



## INTRODUCTION

The Pennsylvania Environmental Defense Foundation ("Petitioner") filed an Addendum to its Second Amended Petition, which was accepted as filed on March 18, 2014, to include Governor Corbett's proposals in his Executive Budget for Fiscal Year ("FY") 2014-15 published on February 4, 2014 to require the Department of Conservation and Natural Resources ("DCNR") to lease an undisclosed amount of additional State Forest land, and for the first time to lease State Park land, for the sole purpose of generating \$75,000,000 for the General Fund to support educational programs; and to require DCNR to use \$117,000,000 from the Oil and Gas Lease Fund to operate the agency. The Addendum specifically states:

**P. Declare that the Governor Violated Article I § 27 of Pennsylvania's Constitution and His Duty Under Article I § 27, and Violated the Conservation and Natural Resources Act and the Oil and Gas Lease Fund Act, By Requiring DCNR to Lease State Forest Land for Gas Extraction to Acquire \$75 million dollars to be Transferred From the Oil and Gas Lease Fund to the General Fund for the fiscal year 2014-15.**

**Q. Find and Declare That The Governor Violated Article I § 27 and His And His Duties As Trustee Thereunder By Deciding To Commit \$117 Million Dollars From the Oil and Gas Lease Fund To DCNR For Operating DCNR For the Fiscal Year 2014-15.**

To try to prevent the Governor's proposals from being implemented, Petitioner filed its Motion For Summary Judgment on April 21, 2014, immediately after the pleadings related to the Addendum were closed. However, the

Respondents asserted the need for six months to respond so they could engage in discovery, and asked the Court for a stay of their response until November 2014. Petitioner opposed the stay. The Court granted the stay in part by giving the Respondents until July 31, 2014 to complete their discovery and file their responses and any dispositive motions of their own.

Given the deadline of June 30, 2014 for passage of an Appropriations Act for FY 2104-15, which could include the Governor's Executive Budget proposals being challenged here, Petitioner filed an Application for Special Relief in the Nature of a Preliminary Injunction. In response to the Respondents' opposition, Petitioner filed an Application for a Hearing on May 9, 2014 on the issues presented in its Application for Special Relief. The Court granted Petitioner's request and the hearing was conducted on May 28, June 2 and June 3. Shortly after the hearing, and in light of Respondents' argument that an order of the Court could impermissibly interfere with the budget deliberations, the Court postponed the decision on the Petitioner's request for a preliminary injunction until an Appropriations Act is enacted by the General Assembly and the Governor.

On July 10, 2014, the Governor signed the Appropriations Act of 2014<sup>1</sup> that now requires DCNR to pay for virtually all of its operations from the Oil and Gas

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<sup>1</sup> See House Bill 2328 at <http://www.legis.state.pa.us/cfdocs/billInfo/billInfo.cfm?sYear=2013&sInd=0&body=H&type=B&bn=2328>.

Lease Fund (\$72,546,000). Excerpts of the Appropriations Act of 2014 related to DCNR's budget are provided in Exhibit UU attached hereto. In addition, on July 10, 2014, the Governor signed amendments to the Fiscal Code<sup>2</sup> to include a new Section 1601.1-E (Legislative findings) and revisions to Sections 1602-E, 1603-E and 1605-E (the "2014 Fiscal Code Amendments") that expressly declares that the Oil and Gas Lease Fund is not a constitutional trust fund as asserted by the Petitioner and proceed to direct DCNR to conduct additional leasing of State Park and Forest lands to raise \$95,000,000 for the transfer to the General Fund. These sections of the 2014 Fiscal Code Amendments are provided in Exhibit VV attached hereto.

In order to have the issues fully briefed on its pending Motion for Summary Judgment before this Court, Petitioner is filing this Addendum to its Motion For Summary Judgment to include facts and issues relating to the Governor's Executive Budget proposals developed during the filings and hearing for its Application for Special Relief, as well as the recent legislative actions signed by the Governor to implement his proposals.

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<sup>2</sup> See House Bill 278 at <http://www.legis.state.pa.us/cfdocs/billInfo/billInfo.cfm?sYear=2013&sInd=0&body=H&type=B&bn=0278>.

## RELEVANT LAW AND FACTS

Petitioner's findings of law and facts in its Motion for Summary Judgment filed on April 21, 2014 are primarily statements taken from the following:

- (a). Pennsylvania Constitution, including Article I § 27 and Article IV § 2;
- (b). Legislative history to Article I § 27;
- (c). Statutes, including the Conservation and Natural Resources Act, the Oil and Gas Lease Fund Act, the 2009 and 2010 Amendments to the Pennsylvania Fiscal Code, and excerpts from Appropriations Acts;
- (d). Public documents, including DCNR's *Penn's Woods: Sustaining Our Forests* (1995), the Governor's Marcellus Shale Advisory Report (July 2011), Governor's Executive Order 2010-5 (October 2010), and the Auditor General Special Report on the Oil and Gas Lease Fund (2004), all of which were admitted as evidence during the recent hearing<sup>3</sup>;
- (e). Public records produced by Respondent Governor, including three memoranda written by Michael DiBerardinis, as Secretary of DCNR, to Governor Ed Rendell, and one memorandum written by John Quigley, as Chief of Staff to

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<sup>3</sup> Some of the exhibits admitted into evidence during the hearing are exhibits that had been previously submitted to the Court as exhibits to Petitioner's Motion for Summary Judgment. A list of hearing exhibits included in this Addendum, with cross-references to the exhibit number assigned to the document in Petitioner's Motion for Summary Judgment, is provided in Attachment A to this Addendum.

the Governor's Office, all of which were admitted as evidence during the recent hearing; and

(f). Deposition testimony of Dr. James R. Grace, former DCNR Deputy Secretary for Parks and Forests, and Michael DiBerardinis, former DCNR Secretary; as well as affidavits from John Quigley, former DCNR Secretary; John Norbeck, former DCNR State Parks Bureau Director; Cindy Bower, Petitioner member; and Daniel Alters, Petitioner member, all of whom testified during the recent hearing.

