

**IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

No. 65 MAP 2020

PENNSYLVANIA ENVIRONMENTAL DEFENSE FOUNDATION,
Appellant,

v.

COMMONWEALTH OF PENNSYLVANIA, and GOVERNOR WOLF,
IN HIS OFFICIAL CAPACITY AS GOVERNOR OF PENNSYLVANIA,
Appellees.

**COMMONWEALTH OF PENNSYLVANIA'S AND GOVERNOR WOLF'S
JOINT APPELLEES' BRIEF
IN OPPOSITION TO THE PENNSYLVANIA ENVIRONMENTAL FOUNDATION'S APPEAL**

Appeal from the October 22, 2020 Order of the
Commonwealth Court at No. 358 MD 2018

GREGORY G. SCHWAB
General Counsel

JOSH SHAPIRO
Attorney General

M. ABBEGAEL GIUNTA
Deputy General Counsel
OFFICE OF GENERAL COUNSEL
333 Market Street, 17th Floor
Harrisburg, PA 17101
Tel: (717) 787-9350

HOWARD G. HOPKIRK
Senior Deputy Attorney General
Appellate Litigation Section
Civil Law Division
OFFICE OF ATTORNEY GENERAL
Strawberry Square, 15th Floor
Harrisburg, PA 17120
Tel: (717) 783-1478

AUDREY F. MINER
Chief Counsel
DEPARTMENT OF CONSERVATION AND
NATURAL RESOURCES
Counsel for Governor Wolf

*Counsel for Commonwealth of
Pennsylvania*

Date: March 24, 2020

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COUNTER-STATEMENT OF JURISDICTION

The proceedings that concluded in the Commonwealth Court’s final declaratory judgment order entered October 22, 2020 were originally commenced in that court. Thus, the Supreme Court has appellate jurisdiction pursuant to 42 Pa.C.S. § 723(a) and Pa. R.A.P. 1101(a)(1) to review the Commonwealth Court’s final declaratory judgment order based on the timely appeal by the Pennsylvania Environmental Defense Foundation (“Foundation”).

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. Are Sections 104(P) and 1601 of the General Appropriation Acts of 2017 and 2018 constitutional where they authorize the appropriation of Lease Fund money for the Department of Conservation and Natural Resources' general government operations?

(Answered in the affirmative by Commonwealth Court)

Suggested answer: Yes.

II. Is the use of Oil and Gas Lease Fund money for environmental conservation and maintenance initiatives unrelated to the Marcellus Shale region constitutional?

(Answered in the affirmative by Commonwealth Court)

Suggested answer: Yes.

III. Was the 2017 repeal and transfer of the 1955 Oil and Gas Lease Fund Act to Section 1601.2-E of The Fiscal Code constitutional?

(Answered in the affirmative by Commonwealth Court)

Suggested answer: Yes.

IV. Is the transfer from the Keystone Recreation, Park and Conservation Fund to the General Fund contained within Section 1726-G of The Fiscal Code constitutional?

(Answered in the affirmative by Commonwealth Court)

Suggested answer: Yes.

V. Is affirmative legislation necessary for the Commonwealth to properly effectuate its Article I, Section 27 duties and responsibilities?

(Answered in the negative by Commonwealth Court)

Suggested answer: No.

VI. Did the Governor or the Commonwealth breach their trustee duties in administering the Section 27 trust?

Suggested answer: No.

COUNTER-STATEMENT OF THE CASE

On June 20, 2017, this Honorable Court issued its decision in *Pennsylvania Environmental Defense Foundation v. Commonwealth of Pa.*, 161 A.3d 911 (Pa. 2017) (“PEDF II”) and noted that the third clause of the Environmental Rights Amendment “establishes a public trust, pursuant to which the natural resources are the corpus of the trust, the Commonwealth is the trustee, and the people are the named beneficiaries.” (“Section 27 trust”) *PEDF II*, 161 A.3d at 931-32. As trustee, the Commonwealth is thus imposed with the “duty to prohibit the degradation, diminution, and depletion of our public natural resources.” *Id.* at 933.

This Court held that Sections 1602-E and 1603-E of the 2009 Fiscal Code Amendments, which relate exclusively to royalties, were facially unconstitutional; reasoning that the allocations of royalty payments from the Oil and Gas Lease Fund (“Lease Fund”) for non-conservation purposes are contrary to the purposes of the Section 27 trust. *PEDF II*, 161 A.3d at 935. However, this Court observed that it was less clear how to categorize revenue streams other than royalties, *i.e.*, the up-front bid-bonus payments and rental payments and therefore remanded the record to the Commonwealth Court for such proceedings. *Id.*

On May 17, 2018, while the remand remained pending before the Commonwealth Court, the Foundation filed the underlying action seeking declaratory relief that the Commonwealth’s use of Lease Fund money for the general

government operating expenses¹ of the Department of Conservation and Natural Resources (“DCNR” or “Department”) is unconstitutional; that the use of Lease Fund money for conservation or maintenance initiatives in locations other than the Marcellus Shale sites from which the money derived is unconstitutional; that the Respondents’ failed to exercise their trustee duties because affirmative legislation and a detailed accounting are necessary; and seeking a declaration that certain provisions of the General Appropriation Acts of 2017 and 2018, and the 2017 legislative amendments to The Fiscal Code are unconstitutional because they divert funds away from intended conservation and maintenance objectives. (RR 155). In early 2019, the parties filed cross applications for summary relief. (RR 333, 387).

