

SUPREME COURT OF PENNSYLVANIA

PENNSYLVANIA ENVIRONMENTAL DEFENSE FOUNDATION,	:	
Appellant	:	
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA; PENNSYLVANIA HOUSE OF REPRESENTATIVES and JOANNA E. McCLINTON, in her official capacity as its SPEAKER; PENNSYLVANIA SENATE and KIM WARD, in her official capacity as SENATE PRESIDENT PRO TEMPORE; and JOSH SHARPIRO, in his official capacity as GOVERNOR of PENNSYLVANIA,	:	111 MAP 2022
Appellees	:	

**PENNSYLVANIA ENVIRONMENTAL DEFENSE FOUNDATION
APPELLANT BRIEF**

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I. INTRODUCTION

The Pennsylvania Environmental Defense Foundation (“PEDF”) filed a petition for review in Commonwealth Court on December 10, 2021 (“Petition”) seeking, among other things, review under Article I, Section 27 of the Pennsylvania Constitution, commonly known as the Environmental Rights Amendment (“ERA”), of legislative and executive actions taken by the Commonwealth of Pennsylvania (“Commonwealth”) through its General Assembly and Governor (collectively, the “Respondents”), as trustees, that allow and mandate expanded use of all-terrain vehicles (“ATV’s) on our state forest and park public natural resources.

The Respondents, through their challenged actions, overruled the long-standing moratorium on expanding ATV use on these ERA trust assets adopted by the Department of Conservation and Natural Resources (“DCNR”), the Respondents’ co-trustee. DCNR’s moratorium was based on its over 35 years of experience managing ATV use on our state forest and park lands, and its finding that this use degrades the natural forest ecology of these trust assets, including the forest’s clean air and pure water and the forest’s natural, scenic, historic and esthetic values.

The Commonwealth Court granted preliminary objections filed by the Respondents and dismissed the Petition. The court concluded that the Governor was not a proper party, that PEDF’s claims were only facial statutory challenges, that the legislative respondents had the right to balance recreational ATV use against the

protections afforded to our state forest and park trust assets under the ERA, and that PEDF did not aver facts to show that the challenged statutes, on their face, unreasonably impair the environmental features of any affected locale.

As set forth in this brief, the Commonwealth Court reached these erroneous conclusions by failing to review the preliminary objections to the Petition based on the plain language of the ERA and applicable trust law—the proper standard of review established by this Honorable Court, and by failing to properly consider the well-pleaded factual averments in the Petition. PEDF requests that this Honorable Court reverse the Commonwealth Court’s final order granting preliminary objections and remand this case for judicial review of the constitutionality of the Respondents’ trustee actions under the ERA.

II. STATEMENT OF JURISDICTION

PEDF filed its Petition under the Commonwealth Court’s original jurisdiction seeking relief under the fiduciary provisions of the Declaratory Judgments Act, 42 Pa.C.S. §§ 7531 – 7541. On November 8, 2022, the Commonwealth Court issued a memorandum opinion and final order granting Respondents’ preliminary objections and dismissing the Petition. *PEDF v. Commonwealth*, 285 A.3d 702 (Pa. Cmwlth. 2022) (“*PEDF VIP*”) (copy attached). Pursuant to 42 Pa.C.S. § 723(a), this Court has exclusive jurisdiction over PEDF’s appeal as of right of this final order.

III. ORDER IN QUESTION

The text of the final order of Commonwealth Court is as follows:

AND NOW, this 8th day of November, 2022, the preliminary objection asserting misjoinder raised by Tom Wolf, in his official capacity as Governor of Pennsylvania, is SUSTAINED. The preliminary objections in the nature of a demurrer raised by the Commonwealth of Pennsylvania, The Pennsylvania House of Representatives and Bryan Dean Cutler, in his official capacity as its Speaker, and The Pennsylvania Senate and Jake Corman, in his official capacity as the Senate President Pro Tempore, are SUSTAINED. The Pennsylvania Environmental Defense Foundation's Petition for Review is DISMISSED.

IV. SCOPE AND STANDARD OF REVIEW

As set forth in *William Penn Sch. Dist. v. Pa. Dept. of Education*, 170 A.3d 414, 435-436 (Pa. 2017), appellate courts “exercise de novo review of a lower tribunal's order sustaining preliminary objections in the nature of a demurrer. *Bruno v. Erie Ins. Co.*, 106 A.3d 48, 56 (Pa. 2014). The scope of our review is plenary. *Kuren v. Luzerne Cnty.*, 146 A.3d 715, 753 (Pa. 2016). We must determine ‘whether, on the facts averred, the law says with certainty that no recovery is possible.’ *Bruno*, 106 A.3d at 56. In conducting our review, ‘we accept as true all well-pleaded material facts set forth in the [petition for review] and all inferences fairly deducible from those facts.’ *Kuren*, 146 A.3d at 718 n.1. We will sustain preliminary objections ‘only when, based on the facts pleaded, it is clear and free from doubt that the complainant will be unable to prove facts legally sufficient to establish a right to relief.’ *Id.* (quoting *Mazur v. Trinity Area Sch. Dist.*, 961 A.2d 96, 101 (Pa. 2008)).”

V. STATEMENT OF QUESTIONS INVOLVED

a. Did the Commonwealth Court fail to apply the proper standard of judicial review in considering preliminary objections to PEDF's challenges to the constitutionality of the Respondents' actions under the ERA, which this Honorable Court has established as requiring judicial review based on the plain text of the ERA and applicable private trust law principles?

Suggested answer: Yes

b. Did the Commonwealth Court err in applying a new standard of judicial review in considering preliminary objections to PEDF's challenges to the constitutionality of the Respondents' actions under the ERA, which requires the court to presume that recreational ATV use authorized by the legislation in question does not unreasonably impair the clean air, pure water and natural, scenic, historic and esthetic values of our state forest and park public natural resources because the legislature is presumed to have investigated and balanced recreational ATV use with environmental protection and preservation of state forest and park lands and this analysis cannot be reviewed by the court since the legislature has no duty to document its analysis?

Suggested answer: Yes

c. Did the Commonwealth Court err in finding that the General Assembly, as trustee, has no duty to seek and follow the advice of its co-trustee, DCNR, when

enacting legislation to allow and mandated ATV use known to degrade, diminish and deplete trust assets that DCNR administers?

Suggested answer: Yes

d. Did the Commonwealth Court improperly characterize PEDF's challenges to the constitutionality of the Respondents' actions under the ERA as facial challenges to the constitutionality of the statutes in question?

Suggested answer: Yes

e. Did the Commonwealth Court err in concluding that recreational ATV use is a constitutionally protected right?

Suggested answer: Yes

f. Did the Commonwealth Court err in concluding that the Governor is not a proper party because he only signed the statutes mandating expanded ATV use on our state forest and park trust assets when he is the trustee with control over DCNR and knew DCNR had long-standing policies prohibiting expanded ATV use on these trust assets because over 35 years of experience demonstrated this use degrades these trust assets?

Suggested answer: Yes

g. Did the Commonwealth Court fairly read the alleged facts in the Petition and inferences reasonably deducible from those facts as true and consider whether those facts and inferences, if proven to be true, clearly and under no

circumstances are sufficient to establish PEDF's right to the relief requested in the Petition?

Suggested answer: No

VI. STATEMENT OF THE CASE

PEDF filed its Petition in Commonwealth Court on December 10, 2021 under the fiduciary provisions of the Declaratory Judgments Act, 42 Pa.C.S. §§ 7531-7541, seeking declarations that legislation mandating the development of ATV trails on state forest and park lands, which are trust assets that must be conserved and maintained, violates the ERA. PEDF is also seeking declaration that the ATV trail pilot project initiated in 2021 to fulfill the legislative mandates violated the ERA and that the Respondents breached their fiduciary duties as trustees of our state forest and park public natural resources by mandating these actions. Petition ¶ 1 (RR008).

PEDF specifically challenges the authorization and implementation of ATV use on state forest and park trust assets under Chapter 77 of the Vehicle Code, 75 Pa.C.S. Chapter 77, known as the Snowmobile and ATV Law, and the expansion of ATV use on state forest and park lands in northcentral Pennsylvania mandated by amendments to the Fiscal Code enacted in 2018 and 2020, 72 P.S. 1702-E(a) and (b), respectively, as well as the implementation of the mandatory expansion of ATV use on these ERA trust assets. In taking the challenged actions, the Respondents overruled DCNR's long-standing moratorium on expanding ATV use on our state

forest and park lands based on its knowledge through over 35 years of experience that ATV use degrades these public natural resources, including their clean air, pure water and natural, scenic, historic and esthetic values. *See, e.g.*, Petition ¶¶ 2-6, 13-49 (RR008-010, RR012-030).

The Petition sets forth factual averments of harm to our state forest and park ERA trust assets from ATV use since this use was first authorized in 1985. Petition ¶¶ 58-81 (RR033-048). These motorized vehicles are specifically designed to travel off-road and have increased in size to multi-passenger vehicles. By allowing these off-road vehicles to access our state forest and park lands through designated trails and state forest roads, these vehicles regularly access the forested ecosystems surrounding these designated roads via administrative roads, transmission and pipeline corridors, and other open areas within the forest closed to public motorized vehicles but accessible to ATVs by virtue of their ability to travel off-road.

By providing these off-road vehicles with access to our state forest and park lands, ATV use has degraded the forest ecosystems of our state forest and park public natural resources. The sound created by these off-road vehicles is akin to loud industrial equipment and can be heard for miles in the quiet natural environment of the forest, disturbing both wildlife and other recreational users who come to the forest to experience its quiet nature. These off-road vehicles damage sensitive environmental areas within the forest ecosystems, including streambeds, wetlands,

vernal pools, wild plant areas, and wildlife habitat. Their off-road tires create ruts and drainage problems and cause erosion and sedimentation of exceptional and high quality streams. *See, e.g.*, Petition ¶¶ 62-67, Exhibit A, pages 12-17 (RR034-036, RR086-0091).

For these and other reasons set forth in the Petition, PEDF alleges that the Respondents' actions allowing and mandating expanded ATV use that degrades the forest ecosystems of our state forest and park public natural resources violate the ERA by failing to conserve and maintain these trust assets and by failing to protect the people's right to the clean air, pure water and natural, scenic, historic and aesthetic values of these trust assets. PEDF also alleges in the Petition that the Respondents have breached their duties as trustees under the ERA. Petition ¶¶ 82-131 (RR048-069).

The Commonwealth Court granted preliminary objections filed by the Respondents in *PEDF VII*, which is attached to this brief. The court first granted the Governor's assertion of misjoinder, asserting he is not a proper party because his only role was signing the legislation mandating the significant expansion of ATV use on our state forest and park lands. In reviewing PEDF's assertions that the Governor took actions in violation of his trustee duties under the ERA, the court did not consider his trustee duties, his control over DCNR, or his knowledge of DCNR's long-standing policy opposing expansion of ATV trails and opposing ATV use of

state forest roads based on its 35 years of experience not being able to constrain ATV use to designated trails and not being able to prevent degradation of our state forest and park trust assets from ATV use.

The Commonwealth Court then granted the preliminary objections of the Respondents asserting that the Petition failed to state a claim under the ERA for which relief could be granted. The court first concluded that the Petition only raised facial constitutional challenges to the ATV statutes because an as-applied challenge would require that DCNR be named as a respondent since DCNR administers ATV use on our state forest and park trust assets under the challenged ATV statutes.

In limiting the scope of its review to a facial challenge, the Commonwealth Court ignored the extensive facts set forth in the Petition establishing that DCNR, based on its over 35 years of experience administering ATV trails on the state forest, adopted policies prohibiting further expansion of this use because off-road vehicles degrade the forest ecosystems of the ERA trust assets that DCNR administers. A fair reading of the Petition supports PEDF's allegations that the Respondents, not DCNR, violated the ERA because the Respondents ignored DCNR's knowledge of the harm from ATV use and required DCNR to repeal its moratorium against expansion of ATV use without any consideration of DCNR's knowledge.

PEDF did not name DCNR as a respondent in the Petition because, based on the information available to PEDF when the Petition was filed, DCNR had taken

appropriate actions to avoid further harm from ATV use. The Commonwealth Court acknowledges that the Respondents' exercise control over DCNR and that DCNR could not refuse to follow their direction to expand ATV use. The facts show that the Respondents' actions relate to implementing the ATV statutes, not just enacting them, and that the court erred in limiting the scope of its review to a facial challenge of the constitutionality of the ATV statutes at issue.

The Commonwealth Court then determined that the standard for reviewing the constitutionality of government actions under the ERA established by this Honorable Court in *PEDF v. Commonwealth*, 161 A.3d 911 (Pa. 2017) ("*PEDF IP*") did not apply. Instead, the Commonwealth Court relied on its recent decision in *Frederick v. Allegheny Twp. Zoning Hearing Bd.*, 196 A.3d. 677 (Pa. Cmwlth. 2018), to apply a new standard based on legislative balancing of ERA rights with other interests, in this case balancing protection of our state forest and park trust assets with the interests of recreational ATV users. The court did not review the plain language of the ERA, which does not recognize recreation as a constitutional right and does not authorize a trustee to balance its duty to conserve and maintain public natural resources with the interests of those advocating for a use that degrades these trust assets.

Nonetheless, the Commonwealth Court applied its balancing test to the factual averments in the Petition and concluded that those averments were conclusory and

contradictory and failed to show that the challenged statutes, on their face, unreasonably impair the environmental features of the affected locale. In reaching these conclusions, the court ignored the extensive factual averments in the Petition supporting PEDF's allegation that ATV use has degraded the forest ecosystems of our state forest and park ERA trust assets, which are supported by an expert report prepared by three retired state forest district managers based on their more than 100 years of combined experience managing state forest lands in northcentral Pennsylvania, as well as the affidavits of nine PEDF members who have experienced degradation of their trust assets at specific locales. Contrary to the court's findings, the factual averments in the Petition are more than sufficient, if proven, to establish PEDF's right to the declaratory relief under the ERA that it seeks in the Petition.

Finally, the Commonwealth Court concluded that the Respondents had no duty to seek advice from DCNR before taking actions to expand ATV use, even though DCNR had extensive experience with this use, because such a duty would violate the principle of separation of powers. The court did not consider the trustee duties of the legislative respondents under the ERA to conserve and maintain our state forest and park trust assets and to act toward these trust assets with prudence, loyalty and impartiality when exercising their legislative powers. These trustee duties require the Respondents to seek the advice of DCNR, their co-trustee with expertise and experience in administer these trust assets. Rather than violating

principles of separation of power, the court sanctions an abuse of legislative power by allowing the legislative respondents to ignore information relevant to their decision as trustees to mandate an activity that degrades our state forest and park trust assets.

