

SUPREME COURT OF PENNSYLVANIA

**PENNSYLVANIA ENVIRONMENTAL :
DEFENSE FOUNDATION, :
Appellant :**

v. :

**TOM WOLF, GOVERNOR; :
COMMONWEALTH OF :
PENNSYLVANIA :
Appellees :**

No. 10 MAP 2015

**PETITION FOR EXTRAORDINARY JURISDICTION OF
THE PENNSYLVANIA SUPREME COURT;
IN THE ALTERNATIVE,
APPLICATION FOR ENFORCEMENT OF REMAND ORDER**

John E. Childe
Attorney for PEDF
I.D. No. 19221
1847 Center Street
Camp Hill, Pa. 17011
717-743-9811
childeje@aol.com
Attorney for Pennsylvania
Environmental Defense Foundation

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INTRODUCTION

The Pennsylvania Environmental Defense Foundation ("PEDF"), Appellant/Petitioner, submits this Petition For Extraordinary Jurisdiction to the Supreme Court of Pennsylvania pursuant to 42 Pa.C.S. § 726; and, in the alternative, submits this Application to the Supreme Court of Pennsylvania seeking an order pursuant to Pa. R.A.P. 2591(b) directing the Commonwealth Court to obey and otherwise enforce the Opinion and Order entered by the Supreme Court on June 20, 2017 (Docket No. 10 MAP 2015), *PEDF v. Commonwealth*, 161 A.3d 911 (Pa. 2017) (*PEDF II*), which reversed, vacated and remanded the Commonwealth Court Order entered on January 7, 2015 (Docket No. 228 MD 2012), *PEDF v. Commonwealth*, 108 A.3d 140 (Pa. Cmwlth. 2015) (*PEDF I*).

PETITION FOR EXTRAORDINARY JURISDICTION

1. “Notwithstanding any other provision of law, the Supreme Court may, on its own motion or upon petition of any party, in any matter pending before any court or magisterial district judge of this Commonwealth involving an issue of immediate public importance; assume plenary jurisdiction of such matter at any stage thereof and enter a final order or otherwise cause right and justice to be done.” 42 Pa.C.S. § 726.

Immediate Need to Protect Section 27 Public Trust Assets

2. This case involves issues of immediate public importance – the protection under Article I, Section 27 of the Pennsylvania Constitution (“Section 27”) of a concentration of Pennsylvania’s most valuable public natural resources in the northcentral region known as the PA WILDS. These public natural resources are a critical part of the social and economic wellbeing of the 12-county area of the PA WILDS, where PEDF’s members live, work and recreate. And, the rights of PEDF’s members under Section 27 have been, are being and will continue to be impacted and degraded and diminished for at least the next 50 years. These impacts are the direct result of Respondents’ past, continuing and almost certain future actions to convert our State Forest into industrial development to extract and sell natural oil and gas for revenue for the general budget of the Commonwealth.

3. On June 20, 2017, this Court in *PEDF II* reversed in part and vacated entirely the Commonwealth Court’s decision in *PEDF I*, which resolved cross motions for summary judgment against PEDF and in favor of the Respondents. A majority of the Supreme Court gave the following direction to guide the Commonwealth Court on remand:

Having established ... that all proceeds from the sale of our public natural resources are part of the corpus of our environmental public trust and that the Commonwealth must manage the entire corpus according to the fiduciary obligations as trustee, the Commonwealth

Court’s decision cannot stand. In light of our specific holding that section 1602-E and 1603-E [of the Fiscal Code] are facially unconstitutional, the pre-2008 appropriations scheme as set forth in the [Oil and Gas] Lease Fund Act and [the Conservation and Natural Resources Act] again controls, with all monies in the Lease Fund specifically appropriated to the [Department of Conservation and Natural Resources (“DCNR”)]. **As to the remaining acts and decisions [PEDF] challenges, we clarify that their constitutionality depends upon whether they result from the Commonwealth’s faithful exercise of its fiduciary duties vis a vis our public natural resources and any proceeds derived from the sale thereof.** For example, the Governor’s ability to override decisions by the DCNR regarding leasing is contingent upon the extent to which he does so in a manner that is **faithful to his trustee obligations, not his various obligations.”**

PEDF II, 161 A.3d at 939 (emphasis added). The Supreme Court concluded its majority opinion with the following holding:

The Commonwealth (including the Governor and the General Assembly) may not approach our public natural resources as a proprietor, and instead must at all times fulfill its role as a trustee. Because the legislative enactments at issue here do not reflect that the Commonwealth complied with its constitutional duties, the order of the Commonwealth Court with respect to the constitutionality of 1602-E and 1603-E is reversed, and the order is otherwise vacated in all respects. **The case is remanded to the Commonwealth Court for further proceedings consistent with this Opinion.**

Id. (emphasis added).

