

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

Pennsylvania State Senator:	:	
Andrew E. Dinniman	:	Consolidated Docket Nos.
Complainant,	:	C-2018-3001451
v.	:	P-2018-3001453
	:	
Sunoco Pipeline, L.P.,	:	
Respondent.	:	

POST-HEARING MEMORANDUM OF CLEAN AIR COUNCIL

On Monday, May 7, 2018 and Thursday, May 10, 2018, Hon. Elizabeth H. Barnes presided over the hearing of State Senator Andrew E. Dinniman’s Amended Petition for Interim Emergency Relief in the above-captioned matter. Intervenor Clean Air Council, through counsel, files the following post-hearing memorandum in support of the Senator’s Petition.

I. Statement of the Case

On April 30, 2018, Senator Dinniman filed an Amended Complaint and Amended Petition for Interim Emergency Relief requesting that the Commission issue an order prohibiting the construction and operation of Sunoco Pipeline L.P.’s (“Sunoco”) Mariner East 2 and Mariner East 2X pipelines (collectively “ME2 pipelines”) and the operation of Sunoco’s Mariner East 1 (“ME1”) pipeline in West Whiteland Township, Chester County, until a series of conditions are met regarding the safety and suitability of those pipelines. Senator Dinniman also requested the Commission make a finding that Sunoco is not a Commission public utility. Clean Air Council has intervened in support of Senator Dinniman’s requests.

II. Summary of Argument

Sunoco’s ME2 pipelines have been fraught with problems from the start. From hundreds of thousands of gallons of drilling fluid spills, to the destruction of drinking water supplies, and permit violations egregious enough to result in two shutdowns, the project has been nothing short of an

environmental disaster. The ME2 pipelines have also threatened the safety of the residents along the route as Sunoco has pressed forward with construction despite its failure to study the subsurface geology it is disrupting, leaving sinkholes in its wake. The residents of West Whiteland Township have been in the crosshairs of this destruction. Despite the threat these pipelines pose to the life and property of the residents of West Whiteland Township, the residents have not been given specific information about how to mitigate these risks and protect themselves. For these reasons, the ME2 pipelines are unsafe and unreasonable. The Commission's swift action is needed to prevent further problems from ME2 and to ensure that ME1 has not been, and will not be, compromised by ME2 construction.

III. Argument

Under the Board's regulations, a petitioner seeking emergency relief must establish the following: (1) the petitioner's right to relief is clear; (2) the need for relief is immediate; (3) the injury would be irreparable if relief is not granted; and (4) the relief requested is not injurious to the public interest. 52 Pa. Code § 3.6. Those factors have been met here.

A. Petitioner's right to relief is clear.

The standard for demonstrating a clear right to relief is well established. It is not necessary to determine the merits of the controversy or dispute in order to find that a petitioner has satisfied the first prong of Section 3.2(b) of the Commission's regulations, 52 Pa. Code § 3.2(b), by showing that the right to relief is clear. Consistent with Pennsylvania law outside of Commission proceedings, the Commission has found that if a petitioner raises "substantial legal questions," then a petitioner has established that its right to relief is clear. *Core Communications, Inc. v. Verizon Pennsylvania, Inc. and Verizon North LLC*, Docket No. P-2011-2253650 (Order entered September 23, 2011); *Level 3 Communications, LLC v. Marianna & Scenery Hill Telephone Company*, Docket No. C-20028114 (Order entered August 8, 2002); *T. W. Phillips Gas and Oil Company v. the*

Peoples Natural Gas Company, 492 A.2d 776 (Pa. Cmwlth. 1985). The Commission should find that the petitioner has raised substantial legal questions, demonstrating that the right to relief is clear.

1. The Mariner East pipelines are unsafe and unreasonable because Sunoco has failed to comply with safety requirements.

The Mariner East pipelines are unsafe and unreasonable because Sunoco has consistently failed to comply with safety requirements. Sunoco has failed to identify leaks on its own pipelines, has failed to report leaks and spills to appropriate authorities when they occur,¹ and has failed to follow its own protocols and safety procedures established to protect the public.

Concerns regarding Sunoco accidents and the lack of public information are not hypothetical. Sunoco's Mariner East 1 went into operation in late 2014. Within a span of 12 months, Mariner East 1 experienced three leaks, all of which occurred in high consequence areas². One of these leaks occurred at or near 5530 Morgantown Road, Morgantown, PA (Berks County) on April 1, 2017.³ Sunoco's own leak detection system failed to identify this hazardous highly volatile liquids (HVL) release in Morgantown. The leak, which was the result of subsurface corrosion, was discovered and reported not by Sunoco, but by a landowner. It qualified as an accident under 49 CFR § 195.50. From the time the landowner informed the operator of the probable leak, it took approximately 90 minutes to shut the pipeline down, and in that time nearly 1,000 liquid gallons of a natural gas liquids mixture were released. This is an extremely dangerous quantity of an extremely dangerous material.

¹ For example, see the recent May 3, 2018 Notice of Violation issued by DEP, which notes that Sunoco failed (on four separate occasions covered by the NOV) to properly report the events.

² See

https://primis.phmsa.dot.gov/comm/reports/operator/OperatorIM_opid_18718.html?nocache=2461#_Incidents_tab_4 for a list of Sunoco pipeline accidents, including accidents on Mariner East 1 on 5/27/16, 8/16/16, and 4/1/17, and see https://www.phmsa.dot.gov/sites/phmsa.dot.gov/files/data_statistics/pipeline/PHMSA_Pipeline_Safety_Flagged_Incidents.zip for Sunoco 7000-1 accident report forms filed with PHMSA for ME1 accidents on 5/27/16, 8/16/16, and 4/1/17.

