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APPENDIX L

Public Comments and Responses to Comments

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I. PUBLIC COMMENTS RECEIVED

The Environmental Assessment (EA) report was posted on the PA Bulletin for review and public comment from January 19 to March 4, 2019. One comment from the public was received for the EA document during the public comment period (see email chain below) and a letter on behalf of Citizens for Pennsylvania's Future (PennFuture) was received on March 4, 2019. No members of the public requested a public hearing.

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From: Ford, Thomas P
Sent: Tuesday, February 19, 2019 8:42 AM
To: Marci Mowery; 'Shenk, Kyle'
Cc: Rebert, Ashley; Eschenmann, Michael; Ford, Thomas P
Subject: RE: [External] RE: New Question About Big Elk Section, Strawbridge 2 Conveyance to DCNR
Good Morning

We are purchasing Strawbridge 2 to be added to Strawbridge 1 and to be managed by State Parks as part of White Clay Creek Preserve. 

There is a tremendous monetary value and recreational utility value provided with this purchase and for this reason we also plan to use the acquisition to help us with some Commonwealth and local Land and Water Conservation Fund conversions that we have been working to resolve.

There is a conversion process that is employed by NPS that includes the opportunity for the State to create what is called an "excess value bank" and to use this bank to resolve preexisting conversions.

Let me know if I can help answer any additional questions.

Tom

Thomas P. Ford | Director, Bureau of Recreation and Conservation
Department of Conservation & Natural Resources
Bureau of Recreation and Conservation
5th Floor, 400 Market St | Harrisburg, PA
17105 Phone: 717.783.2659 | Fax:
717.787.9577
<http://www.dcnr.state.pa.us/brc/>
www.ExplorePATrails.com

From: Marci Mowery <[REDACTED]>
Sent: Monday, February 18, 2019 9:34 AM
To: 'Shenk, Kyle' <[REDACTED]>
Cc: Ford, Thomas P <[REDACTED]>
Subject: [External] RE: New Question About Big Elk Section, Strawbridge 2 Conveyance to DCNR

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Tom, see thread below.

From: Shenk, Kyle [[mailto:\[REDACTED\]](mailto:[REDACTED])]
Sent: Friday, February 15, 2019 9:57 AM
To: Marci Mowery <[\[REDACTED\]](mailto:[REDACTED])>; 'Dysinger, Ryan' <[\[REDACTED\]](mailto:[REDACTED])>
Subject: Re: New Question About Big Elk Section, Strawbridge 2 Conveyance to DCNR

Hi Marci,

I'm no expert on conversions, but I think Scotty has it correct below. Infrastructure projects that are in violation of the stipulations of LWCF funding occurring on properties funded through LWCF, but deemed necessary, can be mitigated by putting unprotected projects under the LWCF stipulations as a "replacement".

I'd defer to DCNR Bureau of Rec and Con for a more detailed and accurate answer.

Kyle

From: Marci Mowery <[\[REDACTED\]](mailto:[REDACTED])>
Sent: Thursday, February 14, 2019 11:49 AM
To: 'Dysinger, Ryan'
Cc: Shenk, Kyle
Subject: FW: New Question About Big Elk Section, Strawbridge 2 Conveyance to DCNR

Can either of you enlighten me?

From: Scotty Crowder [[mailto:\[REDACTED\]](mailto:[REDACTED])]
Sent: Wednesday, February 13, 2019 11:11 AM
To: April Schmitt <[\[REDACTED\]](mailto:[REDACTED])>
Cc: Marci J. Mowery <[\[REDACTED\]](mailto:[REDACTED])>
Subject: Fwd: New Question About Big Elk Section, Strawbridge 2 Conveyance to DCNR

April, I reviewed the information on Page 371 of this document. It looks like the State was making it's case for the purchase of Strawbridge #2 by using the resources offered by the

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Strawbridge #2 property to offset the small changes occurring with other state properties, like bridge expansion and oil well installation etc. Marci may have more comments on the other state properties that are undergoing some changes and loss of resources (usually less than 5 acres for each case, based on the data in Appendix C).

Thanks for questions. Marci may have more insight on what all this means...

Scotty

----- Forwarded message -----

From: **April Schmitt** <[REDACTED]>
Date: Tue, Feb 12, 2019 at 2:40 PM
Subject: New Question About Big Elk Section, Strawbridge 2
Conveyance to DCNR To: Scotty Crowder <[REDACTED]>

Hi Scotty,

I'm hoping that you can ask PPFF about.

I was reading through the below long and complicated report, regarding the great plan to add 963 more acres to WCC Preserve. This is the "Strawbridge 2 properties", north of Strickersville Road. Evidentially, the properties are set to be purchased under the "Land and Water Conservation Fund" land exchange.

I may be totally mistaken, but this is very worth asking Marcy about. There may be some power play decisions, regarding that finalization. If I'm reading this correctly, it may involve competition for other park projects: bridges but also adding additional undesired oil well drilling related projects. Hopefully, I'm mistaken. But if there is any advocating, that we can do ...to try to have more new parkland in parks and less new oil wells in parks ...it would seem priceless!

