

SUPREME COURT OF PENNSYLVANIA

**PENNSYLVANIA ENVIRONMENTAL
DEFENSE FOUNDATION,**
Appellant

v.

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

No. 65 MAP 2020

**PENNSYLVANIA ENVIRONMENTAL DEFENSE FOUNDATION
APPELLANT REPLY BRIEF**

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

John E. Childe
Attorney for Petitioner
I.D. No. 19221
960 Linden Lane
Dauphin, PA 17018
717-743-9811
childeje@aol.com

The arguments that the Appellees Governor Wolf and the Commonwealth of Pennsylvania (“Commonwealth”) made in their joint brief filed on March 24, 2021 are largely addressed by the Pennsylvania Environmental Defense Foundation (“PEDF”) in its main brief. However, PEDF provides the following additional responses to certain issues raised by the Appellants.

(1). The Department of Conservation and Natural Resources Has Violated Article I Section 27 and Its Duties as Trustee Thereunder

The Pennsylvania Department of Conservation and Natural Resources (“DCNR”) was created in 1995 by the Conservation and Natural Resources Act (“CNRA”) with the stated intent and purpose “to serve as a cabinet-level *advocate* for our state parks [and] forests.” 71 P.S. § 1340.101(b) (emphasis added). In enacting the CNRA, the legislature specifically found and declared that Pennsylvania’s public natural resources are to be conserved and maintained under Article I, Section 27 of the Pennsylvania Constitution (“Section 27”) and that its “State forests and parks ... contain some of our State’s most precious and rare natural areas.” 71 P.S. § 1340.101(a). As the Commonwealth agency established to advocate for and manage our State Forests and Parks, DCNR is thus the statutorily designated Section 27 trustee of our State Forest and must carry out its duties under the CNRA consistent with its Section 27 trustee duties.

The named Respondents in this case are Tom Wolf, in his official capacity as Governor of Pennsylvania, and the Commonwealth of Pennsylvania. While DCNR

is not specifically named as a party, is it is part of the Commonwealth and DCNR's Chief Counsel has joined in and actively engaged and represented DCNR in this case since its inception. Thus, DCNR has supported and adopted the positions taken by the Governor and the Commonwealth regarding issues raised by PEDF in this case.

By its active participation in this action, DCNR is supporting the repeal of the 1955 Oil and Gas Lease Fund (OGLF) Act, the enactment of Fiscal Code provisions that remove its control over the OGLF, and use of the OGLF for purposes that deplete the corpus of the State Forest trust, all of which collectively emasculate DCNR's long term strategic plan to sustain our State Forest as an ecosystem and to manage the forest holistically as a natural system. *See Penn's Woods: Sustaining Our Forests*, DCNR 1995, R107.

By actively supporting the actions of the Governor and Commonwealth being challenged in this case, DCNR has violated Section 27 and its duties as trustee thereunder, including the duty of loyalty to the people of Pennsylvania to preserve the State Forest trust corpus for the benefit of the people and to protect their rights "to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values" of the State Forest, as fully discussed in PEDF's brief and other filings in this case.

As trustee for our State Forests and Parks, DCNR has the duty to stand up to the Governor and the Commonwealth, including the legislative and judicial

branches, to protect our State Forest. DCNR should not acquiesce in, and certainly should not actively support, the taking of the corpus of the State Forest and Park Section 27 trust resources.

When PEDF refers to “Respondents” in this brief (who are the Appellees in this appeal), it is referring to the Governor, Commonwealth and DCNR. PEDF has included specific requests for declaratory relief in this reply brief related to DCNR’s violations of Section 27 and its breach of its fiduciary duties as trustee thereunder, in addition to the requests in PEDF’s main brief and this reply brief related to violations by the Governor and the Commonwealth.

(2). The Conservation and Natural Resources Act Cannot Define the Meaning of “Conserve and Maintain” under Section 27

DCNR should be guided by its mission under the CNRA to be a cabinet-level advocate for our State Forests and Parks and its trustee duties to conserve and maintain these public natural resources under Section 27. However, DCNR now contends that part of its mission is to use of our State Forest public natural resources, such as its oil, natural gas and timber, for economic use.¹

¹ DCNR has documented this position in its State Forest Resource Management Plan adopted in 2016 that guides its management of our State Forest. The plan expressly states the following on page 156: “*The economic use and sound extraction and utilization of geologic resources is part of the bureau’s mission in managing these lands.*” PEDF has brought an action in Commonwealth Court challenging this 2016 plan as violating Section 27. See *PEDF v. Secretary Dunn and DCNR*, Docket No. 609 MD 2019.

