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May 16, 2018

Via Electronic Filing

Rosemary Chiavetta, Esquire
Secretary
PA Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

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

Dear Secretary Chiavetta:

Attached for filing is a Brief of Petitioner Senator Andrew E. Dinniman in Support of Amended Petition for Interim Emergency Relief to be filed in the above-referenced matter.

Thank you.

Very truly yours,

Mark L. Freed
For CURTIN & HEEFNER LLP

MLF:jmd
Enclosure
cc: The Honorable Elizabeth Barnes (via email: ebarnes@pa.gov)
Certificate of Service

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

PENNSYLVANIA STATE SENATOR ANDREW E. DINNIMAN,	:	
Petitioner,	:	
	:	Docket No.: C-2018-3001451
v.	:	Docket No.: P-2018-3001453
SUNOCO PIPELINE, L.P.,	:	
Respondent.	:	

BRIEF OF PETITIONER SENATOR ANDREW E. DINNIMAN
IN SUPPORT OF AMENDED PETITION FOR INTERIM EMERGENCY RELIEF

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I. INTRODUCTION

This matter is a study in contrasts: contrasts between what Sunoco claims it is doing to safeguard the public and what the evidence shows Sunoco is actually doing; contrast between what Sunoco says is occurring in the field and the actual reality on the ground. The construction of ME2/2X has been plagued with problems from the start. Among other things, there have been inadvertent returns or frac-outs, sinkholes and other depressions, and impacted and diminished water supplies. Sunoco has received more than 50 notices of violation from DEP. The construction of ME2/2X was suspended after DEP found that Sunoco demonstrated a "lack of ability or intention to comply" with the law, and the operation of ME1 was stopped to avoid a potentially "catastrophic" situation. Much of the problems are the result of the incompatible geology in West Whiteland Township. These problems are exacerbated by Sunoco's failure to plan for and react to the problems caused by this geology. The Commission must assure that Sunoco's construction and operation activities are reasonable, safe, adequate, sufficient and otherwise comply with its regulations. It must require that the construction of ME2 and ME2X, and the operation of ME1, be stopped, that Sunoco undertake a complete and comprehensive geophysical and geotechnical investigation of the pipeline route to determine the impact caused by past activities and the ability to determine if construction and operation of the pipeline can proceed, and that the pipelines otherwise be in compliance with the law. It must also assure that Senator Dinniman and his constituents have complete information regarding the risks from the pipelines and associated activities, and how to respond in the event of an emergency.

II. STATEMENT OF THE CASE

A. ME1, ME2, ME2X

Sunoco Pipeline, L.P. ("Sunoco") owns and operates a pipeline known as Mariner East 1 ("ME1"). (N.T. 59). Sunoco is a subsidiary of Energy Transfer Partners, L.P. *Id.* ME1 is an eight-inch (8") Natural Gas Liquids pipeline that currently operates in the west to east direction. (Petition of the Bureau of Investigation and Enforcement for the Issuance of An *Ex Parte* Emergency Order (hereinafter "BIE Petition" at 2). ME1 has been in operation since approximately 1931. (BIE Petition at 2; N.T. 60, 454). When first established, ME1 carried fuel oil or gas. (N.T. 60). In 2014, ME1 began carrying Hazardous Liquids *Id.* The direction of flow through the pipeline was also changed from westward to eastward. *Id.*

Sunoco has proposed to expand its existing pipeline systems. (Exs. SPLP-6 at 1-1; SPLP-7 at 1). The project involves the installation of two parallel lines within a 306.8-mile, 50-foot-wide right-of-way for the purpose of interconnecting with ME1. *Id.* A 20-inch diameter pipeline (hereinafter "Mariner East 2" or "ME2") and a 16-inch diameter pipeline (hereinafter "Mariner East 2X" or ME2X") would be installed within the right-of-way. *Id.* Much of ME2/ME2X will be collocated adjacent in the existing ME1 system. (Ex. SPLP-6 at 1-1). Construction of ME2/ME2X is generally taking place along the entire right-of-way for ME1 (N.T. 446). Sunoco's project manager for the project, Matthew Gordon, is not aware of any other situations where construction has occurred along the entire right of way of an existing pipeline. *Id.* While there are other pipelines in Chester County, none of the other pipelines propose to construct two adjoining pipelines next to an 87-year-old pipeline. (N.T. 158).

B. Senator Andy Dinniman

Petitioner, Andrew E. Dinniman has served as a Pennsylvania State Senator for the 19th Senatorial District for the past thirteen years. (N.T. 53). The 19th Senatorial District has a population of over 260,000 with a population density in excess of 500 people per square mile. (N.T. 53, 54). Senator Dinniman is a member of the Environmental and Energy Committee and the Agricultural Committee. (N.T. 56). He is also a member of the Joint Conservation Committee of the Legislature, which is involved in setting policy involving the environment, and is the Senate representative of the Bran Franklin Partnership. (N.T. 57).

Senator Dinniman represented the Senate Democratic Caucus on the Pennsylvania Pipeline Infrastructure Task Force. *Id.* There were also many industry representatives on the Task Force. (N.T. 59). The Task Force culminated in a report of collected recommendations from the various subcommittees. (N.T. 206). The recommendations of the Task Force were never signed. (N.T. 57, 140). Senator Dinniman said that his role on the Task Force was to continually remind the group "that they had to deal with this issue of safety, of public concern and, indeed, fear about pipelines . . ." (N.T. 57). The recommendation to collocate pipelines was made by the Siting and Routing Workgroup of the Task Force. (Ex. SPLP 16; N.T. 206). Senator Dinniman was not a member of this workgroup. (Ex. SPLP 16; N.T. 137; N.T. 206). There was very little discussion of this recommendation with the full Task Force. (N.T. 58).

As a Chester County Commissioner, Senator Dinniman served as a Commission's representative on the Conservation District Board. He was involved in the decision by the County to purchase a significant portion of land to protect and preserve the area water supplies. (N.T. 72). Senator Dinniman resides in West Whiteland Township, approximately two (2) miles from ME1 and the ME2/2X right-of-way. (N.T. 52).

Hundreds of area residents have come to Senator Dinniman about the pipelines (N.T. 63). Many bring bottles of their well water containing material that "almost looks like the kind of thing you'd find a in a toilet." (N.T. 89).

C. West Whiteland Township

The 19th Senatorial District includes West Whiteland Township, which has suburban areas and urban centers. (N.T. 70). When ME1 was built in the 1930s, West Whiteland Township was farmland and countryside. *Id.* The Township now has a population of over 18,000 people in 13 square miles and a density of more than 1,400 per square mile. (N.T. 54, 55). West Whiteland is one of the key commercial centers of Chester County. (N.T. 54). Part of the town of Exton, which sits at the crossroads of Route 100 and Route 30, is in West Whiteland Township. (N.T. 54). It has more places of public assembly than any other location in Chester County except West Chester. (N.T. 71).

The pipelines at issue in this petition come, or are proposed to come, into West Whiteland Township from the northwest, through the center of the commercial district, next to the largest mall in the County (Exton Mall), behind the County library, under Route 30 and Amtrak/SEPTA rail lines, and through highly concentrated residential areas that include apartment complexes. (N.T. 68-69, 70). The pipelines are also located near schools and senior care facilities. (N.T. 54, 55). The pipelines pass within 50 feet of residences (N.T. 70, 481) and within three feet of Sts. Peter and Paul Catholic School. (N.T. 69).

D. Hydrogeology

The valley in which West Whiteland Township is located is a basic source of water for the growing population. (N.T. 72). As a Chester County Commissioner, Senator Dinniman made the decision to purchase a significant part of the valley to, in part, protect the water resources in

the limestone area. (N.T. 73, 81). There are more than 700 private water wells in West Whiteland Township, approximately 200 of which are residential water supplies. (N.T. 71). There are also three (3) ground water withdrawals for public water supply wells along the route of the pipeline in West Whiteland Township (p. 71-72, 73). There is also a quarry with a water withdrawal in West Whiteland Township (N.T. 73). Because of the importance of water resources in Chester County, Senator Dinniman meets with the United States Geological Survey. (N.T. 75).

E. Geology

The geology of West Whiteland Township looks like a "Rorschach pattern". (N.T. 250). It contains rocks of very disparate type. *Id*. In the south of the Township is Octoraro phyllite, a clay based rock that has been metamorphosed. (N.T. 250). To the north is Conestoga limestone (calcium carbonate – a rock soluble under normal earth/water conditions) and Ledger dolomite (calcium manganese carbonate – a rock that is also soluble under normal conditions). (N.T. 250, 255-56). Limestone and dolomite "are two units that are certainly susceptible to karstification and to dissolution." (N.T. 251, 260). In karst areas, rock can dissolve and big channels, such as caves and sinkholes, can form. (N.T. 251). There are numerous sinkholes and depressions in and around West Whiteland Township (N.T. 253). The greatest predominance of sinkholes and depressions are in the area around the Exton Mall and the County Library (N.T. 75, 80). West Whiteland Township also contains numerous fault lines. (N.T. 252, 254). Faults are a type of fracture that allow the movement of water and the generation of voids. (N.T. 262).

