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## INTRODUCTION

The Pennsylvania Environmental Defense Foundation ("Petitioner") filed its Second Amended Petition for Review ("Petition") against the Governor of the Commonwealth and not the General Assembly because the primary focus of the Petition—the leasing of State Forest land for extraction of natural gas and the use the Oil and Gas Lease Fund—is the duty and responsibility of the Department of Conservation and Natural Resources ("DCNR") under the Conservation and Natural Resources Act ("CNRA") of 1995 (71 P.S. §§1340.101 *et seq.*).

Under Article IV Section 2 of the Pennsylvania Constitution, the Governor is vested with the supreme executive power, and with the duty to "take care that the laws be faithfully executed." The Governor appoints the Secretary of DCNR, and exercises that supreme executive authority over the Secretary and DCNR. The Governor also has the duty to faithfully execute the Constitution and the Conservation and Natural Resources Act. The General Assembly has no such control or responsibility over DCNR, or the implementation of the law.

The Petitioner, in its Motion for Summary Judgment and its brief in support of its motion, has asked this Court to declare that the Governor, primarily through the actions of former Governor Ed Rendell, violated his trustee duties under Article I, Section 27 of the Pennsylvania Constitution (Article I § 27) by diverting money generated from the leasing of State Forest land for oil and gas extraction from the

Oil and Gas Lease Fund to the General Fund, and by requiring further leasing of State Forest land to generate revenue for the General Fund, contrary to the advice of the Secretary of DCNR that such actions would violate DCNR's mission under the Conservation and Natural Resources Act. Petitioner's Motion for Summary Judgment also asks this Court to declare that that Governor, primarily through actions of current Governor Tom Corbett, violated Article I § 27 by forcing DCNR to increasingly rely on money from the leasing of State Forest land for oil and gas extraction to pay for its day-to-day operating expenses, by diverting money from the Oil and Gas Lease Fund to the Marcellus Legacy Fund; and by further usurping DCNR's mission by giving control over money for statewide conservation and recreation projects to the Commonwealth Financing Authority, which is controlled by the General Assembly.

Petitioner is filing an Addendum to its Motion for Summary Judgment and this brief in support of that Addendum to ask this Court also to declare that Governor Corbett has further violated Article I § 27 by his two recent decisions:

(1) To order DCNR to lease more State Forest and/or Parks land to obtain money for the General Fund, and

(2) To use money generated from the sale of gas on leased State Forest land, which is deposited into the Oil and Gas Lease Fund, to pay DCNR's day-to-



day operating expenses in fiscal year ("FY") 2014-15, rather than use General Fund revenue use for these expenses.

The Governor first proposed additional leasing to raise \$75,000,000 for the General Fund in his FY 2014-15 Executive Budget, and then approved the Appropriations Act of 2014 and amendments to the Fiscal Code that mandate the transfer of \$95,000,000 from the Oil and Gas Lease Fund to the General Fund. DCNR will be required to lease even more State Park and Forest land (estimated at more than 30,000 acres) to raise this additional \$20,000,000. The Governor also first proposed in his Executive Budget the use of \$117,000,000 for DCNR's operating expenses, and then approved the Appropriation Act of 2014, which reduces DCNR's operations budget by almost \$50,000,000, with a total budget for operations of \$81,681,000—90% of which (*i.e.*, \$72,546,000) will come from the Oil and Gas Lease Fund rather than the General Fund. These decisions were all made by the Governor without any consideration of his Article I § 27 trustee duties, DCNR's ability to carry out its statutory mission and its duty under Article I § 27, or the people's rights thereunder.

## **I. HARM TO OUR STATE PARKS AND FORESTS FROM ADDITIONAL LEASES AND LOSS OF FUNDS**

### **A. DCNR Loss of Management Control to Comply with Its Statutory and Constitutional Obligations**

Both Governor Rendell's and Governor Corbett's decisions to lease the State Forests and now the State Parks to obtain revenue for the General Fund take away DCNR's ability to manage our State Forests and Parks to meet their mission under both the Conservation and Natural Resources Act and Article I § 27. Dr. James R. Grace, currently serving as the Penn State Goddard Chair in Forestry and Environmental Resources Conservation and having led the management of our State Forests based on ecosystem principles for twenty years as the DCNR Deputy Secretary for Parks and Forests and as the Director of the Bureau of Forestry, has described the Governors' actions this way: "DCNR's loss of control over whether or not to lease is a terrible precedent. Dictating from outside how many acres to be developed, with no consideration of all the other uses, values, environmental factors, is a terrible precedent. DCNR cannot maintain the balance necessary to sustain the forest." N.T.<sup>1</sup> 61.

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<sup>1</sup> Notes of Testimony ("N.T.") from the transcript of the hearing held on Petitioner's Application for Special Relief in the Nature of a Preliminary Injunction on May 28, 2014 and June 2-3, 2014.

Both Governors, as well as the legislature, have failed to recognize their trustee duties in managing the public natural resources of our State Parks and Forests and have viewed these public lands and their resources as property that can be sold whenever the Commonwealth faces political pressure or financial difficulty. Former Secretary Michael DiBerardinis testified that the legislature was pressuring DCNR to lease the entire State Forest for oil and gas development 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. 224-225. To avoid being directed to by the legislature to lease the entire State Forest, DCNR offered 74,000 acres for lease in the fall of 2008. N.T. 25. In late 2009, shortly after the bids were received for this lease sale, 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. 32. 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 and were not available for use to benefit the State Park and Forest system. N.T. 33.

The loss of the funds for oil and gas leasing that has occurred on State Forest land for decades undermines DCNR's fundamental mission. Dr. Grace described the loss, stating: "To lose the funds from the leases and royalties means DCNR cannot effectively mitigate whatever happens. It does not allow DCNR to have the

control to manage the forest effectively.” *Id.* 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. N.T. 66. Former Secretary DiBerardinis also testified to this impact, stating: “The impact on the Agency when the governor requires DCNR to lease State Forest land for General Fund revenue is that it deprives the agency of its legislative mission, and that is to advocate and protect and manage our State Parks and Forests. You’re taking the management prerogative out of the hands of the department when the department is told to generate this amount of revenue or put this many acres out for lease sale.” N.T. 249.

The Governor's orders to DCNR to conduct additional leasing, first in 2009 and now again in 2014, have two extraordinarily detrimental effects on DCNR. First, these orders take 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 DCNR determines that further leasing is in the best interests of the Commonwealth. DCNR had determined that leasing was not in the best interest of the Commonwealth at the time of these orders by the Governor because DCNR needs time to understand the impacts of Marcellus shale gas development, which is unlike anything it has ever experienced. Consequently,

the Governor's orders to conduct additional lease sales take away DCNR's management control. Secondly, being ordered to lease public lands to raise money for the General Fund takes away the resources that DCNR needs to mitigate the impacts of that leasing activity. From 1955 until the time of the first Marcellus lease sale in 2008, all of the revenue from leasing State Forest land had been reinvested in the natural resources of the State Parks and Forest, but that changed after the 2008 lease sale. N.T. 155. Additionally, DCNR has not leased State Park land for oil and gas development because DCNR does not consider such leasing to be in the best interests of the Commonwealth as such development is not compatible with its mission to "maintain, improve and preserve" our State Parks for under the Conservation and Natural Resources Act. 71 P.S. 1340.101(b)(1); N.T. 301.

Former Secretary of DCNR DiBerardinis attempted to explain the significance of the Governor's action on DCNR's statutory mission in his memorandum dated March 27, 2009 (Exhibit P-3). He testified that he wrote this memorandum because he felt DCNR's management prerogative—its ability to manage the broad interests of the State Forests and sustainably manage the resources of our State Parks and Forests—was slipping away. He further testified that DCNR's historic mission, which is to balance the broad interests in our State Parks and Forests, including their economic, environmental, and social values,

while insuring the uses and health of these public lands for all Pennsylvanians over time, was in jeopardy. N.T. 230.

Secretary DiBerardinis told the Governor that requiring more leasing of the State Forest in north central Pennsylvania would undermine the significant investments that have been made to create sustainable economic development in this area through ecotourism and outdoor recreation. N.T. 247. Specifically, Secretary DiBerardinis states in his March 2009 memorandum that additional leasing of the State Forest "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." Exhibit P-3.

**B. Impacts to State Forests from Additional Leasing and Taking Funds**

Although the Governor, in directing additional leasing of State Forest and, for the first time, State Park land to pay for the FY 2014-15 General Fund spending, is requiring that new leases not allow surface disturbance, such leases will nonetheless cause additional impact to our State Parks and Forests. Dr. Grace testified that, based on his experience, a new lease with no surface disturbance is better than a lease with surface disturbance, but additional impacts are still going to occur from such leases. The additional Marcellus shale gas development will require the construction of additional compressor stations to transport the

additional gas and will generate additional air and noise pollution impacts; the wells drilled to extract gas from the newly leased areas will require millions of gallons of water for each new and this water will be taken from the exceptional value streams in our State Parks and Forests; the drilling of additional wells to extract the gas from the newly leased land will cause additional truck traffic; additional pipelines will be required to transport this additional gas; and many other direct and indirect impact will result from these new "non-surface disturbance" leases. N.T. 64.

Of particular concern with the both the existing oil and gas leases, and with the Governor's order to lease more State Forest land and now State Park land for oil and gas development, is the failure understand the cumulative impact to the public natural resources from this industrial development. Marcellus shale gas development is unlike anything DCNR has ever experienced. N.T. 35. Historically, when DCNR awarded leases for conventional gas development, gas would be found and developed on only a limited portion of the acreage leased. By avoiding the dense well spacing required for shallow gas development (approximately one well on every 40 acres), DCNR initially thought unconventional shale gas development would have less impact than conventional shallow gas development. However, as DCNR now knows, the scale of industrial activity associated unconventional shale gas development is unprecedented. The primary concern is

not the drilling of a single well or a single well pad. The impact to the State Forest results from the cumulative effect of the activity over time, and the fact that such a large area of the State Forest is subject to this industrial activity. Given this cumulative impact, it is not clear that DCNR will be able to meet its obligations to balance the values of the State Forest. N.T. 61.

DCNR will certainly not be able to sustainably manage our State Forests and balance their uses, or to maintain, improve and preserve our State Parks, without control of the Oil and Gas Lease Fund. From the time DCNR and its predecessors first leased State Forest land for oil and gas development, they had control over the money generated by such leasing and production and used that money to acquire a significant portion of our State Park systems and to improve the recreational facilities on these treasured public lands to ensure their availability for the use and enjoyment of the people of Pennsylvania, both now and in the future. To lose control of the Oil and Gas Lease Fund means DCNR cannot effectively mitigate the impacts to State Parks and Forests from oil and gas development at a time when those impacts have increased exponentially. DCNR has advised the Governor of State Park and Forest projects requiring hundreds of millions of dollars that are needed to sustainably manage these public lands and their public natural resources for the benefit of the people of this Commonwealth. By removing



DCNR's control of the Oil and Gas Lease Fund, the Governor and the legislature have eliminated DCNR's ability to manage these public lands effectively. N.T. 61.

