

**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

Supreme Court of Pennsylvania

August 5, 2022

ARGUED: December 8, 2021

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

BAER, C.J., SAYLOR, TODD, DONOHUE,
DOUGHERTY, WECHT, MUNDY, JJ.

OPINION

BAER CHIEF JUSTICE

The Pennsylvania Environmental Defense Foundation ("PEDF") comes before this Court for the third time challenging the use of proceeds from oil and gas leasing on the Commonwealth's forest and park lands as violative of Article I, Section 27 of the Pennsylvania Constitution, also known as the Environmental Rights Amendment. ("Section 27" or "ERA"), which created a trust to conserve and maintain Pennsylvania's public natural resources.^[1] In the first two cases, PEDF challenged several 2009-2015

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budgetary provisions enacted in the wake of the dramatic increase in oil and gas revenue resulting from Marcellus Shale exploration in Pennsylvania. Applying trust principles, this Court held that the budgetary provisions violated Section 27 by utilizing the oil and gas revenue for non-trust purposes via transfers to the General Fund. *PEDF v. Commonwealth*, 161 A.3d 911 (Pa. 2017) ("*PEDF II*"); *PEDF v. Commonwealth*, 255 A.3d 289 (Pa. 2021) ("*PEDF*

V").

PEDF's current declaratory judgment action filed against the Commonwealth of Pennsylvania and Governor Tom Wolf (collectively, "the Commonwealth"), raises numerous constitutional challenges to provisions of the General Appropriations Act of 2017 and 2018, as well as the 2017 Fiscal Code amendments, all of which were enacted after our decision in *PEDF II*.^[2] As discussed in detail below, these challenges can be grouped into several categories. First, PEDF contests the constitutionality of the use of trust resources to fund the Department of Conservation and Natural Resources' ("DCNR's") general operations. Second, PEDF seeks a declaration that the revenue from oil and gas leasing on State forest and park lands should be reserved for environmental programs tied to the Marcellus Shale region from which the oil and gas revenue derived. Third, PEDF challenges the repeal of the Oil and Gas Lease Fund Act and the transfer of

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the Oil and Gas Lease Fund ("Lease Fund") to the control of the General Assembly.^[3] Finally, PEDF questions the constitutionality of specific aspects of the Lease Fund. For the reasons set forth below, we conclude that PEDF has failed to demonstrate that the challenged provisions violate the Pennsylvania Constitution. Accordingly, we affirm the order of the Commonwealth Court, although based on different reasoning.

I. *PEDF II* and IV^[4]

Our decisions addressing PEDF's prior challenges elucidate several principles of Pennsylvania's nascent Section 27 jurisprudence directly applicable to the case at bar.

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As noted, PEDF challenged several 2009-2015 amendments to the Fiscal Code, as well as a provision of the Supplemental General Appropriations Act of 2009.^[5] Broadly

considered, these provisions diverted revenues from the oil and gas leases on State forest and park lands into the General Fund under the control of the General Assembly.

Prior to the challenged enactments and pursuant to the Oil and Gas Lease Fund Act, all rents and royalties from oil and gas leasing on state land were deposited into the Lease Fund and appropriated entirely to the DCNR (or its predecessor) to be "exclusively used for conservation, recreation, dams, or flood control."^[6] 71 P.S. §§ 1331, 1333 (repealed). In contrast, the 2009-2015 budgetary enactments, *inter alia*, provided that royalties from the Lease Fund could only be expended if "appropriated or transferred to the General Fund by the General Assembly[.]" apart from an annual appropriation of up to \$50 million to the DCNR, with the direction that the DCNR "shall give preference to the operation and maintenance of State parks and forests." 72 P.S. §§ 1602-E, 1603-E.

While additional appropriations were made to the DCNR from the Lease Fund through legislative direction, other enactments directed funds to the General Fund without any restriction that they be used for conservation purposes. 72 P.S. §§ 1604-E, 1605-E. Concomitantly, the DCNR received decreased funding from the General Fund. Thus, "a larger portion of monies from the Lease Fund [were] used to pay for the DCNR's operational expenses, which had previously been funded by the General Fund, and thus reduced the amount of monies available for the DCNR's conservation activities." *PEDF II*, 161 A.3d at 923. *PEDF* argued that these provisions violated the Commonwealth's fiduciary duties under the ERA.

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In addressing these claims, this Court in *PEDF II* adopted the reasoning of the landmark decision in *Robinson Township v. Commonwealth*, 83 A.3d 901 (Pa. 2013) (plurality), which revitalized the long dormant Environmental Rights Amendment. Notably, the ERA is included in Article I and, thus, is among the rights reserved to the people that are "excepted out of the general powers of

government and shall forever remain inviolate." Pa. Const. art. 1, § 25.^[7] We explained that the ERA established "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." *PEDF II*, 161 A.3d at 931-32.

This constitutional public trust imposed fiduciary duties on Commonwealth entities to "conserve and maintain [our public natural resources] for the benefit of all the people." Pa. Const. art. 1, § 27. Drawing from *Robinson Township*, we explained that "[t]he plain meaning of the terms conserve and maintain implicates a duty to prevent and remedy the degradation, diminution, or depletion of our public natural resources" and a duty to act toward the corpus of the trust "with prudence, loyalty, and impartiality." *PEDF II*, 161 A.3d at 932 (quoting *Robinson Twp.*, 83 A.3d at 957). The Court concluded that the public trust was subject to basic trust principles in effect at the time of enactment of the ERA, including the restriction that proceeds from the sale of trust assets should remain part of the corpus of the trust and that trust assets could be used "only for purposes authorized by the trust or necessary for the preservation of the trust." *PEDF II*, 161 A.3d at 933.

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In *PEDF II*, this Court held that the royalties generated by the oil and gas leases clearly derived from the sale of trust assets and, thus, had to be returned to the trust corpus. Accordingly, we deemed facially unconstitutional those statutory provisions that directed royalties to be paid over to the General Fund without any restrictions that the funds be used for conservation and maintenance of trust assets. *Id.* at 937-38. In so doing, however, we clarified "that 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." *Id.* at 939. Indeed, "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." *Id.*

While the Court had sufficient information to determine the constitutionality of the statutes addressing royalties, which indisputably arose from the sale of trust assets, we remanded to the Commonwealth Court to address the other revenue streams generated by the leases, including bonus payments, rental fees, and interest penalties. We directed that court to apply the Pennsylvania trust principles in effect when Section 27 was adopted to determine whether these revenue streams should be deemed trust assets and restricted to trust purposes. *Id.* at 935-36.

Following remand, this Court, in *PEDF V*, rejected the Commonwealth Court's analysis which derived from that court's classification of current Pennsylvanians as life tenants and future generations as remaindermen.^[8] Diverging from the Commonwealth

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Court, we concluded that the constitutional text did not create successive beneficiaries of current and future Pennsylvanians but rather established a cross-generational unity of interest in the conservation and maintenance of the public natural resources through Section 27's use of the phrase "all the people." *PEDF V*, 255 A.3d at 309-10 (relying upon *Robinson Twp.*, 83 A.3d at 959). Accordingly, we concluded that the ERA created "simultaneous beneficiaries with equal interest in the trust's management," which negated any allocation of income between life tenants and remaindermen, a distinction created in the Commonwealth Court's analysis. *Id.* at 310. We nevertheless agreed with the Commonwealth Court's determination that the bonus payments, rental fees, and interest fees were income rather than funds resulting from the sale of trust assets. *Id.* at 308. The question remaining was whether this income should be reserved solely for trust purposes.

In considering this question, the Court observed that Pennsylvania trust law clearly provided that a trustee has a duty to deal impartially with all beneficiaries. *Id.* at 311 (citing Restatement (Second) of Trusts § 183 and 20 Pa.C.S. § 7773). Under the ERA, the benefit

accorded to the people of Pennsylvania as beneficiaries is not an entitlement to income but rather the conservation and maintenance of public natural resources. Given "the absence of income entitlements, there is no authority for [the Commonwealth]

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to generate income from oil and gas assets and then use that income to benefit itself for non-trust purposes and not the beneficiaries." *Id.* at 313.

Thus, the Court held that "the income generated from bonus payments, rentals, and late fees must be returned to the corpus to benefit the conservation and maintenance of the public resources for all the people" and could not be diverted to non-trust purposes of the General Fund. *Id.* at 314. Accordingly, the challenged 2009-2015 budgetary provisions were facially unconstitutional as they directed income to the General Fund without restriction. We nevertheless reiterated our observation in *PEDF II* that "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," so long as the assets are directed to entities "dedicated to effectuating" Section 27's purpose of conserving and maintaining Pennsylvania's natural resources. *Id.* at 314 n.21 (quoting *PEDF II*, 161 A.3d at 939).

II. Procedural History and Standard of Review

The current challenge involves PEDF's 2018 petition for review filed pursuant to the Declaratory Judgement Act, 42 Pa.C.S. §§ 7531-7541, seeking numerous declarations that certain provisions in the General Appropriations Acts of 2017 and 2018, as well as in the 2017 amendments to the Fiscal Code, violate the ERA.^[9] In its answer

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and new matter, the Commonwealth responded in opposition to each of PEDF's proposed

declarations. Ultimately, the parties filed cross-applications for summary relief, which the Commonwealth Court granted in part and denied in part.^[10] PEDF appealed to this Court,

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asking us to reverse the Commonwealth Court in relevant part and to grant the denied declarations.

In reviewing "the Commonwealth Court's decision on cross-motions for summary relief pursuant to Pa.R.A.P. 1532(b), we may grant relief only if no material questions of fact exist and the right to relief is clear." *PEDF II*, 161 A.3d at 929 (citations omitted). The parties agree that this case does not involve any issues of fact but rather solely presents pure questions of law. *PEDF IV*, 2020 WL 6193643, at *4. Thus, "our standard of review is *de novo*, and our scope of review is plenary." *PEDF II*, 161 A.3d at 929.

In challenging the constitutionality of duly enacted statutory provisions that are presumed to be constitutional, PEDF bears the burden of demonstrating that the provisions "clearly, plainly, and palpably" violate the Constitution. *Id.* As PEDF presents facial challenges to the statutes, we reiterate that "[a] statute is facially unconstitutional only where there are no circumstances under which the statute would be valid." *Germantown Cab Company v. Philadelphia Parking Authority*, 206 A.3d 1030, 1041 (Pa. 2019).

As this Court opined in *PEDF II*, our review of the Commonwealth's actions challenged under the ERA requires careful consideration of "the text of Article I, Section 27 as well as the underlying principles of Pennsylvania private trust law in effect at the time of its enactment." *Id.* at 930.

Applying basic principles of trust law, the Commonwealth must "administer the [Section 27 trust] in good faith, in accordance with its provisions and purposes and the

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interests of the beneficiaries and in accordance with applicable law." 20 Pa.C.S. § 7771. Moreover, the Commonwealth has a duty to treat the corpus of the trust with loyalty, impartiality, and prudence. *PEDF II*, 161 A.3d at 932. The duty of loyalty includes "administer[ing] the trust solely in the interest of the beneficiaries[,]" which include "all the people" of Pennsylvania, "including generations yet to come." 20 Pa.C.S. § 7772; Pa. Const. art. 1, § 27. Moreover, in acting impartially, a trustee is required to give "due regard to the beneficiaries' respective interests in light of the purposes of the trust," which requires equitable rather than equal treatment.^[11] 20 Pa.C.S. § 7773. Finally, "prudent administration" by a trustee entails administering the trust "as a prudent person would, by considering the purposes, provisions, distributional requirements and other circumstances of the trust and by exercising reasonable care, skill and caution." 20 Pa.C.S. § 7774.

In light of these broad trust principles, we reiterate that Section 27 imposes fiduciary duties on Commonwealth entities to "conserve and maintain [Pennsylvania's public natural resources] for the benefit of all the people," which includes a "duty to prevent and remedy the degradation, diminution, or depletion of our public natural resources." Pa. Const. art. 1, § 27; *PEDF II*, 161 A.3d at 932 (*quoting Robinson Twp.*, 83 A.3d at 956-57).

III. Analysis

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As stated, PEDF sought numerous declarations, which the Commonwealth Court granted in part and denied in part. PEDF filed a direct appeal from that determination to this Court, again raising numerous challenges, which can be grouped in four categories. First, PEDF challenges the use of Lease Fund monies to fund the general operations of the DCNR. Second, PEDF faults the allocation of Lease Fund monies for environmental projects outside of the Marcellus Shale region from which the monies derived. Third, PEDF contends that the repeal of the Oil and Gas Lease Fund Act and the transfer

of the Lease Fund to the control of the General Assembly violates the ERA. Finally, PEDF challenges specific statutory provisions governing the funding of the Lease Fund and appropriations to other funds. We address these issues *seriatim*.^[12]

A. Funding the General Operations of the DCNR

PEDF seeks a declaration that Sections 104(P) and 1601 of the General Appropriation Acts of 2017 and 2018 violate the Commonwealth's trustee duties by using trust resources to pay for the general operations of the DCNR.^[13] PEDF specifically

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contends that revenue from oil and gas leases of State forest and park lands deposited in the Lease Fund should not be appropriated to pay DCNR's general operations, including *inter alia*, the "salaries, wages or other compensation and travel expenses" of DCNR officers and employees of the Commonwealth, or for the "purchase or rental of goods and services" or "any other expenses . . . necessary for the proper conduct of the duties, functions and activities." Section 104(P). PEDF maintains that Section 27 does not authorize the Commonwealth "to sell State Forest assets to generate revenue for the general operating expenses of DCNR," as such sales would deplete the resource, contrary to the goal of conserving and maintaining Pennsylvania's natural resources. PEDF.Supp. Brief at 7.

PEDF additionally argues that these General Appropriations Act provisions violate Section 25 by using Lease Fund monies to replace appropriations from the General Fund. As an explanation for its position, PEDF alleges that the "passage of an annual appropriation act to fund general government operations for the current fiscal year is an Article III responsibility of the Commonwealth and cannot infringe" on the people's rights under Article I, Section 27, which are "excepted out of the general powers of government

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and shall forever remain inviolate" under Section 25. PEDF Brief at 28 (quoting Pa. Const. art. 1, § 25). It contends that Commonwealth entities cannot violate their obligations as Section 27 trustees in order "to fulfill their constitutional duties under Articles III, IV, or V of the Pennsylvania Constitution to raise revenue to fund general budgetary matters." PEDF.Supp. Brief at 3.

The Commonwealth refutes PEDF's argument by observing that "[c]onservation and maintenance activities are not accomplished in a vacuum: they require people and equipment." *PEDF IV*, 2020 WL 6193643, at *5. It contends that the funding of DCNR's general operations is a proper use of trust fund assets as the funding allows DCNR to perform its trustee duties to conserve and maintain Pennsylvania's public natural resources; the Commonwealth emphasizes that "DCNR's main purpose is to effectuate Section 27." Cmwlth. Supp. Brief at 7. It highlights that trust law provides for trustees "to incur expenses which are necessary or appropriate to carry out the purposes of the trust and are not forbidden by the terms of the trust." *Id.* at 11 (quoting Restatement (Second) of Trusts § 188 (1959)).

The Commonwealth contrasts the provisions challenged herein with the statutes deemed unconstitutional in *PEDF II*, which "removed DCNR's ability to act as trustee because the funds were placed in the General Fund, potentially for non-conservation purposes." Cmwlth. Brief at 14 (quoting *PEDF II*, 161 A.3d at 927). In contrast, the current provisions "appropriate the funds directly to the DCNR so that it can continue its conservation and maintenance efforts." *Id.* Thus, the Commonwealth asserts that the allocation of lease fund monies for DCNR's general operation does not violate the Commonwealth's trustee duties under the ERA.