After argument on September 11, 2020, the Commonwealth Court issued its memorandum opinion on October 22, 2020 in the litigation that is the subject of this appeal. The Court held that Lease Fund money, including trust principal, may be expended on environmental conservation and maintenance initiatives beyond the

¹ Section 104(P) of the General Appropriations Act of 2017 and 2018 sets forth general government operating expenses to be:

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 rendered, for the purchase or rental of goods and services for payment and any other expenses, as provided by law or by this act, necessary for the proper conduct of the duties, functions and activities and for the purposes hereinafter set forth for the fiscal year

Act of July 11, 2017, P.L. 1279, No. 1A, titled the General Appropriations of 2017; Act of June 22, 2018, P.L. 1203, No. 1A, titled the General Appropriations of 2018.

Marcellus Shale region, including on the operations of our State parks and forests. *Pennsylvania Environmental Defense Foundation v. Commonwealth of Pa.*, No. 358 M.D. 2018, 2020 Pa. Commw. Unpub. LEXIS 507, 25, 46, 241 A.3d 119, 2020 WL 6193643 (Pa. Cmwlth. October 22, 2020) (“*PEDF IV*”). The Court went on to hold that the challenged legislative enactments (Section 104(P) and 1601 of the General Appropriations Acts of 2017 and 2018; the repeal of the 1955 Lease Fund Act; Section 1601.2-E of The Fiscal Code; and Section 1726-G of The Fiscal Code) were not facially unconstitutional. *Id.* The Commonwealth Court did grant the Foundation’s Application for Summary Relief insofar as it sought a declaration that the Commonwealth is required to maintain accurate records of the Lease Fund and track trust principal as part of its trustee duties. *Id.*

On November 3, 2020, the Foundation filed a notice of appeal of the Commonwealth Court’s October 22, 2020 final order, along with a jurisdictional statement. This Court noted probable jurisdiction of the appeal on January 8, 2021. On February 22, 2021, the Foundation filed its Brief and Reproduced Record.

SUMMARY OF ARGUMENT

This is a continuation of the Pennsylvania Environmental Defense Foundation's (the "Foundation") campaign to restrict the use of all money derived from the leasing of State park and forest lands for the extraction of oil and natural gas and to require that all such money must remain in trust pursuant to Article I, Section 27 of the Pennsylvania Constitution (the "Environmental Rights Amendment" or "Section 27"). The Commonwealth Court's holding in *PEDF IV* is correct.

Contrary to the Foundation's position, there is no constitutional violation where Lease funds are appropriated to finance general government operations of a trustee whose main purpose is to effectuate Section 27, such as the DCNR. *PEDF II*, 161 A.3d at 939. Further, not all money within the Lease Fund is derived from the severance of a public natural resource which would require that all funds are trust corpus. Pursuant to this Court's holding in *PEDF II* and the Commonwealth Court's holding in *PEDF III*, all royalty payments and 2/3 of money from rents and bonus payments are trust principal and must only be used for conservation and maintenance or for preservation of the trust. *PEDF II*, 161 A.3dat 932-933; *Pennsylvania Environmental Defense Foundation v. Commonwealth of Pa.*, 214A.3d 748, 774 (Cmwlt. 2019) ("*PEDF III*"). However, one-third of rent and bonus payments is

income that can be used for non-trust purposes. *Id.* at 774. Accordingly, a portion of the Lease Fund money is unrestricted.

Following this same logic, there is also no requirement that Lease Fund money be used in one specific manner or at one specific location – such as the Marcellus Shale region from where the proceeds derived – as argued by the Foundation. Rather, Section 27 is violated when trust proceeds are diverted to a non-trust purpose. *PEDF II*, 161 A.3d at 939. The General Assembly’s appropriation of trust funds to other conservation and maintenance initiatives or to agencies dedicated to effectuating the Environmental Rights Amendment does not run afoul of the constitution. *Id.* Accordingly, the Governor and the Commonwealth have carried out their Section 27 fiduciary duties of loyalty, impartiality, and prudence in carrying out the constitutional legislative enactments at Sections 104(P) and 1601 of the General Appropriation Acts of 2017 and 2018, and Sections 1601.2-E and 1726-G of The Fiscal Code.

ARGUMENT

I. SECTIONS 104(P) AND 1601 OF THE GENERAL APPROPRIATION ACTS OF 2017 AND 2018 WHICH AUTHORIZE THE APPROPRIATION OF LEASE FUND MONEY FOR DCNR GENERAL GOVERNMENT OPERATIONS ARE CONSTITUTIONAL BECAUSE THE DCNR'S GENERAL GOVERNMENT OPERATIONS DIRECTLY SERVE A SECTION 27 PURPOSE AND NOT ALL MONEY FROM THE LEASE FUND IS NECESSARILY TRUST PRINCIPAL.