The Respondents cite to Section 101(b) of the Conservation and Natural Resources Act, which states that part of DCNR's primary mission is "to manage State forest lands to assure their long-term health, sustainability and *economic use*", 71 P.S. § 1340.101(b)(1) (emphasis added), to argue that Section 27 authorizes the degradation, diminution and depletion of our State Forest trust corpus to support economic development. However, DCNR's statutory mission under the CNRA does not and cannot define compliance with Section 27.

The Respondents are using the term "economic use" in DCNR's mission under the CNRA to justify the sale of State Forest public natural resources, including State Forest oil, gas, coal, other valuable minerals, timber, water, and any other dispositions authorized by the CNRA, to raise money to pay for any DCNR's annual operating expenses, or for other environmental programs.² Their interpretation of the CNRA as authorizing depletion of the corpus of the public trust for economic use renders Section 27 meaningless.

Nothing in the plain language of Section 27 or its legislative history supports the assumption that DCNR can or must deplete our State Forest resources for "economic use" to benefit the Commonwealth. Nor does Section 27 support the assumption that the Commonwealth can fulfill its duty as trustee to "conserve and

² This expansive interpretation of "economic use" is not consistent with the overall purpose of the CNRA, which establishes DCNR to serve as a cabinet-level advocate for State Parks and Forests recognized as high value Section 27 trust assets.

maintain” our State Forest public natural resources by selling these resources to pay for its operating costs or to pay for other economic use initiatives outside of the State Forest.

The Respondents’ abused their discretion and violated their duty as trustees under Section 27 by relying on the phrase “economic use” in the mission statement of the CNRA to authorize their depletion of the State Forest trust corpus for budgetary purposes. Nothing in Section 27 authorizes them to sell the corpus of the Section 27 trust for the Commonwealth’s economic use to balance the State budget.

(3). Conserve and Maintain Applies to the Corpus of the Section 27 Trust

The term “conserve and maintain” applies equally to the use of funds that are part of the corpus of the Section 27 trust as it does to the public natural resources converted to generate them—these funds must be used specifically to conserve and maintain the corpus of the trust. If they are used in a manner that reduces the corpus of the existing trust, then the use violates the trust.

Inherent in the basic duties of a trustee are the preservation of the corpus of the trust and the protection of the rights of the beneficiaries. In the case of the State Forest and the oil and natural gas thereon, all of which are part of the Section 27 State Forest trust corpus, DCNR’s basic duty is to preserve these trust assets for the benefit of all the people, including future generations.

The Respondents, all trustees of the State Forest trust corpus, assert that they can use the trust assets of our State Forest in any way that benefits any initiative or agency that effects the Commonwealth's public natural resources. They contend that they can comply with Section 27 by depleting State Forest trust assets to conserve and maintain other trust assets outside of the State Forest. That is both illogical and in violation of their duty to conserve and maintain the State Forest and to protect the peoples' rights to its public natural resources.

The proceeds from the sale of part of the State Forest Section 27 trust corpus remain part of the State Forest Section 27 trust corpus. The term "conserve and maintain" as applied to our State Forest trust corpus applies equally to these proceeds, which must be retained as part of the State Forest trust corpus.

DCNR also has the basic duty to protect the people's rights and values in their State Forest Section 27 trust resources. At a minimum, this basic duty encompasses protecting the rights established in the first clause of Section 27: "The people have the right to clean air, pure water, and the preservation of the natural, scenic, historic and aesthetic values of the environment," which in this case means sustaining the high-quality resources of our State Forests, as well as the State Parks associated with them. Extracting and selling the oil and natural gas, timber, coal or any other State Forest trust resource for economic benefit does not conserve or maintain our State

Forest trust corpus; rather, it degrades, diminishes and depletes it (*see* PEDF Appellant Brief at 10-11).

(4). State Forest Trust Corpus Cannot Be Used for Trust Administration

Nowhere in Section 27 or its legislative history is the Commonwealth, as trustee, authorized to sell the corpus of the trust—in this case, our State Forest public natural resources—to administer its trustee duties under Section 27. But that is exactly what the Respondents are arguing: “In order to accomplish trust purposes, the use of the trust corpus is necessary.” Respondents Joint Brief at 13.

