Regarding his testimony as an aspect of the fight for scientific authority, Bledsoe carefully established his substantial credentials before beginning his assessment and that of course made his opinion highly credible to DEP, where the permit evaluation was in the hands of field scientists. He presented extensive experience not just as a wetlands scientist, but as one with a specific Western Pennsylvania expertise. In the instance of the ORIX-Woodmont mitigation plan, he found the enlargement of the on-site wetlands from the existing six-plus acres to over 10 acres, when combined with the 93-acre easement, to be an overpowering incentive. “It makes a great deal of sense,” he wrote, “to permit valuable development of degraded lands, to the significant benefit of the Harmar Township tax base, employment force, and citizenry, while retaining truly valuable, undegraded wetlands upstream” (Bledsoe to DEP, 2). In response, Clean Water Action’s Silber objected to Bledsoe’s implied claim of expanded expertise. “In fact,” argued Silber, “even though he claims qualifications to make an assessment of the wetlands in question, he undercuts his supposed academic impartiality by praising the economic benefits of the project, a subject on which he claims no qualifications” (Silber to Dreier, 1). Silber’s exigence here was clear. He saw a weakness in the credibility of an otherwise credible expert and exploited it, arguing that overreaching from biology to economics reduced Bledsoe’s credibility. In his field of expertise, Bledsoe’s credentials were impressive but that credibility did not automatically transfer to a different area of the controversy. Many other supporters presented the economic arguments. Bledsoe did not need to and his departure from his field of expertise, while it may not have damaged his credibility as much as Silber claimed, needlessly diluted the impact of his assessment.

Bledsoe introduced a new wrinkle into the Deer Creek Crossing controversy when he unfavorably compared Wetland Seven, which until now had been accepted as high quality by both sides, to upstream wetlands. While Wetland Seven was in much better shape than the other on-site wetlands, Bledsoe categorized it as degraded in comparison to the wetlands on the 93-acre conservation easement. Those wetlands, he wrote, “are in excellent condition, in strong contrast to all seven wetlands on the development site” (Bledsoe to DEP, 2001, 3). Supporters of Deer Creek Crossing had been very careful to explain that the project design avoided disturbing Wetland Seven, although many in opposition had disputed this claim as the wetland would be enclosed behind an earthen wall and cut off from the Deer Creek floodplain. Now a reputable biologist argued that Wetland Seven had effectively become expendable due to the significance of the easement wetlands. Bledsoe highlighted the degraded condition of the project site by stating that in his expert opinion it had not contained intact floodplain vegetation for at least 70 years (Bledsoe to DEP, 2001, 3). Bledsoe thought that many local people had mistakenly idealized the site and sought to reduce the power of this romanticized memory. The opposition considered Dr. Bledsoe a maverick authority because he had reached conclusions so diametrically opposed to other environmental scientists, with the exception of those hired as consultants for ORIX-Woodmont. But whether that criticism worked for or against the opposition was an open question. To some extent, an impartial, alternative evaluation, rather than seeming aberrant, intimated that accepted scientific opinion might be credibly challenged in this case. And for DEP field operatives, who may have been beginning to feel pressure from the Central Office to resolve – read accommodate – the Deer Creek Crossing application, it may have taken on more significance than might ordinarily be expected. It provided a counterbalancing argument to the weight of most scientific opinion which expressed little

confidence in the utility of replacement wetlands to function successfully at levels anywhere near natural wetlands.

The argument for scientific authority carried over into the public meetings as well. Joseph Pugach, a local resident and regional vice president of the Pennsylvania chapter of Trout Unlimited, submitted the published views of the National Academy of Sciences. Referring to a 27 June 2001 newspaper report in the New York Times, Pugach argued in the October public meeting that the National Academy of Sciences had drawn three conclusions from its study of the effectiveness of replacement wetlands: first, that very often the construction of replacement wetlands was delayed or never completed; second, that when they did get completed they often failed to meet the required standards; and third, that even when they did satisfy the written regulations they failed to duplicate the function of the natural wetlands that they replaced (qtd. in DEP 2001, 110-111). Pugach, of course, never called them “replacement” wetlands. The opposition preferred the term “artificial” wetlands. The Academy contended that the proper way to judge effectiveness was by evaluating the successful replacement of function and not replacement of acreage. By function, they meant as measured “as buffers against floods, as filters for pollution and as habitats for wildlife” (Revkin, A14). Pugach also presented the concurring opinion of a federal General Accounting Office study, reported in the same New York Times article, that there was inconsistency in permit approval processes and far too many instances in which there was virtually no monitoring of function or even final accounting of the size of required replacement wetlands. The result, Pugach maintained, was that a significant amount of wetland mitigation existed only on paper, with no accompanying physical function and acreage (qtd. in DEP 2001, 112-113). Current standards of mitigation were failing, according to the National Academy of Sciences, and “in general, the country’s wetland policies



could benefit from a stronger dose of basic science” (Revkin, A14). As a result of inadequate mitigation requirements, he argued, the country has irreparably lost much wetland acreage and functional value.

A 15 January 2002 Associated Press article, which appeared locally in the Pittsburgh Tribune-Review, examined new Army Corps procedures and requirements imposed by the Bush administration that weakened wetlands regulations created during the Clinton administration. Where formerly any development that destroyed wetlands had to create replacements on at least an acre-for-acre basis, the new policy required only that proposed development not result in a net loss of wetlands nationally. That meant that wetlands destroyed in one place need not be mitigated in the same region, resulting in wetland functions being completely lost in the original area. The US Fish and Wildlife Service objected that the Army Corps had not sufficiently studied the ecological effects of the policy change and did not have “sufficient scientific basis” to claim that the new policies would have “only minimal impact on the nation’s natural resources” (Heilprin, A4).

Resource agency objections seemed to carry little weight with the regulatory agencies despite the fact that most resource agency operatives have extensive scientific training, a condition confirmed by Pennsylvania Fish and Boat Commission biologist Ron Tibbott and US Fish and Wildlife Service field agent Bonnie Crosby Dershem. When asked directly if replacement wetlands work, Tibbott responded that in his experience only about 50% survived. Loss of wetland function and values, he explained, had a substantially greater environmental impact than the loss of acreage (personal interview).

Armed with an insider’s knowledge of what did and did not successfully influence environmental regulatory decisions in Pennsylvania, former chief DEP counsel Terry Bossert

became an important asset for ORIX-Woodmont. Aware that resource agency recommendations had little effect on the permit process, Bossert could advise the developer on how to counter the strenuous objections of the Fish and Boat Commission and the Fish and Wildlife Service. The Army Corps noted the science-based objections of the resource agencies in its Statement of Findings, but simply dismissed them with vague comments that “some degree of adverse impacts could be expected on any development (but). . .they are not contrary to the public interest” (US Army, 41). DEP, on the other hand, because of the scientific training of its field operatives, had a more difficult time dismissing the resource agencies’ negative recommendations. Its eventual approval of the Deer Creek Crossing permit, despite the agencies’ carefully researched and documented scientific objections, indicated that something else had influenced the process more than scientific authority. Rachel Carson lamented this condition when she wrote in Silent Spring: “We train ecologists in our universities and even employ them in our governmental agencies but we seldom take their advice” (11-12).

#### **4.2. Disregarding Ominous Warnings**

The publicly stated positions of the three principal resource agencies -- the Pennsylvania Fish and Boat Commission, the US Fish and Wildlife Service, and the US Environmental Protection Agency -- shared one immediately obvious characteristic: they were remarkably definitive in their recommendation that the Deer Creek Crossing permit application be denied. Each agency warned of dire ecological consequences if the development proceeded. The Fish and Boat Commission constructed its arguments around basic science buttressed with very strong, emotionally arousing language, arguments from pathos. The US Fish and Wildlife Service, equally as vehement in opposition, used arguments from logos and carefully designed its position around more complex, scientifically supported arguments that included long lists of

academic references. Their warnings were noted and ignored. Why? While their role in the regulatory process was advisory, these agencies employed experienced, credible, professional scientists whose opinion ought to have carried considerable weight. Their advice should have had considerable influence on regulatory decision-makers. In the Deer Creek Crossing case, however, the advice of the resource agencies carried little weight and had virtually no influence. The following sections examine the evolution and strength of resource agency objections, the language with which they were presented, and the credibility of the agency positions.

#### **4.2.1. The Pennsylvania Fish and Boat Commission**

From the beginning, the opinion letters emerging from the Pennsylvania Fish and Boat Commission (PFBC) contained the harshest and most adversarial language of any of the resource agencies. Fisheries biologist Ron Tibbott authored all of the letters but copied his supervisors so they were aware of their tone and content. Following several face-to-face pre-application meetings with representatives and consultants from ORIX-Woodmont, PFBC submitted the first official advisory opinion letter on 17 November 1999. This first letter was the most inflammatory, filled with sarcasm and ridicule. Although it began with a relatively restrained statement that the PFBC “strongly recommends” permit denial and finished with a simple declaration that Deer Creek Crossing “is not in the best public interest,” the overall tone of the letter was one of disbelief that any project with the ecologically destructive footprint of Deer Creek Crossing could ever be given serious consideration. The proposed mitigation plan would produce a “rock-lined parody of Deer Creek,” which Tibbott characterized as “almost a joke.” Referring to a meeting that included the developer, PFBC, the Army Corps, the US Fish and Wildlife Service and the US EPA, he recounted that the PFBC had “made clear that in its view the Deer Creek Crossing proposal was a ludicrous environmental disgrace the likes of which

have never been permitted in the Commonwealth of Pennsylvania” (Tibbott to Rogalla, 1999, 1). Tibbott’s reaction to the details of the ORIX-Woodmont development plan might fairly be characterized as incredulous, and he considered any hope of permit approval without drastic changes to be preposterous, an “illusion.” The letter was intense and potent in language, a clear departure from the normally restrained resource agency advisory comments. Tibbott confirmed that he had purposely used exceptionally strong language (E-mail to the author). To some extent, he admitted, previous dealings with the Woodmont Company in connection with their Cranberry Commons development had left him suspicious of their professional ethics, especially regarding the application of political influence. Both he and US Fish and Wildlife agent Bonnie Crosby Dershem, who were interviewed together, considered the Cranberry Commons development and the attendant mitigation effort to be an ecological disaster. Now Deer Creek Crossing threatened to be a repeat of that mistake but on a much larger scale. Duff McCrady, the property owner, had voiced suspicion that Tibbott and Dershem had reviewed the Deer Creek project from a biased perspective (personal interview). For Tibbott and Dershem, previous experience with the Woodmont Company had given them not a bias but a basis on which to evaluate ORIX-Woodmont’s mitigation plan. The Cranberry Commons precedent, combined with the exponentially higher environmental values at risk in the Deer Creek ecosystem, produced for Tibbott an exigence that drew him to write an advisory opinion letter so robust in its opposition that it bordered on outright environmental activism. Nevertheless, Tibbott defended his analysis as objective, asserting that if he used strong language it was because the project as proposed threatened enormously serious environmental consequences. According to Tibbott, the language was therefore appropriate to the situation (personal interview).

The tone of the series of seven recommendation letters and memoranda submitted by PFBC to various personnel associated with the Army Corps and DEP permit evaluation process evolved in tone from incredulous to scientifically scornful to grudgingly accommodating and back to disbelief. In a 28 March 2000 letter to the Army Corps, Tibbott attacked the scientific basis of the ORIX-Woodmont consultant reports regarding the existing and proposed conditions of the Deer Creek stream system. He argued that their evidence and conclusions, which were favorable to the developer's position that stream habitat values could adequately be recreated if relocation occurred, were superficially impressive but scientifically misleading (Tibbott to Rogalla, 2000, 2). The data that the consultant provided did not support the conclusion that the consultant reached, he maintained. Tibbott summarized the PFBC opposition to Deer Creek Crossing by writing, "It needs to be kept in perspective that these are not just eleventh hour concerns but are grave reservations . . . the Fish and Boat Commission has on three separate occasions attempted to dissuade the developer from pursuing such an environmentally devastating project" (Tibbot to Rogalla, 2000, 3).

Following the DEP denial of the first permit application, ORIX-Woodmont resubmitted a substantially altered development plan. Although Deer Creek would not be moved under the new plan, Tibbott and the PFBC remained skeptical that aquatic habitat and stream function would not be significantly affected. Under the revised plan, the PFBC predicted that the proposed culverting of 300 feet of Deer Creek would produce an acceleration of stream velocity resulting in extensive damage from streambed scour and bank erosion. Tibbott argued that when PennDOT, in the course of highway building activities, encountered a similar environmental situation its precedent and practice would require bridges rather than culverts to minimize environmental concerns. "What less-damaging alternative stream crossings were considered," he

wanted to know, and “are they being pursued? If not, why?” However, Tibbott noted that ORIX-Woodmont had made significant environmental changes in the development plan and admitted that Deer Creek Crossing was approaching environmental acceptability, principally because of the decision not to move the stream (Tibbott to Rackham, 2001, 1). Accommodation and compromise again provided an advantage to the developer. Except for the critical decision to leave the stream in its natural course, ORIX-Woodmont responded to the environmental objections with changes that seemed superficially consequential but that were ecologically minor. The environmental damage footprint of the revised plan remained nearly as large as the original plan. But by 27 September 2001, Tibbott and the PFBC had retreated to the point that they changed the language of their recommendation from outright denial to asking that approval be held in abeyance (Tibbott to Rogalla, 2001), considerable movement from their original November, 1999 position that Deer Creek Crossing was a “ludicrous environmental disgrace” (Tibbott to Rogalla, 1999).

But then an event occurred that reenergized PFBC opposition to Deer Creek Crossing. The second public meeting, held on 24 October 2001, showed that opposition to the development remained strong and vigorous. On 15 May 2002, Tibbott sent DEP a memorandum contending that even the revised mitigation measures failed to persuade the PFBC that “Deer Creek's biological integrity could be maintained . . . it's inconceivable that (storm water increases) won't degrade the streambed and accelerate bank erosion . . . a project of this magnitude can't help but permanently impair Deer Creek's fisheries in terms of both abundance and diversity” (Tibbott to Busack, May, 2002, 1). Sharp and cynical language reappeared in the comment letters. On 1 July 2002, Tibbott went so far as to argue to DEP Regional Director Charles Duritsa that approval of Deer Creek Crossing would so impair the habitat values of Deer Creek that it would

violate “the public environmental rights guaranteed by Section 27, Article 1 of the Pennsylvania Constitution” (Tibbott to Duritsa, 1). In the end, persistence and continuous compromise on the part of the developers chipped away at the ability of Ron Tibbott and the Pennsylvania Fish and Boat Commission to object. Although an objective reading of PFBC recommendation letters leads unavoidably to the conclusion that PFBC had mounted opposition as sharp and forceful as any activist group, in the end the agency relented. On 17 August 2002, Ron Tibbott informed DEP that given the project revisions, “the Fish and Boat Commission will not continue to object . . . assuming successful wetlands replacement, the (PFBC) concedes that finally this application represents an acceptable compromise” (Tibbott to Busack, 2002, 1). The language implied that PFBC had adopted an effectively neutral position, no longer actively opposing but far from endorsing the project. Both Ron Tibbott and US Fish and Wildlife Service agent Bonnie Crosby Dershem emphasized that the practical influence exerted by resource agencies on regulatory decisions was severely limited by their advisory role. Because their role was advisory, Tibbott expressed doubt that politics had much effect on the recommendations of *resource* agency field level agents and scientists. On the other hand, both he and Dershem believed that the political pressure exerted on the *regulatory* agencies was substantial and effective. When asked directly why objections had been withdrawn, Tibbott answered that he believed that PFBC had gotten all the concessions from ORIX-Woodmont that an advisory agency was likely to get. Dershem, on the other hand, stated emphatically that the US Fish and Wildlife Service had not withdrawn its objections and remained officially and adamantly opposed to Deer Creek Crossing (personal interviews).

#### **4.2.2. Federal Agencies: US Fish and Wildlife Commission and the EPA**

If the comments from the Pennsylvania Fish and Boat Commission consisted of a healthy dose of science energized by emotionally incendiary language, the advisory letters originating with the US Fish and Wildlife Service (FWS) consisted almost exclusively of scientific arguments. ORIX-Woodmont responded with an equally ambitious scientific refutation, each attacking the quality of the other's scientific expertise. It was a measure of the influence that ORIX-Woodmont felt scientific testimony would have on the regulatory decision that their response letter was so detailed and science-based. They clearly wanted to win the fight for scientific authority and that provided the exigence which provoked such a comprehensive refutation. The same sort of process guided the interaction between ORIX-Woodmont and the US Environmental Protection Agency (EPA). It was refreshing to see a frank and direct exchange of opinions between developer and the resource agencies. The letter-to-letter arguments were much more open and enlightening than the tightly controlled process of the public meetings, where people could say what they wanted but never engage in any interactive critiques of each other's position. The resource agencies, on the other hand, engaged the developer in real and direct question-and-answer debate. If one had a question or comment, the other, for the most part, responded specifically. The tone never reached the level of reciprocated diatribe, but the competitive nature of the framing/reframing analysis energized the letters.

Although Joseph Howell signed the ORIX-Woodmont letters, the technical sophistication indicated that professional consultants provided the data, and the structure and argumentative style indicated that they had been heavily edited by attorneys. Each US Fish and Wildlife Service objection had been addressed in a point-by-point framework virtually identical to responses crafted by lawyers to formal interrogatories, which are written questions submitted to



each other by parties in legal proceedings. FWS letters were researched and written by field agent Bonnie Crosby Dershem and approved and submitted over the signature of David Densmore, Supervisor of the FWS Pennsylvania Field Office. Dershem's style was academic, and created credibility through careful citation of independent scientific studies. The 3 December 1999 letter, for instance, contained nine pages of highly critical assessment of the Deer Creek Crossing development and mitigation plan, supported with 13 separate scientific citations.

