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## I. STATEMENT OF JURISDICTION

Pursuant to 42 Pa.C.S. § 723(a), this Court has exclusive jurisdiction over the appeal as of right by the Pennsylvania Environmental Defense Foundation (“PEDF”) of the final order issued by the Commonwealth Court in this matter filed under the Commonwealth Court’s original jurisdiction.

The fiduciary provisions of the Declaratory Judgements Act states that “[a]ny person interested, as or through ... [a] trustee, ... in the administration of a trust, ... may have a declaration of rights or legal relations in respect thereto: ... [t]o direct the ... administrators, or trustees to do or to abstain from doing any particular act in their fiduciary capacity [or] [t]o determine any question arising in the administration of the ... trust, including questions of construction of ... writings.” 42 Pa.C.S. § 7535. The Declaratory Judgments Act empowers courts of record to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. 42 Pa.C.S. § 7532.

## II. ORDER IN QUESTION

On August 6, 2021, the Commonwealth Court (Judge McCollough) issued an unreported memorandum opinion and final order (**Attachment A**) granting preliminary objections filed by the Pennsylvania Department of Natural Resources (“DCNR”) and DCNR Secretary Cindy Adams Dunn (collectively, “Appellees”) and

dismissing PEDF's Amended Petition for Review ("PEDF Petition"), Docket No. 609 MD 2019. The Commonwealth Court's final order states (*PEDF VII* at 37-38):<sup>1</sup>

AND NOW, this 6<sup>th</sup> day of August, 2021, the Preliminary Objections of the Commonwealth Department of Conservation and Natural Resources (DCNR), and Cindy Adams Dunn, in her official capacity as Secretary of Conservation and Natural Resources, of DCNR, to the Amended Petition for Review filed by the Pennsylvania Environmental Defense Foundation are hereby SUSTAINED. The Amended Petition for Review is dismissed.

### III. SCOPE AND STANDARD OF REVIEW

PEDF is appealing the Commonwealth Court's decision sustaining preliminary objections filed by DCNR and Secretary Dunn and dismissing the PEDF Petition, which seeks declarations that DCNR and Secretary Dunn violated Article I, Section 27 of the Pennsylvania Constitution, commonly known as the Environmental Rights Amendment ("ERA"), and their fiduciary duties as trustees thereunder by failing to manage our State Forest trust assets to conserve and maintain them for current and future generations of Pennsylvanians, as set forth in DCNR's

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<sup>1</sup> PEDF has filed several petitions for review seeking declaratory relief related to the management of our State Forest trust assets by the Commonwealth under Article I, Section 27 of the Pennsylvania Constitution. This Court granted PEDF's requested relief in its first petition (Docket No. 228 MD 2012) through two separate opinions, which are relevant here and referred to in this brief as *PEDF II* and *PEDF IV*. These opinions reversed the Commonwealth Court's denial of PEDF's requested relief in that first petition (*PEDF I* and *PEDF III*). PEDF has also appealed the Commonwealth Court's denial (*PEDF V*) of its requested relief in its second petition (Docket No. 358 MD 2018). Oral argument before this Court is scheduled for December 8, 2021, and this Court's decision in that case will likely be referred to as *PEDF VI* when issued. Thus, this appeal of the Commonwealth Court's dismissal of PEDF's third petition (Docket No. 609 MD 2019), which is provided in Attachment A, is being referred to in this brief as *PEDF VII*.

2016 State Forest Resources Management Plan (“2016 SFRMP”).<sup>2</sup> When reviewing the constitutionality of Commonwealth actions or decisions under the ERA, the proper standard of judicial review “lies in the text of Article I, Section 27 itself as well as the underlying principles of Pennsylvania trust law in effect at the time of its enactment.” *PEDF v. Commonwealth*, 161 A.3d 911, 930 (Pa. 2017) (“*PEDF II*”); *see also PEDF v. Commonwealth*, 255 A.3d 289, 292 (Pa. 2021) (*PEDF IV*) (“the ERA created a constitutional public trust that is subject to private trust principles”). When reviewing a decision sustaining preliminary objections to a petition for review, this Court accepts as true all well-pleaded material facts set for in the petition for review and all inferences fairly deducible from those facts. *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 917 (Pa. 2013). This Court will affirm an order sustaining preliminary objections “only if it is clear that the party filing the petition for review is not entitled to relief as a matter of law.” *Id.* As to pure questions of law, this Court’s standard of review is de novo, and its scope of review is plenary. *PEDF II*, 161 A.3d at 929. This Court is not constrained by the Commonwealth Court’s reasoning and may make its decision on any grounds, as long as the record supports the judgment. *Robinson Twp.*, 83 A.3d at 943.

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<sup>2</sup> The 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 trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.” Pa. Const. art I, § 27.



#### IV. STATEMENT OF QUESTIONS INVOLVED

(a) Does the PEDF Petition state sufficient facts and law to support a claim that the 2016 SFRMP violates the ERA, and that the Appellees DCNR and Secretary Dunn violated their fiduciary duties as trustees under the ERA in approving it?

Suggested Answer: Yes

(b) Did the Commonwealth Court err in failing to apply the principles and findings established by this Honorable Court in *PEDF II* to determine the sufficiency of PEDF's constitutional challenges to the 2016 SFRMP, and PEDF's claims that DCNR and Secretary Dunn violated their constitutional duties as trustees under the ERA by approving administration of our State Forest trust assets, as documented in the challenged 2016 SFRMP provisions, contrary to the ERA trust purposes?

Suggested Answer: Yes

(c) Did the Commonwealth Court err in finding that PEDF does not have the right to request a declaration that DCNR must revise its 2016 SFRMP to comply with its constitutional duties under the ERA as trustee our State Forest public natural resources?

Suggested Answer: Yes

## **V. STATEMENT OF THE CASE**

PEDF filed a petition for review on November 5, 2019, in Commonwealth Court under the fiduciary provisions of the Declaratory Judgments Act seeking declarations that DCNR and Secretary Dunn violated the ERA, and their fiduciary duties thereunder by, among other things, fundamentally changing the management of the State Forest in the State Forest Resource Management Plan approved in 2016. DCNR and Secretary Dunn filed preliminary objections on December 5, 2019, and PEDF filed an amended petition for review in response on January 6, 2020 (RR1-RR74). DCNR and Secretary Dunn again filed preliminary objections in response to the amended petition for review on February 20, 2020. Briefing on the preliminary objections was completed on June 8, 2020, and oral argument was held on September 17, 2020. The Commonwealth Court issued its opinion and final order granting the preliminary objections and dismissing the PEDF Petition on August 6, 2021, almost a year after oral argument.

## **VI. SUMMARY OF THE ARGUMENT**

DCNR and Secretary Dunn are trustees of our State Forest public natural resources, which are part of the corpus of a trust created under Article I, Section 27 of the Pennsylvania Constitution, and have fiduciary responsibility to conserve and maintain our State Forest for the benefit of Pennsylvanians living today and future

generations, and to protect their rights to clean air, pure water, and the preservation of the natural, scenic, historic, and esthetic values of our State Forest.

As trustees, DCNR and Secretary Dunn have the constitutional duty to manage the State Forest in compliance with their fiduciary duties under the ERA. The 2016 SFRMP is their public statement of how they are currently managing and will continue to manage our State Forest public natural resources. The 2016 SFRMP must therefore comply with the constitutional duties established under the ERA.

PEDF is challenging the constitutionality of specific provisions in the 2016 SFRMP, including those that change the mission of DCNR by stating for the first time that leasing our State Forest and selling our oil and natural gas to generate revenue for general economic use by the Commonwealth is part of DCNR's mission in managing our State Forests; and by stating that, in managing our State Forests, DCNR must balance the benefits of the natural ecosystem of our State Forest, and the constitutional rights of the people thereto, with the benefits from extraction and sale of oil and natural gas to generate revenue for the Commonwealth's general economic use.

PEDF is also seeking declarations that the 2016 SFRMP violated the ERA by failing to explain how the degradation of over 600,000 acres of our State Forest currently available for oil and gas extraction will be prevented and remedied. PEDF further seeks a declaration that the 2016 SFRMP violates the ERA by failing to

explain how ecosystem management will be employed to comply with the ERA to conserve and maintain our State Forest trust assets.

As stated in the PEDF Petition, DCNR has become dependent on the revenue from the extraction and sale of State Forest oil and gas to pay for its annual operating budget over the past ten years. Prior to 2009, DCNR's annual operating budgets were funded through General Fund appropriations, but those appropriations have been replaced by appropriations of State Forest oil and gas lease revenue that remains part of the corpus of the State Forest trust assets under the ERA.

The 2016 SFRMP allows the DCNR to formalize the existing practice of using oil and gas lease revenue to pay for its annual operations in lieu of General Fund appropriations. The 2016 SFRMP gives authority to DCNR and Secretary Dunn to continue to lease our State Forest land to obtain revenue from the extraction and sale of the oil, natural gas, and other geologic resources for any economic use that benefits the Commonwealth, including replacing the General Fund appropriations to pay for DCNR operations, without considering the impacts to the rights of the people who are beneficiaries, both living today and for future generations, to have their State Forest trust assets conserved and maintained.

The 2016 SFRMP fundamentally alters DCNR's management of our State Forest by shifting use of the revenue from State Forest oil and gas leases from conservation, as provided for under prior State Forest management plans consistent

with the 1955 Oil and Gas Lease Fund Act, to general economic use by the Commonwealth. This shift is an attempt to provide authority for DCNR and Secretary Dunn to continue this clear violation of their basic fiduciary duties as trustees to conserve and maintain the State Forest public natural resources.

The well-plead facts in the PEDF Petition and reasonable inferences drawn from them refute the preliminary objections filed by DCNR and Secretary Dunn and the Commonwealth Court erred in granting those preliminary objections. The Commonwealth Court agreed with their contention that the 2016 SFRMP is a policy statement that does not bind DCNR or Secretary Dunn and concluded that neither DCNR nor Secretary Dunn has acted to harm PEDF sufficiently to create an actual case or controversy for judicial review. Consideration of whether the 2016 SFRMP is a policy or binding norm as a matter of administrative law is not relevant to the constitutional questions raised by PEDF. DCNR and Secretary Dunn cannot violate their constitutional duties as trustees of our State Forest trust assets as a matter of policy or through regulations that establish binding norms.

By the time the 2016 SFRMP was approved, DCNR had been administering our State Forest trust assets for more than six years consistent with the fundamental changes set forth in the 2016 SFRMP that PEDF is challenging, and these changes were already degrading our State Forest public natural resources. DCNR executed leases in 2009 and 2010 for the extraction and sale of State Forest oil and natural gas

for the general economic benefit of the Commonwealth (*i.e.*, to raise revenue for the General Fund and subsequently to pay for DCNR's annual general operations in lieu of General Fund appropriations, as previously found by this Court in *PEDF II*). The use of revenue from the extraction and sale of State Forest of oil and natural gas for the general economic benefit of the Commonwealth, as now sanctioned by the 2016 SFRMP, has continued through the present.

As established by DCNR's own records, and this Court's prior findings, the extraction of oil and natural gas has caused serious degradation to the State Forest. The well-plead facts in the PEDF Petition, which must be accepted along with reasonable inferences as true in considering the preliminary objections, show that extraction of oil and natural gas from the State Forest have already caused, and will continue to cause, immediate and long-term degradation to the ecology of our State Forest, the quality of our State Forest air and water, and natural, scenic, historic, and aesthetic values of our State Forest.

Prior to 2009, DCNR managed State Forest oil and gas lease sales consistent with the paramount goal of maintaining the ecosystem of the State Forest. Ecosystem management, as defined by the DCNR Bureau of Forestry in its 1995 strategic plan, *Penn's Woods, Sustaining Our Forests* ("*Penn's Woods*"), was used by DCNR from the time of its creation in 1995 until 2009 to conserve and maintain our State Forest trust assets in compliance with the ERA. The 2016 SFRMP now sanctions balancing

the health of the forest ecosystem with the economic benefits to the Commonwealth when leasing State Forest land for the extraction and sale of oil, natural gas, and other geologic resources, as DCNR did in 2009 and 2010. Ecosystem management has been redefined in the 2016 SFRMP consistent with these prior leasing decisions to include, as an approved function of the State Forest, resource extraction to generate revenue to fund general economic use that benefits the Commonwealth. This management approach violates the plain language of the ERA adopted in 1971, and the long-standing practice in place since 1955 of using revenue from State Forest oil and gas leases for conservation purposes that benefit our State Forest and associated State Parks. The 2016 SFRMP authorizes the use of State Forest trust assets for non-trust purposes, which this Honorable Court has found to be unconstitutional in both *PEDF II* and *PEDF IV*.