3. On July 13, 2017, this Honorable Court remitted the record for this case to the Commonwealth Court. (See copy of relevant entry in Supreme Court Docket Sheet for this matter, attached as **Exhibit A.**)

4. Pursuant to Pa. R.A.P. 2140, the Commonwealth Court is required to establish a schedule for further proceedings following remand, or notify the parties if it does not require further briefing. For the past six (6) months, the Commonwealth Court has taken no action to implement this Honorable Court's remand order.

5. Since this Honorable Court's issuance of its opinion in *PEDF II* on June 20, 2017, the Respondents have proceeded with additional actions that violate Section 27 and their duties as trustees set forth in *PEDF II*.

6. The Respondents have enacted the transfer of at least another \$96,000,000 from the corpus of the public trust established by Section 27 ("Public Trust") for purposes that do not conserve and maintain public natural resources as required by Section 27.

7. Respondents have also enacted amendments to the Fiscal Code that undermine the protection of the corpus of the Public Trust by entirely repealing the Oil and Gas Lease Fund Act and providing no new statutory scheme to replace the protections provided by the prior act.

8. With these new actions added to the previous transfers, the corpus of the Public Trust and the benefits that inure to its beneficiaries, both current and

future generations, has been cumulatively depleted by more than \$1.1 billion (\$1,100,000,000.00) (see **Exhibit B**).

9. All \$1.1 billion of these Public Trust financial assets could have been used to conserve and maintain our public natural resources, but are now lost to the beneficiaries of the Public Trust.

10. Without this Court's intervention, these losses to the Public Trust will continue as they have since the 2009-2010 fiscal year budget cycle. The budget cycle for 2018-2019, the tenth cycle since the Respondents began depleting the Section 27 Public Trust, begins the first full week in February in 2018 with the submission of the Governor's Executive Budget to the General Assembly as required by Section 613 of the Administrative Code of 1929 (71 P.S. § 233).

Respondents Violations of Section 27 - General Appropriations Act of 2017

11. On June 30, 2017, just 10 days after the *PEDF II* opinion was issued, both the House and Senate of the General Assembly of Pennsylvania passed House Bill 218, Printer's No. 2196 ("Appropriations Bill") and presented it to the Governor for signature. Section 1601 of the Appropriations Bill, entitled "Oil and Gas Lease Fund Appropriation," would appropriate \$50,000,000 to Department of Conservation and Natural Resources ("DCNR") for general operations; \$7,739,000 to DCNR for State Parks Operations; and \$3,552,000 to DCNR for State Forests

Operation. Section 104(p) of the Appropriations Bill also would require DCNR to spend these funds for the payment of DCNR's annual operating expenses during fiscal year 2017-2018. No funds would be appropriated to pay for projects needed to conserve and maintain the public natural resources of our State Forests and Parks consistent with the Oil and Gas Lease Fund Act (71 P.S. §§ 1331-1333).

12. By operation of law, the Governor had 10 days to either sign the Appropriations Bills, veto it or any appropriation within it, or to do nothing, in which case the Appropriations Bill would become law on July 11, 2017.¹

13. In an effort to stop further depletion of the Public Trust by the appropriation of more than \$61,000,000 from the Oil and Gas Lease Fund for DCNR's annual operating expenses, PEDF filed an application for relief with the Commonwealth Court on July 5, 2017, seeking a declaration that the pending appropriations in Section 1601 of the Appropriations Bill passed by the House and Senate were unconstitutional based on this Court's direction in *PEDF II*. PEDF also filed an application for relief for preliminary injunction on July 6, 2017 to

¹ See Sections 15 and 16, Article IV of the Pennsylvania Constitution (giving the Governor the authority to veto bills, including any item appropriating money in an appropriations bill).

enjoin the spending of the more than \$61,000,000 appropriated in Section 1601 for DCNR's annual operating expenses in the pending Appropriations Bill.²

14. PEDF filed its applications for relief on July 5-6, 2017 to advise the Governor of its belief that Section 1601 of the pending Appropriations Bill violates Section 27 based on this Court's decision in *PEDF II* and to give the Governor the opportunity to prevent further unconstitutional depletion of the Section 27 Public Trust by vetoing the pending Appropriations Bill. The Governor took no action on the pending bill, which therefore became law on July 11, 2017.