Carbonate rock (e.g., limestone) touching non-carbonate rock (e.g. phyllite) tends to be a focus area for dissolution and karst development. (N.T. 257). Acidic runoff from phyllite is neutralized when it hits the limestone, and that neutralization reaction dissolves the rock. (N.T.

259). "[Y]ou would expect there to be significant karst development, and we see that in many places at the boundary between non-carbonate and carbonate units." *Id.*

Human activity is frequently a factor in the creation of collapsed sinkholes. (N.T. 263). Activities like groundwater pumping, removal of underground support, construction activities and excessive loading can destabilize the land surface and result in sink holes. (N.T. 263, 278). Sinkholes resulting from human activity may not occur right away. Activities might leave an arch that is temporarily stable and a collapse may not occur for weeks, months or a year later. (N.T. 264). The collapse could be triggered by something benign, like someone driving a tractor over an area, a drought or an intense rain storm. *Id.* Mixed infrastructure adds another layer of challenges in carbonate karst areas. *Id.* For example, a water line breaking in a karst region has the ability to create sinkholes. (N.T. 292).

Sunoco has a void mitigation plan to address activities in karst geology. However, the plan is designed to fix problems if they are inadvertently discovered. (N.T. 276). This "leaves a danger in karst areas because when you discover it, you may have already damaged the property . . . and it's not the best option to then just go back and fix it." (N.T. 276-77).[1]

Sinkholes "are scary things. They are hazardous things . . . There's property loss. There's people losing their lives . . . ." (N.T. 261).

F. Horizontal Directional Drilling

Sunoco uses horizontal directional drilling ("HDD") for the construction ME2/2X. The Pennsylvania Department of Environmental Protection ("DEP") has identified Sunoco's drilling in and around West Whiteland as "most concerning". (Ex. P-6, at 4). HDD makes use of

[1]Sunoco's safety expert, John Zurcher, agreed that the "level of safety and integrity management really depends on how well the company carries out its policies." (N.T. 554).

pressurized fluid. (N.T. 265). The introduction of fluids underground in a karst area can "absolutely" contribute to sinkholes. (N.T. 277). Most collapse sinkholes require the creation of a void. (N.T. 278). This requires the removal of loose material. *Id.* Water is a very effective agent for removing loose materials. *Id.* Introducing water in a karst area can also result in moving sediments into the water supply. (N.T. 280). Sediments in the water supply can also move bacteria into the water supply. (N.T. 280).

HDD can also result in inadvertent returns ("IR" or "frac-outs"). IRs occur when the pressure of the drilling fluid exceeds the overburden pressure and there is a leakage of drilling fluid onto the surface. (N.T. 269). This can occur in karst areas or in fractures. (N.T. 270, 271).

Drilling fluid consists of bentonite and other materials. Bentonite consists mostly of aluminum, calcium, sodium, silicone and oxygen. (N.T. 311). Bentonite is used in such things as cosmetics, personal care productions, and detergents. (N.T. 313). The bentonite can clog well water equipment. (N.T. 147). It can also reduce the flow of water in a well. (N.T. 279).

Drilling fluid may also contain Fuse-it (polyethylene glycol) and Magma Fiber (mineral fiber) and concrete (N.T. 312, 317). Polyethylene glycol is used in sunscreens and cosmetics. Mineral fiber is a glass fiber looks fiberglass or steel wool. (N.T. 314, 321).

Initially, when Sunoco used HDD it is required to give notice to homeowners with water supplies located within 150 feet of the pipeline. (N.T. 85, 86). In the entire 350 miles of the pipeline, Sunoco identified only 22 private wells. (N.T. 86). Only three of those wells were in Chester County. (N.T. 86). There are more than 700 private water wells in West Whiteland Township, approximately 200 of which are residential water supplies. (N.T. 71). In and around Shoen Road alone, 14 wells were impacted from Sunoco's activities. (N.T. 87).

Sunoco intends to continue using HDD in areas containing fractures or faults. (N.T. 699).

G. Flex Bore

Sunoco originally proposed the use of HDD along Swedesford Road (N.T. 413). After Aqua raised a concern that HDD could negatively impact its water source, Sunoco proposed to change the method of construction from HDD to flex bore along Swedesford Road. (N.T. 414, 473, 666). Flex bore can use fluid. (N.T. 229, 474, 694). The specific method boring (i.e. trenchless construction) Sunoco will use is not set out in its void mitigation plan. (N.T. 474).

H. Open Trench

Open trench or open cut does not remove all the concerns associated with karst geology. (N.T. 267). There is still the potential of cutting into soil-filled voids, which has the potential for developing a collapse. (N.T. 267). Having the open trench can result in the loss of stability. In addition, rain on an open trench or hitting groundwater can result in sediment mobilization. (N.T. 268). "Any time you're mucking around in limestone like this, you have a potential for creating problems." (N.T. 288).

I. Shoen Road

Virginia Marcille-Kerslake resides on Shoen Road in West Whiteland Township (N.T. 335). ME1 is 250 feet from her house. *Id.* There is an HDD drill site across the road from her house. *Id.* This drilling crosses a fault known as the Ketch Fault (N.T. 657). Drilling at the site commenced on June 15, 2017. On the evening of June 22, Ms. Kerslake observed lots of water flooding out of the drill hole at the drill site. (N.T. 336, 337). Sunoco brought in trucks and a generator to pump the water into the trucks. (N.T. 337). Ms. Kerslake was told to expect the generator to be running "24/7". In fact, the generator did run twenty-four hours a day, waking Ms. Kerslake and her family at night. (N.T. 338). Ms. Kerslake asked Sunoco's land agent how long they could expect the pumping to continue. *Id.* He responded that "they had no idea". *Id.*

Despite the flowing water, Sunoco continued to drill at the site. (N.T. 337). Sunoco drilled at the site until July 5, 2017, at which time Sunoco grouted the hole (N.T. 339-340). Sunoco then resumed drilling for a few more days. (N.T. 340).

On July 20, 2018, Ms. Kerslake observed that two springs had emerged on her property. (N.T. 342, 658). The springs were in line with the route of ME1. (N.T. 346). To prevent the water from flowing into the street, Sunoco dug a trench across the front of Ms. Kerslake's property and put straw bales on the grass between the springs and the road. (N.T. 343). The water from these springs continues to flow on Ms. Kerslake's property to this day. *Id.* A parking pad across from Ms. Kerslake property has also been saturated since July of 2017 (N.T. 347).

Ms. Kerslake attempted to resolve the water issue on her property with Sunoco's land agent, without avail. (N.T. 344). Only after a joint meeting with Ms. Kerslake, the Township and Sunoco, did Sunoco begin to work on a plan to resolve the issues on her property. *Id.* Sunoco agreed to pay for the design and installation of a swale or drain and landscaping to divert the water from her property. *Id.* To date, neither the swale nor landscaping has been completed *Id.* Since November or December 2017, Ms. Kerslake has not received information from Sunoco regarding the status of the work, except a letter stating that "work could start at any time". (N.T. 344-45).

Prior to the drilling, Ms. Kerslake was never advised that water might be popping-up on her land. (N.T. 359). They were told that

> the drilling would take place, would be underground, but the drill would be located behind apartments that are across the road from us, and that we wouldn't see it at all, we wouldn't hear it, we wouldn't even know they were there, and the drilling would last for two to three weeks. In April of 2017, they came and they cleared several trees from directly across the road form my home and my neighbor's and turned this wooded lot into open space, we have a clear view of the parking lot and the apartment building . . . we learned that instead

> of two to three weeks of drilling, we were facing 350 days of drilling, and that would be Monday through Saturday, 7:00 a.m. to 7:00 p.m., and it could be stretched over a three-year period.

(N.T. 369).

Ms. Kerslake and her family are worried about their safety. (N.T. 358). Ms. Kerslake has been advised by Sunoco that they don't know what will happen at her property when it begins drilling again. (N.T. 346). A representative of DEP has advised Ms. Kerslake that when drilling resumes, DEP believes the first place water will emerge will be on her property. (N.T. 346).

The only testing at or near Ms. Kerslake's property that she is aware of is hydrostatic testing on ME1 in the spring of 2014. (N.T. 357). Sunoco found an anomaly and had to do a repair on ME1. *Id.*

North of Shoen Road is a neighborhood known as Marchwood, which as a number of private drinking water wells (N.T. 340). From July 6, 2017 through July 10, 2017, DEP received 14 water supply complaints from homeowners at and around Shoen Road. Homeowners complained of, *inter alia*, cloudy water, turbid water, discolored water, loss of water pressure, and diminution of water. (Ex. P-7, at 3).[2] One resident in Meadowbrook, David Mano, had his drinking water analyzed and found that bentonite was in it. (N.T. 149, 150).