The 2016 SFRMP also failed to discuss any measures to prevent and remedy the degradation, diminution, and depletion of our State Forest trust assets that have been caused and that will continue to be caused for decades by the existing State Forest oil and gas leases. The failure of our State Forest trustees to provide clear direction in the 2016 SFRMP to explain how degradation of trust assets will be remedied violates their fiduciary duties under the ERA. It also violates the constitutional rights of PEDF members, as well as current and future generations of

Pennsylvanians, as beneficiaries, to have their State Forest trust assets conserved and maintained under the ERA.

The PEDF Petition requests declarations that DCNR and Secretary Dunn violated the ERA and their fiduciary duties thereunder by fundamentally altering management of our State Forest under the 2016 SFRMP as discussed above; and a declaration that DCNR and Secretary Dunn must amend the SFRMP to correct these violations and explain how they will manage our State Forest trust assets in compliance with the ERA and their trustee duties thereunder.

## VII. ARGUMENT

### A. **PEDF Seeks Review and Declaratory Relief Concerning the Constitutionality of our Trustees' Management of Our State Forest**

The Appellees, DCNR and Secretary Dunn, have the constitutional duty to manage our State Forest in compliance with the specific terms of the ERA. *PEDF II*, 161 A.3d at 916 (“Because state parks and forests, including the oil and mineral rights therein, are part of the corpus of Pennsylvania’s environmental trust, we hold that the Commonwealth as trustee, must manage them according to the plain language of [the ERA], which imposes fiduciary duties consistent with Pennsylvania trust law.”).

The Commonwealth has designated DCNR and Secretary Dunn as trustees of our State Parks and Forests under the ERA through the Conservation and Natural Resources Act (“CNRA”). 71 P.S. § 1340.101. As such, they have the



“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, diminishment and depletion of our public natural resources.” *PEDF II*, 161 A.3d at 938.

DCNR and Secretary Dunn administer the State Forest trust assets through the State Forest Resource Management Plan. In 2016, DCNR adopted its latest update to this plan and subsequently updated State Forest Resource Management Plans for each State Forest Districts based on the 2016 SFRMP (*see* 2016 SFRMP, Letter from the State Forester, PEDF Petition, Exhibit A (RR77-RR78)).

As stated in the 2016 SFRMP, the plan “is the primary instrument that [DCNR] uses to plan, coordinate, and communicate its management of the state forest system” and “the SFRMP lays the groundwork for ensuring that the overarching goal of state forest management – ensuring sustainability – is achieved”. 2016 SFRMP at 2 (RR81). The 2016 SFRMP also identifies two primary purposes; first, to provide a framework for forest managers to make management decisions and professional judgments that ensure sustainability across the State Forests; and second, to communicate to the citizens of Pennsylvania how their forest is being managed. 2016 SFRMP at 20 (RR99). In other words, the State Forest Resource Management Plan represents an important trust document that explains to the people

of Pennsylvania—the common owners of the State Forest trust assets—how their trustees are fulfilling their duties to conserve and maintain the people’s fundamental right to have these assets conserved and maintained.

The 2016 SFRMP cannot infringe on the peoples’ rights under the ERA. This Court has explained the importance of the fundamental rights in the Declaration of Rights (Article I) of our State Constitution and how they function to restrain the general powers granted to our state government. The nature of these rights has long been recognized by this Court. *See, e.g., Spayd v. Ringing Rock Lodge*, 113 A. 70, 72 (Pa. 1921) (“The right in question is a fundamental one, expressly recognized in the organic law of our state as belonging to ‘citizens’ ... The Constitution does not confer the right, but guarantees its free exercise, without let or hindrance from those in authority, at all times, under any and all circumstances”); *Western Pa. Socialist Worker 1982 Campaign v. Connecticut General Life Insurance Co.*, 515 A.2d 1331, 1335 (Pa. 1986) (“[W]e conclude that the Declaration of Rights is a limitation on the power of the state government ... The Pennsylvania Constitution did not create these rights. The Declaration of Rights assumes their existence as inherent in man’s nature. It prohibits the government from interfering with them and leaves adjustment of the inevitable conflicts among them to private interactions, so long as that interaction is peaceable and non-violent. This Court has consistently held this view, that the

Pennsylvania Constitution's Declaration of Rights is a limit on our state government's general power.”).

Much of this Court's analysis of Article I rights has focused on rights denied to early settlers that immigrated to Pennsylvania, including William Penn himself. *Commonwealth v. Tate*, 432 A.2d 1382, 1388 (Pa. 1981) (“The ‘profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open’ ... has special meaning for this Commonwealth, whose founder, William Penn, was prosecuted in England for the ‘crime’ of preaching to an unlawful assembly and persecuted by the court for daring to proclaim his right to a trial by an uncoerced jury.[] It is small wonder, then, that the rights of freedom of speech, assembly, and petition have been guaranteed since the first Pennsylvania Constitution, not simply as restrictions on the powers of government, as found in the Federal Constitution, but as inherent and ‘invaluable’ rights of man.”). With the addition of the ERA to our Article I Declaration of Rights in 1971, the people of Pennsylvania expressly acknowledged their inherent and invaluable right to clean air, pure water, and the preservation of the natural, scenic, historic, and esthetic values of our environment, and their right to have their public natural resources held in trust and conserved and maintained by their state government as trustee. Just like all other fundamental rights in Article I, these rights are guaranteed to the people and cannot be infringed upon at any time by their state government.

Rather than consider PEDF's allegations that DCNR and Secretary Dunn infringed on the constitutional rights of its members and the people of Pennsylvania, the Commonwealth Court concluded that no controversy exists because the Appellees have the discretion to deviate from the 2016 SFRMP, thus making it merely a policy without binding effect. The question of whether the 2016 SFRMP is merely policy and not binding authority is a question of administrative law, not constitutional law. Administrative law is a body of law created by administrative agencies in the form of rules and regulations, orders, and decisions to carry out regulatory powers and duties of such agencies. *Black's Law Dictionary, Sixth Edition*. No principles of administrative law, nor any of the cases cited by the Commonwealth Court, constrain judicial review of alleged unconstitutional actions by Commonwealth agencies with trustee responsibilities under the ERA. The PEDF Petition raises constitutional questions of compliance with the ERA by the trustees of our State Forest trust assets, not administrative law questions regarding their compliance with their enabling legislation, the Conservation and Natural Resources Act, 71 P.S. §§ 1340.101 *et seq.*

The 2016 SFRMP is a document prepared by the Appellees as trustees of our State Forest trust assets to govern their own conduct as trustees. Whether or not the Appellees can deviate from the plan has no bearing on the plan's constitutionality. The Commonwealth Court's attempt to avoid consideration of the constitutionality

of the provisions PEDF challenges in the 2016 SFRMP by applying administrative law binding norm jurisprudence simply misses the mark.

As this Court explained in *Robinson Twp.*, “[t]he General Assembly’s [or a Commonwealth agency’s] declaration of policy does not control the judicial inquiry into constitutionality. If the court allowed the Respondents to control a constitutional inquiry by a statement of benign intent, that would be tantamount to ceding the court’s constitutional duty to the legislative [or executive] branch.” 83 A.3d 901, 951 (citing *Stilp v. Commonwealth*, 905 A.2d 918, 945 (Pa. 2006)).

This Court further observed in *Robinson Twp.* that “[c]ourts are equipped and obliged to weigh parties’ competing evidence and arguments, and to issue reasoned decisions regarding constitutional compliance by other branches of government. The benchmark for decision is the express purpose of the Environmental Rights Amendment to be a bulwark against actual or likely degradation [of our public natural resources]. *Id.* at 953. This Court has also recognized that it “has an obligation to vindicate the rights of its citizens where the circumstances require it and in accordance with the plain language of the Constitution.” *Id.* at 969 (citing *Pap’s A.M. v. City of Erie*, 812 A.2d 591, 605 (Pa. 2002)). In *Pap’s*, this Court observed that “to guard against encroachment [of Article I rights], this Court has not been hesitant to act to ensure these fundamental rights.” *Id.* PEDF requests that this Court do so once again.

The 2016 SFRMP is an important trust document that includes provisions that PEDF asserts are unconstitutional under the ERA and fails to include other provisions necessary to address constitutional compliance, as discussed in the following sections. Judicial review of PEDF’s constitutional questions is essential to protect the fundamental rights of PEDF’s members and the people of Pennsylvania to have our State Forest public natural resources protected.

**B. Challenged Provisions of the 2016 SFRMP: Economic Use of State Forest Trust Assets to Benefit the Commonwealth**

In 2009 and 2010, the General Assembly and the Governor forced DCNR to lease State Forest land for oil and gas extraction for non-trust purposes. Since 2011, DCNR has used revenue from those leases to pay for its annual general operations, rather than for conservation purposes. Prior to 2009, DCNR used such revenue for conservation purposes consistent with the Oil and Gas Lease Fund Act, which was repealed in 2017 after this Court’s decision in *PEDF II*.<sup>3</sup> This Court found in *PEDF II* that decreased General Fund appropriations to DCNR for its operational expenses corresponded to increased appropriations of revenue from State Forest oil and gas leases deposited into the Oil and Gas Lease Fund, which “thus reduced the amount of monies available for the DCNR’s conservation activities.” 161 A.3d at 923. The replacement of General Fund tax revenue *is not a trust purpose*, any more than is

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<sup>3</sup> Act of December 15, 1955, P.L. 865, No. 256, 71 P.S. §§ 1331-1333 (repealed by Section 20(2) of the Act of October 30, 2017, P.L. 725, No. 44).

the payment of DCNR's annual operating expenses previously paid with General Fund tax revenue. By forcing DCNR to use the very money needed to prevent and remedy the degradation of our State Forest for its own annual operations, the trustee agency responsible for ensuring the ecological integrity of our State Forests and Parks is turned into an agency dependent on selling these public natural resources to pay for its annual operations.

DCNR has responded to this new reality of reliance on Oil and Gas Lease Fund revenue for its annual operations by adopting an updated SFRMP in 2016 that fundamentally alters the management of our State Forest. Rather than comply with its fiduciary duties as trustee mandated by the ERA, DCNR is attempting to integrate its new financial reality into a new management concept that reframes its mission by making economic use of oil and gas to benefit the Commonwealth part of its management obligations.

DCNR's new 2016 SFRMP has returned it to the days of making management decisions about our State Forest public natural resources based on the politics of appropriations, rather than making management decisions based on the constitutionally mandated duty to conserve and maintain our State Forest ecosystem. The 2016 SFRMP language changing DCNR's mission to now require use the revenue from State Forest oil and gas leases for the economic benefit of the Commonwealth rather than to remedy to degradation of our State Forest trust assets

is an attempt to provide some authority to continue this clear violation of the basic duty of the Appellees as trustees to conserve and maintain our public natural resources under the ERA.

In the 2016 SFRMP, DCNR states that the “*economic use and sound extraction and utilization of [coal, oil, natural gas and other] geologic resources is (sic) part of the [DCNR’s] mission in managing [State Forest] lands.*” 2016 SFRMP at 156 (emphasis added). DCNR cites the Conservation and Natural Resources Act for its authority to lease our State Forest for the extraction and sale of oil and natural gas for economic benefit as part of DCNR’s *mission* in managing our State Forest public trust assets. *Id.* at 157.

Selling off part of the State Forest resources to benefit the overall economy has never been how the oil and natural gas resources have been used. Since 1955, the Oil and Gas Lease Fund Act, which was in effect at the time the ERA was adopted, determined how the revenue from State Forest oil and gas leases was used. The Oil and Gas Lease Fund Act is relevant to understanding the intent of the settlers of the ERA regarding the use of revenue generated from the oil and gas leases. It required that all rents and royalties generated by leasing minerals on State Forest land be used *exclusively* for projects for conservation, recreation, dams, or flood control, or to match any Federal grants which may be made for any of those



purposes. None of those exclusive uses includes DCNR's use of the revenue to administer the trust or for general budgetary purposes.

In *PEDF IV*, this Court concluded that “[f]rom the perspective of the settlors, the ERA was enacted when the Commonwealth was already devoting the revenues generated by mineral leases to conservation purposes. Redirecting those revenues to non-trust purposes is inconsistent with the backdrop against which the ERA was enacted.” 255 A.3d at 314. As stated by this Court, trust purposes “may roughly be characterized as environmental benefits.” *Id.* at 312. The State Forest oil and gas itself is a public natural resource that is being depleted without any consideration of the current and future need of the revenue from this depletion to sustain and enhance our State Forests and State Parks by remedying the degradation, diminution, and depletion of these public natural resources from the extraction of geologic resources and from other impacts to these resources that are occurring and will continue to occur. This Court has recognized that the common ownership of Pennsylvania's public natural resources by current and future generations “unmistakably conveys to the Commonwealth that when it acts as a trustee it must consider an incredibly long timeline and cannot prioritize the needs of the living over those yet to be born.” *Id.* at 310. This Court has further concluded that the ERA “creates a cross-generational dimension and reminds the Commonwealth that it may not succumb to ‘the inevitable bias toward present consumption of public resources by the current

generation, reinforced by a political process characterized by limited terms of office.” *Id.* (quoting *Robinson Twp.*, 83 A.3d at 959, n. 46). The cross-generational dimension of the rights of the beneficiaries to our State Forest trust assets applies particularly to converting some of these assets (*i.e.*, oil, natural gas, and other geologic resources) by selling them now without considering the rights of future generations.

