

COMMONWEALTH COURT OF PENNSYLVANIA

PENNSYLVANIA ENVIRONMENTAL	:	
DEFENSE FOUNDATION,	:	
Petitioner	:	
	:	No. 228 M.D. 2012
v.	:	
	:	
TOM CORBETT, GOVERNOR;	:	
COMMONWEALTH OF	:	
PENNSYLVANIA,	:	
Respondent	:	

**PETITIONER’S BRIEF IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT**

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STATEMENT OF JURISDICTION

The Commonwealth Court has original jurisdiction over this action pursuant to 42 Pa. C.S. § 7531 *et seq.* because this action has been filed against the Commonwealth and the Governor acting in his official capacity.

SCOPE AND STANDARD OF REVIEW

The standard for summary judgment, including in declaratory judgment actions, is that summary judgment is appropriate where, “the record clearly shows that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.” *Certain Underwriters at Lloyds v. Hogan*, 852 A.2d 352, 354 (Pa. Super. 2004), citing *Harleysville Insurance Companies v. Aetna Casualty and Surety Co.*, 568 Pa. 255, 795 A.2d 383, 385 (2002). *See also* Pa. R.C.P. 1035.1, 1035.2.

When considering a motion for summary judgment a material fact is one whose resolution could affect the outcome of the case under the governing law...”. *Strine v. Commonwealth*, 586 Pa. 395, 894 A.2d 733, 737 (2006).

STATEMENT OF THE QUESTIONS INVOLVED

Question (1). Are Respondents duties when making a decision or taking an action which will or may impact State Forest or Parks defined by the terms of the Article I § 27 as well as the Conservation and Natural Resources Act?

Suggested Answer: Yes

(a). Do the Respondents duties under Article I § 27 include the affirmative duty to conserve and maintain the public natural resources of our State Forests and Parks for the benefit of people, and to protect the peoples' rights established by Article I § 27?

Suggested Answer: Yes

(b). Do the Respondents duties under Article I § 27 include the obligation to consult with the Department of Conservation and Natural Resources before making any decision or taking any action which will or might impact the natural resources on State Forests or Parks?

Suggested Answer: Yes

(c). Do the Respondents duties under Article I § 27 include the obligation to consult with the people whose uses and rights to the natural resources on State Forests or Parks may be impacted before making any decision or taking any action which may impact these public natural resources?

Suggested Answer: Yes

Question (2). Does extracting natural gas on State Forest lands cause immediate and long term negative impacts to the public natural resources of our State Forests?

Suggested Answer: Yes

Question (3). Does extracting natural gas on State Park lands cause immediate and long term negative impacts to the public natural resources of our State Parks and to the peoples' benefits, uses and rights thereto?

Suggested Answer: Yes

Question (4). Does the Conservation and Natural Resources Act create a statutory structure to allow DCNR to continue to lease State Forest land for mineral extraction under the limits of Article I § 27 by continuing the requirement to deposit the rents and royalties from the leasing into a special fund, the Oil and Gas Lease Fund, to be used for the exclusive purposes in the Oil and Gas Lease Fund Act to mitigate the impacts from the leasing?

Suggested Answer: Yes

Question (5). Is the Oil and Gas Lease Fund a de facto trust fund under the public trust established in Article I § 27?

Suggested Answer: Yes

Question (6). Did the Governor violate Article I §27 and his duty as trustee thereunder by making the decision in his FY 2009-10 and FY 2010-11 Executive Budgets to transfer the money received from the lease of 139,000 acres of State Forest land to the General Fund, and by signing the Appropriations Acts and Fiscal Code amendments that required the transfer of \$383 million from the Oil and Gas Lease Fund to the General Fund?

Suggested Answer: Yes

Question (7). Did the Governor violate Article I § 27 and his duties as trustee thereunder by making the decision to and requiring DCNR to lease additional State Forest land in 2009 and 2010 for the purpose of obtaining money for the General Fund ?

Suggested Answer: Yes

Question (8). Can the Governor require the sale of State Forest public natural resources to generate revenue for the General Fund and DCNR's operating expenses in violation of Article I § 27 in order to achieve the constitutional mandate to propose a balanced budget?

Suggested Answer: No

Question (9). Did the Governor consider the reasonable multiple uses of the State Forest public natural resources and the interests of the beneficiaries of these trust resources in his decision to divert money from the Oil and Gas Lease Fund to the General Fund and to require the leasing of more State Forest land as justified by reasonable economic development to increase the general welfare and prosperity of the people?

Suggested Answer: No

Question (10). Do the 2009 amendments to the Fiscal Code, titled Oil and Gas, Article XVI-E, 72 P.S. §§ 1602-E – 1605-E, violate Article I § 27?

Suggested Answer: Yes

Question (11). Did the Governor, in approving and signing into law §§ 1602-E through 1605-E of the Fiscal Code, violate Article I § 27, and his duties thereunder?

Suggested Answer: Yes

Question (12). Do the transfers from the Oil and Gas Lease Fund to the General Fund in 2009 and 2010 violate the Oil and Gas Lease Fund Act and Section 1602-E of the Fiscal Code?

Suggested Answer: Yes

Question (13). Did the Governor violate Article I § 27 and his duties thereunder by requiring DCNR to use Oil and Gas Lease Fund revenue instead of General Fund revenue for operating and administrative expenses (*e.g.*, salaries, fees, travel expenses, etc.) not directly related to conserving and maintaining the public natural resources?

Suggested Answer: Yes

Question (14). Did the Governor violate Article I §27 and his duties thereunder by approving the provisions of Act 13 of 2012 that amend the Oil and Gas Lease Fund Act and require that \$50 million to be taken from the Oil and Gas Lease Fund and transferred to the Marcellus Legacy Fund and authorized the Commonwealth Financing Authority to administer grants for conservation and recreation projects?

Suggested Answer: Yes

Question (15). Is the harm to the rights of Petitioner's members sufficient to give Petitioner standing to bring this action?

Suggested Answer: Yes

STATEMENT OF THE CASE

The Pennsylvania Environmental Defense Foundation ("Petitioner") filed this Petition for Review in the nature of a Complaint for Declaratory Judgment in this Court's original jurisdiction pursuant to the Declaratory Judgment Act, 42 Pa. C.S. §§ 7531 *et seq.*, to request this Court to declare the rights of the Petitioner and its members and Article I, Section 27 the responsibilities of the Respondents under of the Pennsylvania Constitution ("Article I § 27") regarding leasing State Forest and Park Lands for the development of natural gas and oil, and the use of the funds received from those leases.

Petitioner first filed its Petition for Review in this matter on March 6, 2012. In response to preliminary objections filed on March 30, 2012, Petitioner filed an Amended Petition on April 30, 2012 in order to remove the Secretary of the Budget and the State Treasurer as Respondents.

The remaining Respondents (the Commonwealth of Pennsylvania and the Governor) again filed preliminary objections to the amended petition. The preliminary objections were fully briefed, and were denied by this Court in a Memorandum Opinion prepared and filed by Judge Simpson January 22, 2013.

The Republican Caucuses of both the House and Senate of the Pennsylvania General Assembly filed a Petition to Intervene. After a hearing held by the Court, the Petition to Intervene was denied as to allegations under Article I § 27, but was

granted as to allegations under Article III, Sections 3 and 11 of the Pennsylvania Constitution.

After initial discovery, Petitioner filed the Second Amended Petition on December 30, 2013 alleging specific violations of the Governor's duties as fiduciary trustee under Article I § 27, as well as violation of the rights of Petitioner's members thereunder. Petitioner also added 11 affidavits of its members and member groups in support of its standing to bring this action. Further, Petitioner removed allegations under Article III, Sections 3 and 11 of the Pennsylvania Constitution. After motion by the Petitioner, this Court rescinded the Republican Caucuses' limited intervention.

The Respondents Commonwealth of Pennsylvania and Governor of Pennsylvania answered the Petition on February 12, 2014, along with the allegation of new matter. The Petitioner responded to the new matter on March 4, 2014. On February 20, 2014, Petitioner filed a request to file an addendum to the Petition adding allegations of continuing Article I § 27 violations by the Respondent Governor by requiring DCNR to lease additional State Forest and Park land for natural gas extraction. In the addendum, Petitioner believes and avers that the Department of Conservation and Natural Resources ("DCNR") can at any time lease the land and commit the removal of the natural gas, each to the detriment of the Petitioner and its members. This Court granted Petitioner's request to file the

addendum on March 18, 2014, and the Respondents' answered Petitioner's additional allegations on April 18, 2014.

SUMMARY OF ARGUMENT

This case is about the Commonwealth of Pennsylvania and its Governor taking a series of actions which have caused and continue to cause harm to Pennsylvania's State Forests and Parks and to the constitutional rights of Petitioner's members. The actions entail requiring leasing of State Forest land and requiring the funds from the leasing to be transferred from the Department of Environmental Resources Oil and Gas Lease Fund to the General Fund and to the Marcellus Legacy Fund. The Petitioner believes that the Respondents have violated Article I § 27 by taking these actions and that the Governor has violated his duties as trustee of those public natural resources under Article I § 27, and has violated the rights of the people of Pennsylvania as well.

The actions of the Respondents came about with the convergence of a budget crisis for the State (along with a financial crisis for the nation) beginning in 2007 and 2008, an increase in the price for natural gas, and the development of a new technology to successfully extract natural gas from shale formations.

Pennsylvania has approximately 2.2 million acres of State Forest land, much of which is located in the north-central and southwestern portions of the State

where large volumes of natural gas are trapped in the geologic formation known as the Marcellus Shale Region.

The Commonwealth has leased State Forest land for the extraction of natural gas and oil since approximately 1947 through DCNR and its predecessors. Under the Oil and Gas Lease Fund Act established in 1955, the rents and royalties obtained from these leases have been used to mitigate the harm caused by the leasing and gas extraction on the State Forests, to purchase new and expand existing State Parks and Forest lands, and to build dams and recreation areas on these lands to improve conservation, recreation and flood control. Prior to the leasing for Marcellus Shale gas extraction in 2008, the Oil and Gas Lease Fund was receiving approximately 3-4 million dollars annually for these purposes.

Up to 2008, more than 565,000 acres of the 2.2 million acres of State Forest were under active leases for oil and gas development. More than 250,000 acres were under leases managed by DCNR, mostly in the Pennsylvania Wilds conservation landscape initiative (CLI) area. But only 550 wells had been drilled on this land prior to 2008, over 90% of which were shallow conventional gas wells.

The oil and gas development on the remaining 315,000 acres of State Forest under active leases is being conducted through private oil and gas leases because

the Commonwealth does not own the subsurface oil and gas rights on these State Forest lands.

In 1971, the Pennsylvania Constitution was amended to include Article I § 27, after being passed twice by the General Assembly and approved overwhelmingly by the people of Pennsylvania. Article I § 27 has two parts. The first sentence establishes the basic rights of the people of the Commonwealth to clean air, pure water, and the preservation of the natural, scenic, historic and esthetic values of the environment. The second part identifies Pennsylvania's public natural resources, which includes State Parks and Forests, as the common property of the people of Pennsylvania, and imposes on the Commonwealth the duty as trustee to conserve and maintain those public natural resources for the benefit of all the people of Pennsylvania, including future generations.

The Governor, as the chief executive for the Commonwealth, is a trustee under Article I § 27. The Governor therefore has the fiduciary duty to conserve and protect the public natural resources, including Pennsylvania's State Forests and Parks, for the benefit of all the people of the Commonwealth, both now and for future generations. He also has the duty to protect and preserve the peoples' rights enumerated in Article I § 27, the right to clean air, pure water the preservation of the natural, scenic, historic and esthetic values of those resources

To carry out his fiduciary duty, the Governor has an obligation, prior to making any decisions or taking any actions associated with those public natural resources, to assess the harm or negative impacts that may result to those resources, and to assess the consequences of such harm or impact on the people's proprietary right to use those resources, The Governor also has the obligation to assess how the rights of the people established by Article I § 27 are or will be impacted.

In 1995 the Department of Conservation and Natural Resources (DCNR) was established under the Conservation and Natural Resources Act (CNRA) as the Commonwealth agency responsible for the management of Pennsylvania's State Parks and State Forests. Under CNRA the authority to continue to lease State Forest land for gas extraction and the authority to administer the Oil and Gas Lease Fund was reauthorized to DCNR with the specific mandate to carry out its responsibilities under Article I, § 27.

In 2008, DCNR made the decision to lease additional State Forest land for natural gas extraction from the Marcellus Shale Region in response to pressure from the industry and the General Assembly.

This leasing generated an unprecedented amount of money for the Oil and Gas Lease Fun. Under the Oil and Gas Lease Fund Act all revenue from leasing State Forest lands for gas extraction must go into that fund.

DCNR planned to use the funds from the 2008 lease to address a large backlog of projects for State Parks and State Forests. Some of those projects included buying up private subsurface rights under State land to protect the integrity of the land, buying additional land that are private inholdings on State Parks and Forests, and buffers, replacing and restoring dams and recreation areas.

However, the Governor issued an executive budget in February 2009 that proposed to divert most of the money in the Oil and Gas Lease Fund generated by the 2008 leasing to the General Fund for the purpose of lowering the budget deficit for the year. Prior to the proposed budget the Governor had “placed a freeze” on the revenue generated from the lease.

Despite grave concerns that DCNR communicated to the Governor about additional leasing of State Forest land for shale gas extraction given the unknown impacts from this activity, and taking the money that DCNR needed to deal with the leases, the Governor not only directed DCNR to turn over \$143,000,000 from the 2008 lease but also to lease more State Forest to raise the \$60,000,000 needed for the fiscal year 2009-2010 budget. In addition, he directed DCNR to lease more State Forest for the next budget. In February 2010, the Governor issued his executive budget for fiscal year 2010-2011 and proposed diverting another \$180,000,000 from the Oil and Gas Lease Fund to the General Fund. To meet these demands for the \$240,000,000, for the General Fund, DCNR was required to lease

an additional 65,000 acres of State Forest land for shale gas extraction. Between 2008 and 2010 DCNR had to turn over \$383,000,000 from the Oil and Gas Lease Fund.

To justify the decision to lease State Forests for obtaining more revenue for the General Fund and to overcome the special and exclusive nature of the purposes of the Oil and Gas lease fund, and to take the authority away from DCNR to allocate the funds, the Governor signed into law the Amendments to the Fiscal Code in 2009. These amendments give the General Assembly control over the appropriation of the funds, and not DCNR.

Finally, in response to DCNR's mounting protests over additional leasing, the Governor issued Executive Order 2010-05 in October 2010 placing a moratorium on leasing. However, the newly elected Governor, Tom Corbett, stated his intention to rescind this moratorium. Although he did not do so and no additional leasing has occurred since 2010, the Governor issued an executive budget in February 2014 that requires DCNR to lease additional State Forest land to generate \$75,000,000 for the Oil and Gas Lease Fund so that money can be diverted to the General Fund.

In addition, the Governor has taken other actions during the past several years that have diverted and used money from the Oil and Gas Lease Fund for purposes other than assessing and mitigating the harm from gas extraction activity.

The Governor's proposed executive budgets for fiscal years 2011-2012, 2012-2013 and 2013-1014 have continually decreased DCNR's allocation of General Fund revenue for its administrative and operating expenses and forced DCNR to use money from the Oil and Gas Lease Fund for these expenses. In addition, the Governor approved Act 13 of 2012, which diverts more money from the Oil and Gas Lease Fund and further diminishes DCNR's ability to carry out its mandates under the Conservation and Natural Resources Act and Article I § 27.

The actions taken by the Commonwealth and the Governor since 2008 directing DCNR to lease State Forest land without any assessment of the harm or the impact on the people's ability to use and enjoy these public natural resources, by diverting revenue derived from these public trust assets to be used for purposes other than protection of the impacted public natural resources, and by undermining DCNR's ability to carry out its mandates violate Article I § 27, violate his duties thereunder, and violate the constitutional rights of the People of the Commonwealth.

ARGUMENT

FOUNDATIONAL PRINCIPLES OF ARTICLE I § 27 RELEVANT TO THE DECLARATION OF DUTIES AND RIGHTS, AND VIOLATIONS OF THOSE DUTIES AND RIGHTS

The Pennsylvania Supreme Court in the recent plurality opinion in *Robinson Twp. v. Commonwealth*, 83 A.3d 901 (Pa. 2013), articulated numerous foundational principles of Article I § 27 that are relevant in determining a violation of the duties and rights of this constitutional provision. These principles include:

Ours is a government in which the people have delegated general powers to the General Assembly, but with the express exception of certain fundamental rights reserved to the people in Article I of our Constitution. *Id.* at 947; *see* Pa. CONST. art. I § 25 (“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 first section of Article I affirms, among other things, that all citizens have certain inherent and inalienable rights. Among the inherent rights of the people of Pennsylvania are those enumerated in Section 27, the Environmental Rights Amendment. *Id.* at 948.

A legal challenge pursuant to Section 27 may proceed upon alternate theories that either the government has infringed upon citizen’s rights or the government has failed in its trustee obligations, or upon both theories. *Id.* at 950.

“According to the plain language of Section 27, the provision establishes two separate rights in the people of the Commonwealth. The first -- in the initial, prohibitory clause of Section 27 -- is the declared 'right' of citizens to clean air and pure water, and to the preservation of natural, scenic, historic and esthetic values of the environment. This clause affirms a limitation on the state's power to act contrary to this right.” *Id.* at 951.

“Clause one of Section 27 requires each branch of government to consider in advance of proceeding the environmental effect of any proposed action on the constitutionally protected features. The failure to obtain information regarding environmental effects does not excuse the constitutional obligation because the obligation exists *a priori* to any statute purporting to create a cause of action.” *Id.* at 952.

"The right delineated in the first clause of *Section 27* presumptively is on par with, and enforceable to the same extent as, any other right to the people in Article I." *Id.* at 953-954. "The parity between constitutional provisions may serve to limit the extent to which constitutional environmental rights may be asserted against the government is such rights are perceived as potentially competing with, for example, property rights as guaranteed in [*Article I,*] *Sections 1, 9, and 10.*" *Id.* at 954.

“But to achieve recognition of the environmental rights enumerated in the first clause of *Section 27* as 'inviolable' necessarily implies that economic development cannot take place at the expense of an unreasonable degradation of the environment.” *Id.*

“The second right reserved by Section 27 is the common ownership of the people, including future generations, of Pennsylvania’s public natural resources.” *Id.* “At present the concept of public natural resources includes not only state-owned lands, waterways, and mineral reserves, but also resources that implicate the public interest, such as ambient air, surface and ground water, wild flora, and fauna (including fish) that are outside the scope of purely private property.” *Id.* at 955.

“The [third clause of Section 27] provision establishes the public trust doctrine with respect to these public natural resources (the corpus of the trust), and designates 'the Commonwealth' as trustee and the people as named beneficiaries. *Id.* at 956.

“The terms of the trust are construed according to the intent of the settlor, which in this instance, is 'the people.'” *Id.*

“Trust' and 'trustee' are terms of art that carried legal implications well developed at Pennsylvania law at the time the amendment was adopted.” *Id.* “As

trustee the Commonwealth is a fiduciary obligated to comply with the terms of the trust and with standards governing a fiduciary's conduct." *Id* at 957.