**C. Impacts to State Parks from Additional Leasing and Taking Funds**

The Governor's decision to allow leasing of our State Parks for oil and gas extraction, while removing all control of the Oil and Gas Lease Fund from DCNR, will cause immediate and irreparable harm to our State Parks and their public natural resources. John Norbeck, former Director of Pennsylvania State Parks from April 2006 to October 2012, testified that DCNR has had a long history of not leasing State Park lands for oil and gas development when the Commonwealth owns the mineral rights. N.T. 301. However, the Commonwealth does not own the mineral rights beneath approximately 80% of our State Parks. N.T. 308. Of our 120 State Parks, 61 State Parks are located in the Marcellus shale region. N.T. 301, 311. Prior to allowing any company to enter upon a State Park to engage in oil and gas exploration and development activities, the Bureau of State Parks staff would require that the company demonstrate its ownership interest in the oil and gas rights to ensure the company in fact has a right to enter upon the park land. N.T. 327-328.

Given DCNR's history of not leasing State Park lands and the difficulty in developing oil and gas on our State Parks without interfering with the people's use

and enjoyment of these public lands and their public natural resources, no Marcellus shale gas development has yet occurred on our State Parks, despite the private ownership of the oil and gas rights on much of the park land. State Parks have experienced impacts, however, from oil and gas development activities, including impacts from conventional oil and gas development on several State Parks and from both conventional and Marcellus shale gas development on adjoining lands. In one of Pennsylvania's largest and most heavily used parks, Ohiopyle State Park, a private gas company entered the park without any notification and began seismic testing near the camping area of the park. N.T. 327. In addition, the increased industrial activity associated with Marcellus shale gas development on adjoining lands (*e.g.*, increased truck traffic, well pad and pipeline construction, noise from these activities as well as compression stations, etc.) have detracted from the visitor experience within the State Parks. N.T. 313-314, 325, 330-331. During his tenure as Director of State Parks, Mr. Norbeck received numerous complaints from visitors of parks that natural gas drilling problems adjacent or near parks, including noise, truck traffic, and air pollution. N.T. 309.

No study has been conducted by DCNR or anyone else to assess the cumulative impacts of oil and gas extraction on our State Parks, or to evaluate the additional impact that would result from actually leasing State Park land for oil and

gas extraction, particularly without money from the Oil and Gas Lease Fund to mitigate those impacts.

The Supreme Court in *Belden & Blake Corp. v. DCNR*, 600 Pa. 559, 969 A.2d 528 (2009), held that DCNR has no authority to impose restrictions or to limit the access of the mineral rights owner to the State Parks land without just compensation. The Court stated: “If DCNR wishes to further conditions pursuant to its statutory duties, the Commonwealth must compensate the subsurface owner for the diminution of its rights; indeed it may condemn the subsurface interests altogether pursuant to the Eminent Domain Code.” *Id.* at 568. Given DCNR's limited ability to control oil and gas development on State Parks when the oil and gas rights are privately owned, DCNR's only ability to protect our State Parks and ecologically sensitive public natural resources present within our parks is to purchase these oil and gas rights. Use of the Oil and Gas Lease Fund for this purpose would allow DCNR to mitigate for the harm that inevitably occurs with industrial shale gas production on our public lands. The cost to acquire these rights would likely be hundreds of millions of dollars. N.T. 308.

In addition to protecting our State Parks from oil and gas development, hundreds of millions of dollars are needed to complete infrastructure improvement projects, as much of the park infrastructure was constructed decades ago. For example, DCNR needs funds to repair or replace dams on State Parks and to clean

up acid mine drainage problems present on State Parks. DCNR also need funds to acquire additional lands, both inholdings (privately owned parcels within State Parks) and adjacent parcels needed to protect the integrity of our State Parks. N.T. 305-306.

By requiring and approving the leasing of State Park land for oil and gas extraction and the selling the natural gas under State Parks to obtain money for the General Fund, and by using the Oil and Gas Lease Fund to operate DCNR rather than to mitigate the impacts of oil and gas extraction on our public lands, the Governor has undermined DCNR's ability to carry out its mission to maintain, improve and preserve our State Parks. DCNR can no longer balance the interests and values of our State Parks and determine when leasing is in the best interests of the Commonwealth. Nor can DCNR pay for projects needed to improve our State Parks using the Oil and Gas Lease Fund, such as dam repair and restoration, acid mine drainage cleanup, or land and mineral rights purchases, to deal with impacts from private development of gas extraction on and adjoining State Parks, as well as impacts from gas extraction on our State Forest. The Governor, through his decisions to lease State Park land and to eliminate DCNR's use of money from such leasing to mitigate the impacts of oil and gas extraction, has violated Article I § 27, his trustee duties and the people's rights thereunder.

#### **D. Impacts to the Pennsylvania Wilds, Pine Creek Rail Trails and other DCNR Economic Development Initiatives**

The Governor's decisions to require more State Forests and State Parks to be leased for selling natural gas, to require the transfer of money from the Oil and Gas Lease Fund to the General Fund, and to use money from the Oil and Gas Lease Fund rather than the General Fund for DCNR operational expense causes cumulative impacts to the economic development initiatives of DCNR through the Pennsylvania Wilds and the Pine Creek RAILS Trails, and precludes necessary projects from being completed for the loss of the Oil and Gas Lease Funds.

In 1995, under the Conservation and Natural Resources Act, DCNR brought together the Bureaus of State Parks and Forests and the recreation and conservation elements of the former Department of Community Affairs. N.T. 15. The Conservation Landscape Initiatives carries out important objectives articulated by the General Assembly in the following findings and purposes of the Conservation and Natural Resources Act:

“Our State parks and forests and community recreation and heritage conservation areas **are critical to the continued success of our tourism and recreation industry**, the second largest industry in the State.”

"Preserving, enhancing, maintaining and actively managing our system of State parks, forests, community recreation and heritage

conservation areas contributes greatly to the quality of life of Pennsylvania's citizens **and the economic well being of the State.**"

71 P.S. § 1340.101(a) (emphasis added). The Conservation Landscape Initiative also fulfills the intent of the General Assembly in enacting the Conservation and Natural Resources Act "to create a new Department of Conservation and Natural Resources to serve as a **cabinet level advocate for our State parks, forests, rivers, trails, greenways and community recreation and heritage programs to provide more focused management of the Commonwealth recreation, natural and river environments...** and to administer grant and technical assistance programs **that will benefit rivers conservation, trails, and greenways, local recreation, regional heritage conservation** and environmental education programs across Pennsylvania." 71 P.S. § 1340.101(b)(1) (emphasis added).

Cindy Adams Dunn, former DCNR Deputy Secretary for Conservation and Technical Services, headed the grants program and technical assistance to local governments and non-profits around conservation and the Conservation Landscape Initiatives. N.T. 350. She assisted in the development of the Pennsylvania Wilds as DCNR's first Conservation Initiative. Ms. Dunn testified that the Pennsylvania Wilds encompasses a 12-county area in north central Pennsylvania that includes 27 State Parks, and 8 State Forest Districts, and is focused on developing key assets, including the Pine Creek Rails Trails. N.T. 341.

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. 342.

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. 343. 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. 454.

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. 346.

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. 456, Exhibit R-14 at 152. The Shale Gas Monitoring Report also 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. 456-457. 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. 457.

Cindy Bower, a member of and Vice President of the Pennsylvania Environmental Defense Foundation, 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. 356-357. 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. 360.

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.* 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.*

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. 361. 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. 362-363.

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. 363-364. 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. 365. 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. 367-368. 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. 370-371.

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. 371. 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. 377.

#### **E. Impacts from Non-Surface Disturbance Leases**

The Respondents imply that no injury will result from these new leases because they will purportedly not allow any surface disturbance for oil and gas extraction. The Petitioner has established through testimony that there will be additional impacts. This assertion misses the point that the commitment to extraction of the natural gas on these lands itself is an irreparable injury. In

addition, the contention that the surface impact from the shale gas development will be limited is speculative without identification of the specific tracts to be leased and an analysis of the direct and cumulative impacts to these tracts and the surrounding lands.

Based on his experience, Dr. Grace stated that a lease with no surface disturbance is better than a lease with surface disturbance. But, even with no surface disturbance, there are going to be additional air impacts, water requirements, truck traffic, other activity. It is additional gas. Potentially require enlarged pipelines. There will be impacts. N.T. 64.

The development of gas in the Pine Creek Rails Trails area has impacted the project. The leases in the Tiadaghton Forest have been developed very near the Creek and the Trail. N.T. 347. If gas development crosses the threshold gas drilling threatens the very existence of ecotourism in the region. N.T. 354.

As former State Park Director, Mr. Norbeck has concerns that the continuing drilling activities adjacent to State Parks would result in cumulative impacts to those parks, including air problems, noise, light pollution. N.T. 310-311. There are 61 State Parks in the Marcellus Region. N.T. 311. Some of the parks have had drilling next to those parks which have caused impact to the parks. If further drilling were to occur on those existing pads the same type of impacts would occur on those parks. N.T. 314.

**F. Impacts to DCNR, our State Forests and Parks, and the Pennsylvania Wilds Harms the Article I § 27 Rights of Petitioner's Members**

Two Petitioner members testified before this Court on the some of the impacts they have already received from gas extraction on State Forest lands, Cindy Bower and Dan Alters. N.T. 356-388. In addition, Petitioner filed 16 affidavits of members whose interests are in the State Forest and Parks, and are impacted by the gas extraction. Exhibits A - N of the Motion for Summary Judgment.

**II. THE GOVERNOR'S DECISIONS TO LEASE STATE PARKS AND FORESTS, TO TRANSFER OIL AND GAS LEASE FUNDS TO GENERAL FUND, AND TO USE OIL AND GAS LEASE FUNDS TO OPERATE DCNR ARE UNCONSTITUTIONAL**

Petitioner asks this Court to find and declare, for the reasons set forth below, 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.

Governor Corbett published his Executive Budget for FY 2014-2015 on February 4, 2014. In that proposed budget he announced that he would lease both State Forest and State Park land for extracting natural gas for the purpose of

generating \$75,000,000 for the Oil and Gas Lease Fund, which would then be transferred to the General Fund to support his proposed funding for education and health programs. N.T. 468. On July 10, 2014, he approved the Appropriations Act for 2014 and on July 10, 2014 he approved amendments to the Fiscal Code, together which carry out his FY 2014-15 Executive Budget to an even greater extent by requiring the leasing of State Park and Forest land to generate \$95,000,000 for transfer from the Oil and Gas Lease Fund to the General Fund.

