January 19, 2021

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

Via PUC Electronic Filing

RE: *Flynn et. al. v. Sunoco Pipeline L.P., C-2018-3006116*

Dear Secretary Chiavetta,

Please find the attached reply brief from Andover Homeowners' Association, Inc. in the above referenced matter filed with the Commission today. The Association has separately served Her Honor, Administrative Law Judge Elizabeth Barnes, with a copy of the brief in PDF and Word formats.

Please let me know if you have any questions. Thank you.

Sincerely,

/s/ Rich Raiders

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BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

Meghan Flynn, Rosemary Fuller, Michael Walsh, Nancy Harkins,	:	P-2018-3006117
Gerald McMullen, Caroline Hughes, and Melissa Haines	:	C-2018-3006116
	:	
Andover Homeowners' Association, Inc.	:	C-2018-3003605
	:	
Melissa DiBernardino	:	C-2018-3005025
	:	
Rebecca Britton	:	C-2019-3006898
	:	
Laura Obenski	:	C-2019-3006905
	:	
v.	:	
	:	
Sunoco Pipeline, L.P.	:	

REPLY BRIEF OF ANDOVER HOMEOWERS' ASSOCIATION INC.

TABLE OF CONTENTS

Table of Authorities 2
Introduction 4
Proposed Supplemental Findings of Fact 5
Summary of the Argument 5
Argument 7
I. Nothing in AP RP 1162 Supersedes or Replaces the Requirements Set Forth in the Plain Language of Section 195.440 7
II. Sunoco Never Established that Its Public Awareness Plan Meets Applicable Regulatory Requirements 18
III. Sunoco's Public Outreach Does Not Work 22
IV. The Public Has Repeatedly Testified That It Cannot Credibly Implement the Implausible Sunoco-Provided Public Awareness Program Guidance 25
V. Sunoco Must Incorporate Consequences of a Release into Its Public Awareness Program, Even if the Alleged Risk of Such a Release May Not Be Seen by the Operator As Significant 28
VI. The Commission Has the Authority and the Nondiscretionary Responsibility to Obtain Compliance with 49 C.F.R. Part 195, Including Section 195.440(d) 31
Proposed Supplemental Conclusions of Law 32
Conclusion 35
Certificate of Service 39

TABLE OF AUTHORITIES

Cases:

Appalachian Power Co. v. Envtl. Prot. Agency, 208 F.3d 1015 (D.C. Cir. 2000)………. 13

Baker v. Sunoco Pipeline L.P., PUC Docket C-2018-3004294 ………………………………. 14, 15, 18

Brennan Ctr. For Justice at New York U. Sch. Of Law v. U.S. Dep't. of Justice, 697 F.3d 184 (2d Cir. 2012)…… 16

Del. Riverkeeper Network v. Sunoco Pipeline L.P., 179 A.3d 670 (Pa. Cmwlth. 2018). 29

In the Matter of Sunoco Pipeline L.P., a subsidiary of Energy Transfer, L.P., Pipeline and Hazardous Materials Safety Comm'n, Docket CFP 1-2019-5086, Pipeline Haz. Mat. Safety Comm'n (Jun. 2020)……………………………………………………………………………………. 18

In re Martin, 143 A.3d 1000 (Pa. Cmwlth. 2006) (*en banc*); *alloc. denied*, 164 A.3d 485 (Pa. 2016)……………………………………………………………………………………………………….. 30

Interim House, Inc. v. Phila. Zoning Bd. of Adjustment, 36 Pa. Cmwlth. 54, 387 A.2d 511 (Pa. Cmwlth. 1978)……………………………………………………………………………………………. 9

Nat'l Council of La Raza v. Dep't of Justice, 411 F.3d 350 (2d Cir. 2005)………………… 16, 17

Nat'l Res. Def. Council v. Envtl. Prot. Agency, 643 F.3d 311 (D.C. Cir. 2011)…………. 16, 17

Sierra Club v. Envtl. Prot. Agency, 479 F.ed 875, 884 (D.C. Cir. 2007)……………………. 13

Timmons v. P F Enterprises, 14-cv-3359-JNE/BRT (D. Minn. Nov. 10, 2016)……………. 13

Statutes:

5 U.S.C. § 552………………………………………………………………………………………………. 16
49 U.S.C. § 60101…………………………………………………………………………………………. 10, 32
49 U.S.C. § 60116…………………………………………………………………………………………. passim
1 Pa. C.S. § 1903…………………………………………………………………………………………. 8
66 Pa. C.S. § 501…………………………………………………………………………………………. 31
66 Pa. C.S. § 701…………………………………………………………………………………………. 14
66 Pa. C.S. § 702…………………………………………………………………………………………. 14
66 Pa. C.S. § 1501………………………………………………………………………………………. passim
66 Pa. C.S. § 1505………………………………………………………………………………………. 32

Regulations:

1 C.F.R. § 51.1………………………………………………………………………………………….. 16
49 C.F.R. § 195.3………………………………………………………………………………………… 7, 9, 17
49 C.F.R. § 195.440……………………………………………………………………………………… passim
52 Pa. Code § 59.33……………………………………………………………………………………… passim

Documents Incorporated by Reference:

Public Awareness Programs for Pipeline Operators, Am. Pet. Inst., Recommended Practice 1162 (Dec. 2003)………………………………………………………………………………………….. passim

Rulemaking Documents:

Promoting the Rule of Law Through Improved Agency Guidance Documents, Tenn. Valley Auth., 85 Fed. Reg. 60063 (Sep. 24, 2020)…………………………………………………………………… 13

Promoting the Rule of Law Through Improved Agency Guidance Documents, Executive Order 13891, 84 Fed. Reg. 55235 (Oct. 9, 2019)……………………………………………………….. 13

Other Authorities:

Code of Federal Regulations: Incorporation by Reference, National Archives, https://www.archives.gov/federal-register/cfr/ibr-locations.html#why ……………… 16

Black’s Law Dictionary, https://thelawdictionary.org/safety/................................ 8

Merriam-Webster Dictionary, www.merriam-webster.com/dictionary/safety........ 8

<u>INTRODUCTION</u>

Complainant/Intervenor, Andover Homeowners' Association, Inc. ("Association") files this reply brief in the above-captioned consolidated docket. The Association incorporates by reference the brief of the Flynn complainants as if recited in its entirety herein.

The Association respectfully requests that the Pennsylvania Public Utility Commission ("PUC") address a very specific legal question of seeming first impression: Can a public utility comply with its regulatory obligation to provide a public awareness program by publishing instructions for the public that are in their face not credible, implausible, and that cannot be carried out by most or all of the public within harm's way? The Association argues that the claims made by Sunoco Pipeline L.P. ("Sunoco") about compliance with 49 C.F.R. § 195.440 and related authority are merely illusory, not credible, and that its guidance to the public cannot be implemented as required to protect public safety, and prohibit Sunoco from operating Mariner East pipeline service transporting hazardous, highly volatile liquids ("HVL") including ethane, propane, butane and mixtures of these materials in Delaware and Chester Counties, Pennsylvania.