"The explicit terms of the trust require the government to "conserve and maintain" the corpus of the trust. The plain meaning of the terms conserve and maintain implicates the duty to prevent and remedy the degradation, diminution, or depletion of our public natural resources." *Id*.

"As a fiduciary the Commonwealth has the duty to act toward the corpus of the trust with prudence, loyalty and impartiality. As trustee [the Commonwealth] has the duty of loyalty to administer the trust solely in the beneficiary's interest, and not his own." *Id.* at 957.

"The third clause of Section 27 establishes the Commonwealth's duties with respect to Pennsylvania's commonly owned public natural resources, which are both negative, i.e. prohibitory, and affirmative, implicating enactment of legislation." *Id.* at 955. (In fact, the General Assembly did provide affirmative legislation with regard to the public natural resources with the enactment of the Conservation and Natural Resources Act of 1995.)

"As trustee, the Commonwealth has a duty to refrain from permitting or encouraging the degradation, diminution, or depletion of public natural resources, whether such degradation, diminution, or depletion would occur through direct state action or indirectly, *e.g.*, because of the state's failure to restrain the actions of

private parties. In this sense, the third clause of the Environmental Rights Amendment is complete because it establishes broad but concrete substantive parameters within which the Commonwealth may act. Compare *PA. I, § 27* with, e.g., *PA. CONST. art. I, § 28*. This Court perceives no impediment to citizen beneficiaries enforcing the constitutional prohibition in accordance with established principles of judicial review." *Id.* at 957.

“Within the public trust paradigm of *Section 27* the beneficiaries of the trust are 'all the people' of Pennsylvania, including generations yet to come. The trust's beneficiary designation has two obvious implications: first, the trustee has an obligation to deal impartially with all beneficiaries; and second, the trustee has an obligation to balance the interests of present and future beneficiaries. *Id.* at 959.

“The Environmental Amendment offers protection equally against actions with immediate severe impact on public natural resources and against actions with minimal or insignificant present consequences that are actually or likely to have significant or irreversible effects in the short or long term.” *Id.*

PETITIONER'S CLAIMS

I.A. Respondents' Duties when Making a Decision or Taking an Action that can Impact State Forest or Parks are Defined by Article I § 27 and the Conservation and Natural Resources Act, and include the Affirmative Duty to Conserve and Maintain the Public Natural Resources of our State Forests and Parks for the Benefit of People, and to Protect the Peoples' Rights Established by Article I § 27.

Article I § 27 of the Pennsylvania Constitution states:

“The people have a right to clean air, pure water, and 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, the Commonwealth shall conserve and maintain them for the benefit of all the people.”

The Pennsylvania Supreme Court has clearly established that the Commonwealth is the active trustee under Article I §27. In the case of *Payne v. Kassab*, 468 Pa. 226, 361 A.2d 263 (1976), the Supreme Court stated:

“There can be no question that the Amendment itself declares and creates a public trust of public natural resources for the benefit of all the people, (including 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. The Amendment does so by its own, *Ipse dixit.*”¹

¹ It is settled rule of constitutional construction that prohibitive and restrictive provisions are self-executing and may be enforced by the courts independently of any legislative action.” *Logan v Hiltner*, 307 Pa. 343, 161 A. 323,325 (1932). See also *Washingtonian Homes of Chicago v. City of Chicago*, 157 Ill. 414, 41 N.E. 893,896 (Ill. 1859).

This statement in *Payne* is supported by the legislative history of Article I § 27. Franklin Kury, the primary sponsor of the Amendment, stated in the legislative record:

“The first sentence of this constitutional amendment grants to the people a clearly enforceable constitutional right to: (1) clean air and pure waters, and (2) preservation of the natural, scenic, historic and esthetic values of the environment.

In addition, the second and third sentences of the amendment spell out the common property right of all the people, including generations yet to come, in Pennsylvania’s public natural resources. As trustee of these resources, the Commonwealth through all agencies and branches of government, is required to conserve and maintain them for the benefit of all the people. This trusteeship applies to resources owned by the Commonwealth and also to those resources not owned by the Commonwealth, which involve a public interest. This latter group of resources, i.e. air, waters, fish and wildlife, were explicitly enumerated in House Bill 958, printer’s No. 1307 originally passed by the House. The adjustment in the language of this portion of the bill made by the Senate prior to its referral back to the House will avoid any possible restrictive interpretation based on a theory that the enumeration of these four items, (air, waters, fish and wildlife) in the bill should be interpreted as an indication of legislative intent to limit the trusteeship of the Commonwealth to only these four categories of resources in cases where such resources are not owned by the Commonwealth.”

Commonwealth of Pennsylvania House Legislative Journal, Session of 1970, Vol. 1, No. 118 ("Legislative Journal"), Page 2271; copy attached as Exhibit PP.

A legal analysis of the proposed amendment prepared by Robert Broughton, an Associate Professor of Law at Duquesne University Law School, was also inserted into the legislative record, stated:

"The proposed Amendment, for purposes of analyzing its effects, can be viewed almost as two separate bills--albeit there is considerable interaction between them, and the legal doctrines invoked by each should tend mutually to support and reinforce the other because of their inclusion in a single amendment.

The first sentence creates (or affirms) a positive constitutional rights that all individual citizens. The second and third sentences impose the public trust doctrine upon the 'public natural resources' of Pennsylvania.

* * *

The second two sentences seem to rather clearly have the purpose of placing Pennsylvania among the jurisdictions which adhere to the public trust theory of public natural resources management, in contradistinction to the proprietary theory."

Id. at 2272-2273 (footnotes omitted).

The public trust portion of the amendment establishes that the public natural resources are the common property of the people. That property includes State Parks and Forests and the natural resources that are a part of those properties, the trees and plants, the fish and birds, the habitats and ecology that support them. In the legal analysis included in the legislative record, Robert Broughton states:

"Governmentally owned property--land, game, fish, trees, minerals, and governmentally owned waters--would certainly be included [within the category of 'public natural resources']; otherwise one would have to assume the legislature meant nothing at all by the second two sentences of HB 958, a conclusion courts would certainly be hesitant to adopt."

Id. at 2274-2275.

The right and duty to protect and preserve the public's interest in natural wildlife resources does not derive from ownership of resources but from duty owing to the people. *Tomer v. Witsell*, 334 U.S. 385, 408 (1948).

The duties of the trustee are defined by the terms of the trust. The language of the third clause of the public trust portion of Article I § 27 makes clear that the Commonwealth as trustee shall both conserve and maintain those public natural resources, and do so for the benefit of all the people, including the future generations. As the Pennsylvania Supreme stated, in the Plurality Opinion in *Robinson Twp.*, 83 A.3d at 955-956:

“The third clause of Section 27 establishes the Commonwealth's duties with respect to Pennsylvania's commonly-owned public natural resources, which are both negative (*i.e.*, prohibitory) and affirmative, (*i.e.*, implicating enactment of legislation and regulations). The provision establishes the public trust doctrine with respect to these natural resources (the corpus of the trust), and designates “the Commonwealth” as trustee and the people as the named beneficiaries. *Payne*, 361 A.2d at 272. The terms of the trust are construed according to the intent of the settlor, which, in this instance is “the people”. See *Estate of Sykes*, 477 Pa. 254, 383 A.2d 920, 921 (Pa. 1978)”

In interpreting the construction and application of the Constitutional the Supreme Court Plurality stated: “In the process of interpretation our ultimate touchstone is the actual language of the Constitution itself.” “The Constitution's language controls and must be interpreted in its popular sense, as understood by the people when they voted on its adoption.” *Robinson Twp.*, 83 A.3d at 943.

Based on the relevant law and facts discussed above, as well as the facts set forth in Petitioner's Motion for Summary Judgment, Petitioner respectfully requests this Court to declare the following:

1) Find and Declare that Respondents' are trustees under Article I § 27, and when making a decision or taking an action that can negatively impact on State Parks or Forests or any of their public natural resources, all of which are part of the corpus of the trust, the duties of the trustees are defined by Article I § 27 and the Conservation and Natural Resources Act.

2) Find and Declare that the Respondents' duties under Article I § 27 include the affirmative duty to conserve and maintain the public natural resources by sustaining those resources for the benefit of all the people of the Commonwealth, both now and for future generations.

3) Find and Declare that Respondents have the affirmative duty to protect the rights of the people under Article I § 27 to clean air, pure water and the preservation of the natural, scenic, historic and esthetic values of the environment of our State Parks and State Forests.

4) Find and Declare that the Respondents' duty to sustain the public natural resources of the State Parks and State Forests and to protect the inherent rights of the people in those resources precludes them from depleting or diminishing those resources or rights without compensating for that loss.

5) Find and Declare that the Respondents have a duty, before making a decision or taking an action that can impact the public natural resources of our State Parks and State Forests, to gather data on the potential present and future environmental impacts to the public natural resources of the decision or action, to properly determine whether the public natural resources will be sustained and whether the people's rights to the environmental values of those resources will be protected.

I.B. The Respondents have the Duty to Consult with the Department of Conservation and Natural Resources before Making any Decision or Taking any Action that can Impact the Natural Resources on State Forests or Parks.

Inherent in the duty to conserve and maintain is the duty of the trustee to not take any action or make any decision that might or will negatively impact the public natural resources and the uses benefits to those resources and the rights of the people. As the Pennsylvania Supreme Court stated in the Plurality Opinion in *Robinson Twp.*, 83 A.3d at 957:

“As trustee, the Commonwealth has a duty to refrain from permitting or encouraging the degradation, diminution, or depletion of public natural resources, whether such degradation, diminution, or depletion would occur through direct state action or indirectly, because of the state’s failure to restrain the actions of private parties” In this sense, the third clause of the Environmental Rights Amendment is complete because it establishes broad but concrete substantive parameters within which the Commonwealth may act.”

Gas extraction causes immediate impacts to the land by the construction and operation of the wells, well pads, expanded roads, compression stations, water storage facilities, gas lines and other industrial structures. Before making a decision or taking an action that might or will negatively impact the State Forests or Parks, the trustee making the decision has the duty under the trust to understand what those impacts are or might be, both to the public natural resources and to the peoples' uses and benefits to those resources, and to the peoples' rights established in the amendment.

The Pennsylvania Supreme Court Plurality Opinion in *Robinson Twp.* articulated this principle clearly, stating:

“Although the first clause of Section 27 does not impose express duties on the political branches to enact specific affirmative measures to promote clean air, pure water, and the preservation of the different values of our environment, the right articulated is neither meaningless nor merely aspirational. The corollary of the people’s Section 27 reservation of right to an environment of quality is an obligation on the government’s behalf to refrain from unduly infringing upon or violating the right, including by legislative enactment or executive action. **Clause one of Section 27 requires each branch of government to consider in advance of proceeding the environmental effect of any proposed action on the constitutionally protected features.** The failure to obtain information regarding environmental effects does not excuse the constitutional obligation because the obligation exists a priori to any statute purporting to create a cause of action.”

Id. at 951-952 (emphasis added).

In order to make an assessment regarding impacts to State Forests and Parks from extraction of natural gas, it is necessary develop the information necessary to make the assessment. The Governor is obligated to consult with DCNR to develop information on the impacts to State Forests and Parks. DCNR is the statutorily designated trustee of the State Forests and Parks, and the natural resources that are a part thereof.

In 1995, twenty four years after the passage of Article I § 27 in 1971, the General Assembly passed, and Governor Tom Ridge signed into law, an act dealing directly with conservation of natural resources--an act aptly named the Conservation and Natural Resources Act. 71 P.S. §§ 1340.101 *et seq.*

CNRA has imposed DCNR with the duty to maintain, improve and preserve our State Parks and to manage our State Forests to assure their long-term health, sustainability and economic use. CNRA states:

“It is the intent of the General Assembly and the purpose of this act: (1) 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 a 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, manage State Forest lands to assure their long-term health, sustainability and economic use, ... and to administer grant and technical assistance programs that will benefit rivers conservation, trails and greenways, local recreation, regional heritage conservation and environmental education programs across Pennsylvania.”

71 P.S. § 1340.101(b)(1).

DCNR has the duty to meet the obligations of its mission under CNRA as trustee under Article I § 27. 71 P.S. § 1340.101(a)(1). The provision specifically states: “The General Assembly finds and declares as follows: Pennsylvania’s public natural resources are to be conserved and maintained for the use and benefit of all the citizens as guaranteed by section 27 of Article I of the Constitution of Pennsylvania.”

The Pennsylvania Supreme Court has made the determination that DCNR is the statutory trustee of our State Parks, stating: “DCNR has the duty to preserve and maintain state parks pursuant to § 303 of the CNRA, and fiduciary obligations to conserve and maintain them as public natural resources pursuant to Article I § 27 of the Pennsylvania Constitution.” *Belden & Blake v. DCNR*, 600 Pa. 559, 566, 969 A.2d 528, 532 (Pa. 2009); 71 P.S. § 1340.303. That duty applies to State Forests as well.

In 1995, the DCNR Bureau of Forestry developed a strategic plan entitled *Penn's Woods, Sustaining Our Forests (Penn's Woods)* to carry out its duties under Article I § 27 and CNRA. In *Penn's Woods*, the DCNR Bureau of Forestry defines its mission as follows:

Contained in Article I Section 27 of the Pennsylvania Constitution are these words: “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.”

The mission of the Bureau of Forestry is to insure that the long term health, viability and productivity of the Commonwealth’s forests and to conserve native wild 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.

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.”

Penn’s Woods, Exhibit P at 33²; *see also* Deposition Testimony of James Grace; Deposition Testimony of Michael DiBerardinis.

DCNR, though the mission statement of CNRA, and through its own mission statement, has defined the meaning of “conserve and maintain the public natural resources”, by “managing State Forests under sound ecosystem management, to retain their wild character and maintain biological diversity while

² http://www.dcnr.state.pa.us/cs/groups/public/documents/document/dcnr_20026631.pdf.

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”.

DCNR has further defined its constitutional and statutory duties by defining ecosystem management in its long-term plan, *Sustaining Pennsylvania Forests*:

“One of the basic tenets of ecosystem management is that forests, rather than being a set of resources, in fact are more than the sum of their parts. Forests are comprised of quantifiable components such as trees, but forests are also systems performing various functions and processes. Forests provide human goods as well as human experiences, ranging from recreation to peace and solitude. These tangible and intangible aspects of a forest, these products and processes, have been labeled “values” and none is assumed more or less valuable than the others. Thus, a major step toward maintaining Pennsylvania’s environmental heritage, and values is to adopt a management strategy geared toward sustaining the long term health and productivity of forest ecosystems.

Ecosystem management can simply be defined as an ecological approach to resource management. All aspects of an ecosystem are considered important, and the interdependency of biological and non-biological systems and cycles is recognized as central to this holistic approach ...

The primary goal of ecosystem management is to keep the complex interdependencies of ecosystems intact and functioning well over long periods of time. The essence of maintaining ecosystem integrity is to retain the health and resilience of systems so that they can accommodate short-term stresses and adapt to long-term changes. The key elements include maintenance of a diversity of plants and animals and the proper functioning of nutrient, water and energy cycles.

Penn's Woods, Exhibit P at 8.

The Governor is sworn to protect Pennsylvania's laws. He has no ability to assess the potential harm from, and has no ability to conserve and maintain those resources independent of DCNR, to understand how to manage our State Forest to accomplish the mission of CNRA. He has no ability to independently assure the long term health, sustainability and economic use of our State Forests, and how to conserve and maintain them for the benefit of all the people, both now and for future generations, or how to protect and preserve the rights of the people to clean air, pure water, and the preservation of the natural, scenic, historic and esthetic values of our State Forests and Parks.

In order to meet his responsibilities under Article I § 27 when considering actions that might or will impact State Forests, the Governor has the obligation to consult with DCNR and to rely on its scientific expertise to effect his decision, and to not make a decision contrary to DCNR's mission relating to State Forests.

Based on the relevant law and facts discussed above, as well as the facts set forth in Petitioner's Motion for Summary Judgment, Petitioner respectfully requests this Court to declare the following:

- 1) Find and Declare that that the Respondents have the duty under CNRA to consult with the DCNR before making any decision or taking any action that can impact State Forests and Parks and their natural resources to determine how the action may or will impact on DCNR's ability to meet its constitutional and

statutory obligation, and determine how the impacts can be avoided, mitigated or restored.

2) Find and Declare that the Respondents have the duty under CNRA to accept the opinions and/or recommendations of DCNR regarding a proposed decision on the public natural resources or the peoples' rights, or to establish why they do not have the duty to do so, before making the decision or taking the action.

I.C. The Respondents have a Duty to Consult with the People Whose Uses and Rights to the Public Natural Resources on State Forests or Parks are Affected before Taking any Action that can Negatively Impact those Uses or Rights.

Article I § 27 mandates that the Commonwealth conserve and maintain the public natural resources, which are the common property of the people for the benefit of the people, and that the people have a right to clean air, pure water and the preservation of the natural, scenic, historic and esthetic values of the environment that as part of these public natural resources.

As the beneficiaries of the trust, the Governor has the duty to consult with the people who may or will be so impacted to inform them of his proposed decision or action, to inform them of actual or possible impacts, and to ask them how those impacts may affect their uses of the resources and their basic rights to those resources.

The Pennsylvania Supreme Court in its plurality opinion in *Robinson Twp.* recognized that the Commonwealth, as a trustee, has the duty under Article I § 27 to gather and make available to the people as beneficiaries complete and accurate information as to the nature and amount of trust property. 83 A.3d at 983, n. 60. (citing *In re Rosenblum's Estate* 459 Pa. 201, 328 A.2d 158, 164,165 (Pa. 1974); Restatement (Second) of Trusts § 173 (right of access to trust records is essential part of beneficiary's right to complete information concerning administration of trust); and Restatement (Second) of Trusts § 173, comment c (beneficiary is always entitled to such information as is reasonably necessary to enable him to enforce his rights under the trust or to prevent or redress a breach of trust)).

Based on the relevant law and facts discussed above, as well as the facts set forth in Petitioner's Motion for Summary Judgment, Petitioner respectfully requests this Court to declare the following:

- 1) Find and Declare that the Respondents have the duty to consult with the people whose interests, benefits and rights may or will be effected before making the decision or taking the action, to inform them of the actual or potential impacts, and to determine how they might or will be effected, and how their rights may be sustained or mitigated and restored.

II. The Extraction of Natural Gas on State Forest Lands causes Immediate and Long-Term Negative Impacts to the Public Natural Resources of our State Forests.

There is no question that the public natural resources of our State Forests are and will continue to be impacted by the current leases for gas extraction on State Forest land. The court can take judicial notice of the reality that industrial activities are necessary for gas extraction, well pad construction, well drilling, road construction, pipe line construction, water storage areas, construction and operation of compressor stations all require impacting the State Forest and the natural resources thereon.

More than 700,000 acres of the State Forest and State Park land are currently subject to oil and gas development, including development in the Marcellus shale formation, either through leases executed with the Commonwealth or through private ownership or leasing where the Commonwealth does not own the surface or subsurface oil and gas rights.

The development of a Marcellus Shale well site requires considerable land clearing and earth disturbance activity. The need to clear land for support facilities such as access roads, pipe lines, borrow pits (small rock quarries), freshwater and wastewater impoundments, tank farms, equipment staging areas, water withdrawal locations, and compressor stations greatly expands the footprint of a well site.

