

**COMMONWEALTH COURT OF PENNSYLVANIA**

<b>PENNSYLVANIA ENVIRONMENTAL</b>	:	
<b>DEFENSE FOUNDATION,</b>	:	
<b>Petitioner</b>	:	
	:	<b>No. 228 M.D. 2012</b>
<b>v.</b>	:	
	:	
<b>TOM CORBETT, GOVERNOR,</b>	:	
<b>COMMONWEALTH OF</b>	:	
<b>PENNSYLVANIA;</b>	:	
<b>Respondent</b>	:	

**PETITIONER’S MOTION FOR SUMMARY JUDGMENT**

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# PETITIONER'S MOTION FOR SUMMARY JUDGMENT

## INTRODUCTION

The Pennsylvania Environmental Defense Foundation ("Petitioner") hereby moves this Honorable Court for Summary Judgment in the above captioned matter pursuant to Rule 1035.2 of the Pennsylvania Rules of Civil Procedure. Petitioner requests that this Court grant its requests for declaratory relief as set forth in its Second Amended Petition for Review, this motion, and Petitioner's brief filed in support of this motion.

Petitioner filed its Petition for Review in the nature of a Complaint for Declaratory Judgment pursuant to the Declaratory Judgment Act, 42 Pa. C.S. § 7531 *et seq.* Petitioner seeks declaration of the duties and responsibilities of the Commonwealth of Pennsylvania ("Commonwealth") and the Governor of Pennsylvania ("Governor") (collectively, the "Respondents"), as trustees of the public natural resources of Pennsylvania's State Parks and State Forests under Article I, Section 27 of Pennsylvania's Constitution, PA. CONST. art. I § 27 ("Article I § 27"), and the rights of Petitioners' members to protection of the environmental values of those public natural resources.

Petitioner also seeks declaration that the Respondents violated Article I § 27 and their duties thereunder, as well as the rights of Petitioner's members, by their decisions and actions since 2008 to increase natural gas extraction on our State

Forest contrary to the recommendations of the Department of Conservation and Natural Resources ("DCNR"), and then to remove DCNR's control over and use of the Oil and Gas Lease Fund. The rents and royalties from the State Forest oil and gas leases are deposited into this fund and Respondents' actions removed the balance created by the Conservation and Natural Resources Act ("CNRA") essential to DCNR's ability to fulfill its Article I § 27 trustee duties. CNRA balances the authority given to DCNR to lease State Park and Forest land for oil and gas extraction when DCNR determines such leasing is in the best interest of the Commonwealth with DCNR's mandated control and use of the Oil and Gas Lease Fund for projects that mitigate the harm to public natural resources that results from that oil and gas extraction.

Petitioner respectfully requests that this Court make the findings and declarations requested through this Motion for Summary Judgment to restore the Article I § 27 rights of Petitioner's members in their State Parks and Forests.

### **RELEVANT LAW AND FACTS**

Petitioner sets forth below the law and facts relevant to the declarations it requests from this Court in this Motion for Summary Judgment. No genuine issue of dispute exists with regard to the relevant facts. The exhibits provided in support of the relevant facts set forth below are publically available government

publications or records for which this Court can take judicial notice under Pa.R.E. 201. A court, upon request accompanied by necessary information, must take judicial notice of adjudicative facts if the facts are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, and therefore are not subject to reasonable disputes. Pa.R.E. 201; *see Hyer v. Pa. Dept. of Transportation*, 957 A.2d 807 (Pa. Cmwlth. 2008), *In the Interest of D.S.*, 622 A.2d 954, 958 (Pa. Super. 1993) (evidence derived from judicial notice may support findings of fact if unrebutted).

Petitioner respectfully requests that this Court take judicial notice of the following Exhibits, which are generally available government publications: P, Q, R, S, T, U, V, Y, AA, BB, EE, FF, GG, HH, II, KK, LL, MM, and NN. In addition, Petitioner requests that this Court take judicial notice of the following Exhibits, which are correspondence of public officials made publically available to the *Philadelphia Inquirer* in 2009 in response to a request under the Pennsylvania Right-to-Know Law and made available to Petitioner as such during discovery: W, X, CC, and DD.

**A. Respondents' Article I § 27 Constitutional Duties**

1. The Commonwealth of Pennsylvania is the Trustee of Pennsylvania's public natural resources (the "Public Trust") under Article I § 27.

2. The Governor of the Commonwealth of Pennsylvania (formerly Edward Rendell and currently Thomas W. Corbett, Jr.), acting in his official capacity as Governor, is the Chief Executive Officer of the Commonwealth under Article IV, Section 2 of the Pennsylvania Constitution. PA. CONST. art. IV § 2 ("the supreme executive power shall be vested in the Governor, who shall take care that the laws be faithfully executed"). As such, the Governor is also a constitutionally designated trustee of the Public Trust under Article I § 27.

3. Article I § 27 establishes three mandates for the Respondents, as Trustees: (1) to conserve and maintain the public natural resources; (2) to do so for the benefit of all people, including generations yet to come; and (3) to protect the specific rights of the people to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment.

4. Pennsylvania's State Parks and State Forests, as governmentally owned land, and the flora, fauna, minerals, air and waters with them, are part of the public natural resources that are the common property of all people, including generations yet to come. 1970 Pa. Legislative Journal-House 2269, 2274-2275 (April 14, 1970) (governmentally owned property--land, game, fish, trees, minerals and governmentally owned water would certainly be public natural resources, along with air and water that diffuse through such property; discussed in *Analysis of HB 958, the Proposed Pennsylvania Declaration of Rights*, Robert Broughton,

Associate Professor of Law at Duquesne University Law School, which was made part of the legislative record of Article I § 27); Exhibit QQ at 2274-2275.

**B. DCNR'S Statutory and Constitutional Responsibility**

5. The Pennsylvania Department of Conservation and Natural Resources was created in 1995 by the Conservation and Natural Resources Act, 71 P.S. § 1340.101(b), and is the agency given the power and duty to manage our State Parks and State Forests; as well as our rivers, trails, greenways and community recreation and heritage areas consistent with the requirements of Article I § 27, 71 P.S. §§ 1340.101-1340.313.

6. CNRA incorporates the mandates of Article I § 27, stating: “Pennsylvania’s public natural resources are to be conserved and maintained for the use and benefit of all its citizens as guaranteed by section 27 of Article I of the Constitution of Pennsylvania.” 71 P.S. § 1340.101(a)(1).

7. CNRA identifies Pennsylvania's State Parks, State Forests, and community recreation and heritage conservation areas as important public natural resources that contribute greatly to the quality of life of Pennsylvania's citizens and the economic well-being of the Commonwealth. 71 P.S. § 1340.101(a)(2)-(7).

8. CNRA recognized the need for a new department -- DCNR -- to be the advocate for these public natural resources, stating: “State parks, forests and

community recreational and heritage conservation areas have lost out in the competition for financial and staff resources because they have no cabinet-level advocate to highlight these issues for the public.” 71 P.S. § 1340.101(a)(9).

9. CNRA articulates the General Assembly's intent and purpose in creating DCNR, stating:

To create a new Department of Conservation and Natural Resources to serve as a cabinet-level advocate for our state parks, forests, rivers, trails, greenways and community recreation and heritage conservation programs to provide more focused management of the Commonwealth's recreation, natural and river environments. The *primary mission* of the Department of Conservation and Natural Resources *will be to maintain, improve and preserve state parks, to manage State forest lands to assure their long-term health, sustainability and economic use*, to provide information on Pennsylvania's ecological and geologic resources and to administer grant and technical assistance programs that will benefit rivers conservation, trails and greenways, local recreation, regional heritage conservation and environmental education programs across Pennsylvania.

71 P.S. § 1340.101(b)(1) (emphasis added).

10. In 1995, the DCNR Bureau of Forestry, citing its mandates under Article I § 27 and CNRA, defined its mission as follows:

Contained in Article I Section 27 of the Pennsylvania Constitution are these words: “Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.”

The mission of the Bureau of Forestry is to insure that the long-term health, viability and productivity of the Commonwealth's forests and to conserve native wild plants.

The Bureau of Forestry will accomplish this mission by:

Managing state forests under sound ecosystem management, to retain their wild character and maintain biological diversity while providing pure water, opportunities for low-density recreation, habitats for forest plants and animals, sustained yields of quality timber, and environmentally sound utilization of mineral resources.

