

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	:	

**PENNSYLVANIA ENVIRONMENTAL DEFENSE FOUNDATION
SUPPLEMENTAL BRIEF**

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

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The Pennsylvania Environmental Defense Foundation (“PEDF”) hereby files this Supplemental Brief in response to the Order issued by this Honorable Court on August 17, 2021, which granted oral argument and allowed the parties to file supplemental briefs to address this Court’s recent decision in *PEDF v. Commonwealth*, 64 MAP 2019, __A.3d__ (Pa. 2021) (*PEDF IV*). In this brief, PEDF addresses the relevant provisions of *PEDF IV* as they relate to the four (4) questions that this Court has identified for oral argument in this case.

1. Oil and Gas Lease Fund Appropriations for DCNR Operating Costs

This Honorable Court’s decision in *PEDF IV* provides further support for prohibiting use of the revenue from the State Forest oil and gas leases in the Oil and Gas Lease Fund (“OGLF”) for DCNR general budgetary purposes. As this Court observed, at the time the people of Pennsylvania adopted Article I, Section 27 of the Pennsylvania Constitution (commonly referred to as the Environmental Rights Amendment (“ERA”)) in 1971, the State Forest oil and gas revenues had been used since 1955 exclusively for conservation purposes mandated by the Oil and Gas Lease Fund Act.¹ As Court states in *PEDF IV*, the circumstances under which a trust is to be administered is relevant to determining the intent of the settlors in creating the trust. *PEDF IV* at 42 (citing Restatement (Second) of Trusts, § 4, cmt. a). The Oil and Gas Lease Fund Act is relevant to understanding the intent of the people of

¹ Act of December 15, 1955, P.L. 865, No. 256.

Pennsylvania (the settlors) regarding the use of OGLF funds generated from the State Forest oil and gas leases. This Court concludes that “[f]rom the perspective of the settlors, the ERA was enacted when the Commonwealth was already devoting the revenues generated by mineral leases to conservation purposes. Redirecting those revenues to non-trust purposes is inconsistent with the backdrop against which the ERA was enacted.” *Id.* at 43. As stated by this Court, the “benefit conferred on the beneficiaries through the ERA is the conservation and maintenance of the public natural resources” and trust purposes encompass “what may roughly be characterized as environmental benefits,” not general budgetary matters. *Id.* at 39.

The Oil and Gas Lease Fund Act of 1955 required that all rents and royalties generated from State Forest oil and gas leases be deposited into the Oil and Gas Lease Fund and used *exclusively* for conservation, recreation, dam, or flood control projects that the Secretary of Forests and Waters determined were needed. None of these funds were authorized to be used to pay for the department’s annual general budgetary needs. The Commonwealth’s decision to ignore the plain meaning of the ERA and the settlors’ intent in adopting it by using the revenue from the State Forest leases for general budgetary matters, including the annual operating expenses of the Department of Conservation and Natural Resources (“DCNR”),² is unconstitutional.

² In 1955, the Pennsylvania Department of Forest and Waters was responsible for managing our State Forests and Parks. DCNR is the current Commonwealth agency with this responsibility.

This Court also concluded in *PEDF IV* that while the trustee is authorized to generate income from the assets of the trust in its discretion, it can only exercise this discretion to carry out the purpose of the trust, which is to conserve and maintain the public natural resources. *Id.* at 43. This Court has also previously emphasized that a trustee’s discretion “is limited by the purpose of the trust and the trustee’s fiduciary duties, and does not equate to mere subjective judgment.” *PEDF v. Commonwealth*, 161 A.3d 911, 933 (Pa. 2017) (*PEDF II*).

The Commonwealth mandate, as trustee under the ERA, to conserve and maintain the corpus of our State Forest trust assets specifically limits the Commonwealth’s discretion to degrade, diminish or deplete these assets to generate income for its own use. Nothing in the plain language of the ERA supports a finding that the Commonwealth can generate revenue from the corpus of the trust to be used for non-trust purposes.

2. Violation of Article I, Section 25 of the Pennsylvania Constitution

As Article I, Section 25 of the Pennsylvania Constitution expressly states, everything in Article I “is excepted out of the general powers of government and shall forever remain inviolate.” Thus, the Governor and the Commonwealth cannot violate their trust duties under the ERA, an Article I right, to fulfill their constitutional duties under Articles III, IV, or VII of the Pennsylvania Constitution to raise revenue to fund general budgetary matters.

