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## COMMENTS TO STATE FOREST RESOURCE MANAGEMENT PLAN

The comments are divided into two sections:

- I. Analysis of DCNR's constitutional, statutory, and policy mandates.
- II. Proposed Amendments to the State Forest Plan.

### I. DCNR CONSTITUTIONAL, STATUTORY AND POLICY MANDATES

#### A. ARTICLE I SECTION 27 OF THE PENNSYLVANIA CONSTITUTION

In explaining the significance of the constitutional protection afforded to the State Forest by Article I, Section 27 of the Pennsylvania Constitution, the State Forest Plan must incorporate the key principles outlined below.

##### 1. Article I Section 27 Creates an Enforceable Public Trust

The Pennsylvania Supreme Court has made clear that Article I, Section 27 of the Pennsylvania Constitution creates an enforceable public trust, stating:

**“There can be no question that [Article I Section 27 of the Pennsylvania Constitution] itself declares and creates a public trust of public natural resources for the benefit of all the people (including future generations as yet unborn) and that the Commonwealth is made trustee of said resources, commanded to conserve and maintain them. No implementing legislation is needed to enunciate these broad purposes. [Article I Section 27] does so by its own *ipse dixit*.”**

*Payne v. Kassab*, 468 Pa. 226, 244-245; 361 A2d 263 (1976).

##### 2. Article I Section 27 is a Right that Cannot Be Infringed Upon

The fact that the people of Pennsylvania declared that protection of their public natural resources is a right of the people under Article I (Declaration of Rights) of the Pennsylvania Constitution has a very profound impact. The rights established in Article I are the **inalienable**

**rights of the people** and includes such rights as free speech, religion, and due process of law. The people expressly limit the power of the government established through the remaining articles of the Constitution over these fundamental rights. Specifically, in Article I, Section 25 of their Constitution, the people of Pennsylvania state: “To guard against transgressions of the high powers which we have delegated, we declare that everything in this article is excepted out of the general powers of government and shall forever remain inviolate.” The public trust provisions of Article I, Section 27 are thus specifically protected from infringement by the government of the Commonwealth, including from actions by public officials and employees in the executive, legislative and judicial branches.

### 3. The State Forest is the Common Property of the People

Article I, Section 27 of the Pennsylvania Constitution established major new legal rights for the people of Pennsylvania in their public natural resources. The people have declared that Pennsylvania’s public natural resources are the **common property of the people**, including future generations. As a legal principle, this constitutional declaration fundamentally changed the more limited nature of the peoples' interest in public natural resources, which under the common law was only an equitable interest, not ownership. The use of the term “property” in this constitutional provision conveys a legal right of ownership, as that was and is the common meaning of the term (*see, e.g.*, Black's Law Dictionary definition). Thus, under Article I, Section 27, the people have legal ownership of their public natural resources.

### 4. State Forest Public Natural Resources are Public Trust Assets

The entire State Forest system and all of its natural resources are protected by Article I, Section 27 of the Pennsylvania Constitution. The land, water, air, plants, animals, and subsurface minerals are all part of the corpus of the public trust established under the Constitution. The State Forest Plan needs to clearly identify all of the natural resources with our State Forests as the property of the people and, therefore, part of **the corpus of the public trust** established by Article I, Section 27.

### 5. Article I, Section 27 Protection Extends to Future Generations

The inclusion of the phrase “**including future generations**” in Article I, Section 27 to identify which people are the common owners, and also which people are the beneficiaries of the public trust, is quite meaningful. It mandates that all rights affected by the public trust are to be protected both now and for the future. So, decisions affecting the public natural resources must be evaluated both for their immediate and for their long term impacts.

#### 6. Article I, Section Establishes the Commonwealth As Trustee

Article I, Section 27 specifically defines and limits the power of the government of the Commonwealth, that is, all branches of state government, to the role of trustee of the public trust created by the Constitution. As defined by Black’s Law Dictionary, a trust is a **legal entity** created by the grantor (in this case, the people of Pennsylvania in 1971) for the benefit of designated beneficiaries (current and future generations). The trustee holds a **fiduciary responsibility** to manage the trust’s assets for the benefit of all the beneficiaries. A fiduciary duty is a duty to act for someone else’s benefit, while subordinating one’s personal interests to that of another person. Here, the government of the Commonwealth has a duty to conserve and maintain the people's public natural resources for current and future generations of citizens, not to use these resources for the benefit of the government itself. It is the highest standard of duty implied by law.

#### 7. Nature of DCNR's Trustee Fiduciary Duties

The Pennsylvania Supreme Court recognized DCNR's fiduciary duties as trustee in *Belden and Blake Corp. v. DCNR*, 969 A.2d 528, 532 (Pa. 2009), stating that “DCNR has a duty to maintain and preserve state parks pursuant to § 303 of the [Conservation and Natural Resources Act], and *fiduciary obligations to conserve and maintain them as public natural resources pursuant to Article I, § 27 of Pennsylvania’s Constitution*” (emphasis added).

A trustee may use trust assets only for purposes authorized by the trust or necessary for the preservation of the trust, and that other uses are beyond the scope of the discretion conferred, even where the trustee claims to be acting solely to advance other discrete interests of the beneficiaries. *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 978 (citing *Metzger v. Lehigh Valley Trust & Safe Deposit Co.*, 69 A. 1037, 1038 (Pa. 1908)); *see also Lang v. Commonwealth*, 528 A.2d 1335, 1342 (Pa.1987) (trustee has duty of loyalty to administer trust solely in the

beneficiary's interests and not his own, citing Restatement (Second) of Trusts § 170)); *In re Hamill's Estate*, 410 A.2d 770, 773 (Pa. 1980) (trustee has duty of impartiality, citing Restatement (Second) of Trusts § 232).