As trustees, DCNR and Secretary Dunn have the fiduciary duty “to act toward the corpus of the trust – the public natural resources – with prudence, loyalty, and impartiality.” *PEDF II*, 161 A.3d at 932-933 (quoting *Robinson Twp.*, 83 A. 3d at 956-57); *see also* 20 Pa.C.S. Chapter 77 (Trusts), Subchapter H (Duties and Powers of Trustee). The duty of **PRUDENCE** requires them to exercise “such care and skill as a [person] of ordinary prudence would exercise in dealing with his [or her] own property.” *PEDF II*, 161 A.3d at 932 (quoting Restatement (Second) of Trusts § 174 as cited in *In re Mendenhall*, 398 A.2d 951, 953 (Pa. 1979)). Under Pennsylvania law, a trustee must “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 (emphasis added). The duty of **LOYALTY** “imposes an obligation to manage the corpus of the trust so as to accomplish the trust’s purposes for the benefits of the trust’s beneficiaries.” *PEDF II*, 161 A.3d at 932-933; *see also Metzger v. Lehigh*

*Valley Trust & Safe Deposit Co.*, 69 A.1037, 1038 (Pa. 1908); *In re Hartje's Estate*, 28 A.2d 908, 910 (Pa. 1942); Restatement (Second) of Trusts § 186; and 20 Pa.C.S. § 7772(a) (“A trustee shall administer the trust *solely in the interests of the beneficiaries*” (emphasis added)). The duty of *IMPARTIALITY* “requires the trustee to manage the trust so as to give all of the beneficiaries due regard for their respective interests in light of the purposes of the trust.” *PEDF II*, 161 A.3d at 933; *see also* 20 Pa.C.S. § 7773; Restatement (Second) of Trusts § 183; *Estate of Sewell*, 409 A.2d 401, 402 (Pa. 1979).

PEDF alleges that DCNR and Secretary Dunn have violated their fiduciary duties of prudence, loyalty, and impartiality by approving fundamental changes in the State Forest Resource Management Plan sanctioning the sale of State Forest public natural resources and the use of revenue from such sales for non-trust purposes. Judicial review of this fundamental change by the trustees responsible for managing our State Forest is vital to the protection of our State Forest public natural resources.

**C. Challenged Provisions of the 2016 SFRMP: Balancing Economic Use by the Commonwealth with ERA Constitutional Rights**

In the 2016 SFRMP, DCNR states that “[m]anaging the [coal, oil, natural gas and other] geologic resources requires thorough analysis, strategic planning, and attentive oversight to ensure that *the value of geologic resources is balanced with other forest uses and values.*” 2016 SFRMP at 154 (emphasis added). When DCNR

“balances” the conservation and maintenance of our State Forest natural resources with the economic value from geologic resources for use by the Commonwealth, it depletes the State Forest public natural resources (*e.g.*, the geologic resources) and degrades other State Forest public natural resources critical to the ecology of the forest (*e.g.*, the clean air, pure water, and the natural, scenic, historic, and esthetic values of the State Forest). This balancing means violating the fundamental constitutional rights of the people of Pennsylvania to have their public natural resources conserved and maintained.

DCNR has no authority to balance the economic value of the State Forest geologic resources with fundamental rights established by the ERA under Article I of the Pennsylvania Constitution. This Court articulated the significance of inclusion of the ERA in Article I in *PEDF II*, stating:

In 1971, by a margin of nearly four to one, the people of Pennsylvania ratified a proposed amendment to the Pennsylvania Constitution’s Declaration of Rights, formally and forcefully recognizing their environmental rights as commensurate with their most sacred political and individual rights.

161 A.3d at 916. DCNR cannot infringe on the rights of Pennsylvanians to have their commonly owned State Forest public natural resources conserved and maintained, their rights to the clean air and pure water of their State Forest, or their rights to the preservation of the natural, scenic, historic, and esthetic values of their State Forest. When DCNR engages in “balancing” the fundamental constitutional rights of the

people with the Commonwealth's economic needs, it violates the limitations placed by the people of Pennsylvania on their State government in Article I, Section 25 of the Pennsylvania Constitution, which states: "To guard against the 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. I, § 25. DCNR cannot "balance" the fundamental constitutional rights to protection of public natural resources under the ERA with the degradation, diminution, and depletion of those resources for undefined economic benefits of the Commonwealth. In managing our State Forest trust assets, DCNR is limited by its constitutional duties as trustee to conserve and maintain these trust assets.

By balancing the people's fundamental ERA rights with economic benefits to the Commonwealth, the Appellees violate their constitutional trustee duties, which require that they both prevent and remedy existing and future degradation, depletion, or diminution of the State Forest public natural resources, and that they protect of the rights of the people to the clean air, pure water, and the preservation of the natural, scenic, historic, and esthetic values of our State Forests. *PEDF II*, 161 A.3d at 932 ("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.”)

PEDF alleges that DCNR and Secretary Dunn violated their duties as trustees of our State Forest under the ERA, including their fiduciary duties of prudence, loyalty, and impartiality, by approving fundamental changes in the 2016 SFRMP authorizing the balancing our Article I constitutional rights with the Commonwealth’s economic interests. Judicial review of this fundamental change by the trustees responsible for managing our State Forest is vital to the protection of our State Forest public natural resources.

**D. The 2016 SFRMP Fails to Prevent and Remedy the Degradation, Diminution and Depletion of Our State Forest from Existing and Future Oil and Gas Extraction**

The facts set forth in the PEDF Petition, most of which have previously been established by this Court in *PEDF II* and *PEDF IV*, clearly establish that extracting oil and natural gas from State Forest land degrades the ecology of the forest and the peoples’ constitutional rights to protection our State Forest (*see* PEDF Petition, ¶¶ 48-55 (RR21-RR25), Exhibits C and D (2014 and 2018 Shale Gas Monitoring Report excerpts) (RR344)-RR373), and Exhibits F-J (Affidavits of PEDF members, including two retired DCNR District Forest Managers, who describe the degradation they have observed from the fundamental changes to State Forest management in the 2016 SFRMP (RR383-RR402)). By degrading our State Forest, an important

public natural resource, for the economic benefit of the Commonwealth, the basic trust purpose established by the ERA—conservation and maintenance of public natural resource—is violated.

The core area of our State Forest—1.5 million acres, which is almost 70% of the entire State Forest—located in the northcentral region of Pennsylvania is underlain by shale gas formations. 2016 SFRMP at 163 (RR242). Within this core State Forest area, over 644,000 acres (40%) is subject to leases for oil and natural gas extraction. PEDF Petition, ¶¶ 45-46 (RR20); Exhibit D (2018 Shale Gas Monitoring Report at 3-11 (RR365-RR373); *see also PEDF II*, 161 A.3d at 921.

The 2014 and 2018 Shale Gas Monitoring Reports published by DCNR, as well as testimony by former DCNR officials, establish that these leases are and will continue to be active for the next 50 years, causing degradation and diminution of our State Forest public natural resources. *Id.* The current and future degradation from the leasing activities is a major threat to our State Forest ecosystem. Yet, the 2016 SFRMP provides no discussion of how DCNR manages these leases and their impacts.

The 2016 SFRMP identifies two primary purposes; first, to provide a framework for forest managers to make management decisions and professional judgments that ensure sustainability across the State Forests; and second, to communicate to stakeholders—the citizens of Pennsylvania—how their forest is

being managed. 2016 SFRMP at 20 (RR99). However, the 2016 SFRMP provides no framework for forest managers to make management decisions to prevent and remedy the current and future degradation of our State Forest from the current and future impacts from the leasing activities evidenced by the 2014 and 2018 Shale Gas Monitoring Reports, which are occurring and will continue to occur for at least the next 50 years. Nor does it communicate to stakeholders—the citizens of Pennsylvania—how the existing and future degradation of the State Forest allowed by their trustees is being remedied.

PEDF believes and avers that DCNR has the duty as trustee under the ERA to explain in the current SFRMP how it is dealing with the current and future impacts from the over 644,000 acres of State Forest currently subject to oil and gas development. DCNR, as trustee of Pennsylvania’s State Forest under the ERA, has the specific constitutional duty to conserve and maintain these public natural resources, which requires that DCNR prevent and remedy degradation of those resources.

PEDF alleges that by failing to explain in the 2016 SFRMP how the degradation of our State Forest will be remedied from sanctioned geologic resource extraction, DCNR and Secretary Dunn are violating their fiduciary duties of prudence, loyalty, and impartiality to protect the State Forest under the ERA.



Judicial review of these allegations is fundamental to the protection of our State Forest public natural resources by the trustees managing them.

**E. The 2016 SFRMP Improperly Conflates Social and Economic Values with Protection of the State Forest Ecosystem**

In the 2016 SFRMP, DCNR states that “[e]xtraction of geologic resources such as coal, oil, and natural gas also has long been a keystone to Pennsylvania’s economy ... *Geologic resources on state forest lands offers a variety of environmental, social and economic values that the Bureau considers in ecosystem management.*” 2016 SRRMP at 154 (RR233) (emphasis added). DCNR is fundamentally changing its approach to ecosystem management by adding “social and economic” values into its considerations, which again means that DCNR will “balance” protection of the environmental values of our State Forest under the ERA with social and economic values. This approach is contrary to DCNR’s long-standing approach to ecosystem management.

To meet its constitutional responsibility to conserve and maintain the State Forest, DCNR developed and adopted a strategic plan in 1995, *Penn’s Woods*. DCNR states in *Penn’s Woods* that the mission of the Bureau of Forestry is “to ensure the long-term health, viability and productivity of the Commonwealth’s forests and to conserve native wild plants.” *Penn’s Woods* at 32 (RR343). *Penn’s Woods* further states that “[f]irst among the ways the bureau will accomplish this mission is by managing the State Forests under *sound ecosystem management, to*

*retain their wild character and maintain biological diversity* while providing pure water, opportunities for low-density recreation, habitats for forest plants and animals, sustained yields of quality timber, and *environmentally sound utilization of mineral resources.*” *Id.* (emphasis added). Under *Penn’s Woods*, State Forest mineral resources are not used unless their extraction and sale benefit the State Forest public natural resources (*i.e.*, are environmentally sounds), which includes retaining the State Forest’s wild character, biological diversity, pure water, and habitats for forest plants and animals. *Penn’s Woods* does not sanction the balancing of these environmental values with the social and economic values of using State Forest mineral resources.

DCNR and Secretary Dunn make this fundamental shift in ecosystem management of our State Forest without providing any framework in the 2016 SRRMP for forest managers to fulfil their constitutional duties to conserve and maintain the corpus of the State Forest trust assets under the ERA for the benefit of all the people, including future generations. As the administrator of our State Forest public trust assets under the ERA, DCNR and Secretary Dunn have the fiduciary duty as trustees to ensure the State Forest is being managed for its constitutional purposes.

As discussed above, DCNR has published two monitoring reports on the effects of the shale gas extraction and sale on our core State Forest areas—one in

2014 covering data through 2012 and the second in 2018 covering data through 2016. These reports just begin to document why shale gas extraction is not “environmentally sound utilization of mineral resources” under the principles of ecosystem management established in *Penn’s Woods*. These monitoring reports are not management plans and provide no framework for forest managers to comply with the ERA. As discussed above, the update to the State Forest Resource Management Plan approved in 2016 needed to include a framework to remedy the degradation of State Forest public natural resources from the extraction of geologic resources to comply with the ERA. Rather than include such a framework consistent with their fiduciary duties as trustees, DCNR and Secretary Dunn gut the long-standing principles of ecosystem management established in *Penn’s Woods* by simply declaring that DCNR will now consider “social and economic” values along with the environmental values of our State Forest in carrying out ecosystem management.

In *Penn’s Woods*, the Bureau of Forestry states that the basic tenet of ecosystem management “is that forests, rather than being viewed as containing a set of resources, in fact, are more than the sum of their parts. Forests are comprised of quantifiable components such as trees, but forests are also systems performing various functions and processes ... Thus, *a major step toward maintaining Pennsylvania’s environmental heritage and values is to adopt a management*

*strategy geared toward sustaining the long-term health and productivity of forest ecosystems.”* *Id.* at 8 (RR318) (emphasis added). The maintenance of the ecosystem integrity is critical to DCNR’s ability to sustainably manage our State Forests in northcentral Pennsylvania. If the State Forests and associated State Parks in this region are degraded and diminished (*e.g.*, if their wild character, biological diversity, pure air, or clean water are degraded or diminished, or if their natural, scenic, historic, and esthetic values are not preserved), the specific mandates of the ERA to conserve and maintain our public natural resources for present and future generations cannot be met.

