

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

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| In re: Amended Formal Complaint and | : | |
| Amended Petition for Interim Emergency | : | Docket No. C-2018-3001451 |
| Relief of Pennsylvania State Senator | : | and P-2018-3001453 |
| Andrew Dinniman, | : | |
| Petitioner | : | |
| | : | |
| v. | : | |
| Sunoco Pipeline L.P., a/k/a Energy | : | |
| Transfer Partners, | : | |
| Respondent | : | |

**ANDOVER HOMEOWNERS' ASSOCIATION, INC.'S REPLY TO
SUNOCO'S ANSWER OPPOSING INTERVENTION**

COMES NOW Andover Homeowners' Association, Inc. ("Association"), pursuant to 52 Pa. Code § 5.101, and, without waiving the Association's Preliminary Objections objecting to the filing of said Answer, replies to the "Answer" to the Association's Motion for Intervention filed on May 31, 2018 by Sunoco Pipeline L.P. a/k/a Energy Transfer Partners' ("Sunoco") "Answer" Opposing Intervention, or, in the alternative, replies thereto pursuant to 52 Pa. Code § 5.63.:

BACKGROUND

On May 23, 2018, PUC docketed the Association's Petition to Intervene in the instant action. On May 31, 2018, Sunoco filed an Answer objecting to the Association's standing as intervenors without raising New Matter. See, 52 Pa. Code § 5.62. In its Answer, Sunoco alleges that the Association lacks standing to intervene. The Association denies Sunoco's allegations concerning the scope of the Association's right to intervene. As alleged in the Intervention Petition and not contested by Sunoco, the Association is directly impacted by Sunoco's

activities as a membership organization whose members utilize areas impacted by Sunoco's conduct.

ASSOCIATION CONCERNS

The Association, in its Petition for Intervention, has raised a variety of concerns about Sunoco's ongoing Mariner East project, including the following:

- a. Sunoco has a long history of leaking hazardous liquids from its pipelines, including at least three leaks of hazardous, highly volatile liquids from ME1 during 2016-2017.
- b. Sunoco has a long history of failing to report public safety and environmental impacts of its projects, including sinkholes and pipeline releases.
- c. Sunoco has a history of receiving federal enforcement action for "probable violations" of rules relating to pipeline construction, including on the Permian Express II pipeline in April 2016 (this pipeline ruptured in August 2016) and on ME2 in January 2018.
- d. Sunoco has failed to credibly respond to numerous technical and community issues concerning its operations; including but not limited to failures to report operator qualification issues and releases. *See*, May 27, 2018 Order of the PUC at *17-18, Elizabeth Barnes, Administrative Law Judge, presiding ("Barnes Order"); *see also*, *Delaware Riverkeeper Network and the Delaware Riverkeeper, Maya Van Rossum v. Sunoco Pipeline L.P.*, Docket 2:18-cv-02447-PD, Complaint at *13-14 (E.D. Pa. 2017) (Exhibit "A").

- e. The Association is concerned that Sunoco undertook ME2 construction without an adequate understanding of the complex geology in southeast Pennsylvania, and how such construction might impact the integrity of ME1. *Barnes Order* at 13.
- f. The Association is concerned that Sunoco undertook ME2 design and construction without adequately considering the risk (in terms of consequences and probability) associated with construction of a hazardous, highly volatile liquids pipeline in close proximity to both ME1 and residential neighborhoods like the Andover subdivision. *See, Id.* at 21-22.
- g. Moreover, Association Members do not live only in their residences; in fact, they live in their community. This community includes the Lisa Drive area of West Whiteland Township, which is an area containing numerous retail and food shops, restaurants, malls and other opportunities for shopping and leisure; and which contains in addition a popular public library and baseball fields.
- h. The Association is concerned operation of Sunoco's ME1 pipeline, especially in proximity to ME2 construction, poses unacceptable risk to the Association, its property, its Members and its neighbors. *See, Id.* at 15-16.

