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I. COUNTER STATEMENT OF JURISDICTION

The Commonwealth Court has original jurisdiction in this case to review the Amended Petition for Review filed by the Pennsylvania Environmental Defense Foundation (“PEDF” or “Petitioner”) pursuant to 42 Pa.C.S. § 761(a)(1) and the Declaratory Judgments Act, 42 Pa.C.S. §§ 7532, 7535, and 7541, which state:

§ 7532. General scope of declaratory remedy.

Courts of record, within their respective jurisdictions, shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect, and such declarations shall have the force and effect of a final judgment or decree.

§ 7535. Rights of fiduciaries and other persons.

Any person interested, as or through an executor, administrator, trustee, guardian, or other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust, in the administration of a trust, or of the estate of a decedent, an infant, lunatic, or insolvent, may have a declaration of rights or legal relations in respect thereto:

- (2) To direct the executors, administrators, or trustees to do or abstain from doing any particular act in their fiduciary capacity.
- (3) To determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings.

§ 7541. Construction of subchapter.

- (a) *General rule.* --This subchapter is declared to be remedial. Its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations, and is to be liberally construed and administered.
- (b) *Effect of alternative remedy.* --The General Assembly finds and determines that the principle rendering declaratory relief unavailable in circumstances where an action at law or in equity or a special statutory remedy is available has unreasonably limited the availability of declaratory relief and such principle is hereby abolished. The availability of declaratory relief shall not be limited by the provisions of 1 Pa.C.S. § 1504 (relating to statutory remedy preferred over common law) and the remedy provided by this subchapter shall be additional and cumulative to all other available remedies except as provided in subsection (c). Where another remedy is available the election of the declaratory judgment remedy rather than another available remedy shall not affect the substantive rights of the parties, and the court may pursuant to general rules change venue, require additional pleadings, fix the order of discovery and proof, and take such other action as may be required in the interest of justice.

II. COUNTER STATEMENT OF STANDARD OF REVIEW

A demurrer contests the legal sufficiency of a complaint. *Christ the King Manor v. Dep't of Pub. Welfare*, 911 A. 2d 624, 633 (Pa. Cmwlth. 2006), *aff'd*, 951 A. 2d 255 (Pa. 2008). In ruling on preliminary objections, the court must accept as true all well-pled facts that are material and all inferences reasonably deducible from the facts. *Id.* However, the court is not required to accept as true any unwarranted factual inferences, conclusions of law or expressions of opinion. *Id.* For preliminary

objections to be sustained, it must appear with certainty that the law will permit no recovery. *Id.* Any doubt must be resolved in favor of the non-moving party. *Id.*

III. COUNTER STATEMENT OF QUESTIONS INVOLVED

1. Can this Honorable Court declare under the fiduciary provisions of the Declaratory Judgments Act, 42 Pa.C.S. § 7535(2) and (3), whether decisions by Pennsylvania Department of Natural Resources (“DCNR”) and DCNR Secretary Dunn (collectively, “Respondents”) set forth in their 2016 State Forest Resource Management Plan (“2016 Plan”)¹ comply with their fiduciary duties as trustees under Article I, Section 27 of the Pennsylvania Constitution (“Article I § 27” or “Section 27”)?

Suggested Answer: Yes

2. Can this Honorable Court declare under the fiduciary provisions of the Declaratory Judgments Act whether the Respondents’ decision to sanction the extraction and sale of State Forest oil, gas and other geologic resources to benefit the Commonwealth violates Respondents’ trustee duty under Article I § 27 to conserve and maintain our State Forest public natural resources?

Suggested Answer: Yes

3. Can this Honorable Court declare under the fiduciary provisions of the Declaratory Judgments Act whether the Respondents’ failure to direct in the 2016

¹ See Amended Petition, Exhibit A for a copy of the 2016 State Forest Resource Management Plan.

Plan that existing and future degradation of our State Forest from oil and gas extraction be remedied violates Respondents' trustee duty under Article I § 27 to conserve and maintain our State Forest public natural resources?

Suggested Answer: Yes

4. Can this Honorable Court declare under the fiduciary provisions of the Declaratory Judgments Act whether the Respondents' decisions in the 2016 Plan to undermine the long-standing use of ecosystem management to conserve and maintain our State Forest public natural resources violates Respondents' trustee duty under Article I § 27?

Suggested Answer: Yes

5. Can the Respondents evade constitutional review of their decisions governing their management of the State Forest in the State Forest Resource Management Plan by asserting that the management plan is a policy rather than a binding rule?

Suggested Answer: No

7. Can the Respondents evade constitutional review of their decisions governing their management of the State Forest in the 2016 Plan because they have discretion over how to manage the State Forest that can preclude any controversy from arising?

Suggested Answer: No

8. Has PEDF established that it has a substantial, direct and immediate interest in the outcome of this litigation?

Suggested Answer: Yes

9. Can the Respondents evade review of their decisions governing their management of the State Forest in the 2016 Plan because neither Article I § 27 nor the Conservation and Natural Resources Act require that they prepare a plan?

Suggested Answer: No

10. Can the Respondents evade review of the constitutionality of their decisions governing their management of the State Forest in the 2016 Plan because they have immunity from such review?

Suggested Answer: No

IV. COUNTER STATEMENT OF THE CASE

Counter Statement of Procedural History

PEDF accepts the procedural history as described by the Respondents, except for their characterization of the 2016 Plan as a general statement of policy, and their characterization of PEDF's requested relief, which fails to acknowledge that PEDF is asking this Honorable Court to declare that certain State Forest management decisions set forth in the 2016 Plan violate Article I § 27.

PEDF filed the Amended Petition because the Respondents have made new management decisions through the 2016 Plan to sanction oil and gas extraction for

economic benefit as fundamental to their management of our State Forests. Our State Forests, including their oil, gas and other geologic resources, are public trust assets and part of the corpus of the Section 27 public trust that must be conserved and maintained for current and future generations.

Counter Statement of Factual Background

Of the approximately 2.2 million acres of State Forest in Pennsylvania, a significant portion – 1.5 million acres located in the northcentral area of Pennsylvania – is underlain by Marcellus Shale and other shale formations that contain natural gas. Over 617,000 acres of the State Forest are subject to oil and gas extraction, either through Commonwealth leases or through development on tracts with severed, privately-owned subsurface oil and gas rights. DCNR Shale Gas Monitoring Report, July 2018 (“2018 Shale Gas Monitoring Report”) at 3-7 (*see* Amended Petition, Exhibit D); *see also PEDF v. Commonwealth*, 161 A.3d 911, 932 (Pa. 2017) (*PEDF II*).

Of the State Forest acreage subject to oil and gas development, over 90% lies within our State Forest districts in northcentral Pennsylvania (Elk, Loyalsock, Moshannon, Sproul, Susquehannock, Tiadaghton and Tioga). These districts are referred to as the core shale gas districts. *Id.* at 23, Figure 2.2 In the Shale-Gas Monitoring Report issued by DCNR in 2014 (“2014 Shale-Gas Monitoring Report”), DCNR states that natural gas development on State Forest land, “especially at the

scale seen in the modern shale-gas era, affects a variety of forest resources and values, such as recreational opportunities, the forest's wild character, scenic beauty, and plant and wildlife habitat." 2014 Shale-Gas Monitoring Report at 3 (*see* Amended Petition, Exhibit C). To understand impacts to the forest ecosystem, DCNR is monitoring for "changes and impacts to state forest water, air, soil, flora, wildlife, and forest health related to gas development." 2018 Shale Gas Monitoring Report at 5.

While DCNR has embarked on efforts to understand the degradation, diminution and depletion of public natural resources caused by shale gas development on our State Forests, it acknowledges in its 2018 Shale Gas Monitoring Report that, even after eight years of monitoring, only a few trends can be understood and long-term monitoring will be required to understand the full extent of the impact of this new industry. *Id.*, Preface. On the State Forest land subject to DCNR oil and gas leases, DCNR estimates that only 30 to 35 percent of the allowable shale gas development has occurred to date and that full development could result in as many as 1,475 wells on State Forest land. *Id.* at 4. DCNR's 2014 and 2018 Shale Gas Monitoring Reports document that oil and natural gas extraction causes degradation, diminution and depletion of the natural, scenic, historic and esthetic values of State Forest public natural resources to be preserved under Article I § 27.