³ See Exhibit CAC-1.

In addition to numerous leaks on Mariner East 1, Sunoco has also had safety violations on Mariner East 2. On January 11, 2018, PHMSA issued Sunoco a Notice of Probable Violation and Proposed Compliance Order⁴ alleging violations of construction requirements on ME2. In essence, it appears a PHMSA inspector discovered Sunoco in the process of burying damaged ME2 pipe sections. It had not been reported. Sunoco's safety consultant was unaware of this incident when he rendered his opinion about the safety of the Mariner East pipelines. Tr. 579: 16-21. His opinion was also not based on the actual studies that had taken place at Lisa Drive. 577: 20-25.

Sunoco's pattern of safety violations is an invitation for a catastrophic incident. In January 2015 a 20" ATEX ethane pipeline similar in size, pressure and diameter to Mariner East 2 leaked well over a million gallons (1,003,842 gallons according to PHMSA⁵). That liquid turned into roughly 450 million gallons of gas as it volatilized, producing a fireball that scorched five acres. A house 2,000 feet away suffered thermal damage. Consistent with the fears regarding the integrity of ME1 at Lisa Drive when a sinkhole opened, subsidence was at play in this incident and the integrity of the pipeline was compromised. PHMSA reports "indicated that the pipe had dropped more than 3 feet since the line was originally constructed"⁶ 13 months prior. Sunoco's pipeline safety consultant was also unaware of the facts of this explosion when he testified to the safety of the Mariner East pipelines. Tr. 575-576.

2. The Mariner East pipelines are unsafe and unreasonable because Sunoco has continually failed to comply with environmental laws and regulations.

Sunoco's environmental compliance record for the Mariner East 2 pipeline speaks for itself.

⁴ See January 11, 2018 Notice of Violation, available at https://primis.phmsa.dot.gov/comm/reports/enforce/documents/120185002/120185002_NOPV%20PCO_01112018_text.pdf.

⁵ See PHMSA Corrective Action, available at https://primis.phmsa.dot.gov/comm/reports/enforce/documents/120155002H/120155002H_Amended%20Corrective%20Action%20Order_03122015_text.pdf

⁶ See PHMSA Accident Report, available at <https://cms.phmsa.dot.gov/sites/phmsa.dot.gov/files/docs/inspections-and-investigations/17866/149469enterpriseproductsoperatingllcfir2015126reportandappendices.pdf>.

Pipeline construction began at a few locations in February 2017 and slowly ramped up. In April 2017, as horizontal directional drilling began in earnest across the Commonwealth, reports of drilling fluid spills began to flood DEP's offices. *See* DEP "Sunoco Mariner East II - Pipeline Construction Inadvertent Returns - Uplands" (reporting dates and details of drilling fluid spills to uplands)⁷; DEP "Sunoco Mariner East II - Pipeline Construction Inadvertent Returns - Waters of the Commonwealth" (reporting dates and details of drilling fluid spills in waters of the Commonwealth).⁸

The charts documenting Sunoco's drilling fluid spills reveal that most spills are in clusters, indicating that Sunoco failed to fix the problems that caused the first spill and continued to drill despite methods and locations that may be unsuitable. The charts also demonstrate the enormous number of spills that Sunoco has caused during construction of Mariner East 2--over 160 and counting, including several reports that have recently come in from spills during the month of May. The total spillage so far amounts to hundreds of thousands of gallons.

Sunoco's record of erosion and sediment control violations is abysmal as well. Sunoco has regularly failed to use adequate best management practices (BMPs) to avoid unlawful discharges of sediment into receiving water bodies during earthmoving activities. For example, DEP issued a notice of violation on August 16, 2017, detailing how Sunoco's failure to install and maintain appropriate erosion and sediment control BMPs resulted in its violating the Clean Streams Law, the conditions of its permits, and the Dam Safety and Encroachments Act.⁹

⁷ Available on DEP's Mariner East Pipeline II portal page, http://files.dep.state.pa.us/ProgramIntegration/PA%20Pipeline%20Portal/MarinerEastII/Sunoco_Mariner_East_II-Pipeline_Construction_Inadvertent_Returns-Uplands_Revised.pdf.

⁸ Available on DEP's Mariner East Pipeline II portal page, http://files.dep.state.pa.us/ProgramIntegration/PA%20Pipeline%20Portal/MarinerEastII/Sunoco_Mariner_East_II-Pipeline_Construction_Inadvertent_Returns-Waters_of_the_Commonwealth_Revised.pdf.

⁹ *See* August 16, 2017 Notice of Violation, available at [http://files.dep.state.pa.us/ProgramIntegration/PA%20Pipeline%20Portal/MarinerEastII/NOV/NOV%2038%2017%20102%20-%208-16-2017%20\(Bachman%20Run\),%20Lebanon%20County.pdf](http://files.dep.state.pa.us/ProgramIntegration/PA%20Pipeline%20Portal/MarinerEastII/NOV/NOV%2038%2017%20102%20-%208-16-2017%20(Bachman%20Run),%20Lebanon%20County.pdf).

