

COMMONWEALTH COURT OF PENNSYLVANIA

**PENNSYLVANIA ENVIRONMENTAL
DEFENSE FOUNDATION,
Petitioner**

v.

**COMMONWEALTH OF PENNSYLVANIA,
And
GOVERNOR OF PENNSYLVANIA,
THOMAS W. CORBETT, Jr., in his official
capacity as GOVERNOR,
Respondents**

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No. 228 M.D. 1012

AMENDED

PETITION FOR REVIEW

IN THE NATURE OF

AN ACTION FOR DECLARATORY RELIEF

John E. Childe
Attorney for Petitioner
I.D. No. 19221
1847 Center Street
Camp Hill, Pa. 17011
717-743-9811
childeje@aol.com

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I. INTRODUCTORY STATEMENT

(1). Petitioner's Amended Petition is in response to the Preliminary Objections filed by Respondents Governor Thomas W. Corbett, Jr. and Charles Zogby, Secretary of the Budget, on March 30, 2012. Petitioner has added the Commonwealth of Pennsylvania as a Respondent and removed the Secretary of Budget as a Respondent. In response to the Preliminary Objections of the State Treasurer, the State Treasurer has been removed as a Respondent.

II. STATEMENT OF JURISDICTION

(2). The Commonwealth Court has jurisdiction to review this case pursuant to 42 P.S. § 761(a); the Pa. Rule of Civil Procedure 1601 *et seq.*; and the Declaratory Judgment Act, 42 P.S. §§ 7531 *et seq.*, as well as the Pennsylvania Rules of Civil and Appellate Procedure.

III. STATUTORY AUTHORITY

(3). This Petition For Review is brought pursuant to Article I, Section 27 of the Pennsylvania Constitution; the Conservation and Natural Resources Act, Act of June 28, 1995, P.L. 89, No. 18 (71 P.S. §§ 1340.101 *et seq.*); the Oil and Gas Lease Fund Act, Act of December 15, 1955, P.L. 865, No. 256 (71 P.S. §§ 1331 *et seq.*).

IV. PARTIES

(4). The Petitioner is the Pennsylvania Environmental Defense Foundation ("PEDF"), Ron Evans, President, 818 Spring Creek Road, Bellefonte, Pennsylvania, 16823, Phone: 717-579-2263, 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.

(5). The Respondent Commonwealth of Pennsylvania is the Constitutional Trustee of the Public Trust set forth in Article I § 27.

(6). The Respondent Governor of the Commonwealth of Pennsylvania, Thomas W. Corbett, Jr., acting in his official capacity as Governor, is the Chief Executive Officer of the Commonwealth. Under Article IV, Section 2 of Pennsylvania's Constitution, the governor of the Commonwealth "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."

V. SUMMARY OF PETITION

(7). Petitioner is seeking declaratory relief of this Court from continuing actions of the Respondent in violation of Article I § 27 as well as in violation of Petitioner's rights established under Article I § 27, and contrary to the duties of the Respondent under Article I § 27, resulting from transfer of funds in the Oil and Gas Lease Fund from rents and royalties generated by leasing of natural gas to the Commonwealth General Fund and to other funds.

(8). Petitioner also seeks declaratory relief that the Article XVI-E of Act 50 of 2009, entitled "Fiscal Code-Omnibus Amendments", Oil and Gas Wells", that is the basis for making the transfers from the Oil and Gas Lease Fund, violates Article III § 3 of Pennsylvania's Constitution, and is therefore unconstitutional.

(9). Petitioner also seeks declaratory relief that the Appropriations Act of 2011 violates Article III § 11 of Pennsylvania's Constitution, which mandates that a "general appropriations bill shall embrace nothing but appropriations for the executive, legislative and judicial departments of the Commonwealth, for the public debt and for public schools."

(10). Our State Parks and Forests, particularly in the north central part of the State, are rich in mineral resources in deep geologic layers of shale, including the Marcellus and the even deeper Utica shale deposits.

(11). The Pennsylvania Department of Conservation and Natural Resources (“DCNR”) is the State Agency responsible for our State Parks and Forests, under the Conservation and Natural Resources Act, 71 P.S. § 1340.101, and is charged with the duty to determine when and how to lease our mineral rights on State Forest lands. 71 P.S. §1340.302(a)(6).

(12). Under the Oil and Gas Lease Fund Act, 71 P.S. § 1333, all rents and royalties from leasing the mineral rights on State lands are appropriated to DCNR, which is vested with authority and discretion to determine when and how to expend those funds, consistent within its constitutional obligations under Article I § 27 of the Pennsylvania Constitution (aka the “Public Trust Amendment”), which states:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

(13). Pennsylvania’s State Parks and State Forests are public natural resources held in trust by the Commonwealth under Article I § 27 for the benefit of its citizens, including generations yet to come. Gas deposits owned by the Commonwealth on State Park and State Forest lands are part of the public trust and must be managed to protect our State Parks and State Forests. For sixty years, DCNR and its predecessors have done just that.

(14). Oil and gas leasing has been conducted only after careful analysis to ensure that the benefits of such leasing outweigh the costs. The proceeds from

such leasing have been used to build a nationally recognized system of State Parks and State Forests in Pennsylvania. But the current economic downturn and the shale gas boom in Pennsylvania have led to exploitation of our valuable State Park and State Forest public trust assets for improper purposes in violation of Article I § 27 of our Constitution.

(15). In 2008 DCNR decided to lease a large tract of State Forest land to generate sufficient funds to address a backlog of projects for our parks and forests that obviously could not be paid for through the General Fund. The amount of funds received from the 2008 lease in the form of bonus rents staggered both DCNR and the then Governor, Ed Rendell. For leasing 74,000 acres, DCNR received \$163,000,000 for deposit into the Oil and Gas Lease Fund. After the 2008 lease sale, DCNR, consistent with its obligations as trustee of the Commonwealth's natural resources, made the determination not to lease any additional State Forest land until it had the opportunity to study the impacts of shale gas development on the over 660,000 acres of State Forest land subject to existing leases.

(16). The Governor decided, however, that because of the budget deficit he would request that the legislature approve the diversion of \$143,000,000 of the \$163,000,000 from the Oil and Gas Lease Fund to the General Fund. This was accomplished first by the Governor proposing the transfer in his Executive Budget. Then the transfer was made a part of the Appropriations Act for fiscal year 2009/2010, which was passed on October 9, 2009. On the same date that the Appropriations Act was adopted, the Legislature passed the "Fiscal Code-Omnibus Amendments", which included Article XVI-E of the Fiscal Code, entitled "Oil and Gas Wells", Section 1601-E *et seq.*, 72 P.S. § 1601-E *et seq.* Section 1602-E of this article purports to amend the Oil and Gas Lease Fund by adopting revisions to the Fiscal Code which prohibited DCNR from the expenditure of royalties in the fund (but not the rents) without an express appropriation by the General Assembly.

(17). In spite of DCNR's determination not to lease further State Forest land until the impacts of the existing shale gas development could be determined, the Governor agreed to a budget for fiscal year 2009/2010 that required DCNR to proceed with the additional leasing of 32,000 acres of State Forest land to generate another \$60,000,000 for the General Fund through a transfer from the Oil and Gas Lease Fund—which was enacted through the Fiscal Code, codified at 72 P.S. § 1604-E. The lease of 32,000 acres generated the required \$60,000,000, plus an additional \$70,000,000.

(18). But the Governor wanted more, and within weeks, in January 2010, proposed a budget for fiscal year 2010/2011 that required a transfer of another \$180,000,000 from the Oil and Gas Lease Fund to the General Fund. To generate the additional \$110,000,000 needed DCNR was required to lease yet another 33,000 acres of State Forest land in May 2010. The Governor signed the Appropriations Act for fiscal year 2010/2011 and the accompanying Fiscal Code amendment (72 P.S. § 1605-E) to transfer \$180,000,000 from the Oil and Gas Lease Fund to the General Fund on July 6, 2010. Thus, the Governor and the Legislature, through the budget process and Sections 1604-E and 1605-E of the Fiscal Code, forced DCNR to generate funds for the Oil and Gas Lease Fund to be immediately transferred to the General Fund through additional leasing of State Forest land.

(19). After these two coerced lease sales (the “Marcellus Shale Leases”), DCNR issued an impact analysis report that determined that any further leasing of State Forest land would cause harm to the State Forest natural resources. As a result, on October 26, 2010, Governor Rendell issued a moratorium on further leasing (Executive Order 2010-5).

(20). When Governor Tom Corbett was elected in 2011 he announced that he was going to lift the leasing moratorium on State Forests, but he has not done so

to date. However, Governor Corbett continues to use the Oil and Gas Lease Fund supplement the General Fund. He has done this by significantly reducing DCNR's annual budget share of General Fund revenues and then requiring DCNR to expend monies from the Oil and Gas Lease Fund to fund DCNR's general administrative and operating expenses.

(21). By doing so, Governor Corbett, like his predecessor, has used the Oil and Gas Lease Fund to augment the General Fund without proper consideration of the constitutional mandate to conserve and maintain our State Parks and State Forests under Article I, § 27.

(22). Additionally Governor Corbett has recently signed into law Act 13 of 2012 which allocates \$50,000,000 from the Oil and Gas Lease Fund to the Marcellus Legacy Fund for purposes that do not conserve and maintain our State Parks and State Forests under Article I § 27—the very public trust assets harmed in order to generate these funds.

(23). Article I § 27 recognizes a specific public trust that establishes both constitutional and trust rights and imposes both constitutional and trust duties. The beneficiaries of this trust are the people, including future generations. Among the corpus of this trust are Pennsylvania's natural resources, including State Parks and Forests. The duties of trustee are imposed on the Commonwealth of Pennsylvania, acting by and through the Governor and his Cabinet, who are thus mandated as trustees to conserve and maintain those natural resources for the benefit of all the people, both now and for generations yet to come. Article I § 27 was ignored by Respondents in making the decisions to transfer funds from the Oil and Gas Lease Fund to the General Fund, thus compelling the additional leasing of State Forest land for the sole purpose of generating money for the General Fund.

(24). Extracting natural gas from large areas of our State Forest lands causes many different adverse impacts to the resources of those lands. These

impacts are both immediate and long term, direct and indirect, specific and cumulative. Our State Forest system has never had such an enormous challenge to its resources. Knowing what the impacts are and will be, knowing what can be avoided and mitigated and what cannot, knowing the costs of conserving and maintaining both our State Forests and Parks, and insuring that there are sufficient funds to maintain them are all necessary considerations for the trustees to evaluate before irrevocably committing those resources to development by private parties. The impacts of natural gas development on these public resources are exacerbated by the fact that thousands of acres of State Forest land are subject to private development of gas extraction because the mineral rights are not owned by the Commonwealth. This is particularly true of our State Parks, where over 80% of the lands of our Parks are subject to private leasing because the mineral rights were severed from the surface estate.