Dershem began with the assertion that the Deer Creek Crossing on-site wetlands had special value due to their urban setting, and cited the Western Pennsylvania Conservancy's National Heritage Inventory (NHI) as the authority for this claim (Densmore to Ridenour, 1999, 2). That particular document could be considered the central evidentiary document of the Deer Creek Crossing controversy, outside of the permit application itself. Both sides relied on differing interpretations of the same NHI document, which is understandable because it contained language and descriptions that offered support to both positions. It recognized the degraded conditions of certain portions of the Deer Creek Biodiversity Area, particularly the project site, but also stated that if no further disturbances occurred the area could be expected to recover and that even in a degraded condition the wetlands still performed a significant ecological function (WPC, 89). The veracity of each side's claims depended on which part of the Biodiversity Area they viewed. ORIX-Woodmont pointed out that the NHI studied the entire 1,000 acre Biodiversity Area of which the project site comprised only 243 acres. The conclusions drawn by the FWS "inaccurately and improperly exaggerated" the quality of the 243 acre project site, which was "not the untouched, undeveloped protected natural resource claimed by the commenters." This argument was factually correct and ORIX-Woodmont drove that point

home by writing: “The USFWS has misused and misinterpreted information” from the NHI (Howell to Densmore, 14). But the site was not, retorted Dershem, without ecological value. The site could not and should not be considered in isolation but rather evaluated in the context of its location in a highly developed urban region (Densmore to Ridenour, 2000, 6). Regarding past abuses to the site, Dershem argued that, whatever the damage, it was temporary and would heal if not further disturbed. Deer Creek Crossing, on the other hand, threatened to permanently eliminate virtually all ecological value on the site (Densmore to Ridenour, 2000, 2).

The debate over whether the proposed mitigation plan would replace currently existing ecological values, or whether those values would be unavoidably lost, remained contentious throughout the entire controversy. It became a point of impasse characterized by competing definitions, similar to the controversy analyzed by Mark P. Moore. For the Deer Creek Crossing supporters, the on-site wetlands stood for degraded ecological values and provided evidence to approve the development. For the opposition, the on-site wetlands stood for functioning, although disturbed, ecological values and provided evidence to deny the development. The same wetlands were evaluated but produced a different message. The argument extended to envelop the proposed replacement wetlands. Supporters contended that the ecological values lost to construction would be adequately replaced by the newly created wetlands in combination with an undamaged Wetland Seven. The opposition disagreed and argued that the weight of scientific evidence indicated that artificial wetlands do not succeed. The impasse between sides on this point was absolute and contained virtually no chance of rapprochement.

The argument reappeared in the exchange of comments between FWS and ORIX-Woodmont regarding mitigation of ecological damage. Dershem wrote that the development plan would isolate the stream and wetlands and severely reduce their ecological function. “This

is not simply a matter of aesthetics; the system will have little ecological value.” In one of several attacks on scientific credibility, she further argued that the proposed mitigation plan indicated a “fundamental misunderstanding” on the part of ORIX-Woodmont consultants of basic wetland plant requirements (Densmore to Ridenour, 1999, 6). To the contrary, responded the developer, it was FWS that “misapprehends the site’s hydrology, the hydraulics of Deer Creek, and the planting plan” (Howell to Densmore, 13). The developers based their claims on a detailed fluvial geomorphology analysis prepared by a consultant (fluvial geomorphology is the study of how streams and rivers affect the Earth’s surfaces and landforms). As evidence, they listed nearly two full pages of quantitative scientific data (Howell to Densmore, 8). Dershem rejected that offer of proof as lacking credibility because the consultant failed to reference any specific methodology. Although the report used the terminology of fluvial geomorphology, she argued: “ It does not appear that the applicant fully understands this concept” (Densmore to Ridenour, 2000, 3-4). The bulk of the fight for scientific authority came down to the struggle about first, the actual effects of construction on the environment and second, the likely success of mitigation. Within that framework, there was a fundamental disagreement embodied by two credibly argued but utterly opposed positions. Either the environmental effects could be adequately mitigated, which supporters believed, or they could not, which opposition believed.

Because the mission of the US Fish and Wildlife Service involves protecting wildlife and habitats, Dershem understandably showed substantial concern for how their welfare would be affected by the construction. “All mammals, birds, reptiles and amphibians using this site’s habitats will either be eliminated or displaced” (Densmore to Ridenour, 1999, 3). The development plan called for the wetlands to be destroyed first and then rebuilt and included the nearly total destruction of Deer Creek’s floodplain. Dershem could not see how wildlife would

survive the total destruction of their habitat regardless of mitigation plans. The developer claimed that, during the course of construction, little damage would be done to wildlife populations because Wetland Seven “will serve as habitat from which temporarily displaced animal populations will disperse to inhabit the replacement wetlands” (Howell to Densmore, 7). Dershem responded to that argument with contempt. First of all, she wrote, it is impossible to conduct an enormous construction project like Deer Creek Crossing without adversely affecting Wetland Seven. She argued that wetlands are not stand-alone resources. Once construction activities severed its connection with the stream and floodplain, no one could predict the effects on Wetland Seven except to say that they would be significant. Wildlife, unaware of arbitrary human boundaries, used the wetlands, the stream, the riparian buffers, the floodplain and the forested uplands interchangeably. It was absurd to contend, argued Dershem, that wildlife would “temporarily relocate to Wetland Seven to *await the construction* of the new wetlands. This outcome seems unlikely” (Densmore to Ridenour, 2000, 2, emphasis added).

Many of ORIX-Woodmont’s responses incorporated the contention that the basic project purpose must be construed from the perspective of the applicant. If there were no more persuasive answers available to questions about the design or process of Deer Creek Crossing, they simply claimed that some criticism was invalid because it failed to meet the basic purpose of the project from the applicant’s perspective. ORIX-Woodmont considered that to be the fundamental criterion for project evaluation and appropriateness. Dershem identified the fundamental criteria as being a determination of the “least environmentally damaging practicable alternative.” Based on that, she claimed that the developer had failed to meet the standard because the alternatives analysis eliminated all alternative properties that did not permit construction of the previously created design. That left only one acceptable property -- the

McCrary land in Harmar Township. The search, she wrote, was simply too constrained.

(Densmore to Ridenour, 1999, 8) ORIX-Woodmont responded that the alternatives analysis had shown that only one property would meet the basic project purpose from the applicant's perspective. Dershem suggested reducing the size of the project or breaking the complex into smaller, more manageable pieces to adequately protect the environmental values, ideas independently suggested by project opponents at the public meetings as well (Densmore to Ridenour, 1999, 8). The developer rejected such changes on the grounds that they did not meet the basic project purpose. The Harmar site was the one and only acceptable site for ORIX-Woodmont, and they believed that they had satisfied the regulatory requirement to search for less environmentally damaging alternatives that met the basic project purpose from the applicant's perspective. There were no other eligible properties within those constraints, therefore approving permits for the Harmar site was in the best public interest (Howell to Densmore, 15).

The question of alternatives and who properly defined the project purpose stayed in dispute throughout the controversy and would eventually be the basis for one of the legal challenges to Deer Creek Crossing. Jody Rosenberg, attorney for PennFuture, described the confusion as real but unwarranted. "The law relates to the applicant's purpose [but] the important point is that the applicant cannot so narrowly define their purpose as to render the alternatives analysis meaningless. Ultimately, DEP has the duty to apply the law, and while the applicant can propose a description of their purpose, DEP can accept or reject that description . . . In this regard, DEP lost the forest for the trees" (E-mail to the author, 28 Oct. 2005). ORIX-Woodmont so aggressively argued that the applicant controls the project purpose that little public contradiction appeared. It seemed rational. It seemed like common sense that the developer was really the only one that could know a project's basic purpose. But the issue was more subtle than

that. As Rosenberg wrote, DEP cannot tell developers what to build, but it can reject their definition of basic purpose if that definition results in a project that is not the least environmentally damaging practicable alternative. So in that sense, DEP has control of the final determination of basic purpose. In the eyes of the opposition, the agency failed to exercise that control and therefore failed to carry out its duties.

In 2001, the second Deer Creek Crossing permit application provided another opportunity for the US Fish and Wildlife Service to comment. Much of the substance had appeared in previous letters, but there were a few new opinions, mostly connected to the revisions in the development plan. Dershem made it apparent at the outset that the revisions had not changed the opinion of FWS. “The revised project proposal would still obliterate this landscape” (Densmore to Ridenour, 2001, 3). Dershem, by choosing such a powerful predicate, made it clear that FWS considered the natural resources within the Deer Creek Crossing project site to be of significant ecological value. The most important revision in the development plan was changing the design so as not to relocate Deer Creek itself. Dershem objected to the claim that the biological integrity of the stream would be protected if it was not moved. She explained that “numerous studies have confirmed, it is also the land use adjacent to the stream that influences the aquatic life it can support” (Densmore to Ridenour, 2001, 3). She braced that claim with a long examination of the results of five different scientific studies. The Deer Creek valley, argued Dershem, was one big, interconnected ecosystem, and the elimination of floodplains, the culverting of 300 feet of stream, adding dirt fill to create high banks simply could not be done without drastically affecting the biological integrity of Deer Creek. In fact, Dershem warned, “there is no mitigation that can compensate for the adverse effects we expect to the biological integrity of Deer Creek, due to the massive amount of development proposed for this site”

(Densmore to Ridenour, 2001, 5-6). It is hard to overestimate the relevance of that claim. In a controversy that turned on the effectiveness of mitigation, the US Fish and Wildlife Service had stated unequivocally that the anticipated damage to wildlife habitat values simply *could not be* adequately mitigated.

In the instance of wetlands mitigation, FWS took a slightly more accommodating position. It recognized that wetland *acreage* could be created, although the success rate was hotly disputed. But if the success of replacement wetlands depended on the extent to which the functional ecological values remained, FWS remained doubtful that they could be adequately mitigated. “In this instance,” wrote Dershem, “we expect that some created wetlands will be deemed successful because they meet the regulatory definition of ‘wetlands.’ However, we do not expect them to be successful in an ecological sense” (Densmore to Ridenour, 2001, 5).

The US Fish and Wildlife Service was not the only federal resource agency involved in the Deer Creek Controversy. The US Environmental Protection Agency (EPA) also weighed in with advisory recommendations. The EPA was arguably the most prestigious resource agency involved in commenting on Deer Creek Crossing. But its closest field office was in Philadelphia, so the agency depended on documents and personal contact with operatives of other resource agencies for information. Of course, the EPA had copies of the original and revised permit applications from ORIX-Woodmont and that amounted to many hundreds of pages, photographs, oversized maps and engineering drawings. The EPA knew exactly what the developer intended. But the agency had no firsthand knowledge of the project site itself. It depended on the National Heritage Inventory descriptions of the Deer Creek Biodiversity Area. So the familiar dispute reappeared in the exchange of comments between the EPA and the

developer: Which interpretation of the environmental condition of the project site in the NHI was correct?

The EPA sent two opinion letters to the Army Corps in the same month: 3 December 1999 and 28 December 1999. This double comment approach had a very specific purpose. When an agency of the Department of the Interior, which includes both the US Fish and Wildlife Service and the EPA, sought to lay the procedural foundation for the elevation of an individual environmental permit application from the local to the national level, they had to notify the Army Corps twice. The first notification stated that the EPA thought the project *may* “result in unacceptable adverse impacts to Aquatic Resources of National Importance (ARNI)” (Pepino to Massey, 1). The second notification stated that, in the opinion of the EPA, the proposal *will* “result in unacceptable adverse impacts to Aquatic Resources of National Importance (ARNI)” (Laskowski to Ridenour, 1). The US Fish and Wildlife Service had followed the same procedure. The EPA stated that it found the project so destructive that if the Army Corps issued the permit the EPA would appeal it at the national level. It was the dispute over the quality of the wetlands on the project site that determined whether the elevation process might proceed. Individual permits could be elevated only if they impacted Aquatic Resources of National Importance.

The EPA defined the on-site wetlands as vestigial wetlands, remnants of a much larger and more robust system that had been mostly destroyed by regional development over the years. The EPA argued that the urban character of the region actually enhanced the values and ecological importance of the scattered and degraded on-site wetlands (Pepino to Massey, 1). ORIX-Woodmont responded that, even if that characterization were accurate, the enhanced wetlands still reached only the level of low-to-moderate value, and certainly did not rise to the level of Aquatic Resources of National Importance (Howell to Pepino, 1). But the EPA seemed



to be angling toward a different approach. It considered the on-site wetlands as merely a part of the overall Deer Creek Valley Biodiversity Area, and the BDA arguably did contain Aquatic Resources of National Importance. “Deer Creek and its associated wetlands and floodplains represent a unique complex of vestigial habitats within this geographical area” (Pepino to Massey, 1). ORIX-Woodmont distinguished quite clearly between the Deer Creek Valley Biodiversity Area and the project site, and they considered it self-evident that the on-site wetlands and stream were significantly more degraded than the stream and wetlands on the other 750 acres in the 1,000 acre National Heritage Inventory’s BDA. One needed only to physically examine the site to observe the degraded conditions. Unfortunately for the EPA, that omission enabled a damaging line of argument for the developer. They asked how the EPA could make a fair judgment when its staff did not visit the site until 6 January 2000, a full month after taking a public position. “Had the agency had the benefit of firsthand knowledge before submitting comments,” the developer argued, “it would have realized that the proposed site does not contain Aquatic Resources of National Importance” (Howell to Pepino, 5). The concept of evaluating any part of the Deer Creek BDA as if it included the entire BDA probably had considerable scientific merit because it essentially eliminated arbitrary human boundaries and recognized the interconnected nature of contiguous aspects of large ecosystems. But it would not persuade the average, technically unsophisticated layman, who could see the obvious physical differences between the project site and the area of the conservation easement.

The EPA made a strong case that the developer had not sufficiently considered alternative sites that would do less environmental damage. It implied that ORIX-Woodmont drew its motivation from profit potential, which was a perfectly acceptable motive except when it conflicted with the requirements of the Clean Water Act. The law required the developer to

make a good faith search for a less damaging alternative, argued the EPA, and that search could not be governed by profit potential. “The applicant must understand that the most economically profitable proposal is not by default the only practicable alternative” (Pepino to Massey, 2). ORIX-Woodmont’s reaction to that allegation produced a simple clash of declaratory sentences. The EPA said the alternatives analysis had not been sufficiently comprehensive to satisfy the requirement. The developer replied that, yes, it had been. The results of the alternatives analysis “clearly demonstrate that the proposed project represents the least damaging practicable alternative that meets the purpose of the project from the applicant’s perspective” (Howell to Pepino, 5). Once again, the evidentiary basis of a disputed developer position depended on who legally determined the basic project purpose. Handling the threat -- and it did amount to a threat -- by the EPA to proceed with elevation was one area where the developer outmaneuvered the EPA. After mentioning elevation twice, the EPA never again raised the possibility although the agency continued to contend that the permit was not in compliance with Section (404) of the Clean Water Act. Nor did the US Fish and Wildlife Service pursue this strategy. Successful elevation would have required that either agency convince its national offices that the Deer Creek Biodiversity Area should properly be evaluated as a whole when a permit application affected any part of it. This was simply too subjective to provide solid evidence that the Army Corps had reached a mistaken conclusion.

The EPA submitted a new letter in response to ORIX-Woodmont’s second permit application. As with the US Fish and Wildlife Service, many of the remarks were repetitive but there were some new comments and some different, and stronger, language. The EPA agreed with FWS regarding its concern for the “physical, chemical and biological integrity of Deer Creek, a high quality stream, and its adjacent floodplain” (Slencamp to Ridenour, 2). The most

interesting comment concerned the applicability of the least damaging alternative requirement. The EPA felt compelled to explain the hierarchy that governed the application of this principle. The first responsibility of a developer, and the correlating duty of a regulatory agency, was to avoid environmental impacts completely. Only if that could not be done would the second step engage: the responsibility to minimize the environmental effects. And in cases involving “impacts to aquatic habitats through the placement of fill into the waters of the United States,” as proposed by the Deer Creek Crossing development plan, the standard rose higher. Then, responsibility and duty mandated that the “impacts be avoided and minimized *to the greatest extent practicable*” (Slencamp to Ridenour, 2, emphasis added). The EPA further contended that, because the project was not water dependent, the regulations presumed alternatives were available that did not require the destruction of wetlands. As there had been no evidence that Deer Creek Crossing needed “to be sited in wetlands to fulfill its basic purpose” (Slencamp to Ridenour, 3), the developer carried an increased burden of responsibility to search for alternatives and the Army Corps an increased duty to regulate.

The EPA noted that the Deer Creek area, in its totality, comprised one of the “few remaining places in the Allegheny County urban landscape where the functions and ecological values provided by wetlands and forested floodplains are viable” (Slencamp to Ridenour, 2). The choice of the word “viable” implied that only natural aquatic resource complexes could dependably provide those ecological values. Artificially created replacements for natural aquatic resources remained unproven in their ability to thrive and, therefore, in their viability. Loss of viable natural resources, the EPA argued, would be irreparable.

Slowly but surely the economic potential of Deer Creek Crossing overwhelmed all obstacles. Accommodation and persistence eventually wore down even the most ardent

opposition. Throughout the controversy, neither the US Fish and Wildlife Service nor the EPA ever withdrew their objections to the Deer Creek Crossing development. In fact, both agencies continued to characterize their opposition as strong and concerned. It became more and more evident that the philosophical gulf separating the developer from the resource agencies revolved around whether it was scientifically possible to separate the Deer Creek ecosystem into discrete parts for purposes of environmental regulation. Was the appropriate regulatory concentration a microfocus strictly on the project site, or should it be a macrofocus that considered the environmental effects on the entire BDA? Supporters of the former position contended that if a resource were left untouched it would be ecologically unaffected, and that mitigation could adequately replace lost environmental values. Supporters of the latter position rejected that. They thought it technically absurd to presume that a development site situated entirely within a documented biodiversity area could sustain construction activities on the scale of Deer Creek Crossing without having a significant effect on the surrounding natural resources, especially with no proven means of satisfactory mitigation. Supporters contended that philosophical and even ethical interpretations of the law had no place in regulatory decisions, and that the developers had fulfilled each and every responsibility incumbent upon them according to the applicable regulations. On these points there appeared to be no reconciliation. The scale of the environmental devastation in the Deer Creek Crossing plan rendered the vigorous opposition of the resource agencies impotent. They were tilting at windmills.

## 5. FINAL DISPOSITION

What is the goal of environmental rhetoric? That question may reasonably be considered from the perspective of either supporter, opposition, or somewhere in between. Is it to avoid environmental damage altogether? Is it to decrease the cost of avoiding environmental damage as much as possible? Is it to increase the accommodation of development and maintain a standard of minimizing rather than avoiding damage? The latter perspective reflects the current situation. The strategy of accommodation appeals to the public, which has a general discomfort with confrontation. The principle of inertia, that things at rest or in motion tend to stay that way, makes accommodation likely to continue. Should environmental rhetoric aim to educate the public to understand the consequences of both development *and* lack of development? Can compromise reduce the severity of environmental damage on one hand and the passion of opposition on the other? That is the rhetorical motive and operative strategy for regulatory agencies in Pennsylvania. Is the goal of environmental rhetoric to delay and thereby make development less attractive and less economically feasible? That is the rhetorical motive and operative strategy of local environmental activists. Is it to show balance between protection and wise use of natural resources? That is the public motive and operative strategy of supporters of planned development. Or is environmental rhetoric simply the symbolic embodiment of frustration on both sides?