Protecting forestlands, public and private, from damage and/or destruction by fires, insects, diseases and other agents.

Promoting forestry and the knowledge of forestry by advising and assisting other government agencies, communities, landowners, forest industry, and the general public in the wise stewardship and utilization of forest resources.

Protecting and managing native wild flora resources by determining status, classifying, and conserving native wild plants.”

*Penn's Woods, Sustaining Our Forests*, DCNR Bureau of Forestry (1995), Exhibit P (inside back cover)<sup>1</sup>; *see also* Deposition Testimony of James Grace, Pages 13-20 and Deposition Exhibit D.<sup>2</sup>

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<sup>1</sup> [http://www.dcnr.state.pa.us/es/groups/public/documents/document/dcnr\\_20026631.pdf](http://www.dcnr.state.pa.us/es/groups/public/documents/document/dcnr_20026631.pdf).

<sup>2</sup> The deposition transcripts of James Grace, former DCNR Deputy Secretary for Parks and Forests, and Michael DiBerardinis, former DCNR Secretary, have been filed separately with the Court. The exhibits used for both depositions were the same and have also been filed separately with the Court. When a document cited in this motion has been filed both as an exhibit to the Petitioner's Second Amended Petition and a deposition exhibit, Petitioner provides reference to both exhibit locations. Petition exhibits are labeled as "Exhibits" and deposition exhibits are labeled as "Deposition Exhibits" in this motion for summary judgment, and in Petitioner's brief in support of this motion. Copies of Petition exhibits, but not deposition exhibits are being filed with this motion.

11. One of the basic tenets of ecosystem management is that forests, rather than being 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. Forests provide human goods as well as human experiences, ranging from recreation to peace and solitude. These tangible and intangible aspects of a forest, these products and processes, have been labeled “values” and none is assumed more or less valuable than the others. Thus, a major step toward maintaining Pennsylvania’s environmental heritage and values is to adopt a management strategy geared toward sustaining the long-term health and productivity of forest ecosystems. Ecosystem management can simply be defined as an ecological approach to resource management. All aspects of an ecosystem are considered important, and the interdependency of biological and non-biological systems and cycles is recognized as central to this holistic approach. Humans are part of the ecosystem and must be taken into consideration in the development of management strategies. Ecosystem management does not preclude resource use, including timber harvesting, hunting or other recreational activities. The primary goal of ecosystem management is to keep the complex interdependencies of ecosystems intact and functioning well over long periods of time. The essence of maintaining ecosystem integrity is to retain the health and resilience of systems so that they can accommodate short-term stresses and adapt

to long-term changes. The key elements include maintenance of a diversity of plants and animals and the proper functioning of nutrient, water and energy cycles. *Penn's Woods, Sustaining Our Forests*, Exhibit P at 8; Deposition Exhibit D at 8.

12. CNRA reauthorizes in DCNR, subject to the mandates of Article I § 27, authority previously given to the Department of Forests and Waters “to make and execute contracts or leases in the name of the Commonwealth for the mining or removal of any valuable minerals that may be found in State forests ... whenever it shall appear to the satisfaction *of the Department* that it would be for the best interests of the Commonwealth to make such disposition of those minerals.” 71 P.S. § 1340.302(a)(6) (emphasis added).

13. CNRA also reauthorizes in DCNR, subject to Article I § 27, the authority previously given to the Secretary of Forest and Waters under the Oil and Gas Lease Fund Act (71 P.S. §§ 1331-1334) to use rents and royalties generated from State Forest oil and gas leases for projects to benefit the public natural resources managed by DCNR. 71 P.S. § 1340.304(c).

14. Since its inception, the Oil and Gas Lease Fund has been used exclusively for conservation, recreation, dams and flood control projects. Governor’s Marcellus Shale Advisory Commission Report, July, 2011, Exhibit II at 35.

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

**C. Specialized Nature of the Oil and Gas Lease Fund**

16. The Auditor General conducted an audit of the Oil and Gas Lease Fund and submitted the results of the audit to the Governor (then Governor Rendell) in a report dated August 10, 2004 ("2004 Audit"). The 2004 Audit stated that revenue from the Oil and Gas Lease Fund must by law be used exclusively for conservation, recreation, dams and flood control projects on Commonwealth lands. 2004 Audit, Exhibit Q at 1; *see also* Deposition of Michael DiBerardinis at 8-11.

17. The 2004 Audit stated that expenditures for items such as salaries, clothing and other costs which do not appear to be within the purposes set out in the Oil and Gas Lease Fund Act, were of questionable direct benefit to the physical enhancement and conservation of State Parks and State Forests, the intended

beneficiaries of the revenues in the Oil and Gas Lease Fund, and therefore were inappropriate or unjustified. 2004 Audit, Exhibit Q at 2.

18. The Auditor General cited in the 2004 Audit an “informal guidance” letter from the Attorney General dated February 7, 1991 ("1991 AG Letter") in which the Attorney General advised the State Treasurer that the proper lawful use of the Oil and Gas Lease Fund is to carry out physical projects to enhance and conserve the specific conservation, recreation, dam and flood control projects. 2004 Audit, Exhibit Q at 19-22; 1991 AG Letter, Exhibit R; *see also* General Counsel letter to the State Treasurer dated November 2, 1990, Exhibit S; and DCNR Chief Counsel memorandum dated February 24, 2012, Exhibit T.

19. The Attorney General specifically states in the 1991 AG Letter that the Oil and Gas Lease Fund Act “expressly authorizes expenditures to acquire land needed for conservation, recreation, dam or flood control projects” and also for “the construction of facilities and other improvements to land *necessary for such projects*, and for the subsequent purchase of equipment, supplies and services *necessary to maintain or enhance* such projects.” 1991 AG Letter, Exhibit R at 2 (emphasis added).

20. The Attorney General continues as follows 1991 AG Letter:

I believe it beyond the authority of the [Oil and Gas Lease Fund] Act to expend Fund receipts for a purpose not attributable to a specific project undertaken pursuant to the Act. It is not enough that expenditures for the Fund should relate to conservation, recreation,

dam or flood control. If it were, then the Oil and Gas lease Fund would be little more than a general funding source for the broad range of statutory functions performed by DER; and the Act, while imprecise in its expression of intent, certainly suggests otherwise.

In my judgment, the General Assembly's establishment of *this special fund*, and its *focus on geographically-identifiable projects* reflects an intent that *revenues derived from the depletion of the Commonwealth's natural resources should be dedicated directly to the physical enhancement or conservation of the Commonwealth's natural resources*. Viewed in this light, [the Oil and Gas Lease Fund Act] *would not authorize the use of Fund receipts to support DER's regulatory or enforcement activities, its general administrative or legal operations, or any other function not related directly to a project undertaken pursuant to the Act*.

*Id.* at 3-4 (emphasis added.)<sup>3</sup>

#### **D. DCNR Warnings to the Governor against Further Leasing and Diversion of Oil and Gas Lease Funds**

21. Early in 2008, then DCNR Secretary Michael DiBerardinis advised then Governor Rendell that he decided to lease 75,000 acres of State Forest land for gas development in the Marcellus Shale Geologic region. Secretary DiBerardinis Memoranda dated January 10, 2008 and February 26, 2008 ("2008 Memos"), Exhibit W; *see also* Deposition Transcript of Michael DiBerardinis at 23-37 and Deposition Exhibit I.

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<sup>3</sup> The acronym "DER" used in the letter refers to the former Department of Environmental Resources, which prior to CNRA's enactment carried out both the regulatory functions now performed by the Department of Environmental Protection and the recreation and conservation functions now performed by DCNR.

