

Center City

September 1, 2020

Electronic Filing

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, Second Floor
Harrisburg, PA 17120

Re: Flynn, et al. v. Sunoco Pipeline L.P.,
Docket Nos. C-2018-3006116, P-2018-3006117
DiBernardino, Docket No. C-2018-3005025 (consolidated)
Britton, Docket No. C-2019-3006898 (consolidated)
Obenski, Docket No. C-2019-3006905 (consolidated)
Andover, Docket No. C-2018-3003605

**Flynn Complainants' Response in Opposition to Sunoco's Motion
in Limine with Respect to the Testimony of Rosemary Fuller**

Dear Secretary Chiavetta:

Attached for electronic filing with the Commission is the Flynn Complainants' Response in Opposition to Sunoco's Motion in Limine with Respect to the Testimony of Rosemary Fuller.

If you have any questions regarding this filing, please contact the undersigned.

Very truly yours,

MICHAEL S. BOMSTEIN, ESQ.

MSB:mik

cc: Per Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

MEGHAN FLYNN	:	
ROSEMARY FULLER	:	
MICHAEL WALSH	:	
NANCY HARKINS	:	
GERALD MCMULLEN	:	DOCKET NO. C-2018-3006116
CAROLINE HUGHES and	:	DOCKET NO. P-2018-3006117
MELISSA HAINES	:	DOCKET NO. C-2018-3005025
<i>Complainants,</i>	:	DOCKET NO. C-2019-3006898
v.	:	DOCKET NO. C-2019-3006905
	:	DOCKET NO. C-2018-3003605
	:	
SUNOCO PIPELINE L.P.,	:	
<i>Respondent.</i>	:	

**FLYNN COMPLAINANTS' RESPONSE IN OPPOSITION
TO SUNOCO'S MOTION IN LIMINE WITH RESPECT
TO THE TESTIMONY OF ROSEMARY FULLER**

Flynn Complainants, by their attorney, Michael S. Bomstein, having been served with Sunoco's Motion in Limine with Respect to the Testimony of Rosemary Fuller, and desiring to respond thereto, hereby answer as follows:

I. INTRODUCTION

1. Admitted.

2. Admitted.

3. Denied as stated. There was no time to conclude all live testimony within the time allotted for the hearing. Mrs. Fuller was unable to attend the November proceedings and, as a consequence, the parties agreed that Mrs. Fuller could instead submit prewritten testimony and sponsor certain exhibits.

4. Admitted.

5. Denied as stated. Admitted only that Mrs. Fuller does not have scientific or technical expertise relative to the matters at issue in this proceeding.

6. Admitted.

7. Denied. The fact that Mr. King is an expert does not make his testimony unimpeachable by a non-expert.

8. Denied as stated. Sunoco's objection was overruled and discovery was permitted. Impacts to the Fuller family's water supply caused by Sunoco's improvident and illegal drilling are certainly within the scope of the Second Amended Complaint. It most certainly is a matter implicating public health and safety.

9. Denied as stated. Flynn Complainants do not agree that, when discussing contamination of one's water supply it is immaterial to focus on contaminants. Further, Sunoco agent Larry Gremminger made false statements in writing concerning the bentonite being used in drilling, the falsity of which does not need expertise to prove. The fact that crystalline silica is a known human carcinogen is fact. Cigarettes can cause lung cancer and expertise is no longer required to prove it. The warning is on the packet, just as the health warnings are on the Cetco Super Gel-X Safety Data Sheets. Inhalation from crystalline silica can occur in the vapor from showers. See, also, the following websites:

<https://www.osha.gov/Publications/osha3176.html#:~:text=Crystalline%20silica%20has%20been%20classified,be%20disabling%2C%20or%20even%20fatal.&text=In%20addition%2C%20smoking%20causes%20lung,caused%20by%20breathing%20silica%20dust.>

<https://nj.gov/health/eoh/rtkweb/documents/fs/1660.pdf>

<https://www.cancer.gov/about-cancer/causes-prevention/risk/substances/crystalline-silica>

Showering Dangers: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2874882/>

Sunoco's ROW agents previously concealed from the Fullers the reason that workers were wearing PPE, stating that they did not know. Anyone living within a few feet of yards of HDD sites should have been warned about the potential dangers of inhaling the dust. They were not. The public was put at risk and exposed to the dangers while workers were protected. This is scandalous and is again a matter of public safety.

