

**COMMONWEALTH COURT OF PENNSYLVANIA**

**PENNSYLVANIA ENVIRONMENTAL** :  
**DEFENSE FOUNDATION,** :  
**Petitioner** :  
 :  
**v.** : **No. 228 M.D. 1012**  
**COMMONWEALTH OF PENNSYLVANIA,** :  
**and**  
**THOMAS CORBETT** :  
**GOVERNOR OF PENNSYLVANIA,** :  
**in his official capacity as GOVERNOR,** :  
**Respondents** :

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**PETITIONER'S APPLICATION FOR REARGUMENT**

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The Pennsylvania Environmental Defense Foundation (PEDF), through its undersigned counsel, submits this request for reargument in the above-captioned case pursuant to Pa.R.A.P. 2541-2544 because the Commonwealth Court has overlooked or misapprehended certain points of law and fact in its Opinion and Order issued on January 7, 2015.

**The Court Misapprehended Application of the Balancing Test in Considering the Constitutionality of an Action or Decision of the Commonwealth that Directly Impacts Rights Established Under Article I § 27**

The Court concludes, after a brief analysis of Article I Section 27 of the Pennsylvania Constitution (Article I § 27), and after rejecting the Pennsylvania Supreme Court's plurality decision in *Robinson Twp. v. Commonwealth*, 83 A.3d 901 (Pa. 2013), that it remains bound by its own Article I § 27 balancing test established in *Payne v. Kassab*, 312 A.2d 86 (Pa. Cmwlth. 1973), which was affirmed by the Pennsylvania Supreme Court (*Payne v. Kassab*, 361 A.2d 263 (Pa. 1976)). Opinion (Op.) at 33-34. The *Payne* opinions require the Commonwealth to balance any harm to the rights established under Article I § 27 that may or will be caused in carrying out its duties against the benefits derived from the Commonwealth's action.

In reaching its conclusion in this case, the Court misapprehended the meaning of the rights of the people under Article I of the Pennsylvania Constitution, and misconstrued Article I § 25, which clearly and directly precludes any balancing of the people’s rights under Article I § 27 with the constitutional powers and duties given to the Commonwealth government by the people. The Court overlooked PEDF’s argument that Article I § 1 of the Pennsylvania Constitution declares the Article I rights of the people to be indefeasible; and misapprehends the plain language of Article I § 25, which states that “to guard against the 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.” It is undisputable that the Commonwealth is prohibited from balancing Article I rights with the Commonwealth’s duties under other constitutional mandates, including balancing the budget (Article VIII, § 12) or providing for public education (Article II, § 14).

### **The Court Overlooked the Plain Language of Article I § 27**

The plain language of the public trust under Article I § 27 states: “Pennsylvania’s public natural resources *are the common property of all the people*, including generations yet to come” (emphasis added). The Court overlooked this plain language, which states that the people own the public

natural resources, not the Commonwealth. The public natural resources are the corpus of the trust established by Article I § 27. The Commonwealth cannot lease or sell those natural resources, including the natural gas and oil, and take the money out of the public trust to carry out its other responsibilities.

Article I § 27 specifically defines and limits the Commonwealth's role with regard to public natural resources: "As trustee of those natural resources, the Commonwealth *shall* conserve and maintain them *for the benefit of all the people*" (emphasis added). The Commonwealth is constrained to fulfill its duty as trustee under Article I § 27 to conserve and maintain the public natural resources for the benefit of the people in any action it takes to carry out its constitutional or statutory duties. Nothing in Article I § 27 allows the Commonwealth to use the people's public natural resources to carry out its other duties under the Constitution.