Governor's Marcellus Shale Advisory Commission Report, July, 2011 ("Governor's Marcellus Report", Exhibit II at 75-76.

In the next 10 to 20 years, full development of gas in the Marcellus shale formation on State Forest and State Park land currently subject to drilling will result in the direct use of more than 30,000 acres for an estimated 1,100 well pads and associated infrastructure, access roads and pipelines. Governor's Executive Order 2010-05 at 2, Exhibit HH.)

The impact of the five-fold increase in the acreage of State Forest and State Park land that will be used for gas development as a result of activity in the Marcellus shale formation cannot be fully understood at this early stage of development. *Id.*

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. *Id.*

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. Governor's Marcellus Report at 76, Exhibit II.

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. *Id.*

Impacts to forests and other sensitive habitats, including fragmentation, invasive species, loss of wildlife food or cover, erosion and sedimentation, and to recreational uses must be avoided or mitigated, and monitored. *Id.*

In the process of constructing and operating the wells and well pads, surface spills of fluids can and have occurred. *Id.* at 74-75.

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

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

Methane, the major component of natural gas and a green-house gas pollutant, is released into the atmosphere as fugitive emissions through leaks from processing equipment and pneumatic devices. *Id.* at 77.

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

Natural gas compression stations emit pollutants such as NOx, VOCs, and CO. *Id.*

Based on the relevant law and facts discussed above, as well as the facts set forth in Petitioner's Motion for Summary Judgment, Petitioner respectfully requests this Court to declare the following:

1) Find and Declare that extracting natural gas and/or oil on State Forests causes immediate and long term-negative impacts to the public natural resource and to the rights of the people to those resources.

III. The Extraction of Natural Gas on State Park land causes Immediate and Long-Term Negative Impacts to the Public Natural Resources of our State Parks, and to the Peoples' Benefits, Uses and Rights thereto.

There are 61 State Parks within the Marcellus Shale Formation, many of which are embedded in State Forests. The Bureau of State Parks has a policy of not allowing gas or oil exploration on lands where they own or control the mineral rights. However, the Bureau does not own the subsurface rights to an estimated 80

percent of their property. Affidavit of John Norbeck, former Director of State Parks from 2006 to 2012, Exhibit PP.

The Pennsylvania Supreme Court has determined that DCNR does not have the right to put any condition on the rights of the private owner to enter on the State Park land to exercise its oil and gas rights, no authority to require a coordination agreement, no right to impose a performance bond on each well, or to recover the value of natural resources lost. The Supreme Court stated: “If DCNR wishes further conditions pursuant to its statutory duties, the Commonwealth must compensate the subsurface owner for the diminution of its rights; indeed it may condemn the subsurface interests altogether pursuant to the Eminent Domain Code.” *Belden & Blake v. DCNR*, 600 Pa. 559, 568; 969 A.2d 528, 533 (2009).

The lands surrounding and adjacent to these State Parks, whether privately owned or managed as State Game Lands or State Forest, are being developed for gas extraction. The development has a much greater effect than ever expected. The former Director, stated in his affidavit that he received complaints from visitors and staff about the negative impacts associated with drilling. Those complaints were verbal, written letters and emails. Most of the complaints were about diminished park experiences due to rough roads, long detours due to closed roads, large truck traffic, noise,, dust, damage to recreational vehicles from roads, light

pollution from drills and flaring, and complaints about drill workers being disruptive in campgrounds. Exhibit PP.

In order to protect the integrity of our State Parks located in the Marcellus Shale development regions the Bureau of Parks will need an enormous amount of revenue to mitigate the continuing impacts from shale gas development. Norbeck, Exhibit PP.

Based on the relevant law and facts discussed above, as well as the facts set forth in Petitioner's Motion for Summary Judgment, Petitioner respectfully requests this Court to declare the following:

1) Find and Declare that extracting natural gas and/or oil on State Parks causes immediate and long term-negative impacts to the public natural resource and to the rights of the people to those resources.

IV. The Conservation and Natural Resources Act creates a Statutory Structure to allow DCNR to continue to Lease State Forest Land for Mineral Extraction under the Limits of Article I § 27 by continuing the Requirement to Deposit Rents and Royalties from the Leasing into a Special Fund, the Oil and Gas Lease Fund, to be used for the Exclusive Purposes of the Oil and Gas Lease Fund Act, in order to Mitigate the Impacts from the Leasing.

In 1947, statutory authority was given to the Department of Forests and Waters, DCNR's predecessor, to lease State Forest lands for oil and gas extraction. Governor's Marcellus Report at 35, Exhibit II. In 1955, the Oil and Gas Lease Fund Act was passed to create a special fund for all the rents and royalties obtained

from oil and gas leases executed by the Department on State Forest land. 71 P.S. §§ 1331-1334. The Department was given exclusive control over this fund for conservation, recreation, dams and flood control projects.

Since its inception in 1955, the Oil and Gas Lease Fund has been used exclusively by DCNR and its predecessors for conservation, recreation, dams and flood control projects. Governor's Marcellus Report at 35, Exhibit II.

Annual revenue from Commonwealth oil and gas leases on State Forest land prior to the Marcellus Shale gas extraction averaged between \$3-4 million per year. These funds were allocated by DCNR and its predecessors for conservation, recreation and flood control projects. Governor's Marcellus Report at 35, Exhibit II. Specifically, the Fund has been used for the purchase of oil and gas development rights under State Parks and State Forests; State Park and State Forest recreation sanitation facilities; State Parks and State Forest flood control and dam safety projects; the development of the 60 mile Pine Creek Rail Trail; and, land acquisition for 9 new State Parks, and enlargement of 20 other State Parks.³

In 1971, after being passed twice by the General Assembly, Article I § 27 was overwhelmingly approved by the voters of Pennsylvania as an amendment to

³ 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*, attached as Exhibit Y; *2011 State of the Parks/State of the Forests Report, Pennsylvania Parks and Forest Foundation* (excerpts attached as Exhibit Z); and *DCNR Natural Gas Exploration on State Forest Land*, attached as Exhibit AA).

the Pennsylvania Constitution. Article I § 27, as stated above, made Pennsylvania's public natural resources, including its State Forests and Parks, the common property of the people, subject to a public trust, with the Commonwealth as the trustee, to conserve and maintain them for the benefit of the people.

The Pennsylvania Supreme Court noted that the affirmative obligation of the Commonwealth as a trustee is to protect the public natural resources through legislation. *Robinson Twp.*, 83 A.3d at 958 (citing *Geer v. State of Conn.*, 161 U.S. 519, 534 (1896) (trusteeship for benefit of state's people implies legislative duty to enact such laws as will best preserve the subject of the trust, and will secure beneficial use in the future to the people of the state)).

For the conservation and maintenance of our State Forests and Parks and the public resources thereon, the General Assembly passed and Governor Tom Ridge signed into law the Conservation and Natural Resources Act in 1995. That act provides a statutorily designated trustee by legislatively creating the Department of Conservation and Natural Resources. The Conservation and Natural Resources Act reauthorized the leasing authority of State Forests for gas extraction to DCNR, 71 P.S. § 1340.302(a)(6), subject to the mandates of Article I § 27, 71 P.S. § 1340.101(a)(1).

The CNRA, at 71 P.S. § 1340.304(c), also reauthorized in DCNR the authority previously given to the Secretary of Forest and Waters to administer the Oil and Gas Lease Fund Act, also subject to the mandates of Article I § 27.

The Oil and Gas Lease Fund Act 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* known as the Oil and Gas Lease Fund, to be used for the *exclusive purposes* of conservation, recreation, dams, and flood control; and authorizes only the Secretary of Forest and Waters (now DCNR) to determine the need for and location of such projects and to acquire the necessary land. 71 P.S. § 1331-1334 (emphasis added); 71 P.S. § 1340.304(c).

As former Secretary of DCNR, Michael DiBerardinis stated well in his memorandum dated March 27, 2009 ("March 2009 Memo") to the Governor, "diverting the Oil and Gas Lease Fund's lease sale and royalty proceeds toward general use and away from their legislated purpose sets a dangerous precedent. *This reliable funding stream-intended to offset the impacts of resource extraction – has endured through 50 years and multiple administrations, providing stable investments to conservation and environmental protection. The fund has supported the acquisition, infrastructure investments, and maintenance of our state parks and forests that make them what we enjoy today.*" March 2009 Memo, Exhibit CC (emphasis added).

Leasing State Forest land for gas extraction degrades the corpus of the trust contrary to the constitutional mandate of Article I § 27 to conserve and maintain the public natural resources. As noted above, extracting natural gas affects the rights of the people to clean air, pure water and preservation of natural, scenic and esthetic values of the environment.

The only way to allow oil and gas develop with its negative impacts to continue on the State Forest land is to insure the money from the leasing and royalties from oil and gas production are returned to the corpus of the public trust, the State parks, forests, rivers, trails, greenways, and local recreational and heritage programs, for the beneficial use of the trust corpus by the people of the Commonwealth. The terms of the Oil and Gas Lease Fund Act meet those requirements.

Under the limitations of Article I § 27, the Commonwealth could not continue to lease State Forest land for oil and gas extraction without the compensating use of the funds from that lease and sale of natural gas to maintain, improve and preserve our State Parks, and to assure the long term health and sustainability of our State Forests. The Pennsylvania Supreme Court, in the *Robinson Twp.* plurality opinion, recognized this principle, stating:

“As trustee, the Commonwealth is a fiduciary obligated to comply with the terms of the trust and with the standards governing a fiduciary’s conduct. The explicit terms of the trust require the government “to conserve and maintain” the corpus of the trust. See

PA. CONST. art. I, § 27. The plain meaning of the terms conserve and maintain implicates the duty **to prevent and remedy** the degradation, diminution, or depletion of our public natural resources. As a fiduciary, the Commonwealth has a duty to act toward the corpus of the trust -- the public natural resources -- with prudence, loyalty, and impartiality. *See ... Lang [v. Commonwealth, 515 Pa. 428, 528 A.2d 1335, 1342 (1987)]* (citing Restatement (Second) of Trusts § 170) (trustee has duty of loyalty to administer trust solely in the beneficiary's interests and not his own); *In re Hamill's Estate, [487 Pa. 592,] 410 A.2d 770, 773 (Pa. 1980)* (citing Restatement (Second) of Trusts § 232) (trustee has duty of impartiality)."

83 A.3d at 957.

Through the CNRA, the General Assembly established a statutory structure to conserve and maintain our public natural resources while at the same time permitting multiple use of those resources by allowing continuing leases for gas extraction. This was accomplished by giving DCNR the mission to act as trustee under Article I § 27, and giving DCNR control over determining when and how much to lease, and by giving DCNR the revenue from the leasing to mitigate and restore those resources. The statutory structure of the Conservation and Natural Resources Act imposes Article I § 27 constitutional limitations on DCNR's authority and responsibilities and creates a de facto trust fund through the Oil and Gas Lease Fund.

The revenue in the Oil and Gas Lease Fund is generated from the conversion of the public lands by long term leases, and by the royalties generated by the extraction of the natural gas and oil. Both the State Forest land under lease and the

natural gas and oil are part of the corpus of the Public Trust, the public natural resources.

When State Forest land is leased to private entities for gas extraction the lease is long term. It is held for as long as oil or gas production is ongoing. The land is converted into drilling pads, compression stations, water storage areas, pipe lines, roads and other physical changes to the land for the purpose of gas extraction. The land used for these purposes is in effect converted to private use, and its attributes as a public natural resource are severely compromised. The conversion of that land from a public natural resource to a private use requires that the revenue received therefrom is still part of the public trust. To insure loss the people received of their common property is restored to the corpus of the trust it must be retained for the purposes set forth under Article I § 27, *i.e.*, the mitigation of the public natural resources harmed to ensure those resources are conserved and maintained.

The natural gas is a nonrenewable public natural resource. The conversion of that nonrenewable resource to money does not mean that the corpus of the trust that was the common property of the people because it is now lost. The trustee has the fiduciary duty to retain the revenue in the trust as part of the corpus of the trust, for the people for the purposes set forth within Article I § 27.

The Commonwealth is not the proprietor of these public lands and resources. Rather, the Commonwealth is the trustee, holding these public natural resources for the rights and benefits of the people to their continued use and enjoyment. This distinction was described in the legislative history of Article I § 27 by Robert Broughton, stating:

"The public trust doctrine, which may be a part of the common law already, but which, if so, has not been clearly enunciated in Pennsylvania, relates to the rights and duties of government in public property. It is the role of government that is in question: As a holder of property, or of public servitudes (such as navigation rights, or more remotely, the right to prevent public nuisances), is the government simply a corporate property owner, a proprietor, or is it a trustee, with the duty to manage, use, and/or consume the property of the public solely for the benefit of the public. As Clyde O. Martz, former Assistance Attorney General in charge of the Natural Resources Division of the United States Department of Justice has put it:

Under the [proprietary theory, government deals at arms length with its citizens, measuring its gains by the balance sheet profits and appreciation it realizes from its resources operations. Under the trust theory, it deals with its citizens as a fiduciary, measuring its successes by the benefits it bestows upon all its citizens in their utilization of natural resources under law."

Legislative Journal at 2274-2275, Exhibit PP. The Pennsylvania Supreme Court also articulated the Commonwealth's fiduciary role as trustee under Article I § 27 in *Robinson Twp.*, 83 A.3d at 957 (quoted above on pages 43-44).

If the trustee retains the revenues from the conversion of the corpus of the trust for his own purposes, then he has violated his duties of prudence, loyalty, and

impartiality to the corpus of the trust, and his duty of loyalty to the beneficiary's interests. By taking the revenue out of the corpus of the trust and using it for his own purposes (fulfilling the duty of the Governor to balance the budget), the trustee has also violated his duty to conserve and maintain the trust equally for the present beneficiaries and those beneficiaries of future generations.

Based on the relevant law and facts discussed above, as well as the facts set forth in Petitioner's Motion for Summary Judgment, Petitioner respectfully requests this Court to declare the following:

1) Find and Declare that DCNR is obligated under Section 101(a)(1), 71 P.S. 1340.101(1)(a), of CNRA to use its authority to lease State Forest land for oil and gas extraction under Section 302(a)(6) of CNRA, and its authority to allocate the funds generated from its oil and gas leases under Section 304(c) under the fiduciary obligations of Article I § 27, to conserve and maintain the public natural resources, and to do so for the benefit of all the people both now and for future generations.

2) Find and Declare that the Conservation and Natural Resources Act creates a statutory structure to allow continued leasing for natural gas on State Forests and still meet the protections of Article I § 27, by giving DCNR the responsibility to do so and still sustain the public natural resources, and to protect and preserve the rights of the people, by appropriating the revenue from the leases

and royalties to DCNR to mitigate the impacts and benefit the natural resources and the peoples' rights.

V. The Oil and Gas Lease Fund is a De Facto Trust Fund under the Public Trust Established in Article I § 27.

As stated above, the original 1947 and the 1955 statutory authorizations given to the Department of Forest and Waters to lease State Forest land for gas extraction and to control the Oil and Gas Lease Fund were reauthorized in DCNR by the Conservation and Natural Resources Act. 71 P.S. §§ 1340.302(a)(6) and 1340.304(c). DCNR is obligated under Section 101(a)(1) of CNRA to use its authority to lease State Forest land for oil and gas extraction and its authority to allocate the funds generated from its oil and gas leases within the fiduciary obligations under Article I § 27 to conserve and maintain the public natural resources, and to do so for the benefit of all the people both now and for future generations. These obligations require DCNR to protect the rights established under Article I § 27, the right of the people to clean air, pure water and the preservation of natural, scenic, historic and esthetic environment of the State's parks, forests, rivers, trails, greenways and community recreation and heritage areas. CNRA thus mandates that the funds from the leasing of oil and gas must be used for those trust purposes.

The Oil and Gas Lease Fund has historically been considered a de facto trust fund. As stated above, the Oil and Gas Lease Fund Act was enacted in 1955 to create a **special fund** for all the rent and royalty money obtained from leasing State Forest land for gas extraction. The Act specifically **appropriates** the money to DCNR to be allocated for the **exclusive purposes** of projects for conservation, recreation, dams and flood control, the basic missions of DCNR. 71 P.S. §§ 1331-1334 (emphasis added).

Until the actions challenged in this case, the Oil and Gas Lease Fund Act requirements that the funds only be used for conservation, recreation, dams and flood control, had been exercised consistently with the public trust obligations to conserve and maintain the public natural resources for the benefit of the people. The Auditor General's 2004 Special Report reinforces that concept.

The Auditor General conducted an audit of the Oil and Gas Lease Fund and submitted the results of the audit to the Governor (then Governor Rendell) on August 10, 2004 ("2004 Audit"). The Auditor General Report stated that revenue from the Oil and Gas Lease Fund must by law be used exclusively for conservation, recreation, dams and flood control projects on Commonwealth lands. 2004 Audit, Page 1, Exhibit Q; Deposition of Michael DiBerardinis at 8-11, Exhibit B-2.

The Auditor General Report stated 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 State Parks and State Forests, the intended beneficiaries of the revenues in the Oil and Gas Lease Fund**, and therefore were inappropriate or unjustified. 2004 Audit, Page 2, Exhibit Q (emphasis added).

The Auditor General cited in the 2004 Audit an opinion letter from the Attorney General dated February 7, 1991 in which the Attorney General advised the State Treasurer that the proper lawful use of the Oil and Gas Lease Fund is to carry out physical projects for conservation, recreation, dam and flood control projects. 2004 Audit, Pages 19-22, Exhibit Q; Attorney General Letter dated February 7, 1991 (“1991 Letter”), Exhibit R; *see also* General Counsel letter to the State Treasurer dated November 2, 1990, Exhibit S; and DCNR Chief Counsel memorandum dated February 24, 2012, Exhibit T.

The Attorney General specifically states the following in the 1991 Letter regarding the Oil and Gas Lease Fund Act:

I believe it beyond the authority of the [Oil and Gas Lease Fund] 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 DER⁴; and the Act, while imprecise in its expression of intent, certainly suggests otherwise.

The Auditor General concluded in the Special Audit that:

In my judgment, the General Assembly's establishment of this special 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, [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.

1991 Letter, Page 3, Exhibit R (emphasis added).

Based on the relevant law and facts discussed above, as well as the facts set forth in Petitioner's Motion for Summary Judgment, Petitioner respectfully requests this Court to declare the following:

- 1) Find and Declare that the Oil and Gas Lease Fund is a de facto trust fund under the public trust established through Article I § 27.

⁴ DER refers to the Department of Environmental Resources, which prior to CNRA's enactment carried out the regulatory functions now performed by the Department of Environmental Protection and the recreation and conservation functions now performed by DCNR.

VI. The Governor Violated Article I § 27, his Duties as Trustee and the People's Rights thereunder By Proposing Budgets and Approving Appropriations Acts and Fiscal Code Amendments to Transfer \$383,000,000 from the Oil and Gas Lease Fund to the General Fund, By Requiring DCNR to Lease Another 65,000 Acres of State Forest Land for Gas Extraction to Raise Money for the General Fund, and By Approving Fiscal Code Amendments that Permanently Removed DCNR's Control over the Oil and Gas Lease Fund.