**A. Statutory Protection of Constitutional Interests in Public Trust Resources of State Parks and Forests**

The Pennsylvania Supreme Opinion in *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 948 (Pa. 2013),<sup>2</sup> states, “Ours is a government in which the people have delegated general powers to the General Assembly, but with the express exception of certain fundamental rights reserved to the people in Article I of our Constitution. *Id.* at 947; *see* Pa. CONST. art. I § 25 (“to guard against transgressions of the high powers which we have delegated, we declare that everything in this article is excepted out of the general powers of government and shall forever remain inviolate”).

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<sup>2</sup> The *Robinson Twp.* opinion by Chief Justice Castille is a plurality opinion as only Justice Todd and Justice McCaffery joined his opinion. Justice Baer compliments Chief Justice Castille for his thorough, well-considered and able opinion, but join in the result on the basis of substantive due process rather than Article I § 27.

The first section of Article I affirms, among other things, that all citizens have certain inherent and inalienable rights. Among the inherent rights of the people of Pennsylvania are those enumerated in Section 27, the Environmental Rights Amendment. *Id.* at 948. Article I § 27 of the Pennsylvania Constitution states:

“The people have a right to clean air, pure water, and the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come. As trustee, the Commonwealth shall conserve and maintain them for the benefit of all the people.”

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

“There can be no question that the Amendment itself declares and creates a public trust of public natural resources for the benefit of all the people, (including generations as yet unborn), and that the Commonwealth is made trustee of said resources, commanded to conserve and maintain them. No implementing legislation is needed to enunciate these broad purposes. The Amendment does so by its own, *Ipse dixit.*”<sup>3</sup>

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<sup>3</sup> It is settled rule of constitutional construction that prohibitive and restrictive provisions are self-executing and may be enforced by the courts independently of any legislative action.” *Logan v. Hiltner*, 307 Pa. 343, 161 A. 323,325 (1932); *see also Washingtonian Homes of Chicago v. City of Chicago*, 157 Ill. 414, 41 N.E. 893,896 (Ill. 1859).

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

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

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

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

The public trust portion of the amendment establishes that the public natural resources are the common property of the people. That property includes State Parks and Forests and the natural resources that are a part of those properties, the

trees and plants, the fish and birds, the habitats and ecology that support them. In the legal analysis included in the legislative record, Robert Broughton states:

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

*Id.* at 2274-2275.

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

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



and to manage our State Forests to assure their long-term health, sustainability and economic use. CNRA states:

“It is the intent of the General Assembly and the purpose of this act: (1) To create a new Department of Conservation and Natural Resources to serve as a cabinet-level advocate for our State parks, forests, rivers, trails, greenways and community recreation and heritage conservation programs to provide a more focused management of the Commonwealth’s recreation, natural and river environments. The primary mission of the Department of Conservation and Natural Resources will be to maintain, improve and preserve State parks, manage State Forest lands to assure their long-term health, sustainability and economic use, ... and to administer grant and technical assistance programs that will benefit rivers conservation, trails and greenways, local recreation, regional heritage conservation and environmental education programs across Pennsylvania.”

71 P.S. § 1340.101(b)(1).

DCNR has the duty to meet the obligations of its mission under CNRA as trustee under Article I § 27. 71 P.S. § 1340.101(a)(1); *Belden & Blake Corp.*, 600 Pa. at 566, 969 A.2d at 532.

Under the Conservation and Natural Resources Act, DCNR was given the discretion to lease State Forest land for mineral extraction. The Act specifically states: "The Department is hereby empowered to make and execute contracts or leases in the name of the Commonwealth for the mining or removal of any valuable minerals that may be found in State forests...whenever it shall appear to the satisfaction of the Department that it would be for the best interests of this

Commonwealth to make such disposition of those minerals.” 71 P.S. § 1340.302(a)(6).<sup>4</sup>

CNRA specifically incorporated Article I § 27 within its findings and purpose. 71 P.S. § 1340.101(a). CNRA sets forth the specific missions of DCNR to “maintain, improve and preserve State parks, to manage State forests to assure their long-term health, sustainability and economic use ... and to administer grant and technical assistance programs that will benefit rivers conservation, trails and greenways, local recreation, regional heritage conservation and environmental education programs across Pennsylvania.” 71 P.S. § 1304.101(b)(1). These missions are governed under the limitations and obligations of Article I § 27.

Shortly after CNRA was enacted in 1995, DCNR published its strategic plan, entitled “*Penn’s Woods-Sustaining Our Forests*”, to set forth how it would meet its constitutional and statutory mission with regard to State Forests. The Plan

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<sup>4</sup> The provision does not require DCNR to obtain the approval of the Governor to enter into leases. In Section 302(a)(6), the approval of the Governor is required when leases for fractional interests of State Forest are entered into without competitive bidding. Other CNRA provisions also require the Governor’s approval (*e.g.*, the sale or exchange of State Forest land under Section 302(a)(11); the lease of State Forest land for other purposes under Section 302(b)(1)). CNRA clearly establishes that the responsibility for the decision to enter into oil and gas leases lies with DCNR. The Governor is not even authorized to approve DCNR’s decision, much less usurp DCNR’s authority to make the decision in the first place.

calls for "Managing State Forests under sound ecosystem management, to retain their wild character, and maintain biological diversity while providing pure water, opportunities for low density recreation, habits for forest plants and animals, sustained yields of quality timber, and environmentally sound utilization of mineral resources." The plan calls for managing minerals consistent with ecosystem management. N.T. 5 (Exhibit P-1).

The primary goal of ecosystem management is to keep the complex interdependencies of biological systems intact and functioning well over long periods of time. The essence of maintaining ecosystem integrity is to retain the health and resilience of systems so they can accommodate short term stresses and adapt to long-term changes. The key elements include the maintenance of a diversity of plants animals and the proper functioning of nutrient, water and energy cycles. N.T. 8 (Exhibit P-1).

Any decision by DCNR to lease State Forest land must incorporate the above principles. They are developed from the core function of the public trust portion of Article I § 27, to conserve and maintain the public natural resources for the benefit of all the people, both now, and for future generations. (See testimony of former DCNR Deputy Secretary Jim Grace, N.T. 22, and current Deputy Secretary Dan Devlin, N.T. 442).

When Governor Corbett made the decision to use the State Forests and Parks for extraction of natural gas and oil, he did not apply any of the above principles to his decision. He did not even ask DCNR, the agency responsible for our Parks and Forests, and the agency responsible for protecting them as part of public trust under Article I § 27, what impacts his decision would have on their ability to meet their constitutional and statutory duties. N.T. 278. In fact, Deputy Secretary Devlin recommended against any further leasing for purposes of the budget. N.T. 277.

Governor Corbett has been a named Respondent in this case since 2012. He knows or should have known of the allegations set forth in the three different iterations of the Petition for Review, which have set forth and substantiated the above principles. Yet he continued to ignore the clear language of both Article I § 27 and the Conservation and Natural Resources Act when he made his decision first to require further leasing to obtain \$75,000,000, and then to increase that amount to \$95,000,000, for the General Fund, or to use the Oil and Gas Lease Funds to operate DCNR.

His decision to use the corpus of the public trust, both the public lands and the natural gas that is a non-renewable part of the public natural resources, to obtain revenue for the General Fund clearly violates the Article I § 27 mandate to conserve and maintain the public natural resources for the benefit of all the people, both now and for future generations. The Commonwealth has an affirmative

obligation as a trustee under Article I § 27 to protect the public natural resources through legislation, not to undermine prior legislative protections (CNRA and the Oil and Gas Lease Fund Act (71 P.S. §§ 1331-1333) in order use money from a public trust fund for non-trust purposes. The Pennsylvania Supreme Court in its recent analysis of Article I § 27 in states: “The explicit terms of the trust require the government to 'conserve and maintain' the corpus of the trust. The plain meaning of the terms conserve and maintain implicates the duty to prevent and remedy the degradation, diminution, or depletion of our public natural resources.” *Robinson Twp.*, 83 A.3d at 957.

**B. Constitutional Duty to Determine Impact of Decision or Action before any Proposed Action**

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

This principle is clearly articulated in *Robinson Twp.*, which states:

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

*Id.* at 951-952 (emphasis added).

In order to make an assessment regarding impacts to State Forests and Parks from extraction of natural gas, it is necessary to develop the information necessary to make the assessment. The Governor failed to make any assessment of the impacts to the public natural resources before making his decision to lease more State Forest and Park land. He did not consult with DCNR to develop information on the impacts to State Forests and Parks. In fact, he ignored the specific advice of DCNR not to lease any more State Forest land.

The duties of the trustee are defined by the terms of the trust. The language of the third clause of the public trust portion of Article I § 27 makes clear that the Commonwealth as trustee shall both conserve and maintain those public natural

resources, and do so for the benefit of all the people, including the future generations. The nature of this trust is described in in *Robinson Twp.*, 83 A.3d at 955-956, stating:

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

### **C. Constitutional Duty to Refrain from Degradation, Diminution or Depletion of Public Natural Resources**

In interpreting the construction and application of the Constitution, the Supreme Court states: “In the process of interpretation, our ultimate touchstone is the actual language of the Constitution itself. The Constitution’s language controls and must be interpreted in its popular sense, as understood by the people when they voted on its adoption.” *Robinson Twp.*, 83 A.3d at 943 (internal quotations and citations omitted). Inherent in the duty to conserve and maintain is the duty of the trustee to not take any action or make any decision that might or will negatively impact the public natural resources, the use benefits to those resources, and the

rights of the people. The Commonwealth's trustee duty under Article I § 27 is described in *Robinson Twp.*, 83 A.3d at 957, stating:

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

The Supreme Court also described the Commonwealth's fiduciary duties as trustee in *Robinson Twp., id.*, stating:

As a fiduciary, the Commonwealth has a duty to act toward the corpus of the trust -- the public natural resources -- with prudence, loyalty, and impartiality. *See ... Lang [v. Commonwealth]*, 515 Pa. 428, 528 A.2d 1335, 1342 (Pa. 1987)] (citing Restatement (Second) of Trusts § 170) (trustee has duty of loyalty to administer trust solely in the beneficiary’s interests and not his own); *In re Hamill’s Estate*, 410 A.2d 770, 773 (Pa. 1980) (citing Restatement (Second) of Trusts § 232) (trustee has duty of impartiality)."

The Governor's decision violates Article I § 27 by requiring further leasing of State Parks and Forests even though the leases may or will permit the further degradation and or depletion of the public natural resources, including the natural gas that will be extracted and additional impacts from the increased leasing activities, and diverts the money from the public trust fund established to mitigate those impacts.