### **The Court Misapprehended PEDF's Fundamental Article I § 27 Claims**

PEDF's fundamental requests are for the Court to declare that the Respondents violated their duties as Trustees under Article I § 27 by failing to evaluate the impacts on the public natural resources **BEFORE** making the following decisions and taking the following actions:

(1) Requiring DCNR to lease additional State Forest land for oil and gas extraction knowing that more than 600,000 acres of State Forest were already under lease, and that DCNR had decided not to execute any more leases until it could assess the harm to the State Forest from the existing leases;

(2) Taking from DCNR \$143 million that DCNR had obtained from leasing 74,000 acres of State Forest for oil and gas extraction in 2008, knowing that DCNR had entered into those leases with the understanding that it would receive this money under existing law (the Oil and Gas Lease Fund Act) to deal with the impacts from oil and gas extraction and to benefit the public natural resources of our State Forests and Parks;

(3) Requiring additional State Forest oil and gas leases in 2009 and 2010 for the sole purpose of raising money for the General Fund, knowing that the additional oil and gas extraction would cause direct, immediate and long term harm to Pennsylvania's public natural resources, and knowing that DCNR needed the money to fulfill its obligation to conserve and maintain our State Parks and Forests under Article I § 27.

The Court misapprehended the nature of PEDF's fundamental claim and failed to address the Respondents duties under Article I § 27 to evaluate the impact of their decisions and actions before taking them.

The Court also misapprehended the nature of PEDF's fundamental claims in asserting that parties holding DCNR leases are indispensable parties. PEDF has never requested that the Court invalidate the existing DCNR leases and would have named the lease holders if it intended to do so.

### **The Court Overlooked Undisputed Facts of Harm**

The Court recognizes that Article I § 27 places an affirmative duty on the Commonwealth to “prevent and remedy the degradation, diminution, or depletion of our public natural resources”. Op. at 50. To carry out this duty, the Commonwealth, including the Governor as its Chief Executive Officer, must evaluate the degradation, diminution, or depletion of public natural resources (*i.e.*, the harm) that will result from a proposed decision or action. The Court overlooked the need for this critical assessment of harm by the Commonwealth in carrying out its Article I § 27 trustee duties, and the Respondents' failure to conduct this assessment before making decisions and taking actions that would impact public natural resources.

Even if the Respondents are allowed to balance the people's constitutional rights against the Respondents' own duties (a position that, as discussed above, misapprehends our Constitution), the Court overlooked the need for the Respondents to evaluate the harm to the public natural resources, as well as the

harm to the people's rights under Article I § 27, so those harms could be balanced against the benefits that the Respondents allege justify such harms. The Court has the duty to review that balancing, which it could not do because the Respondents failed to evaluate the harm or conduct any actual balancing.

Although the Respondents failed to evaluate the harm to public natural resources from oil and gas extraction on our State Forests and Parks, PEDF presented extensive undisputed evidence of such harm, which the Court overlooked. PEDF provided specific evidence of harm in Affidavits from 14 of its members and member groups, beginning with the loss of thousands of acres of State Forest land to surface disturbance from gas extraction activities. The Court overlooked the specific harm described in the Governor's Marcellus Shale Advisory Commission Report issued in July 2011, including forest fragmentation and air pollution; and the specific harm described in the DCNR Shale-Gas Monitoring Report issued in April 2014. The Court overlooked the undisputed testimony elicited during the three-day hearing in this case of actual, immediate and long term harm to public natural resources caused by the natural gas extraction activities on our State Forests and Parks.

PEDF summarized the findings of harm to our State Forests from DCNR's 2014 report for the Court in its briefs. That harm, which is based on data collected

by DCNR during 2012 when just 20% of the natural gas wells anticipated had been drilled, includes surface disturbance to the land, introduction of invasive species, increased pest susceptibility, water impacts, environmental law violations, air impacts, impacts to wildlife, recreation impacts, dust impacts, noise impacts, timber impacts, pipeline impacts, impacts to the wild character of the forests, and impacts from forest fragmentation. The report projected that gas extraction activity would continue to occur under the leases for at least the next 50 years, and that harm would be cumulative. The Court not only overlooked this undisputed evidence, but failed to even mention the DCNR report.