Please see Appendix C (may be page 371):

http://www.docs.dcnr.pa.gov/cs/groups/public/documents/document/DCNR_20033787.pdf

Thank You,
~April

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HARRISBURG, PA



PennFuture

March 4, 2019

Via First Class Mail and Email

Thomas Ford, Director

Bureau of Recreation and Conservation

PA Department of Conservation and Natural Resources

400 Market Street

Rachel Carson State Office Building, 5th Floor

Harrisburg, PA 17101-2301

RA-NRBRC_CONVERSIONS@pa.gov

**Re: Public Comment on Conversion of LWCF State Forest Lands –
Environmental Assessment of Acquisition of Land to be Acquired by the
Department for the Purpose of Resolving Multiple LWCF Conversions
("Department Acquisition of Strawbridge Property")
49 Pa. Bull. 284 (January 19, 2019)**

Dear Mr. Ford:

On behalf of Citizens for Pennsylvania's Future ("PennFuture"), please accept these public comments on the Pennsylvania Department of Conservation and Natural Resources' ("DCNR" or "Department") Environmental Assessment of the "Acquisition of Land to be Acquired by the Department of Conservation and Natural Resources for the Purpose of Resolving Multiple Land and Water Conservation Fund Conversions" as noticed in the January 19, 2019 *Pennsylvania Bulletin*, 49 Pa. Bull. 284. The report upon which these comments are based is entitled "Environmental Assessment: Strawbridge 2 – White Clay Creek Preserve Addition (Replacement Property) for Multiple Land and Water Conservation Fund Conversions throughout Pennsylvania,

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Elk, Franklin and New London Townships, Chester County, PA" and is dated September 30, 2018 ("Strawbridge Property EA").

Northeast: 425 Carlton Road
Suite 1
Mount Pocono, PA 18344

Southeast: 1429 Walnut Street
Suite 400
Philadelphia, PA 19102

Central: 610 North Third Street
Harrisburg, PA 17101

Southwest: 200 First Avenue
Suite 200
Pittsburgh, PA 15222

PennFuture is a state-wide public interest environmental organization dedicated to leading the transition to a clean energy economy in Pennsylvania and beyond. PennFuture strives to protect our air, water and land, and to empower citizens to build sustainable communities for future generations. PennFuture has long been dedicated to improving and protect our public lands, including state forests, across Pennsylvania through public outreach and education, advocacy, and litigation.

As is set forth in detail below, DCNR's actions fail to comply with both the National Environmental Policy Act ("NEPA") and the Land and Water Conservation Fund ("LWCF") Act, regulations, and the guidelines in the National Park Service ("NPS") LWCF Manual. Specifically,

DCNR:

- Failed to seek NPS approval of the conversions before allowing LWCF state forest land to be converted to industrial oil and gas development;
- Failed to undertake any analysis of the conversion of LWCF state forest land to industrial gas development, let alone the requisite "hard look" under NEPA;
- Appears to have inappropriately segmented its NEPA analysis of the natural gas conversions of LWCF state forest lands;
- Failed to conduct an EIS for the conversion of LWCF state forest land to industrial gas development;
- Failed to consider appropriate NEPA alternatives to the conversion of LWCF state forest land to industrial gas development;
- Failed to analyze both the local impacts of the converted uses and the impacts of the conversions on the remaining LWCF lands in accordance with the LWCF regulations;
- Failed to appropriately select a replacement property in accordance with the LWCF regulations; and
- Failed to appropriately use the replacement property as a "bank" for "recreational usefulness"

Consequently, DCNR must rescind its Strawbridge Property EA; actually evaluate the environmental impacts of the conversion of LWCF state forest land to natural gas well pads – including taking the requisite "hard look" under NEPA; and undertake and Environmental Impact Statement for the

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significant environmental impacts of these industrial natural gas well pads on state forest lands. Critically, DCNR must ensure that for all future conversions of LWCF state forest lands to natural gas extraction facilities and appurtenances, it appropriately follows both the letter and spirit of both LWCF and NEPA by requesting NPS approval and taking a hard look at the environmental consequences of such an act prior to allowing the conversion to take place.

I. “CONVERSIONS” UNDER LWCF

The LWCF is a federal program designed to promote outdoor recreation in America.¹ To realize this goal, the LWCF program provides states with federal funding to acquire or develop lands on the condition that the land will only be used for “public outdoor recreation uses.”² Any change of LWCF land to non-outdoor recreational uses, whether temporary or permanent, must undergo the “conversion” process, which requires replacement of all converted land (i.e., the

LWCF land removed from outdoor recreational use purposes) with substitute property.

Conversions are only permitted with the approval of NPS in accordance to 54 U.S.C. § 200305(6)(f)(3); 36 C.F.R. § 59.3; and the procedures set forth in the NPS’s LWCF State Assistance Program Manual³ (“LWCF Manual”).

States are required by law to obtain NPS approval prior to converting any LWCF land: “No property acquired or developed with assistance under [LWCF] shall, without the approval of the Secretary, be converted to other than public outdoor recreation use.”⁴ The LWCF Manual sets forth in detail the formal process that must be followed for conversions.⁵

A conversion of LWCF land to a non-recreational use can only be approved by NPS if (1) it is consistent with the then existing comprehensive statewide outdoor recreation plan and (2) it provides for the substitution of other suitable replacement properties “of at least equal fair market value and of reasonably equivalent usefulness and location” to the converted land.⁶ The LWCF Manual further states that generally all 6(f)(3) conversions, as they are also known, are subject to NEPA environmental impact review, requiring at least an EA that examines the environmental impacts of both the conversion from recreational use in the LWCF lands and to the development of the replacement parkland.⁷ Thus, a conversion approval must consist of approval of both the converted land and the replacement land as a whole.⁸ Consequently, failure to assess the environmental impacts to the converted land is a fatal deficiency in conversion EAs and proposals.

¹ See National Park Service, Land and Water Conservation Fund webpage, <https://www.nps.gov/subjects/lwcf/index.htm> (last visited March 4, 2019).

² 54 U.S.C. § 200305(b).

³ NPS, Land And Water Conservation Fund State Assistance Program Manual (2008), https://www.nps.gov/subjects/lwcf/upload/lwcf_manual.pdf (hereinafter, “LWCF Manual”).

⁴ 54 U.S.C. § 200305(6)(f)(3); 36 C.F.R. § 59.3(a).