Rather than resolving the constitutionality of using trust resources to fund DCNR's operations, the Commonwealth Court instead relied upon its then-recent analysis in *PEDF III*,

which this Court subsequently respectfully rejected in *PEDF V*. As discussed

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supra, the Commonwealth Court in *PEDF III* reasoned that one-third of the revenue derived from rents and bonus payments could be used for non-trust purposes under the Act of 1947, applicable at the time of the ERA's adoption.

Applying the *PEDF III* analysis to the instant case, the Commonwealth Court distinguished the royalty transfers that this Court deemed unconstitutional in *PEDF II* from the current provisions, which involved transfers from the Lease Fund generally, thus including not only royalties but also rents and bonus payments. Given this distinction, the court held that one-third of the proceeds derived from rents and bonus payments in the Lease Fund could be allocated to non-trust purposes under *PEDF III*. Having reasoned that it did not violate fiduciary duties for the Commonwealth to utilize one-third of these funds for non-trust purposes, the Commonwealth Court concluded that PEDF failed to demonstrate that the statute was "facially unconstitutional" under Section 27, as it was possible that the challenged transfers could have been encompassed within the one-third deemed non-trust assets. *PEDF IV*, 2020 WL 6193643, at *7.^[14]

While it is understandable that the Commonwealth Court utilized its *PEDF III* analysis in the instant case given that it predated *PEDF V*, this portion of the court's analysis cannot stand as it is directly contrary to *PEDF V*. *PEDF V*, 255 A.3d at 293. We nevertheless affirm the Commonwealth Court's ultimate holding, denying PEDF's motion seeking a declaration that Sections 104(P) and 1601 of the General Appropriations Acts of 2017 and 2018 violated the ERA. *See Ario v. Ingram Micro, Inc.*, 965 A.2d 1194, 1200 (Pa. 2009) ("[A]n appellate court may uphold an order of a lower court for any valid reason appearing from the record").

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In addressing PEDF's claim, we apply fundamental principles of Pennsylvania trust law. As explained in *PEDF II*, a "trustee may use the assets of the trust only for purposes authorized by the trust or necessary for the preservation of the trust." *PEDF II*, 161 A.3d at 933 (internal quotation marks omitted). One of the basic duties of a trustee is to administer the trust, and Pennsylvania's trust law provides that a trustee may incur costs in administering the trust, so long as the costs "are reasonable." 20 Pa.C.S. § 7775.^[15] The Uniform Trust Law as adopted in Pennsylvania further empowers a trustee to pay "the compensation of the trustee and employees and agents of the trustee and other expenses incurred in the administration of the trust." 20 Pa.C.S. § 7780.6(a)(8) (listing "illustrative powers of trustee"); *see also* 20 Pa.C.S. § 7769 ("A trustee is entitled to be reimbursed out of the trust property . . . [for] expenses that were properly incurred in the administration of the trust.").

As applied to the trust created by Section 27, this basic trust law clearly empowers the Commonwealth, as trustee, to incur reasonable costs in administering the trust to conserve and maintain Pennsylvania's public natural resources. As noted by the Commonwealth, conservation and maintenance does not occur in a vacuum but instead require people and materials, and in particular the people and materials of the DCNR, which is the cabinet-level advocate for our State forest and park lands, as well as other natural resources. 71 P.S. § 1340.101(b). DCNR's primary mission is, *inter alia*, "to maintain, improve and preserve State parks [and] to manage State forest lands," which

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are indisputably in furtherance of the purposes of the Section 27 trust.^[16] *Id.* Given these statutory responsibilities, we conclude that the use of trust assets to fund DCNR's operations is within the authority of the Commonwealth as trustee to incur costs in administering the Section 27 trust, absent demonstration that these administrative costs

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are unreasonable or that the DCNR has failed to act with prudence, loyalty, or impartiality in carrying out its fiduciary duties.^[17]

As we conclude that PEDF failed to demonstrate that the provisions violate Section 27, we likewise find no violation of Section 25. Accordingly, we affirm the Commonwealth Court's denial of PEDF's requested declaration.

B. Funding Environmental Projects Outside of the Marcellus Shale Region

PEDF seeks a declaration that Sections 104(P) and 1601 violate the ERA by allocating funds derived from oil and gas leasing in Pennsylvania's Marcellus Shale region for environmental projects in other parts of the state. It avers that Commonwealth trustees should not be permitted "to deplete, degrade, or diminish our State Forest and Park public natural resources to benefit another resource." PEDF Brief at 45. Utilizing the term "State Forest and Park trust corpus," PEDF contends that the corpus of this trust should be reserved solely for the region from which the revenue derived to remedy any detrimental effects of the Marcellus Shale leasing. *Id.*

The Commonwealth responds that the plain language of Section 27 does not provide geographic restrictions on the use of trust resources. The Commonwealth instead emphasizes this Court's recognition that trustees have "discretion with respect to the proper treatment of the corpus of the trust," so long as that discretion is exercised in support of the purpose of the trust. Cmwlth. Brief at 17 (quoting *PEDF II*, 161 A.3d at 933). It stresses that the Section 27 trust extends to the conservation and maintenance

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of public natural resources across Pennsylvania, such that it is appropriate for DCNR to expend trust resources to "address the broad environmental threats faced by Pennsylvania," including those outside the Marcellus Shale region. *Id.* at 18. Indeed, it contends that restricting the use of these funds to the

Marcellus Shale region would arguably violate the Commonwealth's fiduciary duty of impartiality to the beneficiaries across Pennsylvania. Cmwlth. Supp. Brief at 19, 26. Moreover, the Commonwealth observes that at the time of the ERA's enactment, use of the Lease Fund was not restricted to the area that produced the funds but instead was intended to be used "for conservation, recreation, dams, or flood control." *Id.* at 19 (quoting 71 P.S. § 1331 (repealed)).

In reviewing these claims, the Commonwealth Court found PEDF's proposed geographic restriction of the use of funds to be "myopic," when the Commonwealth was confronting a multitude of "environmental threats from climate change to polluted waters to invasive species." *PEDF IV*, 2020 WL 6193643, at *8. The court instead opined that DCNR had discretion as trustee to determine how trust funds should be used to conserve and maintain all of Pennsylvania's natural resources. Accordingly, the court denied PEDF's requested declaration and granted the Commonwealth's related declaration, holding that "the appropriations contained in Sections 104(P) and 1601 of the General Appropriation Acts of 2017 and 2018 to the DCNR for the operation of State parks and forests are not facially unconstitutional." *Id.* at *9.

While rejecting PEDF's declaration that the fund must be limited to the Marcellus Shale region, the Commonwealth Court nevertheless "caution[ed] the Commonwealth that the failure to remedy the degradation, diminution, or depletion of the State forests and parks impacted by Marcellus wells - the very public resources harmed in order to generate these funds - may constitute a failure to preserve the trust and a dereliction of its fiduciary duties under Section 27." *Id.* at *9 n.16.

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As noted by the Commonwealth Court, the broad language of Section 27 instructs that "Pennsylvania's public natural resources are the common property of all the people, including generations yet to come" and that the

Commonwealth, as "trustee of these resources," "shall conserve and maintain them for the benefit of all the people." Pa. Const. art. 1, § 27. Absent from this language is any regional segmentation of trust assets or beneficiaries nor a prioritization of regions deserving of conservation and maintenance efforts. Contrary to PEDF's terminology, our charter does not create a "State Forest and Park trust corpus." Instead, Section 27 speaks in the unifying terms of "Pennsylvania's natural resources" and twice encompasses "all the people." *Id.*

Accordingly, we affirm the Commonwealth Court's denial of PEDF's proposed declaration seeking to regionalize Pennsylvania natural resources and to limit expenditure of oil and gas revenue to the Marcellus Shale Region from which it derived.^[18]

C. Oil and Gas Lease Fund Challenges

PEDF next asks this Court to deem unconstitutional the 2017 repeal of the 1955 Oil and Gas Lease Fund Act,^[19] and the enactment of Section 1601.2-E of the Fiscal Code,

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which "continued" the Lease Fund "as a special fund in the State Treasury." 2017 Fiscal Code Amendments § 20(2)(i); 72 P.S. § 1601.2-E(a).^[20] The effect of Section 1601.2-E is

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to remove the Lease Fund from the sole control of the DCNR, where its use was restricted to "conservation, recreation, dams, or flood control," and instead to transfer the control to the General Assembly. 71 P.S. § 1331 (repealed). Subsection (c), however, directs that "[m]oney in the [Lease Fund] may only be used as provided under subsection (e) [directing specific annual transfers] or as annually appropriated by the General Assembly." 72 P.S. § 1601.2-E(c). Subsection (c) additionally mandates that "the General Assembly shall consider the Commonwealth's trustee duties under section 27 of Article I of the Constitution of Pennsylvania," when making appropriations from the Lease

Fund. 72 P.S. § 1601.2-E(c).

PEDF asserts that the repeal of the Oil and Gas Lease Fund Act and transfer of the Lease Fund in Section 1601.2-E violated the Environmental Rights Amendment because the General Assembly eliminated the restrictions on the use of the funds that had been explicitly imposed by the Oil and Gas Lease Fund Act. It also claims that the removal of the Lease Fund from DCNR's control eliminated the prior arrangement whereby DCNR had the statutory authority both to lease State forest and park lands for oil and gas exploration and extraction and to dispense funds to remedy any harm resulting from those leases. PEDF deems the restrictions imposed by subsection (c) on the General Assembly to be insufficient, asserting that subsection (c) fails to restrict Lease Fund monies solely for conservation and maintenance of Pennsylvania's natural resources.

In response, the Commonwealth emphasizes that the repeal and transfer did not result in the elimination of the Lease Fund but rather the explicit continuation of the Lease Fund as a "special fund in the State Treasury," 72 P.S. § 1601.2-E(a). Moreover, the Commonwealth highlights this Court's observation in *PEDF II*, that "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," as the ERA imposes trustee

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duties not merely on the DCNR but on all Commonwealth entities. Cmwlth. Brief at 19 (quoting *PEDF II*, 161 A.3d at 939).

The Commonwealth additionally highlights that the plain language of subsection (c) explicitly directs the General Assembly to consider its trustee duties under the ERA when making appropriations, in contrast to the provisions deemed unconstitutional in *PEDF II*, which allowed for unrestricted transfers to the General Fund for non-trust uses. Indeed, it argues that any appropriation by the General Assembly of Lease Fund monies for non-trust

purposes would violate Section 1601.2-E(c), in addition to Section 27.

The Commonwealth Court addressed PEDF's challenges to subsections (a) and (c) separately. In addressing the "continuation" of the Lease Fund in subsection (a), the Commonwealth Court rejected PEDF's facial challenge, concluding that the absence of explicit restrictions on the use of the Lease Fund in the text of Section 1601.2-E(a) did not violate Section 27, given that all Commonwealth entities were bound by "Section 27's constitutional requirement that trust principal must be used for trust purposes." *PEDF IV*, 2020 WL 6193643, at *11.

The court, however, found support in *PEDF II* for PEDF's challenge to subsection (c). Specifically, it equated subsection (c)'s language, dictating that the "General Assembly shall consider the Commonwealth's trustee duties under [S]ection 27," to language that this Court deemed inadequate to remedy the constitutional violation in *PEDF II*, where Section 1602-E instructed that the "General Assembly shall consider the adoption of an allocation to municipalities impacted by a Marcellus well." *PEDF IV*, 2020 WL 6193643, at *13.

The Commonwealth Court, nevertheless, concluded that Section 1601.2-E(c) did not facially violate Section 27 relying again upon its analysis in *PEDF III*, which deemed it permissible to use one-third of the non-royalty revenues for non-trust purposes. In so doing, the court distinguished the section deemed unconstitutional by this Court in *PEDF*

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II, which solely involved a transfer of royalties, from the section at issue in the current case, which directed a transfer from the Lease Fund generally. Given that it was possible that the transfers could be encompassed within the one-third that it viewed as permissible to use for non-trust purposes, the court concluded that PEDF failed to demonstrate that Section 1601.2-E(c) facially violated the ERA. Accordingly, the

Commonwealth Court granted the Commonwealth's application for declaratory relief and denied PEDF's contrary application.

As with the Commonwealth Court's analysis of PEDF's challenge to the use of Lease Fund assets for DCNR's general operations, we affirm the court's denial of PEDF's proposed declaration but diverge from its reasoning to the extent it relies upon the now-rejected analysis in *PEDF III* permitting one-third of non-royalty revenues to be used for non-trust purposes. In contrast, we conclude that the decision in *PEDF II* answers PEDF's challenge to both Subsections 1601.2-E(a) and (c).

In *PEDF II*, we observed that "that 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," because DCNR is not the only Commonwealth entity with a fiduciary duty under Section 27. *PEDF II*, 161 A.3d at 939. Instead, all Commonwealth entities, including the General Assembly, are bound to conserve and maintain Pennsylvania's public natural resources. *PEDF II*, 161 A.3d at 931 n.23. Thus, as we explained in both *PEDF II* and *PEDF V*, "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." *PEDF II*, 161 A.3d at 939; *PEDF V*, 255 A.3d at 314 n.21.

Section 1601.2-E(c) expressly reminds the General Assembly of its duties in administering the Lease Fund mandating that "the General Assembly shall consider the Commonwealth's trustee duties under section 27 of Article I of the Constitution of Pennsylvania." 72 P.S. § 1601.2-E(c). In contrast to the Commonwealth Court and the

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Concurring and Dissenting Opinion, we find subsection (c)'s reiteration of the General Assembly's Section 27 duties to be entirely distinguishable from the constitutionally insufficient provision in Section 1602-E, under review in *PEDF II*, which merely directed the

Commonwealth to "consider . . . an allocation to municipalities impacted by a Marcellus well." 72 P.S. § 1602-E. The fact that both statutes use the verb "consider" does not render them equivalent. Rather, the operative portion of the provision is what follows the verb: specifically, what must be considered. While one requires consideration of mandatory trustee duties imposed by Section 27, the other suggests a specific allocation of resources to one of many potentially constitutional purposes.

We further observe that the language of subsection (c) seems intended to remedy the fault identified in *PEDF II*. In that case, we criticized the statute reviewed therein for the absence of any "indication that the General Assembly considered the purposes of the public trust or exercised reasonable care in managing the royalties in a manner consistent with its Section 27 trustee duties." *PEDF II*, 161 A.3d at 938. The current language addresses these failings by expressly requiring that "the General Assembly shall consider the Commonwealth's trustee duties under section 27 of Article I of the Constitution of Pennsylvania." 72 P.S. § 1601.2-E(c). Thus, we reject PEDF's facial challenge to the repeal of the Oil and Gas Lease Fund Act and its continuation in Section 1601.2-E. ^[21]

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While Section 1601.2-E(c) is facially constitutional as it requires the General Assembly to consider its mandatory trustee duties and does not authorize the Commonwealth to use trust assets for non-trust purposes, our holding herein does not negate the potential of an as applied challenge to the General Assembly's ultimate appropriation of the Lease Fund. We reiterate that in expending funds from the newly transferred Lease Fund, the General Assembly has a duty to conserve and maintain the Section 27 trust assets which "implicates a duty to prevent and remedy the degradation, diminution, or depletion of our public natural resources" and a duty to act toward the corpus of the trust "with prudence, loyalty, and impartiality." *PEDF II*, 161 A.3d at 932 (quoting *Robinson Twp.*, 83 A.3d at 956-57). ^[22]

D. Section 1601.2-E(b) - Commingling of Funds

PEDF next challenges the constitutionality of Section 1601.2-E(b), which sets forth the "sources" of the Lease Fund. Specifically, it provides for the inclusion in the Lease

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Fund of trust assets of "rents and royalties from oil and gas leases of land owned by the Commonwealth" along with funds derived from the Indigenous Mineral Resources Development Act and "[a]ny other money appropriated or transferred to the fund."^[23] PEDF contends that this comingling of trust and non-trust assets violates the basic trust principle requiring a trustee to maintain separate accounts for trust assets. The Commonwealth responds that Section 27 does not mandate separate accounts.