The Commonwealth Court in *PEDF v. Wolf*, 108 A.3d 140, 167, recognized that the Commonwealth, as trustee under Article I, Section 27, **"is a fiduciary obligated to comply with the terms of the trust and with standards governing fiduciary conduct."** The Commonwealth Court also recognized that the primary duty of a trustee is the **preservation of those assets and the safety of the trust principal.** *Id.* The Commonwealth Court also recognized that the DCNR Secretary has been delegated the exclusive authority to make leasing decisions under the Conservation and Natural Resources Act (CNRA). 71 P.S. § 1340.302(a)(6). In making the decision to lease, the Commonwealth Court stated that **"the DCNR Secretary has a duty as an appointed officer of the Commonwealth to serve the people of the Commonwealth by protecting and preserving their natural resources."** *Id.* at 171.

#### 8. Duty to Conserve and Maintain Public Natural Resources

Article I, Section 27 of the Pennsylvania Constitution directs the government of the Commonwealth to "conserve and maintain" the people's public natural resources, thereby defining the purpose of the trust, and the duties of the trustee. The trustee has the duty to conserve and maintain the public natural resources as the assets of the public trust. The word **"conserve"** is defined as "to save and protect from loss or damage." Black's Law Dictionary. The word **"maintain"** means "to prevent a decline, to keep in an existing state or condition, to preserve, to provide for, to supply with what is needed to support or sustain." *Id.* Thus, DCNR has the obligation to save and protect our State Forests from loss or damage, that is, to not diminish or degrade these public natural resources, and to preserve their core natural values.

Article I, Section 27 further defines the meaning of the duty to conserve and maintain public natural resources through its declaration of the people's right "to clean air, pure water, and the preservation of the natural, scenic, historic and esthetic values of the environment." DCNR, as trustee, must conserve and maintain the State Forests so that the people's rights to clean air, pure water, and the natural, scenic, historic and esthetic values of those forests are preserved.

**B. CONSERVATION AND NATURAL RESOURCES ACT**

1. DCNR Purpose and Mission under CNRA Section 101

The State Forest Plan must clearly state DCNR's authority and mission under the Conservation and Natural Resources Act, which was passed in 1995 (Act 18 of 1995), and the relationship of this statutory authority with the constitutional mandates of Article I, Section 27.

The first provision of the CNRA, Section 101(a)(1), finds and declares that:

Pennsylvania's public natural resources are to be conserved and maintained for the use and benefit of all its citizens as guaranteed by section 27 of Article I of the Constitution of Pennsylvania.

71 P.S. § 1340.101(a)(1). Additional findings and declarations stated in CNRA Section 101(a) include:

Our 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.

Our forest products industry employs over 100,000 people and contributes over \$4.5 billion a year, making it the fourth largest industry.

Preserving, enhancing, maintaining and actively managing our system of State parks, forests, community recreation and heritage conservation areas contributes greatly to the quality of life of Pennsylvania's citizens and the economic well-being of the State.

71 P.S. § 1340.101(a)(4)-(6).

Through these findings, CNRA mandates that DCNR carry out its statutory duties consistent with the trustee duties of Article I, Section 27. Nothing in the stated purposes and intent of the CNRA indicates that DCNR can lease State Forests and sell their public natural resources to meet the revenue needs of the government of the Commonwealth or to provide for private economic development.

CNRA Section 101(b) states that the overarching purpose of the act is "to provide more focused management of the Commonwealth's recreational, natural and river environments." 71 P.S. § 1340.101(b). Nothing in this purpose provides for the use of our natural resources to meet the revenue needs of the government of the Commonwealth or to provide for private economic development.

CNRA Section 101(b) further states: “The primary mission of the DCNR will be to maintain, improve and preserve State parks, to manage State forest lands to assure their long-term health, sustainability and economic use ...”. This mission must be carried out consistent with the trustee mandate of Article I Section 27, which cannot be altered by statute, and the rights of the people established under Article I, Section 27. The mention of *long-term economic use* of our State Forests in the CNRA statement of mission relates directly to the purposes set out in Section 101(a), which are tourism and recreation and preserving and enhancing our system of State Parks and Forests, community recreation and heritage conservation areas. To the extent that this language could be read to mean some general economic use unrelated to long-term health and sustainability of our State Forests, such a reading would be in conflict with the stated purposes in CNRA, and with the rights and mandates established by Article I, Section 27.

A basic tenet of statutory construction provides that any ambiguous statutory term must be read consistent with the context of the Statute and the Constitution. The use of the State Forests for some general economic benefit by leasing and sale of State Forest mineral resources converts the forest to industrial development and degrades the natural ecosystem through fragmentation, adds pollutants to the air, soil and water, impacts the “natural, scenic, historic and esthetic values” of our State Forests, and degrades and diminishes the corpus of the public trust, all contrary to the public trust provisions of Article I, Section 27, and to DCNR’s duties as trustee thereunder.

## 2. Oil and Gas Leasing Authorized by CNRA Section 302(a)(6)

Under CNRA Section 302(a)(6), 71 P.S. § 1304.302(a)(6), DCNR is “empowered to lease State Forest land for the mining or removal of any valuable minerals ... whenever it shall appear to the satisfaction of the department that it would be for the best interests of this Commonwealth to make such disposition of those minerals.” This statutory language, which was first enacted in 1947 to authorize the then Department of Forest and Waters (DFW) to enter into oil and gas leases, was included in CNRA when it was enacted in 1995. In doing so, this language must now be read consistent with the limitations and protections under Article I, Section 27, as well as with the purpose and mission of DCNR as set forth in CNRA Section 101.