Every spill and discharge of sediment into a water of the Commonwealth--be it wetland, stream, lake, or otherwise--is an illegal and unpermitted release of industrial waste. DEP has issued more than fifty notices of violation for drilling fluid spills and sediment discharges.¹⁰ Sunoco refuses to correct its lack of compliance. For example, DEP issued the first notice of violation for Mariner East 2 in May 2017 in response to a drilling fluid spill in Delaware County. In that notice, DEP instructed that Sunoco must immediately notify DEP upon the occurrence of certain types of drilling fluid spills.¹¹ The second-to-latest posted notice of violation, in May 2018 in response to a drilling fluid spill in Delaware County, takes Sunoco to task for, among other things, failing to notify DEP of a drilling fluid spill.¹² Sunoco simply does not prioritize compliance with laws and DEP requirements.

West Whiteland Township has seen its share of these problems, even setting aside the happenings at Lisa Drive, which were preceded by multiple drilling fluid spills at the site.¹³ The contamination of over a dozen water wells in Chester County due to Sunoco's improper horizontal directional drilling occurred along a drilling alignment spanning Uwchlan and West Whiteland Townships. *See* July 24, 2017 Consent Order and Agreement.¹⁴ Sunoco has also sought significant changes to its construction methodology at two locations in West Whiteland Township which the

¹⁰ *See* linked documents available under "Notices of Violation" at DEP's Mariner East Pipeline II portal page, <http://www.dep.pa.gov/Business/ProgramIntegration/Pennsylvania-Pipeline-Portal/Pages/Mariner-East-II.aspx>.

¹¹ *See* May 9, 2017 Notice of Violation, available at <http://files.dep.state.pa.us/ProgramIntegration/PA%20Pipeline%20Portal/MarinerEastII/NOV/2018/May%209,%202017%20Delaware%20County.pdf>.

¹² *See* May 3, 2018 Notice of Violation, available at <http://files.dep.state.pa.us/ProgramIntegration/PA%20Pipeline%20Portal/MarinerEastII/NOV/2018/May%203,%202018%20Delaware%20County.pdf>.

¹³ *See* November 16, 2017 Notice of Violation, available at <http://files.dep.state.pa.us/ProgramIntegration/PA%20Pipeline%20Portal/MarinerEastII/NOV/2018/November%2016,%202017%20Chester%20County.pdf>.

¹⁴ Available at http://files.dep.state.pa.us/ProgramIntegration/PA%20Pipeline%20Portal/MarinerEastII/NOV/Sunoco_Consent_Order_and_Agreement.pdf.

Department of Environmental Protection is evaluating.¹⁵ These changes have provoked a massive public outcry in large part due to the planned destruction of cherished public and natural resources that would be lost as part of the construction at those locations.¹⁶

These series of problems caused by Sunoco's Mariner East 2 construction have not gone unnoticed, but efforts to remedy them have had mixed results. DEP has entered imposed civil penalties on two occasions, in January and then April of this year.¹⁷ The first penalty, for over twelve million dollars, came after DEP suspended construction on Mariner East 2 for more than a month. DEP had concluded that "Sunoco's unlawful conduct set forth in Paragraphs T. through FFF., above, demonstrates a lack of ability or intention on the part of Sunoco to comply with the Clean Streams Law, the Dam Safety and Encroachments Act, and the permits issued thereunder. Suspension of the permits described in Paragraph D, above, is necessary to correct the egregious and willful violations described herein."¹⁸ This "lack of ability or intention" to comply is of a piece with Sunoco's refusal to voluntarily suspend ME1 service despite the risk to the public: Unless

¹⁵ See "Addendums to Chapter 105, Water Obstruction and Encroachment Permits and Chapter 102, Erosion and Sediment Control (E&S) Permits" on DEP's Mariner East Pipeline II portal page, <http://www.dep.pa.gov/Business/ProgramIntegration/Pennsylvania-Pipeline-Portal/Pages/Mariner-East-II.aspx>, and the documents linked therein, available at [http://files.dep.state.pa.us/ProgramIntegration/PA%20Pipeline%20Portal/MarinerEastII/EastSwedesfordRoad/East%20Swedesford%20Road%20-%20HDD%20S3-381%20\(aka%20Drill%20381\).pdf](http://files.dep.state.pa.us/ProgramIntegration/PA%20Pipeline%20Portal/MarinerEastII/EastSwedesfordRoad/East%20Swedesford%20Road%20-%20HDD%20S3-381%20(aka%20Drill%20381).pdf) and [http://files.dep.state.pa.us/ProgramIntegration/PA%20Pipeline%20Portal/MarinerEastII/NorthPottstownPike/North%20Pottstown%20Pike%20-%20HDD%20S3-0370%20\(aka%20Drill%20370\).pdf](http://files.dep.state.pa.us/ProgramIntegration/PA%20Pipeline%20Portal/MarinerEastII/NorthPottstownPike/North%20Pottstown%20Pike%20-%20HDD%20S3-0370%20(aka%20Drill%20370).pdf).

¹⁶ See aggregated public comments on Swedesford Road crossing at http://files.dep.state.pa.us/ProgramIntegration/PA%20Pipeline%20Portal/MarinerEastII/HDD_Reevaluation_Reports/Public_Comments/SwedesfordRoadCrossing/1st%20comment%20period%20-%20Swedesford%20Road%20Crossing.pdf, and aggregated public comments on the North Pottstown Pike crossing at http://files.dep.state.pa.us/ProgramIntegration/PA%20Pipeline%20Portal/MarinerEastII/HDD_Reevaluation_Reports/Public_Comments/NorthPottstownPike/1st%20comment%20period%20-%20North%20Pottstown%20Pike%20Crossing.pdf.