⁵ See, generally, LWCF Manual Chs. 4 and 8.

⁶ 54 U.S.C. § 200305(6)(f)(3); 36 C.F.R. § 59.3(b).

⁷ *Id.* at Ch. 4-6 (emphasis added).

⁸ See *Weiss v. Sec’y of U.S. Dep’t of Interior*, 459 F. App’x 497 (6th Cir. 2012) (considering the “proposed conversion and substitution,” or “land swap,” as a whole).

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If an unauthorized – i.e., unapproved – conversion is discovered by NPS, NPS shall request the non-outdoor recreational activity “cease immediately” and notify the state that it must preclude the project sponsor from “proceeding further with the conversion, use, or occupancy” of the land pending NPS review of the conversion proposal.⁹ Approval by NPS, however, is not automatic for conversions: “This approval is a discretionary action and should not be considered a right of the project sponsor.”¹⁰ The proposal process for these unauthorized conversions is not distinguished from timely proposals in any statute or regulation, as such, it shows that neither

Congress nor NPS intended to create separate requirements for untimely conversion proposals. Thus, an after-the-fact conversion proposal should be as similar to a timely proposal as possible and should be assessed under the same standards.

II. DCNR’S ENVIRONMENTAL ASSESSMENT VIOLATES BOTH THE LETTER AND THE SPIRIT OF NEPA

A. PURPOSE OF NEPA

In 1970, NEPA, codified at 42 U.S.C. §§ 4321, *et. seq.*, was established in recognition of our human impact on the environment around us.¹¹ With NEPA, Congress created a framework for environmental review within federal agency decision-making and established the Council on Environmental Quality (“CEQ”) to administer the program.¹² NEPA guarantees that federal agencies account for the environmental costs of their actions, promoting environmental protection through the procedural process.¹² While not outcome determinative, NEPA’s goal is to foster informed decision-making within the federal agencies, and as a corollary ensure citizen involvement within the process.¹³ As the CEQ’s website states briefly:

The ultimate goal of the NEPA process is to foster excellent action that protects, restores, and enhances our environment. This is achieved through the utilization of environmental assessments (EAs) and environmental impact statements (EISs), which

⁹ *Id.* at Ch. 8-11.

¹⁰ *Id.* at Ch. 4-6.

¹¹ 42 U.S.C. § 4331; *see also* Congressional White Paper, 19th Cong., Congressional White Paper on a National Policy for the Environment (1968); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989) (“Section 101 of NEPA declares a broad national commitment to protecting and promoting environmental quality.”).

¹² 42 U.S.C. § 4331.

¹² *See Robertson*, 490 U.S. at 349 (citing *Kleppe v. Sierra Club*, 427 U.S. 390, 409 (1976)); *Weinberger v. Catholic Action of Hawaii/Peace Educ. Project*, 454 U.S. 139, 143 (1981).

¹³ *Weinberger*, 454 U.S. at 143 (NEPA serves twin aims of “inject[ing] environmental considerations into the federal agency’s decisionmaking process” and “inform the public that the agency has considered environmental concerns”); *see Robertson*, 490 U.S. at 349 (“[NEPA gives the public the assurance that the agency ‘has indeed considered environmental concerns in its decisionmaking process,’ . . . perhaps more significantly, provides a springboard for public comment”) (quoting *Baltimore Gas & Elec. Co. v. Nat’l Resources Def. Council, Inc.*, 462 U.S. 97 (1983)). *See, generally*, CEQ, A Citizen’s Guide to the NEPA (2007), https://ceq.doe.gov/docs/getinvolved/Citizens_Guide_Dec07.pdf.

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ALABAMA

provide public officials with relevant information and allow a “hard look” at the potential environmental consequences of each proposed project.¹⁴

NEPA’s main tools for achieving these goals lies within the Environmental Assessment (“EA”) and Environmental Impact Statement (“EIS”) requirements of environmental review process. Whereas the purpose of an EA is to determine the significance of the environmental effects and to look at alternative means to achieve the agency’s objectives,¹⁵ preparation of an EIS is required for all “major Federal actions significantly affecting the human environment.”¹⁵ While an EIS contains a more in-depth analysis, both EAs and EISs must at least contain identification of all feasible alternatives, including the proposed action, and a “hard look” analysis of their corresponding environmental impacts both direct and indirect.¹⁶

Critically, NEPA further mandates public involvement as an integral part of analysis of the potential environmental impacts of an action. As the Supreme Court recognized, one of NEPA’s goals is to give “the public the assurance that the agency ‘has indeed considered environmental concerns in its decisionmaking process,’ . . . perhaps more significantly, provide[] a springboard for public comment.”¹⁷ When agencies fail to properly prepare an EA and/or an EIS, as DCNR has done here, they frustrate the purpose of NEPA by allowing the agency to make a decision without recognizing the environmental detriments of the proposed action and denying the public its right to be involved in the process. The Supreme Court in *Robinson* stated:

NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct. Similarly, the broad dissemination of information mandated by NEPA permits the public and other government agencies to react to the effects of a proposed action at a meaningful time.¹⁸

DCNR’s actions are not only a violation of the statutory and regulatory requirements, but also a serious public policy issue.

B. DCNR ERRONEOUSLY NARROWED THE SCOPE OF ITS NEPA ANALYSIS OF THE SIGNIFICANT ENVIRONMENTAL IMPACTS OF THE CONVERTED PROPERTIES

DCNR’s NEPA analysis of the relevant 6(f)(3) conversions of LWCF state forest lands to industrial natural gas well pads suffers from several procedural problems which complicates matters. First, DCNR failed to seek approval from NPS prior to allowing LWCF state forest land to be converted. Therefore, the well-pad conversions at issue here are retroactive conversions. This in-and-of-itself raises procedural and timing issues, and in many cases seems to be the root cause for DCNR’s failure to comply with either NEPA or the LWCF Act. Second, DCNR seems to have segmented its NEPA analysis of the natural gas

¹⁴ CEQ, National Environmental Policy Act “Welcome” page, <https://ceq.doe.gov/> (last visited March 4, 2019).