The Commonwealth Court, in the recent decision in *PEDF v. Governor Wolf*, stated: “There is neither a mandate nor an expectation created by [Article I, Section 27] that state-owned

lands or natural resources (e.g. timber, coal, oil, and natural gas) would be leased or sold for reasonable economic development." 108 A.3d at 170. Nor is there any such mandate stated in the purpose and intent of the CNRA.

CNRA Section 302(6) is not a mandate to lease. It provides DCNR with the authority to lease when it decides it is in the best interest of the Commonwealth, but DCNR's decision is limited by its duties under Article I, Section 27. Gas extraction by its very nature is in direct conflict with the stated purposes of Article I, Section 27 and CNRA. Gas extraction requires industrial development, directly converting portions of the State Forest into well pads, compression stations, lined wastewater pits, gas pipelines, new and expanded roads, stream crossings, all reducing the forest habitat and canopy. This industrial development degrades and diminishes our State Forests through cumulative fragmentation of the forest, cumulative loss to plant and animal habitat, and reduction in the natural, scenic historic and esthetic values of the forest. By doing so, this industrial development has a direct negative impact on tourism and the quality of the wilderness experience. It also negatively impacts on DCNR's ability to sustainably manage timber harvesting within the State Forest.

Since, by its very nature, extraction of oil and gas, particularly when drilling involves hydrofracturing, is both degrading and diminishing to the public natural resources of our State Forests, DCNR cannot make the decision to lease without insuring that no such degradation or diminishment occurs and that the constitutional rights of the people are protected. DCNR has no authority to balance the economic use of the State Forest as a revenue source with the constitutional requirement to conserve and maintain the natural resources of our State Forest lands. Article I, Section 25 of the Pennsylvania Constitution precludes any such balance. The State Forest Plan must make this clear.

### 3. The Role of the 1955 Oil and Gas Lease Fund Act

Under CNRA, the DCNR Secretary is authorized to use rents and royalties from oil and gas leases on State Forest lands. This authority that was originally given to the Secretary of the Department of Forest and Waters through Act 256 of 1955, 71 P.S. §§ 1331-1333, commonly referred to as the Oil and Gas Lease Fund Act, after DFW was given the authority to enter into oil and gas leases in 1947. The Oil and Gas Lease Fund Act required that all rents and royalties from oil and gas leases of Commonwealth State Forest land to be placed in a *special fund* to be

used *exclusively* for conservation, recreation, dams, and flood control, and authorized the Secretary of Forest and Waters to determine the need for and location of such projects and to acquire the necessary land. This special fund is the Oil and Gas Lease Fund.

In reauthorizing the use of Oil and Gas Lease Fund by the DCNR Secretary, CNRA ensured that DCNR would have the benefit of these funds when considering whether the lease and sale of oil and gas natural resources on our State Forests would be consistent the constitutional mandates of Article I, Section 27. Nothing in the Oil and Gas Lease Fund Act authorized the Secretary of DFW or DCNR to lease State Forest land for mineral extraction to obtain revenue for general economic benefit to the government or private parties. The Oil and Gas Lease Fund Act establishes exclusive mandates to uses the funds for conservation, recreation, dams and flood control to insure that the impacts from the leases could be fully restored and mitigated.

Under the limitations of Article I, Section 27, DCNR could not continue to lease State Forest land for oil and natural gas extraction without the compensating use of the funds from that lease and sale of those natural resources to maintain, improve and preserve our State Parks, and to assure the long-term health and sustainability of our State Forests. The State Forest Plan must make this clear.

#### 4. DCNR Sale of Timber For Lumber, Wood And Other Forest Products

CNRA Section 313 authorizes DCNR to promulgate rules and regulations not inconsistent with the law to protect the land and resources of State Parks and State Forests. With respect to State Forest, CNRA Section 313(c) provides:

Rules and regulations with respect to State Forests shall be compatible with the purposes for which the State Forests have been created, namely to provide continuous supply of timber, lumber, wood and other forest products, to protect the watersheds, conserve the waters and regulate the flow of rivers and streams of this Commonwealth, and to furnish opportunities for healthful recreation to the public.

The reference in this section to providing a continuous supply of timber, lumber, wood and other forest products as a purpose for which State Forests were created is in conflict with the public trust provisions of Article I, Section 27, the stated purposes of CNRA, and the mission of the DCNR to implement ecosystem management in our State Forests. This language was used when our State Forest system was first created prior to the enactment of CNRA, as well as the adoption

of Article I, Section 27. This language should not be read as creating a purpose inconsistent with DCNR's duties under Article I, Section 27 and Section 101(b) of CNRA, but should be read in a manner that is consistent with those mandates. In other words, DCNR can harvest timber provided that such harvesting can be done consistent with the principles of ecosystem management necessary to conserve and maintain the public natural resources of the State Forest.

**C. DCNR MISSION: 1995 *PENN'S WOODS, SUSTAINING OUR FORESTS***

In 1995, after the passage of the CNRA, DCNR issued its State Forest Strategic Plan and statement of policy, entitled *Penn's Woods-Sustaining Our Forests*, to describe how DCNR would achieve its mandates under CNRA and Article I § 27. The plan provides the basic blueprint for the ecologically sound management of our State Forests into the future and includes the following mission statement:

The mission of the Bureau of Forestry is to ensure the long-term health, viability and productivity of the Commonwealth's forests and to conserve native plants. The Bureau of Forestry will accomplish this 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.

