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STATEMENT OF JURISDICTION

Petitioner filed this Petition for Review in the nature of a Complaint for Declaratory Judgment pursuant to the “Declaratory Judgment Act,” 42 Pa. C.S.A § 761(a)(1) et. seq. The Commonwealth Court has original jurisdiction over this action pursuant to 42 Pa. C.S.A. § 761.(a)(1) because this action has been filed against the Commonwealth and the Governor acting in their official capacities.

STATEMENT OF 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. Ct. 2004), citing *Harleyville Insurance Companies v. Aetna Casualty and Surety Company*, 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*, 894 A.2d 733, 737 (Pa. 2006).

STATEMENT OF QUESTION

Whether Petitioner, through the affidavits of its members, has, as a matter of law, met the standing requirements of harm sufficiently to proceed with challenging the Constitutionality under Article I § 27 of the 2009-2010 Amendments to the Fiscal Code entitled Oil and Gas Amendments, set forth at Article XVI-E, Title 72, Article XVI-E, §§ 1602-E through 1605-E.

Suggested answer: Yes

Form of Action and Procedural History

The Petitioner Pennsylvania Environmental Defense Foundation (PEDF) hereby moves this honorable court to determine by partial summary judgment that the Petitioner has standing to pursue the constitutional challenges to the 2009-2010 Amendments to the Fiscal Code, as cited above.

In the Amended Petition For Review, filed April 30, 2012, the Petitioner Pennsylvania Environmental Defense Foundation (PEDF) submitted five members' statements by affidavits, attached as Exhibit W to the Amended Petition, in support of its standing.

In their Answer to the Amended Petition, filed March 21, 2013, the Respondents Commonwealth of Pennsylvania and the Governor of Pennsylvania cited the Affidavits. However, in raising new matter,

Respondents continued to assert that the Petitioner lacks standing, (See Paragraph 191 of Respondents' Answer).

Petitioner, in support of this motion for partial summary judgment on standing, and in response to the Respondents' New Matter allegations, submits, in addition to the five affidavits attached to the Amended Petition, incorporated herein by reference, the affidavits of additional members of the Petitioner attached hereto as Exhibits A through K.

ARGUMENT

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, *Philadelphia v. Commonwealth*, 575 Pa. 542, 559; 838 A.2d 566, 578. 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, *Pennsylvania Game Commission v. Department 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, *Phila v. Commonwealth*, 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 interest exceeds that of all citizens in procuring obedience to the Law. *Wm. Penn Parking Garage v. City of Pittsburgh*, 464 Pa. 168, 195; 346 A.2d 269, 282. (1975). 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. *Phila v. Commonwealth*, 575 Pa. at 560, 838 A.2d at 577.

a. Petitioner’s Allegations

Petitioner alleges in the Amended Petition that the Respondent Governor violated his duty as trustee of the public trust under Article I § 27 of Pennsylvania’s Constitution, and in violation of Petitioner’s rights under Article I § 27, by, considering and approving the 2009-1010 Amendments to the Pennsylvania Fiscal Code, Title 72, Article XVI-E, §§ 1602-E through

1605-E, entitled Oil and Gas, and that the Amendments violate Article I § 27 and the Petitioner's rights thereunder.

Specifically, the Petitioner alleges that the Amendments:

1. Strip the constitutional and statutory structure established under the Conservation and Natural Resources Act for the Department of Conservation and Natural Resources (DCNR) to protect and conserve the natural resources of our State Parks and State Forests from the impacts of the deep well extraction of natural gas on State Forest land.
2. Require the leasing of State Forest lands for the extraction of natural gas from the Marcellus Region for the specific purpose of transferring the money from the Oil and Gas Lease Fund to the General Fund.
3. Committing the State Lands subject to the extraction of natural gas through indefinite leases to multiple decades of direct and indirect impacts from the industrial activities, thus converting those lands from the public trust to private development.
4. Taking the money from the conversion of the public trust out of the public trust, requiring the transfer of the money to the General

Fund and to other funds that are not part of the public trust under Article I § 27.