¹⁶ 40 C.F.R. § 1501.4(b)-(c).

¹⁵ 42 U.S.C. § 4332(C).

¹⁶ See 43 C.F.R. § 46.310 (EA Requirements); 40 C.F.R. §§ 1502.14, 1502.16 (EIS Requirements).

¹⁷ *Robertson*, 490 U.S. at 349.

¹⁸ 490 U.S. at 349.

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extraction that occurs within its LWCF state forest lands into arbitrary, smaller segments (e.g., well pads, pipelines, etc.) in violation of NEPA. By doing so, DCNR has again too narrowly defined the proposed action, which results in the minimizing of potential impacts and likely avoidance of an EIS.

The Strawbridge Property EA defines the proposed federal action for NEPA purposes to be for NPS “to approve this exchange,”¹⁹ which DCNR states as necessary to “resolve multiple LWCF conversions throughout Pennsylvania.”²⁰ DCNR made quite clear that it did not include approval of the conversion of the LWCF lands to industrial gas well pads as part of the federal action under NEPA.²¹ Thus, DCNR defined the scope of NEPA review as limited to the environmental impacts regarding the replacement property only. By doing so, DCNR erroneously defined the proposed federal agency action to be analyzed creating too narrow a scope for purposes of NEPA review.

As is set forth above, 6(f)(3) conversions are subject to NEPA analysis. A 6(f)(3) conversion necessarily includes both the conversion of the LWCF land to non-outdoor recreational use and the replacement of the converted LWCF lands with property of at least equal fair market value and reasonably equivalent usefulness. Thus, it is uncontroverted that the NEPA analysis must likewise consider both the environmental impacts of the conversion of the LWCF lands and the replacement of that land with different property. Indeed, many agencies in other states have clearly been able to understand and comply with this very basic understanding of LWCF conversions and NEPA.²⁴

Here, however, and perhaps as a direct result of DCNR’s failure to timely seek approval of the well-pad conversions at issue, DCNR’s Strawbridge Property EA completely fails to acknowledge that the NEPA review of the LWCF conversion process must inherently include an analysis of the environmental impacts of changing state forest lands that provide important outdoor recreational uses within Pennsylvania to industrial well pads and appurtenances that serve the natural gas extraction industry and scar the landscape and diminish the recreational enjoyment of those state forest lands. As is discussed below, this failure to properly identify the scope of the proposed federal agency action and NEPA analysis is a fundamental flaw of DCNR’s Strawbridge Property EA and results in the failure of DCNR to undertake any analysis of the environmental impacts of converting LWCF state forest lands to industrial gas well-pads. This failure also results in DCNR’s failure to consider appropriate NEPA alternatives (also discussed below). Moreover, as a result, NPS and the public are prevented from reviewing complete information in a way and at a time that is meaningful. Consequently, the very purposes of NEPA are being frustrated by

²⁴ See, e.g., NYS Office of Parks, Recreation and Historic Preservation, Environmental Management Bureau, *Final Environmental Assessment for Conversion of a Portion of Fort Niagara State Park for adaptive re-use of Historic Buildings and acquisition of replacement lands at Bear Mountain State Park* (March 2013), available at <https://parks.ny.gov/inside-our-agency/documents/FortNiagara/FortNiagaraStateParkConversion.pdf>; City of Westfield, Massachusetts, *Environmental Assessment, Cross Street Playground, Westfield, Massachusetts* (March 2015), available at <https://www.cityofwestfield.org/DocumentCenter/View/2247/Environmental-AssessmentFINAL>; Roaring Fork School District RE-1, *Draft NEPA Environmental Analysis of the Proposed Land*

¹⁹ Strawbridge Property EA, at 2.

²⁰ *Id.*

²¹ *Id.* (“It would not change whether or not the Pennsylvania conversion parcels are used for non-recreation purposes and federal approval of those uses is not part of the federal action.”).

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Exchange for 6F Designation in Glenwood Springs, Colorado (Sept. 26, 2017), available at <http://www.gwsco.gov/DocumentCenter/View/3039/DRAFT-NEPA-Environmental-Assessment-of-ProposedVogellar-Park-Land-Exchange-?bidId>; City of Yakima Parks and Recreation, *NEPA Environmental Assessment, RCO Conversion at Chesterly Park* (April 2017), available at <https://yakimaparks.com/assets/EA-Chesterly-Parkand-Replacement-Park.pdf>; Minnesota Department of Natural Resources, *Environmental Assessment, Conversion of Land and Water Conservation Fund Lands in Lake Bronson State Park for the Sale of Lots within the Lakeside Subdivision, Kittson County, Minnesota* (February 2015), available at <https://files.dnr.state.mn.us/input/environmentalreview/lake-bronson/ea.pdf>.

DCNR's failure to appropriately identify the proposed project and define the scope of the agency action.

