

SUPREME COURT OF PENNSYLVANIA

Case No. 10 MAP 2015

PENNSYLVANIA ENVIRONMENTAL DEFENSE FOUNDATION,
Appellant,

v.

COMMONWEALTH OF PENNSYLVANIA, AND GOVERNOR OF
PENNSYLVANIA, TOM WOLF, IN HIS OFFICIAL CAPACITY AS
GOVERNOR,
Appellees.

BRIEF OF *AMICI CURIAE*
DELAWARE RIVERKEEPER NETWORK, SIERRA CLUB,
PENNFUTURE, AND PENNSYLVANIA LAND TRUST ASSOCIATION
IN SUPPORT OF APPELLANT

Appeal of Pennsylvania Environmental Defense Foundation from the Order of the
Commonwealth Court dated January 7, 2015, in No. 228 MD 2012.

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I. STATEMENT OF INTEREST

Amici curiae—Delaware Riverkeeper Network, Sierra Club, PennFuture, and the Pennsylvania Land Trust Association (collectively “Public Interest *Amici*”)—are non-profit organizations with a shared interest in advancing environmental and public health protections for the people of Pennsylvania.

Delaware Riverkeeper Network (“DRN”) is a non-profit organization established in 1988 to protect and restore the Delaware River, its associated watershed, tributaries, and habitats. DRN also works in communities outside the Delaware River watershed to support organization members with shared interests in protecting water quality, quality of life, public trust resources, and the constitutionally-protected environmental rights in members’ communities.

DRN was an integral party to the Pennsylvania Supreme Court’s decision in *Robinson Township, Delaware Riverkeeper Network, et al. v. Commonwealth*, 83 A.3d 901 (Pa. 2013) (plurality), which recognized the significant rights protected under Article I, Section 27 of the Pennsylvania Constitution and reaffirmed that all citizens have an inalienable right to a clean and healthy environment.

DRN established a new initiative, For the Generations, to: 1) ensure that the Pennsylvania Environmental Rights Amendment is further strengthened in the wake of the *Robinson Township, Delaware Riverkeeper Network* decision; 2) pursue and secure constitutional protection of environmental rights in states across

the nation; 3) pursue and secure recognition of environmental rights at the federal level through constitutional amendment; and 4) ensure governments at the local level, state level, and federal level honor the rights of all people to pure water, clean air and healthy environments in the laws they enact, the decisions they make, and the actions they pursue.

As a result, DRN works with and supports groups around the Commonwealth who are fighting to protect their communities and their constitutional rights to a clean and healthy place in which to live.

Sierra Club is the oldest, largest, and most influential grassroots environmental organization in the U.S., and its Pennsylvania Chapter has over 24,000 members throughout the Commonwealth. Sierra Club's mission is to explore, enjoy and protect the planet, and Sierra Club works to defend the environment at all levels of government including U.S. Congress, state legislatures, and state and federal courts.

PennFuture is a non-profit membership organization that works to create a just future where nature, communities and the economy thrive. PennFuture conducts strategic campaigns and enforces Pennsylvania's environmental laws in order to protect our natural environment and improve public health and safety.

Pennsylvania Land Trust Association is made up of seventy-five of Pennsylvania's most active conservation organizations, who in turn count more

than 100,000 Pennsylvanians as members and contributors. The Association was established by the leaders of the organizations to address matters of collective interest. The Association helps its member organizations and people generally to conserve the lands needed for healthy, prosperous and secure communities—the forests, farms, parks, urban gardens and other green places that safeguard our drinking water, prevent flooding, protect wildlife, provide recreational and economic opportunities, and preserve scenic beauty and community treasures.

II. SUMMARY OF ARGUMENT

The gravamen of this case is the Appellant Pennsylvania Environmental Defense Foundation’s claim that the Commonwealth infringed fundamental rights under Article I, Section 27 of the Declaration of Rights in the Pennsylvania Constitution. Section 27 provides:

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

Pa. Const. art. I, § 27 (the “Environmental Rights Amendment”). This text plainly guarantees “the people” two basic sets of rights—(1) a right to “clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment”, and (2) a right, as the beneficiary of a constitutional trust in

“public natural resources,” to initiate litigation against the Commonwealth when government agencies or officials fail to “conserve and maintain” those resources for the benefit of present and future generations.

The claims of the Pennsylvania Environmental Defense Foundation (hereinafter, “PEDF”) center on its rights as a beneficiary of the constitutional trust under Section 27; that is, the section’s second and third clauses. PEDF claims that the Commonwealth infringed these fundamental rights by opening approximately 140,000 acres of state forest lands to polluting industrial activities and leasing the underlying oil and natural gas—the common property of all the people including PEDF—to generate revenue for non-conservation purposes—all *before* conducting *any comprehensive study* on the impacts/alternatives to doing so. PEDF’s Jurisdictional Statement at 4.

Public Interest *Amici*, first, provide this Honorable Court with a dissection of the Commonwealth Court’s decision. Exercising its discretion, the Commonwealth Court narrowed the issues to be resolved on constitutional grounds. It also declined to address questions concerning past leasing decisions, finding that indispensable parties were missing. On questions concerning future leasing decisions, the Commonwealth Court effectively ruled that those issues were not yet ripe. On questions concerning the transfers/appropriations of lease revenues away from conservation purposes to balance the state budget, the Commonwealth Court

found that there had not been an evidentiary showing of inadequate funding for the state agency primarily charged with conservation.

