

COMMONWEALTH COURT OF PENNSYLVANIA

**PENNSYLVANIA ENVIRONMENTAL
DEFENSE FOUNDATION,
Petitioner** :

v. :

**COMMONWEALTH OF PENNSYLVANIA,
and TOM WOLF, in his official capacity
as GOVERNOR of PENNSYLVANIA,
Respondents** :

**PETITION FOR REVIEW
IN THE NATURE OF DECLARATORY RELIEF**

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I. SUMMARY OF PETITION

(1). On June 20, 2017, the Pennsylvania Supreme Court found Sections 1602-E and 1603-E of the Fiscal Code (72 P.S. §§ 1602-E and 1603-E) to be facially unconstitutional because they “plainly ignore the Commonwealth’s constitutionally imposed fiduciary duty [under Article I Section 27 of the Pennsylvania Constitution (“Section 27”)] to manage the corpus of the environmental trust for the benefit of the people to accomplish its purpose – conserving and maintaining the corpus by, inter alia, preventing and remedying the degradation, diminution and depletion of our public natural resources.” *Pennsylvania Environmental Defense Foundation v. Commonwealth of Pennsylvania*, 161 A.3d 911, 938 (Pa. 2017) (“*PEDF II*”). These Fiscal Code provisions allowed the Commonwealth to use royalty proceeds from State forest oil and gas leases deposited into the Oil and Gas Lease Fund for general government operations through the annual appropriations process. The Supreme Court found that such use did not meet the purposes of the Section 27 trust. Upon finding these provisions facially unconstitutional, the Supreme Court determined that the Pennsylvania Department of Conservation and Natural Resources (“DCNR”) would again control the Oil and Gas Lease Fund through the Oil and Gas Lease Fund Act¹ and the Conservation and Natural Resources Act (“CNRA”).² These statutes give DCNR exclusive control over the Oil and Gas Lease Fund to use solely for conservation, recreation, dams and flood control purposes. *Id.* DCNR and

¹ The act of December 15, 1955, P.L. 865, No. 256 (71 P.S. §§ 1331-1333), commonly referred to as the Oil and Gas Lease Fund Act.

² The act of June 28, 1995, P.L. 89, No. 18, as amended (71 P.S. §§ 1340.101-1340.1103). Section 304(c) of CNRA expressly authorizes DCNR to exercise the powers and duties granted by the Oil and Gas Lease Fund Act. 71 P.S. § 1340.304(c).

its predecessors exercised control over the proceeds from State forest oil and gas leases for these purposes from 1955 to 2009.

(2). On July 11, 2017, less than a month after the Supreme Court opinion in *PEDF II*, Governor Wolf and the Commonwealth enacted the General Appropriations Act of 2017,³ which appropriated more than \$61,000,000 from the Oil and Gas Lease Fund to pay DCNR's general operating expenses for the 2017-18 fiscal year, including salaries and travel expenses. In doing so, the Respondents violated the determinations of the Supreme Court in *PEDF II*, violated Article I, Section 25 of the Pennsylvania Constitution by using Section 27 trust assets to pay for general government operations, violated Section 27 on its face by using public natural resources for non-trust purposes and by degrading and diminishing public natural resources that are the corpus of the environmental trust, and violated their Section 27 fiduciary duties of prudence, loyalty and impartiality to the trust corpus and to the trust beneficiaries, just as they had done in 2009 by enacting and implementing the facially unconstitutional provisions in Sections 1602-E and 1603-E of the Fiscal Code. By using trust assets for non-trust purposes in the 2017-2018 budget year, Governor Wolf and the Commonwealth have acted as proprietors of the public natural resources owned by the people of Pennsylvania when they have no proprietary interest in those resources. They also violated the Oil and Gas Lease Fund Act, which was in full force and effect on July 11, 2017 following the Supreme Court's decision in *PEDF II*.

(3). DCNR is mandated under CNRA to maintain, improve and preserve our State parks, and to manage our State forest lands to assure their long term health, sustainability and economic use, and to provide more focused management of the

³ The act of July 11, 2017, P.L. ___, No. 1A, known as the General Appropriations Act of 2017.

Commonwealth's recreation, natural and river environments, with the specific purposes of ensuring the "continued success of our tourist and recreation industry" and "actively managing our system of State parks and forests, community recreation and heritage conservation areas to "contribute to the quality of life of Pennsylvania's citizens and to the economy of the State". 71 P.S. § 1340.101. To accomplish these purposes, DCNR has adopted the science of ecosystem management to sustain our forests and has developed the initiative identified as the Pennsylvania Wilds ("PA WILDS"), in conjunction with other state agencies and 12½ counties in northcentral Pennsylvania, to conserve and maintain the more than 2 million acres of public lands in this region. This is exactly what the drafters of Section 27 and the people of Pennsylvania intended in enacting this amendment to their Article I constitutional rights to preserve and enhance our public natural resources for their benefit.

(4). The Secretary of DCNR is statutorily designated as an advocate for our public natural resources under the Conservation and Natural Resources Act. As Secretary, she is a trustee under Section 27 of our public natural resources, including our State parks and forests and our community recreational and heritage conservation areas.

(5). By leasing Pennsylvania's State forest lands for the extraction and sale of oil and gas to pay for general government operations, the Respondents authorized large scale industrial development of our State forests that degrades, depletes and diminishes the State forest public natural resources. This industrial development has and will continue to negatively impact the forest and water ecosystems of the PA WILDS and the outdoor recreation they support.

(6). The natural gas extracted from the State forest is itself a non-renewable public natural resource that is depleted when it is extracted and sold. It is no longer

available to benefit present and future generations by providing for the conservation and maintenance of our State parks and forests, which along with the natural gas are part of all the corpus of the Section 27 trust.

(7). The only justification under Section 27 for authorizing degradation of our State forest and park public natural resources from the extraction, sale and depletion of oil and gas that is part of the corpus of the Section 27 trust is to provide needed funding to prevent and remedy degradation and diminution of our State forest and park public natural resources, thus achieving the conservation and maintenance of these public natural resources mandated by Section 27.

(8). All of the State forest and park public natural resources that have been and continue to be degraded and diminished by the oil and gas extraction, sale and depletion are located in northcentral Pennsylvania. These public natural resources are the core of the 1.5 million acres of State Forest and 29 State parks in this region. The degradation of these public natural resources undermines and diminishes the efforts to achieve a sustainable outdoor recreation economy in the PA WILDS.

(9). Continuing oil and gas extraction and sale pursuant to leases of State forest tracts in the PA WILDS can only be authorized consistent with Section 27 if all proceeds are dedicated to uses that benefit the public natural resources of the PA WILDS.

(10). On October 30, 2017, the Respondents enacted amendments to the Fiscal Code⁴ (“2017 Fiscal Code Amendments”) that repeal the Oil and Gas Lease Fund Act and create a new Oil and Gas Lease Fund. This new Fund has no protection

⁴ The act of October 30, 2017, P.L. ____, No. 44, which enacts omnibus amendments to the Fiscal Code.

for the use of the proceeds from the sale and depletion of public natural resources in compliance with the purpose of the Section 27 trust, no requirements to ensure Respondents' fulfill their fiduciary duties under the Section 27 trust, and no regard for the beneficiaries of the Section 27 trust.

(11). Respondents made no effort to evaluate the impacts of these actions prior to authorizing and using the Oil and Gas Lease Fund contrary to the mandates of Section 27. Nor did they consult with DCNR, the agency with the expertise to evaluate these impacts.

(12). Additionally, the Respondents have authorized annual transfers of \$35,000,000 from the Oil and Gas Lease Fund to the Marcellus Legacy Fund, which are then distributed from the Marcellus Legacy Fund to the Environmental Stewardship Fund and the Hazardous Sites Cleanup Fund, through the 2017 Fiscal Code Amendments.

(13). The Section 27 trust assets transferred to the Marcellus Legacy Fund replace revenue from taxes and fees that had been the source of the money for the Environmental Stewardship and Hazardous Sites Cleanup Funds. As a result, the Respondents are degrading and diminishing the public natural resources in northcentral Pennsylvania and depleting Section 27 trust assets to pay for statewide programs they created, but then diverted or eliminated their funding sources. By imposing these transfers, the Respondents have violated Article I, Section 25 of the Pennsylvania Constitution, violated Section 27 and their fiduciary duties of prudence, loyalty and impartiality to the trust corpus and to the beneficiaries of the trust. Further, the Respondents, by these transfers, have acted as proprietors of the public natural resources when they have no proprietary interest in those resources.

(14). As a result of the above Oil and Gas Lease Fund appropriations and transfers, the people who live and work and recreate in the PA WILDS, including PEDF's members, as beneficiaries of the Section 27 trust, are deprived of their rights by the continued degradation of our State forests and parks, and the PA WILDS, continued diminishment of public natural resources that will be needed to sustain the forest for future generations, and the continued loss of the money from the core of the public natural resources in the northcentral area of the Commonwealth.

(15). Governor Wolf continues to violate Section 27 and has fiduciary duties thereunder by recommending in his 2018-2019 Executive Budget that more than \$48,000,000 from the Oil and Gas Lease Fund be used to pay for general government operations of DCNR and that an additional \$35,000,000 be transferred to the Marcellus Legacy Fund.

II. STATEMENT OF JURISDICTION

(16). The Commonwealth Court has jurisdiction to review the requests for declaratory relief in this Petition pursuant to 42 P.S. § 761(a); and the Declaratory Judgment Act, 42 Pa.C.S. §§ 7531-7541.

(17). This Petition is brought pursuant to Article I Section 27 of the Pennsylvania Constitution; the Conservation and Natural Resources Act (71 P.S. §§ 1340.101-1340.1103); the act of December 15, 1955, P.L. 865, No. 256 (71 P.S. §§ 1331-1333), commonly referred to as the Oil and Gas Lease Fund Act⁵; and the Declaratory Judgements Act, specifically Section 7532, entitled "General scope of declaratory remedy," which states that "[c]ourts of record, within their respective

⁵ The Oil and Gas Lease Fund Act was repealed by Section 20 of the act of October 30, 2017, P.L. ___, No. 44. However, PEDF asserts that this repeal is unconstitutional and, therefore, continues to cite the Oil and Gas Lease Fund Act as authority for its petition.

jurisdictions, shall have the power to declare rights, status, and other legal relations whether or not further relief is or could be claimed ...”, and Section 7535, entitled “Rights of fiduciaries and other persons,” which states that “[a]ny person interested, as or through ... [a] trustee, ... in the administration of a trust, ... may have a declaration of rights or legal relations in respect thereto: ... [t]o direct the ... administrators, or trustees to do or to abstain from doing any particular act in their fiduciary capacity [or] [t]o determine any question arising in the administration of the ... trust, including questions of construction of ... writings.” 42 Pa.C.S. §§ 7532 and 7535.

III. PARTIES

(18). The Pennsylvania Environmental Defense Foundation (“PEDF”), the Petitioner, is an entity incorporated as a non-profit organization in 1986 under the laws of Pennsylvania for the purpose of protecting and preserving the environmental interests of its members in Pennsylvania. Ron Evans is PEDF’s President and resides at 818 Spring Creek Road, Bellefonte, Pennsylvania, 16823, Phone: 717-579-2263.

(19). The Respondent Commonwealth of Pennsylvania is the trustee of the constitutional public trust established over Pennsylvania’s public natural resources under Section 27.

(20). The Respondent Tom Wolf, acting in his official capacity as Governor of Pennsylvania, is the Chief Executive Officer of the Commonwealth. Under Article IV, Section 2 of the Pennsylvania Constitution, the governor “has the supreme executive power of the executive branch of the Commonwealth, who shall take care that the laws [of the Commonwealth] be faithfully executed.” As such he is a trustee of the constitutional public trust established over Pennsylvania’s public natural resources under Section 27.

IV. CONTESTED ACTS AND ACTIONS

A. USE OF THE OIL AND GAS LEASE FUND FOR GENERAL GOVERNMENT OPERATIONS PURSUANT TO SECTIONS 104 AND 1601 OF THE GENERAL APPROPRIATIONS ACT OF 2017

(21). The General Appropriations Act of 2017 directs that proceeds from the extraction and sale of oil and gas on our State forests deposited into the Oil and Gas Lease Fund be used to pay general government operating expenses and these proceeds have been used for this purpose in violation of Section 27.

(22). Part XVI, Section 1601 of the General Appropriations Act of 2017 appropriates \$61,291,000 from the Oil and Gas Lease Fund to DCNR for employee salaries and other general government operating expenses. This section states:

Part XVI

Oil and Gas Lease Fund Appropriation

Section 1601. Department of Conservation and Natural Resources.

The following amounts are appropriated to the Department of Conservation and Natural Resources:

For General Operations. State Appropriation \$50,000,000
For State Parks Operations. State Appropriation ... \$7,739,000
For State Forests Operations. State Appropriation ... \$3,552,000

(emphasis added).

(23). Section 104 of the General Appropriations Act of 2017 describes how the state appropriations being made can be used by the named agencies of the executive, legislative and judicial departments of the Commonwealth. Subsection (p) directs that money appropriated from the Oil and Gas Lease Fund be used to pay salaries and other general government operating expenses, stating as follows:

Oil and Gas Lease Fund.—The following sums set forth in this act, or as much as may be necessary, are hereby specifically

appropriated from the Oil and Gas Lease Fund to the hereinafter named agencies of the executive department of the Commonwealth for the payment of salaries, wages or other compensation and travel expenses of the duly appointed officers and employees of the Commonwealth, for the payment of fees for contractual services and for payment of any other expenses, as provided by law or by this act, necessary for the proper conduct of the duties, functions and activities for the purposes hereinafter set forth for the fiscal year beginning July 1, 2017, and for the payment of bills incurred and remaining unpaid at the close of the fiscal year ending June 30, 2017.

B. USE OF THE OIL AND GAS LEASE FUND PURSUANT TO THE 2017 FISCAL CODE AMENDMENTS

(24). The 2017 Fiscal Code Amendments violate Section 27 by removing protections necessary to ensure that proceeds from the extraction and sale of oil and gas on our State forests deposited into the Oil and Gas Lease Fund are used to conserve and maintain public natural resources and by authorizing the use of these proceeds to pay general government operating expenses.

1. Section 20(2) Repeal of the 1955 Oil and Gas Lease Fund Act

(25). Section 20 of the 2017 Fiscal Code Amendments repeals various statutory provisions to effectuate new provisions established in the 2017 Fiscal Code Amendments.

(26). Subsections (1) and (2) of Sections 20 repeal the Oil and Gas Lease Fund Act to effectuate the addition of Sections 1601-E and 1601.2-E of the Fiscal Code. The Oil and Gas Lease Fund Act established the Oil and Gas Lease Fund in 1955 and gave the Secretary responsible for managing our State forests and parks control over these funds exclusively for projects to conserve the natural resources of our State forests and parks.

(27). The 2017 Fiscal Code Amendments establish a new Oil and Gas Lease Fund and give the General Assembly control over the new fund.

(28). Sections 20(1) and (2) of the 2017 Fiscal Code Amendments state:

Section 20. Repeals are as follows:

- (1) The General Assembly declares that the repeals under paragraph (2) are necessary to effectuate the amendment or addition of sections 1601-E and 1601.2-E of the act.
- (2) The following provisions are repealed:
 - (I) The act of December 15, 1955 (P.L. 865, No. 256), entitled “An act requiring the rents and royalties from oil and gas leases of Commonwealth land to be placed in a special fund to be used for conservation, recreation, dams, and flood control; authorizing the Secretary of Forest and Waters to determine the need for and location of such projects and to acquire the necessary land.” This act is commonly referred to as the Oil and Gas Lease Fund Act.
 - (II) 58 Pa.C.S. §§ 2504 and 2505. Chapter 25 of Act 13 of 2012, transferring money from the Oil and Gas Lease Fund to Marcellus Legacy Fund then to the Environmental Stewardship Fund.

2. Use of the Oil and Gas Lease Fund Pursuant to Sections 1601-E and 1601.2-E of the Fiscal Code

(29). Section 3.2 of the 2017 Fiscal Code Amendments amends the definition of “fund” in Section 1601-E of the Fiscal Code to remove the reference to the Oil and Gas Lease Fund established in 1955 by the Oil and Gas Lease Fund Act, which gave control of these Section 27 trust funds to DCNR. Section 1601-E establishes a new fund by the exact same name called the “The Oil and Gas Lease Fund”, which will give the misleading outward appearance that nothing has changed when information is presented on this fund during the budget process.

(30). Section 3.3 of the 2017 Fiscal Code Amendments adds a new Section 1601.2-E to the Fiscal Code establishing requirements for the new Oil and Gas Lease Fund. This new section of the Fiscal Code states:

Section 3.3. The act is amended by adding a section to read:

Section 1601.2-E. Oil and Gas Lease Fund.