On November 29, 2022, PEDF filed its timely notice of appeal of the Commonwealth Court’s final order. PEDF contends, among other things, that the Commonwealth Court erred by not following this Honorable Court’s direction for reviewing the constitutionality of the Respondents’ trustee actions under the ERA, as set forth in both *PEDF II* and *PEDF v. Commonwealth*, 255 A.3d 289 (Pa. 2021) (“*PEDF V*”). PEDF has set forth factual averments in its Petition, which must be accepted as true when considering preliminary objections, that along with reasonable inferences drawn from them establish PEDF’s right to its requested declaratory relief. These factual averments are sufficient to support PEDF’s allegations that the Respondents, as trustees of our state forest and park trust assets, violated the purposes of the ERA trust and breached their trustee duties by taking legislative and executive actions that continue to allow and mandate significant expansion of ATV use on our state forest and park lands when more than 35 years of experience demonstrates that ATV use degrades, diminishes and depletes these public natural resources, their clean air and pure water, and their natural, scenic, historic and esthetic values.

VII. SUMMARY OF ARGUMENT

This appeal raises fundamental questions about the relationship between our legislative and executive branches of state government when carrying out their trustee responsibilities under the ERA as they relate to our state forest and park public natural resources, which are part of the corpus of the ERA trust. This Honorable Court has established that the plain language of the ERA and applicable Pennsylvania private trust law principles govern review of the constitutionality of legislative and executive actions that infringe on our public nature resources, which are the corpus of the ERA trust and the common property of the people of Pennsylvania, both current and future generations. All branches of state government serve as co-trustees under the ERA with fiduciary duties to conserve and maintain our state forest and park public natural resources, to protect their clean air and pure water, and to preserve their natural, scenic, historic and esthetic values.

Through its Petition, PEDF seeks judicial review of legislative and executive actions that have allowed and expanded recreational ATV use on our state forest and park lands when such use, based on more than 35 years of experience, is known to degrade these public natural resources and deplete the corpus of the ERA trust. PEDF seeks declarations that these actions violate the ERA and that the Respondents breached their trustee duties in taking them.

Without considering the plain language of the ERA or the principles of private trust law, the Commonwealth Court determined that PEDF fails in its Petition to state any ERA claims for which relief can be granted. The court first concluded that PEDF has not stated facts sufficient to name the Governor as a respondent and that PEDF is only making a facial statutory challenge because the Petition did not name DCNR as a Respondent. The court then contends that the legislative branch can “balance” the interests of recreational ATV users with the constitutional interests of current and future ERA trust beneficiaries, including PEDF’s members, and that the challenged statutes are reasonable on their face based on deference that must be given to the legislature.

The Commonwealth Court made several fundamental errors in its analysis. First, the legislative branch has no authority to balance constitutionally protected rights guaranteed to the people of Pennsylvania under the ERA with the recreational interests of ATV users. While it may be the province of the legislative branch to balance a wide variety of policy and political consideration when enacting legislation, the legislature has the constitutional duty as a trustee under the ERA to preserve the corpus of the ERA for current and future generations of Pennsylvanians, not to enact legislation that depletes the corpus of the trust to benefit the recreational interests of ATV users.

Second, when legislation infringes on the fundamental Article I constitutional rights of ERA trust beneficiaries, those beneficiaries have the right to seek judicial review of that legislation to vindicate their constitutional rights. By insulating legislation and the trustees responsible for it from judicial review when the legislation directly violates the duties of those trustees under the ERA and directly infringes on fundamental rights of the people in violation of Article I, Section 25 of the Pennsylvania Constitution, the Commonwealth Court has thwarted the fundamental system of checks and balances that our state constitution establishes.

Finally, the leaders of both the legislative and executive branches, as co-trustees, have the duty to coordinate with other trustees authorized to administer ERA trust assets prior to taking actions that may degrade, diminish or deplete those trust assets. They have a fundamental duty as trustees to assess the potential consequence of their proposed actions on trust assets prior to taking them and to maintain records of their assessments to properly inform to the trust beneficiaries of their actions and to enable proper review of their actions both by trust beneficiaries and by the courts if trust beneficiaries seek judicial review.

By failing to recognize any of these fundamental trust principles in reviewing the Petition, the Commonwealth Court erroneously concludes that PEDF can only assert a valid ERA claim against DCNR and then only if PEDF challenges ATV use at a specific location on our state forest and park lands. Thus, the court forecloses

any challenge of the Respondents' trustee actions directing DCNR, their co-trustee, to continue and expand degradation of our state forest and park trust assets in violation of the trust purposes established by the ERA.

The Commonwealth Court leaves DCNR in the impossible position of knowing, based on the more than 35 years of experience, that ATV use cannot occur without degrading our state forest and park trust assets in violation of the ERA but being required by the Respondents to comply with legislative and executive mandates to the contrary. This dilemma is further compounded by the Commonwealth Court's erroneous assertion that PEDF has no basis to name the Governor as a respondent. The Court ignores the vital trustee role of the Governor as head of the executive branch. The Court ignores the Governor's direct authority over DCNR, the agency that administers our state forest and park ERA trust assets. The Court ignores the Governor's knowledge that DCNR, after years of applying the legislative mandate to allow ATV use by designating ATV trails on our state forest ERA trust assets, concluded it cannot both administer this use and fulfill its trustee duty to sustain the ecology of the forest.

The Commonwealth Court also erred by limiting its scope of review in considering the preliminary objections to the Petition to a facial challenge of the ATV statutes because PEDF did not name DCNR as a respondent. The factual averments in the Petition establish that DCNR, the trustee designated by state law to

protect these public natural resources, imposed a long-standing moratorium on the expansion of ATV use on our state forest and park trust assets when it learned that the ATV use allowed by statute was degrading these trust assets. DCNR has repeatedly stated that it cannot administer this use without degrading the ecology of the forest of our state forest and park trust assets, thus impeding its ability to sustain the forest for future generations. By sanctioning the Respondents' imposition of this untenable conflict of interest on their co-trustee, DCNR, that degrades our state forest and park trust assets in violation of the ERA and in breach of their trustee duties, the Commonwealth Court has effectively rendered the ERA meaningless.

PEDF requests that this Honorable Court reverse the order issued by the Commonwealth Court granting the Respondents' preliminary objections and dismissing the Petition. PEDF seeks judicial review through its Petition of trustee actions that, if allowed to stand, will degrade some of our highest value assets within the corpus of the ERA trust—our state forest and park public natural resources.

VIII. ARGUMENT

A. Proper Standard for Judicial Review of PEDF's ERA Claims

This Honorable Court made clear in *PEDF II* that the ERA “establishes a public trust, pursuant to which the natural resources are the corpus of the trust, the Commonwealth²³ is the trustee, and the people are the named beneficiaries.” 161 A.3d at 931-932. In the footnote, this court states ERA trustee obligations “are not vested exclusively in any single branch of Pennsylvania’s government, and instead all agencies and entities of the Commonwealth government, both statewide and local, have a fiduciary duty to act toward the corpus with prudence, loyalty, and impartiality.” *Id.*, n.23. Thus, the General Assembly, acting through its bicameral chambers and the chamber leaders, and the Governor are co-trustees responsible for carrying out the duties of the Commonwealth under the ERA.

This Honorable Court established in *PEDF II* that “when reviewing challenges to the constitutionality of Commonwealth actions under [the ERA], the proper standard of judicial review lies in the text of [the ERA] itself as well as the underlying principles of Pennsylvania trust law in effect at the time of its enactment.” *Id.* at 930; *see also PEDF V*, 255 A.3d at 296 (“the plain text of the ERA controls and must be given the same effect as any other constitutional provision ... private trust law principles [were adopted by] this Court in *PEDF II*, including imposing fiduciary duties as a component of the ERA analysis”).

In reviewing the plain language of the ERA trust, this Honorable Court clearly states that a trustee under the ERA “is a fiduciary obligated to comply with the terms of the trust and with standards governing a fiduciary’s conduct” and that the “explicit terms of the trust require the government to ‘conserve and maintain’ the corpus of the trust.” *Id.* at 932 (quoting *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 956-957 (Pa. 2013)). This court also establishes that the “plain meaning of the terms conserve and maintain implicates a duty to prevent and remedy the degradation, diminution, or depletion of our public natural resources” and a fiduciary duty “to act toward the corpus of the trust—the public natural resources—with prudence, loyalty, and impartiality.” *Id.* This court also found that the ERA right to clean air, pure water and the preservation of natural, scenic, historic and esthetic values “places a limitation of the state’s power to act contrary to this right.” *Id.* at 931. This limitation would also apply to trustee actions to conserve and maintain the corpus of the ERA trust.

Had the Commonwealth Court correctly applied the standard of review established by this Honorable Court in *PEDF II* to evaluate the veracity of PEDF’s constitutional challenges under the ERA, the Commonwealth Court would have found that PEDF has clearly alleged the following elements necessary to state its ERA claims:

(1) Our state forest and park lands are public natural resources that are to be conserved and maintained as part of the corpus of the ERA trust;

(2) Respondents are trustees with the constitutional duty to fulfill the purposes of the ERA trust, which in this case are to conserve and maintain our state forest and park public natural resources, to protect their clean air and pure water, and to preserve their natural, scenic, historic and esthetic values;

(3) PEDF's members are trust beneficiaries who have experienced the degradation, diminution and depletion of their state forest and park public natural resources from ATV use;

(4) DCNR, the co-trustee mandated by state law to conserve and maintain our state forest trust assets, has the conflicting mandate under state law to allow ATV use on these trust assets; however, based on its more than 35 years of experience with degradation to the ecology of our state forest by these vehicles designed for off-road use, DCNR imposed a long-standing moratorium on expansion of ATV use on our state forest and park trust assets.

(5) Respondents have taken both legislative and executive actions that continue to allow and mandate significant expansion of ATV use on our state forest and park public natural resources knowing based on DCNR's experience that ATV use degrades, diminishes and depletes these ERA trust assets in violation of the ERA and in breach of their trustee duties.

The Commonwealth Court’s entire analysis of the Respondents’ preliminary objections is undermined by its failure to review PEDF’s ERA claims in the Petition based on the plain language of the ERA and applicable trust law principles. This failure led the court to erroneously conclude that the Governor was not a proper party and that PEDF failed to state ERA claims for which relief could be granted.

B. Erroneous Application of New Balancing Test Akin to *Payne I* Test

In *PEDF II*, this Honorable Court overruled the three-prong balancing test the Commonwealth Court established for judicial review of the constitutionality of government actions under the ERA in *Payne v. Kassab*, 312 A.2d 86 (Pa. Cmwlth. 1973) (*Payne I*) because this test “is unrelated to the text of [the ERA] and the trust principles animating it [and] strips the constitutional provision of its meaning.” *Id.* at 930; *see also PEDF V*, 255 A.3d at 296 (“We unanimously agreed that the *Payne* test was incompatible with the ERA, thus ‘solidify[ing] the jurisprudential sea-change begun by Chief Justice Castille’s plurality in *Robinson Township* [.]’” (quoting *PEDF II*, 161 A.3d at 940 (Baer, J., concurring and dissenting))).

The legislative Respondents in this case argued that the *Payne I* test should be applied by the Commonwealth Court in analyzing the veracity of PEDF’s ERA claims against them. While acknowledging in a footnote¹ that this Honorable Court overruled the *Payne I* test in *PEDF II*, the Commonwealth Court nonetheless

¹ *PEDF VII*, 285 A.3d at 716, n.14.

proceeded to apply a new balancing test akin to the *Payne I* test based on its analysis in *Frederick* to review the veracity of PEDF's ERA claims in its Petition. *PEDF VII*, 285 A.3d at 716-717.

In *Frederick*, the Commonwealth Court states that “[j]udicial review of the government’s action [under the ERA] requires an evidentiary hearing to determine, first, whether the values in the first clause of the [ERA] are implicated and, second, whether the government action *unreasonably impairs* those values.” 196 A.3d. at 695 (emphasis added). In *Frederick*, the Commonwealth Court was reviewing a claim that a local zoning ordinance was unconstitutional under the ERA. While acknowledging that the ERA imposes trustee duties on the Commonwealth, including state and local officials, to conserve and maintain public natural resources, the Commonwealth Court did not consider these trustee duties or the standard of review established by this court in *PEDF II* to be relevant to its review of a zoning ordinance. *Id.* at 692-694. Instead, the Commonwealth Court formulated its new balancing test by focusing solely on the right established by the first sentence of the ERA, as well as this Honorable Court’s statement in *PEDF II* that this right “places a limitation on the state’s power to act contrary to this right, and while the subject of this right may be amenable to regulation, any laws that unreasonably impair the right are unconstitutional.” *Id.* at 694 (quoting *PEDF II*, 161 A.3d at 931).

This phrase “unreasonably impair” was used by the plurality in *Robinson Twp.* to observe that while the subject of the right in the first sentence of the ERA “certainly may be regulated by the Commonwealth, any regulation is ‘subordinate to the enjoyment of the right ... [and] must be regulation purely, not destruction’; laws of the Commonwealth that unreasonably impair the right are unconstitutional.” 83 A.3d at 951 (quoting *Page v. Allen*, 58 Pa. 338 (1868)). In *Page*, this court reviewed the constitutionality of legislation regulating elections. This court recognized the legislature “must prescribe necessary regulations, as to the places, mode and manner, and whatever else may be required, to insure [the] full and free exercise” of the rights of electors based on qualifications established in the state constitution;² however, this court stated that such regulations “are subordinate to the enjoyment of the right” and the “***right must not be impaired by the regulation.*** It must be regulation purely, not destruction. If this were not an immutable principle, elements essential to the right itself might be invaded, frittered away, or entirely excinded under the name or pretence of regulation, and thus would the natural order of things be subverted by making the principle subordinate to the accessory.” 58 Pa.

² The qualifications of electors were set forth in Article III, Section 1 of our state constitution when *Page* was decided. These qualifications and other provisions related to the administration of elections are now established in Article VII of our state constitution. Thus, this court was not addressing regulation of a fundamental right guaranteed under Article I of our state constitution in *Page*; any regulation that impairs such rights would be even more inimical.

at 347 (emphasis added). Nowhere in this opinion did this court suggest that some level of impairment of a constitutional right is reasonable.