22. In the 2008 Memos, Secretary DiBerardinis specifically advised Governor Rendell that:

a. The purpose of the proposed 75,000 acre lease sale was to meet the demands of the industry for more leases, and to preempt legislation which had been introduced by Senator Mary Joe White and Representative Hutchinson,<sup>4</sup> then chair of the Joint Conservation Committee, to lease the entire State Forest for gas extraction;

b. Secretary DiBerardinis expressed concern that such legislation would take away control from DCNR the ability to decide when to lease State land for gas extraction, and would result in damaging impacts to the State Forest;

c. Gas drilling activity on the State Forest has occurred since 1947 and, as of 2008, more than 565,000 acres of the 2.1 million acres of State Forest were under active natural gas development; more than 250,000 acres were under active oil and gas leases managed by DCNR, mostly in the Pennsylvania Wilds CLI area, with approximately 550 wells drilled, over 90% of which were shallow

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<sup>4</sup> Senate Bill 1127, Session of 2007, was introduced on October 19, 2007 and House Bill 32, Special Session No. 1 of 2007-2008, was introduced on October 18, 2007. Both bills proposed to amend the State Forest leasing provision in CNRA Section 302(a)(6) to include the following: “The department shall conduct a competitive public auction to lease State forest land for exploration and development of natural gas reserves owned by the Commonwealth whenever two or more bidders nominate overlapping or contiguous State forest land acreage for lease. The department shall conduct the public auction within six months of the receipt of a second nomination for contiguous or overlapping acreage.” The bills also required the department to grant rights-of-way through State Forests and State Parks “as needed to facilitate the gathering and delivery to market of natural gas produced from State forest [or State park] lands or from adjacent or contiguous public or private lands.”

gas wells; another 315,000 acres were under development through private oil and gas leases because the Commonwealth does not own the subsurface oil and gas rights on these State Forest lands.

*Id.*

23. The 2003 State Forest Resource Management Plan had proposed a ban on shallow gas leasing, which DCNR believed at the time to cause more intense impact on the surface of the land than deep well gas drilling. DCNR believed that most of the impact from gas drilling resulted from the fragmentation of the surface vegetation caused by the development of roads and well pads. Shallow gas development requires a proportionally greater number of wells at closer spacing than medium or deep development. *Id.*

24. On September 3, 2008, DCNR received the bids for the approximately 74,000 acres of State Forest land offered in the oil and gas leases with the bids totaling almost \$190,000,000. Email from John Quigley to the Governor's Office dated September 4, 2008 ("2008 Email"), Exhibit X; *see also* 2008 Lease Sale Information on DCNR's website;<sup>5</sup> Affidavit of John Quigley, EXHIBIT OO; Deposition Testimony of Michael DiBerardinis at 37-44; Deposition Testimony of James Grace at 36-44; Deposition Exhibit J.

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<sup>5</sup> [http://www.dcnr.state.pa.us/cs/groups/public/documents/document/dcnr\\_017231.pdf](http://www.dcnr.state.pa.us/cs/groups/public/documents/document/dcnr_017231.pdf)

25. In the 2008 Email, John Quigley, then advisor to Secretary DiBerardinis, at the direction of the Secretary, provided the following documents to the Governor through the Governor's chief of staff:

a. A series of documents regarding the 2008 lease sale, including a list of the bidders and the amounts they bid, with a statement below the list stating: "*Revenues generated from a lease sale go to the Oil and Gas Lease Fund, which by law must be used for conservation and recreation programs*";

b. A list of projects that DCNR needed to complete using the funds from the 2008 lease sale, with the statement that DCNR anticipated that only a small portion of the total leased acreage would be used for well site locations;

c. A copy of the Oil and Gas Lease Fund Act;

d. A list of projects completed with money from the Oil and Gas Lease Fund since its inception in 1955, including the purchase of oil and gas development rights under State Parks and State Forests; State Park and State Forest recreation sanitation facilities; State Parks and State Forest flood control and dam safety projects; Pine Creek Rail Trail; land acquisition for 9 new State Parks, and enlargement of 20 other State Parks.<sup>6</sup>

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<sup>6</sup> Since 1955, when Maurice Goddard got the Act passed the Oil and Gas Lease Fund has been used to purchase 26 state parks, construct 170 drinking water treatment systems, 58 wastewater treatment systems, 798 bridges, 3,000 miles of roads, 125 dams and 5,000 buildings. See *State Parks History, The Goddard Era*, attached as Exhibit Y; *2011 State of the Parks/State of the Forests Report, Pennsylvania Parks and Forest Foundation* (excerpts attached as Exhibit Z); and *DCNR Natural Gas Exploration on State Forest Land*, attached as Exhibit AA).

*Id.* (emphasis added).

26. On February 4, 2009, five months after the 2008 Email from DCNR advising of its planned use of revenue from the 2008 lease sale consistent with the requirements of the Oil and Gas Lease Fund Act, then Governor Rendell sent his proposed budget to the General Assembly. In that proposed budget, the Governor ignored DCNR's plans, and committed to transferring \$174,000,000 from the Oil and Gas Lease Fund to the General Fund. Excerpts from the Governor's Executive Budget for Fiscal Year 2009-10, Exhibit BB; Affidavit of John Quigley, Exhibit OO.

27. On March 27, 2009, Secretary DiBerardinis sent another memorandum to the Governor ("March 2009 Memo") expressing his great concern and the concern of DCNR, as the steward of State Forest resources, about the intense interest in leasing even more State Forest land for gas extraction. March 2009 Memo, Exhibit CC; Deposition Testimony of Michael DiBerardinis at 49-59, Deposition Exhibit L-2.

28. Specifically, Secretary DiBerardinis warned the Governor of the following in the March 2009 Memo:

a. Now 660,000 acres of State Forest was subject to oil and gas leases, 290,000 under private leases, and all of which would allow unconventional drilling in shale formations like the Marcellus;

b. To date only two unconventional Marcellus wells had been drilled, but DCNR now believed more than 4,000 unconventional wells could be drilled, and that full development of the leased acreage could take 10 to 20 years or more;

c. The continued wholesale leasing of the State Forest for natural gas extraction will damage the State Forest landscape, and *scar the economic, scenic, ecological, and recreational values of the forest, especially the most wild and remote areas of our state in the PA WILDS*;

d. That “*diverting the Oil and Gas Lease Fund’s lease sale and royalty proceeds toward general use and away from their legislated purpose sets a dangerous precedent. This reliable funding stream -- intended to offset the impacts of resource extraction -- has endured through 50 years and multiple administrations, providing stable investments to conservation and environmental protection. The fund has supported the acquisition, infrastructure investments, and maintenance of our state parks and forest that make them what we enjoy today*”;  
and

e. In conclusion, that “*A rush to drill places the state forest and all its benefits at risk. A balanced management will protect and enhance the legacy we inherited and allow us to deliver it safely to future generations of Pennsylvanians.*”

*Id.* (emphasis added).

29. In spite of warnings of Secretary DiBerardinis, less than a month and a half later the Governor directed DCNR to prepare to lease a total of 80,000 additional acres of State Forest to generate money for the General Fund. Memorandum of Acting Secretary John Quigley dated May 6, 2009 (“May 2009 Memo”), Exhibits DD, Affidavit of John Quigley, Exhibit OO.

30. In the May 2009 Memo, the then newly appointed acting Secretary of DCNR, John Quigley, acknowledging the Governor’s mandate to go forward with leasing the additional 80,000 acres, cited and restated the concerns of former Secretary DiBerardinis' March 2009 Memo, and advised that “DCNR remains very apprehensive about the leasing of any additional State Forest land. Field Staff who are charged with managing exploration activity on SFL are deeply concerned about any new leases.” *Id.*

31. Again the Governor and his staff ignored the warnings of the acting DCNR Secretary, and required the leasing of the 80,000 acres to go forward. Affidavit of John Quigley, Exhibit OO; FY 2009-10 Oil and Gas Lease Sale State Forest Environmental Review dated November 9, 2009 (“2009 Environmental Review”), Exhibit EE.

## **E. DCNR Forced to Lease without Adequate Environmental Review**

32. On October 9, 2009, the Governor signed the Appropriations Act for Fiscal Year 2009-10, which transferred \$143,000,000 generated from the 2008 lease sale from the Oil and Gas Lease Fund to the General Fund. *See* House Bill 1416, Printer's No. 2772, Session of 2009, Section 1912 ("Transfer from the Oil and Gas Lease Fund.--The sum of \$143,000,000 is transferred from the Oil and Gas Lease Fund to the General Fund.").<sup>7</sup>

33. The Governor also approved Fiscal Code Amendments on October 9, 2009, that authorized the transfer of another \$60,000,000 from the Oil and Gas Lease Fund to the General Fund for the current Fiscal Year 2009-10. House Bill 1614, Printer's No. 2799, Session of 2009, Section 1604-E of Article XVI-E ("Transfer. Notwithstanding section 1603-E or any other provision of law, in fiscal year 2009-2010 the amount of \$60,000,000 shall be transferred from the [Oil and Gas Lease Fund] to the General Fund."); 72P.S. § 1604-E. In addition, the Fiscal Code Amendments eliminate the discretion given to DCNR by the Oil and Gas Lease Fund Act and CNRA to determine how royalties from oil and gas extraction on State Forest land should be used to mitigate the harm from the extraction, and

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<sup>7</sup> Although DCNR had received bids totaling almost \$190,000,000 at the oil and gas lease sale bid opening on September 3, 2008, DCNR received \$168,408,695 for executed leases as the final result of the 2008 lease sale. DCNR Lease Sale Final Results for September 3, 2008, Exhibit RR. Of this amount, \$143,000,000 was transferred to the General Fund through this Appropriation Act.

direct DCNR to use what royalties the General Assembly appropriates to it annually for operation and maintenance. *Id.* (Sections 1602-E and 1603-E); 72 P.S. §§ 1602-E, 1603-E.