The Association asks the Commission <u>to rule on this question</u> to permanently enjoin Sunoco from Mariner East HVL service because there is no way for Sunoco to correct the public awareness plan in a manner that provides information to the public that can protect the public in an event of a pipeline release. Sunoco cannot hide behind claimed compliance with an incorporated-by-reference document produced by an industry lobbying organization to overcome the fact that its so-called public awareness program <u>is inadequate from the standpoint of the applicable regulations themselves</u>. The Association believes, and therefore

avers, that the Commission has both the authority and the nondiscretionary responsibility to obtain regulatory compliance, including through a halt to Sunoco's current and proposed transport of HVLs in recklessly unsafe proximity to Andover residences and other places where Association members work, shop, recreate, and send their children to school.

PROPOSED SUPPLEMENTAL FINDINGS OF FACT

The Association adopts and incorporates by reference all Proposed Findings of Fact offered by the Flynn Complainants.

SUMMARY OF THE ARGUMENT

In the main briefs of the Flynn Complainants, the Association and aligned parties ("Complainants"), the Complainants make a prima facie case that Sunoco has failed to comply with its obligations to operate its Mariner East highly volatile hazardous liquids pipeline system in compliance with applicable law. In Sunoco's main brief, it admits that it has not attempted to fully comply with the public awareness program requirements in 49 C.F.R. § 195.440 and 52 Pa. Code § 59.33, or the statutory requirements providing the Commission its authority under these regulations. Sunoco admits that it is not concerned with the consequences of a potential release. Sunoco admits that it only evaluates those release scenarios it wants to analyze, to the detriment of the community stakeholders who, in futility, attempt to rely upon Sunoco's failed public awareness program to plan for their own safety.

Sunoco attempts to argue frivolous points of law in support of its inadequate public awareness plan. Sunoco tries to argue that, somehow, PHMSA guidance is relevant to its compliance efforts. Sunoco attempts to argue that documents incorporated by reference in a federal rulemaking are somehow not equal to applicable regulatory law. Sunoco wants the

Commission to believe that meeting inadequate industry standards somehow allows an operator to comply with the public awareness program requirements without taking into account the massive harm that may come of a victim of a Mariner East release.

Sunoco refuses to acknowledge that several publicly published impact radii studies, including one from its own Canadian affiliate, dictate an impact radius of over 2,800 feet, not the 600 feet or 1,000 feet that had previously been indicated. Sunoco attempts to rely on Facebook and advertising to extend the reach of its public awareness program but showed the Commission no evidence that the public cares.

Sunoco does not show that the public respects its public awareness program because the public has shown, over and over again, that it does not. The public did not evacuate after the Middletown or Boot Road incidents. The roster of complainants and intervenors objecting to Sunoco's programs, simply by joining this proceeding, shows the Commission that the public rejects Sunoco's inadequate public awareness program. The briefs of the Flynn Complainants, Chester County, Twin Valley/West Chester Area School Districts, Middletown Township and others speak for themselves in rejecting Sunoco's public awareness program. However, Sunoco attempts to convince the Commission that all of the 1.2 million residents of Delaware and Chester Counties must object or the objection is irrelevant. In doing so, Sunoco ignores that the Commission has no class action process, and only individuals and entities can complain to the Commission.

Sunoco's Mariner East public awareness program cannot be made adequate for the public safety of the Association, its neighbors, guests, invitees or anyone else within 2,800 feet of the Mariner East system in Delaware and Chester Counties. A public awareness program

that tells the effected public that they die and that local residents are their own first responders does not constitute, and will never constitute, compliance with 49 C.F.R. § 195.440. The Association asks the Commission to take head-on the questions of first impression that drive this action: can Sunoco provide for the public safety concerning Mariner East as currently planned or operating?

ARGUMENT

Sunoco cannot operate the Mariner East System in Delaware and Chester Counties in HVL service in compliance with its regulatory obligations. Sunoco's utter inability to meet its general and specific statutory and regulatory obligations precludes any further operation of this pipeline in HVL service. The Commission should immediately and permanently enjoin Sunoco from any further Mariner East HVL service within Delaware and Chester Counties.

I. NOTHING IN API RP 1162 SUPERSEDES OR REPLACES THE REQUIREMENTS SET FORTH IN PLAIN LANGUAGE IN SECTION 195.440.

In its direct brief, Sunoco failed to demonstrate that its alleged compliance with Recommended Practice 1162, published by the American Petroleum Institute (RP 1162)[1], as incorporated by reference at 49 C.F.R. 195.3, is sufficient for the operator to meet its obligations to alert the public to "the steps to be taken for the public safety in the event of a pipeline release". 49 U.S.C. § 60116(a). Nothing in RP 1162 excuses Sunoco from compliance with statutory authorities and the regulatory requirements set forth in 49 C.F.R. § 195.440.

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[1] *Public Awareness Programs for Pipeline Operators*, Am. Pet. Inst., Recommended Practice 1162 (Dec. 2003), https://mycommittees.api.org/standards/pipeline/1162%20Links/1162nonprintable.pdf last visited January 17, 2021.

a. Sunoco Has Failed to Identify Plausible Steps That Should Be Taken for Public Safety in the Event of a Pipeline Release of Hazardous, Highly Volatile Liquids. Sunoco is required to "educate the public" about "steps that should be taken for the public safety in the event of a hazardous liquid . . . pipeline release". 49 C.F.R. § 195.440(d)(4).

The Commission must define the word safety "safety" as used in the foregoing regulation for the purposes of determining whether Sunoco has met its regulatory obligation. The Association suggests that this is a case of first impression, as the neither the statutes nor the regulations (Federal and Commonwealth) define "safety". The Association was unable to find applicable case law that would guide the Commission. However, Pennsylvania rules of statutory construction provide that undefined words and phrases "shall be construed according to rules of grammar and according to their common and approved usage." 1 Pa. C.S. § 1903. Turning to an authoritative source for the "common and approved" usage of this word, Black's Law Dictionary defines "safety" as "the freedom from injury, harm, danger or loss to personal property whether deliberate or accidental." Black's Law Dictionary, https://thelawdictionary.org/safety/, last visited January 14, 2021. Merriam-Webster defines "safety" virtually identically: "the condition of being safe from undergoing or causing hurt, injury, or loss." Merriam-Webster Dictionary, www.merriam-webster.com/dictionary/safety, last visited January 5, 2021. Section 195.440(d) therefore requires Sunoco to inform the public in harm's way of the steps it should take in order to be free from harm, danger, or loss in the event of continued HVL leaks from its pipelines. Sunoco cannot meet this obligation by telling the public that it should, in the event of a leak, teleport itself to Cleveland, because that would be absurd. But the actual instruction offered by Sunoco to the public (that it should, if it

"suspects a leak," "leave the area on foot immediately," is no less absurd and no more practicable. The expert and lay testimony in this case leaves undisputed the fact that most or all of the population in harm's way is incapable of carrying out this instruction even under the best of conditions, let alone at night or during inclement weather. A regulated entity cannot meet a prescriptive regulatory requirement to provide instructions by offering instructions that are absurd, nonsensical, implausible, and that cannot be carried out by the very people for whom they are intended.

As a threshold question the Commission must define "safety" as used in section 195.440; the Association suggests that the plain meaning of the word, as in the dictionary definitions listed above must guide the Commission in this analysis. *Interim House, Inc. v. Phila. Zoning Bd. of Adjustment*, 36 Pa. Cmwlth. 54, 66, 387 A.2d 511, 516 (Pa. Cmwlth. 1978). The dictionary definition best comports with the statutory mandate and the legislative intent that a pipeline operator must inform the public what to do to <u>ensure its safety</u> in the event of any release, not just a release that the operator believes may occur under some risk analysis not of record before the Commission.