DCNR was established in 1995 under the Conservation and Natural Resources Act, 71 P.S. § 1340.301, to manage our State Forest and State Park public natural resources protected as part of the Section 27 public trust. In 1995, DCNR set forth its management decisions for protecting our State Forests in a strategic plan, *Penn's Woods – Sustaining Our Forests* (“*Penn's Woods*”) (see Amended Petition, Exhibit B). DCNR established in *Penn's Woods* that the Bureau of Forestry would accomplish its mission under Article I § 27 by “managing 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.* at 32. From 1995 to 2008, DCNR’s management directives, as set forth in the *Penn's Wood* strategic plan and its State Forest Resource Management Plans to implement that strategy, were to manage oil and gas extraction and sale, timber harvesting and sale, and recreational uses of our State Forest consistent with the paramount goal of achieving and sustaining a healthy forest ecosystem.

From 2008 to 2010, DCNR was required to lease almost 139,000 acres of State Forest land for oil and gas extraction and sale to capitalize on the new Marcellus Shale gas boom. The money generated by these State Forest oil and gas lease sales was transferred to the General Fund to balance the State budgets for fiscal

years 2009-2010 and 2010-2011. When added to the existing State Forest oil and gas leases and to leases of privately owned oil and gas rights on or within State Forest lands, approximately 617,000 acres of State forest land is subject to the extraction of the oil and gas natural resources, most of which has not yet been developed.

In preparing the environmental reviews for the State Forest oil and gas lease sales in 2009 and 2010 for over 60,000 acres of State Forest land in north central Pennsylvania, DCNR acknowledged that it “had decided not to offer additional lands for lease but rather study the Marcellus play and the operational developments and requirements on the 660,000 acres within the Marcellus fairway subject to valid leases agreements.” Amended Petition, Exhibits F and G at 6 (Consistency with State Forest Resource Management Plan). However, DCNR proceeded to hold these lease sales to generate revenue to support line item appropriations already authorized in the State budgets. *Id.* DCNR had no experience with the extraction of natural gas from deep shale formations and its State Forest Resources Management Plan did not establish any criteria for evaluating whether such extraction would be consistent with the principles of ecosystem management essential to conserve and maintain the State Forests under Article I § 27.

The degradation, diminution and depletion of State Forest public natural resources from existing oil and gas extraction documented by DCNR in its 2018 Shale Gas Monitoring Report include, but are not limited to, the following findings:

(a) Shale gas development in our State Forests since 2008 has converted 1,770 acres of State Forest land from forest to shale gas infrastructure (*id.* at 43), including constructing and operating 265 infrastructure pads (*id.* at 50), constructing 260 miles of new roads and the expanding existing State forest roads (*id.* at 44); and constructing 188 miles of gas pipeline corridors (*id.* at 55).

(b) DCNR reports that “noticeable changes to the forest landscape are evident” with the largest increase overall resulting from “an additional 9,913 acres of forest edge (35 percent change in the Elk State Forest specifically).” *Id.* at 64.

(c) Shale gas development has caused greater fragmentation of our State Forest. Since 2008, our core State Forests have lost 15,134 acres of large intact forest blocks, which are unfragmented forest blocks of more than 500 acres.² *Id.* at 65-66. The fragmentation of these large forest blocks resulted in increases in the category of smaller core forest blocks in almost all State Forest Districts, with the Loyalsock State Forest experiencing a 41.3% increase in smaller core forest blocks of 250-500 acres and a 30% increase in core forest blocks less than 250 acres in size. *Id.*

(d) DCNR has begun to monitor the impacts to water quality from gas development to assess the health our State Forest ecosystems. *Id.* at 79. Approximately 3,500 miles of streams traverse State Forest land within the core

² The monitoring report uses the metric unit of hectares. Large forest blocks are those containing more than 200 hectares, which is equivalent to 247 acres (1 hectare = 2.47 acres).

shale gas forest districts, “including many of the best-know fishing and boating waters in Pennsylvania.” *Id.* DCNR states that “maintaining and protecting the quality of water in these streams is one of the bureau’s highest priorities.” In the State Forest core shale gas districts, “most of the streams (> 70%) are first-order streams,” which “means that the steams on state forest land are generally small, headwater streams that can be influenced greatly by the surrounding forest” and “have the potential to affect many others downstream.” *Id.* Over 85% of the streams in the State Forest core shale gas districts are classified as either exceptional value or high quality. *Id.* at 80.

(e) The main concerns regarding water quality in areas subject to shale gas development “are from chemicals and salts that can be spilled during transportation or during drilling activities.” *Id.* at 81-82. Other concerns include “increases in water temperature, soil, sedimentation, and turbidity from construction of infrastructure and roads improved to accommodate heavy hauling.” *Id.* Fracturing fluids “can pose a potential spill risk during transportation or during well development operations.” *Id.* Macroinvertebrates were surveyed in 37 stream segments to assess stream health and over one third of these segments (13) fell outside of the range of tolerance for their classification. *Id.* at 78.

(f) The monitoring of forest health has documented the spread of invasive species in the State Forest. DCNR surveyed 238 infrastructure pads associated with

oil and gas development in the core shale gas districts and observed invasive species at all but 29 of these pads. *Id.* at 78. Implementation of an early detection and rapid response program “has detected 71 populations of high-threat invasive species.” *Id.* DCNR observes that from 2011 to 2016, “it is evident from the pad surveys that many invasive plant species populations have spread to new sites on state forest land and populations first found from 2011-2013 have expanded at many sites.” *Id.* at 130. DCNR further states that the “proliferation and colonization of invasive plant species is one of the greatest threats to the health and viability of state forest ecosystems.” *Id.* at 138.

While a century of regeneration has certainly improved the condition of our State Forests, recovery from the legacy of past degradation continues. As the 2014 and 2018 Shale Gas Monitoring Reports begin to document, the degradation of our State Forests from the new shale gas development has at a minimum slowed and, in some instances, reversed that recovery.

The State Forest Resource Management Plan issued by DCNR in 2016 “is the primary instrument that the bureau uses to plan, coordinate, and communicate its management of the state forest system. ... The plan has two primary roles. First, it provides a framework for bureau staff to approach its work and make management decisions ... that ensure sustainability across the State Forest lands. The second, and equally important role is to communicate to stakeholders—the citizens of

Pennsylvania, who are the owners of the State forest system—how their forest is being managed.” 2016 Plan at 20. The legal authority that provides the “planning foundation” for DCNR’s preparation of the 2016 Plan includes Article I, Section 27 of the Pennsylvania Constitution. 2016 Plan at 21.

In its 2016 Plan, the Respondents decided to change management of our State Forests from allowing the extraction of oil, gas and other geologic resources only when a healthy forest ecosystem can be sustained to sanctioning such extraction by balancing the economic benefit derived from such extraction against the resulting degradation, diminution or depletion of the State Forest public natural resources. The 2016 Plan states that the “*economic use and sound extraction and utilization of [oil, gas and other] geologic resources is [sic] part of the Bureau’s mission in managing these lands.*” 2016 Plan at 156 (emphasis added).

The Respondents provide no justification for this decision, other than to state 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 [DCNR] considers in ecosystem management.” 2016 Plan at 154 (emphasis added). This statement compromises ecosystem management by making oil and gas extraction part of the management of the ecosystem.*

The Respondents also direct that social and economic values now be balanced with the values of our State Forest protected by Article I § 27 when considering the extraction and sale of oil, gas and other geologic resources, stating 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 Plan at 156 (emphasis added). This “balancing” of economic value with ecological values ensures the continuing degradation of the State Forest, and permits the devaluation of other natural forest values.

PEDF advised the Respondents in a letter dated June 11, 2018 that their decision to fundamentally change the manner in which oil and gas extraction is managed on our State Forest violated their trustee duties under Article I § 27, particularly in light of the Supreme Court decision in *PEDF II*, and that PEDF would sue them if they did correct specifically enumerated constitutional deficiencies of the 2016 Plan (a copy of this letter is attached hereto as **Exhibit A**). The Respondents did not make any changes to the 2016 Plan in response to PEDF’s letter to comply with Article I § 27.

V. SUMMARY OF ARGUMENT

PEDF is asking this Honorable Court to declare that certain decisions made by DCNR and Secretary Dunn in the 2016 State Forest Resource Management Plan regarding management of the State Forest for oil and gas extraction and sale violate Article I, Section 27 of the Pennsylvania Constitution and their fiduciary duties as trustee thereunder. Specifically, PEDF is challenging the constitutionality of Respondents' decisions that expand DCNR's mission to include the extraction and sale of oil, natural gas and other geologic resources on our State Forest for the economic benefit of the Commonwealth; and allowing the continuing degradation, diminution or depletion of State Forest resulting from the extraction and sale of these State Forest public trust assets.