34. To generate the additional \$60,000,000 approved by the Governor through the Fiscal Code Amendments, DCNR was required to proceed with additional leasing of State Forest land. Affidavit of John Quigley, Exhibit OO; 2009 Environmental Review, Exhibit EE.

35. One month later on November 9, 2009, DCNR announced the availability of six additional tracts of State Forest land (approximately 32,000 acres) for lease for oil and gas extraction. *Id.*

36. Also on November 9, 2009, DCNR issued an environmental review to support the lease sale, but acknowledged in the document that review was a formality as the department was holding the lease sale to comply with the Governor's approval of the sale to generate revenue for the General Fund. *Id.*<sup>8</sup>

37. The 2009 Environmental Review states under the heading "PROJECT REVIEW ITEMS: 1. Consistency with State Forest Management Plan": "This lease sale is a direct result of certain line items contained within the budget agreement and fiscal code for FY 2009-10. Following the success of the September 2008 Lease Sale, DCNR and the Bureau of Forestry had decided to not to offer

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<sup>8</sup> [http://www.dcnr.state.pa.us/cs/groups/public/documents/document/d\\_000606.pdf](http://www.dcnr.state.pa.us/cs/groups/public/documents/document/d_000606.pdf)

additional lands for lease but rather study the Marcellus play and the operational developments and requirements on the 660,000 acres within the Marcellus fairway subject to valid lease agreements.” 2009 Environmental Review, Exhibit EE at 4.

38. As a result of the Governor’s order to conduct the lease sale in spite of the fact that DCNR had decided not to lease any more State Forest land until DCNR had time to study the impacts from the existing leases, DCNR was required to go ahead with an environmental review without sufficient information from the studies DCNR had hoped to perform. Affidavit of John Quigley, Exhibit OO.

39. On January 12, 2010, the bid opening for the six additional State Forest tracts offered for lease generated bids totaling of over \$128,000,000. DCNR Oil and Gas Lease Sale Results for January 12, 2010, Exhibit RR.<sup>9</sup>

40. On February 9, 2010, the Governor proposed to transfer another \$180,000,000 from the Oil and Gas Lease Fund to the General Fund in his Executive Budget for Fiscal Year 2010-11, and again required DCNR to lease additional State Forest land to generate the revenue for this transfer. Excerpts from Governor’s Executive Budget for Fiscal Year 2010-11, Exhibit FF; Affidavit of John Quigley, Exhibit OO.

41. On May 10, 2010, DCNR conducted a sole source lease sale of approximately 33,000 additional acres of State Forest land to Anadarko E&P

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<sup>9</sup> [http://www.dcnr.state.pa.us/cs/groups/public/documents/document/dcnr\\_017232.pdf](http://www.dcnr.state.pa.us/cs/groups/public/documents/document/dcnr_017232.pdf)

Company LLP for \$120,162,000. May 2010 Oil & Gas Lease Offering State Forest Environmental Review (“2010 Environmental Review”), Section 22, Exhibit GG;<sup>10</sup> DCNR Oil and Gas Lease Sale Final Results dated May 10, 2010, Exhibit RR.<sup>11</sup>

42. In the 2010 Environmental Review, DCNR again states that it has been directed to conduct the lease sale and the environmental review is a formality. Specifically, DCNR stated, under “*PURPOSE*” that “Planning for the May 2010 Oil and Gas Lease offering began approximately five (5) months ago at the direction of the Governor’s Office as part of the FY 2010-11 Commonwealth budget process.” *Id.*, see also Affidavit of John Quigley, Exhibit OO.

43. DCNR also stated in the review, under the heading “PROJECT REVIEW ITEMS; 1. Consistency With State Resource Management Plan” that “Following the FY 2009-10 Lease Sale, DCNR and the Bureau of Forestry decided [again] not to offer additional lands for lease but rather study the Marcellus play and the operational developments and requirements of the 700,000 acres (approximate) within the Marcellus fairway already subject to valid lease agreements. However, due to projected shortfalls in the Commonwealth Budget, the Bureau of Forestry has been mandated to generate \$180 million for the Commonwealth.” 2010 Environmental Review, Exhibit GG at 1, 5.

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<sup>10</sup> [http://www.dcnr.state.pa.us/cs/groups/public/documents/document/d\\_000599.pdf](http://www.dcnr.state.pa.us/cs/groups/public/documents/document/d_000599.pdf)

<sup>11</sup> [http://www.dcnr.state.pa.us/cs/groups/public/documents/document/dcnr\\_017233.pdf](http://www.dcnr.state.pa.us/cs/groups/public/documents/document/dcnr_017233.pdf)

44. On July 6, 2010, the Governor again ignored DCNR's need to study and mitigate the impacts of the increasing level of unconventional shale gas development on State Forest land by approving another Fiscal Code amendment to transfer another \$180,000,000 from the Oil and Gas Lease Fund to the General Fund. Senate Bill No. 1042, Printer's No. 2141, Session of 2009, Section 2.4 (adding Section 1605-E. Additional Transfer. Notwithstanding Section 1603-E or any other provision of law, in Fiscal Year 2010-2011 the amount of \$180,000,000 shall be transferred from the [Oil and Gas Lease Fund] to the General Fund.); 72 P.S. § 1605-E.

45. On October 26, 2010, after finally recognizing the harm to the State Forest that was occurring as a result of rapidly increasing Marcellus shale gas extraction, the Governor issued Executive Order 2010-05 placing a moratorium on oil and gas leasing of State Park and State Forest land. Governor's Executive Order 2010-05, Exhibit HH.

#### **F. Impacts to State Forests from Gas Leasing and Extraction**

46. The impact of the five-fold increase in the acreage of State Forest and State Park land that will be used for gas development as a result of activity in the Marcellus shale formation cannot be fully understood at this early stage of development. *Id.* at 2.

47. The development of a Marcellus Shale well site requires considerable land clearing and earth disturbance activity. The need to clear land for support facilities such as access roads, pipe lines, borrow pits (small rock quarries), freshwater and wastewater impoundments, tank farms, equipment staging areas, water withdrawal locations, and compressor stations greatly expand the footprint of a well site. Governor's Marcellus Shale Advisory Commission Report dated July 22, 2011 ("Governor's Marcellus Report"), Exhibit II at 75-76.

48. In the next 10 to 20 years, full development of gas in the Marcellus shale formation on State Forests and State Parks and currently subject to drilling will result in the use of more than 30,000 acres for an estimated 1,100 well pads and associated infrastructure, access roads and pipelines. Governor's Executive Order, 2010-5, Exhibit HH at 2.

49. By 2030, an estimated 38,000 to 90,000 acres of forest cover will be cleared by Marcellus gas development. That clearing could threaten forest interior species in an additional 91,000 to 220,000 forest acres. Governor's Marcellus Report, Exhibit II at 76.

50. Forest impacts will be concentrated in the north central and southwest parts of the state where many of the State's largest and most intact forest patches could be fragmented into smaller patches by well pads, roads, and other infrastructure. A significant percentage of Pennsylvania's globally rare and

threatened species can be found in areas with high potential for Marcellus gas development. (Id.)

51. Impacts to forested and other sensitive habitats, including fragmentation, invasive species, loss of wildlife food or cover, and erosion and sedimentation, and impacts to recreational uses must be avoided and mitigated through best management practices and monitoring. *Id.*

52. In the process of constructing and operating the wells and well pads, surface spills of fluids can and have occurred. *Id.* at 74-75.