The Commonwealth Court rejected PEDF's assertions, determining that the addition of other funds to the Oil and Gas Lease Fund did not render the statute facially unconstitutional given that the statute could be applied constitutionally if the Commonwealth appropriated the entirety of the funds solely for trust purposes. The court cautioned, however, that a constitutional issue could arise if the Lease Fund was used for non-trust purposes. Thus, it opined that the Commonwealth trustees should maintain "a clear accounting and identification of corpus funds . . . to ensure that these funds are properly used in strict compliance with Section 27."^[24] *Id.* at *12. It concluded, however, that while the Commonwealth should engage in an accounting, the absence of language requiring an accounting did not render Section 1601.2-E(b) unconstitutional.

We affirm the Commonwealth Court's holding. We reiterate that a party challenging a duly-enacted statute has the burden of demonstrating that the statute "clearly, plainly, and palpably violates the Constitution." *PEDF II*, 161 A.3d at 929 (internal quotation marks omitted). In this case, PEDF failed to demonstrate that Section 1601.2-

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E(b) is facially unconstitutional given that the Commonwealth may fulfill the dictates of Section 1601.2-E(b) without violating its trustee duties under Section 27, by segregating the monies from the different funds and keeping an accurate accounting.^[25] Moreover, as noted by the Commonwealth Court, it may avoid improper expenditure of the funds by restricting the Lease Fund's use solely to trust purposes. Accordingly, we conclude that PEDF failed to demonstrate that Section 1601.2-E(b) is facially unconstitutional.

E. Section 1726-G of the Fiscal Code

Finally, PEDF challenges Section 1726-G's transfer of funds from the Keystone Recreation, Park and Conservation Fund ("Keystone Fund") to the General Fund.^[26] It emphasizes that the Keystone Fund had previously been used by the DCNR to improve

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State forest and parks.^[27] PEDF claims that reducing this line of funding constitutes a violation of the Commonwealth's trustee obligations under Section 27, which should have entailed public notice and an evaluation of the effect of the transfer of these funds on DCNR and the projects affected by the reduced funding.

The Commonwealth Court denied relief to PEDF. The court observed that the Keystone Fund derives not from the proceeds of oil and gas leasing but instead from the sales of bonds and notes and the State Realty Transfer Tax. *PEDF IV*, 2020 WL 6193643, at *15 (citing 32 P.S. § 2014). Thus, it opined that "the transfer of funds from the Keystone Fund to the General Fund does not run afoul of Section 27 or impugn the Commonwealth's fiduciary duties as trustee." *Id.*

The Commonwealth Court additionally rejected PEDF's claim that the Commonwealth entities breached their fiduciary duties by failing to provide public evaluation of the

environmental impact of the transfer from the Keystone Fund. The court concluded that Commonwealth entities are not obligated by their fiduciary responsibilities under Section 27 to provide public evaluation of every transfer of non-trust funds that might implicate Pennsylvania's natural resources.

We affirm the Commonwealth Court's denial of PEDF's proposed declaration in regard to Section 1726-G based upon its conclusion that the transfer from the Keystone Fund does not implicate Section 27. As the Commonwealth Court observed, the Keystone Fund does not involve trust assets but rather allocates funds derived from non-trust sources of Commonwealth revenue. We likewise do not find support in Section 27 or basic trust law for PEDF's claim that the Commonwealth must provide a public evaluation for every decision that could potentially impact Pennsylvania's natural resource trust.

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IV. Conclusion

For the reasons set forth above, we affirm the order of the Commonwealth Court, while rejecting that portion of the court's analysis derived from its decision in *PEDF III*, 214 A.3d 748.

Justices Todd, Donohue and Mundy join the opinion.

Justice Donohue files a concurring opinion in which Justice Todd joins.

Former Justice Saylor did not participate in the consideration or decision of this matter.

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CONCURRING OPINION

JUSTICE DONOHUE

I join the Majority and write separately to address the concerns voiced by my learned colleagues regarding the potential use of trust assets for non-trust activities. While I agree that

in operation the statute may prove to be unconstitutional, I do not believe it is facially so. I conclude that the Commonwealth Court's order requiring the Commonwealth to account for asset expenditures, as specifically requested by the PEDF, will bring any as-applied constitutional defects to light. Indeed, I would not join the Majority Opinion if it "[d]eem[ed] the entirety of DCNR's budget to be a reasonable cost of trust administration[.]" Concurring and Dissenting Op. at 8 (Wecht, J.). The Commonwealth Court rejected that conclusion, and we do so again today.

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I briefly elaborate on two parts of the Commonwealth Court's opinion that I deem pertinent to Justices Dougherty and Wecht's conclusion that Sections 104(P) and 1601 of the General Appropriations Acts of 2017 and 2018 are facially unconstitutional. The PEDF asserted that these provisions are

facially unconstitutional because they authorize the appropriation of Lease Fund money for general government operations. According to the Foundation, the Commonwealth cannot use any of the proceeds from oil and gas deposited in the Lease Fund to pay for the DCNR's general government operations, which include salaries and travel expenses, contract fees, vehicle and equipment purchases and maintenance, office rentals, and other similar expenses.

PEDF v. Commonwealth, 2020 WL 6193643 at *5 (Pa. Commw. 2020) ("*PEDF IV*").

The Commonwealth responded that "[c]onservation and maintenance activities are not accomplished in a vacuum: they require people and equipment." *Id.* The Commonwealth sought its own declaration "that its current usage of the Lease Fund is wholly consistent with its Section 27 trustee responsibilities." *Id.*

The Commonwealth Court denied both declarations. With respect to the PEDF's

challenges, the Majority Opinion cogently explains the Commonwealth Court's reasons and why that result is still correct following *PEDF v. Commonwealth*, 255 A.3d 289 (Pa. 2021) ("*PEDF V*"). As to the Commonwealth's requested declaration, the Commonwealth Court stated:

In sum, because the Lease Fund contains both trust principal and other deposits, we cannot declare that the appropriations contained in Sections 104(P) and 1601 of the General Appropriation Acts of 2017 and 2018 for the DCNR's government operations are facially unconstitutional. By the same token, we are also unprepared to grant the Commonwealth's sweeping request that its current usage is wholly consistent with its Section 27 trustee responsibilities. Such a declaration requires an as-applied analysis, which we

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are not prepared to address in this matter. Therefore, we deny both the Foundation's and the Commonwealth's cross-Applications in this regard.

PEDF IV, 2020 WL 6193643 at *8.

I agree with this analysis. The Commonwealth sought a declaration that everything the DCNR does "is wholly consistent" with its fiduciary duties, but the court could not make that determination in the context of a facial challenge. The Commonwealth Court returned to this same point when ruling on the PEDF's request for "a declaration that the Commonwealth must maintain a detailed accounting of monies in the Lease Fund and how they are used." *Id.* at *16. The Commonwealth Court granted that request for the same reason it denied the Commonwealth's requested declaration.

Although the Commonwealth tracks the source of the monies as they are

deposited into the Lease Fund, once in the Lease Fund, money is no longer earmarked or maintained in separate accounts, but is instead "commingled." Petitioner's Brief, Exhibit A, Commonwealth's Answer and Objections to First Set of Interrogatories, ¶¶3a, 3b, 3c. According to the Commonwealth, "it is not possible to identify the originating source of the total monies in the Lease Fund on a particular day." *Id.* Further compounding the problem are the transfers of money from the Lease Fund to the General Fund and beyond. As the money shuffles from one fund to the next, money loses any trace of its originating source.

While money classified as trust principal must be spent on trust purposes, money classified as income need not comply with the same spending restrictions. *PEDF III*, 214 A.3d at 774. By commingling monies in the Lease Fund without classification and by not maintaining adequate records, the Commonwealth is neglecting its fiduciary duties. *See* 20 Pa. C.S. § 7780. It is impossible for this Court to determine whether the money appropriated and transferred from the Lease Fund is trust principal, and whether trust principal is being used in a constitutional manner. Thus, an accounting is necessary to ensure that the assets of the trust are being used only for purposes authorized by the trust or necessary for the preservation of the trust in accordance with Section

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27. *See PEDF II*, 161 A.3d at 939; *PEDF III*, 214 A.3d at 774. Therefore, we grant the Foundation's Application for Summary Relief in this regard and

declare that the Commonwealth, as trustee of Pennsylvania's public natural resources, is required to keep detailed accounts of the trust monies derived from the oil and gas leases and track how they are spent as part of its administration of the trust.

Id. at *17.

The Commonwealth did not file a cross-appeal from this holding. Thus, I disagree with Justice Wecht's claim that the Majority Opinion holds that the DCNR's entire budget is a reasonable cost of administering the trust. The Commonwealth unsuccessfully sought that type of declaration from the Commonwealth Court, and we, like that court, say only that the provisions are not facially unconstitutional. The Commonwealth must comply with the Commonwealth Court's order to keep detailed accounts, which permits the PEDF to raise as-applied challenges.

Justice Wecht argues that there is no need to wait for an as-applied challenge and says that the Majority misapplies the standard of review for facial challenges. Justice Wecht opines that Sections 104(P) and 1601 of the General Appropriations Acts of 2017 and 2018 share the same flaws as the provisions struck in *PEDF v. Commonwealth*, 161 A.3d 911 (Pa. 2017) ("*PEDF II*"), as both cases involved "transferr[ing] trust assets from the Lease Fund to pay for DCNR's general operations." Concurring and Dissenting Op. at 6-7 (Wecht, J.). *PEDF II* and this case differ in one critical respect: the fund at issue in *PEDF II* was funded entirely with trust assets, while the current fund may not be. The Oil and Gas Lease Fund examined in *PEDF II* stated:

All rents and royalties from oil and gas leases of any land owned by the Commonwealth, except rents and royalties received from game and fish lands, shall be placed in a special fund to be known as the "Oil and Gas Lease Fund"

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which fund shall be exclusively used for conservation, recreation, dams, or flood control or to match any Federal grants which may be made for any of the aforementioned purposes.

PEDF II, 161 A.3d at 920 n.1.

Thus, every dollar put into that fund was from the sale of trust assets, and following *PEDF V* each dollar must go to a trust purpose. The General Assembly, however, has since reconstituted that fund. Section 1601.2-E states that the former Oil and Gas Lease Fund exists as a special fund in the State Treasury and is funded from three sources:

(b) Sources.--The following shall be deposited into the fund:

(1) Rents and royalties from oil and gas leases of land owned by the Commonwealth, except rents and royalties received from game and fish lands.

(2) Amounts as provided under section 5 of the act of October 8, 2012 (P.L. 1194, No. 147), known as the Indigenous Mineral Resources Development Act.

(3) Any other money appropriated or transferred to the fund.

72 P.S. § 1601.2-E (footnote omitted).

The first source undeniably represents trust assets. At least facially, the second source does as well.^[1] The third source does not so long as the "other money" transferred

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to the fund is not from the sale of trust assets. As stated in *Clifton v. Allegheny County*, 969 A.2d 1197 (Pa. 2009), the following principles apply to a facial challenge.

Even under the "plainly legitimate sweep" standard, a statute is only

facially invalid when its invalid applications are so real and substantial that they outweigh the statute's "plainly legitimate sweep." Stated differently, a statute is facially invalid when its constitutional deficiency is so evident that proof of actual unconstitutional applications is unnecessary. For this reason (as well as others), facial challenges are generally disfavored. *See Wash. State Grange*, 552 U.S. at ___, 128 S.Ct. at 1191 ("Facial challenges are disfavored for several reasons. Claims of facial invalidity often rest on speculation. As a consequence, they raise the risk of 'premature interpretation of statutes on the basis of factually barebones records.'") (quoting *Sabri v. United States*, 541 U.S. 600, 609, 124 S.Ct. 1941, 158 L.Ed.2d 891 (2004)).

Id. at 1223 n.37.

In *PEDF II*, the statutes were facially unconstitutional because they "plainly ignore[d] the Commonwealth's constitutionally imposed fiduciary duty to manage the corpus of the environmental public trust for the benefit of the people to accomplish its purpose-conserving and maintaining the corpus by, inter alia, preventing and remedying the degradation, diminution and depletion of our public natural resources." *PEDF II*, 161 A.3d at 938. As the Commonwealth Court in this case pointed out, the *PEDF II* provisions authorized the General Assembly to take trust assets and appropriate them to the General Fund, where they would be clearly spent on non-trust purposes. In terms of a plainly legitimate sweep, the invalid applications of the *PEDF II* provisions were so evident that proof of actual unconstitutional application was unnecessary.

That type of deficiency is not present here for two reasons. First, the Oil and Gas Lease Fund may contain non-trust assets. Thus, on its face the statute is constitutional

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if the appropriation included non-trust asset monies which were sufficient to cover all non-trust activities. Second, the appropriation of monies from the Oil and Gas Lease Fund to the DCNR for, inter alia, "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 and for payment of any other expenses, as provided by law or by this act," Maj. Op. at 12 n.13 (quoting provisions), may include costs legitimately allocable to trust administration. All members of the Court agree that at least some of these activities would qualify as trust activity. Justice Dougherty observes that the DCNR's "mission goals of economic use of state forests, recreation, and heritage conservation are not explicitly related to the trustees' Article I, Section 27 duties to conserve and maintain public natural resources." Concurring and Dissenting Op. at 6 (Dougherty, J.). I express no view on which set of activities would qualify as trust purposes and which would not. Facial challenges are disfavored and at this juncture I fail to see how the Court can address which of the DCNR's activities qualify as trust activities. We lack any factual basis to rule on that issue.

That said, I am highly sensitive to the possibility that the General Assembly has violated its fiduciary duties by creating a funding scheme that forces DCNR to utilize trust assets for non-trust purposes.^[2] *PEDF II* "solidif[ied] the jurisprudential sea-change begun

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by Chief Justice Castille's plurality in *Robinson Township v. Commonwealth*, 83 A.3d 901, 950-51 (Pa. 2013) (plurality)," *PEDF II*, 161 A.3d at 940 (Baer, J., concurring and dissenting), and nothing in today's opinion undermines our precedents. Simultaneously, we must presume good faith on the part of the General Assembly. The General Assembly's reconstitution of the Oil and Gas Lease Fund, and its potential inclusion of funding from non-trust sources must be read at this juncture as facially complying with its

constitutional trustee duties.^[3] In this regard, the General Assembly and the Treasury, as

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the depository for Oil and Gas Lease Fund monies, must account for the trust asset portion of the fund and the DCNR must account for the expenditure of those trust assets. This requirement follows from our recognition in *PEDF II* that "[t]rustee obligations are not vested exclusively in any single branch of Pennsylvania's government, and instead all agencies and entities of the Commonwealth government, both statewide and local, have a fiduciary duty to act toward the corpus with prudence, loyalty, and impartiality." *PEDF II*, 161 A.3d at 931 n.23.