As established in the discussion above, the Governor has a fiduciary duty under Article I § 27 to conserve and maintain State Parks and Forests and to make decisions relating to leasing these public lands for oil and gas extraction only when DCNR determines such leasing is in the best interest of the Commonwealth and only when DCNR manages the money generated from such leasing through the Oil and Gas Lease Fund -- the statutorily created trust fund -- to mitigate the harm that necessarily results from oil and gas extraction.

The Governor violated his duties by proposing budgets to divert a total of \$383 million from the Oil and Gas Lease Fund to the General Fund and forcing DCNR to lease additional State Forest land to meet his budget demands even though DCNR advised him that such actions would harm the State Parks and Forests. The undisputed facts that support Petitioner's allegation of violation are set forth below. Early in 2008, then DCNR Secretary Michael DiBerardinis advised then Governor Ed Rendell that DCNR would lease 74,000 acres of State Forest

land for gas development in the Marcellus Shale geologic region. Secretary DiBerardinis Memoranda dated January 10, 2008 and February 26, 2008 (“2008 Memos”), Exhibit W; Deposition Transcript of Michael DiBerardinis, Pages 22-25.

In the 2008 Memos, Secretary DiBerardinis specifically advised Governor Rendell that:

(a). The purpose of the proposed 74,000 acre lease sale was to meet the demands of the industry for more leases, and to preempt legislation which had been introduced by Senator Mary Joe White and Representative Hutchinson,⁵ then chair of the Joint Conservation Committee, to lease the entire State Forest for gas extraction;

(b). Secretary DiBerardinis expressed concern that such legislation would take away from DCNR the ability to decide when to lease State land for gas extraction, and would result in damaging impacts to the State Forest;

(c). Gas drilling activity on the State Forest has occurred since 1947 and, as of 2008, more than 565,000 acres of the 2.1 million acres of State Forest

⁵ Senate Bill 1127, Session of 2007, was introduced on October 19, 2007 and House Bill 32, Special Session No. 1 of 2007-2008, was introduced on October 18, 2007. Both bills proposed to amend the State Forest leasing provision in CNRA Section 302(a)(6) to include the following: “The department shall conduct a competitive public auction to lease State Forest land for exploration and development of natural gas reserves owned by the Commonwealth whenever two or more bidders nominate overlapping or contiguous State Forest land acreage for lease. The department shall conduct the public auction within six months of the receipt of a second nomination for contiguous or overlapping acreage.” The bills also required the department to grant rights-of-way through State Forests and State Parks “as needed to facilitate the gathering and delivery to market of natural gas produced from State Forest [or State park] lands or from adjacent or contiguous public or private lands.”

were under active natural gas development; more than 250,000 acres were under active oil and gas leases managed by DCNR, mostly in the Pennsylvania Wilds CLI area, with approximately 550 wells drilled, over 90% of which were shallow gas wells; another 315,000 acres were under development through private oil and gas leases because the Commonwealth does not own the subsurface oil and gas rights on these State Forest lands.

The 2003 State Forest Resource Management Plan had proposed a ban on shallow gas leasing, which DCNR believed at the time to cause more intense impact on the surface of the land than deep well gas drilling. DCNR believed that most of the impact from gas drilling resulted from the fragmentation of the surface vegetation caused by the development of roads and well pads. Shallow gas development requires a proportionally greater number of wells at closer spacing than medium or deep development. 2008 Memos, Exhibit W; Deposition Transcript of Michael DiBerardinis.

On September 3, 2008, DCNR received the bids for the approximately 74,000 acres of State Forest land offered in the oil and gas leases with the bids totaling approximately \$190 million. Subsequently, the final lease sale bid total was reduced to \$163 million. Email from John Quigley to the Governor's Office dated September 4, 2008 ("2008 Email"), Exhibit X; *see also* 2008 Lease Sale

Information on DCNR's website⁶; Deposition Testimony of Michael DiBerardinis, Pages 37-44; Deposition Testimony of James Grace, Pages 36-44.

At the time of the bids DCNR expected the revenue from the leases to go to the Oil and Gas Lease Fund for DCNR to use to mitigate the leases. Affidavit of John Quigley, Exhibit OO, Page 2. In the 2008 Email, John Quigley, then advisor to Secretary DiBerardinis, at the direction of the Secretary, provided the following documents to the Governor through the Governor's chief of staff:

(a). A series of documents regarding the 2008 lease sale, including a list of the bidders and the amounts they bid, with a statement below the list stating: **“Revenues generated from a lease sale go to the Oil and Gas Lease Fund, which by law must be used for conservation and recreation programs”** (emphasis added).

(b). A list of projects that DCNR needed to complete using the funds from the 2008 lease sale, with the statement that DCNR anticipated that only a small portion of the total leased acreage would be used for well site locations. Those projects included:

1. Obtain sub-surface mineral rights for areas of State Land where DCNR does not have them;
2. Conduct gas compliance audits and monitoring impacts from gas development;
3. Projects for acid mine cleanup;

⁶ http://www.dcnr.state.pa.us/cs/groups/public/documents/document/dcnr_017231.pdf

4. Repairing and replacing old dams at State Parks and Forests;
5. Improvements to infrastructure and trails a 22 state parks and 18 forest districts;
6. Land acquisitions;
7. Inventory of plants and wildlife;
8. Habitat restoration;
9. Mapping;
10. Recreation equipment;
11. Invasive species remediation;
12. Conservation messaging at parks and forests;
13. Heavy equipment, radios, vehicles.

(c). A copy of the Oil and Gas Lease Fund Act;

(d) A list of projects completed with money from the Oil and Gas Lease Fund since its inception in 1955, including the purchase of oil and gas development rights under State Parks and State Forests; State Park and State Forest recreation sanitation facilities; State Parks and State Forest flood control and dam safety projects; Pine Creek Rail Trail; land acquisition for 9 new State Parks, and enlargement of 20 other State Parks.⁷

2008 Email, Exhibit X; Deposition Testimony of Michael DiBerardinis, Pages 37-44; Deposition Testimony of James Grace, Pages 36-44.

On February 4, 2009, five months after the 2008 Email from DCNR, then Governor Rendell sent his proposed budget to the General Assembly. In that

⁷ 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*, attached as Exhibit Y; *2011 State of the Parks/State of the Forests Report, Pennsylvania Parks and Forest Foundation* (excerpts attached as Exhibit Z); and *DCNR Natural Gas Exploration on State Forest Land*, attached as Exhibit AA).

proposed budget, the Governor committed to transferring \$174 million (subsequently reduced to \$143 million) from the Oil and Gas Lease Fund to the General Fund. Excerpts from the Governor's Executive Budget for Fiscal Year 2009-10, Exhibit BB.

On March 27, 2009 Secretary DiBerardinis wrote the Governor a memorandum dated March 27, 2009, in which he warned the Governor:

"Now 660,000 acres of State Forest was subject to oil and gas leases, 290,000 under private leases, and all of which would allow unconventional drilling in shale formations like the Marcellus."

"To date only two unconventional Marcellus wells had been drilled, but DCNR now believed more than 4000 unconventional wells could conceivably be drilled, and that full development of the leased acreage could take 10 to 20 years or more."

"The continued wholesale leasing of the State Forest for natural gas extraction will damage the State Forest landscape, and *scar the economic, scenic, ecological, and recreational values of the forest, especially the most wild and remote areas of our state in the PA WILDS.*"

"Your years of work and investments in the rural economic revitalization through outdoor experiences in the Pennsylvania Wild could be erased."

“Clearly today’s windfall proceeds are unprecedented, and some diversion to relieve budgetary pressures is reasonable. However, I believe that we need to maintain a balance between meeting current needs and preserving the State’s Forests for future generations.”

He concluded the communication with this statement: “One hundred years ago, the land that would become the state’s forests was a denuded landscape that was scarred by rampant resource extraction. Our State Forest system grew from a visionary effort to reclaim this landscape and restore to Pennsylvania’s citizens their natural birthright. The wise stewardship of these lands since then has struck an appropriate balance between economic development and environmental protection. A rush to drill places the State Forest and all its benefits at great risk. A course of balanced management will protect and enhance the legacy we inherited and allow us to deliver it safely to future generations of Pennsylvanians.”

March 2009 Memo, Exhibit CC; DiBerardinis Deposition at 49-55
(emphasis added).

In explaining the purpose of writing the March 2009 Memo, DiBerardinis stated in his deposition that “up until that point [early 2009] we [DCNR] controlled where and how the leasing took place. That was, I considered, a very important part of our management mission and prerogative. If we moved into mandated leasing -- you have to do this to get this much money -- then the management game

is off. Close shop up...The maintenance of the management prerogative is essential, essential to the health and maintenance of State Forest.” DiBerardinis Deposition at 54.

In spite of the warnings of Secretary DiBerardinis, less than a month and a half later the Governor directed DCNR to prepare to lease a total of 80,000 additional acres of State Forest to generate money for the General Fund. Memorandum of Acting Secretary John Quigley dated May 6, 2009 (“May 2009 Memo”), Exhibit DD.

In the May 2009 Memo, the then newly appointed acting Secretary of DCNR, John Quigley, acknowledging the Governor’s mandate to go forward with leasing the additional 80,000 acres, cited and restated the concerns of the March 2009 Memo, and advised that “DCNR remains very apprehensive about the leasing of any additional State Forest land. Field Staff who are charged with managing exploration activity on SFL are deeply concerned about any new leases.”

In his Affidavit, Secretary Quigley states: “DCNR’s loss of the proceeds from the September, 2008 lease sale meant the agency would not be able to adequately study, manage, or attempt to mitigate the impacts of the development that would result from the leasing activity. The effect was a very serious diminution of the agency’s capacity to fulfill our mission of conserving and

maintaining the public natural resources for the benefit of all the people, including generations yet to come.” Exhibit OO.

On October 9, 2009, the Governor signed the Appropriations Act for Fiscal Year 2009-10, which transferred \$143,000,000 generated from the 2008 lease sale from the Oil and Gas Lease Fund to the General Fund.

The Governor also signed the Fiscal Code Amendments, Sections 1601-E through 1604-E on the same day, October 9, that authorized the transfer of another \$60,000,000 from the Oil and Gas Lease Fund to the General Fund for the current Fiscal Year 2009-10.

To generate this additional \$60,000,000 approved by the Governor, DCNR was ordered to proceed with additional leasing of the State Forest. And with the Governor’s enactment of the 2009 Fiscal Code Amendments, DCNR had no choice but to proceed.

One month later on November 9, 2009, DCNR announced the availability of six additional tracts of State Forest land (approximately 32,000 acres) for lease for oil and gas extraction.

The same day, November 9, 2009, DCNR issued an environmental review to support the lease sale, but acknowledged in the document that the review was a formality as the department was holding the lease sale to comply with the Governor’s requirement to generate revenue for the General Fund. FY 2009-10 Oil

& Gas Lease Sale State Forest Environmental Review (“2009 Environmental Review”), Exhibit EE.⁸

The 2009 Environmental Review states, under the heading “PROJECT REVIEW ITEMS: 1. Consistency with State Forest Management Plan”: “This lease sale is a direct result of certain line items contained within the budget agreement and fiscal code for FY 2009-10, [even though], “following the success of the September 2008 Lease Sale, DCNR and the Bureau of Forestry had decided not to offer additional lands for lease but rather study the Marcellus play and the operational developments and requirements on the 660,000 acres within the Marcellus fairway subject to valid lease agreements.” 2009 Environmental Review, Page 4, Exhibit EE.

On January 12, 2010, the bid opening for the six additional State Forest tracts offered for lease generated bids totaling of over \$128,000,000.⁹

On February 9, 2010, the Governor proposed to transfer another \$180,000,000 from the Oil and Gas Lease Fund to the General Fund in his Executive Budget for Fiscal Year 2010-11, and again required DCNR to lease additional State Forest land to generate the revenue for this transfer. Excerpts from Governor’s Executive Budget for Fiscal Year 2010-11, Exhibit FF.

⁸ http://www.dcnr.state.pa.us/cs/groups/public/documents/document/d_000606.pdf

⁹ http://www.dcnr.state.pa.us/cs/groups/public/documents/document/dcnr_017232.pdf

On May 10, 2010, DCNR conducted a sole source lease sale of approximately 33,000 additional acres of State Forest land to Anadarko E&P Company LLP for over \$120,000,000.¹⁰ May 2010 Oil & Gas Lease Offering State Forest Environmental Review (“2010 Environmental Review”), Exhibit GG.¹¹

In the 2010 Environmental Review, DCNR again states, under “*PURPOSE*” that “Planning for the May 2010 Oil and Gas Lease offering began approximately five (5) months ago at the direction of the Governor’s Office as part of the FY 2010-11 Commonwealth budget process.”; and, under the heading “PROJECT REVIEW ITEMS; 1. Consistency With State Resource Management Plan”, that “Following the FY 2009-10 Lease Sale, DCNR and the Bureau of Forestry decided [again] not to offer additional lands for lease but rather study the Marcellus play and the operational developments and requirements of the 700,000 acres (approximate) within the Marcellus fairway already subject to valid lease agreements. However, due to projected shortfalls in the Commonwealth Budget, the Bureau of Forestry has been mandated to generate \$180 million for the Commonwealth.” 2010 Environmental Review, Pages 1, 5, Exhibit GG.

¹⁰ http://www.dcnr.state.pa.us/cs/groups/public/documents/document/dcnr_017233.pdf

¹¹ http://www.dcnr.state.pa.us/cs/groups/public/documents/document/d_000599.pdf

The Governor's above stated decisions and actions, that resulted in transferring \$383,000,000 from the Oil and Gas Lease Fund to the General Fund to meet the demands of his proposed budgets, and required DCNR to lease another 65,000 acres of State Forest land for gas extraction violates his duties as trustee and violates Article I § 27 in at least the following ways:

1) He failed to evaluate the impact of those decisions on his ability as trustee of the public natural resources to conserve and protect them for the benefit of the people, and to protect the peoples' rights enumerated in Article I § 27 before he made them.

2) He failed to consult with DCNR or with the beneficiaries of the trust before making the decisions, to determine how the decisions might impact on their rights and duties.

3) He failed to consider and respect DCNR's determination not to lease any more State Forest land for gas extraction after the 2008 lease until they could study the impacts from the 660,000 acres already under lease.

4) He failed to consider and respect DCNR's statement that they needed the revenue from the leases, and that the Oil and Gas Lease Fund required that DCNR retain the revenue.

5) He failed to recognize DCNR as the statutorily designated trustee under CNRA with the duty to manage State Forest lands, and to assure their long term

health and sustainability and economic use under CNRA, 71 P.S. §1340.101(b)(1), and his duty to consult with DCNR and to follow DCNR's recommendation regarding its needs to conserve and maintain these public natural resources before making the decision and taking the funds from the Oil and Gas Lease Fund.

6) He required the transfer of \$383,000,000 out of the Oil and Gas Lease Fund for the sole purpose of obtaining the funds to support his proposed budgets by increasing the money available in the General Fund.

7) He failed to recognize the Oil and Gas Lease Fund as a trust fund established to remedy the degradation, diminution and depletion of public natural resources that results from the leasing of State Park and Forest land for oil and gas extraction and his duty as trustee to guard that trust fund for its intended purpose.

The Pennsylvania Supreme Court in its plurality decision in *Robinson Twp.* articulated the Respondents duties as trustees under Article I § 27, stating:

“As trustee, the Commonwealth is a fiduciary obligated to comply with the terms of the trust and with the standards governing a fiduciary’s conduct. The explicit terms of the trust require the government “to conserve and maintain” the corpus of the trust. See *PA. CONST. art. I, § 27*. The plain meaning of the terms conserve and maintain implicates the duty **to prevent and remedy** the degradation, diminution, or depletion of our public natural resources. As a fiduciary, the Commonwealth has a duty to act toward the corpus of the trust -- the public natural resources -- with prudence, loyalty, and impartiality. See ... *Lang [v. Commonwealth]*, 515 Pa. 428, 528 A.2d 1335, 1342 (Pa. 1987)] (citing Restatement (Second) of Trusts § 170) (trustee has duty of loyalty to administer trust solely in the beneficiary’s interests and not his own); *In re Hamill’s Estate*, 410 A.2d 770, 773 (Pa. 1980)

(citing Restatement (Second) of Trusts § 232) (trustee has duty of impartiality)."

As discussed in the previous section, the Oil and Lease Fund is a statutorily created trust fund that remains part of the corpus of the public natural resource trust established by Article I § 27. The Governor violated his duty of prudence, loyalty, and impartiality to the corpus of the trust, and his duty of loyalty to the beneficiaries' interests. His desire to use Oil and Gas Lease Funds to propose balanced budgets that continued to provide funding for other important administration efforts, particularly education, while understandable, was misguided, and instead benefited his own administrative interest in trying to balance the budget. He required DCNR to lease State Forest land in 2009 and 2010 for the sole purpose of obtaining funds to pay off some of the annual General Fund deficit.

A trustee may use the assets of the trust only for the purposes authorized by the trust or necessary for the preservation of the trust. 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.*, 83 A.3d at 978 (citing *Metzger v. Lehigh Valley Trust & Safe Deposit Co.*, 220 Pa. 535, 69 A. 1037, 1038 (Pa. 1908)). State Forests are part of the trust corpus, and leasing and selling the trust corpus for revenue for the General Fund is not one of the purposes of the trust.

The Governor failed to evaluate the impacts of his decisions to lease more State Forest land and require the transfer of the funds on DCNR's statutory and constitutional responsibilities under CNRA and under Article I § 27 to conserve and maintain the public natural resources. CNRA reauthorizes in DCNR, subject to the mandates of Article I § 27, authority previously given to the Department of Forests and Waters "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." 71 P.S. § 1340.302(a)(6). CNRA balances this authority to cause harm to the State Forests by also giving DCNR control over the statutorily created Oil and Gas Lease Fund, 71 P.S. §§ 1331-1334.

The Governor's decisions left DCNR with little or no Oil and Gas Lease Funds to assess and mitigate not only the 74,000 acres leased for gas extraction in 2008, but also the 586,000 acres under prior leases now subject to Marcellus development. The Governor's decisions violate the constitutional protections established under CNRA because CNRA gives DCNR the authority to determine whether to lease, not the Governor, and how to use the money generated from leasing to mitigate the harm from oil and gas extraction.