#### **D. Constitutional Duty of Loyalty to Trust Assets and Beneficiaries**

The Governor also violated his duty of prudence, loyalty, and impartiality to the corpus of the trust, and his duty of loyalty to the beneficiaries' interests. His desire to use Oil and Gas Lease Funds to propose balanced budgets that continued to provide funding for other important administration efforts, particularly education, while understandable, was misguided, and instead benefited his own administrative interest in trying to balance the budget. He is requiring DCNR to lease State Forest land and, now for the first time, State Park land for the sole purpose of obtaining funds for use as general revenue of the Commonwealth, not part of the public trust under Article I § 27.

#### **E. Fiduciary Duty to Future Generations**

The Governor's fiduciary duty under Article I § 27 includes a duty to future generations. The Supreme Court recognized this duty in *Robinson Twp.*, stating: "Within the public trust paradigm of *Section 27* the beneficiaries of the trust are 'all the people' of Pennsylvania, including generations yet to come. The trust's beneficiary designation has two obvious implications: first, the trustee has an obligation to deal impartially with all beneficiaries; and second, the trustee has an obligation to balance the interests of present and future beneficiaries." *Id.* at 959.

The Governor's decisions to require leasing and to use the Oil and Gas Lease Fund for General Fund purposes takes away the basic management decisions

of our State Forests and State Parks, to determine when to lease, how much to lease, how to use the funds from those leases. The loss of DCNR's ability to manage the forest now affects the forests in the future. The Governor's decisions commit our State Parks and Forests to long term (up to 50 years) industrial uses of gas extraction over major parts of these areas, which obviously effect future generations. The decisions impact the future of the economic revitalization of the area for tourism and for outdoor recreational economic development of the area, including the Pennsylvania Wilds and the Pine Creek initiatives. In addition, any consideration to extract minerals of the Public Trust must be made in consideration of possible future needs of the Trust for those minerals for future generations. The Governor has given no consideration of these impacts.

**F. Fiduciary Duty to Use Assets of Trust for Purposes of Trust**

A trustee may use the assets of the trust only for the purposes authorized by the trust or necessary for the preservation of the trust. Other uses are beyond the scope of the discretion conferred, even where the trustee claims to be acting solely to advance other discrete interests of the beneficiaries. *Robinson Twp.*, 83 A.3d at 978 (citing *Metzger v. Lehigh Valley Trust & Safe Deposit Co.*, 220 Pa. 535, 69 A. 1037, 1038 (Pa. 1908)). State Parks and Forests and the natural gas thereon are part of the trust corpus, and leasing and selling the trust corpus for revenue for the General Fund is not one of the purposes of the trust.

**G. Commonwealth Interest in State Parks and Forests is not Proprietary**

The Commonwealth's interests in our State Parks and Forests and the public natural resources is fiduciary, holding those resources for the benefit of the people, not proprietary. By leasing State Park and Forest land for General Fund purposes, the Governor is treating both the State lands and the natural gas that is being extracted for royalty money as Commonwealth property, not as trust property that he must treat with fiduciary responsibilities. But clearly, our State Parks and Forests, and the mineral resources that are a part thereof, are part of the public trust. They are the common property of all the people, both now and for future generations.

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

"The public trust doctrine, which may be a part of the common law already, but which, if so, has not been clearly enunciated in Pennsylvania, relates to the rights and duties of government in public property. It is the role of government that is in question: As a holder of property, or of public servitudes (such as navigation rights, or more remotely, the right to prevent public nuisances), is the government simply a corporate property owner, a proprietor, or is it a trustee, with the duty to manage, use, and/or consume the property of the public

solely for the benefit of the public. As Clyde O. Martz, former Assistance Attorney General in charge of the Natural Resources Division of the United States Department of Justice has put it:

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

Legislative Journal at 2274-2275, Exhibit QQ.

#### **H. Violation of Conservation and Natural Resources Act**

The Governor's decision to lease State Park and Forest land also violates the Conservation and Natural Resources Act, which authorizes only DCNR to determine whether to lease State Forests or State Parks for gas extraction; as well as the principles of ecosystem management that DCNR has established in its strategic plan, *Penn's Woods, Sustaining Our Forests*, to carry out its constitutional and statutory trustee obligations. Further, the decision to lease more State Forest and Park lands depletes the public natural resources without the protection afforded by the Oil and Gas Lease Fund to provide the funds to remedy the degradation and enhance the resources.

For all of the above reasons, Petitioner requests that this Court declare that the Governor's decision to lease more State land to generate \$95,000,000 for the

General Fund is in violation of Article I §27, including his duties and the rights of the people thereunder.

### **III. THE GOVERNOR HAS FAILED TO RECOGNIZE THAT THE OIL AND GAS LEASE FUND IS A TRUST FUND**

Petitioner asks this Court to find and declare, for each and all the reasons set forth below, 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.

#### **A. The MCARE Fund Case**

In directing DCNR to convert additional public natural resources from our State Park and Forest land to money for the Oil and Gas Lease Fund so he can use the money for General Fund purposes, the Governor has failed to recognize that the Oil and Gas Lease Fund is a trust fund that must be used for trust purposes—a determination supported by the recent Supreme Court decision in *Hospital and Healthsystem Assoc. of Pa. v. Commonwealth*, 77 A.3d 587 (Pa. 2013) ("*HHAP*"). That case involved the Medical Care Availability and Reduction of Error Act enacted in 2002 (the “MCARE Act”), which requires health care providers to

maintain a minimum level of professional liability insurance. The MCARE Act also created the Medical Care Availability and Reduction of Error Fund (the “MCARE Fund”), which is designated a “special fund” within the state treasury. 40 P.S. § 1303.712(a). The MCARE Fund is administered by the Insurance Department of Pennsylvania. *Id.* at 592.

Under the MCARE Act, Pennsylvania physicians, hospitals, and certain other health care providers, as a condition of practicing in Pennsylvania, are required to purchase medical professional liability insurance in the amount of \$500,000 per occurrence or claim, and to participate in the MCARE Fund. The MCARE Fund provides a secondary layer of liability coverage to providers by paying, subject to the Fund’s liability limits, damages awarded in medical malpractice actions in excess of the required minimum level of professional liability coverage. *Id.*

Due to a revenue shortfall following the economic downturn in 2008, the Commonwealth faced a budget impasse for FY 2009-10 that lasted 100 days. An interim budget was passed in early August of 2009, when the Governor approved a supplemental appropriations bill, as well as implementing legislation making amendments to Pennsylvania’s Fiscal Code. One of the Fiscal Code provisions directed that \$100 million be transferred from the MCARE Fund to the General Fund. *Id.* at 593. As a result, several health care providers filed a petition for

declaratory judgment and injunctive relief, and filed an application for preliminary injunction. The preliminary injunction was denied based on the Commonwealth's commitment that the money would be "reconstituted", *i.e.*, the money would be deposited back into the MCARE Fund by the Commonwealth in the advent of an adverse ruling. *Id.* at 593-594.

This Court granted summary relief to the petitioner. In doing so, a majority acknowledged that the General Assembly is free to repeal and amend legislation, but found that Section 1976 of the Statutory Construction Act (1 Pa.C.S. § 1976), as well as the Remedies Clause of the Pennsylvania Constitution (Article I Section 11), protect vested rights and accrued causes of action from impairment by subsequent legislation. This Court ultimately held that the health care providers had a vested entitlement to have the monies used for the purposes intended in the MCARE Act, and that such a right cannot be extinguished by the Fiscal Code. *Id.* at 594-595.

The Pennsylvania Supreme Court in its review of the case looked to the fact that the assessment program was never intended as a general revenue mechanism to raise tax revenue; and that a rational relationship existed between the monies paid in and their mandated use to satisfy claims against the health care providers under the MCARE Act. *Id.* at 603. The court examined the fact that the legislative scheme under the MCARE Act lead health care providers to rely on the program as

established to make major decisions regarding their practices. These facts “elevated” the MCARE Fund above the status of standard budgeting allocations. *Id.* On this basis, the Supreme Court determined that the MCARE Fund, although labeled a “special fund”, is “in the nature of a trust fund whose monies are held for the purpose intended by the statute”, *id.* at 604 (citing *Daugherty v. Riley*, 1 Cal.2d 298, 34 P. 2d 1005, 1010 (Cal. 1934)); and that the health care providers had a vested right to have the money utilized in the manner directed by the statute, *id.* (citing *Konidaris v. Portnoff Law Associates*, 598 Pa. 55, 74, 953 A. 2d 1231, 1242 (2008); accord *Bible v. Department of Labor and Industry*, 548 Pa. 247, 261, 696 A.2d 1149, 1156 (1997)).

In response to an argument from the Pennsylvania Senate, as amicus, that the General Assembly must be free to re-appropriate funds to meet changing public needs, the Supreme Court stated that the proper question was “whether the General Assembly was free to redirect assessment monies already paid into the MCARE Fund at the time the 2009 Budget legislation was enacted. **If the Constitution precluded it from doing so, the severity of the fiscal crisis is immaterial, as the Senate acknowledges.**” *HHAP*, 77 A.3d at 604, n. 19 (emphasis added). The Supreme Court observed that courts have recognized that legislative bodies retain authority to control the fate of special funds in order to serve the changing needs of



government, so long as doing so would not contravene a specific constitutional provision or breach a contractual obligation. *Id.*

In the case before this Court the Governor has failed to consider the Supreme Court's direction regarding the use of de-facto trust funds in the MCARE case and its application to the Oil and Gas Lease Fund. Instead, he decided to convert State Park and Forest public natural resources to money to support the proposed General Fund spending in his FY 2014-15 Executive Budget, as implemented through the Appropriation Act of 2014 and implementing provisions in the 2014 Fiscal Code amendments approved by the Governor, rather than recognizing these public natural resources as trust assets that, if liquidated, must be used only for trust purposes. He failed to recognize that a rational relationship exists between the monies paid into the Oil and Gas Lease Fund and their mandated use to mitigate harm to the State Parks and Forests from oil and gas extraction.

The Governor also failed to recognize that under the legislative scheme existing under CNRA and the Oil and Gas Lease Fund Act, DCNR's consideration of when leasing State Forest land is in the best interest of the Commonwealth is based on its belief that it would receive all the money from leasing and gas extraction for the purpose of mitigating the impacts to the public natural resources through conservation, recreation, dam and flood control projects and land

purchases to support those projects. This reliance on the statutory scheme to ensure protection of the State Park and Forest public natural resources elevates the Oil and Gas Lease Fund to a trust fund.

The Governor also failed to recognize that the people of the Commonwealth, by approving Article I § 27 as part of their Constitution, have a constitutionally protected property right in the public natural resources of their State Parks and Forests, and are the beneficiaries of this public trust. The last two sentences of Article § 27 establish that right: “Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources the Commonwealth shall conserve and maintain them for the benefit of all the people.”