[2]These facts rely, in part, on a Consent Order and Agreement entered into between DEP and Sunoco. During the hearing in this matter, Sunoco argued that the Consent Order and Agreement could not be relied upon by Senator Dinniman because of a provision in the agreement that states "[t]he parties do not authorize any other person to use the findings in the Consent Order and Agreement in any matter or proceeding." (Ex. P-7, at 7). Such a provision does not preclude Senator Dinniman's use of the Consent Order and Agreement in this matter. In *City of Chester v. Pennsylvania*, 773 A.2d 1280 (Pa. Cmwlth. 2001), the Commonwealth Court found that a "consent decree cannot in any way bind anyone not a party to that agreement. None of the parties to the proceeding underlying this appeal were a party to the proceeding involving the consent decree, and by deferring to the consent decree, the PUC is violating the due process rights of those who were not a party to that settlement." In *Mary E. Collier v. Commonwealth*, 2012 WL 2950743 (Pa. Env. Hrg. Bd. 2012), the Pennsylvania Environmental Hearing Board interpreted the very language relied upon by Sunoco in DEP's consent order and agreement and found that "a non-

Five families were required to leave their homes. (N.T. 97). DEP determined that Sunoco's drilling activities in and around Shoen Road adversely impacted the well water of at least 14 homeowners. (Ex. P-7, at 5). DEP also determined that Sunoco failed to immediately notify the DEP of adverse impacts to private water supplies in the Shoen Road area as required by its permit. *Id.*

Prior to construction, Shoen Road and Devon Drive section had been classified in Sunoco's void mitigation plan as low risk. (N.T. 227).

J. Lisa Drive

Lisa Drive is located along a fissure of carbonate geology (Conestoga limestone) and non-carbonate geology (Octoraro phyllite) (N.T. 76). On November 11, 2017, DEP received notice of an IR from "a third party", not Sunoco, near 479 Lisa Drive in West Whiteland Township. (Ex. P-15). Sunoco did not notify DEP of the IR (N.T. 105). On or about November 16, 2017, DEP issued an NOV for this IR. *Id.* In the NOV, DEP stated:

a. The discharge of drilling solution appears to have caused ground subsidence and the potential to pollute the groundwater, a water of the Commonwealth. Drilling

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party to a contract cannot be bound by the terms of the contract unless the non-party agrees to its terms. [*Citing City of Chester; other citation omitted*] Here, the Colliers are the third-party beneficiaries of the COA but were not a party to the agreement. Therefore, they cannot be bound by the terms of the COA." The Superior Court reached the same conclusion in *Montgomery v. R. Oil & Gas Enterprises*, 2017 WL 1048113 (Pa. Super March 17, 2017). However, *Montgomery* was an unreported decision therefore non-precedential under Superior Court I.O.P. 65.37. The Commission has also previously relied on NOVs issued by DEP. *See, e.g., Pennsylvania Public Utility Commission v. Deer Haven, LLC d/b/a Deer Haven Sewer Company*, 2011 WL 2530243 (Pa. PUC May 19, 2011); *Application of Aqua Pennsylvania Wastewater, Inc.*, 2017 WL 3116400 (Pa. PUC July 12, 2017); *Sheryl R. DeVaul v. Clarendon Water Company* 2007 WL 2325579 (September 17, 2007 Pa. PUC).

solution is an "industrial waste" under Section 301 of the Clean Streams Law, 35 P.S. § 691.301.

b. There is a history of incidents with this Drill. First, on August 18, 2017, Sunoco contacted DEP and stated that, due to several losses of circulation, the original pilot hole was going to be abandoned and grouted in and a new pilot hole was going to be drilled. Next, on August 24, 2017, Sunoco reported a loss of circulation at the site. Third, on September 21, 2017, DEP received a complaint about a potential "void" under the SEPTA lines in the area of HDD 400. The complainant reported that they had spoken to workers walking the Right-of-Way. The Department performed a field investigation on September 27, 2017. Sunoco was reminded, once again, of the requirement to immediately notify the Department of losses of circulation. Sunoco was also advised to contact Amtrak about the possibility of voids under their tracks and to keep the Department apprised of any ongoing coordination with Amtrak. To 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 an explicit Department request for such information. Additionally, on October 5, 2017, Sunoco reported a release of drilling solution in uplands. Finally, on November 11, 2017, as indicated above, a second inadvertent return (IR) occurred from the Drill.

c. The Department has no record of receiving the required "immediate" notification from Sunoco after the November 11, 2017 IR.

d. "Sunoco has, to date, failed to provide the required initial IR report for the November 11, 2017, IR to the Department."

(Ex. P-15; N.T. 104). The sinkhole referenced in the NOV was just south of railroad tracks used by Amtrak (identified in the BIE's Petition as "Sinkhole No. 1"). (BIE Petition, at 2). The size of the sinkhole was approximately 8 feet wide and 3 feet deep. *Id.*

On or about March 1, 2018, while Sunoco was undertaking the "pull-back" of the pipe, Sunoco workers noticed another sinkhole measuring 8 feet wide and 15 feet deep about 300 feet

from Amtrak's facilities (identified in the BIE's Petition for an Ex Parte Emergency Order as "Sinkhole No. 2"). (BIE Petition, at 2; N.T. 350). On Saturday, March 3, 2018, another sinkhole measuring approximately 15 feet wide and 20 feet deep was discovered at 491 Lisa Drive, West Whiteland Township, approximately 10 feet from the house's foundation wall (identified in the BIE's Petition "Sinkhole No. 3"). *Id.* at 3. One of these sinkholes caused ME1 to become exposed. (N.T. 84). People residing next to the sinkholes were evacuated from their homes on March 3. (N.T. 352). Also, because of equipment in their yard, residents were offered to be put in hotels for four to six weeks. (N.T. 357). Sunoco did not provide any notification to the Commission or PHMSA of these sinkholes. (BIE Petition, at 3).

Also on or about March 5, 2018, PUC Safety Engineers visited Lisa Drive, at which time they discovered that additional sinkholes were developing south of 491 Lisa Drive, in the path of ME1 and/or ME2X. (BIE Petition, at 4; N.T. 351). The next day, while ME1 was still operating, Sunoco had two or three diggers on top of ME1 digging into the ground. (N.T. 352).

On or about March 7, 2018, the PUC BIE filed a petition for issuance of an Emergency *Ex Parte* Emergency Order, seeking to have Sunoco "immediately suspend operations of its Mariner East 1 pipeline . . . ." BIE was compelled to bring its petition:

> Due to, *inter alia*, the concern for the safety of the public given the unknown effects on the nature of the geological instability of the area and the sinkhole events referenced herein which correspond to the construction of the ME2X pipeline, the close proximity of the ME2X construction to the existing and active ME1 pipeline as well as the close proximity of residential single-family dwellings, apartment buildings, Route 100 and Amtrak lines to the site of ME1 and ME2X . . . .

(BIE's Petition at 4). BIE determined that "[t]he construction of ME2 and ME2X at or near the location of the active ME1 pipeline, and the resulting sinkhole events that are occurring concomitant to the boring of the ME2X pipeline compromise the safety of the public." *Id.*

On March 7, 2018, Commission Chair Gladys M. Brown granted BIE's petition and issued the emergency order, finding that "permitting the continued flow of hazardous liquids through ME1 pipeline without proper steps to ensure the integrity of the pipeline could have catastrophic results impacting the public." Commission March 7, 2018 Order. The Chair's order was unanimously ratified by the Commission on or about March 15, 2018.

Prior to construction, the Lisa Drive area was classified by Sunoco in its void mitigation plan as a "very low risk" area. (N.T. 226).

As part of the Commission's Order, Sunoco undertook a study of the area around Lisa Drive. The project area ran about 1200 feet, from south of the Amtrak/SEPTA rail line to south of Lyntree Drive. (Ex. SPLP 19, Figure 1). Sunoco has not produced any forensic explanation of why the sinkholes at Lisa Drive occurred. (N.T. 263, 295). The BIE letter and consultant report summarizing the investigation was merely a study of the extent of the potential problem. (N.T. 273). "[I]f you want to fix something, it's important to understand what went wrong first so that you can avoid having it happen again, as well as to make the best fix possible . . . ." (N.T. 274).

Sunoco attributes the sinkholes at Lisa Drive to DEP's refusal to allow it to undertake drilling of the hole at Lisa Drive during its suspension order. (N.T. 678-679). Despite the fact that no subsidence occurred when Sunoco resumed its drilling after the suspension (N.T. 680), Sunoco claims that had DEP allowed it to drill during the suspension, the subsidence would not have occurred. (N.T. 680-681).

Other than at the project area around Lisa Drive, Sunoco has not done any geotechnical or geophysical work to determine the stability of the geology after the construction of ME2 began. (N.T. 690).