The Commonwealth Court relies on the phrase “unreasonably impair” without any further analysis to fashion a new balancing test that, like its *Payne I* test, strips the ERA of meaning. Further, this new balancing test undermines the standard of review clearly established by this Honorable Court in *PEDF II* that requires judicial review of the constitutionality of government actions under the ERA based on the plain language of the ERA and applicable trust principles. To the contrary, the Commonwealth Court erroneously focuses on the phrase “unreasonably impair” to avoid the plain language of the ERA and the application of trust law principles to review PEDF’s well-pleaded ERA claims in its Petition.³

PEDF is not seeking review of actions taken by the Respondents to establish procedures for other state and local officials to follow, as their co-trustees, to ensure they properly carry out their trustee duties to fulfill the trust purposes of the ERA;

³ Although not at issue in this case, the Commonwealth Court’s new balancing test is also inappropriate in reviewing zoning ordinances because it ignores the fact that when local officials adopt zoning ordinances, they have trustee duties under the ERA to ensure the ordinances conserve and maintain public natural resources within their jurisdictions, as well as the duty to protect the environmental rights established in the first sentence of the ERA. Local officials that approve zoning ordinances that allow land uses in locations that will degrade, diminish or deplete public natural resources within their jurisdiction would violate the ERA and breach their trustee duties under the ERA. Zoning ordinances that degrade, diminish or deplete public natural resources within a municipality (just like statutes that degrade, diminish or delete our state forest and park public natural resources) fail to preserve the corpus of the ERA trust, the very outcome the ERA was intended to avoid. Thus, the standard of judicial review developed by this Honorable Court in *PEDF II* is also the proper standard for reviewing the constitutionality of zoning ordinances under the ERA.

to act toward the trust with prudence, loyalty and impartiality; to maintain appropriate records of the exercise of their fiduciary duties; or to inform trust beneficiaries of their actions as trustees (*i.e.*, regulations to ensure proper administration of the ERA trust). PEDF is seeking constitutional review under the ERA of the Respondents' legislation and executive actions taken as co-trustees that allow and mandate a degrading use of our state forest and park trust assets contrary to their trustee duties (*i.e.*, regulations that destroy the ERA trust). Similarly, PEDF is seeking constitutional review of the actions taken by the Respondents that infringe on the constitutional rights of PEDF's members under the ERA to the clean air, pure water, and natural, scenic, historic and esthetic values of their state forest and park trust assets in violation of Article I, Section 25 of the Pennsylvania Constitution.

The Commonwealth Court fashions a standard of review that allows the Respondents to impair the constitutional rights guaranteed by the ERA. In applying this standard of review, the court asserts that the ERA "requires the trustee to weigh and balance reasonable use of public lands, and we must presume that, here, the legislature investigated and balanced the recreational use of state forests and parks with their environmental protection and preservation." *PEDF VII*, 285 A.3d at 716. The Commonwealth Court further states that the legislature "is not required to document 'some sort of pre-action environmental impact analysis' as a pre-condition to enactment of a statute, such as the Snowmobile and ATV Law" because the

legislature is “presumed ... [to enact] legislation that conforms to any and all applicable constitutional mandates.” *Id.* Finally, the court concludes that the legislature has no duty to seek or follow advice from DCNR because the legislature “cannot delegate its legislative power to an executive branch agency” and seeking advice from DCNR “before passing laws that have environmental impact, if adopted, would violate the principle of separation of powers.” *Id.* at 717.

Based on this new standard of review and its application, the Commonwealth Court erroneously concludes that PEDF did not include averments in its Petition sufficient to state a claim that the Snowmobile and ATV Law and Section 1720-E of the Fiscal Code “on their face, unreasonably impair ‘the local environmental features of the affected locale.’” *Id.* (quoting *Robinson Twp.*, 83 A.3d at 953).⁴ Even if PEDF was only asserting facial challenges to the Snowmobile and ATV Law and Section 1720-E of the Fiscal Code, which as discussed below it is not, the Commonwealth Court’s application of its “unreasonably impairs” standard of review impermissibly insulates legislative actions from judicial review under the ERA. In this case, the Commonwealth Court acknowledges, as it must, that the ERA claims asserted by

⁴ As this Honorable Court recognized in *Payne v. Kassab*, 361 A.2d 263, 272-273 (Pa. 1976) (*Payne II*), allegations that a government action infringes on public property shown to have natural, scenic, historic and esthetic values is sufficient to state claim under the ERA. In *Payne II*, this court considered “whether a court can proceed, on this basis and without more, to adjudicate the charge that the proposed road widening project ‘will violate the constitutional rights’ of the plaintiffs to the preservation of those values []; or stated another way, will violate the trust imposed on the Commonwealth to conserve those values []” and found “no impediment to asserting the constitutional claim” brought by the local citizens and students. *Id.* (citations omitted).

PEDF implicate trustee duties, but then pivots to its view that preserving the corpus of the ERA trust must be balanced with other political considerations without explaining how that balancing is consistent with the plain language of the ERA or trust law principles. By doing so, the court avoided the well-pleaded facts in the Petition supporting PEDF's allegations that the Respondents have taken legislative and executive actions that violate the ERA and their trustee duties. Rather, the court concludes that PEDF's claims, "if successful, would eliminate the balancing of recreational interests with the preservation of the forests, which derives from *Robinson Township*, 83 A.3d at 953, and *Frederick*, 196 A.3d at 694." *Id.*

While the Commonwealth Court does not explain the basis for its balancing test to review the constitutionality of government actions under the ERA, it relies throughout *PEDF VII* on statements made by a plurality of this court in *Robinson Twp.* and its own statements in *Frederick* relating to the constitutionality of government actions regulating the use of private property. As the Petition makes clear, PEDF is not challenging government actions regulating ATV use on private property. Our state forest and park lands are public natural resources owned in common by the people of Pennsylvania, including future generations. No balancing of constitutional rights under Article I of our state constitution is necessary or appropriate.

The constitutionality of government actions allowing ATV use that degrades our state forest and park public natural resources is governed solely by the ERA. The Respondents, all of whom are co-trustees with the same constitutional duties under the ERA, must cooperate in carrying out their respective functions to ensure that they only authorize use of these public natural resources in ways that conserve and maintain these trust assets, that protect their clean air and pure water, and that preserve their natural, scenic, historic and esthetic values; in other words, they can only authorize uses that can occur without degrading, diminishing or depleting these public natural resources or infringing on their values.

As discussed in more detail below, the Commonwealth Court's suggestion that recreational ATV use of our state forest and state park public natural resources is somehow sanctioned by the ERA is simply wrong. The legislature has no authority to balance this use with the preservation of these ERA trust assets, or to mandate expansion of this use when 35 years of experience shows that it cannot be administered without degrading our state forest and park public natural resources and infringing on their environmental values.

Likewise, as also discussed in more detail below, the Commonwealth Court erroneously asserts that under the ERA the legislature alone can investigate and balance harm to trust assets regardless of the knowledge of its co-trustees and can allow the degradation, diminution or depletion of trust assets without assessing in

advance or maintaining any records of the extent of such harm. These assertions fail on every front under the plain language of the ERA and fundamental principles of trust law.

As co-trustees, the Respondents each have duties under the ERA and trust law to fulfill the purposes of the ERA, to act toward the corpus of the ERA trust with prudence, loyalty and impartiality, to maintain appropriate records, and to inform trust beneficiaries of their actions. These fundamental trustee duties require the Respondents to consider the consequences of their actions on our state forest and park trust assets in advance of taking them, which requires consideration of information available from all co-trustees, as well as any other sources relevant to the inquiry. As co-trustees, the Respondents each have a duty to maintain records of their actions, including records documenting their consideration of the consequences of their actions on the trust assets. Such records are essential to their duty to keep trust beneficiaries informed of the status of their trust assets, as well as to inform the courts if trust beneficiaries seek judicial review of their trustee action. Nothing in our state constitution or our state trust law supports the Commonwealth Court's exemption of the Respondents from these trustee duties in carrying out the state government functions.

The Commonwealth Court's "unreasonably impairs" balancing standard allows the purposes of the ERA trust to be undermined by any use deemed

reasonable by the legislature based on political considerations, not based on its trustee duties. As with the *Payne I* test, this deferential balancing standard will rarely, if ever, prevent the degradation, diminution or depletion of our ERA trust resources or prevent infringement upon their clean air, pure water, or natural, scenic, historic or esthetic values. Moreover, based on the presumptions afforded to the Respondents based on the court's application of its balancing standard, trust beneficiaries will have no basis to consider for themselves whether the Respondents' actions conserve and maintain their ERA trust assets or infringe on their rights. In short, the Commonwealth Court's test renders impossible the ability of trust beneficiaries to challenge the direction given by the Respondents, as trustees, to their co-trustees, which must be followed, and strips the ERA of its meaning by imposing an impossible burden on trust beneficiaries seeking review of government actions under the ERA. The Commonwealth Court's "unreasonably impairs" balancing test cannot be the proper standard for judicial review of ERA claims. It is certainly not the standard this Honorable Court established in *PEDF II* and *PEDF V*.

C. Erroneous Application of Trustee Duties in Reviewing ERA Claims

In reviewing the statutes challenged by PEDF in its Petition, the Commonwealth Court concludes, without any analysis of the trustee duties imposed on the Respondents, that the “plain language of the challenged statutes demonstrates the ‘prudence, loyalty and impartiality’ required by the [ERA].” *PEDF VII*, 285 A.3d at 717 (citing *PEDF II*, 161 A.3d at 931). In support of its conclusion, the court asserts that the statutes in question “limit the development of snowmobile and ATV trails and have set up a regulatory regime to enforce those limits” pointing to various provisions that authorize DCNR to collect fees, monitor impacts and take enforcement actions. *Id.* The court fails, however, to explain how any of these provisions fulfill the Respondents’ duties as trustees to conserve and maintain state forest and park public natural resources when their co-trustee, DCNR, has over 35 years of experience to the contrary.

Instead, as discussed above, the Commonwealth Court asserts that the legislative respondents have no duty to seek or follow advice from DCNR, their co-trustee, because such a duty “would violate the principle of separation of powers.” *Id.* The court further states that the legislative respondents are “not required to document ‘some sort of pre-action environmental impact analysis’ as a pre-condition to enactment of a statute, such as the Snowmobile and ATV Law”, and that

legislative actions are “presumed ... [to] conform[] to any and all applicable constitutional mandates.” *Id.* at 716 (quoting *Frederick*, 196 A.3d at 700).

These statements fail to recognize that the Respondents, as well as DCNR, are co-trustees under the ERA and that they must comply with the same trustee duties in administering our state forest and park trust assets. Nothing in PEDF’s challenge to the statutes in question implicates separation of powers issues. Had the Commonwealth Court analyzed PEDF’s ERA claims based on the plain language of the ERA and the applicable trust law principles discussed below, the court would have recognized the flaws in its analysis.

1. Trustee Duty to Administer the Trust in Accordance with the ERA and Applicable Trust Law

The Commonwealth Court fails to analyze the veracity of PEDF’s claims under the ERA based on the Respondents’ basic duties to administer the trust in accordance with the ERA and trust law. As discussed above, this Honorable Court has clearly established that judicial review of trustee actions in administering the ERA trust must comport with the ERA and trust law. *PEDF II*, 161 A.3d at 930; *see also* 20 Pa.C.S. § 7771 (“the trustee shall administer the trust in good faith, in accordance with its provisions and purposes and the interests of the beneficiaries and in accordance with applicable law”); Restatement Third, Trusts § 76 (“The trustee has a duty to administer the trust, diligently and in good faith, in accordance with the terms of the trust and applicable law.”); Restatement Third, Trusts § 76, comment

b (“The trustee’s duty to administer the trust ... is an affirmative duty. Thus, a trustee may commit a breach of trust by improperly failing to act, as well by improperly exercising the powers of the trusteeship. A trustee has a duty in administering a trust not only to act in furtherance of its purposes but also to act in accordance with its terms and applicable law.”)

In accordance with the ERA, the Respondents, as well as DCNR, have the duty as trustees to administer the ERA to fulfill its purposes. As co-trustees, they each have a duty to conserve and maintain our state forest and park trust assets as part of the corpus of the ERA trust, which “implicates a duty to prevent and remedy the degradation, diminution, or depletion” of these public natural resources and “a duty to act toward the corpus of the trust—the public natural resources—with prudence, loyalty, and impartiality.” *PEDF II*, 161 A.3d at 932 (quoting *Robinson Twp.*, 83 A.3d at 956-957. In administering the ERA trust assets, the Respondents, as well as DCNR, also each have a duty under the ERA to protect “the right of citizens to clean air, pure water and the preservation of natural, scenic, historic and esthetic values of the environment ... [which] places a limitation on the state’s power to act contrary to this right.” *Id.* at 931 (citing *Robinson Twp.*, 83 A.3d at 951).

Thus, actions taken by the Respondents, as well as DCNR, to administer our state forest and park trust assets must conserve and maintain these trust assets and cannot be contrary to the rights of the people to clean air, pure water and the

preservation of the natural, scenic, historic and esthetic values of these trust assets. Nothing in the ERA allows the Respondents, as co-trustees of our state forest and park public natural resources, to degrade, diminish or deplete these trust assets or to act contrary to the people’s right to their clean air, pure water and natural, scenic, historic and esthetic values. The Respondents must carry out the powers granted to them by our state constitution consistent with their trustee duties under the ERA. The Commonwealth Court erred by not reviewing the veracity of PEDF’s ERA claims based on the Respondents’ duties to administer the trust in accordance with the ERA and applicable trust law.

2. Trustee Duty to Act Toward the Corpus of the Trust with Prudence

This Honorable Court in *PEDF II* also discussed the fiduciary duties of trustees to act toward the corpus of the ERA trust with prudence, loyalty, and impartiality under Pennsylvania trust law. The duty of prudence “requires a trustee to ‘exercise care and skill as a man [or woman] of ordinary prudence would exercise in dealing with his [or her] own property.’” *Id.* (citing *In re Mendenhall*, 398 A.2d 951, 953 (Pa. 1979); *see also* 20 Pa.C.S. § 7774 (“A trustee shall administer the trust as a prudent person would, by considering the purposes, provisions, ... and other circumstances of the trust and by exercising reasonable care, skill and caution.”); Restatement Third, Trusts § 77, comment b (“The duty of prudence encompasses the duty to exercise reasonable care and skill in trust administration and the duty to act

with a degree of caution suitable to the particular trust and its objectives, circumstances, and overall plan of administration. The duty of *care* requires the trustee to exercise reasonable effort and diligence in planning the administration of the trust, in making and implementing administrative decisions, and in monitoring the trust situation, with due attention to the trust's objectives and the interests of the beneficiaries. This will ordinarily involve investigation appropriate to the particular action under consideration, and also obtaining relevant information about such matters as the contents and resources of the trust estate and the circumstances and requirements of the trust and its beneficiaries."); *Robinson Twp.*, 83 A.3d at 952 ("Clause one of [the ERA] requires each branch of government to consider *in advance of proceeding* the environmental effect of any proposed action on the constitutionally protected features" (emphasis added)).