While Senator Dinniman has touched on several of these concerns in his Complaint, the Association raises additional concerns beyond those identified by the Senator. Specifically, the Association is concerned about operations of above-ground Mariner East facilities not specifically addressed by the Senator. These above-ground facilities, including but not limited to valve sites like the ME1 valve site now on Association property and the ME2 valve site

proposed for Association property, exhibit different safety concerns and risks than pipeline segments buried under some amount of soil cover.

SUNOCO'S CONDUCT IN WEST WHITELAND TOWNSHIP

DIRECTLY IMPACTS THE ASSOCIATION AND ITS MEMBERS

The Association alleged conduct by Sunoco that would impact the Association and its members not only in Thornbury Township, Delaware County, but also in West Whiteland Township, Chester County, and all points between. *See*, Petition to Intervene at Paragraphs 15, 20, 31-43. Sunoco concedes that conduct impacting West Whiteland Township is within the PUC's jurisdiction in this matter. *See*, Answer at *1-2.

A. The Pipelines Interconnect West Whiteland and Thornbury Township. Sunoco's allegations asserting that *William Penn Parking Garage v. City of Pittsburgh*, 464 Pa. 168, 195, 346 A.2d 269, 282 (Pa. 1975) are not on point. Specifically, Sunoco does not allege that a safety issue in West Whiteland Township would not harm residents upstream and downstream from West Whiteland Township. Sunoco does not allege that downstream valve sites would not be impacted by a safety incident in West Whiteland Township. In fact, were Sunoco to release or a third party to develop a full safety analysis as required by the PUC in the May 27, 2018 Order, the Association believes that such a pipeline safety study would find that an incident on any part of the Mariner East system in West Whiteland Township would directly impact Thornbury Township, the Association and Sunoco's pipeline and valve site operations on the Association's Open Space.

The Association hosts a ME1 downstream valve site. The Association is scheduled to host a ME2 downstream valve site. Sunoco has not alleged that it can assure the Association

and its Members that a Sunoco safety incident on any of the Mariner East system in or near West Whiteland Township would not impact the above-ground pipeline facilities on Association property. The Association understands that there is at most one ME1 valve site between West Whiteland Township and the ME1 valve site on Association property. Further, the Association understands that there is at most one proposed ME2 valve site between West Whiteland Township and the proposed ME2 valve site proposed for Association property, in West Goshen Township, on property near Route 202 and Boot Road. However, on information and belief, Sunoco may have eliminated the Boot Road ME2 valve site. If Sunoco has, in fact, eliminated the Boot Road ME2 valve site, then the Andover valve site would be the first valve site closed in the event of any ME2 incident in West Whiteland Township. In the event of a ME1 incident at the Boot Road ME1 valve site, the Andover valve site would be directly impacted.

From current knowledge, the Association believes, and therefore avers, that any incident on any part of the Mariner East system impacting West Whiteland Township could directly impact the valve sites on or proposed for Association property. The Association further believes, and therefore avers, that any work required to be completed at or on the valve sites on or proposed on Association property would or could directly impact the Association and/or its Members.

Sunoco concedes this reality when it fails to argue that these existing and proposed pipelines are not interconnected with the pipeline facilities and valve sites on Association property. Therefore, Sunoco concedes that the Association, as host of significant segments of all Mariner East pipelines, a valve site for ME1 and a proposed valve site for both ME2 lines, has a direct and discernable interest in the safety aspects of pipeline operations at issue in the

instant Complaint. This interest more than satisfies the requirement in *William Penn Parking Garage* that the Intervenor have a specific interest in a matter. Therefore, Sunoco's argument that the Association has no interest beyond the interest of the general public must fail.

B. Sunoco Has Not Provided Sufficient Safety Information to the Government or the Public.

The Association has unsuccessfully sought any and all information from local emergency responders or municipal officials concerning how to proceed if there were a ME1 or ME2 incident involving the Andover valve site(s). Operators are required to maintain operating manuals to document operations, safety and incident management details ("195 Manual"). See, 49 C.F.R. § 195.402.

