

**COMMONWEALTH COURT OF PENNSYLVANIA**

**PENNSYLVANIA ENVIRONMENTAL  
DEFENSE FOUNDATION,  
Petitioner**

**V.**

**COMMONWEALTH OF PENNSYLVANIA,  
and TOM WOLF, in his official capacity  
as GOVERNOR of PENNSYLVANIA,  
Respondents**

[illegible]

**358 M.D. 2018**

**AMENDMENT TO PETITION FOR REVIEW  
IN THE NATURE OF DECLARATORY RELIEF**

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## **I. SUMMARY OF PETITION AMENDMENT**

A1. The Pennsylvania Environmental Defense Foundation (“PEDF”) filed its Petition for Review in the Nature of Declaratory Relief in this case on May 17, 2018 (“Petition”). Based on facts and law developed since the Petition was filed, PEDF amends the Petition as set forth below (“Petition Amendment”) to provide additional support for its claims that the authorization and spending of the Oil and Gas Lease Fund by the Governor and the Commonwealth (“Respondents”) in fiscal years 2017-2018 and 2018-2019 violate Article I, Section 27 of the Pennsylvania Constitution, commonly referred to as the Environmental Rights Amendment (“ERA”),<sup>1</sup> and Article I, Section 25 of the Pennsylvania Constitution, and breach their trustee duties.<sup>2</sup>

A2. Previously in this case, PEDF filed an application for summary relief asking this Honorable Court, among other things, to declare Respondents’ appropriation and spending of ERA trust assets in the Oil and Gas Lease Fund derived from the State Forest trust corpus unconstitutional as a matter of law because the broad spending authority given by the legislative appropriations allowed the

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<sup>1</sup> PEDF refers to Article I, Section 27 of the Pennsylvania Constitution as “Section 27” in the Petition. In its more recent opinions, the Supreme Court refers to constitutional provision as the “ERA”. Thus, PEDF uses ERA throughout this Petition Amendment.

<sup>2</sup> The paragraph numbering in the Petition Amendment uses the prefix “A” to distinguish the averments in the amendment paragraphs from the averments in the Petition paragraphs. Unless expressly replaced by averments in this Petition Amendment, the Petition, as amended, includes the averments in the Petition, which are incorporated by reference, and the additional averments in this Petition Amendment.

spending of ERA trust assets for non-trust purposes similar to the legislation previously held to be facially unconstitutional by the Supreme Court.

A3. This Honorable Court denied PEDF's request and held that the legislative appropriations of ERA trust assets challenged by PEDF were not unconstitutional based solely on the language in the legislation (*i.e.*, not facially unconstitutional), noting that an as-applied analysis would be needed to determine the constitutionality of the Respondents' challenged spending. PEDF also requested a declaration that the Commonwealth had a duty to account for the deposits into and expenditures from the Oil and Gas Lease Fund to demonstrate that ERA trust funds are used for trust purposes, which this Honorable Court granted.

A4. PEDF appealed this Honorable Court's holding that the legislative appropriations of ERA trust assets challenged by PEDF were not facially unconstitutional. The Supreme Court affirmed the holding based on different reasoning and agreed that a detailed accounting and as-applied analysis of challenged spending of ERA trust assets was needed to determine its constitutionality.

A5. The Respondents subsequently provided PEDF with additional details regarding the deposits into and the expenditures from the Oil and Gas Lease Fund beginning with fiscal year 2008-2009.

A6. PEDF is amending its Petition to incorporate the legal determinations in the court decisions issued after the Petition was filed and an as-applied analysis of Respondents' spending of ERA trust assets derived from the State Forest trust corpus based on the additional details provided by the Respondents in response to those decisions.

A7. PEDF is also amending the Petition to include additional averments in support of its allegation that the Respondents violated the ERA and their trustee duties by failing to spend the ERA trust assets derived from the State Forest trust corpus to remedy the existing ongoing degradation to the natural ecology of State Forest from long-standing statutorily authorized uses of the State Forest trust corpus for non-trust purposes, including mineral extraction, all-terrain vehicle ("ATV") recreation, camp leases, rights-of-way, timber sales, and public roads, bridges and other infrastructure required to support these non-trust purposes.

A8. By allowing this existing ongoing degradation to the natural ecology of the State Forest and failing to use the ERA trust assets to remedy this degradation, the Respondents have not conserved and maintained the State Forest trust corpus for current and future generations as mandated by the ERA.

A9. Pennsylvania's State Forest is one of the crown jewels of the corpus of public natural resources trust established when the people of Pennsylvania voted

overwhelming to add the ERA (Section 27) to their declared rights in Article I of the Pennsylvania Constitution.

A10. Pennsylvania's State Forest is not just trees and plants, it is a natural ecosystem. The ERA requires the Respondents to conserve and maintain the natural ecosystem of the State Forest by protecting its clean air and pure water and preserving its natural, the scenic, the historic, and the esthetic values.

A11. PEDF has sought through this case and its related case filed in 2012 (228 M.D. 2012) to ensure the natural ecology of our State Forest is restored from ongoing and extensive degradation by existing statutorily authorized uses and other related stressors, so that current and future generations of Pennsylvanians can enjoy the clean air, pure water, and natural, scenic, historic and esthetic values of the forest ecosystem.

A12. The constitutional duty to conserve and maintain the State Forest public natural resources means the trustees must prevent and remedy degradation, diminution and depletion of the State Forest, which encompasses the rights of the people to the clean air, pure water, and natural, scenic, historic and aesthetic values of the forest.

A13. Certain human uses of the forest have and will continue to occur, including recreation, timber harvesting, even mineral extraction. But these uses can only be allowed to continue if the degradation, diminution or depletion of the natural

ecology of the forest is remedied to conserve and maintain its clean air, pure water, and natural, scenic, historic and esthetic values—otherwise the State Forest trust corpus is diminished. The need to manage the State Forest as an ecosystem was recognized by the Bureau of Forestry in 1995 when it adopted ecosystem management in its strategic plan, *Penn's Woods-Sustaining Our Forests*.

A14. Our state was named for the forests that covered 90-95 percent of its acreage—Penn's Woods. For more than a century, the people of Pennsylvania have supported efforts to acquire clearcut land and forest land recovering from historic clearcutting to begin and continue the long process of restoring the natural forest ecology of these lands. Today, our State Forest includes over 2.2 million acres, approximately 13% of the state's land base, with almost 1.6 million acres of largely contiguous forest in northcentral Pennsylvania.

A15. As restoration efforts progressed and the natural ecology of the forest improved, statutory authority to allow uses of the State Forest natural resources increased to meet the demands of the Commonwealth's growing population—the forest provided outdoor recreation as access by motorized vehicles increased, employment during the Great Depression, wood products during World War II, oil, gas and nuclear energy after World War II, and more recreation as new types of recreational vehicles were developed.

A16. These statutorily authorized uses of the State Forest allow development, consumption and removal of natural resources from the forest that degrade, diminish and/or deplete the natural ecology of the forest. The same is true of statutorily authorized uses of the State Parks that grew initially from the State Forest and have expanded to cover approximately 300,000 additional acres, much of which is forest.

A17. By 1971, the people of Pennsylvania recognized that their consumption and use of natural resources was unsustainable. They added the ERA to their state constitution to shift the paradigm in managing their public natural resources from consumption and use to conservation and maintenance through trust law principles. They declared their public natural resources to be the common property of the people, including generations yet to come; they placed their public natural resources into a trust protected under Article I of Pennsylvania's Constitution, to be managed by their state government as a fiduciary trustee; and they directed their trustee to conserve and maintain their public natural resources to guarantee their rights to clean air and pure water and the preservation of the natural, scenic, historic and esthetic values of their environment.

A18. The Respondents has failed to carry out their trustee duties to conserve and maintain our State Forest. They have allowed uses of the State Forest, including oil and gas extraction, natural gas storage, ATV use, rights-of-way, timber sale, roads and other infrastructure, that have caused ongoing and extensive degradation



of the natural ecology of the forest. They have spent ERA trust assets derived from this degradation for purposes that do not conserve and maintain the forest or other public natural resources. They have not used these trust assets to remedy the degradation of the ecology of the forest to protect its clean air and pure water and preserve its natural, scenic, historic and esthetic values.

A19. Instead of fulfilling its duty as trustee to conserve and maintain our State Forest public natural resources, the Commonwealth has spent over \$1.4 billion in ERA trust assets derived from degradation of the State Forest trust corpus through its annual budget process to pay for state government operations and programs that do not conserve and maintain public natural resources (*i.e.*, are for non-trust purposes). The Commonwealth has used these trust assets to replace general tax revenue in the General Fund for these non-trust purposes so General Fund revenue could be diverted to other Commonwealth priorities.

A20. In this Petition, as amended, PEDF challenges the Respondents' authorization and spending in fiscal years 2017-2018 and 2018-2019 of ERA trust assets generated from the extraction and sale of oil and natural gas on the State Forest, which are deposited by law into the Oil and Gas Lease Fund.

A21. Through the multiple Commonwealth Court and Supreme Court decisions related to PEDF's challenges to the spending of ERA trust assets derived from the degradation of the State Forest, PEDF has prevailed in establishing that the

money generated from the extraction and sale of oil and natural gas from our State Forest and deposited into the Oil and Gas Lease Fund remains part of the corpus of the ERA trust and must be used solely to conserve and maintain our public natural resources for the benefit of current and future generations. PEDF has also prevailed in establishing that legislative appropriations and Fiscal Code provisions transferring \$383,000,000 in trust assets from the Oil and Gas Lease Fund to the General Fund to pay for annual general state government operations violate the ERA.

A22. Based on the details provided by the Respondents and the as-applied analysis of that spending set forth in this Petition Amendment, PEDF claims the Respondents violated our state constitution – both the ERA and Article I, Section 25 – and breached their trustee duties to act toward the corpus of the ERA trust with prudence, loyalty and impartiality by:

(a) Allowing statutorily authorized uses of the State Forest for non-trust purposes that degrade, diminish and deplete our State Forest public natural resources;

(b) Failing to spend the ERA trust assets derived from their allowed uses of the State Forest for actions needed to remedy the ongoing and extensive degradation of the natural ecology of the forest from the cumulative adverse effects of these allowed uses and related stressors—thus diminishing the State Forest trust corpus; actions needed to restore the State Forest include acquiring additional forest land to

replace forest converted to non-forest, abating existing acid mine drainage, mine scarred lands, abandoned oil and gas wells and degradation from prior natural resource extraction, and enhancing the existing ecology of the forest through improved forest regeneration and control of forest pests, diseases and invasive species;

(c) Appropriating and spending these ERA trust assets for the annual operations of the Pennsylvania Department of Conservation and Natural Resources (“DCNR”), including costs incurred to administer numerous statutorily authorized uses of State Forest and State Park public natural resources for non-trust purposes, numerous statutorily authorized statewide programs for non-trust purposes, and general administrative services for non-trust purposes, without any accounting to differentiate between spending for trust and non-trust purposes;

(d) Transferring these ERA trust assets to other statutorily authorized funds for use by various state agencies for numerous purposes, many of which are non-trust purposes, without any accounting to differentiate between spending for trust and non-trust purposes;

(e) All of which have resulted in the Respondents’ spending of ERA trust assets derived from the State Forest trust corpus for non-trust purposes and the degradation, diminution and depletion of the corpus of the ERA trust.

A23. PEDF respectfully requests that this Honorable Court grant its requested declaratory relief set forth in this Petition Amendment below and find, based on the as-applied analyses of the appropriation and spending of ERA trust assets in the Oil and Gas Lease Fund in fiscal years 2017-2018 and 2018-2019, that the Respondents' breached their trustee duties and that their appropriations and spending of these ERA trust assets are unconstitutional.

## **II. AMENDMENT STATEMENT OF JURISDICTION**

A24. The jurisdiction of the Commonwealth Court in this matter remains as set for in Paragraphs 16 – 17 of the Petition, which are incorporated by reference.

## **III. AMENDMENT PARTIES**

A25. The parties in this matter remain as set forth in Paragraphs 18 – 20 of the Petition, which are incorporated by reference.

## **IV. AMENDMENT CONTESTED ACTS AND ACTIONS**

A26. PEDF replaces Section IV.A (¶¶ 21-23) and Section IV.C. (¶¶ 34-36) of the Petition with Section IV.A. below to update the contested acts and actions of the Respondents relative to both appropriations and actual spending of the Oil and Gas Lease Fund in fiscal years 2017-2018 and 2018-2019, which are representative of appropriations and spending that began in fiscal year 2008-2009 through the present, based on relevant facts and law developed after the filing of the Petition.

**A. RESPONDENTS' UNCONSTITUTIONAL APPROPRIATION AND SPENDING OF THE OIL AND GAS LEASE FUND**

A27. PEDF contests the Respondents' appropriation and spending of the Oil and Gas Lease Fund to pay for DCNR operations in fiscal years 2017-2018 and 2018-2019 as authorized by Sections 104(p) and 1601 of the General Appropriations Acts of 2017 (act of July 11, 2017, P.L. 1279, No. 1A)<sup>3</sup> and the General Appropriations Act of 2018 (act of June 22, 2018, P.L. , No. 1A).<sup>4</sup>

A28. Sections 104 in the General Appropriations Acts of 2017 and 2018 describe how the state appropriations being made can be used by the named agencies of the executive, legislative and judicial departments of the Commonwealth. Sections 104(p) authorize spending money appropriated from the Oil and Gas Lease Fund for all expenses associated with agency operations using the following language, which is the same for both fiscal years except for the dates:

Oil and Gas Lease Fund.—The following sums set forth in this act, or as much as may be necessary, are hereby specifically appropriated from the Oil and Gas Lease Fund to the hereinafter named agencies of the executive department of the Commonwealth for the payment of salaries, wages or other compensation and travel expenses of the duly appointed officers and employees of the Commonwealth, for the payment of fees for contractual services and for payment of any other expenses, as provided by law or by this act, necessary for the proper conduct of the duties, functions and activities for the purposes

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<sup>3</sup> Available on the General Assembly website at:  
<https://www.legis.state.pa.us/cfdocs/Legis/LI/uconsCheck.cfm?txtType=HTM&yr=2017&sessInd=0&smthLwInd=0&act=1A>.

<sup>4</sup> Available on the General Assembly website at:  
<https://www.legis.state.pa.us/cfdocs/Legis/LI/uconsCheck.cfm?txtType=HTM&yr=2018&sessInd=0&smthLwInd=0&act=1A>.

hereinafter set forth for the fiscal year beginning July 1, 2017, and for the payment of bills incurred and remaining unpaid at the close of the fiscal year ending June 30, 2018.

A29. Section 1601 of the General Appropriations Act of 2017 appropriated the following from the Oil and Gas Lease Fund for DCNR operations from July 1, 2017 to June 30, 2018 (FY 2017-2018): \$50,000,000 for DCNR general operations; \$7,739,000 for State parks operations; and \$3,552,000 for State forests operations. Based on these authorized appropriations, the Governor has reported that a total of \$58,457,000 was disbursed from the Oil and Gas Lease Fund in FY 2017-2018 to pay for DCNR operations. Governor's Executive Budget 2019-2020, page H52 (reporting *actual* receipts and disbursements from the Oil and Gas Lease Fund for FY 2017-2018); pages of the Governor's Executive Budgets cited in this Petition Amendment are incorporated as **Exhibit A1**<sup>5</sup> (Exhibit A1-032).<sup>6</sup>

A30. Section 1601 of the General Appropriations Act of 2018 appropriated the following from the Oil and Gas Lease Fund for DCNR operations from July 1, 2018 to June 20, 2019 (FY 2018-2019): \$37,045,000 for DCNR general government operations; \$7,739,000 for State parks operations; and \$3,552,000 for State forest operations. Based on these appropriations, the Governor has reported that a total of

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<sup>5</sup> The exhibits to this Petition Amendment are numbered with the prefix "A" to distinguish them from the exhibits attached to the original Petition.

<sup>6</sup> In some cases, key information has been highlighted in yellow for ease of reference. The Governor's Executive Budget for each fiscal year is available in its entirety at: <https://www.budget.pa.gov/Publications%20and%20Reports/CommonwealthBudget/Pages/default.aspx>

\$47,755,000 was disbursed from the Oil and Gas Lease Fund in FY 2018-2019 to pay for DCNR operations. Governor’s Executive Budget 2020-2021, page H48 (reporting *actual* receipts and disbursements from the Oil and Gas Lease Fund for fiscal year 2018-2019); Exhibit A1-039. These appropriations were made pursuant to Section 1601.2-E(c) of the Fiscal Code, 72 P.S. § 1601.2-E(c), enacted on October 30, 2017 (act of Oct. 30, 2017, P.L. 725, No. 44, § 3.4), which states that “[m]oney in the [Oil and Gas Lease Fund] may only be used as provided under subsection (e) [authorizing annual transfers to the Marcellus Legacy Fund] or as annually appropriated by the General Assembly.”

A31. PEDF also contests the Respondents’ actual transfers from the Oil and Gas Lease Fund to the Marcellus Legacy Fund of \$35,000,000 in FY 2017-2018 and \$35,000,000 in FY 2018-2019 as reported by the Governor (Exhibit A1-032, 039). The Respondents authorized these transfers pursuant to Section 1601.2-E(e) of the Fiscal Code, 72 P.S. § 1601.2-E(e), enacted on October 30, 2017 (act of Oct. 30, 2017, P.L. 725, No. 44, § 3.4), which authorizes annual transfers from the Oil and Gas Lease Fund to the Marcellus Legacy Fund beginning in FY 2017-2018.

A32. PEDF contests the above acts and actions relating to appropriations, transfers and spending of the Oil and Gas Lease Fund as violating both Sections 25 and 27 of Article I of the Pennsylvania Constitution, and contends that the Respondents breached their ERA trustee duties in taking these actions.

A33. As set forth in detail in Section V.A. below, the Respondents violated the ERA and breached their trustee duties since fiscal year 2008-2009 by allowing statutorily authorized uses of State Forest public natural resources for non-trust purposes, by failing to use ERA trust assets derived from these allowed uses to remedy the degradation, diminution and depletion of State Forest public natural resources from these allowed uses, and by appropriating and spending ERA trust assets in the Oil and Gas Lease Fund for annual state operations and programs, many of which are for non-trust purposes, without an accounting to differentiate between spending for trust and non-trust purposes—all of which have resulted in the Respondents’ spending ERA trust assets for non-trust purposes and diminishing the corpus of the ERA trust.

A34. As set forth in detail in Section V.A. below, the Respondents also violated Article I, Section 25 of the Pennsylvania Constitution by appropriating and spending ERA trust assets derived from the degradation of the State Forest trust corpus and protected under Article I of the Pennsylvania Constitution since fiscal year 2008-2009 to carry out their annual budget and appropriation duties under Articles III, IV and VIII of the Pennsylvania Constitution by replacing General Fund appropriations with these ERA trust assets, thus infringing on the people’s Article I rights to have their State Forest trust corpus conserved and maintained.



## **V. AMENDMENT OBJECTIONS AND REQUESTED RELIEF**

A35. In Section V.A. (¶¶ 37-125) of the Petition, PEDF objected to the Respondents' appropriation and spending of ERA trust assets from the Oil and Gas Lease Fund in FY 2017-2018 and FY 2018-2019. PEDF sought declarations that those appropriations and spending were unconstitutional and that the Respondents breached their ERA trustee duties by allowing the unconstitutional appropriation and spending of these ERA trust assets for non-trust purposes. PEDF replaces that Section V.A. of the Petition with Section V.A below to include relevant facts and law developed after the filing of the Petition, including as-applied analyses of the appropriations and spending challenged by PEDF.

### **A. RESPONDENTS' APPROPRIATION AND SPENDING OF ERA TRUST ASSETS IN THE OIL AND GAS LEASE FUND ARE UNCONSTITUTIONAL**

#### **1. The Respondents Must Conserve and Maintain Our State Forest and Park Public Natural Resources under Our State Constitution for Current and Future Generations**

##### **a. State Forest and Park Public Natural Resources**

A36. For more than a century, Pennsylvanians have supported the need to acquire forest lands, particularly large tracts of contiguous and undeveloped lands remaining within the Commonwealth, to protect our forest natural resources. In 1895, the Division of Forestry was established within the Department of Agriculture to begin this effort. *1895 to 1995, The Legacy of Penn's Woods*, A History of the

Pennsylvania Bureau of Forestry, Lester A. DeCoster, Pennsylvania Historical and Museum Commission, 1995 (*“Legacy of Penn’s Woods”*), page 27 (excerpts incorporated as **Exhibit A2** to this Petition Amendment; *see* Exhibit A2-009).

A37. When European immigrants began settling in the area we now know as Pennsylvania in the late 1600s, forests covered an estimated 90-95 percent of the 28.7 million acres of land in our state. *Id.*, page 1 (Exhibit A2-007). By 1860, the population in Pennsylvania from European settlement had grown to almost 3,000,000—an incredible increase from just over 11,000 in 1700. By 1960, Pennsylvania’s population had grown to over 11,000,000—a thousand fold increase in less than three hundred years. *Id.*, Tables 15 & 16, page 94 (Exhibit A2-028).

A38. Extensive and unsustainable forest clearing occurred to support this rapid population growth and the industrialization of Pennsylvania that accompanied it. *Id.*, page 11 (Exhibit A2-008). By 1900, forests only covered an estimated 32 percent of Pennsylvania. *Id.*, Table 16 (Exhibit A2-028). Few stands of original forest remain. *Id.*, page 45 (Exhibit A2-015).

A39. Dr. J. T. Rothrock, Pennsylvania’s first forestry commissioner, and others fought to obtain state funding to begin acquiring undeveloped clearcut lands to stop unsustainable private uses that had decimated the forests and to begin restoring these lands to forests by planting trees. Work to educate private landowners about better forestry practices and to control rampant forest fires on both state and

private lands was also part of the state's forestry efforts from the beginning. Rothrock's plan to elevate the state's forestry program to a new department was approved on February 25, 1901, and the department began to purchase land to create our State Forest. *Id.*, pages 27, 31, 41-44 (Exhibit A2-009 – 014).

A40. Many others since Rothrock also successfully fought for state funding to continue the process of acquiring and restoring our State Forest. Based on land acquisitions to date, our State Forest covers “approximately 2.2 million acres of forest land, comprises 13 percent of the land [in Pennsylvania] ... [and] represents one of the largest expanses of public forest land in the eastern United States, making it a truly priceless public asset.” *State Forest Resource Management Plan*, DCNR, 2016 (“2016 State Forest Plan”), page 1 (excerpts incorporated as **Exhibit A3**; A3-005).<sup>7</sup> Almost 1.6 million acres of the State Forest (72%) is in northcentral Pennsylvania. *Id.*, pages 25-26 (Exhibit A3-007, 008).<sup>8</sup>

A41. Today, approximately 57% of the land in Pennsylvania is forested, with most of the forested land (69%) owned privately. *Forests of Pennsylvania, 2019*, U.S. Department of Agriculture, Forest Service; incorporated as **Exhibit A4**.<sup>9</sup>

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<sup>7</sup> This plan is available in its entirety at:

<https://elibrary.dcnr.pa.gov/GetDocument?docId=1742835&DocName=2016%20SFRMP%20Full%20Report%209-7.pdf>.

<sup>8</sup> As of 2016, the combined acreage of State Forest in the State Forest Districts in northcentral Pennsylvania (Susquehannock, Tioga, Elk, Sproul, Tiadaghton, Loyalsock, Moshannon and Bald Eagle) totals 1,593,223 acres, which is 72% of the State Forest.

<sup>9</sup> USDA Forest Service, 2020. *Forests of Pennsylvania, 2019*. Resource Update FS-251. Madison, WI: U.S. Department of Agriculture, Forest Service, 2p. <https://doi.org/10.2737/FS-RU-251>.

A42. Currently, Pennsylvania’s forested land is largely “70- to 100-year old second- and third-growth forest communities. These forests continue to evolve under unprecedented circumstances such as chestnut blight, gypsy moth infestations, invasive plant infestations, fire history, white-tailed deer overbrowsing, air pollutants, and other anthropogenic stresses.” 2016 State Forest Plan, page 48 (Exhibit A3-015).

A43. As lands began to be acquired to create our State Forest and the health of the natural ecology of the forest on these lands improved, statutory authority to allow various uses of the State Forest also increased. By 1929, the Department of Forests and Waters, which was the successor to the Department of Forestry, had broad statutory authority to allow numerous uses of the State Forest. Act of April 9, 1929, P.L. 177, No. 175, Article XVIII, §§ 1802-1803; copy of Article XVIII incorporated as **Exhibit A5**.<sup>10</sup>

A44. In addition to acquiring lands for the State Forest and undertaking projects to restore the natural ecology of the forests on these lands, the Department of Forests and Waters began administering statutorily authorized uses of the State

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<sup>10</sup> Article XVIII was repealed in 1970 when these functions were transferred to the new Department of Environmental Resources (“DER”). The forest powers and duties enumerated in §§ 1802 and 1803 became Article XIX-A, §§ 1902-A and 1903-A, of the Administrative Code of 1929, as amended in 1970. These provisions were subsequently repealed in 1995 when these functions were transferred to DCNR. The current provisions, some of which have been modified over the years, are now part of Section 302 of the Conservation and Natural Resources Act (“CNRA”), 71 P.S. § 1340.302.

Forest that allowed the development, consumption and removal of natural resources. Such uses continue today and include the removal of oil, gas and other mineral, timber sale, leasing land for private camps, granting rights-of-way, and providing places to drive motorized recreational vehicles. Much of the infrastructure developed on the State Forest (*e.g.*, roads, bridges, pipelines, well pads, buildings, impoundments, etc.) has been in support of these consumptive uses.

A45. The Department of Forest and Waters began to spend increasing amounts of its annual budget to administer statutorily authorized uses of the State Forest that developed and removed natural resources. Rather than restore the natural ecology of the forest, these allowed uses conflicted with that purpose by converting forest to non-forest and reducing the quality of the forest ecosystem by fragmenting the forest, destroying habitat for plants and animals, increasing invasive species, creating noise, air and water pollution, disturbing and compacting the forest soil and causing other detrimental environmental effects.

A46. The forest camp lease program was an early example of the demands placed on the State Forest by statutorily authorized uses. In 1913, the Department of Forestry was authorized to lease small tracts of the State Forest to Pennsylvanians for campsites. Although the early leases were for simple tent sites, the program grew into longer-term leases and structures ranging from “wood shanties to handsome

homes” were built. *Legacy of Penn’s Woods*, page 43 (Exhibit A2-013);<sup>11</sup> *see also History of Pennsylvania’s State Parks*, William C. Forrey, DER, Bureau of State Parks, 1984 (“*History of State Parks*”), page 11; excerpts incorporated as **Exhibit A6** (Exhibit A6-004). The State Forest camp lease program was “extremely popular and required considerable resources to administer” as “competition for favored sites” occurred and “political influence was exerted at times to obtain preferred areas.” The issuance of such leases was suspended in 1970, but leases for over 4,000 private camps remain on the State Forest today. *Id.*; *see also* 2016 State Forest Plan, page 204 (Exhibit A3-058).<sup>12</sup>

A47. As camps increased on the State Forest, “the proper care of camp fires became more and more important in forest protection. In 1913 and 1914, 135 forest fires were directly traceable to the carelessness of hunters and campers with the resulting damage averaging 373,251 acres burned each of the two years.” By clearing areas to provide designated camping areas with picnic tables and fireplaces,

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<sup>11</sup> Section 1803(a) of the Administrative Code of 1929 (Exhibit A5) gave the department the authority to “lease, for a period not exceeding ten years, on such terms and conditions as it may consider reasonable, to any citizen, church organization, or school board, of Pennsylvania, such portion of any State forest, as the department may deem suitable, as a site for a temporary building to be used by such citizen, church organization, or school board, for health and recreation, as a site for a church or school purpose”); this provision is now found in CNRA § 302(b) and extends such leasing to corporations and associations, allows leasing for up to 35 years under certain circumstances, and mandates that DCNR allow a lessee to rebuild if a cabin is damaged and to renovate and make additions to an existing cabin.

<sup>12</sup> State Forest Resource Management Plan, DCNR, 2016 (full copy available at <https://www.dcnr.pa.gov/Conservation/ForestsAndTrees/StateForestManagement/ResourceManagementPlan/Pages/default.aspx>).

the forest fire risks were reduced. *History of State Parks*, page 13 (Exhibit A6-006). The development of facilities on the State Forest to support public recreation continued to expand to meet the demands of the growing population and the increased access to the forest by motorized vehicles. Many of these recreational areas are now managed as State Parks. *Id.*, pages 10-19 (Exhibit A6-003 – 012).

A48. During the depression in the 1930s, thousands of Pennsylvanians were employed within the Commonwealth at Civilian Conservation Corps (“CCC”) camps located on the State Forest. They “planted 50 million of trees”, conducted “disease control on 450,000 acres (such as blister rust control)” and spent “more than 65,000 man-days ... fighting fires”, but also built extensive infrastructure for increased recreation and tourism. They built “more than 6,300 miles of roads and trails with numerous bridges, 98 small dams, [and] 86 fire lookout towers.” They also built picnic sites, phone lines, forest campsites, and many other facilities. *Legacy of Penn’s Woods*, pages 71-72 (Exhibit A2-019, 020).

A49. Significant increases in the types and availability of outdoor recreational vehicles resulted in corresponding increases in demand for public recreational facilities within the Commonwealth. From the 1950s through the 1970s, recreation and tourism were the primary focus at the Department of Forests and Waters, which became part of the Department of Environmental Resources (“DER”) in 1971.

A50. Maurice Goddard led these departments for 24 years (1955-1978) with the goal of providing recreational facilities within 25 miles of most Pennsylvanians. Additional State Parks were carved out of the State Forest and land acquisition shifted primarily to acquiring park land closer to population centers to achieve this goal. *Id.*, pages 84-85 (Exhibit A2-024, 025); *History of State Parks*, pages 36-38, 41, 53, Table VII (Exhibit A6-013 – 019).

A51. The Department of Forest and Waters began administering an oil and gas extraction program on the State Forest in the late 1940s to support the oil and gas industry in Pennsylvania, as well as recreation and tourism. The acquisition and development of State Parks during the Goddard era was funded through the Oil and Gas Lease Fund Act enacted in 1955, as well as through two state bond issues referred to as Project 70 and Project 500 signed into law in 1964 and 1968, respectively. *Id.*

A52. Statutory authority to sell timber from the State Forest existed from the beginning. However, timber sales dramatically increased during World War II. In the 1920s and early 1930s, Gifford Pinchot had been a strong proponent of the value to the State Forest for Pennsylvania's wood products industry, first as the forestry commissioner and then as governor, but it was World War II that advanced timber sales from the State Forest to support both the wood products industry in



Pennsylvania and the war effort. *Legacy of Penn's Woods*, pages 60-62, 77-79 (Exhibit A2-016 – 017, 021 – 023).

A53. As Pennsylvania's industrial economy continued to grow to support an increasing population, the Department of Forests and Waters faced increasing demands on the State Forest to support this economic development, as well as increasing challenges in meeting these demands while still restoring and protecting the natural ecology of the State Forest.

**b. Paradigm Shift to Trust Management of our State Forest  
and Park Public Natural Resources**

A54. In 1971, Pennsylvanians voted overwhelmingly to add the ERA to their state constitution and fundamentally alter the protections afforded to our State Forest and other public natural resources. The people of Pennsylvania declared the state's public natural resources to be the common property of the people, including future generations, placed them in a trust, and directed the Commonwealth to conserve and maintain them as a trustee by protecting their rights to clean air, pure water and the preservation of the natural, scenic, historic and esthetic values of their environment. The people of Pennsylvania understood that our natural resources were not limitless and that our past and ongoing development, consumption and use of our natural resources was not sustainable.

A55. Our Supreme Court has recognized that adoption of the ERA was due in part to the knowledge that our State Forest was established out of devastation, not preservation, stating:

It is not a historical accident that *the Pennsylvania Constitution now places citizens' environmental rights on par with their political rights*. Approximately three and a half centuries ago, white pine, Eastern hemlock, and mixed hardwood forests covered about 90 percent of the Commonwealth's surface of over 20 million acres. Two centuries later, the state experienced a lumber harvesting industry boom that, by 1920, had left much of Pennsylvania barren. "Loggers moved to West Virginia and to the lake states, leaving behind thousands of devastated treeless acres," abandoning sawmills and sounding the death knell for once vibrant towns. *Regeneration of our forests (less the diversity of species) has taken decades.*

*PEDF II*, 161 A.3d at 916-917 (quoting *Robinson Twp.*, 83 A.3d at 960) (emphasis added).

A56. Our ERA rights are part of the inalienable rights declared by Pennsylvanians in Article I of their state constitution. Our Supreme Court explained the significance and the intent of the people of Pennsylvania when they imposed ERA duties on all branches of the Commonwealth's government under Article I, stating:

That Pennsylvania deliberately chose a course different from virtually all of its sister states speaks to the Commonwealth's experience of having the benefit of vast natural resources whose virtually unrestrained exploitation, while initially a boon to investors, industry, and citizens, led to destructive and lasting consequences not only for

the environment but also for the citizens' quality of life. Later generations paid and continue to pay a tribute to early uncontrolled and unsustainable development financially, in health and quality of life consequences, and with the relegation to history books of valuable natural and esthetic aspects of our environmental inheritance. ***The drafters and the citizens of the Commonwealth who ratified the Environmental Rights Amendment, aware of this history, articulated the people's rights and the government's duties to the people in broad and flexible terms that would permit not only reactive but also anticipatory protection of the environment for the benefit of current and future generations.*** Moreover, public trustee duties were delegated concomitantly to all branches and levels of government in recognition that the quality of the environment is a task with both local and statewide implications, and to ensure that all government neither infringed upon the people's rights nor failed to act for the benefit of the people in this area crucial to the well-being of all Pennsylvanians.

*Id.* at 918-19 (quoting *Robinson Twp.*, 83 A.3d at 963) (emphasis added)).

A57. By declaring their fundamental rights to have their public natural resources conserved and maintained as part of the corpus of a trust, the people of Pennsylvania fundamentally altered the Commonwealth's duties in managing our State Forest and other public natural resources—they required all branches and levels of state government in Pennsylvania to act as trustees with fiduciary duties to carry out the ERA trust purposes of conserving and maintaining their public natural resources and ensuring their rights to clean air and pure water and the preservation of the natural, scenic, historic and esthetic values of their environment.

A58. The natural ecology of the State Forest is important to forest lands across the Commonwealth, as well as the entire northeastern United. States. The State Forest provides “a core zone of forest and critical link in maintaining the

connectivity of the [] forests in several regions of the state” with the State Forest in northcentral Pennsylvania partially comprising “the largest continuous block of forest in the northeastern United States.” 2016 State Forest Plan, page 34 (Exhibit A3-009).

A59. An important consideration in managing the State Forest “is *promoting core forest characteristics and minimizing and managing the potential effects due to forest loss and forest fragmentation in order to maintain the health, viability, and ecosystem function of forest habitats.*” *Id.* (emphasis added). Core forests, which are “*large tracts of intact forest with minimal fragmenting features ... are important to ecosystem function and health* by providing contiguous habitat for a variety of species; limiting the spread of invasive species; promoting species migration and genetic fitness; and maintaining water quality.” *Id.* An estimated **74% of the State Forest is characterized as core forests greater than 500 acres.** *Id.* (emphasis added).

A60. The State Forest today is also “an important reservoir for both storing carbon and sequestering it from the atmosphere ... [and] sequestered an estimated 4.7 million tons carbon [in 2015], while storing (above ground) approximately 143 million tons. Managing the state forest sustainably—protecting it from threats and mortality, promoting productivity, ensuring adequate regeneration, and limiting forest conversion—contributes to carbon sequestration and storage and provides

society a valuable service in mitigating the impacts of climate change.” *Id.* at 40 (Exhibit A3-013).

A61. As PEDF member Cynthia Bower has succinctly stated, “the increase in carbon dioxide (CO<sub>2</sub>) in the atmosphere is the primary contributor to climate change ... [and] the easiest, best, and least expensive CO<sub>2</sub> antidote has been around for likely longer than humanity. It’s called a tree.” Affidavit of Cynthia Bower testifying to role of the State Forest in limiting climate change (“Bower Climate Change Affidavit”); incorporated as **Exhibit A7** (Exhibit A7-001).

A62. In 1995, the General Assembly recognized that Pennsylvania’s State Forest and State Parks “contain some of our State’s most precious and rare natural areas” and enacted the Conservation and Natural Resources Act (“CNRA”) to establish DCNR as the administrative department tasked with the day-to-day trustee duties of the Commonwealth to conserve and maintain these public natural resources (act of June 28, 1995, P.L. 89, No. 18). 71 P.S. § 1340.101.

A63. In enacting the CNRA, the General Assembly recognized that conservation and maintenance of our State Forest and State Parks had “taken a back seat” to other environmental problems, that “not enough time, energy and money” was being devoted to solving the problems facing our State Forest and State Parks, and that a “cabinet-level advocate” was needed to highlight these and other conservation issues for the public. 71 P.S. § 1340.101(a)(7)-(9).

A64. With passage of the CNRA, the Bureau of Forestry and the Bureau of State Parks were transferred to DCNR. However, the statutorily authorized uses of the State Forest and State Parks were all retained through Sections 302, 303 and 304 of the CNRA. 71 P.S. §§ 1340.302-1340.304.

A65. The Bureau of Forestry also adopted a new strategic plan in 1995 entitled *Penn's Woods—Sustaining Our Forests* (“*Penn's Woods* strategic plan”); incorporated as Exhibit J to the Petition (excerpts also incorporated as **Exhibit A8** to this Petition Amendment for ease of reference).<sup>13</sup>

A66. To accomplish its trustee duties under the ERA, the *Penn's Woods* strategic plan adopted the principles of ecosystem management. The strategic plan states that “[o]ne of the basic tenets of [ecosystem management] is that forests, rather than being viewed as containing a set of resources, in fact, are more than the sum of their parts. Forests are comprised of quantifiable components such as trees, but forests are also systems performing various functions and processes.” *Id.* at 8 (Exhibit A8).

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<sup>13</sup> As noted above, 1995 was the 100<sup>th</sup> anniversary of the creation of the first state forestry agency, which was commemorated by publication of the *Legacy of Penn's Woods*. Dr. James R. Grace, the State Forester and director of the Bureau of Forestry in 1995, oversaw the preparation of both the new strategic plan and the *Legacy of Penn's Woods*. Dr. Grace earned his Ph.D. in Forest Resources from the Pennsylvania State University in 1978, with a focus on forest ecology. He also earned a B.S. in forest management at the University of Vermont in 1970 and a master's degree in forest science at Yale University in 1972. After serving as DER deputy secretary for forestry, state parks, and geological survey, DCNR state forester, and DCNR deputy secretary for forests and parks from 1987-2010, he served as the Maurice K. Goddard Chair in Forestry and Environmental Resource Conservation at the Pennsylvania State University from 2010-2014.

A67. The *Penn's Woods* strategic plan recognizes that “the primary goal of ecosystem management is to keep the complex interdependencies of ecosystems intact and functioning well over long periods. *The essence of maintaining ecosystem integrity is to retain the health and resilience of systems so they can accommodate short-term stresses and adapt to long-term changes.*” *Id.* (emphasis added).

