

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Pennsylvania Environmental	:	
Defense Foundation,	:	
Petitioner	:	
	:	
v.	:	No. 228 M.D. 2012
	:	Submitted: December 10, 2012
Commonwealth of Pennsylvania,	:	
and Governor of Pennsylvania,	:	
Thomas W. Corbett, Jr., in his official	:	
capacity as Governor,	:	
Respondents	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge  
HONORABLE ROBERT SIMPSON, Judge  
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION  
BY JUDGE SIMPSON**

**FILED: January 22, 2013**

Before this Court in our original jurisdiction are the preliminary objections filed by the Commonwealth of Pennsylvania and Governor Thomas W. Corbett, Jr. (collectively, Respondents) to an amended petition for review in the nature of a complaint seeking declaratory relief (amended complaint) filed by the Pennsylvania Environmental Defense Foundation (Petitioner).

Petitioner's amended complaint challenges the constitutionality of certain amendments to The Fiscal Code<sup>1</sup> and Appropriations Acts as well as certain provisions of Act 13 of 2012, see 58 Pa. C.S. §§2301-3504, on the ground these

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<sup>1</sup> Act of April 9, 1929, P.L. 343, as amended, 72 P.S. §§1-1804.

enactments violate Article I, Section 27 of the Pennsylvania Constitution. Petitioner avers the challenged enactments diverted funds from the Oil and Gas Lease Fund,<sup>2</sup> which was created exclusively to preserve Pennsylvania's State parks and forests in connection with the extraction of oil and gas from these public lands, to the Commonwealth's General Fund and other funds. Additionally, Petitioner alleges Respondents compelled the leasing of additional State forest land without evaluating the potential harm to the public's natural resources caused by the leasing of this land in violation of their trustee duties under Article I, Section 27. Upon review, we overrule Respondents' preliminary objections.

## I. Background

In April 2012, Petitioner filed an eight-count, 55-page amended complaint,<sup>3</sup> which we summarize as follows. Petitioner is a nonprofit organization whose stated purpose is to protect and preserve the environmental interests of its members, including their interests in conserving and maintaining Pennsylvania's public natural resources. Five of Petitioner's members filed affidavits in support of the amended complaint.

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<sup>2</sup> Pursuant to Section 1 of the Act of December 15, 1955, P.L. 865, as amended, 71 P.S. §1331 (referred to as the Oil and Gas Lease Act Fund): "All rents and royalties from oil and gas leases of any land owned by the Commonwealth, except rents and royalties received from game and fish lands, shall be placed in a special fund to be known as the 'Oil and Gas Lease Fund' which fund shall be exclusively used for conservation, recreation, dams, or flood control or to match any Federal grants which may be made for any of the aforementioned purposes."

<sup>3</sup> Petitioner filed its amended complaint in response to the preliminary objections filed by Respondent Governor Corbett and Charles Zogby, Secretary of the Budget to Petitioner's original complaint. Petitioner's amended complaint added the Commonwealth of Pennsylvania as a respondent and removed the Secretary of Budget as a respondent. In response to the preliminary objections of the State Treasurer, Petitioner also removed the State Treasurer as a respondent.

The Respondent Commonwealth is the “Constitutional Trustee” of the Public Trust set forth in Article I, Section 27 of the Pennsylvania Constitution. Am. Pet. for Review (Am. Pet.) at ¶5.

The Respondent Governor, Thomas W. Corbett, Jr., acting in his official capacity, is the Chief Executive Officer of the Commonwealth. Pursuant to Article IV, Section 2 of the Pennsylvania Constitution, the Governor is vested with “[t]he supreme executive power” and he “shall take care that the laws [of the Commonwealth] [are] faithfully executed.” Am. Pet. at ¶6 (quoting PA. CONST. art. IV, §2).

Article I, Section 27 imposes on the Commonwealth the duty to “conserve and maintain” Pennsylvania’s public natural resources “for the benefit of all the people,” including generations yet to come. PA. CONST. art. I, §27. Article I, Section 27 defines the people’s rights to the public natural resources to include “clean air, pure water, and ... the preservation of the natural, scenic, historic and esthetic values of the environment.” Id. Pennsylvania’s state parks and forests are public natural resources for which Respondents have trustee duties under Article I, Section 27.

Petitioner seeks declaratory relief from legislative enactments which, it alleges, are unconstitutional because they violate Article I, Section 27 and have caused and will continue to cause direct, immediate and long term harm to Pennsylvania’s State forests and parks, and to Petitioner’s members’ rights to those resources. Specifically, Petitioner challenges the enactment of certain amendments

found in Article XVI-E of the Fiscal Code<sup>4</sup> (Fiscal Code Amendments) as well as the Appropriations Acts that implement those amendments.

Petitioner allege that, through the Fiscal Code Amendments and Appropriations Acts, Respondents effectively mandated the leasing of more than 65,000 acres of State forest land that is a part of the Public Trust established by Article I, Section 27 for the extraction of natural gas, and transferred the proceeds from those leases out of the special fund created to preserve these Public Trust assets. In the process, the Fiscal Code Amendments stripped the Department of Conservation and Natural Resources (DCNR) of its constitutional duties under Article I, Section 27 and its statutory duties under the Conservation and Natural Resources Act (CNRA)<sup>5</sup> to serve as the Commonwealth's Trustee under Article I, Section 27. See Section 101 of the CNRA, 71 P.S. §1340.101.