(25). Yet, no evaluations were made by the Respondents to determine the impacts of the proposed leases on the natural resources, on the rights of the people to those resources, on the costs to remedy or replace those rights and resources, or on the ability to pay for those costs. Nor was there any evaluation as to whether there are other financial needs of the State Parks and Forests that relate to the Trust, before or after requiring the leasing of the land and taking the money from the leasing to be spent on the General Fund or for projects that are not related to protecting the natural resources of the public trust. Nor was an evaluation made by the Governor to determine the effect of ignoring DCNR's statutory duties, and the impacts on Petitioner's rights as a result, either.

(26). These actions of the Respondents have left almost no funds for DCNR to meet its obligations to deal with the impacts of the gas extraction process on the State Forests, and have even hampered DCNR from meeting its increased

administrative needs to deal with the lease requirements of the Marcellus Shale leases.

(27). The Petitioner's rights under Article I § 27 have been and will continue to be violated by the above actions of the Respondents and the likelihood is that Respondents will continue to ignore their duties under Article I § 27 unless this Court declares the actions which have already been taken were in violation of the Constitutional mandate established by Article I § 27. The Petition to the Court is to establish through declaration the constitutional rights of Petitioner and the constitutional duties of the Respondent under the Public Trust of Article I § 27 relating to the controversies described above.

VI. STATEMENT OF FACTS

A. Article I § 27 of the Pennsylvania Constitution

(28). The Public Trust Amendment, which was adopted by the citizens of Pennsylvania on May 18, 1971 as part of the Constitution of the Commonwealth, states as follows:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

(29). The Public Trust Amendment requires the Commonwealth, as Trustee, to conserve and maintain our natural resources for the benefit of all the people of the Commonwealth, both now and for the future. This provision establishes two mandates for the Trustees: (1) to conserve and maintain the public resources; and (2) to manage those resources for the benefit of all the people, both now and for generations to come.

(30). The Commonwealth's obligation to conserve and maintain the public's natural resources for the benefit of all the people must be carried out in a manner that protects the people's "right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment" under the Public Trust Amendment.

(31). DCNR has been designated as the representative trustee of Pennsylvania's State Parks and Forests under the Conservation and Natural Resources Act.

B. Pennsylvania's Natural Resources—State Forests and State Parks

(32). Pennsylvania's State Parks and State Forests, including the air, water, wild animals and fish, trees and plants and minerals, especially those that are rare and endangered, are part of the public natural resources that are the common property of all people, including generations yet to come, as set forth in Section 101(b) of the Conservation and Natural Resources Act, 71 P.S. § 1340.101(b), and the Public Trust Amendment. *See* Robert Broughton, *The Proposed Pennsylvania Declaration of Environmental Rights, Analysis of H.B. 958*, 41 Pa. Bar Assn. Q. 421, 426-427 (1970).

(33). Pennsylvania's 2.1 million acre publicly-owned forest system (the "State Forest") is one of the largest expanses of public forest land in the eastern United States, making it a truly priceless public asset. *See 2007 Update State Forest Resources Management Plan*¹ (Executive Summary attached as **Exhibit A**). The benefits of this public asset to the people of Pennsylvania, as stated in Exhibit A, include, but are not limited to, the following:

¹ Available on DCNR's website at <http://www.dcnr.state.pa.us/forestry/sfrmp/update.aspx>.

(a). Our State Forest provides high quality forestry products which help support a forest products industry.

(b). Our State Forest represents a 2.1 million acre water treatment and air purification system.

(c). Our State Forest provides recreational opportunities and wilderness experiences, as well as a multitude of natural, scenic, historic and aesthetic resources, all vital to Pennsylvania's tourism industry and the health of Pennsylvania's citizens.

(d). Our State Forest is the largest publically owned habitat for plants and animals, including many endangered, threatened and rare species, in the Commonwealth.

(e). Our State Forest contains valuable mineral resources that have provided economic benefits to the people of Pennsylvania for the acquisition of additional lands for the State Forest and for State Parks, and for the development, operation and maintenance of the facilities needed to allow the people of the Commonwealth to enjoy these resources.

(f). Our State Forest is a combination of these resources, uses, and values, as well as a functioning biological system with intrinsic values, to be held in trust for future generations.

(34). Pennsylvania has a nationally-recognized system of 120 State Parks, with over 295, 000 acres of land, providing an array of recreational opportunities, environmental education forums, and unique natural, scenic, historic and esthetic areas within 25 miles of every Pennsylvanian (*see* Pennsylvania State Parks, DCNR website²). Some examples of State Parks that exemplify the benefits of this

² Available on DCNR's website at <http://www.dcnr.state.pa.us/discoverdcnr/atagance/bureaus/index.htm>.

public asset to the people of Pennsylvania include, but are not limited to, the following (*see* DCNR State Parks, 20 Must-See Parks³ attached as **Exhibit B**):

(a). Leonard Harrison and Colton Point State Parks offer spectacular vistas and a fabulous view of Pine Creek Gorge, also known as Pennsylvania's Grand Canyon, a National Natural Landmark and a State Park Natural Area. Hiking trails traverse very rugged terrain, passing close to many steep cliffs affording an abundance of unique sights. The Pine Creek Trail runs through the bottom of the gorge and provides great bicycling.

(b). Ricketts Glen State Park harbors Glens Natural Area, a National Natural Landmark and a State Park Natural Area. The Falls Trail boasts a series of wild, free-flowing waterfalls, each cascading through rock-strewn clefts in this ancient hillside. The 94-foot Ganoga Falls is the highest of twenty-two named waterfalls. Old growth timber and diverse wildlife add to the scenic area.

(c). Ohiopyle State Park provides exhilarating whitewater rafting experiences and scenic beauty with the focal point being more than fourteen (14) miles of the Youghiogheny River Gorge that churns through the heart of the State Park. The famous Lower Yough, below the scenic Ohiopyle Falls, provides some of the best whitewater boating in the Eastern U. S. Other points of interest include Cucumber Falls and the Cucumber Run Ravine which is blanketed with wildflowers and blooming rhododendron. Hiking and biking along the 28-mile Youghiogheny River Trail also provides awesome views of the river and cascading feeder streams. The Ferncliff Peninsula is a National Natural Landmark and a State Park Natural Area. The peninsula is formed by a bend in the Youghiogheny River and contains abundant wildflowers, old growth hemlocks, mixed oak forests and plant species of concern.

³ Available on DCNR's website at <http://www.dcnr.state.pa.us/stateparks/recreation/index.htm>.

(d). Perched on the top of the Allegheny Plateau, Black Moshannon State Park features the Black Moshannon Bog Natural Area, a State Park Natural Area, with trails and a boardwalk to help people explore the birds and plants of the bog and surrounding forests. Wetlands adjacent to the southwest arm of the lake comprise the finest reconstituted bog in Pennsylvania. It has many rare plants associated with sphagnum bogs.

(e). Forests and old farm fields dominate Canoe Creek State Park. The 155-acre lake is a beacon for waterfowl and a haven for anglers. The park boasts one of the largest bat colonies in the Eastern U. S. The endangered Indiana bat and many other bats hibernate in caves in the park, and the park is a yearly breeding place for 40,000 bats. The visitor center has natural and historical exhibits and information.

(f). Cherry Springs State Park is nearly as remote and wild today as it was two centuries ago. Cherry Springs has some of the darkest skies on the east coast. Amateur and professional astronomers flock to the park for its 360 degree view virtually free of light pollution.

(g). Cook Forest State Park has a stand of old growth white pine and hemlock timber, called the Forest Cathedral, that is a National Natural Landmark and one of the largest stands of old growth timber in the Commonwealth. Many of the white pine, eastern hemlock and other trees are over 300 years old. The park has an extensive trail network to allow visitors to see and enjoy the priceless beauty of Cook Forest.

(h). Hickory Run State Park is a favorite of those who enjoy scenic areas. The Boulder Field, a striking boulder-strewn area impressive due to its flatness and large size, is a National Natural Landmark. The park has over 40 miles of hiking trails, three state park natural areas and miles of trout streams. The

park provides opportunities to learn about Pennsylvania's lumbering history, observe wildlife or see Hawk Falls.

(i). Hyner View State Park features a scenic vista overlooking the West Branch of the Susquehanna River and is a favorite spot for hang gliding. This is one of Pennsylvania's most scenic vistas and allows visitors to see for miles upstream and downstream over the West Branch of the Susquehanna River and surrounding mountains.

(j). The Jennings Environmental Education Center is one of several State Parks specifically dedicated to provide environmental education and interpretation to the community. The park provides a unique combination of prairie and forest, which offers a wide array of resource and education opportunities. One of the park's main features, the 20-acre prairie ecosystem, is home to distinctive prairie plants and the endangered Massasauga Rattlesnake. The most noteworthy and spectacular prairie flower is the blazing star. Jennings was the first reserve established in Pennsylvania to protect an individual plant species and remains the only public and protected prairie in the Commonwealth.

(k). Virtually in a class by itself, Worlds End State Park is a wild, rugged and rustic area that seems almost untamed. Camping, cabins and hiking on the Loyalsock Trail attract many visitors to the park. The scenery is spectacular, especially the blooming mountain laurel in June and fall foliage. Canyon Vista, reached by Mineral Spring and Cold Run Roads, provides outstanding views.

C. Respondents' Required DCNR To Lease State Forest Lands For Natural Gas Development and Extraction

(35). Approximately 700,000 acres of State Forest is currently leased for oil and gas extraction either by the Commonwealth or by private owners of oil and gas rights that have been severed from surface ownership. (*see DCNR Natural Gas Development and State Forests, Shale Gas Leasing Statistics*, February 2012, attached as **Exhibit C**).

(36). Section 302(a)(6) of the Conservation and Natural Resources Act, 71 P.S. § 1340.302(a)(6), empowers DCNR “to make and execute contracts or leases in the name of the Commonwealth for the mining or removal of any valuable minerals that may be found in State forests ... whenever it shall appear to the satisfaction of the Department that it would be for the best interests of the Commonwealth to make such disposition of those minerals.” Such leases are awarded through a competitive bidding process.

(37). Contrary to the requirements of 302(a)(6) of the Conservation and Natural Resources Act, and contrary to their fiduciary duties under the Public Trust Amendment, the Respondent (including then Governor Ed Rendell) instructed DCNR to lease sufficient State Forest lands to generate \$60,000,000 to generate revenues for the fiscal year 2009/2010 budget and Fiscal Code amendments enacted on October 9, 2009, which required DCNR to lease 32,000 acres, following the success of the September 2008 Lease Sale (*see August 2008 and FY 2008-2010 Oil and Gas Lease Sale State Forest Environmental Reviews*,⁴ *Project Review Item 1. Consistency with State Forest Management Plan*, excerpts attached as **Exhibit D**).