¹⁷ See Consent Order and Agreement dated February 8, 2018, available at http://files.dep.state.pa.us/ProgramIntegration/PA%20Pipeline%20Portal/MarinerEastII/Summary_of_Order/Sunoco%20Pipeline%20LP,%20Consent%20Order%20and%20Agreement%20-%20February%208,%202018.pdf; Consent Assessment of Civil Penalty dated April 27, 2018, available at http://files.dep.state.pa.us/ProgramIntegration/PA%20Pipeline%20Portal/MarinerEastII/Summary_of_Order/Sunoco%20Pipeline%20LP,%20Consent%20Order%20and%20Agreement%20-%20February%208,%202018.pdf.

¹⁸ DEP Administrative Order in the matter of Sunoco Pipeline, L.P. dated January 3, 2018, at ¶ WWW., available at <http://files.dep.state.pa.us/ProgramIntegration/PA%20Pipeline%20Portal/MarinerEastII/OrderSuspendingConstructionActivities010318.pdf>.

Sunoco is forced to take action to protect the public that may impact its bottom line, it will not.

The Environmental Hearing Board has separately shut down horizontal directional drilling to build Mariner East 2 after granting a temporary supersedeas petition by Clean Air Council and other groups filed in response to the ongoing endangerment of Pennsylvanians' water supplies from the construction. July 25, 2017 Order, EHB Docket No. 2017-009-L, available at <http://ehb.courtapps.com/efile/documentViewer.php?documentID=38322>. An agreement was reached to settle the supersedeas petition, which the Environmental Hearing Board signed off on August 10, 2017. Corrected Stipulated Order, EHB Docket No. 2017-009-L, available at <http://ehb.courtapps.com/efile/documentViewer.php?documentID=38633>. Nonetheless, Sunoco breached that agreement and had to be taken back to court yet again for failure to comply. *See* EHB Docket No. 2018-023-L.

Unfortunately, the list goes on. The new Mariner East pipeline construction has been an environmental and public health disaster due to (using DEP's words) "a lack of ability or intention on the part of Sunoco to comply" with the law. Sunoco has failed to provide safe and reasonable public utility service, and its track record demonstrates that it will not likely do so.

3. The Mariner East pipelines are unsafe and unreasonable because Sunoco has destroyed and continues to threaten drinking water supplies.

The aquifers of West Whiteland Township provide an essential water supply to the area's growing population. Tr. 73: 3-5. Hundreds of West Whiteland residents rely on private water supplies. Tr. 71: 15-2. Multiple *public* water supplies are also sourced from within West Whiteland Township, some very near to the Mariner East route. Tr. 71: 24-25. Sunoco's poor planning and sloppy execution in the construction of the ME2 pipelines has, and continues to, put these water supplies at risk.

From the start, Sunoco has failed to adequately identify and document well locations. Tr.

87: 7-9. In the entire 350-mile pipeline route, Sunoco only identified 22 private wells in its water permit applications. Tr. 86: 14-15. By contrast, fourteen wells have since gone dry in just one area of West Whiteland Township. Tr. 86: 16-20. Sunoco's complacency regarding well identification foreshadowed the damage to water supplies that followed.

In June and July of 2017, Sunoco's drilling near the border of Uwchlan and West Whiteland Townships in Chester County caused more than a dozen homes to lose access to clean water from their wells.¹⁹ Sunoco again failed to immediately notify DEP of the fact that its construction of the pipelines impaired or destroyed residents' wells.²⁰ It was residents, not Sunoco, who notified DEP about impacts to water supplies. Tr. 98: 16-18. Faced with loss of water supplies and flooding, some of the residents were moved to hotels. Tr. 97: 10-18. Senator Dinniman saw numerous samples of contaminated water gathered by concerned members of his community and described it frankly: It looked like something you would "find in a toilet." Tr. 89: 19-20, *see also* Tr. 358: 14-20 (Virginia Marcille-Kerslake describing the increased turbidity, brown color, and cloudiness of the water). The Senator also learned that one of the wells tested positive for bentonite. Tr. 149: 9-13.

At the hearing in this matter, Sunoco's litigation consultant in toxicology downplayed the risks of bentonite ingestion, noting its presence in sunscreen and makeup. Tr. 315: 25, 316: 1-2. This testimony missed an important point. Even if it were advisable to eat sunscreen and makeup, it is not just risks associated with the ingestion of or exposure to pure bentonite that needs to be assessed. Increased turbidity, or cloudiness in water, is more than an unpleasant aesthetic harm. Dr. Sasosky, an expert in geology, karst geology, and hydrogeology testified, "turbidity is

¹⁹ See Consent Order and Agreement dated July 24, 2017, available at http://files.dep.state.pa.us/ProgramIntegration/PA%20Pipeline%20Portal/MarinerEastII/NOV/Sunoco_Consent_Order_and_Agreement.pdf.

²⁰ *Id.*

frequently a measure of the level of concern we would have for biological contamination... if particles of clay can be transported, then biological particles could also be transported.” Tr. 280: 5-13. Indeed, bacterial contamination of water supplies has been a concern throughout the construction of the Mariner East 2 pipelines. Sunoco’s Water Supply Assessment, Preparedness, Prevention and Contingency Plan²¹ was modified through a settlement with DEP, Clean Air Council, Delaware Riverkeeper Network, and Mountain Watershed Association, Inc. to include testing for bacterial pathogens²² after horizontal directional drilling had been shut down by the Environmental Hearing Board in response to the nonprofits’ request for emergency relief.²³ Sunoco is still planning on implementing construction methods in West Whiteland Township that require the use of fluids. Tr. 473: 10-16.²⁴ As Dr. Sasosky explained, introducing fluids underground could result in sediment reaching water supplies. Tr. 280: 1-4. The risk persists.