Based on the relevant law and facts discussed above, as well as the facts set forth in Petitioner's Motion for Summary Judgment, Petitioner respectfully requests this Court to declare the following:

1) Find and Declare that the Governor's actions and decisions that required \$383 million dollars to be transferred from the Oil and Gas Lease Fund to the General Fund in 2009 and 2010, as well as his actions and decisions that required DCNR to lease an additional 65,000 acres of State Forest land in 2009 and 2010 for the purpose of obtaining \$240,000,000 for the General Fund, and his decision to sign into law the amendments to the Fiscal Code, Sections 1601-E through 1605-E, violated Article I § 27, and his trustee duties and the rights of the people thereunder, in at least the following ways:

a. By failing to gather information to consider, before making each of the decisions, what the immediate and long-term impacts would be on the public natural resources, the land, the trees and plants and wild animals, birds and fish, the air and water, and the environmental values guaranteed by Article I § 27;

b. By failing to consult with and to gather information to consider what the immediate and long-term impacts would be on the beneficiaries' interests to those resources, to be able to use them for hiking, biking, fishing, bird watching, hunting, camping, picnicking, or just relaxing, not only for those beneficiaries living today, but for future generations;

c. By failing to gather information to consider the impacts to the people's inherent rights, enumerated in Article I § 27, to clean air, pure water, and the preservation of the natural, scenic, historic and esthetic environment;

d. By failing to gather information to consider the impacts on DCNR's duties as trustee of those resources and of the people's rights, to deal with almost 700,000 acres of State Forest lands under lease, and to not have the revenue from those leases or from the royalties to do so;

e. By failing to get information on the potential impacts to DCNR's mission and DCNR's management plans to sustain the public natural resources and rights to our State Forests, both now and for future generations;

f. By failing to gather information to consider the financial needs of DCNR to accomplish its constitutional and statutory duties to manage almost 700,000 acres of State Forest under lease, and to deal with, both immediately and for the long term, as a result of the Governor's decisions;

g. By failing to gather information to consider the immediate and long-term impacts on the local economy that supports the beneficiaries' uses and rights, and to understand the financial costs to that economy;

h. By failing to consider and respond to DCNR's opinions and objections to taking the Oil and Gas Lease Fund revenue for the General Fund and requiring leasing of additional State Forest for natural gas extraction.

2) Find and Declare that the Governor' violated his duty as trustee to conserve and maintain the public natural resources by preventing and remedying degradation, diminution, or depletion of those resources when he took actions that required more leasing of State Forest land and selling of the natural gas, which would cause degradation, diminution and depletion of those resources, and at the same time removed DCNR's control over the revenue from the leasing and royalties necessary to prevent and remedy this harm.

3) Declare that Find the Governor, by taking the revenue out of the corpus of trust established by Article I § 27, violated his trustee duty to maintain the trust equally for the present beneficiaries and those beneficiaries of future generations.

4) Find and Declare that the Governor violated his duty as trustee by using he trust assets, the State Forest land and the natural gas and oil, for purposes outside of the trust, to pay off some of the annual General Fund deficit.

5) Find and Declare that the Governor's decisions violated his duties and Article I § 27 by violating section 302(6) of the Conservation and Natural Resources Act, 71 P.S. § 1340.302(6), which authorizes only DCNR to decide whether and when to lease State Forest land for gas extraction

6) Find and Declare that the Governor's decisions violated his duties and Article I § 27 by violating the provisions of Oil and Gas Lease Fund Act, 71 P.S.

§§ 1331-1334, which require that revenue from leasing and royalties must go into the Oil and Gas Lease Fund for the exclusive purposes of conservation, recreation, dams and flood control, and that DCNR has the discretion to determine the need for and location of any project authorized by the act.

7) Find and Declare that the Governor's decisions violated Article I § 27 by undoing the constitutional protections under CNRA to authorize continued leasing of State Forest land on the conditions that DCNR decide whether and when to lease and that DCNR control of the revenue from the leasing and royalties to deal with the impacts and to preserve and improve the public natural resources for the benefit of the people, both now and for future generations.

VII. The Governor Cannot Justify Violation of his Article I § 27 Trustee Duties by his Article VIII § 12 Mandate to Propose a Balanced Budget.

The Governor may assert (as he did in his preliminary objections) that his duty under Article VIII, Section 12 of the Pennsylvania Constitution to submit a balanced budget to the General Assembly and recommend specific additional sources of revenue sufficient to pay any deficit gives him the authority to divert money from the Oil and Gas Lease Fund to the General Fund.

The Governor cannot fulfill his governmental obligations under Article VIII by violating the people's rights enumerated in Article I, which are limitations on the authority of the government, not grants of authority.

The Pennsylvania Supreme Court in *Robinson Twp.* describes the fundamental structure of the Pennsylvania Constitution, stating "[O]urs is a government in which the people have delegated general power to the General Assembly, but with the express exception of certain fundamental rights reserved to the people in Article I of our Constitution." *Id.* at 947.

"Section 25 of Article I articulates this concept in no uncertain terms: '[t]o 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.'" *Id.*

"The Declaration of Rights assumes that the rights of the people articulated in Article I of our Constitution -- vis-à-vis the government created by the people -- are inherent in man's nature and preserved rather than created by the Pennsylvania Constitution." *Id.* at 948.

"This concept is illustrated in the basic two-part scheme of our Constitution, which has persisted since the original post-colonial document: one part establishes a government and another part limits that government's powers." *Id.* "The Declaration of Rights is that general part of the Pennsylvania Constitution which limits the power of state government" *Id.*

The Governor's constitutional mandate to propose a balanced budget and to recommend additional sources of revenue if his proposed budget expenditures

exceed available revenue must be carried out within the limits on the government established by Article I, including the limitations in Section 27. The Governor cannot propose a budget that violates the people's rights to clean air, pure water and the preservation of the natural, scenic, historic and esthetic values or that fails to conserve and maintain the public natural resources for the benefit of the people, including future generations.

The Governor proposed budgets for fiscal years 2009-10 and 2010-11 with expenditures that exceeded the available General Fund revenue, which had declined due to the national recession. Preparation of the proposed 2009-10 budget was occurring at the same time that DCNR received unprecedented bids to lease 74,000 acres of State Forest land for oil and gas extraction in the north central part of the State, which was highly desirable to companies interested in natural gas extraction from the Marcellus Shale formation. The extent of harm that would result from this new unconventional gas development was completely unknown to both DCNR and the Governor at the time of this leasing. As with prior leasing, however, DCNR believed the money generated from the natural gas extraction would be sufficient to offset the harm by completing projects to enhance other the public natural resources on State Park and Forest lands. In fact, DCNR advised the Governor of those plans immediately after receiving the bids for the 2008 lease sale.

The Governor made no attempt to evaluate his Article I § 27 trustee obligations or those of DCNR with respect to the Oil and Gas Lease Fund prior to recommending it as a source of money to make up for the General Fund deficit. In fact, he dismissed efforts by DCNR to advise him of the need for such an evaluation. Instead, he prepared his balanced budget proposals for FY 2009-10 and 2010-11 knowing that he lacked the information he needed to assess the impact of those proposals on the people's Article I § 27 rights.

The principle articulated by the Pennsylvania Supreme Court in its *Robinson Twp.* plurality opinion bears repeating here:

“Although the first clause of Section 27 does not impose express duties on the political branches to enact specific affirmative measures to promote clean air, pure water, and the preservation of the different values of our environment, the right articulated is neither meaningless nor merely aspirational. The corollary of the people’s Section 27 reservation of right to an environment of quality is **an obligation on the government’s behalf to refrain from unduly infringing upon or violating the right, including by legislative enactment or executive action.** Clause one of Section 27 requires each branch of government to consider **in advance of proceeding** the environmental effect of any proposed action on the constitutionally protected features. The failure to obtain information regarding environmental effects does not excuse the constitutional obligation because the obligation exists a priori to any statute purporting to create a cause of action.”

Id. at 951-952 (emphasis added).

The Governor did not determine what the impacts would be on public natural resources under Article I §27 from requiring more leasing of State Forest

land and diverting money from the Oil and Gas Lease Fund dedicated to mitigating the harm from such leasing. Without a proper evaluation of the impacts, the Governor could not prepare a balanced budget proposal that properly considered those impacts.

Given the precipitous decline in tax revenue as a result of the national recession, the Governor faced difficult choices during these years in crafting his balanced budget proposals. However, the urgency surrounding the need for revenue to address the budget deficit did not justify the unprecedented and constitutionally infirm decision to fill this revenue gap by converting public natural resource trust assets.

The Governor and the legislature asserted this same sense of economic urgency in defense of Act 13. The response in the plurality opinion of the Pennsylvania Supreme Court is instructive:

"For these reasons, we are constrained to hold that the degradation of the corpus of the trust and the disparate impact on some citizens sanctioned by *Section 3304* of Act 13 are incompatible with the express command of the Environmental Rights Amendment. We recognize the importance of this legislation, and do not question the intentions behind it; we recognize, too, the urgency with which the political branches believe they must act to secure the benefits of developing the unconventional natural gas industry. By any measure, this legislation is of sweeping import. But, in that urgency, it is apparent that the *Article I, Section 27* constitutional commands have been swept aside. Act 13's unauthorized use of the public trust assets is unprecedented and constitutionally infirm, even assuming that the trustee believes it is acting solely and in good faith to advance the economic interests of the beneficiaries.

83 A.3d at 981-982.

The Governor did not ask DCNR what impacts leasing more State Forest land would have on its ability to conserve and maintain the public natural resources of our State Parks and Forests. The Governor did not ask DCNR what impact taking \$383 million out of the Oil and Gas Lease Fund would have on its ability to meet its statutory and constitutional requirements to protect and conserve our State Forests and Parks and preserve the rights of the people to deal with the impacts from the existing leases. Without this information, the Governor not only failed to fulfill his fiduciary duties under Article I § 27, he failed to obtain information critical to properly preparing a balanced budget proposal under Article VIII § 12.

Although the Governor's proposed budgets for the fiscal years 2011-12, 2012-13, or 2013-14 did not require DCNR to lease additional State Forest land to generate money to address the General Fund deficits, the Governor continued to exploit the Oil and Gas Lease Fund in violation of his Article I § 27 trustee duties through these proposed budgets. Rather than preserving the Oil and Gas Lease Fund for offsetting the harm to public natural resources on State Park and Forest from oil and gas extraction, the Governor proposed budgets for these fiscal years that replaced General Fund revenue necessary to pay DCNR's day-to-day operating and administrative expenses with money from the Oil and Gas Lease Fund. For the reasons discussed in Section XIII below, use of the Oil and Gas Lease Fund for

these purposes violates Article I § 27 and raises the same constitutional infirmities that result from direct transfers from the Oil and Gas Lease Fund to the General Fund.

As with his decisions to make the direct transfers, the Governor failed to evaluate the impact of requiring DCNR to use the Oil and Gas Lease Fund rather than General Fund revenue for operating and administrative expenses on his and DCNR's ability to meet their fiduciary responsibilities as trustees under Article I § 27. He did not evaluate the impact of making DCNR dependent on the exploitation of the corpus of the trust for its day-to-day operations. He did not evaluate the impact that converting public natural resource assets in the trust corpus to money from industrial use would have on his and DCNR's fiduciary duty of prudence in dealing with the corpus of the trust, or on their ability to continue to meet the fiduciaries responsibilities of loyalty and impartiality to the beneficiaries of the trust.¹²

¹² As discussed previously, the trustee, as fiduciary, has the duty to act toward the corpus of the trust, the public natural resources, with prudence, loyalty, and impartiality. *Robinson Twp.*, 83 A.3d at 957; *In re Mendenhall*, 398 A.2d 951, 953 (Pa. 1979) (citing Restatement (Second) of Trusts § 174) (duty of prudence generally requires trustee to exercise ordinary skill, prudence, and caution in managing corpus of trust). The trustee has the duty of loyalty to administer the trust solely in the beneficiary's interest and not his own. *Lang v. Commonwealth*, 515 Pa. 428, 528 A.2d 1335, 1342 (Pa. 1987)] (citing Restatement (Second) of Trusts § 170); *In re Hamill's Estate*, 410 A.2d 770, 773 (Pa, 1980) (citing Restatement (Second) of Trusts § 232) (trustee has duty of impartiality.)

In his proposed budget for fiscal year 2014-2015, the Governor is requiring DCNR to again lease additional State Forest land to generate \$75,000,000 for transfer from the Oil and Gas Lease Fund to the General Fund, and attain requiring DCNR's to pay much of its day-to-day operating and administrative expenses from the Oil and Gas Lease Fund. For the same reasons that the Governor's prior proposed budgets violate Article I § 27, his proposed budget for next fiscal year, if implemented, also does so and creates an unprecedented level of constitutional violation.

Based on the relevant law and facts discussed above, as well as the facts set forth in Petitioner's Motion for Summary Judgment, Petitioner respectfully requests this Court to declare the following:

1) Find and Declare that the Governor obligation to submit a proposed balanced budget to the General Assembly under Article VIII § 12 of the Pennsylvania Constitution is subject to the limitations imposed by the people on the government under Article I, including the Governor's trustee duties under Section 27 to conserve and maintain public natural resources and to protect the people's environmental rights established by Article I § 27.

2) Find and Declare that the Governor cannot fulfill his Article VIII constitutional obligation to propose a balanced budget, including finding additional

sources of revenue to pay for proposed expenditures, by violating the peoples' Article I rights, including Article I § 27.

3) Find and Declare that the Governor violated his duty under Article I by failing to comply with DCNR's decision not to lease any more State Forests after the 2008 lease until they had time to study the impacts of existing 660,000 acres under lease to insure the sustainability of the natural resources; and failing to heed DCNR's notice that the revenue from the 2008 lease was needed by DCNR to accomplish their duty to sustain the uses.

VIII. The Respondents Violated Article I § 27 by Failing to Consider the Reasonable Multiple Uses of the State Forest Public Natural Resources and to Balance the Interests of the Beneficiaries in his Decision to Take the Oil and Gas Lease Fund Money and to Require More Leasing of State Forest Land.

Article I § 27 mandates that the Commonwealth, as trustee, conserve and maintain public natural resources for the benefit of all the people, including generations yet to come. The Respondents, prior to making the decision to require DCNR to sell public natural resources (*i.e.*, oil and gas on State Forest land owned by the Commonwealth) to generate money to alleviate the General Fund budget deficits, had the fiduciary duty to ensure that their decision would conserve and maintain public natural resources for the benefit of all the people.

The Pennsylvania Supreme Court in its plurality decision in *Robinson Twp.*, has articulated the nature of the Commonwealth's fiduciary duty, stating:

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

83 A.3d at 957. The Court further describes the balancing that the Commonwealth must undertake to carry out its Article I § 27 mandate:

"Of course, the trust's express directions to conserve and maintain public natural resources do not require a freeze of the existing public natural resource stock; rather, as with the rights affirmed by the first clause of *Section 27*, the duties to conserve and maintain are tempered by legitimate development tending to improve upon the lot of Pennsylvania's citizenry, with the evident goal of promoting sustainable development."

Id. at 958.

It is inherent in the Article I § 27 designation of the beneficiaries as "all the people, including generations yet to come", that the trustees have the obligation to treat the all the beneficiaries impartially, and, second, to balance the interests of present and future generations. *Id.* at 959 (citing *In re Hamill's Estate, supra*, and the Restatement (Second) of Trusts §232).

Dealing impartially with all beneficiaries means that the trustee must treat all beneficiaries equitable **in light of the purposes of the trust.** *Id.* (emphasis added); accord 20 Pa .C.S. § 7773.

The duty of impartiality implicates questions of access to and distribution of public natural resources, including consumable resources such as water, fish and game. *Id.*; accord John C. Dernbach, *Taking the Pennsylvania Constitution Seriously When It Protects the Environment: Part II -- Environmental Rights and Public Trust*, 104 Dickinson L. Rev. 97, 132 (1999) ("Inequitable public access to public natural resources, inequitable distribution of those resources, and state decisions that give priority to private profit-making uses over public uses, are generally limited by the public trust clause."). Access to and using consumable resources such as drinking water, and catching and consuming fish and game, certainly are part of the beneficial uses of the people. However, any consumption must be regulated in a manner that ensures the public natural resources are available for future generations. *See* Dernbach, 104 Dickenson Law Review at 133 ("The state's obligation to conserve and maintain public natural resources for future generations means that the state must ensure that these resources are of at least the same quality and diversity for future generations as they are for the present generation.")

Under CNRA the DCNR is authorized to lease State Forest land for the extraction of natural gas, but only in compliance with the terms of the trust, and on condition that the revenue from the leasing and gas extraction is returned to the corpus of the trust.

As a non-renewable public natural resource, and as part of the corpus of the public trust, the natural gas and oil must be viewed in light of the cross-generational purpose of the trust. Consideration must be given by the trustee to the needs of the trust in the future for the use of the natural gas and oil, and for the revenues that can be derived therefrom. Leasing all the State Forest land now, as has been proposed by key members of the General Assembly, and removing all the gas and oil from the trust corpus now, ignores and violates the cross-generational purposes of the trust. Consideration must be given to reserve our remaining natural gas and oil resources for the future. The Pennsylvania Supreme Court in *Robinson Twp.* issued the following caveat:

“In undertaking its constitutional cross-generational analysis, the trustee should be aware of and attempt to compensate for the inevitable bias toward present consumption of public resources by the current generation, reinforced by a political process characterized by limited terms.”

Id. at 959, n. 46 (citing Barton H. Thompson Jr., Environmental Policy and State Constitutions. 27 Rutgers L.J. 863, 900-01 (1996)). That caveat has become the

reality in the present consumption of our natural gas and oil reserves under our State Forests, and now our State parks, and our rivers.

The same problem exists for the failure to consider the multi-generational impacts of leasing our State Forests and Parks. The leases currently in place will be in existence for as long as gas and or oil extraction takes place, which could easily expand over several generations. No consideration has been given to the impacts on the environmental rights of the people throughout that time span. As stated by the Pennsylvania Supreme Court:

“This[cross-generational] aspect of Section 27 recognizes the practical reality that environmental changes, whether positive or negative, have the potential to be incremental, have a compounding effect, and develop over generations. The Environmental Rights Amendment offers protection equally against actions with immediate severe impact on public natural resources and against actions with minimal or insignificant present consequences that are actually the short or long run.

Robinson Twp., 83 A.3d. at 959.

The Respondents did not consider the requirement of the trustee to deal impartially with all beneficiaries in the use of the natural resources when they undid the requirements of the Oil and Gas lease Fund Act and gave control of the revenues from gas extraction to the General Assembly, or when they required additional leasing of 65,000 acres of State Forest land over the objections of DCNR; nor when they required and continue to require DCNR to use Oil and Gas Lease Fund revenue to operate the agency; nor when the provisions of Act 13 of

2012 were approved to require \$50 million to be taken from the Oil and Gas Lease Fund Annually to the Marcellus Legacy Fund.

The Respondents will no doubt assert that their decisions were made and their actions that were taken for the purpose of allowing reasonable development on the State Forest, or to utilize trust resources in a manner that promotes the welfare, convenience and prosperity of the people. The Governor, in order to submit balanced budget proposals, would have had to either reduce expenditures in his proposed budgets, or recommended other revenue sources to generated the additional revenue needed to pay for his proposed expenditures. By reducing expenditures, some services to the public may have been reduced. Alternatively, if he raised revenue by increasing taxes or fees or leveraging other Commonwealth assets in a permissible manner, some people or businesses may have been required to pay more to support the proposed budgets.

However, any attempt to justify the wholesale raid of the Oil and Gas Lease Fund and the undisputed harm that has resulted to our State Forests is unsupportable. At the time of the first attack on the Oil and Gas Lease Fund (submission of the Governor's proposed budget for FY 2009-10 in February 2009), DCNR was just awarding the oil and gas leases to the successful bidders on 74,000 acres of State Forest land. With the lease of this acreage, almost 660,000 acres of State Forest land subject to oil and gas development. At that time, not one

unconventional Marcellus gas well had been drilled on the State Forest. DCNR had proposed the 2008 lease sale in an effort to satisfy the appetite of the General Assembly for legislation requiring the leasing of the entire State Forest. DCNR had already determined that shallow conventional gas development was harmful to the State Forest and had stopped further leasing for such development. The Respondents made no evaluation of the potential impacts of unconventional shale gas development on the State Forest or the cost of their trust obligations to offset those impacts. The Respondents made political decisions to use the natural resources of the public trust to avoid having to impose new taxes or make further reductions in budget expenditures to achieve their short-term obligation to balance the budget.