A68. As Roy A. Siefert, retired Forest Manager of the Tioga State Forest District, describes, “[f]orest ecosystems are more than trees and plants. They include the water, (ground and surface), all fauna and flora, the soil and minerals that enrich them and the hydrology that enriches the soil, the air, insects, birds, fish, reptiles, amphibians and the forces that alter their function. Ecosystem management is making decisions about the management of all those resources to ensure that they are protected and enhanced.” Affidavit of Roy A. Siefert (“Retired State Forest District Manager Siefert Affidavit”), incorporated as **Exhibit A9**; *see also* Affidavit of Douglas J. D’Amore, retired Forest Manager of the Sprout State Forest (“Retired State Forest District Manager D’Amore Affidavit”, incorporated as **Exhibit A10** (“Our state forest is an intact functioning ecosystem [that] has provided and continues to provide Pennsylvania with one of the largest almost contiguous forest ecosystems in the nation.”).

A69. The Bureau of Forestry recognizes in the *Penn's Woods* strategic plan that a “key element in maintaining ecosystem integrity and viability is the maintenance of biological diversity”, which is “the variety and abundance of species, their genetic composition, and the communities, landscapes and ecosystems in which they occur.” The bureau further recognizes that biodiversity “is a foundation, serving as building blocks for ecosystems and as a barometer for ecosystem health”, including “our everyday needs.” *Penn's Woods* strategic plan, page 9 (Exhibit A8).

A70. The Bureau of Forestry identifies “habitat destruction and fragmentation, along with degradation from pollution, [as] the greatest threats to biodiversity” noting that “Pennsylvania has lost as many as 156 species of native vascular plants and vertebrates in the past 300 years”, that an “additional 351 species have become endangered or threatened”, and that “56 percent of Pennsylvania’s wetlands have been lost since 1780.” *Id.*

A71. The Bureau of Forestry identifies “*the most critical issue facing our forests [as] how to ensure the renewal of healthy and productive forest ecosystems.*” *Id.* (emphasis added). The bureau notes that factors inhibiting natural forest regeneration include “poor seed production, competing vegetation, insects and disease” and white-tailed deer. *Id.* “In many areas of Pennsylvania, the forest floor is nearly devoid of small tree seedlings. ... As a result, forests are not adequately



regenerated to acceptable biological communities ... following natural and human-caused disturbances.” *Id.*

A72. In developing specific ecosystem management goals and policies in the *Penn’s Woods* strategic plan for both the State Forest and private forest land in Pennsylvania, the Bureau of Forestry acknowledges that “[h]umans are part of the ecosystem and must be taken into consideration in the development of management strategies.” *Id.* at 8. However, the goals and objectives adopted in the strategic plan recognize that the statutorily authorized uses of the State Forest are limited by the bureau’s trustee duties to conserve and maintain the natural ecology of the forest.

A73. In consideration of both its ERA trustee duties and its need to administer statutorily authorized use of the State Forest public natural resources for non-trust purposes, the Bureau of Forestry established the goal in the *Penn’s Woods* strategic plan to “***manage State Forests under sound ecosystem management, to retain their wild character and maintain biological diversity while providing pure water, opportunities for low density recreation, habitats for forest plants and animals, sustained yields of quality timber, and environmentally sound utilization of mineral resources.***” *Id.* at 23 (emphasis added).

A74. The Bureau of Forest policies adopted in the *Penn’s Woods* strategic plan to implement the above State Forest management goal, which are stated below,

support the bureau's need to limit and remedy degradation, diminution and/or depletion of State Forest public natural resources from statutorily authorized uses.

PUBLIC PARTICIPATION POLICY: Public participation will be an integral part of the management of State Forest lands.

STATE FOREST RECREATION POLICY: State Forest lands should provide citizens of the Commonwealth with the opportunity for the types of healthful, *dispersed outdoor recreation* that can only be obtained from large forested areas. State Forest visitors should be assured a high-quality outdoor experience.

STATE FOREST TIMBER POLICY: State Forest lands should provide a sustained yield of high quality timber *consistent with principles of ecosystem management*.

STATE FOREST WATER AND SOIL: Surface and subsurface water quality and soil fertility *should be maintained as the highest possible quality*.

STATE FOREST FAUNA AND FLORA POLICY: State Forest lands *should provide habitats that support a diversity of animal and plant communities* and should serve as examples in *promoting the conservation of native wild flora*.

STATE FOREST MINERALS POLICY: The department should hold virgin, surface-minable coal as reserves and should explore and develop other minerals on State Forest lands to provide long-term good to the citizens of the Commonwealth *only when these activities are consistent with ecosystem management*.

STATE FOREST INFRASTRUCTURE POLICY: The infrastructure of the State Forests should be maintained at standards that would ensure the safety and quality experience of visitors. *Additional State Forest lands should be acquired to expand public recreational opportunities, protect the wild character of existing State Forest lands and conserve biodiversity*.

*Id.* at 24-28 (emphasis added).

A75. The Bureau of Forestry states that its strategic plan “amounts to a fundamental change in forest management philosophy predicated on the concept of a sustained forest rather than a sustained yield” with the “old forest management philosophy of use, conserve and preserve [] being supplanted by a new paradigm, ecosystem management encompassing all forest values.” *Id.* at 31. In other words, while the bureau recognizes its continuing need to administer statutorily authorized uses of the State Forest for non-trust purposes, it must limit and remedy the degradation, diminution and/or depletion of the State Forest public natural resources from these statutorily authorized uses.

A76. To date, however, the Bureau of Forestry has not identified in its State Forest resource management plans, including its most recent statewide plan issued in 2016, its processes and procedures for limiting and remedying the statutorily authorized uses of State Forest for non-trust purposes to fulfill its trustee duties under the ERA to conserve and maintain these public natural resources.

A77. As retired Tioga County Planner James Weaver recognizes, the only balance that the Bureau of Forestry needs to achieve in managing our State Forest is the “Balance of Nature” (*i.e.*, the balance of the ecological functions and values of the forest ecosystem), “NOT the balance of multiple use forest management.” DCNR’s Affidavit of James Weaver, biologist and retired Tioga County Planner (“Weaver Affidavit”); incorporated as **Exhibit A11**; Exhibit A11-001. Weaver

further states that the “only true definition of a working forest is the cycling of carbon and the community dynamics of the ecosystem ... the interactions of the forest biome with the atmosphere, watersheds, and species (plants and animals) within the forest on the landscape.” Exhibit A11-002. Weaver recognizes that under the ERA our “forest and resources come first” and that “DCNR needs to focus on ecosystem management that was first outlined in the Strategic Plan, Penn’s Woods, in 1995” rather than shifting its focus to “balancing multiuse demands placed on the public lands”.

A78. The Respondents have the ultimate responsibility to ensure that statutorily authorizes uses of our State Forest and State Park public natural resources are implemented consistent with their constitutional duties as trustee of these public natural resources.

A79. To fulfill their trustee duties under the ERA, they must ensure that any past, present and future degradation, diminution and/or depletion of these public natural resources by these statutorily authorized uses are remedied, and that the ERA trust assets derived from these uses are spent for this trust purpose prior to being spent for any other trust purpose. By doing otherwise, the Respondents breach their trustee duties under the ERA.

**2. Court Determinations that As-Applied Analysis Needed to  
Review the Constitutionality of the Respondents’  
Appropriation and Spending of ERA Trust Assets in the  
Oil and Gas Lease Fund**

A80. PEDF contends in this case that the Respondents failed to appropriate, account for and spend ERA trust assets in the Oil and Gas Lease Fund in fiscal years 2017-2018 and 2018-2019 in compliance with the ERA and their trustee duties.

A81. Based on Commonwealth Court and Supreme Court decisions issued since PEDF filed its Petition in this case, review of the constitutionality of the Respondents’ appropriation and spending of these ERA trust requires an as-applied analysis of their actual spending. The legal precedents established by the courts in these decisions are important to the review of PEDF’s claims in this Petition, as amended, and are set forth below.

A82. On February 15, 2019, PEDF filed an application for summary relief in this case seeking declarations as a matter of law that Respondents’ legislative appropriations and Fiscal Code provisions authorizing the spending of ERA trust assets in the Oil and Gas Lease Fund for DCNR’s annual operations and for transfers to the Marcellus Legacy Fund were unconstitutional on their face. PEDF also sought a declaration that the Respondents had a duty to enact affirmative legislation with safeguards to ensure the ERA trust assets in the Oil and Gas Lease Fund were used for trust purposes; and declarations that the Respondents had a duty to provide a

detailed accounting of their deposits into the Oil and Gas Lease Fund and their expenditures of ERA trust assets in this fund for trust purposes.

A83. On April 17, 2019, the Respondents filed a joint application for summary relief seeking declarations that the legislative enactments challenged by PEDF were not facially unconstitutional, that no affirmative legislation regarding spending from the Oil and Gas Lease Fund was required, and that their spending of ERA trust assets for DCNR's operations were consistent with their ERA trust responsibilities.

A84. Following briefing and oral argument on the cross-applications for summary relief, the Commonwealth Court issued an unreported opinion and order on October 22, 2020 granting in part and denying in part the parties' cross-applications for summary relief. *PEDF v. Commonwealth*, No. 358 M.D. 2018, unreported memorandum opinion and order by Judge Wojcik filed on October 22, 2020 ("*PEDF IV*").

A85. In *PEDF IV*, the Commonwealth Court concluded, consistent with its earlier decision in *PEDF v. Commonwealth*, 214 A.3d 748 (Pa. Cmwlth. 2019) ("*PEDF III*"), that one-third of the bonus, rental and penalty payments paid under State Forest oil and gas leases was income and not part of the corpus of the ERA trust, thus allowing the Respondents to spend these funds for non-trust purposes. *Id.* at 16. Based on its income determination in *PEDF III*, the Commonwealth Court

determined in *PEDF IV* that the appropriations from the Oil and Gas Lease Fund in the General Appropriations Acts of 2017 and 2018 for DCNR’s annual operations were not facially unconstitutional because the Oil and Gas Lease Fund contained both ERA trust principal that had to be used for trust purposes and income that was not part of the corpus of the ERA trust and could be used for non-trust purposes. *Id.* at 16-17. The court noted, however, that it was “unprepared to grant the Commonwealth’s sweeping request that its current usage [of the Oil and Gas Lease Fund] is wholly consistent with its [ERA] trustee responsibilities. Such a declaration requires an as-applied analysis,” which the court was not prepared to address on the cross-applications for summary relief. *Id.* at 17.

A86. The Commonwealth Court in *PEDF IV* denied PEDF’s request for a declaration that the ERA trust funds being generated from the sale of State Forest public natural resources in northcentral Pennsylvania must be used to conserve and maintain the public natural resources of the State Forest, along with associated State Parks, in this same region (northcentral Pennsylvania). *Id.* at 18-20. In doing so, however, the court cautioned the Respondents “that the failure to remedy the degradation, diminution, or depletion of the State forests and parks impacted by Marcellus wells – the very public resources harmed in order to generate these funds – may constitute a failure to preserve the trust and a dereliction of its fiduciary duties under [the ERA].” *Id.* at 20, n.16.

A87. The Commonwealth Court in *PEDF IV* denied PEDF’s requests for declarations that Sections 1601.2-E and 1726-G of the Fiscal Code were facially unconstitutional under the ERA. *Id.* at 20-33.

A88. The Commonwealth Court in *PEDF IV* denied PEDF’s request for a declaration that affirmative legislation is required to establish safeguards to ensure that use of the Oil and Gas Lease Fund complies with the ERA. While recognizing the Supreme Court’s determination in *Robinson Township v. Commonwealth*, 83 A.3d 901, 933 (Pa. 2013) (plurality), that the ERA requires the Commonwealth to “act affirmatively via legislative action to protect the environment,” the Commonwealth Court observed that mandating such legislation “is not the role of the judiciary.” *Id.* at 34. However, the court also denied the Respondents’ request “for a sweeping declaration that ‘no affirmative legislation is needed’ for the Commonwealth to properly effectuate its [ERA] duties and responsibilities.” *Id.* at 35. The court observed that while the ERA “is self-executing for enforcement purposes, ... some legislative or executive measures are necessary to ensure that the trust assets are properly spent on trust purposes. However, [the court] will not dictate how the [other branches of government] should exercise their delegated powers in this regard.” *Id.*

A89. The Commonwealth Court in *PEDF IV* granted PEDF’s request for a declaration that Respondents must maintain a detailed accounting of the ERA trust



assets in the Oil and Gas Lease Fund and how they are spent. The court found that “[b]y commingling monies in the [Oil and Gas] Lease Fund without classification and by not maintaining adequate records, the Commonwealth is neglecting its fiduciary duties” under the ERA; and that “an accounting is necessary to ensure that the assets of the trust are being used only for purposes authorized by the trust or necessary for the preservation of the trust in accordance with the [ERA].” *Id.* at 36. The court also noted its extreme concern based on “a rough estimate of the monies deposited into and diverted from the [Oil and Gas] Lease Fund ... that the Commonwealth may not be administering the trust funds with ‘loyalty, impartiality, and prudence.’” *Id.*, n. 22. In granting PEDF’s request, the Commonwealth Court declared that “the Commonwealth, as trustee of Pennsylvania’s public natural resources, is required to keep detailed accounts of the trust monies derived from oil and gas leases and track how they are spent as part of its administration of the trust.” *Id.* at 36-37. The court denied the Respondents’ application for summary relief “insofar as it seeks a declaration that its current usage of the trust is wholly consistent with its [ERA] trustee responsibilities.”

A90. On July 21, 2021, the Supreme Court issued an opinion and order in PEDF’s appeal of the Commonwealth Court’s decision in *PEDF III. PEDF v. Commonwealth*, 255 A.3d 289 (Pa. 2021) (“*PEDF V*”). In *PEDF V*, the Supreme Court reiterated its findings in *PEDF v. Commonwealth*, 161 A.3d 911 (Pa. 2017)

(“*PEDF II*”) that the ERA created a trust subject to private trust law and “rejected the Commonwealth’s averment that revenues generated from the sale of trust assets may be redirected to general budgetary matters (i.e., non-trust purposes) on the theory that the ERA was silent on that point.” 255 A.3d at 297. The court also reiterated its holding in *PEDF II* that “royalty revenue streams [from State Forest oil and gas leases] must be returned to the [ERA] trust” because of “their direct relation to the sale of trust assets” and that because “royalties must be returned to the corpus, ... Sections 1602-E and 1603-E of the Fiscal Code, which related to royalties, were facially unconstitutional.” *Id.* at 298.

A91. In *PEDF V*, the Supreme Court concluded that bonus, rental and penalty interest payments made under State Forest oil and gas leases qualify as income and are not for the sale of trust assets; nonetheless, the court found these payments to be part of the corpus of the ERA trust because the ERA does not create any entitlement to income in the beneficiaries. *Id.* at 314. The court “stress[ed] the distinction between the generation of income and the distribution of that income. Although the trustee (the Commonwealth) is authorized to generate income from trust assets in its discretion, it does not follow that the beneficiaries are entitled to distribution of those monies through allocation to the general fund. Such distribution is not supported by the purpose of the trust: to conserve and maintain the public natural resources.” *Id.*

A92. In considering the trust entitlements granted by the plain language of the ERA, the Supreme Court in *PEDF V* found that the “language unmistakably conveys to the Commonwealth that when it acts as a trustee it must consider an incredibly long timeline and cannot prioritize the need of the living over those yet to be born.” *Id.* at 310. The court further found that the “explicit inclusion 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 generations, reinforced by a political process characterized by limited terms of office.’” *Id.* (quoting *Robinson Twp.*, 83 A.3d at 959 n. 46).

A93. Based on its analysis in *PEDF V*, the Supreme Court found transfers from the Oil and Gas Lease Fund to the General Fund authorized by Sections 1604-E and 1605-E of the Fiscal Code, as well as Section 1912 of the Supplemental General Appropriations Act of 2009, to be facially unconstitutional. *Id.*

A94. ERA trust funds totaling \$383,000,000 were transferred to the General Fund for general state government operations in fiscal years 2009-2010 and 2010-2011 based on the legislative authorizations found to be unconstitutional in *PEDF V*.

A95. On August 5, 2022, the Supreme Court issued an opinion and order affirming the Commonwealth Court’s determination in *PEDF IV* that, among other things, the legislative appropriations and Fiscal Code provisions appropriating ERA

trust assets in the Oil and Gas Lease Fund for DCNR operations and for transfers to the Marcellus Legacy Fund were not facially unconstitutional. *PEDF v. Commonwealth*, 279 A.3d 1194 (Pa. 2022) (“*PEDF VI*”).

A96. Because the Supreme Court had already determined in *PEDF V* that the bonus, rental and penalty payments made under the State Forest oil and gas leases are part of the corpus of the ERA trust, the Supreme Court’s affirmation in *PEDF VI* was not based on the Commonwealth Court’s reasoning that the Oil and Gas Lease Fund included income that could be used for non-trust purposes. *Id.* at 1205.<sup>14</sup>

A97. In affirming that Sections 104(p) and 1601 of the General Appropriations Acts of 2017 and 2018 were not facially unconstitutional, the Supreme Court acknowledged in *PEDF VI* that “basic trust law clearly empowers the Commonwealth, as trustee, to incur reasonable costs in administering the trust to conserve and maintain Pennsylvania’s public natural resources.” The court also acknowledged the Respondents’ arguments that DCNR has trustee duties as “the cabinet-level advocate for our State forest and park lands, as well as other natural resources” under the CNRA. 71 P.S. § 1340.101(b). Thus, the court concluded that given DCNR’s statutory responsibilities, “use of trust assets to fund DCNR’s

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<sup>14</sup> Justice Donohue noted in her concurring opinion that the Oil and Gas Lease Fund as reconstituted by the General Assembly does now allow for the possible deposit of non-trust assets into the fund under Section 1601.2-E(b)(3) of the Fiscal Code. *Id.* at 1216. 72 P.S. § 1601-2-E(3) (“The following shall be deposited into the fund: ... (3) Any other money appropriated or transferred to the fund.”)

operations is within the authority of the Commonwealth as trustee to incur costs in administering the [ERA] trust, absent demonstration that these administrative costs are unreasonable or that the DCNR has failed to act with prudence, loyalty, or impartiality in carrying out its fiduciary duties.” *Id.* at 1206.

A98. The Supreme Court in *PEDF VI* affirmed that appropriations under Section 1601.2-E of the Fiscal Code were not facially unconstitutional because that the statutory language “requires the General Assembly to consider its mandatory trustee duties and does not authorize the Commonwealth to use trust assets for non-trust purposes.” *Id.* at 1211. However, the court also states that this holding “does not negate the potential of an as applied challenge to the General Assembly’s ultimate appropriation of the [Oil and Gas] Lease Fund. We reiterate that in expending funds from the newly transferred [Oil and Gas] Lease Fund, the General Assembly has a duty to conserve and maintain the [ERA] trust assets which ‘implicates a duty to prevent and remedy the degradation, diminution, or depletion of our public natural resources’ and a duty to act toward the corpus of the trust ‘with prudence, loyalty, and impartiality.’” *Id.* at 1211-1212 (quoting *PEDF II*, 161 A.3d at 932, and *Robinson Twp.*, 83 A.3d at 956-957).

A99. A concurring opinion in *PEDF VI* written by Justice Donohue and joined by Justice Todd added that “the Commonwealth Court’s order requiring the Commonwealth to account for asset expenditures, as specifically requested by

PEDF, will bring any as-applied constitutional defects to light.” *Id.* at 1214. These justices advised that they would not have joined a majority opinion that deemed “the entirety of DCNR’s budget to be a reasonable cost of trust administration” and noted that the Commonwealth Court had rejected such a conclusion. *Id.* This concurring opinion acknowledged that DCNR may engage in activities unrelated to ERA trust purposes, but “express[ed] no view on which set of activities would qualify as trust purposes and which would not” because the court “lack[ed] any factual basis to rule on that issue.” *Id.* at 1217. Nonetheless, Justice Donahue, as joined by Justice Todd, was “highly sensitive to the possibility that the General Assembly has violated its fiduciary duties by creating a funding scheme that forces DCNR to utilize trust assets for non-trust purposes.” *Id.* at 1217-1218. This concurring opinion concludes stating that Justices Donahue and Todd join the majority opinion “with the understanding that any as-applied challenge will ensure that the Commonwealth is not, in fact, diverting trust assets to non-trust purposes.” *Id.* at 1220.<sup>15</sup>

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<sup>15</sup> Justices Dougherty and Wecht dissented in *PEDF VI* from the holding in the majority opinion that appropriations to DCNR from the Oil and Gas Lease Fund to pay for its general government operations were not facially unconstitutional. Justice Dougherty would have found Sections 104(p) and 1601 of the General Appropriations Acts of 2017 and 2018, as well as Sections 1601.2-E(b) and (c) of the Fiscal Code, to be facially unconstitutional. *Id.* at 1221. Justice Dougherty recognized that “DCNR has responsibilities other than conservation and maintenance” and would have found the statutes to be facially unconstitutional “because they ‘permit the trustee to use trust assets for non-trust purposes, a clear violation of the most basic of a trustee’s fiduciary obligations.’” *Id.* at 1224 (quoting *PEDF II*). Justice Wecht would have held Sections 104(p) and 1601 of the General Appropriations Acts of 2017 and 2018 to be facially unconstitutional under *PEDF II* because they “reflect no limitations on the use of trust corpus to fund DCNR.” *Id.* at 1233. He observed that using money in the Oil and Gas Lease Fund to fund DCNR’s general operations “is constitutional only to the extent that general operations further the trust purpose of conservation

A100. The Respondents did not appeal the Commonwealth Court’s declaration in *PEDF IV* in 2020 that the Commonwealth is required to provide a detailed accounting of its deposits into and expenditures from the Oil and Gas Lease Fund to demonstrate its spending of ERA trust assets is for trust purposes.

**3. DCNR Incurs Significant Costs to Administer Many Statutorily Authorized Uses of State Forest and Park Public Natural Resources for Non-Trust Purposes**

A101. Following the Supreme Court’s decision in *PEDF VI*, the Respondents provided additional details regarding their spending of ERA trust assets derived from the State Forest trust corpus in the Oil and Gas Lease Fund for DCNR operations.

A102. The details provided by the Respondents show, based on the as-applied analyses set forth in Section V.A.7. below, that the Respondents spent most of these ERA trust assets for DCNR operations without differentiating between trust and non-trust purposes, just as they spent General Fund appropriations. DCNR incurs significant costs to administer non-trust purposes, including statutorily authorized uses of State Forest and Park public natural resources for non-trust purposes set forth in detail in this Section V.A.3., statutorily authorized statewide programs for non-trust purposes, and general administration for non-trust purposes,

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and maintenance of public natural resources.” *Id.* Justice Wecht would also have found Section 1601.2-E(b) of the Fiscal Code to be facially unconstitutional because it allows the commingling of trust and non-trust funds without an accounting and because the Commonwealth “presently is failing to account for the origin of the assets in the [Oil and Gas] Lease Fund, to account for how the Lease Fund money is spent, or to establish whether the expenses that the Commonwealth claims as a trustee are reasonable.” *Id.* at 1234.

both of which are set forth in detail in Section V.A.5. below. Costs incurred by DCNR to administer these non-trust purposes are not reasonable costs of administering the ERA trust.

A103. As set forth in Section V.A.1. above, DCNR, like its predecessors, incurs significant costs to administer statutory authorized uses of State Forest and State Park public natural resources, which are part of the corpus of the ERA trust, for purposes that do not conserve and maintain these public natural resources (*i.e.*, for non-trust purposes). The adoption of the ERA in 1971 did not eliminate these statutorily authorized uses of our State Forest and State Park trust corpus for non-trust purposes, and DCNR continues to expend significant portions of its budget administering these uses, which are set forth in more detail in this section below.

A104. In addition, existing statutorily authorized uses of our State Forest trust corpus for non-trust purposes have caused and continue to cause extensive degradation, diminution and/or depletion of the natural ecology of State Forest that must be remedied to conserve and maintain the State Forest trust corpus, which is set forth in detail in Section V.A.4. below.

A105. Thus, not only have the Respondents spent ERA trust assets derived from the degradation of the State Forest trust corpus for costs incurred by DCNR to administer non-trust purposes, the Respondents have failed to administer these ERA trust assets for actions needed both now and in the future to remedy the ongoing and



extensive degradation of the State Forest from existing uses for non-trust purposes, which are also set forth in detail in Section V.A.4. below, thus depleting the State Forest trust corpus.

**a. Cost Incurred to Administer Statutorily Authorized Uses of the State Forest Trust Corpus for Non-Trust Purposes**

A106. In the over 2.2 million acres of State Forest, DCNR administers numerous statutorily authorized uses for non-trust purposes, including oil, gas and other mineral extraction; natural gas storage; nuclear energy development; ATV/snowmobile use; camp leases; pipeline, public utility, and communications rights-of-way; timber sales; and road development and maintenance.

A107. In 1971, the Bureau of Forest had become part of the newly established DER just a few months before Pennsylvanians voted overwhelming to add the ERA to their state constitution. When the General Assembly transferred the Bureau of Forestry to DER, it transferred all the same statutory authorities for use of the State Forest with little, if any, substantive changes (act of December 3, 1970, P.L. 834, No. 275). Likewise, when this bureau was transferred to DCNR in 1995 under the CNRA, these same statutory authorities were again transferred with little, if any, substantive changes.

### ***Oil and Gas Extraction***

A108. DCNR administers the statutorily authorized use of the State Forest for the non-trust purpose of oil and gas extraction pursuant to Section 302(a)(6) of the CNRA, 71 P.S. § 1340.302(a)(6).

A109. As of 2016, the DCNR Bureau of Forestry was administering 123 oil and gas leases on the State Forest encompassing “approximately 301,136 acres, primarily in northcentral Pennsylvania.” 2016 State Forest Plan, page 162 (Exhibit A3-030).

A110. In describing the geologic resources of the State Forest in its 2016 State Forest Plan, the Bureau of Forestry states that “[e]xtraction of geologic resources such as coal, oil, and natural gas [] has long been a keystone of Pennsylvania’s economy. These resources provide benefits to society including: domestic energy for heating, fuel, and electrical generation; material for plastic polymers and manufacturing and industrial processes; material for infrastructure construction; and job creation in areas throughout the commonwealth.” *Id.*, page 154 (Exhibit A3-023).

A111. The 2016 State Forest plan states that the “economic use and sound extraction and utilization of geologic resources is part of the bureau’s mission in managing [state forest] lands. Managing geologic resources requires thorough analysis, strategic planning, and attentive oversight to ***ensure that the value of***

*geologic resources is balanced with other forest uses and values.” Id.*, page 156 (emphasis added) (Exhibit A3-024).

A112. Based on this statement, the 2016 State Forest Plan is allowing the economic benefits the Commonwealth derives from the extraction and sale of State Forest oil, gas, and other geologic resources, which are part of the ERA trust corpus, to be “balanced” against the degradation, diminution and depletion of the State Forest trust corpus, thus implying that the Commonwealth does not have the duty to remedy this degradation of the trust corpus. This statement is inconsistent with the *Penn’s Wood* strategic plan, as discussed in Section V.A.1. above, and the ERA trustee duty to conserve and maintain these public natural resources—the plain meaning of which “implicates a duty to prevent and remedy the degradation, diminution, or depletion of our public natural resources.” *PEDF II*, 161 A.3d at 932.

A113. The 2016 State Forest Plan cites the CNRA as the authority for DCNR “to lease lands of the commonwealth for oil and natural gas extraction, natural gas storage, and hard mineral development whenever it is in the best interests of the commonwealth ... including state forests, state parks, navigable waters, and subsurface oil and gas rights.” 2016 State Forest Plan, pages 156-157 (Exhibit A3-024, 025).

A114. Approximately 1.5 million acres of State Forest “are located within areas historically developed for oil and gas.” *Id.* The Bureau of Forestry “expects

that approximately 3,000 [shale gas] wells may be drilled to fully develop the [state forest] lands it currently has leased” and “estimates that the Marcellus Shale is approximately 16 percent developed on lands currently leased.” *Id.*, page 163 (Exhibit A3-031). “Approximately 1,800 wells have been drilled into conventional formations on lands leased by the bureau since 1947. A significant number of these wells have become uneconomic or ceased production altogether and have been plugged and abandoned.” *Id.*, page 167 (Exhibit A3-035)

A115. The Bureau of Forestry also has “a key role ... to actively manage gas development on state forest lands where the commonwealth has no ownership of the subsurface. In general, the bureau is unable to prohibit development where it does not own the subsurface rights as it [would infringe] upon the subsurface owners’ rights to access their property. Because subsurface development could impact various forest resources, the bureau works closely with operators developing the subsurface to promote best management practices and attempts to manage operations consistently.” *Id.*

A116. The 2016 State Forest Plan states that the “bureau held its first lease sale targeting the Marcellus Shale in 2008. Approximately 74,000 acres were leases for a record bonus payment of \$163 million. The bureau’s second lease sale targeting the Marcellus Shale was held in 2010, with 31,947 acres leased for \$130 million. In

2010, 32,896 acres were leased, which generated \$120 million in bonus payment.”  
*Id.* at 159 (Exhibit A3-027).

A117. The 2016 State Forest Plan states that “[f]ollowing the 2010 lease sales, the bureau developed a monitoring team to ensure that shale-gas development was accomplished in a manner that maintained other state forest uses and values.”  
*Id.* The plan acknowledges that the first shale-gas monitoring report was issued in 2014 and that subsequent monitoring reports were expected to follow. *Id.*

A118. In its second shale-gas monitoring report issued in July 2018, after PEDF filed its Petition in this case, DCNR reported that 312,893 acres of State Forest were leased by the Commonwealth for oil and gas extraction and another 331,287 acres were subject to oil and gas extraction through development on tracts with severed, privately-owned subsurface oil and gas rights. DCNR Shale Gas Monitoring Report, July 2018 (“2018 Shale Gas Monitoring Report”), pages 7; excerpts incorporated as **Exhibit A12** (Exhibit A12-009).<sup>16</sup>

A119. Since the acreage of State Forest subject to oil and gas development on tracts with severed, privately-owned subsurface oil and gas rights is similar to the acreage leased by the Commonwealth, presumably the estimated number of shale

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<sup>16</sup> This report is available in its entirety at:  
<http://elibrary.dcnr.pa.gov/GetDocument?docId=1743759&DocName=37999%20DCNR%20Shale%20Gas%20Report%202018%20Interactive.pdf>.

gas wells that may be drilled on the State Forest could double from 3,000 to 6,000 wells.

A120. Of the State Forest acreage subject to oil and gas development, over 90% lies within the State Forest districts in northcentral Pennsylvania (Elk, Loyalsock, Moshannon, Sproul, Susquehannock, Tiadaghton and Tioga). These districts are referred to as the core shale gas districts. 2018 Shale Gas Monitoring Report, page 23, Figure 2.2 (Exhibit A12-010).

A121. The purpose of this statutorily authorized use of the State Forest trust corpus is not to conserve and maintain the State Forest public natural resources. Thus, the cost of administering oil and gas extraction on the State Forest is not a reasonable cost of administering the ERA trust.

A122. Based on the as-applied analyses of the Respondents' spending of ERA trust assets derived from the State Forest trust corpus set forth in Section V.A.7. below, the Respondents spent trust assets to administer this non-trust purpose to replace General Fund appropriations.

### ***Natural Gas Storage***

A123. DCNR administers the statutorily authorized use of the State Forest for natural gas storage pursuant to Section 302(b)(10) of the CNRA, 71 P.S. § 1340.302(b)(10). DCNR reported that 68,483 acres of the State Forest are under natural gas storage leases. 2018 Shale Gas Monitoring Report, page 7 (Exhibit A12-

009). Of that acreage, DCNR administers gas storage leases on 36,525 acres of State Forest, with most of that acreage in northcentral Pennsylvania. 2016 State Forest Plan, page 162, Table 8.2 (Exhibit A3-030).

A124. Natural gas storage, like oil and gas extraction, requires significant permanent infrastructure development, including wells, extensive pipelines, and large compressor stations, all of which convert forest to non-forest.

A125. The purpose of this statutorily authorized use of the State Forest trust corpus is not to conserve and maintain the State Forest public natural resources. Thus, the cost of administering the storage of natural gas on the State Forest is not a reasonable cost of administering the ERA trust.

A126. Based on the as-applied analyses of the Respondents' spending of ERA trust assets derived from the State Forest trust corpus set forth in Section V.A.7. below, the Respondents spent trust assets to administer this non-trust purpose to replace General Fund appropriations.

### ***Other Mineral Extraction***

A127. DCNR administers the statutorily authorized use of the State Forest for coal and hard minerals extraction pursuant to Section 302(a)(6) of the CNRA, 71 P.S. § 1340.302(a)(6). This provision authorizes the removal of "any valuable minerals" from the State Forest when "in the best interests of the Commonwealth."

A128. As of 2016, “[r]esidual coal reserves are found across several forest districts, and in some cases blocks of coal remain that can be recovered economically if the bureau could structure a lease agreement such that the bureau receives its compensation in additional land reclamation.” 2016 State Forest Plan, pages 167-168 (Exhibit A3-035, 036).

A129. The Bureau of Forestry “has an extensive inventory of coal reserve estimates by forest district, with maps and tonnage estimates in most cases ... performed in the 1970s. The bureau has taken the position that it will entertain private proposals and DEP Bureau of Abandoned Mine Reclamation (BAMR) reclamation proposals on a case-by-case basis and judge each proposal on its own merits as opposed to proactively searching for partners for remining and reclamation interest in the coal industry.” *Id.*

A130. The Bureau of Forestry states that an “estimated 30,000 acres of mine scarred lands” exists on the State Forest but that “funds do not exist within the state system to begin reclaiming all these lands.” *Id.*

A131. The purpose of the statutorily authorized use of the State Forest trust corpus for the extraction of coal and other hard minerals is not to conserve and maintain the State Forest public natural resources. Thus, the cost of administering such extraction on the State Forest is not a reasonable cost of administering the ERA trust.



A132. However, as set forth in Section V.A.4. below, actions to abate the existing mine scarred lands on the State Forest may be appropriate to remedy the ongoing degradation of the State Forest trust corpus from existing statutorily authorized uses and associated stressors. The cost of such an action to remedy ongoing degradation of the State Forest trust corpus could be a reasonable cost of administering the ERA trust.

A133. Based on the as-applied analyses of the Respondents' spending of ERA trust assets derived from the State Forest trust corpus set forth in Section V.A.7. below, the Respondents did not spend any ERA trust assets to abate existing mine scarred lands on the State Forest to remedy ongoing degradation from statutorily authorized uses and associated stressors.

### ***Nuclear Energy***

A134. DCNR administered use of the State Forest for a nuclear reactor facility under Section 302(b)(11) of the CNRA, 71 P.S. § 1340.302(b)(11), in what is now the Quehanna Wild Area of the Moshannon State Forest District.<sup>17</sup> This program was authorized “for industrial and economic development purposes or for nuclear reactor safety zone purposes.” DCNR was required to expend significant resources managing this nuclear reactor facility and its decommissioning, which

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<sup>17</sup> See Moshannon State Forest Wild and Natural Areas, Quehanna Wild Area at: [https://www.dcnr.pa.gov/StateForests/FindAForest/Moshannon/Pages/Wild\\_NaturalAreas.aspx](https://www.dcnr.pa.gov/StateForests/FindAForest/Moshannon/Pages/Wild_NaturalAreas.aspx).

degraded, diminished and depleted State Forest public natural resources. The extent to which the degradation to the natural ecology of the State Forest from this facility has been remedied is unknown.

A135. Robert Merrill, the retired Forest Manager of the Moshannon State Forest District during the cleanup required when this facility was abandoned by its operator states that the “nuclear reactor site was being cleaned up from the Strontium 90 experiments that had previously been conducted there. It took about 3 years for the removal and restoration of the site to occur. The cost to the U.S. and the Commonwealth was in the 10’s of millions of dollars”. Affidavit of Robert Merrill, retired Forest Manager of the Moshannon State Forest District (“Retired State Forest Manager Merrill Affidavit”); incorporated as **Exhibit A13** (Exhibit A13-001).

A136. The purpose of the statutorily authorized use of the State Forest trust corpus for nuclear energy development is not to conserve and maintain the State Forest public natural resources. Thus, the cost of administering such energy development on the State Forest is not a reasonable cost of administering the ERA trust.

A137. However, as set forth in Section V.A.4. below, action to abate any remaining degradation of the State Forest from this prior use may be an appropriate remedy for the ongoing degradation of the State Forest trust corpus from existing statutorily authorized uses and associated stressors. The cost of such an action to

remedy ongoing degradation of the State Forest trust corpus could be a reasonable cost of administering the ERA trust.

A138. Based on the as-applied analyses of the Respondents' spending of ERA trust assets derived from the State Forest trust corpus set forth in Section V.A.7. below, the Respondents did not spend any ERA trust assets to abate remaining degradation associated with the Quehanna nuclear reactor to remedy ongoing degradation from statutorily authorized uses of the State Forest and associated stressors.

### ***ATV/Snowmobile Recreation***

A139. Just as the statutorily authorized use of the State Forest for recreation facilities dramatically expanded with increased access to the forest via motor vehicles and public highways, the statutorily authorized use of the State Forest for off-road motor vehicles has dramatically expanded first through use by snowmobiles and then ATVs. Unlike our statewide motor vehicle programs, which are administered under the Vehicle Code by the Department of Transportation, the Commonwealth requires DCNR to administer statewide off-road vehicle programs under the Vehicle Code (75 Pa.C.S. Chapter 77). These functions were first imposed on DER under the Snowmobile Law enacted in 1971 (act of Aug. 12, 1971, P.L. 299, No. 75), which was amended in 1985 to include ATVs (act of July 11, 1985,

P.L. 220, No. 56). Section 308(c) of the CNRA transferred the powers and duties that had been vested in DER to DCNR. 71 P.S. § 1340.308(c).

A140. The Bureau of Forestry began administering statutorily authorized uses of off-road vehicles on the State Forest beginning with snowmobiles under the 1971 law and then with ATVs under the 1985 amendments to the law.

A141. As of 2016, the Bureau of Forestry administered 1,775 miles of joint-use roads available for snowmobile use during the winter. 2016 State Forest Plan, page 200 (Exhibit A3-054). The bureau also administered 273 miles of roads/trails dedicated to ATV use on the State Forest. *Id.*, page 201 (Exhibit A3-055).

A142. The Bureau of Forestry has long found the use of ATVs to be incompatible with its ERA trustee duty to conserve and maintain the State Forest public natural resources. In a survey of State Forest District Managers in 2000, the managers identified significant problems with ATV use in State Forest areas not designated for this use, with erosion problems from ATV use, and with unsafe driving. The survey found “over 10 times as many illegal trails as legal trails” with the “total miles of unauthorized trails estimated to be 2535 miles.” *See* DCNR ATV Policies & Related Documents incorporated as **Exhibit A14** (Exhibit A14-004).

A143. In response, DCNR adopted policies consistent with its ERA trustee duties placing a moratorium on expansion of statutorily authorized ATV use on the State Forest and focused its efforts on providing public ATV roads/trails on other

public and private lands to support the recreation and tourism industry (Exhibit A14-010 – 013).