If the Commission were to allow Sunoco to continue to operate any part of Mariner East in HVL service, the Commission must acknowledge that Sunoco's public awareness plan is the functional equivalent of telling the public to teleport to Cleveland if a pipeline incident occurs. That farcical comparison becomes realistic given that Sunoco believes that it may take a risk-based approach to ignore the consequences of its pipeline actions upon the public.

b. <u>RP 1162 Is Only a Starting Point for a Compliant Public Awareness Program</u>. Sunoco fails to argue that RP 1162 Section 6.2 does not require that a pipeline operator must

not build upon the boilerplate public awareness plan to incorporate local circumstances and adapt to local needs. 49 C.F.R. § 195.3(b)(8) Section 6.2. "The minimum safety standards for all natural gas and hazardous liquid public utilities in the Commonwealth shall be those issued under the pipeline safety laws at 49 U.S.C.A. 60101-60503 and as implemented at 49 CFR Parts 191-193, 195 and 199, including all subsequent amendments thereto." 52 Pa. Code § 59.33(b).

The Commission's regulations clearly require that Sunoco must do more than the bare minimum and must in fact address all local circumstances in preparing any public awareness program. The net result of this analysis, as fully explained below, is that Section 6.2 of RP 1162 requires that an operator extend their programs to meet local circumstances. Thus, an operator may not hide behind RP 1162 as an excuse for failing to offer a public awareness program that complies with the plain language of section 195.440.

c. <u>Commission Regulations Require Sunoco To Protect the Public in the Event of a Release</u>. Beyond the federal requirements to protect the public, the Commission has also required public utility companies to protect the public. "Each public utility shall at all times use every reasonable effort to properly warn and protect the public from danger, and shall exercise reasonable care to reduce the hazards to which employees, customers, and others may be subjected to by reason of its equipment and facilities." 52 Pa. Code § 59.33(a). For the same reasons as outlined above and throughout this brief, Sunoco has utterly failed to provide any useful information to warn the impacted public of the hazards it has imposed upon residents, employees, school children and staff, visitors, and others within the impact zone of a potential Mariner East release. In no way does the Commission's regulation provide any relief from Sunoco's obligations to credibly address public safety.

d. Expert Witnesses are not Required to Recite Conclusions of Law. Sunoco states in its direct brief that because no complaint-aligned parties must have an expert witness conclude that Sunoco failed to comply with section 195.440. Sunoco Brief at *65. Sunoco tellingly provides no authority to support this wild idea that expert witnesses are to write conclusions of law. While expert witnesses are expected to discuss items and issue opinions within their areas of expertise, no expert witness in this matter was admitted as a legal expert. Sunoco did offer witnesses that opined that, in their opinions, Sunoco's obviously inadequate plan checks the boxes printed in RP 1162 and section 195.440. However, these witnesses do not practice law and are not competent to offer anything other than a personal opinion. The Commission is free to apply whatever weight it would like to these legal conclusions, which should be, in the Association's opinion, none.

Compliance with regulatory requirements is a question of law which every party briefing this issue has had the opportunity to address in their proposed conclusions of law. The complainants and aligned intervenors built the elements of Sunoco's failure to comply with law. Just because the case was constructed to show that Sunoco cannot possibly address valid public safety issues arising from pipeline releases, does not impute or require that an expert witness make such a recitation. We as parties brief these issues and propose conclusions of law to address legal questions. The Commission should reject this invitation to require expert witnesses to practice law before the Commission.

Further, the arguments against Sunoco's position, at a basic level, come down to simple common sense. As fully explained below, Sunoco can't simply ignore pipeline releases for which it does not want to plan because the planning might require Sunoco to admit that the

consequences of such a release might actually approximate Mr. Marx's estimates as described in the Association's direct brief. Upon an admission that a release, for instance, at the valve site on Association property, would likely burn or kill hundreds of residents, workers, visitors, and neighbors within and beyond the Association community, that the public would demand that Sunoco find another way to transport HVLs out of Western Pennsylvania.

e. Sunoco Cannot Use Part 440 to Circumvent Section 1501's Requirement to Provide Safe Service. Sunoco claims that its alleged compliance with Part 440 and RP 1162 satisfies all of its compliance obligations. Sunoco Brief at *65. However, Sunoco fails to cite to any authority to show that it can exclusively rely on Part 440 and RP 1162 to demonstrate full compliance with its statutory obligations. Nowhere did Sunoco identify any authority that demonstrated that it does not have a separate duty to provide safe service under the Commission's authorizing statute. 66 Pa. C.S. § 1501. Nor did Sunoco attempt to argue that its alleged compliance with Part 195 and RP 1162 (to the extent that RP 1162 may or may not conflict with Part 195, as argued below) fully meets the statutory public safety authority under Section 60116. Sunoco fails to make these arguments because there is no such authority. The Association suggests that this is a case of first impression in that the Commission must now rule if an inadequate and functionally useless public awareness plan meets the requirements of Part 440, Section 1501 and Section 60116. The Association, as fully described in its direct brief, argues that Sunoco's efforts fall far short of the mark, and cannot be repaired by technical amendments to its public awareness plan.

f. Sunoco Cannot Hide Behind PHMSA Guidance to Demonstrate Compliance. Sunoco attempts to cite to PHMSA web pages as proof that its public awareness program

complies with all applicable requirements. Sunoco Brief at *66. However, Sunoco did not demonstrate that PHMSA incorporated this guidance by reference and rely upon that guidance as law.

Governmental agencies must apply the law "as written by Congress and interpreted by interpreted by [the DC Circuit Court of Appeals]". *Sierra Club v. Envtl. Prot. Agency*, 479 F.ed 875, 884 (D.C. Cir. 2007). An agency "may not escape . . . notice and comment requirements by labeling a major substantive legal addition to a rule a mere interpretation." *Appalachian Power Co. v. Envtl. Prot. Agency*, 208 F.3d 1015, 1024-25 (D.C. Cir. 2000). An agency cannot issue a statement declaring that guidance is an actually a regulatory requirement. *Nat'l Res. Def. Council v. Envtl. Prot. Agency*, 643 F.3d 311, 321 (D.C. Cir. 2011). Some federal agencies have resorted to proposing rules that disclaim that guidance has the force of law. *Role of Supervisory Guidance*, Dep't of the Treasury, Fed. Reserve System, Fed. Deposit Ins. Corp., Natl. Credit Union Adm., Bureau of Consumer Prot., 85 Fed. Reg. 70512, 70514/2 (Nov. 5, 2020); *see also*, *Promoting the Rule of Law Through Improved Agency Guidance Documents,* Tenn. Valley Auth., 85 Fed. Reg. 60063, 60066/3 (promulgating 18 C.F.R. 1301.71(a)(1) (Sep. 24, 2020) (guidance has no force of law); *Promoting the Rule of Law Through Improved Agency Guidance Documents*, Executive Order 13891, 84 Fed. Reg. 55235 (Oct. 9, 2019) ("Agencies may clarify existing obligations through non-binding guidance documents"). Guidance document "means an agency statement of general applicability, intended to have future effect on the behavior of regulated parties, that sets forth a policy on a statutory, regulatory, or technical issue, or an interpretation of a statute or regulation, but does not include" rules, regulations or adjudications. *Id.* at Sec. 2(b).

