



## *PEDF's Request for an Accounting*

On August 30, 2022, the Petitioner Pennsylvania Environmental Defense Foundation (“PEDF”) filed an application for relief in this matter requesting that this Honorable Court order the Commonwealth of Pennsylvania and the Governor (“Respondents”) to submit a detailed accounting of trust funds from the extraction and sale of oil and gas on the Pennsylvania State Forest to allow PEDF and this Honorable Court to determine if these trust assets have been used properly for trust purposes under Article I, Section 27 of the Pennsylvania Constitution, commonly referred to as the Environmental Rights Amendment (“ERA”).

As PEDF explains in its application, PEDF has diligently sought judicial review of the Respondents’ use of the trust funds in the Oil and Gas Lease Fund since 2009, alleging their use has been for non-trust purposes. The Pennsylvania Supreme Court has declared the money deposited into the Oil and Gas Lease Fund from the leasing of State Forest lands for the extraction and sale of oil and gas to be trust funds that must be used by the Respondents, as trustees, to conserve and maintain public natural resources under the ERA. Both this Honorable Court and the Pennsylvania Supreme Court have now established that determining the constitutionality of the Respondents’ use of the trust funds in the Oil and Gas Lease Fund for the annual operations of the Department of Conservation and Natural Resources (“DCNR”) requires a detailed accounting and an as-applied analysis.

In its application for relief filed on August 30, 2022, PEDF asks this Court to compel the Respondents to provide a detailed accounting of their use of trust funds in the Oil and Gas Lease Fund used by DCNR for its annual operations so PEDF can develop the as-applied analysis this Honorable Court requires to determine the constitutionality of the Respondents' use of these trust funds for this purpose under the ERA. The Respondents have answered PEDF's application by filing a motion to dismiss the application as improper and moot, asserting that this case has reached its final disposition and that the Respondents have fully satisfied PEDF's request for an accounting.

For the reasons set forth below in PEDF's answer to the Respondents' motion to dismiss, PEDF asks this Honorable Court to deny the Respondents' motion to dismiss and to grant PEDF's application to compel an accounting. Based on the Respondents' assertion that the information they have provided on revenues deposited into and expended from the Oil and Gas Lease Fund is their accounting, PEDF also asks this Honorable Court to allow PEDF to conduct additional discovery to develop a full accounting of how these funds were used by the Respondents to pay for DCNR's annual operations. Such discovery is necessary for PEDF to prepare the as-applied analysis required by this Honorable Court to support its allegations that the Respondents' uses of these trust funds for this purpose are unconstitutional and violate their trustee duties under the ERA.

*PEDF's Answer to Respondents' Motion to Dismiss*

**A. Procedural Background**

1. Admitted that Petitioner filed its Petition for Review in the Nature of Declaratory Relief in this matter on May 17, 2018 (“Petition”).<sup>1</sup> By way of further response, PEDF requested in its Petition, among other things, that this Court declare unconstitutional Respondents’ use of trust funds in the Oil and Gas Lease Fund for DCNR’s annual operations authorized by Sections 104(p) and 1601 of the General Appropriations Act of 2017. PEDF alleged Respondents’ use of these trust funds was unconstitutional under the ERA, as well as Article I, Section 25 of the Pennsylvania Constitution (“Section 25”), because the costs of DCNR’s annual operations were not trust purposes. PEDF raised both facial and as-applied challenges in the Petition. PEDF also sought review in its Petition of the Respondents’ use of the Oil and Gas Lease Fund for DCNR’s annual operations for fiscal year 2018-2019 as proposed in the Governor’s Executive Budget, which was

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<sup>1</sup> When PEDF filed its Petition on May 17, 2018, its earlier related petition for review alleging that the Respondents unconstitutionally used the Oil and Gas Lease Fund for non-trust purposes since 2009 was still pending before this Court on remand (Docket No. 228 M.D. 2012). PEDF filed another related petition for review on July 17, 2019 alleging Respondents’ unconstitutional use of the Oil and Gas Lease Fund for non-trust purposes pursuant to Sections 104(b) and 1601 of the General Appropriations Act of 2019 (Docket No. 393 M.D. 2019), which is currently stayed. PEDF also filed a related petition for review on August 2, 2021 requesting an accounting of the use of trust funds in the Oil and Gas Lease Fund and repayment of trust funds used for non-trust purposes since 2009 (Docket No. 253 M.S. 2021), which has also been stayed.

subsequently enacted through Sections 104(p) and 1601 of the General Appropriations Act of 2018.