C. DCNR FAILED TO UNDERTAKE ANY ANALYSIS OF THE ENVIRONMENTAL IMPACTS OF THE CONVERSION OF LWCF LANDS TO WELL PADS, LET ALONE THE REQUISITE "HARD LOOK"

As a direct consequence of DCNR's failure to timely seek approval of the 6(f)(3) conversions before they happened, its erroneous definition of the proposed federal project, and its failure to recognize the appropriate scope of the conversion (as discussed above), DCNR failed to appropriately consider the environmental impacts of converting almost 100 acres²² of LWCF state forest land to industrialized natural gas extraction well pads, in clear violation of NEPA. As detailed above, "the essential requirement of the NEPA is that before an agency takes major action, it must have taken a 'hard look' at environmental consequences."²⁶ Yet, the Strawbridge Property EA states nothing more with respect to the loss of LWCF state forest lands than to summarily recite the "recreation lost" for each of the well pad conversions.²³ Even then, the language used for each conversion is almost exactly the same and fails to show any site-specific considerations or analyses. To be clear: there is absolutely no analysis of the environmental impacts of the conversion from LWCF-funded recreational outdoor state forest land to industrial natural gas well pads. This is in direct contravention to the NEPA environmental impact review requirements, LWCF regulations, and the NPS LWCF Manual.

Thus, DCNR must immediately rescind its Strawbridge Property EA and revise it to include the appropriate hard look at the potential environmental impacts of the conversion of LWCF state forest lands to industrial natural gas well pads. Correspondingly, DCNR must also re-notice the correct NEPA environmental review – in this case we believe it should be an EIS as discussed below – and accept public comment on its revised NEPA analysis.

D. AN ENVIRONMENTAL IMPACT STATEMENT SHOULD BE UNDERTAKEN FOR THE CONVERSIONS OF LWCF LANDS TO NATURAL GAS WELL PADS

DCNR's own *Shale Gas Monitoring Report* (July 2018) acknowledges that "[t]he development of traditional and alternative forms of energy may not be consistent with the LWCF protection of land for public outdoor recreational use."²⁴ PennFuture believes that the environmental impacts of the

²² See Strawbridge Property EA, Appendix C (Recreational Usefulness Table).

²⁶ *New York v. Kleppe*, 429 U.S. 1307, 1311 (1976) (quotations omitted).

²³ See Strawbridge Property EA, Appendix C (Recreational Usefulness Table).

²⁴ DCNR, *Shale Gas Monitoring Report* (July 2018), at 11.

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conversion of LWCF state forest lands to industrial well pads results in a significant impact that warrants a full EIS. Through the EIS analysis, DCNR is required to take a hard look at a variety of permanent and temporary, direct, indirect, and cumulative impacts of the 6(f)(3) conversions. It is almost impossible for PennFuture to indicate the significant environmental impacts of the 6(f)(3) conversions at issue here because, as explained above, DCNR completely failed to undertake any analysis of the environmental impacts of the conversions to well pads. But we do know that DCNR recognizes that the scale of well pads on state forest lands is quite large:

The average gas pad has six wells, but could host up to 24, that may be drilled to the Marcellus or Utica formations. . . . Wells are drilled vertically until they reach the target depth and then laterally between 4,000 and 10,000 feet from the pad. A pad with six wells will typically have three north and three south wells. Since the beginning of Marcellus development in 2008, the well laterals have greatly increased in length and the well pads have remained about the same size. Both these developments mean less surface conversion per well drilled. . . . Each pad and its network of wells forms a unit. The unit concept is used to ensure the correct amount of lease land is committed to the development and each well has the appropriate area to drain.

Older shale gas wells were generally spaced 750 feet apart and drilled to a lateral length of 3,500 feet. These wells were set up to drain approximately 60 acres. However, newer wells are being drilled to an 8,000 feet lateral length, or greater, and are spaced at 1,000 feet apart These newer wells are designed to drain approximately 180 acres or more. Therefore, a current six well pad can drain approximately 1,100 acres or 1.7 square miles. Future wells will likely take advantage of longer laterals and be optimized for 1,000 feet spacing and may drain substantially greater areas from a single well pad.²⁵

Yet even with these impacts, a well pad cannot be viewed in isolation; shale gas development represents a permanent change of land use that will impact recreational opportunities for generations. Natural gas development facilities and operations must be viewed comprehensively because the individual structures effect change to a much larger area. For example, the interconnected well pads, gathering lines, compressor stations and road construction represent an obvious loss of recreational opportunities and environmental impacts both individually and cumulatively, direct and indirect. Indeed, activities that effect change are not limited to the physical structure (e.g., security that is a part of shale gas development means the public is precluded from using a substantial area beyond the physical infrastructure, and heavy vehicle traffic reduces both the opportunity and enjoyment of the outdoor experience). This infrastructure will remain active for generations (e.g., the addition of wells to pads over time, and re-fracking of existing wells will extend the period of impact for many years). And the impacts are both direct and indirect (e.g., aside from the obvious loss of opportunities associated with the construction of well pads, forest fragmentation caused by road construction will reduce the amount of core forests available to wildlife and birds, which in turn will cause a loss of wildlife and bird viewing experiences).

²⁵ DCNR, *Shale Gas Monitoring Report* (July 2018), at 16-17.

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For all these and other reasons, it is unbelievable that a proper NEPA analysis would result in an EA or a finding of no significant impact from the 15 conversions identified in the Strawbridge Property EA. Thus, when done properly, and when applying the proper scope and definition of the proposed action (as DCNR failed to do in this case), the 6(f)(3) conversions at issue here will need to be analyzed under NEPA using the full and complete EIS process.

E. DCNR FAILED TO CONSIDER APPROPRIATE ALTERNATIVES UNDER NEPA

NEPA requires that reasonable alternatives of the proposed agency action be considered. In this case, as discussed above, NEPA analysis the 6(f)(3) conversion includes the entire conversion – including both the conversion of LWCF lands and the replacement property. Yet the “alternatives considered” section of the Strawbridge Property EA sets up a false alternatives analysis prescribed by DCNR’s failure to timely act on its NEPA and LWCF 6(f)(3) conversion analysis. Essentially, DCNR removes the necessarily analysis of alternatives to converting the outdoor recreational use of LWCF state forest land to industrial natural gas well pads, including the critical “no alternatives” analysis which would be to not convert the state forest land to industrial uses. Instead, DCNR presents the fallacy that the “no action” analysis is to “not resolve the outstanding conversions, and therefore, not meet the purpose and need of the proposed action.”²⁶

In conclusion, for all the reasons discussed in this section, DCNR’s Strawbridge Property EA fails to comply with the requirements of NEPA.