15. On July 13, 2017, the date this Court remitted the record in this case to the Commonwealth Court following issuance of its decision in *PEDF II*, PEDF filed an application for relief asking the Commonwealth Court to determine that lease and bonus payments for oil and gas extraction on our State Forests are part of the Section 27 Public Trust consistent with this Court's remand.

16. Also on July 13, 2017, PEDF re-filed its application for relief with the Commonwealth Court seeking a declaration that Section 1601 of the General Appropriation Act of 2017, which had become law,³ violates Section 27. PEDF also re-filed on this date its application for relief asking the Commonwealth Court

² PEDF had also filed an application for relief on June 29, 2017 asking the Commonwealth Court to determine that bonus payments made to obtain oil and gas leases on State Forest land are part of the Section 27 Public Trust.

³ Act of July 11, 2017, P.L. __, No. 1A, §1601.

to enjoin the Respondents from spending the more than \$61,000,000 in Public Trust assets appropriated for DCNR's annual operating expenses in fiscal year 2017-2018 until the Court decided if such spending violated Section 27; and PEDF also asked for expedited consideration.

17. The Respondents answered each of PEDF's applications for relief, but the Commonwealth Court has not taken any action on any of them.

Respondents' Joint Application for Limited Remand

18. Respondents then jointly filed an application for relief asking the Commonwealth Court to strike PEDF's applications for relief challenging the new appropriation of Section 27 Public Trust assets to pay DCNR's annual operating expenses for fiscal year 2017-2018. The basis for Respondents' application is that this Honorable Court's remand in *PEDF II* only allows the Commonwealth Court to consider the narrow and limited question of whether bonus payments paid for the right to extract the oil and gas from State Forests are part of the corpus of the Public Trust. Respondents Joint Application, ¶¶ 13-17.

19. PEDF responded to the Respondent's application for relief on July 26, 2017.

20. The Commonwealth Court has not taken any action on Respondents' joint application, including its assertion that this Honorable Court's remand is narrow and limited to a single issue, or PEDF's response.

Respondents Violation of Section 27 - 2017 Fiscal Code Amendments

21. On October 30, 2017, the Respondents amended the Fiscal Code to repeal the entire Oil and Gas Lease Fund Act.⁴ The Fiscal Code amendments also created a new fund, also named “the Oil and Gas Lease Fund,” but with no protective provisions similar to those in the prior Oil and Gas Lease Fund Act; no separation of Public Trust assets from oil and gas leases on State lands from other sources of funds that can be deposited into the fund; and no role for DCNR or any other agency with expertise in managing the public natural resource on our public lands in deciding the use of the funds.⁵ The General Assembly has complete control over the use of the new Oil and Gas Lease Fund.

22. The 2017 Fiscal Code amendments authorize annual transfers from the Oil and Gas Lease Fund beginning in fiscal year 2017-2018 totaling \$35,000,000 to the Marcellus Legacy Fund for projects that do not conserve and

⁴ Act of October 30, 2017, P.L. ___, No. 44, § 20 (repealing the Oil and Gas Lease Fund Act, 71 P.S. §§ 1331-1333).

⁵ *Id.*, § 3.2 (revising definition of “Oil and Gas Lease Fund Act” to mean the new fund being created, not the former fund), and § 3.3 (adding § 1601.2-E (Oil and Gas Lease Fund) to continue use of this special fund without any of the safeguards of the prior act).

maintain the public natural resources of our State Forests and Parks as required by Section 27.⁶

23. Section 1720-F of the 2017 Fiscal Code amendments mandates that DCNR spend \$2,250,000 of funds appropriated to DCNR for fiscal year 2017-2018 to operate and maintain a single State Park without any requirement for DCNR to evaluate the needs of this park in comparison to the needs of the overall park system consistent with its Section 27 trustee duties.