The Commonwealth Court was correct in its holding that the use of Lease Fund money for DCNR's general government operating expenses does not violate the Constitution. The general government operating expenses of the DCNR are exactly those conservation and maintenance activities for which Section 27 trust assets may be used. Additionally, not all money from the Lease Fund is necessarily trust principal that is restricted for conservation and maintenance purposes.²

As held by this Honorable Court in *PEDF II*, the Environmental Rights Amendment “establishes a public trust, pursuant to which the natural resources are

² On July 29, 2019, the Commonwealth Court issued its Opinion and Order holding that bonus and rental payments, unlike royalty payments, are not for the permanent severance of natural resources and are therefore income. *PEDF III*, 214 A.3d at 773. The Commonwealth Court went on to apply the trust law in effect at the time that the Environmental Rights Amendment was ratified - the Principal and Income Act of 1947 (“PIA”) – and held that pursuant to former Section 9 of the PIA, one-third of the rent and bonus payments constitute income and the other two-thirds constitute trust corpus. *PEDF III*, 214 A.3d at 774. Therefore, one-third of the rental and bonus payments may be used for non-conservation purposes. *Id.*

On August 12, 2019, the Foundation filed a notice of appeal of the Commonwealth Court's holding in *PEDF III*. See *Pennsylvania Environmental Defense Foundation v. Commonwealth of Pa.*, No. 64 MAP 2019. The appeal was argued before this Court in September 2020 and remains pending.

the corpus of the trust, the Commonwealth is the trustee, and the people are the named beneficiaries.” *PEDF II*, 161 A.3d at 931-32. “[A]ssets of the trust are to be used for conservation and maintenance purposes.” *Id.* The Foundation is of the position that the Commonwealth cannot use any of the proceeds from the sale of oil and gas that was deposited in the Lease Fund to pay for the DCNR’s general government operations.³

Sections 104(P) and 1601 of the General Appropriations Acts of 2017 and 2018 authorized the appropriation of funds from the Lease Fund to the DCNR, which is an agency specifically created with the mission to conserve and maintain a part of the Section 27 trust. As this Court held in *PEDF II*, so long as the trust funds are appropriated to an “initiative or agency dedicated to effectuating Section 27”, the General Assembly would not run afoul of the Constitution. *PEDF II*, 161 A.3d at 939.

The DCNR’s main purpose is effectuating Section 27 and ensuring conservation and maintenance of State parks and State forests. In fact, the Conservation and Natural Resources Act (“CNRA”), Act of June 28, 1995, P.L. 89,

³ However, not all money from the Lease Fund is trust corpus which must be used for conservation and maintenance purposes. Pursuant to *PEDF II*, royalty payments – payments accepted for the removal of trust assets – are “part of the corpus of the trust and the Commonwealth must manage them pursuant to its duties as trustee.” *PEDF II*, 161 A.3d at 935. However, as the Commonwealth Court held in *PEDF III*, one-third of the rent and bonus payments constitute income and the other two-thirds constitute trust corpus. *PEDF III*, 214 A.3d at 774. Therefore, one-third of the rental and bonus payments may be used without restriction, including non-conservation purposes. *Id.*

which created the DCNR, referenced the Environmental Rights Amendment and set forth the DCNR's primary mission:

[T]o *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).

However, performing the tasks of conservation and maintenance does not take place without cost to the Commonwealth. It requires buildings, vehicles, equipment, and people, including staff and experts. Indeed, the general government operating expenses for Commonwealth agencies that, as part of their mission, conserve and maintain the public natural resources of this Commonwealth, are categorically vital to effectuate and fulfill their trustee responsibilities under Section 27. It is imperative that the DCNR obtain funding, in part, from the Lease Fund to carry out its statutory and trustee duties. The use of Lease Fund monies for these purposes is constitutional because everything that the DCNR does as part of its general government operations is in pursuit of its mission to conserve and maintain part of the Section 27 trust. For example, the DCNR is statutorily mandated under the CNRA 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. *See* 71 P.S. § 1340.101(b)(1). This mission is carried out through not only the State forests (71 P.S. § 1340.302) and State parks (71 P.S. § 1340.303), but through facility development (71 P.S. § 1340.304); ecological and geological services (71 P.S. § 1340.305); community recreation and heritage conservation (71 P.S. § 1340.306); rivers conservation (71 P.S. § 1340.307); trails and greenways (71 P.S. § 1340.308); youth conservation programs (71 P.S. § 1340.309); operation of volunteer programs for or in aid of interpretative functions, visitor services, conservation measures and development or other activities in and related to State park and forest areas and other conservation and natural resource activities administered by the DCNR (71 P.S. § 1340.310); environmental education (71 P.S. § 1340.311); and whitewater education (71 P.S. § 1340.312).

In fact, this Court has already held that a “trustee may use the assets of the trust ‘only for purposes authorized by the trust *or necessary for the preservation of the trust.*’” *Id.* at 933 (citing *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 956-57 (Pa. 2013) (plurality) (emphasis added)). Trustees have discretion with respect to the proper treatment of the corpus of the trust, so long as that discretion is

exercised in “good faith and in accordance with the provisions and purposes of the trust and the interests of the beneficiaries[.]” *Id.* at 933; 20 Pa.C.S. § 7780.4.

Funding DCNR general government operations is not a “general budgetary item,” as the Foundation argued below; rather, the funding of DCNR is precisely what allows it to carry out its duties and responsibilities as a Section 27 trustee. This does not equal a blank check “to pay for [whatever] it so chooses” as the Foundation argues. Rather, the Commonwealth must still use Lease Fund money only for environmental conservation and maintenance purposes or for the preservation of the trust itself. The DCNR’s general government operations monies are spent towards Section 27 purposes; that is what the DCNR is specifically tasked with.

In order to accomplish trust purposes, the use of trust corpus is necessary. Similarly, the failure to fund DCNR’s general government operating expenses from the Lease Fund would render it incapable of carrying out its trustee obligations. As those obligations benefit the trust as a whole, the use of trust corpus to pay the DCNR’s general government operating expenses is not in violation of the Pennsylvania Constitution.