On November 6, 2018, this Court issued an order establishing a schedule for discovery and dispositive motions and advising that trial would be scheduled, if needed, following disposition of dispositive motions.

On February 15, 2019, PEDF filed its application for summary relief seeking declarations that provisions in the General Appropriations Acts of 2017 and 2018 and Fiscal Code amendments enacted in 2017 governing appropriation and use of trust funds in the Oil and Gas Lease Fund were facially unconstitutional under the ERA and Section 25.

On April 17, 2019, the Respondents filed their joint application for summary relief asking the Court to find that the provisions of the General Appropriations Acts and Fiscal Code challenged by PEDF, as well as DCNR's use of the Oil and Gas Lease Fund for its annual operations, did not violate the Pennsylvania Constitution.

2. Admitted in part and denied in part. Admitted that on October 22, 2020, this Court issued an unreported opinion and order in this case granting in part and denying in part the above cross-applications for summary relief. *PEDF v. Commonwealth*, unreported memorandum opinion and order of Judge Wojcik dated October 22, 2020 ("*PEDF 2020*"). Denied that this Court issued a final disposition of the Petition in *PEDF 2020*.

By way of further response, PEDF in its application for summary relief sought declarations, as a matter of law, that the Respondents' use of the Oil and Gas Lease Fund as authorized by Sections 104(p) and 1601 of the General Appropriations Acts of 2017 and 2018 and certain amendments to the Fiscal Code enacted in 2017 relating to use of the Oil and Gas Lease Fund were facially unconstitutional under the ERA and Section 25. This Court concluded that it could not find these legislative provisions to be facially unconstitutional because the money deposited into the Oil and Gas Lease Fund included both income and trust principal. *PEDF 2020* at 17 (“In sum, because the [Oil and Gas] Lease Fund contains both trust principal and other deposits, we cannot declare that the appropriations contained in Section 104(P) and 1601 of the General Appropriations Acts of 2017 and 2018 for the DCNR’s government operations are facially unconstitutional.”)

This Court further determined that the constitutionality of the challenged provisions “requires an as-applied analysis” and therefore, denied the cross-applications for summary relief in this regard. *Id.* at 17-18. This Court further found, based on the cross-applications for summary relief, that “[i]t is impossible for this Court to determine whether the money appropriated and transferred from the [Oil and Gas] Lease Fund is trust principal, and whether trust principal is being used in a constitutional manner,” but noted that “[b]ased upon a rough estimate of the monies deposited into and diverted from the [Oil and Gas] Lease Fund, we are extremely

concerned that the Commonwealth may not be administering the trust funds with ‘loyalty, impartiality, and prudence.’” *Id.* at 36. Thus, this Court granted PEDF’s application for summary relief in part declaring that “the Commonwealth, as trustee of Pennsylvania’s public natural resources, is required to keep detailed accounts of trust monies derived from the oil and gas leases and track how they are spent as part of its administration of the trust.” *Id.* at 36-37.

This Court denied the Respondents’ request in their application for summary relief for a declaration, as a matter of law, that DCNR’s current usage of the Oil and Gas Lease Fund for its operational expenses was consistent with its trustee duties under the ERA. *PEDF 2020* at 17 (“we are also unprepared to grant the Commonwealth’s sweeping request that its current usage is wholly consistent with its [ERA] trustee responsibilities”).

3. Admitted that PEDF filed a Notice of Appeal to the Pennsylvania Supreme Court on November 3, 2020 of this Court’s opinion and order on the cross-applications for summary relief issued on October 22, 2020.

4. Admitted in part and denied in part. Admitted that following PEDF’s appeal of this Court’s opinion and order on the cross-applications for summary relief, the Pennsylvania Supreme Court issued an opinion on August 5, 2022 affirming this Court’s order but rejecting its analysis to the extent it relied upon this Court’s prior finding that some of the proceeds deposited into the Oil and Gas Lease

Fund from State Forest oil and gas leases were income and not trust principal. *PEDF v. Commonwealth*, 279 A.3d 1194 (Pa. 2022) (*PEDF 2022*). Denied that the decision of the Pennsylvania Supreme reviewing PEDF’s appeal of this Court’s disposition of the cross-applications for summary relief can be construed as a final disposition of this case. To the contrary, a majority within the Pennsylvania Supreme Court agreed with this Court’s findings that provisions in the General Appropriations Acts and Fiscal Code challenged by PEDF were not facially unconstitutional under the ERA or Section 25, and that an as-applied analysis is required to determine their constitutionality.