⁴ Available on DCNR's website at <http://www.dcnr.state.pa.us/forestry/naturalgasexploration/leasingmore/index.htm>.

(38). DCNR and the Bureau of Forestry had decided not to offer additional lands for lease after the 2008 lease sale, in order to take the time to study impacts and requirements on the 660,000 acres already subject to valid lease agreements. *Id.*

(39). Contrary to the requirements of § 302(a)(6) of the Conservation and Natural Resources Act, and contrary to their fiduciary duties under the Public Trust Amendment, the Respondent directed DCNR to lease sufficient State Forest lands to generate \$180,000,000 for revenues for fiscal year 2010/2011, which required DCNR to lease 33,000 acres as a direct result of the budget agreement and fiscal code for FY 2010/2011. Again, the Respondent compelled this leasing in spite of the fact that DCNR had again decided not to offer additional lands for lease that year because of the need to study the Marcellus Shale gas play and the operational developments and requirements from the 2009 leases, and the approximate 700,000 acres within the Marcellus Shale region already subject to valid lease agreements (*see May 2010 State Forest Environmental Review*,⁵ *Project Review Item 1. Consistency with State Forest Management Plan*, attached as part of **Exhibit D**).

(40). The Commonwealth through DCNR has issued oil and gas leases that remain currently active on approximately 385,400 acres of State Forest (**Exhibit C**). This acreage includes the approximately 139,000 acres leased in 2008-2010 in response to the perceived need to lease State Public Trust lands to generate money for the General Fund.

(41). In addition to the State Forest land leased by the Commonwealth, oil and gas leases have been issued on approximately 290,000 acres of additional State

⁵ Available on DCNR's website at <http://www.dcnr.state.pa.us/forestry/naturalgasexploration/leasingmore/index.htm>.

Forest land for which the oil and gas rights are not owned by the Commonwealth, but rather privately owned. *Id.*

(42). The Commonwealth does not own the oil and gas beneath a significant portion (estimated to be 80%) of Pennsylvania's State Parks (*see Governor's Marcellus Shale Advisory Commission Report*, dated July 22, 2011, at 26 (excerpts attached as **Exhibit E**)). The private owners of these rights can enter into leases for oil and gas extraction on many of these State Parks.

(43). Oil and gas leases on State Forest extend as long as lessees are producing natural gas from these lands, not only from the Marcellus Shale but other deposits as well, which may be active 20 to 40 years, and possibly longer. (**Exhibit D**).

(44). Much of the State Forest affected by Marcellus Shale extraction activities is concentrated in the northcentral part of the State, which is the headwaters area for much of the Susquehanna River Basin. This State Forest land is the center of some of the most pristine and wild areas of the State, including the Pine Creek George, and much of the high quality cold water streams that are the habitat of endangered wild trout populations of Pennsylvania. It is also the center of many of Pennsylvania's wild native plant species (*see Governor's Executive Order 2010-05 issued on October 26, 2010*, attached as **Exhibit F**).

D. Impacts On State Forests From Gas Leasing

(45). The Public Trust lands currently leased for gas production are and will continue to be significantly impacted as they are developed. These impacts include and have been identified as follows:

(a). By 2030, an estimated 38,000 to 90,000 acres of forest cover will be cleared by Marcellus gas development. That clearing could threaten forest interior species in an additional 91,000 to 220,000 forest acres. 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. A significant percentage of Pennsylvania's globally rare and threatened species can be found in areas with high potential for Marcellus gas development (*see Governor's Marcellus Shale Advisory Commission Report*, at 76, **(Exhibit E)**).

(b). In the next 10 to 20 years, full development of the gas in the Marcellus shale formation on State Forest and State Park land currently subject to drilling will result in the use of more than 30,000 acres for an estimated 1,100 well pads, and associated infrastructure, access roads and pipelines (*see Governor's Executive Order 2010-05* **(Exhibit F)**).

(c). Construction and operation of approximately 1100 wells located principally in the concentrated area of State Forest lands in north central Pennsylvania known as the Pennsylvania Wilds, along with the construction and expansion of access roads, pipelines, compression stations, water impoundments, wastewater storage tanks and other gas production facilities, will significantly increase openings in large blocks of currently contiguous forest canopies resulting in fragmentation and stress from invasive species and disease—the cumulative effect of which could fundamentally alter these forest ecosystems. *Id.*

(d). Over the next 10 to 20 years as Marcellus drilling approaches full development, more than 30,000 acres of State Forest lands will be (or will have been) converted from forest to non-forest uses. This acreage includes both historic oil and gas development (5,200 acres) and Marcellus development (25,000

acres) (see DCNR Bureau of Forestry Draft Oil and Gas Philosophy⁶, dated February 8, 2010, attached as **Exhibit G**).

(e). The cumulative effects of this contiguous fragmentation of State Forest will dramatically change the character and threaten the ecological integrity of the State Forest. The edges created by these openings cause significant stress to the surrounding forest by creating avenues for invasive species and individual tree mortality from root compaction, insects and diseases, and shock from additional sun exposure. Fragmentation affects wildlife by limiting natural migration patterns and increasing vulnerability to predation for some species. Changes to surface and groundwater hydrology also affect aquatic ecosystems as well as soil chemistry and structure, eventually causing additional stress to trees and plants. Combined with tree mortality caused by gypsy moth and other insects and diseases, which totaled 32,000 acres in 2009, the cumulative effects of forest conversion could be devastating to the forest ecosystem as a whole. Particularly, the State Forest contains some of the largest blocks of contiguous, unfragmented forest in the Commonwealth, providing and protecting habitat components for plants and animals that are limited on private lands. The State Forest is globally important for some species, including many neotropical migratory birds. Continued development and conversion threatens this core value of the State Forest System.

Id.

(f). An estimated 60,000 new Marcellus wells are projected by 2030, with a range of between 6,000 and 15,000 new pads, nearly two thirds of which will be in forest areas with forest clearing projected to range between 34,000 and 200,000 acres of forest interior habitat impacts. This will impact forest interior breeding habitats, and will impact watersheds with healthy native brook trout

⁶ Available on DCNR's website at http://www.dcnr.state.pa.us/ucmprd1/groups/public/documents/document/d_000600.pdf.

populations (*see Pennsylvania Energy Impacts Assessment: Report 1: Marcellus Shale Natural Gas and Wind*, The Nature Conservancy/Audubon, November 15, 2010, at 29, excerpts attached as **Exhibit H**).

(g). The cumulative harm from the fragmentation and stress from invasive species and disease threatens the certification of Pennsylvania's State Forest system as compliant with the gold standard for environmentally and socially responsible forestry established by the international Forest Stewardship Council (FSC). This certification is vital to the economic viability of the forest products industry in Pennsylvania (*see Governor's Executive Order 2010-05*, **Exhibit F**).

(h). Additional impacts include the increased noise from the construction and operation of the gas wells, from the compressor stations that operate 24 hours a day, and from the truck traffic on the roads, all are having and will continue to have negative impacts on the ecology and public uses of the leased Public Trust land (*see Governor's Marcellus Shale Advisory Commission Report* at 109, **Exhibit E**).

(i). The increased and expanded gravel roads and the traffic on those roads on the leased Public Trust lands, which are necessary to support the production of gas on these lands over the next 10 to 20 years, creates dust and runoff which have caused and will continue to cause increased sediments into our natural streams. *Id.* at 70, 76.

(j). The compressor stations required to compress the gas for transport emit a significant quantity of pollutants, including methane, into the air. The industry necessarily uses gas powered engines in the operations of the gas production, which also emit contaminants into the air. These contaminants will cumulatively affect the ecology of the leased lands. *Id.* at 76-77.

(k). For a detailed description of the activities required for extraction of natural gas on State Forests see **Exhibit D**, May 2010 State Forest Environmental Review, and **Exhibit E** hereto.

E. Statutory and Constitutional Responsibility of DCNR

(46). DCNR is the agency designated with the expertise and the responsibility to manage our State Parks and State Forests, to determine when and where to lease those lands for development and sale of oil and gas, to determine how and when to use the rents and royalties from leasing State Forest lands for projects that conserve and maintain our State Parks and State Forest lands consistent with the requirements of the Public Trust Amendment, the Conservation and Natural Resources Act, and the Oil and Gas Lease Fund Act.

(47). The General Assembly stated its intent and purpose in passing the Conservation and Natural Resources Act as:

To create a new Department of Conservation and Natural Resources to serve as *a cabinet-level advocate for our state parks, forests, rivers, trails, greenways and community recreation and heritage conservation programs to provide more focused management of the Commonwealth's recreation, natural and river environments*. The primary mission of the Department of Conservation and Natural Resources will be *to maintain, improve and preserve state parks, to manage State forest lands to assure their long-term health, sustainability and economic use ...*

71 P.S. § 1340.101(b)(1) (emphasis added).

(48). The General Assembly, in the Conservation and Natural Resources Act, 71 P.S. § 1340.101(a)(1), incorporated the Constitutional Amendment, Article I § 27.

(49). The General Assembly found and declared in Section 101(a)(5) of the Conservation and Natural Resources Act that “[o]ur state parks and forests and

community recreation and heritage conservation areas are critical to the continued success of our tourism and recreation industry, the second largest industry in the State.” 71 P.S. § 1340.101.

(50). The General Assembly transferred the powers and duties of the Department of Forests and Waters and the Secretary to DCNR, (71 P.S. § 1340.304(c) and granted DCNR the authority to lease State Forest land for mineral development whenever DCNR determines that it is in the best interests of the Commonwealth to do so. 71 P.S. § 1340.302(a)(6).

(51). The DCNR Bureau of Forestry carries out its mission by:

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.

Protecting forestlands, public and private, from damage and/or destruction by fires, insects, diseases and other agents.

Promoting forestry and the knowledge of forestry by advising and assisting other government agencies, communities, landowners, forest industry, and the general public in the wise stewardship and utilization of forest resources.

Protecting and managing native wild flora resources by determining status, classifying, and conserving native wild plants.

(DCNR Bureau of Forestry Mission Statement⁷ attached as **Exhibit I**).

⁷ Available on DCNR’s website at <http://www.dcnr.state.pa.us/forestry/whatwedo/index.htm>.