Industrial development is an anathema to retaining the wild character of the State Forest, maintaining its biological diversity, protecting its pure water and habitats for forest plants and animals, and sustaining the quality of its timber. By subjecting our State Forests to 50 years or more of industrial development through the leasing and sale of oil and gas natural resources, and removing DCNR's ability to use the money from such leasing and sale for projects that restore the State Forests from the impacts of the leases, and improve our State Forests and Parks, DCNR cannot achieve environmentally sound utilization of our mineral resources. The State Forest Plan must make this clear.

**D. DCNR OIL AND GAS LEASING IN COMPLIANCE WITH ARTICLE I, SECTION 27, CNRA AND *PENN'S WOOD-SUSTAINING OUR FORESTS***

Since 1995, DCNR has continued to lease State Forest land for gas extraction in compliance with Article I, Section 27, the terms of the CNRA, and the principles in *Penn's*

*Woods-Sustaining Our Forests*. Prior to 2008, DCNR made *environmentally sound decisions* to lease State Forest land for oil and natural gas extraction only when the lease activities would not degrade or diminish the natural resources, and would and did in fact protect and enhance both our State Parks and Forests. The decisions to lease were *based on the specific consideration* that DCNR would have the funds from both leasing and sale of the natural gas and oil for purposes to maintain the natural resources, as well as to help solve problems from past mineral extraction activities, including legacy coal and oil extraction, and to buy land and construct dams and trails and public access areas, and otherwise improve and add to our public natural resources.

In 2014, DCNR published the *Shale Gas Monitoring Report*, which provided a preliminary assessment of known and potential substantial impacts to the State Forest system from recent natural gas extraction from shale formations. The report demonstrates that the rights of the people established under Article I, Section 27 are being impacted by the existing leases; that the statutory duties of DCNR to assure the long term health and sustainability of our State Forests is being threatened; and that the mission and policies established in the *Penn's Woods-Sustaining Our Forests* are not being achieved.

## **II. PEDF PROPOSED AMENDMENTS TO THE STATE FOREST PLAN**

### **A. Amendments to the State Forest Plan Introduction**

#### **1. Inappropriate Focus on Economic Benefits**

The second paragraph of the Introduction of the State Forest Plan discusses the economic benefits of our State Forests stating that selling the timber of the forests provides the timber industry with \$11.5 billion in annual sales; and that the State Forest lands “provide economic benefits to the Commonwealth through leasing for natural gas development, supplying \$100 million in annual revenue from lease agreements and gas royalties.”

The implication of this paragraph is that our State Forests are primarily to be used for the economic benefit of private companies and the State government rather than the people of the Commonwealth. This is contrary to public trust provisions of Article I, Section 27, the mandates of CNRA, and the strategic mission set forth in the *Penn's Wood-Sustaining Our Forests*. DCNR certainly has both social and economic responsibilities under the CNRA, but these responsibilities are not part of the fiduciary responsibilities to conserve and maintain the natural

resources, or to protect the peoples' right to clean air, pure water and the preservation of the natural, scenic, historic and esthetic values of our State Forests, as mandated by Article I, Section 27.

PEDF recommends replacing the second paragraph of the State Forest Plan Introduction with the following:

Pennsylvania's State Forests are public natural resources, and as such are part of the public trust established by Article I, Section 27 of the Pennsylvania Constitution. This constitutional provision, passed overwhelmingly by the people of the Commonwealth in 1971, provides that the public natural resources are owned in common by all the people, including future generations. It further provides that the Commonwealth is required to act as trustee of those public natural resources, including our State Forests, with the specific mandate to conserve and maintain those forests for the benefit of all the people. DCNR, as the Commonwealth agency responsible for the administering our State Forests, is the fiduciary of this public trust, and must insure that the corpus of the trust, our State Forests, are not depleted, degraded or diminished. Article I, Section 27 further mandates that the people have the right to clean air, pure water and the preservation of the natural, scenic, historic and esthetic values of the environment. In carrying out its fiduciary duty to conserve and maintain the public natural resources of our State Forests, DCNR must protect these rights of the people in our State Forests.

## 2. Inappropriate Focus on Multiple Use Management

The first two paragraphs of the second page of the Introduction mostly relate to the concept of "multiple use management" of our State Forests as first articulated in 1970. This concept was superseded, however, in 1971 by amendment of the Pennsylvania Constitution to include Article I, Section 27, which mandates that the public natural resources of our State Forest be conserved and maintained by the Commonwealth through protection of the forest's clean air and pure water, and the preservation of its natural, scenic, historic and esthetic values.

PEDF recommends replacing these paragraphs with the following:

In 1995, the Department of Conservation and Natural Resources (DCNR) was created through the enactment of the Conservation and Natural Resources Act (Act 18 of 1995). The same year, DCNR adopted its strategic plan and statement of policy for management of our State Forests entitled *Penn's Woods-Sustaining Our Forests*. As the short title of Act 18 and the name of the newly established Commonwealth agency articulate, DCNR was created to conserve our natural resources. That was made clear in the first provision of Act 18, which states: "Pennsylvania's public natural resources are to be conserved and maintained for

the use and benefit of all its citizens as guaranteed by section 27 of Article I of the Constitution of Pennsylvania.”

DCNR sets forth its blueprint for the ecologically sound management of our State Forests in the future under the authority of Article I, Section 27 and Act 18 in *Penn's Woods-Sustaining Our Forests*. DCNR establishes the following mission statement in its 1995 strategic plan:

The mission of the Bureau of Forestry is to ensure the long-term health, viability and productivity of the Commonwealth’s forests and to conserve native plants. The Bureau of Forestry will accomplish this 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.