This chapter examines the role of the principal decision-making bodies in the environmental regulatory process, the Pennsylvania Department of Environmental Protection (DEP), the US Army Corps of Engineers (Army Corps), and courts of law. DEP is a state agency composed of two general parts: administrators and scientists. By structuring an examination of DEP around the roles and influence of these two subgroups, I argue that political considerations may have influenced scientific authority in the regulatory process. The Army

Corps' record enforcement of environmental regulations has been lenient in the Pittsburgh office. I examine their record and the role of the Army Corps in the Deer Creek Crossing controversy. Environmental controversies seem to be particularly vulnerable to impasse, which is why they so often end up in courts of law. Environmental activism ignites a great deal of passion so compromise may not always be realistically possible after a hard fought struggle. Adversaries need a venue that chooses one party over another in a clear victory or defeat and that is what the courts supply. That does not necessarily mean that law courts are objective or fair. I examine the journey of the Deer Creek Crossing controversy through the legal system to determine what influences are most prominent and why.

### **5.1. Regulating Devastation**

In the Deer Creek Crossing case, my analysis of primary documents suggests that the regulatory process may have been surreptitiously political, undermanned and undermined by the privileging of compromise and accommodation as the regular and customary shape environmental protection. The two regulatory agencies approached their decisions with different presumptions and postures, but in the end arrived at the same place. For the Pennsylvania Department of Environmental Protection, the evaluation of the permit application under Chapter 105 of the Dam Safety and Encroachment Act was comprehensive, rigorous, and surprisingly political for an agency that concentrated on independent scientific analyses. For the US Army Corps of Engineers, the evaluation of the permit application under Section 404 of the Clean Water Act was clinical, orderly and surprisingly subjective for an agency dedicated to objective engineering principles. The following sections present the evidence of politicization and explore its implications for the Deer Creek Crossing case as well as the larger arena of environmental controversy. A rhetorical history approach to criticism is especially suited for this task, as it

organizes a rich record of textual analysis that provides the depth necessary to make difficult judgments about the dynamics involved in this case.

#### **5.1.1. The Pennsylvania Department of Environmental Protection**

DEP field level operatives assigned to the Deer Creek Crossing application review had highly credible scientific and technical credentials and extensive experience. The primary field evaluation involved a DEP Southwestern Region team made up of biologist Nancy Rackham, with 13 years of experience, and Chris Kriley, a professional civil engineer with 15 years of experience. Other experts contributed as the team thought warranted, including Tom Proch, a 30-year DEP veteran aquatic biologist and fisheries expert. Dr. Karl Hartner, a civil engineer and professional geologist, and Peter Friday, an outside economic consultant. The evaluation process also involved a variety of supervisory personnel, including local managers like 25-year DEP veteran Section Chief Lawrence Busack, a civil and environmental engineer, 32-year DEP veteran Tim Dreier, a civil engineer and head of the Regional Water Management program, DEP Southwestern Regional Director Charles Duritsa, and high level Central Office Division Chief Ken Reisinger. The application even attracted the personal interest of the Secretary of the Department of Environmental Protection, David E. Hess (Regenstein, Response, 2-11). The technical and scientific review of the Deer Creek Crossing permit application would not ordinarily have directly involved Reisinger or Hess. As high level administrators, they certainly would have been aware of the status of the review but not directly involved with the developers. On Hess' order, however, Reisinger did get directly involved.

The first contention in supervisor Dreier's briefing paper held that Deer Creek Crossing threatened "more significant environmental impacts . . . (and) . . . evoked the most public comments (in excess of 600) of any other encroachment project we have processed" (Dreier,

Briefing Paper, 1). Deer Creek Crossing was simply the most damaging project they had ever reviewed, he said. Dreier illustrated the volatility of the issues with a series of pro/con explanations of the projected economic, safety and environmental impacts of the project. He made a special point of the opposition of the resource agencies, remarking on their “extensive objections.” Regarding specific Chapter 105 regulatory concerns, Dreier listed six separate areas in which the review team considered ORIX-Woodmont to be out of compliance, from adverse environmental impacts to failure to reduce impacts through redesign. Dreier firmly summarized the recommendation of the technical review staff regarding the Deer Creek Crossing permit application. “On the basis of overwhelming public comment, overwhelming environmental agency objections, and the anticipated adverse environmental impacts which are not offset by equal or greater public benefits, the Region recommends this application, like its predecessor, be denied” (Dreier, Briefing Paper, 6). Two and a half months later, DEP approved the permit.

On 31 May 2002, DEP Regional Director Charles Duritsa sent a status e-mail to DEP Secretary David Hess reporting that the technical review was substantially complete and that the review team had determined that, even with the major changes that had been made from the first application, Deer Creek Crossing would still result in environmental damage to the project site. What’s more, the environmental impact remained significant even after, Duritsa wrote, “the developer has done as much as he can do to mitigate the impact for the size of the project that they say they absolutely must have” (Duritsa to Hess et al, 31 May 2002).

“This is a tough decision,” Duritsa wrote, “especially with all the outside environmental review agencies being opposed” (Duritsa to Hess et al, 31 May 2002). If the DEP administration had intended to accept the recommendation of the field agents and deny the permit, presumably the resource agency opposition would make that decision easier, not tougher. Duritsa mentioned



in the same correspondence that he wanted to involve Division Chief Ken Reisinger and the Central Office staff in the evaluation process because, “I’m looking for as much unbiased, objective evaluation as I can get” (Duritsa to Hess et al, 22 May 2002).

On 3 June 2002, Hess responded as if he was unaware of Duritsa’s statement that the developer had done everything possible within the constraints of the project purpose to mitigate environmental damage, yet the mitigation still was unacceptable to his field staff and the resource agencies. “Chuck, I think we need to nail down whether or not the developer can mitigate the harms. Sounds like you have more work to do there. It’s good that you’re getting Central Office staff involved” (Hess to Duritsa, 3 June 2002).

Later the same day, Charles Duritsa forwarded to Ken Reisinger the briefing paper prepared by Tim Dreier, which justified the recommendation from the technical review team to deny the application. He pointed out that he did not necessarily agree, that he had not yet formed a determination personally, but again emphasized the resource agencies’ continuing opposition. Finally, he requested that Reisinger and staff meet with the review team to “objectively discuss the harms/benefit review without any preconceived bias” (Duritsa to Reisinger).

On 13 June 2002, Charles Duritsa informed DEP Secretary Hess that the process had gone badly for ORIX-Woodmont. “The unanimous recommendation of the technical review staff was to deny.” But he implied that the recommendation might not be final, as final as “unanimous” sounded. Duritsa informed Hess that an imminent meeting and site visit by Central Office supervisor Ken Reisinger could produce some changes if Reisinger disagreed with the review team. “Any input from you,” Duritsa wrote to Hess, “would be welcome” (Duritsa to Hess et al, 13 June 2002). Hess directed Duritsa not to make any final decision before talking to him (Hess to Duritsa, 13 June 2002).

Hess wrote to Duritsa two weeks later to ask why the Central Office contribution had not affected the Southwest Region's recommendation. "Why hasn't Ken Reisinger's input made any difference?" (Hess to Duritsa, 28 June 2002) Duritsa responded that, "Ken Reisinger's evaluation was critical and I never meant to imply otherwise" (Duritsa to Hess et al, 28 June 2002).

Duritsa then wrote to Tim Dreier and the review team explaining that he had made ORIX-Woodmont CEO Steven Coslik aware of the impending denial. Coslik, Duritsa related, wanted to know what could be done to make the development plan work, what level of compromise and accommodation would pass review? Duritsa warned Dreier that denial would probably mean a third application. (Duritsa to Dreier et al, 28 June 2002).

Dreier responded by forwarding the Duritsa e-mail to the technical review team, informing them that Duritsa "would like us to assess and determine exactly to what extent we could approve a project along Deer Creek. Please think about this. We will meet next week and attempt to reach a consensus" (Dreier to Rackham et al). The administrative involvement in the Deer Creek Crossing case definitely caused the opposition to suspect some type of political pressure was influencing the process. PennFuture attorney Jody Rosenberg said in a personal interview that the DEP field operatives had considerable sympathy for the opposition in the Deer Creek Crossing case, and she believed the second application also would have been denied but for the subtle intervention of the Central Office (15 July 2004). However, Tim Dreier, in a deposition conducted by Rosenberg, expressly denied that political considerations influenced the Deer Creek Crossing regulatory decision. When directly asked, "So your decision was not based on any political influence?" Dreier responded, "That's correct . . . There was definitely Harrisburg [the state capital] input," he testified, "but it wasn't political" (Dreier, Deposition,

130, 134). Dreier confirmed that Reisinger had been involved in the review. “He was favorable towards the project . . . but there was no . . . to my knowledge, political influence that suggested that, irrespective of the facts, the project had to be approved” (Deposition, 131). Dreier had supervised the team that, based on the science, had unanimously recommended denial. Yet, following the intervention of Reisinger and DEP Central Office, the application was approved. According to Dreier’s testimony, Reisinger exerted considerable influence over the review team. “He brought a statewide perspective to this . . . He made some suggestions and those suggestions were followed” (Deposition, 133). Those suggestions seemed to conflict with the review team’s objective scientific and technical criticisms of the Deer Creek Crossing application. The statewide perspective did not offer better scientific methodology, nor did it offer enhanced technical sophistication. The statewide perspective may, however, have provided a clearer understanding of political conditions. When asked by Attorney Rosenberg, “Did you see this as an effort to get to yes?” Dreier responded, “No I think it was an effort to get to a decision which the department could defend” (Deposition, 135). The field review team had already provided a scientifically defensible position to support denial. Central Office seemed to want a result that DEP could defend politically, and that result appeared to be approval through accommodation.

Early in July, Duritsa reported to Hess that the meeting with Reisinger and the review team had confirmed that “the application, as it presently exists, is not approvable” (Duritsa to Hess et al, 9 July 2002). However, requirements had been forwarded to the developer “regarding what measures needed to be taken by the applicant to bring about an approvable project” (Duritsa to Hess et al, 9 July 2002). Dreier’s briefing paper had listed six major deficiencies in the application and specifically cited violations of Chapter 105 regulations, which resulted in the recommendation to deny. They included adverse environmental impact to the aquatic ecology of

Deer Creek, adverse secondary impacts on adjacent areas, mitigation plans which did not provide public benefits that outweighed public harms, failure to reduce impacts by reducing project size, and the existence of practicable alternatives with less environmental impact on wetlands (Dreier, Briefing Paper, 5-6). By the time Reisinger and Central Office had completed its review, those major deficiencies had been transformed into three relatively minor changes that would produce application approval: expansion of riparian buffer, improved quality of stormwater discharged directly into Deer Creek, and improved access to the stream for maintenance and recreational activities (Duritsa to Hess, 9 July 2002). How these minor changes could produce effects sufficient to mitigate the review team's list of broad environmental concerns was not explained other than to suggest that a good faith compromise by the developer influenced the process.

Duritsa reported to Hess on 23 July that a meeting to reconcile DEP's new position with ORIX-Woodmont's basic project purpose had been productive. "We had a good meeting today with the Deer Creek Crossing developer" (Duritsa to Hess et al, 23 July 2002). The negotiated compromise resulted in an agreement in which DEP retreated further from its already weakened position. The riparian buffer would be expanded to 120 feet on both banks. Not everywhere, of course, but where it was practicable. "We understood all along that that would not have been possible in a few of the areas" (Duritsa to Hess et al, 23 July 2002). Stormwater discharge had been addressed with an agreement to construct multiple discharge points rather than use one large one. That change would lower the temperature of the discharges but do nothing to reduce the parking lot wash-out pollution. Finally, an access road would be constructed for maintenance but could not be offered for public use because the creation of the very same steep fill slopes that had so concerned the resource agencies now made it impossible for the access road to comply with the Americans with Disabilities Act. Therefore, while the public could use the maintenance

road for access, the developer could not openly agree to it. Hess responded, “Sounds like things went well” (Hess to Duritsa, 23 July 2002).

DEP had negotiated an accommodation that apparently disturbed some of the field scientists who had resisted the approval of the Deer Creek Crossing permit on environmental grounds. On 22 August 2002, Nancy Rackham released the DEP Record of Decision. It was a study in contradiction. In the course of discussing the expected impact of the development, she outlined a list of project deficiencies, noted that the developer disagreed, implicitly accepted their position, and then recommended approval. She began by describing the positive characteristics of the stream itself. “Deer Creek is one of [the best], if not the best, quality stream in Allegheny County . . . The diverse and unusual assemblage of fish species contribute to making Deer Creek a unique aquatic resource” (Rackham, “E02-1350,” 1-2). Rackham criticized the alternatives analysis as flawed because the developer’s basic project purpose, which had been accepted by DEP even though the agency had the authority to reject it, could not reasonably be applied to all alternative sites. ORIX-Woodmont claimed that they needed to develop 1.2 million square feet of commercial space in order to adequately finance construction and to guarantee repayment of the TIF. But 1.2 million square feet of commercial space “is not required for every site in order to offset the costs of development because these costs vary for every site.” (Rackham, “E02-1350,” 3) The developer disagreed with that proposition and contended that only the McCrady site could provide the conditions necessary to fulfill their basic project purpose. After specifically refuting the developer’s position as inadequate, Rackham reversed herself and wrote, “The applicant has met the requirements for the off-site alternatives analysis” (Rackham, “E02-1350,” 3). That pattern appeared throughout the document. Rackham wrote that the project violated regulations but in the end accepted the developer’s position. She

recognized the specific requirements arising out of the Reisinger meetings as fulfilled, that is, the riparian buffer expansion, the stormwater systems meant to reduce water temperature in run-off, and the construction of a stream access road. After her description of the quality and value of the Deer Creek aquatic ecosystem, it appeared unlikely that these minor concessions could have the broad mitigative effect that DEP expected. But Rackham wrote, “These mitigative measures should preserve the aquatic habitat and water quality of Deer Creek” (Rackham, “E02-1350,” 4). Rackham the biologist must have known that claim was unsupported by the evidence. She herself had gathered much of the evidence. Regarding wetland replacement and mitigation, she noted that the 93-acre conservation easement comprised a key component of the mitigation plan but remarked, “Conservation easements are not acceptable mitigation” (Rackham, “E02-1350,” 4). She recognized, as Duritsa had done repeatedly, that all resource agencies recommended denial although she also noted that the Pennsylvania Fish and Boat Commission had withdrawn its objections. To the extent possible from her subordinate position at DEP, she kept the original review team objections at the center of the decision document. In the end though, she seemed unable to resist pressure to accommodate the developer’s application.

Charles Duritsa, in a follow-up press release, described the developer concessions as major and Pennsylvania’s environmental protection standards as strict and stringent (DEP, “Press Release”). Certainly the changes from the first development proposal to the approved plan were major. But relevant to the projected environmental impact, many times the concessions would likely have made little difference to the environmental destruction in the Deer Creek valley. The resource agencies recognized that and, judging from Dreier’s briefing paper, so did DEP field personnel. But the political realities overcame regulatory concerns and administrators controlled the decision process, not scientists. The battle for scientific ethos became *de facto* political.

Instead of depending on rational bases for a scientific decision, DEP's Central Office involvement seemed to transform the process into a means to justify and defend an apparently political decision.

### **5.1.2. The US Army Corps of Engineers**

Early in the Deer Creek regulatory process, on 14 November 1999, Pittsburgh Post-Gazette environmental writer Don Hopey wrote a scathing report on the US Army Corps of Engineers Pittsburgh Regional Office entitled, "It's open season for wetland development" (A1). He used statistics obtained from the Army Corps office itself to develop a highly critical account of the agency's record of protection. Written for the layman and complete with graphic depictions of the importance and functions of wetlands, it had an impact because the average citizen had little understanding of the environmental protection process in southwestern Pennsylvania. Only the interested public, the people who found it necessary to know because they got involved in the process, was aware that the Army Corps and not the EPA acted as the principle federal regulatory agency for water resources. Many people knew that Pennsylvania had a Department of Environmental Protection but most thought the Army Corps worked mainly on dams and flood control projects, not protection of wetlands. The Hopey article, with the inflammatory title posted on the newspaper's front page, raised public awareness at precisely the time that local and regional groups were organizing the opposition to Deer Creek Crossing. Hopey decried the current state of wetland protection very aggressively and indicted the Army Corps for abdicating its regulatory responsibility. He noted for example that "the Corps' Pittsburgh District hasn't denied a permit to develop a wetland of any consequence since the late 1970's" (A18). Hopey's exigence arose from his conservationist sympathies. It was not that he failed to be balanced. On the contrary, he carefully included the Army Corps' methodically

respectable record of requiring, as per the Clean Water Act, that replacements be constructed in cases where wetland destruction was total. But of course the controversy as to the efficiency of merely replacing wetland acreage rather than wetland function remained undecided. If the replacement wetlands did not do what wetlands were supposed to do, or did replace function but to a far lesser extent than natural wetlands, then that left the Army Corps vulnerable to arguments that it had failed to carry out the spirit of the Clean Water Act even while the agency technically adhered to the national policy of no overall loss of wetlands. In the article, Hopey reported that US Fish and Wildlife Service agent Ed Perry denounced the Pittsburgh District of the Army Corps. “I don’t think it’s ever denied any permit application on environmental grounds. Certainly it has never denied a proposed wetland fill that we have objected to in the history of the program” (qtd. in Hopey, “It’s open season,” A18). The DEP was equally critical of the Army Corps. Dreier noted that the Army Corps had dropped its consideration of the first application when DEP had denied it and commented, “In essence, the Corps rendered no decision on the initial application” (Dreier, Briefing Paper, 5). In an e-mail, Duritsa had pointedly excluded the Army Corps from the list of environmental review agencies, “I don’t include the Corps of Engineers, Pittsburgh District – who to the best of my knowledge have never denied an application based on environmental reasons” (Duritsa to Hess et al, 31 May 2002).