Furthermore, Sections 104⁴ and 1601⁵ of the General Appropriations Act of 2017 and 2018 are entirely different than the 2009 Fiscal Code sections that were at issue in *PEDF II*. Sections 1602-E and 1603-E dealt with appropriations from the Lease Fund to the General Fund that “took away DCNR’s ability to use the revenues to mitigate damage from oil and gas exploration ... [and] removed DCNR’s ability to act as trustee because the funds were placed in the General Fund, potentially for non-conservation purposes...” *PEDF II*, 161 A.3d at 927. Here, Sections 104 and 1601 appropriate the funds directly to the DCNR so that it can continue its conservation and maintenance efforts and continue to act as trustee. All funds are put toward an agency and its initiatives which effectuate Section 27. Because the

⁴ Section 104(P) of the General Appropriations Acts of 2017 and 2018 state that:

The following sums set forth in this act, or as much thereof 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 rendered, for the purchase or rental of goods and services for payment and any other expenses, as provided by law or by this act, necessary for the proper conduct of the duties, functions and activities and for the purposes hereinafter set forth for the fiscal year beginning July 1, 2017 [& 2018], and for the payment of bills incurred and remaining unpaid at the close of the fiscal year...

Act of July 11, 2017, P.L. 1279, No. 1A, titled the General Appropriations of 2017; Act of June 22, 2018, P.L. 1203, No. 1A, titled the General Appropriations of 2018.

⁵ Sections 1601 of the General Appropriations Act of 2017 appropriated \$50,000,000 for general operations to the DCNR. \$11,291,000 was appropriated to DCNR for State parks operations and State forest operations. Act of July 11, 2017, P.L. 1279, No. 1A, titled the General Appropriations of 2017. Similarly, Section 1601 of the General Appropriations Act of 2018 appropriated \$37,045,000 to the DCNR for general operations and \$11,753,000 for State parks and State forest operations. Act of June 22, 2018, P.L. 1203, No. 1A, titled the General Appropriations of 2018.

DCNR uses the funds for purposes authorized by the trust and for preservation of the trust, the funding mechanism is not in violation of the Constitution. *Id.* at 939.

Finally, the Commonwealth Court correctly dismissed the Foundation's argument below that General Fund revenue was unconstitutionally substituted with Lease Fund money to finance the DCNR's general government operations. The Court correctly held that the issue at hand is not whether the money was substituted, but rather, whether the appropriation and use of the money violates Section 27. *PEDF IV* at 20-21. As argued previously, it does not. Unlike the appropriations at issue in *PEDF II*, the current appropriation of Lease Fund money to DCNR was done in furtherance of Section 27 trust purposes – environmental maintenance and conservation. Therefore, the Commonwealth and the Governor request that this Honorable Court affirm the Commonwealth Court's holding that the appropriation of Lease Fund money for the DCNR's general government operations is in furtherance of Section 27 trust purposes and is constitutional.

II. COMMONWEALTH COURT DID NOT ERR IN HOLDING THAT THE LEASE FUND MONEY NEED NOT BE USED IN THE MARCELLUS SHALE REGION BECAUSE THE ONLY RESTRICTION PLACED UPON LEASE FUND MONEY BY SECTION 27 IS THAT IT IS TO BE USED FOR A TRUST PURPOSE.

The Environmental Rights Amendment identifies the public's rights to "clean air, pure water," as well as "natural, scenic, historic and esthetic values of the environment." Pa. Const. art. I, § 27. The Environmental Rights Amendment also establishes a trust containing all public natural resources without any limitation on the location of those resources, nor prioritizing which locations take precedence for conservation and maintenance. Therefore, the Commonwealth Court was correct in holding that the money from the Lease Fund, although derived from oil and gas wells in the Marcellus Shale region, need not be used exclusively toward the land impacted by those wells.

The environmental trust created by Section 27 requires that the Commonwealth "prohibit the degradation, diminution, and depletion of our public natural resources." *PEDF II*, 161 A.3d at 933. The DCNR, as one of several trustees, focuses upon the maintenance and conservation of our State forests and parks. The DCNR is the executive agency charged with administrative oversight of the Commonwealth's State forests and parks and has the statutory authority to enter into leases for oil and natural gas interests in State forests and parks. The money derived from those leases must be used for trust purposes, however, such money need not be

used for conservation, maintenance, remediation, and restoration of the land directly impacted by the leases exclusively. Rather, the use of trust assets can be used for any trust purpose, including general funding of the DCNR so that it may carry out its trustee duties of conserving and maintaining our State parks and forests.

The Foundation's argument that the money from oil and gas leases must go back into the locations from which it came is unfounded. This Court previously addressed this argument in *PEDF II*. This Court held that "the legislature violates Section 27 when it diverts proceeds from oil and gas development to a non-trust purpose without exercising its fiduciary duties as trustee." *PEDF II*, 161 A.3d at 939. Yet even the appropriation of trust funds to agencies or initiatives other than the DCNR "would not run afoul of the constitution" where the funds are still dedicated to effectuating Section 27. *Id.* By the same logic, the use of Lease Fund money for enhancement, remediation, or conservation of public natural resources in areas other than those outlined by the Foundation is constitutional because such use is not a diversion of proceeds to a non-trust purpose.