The Respondents argue that “[i]t is imperative that DCNR obtain funding, in part, from the [Oil and Gas] Lease Fund to carry out its statutory and trustee duties.” Respondents’ Joint Brief at 11. However, their brief provides no legal support as to why OGLF use for this purpose is imperative. The only imperative to justify the use of the funds is for *budgetary purposes*, so the Commonwealth can reduce the General Fund appropriations previously used to fund DCNR’s annual operations.

The Fiscal Code provisions authorizing use of the OGLF for DCNR general operations in this case are no different than those this Court found to be unconstitutional in *PEDF II*; and the Respondents provide no legal basis for their assertions to the contrary.

The Governor, Commonwealth and DCNR acknowledge the primary duties of the trustee are to preserve the corpus of the trust and to protect the beneficiaries’

rights. However, they argue that everything DCNR does conserves and maintains the Section 27 trust so DCNR can sell the trust corpus to pay for its operating expenses. In support of this assertion, they quote this Court’s statement 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.*’” Respondents’ Joint Brief at 12 (quoting *Pennsylvania Environmental Defense Foundation v. Commonwealth*, 161 A.3d 911, 933 (Pa. 2017) (*PEDF II*) (emphasis added by the Respondents).

This assertion is disingenuous when read in the full context of this Court’s direction with regard to accomplishing the trust purpose in *PEDF II*, which states, “The duty of loyalty imposes an obligation to manage the corpus of the trust so as to accomplish the trust’s purposes for the benefit of the trust’s beneficiaries. *See Metzger v. Lehigh Valley Trust & Safety Deposit Co.*, 220 Pa. 535, 69 A. 1037, 1038 (1908); *see also In re Hartje’s Estate*, 345 Pa. 570, 28 A.2d 908, 910 (1942) (citing Restatement (Second) of Trusts, § 186 for proposition that ‘the trustee can properly exercise such powers and only such powers as (a) are conferred upon him in specific words by the terms of the trust, or, **(b) are necessary or appropriate to carry out the purposes of the trust and are not forbidden by the terms of the trust**’).” 161 A.3d at 933 (emphasis added). Section 27 mandates that the Commonwealth conserve and maintain our public natural resources—period. Taking part of the corpus of the trust for administration of the trust depletes the corpus of the trust, and impacts the

beneficiaries' rights to the State Forest. That is forbidden by the purpose of trust because it depletes the trust corpus rather than conserving and maintaining it.

The Respondents argue that all of DCNR's operating expenses are part of administering the trust. If the phrase "preservation of the trust" means what they contend, the immediate and direct effect is to make all of DCNR's operating expenses become part of the purpose of the Section 27 trust. It means the trust corpus is depleted.

The Respondents fail to recognize that "preservation of the trust" in this case means preservation of the State Forest *public natural resources*, not paying the costs to administer the trust. By asserting that Section 27 public natural resource (the trust assets) can be sold to pay for all of DCNR's expenses in administering the trust, the Respondents violate the terms of the trust.

(5). The Source of Oil and Gas Lease Funds Is a Critical Fact in this Case

Along with the Commonwealth Court, the Respondents ignore the critical facts of this case regarding the source of the funds. The OGLF proceeds being used to pay for DCNR's operating expenses are derived from the degradation, diminution and depletion of State Forest *public natural resources*. (See PEDF Brief, Statement of the Case).

If the Governor, Commonwealth, and DCNR can diminish the State Forest trust corpus to pay for any Commonwealth agency action or initiative that effectuates

Section 27, or for the administration of the trust, then the State Forest does not and will not have any protection under the Constitution.

The Respondents do not have the right to authorize activities that degrade, diminish, and deplete the corpus of our State Forest, and then take the corpus of our State Forest Section 27 trust generated by this conversion (*i.e.*, the OGLF) to pay their expenses to manage those activities.

Even if the Commonwealth authorizes agencies to take actions or support initiatives that will directly benefit another public natural resource (*e.g.*, clean up an abandoned mine discharge, industrial property, or oil well that may benefit water or air quality outside of the State Forest), Section 27 does not sanction degrading another public natural resource to generate the money to pay for those actions or initiatives. If the Commonwealth determines that such actions or initiatives are important to conserving and maintaining our public natural resources Statewide, it must raise revenue to carry out those actions and initiatives as authorized by the Constitution. Section 27 does not give the Commonwealth the discretion to degrade, diminish or deplete our State Forest public natural resources to pay for such actions or initiatives.