F. DCNR Requirements to Carry Out Its Mandate To Protect and Conserve The State's Natural Resources

(52). The Governor's Marcellus Shale Advisory Commission recommended as follows:

(a). Fund DCNR sufficiently to comprehensively monitor and document the impacts, both positive and negative, of natural gas development on plants and forests, wildlife, habitat, water, soil and recreational resources, including fragmentation, invasive species, loss of wildlife food and cover, erosion and sedimentation (*see Governor's Marcellus Shale Advisory Commission Report* at 109-112, **Exhibit E**).

(b). Strengthen the effectiveness of DCNR in the permit review process in protecting Pennsylvania's forests and recreational areas from the impacts cited above. *Id.*

(c). Authorize and fund DCNR to implement more intensive surveys for globally rare and critically endangered species in high potential Marcellus development areas before development begins. *Id.*

(d). Increase DCNR staff capacity and program resources, upgrading computer systems, providing additional technical and planning assistance, increasing acquisition of current field data, and other options as identified to implement the above Recommendations. *Id.*

(53). In addition, DCNR needs to evaluate the cumulative impacts of Marcellus shale gas development on the Public Trust natural resource in State Park and State Forest lands, as well as the impacts to public use and enjoyment of these lands, to determine mitigation and restoration needs. *See DCNR, Natural Gas*

*Exploration, Management Challenges*⁸ attached as **Exhibit J**; and *DCNR Natural Gas Development, Public Access and Recreation, Balancing Uses of State Forest Lands*⁹ attached as **Exhibit K**.

(54). Those cumulative impacts would at least include effects of the fragmentation of the forests; the loss of canopy; the impact of increased impervious surfaces on our State lands, including flooding, erosion and sedimentation; the impacts from air pollution; and the impacts of noise pollution on the public resources and their uses.

(55). DCNR needs to study how to mitigate these impacts and develop the means to restore and maintain the natural resources from the impacts listed in paragraph 30 above.

(56). DCNR needs to be able to acquire gas rights beneath State Park land that are now privately owned in order to protect the State Parks from the impacts of shale gas development. These Public Trust lands are facing a potentially lethal challenge to their existence from the shale extraction process as a result of the recent State Supreme Court decision in *Belden & Blake Corp. v. DCNR*, 600 Pa. 559, 969 A. 2d 528 (2009). In this case, the Supreme Court determined that the Commonwealth does not have the authority to require protective agreements with the mineral rights owners in advance of development. When necessary to protect the integrity of our State Parks and State Forests, DCNR must be able to purchase the outstanding mineral rights beneath those parks and forests to conserve and maintain them where private developers of these rights will not conserve and protect these Public Trust lands.

⁸ Available on DCNR's website at <http://www.dcnr.state.pa.us/forestry/naturalgasexploration/challenges/index.htm>.

⁹ Available on DCNR's website at http://www.dcnr.state.pa.us/ucmprd1/groups/public/documents/document/dcnr_003745.pdf.

(57). DCNR needs to acquire lands to replace the Public Trust lands that will be converted or semi-permanently lost to the people of the Commonwealth over the next 20 to 40 years (or more) because of the gas extraction process. The actual number of acres lost to public use as a result of Marcellus shale gas production, including drilling pads, new and expanded road access, water storage areas, compression stations, dewatering areas, pipe lines, access to pipe lines, etc., is estimated to be at least thirty thousand acres. *See Governor's Executive Order 2010-05 (Exhibit F)*.

(58). DCNR needs to acquire lands not impacted by gas extraction to replace the loss by conversion of hiking trails; nesting, breeding, spawning and migratory habitat; hunting areas; and wild and scenic areas that are or will be impacted by the gas extraction operations. Such purchases are the only way to mitigate the loss of these Public Trust lands and the people's constitutional rights to them, to buffer the impact of the gas extraction process, and to provide sufficient replacement of wildlife habitat affected by the gas extraction process.

(59). And, DCNR needs the funds to accomplish all the above.

G. DCNR Responsibility Under the Oil and Gas Lease Fund

(60). The Oil and Gas Lease Fund is integral to the leasing of the State land for oil and gas extraction authorized under the Conservation and Natural Resources Act, 71 P.S. § 1340.302.

(61). Section 304(c) of the Conservation and Natural Resources Act, 71 P.S. § 1340.304(c), provides that DCNR shall exercise the powers and duties conferred on the Department of Forests and Waters and the Secretary of Forests and Waters by the Oil and Gas Lease Fund Act.

(62). The Oil and Gas Lease Fund Act, 71 P.S. §§ 1331-1333, requires that the rents and royalties from oil and gas leases of Commonwealth land (other than

game and fish lands) be placed in a special fund to be used for conservation, recreation, dams, and flood control; authorizes the Secretary of Forest and Waters (now DCNR) to determine the need for and location of such projects and to acquire the necessary land.

(63). All the monies (rents and royalties) paid into the Oil and Gas Lease Fund are specifically appropriated to the Department of Forests and Waters (now DCNR) to carry out the purposes of the Act. See Special Audit of Auditor General, August, 2004, page 3-6 attached as **Exhibit L**.

(64). By statute, revenue from the Fund is to be used exclusively for conservation, recreation, dams and fold control projects on Commonwealth Lands. *Id.* at 15-16 (relying on a February 7, 1991 “informal guidance” letter from the Attorney General to the State Treasurer cited in **Exhibit L**

(65). The rents and royalties deposited into the Oil and Gas Lease Fund are generated through the leasing of the Public Trust lands and the sale of Public Trust oil and gas and, therefore, the funds generated from these resources remain part of the Public Trust corpus. *Id.*¹⁰

(66). The shale gas extraction process on State Forest land that is the primary source of rents and royalties currently being deposited into the Oil and Gas Lease Fund is causing and will continue to cause unprecedented negative impacts

¹⁰ The Attorney General specifically stated: “In my judgment, the General Assembly’s establishment of this special fund (Oil and Gas Lease Fund), and its focus on geographically-identifiable projects reflects an intent that revenues derived from the depletion of the Commonwealth’s natural resources should be dedicated directly to the physical enhancement or conservation of the Commonwealth’s natural resources. Viewed in this light, Act 256 (the Oil and Gas Lease Fund Act), would not authorize the use of Fund receipts to support DER’s regulatory or enforcement activities, its general administrative or legal operations, or any other function not related directly to a project undertaken pursuant to the Act.”

to the Public Trust lands, and those impacts must be mitigated in order to conserve and maintain the Public Trust as guaranteed by the Public Trust Amendment.

(67). Prior to the actions of the Respondents being challenged in this Petition, DCNR had the ability to expend rents and royalties deposited into the Oil and Gas Lease Fund without limitation on an ongoing basis to fulfill its obligation to conserve and maintain State Parks and State Forests and carry out its mission.

(68). DCNR has historically used the rents and royalties deposited into the Oil and Gas Lease Fund for capital projects, including to acquire additional lands, to construct dams, hiking trails, visitor's facilities, and to mitigate the impacts of oil and gas extraction activity on its leased lands.

(69). Since 1955, when Maurice Goddard got the Act passed the Oil and Gas Lease Fund has been used to purchase 26 state parks, construct 170 drinking water treatment systems, 58 wastewater treatment systems, 798 bridges, 3,000 miles of roads, 125 dams and 5,000 buildings. *See State Parks History, The Goddard Era*¹¹, attached as **Exhibit M**; *2011 State of the Parks/State of the Forests Report, Pennsylvania Parks and Forest Foundation*¹² (excerpts attached as **Exhibit N**); and *DCNR Natural Gas Exploration on State Forest Land*¹³, attached as **Exhibit O**).

(70). According to the *2011 State of the Parks/State of the Forests Report*, over 400 million dollars of project backlogs are needed for our State Parks alone, and additional State Forest projects have not been completed because of lack of funds. **Exhibit N** at 17-19.

¹¹ Available on DCNR's website at <http://www.dcnr.state.pa.us/stateparks/thingstoknow/history/goddardera/index.htm>.

¹² Available at <http://www.paparksandforests.org/downloads/state%20of%20the%20parksforests.pdf>.

¹³ Available on DCNR's website at <http://www.dcnr.state.pa.us/forestry/naturalgasexploration/history/index.htm>.

H. Auditor General Special Audit On Oil and Gas Lease Fund Act; Citing Attorney General “Informal Opinion” of 1991

(71). A special audit of the Oil and Gas Lease Fund was conducted by the Auditor General and submitted to the Governor on August 10, 2004. In that audit the Auditor General found that, by statute, revenue from the Fund is to be used exclusively for conservation, recreation, dams and flood control Projects on Commonwealth lands. Page 1 of the Audit, **Exhibit L**.

(72). The Audit found that expenditures for items such as salaries, clothing and other costs which do not appear to be within the purposes set out in the Oil and Gas Lease Fund Act, were of questionable direct benefit to the physical enhancement and conservation of the Commonwealth’s state parks and forests, the intended beneficiaries of the Fund’s revenues, and therefore were inappropriate or unjustified (Page 2 of the Audit, **Exhibit L**).

(73). Within the Audit the Auditor General cited, at 19-22, an “informal guidance” letter of February 7, 1991 in which the Attorney General advised the State Treasurer as to the proper lawful use of the Oil and Gas Lease Fund (Attorney General letter of 1991, attached as **Exhibit P**).¹⁴

(74). In the letter the Attorney General specifically states “Act 256 [the Oil and Gas Lease Fund Act] authorizes expenditures from the Fund to acquire land for conservation, recreation, dam or flood control projects” and also for construction of facilities and other improvements to land “necessary for such projects” and “subsequent purchase of equipment, supplies and services *necessary to maintain or enhance* such projects.” See **Exhibit L** and **P** (emphasis added). The Opinion continues:

¹⁴ See also General Counsel letter of November 2, 1990, attached as **Exhibit Q**; and memorandum of February 24, 2012 from Chief Counsel for DCNR, attached as **Exhibit R**.)

[It is] beyond the authority of the Act to expend Fund receipts for a purpose not attributable to a specific project undertaken pursuant to the Act. It is not enough that expenditures for the Fund should relate to conservation, recreation, dam or flood control. If it were, then the Oil and Gas lease Fund would be little more than a general funding source for the broad range of statutory functions performed by DER [DCNR's predecessor]; and the Act, while imprecise in its expression of intent, certainly suggests otherwise.

In my judgment, the General Assembly's establishment of *this special fund* [Oil and Gas Lease Fund], and its *focus on geographically-identifiable projects* reflects *an intent* that *revenues derived from the depletion of the Commonwealth's natural resources should be dedicated directly to the physical enhancement or conservation of the Commonwealth's natural resources*. Viewed in this light, Act 256 [the Oil and Gas Lease Fund Act], *would not authorize the use of Fund receipts to support DER's regulatory or enforcement activities, its general administrative or legal operations, or any other function not related directly to a project undertaken pursuant to the Act*.