The Commonwealth Court exempts the Respondents from their duty to act toward the corpus of the ERA trust with prudence by asserting they have no duty prior to taking action to consider the information available from their co-trustee, DCNR, which shows that their action will degrade our state forest and park trust assets, or to maintain records of the basis for their actions contrary to that information. PEDF sets forth factual averments in its Petition to support its allegations that the Respondents violated their duty of prudence by overruling DCNR's long-standing moratorium on expansion of ATV use on our state forest and

park public natural resources because that use cannot be administered without degrading these trust assets. The Commonwealth Court erred in not reviewing the veracity of PEDF's ERA claims based on the Respondents' fiduciary duty to act toward our state forest and park trust assets with prudence.

3. Trustee Duty to Act Toward the Corpus of the Trust with Loyalty and Impartiality

This Honorable Court also discusses in *PEDF II* the duty of trustees to act toward the corpus of the ERA trust with loyalty and impartiality. The duty of loyalty “imposes an obligation to manage the corpus of the trust so as to accomplish the trust’s purpose for the benefit of the trust’s beneficiaries.” *PEDF II*, 161 A.3d at 932; *see also* 20 Pa.C.S. § 7772 (“A trustee shall administer the trust solely in the interest of the beneficiaries.”); Restatement Third, Trusts § 78, comment b (“The fiduciary duty of undivided loyalty in the trust context ... is particularly intense so that, in most circumstances, its prohibitions are absolute for prophylactic reasons. The rationale begins with a recognition that it may be difficult for a trustee to resist temptation when personal interests conflict with fiduciary duty.”).

The duty of impartiality “requires the trustee to manage the trust so as to give all the beneficiaries due regard for their respective interests in light of the purposes of the trust.” *PEDF II*, 161 A.3d at 933; *see also* 20 Pa.C.S. § 7773 (“the trustee must treat the beneficiaries equitably in light of the purposes of the trust”); *PEDF V*, 255 A.3d at 310 (“The explicit inclusion [in the ERA] as simultaneous beneficiaries of

the future generations of Pennsylvanians creates a cross-generational dimension and reminds the Commonwealth that it may not succumb to ‘the inevitable bias toward present consumption of public resources by the current generation, reinforced by a political process characterized by limited terms of office.’” (quoting *Robinson Twp.*, 83 A.3d at 959, n.6)).

The Commonwealth Court exempts the Respondents from their trustee duties to act toward our state forest and park trust assets with loyalty and impartiality by allowing them to direct DCNR, their co-trustee, to continue to allow and to expand ATV use known to degrade these trust assets based on political considerations rather than their trustee duties. The court erred in not reviewing the veracity of PEDF’s ERA claims based on the Respondents’ fiduciary duties to act toward the corpus of the ERA trust with loyalty and impartiality.

4. Trustee Duty to Keep Beneficiaries Informed and to Maintain Records

Under Pennsylvania trust law, trustees have a duty to “keep adequate records of the administration of the trust” and to “promptly respond to a reasonable request ... by a beneficiary ... for information related to the trust’s administration.” 20 Pa.C.S. §§ 7780, 7780.3; *see also* Restatement Third, Trusts § 83, comment a (“Implicit in the duty to provide information to beneficiaries [] is the duty ... requiring a trustee to maintain an adequate set of books and records. The performance of these record-keeping responsibilities is also essential to a trustee’s

duty to collect and safeguard the trust property [] and to the beneficiaries' right to enforce the trustee's duty to act with prudence, loyalty, and impartiality ... Accordingly, the trustee has a duty to maintain ... records that show in detail the nature and amount of the trust property and the trustee's administration thereof.”)

Consistent with its trustee duties, DCNR explained through documents provided as exhibits to the Petition that it would not construct any new roads for ATV use or allow ATV use on existing state forest roads because opening up the state forest to these off-road vehicles was damaging to the forest ecosystem and unsafe for the public. By asserting that the legislative co-trustees have no duty to maintain records or inform the trust beneficiaries or their co-trustees of the basis for their decision to override DCNR's documented basis for its actions, the Commonwealth Court exempts the legislative respondents from the fundamental duties of trustees to maintain records sufficient to inform trust beneficiaries of their actions and the effect of their actions on trust assets.

The Commonwealth Court exempts the Respondents from all the above trustee duties and allows them to make decisions that significantly degrade our state forest and park trust assets based solely on political considerations. These exemptions undermine the important cooperative co-trustee relationships that are essential to achieve the purposes of the ERA trust and to protect the fundamental rights guaranteed to the trust beneficiaries.

D. Erroneous Application of Facial/As-Applied Distinction to the Challenged Co-Trustees Actions

As a preface for applying its erroneous standard of review to analyze the veracity of PEDF’s ERA claims, the Commonwealth Court concluded that PEDF is only asserting a “facial” challenge to the statutes at issue rather than an “as-applied” challenge. *PEDV VII*, 285 A.3d at 713. The court reaches this conclusion because PEDF does not name DCNR as a respondent but does name the General Assembly through its bicameral chambers and their leadership. *Id.* at 713. Since PEDF is not asserting that DCNR “misapplied the statutes in question” but rather “contends that [DCNR] has been ‘legislatively forced’ to accept ATV use in state forest”, the court asserts that PEDF is not making an “as-applied” challenge, notwithstanding the extensive averments in the Petition of degradation of our state forest and park trust assets from DCNR’s required administration of the statutes in question. *Id.*

The Commonwealth Court also bases its facial challenge finding on the fact that the “legislative branch of the government has no role to play in implementation and enforcement of the laws it enacts ... [and] is responsible only for the language of its legislation.” *Id.* The court does not consider the well-pleaded averments in the Petition showing that the legislative respondents have exercised oversight of DCNR’s administration of our state forest and park trust assets and demanded implementation of its mandates to expand ATV use of these trust assets. Petition ¶ 42 (RR024).

Based on its conclusion that PEDF is challenging the constitutionality of the Snowmobile and ATV Law and Section 1720-E of the Fiscal Code on their face, the Commonwealth Court then states that PEDF can only assert a valid facial challenge of these statutes if the averments in its Petition “show that the statutes in question cannot be valid under any set of circumstances.” *Id.* at 716. By construing PEDF’s ERA claims against the legislative respondents as facial challenges and by applying its new *Frederick* balancing test, the Commonwealth Court fails to recognize the fundamental nature of the co-trustee relationship that exists between the legislative and executive branches under the ERA.

PEDF names the Commonwealth as a respondent in the Petition because the Commonwealth is the named trustee in the ERA. The Commonwealth, however, acts through specific state officials that lead its three branches of government, all of whom are trustees under the ERA. *PEDF II*, 161 A.3d at 931, n. 23. The leaders of the legislative and executive branches of state government, namely the Senate President Pro Tempore, the House Speaker, and the Governor, are co-trustees responsible for ensuring that our state forest and park trust assets are protected under the ERA. As co-trustees, these three state government leaders must work cooperatively to carry out their fiduciary duties under the ERA to administer our state forest and park trust assets. *See* 20 Pa.C.S. § 7763 (“A cotrustee shall participate in the performance of a trustee’s function ... a trustee who does not join in an action

of another trustee is not liable for the action.”); Restatement Third, Trusts § 81, Duty with Respect to Co-Trustees (“(1) If a trust has more than one trustee . . . , each trustee has a duty and the right to participate in the administration of the trust. (2) Each trustee also has a duty to use reasonable care to prevent a co-trustee from committing a breach of trust and, if a breach of trust occurs, to obtain redress.”); Restatement Third, Trusts § 81, comment c (“... each co-trustee has a duty, and also the right, of active, prudent participation in the performance of all aspects of the trust’s administration. Implicit in this requirement of prudent participation is a duty of reasonable cooperation among the trustees.”).

While the Governor, as the head of the executive branch of state government, and the Senate President Pro Tempore and House Speaker, as the heads of the bicameral chambers of the legislative branch, have specific functions under our state constitution, when they take actions that degrade our public natural resources and their natural, scenic, historic and esthetic values protected by the ERA, they are first and foremost trustees with the same obligation to protect these trust assets under the ERA and the same fiduciary duties of prudence, loyalty and impartiality in carrying out the purposes of the ERA trust. Rather than provide judicial review of the co-trustee actions established by the well-pleaded ERA claims set forth by PEDF in its Petition and develop the nature of the co-trustee relationship that exists between the Respondents, the Commonwealth Court used the facial versus as-applied distinction

to avoid judicial review of the legislative and executive co-trustee actions challenged by PEDF, which forced DCNR, another co-trustee, to degrade our state forest and park trust assets in violation of the ERA and in breach of its trustee duties.

As for PEDF's decision not to name DCNR or its Secretary as respondents in its Petition, PEDF set forth averments in the Petition showing that DCNR, through its policies, had stopped the expansion of ATV use on our state forest and park lands.⁵ However, the Respondents named by PEDF ignored important information available from DCNR, their co-trustee, based on its over 35 years of experience with ATV use on our state forest in support its long-standing prohibition on expansion of ATV use. Instead, the Respondents took both legislative and executive actions to override DCNR's policies and mandate continued and expanded use of ATVs on our state forest and park public natural resources. These legislative and executive actions are being challenged by PEDF in its Petition and are not limited to facial challenges of the statutes at issue, as the Commonwealth Court contends.

The well-pleaded factual averments in the Petition and the reasonable inferences drawn from them, which must be accepted as true when considering preliminary objections, show that DCNR has struggled for decades with the inherent

⁵ PEDF did name DCNR as an additional party in its Petition Addendum filed on August 29, 2023, which added a challenge under the ERA to a specific action taken by DCNR in Clinton County to implement the mandates of Section 1720-E of the Fiscal Code because it would significantly expand the construction of new ATV roads and degrade the ecology of the state forest.

conflict of interest imposed upon it by the legislature through the Conservation and Natural Resources Act (“CNRA”)⁶ and the Snowmobile and ATV Law. Under the CNRA, DCNR is given broad statutory authority to administer our state forest and park trust assets consistent with the purposes of the ERA, while at the same time being required to regulate and allow ATV use on these trust assets under the challenged ATV statutes.

DCNR and its predecessor (the Department of Environmental Resources) have attempted to manage these conflicting mandates since they were first required to regulate ATVs in 1985; however, they have failed, not because their efforts were misdirected or inadequate but because they were directed to take actions that could not be administered without degrading the trust assets they are required to conserve and maintain. Rather than recognize and eliminate this inherent conflict and the degradation of state forest and park trust assets that has resulted, the Respondents doubled down in 2018 and 2020, mandating through Fiscal Code amendments⁷ that DCNR abandon its policy against further expansion of ATV use and open up the state forest and park trust assets in the entire northcentral Pennsylvania region to this degrading use. Thus, the legislative and executive branch trustees named by PEDF as respondents forced their co-trustee, DCNR, to degrade our state forest and park

⁶ Act of June 28, 1995, P.L. 89, No. 18, 71 P.S. §§ 1340.101 – 1340.1103.

⁷ Sections 1720-E(a) and 1720(b) of the Fiscal Code enacted in 2018 and 2020, respectively.

trust assets through continued and expanded ATV use in violation of the ERA and in breach of their trustee duties.

E. Erroneous Assertion of Constitutional Right to Recreational ATV Use

After eliminating PEDF's ERA claims against the Governor, construing PEDF's ERA claims solely as facial challenges, and applying its balancing test rather than the proper standard of review, the Commonwealth Court then appears to contend that recreational ATV use on our state forest and park public natural resources is a constitutional right that must be balanced with the protections afforded by the ERA. The Commonwealth Court provides no analysis of its assertion that recreational ATV use of our state forest and park ERA trust assets can be balanced against the Commonwealth's constitutional duty to conserve and maintain these trust assets.

Based on the Commonwealth Court's reliance on *Robinson Twp.* and *Frederick* in asserting that the ERA "does not require a 'stagnant landscape' or the 'sacrifice of other fundamental values,' *such as recreation with mechanical devices*", the court appears to be equating the rights of ATV users with the rights of private property owners protected under our state constitution. *PEDF VII*, 285 A.3d at 716 (emphasis added). The phrases "stagnant landscape" and "sacrifice of other fundamental values" are excerpted from the discussion of the preservation of natural, scenic, historic and esthetic values of the environment in the first sentence of the

ERA by a plurality of this court in *Robinson Twp.* In discussing the rights under the ERA, this court states they are “presumptively on par with, and enforceable to the same extent as, any other right reserved to the people in Article I ... This parity between constitutional provisions may serve to limit the extent to which constitutional environmental rights may be asserted against the government if such rights are perceived as potentially competing with, for example, property rights as guaranteed in Sections 1, 9, and 10.” 83 A.3d at 953-954.⁸

Use of ATVs to recreate on our state forest and park public natural resources is not a fundamental right guaranteed by the ERA or any other provision of our state constitution.⁹ What the ERA does guarantee is that our state forest and park public natural resources will be conserved and maintained, that their clean air and pure water will be protected, and that their natural, scenic, historic and esthetic values will be preserved.

⁸ The specific private property rights guaranteed by Article I, Sections 1, 9 and 10 of the Pennsylvania Constitution are “inherent and indefeasible rights, among which are ... acquiring, possessing and protecting property”, the right not to be “deprived ... of property, unless by the judgment of his [or her] peers or the law of the land”, and the right not to have “private property [] taken or applied to public use, without authority of law and without just compensation being first made or secured.” Pa. Const., art. I §§ 1, 9 and 10.

⁹ Even in a case involving another fundamental right protected under our state constitution, which this is not, that fundamental right would not override the protections afforded by the ERA. To the contrary, that right would need to be exercised consistent with the mandates of the ERA. As we have learned since first recognizing our environmental rights under our state constitution over 50 years ago, protection of our public natural resources is vital to our own health and well-being—and ultimately to our survival on this planet. Thus, no other fundamental right protected under our state constitution is superior to our fundamental rights guaranteed by the ERA.

Recreation, like any use of our state forest and park public natural resources, must be prohibited when it degrades, diminishes or depletes these resources. Based on the well-pleaded averments in its Petition, PEDF contends that ATV use on our state forest and park lands has proven to be a recreational use that must be prohibited and is seeking judicial review of the constitutionality of the actions of the named trustees who have continued to allow and mandated expansion of this use knowing that their co-trustee, DCNR, cannot administer this use without degrading these trust assets.