A144. In 2016, DCNR’s State Forest ATV policy was “not to expand the current system of designated ATV trails on state forest lands. This policy does allow for the limited development of connectors, as deemed appropriate by the department, to improve usage within the designated ATV trail networks, but the department does not consider state forest roads to be a safe option for connectors between trail systems.” *Id.*

A145. Notwithstanding its policies limiting further statutorily authorized uses of ATVs on the State Forest for non-trust purposes, DCNR has faced mounting pressure to expand this statutorily authorized use to support the economic development of the Commonwealth’s recreation and tourism industry. DCNR primarily has faced pressure to provide for more long distance riding experiences in northcentral Pennsylvania, including pressure from elected officials in Clinton County to allow ATV users to ride from the designated Bloody Skillet ATV riding area to the Whiskey Springs ATV riding area through the Sproul State Forest District.

A146. In 2018, in response to pressure from the recreation and tourism industry and local officials in northcentral Pennsylvania, the General Assembly enacted Section 1720-E(a) of the Fiscal Code, 72 P.S. § 1720-E(a), requiring DCNR

to significantly expand the development of ATV roads/trails on the State Forest in northcentral Pennsylvania (act of June 22, 2018, P.L. 281, No. 42, § 17). Specifically, DCNR was directed to “develop, open and maintain an ATV trail connecting the Whiskey Springs ATV trail to the Blood[y] Skillet ATV trail by utilizing existing State roads and State forest roads by April 1, 2020.” 72 P.S. § 1720-E(a)(1). DCNR was further directed to expand its ATV program to “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)(2).

A147. When DCNR was unable to find a route that would both protect the natural ecology of the State Forest and safely connect the Bloody Skillet and Whiskey Springs ATV riding areas in the Sproul State Forest District, the Clinton County Board of Commissioners sent a letter to Governor Wolf seeking his support in ensuring that DCNR and the Pennsylvania Department of Transportation implemented the statutorily mandated expansion of ATV use in the State Forest for this “important recreation and tourism project here in Clinton County.” Clinton County Letter dated April 23, 2019, incorporated in Exhibit A14 (DCNR Secretary response dated May 10, 2019 also incorporated in Exhibit A14) (Exhibit A14-014 – 017)).

A148. The Clinton County letter states that “[f]or quite some time, the Clinton County Board of Commissioners have been advocates for DCNR’s consideration of the Bloody Skillet to Whiskey Springs ATV trail connection in Western Clinton County. In fact, in late 2014 the County, working in partnership with the Clinton County Economic Partnership Visitor’s Bureau, participated in a partially grant-funded ATV trail study. ... We have since then met with many representatives from state government and have built a tremendous partnership with the Central Mountain ATV Club and others to form a local consensus and voice in favor of expanding the ATV network.” Exhibit A14-014.

A149. The Clinton County letter concludes stating that the Clinton County Commissioners “see this connector trail as a vital piece in the recreational and economic development in the region and the state of Pennsylvania with many benefits, if built. We see how West Virginia and New Hampshire draw thousands of visitors annually to their trail networks. We feel this project would be a wonderful effort to promote tourism in Pennsylvania and could make Pennsylvania a competitor with trail systems in other states.” Exhibit A14-015.

A150. The General Assembly directed DCNR to further expand the statutorily authorized use of ATV on the State Forest, as well as State Parks, for non-trust purposes in 2020 by enacting Section 1720-E(b) of the Fiscal Code, 71 P.S. § 1720-E(b), which requires DCNR to “establish a regional pilot program for ATV

use on department lands” and “provide access to the department ATV pilot area for the 2021 summer ATV riding season from Friday before Memorial Day through the last full weekend in September, in addition to any extended season to be determined by the department based on local conditions” (act of Nov. 23, 2020, P.L. 1140, No. 114, § 7).

A151. In response to the statutorily mandated expansion of ATV use on State Forest and State Parks for non-trust purposes, DCNR was required to rescind its ATV trail development moratorium and adopted a new policy in 2020 authorizing the statutorily mandated expansion of ATV use on the State Forest for the economic benefit of the Commonwealth’s recreation and tourism industry. DCNR ATV Trail Development and Management Policy issued November 11, 2020 (Exhibit A14-018, 019).

A152. As required by the Fiscal Code, DCNR implemented the regional ATV pilot program in 2021 and is continuing to develop new ATV riding opportunities on the State Forest, as well as some State Parks.<sup>18</sup>

A153. DCNR has incurred significant costs and will continue to incur significant costs to administer the new statutorily mandated expansion of ATV use on the State Forest and State Parks.

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<sup>18</sup> See ATV Regional Trail Connector Pilot on DCNR’s website at: <https://www.dcnr.pa.gov/Recreation/WhatToDo/ATVRiding/ATVRegionalTrailConnectorPilot/Pages/default.aspx>.



A154. The purpose of the statutorily authorized use of the State Forest trust corpus for ATVs and snowmobiles is not to conserve and maintain the State Forest public natural resources. Thus, the costs of administering these uses are not reasonable costs of administering the ERA trust.

A155. Based on the as-applied analyses of the Respondents' spending of ERA trust assets derived from the State Forest trust corpus set forth in Section V.A.7. below, the Respondents spent trust assets to administer this non-trust purpose to replace General Fund appropriations.

### *Camp Leases*

A156. The Bureau of Forestry administers State Forest camp leases authorized by Section 302(b)(1) of the CNRA, 71 P.S. § 1340.302(b)(1). While the bureau stopped issuing new leases under this program in 1970, it continues to administer over 4,000 State Forest camp leases. 2016 State Forest Plan, page 204 (Exhibit A3-058).

A157. The State Forest camp lease program is administered for the recreational benefit of the persons holding these camp leases, not to conserve and maintain the public natural resources of the State Forest. The money from State Forest camp leases is deposited as miscellaneous revenue into the General Fund. Governor's Executive Budget 2019-2020, Conservation and Natural Resources,

Miscellaneous Revenue, page C1-34, Exhibit A1-025 (showing \$778,000 in actual revenue from camp leases FY 2017-2018).

A158. The purpose of this statutorily authorized use of the State Forest trust corpus is not to conserve and maintain the State Forest public natural resources. Thus, the cost of administering these camp leases on the State Forest is not a reasonable cost of administering the ERA trust.

A159. Based on the as-applied analyses of the Respondents' spending of ERA trust assets derived from the State Forest trust corpus set forth in Section V.A.7. below, the Respondents spent trust assets to administer this non-trust purpose to replace General Fund appropriations.

### ***Rights-of-Way***

A160. DCNR administers the statutorily authorized use of the State Forest for rights-of-way granted for non-trust purposes pursuant to Section 302(b)(3) of the CNRA, 71 P.S. 1340.302(b)(3).

A161. DCNR and its predecessors have been authorized since at least 1929 to “grant rights-of-way through State forests to individuals and corporations who may apply therefor when it shall appear to the department that the grant of a right-of-way will not so adversely affect the land as to interfere with its usual and orderly administration, and when it shall appear that the interests of the Commonwealth or its citizens will be promoted by such grant.” Administrative Code of 1929, § 1803(c)

(Exhibit A5). They have also been authorized to acquire land “to hold as State forest, subject to such reservations, if any, of mineral rights, stumpage rights, rights of way, or other encumbrances” considered to be consistent with holding. *Id.*, § 1802(a); CNRA § 302(a)(1); 71 P.S. § 1340.302(a)(1).

A162. By 1995, DCNR’s authority to grant rights-of-way on the State Forest had been expanded to also grant public utility companies “the privilege to construct, maintain and operate their lines over, along and upon highways and roads which lie within or border on any State forests and to grant right of access by such companies to or through State Forest lands, in order to bring public utilities to camps and cottages in State forest lands and in other homes and farms adjacent to State forest lands.” CNRA § 302(b)(8); 71 P.S. § 1340.302(b)(8).

A163. DCNR also has authority to grant “the privilege to erect, construct, maintain and operated, on and over State-owned or -leased lands under the jurisdiction of the department, antennas, towers, stations, cables and other devices and apparatus, helpful, necessary or required for broadcasting, telecasting, transmission, relaying or reception of television.” CNRA § 302(b)(9); 71 P.S. § 1340.302(b)(9).

A164. Pursuant to these statutory authorities, the DCNR Bureau of Forestry has granted and administers rights-of-way on the State Forest for electric line corridors and facilities, water/sewage line corridors and facilities, communication

lines and tower facilities, gas pipeline corridors and related facilities, and office and maintenance buildings. 2016 State Forest Plan, page 216 (Exhibit A3-059).

A165. Although the Bureau of Forestry has not reported the total miles of statutorily authorized rights-of-way it administers on the State, these rights-of-way are extensive and likely total in the thousands of miles.

A166. The Bureau of Forestry administers the State Forest through 20 forest districts. 2016 State Forest Plan, page 25 (Exhibit A3-007). A total of 641 miles of rights-of-way have been reported for the Sproul Forest District alone for the following purposes:

- 188 miles of interstate natural gas transmission lines
- 272 miles of natural gas gathering lines
- 70 miles of natural gas storage field transmission lines
- 69 miles of main electrical transmission lines
- 39 miles of residual electrical distribution lines
- 2 miles of water main lines
- 1 mile of sewer line

Sproul State Forest Resource Management Plan, April 2019, pages 59-60.<sup>19</sup>

A167. The purpose of this statutorily authorized use of the State Forest trust corpus is not to conserve and maintain the State Forest public natural resources. Thus, the cost of administering rights-of-way on the State Forest is not a reasonable cost of administering the ERA trust.

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<sup>19</sup> See Sproul State Forest Resources Management Plan (SFRMP), Sproul SFRMP (PDF) at: <https://www.dcnr.pa.gov/StateForests/FindAForest/Sproul/Pages/default.aspx>.

A168. Based on the as-applied analyses of the Respondents' spending of ERA trust assets derived from the State Forest trust corpus set forth in Section V.A.7. below, the Respondents spent trust assets to administer this non-trust purpose to replace General Fund appropriations.

### ***Timber Sale***

A169. The DCNR Bureau of Forestry administers the statutorily authorized sale of timber from the State Forest to provide a continuous supply of timber, lumber and other forest products for the economic benefit of the wood products industry and the Commonwealth. In enacting the CNRA to create DCNR in 1995, the General Assembly found that our "forest products industry employs over 100,000 people and contributes over \$4.5 billion a year to our economy, making it the State's fourth largest industry." 71 P.S. § 1340.101(a)(5).

A170. Section 302(a)(6) of the CNRA authorizes DCNR to sell or dispose "of any timber on the State forest ... on terms most advantageous to this Commonwealth" when "the welfare of this Commonwealth, with reference to the reforestation and the betterment of the State forests, with respect to control, scientific management, protection, utilization, development and regulation of their occupancy and use, will be advanced." 71 P.S. § 1340.302(a)(6).

A171. The Bureau of Forestry states in its 2016 State Forest Plan that, according to the CNRA, "one of the purposes for the creation of a state forest system

was ‘...to provide a continuous supply to timber, lumber, wood and other forest products’ and thus an important economic resource in Pennsylvania.” 2016 State Forest Plan, page at 84 (Exhibit A3-018); *see also* 71 P.S. § 1340.313(c) (“Rules and regulations with respect to State forests shall be compatible with the purposes for which the State forests are created, namely to provide a continuous supply of timber, lumber, wood and other forest products, to protect the watersheds, conserve the waters and regulated the flow of rivers and streams of this Commonwealth and to furnish opportunities for healthful recreation to the public.”).

A172. The 2016 State Forest Plan goes on to state that “managing timber and non-timber forest products (NTFPs) is central to the bureau’s mission ‘to ensure the long-term health, viability, and productivity of the commonwealth’s forests and to conserve native plants.’ Forest products ... are managed on state forest lands as a component of ecosystem management and to provide a wide variety of environmental, social, and economic values.” *Id.*

A173. In further support of the economic benefits to the Commonwealth from statutorily authorized timber sales, the 2016 State Forest Plan states that “Pennsylvania’s state forests contain an abundance of high-quality forest products, an integral part of the material base of the commonwealth’s \$19 billion per year forest products industry, which employs nearly 58,000 people. Both Pennsylvania’s

consumers and the general economy benefit from this regionally important supply of forest products, including timber.” *Id.*

A174. Over 60% of the State Forest is available for timber harvesting under the management zones described in the 2016 State Forest Plan. *Id.*, page 55, Figure 1.14 (Exhibit A3-016). The plan identifies 50% of the State Forest in the Multiple Resource Management Zone, which “may be considered part of the commercial forest land base”, and other 11% in the Aesthetics/Buffer Management Zone that also “may be considered part of the commercial forest land base.” *Id.* State Forest areas with site quality or topographic constraints (*e.g.*, steep slopes or near streams, recreational trails or vistas), or areas designated as natural or wild areas, are typically not part of the commercial forest land base. *Id.* (Limited Resource Management Zone (23%), Natural Area Management Zone (11%), and Wild Area Management Zone (7%)). *Id.*

A175. The Bureau of Forestry uses a model to establish the timber harvest goals for each state forest district. *Id.* at 71 (Exhibit A3-017). This model uses “forest inventory data, economic information, bureau policies, and target conditions to formulate [these] goals” and “ensure a consistent, sustainable supply of timber for future demand.” *Id.*

A176. The Bureau of Forestry states that the State Forest has “an overabundance of acreage in mature age classes” and one of its “primary silvicultural

goals is to balance the age distribution of the forest in the multiple resource/commercial land base so that each year, a relatively consistent number of mature acres can be harvested, regenerated, regrown, and reharvested in perpetuity.” *Id.*, page 88 (Exhibit A3-019).

A177. The Bureau of Forestry states that balancing the age distribution of trees in the State Forest to achieve a sustainable supply of timber will also provide wildlife habitat across all successional stages of the forest to sustain ecosystem functions and promote forest health. *Id.* However, the bureau also states that regenerating the forest after harvesting has been a challenge because of factors such as “deer, inhibiting vegetation, exotic invasive vegetation, lack of seed source, mortality, thick duff, site limitations, and potential climatic variables.” *Id.*

A178. State Forest timber sales “generate significant revenue for the Commonwealth ... averaging over \$22 million” annually from 2008 to 2015. *Id.*, page 100 (Exhibit A3-020). The Bureau of Forestry states that “[a]ll revenue from timber receipts go into [its] operating budget.” *Id.*; *see also* 71 P.S. § 1340.319(c) (requiring certain percentages of timber sale revenue to be used for forest regeneration and forestry research); Governor’s Executive Budget 2019-2020, page E11-3 (Exhibit A1-026) (showing actual appropriation in FY 2017-2018 of \$23,232,000 from timber sales to augment the General Fund appropriation for State



Forest operations, as well as \$2,516,000 for forest regeneration, and \$439,000 for forestry research).

A179. The purpose of this statutorily authorized use of the State Forest trust corpus is not to conserve and maintain the State Forest public natural resources. Thus, the cost of administering timber sales on the State Forest is not a reasonable cost of administering the ERA trust.

A180. Based on the as-applied analyses of the Respondents' spending of ERA trust assets derived from the State Forest trust corpus set forth in Section V.A.8. below, the Respondents spent trust assets to administer this non-trust purpose to replace General Fund appropriations.

### ***Roads/Bridges***

A181. DCNR administers the statutorily authorized use of the State Forest for public roads "necessary for the proper administration and protection of the State forests" pursuant to Section 302(b)(6) of the CNRA. 71 P.S. § 1340.302(b)(6). DCNR also has broad statutory authority to "design, construct, improve, maintain and repair those lands and facilities which it deems necessary or appropriate in the exercise of the powers and duties transferred by [the CNRA]" pursuant to Section 304 of the CNRA, 71 P.S. § 1340.304.

A182. As of 2016, the Bureau of Forestry administered 2,184 miles of public roads on the State Forest open to licensed motor vehicles. 2016 State Forest Plan,

page 199 (Exhibit A3-053). The bureau administered another 427 miles of limited maintenance roads on the State Forest also open to the public but not recommended for low-clearance vehicles. *Id.* Of these public roads on the State Forest, 1,775 are also open to snowmobile use in the winter. *Id.*, page 200 (Exhibit A3-054). The bureau did not allow ATVs on these public roads in 2016 but maintained 273 miles of roads dedicated to ATV use. *Id.*, page 201 (Exhibit A3-055). As discussed above, the bureau is now required to expand ATV use on State Forest roads under Section 1720-E of the Fiscal Code enacted in 2018 and expanded in 2020. The Bureau of Forestry also maintains 521 bridges on the State Forest public roads. *Id.*, page 216 (Exhibit A3-059).

A183. In addition to maintaining public roads and bridges on the State Forest, the Bureau of Forestry administered 3,570 miles of roads established primarily as timber sale haul roads as of 2016. *Id.*, page 199 (Exhibit A3-053). These roads are not normally open to motor vehicle travel by the public but may be open for such use during hunting season. These roads are typically closed to reduce the bureau's costs to maintain these roads, to police illegal activities (dumping, poaching, ATV use), and to conduct search and rescue activities. *Id.*

A184. State Forest public roads and bridges are used primarily for non-trust purposes by persons recreating on the State Forest, persons engaged in other

activities for non-trust purposes such as oil and gas extraction and timber harvesting, and DCNR staff administering these activities.

A185. The purpose of State Forest roads and bridges is not to conserve and maintain the State Forest public natural resources. Thus, the cost of administering these roads and bridges is not a reasonable cost of administering the ERA trust.

A186. Based on the as-applied analyses of the Respondents' spending of ERA trust assets derived from the State Forest trust corpus set forth in Section V.A.7. below, the Respondents spent trust assets to administer this non-trust purpose to replace General Fund appropriations.

### ***Other Infrastructure***

A187. DCNR has statutory authority to administer many buildings and other facilities on the State Forest to support statutorily authorized uses of the State Forest for non-trust purposes, including those set forth above.

A188. The purpose of constructing and maintain buildings and other infrastructure needed to support statutorily authorized uses of the State Forest for non-trust purpose is not to conserve and maintain the State Forest public natural resources. Thus, the cost of administering these buildings and other infrastructure are not reasonable costs of administering the ERA trust.

A189. Based on the as-applied analyses of the Respondents' spending of ERA trust assets derived from the State Forest trust corpus set forth in Section V.A.7.

below, the Respondents spent trust assets to administer this non-trust purpose to replace General Fund appropriations.

**b. Costs Incurred to Administer Statutorily Authorized Uses of the State Park Trust Corpus for Non-Trust Purposes**

A190. On the approximately 300,000 acres of State Park public natural resource within the Commonwealth, DCNR has broad statutory authority to allow use of these public natural resources for recreation and to develop infrastructure to support such recreation.<sup>20</sup>

A191. Section 303(a) of the CNRA authorizes DCNR to “supervise, maintain, improve, regulate, police and preserve all parks belonging to the Commonwealth.” 71 P.S. 1340.303(a). The General Assembly gave this authority to the Department of Forest and Waters in 1929 and, as noted above, many of our State Parks today were first available for public recreation as part of the State Forest. *See* Administrative Code of 1929, § 1806 (Exhibit A5).

A192. The Department of Forests and Waters was “authorized and directed to set aside, within the State forests, unusual or historical groves of trees, or natural features, especially worthy of permanent preservation, to make the same accessible

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<sup>20</sup> DCNR, History of Pennsylvania State Parks, The Goddard Era at <https://www.dcnr.pa.gov/StateParks/History/Pages/default.aspx>.

and convenient for public use, and to dedicate them in perpetuity to the people of the State for their recreation and enjoyment.” *Id.*, § 1802 (g).<sup>21</sup>

A193. As set forth in Section V.A.1. above, outdoor recreational facilities on the State Forest first began as small clearings close to roads with picnic tables, benches and fireplaces. Eventually, as these recreational facilities expanded, a separate bureau was created to manage these recreational areas as parks. Today, the DCNR Bureau of State Parks administers State Parks imbedded within our State Forest and parks acquired closer to population centers across the Commonwealth.

A194. The statutory authorities related to the administration of State Parks also expanded over time to encompass the broad authorities now given to DCNR through Section 303 of the CNRA, 71 P.S. § 1340.303. DCNR has the authority to acquire and accept donations of park land, to construct recreational facilities, to lease park land for recreational use, to regulate and enforce use of park land; to lease park land for oil and gas development; to grant right-of-way across park land for municipal water and sewer lines; and to carry out various other functions.

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<sup>21</sup> Today, similar authority is provided in Section 302(a)(g) of the CNRA, 71 P.S. § 1340.302(g) (“The department has the ... power and duties with respect to acquisition, establishment and disposition of State forest lands ... To set aside, when in the judgement of the department it is considered necessary, for exclusive use for parks, parkways and other places of scientific, scenic, historic or wildlife interest, any State-owned lands which are not or which may hereafter be under the jurisdiction of the department.”)

A195. As with the State Forest, the cost of administering statutorily authorized uses of State Parks for non-trust purposes are not reasonable costs of administering the ERA trust.

A196. Based on the as-applied analyses of the Respondents' spending of ERA trust assets derived from the State Forest trust corpus set forth in Section V.A.7. below, the Respondents spent trust assets to administer this non-trust purpose to replace General Fund appropriations.

### ***Recreation Infrastructure***

A197. DCNR has authority to provide “conveniences and facilities for the transportation, shelter, comfort and education of people” on State Parks under Section 303(a)(3) of the CNRA, 71 P.S. § 1340.303(a)(3). Such facilities are to be “so designed and constructed as to retain, so far as may be, the naturalistic appearance of State park areas, surroundings and approaches, and conceal the hand of man as ordinarily visible in urban, industrial and commercial activities.” *Id.*

A198. The economic benefits to the Commonwealth of providing outdoor recreation on state park and forest lands and the existing infrastructure that needs to be maintained to support that outdoor recreation is discussed in a report prepared by the Pennsylvania Parks and Forest Foundation in 2018 entitled *The Legacy of*

*Pennsylvania's State Parks and Forests: The Future Is In Our Hands* (“2018 PPFF Report”); excerpts incorporated as **Exhibit A15**.<sup>22</sup>

A199. Based on an updated economic analysis completed for DCNR by the Pennsylvania State University in 2012, “state parks hosted 37.9 million visitors” whose “direct contribution ... to the state economy was \$628.7 million in sales, which supported 9,435 jobs.” 2018 PPFF Report, page 10 (Exhibit A15-004). Economic data summarized in the 2018 PPFF Report shows that Pennsylvania’s outdoor recreation and tourism industry contribute significant economic benefits to the Commonwealth. *Id.*, pages 10-11 (Exhibit A15-004, 005).

A200. DCNR administers more than 4,800 buildings on state park and forest lands, primarily public buildings on State Parks to support the recreation and tourism industry. These buildings include “visitor centers, offices, maintenance and storage buildings, education buildings, pavilions, cabins, bath houses, and modern and rustic bathrooms.” *Id.*, page 29 (Exhibit A15-013).

A201. In addition to buildings, many other facilities have been constructed and must be maintained, including parking lots, athletic facilities, roads, bridges, campgrounds, boat launches, marinas, beaches, and pools, as well as extensive mowed open areas.

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<sup>22</sup> This report is available in its entirety at:  
<https://protectourparksandforests.org/wp-content/uploads/2020/05/final-report.pdf>.

A202. The purpose of the statutorily authorized use of State Parks for recreation infrastructure is not to conserve and maintain the State Park public natural resources. Thus, the cost of administering such infrastructure, including the cost of personnel, equipment, supplies, contracts and other expenses to maintain and repair this infrastructure, is not a reasonable cost of administering the ERA trust.

A203. Based on the as-applied analyses of the Respondents' spending of ERA trust assets derived from the State Forest trust corpus set forth in Section V.A.7. below, the Respondents spent trust assets to administer this non-trust purpose to replace General Fund appropriations.

#### ***Dams/Impoundments/Canal***

A204. Through its broad statutory authority to administer facilities on lands under its jurisdiction under Section 304 of the CNRA, 71 P.S. § 1340.304, as well as its legal duties under the Dam Safety and Encroachments Act, 32 P.S. § 693.13, DCNR operates and maintains 131 dams, including 47 high hazard dams, to provide flood control, outdoor recreation and water supply. 2018 PPFF Report, pages 25-26 (Exhibit A15-009, 010). Of these dams, 31 are on the State Forest. 2016 State Forest Plan, page 216 (Exhibit A3-059). The remainder are on various State Parks.

A205. Dams, which are not public natural resources, require costly maintenance both to ensure the ongoing integrity of dams themselves and to maintain the impoundments they create, which in many cases eventually require



dredging to maintain adequate water depth for their intended purposes, as well as to control invasive plants and algae growth when nutrient levels in the water become too high. 2018 PPFF Report, pages 25-26 (Exhibit A15-009, 010).

A206. The Bureau of State Parks also operates and maintains almost 60 miles of canal, which is not a public natural resource, constructed along the Delaware River as part of the Delaware Canal State Park. Significant portions of this canal have required rebuilding after repeated flooding, making maintaining this canal a costly infrastructure project.<sup>23</sup>

A207. DCNR does not administer these structures on State Parks and the State Forest to conserve and maintain State Forest or State Park public natural resources. Thus, the costs of administering these structures are not reasonable costs of administering the ERA trust.

A208. Based on the as-applied analyses of the Respondents' spending of ERA trust assets derived from the State Forest trust corpus set forth in Section V.A.7. below, the Respondents spent trust assets to administer this non-trust purpose to replace General Fund appropriations.

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<sup>23</sup> See History of Delaware Canal State Park on DCNR's website at: <https://www.dcnr.pa.gov/StateParks/FindAPark/DelawareCanalStatePark/Pages/History.aspx>

### ***Other Statutorily Authorized Uses***

A209. DCNR is statutorily authorized to administer whitewater recreation in the Commonwealth by issuing licenses to whitewater rafting outfitters under Section 312 of the CNRA, 71 P.S. § 1340.312. DCNR administers its whitewater rafting primarily through its licensed concessionaires at certain State Parks (*e.g.*, Lehigh Gorge State Park, Ohiopyle State Park).<sup>24</sup>

A210. DCNR administers statutorily authorized use of the State Parks for oil and gas extraction under Section 303(a)(9) of the CNRA, 71 P.S. § 1340.303(a)(9). Since only surface rights were acquired to establish most State Parks, DCNR must attempt to work with oil and gas operators developing their severed, privately-owned subsurface oil and gas rights on State Parks to limit surface impacts, if possible.

A211. The purposes of these statutorily authorized uses are not to conserve and maintain State Park public natural resources. Thus, the costs of administering these uses are not reasonable costs of administering the ERA trust.

A212. Based on the as-applied analyses of the Respondents' spending of ERA trust assets derived from the State Forest trust corpus set forth in Section V.A.7. below, the Respondents spent trust assets to administer this non-trust purpose to replace General Fund appropriations.

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<sup>24</sup> See Whitewater Boating in Pennsylvania State Parks and Forest at: <https://www.dcnr.pa.gov/Recreation/WhatToDo/WhitewaterBoating/Pages/default.aspx>.

#### **4. Degradation of the State Forest Trust Corpus from Statutorily Authorized Uses for Non-Trust Purposes and Actions Needed to Remedy this Ongoing Degradation to Restore the State Forest Trust Corpus**

A213. The numerous statutorily authorized uses of the State Forest, many of which are set forth in Section V.A.3. above, each degrade, diminish and/or deplete State Forest public natural resources. The cumulative adverse effects of these existing uses on the natural ecology of the State Forest are extensive and ongoing, as set forth in more detail below.

A214. On June 20, 2017, the Supreme Court held in *PEDF II* that Sections 1602-E and 1603-E of the Fiscal Code were facially unconstitutional because they “plainly ignore the Commonwealth’s constitutionally imposed fiduciary duty to manage the corpus of the environmental public trust for the benefit of the people to accomplish its purpose—conserving and maintaining the corpus by, inter alia, preventing and remedying the degradation, diminution and depletion of our public natural resources.” 161 A.3d at 938.

A215. On July 21, 2021, the Supreme Court further directed in *PEDF V* that when the Commonwealth “acts as a trustee [under the ERA] it must consider an incredibly long timeline and cannot prioritize the need of the living over those yet to be born.” 255 A.3d at 310. The court further found that the “explicit inclusion 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 generations, reinforced by a political process characterized by limited terms of office.’” *Id.* (quoting *Robinson Twp.* 83 A.3d at 959 n. 46).

A216. The Commonwealth, as the ERA trustee of the State Forest trust corpus, has the fiduciary duty to take the actions needed to remedy the ongoing degradation to the natural ecology of the State Forest caused by the uses it has authorized. The Commonwealth cannot sanction uses that degrade the State Forest trust corpus without taking the actions needed to restore the State Forest trust corpus. Likewise, the Commonwealth, as ERA trustee, has the duty to administer ERA trust assets derived from the degradation of the State Forest trust corpus to implement the actions needed both now and in the future to restore the State Forest trust corpus.

A217. Based on degradation from existing statutorily authorized uses discussed in this section below and the as-applied analyses of the Respondents’ spending of ERA trust assets derived from the State Forest trust corpus set forth in Section V.A.7. below, the Respondents have not remedied the degradation from existing uses of the State Forest and have not retained any of ERA trust assets generated to date from these degrading uses to remedy the existing or future degradation from these uses, thus diminishing our State Forest trust corpus.

**a. Degradation of the State Forest Trust Corpus  
from Oil and Gas Extraction**

A218. State Forest public natural resources have been and will continue to be degraded, diminished and depleted by oil and gas extraction statutorily authorized under the CNRA on the over 300,000 acres of State Forest subject to existing oil and gas leases issued by the Commonwealth, as well as oil and gas extraction that can occur on the over 300,000 acres of State Forest with severed, privately-owned oil and gas rights. 2018 Shale Gas Monitoring Report, page 7, 12 (Exhibit A12-009, 010). The degradation of over 600,000 acres of the State Forest currently subject to this use will continue well into this century, if not beyond, and the possibility exists that more State Forest could be leases for oil and gas extraction.

A219. To understand impacts to the natural ecology of the forest from oil and gas extraction statutorily authorized on the State Forest, DCNR began monitoring for “changes and impacts to state forest water, air, soil, flora, wildlife, and forest health related to gas development.” *Id.*, page 5 (Exhibit A12-007).

A220. While DCNR has embarked on efforts to understand the degradation, diminution and depletion of public natural resources caused by shale gas development on our State Forests, it acknowledged in its 2018 Shale Gas Monitoring Report that, even after eight years of monitoring, only a few trends can be understood and long-term monitoring will be required to understand the full extent of impact of this new industry. *Id.*, Preface (Exhibit A12-002).

A221. DCNR reports that since gas development began, “approximately 2,400 wells [have been] drilled to all depths and horizons for both exploration and development on state forest lands. About 1,066 wells have been properly plugged and abandoned over time, leaving about 1,334 wells active on state forest lands. Approximately 250 are in gas storage operations, with 1,084 in gas production in all depths and horizons. The Marcellus play has about 640 horizontal wells drilled to the end of 2016, leaving approximately 444 vertical legacy wells producing from other horizons (Oriskany and Upper Devonian).” *Id.*, page 16 (Exhibit A12-011).

A222. On the State Forest land subject to DCNR oil and gas leases, DCNR estimates that from 2008-2016 only 30 to 35 percent of the allowable shale gas development had occurred and that full development could result in as many as 1,475 wells on these State Forest tracts. *Id.*, pages 4, 19 (Exhibit A12-006, 013).<sup>25</sup>

A223. DCNR stated that “[s]ince 2010, no new leases have been issued for natural gas development in state forests” and notes that an Executive Order currently prohibits DCNR from leasing State Park and State Forest lands for oil and gas development. *Id.*, Preface (Exhibit A12-002).<sup>26</sup> Nonetheless, “significant tracts of

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<sup>25</sup> The estimated total number of shale gas wells is lower in the 2018 Shale Gas Monitoring Report than the 2016 State Forest Plan because the length of horizontal laterals drilled at depth in newer wells are longer and drain a larger acreage. Each well is estimated to drain 180 acres in the 2018 report but only 120 acres in the 2016 plan. In addition, 10-15% of the leased acreage was estimated to be inaccessible in the 2018 report. Exhibit A12-012.

<sup>26</sup> Executive Order 2015-03 was issued on January 15, 2015 by Governor Wolf and states that “subject to future advice and recommendations made by DCNR, no State Park or State Forest lands owned and/or managed by DCNR shall be leased for oil and gas development.” A copy is available

state forest land remain subject to development due to severed mineral rights or leasing prior to 2011.” *Id.*

A224. The initial degradation, diminution and depletion of State Forest public natural resources from shale gas extraction from 2008-2016 documented in the 2018 Shale Gas Monitoring Report include, but are not limited to, the following findings:

(a) Shale gas extraction on leased State Forest tracts from 2008-2016 converted 1,770 acres of State Forest land from forest to shale gas infrastructure (*id.*, page 43 (Exhibit A12-015)), including constructing and operating 265 infrastructure pads from 2008-2016 (*id.*, page 50 (Exhibit A12-022)), constructing 260 miles of new roads and the expansion of scenic State forest roads from 2008-2016 (*id.*, page 44 (Exhibit A12-016)); and constructing 188 miles of gas pipeline corridors from 2008-2016 (*id.*, page 55 (Exhibit A12-027)).

(b) DCNR reports that “noticeable changes to the forest landscape are evident” with the largest increase overall resulting from “an additional 9,913 acres of forest edge (35 percent change in the Elk State Forest specifically)” from 2008-2016. *Id.*, page 64 (Exhibit A12-036)).

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at [https://www.oa.pa.gov/Policies/eo/Documents/2015\\_03.pdf](https://www.oa.pa.gov/Policies/eo/Documents/2015_03.pdf). A similar executive order was issued by Governor Rendell in 2010 and rescinded by Governor Corbett in 2011; thus, this executive order could likewise be rescinded in the future and provides little long-term assurance that no future leasing of additional State Forest for oil and gas extraction will occur.

(c) Shale gas extraction has caused greater fragmentation of our State Forest. From 2008-2016, our core State Forests have lost 15,134 acres of large intact forest blocks, which are unfragmented forest blocks of more than 500 acres.<sup>27</sup> *Id.*, pages 65-66 (Exhibit A12-037, 038). The fragmentation of these large forest blocks resulted in increases in the category of smaller core forest blocks in almost all State Forest Districts, with the Loyalsock State Forest experiencing a 41.3% increase in smaller core forest blocks of 250-500 acres and a 30% increase in core forest blocks less than 250 acres in size. *Id.*

(d) As part of its shale gas monitoring program, DCNR began to monitor the impacts to water quality from gas extraction to assess degradation of the natural ecology of the State Forest. *Id.*, page 79 (Exhibit A12-041). Approximately 3,500 miles of streams traverse State Forest land within the core shale gas forest districts, “including many of the best-know fishing and boating waters in Pennsylvania.” *Id.* DCNR states that “maintaining and protecting the quality of water in these streams is one of the bureau’s highest priorities.” In the State Forest core shale gas districts, “most of the streams (> 70%) are first-order streams,” which “means that the steams on state forest land are generally small, headwater streams that can be influenced greatly by the surrounding forest” and “have the potential to affect many others

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<sup>27</sup> The monitoring report uses the metric unit of hectares. Large forest blocks are those containing more than 200 hectares, which is equivalent to 247 acres (1 hectare = 2.47 acres).



downstream.” *Id.* Over 85% of the streams in the State Forest core shale gas districts are classified as either exceptional value or high quality. *Id.*, page 80 (Exhibit A12-042).

(e) The main concerns regarding water quality in areas subject to shale gas development “are from chemicals and salts that can be spilled during transportation or during drilling activities.” *Id.*, pages 81-82 (Exhibit A12-043, 044). Other concerns include “increases in water temperature, soil, sedimentation, and turbidity from construction of infrastructure and roads improved to accommodate heavy hauling.” *Id.* Fracturing fluids “can pose a potential spill risk during transportation or during well development operations.” *Id.* Macroinvertebrates were surveyed in 37 stream segments to assess stream health and over one third of these segments (13) fell outside of the range of tolerance for their classification. *Id.*, page 78 (Exhibit A12-040).

(f) The monitoring of degradation of the natural ecology of the State Forest has documented the spread of invasive species in the State Forest. DCNR surveyed 238 infrastructure pads associated with gas development in the core shale gas districts and observed invasive species at all but 29 of these pads. *Id.* Implementation of an early detection and rapid response program “has detected 71 populations of high-threat invasive species.” *Id.* DCNR observes that from 2011 to 2016, “it is evident from the pad surveys that many invasive plant species populations have

spread to new sites on state forest land and populations first found from 2011-2013 have expanded at many sites.” *Id.*, page 130 (Exhibit A12-045). DCNR further states that the “proliferation and colonization of invasive plant species is one of the greatest threats to the health and viability of state forest ecosystems.” *Id.* at 138 (Exhibit A12-046).

A225. The 2016 State Forest Plan also states that four surface water intakes and one groundwater well have been installed on the State Forest to supply water for shale gas hydraulic fracturing, which requires approximately 5 million gallons of water for each well. 2016 State Forest Plan, page 140-141 (Exhibit A3-021, 022). As of 2016, the plan also reported “30 surface water impoundments on state forest land for shale-gas development, covering 148 acres.” *Id.*

A226. PEDF member Cynthia Bower has “hiked miles upon miles of trails, explored State forestry roads from dawn through dark, canoed rivers and creeks throughout the [northcentral Pennsylvania] region, camped and picnicked at State Parks, and enjoyed vistas with family and friends.” Affidavit of Cynthia Bower on the effects of shale gas development and ATVs on the State Forest (“Bower State Forest Degradation Affidavit”); incorporated as **Exhibit A16** (Exhibit A16-001).

A227. Bower has experienced firsthand the degradation of the State Forest from Marcellus shale gas extraction, observing that “[g]ravel highways and pipelines carve once contiguous forests into patchwork. Thousands of acres are scraped bare

of trees and topsoil, and coated with impervious gravel, concrete, and both fresh and wastewater impoundments. Thousands of pieces of infrastructure, from small valves to mammoth well pads and compressor stations mark the land.” *Id.*

A228. While Bower has observed that “thousands of acres have already been lost” to the shale gas industry, she points to the fact that the Bureau of Forestry in its 2016 State Forest Plan “estimated that the Marcellus Shale is ***appropriately 16 percent developed*** on [State Forest] lands currently leased.” Exhibit A16-002; 2016 State Forest Plan, page 163 (Exhibit A3-031) (emphasis added).

A229. Bower has experienced significant degradation of the peace and solitude in the State Forest that she has cherished for over 50 years stating that “[t]oday, if I drive to hike into formerly favorite places in the State Forest, I find roads on public lands gated, with signs forbidding entry to any vehicles not approved by DCNR. I find formerly accessible scenic views cut off from public access. I find traditional narrow forestry roads expanded into wide gravel highways, and additional new gravel highways build where none existed before. I find the natural topography terraced for gas industry infrastructure, acres upon acres, in formerly roadless areas. Once forested lands now pocked and scarred with well pads, compressor stations, impoundments, roads, and pipelines are off limits, with signs warning ‘Danger,’ as if someone would really want to go there for peace and solitude amidst the noise and emissions of the industry.” Exhibit A16-002.

A230. The degradation to the State Forest is not just from shale gas extraction. Conventional oil and gas development likewise has caused degradation. When Robert Davey, Jr. became the Forest Manager for the Sproul State Forest in 1982, development of a new shallow gas well field commenced. Affidavit of Robert Davey, Jr., retired Forest Manager of the Sproul State Forest District; incorporated as **Exhibit A17** (Exhibit A17-002). While Davey was successful in getting more input into administration of the well drilling program to reduce impacts to the State Forest, that input “did not stop the well-drilling program and environmental damage still occurred. Hundreds of wells were drilled, and continuous forest was fragmented into wood lots surrounded by wells, roads and pipelines. Many of these problems still exist today.” *Id.*

A231. Doug D’Amore followed Davey as the Forest Manager of the Sproul State Forest District just as the shale gas boom began and experienced that “[i]ncreasingly, political forces have viewed the state forests as an asset to be managed for the monetary benefits it can supply to the citizens of the Commonwealth. As a result, I was required to manage activities that are inimical to the ecology of the forest. These include natural gas shale leasing of thousands of acres of the State Forest to extract natural gas.” Retired State Forest Manager D’Amore Affidavit (Exhibit A10-001).