The Commonwealth Court has already concluded that because the Commonwealth failed to maintain adequate records by not classifying monies in the Lease Fund and tracking expenditures of trust assets, it neglected its fiduciary duties. *PEDF IV*, 2020 WL 6193643 at *17. It further declared that the Commonwealth is required "to maintain accurate records of the Lease Fund and track trust principal as part of its trustee duties[.]"^[4] *Id.* Pursuant to our decision in *PEDF V*, the Commonwealth Court's limitation of the account to principal is obsolete and a detailed account must be maintained for all revenue generated from oil and gas leasing activity.^[5]

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In sum, I recognize the concerns voiced by Justices Dougherty and Wecht, but for the reasons stated, this facial challenge cannot succeed.^[6] The Commonwealth's

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preparation of the detailed accounts will allow as-applied challenges to be filed. I therefore join the Majority's Opinion with the understanding that any as-applied challenge will ensure that the Commonwealth is not, in fact, diverting trust assets to non-trust purposes.^[7]

CONCURRING OPINION

MUNDY JUSTICE

I join the Majority Opinion. I write separately to note my position with regard to the Commonwealth's use of funds generated from leasing the oil and gas rights of state land.

Article I Section 27 of the Pennsylvania Constitution, the Environmental Rights Amendment (ERA), states

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As the trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the People.

Pa. Const. art. 1, § 27. In *PEDF v. Commonwealth*, 161 A.3d 911 (Pa. 2017) (*PEDF II*), we explained that the ERA established "a public trust, pursuant to which the natural

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resources are 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.

As trustee, the Commonwealth should not be required to appropriate all funds obtained through oil and gas leases on state forest and park land solely to remediate or cure environmental damage caused by extraction of oil and gas. The Conservation and Natural Resources Act ("CNRA") gives the Department of Conservation and Natural Resources ("DCNR") authority to enter into oil and gas leases for state forest and park land. These lands are clearly part of the trust created by Section 27. Therefore, as the Majority observes, the Commonwealth has a duty as trustee to treat

these lands with loyalty, impartiality, and prudence. Majority Opinion at 11 (citing *PEDF II*, 161 A.3d at 932). Consistent with this duty, the CNRA directs that DCNR may only lease state park and forest land "whenever it shall appear to the satisfaction of [DCNR] that it would be for the best interest of the Commonwealth to make such disposition of those minerals." 77 P.S. §§ 1340.302(6) (State Forests), 1340.303(9) (State Parks). If the granting of such leases would cause such environmental damage to the extent that all proceeds acquired from those leases were needed to remediate and cure such environmental damage, it would be difficult, if not impossible, for DCNR to argue that granting those leases was in the best interest of the Commonwealth. As long as DCNR complies with its statutory obligation to only enter into oil and gas leases that are in the best interest of the Commonwealth there should be lease funds available for use beyond that needed for environmental remediation. In my view, the Commonwealth acts consistent with its trustee duties by allocating those funds for trust purposes beyond remediating and curing environmental damages related to the extraction of the oil and gas.

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CONCURRING AND DISSENTING OPINION

JUSTICE DOUGHERTY

I agree with the Majority Opinion in large part: I fully join Sections III.B and III.E; I agree Pennsylvania trust law allows trustees to use trust funds to pay for reasonable costs incurred in administering the trust, *see* Majority Opinion at 16; and I agree 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,'" *id.* at 24, *quoting Pennsylvania Environmental Defense Foundation v. Commonwealth*, 161 A.3d 911, 939 (Pa. 2017) ("*PEDF II*"). But respectfully, in light of this Court's decisions in *PEDF II* and *PEDF v. Commonwealth*, 255 A.3d 289 (Pa. 2021) ("*PEDF V*"), I cannot agree that Sections

104(P) and 1601 of the General Appropriations Acts of 2017 and 2018, and Sections 1601.2-E(b) and (c) of the Fiscal Code are facially constitutional.

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In *PEDF II*, we held Article I, Section 27 of the Pennsylvania Constitution "establishes a public trust, pursuant to which the natural resources are the corpus of the trust, the Commonwealth¹ is the trustee, and the people are the named beneficiaries." 161 A.3d at 931-32. We adopted this principle following the sound plurality reasoning set forth in *Robinson Township v. Commonwealth*, 83 A.3d 901 (Pa. 2013):

As trustee, the Commonwealth is a fiduciary obligated to comply with the terms of the trust and with standards governing a fiduciary's conduct. The explicit terms of the trust require the government to "conserve and maintain" the corpus of the trust. The plain meaning of the terms conserve and maintain implicates a duty to prevent and remedy the degradation, diminution, or depletion of our public natural resources. As a fiduciary, the Commonwealth has a duty to act toward the corpus of the trust - the public natural resources - with prudence, loyalty, and impartiality.

Id. at 932, quoting *Robinson Township*, 83 A.3d at 956-57 (quoting Pa. Const. art. I, §27).

Considering those general duties, the *PEDF II* Court held:

Pennsylvania's environmental trust thus imposes two basic duties on the Commonwealth as the trustee. First, the Commonwealth has a duty to prohibit the degradation, diminution, and depletion of our public natural resources, whether these harms might result from direct state action or from the actions of private

parties. Second, the Commonwealth must act affirmatively via legislative action to protect the environment.

Id. at 933 (citation omitted).

We then evaluated provisions of the Fiscal Code in light of those articulated duties. Section 1602-E provided:

Notwithstanding any other provision of law and except as provided in section 1603-E, no money in the fund from royalties may be expended unless appropriated or transferred to the General Fund by the General Assembly from the fund. In making appropriations, the General Assembly shall consider the adoption of an allocation to municipalities impacted by a Marcellus well.

72 P.S. §1602-E. Next, Section 1603-E allowed for a maximum of \$50,000,000 to be appropriated to the Department of Conservation and Natural Resources ("DCNR"), and merely specified the DCNR "shall give preference to the operation and maintenance of

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State parks and forests." 72 P.S. §1603-E. We held these provisions were facially unconstitutional because they "lack[ed] any indication that the Commonwealth is required to contemplate, let alone reasonably exercise, its duties as the trustee of the environmental public trust created by the Environmental Rights Amendment." *PEDF II*, 161 A.3d at 937 (emphasis added).

We further explained Section 1602-E was facially unconstitutional because it moved money to the General Fund without limitation on its use, and it "merely require[d] the General Assembly to 'consider' allocating these funds to municipalities impacted by a Marcellus well." *Id.* Section 1603-E was facially unconstitutional because it imposed a maximum of "up to \$50,000,000" for appropriations to the DCNR from the Lease Fund and only required the

DCNR to "give preference to the operation and maintenance of State parks and forests' rather than to conservation purposes." *Id.* at 937-38, quoting 72 P.S. §1603-E. Thus, we reiterated, "there [was] no indication that the General Assembly considered the purposes of the public trust or exercised reasonable care in managing the royalties in a manner consistent with its Section 27 trustee duties." *Id.* at 938 (emphasis added). We elaborated the provisions "plainly ignore[d] the Commonwealth's constitutionally imposed fiduciary duty to manage the corpus of the environmental public trust for the benefit of the people to accomplish its purpose-conserving and maintaining the corpus by, inter alia, preventing and remedying the degradation, diminution[,] and depletion of our public natural resources[,] because they "permit[ted] the trustee to use trust assets for non-trust purposes, a clear violation of the most basic of a trustee's fiduciary obligations." *Id.* (emphasis added).

Because statutes relating to the trust cannot "permit the trustee to use trust assets for non-trust purposes," such laws must plainly indicate both that the relevant trustee "is required to contemplate[and] reasonably exercise" its fiduciary duties. *Id.* at 937-38

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(emphasis added). Section 1602-E was not saved by the fact it "merely require[d] the General Assembly to 'consider'" acting toward a trust purpose. *Id.* Mere consideration is insufficient - trustees must also affirmatively "exercise[] reasonable care" in administering the trust. *See id.* And we held Section 1603-E was likewise deficient despite the fact it required the DCNR to give preference to the operation and maintenance of State forests and parks (which, depending on the DCNR's consequent choices, could have resulted in - but did not require - the use of trust assets for trust purposes). *See id.*

In *PEDF V*, we applied *PEDF II* to find two more provisions of the Fiscal Code unconstitutional. *See* 255 A.3d at 314. We held income generated from bonuses, rental payments, and penalty interest must be returned

to the corpus of the trust. *See id.* Once we reached that conclusion, we determined Fiscal Code Sections 1604-E and 1605-E and Section 1912 of the Supplemental General Appropriations Act of 2009 were facially unconstitutional. *See id.* Those provisions simply directed the transfer of specific amounts of money from the Lease Fund to the General Fund.^[1] Thus, in both *PEDF II* and *PEDF V*, this Court struck down statutes that permitted the Commonwealth to spend trust funds without prohibiting the expenditure of trust funds for non-trust purposes. Even

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though the Commonwealth was a trustee charged with administering the trust, the statutes were not saved by the fact the Commonwealth was essentially given the option to act pursuant to its fiduciary duties under the legislative enactments.

The statutes at issue in the current litigation are similarly infirm. Starting with the provisions of the General Appropriations Acts of 2017 and 2018, Sections 104(P) and 1601 fail to facially indicate the General Assembly must "reasonably exercise[] its duties as the trustee of the environmental public trust[.]" *PEDF II*, 161 A.3d at 937. Instead, the provisions allow the appropriation of Lease Fund money to the DCNR for general operations purposes, including for expenses such as compensation, travel expenses, and purchase or rental of goods and services. *See* §§104(P), 1601, Act of July 11, 2017, P.L. 1279; §§104(P), 1601, Act of June 22, 2018, P.L. 1203. After aptly explaining that trust law generally permits trustees to incur reasonable costs in the administration of the trust, the majority holds these specific appropriations comply with Article I, Section 27 because the DCNR is the "cabinet-level advocate for our State forest and park lands, as well as other natural resources" and its "primary mission is, *inter alia*, 'to maintain, improve and preserve State parks [and] to manage State forest lands[.]'" Majority Opinion at 17, quoting 71 P.S. §1340.101(b). The majority contends the responsibilities in that select quotation "are indisputably in furtherance of the purposes of

the Section 27 trust" and, further, "decline[s] to determine whether all of DCNR's statutory responsibilities qualify as trust purposes[.]" *Id.* at 17 & n.16. But I do dispute that assertion.^[2]

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The DCNR has responsibilities other than conservation and maintenance. More fully, its mission is to:

maintain, improve and preserve State parks, to manage State forest lands to assure their long-term health, sustainability and economic use, to provide information on Pennsylvania's ecological and geologic resources and to administer grant and technical assistance programs that will benefit rivers conservation, trails and greenways, local recreation, regional heritage conservation and environmental education programs across Pennsylvania.

71 P.S. §1340.101(b). The DCNR's mission goals of economic use of state forests, recreation, and heritage conservation are not explicitly related to the trustees' Article I, Section 27 duties to conserve and maintain public natural resources. Despite the majority's failure to consider whether the DCNR only performs trust-furthering functions, that determination is critical to the facial constitutionality of these provisions. Where Sections 104(P) and 1601 provide trust assets to the DCNR for all of its general

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operations, and the DCNR performs functions that **do not** further trust purposes, the statutes are facially unconstitutional because they "permit the trustee to use trust assets for non-trust purposes, a clear violation of the most basic of a trustee's fiduciary obligations." *PEDF II*, 161 A.3d at 938. The majority bypasses this issue because PEDF "presents a facial challenge to the use of trust assets for DCNR's general operations, rather than challenging DCNR's use

of trust funds for specific administrative costs." Majority Opinion at 17 n.16. But *PEDF II* and *PEDF V* also involved facial challenges.

In those cases, we recognized the fact the General Assembly **could** have used the Lease Fund money for trust purposes, once it was moved to the General Fund, was not enough to save the challenged statutes. We held the text of the provisions must indicate consideration and reasonable exercise of the trustee's fiduciary duties. Similarly here, the fact the DCNR **might** use the Lease Fund money only for general operations that would further trust purposes rather than for other aspects of its mission is inadequate. Under *PEDF II*, the statutes must facially require that the funds be used only for trust purposes under Article I, Section 27. Essentially, using Lease Funds for "general operations" may be constitutional, but only if those "general operations" further trust purposes. Indeed, the majority acknowledges the possibility not all of the DCNR's functions further trust purposes. *See id.* Since Sections 104(P) and 1601 facially "permit the trustee to use trust assets for non-trust purposes," they are invalid under *PEDF II*. 161 A.3d at 938.

Section 1601.2-E(c) of the Fiscal Code is similarly flawed. That provision states:

Money in the [Lease Fund] may only be used as provided under subsection (e) or as annually appropriated by the General Assembly. In making an appropriation from the fund, the General Assembly shall

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consider the Commonwealth's trustee duties under section 27 of Article I of the Constitution of Pennsylvania.

72 P.S. §1601.2-E(c) (emphasis added). In *PEDF II*, we held Section 1602-E was facially unconstitutional because it "merely require[d] the General Assembly to '**consider**' allocating these funds to municipalities impacted by a

Marcellus well." 161 A.3d at 937 (emphasis added). Mere consideration of fiduciary duties is insufficient under *PEDF II*, yet mere consideration is all that Section 1601.2-E(c) requires. The majority attempts to distinguish *PEDF II*, stating "[w]hile one requires consideration of mandatory trustee duties imposed by Section 27, the other suggests a specific allocation of resources to one of many potentially constitutional purposes." Majority Opinion at 26. But that distinction does not address the fact that mere consideration of the trust purposes is insufficient under *PEDF II*; the trustees must also reasonably **exercise** their duties. See 161 A.3d at 937.^[3]

The majority further "observe[s] that the language of subsection (c) seems intended to remedy the fault identified in *PEDF II*" that Section 1602-E lacked "any 'indication that the General Assembly considered the purposes of the public trust or exercised reasonable care in managing the royalties in a manner consistent with its Section 27 trustee duties.'" Majority Opinion at 26, quoting *PEDF II*, 161 A.3d at 938. The majority reasons in a footnote that "[t]he statute's arguably inarticulate use of the verb 'consider' does not negate the mandatory nature of the General Assembly's Section 27 duties." *Id.* at 27 n.21. But again, on its face, Section 1601.2-E(c) only requires the

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General Assembly to consider its trustee duties, not reasonably exercise them. And, respectfully, in *PEDF II* and *PEDF V*, the mere existence of the General Assembly's trustee duties under Section 27 was not enough to save what could have then been similarly characterized as "arguably inarticulate" text. Since we deemed such language deficient in *PEDF II*, I would find Section 1601.2-E(c) facially unconstitutional.^[4]

Finally, Section 1601.2-E(b) of the Fiscal Code is facially unconstitutional because it allows the General Assembly, without restriction, to commingle trust funds with its own funds and other non-trust funds. Section 1601.2-E(b) states:

(b) **Sources.**--The following shall be deposited into the fund:

(1) Rents and royalties from oil and gas leases of land owned by the Commonwealth, except rents and royalties received from game and fish lands.

(2) Amounts as provided under section 5 of the act of October 8, 2012 (P.L. 1194, No. 147),¹ known as the Indigenous Mineral Resources Development Act.

(3) Any other money appropriated or transferred to the fund.