53. New wells drilled through a formation that has previously been drilled and fractured can and have created a pathway for contamination. *Id.* at 75.

54. Marcellus Shale development, including drilling, gas collection and processing, pose challenges with respect to air emissions. Generally, pollutants of concern include nitrogen oxides (NO<sub>x</sub>), carbon monoxide (CO), particulate matter, hazardous air pollutants (HAP), such as benzene and toluene, and other volatile organic compounds (VOC). *Id.* at 76.

55. Methane, the major component of natural gas and a green-house gas pollutant, is released into the atmosphere as fugitive emissions through leaks from processing equipment and pneumatic devices. *Id.* at 77.

56. Fugitive emissions including dust from truck traffic and fugitive VOC emissions from leaking valves and pipes are also pollutants of concern. *Id.*

57. Natural gas compression stations mainly emit pollutants such as NO<sub>x</sub>, VOCs, and CO. *Id.*

58. The greatest threats to biodiversity [of our State Forests] are habitat destruction, fragmentation and degradation from pollution. *Penn's Woods, Sustaining Our Forests*, Exhibit P at 9.

### **G. Impacts to State Parks from Gas Extraction**

59. The lands surrounding many of our State Parks are being developed for natural gas extraction. Affidavit of John Norbeck, Exhibit PP.

60. The impacts of natural gas extraction activities, including traffic, noise, air pollution, compression stations, directly affect the natural, scenic, historic and esthetic values of the public natural resources within these State Parks. *Id.*

61. Of the 293,000 acres of State Park land, the Commonwealth owns about 20% of the subsurface mineral rights. About 211,000 acres of State Park land (at least a portion of 61 parks) lies within the Marcellus Shale area. DCNR's policy is not to lease subsurface rights owned by the Commonwealth on State Park land. Governor's Marcellus Report, Exhibit II at 36; Affidavit of John Norbeck, Exhibit PP.

62. As a result gas extraction activities, the State Parks and the people traveling to and trying to enjoy them are impacted by the noise from this industrial

activity, roads damaged by heavy truck traffic, and other disturbances associated with gas development that diminish the natural, scenic and esthetic values of their park experience. Affidavit of John Norbeck, Exhibit PP.

63. Under the limitations established by the Supreme Court decision *Belden & Blake v. DCNR*, 600 Pa. 559, 568, 969 A.2d 528, 533 (2009), DCNR has no control over access to State Parks by private gas developers when the Commonwealth does not own the subsurface gas rights, and can only limit their use of the State Park by filing an action in court to prove their use is unreasonable, or filing a condemnation action using eminent domain to buy the subsurface rights. *See also* Deposition Testimony of James Grace at 25.

#### **H. DCNR Has Been Forced to Rely on Oil and Gas Extraction to Pay its Operating Expenses**

64. In addition to diverting money from the Oil and Gas Lease Fund to the General Fund, the Governor has proposed budgets that have continued to decrease the amount of General Fund revenue available to DCNR for its day-to-day operating expenses and forced DCNR to use the Oil and Gas Lease Fund for these expenses. In each proposed budget, the Governor provides a summary of each agency's appropriations by fund, including the actual amount expended/encumbered for the prior fiscal year, the amount available under the current fiscal year appropriation, and the proposed appropriation for the upcoming

fiscal year. Governor's Executive Budgets for 2011-2012, 2012-2013, 2013-2014 and 2014-2015, DCNR Summary by Fund and Appropriation (Pages E12.3-E12.5), Exhibit SS; *see also* definition of fiscal year in the Governor's Executive Budget for 2014-2015 (Page 15), Exhibit SS; Six-Year Summary Governor's Executive Budgets for DCNR, Exhibit SS.

65. DCNR's actual General Fund expenditures for its General, State Parks, and State Forest Operations in Fiscal Year 2009-2010, as reported by the Governor in his Executive Budget for Fiscal Year 2011-2012, were \$85,747,000. DCNR's actual Oil and Gas Lease Fund expenditures for its General Operations in Fiscal Year 2009-2010 were \$18,549,000. No moneys from the Oil and Gas Lease Fund were expended for State Park or State Forest Operations. *Id.*

66. DCNR's actual General Fund appropriations for its operating expenses in Fiscal Year 2010-2011, as reported by the Governor in his Executive Budget for Fiscal Year 2012-2013, were \$75,856,000. DCNR's actual Oil and Gas Lease Fund expenditures for its operating expenses in Fiscal Year 2010-2011 were \$6,427,000. *Id.*

67. DCNR's actual General Fund expenditures for its operating expenses in Fiscal Year 2011-2012, as reported by the Governor in his Executive Budget for Fiscal Year 2013-2014, were \$48,946,000. DCNR's actual Oil and Gas Lease Fund

expenditures for its operating expenses in Fiscal Year 2011-2012 were \$29,542,000. *Id.*

68. DCNR's actual General Fund expenditures for its operating expenses in Fiscal Year 2012-2013, as reported by the Governor in his Executive Budget for Fiscal Year 2014-2015, were \$47,844,000. DCNR's actual Oil and Gas Lease Fund expenditures for its operating expenses in Fiscal Year 2012-2013 were \$67,511,000. *Id.*

69. DCNR's available General Fund appropriation for its operating expenses in Fiscal Year 2013-2014, as reported by the Governor in his Executive Budget for Fiscal Year 2014-2015, is \$24,614,000. DCNR's available Oil and Gas Lease Fund appropriation for its operating expenses in Fiscal Year 2013-2014 is \$106,546,000. *Id.*

70. DCNR's proposed General Fund appropriation for its operating expenses in Fiscal Year 2014-2015, as reported by the Governor in his proposed budget for Fiscal Year 2014-2015, is \$23,888,000. DCNR's proposed Oil and Gas Lease Fund appropriation for its operating expenses in Fiscal Year 2014-2015 is \$117,546,000. *Id.*

**I. Act 13 Provisions Unlawfully Divert Funds Annually from the Oil and Gas Lease Fund and Divert Funding from DCNR's Community Conservation Grant Program**

**a. Funds Diverted to the Environmental Stewardship Fund**

71. On February 14, 2012, the Governor approved Act 13 of 2012, and authorized further transfers of money from the Oil and Gas Lease Fund to purposes other than mitigating the harm from oil and gas extraction on State Parks and State Forests. House Bill 1950, Printer's No. 3048, Session of 2011(adding 58 Pa.C.S. Chapter 25 (Oil and Gas Lease Fund)).

72. Act 13 transferred \$20,000,000 from the Oil and Gas Lease Fund in 2013, and transfers \$35,000,000 annually thereafter, to the Marcellus Legacy Fund for transfer to the Environmental Stewardship Fund. 58 Pa.C.S. § 2505(b)(1).

74. The Environmental Stewardship Fund also receives money from a fee imposed on each ton of waste deposited in Commonwealth landfills, and a small percentage (less than 4%) of the impact fees collected by Act 13 on drilled unconventional gas wells. 27 Pa.C.S. § 6112; 58 Pa.C.S. §§ 2314-2315.

75. For Fiscal Year 2013-2014, the money available in the Environmental Stewardship Fund, as reported by the Governor in his Executive Budget for Fiscal Year 2014-2015, included \$65,000,000 from landfill fees and \$27,804,000 from the Marcellus Legacy Fund. Of the \$27,804,000 transferred from the Marcellus Legacy Fund, \$20,000,000 came from the Oil and Gas Lease Fund. Governor's Executive Budget for FY 2014-15, Environmental Stewardship Fund (page H26) and Oil and Gas Lease Fund (page H50); Exhibit TT.

73. The Environmental Stewardship Fund is allocated annually to four Commonwealth agencies, including DCNR, as follows:

a. The Department of Environmental Protection receives 37.4% for projects to abate pollution resulting from past mining and oil and gas extraction, as well as pollution from agricultural operations and urban development;

b. The Department of Agriculture receives 14.8% to protect agricultural land from development;

c. The Pennsylvania Infrastructure Investment Authority receives 23.7% for grants for sewer and water infrastructure projects; and

d. DCNR receives 24.1% for grants to local communities to develop trails and parks, and to upgrade infrastructure on our State Parks and Forests.

27 Pa.C.S. §§ 6104, 6105.

74. The diversion of \$35,000,000 annually from Oil and Gas Lease Fund to the Environmental Stewardship Fund will prevent DCNR from using this money, which is generated from oil and gas leases on State Forest land, to mitigate the harm resulting from oil and gas extraction occurring on State Park and Forest land.