Second, Public Interest *Amici* urge this Court—to the extent that it reaches the merits of the constitutional claims—to agree with PEDF that the challenged state acts implicate fundamental rights that “are recognized and unalterably established” in the Pennsylvania Constitution’s Declaration of Rights. Pa. Const. art. I. Further, we urge the Court to analyze PEDF’s claims under principles of public trust law and traditional standards for claims involving infringements of fundamental rights. In other words, to judge—

1) Whether the Commonwealth, as trustee of the constitutional trust in public natural resources, breached its trustee duties of prudence, loyalty, impartiality, and keeping adequate records of the trust’s administration by proceeding with the challenged acts without conducting any comprehensive study on impacts/alternatives in advance; and

2) Whether the Commonwealth’s challenged acts are narrowly drawn to advance a compelling state interest.

III. ARGUMENT

A. THE COMMONWEALTH COURT, IN THE EXERCISE OF ITS DISCRETION, NARROWED THE SCOPE OF ISSUES TO BE RESOLVED ON CONSTITUTIONAL GROUNDS

In the sections that follow we address the central facts at issue and the Commonwealth Court's holdings.

1. Central Facts

PEDF challenges a series of state legislative and executive acts that led to the opening of approximately 140,000 acres of state forest lands to polluting industrial activities and the leasing of the underlying oil and natural gas—the people's common property—to generate revenue for non-conservation purposes—all *before* conducting *any comprehensive study* on the impacts/alternatives to doing so.

As noted in the Commonwealth Court's recitation of the relevant facts, while the Commonwealth's practice of leasing lands for extractive purposes is not new, two developments since 2008 have spurred the rapid and dramatic expansion of the Commonwealth's leasing program. One is the growing demand for access to natural gas reserves in the Marcellus formation and other shale formations that underlie the majority of the state parks and state forests in Pennsylvania. *See Pennsylvania Environmental Defense Foundation v. Commonwealth*, 108 A.3d

140, 142 (Pa. Cmwlth. 2015) (“*PEDF I*”). The other is the pressure to reduce billion-dollar state budget shortfalls. *See id.* at 144-45.

Between 2008 and 2014, the Legislature and Governor allocated hundreds of millions of dollars of projected revenues from new and existing oil and gas leases on public lands to the state’s General Fund to balance the budget. *See, e.g., id.* at 148, 153 (figure showing lease revenue allocation under challenged fiscal code amendments). The amount of projected revenues over just a few years (more than 100 million dollars per year) departed wildly from the actual revenues collected over the past six decades (1947 to 2008), which totaled only approximately 150 million dollars. *See id.* at 143. The difference was largely a function of upfront bonus payments that are common for new leases. *See id.* at 144. However, the Pennsylvania Department of Conservation and Natural Resources (“Department” or “DCNR”), the agency responsible for leasing, had not yet decided that new leases were warranted. *See id.* at 144-46 (finding with respect to Jan. 2010 Lease Sale, for example, “[i]n direct response to the FY 2009–2010 budget and, specifically, Section 1604–E of the 2009 Fiscal Code Amendments, DCNR reversed course on its decision following the 2008 Lease Sale not to enter into further leases of State lands and, instead, proceeded with a new round of leasing in January 2010.”). Thus, through a series of fiscal code amendments and appropriations, the Legislature and Governor directed the agency’s leasing

decisions and exerted pressure to enter into new leases to balance the budget. *Id.* at 144-45 (quoting former DCNR official's testimony that DCNR staff were "being pressured regularly from I'd say the Governor's Office and the Legislature to make additional leases to provide revenue to reduce that shortfall.").

Also, the same fiscal code amendments and appropriations overhauled a state statutory scheme adopted in the 1950's for all "rents and royalties" from oil and natural gas leases on public land to be deposited into the Oil and Gas Lease Fund ("Lease Fund"). *Id.* at 143 (citing Oil and Gas Lease Fund Act, Act of December 15, 1955, P.L. 865, 71 P.S. §§ 1331-1333 ("Lease Fund Act"). This fund was to be "exclusively used for conservation, recreation, dams, or flood control or to match any Federal grants which may be made for any of the aforementioned purposes." *Id.* (citing Lease Fund Act). Starting in 2008, the Governor and Legislature took away the Department's control over some of these revenues by diverting them to the General Fund. This left the Department with less funding to carry out its mission to protect public lands precisely as oil and natural gas extraction on those lands was rapidly expanding.

Nonetheless to meet the projected revenue levels and maintain a balanced budget, the Department undertook new rounds of leasing between 2008 and 2010, thereby opening approximately 140,000 acres of state forests to oil and gas extraction. Indeed, the speed and scope of the new leasing activities since 2008 is

unprecedented in the history of the state’s leasing program. *See id.* at 144 (finding, for example, that “[i]n one month,” in 2008, DCNR’s decision to lease 74,000 acres “generated more revenue than the prior sixty years of leasing activity combined”). The leasing was so intensive and extensive that after an initial round in 2008, the Department announced its plan to defer further leasing pending study of the impacts of natural gas extraction within the Commonwealth. *See id.* The Department’s rationale for this *de facto* moratorium was that it lacked a proper accounting of the cumulative impacts on all the lands (public and private) open to extraction (by then about 650,000 acres total). *Id.* The Department shortly reversed itself, however, citing budgetary pressure and leased another 65,000 acres in 2010. *See id.* at 146.