5. Arbitrarily limiting the DCNR to something less than \$50,000,000 per year from the Oil & Gas Lease Fund to deal with the impacts from the extraction of natural gas on our natural resources, and to mitigate those impacts.

b. Petitioner's Interests Substantial, Direct, Immediate

As established by the affidavits attached hereto as Exhibits A through J, Petitioner's members have substantial, direct and immediate interest in the claims set forth in the Petition.

i. Petitioner's Member's Rights and Interests

The Petitioner's members' rights and interests in the natural resources of Pennsylvania's State Forests and Parks are based on Article I § 27 of Pennsylvania's Constitution. The Amendment states,

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources 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.

As stated in the Article, the natural resources are the **common property** of the people. Thus, the people have specific proprietary interests

in the natural resources. These interests include the right to use and enjoy the State Forests and Parks and the natural resources therein.

The Amendment specifies that the peoples' interests include the right to the "clean air, pure water and to the preservation of the natural, scenic, historic and aesthetic values" inherent in those natural resources.

ii. Petitioner's Members' Unique Interests

The Petitioner's members' interests are not indistinguishable from the interests of everyone. The members and their interests are specifically and uniquely focused on the State Forests and Parks that are impacted by the Marcellus gas development.

All of the organizations' and their members' areas of interest are located within the geographic areas affected by the Marcellus Shale development within our State Forests and State Parks; and on the preservation of those Forests and Parks.

In the Pine Creek Preservation Association (Exhibit A) most of its approximate 1100 members, are property owners within the Pine Creek Watershed. The majority of its membership are located within the five townships that are a part of the Pine Creek Council of Governments. Over 50% of the land in the Pine Creek Watershed is State Forest Land, State Park Land and State Game Lands, located in Potter, Tioga and Lycoming

Counties. In McHenry Township, where the President of the Preservation Association is Chairman of the Board of Supervisors, over 80% of the township is State Forest and State Game lands.

The Keystone Trails Association (Exhibit B) members hike and maintain many trails in Marcellus Region, including the Midstate Trail and Loyalsock Trail. The Association represents over 30 local hiking clubs in Pennsylvania, and the 3.8 million people who are Pennsylvania's hiking community.

The members of the Lycoming Creek Watershed Association (Exhibit C) live, work and recreate in the Lycoming Creek Watershed because of its wild character. The entire State Forest in the Lycoming Creek Watershed, except for the McIntyre Wild area, has been leased for Marcellus Shale gas development.

The 300 members of the Loyalsock Creek Watershed Association (Exhibit D) live and recreate in the watershed because the Loyalsock Creek and the Loyalsock Forest provide a unique connection to nature has become a part of their lives. The membership is deeply committed to the Loyalsock Forest and its ecology because it supports their way of life. A major part of the Forest has been leased for Marcellus Shale gas extraction. The State has leased much of the area where it owns the mineral rights.

Many of the 70 current members of the Muncy Creek Watershed Association (Exhibit E) live and work in the watershed because of its rural nature and its proximity to nearby State Forests.

The Tiadaghton Audubon Society (Exhibit F) and its 125 members are located in Wellsboro, Pennsylvania, (Tioga County). It is the oldest Audubon Society in Pennsylvania. They are keenly aware, due to their weekly bird watching hikes in Tioga and Tiadaghton Forests, that the area is very special with regard to bird habitat.

The Lycoming Audubon Society (Exhibit G) has 350 members who are from Clinton and Lycoming Counties. The State Forests in their areas of interest are parts of the Bald Eagle, the Sproul, the Tioga, the Tiadaghton and the Loyalsock Forests.