This Court, in *PEDF II*, held that the Commonwealth has a "duty to prohibit the degradation, diminution, and depletion of our public natural resources" but is "empowered to exercise discretion with respect to the proper treatment of the corpus of the trust..." *PEDF II*, 161 A.3d at 933. Focusing on an initiative in one area, at the expense of another, merely because the money came from a certain area fails to

benefit the trust or the beneficiaries. Rather, trustees such as the DCNR must exercise their discretion to appropriately address the broad environmental threats faced by Pennsylvania. Therefore, Appellees ask this Court to affirm the Commonwealth Court's holding that expending Lease Fund money in other areas and on other environmental conservation and maintenance initiatives outside of the Marcellus Shale region is not unconstitutional.

III. THE 2017 REPEAL AND TRANSFER OF THE 1955 LEASE FUND ACT TO SECTION 1601.2-E OF THE FISCAL CODE AND SECTION 1601.2-E ITSELF ARE CONSTITUTIONAL BECAUSE THE REQUIREMENT THAT TRUST PRINCIPAL MUST BE USED FOR TRUST PURPOSES IS NOT AFFECTED BY THE REPEAL AND TRANSFER, AND SECTION 27 PROVIDES NO OBLIGATION TO EVALUATE THE IMPACTS OF THE DECISION TO REPEAL THE 1955 LEASE FUND ACT.

A. The Repeal and Transfer of the 1955 Lease Fund Act is Constitutional

In the case below, the Foundation argued that Section 20(2) of the 2017 Fiscal Code Amendments which repealed and transferred the 1955 Lease Fund Act is facially unconstitutional pursuant to Section 27 for a variety of reasons, all of which the Commonwealth Court appropriately rejected. Primarily, the Commonwealth Court correctly noted that, contrary to the Foundation's contentions, the 2017 Fiscal Code Amendments do not establish a new Lease Fund. Rather, the Lease Fund was transferred to Section 1601.2-E of The Fiscal Code and was continued:

Section 1601.2-E. Oil and Gas Lease Fund.

(a) Continuation. – The fund is *continued* as a special fund in the State Treasury.

72 P.S. § 1601.2-E(a). (emphasis added).

The General Assembly exercised its legislative power to enact Section 20(2), which the General Assembly deemed “necessary to effectuate the amendment or addition of Sections 1601-E and 1601.2-E of the Act.” Section 20(1) of the Act of April 9, 1929 (P.L. 343, No. 176) as amended October 23, 2017. Section 27 “does not impose duties on the political branches to enact specific affirmative measures to promote clean air, pure water, and the preservation of the different values of our environment[.]” *Robinson Twp.*, 83 A.3d at 951-52. When determining the merits of a claim that the General Assembly’s exercise of its legislative power is unconstitutional, it is incumbent upon the court to “inquire into more than the intent of the legislative body and focus upon the effect of the law and the right allegedly violated.” *Id.* at 950 (citations omitted).

As noted by this Court in *PEDF II*, “the legislature’s diversion of funds from the [Lease Fund] (and from the DCNR’s exclusive control) does not, in and of itself, constitute a violation of Section 27.” *PEDF II*, 161 A.3d at 939. As noted above, the DCNR is not the only Section 27 trustee, nor is the DCNR the sole agency responsible for conserving and maintaining the public natural resources of this Commonwealth. *Id.* Rather, all “entities of the Commonwealth government, both state and local,” are bound by Section 27 responsibilities. *Id.* at 931, n. 23. Section

1601.2-E does not limit the use of Lease Fund monies to projects that conserve and maintain the public natural resources of State parks and forests because public natural resources encompass more than State parks and forests. Indeed, this Court held in *Robinson Twp.* that such resources encompass “not only state-owned lands, waterways, and mineral reserves, but also resources that implicate the public interest, such as ambient air, surface and ground water, wild flora, and fauna (including fish) that are outside the scope of purely private property.” *Robinson Twp.*, 83 A.3d at 955. Accordingly, the General Assembly’s appropriation of trust funds to other conservation and maintenance initiatives or to agencies dedicated to effectuating the Environmental Rights Amendment does not run afoul of the Constitution. *See PEDF II*, 161 A.3d at 939.

The Foundation’s argument that the 2017 Fiscal Code Amendments remove protections previously afforded under the 1955 Lease Fund is wholly without merit. Section 1601-E’s definition of “Fund” is, in essence, a restatement of the 1955 Lease Fund: “[The Oil and Gas Lease Fund established under the act of December 15, 1955 (P.L.865, No.256), entitled, ‘An act requiring rents and royalties from oil and gas leases of Commonwealth land to be placed in a special fund to be used for conservation, recreation, dams, and flood control; authorizing the Secretary of Forests and Waters to determine the need for and location of such projects and to acquire the necessary land.’]” 72 P.S. § 1601.2-E. The changes to the Lease Fund

made by the 2017 Fiscal Code serve the changing needs of the Department. *Hospital & Health System Ass'n. of Pa. v. Commonwealth*, 77 A.3d 587, 604-605 (Pa. 2013) (a state legislature may, by statute, divert special funds set aside for a particular purpose so long as doing so would not contravene a specific constitutional provision controlling the fund). Section 27 does not preclude the General Assembly from redirecting the Lease Fund monies as long as the monies are diverted to a Section 27 trust purpose.

As correctly held by the Commonwealth Court, the absence of safeguards within Section 1601.2-E that specify that the public natural resources must be conserved and maintained does not render the Section unconstitutional. Rather, the DCNR and all trustees have a constitutional obligation that need not be written into The Fiscal Code. Pursuant to the Pennsylvania Constitution and the Environmental Rights Amendment, the Commonwealth must ensure that trust proceeds are used to conserve and maintain the corpus of the trust. *PEDF IV* at 29. This constitutional obligation is the only safeguard necessary.