K. Other ME1/ME2 Compliance History

Since May 9, 2017, DEP has issued Sunoco over 50 Notices of Violation for IRs and other violations in Pennsylvania, including in West Whiteland Township. (See http://www.dep.pa.gov/Business/ProgramIntegration/Pennsylvania-Pipeline-Portal/Pages/Mariner-East-II.aspx; P-15).

On April 1, 2017, a landowner called the Sunoco Control Center via the company emergency number and reported a possible leak along the ME1 pipeline right-of-way on Morgantown, Pennsylvania. (Ex. CAC-1). Field personnel confirmed that a release had occurred. *Id.*

On or about January 3, 2018, DEP issued an order immediately suspending all work authorized by the permits issued to Sunoco under 25 Pa. Code Chapters 102 and 105 because Sunoco 1) conducted unpermitted activities; 2) failed to comply with the permits that were issued; 3) failed to notify DEP before the start of drilling operations; 4) allowed IRs; and 5) failed to "immediately" report IRs. (Ex. P-8). DEP's January 3, 2018 order concluded that "Sunoco's unlawful conduct . . . demonstrates a lack of ability or intention on the part of Sunoco to comply with the Clean Streams Law, the Dam Safety and Encroachment Act, and the permits issued thereunder." *Id.* Subsequently, DEP and Sunoco entered into a Consent Order and Agreement in which Sunoco agreed to pay DEP a penalty in the amount of $12,599,326.00. (Ex. P-13).

On or about January 11, 2018, the Pipeline and Hazardous Materials Safety Administration ("PHMSA") issued a Notice of Probable Violation and Proposed Compliance Order to Sunoco related to construction of ME2 near Hopedale, Ohio. The violations related to "numerous coating scrapes on at least 5 segments of pipe", "severe coating damage" and a joint

pipe with a gouge that extended into the wall of the pipe. (Ex. P-12, at 2). Upon review of Sunoco's pipe bending procedures, PHMSA found that "[a] process for inspection of field bending was not included in the Procedure." *Id.* at 3.

L. Public Awareness Notices and Outreach

The pipeline safety regulations require companies to have a public awareness program and conduct outreach to the public. (N.T. 541). The public, school districts and elected officials have been seeking information from Sunoco regarding the pipelines' risk assessment and how to respond in the event of an emergency.

By letter dated March 29, 2018, West Chester Area School District advised Governor Wolf that to safeguard its students, it requires a risk assessment regarding construction of ME2 that includes "worse case evacuation routes." (Ex. P-1). The school district has four (4) buildings within 3000 feet of the pipeline and more than 25,000 residents living on or near the pipeline. *Id.* The School noted that, although the school district has been working with Chester County Emergency Management First Responders to develop a safety protocol in the event of a pipeline breach, "it is difficult to measure our plan against potential risks if we don't know what they are." *Id.*

A similar letter, dated April 16, 2018, was sent by the Downingtown Area School District. (Ex. P-2). One of the District's middle schools is located approximately 500 feet from the pipelines. *Id.* The District requested that it be provided with information on "evacuation routes, evacuation procedures, detection equipment, safety training from first responders, as well as, an analysis and recommendation for the appropriate distance of the pipeline from schools to

ensure safe evacuation, if needed." *Id.*[3] Saints Peter and Paul Catholic School has lost twenty (20) students this year because the pipeline project is adjacent to the school. (N.T. 62).

Initially, when Sunoco used HDD, it was required to give notice to homeowners with water supplies located within 150 feet of the pipeline. (N.T. 85, 86). In an effort to determine which of his constituents properly received notice of Sunoco's construction activities, Senator Dinniman requested that Sunoco provide him with a list of residents whom Sunoco advised of its activities. (N.T. 87). Sunoco did not provide the information (N.T. 88). Senator Dinniman then filed a Right-to-Know request with the DEP seeking this information. *Id.* Initially, DEP said it had no such list of those who received notice from Sunoco and denied his request. *Id.* After Senator Dinniman appealed the denial of his Right-to-Know request and won, DEP provided him with a list *Id.*

Senator Dinniman has also requested information regarding the pipelines from Sunoco, but has only received "boilerplate" information (N.T. 111). He also attempted to set up a meeting between Sunoco and the citizens, to no avail. (N.T. 211). "Whenever it would come to the question of what do I do, what is the risk, what is the safety, no one would answer us." (N.T. 112).

Sunoco claims to have met twice with emergency responders in Chester County, at which time it showed them a PowerPoint. (N.T. 422).[4] However, Emergency Management personnel continue to seek information from Sunoco regarding its Integrity Management Plan. (N.T. 190, 193). Sunoco also claims to have sent a public awareness program mailing to people in Chester

[3]Mr. Zurcher was unable to answer how people unable to run (e.g., kids at a day care center, kids a high school, people in prison) can protect themselves when a leak occurs.

[4]Among other things, the PowerPoint purportedly shown to the emergency management personnel describes Ethane, Propane and Butane as "[c]olorless, tasteless and odorless" and states that "[v]apors can be easily ignited & form flammable mixtures with air". Ex. SPLP 11.

County. The content of this mailing is unclear. Sunoco's website contains a document called "Facts About Pipeline Safety in Your Community" (Ex. P-16) (https://www.energytransfer.com/pipeline_safety_brochures.aspx). This document contains little information on how to respond to an emergency. Sunoco claims there is another document on the website as well which was identified during the hearing at Ex. SPLP 46.

III. SUMMARY OF ARGUMENT

Senator Dinniman has standing to pursue this Petition before the Commission. His participation in this matter relates to his official duties as a Senator for the affected district. He is involved with several committees that address issues directly impacted by the pipeline, has the responsibility for commenting on or approving expenditures, and has personal knowledge of the subject matter. Furthermore, in his official capacity, he served as a member of a Pipeline Infrastructure Task Force, which was a significant topic of testimony during the hearing and upon which Sunoco relies to justify its actions. Senator Dinniman's standing in this matter is consistent with the precedent of the Courts of this Commonwealth and prior decisions by the Commission.

Senator Dinniman's right to relief is clear. The Commission must assure that Sunoco's construction and operation activities are reasonable, safe, adequate, and otherwise comply with its regulations. The facts of this case show that the operation of ME1, and the construction and operation of ME2/ME2X, are anything but reasonable, safe, adequate or otherwise in compliance with the regulations. The construction of ME2/2X has been plagued with problems from the start. Among other things, there have been inadvertent returns or frac-outs, sinkholes and other depressions, and impacted and diminished water supplies. Sunoco has received more than 50 notices of violation from DEP. The construction of ME2/2X has been suspended after DEP found that Sunoco demonstrated a "lack of ability or intention to comply" with the law, and the operation

of ME1 was stopped to avoid a potentially "catastrophic" situation. Much of the problems are the result of the incompatible geology in West Whiteland Township. These problems are exacerbated by Sunoco's failure to plan for and react to the problems caused by this geology. Sunoco has not produced any forensic explanation for the problems that have occurred in the past nor implemented adequate remedies that would prevent them, and other issues, from occurring in the future.

Sunoco has also failed to take every reasonable effort to properly warn and protect the public from danger. Among other things, it has failed to properly identify – nonetheless warn – residents with drinking water supplies near the pipelines; failed to properly warn residents, like Ms. Kerslake, of the risks to their property from construction activities and, once the damage was done, failed to responsibly correct the problem; failed to properly instruct emergency management personnel on actions they can take to protect the public from danger; and failed to instruct the school districts on procedures for safeguarding children. Sunoco has also failed to provide the public with documentation that fully explains the risks posed by its activities and facilities.

Sunoco has failed to follow the law and select a route for ME2/2X to avoid, as far as practicable, areas containing private dwellings, industrial buildings, and places of public assembly. Instead, it has chosen to locate the pipeline in a densely populated area in alleged conformance with the recommendation of a subcommittee of an *ad hoc* task force to collocate ME2/2X with an 87 year old pipeline that was constructed when West Whiteland Township was mostly farm land.

ME1 is located within 50 feet of private dwellings, industrial buildings and/or places of public assembly. Although Sunoco has changed the material in and the direction of ME1, and has also expanded ME1 by constructing ME2/2X "for the purpose of interconnecting with

existing SPLP Mariner East pipelines", Sunoco has failed to conform ME1 to the requirements of 49 CFR §195.210(a) by providing it with at least 48 inches of cover.

The need for relief is immediate as ME1 is presently operating and its counsel has represented that construction of ME2 and ME2X will begin in West Whiteland Township in about 90 days. The harm is irreparable as Sunoco has failed to investigate, develop and implement a plan that prevents and remedies the harms caused by its activities. Without understanding the cause of the problems, irreparable harm cannot be prevented, remedied or reversed. Furthermore, as Sunoco is violating the law, its actions constitute irreparable harm *per se*. Finally, the relief requested by Senator Dinniman is not injurious to the public interest. To the contrary, it is clear that it will be injurious to the public interest if the relief requested is not granted. Financial considerations cannot trump the need to protect the health and safety of the public, particularly when any financial harm results from Sunoco's own actions and inactions.

