**NEWS RELEASE**

**PEDF INITIAL RESPONSE TO COMMONWEALTH COURT OPINION OF JULY 29, 2019**

The Pennsylvania Environmental Defense Foundation has been waging a battle to save our State Forest and State Parks since 2012. The Commonwealth Court, which serves as the trial court in this matter, has not been supportive of the Foundation’s efforts and struck again yesterday in its latest ruling denying the Foundation’s application for summary relief.

The Foundation has argued that money received by the Commonwealth under its oil and gas leases on our State Forests must be used to benefit the State Forests impacted by the oil and gas extraction, as well as the State Parks within them. While such leasing has occurred for decades, prior to 2009, the money had to be used to benefit our State Forests and State Parks. When the Marcellus shale gas boom led to new State Forest leases in 2009, the Commonwealth began diverting the money from these leases to pay for general government operations as part of the annual budget process and has continued to do so every year since then rather than requiring that these funds be used to conserve and maintain the quality of our State Forests and State Parks natural resources as required by the Pennsylvania Constitution.

In 1971, the people of Pennsylvania added Section 27 to Article I of our State Constitution to declare that the State’s public natural resources, which include our State Forests and State Parks, are the common property of all the people. They also declared that the government’s role is to conserve and maintain these resources as a trustee for the benefit of all the people, including future generations. The sale of oil and gas on our State Forests necessarily degrades and depletes these public natural resources and the Foundation has argued that the only way for the Commonwealth to comply with its constitutional mandate is to use the proceeds from this leasing to remedy and restore the harm to our State Forests and State Parks. In 2017, the Pennsylvania Supreme Court agreed and gave new life to Article I, Section 27 of the Pennsylvania Constitution.

The State Forest oil and gas leases issued by the Commonwealth require several different types of payments. The Foundation has argued that all these payments are made as part of the sale of public trust assets – the oil and gas on our State Forests – and must remain part of the trust. The Pennsylvania Supreme Court agreed in 2017 that royalty payments remain part of the corpus of the trust and must be used to conserve and maintain our public natural resources, but remanded the case back to the Commonwealth Court to evaluate whether the other payments made under the leases are public trust assets under our Constitution based on trust principles understood at the time Article I, Section 27 was adopted.

The Commonwealth Court ruled yesterday that two-thirds of these payments remain part of the public trust based on legislative actions that authorize the State Forest leasing and allocate income and principle under trusts, rather than evaluating the purpose of these payments under Article 1, Section 27, which would require that all of these funds remain as part of the public trust. Thus, the Foundation will be appealing this decision to the Pennsylvania Supreme Court and asking it to make the proper findings related to these payments under Article I, Section 27.

In a related matter, the Foundation is asking the Commonwealth Court to declare that public trust funds from the extraction and sale of State Forest oil and gas leases cannot be used by the government as part of the annual budget process to pay for general government operations. The Foundation is asking the court to declare that these public trust funds must be used to conserve and maintain the pubic natural resources in northcentral Pennsylvania, an area known as the Pennsylvania Wilds, which has been impacted to generate these funds. Oral argument before the Commonwealth Court on this issue is scheduled for September.

Yesterday, July 29, 2019, the Commonwealth Court issued findings and conclusions in the 2012 case, PEDF v. Governor Corbett, answering the Supreme Court’s remand order in its opinion in the same case, 161 A.3d 911, (Pa. June 20, 2017). The Supreme Court remanded two questions: First, whether money received from payments due under leases for the extraction and sale of oil and gas on state forest lands, including bonuses and annual rental payments, are part of the corpus of the environmental public trust established by Article I Section 27 of Pennsylvania’s Constitution. Second, whether the enactments of Section 1604-E and 1605-E of the 2009 Fiscal Code are unconstitutional.

The Supreme Court delineated the framework for the Commonwealth Court, stating: “In construing Section 1604-E and 1605-E [of the Fiscal Code], to the extent that the lease agreements reflect the generation of revenue streams for amounts other than for the purchase of the oil and gas extracted, it is up to the Commonwealth Court, in the first instance, and in strict accordance and fidelity to Pennsylvania trust principles, to determine whether these funds belong in the corpus of the Section 27 trust.” *Id*.

As to the first issue the Commonwealth Court ignored the direction of the Supreme Court, and determined that, based on the leases, bonus and rental payments are not payments for the “severance” of the oil and gas from the land, and that they are payments only for exploring for the oil and gas.

But the leases expressly state otherwise. The leases specifically state that they are “***for the sole purposes*** ***of*** (1) ***exploring****,* ***drilling****,* ***operating****,* ***producing****,* ***and removing of oil, gas*** ***and liquid hydrocarbons, and*** (2) at locations approved by the Department, ***laying pipelines******and******constructing roads****,* ***tanks****,* ***towers****,* ***stations****,* ***and structures*** thereon ***to*** ***produce****,* ***save****,* ***take care of****,* ***and******transport extracted products***.” The purpose of these lease provisions is to expressly allow the oil and gas, the Section 27 trust assets, to be physically changed, to be drilled, produced, removed, saved, taken and transported away from the control of the trust. These actions would dispose of the trust assets and deprive the trust of those assets. If no oil or gas is actually found and removed, that does not change the purposes of the leases and the payments made thereunder as intended by the parties to the lease. The bonus and annual rental payments are ***express consideration*** paid by lessees for the right to enter upon our State forests to extract and remove the oil and gas.

Contrary to the direction of the Supreme Court the Commonwealth Court did not reaching its findings and conclusions in strict accordance and fidelity to Pennsylvania trust principles, to determine whether these funds belong in the corpus of the Section 27 trust. Instead, Commonwealth Court relied “Principal and Income Act of 1947”. To get there the court determined that the beneficiaries of the trust who are both living today and for future generations must be broken down into two categories. Those beneficiaries living today must be life tenants or income beneficiaries, those of future generations are remaindermen. These designations are based on the court’s analysis of the principals under lease law, not under strict principles of trust law. Under Article I Section 27 the beneficiaries of the trust are also owners of the public natural resources. The second sentence of Section 27 states, “Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come.” As common owners of the natural resources the beneficiaries cannot be limited as either life tenants or income beneficiaries.

The Supreme Court emphasized that that the proper standard of judicial review lies in the text of the Article I Section 27 itself as well as the underlying principles of Pennsylvania Trust law. Nothing in the terms of the trust language of Section 27 authorizes the trustee to lease and sell our public natural resources. Nothing in Section 27 authorizes the trustee to limit the beneficiaries, as common owners, to life tenants and remaindermen.

One of the basic principles of trust law is that it is the duty of the trustee to protect the corpus of the trust for the benefit of the people, not the trustee. Interpreting the leases of the trustee to provide that the trustee receives the income from leases in the form of bonus and rental payments belies this principle.

The Supreme Court in *PEDF II* recognized this fact, stating that the “Commonwealth, as trustee, has the constitutional obligation to negotiate and structure leases in a manner consistent with its Article I Section 27 duties. 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*.*