A232. Roy Siefert also experienced the same difficulty, as the Forest Manager for the Tioga State Forest District, in trying to manage activities that impacted his ability to protect the ecology of the forest. He states that “[a]s long as I had worked at DCNR to manage our state forest I was never asked whether leasing our forest to extract oil and natural gas, or developing recreational motorized ATV trails would impact our ability to protect the ecology of the forest. I worked towards trying to minimize diminishment and degradation of public natural resources that were being depleted. We were simply told to do our best to do both, to manage the ecology and to manage the diminishment of the oil and gas extraction and the degradation caused by ATV use. These activities have caused and continue to cause severe damage to the ecology of the forest.” Retired State Forest Manager Siefert Affidavit (Exhibit A9-002).

A233. To date, the ongoing degradation of the State Forest from this statutorily authorized use has not been remedied.

A234. Based on the as-applied analyses of the Respondents’ spending of ERA trust assets derived from the State Forest trust corpus set forth in Section V.A.7. below, the Respondents did not use or retain any of these trust assets to remedy this ongoing degradation.

**b. Degradation of the State Forest Trust Corpus From Other Statutorily Authorized Uses for Non-Trust Purposes**

A235. As set forth in Section V.A.3. above, DCNR administers or has administered numerous other statutorily authorized uses of the State Forest for non-trust purposes, including natural gas storage, other mineral extraction, nuclear energy development, ATV/snowmobile recreation, camp leases, rights-of-way, timber sale, and State Forest roads. Each of these uses has resulted in degradation, diminution and/or depletion of the natural ecology of the State Forest that has not been remedied.

***Degradation from Natural Gas Storage***

A236. Natural gas storage on the State Forest requires similar infrastructure to natural gas extraction (*e.g.*, wells, pipelines, compressor stations, roads). The gas infrastructure required to operate a natural gas storage field is extensive and permanent. Currently, DCNR has reported that 68,483 acres of the State Forest are under natural gas storage leases. 2018 Shale Gas Monitoring Report, page 7, 12 (Exhibit A12-009, 010).

A237. To date, the ongoing degradation of the State Forest from this statutorily authorized use has not been remedied.

A238. Based on the as-applied analyses of the Respondents' spending of ERA trust assets derived from the State Forest trust corpus set forth in Section V.A.7.

below, the Respondents did not use or retain any of these trust assets to remedy this ongoing degradation.

### ***Degradation from Other Mineral Extraction***

A239. Coal, stone, aggregate, sand and various commercial hard minerals have been extracted from lands that are now part of the State Forest. 2016 State Forest Plan, page 161 (Exhibit A3-029). Coal operators “located and mined large expanses of coal lands in central Pennsylvania, where the majority of state forest land holdings now reside. ... Initially, mining was focused on deep coal seams ... thought to be somewhat benign to surface impacts ... However, just prior to and with the advent of World War II and the development of large economical mining machines and means of moving large amounts of earth inexpensively, strip mining became economically viable ... [and resulted] in large-scale surface strip mining in Pennsylvania. Unfortunately, the result was widespread water quality degradation, loss of critical forest habitat, and no funding for land reclamation in the old mine pits and high walls.” *Id.* DCNR has estimated that “30,000 acres of mine scarred lands in the state forest system would benefit from reclamation” but “funds to not exist within the state system to begin reclaiming all these lands.” *Id.*, page 168 (Exhibit A3-036).

A240. To date, the ongoing degradation of the State Forest from this statutorily authorized use has not been remedied.

A241. Based on the as-applied analyses of the Respondents' spending of ERA trust assets derived from the State Forest trust corpus set forth in Section V.A.7. below, the Respondents did not use or retain any of these trust assets to remedy this ongoing degradation.

***Degradation from ATVs***

A242. The statutorily mandated expansion of ATV use on the State Forest significantly degrades, diminishes and depletes these public natural resources and exacerbates the degradation caused by the many other statutorily authorized uses of the State Forest for non-trust purposes.

A243. As set forth in Section V.A.3. above, DCNR managed 273 miles of designated ATV roads/trails on the State Forest and prohibited ATV use on State Forest roads as of 2016. Even with these limitations, the Bureau of Forestry found this activity to be unmanageable because, as their name indicates, these motorized vehicles are specifically designed to travel off-road and traverse all types of terrain. Thus, their riders cannot be constrained to designated roads/trails and given the extensive road and rights-of-way infrastructure on the State Forest developed through other statutorily authorized uses of the State Forest, ATV riders can range far and wide and the bureau cannot stop them. The bureau has estimated that over 2,000 miles of illegal ATV trails on the State Forest have caused significant



degradation of important forest natural areas, including wetlands, vernal pools, and rare native plants.

A244. Since 2018, DCNR is now required by Section 1720-E of the Fiscal Code to administer a significant expansion of ATV use on the State Forest for non-trust purposes, as set forth in Section V.A.3. above.

A245. Retired State Forest Managers Davey and D'Amore were at the epicenter of the degradation to the natural ecology of the State Forest from statutorily mandated ATV use. When Davey became the Forest Manager of the Sproul State Forest District in 1982, he “started to have many problems with ATVs on State Forest Roads and running new trails through the forest. ATVs were involved in many accidents including those that were fatal.” Retired State Forest Manager Davey Affidavit (Exhibit A17-001). He “decided on a policy that there could be no ATV use of the forest. Shortly after that, in 1985, the State Legislature passed a law requiring DER to allow ATV trails on the State Forest. Representative Russell Letterman, whose district included Sproul State Forest, was a prime sponsor of this law. In 1986 a pilot ATV trail was approved for the Huling Branch of Sproul State Forest, part of the Two Mile Watershed flowing into Kettle Creek several miles upstream from the village of Westport. This trail is now called “Whiskey Springs”. The location of the pilot trail was chosen because the area was heavily damaged, unreclaimed mining land. District Foresters had to find and develop ATV trails in the

forest. The result of having to provide ATV trails in the State Forest was over 2,000 miles of illegal trails were established by the ATV users. We had no ability to stop this use. Most of these trails still exist. We were not given the money or the people to deal with them.” Exhibit A17-001 – 002.

A246. Retired State Forest Manager D’Amore “was also required to help design and to manage All Terrain Vehicle recreational trails in the State Forest. These trails brought in thousands of high powered vehicles into the forest, made to be ridden off road, through rough terrain. They are loud and destructive. The trails we had to make for them have to be at least 12 to 15 feet wide. We must convert hundreds of acres of natural forest into impacted roads. The major problems with ATVs are from illegal use of State Forest land. We have over 2000 miles of illegal trails, many of them from adjoining land owners.” Retired State Forest Manager D’Amore Affidavit (Exhibit A10-001).

A247. As of 2016 (prior to the recent mandated expansion of ATV use on the State Forest by the Fiscal Code), the roads/trails in the State Forest designated for ATV use in northcentral Pennsylvania represented 170 miles of the total 273 miles of ATV road/trails in the State Forest (Sproul – 90 miles, Susquehannock – 45 miles, Tiadaghton – 18 miles; and Bald Eagle – 17 miles). 2016 State Forest Plan, page 201 (Exhibit A3-055). These designated ATV roads/trails include Whiskey Springs and Bloody Skillet in the Sproul State Forest District, the designated ATV roads/trails

connecting Lyman Run and Denton Hill State Parks in the Susquehannock State Forest District, and the designated ATV roads/trails near Haneyville in the Tiadaghton State Forest.<sup>28</sup>

A248. PEDF member Cynthia Bower testifies that “[f]rom years of use and misuse, the miles of DCNR ATV trails I have walked at Susquehannock State Forest, Haneyville, and Bloody Skillet are deeply rutted, with extensive pools of standing water and mud holes. To avoid the worst areas, ATV riders have created bypasses (causing more destruction) and yet more bypasses causing even more destruction as they attempt to avoid the now massive and all-but-obliterated original trails. This has caused further devastation to the integrity of the surrounding forest as the trails split and divide into pieces of what had been undisturbed ground; introduce invasive species into the vegetation; send sediment into the streams; compact the soil; and fill the air with dust, noise and exhaust.” Bower State Forest Degradation Affidavit (Exhibit A16-002).

A249. To date, the ongoing degradation of the State Forest from this statutorily authorized use has not been remedied.

A250. Based on the as-applied analyses of the Respondents’ spending of ERA trust assets derived from the State Forest trust corpus set forth in Section V.A.7.

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<sup>28</sup> Additional details about designated ATV Trails in State Forest Districts are available at: <https://www.dcnr.pa.gov/Recreation/WhatToDo/ATVRiding/ATVTrailsinStateForests/Pages/default.aspx>,

below, the Respondents did not use or retain any of these trust assets to remedy this ongoing degradation.

### ***Degradation from Timber Sales***

A251. While the Bureau of Forestry works to minimize the degradation, diminution and/or depletion of State Forest public natural resources from statutorily authorized timber sale, degradation from this non-trust purpose cannot be completely avoided. The removal of mature trees, the alteration of existing wildlife habitat, soil compaction from heavy logging equipment, the need for haul roads to remove the harvested timber, increased erosion from disturbed areas, the potential for fuel spills, and the noise and emissions from heavy equipment all disturb the natural ecology of the forest.

A252. To date, the ongoing degradation of the State Forest from this statutorily authorized use has not been remedied.

A253. Based on the as-applied analyses of the Respondents' spending of ERA trust assets derived from the State Forest trust corpus set forth in Section V.A.7. below, the Respondents did not use or retain any of these trust assets to remedy this ongoing degradation.

### ***Degradation from Other Forest Conversion to Non-Forest***

A254. As of 2016, DCNR administered the following statutorily authorized uses of the State Forest primarily for non-trust purposes: 6,189 miles of roads, 31

dams, 521 bridges, 4,017 leased campsites, 684 buildings, 20 municipal water supply agreements, 2 wastewater treatment facilities, 27 picnic areas, 798 miles of hiking trails, 1 shooting range, 1 golf course, 336 tower agreements, approximately 50 fire towers, and thousands, of miles of rights-of-way for electric, water, sewer, and communication facilities, and pipelines. 2016 State Forest Plan, page 216 (Exhibit A3-059). This list does not include the acres of forest cleared to provide parking, camping, and comfort facilities for persons recreating or otherwise engaged in statutorily authorized uses of the State Forest for non-trust purposes.

A255. Almost all this infrastructure requires the conversion of forest to non-forest, and fragments the forest, increases forest edge and invasive species, and destroys habitat for native plants and animals. The cumulative impacts to the natural ecology of the forest from the infrastructure needed to support the statutorily authorized uses of the State Forest are extensive.

A256. As Retired State Forest Manager Merrill states, “[a]ny activities that cause the forest to be converted into non-forest must be curtailed and managed more conservatively. The forest has an ability to recover from disturbances depending on the severity and permanence of the disturbance. Forest that is converted to non-forest may eventually revert back to forest and a functional ecosystem, if properly managed with appropriate scientifically based techniques. This process generally takes decades, if not centuries to occur. If the forest is removed for activities like gas wells,

ATV trails, and other non-forest conversions, the world loses those areas for clean air, pure water and the natural, scenic, historic, and esthetic values the forest environment provides.” Retired State Forest Manager Merrill Affidavit (Exhibit A13-002).

A257. To date, the ongoing degradation of the State Forest from this statutorily authorized use has not been remedied.

A258. Based on the as-applied analyses of the Respondents’ spending of ERA trust assets derived from the State Forest trust corpus set forth in Section V.A.7. below, the Respondents did not use or retain any of these trust assets to remedy this ongoing degradation.

**c. Cumulative Adverse Effect to the Natural Ecology of the State Forest and Its Ability to Capture Carbon and Limit Climate Change**

A259. Today, our State Forest has a vital role in capturing carbon from the atmosphere to limit changes to our climate from our burning of fossil fuels. At the same time, the ability of the State Forest to capture carbon and limit climate change is being degraded, diminished and depleted by the conversion of thousands of acres of forest to non-forest—thus depleting the capacity of the forest to capture carbon—and by degrading and diminishing the capacity of the remaining forest ecosystem to capture carbon through the cumulative adverse effects of various stressors such as fragmentation, increased invasive species, increased disease from forest pests,

eroded and compacted soil, reduced air and water quality, and other disruptions to the diversity of plants and animals and the proper functioning of nutrient, water and energy cycles within the forest.

A260. The 2016 State Forest Plan states that “Pennsylvania has undergone a long-term warming of more than 1°C (1.8°F) over the past 110 years” causing “parts of Pennsylvania [to move from growth] Zone 6 to Zone 7, similar to Tennessee and Virginia.” 2016 State Forest Plan, page 39 (Exhibit A3-012). As a result, “the state will become increasingly unsuitable for many of the tree species that are now present, especially those generally associated with northern hardwood ecosystems. ... The state will also become increasingly suitable for some species that are currently rare or not present in the state, such as loblolly and shortleaf pines, common persimmon, and red mulberry.” *Id.* Stressors from a warming climate that will make some tree species susceptible to increased mortality and decreased regeneration success include “acidic deposition and both native and non-native insects and diseases”, as well as secondary impacts “if climate change increases the frequency of severe storms, and fires may become [] become more common as temperatures rise.” *Id.*; see Section V.A.8.e. below for additional details on the cumulative adverse effects of these stressors on the natural ecology of the State Forest.

A261. The 2016 State Forest Plan recognizes that “[d]espite the potential impacts of climate change on forest ecosystems, forests and their soils ... represent one of the largest terrestrial pools of carbon and actively sequester carbon from the atmosphere. With active management, it is possible to increase the rate at which carbon is sequestered.” *Id.*

A262. The 2016 State Forest Plan states that “many existing ecosystem management practices contribute to healthy forests that can resist and adapt to the stresses of climate change” and lists the following as some of these management practices and strategies:

- Protecting the forest from severe mortality events, such as insect and disease outbreaks.
- Promoting forest health, growth, and productivity.
- Maintaining and enhancing community, species, and genetic diversity.
- Improving forest connectivity and limiting fragmentation to facilitate species migration.
- Limiting forest conversion and promote restoration.
- Acquiring key tracts of land to improve forest connectivity and limit forest loss.
- Ensuring diverse and rigorous regeneration following timber harvests and natural mortality events.
- Promoting a vibrant wood products economy to facilitate management activities while providing for long-term carbon storage in durable wood products.

2016 State Forest Plan, page 40 (Exhibit A3-013).



A263. PEDF member Cynthia Bower reports on important and emerging research and efforts directed at enhancing the capacity of forests to capture carbon, including a statement by the Northeast Wilderness Trust explaining that “[a]s a forest’s age increases, so too does the amount of carbon it stores. It was once believed that old-growth forests were sources of carbon (giving off carbon into the atmosphere) but we now know that they are more often carbon sinks, continuing to absorb carbon even when they are centuries-old.” Bower Climate Change Affidavit (Exhibit A7-002).

A264. Bower has worked with the Western Pennsylvania Conservancy to protect the forest on her own property to capture carbon over the long term and quotes the conservancy’s explanation of the importance of forests in this effort, stating, “[t]rees capture and use CO<sub>2</sub> when they perform photosynthesis. When a tree pulls CO<sub>2</sub> out of the air, the gas combines with water and sunlight to make sugar, and during this food-making process, oxygen is released helping to clear the air. One mature tree can absorb approximately 48 pounds of CO<sub>2</sub> a year. Trees also release CO<sub>2</sub>, though slowly, through decomposition. This makes trees and forests essential in the fight against climate change.” *Id.*

A265. Bower also reports on the importance reforesting and extending the harvest cycles on the State Forest as one of the natural strategies for increasing

carbon sequestration identified in Pennsylvania Climate Action Plan. *Id.*; *see also* Pennsylvania Climate Action Plan, DEP, September 2021, page 95.<sup>29</sup>

A266. To ensure our State Forest maximizes its important ecological function of capturing and storing carbon to aid in our efforts to limit climate change, the degradation, diminution and depletion of the natural ecology of the State Forest from statutorily authorized uses must be fully remedied.

A267. To date, the ongoing degradation of the State Forest from statutorily authorized uses that reduce the forest's capacity to capture carbon and limit climate change have not been remedied.

A268. Based on the as-applied analyses of the Respondents' spending of ERA trust assets derived from the State Forest trust corpus set forth in Section V.A.7. below, the Respondents did not use or retain any of these trust assets to remedy this ongoing degradation.

**d. Actions Needed to Remedy the Ongoing and Extensive Degradation of the State Forest Trust Corpus**

A269. The DCNR Bureau of Forestry under its *Penn's Woods* strategic plan seeks to administer the various statutorily authorized uses of the State Forest for non-trust purposes consistent with its trustee duty to conserve and maintain the State Forest public natural resources.

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<sup>29</sup> Available at <https://www.dep.pa.gov/Citizens/climate/Pages/PA-Climate-Action-Plan.aspx>.

A270. The ability of the DCNR Bureau of Forestry to implement the *Penn's Woods* strategic plan depends on adequate funding and expertise to remedy the ongoing degradation of the natural ecology of the State Forest from these statutorily authorized uses of the State Forest for non-trust purposes, including the cumulative adverse effects of these uses and other stressors on the forest ecosystem.

A271. As set forth above, the ongoing degradation of the State Forest trust corpus from the statutorily authorized uses and related stressors will likely continue well into this century, if not beyond. Regarding ongoing shale gas extraction, Pennsylvania has extensive experience with extraction industries and the fact that as the resources being extracted are depleted, the money available to remedy the remaining environmental degradation becomes scarce and eventually nonexistent. The ERA trust assets in the Oil and Gas Lease Fund may well be the only funds available to remedy the long-term degradation to the natural ecology of the State Forest from the extensive shale gas extraction that will continue to occur.<sup>30</sup>

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<sup>30</sup> As of 2016, DCNR held a total of \$65,292,500 in bonds for the plugging of approximately 1,000 gas wells currently installed under State Forest oil and gas leases issued by DCNR. DCNR states that this bonding amount “is calculated to be sufficient to address any well abandonment issues for its leasing program.” 2016 State Forest Plan, page 166 (Exhibit A3-034). DCNR’s experience with plugging shale gas wells has been limited and the cost of plugging will only increase over time while the amount of the plugging bonds will not increase. Moreover, DCNR does not hold plugging bonds for wells drilled on the 347,258 acres of State Forest with severed subsurface ownership or have funds in reserve for the cost of other degradation that will need to be remedied from oil and gas development on the State Forest.

A272. Ongoing degradation of the State Forest trust corpus from statutorily authorized uses for non-trust purposes and related stressors can be remedied through actions such as acquiring replacement forest land to remedy State Forest land conversions; restoring converted forest land back to forest; abating legacy pollution from past mining, oil and natural gas extraction and other industrial operations; and enhancing the existing forest ecosystem by improving forest regeneration and controlling invasive species, forest pests and diseases; however, funding for such actions has always been in short supply as most of the bureau's budget is needed to carry out its general administration of statutorily authorized uses of the State Forest for non-trust purposes.

A273. The acquisition of additional forest land is needed to remedy the ongoing degradation of the State Forest trust corpus from the conversion and degradation of forest to non-forest by the many statutorily authorized uses of the State Forest for non-trust purposes. The 2016 State Forest Plan identifies the following State Forest acquisition priorities:

- Interior holdings or deeply indented tracts that will simplify boundaries and thus make land management more efficient
- Properties that strategically link existing state forest lands or other public/conserved lands
- Lands that contain species of special concern or unique habitats or plant communities
- Lands that are threatened by development pressure or that will buffer existing state forest land from nearby development

- Lands that help protect and conserve critical water resources
- Lands that provide new or unique recreational opportunities
- Properties that provide a new or improved point of access to existing state forest lands, which will enhance access for management and recreation
- Expansive properties that create a new core land holding (typically 1,000 acres or more)
- Oil, gas, and mineral rights associated with severed land holdings where conservation of wild character or core forest are a priority.

2016 State Forest Plan, page 47 (Exhibit A3-014).

A274. The 2016 State Forest Plan reports almost 500 miles of impaired streams on the State Forest, with 226 miles impaired by acid mine drainage, 215 impaired from atmospheric deposition, 21 impaired by agriculture, and 19 miles impaired by hazardous substances (polychlorinated biphenyl or mercury). *Id.*, page 141 (Exhibit A3-022). Actions to abate these impaired streams are needed to remedy the degradation of the State Forest from statutorily authorized uses for non-trust purposes.

A275. As discussed above, the 2016 State Forest Plan states that an estimated 30,000 acres of mine scarred land on the State Forest would benefit from remediation if funds were available. *Id.*, page 166 (Exhibit A3-034). Actions to abate these mine scarred lands are needed to remedy the degradation of the State Forest from statutorily authorized uses of the State Forest for non-trust purposes.

A276. Retired State Forest Manager Roy Siefert has identified actions that are needed to remedy the State Forest from “both from past and present activities

that harm the ecology” to the extent those currently authorized to use the State Forest for non-trust purposes are not required to take these actions:

- Plugging abandoned oil and gas wells and restoring old well pads to natural forest;
- Restoring to natural forest a multitude of old pipeline and unused rights of way to eliminate the fragmenting;
- Restoring to natural forest the roads and pipelines and well pads that were newly constructed or expanded to allow the extraction of the oil and gas;
- Reestablishing aquatic organism passage on streams;
- Reestablishing stream floodplains;
- Improving road drainage to prevent stream siltation;
- Establishing forest cover along streams that were impacted by prior wholesale logging.
- Restoring to natural forest over 2000 miles of Illegal ATV trails in the forest;
- Restoring to natural forest areas of the forest subject to coal mining activities and damage from acid mine drainage;
- Eliminating Invasive species that have damaged the forest, and restoring the areas damaged to natural forest;
- Purchasing private lands that are within the boundaries of the State Forest that would conserve and protect the ecology of the forest;
- Buying out leased cabins in the State Forest;
- Buying out private oil and gas rights on State Forest land;
- Developing protection for and enhancement of existing core forest areas of the state forest, and restoring impacts to existing core forest areas from the current and future oil and gas extraction in the state forest.
- Establishing an ongoing monitoring for air pollution impact on the state forest from the oil and natural gas activities including methane releases;
- Establishing ongoing research to understand how to enhance the state forest as a means of absorbing climate change pollutants in the air by carbon sequestration and carbon impoundment;

- Establishing an ongoing research program to understand the existing and potential future impacts to our state forest from climate change.

Retired State Forest Manager Siefert Affidavit (Exhibit A9-002 – 004).

A277. The costs of taking actions such as those above to remedy the degradation from statutorily authorized uses of the State Forest for non-trust purposes are substantial. While these costs should be borne by those benefiting from the statutorily authorized uses of the State Forest that cause the degradation, much of the ongoing degradation of the State Forest trust corpus results from uses authorized prior to 1971 when trustee duties were imposed on the Commonwealth or from uses that were authorized after this paradigm shift without imposing obligations on those benefiting from these uses to remedy the degradation.

A278. The Commonwealth has the duty as trustee of the State Forest trust corpus to use and retain ERA trust assets derived from the State Forest trust corpus to remedy the ongoing degradation of the natural ecology of the State Forest from existing authorized uses and related stressors to restore the State Forest trust corpus.

A279. As stated by retired State Forest Manager Doug D’Amore, “Forest District yearly [budget] allocations were and are based on past expenditures for things like electric, vehicle and equipment repair costs, and office supplies, not the ecological needs of the forest. If there were any leftover funds at the end of the current budget year, we could use them for ecological needs. But there was never

enough money to take care of the problems.” Retired State Forest Manager D'Amore Affidavit (Exhibit A10-001 – 002).

A280. As stated by retired State Forest Manager Roy Seifert, the “impacts to the state forest from both the past and current activities that harm the ecology need to be remediated. Many have not. Our state forest ecosystem, in my opinion, is at a tipping point. Our forest ecosystem cannot absorb any more degrading activities. The time has come to start a concerted effort to restore our forest ecosystem.” Retired State Forest Manager Seifert Affidavit (Exhibit A9-002).

A281. Based on the as-applied analyses of the Respondents’ spending of ERA trust assets derived from the State Forest trust corpus set forth in Section V.A.7. below, the Respondents did not use or retain any of these trust assets to take actions such as those above to remedy the ongoing degradation of the State Forest from existing statutorily authorized uses.

## **5. DCNR Incurs Many Other Administrative Costs For Non-Trust Purposes**

A282. In addition to incurring costs to administer many statutorily authorized uses of State Forest and State Park public natural resources for non-trust purposes, as set forth in Sections V.A.3. above, DCNR incurs costs to administer many statutorily authorized statewide programs for non-trust purposes and costs for general administrative services for non-trust purposes, both of which are described in more detail in this section.



A283. Costs incurred by DCNR to administer statewide programs for non-trust purposes and for general administrative services for non-trust purposes are not reasonable costs of administering the ERA trust.

A284. Based on the as-applied analyses of the Respondents' spending of ERA trust assets derived from the State Forest trust corpus set forth in Section V.A.7. below, the Respondents spent trust assets for these non-trust purposes.

**a. Administrative Costs for Statewide Recreation and Tourism Programs for Non-Trust Purposes**

A285. DCNR administers multiple statewide outdoor recreation and tourism programs for purposes that do not conserve and maintain public natural resources (*i.e.*, are for non-trust purposes). As with costs incurred by DCNR to administer statutorily authorized uses of State Forest and State Park public natural resources for not-trust purpose, costs incurred by DCNR to administer statewide recreation and tourism programs for non-trust purposes are not costs of administering the ERA trust.

A286. As set forth in more detail below, DCNR is statutorily authorized to administer statewide technical assistance and grant programs to provide recreational facilities at local parks, such as swimming pools, playgrounds and equipment, athletic fields/courts, parking lots, roads, bridges, walkways, pavilions, concession stands, bathhouses, restrooms, signage and other similar features. DCNR is also

statutorily authorized to administer statewide recreation/tourism programs to provide river access, whitewater rafting, ATV parks, and cultural heritage areas.

A287. Section 306 of the CNRA, 71 P.S. § 1340.306, transferred to DCNR the administration of numerous statewide grant and technical assistance programs that had been administered by the Department of Community Affairs to aid local communities in planning for and developing outdoor recreational facilities at local parks.

A288. DCNR reports that approximately \$24 million is awarded every year for parks and recreation on the over 6,000 local parks across the Commonwealth encompassing almost 200,000 acres.<sup>31</sup> These local parks provide local recreational facilities including over 300 swimming pools, almost 2,400 playgrounds and over 2,000 parks with athletic fields.

A289. Various statutes authorize funds to support these statewide recreation programs, including the Keystone Recreation, Park and Conservation Fund (32 P.S. §§ 2014, 2018, 2022), the Environmental Stewardship Fund (27 Pa.C.S. §§ 6104-6105), the ATV Management Restricted Account and the Snowmobile Management Restricted Account (75 Pa.C.S. § 7706), and various other state and federal funding sources.

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<sup>31</sup> See Local Parks on DCNR's website at <https://www.dcnr.pa.gov/Communities/LocalParks/Pages/default.aspx>.

A290. DCNR awards hundreds of grants each year to municipalities and nonprofit organizations to develop and maintain recreational facilities in local parks as evidenced by the lists of the grants awarded each year posted on its website.<sup>32</sup>

A291. In addition to administering ATV use on the State Forest as discussed above, DCNR is statutorily required to provide statewide regulation of snowmobiles and ATVs and provide statewide recreational facilities for these outdoor recreation vehicles under the Vehicle Code (75 Pa.C.S. Chapter 77). DCNR is statutorily required to administer a broad range of functions, including registering snowmobile and ATV dealers, registering and issuing certificates of title for snowmobiles and ATVs, issuing vintage snowmobile permits, regulating snowmobiles and ATV operations and equipment, designating snowmobile and ATV roads on state forest and park lands, permitting special snowmobile and ATV events, and enforcing these programs. DCNR is also statutorily authorized to award grants to municipalities and profit and nonprofit organizations to facilitate ATV use on lands not owned by the Commonwealth.

A292. DCNR is statutorily authorized to promote local cultural and heritage areas for tourism and economic development through Section 306(a)(3) of the

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<sup>32</sup> See DCNR Community Conservation Partnerships Program Grants, Previous Grants, DCNR Grant Announcements 2007-2021 (PDF) at: <https://www.dcnr.pa.gov/Communities/Grants/pages/default.aspx>.

CNRA, 71 P.S. § 1340.306(a)(3). DCNR awards grants to statewide organizations and local communities to support local heritage areas.

A293. DCNR is statutorily authorized to administer grants and technical assistance to local governments and nonprofit organizations for river conservation projects by Section 307 of the CNRA, 71 P.S. § 1340.307. DCNR awards grants for projects to provide public access to rivers for boating, fishing and other water-dependent recreational activities through this program.

A294. DCNR is statutorily authorized to provide grants to support regional recreational trail development by Section 308 of the CNRA, 71 P.S. § 1340.308 (authorizing DCNR to administer the Rails to Trails Act (32 P.S. §§ 5601-5622) and the Pennsylvania Appalachian Trail Act (64 P.S. §§ 801-805)).

A295. Costs incurred by DCNR to administer the above program for purposes other than conserving and maintaining public natural resources are not reasonable costs of administering the ERA trust.

A296. Based on the as-applied analyses of the Respondents' spending of ERA trust assets derived from the State Forest trust corpus set forth in Section V.A.7. below, the Respondents spent trust assets to administer these statewide programs for non-trust purposes.

**b. Administrative Costs for Other Statewide Programs  
for Non-Trust Purposes**

A297. DCNR is statutorily authorized to administer numerous other statewide programs for non-trust purposes that support development of natural resources within the Commonwealth, including leasing of other lands owned by the Commonwealth for oil and gas extraction, surveying the geologic resources of the Commonwealth to identify geologic resources that can be developed, and licensing drillers of groundwater wells to provide drinking water within the Commonwealth. DCNR is also statutorily authorized to administer statewide programs to benefit natural resources on private lands within the Commonwealth, including preventing and controlling forest fires on private lands, assessing and controlling forest pests on private lands, and surveying ecological resources on private land. The specific statutory authorities for these statewide programs are set forth below.

A298. DCNR is statutorily authorized to administer oil and gas extraction programs on other Commonwealth lands under Section 302(a)(13) of the CNRA, 71 P.S. § 1340.302(a)(13). The CNRA authorizes leasing lands and subsurface rights owned by the Commonwealth for the extraction of natural gas and other mineral deposits to owners or lessees of rights to mineral deposits on adjoining lands. DCNR

leases submerged lands owned by the Commonwealth beneath navigable waters for shale gas extraction using this authority.<sup>33</sup>

A299. DCNR is statutorily authorized to administer the leasing of certain other Commonwealth land for the extraction of oil and gas through delegation from the Department of General Services under the Indigenous Mineral Resources Development Act (act of October 8, 2012, P.L. 1194, No. 147), 71 P.S. §§ 1357.1-1357.6. This statute authorizes leasing for the removal of valuable coal, oil, natural gas, coal bed methane or limestone from lands owned by the Commonwealth (other than lands owned or administered by DCNR, the Pennsylvania Fish and Boat Commission, or the Pennsylvania Game Commission) and lands owned or controlled by the State System of Higher Education. This statute directs that 60% of the royalty payments from these leases of land owned by the Commonwealth be deposited into the Oil and Gas Lease Fund. All other payments are allocated to other state agencies.

A300. DCNR is statutorily authorized to conduct “a thorough and extended survey of this Commonwealth ... elucidating the geology and topography of this Commonwealth” by Section 305(a)(1)-(8) of the CNRA, 71 P.S. §§ 305(a)(1)-(8). The CNRA further directs that the survey “shall disclose the chemical analysis and

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<sup>33</sup> See Shale Gas and Publicly-Owned Streambeds on DCNR’s website at: <https://www.dcnr.pa.gov/Business/StreambedGasLeasing/Pages/default.aspx>.

location of ores, coals, oils, clays, soils, fertilizing and of other useful minerals, and of waters, as shall be necessary to afford the agricultural, forestry, mining, metallurgical and other interests of this Commonwealth and the public a clear insight into the character of its resources. It shall also disclose the location and character of such rock formations as may be useful in the construction of highways or for any other purpose.” *Id.* In other words, DCNR administers this statewide geologic survey program to facilitate use of valuable geologic resources within the Commonwealth, not to conserve and maintain them.

A301. DCNR is statutorily authorized to license well drillers within the Commonwealth by Section 305(b) of the CNRA, 71 P.S. § 1340.305(b), and the Well Drillers License Act (act of May 29, 1956, P.L (1955) 1840, No. 610), 32 P.S. §§ 645.1-645.13. The Well Drillers License Act requires, among other things, that persons drilling a water well to secure a license from DCNR (32 P.S. § 645.4) and record the location of the well (32 P.S. § 645.10). The purpose of this statute is to ensure that the groundwater resources of the Commonwealth be developed “in an orderly and reasonable manner, without waste, in order to assure sufficient supplies for continued population growth and industrial development of the Commonwealth.” 32 P.S. § 645.1.

A302. DCNR is statutorily authorized to administer a system of fire wardens across the Commonwealth to take “measures for the prevention, control and

extinction of forest fires as will assure a reasonable protection from fire to woodlots, forest and wild land within this Commonwealth” by Sections 302(d)-(g) of the CNRA, 71 P.S. §§ 1340.302(d)-(g) (originally §§ 1818-1821 of the Administrative Code of 1929 (Exhibit A5)); *see also* CNRA § 302(a)(7), 71 P.S. § 1340.302(a)(7) (giving DCNR authority to appoint and fix compensation for fire wardens); CNRA § 302(b)(7), 71 P.S. § 1340.302(b)(7) (giving DCNR authority to “enter into cooperative agreements with county, township, municipal and private agencies for the prevention and suppression of forest fires as provided by law”).

A303. In the 2016 State Forest Plan, the Bureau of Forestry states that “[o]ver the last few decades, expansion of the wildland/urban interface—areas where homes and other human development meet or overlap with undeveloped land—has significantly impacted all emergency response and disaster management activities ... Increasingly, the bureau is tasked with protecting lives and property from damage by wildfires.” 2016 State Forest Plan, page 176 (Exhibit A3-038).

A304. Today, most wildfires occur on private lands. The Bureau of Forestry reported an annual average of 640 forest fires from 2008-2015 with these fires burning an average of 3,920 acres of forest each year. Of the 640 fires each year, only 29 occurred on state forest land and burned an annual average of 774 acres. *Id.*, page 178 (Exhibit A3-040).



A305. The Bureau of Forestry administers “a network of approximately 50 fire towers” to detect wildfires, as well as a network of “[n]early 2,000 volunteer fire wardens on call across the commonwealth.” *Id.* The bureau also “enters into partnerships with other state and federal agencies to share knowledge and resources.” *Id.*, page 176 (Exhibit A3-038).

A306. DCNR is statutorily authorized “to protect all forest land in this Commonwealth from forest fires, fungi, insects and other enemies” by Section 302(a)(4) of the CNRA, 71 P.S. § 1340.302(a)(4). The DCNR Bureau of Forestry monitors and manages non-native invasive forest insects and forest diseases by using specialists to “map defoliation and mortality events across the state [with aerial detection programs] to understand where impacts may be the highest and to develop integrated pest management strategies to manage impact in forest ecosystems.” 2016 State Forest Plan, page 184 (Exhibit A3-043).

A307. DCNR is statutorily authorized to conduct “a thorough and extended survey ... of the ecological resources of this Commonwealth, to gather and digest information from sources within and outside this Commonwealth and to put the results of the survey into a form convenient for reference” by Section 305(a)(10) of the CNRA, 71 P.S. § 1340.305(a)(10), and to administer the Wild Resource Conservation Act (act of June 23, 1982, P.L. 597, No. 170 (32 P.S. §§ 5301-5314)) by Section 305(a)(9) of the CNRA, 71 P.S. § 1340.305(a)(9). DCNR administers

this statewide ecological survey program, known as the Pennsylvania Natural Heritage Program, in partnership with the Pennsylvania Fish and Boat Commission, and the Pennsylvania Game Commission and the Western Pennsylvania Conservancy, and in cooperation with the U.S. Fish and Wildlife Service.<sup>34</sup> Through this program, DCNR administers the Pennsylvania Natural Diversity Inventory, which is used primarily to conduct environmental reviews for private land development within the Commonwealth requiring environmental approvals and/or permits.

A308. The above statewide programs administered by DCNR are either exclusively or partially for purposes other than conserving and maintain public natural resources. Costs incurred by DCNR to administer these statewide programs for non-trust purposes are not reasonable costs of administering the ERA trust.

A309. Based on the as-applied analyses of the Respondents' spending of ERA trust assets derived from the State Forest trust corpus set forth in Section V.A.7. below, the Respondents spent trust assets to administer these statewide programs for non-trust purposes.

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<sup>34</sup> See Pennsylvania Natural Heritage Program at <https://www.naturalheritage.state.pa.us/Default.aspx>.

### **c. General Administrative Costs for Non-Trust Purposes**

A310. DCNR incurs significant general administrative costs to carry out its authorities under the CNRA and other statutes for non-trust purposes, including costs for DCNR staff, vehicles, equipment, and contracting for other specialized services. General administrative costs to carry out these non-trust purposes are not costs of administering the ERA trust.

A311. DCNR has had an average of just under 2,400 employees since 2012, most of whom carry out the statutory authorities for non-trust purposes set forth above in this section and in Section V.A.3. or who provide general administrative services to support staff carrying out these statutory authorities.<sup>35</sup>

<b>Date</b>	<b>Salaried Employees</b>	<b>Wage Employees</b>	<b>Total</b>
July 15, 2012	1,300	1,075	2,375
July 15, 2013	1,304	1,139	2,443
July 15, 2014	1,325	1,148	2,473
July 15, 2015	1,333	1,180	2,513
July 15, 2016	1,287	1,207	2,494
July 15, 2017	1,276	1,211	2,487
July 15, 2018	1,251	1,161	2,412
July 15, 2019	1,259	1,152	2,411
July 15, 2020	1,235	984	2,219
July 15, 2021	1,235	1,016	2,251
July 15, 2022	1,259	977	2,236
Average	1,279	1,114	2,392

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<sup>35</sup> State agency employee count data reported at:  
<http://pennwatch.pa.gov/employees/Pages/Employee-Count-by-Agency.aspx>.

A312. DCNR's executive staff and those reporting to them are directly supervised by the Governor's Office and their primary responsibility is to ensure that DCNR program staff carry out their functions consistent with the Governor's political objectives. Persons in positions reporting directly to the Governor's Office include the DCNR Secretary and three Deputy Secretaries, the DCNR Chief Counsel and five Assistant Counsel, the DCNR Policy Director, the DCNR Legislative Director, the DCNR Communications Director, and various additional advisors and supporting staff.

A313. DCNR also has general administrative support staff not assigned to specific programs but responsible for assisting with administrative functions such as budgeting, human resources, information technology (*e.g.*, computer hardware, software, networks, data storage, etc.), purchasing and contracting. DCNR's budget staff work closely with and under the direction of the Governor's Office of Budget.