When oil and gas that is part of the public natural resources of State Parks and Forests is converted to money through leasing and extraction, this money, which is deposited into the Oil and Gas Lease Fund, remains part of the public trust. As such, the people have a vested interest in the Oil and Gas Lease Fund as a public trust fund based on the legislative structure of the CNRA and the Oil and Gas Lease Fund Act. The money in this public trust fund must be used to enhance the public natural resources of our State Parks and Forests through projects and land purchases authorized by the Oil and Gas Lease Fund. Neither the Governor, nor the General Assembly, can divert the use of the Oil and Lease Fund to non-

trust purposes without violating Article I § 27 and the legislative scheme established by CNRA and the Oil and Lease Fund Act to implement it.

**B. Oil and Gas Lease Fund Statutory Framework**

The Governor's decisions in his FY 2014-15 Executive Budget, and his approval of the Appropriation Act of 2014 and the 2014 Fiscal Code amendments that implement his budget, require the conversion of State Park and Forest public natural resources to money for General Fund spending, and the use of the Oil and Gas Lease Fund to operate DCNR. In making these decisions, the Governor ignores the statutory framework of CNRA and the Oil and Gas Lease Fund Act, which establish the Oil and Gas Lease Fund as a trust fund under Article I § 27.

The Oil and Gas Lease Fund is not a fund consisting of general tax revenue that the Governor can shift to various purposes as the need arises. It is a fund that consists solely of rent (including upfront rent known as bonus payments) from leasing State lands for oil and gas extraction and royalties based on the oil and gas produced from those lands, and must be “exclusively used for conservation, recreation, dams, and flood control.” 71 P.S. § 1331.

The Oil and Gas Lease Fund Act states: “It shall be within the discretion of the Secretary of [DCNR] to determine the need for and the location of any project authorized by this act.” 71 P.S. §1332. If that is not clear enough, the Act concludes stating: “All the moneys from time to time paid into the 'Oil and Gas

Lease Fund' shall be specifically appropriated to the [DCNR] to carry out the purposes of this act." 71 P.S. § 1333.

Based on the Supreme Court authority in the MCARE decision, the Oil and Gas Lease Fund, even though labeled a “special fund”, is a trust fund whose monies are being held for the purpose designated by the Oil and Gas Lease Fund Act, consistent with Article I § 27. It is in essence a specific trust fund for Pennsylvania’s public natural resources established under the Conservation and Natural Resources Act of 1995. *See Hospital and Healthsystem Assoc. of Pa., supra.*

The Oil and Gas Lease Fund Act requires that the rents and royalties from oil and gas leases of Commonwealth land (other than game and fish lands) be placed in a *special fund* known as the Oil and Gas Lease Fund, to be used for the *exclusive purposes* of conservation, recreation, dams, and flood control; and authorizes only the Secretary of Forest and Waters (now DCNR) to determine the need for and location of such projects and to acquire the necessary land. 71 P.S. §§ 1331-1334 (emphasis added); 71 P.S. § 1340.304(c).

The Commonwealth has an affirmative obligation as a trustee under Article I § 27 to protect the public natural resources through legislation. *Robinson Twp.*, 83 A.3d at 958 (citing *Geer v. State of Conn.*, 161 U.S. 519, 534 (1896) (trusteeship for benefit of state’s people implies legislative duty to enact such laws as will best

preserve the subject of the trust, and will secure beneficial use in the future to the people of the state). That is what CNRA does.

For the conservation and maintenance of our State Forests and Parks and the public resources thereon, the General Assembly passed and Governor Tom Ridge signed into law the Conservation and Natural Resources Act in 1995. 71 P.S. §§ 1340.101 *et seq.* That act provides a statutorily designated trustee for these public natural resources in the Department of Conservation and Natural Resources. Section 302(a)(6) of the Conservation and Natural Resources Act reauthorized the ability to lease State Forests for gas extraction to DCNR (71 P.S. § 1340.302(a)(6)), subject to the recognized protections afforded to these public natural resources under Article I § 27 (71 P.S. § 1340.101(a)).

Under CNRA, DCNR is obligated to use its authority to lease State Forest land for oil and gas extraction and its authority to allocate the funds generated from its oil and gas leases within the fiduciary obligations under Article I § 27, to conserve and maintain the public natural resources, and to do so for the benefit of all the people both now and for future generations. To fulfill these obligations, DCNR is required to protect the rights of the people established under Article I § 27 to clean air, pure water and the preservation of natural, scenic, historic and esthetic environment in managing State's parks, forests, rivers, trails, greenways and community recreation and heritage areas. CNRA provides DCNR with the

specific means to fulfill its statutory and constitutional obligations, when determining to lease State land for private development of natural gas, by providing DCNR with the funds from the leasing and gas extract for the exclusive purposes of the Oil and Gas Lease Fund. This statutory structure mandates that the funds from the leasing of Oil and Gas Lease Fund must be treated as trust funds belonging to and for the purpose of the Public Trust.

Petitioner's members have a constitutionally protected proprietary interest under Article I § 27 in the assets of the Oil and Gas Lease Fund. The public natural resources of our State Parks and Forests are the common property of all citizens of Pennsylvania, both now and for future generations. *See Robinson Twp.*, 83 A.3d at 954 (“The second right reserved by [Article I] Section 27 is the common ownership of the people, including future generations, of Pennsylvania’s public natural resources.”) The Oil and Gas Lease Fund monies generated by the conversion of those public natural resource assets remain part of the public trust and must be used for the purposes of conserving and maintaining those public natural resources.

The Governor cannot take away the Constitutionally protected proprietary interests of the people in that land and in the mineral resources simply by amending the Oil and Gas Lease Act through the Fiscal Code to give control of the

Fund to the General Assembly so that the Governor and the General Assembly can divide up the Fund as if it is part of the Commonwealth's general revenues.

When DCNR leases State Forest land to private companies for oil and gas extraction, the lease remains in effect as long as the company is producing oil or gas (estimated to be 50 years or more for shale gas layers (N.T. at 39)), and the land is converted into drilling pads, compression stations, water storage areas, pipe lines, roads and other industrial uses for the purpose of gas extraction, then that State Forest land is in effect converted to private use, and its attributes as a public natural resource are severely compromised. The conversion of the proprietary interests of the people from a public natural resource to a private use for revenue requires that the revenue from that conversion is still "the common property of the people". That revenue must remain as part of the public trust and be retained to conserve and maintain our State Parks and Forests under Article I § 27 by mitigating for this loss consistent with the purposes of CNRA and the Oil and Gas Lease Fund Act.

The Governor has failed to recognize that oil and gas on our State Parks and Forests that has been acquired by the Commonwealth as part of the purchase of these lands is part of the public trust established by Article I § 27. The oil and gas removed by the private companies is part of the public natural resources of that land. *See Robinson Twp.* 83 A.3d at 955 ("At present the concept of public natural

resources includes not only state-owned lands, waterways, **and mineral reserves**, but also resources that implicate the public interest, such as ambient air, surface and ground water, wild flora, and fauna (including fish) that are outside the scope of purely private property” (emphasis added).); N.T. at 22 (natural gas is a nonrenewable natural resource).

When oil and gas is extracted from State Forest land under existing DCNR leases, this public natural resource is converted into money through the sale of the oil and gas (royalty revenue). The people have a constitutionally protected proprietary interest in the natural gas. The Governor cannot destroy that interest by converting the public trust resource into revenue and then distributing that revenue outside of the purposes of the Trust. The conversion of that nonrenewable resource to money requires that the money obtained therefrom be retained as part of the trust for purposes to conserve and maintain our State Parks and Forests under Article I § 27 by mitigating for the loss consistent with the purposes of CNRA and the Oil and Gas Lease Fund Act.

To take that money out of DCNR to be used for other purposes such as programs for education or programs under the regulatory direction of the Department of Environmental Protection, would result in the loss of the property interests of the people in the State Parks and Forests.



That money from the lease of the land and the sale of the natural gas is still a part of the trust that is part of the State Parks and Forests and the natural resources therein. The money must be managed by the DCNR, as well as the Governor and the General Assembly, consistent with recognized standards governing fiduciary conduct. *See Robinson Twp.*, 83 A.3d at 956 (“‘Trust’ and ‘trustee’ are terms of art that carried legal implications well developed at Pennsylvania law at the time the amendment was adopted.”); *id.* at 957 (“As trustee, the Commonwealth is a fiduciary obligated to comply with the terms of the trust and with standards governing a fiduciary’s conduct ... As a fiduciary, the Commonwealth has the duty to act toward the corpus of the trust with prudence, loyalty and impartiality.”) In other words, DCNR, and all representatives of the Commonwealth as trustees, have the fiduciary duty to use the money in the Oil and Gas Lease Fund from oil and gas leasing and extraction on State Park and Forest land to conserve and maintain the public natural resources of the State Parks and Forest for the benefit of the beneficiaries of the Public Trust—the people of Pennsylvania. Attempting to use the public natural resources of the Public Trust to make up budget deficits violates the fiduciary duty of the Governor as trustee of the Public Trust.

The Governor, based on his decisions in his FY 2014-15 Executive Order, and in the Appropriations Act, clearly views the State Parks and Forests, and the oil and gas on State Parks and Forests, as the property of the Commonwealth, not

as part of the Public Trust natural resources of our State Parks and Forests held by the Commonwealth, as trustee, for the use and enjoyment of the people, including future generations, under Article I § 27. The Governor's proprietary view is inconsistent with the legislative history of Article I § 27, which includes the following legal analysis of this issue by Robert Broughton, Associate Professor of Law, Duquesne University Law School:

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

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

Pennsylvania Legislative Journal, House of Representatives, April 14, 1970, at 2274-2275, Exhibit QQ.

The Oil and Gas Lease Fund has historically been considered a de facto trust fund and used consistent with public trust concepts. Since its enactment in 1955,

the revenue from natural gas extraction from State lands has been specifically “appropriated” to DCNR (and its predecessors) for the exclusive purposes of the Oil and Gas Lease Fund Act. Until the actions of Governor Rendell, and now Governor Corbett, DCNR consistently exercised its trustee duties under Article I § 27, CNRA and the Oil and Gas Lease Fund Act by only using the Oil and Gas Lease Fund for conservation, recreation, dams and flood control to conserve and maintain the public natural resources of the State Parks and Forests for the benefit of the people. N.T. 31; Exhibit P-2 (list of projects funded by Oil and Gas Lease Fund since its inception).

The Governor made his decisions to convert State Park and Forest public natural resources to money to support the proposed General Fund spending in his FY 2014-15 Executive Budget knowing that both DCNR and the Auditor General had strongly recommended against this practice in the past. Former Secretary Michael DiBerardinis stated in his Memorandum to then Governor Rendell on March 27, 2009 that “*diverting the Oil and Gas Lease Fund’s* lease sale and royalty proceeds toward general use and away from their legislated purpose *sets a dangerous precedent. This reliable funding stream—intended to offset the impacts of resource extraction—has endured through 50 years and multiple administrations, providing stable investments to conservation and environmental protection. The fund has supported the acquisition, infrastructure investments, and*

maintenance of our state parks and forest that make them what we enjoy today.”