Id.

I. Transfers From Oil and Gas Lease Funds to General Fund

(75). From 2008 to 2010 the Respondent has authorized the direct transfer of \$383,000,000 from the Oil and Gas Lease Fund to the General Fund.

(76). The natural gas leases issued for approximately 139,000 acres of State Forest during that period generated over \$413,000,000 in pre-paid rental payments (commonly known as "bonus bid" payments), which by law was deposited into the Oil and Gas Lease Fund. See *DCNR Natural Gas Development and State Forests, Shale Gas Leasing Statistics*, February 2012 (**Exhibit C**).

(77). On October 9, 2009, the Governor signed into law the General Appropriations Act of 2009 (Act 10A of 2009), which transferred \$143,000,000 from the Oil and Gas Lease Fund to the General Fund (Section 1912).

(78). On the same day, the Governor signed into law an amendment to the Pennsylvania Fiscal Code to add Article XVI-E (Oil and Gas Wells), Act of October 9, 2009, P.L. 537, No. 50, which transferred an additional \$60,000,000 from the Oil and Gas Lease Fund to the General Fund for fiscal year 2009-1010 (Section 1604-E). 72 P.S. § 1604-E.

(79). In 2010, the Fiscal Code was again amended to add Section 1605-E to Article XVI-E (Oil and Gas Wells), Act of July 6, 2010, P.L. 279, No. 46, to transfer \$180,000,000 from the Oil and Gas Lease Fund to the General Fund in fiscal year 2010-1011. 72 P.S. § 1605-E.

(80). As a result of Section Article XVI-E of the Fiscal Code and the 2009 Appropriations Act, \$383,000,000 of the \$413,000,000 received from leasing State lands for Marcellus Shale were diverted from the trust for general government purposes unrelated to protection of the Public Trust assets used to generate these funds. This money will never be available to the Public Trust to deal with impacts from Marcellus shale extraction on State Forests and Parks.

(81). Although Governor Rendell issued a moratorium on Leasing on October 26, 2010 (**Exhibit F**), Governor Corbett has publically stated his intent to lift that moratorium to allow continued leasing to generate additional monies for the General Fund. *See* Petitioner's Notice of Intent to Sue Governor Corbett dated February 22, 2011, attached as **Exhibit S**.

J. 2009 Amendments to the Fiscal Code

(82). When the Governor signed into law Section 1602-E of the Fiscal Code on October 9, 2009, he withdrew the authority that the Secretary of DCNR (and DCNR's predecessors) had since 1955 to spend the *royalties* deposited in the Oil and Gas Lease Fund on conservation, recreation, dam and flood control projects that the Secretary determined were appropriate.

(83). Section 1602-E (Appropriations) of the Fiscal Code states that “[n]otwithstanding any other provision of law [Oil and Gas lease Fund Act] and except as provided in Section 1603-E, no money in the [Oil and Gas Lease] Fund from *royalties* may be expended unless appropriated by the General Assembly.” 72 P.S. § 1602-E.

(84). Section 1602-E effectively takes away from DNCR, the agency with expertise and responsibility for managing State Parks and State Forests, the statutory duty and ability to make decisions as to how to allocate the *royalties* from gas leases on those lands that are deposited into the Oil and Gas Lease Fund, and instead establishes the General Assembly and the Governor as the authority to determine how to allocate those royalties.

(85). Section 1602-E is intended to provide the authority to ignore the requirements of the Oil and Gas Lease Fund Act to allocate the royalties from leasing State lands for the limited purposes set forth in the Act so that the Legislature and the Governor can use the funds for any purpose they deem appropriate.

(86). The original House Bill 1950 that was passed by the house is a clear indication of the Legislature’s willingness to commit the entire annual income from the Marcellus Shale rents and royalties for purposes beyond the conservation and maintenance of natural resources of the State Forests from which the money was derived. *See Exhibit T*, Original HB 1050 passed by the House.

(87). Section 1603-E of Article XVI-E of the Fiscal Code states that, “[s]ubject to the availability of money in the [Oil and Gas Lease] fund, up to \$50,000,000 from the fund from *royalties* shall be appropriated annually to [DCNR] to carry out the purposes set forth in the [Oil and Gas Lease Fund Act].” 72 P.S. § 1603-E.

(88). Section 1603-E of the Fiscal Code limits the royalties available to DCNR from the Oil and Gas Lease Fund arbitrarily to \$50,000,000 without any fiduciary analysis of the needs of the Public Trust lands. It also requires DCNR to give preference to operation and maintenance rather than to capital projects.

(89). Sections 1604-E and 1605-E require the transfer to the General Fund of \$60,000,000 and \$180,000,000 from the Oil and Gas Lease Fund. That money, (not yet generated at the time of the enactment of the Fiscal Code Amendments), is not from *royalties* from the sale of the Commonwealth's natural gas, but from the leasing of State Forest land, that is, *rent* or '*bonus*' money from opening up the State's Forest to natural gas exploration and extraction.

(90). Since Section 1602-E only applies to the royalties in the Oil and Gas Lease Fund, the prior appropriation to DCNR under the Oil and Gas Lease Act of all monies in the Oil and Gas Lease Fund is unaffected with respect to the rents deposited in the Fund, and thus the transfer of the rents in the Fund to the General Fund mandated by Sections 1604-E and 1605-E of the Fiscal Code were both unlawful and unconstitutional. These transfers should have been considered temporary transfers under 72 P.S. § 3611, and not permanent transfers.

(91). Under the transfer of monies from funds provisions of the Fiscal Code, 72 P.S. § 3612, the transfers of October 9, 2009 of \$143,000,000 could only have been authorized as a temporary transfer.

K. Transferring Oil and Gas Fund To DCNR Operations

(92). Since 2007, the Respondents have consistently reduced expenditures for DCNR's operations from General Fund revenue while increasing DCNR's dependence on rents and royalties from the Oil and Gas Lease Fund for its routine operations during the same period, as shown in the table below.

DCNR Operating Budget (Thousands) ¹⁵						
Source	FY 07-08	FY 08-09	FY 09-10	FY 10-11	FY 11-12	FY 12-13
General Fund	104,156	106,823	89,343	79,064	52,288	49,618
Oil & Gas Lease Fund	4,250	12,156	18,549	24,002	79,584	69,511

(93). In FY 2011-12, the Respondents allocated over \$79,000,000 from the Oil and Gas Lease Fund for DCNR’s operating expenses, three times what was allocated the previous year, and the same amount that was received from the General Fund the year before.

(94). The Governor and Budget Secretary are proposing that DCNR use \$69,511,000 from the Oil and Gas Lease Fund for operating expenses in FY 2012-2013. *See Governor’s Executive Budget 2012-2013* at H28, attached as **Exhibit U**.

L. Act 13 Transfers From Oil and Gas Lease Fund-Marcellus Legacy Fund

(95). On February 14, 2012, the Governor signed into law amendments to Title 58 of Pennsylvania’s Consolidated Statutes (Act 13 of 2012) to add Chapter 25 (Oil and Gas Lease Fund), which annually transfers oil and gas rents and royalties generated from State lands from the Oil and Gas Lease Fund to the Marcellus Legacy Fund beginning with \$20,000,000 in 2013 and increasing to \$50,000,000 by 2016 and beyond. These rents and royalties will then be distributed from the Marcellus Legacy Fund to the Environmental Stewardship Fund (\$35,000,000 annually by 2014) and to the Hazardous Sites Cleanup Fund (\$15,000,000 annually by 2016). These annual transfers from the Oil and Gas

¹⁵ Source: Governor’s Executive Budgets – Oil and Gas Lease Fund (excerpts attached as **Exhibit T**); General Appropriation Acts – DCNR General Government Operations, State Park Operations, State Forest Operations & Forest Pest Management (excerpts attached as **Exhibit U**).

Lease Fund will occur after DCNR is allocated any amount appropriated to it through the annual budget process.

(96). Only a small portion of the Marcellus Legacy Fund transfers will benefit the Public Trust lands impacted, and therefore these transfers of funds are contrary to the Conservation and Natural Resources Act and the Oil and Gas Lease Fund Act.

M. Petitioner's Standing

(97). The Pennsylvania Environmental Defense Foundation, by and through its members, has been adversely affected by current and ongoing impacts to the public natural resources of the State Forests from Marcellus shale gas development, and has substantial, direct and immediate interest in the claims set forth in this Petition. *Payne v. Kassob* 468 Pa. 226, 273 (1976); citing *Price v. Philadelphia Parking Authority*, 422 Pa. 317.

(98). Five PEDF members, who are a representative group of PEDF's members who actively use the Public Trust lands and rely on their Constitutional rights set forth in the Public Trust Amendment, have prepared affidavits setting forth their interests and concerns in Pennsylvania's State Parks and Forests and wild and scenic areas that are and will be adversely effected by diversion of the Oil and Gas Lease Fund to uses other than protecting, mitigating and restoring State Park and Forest lands from the impacts of the gas extraction process. These affidavits are attached as **Exhibit W**, and are summarized as follows:

(a). Cynthia Bower lives in Lycoming County and has lived in north central Pennsylvania since 1970. Excerpts of her Affidavit include: "I have been a member of PEDF for at least the past 5 years... have already seen what is happening in our State Forests in Tioga and Lycoming Counties, and know how serious the threats to our State Forests and Parks are. My interests in

Pennsylvania's wilderness conserved in our State Parks and Forests have been and will continue to be harmed if there is not sufficient funding to deal with these impacts. Our public lands, abundance of open spaces, and clean water are, quite honestly, the sole reason I have stayed. Though not an ecologist, I have a graduate degree in environmental education from Pennsylvania State University, and have followed conservation issues all on my adult life. Two of the gas drilling impacts I am most concerned about are the *cumulative* environmental and economic effects over time...can it be reversed? We cannot continue to accumulate and pass on to generations staggering environmental cleanup costs as our forbears have done.”

(b). Joseph E. Lauver Jr. lives in Dauphin County. He has been a member since the mid-1990. Excerpts from his Affidavit include: “Several times a year, for the past thirty-five years, my family and I recreate and fish the Pine Creek Valley, Kettle Creek Valley and also the West Branch of Pine Creek above the confluence of Lyman Run and including Sunken Branch and Lyman Run. I believe the gas extraction process and the transportation process in these aforementioned areas threaten the native brook trout. Ninety percent of the (my families and my) angling time spent in the previously mentioned areas is done in the pursuit of Brook Trout, the State of Pennsylvania's native fish...I believe that gas extraction and the associated transportation processes in these areas affect wild trout streams and the scenic landscapes of the forest. The streams and the trout are harmed by thermal pollution from the loss of overhead cover and sediment pollution resulting from over used roads. The solitude and tranquility of the forests are ruined by noise pollution from the compressor stations, and the experience is lessened by the fragmentation of the forests. Future restoration from both the direct and collateral damages incurred to these watersheds due to Marcellus exploration and transportation requires that the Oil and Gas Lease Fund monies should not be siphoned for other purposes.”