10. Denied as stated. This averment is vague and does not specifically identify any particular objectionable testimony.

II. LEGAL STANDARDS

11 – 26. Admitted

III. ARGUMENT

A. Sunoco's preclusion argument is overbroad.

27. Denied as stated. While Mrs. Fuller may not provide expert testimony in those areas, she is certainly free to offer competent non-expert testimony as to the health effects of Sunoco's drilling on her water supply and on her family. Before and after testimony of a lay witness is admissible and the doctrine of *res ipsa loquiter* may apply as well.

28. Admitted.

29. Denied as stated. See ¶ 27 above.

30. Admitted.

31. Denied. See ¶ 27 above. Further, Sunoco has overgeneralized and not identified any particular assertion by Mrs. Fuller that is objectionable.

32. Admitted.

33. Admitted.

34. Admitted.

35. Denied as stated. This, once again, is an overgeneralization and does not furnish any basis for any conclusion whatsoever.

36. Denied. See ¶ 27 above. Further, Sunoco has overgeneralized and not identified any particular assertion by Mrs. Fuller that is objectionable.

37. Denied. The document explains precisely what is meant by “major” and it takes no expertise to understand the point.

38. Denied as stated. Admitted that Mrs. Fuller’s wording appears open to interpretation. The report states, clearly, however, that "major concentrations" denote the parameter amounts of the phases as a percentage of the dried solids samples. The significance of a major concentration, however, would be a matter of expertise.

39. Denied as stated. Mrs. Fuller has detailed personal knowledge of when water samples were taken and how they were taken.

40. Denied as stated. Publicly available information has been relied upon by Mrs. Fuller in her testimony on this point.

41. Denied as stated. In the original permit applications, the fracture trace analysis clearly indicates a fracture trace line from the HDD to the Fuller property. See letter from Larry Gremminger, Geotechnical Evaluation Leader, Mariner II Pipeline Project to John Hohenstein of the DEP, dated May 21, 2018, Attachment 3, HDD profiles with Well Locations, Water Levels, and Fracture Trace Lines. This is a public document that may be found at http://files.dep.state.pa.us/ProgramIntegration/PA%20Pipeline%20Portal/MarinerEastII/HDD_Reevaluation_Reports/Sunoco_Response/Sunoco%27s%20Response%20to%20DEP%20-%205-21-18%20-%20Valley%20Road%20Crossing.pdf Now, Sunoco’s witness Mr. King is declaring this information as incorrect. It does not take an expert to recognize the contradiction here.

However Sunoco excuses its excesses, there have been at least half a dozen “subsidence” events in Middletown and even more in Exton related to Sunoco activities. There have been three inadvertent returns on Valley Road alone – October 4, 2019, November 2, 2019 and June 20, 2019. Since the filing of Mrs. Fuller’s surrebuttal testimony, more sinkholes have been created by Sunoco activities in Exton and on August 10, 2020 Sunoco caused 10,000 gallons of industrial waste to spill into Marsh Creek. The negative impacts of these events have been experienced by the Fuller family and information on them is relevant to this case.

42. Denied as stated. Denied that Mrs. Fuller is not at liberty to call to Your Honor’s attention various statutes and regulations. Several of Sunoco’s witnesses have testified at length in their rebuttal testimony as to what the law requires. Mr. Zurcher is an obvious example.

43. Denied as stated. The *Browne* case says “that the question of whether a party has violated an ordinance is a question of law, and thus, legal opinion testimony is not admissible. (footnote omitted). A witness may testify as to the action he or she took with regard to an ordinance, in order to develop a factual basis to assist the court or jury in determining whether an ordinance applies and whether a party complied with the terms of the ordinance, but the witness may not ordinarily testify as to whether he believes a party's actions constitute a violation of the ordinance.” 843 A. 2d at 433-34. Neither Mrs. Fuller nor a hired lawyer will be the basis for the ALJ’s legal conclusions. That does not, however, preclude Mrs. Fuller or one of Sunoco’s experts from discussing how the law may apply to this case.