24. Section 1726-G of the 2017 Fiscal Code amendments authorize the Respondents to transfer \$300 million from unnamed special funds, which could include the Oil and Gas Lease Fund, to the General Fund to pay for the fiscal year 2017-2018 appropriations.

Respondents Continued Attempts to Limit Supreme Court Remand Order

25. Since PEDF first filed its Petition for Review initiating this action on March 6, 2012, the Respondents have continued to take actions that have depleted the Section 27 Public Trust. PEDF has amended its initial petition twice and filed

⁶ *Id.*, § 3.3 (adding § 1601.2-E(e) authorizing these transfers; similar transfers were previously authorized by Act 13 of 2012 (58 Pa.C.S. § 2504 and 2505, which are repealed by § 20(2) the 2017 Fiscal Code amendments).

an addendum to its amended petition to include these additional actions as the case has progressed.

26. On December 5, 2017, PEDF filed a second addendum to its amended petition to challenge the new actions taken by Respondents to further deplete the Section 27 Public Trust through the General Appropriations Act of 2017 and the 2017 Fiscal Code amendments.

27. Respondents would not consent to PEDF's filing of its second addendum to its amended petition; therefore, PEDF filed an application for relief asking the Commonwealth Court to grant it permission to file this second addendum.

28. On December 26, 2017, Respondents filed their opposition to PEDF's application to file its second addendum, again asserting that this Honorable Court's remand in *PEDF II* is only for the narrow and limited purpose of determining whether bonus payments for lease rights to extract the oil and gas from State Forests are part of the corpus of the Section 27 Public Trust; and that issues not encompassed within the remand may not be further considered by the Commonwealth Court in this case.

29. The Respondents are arguing, contrary to the clear language of the Supreme Court Opinion, that all the issues of the Second Amended Petition have somehow dissolved with the Remand.

30. No basis in fact or law supports this argument.

Respondents Misapprehend the Scope of the Remand

31. The issues pending before the Commonwealth Court in this case are not limited to the single issue of whether bonus payments to obtain leases from DCNR to extract oil and gas from State Forest land are part of the corpus of the Section 27 Public Trust.

32. On April 21, 2014, PEDF filed its Motion for Summary Judgment and a supporting brief on all the declarations (A-O) set forth in its Second Amended Petition (filed on December 20, 2013) relating to actions taken by the Commonwealth and then Governors Rendell and Corbett to lease State Forest land and sell natural gas on the State Forest to raise general revenue to balance budgets beginning with the 2009-2010 fiscal year without consideration of their trustee obligations under Section 27.

33. On July 10, 2014, PEDF filed an addendum to its Motion for Summary Judgment and a supporting brief on the two additional declarations (P-Q) set forth in its Addendum to its Second Amended Petition for Review (filed on

March 18, 2014) related to actions taken by the Respondents to use proceeds from the sale of natural gas from the State Forest to balance the fiscal year 2014-2015 budget without consideration of their Section 27 trustee obligations.

34. On January 7, 2015, the Commonwealth Court issued its opinion and order in *PEDF I* denying PEDF's Motion for Summary Judgment in its entirety.

35. When this Honorable Court reversed the *PEDF I* decision in part, vacated the remainder of the *PEDF I* order, and remanded the case to the Commonwealth Court for further consideration consistent with its decision in *PEDF II*, it did not limit the scope of PEDF's pending action.

36. The Commonwealth Court's refusal to respond to this Court's remand in a timely manner or respond to any of the applications for relief currently pending in this matter has been detrimental to the corpus of the Public Trust and to the rights of PEDF's members under Section 27.

37. This refusal to respond has resulted in further depletion of critical public natural resources protected as part of the Section 27 Public Trust, and necessary for both the present and future conservation of the Public Trust.

38. For the above cited reasons, PEDF requests that this Honorable Court assume plenary jurisdiction of these important matters to ensure timely resolution and protection of the constitutional rights of PEDF's members.