*Penn’s Woods* states that a “**key element in maintaining ecosystem integrity and viability is the maintenance of biological diversity.**” *Id.* at 9 (RR319) (emphasis added). Noting that hundreds of plant and animal species have been lost or are endangered or threatened in Pennsylvania and that over half of our wetland habitat has been lost, *Penn’s Woods* concludes that “**habitat destruction and fragmentation, along with degradation from pollution, are the greatest threats to biodiversity.**” *Id.* (emphasis added). These threats are the same elements of degradation experienced in our State Forest from the extraction and sale of oil and gas natural resources.

*Penn’s Woods* clearly reflects the intentions of the people of Pennsylvania who voted to approve the ERA public trust and who understood our history of boom-

and-bust industrial natural resource extraction and the devastation these industries can leave behind. Their purpose in declaring Pennsylvania's public natural resources to be the common property of the people and requiring their government to conserve and maintain these resources as a trustee is to ensure these resources, including our State Forests and State Parks, are restored and maintained as healthy ecosystems that support the natural diversity of plants and animals that can thrive in such ecosystems.

PEDF alleges that by fundamentally altering DCNR's long-standing principles of ecosystem management to now included consideration of "social and economic" values, DCNR and Secretary Dunn are violating their fiduciary duties of prudence, loyalty, and impartiality to protect the State Forest under the ERA. Judicial review of these allegations is fundamental to the protection of our State Forest public natural resources by the trustees managing them.

#### **F. The Commonwealth Court Erred in Failing to Review PEDF's Constitutional Questions**

The Commonwealth Court clearly understood that PEDF is seeking review in the PEDF Petition of the constitutionality of aspects of the 2016 SFRMP. The Commonwealth Court states in *PEDF VII* that PEDF's "position that DCNR has moved away from utilizing 'ecological' principles to guide its management decisions on State Forest lands in favor of 'economic' principles. [PEDF] claims that DCNR 'changed its paradigm' for administering the State Forest trust assets to now equate the economic values of oil and gas with the value of the forest ecosystem

itself, including the peoples’ constitutional rights ‘to clean air, pure water, and the preservation of the natural, scenic, historic and aesthetic values of the [forest] environment.’” *PEDF VII* at 9 (Attachment A).

The Commonwealth Court also acknowledged that PEDF “asks this Court to determine questions arising from the 2016 SFRMP, and to ... administer State Trust assets consistent with its trustee duties, and with our Supreme Court’s 2017 decision in [*PEDF II*].” *PEDF VII* at 5. The Commonwealth Court below clearly read and understood this Court’s findings and holding in *PEDF II*. The Commonwealth Court restated many of the relevant provisions in *PEDF II* regarding review of compliance with the ERA but simply ignored them in its analysis of the preliminary objections and instead applied judicial principles of administrative law to avoid the constitutional questions.

The Commonwealth Court also ignored this Court’s holdings in *PEDF II* and *PEDF IV* that both royalties and all other income from State Forest oil and natural gas leases are part of the corpus of the ERA public trust and must be used to conserve and maintain our public natural resources. Just two weeks before the Commonwealth Court dismissed the PEDF Petition, this Court reiterated these principles in *PEDF IV* concluding that, along with royalties, “income generated from bonus payments, rental and late fees must be returned to the corpus to benefit the conservation and maintenance of the public resources for all the people. To hold otherwise and allow

allocation of the income to the general fund would permit the Commonwealth to use trust income to advance a non-trust purpose, an outcome we previously rejected.” 255 A.3d at 314.

The PEDF Petition alleges that DCNR and Secretary Dunn are now sanctioning the generation of revenue from the extraction and sale of oil, natural gas, and other geologic resources from our State Forest for non-trust purposes in violation of the ERA, which has been occurring since at least 2009. The Commonwealth Court ignored the facts in the PEDF Petition supporting that allegation, including the facts established by DCNR regarding current and continuing degradation of the State Forest from shale gas extraction and the findings of this Court regarding the rights of the people under the ERA and the Commonwealth’s fiduciary duty as trustee to use revenue from State Forest oil and gas leases for trust purposes.

The Commonwealth Court’s decision to dismiss PEDF’s claims also ignored this Court’s determination that the Commonwealth’s trustee obligations create a right to seek to enforce those obligations. As this Court has stated, in determining questions of constitutionality related to the application of the plain text of the ERA, a “legal claim ‘may proceed upon alternative theories that either the government has infringed upon citizens’ rights, or the government has failed in its trustee obligation, or upon both theories.’” *PEDF IV*, 255 A.3d at 296 (quoting *Robinson Twp.* 83 A.3d at 950-951). PEDF’s claims are based on both theories.

The Commonwealth Court asserts that PEDF cannot request a declaration to direct DCNR and Secretary Dunn, as trustees of our State Forest trust assets, to fulfill their responsibilities as trustees of these public natural resources under the ERA consistent with *PEDF II*. Section 7532 of the Declaratory Judgements Act, entitled “General scope of declaratory remedy,” states that “[c]ourts of record, within their respective jurisdictions, shall have the power to declare rights, status, and other legal relations whether or not further relief is or could be claimed ...”; and Section 7535, entitled “Rights of fiduciaries and other persons,” states that “[a]ny person interested, as or through ... [a] trustee, ... in the administration of a trust, ... may have a declaration of rights or legal relations in respect thereto: ... [t]o direct the ... administrators, or trustees to do or to abstain from doing any particular act in their fiduciary capacity [or] [t]o determine any question arising in the administration of the ... trust, including questions of construction of ... writings.” 42 Pa.C.S. §§ 7532 and 7535. A request for a declaration that the State Forest Resource Management Plan prepared by DCNR and Secretary Dunn, as trustees of our State Forest, must comply with their constitutional obligations, as articulated in any declaratory relief granted in response to the PEDF Petition, is not a mandamus action. Likewise, the requests for declarations in the PEDF Petition relevant to the duties of DCNR and Secretary Dunn as trustees of our State Forest trust assets are not requests for advisory opinions. They are requests for clarification of the duties of these trustees



to ensure our State Forest trust assets are conserved and maintained and the facts and law that define those trustee duties.

As this Court stated in *PEDF II*, “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.” 161 A.3d at 933 (citing *Robinson Twp.*, 83 A.3d at 597-598 and *Geer v. Connecticut*, 161 U.S. 519, 534 (1896)). These duties logically extend to requiring DCNR and Secretary Dunn to ensure that the State Forest Resource Management Plan governing their administration of our State Forest trust assets affirmatively explain how they are protecting these constitutionally protected public natural resources.

### **VIII. REQUESTED RELIEF**

IN CONCLUSION, for the reasons set forth above, PEDF respectfully requests that this Honorable Court:

- (1) Vacate the Commonwealth Court’s Order; and
- (2) Remand the case to the Commonwealth Court to hear and determine PEDF’s constitutional challenges under the ERA to the 2016 SFRMP, including PEDF’s requests for declarations that:

(a) The 2016 SFRMP violates the ERA by fundamentally altering the Bureau of Forestry's mission in managing our State Forest to include generating revenue from the extraction of State Forest geologic resource for the economic use of the Commonwealth; and that DCNR and Secretary Dunn violated the ERA and their fiduciary duties as trustees of our State Forest by approving this fundamental change to the State Forest Resource Management Plan that violates the ERA.

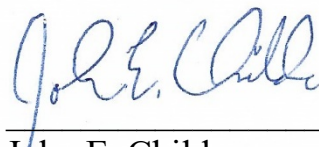
(b) The 2016 SFRMP violates the ERA by fundamentally changing the basis for allowing the extraction of State Forest geologic resources to include balancing of the economic value of such extraction for the benefit of the Commonwealth with the fundamental rights established under the ERA to have our State Forest trust assets conserved and maintained; and that DCNR and Secretary Dunn violated the ERA and their fiduciary duties as trustees of our State Forest by approving this fundamental change to the State Forest Resource Management Plan that violates the ERA.

(c) The 2016 SFRMP violates the ERA by failing to explain how the degradation of State Forest trust assets from past, present, and ongoing geologic resource extraction will be prevented and remedied; and that DCNR and Secretary Dunn violated the ERA and their fiduciary duties as trustees of our State Forest by approving the State Forest Resource Management Plan without including this explanation, which is critical to compliance with the ERA.

(d) The 2016 SFRMP violates the ERA by fundamentally altering the long-standing principles of ecosystem management established in *Penn's Woods* to sustain our State Forest and comply with the ERA to now include consideration of social and economic values; and that DCNR and Secretary Dunn violated the ERA and their fiduciary duties as trustees of our State Forest by approving this fundamental change to the State Forest Resource Management Plan that violates the ERA.

(e) The State Forest Resource Management Plan governing trustee administration of our State Forest trust assets must comply with the ERA; and DCNR and Secretary Dunn must revise the 2016 SFRMP consistent with declaratory relief granted based on the PEDF Petition.

Respectfully,



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## **ATTACHMENT A**

Commonwealth Court Memorandum Opinion and Final Order  
dated August 6, 2021 (Docket No. 609 MD 2019)

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Pennsylvania Environmental	:	
Defense Foundation,	:	
Petitioner	:	
	:	No. 609 M.D. 2019
v.	:	
	:	Argued: September 17, 2020
Commonwealth Department of	:	
Conservation and Natural Resources,	:	
and Cindy Adams Dunn, in her	:	
official capacity as Secretary,	:	
Respondents	:	

BEFORE: HONORABLE PATRICIA A. McCULLOUGH, Judge  
          HONORABLE J. ANDREW CROMPTON, Judge  
          HONORABLE BONNIE BRIGANCE LEADBETTER, Senior Judge

**OPINION NOT REPORTED**

MEMORANDUM OPINION  
BY JUDGE McCULLOUGH

FILED: August 6, 2021

Before this Court in our original jurisdiction are the preliminary objections filed by the Pennsylvania Department of Conservation and Natural Resources (DCNR) and Cindy Adams Dunn, Secretary of Conservation and Natural Resources, of DCNR (Secretary Dunn), (collectively, DCNR), to an amended petition for review in the nature of a mandamus action seeking declaratory relief filed by the Pennsylvania Environmental Defense Foundation (Foundation).

**I. Background**

The Petitioner, the Foundation, is a non-profit organization incorporated under the laws of Pennsylvania since 1986 for the purposes of protecting and

preserving the environmental interests of its members in Pennsylvania. Five members of the Foundation have filed affidavits in support of the amended petition for review.

The Respondent DCNR is the “trustee” of the public trust set forth in Article I, Section 27 of the Pennsylvania Constitution, known as the Environmental Rights Amendment (ERA).<sup>1</sup>

The Respondent Secretary Dunn, acting in her official capacity, is the Secretary of DCNR, appointed by the Governor and approved by a majority of the members elected to the Senate to serve as the head of DCNR.<sup>2</sup> Secretary Dunn has taken an oath to “support, obey and defend the Constitution of Pennsylvania.” PA. CONST. art. VI, §3; Section 218 of The Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. §78.

#### **A. The Environmental Rights Amendment**

In 1971, the Commonwealth adopted the ERA. The ERA imposes on DCNR, as trustee, the duty to “conserve and maintain” Pennsylvania’s public natural resources “for the benefit of all the people,” including generations yet to come. PA. CONST. art. I, §27. The ERA defines the people’s rights to the public natural resources to include “clean air, pure water, and . . . the preservation of the natural, scenic, historic

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<sup>1</sup> The ERA provides:

The people have a right to clean air, pure water, and 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.

<sup>2</sup> Section 301 of the Conservation and Natural Resources Act (CRNA), Act of June 28, 1995, P.L. 89, *as amended*, 71 P.S. §1340.301.

and esthetic values of the environment.” *Id.* Pennsylvania’s state parks and forests are public natural resources for which DCNR has trustee duties under the ERA.

**B. The Conservation and Natural Resources Act**

The CNRA created DCNR and tasked it with advocating for and managing the ERA trust assets found in the State Forests and State parks, granting it the primary mission

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 geological 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.

Section 101(b)(1) of the CNRA, 71 P.S. §1340.101(b)(1).

**C. The 2016 State Forest Resource Management Plan**

Periodically, since 1955, DCNR’s Bureau of Forestry (Bureau) has prepared forest resource management plans. Prior plans were adopted in 1970, 1985, 2003, and 2007. The most recent state forest resource management plan, and the one currently in effect and at issue here, is the 2016 State Forest Resource Management Plan (2016 SFRMP).<sup>3</sup> It was the first update to the plan in nine years. (2016 SFRMP, Letter from State Forester, Dan Devlin.)