The Respondents' management decisions in the 2016 Plan fundamentally alter the management of oil and gas extraction on our State Forest without any consideration of their fiduciary duties as trustee under Article I § 27. Their decision to allow the economic benefit of oil and gas extraction to be "balanced" with the natural, scenic, historic and esthetic values of the State Forest protected by Article I § 27 means that DCNR will not need to remedy the degradation of these constitutionally protected values. PEDF contends in its Amended Petition that the Respondents' decisions to allow economic benefit to the Commonwealth to guide DCNR's management of our State Forest rather than continuing to follow the

principles of ecosystem management set forth in its 1995 State Forest strategic plan, *Penn's Woods—Sustaining Our Forests*, violates Article I § 27 and the Respondents' trustee duties thereunder.

The Declaratory Judgments Act specifically authorizes this Court to direct trustees “to do or abstain from doing any particular act in their fiduciary capacity.” 42 Pa.C.S. § 7535(2). The Supreme Court has clearly stated that the Respondents have the fiduciary duty to manage State Forest public trust assets consistent with the Section 27 mandate to conserve and maintain them for the benefit of current and future generations. This mandate requires the Respondents to both prevent and remedy any degradation, diminution or depletion of our public natural resources. PEDF's request for declaratory relief in its Amended Petition seeks to have this Court direct the Respondents, in their fiduciary capacity, to abstain from carrying out management decisions set forth in the 2016 Plan that violate the purposes of the public trust established by Article I § 27, and to both prevent any further degradation and to remedy the existing degradation in our State Forest. PEDF's requests are valid claims under the Declaratory Judgments Act. This Court has a duty to ensure that the Respondents are managing our State Forests in compliance Article I § 27.

The Respondents' failure to comply with their constitutional duties as trustees of our State Forest under Article I § 27 is reflected in the preliminary objections they have filed seeking to have this Court dismiss the Amended Petition. The

Respondents essentially contend the 2016 Plan is a statement of policy that does not bind them. They fail to understand that the 2016 Plan is a statement of how they are and will continue to manage our State Forest, and as a result, it must comply with the constitutional mandates of Article I § 27. Likewise, the Respondents' assertions that no controversy exists and that this case is not ripe demonstrate their lack of understanding of their fundamental duties as trustees. Their fiduciary duties include communicating to the people of Pennsylvania how they will manage Section 27 trust assets that are the common property of the people. Their duties include setting forth in their management plan how they will remedy the existing degradation caused by leasing public trust oil and gas assets for extraction and sale. The cases that the Respondents cite do not support their preliminary objections to the Amended Petition.

The Respondents also assert that PEDF does not have standing to seek review of the 2016 Plan for compliance with Article I § 27. As established by the 2014 and 2018 Shale Gas Monitoring Reports, the existing leases for oil and gas extraction have caused and will continue to cause degradation of our State Forest for the next 50 years. The 2016 Plan does not provide any specific plan to deal with the existing and future degradation. The 2016 Plan not only does not have a plan to deal with the existing degradation, it adopts a new management objective to continue to lease and sell our public natural resources for the economic benefit of the Commonwealth; and

further, to balance the existing and future degradation caused by the extraction and sale of public trust assets with the economic benefits obtained. This new management decision thus sanctions current and future degradation our State Forest public natural resources. This new State Forest management decision to sell our public trust assets for their economic value also has the immediate effect of compromising the long-standing principles of ecosystem management that have guided the Bureau of Forestry since 1995.

As a result of the actions taken by the Respondents, PEDF's members, who are beneficiaries of the Section 27 public trust, have suffered and will continue to suffer immediate and irreparable harm, not only by the Respondents' failure to prevent and remedy the existing and future degradation of our State Forest public natural resources, but by their actions to compromise the management plan governing our State Forest as a forest ecosystem to ensure its public trust assets are conserved and maintained. These and other harms are clearly articulated in their affidavits submitted as exhibits to the Amended Petition, which establish that PEDF has standing to file its Amending Petition.

Finally, the Respondents' assert that PEDF cannot challenge their management decisions set forth in the 2016 because neither Article I § 27 nor the Conservation and Natural Resources Act requires that they prepare a plan and because they are immune from suit. Under this logic, the Respondents can develop

a plan completely contrary to their constitutional duties and statutory authority and no one can question it. The Respondents have prepared a management plan and included actions in that plan that are contrary to their constitutional and statutory mandates. As such, review of their management decisions by this Honorable Court is not only appropriate, it is necessary to protect the constitutionally protected State Forest public natural resources. The Respondents are not immune from review of the constitutionality of their actions.

VI. ARGUMENT

A. The Amended Petition Asserts Valid Constitutional Claims Against Respondents as Trustees under the Declaratory Judgments Act

The Respondents raise preliminary objections to the Amended Petition without addressing the fundamental nature of the claims made by PEDF, which are whether certain management decisions made by the Respondents in their 2016 State Forest Resource Management Plan violate Article I, Section 27 of the Pennsylvania Constitution, and the Respondents' fiduciary duties thereunder. PEDF's constitutional claims are clearly justiciable. The Respondents' assertions that their decisions are not subject to this Court's review because they are statements of policy that have no binding effect fundamentally misconstrues their fiduciary duties as trustees under Article I § 27. Likewise, their interpretation of and reliance on the Conservation and Natural Resources Act to justify decisions that are contrary to their constitutional mandates are fundamentally flawed.

The Supreme Court determined in *PEDF II* that Article I § 27 creates a viable trust, with Pennsylvania’s public natural resources, including our State Parks and Forests, and the oil and natural gas therein, as part of the corpus of the trust. The Commonwealth of Pennsylvania, including all State and local agencies thereof, are trustees and the purpose of the trust is to conserve and maintain Pennsylvania’s public natural resources for the benefit of the people of Pennsylvania, both those living today and generations yet to come, who are the trust beneficiaries.

The Supreme Court in *PEDF II* determined that the Commonwealth must manage the public natural resources according to the mandates of Article I § 27, stating that “[b]ecause state parks and forests, including the oil and natural minerals therein, are part of the corpus of Pennsylvania’s environmental public trust, we hold that the Commonwealth as trustee *must manage them according to the plain language of Section 27*, which imposes fiduciary duties consistent with Pennsylvania trust law.” *Id.* (emphasis added).

The 2016 State Forest Resource Management Plan “is the primary instrument that [DCNR] uses to plan, coordinate, and communicate its management of the State Forest system. ... The Plan has two primary roles. First, it provides a framework for [DCNR] staff to approach its work and make management decisions ... that ensure sustainability across the State Forest lands. ... The second, and equally important role is to communicate to stakeholders—the citizens of Pennsylvania, who are the

owners of the State forest system—how their forest is being managed.” 2016 Plan at 20. The legal authority that provides the “planning foundation” for DCNR’s preparation of the 2016 Plan includes Article I, Section 27 of the Pennsylvania Constitution. 2016 Plan at 21.

Through their 2016 Plan, the Respondents provide direction to Bureau of Forestry staff in managing our State Forests. That direction is an action taken by the Respondents as trustees of our State Forest public trust assets that must be in compliance with Article I § 27 and their fiduciary duties thereunder. The Declaratory Judgments Act specifically authorizes this court to direct trustees “to do or abstain from doing any particular act in their fiduciary capacity.” 42 Pa.C.S. § 7535(2).

PEDF has made a valid and justiciable request for this Honorable Court to declare whether the Respondents’ acts in issuing certain management directions set forth in the 2016 Plan comply with their fiduciary duties under the Article I § 27.

B. The Amended Petition Asserts a Valid Claim Concerning the Respondents’ Decision to Manage State Forest Geologic Resources Based on their Economic Benefit in Violation of Article I § 27

The Respondents changed their management of the State Forest in their 2016 State Forest Resource Management Plan by making oil and natural gas extraction for economic benefit part of DCNR’s mission in managing the State Forest. They state in their 2016 Plan that the “*economic use and sound extraction and utilization of [oil, natural gas and other] geologic resources is [sic] part of the Bureau’s*

mission in managing these lands.” 2016 Plan at 156. To carry out this new mission, the Respondents further direct in their 2016 Plan 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.” *Id.* at 154 (emphasis added). These management decisions redefine DCNR’s mission and purpose for managing our State Forest.

The purpose of the Section 27 trust is to conserve and maintain the public natural resources for the benefit of the people. The Supreme Court in *PEDF II* determined that conserving and maintaining these resources means both to “prevent and remedy any degradation, diminution or depletion of our public natural resources.” 161 A.3d at 932 (quoting *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 956-957 (Pa. 2013)). The Supreme Court went on to hold that two provisions of the Fiscal Code, Sections 1602-E and 1603-E, were facially unconstitutional because they “plainly ignore the Commonwealth’s constitutionally imposed fiduciary duty to manage the corpus of the environmental public trust for the benefit of the people to accomplish its purpose—conserving and maintaining the corpus.” *Id.* at 938. The Court found that “[w]ithout any question, these legislative enactments permit the trustee to use public assets for non-trust purposes, a clear violation of the trustees’ most basic fiduciary obligations.” *Id.* The Respondents’ management direction given in the 2016 Plan to sell our public natural resources for the economic

benefit of the Commonwealth is not a trust purpose. Our natural resources are to be conserved and maintained, not sold for the economic benefit of the Commonwealth.