The publication of such charges in the Post-Gazette article, however, did elicit a surprised response from Army Corps spokesmen, who described their record as a strategy of reasonable compromise that accurately reflected the Army Corps’ proper role. The chief of the Pittsburgh District’s regulatory branch, Albert Rogalla, defended the Corps procedures and actions as dispassionate and reasonable, contending that “We don’t have to deny a permit to preserve the



environment” (qtd. in Hopey, “It’s open season,” A18). But a wise use strategy threatens eventually to reach a point of diminishing returns, especially regarding wetlands. And if the Army Corps sought actively to assist developers in redesigning projects to maximize profit while minimizing environmental concessions, then the agency opened itself to criticism that it had abdicated its mission.

That is precisely what the Raymond Proffitt Foundation accused the Army Corps of doing. Just after the denial of the first Deer Creek Crossing application, it published a highly critical editorial regarding the failure of the Army Corps to actively support the DEP denial. “The Corps could have denied the permit for many of the same reasons that the DEP did. Instead, they elected to leave DEP out on the limb by themselves, taking all the heat” (Turner, “Pavlov’s Dog,” 1). At the suggestion of the Army Corps, an ORIX-Woodmont consultant requested that the National Resource Conservation Service review stream relocation plans and make recommendations to develop a more acceptable stream relocation design. The Proffitt Foundation thought this Army Corps action to be a strange way of protecting streams and wetlands. “We wish the Corps had spent as much time supporting DEP’s denial of the permit, and less time trying to figure out a way to help the developer get his mall approved” (Turner, “Pavlov’s Dog,” 2). But the Army Corps interpreted its mission as negotiation and accommodation aimed at minimizing, not eliminating, environmental impact. From that perspective, it seemed more reasonable to enlist experts in stream design than to reject stream relocation altogether. The Proffitt Foundation argued that the current Army Corps Pittsburgh region’s regulatory practice virtually guaranteed approval to any developer that showed the willingness to compromise. If that was true, it created an exigence ripe for manipulation by developers savvy enough to request more than they actually need. In the Hopey article, US Fish

and Wildlife agent Ed Perry echoed that concern. “In general, in Pittsburgh, if you apply for a permit, you’ll get it” (qtd. in Hopey, “It’s open season,” A18).

Hopey examined the Army Corps record on enforcement of permit approval conditions as well. Often he discovered that required mitigation actions were inadequate and sometimes never accomplished. The Pittsburgh District office had few funds for enforcement actions and therefore acted only rarely to monitor mitigation areas. Requiring cash bonds from developers became the acceptable replacement for enforcement, the theory being that if a substantial amount of money was at risk, mitigation requirements were likely to be met. Hopey noted that the Army Corps, in 1998, had filed “no lawsuits, imposed no fines” (“It’s open season,” A19). Yet lawsuits and fines comprised the only enforcement measures available to regulatory agencies once permitted work had been completed. The Army Corps’ Albert Rogalla explained that, as funding for regulation decreased, something had to give and very often that was enforcement, just exactly the opposite of what it ought to be according to Ed Perry. “If the Corps really wants to save wetlands, it should concentrate on enforcement, not permitting” (qtd. in Hopey, “It’s open season,” A19).

Enforcement problems were also at the center of the Proffitt Foundation’s criticisms. They ridiculed the replacement wetlands in the previous local Woodmont development, Cranberry Commons, as little more than stormwater retention ponds. “They even have a cyclone fence around them to make sure animals don’t get in” (Turner, “Pavlov’s Dog,” 3). Declaring that the “most environmentally egregious” development projects were located in the area regulated by the Pittsburgh District of the Army Corps, the Foundation lamented the lack of effective protection from agencies that were specifically charged with environmental protection. Just as some people in the Deer Creek Crossing public meetings had charged that regulatory

conditions should not require that the general public supply the protection function incumbent on the Army Corps and DEP, the Proffitt Foundation mocked the corruption of those same environmental protection responsibilities. Why were the regulatory agencies not acting as environmental watchdogs, they asked? “What is the point of having a dog if we have to do all the barking?” (Turner, “Pavlov’s Dog,” 3)

The Army Corps seemed immune to these criticisms. Although the agency exhibited a clinical perspective on environmental protection, it was nothing if not comprehensive. The Army Corps’ final decision document in the Deer Creek Crossing case ran to 49 pages and addressed virtually every objection that had been raised to the development, although its response often consisted of simply claiming the project served the public interest and included no rationale or direct refutation of opposition comments. For instance, the Army Corps examined the economic effects of the development and determined that concerns about competition to local businesses, job shifting, and low quality job creation were in fact valid but implied no overall detriment to the community. “Although, these may be considered negative factors from some viewpoints, the overall public interest will be better served” (US Army Corps, Statement of Findings, 32). This was a good example of some of the incomplete, disconnected reasoning that characterized the Army Corps decision document. The pattern was to repeat the opposition evidence, recognize the validity, then simply disagree, usually with no explanation past the claim that the public interest would be served.

The regulatory agencies were required to request and consider public input. They provided a process to elicit public comment but never explained exactly how consideration affected official decision-making. The Army Corps claimed that the developer had been available at the public meetings to “answer questions along with representatives of the Corps and

PA DEP” (Statement of Findings, 12). That simply did not occur. There was no directly interactive debate at those meetings, no question and answer activity, because the Army Corps and DEP specifically disallowed it in their rules of order. The developer had no obligation to respond to direct and specific questions and did not, because their presentation came at the beginning of the meeting. It remained unclear how public or resource agency comment affected the decision for either regulatory agency. It was particularly noticeable with the Army Corps as it produced a lengthy decision document that claimed: “All of the comments have been reviewed, with all relevant and appropriate comments being considered in the decision making process” (Statement of Findings, 11).

On the fiery debate over alternative sites, the Army Corps deferred to the developer and accepted that ORIX-Woodmont had adequately investigated alternatives and that only the McCrady site fit the basic project purpose. It adopted that position even though it had stated clearly that the “overall project purpose is defined by the Corps” (Statement of Findings ,29). The Army Corps uncritically accepted the validity of eliminating alternative sites based purely on economic and construction obstacles, even though Deer Creek Crossing was not a water dependent project and therefore it was assumed as a matter of law that alternatives existed to wetland disturbance.

The Army Corps Statement of Findings equated mere change with acceptability in several crucial areas of dispute. When ORIX-Woodmont reduced the area of floodplain marked for destruction from 45 acres to 23 acres, the Army Corps accepted that reduction in impact as sufficient even though several arguments had been offered that burying any floodplain would have a significant effect on flood hazards, stream bank erosion, and habitat values. The Army Corps also accepted without question the assertion that the least environmental impact occurred

by eliminating stream relocation plans in favor of culverting and enclosure. Once again, the reduction in impact trumped critical analysis of the actual environmental effect and precluded objective consideration of redesign that would eliminate the need for any direct stream crossing impacts.

The Army Corps proposed a number of conditions for approval that contained no practical monitoring or enforcement procedures, just as the US Fish and Wildlife's Ed Perry had feared and reported to Don Hopey ("It's open season," A19). Recognizing the exceptional value of Deer Creek as a fishery, the Army Corps required that fish species and age classes would not be allowed to drop below 80% of the composition in stream reaches above and below the project area. But the agency required no monitoring plan nor did it offer any enforcement policy. Enforcement became a legal fiction that granted approval with no significant supervision.

Incomplete and somewhat contorted reasoning could be found in the Army Corps' position on riparian buffers. First, it recognized that riparian buffers and vegetative shading were important to fish habitat. This admission was significant because the primary opposition groups were trout fishing clubs. Second, the agency noted that riparian buffers in the project area had been degraded by previous disturbances. But then, third, it admitted that the existing on-site riparian areas nevertheless contributed significantly to the high quality of wildlife habitat. The conclusion that the Army Corps drew from that series of premises was that the developer's replanting plan, necessitated by the placing of fill on floodplains and stream culverting, would help to reestablish the riparian corridor (Army Corps, Statement of Findings, 40). In other words, the proposed riparian mitigation would *re*-establish a resource that the Army Corps admitted already existed, namely a functioning riparian zone.

Regarding the proposed wetland mitigation plans, the Army Corps recognized that there would be unavoidable impacts to existing wetlands, but the agency's reasoning process led it to the conclusion that "there is no overriding public benefit or detriment to the proposed action" (Statement of Findings, 44). The Army Corps reached that conclusion by listening to the debate on the success rate of constructed wetlands and determining that it had a method to guarantee success. The agency acknowledged the difficulty of replacing wetland function and that current scientific opinion differed on how well it could be done. But the Army Corps constructed a four-point justification to support permit approval. First, the donation of the conservation easement property protected over 18 acres of healthier wetlands than those on the project site. Second, the destroyed wetlands would require construction of replacement wetlands at a 1:1 ratio, either on-site or immediately adjacent to the site. Third, the developer would be required to post a \$1 million bond, or present a letter of credit, to motivate compliance with mitigation requirements. Fourth, the replacement wetlands would be monitored. The third condition turns on a question of risk. If the developer merely presented a letter of credit they assumed virtually no risk because no money actually changed hands. If they posted a \$1 million bond, the risk existed to the principal but would that represent a significant risk to ORIX-Woodmont? They planned to spend in excess of \$100 million on constructing the development, including the cost of wetland construction, based on an expectation of substantial profit. If the wetlands failed, or even if they were never built, ORIX-Woodmont might consider a \$1 million bond to be a shrewd financial gamble. If the cost of wetland replacement exceeded the amount of the bond, absent monitoring and enforcement, what compulsion would they feel to succeed? But the Army Corps stated simply that wetland replacement, combined with the conservation easement, the \$1 million bond and adequate monitoring would "insure the successful replacement of lost functions" (Statement

of Findings, 43-44). That conclusion was based on conflicting scientific evidence. If there was one thing that the experts agreed on, it was that there *was* no agreement on the likely success of artificial wetlands. Yet the Army Corps adopted the strangely circular position that success could be assured simply by requiring success as a condition of permit approval.

Perhaps most surprising was the way that the Army Corps dismissed the recommendations of the very resource agencies that were responsible for providing scientific advice, the PA Fish and Boat Commission, the US Fish and Wildlife Service and the US Environmental Protection Agency. Despite having in hand remarkably strident letters of opposition from each of those agencies, the Army Corps dismissed them on what amounted to a technicality. The eligible Department of the Interior agencies, US Fish and Wildlife and the EPA, had informed the Army Corps that if the first permit application had been approved they would initiate the process of elevation, which would move the responsibility for the regulatory decision from the Army Corps' Pittsburgh District office to the national office. But in their letters opposing the second application, just as strong in opposition, the agencies did not threaten elevation. The Army Corps used this omission as justification to depreciate the resource agencies opposition. The agencies, the Army Corps admitted, continued "to object to the project but have not indicated a belief that the current proposed action would result in unacceptable impact to aquatic resources of national importance" (Statement of Findings,47). In other words, despite the letters of objection, the failure to request elevation meant that the resource agencies did not really oppose Deer Creek Crossing. But "impact to aquatic resources of national importance" comprised the requirement for elevation, not for approval of the Deer Creek Crossing permit. The Clean Water Act standard operated at a lower level of impact, requiring the elimination or reduction of adverse environmental impacts in *any* situation that involved a

filling or discharge into the waters of the United States, not only for aquatic resources of national importance. The creativity with which the Army Corps avoided recognizing the value of resource agency recommendations confirmed US Fish and Wildlife agent Ed Perry's assessment of its relationship with environmental advisory agencies. "Of all the districts we work with, Pittsburgh not only issues permits over our objections, it is the least likely to respond to our objections" (quoted in Hopey, "It's open season," A18).

The approval process was highly subjective and, I would argue political, but of course it is in precisely that situation that rhetoric becomes so important. Both regulatory agencies interpreted their responsibility to protect environmental resources in a narrow fashion. The Army Corps operated in an atmosphere of detachment, seemingly not making the connections between what scientists were telling them and the real world effects of ignoring that science. The DEP review, while more critical, was in some ways more surprising. Their scientists recognized the environmental danger implicit in the Deer Creek Crossing proposal and reported it. But that report could not withstand the implicit application of politics to science. Higher authorities rendered the field operatives' opinions impotent. Upon the approval of the Deer Creek Crossing permit on 22 August 2002, a role switch occurred within DEP. The adversary became an ally. The relationship between ORIX-Woodmont and DEP, which had been antagonistic, evolved into a cooperative one when PennFuture's clients challenged the approval in court. Now ORIX-Woodmont and DEP were on the same side, aligned against PennFuture's legal challenge, fully engaged in the final battle of this environmental public argument, facing a situation turned completely upside down.



## 5.2. The Rule of Law as Final Arbiter

If any overriding lesson emerged from the Deer Creek Crossing controversy, it was this: the legal challenge provides the most viable opposition to ecologically damaging property development. In environmental public argument, public forums may arouse opposition through emotional responses, resource agencies may provide credibility, and experts may supply supporting scientific evidence, but if the potential for profit is high enough, developers can spend their way over any of these obstacles.

But in the courts the opposition can have a practical rather than merely rhetorical effect. Even the regulatory agencies cannot realistically stop a development project that is backed by willing and able financiers. They can deny a permit but the result will most likely be another application and another after that if necessary, each accommodation by the agency moving the application closer and closer to approval. The courts can stop a development project in its tracks. Although any decision can be appealed, the deference with which appellate courts treat lower court rulings make it unlikely that a decision would be reversed without a showing of substantial legal error. Trial judges as finders of fact may and did ignore arguments with virtual impunity, or so the opposition contended in the Deer Creek Crossing case. But appellate courts do not generally overturn decisions based on their own new interpretation of facts. Therefore, if the opposition in an environmental controversy can convince a trial court that their arguments are valid and get a favorable ruling, the chances of preventing development, appeals notwithstanding, are far greater than that offered at any other point in the regulatory process.

Landowner Duff McCrady indicated that legal defense costs alone for Deer Creek Crossing amounted to hundreds of thousands of dollars (personal interview). Expenses associated with the submission of two enormous permit applications, numerous addenda and related consultant fees surely totaled hundreds of thousands if not millions of dollars more.

ORIX-Woodmont invested because they believed a successful development would recoup the costs. This sort of financial commitment carried with it a significant suasive power in the regulatory process. DEP biologist Nancy Rackham, in her sworn deposition, alluded to the deference attached to investment. “The person that’s willing to put up millions of dollars to back their opinions probably gets the benefit [of the doubt]” (Deposition, 92).

When the court actions began, the new rhetorical situation changed the tone of argument to reflect tighter procedures and the highly constrained forms inherent in legal process. Where the public forums had been loosely structured, with rules that eliminated face-to-face debate but otherwise allowed anyone to say anything, the legal forums organized the debate by applying fixed and formal patterns to nearly every aspect of the case, from motions to briefs, rules of evidence, court appearances, adjudications, and appeals. Witnesses delivered all testimony under oath, which produced more comprehensive accounts but also occasionally misleading testimony. On one hand, witnesses were forced to reveal a great deal about their reasoning processes that they would probably have preferred not to reveal. On the other hand, they carefully framed, and opposing counsel reframed, those revelations in ways most advantageous to their side.

From that clash of adversarial interpretations, American jurisprudence presumed that the truth would emerge. For the most part, the general public believed that a system like that would be fair and impartial, even objective. But the discretion of judges to choose what evidence they consider probative is unavoidably subjective. For instance, when presented with conflicting assessments of the adequacy of the alternative site analysis in the Deer Creek Crossing case, the opposition contended that Environmental Hearing Board (EHB) Judge Thomas Renwand addressed only the issues that supported his ruling and ignored the issues that did not.

PennFuture attorney Jody Rosenberg observed, “He simply refused to look at the evidence and our specific challenges. We said they [ORIX-Woodmont] limited themselves to an arbitrary size, geographic location, mix of components simply to make the finding of alternatives impossible. He did not directly address any of our contentions” (E-mail to the author, 5 November 2005).

Alerted by the appearance of grass roots opposition to Deer Creek Crossing, and at the urging of local environmental groups, Citizens for Pennsylvania’s Future (PennFuture) joined the opposition just as the DEP/Army Corps public hearing process began. The entry of this statewide citizen action group raised the caliber of opposition to an entirely new level. As passionately as local citizens and outdoors clubs had opposed the development and as effective as regional groups like Clean Water Action had been in organizing the opposition, PennFuture brought resources to bear that had been financially inaccessible to those groups. Leaving the emotional reaction to the public and the scientific arguments to the experts, PennFuture tested the developer’s permit application against the existing laws and regulations. In statements at the public hearings, lawyers for PennFuture raised procedural and regulatory objections that were beyond the ability of the average concerned citizen to develop. When DEP and the Army Corps approved the permit application, effectively ending public influence on the Deer Creek Crossing project, PennFuture and ORIX-Woodmont waged the final contest in courtroom battles with two contemporaneous fronts, one economic and one environmental.

### **5.2.1. The Economic Front**

From the beginning, the Deer Creek Crossing tax-increment financing package (TIF) presented the opposition with an exploitable weakness in the ORIX-Woodmont strategy. The public accepted that landowners had a right to make development decisions individually, within

the constraints of applicable rules and regulations. But they also believed that exercising that right involved an assumption of risk commensurate with the potential for profit. TIFs reduce private risk by shifting some portion of that risk to public investment. Discomfort with the philosophy behind TIFs as a development instrument caused many citizens at the public meetings to voice skepticism that TIFs could be reconciled with the free market. Take the profit, take the risk, they said.

The opposition realized that the TIF concept, however effective it might be economically, remained a sensitive political subject. PennFuture attorneys decided early on that the Deer Creek Crossing TIF was vulnerable on several bases. Apparently, the case against the TIF had been in preparation for some time since PennFuture filed a lawsuit challenging it the day after DEP approved the environmental permit. Prior to this filing, there had been a great deal of posturing on both sides about legal remedies but no action.

The TIF should have been nullified, argued PennFuture, for three compelling reasons. First, the former Allegheny County Board of Commissioners, now replaced with a County Council, had not followed the proper procedure for awarding a TIF. Specifically, they had failed to hold a required hearing to elicit public comment. The attorney for ORIX-Woodmont disputed that. “There was a public hearing,” he said. “There’s been no hiding and no secrecy. The misperception that the public has been excluded is a wild and reckless accusation.” Attorney Rosenberg retorted that an audio tape and sign-in sheet of the “public hearing” indicated that it had lasted three minutes and that no members of the public were present, only representatives of ORIX-Woodmont. Not even the Commissioners themselves attended (Gross, “Judge hears responses,” B1). Given the public record of the meeting, ORIX-Woodmont’s use of the phrase “wild and reckless accusation” constituted an example of a strategic exaggeration argument

form, which was meant to deflect attention from the hearing itself to the hyperbolic description of motive.