Petitioner's findings of law and facts in this Addendum are additional statements provided through documents and testimony provided during the hearing on May 28, June 2 and June 3 in support of Petitioner's request for a preliminary injunction, which relies upon many of the same facts and law in support of Petitioner's Motion for Summary Judgment, as well as subsequent legislative enactments relevant to Petitioner's Motion for Summary Judgment. The relevant facts and law in this Addendum are primarily statements from:

(a). Public documents described above, as well as additional documents, including the Governor's Executive Order 2014-3 (May 2014); DEP/DCNR Joint Policy for the Evaluation of Impacts of Oil and Gas Development on State Parks and State Forests (2010); DCNR Impacts of Leasing Additional State Forest for Natural Gas Development (2010); Update of Pennsylvania Wilds Initiative (2010);

and the Pine Creek Rails Trails Guide (2009), all of which were admitted as evidence during the hearing;

(b). Testimony presented at the hearing from Dr. James R. Grace, former DCNR Deputy Secretary for Parks and Forests; Michael DiBerardinis, former DCNR Secretary; John Quigley, former DCNR Secretary; Cindy Adams Dunn, former DCNR Deputy Secretary for Conservation and Technical Services; John Norbeck, former DCNR State Parks Bureau Director; Cindy Bower, Petitioner member; Daniel Alters, Petitioner member; and Daniel Devlin, current DCNR Deputy Secretary for Parks and Forests.

(c). The Appropriations Act of 2014 enacted on July 10, 2014, and the 2014 Fiscal Code Amendments enacted on July 10, 2014.

## **A. GOVERNOR'S ACTIONS UNDERMINING DCNR MISSION**

### **Testimony of Dr. James R. Grace, former DCNR Deputy Secretary**

1. Dr. James R. Grace has had a distinguished career in academics and in management of Pennsylvania's State Forests. He has an undergraduate degree in forestry from the University of Vermont, a master's degree in forestry from Yale School of Forestry, and a doctorate degree in forest ecology from the Pennsylvania State University. He has served on the faculty of Department of Horticulture and Forestry at Rutgers University (1976-1983); on the faculty of School of Forestry at Penn State (1984-1987); as the Deputy Secretary at the former Department of

Environmental Resources (1987-2000); as DCNR State Forester and Bureau of Forestry Director (2000-2007); as DCNR Deputy Secretary for Parks and Forestry (2007-2009); and currently as the Goddard Professor of Forestry at Penn State (2010- present). Notes of Hearing Testimony ("N.T") at 13-14.

2. DCNR was created early in the Ridge Administration to respond to public concerns that the Secretary of the former Department of Environmental Protection could not effectively manage both the regulatory functions of environmental protection as well as the natural resource protection functions. N.T. at 14.

3. The Bureaus of State Parks and Forests were moved into DCNR along with the recreation and conservation elements from the former Department of Community Affairs. *Id.*

4. The basic premise of the mission of the Bureau of Forestry, as described in its strategic plan entitled *Penn's Wood—Sustaining our Forest* (Exhibit P-1<sup>4</sup>) published in 1995, is to manage the state forests under ecosystem management. N.T. at 17-22.

5. Ecosystem management requires an understanding of the connectivity of all the resources, and that balancing the uses and values of the resources requires

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<sup>4</sup> Exhibits numbered with the prefix "P-" refer to Petitioner's exhibits as marked during the hearing.

retaining the ecological integrity of the forest's basic biological and ecological functions. *Id.*

6. The DCNR Bureau of Forestry relies on these ecosystem management principles in determining the meaning of environmentally sound utilization of mineral resources. *Id.*

7. Natural gas is a non-renewable natural resource. *Id.*

8. During the mid-2000s up to 2008, the price of natural gas went up significantly, and DCNR received significant pressure to lease more State Forest land for gas extraction. In fact, proposals were introduced in the General Assembly to require DCNR to lease all of Pennsylvania's State Forests for gas extraction. N.T. at 25.

9. In 2008, DCNR had little knowledge of the new gas extraction process to extract natural gas from the Marcellus Shale Region. *Id.*

10. In order to deal with the pressure from the industry and the legislature, DCNR decided to lease 74,000 acre in 2008 and received bids of over \$190,000,000. N.T. at 25-26.

11. The day after the bids were received, DCNR sent the Governor's Office a memorandum dated September 4, 2008 (Exhibit P-2), which included a list of the bids received, a statement that the proceeds would go into the Oil and Gas Lease Fund, a copy of the Oil and Gas Lease Fund Act which identifies the

Fund as a special fund used exclusively for conservation, recreation and flood control projects to be decided by DCNR, a list of projects that DCNR proposed to fund, including purchasing mineral rights under state lands to protect the lands, clean up acid mine drainage problems on state lands, repair and replace dams, all of which would cost billions of dollars. N.T. at 26-30.

12. The DCNR memorandum to the Governor's Office (Exhibit P-2) also contained a list of projects that were developed from the Oil and Gas Lease Fund monies over the 50 years since it was passed, including the 26 State Parks that were purchased and built or added onto. N.T. at 31.

13. The Governor's Office did not response to the DCNR memorandum dated September 4, 2008 (Exhibit P-2). N.T. at 30.

14. Shortly after the bids were received in September 2008, around the end of the year, DCNR was informed by the Governor's Office that the money from the leasing was being placed in budgetary reserve and would not be available to DCNR. N.T. at 32.

15. For the first time in the history of leasing State Forest land for oil and gas extraction, the funds received from leasing were removed from DCNR's control for use for the benefit of the State Park and Forest system. N.T. at 33.

16. Without the money generated from the leasing, DCNR was concerned that it could not carry out remediation of the gas extraction process, and would

have no ability to purchase additional recreational facilities and lands to make up for what was lost to leasing. *Id.*

17. For DCNR, the loss of control of the money from the leasing was a precedent that was disturbing. *Id.*

18. When the 2008 leases were awarded, DCNR had no experience with the Marcellus shale unconventional gas development and what it would mean for the State Forest. DCNR learned quickly that it was completely different than conventional gas development and was not like anything it had previously experienced. N.T. at 34.

19. Before Marcellus shale gas development, when tracts of State Forest were offered for conventional shallow gas development, gas would generally only be found on a small portion of the tract and much of the leased land would be released back to DCNR within a year or two. With Marcellus shale under the entire State Forest leased area, the whole northern tier of Pennsylvania will be developed. N.T. at 35.