In *PEDF IV*, this Court looked to the plurality opinion in *Robinson Township v. Commonwealth*, 83 A.3d 901, 948 (Pa. 2013) to stress the significance of the placement of the ERA within Article I of the Pennsylvania Constitution. *PEDF IV* at 42. This Court concluded that “[p]ursuant to fundamental principles of private trust law, we cannot conclude that the Commonwealth, as trustee of the constitutional trust created for the conservation and maintenance of the public natural resources that are owned by ‘all the people,’ can divert for its own use revenue generated from the trust and its administration. The Commonwealth acts as a trustee managing the corpus, not as a sovereign owner that may use income in a manner that does not benefit the trust.” *Id.*

As summarized in *PEDV IV*, this Court previously determined that royalties generated from State Forest oil and gas leases are the sale of constitutional trust assets (public natural resources) and must be used to conserve and maintain the trust corpus under the ERA—not redirected to pay for general budgetary matters of the State government. *PEDF IV* at 12-13. Using OGLF revenue from State Forest oil and gas leases for general budgetary matters benefits the Governor and the Commonwealth directly by allowing them to use the trust assets specifically protected by the people under Article I for Article III mandates in direct violation of Article I, Section 25 of the Pennsylvania Constitution.

This Court states in *PEDF IV* that, “[i]n the absence of income entitlement, there is no authority for the trustee to generate income from oil and gas assets and then use that income for non-trust purposes and not the beneficiaries.” *Id.* at 40-41. In support of this statement, this Court quotes several of its earlier cases, including *Stahl v. First Pennsylvania Banking & Trust Co.*, 191 A.2d 386, 388 (Pa. 1963) (“It is well recognized general rule that a trustee or fiduciary may not use trust property for his own benefit and if he does he is liable to a cestui que trust for profits made by him for the use of trust property.”) and *Raybold v. Raybold*, 20 Pa. 308, 311-12 (Pa. 1853) (“[T]here is no principle better settled than that a trustee is not permitted to obtain any profit or advantage to himself in managing the concerns of the cestui que trust.”). *Id.* at 41.

In *PEDF IV*, this Court reiterates its disagreement with the Commonwealth’s attempt “to isolate the phrase ‘for the benefit of the people’ from the remainder of the ERA to establish that allocating revenues generated from the [State Forest] Marcellus Shale leases towards general budgetary matters broadly benefitted all the people and was therefore permissible under the ERA.” *Id.* at 39. Further, the Court reiterated that the Commonwealth cannot “divert for its own use revenue generated from the trust and its administration” because the Commonwealth “acts as a trustee managing the corpus, not as a sovereign owner that may use income in a manner that does not benefit the trust.” *Id.* at 41.

Article I, Section 25 of the Pennsylvania Constitution precludes the Governor and the Commonwealth from diverting public trust assets that are protected under the ERA for their Article III purposes. They have no sovereign ownership over the public trust assets. By treating these trust assets as their property, they have violated Article I, Section 25 of the Pennsylvania Constitution.

3. Use of State Forest Oil and Gas Lease Revenue for Any Agency or Initiative that Effectuates the ERA

This Court in the final footnote of *PEDF IV* states that “the legislature’s diversion of trust funds from the [Oil and Gas] Lease Fund (and from the DCNR’s exclusive control) does not, in and of itself, constitute a violation of [the ERA].” *PEDF IV* at 43, n. 21. This Court goes on to say that the General Assembly “would not run afoul of the constitution by appropriating trust funds to some other initiative or agency dedicated to effectuating [the ERA].” *Id.* While both statements are true as general matters, they are negated by the facts of this case. The source of the funds in this case is from State Forest oil and gas leases. The revenue from those leases is generated by selling the public natural resources from the State Forest—the oil and natural gas—and from extracting those resources, which results in degrading, diminishing and depleting thousands of acres of the State Forests. The degradation of the forest directly harms the rights of the people to the clean air, pure water, and the natural, scenic, historic, and esthetic values of the State Forest.

The ERA provides no authority for the Governor or the Commonwealth, as trustee, to sell State Forest assets to generate revenue for the general operating expenses of DCNR or any other agency with the authority or duty to conserve public natural resources (a duty that all agencies have), or to pay for other initiatives that benefit the conservation of public natural resources. To deplete the assets of the State Forest for other agencies or initiatives would be in direct contradiction to the basic purpose of the trust, to conserve and maintain the natural resources and to sustain the specifically enumerated rights of the people to the State Forest—the rights to clean air, pure water, and the preservation of the natural, scenic, historic, and esthetic values of the State Forest.

The revenue generated from the sale of State Forest resources must remain with the corpus of the trust within the State Forest. To authorize the use of trust assets generated from the degradation and depletion of the State Forest for any agency or initiative directly contradicts the multigenerational duties of the trustee to conserve the corpus of State Forest and the peoples’ rights to the State Forest.