Remarkably, there is no record evidence of the Commonwealth conducting any comprehensive study of the impacts or alternatives *before* rendering its budget and leasing decisions. Instead, the Commonwealth mainly cited a report that it published three years after the third and final round of leasing at issue was completed:

Respondents would point this Court to DCNR’s “Shale Gas Monitoring Report” issued in April 2014 (Monitoring Report) as evidence of DCNR’s successful efforts to preserve the values of State forest lands, and to balance mineral resource development with the ecological and recreational values and uses of State forest and park lands.

Respondents' Brief in Opposition to PEDF's Motion for Summary Judgment, dated August 29, 2014, at 29 ("Respondents' Brief"). The report acknowledges that it is the first of its kind, is not comprehensive, and supplements to it are not forthcoming:

This Shale-Gas Monitoring Report represents a first iteration of our measurements and is intended to represent a snapshot in time While the [B]ureau [of Forestry] is planning an expanded monitoring program for gas activities, the details have not been specified and the funding has not been secured.

Exhibit Q to Respondents' Brief at 0 (preface), 213.

2. The Commonwealth Court's Holdings

PEDF presented "approximately twenty questions" for the Commonwealth Court's consideration under the Declaratory Judgments Act, 42 Pa. C.S. §§ 7531-7541.¹ *PEDF I* at 155. The *en banc* panel concluded that only three issues were appropriate for judicial resolution under the Act:

1. Whether Sections 1602-E and 1603-E of the Fiscal Code, which respectively provide that the General Assembly shall appropriate all royalty monies the Lease Fund and that, subject to availability, up to \$50 million of the Lease Fund royalties shall be appropriated to DCNR, violate Article I, Section 27;

¹ Obtaining declaratory judgment is not a matter of right, but of court discretion. *See e.g., Alaica v. Ridge*, 784 A.2d 837, 841 (Pa. Commw. Ct. 2001) (quoting *Pa. State Lodge v. Commonwealth*, 692 A.2d 609, 613 (Pa. Commw. Ct. 1997), *aff'd* without op., 707 A.2d 1129 (Pa. 1998)); *see also Gulnac by Gulnac v. S. Butler Cnty. Sch. Dist.*, 587 A.2d 699, 701 (Pa. 1991) (cited by *PEDF I*).

2. Whether the General Assembly's transfers/appropriations from the Lease Fund violate Article I, Section 27; and
3. Who within the Commonwealth has the duty and thus bears the responsibility to make determinations with respect to the leasing of State lands for oil and natural gas extraction.

Id. The Commonwealth Court's analysis on each will be discussed in the sections that follow. We will also briefly discuss the Commonwealth Court's refusal to address other issues, including the Commonwealth's decision to enter into leases between 2008 and 2010.

- a. **Whether Sections 1602-E and 1603-E of the Fiscal Code, which respectively provide that the General Assembly shall appropriate all royalty monies in the Lease Fund and that, subject to availability, up to \$50 million of the Lease Fund Royalties shall be appropriated to DCNR, violate Article I, Section 27.**

- i. *Section 1602-E*

To decide PEDF's facial challenge to amended Section 1602-E, the court referred to Section 1602-E's plain language:

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

Id. at 160-161 (quoting Fiscal Code, Act of April 9, 1929, P.L. 343, as amended, 72 P.S. §§ 1–1805). The Court summarized Section 1602-E as “effectively remov[ing] royalty monies in the Lease Fund from the standing appropriation to DCNR in Section 3 of the Lease Fund Act.” *Id.* at 159. The Commonwealth Court also noted that the challenged 2009 Fiscal Code Amendments relied on revenue projections based on *new* and existing leases. *Id.* at 147.

The Court agreed with PEDF that the Environmental Rights Amendment imposes trust duties to protect public lands. *Id.* at 160. These duties, the Court found, are the shared responsibility of all branches and agencies of government:

DCNR is a cabinet-level agency vested with the authority to protect our State park and forest lands consistent with the Environmental Rights Amendment, it does not exercise that authority to the exclusion of the General Assembly, the Governor, or even this Court. As noted by the Supreme Court plurality in *Robinson Township*, “the Commonwealth” is the trustee under Article I, Section 27, not DCNR.

Id., citing *Robinson Twp.*, 83 A.3d at 957. The Court thus rejected any suggestion that only DCNR can make decisions that impact the corpus of the trust.

The Court also rejected any invitation to explore the motives of the General Assembly. As the Court stated:

PEDF’s contention that the General Assembly’s passage of Section 1602-E was more about exercising control over certain funds as a budget-balancing device than about protecting the environment is not without support in the record. But, an inquiry into the motives of the

General Assembly is not part of our constitutional inquiry.

PEDF I at 160.