(6). The 2017 OGLF Is Not a “Restatement of the 1955 OGLF”

Section 20(2) of the Fiscal Code amendments enacted in 2017 repealed the entire 1955 OGLF Act, including the provision that established the OGLF. Section

1601.2-E of the Fiscal Code, which was enacted as part of the same 2017 Fiscal Code amendments, reinstates the OGLF. While the two funds have the same name and both have been designated as repositories for proceeds from State Forest oil and gas leases, Section 1601.2-E of the Fiscal Code provides none of the safeguards of the 1955 OGLF Act to ensure the State Forest trust corpus deposited into the OGLF is used to conserve and maintain our State Forest Section 27 trust resources. The fact that the OGLF reinstated in the 2017 Fiscal Code has the same name does mean, as the Respondents argue, that the new fund is, “in essence, a restatement of the 1955 [OGLF].” Respondents’ Joint Brief at 20. The 2017 Fiscal Code amendments do not keep any of the protections of the 1955 OGLF Act.

To justify the repeal of the OGLF protections, the Respondents rely in part on the statement by this Court in *PEDF II* that “the legislature’s diversion of funds from the [OGLF] (and from the DCNR’s exclusive control) does not, in and of itself, constitute a violation of Section 27,” 161 A.3d at 939. Respondents’ Joint Brief at 19. They also argue that the repeal of the 1955 OGLF Act and enactment of Section 1601.2-E of the Fiscal Code “serve the changing needs of [DCNR]. *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).” Respondents’ Joint Brief at 20-21. Neither this Court’s above

statement in *PEDF II* nor its decision in *Hospital & Healthsystem Association of Pennsylvania (HHAP)* support their position.

The above cited language relied on by the Respondents is separate and apart from this Court’s specific factual findings and holdings in *PEDF II*. Contrary to sanctioning the repeal of the 1955 OGLF Act, this Court in the paragraph preceding the language quoted by the Respondents specifically directed that “the pre-2008 appropriations scheme as set forth in the [1955 OGLF Act] and the CNRA again controls, with all the monies in the [OGLF] specifically appropriated to the DCNR.”

The Commonwealth’s repeal of the 1955 OGLF Act less than four months later and replacement with new Fiscal Code provisions that give the Commonwealth complete control over the OGLF appropriations without protections for the State Forest Section 27 trust corpus in the OGLF renders these acts unconstitutional, just like the Fiscal Code provisions this Court found unconstitutional in *PEDF II*.³

(7). No “Changing Needs of the Commonwealth” Justify the Repeal of the Oil and Gas Lease Fund Act

The reliance by the Governor, Commonwealth and DCNR on the “changing needs” of DCNR to justify the repeal of the 1955 OGLF Act in 2017 is equally misplaced.

³ The paragraph in *PEDF II* containing the statement quoted by the Respondents also advises that the “General Assembly would not run afoul of the constitution by appropriating trust funds to some other initiative or agency dedicated to effectuating Section 27.” As *PEDF* discusses in its main brief, as well as this reply brief, this sentence likewise does not authorize the Commonwealth to use the corpus of the State Forest, including trust assets in the OGLF, for any purpose outside of the State Forest.

The Commonwealth used the 2017 Fiscal Code amendments to take control of the OGLF, which is the repository for proceeds derived from the extraction and sale of oil and natural gas from our State Forest. By doing so, DCNR no longer has any control over use of State Forest Section 27 trust corpus in the OGLF to meet its Section 27 duties as trustee. Under Section 1601.2-E of the Fiscal Code, the Commonwealth can make appropriations from the OGLF for any political purpose it chooses, including to pay DCNR's annual operating expenses to reduce DCNR's General Fund appropriations so those funds can be used elsewhere.

The changing needs of DCNR have, in fact, been imposed on DCNR by the Commonwealth's actions being challenged in this case, which have made DCNR dependent on the continuing sale of State Forest oil and gas to pay for its annual operating expenses.

The Governor, Commonwealth, and DCNR cite to this Court's decision in *HHAP* to support their "changing needs" justification. However, this Court clearly stated in *HHAP* that legislative bodies cannot take money from a special fund when doing so would contravene a specific constitutional provision or breach a contractual obligation. 77 A.3d at 604-605 (citing *Washington, D.C. Ass'n of Realtors, Inc. v District of Columbia*, 44 A.3d 299, 305 & n.28 (D.C. 2012)). This Court further advised that "if the Constitution precluded it from doing so, the severity of the fiscal crisis is immaterial, as the Senate acknowledges." *Id.*, fn. 19.

The OGLF is a special fund created by statute in 1955. However, by virtue of the amendment of our Constitution in 1971 to include Section 27, this special fund became the repository for trust funds that are part of the corpus of our State Forest public trust resources. Thus, consistent with this Court's analysis in *HHAP*, the legislature cannot divert money from the OGLF in contravention of specific constitutional provisions in Section 27, which it has done through the repeal of the 1955 OGLF Act and the enactment of Section 1601.2-E of the Fiscal Code.