Based on the Commonwealth Court's erroneous views that recreational ATV use is a constitutionally protected right, that the ATV statutes are only being challenged on their face, and that its balancing test is appropriate, the court reaches the erroneous conclusions that "the plain language of the challenged statutes demonstrates the 'prudence, loyalty and impartiality' required by the [ERA]", that "the balancing done by the legislature in allowing, but regulating, ATV use does not establish that the statutory scheme is unconstitutional on its face", and that the Petition "does not allege facts to show that Respondents have acted in a way that 'unreasonably impair[s]' citizens' rights protected by the [ERA]." *PEDF VII*, 285 A.3d at 717. The court's erroneous characterization of recreational ATV use, along with its other compounding errors, renders the ERA meaningless in preventing the degradation of our state forest and park public natural resources.

F. Erroneous Characterization of Governor’s Trustee Role Under the ERA

As explained above, the Governor, as the head of the executive branch of state government, has a vital role in ensuring that the trust purposes of the ERA are fulfilled when executive agencies under the Governor’s jurisdiction take actions that can degrade, diminish or deplete public natural resources or infringe on the people’s right to clean air, pure water or the preservation of natural, scenic, historic and esthetic values of the environment. The Commonwealth Court finds the averments in the Petition only sufficient to show that the Governor signed the legislation in 2018 and 2020 enacting Section 1720(a) and (b) of the Fiscal Code, respectively. *Id.* at 710. The court then concludes that the “Governor is not a proper party merely because he signed into law The Fiscal Code amendments that are alleged to violate the [ERA] in this declaratory judgment action” and because “the merits of [PEDF’s] constitutional challenge can be decided without the Governor’s participation.” *Id.*

In analyzing PEDF’s claims against the Governor, the Commonwealth Court errs by ignoring the Governor’s trustee duties when supporting and approving legislation that authorizes degradation of our state forest and park trust assets, as well as by ignoring his trustee duties when exercising control over DCNR and its policies governing ATV use on our state forest and park trust assets. As the head of the executive branch of state government, the Governor exerts significant control over executive agencies under his jurisdiction through his appointment and

supervision of the heads of executive agencies and through his legislative, policy, budget, legal and communications offices. These offices all have staff assigned to specific executive agencies to ensure they are acting consistent with the Governor's direction.

In the case of overseeing DCNR's administration of our state forest and park trust assets to fulfill the purposes of the ERA, the Governor's trustee role under the ERA is paramount. When the Governor supports legislation that is contrary to policies previously adopted by DCNR to protect our state forest and park trust assets and requires DCNR to revise its policies consistent with that legislation, the Governor not only violates the ERA and his trustee duties, he forces the head of DCNR, his co-trustee, to also violate the ERA and her trustee duties. *See PEDF II*, 161 A.3d at 939 ("the Governor's ability to override decisions by the DCNR ... is contingent upon the extent to which he does so in a manner that is faithful to his trustee obligations, not his various other obligations").

PEDF's factual averments in its Petition establish that the Governor knew DCNR had a policy against expansion of ATV use on state forest and park lands, yet still supported legislation mandating significant expansion of ATV use on these trust assets in northcentral Pennsylvania, thus requiring DCNR to change its policy to abandon its moratorium on expansion of ATV use to implement the legislation supported by the Governor. These facts and the reasonable inferences that can be

drawn from them, all of which must be viewed as true when reviewing preliminary objections, are sufficient for PEDF to establish its ERA claim against the Governor alleging that he violated the ERA and breached his trustee duties.

G. Erroneous Review of PEDF’s Well-Pleaded Factual Averments

The Commonwealth Court selectively chose isolated factual averments from the Petition to sustain the Respondents’ preliminary objection in the nature of a demurrer. Based on these selected averments, the court concludes that PEDF’s “pleading does not state facts to show that the statutes, on their face, unreasonably impair ‘the environmental features of the affected local,’” citing *Robinson Township*, 83 A.3d at 953, because the “factual averments are numerous, but, ultimately, conclusory and contradictory.” *PEDF VII*, 285 A.3d at 716.

1. Test to Determine Sufficiency of Pleadings

As this Honorable Court has stated, the test to determine the sufficiency of pleadings when reviewing a preliminary objection in the nature of a demurrer is “whether, on the facts averred, the law says with certainty that no recovery is possible.” *Bruno*, 106 A.3d at 56. In conducting such a review, courts must “accept as true all well-pleaded material facts set forth in the [petition for review] and all inferences fairly deducible from those facts.” *Kuren*, 146 A.3d at 718 n.1. Courts will sustain preliminary objections “only when, based on the facts pleaded, it is clear and

free from doubt that the complainant will be unable to prove facts legally sufficient to establish a right to relief.” *Id.* (quoting *Mazur*, 961 A.2d at 101).

The Commonwealth Court’ erroneously evaluated the sufficiency of PEDF’s pleading based on whether the statutes in question reasonably or unreasonably impair the environmental features of the affected locale. First, as discussed above, no impairment of a fundamental right under Article I of our state constitution is permissible. Second, PEDF is not seeking declarations as to whether the words of the statutes mandating ATV use on our state forest and park trust assets can be read on their face to “unreasonably impair” environmental features of these forest ecosystems. PEDF is seeking declarations that the Respondents’ actions violated the ERA and breached their trustee duties because the *application* of these statutes has caused and will continue to cause degradation to the forest ecosystems of these trust assets, and has infringed and will continue to infringe on the rights of the trust beneficiaries to the natural, scenic, historic and aesthetic values of those forests.

Had the Commonwealth Court applied the proper test in reviewing the Respondents’ request for a demurrer, it would have found that the factual averments in the Petition and the reasonable inferences that can be drawn from them, which must be accepted as true, establish that the Respondents took legislative and executive actions to continue and expand ATV use that degrades trust assets and infringes on trust beneficiary rights knowing that their co-trustee, DCNR, had a long-

standing moratorium on expanding ATV use for these very reasons. The court would have further found, based on the factual averments in the Petition and reasonable inferences, that it could not sustain the Respondents' request for a demurrer because it was not clear and free from doubt that PEDF would be unable to prove facts legally sufficient to establish its right to the declaratory relief requested in the Petition. By framing its evaluation of the pleading as to whether the language of the statutes in question on their face unreasonably impair the environmental features of our state forest and park trust assets, the Court erred in carrying out its obligation when reviewing the Respondents' preliminary objection.

2. Averments of Degradation Not Conclusory

In support of its determination that PEDF's averments are "conclusory and contradictory," the Commonwealth Court points to PEDF's averment that "ATV trails degrade the environment" because "ATVs are noisy and that their 12-foot-wide trails 'fragment the forest, compact the soil and concentrate water flow.'" *PEDF VII*, 285 A.3d at 716. The court finds this averment to be "broad and conclusory" because it "applies to every paved road that passes through a state forest" and "does not identify a particular locale where an ATV trail is inappropriate." *Id.*

PEDF does, in fact, assert that ATV use anywhere on our state forest and park public natural resources (*i.e.*, on trails or roads designated for this use or elsewhere) violates the ERA because ATVs by their very nature cause degradation of the forest

ecosystems of these trust assets. This assertion, while broad, is not conclusory. The assertion in the Petition that degradation occurs anywhere that ATV use occurs on our state forest and park trust assets is based “on 35 years of experience with the impacts of ATV use on the State Forest [showing] this use is not compatible with the ecology of the forest,” which is further supported by the specific factual averments of degradation by experts with direct experience with ATV use on our state forest, PEDF members with broad experiences with ATV use degrading our public lands at specific locations, and the experience of DCNR supported by its long-standing moratorium on expansion of this use. *See, e.g.*, Petition ¶¶ 26-27, 34, 47-48, 62-68, 71-81 and Exhibits A, E, F, G, O and Q – Y (RR017-332).

Contrary to the Commonwealth Court’s findings, the well-pleaded facts of degradation to our state forest and park trust assets by ATV use set forth in the Petition and the inferences reasonably deducible from them, both of which must be viewed as true when reviewing preliminary objections, are sufficient to establish PEDF’s right to its requested relief.

3. Averments of Legislative Mandates Not Contradictory

In addition to concluding that PEDF’s factual averments do not adequately show that our state forest and park trust assets are degraded by ATV use, the Commonwealth Court also contends that PEDF’s factual averments that DCNR has been legislatively mandated to allow and expand ATV use on these trust assets in

violation of the ERA are contradictory. As support for its contention, the court points to DCNR's recent statements in its policy rescinding its moratorium and its state forest environmental review approving expanded ATV use regarding its need to balance its constitutional trustee duty to conserve and maintain our state forest and park trust assets with its conflicting legislative obligations under the challenged statutes to allow ATV use on these trust assets. PEDF includes factual averments in the Petition to highlight DCNR's conflicting constitutional and legislative mandates. The contradictions that the court raises are not in PEDF's factual averments, they are inherent in the challenged legislative mandates that ignore DCNR's constitutional trustee duties under the ERA, as well as the Respondents own trustee duties to conserve and maintain our state forest and park public natural resources. By taking legislative and executive actions to allow and mandate ATV use that degrades these ERA trust assets, the Respondents have forced DCNR to significantly expand ATV use on our state forest and park lands contrary to its long-standing moratorium on such expansion and contrary to its knowledge based on 35 years of experience that ATV use degrades these trust assets.

The factual averments in the Petition support PEDF's contention that DCNR has been forced through the challenged legislative and executive actions of the Respondents to take actions that violate its trustee duties.. The balancing language use by DCNR in its recent policy statement and state forest environmental review to

justify degradation to our state forest and park trust assets trust assets is consistent with the Commonwealth Court's long-standing application of standards for judicial review established in *Payne I* and now *Frederick* erroneously supporting such balancing under the ERA.

The Commonwealth Court also contends that PEDF's factual averments in its Petition are contradictory because PEDF seeks an absolute prohibition against ATV use on state forest and park trust assets but asserts that "an absolute prohibition did not work because miles of illegal trails were created even before the passage of the Snowmobile and ATV law. Petition at 8, ¶20." This inference drawn by the court from the factual averment in the Petition is not reasonable. The fact that illegal use of ATVs on the state forest began to occur with the advent of these off-road vehicles in the 1980s does not mean that that prohibiting ATV use will not work to prevent degradation of our state forest trust assets. The reasonable inference that can be drawn from the factual averments in the Petition is that had the Respondents worked cooperatively with their co-trustee, DCNR, before taking action to gather information to better understand the degradation caused by ATV use on our state forest and park trust assets, the Respondents would have understood why this degrading use had to be prevented, not expanded, to fulfill their trustee duties to conserve and maintain these trust assets for both current and future generations of Pennsylvanians.

Contrary to the Commonwealth Court’s findings, the well-pleaded facts set forth in the Petition and inferences reasonably deducible from them, both of which must be viewed as true when reviewing preliminary objections, establish that the Respondents, through their legislative and executive actions, have mandated that their co-trustee, DCNR, continue to allow and expand ATV use on our state forest and park trust assets when the Respondents knew this use has degraded and continues to degrade these trust assets. These facts are sufficient, if proven, to establish PEDF’s right to its requested declaratory relief that the Respondents’ actions violated the ERA and breached their trustee duties.

IX. CONCLUSION

As this Honorable Court has now clearly established, the courts have a duty under the ERA, as judicial branch trustees, to review the actions of the legislative and executive branches—their co-trustees—to ensure the purposes of the ERA are fulfilled based on the plain language of the ERA and on applicable trust law. Under the plain language of the ERA, our state forest and park public natural resources, which are the common property of the people, must be conserved and maintained as part of the corpus of the ERA trust, and their clean air, pure water and natural, scenic, historic and esthetic values must be preserved. Nothing in the ERA sanctions allowing these public natural resources to be degraded by ATV use.

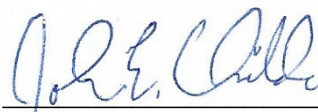
Our state forest and park public natural resources have succumbed to the inevitable bias toward present consumption by the current generation, reinforced by a political process characterized by limited terms of office, which the ERA was intended to prevent. The forest ecosystems of our state forest and park lands are still recovering from the devastation of a century ago, which led to a sea-change fifty years ago in the legal protection we afforded to these and other public natural resources. By placing our public natural resources in a trust, we required our state and local government officials to work together as co-trustees for the sole purpose of conserving and maintaining them, including their clean air, pure water and natural, scenic, historic and esthetic values.

Yet our state forest and park public natural resources are again being degraded at an unprecedented rate because rather than requiring these trust assets to be conserved and maintained, our judicial branch trustees have allowed their legislative and executive branch co-trustees to approve degrading uses of these trust assets by allowing them to balance that degradation with short-term political considerations. Over the past ten years, this Honorable Court has recognized that failing, first in its plurality decision in *Robinson Twp.*, and then in its majority decisions in *PEDF II* and *PEDF V*. However, much remains to be done to accomplish the sea-change in legal protection of our public natural resources that the people of Pennsylvania

supported through the ERA over fifty years ago. This case represents an important step toward achieving those legal protections for our state forest and park trust assets.

For the reasons set forth in this brief, PEDF requests that this Honorable Court deny the Respondent's preliminary objections to the Petition and reverse the Commonwealth Court's order. PEDF also requests that this Honorable Court remand this case to the Commonwealth Court, direct the Respondents, including the Governor, to promptly file answers the Petition, and direct the Commonwealth Court to review PEDF's requests for declaratory relief set forth in the Petition based on the Respondents' trustee duties under the plain language of the ERA and applicable trust law principles, consistent with this Honorable Court's direction in *PEDF II* and *PEDF V*.

Respectfully Submitted,



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ATTACHMENT

Commonwealth Court Opinion and Order Issued on November 8, 2022

(Docket No. 447 M.D. 2021)

PEDF v. Commonwealth, 285 A.3d 702 (Pa. Cmwlth. 2022)

285 A.3d 702

Commonwealth Court of Pennsylvania.

PENNSYLVANIA ENVIRONMENTAL
DEFENSE FOUNDATION, Petitioner

v.

COMMONWEALTH of Pennsylvania;
The Pennsylvania House of
Representatives and Bryan Dean Cutler,
in his Official Capacity as its Speaker; The
Pennsylvania Senate and Jake Corman, in
his Official Capacity as the Senate
President Pro Tempore; and Tom Wolf,
in his Official Capacity as Governor of
Pennsylvania, Respondents

No. 447 M.D. 2021

|
Argued September 12, 2022

|
Decided November 8, 2022

*705 Original Jurisdiction

Attorneys and Law Firms

John E. Childe, Dauphin, for Petitioner.