The specific intent of the CNRA is “to create [DCNR] to serve as a cabinet level advocate for our State parks, forests, rivers, trails, greenways and community recreation and heritage conservation programs to provide more focused management of the Commonwealth's recreation, natural and river environments.” Section 101(b)(1) of the CNRA. Under the CNRA, DCNR's primary mission is “to maintain, improve and preserve State parks” and “to manage State forest lands to assure their long term health, sustainability and economic use ....” Id. The CNRA includes findings that “Pennsylvania's State forests and parks cover almost

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<sup>4</sup> See 71 P.S. §§1602-E—1605-E. Sections 1602-E—1604-E were added by the Act of October 9, 2009, P.L. 537. Section 1605-E was added by the Act of July 6, 2010, P.L. 279.

<sup>5</sup> Act of June 28, 1995, P.L. 89, as amended, 71 P.S. §§1340.101-1340.1103.

2.3 million acres in this Commonwealth and contain some of the most precious and rare natural areas.” Section 101(a)(2) of the CNRA. “Our State parks and forests and community recreation and heritage conservation areas are critical to the continued success of our tourism and recreation industry, the second largest industry in the State.” Section 101(a)(4) of the CNRA. “State Parks and Forests have taken a back seat to other environmental issues ... and ... have lost out in the competition for financial and staff resources because they have no cabinet-level advocate.” Section 101(a)(8-9) of the CNRA.

The CNRA specifically grants DCNR the authority to lease State forest land for mineral development whenever DCNR “determines that it is in the best interests of this Commonwealth” to do so. Section 302(a)(6) of the CNRA, 71 P.S. §1340.302(a)(6). DCNR also possesses the authority and duty under Section 304(c) of the CNRA, 71 P.S. §1340.304(c), as part of its mission, to administer the statute commonly known as the Oil and Gas Lease Fund Act,<sup>6</sup> which is entitled “An act requiring rents and royalties from oil and gas leases of Commonwealth land to be placed in a **special fund** to be used [**exclusively**] for conservation, recreation, dams, and flood control; authorizing the Secretary of [DCNR] to determine the need for and location of such projects and to acquire the necessary land.” Section 1 of the Oil and Gas Lease Fund Act, 71 P.S. §1331, Historical and Statutory Notes. (Emphasis added). Section 3 of the Oil and Gas Lease Fund Act “specifically **appropriated**” the fund to DCNR “to carry out the purposes of the Act.” 71 P.S. §1333 (Emphasis added). Am. Pet. at ¶¶ 50, 61.

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<sup>6</sup> Act of December 15 1955, P.L. 865, as amended, 71 P.S. §§1331-1333.

Since 1955, DCNR and its predecessors, initially under the guidance of former Secretary Maurice Goddard, leased State forest land for the development and sale of oil and gas resources numerous times. Such leasing activities were conducted only after a careful analysis to ensure that the benefits of the leasing activities to the state's natural resources clearly outweighed the harm caused by the gas extraction activities.

Throughout these historic actions, DCNR and its predecessors leased state forest land with the specific knowledge and belief that the rents received from granting leases and the royalties received from the production of oil and gas pursuant to those leases would be deposited into the Oil and Gas Lease Fund and would be put back into the State forest and park system for the purposes set forth in the Oil and Gas Lease Fund Act. Those enumerated purposes include restoring and improving the park and forest lands and purchasing additional lands to mitigate the gas extraction impacts. DCNR and its predecessors used the monies obtained from these leasing activities to enhance State parks and forests to the nationally recognized systems they are today.

In 2008, after the development of a new technology that enabled the extraction of oil and natural gas from deep level shale deposits, DCNR decided to lease 74,000 additional acres of State forest land. For leasing these 74,000 acres, DCNR received \$163 million in prepaid rental payments, which were deposited into the Oil and Gas Lease Fund. DCNR leased this forest land for oil and gas extraction with knowledge that these activities would impact the public natural resources. However, the impacts would be offset with funds from the leasing

appropriated to DCNR for that specific purpose under the Oil and Gas Lease Fund Act.

Nevertheless, Petitioner avers, without regard for the statutory limitations on use of funds in the Oil and Gas Lease Fund, the Governor signed into law the General Appropriations Act of 2009, which transferred \$143 million of the \$163 million deposited into the Oil and Gas Lease Fund into the General Fund to support the budget being enacted. This transfer left less than 13% of the proceeds from the leasing of State forest land in the Oil and Gas Lease Fund. Am. Pet. at ¶¶ 15-16, 38-39, 60-70, 76-78.

Further, Section 1602-E of the Fiscal Code Amendments<sup>7</sup> requires that, contrary to the Oil and Gas Lease Fund Act's express requirements, no *royalties* from the Oil and Gas Lease Fund can be expended unless appropriated by the General Assembly. 72 P.S. §1602-E. Petitioner asserts it is important to note that Section 1602-E addressed only *royalties*, while the Appropriations Act of 2009 transferred lease rental payments, not royalties, from the Oil and Gas Fund to the General Fund.