44. Denied as stated. For the third time herein, Sunoco has overgeneralized and not identified any particular assertion by Mrs. Fuller that is objectionable.

B. Fuller has not sought to introduce an impermissible issue into the case.

45. Admitted.

46. Denied as stated. Denied that the harmful effects of Sunoco's drilling activities is a new issue in this case.

47. Denied as stated. Publicly available information that is beyond dispute may be the basis for lay testimony. ¶ 9 above is hereby incorporated by reference thereto.

48. Denied as stated. Denied the testimony is irrelevant. See ¶ 47 above.

49. Denied as stated. Sunoco may cross-examine Mrs. Fuller on these points if it wishes to do so. The route to the HDD site located at St. Simon and Jude Church and School is Route 352. It is a route the Fuller family often drives to get to West Chester. The two nearest towns to the Fuller are Media and West Chester. Mrs. Fuller has noticed the pallets and taken pictures on her cell phone. Michel's lists on its website that the 3 carcinogenic brands of bentonite mix they use - Max Gel TM, Cetco's Super Gel-X and Bara-Kade (<https://puc.sd.gov/commission/dockets/HydrocarbonPipeline/2014/HP14-002/contingency.pdf>). The HDD nearest to the Fuller home is set to begin HDD for the ME2, 20-inch pipe. Mrs. Fuller received a letter from Sunoco stating this. She, therefore, believes that one of these three brands listed that will be used by Michels and that is seriously concerning. No one has ever warned the Fuller family about this.

50. Denied as stated. The toxicity of these materials used is not "alleged". It is clearly marked on the Safety Data Sheets of the products:

1. Max Gel TM

- http://files.dep.state.pa.us/OilGas/BOGM/BOGMPortalFiles/IndustryResources/InformationalResources/HDD_Safety_Data_Sheets/M-I_MAX%20GEL_MSDS.PDF

2. Cetco Super Gel-X - https://www.mineralstech.com/docs/default-source/performance-materials-documents/cetco/drilling-products/sds/sds---us/sds-us---super-gel-x.pdf?sfvrsn=25cc0ad3_16

3. Bara-Kade

- http://files.dep.state.pa.us/OilGas/BOGM/BOGMPortalFiles/IndustryResources/InformationalResources/HDD_Safety_Data_Sheets/BENTONITE%20Performance%20Minerals_BARAKADE_SDS.pdf

Toxicity of these products is a public safety matter as well as the failure of Sunoco to make the public aware of the danger of contact either through inhalation, absorption or contact with these products. The proximity of HDD sites to people's homes, wells and recreational areas where inhalation is possible has placed the public in immediate and life-threatening danger.

51 – 55. Denied as stated. Admitted that the general description of Your Honor's previous rulings is accurate. Denied that these averments are in any respects relevant. The thrust of these averments is that Complainants have been bad prior to this juncture and therefore the instant motion should be granted. Complainants submit that the instant motion must be decided solely on its own merits.

56. Denied. For all the reasons set forth above, Flynn Complainants deny this averment.

57. Denied. For all the reasons set forth above, Flynn Complainants deny that Mrs. Fuller's testimony should be excluded.

58. Denied. Sunoco's experts already have given their best efforts to eviscerate Mrs. Fuller's testimony and already have submitted rejoinder outlines. Sunoco is now seeking to skirt the applicable pre-trial order without filing an appropriate motion, once again suggesting its consistent position that what is sauce for the goose is not sauce for the gander.

59. Denied. Sunoco has submitted its rejoinder outlines and the pre-trial order should govern testimony of its experts at the time of the hearing.

IV. CONCLUSION

WHEREFORE, Flynn Complainants pray Your Honor deny Sunoco's Motion in Limine.

Respectfully submitted,

/s/ Michael S. Bomstein

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Dated: September 1, 2020

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of Flynn Complainants' foregoing Response upon the persons listed below as per the requirements of § 1.54 (relating to service by a party).

See attached service list.

/s/ Michael S. Bomstein
Michael S. Bomstein, Esq.

Dated: September 1, 2020

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