**B. Amendments to the Purpose of the State Forest Plan**

1. Need to Address Current Lease Impacts

The first paragraph of the Purpose section of the State Forest Plan does not accurately describe the problems that need to be dealt with in the plan. The State Forest is not remarkably healthy now. It faces many impacts from industrial development, including fragmentation and pollution of its air, water and soil resources. The principle impacts are from the extraction of oil and gas authorized by State Forest leases. Oil and gas extraction under these leases will pose continuing management challenges for DCNR over the next 50 years and threaten the public trust mandate to conserve and maintain our State Forest under Article I, Section.

PEDF recommends removing the first paragraph under "Purpose of the State Forest Resource Management Plan", except for the first sentence, and adding the following paragraph:

Our state forest land is under unprecedented intrusion and conversion from natural forest to industrial development for the purpose of extracting natural gas and oil. Almost 700,000 acres of state forest land is currently under lease for extraction of natural gas. The new unconventional extraction process requires land use far beyond any previous extraction methods. Although only an estimated 16% of the anticipated development has occurred based on current extraction techniques, the forest has experienced significant impact through direct conversion and fragmentation of the core of the forest. The extent of the cumulative impacts from the total oil and gas development authorized by the

existing leases is unknown. Such development could continue for 50 years or more. DCNR will need to engage in thorough and cutting edge research and monitoring to understand the total extent of the impacts. At the same time, the bureau has lost the use of all the funds from the existing oil and gas leases and sales that had previously been used to deal with the impacts from the leases, as well as to take care of other projects needed to conserve and maintain our state forests and parks.

## 2. Need to Clarify the Role of the State Forest Plan

The third and fourth paragraphs of the Purpose of the State Forest Plan section do not provide a specific context or background of the issues causing impacts to our forests, the existing efforts to deal with those problems, and the management challenges that constrain those efforts. Nor does the draft plan state DCNR's specific goals for its forest managers and department administrators when making management decisions related to State Forest impacts and uses.

PEDF recommends replacing these paragraphs with the following:

The first role of the plan is to clearly describe the status of the state forest as it is today, including delineation of the current impacts to the forest from industrial development for natural gas extraction, and other uses of the public natural resources of the forest; and the management challenges faced by the department and bureau as a result of insufficient funds and personnel. A clear statement of the status of our state forests today is necessary to provide a context and background for future management decisions. Equally important, the plan must provide the people of Pennsylvania with a clear picture of the health of their state forest public natural resources.

The second role of the plan is to provide a framework for conserving, maintaining and restoring the public natural resources of the forest. That framework begins with a summary of methods necessary to assess the impacts to the forests from its current and projected future uses through monitoring, evaluation, and research into new methods and technologies necessary to understand the impacts. The framework also provides a description of the actions necessary to avoid, minimize and mitigate future impacts to the forest and to restore public natural resources degraded by past actions.

## C. Amendments to Planning Foundations

### 1. Legal Authority

The State Forest Plan does not adequately describe the legal authority of Article I, Section 27 of the Pennsylvania Constitution. It merely recites the Amendment with no description of its legal mandates.

PEDF recommends adding the following paragraph:

Our state forests and parks are part of a public trust established by Article I, Section 27. Act 18 designates DCNR as the Commonwealth agency responsible for these public trust assets with a fiduciary duty as a Commonwealth trustee to conserve and maintain them for the benefit of all the people. The management of our state forests must be guided by the purpose of the public trust. The benefits of our state forests that must be conserved and maintained by insuring that the resources are not degraded, diminished or depleted; and the people's right to clean air, pure water, and the preservation of the natural, scenic, historic and esthetic values of the forest are protected.

### 2. Forest Sustainability

Following the first sentence of the first paragraph, the term *sustainability* as used in the phrase forest sustainability is wrongfully defined as a complex idea involving economic, environmental, and social factors. Forest sustainability must relate to the constitutional duty to conserve and maintain the public natural resources of our State Forests for the long term and for future generations. The constitutional mandate to conserve and maintain these public natural resources means that DCNR will not allow the degradation, depletion or diminishment of the diversity of the plant and animal life of the forest through protection of the ecosystem of our State Forests. That means no degradation or diminishment of the soil, water, and air within the forests, or the natural, scenic, historic and esthetic values of our forests. These parameters of sustainability are met through the science of ecosystem management.

Any economic and social goals articulated in CNRA or by DCNR are not derived from the ecological/environmental mandates of Article I, Section 27 and should not be characterized as co-equal with the constitutional mandates of Article I, Section 27. PEDF recommends deleting the definition of Forest Sustainability as a complex idea involving economic, environmental and social factors.

#### **D. Amendments to Resource Management Conflicts**

The State Forest Plan does not provide a clear authoritative basis for managers to rely on to use their professional judgment to resolve potential or actual conflicts in managing resources. The managers, including all levels of management within DCNR, are bound by the limits of their duties as trustees of the public natural resources as stated in Article I, Section 27. Any decision that might or will adversely impact those duties must be avoided. In carrying out the duties of CNRA to insure the long-term health and sustainability of the State Forest, all DCNR managers must follow the scientific principles of ecosystem management established in the 1995 policy, *Penn's Woods, Sustaining Our Forests*, and as specifically outlined in this plan update.