75. While the projects funded by the Environmental Stewardship Fund are laudable, the use of money from State Forest oil and gas leases to pay for these projects, many of which are to abate legacy industrial pollution on private lands,

deprives DCNR of the funds necessary to fulfill its trustee duties under Article I § 27 and CNRA.

**b. Funds Diverted to the Hazardous Sites Cleanup Fund**

76. Act 13 transfers \$5,000,000 to the Marcellus Legacy Fund for distribution to the Hazardous Sites Cleanup Fund in 2015 and increases the amount of this transfer to \$15,000,000 annually thereafter. 58 Pa.C.S. § 2505(b)(2).

77. The primary source of money for the Hazardous Sites Cleanup Fund is the annual transfer of \$40,000,000 from revenue received from the Capital Stock and Franchise Tax. 35 P.S. § 6021.4.

78. The Hazardous Sites Cleanup Fund can be used by the Department of Environmental Protection to respond to releases or threatened releases of hazardous substances or contaminants, which primarily result from industrial activity on private property. 35 P.S. § 6020.902.

79. As with the transfers to the Environmental Stewardship Fund, the diversion of \$15,000,000 annually from Oil and Gas Lease Fund to the Hazardous Sites Cleanup Fund will prevent DCNR from using this money, which is generated from oil and gas leases on State Forest land, to mitigate the harm resulting from oil and gas extraction occurring on State Park and Forest land.

80. While the need to fund responses to hazardous industrial releases through the Hazardous Sites Cleanup Fund is important, the use of money from

State Forest oil and gas leases to pay for the cleanup of industrial pollution on private lands deprives DCNR of the funds necessary to fulfill its trustee duties under Article I § 27 and CNRA.

**c. Funding Diverted from DCNR's Community Conservation Grant Program**

81. The Respondents approved the use of unconventional gas well impact fees collected under Act 13 for grants to eligible applicants for "planning acquisition, development, rehabilitation and repair of greenways, recreational trails, open space, parks and beautification projects." 58 Pa.C.S. § 2315(a.1)(1)(iv.).

82. CNRA articulates the General Assembly's intent and purpose in creating DCNR, stating:

To create a new Department of Conservation and Natural Resources to serve as a **cabinet-level advocate for our state parks, forests, rivers, trails, greenways and community recreation and heritage conservation programs** to provide more focused management of the Commonwealth's recreation, natural and river environments. The **primary mission** of the Department of Conservation and Natural Resources will be to maintain, improve and preserve state parks, to manage State forest lands to assure their long-term health, sustainability and economic use, to provide information on Pennsylvania's ecological and geologic resources and **to administer grant and technical assistance programs that will benefit rivers conservation, trails and greenways, local recreation, regional heritage conservation and environmental education programs across Pennsylvania.**

71 P.S. § 1340.101(b)(1) (emphasis added).

83. The Respondents did not provide the Act 13 funds made available for these grants to DCNR -- the agency created to advocate for and administer grants that will benefit greenways, recreational trails, open space, parks and beautification projects -- even though DCNR administers the Community Conservation Partnerships Program that annually provides grants for these types of projects consistent with Pennsylvania's Comprehensive Outdoor Recreation Plan. Rather, the Respondents authorized the Commonwealth Financing Authority to administer these grants. DCNR Community Conservation Partnership Program (<http://www.dcnr.state.pa.us/brc/grants/index.aspx>); 58 Pa.C.S. § 2315(a.1)(1)(iv).

84. The Commonwealth Financing Authority is controlled by a seven-member board comprised of four legislative appointees, one from each House and Senate caucus, and the Secretaries of the Department of Community and Economic Development, the Governor's Office of Budget, and the Department of Banking. Five members of the board constitute a quorum and at least four members must consent to the approval of projects. In other words, no project can be approved without at least one vote from a legislative board member. 64 Pa.C.S. § 1512.

85. Act 13 directs DCNR to review applications for grant projects "as requested by the Commonwealth Financing Authority" and to provide

recommendations on priority of projects and project approval. The Authority is not required to follow DCNR's recommendations. 58 Pa.C.S. § 2315(c).

86. The Respondents have undermined DCNR's ability to advocate, provide technical assistance, and award grants for projects that will benefit greenways, recreational trails, open space, parks and beautification projects across Pennsylvania consistent with Pennsylvania's Comprehensive Outdoor Recreation Plan by giving Act 13 grant funds for these projects to an authority controlled by the General Assembly to award rather than DCNR.

**J. Interests of Petitioner's Members**

87. As set forth in the Affidavits of the Petitioner's members in Exhibits A-O, their rights and interests under Article I §27 are, have been and continue to be substantially and immediately harmed by the decisions and actions of the Respondents set forth in the Second Amended Petition and this motion. Petitioner's members have been harmed by the loss of DCNR's control of the Oil and Gas Lease Fund, the loss of their ability to use the State Forest land and natural resources now controlled by private industrial development of gas extraction. They have experienced the loss of air quality and water quality, and the loss of natural scenic, historic and esthetic values of the State Forests. Additionally, they have experienced increased flooding from the additional stormwater resulting from the

land clearing associated with the industrial development occurring on State Forests, and have experience the loss of value to real estate near this industrial development.

88. The interests of the Petitioner's members are specifically and uniquely focused on the State Forests and Parks that are impacted by the Marcellus gas development.

89. All of the members of organizations that are Petitioner members are located within the geographic areas affected by the Marcellus Shale development within our State Forests and State Parks; and they have direct interests in the preservation of those State Forests and Parks.

90. Most of the approximate 1100 members of the Pine Creek Preservation Association -- a Petitioner member -- are property owners within the Pine Creek watershed. The majority of its membership is located within the five townships that are a part of the Pine Creek Council of Governments. Over 50% of the land in the Pine Creek watershed is comprised of State Forests, State Parks, and State Game Lands, located in Potter, Tioga and Lycoming Counties. In McHenry Township, where the President of the Pine Creek Preservation Association serves as Chairman of the Board of Supervisors, over 80% of the township is State Forest and State Game lands. Affidavit of the Pine Creek Preservation Association, Exhibit E.

91. The members of the Keystone Trails Association -- a Petitioner member -- hike and maintain many trails in Marcellus Region, including the Midstate Trail and Loyalsock Trail. This Association represents over 30 local hiking clubs in Pennsylvania, and the 3.8 million people who are Pennsylvania's hiking community. Affidavit of the Keystone Trails Association, Exhibit F.

92. The members of the Lycoming Creek Watershed Association -- a Petitioner member -- live, work and recreate in the Lycoming Creek watershed because of its wild character. The entire State Forest in the Lycoming Creek watershed, except for the McIntyre Wild area, has been leased for Marcellus Shale gas development. Affidavit of the Lycoming Creek Watershed Association, Exhibit G.

93. The 300 members of the Loyalsock Creek Watershed Association -- a Petitioner member -- live and recreate in the watershed because the Loyalsock Creek and the Loyalsock State Forest provide a unique connection to nature that has become a part of their lives. The membership is deeply committed to the Loyalsock State Forest and its ecology because it supports their way of life. This State Forest will experience major impacts from Marcellus Shale extraction because the Commonwealth does not own the gas rights beneath much of it and most of the areas where the Commonwealth does own those rights has already

been leased for gas extraction. Affidavit of the Loyalsock Creek Watershed Association, Exhibit O.

94. Many of the 70 current members of the Muncy Creek Watershed Association -- a Petitioner member -- live and work in the watershed because of its rural nature and its proximity to nearby State Forests. Affidavit of Muncy Creek Watershed Association, Exhibit H.

95. The Tiadaghton Audubon Society, the oldest Audobon Society chapter in Pennsylvania and a Petitioner member, is located in Wellsboro, Tioga County, and has about 125 members. They are keenly aware, due to their weekly bird watching hikes in Tioga and Tiadaghton State Forests, that this area is very special with regard to bird habitat. Affidavit of Tiadaghton Audobon Society, Exhibit I.

96. The Lycoming Audubon Society -- a Petitioner member -- has 350 members who are from Clinton and Lycoming Counties. The State Forests in their areas of interest are parts of the Bald Eagle, the Sproul, the Tioga, the Tiadaghton and the Loyalsock State Forests. Affidavit of the Lycoming Audubon Society, Exhibit J.