5. Admitted.

6. Admitted that on August 30, 2022, PEDF filed an application for relief to compel the Respondents to file a detailed accounting of their use of trust funds in the Oil and Gas Lease Fund.

7. Admitted.

8. Admitted.

## **B. Accounting**

9. This Court’s opinion and order on the cross-applications for summary relief issued on October 22, 2020 speak for themselves. By way of further response, see answer to ¶ 2 above.

10. Admitted in part and denied in part. Admitted that this Court declared in its opinion issued on October 22, 2020 that “the Commonwealth, as trustee of Pennsylvania’s public natural resources, is required to keep detailed accounts of the trust monies derived from the oil and gas leases and track how they are spent as part of its administration of the trust” and “strongly suggest[ed] that the Commonwealth account for and track all monies derived from the oil and gas leases, not just royalties and other trust principal.” *PEDF 2020* at 36-37 & n.23. Denied that this Court has made any determination regarding the Respondents’ production of these detailed accounts in this case.

11. Admitted.

12. Admitted in part and denied in part. Admitted that Respondents provided information to PEDF on September 28 and 29, 2020 on the revenue deposited into and expended from the Oil and Gas Lease Fund from 2008 to date, the most detailed of which are provided in the attached Exhibit A. Denied that this information provides an accounting sufficient to determine the constitutionality of the Respondents’ use the trust funds in the Oil and Gas Lease Fund under the ERA and Section 25.

### **C. Application Is NOT Improper**

13. Denied. Neither this Court nor the Pennsylvania Supreme Court has issued a final disposition of this case. See answers to ¶¶ 2 and 4 above. By way of

further response, Justice Donohue, in her concurring opinion joined by Justice Todd, specifically affirms this Court’s finding that an as-applied analysis is needed to determine the constitutionality of the legislative provisions challenged by PEDF, stating:

I join the Majority and write separately to address the concerns by my learned colleagues regarding the potential use of trust assets for non-trust activities. While I agree that in operation the statute may prove to be unconstitutional, I conclude that the Commonwealth Court’s order requiring the Commonwealth to account for asset expenditures, as specifically requested by the PEDF, ***will bring any as-applied constitutional defects to light.***

*PEDF 2022*, 279 A.3d at 1214 (emphasis added).<sup>2</sup>

Justice Donohue clarified her reasons for not finding the legislative provisions challenged by PEDF in this case to be facially unconstitutional, even though the Supreme Court held in *PEDF II* and *PEDF V* that certain Fiscal Code provisions governing use of the Oil and Gas Lease Fund were facially unconstitutional. She explains that the legislative changes to the Oil and Gas Lease Fund enacted through

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<sup>2</sup> The Pennsylvania Supreme Court was divided in *PEDF 2022* on whether the legislative provisions challenged by PEDF governing appropriation and use of the trust funds in the Oil and Gas Lease Fund were facially unconstitutional. Justice Baer wrote the majority opinion affirming this Court’s finding that these legislative provisions were not facially unconstitutional and Justice Mundy joined his opinion in that regard. Justices Dougherty and Wecht did not agree and wrote dissenting opinions agreeing with PEDF that these legislative provisions were facially unconstitutional based on the Court’s prior analyses in *PEDF v. Commonwealth*, 161 A.3d 911 (Pa. 2017) (“*PEDF II*”) and *PEDF v. Commonwealth*, 255 A.3d 289 (Pa. 2021) (“*PEDF V*”), both of which were written by Justice Donohue and joined by Justices Dougherty, Wecht and Todd. Justices Donohue and Todd joined in Justice Baer’s opinion agreeing that the legislative provisions challenged by PEDF in this case were not facially unconstitutional, but Justice Donohue wrote a concurring opinion, which Justice Todd joined, to clarify her reasons for agreeing that these legislative provisions were not facially unconstitutional.

the Fiscal Code since *PEDF II* expanded the potential sources of money that could be deposited into this fund to include sources that were not trust funds. She further explains that the Fiscal Code provisions held to be facially unconstitutional in *PEDF II* transferred trust funds in the Oil and Gas Lease Fund to the General Fund with no limitations on their use. Since this case involves use of trust funds in the Oil and Gas Lease Fund for DCNR's annual operations and DCNR has certain trustee duties, she did not believe the courts could assess whether the agency had made proper use of the trust funds in the Oil and Gas Lease Fund without an as-applied analysis.