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<sup>7</sup> That Section provides:

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

72 P.S. §1602-E.

Petitioner further avers that, after awarding the 2008 leases, DCNR determined no further leases for natural gas extraction should be approved until DCNR could study and evaluate the impacts of the current leases on the state's natural resources. Despite DCNR's determination, Petitioner alleges, the Governor forced DCNR to lease 65,000 additional acres of State forest land to generate more revenue to support budget appropriation bills by enacting, along with the General Assembly, two new Fiscal Code sections that required additional transfers from the Oil and Gas Lease Fund to the General Fund—Section 1604-E of the Fiscal Code Amendments,<sup>8</sup> transferring \$60 million, and Section 1605-E of the Fiscal Code Amendments,<sup>9</sup> transferring \$180 million.

As a direct and immediate result of these enactments, Petitioner alleges, DCNR leased 32,000 acres of State forest land in January 2010 and another 33,000 acres in May 2010. Petitioner further avers that the Governor, acting in concert with the General Assembly, erroneously relied on the restriction

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<sup>8</sup> That Section states:

Notwithstanding section 1603-E or any other provision of law, in fiscal year 2009-2010 the amount of \$60,000,000 shall be transferred from the [Oil and Gas Lease Fund] to the General Fund.

72 P.S. §1604-E.

<sup>9</sup> That Section provides:

Notwithstanding section 1603-E or any other provision of law, in fiscal year 2010-2011, the amount of \$180,000,000 shall be transferred from the [Oil and Gas Lease Fund] to the General Fund.

72 P.S. §1605-E.



on the appropriation of *royalties* set forth in Section 1602-E of the Fiscal Code Amendments, in approving the appropriation and transfer of the coerced lease *rental* proceeds from the Oil and Gas Lease Fund to the General Fund. Petitioner alleges the Governor did so despite the fact the Oil and Gas Lease Fund Act already appropriated those funds to DCNR to mitigate the impacts of the leasing. In so doing, Petitioner alleges, Respondents acted without any input from DCNR and without meeting the requirements of the Oil and Gas Lease Fund Act, in violation of their trustee duties under Article I, Section 27.

Petitioner also avers that extracting natural gas from large areas of our State forest lands causes many adverse impacts to the natural resources of those lands, which are both immediate and long term, direct and indirect, specific and cumulative.

Petitioner further avers the Commonwealth, through DCNR, issued oil and gas leases that currently remain active on approximately 385,400 acres of State forest land, which includes the approximately 139,000 acres leased in 2008-2010.<sup>10</sup> The impacts of natural gas development on these Public Trust resources are exacerbated by the fact that hundreds of thousands of acres of State park and forest land are also subject to private development of gas extraction because the mineral rights are not owned by the Commonwealth. Petitioner alleges that the impacts from gas extraction on these Public Trust lands will continue for many decades as Marcellus Shale extraction expands and other shale formations are discovered and

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<sup>10</sup> See Am. Pet. for Review, Ex. C (DCNR Natural Gas Development and State Forests, Shale Gas Leasing Statistics, February 2012).

produced. As such, DCNR's need for funds to evaluate and mitigate these impacts will likewise continue to grow.

Petitioner also avers that, after the two coerced lease sales required by the Fiscal Code Amendments, DCNR issued an impact analysis report that determined that any further leasing of State forest land would harm State forest natural resources. As a result, in October 2010, former Governor Rendell issued a moratorium on further leasing. When Respondent Governor Corbett was elected in 2011, he announced he would lift the leasing moratorium on State forests, although he has not done so to date. However, Petitioner avers, Governor Corbett continued to use the Oil and Gas Lease Fund to supplement the General Fund in violation of Article I, Section 27.

Specifically, rather than making direct transfers to the General Fund, Governor Corbett significantly reduced DCNR's annual appropriation from the General Fund and forced DCNR to use the Oil and Gas Lease Fund to cover its general administrative and operating expenses. In so doing, Governor Corbett, like his predecessor, used the Oil and Gas Lease Fund to augment the General Fund without proper consideration and in violation of the constitutional mandate to conserve and maintain our State parks and forests under Article I, Section 27.

In addition, Governor Corbett recently signed into law Act 13 of 2012, certain provisions of which allocate \$50 million annually from the Oil and Gas Lease Fund to the Marcellus Legacy Fund. Petitioner alleges these provisions of Act 13 violate all three sections of the Oil and Gas Lease Fund Act, for purposes

that do not conserve and maintain our State parks and forests under Article I, Section 27, the very Public Trust assets harmed in order to generate these funds.

As a result of Respondents' actions, Petitioner filed this suit asserting Respondents' actions are unconstitutional. Specifically, Petitioner's amended complaint contains the following eight counts:

- **Count I.** The Fiscal Code Amendments violate Article III, §3 of the Pennsylvania Constitution by repealing DCNR's authority to carry out its trustee duties under Article I, §27 of the Pennsylvania Constitution, the CNRA, and the Oil and Gas Lease Fund Act in an omnibus bill amending the Fiscal Code.
- **Count II.** Section 1602-E of the Fiscal Code violates Article I, §27 of the Pennsylvania Constitution and Petitioner's rights thereunder by removing control of Public Trust revenue derived from an activity that harms public natural resources from the Commonwealth agency statutorily designated to serve as trustee of those resources and by removing the agency's power to properly allocate those funds.
- **Count III.** Section 1603-E of the Fiscal Code,<sup>11</sup> violates Article I, §27 of the Pennsylvania Constitution and Petitioner's rights thereunder by

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<sup>11</sup> That Section states:

Subject to the availability of money in the [Oil and Gas Lease Fund], up to \$50,000,000 from the [Oil and Gas Lease Fund] from royalties shall be appropriated annually to the department to carry out the purposes set forth in the act of December 15, 1955 (P.L. 865, No. 256), entitled "An act requiring rents and royalties from oil and gas leases of Commonwealth land to be placed in a special fund to be used for conservation, recreation, dams, and flood control; authorizing the Secretary of Forests and Waters to determine the need for and location of such projects and to acquire the necessary land." The department shall give preference to the operation and maintenance of State parks and forests.