- (a) Continuation.—The Oil and Gas Lease Fund is continued as a special fund in the state treasury.
- (b) Sources.—The following shall be deposited into the fund:
 - (1) Rents and royalties from oil and gas leases of land owned by the Commonwealth, except rents and royalties from game and fish lands.
 - (2) Amounts as provided under section 5 of the act of October 8, 2012 (P.L. 1194, No. 147), known as the Indigenous Mineral Resources Development Act.
 - (3) Any other money appropriated or transferred to the fund.
- (c) Use.—Money in the fund may only be used as provided under subsection (e) or as annually appropriated by the General Assembly. In making an appropriation from the fund, the General Assembly shall consider the Commonwealth's trustee duties under Section 27 of Article I of the Constitution of Pennsylvania.
- (d) Priority.—Money appropriated from the fund under a general appropriations act or other appropriation act shall be distributed prior to allocations under subsection (e).
- (e) Annual transfers.—The following apply:
 - (1) For the 2017-2018 fiscal years and each fiscal year thereafter, \$20,000,000 shall be transferred from the fund to the Marcellus Legacy Fund for distribution to the Environmental Stewardship Fund.
 - (2) For the 2017-2018 fiscal year and each fiscal year thereafter, \$15,000,000 shall be transferred from the fund to the Marcellus Legacy Fund for distribution to the Hazardous Sites Cleanup Fund.

3. State Park Use of the Oil and Gas Lease Fund Pursuant to Section 1720-F of the Fiscal Code

(31). Section 19 of the 2017 Fiscal Code Amendments adds Article XVII-F relating to implementation of the 2017-2018 budget. Subsection B includes budget implementation provisions for executive departments.

(32). Section 1720-F of the Fiscal Code provides specific direction to DCNR on how to spend certain funds appropriated to DCNR by the General Appropriations Act of 2017 for State Park operations. Section 1720-F of the Fiscal Code states:

Section 1720-F. Department of Conservation and Natural Resources.

The following shall apply to appropriations for the Department of Conservation and Natural Resources:

(1) From money appropriated for State Park operations, no less than \$2,250,000 shall be used for the operation and maintenance of the Washington Crossing Historical Park.

(2) (Reserved).

4. Special Fund Transfers from the Oil and Gas Lease Fund Pursuant to Section 1726-G of the Fiscal Code

(33). Section 19 of the 2017 Fiscal Code Amendments adds Article XVII-G to the Fiscal Code relating to restrictions on 2017-2018 appropriations for fund and accounts. A new Section 1726-G of the Fiscal Code is added to this article, stating:

Section 1726-G. Fund Transfers

During the 2017-2018 fiscal year, \$300,000,000 shall be transferred from amounts available in special funds and restricted accounts to the General Fund. The transfers under this section shall be in accordance with the following:

(1) The Secretary of the Budget shall transmit to the State Treasurer a list of amounts to be transferred from special funds and restricted accounts to the General Fund.

(2) Upon receipt of the list under paragraph (1), the State Treasurer shall cause the transfers under paragraph (1) to occur.

C. USE OF THE OIL AND GAS LEASE FUND IN GOVERNOR'S EXECUTIVE BUDGET 2018-2019

(34). On February 7, 2018, Respondent Governor Wolf published his Executive Budget for fiscal year 2018-2019 recommending that proceeds from the extraction and sale of oil and gas on our State forests continue to be used to pay for general government operations and for programs that do not prevent and remedy degradation of impacted public natural resources in northcentral Pennsylvania in violation of Section 27.

(35). Respondent Governor Wolf recommends spending \$48,798,000 from the Oil and Gas Lease Fund for DCNR operations. Governor's Executive Budget 2018-2019, pages E11-5 and H52 (pages attached as **Exhibit A**).⁶

(36). Respondent Governor Wolf recommends transferring \$35,000,000 from the Oil and Gas Lease Fund to the Marcellus Legacy Fund, and then transferring \$29,241,000 of these funds to the Environmental Stewardship Fund, and \$19,621,000 to the Hazardous Sites Cleanup Fund. *Id.*, pages H25, H32, H44 and H52 (pages attached as **Exhibit A**).

⁶ The Governor's Executive Budget 2018-2019 is available in its entirety at <http://www.budget.pa.gov/PublicationsAndReports/CommonwealthBudget/Pages/default.aspx>.

V. OBJECTIONS AND REQUESTED RELIEF

A. USE OF THE OIL AND GAS LEASE FUND PURSUANT TO SECTIONS 104 AND 1601 OF THE GENERAL APPROPRIATIONS ACT OF 2017 IS UNCONSTITUTIONAL

1. Use of Section 27 Trust Assets for General Government Operations Violates Section 27 on its Face

(37). Section 1601 of the General Appropriations Act of 2017 appropriates over \$61,000,000 from the Oil and Gas Lease Fund to pay general government operating expenses of DCNR for the 2017-18 fiscal year in violation of Section 27.

(38). Section 104 of the General Appropriations Act of 2017 directs that appropriations from the Oil and Gas Lease Fund be used “for the payment of salaries, wages or other compensation and travel expenses of the duly appointed officers and employees of the Commonwealth, for the payment of fees for contractual services and for payment of any other expenses, as provided by law or by this act, necessary for the proper conduct of the duties, functions and activities for the purposes hereinafter set forth for the fiscal year beginning July 1, 2017, and for the payment of bills incurred and remaining unpaid at the close of the fiscal year ending June 30, 2017.”

(39). On June 20, 2017, the Pennsylvania Supreme Court found Sections 1602-E and 1603-E of the Fiscal Code (72 P.S. §§ 1602-E and 1603-E) facially unconstitutional in *PEDF II* because they “plainly ignore the Commonwealth’s constitutionally imposed fiduciary duty [under Section 27] to manage the corpus of the environmental trust for the benefit of the people to accomplish its purpose – conserving and maintaining the corpus by, inter alia, preventing and remedying the degradation, diminution and depletion of our public natural resources.” 161 A.3d at 938. These unconstitutional Fiscal Code provisions eliminated DCNR’s control over the proceeds from the extraction and sale of oil and gas on State forest land deposited

into the Oil and Gas Lease Fund and DCNR's exclusive use of these proceeds for projects that benefited the public natural resources of our State parks and forests. They authorized the General Assembly to appropriate proceeds in the Oil and Gas Lease Fund for general government operations; and required DCNR to use its appropriations from the Oil and Gas Lease Funds for its general operating costs in place of General Fund appropriations. The Supreme Court found that "[w]ithout any question, these legislative amendments permit the trustee to use trust assets for non-trust purposes, a clear violation of the most basic of a trustee's fiduciary obligations." *Id.*

(40). All branches of government within the Commonwealth have the duty to perform their functions consistent with their trustee duties under Section 27. These duties do not authorize the Commonwealth to sell public natural resources that are part of the corpus of the Section 27 trust to pay for general government operations.

(41). The General Appropriations Act of 2017 was presented to the Governor on June 30, 2017 and the Governor allowed the act to become law on July 11, 2017 without vetoing the provisions related to the Oil and Gas Lease Fund.

(42). Salaries and expenses, contract fees, and other general government expenses of the trustees do not conserve and maintain our public natural resources. The appropriations from the Oil and Gas Lease Fund to pay for general government operations in fiscal year 2017-2018 clearly authorize the use of Section 27 trust funds for non-trust purposes in violation of Section 27, which requires that the trustees use these funds to conserve and maintain the public natural resources themselves.

(43). WHEREFORE, Petitioner respectfully requests this Honorable Court to find and declare that Sections 104 and 1601 of the General Appropriations Act of 2017 violate Section 27 on their face by appropriating over \$61,000,000 from the

Oil and Gas Lease Fund for general government operations, which are non-trust purposes.

2. Use of the Section 27 Trust for General Government Operations Violates Article I Section 25 of the Pennsylvania Constitution

(44). All prior paragraphs are hereby incorporated by reference.

(45). The right to have our public natural resources conserved and maintained for the people both living now and for future generations is established under Article I of the Pennsylvania Constitution as part of the inalienable rights of the people.

(46). The ability of the Commonwealth government to infringe on the declared rights of the people in Section 27 is explicitly limited by Article I, Section 25 of the Pennsylvania Constitution (“Section 25”), which states: “To guard against the transgressions of high powers which we have delegated, we declare that everything in this article is excepted out of the general powers of government and shall forever remain inviolate.”

(47). The Governor and the General Assembly derive their power to enact an annual budget for general government operations from Articles III (Legislation), IV (The Executive) and VIII (Taxation and Finance) of the Pennsylvania Constitution. These powers are expressly limited by the fundamental rights reserved to the people in Article I of our Constitution.

(48). The clear purpose of appropriating over \$61,000,000 from the Oil and Gas Lease Fund to pay for general government operations is to avoid having to pay for those operations from the General Fund, and thus to be able to use that revenue for other government purposes. *See PEDF II*, 161 A.3d at 920-925 (providing

history of using the Oil and Gas Lease Fund to replace the General Fund appropriations for DCNR operations).

(49). The passage of annual appropriations bills to fund general government operations for the current fiscal year is an Article III responsibility of the government and cannot infringe upon the fundamental rights of the people in Section 27. *PEDF II*, 161 A.3d at 930-931; *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 947 (Pa. 2013).

(50). WHEREFORE, Petitioner respectfully requests that this Honorable Court find and declare that the General Appropriations Act of 2017 violates Section 25 by using revenue from the corpus of the Section 27 trust to fund general government operations in place of using general tax revenues.

3. Respondents Violated Their Section 27 Fiduciary Duties of Prudence, Loyalty and Impartiality to the Trust Beneficiaries

(51). All prior paragraphs are hereby incorporated by reference.

(52). The Commonwealth's duties as the trustee of the environmental trust were created by the people of Pennsylvania under Section 27. As trustee, the Commonwealth is a fiduciary obligated to comply with the terms of the trust and with the standards governing a fiduciary's conduct. The explicit terms of the trust require the government to "conserve and maintain" the corpus of the trust. The plain meaning of the terms conserve and maintain implicates a duty to prevent and remedy the degradation, diminution, or depletion of our public natural resources. As a fiduciary, the Commonwealth has a duty to act toward the corpus of the trust – the public natural resources – with prudence, loyalty, and impartiality. *PEDF II*, 161 A.3d at 934 (citing *Robinson Twp.*, 83 A. 3d at 956-57); *see also* 20 Pa.C.S. Chapter 77 (Trusts), Subchapter H (Duties and Powers of Trustee).

(53). By enacting Sections 104 and 1601 of the General Appropriations Act of 2017, Governor Wolf and the Commonwealth violated their Section 27 fiduciary duties of prudence, loyalty and impartiality.

(54). **PRUDENCE** requires a trustee to exercise “such care and skill as a man of ordinary prudence would exercise in dealing with his own property.” 161 A.3d at 932 (quoting Restatement (Second) of Trusts § 174 as cited in *In re Mendenhall*, 398 A.2d 951 (Pa. 1979)). Under Pennsylvania law, a trustee must “administer the trust as a prudent person would, by considering the purposes, provisions, distributional requirements and other circumstances of the trust and by *exercising reasonable care, skill and caution.*” 20 Pa.C.S. § 7774 (emphasis added). When the Respondents use the corpus of the Section 27 trust to pay for general government operations, they deplete the corpus of the Section 27 trust. A prudent trustee must use proceeds from the sale of the corpus of the Section 27 trust to remedy and restore the remaining corpus that has been degraded and diminished to ensure the trust corpus is conserved and maintained. A prudent trustee would not use Section 27 trust funds for annual general operating costs that diminish the corpus of the trust when the trustee has been authorized to use other sources of general funds for those costs.

(55). **LOYALTY** “imposes an obligation to manage the corpus of the trust so as to accomplish the trust’s purposes for the benefits of the trust’s beneficiaries.” 161 A.3d at 932-933; *see also* 20 Pa.C.S. § 7772 (“A trustee shall administer the trust solely in the interests of the beneficiaries.”). Loyalty requires the trustee to administer the trust *solely in beneficiary’s interest and not the trustee’s own interest*. By selling our Section 27 public natural resources to pay for general government operations rather than paying for those operations through appropriate taxes (*e.g.*, a severance tax on the oil and gas industry), the Respondents did not

exercise loyalty to the trust or to the beneficiaries of the trust. By selling public natural resources to pay for general government operations, the Respondents benefitted themselves by avoiding decisions related to necessary government services and the generation of tax revenue sufficient to pay for them.

(56). **IMPARTIALITY** “requires the trustee to manage the trust so as to give all of the beneficiaries due regard for their respective interest in light of the purposes of the trust.” 161 A.3d at 933 (citing 20 Pa.C.S. § 7773 and Restatement (Second) of Trusts § 183 as cited in *Estate of Sewell*, 409 A.2d 401, 402 (Pa. 1979). Under Section 27, the trustee must manage the trust *for both current and future generations*. By selling Section 27 trust assets to pay for general government operations, the Respondents deplete the corpus of the Section 27 trust and diminishes the use and enjoyment of our State forests and parks by both the current and future generations. By failing to use the proceeds of the sale of Section 27 trust assets to remedy the degradation and diminution of our State forests and parks and by failing to retain those proceeds as part of the trust corpus to benefit current and future generations, the Respondents violate their Section 27 fiduciary duty of impartiality.

(57). Governor Wolf and the Commonwealth have also violated their fiduciary duties of prudence, loyalty and impartiality as Section 27 trustees by *failing to evaluate* the impacts of their decision to sell public natural resources to pay for general government operations. Nothing in the General Appropriations Act of 2017 indicates that the Respondents evaluated their duties as trustee of the Section 27 public trust prior to appropriating Section 27 trust funds to pay annual general government operating expenses. No evaluation or analysis was conducted of the immediate or long-term impacts of this Act on the public natural resources, on the rights of the beneficiaries of the public trust, on the duties of the trustees to conserve

and maintain both the corpus of the Section 27 trust and the rights of the people, or on the current and future needs the public natural resources.

(58). The Supreme Court, in its plurality opinion in *Robinson Twp.*, clearly articulated the need for an evaluation, stating:

The corollary of the people's Section 27 reservation of right to an environment of quality is an obligation on the government's behalf to refrain from unduly infringing upon or violating the right, including by legislative enactment or executive action. ***Clause one of Section 27 requires each branch of government to consider in advance of proceeding the environmental effect of any proposed action on the constitutionally protected features.*** The failure to obtain information regarding environmental effects does not excuse the constitutional obligation because the obligation exists a priori to any statute purporting to create a cause of action.

83 A.3d at 952 (emphasis added).

(59). As trustees of our public natural resources, both the General Assembly and the Governor have the duty to understand and evaluate the current and future needs of our State forest and park public natural resources and both current and future uses of those resources by the beneficiaries prior to making any decisions that might or will affect those resources. This is particularly relevant in determining how to use the proceeds from the extraction and sale of our oil and gas resources from our State forest and parks.

(60). WHEREFORE, the Petitioner respectfully requests this Honorable Court to find and declare the following:

(a) The Respondents have violated their duty as trustee under Section 27 by enacting Sections 104 and 1601 of the Appropriations Act of 2017, which deplete and diminish public natural resources that are part of the corpus of the Section 27 trust and appropriate the proceeds from the sale of these public natural resources to

non-trust purposes, thus depriving the trust beneficiaries of their rights in these public natural resources;

(b) The Respondents violated their fiduciary duty of PRUDENCE as trustees under Section 27, by selling the corpus of the Section 27 trust to pay for general government operations rather using the proceeds to prevent and remedy the degradation, diminution and depletion of our public natural resources to ensure Section 27 trust assets are conserved and maintained;

(c) The Respondents have violated their duty of LOYALTY as trustees under Section 27 by selling public natural resources to replace tax revenue from the General Fund to pay for general government operations and by depleting the corpus of Section 27 trust and the beneficiaries' rights to their public natural resources; and

(d) The Respondents violated Section 27 and their fiduciary duties of IMPARTIALITY by failing to thoroughly evaluate the impact or potential impact on our public natural resources or the rights of the beneficiaries both now and in the future prior to enacting Sections 104 and 1601 of the General Appropriations Act of 2017.

4. Respondents Have No Proprietary Interest in the Public Natural Resources in the Section 27 Trust that Allows Them to Deplete These Resources

(61). All prior paragraphs are hereby incorporated by reference.

(62). The people, including future generations, are the common owners of the public natural resources held in trust under Section 27, and the Commonwealth, as the trustee, must deal with the people "as a fiduciary, measuring its successes by the benefits it bestows upon all its citizens in their utilization of natural resources under law." *PEDF II*, 161 A.3d at 934.

(63). The Commonwealth, including the Governor, may not approach our public natural resources as a proprietor, and instead must at all times fulfill its role as a trustee. *Id.* at 939.

(64). The Respondents' use of our public natural resources to pay for general government operations, including salaries and routine daily expenses of DCNR, is based on the misconception that the Commonwealth has some proprietary interest in the public natural resources.

(65). Respondents' proprietary use of the public natural resources to pay for general government operations is depleting the very public natural resources they are bound as trustees to conserve and maintain.

(66). WHEREFORE, the Petitioner respectfully requests this Honorable Court to find and declare that the Respondents' have violated Section 27 and their fiduciary duties by their proprietary sale and use of the public natural resources of our State forests and parks to pay for general government operations.