Karl S. Myers, Philadelphia, for Respondent Pennsylvania
House of Representatives and Pennsylvania Senate.

Warren E. Kampf, West Chester, for Respondents Bryan
Cutler, in his official capacity as the Speaker of the
Pennsylvania House of Representatives and Jake Corman,
in his official capacity as the President Pro Tempore of the
Pennsylvania Senate.

Joshua B. Ebersole, Assistant Counsel, Harrisburg, for
Respondent Tom Wolf, in his official capacity as Governor
of Pennsylvania.

Jeffrey Mozdziok, Deputy Attorney General,
Philadelphia, for Respondent Commonwealth of
Pennsylvania.

BEFORE: HONORABLE MICHAEL H. WOJCIK, Judge,
HONORABLE LORI A. DUMAS, Judge, HONORABLE
MARY HANNAH LEAVITT, Senior Judge

Opinion

OPINION BY SENIOR JUDGE LEAVITT

Before the Court are the preliminary objections of the Commonwealth of Pennsylvania, the Governor of Pennsylvania, Tom Wolf, the Pennsylvania House of Representatives and the Pennsylvania Senate (General Assembly), and House Speaker Bryan Cutler and Senate President Pro Tempore Jake Corman (Legislative Leadership) (collectively, Respondents) that were filed in response to the petition for review of the Pennsylvania Environmental Defense Foundation (Foundation). The petition for review seeks a declaratory judgment that the Snowmobile and All-Terrain Vehicle Law¹ and Section 1720-E(a) and (b) of The Fiscal Code² violate the Environmental Rights Amendment of the Pennsylvania Constitution. PA. Const. art. I, § 27.³ Respondents, in separate responsive pleadings, assert, *inter alia*, that the petition fails to state a claim upon which relief can be granted. We sustain the demurrers.

Petition for Review

The Foundation is a non-profit organization incorporated under the laws of Pennsylvania *706 for the purpose of protecting and preserving the environmental interests of its members in Pennsylvania. Members of the Foundation have filed affidavits in support of the petition for review.

The petition for review identified the named Respondents as trustees of a trust established by the Environmental Rights Amendment to the Pennsylvania Constitution. State forests and state parks constitute the corpus of this trust. The state forest in northcentral Pennsylvania, approximately 1.4 million acres, is “one of the most extensive intact forest ecosystems in the eastern United States.”⁴ Petition for Review (Petition) at 27, ¶61.

In 1971, the General Assembly enacted the Snowmobile Law⁵ to require snowmobiles to be titled and registered and to authorize registered snowmobiles to use trails in state forests developed for that purpose. In 1985, the Snowmobile and All-Terrain Vehicle Law, 75 Pa. C.S. §§ 7701-7753, added all-terrain vehicles (ATVs) to the titling and registration regime and authorized their use on designated trails in state forests and state parks. Some ATV trails were placed on the preexisting illegal trails. Petition at 8, ¶20.

In 1995, the Department of Environmental Resources was reorganized into two agencies. The General Assembly created the Department of Conservation and Natural Resources (Department or DCNR) to conserve state forests and state parks and manage their use. In that regard, the Department is required to deposit all revenue generated by the ATV program into restricted accounts and to use those accounts for such ATV-related purposes as “registration and certificate of title activities, training, education,

enforcement activities, construction and maintenance of snowmobile and ATV trails and acquisition of equipment, supplies and interests in land[.]” Petition at 7, ¶17 (quoting 75 Pa. C.S. § 7706(a)(2)).

On March 16, 2000, in response to the increased demand for more ATV trails, the Secretary of Conservation and Natural Resources directed the development of a five-year plan for their use in state forests. Petition at 9, ¶22. The Department’s survey found that approximately 222 miles of ATV trails had been approved for use in state forests, but over 2,500 miles of illegal trails had been created by ATV users. Petition at 10, ¶24. In response, the Department adopted enforcement policies in 2001 and 2003 to restrain ATV use in state forests. Under pressure, however, the Department agreed to consider “strategic connector” trails in state forests “in part to support local economic interest.” Petition at 10, 12, ¶¶25-26, 29. By 2015, the authorized ATV trails in the state forest had increased to 265 miles. The Department’s 2015 policy reiterated that except for “limited development of connectors, as deemed appropriate by the Department[.]” the ATV trail system should not be further expanded. Petition at 13, ¶33. That policy also stated that the Department “does not consider state forest roads to be an option for connectors between trails systems” due *707 to visitor safety concerns. Petition at 14, ¶34 (emphasis in original omitted).

One connector considered was a new ATV trail through the Sproul State Forest District to connect the existing Bloody Skillet ATVT Trail in northern Centre County and the Whiskey Springs ATV Trail in western Clinton County. Petition at 14, ¶35. The Department retained the Larson Design Group to evaluate the feasibility of such a connection, but it was “unable to identify a connector ATV route that would not impact on sensitive State Forest resources[.]” Petition at 15, ¶37.

In 2018, shortly before the Larson Design Group completed its study, the General Assembly amended The Fiscal Code to add Section 1720-E(a). It states as follows:

(a) Appropriations.--The following shall apply to appropriations for the Department of Conservation and Natural Resources:

(1) The department shall, in consultation with the Department of Transportation, develop, open and maintain an ATV trail connecting the Whiskey Springs ATV trail to the Blood Skillet ATV trail *by utilizing existing State roads and State forest roads* by April 1, 2020.

(2) The department shall, in consultation with the Department of Transportation, implement the full

Northcentral Pennsylvania ATV initiative and create a network of ATV trails connecting Clinton County to the New York State border *by utilizing existing State roads and State forest roads* by April 1, 2024.

72 P.S. § 1720-E(a) (emphasis added).

On May 10, 2019, the Secretary of Conservation and Natural Resources advised the Governor that the Department could not meet the April 1, 2020, deadline in Section 1720-E(a) because it lacked the necessary funding and had concerns for “user safety, environmental consequences, user satisfaction and legality, among others.” Petition at 17, ¶41. In response, on August 14, 2019, Senator Joe Scarnati, then President Pro Tempore of the Senate, met with an ATV association as well as representatives of the Department and the Department of Transportation (PennDOT). The senator informed them that his office planned to discuss with the Governor why the Department and PennDOT “were not complying with the Governor’s directive to change their policies” to implement the law authorizing the use of state roads to connect ATV trails. Petition at 17-18, ¶42.

On November 18, 2020, the Department issued a policy that stated, *inter alia*, that the Department is “working to ensure that registered ATV owners receive sufficient benefits for their registration funds while balancing the protection of our natural resources and the needs of all recreational uses on state lands.” Petition at 18, ¶43 (emphasis in original omitted). The policy recognized the growing popularity of ATVs, which impacted “the core functions that state forest lands were acquired to address” including “protection of clean water, clean air, wildlife habitat, scenic beauty, rare and significant ecosystems, and wild plants.” *Id.* The policy stated that the Department did not “consider state forest roads to be a viable option for ATV connectors or trail systems mainly because they may not be conducive for ATV riding.” *Id.*

On November 23, 2020, the General Assembly amended The Fiscal Code to add Section 1720-E(b), which states, in pertinent part, as follows:

(b) Regional ATV pilot program for department lands.--

(1) The department shall establish a regional pilot program for ATV use on department lands.

*708 (2) As part of the pilot program, by December 31, 2020, the department shall:

(i) evaluate department forest districts, including Elk, Moshannon, Sproul, Susquehannock and Tioga, for roads and trails to serve as potential regional connectors and to provide local access or

serve as a trail complex for ATV use; and

(ii) perform an assessment regarding charging fees for access to the department ATV pilot area.

* * * *

(5) The department shall provide access to the department ATV pilot area for the 2021 summer ATV riding season from the Friday before Memorial Day through the last full weekend in September, in addition to an extended season to be determined by the department based on local conditions.

72 P.S. § 1720-E(b)(1)-(2), (5).

To comply with Section 1720-E(b) of The Fiscal Code, the Department developed the 2021 ATV Regional Connector Trail Pilot (2021 ATV Pilot) on 59 miles of ATV trails (45.4 miles of existing trails and 13.6 miles of new trails). The 2021 ATV Pilot “reflects plans for an initial phase of a potential larger project, plans for which will be submitted later. In future years the trail network may be expanded. Any expansions of the system will be covered by subsequent SFERs.”⁶ Petition at 20, ¶46 (citing Exhibit N) (emphasis in original omitted). In conjunction with the 2021 ATV Pilot, the Department’s Bureau of Forestry did an environmental assessment of the impact of the increased ATV use on erosion and sedimentation; water quality; state forest roads; and the risk of fuel spills. Petition at 20-21, ¶48.

The petition avers that the ATV trails, which are 12 feet wide to allow passing in the opposite direction, “fragment the forest, compact the soil, concentrate water flow causing erosion and sedimentation, and degrade high quality and exceptional value headwater stream.” Petition at 27, ¶63. It further avers that ATV use “generates dust and destroys habitats for sensitive species in wetlands and vernal pools[.]” and “[e]ven more extensive impacts result from illegal ATV use of the State Forest beyond designated ATV trails[.]” Petition at 27, ¶¶63-64. Finally, ATVs are “loud with a noise level more akin to heavy industrial equipment[.]” Petition at 28, ¶65. The petition avers that state forest district managers do not have the staff and resources necessary to inventory and remedy the degradation of the state forest by ATV use. Petition at 29, ¶68. The petition avers that the challenged statutes have forced the Department to violate its constitutional duty to “conserve and maintain the public natural resources.” Petition at 30, ¶70.

Based on these allegations, the petition for review seeks a judgment that declares the following legislative acts and actions taken pursuant to those acts are unconstitutional under the [Environmental Rights Amendment] and that the

Respondents violated their constitutional duties as trustees under the [Environmental Rights Amendment] in mandating them:

(a) The legislatively forced use of ATVs on our State Forest and State Parks by the provisions in the Snowmobile and ATV Law that require DCNR to title and register ATVs within the Commonwealth, authorize the use of ATVs on our State Forest and State Parks, and thus create the expectation among *709 ATV users that DCNR will use the revenue generated by ATV titling and registration activities to provide ATV trails for their use on our State Forest and State Parks.

(b) The legislatively forced use of ATVs on our State Forest and State Parks by Section 1720-E(a) of the Fiscal Code enacted in 2018 that requires DCNR to develop, open and maintain new ATV trails in the Sproul State Forest District to connect the existing Whiskey Springs and Bloody Skillet ATV trails, to authorize the use of State Forest roads as part of this new ATV trail system, and to create a network of ATV trails connecting Clinton County to the New York State border.

(c) The legislatively forced use of ATVs on our State Forest and State Parks by Section 1720-E(b) of the Fiscal Code enacted in 2020 that requires DCNR to implement a regional ATV connector trail pilot program during the summer of 2021.

(d) The [2021 ATV Pilot] opened during the summer of 2021 to comply with Section 1720-E(b) of the Fiscal Code that further expands ATV trails on our State Forest and State Parks, thus increasing the use of our State Forest and State Parks by ATVs.

Petition at 41-42, ¶82 (grammatical errors not corrected).

Preliminary Objections

The General Assembly has filed preliminary objections to the petition for review asserting insufficient specificity to the pleading, untimeliness, and legal insufficiency (demurrer). The Legislative Leadership has filed preliminary objections in the nature of a demurrer. The Governor has filed preliminary objections asserting misjoinder. The Commonwealth has filed preliminary objections asserting untimeliness, a demurrer, and sovereign immunity.

In ruling on preliminary objections, we accept as true all well-pleaded material allegations in the petition for review and any reasonable inferences therefrom. *Thomas v. Corbett*, 90 A.3d 789, 794 (Pa. Cmwlth. 2014). “The Court,

however, is not bound by legal conclusions, unwarranted inferences from facts, argumentative allegations, or expressions of opinion encompassed in the petition for review.” *Id.* We may sustain preliminary objections where the law makes clear that the petitioner cannot succeed on his claim, and we must resolve any doubt in favor of the petitioner. *Id.*

I. Misjoinder

We begin with the Governor’s preliminary objection asserting misjoinder.⁷ The Governor argues that he is not a proper party to this action merely because he signed into law two of the challenged statutes. The Governor contends that “the proper party in interest to a challenged law is the government official that implements the law,” which is not the Governor. Governor Brief at 10.

In response, the Foundation argues that the Governor is a proper party because he directed the Department to revoke the *710 moratorium on new ATV trails in state forest lands and the use of state forest roads to connect existing trails. Foundation Brief at 56. The Foundation further contends that the Department “has little choice” when “facing the mandate by the Governor to take an action that degrades our State Forest and State Parks.” *Id.* at 57. These claims about the Governor’s directives and mandates were not alleged in the petition for review and cannot be considered.

The allegations that are included in the petition for review are oblique and limited as to the Governor. One allegation states that on August 14, 2019, Senator Joe Scarnati pledged to discuss with the Governor’s Office why the Department and PennDOT “were not complying with the Governor’s directive to change their policies [regarding use of roads for ATVs] as was signed into law.” Petition at 17-18, ¶42 (emphasis added). Another allegation states that in 2020, the Department’s policy office, described as “an extension of the Governor’s Policy Office,” rescinded the ATV moratorium. Petition at 18, ¶43. These passing references to the Governor are inadequate to demonstrate his responsibility for legislation on ATV trails in state forests and parks.

The Governor is not a proper party merely because he signed into law The Fiscal Code amendments that are alleged to violate the Environmental Rights Amendment in this declaratory judgment action. *See Phantom Fireworks Showrooms, LLC v. Wolf*, 198 A.3d 1205, 1217 (Pa. Cmwlth. 2018). Further, the merits of the Foundation’s constitutional challenge can be decided without the Governor’s participation. *Pennsylvania State Education Association v. Department of Education*, 101 Pa. Cmwlth. 497, 516 A.2d 1308, 1310 (1986) (holding that the

Department of Education’s involvement in the implementation of the tuition agreement in question was “minimal” and that “meaningful relief can readily be afforded without the inclusion of the Department in the instant matter”).

We sustain the Governor’s preliminary objection asserting misjoinder under Pa.R.Civ.P. 1028(a)(5).

II. Demurrer

Next, we address the preliminary objection of the remaining Respondents that the petition for review fails to state a claim upon which relief may be granted. The General Assembly, the Commonwealth, and the Legislative Leadership assert that the allegations in the petition for review are inadequate to overcome the presumed constitutionality of the statutes challenged by the Foundation.