The Pennsylvania Supreme Court discussed the potential conflict that may arise between conserving and maintaining public natural resources under Article I § 27 and economic interests in land development in the context of private property, stating:

"Relatedly, while economic interests of the people are not a specific subject of the Pennsylvania Declaration of Rights, we recognize that development promoting the economic well-being of the citizenry obviously is a legitimate state interest. In this respect, and relevant here, it is important to note that we do not perceive *Section 27* as expressing the intent of either the unanimous legislative sponsors or the ratifying voters to deprive persons of the use of their property or to derail development leading to an increase in the general welfare, convenience, and prosperity of the people. But, to achieve recognition of the environmental rights enumerated in the first clause of *Section*

27 as "inviolable" necessarily implies that economic development cannot take place at the expense of an unreasonable degradation of the environment. As respects the environment, the state's plenary police power, which serves to promote said welfare, convenience, and prosperity, must be exercised in a manner that promotes sustainable property use and economic development."

83 A.3d. at 954. The Respondents failed to conduct any analysis of the natural gas development proposed on the State Forest to determine whether it promoted sustainable property use. If they had done so, they would have recognized the critical role that the money generated from such leasing plays in offsetting the undisputable harm to public natural resources that occurs with such development.

Even assuming the Respondents' actions could be considered to allow reasonable use of the public natural resources for the general prosperity of the people, the trustee cannot allow or permit private uses on public lands held in trust that interfere with the rights of the beneficiaries. *See Ill. C.R. v. Ill.* 146 U.S.387, 452; 13 S. Ct. 110; 36 L. Ed.1018 (1892) ("It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce, and have the liberty of fishing therein free from the obstruction or interference of private parties."); *see also Reighard v.Flinn*, 189 Pa. 355, 42 A. 23 (1899). Nor can a trustee divert the corpus of a public trust to private uses. *Payne v. Kassab*, 468 Pa. 226, 237, 361 A.2d 263, 268 (citing *Bernstein v. Pittsburgh*, 366 Pa. 200, 77 A.2d 452 (1951); *Trustees of the Philadelphia Museum v. Trustees of University of Pennsylvania*, 251 Pa. 115, 96 A.2d 135 (1915)). Nor can a trustee divert the

corpus of a trust to public uses not within those designated in the dedicatory language. *Id.* The trustee has the duty of loyalty to administer the trust solely in the beneficiary's interest and not his own. *In re Hamill's Estate, supra.*

Based on the relevant law and facts discussed above, as well as the facts set forth in Petitioner's Motion for Summary Judgment, Petitioner respectfully requests this Court to declare the following:

1) Find and Declare when evaluating whether the leasing of State Forest land for oil and gas extraction is in the best interest of the Commonwealth under CNRA and Article I § 27, the Respondents must consider all reasonable uses of the State Forest and must weigh the benefits to both current and future generations to ensure any proposed development is sustainable and conserves and maintains the public natural resources.

2) Find and Declare that DCNR has developed a management plan under their statutory mission established in CNRA and their responsibility as trustee, to balance the multiple uses of the State Forests to insure the sustainability of those uses for the benefit of all the people both now and for future generations, and to sustain the rights of the people.

3) Find and Declare that the Respondents violated their duty under Article I by failing to comply with DCNR's decision not to lease any more State Forests after the 2008 lease until they had time to study the impacts of existing

660,000 acres under lease to insure the sustainability of the natural resources; and failing to heed DCNR's notice that the revenue from the 2008 lease was needed by DCNR to accomplish their duty to sustain the uses.

IX. The 2009 Amendments to the Fiscal Code, Titled Oil and Gas, Article XVI-E, 72 P.S. §§ 1602-E – 1605-E, Violate Article I § 27.

A. Section 1602-E of the Fiscal Code

The Supreme Court of Pennsylvania plurality opinion in *Robinson Twp.* states the principle that “constitutional commands...cannot be abrogated by statute.” 83 A.3d at 977; *see also Mesivtah Eitz Chaim of Bobov, Inc. v. Pike County Bd. Of Assessment Appeals*, 615 Pa. 463, 44 A.3d 3, 9 (2012); *Alliance Home of Carlisle, Pa. v. Board of Assessment Appeals*, 591 Pa. 436, 919 A.2d 206, 223 (2007); *Stilp v. Commonwealth*, 588 Pa. 539, 905 A.2d 918, 943 (2006) (quoting *Jorgensen v. Blagojevich*, 811 N.E. 2d 652, 669-70 (Ill. 2004) (“No principle of law permits us to suspend constitutional requirements for economic reasons, no matter how compelling those reasons may seem.”)).

Section 1602-E of the Fiscal Code, 72 P.S. § 1602-E, abrogates the purpose of Article I § 27 by removing its protection for our State Forests and Parks. Section 1602-E states: “Appropriation. Notwithstanding any other provision of law 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. In

making the appropriations the General Assembly shall consider the adoption of an appropriation to municipalities impacted by a Marcellus well.”

Section 1602-E was passed by the General Assembly and approved by the Governor to provide statutory legitimacy to the decisions that violate the Oil and Gas Lease Fund Act by taking funds from the Oil and Gas Lease Fund in 2008, 2009 and 2010 and putting them in the General Fund. It is also applied to authorize using Oil and Gas Lease Fund Revenue to replace General Funds to operate DCNR.

But Section 1602-E does more than provide the statutory legitimacy to violate the Oil and Gas Lease Fund Act. It permanently takes away DCNR’s ability to allocate the funds under its authority and mission. And, instead, it gives the General Assembly, with the approval of the Governor, complete control over the funds obtained from the leasing of State Forest land.

The General Assembly has little or no ability to know how to “conserve and maintain the public natural resources” of the State Parks and Forests of the Commonwealth because it lacks the scientific and technical expertise to understand forests and parks and how to preserve and sustain them for generations yet to come.

That is why the General Assembly passed the Conservation and Natural Resources Act in 1995, creating DCNR to conserve and maintain our State Forests and Parks within the mandate of Article I § 27.

That is why the General Assembly reauthorized in DCNR the authority to lease State Forests for gas extraction along with the Oil and Gas Lease Fund Act to use the funds for the leases and royalties to mitigate and restore the natural resources from the impacts of gas extraction, so that the people's natural resources could be conserved and maintained, and the people's rights preserved, and even improved and sustained. DCNR had to make those decisions in conformance with Article I § 27.

Section 1602-E violates Article I § 27 by permanently removing the statutory protections established in the Conservation and Natural Resources Act, which allowed DCNR to continue to lease State Forest land for extraction of oil and gas and provided DCNR with the revenue from the leasing to mitigate and improve our natural resources as mandated by Article I § 27. Section 1602-E provides no replacement protections to allow DCNR to meet its constitutional obligations as trustee as well as its obligations under CNRA to preserve our Parks and to insure the sustainability of our Forests.

Secretary DiBerardinis made the consequences of these actions clear to the Governor in his March 2009 Memo when he wrote: "The continued wholesale

leasing of the State Forest for natural gas extraction will damage the State forest landscape, and *scar the economic, scenic, ecological, and recreational values of the forest, especially the most wild and remote areas of our state in the PA WILDS.*” He further stated that *“diverting the Oil and Gas Lease Fund’s lease sale and royalty proceeds toward general use and away from their legislated purpose sets a dangerous precedent. This reliable funding stream -- intended to offset the impacts of resource extraction -- has endured through 50 years and multiple administrations, providing stable investments to conservation and environmental protection. The fund has supported the acquisition, infrastructure investments, and maintenance of our state parks and forest that make them what we enjoy today.”* He concluded stating: *“A rush to drill places the state forest and all its benefits at risk. A balanced management will protect and enhance the legacy we inherited and allow us to deliver it safely to future generations of Pennsylvanians.”* Exhibit CC (emphasis added).

Section 1602-E takes away from DCNR the ability to provide the balanced management of the public natural resources on our State Forests, and subverts the Bureau of Forestry mission of

"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."

Penn's Woods, Exhibit P. The beneficiaries of the public trust are directly impacted by this loss. Section 1602-E takes away DCNR's ability to act as the trustee of our State Parks and Forests under Article I § 27, to protect the people's common property rights, and to insure their inherent environmental rights, without providing anyone as a replacement. The General Assembly has no ability to manage the sustainability of our State Forests for the multiple uses required by CNRA and Article I § 27.

Section 1602-E takes away from the corpus of the trust the revenues from the leasing and natural gas extraction that are the converted assets of the public trust.

Section 1602-E takes away the revenue from the leasing from conserving and maintaining and preserving the beneficiaries' interests in the trust, and gives control of the revenue to the General Assembly to use for purposes of their choosing based on their interests, whether political or to meet other programs that they are committed to support.

The revenue from the conversion of the public lands and the sale of the public natural gas and oil belongs to the Public Trust. The Commonwealth is not the proprietor of those lands and resources, it is the trustee. Legislative Journal at 2273 ("The second two sentences [of Article I § 27) seem to clearly have the purpose of placing Pennsylvania among the jurisdictions which adhere to the

public trust theory of public natural resource management, in contradistinction to the proprietary theory.").

Based on the relevant law and facts discussed above, as well as the facts set forth in Petitioner's Motion for Summary Judgment, Petitioner respectfully requests this Court to declare the following:

1) Find and Declare that Section 1602-E of the Fiscal Code, 72 P.S. § 1602-E, violates Article I § 27 by permanently replacing the constitutional and statutory protections established in the Conservation and Natural Resources Act by taking away DCNR's sole authority to determine how and when to use the Oil and Gas Lease Funds to mitigate the impacts from the leasing of State Parks and Forests, and provides no statutory replacement protection to balance the harm caused by the leasing of State Forest Land from gas extraction, and no replacement of the loss of the natural gas resources from the corpus of the trust.

2) Find and Declare that the people of the Commonwealth have a right to the protections given in CNRA to the State Park and Forests, and that if the trustee is able to and makes a decision to take that protection away without replacing that protection with equal or greater protection then the peoples' rights are violated.

3) Find and Declare that Section 1602-E takes away from DCNR the ability to provide the balanced management of the public natural resources, and

subverts its mission to sustain our State our Forests through ecosystem management.

B. Section 1603-E of the Fiscal Code

Section 1603-E of the Fiscal Code, 72 P.S. § 1603-E, states that “subject 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]. The Department shall give preference to the operation and maintenance of State Parks and Forests.”

The Governor’s approval of Section 1603-E of Article XVI-E of the Fiscal Code directly impacts DCNR’s ability to comply with its constitutional and statutory mandates by giving the General Assembly authority to arbitrarily control the limit of funds DCNR would get each year from the Oil and Gas Lease Fund from anywhere between zero (0) and up to \$50 million, and for the General Assembly to determine, with the approval of the Governor, what projects fit the term “operation and maintenance of State Parks and Forests”.

Section 1603-E of the Fiscal Code violates Article I § 27 by arbitrarily limiting the royalties available to DCNR from the Oil and Gas Lease Fund to \$50,000,000 without any fiduciary analysis of the financial needs of DCNR to meet its statutory and constitutional responsibilities to conserve and maintain the

State Parks and Forest lands, and to protect the rights and benefits of the people of the Commonwealth to those lands.

Section 1603-E of the Fiscal Code violates Article I § 27 by arbitrarily limiting the royalties available to DCNR from the Oil and Gas Lease Fund to \$50,000,000 without any fiduciary analysis of the needs of DCNR to the needs of the money to meet its statutory and constitutional responsibilities to conserve and maintain the State Parks and Forest lands, and to protect the rights and benefits of the people of the Commonwealth to those lands.

Based on the relevant law and facts discussed above, as well as the facts set forth in Petitioner's Motion for Summary Judgment, Petitioner respectfully requests this Court to declare the following:

- 1) Find and Declare that Section 1603-E of Article XVI-E of the Fiscal Code, 72 P.S. § 1603-E, violates Article I § 27 by directly impacting DCNR's ability to comply with its constitutional and statutory mandates by giving the General Assembly authority to arbitrarily control the limit of funds DCNR would get each year from the Oil and Gas Lease Fund from anywhere between zero (0) and up to \$50 million, and for the General Assembly to determine, with the approval of the Governor, what projects fit the term "operation and maintenance of State Parks and Forests".

2) Find and Declare that Section 1603-E of the Fiscal Code violates Article I § 27 by arbitrarily limiting the royalties available to DCNR from the Oil and Gas Lease Fund to \$50,000,000 without any fiduciary analysis of the financial needs of DCNR to meet its statutory and constitutional responsibilities to conserve and maintain the State parks and forest lands, and to protect the rights and benefits of the people of the Commonwealth to those lands.

C. Sections 1604-E and 1605-E of the Fiscal Code

Sections 1604-E and 1605-E of the Fiscal Code, 72 P.S. §§ 1604-E and 1605-E, provide the statutory authority to require the transfer to the General Fund of \$60,000,000 and \$180,000,000 from the Oil and Gas Lease Fund as proposed by the Governor in his Executive Budgets of Fiscal Years 2009-10 and 2010-11.

Section 1604-E states, “Notwithstanding section 1603-E or any other provision of law, in fiscal year 2009-2010 the amount of \$60,000,000 shall be transferred from the [Oil and Gas Lease] fund to the General Fund.” Section 1605-E repeats the language of 1604-E, except the amount of \$180,000,000 shall be transferred in fiscal year 2010-2011 to the General Fund.

By the authority they gave themselves under Section 1602-E to control the allocations from the Oil and Gas Lease Fund, the General Assembly, with the approval of the Governor, required the transfer of \$240,000,000 from the Oil and Gas Fund contrary to the provisions of the Oil and Gas Lease Fund Act, and

contrary to the statutory structure of the CNRA to provide protection of the public natural resources from the impacts of leasing State Forest land for gas extraction, and contrary to the promise of Section 1603-E to give DCNR up to \$50,000,000 for that year.

Using the authority of the Fiscal Code to demand the transfer of \$240,000,000 from the Oil and Gas lease Fund when the Oil and Gas Lease Fund did not have that amount available, the General Assembly, with the approval of the Governor, required DCNR to lease more State Forest land contrary to Section 302(6) of CNRA, which gives only DCNR the authority to lease State Forests for gas extraction “whenever it shall appear to the satisfaction of [DCNR] that it would be in the best interests of the Commonwealth to make such disposition of those minerals.”

The result of the requirements of Sections 1604-E and 1605-E was that DCNR had to lease an additional 65,000 acres of State Forest land to provide the \$240,000,000 that the Fiscal Code required.

Sections 1604-E and 1605-E violate Article I § 27 because they treat the public natural resources, which are the corpus of the Public Trust under Article I § 27, as proprietary property of the Commonwealth, and not as the common property of the people held in trust by the Commonwealth. These provisions violate the duty imposed on the Commonwealth to conserve and maintain those resources for the

benefit of the people for generations to come, and to preserve and protect the rights of the people to clean air, pure water and the preservation of the natural, scenic, historic and aesthetic values of those resources.

Sections 1604-E and 1605-E violated Article I § 27 by adversely impacting the corpus of the Public Trust property by leasing State Forest for gas extraction and causing long-term harm and loss of our public natural resources to get money for the General Fund when other alternatives were available to balance the budget, *i.e.*, raising additional tax revenue or temporarily reducing spending until the tax revenue rebounded following the recession.

Sections 1604-E and 1605-E violate Article I § 27 by requiring leasing of State Forest land in violation Section 302(6) of CNRA, which authorizes only DCNR to make the determination to lease under the mandates of their duty as trustee under Article I § 27.

Sections 1604-E and 1605-E violate Article I § 27 by requiring the transfer of funds from the Oil and Gas Lease Fund in violation of the Oil and Gas Lease Fund Act, which requires that the money from the leasing State lands be put into a special fund to be used exclusively for projects for conservation, recreation, dams and flood control, which funds are specifically appropriated to DCNR to determine the need for and location of the projects to carry out the provisions of the act, and to fulfill its duties as trustee under Article I § 27.

Sections 1604-E and 1605-E violate Article I § 27 by taking away DCNR's ability as trustee to conserve and maintain our State Parks and State Forests and the public natural resources therein for the benefit of all the people, and to preserve the peoples' rights to those resources from the impacts of leasing State Forest land for gas extraction.

Sections 1604-E and 1605-E violate Article I § 27 by requiring the transfer of money from the special fund known as the Oil and Gas Lease Fund, that is a part of the Public Trust under Article I § 27. The conversion of the public trust corpus, both the land through leasing for gas extraction and the sale of the natural gas, into money requires that the money be kept for the purposes of the trust, and not be used by the Commonwealth for purposes outside of the trust obligations.

Based on the relevant law and facts discussed above, as well as the facts set forth in Petitioner's Motion for Summary Judgment, Petitioner respectfully requests this Court to declare the following:

- 1) Declare that Sections 1604-E and 1605-E of the Fiscal Code, 72 P.S. §§ 1604-E and 1605-E, violate Article I § 27 by requiring leasing of State Forest land in violation Section 302(6) of CNRA, which authorizes only DCNR to make that determination to lease under the mandates of their duty as trustee under Article I § 27.

2) Declare that Sections 1604-E and 1605-E violate Article I § 27 by requiring the transfer of funds from the Oil and Gas Lease Fund in violation of the Oil and Gas Lease Fund Act, which requires that the money from the leasing of State Forest lands be put into a special fund to be used exclusively for projects for conservation, recreation, dams and flood control, which funds are specifically appropriated to DCNR to determine the need for and location of the projects to carry out the provisions of the act, and its duties as trustee under Article I § 27.

3) Find and Declare that Sections 1604-E and 1605-E violate Article I § 27 by taking away DCNR's ability as trustee to conserve and maintain our State Parks and State Forests and the public natural resources therein for the benefit of all the people, and to preserve the peoples' rights to those resources from the impacts of leasing State Forest land for gas extraction.

4) Find and Declare that Sections 1604-E and 1605-E violate Article I § 27 by requiring the transfer of money from the special fund known as the Oil and Gas Lease Fund, that is a part of the Public Trust under Article I § 27.

XI. The Transfers from the Oil and Gas Lease Fund to the General Fund in 2009 and 2010 are in Violation of the Oil and Gas Lease Fund Act and are Not Authorized under Section 1602-E of the Fiscal Code.

The money for the transfers to the General Fund from the Oil and Gas Lease Fund was obtained from payments of upfront rental/bonus bids for the 2008, 2009 and 2010 State Forest oil and gas leases. This money was wrongfully transferred

because Sections 1601-E and 1602-E of the Fiscal Code only authorize transfers of money from *royalty* payments from the extraction of the natural gas. The Respondents wrongfully approved those transfers in violation of the Oil and Gas Lease Fund Act.

Section 1602-E 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.

Sections 1604-E and 1605-E mandates transfers from the Oil and Gas Lease Fund to the General Fund of \$60,000,000 and \$180,000,000. That money (not yet generated at the time of the enactment of the Fiscal Code Amendments) was not from *royalties*, which would be generated when Commonwealth’s natural gas was actually extracted and sold, but from the leasing of State Forest land, that is, *rent* (commonly called ‘*bonus*’ money) from opening up the State Forests tracts to natural gas exploration and extraction.