To manage our State Forest by extracting and selling part of the corpus of the trust for economic benefit is not authorized by Article I § 27. In fact, it directly contradicts the constitutional mandate to conserve and maintain the State Forest public natural resources, which requires preventing and remedying their degradation, diminution and depletion. Extracting and selling oil and natural gas degrades, diminishes and depletes the public natural resources of our State Forest, as described in the 2018 Shale Gas Monitoring Report (*see* Counter Statement of Factual Background above). The conversion of public natural resources to money through extraction and sale uses Section 27 public trust assets for non-trust purposes and “is a clear violation of the trustees’ most basic fiduciary obligations.” *PEDF II*, 161 A.3d at 938.

The core area of our State Forest – 1.5 million acres, which is almost 70% of the entire State Forest – is located in the northcentral region of Pennsylvania and is underlain by shale gas formations. Within that core area, over 617,000 acres (40%), is subject to leases for oil and natural gas extraction from the shale gas formations that are active and will continue to be active for at least the next 50 years. The 2014 and 2018 Shale Gas Monitoring Reports published by DCNR establish that the extraction of oil and natural gas from these leases have caused, are causing and will

continue to cause degradation, depletion and diminution of our State Forest public natural resources.

The Respondents management decision in their 2016 Plan to allow the balancing of the economic benefit of extracting and selling oil, gas and other geologic resources, which are Section 27 public trust assets, with other forest uses and values also violates the requirements of Article I § 27 and the trustees' fiduciary duty to conserve and maintain those resources. By balancing the economic benefits of resource extraction and sale against the degradation, diminution and depletion of the State Forest public natural resources, the Respondents sanction the conversion and loss of part of the corpus of the Section 27 public trust, both through the sale of the State Forest geologic resource, and in the degradation and diminution of other State Forest public natural resources that result from the extraction activity.

To balance economic benefit with other State Forest uses and values means to allow those other forest uses and values to be reduced because money is made. These other forest uses and values include the rights and values specifically preserved by the first sentence of Article I § 27: "The people have the right to clean air, pure water, and the preservation of the natural, scenic, historic and aesthetic values of the environment." These constitutionally protected values cannot be "balanced", *i.e.*, code word for compromised, by creating economic benefits to help Pennsylvania's economy, which is clearly not a Section 27 trust purpose.

The Respondents' decisions to change management of State Forest geologic resources in the 2016 Plan are management decisions that violate Article I § 27. Nothing the 2016 Plan indicates that the Respondents considered the purpose of the Section 27 public trust or exercised reasonable care as trustee in making these management decisions. The Respondents' fiduciary duty to manage the State Forest requires prudence, which at a minimum involves consideration of the purpose of the Section 27 trust, and the exercise of reasonable care, skill and caution in making decisions regarding trust assets. *PEDF II*, 161 A.3d at 938.

The Respondents provide no analysis in the 2016 Plan of whether their new management of State Forest geologic resources complies with Article I § 27; nor do they provide any explanation of how they will comply with their fiduciary duties as trustees under Article I § 27 in managing State Forest assets that are part of the corpus of the Section 27 public trust. In fact, the Respondents provides no evaluation at all in the 2016 Plan of how they will comply with Article I § 27 or their fiduciary duties as trustees of our State Forest public trust assets. The Respondents acknowledge the existence of Article I § 27 in the 2016 Plan, but states only that it “provides the *legislated acknowledgment* that natural resources are public property and that the state bears *stewardship* responsibilities on behalf of millions of Pennsylvanians.” 2016 Plan at 21 (emphasis added).

The Supreme Court states in *PEDF II* that the “Commonwealth (including the Governor and General Assembly) may not approach our public natural resources as a proprietor, and instead must at all times fulfill its role as a trustee.” 161 A.3d at 939. Selling public natural resources for the economic benefit of the Commonwealth is treating these resources as if the Commonwealth owns them. The Commonwealth does not. Article I § 27 specifically states that “Pennsylvania’s public natural resources are the common property of all the people, including future generations yet to come.” The Respondents, as trustees of our State Forest public natural resources, cannot make management decisions in the 2016 Plan contrary to their fiduciary duty to conserve and maintain those resources.

PEDF’s Amended Petition states valid claims for declaratory relief concerning the constitutionality of the Respondents’ decisions in their 2016 Plan to fundamentally alter management of State Forest geologic resources to allow extraction and sale of these Section 27 public trust assets to benefit the Commonwealth, a non-trust purpose, when that decision will result in the degradation of our State Forests.

C. The Amended Petition Asserts a Valid Claim Concerning the Respondents’ Decision to Allow Degradation of our State Forest from Oil and Gas Extraction in Violation of Article I § 27

The core area of our State Forest – 1.5 million acres, which is almost 70% of the entire State Forest – is located in the northcentral region of Pennsylvania and is

underlain by shale gas formations. Within that core area, over 617,000 acres (40%), is subject to leases for oil and natural gas extraction. The 2014 and 2018 Shale Gas Monitoring Reports published by DCNR establish that these leases are and will continue to be active for at least the next 50 years, causing degradation and diminution of our State Forest public natural resources (*see* Counter Statement of Factual Background above).

Yet, knowing of this existing and future degradation from oil and gas extraction, DCNR and Secretary Dunn adopted the 2016 Plan to manage our State Forest public trust assets without directing that this degradation be remedied. They failed to do so because they do not intend to remedy the existing and future degradation. Rather, as discussed above, they have decided to fundamentally alter their management of State Forest geologic resources to sanction such degradation by directing that these Section 27 public trust assets be extracted and sold to generate economic benefit for the Commonwealth. This management decision authorizes both degradation, diminution and/or depletion of State Forest public trust assets—both the geologic resources and other resources impacted by the extraction. The Respondents further enable this degradation by directing that the economic benefits from the extraction and sale of State Forest geologic resources be somehow “balanced” with other forest values.

The Supreme Court in *PEDF II* states that “[b]ecause state parks and forests, including the oil and natural minerals therein, are part of the corpus of Pennsylvania’s environmental public trust we hold that the *Commonwealth as trustee, must manage them according to the plain language of section 27*, which imposes fiduciary duties consistent with Pennsylvania trust law.” 161 A.3d at 916 (emphasis added). The Supreme Court further held that the Commonwealth has 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.” *Id.* at 938.

DCNR and Secretary Dunn have a constitutional duty to both prevent and remedy the degradation of the State Forest caused by the extraction of the oil and natural gas. They know degradation is occurring through their own monitoring, yet they made the management decision to exclude any direction to remedy that degradation in their 2016 Plan. As trustees, they are violating the purpose of the Section 27 public trust to conserve and maintain our State Forest public natural resources by failing to direct that known degradation be remedied.

DNCR and Secretary Dunn provide no analysis in the 2016 Plan of their fiduciary duties as trustee to conserve and maintain our State Forest public natural resources; no analysis of the degradation of those resources that they have

documented from the existing oil and gas extraction authorized on the State Forest; no analysis of how they will remedy that degradation to comply with Article I § 27 and their fiduciary duties in managing our State Forest as part of the corpus of the Section 27 trust; and no analysis of their financial needs to remedy the degradation to comply with Article I § 27. Without such analysis in the 2016 Plan, neither the Respondents nor the people as beneficiaries can know if the Respondents are meeting and can continue to meet their duty to conserve and maintain our State Forest public natural resources.

PEDF's Amended Petition states valid claims for declaratory relief concerning the constitutionality of the Respondents' decision to exclude from their 2016 Plan any direction to remedy know degradation of State Forest public trust assets from oil and gas extraction or provide any analysis of this critical need.

D. The Amended Petition Asserts a Valid Claim Concerning the Respondents' Decision to Undermine Ecosystem Management of our State Forest in Violation of Article I § 27

As part of the newly created DCNR, the Bureau of Forestry adopted a strategic plan in 1995, entitled *Penn's Woods, Sustaining Our Forests*, to manage our State Forest public 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 Article I § 27. *See* Amended Petition, Exhibit B. The Respondents do not provide any direction in their 2016 Plan on how Bureau of

Forestry staff can employ ecosystem management in compliance with Section 27, without remedying the existing and future degradation resulting from oil and gas extraction.