Disruption of the flow of water into private wells has also been an ongoing concern. Dr. Sasosky testified that bentonite can reduce the flow of water to a well. Tr. 279: 23-25. In looking at the impacts of bentonite, Sunoco’s litigation consultant did not look at impacts to water systems, Tr. 321: 24-25, 322: 1-3, how bentonite could alter the movement of groundwater, Tr. 324: 17-19, or how bentonite could disrupt the flow of water into a drinking water well, Tr. 324: 20-24. It is unsafe to cut off or contaminate people’s water supplies and unreasonable to expect people to give up their private water in favor of bottles, tanks, and water bills because Sunoco has chosen not

²¹ Referenced throughout and developed in conjunction with SPLP Exhibits 7 and 8, also available directly through DEP’s website at <http://files.dep.state.pa.us/ProgramIntegration/PA%20Pipeline%20Portal/MarinerEastII/Water%20Supply%20Assessm ent.%20Preparedness.%20Prevention%20and%20Contingency%20Plan%20w%20appendices%20-%20Revised%20080817.pdf>.

²² See *id.* at Appendix B, Well Test Plan.

²³ See Order Environmental Hearing Board dated July 25, 2017, EHB Docket No. 2017-009-L, available at <http://ehb.courtapps.com/efile/documentViewer.php?documentID=38322>.

²⁴ See also List of 102 and 105 Activities That Have Yet to Be Completed or Commenced, available at http://files.dep.state.pa.us/ProgramIntegration/PA%20Pipeline%20Portal/MarinerEastII/Summary_of_Order/Para%208 %20-%20Exhibit%20D%20-%20Pending%20Earth%20Disturbance%20Water%20Obstruction%20%20Encroachment.pdf

protect their private wells.

4. The Mariner East pipelines are unsafe and unreasonable because Sunoco has not adequately investigated the geology along the route.

The series of sinkholes that opened up on Lisa Drive may have been one of the more dramatic manifestations of Sunoco's failed planning, but as the foregoing context has made clear, the sinkholes were far from the start of the problems, and certainly not isolated incidents. One common thread that runs through the scores of drilling fluid spills, the destruction of water supplies, and the sinkholes is Sunoco's failure to account for the subsurface geology it has been disrupting with its construction.

Sunoco was warned before the start of ME2 construction about the vulnerability of the geology in the Exton area.²⁵ Yet Sunoco waited until its construction caused potentially "catastrophic" conditions before it performed any surface geophysical studies in West Whiteland Township.²⁶ Surface geophysical studies include electrical resistivity, gravity, and seismic methods that can help provide an image of subsurface conditions; these are the types of studies that were ordered by the Commission when it recently shut down operation of ME1.²⁷ Prior to the Commission's Emergency Order, instead of performing geophysical studies, Sunoco utilized *geotechnical* test boring at horizontal direction sites prior to the start of drilling. Tr. 470: 15-22. The distinction is significant and plainly the test boring was insufficient. Repeated and voluminous drilling fluid spills, destruction of water supplies, and sinkholes on Lisa Drive all occurred after test boring and despite the availability of test bore data.

The inadequacy of Sunoco's test boring regime is no surprise. As Sunoco's geology consultant Mr. Demko explained, a test bore is like a biopsy. It gives information about one

²⁵ See Exhibit P-6.

²⁶ See Emergency Order of the Public Utility Commission dated March 7, 2017. Docket No. P-2018-3000281

²⁷ *Id.*

specific point. Tr. 683: 16-17. To continue Mr. Demko's analogy, a doctor cannot trust a biopsy to tell a patient he is cancer free if the doctor took a biopsy of the patient's liver and the tumor is in the lung. Surface geophysical studies, "like an MRI", provide the needed context. *See* Tr. 683: 16-17. It is thus little comfort that Sunoco continues to rely on data from test boring and not geophysical studies for the sites in West Whiteland where Sunoco intends to use HDD.

It appears the *only* location in West Whiteland Township that Sunoco performed surface geophysical studies, like those ordered by the Commission, was at Lisa Drive itself. At hearing, the testimony presented by Sunoco about which studies were performed at which sites was scattered and unclear. The documents that speak to this point are instructive.

Matthew Gordon, the project manager for ME2, testified that geophysical studies were conducted at North Pottstown Pike and Swedesford Road but could not recall specifics. Tr. 449: 8-20. Upon request of counsel, questions regarding geophysical surveying were then deferred for Sunoco's geologist. Tr. 449: 21-25. Mr. Demko testified that seismic studies were conducted at North Pottstown Pike. Tr. 662: 9-14. Sunoco made a similar claim in the cover letter for its major modification request, dated October 17, 2017.²⁸ However, Sunoco's reevaluation report for the same site, reviewed and signed by Mr. Demko, dated November 7, 2017, says "[n]o geophysical studies have been completed" for that location.²⁹ If geophysical studies have been performed in the intervening months, they did not inform and were not incorporated into the construction plans. At Swedesford Road, a "downhole" geophysical study--as opposed to a surface geophysical survey--was performed near the threatened Aqua Pennsylvania public water source.³⁰ There is no question that downhole testing is a different scope and nature of study than electrical resistivity, seismic, or

²⁸ *See* Exhibit SPLP-5.