5. The 2017 Appropriations from the Oil and Gas Lease Fund Violate the Oil and Gas Lease Fund Act

(67). All prior paragraphs are hereby incorporated by reference.

(68). On June 20, 2017, the Supreme Court declared facially unconstitutional Fiscal Code provisions that usurped DCNR's authority under the Oil and Gas Lease Fund Act to use the proceeds from State forest oil and gas leases deposited into the Oil and Gas Lease Fund for the benefit of the public natural resources of our State forests and parks. As a result, the Supreme Court declared the Oil and Gas Lease Fund Act to again control the use of the Oil and Gas Lease Fund. This act appropriated these funds to DCNR for the exclusive purposes of conservation, recreation, dams and flood control.

(69). Section 1601 of the General Appropriations Act of 2017 enacted by the Respondents on July 11, 2017 appropriated the proceeds from the extraction and sale of State forest oil and gas to pay for general government operations (salaries and expenses) of DCNR in direct violation of the Oil and Gas Lease Fund Act.

(70). WHEREFORE, Petitioner respectfully requests this Honorable Court to find and declare that Section 1601 of the General Appropriations Act of 2017 violated the Oil and Gas Lease Fund Act.

6. The 2017 Appropriations from the Oil and Gas Lease Fund Violate Section 27 by Degrading and Diminishing High Value Public Natural Resources in the PA WILDS of Northcentral Pennsylvania and by Depleting this Region's Section 27 Trust Assets

(71). All prior paragraphs are hereby incorporated by reference.

(72). Proceeds from the sale of oil and gas on our State forest, which is part of the corpus of the Section 27 trust, must remain in the corpus of the trust. *PEDF II*, 161 A.3d at 935.

(73). One of the principle duties of the trustee is to maintain the corpus of the trust. A trustee may use the trust assets only for the purposes authorized by the trust, or necessary for the preservation of the trust. Other uses are beyond the scope of the trustee's discretion even when the trustee claims to be acting solely to advance other discrete interests of the beneficiaries. *Id.* at 934.

(74). The 2017 appropriations from the Oil and Gas Lease Fund spend proceeds from leases of State forests tracts in northcentral Pennsylvania for the extraction and sale of the oil and gas. The high value public natural resources in these State forest and the State parks embedded within them support sustainable

recreation and tourism economies in this area of Pennsylvania, which is marketed as the PA WILDS.

(75). Conservation of the high value public natural resources of the PA WILDS is the essence of the purpose and intent of Section 27. In recounting the history of the enactment and ratification of Section 27 and the mischief to be remedied, the Supreme Court in *PEDF II* quotes the following passage from the Section 27 legislative history:

We seared and scarred our once green and pleasant land with mining operations. We polluted our rivers and our streams with acid mine drainage, with industrial waste, with sewage. We poisoned our 'delicate, pleasant and wholesome' air with the smoke of steel mills and coke ovens and with the fumes of millions of automobiles. We smashed our highways through fertile fields and thriving city neighborhoods. We cut down our trees and erected eyesores along our roads. We uglified our land and we called it progress.

161 A.3d at 918 (citing 1970 Pa. Legislative Journal-House at 2270, with the quote attributed to an anonymous 1698 description of Penn's Woods).

(76). The PA WILDS encompasses 12½ counties in northcentral Pennsylvania including Cameron, northwest Centre, Clarion, Clearfield, Clinton, Forest, Elk, Jefferson, Lycoming, McKean, Potter, Tioga, and Warren Counties. The area includes more than two million acres of public land, the largest aggregation of public land between New York and Chicago and an area of public land comparable to Yellowstone National Park. **Exhibit B**, PA WILDS Conservation Landscape

Initiative Fact Sheet;⁷ **Exhibit C**, Excerpts from “*A Recreation Plan for the State Parks and State Forests in the Pennsylvania Wilds*,” DCNR, February 2006.⁸

(77). The PA WILDS offers tremendous outdoor recreational experiences, some of the best in the nation, with 29 State parks, 50 State game lands, 8 State forests encompassing over a million and a half acres, the 500,000-acre Allegheny National Forest, abundant wildlife and hundreds of miles of land and water trails. The region is home to the largest elk herd in northeastern United States, and some of darkest skies in the country for star gazing. Many visitors come to experience the area’s rich oil and lumber heritage and authentic small towns. The PA WILDS contains 49% of the Pennsylvania’s public lands, 52% of its Class A native trout streams, and 65% of its State and Federal natural and wild areas. **Exhibits B and C.**

(78). The economic significance of the PA WILDS to the people who live, work and recreate there cannot be overstated. DCNR, in a report on the status of the PA WILDS published in 2012 captures that significance through conversations with key local residents and includes the following quote from Brant Enos:

People sometimes misinterpret that the PA Wilds Initiative is about making this area a playground for people from the City. But it’s really about us. Our region has seen decades of job losses and population declines. Our kids go away for college or jobs and don’t come back. We want that to stop. Tourism can’t solve everything, but it is part of the answer. It’s something done in addition to other industries, not instead of them. Visitors help restaurants, cafes, outfitters, stores, lodges – our friends and neighbors – stay in business, create new jobs and add new products and services that residents need and want.

⁷ This public document is also available on DCNR’s website at http://www.docs.dcnr.pa.gov/cs/groups/public/documents/document/dcnr_001776.pdf.

⁸ This public document is available in its entirety on DCNR’s website at http://www.pawildscenter.org/wp-content/uploads/pdf/dcnr_001696.pdf.

Tourism can help diversify our local economies and makes our communities more vibrant, which in turn helps to attract or retain businesses in other industries. It works on a lot of levels.

Exhibit D, Excerpts from Conservation Landscape Initiatives – PA WILDS, First Quarter 2012, DCNR Recreation and Parks (pages 16-17);⁹ *see also* **Exhibit L**, Affidavit of Paul Hoffmaster, summarized in Section VI below.

(79). Healthy forest and water ecosystems within the public natural resources of the PA WILDS are central to promoting sustainable economic development based on recreation and tourism.

(80). The Marcellus shale formation underlies most of the PA WILDS. Most, if not all, of the State forest tracts leased for the extraction and sale of oil and gas in 2009 and 2010 are in the PA WILDS.

(81). DCNR executed these leases solely for the purposes of “(1) exploring, drilling, operating, producing, and removing oil, gas and liquid hydrocarbons; and (2) at locations approved by the Department, laying pipelines and constructing roads, tanks, towers, stations, and structures thereon to produce, save, take care of, and transport extracted products.” *See* **Exhibit E**, State Forest Oil and Gas Lease.

(82). The appropriation of proceeds from these leases for the extraction and sale of public natural resources in the PA WILDS to pay for general government operations and certain statewide programs violates Section 27 because the appropriations degrade, diminish and deplete the public natural resources of the PA WILDS and harm the people who live in, work and recreate in this area. Impacts from these appropriations include, but are not limited to:

⁹ This public document is available in its entirety on DCNR’s website at http://www.docs.dcnr.pa.gov/cs/groups/public/documents/document/dcnr_20033042.pdf.

(a) The degradation of the natural, scenic, historic and esthetic values of our State forests from the industrial processes associated with the extraction of oil and gas and their transportation to markets for sale;

(b) The loss of the proceeds from the sale of oil and gas extracted from our State forests to deal with the existing and future problems in the State forests and embedded State parks, including the immediate and long-term impacts from the oil and gas extraction and transportation processes;

(c) The loss of the oil and gas, a non-renewable resource, for sustaining the State forests and parks in northcentral Pennsylvania for future generations.

(83). Some of the impacts of Marcellus Shale gas extraction were reported by the Marcellus Shale Advisory Commission, which was created by Governor Corbett through Executive Order 2011-01. The commission issued a report in July 2011 with recommendations on effective development of Marcellus Shale natural gas in the Commonwealth. In its report, the commission discusses the environmental impacts of shale gas development. **Exhibit F**, Governor's Marcellus Shale Advisory Commission Report, Section 8.1 (Environmental Impact Mitigation), pages 73-79.¹⁰

(84). According to the Marcellus Shale Advisory Commission Report, the development of a Marcellus Shale well site requires considerable land clearing and earth disturbance. In addition, the need to clear land for support facilities such as access roads, pipe lines, borrow pits (small rock quarries), freshwater and wastewater impoundments, tank farms, equipment staging areas, water withdrawal

¹⁰ This public document is available in its entirety at http://files.dep.state.pa.us/PublicParticipation/MarcellusShaleAdvisoryCommission/MarcellusShaleAdvisoryPortalFiles/MSAC_Final_Report.pdf.

locations, and compressor stations was reported to greatly expand the footprint of a well site. *Id.*

(85). Concerning harm to Pennsylvania's forests, in particular the large intact forests in the PA WILDS, the report states that these forests could be fragmented into smaller patches and that impacts to forest interior species will vary depending on their geographic distribution and density. *Id.*

(86). Other impacts and recommendations in the Marcellus Shale Advisory Commission Report include the following:

According to recent estimates, by 2030, a range of between 38,000 to 90,000 acres of forest cover could be cleared by new Marcellus gas development in the state. Such clearings would create new forest edges where the risk of predation, changes in light and humidity levels, and expanded presence of invasive species could threaten forest interior species in an additional 91,000 to 220,000 forest acres adjacent to Marcellus development. In addition, forest impacts will be concentrated in the north central and southwest parts of the state where many of the state's largest and most intact forest patches could be fragmented into smaller patches by well pads, roads, and other infrastructure. Impacts to forest interior species will vary depending on their geographic distribution and density. In general, locating energy infrastructure in open areas or toward the outer edges of large patches can significantly reduce impacts to important forest areas.

Id.

(87). A significant percentage of Pennsylvania's globally rare and threatened species can be found in areas with high potential for Marcellus gas development. Best management practices and careful monitoring will be essential to ensure that impacts to forested and other sensitive habitats, including fragmentation, invasive species, loss of wildlife food or cover, erosion and sedimentation, and to recreational uses, are avoided and mitigated, and that monitoring information is used to incorporate management improvements. *Id.*

(88). In the process of constructing and operating the wells and well pads, surface spills of fluids can and have occurred. *Id.*

(89). New wells drilled through a formation that has previously been drilled and fractured can and have created a pathway for groundwater contamination. *Id.*

(90). Marcellus Shale development, including drilling, gas collection and processing, poses challenges with respect to air emissions. Generally, pollutants of concern include nitrogen oxides (NO_x), carbon monoxide (CO), particulate matter, hazardous air pollutants such as benzene and toluene, and other volatile organic compounds (VOC). *Id.*

(91). Methane, the major component of natural gas and a green-house gas pollutant, is released into the atmosphere as fugitive emissions through leaks from processing equipment and pneumatic devices. *Id.*

(92). Fugitive emissions including dust from truck traffic and fugitive VOC emissions from leaking valves and pipes are also pollutants of concern. *Id.*

(93). Natural gas compression stations emit pollutants such as NO_x, VOCs, and CO. *Id.*

(94). Within the PA WILDS, over 617,000 acres of the State forest is subject to oil and gas development through DCNR leases and development on State forest tracts with privately-owned oil and gas rights subject to development. **Exhibit G**, Natural Gas Development and State Forests, Shale Gas Leasing Statistical Summary, May 2017.¹¹

¹¹ This public document is available on DCNR's website at http://www.docs.dcnr.pa.gov/cs/groups/public/documents/document/dcnr_20029363.pdf.

(95). In addition, thousands of acres of Pennsylvania Game Lands and privately-owned lands adjacent to our State forest are subject to active industrial development to extract oil and gas.

(96). DCNR has initiated some monitoring in an effort to understand the impacts to the State forest in the PA WILDS from shale gas development and issued its first report in 2014 to document its initial efforts. Although DCNR acknowledges in this report that it has barely scratched the surface in understanding the full impact to the State forest from shale gas development, it nonetheless documents significant and wide-ranging actual and potential impacts in the PA WILDS. **Exhibit H**, Shale-Gas Monitoring Report, Executive Summary and Part I (Introduction), DCNR, April 2014.¹²

(97). Based on data collected through 2012, just a few years after shale gas drilling began, DCNR has documented the conversion of approximately 1,500 acres of State forest land to industrial use; the expansion of 161 miles of scenic State forest roads for industrial use; and the clearing of State forest land to construct 104 miles of gas pipeline corridors. DCNR has also documented the spread of invasive species, the fragmentation of core State forest districts, losses to the wild character of the State forest, and a decrease in the value of the recreational experiences for visitors to the State forests.

(98). DCNR also recognizes the impacts to the PA WILDS in its report, stating:

In addition to environmental concerns, shale-gas development could alter the character of north-central Pennsylvania, and area known as the

¹² This public document is available in its entirety on DCNR's website at http://www.docs.dcnr.pa.gov/cs/groups/public/documents/document/dcnr_20029147.pdf.

“Pennsylvania Wilds,” that abounds with scenic beauty and outdoor recreational opportunities. Understanding impacts to state forest visitors is critical to sustaining tourism and the ability to provide healthful outdoor recreation opportunities to Pennsylvanians.

Exhibit H, page 28.

(99). Oil and gas extraction on State forest land imposes both immediate and long-term degradation to our public natural resources. These impacts have already occurred and will continue to occur.

(100). The only way to allow the extraction and sale of oil and gas to continue on State forests in the PA WILDS consistent with the Section 27 mandates, given the negative impacts to PA WILDS trust public natural resources, is to ensure that all proceeds from the leases (bonus, rental and royalty payments) are used to benefit these resources, not only to prevent and remedy degradation that has and will continue to occur, but also to sustain those resources for the future trust beneficiaries.

(101). The Supreme Court in *PEDF II* describes the Commonwealth’s duties as the trustee of the Section 27 trust created by the people of Pennsylvania as follows:

As trustee, the Commonwealth is a fiduciary obligated to comply with the terms of the trust and with the standards governing a fiduciary’s conduct. The explicit terms of the trust require the government to “conserve and maintain” the corpus of the trust. ***The plain meaning of the terms conserve and maintain implicates a duty to prevent and remedy the degradation, diminution, or depletion of our public natural resources.*** As a fiduciary, the Commonwealth has a duty to act toward the corpus of the trust—the public natural resources—with prudence, loyalty, and impartiality.

Id. at 932 (emphasis added) (quoting *Robinson Twp.*, 83 A.3d at 956-57).

(102). The Supreme Court concludes that Section 27 imposes two basic duties on the Commonwealth as the trustee. First, as noted above, the Commonwealth has a duty to prohibit the degradation, diminution, or depletion of our public natural

resources; and, second, the Commonwealth must act affirmatively via legislative action to protect our public natural resources and the people's right under Section 27. *Id.* at 933 (citing *Robinson Twp.*, 83 A.3d at 957-58).

(103). When State forest land is leased to private entities for the extraction and sale of oil and gas, the lease continues to be valid as long as the lessee is producing oil or gas from the leased track, which can be 50 years or more. The State forest land used for drilling pads, compression stations, water storage areas, pipelines, roads and other physical changes to the land for the purpose of oil and gas extraction and sale is converted to this industrial use.

(104). The use of the proceeds from the conversion of public natural resources in the PA WILDS authorized by the DCNR leases must be returned to the State forest in the PA WILDS. Otherwise, these leases will not conserve and maintain the corpus of the Section 27 trust – the public natural resources in the PA WILDS – for the benefit of the people, both current and future generations.¹³

(105). WHEREFORE, Petitioner respectfully requests this Honorable Court to find and declare the following:

(a) The extraction of oil and gas in our State Forests requires industrial development that degrades, diminishes and depletes the public natural resources of the forest;

¹³ PEDF is not seeking to have the 2009 and 2010 leases of State forest tracts in the PA WILDS for oil and gas extraction and sale declared invalid under Section 27. No evidence suggests that the lessees were not justified in relying on DCNR's authority to lease. Rather, PEDF is seeking a declaration that the proceeds from these leases must be used to prevent and remedy degradation to the public natural resources in the State forests in the PA WILDS, including the degradation resulting from the authorized oil and gas extraction, for these leases to be valid under Section 27.

(b) Over 617,000 acres of our State forest in northcentral Pennsylvania are and may be subject to degradation from extraction and sale of gas and oil, which are public natural resources;

(c) The degradation of our State forest from oil and gas extraction and sale threaten the integrity of the ecology of the forest from fragmentation, invasive species, and pollution;

(d) The continued degradation of our State forest threatens the continued development of the social and economic initiative in the PA WILDS;

(e) The proceeds from the extraction and sale of our public natural resources in northcentral Pennsylvania are also part of the public natural resources of northcentral Pennsylvania;

(f) Governor Wolf and the Commonwealth continue to degrade the Section 27 trust resources in northcentral Pennsylvania by allowing the extraction and sale of oil and gas from State forests in this region to continue without using the proceeds to benefit the people and public natural resources of northcentral Pennsylvania;

(g) Governor Wolf and the Commonwealth have the duty, under the explicit terms of the Section 27 trust, to “conserve and maintain” the corpus of the trust, which *implicates a duty to prevent and remedy the degradation, diminution, or depletion of our public natural resources*; and

(h) In order to prevent and remedy the continued degradation and to sustain those resources for the future, the proceeds from leases of State forest tracts in the PA WILDS for oil and gas extraction and sale must be used for the public natural resources of the PA WILDS to achieve the Section 27 mandate to conserve and maintain these public natural resources.