Although the Respondents purport to be continuing to employ ecosystem management in the 2016 Plan, they have compromised the ecosystem management principles fundamental to sustaining the health of our State Forest and complying with Article I § 27 that have been in place since DCNR was established in 1995. The Respondents, in making the decision to include “economic use” of geologic resources as part of DCNR’s mission, go so far as to state that this economic value is now part of ecosystem management. *See* 2016 Plan at 154 (“***[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 [DCNR] considers in ecosystem management*” (emphasis added)).**

In *Penn’s Woods*, DCNR states as its State Forest minerals policy 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.* at 28. In *Penn’s Woods*, DCNR articulated “a fundamental change in forest management philosophy predicated on the concept of

a sustained forest rather than a sustained yield” and determined that “ecological principles will guide management decisions on State Forest lands.” *Id.* at 31.

To comply with the mandates of Article I § 27, the Respondents must provide clear direction in the 2016 Plan as to how geologic resources can be used consistent with ecosystem management principles articulated in DCNR’s *Penn’s Woods* strategic plan. DCNR established in *Penn’s Woods* that the Bureau of Forestry would accomplish its constitutional mission by “managing 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.*

The Respondents provide no direction in the 2016 Plan on the meaning of the phrase “environmentally sound utilization of mineral resources” used in the *Penn’s Woods* strategic plan. Under the mandate of Article I § 27, it can only mean that oil and gas extraction cannot negatively impact on the ecosystem of the State Forest. It cannot mean that the health of the forest can be “balanced” with the social and economic values of oil and gas extraction.

The Respondents’ decision to fundamentally alter their management of State Forest geologic resources in a manner that undermines their long-standing direction to use of ecosystem management without providing any further direction to Bureau

of Forestry staff violates Article I § 27 and their fiduciary duties thereunder. PEDF's Amended Petition states valid claims for declaratory relief concerning the constitutionality of Respondents' decisions as set forth in the 2016 Plan to undermine the use of ecosystem management to comply with its fiduciary duties as trustees under Article I § 27 to conserve and maintain the State Forest public natural resources.

E. Constitutionality of the 2016 Plan Not Dependent on the Distinction Between Policies and Binding Regulations

The Respondents assert the Amended Petition should be dismissed because the 2016 Plan is a general statement of policy that does not establish a binding norm. In making this argument, the Respondents fundamentally misconstrue the application of case law governing agency compliance with the Constitution and their fiduciary duties as trustees consistent with Article I § 27. Neither DCNR nor Secretary Dunn are acting in any regulatory capacity in this matter. They are fulfilling their own constitutional duty to manage the public natural resources of our State Forest under Article I § 27. As trustees of these public natural resources, which are part of the corpus of a trust established by the Pennsylvania Constitution, DCNR and Secretary Dunn have the fiduciary duty to make management decisions consistent with the purposes of the trust and to explain to the people of Pennsylvania, who are the trust beneficiaries, how they will comply with their constitutional mandates through their management plan.

The Respondents' assertion that PEDF's Amended Petition must be dismissed because the 2016 Plan does not establish a binding norm is not supported by the cases they cite, all of which relate to Commonwealth agency regulation of third parties and whether binding requirements imposed on those parties have been properly promulgated. As the Respondents readily admit, the purpose of the 2016 Plan is to guide their current and future decisions in managing our State Forest. The Respondents cannot adopt a management policy (or a regulation) that is contrary to their constitutional mandates under Article I § 27. PEDF is challenging portions of the 2016 Plan because they do just that.

The Respondents cite *Pa. Human Relations Commission v. Norristown Area School District*, 374 A.2d 671 (Pa. 1977), to support their preliminary objections, but it does not. This case involved the authority of the Pennsylvania Human Relations Commission ("PHRC") to regulate desegregation of school districts under the Pennsylvania Human Relations Act ("PHRA"). PHRC had formulated guidelines and recommendations to "aid its efforts to work with school districts to eliminate racial imbalance in the Commonwealth's schools." *Id.* at 675-76. After conciliation efforts with the Norristown School District failed to resolve its racial imbalance, PHRC held a hearing on the school district's violations of the PHRA. The school district did not present any evidence to refute the PHRC's allegations of violation, but rather asserted that PHRC's guidelines for developing segregation

plans were improperly promulgated regulations.³ *Id.* at 674-675. PHRC issued an order finding the school district in violation of the PHRA and directing it “to develop and submit a desegregation plan that would eliminate racial imbalance in its schools.” *Id.* at 675.

The Supreme Court found “nothing improper” with the procedure followed by the PHRC in adjudicating whether the school district violated the PHRA. *Id.* at 677. In discussing the difference between rules or regulations and general statements of policy, the Supreme Court states in *PHRC* that the “critical distinction ... is the different practical effect that these two types of pronouncements have in subsequent administrative proceedings.” *Id.* at 679. A policy embodied in a rule has “the force of law” and “is not generally subject to challenge before the agency.” *Id.* (quoting *Pacific Gas & Electric Co. v. FPC*, 506 F.2d 33 (D.C. Cir. 1974)). However, when an agency relies on a policy embodied in a “general statement of policy” that has not been promulgated through the rulemaking process and takes a specific action consistent with that policy, it must provide support of its action “just as if the policy statement had never been issued.” *Id.*

PEDF is not asserting that DCNR and Secretary Dunn have taken an action that is inconsistent with a binding provision in the 2016 Plan that should have been

³ Contrary to the Respondents’ assertion in its brief, the desegregation plan developed by the Norristown School District is not the statement of policy at issue in this case. Respondents’ Brief at 16.

promulgated as a regulation. PEDF is challenging management decisions made by DCNR and Secretary Dunn in formulating the 2016 Plan that violate Article I § 27 and their fiduciary duties as trustee thereunder. The Respondents' reliance on *PHRC* to seek dismissal of PEDF's petition mischaracterized the Supreme Court's analysis in *PHRC* and does not support the Respondents' preliminary objections.

Likewise, the Respondents' reliance on *Home Builders Association of Chester and Delaware Counties v. Commonwealth*, 828 A.2d 446 (Pa. Cmwlth. 2004) and *Borough of Bedford v. Commonwealth*, 972 A.2d 53 (Pa. Cmwlth. 2009) are similarly misplaced. Both of these cases address whether purported statements of policy by the Pennsylvania Department of Environmental Protection ("DEP") were binding on persons regulated by the agency and, therefore, regulations that had not been properly promulgated. In *Home Builders*, a non-for-profit trade organization alleged that an administrative settlement agreement entered into by DEP and a policy it has issued both imposed mandatory obligations on persons seeking permits from DEP for surface water discharges and, therefore, were regulations that had not been properly promulgated. 828 A.2d at 447-448. Relying on *PHRC*, as well as *DEP v. Rushton Mining Co.*, 591 A.2d 1168 (Pa. Cmwlth. 1991), this Court concluded that neither the settlement agreement nor the policy was binding on the parties represented by the petitioner. Nothing in *Home Builders* provides support for

dismissing PEDF's claims that the Respondents' management decisions set forth in the 2016 Plan violate Article I § 27 or the Respondents' trustee duties thereunder.

Similarly, nothing in *Borough of Bedford* provides a basis for dismissing the Amended Petition. In that case, DEP issued a plan announcing its intent to impose more stringent nitrogen and phosphorus limits in permits issued to persons operating wastewater treatment plants that discharged into surface waters within the Chesapeake Bay watershed. Because the plan included specific standards for nitrogen and phosphorus to be included in future permits and DEP did not argue that these standards would vary from permit to permit, the standards appeared to be binding rules that had not been properly promulgated. This Court found that additional facts were needed to assess whether DEP retained any discretion in issuing the future permits and denied DEP's motion for summary judgment. Again, this regulatory case provides no basis for dismissing PEDF's Amended Petition challenging the Respondents' unconstitutional actions in the 2016 Plan.

F. The Amended Petition Presents an Actual Controversy

Respondents also contend that because the 2016 Plan is a statement of policy, PEDF's Amended Petition should be dismissed because "any relief granted would be merely academic in nature," citing *Funk v. Wolf*, 144 A.3d 228 (Pa. Cmwlth. 2016). Somewhat incredibly, the Respondents assert that if "this Court declare[s] that the DCNR and the Secretary have violated Pa. Const. Art. I, § 27, and requests

the imposition of requirements on the DCNR, and requests that the DCNR and the Secretary be directed to carry out affirmative acts” (*i.e.*, to revise the 2016 Plan consistent with its Section 27 fiduciary duties), such relief “would have no practical effect on the DCNR’s and the Secretary’s management of the State forest.” Respondents Brief at 18. If such relief is granted, it would have the effect of requiring the Respondents to prepare a State Forest Resource Management Plan that complies with Article I § 27 and their fiduciary duties thereunder and ensuring the public natural resource of our State Forests are conserved and maintained. Compliance with the Constitution would not be merely academic in nature.