Sunoco cannot rely on guidance to support its compliance with anything relating to Part 195. Guidance is not law. Even if the agency were to have been found to used the guidance as a basis for law, Sunoco was required to show that anything it used from a PHMSA webpage has the force of law before citing to it. It utterly failed to meet its burden to rely upon the web site for any reason other than simple guidance. As the website has no force of law, compliance with anything on the website is irrelevant to Sunoco's defense of its public awareness plan.

g. Sunoco Cannot Justify Why All 1.2 Million Residents of Delaware and Chester Counties Must Disapprove of Sunoco's Obviously Inadequate Public Awareness Plan. Sunoco attempts to argue that the dozens of complainants, intervenors and witnesses who testified and/or argued that the Sunoco public awareness plan is inadequate or useless must get concurrence from the entirety of the population of Delaware and Chester Counties. Sunoco Brief at *68. However, there is no authority in the Commission's regulations that allows for class actions. *See*, 66 Pa. C.S. §§ 701, 702 (only discrete individuals or entities may file complaints, service required upon each party). Further, the Association notes that both counties, several municipalities and several school districts have intervened in this matter, and most of those governmental entities have briefed this matter. Sunoco cites no authority to justify why the entirety of these populations must object to their inadequate public awareness plan because no such authority exists. In support of Sunoco's position, it claims that the Complainants had some duty to show that the entire populations of Delaware and Chester Counties disapproved of Sunoco's inadequate plan. Sunoco Brief at *68. Sunoco cites to no authority to show that any such showing is required, because no such authority exists. The Commission held in Baker that one complainant can show that Sunoco's compliance with Part

195 is inadequate. *See*, *Baker v. Sunoco Pipeline L.P.*, Docket C-2018-3004294, Opinion and Order, Sep. 17, 2020, document 1678249 at *1-2. Further, the Commission found that Mr. Baker alone was able to show that certain elements of Sunoco's public awareness plan were inadequate. *Id.* at *27-28 (Sunoco must exceed 49 CFR § 195.440 concerning public meetings under the Commission's authority at 66 Pa. C.S. § 1501 with regard to public outreach when such additional steps are found to be necessary to protect the public). The Commission should reject Sunoco's invitation to hold that there is a threshold of people complaining about Sunoco's inadequate public awareness program required before the Commission can find Sunoco cannot formulate a complaint public awareness plan.

h. Sunoco Fails to Show that RP 1162 is the Exclusive Means to Comply with Public Awareness Plan Requirements. As the Association suggested in its direct brief, Sunoco attempts to hide behind baseline RP 1162 compliance as a fully developed public awareness program. Sunoco Direct Brief at *78. However, Sunoco's argument must fail strictly by a quick review of the underlying statutory authority. While the Association fully briefed the question of 49 U.S.C. § 60116(a) and the requirement to address public safety issues in the event of any pipeline release in its main brief, the Association here emphasizes that there is simply no risk-based shortcut in the statute. Sunoco attempts to rely on a risk-based argument to hide behind a MERO exercise that fails to address pipeline releases which Sunoco knows could occur, and which ignores its obligation to directly inform the public of credibly possible "steps to take for the public safety. Sunoco Main Brief at *78. However, the plain language of the statute prohibits such an evaluation. Sunoco is required to inform the public of what it must do "for safety" . . . "in the event of a pipeline release." 49 U.S.C. § 60116(a). Nowhere in the case law

or any authority the Association was able to find has any tribunal held that a pipeline operator only is required to make the public aware of how to manage public safety for events that the pipeline operator thinks may occur. The statute requires that the operator address every possible release, not just the releases which the operator wants to analyze.

i. Sunoco Falsely Claims that Published Regulations May Preempt RP 1162. Sunoco utterly fails to understand administrative law in its incomprehensible claim that Part 195 may preempt compliance with RP 1162 in the event of a conflict. Sunoco Brief at *81-82. Sunoco offers no support for this frivolous claim because no such authority exists. "[M]atter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register". 1 C.F.R. § 51.1(a); quoting, 5 U.S.C. § 552(a). An agency requesting the Office of Federal Register incorporate a document by reference as a regulation must seek approval before Federal Register publication. 1 C.F.R. § 51.5(b).

"Incorporation by reference is used primarily to make privately developed technical standards Federally enforceable." Code of Federal Regulations: Incorporation by Reference, National Archives, https://www.archives.gov/federal-register/cfr/ibr-locations.html#why (last accessed December 28, 2020). An agency that takes affirmative steps to rely upon a document outside the Federal Register sometimes adopts the outside document as law. *Brennan Ctr. For Justice at New York U. Sch. Of Law v. U.S. Dep't. of Justice*, 697 F.3d 184, 198 (2d Cir. 2012); *citing*, *Nat'l Council of La Raza v. Dep't of Justice*, 411 F.3d 350, 356 (2d Cir. 2005). In a matter reviewing the applicability of the Administrative Procedures Act ("APA") to matter incorporated by reference by the Department of Justice, the *La Raza* trial court reviewed documents which

the federal government relied upon concerning if disclosure of documents associated with final adoption were shielded from public disclosure by Exemption 5 of the APA. *Id.* at 196. The *La Raza* court held that, because the government relied upon the document for application of law, it has the force of law. *Id.* at 197.

Sunoco admits that PHMSA incorporated RP 1162 by reference. 49 C.F.R. § 195.3(b)(8); Sunoco Main Brief at *81-82. No language anywhere in Part 195 discusses any conflict between Part 440 and RP 1162. Because there is no preemption doctrine that guides conflicts between parts of the Code of Federal Regulations, a judicial or quasi-judicial tribunal must evaluate, and decide, how any conflicts among the law must be addressed. The Commission is such a forum, and to the Association's knowledge, has never addressed this conflict. The only litigation reference to RP 1162 found by the Association briefly mentions that RP 1162 was incorporated by reference and is the basis of federal law governing natural gas distribution pipeline systems. *Timmons v. P F Enterprises*, 14-cv-3359-JNE/BRT (D. Minn. Nov. 10, 2016). The *Timmons* court, addressing a removal action, did not address the merits of if RP 1162 was preempted by Part 192 (which would likely strongly persuade a finder of fact concerning the applicability of such concepts to Part 195). Due to the lack of authority on the question, the Association suggests that the Commission not give any credit to Sunoco's unfounded suggestion that Part 440 somehow would preempt RP 1162 in the event of any conflict.

Further, there is no justification for any opinion that RP 1162 may preempt Section 440, the underlying statutory authority, the common law, or any other authority which Sunoco may attempt to cite. All regulations, including Part 195, RP 1162 and Commission regulations, must be read as equal but subservient to the underlying statutory authority. Any other reading is

simply not lawful. The statute requires that the operator address every release, not just some releases which the operator wants to analyze. If Sunoco believes that there is a conflict between RP 1162 and 49 C.F.R. § 195.440, Sunoco should raise the issue with the Commission or PHMSA to resolve the conflict, as there is no authority that directs otherwise.