97. The Responsible Drilling Alliance -- a Petitioner member -- is located in Williamsport, Pennsylvania. Its members hike, bike, fish and recreate

throughout the State Forests, including the Loyalsock Forest and the Pine Creek Valley. Affidavit of the Responsible Drilling Alliance, Exhibit K.

98. The Slate Run Sportsmen -- a Petitioner member -- was established in 1954 by a group of visionary fly fishermen who enjoy the Class A Wild Trout Stream known as Slate Run in the Pine Creek Valley. Its 175 members come from all over the State and from 15 other states, because of their love for the Pine Creek Valley. Some own cabins there, others camp or stay in local hotels. They come here to enjoy the more primitive environment, the fresh air, the clean water, the silence, and the darkness of the mountains at night. Affidavit of Slate Run Sportsmen, Exhibit L.

99. The Pine Creek Headwaters Protection Group – a Petitioner member – and its 200 members are committed to the protection of the headwaters of Pine Creek and her tributaries. Affidavit of the Pine Creek Headwaters Protection Group, Exhibit M.

100. The Pennsylvania Forest Coalition – a Petitioner member – is concerned about the protection and preservation of all of Pennsylvania’s State Forests. Its members are from all over the State, but frequently use the State Forests and Parks affected by the Marcellus Shale gas extraction leases. Affidavit of the Pennsylvania Forest Coalition, Exhibit N.

101. Petitioner's individual members are also frequent and life-long users of Pennsylvania's State Forests and Parks. Cynthia Bower has experienced the changes in the State Forests in Lycoming, Sullivan, Clinton, Potter and Tioga Counties and the harm to the wilderness character of these forests as a result of the natural gas extraction. Affidavit of Cynthia Bower, Exhibit A. Joseph Lauver is an avid fisherman who several times each year for 35 years has enjoyed the wild trout streams and scenic landscapes of the Pine Creek Valley, Kettle Creek Valley and the West Branch of Pine Run within the State Forest. Affidavit of Joseph Lauver, Exhibit B. Butch Davey, a professional forester who has spent more than forty years managing Pennsylvania's State Forests, has experienced first-hand the many changes that occur to the State Forest as a result of natural gas extraction and the harm that can result without adequate funding to mitigate that harm. Affidavit of Robert (Butch) Davey, Exhibit C. Ron Evans had fished, hiked and camped extensively in State Forests and Parks for over 40 years and experienced the harm from gas extraction to the almost wilderness settings he has enjoyed in Sproul State Forest. Affidavit of Ron Evans, Exhibit D.

**a. Loss of DCNR Control of the Oil and Gas Lease Funds**

102. Petitioner and its members have been substantially and immediately harmed by the Respondents' numerous decisions and actions since 2008 discussed in previous sections of the motion that have removed control and use of the Oil and

Gas Lease Fund from DCNR and prevent DCNR from fulfilling its trustee duties under Article I § 27 and CNRA. In particular, loss of these important funds leaves DCNR without the ability to mitigate the harm that results from industrial natural gas development on the State Forests that Petitioners' members use and enjoy. The Petitioner's members have realized the immediate and long-term impacts from Respondents' decisions and actions.

103. Paul Hoffmaster, President of the Pine Creek Preservation Association, has described explicitly, in Exhibit E hereto, the depth of the collaborative relationship of DCNR with his organization and others in the development of the recreational and tourist economy of the Pine Creek Valley. These relationships have resulted in the "Pine Creek Valley Management Plan", the "Pine Creek Rail Trail Plan", the "PA Wilds Economic Development Program" and the "Pine Creek Watershed River Conservation Plan". These plans and programs all integrate the uses of the natural resources of the State Forests and Parks in the area with the recreational and economic development the four-county region of the Pine Creek Valley and the twelve-county area of the PA Wilds. These efforts are all dependent on DCNR's continued funding commitments. As stated by Paul Hoffmaster, under "The Stewards?" section of Exhibit E: "The Pine Creek Valley and whatever remains of the 'PA Wilds' dream of economic growth through recreation and tourism depends heavily on the presence and mission of DCNR."

Paul continues to add: “With the addition of enhancing and accommodating rail trail, tourism and outdoor recreation activities as part of their mission, came additional responsibilities such as maintaining the rail trail, expanding and maintaining snowmobile and cross-country trails, expanding and maintaining canoe and boat access areas, expanding and improving hiking trails, expanding and improving both camping areas and their amenities.” In addition to these responsibilities, over and above their duty to protect and conserve the State Forest and the natural resources of the forests, Paul Hoffmaster points to added responsibilities of DCNR to oversee the gas industry activities within those forests. Yet, as Mr. Hoffmaster concludes, DCNR’s local staffing is significantly less today than it was five years ago. DCNR’s proposed recreational enhancements to the area have been curtailed. And, DCNR has lost the Oil and Gas Lease Funds that are necessary to carry out those purposes.

104. These harms are expressed by other Petitioner members’ in their affidavits as well. The Slate Run Sportsmen have noted that since the development of gas on State Forest lands, the DCNR enforcement officers, who were already spread thin, have been pulled from their regular duties to handle incidents on well pads and gas truck traffic violations and incidents. Exhibit L. Further, the Slate Run Sportsmen are concerned that there will not be sufficient funds left in the Oil

and Gas Lease Fund for restoration of the natural resources after the damage from the drilling activities are completed. *Id.*

105. The Responsible Drilling Alliance believes that the loss of the control of the Oil and Gas Lease Funds by DCNR directly affects the economic interests of the recreational industry in the area because DCNR is left without sufficient money to successfully perform its responsibilities. Exhibit K.

106. The Lycoming Audubon Society sees the Oil and Gas Lease Fund monies as necessary for DCNR, as both a moral and ethical as well as legal obligation to use for public uses, to restore and protect the aesthetic wilderness, water quality and air quality of our natural resources. To use that money for the General Fund instead violates those obligations. Exhibit J. The Lycoming Creek Watershed Association (Exhibit G), the Muncy Creek Watershed Association (Exhibit H), and the Keystone Trails Association (Exhibit F) share these concerns.

**b. Loss of Use of State Forest Land for Private Industrial Development**

107. The Pennsylvania Forest Coalition, as well as all other members, have been harmed by the direct loss of the use of hundreds if not thousands of acres of State Forest land that are currently being used for private industrial purposes for gas extraction, including well pads, compression stations, water storage facilities, access roads, pipelines and other facilities. These areas will be unavailable to the

Petitioner's members throughout the development process, which could be more than 40 to 60 years. Exhibit N.

108. The entire Loyalsock State Forest in the Lycoming Creek watershed, with the exception of the McIntyre Wild Area, has been leased for shale gas development. This amount of guaranteed industrial development will alter the natural character of the lands in the watershed held in the public trust (Lycoming Creek Watershed Association Affidavit, Exhibit G); and will negatively affect our outdoor recreation industry, (Responsible Drilling Alliance, Exhibit K).

109. Members of the Lycoming Creek Watershed Associations have been denied the right to use State Forest Lands by employees of the gas companies. Exhibit O.

**c. Loss of Air Quality and Water Quality**

110. The Lycoming Creek Watershed Association stated that the amount of industrial development occurring as a result of the State Forest gas leases cannot occur without impacting the many Exceptional Value streams in Lycoming Creek watershed. The Association questions how those legally responsible for maintaining the people's rights to these public natural resources (DCNR) will ensure that the water quality in our Exceptional Value streams are not degraded from all the industrial activity on the State Forests without the funds to mitigate those impacts. Exhibit O.

111. The Pine Creek Headwater Protection Group members are deeply concerned with the native brook trout population. The brook trout are very sensitive to increased degradation of the water quality of the streams they inhabit. The drilling activities in the Tioga State Forest threaten to degrade the streams that the brook trout live and breed in. Exhibit M.

112. The Tiadaghton Audubon Society has experienced impacts to species of birds, mammals, reptiles, amphibians, particularly those that rely on forest interior habitats, from the combination of the gas pads, roads, pipelines, holding ponds, compressor stations, truck traffic and noise, which change the landscape. Exhibit I.