72 P.S. §1601.2-E(b). As the majority explains, "[a] trustee has a duty to maintain 'adequate records of the administration of the trust' and to 'keep trust property separate

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from the trustee's own property.'" Majority Opinion at 29 n.25, quoting 20 Pa.C.S. §7780(a), (b). But Section 1601.2-E(b)(3) expressly permits the General Assembly to commingle trust funds with "[a]ny other money appropriated or transferred to the fund." 72 P.S. §1601.2-E(b)(3). On its face, Section 1601.2-E(b) allows the Commonwealth to commingle its own funds with trust funds, which would violate its duties as a trustee. See 20 Pa.C.S. §7780(b). Section 1601.2-E(b) also fails to require an accounting if "[a]ny other money appropriated or transferred to the fund" is non-trust money. See *id.* at §7780(a). In direct contravention of the Commonwealth's duties as a trustee, the provision puts no limits on the money that can be commingled with trust money within the Lease Fund. See *id.*; see also Restatement (Second) of Trusts §179 ("The trustee is under a duty to the beneficiary to keep the trust property separate from his individual property, and, so far as it is reasonable that he should do so, to keep it separate from other property not subject to the trust, and to see that the property is designated as property of the trust."). Thus, "there is no indication that the General Assembly

considered the purposes of the public trust or exercised reasonable care in managing the [trust funds] in a manner consistent with its Section 27 trustee duties." *PEDF II*, 161 A.3d at 938. I would therefore find Section 1601.2-E(b) facially unconstitutional.

In her concurring opinion, Justice Donohue suggests this commingling of funds is why the General Assembly can facially permit Lease Fund money to be spent on all of DCNR's general operations. See Concurring Opinion at 5-7 (Donohue, J.). But as the saying goes, two wrongs do not make a right. The General Assembly cannot obfuscate its fiduciary duty to prevent the spending of trust money on non-trust purposes by breaching its other fiduciary duty not to commingle funds. And contrary to Justice Donohue's assertion that Section 1601.2-E(b)'s commingling of funds differentiates this case from *PEDF II*, this case presents an analogous scenario. As explained in *PEDF II*,

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Section 1602-E required Lease Fund money to be moved into the General Fund before it could be spent. See *PEDF II*, 161 A.3d at 921-22. Thus, Section 1602-E essentially commingled trust money with the Commonwealth's money in the General Fund, and then allowed the General Assembly to appropriate those funds without clear limitations. In fact, in *PEDF V*, we described Section 1602-E's functions as follows:

The most significant change was Section 1602-E, which stated that no Lease Fund royalty money, with an exception discussed next, should be expended unless appropriated or transferred to the general budgetary fund by the General Assembly. Thus, all the royalties in the Lease Fund would be transferred to a larger pool of money, whereupon the General Assembly would allocate back to the DCNR whatever amount it saw fit.

PEDF V, 255 A.3d at 294 (emphasis added). Under that scheme, it was possible the General

Assembly could have spent the trust funds on trust purposes entirely once they were moved to the General Fund, just as Justice Donohue now suggests it is possible that the non-trust funds commingled with the trust corpus within the Lease Fund would cover any non-trust purposes. But, of course, we found Section 1602-E facially unconstitutional in *PEDF II* because it permitted the spending of trust funds on non-trust purposes.^[5] The Commonwealth cannot enact legislation facially permitting the spending of trust money on non-trust purposes simply because it first commingles the money with other funds. To hold otherwise would contradict *PEDF II* and provide the Commonwealth a perverse incentive to breach its fiduciary duty not to commingle funds.

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In sum, the majority frames its opinion by PEDF's burden in this case: "[i]n challenging the constitutionality of duly enacted statutory provisions that are presumed to be constitutional, PEDF bears the burden of demonstrating that the provisions 'clearly, plainly, and palpably' violate the Constitution." Majority Opinion at 10, quoting *PEDF II*, 161 A.3d at 929; see also *id.* at 27 n.21 (relying on 1 Pa.C.S. §1922(3) as "providing that in interpreting legislative intent, courts may presume '[t]hat the General Assembly does not intend to violate the Constitution'"). It then finds PEDF failed to meet its burden because the Commonwealth could still - in theory - act according to its fiduciary duties under the provisions at issue. While this rationale has some appeal, we are bound by the dictates of *stare decisis*. In *PEDF II*, we held statutes are facially unconstitutional - that they "clearly, plainly, and palpably" violate Article I, Section 27 - where they "permit the trustee to use trust assets for non-trust purposes[.]" *PEDF II*, 161 A.3d at 938.^[6] In *PEDF V*, we applied that premise to hold provisions that simply transferred money from the Lease Fund to the General Fund were facially unconstitutional. Like the provisions we struck down in *PEDF II* and *PEDF V*, Sections 104(P) and 1601 of the General

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Appropriations Acts of 2017 and 2018 and Sections 1601.2-E(b) and (c) of the Fiscal Code lack explicit language requiring trust funds be used for trust purposes, demonstrating the General Assembly failed to consider trust purposes or exercise reasonable care in administering the trust. I would therefore hold those provisions facially unconstitutional.

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CONCURRING AND DISSENTING OPINION

JUSTICE WECHT

Article I, Section 27 of the Pennsylvania Constitution, known as the Environmental Rights Amendment ("ERA"), created a public trust to conserve and maintain Pennsylvania's public natural resources.^[1] In *Pennsylvania Environmental Defense Foundation v. Commonwealth*, 161 A.3d 911, 938 (Pa. 2017) (*PEDF II*), this Court struck

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down as facially unconstitutional certain budgetary appropriations authorizing the use of trust corpus for the general operations of the Department of Conservation and Natural Resources ("DCNR").

Shortly thereafter, the Commonwealth once again appropriated trust corpus for DCNR's general operations for the 2017 and 2018 fiscal years.^[2] The Pennsylvania Environmental Defense Foundation ("PEDF") again challenged these legislative appropriations as violating the ERA. The Majority rejects PEDF's arguments and approves of the 2017 and 2018 appropriations. According to the Majority, the

Commonwealth's "use of trust assets to fund DCNR's operations is within the authority of the Commonwealth as trustee to incur costs in administering the Section 27 trust, absent demonstration that these administrative costs are unreasonable or that the DCNR has failed to act with prudence, loyalty, or impartiality in carrying out its fiduciary duties."^[3] I disagree.

The budgetary appropriations that the Majority upholds today share the same constitutional infirmities that doomed the prior appropriations in *PEDF II*. The Majority's holding that the Commonwealth is entitled to use trust corpus to fund DCNR's general operations as a reasonable trustee expense cannot be squared with *PEDF II*.

The Majority further upholds legislation permitting the Commonwealth to commingle trust assets with non-trust assets without accounting for how trust assets are disbursed. In my view, this legislation is facially unconstitutional because it does not demand of the Commonwealth, as trustee, transparent accounting to demonstrate that its treatment of trust corpus conforms with the public trust established by the ERA.

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Accordingly, I dissent from the Majority's holding in Parts III.A, III.D, and IV. PEDF also raises a number of additional challenges that the Majority rejects in turn. I agree that these additional challenges do not warrant relief. Accordingly, I join Parts I, II, III.B, III.C, and III.E.

In 1955, the General Assembly established the Oil and Gas Lease Fund ("Lease Fund") to receive "all rents and royalties from oil and gas leases" executed on the Commonwealth's forest and park lands and to use these funds "exclusively for conservation, recreation, dams, or flood control."^[4] Against this backdrop, the ERA was adopted in 1971 as part of Article I of the Pennsylvania Constitution.^[5]

As we have explained, the ERA established an environmental public trust for the benefit of the people that imposes fiduciary duties upon the Commonwealth as trustee. We delineated the scope of this public trust in *PEDF II*: "The third clause of Section 27 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."^[6] The purpose of the trust is the conservation and maintenance of Pennsylvania's public natural resources.^[7] The Commonwealth,

as trustee, has the duty "to prevent and remedy the degradation, diminution, or depletion of our public natural resources" and to act toward the trust corpus with "prudence, loyalty, and impartiality."^[8] All proceeds from the sale of

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trust assets remain part of the trust corpus.^[9] Trust assets can only be used for the trust purpose of conservation and maintenance of the Commonwealth's public natural resources.

When the legislature created DCNR in 1995, it provided that "all moneys" paid into the Lease Fund were appropriated directly to DCNR.^[10] Beginning in 2009, however, the General Assembly enacted budgetary legislation that transferred money in the Lease Fund to pay for government operations. In particular, Sections 1602-E and 1603-E pertained to fiscal year 2009 and provided that money in the Lease Fund could only be expended if it was first "appropriated or transferred to the General Fund by the General Assembly," or if it was part of an annual appropriation for DCNR of \$50 million. Additionally, those provisions required that preference be given not to conservation but "to the operation and maintenance of State parks and forests."^[11] In 2013, and again in 2014-2015, the General Appropriations Acts decreased the appropriation to DCNR from the General Fund and simultaneously increased the appropriation to DCNR from the Lease Fund. This resulted "in a larger portion of monies from the Lease Fund being used to pay for DCNR's operational expenses, which had previously been funded by the General Fund, and thus reduced the amount of monies available for DCNR's conservation activities."^[12]

The ERA was implicated in a series of challenges brought by PEDF to these budgetary enactments, all of which were premised upon the argument that using funds generated by the environmental trust for non-trust purposes was unconstitutional. In

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PEDF II, we agreed that all royalties from oil and

gas leases on State forest and park lands must be returned to the trust corpus. Several years later, in *PEDF V*, this Court further held that all income generated from such oil and gas leases must be returned to the corpus to benefit the conservation and maintenance of the public natural resources for all people as a matter of trust law.

These challenges to legislative appropriations that diminished the constitutional trust established by the ERA indicated that using money in the Lease Fund for purposes unrelated to the conservation and maintenance of public natural resources violated the Commonwealth's fiduciary duties. Applying trust principles, this Court struck down as facially unconstitutional Sections 1602-E and 1603-E, concluding that "without any question, these legislative amendments permit the trustee to use trust assets for non-trust purposes, a clear violation of the most basic of a trustee's fiduciary obligations."^[13] In reaching this conclusion, we observed that the legislative and executive branches had restricted the allocation of Lease Fund monies to DCNR by using the Lease Fund to support DCNR's overall budget instead of funding DCNR from the Commonwealth's General Fund, the effect of which was to reduce the amount of money available for conservation purposes.^[14]

In our constitutional analysis, we repeatedly distinguished between DCNR's conservation activities and its general operations. For example, we observed that, "while the Lease Fund Act requires that the funds generated by leasing be 'exclusively used for conservation, recreation, dams, or flood control,'" Section 1603-E "designates that preference be given instead 'to the operation and maintenance of State parks and

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forests."^[15] We likewise compared DCNR's "operational expenses" to its "conservation activities,"^[16] and DCNR's "overall budget" to its "conservation purposes."^[17] In finding Section 1603-E to be unconstitutional, we relied upon the legislation's requirement that DCNR "give

preference to the operation and maintenance of State parks and forests" as opposed to "conservation purposes."^[18] While the latter priority aligns with the trust purpose of conservation and maintenance of public natural resources, the former did not. Because Sections 1602-E and 1603-E of the Fiscal Code prioritized Lease Fund assets to pay for DCNR's general operations, rather than conservation, it was unconstitutional.^[19] In *PEDF V*, the Court continued to distinguish "operation and maintenance" from "conservation, recreation, dams, or flood control" as well as DCNR's "overall budget" from "conservation purposes."^[20]

PEDF's present challenge is levied against, *inter alia*, Sections 1601 and 104(p) of the General Appropriations Acts of 2017 and 2018, which appropriated funds from the Lease Fund to pay for DCNR's general operations. These provisions suffer from the same constitutional defects identified in Sections 1602-E and 1603-E in *PEDF II*. Each provision transferred trust assets from the Lease Fund to pay for DCNR's general

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operations. The budgetary appropriations challenged herein unconstitutionally appropriate trust funds to pay for DCNR's general operating expenses to the same extent as former sections 1602-E and 1603-E. Under *PEDF II*, they should suffer the same fate.

Our analysis in *PEDF II* recognized that using trust assets to fund DCNR's general operations reduced the amount of money available to pay for conservation activities and was inconsistent with the Commonwealth's Section 27 trustee duties. The constitutional obligation to conserve and maintain "implicates a duty to prevent and remedy the degradation, diminution, or depletion of our public natural resources."^[21] Using funds from the trust corpus to fund DCNR's general operations would deplete, degrade, and diminish the very public natural resources DCNR is required to conserve and maintain. Under our precedent, legislation that attempts to use the corpus of the

environmental trust to fund anything other than conserving and maintaining the corpus is unconstitutional.

The Majority reads *PEDF II*'s rejection of Sections 1602-E and 1603-E as being premised upon the unrestricted transfer of trust assets to the General Fund, rather than upon the use of trust assets to fund DCNR's general operations.^[22] I disagree. Woven throughout our constitutional analysis of these budgetary provisions is a repeated distinction between DCNR's conservation activities and its operational expenses. Our constitutional holding flowed directly from our recognition of this distinction.

The Majority also deems the entirety of DCNR's operational budget to amount to the costs of administering the environmental trust, for which the use of trust assets is permitted absent a showing that these costs "are unreasonable or that the DCNR has

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failed to act with prudence, loyalty, or impartiality."^[23] Once again, I cannot agree. Whether trust corpus can be used to pay for DCNR's general operations would depend upon whether the general operations are "necessary or appropriate to carry out the purposes of the trust."^[24] In *PEDF II*, we described the challenged budgetary appropriations as decreasing the appropriation to DCNR from the General Fund and increasing the appropriation from the Lease Fund to DCNR, "resulting in a larger portion of monies from the Lease Fund being used to pay for DCNR's operational expenses, which had previously been funded by the General Fund, and thus reduced the amount of monies available for DCNR's conservation activities."^[25] Because those appropriations unconstitutionally used the trust corpus as a funding source to offset decreases in appropriations to DCNR from the General Fund, they were invalid under the ERA. Deeming the entirety of DCNR's budget to be a reasonable cost of trust administration today is therefore contrary to our holding in *PEDF II* to strike fiscal

code provisions that authorized the use of the Lease Fund to pay for DCNR's general operations.

The Majority shrugs away any tension between our reasoning in *PEDF II* and today's holding because the case *sub judice* presents a facial challenge. Accordingly, the Majority explains, we do not have to determine which of DCNR's responsibilities qualify as trust purposes.^[26] I cannot agree. In relying upon this distinction, the Majority overlooks the fact that *PEDF II* was also a facial challenge. This Court was able there to

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examine the legislation, and we determined that it misappropriated trust corpus. The same is true here.

More importantly, the Majority has inverted the analysis. Because *PEDF* is bringing a facial challenge, this Court must address whether the challenged legislation facially permits the depletion of trust corpus for non-trust purposes. To do so, we must address what parts of DCNR's general operations are or are not related to conservation. If a portion of trust corpus is being diverted for non-trust purposes, then *PEDF*'s facial challenge would be successful. In explicitly leaving open the possibility that trust corpus will be spent on things unrelated to the conservation and maintenance of public natural resources (which might then be struck down in an as-applied challenge),^[27] the Majority is sanctioning the unconstitutional use of trust corpus for non-trust purposes. This we cannot do.