Second, PennFuture argued that there were a number of substantive mistakes in the TIF, the most flagrant of which involved the improper designation of the Deer Creek property as blighted. Opponents considered that a preposterous misuse of the term. “There’s no way you can claim a greenfield is a blighted area,” argued PennFuture’s John Quigley (qtd. in Bails, “PennFuture spearheads,” B1). Supporters contended that any stricter interpretation of blight would discourage development. The Allegheny County Director of Economic Development, Steve Morgan, explained that blight, in regard to TIFs, should not be taken literally. The definition of “blight for planning purposes is in the very academic sense of the word” (qtd. in Bails, “PennFuture spearheads” B1). But the Allegheny Institute for Public Policy, a fiscally conservative, free market public interest group, warned that subsidizing retail development did not produce long-term economic growth. “A region that needs to grow a real economic base cannot hope to do that with retail subsidies. There is no export component and there is no multiplier effect. Retailing is a dead-end development strategy” (Haulk and Montarti, “Wholesale use,” F1).

Third, regardless of whether or not the TIF had been issued legally, the changes in Deer Creek Crossing were so substantial as to require a reauthorization of the subsidy. The development plan for which the TIF had been issued in 1999 had been rejected by DEP, argued PennFuture, but a new and different plan had been approved and that alone provided evidence of major changes. (Rosenberg, E-mail to the author, 5 Nov. 2005). If the TIF were revoked the developer contended the project would be economically impractical (Whitney, “Developer,” B6).

PennFuture believed that its legal position was solid. Attorneys for ORIX-Woodmont believed that PennFuture's position had little to do with legal rationale. They claimed in Common Pleas court that the entire PennFuture lawsuit amounted to a delaying tactic lacking legal foundation. The ORIX-Woodmont attorney accused PennFuture of using the TIF lawsuit as a stalling tactic (Gross, "Judge hears responses," B1). The original TIF had been issued in 1999 and required that the bonds be repaid no later than 20 years after approval, regardless of when construction started, so ORIX-Woodmont had already fallen three years behind schedule. Since Deer Creek Crossing existed only on paper, no new property taxes had been collected on the development so no payments had been made on the TIF bond. ORIX-Woodmont believed that PennFuture wanted that delay and asked Common Pleas Court to dismiss the case at the stage of preliminary objections, which meant before any consideration on the merits. Judge Robert Gallo agreed. PennFuture confidently appealed that decision to Commonwealth Court. Pennsylvania courts have, explained Rosenberg, "consistently thrown out municipal ordinances where the public's right to participate was compromised. The abuses here are far more egregious" (qtd. in Gross, "Judge dismisses," A1).

But ORIX-Woodmont chief executive officer Stephen Coslik declared that no amount of legal maneuvering by environmental opposition groups would be permitted to disrupt the groundbreaking or construction, which he promised would begin in May 2003, only three or four months away (Everett, "Target," B1). That projection turned out to be overly optimistic. As of May 2006 no construction had commenced. Whether or not PennFuture meant to use the appeal as a delaying tactic or not, it certainly functioned that way, causing Harmar Township supervisor Robert Seibert to warn in June 2003 that construction was not likely to begin soon. "I think this [legal action] could last another year or two" (qtd. in Jacobs, "Developer," 4).

When the case moved from Common Pleas to the appellate level, the legal reasoning began to get convoluted, eventually winding back on itself at the Supreme Court level in a confusion of missed deadlines and fractured timelines. ORIX-Woodmont's attorney requested that Commonwealth Court uphold the Common Pleas dismissal of the PennFuture lawsuit on the grounds that it had not been filed in a timely fashion. Rosenberg responded that no filing deadline could attach to a statute that had never been legally enacted (personal interview). Commonwealth Court split their decision, offering both sides the chance to claim victory. On one hand, they refused to overturn the dismissal of the original action because PennFuture, they said, had *not* in fact filed the law suit in a timely manner. Woodmont's Stephen Coslik responded that he was "pleased with the findings of the court." On the other hand, they also found that the lower court had erred in dismissing that portion of the lawsuit which claimed that substantial changes in the development plan necessitated amendment of the TIF, and they sent the case back to Common Pleas Court for reconsideration. PennFuture's Jody Rosenberg responded that "We are delighted that the Commonwealth Court agreed that this case needs further review." Even though the parties were "pleased" and "delighted," they both filed Petitions for Allowance of Appeal to the Pennsylvania Supreme Court (Bails, "Court reverses," A1).

The ORIX-Woodmont petition asked for reversal of that portion of the Commonwealth Court decision that directed Common Pleas Court to decide whether the TIF plan had to be reauthorized. The Supreme Court refused to consider their petition which meant in practical terms that the issue would go to trial on its merits. The PennFuture petition asked for reconsideration of the legality of the original TIF authorization procedure and requested that the

issue also be sent back to Common Pleas Court for trial on its merits rather than be dismissed on the technical of a missed filing deadline.

The Supreme Court, already engaged in hearing another case that addressed the same issue of filing deadlines in regard to challenging municipal ordinances, agreed to hold PennFuture's petition in abeyance until that case could be decided. Attorney Rosenberg explained the extraordinarily complex process in a personal interview. In the precedent case, the Supreme Court decided that if an ordinance enactment like the TIF authorization failed to follow proper procedures then it never became effective. So if the appeal deadline starts on the date the ordinance becomes effective, and it never does become effective, then the filing period never starts and cannot be missed. In the PennFuture appeal, however, since the Supreme Court upheld the lower court ruling that the TIF ordinance had been properly enacted, the filing deadline had begun. Further, they ruled that because the issue involved "public indebtedness," the normal 30-day filing deadline had been reduced to 10 days. PennFuture had in fact missed the 10-day deadline. Of course, it turned out to be not quite that straightforward. The TIF act explicitly denies that TIFs involve public indebtedness since theoretically the repayment comes not from public coffers but from newly created tax revenues specific to the developer. And, in the year-end Allegheny County financial report no outstanding TIFs have been listed as part of the County's public debt. So the Supreme Court denied PennFuture's petition based on missing a filing deadline that had been activated because public indebtedness was involved although the County didn't consider a TIF to be public indebtedness and the law itself doesn't allow it. The decision upheld the need for the TIF to be reauthorized due to substantial changes in the development plan (Rosenberg, personal interview, 15 July 2004). ORIX-Woodmont chose at this point to begin a new TIF process rather than continue the fight over the original TIF, which



would have reinforced the stalling effect that the developer thought lay at the heart of PennFuture's strategy. (Rosenberg, E-mail to the author, 5 Nov. 2005) It was curious that the Supreme Court focused on the exigent nature of the Deer Creek Crossing case to the point that the difference between a 10-day and a 30-day deadline became dispositive. Presumably, the presence of public indebtedness attached some sort of urgency to the case. But, ironically, the court took four months to make that ruling. Allegheny County Council reauthorized the Deer Creek TIF in January, 2005.

### **5.2.2. The Environmental Front**

The technical complexity of the TIF case stood in stark contrast to the relatively straightforward, but equally intense, fight over the environmental appeal. Although the case contained its share of heated exchanges and legal maneuvering, including a fight over whether PennFuture had standing to intervene at all, two essential questions were at issue: Did DEP abuse its discretion by granting an environmental permit to ORIX-Woodmont for Deer Creek Crossing? And did ORIX-Woodmont adequately rebut the presumption that alternative sites existed which would reduce adverse environmental impacts? The Environmental Hearing Board (EHB) to which appealed the DEP decision, was a court of first impression, which means it "considers the evidence anew and is not bound by prior determinations by the Department." It was that very condition which made the legal challenge so potent. Based on their own new evaluation of the facts, the Environmental Hearing Board could change the finding of the regulatory agency from approval to denial if they wished. "We may substitute our discretion for the prior decision-maker," wrote Judge Thomas Renwand (Renwand, Adjudication, 2). The EHB created an entirely new record, although the DEP record of decision and both permit applications became part of that record. ORIX-Woodmont Attorney Terry Bossert would allude

in his closing arguments to the “preponderance of the evidence” burden of proof incumbent upon PennFuture to show that DEP had abused its discretion in granting the Deer Creek Crossing permit. “It is not enough,” he said, “for them to think the Department should be doing something differently” (EHB, “Transcript,” 1136). But it *was* enough for the EHB to think that. The opposition would be given a second chance to argue that the permit should not have been approved based on the record and any new evidence that might be introduced. If they succeeded in convincing the EHB, the permit could be rescinded. But, as Judge Renwand noted in his Adjudication, “this was absolutely the worst case an appellant could litigate because of the rigorous review conducted by the Department in this matter” (Renwand, 72). If a rigorous review of the most environmentally damaging development project in 10 years could not sustain a denial, then the practical effect of environmental regulations in Pennsylvania needed a critical examination. The principal of accommodation precluded, in a practical sense, the denial of any project with well-funded and determined developers. That condition appears to be inconsistent with the right to clean air and clean water guaranteed to the people in the Pennsylvania Constitution.

The issue of whether impairment to Deer Creek itself could be raised to the Environmental Hearing Board constituted a continuing argument. In the course of pre-trial discovery, PennFuture had answered an interrogatory [written questions submitted from party to party] by mentioning that their notice of appeal had not “raised an issue concerning impact to Deer Creek” (EHB, “Transcript,” 160). Now, ORIX-Woodmont attempted to interpret that to mean that PennFuture had forfeited all rights to discuss stream impacts during the trial in any context. In fact, PennFuture had determined that it was unlikely that they could successfully dispute DEP’s scientific ethos on the issue of stream impacts. The cost would be enormous and

resources were limited. “The science would be speculative,” explained Jody Rosenberg, “and in a battle of experts, DEP is given substantial deference” (E-mail to the author, 5 Nov. 2005). So they had decided to focus on the issues they felt were winnable and stream impacts was not one of them. But they had not meant to eliminate stream impact as an issue. Could environmental effect be assessed without reference to the central component of any watershed, its watercourse? Every natural occurrence within the Deer Creek watershed somehow interacted with the stream itself. PennFuture contended that the stream could not be ecologically separated from other natural resources, like wetlands or floodplains. Rosenberg tried to explain that she intended the interrogatory answers to mean that PennFuture raised no separate claim of harm to Deer Creek outside of the alternatives analysis. But the regulations required an alternatives analysis for the specific purpose of protecting wetlands. “Wetlands,” argued Rosenberg, “serve stream functions” (EHB, 102). To the extent that wetlands functions were connected to the stream, PennFuture rejected the position that they had surrendered impacts to Deer Creek as an issue. ORIX-Woodmont attorney Mark Bradshaw found Rosenberg’s explanation disingenuous. “I think counsel’s testimony, if you will, as to her state of mind when she answered the interrogatory is entirely inappropriate. . . . the interrogatory itself is crystal clear” (EHB, 103). Each time that any PennFuture question implied a connection to Deer Creek itself, the opposing attorneys raised an objection, to which Rosenberg replied that she objected to the characterization of her interrogatory answer as excluding stream issues. “Much was made of the fact,” she explained later, “that we were not alleging stream impairment (as if we were admitting that all would be okay—not logically or factually true)” (E-mail to the author, 5 Nov. 2005). In the end, Judge Renwand ruled narrowly. “I read that interrogatory answer several times where you said there was no impact to Deer Creek,” he commented, “and I think you’re bound by that. .

. . as I see it, the impact to Deer Creek was taken out of the case” (EHB, 154). That ruling was somewhat of a surprise, not from a legal standpoint, but because Judge Renwand had been remarkably flexible regarding PennFuture. Rosenberg believed that he was being more cautious than accommodating, “I think he was clearly being careful not to set up a basis for appeal so he gave us wide latitude in getting evidence in” (E-mail to the author, 10 Sept. 2004).

Among the most interesting new pieces of evidence introduced at the EHB level were internal DEP communications, e-mails, memoranda and briefing papers, which opened a window on the actual regulatory process in action. The same series of e-mails discussed in the DEP section above were presented at trial, with each side providing conflicting interpretations as to what the messages meant. PennFuture Attorney Lisette McCormick led DEP’s Tim Dreier through a series of questions that insinuated the influence of Central Office on the Deer Creek Crossing permit approval, although Dreier maintained his testimony that no internal pressure had been brought to bear. He testified that the staff recommendation to deny the permit and his own briefing paper of 1 June 2002 indicated no significant concerns about wetland impacts. (EHB, “Transcript,” 400) But the briefing paper itself listed six areas of major regulatory concern, two of which dealt with wetland impacts. Dreier wrote that the review staff had determined that first, “Adverse wetland impacts could be avoided by a project with a smaller scope,” and second, “Practicable alternatives exist that would have less impact on wetlands” (Dreier, “Briefing Paper,” 6). He confirmed that DEP Central Office administrator Ken Reisinger had met with ORIX-Woodmont and on 15 July 2002 sent a pre-denial letter to ORIX-Woodmont providing a list of deficiencies that upon compliance would produce permit approval. (EHB, “Transcript,” 407) These conditions did not include all of the concerns that the technical review staff had expressed, specifically the concern about wetland impacts. Charles Duritsa verified that the

conditions which emerged from Reisinger's intervention had not addressed all of the concerns noted by his staff. "The July 15<sup>th</sup> letter certainly does not speak to all of the things that are in this memo. That's absolutely true" (EHB, 916). Even though both Dreier and Duritsa denied that Central Office political pressure had any effect on the permit process, the following timeline remained unrefuted: the technical review staff had unanimously recommended denial; they listed a number of major concerns; Ken Reisinger became involved; and DEP issued the permit based on ORIX-Woodmont's satisfaction of stipulations significantly less demanding than those requested by regional staff. Noting the unanimous recommendation to deny from the technical review staff, PennFuture's attorney asked, "You spent three months negotiating with the permit applicant to find a way for the permit applicant to meet the conditions [of approval], did you not?" Duritsa answered, "I don't think that's at all unusual with the way the Department functions" (EHB, 917). The Director of the Southwest Regional office of the Department of Environmental Protection virtually admitted that the driving force behind regulatory action in Pennsylvania was accommodation. In fact, the concerns set down in the Dreier Briefing Paper were never satisfied. DEP simply stopped asking for them and substituted less stringent conditions which ORIX-Woodmont could satisfy.

For Pennsylvania, the lesson was that the environmental regulations are meant *in spirit* to protect natural resources but they are not designed *in law* to protect natural resources. The laws were designed to regulate the use of resources, but some resources – wetlands being a good example – have no developmental use per se. From the developer's perspective, they were an obstacle to be overcome in order to facilitate development. It is not the resource that a developer wants to make use of, but rather the land upon which the resource sits. Unfortunately, in many cases, to use the land involves destruction of the resource. Pennsylvania's environmental

regulations say that a developer may do that, may eliminate the natural resource, if certain conditions are satisfied. The overriding goal of Pennsylvania environmental regulations seemed not to be protection of natural resources but damage control, a strategy mathematically certain eventually to eliminate Pennsylvania's natural resources. Tim Dreier, when asked if he thought "every need or use of a person's property, if they claim not to be able to find a suitable alternative, should be accommodated in some manner by the Department," answered, "No, I don't think so" (EHB, "Transcript," 385-386). Yet the Deer Creek Crossing project, which according to Dreier's own briefing paper constituted the most destructive ever to be reviewed by his office, was not denied but accommodated. If the most destructive projects warrant approval, what conditions would warrant denial? In practice, "protection" consists of setting conditions, admittedly stringent, under which the protected resource can be destroyed.

That conflict between the ideal and the real reappeared in the EHB trial's closing arguments. Rosenberg's closing was pensive, laced with pathos, while Bossert's sounded practical and firmly grounded in logos. Rosenberg argued the spirit of the law and Bossert argued the letter. Courts have not typically responded to pathos as sympathetically as logos. Rosenberg opened her closing statement with a pointedly non-legal appeal to reduce the case of Deer Creek Crossing to its most essential component. "I would submit to you, Judge Renwand, that the only question that really needs to be answered to resolve this case is [this:] are we serious about protecting wetlands?" (EHB, 1123).

The disjunction in actual practice between the spirit and the letter of the law appeared also in the argument over the definition of blight. In both examples, regulatory decisions turned on what was written, not what was *meant* by what was written. Rosenberg suggested that the Deer Creek decision violated both. Regulations provided the means to protect Pennsylvania's

natural resources, she argued, accusing DEP of sacrificing that end to accommodation. “Why is it a problem,” she asked, “to deny . . . a project that [has] the largest impact the southwest region has ever seen on one of the highest quality streams around?” (EHB, 1132).

ORIX-Woodmont attorney Terry Bossert, on the other hand, argued that the Deer Creek Crossing permit had been approved because the regulations had been satisfied, contending that no one could offer any effective arguments to the contrary. “I suggest to you,” he stated, “that there has been no evidence presented to refute a single conclusion that’s drawn by the Applicant’s team of highly competent professionals” (EHB, 1136-1137). In the course of a long and comprehensive analysis of virtually every point of contention in the case, he endeavored to paint ORIX-Woodmont as a good corporate citizen, endlessly patient, willing, even anxious to compromise. Proof, he argued, lay in the developer’s compliance with every DEP request. The developer, declared Bossert, had “performed an exhaustive re-evaluation of the whole situation, sent his professionals out there to restudy, resubmit information, [re]draw conclusions” (EHB, 1157). The process for Bossert seemed transparently simple. DEP asked lots of questions and ORIX-Woodmont satisfactorily answered them. DEP issued a perfectly valid permit for a perfectly valid project. “The question is have the Appellants [PennFuture] carried their burden of proving that the conclusion was wrong? I submit to you that they have not” (EHB, 1157). DEP attorney Charney Regenstein provided support for Bossert’s position in her closing. She rejected the contention that DEP had failed to carry out an aggressive review of the project. On the contrary, the process had been intensive and the data “reviewed and re-reviewed” (EHB, 1160). The decision by DEP to issue the permit was the right one not at all “arbitrary and capricious.” The Department of Environmental Resources, she argued, had not abused their discretion but had carried out the duties of the Department at every step (EHB, 1161).