This Court has interpreted the interests for current and future beneficiaries to encompass a “cross-generational dimension” that is “the same across that divide: the conservation and maintenance of the public natural resources.” *PEDF IV* at 36. As this Court states, “[f]ar from setting up any kind of conflict between these beneficiaries regarding profiting from trust assets, the express inclusion of

generations yet to come in ‘all of the people’ establishes that current and future Pennsylvanians stand on equal footing and have identical interests in the environmental values broadly protected by the ERA.” *Id.*

The General Assembly and the Governor, by enacting legislation that converts public natural resources to revenue when that conversion results in the degradation and depletion of the corpus of the public natural resource, have violated the public trust mandates of the ERA and their fiduciary duties as trustees. For the General Assembly and the Governor to take that revenue away from the part of the public natural resources that has been degraded and depleted compounds those violations. Such an action violates the cross-generational duties of the trustees.

As this Court recognizes in *PEDF IV*, the language of the ERA “unmistakably conveys to the Commonwealth that when it acts as a trustee it must consider an incredibly long timeline and cannot prioritize the needs of the living over those yet to be born. The explicit inclusion as simultaneous beneficiaries of the future generations of Pennsylvanians creates a cross-generational dimension and reminds the Commonwealth that it may not succumb to ‘the inevitable bias toward present consumption of public resources by the current generation, reinforced by a political process characterized by limited terms of office.’” *Id.* at 35-36 (quoting *Robinson Twp.*, 83 A.3d at 959, n. 46).

To deplete the assets of the State Forest for other agencies or initiatives would be in direct contradiction to the basic purpose of the trust, to conserve and maintain the natural resources in furtherance of the specifically enumerated rights (*i.e.*, the right to clean air, pure water, and to the preservation of the natural, scenic, historic, and esthetic values of our State Forests). Those rights belong as much to future generations as they do for the people of Pennsylvania today. To appropriate part of the corpus of our State Forest to be consumed today for agencies or initiatives outside of the State Forest directly violates the trustees' duty to protect the cross-generational rights of the beneficiaries to the State Forest.

4. Revenue From Oil and Gas Leases Remain Part of the Corpus of State Forest and Must Be Appropriated to DCNR to Conserve and Maintain the State Forest Through Ecosystem Management

As this Court again recognizes in *PEDF IV*, DCNR is the Commonwealth agency established by the Conservation and Natural Resources Act of 1995 to manage our State Forests and Parks in compliance with the ERA. *PEDF IV* at 5. Since 1955, DCNR and its predecessors have been authorized by law to lease State Forest land for oil and gas extraction; and have been required by the Oil and Gas Lease Fund Act of 1955 to deposit the revenue from those leases into the Oil and Gas Lease Fund exclusively for conservation, recreation, dam, or flood control projects. From 1995 through 2008, the OGLF revenue was appropriated by the Oil

and Gas Lease Fund Act solely to DCNR for conservation projects consistent with its trustee duties under the ERA. *Id.*

As this Court found in *PEDF II* and summarized in *PEDF IV*, DCNR imposed a moratorium on further leasing of State Forest land for oil and gas development to better understand the nature of the industrial development associated with recovery of natural gas from the Marcellus shale, which was much different from conventional oil and gas development. *Id.* Subsequently however, as this Court states in *PEDF IV*, “the large amounts of money generated by the 2008 leases inspired the executive and legislative branches to pressure the DCNR to lease more land.” *Id.*

Although DCNR had expected to be able to continue to use the OGLF revenue for conservation projects on our State Forests and Parks, the General Assembly and the Governor first diverted the OGLF revenue to the General Fund and subsequently appropriated the OGLF revenue directly to pay for DCNR’s operating expenses in lieu of General Fund appropriations. *PEDF II*, 161 A.3d at 922-923. As this Court summarized in *PEDF IV*, “[t]he legislative and executive branches took other steps that served to restrict the allocation of [OGLF] monies to the DCNR. These included using [OGLF] money to support the DCNR’s overall budget – as opposed to using money from the General Fund to fund the DCNR – thereby reducing the amount of money available for conservation purposes.” *PEDF IV* at 6-7. In addition, “[t]he General Assembly also created the Marcellus Legacy Fund, which supplied money

for environmental projects not controlled by the DCNR, and was funded in part by annual appropriations from the [OGLF]. The Marcellus Legacy Fund’s creation was one component of Act 13 of 2012, which ‘amended the Pennsylvania [OGLF] Act with substantial benefits to the natural gas industry in response to the Marcellus Shale boom.’” *Id.* at 7 (quoting *PEDF II*, 171 A.3d at 930, n. 21.)