III. DCNR’S PROPOSED “CONVERSION” FAILS TO SATISFY LWCF REQUIREMENTS

A. DCNR MUST ANALYZE BOTH THE LOCAL IMPACTS OF THE CONVERTED USES AND THE IMPACTS OF THE CONVERSIONS ON THE REMAINING LWCF LANDS

As discussed above, NEPA mandates inclusion of the local environmental impacts of the converted lands within the NEPA analysis.²⁷ Fulfillment of NEPA requirements is incorporated into the LWCF regulations as a prerequisite to conversion approval.²⁸ Accordingly, approval of a conversion without examination of the local effects of the converted use fails to satisfy all of the NEPA requirements and constitutes a violation of the LWCF regulations.

Additionally, LWCF regulations require that “the impact of the remainder shall be considered” for sites which are partially converted.²⁹ As DCNR recognizes, all of the oil-and-gas converted areas at issue in

²⁶ Strawbridge Property EA, at 2. Note that this, in turn, suffers from the erroneous description of the proposed action which fails to acknowledge the conversion of LWCF lands to well pads.

²⁷ See also LWCF Manual, at Ch. 8-8; 4-5 (scope of environmental review includes the entire Sec 6(f)(3) park proposed for conversion).

²⁸ 36 C.F.R § 59.3(b)(7).

²⁹ 36 C.F.R § 59.3(b)(5).

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this EA are partial conversions. Therefore, it is undeniable that DCNR must analyze the impacts of the conversions on the remaining LWCF lands.

In particular, DCNR must include analysis of the cumulative impacts of the conversions, including the effects of forest fragmentation from the many small conversions on the overall recreational usefulness of the remaining LWCF lands.³⁰

B. THE REPLACEMENT PROPERTY FAILS TO SATISFY LWCF REQUIREMENTS

1. DCNR Cannot Select Appropriate Replacement Land without Consideration of the Converted LWCF Lands

The LWCF regulations clearly require that the replacement land be selected based on the loss of outdoor recreation from the converted land and that the 6(f)(3) conversion (converted land and replacement land) be considered as a whole. Approval of a conversion is only allowed where there is substitution of properties “of at least equal fair market value and of reasonable equivalent usefulness and location.”³⁵ Leaving aside all NEPA issues, it is clear that DCNR’s failure to properly analyze the impacts of the conversion of LWCF state forest land to industrial gas facilities and operations negatively impacts the agency’s ability to properly select a replacement property under LWCF.

It is obvious that DCNR cannot select a similar replacement without knowing what is being replaced. And while PennFuture is not arguing here that the Strawbridge Property is not a good addition to Pennsylvania’s LWCF lands, we do take serious issue with DCNR’s failure to follow the LWCF process in ensuring that the Strawbridge Property is an appropriate replacement property for the loss of state forest land resources to industrial shale gas development. Approval of the converted properties is not simply “processing paperwork”³¹ as DCNR puts it, but rather a careful considered decision that may be denied, even for after-the-fact conversion requests.³² To look at it otherwise, would gut LWCF’s purpose of preserving outdoor recreation areas, by allowing states to use untimely proposals to bypass NPS approval and freely shift LWCF areas around at their own convenience.

2. DCNR Must Consider the Location and Usefulness of the Replacement Land Relative to the Converted Lands

The location of the converted land must be considered when choosing replacement land. Pursuant to 54 U.S.C. § 200305(6)(f)(3), the substitution property must have a reasonably equivalent location. This is critical to ensure that the communities that are losing the outdoor recreation will also benefit from the replacement land’s recreational opportunities. The regulations recognize that some flexibility is needed in certain situations, and clarify that a “replacement property need not necessarily be directly adjacent to or close by the converted site.”³⁸ However, this flexibility cannot be interpreted to completely

³⁰ Note that this LWCF analysis of impacts on outdoor recreational opportunities is distinct from its duty to analyze the significant environmental impacts under NEPA, but that DCNR has failed to properly undertake both.

³⁵ 54 U.S.C. § 200305(6)(f)(3); 36 C.F.R. § 59.3(a).

³¹ Strawbridge Property EA, at 2.

³² See also, affirmation of the NPS’s authority to disapprove conversion requests in the paragraph directly following discussion of unauthorized conversions in the LWCF Manual, at Ch. 8-4. ³⁸ 36 C.F.R. § 59.3(b)(3)(ii).

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eliminate the state's obligation to consider the converted land's location. The regulations explain that generally replacement land will serve the same community(ies) or area as the converted land, unless there is an exception, such as a major demographic change.³³ As such, the regulations must be interpreted to require a recognition, analysis, and discussion of the locations of both converted and replacement land relative to one another and justification for any significant differences. Otherwise, the regulations would be in conflict with the statute, the community that has for so long relied on the outdoor recreation would be harmed, and "reasonably equivalent location" would be rendered meaningless.

In conjunction with location, DCNR must also take the recreational usefulness of the converted properties into account.³⁴ This is not simply a cursory look at how the converted property is being used, but also what recreational needs are being fulfilled and the types of outdoor resources and opportunities available in the area.³⁵ The focus of this factor is to find a replacement site that fulfills recreational needs of similar "magnitude and impact to the user community" as that of the converted land.³⁶ Consequently, the usefulness analysis is intimately connected to the location analysis as it relates to the community(ies) served.