N.T. 248-251; Exhibit P-3 (emphasis added.)

The Auditor General’s 2004 Special Audit of DCNR's Oil and Gas Lease Fund Program ("2004 Audit") reinforces that concept. The 2004 Audit states that revenue from the Oil and Gas Lease Fund must by law be used exclusively for conservation, recreation, dams and flood control projects on Commonwealth lands.

N.T. 252; Exhibit P-12 at 1.

In describing appropriate uses of the Oil and Gas Lease Fund, the 2004 Audit states that expenditures for items such as *salaries, clothing* and other costs which do not appear to be within the purposes set out in the Oil and Gas Lease Fund Act, were of *questionable direct benefit to the physical enhancement and conservation of State Parks and State Forests, the intended beneficiaries of the revenues in the Oil and Gas Lease Fund*, and therefore were inappropriate or unjustified. Exhibit P-12 at 2 (emphasis added). The 2004 Audit relies in part upon an analysis of the use of the Oil and Gas Lease Fund by the Attorney General in 1991 that concludes:

In my judgment, the General Assembly’s establishment of this special fund, and its focus on geographically-identifiable projects reflects an intent that *revenues derived from the depletion of the Commonwealth’s natural resources should be dedicated directly to the physical enhancement or conservation of the Commonwealth’s natural resources*. Viewed in this light, [the Oil and Gas Lease Fund Act] would not authorize the use of Fund receipts to support DER’s

regulatory or enforcement activities, its general administrative or legal operations, or any other function not related directly to a project undertaken pursuant to the Act.

Exhibit P-12 at 16 (emphasis added).

The Governor's failure to recognize that the Oil and Gas Lease Fund is a trust fund established by CNRA and the Oil and Gas Lease Fund Act to fulfill the Commonwealth's trustee duties under Article I § 27 has lead him to violate Article I § 27 and the people's rights thereunder in his FY 2014-15 Executive Budget decision.

The money from the conversion of public natural resources on State Park and Forest lands remains in the public trust. The Governor's view of the Commonwealth as the proprietor of the natural gas on State Parks and Forests, rather than the trustee of these natural resources is erroneous. The Governor cannot circumvent his trustee duties under Article I § 27, or those of DCNR, by ignoring CNRA and the Oil and Gas Lease Fund Act, the legislation enacted to fulfill those duties. He has the fiduciary duty to ensure that DCNR uses the Oil and Gas Lease Fund for the exclusive purposes established by CNRA and the Oil and Gas Lease Fund Act to mitigate the loss of public natural resources from oil and gas extraction, and to conserve and maintain our State Parks and Forest for the use and enjoyment of the people, including future generations. No matter how dire the

needs are for funds for the budget, the Governor cannot violate the Constitution by moving the funds out of the Oil and Gas Lease Fund and into the General Fund.

#### **IV. THE GOVERNOR CANNOT USE THE OIL AND GAS LEASE FUND TO OPERATE DCNR**

The Petitioner asks this Court to 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.

The Respondents have made it clear in their Joint Brief in Opposition to the Petitioner's Application for Special Relief that the Governor's policy and intention is to continue use of the Oil and Gas Lease Fund to fund DCNR's operations. Specifically, the Respondents Joint Brief (p. 20) states: *"Since removal of the gas from the Marcellus Shale became viable, revenues into the Oil and Gas Lease Fund have risen substantially and now provide a consistent stream of revenues. These revenues, in turn, allow the General Assembly to reallocate the costs of conservation and operations of the state parks and forest from the General Fund to*

*the Oil and Gas Lease Fund, essentially making those resources self-sustaining.”*  
(Emphasis added). This policy violates numerous constitutional principles.

For the reasons set forth above, the funds in the Oil and Gas Lease Fund are part of the public trust. The Oil and Gas Lease Fund was never intended as a mechanism to replace General Fund tax revenue. This fund was always intended and used exclusively for conservation, recreation and flood control projects, which are projects that fulfill the Article I § 27 mandate to conserve and maintain the public natural resources of our State Parks and Forests for the benefit of all the people, both now and for future generations.

The legislative scheme initiated under CNRA, and consistently applied until the actions challenged in this Petition beginning in 2009 and now again by Governor Corbett in 2014, established a direct relationship between oil and gas leasing on State Parks and Forests, oil and natural gas production, and the money generated by that leasing and production. The gas extraction process impacts the public’s natural resources of our State Parks and Forests. The money from that leasing and gas extraction has always gone back into enhancing those resources to offset the harm from the extraction process. As described above in the discussion of the recent Supreme Court MCARE case, this type of legislative scheme and the reliance by DCNR and the public on the use of the Oil and Gas Lease Fund to benefit the State Parks and Forests impacted by the oil and gas extraction elevates

this fund to a trust fund. The Governor's proposed use of the Oil and Gas Lease Fund in his Executive Budget for FY 2014-15 and then his approval of such use in the Appropriation Act of 2014 violate his fiduciary duties as trustee of this fund under Article I § 27 and CNRA.

By using the Oil and Gas Lease Fund to pay the salaries and the expenses of DCNR employees, the Governor also creates a conflict within DCNR between its mission to sustain the public natural resources of the State Parks and Forests, and its concern for the well-being of its staff. When this type of conflict exists, the decision as to whether or not to lease becomes blurred, particularly when other sources of revenue to pay operating expenses decline. In addition, the ability to objectively evaluate the impacts of leasing using sound ecosystem management becomes more difficult when the money generated from leasing is necessary to pay the salaries and benefits of those who are making these evaluations, along with their colleagues. When faced with the choice of protecting our public natural resources or protecting jobs, the latter will win to the detriment of our public lands. DCNR cannot properly fulfill its fiduciary duty under Article I § 27 and CNRA if its employees are dependent on money from oil and gas leasing for their jobs.

The use of the Oil and Gas Lease Fund for DCNR operating expenses also has the serious consequence of diverting these funds from use in mitigating the loss of public natural resources on State Parks and Forests from the oil and gas



extraction process. DCNR has just begun to monitor the impact from the Marcellus shale unconventional gas development of almost 700,000 acres of State Forest. Of Pennsylvania's 120 State Parks, 61 are located within the Marcellus shale region and the Commonwealth does not own the subsurface oil and gas rights on a significant portion of the State Parks (estimated at 80%). The development of Marcellus shale unconventional wells on State Park land has not yet occurred and, therefore, DCNR cannot yet predict the loss of public natural resources likely to result from this activity on State Park lands. N.T. 306, 311.

The Governor, by proposing to use money from the Oil and Gas Lease Fund to pay DCNR's operating expenses in FY 2014-15 and approving the Appropriations Act of 2014 that does so, is again treating the money from the conversion of public natural resources like general proprietary revenue, not as a trust fund asset. Use of the Oil and Gas Lease Fund for general agency operating expenses is exactly what the 2004 Audit found inappropriate. DCNR's operating expenses have historically been paid with General Fund tax revenue. With the increase in money in the Oil and Gas Lease Fund as a result of the Marcellus shale gas leasing and production on State Forest, Governor Corbett has proposed, and approved, paying an increasing percentage of DCNR's operating expenses from the Oil and Gas Lease Fund. With the Governor's FY 2014-15 Executive Budget, DCNR operating expenses are almost fully paid from the Oil and Gas Lease Fund.

The use of money from the Oil and Gas Lease Fund for DCNR operating expenses in FY 2014-15 is functionally equivalent to a direct transfer from the Oil and Gas Lease Fund to the General Fund, with the same resulting loss to the public trust. The revenue that has been cut from DCNR's General Fund appropriation will be used to fund other agencies and programs that do not benefit our State Park and Forest public natural resources, just as if a direct transfer of \$72,546,000 from the Oil and Gas Lease Fund to the General Fund had occurred and DCNR had retained its General Fund appropriation. By replacing DCNR's General Fund appropriation for its operations with money from the Oil and Lease Fund, the true impact to our State Parks and Forests is less obvious as it appears that DCNR still has use of the Oil and Gas Lease Fund.

Section 1603-E of the Fiscal Code, which is discussed in more detail below, is similarly deceptive in that it appears to allow DCNR up to \$50,000,000 annually to carry out the purposes of the Oil and Gas Lease Fund Act; however, this provision then gives priority to use of these funds for DCNR operational expenses, which as explained above, is not a legitimate use under the Oil and Gas Lease Fund Act.

In addition to use of \$72,546,000 from the Oil and Gas Lease Fund in FY 2014-15 for DCNR operations, another \$35,000,000 will be transferred from the Oil and Gas Lease Fund to the Marcellus Legacy Fund in FY 2014-15 under Act

13 of 2012 (58 Pa .C.S. § 2505(b)). Again, these funds will primarily be used by other agencies for programs that do not benefit our State Parks and Forest public natural resources.

So in reality, DCNR has little or no money from the Oil and Gas Lease Fund to use for the purposes established by the Oil and Gas Lease Fund Act—purposes necessary to achieve the mandates of Article I § 27, as implemented through CNRA, to conserve and maintain the public natural resources of our State Parks and Forests.

Despite having little or no money from the Oil and Gas Lease Fund to mitigate losses to our State Parks and Forests from Marcellus shale gas development, such losses are occurring. In its recent Shale-Gas Monitoring Report<sup>5</sup>, DCNR describes the efforts underway to understand these losses, acknowledging that much is still unknown and that only 20% of the State Forest land leased for oil and gas development has actually been developed. Nonetheless, DCNR already has observed impacts in its report based on monitoring activity occurring through 2012 (*e.g.*, almost 1,500 acres of State Forest directly converted to industrial gas infrastructure; conversion of traditional narrow, canopied forest roads to wide open industrial roads; significant water withdrawal from exceptional

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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.

and high quality streams; loss of scenic vistas; increased forest edge and invasive species; need for long-term monitoring to assess forest health in areas surrounding gas infrastructure; and the loss of over 9,000 acres of core forest).

As a result of the Governor's decision in his FY 2014-15 Executive Budget and his approval of the Appropriations Act of 2014, our State Parks and Forest, which are to be held in public trust for the people, including future generations, are suffering losses from Marcellus shale gas extraction to support other State programs that will not benefit the use and enjoyment of our State Parks and Forests.

**V. THE 2014 AMENDMENTS TO ARTICLE XVI-E OF THE FISCAL CODE VIOLATE ARTICLE I § 27**

Petitioner asks this Court to find and declare that amendments Article XVI-E, Sections 1601-E – 1605-E, of the Fiscal Code (72 P.S. §§ 1601-E – 1605-E) signed by Governor Corbett on July 10, 2014 (the "2014 Fiscal Code Amendments") 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.