The 2016 SFRMP is a 220-page document with a table of contents, executive summary, appendix, colored photographs, and several introductory chapters, followed by a series of 12 resource chapters that focus on the variety of resources, uses, and values of state forest land. The resource chapters are the following:

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<sup>3</sup> The 2016 SFRMP is attached to the Foundation’s original Petition for Review as Exhibit “A.”

Communications, Timber and Forest Products, Native Wild Plants, Wildlife, Water Resources, Soils, Geologic Resources, Wildland Fire, Forest Health, Recreation, Infrastructure, and Cultural Resources. Each resource chapter contains an informational/educational section, an assessment of forest conditions, accomplishments, guidelines, tools, resources, and strategies and tactics for addressing forest threats and future management of Pennsylvania forests. An electronic version of the 2016 SFRMP can be found online at [http://www.docs.dcnr.pa.gov/cs/groups/public/documents/document/dcnr\\_20032045.pdf](http://www.docs.dcnr.pa.gov/cs/groups/public/documents/document/dcnr_20032045.pdf) (last visited on 08/05/2021).

According to State Forester, Dan Devlin, the 2016 SFRMP and the others before it were developed and relied on to “guide [DCNR’s] management and communicate [DCNR’s] management principles and goals to the public.” *Id.* It is described as

the primary instrument that the [B]ureau uses to plan, coordinate, and communicate its management of the state forest system. By relating the broad policies of the [B]ureau’s strategic plan to focused goals and objectives and specific operational guidelines, the SFRMP lays the groundwork for ensuring that the overarching goal of state forest management - ensuring sustainability - is achieved.

(2016 SFRMP at 24.)

It further states that it is “not a prescriptive manual,” but is intended to provide the Bureau staff with context, background, goals, and objectives to consider when making management decisions, and to provide Pennsylvanians with a description of its management approaches, context, goals, and objectives as an educational document. *Id.* at 20.

At issue here are certain statements contained in the 2016 SFRMP, which the Foundation claims evidences DCNR’s breach of its fiduciary duties under the ERA



to protect, conserve, and maintain our State Forest public natural resources. (Amended Petition for Review (Am. Pet.) ¶2.) The Foundation asks this Court to determine questions arising from the 2016 SFRMP, and to direct DCNR to amend the 2016 SFRMP and administer State Forest trust assets consistent with its trustee duties, and our Supreme Court's 2017 decision in *Pennsylvania Environmental Defense Foundation v. Commonwealth*, 161 A.3d 911 (Pa. 2017) (*PEDF*).

Specifically pertinent to this dispute are several statements made, and/or positions taken, by DCNR throughout the 2016 SFRMP, relative to DCNR's management of the State Forests and its handling of monies resulting from oil and gas drilling on State Forest land. The Foundation contends that extraction and sale of oil and gas has caused and continues to cause immediate and long-term degradation to our State Forests' trust assets. The Foundation believes that DCNR's plan for management of our State Forests must be focused solely on ecosystem rehabilitation and management, not on the economic value of these resources. The Foundation takes issue with various statements extracted from the 2016 SFRMP, which it claims demonstrate that DCNR is currently managing our State Forests in a manner that is inconsistent with its fiduciary duties as trustee under the ERA and in derogation of *PEDF*. It also faults DCNR for its failure to articulate in the 2016 SFRMP how the degradation, diminution, and depletion of these assets by existing oil and gas development will be remedied. The Foundation asks us to (1) declare that certain statements made by DCNR in the 2016 SFRMP are contrary to, and in violation of, the ERA and (2) compel DCNR to amend the 2016 SFRMP so that it comports with DCNR's responsibilities to manage our State Forests in a manner consistent with its trustee duties under the ERA.

#### D. *PEDF v. Commonwealth*

In *PEDF*, the Foundation, *i.e.*, the Petitioner in this case, commenced a declaratory judgment action against the Commonwealth, challenging two recent legislative enactments to The Fiscal Code,<sup>4</sup> which directed that royalties, rents, and bonuses generated from the leasing of State Forest and park lands for oil and gas exploration and extraction be transferred to the General Fund to pay for government operations in 2009 and 2010. The Foundation alleged that these legislative enactments violated the ERA.

In considering the question, the Supreme Court reaffirmed the legal principles pronounced by a plurality of the Court in *Robinson Township v. Commonwealth*, 83 A.3d 901 (Pa. 2013) (plurality), ultimately overruling the three-part balancing test for determining if an action violates the ERA set forth in *Payne v. Kassab*, 312 A.2d 86, 94 (Pa. Cmwlth. 1973) and establishing a new test that requires courts to adhere to private trust principles when deciding whether the Commonwealth is in violation of the ERA. *PEDF*, 161 A.3d at 933 n.26.

The Supreme Court analyzed each of the ERA's three clauses, explaining that the first clause is "a prohibitory clause declaring the right of citizens to clean air and pure water, and . . . the preservation of natural, scenic, historic and esthetic values of the environment." *Id.* at 931. In other words, the first clause prohibits the Commonwealth from acting in a way that unreasonably impairs citizens' rights to a clean environment. *Id.* The second clause of the ERA confers ownership of the state's "public natural resources" upon Pennsylvania's citizens, including future generations. *Id.* The third clause of the ERA establishes a public trust, with the Commonwealth as

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<sup>4</sup> Act of April 9, 1929, P.L. 343, *as amended*, 72 P.S. §§1-1805.

trustee, the natural resources as the corpus of the trust, and the citizens as the beneficiaries of the trust. *Id.* at 932.

The Supreme Court enumerated trust principles and how they are to be applied. “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. The Court found that two fiduciary duties are imposed on the Commonwealth as a trustee to prevent public or private harm to trust property: “a duty to prohibit the degradation, diminution, and depletion” of our public resources and “a duty to act affirmatively via legislation to protect the environment.” *Id.* at 911.

The Supreme Court explained that the Commonwealth’s trustee obligations “create a right in the people to seek to enforce the obligations” and therefore the public trust provisions of the ERA are “self-executing.” *Id.* at 974. In other words, the public trust obligations of the ERA are enforceable regardless of whether there is legislation providing for such enforcement.<sup>5</sup>

The Supreme Court went on to find that the minerals under state parks and forests were “part of the corpus of Pennsylvania’s environmental public trust.” *Id.* at 936. The Court enforced the duty of the State to protect the environment and serve as a trustee, rather than as a proprietor, of its “public natural resources.” *Id.* Although *PEDF* did not bar DCNR from leasing state land for the exploration and development of oil and gas, it required that royalties generated from production be committed to “furthering the purposes, rights, and protections” of the ERA. *Id.* at 934-35. To that end, the Supreme Court ruled that Sections 1602-E and 1603-E of the Fiscal Code<sup>6</sup>

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<sup>5</sup> John C. Dernbach et al., *Recognition of Environmental Rights for Pennsylvania Citizens: Pennsylvania Environmental Defense Foundation v. Commonwealth of Pennsylvania*, 70 Rutgers U.L. Rev. 803, 835 (2018).

<sup>6</sup> Added by the Act of October 9, 2009, P.L. 537, 72 P.S. §§1602-E, 1603-E.

were facially unconstitutional because they allocated the royalties from the sale of oil and gas to the General Fund, which was a “non-trust purpose” in violation of the ERA. *Id.* at 938-39.<sup>7</sup>

## **II. The Foundation’s Amended Petition for Review**

With *PEDF* as its springboard, the Foundation initiated this action on November 5, 2019, by filing a petition for review in the nature of a complaint for declaratory and mandamus relief. DCNR filed preliminary objections, and the Foundation filed its amended petition for review on January 22, 2020.<sup>8</sup> It is the Foundation’s position that, as demonstrated throughout the 2016 SFRMP, DCNR has been and is continuing to violate its fiduciary duties, under the ERA with respect to its

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<sup>7</sup> The Supreme Court remanded the matter to the Commonwealth Court to decide whether bonuses and rental payments deposited into the General Fund to pay for government operations in 2009 and 2010 pursuant to two fiscal enactments were part of the trust corpus. On July 29, 2019, this Court published its decision on remand holding that bonuses and rental payments were not for the severance of natural resources but were consideration for the exploration for oil and gas on public land, and therefore, they were not part of the trust corpus. Therefore, Sections 1604-E and 1605-E of the Fiscal Code and Section 1912 of the Supplemental General Appropriations Act of 2009 were not facially unconstitutional. *Pennsylvania Environmental Defense Foundation v. Commonwealth*, 214 A.3d 748, 751 (Pa. Cmwlth. 2019). On August 12, 2019, the Foundation filed an appeal to the Pennsylvania Supreme Court, and the Court reversed this Court’s decision. *Pennsylvania Environmental Defense Foundation v. Commonwealth*, --- A.3d --- (Pa., No. 64 MAP 2019, filed July 21, 2021).

<sup>8</sup> The present action is one of a series of legal actions by the Foundation seeking to enforce the Supreme Court’s 2017 decision in *PEDF*. See *Pennsylvania Environmental Defense Foundation v. Commonwealth* (Pa. Cmwlth., No. 358 M.D. 2018, filed 5/17/18) (petition for declaratory relief asking this Court to declare 2017 amendments to Fiscal Code eliminating DCNR’s Oil and Gas Lease Fund and making and proposing \$96 million in money transfers from the Fund unconstitutional); *Pennsylvania Environmental Defense Foundation v. Commonwealth* (Pa. Cmwlth., No. 393 M.D. 2019, filed 7/17/19) (petition for declaratory relief asking this Court to block transfers from DCNR’s Oil and Gas Fund to pay for DCNR’s operating expense in the Fiscal Year 2019-20 budget). That case was stayed on September 23, 2019, pending this Court’s disposition of the parties’ cross-motions for summary relief at 358 M.D. 2018.

management and administration of our State Forests' natural resources, and it asks us to make various declarations to this effect. The Foundation also asks us to compel DCNR to amend the 2016 SFRMP to ensure that DCNR manages State Forests' natural resources consistent with its trustee duties under the ERA.

By way of background, the amended petition for review recounts how in 1995, as part of the newly created DCNR, the Bureau adopted a strategic plan, entitled *Penn's Woods, Sustaining Our Forests* ("*Penn's Woods*"), to manage our State Forest trust assets and to guide the development of future State Forest Resource Management Plans consistent with its trustee duties to conserve and maintain these trust assets under the ERA. (Am. Pet. ¶30.) The Foundation avers that from 1995 to 2016, DCNR's stated strategic plan was to manage our State Forest trust assets based on the science of "ecosystem management" consistent with its strategic plan adopted in *Penn's Woods*, and its trustee duties under the ERA. *Id.* ¶30. With respect to DCNR's State Forest minerals policy, *Penn's Woods* stated that it "should hold virgin, surface-minable coal as reserves and should explore and develop other minerals on State Forest lands to provide long-term good to the citizens of the Commonwealth only when these activities are consistent with ecosystem management." *Id.* ¶33 (citing *Penn's Woods* at 28).

It is the Foundation's position that DCNR has moved away from utilizing "ecological" principles to guide its management decisions on State Forest lands in favor of "economic" principles. *Id.* ¶34. The Foundation claims that in the 2016 SFRMP, DCNR "changed its paradigm" for administering the State Forest trust assets to now equate the economic values of oil and gas with the value of the forest ecosystem itself, including the people's constitutional right to "clean air, pure water, and the

preservation of the natural, scenic, historic and esthetic values of the [forest] environment.” *Id.* ¶4.

In Count “A,” the Foundation alleges that DCNR is in violation of its fiduciary duties as trustee under the ERA, as evidenced by the following sentence on page 156 of the 2016 SFRMP:

The *economic use* and sound extraction and utilization of geologic resources *is part of the [B]ureau’s mission* in managing these lands.

(2016 SFRMP at 156) (emphasis added).

According to the Foundation, this particular excerpt evidences that DCNR has used, and intends to continue to use, funds derived from the extraction and sale of the State Forests’ oil and natural gas for the Commonwealth’s economic use in funding general government operations, including DCNR’s own annual operations, in place of revenue from the General Fund.<sup>9</sup> See Am. Pet. ¶¶62-64. The Foundation asserts that using State Forests’ natural resources for the benefit of the Commonwealth is unconstitutional under *PEDF*, which held that funds generated from leasing State lands should be used solely to conserve and maintain the State’s natural resources, *i.e.*, money generated from leasing State lands must remain in the corpus of the trust. *PEDF*, 161 A.3d at 938-39. The Foundation asserts that DCNR is “aware of and bound by the law established by the Supreme Court in *PEDF*[], but [has] failed to amend the 2016 [SFRMP] to comply with the 2017 mandates of the Supreme Court and continues [in the 2016 SFRMP] to assert [it has] an unconstitutional mission to sell the oil and

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<sup>9</sup> Along these same lines, see 2016 SFRMP section titled, “Timber and Forest Products,” which also states that “*timber and other forest products on [S]tate [F]orest lands are managed to promote and maintain desired landscape conditions and provide sustainable social and economic benefits to the [C]ommonwealth.*” (2016 SFRMP at 8) (emphasis added).

gas resources of our State Forest[s] for the economic benefit of the Commonwealth, including paying for DCNR's operations costs." (Am. Pet. ¶92.)