IV. ARGUMENT

A. Standing

Senator Dinniman brings this action in his official capacity.

Standing to participate in proceedings before an administrative agency is primarily within the discretion of the agency. *Pennsylvania Natural Gas Association v. T.W. Phillips Gas and Oil Co., 75 Pa. PUC 598* (1991).

Generally, Pennsylvania courts have held that a person or entity has standing when the person or entity has a direct, immediate, and substantial interest in the subject matter of a proceeding. *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269, 282-284 (Pa. 1975). In *Pennsylvania Game Commission v. Department of Environmental Protection*, 555 A.2d 812 (Pa. 1989), the Pennsylvania Supreme Court described these terms as follows:

> The concept of 'standing' in its accurate legal sense, is concerned only with the question of who is entitled to make a legal challenge to the matter involved.... Although our law of standing is generally articulated in terms of whether a would-be litigant has a 'substantial interest' in the controverted matter, and whether he has been 'aggrieved' or 'adversely affected' by the action in question, we must remain mindful that the purpose of the 'standing' requirement is to insure that a legal challenge is by a proper party.... The terms 'substantial interest', 'aggrieved' and 'adversely affected' are the general, usual guides in that regard, but they are not the only ones. For example, when the legislature statutorily invests an agency with certain functions, duties and responsibilities, the agency has a legislatively conferred interest in such matters. From this it must follow that, unless the legislature has provided otherwise, such an agency has an implicit power to be a litigant in matters touching upon its concerns. In such circumstances the legislature has implicitly ordained that such an agency is a proper party litigant, i.e., that it has 'standing.'

555 A.2d at 815.

Legislators are granted standing in their official capacity to challenge agency actions that may implicate their legislative functions. *Fumo v. City of Philadelphia*, 972 A.2d 487, 497 (Pa. 2009); *Corman v. NCAA*, 74 A.3d 1149, 1161 (Pa. Cmwlth. 2013). "[L]egislators, as legislators, are granted standing to challenge executive actions when specific powers unique to their functions under the Constitution are diminished or interfered with." *Fumo v. City of Philadelphia*, 972 A.2d 487, 497 (Pa. 2009) (*citing Wilt v. Beal*, 363 A.2d 876, 881 (Pa. Cmwlth. 1976)) (granting legislative standing to state legislators in a challenge to an agency action implicating the General Assembly's authority to license submerged lands within the Commonwealth). "These duties have their origin in the Constitution and in that sense create constitutional powers to enforce those duties. Such powers are in addition to what we normally speak of as the constitutional rights enjoyed by all citizens." *Id.* Additionally, these powers may also be found in statute. *Corman v. NCAA*, 74 A.3d 1149 (Pa. Cmwlth. 2013).

In *Corman*, an *en banc* panel of the Commonwealth Court applied these principals to the standing of State Senator Jake Corman. Therein the court examined the specific and unique official duties of Senator Corman and found that because of those duties, Senator Corman had standing. 74 A.3d 1161-62. Specifically, the court found that:

> Clearly, Senator Corman's statutory duties for overseeing Fund expenditures is a "matter [ ] touching upon [his] concerns." *Pennsylvania Game Comm'n*, 521 Pa. at 128, 555 A.2d at 815. As such, "the legislature has implicitly ordained that [Senator Corman, as Chair of the Senate Appropriations Committee,] is a proper party litigant, i.e., that [he] has 'standing.' " *Id.* Accordingly, we conclude that Senator Corman has standing.

Id. at 1161. The court further noted that Senator Corman was one of "10 General Assembly leaders from different political parties" with the specific authority that provided him standing in that matter. *Id.* at n. 16.

In *Application of Artesian Water Pennsylvania, Inc.*, Docket No. A-2014-2451241, two administrative law judges of the Commission followed these principals and properly determined that Senator Dinniman had standing in that matter. That matter involved an application by Artesian Water Pennsylvania, Inc. to offer, render, furnish or supply water service to the public in an additional portion of New Garden Township, Chester County. Senator Dinniman filed a protest to the application. *Application of Artesian Water Pennsylvania, Inc.*, slip op., Docket No. A-2014-2451241 (March 13, 2015), at 1. In support of his protest, Senator Dinniman alleged, *inter alia*, that he is a Senator in the Pennsylvania General Assembly who represents the 19th Senatorial District, which is affected by the application; that the Commission is a creation of the General Assembly and has statutory reporting duties under 66 Pa.C.S. § 320; that he is a member of the standing Senate Environmental Resources and Energy Committee; that he is member of the Joint Legislative Air and Water Pollution Control and Conservation Committee; that he is a

member of the General Assembly with the authority to receive, review and comment upon the Governor's annual expenditure plan for the Environmental Stewardship Fund under 27 Pa.C.S. § 6104, which funds in part the Chester County Conservation District and its oversight of the watersheds and water supply of New Garden Township; that he possessed knowledge of a local perspective on the potential effects essential to make a determination of the application; that he was involved in the creation of the County Landscape Plan; and that he was involved with the Chester County Conservation District. *Id.* at 7, 8.

In finding that Senator Dinniman had standing, the judges properly stated that:

> The Protestant has provided information to show that his participation in this matter relates to his official duties as a Senator for the affected district. In addition, he is involved with several committees that address water issues. He has personal knowledge of the subject matter and has the responsibility of commenting on or approving expenditures related to water resources etc. in Chester County.
>
> Consequently, Senator Dinniman's interest is direct because it will be adversely affected by the actions challenged in this Protest. His interest is immediate because there is a close causal nexus between Senator Dinniman's asserted injury and the actions challenged in the Protest. In addition, the interest is substantial because Senator Dinniman has a discernible interest other than the general interest of all citizens in seeking compliance with the law. Accordingly, the decision regarding this Application will have a direct, immediate and substantial effect on Senator Dinniman.

Id. at 11.

In reaching this conclusion, the judges rejected the claims that Senator Dinniman's action was "nothing more than of allegations of future speculative harms" or that the Commonwealth Court's decisions in *Camille "Bud" George v. Pennsylvania Public Utility Commission*, 735 A.2d 1282 (Pa. Cmwlth. 1999) precluded Senator Dinniman's standing. *Id.* at 6-7.

In the case at bar, Senator Dinniman alleges standing based on the following:

- He is a member of the General Assembly as a Senator and represents the 19th Senatorial District, which includes West Whiteland Township (Petition, ¶ 11; N.T. 53). The 19th District includes West Whiteland Township (N.T. 54, 55);
- He is the representative of the individuals in the 19th District affected by the project;
- He is a member of the standing Senate Environmental Resources and Energy Committee;
- He is a member of the Joint Legislative Air and Water Pollution Control and Conservation Committee;
- He served as a member of the Pennsylvania Pipeline Infrastructure Task Force, a group of experts and stakeholders that recommended policies, guidelines and best practices to guide expansion of pipeline infrastructure in the Commonwealth. The recommendations of the Task Force, and Senator Dinniman's participation therein, were topics of testimony throughout the hearing. (*See* N.T. 47-48, 50-51, 57-58, 135, 137-140, 142, 205, 211, 222, 389, 399, 431, 433, 485, 580);
- He is a member of the General Assembly with the authority to receive, review and comment upon the Governor's annual expenditure plan for the Environmental Stewardship Fund under 27 Pa.C.S. § 6104, which funds in part the Chester County Conservation District and its oversight of the watersheds and water supply of West Whiteland Township;
- He receives annual, mandatory reports from the Commission under the Pennsylvania Public Utility Code. 66 Pa.C.S. § 320;
- He resides approximately two miles from ME1, ME2 and ME2X, and possesses knowledge of a local perspective on the potential effects essential to make a determination. Petition, ¶ 10; N.T. 52-53.

Petition, ¶¶ 10-12. During testimony, Senator Dinniman affirmed these unique roles and responsibilities. *See* Statement of the Case, above.

Just as the court found in regard to Senator Corman, and as the judges of this Commission have previously found with regard to Senator Dinniman, Senator Dinniman's interests in this matter far exceed those of the general population.

Just as the two judges found in *Artesian,* Senator Dinniman has provided information to show that his participation in this matter relates to his official duties as a Senator for the affected district; he is involved with several committees that address issues directly impacted by the pipeline; and has personal knowledge of the subject matter and has the responsibility of commenting on or approving expenditures.

Consequently, Senator Dinniman's interest is direct because it will be adversely affected by the actions challenged in this Petition. His interest is immediate because there is a close causal nexus between Senator Dinniman's asserted injury and the actions challenged in the Petition. In addition, the interest is substantial because Senator Dinniman has a discernible interest other than the general interest of all citizens in seeking compliance with the law. Accordingly, the decision regarding this Application will have a direct, immediate and substantial effect on Senator Dinniman.