After seven years of controversy, eight days of argument and well over a thousand pages of transcribed testimony, the fate of Deer Creek Crossing rested in the hands of a judge, exactly where everyone had threatened it would be. Six months later, on 23 April 2004, Judge Thomas Renwand ruled in favor of ORIX-Woodmont. He offered a very strongly worded opinion that reflected the interpretation urged on him by ORIX-Woodmont attorney Terry Bossert. In the course of offering his adjudication, Renwand stated a number of Findings of Fact, which are final determinations by the court as to which of two conflicting claims is true. These are important because they may not be set aside on appeal unless clearly in error. Appeals courts like Commonwealth Court accepted the findings of fact *as* factual and made decisions relying on them (Black's Law Dictionary, 569)

The voluminous trial record in the Deer Creek Crossing case proved the value of rhetorical history and contextual analysis to the understanding of diachronic rhetorical events. The Deer Creek Crossing trial generated literally thousands of pages of documents and other rhetorical artifacts representing a capsulized version of the extended controversy, from permit applications to public hearings to regulatory decision processes to legal procedures, none of which could be fully understood without reference to the others. Understanding Judge Renwand's Findings of Fact requires understanding the context of the Deer Creek Crossing rhetorical situation. They were not in themselves of special importance outside of their dispositive character. In fact, they are too specific to have any general explanatory power. But these conclusions, whether one thinks they are right or wrong, emerged from an evaluation of seven years of unrelenting action and reaction, argument and counterargument. Renwand experienced a personal version of rhetorical history when he examined this controversy in parts and contextualized them into a whole.



I examine below five Findings of Fact and consider if they may be characterized as disputable through alternate interpretations of the diachronic complexity of the Deer Creek Crossing case.

1) “The Department never asked Orix-Woodmont to remove any of the specific use components of the development to ‘shrink the development’” (Renwand, 23). This finding seems misleading. While DEP may never have asked for a reduction in scope by eliminating one specific component, they did ask ORIX-Woodmont to shrink the overall environmental footprint of the project which means to reduce the size of the area impacted by development. There does not appear to be enough of a substantive difference between reducing the footprint and removing specific components to cause Judge Renwand to reach a conclusion that implies ORIX-Woodmont did not decrease the scope because they were not asked to do so. Since the rhetorical situation changed as ORIX-Woodmont adapted the application through two complete permit processes, this implication emerges only when the entire application process is considered and not by reference to any one part.

2) “The Deer Creek development avoids substantially impacting Wetland 7” (26). This seems curiously subjective for a finding of fact. The issue of impact to Wetland Seven remained an open question scientifically. The opposition claimed that changing the surrounding topography would unavoidably have some effect on Wetland Seven since the Deer Creek valley was ecologically interconnected. ORIX-Woodmont took the position that limited physical alteration equaled limited impact. In order to determine the degree of impact, Renwand would have to include some way to quantify it or the term ‘substantially’ becomes rhetorically pliable.

3) “Mr. Duritsa’s decision was not influenced by political pressure or otherwise dictated by his superiors” (52). This conclusion could be objectively drawn only if Renwand accepted as

factual Charles Duritsa's statement that he had not been influenced. A close reading of the subject e-mails would raise suspicions as to the manipulative effect of the content and the implications contained in them. Further, although Duritsa signed the permit, the decision to approve was not his alone. In fact, much more responsibility rested on his staff than on Duritsa. And Renwand's finding says nothing about the effect of internal pressure on them, especially that portion of pressure which might have been generated by Duritsa himself.

4) "The replacement wetlands provided by Orix-Woodmont will provide the same or superior function and value to those being impacted as a result of the project" (55-56), and

5) "The replacement wetlands proposed by Orix-Woodmont will provide greater wetland function than the existing wetlands on site" (56). First of all, it is unclear that there are any differences between these two statements. They appear to be saying the same thing, both unproven by settled science. The capacity of replacement wetlands to perform wetland functions at a level approaching natural wetlands remains an open question. The preponderance of the evidence suggests that artificial wetlands perform substantially less efficiently than natural wetlands. Replacement of function and value must be considered an innately subjective judgment unless it can be measured. Although DEP accepted that the ORIX-Woodmont wetlands mitigation plan fulfilled the regulations, that is a very different thing from Renwand's Finding of Fact that they *will* provide equal or superior function and value. Had his finding been that DEP *accepts* the ORIX-Woodmont contention as fact, it would be more defensible. These two Findings of Fact were scientifically beyond Renwand's ability to determine, just as they were beyond the ability of DEP, ORIX-Woodmont consultants, or the opposition to determine to the level of certainty implied in the finding.

The conviction emanating from Judge Thomas Renwand's opinion belied the significance and complexity of the Deer Creek Crossing case. This development plan was riddled with environmental uncertainty. Do man-made wetlands actually work at anywhere near the efficiency of natural ones? We don't know. Could anyone accurately predict the ecological effect of dumping over 7 million cubic yards of fill onto 25 acres of floodplain? No. Could any mitigation plan actually compensate for real habitat losses as opposed to compensating merely to the extent that regulations require? Unknown, since no one knew what the real habitat losses would be. Yet Renwand not only upheld ORIX-Woodmont's permit approval, he did so enthusiastically, praising the efforts of the developer to lessen the impact on the environment. He believed that the "permit was granted due to the sheer tenacity of Orix-Woodmont and its consultants in addressing every question the Department raised and modifying its project in countless ways to make it friendlier to the environment" (Renwand, 72). No doubt ORIX-Woodmont did present a "textbook example of how an applicant should proceed when applying for a permit under which wetlands will be impacted" (78). If so, perhaps the regulations are insufficient to carry out the mission of the Department of Environmental Protection. If ORIX-Woodmont did in fact satisfy stringent requirements for permit approval and yet the impending environmental destruction remained staggering, then the effect of Pennsylvania environmental protection regulations becomes problematic. Judge Renwand stated that "few, if any, developers will have the patience, resources, and willpower to continue to move forward with a project impacting wetlands in the face of such relentless questions posed by the Department" (73). ORIX-Woodmont did overcome significant opposition to Deer Creek Crossing and it might be reasonably argued that the process worked exactly as it should. Even the opposition would admit that the regulatory process resulted in a less environmentally damaging development plan which

could be and was considered a victory by many. Ironically, some environmental battles that lose in the courts might actually impair environmental activism if the wrong precedents are set.

PennFuture attorney Jody Rosenberg expressed concern that the Deer Creek Crossing legal challenge had “permanently weakened . . . the alternatives analysis into the future. . . The sheer volume of materials submitted by the developer concerning the alternatives analysis, though substantively void, and the long period of the review . . . (as well as the fact that it was originally denied) was very convincing to the EHB” (Rosenberg, E-mail to the author, 5 Nov. 2005).

PennFuture appealed the EHB’s ruling to Commonwealth Court. Rosenberg argued in her brief that Judge Renwand improperly relied on intuition rather than the law when he speculated that ORIX-Woodmont had proven that no alternative existed. Renwand had wondered in his opinion why ORIX-Woodmont would subject themselves to such a regulatory nightmare if a viable alternative actually existed. (Rosenberg, Brief, 2) Rosenberg raised an interesting point regarding the ongoing conflict between language and meaning in law. She argued that it was an established legal principle “that the law should be read as to give effect to its meaning” (9). Clearly, the law was meant to afford some level of environmental protection. But both Bossert, for ORIX-Woodmont, and Regenstein, for DEP, claimed that “this is not an environmental protection case” (Regenstein, 29). They claimed that since no opposition expert had been called specifically to refute the contention that the replacement wetlands would function at a level superior to the natural ones, PennFuture had accepted that the wetlands mitigation plan would be effective. Therefore, the case must be about the technical analysis of alternatives, not environmental protection (Bossert, Brief for ORIX-Woodmont, 11, Regenstein, Brief for Respondent, 29), This illustrates how disconnected the procedures of law can become from the spirit of the laws they are meant to implement. Rosenberg called that claim

“astounding,” and suggested that it meant that “DEP does not understand its role and the purpose of its regulations” (Rosenberg, Brief for Petitioners, 17). Far from indicating that Deer Creek Crossing would have no significant environmental impact, she implied that the very existence of a regulatory process proved the opposite. “To the contrary, DEP permits are required *because* there is an environmental impact” (18, emphasis added).

Commonwealth Court declined to reverse the ruling of the EHB. PennFuture then made the strategic decision not to pursue the appeal any further. At that point, they considered further appeals to be a waste of resources. Rosenberg remained convinced that the failure of the EHB to consider PennFuture’s legal arguments had doomed the appeal at the trial court level. Commonwealth Court would not overrule Renwand’s opinion, she thought, especially since two separate processes had reached the same conclusion. “Basing their decision on the very strongly worded EHB opinion that failed to delineate our specific challenges, they deferred to the finder of fact (the trial judge). Once the trial judge ignores your arguments it’s hard to direct the appeals court back to your original contentions” (Rosenberg, E-mail 5 Nov. 2005). So ended one of the most intense environmental controversies in Western Pennsylvania memory. Too much had been invested over too long a period of time to let financing scuttle the project. As of 23 May 2006, no construction had commenced on Deer Creek Crossing. Pittsburgh Mills, a competing project started two years after Deer Creek Crossing opened for business in October, 2005. Duff McCrady claimed that Deer Creek Crossing had been unfairly singled out for opposition and that had put the development at a significant competitive disadvantage (personal interview). And he was right. But the opposition had established the effectiveness of a highly organized public interest and legal challenge to development. Although other large-scale commercial projects had begun without significant opposition during the Deer Creek process,

developers could not mistake the enormous impediment that this particular opposition movement had created. If Deer Creek was a symbolic test case, and had frozen the construction process for seven years, then a rhetorical template for local environmental activism had been created and could be implemented at any time, against any project.

## **6. CONCLUSION: LESSONS LEARNED FROM DEER CREEK CROSSING**

This chapter will present conclusions regarding the significance of the Deer Creek Crossing project itself and how it serves as an exemplar of environmental controversy, the function of rhetorical history and the rhetorical situation in the Deer Creek Crossing case study, and the lessons learned for rhetorical scholarship, environmental activists, and developers. The overarching perspective of this study depends on understanding the analytical power of rhetorical situation theory, articulated through a rhetorical history methodology. I have examined why situational context drew forth, out of such a rich wellhead of primary source artifacts, certain responses and not others and what exigencies and constraints determined argumentative choices. On a specific level, the theoretical concepts contained in other treatments of environmental rhetoric supplement the rhetorical situation theory and identify and correlate the strategy and tactics of argument. These ideas appeared throughout the record of the Deer Creek Crossing case and worked to illustrate the practical utility of these theoretical concepts of environmental rhetoric.

### **6.1. The Significance of Deer Creek Crossing as an Environmental Controversy**

By local development standards, the Deer Creek Crossing proposal was a very large undertaking -- economically and environmentally significant for that reason alone. It is reasonable to conclude that certain other features increased its significance further, for both supporters and the opposition. Judging from past practices in Western Pennsylvania, the project site's topography should have excluded it from development. But a combination of conditions triggered reconsideration by the developer. First, market analysis indicated regional viability. Certainly, the principal impetus for any commercial development -- and especially one the size of Deer Creek Crossing -- is the probability of commercial success. From Spangle and Knapp's

resource functionalist perspective, that is the only consideration. But from a wider social perspective, other concerns should impinge on the project approval process. Communities are meant to have control over local development so as to protect their residents from undesirable consequences -- a reduction in the quality of life, an alteration of the familiar social fabric, and damage to amenities considered to be intrinsic to local identity such as natural resources and community character. Any of these could be adversely affected by development guided purely by market analysis, and all were in play in the Deer Creek Crossing case.

Second, advances in earthmoving techniques supported feasibility. The Deer Creek Crossing project area consisted of two geographically dominant features – a wooded hillside and a deep valley floodplain. In order to create a flat construction pad big enough for the proposed development, the hillside had to be graded away and the fill dumped onto the floodplain, an immense undertaking. In the past, local topography had often made this kind of earthmoving activity financially prohibitive. Now it was possible. Deer Creek Crossing required the public to consider the significant question of whether large-scale development should be done simply because it could be done and what rights local communities had to control it.

Third, sizable undeveloped properties so close to major highways were scarce in the Allegheny River valley. Commercial success cannot be predicted simply by determining the existence of a market. No matter how much a population may want access to commercial centers, they are unlikely to patronize any development if they cannot travel there with relative ease. The McCrady property lay within a triangle bordered by a pair of high-speed, limited-access highways -- the Pennsylvania Turnpike and State Route 28 -- as well as the smaller but heavily traveled State Route 910. This location was important to the controversy because the alleged deficiencies in the alternative site analysis was a centerpiece of the opposition's legal



case, which contended that it aimed to eliminate other sites rather than identify possible alternatives. It took on even more significance when that argument failed in court. As PennFuture attorney Jody Rosenberg observed, losing the Deer Creek Crossing case may have “made bad law” (E-Mail to the author, 5 November 2005).

Conversely, certain other features distinguished Deer Creek Crossing from similar developments and increased its significance for environmental activism as well. First, the proximity of the Rachel Carson homestead created a potent symbol. For environmentalists, no other development site would have carried the significance of Deer Creek Crossing. It immediately aroused special interest among local conservation groups. As a major exigence, it called forth a strong opposition response because if developers were unafraid to pursue projects in Rachel Carson’s backyard, especially massive projects like Deer Creek Crossing, then no place was safe from development. Most regional conservation groups weighed in against the development, some through public comment letters and others by actually sending representatives to speak at public meetings. ORIX-Woodmont’s unsuccessful attempt to co-opt the Rachel Carson persona in connection with the wetlands conservancy easement energized the opposition and attracted attention from the media. For conservationists, Deer Creek Crossing embodied a symbolically bold attack on the environment made particularly offensive to them through the Rachel Carson affiliation.

Second, local custom identified this particular site as a familiar open green space. Many speakers in the public meetings alluded to the traditional public recreational use of the Deer Creek valley. Even supporters of the project testified to the special affinity locals felt for Deer Creek. Of course, they distinguished the project area from the much larger and more unspoiled Deer Creek Biodiversity Area. Blurring that distinction was among the most effective opposition

rhetorical strategies. In any case, local residents had considered the area an unlikely location for development. The ORIX-Woodmont proposal surprised them and contributed to the rise of nearly immediate opposition.

Third, the level of spontaneous grassroots opposition attracted attention from both the media and from more organized and well-funded environmental activist groups. Both PennFuture and Clean Water Action took notice of the Deer Creek Crossing development proposal because of the leadership emerging from local trout fishing clubs. Because the state of Pennsylvania stocked Deer Creek with game fish, fishermen became aware of the proposal and speculated as to the effects very quickly. They publicized the proposal to other sympathetic current and former Allegheny River valley residents and created a conspicuous opposition. The media focus publicizing the extent of grassroots opposition caught the attention of more organized and professional activist groups with substantial resources and the battle lines were drawn.

Principally for these reasons, the Deer Creek Crossing development proposal became significant as a synecdochal representation of the tension between conservation and wise use philosophies of environmental protection. Each side characterized the proposal differently, either as an economically important and environmentally sensitive development or as a particularly egregious variant of profit-driven environmental destruction. In the Deer Creek Crossing case, everything was in play.

## **6.2. The Significance of the Study for Rhetorical Scholarship**

The Deer Creek Crossing case study contributes to rhetorical scholarship in three principal ways. First, it increases our understanding of how rhetorical history can explain public

argument as a diachronic process; second, it deepens our understanding of how form can affect public argument; and third, it provides practical testing of rhetorical situation theory.

### **6.2.1. How Deer Creek Crossing Functions as a Rhetorical History**

The rhetorical history approach is ideally suited for studying public argument processes that play out over time and which may not be adequately understood by reference to any particular rhetorical event within the process. Only by discovering what Kenneth Burke called the “value of the aggregate” can we expose the distinct characteristics of diachronic public argument: “The great mass of art can produce an effect beyond the range of individual artists . . . we could get something beyond these experiences out of their assemblage” (Counterstatement, 182). What Burke attributed to art is equally true of rhetorical processes. Any component event can be analyzed in isolation and thereby certain conclusions reached. But accurate conclusions about a diachronic rhetorical process can best be drawn from consideration of all of the components in the totality of the circumstances. In natural interaction with each other over time, these components reveal more about the overall rhetorical significance than could any particular event.

Kathleen Turner, in the introduction to Doing Rhetorical History, explained the difference between rhetorical criticism and rhetorical history: “whereas rhetorical criticism seeks to understand the message in context, rhetorical history seeks to understand the context through messages that reflect and construct that context” (2). Read as a component of a larger rhetorical process, the first public meeting, which had appeared to be highly favorable to the opposition, had different effects. Comments at that meeting indicated that strong opposition to Deer Creek Crossing dominated public opinion. An observer could reasonably conclude that ORIX-Woodmont faced a difficult undertaking to influence public opinion and that public

comment should have a determinant effect. Denial of the first permit application reinforced that conclusion. What was less obvious in the event itself, and what emerged from assessing the public meeting as part of a larger process, was that the unexpectedly fierce opposition produced a more pragmatic adaptation of perspective from the developer. Faced with sharp opposition, their permit approval strategy evolved into one of accommodation and incremental adaptation designed to accomplish two things: to present a public position of reasonable compromise, and to discover the parameters within which the permit application would be least likely to fail. That strategy did not emerge clearly from the comments of the first public meeting. Rather, it became recognizable only when viewing the controversy holistically, as a series of discrete but interconnected episodes, not a series of independent events. This example illustrates how a rhetorical history approach reveals more about a controversy in context than could be learned from analysis of any one component. Recognizing strategies that emerge from the interaction of events over the life of a process rather than from singular events is a characteristic of the rhetorical history approach.

In fact, the Deer Creek Crossing case can best be understood by reference to how different components interconnected with and informed the others. The holistic approach can provide insights that are not discernible from individual events. For instance, why was a legal challenge a component of this case when it was not in so many others? It happened because a citizen advocacy group with legal and financial resources took notice of the groundswell of local opposition. The public interest mobilized the professional resources, and that interconnection distinguished the Deer Creek Crossing case.

We can understand why this particular project incited such strong opposition by examining the elements in dynamic interaction. Why did significant public opposition appear?