Based on these allegations, the Foundation asks this Court to declare:

- DCNR's *stated "mission"* to use the proceeds from the extraction and sale of coal, oil, natural gas and other geologic resources of our State Forests for the economic benefit of itself and the Commonwealth *is a violation of its constitutional trustee duties under the ERA*. *Id.* ¶93(a).
- DCNR and Secretary Dunn have violated their fiduciary duties of prudence, loyalty and impartiality as trustees under the ERA by treating our State Forests' geologic resources as proprietors, and *declaring their mission in the 2016 SFRMP* to be the extraction and sale of public natural resources of our State Forests for economic use by them and the Commonwealth. *Id.* ¶93(b).
- The phrase "in the best interest of the Commonwealth" in section 302(a)(6) of the CNRA, 71 P.S. §1340.302(a)(6), does not mean that DCNR can lease and sell our public natural resources for money for the economic use by the Commonwealth in violation of the ERA. *Id.* ¶93(c).
- DCNR's mission as stated in CNRA section 101(b) to manage our State Forest lands to assure their long-term health, sustainability and economic use does not require DCNR to authorize the extraction and sale of the oil and gas that are a part of the public natural resources of our State Forests when that activity will degrade, diminish and deplete our State Forest public natural resources contrary to the mandates of the ERA. *Id.* ¶93(d).
- DCNR's *expansion of its mission in administering the State Forest public trust under the 2016 SFRMP* to include the extraction and sale of oil and gas from our State Forests for the economic benefit of the Commonwealth violates the ERA. *Id.* ¶93(e).

- The oil and natural gas resources of our State Forests, as part of the corpus of the public trust under the ERA, cannot be used for the economic benefit of the Commonwealth because such economic use violates the purpose of the trust, which is to conserve and maintain those resources for the benefit of the people. *Id.* ¶93(f).
- Both DCNR and Secretary Dunn have violated the ERA and their duties thereunder ***by continuing to use money*** from the extraction and sale of oil and natural gas from our State Forests for purposes other than conserving and maintaining the public natural resources of our State Forests, including protecting the clean air, pure water and natural, scenic, historic and esthetic values of our State Forests. *Id.* ¶93(g).
- Secretary Dunn has violated her oath to support, obey and defend the Constitution of Pennsylvania by ***failing to abide by the law established by the Supreme Court*** concerning the use of ERA trust assets, including the proceeds from the sale of our State Forests' oil and gas, and ***by failing to require amendment of the 2016 SFRMP*** to comply with the Supreme Court mandates; to the contrary, she has ***continued to assert*** that DCNR's mission in administering our State Forest trust assets is to sell the oil and gas trust assets and use the money from this sale for the unconstitutional purpose of paying for general State government operations, including paying for DCNR's operations costs, rather than implementing projects necessary to conserve and maintain our State Forests. *Id.* ¶93(h).
- Both DCNR and Secretary Dunn have violated the ERA by ***failing to explain*** to the trust beneficiaries ***in their 2016 SFRMP*** the nature of their fiduciary duties under the ERA in administering our State Forest trust assets under the 2016 SFRMP, by failing to explain to the beneficiaries how they have complied with those duties under past plans, and



by failing to explain how the actions they will take to comply with those duties in the future. *Id.* ¶93(i).

As part of this Count, the Foundation also asks this Court to compel DCNR to remove from the 2016 SFRMP all statements that indicate its mission is to manage our State Forests by selling their oil and gas resources for economic use. *Id.* ¶93(j).

Next, in Count “B,” the Foundation argues that DCNR is in violation of its fiduciary duties as the trustee under the ERA as evidenced by the following statement which appears on page 154 of the 2016 SFRMP:

***Extraction of geologic resources such as coal, oil, and natural gas also has long been a keystone to Pennsylvania’s economy. These resources provide*** benefits to society including: domestic energy for heating, fuel, and electrical generation; material for plastic polymers and manufacturing and industrial processes; material for infrastructure construction; and job creation in areas throughout the Commonwealth. Geologic resources on state forest lands offer a variety of environmental, social, and ***economic values that the [B]ureau considers in ecosystem management.***

(2016 SFRMP at 154) (emphasis added).

The Foundation contends that DCNR’s recent ideology, which integrates economic considerations, is contrary to DCNR’s trustee duties under the ERA. (Am. Pet. ¶103.) It avers that DCNR’s approach to managing our State Forests as a “proprietor” of State Forest trust assets distorts the fundamental principles of ecosystem management that previously guided DCNR’s management of our State Forests, and it is contrary to the principles established in DCNR’s 1995 strategic plan, *Penn’s Woods*, and the ERA. *Id.* ¶¶95, 98.

Based on these allegations, the Foundation asks this Court to find and declare the following:

- DCNR's *assertion in the 2016 SFRMP*, which it follows to administer our State Forest public trust assets, that the social and economic values from selling our State Forests' oil and gas are on par with the ecological health of the State Forests violates DCNR's fiduciary duties as the trustee of our State Forest under the ERA and the rights of the beneficiaries thereunder. *Id.* ¶103(a).
- *In its 2016 SFRMP* to administer our State Forest trust assets, *DCNR's assertion that* the social and economic values from selling our State Forests' oil and gas are considered in ecosystem management is contrary to the principles of ecosystem management articulated in DCNR's 1995 strategic plan, *Penn's Woods*, to implement the ERA. *Id.* ¶103(b).
- DCNR and Secretary Dunn have violated their fiduciary duties of prudence, loyalty and impartiality as trustees of our State Forest trust assets under the ERA and have violated the beneficiaries' rights thereunder *by declaring in the 2016 SFRMP* for administration of those trust assets that the social and economic values from selling our State Forests' oil and natural gas be considered in ecological management of the State Forests. *Id.* ¶103(c).

In this Count, the Foundation also asks this Court to compel DCNR to remove from the 2016 SFRMP any statements or discussions that consider the social and economic values of selling our State Forests' oil and gas in managing the ecological health of our State Forests. *Id.* ¶103(d).

In Count "C," the Foundation next avers that DCNR is in violation of its fiduciary duties as trustee under the ERA as evidenced by its assertion in the 2016 SFRMP that

[m]anaging geologic resources requires thorough analysis, strategic planning, and attentive oversight to ensure that the

*value of geologic resources is balanced with other forest uses and values.*

(2016 SFRMP at 156) (emphasis added).

The Foundation contends that this statement means that DCNR is allowing the ecological value of our State Forests' geologic resources to be degraded, diminished, or depleted in order to support the economic value derived from extracting the geologic resources. (Am. Pet. ¶105.) The Foundation asserts that the constitutional rights established under the ERA cannot be balanced with the proprietary economic benefits from the extraction and sale of State Forests' oil and natural gas. Such balancing violates the ERA and the protections of the inalienable rights established therein. *Id.* ¶114.

Based on these assertions, the Foundation seeks the following declarations from this Court:

- ***In its 2016 SFRMP*** to administer our State Forest trust assets, DCNR ***has violated its fiduciary duties as trustee under the ERA by asserting*** that it can “balance” the purposes of the ERA, *i.e.*, the right to have our public natural resources conserved and maintained by the Commonwealth as trustee for the benefit of the people living today and for future generations, with the alleged proprietary right to extract and sell our public resources for public use. *Id.* ¶115(a).
- DCNR is in violation of its fiduciary duties as trustee, ***by asserting in the 2016 SFRMP that*** it can “balance” the economic value of the extraction and sale of oil and gas on State Forest land with ecological values of our State Forests. *Id.* ¶115(b).
- DCNR's proprietary attempt to “balance” rights under the ERA with rights established with other articles of the Constitution, including Commonwealth's right to

appropriate funds and enact laws, violates Article I Section 25 of the Pennsylvania Constitution. *Id.* ¶115(c).

- DCNR has no constitutional right under the ERA to lease our State Forest land and sell our State Forest oil and natural gas. *Id.* ¶115(d).

- DCNR cannot “balance” the constitutional rights established under the ERA with any proprietary activities or policies involving non-trust purposes of the Commonwealth. *Id.* ¶115(e).

- DCNR cannot “balance” the constitutional rights established under the ERA with any proprietary activities that would result in the degradation, diminution and depletion of the public natural resources of our State Forests, including the oil and natural gas resources that are a part thereof. *Id.* ¶115(f).

- DCNR and Secretary Dunn, as trustees, violate both the ERA and Section 25 of Article I of the Pennsylvania Constitution *by stating in the 2016 SFRMP* to administer our State Forest trust assets that “[m]anaging the [coal, oil, natural gas and other] geologic resources requires thorough analysis, strategic planning, and attentive oversight to ensure that the value of geologic resources is balanced with other forest uses and values.” *Id.* ¶115(g).

- Both DCNR and Secretary Dunn have violated the ERA and their fiduciary duties thereunder *by approving the 2016 SFRMP* to administer the State Forests’ public trust assets without evaluating their current compliance with the ERA’s purposes and without articulating how future compliance will be achieved, *e.g.*, without evaluating whether State Forest public natural resources have been conserved and maintained, without evaluating whether the clean air, pure water and natural, scenic, historic, and esthetic values of the State Forests have been protected and preserved, and without identifying actions that need to be

taken to ensure our State Forests' public natural resources will be conserved and maintained in the future. *Id.* ¶115(h).

As part of this Count, the Foundation also asks this Court to compel DCNR to amend the 2016 SFRMP to remove the unconstitutional proprietary statement that “[m]anaging the [coal, oil, natural gas, and other] geologic resources requires thorough analysis, strategic planning, and attentive oversight to ensure that the value of geologic resources is balanced with other forest uses and values” and related discussion based on this statement. *Id.* ¶115(i).

Next, in Count “D,” the Foundation contends that DCNR is in violation of its fiduciary duties as trustee under the ERA as evidenced by its assertion in the 2016 SFRMP that

*[d]evelopment of geologic resources should occur* when it is compatible with landscape goals and functions, avoids sensitive ecological and socially important areas, and minimizes adverse impacts.

(2016 SFRMP at 156) (emphasis added).

The Foundation argues that according to this statement, DCNR is acting in contravention of the ERA because it is “sanctioning” the leasing of State Forest land for oil and gas extraction and sale without explaining how it will prevent and remedy the inevitable degradation, diminution and depletion of the State Forests' public natural resources. (Am. Pet. ¶¶116-22.)

Based on these allegations, the Foundation asks this Court to declare the following:

- The *conditions established by DCNR in its 2016 SFRMP* to administer our State Forest public trust assets and allow the development of oil, gas and other geologic resources, *i.e.*, its statement that “[d]evelopment of geological resources should occur when it is compatible with landscape goals and functions, avoids sensitive areas, and minimizes adverse impacts,” are contrary to and in violation

of the ERA because they sanction leasing of State Forest land for oil and gas. *Id.* ¶123(a).

- Both DCNR and Secretary Dunn have violated the ERA and their fiduciary duties as trustee thereunder *by stating in the 2016 SFRMP* to administer our State Forests' trust assets that development of the State Forests' geologic resources should occur under conditions that will not conserve and maintain those resources, which are part of the corpus of the ERA public trust. *Id.* ¶123(b).

- Both DCNR and Secretary Dunn have violated the ERA and their duties thereunder *by failing to properly explain in their 2016 SFRMP* to administer our State Forests' trust assets how any decision to lease State Forest land for the development of oil, gas or any geologic resources will be made, what evaluation will be conducted to ensure compliance with the ERA, and how the trust beneficiaries will be apprised of this evaluation prior to any decision to lease our State Forest land for this purpose. *Id.* ¶123(c).

In Count "E," the Foundation asserts that DCNR adopted the 2016 SFRMP to administer the State Forests' trust assets without including any evaluation of the degradation caused by past and present oil and gas development or any plan to implement measures to remedy that harm. *Id.* ¶128. The amended petition for review asserts that the 2014 and 2018 Shale Gas Monitoring Reports published by DCNR (attached to the Amended Petition as Exhibits "C" and "D") establish that the extraction of oil and natural gas from these leases has caused, is causing, and will continue to cause, the degradation, depletion, and diminution of our State Forest public natural resources. The Foundation alleges that DCNR has *failed to provide a framework in the 2016 SFRMP* for its forest managers to make management decisions to prevent and remedy the current and future degradation of the State Forests from the shale gas development activities. *Id.* ¶129.