The 2014 Fiscal Code Amendments radically amend the Conservation and Natural Resources Act removing DCNR's ability to decide when to lease State Parks and Forests for oil and gas extraction, and giving control of the use of the

funds leasing and oil and gas extraction for whatever purposes the Governor and the General Assembly determine appropriate. These amendments strip from the CNRA the constitutional protections established to allow leasing of our State Forests and our State Parks.

**A. Section 1601.1-E of the Fiscal Code**

The basis for the 2014 Fiscal Code Amendments are set forth in a new Section 1601.1-E (Legislative Findings), which states: “The General Assembly finds and declares as follows: (1). Revenue from the leasing of State land to extract natural gas is necessary to obtain the revenue necessary to effectuate the 2014-2015 General Appropriations Act.” 72 P.S. § 1601.1-E(1).

Under Section 1601.1-E(9)(ii) of the Fiscal Code (72 P.S. § 1601.1-E(9)(ii)), the General Assembly and the Governor changed the meaning of the term “best interests of the Commonwealth” in the Section 302(a)(6) of CNRA (71 P.S. § 1340.302(a)(6)) that allows leasing of State Forests for oil and gas extraction. This Fiscal Code provision states: “The department should consider the State Forests and Parks as one of the Commonwealth’s interests when considering whether or not to lease additional State forest and park lands and determining what is in the best interests of the Commonwealth. Interests in decisions relating to leasing State Forest lands should not be made to the exclusion of all other interests of the Commonwealth.” 72 P.S. 1601.1-E(9)(ii).

Section 1601.1-E(9)(iii) then goes on to state: “Notwithstanding any other law to the contrary, it is in the best interest of the Commonwealth to lease oil and gas rights in State forests and parks if the Department: (A) in consultation with the Governor, continues strong and effective lease protection, best management practices and ongoing monitoring programs on the impact of gas operations; and (B) maintains a balance of money in the fund to carry out the department’s statutory obligations to protect State Forest and park lands and other environmental activities.” 72 P.S. § 1601.1-E(9)(iii). In the final finding, Section 1601.1-E(10) states: “If a balance in the funds is adequate to achieve the purposes of paragraph (9) transfers to the General Fund are permissible.” 72 P.S. § 1601.1-E(10).

Section 1601.1-E of the Fiscal Code (72 P.S. § 1601.1-E) strips away the protections established under the Conservation and Natural Resources Act to allow for continued leasing by DCNR, the designated trustee of our State Parks and Forest and their public natural resources under Article I § 27.

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

“There can be no question that the Amendment itself declares and creates a public trust of public natural resources for the benefit of all the people (including generations as yet unborn), and that the Commonwealth is made trustee of said resources, commanded to conserve and maintain them. No implementing legislation is needed to

enunciate these broad purposes. The Amendment does so by its own, *Ipsse dixit.*”<sup>6</sup>

This statement in *Payne* is supported by the legislative history of Article I § 27. Franklin Kury, the primary sponsor of the bill amending our Constitution to add Article I § 27, stated in the legislative record:

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

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

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<sup>6</sup> It is settled rule of constitutional construction that prohibitive and restrictive provisions are self-executing and may be enforced by the courts independently of any legislative action.” *Logan v. Hiltner*, 307 Pa. 343, 161 A. 323,325 (1932); *see also Washingtonian Homes of Chicago v. City of Chicago*, 157 Ill. 414, 41 N.E. 893,896 (Ill. 1859).

Legislative Journal at 2271; Exhibit QQ.

The Commonwealth has an affirmative obligation as a trustee under Article I § 27 to protect the public natural resources through legislation, not to undermine prior legislative protections in order use money from a public trust fund for non-trust purposes. *See Robinson Twp.*, 83 A.3d at 958 (citing *Geer v. State of Conn.*, 161 U.S. 519, 534 (1896) (trusteeship for benefit of state’s people implies legislative duty to enact such laws as will best preserve the subject of the trust, and will secure beneficial use in the future to the people of the state)).

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

Section 302(a)(6) of the Conservation and Natural Resources Act reauthorized the ability to lease State Forests for gas extraction to DCNR (71 P.S. § 1340.302(a)(6)), subject to protections afforded to these public natural resources under Article I § 27, as recognized in CNRA Section 101(a) (71 P.S. § 1340.101(a)). CNRA specifically states: "The Department is hereby empowered to



make and execute contracts or leases in the name of the Commonwealth for the mining or removal of any valuable minerals that may be found in State forests...whenever it shall appear to the satisfaction of the Department that it would be for the best interests of this Commonwealth to make such disposition of those minerals.” 71 P.S. § 1340.302(a)(6).<sup>7</sup> Section 303(a)(9) of CNRA includes the same language with respect to the leasing of State Parks for mineral extraction. 71 P.S. § 1340.303(a)(9).

The specific missions of DCNR set forth in CNRA are to “maintain, improve and preserve State parks, to manage State forests to assure their long-term health, sustainability and economic use ... and to administer grant and technical assistance programs that will benefit rivers conservation, trails and greenways, local recreation, regional heritage conservation and environmental education programs across Pennsylvania.” 71 P.S. § 1304.101(b).

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<sup>7</sup> As noted previously, this provision does not require DCNR to obtain the approval of the Governor to enter into leases. In Section 302(a)(6), the approval of the Governor is required when leases for fractional interests of State Forest are entered into without competitive bidding. Other CNRA provisions also require the Governor’s approval (*e.g.*, the sale or exchange of State Forest land under Section 302(a)(11); the lease of State Forest land for other purposes under Section 302(b)(1). CNRA clearly establishes that the responsibility for the decision to enter into oil and gas leases lies with DCNR. The Governor is not even authorized to approve DCNR’s decision, much less usurp DCNR’s authority to make the decision in the first place.

Shortly after CNRA was enacted in 1995, DCNR published its strategic plan, entitled "*Penn's Woods-Sustaining Our Forests*", to set forth how it would meet its constitutional and statutory mission with regard to State Forests. The Plan calls for "Managing State Forests under sound ecosystem management, to retain their wild character, and maintain biological diversity while providing pure water, opportunities for low density recreation, habits for forest plants and animals, sustained yields of quality timber, and environmentally sound utilization of mineral resources." The plan calls for managing minerals consistent with ecosystem management. N.T. 5 (Exhibit P-1).

The primary goal of ecosystem management is to keep the complex interdependencies of biological systems intact and functioning well over long periods of time. The essence of maintaining ecosystem integrity is to retain the health and resilience of systems so they can accommodate short term stresses and adapt to long-term changes. The key elements include the maintenance of a diversity of plants animals and the proper functioning of nutrient, water and energy cycles. N.T. 8 (Exhibit P-1). Any decision by DCNR to lease State Forest lands for gas extraction must incorporate the above principles. (See testimony of former DCNR Deputy Secretary Dr. Jim Grace, N.T. 22, and current DCNR Deputy Secretary Dan Devlin, N.T. 442).

Section 1601.1-E(1) of the Fiscal Code takes away these CNRA protections by simply stating: “Revenue from the leasing of State land to extract natural gas is necessary to obtain the revenue necessary to effectuate the 2014-2015 General Appropriations Act.” 72 P.S. § 1601.1-E(1). With this provision, it no longer matters what impacts additional leasing will have on the State lands. It no longer matters that DCNR loses control of these funds to mitigate the harm from this industrial activity on our public lands. It no longer matters that our State Parks and Forests are part of a trust and that those lands are the common property of the people; or that the Commonwealth has the obligation, under the Constitution, to conserve and protect those public resources for the benefit of the people.

The mandates in Section 1601.1-E(9) of the Fiscal Code (72 P.S. § 1601.1-E(9)) replace the CNRA protections associated with leasing State Park and Forest lands for oil and gas extraction and establishes a new way to determine whether leasing will benefit the interests of the Commonwealth. Section 1601.1(9)(ii) redefines the Commonwealth interests in leasing to be other Commonwealth interests in addition to the interests of the public natural resources of the State Parks and Forests, and to include “all other interests of the Commonwealth”. 72 P.S. § 1601.1-E(9)(ii). If the money from the leasing could benefit educational programs of the State, or could benefit environmental regulation of private lands by the Department of Environment Protection, then the leasing would be justified,

even if that leasing results in no benefit to and degradation of our State Parks and Forests.

Under Section 1601.1-E(9)(iii)(A) of the Fiscal Code, the leasing of State Parks and Forests for gas extraction is declared to be in the best interest of the Commonwealth not when DCNR makes this determination based on principles of ecosystem management, but rather if DCNR, in consultation with the Governor, employs its current leasing and management practices, and if DCNR maintains a balance of funds to carry out its obligations and other environmental activities. Under CNRA, leasing of our State Parks and Forests for oil and gas extraction is in the best interests of the Commonwealth when DCNR, the statutorily designated trustee under Article I §27, determines that the impacts from such leasing can be mitigated using the funds from the leasing and extraction to ensure the public natural resources of our State Parks and Forests are conserved and maintained. Under Section 1601.1-E of the Fiscal Code, the Governor, as the Chief Executive of the Commonwealth, will now be the decision maker, not DCNR. The Governor will make the decision to lease our State Parks and Forests for oil and gas extraction whenever a deficit occurs and additional General Fund revenue is needed to balance the budget, regardless of whether that revenue is used to support projects that benefit our State Parks and Forests or the people's use and enjoyment of these public natural resources. The Governor, as he has done in FY 2014-15, can

require leasing of State Parks and Forests to pay for education and health programs that, while laudable, will now be funded to the detriment of our State Parks and Forests.

Section 1601.1-E(9)(iii)(A) of the Fiscal Code specifically states that it is in the best interest of the Commonwealth to lease State lands if DCNR “continues strong and effective lease protections, best management practices and ongoing monitoring programs on the impact of gas operations.” 72 P.S. § 1601.1-E(9)(iii)(A). This replaces the principles of ecosystem management that DCNR has employed since its creation to carry out its mission under CNRA to ensure the “environmentally sound utilization of mineral resources.” The Governor and the General Assembly are now attempting to limit, through the Fiscal Code, the Constitutional mandate to conserve and maintain the public natural resources of our State Forests and Parks to use of DCNR's lease, best management practices and monitoring, none of which can eliminate the impact of this industrial activity. Their attempt to suggest that DCNR has the ability to carry out projects needed to mitigate these impacts by maintaining a balance in the Oil and Gas Lease Fund is nothing short of deception. DCNR has no control over the Oil and Gas Lease Fund and neither the Governor, nor the General Assembly, has attempted to understand what funds would be required to mitigate these impacts, let alone given DCNR control of the funds necessary to do so.