²⁹ *See* North Pottstown Pike HDD Reevaluation Report at Attachment 1, p. 10, available at http://files.dep.state.pa.us/ProgramIntegration/PA%20Pipeline%20Portal/MarinerEastII/HDD_Reevaluation_Reports/N.%20Pottstown%20Pike%20Crossing%20-%20S3-370%20-%20PA-CH_0212.0000%20-%20HDD%20Reanalysis.pdf

³⁰ *See* Swedesford Road HDD Reevaluation Report at Attachment 1, p.8, available at http://files.dep.state.pa.us/ProgramIntegration/PA%20Pipeline%20Portal/MarinerEastII/HDD_Reevaluation_Reports/E15-862%20-%20Swedesford%20Road%20Crossing%20-%20PA-CH-0219.0000%20-S3-0382.pdf

gravimetry, which provide the MRI-like scan Mr. Demko described. The HDD reevaluation report for Swedesford Road, which was also reviewed and signed by Mr. Demko, even recommended geophysical testing:

A geophysical study is required to determine the extent of karst development along the profile of HDD S3-0382, especially in light of installation challenges that are being experienced at HDD S3-400 due south of HDD S3-0382, including excessive groundwater discharge; loss of fluids, with no IRs to date; and difficulties steering the pilot hole.³¹

Sunoco did not follow this recommendation; geophysical surveying was “not implemented.”³²

Perhaps even more importantly, even if geophysical studies had been conducted at both the North Pottstown Pike and Swedesford Road sites, there is no dispute that the vast majority of West Whiteland Township has not been evaluated with geophysical surveys.

During the hearing, Sunoco focused on its intention to limit HDD in West Whiteland, modifying its plans for Lisa Drive and other locations to other trenchless construction methods and/or open trench installation. Changing construction methods does not make up for the lack of studies. First, Sunoco still intends to use construction methods, such as FlexBor and other boring techniques, that introduce liquids underground. Tr. 473: 10-16.³³ Mr. Demko and Dr. Sasowsky agree that water contributes to subsidence and sinkholes. This is particularly concerning as not all of the methods Sunoco intends to use are specifically covered by Sunoco’s Void Mitigation Plan. Tr. 474: 10-11.³⁴

Second, even where *no* fluid is being used in construction, a risk of subsidence remains. As Dr. Sasowsky explained, open trenching does not remove all concerns; there is still the potential of

³¹ *Id.* at Attachment 1, p. 10.

³² *Id.* at the unnumbered second page of the PDF.

³³ See also List of 102 and 105 Activities That Have Yet to Be Completed or Commenced, available at http://files.dep.state.pa.us/ProgramIntegration/PA%20Pipeline%20Portal/MarinerEastII/Summary_of_Order/Para%208%20-%20Exhibit%20D%20-%20Pending%20Earth%20Disturbance%20Water%20Obstruction%20%20Encroachment.pdf (listing construction activities still to be complete in West Whiteland).

³⁴ See also, SPLP Exhibit 7.

hitting soil filled voids which are only “pseudo-stable” and can collapse. Tr. 267: 7-21. Anywhere there is carbonite lithology, you should be cautious of sinkholes. Tr. 260: 1-10. Moreover, it is not just the actual excavation sites themselves that are at risk, sinkholes can propagate even a thousand yards away from the excavation site. Tr. 268: 2-3. Similarly, the risk of sinkholes and subsidence persists after construction is complete. Tr. 265: 2-5. If construction activity disrupts the subsurface and creates a void, a sinkhole might take weeks or years to materialize; it could be triggered by a weather event or even someone riding a lawn mower. Tr. 264: 12- 24. This risk must be taken seriously; sinkholes are hazardous and cause loss of life and property. Tr. 261: 3-6.

Sunoco’s failure to adequately address geological risk predictably led to a series of ongoing problems which continue to plague its pipeline construction. As described above, this has endangered residents and led to environmental harm along the construction route. Because of this failing, the Mariner East pipelines have been unsafe and their construction unreasonable.

5. The Mariner East pipelines are unsafe and unreasonable because Sunoco has not adequately informed communities along the route about how to respond to an emergency.

Regardless of any rhetoric Sunoco has put forth about its efforts of public notice and communication, the reality on the ground for residents in West Whiteland Township--those who actually have to live with the threat of the Mariner East pipelines running by their homes and schools--is that residents do not know how to protect themselves, and Sunoco has not answered their questions. Two large school districts have taken the extraordinary step of writing to Governor Wolf asking what to do in case of an emergency. Tr. 62: 2-6.³⁵ A private school, St. Peter and Paul, has lost 20 students this year over fears related to the pipeline. Tr. 62: 19-22. Residents crave specific information about how to respond in an emergency, but have only received “boilerplate” and “general” information. Tr. 111: 5-8. Even if the concerns of the average resident

³⁵ See also Exhibits P-1 and P-2.

are not given weight, the concerns of emergency response professionals undoubtedly should be. Chester County Emergency Services has requested to see the emergency management plan. As of the hearing in this matter, over a year into construction, that meeting about that information had not yet occurred. Tr. 190: 4-5.

The testimony of Sunoco's pipeline safety consultant at the hearing did little to address the concerns of residents. One of the questions that has emerged from residents along the route is whether it is safe to use cell phones in the event of a leak. Sunoco's expert was unsure and acknowledged science still needed to be done, but also characterized the question as fun. Tr. 567: 1-13. Nothing about this situation and the possibility of an explosion feet from their homes is fun to the residents of West Whiteland Township. When asked what people who are unable to run are supposed to do in the event of a leak, such as people with disabilities, residents of nursing homes, and daycares, Sunoco's expert ultimately could not answer. Tr. 579-580. Such individuals are particularly reliant on a strong integrity management plan. Tr. 579-580. Unfortunately, the level of safety and integrity management really depends on how the company carries out its policies, Tr. 554: 20-23, and Sunoco has demonstrated time and again an unwillingness to follow protocol.