Based on these allegations, the Foundation asks this Court to make the following declarations:

- DCNR has violated its duties as trustee under the ERA **by failing to include in the 2016 SFRMP** (1) a comprehensive strategy for evaluating when the development of State Forest geologic resources may be authorized, (2) a comprehensive evaluation of the current degradation, diminution and depletion of State Forest trust assets from geologic resource development that must be remedied; (3) a comprehensive strategy for preventing and remedying the degradation, diminution and depletion of our State Forests' trust assets that has and will continue to occur as the result of such authorized geologic resource development, and (4) an analysis of the funding necessary to implement, all of which are essential to provide a prudent framework from which DCNR's forest managers can make decisions to comply with their constitutional duties under the ERA. *Id.* ¶135(a).

- DCNR has violated its duties as trustee under the ERA **by failing to provide** stakeholders, the beneficiaries of the State Forest public trust, with **any evaluation in the 2016 SFRMP** of DCNR's current compliance with the ERA or its strategy for remedying existing and anticipated degradation, diminution or depletion of our State Forests' public natural resources; or any explanation of how DCNR will solicit timely stakeholder input in specific decisions to authorize geologic resource development or remedy degradation that has and continues to occur from development already authorized by DCNR. *Id.* ¶135(b).

In this Count, the Foundation also asks this Court to direct DCNR to amend the 2016 SFRMP to correct these alleged violations. *Id.* ¶135(c).

In Count "F," the Foundation asserts that in the 2016 SFRMP, DCNR fails to provide a specific plan to develop and implement ecosystem management to retain the natural wild character and maintain the biological integrity of the State Forests. *Id.*

¶139. Based on these allegations, the Foundation asks this Court to declare the following:

- DCNR has violated its constitutional duties under the ERA *by failing to provide the people of Pennsylvania with a specific plan* to implement ecosystem management in compliance with its duties to prevent and remedy the existing and future degradation of our State Forests from the current and future degradation caused by the extraction and sale of the oil and natural gas. *Id.* ¶147(a).

In connection with this Count, the Foundation also asks this Court to compel DCNR to amend the 2016 SFRMP to (1) provide the people of Pennsylvania, as well as its own forest managers, with the goals and objectives that DCNR will seek to achieve to enhance and to sustain our State Forests' ecosystems consistent with the policies in *Penn's Woods* and to provide them with an evaluation of the cost of the measures necessary to carry out these goals and objectives; and (2) provide a specific plan for developing and implementing ecosystem management to provide a framework for forest managers to make management decisions to ensure that our State Forests and State Parks are restored and maintained as healthy ecosystems that support the natural diversity of plants and animals that can thrive in such ecosystems, as envisioned by the drafters of the ERA and voters who overwhelmingly supported this constitutional amendment; and provide an evaluation of the costs to carry out this plan and a process for allocating money from the Oil and Gas Lease Fund to pay those costs. *Id.* ¶147(b) and (c).

Lastly, in Count "G," the Foundation argues that DCNR is in violation of its fiduciary duties as the trustee under the ERA as evidenced by its assertion in the 2016 SFRMP that

[f]orest products . . . are managed on state forest lands as a component of ecosystem management and to provide a wide variety of environmental, social, *and economic values*.



(2016 SFRMP at 84) (emphasis added).

The Foundation contends that this excerpt indicates that DCNR is presently balancing the social and economic values from the sale of timber products with other ecological values of the State Forests in making management decisions. (Am. Pet. ¶150.) It claims that DCNR has *failed in the 2016 SFRMP to provide* its forest managers and the trust beneficiaries with *a framework* for evaluating compliance with the ERA when authorizing timber harvesting or the removal of other forest products from the State Forests. In this manner, the Foundation asks us to declare that DCNR violated its fiduciary duties as trustee under the ERA. *Id.* ¶156(a)-(c).

### III. DCNR's Preliminary Objections

On February 20, 2020, DCNR filed the following five preliminary objections<sup>10</sup> challenging the legal sufficiency of the amended petition for review:

1. The amended petition for review fails to state a claim for which relief can be granted because the 2016 SFRMP does not create a binding norm; any declaration related to the 2016 SFRMP would not bind or restrict DCNR's actions when managing the State forests.

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<sup>10</sup> The Court's review of preliminary objections is limited to the pleadings. *See Pennsylvania State Lodge, Fraternal Order of Police v. Department of Conservation & Natural Resources*, 909 A.2d 413, 415-16 (Pa. Cmwlth. 2006), *aff'd*, 924 A.2d 1203 (Pa. 2007). The Court is "required to accept as true the well-pled averments set forth in the . . . [petition for review], and all inferences reasonably deducible therefrom." *Id.* "[T]he Court need not accept as true conclusions of law, unwarranted inferences from facts, argumentative allegations, or expressions of opinion." *Id.* Because the sustaining of a demurrer results in a denial of the pleader's claim or a dismissal of its suit, a preliminary objection in the nature of a demurrer should be sustained only in cases that clearly and without a doubt fail to state a claim for which relief may be granted. *Schott v. Westinghouse Electric Corporation*, 259 A.2d 443 (Pa. 1969); *Botwinick v. Credit Exchange, Inc.*, 213 A.2d 349 (Pa. 1965). If the facts as pleaded state a claim for which relief may be granted under any theory of law, then there is sufficient doubt to require the preliminary objection in the nature of a demurrer to be overruled. *Packler v. State Employees' Retirement Board*, 368 A.2d 673, 675 (Pa. 1977).

2. The amended petition for review fails to raise a controversy that is ripe for review because the 2016 SFRMP does not prescribe actions DCNR must take when carrying out the management of the State Forests, so no harm has or can occur from the 2016 SFRMP.
3. The Foundation lacks standing to bring this action because the amended petition for review does not allege any harm that has or will occur as a result of the 2016 SFRMP.
4. The amended petition for review fails to state a claim for which relief can be granted because the Foundation fails to establish that DCNR is required by law, namely the ERA, or any other mandate to develop and maintain any such plan or the amendments sought by the Foundation.
5. DCNR and Secretary Dunn have immunity from being directed to amend the 2016 SFRMP.

(DCNR's Preliminary Objections at 6-7.)

#### **IV. Analysis**

##### **A. Failure to State Claim for Declaratory Relief**

Pennsylvania is a fact-pleading state; a petition for review must not only give the respondent notice of what the petitioner's claim is and the grounds upon which it rests, but the petition for review must also formulate the issues by summarizing those facts essential to support the claim. *Alpha Tau Omega Fraternity v. University of Pennsylvania*, 464 A.2d 1349, 1352 (Pa. Super. 1983). Petitions for declaratory judgments are governed by the provisions of the Declaratory Judgments Act, 42

Pa.C.S. §§7531-7541. *Ronald H. Clark, Inc. v. Township of Hamilton*, 562 A.2d 965, 967 (Pa. Cmwlth. 1989). Declaratory judgments are not obtainable as a matter of right. *Id.* at 968-69. Thus, the granting of a petition for a declaratory judgment is a matter lying within the sound discretion of a court of original jurisdiction. *Gulnac by Gulnac v. South Butler County School District*, 587 A.2d 699, 701 (Pa. 1991).

In this declaratory judgment action, the Foundation’s requests for judicial declarations may be separated into two categories: (1) those requests which ask us to declare that DCNR is in violation of the ERA based on specific declarations and announcements in the 2016 SFRMP;<sup>11</sup> and (2) those requests which ask us to make certain general pronouncements of the law.

### **1. Requests Which Ask Us to Declare that DCNR is in Violation of the ERA Based on Specific Statements in the 2016 SFRMP**

With regard to the requested declarations in the first category, the Foundation is challenging DCNR’s statements in the 2016 SFRMP – as opposed to specific acts that resulted from the actual implementation of the 2016 SFRMP. In other words, the Foundation relies exclusively on statements made in the 2016 SFRMP as

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<sup>11</sup> See Am. Pet. ¶93(a) (“stated mission”), ¶93(b) (“declaring their mission in the 2016 SFRMP to be”), ¶93(e) (“expansion of its mission”), ¶93(h) (“by failing to require amendment of the 2016 SFRMP . . . [and] continu[ing] to assert that”), ¶93(i) (“failing to explain”), ¶103(a) (“assertion in the 2016 SFRMP”), ¶103(b) (“[i]n its 2016 SFRMP . . . DCNR’s assertion that”), ¶103(c) (“by declaring in the 2016 SFRMP [that]”), ¶115(a) (“In its 2016 SFRMP to administer our State Forest trust assets, DCNR has violated its fiduciary duties as trustee under the ERA by asserting that”), ¶115(b) (“by asserting in the 2016 SFRMP that”), ¶115(g) (“by stating in the 2016 SFRMP”), ¶115(h) (“by approving the 2016 SFRMP”), ¶123(a) (“conditions established by DCNR in its 2016 SFRMP”), ¶123(b) (“by stating in the 2016 SFRMP”), ¶123(c) (“by failing to properly explain in their 2016 SFRMP”), ¶135(a) (“by failing to include in the 2016 SFRMP”), ¶135(b) (“by failing to provide . . . any evaluation in the 2016 SFRMP of”), ¶147(a) (“by failing to provide the people of Pennsylvania with a specific plan”), and ¶156(a)-(c) (“failed in the 2016 SFRMP to provide . . . a framework”).

the factual basis for its claim that DCNR is mismanaging the State's forest assets. This is problematic for two reasons.

**a. The 2016 SFRMP is Not a Binding Norm**

First, as DCNR points out, the Foundation fails to establish a legal requirement or mandate for the relief sought. Although declaratory judgment actions were designed, in part, to eliminate the substantial expense and uncertainty that results from piecemeal litigation, *Bayada Nurses, Inc. v. Department of Labor and Industry*, 8 A.3d 866, 876 (Pa. 2010), “[a] declaratory judgment must not be employed to determine rights in anticipation of events which may never occur or for consideration of moot cases or as a medium for the rendition of an advisory opinion which may prove to be purely academic.” *Gulnac*, 587 A.2d at 701.

“A general statement of policy is . . . merely an announcement to the public the policy which the agency hopes to implement in [the] future. . . . A general statement of policy, like a press release . . . announces the course which the agency intends to follow.” *Home Builders Association of Chester and Delaware Counties v. Department of Environmental Protection*, 828 A.2d 446, 450 (Pa. Cmwlth. 2003), *aff'd*, 844 A.2d 1227 (Pa. 2004). “A general statement of policy . . . does not establish a ‘binding norm’ . . . A policy statement announces the agency’s tentative intentions for the future.” *Id.* at 451. This Court, in *Home Builders*, defined “binding norm” as follows:

“Binding norm” means that the agency is bound by the statement until the agency repeals it, and if the statement is binding on the agency, it is a regulation. Additionally, in determining whether an agency action is a regulation or a statement of policy, one must look to the extent to which the challenged pronouncement leaves the agency free to exercise discretion to follow or not follow the announced policy in an individual case.

*Id.*

In *Pennsylvania Human Relations Commission v. Norristown Area School District*, 374 A.2d 671 (Pa. 1977), our Supreme Court considered whether a plan to desegregate schools was a statement of policy without binding effect or whether it carried the force of law. The Court determined that because the plan provided only tentative future actions on desegregation, it was therefore a statement of policy with no binding effect.

A review of the 2016 SFRMP confirms that it is not a binding norm. It contains no mandatory, restrictive language that is indicative of a regulation. It does not require or authorize DCNR to take any action with regard to the use of proceeds from the sale of our State Forests' oil and gas. It does not require or authorize the use of money from such sales for the unconstitutional purpose of paying for general State government operations, including paying for DCNR's operational costs, and does not grant any oil or natural gas leases. DCNR does not rely on the 2016 SFRMP as legal authority to do any of the acts alleged in the amended petition for review. In this way, this case is very different from *PEDF* where the Foundation challenged *legislative enactments* in the Fiscal Code as unconstitutional under the ERA. Because the 2016 SFRMP is not a regulation or rule that DCNR is *required* to follow, and DCNR is not required by any law to adopt a forest resource management plan, any judicial declaration by this Court that the statements made in the 2016 SFRMP are contrary to DCNR's obligations under the ERA would not bind DCNR or restrict its actions when managing the State Forests.

Moreover, we cannot ignore that the 2016 SFRMP was adopted *before* *PEDF* was decided in 2017. The Foundation concedes in its amended petition for review that that DCNR "is aware of and bound by the law established by Supreme Court in *PEDF*," but complains that DCNR has *yet to* "amend the 2016 Plan to comply

with the 2017 mandates of Supreme Court.” (Am. Pet. ¶92.) We decline to assume, as the Foundation asks us to, that DCNR is actively disregarding *PEDF* and its obligations under the ERA, merely because it has not yet adopted a new SFRMP after *PEDF* was decided. This is an unwarranted inference that we are not obligated to accept as true. *Pennsylvania State Lodge, Fraternal Order of Police v. Department of Conservation and Natural Resources*, 909 A.2d 413, 416 (Pa. Cmwlth. 2006). The statements in the 2016 SFRMP were made before *PEDF* was decided and clearly do not reflect post-*PEDF* considerations. We recognize the obligations enunciated by the Supreme Court in *PEDF* to preserve the corpus of the trust and commend the Foundation’s efforts to ensure that is accomplished. However, simply because a new forest plan (which, by all accounts, takes countless hours to create) has not yet been developed, does not support the conclusion that DCNR is presently managing the State Forests in violation of the ERA or contrary to *PEDF*.