72 P.S. §1603-E.

arbitrarily limiting the amount of Public Trust revenue available to mitigate the harm caused to public natural resources by the activity authorized to generate the revenue without evaluating the extent of the harm, the measures needed to minimize the harm, or the cost of those mitigation measures.

- **Count IV.** Sections 1604-E and 1605-E of Fiscal Code violate Article I, §27 of the Pennsylvania Constitution and Petitioner's rights thereunder by diverting public trust revenue derived from an activity that harms public natural resources from use for mitigating that harm without evaluating the extent of the harm, the measures needed to minimize the harm, or the cost of those mitigation measures.
- **Count V.** The Governor's Executive Budgets and Appropriation Acts for Fiscal Years 2009-2010 and 2010-2011 violate Article I, §27 of the Pennsylvania Constitution and Petitioner's rights thereunder by requiring DCNR to generate \$240 million through leasing 65,000 acres of State forest land for oil and gas extraction and diverting this Public Trust revenue from the Oil and Gas Lease Fund to the General Fund.
- **Count VI.** The Appropriation Act of 2011 violates Article III §11 of the Pennsylvania Constitution by embracing more than appropriations through a provision that substantively alters the purposes for which the funds generated for the Oil and Gas Lease Fund can be expended.
- **Count VII.** The Governor's Executive Budgets and Appropriation Acts for Fiscal Years 2011-2012 and 2012-2013 violate Article I, §27 of the Pennsylvania Constitution and Petitioner's rights thereunder by diverting Public Trust revenue derived from an activity that harms public natural resources from use for minimizing that harm without ensuring the public trust duties are met.
- **Count VIII.** Chapter 25 of Act 13 of 2012, 58 Pa. C.S. §§2501-2505,<sup>12</sup> violates Article I, §27 of the Pennsylvania Constitution and

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<sup>12</sup> Relevant to Petitioner's claims, Sections 2504 and 2505 of Act 13 state:

**§2504. Appropriation of Money  
(Footnote continued on next page...)**

Petitioner's rights thereunder by diverting Public Trust revenue derived from an activity that harms public natural resources from use for mitigating that harm without evaluating the extent of the harm, the measures needed to minimize the harm, or the cost of those mitigation measures.

Respondents filed preliminary objections challenging the legal sufficiency of the amended complaint, and asserting Petitioner's claims present

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**(continued...)**

Money in the Oil and Gas Lease Fund is specifically appropriated as provided in this chapter.

**§2505. Funds**

**(a) Priority.--**Funds appropriated from the Oil and Gas Lease Fund to [DCNR] under ... The Fiscal Code, or other appropriation act shall be distributed prior to allocations under subsection (b).

**(b) Allocations.--**Money in the Oil and Gas Lease Fund shall be allocated on an annual basis as follows:

(1) The following amounts shall be transferred from the Oil and Gas Lease Fund to the Marcellus Legacy Fund for distribution to the Environmental Stewardship Fund:

(i) For 2013, \$20,000,000.

(ii) For 2014 and each year thereafter, \$35,000,000.

(2) The following amounts shall be transferred from the Oil and Gas Lease Fund to the Marcellus Legacy Fund for distribution to the Hazardous Sites Cleanup Fund:

(i) For 2015, \$5,000,000.

(ii) For 2016 and each year thereafter, \$15,000,000.

58 Pa. C.S. §§2504, 2505.

non-justiciable political questions.<sup>13</sup> This matter is now before us for disposition of Respondents' preliminary objections.

At the outset, we note, Respondents do not appear to challenge Counts I and VI of the amended complaint through their preliminary objections. Indeed, Respondents assert, "to extent these are justiciable claims, Respondents will withdraw their demurrers to Counts I and VI and address them separately in an answer to the amended [complaint]." Respondents' Br. at 13.

## **II. Discussion**

### **A. Demurrer**

#### **1. Contentions**

Respondents first argue that, contrary to Petitioner's averments, Article I, Section 27 of the Pennsylvania Constitution is not violated simply by the diversion of funds away from the environmental cause most cherished by Petitioner. They contend that, although Petitioner takes issue with the mission of two Governors as it pertains to funding of operations in State parks and forests, the primary flaw in Petitioner's claims is that they focus entirely on State parks and forests with no recognition of governmental efforts at environmental improvement in other sectors of the Commonwealth. Further, Respondents assert the General Assembly possesses the authority to change funding statutes. Respondents further contend the challenged legislative enactments did not directly harm the environment. To the contrary, these enactments contributed financial resources to

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<sup>13</sup> In their preliminary objections, Respondents vaguely reference the issue of whether Petitioner named the proper Commonwealth entities as parties in its amended complaint; however, Respondents do not brief this issue. Thus, we will not address it.

farmland preservation, open space protection and hazardous site cleanup. As such, Respondents maintain, the amended complaint is legally insufficient to state a claim under Article I, Section 27 of the Pennsylvania Constitution.