It appeared because the pathos of familiarity emotionally overwhelmed the usual tendency of the public to avoid confrontation. Deer Creek Crossing threatened a popular and local natural resource with a level of damage that would be irreversible. Once the controversy became publicized, local residents and environmental activists from various parts of Allegheny County involved themselves and their organizations in the case. Highly organized groups, like Clean Water Action and the Sierra Club, procured credible experts to argue the science of wetlands and PennFuture engaged experts in land use to testify that alternatives to the McCrady land existed and that wetland destruction did not need to occur to secure the benefits of economic growth. ORIX-Woodmont believed that they had to invest enormous sums of money compiling expert consultant reports *because* the opposition hired technical experts to refute the developer's position. They did it *because* the resource agency opposition was so harsh and had distinctly scientific bases. The logos of science could only be answered with more science. Once public interest had risen to the level of controversy that attracted resources not generally available to citizen groups, the dynamic of the process changed and public scrutiny raised the bar on the regulatory agencies. That sequence of events interacted so as to provide conditions that permitted legal action. Examining these occurrences as individual parts of a greater whole, therefore, reveals contextual connections that might not otherwise be seen. A rhetorical history approach has provided deeper understanding than analysis of any one particular aspect.

Bitzer characterizes a complex rhetorical situation as one in which many elements are interacting. That was an understatement for the Deer Creek Crossing case. The controversy supplied a reservoir of experience from which to draw lessons about environmental public argument. Variables and artifacts were so numerous that it became incredibly difficult to sort and organize them. And it is a strength of rhetorical history that it enables just such a clarifying

approach to complex structures. The organizing function of rhetorical history permitted a deeper understanding of key rhetorical texts because context provided a broader basis for judgment. For instance, over a year elapsed between the two public regulatory meetings on the Deer Creek Crossing environmental permit applications. Examined as two discrete rhetorical artifacts, the transcripts of those hearings did not immediately appear to be very different. And the structure of each meeting didn't change. Many of the arguments were repeated. Evaluated individually, the transcripts seemed more alike than different. But when examined from a rhetorical history perspective, in context across time, clear differences emerged in the rhetorical situation. The failure of the first application cast the second regulatory process in a new light in which environmental activism had worked. It also illustrated in sharp relief the accommodation dynamic at work in environmental regulation. Although many of the comments were the same, the development plan had undergone significant adjustment as a result of the first denial. Read in the light of an initial victory, the second transcript took on different meaning. The same sort of time-elapsing context contributed much to understanding the evolution of DEP's technical review process from a purely science-based review to one very possibly influenced by political considerations. Looking at rhetorical events in the context of a seven-year long battle provided different conclusions than any single event might suggest.

The Deer Creek Crossing case enriches the broader collection of case studies in environmental rhetoric. It reinforced the rhetorical nature of environmental public argument by showing, for instance, that scientific evidence is subject to value interpretations and not nearly as objective as generally believed, that rhetorical situations very often change to reflect not just events but the context within which those events occur, that argumentative positions must be constructed to anticipate co-option and reversal by opponents, and that the form of regulatory

processes exerts a dynamic influence on the outcome. This study shows that rhetorical processes may be most accurately understood as having holistic meaning, with each component form dynamically interconnected so as to shape the entire process as a form in itself, one in which, as Burke observes, we should “not expect to find any principle functioning in isolation from the others” (Counterstatement 128).

### **6.2.2. How Form Affected Public Argument in the Deer Creek Crossing Case**

Throughout the long Deer Creek Crossing process, participants remained cognizant of its likely procedural trajectory. Supporters and opponents understood that a process already existed in precedent, a form of engagement developed by law and past practices that would govern progress. In that sense, Deer Creek Crossing really was one long rhetorical act composed of many smaller events. The overarching form was conventional: public relations, followed by public meetings, leading to regulatory decisions, and finally appeals.

The controversy was most directly affected by form in the way public hearings were structured. Regulatory and legal processes are defined by their reliance on formal procedures. Regulations required that a period be set aside for public comment but the question of exactly what effect that comment would have on the final decision received no clear explanation. In preliminary remarks, US Army Corps of Engineers Colonel David Ridenour announced: “Federal and state law requires that the public be offered the opportunity for a hearing such as this one. The purpose of this public hearing is to provide a forum for the public to be informed about Deer Creek Crossing . . . and to receive public comment regarding this proposed project” (qtd. in DEP 2000a, 4). He further declared that: “All of this information will be evaluated and considered by the United States Army Corps of Engineers, Pittsburgh District” (10). Based on a reasonable, common sense interpretation of the conventional form outlined by Colonel Ridenour,

participants believed that “evaluated and considered” meant that their comments would exert some influence on the decision-making process, although that effect was not explicitly promised. If influence had in fact been exerted by public comment, it remained unclear how that influence manifested. It was clear however that the form raised the expectations of the public that their influence *would* manifest somehow, that public comment would matter.

Katz and Miller describe a model of risk communication in government that devalues public participation, and that model reflected the preferred DEP/Army Corps form of public comment organization (125). The regulators controlled the agenda, the rules, the process, the terms of debate. Commenters did not talk to each other. They made statements in isolation. They spoke almost in a vacuum, asking questions that received no responses. The regulatory agencies seemed disinterested in educating the audience and they deflected that responsibility to ORIX-Woodmont, who presented an unrefuted 30-minute defense of the project. There seemed to be little respect for the technical comments of a non-technical public. Speakers could make anecdotal scientific claims but the regulatory agencies seemed strangely detached from the comments. They offered no response whatsoever. They asked no questions and made no remarks. If the comments from the public were in fact “evaluated and considered,” it was not clear how that happened. In fact, the format produced a segmenting and compartmentalization of debate that significantly constrained interaction. Claims were made but not directly challenged. Challenges could be and were ignored and arguments were acknowledged only when the answer could dependably offer a strong counterargument.

The public commented but had no way to assess the effect of what they said, which made the structure of the hearings an unfulfilled form. Because they were led to believe that one end would result, namely the application of influence, but were presented with another result, namely



uncertainty as to that influence, a violation of the form emerged. It appeared that expectations raised by the use of predictable, conventional form -- by categorical expectancy -- were not satisfied. If, as Burke argues: "Form, having to do with the creation and gratification of needs is "correct" insofar as it gratifies the needs which it creates" (Counterstatement 138), then the public meetings frustrated the needs of the audience. The form was incorrect. When the expectations of an audience are frustrated rather than fulfilled, how do they react?

In this case, some speakers complained in the meeting itself. Clean Water Action's Myron Arnowitt objected to a meeting structure that allowed an uncontroverted presentation by the developer: "There was no other presentation given to refute some of the points that the developer was making . . . What did that provide except an obvious need for the developer to do public relations" (qtd. in DEP 2000a, 134). Arnowitt was frustrated by the procedures, not the substance, and that was a direct effect of form on the argument process. He seemed willing to argue the content of the developer's position but that sort of interactive debate was disallowed by the process. Some opponents counterbalanced the form by anticipating the frustration in the overall process and preparing the legal briefs, leaving the public comment to others. Some found that the opportunity to publicly state their position was cathartic regardless of effect. Many Deer Creek Crossing supporters voiced no objection because the form worked to the advantage of the development project.

When the first application was denied, an argument could be made that the public comments produced that result. But most opponents felt that the initial victory arose more from the scale of environmental damage anticipated by the DEP technical review team than from any transfer of value judgments between the public and the regulatory agencies. If many of those same objections were voiced in the public hearings, it was more co-incidental than influential.

In addition to the effect of form on the overall process in the Deer Creek Crossing case, the form of specific arguments also accounted for some portion of the character of the controversy. For instance, the choice by ORIX-Woodmont to utilize greenwashing as a form to disarm and possibly even convert the opposition had unanticipated results. When they realized that the co-option of Rachel Carson's ethos had stirred up more opposition than it had tamped down, they made an effort to distance themselves from it and concentrated their public relations on the environmental value of the conservation easement itself and away from the misguided naming strategy. But the fallout from that miscalculation shadowed them throughout the controversy. They were never able sufficiently to distance themselves from it even though most of the damage had been done early. It remained a potent tool for the opposition to use to counter ORIX-Woodmont's environmental sensitivity claims.

Strategic exaggeration as an argument form appeared regularly in the Deer Creek Crossing case. Because so much of the public argument occurred orally, the human tendency to debate first and rationalize later kept the hyperbole active. Both ORIX-Woodmont's Joseph Howell and Harmar Township supervisor Don Burns drew support from the pathos of an emotionally charged narrative: "I personally saw a major collision . . . And anyone who tells you that's not a dangerous intersection out there needs to talk to those two teenage sisters from Cheswick who were in that crash" (26). Howell, who hails from Texas, sought to create support for ORIX-Woodmont by connecting the project with something good, an ennobling strategy which if accepted would create an argumentative opportunity based on best/worst case scenarios. That sort of structure encouraged arguments from hyperbole, or strategic exaggeration: "If this entire Deer Creek Crossing project," declared Harmar Township Board of Supervisor's chairman Don Muse, ". . . prevents one fatality or one child from being crippled for life, it is well worth it"

(qtd. in DEP 2000a, 45). While most instances of strategic exaggeration emerged from oral testimony, some used it in carefully prepared written arguments. Joseph Howell's letter to Pennsylvania Governor Tom Ridge accused state resource agency field agents, agents with credible scientific credentials, of making "myopic assessments," a provocative but presumably conscious use of hyperbole. The boldest use of hyperbole came from two resource agency field scientists, Ron Tibbott of the Pennsylvania Fish and Boat Commission and Bonnie Crosby Dershem of the US Fish and Wildlife Service. Their comment letters on Deer Creek Crossing contained language that was more inflammatory and provocative than any marshaled by environmental activists.

In a larger sense, strategic exaggeration characterized the general ambience of debate about Deer Creek Crossing. Constant framing and reframing of both hard scientific data and more subtle emotional appeals shaped arguments into a hybrid of fact-plus-interpretation. In this world of embellishment, a seemingly clear term like "blight" could be stretched to include open green spaces, and conversely, wetlands created from tire tracks could become commensurate with high-functioning, naturally occurring topographical wetlands. The stakes were high, the will to win intense, and sometimes integrity became a casualty of debate.

That sort of intensity led antagonists to utilize excessive forms of tactical argument such as parallel vilification and reciprocated diatribe. The Deer Creek Crossing controversy could not be characterized as a respectful disagreement. It was a battle, and civility was superficial at best. For example, during the appeals process, property owner Duff McCrady publicly aired his frustration in a press release. He vilified PennFuture's delaying strategy as an abuse of the legal system and a "sad commentary on the standards of the organization and its leadership" ("Statement" 1). He characterized PennFuture rhetoric as consisting of "the most extreme,

mean-spirited claims” which “give us no choice but to join the public battle” (2). PennFuture’s response utilized even more volatile language, raising the volume and the stakes by increasing the vituperation. “These are false and even libelous charges,” they cried, “more desperate words of a desperate man . . . unfounded, untrue and defamatory” (PennFuture response” 1). There would likely be no rapprochement between McCrady and PennFuture. Rather, their interaction reached a virtual impasse, which is how Lange claims that sort of excessive rhetoric often concludes ( 139-140).

Just as Craig Waddell investigated the role of models of public participation in “Saving the Great Lakes: Public Participation in Environmental Policy,” so this study investigates the role of form to shape environmental public argument. Deer Creek Crossing manifested as a series of smaller forms – public meetings, argumentative tactics, argumentative strategies, formal procedures – that, taken together, revealed the larger form of environmental rhetoric as a diachronic process. Within that larger form, a constantly shifting rhetorical situation controlled the participant’s choices and ultimately the resolution of the controversy.

### **6.2.3. How Deer Creek Crossing Embodied Rhetorical Situation Theory**

Rhetorical situation theory offered the most useful framework to analyze the Deer Creek Crossing case. Over the course of the seven-year process, the situation could best be characterized as consistently dynamic, with discrete rhetorical events changing and creating new relationships within the overall controversy. What did not change was the constant pressure of exigencies that motivated the parties and the appearance and utilization of constraints and resources as tools to exert influence. These exigencies rose and fell, matured and decayed, as the situation evolved and reacted to changing conditions. Deer Creek Crossing illustrated the principles of rhetorical situation theory in several ways.

# *Rhetoric is pragmatic* - Lloyd Bitzer explicitly defines the purpose of rhetoric as pragmatic, concerned principally with changing existing conditions and controlling potential conditions (“The Rhetorical Situation,” 6). Participants in the Deer Creek Crossing controversy were driven to speak or to act in order to assert control over the exigence, the “imperfection marked by urgency,” and the terms of debate. For the opposition, the existing conditions -- the submission of a development plan that threatened great damage to the environment of the Deer Creek valley -- were unacceptable and they set upon finding constraints that would change those conditions. They chose to mobilize public opinion, to offer alternative interpretations of scientific and economic data, and to challenge the developer in court -- all in an attempt to “modify the exigence” of development in a practical way. For project supporters, the rhetorical situation created an exigence that required responses to keep the process moving forward. Insofar as the opposition kept up constant pressure to derail the project, supporters attempted to control those potential obstacles by cultivating the persona of a reasonable and accommodating corporate citizen and by steering the debate towards the economic self-interest of the local populace -- just the behavior predicted by Spangle and Knapp from the pro-business radical functionalist.

# *Rhetorical situations recur and responses are predictable* - There are recurring elements in environmental public argument, elements that, when contextualized within the full historical and perceptual rhetorical situation, provide a level of prediction that can influence the success of rhetorical strategies and tactics. The elements define the active exigencies at any given time and structure the arguments for both sides. The usual environmental controversy contains the pathos of irreplaceable loss, the logos of economic and scientific data, the ethos of expert credibility, and finances permitting, the legal challenge. These elements have been and

will continue to be repeated in environmental controversies throughout the US, and Deer Creek Crossing is a good example of them in action. For instance, Attorney Rosenberg's closing before the Environmental Hearing Board contained implied warnings about irreparable loss, clothed in her skeptical questioning of our commitment as a society to the protection of wetlands (EHB, "Transcript," 1123). Later in the EHB adjudication, Judge Renwand found the scientific data contending that artificial wetlands function at a level equal to or better than natural wetlands to be legally factual. Finally, he weighed the testimony of two competing experts regarding the adequacy of the Deer Creek Crossing alternatives analysis and made a finding of fact that one was more credible than the other (Renwand, 55-56). Thus, arguments from pathos, logos, and ethos appeared on both sides and could reasonably have been predicted to appear based on experience. The rhetorical situation drew conflicting ideas from each rhetor. The exigence was embodied in two diametrically opposed philosophies of environmental protection, wise use versus conservation. Recurring elements were interwoven throughout the case, melding and separating ideas, supporting and rejecting environmental world views which only become obvious when comprehended in context, each part helping to clarify the rest. When we analyze the tension between these elements we realize the rhetorical impasse implicit within them. The recurring nature of rhetorical environmental situations can be identified in the whole, that is, the totality of conditions comprising the overall controversy, and also in its smaller constituent parts.

# *Rhetorical situations are fluid and unstable* – In the Deer Creek Crossing controversy, a complicated case with many variables interacting, the length of the process and the complexity of the context produced not only many competing perspectives but also a regularly shifting interpretation of the rhetorical situation. For instance, a fundamental reconstitution occurred when the first ORIX-Woodmont permit application was unexpectedly

denied. It was not the customary outcome of environmental permit application processes in Pennsylvania. Even though they felt confident that good evidence had shown Deer Creek Crossing to be a bad environmental risk, project opponents were nevertheless surprised at the outright denial. Not only did DEP deny the permit, they did so with strong environmental criticisms, including a public statement by DEP Southwest Regional Director Charles Duritsa that even though “the property is not in pristine condition . . . we believe this land is still worthy of protection” (DEP, “News Release,” 2). Going into the second permit application process, the new rhetorical situation reflected a heightened sense of empowerment within the opposition, including the conviction that the project could not stand on its environmental merits, which colored the strategy of both sides. ORIX-Woodmont conducted a major overhaul of the application and shifted their focus from the public audience to the regulatory audience. Their exigence became less the unfavorable public opinion and more the need to satisfy specific regulatory criteria.

The opposition entered the new phase of the controversy believing that the environmental damage integral to the construction of Deer Creek Crossing might comprise an insurmountable obstacle and complicate ORIX-Woodmont’s plans much more effectively than public opinion had. It was difficult for them to see how any design changes in the development plan could obviate the environmental objections outlined in the DEP record of decision. Opposition groups recommitted their resources based on a new rhetorical situation that now offered the possibility of stopping the development rather than delaying it.

The most dramatic new result of the redefined situation was the addition to the conservation easement of 80 acres of nearly pristine property a short distance upstream from the project site. This new condition in turn altered the rhetorical situation again. Most notably, the

tactic cemented the support of the Allegheny Valley School District and suddenly made the idea of an environmental trade-off more palatable. This sequence of events, with each action altering subsequent actions in response to the shifting rhetorical situation, showed how easily perceptions and conditions could change the tone and tenor of argument. Context-plus-interpretation constructed the rhetorical reality.

# *Bitzer versus Vatz* – The debate over the nature of the rhetorical situation has proceeded theoretically beyond Bitzer and Vatz. But to the extent that the rhetorical situation is of practical utility, a merger of the Bitzer and Vatz perspectives remains a valuable tool. Vatz' critique of Bitzer's original article showed that Bitzer had not taken sufficiently into consideration the role of the rhetor's perceptions in creating a rhetorical situation. Although Vatz took his argument too far by contending that a rhetorical situation could be only what the rhetor thought it was, Bitzer implicitly recognized Vatz' legitimate criticism and reworked situation theory to view the rhetorical situation as being established through the interactions of both mental and physical processes -- perceptions and historical conditions. For instance, when ORIX-Woodmont miscalculated the reaction to the use of Rachel Carson's reputation as a legitimating tool, they were responding to a rhetorical situation in which their perception -- that Carson's credibility would support their claim of environmental sensitivity -- collided with Carson's established conservation ethos. They misread the situation because they failed to sufficiently account for the historical condition of Carson's existing reputation. Perception and historical condition conflicted to produce a miscalculated rhetorical situation that led to ineffective but predictable responses.

# *Bitzer's evolving rhetorical situation* – Rhetorical situations pass through a four-stage evolutionary process according to Lloyd Bitzer: origination, maturation, deterioration, and



disintegration. Deer Creek Crossing originated as an entirely local issue energized by a grass roots constituency. It matured when more organized groups with substantial resources noticed that energy and joined the opposition, immediately increasing the possibility of influencing and moderating the exigence. Once the approval process ended and the public eliminated as a viable opposition force, the situation deteriorated. When the legal appeals process ended, the situation disintegrated as no expectation of modification remained. Yet the project, now fully permitted, remains undone, another example of the importance of interpreting diachronic rhetorical processes in context.