II. SUNOCO NEVER ESTABLISHED THAT ITS PUBLIC AWARENESS PLAN MEETS APPLICABLE REGULATORY REQUIREMENTS.

a. The Mailings Are Inadequate. Sunoco attempts to rely on its inadequate mailings to support its claims of Part 440 compliance. Sunoco Main Brief at *69-70. The main briefs of various plaintiff-aligned parties, including Flynn and others, clearly show that Sunoco failed to address hazards and consequences of potential Mariner East releases. The Commission and PHMSA have already partially addressed flaws with the mailers, though the issues about hazards and consequences are left for this proceeding. *See*, *In the Matter of Sunoco Pipeline L.P., a subsidiary of Energy Transfer, L.P.*, Pipeline and Hazardous Materials Safety Comm'n, Docket CFP 1-2019-5086, Final Order, Jun. 26, 2020, https://primis.phmsa.dot.gov/Comm/Reports/enforce/documents/120195006/120195006_Final%20Order_06262020.pdf, last visited January 14, 2021 at*3-5; *In the Matter of Sunoco Pipeline L.P., a subsidiary of Energy Transfer, L.P.*, Pipeline and Hazardous Materials Safety Comm'n, Docket CFP 1-2019-5086, Proposed Order, May 17, 2019 at *4-7, *Baker*, Document 1678249 at *11-12.

b. In Two Prior Adjudications, Sunoco was Found to Have Not Adequately Managed its Mailing Programs. Below, the Association argues that Sunoco, even though it may have sent mailers to more people than before, has missed most of the people who should have been

included in the public awareness program. While various regulators increased Sunoco's coverage area a bit, no agency has seemingly reviewed Sunoco's admitted 700-meter impact radius described below. These half-steps show that Sunoco is not serious about public safety, even in the small step of telling people in the publicly known impact radius published by Sunoco's Canadian affiliate for these materials. As Sunoco can't even get a simple mailer correct, the Association suggests that Sunoco isn't capable of making the extensive modifications to its public awareness program to achieve compliance, even if compliance were possible.

c. Other Outreach Suffers the Same Flaws Exhibited in Mailers. Sunoco claims that it has put content into the internet, using various platforms, that extends its public awareness program. Sunoco Main Brief at *70-71. However, Sunoco never addresses that this content, just like the mailers, is inadequate and non-actionable. This repeat of the same lacking content does not save Sunoco's claims about its Section 440 program.

d. Sunoco Has Not Shown That Its Marketing Campaign Reaches the Appropriate Audience. Sunoco claims that it engages in wider marketing of its inadequate public awareness program. Sunoco Main Brief at *71. However, Sunoco failed to establish in the record that this content either reaches any required audience or that the content of this outreach cures Sunoco's inadequate Part 440 program. Therefore, the Commission should find that this "outreach" is insufficient to cure all of the defects in the Part 440 program, and nothing in these outreach efforts can cure Sunoco's public awareness plan problems.

e. Sunoco Cannot Leave Governmental Entities High and Dry with Respect to Local Governmental Entities' Required Safety Plans. Sunoco has an obligation, or the Commission

should impose upon Sunoco an obligation, to ensure that third parties which have a responsibility to develop independent safety and emergency response plans to have full and accurate information to use to develop realistic and competent safety programs. Sunoco correctly points out that municipal governments and school districts must develop their own safety programs. Sunoco Direct Brief at *66. Sunoco also claims that it has provided a "wealth" of information to governmental actors. *Id.* However, the "information" provided to these actors is wholly inadequate and fails to comply with applicable requirements.

The Association refers the Commission to the briefs submitted by or on behalf of the several municipal, school district and public official intervenors in this matter for more information. Specifically, the Association adopts as its own the main brief arguments of Chester County and the consolidated Twin Valley and West Chester Area School District briefs concerning these governmental entities' frustrations with Sunoco's blatantly inadequate public awareness program. Sunoco fails to address or appreciate the fact that all of these intervenors disagreed with Sunoco's contention that it has complied with Part 440 with relation to governmental actors that they intervened in this complaint. Had the recipients of this information agreed with Sunoco, logic dictates that none or very few of these intervenors would have participated in this litigation. However, these governmental actors, including the municipality that embraces the Association's property, Thornbury Township, Delaware County, have joined this action seeking more information or more action by Sunoco. Rather than agree to assist these actors in helping their plans by providing more and better data, Sunoco fights every step of the process and hides behind technical "compliance" with RP 1162 and Section

440. The Commission should reject Sunoco's invitation to hide behind their restrained version of the requirements to provide full information.

f. <u>What Individual Governmental Officials Say or Know About a Pipeline Is Irrelevant</u>. The question of what individual governmental actors know or believe about Sunoco's inadequate Part 440 plan just does not matter. Sunoco points out that a East Goshen representative has "sufficient" information. Sunoco Main Brief at *67-68. Sunoco also notes that the Delaware County Emergency Response Director "appreciate[s] Energy Transfer's commitment" to safety. Sunoco Main Brief at *67. A Chester County representative has noted that he now knows "more than I ever imagined" about Mariner East. Sunoco Main Brief at *67. However, none of these statements are at all relevant to Sunoco's obligations to provide full and complete information about the death and injury that would occur in the event of a significant release event on any part of the Mariner East system in Delaware and Chester Counties.

Mr. Miller's superiors at East Goshen Township disagree with Mr. Miller, otherwise they would have not intervened in this matter. Mr. Hubbard's county LEPC Director testified in this proceeding that Sunoco's program is wholly inadequate. Mr. Boyce testified in this proceeding that there is literally nothing Sunoco can do to protect the public safety of his Delaware County constituents. Therefore, Sunoco's claims about specific individual's claims or discussions is utterly irrelevant towards Sunoco's inability to provide useful and actionable public awareness information to the public.

III. SUNOCO'S PUBLIC OUTREACH DOES NOT WORK.

a. Sunoco's School Outreach Did Not Impress Several School Districts or Parents of Students of School Students. The educational community also rejected Sunoco's public awareness program. The Commission can plainly see at least part of the scope of this rejection simply by reading the certificate of service showing the various school districts intervening in this matter. Further, the Flynn complainants addressed the issue of school related problems with the public awareness program in their brief. Pro se complainant, Rebecca Britton, is a school board director. Sunoco's claim that their public awareness program satisfies the local school districts cannot withstand the simple scrutiny provided by the districts, parents and the school board director who have briefed this matter. The Association refers the Commission to the briefs of the districts, the Flynn Complainants and Ms. Britton in support of its suggestion that the Delaware and Chester County education communities are not satisfied with Sunoco's public awareness program.

b. Sunoco's County Outreach Is Inadequate. Sunoco somehow believes that Delaware and Chester Counties are satisfied with the utterly inadequate public awareness program they have been offered. If so, the counties would have not intervened in this matter. The Association requests that the Commission rely upon the briefs and testimony of the counties in support of the Association's contention that the counties do not believe that Sunoco has offered a viable and useful public awareness program.

c. MERO Is Irrelevant to the Public Awareness Program Requirements of Section 195.440. Sunoco claims that its MERO program is of any use in Part 195 compliance, specifically with respect to public awareness. Sunoco Main Brief at *73-74. However, and tellingly,

Sunoco admits that it is not truthful in its logic: "[Y]ou cannot have an emergency response plan for each potential incident and each potentially-affected neighborhood." Sunoco Main Brief at *73. However, the underlying authority utterly rejects this pick-and-choose logic. The operator MUST provide for "what steps should be taken for the public safety in the event of a pipeline release." 49 U.S.C. 60116(a). And "[T]he operator's program must assess the unique attributes and characteristics" of the operator's system in providing for public safety. 49 C.F.R. 195.440(b). Local characteristics, by the plain language of section 195.440, must include the material being transported, the local land use, topography and local resources, and the nature and density of the population whose safety is placed at risk by the proposed operation.