Respondents acknowledge that Article I, Section 27 places the authority and the obligation to control Pennsylvania's natural resources on the Commonwealth. Respondents further point out this constitutional provision "was intended to allow the normal development of property in the Commonwealth, while at the same time constitutionally affixing a public trust concept to the management of public natural resources of Pennsylvania. The result ... is a controlled development of resources rather than no development." Energy Conservation Council of Pa. v. Pa. Pub. Util. Comm'n, 25 A.3d 440, 447 (Pa. Cmwlth. 2011) (quoting Payne v. Kassab, 312 A.2d 86, 94 (Pa. Cmwlth. 1973), aff'd, 468 Pa. 226, 361 A.2d 263 (1976)). "[A]s a corollary of this conclusion, decision makers will be faced with the constant and difficult task of weighing conflicting environmental and social concerns in arriving at a course of action that will be expedient as well as reflective of the high priority which constitutionally has been placed on the conservation of our natural, scenic, esthetic and historical resources." Id.

Respondents assert that Petitioner asks this Court to declare unconstitutional a number of legislative decisions involving funding that do not on their face plainly or directly have any consequences for clean air, pure water, or the natural, scenic, historic or esthetic values of the environment. Respondents argue that, although the amended complaint is silent as to the extent to which DCNR

benefitted from Oil and Gas Lease Fund revenue before 2008, Petitioner seems to conclude that any diversion of funds from oil or gas extraction will harm State parks and forests. Respondents contend this Court is not obligated to follow Petitioner to this conclusion.

Respondents further argue that Petitioner characterizes budgetary decisions as coercive by the Governor and against the wishes of DCNR. As the amended complaint acknowledges, however, the Governor is the chief executive of the Commonwealth and has “supreme executive power of the executive branch of the Commonwealth ....” Am. Pet. at ¶6. Respondents argue that DCNR lacks authority that is independent from that of the Governor and, to the contrary, exists to carry out the Governor’s mission. As such, the Governor — acting through DCNR — may exercise the authority to lease State forest land for mineral extraction “whenever it shall appear to the satisfaction of the [DCNR] that it would be for the best interests of the Commonwealth to make such disposition of those minerals.” Am. Pet. at ¶¶ 36-37; Section 302(a)(6) of the CNRA.

Respondents assert Petitioner has no cognizable claim under Article I, Section 27 based on the General Assembly’s decision to divert a longstanding source of revenue to other worthy causes that improve the environment. The General Assembly and the Governor must constantly make funding decisions that balance environmental concerns against a range of other factors. The funding decisions at issue not only do not plainly and palpably cause harm to the environment by themselves, but by Petitioner’s own admission, they have dedicated monies to worthy environmental causes. Therefore, Respondents



contend, Petitioner's claims under Article I, Section 27 of the Pennsylvania Constitution must fail.

## 2. Analysis

A demurrer contests the legal sufficiency of a complaint. Christ the King Manor v. Dep't of Pub. Welfare, 911 A.2d 624 (Pa. Cmwlth. 2006), aff'd, 597 Pa. 217, 951 A.2d 255 (2008). In ruling on preliminary objections, we must accept as true all well-pled facts that are material and all inferences reasonably deducible from the facts. Id. However, we are 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.

All legislative enactments enjoy a presumption of constitutionality under both the rules of statutory construction and the decisions of our courts. See 1 Pa. C.S. §1922(3); Mixon v. Commonwealth, 759 A.2d 442 (Pa. Cmwlth. 2000) (en banc), aff'd per curiam, 566 Pa. 616, 783 A.2d 763 (2001). Any party challenging a legislative enactment has a heavy burden, and legislation will not be invalidated unless it clearly, patently, and plainly violates the constitution. Mixon. Any doubts are to be resolved in favor of a finding of constitutionality. 1 Pa. C.S. §1922(3); Mixon.

Here, Petitioner avers the challenged enactments violate Article I, Section 27 of the Pennsylvania Constitution, which states (with emphasis added):

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. This Court previously held that this constitutional provision is self-executing. Payne.<sup>14</sup>

In analyzing a claim under Article I, Section 27, we recently reiterated:

Article I, Section 27 of the Pennsylvania Constitution was intended to allow the normal development of property in the Commonwealth, while at the same time constitutionally affixing a public trust concept to the management of public natural resources of Pennsylvania. The result of our holding is

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<sup>14</sup> In this Court's decision in Payne v. Kassab, 312 A.2d 86, 94 (Pa. Cmwlth. 1973), aff'd, 468 Pa. 226, 361 A.2d 263 (1976), a majority of the Court specifically stated that Article I, Section 27 "is a self-executing provision." Id. at 97. Further, as indicated above, the Supreme Court affirmed this Court's decision in Payne. In so doing, however, the Supreme Court stated it saw no need to determine whether Article I, Section 27 is self-executing. The Court further stated (with emphasis added):

There can be no question that the Amendment itself declares and creates a public trust of public natural resources for the benefit of all the people (including future generations as yet unborn) and that the Commonwealth is made the trustee of said resources, commanded to conserve and maintain them. No implementing legislation is needed to enunciate these broad purposes and establish these relationships; the amendment does so by its own ipse dixit.

Payne, 468 Pa. at 245, 361 A.2d at 272-73. It does not appear the Supreme Court has definitively resolved the issue of whether Article I, Section 27 is self-executing. Here, however, Respondents do not assert that this provision is not self-executing.

a controlled development of resources rather than no development.