Additionally, the Court rejected the notion that the money in the Lease Fund constitutes the corpus of the trust, holding that “the Lease Fund is a special fund created by the Lease Fund Act, not by the Pennsylvania Constitution.” *Id.* at 159 (noting that it predated Section 27). As a result, the Court found that just as the General Assembly could vest DCNR with discretion over the monies in the fund, the General Assembly could likewise “reassert some control over the use of funds within that special fund.” *Id.*

At the same time, Commonwealth Court recognized that how the General Assembly exercises that control is subject to judicial review: “The General Assembly’s powers, like the other branches of government, are tempered by the Declaration of Rights in the Pennsylvania Constitution, which includes the Environmental Rights Amendment.” *Id.* at 160.

The Court found nothing in the text of 1602-E that would “in any way abrogate the authority conferred on DCNR in the [Conservation and Natural Resources Act (CNRA), 71 Pa. C.S. §§ 1340.101–1340.1103] to choose whether to enter into leases of State land for oil and natural gas extraction.” *Id.* at 160. Thus, as to Section 1602-E, the Commonwealth Court held:

Based on the plain language, then, PEDF has not convinced this Court that Section 1602–E of the Fiscal Code is clearly, palpably, and plainly unconstitutional. The decision by the General Assembly, reflected in the statutory language, to vest in itself the power to appropriate certain monies in the Lease Fund does not by itself infringe upon the rights afforded the people of this Commonwealth under the Environmental Rights Amendment. Nor does the decision reflect a failure by the General Assembly to act consistent with its trustee obligations under Article I, Section 27.

Id. at 161.

ii. Section 1603-E

Turning to 1603-E, the Commonwealth Court again referred to the plain language:

[S]ubject to the availability of money in the Lease Fund, Section 1603-E appropriates “up to \$50,000,000” in royalty monies from the Lease Fund to DCNR annually to carry out the purposes of the Lease Fund. The section requires DCNR to give preference in the use of those dollars to the operation and maintenance of State parks and forests.

Id.

The Commonwealth Court framed the issue as whether “by limiting DCNR’s funding from the royalties in the Lease Fund to ‘up to \$50,000,000’ the General Assembly is failing to fund DCNR’s mission adequately under the Environmental Rights Amendment.” *Id.* The Court noted that, “[t]he only standard for adequate funding inquiries adopted by the Pennsylvania Supreme Court

inquires is whether the amount funded is so inadequate that it impairs the proper functioning of [the agency in question].” *Id.* at 166.

Framed as such, the Court held that “PEDF has presented no evidence that the current funding appropriated to DCNR from all sources is inadequate — i.e., that the funding is so deficient that DCNR cannot conserve and maintain our State natural resources.” *Id.*

b. Whether the General Assembly’s transfers/appropriations from the Lease Fund violate Article I, Section 27.

In addressing this second question, the Commonwealth Court acknowledged that “the Environmental Rights Amendment places an affirmative duty on the Commonwealth to ‘prevent and remedy the degradation, diminution, or depletion of our public natural resources’ — i.e., to conserve and maintain...” *Id.* at 168. Nonetheless, the Court found that “the Environmental Rights Amendment does not also expressly command that all revenues derived from the sale or leasing of the Commonwealth’s natural resources must be funneled to those purposes and those purposes only.” *Id.*

Public Interest *Amici* urge this Honorable Court to recognize that, consistent with the constitutional standards discussed herein, with respect to state forest lands, the Amendment at a minimum commands that the sale or leasing does not lead to the degradation, diminution, or depletion of the public natural resources. As the constitutional standard dictates, this requires an affirmative evaluation by the

government before its sale or leasing decisions that the resource will thereby be conserved and maintained. While the Commonwealth Court did not reach this question, because it concluded that indispensable parties were missing, no such evaluation occurred for the new leasing that occurred between 2008 and 2010.

The Commonwealth Court held that, “[i]n the absence of an express direction to the contrary, *so long as the Commonwealth is fulfilling its Article I, Section 27 obligations*, the source of the funding appropriated to meet those obligations seems to us to be a matter of discretion vested in the General Assembly under Article II, Section 1; Article III, Section 24; and Article VIII, Section 13 of the Pennsylvania Constitution.” *Id.* [emphasis added].

As noted above, the Court rejected the contention that the monies in the Lease Fund are trust property. Instead, the Court found that “[t]he General Assembly ‘retains authority to control the fate of special funds in order to serve the changing needs of the government.’” *Id.* at 168-69 (citations omitted); *see also, Id.* at 169 (“there is no constitutional mandate that monies derived from the leasing of State lands for oil and natural gas development be reinvested into the conservation and maintenance of the Commonwealth’s public natural resources”).

In reaching this conclusion, the Commonwealth Court noted that the Lease Fund was created before the Environmental Rights Amendment was adopted. However, this should not bar the application of trust concepts. Much of the State

forest system was purchased before the Environmental Rights Amendment was adopted, and there is no dispute that such public lands are within the ambit of its constitutional protection. In rejecting the contention that the Lease Fund is a trust fund, the Court refused to impose any trust duties on the trustees. Trust duties include the duty to conserve trust property, the duty to act prudently, and the duty to ensure that future generations will be able to enjoy the benefits of the State forests.

c. Who within the Commonwealth has the duty and thus bears the responsibility to make determinations with respect to the leasing of State lands for oil and natural gas extraction.