7. The 2017 Appropriations from the Oil and Gas Lease Fund Violate Section 27 by Preventing DCNR from Utilizing Its Expertise and Fulfilling its Section 27 and CNRA Duties

(106). All prior paragraphs are hereby incorporated by reference.

(107). The PA WILDS bring together the highest expression of DCNR's purposes under Section 27 and the Conservation and Natural Resources Act, as set forth in the CNRA legislative findings, 71 P.S. § 1340.101(a).

(108). DCNR is mandated under the CNRA to maintain, improve and preserve our State parks, and to manage our State forest lands to assure their long term health, sustainability and economic use, and to provide focused management of the Commonwealth's recreation, natural and river environments, with specific purposes that include ensuring the "continued success of our tourist and recreation industry" and "actively managing our system of State parks and forests, community recreation and heritage conservation areas to "contribute to the quality of life of Pennsylvania's citizens and to the economy of the State." 71 P.S. § 1340.101. To accomplish these purposes, DCNR facilitated the PA WILDS initiative in conjunction with other state agencies and local governments in northcentral Pennsylvania.

(109). The core of the PA WILDS is its extensive public natural resources, including eight State forests embedded with many of Pennsylvania's most outstanding State parks, as well as miles of exceptional value streams, rivers and wetlands that form the headwaters of two of Pennsylvania's largest rivers – the Susquehanna and the Allegheny.¹⁴

¹⁴ The Delaware River Basin Commission (DRBC) recently proposed regulations that would prohibit the use of high volume hydraulic fracturing to extract natural gas from shale formations within the Delaware River basin to protect the basin's high-quality water resources, in particular those designated as Special Protection Waters. 48 Pa.B. 255 (January 13, 2018). The reasons that

(110). While DCNR was established in 1995, its special skills and expertise in managing the public natural resources of our State forests and parks dates back much further. Pennsylvania's first state park was established in 1893 and the Bureau of State Parks was established in 1929. **Exhibit I**, State Park History, The Goddard Era.¹⁵ The Department of Forestry, which eventually became the Bureau of Forestry within DCNR, was established in 1901.¹⁶ DCNR and its predecessors were authorized in 1955 by the Oil and Gas Lease Fund Act (71 P.S. §§ 1331-1333) to use the proceeds from the sale of oil and gas on our State forests and parks for purposes that benefit, conserve and maintain these public natural resources.

(111). From 1955 through 2008, DCNR and its predecessors used the oil and gas lease rents and royalties in the Oil and Gas Lease Fund established by the Oil and Gas Lease Fund Act to benefit our State forests and parks.

(112). In 1971, Pennsylvania's State forest and parks became part of the corpus of the constitutionally enacted Section 27 trust. The Oil and Gas Lease Fund could be used consistent with the Oil and Gas Lease Fund Act to fulfill the Section 27 trustee duty to conserve and maintain the public natural resources of our State forests and parks.

DRBC is seeking to protect the forested headwater areas in the upper portion of the Delaware River basin (*id.* at 258-59) are the same reasons that Section 27 trust funds must be used to prevent and remedy the degradation occurring in the forested headwaters of the Susquehanna and Allegheny Rivers within the PA WILDS.

¹⁵ See also "*History of Pennsylvania State Parks*" on DCNR's website at <http://www.dcnr.pa.gov/StateParks/History/Pages/default.aspx>.

¹⁶ Act of February 25, 1901, P.L. 11, No. 9 available at <http://www.legis.state.pa.us/WU01/LI/LI/US/PDF/1901/0/0009..PDF>.

(113). While DCNR has the authority under CNRA to lease State forest land for oil and gas extraction, this authority was granted in conjunction with the authority to use the Oil and Gas Lease Fund to benefit State forests and parks. 71 P.S. §§ 1340.101(a)(1), 1340.302(a)(6) and 1340.304(c).

(114). Prior to 2009, DCNR always leased State forest land and sold oil and gas on State forest tracts in the PA WILDS predicated on its ability to use the proceeds to benefit the public natural resources.

(115). In appropriating Section 27 funds derived from the sale of public natural resources on our State forests and parks, the Commonwealth and the Governor must ensure, consistent with their fiduciary duties of prudence, loyalty and impartiality, that the agency receiving those funds has the special skills and expertise necessary to conserve and maintain the public natural resources of our State forests and parks and will use those special skills and expertise in the administration of the Section 27 trust funds. 20 Pa.C.S. § 7776. The Commonwealth has in fact already established DCNR as that agency.

(116). After its creation in 1995, DCNR adopted the science of ecosystem management to meet its statutory and constitutional mission to conserve and maintain our State forests for future generations. DCNR adopted these principles in its 1995 State forest strategic plan, *Penn's Woods, Sustaining Our Forests*, attached as **Exhibit J**.

(117). In its strategic plan, DCNR states that its mission in regard to sustaining our State forests is “to ensure the long-term health, viability and productivity of the Commonwealth’s forests and to conserve native wild plants by managing the forest under science of *sound ecosystem management, by retaining their wild character and maintaining biological diversity*, while providing pure water, opportunities for

low density recreation, habitats for forest plants and animals, sustained yields of quality timber, and environmentally sound utilization of mineral resources.” *Id.* (emphasis added).

(118). *Penn’s Woods* describes the basic tenet of ecosystem management as recognizing that forests, rather than being a set of resources, are in fact more than the sum of their parts. Forests are comprised of quantifiable components such as trees, but forests are also systems performing various functions and processes. Thus, a major step toward maintaining Pennsylvania’s environmental heritage and values is to adopt a management strategy geared toward sustaining the long-term health and productivity of forest ecosystems. *Id.* at 8.

(119). The maintenance of the ecosystem integrity of our State forest is critical to DCNR’s ability to sustainably manage our State forest and support the communities of the PA WILDS in northcentral Pennsylvania. If the State forest and parks in this region are degraded and diminished, the air and the water polluted, and the natural, scenic, historic and esthetic values diminished, the specific mandates to sustain the ecosystem of our State forest and support the social and economic development goals of the PA WILDS will not be achieved.

(120). The *Penn’s Woods* strategic plan and the conservation landscape initiative plan of the PA WILDS clearly reflect the intentions of the people who voted to approve the Section 27 trust.

(121). Based on the policies and principles established in its strategic plan, DCNR is the agency with the special skills and expertise to apply the principles of sound ecosystem management needed to conserve and maintain the public natural resources of our system of State parks and forests, community recreation and heritage conservation areas for the benefit of the Section 27 trust beneficiaries.

(122). With the continuing development and extraction of oil and gas on over 617,000 acres of State forest land, and without the proceeds from the extraction and sale of that oil and gas, DCNR is and will be severely challenged to maintain the principles of sound ecosystem management and to meet its statutory and constitutional duties to prevent and remedy the degradation, diminution or depletion of the public natural resources in the PA WILDS. It will also be severely challenged to meet its fiduciary duties under Section 27 to treat all beneficiaries, both present and future, equitably *in light of the purposes of the trust*. 20 Pa.C.S. § 7773 (emphasis added).

(123). As recognized by the Supreme Court in *PEDF II*, “DCNR had anticipated receiving the full amount of the rents and royalties to allow it to oversee the rapid expansion of drilling on state land when it decided to enter into the [oil and gas leases for State forests tracts offered in 2008].” 161 A.3d at 922

(124). The only way Section 27 trust funds can be used to comply with the Section 27 mandate to conserve and maintain the corpus of the trust is to use the funds to prevent and remedy the degradation, diminution and depletion of the public natural resources that occurred to generate the funds in the first place.

(125). WHEREFORE, Petitioner respectfully requests this Honorable Court to find and declare the following:

(a) DCNR is the only existing agency who has the statutory authority to conserve and maintain our State forest, and the only agency with the specialized skills and expertise necessary to conserve and maintain the public natural resources of northcentral Pennsylvania both now and for future generations;¹⁷ and

¹⁷ The General Assembly has the legislative authority to eliminate DCNR as an executive agency. However, the General Assembly would be obligated through its Section 27 fiduciary duties to

(b) DCNR is the only agency that can use the Section 27 trust funds from the State forest public natural resources in the PA WILDS of northcentral Pennsylvania to conserve and maintain those State forests, both now and for future generations, by continuing to develop and enhance the integrity of their forest ecosystems.

B. THE REPEAL OF THE 1955 OIL AND GAS LEASE FUND ACT PURSUANT TO SECTION 20(2) OF THE 2017 FISCAL CODE AMENDMENTS VIOLATES SECTION 27 AND THE TRUSTEES' DUTIES THEREUNDER

(126). All prior paragraphs are hereby incorporated by reference.

(127). Section 20(2) of the 2017 Fiscal Code Amendments repeals the Oil and Gas Lease Fund Act.

(128). Petitioner believes and avers that Section 20(2) violates Section 27 because repealing the Oil and Gas Lease Fund Act causes immediate and long-term impacts to our public natural resources and to the beneficiaries' rights to those resources.

(129). By repealing the Oil and Gas Lease Fund Act, the gas and oil extraction authorized on over 617,000 acres of State Forest land continues, but the proceeds from the leasing are no longer available to DCNR to benefit our State forests and parks as they had been under the Oil and Gas Lease Fund Act.

replace DCNR with another agency that could conserve and maintain the public natural resources of our system of State forests and parks and community recreation and heritage conservation areas for the benefit of the Section 27 trust beneficiaries through provisions similar to those in the Conservation and Natural Resources Act.

(130). Since 1947, DCNR and its predecessors have had the authority to lease State forest and park lands for the extraction and sale of the oil and gas. *PEDF II*, 161 A.3d at 919.

(131). In 1955, the Oil and Gas Lease Fund Act established specific controls over the use of the funds from leasing State forest and park lands for the sale of oil and gas. Specifically, the Oil and Gas Lease Fund Act required that all the rents and royalties from such oil and gas leases be deposited into a special fund known as the Oil and Gas Lease Fund. 71 P.S. § 1331. It also required that the funds “be exclusively used for conservation, recreation, dams, or flood control...”, *id.*; authorized only the Secretary of Department of Forests and Waters (and now its successor, DCNR) to “determine the need for and location of such projects and to acquire the necessary land,” 71 P.S. § 1332; and provided that all the monies paid into the Fund “are specifically appropriated to [DCNR] to carry out the purposes of this act.” 71 P.S. § 1333.

(132). In repealing the Oil and Gas Lease Fund Act, the 2017 Fiscal Code Amendments did not replace it with any safeguards on the use of the Section 27 trust funds from extraction and sale of oil and gas on our State forests and parks.

(133). By repealing the Oil and Gas Lease Fund Act without providing any safeguards to ensure the trustees use the Section 27 trust funds to conserve and maintain public natural resources, the Respondents violated Section 27 on its face.

(134). The proceeds from the sale of oil and gas on our State forests are part of the corpus of the Section 27 trust. *PEDF II*, 161 A.3d at 933.

(135). The proceeds from the sale of our public natural resources must be used for Section 27 trust purposes, which is to conserve and maintain our public natural

resources by preventing and remedying the degradation and diminution of our State forests and parks from the depletion of the oil and gas resources.

(136). The repeal of the Oil and Gas Lease Fund Act and replacement with new provisions that give the General Assembly control over these Section 27 trust funds are no different than the prior attempt to shift control of the Oil and Gas Lease Fund from DCNR under Section 1602-E and 1603-E of Fiscal Code (72 P.S. §§ 1602-E and 1603-E, enacted as part of omnibus amendments to the Fiscal Code on October 9, 2009), which the Supreme Court declared facially unconstitutional under Section 27. *PEDF II*, 161 A.3d at 938.

(137). In finding Sections 1602-E and 1603-E of the Fiscal Code unconstitutional, the Supreme Court states that “[t]hey plainly ignore the Commonwealth’s constitutionally imposed fiduciary duty to manage the corpus of the environmental public trust for the benefit of the people to accomplish its purpose – conserving and maintaining the corpus by, inter alia, preventing and remedying the degradation, diminution and depletion of our public natural resources.” *Id.*

(138). Upon finding the prior Fiscal Code provisions giving the General Assembly control over the Oil and Gas Lease Fund unconstitutional, the Supreme Court declared that the appropriations scheme established by the Oil and Gas Lease Fund Act and the Conservation and Natural Resources Act “again controls, with all the monies in the [Oil and Gas] Lease Fund specifically appropriated to DCNR.” *Id.* at 939.

(139). By repealing the Oil and Gas Lease Fund Act, the Respondents have again diverted Section 27 trust funds from the control of DCNR, leaving DCNR without the ability to fulfill its Section 27 trustee duties; and without establishing any alternative method for the Commonwealth to faithfully exercise its

constitutional and fiduciary duties to conserve and maintain the public natural resources of our State forests and parks.

(140). The Commonwealth, as a trustee, has a fiduciary duty to act toward the corpus of the trust – the public natural resources – with prudence, loyalty, and impartiality. *PEDF II*, 161 A.3d at 952 (citing *Robinson Twp.*, 83 A.3d at 956-957); *see also* 20 Pa.C.S. §§ 7772-7774. The Commonwealth, as trustee, also must “administer the trust in good faith, in accordance with its provisions and purposes and the interests of the beneficiaries and in accordance with applicable law.” 20 Pa.C.S. § 7771.

(141). The Respondents’ fiduciary duties as trustee of the Section 27 trust include the obligation to be prudent, which requires the trustee to consider the purposes, provisions and circumstances of the trust and to exercise such care, skill and caution as a person of ordinary prudence would exercise in dealing with his or her own property. *PEDF II*, 161 A.3d at 932; 20 Pa.C.S. § 7774. A prudent person would not remove safeguards in place to protect his or her property without replacing those safeguards with equally protective measures.

(142). The Respondents, as trustees, also have the duty of loyalty, which means they must administer the trust “so as to accomplish the trust’s purposes for the benefit of the trust’s beneficiaries.” *Id.* at 932-933. They must administer the trust **solely** in the interests of the beneficiaries. 20 Pa.C.S. § 7772(a). The Respondents breached their duty of loyalty by depleting the public natural resources of our State forests and parks without regard to the rights of the beneficiaries, both present and future generations.

(143). The Respondent’s duties as fiduciary also mandate impartiality, which requires the trustee “to manage the trust so as to give all the beneficiaries due regard

for the respective interests.” *Id.* at 933; 20 Pa.C.S. § 7773. The Respondents breached their fiduciary duty of impartiality by failing to evaluate that impact of the repeal of the Oil and Gas Lease Fund Act on the interest of both present and future beneficiaries of the State forests and acting solely in their own budgetary interests for the pending fiscal year.

(144). Before making a decision or taking an action that might or will negatively impact the public natural resources of our State forests and parks, the Commonwealth trustee making the decision has the duty under the Section 27 trust to understand what those impacts are or might be, both to the public natural resources and to the peoples’ uses of, benefits from and rights in those resources under Section 27. *See Robinson Twp.*, 83 A.3d at 951-952.

(145). Under Pennsylvania law, a trustee must “take reasonable steps to take control of and protect the trust property.” 20 Pa.C.S. § 7779. The basic step of evaluating the impact of an action prior to taking it is an essential reasonable step that a trustee must take to protect trust property.

(146). The Respondents provided no evidence of any evaluation or analysis of the immediate or long-term impacts of their decision to repeal the Oil and Gas Lease Fund Act on the public natural resources of our State Forest; of the rights of the people, both as the proprietary owners of the natural resources and as the beneficiaries of the Section 27 trust; of the duties of the trustees to conserve and maintain both the corpus of the Section 27 trust or the Section 27 rights of the people; of their fiduciary duties as trustee to the trust and to the trust beneficiaries; or of the need for projects on our State forests and parks to prevent and remedy the degradation, diminution and depletion of public natural resources.

(147). The Respondents failure to evaluate any of the above impacts violates Section 27 and their trustee duties thereunder, which require them to conserve and protect the public natural resources of our State forests and parks for the benefit of the people, both now and future generations.

(148). WHEREFORE, the Petitioner respectfully requests this Honorable Court to find and declare the following:

(a) Section 20(2) of the 2017 Fiscal Code Amendments violates Section 27 on its face by repealing the Oil and Gas Lease Fund Act without replacing its safeguards to ensure the public natural resources of our State forests and parks are conserved and maintained;

(b) The Respondents violated Section 27 by enacting Section 20(2) of the 2017 Fiscal Code to repeal the Oil and Gas Lease Fund Act without replacing its safeguards to ensure that use of Section 27 trust funds comply with the Section 27 and their duties as trustees thereunder;

(c) The Respondents, as trustees, violated their fiduciary duties of prudence, loyalty and impartiality to the corpus of the Section 27 trust and to the interests of the beneficiaries thereto by repealing the Oil and Gas Lease Fund Act without ensuring compliance with Section 27 and with their duties as trustees; and

(d) The Respondents failed to evaluate the impacts to the public natural resources of our State forests and parks by repealing the Oil and Gas Lease Fund Act, including DCNR's ability to meet its statutory and constitutional duties to conserve and maintain those public natural resources.