The Responsible Drilling Alliance (Exhibit H) is from Williamsport, Pennsylvania. The members hike, bike, fish and recreate throughout the State Forests, including the Loyalsock Forest and the Pine Creek Valley.

The Slate Run Sportsmen (Exhibit I) was established in 1954 by a group of visionary fly fishermen who enjoy the Class A Wild Trout Stream known as Slate Run in the Pine Creek Valley. The 175 members come from all over the state and from 15 other states, who share their love for the Pine Creek Valley. Some own their own cabins there, others camp or stay in local

hotels. They come here to enjoy the more primitive environment, the fresh air, the clean water, and the silence and the darkness of the mountains at night.

The Pine Creek Headwaters Protection Group (Exhibit J) and its 200 members are committed to the protection of the headwaters of Pine Creek and her tributaries.

The Forest Coalition (Exhibit K) is concerned about the protection and preservation of all of Pennsylvania's State Forests. Its members are from all over the State, but frequent use the State Forests and Parks affected by the Marcellus Shale gas extraction leases.

iii. The Petitioner's Members' Rights and Interests Substantially and Immediately Harmed

a. Loss of DCNR Control Of Oil and Gas Funds

The Fiscal Code Amendments, specifically Section 1602-E, immediately, at the time of enactment, took away from DCNR control of those funds obtained from leasing State Forest land for oil and gas extraction, both prior existing leases, and those leases required by Sections 1604-E and 1605-E of the Fiscal Code, and required the transfer hundreds of millions of dollars from the Fund to the General Fund. (See Petitioner's Brief in Opposition to respondents' Preliminary Objections, pages 23 through 39, for a full discussion of the Petitioner's allegations of the

unconstitutionality of the Fiscal Code Amendments.) The Petitioner's members' realized the immediate and long term impacts from these actions.

Paul Hoffmaster, President of the Pine Creek Preservation Association, has described explicitly, in Exhibit A hereto, the depth of the collaborative relationship of DCNR with his organization and others in the development of the recreational and tourist economy of the Pine Creek Valley. These relationships have resulted in the "Pine Creek Valley Management Plan", the "Pine Creek Rail Trail Plan", the "PA Wilds Economic Development Program" and the Pine Creek Watershed River Conservation Plan". These plans and programs all integrate the uses of the natural resources of the State Forests and Parks in the area with the recreational and economic development of the Valley and the four county region of Pine Creek and the twelve county area of the PA Wilds. They are all dependent on DCNR's continued funding commitments. As stated by Paul Hoffmaster, under **The Stewards** section of Exhibit A, "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 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 members’ in their affidavits as well. The Slate Run Sportsmen have noted that since the development of gas of 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 I). 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.

The Responsible Drilling Alliance (Exhibit H) believes that the loss of the control of the Oil and Gas Lease Funds by DCNR directly affects the economic interests of the recreational industry in the area because DCNR is left without insufficient money to successfully perform its responsibilities.

The Lycoming Audubon Society sees the Oil and Gas Lease Fund monies as necessary for DCNR, as both a moral and ethical as well as legal obligation to use for public uses, to restore and protect the aesthetic wilderness, water quality and air quality of our natural resources; and to use that money for the General Fund instead violates those obligations. So too does the Lycoming Creek Watershed Association, (Exhibit G), the Muncy Creek Watershed Association (Exhibit E), and the Keystone Trails Association, (Exhibit B).

Loss of Use of Forest Land For Private Industrial Development

The Forest Coalition (Exhibit K), as well as other members, have been harmed by the direct loss of the use of hundreds if not thousands of acres of State Forest land that are currently being used for private industrial purposes for gas extraction, including well pads, compression stations, water storage facilities, access roads, pipelines and other facilities. These areas will be unavailable to the Petitioner's members throughout the development process, which could be more than 40 to 60 years.