A314. The costs of DCNR staff administering statutory authorities for non-trust purposes and providing general administrative services for non-trust purposes are not costs of administering the ERA trust.

A315. DCNR uses a significant number of vehicles and various heavy equipment to carry out its statutory authorities described above and in Section V.A.3. for non-trust purposes. The costs of such vehicles and equipment for non-trust purposes are not costs of administering the ERA trust.

A316. DCNR requires significant information technology equipment (*e.g.*, computer hardware, software, networks, geographic information systems, data storage, etc.) to carry out its statutory authorities described above and in Section V.A.3. for non-trust purposes. The costs of such equipment for non-trust purposes are not costs of administering the ERA trust.

A317. DCNR requires significant amounts of other equipment and supplies (*e.g.*, communications equipment, radio systems, mailing and shipping supplies, office supplies, fuel, furniture, utilities, educational supplies, recreational equipment, uniforms, aggregate and other road materials, mowing equipment, surveying equipment, environmental testing supplies, etc.) to carry out its statutory authorities described above and in Section V.A.3. for non-trust purposes. The costs of such equipment and supplies for non-trust purposes are not costs of administering the ERA trust.

A318. DCNR contracts for a significant number of specialized services to carry out its statutory authorities described above and in Section V.A.3. for non-trust purposes, including environmental and engineering services, information technology support, road maintenance, legal services, construction contractors, communication/media services, accounting/auditing services, agricultural services, fencing, printing, and many other services. The costs of such specialized services for non-trust purposes are not costs of administering the ERA trust.

A319. Based on the as-applied analyses of the Respondents' spending of ERA trust assets derived from the State Forest trust corpus set forth in Section V.A.7. below, the Respondents spent trust assets for the above DCNR general administrative services for non-trust purposes.

## **6. Statutorily Authorized Uses of ERA Trust Assets in the Marcellus Legacy Fund for Non-Trust Purposes**

A320. In addition to appropriating and spending ERA trust assets in the Oil and Gas Lease Fund to pay for DCNR operations for non-trust purposes, as described in Sections V.A.3 – V.A.5 above, the Respondents annually transfer ERA trust assets from the Oil and Gas Lease Fund to the Marcellus Legacy Fund for various other statutorily authorized uses for non-trust purposes. The costs incurred under these statutory authorities are likewise not costs of administering the ERA trust.

A321. The Marcellus Legacy Fund was established in 2012 as part of legislation that imposed a fee on and regulated the new shale gas industry in Pennsylvania (act of February 14, 2012, P.L. 87, No. 13). 58 Pa.C.S. § 2315(a). The money deposited into the Marcellus Legacy Fund is from the Unconventional Gas Well Fund, which receives the revenue from fees imposed on spud unconventional gas wells, and from the Oil and Gas Lease Fund.

A322. Following specific distributions authorized from the Unconventional Gas Well Fund, 40% of the remaining revenue in that fund is deposited into the Marcellus Legacy Fund. 58 Pa.C.S. § 2315(c).

A323. Annual transfers from the Oil and Gas Lease Fund to the Marcellus Legacy Fund have ranged from \$15,000,000 to \$35,000,000 since 2012 under several statutes (first 58 Pa.C.S. § 2505(b), then Section 1608-E of the Fiscal Code, 71 P.S. § 1608-E, and currently under Section 1601.2-E(e) of the Fiscal Code, 71 P.S. § 1601.2-E(e)).

A324. Under the above statutory authority, ERA trust assets in the Oil and Gas Lease Fund transferred to the Marcellus Legacy Fund since 2012 have been commingled with non-trust assets from the Unconventional Gas Well Fund. A summary of the amounts transferred in fiscal years 2012-2013 through 2021-2022, and the statutory authority for those transfers, are incorporated as **Exhibit A18**.

A325. The annual transfers authorized by statute from the Oil and Gas Lease Fund to the Marcellus Legacy Fund are then distributed to the Environmental Stewardship Fund and the Hazardous Sites Cleanup Fund. The amounts transferred each year from the Marcellus Legacy Fund to these funds are also summarized in Exhibit A18.

**a. Transfers to the Environmental Stewardship Fund  
for Non-Trust Purposes**

A326. To date, a total of \$220,000,000 has been transferred from the Oil and Gas Lease Fund to the Marcellus Legacy Fund (Exhibit A18). Of that total, \$135,000,000 (62%) was transferred to the Environmental Stewardship Fund.

A327. The Environmental Stewardship and Watershed Protection Act established the Environmental Stewardship Fund in 1999 (act of December 15, 1999, P.L. 949, No. 68; 27 Pa.C.S. Chapter 61). The primary sources of money deposited into this fund prior to authorization of the transfers from the Oil and Gas Lease Fund were fees on solid waste disposed in municipal waste landfills, as well as Growing Greener bond funds authorized in 2005 that are being repaid by the landfill fees. 27 Pa.C.S. §§ 6112(b), 6115(d)(4).

A328. The ERA trust assets in the Oil and Gas Lease Fund that pass through the Marcellus Legacy Fund to the Environmental Stewardship Fund are commingled with the landfill fee revenue and other non-trust funds also deposited into the Environmental Stewardship Fund. The amounts from each of these sources for fiscal years 2017-2018 through 2021-2022 are summarized and incorporated in **Exhibit A19**.

A329. The money deposited into the Environmental Stewardship Fund is disbursed to several state agencies for specific purposes, which are summarized below, many of which are non-trust purposes.

A330. Money in the Environmental Stewardship Fund is disbursed annually to the State Treasury to pay the debt service on the Growing Greener bonds, which is a non-trust purpose (*see* disbursements to Treasury in Exhibit A19). Based on the as-applied analyses of the Respondents' spending of ERA trust assets derived from



the State Forest trust corpus set forth in Section V.A.7. below, the Respondents spent trust assets for non-trust purposes through its Environmental Stewardship Fund disbursements to the State Treasury.

A331. After payment of debt service on the Growing Greener bonds, the money remaining in the Environmental Stewardship Fund is transferred annually as follows: DCNR - 28.4%; DEP – 37.4%; Department of Agriculture - 14.8%; and Pennsylvania Infrastructure Investment Authority (“PennVest”) - 23.7%. 27 Pa.C.S. §§ 6104(d)-6104(d.3).

***DCNR Non-Trust Purposes***

A332. DCNR is statutorily authorized to spend the money it receives through annual transfers from the Environmental Stewardship Fund to administer various programs described in Sections V.A.3. and V.A.5 above for non-trust purposes, including grants for local park recreation facilities, rehabilitation of facilities on state forest and park lands, and natural diversity grants (*see* disbursements to DCNR in Exhibit A19). 27 Pa.C.S. § 6105(a).

A333. Based on the as-applied analyses of the Respondents’ spending of ERA trust assets derived from the State Forest trust corpus set forth in Section V.A.7. below, the Respondents spent trust assets for non-trust purposes through its Environmental Stewardship Fund disbursements to DCNR.

### ***DEP Non-Trust Purposes***

A334. DEP is statutorily authorized to spend money from the Environmental Stewardship Fund primarily to implement its own programs or provide grants and technical assistance to local governments to plan for and abate legacy pollution from various industries, much of which occurs on former private industrial sites for non-trust purposes (*see* disbursements to DEP in Exhibit A19). 27 Pa.C.S. § 6105(b).

A335. Based on the as-applied analyses of the Respondents' spending of ERA trust assets derived from the State Forest trust corpus set forth in Section V.A.7. below, the Respondents spent trust assets for non-trust purposes through its Environmental Stewardship Fund disbursements to DEP.

### ***Agriculture Non-Trust Purposes***

A336. The Department of Agriculture is authorized by statute to spend money from the Environmental Stewardship Fund deposited into the Agricultural Conservation Easement Purchase Fund for the purposes set forth in the Agricultural Area Security Law (act of June 30, 1981, P.L. 128, No. 43 (3 P.S. §§ 901-915)). 27 Pa.C.S. § 6105(c).

A337. The General Assembly declared that the purpose of the Agricultural Area Security Law is “to provide means by which agricultural land may be protected and enhanced as a viable segment of the Commonwealth’s economy and as an

economic and environmental resource of major importance.” 3 P.S. § 902. The benefits of this program accrue to private landowners for these further purposes:

- (1) Encourage landowners to make a long-term commitment to agriculture by offering them financial incentives and security of land use.
- (2) Protect farming operations in agricultural security areas from incompatible nonfarm land uses that may render farming impracticable.
- (3) Assure permanent conservation of productive agricultural lands in order to protect the agricultural economy of this Commonwealth.
- (4) Provide compensation to landowners in exchange for their relinquishment of the right to develop their private property.
- (5) Leverage State agricultural easement purchase funds and protect the investment of taxpayers in agricultural conservation easements.
- (6) Encourage financial partnerships between State and local governments with nonprofit entities in order to increase the funds available for agricultural conservation easement purchases.

*Id.*

A338. The purpose of this program is not to conserve and maintain public natural resources (*see* disbursements to Agriculture in Exhibit A19).

A339. Based on the as-applied analyses of the Respondents’ spending of ERA trust assets derived from the State Forest trust corpus set forth in Section V.A.7. below, the Respondents spent trust assets for non-trust purposes through its Environmental Stewardship Fund disbursements to the Department of Agriculture.

### ***PennVest Non-Trust Purposes***

A340. PennVest is authorized by statute to spend money from the Environmental Stewardship Fund to provide grants “for storm water, water and

sewer infrastructure projects, including construction or rehabilitation of collection and conveyance systems.” 27 Pa.C.S. § 6105(d). PennVest primarily provides grants for such infrastructure projects to local governments that could not otherwise provide sewer and water services to their residents at affordable rates (25 Pa. Code § 963.14), which is a non-trust purpose (*see* disbursements to PennVest in Exhibit A19).

A341. Based on the as-applied analyses of the Respondents’ spending of ERA trust assets derived from the State Forest trust corpus set forth in Section V.A.7. below, the Respondents spent trust assets for non-trust purposes through its Environmental Stewardship Fund disbursements to PennVest.

**b. Transfers to the Hazardous Sites Cleanup Fund  
for Non-Trust Purposes**

A342. To date, a total of \$114,364,000 has been transferred from the Marcellus Legacy Fund to the Hazardous Sites Cleanup Fund (Exhibit A18). Of that total, \$85,000,000 (74%) was from the Oil and Gas Lease Fund. *Id.*

A343. The Hazardous Sites Cleanup Fund also receives deposits from other revenue sources. Beginning in fiscal year 2008-2009, the fund received \$40,000,000 annually from the Capital Stock and Franchise Tax. 35 P.S. § 6021.4(a). This tax was eliminated as of January 1, 2016, although transfers to the fund from this revenue source have continued.

A344. The ERA trust assets in the Oil and Gas Lease Fund that pass through the Marcellus Legacy Fund to the Hazardous Sites Cleanup Fund are commingled with tax revenue, fees and other non-trust fund sources also deposited into the Hazardous Sites Cleanup Fund. The deposits into this fund from each of these sources for fiscal years 2017-2018 through 2020-2021 are summarized and incorporated in **Exhibit A20**.

A345. DEP is authorized by the Section 902 of the Hazardous Sites Cleanup Act (act of Oct. 18, 1988, P.L. 756, No. 108, § 902) to spend money in the Hazardous Sites Cleanup Fund to aid in state efforts and supplement federal programs for the cleanup of releases of hazardous substances within the Commonwealth. 35 P.S. § 6020.902(a). In authorizing this state program, the General Assembly declared that “cleanup of sites that are releasing or threatening the release of hazardous substances into the environment and the replacement of contaminated water supplies protects the public health, preserves and restores natural resources and is vital to the economic development of this Commonwealth.”

A346. DEP primarily uses these funds to investigate releases or threatened releases of hazardous substances from former industrial sites, determine response actions needed, take enforcement action against responsible persons to implement needed response actions, or take response actions itself and seek recovery of its response costs from responsible persons. 35 P.S. §§ 6020.501, 6020.505. Most

hazardous site cleanups occur on property contaminated by past industrial operations that pose unacceptable risks to nearby residents from contaminants in their private drinking water wells.<sup>36</sup>

A347. The primary purpose of expenditures from the Hazardous Sites Cleanup Fund is to return former industrial sites to beneficial economic use and to provide nearby residents with alternative drinking water when their groundwater wells are contaminated, which are non-trust purposes.

A348. Based on the as-applied analyses of the Respondents' spending of ERA trust assets derived from the State Forest trust corpus set forth in Section V.A.7. below, the Respondents spent trust assets for non-trust purposes through its Environmental Stewardship Fund disbursements to DEP.

#### **7. As-Applied Analysis of Respondents' Unconstitutional Appropriation and Spending of ERA Trust Assets Derived from Degradation of State Forest Trust Corpus**

A349. As set forth in the Petition Amendment above, the Respondents have a fiduciary duty under the ERA to conserve and maintain our State Forest public natural resources by sustaining the natural ecology of the forest, protecting the clean air and pure water of the forest, and preserving the natural, scenic, historic and esthetic values of the forest. *See* Section V.A.1. above.

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<sup>36</sup> As shown in Exhibit A20, transfers are also made from the Hazardous Sites Cleanup Fund to other funds to further support the cleanup of industrial sites, as well to support household hazardous waste programs.

A350. DCNR administers many statutorily authorized uses of the State Forest for non-trust purposes, including oil and gas extraction, ATV use, rights-of-way, timber sales, camp leases, road/bridges and other infrastructure constructed to support these non-trust purposes. *See* Section V.A.3. above.

A351. The degradation of the State Forest trust corpus from uses for non-trust purposes already authorized is extensive and ongoing. Actions to remedy this degradation are needed now and in the future to restore the State Forest trust corpus and have not been implemented because funding has not been available. *See* Section V.A.4. above.

A352. In addition to costs incurred by DCNR to administer statutorily authorized uses of our State Forest and Park trust corpus for degrading non-trust purposes, DCNR incurs significant costs to administer statutorily authorized statewide programs for non-trust purposes, including statewide programs to provide recreational facilities at local parks and to support other recreation and tourism programs, and for other statewide programs to support the extraction of geologic resources, water well drilling and private land development. DCNR also incurs significant general administrative costs to administer its statutory authorities for non-trust purposes. *See* Section V.A.5. above.

A353. Likewise, many of the statutorily authorized programs that receive money through Marcellus Legacy Fund are for non-trust purposes. *See* Section V.A.6. above.

A354. Given the ongoing and unremedied degradation of the State Forest trust corpus from existing statutorily authorized uses for non-trust purposes, including the natural gas extraction from which the ERA trust funds in the Oil and Gas Lease Fund are currently derived, and given the Respondents' fiduciary duties of prudence, loyalty and impartiality to conserve and maintain the State Forest trust corpus, the Respondents have a duty to administer the ERA trust assets in the Oil and Gas Lease Fund to remedy this ongoing degradation both now and in the future to restore the State Forest trust corpus.

A355. Given the extent of statutorily authorized programs for non-trust purposes administered by DCNR or receiving money through the Marcellus Legacy Fund, and given the Respondents' fiduciary duties of prudence, loyalty and impartiality to conserve and maintain the State Forest trust corpus, the Respondents have a duty to provide a detailed accounting of their spending of ERA trust assets derived from the State Forest trust corpus to demonstrate that the ongoing degradation of the State Forest from existing statutorily authorized uses is being remedied both now and in the future to restore the State Forest trust corpus.



A356. Based on the as-applied analysis below, the Respondents appropriated and spent ERA trust assets in the Oil and Gas Lease Fund in violation of the ERA and in breach of their fiduciary duties as trustees by spending these ERA trust assets for non-trust purposes and by failing to administer these ERA trust assets to remedy the ongoing and extensive degradation of the State Forest from existing statutorily authorized uses, thus diminishing our State Forest trust corpus.

A357. Based on the as-applied analysis below, the Respondents spent ERA trust assets derived from the State Forest trust corpus for non-trust purposes and failed to use these trust assets to restore the State Forest trust corpus to divert General Fund appropriations to other political priorities, thus infringing on the trust beneficiaries' inherent rights to have their ERA trust corpus conserved and maintained in violation of Article I, Section 25 of the Pennsylvania Constitution.

**a. As-Applied Analysis of the Unconstitutional Spending of  
ERA Trust Assets Since Fiscal Year 2008-2009**

***Spending Details Provided by Respondents***

A358. During discovery conducted by PEDF prior to the filing of its application for summary relief, PEDF served interrogatories requesting the Respondents to account for the sources of the monies deposited into the Oil and Gas Lease Fund and their spending of those monies. The Respondents answered PEDF's interrogatories on November 1, 2018, and supplemented their answers on December

10, 2018. Copies of the Respondents' answers are provided as **Exhibit A21** to this Petition Amendment.

A359. In their answers to interrogatories about how royalties deposited into the Oil and Gas Lease Fund were spent in FY 2017-2018, the Respondents stated that “[n]o Fiscal Code requires the Respondents to identify the primary source of the funds (Bonus, Rental, or Royalty) prior to expenditures from the Oil and Gas Lease Fund. Once a Royalty Payment enters the Oil and Gas Lease Fund, it is commingled with other monies. Accordingly, it is not possible to identify the originating sources of any monies allocated from the Oil and Gas Lease Fund for expenditures.” Exhibit A21-017, 018 (Response to Interrogatory 8a and repeated in responses to Interrogatories 8b, 8c, 8d, and 8e).

A360. When asked whether any evaluations were done prior to the Respondents' appropriation of money from the Oil and Gas Lease Fund for DCNR operations on the impact of the loss of this money for projects to prevent and remedy degradation of our State Forest public natural resources from oil and gas removal and sale, both now and in the future, the Respondents answered saying that “[a]ll of DCNR's activities and spending, by their very nature, are implemented with the purpose of conserving and maintaining the public natural resources for the benefit of all the people, including generations yet to come.” Exhibit A21-029, 030 (*see* Interrogatory 14 and response).

A361. Following the Supreme Court’s issuance of its decision in *PEDF VI* and its return of this matter to the Commonwealth Court on August 26, 2022, PEDF filed a motion on August 30, 2022 asking the Commonwealth Court to compel the Respondents to provide a detailed accounting of the deposits of ERA trust assets into the Oil and Gas Lease Fund and the expenditures from this fund in sufficient detail to demonstrate the use of the ERA trust assets for trust purposes, consistent with Commonwealth Court’s declaration in *PEDF IV* that the Commonwealth is required to keep such an accounting.

***All Deposits into the Oil and Gas Lease Fund Since  
Fiscal Year 2008-2009 Are ERA Trust Assets***

A362. In response, the Respondents provided additional details to PEDF regarding the source of monies deposited into the Oil and Gas Lease Fund beginning with fiscal year 2008-2009, which are incorporated as **Exhibit A22**.<sup>37</sup>

A363. Of the almost \$1.5 billion deposited into the Oil and Gas Lease Funds since fiscal year 2008-2009 as shown in Exhibit A22, approximately 99% is from State Forest oil and gas leases issued by the Commonwealth (*i.e.*, royalties, rents,

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<sup>37</sup> PEDF has challenged the Respondents’ appropriation and spending of the Oil and Gas Lease Fund since additional State Forest oil and gas leases were issued in fiscal year 2008-2009. The information provided by the Respondents on sources and spending from the Oil and Gas Lease Fund beginning in fiscal year 2008-2009 provides the full context for the spending under review in this case. The detailed as-applied analysis of the spending in FY 2017-2018 and 2018-2019 is representative of the spending that has occurred since fiscal year 2008-2009.

bonus, and interest penalties), all of which is part of the corpus of the ERA trust based on *PEDF II* and *PEDF V*.

A364. Other monies deposited into the Oil and Gas Lease Fund since fiscal year 2008-2009 include interest and investment income, payments under Commonwealth oil and gas leases on other Commonwealth-owned lands (referred to as “Act 147 Lease Pmt”),<sup>38</sup> and money from the sale of vehicles purchased using money from the Oil and Gas Lease Fund. For the reasons set forth in the as-applied analyses for FY 2017-2018 and 2018-2019 in Sections V.A.7.b. and V.A.7.c. below, respectively, these monies are all part of the corpus of the ERA trust.

A365. The Supreme Court in *PEDF V* states that “[i]n the absence of income entitlements, there is no authority for the trustee to generate income from oil and gas assets and then use that income benefit itself for non-trust purposes and not for the beneficiaries.” 255 A.3d at 313. The court “stress[ed] the distinction between the generation of income and the distribution of that income. Although the trustee (the Commonwealth) is authorized to generate income from trust assets in its discretion, it does not follow that the beneficiaries are entitled to distribution of those monies through allocation to the general fund. Such distribution is not supported by the

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<sup>38</sup> Refers to the Indigenous Mineral Resources Development Act, act of October 8, 2012, P.L. 1194, No. 147 (Act 147 of 2012) discussed above (*see* ¶A299).

purpose of the trust: to conserve and maintain the public natural resources.” *Id.* at 314.

A366. Thus, income derived from interest on and investment of trust assets in the Oil and Gas Lease Fund, from the sale of trust asset investments, and from the sale of vehicles previously purchased with trust assets in the fund remain part of the corpus of the ERA trust.

***Unconstitutional Spending of ERA Trust Assets for DCNR  
Operations Since Fiscal Year 2008-2009 For Non-Trust Purposes***

A367. As part of the Governor’s executive budget issued each year pursuant to Article VIII, Section 12 of the Pennsylvania Constitution, the Governor provides a statement of the actual cash receipts and disbursements for the Oil and Gas Lease Fund from the prior fiscal year. Pa. Const. art. VIII, § 12.

A368. Based on the actual receipts and disbursements for the Oil and Gas Lease Fund reported in the Governor’s executive budgets, which are summarized in the table below, the Respondents have maximized overall spending of the ERA trust assets from this fund and not retained any trust assets to remedy the ongoing degradation of the State Forest trust corpus. The annual Oil and Gas Lease Fund statements in each of the Governor’s executive budgets beginning with fiscal year 2010-2011 (the fiscal year that actual receipts and disbursements were reported for fiscal year 2008-2009) are provided in Exhibit A1 (references to appropriate exhibit pages provided in the table below)).

<b>Oil and Gas Lease Fund</b>			
<b>Fiscal Year</b>	<b>Total Receipts</b>	<b>Total Disbursements</b>	<b>Reference</b>
2008-2009	\$165,128,000	\$12,156,000	Exhibit A1-040
2009-2010	\$277,678,000	\$221,549,000	Exhibit A1-042
2010-2011	\$32,465,000	\$204,002,000	Exhibit A1-044
2011-2012	\$64,947,000	\$59,805,000	Exhibit A1-045
2012-2013	\$104,146,000	\$67,823,000	Exhibit A1-047
2013-2014	\$147,961,000	\$121,813,000	Exhibit A1-049
2014-2015	\$115,454,000	\$167,299,000	Exhibit A1-051
2015-2016	\$72,301,000	\$110,770,000	Exhibit A1-012
2016-2017	\$79,870,000	\$74,792,000	Exhibit A1-024
2017-2018	\$85,334,000	\$93,457,000	Exhibit A1-032
2018-2019	\$77,940,000	\$82,755,000	Exhibit A1-039
2019-2020	\$77,005,000	\$84,879,000	Exhibit A1-055
2020-2021	\$74,237,000	\$60,644,000	Exhibit A1-059
Total	\$1,374,536,000	\$1,361,744,000	

A369. As the deposits into the Oil and Gas Lease Fund began to significantly increase in fiscal year 2008-2009 with the issuance of new oil and gas leases on our State Forest, the Respondents transferred ERA trust assets totaling \$383,000,000 from this fund to the General Fund for annual statewide government operations in fiscal years 2009-2010 and 2010-2011 as authorized by Sections 1603-E and 1604-E of the Fiscal Code and Section 1912 of the Supplemental General Appropriations Act of 2009, which the Supreme Court found to be unconstitutional in *PEDF V*, as set forth in Section V.A.2. above. *See* Governor’s Executive Budget 2011-12, Oil and Gas Lease Fund, page H48 (showing actual transfer in fiscal year 2009-2010 of \$203,000,000 in ERA trust assets to the General Fund) (Exhibit A1-042); Governor’s Executive Budget 2012-13, Oil and Gas Lease Fund, page H48 (showing

actual transfer in fiscal year 2010-11 of \$180,000,000 in ERA trust assets to the General Fund) (Exhibit A1-044).

A370. The Respondents also began annually appropriating increased amounts from the Oil and Gas Lease Fund to pay for DCNR operations, characterizing these appropriations as augmentations to the General Fund appropriations for DCNR operations, and reducing appropriations from the General Fund for DCNR operations. *See, e.g.*, Governor's Executive Budget 2011-2012, page E12.3 (showing actual fiscal year 2009-2010 General Fund augmentations, shown as "(A)", from the Oil and Gas Lease Fund for DCNR General Government Operations, State Parks Operations and State Forests Operations) (Exhibit A1-041); Governor's Executive Budget 2012-2013, E12.3 (showing similar augmentation of the General Fund appropriations from the Oil and Gas Lease Fund) (Exhibit A1-043).

A371. A summary of the Respondents' actual appropriations from both the Oil and Gas Lease Fund and the General Fund to pay for DCNR operations is incorporated as **Exhibit A23**. The comparison in Table 1 of Exhibit 23 of the appropriations from these two funds for DCNR operations since fiscal year 2008-2009 shows that when Oil and Gas Lease Fund appropriations for DCNR operations increased, General Fund appropriations decreased and vice versa, demonstrating that

the Respondents considered these two funds to be interchangeable (*i.e.*, ERA trust assets in the Oil and Gas Lease Fund could replace tax revenue in the General Fund).

A372. Governor Wolf, in his budget for FY 2017-2018, recommended reductions in General Fund appropriations for DCNR State Parks and State Forest operations “to provide for a shift in current operation costs to the Oil and Gas Lease Fund.” Governor’s Executive Budget 2017-2018, page E11-8 (Exhibit A1-009). In his budget for FY 2018-2019, Governor Wolf makes recommendations for the General Fund and Oil and Gas Lease Fund “combined”. Governor’s Executive Budget 2018-2019, E11-8 (Exhibit A1-021).

A373. In response to PEDF’s requests for additional information on spending from the Oil and Gas Lease Fund, the Respondents ran queries on the Commonwealth’s SAP financial accounting system for actual spending from the Oil and Gas Lease Fund for each fiscal year since 2008-2009. These queries produced multiple spreadsheets for each fiscal year, which the Respondents provided to PEDF, including a spreadsheet for each fiscal year that summarized spending from the Oil and Gas Lease Fund by major categories. Based on these spreadsheets, the Respondents’ spending by these major categories for fiscal years 2008-2009 through 2021-2022 is summarized and incorporated as **Exhibit A24**, which also includes the spreadsheet for each fiscal year provided by the Respondents from which the summary table was prepared.



A374. As shown in Exhibit 24, during fiscal years 2008-2009 through 2021-2022, the Respondents report spending a total of \$762,585,329.12 from the Oil and Gas Lease Fund for DCNR operations (*see* “Total Spending for DCNR Operations” highlighted in red on Exhibit A24-001).<sup>39</sup> Of this amount, a total of \$581,950,851.34 (76%) was reported as spent through “Miscellaneous Expense Transfers”, which means these funds were spent for DCNR operations without assigning them to specific expenses and thus without any differentiation between spending for trust and non-trust purposes, just as the General Fund appropriations for DCNR operations were spent.

A375. These reported Miscellaneous Expense Transfers for DCNR operations from fiscal years 2008-2009 through 2021-2022 represent 38% of the undifferentiated spending for DCNR operations over this period. In other words, the Respondents spent ERA trust assets and General Fund revenue for DCNR operations without differentiating between trust and non-trust purposes with each dollar of spending consisting of 38 cents of ERA trust assets and 62 cents of General Fund revenue.

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<sup>39</sup> This total spending amount based on the spreadsheets provided by the Respondents is less than the total actual disbursements reported in the Governor’s executive budgets for these same fiscal years (\$821,471,000), as summarized in Exhibit A23. While this discrepancy does not alter the conclusion of this as-applied analysis, PEDF will seek to clarify the information in the spreadsheets provided by the Respondents to resolve the discrepancy.

A376. As set forth in Sections V.A.3. and V.A.5. above, DCNR incurs significant costs to administer non-trust purposes. The Respondents replaced General Fund revenue to pay the costs incurred by DCNR to administer these non-trust purposes with ERA trust assets in violation of the ERA.

A377. The remainder of the Respondents' total reported spending from the Oil and Gas Lease Fund for DCNR operations beginning in fiscal year 2008-2009 (approximately 24%) was assigned to specific expenses. Thus, the Respondents paid 100% of these expenses with ERA trust. The Respondents have reported spending a total of \$54,913,127.68 (7%) for specific DCNR personnel, \$62,542,516.61 (8%) for specific DCNR operational expenses, \$56,132,657.70 (7%) for specific DCNR fixed asset expenses and \$7,0446,175.70 (1%) for specific grants awarded by DCNR (Exhibit A24-001).

A378. The additional details provided by the Respondents related to this specific spending included spreadsheets for each major spending category for each fiscal year. For the personnel services, the Respondents provided spreadsheets for each fiscal year showing the specific DCNR positions that were assigned to receive ERA trust assets and the amount of trust assets paid for each position. However, the spreadsheets did not provide any information regarding the actual purpose for which the personnel service expenses were incurred.

A379. Similarly, the Respondents provided a spreadsheet for each fiscal year showing which bureau or office incurred general categories of operational costs (e.g., vehicle, machinery and equipment expenses, specialized services and miscellaneous expenses, information technology expenses, etc.). However, the spreadsheets did not provide any information regarding the actual purpose for which the operational expenses were incurred.

A380. The Respondents also provided spending plans for each fiscal year showing how DCNR anticipated spending its appropriations from the Oil and Gas Lease Fund which are incorporated as **Exhibit A25**; *see also* “A Special Audit of: the Pennsylvania Department of Conservation and Natural Resources’ Oil and Gas Lease Fund Program, August 2004, Auditor General (“2004 Audit Report”), page 15; incorporated as **Exhibit 26** (explaining the process DCNR followed at the time of the audit to develop such spending plans).

A381. In many instances, the Oil and Gas Lease Fund spending plans provided by the Respondents do not provide any more detail than the spreadsheets provided by the Respondents. In some instances, these plans provide some descriptions of the planned expenditures, but these descriptions largely confirm that the ERA trust assets are being spent for non-trust purposes or without any differentiation between trust and non-trust purposes, just as with the General Fund appropriations for DCNR operations. These spending plans show that ERA trust

assets were spent for non-trust purposes, including administering oil and gas extraction, developing recreation facilities, and general administrative expenses.

A382. The more detailed analysis of the Respondents' spending for specific DCNR operations for FY 2017-2018 and 2018-2019 in V.A.8.b. and V.A.8.c. below further demonstrates that the Respondents' spent ERA trust assets for these specific DCNR operations for non-trust purposes.

A383. The unconstitutionality of Respondents' spending of ERA trust assets on DCNR operations for non-trust purposes is further compounded by the Respondents' failure to administer these ERA trust assets to remedy the ongoing and extensive degradation of the State Forest trust corpus from existing statutorily authorized uses, both now and in the future, including the cumulative adverse effects of these uses and related stressors on the ecology of the forest.

A384. In addition to violating the ERA and their trustee duties by failing to administer ERA trust assets for trust purposes and failing to restore the State Forest trust corpus, the Respondents have infringed upon the Article I rights of the people by using ERA trust assets to replace General Fund appropriations through their budget and appropriation process in violation of Article I, Section 25 of the Pennsylvania Constitution.

***Unconstitutional Transfers to the Marcellus Legacy Fund  
Since Fiscal Year 2013-2014 For Non-Trust Purposes***

A385. In addition to their unconstitutional spending of ERA trust assets in the Oil and Gas Lease Fund for state government operations since fiscal year 2008-2009, the Respondents have transferred a total of \$220,000,000 from the Oil and Gas Lease Fund to the Marcellus Legacy Fund (Exhibit A18) for further unconstitutional spending for non-trust purposes.<sup>40</sup>

A386. The Respondents reported the transfers from the Oil and Gas Lease Fund to the Marcellus Legacy Fund as “69/Non-Expense Items/GT/Statutory Transfer” in their spreadsheets beginning in fiscal year 2011-2011 summarizing their Oil and Gas Lease Fund spending the major categories (Exhibit A24-005 – 015).<sup>41</sup>

A387. The Respondents have not accounted for the ERA trust assets transferred to the Marcellus Legacy Fund for the trust purpose of conserving and maintaining public natural resources.

A388. As set forth in Section V.A.6. above, ERA trust assets in the Oil and Gas Lease Fund the transfers to the Marcellus Legacy Fund are then further

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<sup>40</sup> The spreadsheets showing major categories of spending from the Oil and Gas Lease Fund provided by the Respondents and compiled in Exhibit A24 show the total transfers from the Oil and Gas Lease Fund to the Marcellus Legacy Fund to be \$275,395,085.68, which is more than the amount reported in the Governor’s executive budgets. While this discrepancy does not alter the conclusion of this as-applied analysis, PEDF will seek to clarify the information in the spreadsheets provided by the Respondents to resolve the discrepancy.

<sup>41</sup> The statutory transfer of \$180,000,000 reported by the Respondents in 2010 (Exhibit A24-004) is the transfer authorized by Section 1605-E of the Fiscal Code, which the Supreme Court held to be facially unconstitutional in *PEDF V.*

transferred to the Environmental Stewardship Fund and the Hazardous Sites Cleanup Fund, both of which also receive funds from other non-trust sources and are used for statutorily authorized programs for non-trust purposes.

A389. Based on the as-applied analyses in Section V.A.7.b. and V.A.7.c. below, the ERA trust assets deposited into Environmental Stewardship Fund in FY 2017-2018 and 2018-2019 were approximately 20% and 18% of the total receipts deposited into that fund those fiscal year, respectively. Since the Respondents did not account for the spending of the ERA trust assets in the Environmental Stewardship Fund, the disbursements from this fund to each state agency likewise would have had these same percentages of ERA trust assets, which would have been spent for the non-trust purposes set forth in Section V.A.6. above.

A390. Likewise, based on the as-applied analyses in Section V.A.7.b. and V.A.7.c. below, the ERA trust assets deposited into Hazardous Sites Cleanup Fund in FY 2017-2018 and 2018-2019 were approximately 31% and 40% of the total receipts in that fund, respectively. Since the Respondents did not account for the spending of the ERA trust assets in the Environmental Stewardship Fund, the disbursements from this fund to DEP and the other funds would have had these same percentages of ERA trust assets, which would have been spent for the non-trust purposes set forth in Section V.A.6. above.

A391. The as-applied analyses for FY 2017-2018 and 2018-2019 showing that ERA trust assets were used for non-trust purposes through the transfers to the Marcellus Legacy Fund would yield the same conclusion for each year since these transfers began in fiscal year 2013-2014.

A392. The unconstitutionality of Respondents' spending of ERA trust assets through these transfers for non-trust purposes is further compounded by the Respondents' failure to administer these ERA trust assets to remedy the ongoing and extensive degradation of the State Forest trust corpus from existing statutorily authorized uses, both now and in the future, including the cumulative adverse effects of these uses and related stressors on the natural ecology of the forest.

A393. In addition, the Respondents have infringed upon the Article I rights of the people by using ERA trust assets to replace General Fund appropriations through their budget and appropriation process in violation of Article I, Section 25 of the Pennsylvania Constitution.

**b. As-Applied Analysis of the Unconstitutional Spending of  
ERA Trust Assets in Fiscal Year 2017-2018**

***All Deposits into the Oil and Gas Lease Fund in  
FY 2017-2018 Are ERA Trust Assets***

A394. All monies deposited into the Oil and Gas Lease Fund in FY 2017-2018 are part of the corpus of the ERA trust.

A395. The Respondents have identified the source of the money deposited into the Oil and Gas Lease Fund in FY 2017-2018 (*see* Exhibit A22) as follows:

Royalties from State Forest Oil & Gas Leases:	\$ 70,998,838.93	(83%)
Rents from State Forest Oil & Gas Leases:	\$ 5,743,911.17	(7%)
Bonus from State Forest Oil & Gas Leases:	\$ 7,397,920.00	(9%)
Interest/Investment Income	\$ 932,544.47	(1%)
Sale of Investments	\$ 139,215.06	(<0.2%)
Sale of Vehicles	\$ 86,595.00	(<0.1%)
Lease Payments under Act 147 of 2012	\$ 35,248.19	(<0.1%)
Total	\$ 85,334,272.82	

A396. Based on *PEDF II* and *PEDF V*, all money derived from State Forest oil and gas leases executed by the Commonwealth (royalties, rents, bonus) are part of the corpus of the ERA trust. Based on the information provided by the Respondents, approximately 99% of the money deposited into the Oil and Gas Lease Fund in FY 2017-2018 is from payments made under State Forest oil and gas leases and, thus, part of the corpus of the ERA trust.

A397. The other money deposited into the Oil and Gas Lease Fund in FY 2017-2018, which total almost \$1,200,000, is likewise part of the corpus of the ERA trust.

A398. Income derived from the investment of the ERA trust assets in the Oil and Gas Lease Fund and the sale of such investments remains part of the corpus of the ERA trust.

A399. The money from the sale of vehicles deposited into the Oil and Gas Lease Fund remains part of the corpus of the ERA trust since, based on information



provided by the Respondents, DCNR regularly uses its appropriations from the Oil and Gas Lease Fund to purchase vehicles and this money is from the sale of such vehicles.

A400. Money deposited into the Oil and Gas Lease Fund from oil and gas leases issued by the Commonwealth on other lands owned by the Commonwealth under the Indigenous Mineral Resources Development Act (Act 147 of 2012) is part of the corpus of the ERA trust for the same reason that money derived from State Forest oil and gas leases remains part of the corpus of the ERA trust.

A401. If any money deposited into the Oil and Gas Lease Fund in FY 2017-2018 is found not to be part of corpus of the ERA trust, the Respondents violated their trustee duties by commingling all monies deposited into the Oil and Gas Lease Fund, thus making it impossible to account for use of ERA trust funds for trust purposes, as they have acknowledged in their responses to PEDF's interrogatories. Exhibit A21-011 – 014 (Responses to Interrogatories 3a, 3b, 3c, 4a, 4b, and 4c acknowledging that all monies deposited in the fund are commingled and cannot be tracked separately after deposit).

#### ***Appropriations for DCNR Operations In FY 2017-2018***

A402. In the Governor's Executive Budget for FY 2017-2018 issued on February 7, 2017, the Governor recommended appropriating \$50,000,000 from the Oil and Gas Lease Fund for DCNR general operations as an executive authorization

under Section 1603-E of the Fiscal Code, 72 P.S. § 1603-E. Governor’s Executive Budget 2017-2018, pages i (Governor’s budget letter), E11-4 (Oil and Gas Lease Fund, 2017-18 Budget column) and H51 (Oil and Gas Lease Fund, 2017-18 Estimated column); Exhibit A1-001, 005, 012.

A403. The Governor also recommended appropriating an additional \$43,588,000 from the Oil and Gas Lease Fund for State Parks Operations, an additional \$21,412,000 for State Forests Operations, and the transfer of \$15,000,000 to the Marcellus Legacy Fund. *Id.*

A404. The Governor recommended reductions in appropriations from the General Fund for DCNR annual operations “to provide for a shift in current operation costs to the Oil and Gas Lease Fund.” *Id.*, page E11-8 (Program Recommendations); Exhibit A1-009.