In his concurring and dissenting opinion, Justice Dougherty opines that the budgetary legislation challenged in this case is facially unconstitutional. In reaching this conclusion, Justice Dougherty observes that DCNR's responsibilities extend beyond conservation, including managing the economic use of state forests, recreation, and heritage conservation. To the extent that DCNR's general operations are broader than the trust purpose of conservation and maintenance of public natural

resources, Justice Dougherty believes that using trust corpus to fund these general operations is facially unconstitutional.^[28] As explained herein, I agree. In particular, DCNR's statutory duties include managing state forest lands to assure their economic use.^[29] The statutory directive to exploit the Commonwealth's public natural resources for their economic use

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presents an obvious conflict with the constitutional obligation to use the trust corpus solely to prevent the degradation, diminution, and depletion of these resources.

Using lease fund money to fund DCNR's general operations is constitutional only to the extent that general operations further the trust purpose of conservation and maintenance of public natural resources. Because Sections 104(P) and 1601 reflect no limitation on the use of trust corpus to fund DCNR, I would hold that they are facially unconstitutional under *PEDF II*. With these budgetary appropriations, the Commonwealth is deploying public natural resources to raise revenue and offset its obligation to fund government operations. On this basis alone, I would hold that *PEDF* has lodged a successful facial challenge.

The Commonwealth's obligation to fund our government exists independently from the Commonwealth's duties as trustee. "From the perspective of the settlors, the ERA was enacted when the Commonwealth was already devoting the revenues generated by mineral leases to conservation purposes."^[30] Redirecting those revenues to general operations is inconsistent with the backdrop against which the ERA was enacted. A trustee's ability to use trust corpus to cover reasonable trustee expenses alleviates the expenses associated with being trustee. It does not relieve the Commonwealth of its independent obligation to fund government operations.

If the Commonwealth is permitted to use trust corpus to fund DCNR's general operations, then the public natural resources that the Commonwealth is obligated to conserve and

maintain are depleted, degraded, and diminished in order to fulfill the Commonwealth's obligation to fund the costs of government. The Commonwealth would alleviate its funding obligation through its trustee duties, degrading the corpus of the same trust it has the duty to conserve and maintain. In using the corpus of the trust to replace

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appropriations from the General Fund, the Commonwealth is failing to preserve the 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 public natural resources.^[31] It is inconsistent with the Commonwealth's duty as trustee under the ERA "to conserve and maintain" our public natural resources to deplete this trust corpus to pay for DCNR's general operating costs.^[32]

Although I disagree with the Majority's analysis of Sections 104(P) and 1601, I observe that the Majority does not foreclose an as-applied challenge to budgetary appropriations that are not necessary or appropriate to carry out the purpose of the trust.^[33] Generally speaking, a trustee who seeks to encumber the trust with expenses incurred in maintaining and administering the trust has the burden of justifying those expenses.^[34] Every expenditure must be made in accord with the terms of the trust itself.^[35] The Commonwealth should not perceive a rejection of PEDF's facial challenge as approving of characterizing every expense associated with DCNR as a reasonable cost of administering the trust.

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I recognize that the Lease Fund at issue today is not the same Lease Fund that we evaluated in *PEDF II*. In particular, Section 1601.2-E(b) now establishes three funding sources for the Lease Fund:

- (1) Rents and royalties from oil and gas leases of land owned by the Commonwealth, except rents and

royalties received from game and fish lands.

- (2) Amounts as provided under section 5 of the act of October 8, 2012 (P.L. 1194, No. 147), known as the Indigenous Mineral Resources Development Act.

- (3) Any other money appropriated or transferred to the fund.

72 P.S. § 1601.2-E(b).

The consequence of Section 1601.2-E(b), taken together with Sections 104(P) and 1601 of the General Appropriations Acts, is that trust corpus and non-trust corpus are commingled in the Lease Fund, and that expenditures from the Lease Fund are being made for trust and non-trust purposes alike. The use of non-trust corpus for non-trust purposes, even if these funds pass through the Lease Fund, is of no moment to the ERA. The ERA is violated when trust corpus is expended for non-trust purposes. To ensure constitutional compliance, the Commonwealth, as trustee, is responsible for tracking every dollar that constitutes trust corpus from the moment it is generated until the moment it is spent on conservation. The Commonwealth, therefore, violates its fiduciary duties under the ERA whenever it permits commingling without an accounting.^[36]

There presently is no requirement to account for the source of dollars as they are deposited into the Lease Fund under Section 1601.2-E(b), nor to identify the purpose for which that money is spent under Sections 104(P) and 1601. Without such accounting,

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the Commonwealth fails to ensure the constitutional collection and disbursement of assets belonging to the trust. The Commonwealth presently is failing to account for the origin of the assets in the Lease Fund, to account for how Lease Fund money is spent, or to establish whether the expenses that the Commonwealth claims as a trustee are

reasonable. Indeed, as the Commonwealth conceded in the Commonwealth Court, under the current state of the law, "it is not possible to identify the originating source of the total monies in the Lease Fund on a particular day."^[37]

In the Commonwealth Court, PEDF sought a declaration that the Commonwealth must maintain detailed accounting of monies in the Lease Fund and how the money is used. Relying upon its own precedent in *Pennsylvania Environmental Defense*

Foundation v. Commonwealth, 214 A.3d 749 (Pa. Cmwlth. 2019), which this Court reversed in *PEDF V*, the Commonwealth Court held that money classified as trust principal must be spent on trust purposes, while money classified as income need not comply with spending restrictions.^[38] By failing to account for money in the Lease Fund, the Commonwealth was, according to the Commonwealth Court, neglecting its fiduciary duties. To remedy this breach, the Commonwealth Court imposed an accounting obligation to ensure that trust assets—which, at that time, was understood solely as trust principal—are being used constitutionally.

The Commonwealth does not rely upon the current configuration of the Lease Fund to save Sections 104(P) and 1601. Nor could the Commonwealth make such an argument without an accounting to support it. Rather, like the Majority, the

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Commonwealth argues that it is entitled to use the Lease Fund to pay for DCNR's general operations as a trustee expense related to conservation.

I am not convinced that the change wrought in the Lease Fund by Section 1601.2-E(b) warrants a departure from *PEDF II*. The lack of any accounting obligation or restriction of the use of trust assets solely for trust purposes on the part of the Commonwealth as trustee clearly, plainly, and palpably violates the Constitution. The extent to which we can evaluate the constitutionality of Lease Fund

expenditures depends upon the Commonwealth's adherence to its constitutional duty as fiduciary to maintain accurate accounts of money flowing into and out of the Lease Fund, an obligation with which the Commonwealth has made no effort to comply.^[39]

The possibility that only non-trust corpus in the Lease Fund is being expended upon DCNR's non-conservation activities is not plausible. As developed in the

Commonwealth Court below, of the funds available in the Lease Fund to pay the \$61,291,000 appropriated for DCNR's annual budget in 2017-2018, eighty-five percent was derived from royalties paid under state forest oil and gas leases, and another fourteen percent was derived from bonus and rental payments paid under those leases.^[40] This

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means that ninety-nine percent of the Lease Fund was trust corpus. In 2018, the Commonwealth appropriated \$48,798,000 from the Lease Fund to pay for DCNR's annual budget which, again, was almost all derived from oil and gas leases. Considering the non-conservation purposes to which this money is put (as developed herein as well as in Justice Dougherty's Concurring and Dissenting Opinion), it is not plausible that trust fund corpus is *not* being expended for non-trust purposes.^[41]

To the extent that Justice Donohue believes that the Commonwealth Court's order directing the Commonwealth to maintain accurate accounts saves the budgetary legislation from facial unconstitutionality, I cannot agree. First, the legal foundation of the Commonwealth Court's order is shaky at best, tied as it is to a prior Commonwealth Court decision that this Court reversed in *PEDF V*. Second, the scope of the Commonwealth Court's order is unclear. When must the Commonwealth comply with the directive to provide an accounting? Is this a routine obligation, or is it dependent upon a third party challenge to particular disbursements? Is it prospective, or does it

relate to the 2017 and 2018 budgetary legislation? Assuming that the obligation applies to the present dispute, the Commonwealth already has indicated that it is impossible for it to know from one day to the next the source of money in the Lease Fund. We cannot in good faith uphold

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legislation of apparent unconstitutionality by relying upon an unpublished, unappealed intermediate appellate court order premised upon reversed precedent with which the Commonwealth believes it cannot comply.

Third, attempting to save the challenged legislation from a facial challenge by linking the statutes to the Commonwealth Court's order implicitly recognizes that the statutes, on their face, clearly, plainly, and palpably violate the constitution. The statutes as they stand do not comport with the constitutional fiduciary requirement of an accounting.

Fourth, in rejecting the present facial challenge, the Majority and Justice Donohue favor shifting any claims of unconstitutionality to as-applied challenges based upon whatever accounting the Commonwealth believes it must comply. This is untenable. The ERA imposes fiduciary obligations upon the Commonwealth of constitutional magnitude. These obligations make the Commonwealth accountable, as trustee, to track and disclose every dollar of trust corpus. Without this obligation appearing on the face of the legislation itself, Section 1601.2-E(b) cannot withstand constitutional scrutiny. Rejecting this facial challenge shifts to third parties such as PEDF the expense and burden of sifting through the Commonwealth's accounting in order to lodge as-applied challenges to particular disbursements. Relying upon third parties to monitor the Commonwealth's compliance with its constitutional obligations is no substitute for judicial review of unconstitutional statutes.

The result of the Majority's analysis is the unavoidable degradation, diminution, and depletion of the constitutional trust corpus.

Because trust assets return to the trust corpus and cannot be used for non-trust purposes, I dissent from Parts III.A, III.D, and IV of the Majority Opinion. I join Parts I, II, III.B, III.C, and III.E.

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Notes:

^[1] Article I Section § 27, entitled "Natural resources and the public estate." provides in full as follows:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

Pa. Const. art. 1, § 27.

^[2] General Appropriations Act of 2017, Act of July 11, 2017, P.L. 1279, No. 1A, §§ 104(P), 1601; General Appropriations Act of 2018, Act of June 22, 2018, P.L. 1203, No. 1A, §§ 104(P), 1601; 72 P.S. §§ 1601.2-E; 1726-G.

^[3] 71 P.S. §§ 1331-1333 (repealed).

^[4] PEDF's declaratory judgment actions have generated numerous opinions from this Court and the Commonwealth Court. As the parties to these actions are identical, so too are the captions. Accordingly, we will use the following numerical indicators to differentiate the opinions, which we describe in more detail in the body of this opinion.

The Commonwealth Court first addressed PEDF's challenges to the 2009-2015 budgetary provisions in *PEDF v. Commonwealth*, 108 A.3d 140 (Pa. Cmwlth. 2015) ("*PEDF I*"), which this

Court reversed in *PEDF v. Commonwealth*, 161 A.3d 911 (Pa. 2017) ("*PEDF II*"), concluding that royalties from the oil and gas leasing must be returned to the trust corpus and remanding for the Commonwealth Court to apply private trust principles to address the bonus payments, rents, and interest payments. On remand, the Commonwealth Court applied what it deemed to be relevant private trust law principles in *PEDF v. Commonwealth*, 214 A.3d 748 (Pa. Cmwlth. 2019) ("*PEDF III*").

While the remand following *PEDF II* was pending in the Commonwealth Court, PEDF filed the instant declaratory judgment action in that court challenging the 2017 and 2018 budgetary provisions, enacted after our 2017 decision in *PEDF II*. The Commonwealth Court's unpublished decision adjudicating the challenges to the 2017 and 2018 provisions can be found at *PEDF v. Commonwealth*, 2020 WL 6193643, at *1 (Pa. Cmwlth. 2020), and will be referenced herein as *PEDF IV*.

PEDF's current appeal of *PEDF IV* was pending in this Court when we reversed the Commonwealth Court's decision in *PEDF III* in *PEDF v. Commonwealth*, 255 A.3d 289, 294 (Pa. 2021) (*PEDF V*). While we will utilize the designations of *PEDF I-V* in this opinion, we will strive to clarify the relevant decisions with descriptive phrases where possible.

^[5] Specifically, PEDF challenged 72 P.S. §§ 1602-E -1605-E as well as Act of Oct. 9, 2009, P.L. 779, No. 10A, § 1912.

^[6] The Oil and Gas Lease Fund Act is set forth in full *infra*. *PEDF II* provides a more extensive historical perspective relating to the creation of the DCNR and the Oil and Gas Lease Fund Act. *PEDF II*, 161 A.3d at 919-920.

^[7] Section 25, entitled "Reservation of powers in people" provides:

To guard against transgressions of the high powers which we have delegated, we declare that everything in this article is excepted out of the general powers of

government and shall forever remain inviolate.

Pa. Const. art. 1, § 25.

^[8] In its analysis, the Commonwealth Court utilized Section 9 of the Principal and Income Act of 1947 ("1947 Act"), which was applicable at the time of the ERA's enactment and "govern[ed] trusts where the trustee is authorized to sell, lease or otherwise develop such natural resources and no provision is made for the disposition of the net proceeds." *PEDF III*, 214 A.3d at 768 (citing Act of July 5, 1947, P.L. 1283, *as amended*, formerly 20 P.S. §§ 3470.1-3740.15). This statute apportioned proceeds of the trust between life tenants and remaindermen. *Id.* at 765.

Under this statute, life tenants were entitled to one-third of the net proceeds, while two-thirds had to be reserved to the trust corpus. Accordingly, the Commonwealth Court declined to find the remaining 2009-2015 budgetary provisions facially unconstitutional as PEDF had not demonstrated that the non-trust uses exceeded one-third of the proceeds from rent and bonus payments.

Relevantly, the Commonwealth Court applied the same analysis to PEDF's current challenges to the 2017 and 2018 budgetary provisions, as discussed *infra*. For the reasons stated in *PEDF V*, we again are restrained to reject the Commonwealth Court's analysis to the extent it relied upon the 1947 Act's division of revenue between life tenants and remaindermen.

^[9] The Commonwealth Court summarized the declarations sought by PEDF as follows:

(1) the appropriations from the Lease Fund contained in Sections 104(P) and 1601 of the General Appropriation Acts of 2017 and 2018 for the DCNR's government operations are facially unconstitutional;

(2) the use of these appropriations for environmental initiatives beyond

Pennsylvania's Marcellus Shale region are likewise facially unconstitutional;

(3) the repeal of the act commonly referred to as the 1955 Oil and Gas Lease Fund Act (1955 Lease Fund Act) is facially unconstitutional;

(4) Section 1601.2-E of The Fiscal Code is facially unconstitutional;

(5) Section 1726-G of The Fiscal Code is facially unconstitutional; and

(6) affirmative legislation and a detailed accounting are required to ensure that the Lease Fund is protected and used in accordance with Section 27.

PEDF IV, 2020 WL 6193643, at *3 (reformatted).

^[10] As will be explained in detail *infra*, the Commonwealth Court made the following determinations:

We grant [PEDF's] Application insofar as it seeks 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, and we deny the Application in all other respects.

We grant the Commonwealth's Application for Summary Relief upon concluding that 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.

We also grant the Commonwealth's declaratory request that Lease Fund money, including trust principal, may be expended on environmental

conservation initiatives beyond the Marcellus Shale region.

However, we deny the Commonwealth's Application insofar as it seeks a declaration that its current usage of the trust is wholly consistent with its Section 27 trustee responsibilities and that affirmative legislation is not necessary.

Id. at *17 (reformatted).