The Commonwealth Court held that “under the CNRA, DCNR has the exclusive statutory authority to determine whether to sell or lease the Commonwealth’s natural resources for oil and natural gas extraction.” *Id.* at 173. While the Court did not assess the constitutionality of any future leasing, it found the criteria set forth in the 2014 Fiscal Code Amendments “are not the criteria for assessing the constitutionality of future sales and leases.” *Id.* at 171. Likewise, the Court appropriately recognized that “the General Assembly’s finding that it is in the Commonwealth’s best interest to lease oil and gas rights [is not] binding on this Court or executive branch decision-makers.” *Id.* “It is within the province of the judiciary to determine whether particular legislative or executive action complies with existing law and, even more important, the Pennsylvania Constitution.” *Id.*

As the Commonwealth Court correctly noted:

[T]he sale or lease of our Commonwealth's natural resources implicates not just policy, but constitutional rights and duties as well. As appointed officers of the Commonwealth, vested by law with the duty to protect and preserve our natural resources, officials within DCNR serve at the pleasure of the Governor. But, so long as they serve, they serve the people of this Commonwealth. And the people of Pennsylvania are entitled to expect that those officials will 'support, obey and defend' Article I, Section 27 of the Pennsylvania Constitution in the discharge of their powers and duties under the CNRA with fidelity, even when faced with overwhelming political pressure, perhaps from the Governor, to act against their better judgment.

Id. at 171-172.

d. Commonwealth Court refrained from deciding other issues raised by the parties on jurisdictional and/or justiciability grounds.

The Court judged it inappropriate or unnecessary on justiciability and jurisdictional grounds to reach other issues raised by PEDF and the Commonwealth, and summarized these avoided issues as follows:

- “Requests that the Court outline in general terms the respective rights, privileges, and duties under the ERA, the Lease Fund Act, and the CNRA;”
- Requests that the Court “make sweeping factual findings about ‘immediate and long term negative impacts’ of extracting natural gas on State lands;”

- Requests that the Court “rul[e] on the constitutionality of budget proposals;”
- Requests that the Court rule “on the legality of” 2008-2010 lease sales;
- Requests to “address the issue of future leasing;” and
- Requests that the Court “hold that the Governor may override DCNR’s decisions under the CNRA.”

Id. at 155, 173-74. In declining to rule on the legality of the 2008-2010 leases, the Commonwealth Court held that it could not address this issue in the absence of the leaseholders, who the Court deemed to be indispensable parties. *Id.* at 156. Therefore, the court did not reach a decision on the constitutionality of the 2008-2010 lease sales. As to the Commonwealth’s future leasing decisions, the Commonwealth Court effectively ruled that the decisions themselves were not yet ripe. *Id.* at 169 (“we do not have before us a challenge to a proposed sale, as the record does not show that a final decision to lease additional State lands for non-surface disturbance leasing, as authorized in the Corbett Executive Order, has been made.”)

B. TO THE EXTENT THAT THIS COURT REACHES THE MERITS OF PEDF’S CONSTITUTIONAL CLAIMS, IT SHOULD APPLY PRINCIPLES OF PUBLIC TRUST LAW AND TRADITIONAL STANDARDS FOR CLAIMS INVOLVING INFRINGEMENTS OF FUNDAMENTAL RIGHTS.

In the sections that follow, Public Interest *Amici* discuss the legal standards under Section 27 adopted by Commonwealth Court; the strict scrutiny test applied to claimed infringements of fundamental rights; and the principles of public trust

law. To the extent that this Honorable Court reaches the merits of PEDF's constitutional claims, Public Interest *Amici* urge the Court to apply the standards set out below.

1. Legal Standard Under Section 27 Adopted by the Commonwealth Court

The Commonwealth Court's decision below correctly re-affirmed that the constitutional text of Section 27 must be honored and that it restricts the government from infringing environmental rights, and from failing to fulfill its public trust duties. While noting that *Robinson Township* was a plurality decision, the *en banc* panel of the Commonwealth Court also noted that none of the other justices had contradicted the plurality's textual analysis of Section 27. *PEDF I* at 156 n. 37. The panel proceeded to quote extensively from the *Robinson Township* decision throughout its statements of governing legal principles and its analysis.

The Commonwealth Court correctly concluded that government officials are "vested by law with the duty to protect and preserve our natural resources," and "the people of Pennsylvania are entitled to expect that those officials will 'support, obey and defend' Article I, Section 27 of the Pennsylvania Constitution in the discharge of their powers and duties ..."*PEDF I* at 171-72 (citing Pa. Const. art. VI, § 3 (Oath of Office)). The Court noted that government officials take an oath of office to support the Pennsylvania Constitution. *Id.* Having taken that oath, those officials must discharge their duties under and in accordance with Article I,

Section 27. *Id.* How the government discharges its duties is at the heart of this case.

Thus, the Court correctly re-affirmed that Section 27 requires government officials at all levels to avoid unduly infringing rights of “the people” to “clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment” in which they live every day in their community. *Id.* at 156-57. To avoid infringing these rights, officials must engage in science-based decision-making. As the Commonwealth Court noted, “[t]he first clause of the Environmental Rights Amendment ‘requires each branch of government to consider in advance of proceeding the environmental effect of any proposed action on the constitutionally protected features.’” *Id.* at 156 (quoting *Robinson Twp.*).