Rhetorical processes are contextual and unstable. Different theoretical tools are required to evaluate processes rather than singular events. Deer Creek Crossing remains a complex controversy with the great number of variables expected from a seven-year long process of public argument. Organized on a rhetorical history framework, rhetorical situation theory supplies a template through which to analyze discrete actions.

### **6.3. The Lessons of the Study for Environmental Activists**

Long-term study of Deer Creek Crossing as an environmental controversy suggests a number of conclusions for each side -- both strategic and tactical. By strategic, I mean general behaviors that contribute to the gradual, overall success of a movement or vision. By tactical, I mean choosing and employing specific behaviors to gain specific objectives. Although some of the conclusions may have already been evident from other episodes of environmental controversy, the combination and variety offered by the Deer Creek Crossing case -- Burke's "value of the aggregate" -- provides a composite portrait, and more holistic understanding of these effects in dynamic interaction. The strategic lessons learned by environmentalists from observation and analysis of the Deer Creek Crossing controversy include: the value of symbolic

resistance, the importance of staking out realistic goals, the importance of keeping local and regional environmental activist groups aware of the events, the functional deficiencies of artificial wetlands, and the evidentiary weaknesses inherent in arguments positing political influence.

### **6.3.1. Strategic Lessons**

# *The value of symbolic resistance* - Although the legal challenge offers the most effective chance of preventing damage to natural resources, the holding-action strategy of targeting specific developments for resistance can create significant constraints for developers. The strategy can have a three-fold effect: 1) it can cause developers to reconsider the wisdom of beginning certain developments; 2) it can encourage resistance from other opposition groups to other developments; and 3) it can sometimes stop the targeted development itself if circumstances change over time sufficiently to affect the economic viability of the project.

Property owner Duff McCrady suspected, and PennFuture attorney Jody Rosenberg confirmed, that Deer Creek Crossing evolved into a symbolic target for environmental activists (personal interviews). Symbolic target opposition may be more effective than expected. When ORIX-Woodmont began the development process in 1999, no competing commercial centers existed in the area. Although they had not been the first development partnership to conclude that there was a market for a mixed-use shopping center in the northeast corner of Allegheny County, the others had been deterred by environmental concerns and the topography. For seven years, the Deer Creek Crossing developer battled with environmental and community activists over construction. During the course of that regulatory process another nearby commercial development, Pittsburgh Mills, sailed unopposed through the approval phase, started construction, and has since opened for business. Early in 2006, ORIX Real Estate Equities of

Chicago withdrew as an equity partner in the Deer Creek Crossing development group. Amid reports of a depressed commercial market and problems securing funding, it is possible that the developer may reevaluate the feasibility of beginning construction at all (Stouffer, “Deer Creek Crossing”). If that occurs then the strategy of symbolically targeting specific developments, even if individual opposition tactics were defeated, could redefine the Deer Creek Crossing controversy as an environmental success story. Environmental and community activists would have lost nearly every battle but won the war.

# *The importance of staking out realistic goals* – Extreme environmental positions and exaggerated claims are unlikely to resonate with the populace, especially in cases involving private property. As Brick points out, private property rights are one of the issues driving the success of the wise use movement (201) and there is a lot of popular sympathy for them. In addition, the ideological power of the term “progress” leads to a tendency to prefer compromise in economic development decisions and, as Killingsworth and Palmer observe, calls for less confrontational appeals (25). Opposition speakers on a number of occasions stated that they were not opposed to all development on the McCrady property, just the ORIX-Woodmont plan *as designed*. Calling for reduction rather than elimination of development plays into the regulatory agencies’ preference for accommodation. Realistically, that may be the most achievable goal. Pennsylvania Fish and Boat Commission biologist Ron Tibbott, possibly the most hyperbolic opponent of Deer Creek Crossing, observed, when his agency withdrew its objections, that he thought they had wrung from ORIX-Woodmont all the concessions they were likely to get (personal interview).

# *The importance of keeping other environmental groups apprised* – Brick asserts that the best strategy for converting environmental protection into public policy is to locate

leadership in local groups (203). Most activists are motivated by personal identification with environmental problems, which means that a lot of energy is concentrated in local conservation groups. Those groups should be involved if only to the extent of keeping them aware of the controversy. Familiarity encourages action. Many organizations, especially state and national groups, take advantage of technological communication advances like e-mail address lists to stay connected with supporters and to keep them actively involved. PennFuture has created e-mail response networks that can generate hundreds or even thousands of targeted e-mail messages and telephone calls within a matter of days. In the Deer Creek Crossing case, most conservation groups in the Greater Pittsburgh area participated by writing letters of opposition or sending representatives to speak in public forums. Even that relatively minor level of involvement made an impression on the regional organizations like Clean Water Action and PennFuture when deciding how deeply to invest their own resources in the controversy. The sense of regional unity implied by even peripheral involvement strengthens the credibility of resistance.

# *The functional deficiencies of artificial wetlands* – Mitigation is the key to a successful development plan that impacts wetlands. If a developer can convince the public and the regulatory agencies that environmental damage can be adequately mitigated, they have taken a giant step towards approval. Mitigating for loss of wetland *area* is relatively easy, but mitigating for lost *function* is much more difficult to prove. Functional mitigation is an exploitable weakness in most development plans. A comprehensive, scientifically credible argument should be compiled by scientific experts and disseminated to every conservation group. In the Deer Creek Crossing case, the viability of replacement wetlands was attacked in a random and uncoordinated way by several speakers in the public forums but, as technically unsophisticated laymen, they lacked scientific credibility. The science is heavily in favor of

rejecting the functional success of artificial wetlands but most local groups do not have the expertise to develop the argument independently so the precise statistics and even the form of argument should be supplied to them.

# *The evidentiary weakness of political arguments* – Argument by insinuation is a difficult argument to make. By its very nature, political pressure is subtle. Therefore, mobilizing a political argument, even one that seems obvious, should be done very carefully if only because it carries counterargument within itself: “Claims that pressure was applied are just a political attack.” In the Deer Creek Crossing case, it seemed likely that political influence affected the decision. The cited series of internal DEP e-mails implied a clear pattern of pressure but supplied no absolute proof. The evidence was circumstantial. Therefore, political arguments should be utilized only in a subsidiary capacity, implying a conclusion but not claiming to prove it. Present the evidence and let the audience judge the probative value. Overreaching that warrant could weaken credibility in other parts of a case. Conversely, it is profoundly important to keep overt pressure on elected politicians to increase the level of environmental protection and to reinforce existing enforcement procedures.

### **6.3.2. Tactical Lessons**

Complementing the strategic lessons, several tactical lessons for environmental activists emerged from the Deer Creek Crossing case study: compose a focused public relations approach, share spokesperson responsibilities, organize and coordinate statements in public forums, and be cognizant of different perspectives of regulatory agencies.

# *Compose a focused public relations approach* - Aim public relations at 1) getting a noteworthy number of people involved in order to 2) gain media coverage and 3) attract the attention of organizations with more resources. There is strength in numbers and this is

especially true of community activism. When many people care enough about an issue to physically appear at public regulatory hearings or even municipal government meetings, it changes the rhetorical situation and gets the attention not only of elected officials but also of larger activist organizations. PennFuture attorney Jody Rosenberg made it very clear that her organization joined the resistance to Deer Creek Crossing because of the spontaneous grass roots support generated by local activists (personal interview). Crowds at a public meeting generate media coverage, and that attracts more people and increases involvement. This tactic works better in confrontational circumstances than in cooperative ones because while most positive conservation efforts aren't news, controversies are.

# *Share spokesperson responsibilities* – When an environmental protest action include several groups, coordinate the message closely and use several different faces for public relations. It is easier to ignore the arguments of one or two people than it is to ignore many making the same arguments, just as it is easier to demonize one person or even one group. In the Deer Creek Crossing case, Robert Silber and Jody Rosenberg emerged as the public faces of the opposition. While they both had the communication skills to do the job well, the media began to focus on them to the exclusion of many other informed sources. Strength of numbers is diluted when one or two people become public symbols. For instance, when Jody Rosenberg and Duff McCrady engaged in their heated personal exchange over the ethical exercise of legal action, the controversy lost some of its populist potency.

# *Organize and coordinate statements in public forums* – The formal procedures of regulatory public meetings tends to disengage arguments from counterarguments and separate questions from answers. After the opening presentation, the developer virtually withdraws from the process, answering no direct questions and making no specific responses. The regulatory

agencies open and close the meeting but do not participate except as an audience. Without any direct examination opportunities, this structure makes it difficult to construct a logically progressive opposition. The key to overcoming this condition is twofold. First, attempt to predict the developer's most compelling arguments and prepare refutations prior to the public hearings. Then coordinate speakers so that the principal refutation positions are presented credibly several times by different people for emphasis. Second, in addition to pre-meeting preparation, a team should be deployed at the meeting to listen to the developer presentation and to the remarks of supporters and prepare immediate and specific rebuttals to be delivered by speakers carefully planted near the end of the speaking queue.

# *Be cognizant of different regulatory perspectives* – The US Army Corps of Engineers and the Pennsylvania Department of Environmental Protection approached the Deer Creek Crossing with different strengths and investigative attitudes that reflected the training background of their field operatives. The Army Corps took a methodical and systematic approach, with more experience in the technical engineering aspects of environmental permitting and procedures than expertise in science. DEP field agents were generally professional scientists and responded more to credible scientific arguments. Tailoring argumentative positions to appeal to each agency's predispositions, while probably not determinative, could be more persuasive than making general arguments meant to appeal to all audiences.

Environmental activism is very much a reactive process. Because most people are inexperienced with any kind of activism, having a structure to inform action should increase participation and perhaps the influence of activists. On one hand, grass roots activism is difficult to manage. It is physically and mentally exhausting and the motivation of victory is rare. It is hard for leaders to maintain the level of emotional intensity necessary to keep a grass roots

movement afloat. People burn out. On the other hand, developers are typically well-financed and employ professional consultants. They don't go home from work and face an evening consumed by the details of organization. They do that *at* work. They prepare comprehensively because that's what they're paid to do. On the rare occasion that environmentalists prevail, as in the Deer Creek Crossing case, the likelihood of a second attack is high, and another after that if necessary. It is public argument by attrition.

#### **6.4. The Lessons of the Study for Developers**

Deer Creek Crossing was instructive for developers as well as environmentalists and they should have extracted certain strategic and tactical lessons from the experience. The strategic lessons learned by developers from observation and analysis of the Deer Creek Crossing controversy include: contemporaneous focus on both regulatory audience and the public audience, enter approval process ready to compromise, design expendable items into development plan, anticipate the opposition strategy and plan refutation, and utilize attrition strategy.

##### **6.4.1. Strategic Lessons**

# *Contemporaneous focus on regulatory and public audience* – The most effective approval strategy will utilize a two-pronged approach. First, raise public support through friendly, non-confrontational informal public appearances that focus mainly on the benefits of the project, especially economic benefits. ORIX-Woodmont conducted a number of neighborhood meetings preliminary to the formal application process at which they modeled an image of reasonable benevolence. Creating good will provides a favorable starting impression.

Second, stay cognizant that the final decision will be rendered by agencies charged with containing development within the constraints of *existing* regulations. Therefore, irrespective of



the influence of public opinion, technical consultants should constantly be testing designs against those regulations and providing contingent alternatives. In the final analysis, plans that satisfy the letter of the regulations will pass muster even in the face of accusations that the intent of the regulations have been flaunted. Deer Creek Crossing embodies an excellent example of that reality at work.

# *Enter the process ready to compromise* – A classic tool of negotiation is to ask for more than you want. Although the public doesn't think of environmental enforcement as a negotiation so much as a rules-following procedure, in practical terms it functions as a process of accommodation. Inflexibility diminishes public sympathy and provides regulators with a basis for denial. On the other hand, flexibility increases public sympathy and provides regulators with a rationale to approve. In the Deer Creek Crossing case, eliminating the stream relocation corresponded to removing the most egregious environmental damage from the design. A significant reduction in environmental threat created an instantly more acceptable plan.

# *Design the development with expendable parts* – Use a devil's advocate to critique the development plan from the perspective of the opposition in order to discover the aspects most likely to raise objections. Plan contingencies to respond incrementally, adapting the plan only as much as necessary to appear reasonable but not so much as to interfere with the probability of commercial success. In the Deer Creek Crossing case, ORIX-Woodmont was able to redesign the development around the need to relocate Deer Creek, but without affecting the project's economic viability, a reasonable adjustment strategy and one that should have been anticipated.

# *Anticipate opposition strategy and plan refutation* – use a team to examine the plan from the opposition perspective and speculate on what strategies might be expected. Create

an argument plan that effectively nullifies those strategies. Be prepared for the opposition's plan of attack by anticipating the opposition and preparing defenses long before the engagement begins. Never assume an ineffective opposition. An honest internal evaluation By the developer of the original Deer Creek Crossing development plan would have raised a red flag at the idea of stream relocation. Prepare for worst case scenarios.

# *Utilize attrition strategies* - For developers, winning continually refills their coffers with commercial profit. For opponents, winning and losing are equally debilitating financially. Attrition emerges as the developer's most powerful tool and can produce both issue-exhaustion and resource-exhaustion in the opposition. Environmental activist groups are dependent on private largesse for funding and so they have a significantly lower level of resources than do profit-driven developers. When they concentrate those resources on a symbolic target, they can cause a great deal of distress and aggravation, as they did in the Deer Creek Crossing case. But even then, a determined developer can achieve plan approval. ORIX-Woodmont has not started construction of Deer Creek Crossing but, from a procedural standpoint, they could do so at any time. Whatever is preventing them, it is not linked to regulatory approvals. Limited opposition resources make attrition an exceptionally effective development strategy.

#### **6.4.2. Tactical Lessons**

Tactical lessons for developers illustrated by the Deer Creek Crossing study include: carefully choose specific communications tactics, pick a public representative to embody a persona of reason and compromise, and take advantage of regulatory meeting structure.

# *Carefully choose specific communications tactics* – Realistically anticipate the effect of certain tactics before implementing them. ORIX-Woodmont's decision to use a

greenwash tactic was not intrinsically counterproductive. Greenwashing can have powerful psychological effects. But choosing to structure it around the legacy of Rachel Carson turned out to be a serious mistake, one that should have been anticipated. The psychological effects worked against rather than in favor of Deer Creek Crossing. Mustering Carson's ethos did not placate the opposition but rather outraged them. Even neutral observers found that particular use of Rachel Carson's legacy not to be credible. ORIX-Woodmont realized the mistake almost immediately and abandoned the tactic. But they found it difficult to sever the connection and it interfered with their ability to cultivate a sense of environmental sensitivity. Like greenwashing, expendable design components carry the risk of excessive negative reaction. Generally, expendables should not be included that may trigger public outrage because it can be difficult to reverse highly emotional effects.

# *Choose public representative to show accommodation* – Because a developer seeks to create a reasonable and accommodating public persona, choosing a public representative with the right mixture of characteristics is critical. Developers utilize a business model of public relations with a single designated spokesperson presenting a unified position. ORIX-Woodmont changed public faces as the rhetorical situation changed. Initially, they believed that Deer Creek Crossing would be positively received and they used Woodmont executive Joseph Howell to present the development plan as an enthusiastic marketing executive would to a sympathetic audience. When the intensity of opposition indicated a different approach, especially after the denial of the first application altered the rhetorical situation, they engaged former DEP General Counsel Terry Bossert to defend the development plan. Bossert provided both a familiarity with DEP regulatory procedures and a more structured and reasoned presentation. Once the approvals were in hand, Woodmont CEO Stephen Coslik stepped in to emphasize the importance of the

project both to the developer and to the community. ORIX-Woodmont's adjustment of public persona was flawless, reinforcing the value of having the right person in public at the right time.

# *Take advantage of regulatory meeting structure* – The procedures of regulatory public hearings favor the developer so an effort should be made to maximize that advantage. With no sort of cross-examination permitted, developers are free to present the project in the best possible light with no direct refutation. Because that presentation precedes any public comment, advantages can be highlighted, objections addressed, and attitudes shaped before any claims are disputed in rebuttal. The audience is exposed to first impressions shaped by the developer. That opportunity should not be wasted.

Developers have the advantage in environmental controversies in Pennsylvania because regulatory structures stifle open debate, because there is a culture of accommodation within regulatory agencies, and because they have financial resources far beyond any activist group. But developers often partially waste this advantage because their strategy is guided by a business model in which economic statistics are the primary means of evaluation. They need to construct their public positions around rhetorical principles in addition to economic ones. The public is often more easily persuaded by logic and emotion and credibility than by numbers alone. Communication professionalism can reinforce an already favorable regulatory structure.

## **6.5. Epilogue**

In March 2005, the United Nations released the “Millennium Ecosystem Assessment.” This report was not written to bolster the environmental movement but to alert business and government leaders to the implications of current global environmental policy. In order to ensure credibility, it used only evidence that reflected scientific consensus and studiously avoided claims with conflicting or uncertain evidence. Even under these constraints, the report

warned that short-sighted policies and lack of vision have created a dire threat to future generations. It concluded that we are enhancing our own comfort at the expense of posterity. “At the heart of this assessment is a stark warning. Human activity is putting such a strain on the natural functions of Earth that the ability of the planet’s ecosystem to sustain future generations can no longer be taken for granted” (qtd. in Borenstein, A2). As long as natural resources appear virtually infinite, the pressure to use them indiscriminately will remain. If we can’t calculate a reasonable level of usage, we will be unable to predict the effect of that usage on the future availability of natural resources, except to say that it will be substantial. It may be argued that natural resources are renewable and that is true from the perspective of economics and utility, but not from the perspective of a natural resource desirable for its own sake. If an old growth forest is cut down and a tree farm is planted, that may provide us with lumber for a thousand years, and in that sense it is renewable. But the old growth forest will be gone. We need to decide -- and the need is urgent -- whether it is wiser to live strictly in the present or to plan for a sustainable future that includes wilderness and wildlife as environmental, aesthetic and even spiritual imperatives.

## **APPENDIX**

### **Interview Methodology**

All interviews were carried out by the author at a place chosen by the interview participant. Sites included private homes, offices, a restaurant, and once, when the interview participant was out of town, by telephone. Most people were interviewed only once but in one case there were several separate interviews. Questions were generally open-ended in order to allow the interview participant the maximum opportunity to present his or her position. The author requested permission to tape record each interview but all interview participants refused. Therefore all material from the interviews is taken from the author's personal field notes and available on request. Except for the interviews, all sources used in this study are properly cited or are public record and can be independently checked for accuracy.

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