We must recognize, as a corollary of such a conclusion, that decision makers will be faced with the constant and difficult task of weighing conflicting environmental and social concerns in arriving at a course of action that will be expedient as well as reflective of the high priority which constitutionally has been placed on the conservation of our natural, scenic, esthetic and historical resources.

Judicial review of the endless decisions that will result from such a balancing of environmental and social concerns must be realistic and not merely legalistic. The court's role must be to test the decision under review by a threefold standard: (1) Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources? (2) Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum? (3) Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?

Energy Conservation Council, 25 A.3d at 447 (quoting Payne, 312 A.2d at 94) (emphasis added).

Commentators observe the Payne test has become the “all-purpose test for applying Article I, Section 27 when there is a claim that the Amendment itself has been violated.” KEN GORMLEY ET AL., THE PENNSYLVANIA CONSTITUTION §29.3(a) (2004 ed.) (Footnote omitted).

Here, through the challenged counts, Petitioner alleges: (1) Sections 1602-E—1605-E of the Fiscal Code Amendments, (2) the Governor's Executive

Budgets and Appropriations Bills for Fiscal Years 2009/2010, 2010/2011, 2011/2012 and 2012/2013, and (3) the provisions of Act 13 of 2012 that require the transfer of funds in the Oil and Gas Lease Fund to the Environmental Stewardship Fund and the Hazardous Site Cleanup Fund, violate Article I, Section 27.

Essentially, Petitioner alleges the legislative enactments that authorize the transfer of funds in the Oil and Gas Lease Fund (which are derived from the rents and royalties generated by leasing Commonwealth property for oil and gas extraction) to the General Fund and other funds violate Article I, Section 27 because these acts compromise the ability of DCNR (the statutorily designated trustee of the State's parks and forests) to preserve the State's forests and parks for the use and enjoyment of Petitioner's members and the public. Petitioner alleges Respondents ignored Article I, Section 27 when they decided to transfer funds from the Oil and Gas Lease Fund to the General Fund and other funds, and compelled the leasing of additional State forest land for the sole purpose of generating revenue for the General Fund. Additionally, Petitioner avers Respondents did not evaluate the impacts of the proposed leases on the state's natural resources prior to doing so, and Respondents' actions depleted the funding for DCNR to meet its obligations to deal with the impacts of the gas extraction process on State forests.

Based on our review of the challenged counts, we cannot state with certainty that Petitioner cannot state a legally sufficient claim under Article I, Section 27 of the Pennsylvania Constitution. To that end, Petitioner's amended complaint contains averments that fall within the three-part test set forth in Payne.

The first part of the Payne test asks whether there was compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources.

Here, the amended complaint avers that, by diverting funds from the Oil and Gas Lease Fund to the General Fund and other funds and coercing the leasing of additional public lands, Respondents did not comply with the statutes relevant to the protection of the Commonwealth's State parks and forests, including the Oil and Gas Lease Fund Act and the CNRA. See Section 1 of the Oil and Gas Lease Fund Act (requiring all rents and royalties from oil and gas leases of any land owned by the Commonwealth to be placed in the Oil and Gas Lease Fund, which shall be used exclusively for conservation, recreation, dams, or flood control or to match any Federal grants which may be made for any of the aforementioned purposes); Section 2 of the Oil and Gas Lease Fund Act (granting DCNR discretion to determine the need for and location of any project authorized by the Oil and Gas Lease Fund Act); Section 3 of the Oil and Gas Lease Fund Act (appropriating all funds paid into the Oil and Gas Lease Fund to DCNR to carry out the purposes of the Oil and Gas Lease Fund Act); Section 101(a)(1) of the CNRA (Pennsylvania's public natural resources are to be conserved and maintained for the use and benefits of all its citizens as guaranteed by Article I, Section 27); Section 302(a)(6) of the CNRA (“[DCNR] is hereby empowered to make and execute contracts or leases in the name of the Commonwealth for the mining or removal of any valuable minerals that may be found in State forests ....”); Section 303(a)(1) of the CNRA (granting DCNR the power and duty to “supervise, maintain, improve, regulate, police and preserve all parks belonging to

the Commonwealth.”); Section 303(a)(9) of the CNRA (granting DCNR the power and duty to “make and execute contracts or leases in the name of the Commonwealth for the mining or removal of any oil or gas that may be found in a State park whenever it shall appear to the satisfaction of [DCNR] that it would be for the best interests of this Commonwealth to make such disposition of said oil and gas.”); Section 304(c) of the CNRA (granting DCNR the authority to exercise powers and duties conferred upon it under the Oil and Gas Lease Fund Act). See Am. Pet. at ¶¶11, 12, 31, 36, 46, 47, 48, 49, 50, 60, 61, 62, 63, 64, 65, 68, 69, 135.

The second part of the Payne test asks whether the record demonstrates a reasonable effort to reduce the environmental incursion to a minimum.

Here, Petitioner alleges that the diversion of funds from the Oil and Gas Fund to the General Fund and other funds, and the coerced leasing of additional State forest land for oil and gas extraction without analyzing the potential impacts, will cause substantial harm. Am. Pet. at ¶¶24, 45, 54, 66, 125, 134, 145.

The third part of the Payne test asks whether the environmental harm that will result from the challenged decision or action so clearly outweighs the benefits to be derived from that decision or action that to proceed further would be an abuse of discretion.