**The Court Overlooked or Misapprehended that PEDF's Claims are  
Against the Governor Not the General Assembly**

The Court misapprehended that PEDF filed its claims against the Governor and the Commonwealth, not the General Assembly, because the Governor, as the Chief Executive Officer of the Commonwealth, was and is responsible for insuring that he and DCNR meet their constitutional and statutory obligations as trustee of Pennsylvania's natural resources, and his failure to do so has resulted in harm to PEDF's members. The Court recognizes that officials at DCNR have a duty to support, obey and defend Article I § 27 when determining whether leasing State Forest and Park land for oil and gas extraction is in the best interest of the



Commonwealth; but then condones the attempt by the Governor (and the General Assembly) to influence DCNR's decision without regard to Article I § 27.

Op. at 57-58.

**The Court Misapprehended that Sections 1602-E and 1603-E of the Fiscal Code Violate Article I § 27 by Altering Appropriations to DCNR AFTER DCNR Made Decisions in Reliance upon those Appropriations**

The Court recognizes that DCNR has exclusive authority under the Conservation and Natural Resources Act (71 P.S. § 1340.302(a)(6)) to lease State Forest land for oil and gas extraction when it determines that doing so is in the best interest of the Commonwealth. Op. at 56. The Court recognizes that DCNR must consider whether such leases are consistent with the rights, duties and obligations embodied in Article I § 27. Op. at 58.

The Court recognizes that since 1955 the Oil and Gas Lease Fund Act (71 P.S. §§ 1331-1333) expressly appropriates all of the money from DCNR leases to DCNR for its exclusive use for conservation, recreation, dams and flood control projects. Op. at 4. The Court recognizes that since the inception of DCNR's oil and gas leasing of State Forest land for oil and gas extraction in 1947, DCNR has made its leasing decisions knowing that the Oil and Gas Lease Fund Act gives it control of the funds generated from the leasing to mitigate the harm from the extraction activities by funding projects to enhance State Forests and State Parks. *Id.*

The Court recognizes that when DCNR made the decision to award additional leases in 2008, the Oil and Gas Lease Fund Act continued to direct the money from such leasing to DCNR. **AFTER** these leases were awarded and the initial bonus rental payments received, the Respondents approved Sections 1602-E and 1603-E to the Fiscal Code, which give the General Assembly the ability to override the standing appropriation by the Oil and Gas Lease Fund Act of royalty money from DCNR leases directly to DCNR. At the same time, the Respondents approved the transfer of \$143 million of the initial lease rental payments received by DCNR for the 2008 leases from the Oil and Gas Lease Fund to the General Fund through the General Appropriations Act of 2009. Op. at 7-9.

For all the leases entered into by DCNR before the additional leasing was mandated by the Respondents in 2009 and 2010 (discussed further below), DCNR awarded those leases on the basis that it would receive the money therefrom to mitigate the impacts to the public natural resources from the gas extraction process by funding projects to protect and improve the public natural resources of our State Forests and State Parks. PEDF provided uncontroverted testimony that DCNR has a backlog of projects needed to conserve and maintain the public natural resources of our State Parks and Forests totaling an estimated billion dollars, including the repair and replacement of existing dams, remediation of

acid mine drainage and pollution from abandoned wells, the purchase of privately-held natural gas rights on our State Parks and Forests to protect their integrity, and the purchase of additional land in and adjacent to our State Parks and Forests in order to protect and buffer the impacts of gas extraction occurring on nearby private lands.

Despite DCNR's expectation that the moneys from the 2008 leasing would be available to it to fulfill its Article I § 27 duties to conserve and maintain the public natural resources of our State Forests and Parks, the Respondents approved these Fiscal Code provisions without any analysis of the costs to deal with the cumulative impacts from the gas extraction under the existing DCNR leases, gas extraction under private leases on State Park and Forest land with severed oil and gas rights, or gas extraction occurring on private land adjacent to our State Parks and Forests.