Moreover, Section 1601.2-E(c) clearly evidences that the General Assembly contemplated and faithfully exercised its fiduciary obligations as trustee by mandating that the legislature “consider the Commonwealth’s trustee duties under section 27 of the Constitution of Pennsylvania” when appropriating any Lease Fund

monies. 72 P.S. § 1601.2-E(c). Such language unequivocally reflects the appropriate exercise of the Commonwealth's fiduciary obligations as Section 27 trustees.

The Foundation wrongfully attempts to impose a requirement upon the Appellees that does not exist by asserting that the Appellees violated Section 27 by failing to provide an evaluation on the immediate or long-term impacts “of their decision to repeal” the Lease Fund. There is no requirement for the General Assembly or the Commonwealth to provide the Foundation or the public any written evaluation prior to amending the Lease Fund or making other decisions that concern trust principal, nor should the requirement for such evaluation be inferred. In *Frederick v. CNX Gas*, 196 A.3d 677, 691 (Pa. Cmwlth. 2018), the petitioners alleged that Allegheny Township violated Section 27 by enacting an ordinance that permitted an oil and gas operator to place an unconventional gas well in an agricultural area. The petitioners alleged that said well degraded “the public natural resources on which people rely” and, citing the *Robinson Twp.* plurality opinion, argued that the Township failed to undertake a “pre-action environmental analysis” required by Section 27. *Id.* The Commonwealth Court held that pursuant to Section 27, the Township had no obligation to undertake any “pre-enactment, health, and safety” evaluation, and agreed with the Zoning Board’s reasoning that “construing [Section 27] to require some sort of ‘pre-action environmental impact analysis’ ‘is a novel construction without any foundation in Pennsylvania law.’” *Id.* at 700. For

the same reasons, the Foundation’s argument that the Appellees’ failure to provide “evidence” of an evaluation concerning the impacts of Section 20(2) violates Section 27 is without merit and the Commonwealth Courts holding should be affirmed.

B. Section 1601.2-E of the 2017 Fiscal Code Amendments is Constitutional

The Commonwealth Court correctly held that Section 1601.2-E does not violate Section 27. In the case below, the Foundation argued that Section 1601.2-E of the 2017 Fiscal Code Amendments is facially unconstitutional because it fails to guarantee that the Commonwealth, in its administration of the Lease Fund, will comply with its trustee duties and responsibilities. With respect to Section 1601.2-E’s relationship with the Appellees’ duties and responsibilities under Section 27, as noted *supra*, Section 1601.2-E mandates that the General Assembly exercise its trustee responsibilities when making any appropriation of trust principal and clearly reflects the Commonwealth’s intention to faithfully exercise its fiduciary duties vis a vis Pennsylvania’s public natural resources and the proceeds from the sale thereof. Significantly, nothing in Section 1601.2-E permits the General Assembly to divert oil and gas trust principal to non-trust purposes, unlike the appropriations contemplated by Sections 1602-E and 1603-E, which this Honorable Court held were facially unconstitutional in *PEDF II*. Indeed, any divestiture of trust principal for non-trust purposes would violate subsection (c) of Section 1601.2-E.

A plain reading of the language of Section 1601.2-E fails to support the Foundation's contention that the General Assembly or the Appellees have acted in a manner inconsistent with their trustee responsibilities; moreover, nothing in the 2017 Fiscal Code Amendments conveys an intent on the part of the General Assembly or the Respondents to divert trust principal from conservation and maintenance efforts in this Commonwealth. The language in Section 1601.2-E(c) requiring the General Assembly to consider the Commonwealth's duties as trustee under Section 27 when making any appropriation from the Lease Fund necessarily conveys the requirement that funds derived from the sale of public natural resources be used for conservation and maintenance efforts and only such efforts.

Again, the Foundation's argument that proceeds derived from the sale of oil and natural gas on State park and forest lands must be solely used to address the impacts incident to oil and natural gas production on such lands was already addressed by this Court in *PEDF II*. The General Assembly's allocation of "proceeds from oil and gas development" will not run afoul of Section 27 so long as the diversion of proceeds furthers the purposes of the Section 27 trust, even if said allocation funds another initiative or agency of the Commonwealth. *PEDF II*, 161 A.3d at 939. The allocation of monies to other Commonwealth agencies or initiatives, including the Environmental Stewardship Fund and Hazardous Sites Cleanup Fund as in Section 1601.2-E(e), is not in violation of Section 27 as the

appropriations are devoted to a multitude of conservation and maintenance efforts. The Foundation continues to mistakenly rely upon the alleged fact that Lease Fund monies are used to replace landfill fees and tax revenue via the Environmental Stewardship Fund and Hazardous Sites Cleanup Fund when the analysis should address whether said funds are devoted to trust purposes. The Environmental Stewardship Fund devotes monies to environmental restoration and conservation projects and the Hazardous Sites Cleanup Fund devotes monies to cleanup activities at sites where hazardous substances have been released. These are clearly environmental conservation and maintenance initiatives as required by Section 27.

Accordingly, Appellees request that this Honorable Court affirm the Commonwealth Court's holding that Section 1601.2-E is constitutional.