A405. On June 20, 2017, the Supreme Court held Sections 1602-E and 1603-E of the Fiscal Code to be facially unconstitutional in *PEDF II*. The Supreme Court described Section 1603-E of the Fiscal Code as limiting “DCNR’s allocation from the [Oil and Gas] Lease Fund to ‘up to \$50,000,000’ from royalties and requir[ing] DCNR to ‘give preference to the operation and maintenance of State parks and forests’ rather than to conservation purposes.” 161 A.3d at 937-938.

A406. In holding Sections 1602-E and 1603-E of the Fiscal Code unconstitutional, the Supreme Court further stated that “these legislative enactments

permit the trustee to use trust assets for non-trust purposes, a clear violation of the most basic of a trustee’s fiduciary obligations.” *Id.* In support of its holding, the court quotes *Robinson Twp.*, 83 A.3d at 978 (“[T]he trustee may use the assets of the trust only for purposes authorized by the trust or necessary for the preservation of the trust; other uses are beyond the scope of the discretion conferred, even where the trustee claims to be acting solely to advance other discrete interests of the beneficiaries.”) and cites the Uniform Trust Act, 20 Pa.C.S. § 7780, as “providing that the duty to administer a trust with prudence involves ‘considering the purposes’ of the trust and ‘the exercise of reasonable care, skill, and caution’”). *Id.*

A407. Based on its holding that Sections 1602-E and 1603-E of the Fiscal Code were facially unconstitutional, the Supreme Court in *PEDF II* declared that “the pre-2008 appropriations scheme as set for the in the [Oil and Gas] Lease Fund Act and the CNRA again controls, with all monies in the [Oil and Gas] Lease Fund specifically appropriated to the DCNR.” 161 A.3d at 939.<sup>42</sup>

A408. On July 11, 2017, Sections 1601 of the General Appropriations Act of 2017 appropriated \$50,000,000 from the Oil and Gas Lease Fund for DCNR general operations, \$7,739,000 for State parks operations, and \$3,532,000 for State forests operations. Section 104(p) of the General Appropriations Act of 2017 gave DCNR

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<sup>42</sup> The Oil and Gas Lease Fund Act is the name commonly used for the act of Dec. 15, 1955 (P.L. 865, No. 256), which remained in effect at the time of the Supreme Court decision in *PEDF II*. See Exhibit A23, n.1, for the full text of the act.

broad authority to spend its appropriations from the Oil and Gas Lease Fund for all government expenses. *See* ¶¶A27-A29 above.

A409. On October 30, 2017, the Respondents approved adding Section 1601.2-E to the Fiscal Code to continue use of the Oil and Gas Lease Fund under this new provision and to repeal the Oil and Gas Lease Fund Act, which established this fund and its uses since 1955 (act of Oct. 30, 2017, P.L. 725, No. 44, §§ 3.3, 20); 71 P.S. § 1601.2-E.

A410. Section 1601.2-E(c) of the Fiscal Code now states that money in the Oil and Gas Lease Fund “may only be used as provided under subsection (e) or as annually appropriated by the General Assembly” and requires the General Assembly “to consider the Commonwealth’s trustee duties under [the ERA]” in making appropriations from the fund.

A411. Section 1601.2-E(e) of the Fiscal Code authorizes annual transfers beginning in FY 2017-2018 from the Oil and Gas Lease Fund to the Marcellus Legacy Fund for distribution to the Environmental Stewardship Fund and the Hazardous Sites Cleanup Fund. As set forth in Section V.A.6. above, these three funds receive deposits from multiple sources and the commingled monies in these funds are spent to administer numerous statutorily authorized programs for non-trust purposes.

A412. Section 1601.2-E(e) of the Fiscal Code does not expressly state that the ERA trust assets in the Oil and Gas Lease Fund transferred annually to these various funds must be accounted for and spent solely for the trust purpose of conserving and maintaining public natural resources.

A413. The Fiscal Code does not expressly impose any obligation on the Respondents to account for the spending of ERA trust assets in the Oil and Gas Lease Fund to demonstrate that these trust funds are spent for trust purposes.

A414. Because the General Assembly is required to consider the Commonwealth's ERA trustee duties in making appropriation from the Oil and Gas Lease Fund under Section 1601.2-E(c) of the Fiscal Code and the General Assembly does not expressly require any accounting to ensure the spending of appropriated ERA trust assets is for trust purposes, the Respondents did not maintain a detailed account for their spending of appropriated ERA trust assets to ensure these funds were spent for trust purposes.

***Unconstitutional Spending of ERA Trust Assets for  
DCNR Operations in FY 2017-2018***

A415. The Respondents provided multiple spreadsheets from the Commonwealth's SAP financial accounting system in support of their actual spending from the Oil and Gas Lease Fund for FY 2017-2018, which are referred to in this Petition Amendment as the FY 2017-2018 Commonwealth SAP Report and incorporated as **Exhibit 27**.

A416. The Respondents have reported spending a total of \$93,457,333.67 from the Oil and Gas Lease Fund in FY 2017-2018. FY 2017-2018 Commonwealth SAP Report (Exhibit A27-001, 002).<sup>43</sup> Of this total spending, the Respondents have reported spending \$58,457,333.67 for DCNR operations and transferring \$35,000,000 to the Marcellus Legacy Fund as authorized by Section 1601.2-E of the Fiscal Code and Sections 104(p) and 1601 of the General Appropriations Act of 2017. *Id.*

A417. Of the \$58,457,333.67 spent from the Oil and Gas Lease Fund for DCNR operations, the Respondents have reported spending \$49,787,000.00 (85%) as Miscellaneous Expense Transfers (“Misc. Exp. Transfers”) that were “Not Assigned” to any specific agency expenses (Exhibit A27-002, 003).

A418. The Respondents only tracked these transfers under the broad categories of administrative transfers for personnel (“Adm Tr-Personnel”), which totaled \$48,518,000.00, and administrative transfers for other operations (“Adm Tr-Other Operate”), which totaled \$1,269,000.00 (Exhibit A27-003).

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<sup>43</sup> As explained above, the Respondents conducted queries of Commonwealth’s SAP financial accounting system and produced multiple Excel spreadsheets for each fiscal year since 2008-2009. PEDF converted these spreadsheets for fiscal years 2017-2018 and 2018-2019 to Adobe Acrobat pdf files to incorporate as exhibits to this Petition Amendment. The information in Exhibit A27 is identical to the information in the spreadsheets provided by the Respondents. The specific expenditures shown on Exhibit A27-007 – 017 do not include the first two columns of the spreadsheet provided by the Respondents, which identify each expenditure as being fund type 016-Oil and Gas Lease Fund, or the column showing the commitment item number associated with each type of commitment (*e.g.*, travel, training, etc.). These columns were excluded so the remaining information could be read more clearly.

A419. By spending ERA trust funds through Miscellaneous Expense Transfers for DCNR operations without assigning them to specific expenses, the Respondents spent these trust assets without differentiating between spending for trust and non-trust purposes, just as the General Fund appropriations for DCNR operations were spent.

A420. In FY 2017-2018, the appropriations for DCNR operations from both the Oil and Gas Lease Fund and the General Fund totaled \$152,473,000 (Exhibit A23). Of this amount, the ERA trust assets spent through Miscellaneous Expense Transfers totaled \$49,787,000, which represents 33% of the total spending for DCNR operations from these two funds in FY 2017-2018. Thus, for annual DCNR operations paid with both General Fund appropriations and ERA trust assets through these Miscellaneous Expense Transfers in FY 2017-2018, the ratio was 2/3 General Fund to 1/3 ERA trust assets without any differentiation between trust and non-trust purposes.

A421. In addition to spending ERA trust assets for DCNR operations through the above Miscellaneous Expense Transfers, the Respondents also spent a total of \$8,670,333.67 (15%) of the FY 2017-2018 appropriations from the Oil and Gas Lease Fund for DCNR operations for the following specific DCNR expenses (Exhibit A27-002), meaning that 100% of these expenses were paid with ERA trust assets:

Personnel Services:	\$1,639,307.51
Operational Expenses:	\$2,130,117.11
Fixed Asset Expenses:	\$4,833,408.39
Grants:	<u>\$ 67,500.00</u>
Total:	\$8,670,333.67

A422. The Respondents spent the \$1,639,307.51 identified for specific DCNR personnel services for personnel in the following bureaus and offices (Exhibit A27-004, 005):<sup>44</sup>

Bureau of Forestry:	\$1,338,749.98
Office of General Counsel:	\$ 296,192.52
Office of the Secretary:	<u>\$ 4,365.01</u>
Total:	\$1,639,307.51

A423. The Respondents identified the DCNR personnel positions that received this funding (Exhibit A27-005) but did not provide any information demonstrating that these expenditures of ERA trust assets were for trust purposes.

A424. As general support for the specific expenditures from the Oil and Gas Lease Fund for DCNR operations in FY 2017-2018, the Respondents provided the spending plan developed for these expenditures, which is referred to in this Petition Amendment as the “FY 2017-2018 Spending Plan” (Exhibit A25-037 – 045); *see also* 2004 Audit Report, page 15 (explaining the process DCNR followed at the time of the audit to develop such spending plans) (Exhibit A26).

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<sup>44</sup> The Respondents tracked this spending under General Government Operations and General Operations. Based on PEDF’s current understanding of the information provided by the Respondents, this distinction is not significant to this as-applied analysis.



A425. The FY 2017-2018 Spending Plan recommends spending \$1,700,000 from the Oil and Gas Lease Fund for personnel in the Bureau of Forestry administering the State Forest oil and gas program. FY 2017-2018 Spending Plan, page 4 (Oil & Gas Program Administration ORG CODE 8180, Minerals Division Personnel Costs, Forestry, \$1,700,000, Oil & Gas Fund) (Exhibit A25-040). This plan also recommends spending \$100,000 for litigation expenses related to the administration of the State Forest oil and gas program. *Id.* The specific spending of ERA trust funds for personnel services reported by Respondents in the FY 2017-2018 Commonwealth SAP Report (Exhibit A27-005, 006) is consistent with this planned spending.

A426. As set forth in Section V.A.3.. above, the statutorily authorized use of the State Forest for oil and gas extraction is a non-trust purpose. Thus, the Respondents' spending of ERA trust assets for personnel to generally administer the State Forest oil and gas extraction program was for non-trust purposes.

A427. As with the specific expenditures for DCNR personnel services, the Respondents do not explain how their reported spending of \$7,031,026.16 from the Oil and Gas Lease Fund for specific DCNR operational expenses, fixed asset expenses and grants is for trust purposes. The details they provided regarding this spending in their FY 2017-2018 Commonwealth SAP Report identifies general categories of spending by various DCNR bureaus and offices. Exhibit A27-007 –

017. Many of these specific expenditures are to vendors (indicated by last column) and the Respondents provide a separate spreadsheet of those expenditures by vendor.

Exhibit A27-018 – 021.

A428. The largest categories of expenditures associated with the specific spending for DCNR operations in FY 2017-2018 are as follows: <sup>45</sup>

<b>Specific Spending Category</b>	<b>Total</b>	<b>Reference</b>
Motor Vehicles/Aircraft	\$3,212,099.75	Exhibit A27-016
Other Specialized Services	\$1,700,975.58	Exhibit A27-009
Miscellaneous	\$449,803.75	Exhibit A27-011
Machinery & Equipment	\$443,945.87	Exhibit A27-017
Machinery/Equipment	\$414,112.47	Exhibit A27-016
Hardware Desktop	\$280,259.52	Exhibit A27-013
Land Purchase Exclusive of Right of Way <sup>46</sup>	\$250,000.00	Exhibit A27-016
IT Con App Dev	\$237,426.87	Exhibit A27-008
Heavy/Agricultural	\$144,772.84	Exhibit A27-017
Printing	\$144,088.83	Exhibit A27-015
IT-Rad-Proc \$5K-\$25K	\$125,948.54	Exhibit A27-017
Motor Vehicles	\$115,535.96	Exhibit A27-017

A429. The Respondents do not report any information from the Commonwealth SAP financial accounting system identifying how these specific expenditures of ERA trust assets were for trust purposes. As set forth in Sections V.A.3 and V.A.5. above, DCNR incurs costs to administer many statutorily

<sup>45</sup> PEDF has summarized the largest spending categories but acknowledges that these figures exceed the total for this spending and thus may warrant adjustment.

<sup>46</sup> The vendor listed for these land purchases are North Branch Land Trust (Exhibit A27-019) and Betty J. Countryman (Exhibit A27-021). PEDF reviewed the state contracts made publicly available by State Treasury on its e-library and no contracts between DCNR and these vendors were available.

authorized uses of the State Forest and State Parks for non-trust purposes, to administer many statutorily authorized statewide programs for non-trust purposes, and for general administrative expenses for non-trust purposes.

A430. The FY 2017-2018 Spending Plan discusses projects to support some of the above spending but also fails to explain how these expenditures were for trust purposes. For example, the plan recommends spending \$2,000,000 for vehicles and heavy equipment to replace vehicles and heavy equipment that has “reached end of life”. FY 2017-2018 Spending Plan, page 4 (Exhibit A25-040). The actual spending from the Oil and Gas Lease Fund on vehicles and equipment based on the information provided by the Respondents in the FY 2017-2018 Commonwealth SAP Report is significantly higher than the amount recommended in the plan. The plan does not identify any specific projects or actions undertaken for trust purposes with the vehicles or equipment purchased with ERA trust assets.

A431. Many of the projects described in the FY 2017-2018 Spending Plan are to support statutorily authorized programs for non-trust purposes. The projects identified by the Bureau of Topographic and Geologic Survey are to aid in administering the State Forest oil and gas program, as well as other mineral extraction in the Commonwealth. The projects identified by the Bureau of Forestry primarily support statutorily authorized programs for non-trust purposes, including forest fire protection on private lands, State Forest oil and gas extraction, and State

Forest recreation. The projects identified by the Bureau of State Parks primarily support statutorily authorized programs for non-trust purposes related to promoting recreation and tourism. The Bureau of Facility Design and Construction (“FDC”) simply identifies general administrative needs without identifying any specific projects. Finally, the projects identified by the Secretary are for non-trusts purposes such recreation equipment, marketing, communications, and other general administrative services for programs that do not conserve and maintain public natural resources.

A432. PEDF requested that the Respondents identify projects undertaken in FY 2017-2018 to restore the quality of the State Forest public natural resources degraded by the removal and sale of oil and gas. Exhibit A21-027 (Interrogatory 12b). The Respondents answered stating they “fulfill their trustee obligations as long as the entirety of the public natural resources corpus is made whole for shale gas infrastructure projects.” Exhibit A21-028 (Response to Interrogatory 12b). The additional details provided by the Respondents regarding their spending of ERA trust assets provides no evidence that they have remedied the ongoing degradation from shale gas extraction on the State Forest or any other statutorily authorized use of the State Forest for non-trust purposes.

A433. The Respondents further stated that “projects that are performed in the day-to-day operations of State forest staff are not delineated separately. Projects that

are out of the day-to-day realm of State forest staff for FY 2017 are attached as Exhibit 2. Note that for Dirt & Gravel Road Funds projects that were performed as construction contracts are listed.” *Id.*; *see also* Respondents’ Exhibit 2 (Exhibit A21-040, 041).

A434. None of the projects identified in Respondents’ Exhibit 2 were funded by the Oil and Gas Lease Fund.<sup>47</sup> The Respondents identify nine projects on the State Forest funded by “Growing Greener” (*i.e.*, projects funded by the “Parks & Forest Facility Rehabilitation” appropriation from the Environmental Stewardship Fund in FY 2017-2018); *see* Exhibit A19 – Environmental Stewardship Fund Receipts & Disbursements; Governor’s Executive Budget 2019-2020, page E11-4 (actual 2017-2018 appropriations to DCNR from the Environmental Stewardship Fund, Parks & Forest Facility Rehabilitation) (Exhibit A1-027).

A435. Only one of the projects identified by the Respondents occurred in a State Forest District where oil and gas extraction is occurring and it was a project to replace the roof on the district office garage in the Elk State Forest District. ERA trust assets in the Environmental Stewardship Fund used for these projects did not

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<sup>47</sup> “Act 26” in Respondents’ Exhibit 2 refers to the restricted account for forestry bridge projects established from a percentage of the tax imposed on petroleum revenues (act of Aug. 5, 1991, P.L. 238, No. 26, § 15 (amending 75 Pa.C.S. § 9503(a)). DCNR was appropriated \$11,000,000 from this restricted account for forestry bridges in FY 2017-2018; *see* Governor’s Executive Budget 2019-2020 (actual 2017-2018 appropriation from Motor License Fund, Grants and Subsidies, (R) Forestry Bridges – Excise Tax (EA)) (Exhibit A1-027).

conserve and maintain any public natural resource and were for spent for non-trust purposes.

A436. Most of the project listed in Respondents' Exhibit 2 were for road and bridge repair or replacement, and building/structure construction, repair, replacement or demolition. As set forth in Section V.A.3. above, DCNR administers a significant amount of infrastructure in support of statutorily authorized uses of the State Forest for non-trust purposes. The cost of maintaining infrastructure for non-trust purposes is not a reasonable cost of administering the ERA trust.

A437. The unconstitutionality of Respondents' spending of ERA trust assets on DCNR operations for non-trust purposes is further compounded by the Respondents' failure to administer these ERA trust assets to remedy the ongoing and extensive degradation of the State Forest trust corpus from existing statutorily authorized uses, both now and in the future, including the cumulative adverse effects of these uses and related stressors on the natural ecology of the forest.

A438. The Respondents have not provided any information showing that they spent any ERA trust assets in the Oil and Gas Lease Fund in FY 2017-2018 for any specific geographically identifiable projects or actions needed to remedy the ongoing degradation of the State Forest, as set forth in Section V.A.4. above.

A439. The Respondents contend that they "fulfill their trustee obligations as long as the entirety of the public natural resources corpus is made whole for shale

gas infrastructure impacts” (Exhibit A21-028) but provide no accounting of specific actions taken for trust purposes in FY 2017-2018 to demonstrate that they did so.

A440. In addition to violating the ERA and their trustee duties by failing to administer ERA trust assets for trust purposes and failing to restore the State Forest trust corpus, the Respondents have infringed upon the Article I rights of the people by using ERA trust assets to replace General Fund appropriations through their budget and appropriation process in violation of Article I, Section 25 of the Pennsylvania Constitution.

***Unconstitutional Transfers of ERA Trust Assets to the  
Marcellus Legacy Fund In FY 2017-2018***

A441. In addition to their unconstitutional spending of ERA trust assets for DCNR operations for non-trust purposes, the Respondents spent \$35,000,000 from the Oil and Gas Lease Fund through transfers to the Marcellus Legacy Fund for non-trust purposes, as authorized by Section 1601.2-E(e) of the Fiscal Code, 72 P.S. § 1601.2-E(e). Governor’s Executive Budget 2019-2020, page H52 (Oil and Gas Lease Fund actual disbursement of FY 2017-2018) (Exhibit A1-032).

A442. Because the General Assembly does not expressly require any accounting related to the transfers from the Oil and Gas Lease Fund authorized by Section 1601.2-E(e) of the Fiscal Code, the Respondents did not maintain a detailed account of their spending of transferred ERA trust assets to ensure these funds were spent for trust purposes.

A443. As set forth in Section V.A.6. above, ERA trust assets transferred to the Marcellus Legacy Fund are commingled with unconventional gas well fees from the Unconventional Gas Well Fund and then transferred to other funds and further commingled with other non-trust funds.

A444. In FY 2017-2018, the Respondents spent \$20,000,000 of the ERA trust assets in the Marcellus Legacy Fund through transfers to the Environmental Stewardship Fund as authorized under Section 1601.2-E(e) of the Fiscal Code.

A445. These ERA trust assets were commingled with \$72,256,000 in landfill fees, \$7,652,000 in unconventional gas well fees also transferred from the Marcellus Legacy Fund, and \$2,638,000 in interest. Governor's Executive Budget 2019-2020, Environmental Stewardship Fund, page H25 (Exhibit A1-029). Thus, of the total receipts deposited into the Environmental Stewardship Fund in FY 2017-2018 (\$102,546,000), the ERA trust assets represented approximately 20% and would thus also represent 20% of the funds disbursed to various state agencies. *Id.*

A446. In FY 2017-2018, the disbursements from the Environmental Stewardship were as follows: \$26,871,000 to Treasury for debt service on the Growing Greener bonds, \$11,248,000 to Agriculture to preserve private farmland, \$6,242,000 to DCNR for local park grants, \$5,969,000 to DCNR to rehabilitate infrastructure on state forest and park lands, \$391,000 to DCNR for natural diversity



grants, \$15,860,000 to DEP to abate pollution of private and public lands, and \$18,012,000 to PennVest for grants to keep water and sewer rates affordable. *Id.*

A447. As set forth in Section V.A.6. above, most of the disbursements from the Environmental Stewardship Fund are for non-trust purposes.

A448. In FY 2017-2018, the Respondents also spent \$15,000,000 of the ERA trust assets in the Marcellus Legacy Fund through transfers to the Hazardous Sites Cleanup Fund as authorized under Section 1601.2-E(e) of the Fiscal Code.

A449. These ERA trust assets were commingled with \$24,403,000 in revenue from the capital stock and franchise tax, \$3,826,000 in unconventional gas well fees also transferred from the Marcellus Legacy Fund, \$1,999,000 in hazardous waste fees, \$1,795,000 in cost recovery, \$1,574,000 in interest and \$7,000 from other sources. *Id.*

A450. Of the total Hazardous Sites Cleanup Fund receipts in FY 2017-2018 (\$48,604,000), the ERA trust assets represented approximately 31% and would thus also represent 31% of the funds disbursed to DEP and to other funds. *Id.*

A451. In FY 2017-2018, the disbursements from the Hazardous Sites Cleanup Fund were as follows: \$36,496,000 to DEP to abate releases of hazardous substances primarily on former industrial sites, \$2,000,000 to the Industrial Sites Environmental Assessment Fund, \$2,000,000 to the Industrial Sites Cleanup Fund, and \$1,000,000 to the Household Hazardous Waste Account. *Id.*

A452. As set forth in Section V.A.6. above, most of these disbursements from the Hazardous Sites Cleanup Fund are for non-trust purposes.

A453. The unconstitutionality of Respondents' spending of ERA trust assets through transfers to the Marcellus Legacy Fund for non-trust purposes is further compounded by the Respondents' failure to administer these ERA trust assets to remedy the ongoing and extensive degradation of the State Forest trust corpus from existing statutorily authorized uses, both now and in the future, including the cumulative adverse effects of these uses and related stressors on the natural ecology of the forest.

A454. The Respondents have not provided any information showing that they spent any ERA trust assets in the Oil and Gas Lease Fund in FY 2017-2018 for any specific geographically identifiable projects or actions needed to remedy the ongoing degradation of the State Forest, as set forth in Section V.A.4. above.

A455. The Respondents contend that they "fulfill their trustee obligations as long as the entirety of the public natural resources corpus is made whole for shale gas infrastructure impacts" (Exhibit A21-028) but provide no accounting of specific actions taken for trust purposes in FY 2017-2018 to demonstrate that they did so.

A456. In addition to violating the ERA and their trustee duties by failing to administer ERA trust assets for trust purposes and failing to restore the State Forest trust corpus, the Respondents have infringed upon the Article I rights of the people

by using ERA trust assets to replace General Fund appropriations through their budget and appropriation process in violation of Article I, Section 25 of the Pennsylvania Constitution.

**c. As-Applied Analysis of Unconstitutional Spending of  
ERA Trust Assets in Fiscal Year 2018-2019**

***All Deposits into the Oil and Gas Lease Fund in  
FY 2018-2019 Are ERA Trust Assets***

A457. As with the Respondents' spending of ERA trust assets in the Oil and Gas Lease Fund in FY 2017-2018, the information they have reported on their spending for FY 2018-2019 also demonstrates their appropriation and spending of ERA trust assets is likewise unconstitutional and in breach of their trustee duties.

A458. All monies deposited into the Oil and Gas Lease Fund in FY 2018-2019 are part of the corpus of the ERA trust.

A459. The Respondents have identified the source of the money deposited into the Oil and Gas Lease Fund in fiscal year 2018-2019 as follows (Exhibit A22):

Royalties from State Forest Oil & Gas Leases:	\$ 66,781,972.15	(86%)
Rents from State Forest Oil & Gas Leases:	\$ 6,737,433.02	(9%)
Bonus from State Forest Oil & Gas Leases:	\$ 2,136,400.00	(3%)
Interest Penalties from State Forest Oil & Gas Leases	\$ 862.20	(<0.1%)
Interest/Investment Income	\$ 965,103.96	(1%)
Sale of Investments	\$ 1,115,584.71	(1%)
Sale of Vehicles	\$ 144,544.00	(<0.2%)
Lease Payments under Act 147 of 2012	\$ 57,437.82	(<0.1%)
Total	\$ 77,939,337.86	

A460. Based on *PEDF II* and *PEDF V*, all money derived from State Forest oil and gas leases executed by the Commonwealth (royalties, rents, bonus, interest penalties) are part of the corpus of the ERA trust. Based on the information provided by the Respondents, approximately 98% of the money deposited into the Oil and Gas Lease Fund in FY 2018-2019 is from payments made under State Forest oil and gas leases and, thus, part of the corpus of the ERA trust.

A461. The other money deposited into the Oil and Gas Lease Fund in FY 2017-2018, which total almost \$2,300,000, is likewise part of the corpus of the ERA trust.

A462. Income derived from the investment of the ERA trust assets in the Oil and Gas Lease Fund and the sale of such investments remains part of the corpus of the ERA trust.

A463. The money from the sale of vehicles deposited into the Oil and Gas Lease Fund remains part of the corpus of the ERA trust since, based on information provided by the Respondents, DCNR regularly uses its appropriations from the Oil and Gas Lease Fund to purchase vehicles and this money is from the sale of such vehicles.

A464. Money deposited into the Oil and Gas Lease Fund from oil and gas leases issued by the Commonwealth on other lands owned by the Commonwealth under the Indigenous Mineral Resources Development Act (Act 147 of 2012) is part

of the corpus of the ERA trust for the same reason that money derived from State Forest oil and gas leases remains part of the corpus of the ERA trust.

A465. If any monies deposited into the Oil and Gas Lease Fund in FY 2018-2019 are found not to be part of corpus of the ERA trust, the Respondents violated their trustee duties by commingling all monies deposited into the Oil and Gas Lease Fund, thus making it impossible to account for their use of ERA trust funds for trust purposes, as they have acknowledged in their responses to PEDF's interrogatories. Exhibit A21-011 – 014 (Responses to Interrogatories 3a, 3b, 3c, 4a, 4b, and 4c acknowledging that all monies deposited in the fund are commingled and cannot be tracked separately after deposit).

***Unconstitutional Spending of ERA Trust Assets for  
DCNR Operations in FY 2018-2019***

A466. In the Governor's Executive Budget for FY 2018-2019 issued on February 6, 2018, the Governor recommended appropriating \$37,045,000 from the Oil and Gas Lease Fund for DCNR general government operations under Section 1601.2-E(c) of the Fiscal Code, 72 P.S. § 1601.2-E(c). *See* Governor's Executive Budget 2018-2019, pages i (Governor's budget letter), E11-5 (Oil and Gas Lease Fund, 2018-19 Budget column), and H52 (Oil and Gas Lease Fund, 2018-19 Estimated column (Exhibit A1-013, 018, 024).

A467. The Governor also recommended appropriating an additional \$7,555,000 from the Oil and Gas Lease Fund for State Parks Operations, an

additional \$4,198,000 for State Forests Operations, and the transfer of \$35,000,000 to the Marcellus Legacy Fund. *Id.*, page E11-5 (Exhibit A1-018).

A468. In making his recommended budget changes for DCNR programs, the Governor “combined” the General Fund and Oil and Gas Lease Fund, clearly indicating the Respondents’ view these funds as interchangeable. *Id.*, page E11-8 (Program Recommendations) (Exhibit A1-021).

A469. On June 22, 2018, Sections 1601 of the General Appropriations Act of 2018 appropriated \$37,045,000 from the Oil and Gas Lease Fund for DCNR general operations, \$7,555,000 for State parks operations, and \$4,198,000 for State forests operations, as recommended by the Governor. Section 104(p) of the General Appropriations Act of 2018 gave DCNR broad authority to spend its appropriations from the Oil and Gas Lease Fund for all government expenses. *See* ¶¶A27-A30 above.

A470. The Respondents provided multiple spreadsheets from the Commonwealth’s SAP financial accounting system in support of their actual spending from the Oil and Gas Lease Fund for FY 2018-2019, which are referred to in this Petition Amendment as the FY 2018-2019 Commonwealth SAP Report and incorporated as **Exhibit 28**.

A471. The Respondents have reported spending a total of \$82,755,248.76 from the Oil and Gas Lease Fund in FY 2018-2019. FY 2018-2019 Commonwealth

SAP Report (Exhibit A26-001, 002).<sup>48</sup> Of this total spending, the Respondents have reported spending \$47,755,248.76 for DCNR operations and transferring \$35,000,000 to the Marcellus Legacy Fund as authorized by Section 1601.2-E of the Fiscal Code and Sections 104(p) and 1601 of the General Appropriations Act of 2018. *Id.*

A472. Section 1601.2-E of the Fiscal Code does not expressly require the Respondents to account for the spending of ERA trust assets in the Oil and Gas Lease Fund to demonstrate that these trust funds are spent for trust purposes.

A473. Because Section 1601.2-E(c) of the Fiscal Code requires the General Assembly to consider the Commonwealth's ERA trustee duties in making appropriation from the Oil and Gas Lease Fund and does not expressly require an accounting to ensure the spending of appropriated ERA trust assets are for trust purposes, the Respondents did not maintain detailed accounts of their spending of appropriated ERA trust assets to ensure these funds were used for trust purposes.

A474. Of the \$47,755,248.76 spent from the Oil and Gas Lease Fund for DCNR operations, the Respondents have reported spending \$37,294,00.00 (78%) as

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<sup>48</sup> The information in Exhibit A28 is identical to the information in the spreadsheets provided by the Respondents. The specific expenditures shown on Exhibit A28-007 – 017 do not include the first two columns of the spreadsheet provided by the Respondents, which identify each expenditure as being fund type 016-Oil and Gas Lease Fund, or the column showing the commitment item number associated with each type of commitment (*e.g.*, travel, training, etc.). These columns were excluded to better fit the remaining information on each page.

Miscellaneous Expense Transfers (“Misc. Exp. Transfers”) that were “Not Assigned” to any specific agency expenses (Exhibit A28-002, 003).

A475. The Respondents only tracked these transfers of ERA trust assets under the broad categories of administrative transfers for personnel (“Adm Tr-Personnel”), which totaled \$26,274,000.00, and administrative transfers for other operations (“Adm Tr-Other Operate”), which totaled \$11,020,000.00 (Exhibit A28-003).

A476. By spending ERA trust funds through Miscellaneous Expense Transfers for DCNR operations without assigning them to specific expenses, the Respondents spent these trust assets without differentiating between spending for trust and non-trust purposes, just as the General Fund appropriations for DCNR operations were spent.

A477. In FY 2018-2019, the appropriations for DCNR operations from both the Oil and Gas Lease Fund and the General Fund totaled \$156,547,000 (Exhibit A23). Of this amount, the ERA trust assets spent through Miscellaneous Expense Transfers totaled \$37,294,000, which represents approximately 24% of the total spending for DCNR operations from these two funds in FY 2017-2018. Thus, for annual DCNR operations paid with both General Fund appropriations and ERA trust assets through these Miscellaneous Expense Transfers in FY 2018-2019, the ratio



was 3/4 General Fund to 1/4 ERA trust assets without any differentiation between trust and non-trust purposes.

A478. In addition to spending ERA trust assets for DCNR operations through the above Miscellaneous Expense Transfers, the Respondents spent a total of \$10,461,248.76 (22%) of the FY 2018-2019 appropriations from the Oil and Gas Lease Fund for DCNR operations for the following specific DCNR expenses (Exhibit A28-002), meaning 100% of these expenses were paid with ERA trust assets:

Personnel Services:	\$ 1,626,349.40
Operational Expenses:	\$ 2,658,032.69
Fixed Asset Expenses:	\$ 5,826,866.67
Grants:	<u>\$ 350,000.00</u>
Total:	\$10,461,248.76

A479. The Respondents identified the DCNR personnel positions that received this funding (Exhibit A28-005) but did not provide any information demonstrating that these expenditures of ERA trust assets were for trust purposes.

A480. As general support for the specific expenditures from the Oil and Gas Lease Fund for DCNR operations in FY 2018-2019, the Respondents provided the spending plan developed by DCNR for these expenditures, which is referred to in this Petition Amendment as the “FY 2018-2019 Spending Plan” (Exhibit A25-046 – 049); *see also* 2004 Audit Report, page 15 (Exhibit 26) (explaining the process DCNR followed at the time of the audit to develop such spending plans).

A481. The FY 2018-2019 Spending Plan recommends spending \$1,700,000 from the Oil and Gas Lease Fund for personnel in the Bureau of Forestry administering the State Forest oil and gas program. Exhibit A25-048 (Oil & Gas Program Administration ORG CODE 8180, Minerals Division Personnel Costs, \$1,700,000). This plan also recommends spending \$100,000 for litigation expenses related to the administration of the State Forest oil and gas program. *Id.* The specific spending of ERA trust funds for personnel services reported by Respondents in the FY 2018-2019 Commonwealth SAP Report (Exhibit A28-005, 006) is consistent with this planned spending.

A482. As set forth in Section V.A.3.. above, the statutorily authorized use of the State Forest for oil and gas extraction is a non-trust purpose. Thus, the Respondents' spending of ERA trust assets for personnel to generally administer the State Forest oil and gas extraction program was for non-trust purposes.

A483. As with the specific expenditures for DCNR personnel service, the Respondents do not explain how their reported spending of \$8,834,899.36 from the Oil and Gas Lease Fund for specific DCNR operational expenses, fixed asset expenses and grants is for trust purposes. The details they provided regarding this spending in their FY 2018-2019 Commonwealth SAP Report identifies general categories of spending by various DCNR bureaus and offices. Exhibit A28-006 – 012. Many of these specific expenditures are to vendors (indicated by last column)

and the Respondents provide a separate spreadsheet of those expenditures by vendor.

Exhibit A28-013 – 015.

A484. The largest categories of expenditures associated with the specific spending for DCNR operations in FY 2018-2019 are as follows:

<b>Specific Spending Category</b>	<b>Total</b>	<b>Reference</b>
Motor Vehicles/Aircraft	\$3,860,347.71	Exhibit A28-012
Land Purchases Exclusive of Right of Way <sup>49</sup>	\$1,400,000.00	Exhibit A28-015
Other Specialized Services	\$1,200,451.41	Exhibit A28-008
Grant to PA Urban & Community Forestry <sup>50</sup>	\$350,000.00	Exhibit A28-012
Machinery/Equipment	\$513,847.83	Exhibit A28-012
IT Con App Dev	\$235,818.05	Exhibit A28-007
Miscellaneous	\$198,082.41	Exhibit A28-009
Printing	\$116,151.24	Exhibit A28-011
Motor Vehicles	\$115,535.96	Exhibit A28-017
Software Lic Maint	\$98,643.64	Exhibit A28-008
ConsultntSve-Non-EDP	\$91,383.23	Exhibit A28-006
Aggregates and Other	\$85,715.74	Exhibit A28-010

A485. The Respondents do not report any information from the Commonwealth SAP financial accounting system identifying how these specific expenditures of ERA trust assets were for trust purposes. As set forth in Sections V.A.3 and V.A.5. above, DCNR incurs costs to administer many statutorily authorized uses of the State Forest and State Parks for non-trust purposes, to

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<sup>49</sup> The vendor associated with this purchase is the Mount Nittany Medical Center (Exhibit A28-015). PEDF reviewed the state contracts made publicly available by the State Treasury on its e-library and no contract was available for a contract between DCNR and this vendor.

<sup>50</sup> This expenditure is the last item listed for specific operations and corresponds to the amount paid to the vendor identified as “PA Urban & Community Forestry” (Exhibit A28-014).

administer many statutorily authorized statewide programs for non-trust purposes, and for general administrative expenses for non-trust purposes.

A486. The FY 2018-2019 Spending Plan discusses projects to support some of the above spending but also fails to explain how these expenditures were for trust purposes. For example, the plan recommends spending \$2,500,000 for replacement of heavy equipment and vehicles but provides no information regarding the use of the equipment or vehicles (Exhibit A25-048). The actual spending from the Oil and Gas Lease Fund on vehicles and equipment based on the information provided by the Respondents in the FY 2018-2019 Commonwealth SAP Report is significantly higher than the amount recommended in the plan. The plan does not identify any specific projects undertaken with the vehicles or equipment purchased with ERA trust assets.

A487. Many of the projects described in the FY 2017-2018 Spending Plan are to support statutorily authorized programs for non-trust purposes. The projects identified to support the statewide geologic survey program primarily support the State Forest oil and gas programs and other mineral extraction in the Commonwealth. The development of the Pennsylvania outdoor recreation plan is a general administrative cost supporting recreation and tourism in the Commonwealth. The projects identified by the Bureau of Forestry primarily support its statutorily authorized programs for non-trust purposes, including forest fire protection on

private lands, State Forest oil and gas extraction, and State Forest recreation. The projects identified by the Bureau of State Parks primarily support the recreation and tourism industry. FDC simply identifies general administrative needs without identifying any specific projects. Finally, the projects identified by the Secretary primarily support recreation, marketing, communications, and other general administrative services for programs that do not conserve and maintain public natural resources.

A488. The unconstitutionality of Respondents' spending of ERA trust assets on DCNR operations for non-trust purposes is further compounded by the Respondents' failure to administer these ERA trust assets to remedy the ongoing and extensive degradation of the State Forest trust corpus from existing statutorily authorized uses, both now and in the future, including the cumulative adverse effects of these uses and related stressors on the natural ecology of the forest.

A489. The Respondents have not provided any information showing that they spent any ERA trust assets in the Oil and Gas Lease Fund in FY 2018-2019 for any specific geographically identifiable projects or actions needed to remedy the ongoing degradation of the State Forest, as set forth in Section V.A.4. above.

A490. The Respondents contend that they "fulfill their trustee obligations as long as the entirety of the public natural resources corpus is made whole for shale

gas infrastructure impacts” (Exhibit A21-028) but provide no accounting of specific actions taken for trust purposes in FY 2018-2019 to demonstrate that they did so.

A491. In addition to violating the ERA and their trustee duties by failing to administer ERA trust assets for trust purposes and failing to restore the State Forest trust corpus, the Respondents have infringed upon the Article I rights of the people by using ERA trust assets to replace General Fund appropriations through their budget and appropriation process in violation of Article I, Section 25 of the Pennsylvania Constitution.

***Unconstitutional Transfers of ERA Trust Assets  
to the Marcellus Legacy Fund in FY 2018-2019***

A492. In addition to their unconstitutional spending of ERA trust assets for DCNR operations, the Respondents spent \$35,000,000 from the Oil and Gas Lease Fund through transfers to the Marcellus Legacy Fund for non-trust purposes, as authorized by Section 1601.2-E(e) of the Fiscal Code, 72 P.S. § 1601.2-E(e). Governor’s Executive Budget 2020-2021, page H58 (Oil and Gas Lease Fund actual disbursement of FY 2018-2019) (Exhibit A1-039).