The Court also agreed that Article I, Section 27 makes every level and branch of government a trustee of public natural resources. *See, e.g., id.* at 160, 167. Like the *Robinson Township* plurality, the *en banc* panel below correctly gave a broad reading of the term “public natural resources.” The Court recognized that “public natural resources” include both publicly-owned land, and “resources that implicate the public interest, such as ambient air, surface and ground water, wild flora, and fauna (including fish) that are outside the scope of purely private property.” *Id.* at 167 (quoting *Robinson Twp.*).

The Commonwealth Court likewise was correct in finding that as a trustee under Section 27, each and every entity within the Commonwealth government has a duty of prudence, and as part of that duty, cannot perform its “duties respecting the environment unreasonably.” *Id.* at 157 (quoting *Robinson Twp.*). As the Superior Court has said, “[T]he trustee’s action must represent an actual and honest exercise of judgment predicated on a genuine consideration of existing conditions.” *In re Scheidmantel*, 868 A.2d 464, 492 (Pa. Super. Ct. 2005); *see also PEDF I* at 167 (citing superior court cases on trustee’s fiduciary duties).

Further, the Commonwealth Court correctly held that a governmental entity has a fiduciary duty:

To deal impartially with all beneficiaries and . . . the trustee has an obligation to balance the interests of present and future beneficiaries The Environmental Rights Amendment offers protection equally against actions with immediate severe impact on public natural resources and against actions with minimal or insignificant present consequences that are actually or likely to have significant or irreversible effects in the short or long term.

PEDF I at 157 (quoting *Robinson Twp.*, citations omitted).

In the context of the leasing of public lands, all the land is public and thus the need for balancing of Section 27 rights against, for instance, Section 1 property rights is absent, in contrast to the situation in *Robinson Township* where private rights were potentially impacted. *Id.* at 170-171. Therefore, while there may be

economic benefits from leasing public land, Commonwealth officials must address whether such actions are “consistent with the rights, duties, and obligations embodied in the Environmental Rights Amendment.” *Id.* at 172.

Such statements by the Commonwealth Court also reflect a view that Section 27 is an independent limitation on authority, separate and apart from statutory provisions. This view is in line with the concept that Section 27 is self-executing like other provisions of Article I of the Pennsylvania Constitution.

While the Commonwealth Court did not explicitly overrule its multi-factorial test from *Payne v. Kassab*, 312 A.2d 86 (1973) (*en banc*), aff’d, 361 A.2d 263 (1976), it did not apply it either, opting instead to apply principles more in line with the constitutional text of Section 27, as discussed in *Robinson Township*. This re-affirms that such a test applies only in particular situations, consistent with the view of the Supreme Court plurality in *Robinson Township*. The Commonwealth Court also acknowledged that the Pennsylvania Supreme Court has not adopted the *Payne* multi-factor test either, as *Robinson Township* stated. *PEDF I* at 159 (citing *Robinson Twp.*, 83 A.3d at 966–67). Likewise, in a 2005 case challenging the harms/benefits test in landfill regulations, the Pennsylvania Supreme Court stated:

The parties focus substantial portions of their briefs on the import of the three-part test set forth in the Commonwealth Court’s decision in *Payne I* The test, however, is not directly applicable to the questions in this case. The test, which questions whether the harms “clearly outweigh” the benefits does not prohibit an

agency from requiring that the benefits clearly outweigh the harms. Furthermore, this Court did not specifically adopt the three-part test, but instead noted that the Commonwealth Court’s test merely provided for “normal appellate review.”

Eagle Envtl. II, L.P. v. Commonwealth, 584 Pa. 494, 884 A.2d 867, 882 (2005)

(citations omitted).

Finally, given PEDF’s claims centering on state budgetary matters, the Commonwealth Court judged that these matters, too, fall within the ambit of Section 27. *PEDF I* at 167. The court drew on the Pennsylvania Supreme Court’s recent decision in *Hosp. & Healthsystem Ass’n of Pa. v. Commonwealth*, that “regardless of the extent to which the political branches are responsible for budgetary matters, they are not permitted to enact budget-related legislation that violates the constitutional rights of Pennsylvania citizens,” including their constitutional environmental rights. 77 A.3d 587, 598 (Pa. 2013).

Public Interest *Amici* maintain that the above-referenced statement of the law is correct and that the Commonwealth Court was correct in not applying *Payne I* to questions concerning the constitutionality of the General Assembly’s actions.

2. Article I, Section 27 Enumerates Fundamental Rights and Claims of Their Infringement Are Subject To the Strict Scrutiny Test

a. Article I, Section 27 enumerates fundamental rights

As a plurality of this Court has found, “[t]he decision to affirm the people’s environmental rights in a Declaration or Bill of Rights, alongside political rights, is relatively rare in American constitutional law.” *Robinson Twp.*, 83 A.3d at 962. Further, “[t]he actions brought under Section 27 since its ratification ... have provided this Court with little opportunity to develop a comprehensive analytical scheme based on the constitutional provision.” *Id.* at 950. Nonetheless, on the rare occasions when it has reviewed claims under this even rarer form of constitutional protection, this Court has consistently recognized that “fundamental” values and “inviolable” individual rights are at stake, most recently in *Robinson Township*:

The right delineated in the first clause of Section 27 presumptively is on par with, and enforceable to the same extent as, any other right reserved to the people in Article I. ...