(c). Robert (Butch) Davey lives in Clinton County. Excerpts of his Affidavit include: “From 1963 to 2003 I was employed as a professional forester for the Department of Forests and Waters, Department of Environmental Resources Bureau of Forestry, and Department of Conservation and Natural Resources Bureau of Forestry...The Marcellus Shale leases produce a 25 fold increase in forest fragmentation, and the well pads require industrial complexes to complete...The Marshall Shale Gas play is having deleterious effects on State Forest ecosystems and threatens the exceptional value and high quality watersheds on State Forest land. These fragile undeveloped forested watersheds are cold water shaded habitats for native brook trout, the State fish...and will be adversely effected by Marcellus Shale well pads, pipelines, access roads and compressor sites...Considering all the risks to values of forest ecosystems on public State Forests and Parks land plus the confiscation of revenue from the Oil and Gas Fund to fund general operations and reduce budget deficits is wrong. It is neither sustainable nor well managed. Over the years much of the funding for land acquisition and facilities has been provided by the Oil and Gas Fund...The use of the fund has greatly improved forest conservation in Pennsylvania. This fund exquisitely dovetails with the Constitution Article I, Section 27. For instance, in Sproul State Forest over 30 thousand acres of private land were acquired for the citizens of Pennsylvania from revenue provided from the Oil and Gas Fund. Revenue from the Oil and Gas Fund are crucial to sustaining and conserving State Forest land and State Park land.”

(d). Ron Evans lives in Center County. He has been a member of PEDF since its inception and is currently President. Excerpts from his Affidavit include: “I have lived in Pennsylvania since 1972 and over the past 40 years have fished, hiked and camped extensively in state parks and forests. One of my greatest pleasures still is fishing in remote areas for native brook trout, and Sproul State

Forest in northern Center County offers fishing in an almost wilderness setting. That is until gas drilling began. Given the current encroachment on the ecological and aesthetic value of state parks and forests and the fact that accidental spills from Marcellus Shale drilling activity have occurred and most probably will continue I believe the money in the Oil and Gas Lease Fund should be retained for the purpose of restoring damaged land, replacing land where the effects of gas drilling activity can never be remedied, and preserving the relatively few places where remoteness is possible.”

(e). Richard Martin lives in Cumberland County. He has been a member of PEDF for more than a year. Excerpts from his Affidavit include “I am a lifetime resident of Pennsylvania. For the past eleven years I have been Coordinator for the Pennsylvania Forest Coalition (the mission of the Coalition is “Good Stewardship of our public lands”). Now, because so many of our State Forest lands have been leased for development of unconventional drilling for natural gas, we can expect a vast increase in deleterious effects, including forest fragmentation, loss of habitat, disturbance of nesting, increased predation-plus degradation of our headwater/coldwater fisheries. The loss of Forest Stewardship Council certification for sustainability is also a risk because of this industrialization of our State Forests. The Oil and Gas Fund should be ameliorating those losses. That Fund should be used to buy replacement lands and purchasing mineral rights on existing State lands.”

VII. TRUSTEE DUTY UNDER ARTICLE I § 27

(97). Article I Section 27 of Pennsylvania's Constitution establishes a public trust of the Commonwealth's natural resources. Specifically, the Amendment states, "Pennsylvania's natural resources are the common property of all the people, including generations yet to come. As trustee of these resources the Commonwealth shall conserve and maintain them for the benefit of all the people." This Public Trust provision of Article I § 27 is self-executing. *Payne v. Kassob*, 361 A.2d 263, 272 (Pa. 1976).

(98). Pennsylvania's natural resources within the Public Trust include State Parks and State Forests (*Payne v. Kassob*, 312 A.2d 86 (Pa. Commw. Ct. 1973), and includes wild animals and fish, trees, plants and minerals on State Parks and Forests, and especially endangered species, and it also includes surface and ground water as well as ambient air. Robert Broughton, *The Proposed Pennsylvania Declaration of Environmental Rights, Analysis of H.B. 958,41*, Pa. Bar Assn. Q. 421, 426-427 (1970).

(99). The benefits of the trust for the people include the use of the public lands under the Trust for recreation, including hiking, hunting fishing, bird watching, camping, and other enjoyment of the wilderness experience offered by the natural resources.

(100). Article I § 27 enumerates the rights to be enjoyed within the Public Trust. "The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment."

(101). The trustee of the Public Trust is the Commonwealth. All three branches of Commonwealth, The Executive, the Legislative and the judicial, have obligations as trustee. *Commonwealth v. Parker White*, 515 A.2d 1358 (Pa. 1986).

(102). As Trustees the Respondent has the specific duty to conserve and maintain the natural resources that are a part of the Public Trust. Further they must conserve and maintain them for the benefit of the people for generations yet to come.

(103). The Respondent has the further duty under the Public Trust to protect the peoples' rights to those natural resources, including clean air and water, and the preservation of the natural, scenic, historic and aesthetic values of the Public Trust lands.

(104). It is inherent in these duties to conserve and protect that the trustee, before taking any action or making any decision that will impact the natural resources of the Public Trust, must evaluate what that impact will be on the natural resources, and on the benefits of those resources to the people of the Commonwealth, and to the peoples' rights to the natural resources.

(105). The mandate to conserve and protect requires a thorough evaluation of the impacts of gas extraction on Public Trust lands, including the impacts described in Paragraph 43 above, which are beyond the statutory and regulatory requirements governing gas extraction, as well as requirements of the DCNR leases. That evaluation must address the cumulative impacts of the entire gas leasing process on the Public Trust natural resources, including fragmentation and the impacts on the use and enjoyment of these Public Trust resources by the public, both now and for future generations.

(106). If through the evaluation, and/or in the course of developing the extraction of the natural gas, it is determined that the development is causing and will continue to cause harm to the Public's natural resources and to their rights thereto, then it is the duty of the trustee to restore and/or replace the natural resources, and to restore and/or replace the rights of the people thereto.

(107). Where it is established that harm has been caused and is continuing to be caused it is the duty of the trustee to insure that there are sufficient funds in the trust to fully mitigate that harm.

(108). Where the corpus of the trust is sold, that is, when the public's nonrenewable oil and gas natural resources are sold, then the trustee has the duty to retain those monies obtained from the sale within the trust.

(109). Where the corpus of the trust is leased for an indeterminate time, or is permanently harmed, then the trustee has the duty to replace that part of the public trust land that is taken by lease with additional lands to be added to the trust corpus, through the use of the funds obtained from the leases and royalties therefrom.

VIII. STATEMENT OF RELIEF SOUGHT

COUNT I

Article III § 3 of the Pennsylvania Constitution

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

(111). Find and declare that the passage of Article XVI-E of Act 50 of 2009, entitled "Fiscal Code-Omnibus Amendments", "Oil and Gas Wells" 72 P.S. 1601-E *et seq.*, violates Article III § 3 Of Pennsylvania's Constitution, and is therefore unconstitutional.

(112). Article III § 3 of the Pennsylvania Constitution states that "No law shall be passed containing more than one subject, except a general appropriation bill or a bill codifying or compiling the law or part thereof."

(113). Article III § 3 was designed to prevent abuses related to the practice of passing "Omnibus" bills with hundreds of pages of unrelated provisions and little public notice as to their contents, *i.e.* "stealth legislation", or "24 hour

legislation.” *See City of Philadelphia v. Commonwealth*, 573 Pa. 542; 838 A.2d 566 (2003); *see also Commonwealth v. Barnett*, 199 Pa. 161, 48 A. 976 (1901).

(114). Hidden within the Act 50 legislation was Article XVI-E, entitled “Oil and Gas Wells”, a clear attempt to hide amendments to the Oil and Gas Act and the Conservation and Natural Resources Act, 71 P.S. § 1340.101 *et seq.*

(115). Article XVI-E is no mere codification, but effectively repeals the authority of DCNR to allocate funds, as mandated under the Oil and Gas Lease Fund Act, from royalties for the sale of the Commonwealth’s natural gas on State Forests. (*See* Section 1602-E of Article XVI-E.)

(116). Article XVI-E also effectively repeals the specific limitations on the use of funds set forth in the Oil and Gas Lease Fund Act, 71 P.S. § 1333, from the lease of State Forest land and sale of the oil and gas natural resources thereon. (*See* Sections 1602-E, 1603-E, 1604-E and 1605-E of Article XVI-E.)

(117). Article XVI-E also effectively repeals the authority of DCNR to determine when, where and how to lease oil and gas on State Forest land, as mandated by the Conservation and Natural Resources Act, 71 P.S. § 1340.302(a)(6).

(118). For the above reasons, Article XVI-E is in violation of the Oil and Gas Lease Fund Act and the Conservation and Natural Resources Act.

COUNT II

Section 1602-E of the Fiscal Code

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

(120). Find and declare that Section 1602-E of the 2009 amendments to the Fiscal Code, Title 72, Article XVI-E, entitled Oil and Gas Wells, 72 Pa.C.S. § 1602-E, violates Article I Section 27 of Pennsylvania’s Constitution; and violates the rights of the Petitioners under Article I § 27.

(121). Section 1602-E overrides the authority of DCNR under the Oil and Gas Lease Fund Act, 71 P.S. §§ 1331-1333, to determine how to allocate the funds in the Oil and Gas Lease Fund by stating that “notwithstanding any provision of law [the Oil and Gas Lease Fund Act], and except as provided in Section 1603-E, no money in the Oil and Gas Lease Fund from royalties may be expended unless appropriated by the General Assembly.” 72 P.S. § 1602-E. It therefore is unconstitutional.

(122). Section 1602-E directly impacts DCNR’s abilities to comply with its duties and obligations under the Conservation and Natural Resources Act 71 P.S. § 1340.101(a) and (b); and DCNR’s ability to meet its duties as trustee of the Public Trust under Article I § 27, to conserve and maintain the State’s natural resources, and is therefore unconstitutional.

(123). Section 1602-E overrides the legislatively created purpose of the Oil and Gas Lease Fund, 71 P.S. 1331-1333, by authorizing the transfer of public trust funds for purposes that do not support the purposes of the Public Trust, and is therefore unconstitutional.