C. THE NEW OIL AND GAS LEASE FUND ESTABLISHED UNDER SECTION 1601.2-E OF THE FISCAL CODE IS UNCONSTITUTIONAL

1. The New Oil and Gas Lease Fund Established under Section 1601.2-E(a) of the Fiscal Code Violates Section 27 and the Trustees' Duties Thereunder

(149). All prior paragraphs are hereby incorporated by reference.

(150). Section 3.2 of the 2017 Fiscal Code Amendments amends the definition of “fund” in Section 1601-E of the Fiscal Code to remove the reference to the Oil and Gas Lease Fund Act, which gave control of these Section 27 trust funds to DCNR.

(151). Section 1601.2-E(a) of the Fiscal Code establishes a new fund by the exact same name, the Oil and Gas Lease Fund, as the fund established in 1955 under the Oil and Gas Lease Fund Act. The new “Oil and Gas Lease Fund” gives the misleading outward appearance that nothing has changed, even though use of the new fund is fundamentally different from use of the fund established under the Oil and Gas Lease Fund Act.

(152). The new Oil and Gas Lease Fund has none of the protective limits provided under the Oil and Gas Lease Fund Act to ensure that these funds, which are part of the corpus of the Section 27 trust, will be used in compliance with the Section 27 and the trustees' duties thereunder.

(153). Section 1601.2-E(a) violates Section 27 by establishing the new Oil and Gas Lease Fund as a special fund without recognizing that the funds deposited into this new fund from the extraction and sale of oil and gas on our State forests are Section 27 trust funds, as declared by the Supreme Court in *PEDF II*, and without

incorporating limits on the use of these funds for the trust purpose of conserving and maintaining our public natural resources.

(154). The Supreme Court in *PEDF II* found that Sections 1602-E and 1603-E of the Fiscal Code enacted in 2009 “do not reflect that the Commonwealth complied with its constitutional duties” under Section 27 and reversed the Commonwealth Court’s order to the contrary. 161 A.3d at 939.

(155). As legislation that impacts public natural resources, Section 1601.2-E(a) of the Fiscal Code fails to ensure the Section 27 trust funds in the Oil and Gas Fund will be used to prevent and remedy the degradation, diminution or depletion of the corpus of the Section 27 trust, or to secure the beneficial use for the people, both now and in the future.

(156). The Commonwealth, by reauthorizing the Oil and Gas Lease Fund Act under DCNR’s control in 1995 through the Conservation and Natural Resources Act, ensured that the proceeds from State forest oil and gas leases were used effectively by DCNR to conserve and maintain the public natural resources of our State forests and parks consistent with Section 27, as its predecessors had done for over 40 years.

(157). DCNR, as the statutorily designated trustee for our State forests and parks, is entrusted by the General Assembly under CNRA to use the Oil and Gas Lease Fund consistent with the purposes of the Section 27 trust to sustain Pennsylvania’s forests and parks for both current and future generations.

(158). The Oil and Gas Lease Fund Act “specifically appropriated” the rents and royalties deposited into the Oil and Gas Lease Fund to the department responsible for managing our State forests and parks (now DCNR) “to carry out the purposes of the act.” No further legislation was needed for that department to use the funds for the purposes of the act.

(159). Under Section 1601.2-E(a) of the Fiscal Code, the protective limits for the use of the Oil and Gas Lease Fund established in 1955 no longer exist. Section 1601.2E(a) does not provide any specific limitations on the uses of the funds that will ensure compliance with terms of the Section 27 public trust and the trustee's duties thereunder.

(160). WHEREFORE, the Petitioner respectfully requests this Honorable Court to find and declare the following:

(a) Section 1601.2-E(a) of the Fiscal Code violates Section 27 on its face by establishing the Oil and Gas Lease Fund as a special fund without recognizing that the funds deposited into the Oil and Gas Lease Fund from the extraction and sale of oil and gas on State forests are Section 27 trust funds, as declared by the Supreme Court in *PEDF II*, and without incorporating limits on the use of these funds to ensure compliance with Section 27 and the trustees' duties thereunder;

(b) Section 1601.2-E(a) of the Fiscal Code violates Section 27 because it does not ensure that Section 27 trust funds in the Oil and Gas Fund will be used to prevent and remedy the degradation, diminution or depletion of the corpus of the Section 27 trust, or to secure the beneficial use of Section 27 public natural resources for the people, both now and in the future.

(c) The Respondents violated their trustee duties under Section 27 by enacting Section 1601.2-E(a) without including the proper safeguards and limitations to ensure the Oil and Gas Lease Fund is used solely to conserve and maintain the public natural resources of our State forests and parks degraded by the oil and gas extraction and sale that generated the money in the fund.

2. Section 1601.2-E(a) violates Article I Section 25 of the Pennsylvania Constitution

(161). All prior paragraphs are hereby incorporated by reference.

(162). Courts have recognized that legislative bodies retain authority to control the fate of special funds in order to serve the changing needs of government, *so long as doing so would not contravene a specific constitutional provision* or breach a contractual obligation. *Hospital and Healthsystem Assoc. of Pa. v. Commonwealth*, 77 A.3d 587, 604-605 (Pa. 2013) (quoting *Washington, D.C. Ass'n of Realtors, Inc. v. District of Columbia*, 44 A.3d 299, 305 & n.28 (D.C. 2012) (emphasis added)).

(163). The Supreme Court acknowledges that the ability to redirect special funds may be limited in connection to monies held in trust or otherwise protected by vested entitlements as to the manner of their use. *Id.*

(164). Although the trustee is empowered to exercise discretion with respect to the proper treatment of the corpus of the trust, that discretion is limited by the purpose of the trust and the trustee's fiduciary duties and does not equate to mere subjective judgment. *PEDF II*, 161 A.3d at 933.

(165). The proceeds from the extraction and sale of oil and gas on our State forests and parks is part of the corpus of the Section 27 trust and its use to conserve and maintain public natural resources is an inalienable right of the people under Article I of the Pennsylvania Constitution. Section 25 severely limits the ability of the Commonwealth, as trustee, to redirect the use of these Article I trust funds to meet the annual budgetary needs of the government under Articles III, IV and VIII of the Constitution.

(166). By eliminating the Oil and Gas Lease Fund established under the Oil and Gas Lease Fund Act, Section 1601-E(a) establishes a new Oil and Gas Lease Fund without any of the constitutional protections of the Oil and Gas Lease Fund Act.

(167). WHEREFORE the Petitioner respectfully requests this Honorable Court to find and declare that:

(a) Section 1602-E(a) violates Article I Section 25 because it takes away the commitment of Section 27 trust funds to the public natural resources protections of the Oil and Gas Lease Fund Act, and establishes a new fund with the same name but without any constitutional protections; and,

(b) The Respondents have violated Article I Section 27 and their duties as trustees by enacting Section 1601.2-E(a) without insuring that the new fund is and will be used in compliance with Section 27 and their duties as trustees as trustees thereunder.

3. Section 1601.2-E(b) Violates Section 27 by Failing to Properly Account for Section 27 Trust Funds and Their Use for Trust Purposes

(168). All prior paragraphs are hereby incorporated by reference.

(169). Section 1601.2(b) of the Fiscal Code identifies the sources of funds that may be deposited into the Oil and Gas Lease Fund as: (1) rents and royalties from oil and gas leases of land owned by the Commonwealth, except rents and royalties from game and fish lands; (2) amounts as provided under section 5 of the act of

October 8, 2012 (P.L. 1194, No. 147) known as the Indigenous Mineral Resources Development Act;¹⁸ and (3) any other money appropriated or transferred to the fund.

(170). Pennsylvania law requires a trustee to “keep adequate records of the administration of the trust” and to “keep trust property separate from the trustee’s own property.” 20 Pa.C.S. § 7780. By allowing Section 27 trust funds to be mixed with funds from other sources, Section 1601.2-E(b) of the Fiscal Code precludes the Respondents from maintaining detailed and accurate accounts of the uses of the Section 27 funds from the rents and royalties from oil and gas leases on State forest and park land deposited in the new Oil and Gas Lease Fund.

(171). Proceeds from the extraction and sale of oil and gas on our State forests are part of the corpus of the Section 27 trust and are protected by the mandates of Section 27 and the trustees’ duties thereunder. Section 1601.2-E(b) of the Fiscal Code violates Section 27 by failing to assure that these proceeds are accounted for and used solely to conserve and maintain the public natural resources degraded, diminished and depleted to generate these Section 27 trust funds.

(172). At a minimum, adequate records of the administration of a trust must provide detailed and accurate accounts of the type and amount of trust property and the trustee’s actions related to administration of that property. Restatement (Second) of Trusts § 172, comment a.

¹⁸ This statute authorizes the leasing of land owned by the State System of Higher Education and State-owned lands (other than land owned and administered by DCNR, the Pennsylvania Fish and Boat Commission or the Pennsylvania Game Commission) for oil, gas, coal, coal bed methane and limestone extraction. 71 P.S. §§ 1357.1 – 1357.6.

(173). The obligation to inventory the trust corpus is basic to trust law and includes a continuing obligation to record changes in the property. Restatement (Second) of Trusts § 172, comment c, note 318.

(174). A trustee must promptly respond to a reasonable request by the settlor of a trust or a trust beneficiary for information related to the trust's administration. 20 Pa.C.S. § 7780.3. To provide a prompt response, a trustee must maintain complete and accurate information concerning trust property. Restatement (Second) of Trusts § 172, comment c, note 318, and § 173.

(175). The obligation to report to beneficiaries is considered so central to the trustee's basic obligations under the trust that Pennsylvania courts have implied this duty even when not expressly required. *Fidelity Bank v. Commonwealth Marine and General Insurance Co.*, 592 F. Supp. 513, 528-29 (E.D. Pa. 1984).

(176). By mixing the funds that are part of the corpus of the Section 27 trust with other funds, the Respondents cannot provide the trust beneficiaries with accurate information regarding those trust proceeds to know how they will or have been used.

(177). WHEREFORE, the Petitioner respectfully requests the Commonwealth Court to find and declare that Section 1601.2-E(b) of the Fiscal Code violates Section 27 and the trustees' fiduciary duties thereunder because mixing Section 27 trust funds with non-trust funds precludes any detailed and accurate account of the trust funds and how they are being used in compliance with Section 27 and the the trustees' fiduciary duties thereunder.

4. Section 1601.2-E(c) Violates Section 27 on its Face by Failing to Provide Any Assurance that the New Oil and Gas Lease Fund Will Comply with Section 27 Trust Purposes

(178). All prior paragraphs are hereby incorporated by reference.

(179). Section 1601.2-E(c) of the 2017 Fiscal Code states that:

Use.—Money in the fund may only be used as provided under subsection (e) or as **annually appropriated** by the General Assembly. In making an appropriation from the fund, the General Assembly shall **consider** the Commonwealth’s trustee duties under Section 27 of Article I of the Constitution of Pennsylvania.

(Emphasis added).

(180). The Supreme Court found Sections 1602-E and 1603-E of the Fiscal Code facially unconstitutional because those amendments “plainly ignore the Commonwealth’s constitutionally imposed duty to manage the corpus of the environmental public trust for the benefit of the people to accomplish its purpose – conserving and maintaining the corpus – by, inter alia, preventing and remedying the degradation, diminution and depletion of our public natural resources.” *PEDF II*, 161 A.3d at 938.at 938. The Supreme Court found these Fiscal Code provisions unconstitutional “[b]ecause the legislative enactments at issue do not reflect that the Commonwealth complied with its constitutional duties.” *Id* at 939.

(181). The requirement that the General Assembly consider its duties as trustee under Section 27 in some future appropriation of Section 27 trust funds does not provide assurance that Section 1601.2-E(c) of the 2017 Fiscal Code will ensure that Section 27 trust funds will be used to conserve and maintain the public natural resources degraded to generate the trust funds.

(182). Section 1601.2-E(c) of the Fiscal Code does not provide any direct limitation on the use of the fund to comply with mandates of the Section 27 trust. It

does not require that the funds be used to prevent and remedy the degradation of the State forests and parks, contains no statement that the funds must be used only for Section 27 conservation and maintenance purposes, does not require that the rights of the people to the Section 27 trust be met, both now and in future generations, and does not require that the use of the funds must comply with the fiduciary duties of the trustees under Section 27.

(183). Section 1601.2-E(c) of the Fiscal Code violates Section 27 because it does not require any evaluation prior to use of Section 27 trust funds generated from the extraction and sale of oil and gas on State forests and parks as to the impact to State forest and parks public natural resources, the people's rights to have those resources conserved and maintained, both now and in the future, or the trustees' duties under Section 27.

(184). WHEREFORE, Petitioner respectfully requests this Honorable Court to find and declare that Section 1601.2-E (c) of the Fiscal Code is unconstitutional on its face; and that the Respondents violated Section 27 and their duties as trustees thereunder for enacting it.

5. Respondents Violated Sections 25 and 27 by Authorizing Annual Appropriations from the New Oil and Gas Lease Fund under Section 1601.2-E(c) When They Have No Proprietary Interest in the Section 27 Trust Proceeds in this Fund

(185). All prior paragraphs are hereby incorporated by reference.

(186). Section 1601.2-E(c) requires that “[m]oney in the fund may only be used as provided under subsection (e) or as **annually appropriated** by the General Assembly” (emphasis added).

(187). The ability of the Commonwealth government to infringe on the declared rights of the people in Section 27 is explicitly limited by Article I, Section 25 of the Pennsylvania Constitution, which states: “To guard against the transgressions of high powers which we have delegated, we declare that everything in this article is excepted out of the general powers of government and shall forever remain inviolate.”

(188). The Governor and the General Assembly derive their power to enact annual appropriations from Articles III (Legislation), IV (The Executive) and VIII (Taxation and Finance) of the Pennsylvania Constitution. These powers are expressly limited by the fundamental rights reserved to the people in Article I of our Constitution.

(189). The passage of annual appropriations bills to fund general government operations for the current fiscal year is an Article III responsibility of the government and cannot infringe upon the fundamental rights of the people in Section 27. *PEDF II*, 161 A.3d at 930-931; *Robinson Twp.*, 83 A.3d at 947.

(190). Section 1601.2-E(c) puts the management of the new Oil and Gas Lease Fund under the control of the political process of determining the budget. By placing the management of the new Oil and Gas Lease Fund under the political appropriations process, the Respondents are acting as proprietors with complete control over the funds, rather than trustees with a fiduciary duty to use these Section 27 trust funds only for the trust purposes established in Section 27.

(191). The Supreme Court concluded in *PEDF II* that “[t]he Commonwealth (including the Governor and General Assembly) may not approach our public natural resources as a proprietor, and instead must at all times fulfill its role as a trustee.” *Id.* at 939.

(192). Using our public natural resources as part of the budget process violates Article I Section 25 of Pennsylvania’s Constitution, which excepts everything in Article 1 “out of the general powers of government and shall forever remain inviolate.”

(193). WHEREFORE, the Petitioner respectfully requests this Honorable Court to find and declare that:

(a) Section 1601.2-E(c) violates both Sections 25 and 27 by directing that Section 27 trust funds in the Oil and Gas Lease Fund be used for undisclosed Article III government appropriations;

(b) The Respondents’ administration of Article I trust funds through the annual appropriations for general government operations is a proprietary action that violates Section 27 by allowing part of the corpus of the Section 27 trust to be used for non-trust Article III government purposes when Respondents have no proprietary interest in the Article I trust funds;

(c) Governor Wolf and the Commonwealth have violated Sections 25 and 27, and their fiduciary duties under Section 27, by enacting Section 1601.2-E(c) of the Fiscal Code, which requires Section 27 trust funds be used for annual government appropriations – a proprietary use of our public natural resources.

6. Respondents Violated Section 27 by Failing to Evaluate Section 1601.2-E(c) for Compliance with Section 27 Prior to Enactment

(194). All prior paragraphs are hereby incorporated by reference.

(195). As Section 27 trustees, the Respondents must exercise their fiduciary duties to prohibit the degradation, diminution and depletion of our public natural resources. Before making a decision or taking an action that might or will negatively

impact the public natural resources, the trustee making the decision has the fiduciary duty under the trust to understand what those impacts are or might be, both to the public natural resources, the corpus of the trust, and to the peoples' rights established in Section 27. In order to make an effective evaluation, the Respondents must complete an inventory of the public natural resources that might or will be impacted. Our State forests must be managed based on sound, scientific ecosystem management. The inventory must include the current status and future needs of the forest.