20. When DCNR started to realize the impacts from Marcellus shale unconventional gas development, it also realized that not only would the 74,000 acres of the newly leased State Forest be developed, but the 250,000 acres of previously leased State Forest and the 290,000 acres of State Forest land on which

DCNR did not own the mineral rights would also be developed for Marcellus shale unconventional gas extraction. N.T. at 36.

21. DCNR thus realized that over 650,000 acres of State Forest land would be impacted by Marcellus shale unconventional gas development. *Id.*

22. With this realization, DCNR felt strongly that no further leasing of State Forest land should occur until the impacts to the land currently being developed could be monitored and understood because it was going to have to deal with a tremendous amount of gas activity on the State Forest over the next 50 years. *Id.*

23. DCNR had never experienced natural gas development of the scale that would result from the new Marcellus shale unconventional gas drilling. DCNR had concern that this level of activity would have significant impact on other uses and values of the State Forest. N.T. at 37.

24. The shale gas extraction activity on State Forests will be going on for the next 40-50 years. N.T. at 39.

25. On March 27, 2009, in response to pressure for more leasing to raise money for the budget, then Secretary Michael DiBerardinis sent a memorandum to the Governor (Exhibit P-3) stating: “Wholesale leasing will damage our forest landscape, scar the economic, scenic, ecological, and recreational values of the

forest, especially the most wild, and remote areas of our State in the Pennsylvania Wilds.” Dr. Grace testified that this was his concern. N.T. at 40-41, 44.

26. The Pennsylvania Wilds is an area from Route 80 to the New York border that includes two million acres of State Forest land along with half a million acres of the Allegheny Forest, numerous State parks, private inns, and other activities utilizing the Pennsylvania Wilds, which is an economic revitalization effort by DCNR to promote ecotourism to stimulate the economy in the area. N.T. at 45-46.

27. The basic operating principle within the Bureau of Forestry is to insure a balanced approach in developing natural resources. To do so, the various uses have to be balanced to protect the entire ecosystem integrity. N.T. at 48.

28. DCNR was concerned that the existing leases on State Forest land created the potential for conflict with other uses. N.T. at 53.

29. Any more leasing of State Forest land for gas extraction was ill-advised until the impacts from the existing leases could be determined. *Id.*

30. The Governor never responded to the DCNR memorandum of March 27, 2009 (Exhibit P-3). N.T. at 57.

31. Despite receiving the DCNR memorandum expressing grave concern with further leasing of State Forest land for gas extraction (Exhibit P-3), the Governor decided that DCNR must lease additional State Forest land, first to

obtain another \$40,000,000 for the General Fund, then again to obtain another \$180,000,000 for the General Fund. N.T. at 58-59.

32. To raise this amount, DCNR leased another 65,000 acres of State land leased for Marcellus shale gas extraction. N.T. at 59.

33. The problem was not just that another 65,000 acres of State Forest land was leased. DCNR's primary concern was not the drilling of a single well or a single well pad. It was the cumulative effect of the gas development activity over time and the fact that it was occurring on such a large area of the State Forest. DCNR was concerned with how the balancing of the values of the State Forest would be met. N.T. at 60.

34. DCNR's loss of control over the decision when to lease State Forest land set a terrible precedent. By having the Governor dictate how many acres to be developed with no consideration of all the other uses, values, and environmental factors, DCNR cannot maintain the balance necessary to sustain the State Forest. N.T. at 61.

35. To lose the funds from the leases and royalties from gas development on the State Forest means DCNR cannot effectively mitigate the impacts of the gas development. DCNR no longer has control to manage the State Forest effectively. N.T. at 61.

36. DCNR has a list of hundreds of millions of dollars of State Park and Forest projects that are needed to fulfill its mandate under Article I § 27. N.T. at 62.

37. Dr. Grace is currently Chairman of the DCNR Natural Gas Advisory Committee. In the April 2014 meeting, the Committee was presented with the Governor's Executive Budget proposal to lease more State Park and Forest land to obtain \$75,000,000 for the 2014-15 Budget. N.T. at 63.

38. At the time of the Committee meeting, DCNR did not know the amount or location of State Park or Forest land that would be leased to raise the \$75,000,000. DCNR only knew that the no new surface disturbance would be allowed by the leases. N.T. at 64.

39. Based on his experience, Dr. Grace stated that a lease with no surface disturbance is better than a lease with surface disturbance; however, even leases that allow no surface disturbance would cause additional air impacts, water requirements, truck traffic, other activity and the potential need for enlarged pipelines. These new leases will have impacts. *Id.*

40. The Shale Gas Monitoring Report did not change Dr. Grace's opinion that there should be no further leasing until the existing leases' impacts are understood. He testified that the report is an excellent initial assessment of gas development activity through 2012, but the level of activity is increasing. The

report is based on approximately 560 wells in place, which is only 20% of the 3,000 wells that are expected to be drilled. The report indicates impacts have already been observed to habitat, with invasive species, and the wildness of the core State Forest, and concerns remain with air emissions and damage to water quality in the headwaters of our most significant watersheds when the cumulative effects of gas development expand over time. N.T. at 66-68.

41. The fact that additional leasing of State Park and Forest land would be done under DCNR's new leases did not change Dr. Grace's opinion that no more leasing should occur until the existing lease impacts are understood. Many areas of State Forest are being developed for natural gas under old DCNR leases, and many areas being developed are not under DCNR control because the Commonwealth does not own the gas. The leases do not control the cumulative impacts from the existing development. N.T. at 68-69; 132.

42. The new DCNR leases provide good controls over the gas extraction and the monitoring report gives DCNR the ability to alter practice as development continues. But the total cumulative effect when complete development occurs, even using the best controls, still has the potential to have a significant impact on other uses and values on the State Forest. N.T. at 69.

43. DCNR is authorized to lease State Forest land, but not required to do so. DCNR is authorized to harvest timber, but not required to do so. N.T. at 123.

44. Dr. Grace can say with certainty that some harm will develop from the existing gas extraction development. The Monitoring Report has established that harm has already occurred. N.T. at 132.