Nowhere in the statute or regulations does Sunoco derive any authority to claim that a MERO program for first responders can substitute for the plausible public education program required by law. Sunoco admits that it fails to comply with law by limited MERO to scenarios that Sunoco wants to analyze to plan for. Sunoco admits in its main brief that it does not want to plan for "each potential incident" for which the statute and regulations require Sunoco to address in its public awareness program. Sunoco has no excuse for this utterly inadequate planning for what it may believe is a low probability scenario. This seeming risk-based approach is just unlawful.

Sunoco also did not dispute the fact that, in an accident involving a release of HVLs, the public becomes its own first responder. Boyce Direct at *19. Mr. Boyce explained that no outside first responder could possibly reach impacted "public in harm's way" before said public would be required to take action. *Id.* He further noted that "any such self-evacuation must be rapid to have any hope of success." *Id.* Sunoco fails to address the public as its own first

responder because, in the Association's opinion, there is no possible way to address the issue in the event of delayed ignition of a vapor cloud. For this reason, the Association suggests to the Commission that Sunoco has failed to comply with its obligation under 49 C.F.R. § 195.440.

Sunoco also fails to acknowledge that its' in-house MERO "evaluations" are of no moment in the Commission's evaluation if the MERO program provides for the public safety in the event of a pipeline release. Sunoco presents nothing to show that these evaluations of a program that admittedly does not consider certain pipeline releases consider the legal requirements of the public awareness program. Sunoco Main Brief at *74. Therefore, these alleged evaluations are meaningless in this evaluation of the public awareness program.

Ultimately, Sunoco cannot rely on the MERO program to demonstrate compliance with Part 440 or the underlying authority. Regardless of the Commission's other rulings, the Association requests that the Commission reject MERO because it fails to address pipeline release scenarios Sunoco knows could occur.

d. Other Sunoco Outreach Programs Also Fail to Show Compliance with Part 440. Sunoco also points to other inadequate programs to show compliance with its public awareness requirements. Sunoco alleges that the CORE training has anything to do with compliance with Section 440. Sunoco Main Brief at *74-75. However, nowhere does Sunoco show that anything in the CORE training address how to address the public safety in the event of a Mariner East as modeled by Quest or G2 described in the Marx or Boyce testimony, respectively. The Commission does not have an adequate record to address what, if anything, CORE includes that addresses how to address a rupture release.

Further, Sunoco cannot rely on gifts to first responders to show anything to do with Section 440. Sunoco claims that its purchasing equipment and training for some first responders somehow shows compliance with Part 440. Sunoco Main Brief at *75-76. However, Sunoco fails to show how any of this largesse to certain entities at all protects public safety if Sunoco were to deinventory one or more Mariner East pipeline segments during a release.

Sunoco also futilely tries to point to the PAPERS alleged audit of its public awareness program as proof that something is working about their Section 440 plan. Sunoco Main Brief at *77-78. Sunoco failed to put anything in the record to show that PAPERS addresses anything that supports a proper and actionable public awareness program. No party or intervenor testified that anyone associated with the plaintiff-aligned witnesses ever participated in this process. Sunoco never introduced anything to support exactly what PAPERS does or does not audit or how the audit, if it actually occurs, is conducted. Sunoco never addressed if this audit process evaluates how to provide for the public safety in the event of a rupture release. Because no such information is before the Commission on the record, the Commission should reject any claim by Sunoco that any industry audit of its Part 440 program means anything concerning this litigation.

IV. THE PUBLIC HAS REPEATEDLY TESTIFIED THAT IT CANNOT CREDIBLY IMPLEMENT THE IMPLAUSIBLE SUNOCO-PROVIDED PUBLIC AWARENESS PROGRAM GUIDANCE.

a. <u>The Commission Has No Idea How to Determine a "Safe Distance" From a Release</u>. Sunoco's experts seem to have offered a defense of their undefined "safe distance" from a release with what amounts to a "you will know it when you see it" defense. Sunoco

Main Brief at *78-79, NT-3308, 3391. This advice is utterly useless. The public has utterly rejected this vague and undocumented approach, where the record contains significant testimony that the public has no idea how to determine if a person is safe from the potential harms of an odorless, tasteless and possibly invisible vapor cloud. *See, e.g.*, Boyce Direct at *12-13. Sunoco cannot possibly address mobility issues with those with physical limitations, evacuation concerns in a variety of institutions (schools, nursing homes, etc.). *See, e.g.*, Boyce Direct at *17-18; Flynn Brief at 11-12. Sunoco has not addressed how those with constrained land use or topography can evacuate to any "safe distance" when such a "safe distance" may be over highways, through hills, woods or other obstacles, or other development. *Id.*. Sunoco further fails to evaluate if the potentially impacted populations have Therefore, Sunoco's advice to travel to a "safe distance" is utterly useless. The Association suggests that Sunoco will be unable to cure these defects, and should be enjoined from HVL service in Delaware and Chester Counties on Mariner East.

b. <u>The Commission Cannot Determine If and When Cell Phones Should Be Used to Report a Release</u>. Sunoco's public awareness program indicates that the public should not create an electrical spark, nor use a telephone until after reaching "a safe location" (the standardless determination of which Sunoco leaves to the supposedly fleeing-on-foot public). *See, e.g.*, Boyce Direct at *22. However, Sunoco's expert witnesses claim that a person involved in a HVL leak incident may or may not be able to use a cell phone. *See*, Flynn Direct Brief at *83. With this inconsistency, Sunoco admits that its public awareness plan has failed. Sunoco cannot agree on the status of cell phones with its own published materials. Sunoco is well aware that cell phones are not intrinsically safe; warning signs near its infrastructure

prohibit their use. As established immediately above, the public has no idea how to identify a "safe location" from which to use a cell phone. However, Sunoco wants the public to call for first responders after walking (somehow) to this undefined "safe location". Which will likely take more time than the public may have to avoid death or mortal harm from a large release. *See*, Boyce Direct at *17. Sunoco's advice about cell phones is useless and could be dangerous. The Association cannot imagine how Sunoco can provide valid advice to the public about potential cell phone use within the impact zone, and should not be credited with any valid evidentiary weight in any cell phone evaluation.

c. <u>The Commission Cannot Find that Sunoco can Properly Inform the Public if to Escape Upwind or Away from a Pipeline Incident</u>. Sunoco admits that its published guidance to travel upwind is not practically useful. *80. Sunoco's experts allege, with no support, that the public knows how to determine wind direction. *Id.* However, nothing in the record from anyone not a Sunoco expert shows that the public, in fact, can determine wind direction. *See, e.g.*, Boyce Direct at *22. Tellingly, the record does not include any information concerning if the public knows how to evaluate a weather report that indicates wind direction or not. Sunoco's assurance that the public knows which way the wind blows is hollow and an indication that the public awareness program has again failed.

d. <u>The Commission Must Reject Sunoco's Conflicting Shelter in Place Advice</u>. Sunoco's advice to the public is to evacuate to the undetermined "safe distance". However, Sunoco recommends to the Commission that shelter in place may be appropriate. However, Sunoco's advice is useless in the event of a rupture release. First, the public doesn't listen to the evacuation advice already being given by Sunoco. Second, shelter in place directly

contradicts Sunoco's published public awareness information instructing evacuation (with all the flaws in this advice discussed above). Third, a shelter in place order requires first responders to somehow instruct people inside the incident impact zone to receive this advice. Fourth, the public has not, to the Association's knowledge, been instructed how to properly shelter in place.