(196). A trustee violates the fiduciary duty of prudence by failing to evaluate the impact of any decision that might or will impact the corpus of the trust and/or the rights of the beneficiary before making that decision or taking that action. A trustee violates the fiduciary duty of impartiality by failing to exercise such skill as a person of ordinary prudence would exercise with his or her own property or by failing to evaluate both the current and future impacts of any decision before the decision is finalized.

(197). The Supreme Court, in its plurality opinion in *Robinson Twp.*, clearly articulated the need for an evaluation, stating that Section 27 "requires each branch of government to consider in advance of proceeding the environmental effect of any proposed action on the constitutionally protected features." 83 A.3d at 951-952.

(198). Section 1601.2-E(c) provides no evidence that any evaluation was made to determine if and how much impact it would have on the constitutional obligation under Section 27 to prevent and remedy harm to the public natural resources; nor does it provide evidence of any evaluation of the impact it would have on the rights of the people who use those public natural resources. The designation of a new Oil and Gas Lease Fund that has no limitations to ensure compliance with

Section 27, that treats the use of the Oil and Gas Lease Fund as part of the appropriations process, and that fails to consider any of the duties and abilities of the DCNR to prevent and remedy the degradation of the public natural resources of our State forests and parks, will have significant impacts that must be evaluated before enacting a change of this magnitude.

(199). WHEREFORE, Petitioner respectfully requests this Honorable Court to find and declare that the Respondents violated Section 27 and their duties as trustees thereunder by failing to evaluate the impacts of their enactment of Section 1601.2-E(c) of the Fiscal Code on the public natural resources that are part of the Section 27 trust and their duties as trustees thereunder.

7. Section 1601.2-E(e) Violates Section 27 by Authorizing Annual Transfers from the New Oil and Gas Lease Fund to Support Programs Previously Funded by Expired Tax and Diverted Fee Revenue

(200). All prior paragraphs are hereby incorporated by reference.

(201). Section 1601.2-E(e) of the Fiscal Code directs the following annual transfers from the Oil and Gas Lease Fund: “(1) For the 2017-2018 fiscal years and each fiscal year thereafter, \$20,000,000 shall be transferred from the fund to the Marcellus Legacy Fund for distribution to the Environmental Stewardship Fund. (2) For the 2017-2018 fiscal year thereafter, \$15,000,000 shall be transferred from the fund to the Marcellus Legacy Fund for distribution to the Hazardous Sites Cleanup Fund.”

(202). On February 14, 2012, the Governor approved Act 13 of 2012 that authorized further annual transfers of Section 27 trust funds deposited into the Oil and Gas Lease Fund to the newly created Marcellus Legacy Fund and then to the

Environmental Stewardship Fund and the Hazardous Sites Cleanup Fund. 58 Pa.C.S. Chapter 25 (Oil and Gas Lease Fund).

(203). Through the annual transfers to the Marcellus Legacy Fund authorized by 58 Pa.C.S. § 2504-2505 and now Section 1601.2-E(e) of the Fiscal Code, the Respondents have appropriated and spent large sums of money (\$135,000,000 to date) from the Oil and Gas Lease Fund for projects untethered to protection of public natural resources of our State forests and parks. The Respondents also protected their ability to control these annual transfers from the Oil and Gas Lease Fund by giving priority in Section 1601.2-E(d) to other appropriations from the Oil and Gas Lease Fund made through the Fiscal Code or other appropriation acts.

(204). Section 20(2) of the 2017 Fiscal Code Amendments repeals 58 Pa.C.S. §§ 2504-2505, but similar annual transfers from the Oil and Gas Lease Fund to the Marcellus Legacy Fund for distribution to the Environmental Stewardship Fund and the Hazardous Sites Cleanup Fund are authorized to continue through the new Section 1601.2-E(e) of the Fiscal Code.²⁵⁰⁴

a. Environmental Stewardship Fund

(205). When the Environmental Stewardship Fund was originally established by the Environmental Stewardship and Watershed Protection Act (27 Pa.C.S. §§ 6101 – 6119), it received most of its money from a legislative fee imposed on each ton of waste deposited in Commonwealth landfills. 27 Pa.C.S. § 6112.

(206). In 2005, the act was amended to authorize the issuance \$625,000,000 in bonds over a five-year period to fund the Growing Greener initiative. These bonds would be repaid with up to \$60,000,000 of the moneys deposited into the Environmental Stewardship Fund on an annual basis. 27 Pa.C.S. § 6115(d)(4). Revenue from the landfill fees authorized by this act generate approximately

\$65,000,000 annually. As of the 2015-16 fiscal year, the debt service on the Growing Greener bonds was \$37,539,000 and the debt service was estimated to be \$20,871,000 in the Governor's Executive Budget for 2017-18 (page H24).¹⁹

(207). Up to \$35,000,000 has been transferred annually from the Oil and Gas Lease Fund under Act 13 of 2012 (58 Pa.C.S. § 2505(b)) to replace the money in the Environmental Stewardship Fund needed to pay for the Growing Greener bond debt.

(208). Section 1601.2-E(e) of the Fiscal Code will now transfer \$20,000,000 annually from the new Oil and Gas Lease Fund to Environmental Stewardship Fund via the Marcellus Legacy Fund to replace legislatively mandated fees from landfills being used to pay the Growing Greener bond debt.

(209). The creation of the Environmental Stewardship Fund to support environmental projects from revenue generated by landfill fees is laudable. But replacing those fees with proceeds from the extraction and sale of oil and gas on our State forest violates Section 27 because it depletes our public natural oil and gas resources and degrades and diminishes our State forests and parks, thereby failing to conserve and maintain the corpus of the Section 27 trust.

(210). The diversion of \$20,000,000 annually from Oil and Gas Lease Fund to the Environmental Stewardship Fund also deprives DCNR from direct use of this money to meet its statutory and constitutional mandates to conserve and maintain the public natural resources our State forests and parks to support sustainable economic develop based on recreation and tourism in the PA WILDS.

¹⁹ Available on the Pennsylvania Office of Budget webpage at <http://www.budget.pa.gov/PublicationsAndReports/CommonwealthBudget/Documents/2017-18%20Proposed%20Budget/2017-18%20Budget%20Document%20-%20Web.pdf>.

(211). The amount of Section 27 trust funds in the Oil and Gas Lease Fund to be transferred to the Marcellus Legacy Fund and then to the Environmental Stewardship Fund is determined by legislative appropriation decisions, which are proprietary in nature, and not based on the two core duties of the trustee under Section 27, which are to conserve and maintain the corpus of the Section 27 trust and protect the rights of the beneficiaries of the trust.

(212). Funds in the Environmental Stewardship Fund not used to pay for the Growing Greener bonds are allocated annually to four Commonwealth agencies, including DCNR, as follows under 27 Pa.C.S. §§ 6104-6105:

a. The Department of Environmental Protection (“DEP”) receives 37.4% to fund projects to abate pollution resulting from past mining and oil and gas extraction, as well as pollution from agricultural operations and urban development;

b. The Department of Agriculture (“PDA”) receives 14.8% to protect private agricultural land from development;

c. The Pennsylvania Infrastructure Investment Authority (“PENNVEST”) receives 23.7% for grants for sewer and water infrastructure projects; and

d. DCNR receives 24.1% for grants to local communities to develop trails and parks, and to upgrade infrastructure on our State parks and forests.

(213). The Section 27 trust funds being used to pay for DEP pollution abatement, PDA farmland preservation, and PENNVEST sewer and water projects all benefit either public and private natural resources.

(214). The use of Section 27 trust funds from the extraction and sale of oil and gas on our State forests and parks to replace other legislative sources of funds for legislatively authorized projects listed above that do not conserve and maintain the

public natural resources of our State forests and parks violates Section 27 and the trustee's fiduciary duties thereunder.

(215). The duty of the trustee under Section 27 is to conserve and maintain our public natural resources for the benefit of the people living today and for future generations. That duty requires that the trustee prevent and remedy the degradation of the corpus of the Section 27 trust. It is the duty of the trustee to ensure that money from the degradation and depletion of State forests and park public natural resources be used to prevent and remedy the resources of the State forests and parks.

(216). The Respondents, as trustees, cannot take the public natural resources of our State forests and parks in the PA WILDS to benefit other public natural resources because that would not conserve and maintain the public natural resources of the PA WILDS contrary to the purposes of Section 27.

(217). The amount of money DCNR receives under the Environmental Stewardship Fund is determined by the General Assembly as part of the political appropriations process and is not based on an evaluation of DCNR's needs to prevent and remedy harm to our State forests and parks from oil and gas extraction, as required by Section 27.

(218). Under the Oil and Gas Lease Fund Act, DCNR would have the direct use of all the money in the Oil and Gas Lease Fund for projects to conserve and maintain the public natural resources of our State forests and parks to fulfill its Section 27 trustee duties. Now it is limited to what the General Assembly appropriates annually.

b. Hazardous Sites Cleanup Fund

(219). Section 1601.2-E(e) of the 2017 Fiscal Code transfers \$15,000,000 annually from the new Oil and Gas Lease Fund to the Marcellus Legacy Fund for distribution to the Hazardous Sites Cleanup Fund.

(220). When the Hazardous Sites Cleanup Fund was created in 1988, it was funded from an annual transfer of revenue generated by the Capital Stock and Franchise Tax imposed by Article VI of the Tax Code of 1971, as well as fees assessed on the transportation and management of hazardous waste within the Commonwealth, recovery of costs incurred by the Commonwealth from parties responsible for hazardous sites, interest and penalties, and other State and Federal funds appropriated.²⁰ The Hazardous Sites Cleanup Fund Funding Act²¹ was enacted in 2007 and directed the annual transfers of \$40,000,000 in revenue received from the Capital Stock and Franchise Tax to the Hazardous Sites Cleanup Fund. This tax expired on December 31, 2015 and is no longer available as a source of funding for the Hazardous Sites Cleanup Fund.²²

(221). The Hazardous Sites Cleanup Fund is administered by DEP to investigate, cleanup and monitor contaminated sites to respond to releases or threatened releases of hazardous substances or contaminants, which primarily result from industrial activity on private property. DEP also uses this fund to participate in

²⁰ Act of October 18, 1988, P.L. 756, No. 108.

²¹ Act of December 18, 2007, P.L. 486, No. 77.

²² See DEP Hazardous Sites Cleanup Fund Annual Report, August 2016, available at <http://www.elibrary.dep.state.pa.us/dsweb/Get/Document-116315/2620-RE-DEP4351%20%202016.pdf>.

the federal Superfund and hazardous waste programs and to implement the Commonwealth's land recycling program. 35 P.S. § 6020.902.

(222). The Hazardous Sites Cleanup Fund is important but replacing the expired Capital Stock and Franchise Tax with Section 27 trust funds to support these legislatively created programs violates Section 27 and the Commonwealth's trustee duties thereunder.

(223). Most if not all of DEP's programs are committed in some way to helping to protect and preserve our natural environment. If Respondents can use money from the sale of our public natural resources to replace taxes or fees for one or two or three DEP programs, then all DEP programs could be funded from the sale of our public natural resources. The result would be the loss of the constitutional protection of the Section 27 trust itself.

(224). As with the transfers to the Environmental Stewardship Fund, the diversion of \$15,000,000 annually from Oil and Gas Lease Fund to the Hazardous Sites Cleanup Fund also deprives DCNR of funds necessary to fulfill its trustee duties under Section 27 and Conservation and Natural Resources Act.

(225). The right to have our public natural resources conserved and maintained for the people both living now and for future generations is established under Article I of the Pennsylvania Constitution as part of the inalienable rights of the people.

(226). The ability of the Commonwealth government to infringe on the declared rights of the people in Section 27 is explicitly limited by Article I, Section 25 of the Pennsylvania Constitution, which states: "To guard against the transgressions of high powers which we have delegated, we declare that everything

in this article is excepted out of the general powers of government and shall forever remain inviolate.”

(227). The General Assembly derives its power from Article III of the Pennsylvania Constitution. Its powers are expressly limited by the fundamental rights reserved to the people in Article I of our Constitution. *PEDF II*, 161 A.3d at 930-931.

(228). The clear purpose of requiring the transfers under Section 1601.2E(e) is to replace the annual funding of legislatively created programs through taxes and fees.

(229). The annual funding of general legislative programs is an Article III responsibility of the government and cannot infringe upon the Article I rights of the people under Section 27. *PEDF II*, 161 A.3d at 930-931; *Robinson Twp.*, 83 A.3d at 947.

(230). The money from the sale of our public natural resources is the common property of the people as beneficiaries of the Section 27 trust. *Id.* at 931. The Commonwealth has no proprietary interest in the corpus of the trust, only the duty as trustee to conserve and maintain the resources for the people. *Id.* at 932. The Respondents violate Section 27 by using trust funds for proprietary purposes that result in the degradation and depletion of the corpus of the Section 27 trust.

(231). As trustee, the Commonwealth is limited to use the corpus of the Section 27 trust to remedy, replace and restore those public natural resources degraded or depleted to generate the Section 27 trust funds, not to fund other legislative mandates that do not achieve that purpose.

(232). WHEREFORE, the Petitioner respectfully requests this Honorable Court to find and declare the following:

(a) Section 1601.2-E(e) of the Fiscal Code violates Section 27 because it depletes our oil and gas public natural resources and degrades and diminishes our State forests and parks, which are all part of the corpus of the Section 27 trust;

(b) Section 1601.2-E(e) of the Fiscal Code violates Section 25 because the Commonwealth cannot use Section 27 trust funds protected under Article I of the Pennsylvania Constitution to replace tax and fee funding sources established by the General Assembly under its Article III authority to support its legislative programs when those programs impact the rights of the people under Section 27;

(c) Governor Wolf and the Commonwealth violated their duty under Section 27 to conserve and maintain our public natural resources by enacting Section 1601.2-E(e) of the Fiscal Code, which diverts Section 27 trust funds from the extraction and sale of the oil and gas from our State forest in the PA WILDS away from preventing and remediating the degradation to these State forests to benefit public (and private) natural resources in other parts of the State;

(d) Governor Wolf and the Commonwealth violated Section 25 and their duty under Section 27 by enacting Section 1601.2-E(e) of the Fiscal Code, which impacts Article I protected rights to benefit Article III responsibilities by replacing revenue from expired taxes or diverted fees to fund general government programs with Section 27 trust funds;

(e) Governor Wolf and the Commonwealth violated their duty under Section 27 by using Section 27 trust funds deposited into the Oil and Gas Lease Fund for the proprietary purpose of annually funding legislatively created programs through the Marcellus Legacy Fund, the Environmental Stewardship Fund and the Hazardous

Sites Cleanup Fund when they have no proprietary interest in the Section 27 trust funds and are limited to using these funds as trustees solely for Section 27 purposes;

(f) Governor Wolf and the Commonwealth violated their duty under Section 27 by enacting Section 1601.2-E(e) of the Fiscal Code, which take the funds from the degradation of our State forest away from DCNR and impacts DCNR's ability to meet its constitutional and statutory duty to conserve and maintain the State forests and parks in the PA WILDS. When DCNR entered offered to leases State forest tracts in the PA WILDS for the extraction and sale of oil and gas, DCNR anticipated it would have control of the proceeds from the leases under the Oil and Gas Lease Fund Act to meet its statutory and constitutional responsibilities. **Exhibit K**, Memorandum dated September 4, 2008 from John Quigley, DCNR, to Governor Rendell; *PEDF II*, 161 A.3d at 922.

c. Failure to Evaluate Impact of the Annual Transfers

(233). As trustees under Section 27, the Respondents must exercise their fiduciary duties to prohibit the degradation, diminution and depletion of our public natural resources. Before making a decision or taking an action that might or will negatively impact the public natural resources, the trustee making the decision has the fiduciary duty under the trust to understand what those impacts are or might be, both to the public natural resources, the corpus of the trust, and to the peoples' rights established in Section 27.

(234). In order to make an effective evaluation, a complete inventory of the natural resources that might or will be impacted must be prepared. Our State forests must be managed based on sound, scientific ecosystem management. The inventory must include the current status and future needs of the forest.

(235). Nothing in Section 1601.2-E(e) of the Fiscal Code indicates that the Respondents evaluated the impact of the annual transfers on DCNR's ability to prevent and/or remedy the degradation, diminution or depletion of our State forest.

(236). Nothing in Section 1601.2-E(e) requires the Respondents or any other Commonwealth agency to evaluate the impacts of the annual transfers from the Oil and Gas Fund to the Marcellus Legacy Fund and other legislatively mandated funds on the public natural resources of our State forests and parks degraded to raise these funds.

(237). Nothing in Section 1601.2-E(e) indicates that the Respondents evaluated the impacts of the annual transfers from the Oil and Gas Lease Fund to the Marcellus Legacy Fund and other legislatively mandated funds to sustaining our State forest through ecosystem management.

(238). Nothing in Section 1601.2-E(e) indicates that the Respondents evaluated the impacts to the PA WILDS from the annual diversion from the Oil and Gas Lease Fund.