A493. Because the General Assembly does not expressly require any accounting related to the transfers from the Oil and Gas Lease Fund authorized by Section 1601.2-E(e) of the Fiscal Code, the Respondents did not maintain a detailed account of their spending of transferred ERA trust assets to ensure these funds were spent for trust purposes.

A494. As set forth in Section V.A.6. above, ERA trust assets transferred to the Marcellus Legacy Fund are commingled with unconventional gas well fees from the Unconventional Gas Well Fund and then transferred to other funds and further commingled with other non-trust funds.

A495. In FY 2018-2019, the Respondents spent \$20,000,000 in ERA trust assets in the Marcellus Legacy Fund through transfers the Environmental Stewardship Fund as authorized under Section 1601.2-E(e) of the Fiscal Code.

A496. These ERA trust assets were commingled with \$76,702,000 in landfill fees, \$9,337,000 in unconventional gas well fees also transferred from the Marcellus Legacy Fund, and \$3,582,000 in interest. Governor's Executive Budget 2020-2021, Environmental Stewardship Fund, page H24 (Exhibit A1-036). Thus, of the total receipts deposited into the Environmental Stewardship Fund in FY 2018-2019 (\$109,621,000), the ERA trust assets represented approximately 18% and would thus also represent 18% of the funds disbursed to various state agencies. *Id.*

A497. In FY 2018-2019, the disbursements from the Environmental Stewardship were as follows: \$26,053,000 to Treasury for debt service on the Growing Greener bonds, \$12,759,000 to Agriculture to preserve private farmland, \$6,124,000 to DCNR for local park grants, \$6,786,000 to DCNR to rehabilitate infrastructure on state forest and park lands, \$275,000 to DCNR for natural diversity

grants, \$17,565,000 to DEP to abate pollution of private and public lands, and \$20,432,000 to PennVest for grants to keep water and sewer rates affordable. *Id.*

A498. As set forth in Section V.A.6. above, most of the disbursements from the Environmental Stewardship Fund are for non-trust purposes.

A499. In FY 2018-2019, the Respondents also spent \$15,000,000 of the ERA trust assets in the Marcellus Legacy Fund through transfer to the Hazardous Sites Cleanup Fund as authorized under Section 1601.2-E(e) of the Fiscal Code.

A500. These ERA trust assets were commingled with \$13,012,000 in revenue from the capital stock and franchise tax, \$4,656,000 in unconventional gas well fees also transferred from the Marcellus Legacy Fund, \$1,977,000 in hazardous waste fees, \$782,000 in cost recovery, \$2,000,000 in interest and \$32,000 from other sources. *Id.* Of the total Hazardous Sites Cleanup Fund receipts in FY 2018-2019 (\$37,479,000), the ERA trust assets represented approximately 40% and would thus also represent 40% of the funds disbursed to DEP and to other funds. *Id.*

A501. In FY 2018-2019, the disbursements from the Hazardous Sites Cleanup Fund were as follows: \$36,692,000 to DEP to abate releases of hazardous substances primarily on former industrial sites, \$2,000,000 to the Industrial Sites Environmental Assessment Fund, \$2,000,000 to the Industrial Sites Cleanup Fund, and \$1,000,000 to the Household Hazardous Waste Account. *Id.*



A502. As set forth in Section V.A.6. above, most of the disbursements from the Hazardous Sites Cleanup Fund are for non-trust purposes.

A503. The unconstitutionality of Respondents' spending of ERA trust assets through transfers to the Marcellus Legacy Fund for non-trust purposes is further compounded by the Respondents' failure to administer these ERA trust assets to remedy the ongoing and extensive degradation of the State Forest trust corpus from existing statutorily authorized uses, both now and in the future, including the cumulative adverse effects of these uses and related stressors on the natural ecology of the forest.

A504. The Respondents have not provided any information showing that they spent any ERA trust assets in the Oil and Gas Lease Fund in FY 2018-2019 for any specific geographically identifiable projects or actions needed to remedy the ongoing degradation of the State Forest, as set forth in Section V.A.4. above.

A505. The Respondents contend that they "fulfill their trustee obligations as long as the entirety of the public natural resources corpus is made whole for shale gas infrastructure impacts" (Exhibit A21-028) but provide no accounting of specific actions taken for trust purposes in FY 2018-2019 to demonstrate that they did so.

A506. In addition to violating the ERA and their trustee duties by failing to administer ERA trust assets for trust purposes and failing to restore the State Forest trust corpus, the Respondents have infringed upon the Article I rights of the people

by using ERA trust assets to replace General Fund appropriations through their budget and appropriation process in violation of Article I, Section 25 of the Pennsylvania Constitution.

## **8. Declaratory Relief Requested by PEDF**

A507. As on the as-applied analyses set forth in Section V.A.7. above, PEDF requests that this Honorable Court grant the declaratory relief set forth below regarding the unconstitutionality of Respondents' appropriation and spending of ERA trust assets in the Oil and Lease Fund.

### **a. Declare the ERA Trust Purpose to be Achieved in Managing our State Forest and Park Trust Corpus is to Conserve and Maintain These Public Natural Resources, Protect their Clean Air and Pure Water, and Preserve their Natural, Scenic, Historic and Esthetic Values for Current and Future Generations of Pennsylvanians**

A508. The ERA “contains an express statement of the rights of the people and the obligations of the Commonwealth with respect to the conservation and maintenance of our public natural resources.” *PEDF II*, 161 A.3d at 916. The trustees of our constitutionally protected trust corpus—our public natural resources—have the duty under the plain language of the ERA to both conserve and maintain the public natural resources, in this case our State Forest and Parks, and to preserve the rights of the people to the clean air, pure water and natural, scenic, historic and esthetic values of our State Forest and Parks.

A509. In the first clause of the ERA, the people of Pennsylvania declared their “right to clean air and pure water, and the ***preservation*** of the natural, scenic, historic and esthetic values of the environment.” Pa. Const. art. I § 27 (emphasis added). In the case of our State Forest, the environment that must be preserved is the natural, scenic, historic and esthetic value of the forest ecosystem. The preservation of these values in the natural ecology of the forest is the fundamental principle that makes our State Forest worthy of protection as a public natural resource under Article I of our state constitution.

A510. Under the ERA, “public trustee duties were delegated concomitantly to all branches and levels of government in recognition that the quality of the environment is a task with both local and statewide implications, and to ***ensure that all government neither infringed upon the peoples’ rights nor failed to act for the benefit of the people*** in this area crucial to the well-being of all Pennsylvanians.” *PEDF II*, 161 A.3d at 919 (quoting *Robinson Twp.*, 83 A.3 at 963) (emphasis added).

A511. The protection of the State Forest natural resources as a public natural resource under the ERA is consistent with the legislative history of the ERA and undisputed.<sup>51</sup> The Supreme Court has held that our State Forest and State Parks are

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<sup>51</sup> See 1970 Legislative Journal-House at 2274 (“Governmentally owned property—land, game, fish, trees, minerals, and governmentally owned waters—would certainly be [public natural resources]; otherwise one would have to assume the legislature meant nothing at all by the second two sentences of HB 958, a conclusion courts would certainly be hesitant to adopt.”) (quoting *Analysis of HB 958, the Proposed Pennsylvania Environmental Declaration of Rights* by Robert Broughton, which is part of the ERA legislative history).

part of the corpus of the ERA trust, stating “[b]ecause state parks and forests, including the oil and gas minerals therein, are part of the corpus of the Pennsylvania’s environmental public trust, we hold that the Commonwealth, as trustee, must manage them according to the plain language of [the ERA], which imposes fiduciary duties consistent with Pennsylvania trust law.” *Id.* at 916.

A512. The inclusion of both current and future generations of Pennsylvanians as ERA trust beneficiaries requires administration of our State Forest and State Park trust corpus with a long-term strategy that does not “prioritize the needs of the living over those yet to be born.” *PEDF V*, 255 A.3d at 310.

A513. Thus, the Respondents, as trustees, have the duty to administer our State Forest and State Parks for the trust purpose of conserving and maintaining these public natural resources, protecting their clean air and pure water, and preserving their the natural, scenic, historic and esthetic values for current and future generations.

A514. Wherefore, PEDF requests that this Honorable Court declare that the ERA trust purpose that Respondents, as trustees, must achieve in managing our State Forest and State Park trust corpus is to conserve and maintain these public natural resources, to protect their clean air and pure water, and to preserve their natural, scenic, historic and esthetic values for current and future generations.

**b. Declare that the Public Natural Resources of the State  
Forest ERA Trust Corpus Encompass the Natural Ecology  
of the Forest**

A515. To manage our State Forest trust corpus to achieve the ERA trust purpose of conserving and maintaining its public natural resources, protecting its clean air and pure water, and preserving its natural, scenic, historic and esthetic values, the State Forest must be managed not just to conserve and maintain trees. As recognizes by DCNR in the 1995 *Penn's Woods* strategic plan, “[o]ne of the basic tenets of [ecosystem management] is that forests, rather than being viewed as containing a set of resources, in fact, are more than the sum of their parts. Forests are comprised of quantifiable components such as trees, but forests are also systems performing various functions and processes.” *Penn's Woods* strategic plan, page 8 (Exhibit A8).

A516. As retired State Forest Manager Siefert has explained, a “forest ecosystem is more than trees and plants. It includes the water, all fauna and flora, the soil and minerals that enrich them and the hydrology that enriches the soil, the air, insect, birds, fish, reptiles, amphibians and the forces that alter their function. Ecosystem management is making decisions about the management of all those resources to ensure that they are protected and enhanced. Our forest ecosystem likewise is connected to all the forest ecosystems on earth and what we do here has an effect globally.” Retired State Forest Manager Siefert Affidavit (Exhibit A9-001).

A517. To conserve and maintain the State Forest trust corpus, the complexity of the natural ecology of the forest must be considered and the full range of consequences associated with altering one aspect of the ecosystem must be evaluated when making decisions.

A518. Resource management decisions must consider the best scientific information available on forest ecology and recognize the limitation of our understanding of the complex biological, chemical and physical interdependencies at work in a forest ecosystem.

A519. Wherefore, PEDF respectfully requests that this Honorable Court declare that the public natural resources of our State Forest trust corpus encompass the natural ecology of the forest, including all flora and fauna and biological, chemical and physical interdependencies necessary to sustain the functions and values of the forest ecosystem.

**c. Declare that the Respondents' ERA Trustee Duties Require Sustaining the Ecosystem of the State Forest For Current and Future Generations, Consistent with the Principles of Ecosystem Management Set Forth in DCNR's *Penn's Wood* Strategic Plan**

A520. In 1995, the CNRA was enacted to create DCNR as a cabinet level advocate under the ERA for "Pennsylvania's State forests and parks [that] cover almost 2.3 million acres in this Commonwealth and contain some of our State's most precious and rare natural areas." 71 P.S. § 1340.101.

A521. As set forth in Section V.A.1 above, the Bureau of Forestry was transferred to the newly created DCNR in 1995 and adopted the *Penn's Woods* strategic plan to carry out its ERA trustee duties. In adopting ecosystem management to sustain the long-term health and productivity of our State Forest, the *Penn's Woods* strategic plan states that the “primary goal of ecosystem management is to keep the complex interdependencies of ecosystems intake and functioning well over long periods of time. The essence of maintaining ecosystem integrity is to retain the health and resilience of systems so they can accommodate short-term stresses and adapt to long-term changes.” *Penn's Woods* strategic plan, page 8 (Exhibit A8).

**A522.** The DCNR Bureau of Forestry established the goal in the *Penn's Woods* strategic plan to “***manage State Forests under sound ecosystem management, to retain their wild character and maintain biological diversity while providing pure water, opportunities for low density recreation, habitats for forest plants and animals, sustained yields of quality timber, and environmentally sound utilization of mineral resources.***” *Id.*, page 23. The bureau stated that its strategic plan “amounts to a fundamental change in forest management philosophy predicated on the concept of a sustained forest rather than a sustained yield” with the “old forest management philosophy of use, conserve and preserve [] being supplanted by a new paradigm, ecosystem management encompassing all forest values.” *Id.*, page 31.

A523. As reported in the 2016 State Forest Plan, an important consideration in managing the State Forest under the principles of ecosystem management “is promoting core forest characteristics and minimizing and managing the potential effects due to forest loss and fragmentation in order to maintain the health, viability and ecosystem functions of the forest habitats.” 2016 State Forest Plan, page 34 (Exhibit A3-009).

A524. Ecosystem management is necessary under the ERA to preserve the natural, scenic, historic and scenic values of the State Forest for future generations. The Supreme Court in *PEDF V* found that “the ERA contains a ‘cross-generational dimension [that] reinforces the conservation imperative: ***future generations are among the beneficiaries*** entitled to equal access and distribution of resources, thus the trustee cannot be shortsighted.’” 255 A.3d at 310 (emphasis in original) (quoting *Robinson Twp.*, 83 A.3d at 959). The court states the language of the ERA “unmistakably conveys to the Commonwealth that when it acts as a trustee it must consider an incredibly long timeline and cannot prioritize the needs of the living over those yet to be born. The explicit inclusion 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.’” *Id.*



A525. Wherefore, PEDF requests that this Honorable Court declare that the Respondents' trustee duties in managing our State Forest trust corpus requires sustaining the ecosystem of the forest for current and future generations consistent with the goals and objectives of the *Penn's Woods* strategic plan developed by the DCNR Bureau of Forestry.

**d. Declare that Statutorily Authorized Uses of the State Forest for Non-Trust Purposes Have Caused and Continue to Cause Degradation of the State Forest Ecosystem**

A526. As set forth in Section V.A.4. above, the many existing statutorily authorized uses of the State Forest for non-trust purposes have caused and will continue to cause degradation, diminution and depletion of the public natural resources and the natural ecology of the State Forest. These existing statutorily authorized uses include oil and gas extraction, natural gas storage, ATV use, camp leases, rights-of-way, timber sale, public roads and other infrastructure required to support these non-trust purposes, as well as the prior purchase of lands to be part of the State Forest degraded by former mining, oil, gas or other natural resource extraction. This ongoing degradation needs to be remedied, both now and in the future, to restore the natural ecology of the forest.

A527. As set forth in Section V.A.4. above, over 600,000 acres of the State Forest in northcentral Pennsylvania is currently subject to shale gas extraction with only 16% of the shale gas developed as of 2016. During the eight year period from

2008-2016, shale gas extraction converted 1,770 acres of forest to shale gas infrastructure, added almost 10,000 acres of forest edge, and fragmented over 15,000 acres of core forest. Most of the degradation associated with this statutorily authorized use of the forest has yet to be determined.

A528. Almost 70,000 acres of the State Forest is subject to natural gas storage, which also requires significant infrastructure, including well, pipelines and large compression stations.

A529. An estimated 30,000 acres of the State Forest is scared from old mining operations and countless unplugged abandoned and orphaned wells exist on the State Forest.

A530. An estimated 2,000 miles of illegal ATV roads/trails exist on the State Forest and DCNR is now statutorily mandated to increase ATV use on the State Forest.

A531. DCNR reports that it administers extensive infrastructure on the State Forest, including 6,189 miles of roads, 31 dams, 521 bridges, 4,017 leased campsites, 684 buildings, 20 municipal water supply agreements, 2 wastewater treatment facilities, 27 picnic areas, 798 miles of hiking trails, 1 shooting range, 1 golf course, 336 tower agreements, approximately 50 fire towers, and thousands, of miles of rights-of-way for electric, water, sewer, and communication facilities, and pipelines. 2016 State Forest Plan, page 216 (Exhibit A3-059).

A532. “Forest fragmentation is the process by which an otherwise continuous forest is converted to non-forest or becomes separated into smaller, more isolated forest patches. Whether natural or man-made, the consequences of a fragmented forest are usually due to the reduction in forest area, the increased vulnerability of smaller forest patches to further disturbance, or the increasing separation between forested areas. ... A fragmented forest is generally less resilient and is impacted more severely by damaging agents.” *Id.*, page 191 (Exhibit A3-050).

A533. As set forth in this Petition Amendment, the statutorily authorized uses of the State Forest for non-trust purposes have resulted in extensive fragmentation of the State Forest, including the significant loss of large, contiguous blocks of core forest.

A534. As biologist and retired planner James Weaver observes, “[h]abitat fragmentation and degradation, pollution and increasing temperatures have all contributed to the loss of biodiversity. The recent list of the Northern Goshawk as endangered is a classic example of [what Aldo Leopold once said, ‘the first step in intelligent tinkering is to save all the parts.’] The goshawk is an excellent indicator is an excellent indicator species of old growth forest health ... its decline contributes to the unraveling of forest ecosystems. In just a few decades we have gone from 150-200 nest sites in PA to 3!” Weaver Affidavit, Exhibit A11-002.

A535. The degradation of the State Forest from its many existing and ongoing statutorily authorized uses is extensive and has not been remedied.

A536. Wherefore, PEDF requests that this Honorable Court declare that the statutorily authorized uses of the State Forest for non-trust purposes have caused and will continue to cause degradation, diminution and depletion of the public natural resources and natural ecology of the State Forest ecosystem.

**e. Declare the State Forest Subject to Ongoing Degradation from the Cumulative Adverse Effects of Statutorily Authorized Uses, Climate Change, Invasive Species, Forest Pests and Disease, Air and Water Pollution and Other Known Stressors**

A537. A century ago, Pennsylvania's forests had suffered unprecedented devastation from unconstrained industrial logging to support the growing population of Pennsylvania and the nation.

A538. Pennsylvania's forests today face different but equally threatening forces of devastation to their ecological health and vitality from the cumulative adverse effects of statutorily authorized uses for non-trust purposes, climate change, invasive species, forest pests and disease, air and water pollution and other known stressors.

A539. "The capacity of the forest to renew itself through natural regeneration is a key indicator of forest health and a necessary component of a sustainably managed forest. ... Across the state, only 54 percent of sampled stands have

adequate regeneration to develop into high-canopy dominant forests []. When only considering commercially desirable species, the number drops to 36 percent [].” 2016 State Forest Plan, page 190 (Exhibit A3-049).

A540. “Climate change likely will cause many changes to Pennsylvania’s forests. First, the state will become increasingly unsuitable for many of the tree species that are now present, especially those generally associated with northern hardwood ecosystems.” *Id.*, page 39 (Exhibit A3-012).

A541. “In Pennsylvania, forest damage-causing agents may include forest insects and disease, invasive plants, climate change, inadequate forest regeneration, acid mine drainage, acid deposition, waste and littering, air pollution, habitat fragmentation, overabundant deer population, and wildfire.” *Id.*, page 183 (Exhibit A3-042).

A542. “Non-native invasive insects and diseases are very serious threats and can have devastating impacts on the long-term health and sustainability of state forest ecosystems. Diseases, such as chestnut blight and Dutch elm disease, and insect pests, such as gypsy moth and hemlock wooly adelgid, already have significantly changed forest landscapes.” *Id.*

A543. “Oaks continue to be at risk from gypsy moth defoliation, while beech bark disease continues to expand and threaten beech populations. Threats to oaks and beech are especially important because they are the largest remaining sources of

hard mast for wildlife. ... Similarly, the emerald ash borer ... is not found in most of Pennsylvania and several state forest districts. ... A European woodwasp ... has the potential to be a serious pest of pines, while the Asian longhorned beetle ... could cause considerable harm to the maple resource already under stress due to sugar maple decline. The spotted lantern fly ... is a threat to fruit trees, ornamental trees, and various other woody trees and vines. Finally, other tree species, such as walnut and butternut, are threatened by other invasive insects and diseases that are established in North America.” *Id.*, pages 183-184 (Exhibit A3-042, 043)

A544. “In addition to exotic insects and diseases, intense outbreaks of native insect pests and disease, such as forest tent caterpillar and anthracnose disease, can cause severe defoliation and mortality in localized areas. The risk of mortality increases when these outbreaks occur in conjunction with other stressors, such as drought or acid deposition. Climate change adds an additional level of uncertainty to future impacts of both native and exotic forest pests. Secondary pests that attack stressed trees may become more prevalent if their tree hosts are exposed to pressures associated with climate change.” *Id.*

A545. “Without active management, it is predicted that emerald ash borer will decimate nearly all populations of ash trees in the state. ... The gypsy moth has been causing significant forest damage in Pennsylvania since the 1970s. ... this pest

has been the principal agent of tree mortality on state forest land since 2008 ... .”  
*Id.*, page 185 (Exhibit A3-044).

A546. “In a forested landscape, the effects of invasive plants on native plant communities are numerous and may include alterations to nutrient cycling, hydrology, natural fire regimes, light levels, regeneration of native tree species and understory species, and physical habitat structure. Especially critical is the direct competition with native plants for available resources, such as space and sunlight. Invasive plants, by definition, outcompete native vegetation for these resources, ultimately leading to minimization of native species on the landscape. The long-term effects of all these changes are largely unknown, but the increasing occurrences of invasive plants on state forest land raises concern about the ability of native plant communities to adapt or remain resilient to additional threats.” *Id.*, page 187 (Exhibit A3-046).

A547. “Acid deposition occurs when acid-forming substances [typically from power generation and heavy manufacturing] are transferred from the atmosphere to the surface of the earth, often through precipitation. ... Research has shown that acid deposition can cause slower growth, injury, or death of trees, particularly sugar maple and red spruce. ... Acid deposition ... is more likely to weaken trees by damaging their leaves, limiting the nutrients available to them, or

exposing them to toxic substances slowly released from the soil.” *Id.*, pages 189-190 (Exhibit A3-048, 049).

A548. Releases of methane, a potent greenhouse gas contributing to climate change, are known to occur from shale gas development; to date, no air quality monitoring to determine the cumulative effects of these releases on the State Forest has occurred.<sup>52</sup>

A549. Wherefore, PEDF respectfully requests that this Honorable Court declare that the State Forest is subject to ongoing cumulative adverse effects to the natural ecology of the forest from statutorily authorize uses, climate change, invasive species, forest pests, air and water pollution and other known stressors.

**f. Declare Respondents, As ERA Trustees, Have the Duty to Remedy the Ongoing Degradation to Natural Ecology of the State Forest to Restore the State Forest Trust Corpus**

A550. The Supreme Court has clearly articulated the standards to determine the constitutionality of the Respondents’ duties as trustees to conserve and maintain our public natural resources under the ERA, including the ecosystem of the State Forest. The Supreme Court stated in *PEDF II* that “[a]s trustee, the Commonwealth is a fiduciary obligated to comply with the terms of the trust and with the standards governing a fiduciary’s conduct. The explicit terms of the trust require the

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<sup>52</sup> See Northcentral Pennsylvania Marcellus Shale Short-Term Ambient Air Sampling Report, DEP, May 6, 2011, available at: [https://files.dep.state.pa.us/OilGas/BOGM/BOGMPortalFiles/Air/Marcellus\\_NC\\_05-06-11.pdf](https://files.dep.state.pa.us/OilGas/BOGM/BOGMPortalFiles/Air/Marcellus_NC_05-06-11.pdf).



government to ‘conserve and maintain’ the corpus of the trust. The plain meaning of the terms to conserve and maintain implicates a duty to prevent and remedy the degradation, diminution, or depletion of the public natural resources. As a fiduciary, the Commonwealth has a duty to act toward the corpus of the trust—the public natural resources—with prudence, loyalty, and impartiality.” 161 A.3d at 932 (quoting *Robinson Twp.*, 83 A.3d at 956-957).

A551. As set forth in this Petition Amendment, existing statutorily authorized uses of our State Forest for non-trust purposes have and continue to degrade, diminish and deplete our State Forest trust corpus directly and through the cumulative adverse effects of these uses and other stressors on the natural ecology of the forest.

A552. The Respondents, as trustees of the State Forest trust corpus, have the fiduciary duty to conserve and maintain the natural ecology of the forest, to protect the clean air and pure water of the forest, and to preserve the natural, scenic, historic and esthetic values of the forest.

A553. To fulfill their trustee duty to conserve and maintain the State Forest trust corpus, the Respondents have the fiduciary duty to prevent and remedy the ongoing degradation, diminution and depletion of our State Forest trust corpus from existing and future statutorily authorized uses, including the cumulative adverse effects of these uses and other stressors on the natural ecology of the forest.

A554. Wherefore, PEDF respectfully requests that the Honorable Court declare that the Respondents have a constitutional duty under the ERA to remedy the ongoing degradation to the natural ecology of the State Forest to restore the State Forest trust corpus.

**g. Declare Respondents, as ERA Trustees, Have the Duty to Acquire Replacement Forest Land, Abate Existing Pollution, and Enhance Forest Ecosystem Values to Remedy Ongoing Degradation and to Restore the State Forest Trust Corpus**

A555. The key action needed to remedy ongoing degradation of the State Forest from existing statutorily authorized uses for non-trust purposes, including the cumulative adverse effects of these uses and other stressors, and to restore the State Forest trust corpus is acquiring additional forest lands to replace the areas of the State Forest converted to non-forest, including the following priorities identified by the DCNR Bureau of Forestry:

- Interior holdings or deeply indented tracts that will simplify boundaries and thus make land management more efficient
- Properties that strategically link existing state forest lands or other public/conserved lands
- Lands that contain species of special concern or unique habitats or plant communities
- Lands that are threatened by development pressure or that will buffer existing state forest land from nearby development
- Lands that help protect and conserve critical water resources
- Lands that provide new or unique recreational opportunities
- Properties that provide a new or improved point of access to existing state forest lands, which will enhance access for management and recreation

- Expansive properties that create a new core land holding (typically 1,000 acres or more)
- Oil, gas, and mineral rights associated with severed land holdings where conservation of wild character or core forest are a priority.

A556. Additional actions needed to remedy and restore the State Forest include the following to the extent these actions cannot be performed by those engaged in statutorily authorized uses of the State Forest for non-trust purposes:

- Plugging abandoned oil and gas wells and restoring old well pads to natural forest;
- Restoring to natural forest a multitude of old pipeline and unused rights of way to eliminate the fragmenting;
- Restoring to natural forest the roads and pipelines and well pads that were newly constructed or expanded to allow the extraction of the oil and gas;
- Reestablishing aquatic organism passage on streams;
- Reestablishing stream floodplains;
- Improving road drainage to prevent stream siltation;
- Establishing forest cover along streams that were impacted by prior wholesale logging.
- Restoring to natural forest over 2000 miles of illegal ATV trails in the forest;
- Restoring to natural forest areas of the forest subject to coal mining activities and damage from acid mine drainage;
- Eliminating invasive species that have damaged the forest, and restoring the areas damaged to natural forest;
- Buying out leased cabins in the State Forest;
- Developing protection for and enhancement of existing core forest areas of the state forest, and restoring impacts to existing core forest areas from the current and future oil and gas extraction in the state forest.
- Establishing an ongoing monitoring for air pollution impact on the state forest from the oil and natural gas activities including methane releases;

- Establishing ongoing research to understand how to enhance the state forest as a means of absorbing climate change pollutants in the air by carbon sequestration and carbon impoundment;
- Establishing an ongoing research program to understand the existing and potential future impacts to our state forest from climate change.

A557. Wherefore, PEDF respectfully requests that this Honorable Court declare that Respondents, as ERA trustees, have the duty to acquire replacement forest land, abate existing pollution, and enhance forest ecosystem values to remedy ongoing degradation of the State Forest from statutorily authorized uses for non-trust purposes, including the cumulative adverse effects of these uses and other stressors, and to restore the State Forest trust corpus.

**h. Declare Respondents, as ERA Trustees, Have the  
Fiduciary Duty to Administer ERA Trust Assets Derived  
from the State Forest Trust Corpus to Remedy and  
Restore the State Forest Trust Corpus from Ongoing  
Degradation Prior to Spending these Trust Assets for  
Other Trust Purposes**

A558. As set forth in Sections V.A.3. and V.A.4. above, DCNR administers many statutorily authorized uses of State Forest for non-trust purposes that degrade, diminish and/or deplete the public natural resources of the forest, including the natural gas extraction that has generated and continues to generate the ERA trust assets in the Oil and Gas Lease Fund.

A559. As set forth in this Petition Amendment, ERA trust assets are needed both now and in the future to remedy the degradation of the natural ecology of the

State Forest from statutorily authorized uses for non-trust purposes, including the cumulative adverse effects of those uses and other stressors on the forest ecosystem.

A560. The Supreme Court in *PEDF II* established that the Respondents have the fiduciary duties as trustees to act toward the corpus of the ERA trust with prudence, loyalty and impartiality:

As trustee, the Commonwealth is a fiduciary obligated to comply with the terms of the trust and with standards governing a fiduciary's conduct. ***The explicit terms of the trust require the government to “conserve and maintain” the corpus of the trust.*** See Pa. Const. art. I, § 27. 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. As a fiduciary, the Commonwealth has a duty to ***act toward the corpus of the trust—the public natural resources—with prudence, loyalty, and impartiality.***

161 A.3d at 932 (emphasis added) (citing *Robinson Twp.*, 83 A. 3d at 956-57); see also 20 Pa.C.S. Chapter 77 (Trusts), Subchapter H (Duties and Powers of Trustee).

A561. ***PRUDENCE*** requires a trustee to exercise “such care and skill as a man of ordinary prudence would exercise in dealing with his own property.” *Id.* (quoting Restatement (Second) of Trusts § 174, as cited in *In re Mendenhall*, 398 A.2d 951 (Pa. 1979)). Under Pennsylvania law, a trustee must “administer the trust as a prudent person would, by considering the purposes, provisions, distributional requirements and other circumstances of the trust and by ***exercising reasonable care, skill and caution.***” 20 Pa.C.S. § 7774 (emphasis added).

A562. **LOYALTY** “imposes an obligation to manage the corpus of the trust so as to accomplish the trust’s purposes for the benefits of the trust’s beneficiaries.” *PEDF II*, 161 A.3d at 932-933; *see also* 20 Pa.C.S. § 7772 (“A trustee shall administer the trust solely in the interests of the beneficiaries.”).

A563. **IMPARTIALITY** “requires the trustee to manage the trust so as to give all of the beneficiaries due regard for their respective interest in light of the purposes of the trust.” *Id.* at 933 (citing 20 Pa.C.S. § 7773; *Estate of Sewell*, 409 A.2d 401, 402 (Pa. 1979); Restatement (Second) of Trusts § 183). In *PEDF V*, the Supreme Court determined that the ERA’s “express inclusion of generations yet to come in ‘all of the people’ establishes that current and future Pennsylvanians stand on equal footing and have identical interests in the environmental values broadly protected by the ERA. [] The language unmistakably conveys to the Commonwealth that when it acts as a trustee it must consider an incredibly long timeline and cannot prioritize the needs for the living over those yet to be born. The explicit inclusion as simultaneous beneficiaries of the future generation of Pennsylvanians creates a cross-generation 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.’” 255 A.3d at 310 (citation omitted) (quoting *Robinson Twp.*, 83 A.3d at 959, n.46).

A564. In considering the cross-applications for summary relief filed by the parties in this case, the Commonwealth Court concluded that the failure of Sections 104(p) and 1601 of the General Appropriations Acts of 2017 and 2018 to require use of the Oil and Gas Lease Fund to remedy the state forest and park lands being impacted by the oil and gas extraction on these lands to generate the money in the fund did not render these provisions to be facially unconstitutional. *PEDF IV* at 20. The Commonwealth Court relied upon the Supreme Court’s statement in *PEDF II* that “the General Assembly would not run afoul of the constitution by appropriating trust funds *to some other initiative or agency dedicated to effectuating Section 27*” to conclude that the Oil and Gas Lease Fund “may be expended on other environmental conservation initiatives because such use is not a diversion of funds to a non-trust purpose.”

A565. The Commonwealth Court in *PEDF IV* cautioned the Commonwealth, however, that “the failure to remedy the degradation, diminution, or depletion of the State forest and parks impacted by the Marcellus wells – the very public resources harmed in order to generate these funds – may constitute a failure to preserve the trust and a dereliction of its fiduciary duties under [the ERA].” *Id.*, n. 16 (citing *PEDF II*, 161 A.3d at 933 (“Although a trustee is empowered to exercise discretion with respect to the proper treatment of the corpus of the trust, that discretion is limited by the purpose of the trust and the trustee’s fiduciary duties ...”; “[t]he

trustee may use the assets of the trust ‘only for purposes authorized by the trust or necessary for the preservation of the trust’”); and citing Section 7780.4 of the Uniform Trust Act, 20 Pa.C.S. § 7780.4 (“The trustee shall exercise a discretionary power in good faith and in accordance with the provisions and purposes of the trust and the interests of the beneficiaries ...”).

A566. In affirming the Commonwealth Court’s conclusion that Sections 104(p) and 1601 of the General Appropriations Acts of 2017 and 2018 are not facially unconstitutional for failing to limit use of the Oil and Gas Lease Fund to the region where shale gas extraction had depleted public natural resources from state forest and park land, the Supreme Court in *PEDF VI* quoted the above cautionary language of the Commonwealth Court. In support of its affirmation that the appropriations were not facially unconstitutional, the court noted that the express language of the ERA does not include “any regional segmentation of trust assets or beneficiaries nor a prioritization of regions deserving of conservation and maintenance efforts.” 279 A.3d at 1207-1208.

A567. The Supreme Court in *PEDF VI* also affirmed that the authority for annual appropriations of the Oil and Gas Lease Fund by the General Assembly under Section 1601.2-E(c) of the Fiscal Code was not facially unconstitutional because this provision “requires the General Assembly to consider its mandatory trustee duties and does not authorize the Commonwealth to use trust assets for non-trust purposes”



*Id.* at 1211. However, the Supreme Court states that this holding “does not negate the potential of an as applied challenge to the General Assembly’s ultimate appropriation of the [Oil and Gas] Lease Fund. We reiterate that in expending funds from the newly transferred [Oil and Gas] Lease Fund, the General Assembly has a duty to conserve and maintain the [ERA] trust assets which ‘implicates a duty to prevent and remedy the degradation, diminution, or depletion of our public natural resources’ and a duty to act toward the corpus of the trust ‘with prudence, loyalty, and impartiality.’” *Id.* at 1211-1212 (quoting *PEDF II*, 161 A.3d at 932, and *Robinson Twp.*, 83 A.3d at 956-957).

A568. The concurring opinion of Justice Donahue, joined by Justice Todd, confirmed that “*PEDF II* ‘solidif[ied] the jurisprudential sea-change begun by Chief Justice Castille’s plurality in *Robinson Twp.* ... and nothing in [*PEDF VI*] undermines our precedents.” *Id.* at 1218.

A569. A prudent trustee has a duty to use trust assets derived from allowed uses that degrade, diminish and deplete the trust corpus to remedy and restore the trust corpus. Otherwise, the trustee will not fulfill the most basic trustee duty of preserving the corpus of the trust. The Respondents, as trustees of our State Forest trust corpus, have a duty to use trust assets derived from statutorily allowed uses of the State Forest that degrade, diminish and deplete the State Forest trust corpus to remedy the natural ecology of the forest to restore the State Forest trust corpus.

A570. A loyal trustee has a duty to manage the corpus of the trust so as to accomplish the trust's purposes for the benefits of the trust's beneficiaries. The Respondents, as trustees of our State Forest trust corpus, have a duty to manage the State Forest trust corpus to conserve and maintain its public natural resources, to protect its clean air and pure water, and to preserve its natural, scenic, historic and esthetic values—the ERA trust purpose—for the benefit of current and future generations of Pennsylvanians.

A571. An impartial trustee has the duty to manage the trust so as to give due regard for the respective interest of all trust beneficiaries in light of the purposes of the trust. The Respondents, as trustees, have the duty to manage the State Forest trust corpus by giving due regard to both current and future generations of Pennsylvanians in light of the purpose of the ERA trust to conserve and maintain its public natural resources, to protect its clean air and pure water, and to preserve its natural, scenic, historic and esthetic values.

A572. The Supreme Court's statement in *PEDF II* that “the General Assembly would not run afoul of the constitution by appropriating trust funds to some other initiative or agency dedicated to effectuating [the ERA]” does not alleviate the Respondents or the General Assembly of their fiduciary duties of prudence, loyalty and impartiality set forth above as trustees of the State Forest trust corpus.

A573. DCNR is the state agency currently designated by statute to carry out the Commonwealth's day-to-day trustee duties of managing the State Forest trust corpus and has developed expertise in forest ecology to fulfill that duty. Thus, appropriating the ERA trust funds derived from the State Forest trust corpus to DCNR to remedy and restore the ongoing degradation of the State Forest trust corpus would be acting with prudence, loyalty and impartiality in carrying out the Commonwealth's trustee duties. However, other state agencies such as DEP may also have the expertise to take certain actions to remedy the State Forest trust corpus (*e.g.*, actions to plug abandoned or orphaned oil and gas wells on the State Forest, actions to abate acid mine drainage and mine scarred lands on the State Forest).

A574. The Respondents and the General Assembly would run afoul of the constitution by appropriating ERA trust funds derived from the State Forest trust corpus to some other initiative or agency dedicated to effectuating the ERA without first ensuring that the State Forest trust corpus is remedied and restored. By doing so, they would breach their trustee duty to preserve the State Forest trust corpus.

A575. Wherefore, PEDF requests that this Honorable Court declare that the Respondents have the fiduciary duty to use the ERA trust assets derived from the State Forest trust corpus to remedy and restore the State Forest trust corpus from ongoing degradation prior to spending these trust assets for any other trust purpose.

**i. Declare Respondents, as Trustees, Have the Duty to Manage ERA Trust Assets Derived from the State Forest Trust Corpus in an Account Dedicated to Remediating the Ongoing Long-Term Degradation of the State Forest to Restore the State Forest Trust Corpus**

A576. As the facts set forth in this Petition Amendment and its exhibits establish, the degradation to the natural ecology of the State Forests currently subject to shale gas extraction and other statutorily authorized uses is extensive and ongoing. Only 16% of the shale gas extraction authorized under existing State Forest leases had been completed by 2016. The actual degradation of the forest ecosystem from climate change and related stressors is scientifically supportable.

A577. Nonetheless, the Respondents have spent all the ERA trust assets derived from the State Forest trust corpus since 2008, when Marcellus Shale natural gas extraction began, primarily to pay for state government operations to replace General Fund appropriations without remediating the existing degradation of the State Forest or retaining funds necessary to remedy the degradation that will continue for decades, if not longer, from already existing authorized uses of the State Forest for oil and gas extraction and other statutorily authorized uses for non-trust purposes.

A578. The Supreme Court has recognized that Pennsylvania added the ERA to its state constitution based on “the Commonwealth’s experience of having the benefit of vast natural resources whose virtually unrestrained exploitation, while initially a boon to investors, industry, and citizens, led to destructive and lasting

consequences not only for the environment but also for the citizen's quality of life. ... The drafters and the citizens of the Commonwealth who ratified the Environmental Rights Amendment, aware of this history, articulated the people's rights and the government's duties to the people in broad and flexible terms that would permit not only reactive but also anticipatory protection of the environment for the benefit of current and future generations. *PEDF II*, 161 A.3d at 918-919.

A579. In considering the trust entitlements granted by the plain language of the ERA, the Supreme Court in *PEDF V* found that the "language unmistakably conveys to the Commonwealth that when it acts as a trustee it must consider an incredibly long timeline and cannot prioritize the need of the living over those yet to be born." 255 A.3d at 310. The court further found that the "explicit inclusion 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 generations, reinforced by a political process characterized by limited terms of office.'" *Id.* (quoting *Robinson Twp.*, 83 A.3d at 959 n. 46).