V. SUNOCO MUST INCORPORATE CONSESEQUENCES OF A RELEASE INTO ITS PUBLIC AWARENESS PROGRAM, EVEN IF THE ALLEGED RISK OF SUCH A RELEASE MAY NOT BE SEEN BY THE OPERATOR AS SIGNIFICANT.

a. Sunoco Must Inform the Public that a Release Can Result in Death or Significant Bodily Burns. Sunoco alleges that it has no duty to tell the public about the consequences of a potential release. Sunoco Brief at *81-82. Sunoco attempts to hide behind PHMSA not publishing unenforceable guidance or implementing regulations about reporting consequences to the public in a public awareness program to avoid this unpleasant discussion. Id. However, for Sunoco to successfully argue this point, Sunoco needed to, and failed to, argue that some authority somehow preempted the consequences discussions in the federal statute, Part 440, and RP 1162. Sunoco waived this argument by citing to no authority that it was exempt from any aspect of telling the public how to provide for the public safety after a pipeline release.

b. Sunoco Cannot Provide for the Public Safety by Ignoring Its Duty to Inform the Public of Consequences of a Release. Sunoco attempts to make a risk-based argument that it has no duty to inform the public of the consequences of a rupture release is utterly not based in any law. Sunoco Main Brief at *82-83. However, Sunoco must inform the public of how to protect themselves in the event of any pipeline release, not just the ones Sunoco wants to think

are more likely than others. 49 C.F.R. § 195.440(d)(2); 52 Pa. Code § 59.33(a). This risk-based exception just does not exist in the law. Basically, Sunoco's risk-based attempts to not address rupture releases is tantamount to telling those working, living or visiting within the at least 700-meter impact radius from a pipeline release that they will either luckily escape, get burned or die. There is literally no other conclusion that the Association can find. Risk has literally nothing to do with Part 440 or RP 1162, or the underlying statutory authority. Sunoco's public awareness plan, by ignoring these harms and preventing the public from understand that, in the event of a rupture release that there just is not enough time to do anything for public safety, fails to comply with applicable law. Any remedial efforts to bring the Sunoco public awareness plan into compliance is utterly futile. Sunoco does not even believe that the Association has any duty to evaluate where to install its pipelines. Sunoco Main Brief at *85-86.

However, the Commission has siting authority, even if it has, to date, failed to develop any rules to use its expansive siting authority. *Del. Riverkeeper Network v. Sunoco Pipeline L.P.*, 179 A.3d 670, 693 (Pa. Cmwlth. 2018). Sunoco attempts to hide behind the preceding Commission Order which overturned the Commission's position that the Commission did not, in fact, have siting authority. Sunoco Main Brief at *85-86. The Association assumes that Sunoco is aware of appellate action in which it participates, as it fully briefed the *Riverkeeper* appeal. Sunoco's argument that the Commission has no recourse as to the location of public utility service is at best disingenuous, especially as Sunoco was the defendant in the Commonwealth Court matter that established the Commission's siting authority. Sunoco cannot accept the Commonwealth Court declaring Mariner East service as public utility service and reject the

same court's holding that the Commission has siting authority. *See*, *Martin*, 143 A.3d 1000, 1006 (Pa. Cmwlth. 2017).

The Association does not believe that Sunoco will publicly admit that the thousands of people who live, work and visit inside of the 700-meter or more impact zone, many of whom have never received a Sunoco mailer at their home, would suffer mortal harm in the event of a rupture release. Sunoco has a recourse here, simply do not put a HVL pipeline in densely populated Delaware and Chester Counties. The Commission has recourse here, to cancel the Certificate of Public Convenience awarded for the Mariner East project by the Commonwealth Court in Delaware and Chester Counties. The Association asks the Commission to hold that this eventuality is too much of a risk for the public in Delaware and Chester Counties to be forced to accept.

c. <u>Sunoco Cannot Hide Behind Inadequate Industry Practices to Avoid Developing a Proper Public Awareness Program</u>. Sunoco attempts to justify its inadequate and implausible public awareness program by hiding behind its industry peers. Sunoco Main Brief at *82-83, NT-4233, 4239-42. Sunoco witness Zurcher claimed "We talk about the hazards, but not the consequences." Sunoco claimed that this inadequate program comports with industry practices. Sunoco Main Brief at *83. However, Sunoco offers no support for ignoring the black letter law to provide for the public safety in the event of a rupture release. See, 49 U.S.C. 60116(a); 49 C.F.R. 195.440(d)(4); 52 Pa. Code 59.33(a), 66 Pa. C.S. 1501(a). The Association requests that the Commission directly address that inadequate industry practices to ignore consequences of rupture releases, regardless of any Sunoco risk argument, violates Part 440

and a variety of other authority cited above. Industry practice is utterly irrelevant concerning Sunoco's noncompliance with Part 440 and the underlying statutory authority.

VI. THE COMMISSION HAS THE AUTHORITY AND THE NONDISCRETIONARY RESPONSIBILITY TO OBTAIN COMPLIANCE WITH 49 CFR PART 195, INCLUDING SECTION 195.440(d).

The Commission must compel Sunoco to comply with 49 C.F.R. § 195.440 and has the affirmative duty to seek full compliance in whatever form may be necessary. The Commission has the full authority to determine that compliance with the public awareness requirements may require that the Mariner East system just cannot be operated in Delaware and Chester Counties.

The general powers of the Commission are well known to this Court and are set forth in 66 Pa. C.S. § 501, which provides in pertinent part that:

> (a) **Enforcement of provisions of part.**--In addition to any powers expressly enumerated in this part, the commission shall have full power and authority, and it shall be its duty to enforce, execute and carry out, by its regulations, orders, or otherwise, all and singular, the provisions of this part, and the full intent thereof; and shall have the power to rescind or modify any such regulations or orders.
> (b) **Administrative authority and regulations.**--The commission shall have general administrative power and authority to supervise and regulate all public utilities doing business within this Commonwealth. . . .
> (c) **Compliance.**--Every public utility, its officers, agents, and employees, and every other person or corporation subject to the provisions of this part, affected by or subject to any regulations or orders of the commission or of any court, made, issued, or entered under the provisions of this part, shall observe, obey, and comply with such regulations or orders, and the terms and conditions thereof.

66 Pa. C.S. § 501(a) (underline added). The Commission may, upon notice and hearing, prescribe that a regulated entity must take actions ordered by the Commission to make a

regulated activity <u>safe</u> within the Commission's authority. See 66 Pa. C.S. § 1505(a). Further, pursuant to 52 Pa. Code § 59.33,

> "[t]he minimum safety standards for all natural gas and hazardous liquid public utilities in this Commonwealth shall be those issued under the pipeline safety laws as found in 49 U.S.C.A. §§ 60101-60503 <u>and as implemented at 49 CFR Parts 191-193, 195 and 199</u>, including all subsequent amendments thereto.

52 Pa. Code § 59.33(b)(underline added).

The Commission therefore has both the authority <u>and the duty</u> to obtain compliance by Sunoco with section 195.440(d), and to do so by either a) requiring Sunoco to provide a plausible, credible, non-illusory public awareness program, or b) directing Sunoco to immediately halt hazardous, highly volatile liquids operations on the Delaware and Chester County portions of the Mariner East system.