(239). The Respondents violated their fiduciary duty toward the Section 27 trust by authorizing annual transfers from the Oil and Gas Lease Fund to the Marcellus Legacy Fund under Section 1601.2(e) of the Fiscal Code without evaluating DCNR's ability to prevent and remedy the harm to public natural resources of the State forest and the beneficiaries' rights thereto.

(240). The Respondents, as trustees, have a fiduciary duty to act toward the corpus of the trust – the public natural resources – with prudence, loyalty, and impartiality. *PEDF II*, 161 A.3d at 952 (citing *Robinson Twp.*, 83 A.3d at 956-957; 20 Pa.C.S. §§ 7771—7774).

(241). The Respondents' fiduciary duties as trustee of the public trust under Section 27 include the obligation to be prudent, which requires the trustee to exercise such care and skill as a person of ordinary prudence would exercise in dealing with his or her own property. *PEDF II*, 161 A.3d at 932; 20 Pa.C.S. § 7774.

(242). A prudent person deciding how to use Section 27 trust funds would ensure that the purposes of the trust and the beneficiaries' rights to the trust were met that the corpus of the trust would not be degraded, diminished or depleted.

(243). The Respondents, as trustees, also have the duty of loyalty, which means they must administer the trust "so as to accomplish the trust's purposes for the benefit of the trust's beneficiaries." *Id.* at 932-933; 20 Pa.C.S. § 7772. Respondents breached their duty of loyalty by making annual transfers from the Oil and Gas Lease Fund without ensuring that the rights of the beneficiaries were maintained; and by benefiting legislatively mandated programs rather than ensuring the use the funds to conserve and maintain the public natural resources of the State forest that are impacted by the oil and gas extraction and sale.

(244). The Respondent's duties as fiduciary also mandate impartiality, which requires the trustee "to manage the trust so as to give all the beneficiaries, including future generations, due regard for the respective interests." *Id.* at 933; 20 Pa.C.S. § 7773. The Respondents breached their fiduciary duty of impartiality by failing to ensure that the Oil and Gas Lease Fund would be used for both present and future beneficiaries' interests.

(245). WHEREFORE, the Petitioner respectfully requests this Honorable Court to find and declare that:

(a) Governor Wolf and the Commonwealth violated their duties of prudence, loyalty and impartiality as fiduciaries of the trust under Section 27 by enacting

Section 1601.2-E(e) of the Fiscal Code authorizing annual transfers of Section 27 trust funds in the Oil and Gas Lease Fund to the Marcellus Legacy Fund and then to the Environmental Stewardship Fund and the Hazardous Sites Cleanup Fund that cause the degradation, diminishment and depletion of the public natural resources in the State forest in the PA WILDS of northcentral Pennsylvania to benefit other public and private natural resources in other areas of the State;

(b) The Respondents violated Sections 25 and 27 and their duties as trustees by enacting Section 1601.2-E(e) of the Fiscal Code and authoring annual transfers that use Section 27 trust funds to replace legislatively established taxes and fees for statewide programs that do not conserve and maintain the public natural resources of the PA WILDS;

(c) The Respondents violated Section 27 and the trustees' duties thereunder, as well as the beneficiaries' rights thereto, because they enacted Sections 1601.2-E(e) of the Fiscal Code without inventorying and evaluating the impacts to the ecosystem of the State forest and the PA WILDS from the transfer of Section 27 trust funds in the Oil and Gas Lease Fund to the Marcellus Legacy Fund and other legislatively mandated funds rather than using those trust funds to remedy and restore the public natural resources of the PA WILDS;

(d) The Respondents violated Section 27 and the trustees' duties thereunder, as well as the beneficiaries' rights thereto, without evaluating the actual or potential harm to the State forest by taking the funds away from DCNR to prevent and remedy such harm and to meet its current and future constitutional and statutory mandates to conserve and maintain the State forest; and

(e) Section 1601.2-E(e) of the Fiscal Code is unconstitutional because it lacks any indication that the Commonwealth is required to reasonably exercise its duties as trustee of the Section 27 trust.

D. RESPONDENTS FAILED TO REPLACE THE OIL AND GAS LEASE FUND ACT LIMITATIONS WITH A STATUTORY SCHEME THAT COMPLIES WITH SECTION 27

1. Need for Constitutional Mandate to Pass Legislation to Protect Our Environment

(246). All prior paragraphs are hereby incorporated by reference.

(247). As the trustee, the Commonwealth has a duty to “*act affirmatively via legislative action* to protect the environment.” *PEDF II*, 161 A.3d at 933 (emphasis added).

(248). Affirmative legislative action is needed to ensure that the new Oil and Gas Lease Fund has protective limitations to replace the limitations of the now repealed Oil and Gas Lease Fund Act.

(249). Respondents have repealed the Oil and Gas Lease Fund Act and eliminated its limitations that ensured that Section 27 trust funds were appropriated to DCNR and used exclusively to benefit the public natural resources of our State forests and parks through on-the-ground physical projects;

(250). Following on the repeal of the Oil and Gas Lease Fund Act by Section 20-2 of the 2017 Fiscal Code Amendments, Section 1601.2-E(b) of the Fiscal Code established a new fund, called by the same name as the fund established under the repealed Oil and Gas Lease Fund Act – the Oil and Gas Lease Fund.

(251). Nothing in Section 1601.2-E(b) of the Fiscal Code provides any safeguards to ensure that use of the Section 27 trust funds in the new “Oil and Gas

Lease Fund” complies with Section 27. Section 1601.2-E(b) does not acknowledge that new “Oil and Gas Lease Fund” is part of the corpus of the Section 27 trust. It does not establish clear limitations on use of the fund by the trustees solely for the purpose of the Section 27 trust, which is to conserve and maintain the public natural resources themselves or prohibit the Commonwealth’s use of these Article I funds to meet general government responsibilities, including budgeting and operational costs of government agencies.

(252). Section 1601.2-E(c) provides no limitations on the use of the new fund except under subsection(c), which states that “[m]oney in the fund may only be used as **annually appropriated** by the General Assembly. In making an appropriation from the fund, the General Assembly shall **consider** the Commonwealth’s trustee duties under Section 27 of Article I of the Constitution of Pennsylvania” (emphasis added).

(253). The Supreme Court in *PEDF II* found Sections 1602-E and 1603-E of the Fiscal Code enacted in 2009 to be unconstitutional because these amendments lacked any indication that the Commonwealth was required to reasonably exercise its duties as trustee of the Section 27 trust. 161 A.3d at 938.²³

(254). Additionally, the Supreme Court found that Section 1603-E of the Fiscal Code was unconstitutional because it gave preference to the operation of State parks and forests rather than to conservation of their public natural resources. The Supreme Court stated that “[b]ecause the legislative enactments at issue here do not reflect that the Commonwealth complied with its constitutional duties, the order of

²³ In *PEDF II*, the Supreme Court states that “Section 1602-E merely requires the General Assembly to ‘consider’ allocating these funds to municipalities...” 161 A.3d at 937. It is clear that merely requiring to “consider” is not sufficient to indicate the means by which the Commonwealth is required to meet its constitutional responsibilities.

the Commonwealth Court with respect to the constitutionality of 1602-E and 1603-E is hereby reversed.” *Id.* at 939. Prior to any appropriation, the Respondents must comply with their constitutional duties.

(255). WHEREFORE, the Petition requests that this Honorable Court find and declare that Fiscal Code provisions related to the new Oil and Gas Lease Fund be amended to provide affirmative requirements consistent with Section 27 and the trustee’s duties thereunder to ensure proper use of Section 27 funds prior to any appropriations from this fund.

2. The Oil and Gas Lease Fund Must Be Available to Conserving Our Natural Resources for Future Generations

(256). All prior paragraphs are hereby incorporated by reference.

(257). Section 1601.2-E(c) has no provisions that establish that Section 27 trust funds in the new “Oil and Gas Lease Fund” must be available conserve and maintain public natural resources for future generations as well as for the present generation.

(258). The Commonwealth’s Section 27 obligation to conserve and maintain the public natural resources for future generations means that the Commonwealth must ensure that these resources are of at least the same quality and diversity for future generations as they are for the present generation. In this way, the Commonwealth must maximize the options available to future generations. *See* Edith Brown Weiss, *In Fairness of Future Generations: International Law, Common Patrimony, and Intergenerational Equity*, Transnational Publishers, Inc., 1989 (pages

38-43). This is a basic fiduciary requirement of impartiality of the use of the Section 27 trust.²⁴

(259). The Fiscal Code provisions establishing the new Oil and Gas Lease Fund must address the need for the availability of Section 27 trust funds to maximize the options available for future generations.

(260). To be in compliance with the mandate of Section 27, proceeds from the sale of oil and gas on our State forests must be used in the area effected by the extraction of the oil and gas to prevent and remedy the degradation of public natural resources caused by the extraction and sale of the oil and gas.

(261). The State forests and parks being degraded by oil and gas extraction are a critical part of the PA WILDS.

(262). The PA WILDS includes the State forests and parks, county and municipal public natural resources such as parks, trails, greenways, rivers and streams, and other natural, scenic, historic and esthetic resources in the PA WILDS.

(263). Degradation of our State forests and parks has caused and will continue to cause degradation to the PA WILDS.

(264). The Fiscal Code provisions establishing the new Oil and Gas Lease Fund must ensure compliance with the Section 27 requirement to prevent and remedy the public natural resources by directing use of the money taken from the

²⁴ Because the condition of public natural resources is constantly changing, it is impossible to simply maintain them at some fixed condition. Rather, the state needs to aim at enhancing their quality and integrity to ensure that they are conserved and maintained for future generations. John C. Dernbach, *Taking the Pennsylvania Constitution Seriously When it Protects the Environment: Part II – Environmental Rights and Public Trust*, Penn State Law Review, Vol. 104, 1999, page 134.

public natural resources of the PA WILDS in northcentral Pennsylvania to prevent and remedy the degradation and diminution of these public natural resources of the PA WILDS.

(265). WHEREFORE, the Petitioner requests this Honorable Court to find and declare that the Fiscal Code provisions related to the new Oil and Gas Lease Fund be amended prior to any further appropriations to address the following:

(a) All proceeds from the extraction and sale of oil and gas on State forest land must be used to conserve and maintain the public natural resources in the area impacted by the extraction and sale; specifically, the proceeds from oil and gas extraction on State forest lands in the PA WILDS must be used to prevent and remedy the degradation and diminution of these high value public natural resources to restore recreation and tourism economies they support in the PA WILDS;

(b) Use of Section 27 trust funds must be limited to actual projects that conserve and maintain the public natural resources in the State forest and park areas impacted by the oil and gas extraction and sale;

(c) The Section 27 trust funds must be used to conserve and maintain the public natural resources for the benefit of the people, both now and future generations; and

(d) The Section 27 trust funds must be used to ensure that the public natural resources are of at least the same quantity, quality and diversity for future generations as they are for the present generation.

3. Section 27 Trust Funds Must Be Appropriated to Agency Dedicated to Effectuating Section 27

(266). All prior paragraphs are hereby incorporated by reference.

(267). Section 1601.2-E(c) of the Fiscal Code authorized the General Assembly to appropriate all the money generated from oil and gas extraction on State forests. The General Assembly does not have the expertise or specialized knowledge necessary to identify projects or activities needed to conserve and maintain the public natural resources of our State parks and forests for current and future generations.

(268). Section 27 trust funds must be appropriated to an “initiative or agency dedicated to effectuating Section 27.” *PEDF II*, 161 A.3d at 939. “The Commonwealth (including the Governor and the General Assembly) may not approach our public natural resources as a proprietor, and instead must at all times fulfill its role as a trustee.” *Id.*

(269). DCNR is the only existing Commonwealth agency with the expertise, knowledge, capability and authority to conserve and maintain the public natural resources of our State forest and parks subject to oil and gas extraction and sale in the PA WILDS.

(270). When a Commonwealth agency with statutory power and authority to protect public natural resources considers actions necessary to achieve such protection and resolution of factual questions requires scientific and technical expertise, the Respondents should defer to the agency’s expertise on those factual issues unless they have obtained independent scientific and technical expertise that refutes the agency findings and have provided the agency with the opportunity to review and respond to the alternative factual findings.

(271). Since 1995, when DCNR was created, it has been the legislatively appointed agency responsible for managing the public natural resources of our State forests and parks and their associated mineral resources consistent with Section 27.

(272). DCNR is the statutorily created Commonwealth agency with the expertise to evaluate the impacts to State forests and parks from oil and gas extraction and to determine the types of projects needed to prevent and remedy such impacts.

(273). DCNR is mandated by Section 27 to sustain our State forest and parks for both current and future generations. To do so, DCNR has developed the scientific and technical expertise to both manage and sustain our forests through ecosystem management principles adopted in its 1995 strategic plan, *Penn's Woods-Sustaining Pennsylvania's Forest* (**Exhibit J**).

(274). DCNR adopted the scientific system of ecosystem management for the purpose of sustaining our State forests. The basic principle of ecosystem management is to ensure that all the uses of the forest are balanced so that the integrity of the entire ecosystem is protected. The Bureau of Forestry has stated its mission in *Penn's Woods* as "managing state forests under sound ecosystem management, to retain their wild character and maintain biological diversity while providing pure water, opportunities for low-density recreation, habitats for forest plants and animals, sustained yields of quality timber, and environmentally sound utilization of mineral resources."

(275). DCNR expertise in sustainably managing the ecosystems our State forests and parks is necessary to ensure the Section 27 trust funds in the new Oil and Gas Lease Fund are used in compliance with the constitutional mandates of the Section 27.

(276). The Respondents have none of the capabilities of DCNR to administer the new Oil and Gas Lease Fund in compliance with the Section 27 mandates. They must either create their own capabilities to conserve and maintain the public natural

resources of our State forests and parks and to prevent and remedy the degradation and diminution of these resources as a result of oil and gas extraction and sale, or they must reinstate DCNR as the Commonwealth agency responsible for use of the Section 27 trust funds in the new Oil and Gas Lease Fund.

(277). The Fiscal Code provisions establishing the new Oil and Gas Lease Fund must be amended to ensure that the Section 27 trust funds are appropriated to and used by the agency with the administrative and scientific capabilities to meet the Section 27 constitutional mandates, which as of now is DCNR.

(278). WHEREFORE, the Petitioner requests this Honorable Court find and declare that the Fiscal Code provisions establishing the new Oil and Gas Lease Fund be amended to require DCNR to administer this fund consistent with its expertise to ensure the public natural resources of our State forests and parks are managed sustainably consistent with the principles of ecosystem management.

4. Detailed Accounts of Use of Section 27 Trust Required

(279). All prior paragraphs are hereby incorporated by reference.

(280). Section 1601.2-E(c) of the Fiscal Code has no requirement to meet the trustee's basic obligation to keep detailed and accurate accounts of the type, amount and use of Section 27 trust property and the trustee's administration of that property. Restatement (Second) of Trusts § 172 & cmt. A (1959).

(281). In fact, Section 1601.2-E(b) allows Section 27 trust funds to be mixed with other non-trust funds without segregating these funds in any way, which would make accounting of the use of the Section 27 trust funds impossible.

(282). The Fiscal Code provisions creating the new Oil and Gas Lease Fund must be amended to require the Respondents to keep a detailed account of the use of

the Section 27 trust funds to comply with Section 27 and the trustees' duties thereunder.

(283). WHEREFORE, the Petitioner respectfully requests this Honorable Court to find and declare that the Fiscal Code provisions creating the new created Oil and Gas Lease Fund be amended prior to any appropriation to include require the Respondents to keep detailed accounts of the type, amount and use of the Section 27 trust funds in the Oil and Gas Lease Fund.

E. STATE PARK USE OF THE OIL AND GAS LEASE FUND PURSUANT TO SECTION 1720-F OF THE FISCAL CODE VIOLATES SECTION 27

(284). All prior paragraphs are hereby incorporated by reference.

(285). Section 1720-F of the Fiscal Code provides specific direction to DCNR on how to spend certain funds appropriated to DCNR by the General Appropriations Act of 2017 for State Park operations. Section 1720-F of the Fiscal Code directs DCNR to use no less than \$2,250,000 from money appropriated for State Park operations for the operation and maintenance of the Washington Crossing Historical Park.

(286). DCNR was appropriated \$7,739,000 from the Oil and Gas Lease Fund for State Park Operations under the General Appropriations Act of 2017. These funds are used to pay a myriad of expenses associated with operating Pennsylvania's 121 State Parks, including employee salaries, benefits and other expenses, equipment and supplies, utilities, and routine maintenance.

(287). The 2017 Fiscal Code Amendment directs DCNR to spend \$2,250,000 to operate and maintain one park, Washington Crossing Historical Park, without any limitation as to which fund is to be used.

(288). Washington Crossing Historical Park is located along the Delaware River in Bucks County. While an important historic landmark, this park has no proximity to the public natural resources being degraded, diminished and depleted by oil and gas extraction on our State forests and parks or the PA WILDS.

(289). By requiring that money appropriated for State Parks be directed to this park without assurance that the money is not from the Oil and Gas Lease Fund, the Respondents have failed to fulfill their fiduciary duties under Section 27.