Justice Donohue also viewed the concern expressed by Justice Wecht that the majority opinion in *PEDF 2022* could be construed to mean that "DCNR's entire budget is a reasonable cost of administering the trust" was not correct. *Id.* at 1216. She clarified in her concurring opinion that the majority opinion in *PEDF 2022* only concluded that the challenged legislative "provisions are not facially unconstitutional." *Id.* She further clarified that the "Commonwealth must comply with the Commonwealth Court's order to keep detailed accounts, which permits the PEDF to raise as-applied challenges." *Id.* She concluded stating that she joined the majority opinion "with the understanding that any as-applied challenge will ensure that the Commonwealth is not, in fact, diverting trust assets to non-trust purposes." As Justice Todd joined Justice Donohue's concurring opinion, she too joined the majority opinion with this understanding. *Id.* at 1220.

14. Denied. Important justiciable issues remain in this case for this Court's disposition, including the nature of the detailed accounts that the Respondents' must maintain on the trust funds in the Oil and Gas Lease Fund and the constitutionality of the Respondents' actual use of the trust funds in the Oil and Gas Lease Fund for DCNR's annual operations.

15. Denied for the reasons set forth in the answers above.

#### **D. Application Is NOT Moot**

16. The Pennsylvania Rules of Appellate Procedure speak for themselves.

17. Admitted that *Harris v. Rendell*, 982 A.2d 1030, 1035 (Pa. Cmwlth. 2009) quotes *Pub. Defender's Office of Venango County v. Venango County Court of Common Pleas*, 893 A.2d 1275, 1279 (Pa. 2006) as stating that "under the mootness doctrine, 'an actual case or controversy must be extant at all stages of review, not merely at the time the complaint is filed.'" Denied that this case does not present an actual case or controversy at this stage of review.

18. Admitted that *Harris* quotes *City of Philadelphia v. SEPTA*, 937 A.2d 1176, 1179 (Pa. Cmwlth. 2007) as stating that "[t]he existence of a case or controversy requires 'a real and not a hypothetical legal controversy and one that affects another in a concrete manner so as to provide a factual predicate for reasoned adjudication.'" Denied that this case does not present a real legal controversy that

affects the constitutional rights of PEDF's members to provide a factual predicate for reasoned adjudication by this Court.

19. Admitted that *Venango County* states the quoted language. Denied that any changes in the facts or in the law have occurred since PEDF filed its Petition that deprive PEDF of the necessary stake in the outcome of this case.

20. PEDF's application for relief filed on August 30, 2022 speaks for itself.

21. Denied. See answer to ¶ 12.

22. Denied. This case has not reached a final disposition for the reasons set forth in the answers above and should not be closed. Respondents have not provided the relief sought by PEDF in its application for relief filed on August 30, 2022.

23. Denied. PEDF's application for relief for an accounting filed on August 30, 2022 is not moot and should not be dismissed.

WHEREFORE, PEDF respectfully requests that this Honorable Court deny the Respondents' motion to dismiss PEDF's application to compel an accounting of trust funds in the Oil and Gas Lease Fund. PEDF also requests that this Honorable Court grant its application to compel the accounting and, based on the limited details in the information provided by the Respondents to date, grant PEDF additional discovery to develop a full accounting of how these funds were used by the Respondents to pay for DCNR's annual operations. Such discovery is necessary for

PEDF to prepare the as-applied analysis required by this Honorable Court to support its allegations that the Respondents' uses of these trust funds for this purpose are unconstitutional and violate their trustee duties under the ERA. PEDF has provided a revised proposed order to this effect.

Respectfully Submitted,



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**EXHIBIT A**

**Oil and Gas Lease Fund Revenue and Expenditure  
Provided by Respondents to Date**



additional documentation to conduct further discovery to fully account for trust funds deposited into the Oil and Gas Lease Fund and how DCNR spent those trust funds. Both parties may request additional time, if necessary.

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J.