45. Prior to 1995, the economic uses for the State Forests were oil and gas development, timber management and recreational activity. N.T. at 127.

**Testimony of Michael DiBerardinis, former DCNR Secretary**

46. Michael DiBerardinis was Secretary of DCNR from 2003 until April of 2009.

47. In early 2008, then Secretary DiBerardinis sent two memoranda (Exhibit P-10) to then Governor Rendell regarding leasing State Forest land for gas extraction. N.T. at 218.

48. The first memorandum proposed leasing 100,000 acres of State Forest land for gas extraction in order to avoid an attempt by the General Assembly to require leasing the entire State Forest. N.T. at 218-221.

49. The proposed lease tracts would be in the Pennsylvania Wilds, an area in the north central region of twelve counties where the largest concentration of State Forests is located. DCNR was working hard to build the economy around a set of initiatives to build ecotourism in the twelve-county region. N.T. at 220.

50. The second of the two memoranda (Exhibit P-10) stated that “DCNR has always strived to carry out mineral extraction in an environmentally

responsible manner. Most impacts from gas drilling revolve around fragmentation of surface vegetation caused by the development of roads and well pads. Shallow gas development requires a proportionately greater number of wells at closer spacing than does medium or deep development that require fewer and more widely spaced wells.” N.T. at 223.

51. The second memorandum concludes stating: “ Our lack of movement toward a lease sale during the last several years has resulted in a number of proposed legislative fixes which if enacted would take away control from the department and have very damaging impacts on our state forest.” N.T. at 224.

52. Former Secretary DiBerardinis testified that the legislature was proposing to require the leasing of the entire State Forest and that being told when and how much State Forest to lease destroys the mission of the DCNR to manage the State Forest in a sustainable way. N.T. at 224-225.

53. Mr. DiBerardinis testified that as Secretary he did not need the approval of the Governor to either lease State Forest land for gas extraction or to purchase land for parks and forests. N.T. at 229.

54. Former Secretary DiBerardinis testified that he signed and sent the memorandum dated March 27, 2009 (Exhibit P-3) to the Governor. N.T. at 230.

55. He sent the memorandum to the Governor because he felt that DCNR’s management prerogative, its ability to manage the broad interests of the

State Forest lands, and its ability to sustainably manage the resource were slipping away. *Id.*

56. Former Secretary DiBerardinis believed that the loss of control over State Forest leasing jeopardized DCNR's historic mission to balance the broad environmental, social and economic interests in the State Forest, and at the same time to insure the uses and the health of the forest for all Pennsylvanians over time. N.T. at 231-232.

57. The basis for his concerns was that the Governor was looking to lease State Forest land to deal with budget shortfalls. N.T. at 232.

58. In his 2009 memorandum (Exhibit P-3), DiBerardinis wrote: "It would scar the economic, scenic, ecological, and recreational values of the forests, especially the most wild and remote areas of our state in the Pennsylvania Wilds. Your (the Governor's) work and investment in rural economic revitalization through the outdoor experiences in the Pennsylvania Wilds could be erased." N.T. at 247.

59. He was concerned that over drilling could ruin the economic investments in ecotourism and outdoor venues in the Pennsylvania Wilds. N.T. at 247.

60. In his 2009 memorandum (Exhibit P-3), DiBerardinis further wrote: "Diverting the Oil and Gas Lease Fund sales 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 in 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.” N.T. at 247-248.

61. Former Secretary DiBerardinis testified that when the Governor requires DCNR to lease State Forest land for General Fund revenues, DCNR is deprived of its legislative mission to advocate for, protect and manage our State Parks and Forests. DCNR loses its management prerogative when the leasing decision is taken out of its hands and it is told to generate this amount of revenue or put this many acres out for lease sale. N.T. at 249.

62. When former Secretary DiBerardinis advised in one of his memoranda to the Governor that being required to lease additional State Forest land affected him personally, he testified that he meant it really struck at the heart of his job as Secretary, to his heart, and to the heart of the department. He testified that to take away DCNR's ability to manage the leasing of State Parks and Forest is to take away its meaning and reason to exist. N.T. at 250.

63. Secretary DiBerardinis identified the Auditor General Report issued in 2004 (Exhibit P-12) as the report he received from the Auditor General and

testified that the agency used this report to define how to use the Oil and Gas Lease Fund. N.T. at 252.

**Testimony of John Quigley, former DCNR Secretary**

64. John Quigley served as Secretary of DCNR from April 2009 to January 2011 and in several DCNR senior executive positions, including Chief of Staff for Secretary DiBerardinis from 2005 to 2009. N.T. at 148.

65. DCNR clearly communicated to the Governor that it did not want to lease any additional State Forest land for gas extraction after the 2008 lease sale, but was nevertheless ordered to do two additional lease sales. N.T. at 152-153.

66. The Governor's order to conduct additional leasing had two extraordinarily detrimental effects on DCNR. First, it took away DCNR's management control of the State Forest. Under the Conservation and Natural Resources Act, DCNR has the ability to lease State Forest land for gas extraction if it determines that it is in the best interests of the Commonwealth. DCNR had determined that leasing was not in the best interest of the Commonwealth at that time. So being ordered to conduct two additional lease sales took away DCNR's management control. Secondly, being ordered to lease to raise money for the General Fund took away the resources that DCNR needed to mitigate the impacts of that leasing activity. From 1955 to the time of the first Marcellus lease sale in

2008, all of the revenue from leasing had been reinvested in the natural resources of the State Parks and Forest, but that changed after the 2008 lease sale. *Id.*

67. The Governor's decisions to require two additional leasing sales created a very slippery slope and a situation where the State Forest was being used as a cash cow. Former Secretary Quigley expressed his judgment that such decisions create an existential threat to the resource. N.T. at 153-154.

68. Former Secretary Quigley first learned of the enactment of the 2009 amendments to the Fiscal Code adding Article XVI-E (Oil and Gas Wells) (Exhibit P-5) the morning of the day that it was passed. N.T. at 155.