In conclusion, for the reasons set for above and in its other filings in this case, PEDF respectfully requests this Honorable Court to find and declare the following, in addition to the requests in PEDF's brief in this appeal:

(1). DCNR has violated Section 27 and its duties as trustee, including its duty of loyalty to the preservation of the State Forest trust corpus and to the rights of the people thereto, by adopting the appropriations of the OGLF for DCNR's operations, by adopting the new 2017 changes to the Fiscal Code repealing the 1955 OGLF Act, and by giving control of the OGLF to the General Assembly.

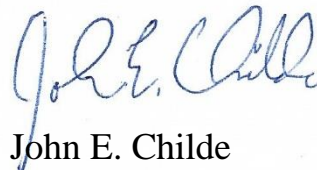
(2). The Governor, Commonwealth and DCNR violate Section 27 and their trustee duties thereunder by relying on the phrase "economic use" in the mission statement of the CNRA to authorize their sell the State Forest trust corpus to raise money for budgetary purposes when nothing in Section 27 authorizes them to deplete and degrade the corpus of the trust for such economic use.

(3). The phrase “conserve and maintain” in Section 27 as applied equally to the use of funds that are a part of the corpus of the Section 27 trust in the OGLF and requires that those funds be used specifically to conserve and maintain the corpus of the trust to avoid depletion of the corpus in violation of the trust.

(4). The Governor, Commonwealth and DCNR violate Section 27 and their fiduciary duties thereunder by selling the corpus of the Section 27 trust to pay for administration of the trust when nothing in Section 27 or its legislative history authorizes depletion of the corpus of the trust for this purpose.

(5). The Governor, Commonwealth and DCNR violate Section 27 by degrading one public natural resource—our high value State Forest resources—to generate the money to pay for actions or initiatives that benefit other public natural resources outside of the degraded resource—our State Forest.

Respectfully,



John E. Childe
Attorney for Appellant PEDF
I.D. No. 19221
960 Linden Lane
Dauphin, Pa. 17018
717-743-9811
childeje@aol.com

SUPREME COURT OF PENNSYLVANIA

PENNSYLVANIA ENVIRONMENTAL	:	
DEFENSE FOUNDATION,	:	
Appellant	:	
	:	
v.	:	No. 65 MAP 2020
	:	
COMMONWEALTH OF	:	
PENNSYLVANIA and	:	
TOM WOLF, in his official capacity as	:	
GOVERNOR OF PENNSYLVANIA,	:	
Appellees	:	

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

I hereby certify that the Appellant’s Reply Brief is in compliance with Pa. Rule of Appellate Procedure 2135 and includes a total word count of 3,747 based on the word count feature in Microsoft Word.



John E. Childe
ID No. 19221
960 Linden Lane
Dauphin, PA 17018
childeje@aol.com
(717) 743-9811
Counsel for PEDF

SUPREME COURT OF PENNSYLVANIA

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

v. :

No. 65 MAP 2020

**COMMONWEALTH OF :
PENNSYLVANIA and :
TOM WOLF, in his official capacity as :
GOVERNOR OF PENNSYLVANIA, :
Appellees :**

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

I hereby certify that the Appellant's Reply Brief is in compliance with Pa. Rule of Appellate Procedure 127.




John E. Childe
ID No. 19221
960 Linden Lane
Dauphin, PA 17018
childeje@aol.com
(717) 743-9811
Counsel for PEDF

SUPREME COURT OF PENNSYLVANIA

PENNSYLVANIA ENVIRONMENTAL	:	
DEFENSE FOUNDATION,	:	
Appellant	:	
	:	
v.	:	No. 65 MAP 2020
	:	
COMMONWEALTH OF	:	
PENNSYLVANIA and	:	
TOM WOLF, in his official capacity as	:	
GOVERNOR OF PENNSYLVANIA,	:	
Appellees	:	

CERTIFICATION OF SERVICE

I hereby certify that the Appellant’s Reply Brief has been serviced electronically on Abigail Guinta, Audrey Miner, and Howard Hopkirk, Appellees’ counsel, through the Court’s PACFile electronic filing system.



John E. Childe
ID No. 19221
960 Linden Lane
Dauphin, PA 17018
childeje@aol.com
(717) 743-9811
Counsel for PEDF

Date: April 10, 2021