PEDF recommends adding the following language to the Resource Conflict Statement:

In cases where management goals may or will be in conflict, the resolution of the conflict must be based first on DCNR's responsibility to administer the public trust requirements of Article I, Section 27 of the Pennsylvania Constitution. For example, if leasing a tract of state forest land for oil and gas extraction conflicts with the duty to preserve the natural, scenic, historic, or esthetic values of that state forest tract, then DCNR cannot proceed with the leasing. Also, any management decision that would not achieve the ecosystem management standards defined in DCNR's 1995 strategic plan and policy statement, *Penn's Woods, Sustaining Our Forests*, and described in this plan under *Ecosystem and Landscape Management Considerations*, as a result of negative impacts on the forest biodiversity, wildness, or plant and animal habitat, must be avoided.

#### **E. Amendments to Ecosystem and Landscape Management Considerations**

The section of the State Forest Plan describing ecosystem and landscape management considerations comprehensively defines the science of ecosystem management and how it is to be applied to managing our State Forests (pages 11-16). Following that discussion, the plan then describes a major threat to maintaining ecosystem management, global warming, and establishes methods to deal with the impacts. However, the plan fails to deal similarly with the current impacts to the State Forest ecosystem, and DCNR's ability to manage those impacts, from the existing leases for natural gas and oil extraction on our State Forests. The State Forest Plan must address the ecosystem and landscape management considerations associated with this activity.

PEDF recommends adding a subsection entitled *Leasing of State Forest Land for Gas Extraction* to the section on *Ecosystem and Landscape Management Considerations* immediately

following the definitions and before the section dealing with Global Warming, which currently is at page 16 of the State Forest Plan:

### **Leasing of State Forest Land for Gas Extraction**

Gas extraction requires industrial development that directly converts portions of the forest into well pads, compression stations, lined impoundments, gas pipelines, new and expanded roads, stream crossings, and other infrastructure development. This industrial development not only converts areas of the forest, it causes forest fragmentation, and cumulative impacts over the life of the leases to water resources, plant and animal habitat, forest soils, air resources, and other natural, scenic and esthetic resources of the forest.

Of the 2.2 million acres of state forest in Pennsylvania, 1.5 million acres are underlain with significant natural gas deposits in several deep shale formations including the Marcellus, Burket and Genesco black shales, and the Utica. Currently, 675,000 acres or 44% of this 1.5 million acres of state forest land is under lease for unconventional natural extraction from these deposits. DCNR manages the oil and gas lease on 386,000 acres of state forest. Of that acreage, 139,000 acres are under new leases updated to address unconventional gas development, and the remaining 247,000 acres are managed under older oil and gas leases that do not contain the updated provisions. The other 287,000 acres of state forest land subject to development are under private leases, where the mineral rights are privately owned. DCNR generally has limited, if any, control over the surface use of the state forest lands under those leases.

In 2008, DCNR decided to not issue any further leases until studies could be completed and monitoring data collected to determine the impacts of the new unconventional gas development. However, by legislative acts in 2009 and 2010, DCNR was required to lease an additional 65,000 acres for the purpose of generating money for the General Fund.

In 2014, DCNR published the *Shale Gas Monitoring Report* based on preliminary data collected in 2012. DCNR estimated that 3,000 unconventional gas wells will be drilled on the state forest to develop the leased areas. As of 2013, 973 wells were drilled on a total of 226 well pads. Over 8,000 wells have been drilled in the Marcellus region of Pennsylvania, with many of those wells located adjacent to state forest land. DCNR established a monitoring program to evaluate the impacts from the existing state forest leased areas and reported on known and potential impacts to water, wildlife, plants, invasive species, compliance incidents, air, land use, soils, revenue, recreation, local communities, forest health, timber products, and infrastructure.

## **Developing Management Strategies For Gas Extraction Impacts**

[Summarize data results obtained for each area in a chart similar to chart at page 18 of the State Forest Plan; and summarize the goals and management strategies for gas extraction impacts.]

### **F. Amendments Related to DCNR's Need for Oil and Gas Lease Funds**

DCNR has lost the use of all royalty money from the existing 365,000 acres of State Forest land currently under lease. These funds are needed for dealing with the impacts to our State Forests and Parks of gas extraction, including the costs of studying and evaluating the impacts, and, determining how to minimize, mitigate and restore those impacts. DCNR also needs these funds to restore and enhance our State Forest and Parks by finding and plugging abandoned oil and gas wells, reclaiming abandoned coal operations and treating acid mine discharges, and constructing a backlog of existing infrastructure projects, including repairing and replacing dams, upgrading sewage treatment facilities, and improving recreational facilities. DCNR also need these funds to protect the integrity of State Forests and Parks by acquiring subsurface oil and gas rights beneath sensitive natural resources to avoid further impact.

PEDF recommends adding the following paragraphs to the State Forest Plan:

#### **Impacts from Loss of Oil and Gas Lease Funds Since 2008**

Since the passage of the Oil and Gas Lease Fund Act in 1955, all funds from the lease and sale of natural gas on state forest land has been deposited into a special fund named the Oil and Gas Lease Fund. All the money from this fund is required by this act to be used exclusively for conservation, recreation, dam and flood control projects, and for the purchase of addition land for those purposes.

From 2008 to 2010, DCNR held three separate oil and gas lease sales targeted at unconventional shale gas development that resulted in the leasing of approximately 139,000 acres of state forest land. The leases resulted in initial rental payments of approximately \$413 million dollars. Through Appropriation Acts and amendments to the Fiscal Code, \$383 million was transferred to the General Fund to pay for general government spending. The General Assembly also removed DCNR's ability to use royalty payments from existing state forest leases for project on State Parks and Forests through a Fiscal Code amendment and now requires annual appropriation of these funds by the General Assembly.

The loss of the ability to use the Oil and Gas Lease Fund for State Park and Forest projects has left DCNR without adequate funding to meet its constitutional and

statutory mandates to conserve and maintain the public natural resources of the State Parks and Forests.