Here, Petitioner avers Respondents diverted the funds from the Oil and Gas Fund and required the leasing of additional State forest land without undertaking the analysis necessary to determine whether the resulting environmental harm would outweigh the benefits to be derived from these challenged actions. Am. Pet. at ¶¶24, 25, 53, 126, 128, 137, 145, 152, 167 179, 180, 185.

For these reasons, we cannot state with certainty that Counts II, III, IV, V, VII, and VIII of Petitioner’s amended complaint fail to state claims under Article I, Section 27 of the Pennsylvania Constitution.

Further, in light of the fact intensive inquiry required to apply the three-part Payne test, a definitive resolution of Petitioner’s claims at this stage would be premature. Thus, although it is unclear whether Petitioner will ultimately prevail on the merits, we overrule Respondents’ demurrer to Counts II, III, IV, V, VII, and VIII of the amended complaint.

## **B. Non-Justiciable Political Question**

### **1. Contentions**

Respondents next contend that Petitioner’s challenge involves a non-justiciable political question. Specifically, Respondents argue the General Assembly possesses the exclusive power to make appropriations of funds to the three branches of government. They assert Pennsylvania courts respect the separation of powers by declining to review challenges to budgeting decisions. Respondents maintain the amended complaint attempts to make a constitutional

issue out of budgeting decisions simply because those decisions had the potential to affect State parks and forests.

Respondents argue this Court has recognized the difficult decisions that government officials must make after weighing environmental, social, economic and other factors. Further, it is just as well established that the appropriation of Commonwealth funds is vested in the legislature and any challenges to its decisions in that regard present non-justiciable political questions. Pa. Sch. Bds. Ass'n, Inc. v. Commonwealth Ass'n of Sch. Adm'rs, 569 Pa. 436, 805 A.2d 476 (2002). Respondents argue the judiciary should not review decisions such as the ones at issue, which are committed to the discretion of the legislature. Blackwell v. City of Phila., 546 Pa. 358, 364, 684 A.2d 1068, 1071(1996) (citing Sweeney v. Tucker, 473 Pa. 493, 508-09, 375 A.2d 698, 705-06 (1977)).

Respondents further maintain Article VIII, Section 12 of the Pennsylvania Constitution requires the Governor to submit a proposed balanced operating budget to the General Assembly outlining in detail proposed expenditures and estimated revenues. If a deficiency exists, the Governor must also “recommend specific additional sources of revenue sufficient to pay the deficiency.” PA. CONST. art. VIII, §12(a). The General Assembly must then make appropriations from the Commonwealth’s revenues and surplus to adopt a balanced budget. PA. CONST. art VIII, §13. As this Court has observed, “[t]he budgeting process is beyond the power of the courts to direct. Courts cannot direct the Governor how to speak to the legislature any more than they can direct the



legislature what amount to appropriate ....” City & County of Phila., Phila. Dep’t of Human Servs. v. Dep’t of Pub. Welfare, 941 A.2d 766, 774 (Pa. Cmwlth. 2008).

Respondents argue that Petitioner seems to assume that the terms of the Oil and Gas Lease Fund Act and the Appropriations Acts of previous years are immutable and can never be altered in subsequent legislation. Respondents contend the General Assembly’s legislative power is not so restrained by the substance of prior legislative acts. Indeed, the General Assembly enjoys a nearly plenary legislative power to make, change, adjust, suspend, repeal or reinstate any of the Commonwealth’s laws, subject to the terms of the Pennsylvania Constitution. Blackwell v. State Ethics Comm’n, 523 Pa. 347, 359, 567 A.2d 630, 637 (1989); City of Phila. v. Schweiker, 817 A.2d 1217 (Pa. Cmwlth. 2003), aff’d, 579 Pa. 591, 858 A.2d 75 (2004).

In sum, Respondents argue the revenue generated by the extraction of oil and gas is subject to the broad power of appropriation vested in the General Assembly. Even though Petitioner is dissatisfied with the reallocation of funds previously dedicated by the legislature to certain uses by DCNR, Respondents assert, it is inappropriate for this Court to review decisions regarding funding by the General Assembly.

## **2. Analysis**

The political question doctrine is derived from the separation of powers principle. Robinson Twp. v. Commonwealth, 52 A.3d 463 (Pa. Cmwlth. 2012) (en banc). A basic precept of our form of government is that the Executive,

the Legislature and the Judiciary are independent, co-equal branches of government. Id. Although the ordinary exercise of the judiciary's power to review the constitutionality of legislative action does not offend the principle of separation of powers, there are certain powers constitutionally conferred on the legislative branch that are not subject to judicial review. Id. A challenge to the Legislature's exercise of a power that the Constitution commits exclusively to the Legislature presents a non-justiciable political question. Id.

Further, our Supreme Court explains:

[W]hile the dividing lines among the three branches 'are sometimes indistinct and are probably incapable of any precise definition[.]' under the principle of separation of the powers of government, no branch should exercise the functions exclusively committed to another branch. The political question doctrine is generally considered to derive from the principle of separation of powers. Under the doctrine, the courts will not review the actions of another branch of government where the constitution entrusts those actions to that other branch.