(124). Until the enactment of Section 1602-E, the Oil and Gas Lease Fund was a major source of funds for DCNR to accomplish its mission of managing State Parks and State Forests for the benefit of the people of the Commonwealth, including future generations. Since 1955, when Maurice Goddard (then Secretary of the Department of Forest and Waters) advocated for and obtained passage of legislation to create this fund, the Oil and Gas Lease Fund has been used to purchase 26 State Parks, construct 170 drinking water treatment systems, 58 wastewater treatment systems, 798 bridges, 3,000 miles of roads, 125 dams and 5,000 buildings. *See Exhibits M, N and O.*

(125). The source of the money in the Oil and Gas Lease Fund is from leasing State Forest land for extraction of oil and gas. Those leasing activities have

caused and are continuing to cause negative impacts on the State forests that will develop over the life of the leases, which are indefinite, but for at least several decades.

(126). The trustees of the Public Trust under Article I § 27 are not prohibited from leasing the Public Trust lands for the extraction of minerals, but that activity cannot destroy the Public Trust natural resources in the process. And if the activity harms the resources and the public's rights to use and enjoy those resources, then the trustees have the obligation to understand the full extent of the harm that is caused and that will be caused, and to mitigate those harms so that the Public Trust resources are fully restored or replaced.

(127). The Oil and Gas Lease Fund is not a general fund from which the Respondent can replenish other funds. It is a special fund, consisting of monies taken from the conversion of assets from the Public Trust under Article I § 27. It is in essence a specific trust fund for Pennsylvania's natural resources. It is therefore a violation of Article I § 27 to remove funds from the Public Trust without insuring that the public trust duties and requirements are met.

(128). The enactment of 1602-E enables the removal and transfer of money from the Oil and Gas Lease Fund for uses outside the Public Trust without evaluating the impacts of that decision on the conservation and maintenance of Pennsylvania's State Forests and the natural resources therein, and on the rights of the public to those uses. It is therefore unconstitutional.

(129). Section 1602-E has the effect of overriding the purpose and intent of Article I § 27 by allowing the corpus of the trust (the natural resources of our State Parks and State Forests) to be diminished by conversion through leasing State Forest land, which harms the resources, and by selling the nonrenewable oil and gas resources, and then taking the money from the leasing and royalties away from Public Trust and beyond the reach of DCNR, the agency with the expertise and

mandate to protect the trust. It is unconstitutional to amend the provisions of the constitutional trust through changes to the Fiscal Code.

COUNT III
Section 1603-E of the Fiscal Code

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

(131). Find and declare that Section 1603-E of the Fiscal Code, Title 72, Article XVI-E, entitled “Oil and Gas Wells”, 72 Pa.C.S. § 1603-E, violates Article I § 27 of Pennsylvania’s Constitution; and violates the rights of the Petitioners under Article I § 27.

(132). Section 1603-E violates Article I § 27 by limiting appropriations to DNCR from the Oil and Gas Lease Fund to no more than \$50,000,000 annually, contrary to the Oil and Gas Lease Fund Act, which requires all the monies from both leasing rents and from oil and gas sales royalties to go to the Oil and Gas Lease Fund.

(133). The Oil and Gas Lease Fund is not a general fund from which the Respondent can replenish other funds. It is a special fund, consisting of monies taken from the conversion of assets from the Public Trust under Article I § 27. It is in essence a specific trust fund for Pennsylvania’s natural resources. It is therefore a violation of Article I § 27 to remove funds from the Public Trust without insuring that the public trust duties and requirements are met. *See Exhibit L.*

(134). The source of the money in the Oil and Gas Lease Fund is from leasing State Forest land for extraction of oil and gas. Those leasing activities have caused and are continuing to cause negative impacts on the State Forests that will develop over the life of the leases, the terms of which are indefinite, but will extend at least several decades.

(135). DCNR has the statutory and constitutional obligation to protect and conserve, restore and maintain Pennsylvania's State Forests. It is not only responsible for administering the leases for natural gas, but also to understand and mitigate the effects from the gas extraction process throughout the life span of the leases and beyond. Those effects go far beyond the protections established in the permits required for the gas extraction process, and the requirements and protections established in the leases directly. Additionally, DCNR is responsible for all the projects necessary to construct, repair and replace the infrastructure on State Parks and Forests. For these reasons it is arbitrary, abusive and in violation of Article I § 27 to limit DCNR's use of the Oil and Gas Lease Funds.

(136). The additional requirement of Section 1603-E of the Fiscal Code that DCNR give preference to operation and maintenance of State Parks and Forests, rather than for the purposes intended the Oil and Gas lease Fund, is contrary to the Oil and Gas Lease Fund Act and Article I § 27.

(137). The limitation to DCNR of \$50,000,000 from the Oil and Gas Lease Fund is a violation of Article I § 27 because of (a) the Respondent's failure to evaluate the impacts of the enactment of Section 1603-E on the ability of DCNR to comply with its legislative and constitutional mandates under the Conservation and Natural Resources Act and Article I § 27 to protect and conserve the State's Parks and Forests; and (b) the Respondent's failure to require an evaluation of the impact of oil and gas extraction on the State Forest's natural resources and the people's rights to those resources, including the short and long term impacts, the direct and indirect, the specific and the cumulative, negative and positive impacts.

COUNT IV
Sections 1604-E and 1605-E of the Fiscal Code

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

(139). Find and declare that Section 1604-E and 1605-E of Article XVI-E of the Fiscal Code violate Article I § 27 of Pennsylvania's Constitution, and violate the rights of the Petitioners under Article I § 27.

(140). Sections 1604-E and 1605-E specifically require the transfer of the \$60,000,000 from the Oil and Gas Lease Fund to the General Fund in fiscal year 2009/2010, and the \$180,000,000 for fiscal year 2010/2011.

(141). The requirements of Sections 1604-E and 1605-E of the Fiscal Code to transfer Oil and Gas Lease Fund money to the General Fund are in violation of the Oil and Gas Lease Fund Act, 71 P.S. §§ 1331-1333.

(142). In order to comply with the requirements of Sections 1604-E and 1605-E to generate the \$240,000,000 DCNR was required to lease 65,000 acres of State Forest land for the extraction of natural gas.

(143). Requiring DCNR to lease State Forest land to generate money for the General Fund directly conflicts with DCNR's duties under the Conservation and Natural Resources Act, 71 P.S. §1340.302(a)(6), and Article I § 27, to conserve and maintain Pennsylvania's State Parks and State Forests and the natural resources therein, and is therefore unconstitutional.

(144). The DCNR Bureau of Forestry made the determination in both 2009 and 2010 not to offer additional lands for lease after the 2008 lease sale, in order to take the time to study the impacts and requirements on the 660,000 acres already subject to valid lease agreements (*see Exhibit D*). Sections 1604-E & 1605-E both override DCNR's specific determinations and are therefore in violation of Conservation and Natural Resources Act and Article I § 27.

(145). The leasing activities on the 65,000 acres required to generate the \$240,000,000 needed for transfers to the General Fund have caused and will continue to cause severe impacts on the natural resources of the State Forest land leased. The requirement to lease that amount of State Forest, without evaluating

the impacts to the natural resources, without evaluating the impacts to the public's rights and uses to those resources, without evaluating how to deal with these impacts, without evaluating the costs, and without evaluating and insuring the availability of the funds in the Oil and Gas Lease Fund to pay those costs, breaches the Respondent's duties under Article I § 27, and is a violation thereunder.

(146). Sections 1604-E and 1605-E both violate Article I § 27 by taking the money (\$240,000,000) out of the Public Trust. Rent payments, including up front bonus rentals, paid for leases of the State Forest land remains part of the Public Trust corpus established under Article I § 27.

(147). The Oil and Gas Lease Fund is not a general fund from which the Respondent can replenish other funds. It is a special fund, consisting of monies taken from the conversion of assets from the Public Trust under Article I § 27 and is therefore a specific trust fund for Pennsylvania's natural resources. The removal of funds from the Public Trust without insuring that the public trust duties and requirements are met is a violation of Article I § 27. *See Exhibit L.*

(148). Transferring \$240,000,000 from the Oil and Gas Lease Fund to the General Fund precludes DCNR from the use of that money for mitigation of the impacts from the leasing operations, and for the huge backlog of infrastructure projects critical to the conservation and restoration of our State Parks and State Forests (*see Exhibit L*, pages 17-19), and is therefore in violation of Article I § 27.

(149). It is axiomatic that the provisions of Pennsylvania's Constitution cannot be altered or amended by legislative mandate. Sections 1604-E and 1605-E attempt to do that by mandating that public trust assets be withdrawn from the Trust for purposes that do not serve the duties and requirements of the Trust.

(150). Sections 1604-E and 1605-E transfer funds from the Oil and Gas Lease Fund generated from rental or bonus payments for the leasing of the State Forest land, not from royalty payments received from the actual sale of produced

natural gas. Other than the appropriation authority under the Oil and Gas Lease Fund Act, which appropriates both rents and royalties to DCNR, no appropriation authority exists under the Fiscal Code to transfer rents from leasing State Forest lands. The Sections 1604-E and 1605-E transfers must therefore be considered temporary transfers under 72 P.S. § 3611, from one fund to another, and must be repaid to the Oil and Gas Lease Fund.

COUNT V
Governor's Executive Budgets and Appropriation Bills
For Fiscal Years 2009/2010 and 2010/2011

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

(152). Find and declare that the provisions of the State budgets for fiscal years 2009/2010 and 2010/2011 requiring DCNR to generate \$240,000,000 for the Oil and Gas Lease Fund for transfer to the General Fund proposed by the Governor in the Executive Budgets and signed into law by the Governor in the Appropriations Acts violate Article I § 27 and violate Petitioner's rights under Article I §27, for the same reasons set forth in Count IV above, because, in conjunction with Sections 1604-E and 1605-E of the Fiscal Code, these State budgets and Appropriations Acts require DCNR to generate \$240,000,000 for the General Fund, which required DCNR to lease 65,000 acres of State Forest land contrary to the Conservation and Natural Resources Act, and require DCNR to transfer \$240,000,000 out of the Oil and Gas Lease Fund contrary to the Oil and Gas lease Fund Act.

COUNT VI
Appropriations Bill of 2011/
Article III § 3 Pennsylvania Constitution

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

(154). Find and declare that the Appropriations Act of 2011 violates Article III § 11 of Pennsylvania’s Constitution, which mandates that a “general appropriations bill shall embrace nothing but appropriations for the executive, legislative and judicial departments of the Commonwealth, for the public debt and for public schools.”

(155). The Appropriations Act of 2011 contains improper substantive language at pages 197-198 that conflicts with specific requirements of the Oil and Gas Lease Fund Act, 71 P.S. § 1331 *et seq.*, and therefore violates Article III § 11.