The Environmental Rights Amendment speaks of the rights of “the people.” The only other constitutional provision similarly formulated is interpreted to guarantee a constitutional right personal to each citizen.

Id. at 951 n. 39; *see also id.* at 976 (citing Pa. Const. art. I, § 27) (citizens seek “to vindicate fundamental constitutional rights” under Section 27); *Nat’l Wood Preservers, Inc. v. Commonwealth*, 414 A.2d 37, 44 (Pa. 1980) (citing same)

(“maintenance of the environment is a fundamental objective of state power”); *cf.* *Zauflik v. Pennsbury Sch. Dist.*, 104 A.3d 1096, 1128 (Pa. 2014) (“unlike other provisions in Article I—such as Section 27, the Environmental Rights Amendment, which was at issue in *Robinson Twp.*—Section 11 expressly includes a limitation on the individual right to ‘open courts’ and remedies therein”); *Robinson Twp.*, 83 A.3d at 1014-1015 (J. Eakin dissenting) (“It is a very fundamental precept of constitutional law that the Constitution assures the rights of individuals, not governments.”).

Similarly, *en banc* panels of the Commonwealth Court have judged that the location of the Environmental Rights Amendment within the Declaration of Rights signifies a particular constitutional constraint on the Commonwealth’s actions, most recently in the case now on appeal. *See PEDF I* at 160 (“The General Assembly’s powers, like the other branches of government, are tempered by the Declaration of Rights in the Pennsylvania Constitution, which includes the Environmental Rights Amendment.”); *see also Com. v. Nat’l Gettysburg Battlefield Tower, Inc.*, 8 Pa. Cmwlth. 231, 243, 302 A.2d 886, 892 (Pa. Commw. Ct. 1973) *aff’d sub nom. Com. by Shapp v. Nat’l Gettysburg Battlefield Tower, Inc.*, 454 Pa. 193, 311 A.2d 588 (1973) (comparing political rights and environmental rights under Article 1 and concluding Environmental Rights Amendment is “more than a declaration of rights not to be denied by government; it establishes rights to be

protected by government.”). So too the Commonwealth Court has recognized the “importance of the Commonwealth’s scenic and natural resources to all present and future Pennsylvanians” as “an unassailable truth, and one that, through the wisdom and foresight of our citizenry, is enshrined in the Environmental Rights Amendment.” *PEDFI* at 154.

Tellingly, no Pennsylvania courts nor even the Commonwealth have suggested that the rights enumerated in Section 27 are somehow not fundamental. If we are to take the constitution seriously, we must take each provision seriously. We cannot pick and choose which constitutional provisions we like, and which we do not like. The rights “recognized and unalterably established” in the Pennsylvania Declaration of Rights are our core, fundamental rights; they are inalienable and indefeasible. Pa. Const. art. I. They serve as limitations on the authority of the Commonwealth. Just as the Commonwealth cannot take action that would infringe our free speech rights, it is equally true that the Commonwealth cannot take action that would infringe our environmental rights. Just as the citizens can hold the Commonwealth accountable for violations of our rights to bear arms, it is equally true that the citizens can hold the Commonwealth accountable for violations of our environmental rights. Just like the Court has a responsibility to vindicate our property rights when another branch has infringed

such rights, it is equally true that the Court has a responsibility to vindicate our environmental rights when another branch has infringed these rights.

b. Claims of infringed fundamental rights, such as those in Section 27, are subject to the strict scrutiny test.

This Court has noted, “[w]here laws infringe upon certain rights considered fundamental, such as the right to privacy, the right to marry, and the right to procreate, courts apply a strict scrutiny test.” *Nixon v. Department of Public Welfare*, 839 A.2d 277, 287 (2003) (citing state and federal cases). Under this test, courts ask whether the challenged government action is “narrowly drawn to accomplish a compelling governmental interest,” *Pap’s A.M. v. City of Erie*, 812 A.2d 591, 605 (2002) (citing *Pap’s A.M. v. City of Erie*, 719 A.2d 273, 275 (1998), rev’d on other grounds, 529 U.S. 277 (2000)); cf. *Sweeney v. Tucker*, 375 A.2d 698, 709 (1977) (“the need for courts to fulfill their role of enforcing constitutional limitations is particularly acute where the interests or entitlements of individual citizens are at stake.”).

Even under this test, the party challenging the constitutionality of a statute has a heavy burden to establish that the challenged statute “clearly, palpably, and plainly violates” the Constitution. *Konidaris v. Portnoff Law Associates, Ltd.*, 598 Pa. 55, 953 A.2d 1231, 1239 (2008) (citation omitted). The presumption that legislative enactments are constitutional is strong. *Commonwealth v. McMullen*, 961 A.2d 842, 846 (2008); see also 1 Pa.C.S. § 1922(3) (in ascertaining intent of

General Assembly in enactment of statute, presumption exists that General Assembly did not intend to violate federal and state constitutions). Further, they “are to be construed whenever possible to uphold their constitutionality.” *In re William L.*, 383 A.2d 1228, 1231 (1978). Also, “[i]t is well settled that when a case raises both constitutional and non-constitutional issues, a court should not reach the constitutional issue if the case can properly be decided on non-constitutional grounds.” *Ballou v. State Ethics Comm’n*, 436 A.2d 186, 187 (1981).