69. When he first read Section 1602-E of the Fiscal Code (72 P.S. 1602-E), which states in part that “notwithstanding any other provision of law [The Oil and Gas Lease Fund Act], no money in the fund [Oil and Gas Lease Fund] from royalties may be expended unless appropriated by the General Assembly...”, then Secretary Quigley was shocked and angered. N.T. at 155-156).

70. This Fiscal Code provision was taking away from DCNR the ability to spend money for conservation, recreation and flood control, the three exclusive purposes of the Oil and Gas Lease Fund, to mitigate the damage from the gas extraction on State Forests. N.T. at 156.

71. As a result, since 2009 the General Assembly has had control of the Oil and Gas Lease Fund, not DCNR. N.T. at 156.

72. The term “royalties” as used in Section 1602-E of the Fiscal Code means the percentage of the value of the oil or gas produced that is paid to DCNR. The money paid up-front to lease the State forest land is called “bonus payments” and is different from royalties. N.T. at 157.

73. Section 1603-E of the Fiscal Code (72 P.S. § 1603-E) states: “Subject to the availability of money in the fund, up to \$50 million from the fund from royalties shall be appropriated annually to the department to carry out the purposes of the Oil and Gas Lease Fund. The department shall give preference to the operation and maintenance of state parks and forests.” N.T. at 158.

74. Secretary Quigley was again shocked when he read this provision as it limited DCNR’s funds, took away control of the Oil and Gas Lease Fund from DCNR, and directed that DCNR use the funds to operate the agency. N.T. 158.

75. In Former Secretary Quigley's opinion, these Fiscal Code provisions effectively repealed the Oil and Gas Lease Fund Act. N.T. at 159.

76. Sections 1604-E and 1605-E of the Fiscal Code (72 P.S. §§ 1604-E and 1605-E) required DCNR to transfer first \$60,000,000, then another \$180,000,000 from the Oil and Gas Lease Fund to the General Fund. N.T. at 159.

77. To obtain the funds to make these transfers, DCNR was required to lease more State Forest land. Thus, through the Fiscal Code, the General Assembly

and the Governor were forcing DCNR to lease State Forest land without regard to DCNR's mission. N.T. at 159.

78. In early to mid-2010, then DCNR Secretary Quigley and then Secretary of the Department of Environmental Protection ("DEP") John Hanger, issued a policy entitled *Department of Environmental Protection, Bureau of Oil and Gas Management and Department of Conservation and Natural Resources, Policy for Evaluation of Impacts of Oil and Gas Development on State Parks and Forests* ("Joint DEP/DNCR Policy") (Exhibit P-6). N.T. at 160.

79. The purpose of the Joint DEP/DCNR Policy was to provide guidance on how DEP and DCNR would work collaboratively in considering applications for oil and gas well permits on State Park and Forest lands, particularly where the Commonwealth did not own the mineral rights, so that the potential impacts to the public natural resources were actually considered as required by the Pennsylvania Oil and Gas Act. N.T. at 161-162.

80. The Joint DEP/DCNR Policy required DCNR to conduct a mini-environmental review of 15 listed measures, many of which were based on natural resource values not covered by the DEP permit program (*e.g.*, ecological diversity; ecological integrity, forest fragmentation, invasive species, aesthetic impacts, and cumulative impacts). N.T. at 162-163.

81. DEP reviewed well permit applications based on environmental considerations, such as water and air quality; but DCNR, as manager of the public lands, was responsible for the all public natural resource values, including ecological, esthetic, and recreational values, in keeping with its mission. N.T. at 163.

82. The Joint DEP/DCNR Policy was put into effect on October 25, 2010, but was rescinded by the Corbett Administration within the first few weeks of taking office in late January or early February 2011. N.T. at 163164.

83. Under the direction of then Secretary John Quigley, DCNR prepared an analysis entitled "*Impacts of Leasing Additional State Forest For Natural Gas Development*" ("DCNR Impact Analysis") (Exhibit P-7) to graphically show the impacts of further leasing of State Forest land. N.T. at 165.

84. The DCNR Impact Analysis was intended to explain the basis for DCNR's determination that no further leasing of State Forest land should occur until the impacts from the existing leases could be determined. N.T. at 165.

**Testimony of Daniel Devlin, DCNR Deputy Secretary**

85. Dan Devlin is currently Deputy Secretary for Parks and Forests. N.T. at 274.

86. Deputy Secretary Devlin learned about 2 or 3 days before the public announcement that Governor Corbett proposed in his budget to require DCNR to

lease State Park and Forest land to obtain \$75,000,000 for the 2014-2015 Budget. N.T. at 276.

87. As Deputy Secretary, Mr. Devlin got an advance copy of the proposal prior to the announcement, but he had no contact with the Governor or his staff. N.T. at 276.

88. In the fall of 2013, Deputy Secretary Devlin, along with the DCNR Secretary, had a discussion with the Budget Secretary and his staff regarding the budget for the next fiscal year. N.T. at 277-278.

89. Deputy Secretary Devlin was asked about further leasing of State Forest land for oil and gas extraction and he recommended against it. N.T. at 277.

90. Deputy Secretary Devlin did not know why the Governor or the Budget Office established the amount of \$75,000,000 to be generated from additional leasing of State Forest land in the FY 2014-15 Executive Budget. N.T. at 278.

91. Deputy Secretary Devlin met with the Governor to discuss the proposed Executive Order (No. 2014-3) and he explained for the Governor what the term non-surface disturbance would mean in the context of new leases for gas extraction on the State Forest. N.T. at 279.

92. Deputy Secretary Devlin reviewed the Executive Order being proposed by Governor Corbett and made a few minor suggested changes. N.T. at 280.

93. Deputy Secretary Devlin testified that a non-surface disturbance lease of State Forest land would require drilling a new well on an existing pad, and would require more traffic and more noise. N.T. at 286.

94. The DCNR Bureau of Forestry has not identified any specific tracts to be leased to generate the \$75,000,000 in the Governor's Executive Budget for FY 2014-15, nor established whether any natural gas exploration companies are currently interested in leasing State Forest land for non-surface development. N.T. at 287.

95. Now that the Executive Order has been issued, DCNR has the authority to lease State Park and Forest land for oil and gas extraction and could do so at any time. N.T. at 289.