The General Assembly argues that on its face the Snowmobile and ATV Law demonstrates a “reasonable legislative attempt to limit and control unauthorized ATV riding and hence limit environmental harm.” General Assembly Brief at 29. In 1985, challenges raised under the Environmental Rights Amendment were reviewed under the three-factor test set forth in *Payne v. Kassab*, 11 Pa. Cmwlth. 14, 312 A.2d 86, 94 (1973), which is (1) whether the respondent complied with the Commonwealth’s environmental laws; (2) whether the record showed a reasonable effort to reduce the environmental incursion to a minimum; and (3) whether the environmental harm so clearly outweighed the benefits to be derived so that allowing the action would be an abuse of discretion. *Id.* The General Assembly argues that the Snowmobile and ATV Law should be reviewed under the *Payne* test, which was in effect when the statute was enacted, and not under the test announced in *711 *Pennsylvania Environmental Defense Foundation v. Commonwealth*, 640 Pa. 55, 161 A.3d 911 (2017) (*PEDF II*).⁸ Even so, the Snowmobile and ATV Law meets the *PEDF II* standard because it reflects a “reasonably balanced legislative effort to channel and control growing and difficult-to-manage ATV traffic.” General Assembly Brief at 31. As explained in *Robinson Township, Washington County v. Commonwealth*, 623 Pa. 564, 83 A.3d 901, 953 (2013), the Environmental Rights Amendment prohibits a government act that “unreasonably causes actual or likely deterioration” of public natural resources. Further, “Section 27 rights belong to all of the People,” including those who “choose to enjoy the Commonwealth’s natural, scenic, historic, and esthetic values by way of [an] ATV.” General Assembly Brief at 31. The General Assembly has to balance these diverse interests, and it did so in the Snowmobile and ATV Law. The General Assembly does not have to make “specific

Section 27 findings before passing its enactments.” General Assembly Brief at 27 (citing *Frederick v. Allegheny Township Zoning Hearing Board*, 196 A.3d 677, 701 (Pa. Cmwlth. 2018)).

With respect to the 2018 and 2020 amendments to The Fiscal Code, the General Assembly argues that the 2018 amendment directs the Department to develop ATV trails “by utilizing existing State roads and State forest roads”; new trail construction is not required. Section 1720-E(a) of The Fiscal Code, 72 P.S. § 1720-E(a) (emphasis added). The 2020 amendment calls for an ATV “pilot program” that is experimental, not permanent, and gives the Department flexibility to address environmental concerns that arise in the course of implementing the pilot program. The 2020 amendment directs the Department to “perform outreach to affected communities and stakeholders,” which includes environmental groups, such as the Foundation. 72 P.S. § 1720-E(b)(3)(ii). It also requires the Department to collect fees from pilot program users and deposit them into the restricted account to fund “ATV activities, enforcement and maintenance on department lands.” 72 P.S. § 1720-E(b)(8) (emphasis added). Finally, the 2020 amendment directs the Department to “monitor the use, enforcement, maintenance needs and any associated impacts to State Forest land resources” and submit a report to the legislature. 72 P.S. § 1720-E(b)(9). In short, the 2018 and 2020 amendments to The Fiscal Code “reasonably account for the environmental features of the affected locale” and, thus, satisfy the Environmental Rights Amendment. General Assembly Brief at 34 (quoting *Murrysville Watch Committee v. Municipality of Murrysville Zoning Hearing Board*, 2022 WL 200112 (Pa. Cmwlth., No. 579 C.D. 2020, filed January 24, 2022), slip op. at 22 (unreported),⁹ *appeal denied*, 276 A.3d 998 (Pa., No. 56 WAL 2022, filed August 10, 2022) (emphasis added)).

The Commonwealth makes arguments in support of a demurrer that are substantially the same as those of the General Assembly.

In support of its demurrer, the Legislative Leadership notes that the petition for review recites that the 2021 ATV Pilot program is sited entirely on existing roads and trails on state forest lands. *712 Legislative Leadership Brief at 25. Because The Fiscal Code amendments “maximiz[e] the use of existing resources rather than using new ones,” they meet the “ordinary prudence” standard by which a trustee’s actions are evaluated under the Environmental Rights Amendment. Legislative Leadership Brief at 18. Likewise, the Snowmobile and ATV Law satisfies the constitutional standard of ordinary prudence announced in *PEDF II*.¹⁰ Contrary to the Foundation’s assertion, the legislature need not defer to an agency’s opinion “on the merits” of

proposed legislation. Legislative Leadership Brief at 20. Further, the Environmental Rights Amendment does not prohibit normal and customary outdoor recreational use of a public resource. Indeed, at the time of the adoption of the Environmental Rights Amendment, the settlers of the public trust were aware that some beneficiaries “chose to exercise their rights through the use of mechanical equipment” and, thus, were developing trails for snowmobiles. *Id.* at 29.

The Foundation responds that its petition for review states a claim. The petition challenges the statutes’ authorization of “ATV use” in state forests and state parks because “such use degrades these constitutionally protected resources.” Foundation Brief at 22. The duty of Respondents to “conserve and maintain” is antithetical to “the degradation, diminution and depletion” of our public natural resources authorized by the challenged statutes. *Id.* at 36. The Foundation contends that whether the level of environmental degradation authorized by the unconstitutional statutes is “minimal” requires evidence and a factual finding. *Id.* at 29.

The Foundation argues that *Frederick*, 196 A.3d 677, and *Murrysville Watch Committee*, No. 579 C.D. 2020, are inapposite. They involved a constitutional challenge to a zoning ordinance that allowed oil and gas development in all zoning districts, provided certain conditions were met. This case, by contrast, involves the constitutionality of state statutes that have violated the trustee’s duties with respect to public lands. Respondents’ claim that they have “balanced” the protection of trust assets with the recreational interests of ATV riders is not enough to escape judicial review. Foundation Brief at 19. The General Assembly in 1985 had a fiduciary duty as trustee to conserve and maintain the public natural resources when, for the first time, it authorized the use of ATVs in state forests. Prior thereto, ATVs were not allowed on state forest roads due to concerns for the ecology and safety. Petition at 14, 18, ¶¶34, 43.

The Department, which is the General Assembly’s “co-trustee with expertise in conserving and maintaining the public natural resources,” has repeatedly issued reports and policy statements opposing ATV use on state forest roads or any new trails on state forest land. Foundation Brief at 25; Petition at 10-12, ¶¶25-28. The enactment of legislation mandating the 2021 ATV Pilot program was contrary to the Department’s advice.

The Foundation argues that the challenged statutes violate the legislature’s duty of loyalty and impartiality because they prioritize “the desires (not the needs) of current ATV enthusiasts and local businesses and officials interested in

economic development[.]” Foundation Brief at 29. The duty of loyalty requires a trustee to “administer the trust solely in the interest of the beneficiaries,” which include future generations. *PEDF II*, 161 A.3d at 934. *713 The petition’s averment that the statutes in question have reduced the value of state parks and forests for current and future generation beneficiaries is sufficient to state a claim under the Environmental Rights Amendment.

The Foundation’s petition for review asserts that legislation that authorizes any ATV and snowmobile use in state forests and state parks violates the Pennsylvania Constitution. Here, the challenged statutes have authorized 265 (or so) miles of trails on over 2 million acres of state forest lands. The Foundation seeks a declaratory judgment that the Snowmobile and ATV Law and Sections 1720-E(a) and 1720-E(b) of The Fiscal Code violate the Environmental Rights Amendment.¹¹

In addressing the parties’ demurrer, we first consider the nature of the Foundation’s constitutional challenge and whether it is a facial or “as-applied” challenge. We conclude that it is the former.

First, the petition for review did not name the Department, which is the agency created by the legislature to enforce the challenged statutes. An as-applied challenge “does not contend that a law is unconstitutional as written but that its application to a particular person under particular circumstances deprived that person of a constitutional right[.]” *Johnson v. Allegheny Intermediate Unit*, 59 A.3d 10, 16 (Pa. Cmwlth. 2012) (quoting *Commonwealth v. Brown*, 26 A.3d 485, 493 (Pa. Super. 2011)). To present an as-applied challenge, it is necessary to name the agency responsible for the enforcement of the statute in question that has implemented the statute in an unconstitutional manner. The Foundation’s petition does not name the Department, let alone assert that it has misapplied the statutes in question. Rather, the pleading contends that the Department has been “legislatively forced” to accept ATV use in state forests.

Second, the petition for review named the General Assembly and its leadership as respondents. The legislative branch of the government has no role to play in the implementation and enforcement of the laws it enacts. It is responsible only for the language of its legislation.

We conclude that the Foundation’s pleading has lodged a facial challenge to the statutes in question. A facial challenge “tests a law’s constitutionality based on its text alone and does not consider the facts or circumstances of a particular case.” *Johnson*, 59 A.3d at 16 (quoting *Brown*, 26 A.3d at 493). “A statute is facially unconstitutional only

where no set of circumstances exist[s] under which the statute would be valid.” *PEDF II*, 161 A.3d at 938 n.31 (quoting *Clifton v. Allegheny County*, 600 Pa. 662, 969 A.2d 1197, 1222 (2009)). “In determining whether a statute is facially invalid, courts do not look beyond the statute’s explicit requirements or speculate about hypothetical or imaginary cases.” *Germantown Cab Company v. Philadelphia Parking Authority*, 651 Pa. 604, 206 A.3d 1030, 1041 (2019). As these standards plainly reflect, “facial challenges are generally disfavored,” *Clifton*, 969 A.2d at 1223 n.37, and they are “the most difficult challenge to mount successfully[.]” *Commonwealth v. Pownall*, — Pa. —, 278 A.3d 885, 905 (2022) (quoting *714 *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987)).

In *PEDF II*, 161 A.3d 911, the Foundation, the petitioner in this case, challenged the constitutionality of several provisions of The Fiscal Code that directed revenue generated by the lease of state forest and park lands for oil and gas extraction to be used to fund state government operations. The Foundation sought a declaratory judgment that these provisions of The Fiscal Code violated the Environmental Rights Amendment because they allowed public trust assets to be used for purposes other than preservation of these public assets. The Supreme Court held that some of the challenged Fiscal Code provisions, on their face, violated the Environmental Rights Amendment.

In so holding, the Supreme Court analyzed each sentence of the Environmental Rights Amendment, which states as follows:

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

Pa. Const. art. I, § 27. The Court explained that the first sentence is “a prohibitory clause declaring the right of citizens to clean air and pure water, and ... the preservation of natural, scenic, historic and esthetic values of the environment.” *PEDF II*, 161 A.3d at 931. In other words, it prohibits the Commonwealth from acting in a way that “unreasonably impairs” citizens’ rights to a clean environment. *Id.* The second sentence confers ownership of the state’s “public natural resources” upon Pennsylvania’s citizens, including future generations. *Id.* The third sentence makes the natural resources the corpus ---of a public trust and names the Commonwealth as trustee and its citizens as the beneficiaries of the trust. *Id.* at 931-

32. The Supreme Court held that “[a]s a fiduciary, the Commonwealth has a duty to act toward the corpus of the trust—the public natural resources—with *prudence, loyalty, and impartiality.*” *Id.* at 932 (quoting *Robinson Township*, 83 A.3d at 957) (emphasis added). This involves two duties: “a duty to prohibit the degradation, diminution, and depletion” of our public resources and a duty to “act affirmatively via legislative action to protect the environment.” *PEDF II*, 161 A.3d at 933.

Finding the minerals under state parks and forests to be “part of the corpus of Pennsylvania’s environmental public trust,” *id.* at 916, the Court held that the Commonwealth serves as a trustee, rather than as a proprietor, of its “public natural resources.” *Id.* at 935. The royalties generated from the lease of state land for oil and gas extraction must be committed to “furthering the purposes, rights, and protections” of the Environmental Rights Amendment. *Id.* at 928 (quotation omitted). The Supreme Court ruled that Sections 1602-E and 1603-E of The Fiscal Code¹² were facially unconstitutional because they allocated the royalties from the sale of oil and gas to the General Fund, *i.e.*, to a “non-trust purpose.” *PEDF II*, 161 A.3d at 938-39.¹³

*715 In *Frederick*, 196 A.3d at 684-85, township residents appealed a zoning hearing board’s denial of their substantive validity challenge to an ordinance that allowed oil and gas operations in all zoning districts. The township residents argued, *inter alia*, that the zoning ordinance violated the Environmental Rights Amendment because placing an “industrial use,” such as an unconventional gas well, in agricultural areas “degrades the local environment in which people live, work, and recreate, including the public natural resources on which people rely.” *Id.* at 691 (quotation omitted). The residents argued, relying on *PEDF II*, that the township breached its trustee duty in the enactment of the zoning ordinance. The trial court affirmed the zoning hearing board.

In affirming the trial court, we relied upon the Supreme Court’s holdings in *PEDF II* and *Robinson Township* to hold that the township residents did not prove that the zoning ordinance “unreasonably” impaired their rights under the Environmental Rights Amendment. *Frederick*, 196 A.3d at 697. Credited expert testimony proffered in the residents’ substantive validity challenge established that there was a long history of oil and gas development safely coexisting with agricultural uses in the township. Further, unconventional gas development would help preserve the ability of landowners to continue farming, thereby advancing the object of the Environmental Rights Amendment.

We further noted that balancing the interest of private property owners with the public health, safety, and welfare of the community goes into the enactment of any land use regulation. *Id.* at 693 n.29. Indeed, zoning legislation accounts for the “natural, scenic, historic and esthetic values of the environment” by placing compatible uses in the same zoning district, and it is axiomatic that a zoning ordinance must balance the public interests of the community with the individual due process rights of private property owners. *Id.* at 695 (quoting Pa. Const. art. I, § 27). As our Supreme Court explained in *Robinson Township*, the “ ‘Environmental Rights Amendment does not call for a stagnant landscape’ or ‘for the derailment of economic or social development’ or ‘for a sacrifice of other fundamental values.’ ” *Frederick*, 196 A.3d at 694 (quoting *Robinson Township*, 83 A.3d at 953).

We concluded that courts must presume that the township “ ‘investigated the question and ascertained what is best for ... the good of the people’ when it enacted [the zoning ordinance in question].” *Frederick*, 196 A.3d at 701 (quoting *Khan v. State Board of Auctioneer Examiners*, 577 Pa. 166, 842 A.2d 936, 947 (2004)). Whether the zoning ordinance “is wise or whether it is [the] best means to achieve the desired result are matters left to the legislature, and not the courts.” *Frederick*, 196 A.3d at 701 (quoting *Khan*, 842 A.2d at 947).