On information and belief, Sunoco maintains their 195 Manual as a confidential document, not disclosed to the public except for specific reasons. See, Public Utility Confidential Security Information Disclosure Protection Act, 35 P.S. 2141.2 *et. seq.*, P.L. 1435, No. 156 of 2006; *Pipeline Safety: Guidance for Pipeline Flow Reversals, Product Changes and Conversions to Service*, Advisory Bulletin ADB-2014-04, 79 Fed. Reg. 56121 (Sep. 18, 2014), <http://www.occeweb.com/PLS/2014Gas/Guide-Flo%20Rev-Prod%20Ch-Conver.pdf> (last viewed June 13, 2018).

Sunoco is required to maintain a "Public Awareness" program to address how the pipeline operator communicates important information to the impacted public. See, 49 C.F.R. §195.440; Citing, API Recommended Practice 1162, "Public Awareness Programs for Pipeline Operators", 1st Edition, December 2003. However, the PUC has found that Sunoco's Public Awareness program is, at best, "boiler plate." See, May 27 Order at *15. Sunoco's ongoing operation of ME1, if, if it becomes operational, ME2, within West Whiteland Township would

have a profound impact upon the Association and its Members. Sunoco complains that the Association cannot show a “direct and immediate” interest of people residing as close as fifty (50) feet from the proposed ME2. Answer at *5-7. The entire ME1/ME2 corridor between West Whiteland Township and the Association property is a “High Consequence Area” (“HCA”). See, 49 C.F.R. § 195.450.

Specifically, this corridor meets the definition of a “high population area” within the HCA definition, with a metropolitan population of at least 50,000 and at least 1,000 people per square mile. *Id.* Chester County has an estimated population of 516,312 as of 2016. See, <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk> (last viewed June 13, 2018). Delaware County has an estimated population of 563,402 as of 2016. *Id.* The corridor between West Whiteland Township and Thornbury Township, Delaware County, clearly meets HCA criteria. The Association believes, and thus avers, that the HCA includes the entire Philadelphia metropolitan area, including, *inter alia*, Delaware and Chester Counties. Judge Barnes specifically noted issues with the public not understanding the impact of any variety of pipeline incidents upon the HCA encompassing both West Whiteland and the Association’s community. *Id.* at 15-16, 18, 20. “[T]he undisputed evidence that ME1 is an 87-year old 8-inch pipe transporting HVLs through an HCA and there is insufficient evidence to show whether the pipe has been properly tested for repurposing.” *Id.* at 18.

PUC requested a comprehensive review of HCA impacts that could readily extend beyond West Whiteland Township. *Id.* at 15-16. Thornbury Township is within the same HCA area as West Whiteland Township. Sunoco cannot support that the HCA required by PUC would not include the Association vicinity. Sunoco cannot support that any findings of hazard

reviews required by PUC would not require modifications or adjustments to Sunoco's operations in Thornbury Township. Sunoco has not and cannot allege that its pipeline exclusively impacts residents and visitors to West Whiteland Township, as this pipeline extends to seventeen (17) counties in Pennsylvania and beyond.

In Footnote 3, Sunoco improperly alleges that *Woodward Twp. v. Zerbe*, 6 A.3d 651, 658 (Pa. Commw. 2010) forces the PUC to restrict relief and intervention status to a narrow focus. This citation only relates to the remedies available for injunctive relief. The Association does not seek injunctive relief of its own motion. The Association only seeks to intervene to support Senator Dinniman's filings.

The relief sought by Senator Dinniman would necessarily impact portions of the pipeline beyond West Whiteland Township. Specifically, Senator Dinniman's request for relief concerning safety planning, emergency response and other impacts of information confidentially held by Sunoco in its "195 Manual" impact the entire 350 mile extent of the pipeline. See, 49 C.F.R. §§ 195.402(a), 195.402(c). Sunoco cannot cite that any part of its 195 Manual is restricted to West Whiteland Township. These manuals, and the policies, procedures and tasks derived from compliance with various parts of the 195 Manual, are applied to the entire pipeline or every portion of the pipeline where applicable.