96. If the new State Forest non-surface disturbance leases were drilled from adjoining private land, DCNR would not have the ability to control the activity on the private land. N.T. at 291.

**Testimony of John Norbeck, former DCNR State Park Director**

97. John Norbeck was Director of the DCNR Bureau of State Parks from April 2006 to October 2012. N.T. at 301.

98. According to Mr. Norbeck, the list of projects that was submitted to Governor Rendell on September 4, 2008 (Exhibit P-2) contained projects to address the tremendous infrastructure needs of the State Parks such as dam repairs and replacements, acid mine drainage problems, acquisition of privately owned mineral rights under State Parks, and other land acquisitions. N.T. at 305-306.

99. Mr. Norbeck testified that on about 80% of the State Park land, the Commonwealth does not own the mineral rights under the land. He estimated that to purchase mineral rights would cost hundreds of millions of dollars. N.T. at 308.

100. Mr. Norbeck estimated that the cost of cleaning up acid mine drainage problems could also be hundreds of millions of dollars. *Id.*

### **Governor's Approval of FY 2014-15 Appropriations Act and Fiscal Code Amendments**

101. On July 10, 2014, the Governor approved the Appropriations Act of 2014 that requires DCNR to generate \$95,000,000 from additional leasing of State Park and Forest land—a \$20,000,000 increase over the Governor's proposal in his FY 2014-15 Executive Budget. The Governor also approved \$81,681,000 for DCNR's operating expenses for FY 2014-15—a decrease of almost \$50,000,000 from last year—with almost 90% of the money (\$72,546,000) coming from the Oil and Gas Lease Fund rather than the General Fund.

102. On July 10, 2014, the Governor approved the 2014 Fiscal Code Amendments that, *inter alia*, declares in Section 1601.1-E(9) that it is in the best

interest of the Commonwealth for DCNR to lease State Park and Forest land for oil and gas development if DCNR, in consultation with the Governor, uses its current lease, best management practices and monitoring program, and DCNR "maintains a balance of money in the Oil and Gas Lease Fund to carry out its statutory obligation to protect State forest and park land and other environmental activities." If this fund balance is achieved, Section 1601.1-E(10) declares that money from the Oil and Gas Lease Fund can be transferred to the General Fund. Section 1605-E is amended to require the transfer of \$95,000,000 from the Oil and Gas Lease Fund to the General Fund in FY 2014-15.

**B. HARM TO PUBLIC LANDS FROM GAS DEVELOPMENT**

103. During his tenure as Director, Mr. Norbeck received numerous letters and complaints from State Park users about truck traffic, noise, and air pollution associated with oil and gas extraction. N.T. at 309.

104. As park director, Mr. Norbeck had concerns that the continuing drilling activities adjacent to State Parks would result in cumulative impacts to those parks, including air problems, noise, and light pollution. N.T. at 310-311.

105. Of Pennsylvania's 120 State Parks, 61 parks are located in the Marcellus Region. N.T. at 311.

106. Some of the State Parks have had oil and gas drilling next to those parks that have caused impact to the parks. If further drilling were to occur on

those existing well pads, the same type of impacts would occur on those State Parks. N.T. at 314.

107. At least one park, Ohio State Park, had a company enter onto the park property without permission and conduct seismic testing for natural gas exploration near the camping area of the park. The Park Rangers halted the action. N.T. at 327.

**Testimony of Cindy Adams Dunn, former DCNR Deputy Secretary**

108. Cindy Adams Dunn was the Deputy Secretary for Conservation and Technical Services at DCNR. She headed the grants program and technical assistance to local governments and nonprofits around conservation, and the conservation landscape initiatives. N.T. at 349-350.

109. The Pennsylvania Wilds is one of Conservation Landscape Initiatives that former Deputy Secretary Dunn helped create, and encompasses a 12 county area in north central Pennsylvania that includes 27 State Parks, and 8 State Forest Districts, and is focused on revitalizing local economies by developing key assets, including the Pine Creek Rails Trails. N.T. at 341.

110. A 2010 brochure on the Pennsylvania Wilds (Exhibit P-14) enumerates the numerous investments DCNR has made in this Conservation Landscape Initiative. The Pennsylvania Wilds has shown an uptick in economic development and tourism as a result of those investments, and the brochure

enumerates the improvements and increases in economic activity by visitors in the area, with increases in attendance and spending. The brochure highlights the nature resources of the area and markets the Pennsylvania Wilds as an ecotourism outdoor recreation destination. N.T. at 342.

111. The Pennsylvania Wilds is being marketed as a wilderness experience. When people drive through the area and encounter industrial natural gas drilling activities, truck traffic and forest areas fragmented by this activity, their experience is impacted. N.T. at 343.

112. The geographic relationship between the Pennsylvania Wilds and the State Forest subject to gas extraction in the Marcellus Region is almost identical. *Id.*

113. About 40 % of the State Forest in the Pennsylvania Wilds has been leased for natural gas development now. N.T. at 343.

114. The Oil and Gas Lease Fund is needed to provide grants and funding for projects to further support the Conservation Landscape Initiatives. Many projects have not had funding to date. N.T. at 344.

The Pennsylvania Pine Creek Rails Trails Guide (Exhibit P-15) described this valuable ecotourism asset that brings 5 million visitors annually to the Pennsylvania Wilds. Additional funds are needed to complete the trail. N.T. at 346.

### **Testimony of Cindy Bower, Petitioner Member**

115. Cindy Bower is a member of and Vice President of the Pennsylvania Environmental Defense Foundation. N.T. at 356.

116. Ms. Bower testified that the purpose of the Pennsylvania Environmental Defense Foundation is to educate the citizens of Pennsylvania about their rights under environmental laws; and where those rights are being violated to give its members litigation support to protect their rights. N.T. at 357.

117. Ms. Bower lived in the Pine Creek Valley for years in the village of Cammal in the middle of the Tiadaghton State Forest. She has used the forest and the Pennsylvania Wilds on a regular basis to enjoy outdoor activities such as hiking, canoeing, and climbing. She brings friends and family to the State Forest, eats in local restaurants, and stays in local hotels. N.T. at 360.