In *Funk*, the petitioners sought mandamus and declaratory relief from this Court requiring various Commonwealth agencies and officials “to determine what steps are necessary to conserve and maintain the public natural resources, including the atmosphere, in the face of climate change ... to satisfy the constitutional mandate in [Article I § 27].” 144 A.3d at 239. This Court found that an existing legislative scheme includes “a variety of provisions that directly and indirectly impact global climate change,” but did not mandate any of the actions sought by the petitioners. *Id.* at 250. Thus, the Court concluded that the petitioners did “not have a clear right to have Respondents conduct the requested studies, promulgate or implement the requested regulations, or issue the requested executive orders” to support mandamus. *Id.* at 251. Since mandamus did not lie, the Court found no indication that future

litigation between the parties would turn on the petitioner's requested declaratory relief and declined to grant such relief because "doing so would require [the Court] to enter an advisory opinion." *Id.*

DCNR has the clear duty to manage our State Forest in compliance with the terms of Article I § 27. Unlike the situation in *Funk*, in this case DCNR has published a State Forest Resources Management Plan to comply with its constitutional duty under Article I § 27. In the 2016 Plan, the Respondents have issued management decisions or actions that fundamentally change their management of the State Forest. Those actions ensure the continued and future degradation of the State Forest, contrary to their duty to conserve and maintain our State Forest public trust assets for future generations. Their failure to comply with Article I § 27 in managing our State Forest has and will continue to lead to litigation. Thus, unlike the situation in *Funk*, this Court would not be entering an advisory opinion by considering PEDF's Amended Petition. In fact, this Court has a duty to ensure that the Respondents properly manages our State Forest consistent with their trustee duties under Article I § 27.

The Respondents also assert that neither a real nor actual controversy, nor the ripening seeds of one, exists to support PEDF's request for declaratory relief, citing *In re Cryan's Estate*, 152 A. 677 (Pa. 1930). In *Cryan's Estate*, the Supreme Court recounts that the "right to construe wills and otherwise assist in the administration

of estates by declaratory judgments has been repeatedly exercised by the court.” 98 A. at 677. In discussing the need for an actual controversy or the ripening seeds of one to have jurisdiction, the Supreme Court described the latter as meaning “a state of facts indicating ‘imminent’ and ‘inevitable’ litigation. *Id.* at 678. The court further explained that “[i]f difference between the parties concerned, as to their legal rights, have reached the stage of antagonistic claims, which are being actively pressed on one side and opposed on the other, an actual controversy appears; where, however, the claims of the several parties in interest, while not having reached that active stage, are nevertheless present, and indicative of threatened litigation in the immediate future, which seems unavoidable, the ripening seeds of a controversy appear.” *Id.* Where an actual controversy exists or litigation between those in interest is inevitable and imminent, “one of the purposes of the Declaratory Judgments Act [has been] to enable parties so situated to have ‘issues speedily determined which otherwise would be delayed, to the possible injury of those interested [in them], if they were compelled to await the ordinary course of judicial proceedings.” *Id.* at 679 (quoting *List’s Estate*, 129 A. 64, 64-65 (Pa. 1925)).

The Respondents assert that no controversy exists because the 2016 Plan “merely recommends scientific approaches to manage the State forests within the DCNR’s and the Secretary’s administrative discretion consistent with the [Conservation and Natural Resources Act].” Respondents’ Brief at 20. The

Respondents further contend that the 2016 Plan is “meant to guide the DCNR personnel and announce the agency’s tentative intentions for the future,” but is not “a concrete government act triggering rights or remedies of an affected party that can be reviewed by this Court.” *Id.* These statements themselves are contradictory. The Respondents, through the 2016 Plan, make and communicate their decisions on how Bureau of Forestry staff should manage our State Forests, both presently and in the future. The Respondents’ decisions on how to manage our State forest effect the constitutional rights of PEDF’s members to have the public natural resources of the State Forests conserved and maintained, remedied and restored, their clean air and pure water protected, and their natural, scenic, esthetic and historic values preserved.

The Respondents also cite *Commonwealth v. Donahue*, 98 A.3d 1223 (Pa. 2014) and *Home Builders, supra*, to support their argument that no actual controversy exists in this case. Neither support that contention.

G. PEDF has Standing to Challenge the Constitutionality of the 2016 Plan

The doctrine of standing is generally “an inquiry into whether the petitioner filing suit has demonstrated aggrievement, by establishing ‘a substantial, direct and immediate interest in the outcome of the litigation.’” *Robinson Twp.*, 83 A.3d at 917 (quoting *Fumo v. City of Philadelphia*, 972 A.2d 487, 496 (Pa. 2009)). The decision of DCNR and Secretary Dunn in the 2016 Plan to manage our State Forest by allowing the current and future degradation of our State Forest from oil and gas

extraction to be “balanced” with the economic benefits to the Commonwealth of that extraction causes the beneficiaries of the Section 27 public trust, including the Petitioner’s members, immediate and irreparable harm. Their decision fails to prevent and to remedy the existing and future degradation of our State Forest from oil and gas development and violates their fiduciary duties as trustee to conserve and maintain the public natural resources of our State Forest under Article I § 27.

The Respondents argue that PEDF does not have standing because it has failed “to allege any causal connection between any action taken by the DCNR that relied on the 2016 [Plan] for authority and any harm that has or could occur” or “to allege a DCNR action that relied on the 2016 [Plan] as authority for a DCNR decision in the management of the State forests.” Respondents Brief at 22. In essence, the Respondents assert that PEDF does not have standing to challenge the constitutionality of the Respondents’ decision, as plainly stated in the 2016 Plan, to fundamentally alter their management of oil and gas development on our State Forests.

In deciding in the 2016 Plan that they must manage our State Forest by selling oil, gas and other geologic resources for economic benefit, the Respondents have decided not to remedy the degradation of our State Forest public natural resources from the extraction of geologic resources, but simply to justify the degradation based on the economic benefit. The 2016 Plan does not include any analysis of the

Respondents' duty to remedy this degradation, any explanation of how this degradation will be remedied, or any discussion of how they will fund those remedies. Additionally, the Respondents have not provided any plan to implement ecosystem management to sustain the State Forest. Instead, Respondents have decided, without any scientific or legal analysis, that oil and gas extraction and sale for economic benefit is part of ecosystem management. Ecosystem management is thereby compromised.

PEDF and its members have clearly alleged the causal connection between the Respondents' decision not to remedy the degradation of our State Forest from oil and gas extraction and the substantial, direct and immediate harm they are experiencing from the Respondents' failure to conserve and maintain their State Forest public natural resources, as described in the affidavits of PEDF's members summarized below. The Respondents themselves have documented this harm through the 2014 and 2018 Shale Gas Monitoring Reports discussed above.

Affidavit of Gary Metzger and the Lycoming Audubon Society

Gary Metzger and the Lycoming Audubon Society are members of PEDF. The affidavit of Gary Metzger is attached to the Amended Petition as Exhibit F. The mission of the Lycoming Audubon Society is “[t]o conserve and restore the natural ecosystem focusing on birds and other wildlife, and their habitat for the benefit of humanity and earth’s biological diversity.”

The Lycoming Audubon Society has 320 members who live, work and recreate in Lycoming and Clinton Counties. The abundant State public lands, including the State Forests, are critical elements of the natural character of the region that are important to them. They hunt, fish, hike, bike, and watch wildlife, including birds. The members believe that the State Forest land is not being protected as required by Article I, Section 27 of the Pennsylvania Constitution. The shale gas development is degrading the biological integrity of the forest, the air and water, and the scenic vistas.

Pennsylvania's tracts of contiguous forested lands provide critically important habitat for a whole suite of forest bird species. Many of these species have declined as a result of habitat impacts.

The impacts on State Forest areas that are leased will result in reduction in biodiversity. DCNR states its policy in the 1995 strategic plan, *Penn's Woods*, that "[e]cosystem management concepts and principles should serve as the fundamental basis for the management of public lands in the Commonwealth." By maintaining suitable habitat for forest bird populations, biological diversity can be protected. The 2016 Plan does not include a management plan to maintain such habitat and diversity. Without such a plan, DCNR cannot meet its constitutional duties under Article I § 27.

Affidavit of Jim Weaver and Pine Creek Watershed Council

Jim Weaver is a biologist, fisherman and retired Tioga County Planner. His affidavit is attached to the Amended Petition as Exhibit G. He lives at 428 Coop Hollow Road in Wellsboro, Pa. He has lived in the Pine Creek Valley for most of his life and helped to write the Pine Creek Watershed River Conservation Plan. He is currently a member of the board of the Pennsylvania Wilds Center for Entrepreneurship.

The wilderness forests and public lands are his source of inspiration, solitude and sustenance. He follows the Pennsylvania visionaries of the past: Mira Lloyd Dock, Pinchot, Rothrock and Goddard, who worked hard to build and protect our State Forest. He believes that only with continued reliance on ecosystem management can we sustain this protection.