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 from 2008 to 2010.

Thus, the transfer of the \$383,000,000 of bonus rents in the Oil and Gas Lease Fund to the General Fund mandated by Sections 1604-E and 1605-E of the Fiscal Code were both in violation of the Oil and Gas Lease Fund Act, and in violation of Article I § 27.

Based on the relevant law and facts discussed above, as well as the facts set forth in Petitioner's Motion for Summary Judgment, Petitioner respectfully requests this Court to declare the following:

1) Find and Declare that the transfer of the \$383,000,000 of bonus or rents in the Oil and Gas Lease Fund to the General Fund mandated by the Appropriations Acts of 2009 and 2010, and by Sections 1604-E and 1605-E of the Fiscal Code, were in violation of the Oil and Gas Lease Fund Act and in violation of Article I § 27 because the only statutory authorization to avoid the exclusionary requirements of Oil and Gas Lease Funds Act is Section 1602-E, which only authorizes royalty funds from the Oil and Gas Lease Fund to be excluded from the Act's requirements.

XII. The Governor Violated Article I §27, his Trustee Duties and the People's Rights Thereunder by Requiring DCNR to Use the Oil and Gas Lease Fund Instead of the General Fund for Operating Expenses (e.g., Salaries, Fees, Travel, etc.) Not Directly Related to Conserving and Maintaining the Public Natural Resources.

In 2010, not long before leaving office, Governor Rendell signed Executive Order 2010-05 (Exhibit HH), which issued a moratorium on further leasing of State Forest land. But Section 1602-E of the Fiscal Code – the provision that permanently removed DCNR's control over the Oil and Gas Lease Fund – was still in effect. Governor Corbett has used this authority to continue to raid the Oil and Gas Lease Fund just as Governor Rendell did before the moratorium, but using a different tactic. Rather than propose direct transfers from Oil and Gas Lease Fund to use for General Fund purposes, Governor Corbett has made increasingly deeper cuts to DCNR's General Fund appropriation and substituted money from the Oil and Gas Lease Fund to pay for operating expenses that had been paid with General Fund revenue.

In his first Executive Budget, Governor Corbett proposed reducing DCNR's FY 2011-12 General Fund appropriations for its General, State Parks and State Forest Operations from \$79,104,000 to \$55,316,000, and increasing DCNR's appropriation from the Oil and Gas Lease Fund for General and State Park Operation from \$18,171,000 to \$34,647,000. Exhibit SS.

In his second Executive Budget, Governor Corbett proposed reducing DCNR's FY 2012-13 General Fund appropriations for its General, State Parks and

State Forest Operations from \$52,288,000¹³ to \$49,618,000, and reducing DCNR's appropriation from the Oil and Gas Lease Fund for General and State Park Operation to \$33,788,000. *Id.*

In his third Executive Budget, Governor Corbett proposed maintaining DCNR's FY 2013-14 General Fund appropriations for its General, State Parks and State Forest Operations at \$49,618,000, and increasing DCNR's appropriation from the Oil and Gas Lease Fund for General, State Park and State Forest Operation to \$47,925,000. However, he approved and signed an Appropriations Bill for FY 2013-14 that reduced DCNR's General Fund appropriation for Operations to \$24,614,000 and increased its Oil and Gas Lease Fund appropriation for Operations to \$106,546,000. *Id.*

In his recently issued fourth Executive Budget, Governor Corbett proposed reducing DCNR's FY 2014-15 General Fund appropriations for its General, State Parks and State Forest Operations to \$23,888,000, and increasing DCNR's appropriation from the Oil and Gas Lease Fund for General, State Park and State Forest Operation to \$117,546,000. *Id.*

The up to \$50 million from the Oil and Gas Lease Fund that Section 1603-E appropriates annually to DCNR is required to be used for DCNR's annual

¹³ Although Governor Corbett proposed \$55,316,000 in General Fund appropriations for FY 2011-12, he approved and signed an Appropriation Bill that only provided DCNR with \$52,288,000 in General Fund appropriations.

operating expenses, not mitigation of the harm to the State Parks and Forests from oil and gas extraction.

In addition to the \$117 million to be taken from the Oil and Gas Lease Fund for DCNR's annual operating expenses, the Governor's FY 2014-15 budget proposes to transfer another \$75 million from the Oil and Gas Lease Fund to the General Fund, even though this amount is not available in the Oil and Gas Lease Fund and will require DCNR to lease additional State Forest land for gas extraction to generate the money to be transferred. *Id.*

The trustee, as fiduciary, has the duty to act toward the corpus of the trust, the public natural resources, with prudence, loyalty, and impartiality. *Robinson Twp.*, 83 A.3d at 84 (citing *In re Mendenhall*, *supra* (duty of prudence generally requires trustee to exercise ordinary skill, prudence, and caution in managing corpus of trust.) The trustee has the duty of loyalty to administer the trust solely in the beneficiary's interest and not his own. *Id.* (citing *In re Hamill's Estate*, *supra* (trustee has duty of impartiality.)

The Governor violated and continues to violate his duty as trustee by requiring DCNR to depend on the Oil and Gas Lease Fund for money to pay its staff and cover its day-to-day operating expenses, rather than receive General Fund revenue. The money in the Oil and Gas Lease Fund is part of the corpus of the trust. It is generated from the conversion of the public natural resources – the

corpus of the trust – to private industrial use. His decision to use the Oil and Gas Lease Fund rather than the General Fund to operate DCNR compromises both his and DCNR’s ability to function as trustee with prudence toward the corpus of the trust, and with loyalty to act solely in the interest of the beneficiaries – the people of the Commonwealth.

The Governor has violated his duty under Article I § 27 in making the above decisions and taking the above actions to force DCNR to operate on money from State Forest gas leases, to divert money from the Oil and Gas Lease Fund to the General Fund, and to require leasing additional State Forest land for gas extraction, which will adversely impact public natural resources, without evaluating the extent of the impacts thereto on the duties of the trustee to conserve and maintain the public natural resources for the benefit of all the people, including generations yet to come; and without evaluating whether these actions will protect the rights of the people to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of those resources.

The Governor violates Article I § 27 because his decisions continue to deprive DCNR of its ability to fulfill its constitutional duty under Article I § 27 to conserve and maintain the public natural resources, and its statutory duty under CNRA to manage the State Forest lands to assure their long-term health, sustainability and economic use. He does this by leaving DCNR with almost

700,000 acres of State Forest land now subject to Marcellus development with no revenue from those leases for DCNR to deal with the impacts from the gas extraction, or the ability to mitigate those impacts.

The Governor violates Article I § 27 because his decisions violates the statutory structure created by CNRA to allow leasing of State lands for gas extraction under the limits of Article I § 27, and to require that DCNR control and use the revenue from leasing and the royalties from oil and gas production in the Oil and Gas Lease Fund to mitigate and restore the public natural resources from the impacts of oil and gas extract on State Parks and Forests, and to enable DCNR to maintain and improve the benefits to the people from those resources, and to protect the peoples' rights to clean air, pure water and the preservation of the natural, scenic, historic and esthetic values of those resources.

A trustee cannot divert the corpus of a public trust to private uses. *Payne v. Kassab*, 468 Pa. 226, 237, 361 A.2d 263, 268 (citing *Bernstein v. Pittsburgh*, 366 Pa. 200, 77 A.2d 452 (1951); *Trustees of the Philadelphia Museum v. Trustees of University of Pennsylvania*, 251 Pa. 115, 96 A.2d 135 (1915)). Nor can a trustee divert the corpus of a trust to public uses not within those designated in the dedicatory language. *Id.*, cf. *Brucker v. Carlisle Borough*, 376 Pa. 330, 102 A.2d 418 (1954).

It has long been held and determined that DCNR cannot use the Oil and Gas Lease Funds for its operations. The Auditor General conducted an audit of the Oil and Gas Lease Fund and submitted the results of the audit to the Governor (then Governor Rendell) on August 10, 2004. The Auditor General Report stated that revenue from the Oil and Gas Lease Fund must by law be used exclusively for conservation, recreation, dams and flood control projects on Commonwealth lands. 2004 Audit at 1, Exhibit Q; *see* Deposition of Michael DiBerardinis at 8-11.

The Auditor General Report stated 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 State Parks and State Forests, the intended beneficiaries of the revenues in the Oil and Gas Lease Fund, and therefore were inappropriate or unjustified. 2004 Audit at 2, Exhibit Q.

The Auditor General cited in the 2004 Audit an “informal guidance” letter from the Attorney General dated February 7, 1991 in which the Attorney General advised the State Treasurer that the proper lawful use of the Oil and Gas Lease Fund is to carry out physical projects to enhance and conserve the specific conservation, recreation, dam and flood control projects. 2004 Audit at 16-22, Exhibit Q; 1991 Letter, Exhibit R; *see also* General Counsel letter to the State

Treasurer dated November 2, 1990, Exhibit S; and DCNR Chief Counsel memorandum dated February 24, 2012, Exhibit T.

The Attorney General specifically states in the 1991 Letter that the Oil and Gas Lease Fund Act “expressly authorizes expenditures to acquire land needed for conservation, recreation, dam or flood control projects” and also for “the construction of facilities and other improvements to land *necessary for such projects*, and for the subsequent purchase of equipment, supplies and services *necessary to maintain or enhance* such projects.” 1991 Letter at 2, Exhibit R (emphasis added).

The 1991 Letter continues:

I believe it beyond the authority of the [Oil and Gas Lease Fund] 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 DER¹⁴; and the Act, while imprecise in its expression of intent, certainly suggests otherwise.

The Auditor General concluded in the Special Audit that:

In my judgment, the General Assembly’s establishment of *this special 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*

¹⁴ DER refers to the Department of Environmental Resources, which prior to CNRA’s enactment carried out the regulatory functions now performed by the Department of Environmental Protection and the recreation and conservation functions now performed by DCNR.

the physical enhancement or conservation of the Commonwealth's natural resources. Viewed in this light, [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. at 3 (emphasis added.)

Based on the relevant law and facts discussed above, as well as the facts set forth in Petitioner's Motion for Summary Judgment, Petitioner respectfully requests this Court to declare the following:

1) Find and Declare that the conversion of public trust corpus land and natural gas, both by the long-term leasing of the land for gas extraction, and the sale of the natural gas into money requires that the money is still part of the corpus of the trust and must be retained for the purposes of the trust, and not be used by the Commonwealth for purposes outside of the trust obligations.

2) Find and Declare that the Governor violated and continues to violate his duty as trustee by requiring DCNR to use Oil and Gas Lease Funds to operate the agency, which is not a trust purpose.

3) Find and Declare that the Governor's decision to use the Oil and Gas revenue to operate DCNR compromises both his and DCNR's ability to function as fiduciary trustee, to act with prudence, loyalty and impartiality toward the corpus of the trust, and with loyalty to act solely in the interests of the beneficiary's interests.

3) Find and Declare that the Governor's decision to use Oil and Gas Lease Funds to operate DCNR has violated his duty under Article I § 27 by failing to evaluate the impacts thereof on the duties of the trustee to conserve and maintain the public natural resources for the benefit of all the people, including generations yet to come; and to preserve and protect the enumerated rights of the people to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of those resources.

4) Find and Declare that the Governor's decision to force DCNR to operate on oil and gas revenue from the leasing of State Forest land violates Article I §27 because the decision continues to deprive DCNR of the funds necessary to meet its constitutional duties under Article I § 27 to conserve and maintain the public natural resources and its statutory duty under CNRA to manage State Forest lands to assure their long-term health, sustainability and economic use, including its duty to deal with almost 700,000 acres of State Forest land now subject to Marcellus development with no revenue from those leases for DCNR for the impacts from the gas extraction, or the ability to mitigate those impacts.

5) Find and Declare that the Governor's decision to force DCNR to pay its operating expenses from the Oil and Gas Lease Fund violates Article I § 27 because the decision violates the statutory structure created by CNRA to allow leasing of state lands for gas extraction under the limits of Article I § 27, and to

require that DCNR controls the revenue from leasing and royalties in the Oil and Gas Lease Fund to mitigate and restore the public natural resources from the impacts of gas extract, and to enable DCNR to maintain and improve the benefits of the people to those resources, and to protect the peoples' rights to clean air, pure water and the preservation of the natural, scenic, historic and esthetic values of those resources.

XIII. Act 13 of 2012 Violates Article I § 27 By Diverting \$50 Million Annually from Oil and Gas Lease Fund to the Marcellus Legacy Fund, and By Failing to Give DCNR the Authority to Administer Grants from the Marcellus Legacy Fund for Conservation and Recreation Projects; and Respondents Violated Article I § 27, their Trustee Duties and the People's Rights thereunder, By Approving these Act 13 Provisions.

A. Unlawful Oil and Gas Fund Transfers

On February 14, 2012, the Governor signed into law Act 13 of 2012, which amends Title 58 (Oil and Gas) of Pennsylvania's Consolidated Statutes to add several new chapters. Chapter 23 imposes a new impact fee on unconventional wells drilled into geologic formations that required hydraulic fracturing to produce the natural gas (*e.g.*, natural gas wells in the Marcellus Shale formation). The fees collected are deposited into the Unconventional Gas Well Fund and then distributed to various State and local agencies to deal with the impacts from the natural gas drilling activities.

Although the Act 13 impact fee is imposed on unconventional wells drilled on State Park and Forest land, DCNR does not receive any funds from the Unconventional Gas Well Fund. A portion of the fees deposited into the Unconventional Gas Well Fund are subsequently transferred to the Marcellus Legacy Fund and distributed primarily to State agencies for environmental projects and bridge improvements. Again, DCNR does not receive any direct funds from the Marcellus Legacy Fund, but will receive some funds through the Environmental Stewardship Fund. Unfortunately, any such funds received by DCNR are more than offset by the Act 13 provisions in the new Chapter 25 that transfer money in the Oil and Gas Lease Fund generated from the oil and gas leases on State Forest land into the Marcellus Legacy Fund. Consequently, Act 13 results in a net loss of revenue to DCNR even though State Parks and Forests are and will continue to be impacted by natural gas development.

Act 13 required the transfer \$20,000,000 from the Oil and Gas Lease Fund to the Marcellus Legacy Fund in 2013 and annual transfers thereafter increasing to \$50,000,000 by 2016. 58 Pa.C.S. § 2505(b). These rents and royalties generated from State Forest oil and gas leases 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).

Id. These annual transfers from the Oil and Gas Lease Fund will occur after DCNR is allocated any amount appropriated to it through the annual budget process.

The Environmental Stewardship Fund is allocated annually to four Commonwealth agencies, including DCNR, as follows:

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

b. The Department of Agriculture receives 14.8% to protect agricultural land from development;

c. The Pennsylvania Infrastructure Investment Authority receives 23.7% primarily for grants for sewer and water infrastructure projects; and

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

27 Pa.C.S. §§ 6104, 6105. So, for example, of the \$20,000,000 in revenue that DCNR lost to the Marcellus Legacy Fund in 2013, it got 24.1% of that amount back through the Environmental Stewardship Fund – a net loss of over 75%.

DCNR does not receive any of the funds directed to the Hazardous Sites Cleanup Fund. Prior to Act 13, the Hazardous Sites Cleanup Fund was funded solely by the Capital Stock and Franchise Tax. 35 P.S. § 6021.4 This fund is for the Department of Environmental Protection (formerly Department of

Environmental Resources) to investigate, cleanup and monitor contaminated sites (primarily private industrial facilities, 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. 35 P.S. § 6020.902

The Respondents, as trustees, have the fiduciary duty to act toward the corpus of the trust, the public natural resources under Article I § 27, with prudence, loyalty, and impartiality. *Robinson Twp.*, 83 A.3d at 84 (citing *In re Mendenhall, supra* (duty of prudence generally requires trustee to exercise ordinary skill, prudence, and caution in managing corpus of trust.) As trustees, the Respondents have the duty of loyalty to administer the Article I § 27 trust solely in the beneficiaries' interest and not in their own interests. *Id.* (citing *In re Hamill's Estate, supra* (trustee has duty of impartiality)).

The Respondents violated those fiduciary duties by approving the transfer of \$50,000,000 annually out of the Oil and Gas Lease Fund to the Marcellus Legacy Fund for its purposes. These transfers deprive DCNR, the statutory trustee of the public natural resources being harmed to generate these funds, of control of these funds to mitigate the harm to State Parks and Forests from oil and gas extraction. As a result, DCNR cannot fulfill its duty to conserve and maintain these public natural resources, or its duty to protect the rights of the people in those resources.

While the projects funded by the Environmental Stewardship Fund are

laudable and the need to fund responses to hazardous industrial releases through the Hazardous Sites Cleanup Fund is important, the use of money from State Forest oil and gas leases to pay for these projects and responses, many of which are to abate legacy industrial pollution on private lands, deprives DCNR of the funds necessary to fulfill its trustee duties under Article I § 27 and CNRA. Money from the sale of our public natural resources should not be used to pay for cleanup of private industrial facilities.

The Respondents did not consult with DCNR concerning its duties, nor did they consult with the beneficiaries of the public trust concerning their rights, to evaluate the impacts prior to approving the diversion of \$50,000,000 annually from the Oil and Gas Lease Fund to the Marcellus Legacy Fund; nor did he consider the interests of future generations of beneficiaries.

The Respondents failed to consider or evaluate the current or future financial costs for DCNR to comply with its constitutional and statutory duties to deal with the impacts from shale gas development on almost 700,000 acres of State Forest and over 200,000 acres of State Parks, before committing \$50,000,000 annually for purposes outside the trust. Costs that the Respondents failed to consider or evaluate, including the following:

- The costs to protect the integrity of State Parks from harm from private gas extraction by paying to limit the impacts or to buy the sub-surface rights;

- The cost of buying land to buffer the impacts of the gas extraction process on State Parks and Forests, and on the peoples' rights and benefits, or to mitigate for the loss of use of State land from long-term leasing activities on State land;
- The costs of obtaining a thorough inventory of the public natural resources on State Parks and Forest land, including endangered species; and an inventory of the benefits of those lands to the people, and of the air and water and the natural, scenic, historic and esthetic values;
- The costs of a thorough monitoring program for both State Parks and Forests that are or will be subject to impacts from the gas extraction process, both for the present and for the future, to determine the immediate and long-term, direct and indirect, cumulative impacts to the natural resources, including direct and indirect air pollution impacts, direct and indirect water pollution impacts, direct and indirect impacts to natural, scenic and esthetic values;
- The costs of completing all the projects that DCNR has identified but has not had the funds to complete, including repairing and replacing dams, bathroom facilities, Park and Forest offices in the field to provide a place for education projects, trail repairs and replacements, and vehicle replacement;

- The cost to clean up historic “legacy” problems of State Parks and Forests, including acid mine drainage, uncapped wells, contaminated ground and surface water.

The Act 13 provision transferring the Oil and Gas Lease Funds violates the constitutional protections established under CNRA to allow for continued leasing of State Forest land for gas extraction by committing the revenue from the leasing and royalties to be deposited into the Oil and Gas Lease Fund and appropriated to DCNR for mitigation and restoration of the public natural resources for the benefit of the people, including future generations, and to protect their rights as established under Article I § 27.