A580. The Respondents, as trustees, have the duty to retain available ERA trust assets derived from the State Forest trust corpus to remedy known existing and ongoing degradation of the State Forest trust corpus. To conclude otherwise would authorize the trustees to degrade our ERA trust corpus, which is the antithesis of the

trust purpose established by the ERA. The legislative history of the ERA recounts the abuses to our abundant forests, clean streams and clean air stating “that our woods were abundant, our streams clear and sparkling and with a multitude of fish ... which man, with ruthless indifference, then proceeded to despoil. We seared and scared our once green and pleasant land with mining operations. ... We cut down our trees and erected eyesores along our roads. We uglified our land and we called it ‘progress’.” 1970 Legislative Journal-House 2270 (April 14, 1970).<sup>53</sup> The Supreme Court recounted that “[w]ith these events in the recent collective memory of the General Assembly, the proposed Environmental Rights Amendment received the unanimous assent of both chambers during both the 1969-1970 and 1971-1972 legislative sessions.” *PEDF II*, 161 A.3d at 918 (quoting *Robinson Twp.*, 83 A.3d at 961).

A581. Without retaining available ERA trust assets derived from the State Forest trust corpus to remedy the existing and ongoing degradation of our State Forest, as well as our State Parks, the ERA trust beneficiaries will be left with the scars of this degradation and a diminished ERA trust corpus.

A582. Wherefore, PEDF requests that this Honorable Court declare that the Respondents, as Trustees, have the duty to retain ERA trust assets derived from the

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<sup>53</sup> Remarks by House Speaker Herbert Fineman, Special Order of Business “Earth Day—Pennsylvania” (discussing the importance of the ERA and other environmental initiatives taken by the House the prior year).

State Forest trust corpus in an account dedicated to remedying the ongoing long-term degradation of the natural ecology of the forest to restore the State Forest trust corpus.

**j. Declare Respondents, as Trustees, Have Violated their ERA Duty to Account for their Spending of ERA Trust Assets Derived from the State Forest Trust Corpus in Sufficient Detail to Demonstrate Compliance with ERA Trust Purposes**

A583. As set forth in Section V.A.3. above and throughout this Petition Amendment, DCNR administers many statutorily authorized uses for the State Forest for non-trust purposes, including oil and gas extraction, natural gas storage, ATV and snowmobile use, camp leases, rights-of-way for pipelines, public utilities and communication companies, timber sales, and thousands of miles of roads and other infrastructure on the State Forest for these non-trust purposes.

A584. As set forth in Section V.A.4. above and throughout this Petition Amendment, ERA trust assets are needed for actions that remedy the ongoing degradation of the State Forest from these statutorily authorized uses for non-trust purposes, including the cumulative adverse effects of these uses and other stressors on the forest ecosystem.

A585. As set forth in Section V.A.5. above and throughout this Petition Amendment, DCNR also administers many other statutorily authorized statewide

programs for non-trust purposes and incurs general administrative costs for non-trust purposes.

A586. As set forth in Section V.A.6. above and throughout this Petition Amendment, the Marcellus Legacy Fund supports statutorily authorizes uses for non-trust purposes.

A587. As set forth in the as-applied analyses of the Respondents' spending of ERA trust assets in the Oil and Gas Lease Fund in Section V.A.7. above and throughout this Petition Amendment, the Respondents did not account for their spending of ERA trust assets for DCNR operations or statutorily authorized uses of the Marcellus Legacy Fund in sufficient detail to ensure that the ERA trust assets were spent for any trust purposes. To the contrary, the as-applied analyses show the Respondents spent ERA trust assets to replace General Fund appropriations without differentiating between trust and non-trust purposes.

A588. The unconstitutionality of Respondents' spending of ERA trust assets without accounting for trust and non-trust purposes is further compounded by the Respondents' failure to administer these ERA trust assets to remedy the ongoing and extensive degradation of the State Forest trust corpus from existing statutorily authorized uses, both now and in the future, including the cumulative adverse effects of these uses and related stressors on the ecology of the forest.



A589. Wherefore, PEDF requests that this Honorable Court declare that the Respondents, as trustees, have violated their duty under the ERA to account for their spending of ERA trust assets derived from the State Forest trust corpus in sufficient detail to demonstrate compliance with ERA trust purposes.

**k. Declare that All Deposits into the Oil and Gas Lease Fund Have Been Part of the ERA Trust Corpus**

A590. As set forth in the as-applied analyses in Section V.A.7. above, all the deposits into the Oil and Lease Fund have been part of the corpus of the ERA trust.

A591. A total of \$85,334,272.82 was deposited into the Oil and Gas Lease Fund in FY 2017-2018 and \$77,939,337.86 was deposited in FY 2018-2019.

A592. Of these total deposits into the Oil and Gas Lease Fund, \$84,140,670.10 (99%) deposited in FY 2017-2018 and \$75,656,667.37 (98%) deposited in FY 2018-2019 were from payments (royalties, rents, bonus, interest penalties) paid under State Forest oil and gas leases, which the Supreme Court has declared to be part of the corpus of the ERA trust in *PEDF II* and *PEDF V*.

A593. An additional \$35,248.19 deposited into the Oil and Gas Lease Fund in FY 2017-2018 and \$57,437.82 deposited in FY 2018-2019 were from payments paid under oil and gas leases on other Commonwealth land, which would also be part of the corpus of the ERA trust under the same reasoning set forth in *PEDF II* and *PEDF V*.

A594. Income totaling \$1,158,354.53 in FY 2017-2018 and \$2,225,232.67 in FY 2018-2019 was also deposited into the Oil and Gas Lease Fund. This income was derived from interest on and investment of trust assets in the Oil and Gas Lease Fund, from the sale of trust asset investments, and from the sale of vehicles previously purchased with trust assets in the fund. In *PEDF V*, the Supreme Court determined that bonus, rental and interest penalty payments made under the State Forest oil and gas leases were income but remained part of the corpus of the ERA trust because the ERA does not create any income entitlements in the beneficiaries.

A595. The Supreme Court in *PEDF V* states that “[i]n the absence of income entitlements, there is no authority for the trustee to generate income from oil and gas assets and then use that income to benefit itself for non-trust purposes and not for the beneficiaries.” 255 A.3d at 313. The court “stress[ed] the distinction between the generation of income and the distribution of that income. Although the trustee (the Commonwealth) is authorized to generate income from trust assets in its discretion, it does not follow that the beneficiaries are entitled to distribution of those monies through allocation to the general fund. Such distribution is not supported by the purpose of the trust: to conserve and maintain the public natural resources.” *Id.* at 314.

A596. Thus, income derived from interest on and investment of trust assets in the Oil and Gas Lease Fund, from the sale of trust asset investments, and from the

sale of vehicles previously purchased with trust assets in the fund remain part of the corpus of the ERA trust.

A597. Based on the details of deposits into the Oil and Gas Lease Fund provided by the Respondents since fiscal year 2008-2009 (Exhibit A22), all these deposits are likewise part of the corpus of the ERA trust for the same reasons set forth above regarding the deposits in FY 2017-2018 and 2018-2019.

A598. Wherefore, PEDF respectfully requests that this Honorable Court declare that all the monies deposited into the Oil and Gas Lease Fund have been part of the corpus of the ERA trust.

**I. Declare Respondents Breached their Trustee Duties  
By Commingling ERA Trust Assets With Non-Trust Monies  
Without Accounting for their Spending of ERA Trust  
Assets for Trust Purposes**

A599. To the extent any of the sources of monies deposited into the Oil and Gas Lease Fund are determined not to be part of the corpus of the ERA trust, the Respondents commingled these trust assets with non-trust money and did not track the ERA trust asset deposits separately or account for their spending separately as required by their fiduciary trustee duties of prudence, loyalty and impartiality to ensure these trust assets were administered and spent for trust purposes.

A600. As set forth in V.A.6. and V.A.7. above, the Respondents transferred ERA trust assets totaling \$70,000,000 in FY 2017-2018 and 2018-2019 from the Oil and Gas Lease Fund to the Marcellus Legacy Fund, the Environmental Stewardship

Fund, and the Hazardous Sites Cleanup Fund, which all also receive deposits from non-trust sources and did not account for these deposits or their spending separately as required by their fiduciary trustee duties of prudence, loyalty and impartiality to ensure these trust assets were administered and spent for trust purposes.

A601. Since transfers to the Marcellus Legacy Fund began in fiscal year 2013-2014 (Exhibit A18), the Respondents have commingling ERA trust assets totaling \$220,000,000 as of fiscal year 2021-2022 with non-trust funds through transfers to the Marcellus Legacy Fund and other funds and have failed to account for their deposits and spending of ERA trust assets through these transfers.

A602. Wherefore, PEDF requests that this Honorable Court declare that the Respondents breached their trustee duties by commingling ERA trust assets in the Oil and Gas Lease Fund with non-trust assets without accounting for their spending of ERA trust assets for trust purposes.

**m. Declare Respondents Breached their Trustee Duties by Failing to Administer ERA Trust Assets Derived from the State Forest Trust Corpus to Remedy the Ongoing Degradation of the State Forest, Both Now and in the Future, to Restore the State Forest Trust Corpus**

A603. As set forth throughout this Petition Amendment, the Respondents have the fiduciary duty to administer the ERA trust assets derived from the State Forest trust corpus to remedy the ongoing degradation of the natural ecology of the State Forest, both now and in the future, and restore the State Forest trust corpus.

A604. As set forth in the as-applied analysis in Section V.A.7. above, the Respondents failed to spend or retain the ERA trust assets derived from the State Forest trust corpus for actions needed to remedy and restore the State Forest and have, therefore, depleted the State Forest trust corpus.

A605. Wherefore, PEDF requests that this Honorable Court declare that the Respondents breached their trustee duties by failing to administer ERA trust assets derived from the State Forest trust corpus to remedy the ongoing degradation of the natural ecology of the State Forest, both now and in the future, to restore the State Forest trust corpus.

**n. Declare Respondents' Spent ERA Trust Assets  
Derived from the State Forest Trust Corpus for  
DCNR Operations for Non-Trust Purposes in Violation of  
the ERA and in Breach of their Trustee Duties**

A606. As set forth in Section V.A.3. above, DCNR incurs significant costs in administering statutorily authorized uses of the State Forest and State Parks for non-trust purposes, including oil and gas extraction, natural gas storage, ATV use, right-of-way, camp leases, timber sale, public roads and bridges, recreational infrastructure, dams and canals, buildings and other infrastructure to support non-trust purposes.

A607. As set forth in Section V.A.5. above, DCNR incurs significant costs to administer statutorily authorized statewide programs for non-trust purposes, including statewide grant programs for recreation facilities at local parks (*e.g.*,

swimming pools, playgrounds, athletic fields, parking areas, restrooms, etc.), ATV parks, access for river recreation, cultural heritage areas; statewide ATV and snowmobile regulation; statewide surveys of geologic resources for mineral extraction; statewide surveys of ecological resources for private land development; statewide licensing of drinking well drillers; statewide control of forest fires and forest pests on private lands; and leasing of other Commonwealth lands for oil and gas extraction.

A608. As also set forth in Section V.A.5. above, DCNR incurs significant general administrative costs to carry out its statutory authorities for non-trust purpose, including costs for DCNR staff, vehicles, equipment, and contracting for other specialized services. General administrative staff include the DCNR Secretary and three Deputy Secretaries, the DCNR Chief Counsel and five Assistant Counsel, the DCNR Policy Director, the DCNR Legislative Director, the DCNR Communications Director, and various additional advisors and supporting staff.

A609. The as-applied analyses in Section V.A.7. above demonstrate that the Respondents have spent ERA trust assets for DCNR operations for these non-trust purposes.

A610. Based on the as-applied analyses in Section V.A.7. above, the Respondents spent ERA trust assets appropriated from the Oil and Gas Lease Fund totaling \$58,457,333.67 in FY 2017-2018 and \$47,755,248.76 in FY 2018-2019 for

DCNR operations. Of this total spending of ERA trust assets for DCNR operations, Respondents spent \$49,787,000.00 in FY 2017-2018 (85%) and \$37,294,00.00 in FY 2018-2019 (78%) as Miscellaneous Expense Transfers for all DCNR operations, including for non-trust purposes, without differentiating between spending for trust and non-trust purposes, just as they spent General Fund appropriations for DCNR operations.

A611. The Respondents spending of ERA trust assets for DCNR operations through these Miscellaneous Expense Transfers represented approximately 33% of the total monies appropriated for DCNR operations in FY 2017-2018 from both the General Fund and the Oil and Gas Lease Fund, and approximately 24% in FY 2018-2019, all spent without any differentiation between trust and non-trust purposes. Thus, the ratio of Respondents' spending for DCNR operations was 2/3 General Fund revenue to 1/3 ERA trust assets in FY 2017-2018 and 3/4 General Fund revenue to 1/4 ERA trust assets in FY 2018-2019.

A612. In addition to spending ERA trust assets for DCNR operations through Miscellaneous Expense Transfers in FY 2017-2018 and 2018-2019, the Respondents spent ERA trust assets totaling \$8,670,333.67 in FY 2017-2018 and \$10,461,248.76 in FY 2018-2019 for specific DCNR personnel, operational expenses, fixed asset expenses and grants, again without differentiating between expenses incurred for trust and non-trust purposes. Thus, the Respondents paid 100% of these expenses

with ERA trust assets, again without differentiating between expenses for trust and non-trust purposes, as established in the as-applied analyses in Section V.A.7. above.

A613. For example, in both FY 2017-2018 and FY 2018-2019, over \$1,600,000 in ERA trust assets were spent on specific personnel to administer the statutorily authorized use of the State Forest for oil and gas extraction, which is a non-trust purpose. In both FY 2017-2018 and FY 2018-2019, over \$4,000,000 in ERA trust assets were spent for motor vehicles, machinery and equipment without differentiating between their need for trust or non-trust purposes. The spending plans provided by the Respondents for each of these fiscal years (Exhibit A25) indicate that most, if not all, of these specific expenditures were for non-trust purposes.

A614. Since 2008 when the leasing of State Forest for shale gas extraction significantly increased, the Respondents have spent ERA trust assets derived from the State Forest trust corpus appropriated from the Oil and Gas Lease Fund for DCNR operations to replace a total of approximately 42% of the General Fund appropriations to DCNR for these expenses through fiscal year 2022-2023 (Exhibit A23), with this rate of General Fund replacement ranging from 11% in fiscal year 2008-2009 to 94% in fiscal year 2014-2015.

A615. Wherefore, PEDF respectfully requests that this Honorable Court declare that the Respondents' spending of ERA trust assets for DCNR operations through Miscellaneous Expense Transfers and through their specific spending



without differentiating between expenses for trust and non-trust purposes violates the ERA and breaches their trustee duties.

**o. Declare Respondents' Spent ERA Trust Assets Derived from the State Forest Trust Corpus Through Transfers to the Marcellus Legacy Fund for Non-Trust Purposes in Violation of the ERA and in Breach of their Trustee Duties**

A616. As set forth in Sections V.A.6. and V.A.7. above, the Respondents spent a total of \$70,000,000 in ERA trust assets derived from the State Forest trust corpus in FY 2017-2018 and 2018-2019 through transfers from the Oil and Gas Lease Fund to the Marcellus Legacy Fund and then to the Environmental Stewardship Fund and the Hazardous Sites Cleanup Fund. Since transfers of ERA trust assets to the Marcellus Legacy Fund began in fiscal year 2013-2015, a total of \$220,000,000 in ERA trust assets have been transferred to the Marcellus Legacy Fund. *See* Exhibit A18 (Marcellus Legacy Fund Transfers).

A617. The Respondents, through these transfers of ERA trust assets derived from the State Forest trust corpus, have commingled these trust assets with money from non-trust sources, and spent these trust assets for many statutorily authorized uses for non-trust purposes without any accounting of the transferred trust assets to ensure their use for trust purposes.

A618. The \$20,000,000 in ERA trust assets transferred from the Marcellus Legacy Fund to the Environmental Stewardship Fund in both FY 2017-2018 and 2018-2019 represented approximately 20% and 18%, respectively, of the monies

disbursed from the Environmental Stewardship Fund during those fiscal years, with the remainder consisting of landfill and unconventional gas well fees and interest, which were all commingled with the ERA trust assets.

A619. The annual disbursements from the Environmental Stewardship Fund are to multiple agencies for various programs, many of which are for non-trust purposes, including disbursements to Treasury to pay the debt service on the Growing Greener bonds, which is a non-trust purpose; disbursements to the Department of Agriculture for the preservation of private farmland, which is a non-trust purpose; disbursements to PennVest for grants for sewer and water projects to keep rates affordable for small communities, which is a non-trust purpose; disbursements to DCNR for community grants, including grants for recreational facilities, which is a non-trust purpose; disbursements to DCNR for projects to rehabilitate infrastructure on State Parks and the State Forest, most of which supports statutorily authorized uses for non-trust purposes; disbursements to DCNR for natural diversity grants which may be for trust purposes if used to conserve and maintain public natural resources; and disbursements to DEP for pollution abatement, which could be a trust purpose if benefiting public natural resources or a non-trust purpose if benefiting private land. *See Exhibit A19 (Environmental Stewardship Fund Receipts and Disbursements).*

A620. Since each of the above disbursements from the Environmental Stewardship Fund in FY 2017-2018 and 2018-2019 consisted of approximately 20% and 18% of ERA trust assets, respectively, the Respondents spent ERA trust assets for non-trust purposes through these disbursements.

A621. The \$15,000,000 in ERA trust assets transferred from the Marcellus Legacy Fund to the Hazardous Sites Cleanup Fund in both FY 2017-2018 and 2018-2019 represented approximately 31% and 40%, respectively, of the monies disbursed from the Hazardous Sites Cleanup Fund those fiscal years, with the remainder consisting of revenue from the capital stock and franchise tax, unconventional gas well fees, hazardous waste fees, recovered costs, interest, and other sources, which were all commingled with the ERA trust assets.

A622. The annual disbursements from the Hazardous Sites Cleanup Fund are to DEP and other funds for various programs that include non-trust purposes, including abatement of releases of hazardous substances on former industrial sites, which may not be for trust purposes if the cleanup benefits private property or natural resources on private property; and disbursements to the Industrial Sites Environmental Assessment Fund, the Industrial Sites Cleanup Fund; and the Household Hazardous Waste Account, all of which are for purposes other than conserving and maintaining public natural resources.

A623. Since each of the above disbursements from the Hazardous Sites Cleanup Fund in FY 2017-2018 and 2018-2019 consisted of approximately 31% and 40% of ERA trust assets, respectively, the Respondents spent ERA trust assets for non-trust purposes through these disbursements.

A624. The above spending of ERA trust assets through transfers to the Marcellus Legacy Fund are representative of the spending that has occurred since such transfers began. Thus, the \$220,000,000 in total transfers of ERA trust assets derived from the State Forest trust corpus through fiscal year 2021-2022 have likewise been commingled with money from non-trust sources, and spent for many statutorily authorized programs for non-trust purposes without any accounting of the transferred ERA trust assets to ensure their use for trust purposes.

A625. Wherefore, PEDF respectfully requests that this Honorable Court declare that the Respondents have spent ERA trust assets derived from the State Forest trust corpus through transfers to the Marcellus Legacy Fund and other funds for non-trust purposes in violation of the ERA and in breach of Respondents' trustee duties.

**p. Declare Respondents' Appropriation and Spending of  
ERA Trust Assets Derived from the State Forest Trust  
Corpus In Violation of Article I, Section 25 of the  
Pennsylvania Constitution**

A626. Since 2008 when the leasing of State Forest for shale gas extraction significantly increased, the Commonwealth has appropriated ERA trust assets

derived from the degradation of the State Forest trust corpus to replace General Fund appropriations through both transfers from the Oil and Gas Lease Fund to the General Fund and through appropriations from the Oil and Gas Lease Fund for DCNR operations and transfers to the Marcellus Legacy Fund.

A627. The Supreme Court declared the transfers from the Oil and Gas Lease Fund to the General Fund to be facially unconstitutional in *PEDF V.* 255 A.3d at 315 (these direct transfers were authorized by Sections 1604-E and 1605-E of the Fiscal Code and Section 1912 of the Supplemental General Appropriations Act of 2009, which the court declared to be facially unconstitutional under the ERA).

A628. Although direct transfers to the General Fund stopped after fiscal year 2010-2011, the as-applied analyses of Respondents' spending of the ERA trust assets derived from the State Forest trust corpus in Section V.A.7. above shows that unconstitutional spending of ERA trust assets to replace General Fund revenue continued. Based on the spending details provided by the Respondents, approximately 76% of the ERA trust assets in the Oil and Gas Lease Fund spent for DCNR operations beginning in fiscal year 2008-2009 were spent through Miscellaneous Expense Transfers, which means these funds were spent for DCNR operations without assigning them to specific expenses and thus without any differentiation between spending for trust and non-trust purposes, just as the General Fund appropriations for DCNR operations were spent.

A629. These reported Miscellaneous Expense Transfers for DCNR operations from fiscal years 2008-2009 through 2021-2022 represent 38% of the undifferentiated spending for DCNR operations over this period. In other words, the Respondents spent ERA trust assets to replace 38% of the General Fund revenue appropriated for DCNR operations and spent these trust assets like General Fund revenue without differentiating between trust and non-trust purposes.

A630. The remaining 24% of Respondents' spending of ERA trust assets for DCNR operations were used to pay 100% of certain specific expenses for personnel services, operational expenses, fixed asset expenses and grants. However, the as-applied analyses of this spending likewise showed that Respondents failed to differentiate between expenses for trust and non-trust purposes. Thus, this spending replaced General Fund appropriations for costs incurred by DCNR to administer non-trust purposes just as the spending through the Miscellaneous Expense Transfers relaced General Fund appropriations.

A631. In total, the Commonwealth has spent ERA trust assets derived from the degradation of the State Forest trust corpus to replace approximately 42% of the General Fund appropriations to DCNR for its annual operations from fiscal year 2008-2009 through fiscal year 2022-2023, a total of \$877,261,000, without any differentiation between spending for trust and non-trust purposes (Exhibit A23).

A632. The Respondents exercise their duties to develop annual budgets and appropriate funds to carry out government functions under Articles III (Legislation), IV (Executive) and VIII (Taxation and Finance) of the Pennsylvania Constitution. The Governor is required to submit a balanced operating budget for the ensuing year to the General Assembly under Article VIII, Section 12 of the Pennsylvania Constitution. Pa. Const. art. VIII § 12. The General Assembly then introduces general appropriation bills under Article III, Section 11 of the Pennsylvania Constitution, Pa. Const. art. III § 11, which upon passage are presented to the Governor for approval under Article IV, Section 15 of the Pennsylvania Constitution. Pa. Const. art. IV § 15.

A633. In carrying out the annual budget and appropriation process, the Respondents cannot infringe upon the declared rights of the people of Pennsylvania in Article I of the Pennsylvania Constitution, which includes the ERA. In Article I, Section 25 of the Pennsylvania Constitution, the people have declared that “[t]o guard against transgressions of the high powers which we have delegated, we declare that everything in this article is excepted out of the general powers of government and shall forever remain inviolate.” Pa. Const. art. I § 25.

A634. Based on the as-applied analyses of the Respondents’ appropriation and spending of ERA trust assets derived from the degradation of the State Forest trust corpus, they have used the budgeting and appropriation authority given to them

by the people of Pennsylvania under their state constitution to infringe upon the declared ERA rights of the people under Article I, which are to “forever remain inviolate.” Pa. Const. art. I § 25.

A635. Wherefore, PEDF requests this Honorable Court to declare that the Respondents’ appropriation and spending of ERA trust assets derived from the degradation of the State Forest trust corpus in FY 2017-2018 and FY 2018-2019 violate Article I, Section 25 of the Pennsylvania Constitution based on the as-applied analyses of their spending of these ERA trust assets.

**q. Declare Sections 104(p) and 1601 of the General Appropriations Acts of 2017 and 2018 Unconstitutional Based on the As-Applied Analyses of the Respondents’ Spending of these Appropriations**

A636. Sections 104(p) of the General Appropriations Acts of 2017 and 2018 both authorize spending money appropriated from the Oil and Gas Lease Fund for all expenses associated with agency operations using the language as follows, except changes in the dates:

Oil and Gas Lease Fund.—The following sums set forth in this act, or as much as may be necessary, are hereby specifically appropriated from the Oil and Gas Lease Fund to the hereinafter named agencies of the executive department of the Commonwealth for the payment of salaries, wages or other compensation and travel expenses of the duly appointed officers and employees of the Commonwealth, for the payment of fees for contractual services and for payment of any other expenses, as provided by law or by this act, necessary for the proper conduct of the duties, functions and activities for the purposes hereinafter set forth for the fiscal year beginning July 1, 2017,



and for the payment of bills incurred and remaining unpaid at the close of the fiscal year ending June 30, 2018.

A637. Section 1601 of the General Appropriations Act of 2017 appropriated ERA trust assets from the degradation of the State Forest trust corpus in the Oil and Gas Lease Fund for DCNR operations in FY 2017-2018 as follows: \$50,000,000 for DCNR general operations; \$7,739,000 for State parks operations; and \$3,552,000 for State forests operations. Based on these authorized appropriations, the Governor has reported that a total of \$58,457,000 was disbursed in FY 2017-2018 to pay for DCNR operations. Governor's Executive Budget 2019-2020, page H52 (reporting *actual* receipts and disbursements from the Oil and Gas Lease Fund for FY 2017-2018) (Exhibit A1-032)

A638. Section 1601 of the General Appropriations Act of 2018 appropriated ERA trust assets from the degradation of the State Forest trust corpus in the Oil and Gas Lease Fund for DCNR operations in FY 2018-2019 as follows: \$37,045,000 for DCNR general government operations; \$7,739,000 for State Parks operations; and \$3,552,000 for State Forest operations. Based on these appropriations, the Governor has reported that a total of \$47,755,000 was disbursed in FY 2018-2019 to pay for DCNR operations. Governor's Executive Budget 2020-2021, page H58 (reporting *actual* receipts and disbursements from the Oil and Gas Lease Fund for FY 2017-2018) (Exhibit A3-037).

A639. In its application for summary relief filed in this case on February 15, 2019, PEDF requested that the Commonwealth Court declare Sections 104(p) and 1601 of the General Appropriations Acts of 2017 and 2018 facially unconstitutional under the ERA and Article I, Section 25 of the Pennsylvania Constitution because the language of these provisions allowed spending the ERA trust assets derived from the degradation of the State Forest trust corpus in the same manner as appropriations from the General Fund.

A640. PEDF relied on the Supreme Court’s analysis in *PEDF II* in seeking its declarations that these appropriations were unconstitutional on their face. The Supreme Court in *PEDF II* held Sections 1602-E and 1603-E of the Fiscal Code, which related exclusively to royalties in the Oil and Gas Lease Fund, to be facially unconstitutional. The Supreme Court found that “[o]n their face, these [Fiscal Code provisions] lack any indication that the Commonwealth is required to contemplate, let alone reasonably exercise, its duties as the trustee of the environmental public trust created by the [ERA].” 161 A.3d at 937. The court also found “no indication that the General Assembly considered the purposes of the public trust or exercised reasonable care in managing the royalties in a manner consistent with its [ERA] trustee duties.” *Id.* at 938.

A641. In holding Section 1602-E and 1603-E of the Fiscal Code to be facially unconstitutional, the Supreme Court in *PEDF II* concluded that these provisions

“plainly ignore the Commonwealth’s constitutionally imposed fiduciary duty to manage the corpus of the environmental public trust for the benefit of the people to accomplish its purpose—conserving and maintaining the corpus by, inter alia, preventing and remedying the degradation, diminution and depletion of our public natural resources. [] Without question, these legislative enactments permit the trustee to use the trust assets for non-trust purposes, a clear violation of the most basic of a trustee’s fiduciary obligations.” *Id.*

A642. In *PEDF IV*, the Commonwealth Court concluded that “because the [Oil and Gas Lease] Fund contains both trust principal and other deposits, we cannot declare the appropriations contained in Sections 104(p) and 1601 of the General Appropriations Acts of 2017 and 2018 for DCNR’s government operations facially unconstitutional. By the same token, we are also unprepared to grant the Commonwealth’s sweeping request that its current usage is wholly consistent with its [ERA] trustee responsibilities. Such a declaration requires an as-applied analysis, which we are not prepared to address in this matter.” Unreported opinion, page 17.

A643. Upon PEDF’s appeal of this conclusion, the Supreme Court agreed in *PEDF VI* that an as-applied analysis was needed in this case because DCNR has the statutory responsibility to manage State forest and park land in furtherance of the purposes of the ERA. 279 A.3d at 1205-1206. In the concurring opinion of Justice Donohue, joined by Justice Todd, the majority opinion was further explained, stating

that “the *PEDF II* provisions authorized the General Assembly to take trust assets and appropriate them to the General Fund, where they would be clearly spent on non-trust purposes. In terms of plainly legitimate sweep, the invalid applications of the *PEDF II* provisions were so evident that proof of actual unconstitutional application was unnecessary.” *Id.* at 1217. While Justices Donohue and Todd recognized the concerns of Justices Dougherty and Wecht, who concluded that Sections 104(p) and 1601 of the General Appropriations Acts of 2017 and 2018 were facially unconstitutional, they joined the majority’s opinion “with the understanding that any as-applied challenge will ensure that the Commonwealth is not, in fact, diverting trust assets to non-trust purposes.” *Id.* at 1219-2220.

A644. For all the reasons set forth above in this Petition Amendment in support of PEDF’s as-applied analyses of the Respondents’ spending of the appropriations authorized by Sections 104(p) and 1601 of the General Appropriations Acts of 2017 and 2018, the Respondents have diverted trust assets derived from the degradation of the State Forest trust corpus to non-trust purposes in violation of the ERA. Moreover, the Respondents have degraded the State Forest trust corpus in violation of the ERA by allowing statutorily authorized uses of the State Forest for non-trust purposes and failing to take actions needed to remedy the ongoing degradation to the natural ecology of the State Forest from these allowed

uses, including the cumulative adverse effects of these uses and other stressors on the forest ecosystem, thus failing to restore the State Forest trust corpus.

A645. Wherefore, PEDF requests this Honorable Court to declare the appropriations authorized by Sections 104(p) and 1601 of the General Appropriations Acts of 2017 and 2018 to be unconstitutional based on the as-applied analyses of the Respondents' spending of these appropriations.

**r. Declare Section 1601.2-E of the Fiscal Code  
Unconstitutional As-Applied to the Appropriations and  
Transfers of ERA Trust Assets in FY 2017-2018 and  
2018-2019 Based on the Respondents' Spending of these  
Trust Assets**

A646. Section 1601.2-E(b) of the Fiscal Code was enacted several months after the Supreme Court held Sections 1602-E and 1603-E of the Fiscal Code to be facially unconstitutional in *PEDF II* and required that appropriations from the Oil and Gas Lease Fund be again controlled by the Oil and Gas Lease Fund Act. The General Assembly enacted this new Fiscal Code provision to replace the Oil and Gas Lease Fund Act by authorizing the deposit of certain sources of money into the Oil and Gas Lease Fund, a "special fund in the State Treasury" continued when Section 1601.2-E was added and the Oil and Gas Lease Fund Act was repealed (act of October 30, 2017, P.L. 725, No. 44). Section 1601-2.E(b) authorizes the following to be deposited into the Oil and Gas Lease Fund:

- (1) Rents and royalties from oil and gas leases of land owned by the Commonwealth, except rents and royalties received from game and fish lands.
- (2) Amounts as provided under section 5 of the act of October 8, 2012 (P.L.1194, No. 147), known as the Indigenous Mineral Resources Development Act.
- (3) Any other money appropriated or transferred to the fund.

72 P.S. §1601.2-E(b).

A647. Section 1601.2-E(c) of the Fiscal Code controls use of the money in the Oil and Gas Lease Fund and states that “[m]oney in the fund may only be used as provided under subsection (e) or as annually appropriated by the General Assembly.” In response to the Supreme Court’s holding in *PEDF II*, the General Assembly also states in Section 1601.2-E(c) of the Fiscal Code that “[i]n making appropriation from the fund, the General Assembly shall consider the Commonwealth’s trustee duties under Section 27 of Article I of the Constitution of Pennsylvania.” 72 P.S. § 1601.2-E(c).

A648. Section 1601.2-E(e) of the Fiscal Code establishes annual transfers from the Oil and Gas Lease Fund to the Environmental Stewardship Fund and the Hazardous Sites Cleanup Fund. 72 P.S. § 1601.2-E(e). This provision authorized the transfer of \$20,000,000 from the Marcellus Legacy Fund to the Environmental Stewardship Fund and \$15,000,000 from the Marcellus Legacy Fund to the Hazardous Sites Cleanup Fund in both FY 2017-2018 and FY 2018-2019. *Id.*

A649. In its application for summary relief filed in this case on February 15, 2019, PEDF requested that the Commonwealth Court declare Section 1601.2-E of the Fiscal Code facially unconstitutional under the ERA and Article I, Section 25 of the Pennsylvania Constitution because the language of these provisions allowed spending the ERA trust assets derived from the degradation of the State Forest trust corpus without any safeguards to ensure the ongoing degradation to the State Forest trust corpus would be remedied to conserve and maintain the State Forest trust corpus as required by the ERA.

A650. PEDF relied on the Supreme Court's analysis in *PEDF II* in seeking its declarations that Section 1601.2-E of the Fiscal Code was unconstitutional on its face. The Supreme Court in *PEDF II* held Sections 1602-E and 1603-E of the Fiscal Code, which related exclusively to royalties in the Oil and Gas Lease Fund, to be facially unconstitutional. The Supreme Court found that “[o]n their face, these [Fiscal Code provisions] lack any indication that the Commonwealth is required to contemplate, let alone reasonably exercise, its duties as the trustee of the environmental public trust created by the [ERA].” 161 A.3d at 937. The court also found “no indication that the General Assembly considered the purposes of the public trust or exercised reasonable care in managing the royalties in a manner consistent with its [ERA] trustee duties.” *Id.* at 938.

A651. In holding Section 1602-E and 1603-E of the Fiscal Code to be facially unconstitutional, the Supreme Court in *PEDF II* concluded that these provisions “plainly ignore the Commonwealth’s constitutionally imposed fiduciary duty to manage the corpus of the environmental public trust for the benefit of the people to accomplish its purpose—conserving and maintaining the corpus by, inter alia, preventing and remedying the degradation, diminution and depletion of our public natural resources. [] Without question, these legislative enactments permit the trustee to use the trust assets for non-trust purposes, a clear violation of the most basic of a trustee’s fiduciary obligations.” *Id.*

A652. In *PEDF IV*, the Commonwealth Court concluded that the commingling of ERA trust funds with non-trust funds authorized by Section 1601.2(b) of the Fiscal Code was not facially unconstitutional “because if the General Assembly chose[s] to appropriate all monies in the [Oil and Gas] Lease Fund for trust purposes, there would be no [ERA] violation. The constitutional problem arises only when trust assets are applied to non-trust purposes. *See PEDF II*. Although we agree with [PEDF] a clear accounting and identification of corpus funds from the oil and gas leases are necessary to ensure that these funds are properly uses in strict compliance with [the ERA], ... the absence of such a mandate within Section 1601.2-E(b) itself does not render this provision facially unconstitutional. *PEDF IV* at 27.



A653. The Commonwealth Court in *PEDF IV* also concluded that Section 1601.2-E(c) of the Fiscal Code was not facially unconstitutional because it “authorizes the appropriation and transfer of monies in the [Oil and Gas] Lease Fund without any indication as to the specific nature of the funds, *i.e.*, royalties, rents, bonuses, interest or other sources ...[and] the [Oil and Gas] Lease Fund is comprised of both restricted corpus and unrestricted deposits.” *Id.* at 28. The Commonwealth Court also concluded that the annual transfers authorized by Section 1601.2-E(e) were not facially unconstitutional because “it is not clear whether the transfers ... are trust principal or income” and that the use of trust assets would only violate the ERA “when trust assets are used for non-trust purposes.” *Id.* at 30.

A654. Upon PEDF’s appeal of this conclusion, the Supreme Court agreed in *PEDF VI* that Section 1601.2-E of the Fiscal Code was not facially unconstitutional but did not rely on the Commonwealth Court’s findings related to the distinction between trust principal and income derived from the State Forest trust corpus. The Supreme Court did not find Section 1601.2-E(c) of the Fiscal Code to be facially unconstitutional because “it requires the General Assembly to consider its mandatory trustee duties and does not authorize the Commonwealth to use trust assets for non-trust purposes” but further stated that its holding “does not negate the potential of an as applied challenge to the General Assembly’s ultimate appropriation of the [Oil and Gas] Lease Fund. We reiterate that in expending funds

from the newly transferred [Oil and Gas] Lease Fund, the General Assembly has the duty to conserve and maintain the [ERA] trust assets which ‘implicates a duty to prevent and remedy the degradation, diminution, or depletion of our public natural resources and a duty to act toward the corpus of the trust ‘with prudence, loyalty, and impartiality.’” 255 A.3d. at 1211-1212 (quoting *PEDF II*, 161 A.3d at 932, and *Robinson Twp.*, 83 A.3d at 956-957).

A655. For all the reasons set forth in this Petition Amendment in support of PEDF’s as-applied analyses of the Respondents’ spending of the appropriations and transfers authorized by Section 1601.2-E of the Fiscal Code, the Respondents have diverted trust assets derived from the degradation of the State Forest trust corpus to non-trust purposes in violation of the ERA. Moreover, the Respondents have degraded the State Forest trust corpus in violation of the ERA by allowing statutorily authorized uses of the State Forest for non-trust purposes and failing to remedy the ongoing degradation to the natural ecology of the State Forest from these allowed uses, including the cumulative adverse effects of these uses and other stressors on the forest ecosystem, thus failing to restore the State Forest trust corpus.

A656. Wherefore, PEDF requests this Honorable Court to declare Section 1601.2-E of the Fiscal Code unconstitutional as applied to the appropriations and transfers of ERA trust assets derived from the degradation of the State Forest trust

corpus for FY 2017-2018 and 2018-2019 based on the Respondents' spending of these ERA trust assets.

## **VI. AMENDMENT SUPPORT FOR PETITIONER'S STANDING**

A657. The standing of PEDF in this matter set forth in Paragraphs 306 – 326 of the Petition are incorporated by reference.

A658. The affidavit of PEDF board member Cynthia Bower (Exhibit M to the Petition) is supplemented by her affidavits incorporated in this Petition Amendment (Exhibits A7 and A16).

A659. The affidavit of biologist, retired Tioga County planner and PEDF member James Weaver (Exhibit P to the Petition) is supplemented by his affidavit incorporated in this Petition Amendment (Exhibit A11).

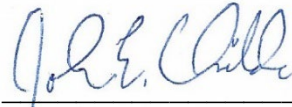
A660. The affidavit of retired State Forest District Manager and PEDF member Roy Siefert (Exhibit S to the Petition) is supplemented by his affidavit incorporated in this Petition Amendment (Exhibit A9).

A661. The new affidavits of retired State Forest District Managers and PEDF members Douglas J. D'Amore (Exhibit A10), Robert Merrill (Exhibit A12), and Robert Davey, Jr. (Exhibit A17) supplement PEDF's standing in this matter.

## VII. AMENDMENT CONCLUSION

A662. For the reasons set forth in the Petition, as amended, PEDF respectfully requests that this Honorable Court grant the requested declaratory relief set forth above based on PEDF's as-applied analysis of Respondents' appropriation and spending of ERA trust assets derived from the State Forest trust corpus in the Oil and Gas Lease.

Respectfully,



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