[Develop a chart on each of the areas the Oil and Gas Lease Funds are needed, including:

- Infrastructure project backlogs, *i.e.*, repair and replacement of dams, identifying and plugging abandoned oil well, reclaim abandoned coal mine land and treating acid mine discharges, etc.;
- Protection from surface impacts on severed rights State Forest and Parks lands;
- Eminent domain to require surface use agreements; mitigation through land purchases;
- Immediate and long term studies and evaluations to minimize and mitigate surface impacts;
- Further development of conservation landscape initiatives.]

#### **G. Amendments to Wild Character**

PEDF recommends including the following statement at the beginning of the State Forest Plan section on Wild Character:

DCNR has the duty to conserve and maintain the wildness or the wild character of our state forests is under Article I, Section 27 of the Pennsylvania Constitution. By protecting the wild character of the state forest, DCNR ensures that the people's constitutional right "to clean air, pure water, and to the preservation the natural, scenic, historic and esthetic values" of the state forest is achieved. Each of these values should be defined based on the scientific principles of ecosystem management. For instance, in order to preserve the natural, scenic and esthetic values of the state forest, DCNR must design the state forest road system that provides a level of public access appropriate to ensure protection of sensitive natural resources such as old growth forests, habitat for rare, threatened and endangered species, and geologic features such as waterfalls, rock outcrops, and scenic overlooks.

#### **H. Amendments to Recreation**

PEDF recommends including the following statement at the beginning of the State Forest Plan section on Recreation:

While DCNR's mission includes managing the state forests for public recreation, DCNR must provide for recreation consistent with its constitutional duty to conserve and maintain the public natural resources of the state forest. DCNR

accomplishes this mandate by providing for low density recreation that allows people to enjoy the clean air, pure water and natural, scenic, historic and esthetic values of the state forests without diminishing the forests wildness, natural habitat for plants and animals, or its water, air, soil and geologic resources under the scientific principles of ecosystem management.

**I. Amendments to Land Inventories, Delineations, Classifications, and Designations**

The land inventories, delineations, classifications and designations described in the State Forest Plan are critical to DCNR's successful implementation of its duties under Article I, Section 27, and must be performed consistent with those duties. The law does not mandate the use or designation of areas of the State Forest for commercial activities such as harvesting timber or mineral extraction and these commercial uses can only be authorized consistent with DCNR's constitutional duties, *i.e.*, to conserve and maintain the public natural resources of the State Forest, and to protect the rights of the people to the clean air, pure water, and the preservation of the natural, scenic, historic and esthetic values of the State Forest. To carry out its fiduciary duty to protect the public natural resources of the State Forest, DCNR must assess potential impacts to the air, water, and natural, scenic, historic and esthetic values of the State Forest prior to designating or classifying any State Forest land for commercial use.

At a minimum, PEDF recommends adding the following statement to the beginning of this section of the State Forest Plan:

As a trustee of the public natural resources of the state forests under Article I, Section 27 of the Pennsylvania Constitution, DCNR must conduct inventories, delineations, classifications and designations of state forest land consistent with its duty to conserve and maintain the people's right to the clean air, pure water, and the preservation of the natural, scenic, historic and esthetic values of the state forest.

**J. Amendment to Timber Sale Planning**

The State Forest Plan must clearly state that commercial timber sales will be planned consistent with DCNR's duties under Article I, Section 27 of the Pennsylvania Constitution.

At a minimum, PEDF recommends adding the following sentence to the section of the State Forest Plan discussing Timber Sale Planning:

When planning for timber sales, DCNR must evaluate the potential impact on the public natural resources of the state forest to comply with its duties under Article

I, Section 27 of the Pennsylvania Constitution. To avoid any diminution, depletion or degradation of the public natural resources of the state forest, DCNR must plan timber sales in a manner that protects the clean air and pure water of the state forests, and preserves their natural, scenic, historic and esthetic values.

#### **K. Amendments to Timber and Forest Products**

For the reasons discussed above, the statement in the State Forest Plan (page 60) that one of the purposes of the Conservation and Natural Resources Act is “to provide a continuous supply of timber, lumber, wood and other forest products ...” is incorrect and should be deleted. The purposes of CNRA are specifically stated in Section 101 and DCNR's reliance on language in CNRA Section 313(c), which relates to DCNR's establishment of State Forest rules and regulations, as a statement of purpose is inappropriate. CNRA Section 313(c) states:

Rules and regulations with respect to State Forests shall be compatible with the purposes for which the State Forests have been created, namely to provide continuous supply of timber, lumber, wood and other forests products, to protect the watersheds, conserve the waters and regulate the flow of rivers and streams of this Commonwealth, and to furnish opportunities for healthful recreation to the public.

Section 313(c) was not new language, but was language carried forward from prior legislation giving the Environmental Quality Board authority to formulate, adopt and promulgate rules and regulations for the Department of Environmental Resources (see Section 1920-A(g) of the Administrative Code of 1929, which was enacted in 1970).

CNRA Section 101 provides the General Assembly's findings and statement of purpose related to its enactment of CNRA in 1995. The General Assembly expressly finds that Pennsylvania's State Forests and Parks are public natural resources to be conserved and maintained under Article I, Section 27 of the Pennsylvania Constitution. Further, the General Assembly states that its purpose in enacting CNRA is to establish DCNR 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 General Assembly further states that DCNR's mission with respect to management of our State Forests is to "assure their long-term health, sustainability and economic use."