<u>PROPOSED SUPPLEMENTAL CONCLUSIONS OF LAW</u>

1. The Association adopts and incorporates by reference all Proposed Conclusions of Law offered by the Flynn Complainants, and supplements those below:

2. The Commission has the authority to require full compliance with its regulations, including public awareness regulations.

3. The Commission has the affirmative duty to require full compliance with its regulations, including public awareness regulations.

4. The Commission has authority to regulate public utilities under its own authority and the federal authority of 49 C.F.R. § 195 and 49 U.S.C. § 60101 et. seq. as adopted by the Commission.

5. Pipeline operators have the affirmative duty to provide for public safety in the event of a pipeline release.

6. The affirmative duty to provide for public safety may not be limited, constrained or restricted by a pipeline operator's risk assessments.

7. Risk is not an element of any operator's compliance obligations concerning 49 C.F.R. § 195.440, 52 Pa. Code § 59.33, 66 Pa. C.S. § 1501 or 49 U.S.C. § 60116.

8. Sunoco refused to address the consequences of a pipeline release in its public awareness program.

9. Sunoco's public awareness program fails as it refuses to address the fatality and injury consequences of pipeline releases from the Mariner East system.

10. Sunoco cannot provide for public safety for those within the impact radius of a pipeline release in a rupture scenario.

11. First responders will unlikely be able to assist those within the blast zone, where the public will not receive any assistance before suffering serious or fatal injuries.

12. In the event of a rupture release at the Andover valve site, the entire Andover neighborhood would likely suffer death or serious injury without the ability to evacuate.

13. No public awareness program can provide for the public safety of those who, in the event of a rupture release, would likely be left for dead.

14. Sunoco is unable to provide any actionable public awareness advice to those whom cannot be reasonably evacuate from a pipeline release.

15. Sunoco has not provided any actionable public awareness information to those within the impact radius who suffer from mobility restrictions.

16. Sunoco cannot provide any actionable public awareness information to those within the impact radius who suffer from mobility restrictions.

17. Sunoco has not provided credible public awareness information to the affected public it did notify by brochures concerning the use of cell phones, the response time of emergency responders, exclusion zones that may be set up by first responders, the utility of shelter-in-place instructions, wind direction, or how to leave the area when land development, terrain or other hazards restrict movement away from a hazard.

18. Sunoco cannot provide any actionable public awareness information to the anyone concerning what might constitute a "safe distance" from a pipeline release event.

19. Sunoco cannot provide any actionable public awareness information concerning evacuation, as the public's actions in at least two Sunoco releases in Delaware and Chester Counties in recent years demonstrates that the public will not evacuate from a release site.

20. Sunoco cannot provide any actionable public awareness information concerning wind direction, because the public does not, contrary to Sunoco's exert testimony, understand how to determine wind direction.

21. 49 C.F.R. § 195.440 does not preempt API RP 1162.

22. API RP 1162 does not preempt 49 C.F.R. § 195.440.

23. 49 C.F.R. § 195.440 and API RP 1162 are equally applicable federal regulations.

24. Agency guidance from the Pipeline and Hazardous Materials Safety Administration does not constitute regulatory authority and has no force of law.

25. 49 C.F.R. § 195.440 provides the minimum standards of public awareness programs.

26. Operators are required to exceed the minimum standards set by regulation when circumstances require additional measures.

27. The minimum impact radius for the Mariner East project is 700 meters or 2,296 feet from the pipeline.

28. Sunoco's public awareness program violates applicable law as it does not include all stakeholders within at least 2,296 feet in its notification program.

29. Under 66 Pa. C.S. § 1501, the Commission may enjoin public utility operations that are not safe and unreasonably burden the public.

30. The Mariner East pipeline system is not safe, cannot be made safe, and unreasonably burdens the public.

31. The Commission may, and must, enjoin operation of the Mariner East system in Delaware and Chester Counties, Pennsylvania until and unless Sunoco Pipeline L.P. can demonstrate that it is able to provide for the public safety in the event of a pipeline release.

CONCLUSION

Complainant and Intervenor, Andover Homeowners' Association, Inc., hereby requests that the Pennsylvania Public Utility Commission permanently enjoin Sunoco Pipeline L.P. from offering highly volatile liquid hydrocarbon transportation services on the Mariner East pipeline system within Delaware and Chester Counties. Sunoco has utterly failed to comply with 49 C.F.R. § 195.440 and related underlying authority. Sunoco's attempts to cobble together some semblance of a public awareness program upon which the community stakeholders can rely upon does not provide for the public safety of the public, including nearby residents, governments, institutions, or anyone visiting, working in, attending school in, or residing within

at least 700 meters of any part of the Mariner East pipeline system in Delaware and Chester Counties. Sunoco applies a strained definition of "safety" that ignores the worst-case scenario: a catastrophic release from a HVL pipeline causing a vapor cloud that ignites in a densely populated community along the Mariner East pipeline.

Sunoco admits that it does not plan for this potentially very real scenario, hiding behind a specious argument that such a release is just not likely enough to occur on their pipeline. However, the law does not allow the operator to hide behind this inadequate industry practice. Sunoco also tries to hide behind an excuse, with no basis in law, that the pipeline operator does not have to tell neighbors or other stakeholders about the consequences of a pipeline release. Finally, Sunoco alleges that its flawed logic can somehow transform bad advice, like if to shelter in place or not, if to use a cell phone or not, which way to evacuate after a release, should the school districts wait for 911 or take immediate action after a release, and can first responders beyond the victims of such a release even arrive on the scene in time to assist, into a credible public awareness plan that addresses the needs of the Delaware and Chester County communities. The Association believes that Sunoco is utterly unable to transform this cobbled together strategy into an actual, credible public awareness program. Sunoco fails to understand that third party documents incorporated by reference into federal regulations become federal regulations with equal applicability to the underlying regulation, that agency website guidance is not law, and that industry audits that do not involve community stakeholders are useless.

Thus, Sunoco cannot possibly comply with its regulatory and statutory public awareness plan requirements, cannot provide safe public utility service, and cannot possibly provide for

the public safety in the event of a pipeline release. The ongoing Mariner East service in Delaware and Chester Counties endangers the public in ways that Sunoco refuses to recognize because its continuing operation fully depends on Sunoco not recognizing the reality that Mariner East HVL service unacceptably endangers the public. Thus, the Association requests that the Commission permanently enjoin Sunoco from HVL service on Mariner East in Delaware and Chester Counties, and develop whatever documentary record which may be required to support the shutdown decision if the Commission allows Sunoco to try to repair their public awareness program.

The Association asks the Commission to address certain questions of seeming first impression presented in this matter. First, does the definition of “safety” for pipeline regulations, both in federal regulations and in Commission authority, mean every event that might occur, or only the events that the operator wants to address. Second, must a public awareness program for HVL pipeline service regulated by the Commission be credible and usable by the community, or can a non-credible and unusable program that ignores uncomfortable scenarios and consequences the community may not like suffice. Third, can a service declared a public utility by the courts operate HVL service in the face of not possibly being able to comply with public awareness and safe service requirements. The Association hopes the Commission will address each of these threshold questions, holding that public safety requirements must be strictly construed, in its upcoming process.

Respectfully Submitted,

Date: January 19, 2021

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<u>**CERTIFICATE OF SERVICE**</u>

I hereby certify that I have served the Brief of Andover Homeowners' Association, Inc. upon those listed on the attached service list.

Date: January 19, 2021 <u>/s/ Rich Raiders</u>

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