The entire State Forest (Loyalsock Forest) in the Lycoming Creek Watershed with the exception of the McIntyre Wild Area has been leased for shale gas development. This amount of guaranteed industrial development will alter the natural character of the lands in the watershed held in the public trust (Lycoming Creek Watershed Association Affidavit, Exhibit C); and will negatively affect our outdoor recreation industry, (Responsible Drilling Alliance, Exhibit H).

Members of the Lycoming Creek Watershed (Exhibit C) have been denied the right to use State Forest Lands by employees of the gas companies.

c. Loss of Air Quality and Water Quality

The Lycoming Creek Watershed Association stated that the amount of industrial development that will occur cannot occur without impacting the exceptional Value streams. The Association then asks, how will those legally responsible for maintaining our rights to the public trust (DCNR) ensure that the water quality in our Exceptional Value streams...are not degraded from all the industrial activity that will occur without the funds to mitigate those impacts. Exhibit C.

The Pine Creek Headwater Protection Group members are deeply concerned with the native brook trout population. The brook trout are

very sensitive to increased degradation of the water quality of the streams they inhabit. The drilling activities in the Tioga Forest threaten to degrade the streams that the brook trout live and breed in. (Exhibit J).

The Tiadaghton Audubon Society (Exhibit F) has experienced impacts to species of birds, mammals, reptiles, amphibians, particularly who rely on forest interior habitats, from the combination of the gas pads, roads, pipelines, holding ponds, compressor stations, truck traffic and noise, which change the landscape.

d. Aesthetic Harm

Members of the Keystone Trails Association (Exhibit B) have experienced well pads being constructed on existing trails; expanding roads and buildings on or near trails; compressor stations bring industrial level noise pollution to wilderness settings; truck traffic causing loud noises, dust billowing 40 feet into the air; diesel engines spewing black smoke; loss of canopy; overzealous security guards chasing members off trails. Many of these members are talking about giving up using the trails as a result of these impacts.

The members of the Pine Creek Headwaters Protection Group have experienced noise levels associated with increased truck traffic have greatly increased since the Marcellus Gas industry in many parts of the Tioga State

Forest. Hunting experiences and simply enjoyment of wildlife sounds is greatly diminished by the cumulative noise levels from compressor stations, railroad traffic, and truck traffic.

In the Pine Creek Watershed there are many examples of vistas that used to look over unbroken forest that now offer views of industrial development. (Exhibit C).

e. Increased Flooding From Increased Stormwater

The Loyalsock Creek Watershed Association Affidavit points out that much of the Loyalsock Forest has been leased for gas extraction. The State has leased much of the Forest where it owns the mineral rights. Much of the rest of the mineral rights under the State Forest are privately owned and leased out. Much deforestation will occur in the development of natural gas in Forest. Deforestation exacerbates flooding. The gas industry will cause increased impermeable surfaces accelerating runoff. The Loyalsock Valley is subject to frequent flooding. The emotional and economic impacts of flooding are severe.

f. Loss of Value to Real Estate

The members of the Pine Creek Protective Association have already experienced that property value in their area in close proximity to gas

industry traffic and its activities have declined dramatically, some properties literally unable to sell. (Exhibit A).

The Loyalsock Creek Watershed Association is 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 Loyalsock Forest and Loyalsock Creek. (Exhibit C)

Conclusion

The above listed harms enumerated above only partially cover the impacts and concerns of the affidavits submitted as Exhibits A through K. The Petitioner respectfully requests this Honorable Court to read and review the entirety of the Affidavits to fully understand the direct and immediate impacts of the gas development that is happening to the members of the PEDF on our State Forests and on and around our State Parks. They clearly establish direct and immediate harm.

WHEREFORE, the Petitioner Pennsylvania Environmental Defense Foundation respectfully requests that this Honorable Court grant partial summary judgment in their favor on the question of standing to challenge the constitutionality under Article I § 27 of Fiscal Code Amendments of 2009-2010, Article XVI-E, Sections 1602-E through 1605-E.

Respectfully,

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