In an effort to challenge Senator Dinniman's standing, Sunoco presented a "bench memo" that raises a number of issues. Each of the arguments made in the memo fails. First, without addressing any of the underlying case law that supports the judges opinions in *Artesian*, Sunoco argues that the decision in *Artesian* is distinguishable, because it involved a protest to an application and not a complaint or petition. Bench Memo, at 2. However, Sunoco fails to explain why the test for standing on a petition or a complaint is any different than the test for standing on

a protest. In fact the test is not different. Whether based on 66 Pa.C.S. § 701 or the case law discussed above, the test for standing is the same and the judges rational in *Artesian* is equally applicable to this case.

Perhaps recognizing the weakness of its first argument, Sunoco then claims that the decision in Artesian was "legal error". Bench Memo, at 6. However, as discussed above, the judges' decision in Artesian was entirely consistent with applicable case law, including the *en banc* decision in *Corman v. National Athletic Association,* 74 A.3d 1149 (Pa. Cmwlth. 2013).

Sunoco then argues that, if *Artesian* is not distinguishable (which it is not) and if *Artesian* was not decided in error (which is was not), then the Pennsylvania Supreme Court's decision in *Markham v. Wolf*, 136 A.3d 134 (Pa. 2016) overruled prior precedent. It did not. Rather, by its very terms, Markham merely reviewed "our Commonwealth's prior caselaw applying these principals as they relate to legislators." 136 A.3d at 141. It neither set out to, nor overruled, any of the prior case law on this issue.

Sunoco also relies on *Camille "Bud" George v. Pennsylvania Public Utility Commission*, 735 A.2d 1282 (Pa. Cmwlth. 1999). However, the facts in *George* are clearly distinguishable from this matter. In *George,* the court found that Representative George "***advance[d] no argument*** explaining how the Commission's action diminishes or interferes with his constitutional powers as a state representative." *Id.* at 1286 (emphasis added). Nor did he claim standing based on his official capacity as a State Representative. Instead, he claimed standing based on a "personal interest in having all ratepayers be provided with adequate notice," which the court rejected "for want of an adequate causal relationship." *Id.* (emphasis added). As such, *George* is distinguishable from the facts presented to the Commission here regarding legislative

standing and does not apply to the Senator Dinniman's claim that he has standing based on his official capacity as a State Senator and member of the General Assembly.[5]

B. Petitioner's Right to Relief is Clear

Issues related to the hazardous nature of the petroleum products involved in the pipeline transportation services, protection of public natural resources generally, and damage to drinking water supplies in particular, and detrimental impacts on health, safety, welfare and property values implicate "the reasonableness and safety of the pipeline transportation services or facilities, matters committed to the expertise of the PUC by express statutory language." *Delaware Riverkeeper Network v. Sunoco Pipeline L.P.,* 179 A.3d 670, 682 (Pa. Cmwlth. 2018) (*citing* 66 Pa. C.S. § 1505). "Sunoco's decisions are subject to review by the PUC to determine whether Sunoco's service and facilities 'are unreasonable, unsafe, inadequate, insufficient, or unreasonable discriminatory, or otherwise in violation of the Public Utility Code ....'" *Id.* at 693 (*citing* 66 Pa. C.S. § 1505(a)).

1. ME1, ME2 and ME2X are Unreasonable, Unsafe and Inadequate

Section 1501 of the Public Utility Code, 66 Pa. C.S. §1501, provides that:

> Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such

[5]Sunoco also claims that the Senator is bringing this challenge because "he does not like the Commission and DEP's interpretation of existing law . . . ." See, e.g., Bench Memo, at 6. This is not correct. Rather, Senator Dinniman brings this action in accordance with the Commission's existing law. Section 1505(a) of the Public Utility Code, 66 Pa. C.S. 1505(a), provides that whenever the Commission finds, "upon its own motion or upon complaint" that the service or facilities of any public utility are unreasonable, unsafe, inadequate, insufficient, or unreasonably discriminatory, or otherwise in violation of this part, the Commission may issue an appropriate order. *See also Delaware Riverkeeper Network v. Sunoco Pipeline L.P.,* 179 A.3d 670, 693 (Pa. Cmwlth. 2018) ("Sunoco's decisions are subject to review by the PUC to determine whether Sunoco's service and facilities 'are unreasonable, unsafe, inadequate, insufficient, or unreasonable discriminatory, or otherwise in violation of the Public Utility Code ....'") (citing 66 Pa. C.S. § 1505(a)). Senator Dinniman is merely availing himself to this process to trigger the Commission's statutory authority in accordance with existing case law.

> repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public . . . Such service and facilities shall be in conformity with the regulations and orders of the commission.

Section 1505(a) of the Public Utility Code, 66 Pa. C.S. §1505(a) provides that:

> Whenever the commission, after reasonable notice and hearing, upon its own motion or upon complaint, finds that the service or facilities of any public utility are unreasonable, unsafe, inadequate, insufficient, or unreasonably discriminatory, or otherwise in violation of this part, the commission shall determine and prescribe, by regulation or order, the reasonable, safe, adequate, sufficient, service or facilities to be observed, furnished, enforced, or employed, including all such repairs, changes, alterations, extensions, substitutions, or improvements in facilities as shall be reasonably necessary and proper for the safety, accommodation, and convenience of the public.

The facts of this case show that the construction and operation of ME1 and ME2/ME2X are anything but reasonable, safe, adequate or otherwise in compliance with the regulations.

Since May 9, 2017, DEP has issued Sunoco over 50 Notices of Violation for IRs and other violations in Pennsylvania, including in West Whiteland Township. The project has been shut down twice in the last five months, one time for problems that arose in West Whiteland Township and the other time for, among other things, Sunoco's conducting of unpermitted activities. DEP's January 3, 2018 order concluded that "Sunoco's unlawful conduct . . . demonstrates a lack of ability or intention on the part of Sunoco to comply with the Clean Streams Law, the Dam Safety and Encroachment Act, and the permits issued thereunder." (Ex. P-8). Sunoco has received a Notice form PHMSA for "severe coating damage." (Ex. P-12, at 2). And, Sunoco has repeatedly failed to properly report problems when they occur.

In West Whiteland Township, Sunoco's activities have resulted in household water supplies becoming cloudy, turbid, discolored, and diminished; families having to leave their

homes; and water bubbling-up onto property. It has also resulted in inadvertent returns and multiple large sinkholes near a rail line, including one immediately over ME1.

Significantly, Sunoco has not produced any forensic explanation for the problems that have occurred in West Whiteland Township. With regard to Lisa Drive, the sink holes in this geology should have come as no surprise. Lisa Drive sits by a fault line between carbonate Conestoga limestone and non-carbonate Octoraro phyllite. As Dr. Saskowsky explained, carbonate rock touching non-carbonate rock tends to be a focus area for dissolution and karst development. (N.T. 257). Acidic runoff from phyllite is neutralized when it hits the limestone, and that neutralization reaction dissolves the rock. (N.T. 259). "[Y]ou would expect there to be significant karst development, and we see that in many places at the boundary between non-carbonate and carbonate units." *Id.* These conditions are only exacerbated by the "human activity" associated with the construction of ME2/2X. It is unclear how Sunoco could classify such a location as "very low risk". (N.T. 226).

Instead of carefully considering the forensic explanation for problem, Sunoco has chosen to consider this a one-time event attributable to DEP's refusal to allow them to continue drilling during a suspension (which itself was the result of Sunoco's poor compliance). (N.T. 678-679). This explanation is difficult to understand as Sunoco concedes that when it restarted drilling after the suspension, there were no problems. It was only when Sunoco undertook to pull-back ME2X at this location that the subsidence occurred.

This leads to another significant point: To date, the ***only*** portion of ME2X to be installed in West Whiteland Township is at Lisa Drive. And, the results were catastrophic. (N.T. 448-49). This does not bode well for the installation of the remainder of the line.

Sunoco also claims that it has resolved the problems in West Whiteland Township by changing construction methods in certain locations. Again, it is difficult to develop a proper solution if the cause of the problem has not been identified. "[I]f you want to fix something, it's important to understand what went wrong first so that you can avoid having it happen again, as well as to make the best fix possible . . . ." (N.T. 274).

In addition, Sunoco's proposed remedies are not adequate. For example, to avoid subsidence in karst areas, Sunoco has applied to DEP to change its method of construction from HDD to open cut and boring, including flex bore. However, open trench does not remove all of the concerns associated with Karst geology. (N.T. 267). There is still the potential of cutting into soil-filled voids, which has the potential for developing a collapse. *Id.* Having the trench open can result in the loss of stability. In addition, rain on an open trench or hitting groundwater can result in sediment mobilization. (N.T. 268). "Any time you are mucking around in limestone like this, you have a potential for creating problems." (N.T. 288). In addition, flex bore can use fluid. (N.T. 474, 694). Sunoco has not committed to how it will undertake its flex bore. The specific method of boring (i.e. trenchless construction) that Sunoco will use is not set out in its void mitigation plan. (N.T. 474).