B. The need for relief is immediate.

The relief Senator Dinniman has requested to protect the residents of West Whiteland Township is urgently needed. Sunoco's record of safety violations and pattern of failure to self-report incidents make it critical that the Commission step in to protect the public before Sunoco causes further harm.

The Lisa Drive incidents are a prime example. On November 11, 2017, DEP received notice of a spill at the site not from Sunoco, but from a third party.³⁶ DEP had to remind Sunoco more than once that when there is a loss of drilling fluid circulation, it must notify DEP, and that it

³⁶ Notice of Violation dated November 16, 2017, available at <http://files.dep.state.pa.us/ProgramIntegration/PA%20Pipeline%20Portal/MarinerEastII/NOV/2018/November%2016,%202017%20Chester%20County.pdf>

must keep Amtrak apprised of potential voids near its tracks.³⁷ DEP noted “[t]o date, no notice of any loss of circulation has been received from Sunoco, and Sunoco has not provided the Department with information about any contacts they may have made with Amtrak on this issue, despite explicit Department request for such information.”³⁸ Immediate notification to DEP is a permit requirement, but DEP had no record of receiving any such notice from Sunoco about the November 11, 2017 inadvertent return or the losses of circulation. DEP went on to explain: “The Department is very concerned with Sunoco’s continued failure to provide the required notifications for these incidents.”³⁹ Sunoco also failed to provide the required technical reports.⁴⁰ A few months later, on March 3, 2018, it was a resident, and again not Sunoco, who reported to PUC that additional sinkholes had formed.⁴¹

Sunoco’s pattern of disregard for safety regulations and failure to self-report is not limited to the Lisa Drive incidents or the other Mariner East incidents described above; it permeates Sunoco projects across the country. Just a few such examples follow.

In April 2016, Sunoco received a Notice of Probable Violation for pipeline construction irregularities involving the Permian Express II (PEX II) pipeline in Texas. PHMSA alleged that Sunoco used unqualified welders and unqualified welding procedures to make more than 3,000 welds on PEX II.

Upon discovery of these errant practices, Sunoco attempted to qualify the welders by re-testing them after-the-fact. While this is not consistent with the requirements of Part 195, it is even more problematic that some of these welders who had already made production welds on the PEX II pipeline failed to pass the re-test, and in some cases failed multiple qualification attempts.⁴²

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Petition of the Bureau of Investigation and Enforcement of the Pennsylvania Public Utility Commission for the Issuance of an Ex Parte Emergency Order, at p. 1.

⁴² Notice of Probable Violation and Proposed Civil Penalty and Proposed Compliance Order dated April 28, 2016, available at

Sunoco put PEX II in service anyway, upon which it promptly failed “in the vicinity of a girth weld.”⁴³ Sunoco had initial indications of a problem on PEX II on or about August 30, 2016, but failed to determine the pipeline had ruptured for eleven long days--PEX II was not shut down until September 10.⁴⁴ Sunoco then was subject to an additional federal enforcement action for the PEX II rupture.⁴⁵ Sunoco initially reported that PEX II had leaked 800 barrels of hazardous liquids, a figure it later revised by an order of magnitude to 8,600 barrels.

On November 6, 2012, PHMSA served Sunoco with a Notice of Probable Violation and Proposed Civil Penalty for failing to file a required report relating to an accident that occurred on February 8, 2011 in Sharon Hill, Pennsylvania.⁴⁶ PHMSA issued a Final Order finding a violation on June 13, 2013.⁴⁷

Even more seriously, and more recently, Sunoco, on April 6, 2017, received another Notice of Probable Violation and Proposed Compliance Order from PHMSA.⁴⁸ The document states “SUNOCO failed to submit a written DOT Form 7000-1 for an accident that occurred on August 12, 2016, at its Terminal facility in Nederland, Texas. The accident involved a release of crude oil,

https://primis.phmsa.dot.gov/comm/reports/enforce/documents/420165011/420165011_NOPV%20PCP%20PCO_04282016_text.pdf

⁴³ Corrective Action Order dated September 14, 2016, available at

https://primis.phmsa.dot.gov/comm/reports/enforce/documents/420165030H/420165030H_Corrective%20Action%20Order_09142016_text.pdf.

⁴⁴ *See id.*

⁴⁵ September 14, 2016 Corrective Action Order, available at

https://primis.phmsa.dot.gov/comm/reports/enforce/documents/420165030H/420165030H_Corrective%20Action%20Order_09142016_text.pdf.

⁴⁶ *See* Notice of Probable Violation and Proposed Civil Penalty dated November 6, 2012, available at

https://primis.phmsa.dot.gov/comm/reports/enforce/documents/120125019/120125019_NOPV_PCP_11062012_text.pdf

⁴⁷ Final Order dated June 13, 2013, available at

https://primis.phmsa.dot.gov/comm/reports/enforce/documents/120125019/120125019_Final%20Order_06132013_text.pdf

⁴⁸ Available at

https://primis.phmsa.dot.gov/comm/reports/enforce/documents/420175011/420175011_NOPV%20PCO_04062017_text.pdf.

ignition of the crude oil, and injuries requiring in-patient hospitalization.”⁴⁹ In fact, at least seven people were injured in this accident.⁵⁰

The risk to the public from further malfeasance is ongoing and serious, and so the need for relief is immediate.