118. Ms. Bower has a master's degree in environmental education. When she taught school, she would bring groups of children to the State Forest for learning experiences. *Id.*

119. For Ms. Bower, the Pennsylvania Wilds is the only place in Pennsylvania where she has been able to experience the peace and serenity that its wealth of resources and vast amount of State Forest land provide. *Id.*

120. DCNR has leased all of the Tiadaghton State Forest in the vicinity of Waterville for Marcellus shale gas development and impact has been unbelievably destructive. N.T. at 361.

121. Ms. Bower testified, using photographs she has taken depicting areas of the Tiadaghton State Forest (Exhibit P-16) before and after the ongoing Marcellus shale gas development, that environmentally sensitive areas have been impacted along the Mid State Trail. N.T. at 362-363.

122. The Tiadaghton State Forest roads prior to Marcellus shale gas development were narrow (about 14 feet wide) and had tree canopies over the road, but have been completely changed to wide open industrial roads ranging from 79 to 180 feet in width. N.T. at 363-364.

123. Ms. Bower observed a brine water impoundment in the Tiadaghton State Forest next to a forest road that had a very strong acrid odor and water was evaporating into the air. N.T. at 365.

124. Ms. Bower had photographs of the intersection of the Mid State Trail and Ramsey Road on the Tiadaghton State Forest showing before and after construction impacts to an area that DCNR has identified as environmentally sensitive. N.T. at 367-368.

125. Ramsey Road in the Tiadaghton State Forest formerly provided access to two scenic vistas. Now the road is closed to the public and an impoundment has

been constructed along the road preventing access to the vistas. Those vistas were popular spots for her family, several of whom cannot walk the distance to enjoy them now that Ramsey Road is closed. N.T. at 370-371.

126. In Ms. Bower's experience, the integrity of the State Forest has been destroyed in the areas where Marcellus shale gas development has taken place. N.T. at 371.

127. Ms. Bower's experience would be further impacted if more drilling were permitted on existing pads even though the drilling would not result in any more surface disturbance. When drilling of a Marcellus shale gas well occurred approximately a mile from her house, it rattled her windows. N.T. at 377.

128. Ms. Bower found the impacts from the flare-off from the Marcellus shale gas wells to be horrific. The constant noise is like the sound of a jet engine on the tarmac of an airport and it never gets dark during a flare-off. N.T. at 378.

**Testimony of Daniel Alters, Petitioner Member/former DEP Employee**

129. Daniel Alters is a member of the Pennsylvania Environmental Defense Foundation and the Lycoming Audubon Society. N.T. at 381.

130. Mr. Alters was employed by the Pennsylvania Department of Environmental Protection for 35 years, and served for his last 12 years as the Water Quality Manager for the Williamsport Regional Office. N.T. at 381.

131. The Lycoming Audubon Society members walk, hike, bike, canoe and otherwise enjoy our State Forests and Parks. N.T. at 384.

132. Many bird species enjoy large, unbroken tracts of forest, including Northern Goshawk, Scarlet Tanager, and many Warbler species. It does not take much human activity, especially removal of trees, to discourage birds from using the forest. N.T. at 387.

133. Forest fragmentation discourages certain species of birds from nesting in those areas. Just as importantly, industrial gas development activity that creates noise and perennial lighting from well pads, flaring, and truck traffic discourages nesting in those same areas. Audubon is concerned about the cumulative impacts from those activities in our State Forests. N.T. at 388.

**Testimony of Dan Devlin, DCNR Deputy Secretary**

134. DCNR Deputy Secretary Dan Devlin testified that so far 1600 acres of State Forest land that has been leased by DCNR has been converted to gas extraction use, i.e. well pads, pipe lines, compression stations, that sort of thing. It is projected that there will be up to 30,000 acres that will be converted. N.T. at 414.

135. Deputy Secretary Devlin testified that the land that is part of the State Parks and Forests belongs to the people of the Commonwealth and not the Commonwealth's property. N.T. at 441.

136. The mineral resources that are a part of the State Parks and Forests, such as oil and gas rights that have not been severed, are the property of the public trust and are public natural resources. N.T. at 441.

137. Deputy Secretary Devlin testified that the provisions of the Bureau of Forestry mission statement set forth in the 1995 *Penn's Wood—Sustaining Our Forests*, are the requisites for analysis of whether to approve any additional leasing of State Forest land. N.T. at 442.

138. The premise of ecosystem management is sustaining the functions of all the different interrelated processes that exist in the forest over time, so if one of those functions or processes is threatened by a specific activity, it would not be a good management practice to allow more of that activity. N.T. at 443.

139. Deputy Secretary Devlin testified that what DCNR was most concerned about with Marcellus shale gas development under its leases was forest fragmentation, so DCNR decided to put the well pads near the existing roads to cut down on that fragmentation, but the trade-off is that peoples experience when they drive along the forest roads has been impacted. N.T. at 446-447.

140. The DCNR Shale Gas Monitoring Report (Exhibit R-14) indicates that the Marcellus shale gas development has already caused an increase in invasive species in the State Forest. Invasive species replaces native plants. N.T. at 448.

141. Of the 700,000 acres of State Forest land that is currently subject to Marcellus shale development, 130,000 acres are managed by DCNR under its current more protective lease. Another 270,000 acres is managed by DCNR under the older less protective leases. The remaining 312,000 acres are being developed through private leases because the gas rights are privately owned, so DCNR does not manage that development through its leases. N.T. at 450.

142. So far, with the 2012 data from the Shale Gas Monitoring Report (Exhibit R-14), DCNR has seen a change in 9,000 acres of State Forest land from primitive forest land converted to semi-primitive or semi-developed forest lands. N.T. at 452.

143. The Shale Gas Monitoring Report (Exhibit R-14) states: "In core gas forest districts, the Bureau of Forestry's fragmentation analysis showed the largest increase in edge forest in the Tiadaghton State Forest, 1813 acres; in the Tioga State Forest, 1257 acres." These State Forests encompass the Pine Creek Rail Trail and are part of the Pennsylvania Wilds areas. N.T. at 454.