**d. Loss of Preservation of Natural, Scenic, Historic and Aesthetic Values of the Public Natural Resources**

113. Members of the Keystone Trails Association have experienced well pads being constructed on existing trails; expanding roads and buildings on or near trails; compressor stations bring industrial level noise pollution to wilderness settings; truck traffic causing loud noises and dust to billow 40 feet into the air; diesel engines spewing black smoke; loss of tree canopy cover; overzealous security guards chasing members off trails. Many of these members are talking about giving up using the trails as a result of these impacts. Exhibit F.

114. The members of the Pine Creek Headwaters Protection Group have experienced noise levels associated with increased truck traffic have greatly

increased since the Marcellus Gas industry in many parts of the Tioga State Forest. Hunting experiences and simply enjoyment of wildlife sounds is greatly diminished by the cumulative noise levels from compressor stations, railroad traffic, and truck traffic. Exhibit M.

115. In the Pine Creek Watershed there are many examples of vistas that used to look over unbroken forest that now offer views of industrial development. Exhibit G.

**e. Increased Flooding From Increased Stormwater**

116. The Loyalsock Creek Watershed Association points out that the State has leased much of the Loyalsock State Forest where it owns the gas. Much of the rest of the mineral rights under the State Forest are privately owned and leased out. Much deforestation will occur in the development of natural gas in the Loyalsock State Forest, which will exacerbate flooding. The gas industry will cause increased impermeable surfaces (well pads, roads) that will accelerate runoff. The Loyalsock Valley is subject to frequent flooding and the emotional and economic impacts of flooding are severe. Exhibit O.

**f. Loss of Value to Real Estate**

117. The members of the Pine Creek Preservation Association have already experienced that property value in their area in close proximity to gas industry traffic and its activities have declined dramatically. Exhibit E.

## **REQUESTED DECLARATORY RELIEF**

Petitioner requests that this Court grant the declaratory relief set for the in detail its brief in support of this Motion for Summary Judgment. A general summary of that is provided below:

1. Find and declare that the duties of the Respondents, when making a decision or taking an action that will or may impact State Forest or Parks, are defined by the terms of Article I § 27, as implemented by the Conservation and Natural Resources Act, and include:

(a). The affirmative duty to conserve and maintain the public natural resources of our State Forests and Parks for the benefit of people, including future generations, and the duty to protect the peoples' rights to clean air, pure water, and to preserve the natural, scenic, historic and esthetic values of our State Forests and Parks;

(b). The duty to obtain DCNR's evaluation of any proposed action that will or might impact the natural resources of State Forests or Parks based on established natural resource management principles, and to make changes to the proposed action recommended by DCNR to ensure consistency with those principles;

(c). The duty to consult with the people on any proposed action that will or might impact their uses and rights to the natural resources of State Forests or Parks before making the decision to proceed with the proposed action.

2. Find and declare that extracting natural gas on State Forest and Park lands causes immediate and long-term negative impacts to these public natural resources that must be mitigated to fulfill the obligation to conserve and maintain these resources under Article I § 27, and to protect the people's rights to these resources, both now and in the future.

3. Find and declare that CNRA creates a statutory structure that only allows DCNR to continue to lease State Forest land for mineral extraction under the limits of Article I § 27 when DCNR maintains control over the money in the Oil and Gas Lease Fund from that leasing to mitigate the impacts to State Parks and Forests from oil and gas extraction.

4. Find and declare that the Oil and Gas Lease Fund is a de facto trust fund under the public trust established by Article I § 27.

5. Find and declare that the Governor violated Article I § 27, and his trustee duties and the people's rights thereunder, by proposing in his Executive Budget for FY 2009-10 the transfer to the General Fund of \$174 million dollars from the Oil and Gas Lease Fund generated from the 2008 oil and gas lease sale of 74,000 acres of State Forest land, and by giving final approval to actually transfer \$143,000,000 by signing the Appropriations Act for FY 2009-10.

6. Find and declare that the Governor violated Article I § 27, his trustee duties and the people's rights thereunder, by signing an amendment to the Fiscal

Code (72 P.S. § 1604-E) knowing that it required the transfer to the General Fund of an additional \$60,000,000 from the Oil and Gas Lease Fund for the current fiscal year, and then by requiring DCNR to lease additional State Forest land for oil and gas extraction to generate this amount when DCNR recommended against further leasing until it had time to evaluate the impacts from unconventional Marcellus Shale gas extraction.

7. Find and declare that the Governor violated Article I § 27, and his trustee duties and the people's rights thereunder, by approving and signing into law amendments to the Fiscal Code that added Article XVI-E, Sections 1602-E and 1603-E (72 P.S. §§ 1602-E and 1603-E) to permanently remove DCNR's control over and use of the Oil and Gas Lease Fund to fulfill its trustee duties under Article I § CNRA.

8. Find and declare that the Governor violated Article I § 27, and his trustee duties and the people's rights thereunder, by proposing in his Executive Budget for FY 2010-11 the transfer to the General Fund of \$180,000,000 dollars from the Oil and Gas Lease Fund knowing that additional leasing of the State Forest for oil and gas extraction would be required to generate this amount; by then requiring DCNR to proceed with this leasing knowing that DCNR recommended against further leasing until it had time to evaluate the impacts from unconventional Marcellus Shale gas extraction; and by approving the final transfer

of the \$180,000,000 by signing the amendment to the Fiscal Code (72 P.S. § 1605-E) that authorizes this transfer.

9. Find and declare that the Governor, in fulfilling his mandate to submit a balanced budget proposal to the General Assembly under Article VIII § 12 of the Pennsylvania Constitution cannot violate the people's rights under Article I § 27 because the people's Article I rights are limitations on the authority they give to the government under the Constitution.

10. Find and declare that the Respondents violated Article I § 27, and their trustee duties and the people's rights thereunder, by failing to evaluate the impact of the additional leasing of the State Forest for oil and gas extraction on other uses of the public natural resources by the people as beneficiaries, including future generations, before directing DCNR to lease additional State Forest land.

11. Find and declare that the 2009 amendments to the Fiscal Code, titled Oil and Gas, Article XVI-E, 72 P.S. §§ 1602-E – 1605-E, violate Article I § 27 by permanently removing DCNR's control over and use of the Oil and Gas Lease Fund to fulfill its trustee duties under Article I § 27 and CNRA, and by authorizing transfers from the Oil and Gas Lease Fund to the General Fund.

12. Find and declare that the transfers from the Oil and Gas Lease Fund to the General Fund purportedly carried out pursuant to the Article XVI-E, Sections 1604-E and 1605-E of the Fiscal Code (72 P.S. §§ 1604-E and 1605-E) were not

authorized because Section 1602-E only allows the transfer of royalties deposited into the Oil and Gas Lease Fund and the money transferred was derived from lease sale bids, not royalties.

13. Find and declare that the Governor violated Article I § 27, his trustee duties and the people's rights thereunder, by proposing Executive Budgets and approving Appropriations Acts that require DCNR to use the Oil and Gas Lease Fund instead of General Fund revenue to pay DCNR's day-to-day operating expenses, such as salaries, office supplies and equipment, travel expenses and other costs to administer DCNR, and prevent DCNR from using the Oil and Gas Lease Fund to mitigate the harm to State Parks and Forests from oil and gas extraction as required to fulfill its trustee duties under Article I § 27 and CNRA.

14. Find and declare that the Respondents violated Article I § 27, and their trustee duties and the people's rights thereunder, by approving the provisions of Act 13 of 2012 (58 Pa.C.S. Chapter 25) that transfer \$50 million annually from the Oil and Gas Lease Fund to the Marcellus Legacy Fund and prevent DCNR from using the Oil and Gas Lease Fund to mitigate the harm to State Parks and Forests from oil and gas extraction as required to fulfill its trustee duties under Article I § 27 and CNRA.

15. Find and declare that the Respondents violated Article I § 27, and their trustee duties and the people's rights thereunder, by approving the provisions

of Act 13 of 2012 (58 Pa.C.S. § 2315) that creates a grant program to benefit greenways, recreational trails, open space, parks and beautification projects across Pennsylvania and authorizes the Commonwealth Financing Authority, an authority controlled by the General Assembly, to administer the grant program rather than DCNR, the agency with the authority under CNRA and the expertise to administer grant for these types of projects.

16. Find and declare that the Petitioner has standing to bring this action.

WHEREFORE, the Petitioner Pennsylvania Environmental Defense Foundation respectfully requests that this Honorable Court grant summary judgment in its favor on the requested declaratory relief under Article I § 27.

Respectfully,

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