C. The injury would be irreparable if relief is not granted.

The relief sought is necessary to prevent irreparable injury. There can be no question but that the risk of physical injury or death as a result of unsafe construction and operation constitutes irreparable harm. For example, the Commonwealth Court in *Woods at Wayne Homeowners Ass'n v. Gambone Bros. Constr. Co.* upheld the trial court’s issuance of a mandatory preliminary injunction requiring the stabilization of a retaining wall that was at risk of collapsing and damaging adjacent townhouses and injuring their occupants. 893 A.2d 196 (Pa. Cmwlth. 2006). The Court held that “[t]he injunction was needed to prevent irreparable injury, such as death, not compensable in money damages.” The Commission indeed has already found that harm of this type is irreparable in its ruling on the Bureau of Investigation and Enforcement’s Petition for Issuance of an Ex Parte Emergency Order. *See* March 7, 2018 Emergency Order, Docket No. P-2018-3000281.

In this case, the construction of the Mariner East 2 pipelines has already led to a grave risk of rupture of the Mariner East 1 pipelines with which the Commission is familiar. Besides that, as detailed above, it has led to loss of water supplies, flooding, and evacuation. Tr. 97: 10-18. Contamination of water supplies such as what has already happened due to the Mariner East 2 construction endangers public health. *See* Tr. 89: 19-20, 358: 14-20. Illness short of death is still irreparable injury.

Environmental injury due to continued spills of drilling fluids and discharges of sediment

⁴⁹ Notice of Probable Violation and Proposed Civil Penalty dated April 6, 2017, available at https://primis.phmsa.dot.gov/comm/reports/enforce/documents/420175011/420175011_NOPV%20PCO_04062017_text.pdf

⁵⁰*Id.*

into waters is irreparable as well. *See, e.g., Commonwealth v. Kennedy*, 87 A. 605, 606 (Pa. 1913) (pollution of a stream constitutes irreparable harm warranting an injunction); 35 Pa. Stat. Ann. § 6018.102 (“The Legislature hereby determines, declares and finds that ... improper and inadequate solid waste practices create public health hazards, environmental pollution, and economic loss, and cause irreparable harm to the public health, safety and welfare”).

The nature of the threatened harm is irreparable: it cannot be compensated by money damages, and indeed cannot be adequately compensated for at all.

D. The relief requested is not injurious to the public interest.

Injunctive relief is crucial to protecting the public interest. Here, relief is being sought specifically on behalf of the public, to ensure that public utility service is provided only to the extent that it is “proper for the safety, accommodation, and convenience of the public.” 66 Pa. C.S. § 1505(a). The public needs protection from much that Sunoco threatens: sinkholes; water contamination; destruction of or damage to private property; degradation of public natural resources; explosion and loss of health or life; and more. The relief sought is unambiguously for the public interest.

Sunoco’s approach has been to muddy the waters by putting on evidence intended to show injury to itself and others. For example, Sunoco claims it would sustain financial injury. Injury to Sunoco, a foreign, for-profit corporation, does not constitute injury to the public interest.

Furthermore, any financial harm to Sunoco should be considered in light of the fact that Sunoco has created this situation by making a deliberate choice to prioritize expediency and cost savings over public safety and environmental compliance. Courts have recognized that oil and gas companies are on notice that their agency-granted permissions can be revoked or suspended through court challenges, and should take precautions to protect their interests at their own expense. *See, e.g., Harrison v. Cabot Oil & Gas Corp.*, 110 A.3d 178, 186 (Pa. 2015) (recognizing “that oil-and-

gas-producing companies are free to proceed according to their own devices to negotiate express tolling provisions for inclusion in their lease” and, therefore, can protect their investments without help from the courts).

Sunoco has also put on evidence intending to show harm to the workers building Mariner East 2. There is no question that when a pipeline builder builds its project in a hazardous manner, that will affect the workers doing the construction. The testimony establishes, however, that compensation to construction workers continues during some delays. Tr. 502:20-25. Pipeline projects are necessarily of limited duration and then the workers move on to other work. Tr. 498:12-14. If Mariner East 2 does not ultimately start up, the Marcus Hook terminal can receive natural gas liquids by rail or truck. Tr. 506:17-22. Jobs would then increase in those industries. Sunoco merely speculates that any hypothetical decrease in the amount of work due to pipeline construction would not be more than compensated by an increase in longer-term jobs transporting natural gas liquids by rail or truck.

Sunoco’s malfeasance has been damaging the public’s perception of pipeline projects. Tr. 221:18-23. If this makes it harder for other pipeline companies to build their projects, that means less work on pipeline construction for the unions who do that work. Tr. 501:1-4.

Moreover, while it may be Sunoco’s position that the Commission should value moving ahead on its project over public safety, that is not the opinion of the union representative that Sunoco called; he made clear that lives should never be put in danger over jobs. Tr. 511: 5-6.

The evidence shows that issuing the requested relief is in the public interest, and Sunoco has not met its burden to show a countervailing public interest that will suffer substantial harm.

IV. Conclusion

For the foregoing reasons, and as argued in the Post-Hearing Memorandum of Senator Dinniman, the Senator’s Amended Petition for Interim Emergency Relief should be granted.

Respectfully,

A handwritten signature in black ink, appearing to read "Joseph Minott". The signature is fluid and cursive, with a prominent initial "J" and a long horizontal stroke at the end.

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May 16, 2018

CERTIFICATE OF SERVICE

I hereby certify that this day I have served a copy of forgoing upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54 (relating to service by a party).

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