Rather than analyzing the Respondents' duties under Article I § 27, the Court misapprehends PEDF's claims as questioning the adequacy of the amount of royalty funds (up to \$50,000,000) appropriated to DCNR under Section 1603-E of the Fiscal Code. PEDF does not raise this question. By framing the question in this manner, the Court shifts the burden to DCNR to demonstrate that the funding

appropriated to DCNR "is so deficient that DCNR cannot conserve and maintain our State natural resources." Op. at 47.

Under Article I § 27, the burden is on the Respondents as trustees to insure that their actions do not and will not harm the public natural resources. The Respondents, not PEDF, bear the burden of ensuring that DCNR retains the funds it relied upon in deciding to lease State Forest land to carry out its constitutional and statutory obligations to conserve and maintain the public natural resources of our State Parks and State Forests.

#### **The Court Overlooked the Fiscal Code Transfers to the General Fund**

PEDF's challenge to Sections 1604-E and 1605-E of the Fiscal Code, which authorized the transfer to the General Fund of \$240 million generated by mandated additional State Forest leasing, are fundamental to the Court's analysis of the Respondents' Article I § 27 duties. The Court overlooked these transfers and only reviewed the constitutionality of Sections 1602-E and 1603-E of the Fiscal Code.

The undisputed facts establish that the Governor knew when he signed these Fiscal Code provisions into law that DCNR would be required to lease additional State Forest lands to raise the money for these transfers; he also knew that DCNR recommended against such additional leasing because it needed time

to evaluate the impacts of unconventional gas extraction occurring under existing leases to assess whether more oil and gas extraction could occur without irreparable harm. The Court also overlooked the undisputed fact that the Governor knew DCNR needed the money from the oil and gas leasing to mitigate the impacts from the gas extraction activity; and that, as discussed above, DCNR awarded the leases expecting to retain the money generated by the leases, based on existing law in effect since 1955, which appropriated the money from the leasing directly and only to DCNR exclusively for projects to conserve our State Parks and Forests and to enhance their recreational use by the people.

**The Court Misapprehended the Public Trust Fund  
Established by Article I § 27**

The Court recognizes that Article I § 27 "creates a public trust in favor of the people (*i.e.*, the trust beneficiaries), including future generations, which encompasses our public natural resources, which include, *inter alia*, state-owned lands and mineral reserves (*i.e.*, the corpus of the trust)." Op. at 30. The Court further recognizes that the Commonwealth's trustee obligation under Article I § 27 places an affirmative duty on the Commonwealth to prevent and remedy the degradation, diminution, or depletion of our public natural resources; and that as

fiduciary, the Commonwealth has a duty to act toward the corpus of the trust—the public natural resources—with prudence, loyalty, and impartiality. Op. at 50.

After finding that the oil and gas on our State Forests are part of the corpus of the public trust established by Article I § 27, the Court misapprehended the nature of the money derived from the sale of those trust assets when it asserts that their placement in a fund created by statute makes them a "special fund", not a constitutional trust fund. The Court points to other provisions in the Pennsylvania Constitution that dedicate certain money to particular purposes (*e.g.*, use of gasoline taxes and motor license fees for public highway taxes under Article VIII § 11(a); issuing bonds to create a fund for land and water conservation and reclamation under Article VIII § 16) to suggest that these funds are trust funds, but that money derived from the sale of trust assets established under Article I § 27 somehow are not. The Court misapprehended the nature of trust funds and the fiduciary duties of trustees to reach this conclusion.

The money from the sale of public natural resources, which are public trust assets under Article I § 27, must be used exclusively for trust purposes—to conserve and maintain public natural resources—just as the funds established under Article VIII must be used exclusively for their trust purposes. The sale of our public natural resources to raise money for other laudable government purposes

(*e.g.*, education, remediating legacy contamination on private land, or preserving farmland) is not sanctioned.

For the reasons set forth above, PEDF respectfully requests that the Court grant reargument and reconsider its Opinion and Order as it relates to the above issue.

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