The Respondents, as trustees under Article I § 27, cannot divert the corpus of a trust – our public natural resources – to public uses not designated in the trust dedicatory language, *i.e.*, for purpose other mitigating the harm to the public natural resources caused by the oil and gas extraction in order to conserve and maintain these public natural resources. The Act 13 uses of the Oil and Gas Lease Fund, while beneficial, are outside of the purposes of the trust and result in harm to our public natural resources in violation of Article I § 27. To allow industrial oil and gas development to occur on our State Forests, and then to be forced to use to the money generated to pay for the cleanup of spills from that activity, or restoration of oil and gas sites, rather than having that money available to enhance

the public natural resources of the State Parks and Forest, deprives the trust beneficiaries of their rights to the conservation and maintenance of these resources, and to their rights to clean air, pure water and the preservation of the natural, scenic, historic and aesthetic values of their State Parks and Forests.

Based on the relevant law and facts discussed above, as well as the facts set forth in Petitioner's Motion for Summary Judgment, Petitioner respectfully requests this Court to declare the following:

1) Declare that the Respondents violated their fiduciary duties under Article I § 27 when they approved transferring \$50,000,000 annually out of the Oil and Gas Lease Fund to the Marcellus Legacy Fund, under the Act 13 Chapter 25 amendments to the Oil and Gas Lease Fund Act, which is a fund that is and will be controlled by the General Assembly, with the approval of the Governor, to be used by the General Assembly for its purposes and not by DCNR, the statutory trustee of the public natural resources, who is bound to protect and conserve the beneficiaries' rights and interests to those resources.

2) Declare that the Governor violated his duties under Article I § 27 by signing into law the Act 13 Chapter 25 provisions without first evaluating the effects of the provision on his ability to comply with his duties as trustee.

3) Declare that the Respondents violated their duties as trustees when they did not consult with DCNR or the beneficiaries as to the impacts of the

diversion of the \$50,000,000 annually on their rights or duties, and on the interests of future generations of beneficiaries.

4) Declare that the Respondents violated their duties as trustee under Article I § 27 when they failed to consider or evaluate what the financial costs are and might be for DCNR to comply with its constitutional and statutory duties to deal with the impacts from shale gas development on almost 700,000 acres of State Forest and Park, before committing \$50,000,000 annually outside the trust.

B. Act 13 Grant Funds for Conservation and Recreation Projects Unlawfully Given to the Commonwealth Financing Authority

In addition to approving the unlawful diversion of money from the Oil and Gas Lease Fund through Act 13, the Respondents unlawfully diverted grant funds approved for recreation and conservation projects from the program for such projects administered by DCNR under CNRA to an authority controlled by the General Assembly. In other words, these grants funds are awarded based on the politics, not objective criteria established to ensure these funds are used to best meet the needs of the people.

Act 13 directs that 20% of the unconventional gas well impact fees deposited into the Marcellus Legacy Fund be used for grant projects similar to those funded through Environmental Stewardship Fund. 58 Pa.C.S. § 2315(a.1)(1); *cf.* 27 Pa.C.S. § 6105. In particular, Act 13 allows these Marcellus Legacy Funds to be used for grants to eligible applicants for "planning acquisition, development,

rehabilitation and repair of greenways, recreational trails, open space, parks and beautification projects." 58 Pa.C.S. § 2315(a.1)(1)(iv).

DCNR is the Commonwealth agency established to administer financial and technical assistance for these types of conservation and recreation projects. The General Assembly articulated its intent to give DCNR authority over and to impose the duty on DCNR to develop expertise over these types of projects, stating that DCNR is 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, to provide information on Pennsylvania's ecological and geologic resources and to administer grant and technical assistance programs that will benefit rivers conservation, trails and greenways, local recreation, regional heritage conservation and environmental education programs across Pennsylvania.

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

DCNR provides grants for conservation and recreation projects through its Community Conservation Partnership Program ("C2P2 grants"). In 2013, DCNR awarded C2P2 grants of more than \$37 million for conservation and recreation

projects with total estimated costs of more than \$110 million.¹⁵ The primary sources of funding for C2P2 grants are the Environmental Stewardship Fund and the Keystone Recreation, Park and Conservation Fund. Exhibit SS.

To guide its grant award process, DCNR develops a comprehensive outdoor recreation plan, which is updated every five years with the expertise and support of its technical advisory committee and extensive input from citizens and stakeholders throughout the Commonwealth.¹⁶ In her letter opening the C2P2 grant process for 2014, the Director of the DCNR Bureau of Conservation and Natural Resources states:

Over the past 20 years – in partnership with hundreds of communities and organizations – the Bureau of Recreation and Conservation has funded more than 4,000 projects that have helped plan, acquire, and develop parks, recreation facilities, trails, and conserved critical conservation areas and watersheds; supported education and training on conservation and recreation topics; and built conservation, heritage, and recreation partnerships. As our partner, the on-the-ground work you do benefits your community, our environment and future generations. Thank you for helping build green and healthy communities! In 2014, the grant program encourages applications that advance your local conservation and recreation vision and also those that implement Pennsylvania's Comprehensive Outdoor Recreation Plan ...

DCNR C2P2 Grant Program Requirements and Guidelines at 2-3.¹⁷

¹⁵ See DCNR C2P2 Grants Interactive Map (<http://maps.dcnr.pa.gov/brc/grants/>).

¹⁶ See PA Outdoor Recreation Plan (<http://www.dcnr.state.pa.us/brc/recreation/scorp/index.htm>).

¹⁷ http://www.dcnr.state.pa.us/cs/groups/public/documents/document/D_001230.pdf.

The grant funds made available through the Act 13 Marcellus Legacy Fund for these conservation and recreation projects were not provided to DCNR, even though DCNR is the Commonwealth agency with the authority and duty to administer grants for these projects. Rather, Act 13 provides these funds to the Commonwealth Financing Authority ("CFA"), which is controlled by a seven-member board comprised of four legislative appointees,¹⁸ one appointed by the leader of each House and Senate caucus, and the Secretaries of the Department of Community and Economic Development, the Governor's Office of Budget, and the Department of Banking. 64 Pa.C.S. § 1512. Five members of the board constitute a quorum and at least four members must consent to the approval of projects. In other words, no project can be approved without at least one vote from a legislative board member. *Id.* Act 13 directs DCNR to review applications for grant projects "as requested by the Commonwealth Financing Authority" and to provide recommendations on priority of projects and project approval. 58 Pa.C.S. § 2315(c). Act 13 does not direct the Commonwealth Financing Authority to follow DCNR's recommendations.

¹⁸ The CFA legislative appointees cannot be members of the General Assembly or their staff and serve at the pleasure of the appointing legislative leader. The current legislative appointees are Michael Karp, President, University City Housing Company; Austin J. Burke, formerly with the Greater Scranton Chamber of Commerce; John J. Verbanac, President/CEO, Summa Development, and Marc Little, President/CEO, Minority & Women Educational Labor Agency (<http://www.newpa.com/find-and-apply-for-funding/commonwealth-financing-authority>).

Act 13 violates Article I § 27 by undermining DCNR's trustee duties to advocate for and provide more focused management of the Commonwealth's recreation, natural and river environments. Like our State Parks and Forests, our local community parks and natural resource conservation areas are public natural resources to be conserved and maintained as part of the public trust established by Article I § 27. DCNR is the Commonwealth agency statutorily designated to serve as the trustee for these public natural resources, not the Commonwealth Financing Authority. DCNR has carried out its obligation to provide more focused management of these public natural resources by preparing a comprehensive statewide outdoor recreation plan developed through a public process. DCNR has administered a long-standing grant program to fund recreation and conservation projects consistent with its comprehensive management plan. By providing the Marcellus Legacy Funds to the Commonwealth Financing Authority, Act 13 violates Article I § 27, and the people's rights thereunder, by directing funds necessary to conserve and maintain public natural resources to an entity with no expertise to carry out the Commonwealth's fiduciary duties under Article I § 27.

Additionally, Act 13 impermissibly extends legislative control over the governmental policy it establishes to fund conservation and recreation projects with the Marcellus Legacy Fund. By directing approval of those projects by the Commonwealth Financing Authority, rather than DCNR, the General Assembly

retains control over implementation of the grant program established by Act 13. Although the Commonwealth Financing Authority is intended to function as an executive agency that *implements* legislation, as opposed to a "legislative agency" providing legislative oversight or review, the structure of the CFA Board gives the General Assembly control over the majority of its members, which violates the separation of powers doctrine. *Commonwealth v. Sessoms*, 516 Pa. 365, 374, 532 A. 2d 775, 780 (1987) ("to the extent a statute establishes *governmental* policy, the legislature may not further control the execution of that policy except through legislation ... the inclusion of legislators and/or judges on an agency administering the laws is itself likely violative of the separation of powers doctrine"); *Commonwealth v. Jubelirer*, 531 Pa. 472, 487, 614 A.2d 204, 212 (1992) ("The policies underlying environmental legislation is a matter left entirely to the legislative branch ... ; the administration and execution of those policies, as properly and constitutionally established by the legislature, is within the exclusive discretion of the Executive Branch.").

The Respondents have violated their fiduciary duties and the people's rights under Article I § 27 by approving the Act 13 provisions that give the Commonwealth Financing Authority control over the Marcellus Legacy Funds designated for conservation and recreation projects. The Commonwealth Financing Authority has no expertise in conserving and maintaining greenways, recreational

trails, open space, and parks, or preserving the natural, scenic, historic and aesthetic values of our environment; nor does it have any obligation under Act 13 to request or follow recommendations from DCNR – the agency with the statutory and constitutional duty and expertise to carry out these functions. The Respondents approved the transfer of these functions from DCNR to the Commonwealth Financing Authority without evaluating the impact of doing so on DCNR's trustee duties to conserve and maintain these public natural resources, or on people's rights under Article I § 27.

Based on the relevant law and facts discussed above, as well as the facts set forth in Petitioner's Motion for Summary Judgment, Petitioner respectfully requests this Court to declare the following:

1) Find and Declare that the Act 13 provision authorizing the Commonwealth Financing Authority to administer Marcellus Legacy Funds for conservation and recreation projects violates Article I § 27 and CNRA.

2) Find and Declare that the Act 13 provision authorizing the Commonwealth Financing Authority to award grants for conservation and recreation projects violates the separation of powers doctrine because the CFA Board is controlled by members appointed by the General Assembly.

3) Find and Declare that the Respondents violated Article I § 27, and their trustee duties and the people's rights thereunder, by approving the provisions

of Act 13 that authorize the Commonwealth Financing Authority to award grants for conservation and recreation projects rather than DCNR, the agency statutorily designated as the trustee of the public natural resources to be benefited by these grants.

XIV. Petitioner's Members are Directly, Substantially and Immediately Harmed by the Respondent's Actions.

The requirement for standing is prudential in nature, and stems from the principle that judicial intervention is appropriate only where the underlying controversy is real and concrete. *City of Phila. v. Commonwealth*, 575 Pa. 542, 559; 838 A.2d 566, 578 (2003). The core concept is that a party who is not negatively affected by the matter he seeks to challenge is not aggrieved, and thus has no right to obtain judicial resolution of his challenge. *Id.* (citing, *Pa. Game Commission v. Dept. of Environmental Resources*, 521 Pa. 121, 127, 555 A.2d 812, 815 (1989)). In *Zemprelli v. Daniels*, 496 Pa. 247, 253, 436 A.2d 1165, 1168 (1981), the court found that standing existed because the plaintiffs had “alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.” A litigant can establish that he is aggrieved if he can show that he has a substantial, direct and immediate interest in the outcome of the litigation. *City of Phila.*, 575 Pa. at

560, 838 A.2d at 577; *Wm. Penn Parking Garage v. City of Pittsburgh*, 464 Pa. 168, 346 A.2d 269 (1975). A party has substantial interest in the outcome of litigation if his or her interest exceeds that of all citizens in procuring obedience to the law. *Wm. Penn Parking Garage*, 464 Pa. at 195, 346 A.2d at 282. The interest is direct if there is a causal connection between the asserted violation and the harm complained of; it is immediate if that causal connection is not remote or speculative. *City of Phila.*, 575 Pa. at 560, 838 A.2d at 577.

As set forth in paragraphs 87-117 of the Petitioner's Motion for Summary Judgment and their affidavits (Exhibits A-O), Petitioner's members have a substantial, direct and immediate interest in the outcome of this litigation. The majority of Petitioner's members live in north central Pennsylvania and recreate in the State Parks and Forests that are being impacted by Marcellus Shale natural gas extraction. Specifically, Petitioner's members enjoy outdoor activities including fishing, hiking, bird watching, biking, canoeing, kayaking, camping, picnicking, and hunting, all of which allow them to experience the solitude and wild character of the hundreds of thousands of acres of State Park and State Forest land that are part of the Pennsylvania Wilds. Petitioner's members have experienced first-hand the harm to these public natural resources that has and is continuing to occur from the industrialized activity of Marcellus Shale natural gas extraction now occurring on the State Forest.

The conversion of hundreds, if not thousands, of acres of remote wild areas of the State Forest to private industrial sites (well pads, roads, pipelines, compression stations, impoundments, etc.), with the heavy truck traffic, tree cutting, land clearing, construction, noise, dust, diesel engine exhaust and other pollution that accompanies any industrial activity of this magnitude, has fundamentally altered the wild character of areas of the State Forests under development. Petitioner's members have experienced the direct loss of scenic vistas, hiking trails, dark skies and favorite hunting places and, in some case, been told by gas companies that they can no longer access parts of the State Forest. They have also experienced impacts from the natural gas industrial development on the State Forest to species of birds, mammals, reptiles, and amphibians, particularly those that rely on forest interior habitats. *See* Affidavits of Pennsylvania Forest Coalition (Exhibit N); Keystone Trails Association (Exhibit F); Pine Creek Headwaters Protective Association (Exhibit M); Lycoming Creek Watershed Association (Exhibit G); Responsible Drilling Alliance (Exhibit K); Tiadaghton Audubon Society (Exhibit I); Pine Creek Watershed (Exhibit N).

One of the greatest losses for Petitioner's members has been the inability to experience the peace and tranquility that comes from simply spending an afternoon or weekend enjoying the clean air, pure water and quiet natural, scenic, and aesthetic beauty of these wild lands without the intrusion of the industrial natural

gas development. The areas of the State Forest being developed for natural gas will be unavailable to the Petitioner's members throughout the development process, which could be more than 40 to 60 years. *Id.*

Many of the streams located within the State Forest are designated as exceptional value streams under Pennsylvania's water quality standards and support native brook trout, a species extremely sensitive to pollution. Petitioner's members have a substantial, direct and immediate interest in the protection of the water quality in these streams. *See* Affidavits of Lycoming Creek Watershed Association (Exhibit G); Pine Creek Headwater Protective Association (Exhibit M). In addition, Petitioner's members face harm from increased stormwater runoff and flooding as land clearing for industrial natural gas development expands, particularly in the rugged steep valleys characteristic of much of the State Forest. *See* Affidavit of the Loyalsock Creek Watershed Association (Exhibit O).

In addition to the harm experienced by Petitioner members from direct impacts to the State Forest from natural gas drilling, Petitioner's members have also experienced harm to the substantial Regional efforts that have been undertaken to establish a sustainable ecotourism economy in north central Pennsylvania. Paul Hoffmaster, President of the Pine Creek Preservation Association, describes in his affidavit (Exhibit E) the depth of the collaborative relationship of DCNR with his organization and others in the development of the

recreational and tourist economy of the Pine Creek Valley. These relationships have resulted in the “Pine Creek Valley Management Plan”, the “Pine Creek Rail Trail Plan”, the “PA Wilds Economic Development Program” and the “Pine Creek Watershed River Conservation Plan”. These plans and programs all integrate the uses of the natural resources of the State Forests and Parks in the area with the recreational and economic development of the Pine Creek Valley, the four-county region of Pine Creek, and the twelve-county area of the PA Wilds. These efforts are all dependent on DCNR’s continued protection of the public natural resources of the State Parks and Forests and continued funding the local community ecotourism initiatives.

Paul Hoffmaster has expressed the harm that Petitioner's members have experienced, stating: “The Pine Creek Valley and whatever remains of the PA Wilds dream of economic growth through recreation and tourism depends heavily on the presence and mission of DCNR.” Paul continues to add, “With the addition of enhancing and accommodating rail trail, tourism and outdoor recreation activities as part of their mission, came additional responsibilities such as maintaining the rail trail, expanding and maintaining snowmobile and cross-country trails, expanding and maintaining canoe and boat access areas, expanding and improving hiking trails, expanding and improving both camping areas and their amenities.”

In addition to these responsibilities, over and above their duty to protect and conserve the State Forest and the natural resources of the forests, Paul Hoffmaster points to added responsibilities of DCNR to oversee the gas industry activities within those forests. Yet, as Mr. Hoffmaster concludes, DCNR's local staffing for its ecotourism initiative is significantly less today than it was five years ago. DCNR's proposed recreational enhancements to the area have been curtailed. And, DCNR has lost the Oil and Gas Lease Funds that are necessary to carry out those purposes.

These harms are experienced by other Petitioner members in their affidavits as well. The Slate Run Sportsmen have noted that since the development of gas on State Forest lands the DCNR enforcement officers, who were already spread thin, have been pulled from their regular duties to handle incidents on well pads and gas truck traffic violations and incidents (Exhibit L). Further, the Slate Run Sportsmen are concerned that there will not be sufficient funds left in the Oil and Gas Lease Fund to for restoration (of the natural resources) after the damage from the drilling activities are completed. *See also* Affidavit of the Responsible Drilling Alliance (Exhibit K); Lycoming Audubon Society (Exhibit J); Lycoming Creek Watershed Association, (Exhibit G); Muncy Creek Watershed Association (Exhibit H); and the Keystone Trails Association (Exhibit F).

Petitioner's members are also concerned about the loss of property values, as well as jobs. They believe the quality of the State Forest has an impact on the value of their homes, hunting fishing camps and services that support tourism in and near the Forest. Industrialization of the State Forest for gas extraction may benefit the private gas industry, but not the residents and recreational users of the State Forests. *See* Affidavit of the Loyalsock Creek Watershed Association (Exhibit O); Pine Creek Headwaters Protective Association (Exhibit M).

The harms enumerated above only partially cover the impacts and concerns of the Petitioner's members as expressed in their affidavits (Exhibits A – O). The Petitioner respectfully requests this Honorable Court to read and review the entirety of each affidavit to fully understand the substantial, direct and immediate impacts on Petitioner's members of the natural gas development occurring on our State Forests, and on and around our State Parks.

Based on the relevant law and facts discussed above, as well as the facts set forth in Petitioner's Motion for Summary Judgment, Petitioner respectfully requests this Court to declare the following:

- 1) Petitioner has standing to assert the claims in its Second Amended Petition for Review and this Motion for Summary Judgment.

CONCLUSION

Based on the relevant law and the undisputed facts set forth in its Motion for Summary Judgment and for the reasons discussed herein, the Petitioner Pennsylvania Environmental Defense Foundation respectfully requests that this Honorable Court grant summary judgment in its favor and declare that the Respondents have violated Article I § 27 and that the Fiscal Code amendments and Act 13 provisions in question are also unconstitutional.

Respectfully,

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