Jim believes the 2016 Plan pays lip service to ecosystem management, but is supporting a return to managing our forest for the economic values of selling our timber and our natural gas to generate money.

He objects to the new policy of attempting to balance the management of the forest resources with the economic value of resource extraction. He argues that all of the uses must be compatible with ecosystem management. He identifies all the types of degradation that are being inflicted from gas extraction—fragmentation, impacts to forestry roads, increased invasive species, loss of aesthetic value, hiking,

biking fishing, increased erosion and sedimentation into our exceptional value streams.

The Conservation Landscape Initiatives, including the Pennsylvania Wilds, engaging the local communities through entrepreneurship, marketing and planning efforts are just beginning to see results. These initiatives rely on the sustainability of our State Forest. The 2016 Plan supports the continued development of timber an oil and natural gas extraction and balancing those activities with protecting our forest. This weakens the ecosystem of the State Forest and the development of sustainable economies based on conservation initiatives with the communities.

Affidavit of Roy Siefert

Roy Siefert lives in the Pennsylvania Wilds in Tioga County. His affidavit is attached to the Amended Petition as Exhibit H. He is the retired District Forester of the Tioga State Forest District. He has a B.S. degree in Forestry Science. He has spent his entire life working for Pennsylvania's forest.

Under the constitutional protections of Article I § 27, the people of Pennsylvania have committed to sustaining our State Forest for both the present and future. The only way Roy knows to do that is to manage the forest as a biological ecosystem.

During the entire tenure of his service as District Forester, the Bureau of Forestry never allowed timber sales, recreational use, or gas extraction to interfere

with the forest ecology. The bureau always used the money from those economic activities to fund projects to protect the State Forest.

Roy believes strongly that the Bureau of Forestry cannot sell our non-renewable (oil and natural gas) natural resources for economic development. He believes it is wrong to sell our State Forest resources to operate our State agencies.

Roy is deeply troubled when he goes back into the forest that he spent his lifetime protecting and sees the degradation occurring from shale gas development. He believes we need to ensure that we retain all of our natural resources to ensure that we can restore and sustain the State Forest for the future.

Affidavit of Cindy Bower

Cindy Bower is the PEDF vice president of the northcentral region of Pennsylvania. Her affidavit is attached to the Amended Petition as Exhibit I. She is a resident of Lycoming County. Her house borders on the Loyalsock State Forest. She has spent countless hours exploring the Moshannon, Elk, Rothrock, Bald Eagle, Tioga, Sproul and Susquehannock State Forests. Pennsylvania's public natural resources are of utmost and critical importance to her. They are the primary reason she has stayed in northcentral Pennsylvania.

Cindy has read the 2016 Plan and believes it is contrary to the constitutional mandates of Article I § 27. The vast proliferation of infrastructure from oil and gas

extraction has already fragmented the interior of the State Forest. Roads providing access to scenic forest experiences are now gated.

Of particular concern to Cindy is lack of any plan within the 2016 Plan to deal with the impacts from the oil and natural gas leases or for implementing ecosystem management. As a result, it provides no management plan to fulfill the constitutionally mandated Section 27 duties.

Affidavit of Butch Davies

Butch Davies has a bachelor of science degree from Penn State in Forest Management. His affidavit is attached to the Amended Petition as Exhibit J. For 21 years he was the District Forester for the Sproul State Forest. The 2016 State Forest Resource Management Plan mandates to use oil and gas for economic benefit does not square with Article I § 27 because the new techniques for shale gas drilling cause degradation. Likewise, the economic use of timber sales cannot degrade, diminish or deplete our public natural resources. The 2016 State Forest Resources Management Plan and the 2018 District Plans should be guided by DCNR's Strategic Plan, *Penn's Wood*.

H. The Respondents' 2016 Plan Must be Consistent with their Constitutional and Statutory Mandate to Manage our State Forests to Conserve and Maintain their Public Natural Resources

The Respondents assert that PEDF cannot ask this Honorable Court to declare that the 2016 Plan violates Article I § 27 because they have no duty under Article I § 27 or the Conservation and Natural Resources Act to prepare a plan for management of our State Forests or to perform any analysis of their fiduciary duties as trustee of these Section 27 public trust assets in such a plan. Respondents' Brief at 15-17. They contend that by declaring the 2016 Plan in violation of Article I § 27, this Court would be impermissibly directing Respondents to exercise their judgment or discretion in a particular way and expanding the statutory power granted them. *Id.* They also assert that whether the 2016 Plan complies with Article I § 27 is dictated by "what is mandatory under the forest management legislative scheme." *Id.*

The Respondents seem to suggest that unless the people of Pennsylvania tell them how to conserve and maintain the public natural resources of our State Forest through specific provisions in their Constitution or the General Assembly provides such direction by enacting specific legislation, they don't have to do anything. This argument turns our system of government on its head. The people of Pennsylvania have declared in Article I § 27 of their State Constitution that their State government is responsible as a trustee for conserving and maintaining the public natural

resources in their State, which they own and have set aside in a public trust. The General Assembly has enacted the Conservation and Natural Resources Act to establish DCNR as the Commonwealth agency responsible for carrying out these trustee duties for our State Parks and State Forests. The DCNR Secretary is responsible for overseeing this mission and ensuring that DCNR develops the expertise necessary to do so.

The Respondents have been directed by the Supreme Court in *PEDF II* to exercise their fiduciary duties of prudence, loyalty and impartiality as trustees under Article I § 27 and CNRA to prevent and remedy the degradation, diminution and depletion of our State Forest and State Park public natural resources. It is their job to develop and apply their expertise to carry out these duties and to explain to the people of Pennsylvania how they do so. They have failed to carry out their trustee duties in the 2016 Plan and PEDF has documented that failure. The Respondents' attempt to now avoid any constitutional review of their plan by arguing that PEDF cannot point to a specific mandate for it to prepare one. Under this logic, the Respondents can develop a plan completely contrary to their constitutional duties and statutory authority or have no plan, and no one can question it. Such an argument cannot stand.

I. Sovereign Immunity Does Not Bar Constitutional Challenge

The Respondents assert that PEDF's claim for declaratory relief should be dismissed because the Respondents are immune from claims that seek to compel affirmative action. PEDF's is asking this Honorable Court to declare that certain management decisions made and documented by the Respondents in the 2016 Plan violate Article I § 27, as well as the Respondents' trustee duties thereunder. If that declaratory relief is granted, PEDF has also asks this Court to direct the Respondents to amend the 2016 consistent with the constitutional mandates of Article I § 27, and their fiduciary duties as trustees thereunder. PEDF has the right under the Declaratory Judgments Act to ask this Honorable Court to direct the Respondents, as trustees, "to do or abstain from doing any particular act in their fiduciary capacity." 42 Pa.C.S. § 7535.

The Respondents do not have immunity from PEDF's request to have this Court restrain their decisions to manage our State Forests, as documented in the 2016 Plan, contrary to their constitutional mandates. No Commonwealth agency or agency head is immune from suits challenging actions they take contrary to the Pennsylvania Constitution. The Respondents' decision to direct management of our State Forests in a manner that does not remedy known degradation from oil and gas extraction is an affirmative action that has been taken by the Respondents in violation of Article I § 27. The Respondents' attempt to characterize the 2016 Plan they have prepared

to document how they are managing our State Forests as something other than an affirmative action that PEDF has the right to challenge is disingenuous.

Nothing in any of the cases that the Respondents cite sets forth a basis to constrain PEDF's right to seek declaratory relief in this matter. In *Stackhouse v. Commonwealth*, 892 A.2d 54 (Pa. Cmwlth. 2006), this Court considered whether the Commonwealth was immune from suit by a State employee who was seeking compensation for violation of her privacy and reputational interests by certain State officials. This Court observed that while generally the Commonwealth and its agencies, officials and employees "acting within the scope of their duties are immune from suits for damages," sovereign immunity does not bar certain suits in equity such as "suits which simply seek to *restrain state officials* from performing affirmative acts." *Id.* at 59 (quoting *Fawber v. Cohen*, 532 A.2d 429, 433-34 (Pa. 1987)). This Court also noted that "in addition to suits seeking compensation, sovereign immunity bars claims seeking mandatory injunctions to compel affirmative action by Commonwealth officials, but not those seeking prohibitory injunctions to restrain state action." *Id.* at 62 (citing *Bonsavage v. Borough of Warrior Run*, 676 A.2d 1330 (Pa. Cmwlth. 1996)). This Court also stated that "the substance of the relief requested and not the form or phrasing of the request" guides its inquiry. *Id.*

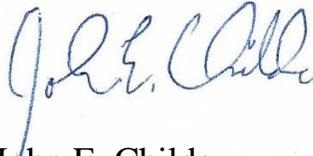
In discussing the application of sovereign immunity to declaratory judgment actions, this Court noted that its applicability “is not altogether clear. While the language in a number of cases seems to suggest that immunity is never a defense, [] it would seem self-evident that where a request for a declaration of rights can have no effect nor serve any purpose other than as the legal predicate for a damage or other immunity-barred claim in the same action, the demand for declaratory relief ought to fall along with the claim it serves to support.” *Id.* (footnote omitted); *see also Legal Capital, LLC v. Medical Professional Liability Catastrophe Loss Fund*, 750 A.2d 299, 302 (Pa. 2000) (“sovereign immunity does not apply because it is not applicable to declaratory judgment actions”); *Wilkesburg Police Officers Assoc. v. Commonwealth*, 564 A.2d 1015, 1019 (Pa. Cmwlth. 1989) (“Sovereign immunity poses no bar to the Associations’ request ... that this Court modify or set aside the Borough’s financial recovery plan as an unconstitutional infringement of the Association’s existing contractual rights.”).