Sunoco also incorrectly argues that "[t]his proceeding is limited to the geography of the alleged emergency conditions complained of". Sunoco ignores that impacts along linear projects, like pipelines, may not be restricted to the immediate location of an incident. Sunoco also incorrectly argues that this proceeding cannot be transformed into a general safety inquiry. Due to the potentially catastrophic nature of Sunoco's conduct and its utter inability to

demonstrate basic pipeline safety, the PUC has already transformed this inquiry into a general discussion of Sunoco's inability to demonstrate that it can assure anyone that it is capable to safely operate any part of the Mariner East system. Any findings concerning integrity management, public awareness or emergency response necessarily must include the entire pipeline system. Such discussions must, as described above, also include impacts on nearby valve sites, such as the valve sites that the Association is and is expected to host for the Mariner East system.

Sunoco further unsuccessfully argues that the Association is attempting to not "take the proceeding as it currently stands." The Association intervenes to represent the interests of land owners and residents directly impacted by above-ground Mariner East facilities where Sunoco would likely have to respond to an incident at West Whiteland, or a similarly situated underground location. The Association also intervenes as the host land owner for the longest proposed horizontal directional drilling ("HDD") site for the entire ME2 site, the segment proposed between Route 926 and Route 3. This segment, over a mile long, has yet to be drilled.

Further, the Association intervenes as the owner of a parcel where Sunoco has suffered indefinite suspension of its grading permit within Thornbury Township, another demonstration of Sunoco's inability to comply with the various permits it is required to hold to construct this project. The PUC has already held that Sunoco's inability to comply with its permits is a critical element in this matter. *See*, May 27, 2018 Order at *17-19.

By attempting to overly narrowly focusing Senator Dinniman's complaints on a very specific geography, Sunoco fails to understand that its failure to protect the public in West

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Whiteland Township fails to protect the Association and its Members. The relief offered by the PUC in the May 27, 2018 Order directly impacts everyone along the entire Mariner East system.

C. The Associations' Interests Complement, But Do Not Duplicate, Senator Dinniman's

Interests. The Association appreciates Senator Dinniman's efforts to protect his constituents in West Whiteland and through his Senatorial District. The Association seeks intervention status to protect residents outside of Senator Dinniman's Senatorial District and to raise specific issues of how valve sites would be impacted by Sunoco's conduct and operations of the Mariner East system.

Senator Dinniman has not raised any specific issues concerning valve sites. West Whiteland Township does not host any valve sites for any of the Mariner East system.

D. Sunoco's Incorrectly Claims That The Intervenor Need Be Bound by This Proceeding.

Sunoco incorrectly claims, without citing any authority, that the Intervenor must be "bound" by the proceedings to intervene. Noting in 52 Pa. Code 5.72 requires that any intervenor be "bound" by the proceeding. The PUC has the discretion to grant intervention status for any interested party for which "participation of the petitioner may be in the public interest." 52 Pa. Code 5.72(a)(2). As the Association described more fully above, the Association, as the host of ME1 and proposed ME2 valve sites, has a different interest than the Senator. The geographic area of interest in West Whiteland Township, which Sunoco defines as the Lisa Drive portion of West Whiteland Township, has no ME1 or ME2 valve sites.

An intervenor may participate if the intervenor has a direct public interest not adequately represented. 52 Pa. Code 5.72(a)(2). As described below, the Commission has invited impacted individuals and entities to intervene. Safety concerns raised by the Senator

and echoed by the PUC in the May 27, 2018 Order establish that every person or entity along ME1 or ME2 has a direct public interest in the safety of Sunoco's Mariner East Operations.