3. DCNR Has Not Shown that a Site Over 200 Miles Away from the Majority of the Conversions Has "Reasonably Equivalent Usefulness and Location"

DCNR's barebones assertion that "[a]s a statewide provider, DCNR may consider replacement property anywhere in Pennsylvania" simply glosses over crucial considerations prescribed by LWCF's statutes and regulations. As shown above, the underlying purpose of the "reasonably equivalent usefulness and location" is to ensure that generally the recreational resources are maintained within the same community. To generalize an entire state as a community, as DCNR has done here, would frustrate the Congressional intent of this requirement.

The state of Pennsylvania is over 46,000 square miles and incredible diversity in landscapes, populations, and recreational opportunities. Travelling 200 miles by car from the converted sites to the proposed replacement in Chester County easily takes over three hours.³⁷ In reality, this distance effectively removes access to these resources for those near the converted sites. Not only are the communities distinguished by geography, but also demographics. The proposed replacement site lies within the wealthiest county in Pennsylvania.³⁸ Contrast that with the converted well pad LWCF land properties' counties, which rank from 22nd to 66th in terms of wealth, and whose per capital income averages about

³³ *Id.*

³⁴ Except for wetland conversions. 36 C.F.R. § 59.3(b)(3)(ii).

³⁵ 36 C.F.R. § 59.3 (3)(i).

³⁶ 36 C.F.R. § 59.2(3)(i).

³⁷ This is a rough estimate based on Google Map driving directions from Lycoming and Centre Counties to Replacement Area.

³⁸ US Census Bureau, *Quick Facts*, <https://www.census.gov/quickfacts/fact/map/US/INC910217> (select *Per Capital Income in the past 12 months (in 2017 dollars)*, 2013-2017: Pennsylvania).

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half of that in Chester County.³⁹ To ignore such distinctions under the guise of a statewide “community” is out of step with the spirit of

LWCF’s allowance for conversions and replacement of outdoor recreational opportunities lost. Just because a site is managed by a statewide provider, that cannot mean that it may be replaced with property anywhere in the state.

Moreover, DCNR’s 6(f)(3) conversion proposal lacks any real consideration of either the location or usefulness of the converted sites leaving the replacement property selection deficient. While DCNR does provide a reason for consolidation of the replacement land, there is no explanation why it did not look at replacement sites in Central PA, closer to the majority of the conversions, nor why it failed to examine the impact on the communities near the converted sites. Chester County’s increased need for outdoor recreation areas, does not necessarily mean that the communities in Central PA do not also have a need for such resources. Moreover, the total loss of outdoor recreational opportunities is 124.29 acres, with 99.72 acres coming from Central PA, an amount which could have a significant impact on the local communities, and a factor which should be taken more seriously by DCNR.

In brief, PennFuture requests that DCNR adequately account for the usefulness and location of the converted areas in their choice of replacement land, consider possible replacement sites closer to the bulk of the converted sites, and provide justification for any substantial deviations in communities served.

4. DCNR Has Not Shown That the Replacement Land Is of at Least Equal Fair Market Value

In addition to ensuring “reasonably equivalent usefulness and location” of the replacement property, LWCF requires that the converted properties and replacement properties be “of at least equal fair market value.”⁴⁰

Here, the Strawbridge Property EA contains zero mention of the actual fair market value of any of the converted properties nor is there indication that the converted LWCF lands were ever appraised. Rather, DCNR state that the replacement property “was appraised at more than 13 million dollars” and concludes, without any support, that this property “will, therefore, adequately provide more than enough value for the conversions being bundled.”⁴¹ Notwithstanding DCNR’s apparently violation of LWCF regulations,⁴² this is not, and cannot be, an acceptable justification. Therefore, without knowing the fair market value of the lost LWCF lands, the replacement land cannot be found to satisfy LWCF requirements. Thus, DCNR must supplement its analysis with appraisals of the converted land.

³⁹ US Census Bureau, Quick Facts, <https://www.census.gov/quickfacts/fact/map/pa/INC910217> (select *Per Capital Income in the past 12 months (in 2017 dollars)*, 2013-2017: “Clearfield, Centre, Clinton, Lycoming, Potter, and Tiago Counties”); US Census Bureau, Quick Facts, <https://www.census.gov/quickfacts/fact/map/pa/INC910217> (select *Per Capital Income in the past 12 months (in 2017 dollars)*, 2013-2017: “Chester County”).

⁴⁰ 54 U.S.C. § 200305(6)(f)(3).

⁴¹ Strawbridge Property EA, at 1.

⁴² See 36 C.F.R. § 59.3(b)(2) (establishment of the fair market value of converted property is a prerequisite for conversion approval).

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C. DCNR ERRONEOUSLY UTILIZED A CONVERSION REPLACEMENT “BANK”

In the Strawbridge Property EA, DCNR proposes to establish a conversion replacement “bank” of “excess fair market value and recreational usefulness” which “would be eligible for replacing additional LWCF conversions for a period of up to five years.”⁴³ As mentioned above, the argument here is not that the Strawbridge Property is not an appropriate consideration for LWCF lands, or even that “banking” is an inappropriate option under LWCF, but rather that DCNR has failed to properly apply the requirements of LWCF in analyzing whether it is appropriate for replacement of the outdoor recreational opportunities lost in this circumstance.

The LWCF Manual sets forth different requirements for banking of “fair market value” versus banking of “recreational usefulness.” Whereas banking for “fair market value” is relatively straightforward, the LWCF Manual clearly requires that banking to satisfy the “equal usefulness criterion for subsequent conversions” can only be accomplished when “additional conversions are anticipated by the sponsor at the time of the original conversion request and the accompanying documentation clearly addresses how the replacement property would satisfy the equal usefulness criteria for the original conversion as well as those that are anticipated.”⁴⁴ Here, DCNR has not indicated that has considered any additional conversions for which the Strawbridge Property would satisfy the equal usefulness criteria. Consequently, DCNR cannot use the Strawbridge Property as a bank for “recreational usefulness.”