The carryover of rulemaking language in Section 313(c) from prior legislation should not be read to mandate timber harvesting. This section must be read in light of the public trust provisions of Article I Section 27 adopted in 1971, and the General Assembly's findings and statement of purpose in 1995 when it enacted CNRA. DCNR itself has interpreted its mission under CNRA with respect to the management of our State Forests to require the application of the scientific principles of ecosystem management (see *Penn's Woods, Sustaining Our Forests*). To state that one of DNCR's statutory purposes is to provide a continuous supply of timber, lumber and other forest products misstates the CNRA and the principles that govern management of our State Forest.

PEDF recommends adding the following statement to the State Forest Plan section related to Timber and Forest Products:

The trees of the state forests are the renewable natural resource central to the ecological health and sustainability of these public lands. Prior to the sale of any trees from the state forest for timber or other forest products, DCNR must assess the potential impact of the sale on the Commonwealth's trustee duties under Article I, Section 27 of the Pennsylvania Constitution. Specifically, DCNR has the fiduciary duty to ensure that the sale will not result in the degradation, diminution or depletion of the public natural resources of the state forest, including the clean air and pure waters of the state forest, and its natural, scenic, historic and esthetic values. DCNR will assess the impacts of proposed timber harvesting using the principles of ecosystem management described in its strategic plan and statement of policy for the management of the state forest, *Penn's Wood, Sustaining Our Forest*.

#### **L. Amendment to Geologic Resource Extraction**

The section of the State Forest Plan discussing Geologic Resource Extraction (page 130) states: “The economic use and sound extraction and utilization of geologic resources [*e.g.*, oil and gas] is part of the bureau’s mission in managing these [State Forest] lands.” Extraction and economic utilization of natural gas on State Forest lands is not part of the mission of DCNR or the bureau and this statement should be deleted. While prior authority to lease State Forest and Park land for oil and gas extraction was reestablished in DCNR under the Conservation and Natural Resources Act, that authority is not an agency mission and can only occur in limited circumstances, namely when such extraction can be undertaken consistent with the

Commonwealth's duties to conserve and maintain our State Parks and Forests and to protect the people's rights under Article I, Section 27 of the Pennsylvania Constitution.

Extraction of oil and gas, particularly utilizing unconventional techniques, causes immediate and long term impacts on the surface of our State Forests and Parks. As trustee of these public natural resources, DCNR cannot authorize such impacts without insuring that the ecological values of State Forests and Parks are conserved and maintained. Prior to 2008, DCNR insured that all leases for oil and gas extraction entered into were protected by the statutory obligation that all funds from those leases were controlled by DCNR to insure that the ecological values of the forests and parks were not only maintained, but improved. That statutory obligation has been changed by Section 1602-E of the Fiscal Code, so that only the General Assembly can determine how to use the funds from the oil and gas leases. Without control of those funds, DCNR cannot ensure that the duties as trustee of those resources are met.

In 2009, and again in 2010, DCNR made the decision that no further leases could be entered into until DCNR could determine the impacts on our State Forests from the existing leases, as well as from the privately held leases on State Forest land, and on lands adjacent to the State Forests. That process has just begun, as reflected in the 2014 Shale Gas Monitoring Report.

The State Forest Plan should reflect these realities, and should provide a clear outline on how DCNR can and will consider being able to enter into any additional leases of State Forest land for gas extraction. PEDF recommends that the first paragraph of the section entitled "Geologic Resource Extraction" of the State Forest Plan be deleted, and the following language be added:

Currently, Executive Order 2015-03 prohibits DCNR from entering into further leases of state forest land for oil and gas extraction. DCNR made the decision not to enter into any additional oil and gas leases in early 2009 based on the existing acreage of state forest land subject to the new unconventional gas extraction activities. After DCNR executed the oil and gas leases for the additional 74,000 acres of state forest land offered in the 2008 lease sale, DCNR realized that over 600,000 acres of state forest land would be open for unconventional natural gas extraction. With the growing awareness of the significant impacts to the surface of the land from unconventional drilling, DCNR recognized a very real threat to the integrity of the ecological values of the state forest.

In 2009-2010, DCNR began a major effort to understand the impacts to the state forest from unconventional natural gas development by seeking approval to hire additional staff to study, identify and monitor the existing and potential impacts. In 2014, DCNR issued a detailed report, the *Shale-Gas Monitoring Report*, which provided preliminary data on

the extent of the impacts from unconventional natural gas development on the state forest. These monitoring and evaluation activities are continuing. As of the date of the 2014 report, DCNR estimated that only 16% of the potential development under the existing oil and gas leases had occurred.

Although DCNR planned to use the rents and royalties from the state forest oil and gas leases to continue to fund conservation and recreation projects on the state forests and parks as it had done since 1955, including funding of its shale gas monitoring project, DCNR lost control over all these funds in 2009 when the General Assembly amended the Fiscal Code.

Based on the Commonwealth's duty as trustee of the state forests and parks under Article I, Section 27 of the Pennsylvania Constitution, DCNR cannot recommend that Executive Order 2015-03 be modified to allow any new leasing of state forest land for oil and gas extraction until it evaluates the cumulative impacts from the existing leases and determines the measures necessary to restore the state forests and parks from those impacts. DCNR must also evaluate the consequences of the loss of the revenue from the oil and gas leasing for conservation and recreation projects necessary to restore and enhance the state forests and parks to mitigate impacts from leasing. Such projects are essential to achieve the Commonwealth's constitutional mandate to conserve and maintain the public natural resources of the state forest and parks for the people, including future generations, as well as the mandate to protect the people's right to the clean air and pure water of their state forests and parks, and their right to the preservation of their natural, scenic, historic and esthetic values.