(290). The Respondents have not provided any documentary evidence indicating that any consideration was given to whether Section 1720-F of the 2107 Fiscal Code Amendments complies with Section 27 and the duties of the trustee thereunder.

(291). Respondents have not provided any evaluation on the impacts to DCNR's other state park operations.

(292). WHEREFORE, the Petitioner respectfully requests this Honorable Court find and declare that Section 1720-F of the 2017 Fiscal Code Amendments violates Section 27 because the Respondents failed to fulfill their fiduciary duties thereunder by not evaluating the impact Section 1720-F on the public natural resources.

F. TRANSFERS FROM THE OIL AND GAS LEASE FUND PURSUANT TO SECTION 1726 OF THE FISCAL CODE VIOLATES SECTION 27

(293). All prior paragraphs are hereby incorporated by reference.

(294). Section 19 of the 2017 Fiscal Code Amendments adds Article XVII-G to the Fiscal Code relating to restrictions on 2017-2018 appropriations for funds and accounts. A new Section 1726-G of the Fiscal Code is added to this article requiring

the governor or the budget secretary to transfer of \$300,000,000 during the 2017-18 fiscal year from amounts available in unidentified special funds and restricted accounts to the General Fund. These transfers will occur without any notice, without any transparency for the public. These transfers could involve Section 27 trust fund, including such funds in the Oil and Gas Lease Fund.

(295). Section 1726-G does not require any evaluation of whether proposed special funds and restricted accounts being considered might or will impact Section 27 trust funds, our public natural resources or the beneficiaries' Section 27 rights thereto prior to transferring those funds to the General Fund to be used for non-trust purposes.

(296). Section 1726-G does not require Respondents to provide any prior notice to the Section 27 trust beneficiaries of the transfer of Section 27 trust funds or the use of such funds in a manner that might or will impact public natural resources or the rights of the beneficiaries thereto prior to transferring those funds to the General Fund to be used for non-trust purposes.

(297). WHEREFORE, the Petitioner respectfully requests the Honorable Court to find and declare that the fund transfers in Section 1726-G of the Fiscal Code Violates violate Section 27 by failing to require evaluation or prior notice to Section 27 trust beneficiaries of whether proposed fund transfers might or will impact Section 27 trust funds, our public natural resources or the rights of the beneficiaries or by failing to specifically exclude any fund transfers involving Section 27 trust funds.

G. THE GOVERNOR VIOLATED HIS SECTION 27 TRUSTEE DUTIES BY RECOMMENDING THE CONTINUED USE OF THE OIL AND GAS LEASE FUND TO OPERATE DCNR IN FISCAL YEAR 2018-2019

(298). All prior paragraphs are hereby incorporated by reference.

(299). The Governor has recommended in his Executive Budget for fiscal year 2018-2019 issued on February 6, 2018 the continued appropriation of Section 27 trust funds in the Oil and Gas Lease Fund to pay for general government operating costs and the continued transfer of Section 27 trust funds to the Marcellus Legacy Fund to replace tax and fee revenue previously used to fund statewide programs that do not conserve and maintain public natural resources degraded, diminished and depleted to generate the Section 27 trust funds.

(300). The Governor has recommended appropriating \$37,045,000 from the Oil and Gas Lease Fund to pay for the general government operations of DCNR, \$7,555,000 from the Oil and Gas Lease Fund to pay for the general government operations of the DCNR Bureau of State Parks, and \$4,198,000 to pay for the general government operations of the DCNR Bureau of Forestry. **Exhibit A**, Governor's Executive Budget 2018-2019, page H52 (Oil and Gas Lease Fund).

(301). For the reasons set forth previously in this Petition for Review, the Governor's recommended use of Section 27 trust funds to pay for general government operations violates Sections 25 and 27, the Governor's trustee duties under Section 27 and his duties under Article IV, Section 2 of the Pennsylvania Constitution to "take care that the laws be faithfully executed."

(302). The Governor has recommended transferring \$35,000,000 from the Oil and Gas Lease Fund to the Marcellus Legacy Fund in fiscal year 2018-2019 for further distribution to the Environmental Stewardship Fund and the Hazardous Sites

Cleanup Fund. **Exhibit A**, Governor’s Executive Budget 2018-2019, page H44 (Marcellus Legacy Fund) and page H52 (Oil and Gas Lease Fund).

(303). The Governor has recommended the transfer of Section 27 trust funds in the Oil and Gas Lease fund to the Marcellus Legacy Fund to replace revenue from expired taxes and diverted fees to pay for statewide programs that do not conserve and maintain public natural resources degraded, diminished or depleted to generate the Section 27 trust funds.

(304). For the reasons previously set forth in this Petition for Review, the Governor has violated Sections 25 and 27, the Governor’s trustee duties under Section 27 and his duties under Article IV, Section 2 of the Pennsylvania Constitution to “take care that the laws be faithfully executed” by recommending the above transfer of Section 27 funds in the Oil and Gas Lease Fund to the Marcellus Legacy Fund.

(305). WHEREFORE, the Petitioner requests that this Honorable Court find and declare that the Governor’s recommended use of the Section 27 trust funds in the Oil and Gas Lease Fund in his Executive Budget for fiscal year 2018-2019 violate Sections 25 and 27, the Governor’s trustee duties under Section 27 and his duties under Article IV, Section 2 of the Pennsylvania Constitution to “take care that the laws be faithfully executed.”

VI. SUPPORT FOR PETITIONER’S STANDING

(306). The interests of the Petitioner’s members are distinguishable from the interests of the general public. The members and their interests are specifically and uniquely focused on the State forests and parks that are impacted by the Marcellus Shale natural gas development occurring on State forests in northcentral Pennsylvania. Petitioner has filed fifteen affidavits of members and member

organizations to demonstrate its specific and unique interests in related actions challenged in its prior petition for review filed in Commonwealth Court (Docket No. 228 MD 2012, Exhibits A – O). In addition to the interests identified in those affidavits, which are incorporated herein by reference, Petitioner is providing seven additional affidavits (**Exhibits L – S**) of members and member groups to emphasize the breadth of the impacts to the people living and working in the areas affected by the leasing of State forests.

(307). All of the areas of interest of PEDF’s members and member organizations are located within the geographic areas affected by the Marcellus Shale natural gas development within our State forests and focus on the preservation of State forests and parks impacted by this gas extraction and sale. As examples, two of the organizations’ interests follow:

(308). Most of the approximate 1100 members of the Pine Creek Preservation Association (**Exhibit L**), which is a member of PEDF, are property owners within the Pine Creek Watershed. The majority of its membership are located within the five townships that are a part of the Pine Creek Council of Governments. Over 50% of the land in the Pine Creek Watershed is State Forest Land, State Park Land and State Game Lands located in Potter, Tioga and Lycoming Counties. In McHenry Township, where the President of the Preservation Association is Chairman of the Board of Supervisors, over 80% of the township is State Forest and State Game Lands.

(309). The 300 members of the Loyalsock Creek Watershed Association (**Exhibit N**), which is a PEDF member, live and recreate in the Loyalsock creek watershed because the Loyalsock Creek and the Loyalsock State Forest provide a unique connection to nature and have become a part of their lives. The membership is deeply committed to the Loyalsock State Forest and its ecology because it supports

their way of life. A major part of the Loyalsock State Forest is subject to Marcellus Shale gas extraction. The Commonwealth has leased much of the State forest tracts where it owns the mineral rights.

(310). As set forth in the affidavits of Petitioner's members, their rights and interests under Section 27 are, have been and continue to be substantially and immediately harmed by the decisions and actions of the Respondents set forth in this Petition for Review. Below are some highlights from the attached affidavits.

Exhibit L. Affidavit of Paul Hoffmaster and the Pine Creek Preservation Association

(311). Paul Hoffmaster, President of the Pine Creek Preservation Association, has described explicitly, in his affidavit attached as **Exhibit L**, the depth of the collaborative relationship of DCNR with his organization and others in the development of the recreational and tourist economy of the Pine Creek Valley. These relationships have resulted in the "Pine Creek Valley Management Plan", the "Pine Creek Rail Trail Plan", the "PA Wilds Economic Development Program" and the Pine Creek Watershed River Conservation Plan". These plans and programs all integrate the uses of the natural resources of the State Forests and Parks in the area with the recreational and economic development of the Valley and the four-county region of Pine Creek and the twelve-county area of the PA WILDS. These efforts are all dependent on DCNR's continued funding commitments. As stated by Paul Hoffmaster, under "**The Stewards**" section of Exhibit L, "The Pine Creek Valley and whatever remains of the PA WILDS dream of economic growth through recreation and tourism depends heavily on the presence and mission of DCNR. Paul states that "[w]ith the addition of enhancing and accommodating rail trail, tourism and outdoor recreation activities as part of their mission, came additional responsibilities such as maintaining the rail trail, expanding and maintaining

snowmobile and cross-country trails, expanding and maintaining canoe and boat access areas, expanding and improving hiking trails, expanding and improving both camping areas and their amenities.” In addition to these responsibilities, over and above their duty to protect and conserve the State Forest and the natural resources of the forests, Paul Hoffmaster points to added responsibilities of DCNR to oversee the gas industry activities within those forests. Yet, as Mr. Hoffmaster concludes, DCNR’s local staffing is significantly less today than it was five years ago. DCNR’s proposed recreational enhancements to the area have been curtailed and DCNR has lost control of the Oil and Gas Lease Fund that is necessary to carry out those purposes.

Exhibit M. Affidavit of Cindy Bower

(312). Cindy Bower is the Vice Chairman for PEDF for the central region. She has been a resident of northcentral Pennsylvania for the past 47 years. She has a personal business ownership in the tourism industry in the PA WILDS.

(313). Since her previous affidavit, the harm she wrote about and testified to in Commonwealth Court to still remains, and new damage to the forest and to her use of the forest has occurred. New State Forest roads have been expanded, new gates deny public access, and new pipelines fragment the forest. Formerly accessible scenic views are cut off from public access. She finds formerly traditionally narrow roads expanded into wide gravel highways, and additional new gravel highways built where none existed before. Parts of the natural topography have been enormously terraced with industry infrastructure, acres upon acres in formerly undisturbed forestry land. And the development is only 16% of the lands currently under lease.

(314). Ms. Bower does not believe that she will see in her lifetime the restoration of trees in the parts of the Tiadaghton and Loyalsock State Forests. The

unbroken forests that have been fragmented by expanded roads and pipelines, well pads, impoundments and other infrastructure will not be restored. These impacts are deeply and personally wrenching.

(315). A tremendous need for mitigation of these continuing losses exists, mitigation through purchase of new lands within or adjacent to those impacted. Protection of State forest and park lands from overdevelopment where severed gas rights exist is needed through the purchase of some of those severed gas rights. Significant purchases of severed oil and gas rights are needed on State forest and park lands to stop further development within critical areas of these State forests and parks.

(316). Our State forest and park lands are our heritage. Our future generations need to be assured that what we leave them will still be there, fully restored.

Exhibit N. Affidavit of Carol Kafer and the Loyalsock Creek Watershed Association

(317). For the past 13 years, Carol Kafer is and has been president of the Loyalsock Creek Watershed Association (LCWA), which is a PEDF member. LCWA has been in existence since 1970 and has over 300 members. The purpose of the LCWA is to promote the protection and enhancement of the pristine beauty and rich diversity of the Loyalsock Creek Watershed. The watershed is about 320,000 acres and the Loyalsock State Forest comprises about 30% of the watershed.

(318). In order for the members of the LCWA to have access to non-industrialized State forests, DCNR needs to be adequately funded. The State does not own the mineral rights to about 10,000 acres of the Loyalsock State Forest. This is largely in the headwaters of the creek and includes two of our most valuable assets: Worlds End State Park and about 22 miles of the Loyalsock Trail. Without the

funding to negotiate with the owners of the gas resources, these irreplaceable recreational resources could be ruined. DCNR needs adequate funding to prevent industrialization of our State forests.

(319). About 85% of the Loyalsock Creek and its tributaries are designated Exceptional Value (EV) streams. The main reason that the Loyalsock Creek and its tributaries are exceptional is that they are surrounded by intact, undeveloped forest. The forested land absorbs rain water, filters it, and drains it into the aquifers to supply good cold clean water to our streams.

(320). Carol has a PhD on biological sciences. The current technologies for gas extraction cause increased impermeable surfaces which accelerate runoff, cause changes in micro-environments and forest fragmentation, and add miles of roads that are vectors of invasive species. DCNR will have to make many hard decisions on how to accommodate development of gas extraction on State forest lands. DCNR needs to be able to control all the money from the existing leases so that its staff, as the experts in forest management, can manage and maintain our forests in the future.

Exhibit O. Affidavit of Gary Metzger and the Lycoming Audubon Society

(321). The purpose of the Lycoming Audubon Society, which is a PEDF member, is to conserve and restore the natural ecosystem focusing on birds, wildlife and their habitats in the Lycoming County area. The State forests in their area include the Tiadaghton, Sproul, Bald Eagle, and Loyalsock. The industrialization of these forests from shale gas development has detrimentally altered their natural character. Our constitutional right to be able to enjoy the wildlife in these areas has already been compromised and will continue. We believe it is critical for DCNR to have control of all the oil and gas funds. The National Audubon Society, of which we are a part, recognizes a portion of the Loyalsock State forest as an Important Bird Area

because of its unique habitat. We believe that even with the current development of gas extraction, we have already lost too much.

Exhibit P. Affidavit of Jim Weaver and Tioga Watershed Council

(322). Jim Weaver is the retired Tioga County Planner. He is a member of the Tioga County Watershed Council, which is a PEDF member. Jim and the members of the Council have experienced harm from the continued fragmentation of the core State forests of northcentral Pennsylvania. The expansion of State forest roads has dramatic impacts to water quality and habitat in our State forests. Increased invasive species are carried on expanded roads and pipelines, and the impacts to our Commonwealth biodiversity have been immeasurable. Jim is very concerned by the openings of the forest canopy, which cause increased sun light and warming of the temperature of the water above the threshold for our native trout. Increased sedimentation effects the macroinvertebrate community. All of these impacts require resources for the Bureaus of Forestry and Parks to manage and mitigate. They have seen enough of the impacts from the gas industry already, and only 16% of the leased lands have been developed. It is paramount to keep the oil and gas lease fund for the tasks ahead. We deserve to have access to our public lands in pristine condition.

Exhibit Q. Affidavit of Mark Simonis and the Pine Creek Protective Association

(323). Mark Simonis is retired from the U.S. Corps of Engineers. When a large section of the northcentral Pennsylvania was designated as the PA WILDS, he immediately felt a kinship. He has lived and played in the wilds of the State forest for almost 50 years. The negative impacts to the State forest from gas development are considerable. Areas where he used to hike, camp and fish are now dominated by gas well pads, haul roads, and pipelines. He usually does not go there anymore. In his retirement, he has taken up the hobby of botany in the State forest, where he has

discovered many habitats and species that had not been identified before. An inventory of all habitat and species in our State forest is needed and these habits and species need to be protected. DCNR needs the money from the sale of the natural gas to conduct those inventories and protect these resources.

Exhibit R. Affidavit of Robert Ross and the Tiadaghton Audubon Society

(324). For the past 29 years, Robert Ross has been a member of the Tiadaghton Audubon Society, which is a PEDF member. Its members have done extensive restoration work on the upper Pine Creek. He is an ecologist, retired from the U.S. Department of Interior. He is frustrated and in disbelief with the extent of the damage in the Tioga Forest on Oak Ridge. The industry has made recreation and use on Oak Ridge almost completely non-existent for him. His favorite birding and picnic areas are gone. Many of the forest roads and trails are all impacted by the industry. DCNR needs the oil and gas lease money to protect and mitigate these areas.

Exhibit S. Affidavit of Roy Seifert

(325). Roy Seifert is retired from DCNR as District Forester of the Tioga State Forest. He has a degree in forestry science from Penn State. He currently lives in the PA WIDLS of northcentral Pennsylvania. He has dedicated his career and his life to trying to ensure that every Pennsylvanian can experience and benefit from Penn's Woods. [DCNR's 1995 strategic plan to sustain Pennsylvania's woods through ecosystem management.] While with DCNR, he tried to develop a plan to inventory the resources of our State forest, but the plan never materialized.

(326). The monetary resources of the Oil and Gas lease Fund are needed to sustain the State Forest. Thousands of miles of streams are impaired and degraded by mine sites and abandoned oil and gas wells, and hundreds of maintenance and improvement needs are on DCNR's list.

VII. CONCLUSION

(327). For the reasons set forth in this Petition for Review in the Nature of Declaratory Relief, Petitioner Pennsylvania Environmental Defense Foundation respectfully requests that this Honorable Court grant the requested declaratory relief set forth herein related to the Respondents' unconstitutional enactments and actions authorizing use of Section 27 trust funds in the Oil and Gas Lease Fund for purposes that do not conserve and maintain the public natural resources degraded, diminished and depleted by the extraction and sale of oil and gas that generated the trust funds.

Respectfully,

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