^[11] The duty of impartiality is defined as follows:

If a trust has two or more beneficiaries, the trustee shall act impartially in investing, managing and distributing the trust property, giving due regard to the beneficiaries' respective interests in light of the purposes of the trust. The duty to act impartially does not mean that the trustee must treat the beneficiaries equally. Rather, the trustee must treat the beneficiaries equitably in light of the purposes of the trust

20 Pa.C.S. § 7773.

^[12] Following the decision in *PEDF V*, this Court permitted the parties to file supplemental briefing. For ease of discussion, we provide a single recitation of the parties' arguments gleaned from their presentations to the Commonwealth Court as well as to this Court. We do not address the parties' arguments responding to the Commonwealth Court's analysis in *PEDF III*, which this Court subsequently rejected in *PEDF V*.

^[13] Section 104(P) of the General Appropriations Act of 2017, Act of July 11, 2017, P.L. 1279, provided as follows:

(p) Oil and Gas Lease Fund. -- 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 and for payment of any other expenses, as provided by law or by this act, necessary for the proper conduct of the duties, functions and activities and for the purposes hereinafter set forth for the fiscal year beginning July 1, 2017, and for the payment of bills incurred and remaining unpaid at the close of the fiscal year ending June 30, 2017.

The General Appropriations Act of 2018 contained a functionally identical Section 104(P). Act of June 22, 2018, P.L. 1203. We reference these provisions collectively as "Section 104(P)."

Section 1601 of the 2017 General Appropriations Act appropriated to the DCNR \$50 million for general operations, nearly \$8 million for state park operations, and approximately \$3.5 million for state forest operations. The following year, Section 1601 allocated to the DCNR approximately \$37 million for general operations, \$7.5 million for state park operations, and \$4.2 million for state forest operations.

^[14] The Commonwealth Court likewise found that PEDF's Section 25 challenge failed as it hinged on a violation of Section 27. The court additionally denied the Commonwealth's request to declare constitutional its use of Lease Fund monies for DCNR's general operations.

^[15] "In administering a trust, the trustee may incur only costs that are reasonable in relation to the trust property, the purposes of the trust and the skills of the trustee." 20 Pa.C.S. § 7775; *see also* Restatement (Second) of Trusts § 188 (1959) ("The trustee can properly incur expenses

which are necessary or appropriate to carry out the purposes of the trust and are not forbidden by the terms of the trust, and such other expenses as are authorized by the terms of the trust."). Similarly, "[a] trustee shall administer the trust as a prudent person would, by considering the purposes, provisions, distributional requirements and other circumstances of the trust and by exercising reasonable care, skill and caution." 20 Pa.C.S. § 7774.

^[16] In full, the Conservation and Natural Resources Act explains the primary mission of the DCNR as follows:

The primary mission of the Department of Conservation and Natural Resources will be to maintain, improve and preserve State parks, to manage State forest lands to assure their long-term health, sustainability and economic use, to provide information on Pennsylvania's ecological and geologic resources and to administer grant and technical assistance programs that will benefit rivers conservation, trails and greenways, local recreation, regional heritage conservation and environmental education programs across Pennsylvania.

71 P.S. § 1340.101; *see also* 71 P.S. §§ 1340.302-312 (setting forth DCNR's statutory authority). Our colleagues in dissent on this issue question whether all of DCNR's statutory responsibilities are consistent with its Section 27 trustee duties to conserve and maintain Pennsylvania's public natural resources. *See* Concurring and Dissenting Opinion at 6 (Dougherty, J.) (viewing aspects of DCNR's mission as "not explicitly related to the trustees' Article I, Section 27 duties").

Respectfully, we decline to determine whether all of DCNR's statutory responsibilities qualify as trust purposes because PEDF, in the current litigation, presents a facial challenge to the use of trust assets for DCNR's general operations,

rather than challenging DCNR's use of trust funds for specific administrative costs. We further observe that our nascent Section 27 jurisprudence has not explored what activities qualify as trust purposes. Accordingly, while it appears that many, if not all, of DCNR's responsibilities are consistent with Section 27, we do not speak to those issues herein. Rather, for purposes of this case, we conclude that the existence of these other duties does not undermine our rejection of PEDF's facial challenge to the appropriation of trust assets for DCNR's general operations, as the challenged provisions are not inconsistent with DCNR's use of the trust assets solely for trust purposes. See *Germantown Cab Company v. Philadelphia Parking Authority*, 206 A.3d 1030, 1041 (Pa. 2019) ("A statute is facially unconstitutional only where there are no circumstances under which the statute would be valid.").

^[17] We additionally address a portion of PEDF's argument relying upon our decision in *PEDF II*, which deemed unconstitutional a statutory provision that gave preference to funding "the operation and maintenance of State parks and forests" rather than conservation purposes. *PEDF II*, 161 A.3d at 937-938 (quoting 72 P.S. § 1603-E). PEDF reads our decision as deeming the funding of DCNR's general operations to be a non-trust use. Respectfully, we reject PEDF's reading because this Court in *PEDF II* did not address whether the trust funds could be used to pay DCNR's general operations, which is the issue resolved herein.

^[18] PEDF raises a related issue in its challenge to Section 1601.2-E(e) of the Fiscal Code, set forth *infra* at 22 n.20. Section 1601.2-E(e) directs specific annual transfers from the Lease Fund to the Marcellus Legacy Fund for distribution to the Environmental Stewardship Fund and the Hazardous Sites Cleanup Fund.

PEDF alleges that these transfers violate Section 27 because these funds support statewide projects that are not limited to the Marcellus Shale region and not controlled by the DCNR, and also because these funds were previously supported through non-trust sources, including a waste disposal fee and the Capital Stock and

Franchise Tax. As these allegations fail for the same reasons PEDF's challenges to the General Appropriations Act provisions fall, we will not address them separately below.

^[19] The Oil and Gas Lease Fund Act was repealed in Section 20(2)(i) of the 2017 Fiscal Code Amendments, Act of October 30, 2017, P.L. 725 ("2017 Fiscal Code Amendments"). Prior to its repeal, the Act provided in full as follows:

Section 1. All rents and royalties from oil and gas leases of any land owned by the Commonwealth, except rents and royalties received from game and fish lands, shall be placed in a special fund to be known as the "Oil and Gas Lease Fund" which fund shall be exclusively used for conservation, recreation, dams, or flood control or to match any Federal grants which may be made for any of the aforementioned purposes.

Section 2. It shall be within the discretion of the [DCNR] to determine the need for and the location of any project authorized by this act. The Secretary of [DCNR] shall have the power to acquire in the name of the Commonwealth by purchase, condemnation or otherwise such lands as may be needed.

Section 3. All the moneys from time to time paid into the "Oil and Gas Lease Fund" are specifically appropriated to the [DCNR] to carry out the purposes of this act.

71 P.S. §§ 1331-1333 (repealed). When originally enacted in 1955, the Oil and Gas Lease Fund Act granted discretion over the funds to the Department of Forests and Waters. The General Assembly subsequently substituted the DCNR for the Department of Forests and Waters pursuant to the Conservation and Natural Resources Act (CNRA) in 1995. 71 P.S. § 1340.304(c). A more extensive recounting of the

history of the Oil and Gas Lease Fund Act, the CNRA, and leasing on State forest and park lands can be found in this Court's decision in *PEDF V*, 255 A.3d at 293-294.

^[20] Section § 1601.2-E, entitled "Oil and Gas Lease Fund" provides in full as follows:

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

(b) Sources. -- The following shall be deposited into the fund:

(1) Rents and royalties from oil and gas leases of land owned by the Commonwealth, except rents and royalties received from game and fish lands.

(2) Amounts as provided under section 5 of the act of October 8, 2012 (P.L. 1194, No. 147), known as the Indigenous Mineral Resources Development Act.

(3) Any other money appropriated or transferred to the fund.

(c) Use. -- Money in the fund may only be used as provided under subsection (e) or as annually appropriated by the General Assembly. In making an appropriation from the fund, the General Assembly shall consider the Commonwealth's trustee duties under section 27 of Article I of the Constitution of Pennsylvania.

(d) Priority. -- Money appropriated from the fund under a General Appropriation Act or other appropriation act shall be distributed prior to allocations under subsection (e).

(e) Annual transfers. -- The following apply:

(1)(i) Except as provided under

subparagraph (ii), for the 2017-2018 fiscal year and each fiscal year thereafter, \$20,000,000 shall be transferred from the fund to the Marcellus Legacy Fund for distribution to the Environmental Stewardship Fund.

(ii) No amount shall be transferred from the fund to the Marcellus Legacy Fund for distribution to the Environmental Stewardship Fund for the 2019-2020, 2020-2021 and 2021-2022 fiscal year.

(2) For the 2017-2018 fiscal year and each fiscal year thereafter, \$15,000,000 shall be transferred from the fund to the Marcellus Legacy Fund for distribution to the Hazardous Sites Cleanup Fund.

72 P.S. § 1601.2-E.

^[21] In rejecting PEDF's challenge, we agree with Justice Dougherty's statement that Section 27 and our decisions in *PEDF II* and *V* require the General Assembly to "exercise reasonable care" in administering the trust." Concurring and Dissenting Opinion at 4 (quoting *PEDF II*, 161 A.3d at 938) (Dougherty, J.). Respectfully, we diverge from the responsive opinion because we read the current language of Section 1601.2-E(c) to incorporate the duty to exercise reasonable care. See 1 Pa.C.S. § 1922(3) (providing that in interpreting legislative intent, courts may presume "[t]hat the General Assembly does not intend to violate the Constitution").

As stated above, Section 1601.2-E(c) instructs that the General Assembly "shall consider the Commonwealth's trustee duties under section 27 of Article I of the Constitution of Pennsylvania." While the responsive opinion reads this phrase as providing for the General Assembly's "mere consideration" of its trustee duties, we view this language as an express reminder to the General Assembly of its mandatory duties imposed by the Constitution. Concurring and Dissenting Opinion at 8. The statute's arguably inarticulate use of the verb "consider" does not negate the

mandatory nature of the General Assembly's Section 27 duties.

These duties, as interpreted by this Court in *PEDF II* and *V*, include, *inter alia*, the duty to act with prudence toward the corpus of the trust, which is defined as incorporating the duty of "exercising reasonable care, skill and caution" in administering the trust. 20 Pa.C.S. § 7774. While the General Assembly could have listed each of the Section 27 trustee duties or quoted this Court's summary of those duties, including the exercise of reasonable care, the absence of such explication does not undermine the constitutionality of Section 1601.2-E(c).

^[22] In conjunction with this and the other arguments raised, PEDF seeks a declaration that the Commonwealth must "petition the court for a declaration of compliance with Section 27 prior" to engaging in the challenged activities. PEDF Brief at 58. We reject this argument outright as our constitution's tripartite system of government does not provide for judicial pre-approval of legislative or executive action.

^[23] Section 1601.2-E(b) is set forth in full *supra* at 22, n.20.

^[24] The court granted PEDF's separate request for a declaration that the "Commonwealth, as trustee of Pennsylvania's public natural resources, is required to keep detailed accounts of the trust monies derived from the oil and gas leases and track how they are spent as part of its administration of the trust." *PEDF IV*, 2020 WL 6193643, at *17. The Commonwealth has not appealed that holding to this Court.

^[25] A trustee has a duty to maintain "adequate records of the administration of the trust" and to "keep trust property separate from the trustee's own property." 20 Pa.C.S. § 7780(a), (b).

^[26] Section 1726-G of the Fiscal Code, entitled "Fund transfers," provides as follows:

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. Included in the \$300,000,000 was a transfer of \$10,000,000 from the Keystone Fund to the General Fund. *See* Petitioner's Brief in Supp. of Application for Summ. Relief, Exhibit J, Commonwealth's Supplemental Answer and Objections to First Set of Interrogatories, ¶16.

^[27] The General Assembly provided that one of the purposes of the Keystone Act, which created the Keystone Fund is to provide "[a] predictable and stable source of funding" funding for state parks. 32 P.S. § 2012(6).

^[1] The Indigenous Mineral Resources Development Act provides that "[s]ixty percent of payments or royalties received by the department shall be deposited in the Oil and Gas Lease Fund." 71 P.S. § 1357.5. Those monies are generated from contracts or leases for mineral extraction on certain State-owned land. 71 P.S. § 1357.3(a).

^[2] Justice Wecht states that "the challenged legislation facially permits the depletion of trust corpus for non-trust purposes." Concurring and Dissenting Op. at 8 (Wecht, J.). The General Assembly may well have violated its fiduciary duties by failing to adequately fund the Oil and Gas Lease Fund with sufficient non-trust assets. If so, that is a function of its budgetary choices and not a function of the provisions as written. Unlike the *PEDF II* statutes, the challenged provisions are constitutionally valid if the General Assembly sufficiently funded the Oil and Gas Lease Fund with non-trust assets. Alternatively, the provisions are valid if the

DCNR did not spend trust revenues on non-trust purposes. We are ill-equipped to decide, in the absence of an as-applied challenge with a developed factual record and adversarial briefing, which of the activities funded by the Oil and Gas Lease Fund constitute trust purposes.

^[3] After our decision in *PEDF II*, as a matter of law, Article I, Section 27 fiduciary duties are incorporated into all legislative and executive action at all levels of the Commonwealth's governance. It is, in my view, unnecessary to pronounce the existence of mandatory constitutional fiduciary duties in legislation or orders relating to Article I, Section 27 trust assets. Any such pronouncement is surplusage and thus, I do not quibble with the language chosen by the General Assembly in Section 1601.2-E(c) of the Fiscal Code.

Relatedly, Justice Wecht states that the change in the Lease Fund's structure does not warrant a different outcome because "[t]he lack of any accounting obligation or restriction of the use of trust assets solely for trust purposes on the part of the Commonwealth as trustee clearly, plainly, and palpably violates the Constitution."

Concurring and Dissenting Op. at 14 (Wecht, J.). Again, I do not see how the absence or presence of this language is relevant. For example, government agencies cannot discriminate on the basis of race, but this would not make every statute dealing with governmental benefits unconstitutional unless the agencies are explicitly told by the General Assembly not to discriminate on the basis of race in making benefit eligibility determinations. Those obligations exist regardless of whether the General Assembly chooses to explicitly codify them. The same is true of the Commonwealth's fiduciary duties. I therefore disagree that the "burden for enforcing the Commonwealth's constitutional fiduciary duties" falls to third parties in the absence of this language. *Id.* at 14 n.39. Inserting language requiring the Commonwealth to maintain an account would not guarantee that the funds will be spent in accordance with the Commonwealth's trust duties. Whether explicitly stated or not, from a citizen's perspective it is simply unknown

whether the Commonwealth complied with its fiduciary duties unless and until a challenge to the account is brought.

^[4] Justice Wecht argues that the scope of this order is unclear and asks whether the Commonwealth must continue to comply with this directive. The obvious answer is yes. The Commonwealth Court did nothing more than to recognize that those fiduciary duties are imposed on the Commonwealth as trustee of the Article I, Section 27 trust assets. Those fiduciary duties exist by operation of law, and they are imposed even if the Commonwealth Court had not issued the order. *See nn.* 3 and 6.

^[5] Because the *PEDF III* opinion was on appeal when the Commonwealth Court issued its decision, the panel "strongly suggest[ed] that the Commonwealth account for and track all monies derived from the oil and gas leases, not just royalties and other trust principal." *PEDF IV*, 2020 WL 6193643 at *17 n.23. Given our precedent, the DCNR must track how it spends those revenues, separating trust proceeds from non-trust proceeds. This duty, as well as others, is imposed by trust law, as the Commonwealth Court decision recognized. "As for the accounting, under Pennsylvania trust law, a trustee must maintain 'adequate records of the administration of the trust.'" *Id.* at *16 (quoting 20 Pa. C.S. § 7780(a)). In addition, '[a] trustee shall keep trust property separate from the trustee's own property' 20 Pa. C.S. § 7780(b). Trustees also have reporting duties. *See generally* 20 Pa.C.S. § 7780.3.