PEDF is not seeking an award of money damages. PEDF is seeking compliance with the Constitution and particularly compliance with the mandates of Article I § 27. The Respondents have no immunity from PEDF’s valid claims under the Declaratory Judgments Act challenging the constitutionality of their actions.

VII. CONCLUSION

For the reasons set forth in this brief, Petitioner PEDF respectfully requests that this Honorable Court deny the Respondents' preliminary objections.

Respectfully,

A handwritten signature in blue ink, appearing to read "John E. Childe". The signature is written in a cursive style with a large initial "J" and "C".

John E. Childe
Attorney for Petitioner
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960 Linden Lane
Dauphin, PA 17018
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APPENDIX A

PEDF Notice to Respondents of its Intent to Sue dated June 11, 2018

John E. Childe, Esq.
1847 Center Street
Camp Hill, Pa. 17011
717-743-9811
childeje@aol.com

June 11, 2018

NOTICE OF INTENT TO SUE – HAND DELIVERY

Cindy Adams Dunn, Secretary
Ellen Schultزابarger, State Forester
Department of Conservation and Natural Resources
400 Market Street
Harrisburg, PA 17101

Dear Secretary Dunn and State Forester Schultزابarger:

I represent the Pennsylvania Environmental Defense Foundation (“PEDF”). I am writing about your proposal to amend the 20 separate district forest management plans in conformance with the State Forest Resource Management Plan (“State Forest Plan”) updated by the Department of Conservation and Natural Resources (“DCNR”) in 2016. The State Forest Plan, as updated in 2016, violates Article I, Section 27 of the Pennsylvania Constitution (“Article I § 27”) and your duties as trustees of our State Forest public natural resources thereunder.

PEDF hereby requests that you amend the 2016 State Forest Plan consistent with Article I § 27 before you proceed with updates to the separate district forest management plans. In addition, PEDF believes it is necessary for DCNR to publish an updated Shale-Gas Monitoring Report that includes the current impacts from shale gas extraction on our State forests and to incorporate those impacts into the amended State Forest Plan.

The 2016 State Forest Plan states that it “is the primary instrument that the bureau uses to plan, coordinate, and communicate its management of the state forest system. The plan has two primary roles. First, it provides a framework for bureau staff to approach its work and make management decisions ... that ensure sustainability across the state forest lands” (page 20). The second and equally important role is to communicate to stakeholders – the citizens of Pennsylvania, who are the owners of the state forest system – how their forest is being managed by DCNR, as the trustee.

The DCNR Environmental Reviews prepared for the oil and gas lease sales conducted in 2009 and 2010 approved leasing and extracting oil and gas on over 60,000 acres of State forest land in northcentral Pennsylvania even though DCNR had decided not to lease any more State forest land after leasing over 70,000 acres in 2008. Nothing in the State Forest Plan in existence at that time established appropriate criteria to evaluate whether such leasing would be consistent with the principles of ecosystem management essential to conserve and maintain the public natural resources of our State forests consistent with Article I § 27.

Secretary Cindy Adams Dunn
June 11, 2018

The shale gas extraction conducted to date under the leases executed in 2009 and 2010 have already caused significant degradation, depletion and diminishment our public natural resources, both by industrial development in our state forests and by removing and selling our oil and gas reserves. Over 617,000 acres of State forest land in northcentral Pennsylvania are subject to oil and gas development. This acreage comprises the core public natural resources of the entire Pennsylvania Wilds. The 2016 State Forest Plan needs to recognize these existing and future impacts and how they will be addressed.

The 2016 State Forest Plan proposes for the first time that the extraction and sale of oil and gas is one of the basis values and uses of our State forest. The plan states that “State forest lands are *working forests*, belonging to the citizens of the commonwealth, and are *managed for multiple resources and values* consistent with the principles of ecosystem management. *The economic use and sound extraction and utilization of geologic resources is part of the bureau’s mission* in managing these lands. Managing 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*. Development 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” (page 156 (emphasis added)). None of the highlighted proposals are in conformance with Article I Section 27 or ecosystem management.

Nothing in the plain language of Article I § 27 allows the sale of our public natural resources for economic use or benefit; or for use of proceeds from the sale of our natural resources for operational expenses of DCNR. If a conflict exists between DCNR’s constitutional trustee duties and its statutory authority, the statutory authority must give way to the constitutional duties.

Nothing in the plain language of Article I § 27 allows “balancing” the economic gains from the extraction and sale of our State forest natural gas against the long-term quality and sustainability of our State forest, including our constitutional right “to clean air, pure water, and the preservation of the natural, scenic, historic and esthetic values of the environment.”

Since 1995, DCNR and the Bureau of Forestry have relied on the science of ecosystem management to ensure the sustainability of our State forest in compliance with Article I § 27. Nothing in the science of ecosystem management allows the balancing of the impacts from extraction and sale of our natural gas and oil with the integrity of the ecology of our State forest. In fact, ecosystem management rejects managing the forest, or parts of it, for specific values (*e.g.*, oil, gas or timber extraction) and recognizes the need to manage the forest for its overall ecological integrity in order to sustain our forests.

Nothing in the 2016 State Forest Plan analyses whether industrial shale gas development in our State forest complies with Article I § 27; whether the sale of our State forest natural gas and oil for economic gain complies with Article I § 27; or whether such development and sale complies with the science of ecosystem management.

The 2014 Shale-Gas Monitoring Report discusses the monitoring needed to evaluate the impact of shale gas development occurring in our State forest and begins to assess the impacts from the exiting leases. The 2016 State Forest Plan acknowledges that only 16 percent of the shale gas development authorized by the 2009 and 2010 leases has occurred.

Secretary Cindy Adams Dunn
June 11, 2018

The recent Supreme Court decision issued in *PEDF v. Commonwealth*, 161 A.3d 911 (Pa. 2017) defines your duties as trustees of our State forests and parks, including our oil and natural gas. Your constitutional obligation under Article I § 27 is to conserve and maintain the corpus of the trust, our public natural resources, for the benefit of the people, who are the beneficiaries of the trust. To conserve and maintain means that you cannot deplete, diminish or degrade those resources. You have the duty to both prevent and remedy any degradation of those resources. It means that you must ensure that the resources are conserved for future generations. The 2016 State Forest Plan does not reflect that you have complied with those duties.

As trustees, you must comply with the fiduciary trust laws of Pennsylvania. One of your primary fiduciary duties is to provide the beneficiaries with a complete inventory of the public natural resources, including an inventory of the existing degradation of those resources. In addition, you have the duty to inform the beneficiaries of the management plans to prevent and remedy the degradation, and to ensure the sustainability of the corpus of the trust for future generations.

For DCNR to develop new management plans for each State forest district based on a 2016 State Forest Plan that fails to recognize DCNR's trustee duties under Article I § 27 and articulate management actions consistent with those duties further violates your duties as the trustees of our State forests public natural resources, which includes our oil and gas.

If you go ahead and approve the updated plans for the District Forests based on the 2016 State Forest Plan, PEDF will have to file an action in Commonwealth Court to protect its rights under Article I § 27 and ensure you comply with your duties as trustees thereunder. PEDF welcomes the opportunity to try to resolve the deficiencies in the 2016 State Forest Plan expressed above to avoid going to court for a resolution.

Sincerely,



John E. Childe, Esq.

cc: Audrey Miner, DCNR Chief Counsel, aminer@pa.gov
Mary Abbegael Giunta, Office of General Counsel, magiunta@pa.gov
Howard Greeley Hopkirk, Office of Attorney General, hhopkirk@attorneygeneral.gov
John Norbeck, Deputy Secretary, jnorbeck@pa.gov