Thus, for example, in *DePaul v. Commonwealth*, 969 A.2d 536 (Pa. 2009), this Court reviewed claims of the infringement of protected freedoms of expression and association under the strict scrutiny test. The petitioner, who had invested in a planned casino, challenged an absolute statutory ban on state political contributions by a class of individuals affiliated with licensed gaming in the state. This Court analyzed the compelling government interest prong of the strict scrutiny, as follows:

Ultimately, what matters most for purposes of the constitutional challenge forwarded here is the specifics of the Pennsylvania legislation. And what is notable about that regulatory scheme is that, although the General Assembly did not produce the sort of legislative record [the appellant] believes it should have in order to establish a compelling governmental interest, the Legislature did include a detailed provision addressing “Legislative intent” in the [challenged statute], and that provision directly addressed the issue of the corrupting influence of campaign contributions.

969 A.2d at 552. The Court found that the expressed government interest in the legislative intent section of the challenged statute was to address “the effect of campaign contributions” to “prevent the corrupting influence or appearance resulting from large campaign contributions, not all campaign contributions.” *Id.* The relatively narrow government interest at issue thus required “a correspondingly more precise measure of the means adopted to advance the identified interest.” *Id.* Applying this strict test, the Court held unconstitutional the absolute ban because the Commonwealth had alternative means such as a limit on the amount of contributions to advance its interest. *Id.* at 552-53 (citing less restrictive regulations in other jurisdictions).

The text of Section 27 and its location within Article I (as discussed above), as well as the circumstances surrounding its enactment (as discussed in *Robinson Twp.*), make it a rare affirmation of constitutional environmental rights alongside political rights that are fundamental and inviolate. It is axiomatic that the strict scrutiny test applies to such rights. This includes PEDF’s rights as beneficiaries of the constitutional public trust.

3. Principles of Public Trust Law

The public trust rights in Article I, Section 27 mean that the Commonwealth has a fiduciary duty to protect them:

As trustee, the Commonwealth is a fiduciary obligated to comply with the terms of the trust and with standards

governing a fiduciary's conduct. The explicit terms of the trust require the government to “conserve and maintain” the corpus of the trust. *See* Pa. Const. art. I, § 27. The plain meaning of the terms conserve and maintain implicates a duty to prevent and remedy the degradation, diminution, or depletion of our public natural resources. As a fiduciary, the Commonwealth has a duty to act toward the corpus of the trust—the public natural resources—with prudence, loyalty, and impartiality.

Robinson Twp., 83 A.3d at 957. Each and every entity within the Commonwealth government has a duty of prudence, and as part of that duty, cannot perform its “duties respecting the environment unreasonably.” *PEDF I.* at 157 (quoting *Robinson Twp.*). As the Superior Court has correctly said, “[T]he trustee’s action must represent an actual and honest exercise of judgment predicated on a genuine consideration of existing conditions.” *In re Scheidmantel*, 868 A.2d at 492; *see also PEDF I* at 167 (citing superior court cases on trustee’s fiduciary duties). This is consistent with the widely recognized meaning of the duty of prudence for public trusts which includes, among other things, that, prior to making decisions, the trustee should understand the impact of its decisions on public natural resources held in trust. *See, e.g., In re Water Use Permit Applications*, 9 P.3d 409, 455 (Haw. 2000) (citing cases from other states) (“the public trust compels the state duly to consider the cumulative impact of existing and proposed diversions on trust purposes and to implement reasonable measures to mitigate this impact, including the use of alternative sources.”). In *Nat’l Audubon Soc’y v. Superior*

Court, the California Supreme Court held that the state’s failure to consider the impact of a water diversion decision on protected natural resources violated the public trust doctrine. 658 P.2d 709, 727-29 (1983) (cited with approval in *Robinson Twp.*, 83 A.3d at 958).

As this Court well knows, a contemporaneous written assessment prior to a decision is likely to be more trustworthy than a post-hoc rationalization or justification for a decision that has already been made. All of this is particularly important because of the Commonwealth’s duty of prudence to “conserve and maintain” public natural resources held in a constitutional trust pursuant to Article I, Section 27.

IV. CONCLUSION

Public Interest *Amici* respectfully request, if the Court reaches the merits of PEDF’s constitutional claims, the Court should apply a standard grounded in the constitutional text that is consistent with the strict scrutiny applied to claimed infringements of other fundamental rights, and with traditional public trust law principles.

Dated this 20th day of May 2015.

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**CERTIFICATE OF COMPLIANCE
WITH PA. R.A.P. 2135**

This is to certify that the foregoing Amici Curiae Brief filed by Delaware Riverkeeper Network, Sierra Club, PennFuture, and Pennsylvania Land Trust Association, complies with Pa. R.A.P. 2135(d). The brief is 34 pages long, not including front matter, this certificate, and certificate of service. However, it has approximately 8,477 words, including cover, front matter and certificate of service, based on the word count of the Microsoft Word program that was used to prepare the brief. It is therefore within the limit of 14,000 words prescribed by Pa. R.A.P. 2135(a)(1).

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