In evaluating whether there is a political question in a case such that a court should refrain from deciding, we are guided by the standards the U.S. Supreme Court discussed in *Baker [v. Carr]*, 369 U.S. 186, 198 (1962), the seminal case in the area. In *Baker*, the High Court stated:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent

resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

*Id.* at 217, 82 S.Ct. 691, *quoted in* [*Sweeney v. Tucker*, 473 Pa. 493, 510, 375 A.2d 698, 706 (1977)].

Council 13, Am. Fed'n of State, Cnty. & Mun. Employees, AFL-CIO v. Rendell, 604 Pa. 352, 370-71, 986 A.2d 63, 74-75 (2009).

Here, Petitioner's basic claim in the challenged counts is that the Fiscal Code Amendments, Appropriations Acts and certain provisions of Act 13 of 2012 violate Article I, Section 27 of the Pennsylvania Constitution. Thus, through its amended complaint, Petitioner asks us to determine whether the challenged enactments are constitutional or not, a judicial function. Petitioner does not ask that we make any specific legislative policy determination in order to resolve this matter. Nor do we lack judicially manageable standards to evaluate Petitioner's challenge to the constitutionality of various legislative enactments. Thus, the issue of whether the challenged acts violate the Pennsylvania Constitution presents a justiciable question for this Court to resolve. See Robinson Twp. (overruling Commonwealth's preliminary objection that political question doctrine barred suit challenging constitutionality of Act 13 of 2012).

Additionally, Philadelphia Department of Human Services, relied on by Respondents, does not compel a different result. There, we held that the Philadelphia Department of Human Services was not entitled to a formal

administrative hearing on the Department of Public Welfare's (DPW) tentative allocation of a budget for the Office of Children, Youth and Families (CYF), which was still in the proposal stage. Although this Court observed the "budgeting process" is "beyond the power of the courts to direct[,]" and that "judges may not intrude upon the legislative function of budget enactment," id. at 775, we ultimately rejected an argument that a challenge to DPW's final allocation to CYF would be barred by the political question doctrine.

Here, Petitioner's amended complaint does not seek a determination that would intrude on the legislature's function of budget enactment. Rather, Petitioner challenges as unconstitutional various enactments that it alleges diverted funds from the Oil and Gas Fund, which was created to protect Pennsylvania's State parks and forests. As such, Philadelphia Department of Human Services does not support Respondents' position.

Similarly, our Supreme Court's decision in Pennsylvania School Boards Association does not support Respondents' position. There, the Court held that a challenge that a statute relating to the collective bargaining rights of school administrators violated Article III, Section 14 of the Pennsylvania Constitution was barred by the political question doctrine. (Article III, Section 14 mandates that the General Assembly provide for "the maintenance and support of a thorough and efficient system of public education." PA. CONST. art. III, §14.) In so doing, the Court stated: "[T]here is no judicially manageable standard for determining whether the Legislature's enactment of [the challenged statute] resulted in a failure to provide for a 'thorough and efficient system of public education.'" Id. at 461,

805 A.2d at 490-91. Further, the challenge at issue impermissibly raised questions concerning the soundness of the policy set forth by the Legislature. For these reasons, the Court held the political question doctrine barred a challenge under Article III, Section 14 of the Pennsylvania Constitution.

Unlike Pennsylvania School Boards Association, the case presently before us does not involve a claim under Article III, Section 14 of the Pennsylvania Constitution. Rather, this case involves a claim that the challenged enactments violate Article I, Section 27, for which this Court has developed an analytical framework. See Payne. Thus, there are judicially manageable standards for analyzing this claim. Further, consideration of the constitutionality of the challenged enactments does not implicate a review of legislative policy, but rather a determination of whether the enactments are, in fact, consistent with the Pennsylvania Constitution.<sup>15</sup>

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<sup>15</sup> Also distinguishable is Blackwell v. City of Philadelphia, 523 Pa. 347, 567 A.2d 630 (1989), cited by Respondents, in which our Supreme Court held that the issue of whether Philadelphia City Council violated its own internal rules in firing a City Councilwoman's special assistant presented a non-justiciable political question.

Here, unlike in Blackwell, Petitioner does not seek to interfere in a solely legislative matter concerning the day-to-day affairs of a legislative body; rather, in this case Petitioner challenges the constitutionality of certain legislative enactments.

Further, Respondents cite Shapp v. Sloan, 480 Pa. 449, 391 A.2d 395 (1978) for the proposition that the executive branch may not of its own initiative use funds appropriated for one program in carrying out another and may not spend on a program more than its designated amount. However, Shapp does not address the political question doctrine and does not involve a constitutional challenge under Article I, Section 27. Therefore, its applicability here is unclear.

For these reasons, we overrule Respondents' preliminary objection that the challenged counts raise non-justiciable political questions.

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ROBERT SIMPSON, Judge

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Pennsylvania Environmental	:	
Defense Foundation,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 228 M.D. 2012
	:	
Commonwealth of Pennsylvania,	:	
and Governor of Pennsylvania,	:	
Thomas W. Corbett, Jr., in his official	:	
capacity as Governor,	:	
	:	
Respondents	:	

**ORDER**

**AND NOW**, this 22<sup>nd</sup> day of January, 2013, the preliminary objections of Respondents Tom Corbett, Governor, and the Commonwealth of Pennsylvania are **OVERRULED**.

Respondents Tom Corbett, Governor, and the Commonwealth of Pennsylvania shall file an answer within the time allowed by Pa. R.A.P. 1516(b).

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ROBERT SIMPSON, Judge