*716 To succeed in its facial challenge, the Foundation must show that the statutes in question cannot be valid under any set of circumstances. *Clifton*, 969 A.2d at 1222. For example, a statute that authorized unrestricted and unlicensed snowmobile and ATV use in all state forests and state parks without regard to the particular locale may be facially invalid. However, that is not the statutory scheme before the Court. Rather, the statutes limit the development of snowmobile and ATV trails and have set up a regulatory regime to enforce those limits. On their face, they meet the standards set forth in *PEDF II* and *Robinson Township*.¹⁴

The Environmental Rights Amendment requires the trustee to weigh and balance reasonable use of public lands, and we must presume that, here, the legislature investigated and balanced the recreational use of state forests and parks with their environmental protection and preservation. The Environmental Rights Amendment does not require a “stagnant landscape” or the “sacrifice of other fundamental values,” such as recreation with mechanical devices. *Robinson Township*, 83 A.3d at 953; *Frederick*, 196 A.3d at 694. Further, the General Assembly is not required to document “some sort of pre-action environmental impact analysis” as a pre-condition to enactment of a statute, such as the Snowmobile and ATV Law. *Frederick*, 196 A.3d at

700 (quotation omitted). It is presumed that the General Assembly enacts legislation that conforms to any and all applicable constitutional mandates.

The Foundation’s pleading does not state facts to show that the statutes, on their face, unreasonably impair “the environmental features of the affected locale.” *Robinson Township*, 83 A.3d at 953. The factual averments are numerous but, ultimately, conclusory and contradictory.

The pleading avers, for example, that ATV trails degrade the environment. It avers that ATVs are noisy and that their 12-foot-wide trails “fragment the forest, compact the soil, [and] concentrate water flow.” Petition at 27, ¶63. This broad and conclusory allegation also applies to every paved road that passes through a state forest. Wider than 12 feet, these roads also fragment the forest and compact the soil. Indeed, footfalls compact the soil. The pleading challenges neither roads nor hiking trails. The pleading does not identify a particular locale where an ATV trail is inappropriate; rather, it asserts that any ATV trail, regardless of its location in an area of 2.2 million acres, violates the Environmental Rights Amendment.

The petition for review asserts that the statutes have “legislatively mandated” the Department to violate its duties as trustee. However, the petition’s allegations contradict this proposition repeatedly. It states, for example, that the Department issued a policy that balances “the protection of our natural resources and the needs of all recreational uses on state lands.” Petition at 18, ¶43. The petition states that the Department will not undertake any expansion of the ATV trail system without “subsequent SFERs.” Petition at 20, ¶46. With regard to the 2021 ATV Pilot, the Department did an assessment of ATV use on erosion, water quality, and risk of oil spills. Petition at 20-21, ¶48. These allegations all contradict the Foundation’s claim that the *717 legislative mandates it challenges have robbed the Department of the ability to protect and preserve our natural resources.

The petition for review seeks an absolute prohibition against the use of state forests and parks for ATV use. However, the petition for review also alleges that the absolute prohibition did not work because miles of illegal trails were created even before the passage of the Snowmobile and ATV Law. Petition at 8, ¶20.

The statutes in question limit the development of snowmobile and ATV trails and have set up a regulatory regime to enforce those limits. The 2020 amendment to The Fiscal Code directs the Department to collect fees from the 2021 ATV Pilot program users and deposit them into the restricted account to fund “ATV activities, enforcement

and maintenance on department lands[.]” 72 P.S. § 1720-E(b)(8) (emphasis added). The 2020 amendment also directs the Department to “monitor the use, enforcement, maintenance needs and any associated impacts to State Forest land resources” and submit a report to the legislature. 72 P.S. § 1720-E(b)(9). Although the pleading avers that the challenged statutes were enacted to advance “local economic interest,” Petition at 12, ¶29, economic interests are not anathema to the Environmental Rights Amendment. *Robinson Township*, 83 A.3d at 953. The plain language of the challenged statutes demonstrates the “prudence, loyalty and impartiality” required by the Environmental Rights Amendment. *PEDF II*, 161 A.3d at 931.

That the Foundation and even the Department staff may disagree with the balancing done by the legislature in allowing, but regulating, ATV use does not establish that the statutory scheme is unconstitutional on its face. The General Assembly cannot delegate its legislative power to an executive branch agency. The Foundation’s proposition that the General Assembly must “seek and follow the advice” of the Department before passing laws that have environmental impact, if adopted, would violate the principle of separation of powers. Foundation Brief at 28. “The legislative power in its most pristine form is the power to make, alter and repeal laws[.]” and “[i]t is *axiomatic* that the Legislature cannot constitutionally delegate the power to make law to any other branch of government or to any other body or authority.” *Blackwell v. State Ethics Commission*, 523 Pa. 347, 567 A.2d 630, 636 (1989) (emphasis in original) (quotations omitted). The Foundation seems not to appreciate that the Department is a creature of statute subject to the legislature’s directives.

¹²³In short, the petition for review does not allege facts to show that Respondents have acted in a way that “unreasonably impair[s]” citizens’ rights protected by the Environmental Rights Amendment. *PEDF II*, 161 A.3d at 931; *Frederick*, 196 A.3d at 697. The challenged statutes have set up a regulatory regime to limit and manage snowmobile and ATV trails, and courts must presume that the legislature has “investigated the question and ascertained what is best for ... the good of the people[.]” when it enacted the statutes in question. *Frederick*, 196 A.3d at 701 (quoting *Khan*, 842 A.2d at 947). The petition for review does not support the claim that, on their face, the statutes show no respect for the Environmental Rights Amendment. *PEDF II*, 161 A.3d at 938 n.31; *Clifton*, 969 A.2d at 1222. The Foundation’s claim, if successful, would eliminate the balancing of recreational interests with the preservation of the forests, which deviates from *Robinson Township*, 83 A.3d at 953, and *Frederick*, 196 A.3d at 694.

*718 For these reasons, we conclude that the petition for review fails to state a claim under the Environmental Rights Amendment upon which relief may be granted. We thus sustain Respondents’ preliminary objections in the nature of a demurrer.

Conclusion

Based on the foregoing, we sustain the preliminary objections asserting misjoinder under Pa.R.Civ.P. 1028(a)(5) and demurrer under Pa.R.Civ.P. 1028(a)(4) and dismiss the Foundation’s petition for review.¹⁵ Given this conclusion, the Foundation should consider withdrawing its “Addendum” to this petition for review and refile it as a separate pleading.¹⁶

ORDER

AND NOW, this 8th day of November, 2022, the preliminary objection asserting misjoinder raised by Tom Wolf, in his official capacity as Governor of Pennsylvania, is SUSTAINED. The preliminary objections in the nature of a demurrer raised by the Commonwealth of Pennsylvania, The Pennsylvania House of Representatives and Bryan Dean Cutler, in his official capacity as its Speaker, and The Pennsylvania Senate and Jake Corman, in his official capacity as the Senate President Pro Tempore, are SUSTAINED. The Pennsylvania Environmental Defense Foundation’s Petition for Review is DISMISSED.

All Citations
285 A.3d 702

Footnotes

- ¹ 75 Pa. C.S. §§ 7701-7753.
- ² Act of April 9, 1929, P.L. 343, *as amended*, added by the Act of July 17, 2007, P.L. 141. Section 1720-E(a) was added by the Act of June 22, 2018, P.L. 281, and Section 1720-E(b) was added by the Act of November 23, 2020, P.L. 114, 72 P.S. § 1720-E(a), and (b).
- ³ The text of the Environmental Rights Amendment is set forth in the opinion, *infra*.
- ⁴ According to the Department of Conservation and Natural Resources, the state forest system comprises 2.2 million acres of forestland in 50 of Pennsylvania’s 67 counties. *See* Pennsylvania Department of Conservation & Natural Resources, Pennsylvania State Forest Districts, <https://www.dcnr.pa.gov/StateForests/Pages/default> (last visited November 7, 2022).
- ⁵ Act of August 12, 1971, P.L. 299, No. 75 (Act 75). The Act of June 17, 1976, P.L. 162, No. 81 (Act 81) repealed Act 75 and reenacted the Snowmobile Law, codifying it in Title 75 of the Vehicle Code, 75 Pa. C.S. §§ 7701-7753. Act 81 was amended by the Act of July 11, 1985, P.L. 225, to include all-terrain vehicles (ATVs).
- ⁶ “SFERs” stands for State Forest Environmental Reviews.
- ⁷ Pennsylvania Rule of Civil Procedure 1028(a)(5) states:
 - (a) Preliminary objections may be filed by any party to any pleading and are limited to the following grounds:
 - * * * *
 - (5) lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action[.]PA.R.Civ.P. 1028(a)(5).
- ⁸ In *PEDF II*, the Pennsylvania Supreme Court reversed this Court’s decision in *Pennsylvania Environmental Defense Foundation v. Commonwealth*, 108 A.3d 140 (Pa. Cmwlth. 2015) (*PEDF I*).
- ⁹ Pursuant to Section 414(a) of this Court’s Internal Operating Procedures, 210 Pa. Code § 69.414(a), an unreported panel decision of this Court issued after January 15, 2008, may be cited for its persuasive value, but not as binding precedent.

- ¹⁰ Notably, the Snowmobile and ATV Law was enacted in 1971 before the service of either the House Speaker or the Senate President Pro Tempore in the General Assembly.
- ¹¹ A declaratory judgment is not granted as a matter of right. *Ronald H. Clark, Inc. v. Township of Hamilton*, 128 Pa.Cmwlth. 31, 562 A.2d 965, 968-69 (1989). Whether a court should grant a declaratory judgment is a matter committed to the discretion of a court of original jurisdiction. *Gulnac by Gulnac v. South Butler County School District*, 526 Pa. 483, 587 A.2d 699, 701 (1991). *See also* Declaratory Judgments Act, 42 Pa. C.S. §§ 7531-7541.
- ¹² Added by the Act of October 9, 2009, P.L. 537, *as amended*, 72 P.S. §§ 1602-E, 1603-E.
- ¹³ The Supreme Court remanded the matter to the Commonwealth Court to decide whether bonuses and rental payments deposited into the General Fund to pay for government operations in 2009 and 2010 pursuant to two fiscal enactments were part of the trust corpus. On July 29, 2019, this Court held that bonuses and rental payments were not for the severance of natural resources and, therefore, not part of the trust corpus. This Court held that Sections 1604-E and 1605-E of The Fiscal Code, added by the Act of October 9, 2009, P.L. 537, and the Act of July 6, 2010, P.L. 279, 72 P.S. §§ 1604-E, 1605-E, and Section 1912 of the Supplemental General Appropriations Act of 2009, were constitutional. *Pennsylvania Environmental Defense Foundation v. Commonwealth*, 214 A.3d 748, 751 (Pa. Cmwlth. 2019) (*PEDF III*). The Foundation appealed, and the Supreme Court reversed. *Pennsylvania Environmental Defense Foundation v. Commonwealth*, — Pa. —, 255 A.3d 289, 293 (2021) (*PEDF IV*) (holding that revenue from upfront bonus payments, rentals, and penalty interest for leases qualified as income generated by trust assets and could not be used for non-trust purposes).
- ¹⁴ We reject the General Assembly’s suggestion that the Snowmobile and ATV Law should be evaluated under *Payne*, 11 Pa.Cmwlth. 14, 312 A.2d 86, which governed application of the Environmental Rights Amendment at the time the 1985 statute was enacted. *PEDF II* refined our understanding of the Environmental Rights Amendment and overruled *Payne*. The principles in *PEDF II* govern the Snowmobile and ATV Law.
- ¹⁵ Because we dismiss the petition for review based upon misjoinder and demurrer, we need not address Respondents’ other preliminary objections.
- ¹⁶ On August 29, 2022, the Court granted the Foundation’s application to amend its petition for review with an addendum. The addendum adds the Pennsylvania Department of Conservation and Natural Resources (Department) and Cindy Adams Dunn, in her official capacity as the Secretary of Conservation and Natural Resources, as Respondents and asserts that the Department’s actions related to the Renovo ATV Connector Trail violated its trustee duties under the Environmental Rights Amendment, Pa. Const. art. I, § 27. By order dated September 8, 2022, the Court stayed responsive pleadings to the petition addendum pending disposition of the preliminary objections.

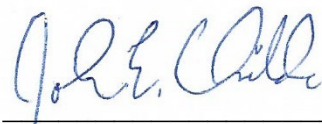
SUPREME COURT OF PENNSYLVANIA

PENNSYLVANIA ENVIRONMENTAL DEFENSE FOUNDATION, Appellant v. COMMONWEALTH OF PENNSYLVANIA; PENNSYLVANIA HOUSE OF REPRESENTATIVES and JOANNA E. McCLINTON, in her official capacity as its SPEAKER; PENNSYLVANIA SENATE and KIM WARD, in her official capacity as SENATE PRESIDENT PRO TEMPORE; and JOSH SHARPIRO, in his official capacity as GOVERNOR of PENNSYLVANIA Appellees

111 MAP 2022

CERTIFICATION OF COMPLIANCE WITH Pa. R.A.P. 2135(d)

I hereby certify that the Appellant’s Brief complies with Pa. Rule of Appellate Procedure 2135 and includes a total word count of 13,952 based on the word count feature in Microsoft Word.



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SUPREME COURT OF PENNSYLVANIA

PENNSYLVANIA ENVIRONMENTAL DEFENSE FOUNDATION,
Appellant
v.
COMMONWEALTH OF PENNSYLVANIA;
PENNSYLVANIA HOUSE OF REPRESENTATIVES and JOANNA E. McCLINTON, in her official capacity as its SPEAKER; PENNSYLVANIA SENATE and KIM WARD, in her official capacity as SENATE PRESIDENT PRO TEMPORE; and JOSH SHARPIRO, in his official capacity as GOVERNOR of PENNSYLVANIA
Appellees

111 MAP 2022

CERTIFICATION OF COMPLIANCE WITH Pa. R.A.P. 127

I certify that Appellant’s Brief and Reproduced Record comply with Pa. Rule of Appellate Procedure 127.



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SUPREME COURT OF PENNSYLVANIA

PENNSYLVANIA ENVIRONMENTAL DEFENSE FOUNDATION,	:	
Appellant	:	
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA; PENNSYLVANIA HOUSE OF REPRESENTATIVES and JOANNA E. McCLINTON, in her official capacity as its SPEAKER; PENNSYLVANIA SENATE and KIM WARD, in her official capacity as SENATE PRESIDENT PRO TEMPORE; and JOSH SHARPIRO, in his official capacity as GOVERNOR of PENNSYLVANIA	:	
Appellees	:	
	:	

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CERTIFICATION OF SERVICE

I certify that Appellant Brief and Reproduced Record have been served on counsel for the above Respondents through the PACFile electronic filing system.



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