The mandates of Section 1601.1-E ignores the current dilemma that DCNR has over 700,000 acres of State Forest under lease. At the time that DCNR and its predecessors entered into these leases, they did so based on their understanding of conventional oil and gas development, not unconventional shale gas extraction. Even when DCNR issued its 2008 leases specifically targeted to Marcellus shale gas development, DCNR had no idea what this method of extraction would require or the impacts it would have on the public natural resources of the State Forest. DCNR and its predecessors also made the decision to lease State Forest land based on the understanding that the revenue from these leases would be available to them to mitigate the impacts of oil and gas extraction that would occur under the leases. Now the Governor and the General Assembly have altered that expectation.

As DCNR began to understand how different Marcellus shale gas extraction was after the 2008 lease sale and the potential for significant impacts to the State Forest from not only the 2008 leases, but all existing State Forest leases in the Marcellus shale region, DCNR decided not to allow any more leases after the 2008 lease sale until it could understand the impacts of shale gas extraction the existing leases. DCNR's decision was supported by Governor Rendell in 2010 through issuance of Executive Order 2010-05 placing a moratorium on further leasing until the impacts could be determined. Executive Order 2010-05, Exhibit HH (Motion For Summary Judgment), Exhibit P-8 (Hearing). Any further leasing without

knowing the full impacts of shale gas develop under the existing State Forest leases, the measures needed to mitigate those impacts, and the cost of those measures is contrary to Article I § 27. Neither the Governor, nor the General Assembly made these evaluations prior to approving the 2014 Fiscal Code Amendments.

The Supreme Court has recognized that conserving and maintaining our public natural resources includes remedying impacts that occur, stating: “The explicit terms of the trust require the government to “conserve and maintain” the corpus of the trust. The plain meaning of the terms conserve and maintain implicates the duty to prevent and remedy the degradation, diminution, or depletion of our public natural resources.” *Robinson Twp.*, 83 A.3d at 957. Inherent in the duty to conserve and maintain is the duty of the trustee to not take any action or make any decision that might or will negatively impact the public natural resources and the uses benefits to those resources and the rights of the people. As the Pennsylvania Supreme Court stated in *Robinson Twp.*, 83 A.3d at 957:

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

because it establishes broad but concrete substantive parameters within which the Commonwealth may act.”

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

In *Robinson Twp.*, the Supreme Court articulated this principle clearly, stating:

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



Section 1601.1-E(9) of the Fiscal Code (72 P.S. § 1601.1-E(9)) does not require any analysis of the proposed actions to require further leasing and to take the funds out of the constitutionally limited purposes of the Oil and Gas Lease Fund. No consideration was given to the changes that the 2014 Fiscal Code Amendment would have on the protections established under CNRA for gas extraction on State Parks and Forests and on the effects of those changes on their constitutionally protected public natural resources.

The Governor and the General Assembly clearly view the State Parks and Forests, and the oil and gas on them, as the property of the Commonwealth that can be used to generate general revenue. The Governor does not view the public natural resources of our State Parks and Forests as part of the public trust established under Article I § 27 to be held by the Commonwealth as trustee, for the use and enjoyment of the people, including future generations. The Governor's proprietary view is inconsistent with the legislative history of Article I § 27, which includes the following legal analysis of this issue by Robert Broughton, Associate Professor of Law, Duquesne University Law School:

"The public trust doctrine, which may be a part of the common law already, but which, if so, has not been clearly enunciated in Pennsylvania, relates to the rights and duties of government in public property. It is the role of government that is in question: As a holder of property, or of public servitudes (such as navigation rights, or more remotely, the right to prevent public nuisances), is the government simply a corporate property owner, a proprietor, or is it a trustee, with

the duty to manage, use, and/or consume the property of the public solely for the benefit of the public. As Clyde O. Martz, former Assistance Attorney General in charge of the Natural Resources Division of the United States Department of Justice has put it:

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

Legislative Journal at 2274-2275, Exhibit QQ.

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

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

In interpreting the construction and application of the Constitution, the Supreme Court stated: “In the process of interpretation our ultimate touchstone is the actual language of the Constitution itself. The Constitution’s language controls and must be interpreted in its popular sense, as understood by the people when they voted on its adoption.” *Robinson Twp.*, 83 A.3d at 943 (internal quotations and citations omitted). Inherent in the duty to conserve and maintain is the duty of the trustee to not take any action or make any decision that might or will negatively impact the public natural resources and the uses benefits to those resources and the rights of the people.

The Fiscal Code amendments under 1601.1-E(9), by authorizing leasing of gas extraction for general purposes, violates this duty. The Petitioner submitted uncontroverted testimony at the hearing on it preliminary injunction request of the continuing harm from additional leasing. That harm included the harm of taking away from DCNR its ability to manage the natural resources by taking away its control of leasing State lands and by taking away the funds from those leased, as discussed in Section I above.

Section 1601.1-E(9)(iii)(B) requires the DCNR to maintain a balance of money in the fund (presumably the Oil and Gas Lease Fund) “to carry out the department’s statutory obligations to protect State forest and park land and other environmental activities.” One problem with this requirement is that DCNR has no

control over the fund under revised Sections 1602-E and 1603-E. Another is that the provision provides no clear definition of DCNR's statutory obligations.

It seems possible that what is meant is that DCNR's obligations are to adjust to impacts from gas extraction on an annual basis, based on the annual monitoring report. If that is the case, then the DCNR's obligations are not to prevent degradation or diminution, but to react to it somehow after it has occurred. How does DCNR, or anyone else determine how much money to keep on hand?

CNRA imposes a continuing obligation on DCNR to maintain, replace and restore the projects that are a part of the Parks and Forests. DCNR has identified a substantial need for projects to replace and improve the aging infrastructure in many of our State Parks and Forests, including the repair or replacement of numerous dams. The costs of these obligations are in the hundreds of millions of dollars. DCNR has identified the substantial need for projects to address legacy contamination from mining and oil and gas extraction on our State Parks and Forests, including projects to control acid mine drainage. The cost of remediating legacy contamination is in the hundreds of millions of dollars. DCNR has identified a substantial need to purchase mineral rights on our State Parks and Forests to protect the integrity of the public resources, particularly ecologically sensitive and wild areas. Those costs would easily be in the hundreds of millions of dollars. DCNR has not been able to complete numerous projects necessary to

develop sustainable economic development based on the public natural resources of our State Parks and Forests as discussed in Section I because of the lack of funding (*e.g.*, completion of the Pine Creek Rail Trail and other similar projects that connect our public lands to local communities). Another problem with the requirement to maintaining a balance of funds is that the Governor would again have control over that determination.

Section 1601.1-E(10) of the Fiscal Code Amendments states that that “if a balance of money in the funds is adequate to achieve the purposes of paragraph (9) transfers to the General fund are permissible.” This section has all the infirmities of Section 1601.1-E(9).

#### **B. Sections 1602-E and 1603-E of the Fiscal Code**

Section 1602-E of the Fiscal Code also abrogates the purpose of Article I § 27 by removing its protection for our State Forests and Parks. 72 P.S. § 1602-E. Section 1602-E states that “[n]otwithstanding any other provision of law and except as provided in section 1603-E, no money in the [Oil and Gas Lease] fund from royalties may be expended unless appropriated by the General Assembly.” *Id.* The 2014 Fiscal Code Amendments add a change to this provision. After the term “unless appropriated” the new amendments add the phrase “**or transferred to the General Fund**”; and after the existing phrase “by the General Assembly” adding the new phrase “**from the fund.**”

Section 1603-E of the Fiscal Code states that “subject to the availability of money in the [Oil and Gas Lease] fund, up to \$50,000,000 from the fund from *royalties* shall be appropriated annually to [DCNR] to carry out the purposes set forth in the [Oil and Gas Lease Fund Act]. The Department shall give preference to the *operation and maintenance* of State Parks and Forests.” 72 P.S. § 1603-E (emphasis added). This provision has also been amended, by adding the phrase “**following transfers**” after the phrase “availability of money in the fund” and before the existing phrase “up to \$50,000,000 from the fund”. *Id.* This change puts DCNR’s share of the funds at risk of being eliminated when the General Assembly deems it appropriate.

These Fiscal Code provisions were initially passed by the General Assembly and approved by the Governor in 2009, and now further amended, as an attempt to provide statutory legitimacy to transfers from the Oil and Gas Lease Fund to the General Fund in violation of the Commonwealth's trustee duties under Article I § 27, as implemented by the Conservation and Natural Resources Act and the Oil and Gas Lease Fund Act.

Governor Corbett has continued to rely upon these provisions, particularly Section 1603-E, to justify the decisions in his Executive Budgets, to replace ever increasing amounts of DCNR's General Fund appropriations for its operations with money from the Oil and Gas Lease Fund. He did so again in his Executive Budget

for FY 2014-15 and his approval of the Appropriations Act of 2014, by proposing that DCNR use \$117,000,000 from the Oil and Lease Fund for its operating expenses and then finally approving the use of \$72,546,000 for such expenses.

### **C. Section 1605-E of the Fiscal Code**

The 2014 Fiscal Code Amendments add a new Section 1605-E(b), which states: "**Fiscal year 2014-2015. Notwithstanding section 1603-E or any other provision of law, in fiscal year 2014-2015 the amount of \$95,000,000 shall be transferred from the fund to the General Fund.**"

As discussed extensively above, the protections established by CNRA and the Oil and Gas Lease Fund Act allow DCNR to mitigate the harm to State Park and State Forest public natural resources from oil and gas extraction through control of the money generated by leasing and production of oil and gas for authorized projects, thereby conserving and maintaining the public natural resources of our State Parks and Forests and the people's right under Article I § 27. The transfer of \$95,000,000 under Section 1605-E(b), in conjunction with the prior transfer of \$180,000,000 permanently takes away DCNR's ability to use this money in the Oil and Gas Lease Fund to mitigate the impacts of oil and gas extraction on State Parks and Forests, which is integral to its management of our public natural resources. Section 1605-E of the Fiscal Code, like the previous sections, has given the General Assembly, with the approval of the Governor,

complete control over use of the Oil and Gas Lease Fund since 2009 and has undermined the legislative scheme specifically established under CNRA to implement Article I § 27.

The Governor's reliance on the 2014 Fiscal Code Amendments to justify his FY 2014-15 Executive Budget decisions and his approval of the Appropriation Act of 2014 to implement those decisions, without any consideration of his or DCNR's fiduciary duties under Article I § 27, or DCNR's statutory duties under CNRA and the Oil and Gas Lease Fund Act, violates the people's rights under our Constitution. The Governor cannot alter the people's constitutionally protected property interest in the public natural resources of our State Parks and Forests, or their constitutionally protected interest in the Oil and Gas Lease Fund, the legislatively created public trust fund established to fund projects to mitigate the harm from oil and gas leasing and extraction on our State Parks and Forests.



## **CONCLUSION**

Based on the forgoing, the petitioner hereby requests this Honorable Court to make the findings and declarations included in the Addendum to the Petitioner's Motion for Summary Judgment and this Addendum to Petitioner's Brief in Support of Summary Judgment.

Respectively Submitted,

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