Even seemingly minor technical points such as this highlight DCNR’s failure to properly follow both the letter and spirit of the LWCF conversion process, resulting in potential inequities to communities that are impacted by the loss of local LWCF lands through the 6(f)(3) conversion process.

In conclusion, for all the reasons discussed in this section, DCNR’s Strawbridge Property EA fails to comply with the requirements of LWCF.

IV. DCNR FAILED TO COMPLY WITH ARTICLE I, SECTION 27 OF THE PENNSYLVANIA CONSTITUTION

The Environmental Rights Amendment (Article I, Section 27) of the Pennsylvania Constitution states:

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

⁴³ Strawbridge Property EA, at 2.

⁴⁴ LWCF Manual, at Ch 8-9 (emphasis in original).

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In 2017, the Pennsylvania Supreme Court in *Pa. Envtl. Def. Found. v. Commonwealth*⁴⁵ (commonly referred to as simply *PEDF*) recognized that Article I, Section 27 establishes a public trust that imposes obligations on the Commonwealth to prohibit the degradation, diminution, and depletion of our public natural resources for which the Commonwealth is the trustee.

Thus, the Environmental Rights Amendment imposes upon DCNR its greatest obligation in managing the Commonwealth's state forest resources: "Pennsylvania's public natural resources are the common property of all the people, including generations yet to come."⁴⁶ As trustee of these resources, DCNR (as a constituent agency of the Commonwealth) has a fiduciary duty to "conserve and maintain [the public natural resources] for the benefit of all the people."⁴⁷ Pennsylvania's state forest lands, including LWCF lands, are included in the public natural resources covered by this trustee obligation, and thus DCNR must work to conserve the air, land and water resources that make up the state forests entrusted to it, and ensure that the principal of the trust is conserved and maintained for future generations. DCNR has acknowledged their duty in their recent *Shale Gas Monitoring Report* where the agency stated: "Article 1 Section 27 of the Pennsylvania Constitution affirms DCNR's role as a trustee of the Commonwealth's public natural resources, charged with conserving and maintaining them for current and future generations."⁴⁸

Yet DCNR's conversion of LWCF state forest lands for purposes of industrial natural gas facilities is contrary to its duty under Article I Section 27. As a trustee, DCNR should comply with all federal and state laws in compliance with the protections of the environmental rights under Article I, Section 27. Importantly, these duties require DCNR to sufficiently evaluate the impacts of natural gas extraction activities within Pennsylvania's state forest lands, which includes but is not limited to undertaking an appropriate environmental analysis under NEPA. Such a process would ensure that all environmental impacts of LWCF conversions regarding natural gas development that impact the public trust corpus are accounted for and evaluated, and also has the added benefit of allowing DCNR to gather information from the public about potential environmental impacts (which, as detailed above, it has failed to do).

V. CONCLUSION

In conclusion, DCNR has utterly failed to comply with LWCF and NEPA regarding the conversion of LWCF state forest lands to natural gas well pads. DCNR must rescind its Strawbridge Property EA; actually evaluate the environmental impacts of the conversion of LWCF state forest land to natural gas well pads – including taking the requisite "hard look" under NEPA; and undertake and Environmental Impact Statement for the significant environmental impacts of these industrial natural gas well pads on state forest lands.

Critically, DCNR must ensure that for all future conversions of LWCF state forest lands to natural gas extraction facilities and appurtenances, it appropriately follows both the letter and spirit of both LWCF and NEPA by requesting NPS approval and taking a hard look at the environmental consequences of such

⁴⁵ 161 A.3d 911 (Pa. 2017).

⁴⁶ Pa. Const. art. I, § 27.

⁴⁷ *Id.* See *PEDF*, 161 A.3d 911 (Pa. 2017); *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 978 (Pa. 2013).

⁴⁸ DCNR, *Shale Gas Monitoring Report*, at Preface.

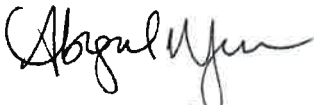
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an act prior to allowing the conversion to take place. Our comments herein therefore also apply to any future conversion of LWCF state forest land to natural gas extraction that DCNR may seek to undertake.

Thank you for your consideration of these comments. Should you wish to discuss anything PennFuture has raised in these comments or DCNR's processes and procedures for allowing natural gas extraction on LWCF state forest lands, please do not hesitate to contact us at jones@pennfuture.org or 570-216-3313.

Respectfully submitted,



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Staff Attorney



Victoria Leung, J.D.*
Legal Fellow

(*admission pending in NY)

March 4, 2019
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Cc: State and Local Assistance Programs National
Park Service

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II. RESPONSES TO PUBLIC COMMENTS

The email comment/inquiry from April Schmitt on February 12, 2019 was resolved by a simple response clarifying the purpose of the Strawbridge EA document. In response to the letter from PennFuture, the Department requests that PennFuture review the draft "Resolution of Natural Gas Conversions on LWCF funded State Forest Land" Environmental Assessment that has been developed by the Department and will be available for public comments via a Pennsylvania Bulletin notice. The Gas Conversion EA may help address concerns enumerated in PennFuture's March 4, 2019 letter. The Department has been in communication with the National Park Service regarding the gas development on Bureau of Forestry land and has been diligently working through the conversion process as outlined in the Land and Water Conservation Fund State Assistance Program Manual, Chapter 8 – Post-Completion and Stewardship.