IV. THE TRANSFER FROM THE KEYSTONE RECREATION, PARK AND CONSERVATION FUND TO THE GENERAL FUND CONTAINED WITHIN SECTION 1726-G OF THE FISCAL CODE IS CONSTITUTIONAL BECAUSE THE KEYSTONE RECREATION, PARK AND CONSERVATION FUND IS NOT FUNDED BY TRUST PRINCIPAL.

As a result of Section 1726-G of The Fiscal Code, \$10,000,000 was transferred from the Keystone Recreation, Park and Conservation Fund (“Keystone Fund”) to the General Fund. 32 P.S. § 2014. The Commonwealth Court correctly held that the transfer from the Keystone Fund did not violate the Constitution as the transfer of unrestricted money from one fund to another is a “matter of legislative prerogative.” *PEDF IV* at 40-41.

Section 1726-G of the 2017 Fiscal Code Amendments states the following:

Section 1726-G. Fund transfers.

During the 2017-2018 fiscal year, \$300,000,000 shall be transferred from amounts available in special funds and restricted accounts to the General Fund. The transfers under this section shall be in accordance with the following:

- (1) The Secretary of the Budget shall transmit to the State Treasurer a list of amounts to be transferred from special funds and restricted accounts to the General Fund.
- (2) Upon receipt of the list under paragraph (1), the State Treasurer shall cause the transfers under paragraph (1) to occur.

72 P.S. § 1726-G. Contrary to the Foundation’s position, just as the diversion of funds from the Lease Fund does not, in and of itself, constitute a violation of the Commonwealth’s Section 27 duties and responsibilities, the diversion of funds from the Keystone Fund, without more, does not violate the Commonwealth’s and the

Governor's duties and responsibilities as Section 27 trustees. Unlike the Lease Fund, the Keystone Fund is funded by "proceeds from the sale of bonds or notes" and "the monthly transfer of a portion of the State Realty Transfer Tax." Section 4(b) of the Keystone Fund, 32 P.S. § 2014(b). These funds are unrelated to the severance of a public natural resource; therefore, there is no trust principal at issue. Accordingly, the Commonwealth's trustee obligations are not triggered.

Yet again, the Foundation argues that the Commonwealth was under an obligation to provide notice or evaluate the impact of the transfer on the public natural resources. However, as argued previously, no such requirement exists. As the Commonwealth Court correctly held, "there is no requirement for public notice or an evaluation as to the potential impacts of such transfers." *PEDF IV* at 40 (citing *Frederick v. CNX Gas*, 196 A.3d 677, 700 (Pa. Cmwlth. 2018)). Such a transfer of unrestricted funds is up to the legislature and should not be encroached upon by the judicial branch. *See Common Cause of Pennsylvania v. Commonwealth*, 668 A.2d 190, 206 n.21 (Pa. Cmwlth. 1995). Therefore, this Court should affirm the Commonwealth Court's holding that Section 1726-G is not facially unconstitutional.

V. NO AFFIRMATIVE LEGISLATION IS NEEDED FOR THE COMMONWEALTH TO PROPERLY EFFECTUATE ITS SECTION 27 DUTIES AND RESPONSIBILITIES BECAUSE SECTION 27 IS SELF-EXECUTING AND THE COMMONWEALTH HAS DISCRETION TO DETERMINE WHAT NEW LEGISLATIVE ENACTMENTS ARE NECESSARY IN FURTHERANCE OF SECTION 27.

The Foundation reasserts its argument that affirmative legislation is needed to ensure that the Lease Fund has protective limitations that were removed with the repeal of the Lease Fund Act. (Appellant’s Brief at 50). The Commonwealth Court correctly denied the Foundation’s request for a declaration that specific affirmative legislation is necessary. This argument was also made in *PEDF II*, where it was rejected by this Court:

. . . [T]his Court in *Payne II*, nevertheless concluded that the trust provisions in the second and third sentences of Section 27 do not require legislative action in order to be enforced against the Commonwealth in regard to public property. In *Payne II*, we stated:

There can be no question that the Amendment itself declares and creates a public trust of public natural resources for the benefit of all the people (including future generations as yet unborn) and that the Commonwealth is made the trustee of said resources, commanded to conserve and maintain them. No implementing legislation is needed to enunciate these broad purposes and establish these relationships; the [A]mendment does do by its own *ipse dixit*.

Payne II, 361 A.2d at 272.

Former Chief Justice Castille echoed this concept in the *Robinson Township* plurality, concluding that the Commonwealth's obligations as trustee "create a right in the people to seek to enforce the obligations." *Robinson Township*, 83 A.3d at 974. Accordingly, we re-affirm our prior pronouncements that the public trust provisions of Section 27 are self-executing.

PEDF II, 161 A.3d at 938. The Foundation cites to no new authority, and makes no new arguments, as to why implementing legislation is needed. The Appellees are bound, with or without legislation, to effectuate their duties as Section 27 trustees by acting prudently, loyally, and impartially. Furthermore, the Commonwealth Court correctly held that it is the legislative and executive branches' discretion in furtherance of their Section 27 duties that dictates what new legislative enactments are necessary, not the role of the judiciary to mandate such legislation. *PEDF IV* at 43. The Appellees respectfully request that this Court affirm the Commonwealth Court's holding.

VI. NEITHER THE GOVERNOR NOR THE COMMONWEALTH HAVE BREACHED THEIR TRUSTEE DUTIES IN ADMINISTERING THE SECTION 27 TRUST BECAUSE THE GOVERNOR AND THE COMMONWEALTH HAVE ACTED WITH PRUDENCE, LOYALTY, AND IMPARTIALITY.