144. Deputy Secretary Devlin testified that he helped to develop the Pine Creek Rail Trail, and that he was very adamant in trying to protect that area. *Id.*

145. In the Shale Gas Monitoring Report, however, a survey of users of the area indicated that 46 out of 116 comment cards indicated that their visitation experiences were impacted by the Marcellus shale gas development, and 41 out of

116 indicated the gas development had changed their recreational use of the State Forests. N.T. at 456, Exhibit R-14 at 152.

146. The Shale Gas Monitoring Report states: “In addition to environmental concerns, shale gas development could alter the character of the north central Pennsylvania, an area known as the Pennsylvania Wilds, that abounds with scenic beauty and outdoor recreational opportunities. Understanding impacts to State Forest visitors is critical to sustaining tourism and the ability to provide healthful outdoor recreation opportunities in Pennsylvania to Pennsylvanians.” N.T. at 456-457.

147. The Shale Gas Monitoring Report does not evaluate the economic impacts to the Pennsylvania Wilds as a result of the gas extraction in the area. N.T. at 457.

148. Many of the DCNR monitoring programs discussed in the Shale Gas Monitoring Report have just begun to be put into place and the impacts to the State Forest over the lifetime of the existing leases is not known. N.T. at 457.

149. Deputy Secretary Devlin, when asked about the value to our public natural resources of additional leasing of State Forest land for gas extraction, answered that additional leasing would provide no value to the natural resources and no benefit from an ecological standpoint. N.T. at 458.

150. Deputy Secretary Devlin believes, however, that the natural resources would benefit from money going into the Oil and Gas Lease Fund and used for conservation, recreation and flood control. N.T. at 458-459.

151. Deputy Secretary Devlin did not make the decision to propose further leasing for the budget; in fact, he recommended against further leasing. N.T. at 463.

152. Deputy Secretary Devlin testified that it was his understanding that the Governor wanted the \$75,000,000 from leasing State Forest lands to go to education and health programs. N.T. at 468.

### **DECLARATORY RELIEF**

Based on the relevant law and facts set forth in Petitioner's Motion for Summary Judgment and this Addendum, Petitioner requests that this Court grant the following additional declaratory relief as part of its Motion for Summary Judgment:

1. Find and declare that Governor Corbett's decisions to lease State Forest and Park Lands, transfer the revenue from those leases to the General Fund, and to use the Oil and Gas Lease Fund to operate DCNR are unconstitutional and violate his duties under Article I § 27, and violate the rights of the people thereunder.

2. Find and declare that the Oil and Gas Lease Fund is a trust fund, that the funds therein are vested in the public trust, and that the Governor must use those funds for the purposes intended in the public trust, as set forth in the Oil and Gas Lease Fund Act, to conserve and maintain the rights of the people under Article I § 27, and that the Governor violated his duty as trustee and the rights of Petitioner's members thereunder, by using trust fund moneys for general revenue.

3. Find and declare that the Governor violated Article I § 27 by making the decision to use money from the Oil and Gas Lease Fund, rather than General Fund revenue, to pay DCNR operations for the FY 2014-2015 (\$117,000,000 first proposed in his Executive Budget and then \$72,546,000 actually approved in the Appropriation Act of 2014), and thereby depriving DCNR of the use of these funds necessary to mitigate the loss of public natural resource on State Park and Forest land from oil and gas extraction.

4. Find and declare that the 2014 Fiscal Code Amendments to Article XVI-E, Oil and Gas Wells, signed by Governor Corbett on July 10, 2014, which add Sections 1601.1-E and revise Sections 1602-E, 1603-E and 1605-E, are unconstitutional violations of Article I § 27, and that the Governor violated Article I § 27, his duties and the peoples' rights thereunder by approving the 2014 Fiscal Code Amendments.

WHEREFORE, the Petitioner Pennsylvania Environmental Defense Foundation respectfully requests that this Honorable Court grant summary judgment in its favor on the requested declaratory relief under Article I § 27.

Respectfully,

John E. Childe  
Attorney for Petitioner  
I.D. No. 19221

**ATTACHMENT A**  
**LIST OF ADDENDUM EXHIBITS**

<b>Hearing Exhibit</b>	<b>Summary Judgment Motion Exhibit</b>	<b>Document</b>
P-1	P	<i>Penn's Woods—Sustaining Our Forests</i> , excerpts
P-2	X	Memorandum from John Quigley to Governor's Office dated September 4, 2008
P-3	CC	Memorandum of DCNR Secretary Michael DiBerardinis to Governor Rendell March 27, 2009
P-5	--	Fiscal Code Amendments
P-6	--	DEP/DCNR Policy for the Evaluation of Impacts of Oil and Gas Development on State Parks and State Forests
P-7	--	Impacts of Leasing Additional State Forest for Natural Gas Development
P-8	HH	Governor's Executive Order 2010-05 (10/26/10)
P-9	--	Governor's Executive Order 2014-03 (5/23/14)
P-10	W	Memoranda of Secretary Michael DiBerardinis to Governor Rendell dated January 10, 2008 and February 26, 2008
P-12	Q	2004 Auditor General Special Audit of the DCNR Oil and Gas Lease Fund Program
P-14	--	2010 Update on the Pennsylvania Wilds Initiative
P-15	--	Pine Creek Rail Trail Guide
R-14 <sup>5</sup>	--	DCNR Shale Gas Monitoring Report – April 2014
--	UU	Appropriations Act of 2014, excerpts
--	VV	2014 Fiscal Code Amendments (§§ 1601.1-E – 1605-E)

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<sup>5</sup> See [http://www.dcnr.state.pa.us/cs/groups/public/documents/document/dcnr\\_20029147.pdf](http://www.dcnr.state.pa.us/cs/groups/public/documents/document/dcnr_20029147.pdf). This report was also admitted as evidence during the hearing as Respondents Exhibit R-14. A copy of this report has not been included with this Addendum.

# EXHIBIT P-1

# EXHIBIT P-2

# EXHIBIT P-3

# EXHIBIT P-5

# EXHIBIT P-6

# EXHIBIT P-7

# EXHIBIT P-8

# EXHIBIT P-9

# EXHIBIT P-10

# EXHIBIT P-12

# EXHIBIT P-13

# EXHIBIT P-14

# EXHIBIT P-15

# EXHIBIT UU

# EXHIBIT VV