(156). The Oil and Gas Lease Fund Act requires that “All rents and royalties from oil and gas leases of any land owned by the Commonwealth ... shall be placed in a special fund to be known as the Oil and Gas Lease Fund which fund shall be used exclusively for conservation, recreation, dams, or flood control or match any federal funds for the aforementioned purposes”, 71 P.S. § 1331.

(157). The Oil and Gas Lease Fund Act states that “It shall be within the discretion of the Secretary of Forests and Waters to determine the need for and location of any project authorized by this Act. The Secretary of Forests and Waters shall have the power to acquire land in the name of the Commonwealth by purchase, condemnation or otherwise such lands as may be needed.” 71 P.S. § 1332.¹⁶

(158). The Oil and Lease Fund Act states that “All the monies from time to time paid into the “Oil and Gas Lease Fund” are specifically appropriated to the

¹⁶ The General Assembly transferred the powers and duties of the Secretary of the Department of Forests and Waters under this act to the Secretary of DCNR, 71 P.S. § 1340.304(c).

Department of Forests and Waters to carry out the purpose of this Act.” 71 P.S. 1333.

(159). The Appropriations Act of 2011 states the following at pages 197-198:

(P). Oil and Gas Lease Fund.—The following sums set forth in this Act, or as much thereof 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 rendered, for the purchase or rental of goods and services and for payment of other expenses, as provided by law or by this Act, necessary for the proper conduct of the duties, functions and activities and for the purposes hereinafter set forth for the fiscal year beginning July 1, 2011, and for the payment of bills incurred and remaining unpaid at the close of the fiscal year ending June 30, 2011.*

(160). The Appropriations Act of 2011 takes the Oil and Gas Lease Fund money specifically appropriated to DNCR under Section 3 of the Oil and Gas Lease Fund Act, 71 P.S. § 1333, and RE-appropriates it to DCNR, not for conservation, recreation, dam or flood control projects determined by DCNR to be needed, as mandated by the Oil and Gas Lease Fund Act, 71 P.S. §§ 1331-1332, but for salaries, wages, etc. as determined by the legislature.

COUNT VII

Governor's Executive Budget and Appropriations Bill For Fiscal Years 2011/2012 and 2012/2013

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

(162). Find and declare that the State budget for fiscal year 2011/2012 and signed into law by the Governor in the Appropriations Act of 2011 violate Article I § 27 of Pennsylvania's Constitution; and violate the rights of the Petitioners under Article I § 27.

(163). Since 2007, the Respondent has consistently reduced expenditures for DCNR's operations from General Fund revenue while increasing DCNR's dependence on rents and royalties from the Oil and Gas Lease Fund for its routine operations during the same period, as shown in the table below.

DCNR Operating Budget (Thousands) ¹⁷						
Source	FY 07-08	FY 08-09	FY 09-10	FY 10-11	FY 11-12	FY 12-13
General Fund	104,156	106,823	89,343	79,064	52,288	49,618
Oil & Gas Lease Fund	4,250	12,156	18,549	24,002	79,584	69,511

(164). As the above table shows, DCNR's operating budget for FY 2010/2011 takes almost \$80,000,000 from the Oil and Gas Lease Fund. The first \$50,000,000 of that money is appropriated by Section 1603-E of the Fiscal Code. The rest is appropriated by the Appropriation Act of 2011.

¹⁷ Source: Governor's Executive Budgets – Oil and Gas Lease Fund (excerpts attached as **Exhibit O**); General Appropriation Acts – DCNR General Government Operations, State Park Operations, State Forest Operations & Forest Pest Management (excerpts attached as **Exhibit P**).

(165). Section 1603-E of the Fiscal Code appropriates \$50,000,000 annually to DCNR to be used for purposes set forth in the Oil and Gas lease Fund Act. The use of that money for DCNR's operating costs is not within the purposes set forth in the Act.

(166). The use of the Oil and Gas Lease Fund to replace the General Fund money for DCNR's operations violates Article I §27.

(167). The Oil and Gas Lease Fund is not a general fund from which the Respondent can replenish other funds. It is a special fund, consisting of monies taken from the conversion of assets from the Public Trust under Article I § 27 and is therefore a specific trust fund for Pennsylvania's natural resources. The removal of funds from the Public Trust without insuring that the public trust duties and requirements are met is a violation of Article I § 27.

(168). By requiring that the limited funds from the Oil and Gas Lease Fund allocated to DCNR under Section 1603-E of the Fiscal Code be used for operating costs, the Respondent has precluded DCNR from using those funds to mitigate the negative impacts to the Public Trust resources as required under the Conservation and Natural Resources Act and Article I § 27, and therefore is in violation of Article I § 27.

(169). By requiring that the limited funds from the Oil and Gas Lease Fund allocated to DCNR under Section 1603-E of the Fiscal Code be used for operating costs, the Respondent has precluded DCNR from using those funds to reduce the backlog of projects necessary to conserve and maintain the infrastructure of our State Parks and Forests as required under the Conservation and Natural Resources Act and Article I § 27, and therefore is in violation of Article I § 27.

(170). As a result of being required to use the Oil and Gas Lease Fund for its operating expenses in the current fiscal year (2011/2012), DCNR's responsibilities

under the Conservation and Natural Resources Act and under Article I §27 are compromised and conflicted, which violates Article I § 27.

(171). Using \$80,000,000 from the Oil and Gas Lease Fund to pay DCNR's operating costs violates the Oil and Gas Lease Fund Act because such costs are not within the purposes set forth in the Act.

COUNT VIII Act 13 of 2012

(172). All preceding paragraphs are hereby incorporated by reference.

(173). Find and declare that those provisions of Act 13 of 2012 dealing with the Oil and Gas Lease Fund, which require the transfer of Oil and Gas Lease Fund money to the Environmental Stewardship Fund and the Hazardous Site Cleanup Fund through the newly created Marcellus Legacy Fund (*see* excerpts of Act 13 attached as **Exhibit X**) violate Article I Section 27 of Pennsylvania's Constitution.

(174). Prior to Act 13 of 2012, the Environmental Stewardship Fund was funded solely by landfill fees. This fund provides for farmland preservation projects, open space protection, abandoned mine reclamation, watershed protection and restoration, water and sewer infrastructure, and the improvement and conservation of Commonwealth and community parks and recreational facilities (*see* excerpts attached as **Exhibit Y**).

(175). Prior to Act 13 of 2012, the Hazardous Site Cleanup Fund was funded by solely by the Capital Stock and Franchise Tax. This fund is for the Department of Environmental Protection to investigate, cleanup and monitor contaminated sites (which would include natural gas extraction sites), to participate in the federal Superfund and hazardous waste programs, and to implement the Commonwealth's land recycling program (*see* excerpts attached as **Exhibit Z**).

(176). Very little of the \$50,000,000 going to these funds will be used for purposes set forth in the Oil and Gas Lease Fund Act, or will be administered by DCNR, as required by the Act.

(177). The Oil and Gas Lease Fund enables DCNR to fund projects that conserve and maintain the natural resources of Pennsylvania's Parks and Forests.

(178). The source of the money in the Oil and Gas Lease Fund is from leasing State Forest land for extraction of oil and gas. Those leasing activities have caused and are continuing to cause negative impacts on the State Forests that will develop over the terms of the leases, which are indefinite, but will extend for at least several decades.

(179). The trustees of the Public Trust under Article I § 27 are not prohibited from leasing the Public Trust lands for the extraction of oil and gas, but that activity cannot destroy the Public Trust natural resources in the process. If the activity harms the resources and the public's rights to use and enjoy those resources, then the trustees have the obligation to understand the full extent of the harm that is caused and that will be caused, and to mitigate those harms so that the Public Trust resources are fully restored or replaced.

(180). The transfer by Act 13 of \$50,000,000 annually out of the future rents and royalties from the Oil and Gas Lease Fund without evaluating the impacts from the leasing activities both now and over the next several decades on the State Forest and its natural resources, without evaluating the impacts to the rights and benefits of the people to those resources, and without evaluating the needs and costs to mitigate those impacts, is in violation of Article I § 27.

(181). The transfer by Act 13 of \$50,000,000 annually out of the future rents and royalties from the Oil and Gas Lease Fund without evaluating the need for capital improvement projects for the State Parks and Forests necessary to conserve

and maintain the State public trust assets and meet the requirements of the Oil and Gas Lease Fund Act, is a violation of Article I § 27.

(182). The violations set forth in Paragraphs 180 and 181 are aggravated by the cumulative impact of the violations resulting from the transfer of \$80,000,000 from the Oil and Gas Lease Fund under Section 1603-E of the Fiscal Code and the Appropriations Act of 2011, the transfer of \$240,000,000 required by Sections 1604-E and 1605-E of the Fiscal Code, and the transfer of \$143,000,000 required by the Appropriations Act of 2009. These violations will be further aggravated by next year's transfer of an additional \$70,000,000 from the Oil and Gas Lease Fund.

(183). The Act 13 diversions from the Oil and Gas Lease Fund are contrary to and in violation of the Oil and Gas Lease Fund Act, and the Conservation and Natural Resources Act.

(184). The transfer by Act 13 of \$50,000,000 annually out of the future rents and royalties from the Oil and Gas Lease Fund without evaluation of the impacts of those transfers on DCNR's ability to meet its statutory obligations under the Conservation and Natural Resources Act, and its constitutional obligations under Article I § 27, is in violation of Article I § 27.

(185). The Oil and Gas Lease Fund is not a general fund from which the Respondent can replenish other funds. It is a special fund, consisting of monies taken from the conversion of assets from the Public Trust under Article I § 27 and is therefore a specific trust fund for Pennsylvania's natural resources. The removal of funds from the Public Trust without insuring that the public trust duties and requirements are met is a violation of Article I § 27.

(186). Respondent is responsible for returning or replacing those funds transferred from the Oil and Gas Lease Fund to other funds.

(187). It is axiomatic that the provisions of Pennsylvania's Constitution cannot be altered or amended by legislative mandate. Act 13 attempts to do that by

mandating that public trust assets be withdrawn from the Trust for purposes that do not serve the duties and requirements of the Trust.

Date: April 30, 2012

Respectfully Submitted,

John E. Childe, Esq.
PA Supreme Ct. ID No. 19221
1847 Center Street
Camp Hill, PA 17011
Telephone: 717-761-6162
Email: childeje@aol.com

CERTIFICATE OF SERVICE

I, John E. Childe, Esq., hereby certify that I served a copy of this Petition for Review IN PERSON April 30, 2012, on the following:

Attorney General
Commonwealth of Pennsylvania
16th Floor, Strawberry Square
Harrisburg, PA 17120

Stephen Aichele
Governor's General Counsel
333 Market Street, 17th Floor
Harrisburg, PA 17101

John E. Childe, Esq.