^[6] Justice Wecht claims that I "attempt[] to save the challenged legislation from a facial challenge by linking the statutes to the Commonwealth Court's order," thereby "implicitly recogniz[ing] that the statutes ... violate the constitution." Concurring and Dissenting Op. at 15 (Wecht, J.). To be clear, the statutes are not facially unconstitutional, because the challenged statutes allow for the General Assembly to fund the DCNR with non-trust assets. The Commonwealth Court's order addresses operational fiduciary breaches not facial constitutional infirmities with the statutes. Moreover, the Commonwealth Court's order

belies the notion that the Majority and the Commonwealth Court hold that the DCNR's expenditures of the appropriated funds is immune from challenge.

Furthermore, Justices Dougherty and Wecht appear to view the conclusion that the provisions are not facially unconstitutional as equivalent to a holding that they are definitively constitutional. But the standard of review for facial challenges accepts that the statute may well include some unconstitutional applications. In *Clifton v. Allegheny Cnty.*, 969 A.2d 1197 (Pa. 2009), wherein this Court applied the "plainly legitimate sweep" standard, we disagreed with the trial court's conclusion that property assessment laws were facially unconstitutional. While agreeing the laws were unconstitutional as-applied, we nonetheless determined that the facial challenge failed because the challengers "relie[d] on evidence of the provisions' inequitable application here, and ... it appears there are circumstances where the base year provisions could be constitutionally applied[.]" *Id.* at 1224. The question is simply whether the unconstitutionality is so apparent that actual proof is unnecessary. In *PEDF II*, there was no possibility that the statute was constitutional. Here, actual proof is necessary because the provisions on their face do not violate our constitution. Moreover, the stricter standard for facial challenges as discussed by the Majority, Maj. Op. at 10, cannot possibly be met given the potential constitutional application premised on the possibility of additional non-trust asset funding so that the DCNR did not spend trust assets on non-trust purposes. A constitutional application dooms the facial challenge. See *Schall v. Martin*, 467 U.S. 253, 264 (1984) (a facial challenge fails where "at least some" constitutional applications exist).

^[7] The Commonwealth Court expressed skepticism that the Commonwealth is fully compliant with its duty to adequately fund the Oil and Gas Lease Fund. See *PEDF IV*, 2020 WL 6193643 at *17 n.22 ("Based upon a rough estimate of the monies deposited into and diverted from the Lease Fund, we are extremely concerned that the Commonwealth may not be

administering the trust funds with 'loyalty, impartiality, and prudence.'") (citations omitted).

Relatedly, Justice Wecht asserts that the factual record proves that the statute is facially unconstitutional because "of the funds available in the Lease Fund to pay the \$61,291,000 appropriated for DCNR's annual budget in 2017-2018 ... ninety-nine percent ... was trust corpus." *Id.* at 14. These figures are correctly reported from the Commonwealth Court's opinion but the DCNR's entire budget exceeded \$61,291,000. The Office of the Budget lists an appropriation of \$106,961,000 to the DCNR. (Available at <https://www.budget.pa.gov/Publications%20and%20Reports/CommonwealthBudget/Pages/PastBudgets2015-16To2006-07.aspx>). This indicates that an additional \$45,670,000 was provided to DCNR. We do not know the source of these funds or how these pools of money were spent. I thus do not share Justice Wecht's confidence that the actual operation of the statute was unconstitutional.

^[1] Section 1604-E provided: "Notwithstanding section 1603-E or any other provision of law, in fiscal year 2009-2010 the amount of \$60,000,000 shall be transferred from the fund to the General Fund." 72 P.S. §1604-E. Section 1605-E similarly stated:

(a) Fiscal year 2010-2011.--
Notwithstanding section 1603-E or any other provision of law, in fiscal year 2010-2011, the amount of \$180,000,000 shall be transferred from the fund to the General Fund.

(b) Fiscal year 2014-2015.--
Notwithstanding section 1603-E or any other provision of law, in fiscal year 2014-2015, the amount of \$95,000,000 shall be transferred from the fund to the General Fund.

72 P.S. §1605-E. Section 1912 likewise provided: "The sum of \$143,000,000 is transferred from the Oil and Gas Lease Fund to the General Fund." Act of Oct. 9, 2009, P.L. 779, No. 10A, §1912.

^[2] It is apparent to me that not all of the DCNR's work relates directly to Article I, Section 27 - even work done to carry out the duties the majority claims indisputably further trust purposes. *See, e.g.*, ATV Riding in State Forests, Pa. DCNR, <https://www.dcnr.pa.gov/Recreation/WhatToDo/ATVRiding/Pages/default.aspx> (last visited July 29, 2022) (DCNR oversees use, registration, titling of Snowmobiles and ATVs); Construction Bids and Requests for Proposals for Projects and Services on State Park and Forest Lands, Pa. DCNR, <https://www.dcnr.pa.gov/Business/ConstructionBids/Pages/default.aspx> (last visited July 29, 2022) (DCNR manages construction projects in state parks and forests, including, *inter alia*, bridges, roads, sewage systems, swimming pools, campgrounds, cabins, visitor centers, and offices); Recreation Skills Education, Pa. DCNR, <https://www.dcnr.pa.gov/Education/RecreationSkills/Pages/default.aspx> (last visited July 29, 2022) (DCNR offers workshops for training teachers in hiking, snowshoeing, and geocaching); State Park Concession Opportunities, Pa. DCNR, <https://www.dcnr.pa.gov/Business/StateParkConcessions/Pages/default.aspx> (last visited July 29, 2022) (DCNR manages lease agreements for concession operations in state parks, including food and refreshments, watercraft rentals, bicycle rentals, restaurant operations, golf course operations, and whitewater rafting operations). We implicitly acknowledged this reality in *PEDF II* when we struck down §1603-E of the Fiscal Code, which put a cap of \$50 million in allocations from the Lease Fund to the DCNR and stated "[t]he department shall give preference to the operation and maintenance of State parks and forests." While the cap was certainly part of the problem, we also took issue with the quoted language because it "require[d] DCNR to 'give preference to the operation and maintenance of State parks and forests' rather than to conservation purposes." *PEDF II*, 161 A.3d at 937-38. If all of the DCNR's duties effectuated Section 27, this language would not have been problematic.

^[3] In her concurring opinion, Justice Donohue

asserts, "[a]fter our decision in *PEDF II*, as a matter of law, Article I, Section 27 fiduciary duties are incorporated into all legislative and executive action at all levels of the Commonwealth's governance." Concurring Opinion at 8 n.3 (Donohue, J.). But our decision in *PEDF II* did not change the text of Section 27 - it explained what Section 27 means and requires. Thus, the provisions at issue now must adhere to the same Section 27 requirements as the provisions at issue in *PEDF II*.

^[4] I do not suggest the General Assembly was required to "list[] each of the Section 27 trustee duties or quote[] this Court's summary of those duties[.]" Majority Opinion at 27 n.21. But in *PEDF II* and *PEDF V*, we explicitly held that in order to reasonably exercise their duties, trustees can spend money derived from trust resources to further trust purposes only. When the General Assembly allocates trust funds, its "legislative enactments [cannot] permit the trustee to use trust assets for non-trust purposes" as that would be "a clear violation of the most basic of a trustee's fiduciary obligations." *PEDF II*, 161 A.3d at 938. Thus, something more than mere "consideration" of Section 27 is required before trust funds may be used; furtherance of trust purposes must be a **condition** of the expenditure. *See id.* In my view, the General Assembly might have fulfilled this directive from *PEDF II* simply by requiring the money be spent only to further trust purposes.

^[5] Justice Donohue attempts to reframe the Court's holding in *PEDF II*, stating: "the *PEDF II* provisions authorized the General Assembly to take trust assets and appropriate them to the General Fund, where they would be clearly spent on non-trust purposes." Concurring Opinion at 6 (Donohue, J.). But *PEDF II* did not hinge on a finding the trust funds would "be clearly spent on non-trust purposes" once moved to the General Fund. *Id.* In fact, Section 1602-E required the General Assembly to consider allocating at least some of those funds to the "municipalities impacted by a Marcellus well[.]" 72 P.S. §1602-E, which very well could have encompassed trust purposes. Instead, that

provision was unconstitutional because it "permit[ted] the trustee to use trust assets for non-trust purposes[.]" *PEDF II*, 161 A.3d at 938 (emphasis added).

^[6] Justice Donohue's extensive analysis under the "plainly legitimate sweep" standard discussed in *Clifton v. Allegheny County*, 969 A.2d 1197 (Pa. 2009), is puzzling. See Concurring Opinion at 6-7, 10 n.6 (Donohue, J.). In *Clifton*, this Court merely recognized that the United States Supreme Court "seems to have settled on the 'plainly legitimate sweep' standard[.]" which is more lenient than the stricter standard requiring a challenger to show "no set of circumstances exists under which the [statute] would be valid." *Clifton*, 969 A.2d at 1223 (citations omitted). The *Clifton* Court then found that even under the more lenient standard, the challenger's facial challenge failed. See *id.* at 1224. To be clear, the *Clifton* Court did not adopt the "plainly legitimate sweep" standard, and the Court has since applied the stricter "no set of circumstances" standard in evaluating facial challenges. See *Commonwealth v. Pownall*, __ A.3d, __ 2022 WL 2824741, at *15 (Pa. July 20, 2022); *Germantown Cab Co. v. Phila. Parking Auth.*, 206 A.3d 1030, 1041 (Pa. 2019). But since I would find the provisions here unconstitutional even under the stricter "no set of circumstances" standard, and since the majority applies the correct standard, see Majority Opinion at 10, an analysis of the "plainly legitimate sweep" standard is of no moment.

^[1] Section 27 provides:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

Pa. Const. art. I, § 27.

^[2] General Appropriations Act of 2017, Act of July 11, 2017, P.L. 1279, No. 1A, §§ 104(P), 1601; General Appropriations Act of 2018, Act of June 22, 2018, P.L. 1203, No. 1A, §§ 104(P), 1601.

^[3] Maj. Op. at 18.

^[4] 71 P.S. § 1331 (repealed by Act 2017, Oct. 30, P.L. 725).

^[5] See *Pennsylvania Envtl. Def. Found. v. Commonwealth*, 255 A.3d 289, 314 (Pa. 2021) ("*PEDF V*") (recognizing that the circumstances under which the trust is to be administered are relevant to determining the intent of the settlors in creating the trust).

^[6] *PEDF II*, 161 A.3d at 931-32.

^[7] *Id.* at 935.

^[8] *Id.* at 932.

^[9] *Id.*

^[10] 71 P.S. § 1333 (repealed by Act 2017, Oct. 30, P.L. 725).

^[11] 72 P.S. §§ 1602-E-1603-E; see also *PEDF II*, 161 A.3d at 921-22.

^[12] *PEDF II*, 161 A.3d at 923; see also *PEDF V*, 255 A.3d at 294-95.

^[13] *PEDF II*, 161 A.3d at 938.

^[14] *Id.* at 925; see also *PEDF V*, 255 A.3d at 294-95.

^[15] *PEDF II*, 161 A.3d at 922.

^[16] *Id.* at 923.

^[17] *Id.* at 925 (observing that "the Legislature began using [Lease Fund] revenue to support the overall budget of DCNR, rather than obtaining that budget money from the [G]eneral [F]und and using [Lease Fund] money for conservation purposes related to oil and gas extraction") (quoting John C. Dernbach, *The Potential Meaning of a Constitutional Public Trust*, 45 Envtl. L. 463, 488 (2015)).

^[18] *Id.* at 937-38.

^[19] *Id.*

^[20] *PEDF V*, 255 A.3d at 294-95.

^[21] *PEDF II*, 161 A.3d at 932.

^[22] Maj. Op. at 18, n.17.

^[23] *Id.* at 18.

^[24] Restatement (Second) of Trusts § 188 (1959); Maj. Op. at 16, n.15.

^[25] *Id.* at 923.

^[26] Maj. Op. at 17, n.16.

^[27] *See id.* at 27.

^[28] Concurring and Dissenting Op. at 5 (citing 71 P.S. § 1340.101(b)(1)).

^[29] 71 P.S. § 1340.101(b)(1).

^[30] *PEDF V*, 155 A.3d at 314.

^[31] Pa. Const. art. I, § 27.

^[32] *Id.*

^[33] Maj. Op. at 16 n.15.

^[34] *See, e.g., In re Strickler's Estate*, 47 A.2d 134, 135 (Pa. 1946) ("Where a fiduciary claims credit for disbursements made by him the burden rests upon the fiduciary to justify them. Proper vouchers or equivalent proof must be produced in support of such credits."); *In re Union Real Estate Investment Co. First Mortgage 6% Gold Bonds Due July 1, 1941*, 1 A.2d 662, 666 (Pa. 1938) (requiring a trustee to "justify every expenditure as a proper one according to the terms of the instrument under which it is acting, or the power and authority conferred upon it"); *Mintz v. Brock*, 44 A. 417 (1899) (providing that it is the duty of the trustee to sustain the account of all moneys paid with regard to the business relating to the trust).

^[35] *Union Real Estate*, 1 A.2d at 666.

^[36] *See, e.g.*, 20 Pa.C.S. § 7780(a) (requiring a trustee to maintain "adequate records of the administration of the trust"); *id.* § 7780(b) (requiring a trustee to "keep trust property separate from the trustee's own property").

^[37] *Pennsylvania Env. Defense Found. v. Commonwealth*, 358 M.D. 2018, 2020 WL 6193643, *17 (Cmwlth. Ct. Oct. 22, 2020).

^[38] *Id.* at *17.

^[39] I disagree with Justice Donohue that the lack of a statutory accounting obligation is irrelevant to the statute's constitutionality. *See* Concurring Op. (Donohue, J.), at 9, n.3. Unlike a constitutional equal protection challenge, a challenge to the constitutionality of a statute under the ERA implicates the Commonwealth's fiduciary duties "to act toward the corpus of the trust-the public natural resources-with prudence, loyalty, and impartiality." *PEDF II*, 161 A.3d at 932. Indeed, in *PEDF II*, we observed that, "if proceeds are moved to the General Fund, an accounting is likely necessary to ensure that the funds are ultimately used in accordance with the trustee's obligation to conserve and maintain our natural resources." *Id.* at 939. Because the legislation at issue in this case facially requires no accounting, it shifts the cost burden for enforcing the Commonwealth's constitutional fiduciary duties to third parties who must then find and spend funds and other resources needed to challenge the legislation in court. This is a facial violation of the Commonwealth's fiduciary duties.

^[40] Section 104(P) of the General Appropriations Act of 2017 directed transfers from the Lease Fund to named agencies "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 and for payment of any other expenses..." Section 1601 of the General Appropriations Act of 2017 provided for the following expenditures from the Lease Fund to DCNR: \$50,000,000 for general operations, \$7,739,000 for state park operations, and

\$3,552,000 for state forest operations.

^[41] Although, as Justice Donohue observes, DCNR's entire budget exceeded the transfers from the Lease Fund, see Concurring Op. (Donohue, J.), at 11, n.7, there is no limitation on the face of the legislation that limits the use of trust corpus to trust purposes. In this respect, I

agree with Justice Dougherty that the legislative transfers from the Lease Fund in this case are facially unconstitutional to the same extent as the provisions we struck down in *PEDF II* and *PEDF V*. See Concurring and Dissenting Op. at 12.