Open trench poses another problem on this project. John Zurcher, Sunoco's pipeline safety expert, testified that "[p]ipelines do leak, yes . . . Number one because an excavator dug up the pipeline and hit it . . . ." (N.T. 563). By using open cut to excavate areas around ME1, Sunoco is increasing the risk of that an excavator will hit an operating hazardous liquids pipeline.[6]

[6]Mr. Zurcher also testified that there has been one "fatality" in the "general public" resulting from hazardous liquid pipelines "since 2010". (N.T. 530, 574). However, he conceded that there have been explosions of hazardous liquids pipelines that did not result in fatalities. (N.T. 574, 575).

In addition, we have no assessment of how Sunoco's work to date has impacted the volatile geology of West Whiteland Township. Sunoco concedes that, other than at Lisa Drive -- where Sunoco was ordered by the PUC to undertake geophysical work -- there has been no geophysical work areas of West Whiteland Township where construction activities have occurred. (N.T. 450). The northern portion of West Whiteland Township consists of carbonate limestone and dolomite, and a predominance of sinkholes and depressions. (N.T. 75, 80, 250, 255-56). The impacts from construction activities in these areas may not occur for weeks, months or a year later. (N.T. 264). The collapse could be triggered by something benign, like someone driving a tractor over an area, a drought or an intense rain storm. *Id.* Mixed infrastructure only adds another layer of challenge. (N.T. 292).

The impact of the bentonite drilling mud also cannot be overlooked. Although Sunoco presented an expert to argue that bentonite is not toxic, it did nothing to address the other problems that bentonite causes: Bentonite can clog well water equipment and reduce the flow of water in a well. (N.T. 147, 279).

2. Sunoco has Failed to Take Reasonable Efforts to Warn and Protect the Public From Danger

Section 59.33(a) of the PUC regulations, provides that:

> 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.

Since 2006, Sunoco has had 295 incidents on its hazardous liquids pipelines. https://primis.phmsa.dot.gov/comm/reports/operator/OperatorIM_opid_18718.html?nocache=432#_Incidents_tab_2. Although Mr. Zurcher minimizes the risk of injury resulting from a pipeline, he noted that has a combustible gas detector in his home, has bought them for his family and friends, and "if I had a way to them for everybody in the United States or if I had a way to require the building codes to be adjusted, that's what I would do, sir." (N.T. 568-69).

52 Pa. Code §59.33(a) (emphasis added). It is clear that Sunoco has failed to take "every" reasonable effort to "properly" warn and "protect" the public from danger. Sunoco claims that its efforts to warn and protect the public include:

- Sending a cover letter and brochure to elected officials;
- sending a brochure to residents; and
- Holding a few meetings with PowerPoints.

Such efforts fall well short of Sunoco's regulatory responsibility. In fact, as the testimony revealed, Sunoco has, among other things:

- Failed to properly identify – nonetheless warn – residents with drinking water supplies near the pipelines: In the entire 350 miles of the pipeline, Sunoco had identified only 22 private wells. (N.T. 86). Only three of those wells were in Chester County. (N.T. 86). There are more than 700 private water wells in West Whiteland Township, approximately 200 of which are residential water supplies. (N.T. 71).
- Failed to properly warn residents, like Ms. Kerslake, of the risks to their property from the construction activities and, once the damage was done, failed to responsibly correct the problem: Prior to the drilling, Ms. Kerslake was never advised that water might be popping up on her land. (N.T. 359). Once the issues arose, Ms. Kerslake attempted to resolve them with the Sunoco's land agent, without avail. (N.T. 344). Only after a joint meeting with Ms. Kerslake, the Township and Sunoco, did Sunoco begin to work on a plan to resolve the issues on her property. (N.T. 344). Sunoco agreed to pay for the design and installation of a swale or drain and landscaping to divert the water from her property. (N.T. 344). To date, neither the swale nor landscaping has been completed (N.T. 344). Since November or December 2017, Ms. Kerslake has not received

information from Sunoco regarding the status of the work, except a letter stating that "work could start at any time". (N.T. 344-45). Ms. Kerslake has been advised by Sunoco that they don't know what will happen at her property when they begin drilling again. (N.T. 346). A representative of DEP has advised Ms. Kerslake that when drilling resumes, DEP believes the first place water will emerge will be on her property. (N.T. 346).

- Failed to properly instruct emergency management personnel of actions they can take to protect the public from danger: Emergency management personnel continue demand for information from Sunoco regarding its IMP. (N.T. 190, 193).
- Failed to instruct the school districts on procedures for safeguarding children: (Ex. P-2). School districts continue to request guidance on "evacuation routes, evacuation procedures, detection equipment, safety training from first responders, as well as, an analysis and recommendation for the appropriate distance of the pipeline from schools to ensure safe evacuation, if needed." (Ex. P-2).

Sunoco has also refused to share its Integrity Management Plan. It claims that, under the Public Utility Confidential Security Information Disclosure Protection Act, it cannot share the document without subjecting itself to criminal fines. However, the Act does not prohibit Sunoco from releasing any information. Rather, the act requires Sunoco to identify to determine whether a record or portion thereof contains confidential security information.. Because Senator Dinniman has not been permitted to review the document, he is unable to determine if Sunoco's designation is proper or warranted. Furthermore, the prohibition on releasing information applies only to "[a]n agency". 35 P.S. § 2141.5(a). The Act does not prohibit Sunoco from disclosing any information.

More importantly, Sunoco has failed to explain why it cannot either redact the confidential security information or create a separate risk analysis that excludes such information. Such a document, fully explaining the risks of its facilities and activities, is clearly encompassed within its obligation to "properly warn and protect the public" and may go a long way to answering many of the public's questions.

3. Sunoco has Failed to Select a Pipeline Right-Of-Way so as to Avoid Areas Containing Private Dwellings and Places of Public Assembly

49 CFR §195.210(a) of the federal Pipeline and Hazardous Materials Safety Administration (PHMSA) regulations, incorporated by reference into the PUC regulations at 52 Pa. Code 59.33(b), provides that:

> Pipeline right-of-way ***must*** be selected to avoid, as far as practicable, areas containing ***private dwellings***, industrial buildings, and ***places of public assembly***.

49 CFR §195.210(a). Sunoco justifies its decision to place the pipeline through the center of the commercial district, next to the largest mall in the County (Exton Mall), behind the County library, under Route 30 and Amtrak/SEPTA rail lines, and through highly concentrated residential areas that include apartment complexes (N.T. 68-69, 70), because it believes it should be collocating ME2 and ME2X with ME1. In support of this argument, Sunoco claims that such collocation will, among other things, reduce the impacts on such sensitive environmental features as wetlands, bog turtles habitats, bat habitat and cultural sites. (N.T. 392). It also relies on the Task Force report.

There are numerous problems with this rationale. First, while Sunoco claims it is collocating the pipelines in the name of environmental protection, Sunoco admits that the collocated route contains turtle habitat, wetlands, bat habitat, cultural resources and greenfields (N.T. 439, 447). Sunoco's reliance on the Task Force report is also misplaced. The Task Force

Report was merely a collection recommendations from the various subcommittees. (N.T. 206). It is not the law. Where collocating the pipeline conflicts with a regulatory requirement, the regulatory requirement, and not a set of recommendations from an *ad hoc* task force, must prevail.

During his testimony, Sunoco's project manager for the pipeline project, Matthew Gordon, stated that Sunoco "accomplished the goal, consistent with the pipeline task force recombination to collocate these Mariner East 2 and 2X pipelines", "to the extent practicable." (N.T. 399, 431). This, of course, turns the law on its head. It was not Sunoco's obligation to comply with the recommendations of the Task Force "to the extent practicable". Rather, it was Sunoco's obligation to comply with the regulations and select to route that avoids areas containing private dwellings, industrial buildings, and places of public assembly "to the extent practicable." Sunoco clearly failed to do this.

4. ME1 is Located within 50 Feet of Private Dwellings Despite Being Less than 48 Inches Underground

49 CFR §195.210(a) of the PHMSA regulations, incorporated by reference into the PUC regulations, provides that:

> No pipeline may be located within 50 feet (15 meters) of any private dwelling, or any industrial building or place of public assembly in which persons work, congregate, or assemble, unless it is provided with at least 12 inches (305 millimeters) of cover in addition to that prescribed in § 195.248.

49 CFR §195.210(a). The evidence presented is clear that ME1 is within 50 feet of private dwelling, or any industrial building or place of public assembly in which persons work, congregate, or assemble, and that the pipeline does not have 12 inches (305 millimeters) of cover in addition to that prescribed in § 195.248 (i.e. 48 inches of cover). Sunoco did not present any evidence to dispute this.

Instead Sunoco argues that the requirements of 49 CFR §195.210(a) do not apply because ME1 is an "existing" pipeline. However, 49 CFR §195.200 provides that "[t]his subpart prescribes minimum requirements for constructing new pipeline systems with steel pipe, and for ***relocating, replacing, or otherwise changing existing pipeline systems*** that are constructed with steel pipe." (emphasis added).