**APPLICATION FOR EXPEDITED ENFORCEMENT
OF REMAND ORDER**

39. In the alternative, if this Honorable Court does not grant PEDF's Petition For Extraordinary Jurisdiction, PEDF requests that this Honorable Court issue an order to the Commonwealth Court pursuant to Pa. R.A.P. 2591(b) clarifying that the remand is not limited as the Respondents assert and directing the Commonwealth Court to issue a schedule for expedited consideration of the important remaining requests for declaratory relief still pending in this case, including declarations related to recent actions taken by the Respondents that impact the Section 27 Public Trust as set forth in the addendum that PEDF filed to its petition on December 5, 2017.

40. The allegations in ¶¶ 1-33 above are incorporated by reference into this application.

41. The Commonwealth Court has taken no action to date in response to this Honorable Court's remand in *PEDF II*. Immediate action is necessary to halt the depletion of Section 27 Public Trust assets currently occurring, as well as further depletion likely to occur during the 2018-2019 fiscal year budget process.

42. For the reasons set forth in this application, PEDF requests this Honorable Court to issue the requested order to Commonwealth Court for **expedited compliance** with remand order, and **expedited determination** of the 2017 actions raised in PEDF's Second Addendum to the Second Amended Petition.

Respectfully,

John E. Childe
Attorney for PEDF
I.D. No. 19221
1847 Center Street
Camp Hill, Pa. 17011
717-743-9811
childeje@aol.com
Attorney for PEDF

Date: January 2, 2018

EXHIBIT A

*Excerpts from Supreme Court Docket Sheet for
Docket No. 10 MAP 2015*

EXHIBIT B

Section 27 Public Trust Assets at Issue to Date

Beginning in the 2009-10 fiscal year, the Respondents began reducing General Fund appropriations for DCNR's annual operating expenses and instead appropriating revenue from the Oil and Gas Lease Fund, which is part of the Section 27 Public Trust, to pay these expenses. The table below summarizes this shift.

DCNR OPERATING FUNDS (Thousands)						
Source	FY 07-08	FY 08-09	FY 09-10	FY 10-11	FY 11-12	FY 12-13
General Fund*	98,963	101,617	87,374	77,285	50,459	47,844
O&G Lease Fund**	NA***	NA***	18,549	24,002	59,805	67,823
Total	98,963	101,617	105,923	101,287	110,264	115,667
Source	FY 13-14	FY 14-15	FY 15-16	FY 16-17	FY 17-18	
General Fund*	24,614	23,878	56,805	100,929	94,402	
O&G Lease Fund**	100,813	132,299	85,770	59,561	61,291	
Total	125,427	156,177	142,575	160,490	155,693	

With the recent appropriation from the Oil and Gas Lease Fund to pay DCNR operating expenses for the 2017-18 fiscal year, Respondents have now authorized spending \$609,913,000 from the Section 27 Public Trust to replace General Fund appropriations for DCNR operating expenses since 2009.

The above depletion of the Section 27 Public Trust to reduce appropriations from the General Fund is in addition to the \$383,000,000 transferred directly from the Oil and Gas Lease Fund to the General Fund for statewide general government operations during the 2009-2010 and 2010-2011 fiscal years. *See* Section 1912 of the Supplemental Appropriations Act of 2009; 72 P.S. §§ 1604-E and 1605-E.

In addition, Respondents will have transferred \$135,000,000 from the Oil and Gas Lease Fund to the Marcellus Legacy Fund by the conclusion of the 2017-2018 fiscal year. 58 Pa.C.S. §§ 2504 and 2505; 71 P.S. § 1601.2-E(e).**

In total, Respondents have removed over \$1.1 billion in assets from the Section 27 Public Trust since 2009.

* Governor's Executive Budgets, FY 2007-08 through FY 2017-18, DCNR Summaries by Fund and Appropriation; Section 211 of the General Appropriations Act of 2017 (FY 2017-2018).

** Governor's Executive Budgets, FY 2007-08 through FY 2017-18, Oil and Gas Lease Fund Actual Disbursements (available disbursements for FY 2016-17); Section 1601 of the General Appropriations Act of 2017 (FY 2017-2018).

*** Disbursements from the Oil and Gas Lease Fund for FY 07-08 and FY 08-09 were \$4,250,000 and \$12,156,000, respectively; these funds were used for purposes authorized by the Oil and Gas Lease Fund Act and were not used for DCNR operating costs.