**b. Ripeness**

The second reason why the 2016 SFRMP is insufficient to form a basis for an ERA claim is controlled by the justiciability doctrine of ripeness.

Although the Declaratory Judgments Act is to be liberally construed, one limitation on a court’s ability to issue a declaratory judgment is that the issues involved must be “ripe” for judicial determination, meaning that there must be the presence of an actual case or controversy. *Ruszin v. Department of Labor and Industry, Bureau of Workers’ Compensation*, 675 A.2d 366, 371 (Pa. Cmwlth. 1996). Thus, the Declaratory Judgments Act requires a petition seeking declaratory relief to state an actual controversy between the petitioner and the named respondent. *Pennsylvania State Lodge v. Department of Labor and Industry*, 692 A.2d 609, 613 (Pa. Cmwlth. 1997), *aff’d*, 707 A.2d 1129 (Pa. 1998). It is beyond the jurisdiction of our courts,

appellate and original, to use the Declaratory Judgments Act to issue advisory opinions or to determine rights in anticipation of events which may never occur. *Pittsburgh Palisades Park, LLC v. Commonwealth*, 888 A.2d 655, 659 (Pa. 2005).

Pennsylvania courts have held that ripeness requires there to be a “concreteness” to government actions, otherwise no justiciable controversy exists for a court to review. *Texas Keystone Incorporated v. Pennsylvania Department of Conservation and Natural Resources*, 851 A.2d 228, 239 (Pa. Cmwlth. 2004) (“ripeness doctrine insists on a more concrete context, *i.e.*, one involving a final agency action and a factual record that would allow this Court to properly review [the] substantive claims”); *Ronald H. Clark*, 562 A.2d at 968. In *Gardner v. Department of Environmental Resources*, 658 A.2d 440 (Pa. Cmwlth. 1995), this Court explained the ripeness doctrine, as follows:

Ripeness arises out of a judicial concern not to become involved in abstract disagreements of administrative policies. *Abbott Laboratories v. Gardner*, 387 U.S. 136 . . . (1967). It has been defined as the presence of an actual controversy. *American Council of Life Insurance v. Foster*, [] 580 A.2d 448 ([Pa. Cmwlth.] 1990). ***It insists on a concrete context, where there is a final agency action so that the courts can properly exercise their function.*** The doctrine of ripeness is described as a legal principle “instructing courts to review government actions only when the government’s position has crystallized to the point at which a court can identify a relatively discrete dispute.” Davis & Pierce, *Administrative Law Treatise*, vol. II, § 15.12 (3d edition).

*Gardner*, 658 A.2d at 444 (emphasis added).

A claim based on speculative, anticipated events is not justiciable. *Berger v. Department of Environmental Resources*, 400 A.2d 905, 907 (Pa. Cmwlth. 1979) (“[A] declaratory judgment is not to be employed for the determination of rights in

anticipation of an event which may never occur.”). In *Berger*, the landowners sought a pre-decision review of the procedure by which the Department of Environmental Resources (DER) was evaluating an application for a permit to construct and operate a sanitary landfill. We sustained DER’s preliminary objection that the petition for review was premature because DER’s refusal to consider the factors suggested by the landowners did not constitute an appealable determination.

In *Chester Upland School District v. Commonwealth*, 495 A.2d 981 (Pa. Cmwlth. 1985), a school district challenged the constitutionality of an amendment to the public school code which prohibited some school districts from having residency requirements for employees. The school district had taken preliminary steps to discharge certain employees for failure to reside within the district and alleged that those employees, claiming protection under the amendment, threatened to bring legal action against the district if they were terminated. However, because the school district’s petition contained no averments that the employees ever sought to enforce the amendment, or that such action was imminent or inevitable, we held that a declaratory judgment was inappropriate.

Similarly, in *Woods Schools v. Department of Education*, 514 A.2d 686 (Pa. Cmwlth. 1986), a private school sought an order for proceedings to disenroll an exceptional student or, alternatively, to guarantee full payment of that student’s tuition. However, because there was nothing in the school’s petition from which we could infer that payment would not be made, we determined that no justiciable controversy existed because it could not yet be determined whether the school would be fully reimbursed.

We apply the same rationale here to conclude that the amended petition for review fails to raise a controversy that is ripe for review because the Foundation has not alleged that DCNR has committed a concrete government act triggering rights



or remedies of an affected party that can be reviewed by this Court. Undeniably, the 2016 SFRMP *discusses* the economic benefits to the Commonwealth of State Forest products. In the section of the 2016 SFRMP titled “Timber and Forest Products,” the 2016 SFRMP states that “timber and other forest products on [S]tate [F]orest lands are managed to promote and maintain desired landscape conditions and provide sustainable social and economic benefits to the [C]ommonwealth.” (2016 SFRMP at 8.) The 2016 SFRMP also explains that

Pennsylvania’s [S]tate [F]orests contain an abundance of high-quality forest products, an integral part of the materials base of the [C]ommonwealth’s \$19 billion per year forest products industry, which employs nearly 58,000 people. Both Pennsylvania’s consumers and the general economy benefit from this regionally important supply of forest products, including timber. Timber sales generate significant revenue for the [C]ommonwealth. From 2008 to 2014, Pennsylvania received income from timber sales averaging approximately \$22.5 million per year.

*Id.* at 9.

It further explains that Pennsylvania’s State Forests have been leased for valuable oil and gas reserves since 1947. *Id.* at 14. In 2009, shale-gas development began on State Forest lands. *Id.* at 12. According to the 2016 SFRMP, subsurface geologic resources are managed to provide long-term benefits to Commonwealth citizens while adhering to the principles of ecosystem management. *Id.* at 13. The 2016 SFRMP reports that

[t]he forest lands also provide economic benefits to the [C]ommonwealth through leasing for natural gas development, supplying approximately \$100 million in annual revenues to the [C]ommonwealth from lease agreements and gas royalties, and additionally contributing to local communities.

*Id.* at 20.

Contrary to the Foundation's view, these statements in and of themselves are simply not actionable. In fact, the Supreme Court in *PEDF* recounted similar facts. *See PEDF*, 161 A.3d at 919-21. Aside from these statements, which basically recount the state of affairs before *PEDF* was decided, the Foundation does not cite any instances where DCNR is, at present, using money from the extraction and sale of State Forests' oil and natural gas for purposes other than conserving and maintaining the public natural resources of our State Forests. Finding a constitutional violation based on statements in the 2016 SFRMP, without reference to any particular *action* on the part of DCNR, would take us into the realm of speculation and conjecture.

Accordingly, because the Foundation has failed to articulate any imminent injuries occasioned by adoption of the 2016 SFRMP, and has failed to anchor its amended petition for review on any particular action taken by DCNR, we must conclude that the matter is not ripe, and no controversy is present that could permit us to enter a declaratory judgment.<sup>12</sup> Our disposition should not be understood to foreclose the possibility that a claim under the ERA might ripen if DCNR implements its forest resources plan in a manner which violates the ERA. Should the Foundation find that a definite course of action or inaction on the part of DCNR is objectionable, there may be no impediment to judicial review at that time.

## **2. Requests Which Ask Us to Make Certain General Pronouncements of Law**

Next, the Foundation asks that we make certain general pronouncements of the law, including:

- The phrase "in the best interest of the Commonwealth" in section 302(a)(6) of the CNRA, 71 P.S. §1340.302(a)(6), does not mean that DCNR can lease and sell our public

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<sup>12</sup> Having concluded that a judicial declaration by this Court would be premature at this juncture, we need not address DCNR's preliminary objection raising lack of standing.

natural resources for money for the economic use by the Commonwealth in violation of the ERA. *Id.* ¶93(c).

- DCNR’s mission as stated in CNRA Section 101(b) to manage the State Forest lands to assure their long-term health, sustainability and economic use does not require DCNR to authorize the extraction and sale of the oil and gas that is a part of the public natural resources of our State Forests when that activity will degrade, diminish and deplete the State Forests’ public natural resources contrary to the mandates of the ERA. *Id.* ¶93(d).
- The oil and natural gas resources of our State Forests, as part of the corpus of the public trust under the ERA, cannot be used for the economic benefit of the Commonwealth because such economic use violates the purpose of the trust, which is to conserve and maintain those resources for the benefit of the people. *Id.* ¶93(f).
- DCNR’s proprietary attempt to “balance” rights under the ERA with rights established with other articles of the Constitution, including the Commonwealth’s right to appropriate funds and enact laws, violates Article I Section 25 of the Pennsylvania Constitution. *Id.* ¶115(c).
- DCNR has no constitutional right under the ERA to lease our State Forest land and sell our State Forests’ oil and natural gas. *Id.* ¶115(d).<sup>13</sup>
- DCNR cannot “balance” the constitutional rights established under the ERA with any proprietary activities or policies involving non-trust purposes of the Commonwealth. *Id.* ¶115(e).

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<sup>13</sup> Contrary to the Foundation’s assertion, *PEDF* never held that DCNR has no constitutional right under the ERA to lease our State Forest lands and sell our State Forests’ oil and natural gas. Rather, it acknowledges the right, but held that “oil and gas leases may not be drafted in ways that remove assets from the corpus of the trust or otherwise deprive the trust beneficiaries (the people, including future generations) of the funds necessary to conserve and maintain the public natural resources.” 161 A.3d at 936.

- DCNR cannot “balance” the constitutional rights established under the ERA with any proprietary activities that would result in the degradation, diminution and depletion of the public natural resources of our State Forests, including the oil and natural gas resources that are a part thereof. *Id.* ¶115(f).

The proscription against issuing advisory opinions or decisions in the abstract restrains the courts of this Commonwealth from addressing claims made, which at bottom seek merely an academic answer to a hypothetical question rather than redress of an injury. *Spahn v. Zoning Board of Adjustment*, 977 A.2d 1132, 1151 (Pa. 2009).

As noted above, we are not satisfied that the Foundation has presented this Court with a justiciable dispute or controversy within the meaning of the Declaratory Judgments Act. Any pronouncement by this Court as to the legal validity of the requested declarations would be in the abstract, and thus, an impermissible advisory opinion.

#### **B. Failure to State a Claim – Mandamus Claims**

Although the Foundation does not identify its claims as such, this Court concludes, based on the nature of the relief sought, that the Foundation’s amended petition for review does, indeed, seek mandamus relief because it asks us to direct DCNR to fulfill its responsibilities as a trustee of the Commonwealth’s natural resources under the ERA consistent with *PEDF*. See Am. Pet. ¶¶135(c), 147(b)-(c).

Mandamus is an extraordinary writ. *Bronson v. Board of Probation and Parole*, 421 A.2d 1021 (Pa. 1980). It will only be granted to compel performance of a ministerial duty where the petitioner establishes a clear legal right to relief and a corresponding duty to act by the respondent. *Waters v. Pennsylvania Department of Corrections*, 509 A.2d 430 (Pa. Cmwlth. 1986). Mandamus is not proper to establish

legal rights but is only appropriately used to enforce those rights which have already been established. *Id.* “Thus, in an action involving an administrative agency’s exercise of discretion, the court may only direct the agency to perform the discretionary act and may not direct the agency to exercise its judgment or discretion in a particular way or direct the retraction or reversal of action already taken.” *McGill v. Pennsylvania Department of Health, Office of Drug & Alcohol Programs*, 758 A.2d 268, 270 (Pa. Cmwlth. 2000).

The Foundation seeks to compel DCNR to amend the 2016 SFRMP in the ways outlined in the amended petition for review. However, the Foundation does not have a clear right to such relief. It points to no legislative enactments or regulatory provisions, and we have found none, that mandate DCNR to develop and maintain a forest resource management plan in the first place. Because the Foundation seeks to compel DCNR to do something it is not mandated to do, mandamus will not lie, and we sustain DCNR’s preliminary objections as to the mandamus claims.

Because we conclude that the Foundation has failed to state cognizable claims for declaratory or mandamus relief based on the above, we need not reach the question of sovereign immunity.

#### V. Conclusion

The Foundation has not demonstrated that its action for declaratory relief is ripe for judicial review. It has also failed to demonstrate that it is entitled to the mandamus relief it seeks. Accordingly, we sustain DCNR’s preliminary objections and dismiss the amended petition for review.

s/ Patricia A. McCullough  
PATRICIA A. McCULLOUGH, Judge