Although existing, ME1 has been changed in two ways. First, In 2014, ME1 was changed to a Hazardous Liquids pipeline and the flow of materials through the pipeline was also switched from westward to eastward. (N.T. 60). This alone is enough to trigger the application of 49 CFR §195.210(a).

In addition, ME1 is not separate and distinct from ME2/ME2X. Rather, by Sunoco's own admission, ME2/ME2X is an "expansion" of its existing pipeline systems and the project involves the installation of two parallel lines within a 306.8-mile, 50-foot-wide right-of-way "***for the purpose of interconnecting with existing SPLP Mariner East pipelines***." (Exs. SPLP-6 at 1-1; SPLP-7 at 1) (emphasis added). Such an expansion and interconnection of ME1 is a change to the existing pipeline system requiring compliance with 49 CFR §195.210(a).[7]

C. The Need for Relief is Immediate

The need for relief is immediate. ME1 is presently operating, carrying hazardous liquids. Construction on ME2/2X can proceed at any time. During the hearing, counsel for Sunoco stated that they would re-start construction activities on ME1/ME2X in approximately 90 days. To date, the only portion of ME2X to be installed in West Whiteland Township is at Lisa Drive. The results

[7]Senator Dinniman is not seeking relief based on ME1, ME2 and ME2X's status as public utility facilities as part of this Petition for Interim Emergency Relief. He reserves the right to pursue that challenge as part of his Formal Complaint.

of that installation caused sink holes, one of which exposed ME1. (N.T. 448-49). The Commission must act immediately to prevent future problems.

D. The Injury Would be Irreparable if Relief is not Granted

In determining whether an injury is irreparable, the Commission determines "whether the harm can be reversed if the request for emergency relief is not granted." *Application of Fink Gas Co. for Approval of the Abandonment of Serv. by Fink Gas Co. to 22 Customers Located in Armstrong Cty., Pennsylvania, & the Abandonment by Fink Gas Co. of All Nat. Gas Servs. & Nat. Gas Distribution Servs.*, 2015 WL 5011629, at *9 (Pa. P.U.C. Aug. 20, 2015). The pipeline project has been beset by problems such as inadvertent returns or frac-outs, sinkholes and other depressions, and impacted and diminished water supplies. Sunoco has not produced any forensic explanation for the problems that have occurred in the past. Nor has it implemented adequate remedies that would prevent problems from occurring in the future. Rather, Sunoco's plan is merely to attempt to fix the problems if they are inadvertently discovered. (N.T. 276). Without understanding the cause of the problem, irreparable harm cannot be prevented, remedied or reversed. Rather, "if you want to fix something, it's important to understand what went wrong first so that you can avoid having it happen again, as well as to make the best fix possible . . . ." (N.T. 274). To prevent irreparable harm, Sunoco must be required investigate, develop and implement a plan that prevents and remedies all harms caused by its activities.

Furthermore, a violation of law is irreparable harm *per se*. *Pa. PUC v. Israel*, 356 Pa. 400, 52 A.2d 347 (1947); *Core Communications, Inc. v.Verizon Pennsylvania Inc. Verizon North LLC*, 2011 WL 5121092 (Pa. PUC September 23, 2011). As set forth above, Sunoco has violated 52 Pa. Code §59.33(a) (requirement to use every reasonable effort to properly warn and protect the public from danger), 49 CFR §195.210(a) (requirement to select pipeline right-of-way to avoid

areas containing private dwellings, industrial buildings, and places of public assembly), and 49 CFR §195.210(a) (requirement for 48 inches of cover). As such, Sunoco's actions are irreparable harm *per se*.

E. The Relief Requested is Not Injurious to the Public Interest

The public interest is adversely affected where greater injury would result by refusing the preliminary injunction then granting it. *See, e.g., Valley Forge Historical Soc. v. Washington Memorial Chapter, 426 A.2d 1123* (Pa. 1981) (affirming grant of preliminary injunction where denial of the injunction would have interfered with the public's right to access historic artifacts in the natural setting). Where an action is clearly within the public interest, the preliminary injunction should issue. *Shondra Rushing v. Pennsylvania Am. Water Co.*, Opinion and Order, Docket No.: F-2015-2461147 (Pa. PUC) (affirming Administrative Law Judge findings that it was clearly within the public's interest and the interest of PAWC customers to issue a preliminary injunction to terminate a customer's service to prevent further loss of water resource prior to any expansion project by PAWC).

For the reasons discussed above, an injunction is in the public interest. Sunoco claims that an injunction would monetarily impact Sunoco, a supplier and a trade union. Even if true, financial considerations cannot trump the need to protect the health and safety of the public. Furthermore, the need for an injunction is the result of Sunoco's own actions and failures. The interests of the public cannot be outweighed by financial harm resulting from Sunoco's own actions and inactions.

Based on questions asked by Sunoco's counsel during the hearing, it is anticipated that Sunoco will request a bond. However, Senator Dinniman is not required to post a bond because

he is an "officer of the Commonwealth," from whom no bond is required. Under the Pennsylvania Rules of Civil Procedure 1531(b) governing special relief and injunctions:

> b) Except when the plaintiff is the Commonwealth of Pennsylvania, a political subdivision or a department, board, commission, instrumentality or officer of the Commonwealth or of a political subdivision, a preliminary or special injunction shall be granted only

Pa. R. C. P. 1531. See also Section 601(b) of the Clean Streams Law, 35 P. S. § 691.601(b), which relieves the Attorney General, the district attorney or the solicitor of a municipality from the requirement of bond in injunction proceedings. Senator Dinniman is an elected officer of this Commonwealth as a Senator in this Commonwealth. *See,* e.g., *Stilp v. Com.*, 905 A.2d 918, 945, (Pa.,2006) (explaining that "[a] person will be deemed a public officer if the person is appointed or elected to perform duties of a grave and important character, and which involve some of the functions of government, for a definite term.") *See also, Lewis v. City of Harrisburg*, 631 A.2d 807 (Pa. Cmwlth. 1993) (district attorney not required to post injunction bond).

Even under normal circumstances, a bond is not required. Rather, it is discretionary with the Commission. Section 3.8(b) of the Commission's regulations provides that: "An order following a hearing on a petition for interim emergency relief ***may*** require a bond to be filed in a form satisfactory to the Secretary and will specify the amount of the bond." 52 Pa. Code 3.8(b) (emphasis added).

Where a bond is required, bond amounts are to be determined on a case-by-case basis. *Christo v. Tuscany, Inc.,* 533 A.2d 461 (Pa. Super. 1987). Where the damages could be great and plaintiffs may be unable to provide sufficient security where damages could be great, "yet the court may determine, based upon the balance of the equities, that the injunction should nevertheless issue. Consequently, a relatively low bond in light of possible damages may be set."

Christo, 533 A.2d at 467. In addition, there is no requirement that a bond would cover all damages, because the nature of a preliminary injunction hearing makes a court's primary duty the consideration of whether to grant an injunction; the amount of potential damages to the party whose conduct is sought to be enjoined is not the court's primary concern. *Green County Citizens United by Cumpston v. Greene County Solid. Waste Auth.*, 636 A.2d 1278 (Pa. Cmwlth. 1994). Imposition of an excessive bond could deprive a party of their due process rights by preventing him from seeking relief to which he is entitled.

Accordingly, Senator Dinniman requests that the Commission reject Sunoco's request for a bond.

V. CONCLUSION

In light of the forgoing, Petitioner respectfully requests that the Commission issue an Order:

1) Prohibiting the construction and operation of ME2 and ME2X in West Whiteland Township;

2) Prohibiting the operation of ME1 in West Whiteland Township;

3) Requiring that Sunoco fully assess, and the Commission approve, the condition, adequacy, efficiency, safety and reasonableness of ME1, ME2 and ME2X and the geology in which they sit or are being constructed;

4) Requiring that Sunoco fully conduct and release to the public a written integrity management program, risk analysis and any other information required to warn and protect the public from danger and to reduce the hazards to which the public may be subjected by reason of ME1, ME2 and ME2X;

5) Prohibiting the operation of ME1 in areas of West Whiteland Township containing private dwellings, industrial buildings, and places of public assembly until such time as ME1 is has at least 48" of cover; and

6) Granting such other relief as the Commission finds to be just and appropriate.

Respectfully submitted,
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By: 

Date: May 16, 2018

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

PENNSYLVANIA STATE SENATOR ANDREW E. DINNIMAN,	:	
Complainant,	:	Docket No.: C-2018-3001451
	:	Docket No.: P-2018-3001453
v.	:	
SUNOCO PIPELINE, L.P.,	:	
Respondent.	:	

CERTIFICATE OF SERVICE

I hereby certify that I have, on this date, served a true and correct copy of the foregoing on the following:

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