As argued throughout, the Commonwealth Court correctly held that the appropriation of Lease Fund money within the General Appropriations Acts of 2017 and 2018, the repeal of the 1955 Lease Fund Act and its transfer to Section 1601.2-E of The Fiscal Code do not violate Section 27. Accordingly, the actions of the

Governor and the Commonwealth related to these appropriations are in line with their fiduciary duties as trustees of the Section 27 trust.

The Governor and the Commonwealth have acted with the appropriate prudence, loyalty, and impartiality in managing the Section 27 trust. The appropriation of some of the Lease Funds to cover the general government operating expenses of a trustee, the DCNR, or to other environmental initiatives is wholly in line with the purpose of the Section 27 trust – to prohibit the degradation, diminution, and depletion of our public natural resources. A trustee must “exercise reasonable care, skill and caution over a trust as he would in dealing with his own property. 20 Pa.C.S. § 7774; *see also PEDF II*, 161 A.3d at 932 (citing *In re Mendenhall*, 398 A.2d 951, 953 (Pa. 1979)). Further, a trustee must act with loyalty so as to manage the corpus of the trust to accomplish the true purpose of the trust for the benefit of the beneficiaries. *Id.* (citing *Metzger v. Lehigh Valley Trust & Safe Deposit Co.*, 69 A. 1037, 1038 (Pa. 1908)). Finally, impartiality is required to fairly provide regard for the interests of all in line with the purposes of the trust. *Id.* (citing 20 Pa.C.S. § 7773). The actions challenged by the Foundation were all undertaken in line with the fiduciary duties required of the trustees as they contribute to the environmental conservation goals of the trust and benefit all beneficiaries.

The Foundation’s position that the Appellees breached their duties by failing to petition this Court for guidance in light of *PEDF II* is flawed for several reasons.

First, this Court has repeatedly stated that it does “not sit as an advisory board for lower courts, but to correct errors alleged to have been committed by them when brought up to us by proper assignments.” *Jones v. Ott*, 191 A.3d 782, 789 (Pa. 2018) quoting *Troxell v. Anderson Coal Min. Co.*, 62 A. 1083, 1084 (Pa. 1906) (internal quotations omitted). Further, issues not raised in the court of original jurisdiction should not be considered on appeal. *Id.* (citing *Chwatek v. Parks*, 299 A.2d 631, 633 (Pa. 1972)).


Finally, there is no constitutional requirement that the Commonwealth or the Governor take the action to seek advice or permission from this Court prior to amending General Appropriations or The Fiscal Code as the Foundation suggests. In fact, such action violates the separation of powers doctrine as noted by the Commonwealth Court. *See PEDF IV* at 43 (“[W]e will not dictate how the Commonwealth, or the General Assembly for that matter, should exercise their delegated powers in this regard. To do so would encroach upon executive and legislative power in violation of the constitutional provision governing separation of powers.”).

CONCLUSION

For the foregoing reasons, the Commonwealth and the Governor respectfully request that this Court affirm the holding of the Commonwealth Court and declare that 1) the following legislative enactments are not facially unconstitutional: Sections 104(P) and 1601 of the General Appropriation Acts of 2017 and 2018; the repeal of the 1955 Lease Fund Act; Section 1601.2-E of The Fiscal Code; and Section 1726-G of The Fiscal Code, and that 2) Lease Fund money, including trust principal, may be expended on environmental conservation and maintenance initiatives beyond the Marcellus Shale region.

Respectfully submitted,


Date: March 24, 2021

By: 

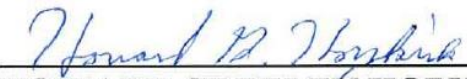
M. ABBEGAEL GIUNTA
Deputy General Counsel
Attorney I.D. 94059
Governor's Office of General Counsel
333 Market Street, 17th Floor
Harrisburg, PA 17101
Tel: (717) 787-9350
Fax: (717) 787-1788
Email: magiunta@pa.gov
Attorney for Respondent, Governor Wolf

[signature blocks continued on next page]

Date: March 24, 2021

By: 
AUDREY FEINMAN MINER
Chief Counsel
Attorney I.D. 41659
Department of Conservation & Natural Resources
400 Market Street, 7th Floor
Harrisburg, PA 17105
Tel: (717) 772-4171
Fax: (717) 705-2830
Email: aminer@pa.gov
Attorney for Respondent, Governor Wolf

Date: March 24, 2021

By: 
HOWARD GREELEY HOPKIRK
Senior Deputy Attorney General
Attorney I.D. 74264
Office of Attorney General
Appellate Litigation Section
Strawberry Square, 15th Floor
Harrisburg, PA 17120
Tel: (717) 783-1478
Fax: (717) 772-4526
Email: hhopkirk@attorneygeneral.gov
*Attorney for Respondent,
Commonwealth of Pennsylvania*

CERTIFICATE OF COMPLIANCE – WORD COUNT

I hereby certify that the **Appellees’ Brief in Opposition to the Pennsylvania Environmental Defense Foundation’s Appeal** complies with the word-count limit set forth in Rule 2135(a)(1). Based on the word-count function of the word processing system used to prepare the brief, the brief contains 6,986 words (excluding portions of the brief covered by Rule 2135(b)).

By: malta
M. ABBEGAEL GIUNTA
Deputy General Counsel

CERTIFICATE OF COMPLIANCE – PUBLIC ACCESS

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

By: 

M. ABBEGAEL GIUNTA
Deputy General Counsel