The statutory scheme in place prior to 2009 under the 1955 Oil and Gas Lease Fund Act authorized DCNR to carry out its trustee duties under the ERA and to conserve and maintain our State Forest and Park public natural resources for current and future generations of Pennsylvanians through the science of ecosystem management adopted in DCNR’s 1995 strategic plan, *Penn’s Woods, Sustaining Our Forests (Penn’s Woods)*. The altered statutory scheme enacted in 2009 and subsequently amended through the present does not. The Oil and Gas Lease Fund Act of 1955 has been repealed and DCNR can no longer use the revenue from the State Forest oil and gas leases to deal with the continuing impacts from the hundreds of thousands of acres of our State Forest impacted by those leases. DCNR can no longer use those funds to comply with its duty to conserve and maintain our State Forest through the science of ecosystem management it adopted in *Penn’s Woods*.

The history of the Oil and Gas Lease Fund Act informs the settlors’ intent in adopting the ERA. It directly supports a finding that the Commonwealth agency responsible by law for our State Forests (now DCNR) is the appropriate agency to

receive the oil and gas lease funds for use exclusively for the conservation of the State Forest. As the designated trustee of our State Forest under the Conservation and Natural Resources Act, DCNR is the only agency currently with the authority and the ability to determine how to use the revenue from the State Forest to ensure the cross-generational sustainability of the State Forest and the rights of the people to the State Forest through the science of ecosystem management.

As established by the facts in *PEDF II*, the revenue from the leases comes directly from the depletion of the State Forest resources, and from the degradation of the rights of the people to those resources. As stated by this Court in *PEDF IV*, revenue from the conversion of part of the trust corpus must be returned to the corpus of the trust. In this case, the revenue is from the State Forest corpus and, therefore, must be returned to the State Forest corpus. The “cross-generational” dimension of the trust purpose mandates that the Governor and Commonwealth administer the trust in conformance with the simultaneous nature of the rights of all the people, including future generations, in taking any action or making any decision that impacts the corpus of the trust.

The General Assembly has the authority to abolish DCNR as an agency and to establish another agency to administer the trustee duties to conserve and maintain our State Forests and Parks under the ERA. But that new agency would have the same fiduciary duties as DCNR. Unless DCNR is relieved of its statutory duties as

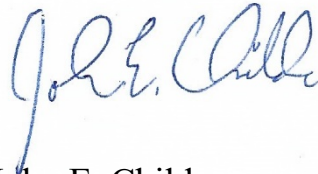
trustee, it must serve as the agency responsible for the protection and restoration of our State Forest and Park natural resources and the rights of the people to those resources for future generations. Neither the General Assembly, the Governor, nor any Commonwealth entity other than DCNR, has the expertise to sustain our State Forest for future generations. Nor do they have the capability or understanding of the science of ecosystem management to ensure the OGLF funds are used to sustain the State Forest.

The General Assembly, the Governor, and DCNR have the authority to discontinue managing the State Forest consistent with 1995 strategic plan, *Penn's Woods*. But, based on their fiduciary duties under the ERA, including their duties of prudence, loyalty, and impartiality, they still have the duty to manage the State Forest in compliance with the specific terms of the ERA, which are to conserve and maintain the State Forest for the benefit of all the people. *PEDF II*, 161 A.3d at 932. Until *Penn's Woods* has been effectively replaced with a management plan that can meet these obligations in another manner, DCNR must comply with it. DCNR needs the OGLF revenue from the State Forest oil and gas leases to continue to develop and manage our State Forest through the science of ecosystem management. The funds from the leases must be used by DCNR to conserve and maintain the State Forest consistent with *Penn's Woods*, unless DCNR adopts another management

system that is equal to or better than ecosystem management to sustain the State Forest for current and future generations in compliance with the ERA.

WHEREFORE, PEDF respectfully requests that this Honorable Court to grant its requests for declaratory relief in this case.

Respectfully,

A handwritten signature in blue ink, appearing to read "John E. Childe". The signature is fluid and cursive, with a long, sweeping tail on the final letter.

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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 Brief is in compliance with Pa. Rule of Appellate Procedure 127.




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CERTIFICATION OF SERVICE

I hereby certify that the Appellant’s Brief has been service electronically on James Bohan, Audrey Miner, Joshua Ebersole, and Howard Hopkirk, Respondents’ counsel, through the Court’s PACFile electronic filing system.



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