Sunoco incorrectly claims that direct interests in a matter require that the intervenor become "bound" by the action. Sunoco incorrectly cites to *Parents United for Better Schools, Inc. v. School Dist. of Philadelphia*, 166 Pa. Commw. 462, 646 A.2d 689 (Pa. Commw. 1994) (cited by Sunoco as 684 A.2d 689) for support that the intervenor must be bound by the decision of the PUC to intervene. However, this case has nothing to do with any intervenors, as it relates to direct litigants concerning organizational standing. *Id.* at 465. Sunoco also cites to *Sierra Club v. Hartman*, 529 Pa. 454, 605 A.2d 309 (Pa. 1992) to justify that PUC intervenors must have full judicial standing to intervene. However, this case does not relate to PUC standing, only relating to court standing. *See, QRK, LLC v. Kenilworth Court Residents Ass'n, Inc.*, 167 A.3d 303 (Pa. Commw. 2017). Nothing in PUC rules requires that intervenors maintain full standing to participate. 52 Pa. Code § 5.72.

E. The PUC Has Stated That Intervention Is In the Public Interest. Sunoco incorrectly asserts that allowing the Association to intervene is not in the public interest. However, when PUC Chairman, Gladys Brown, commented upon the May 3, 2018 Order to allow Sunoco to restart ME1, she noted

"While the specific concerns of the Commission's Emergency Order have been remedied, there are still legal vehicles for concerned citizens and entities to have their voices heard. The individuals and organizations who attempted to intervene in this proceeding may file their own formal complaint or intervene in an existing complaint which relates to their concerns."

"PUC Allows Reinstatement of Operations on Mariner 1 East Pipeline Following Resolution of Safety Concerns; Requires Additional Notification and Reporting," Penn. Pub. Util. Comm'n., May 3, 2018, http://www.puc.state.pa.us/about_puc/press_releases.aspx?ShowPR=4024 (last viewed June 14, 2018).

The Association recognizes that the Chairman's comments in a press release are not binding upon the Commission, but also recognizes that the Commission's Chairman carries strongly persuasive authority in deciding what the PUC believes is in the Public Interest. The PUC has already found that shipper concerns for their profits do not outweigh the public's concerns that Sunoco cannot adequately demonstrate to the public that it can safely operate valve sites on Association property. Sunoco's cold and calculating assertions that no emergency exists in relation to Sunoco's ongoing noncompliant conduct in no way represent any statement of public policy or public interest.

The PUC has already found that Sunoco's conduct in chasing profit instead of carefully executing the Mariner East project harms everyone in Pennsylvania, including land owners hosting valve sites, pipeline segments, and those with the potential impact zone of a potential incident along the Mariner East system.

F. Intervention Is Discretionary Before the PUC. Sunoco incorrectly asserts that the PUC must follow any bright-line test to allow intervention. "[An] agency's decision on intervention will not be disturbed absent 'a manifest abuse of discretion'". *Lyft, Inc. v. Penn. Pub. Util. Comm'n*, 145 A.3d 1235, 1247 (Pa. Commw. 2017); quoting, *Pittsburgh Palisades Park, LLC v. Pa. Horse Racing Comm'n*, 844 A.2d 62, 65 (Pa. Commw. 2004); *alloc. denied*, 581 Pa. 702, 864 A.2d 1206 (Pa. 2004) (quotations in original).

Sunoco takes an unreasonably limited view of the standing requirements concerning persons who may be bound by Commission proceedings. See, *Penn. Pub. Util. Comm'n, Bureau of Investigation and Enforcement v. UGI Utilities, Inc.*, Docket No. C-2012-2308997. The Commission allows intervention beyond Sunoco's purported three-part test, which claims that

the intervenor must show (1) a direct, substantial, and immediate interest meeting the legal standard discussed above, (2) that it is not adequately represented by existing participants, and (3) that the petitioner may be bound by the action of the Commission in the proceeding. Sunoco "Answer," p.4. The Commission's rules specifically allow intervention for various reasons, including "[a]nother interest of such nature that participation of the petitioner may be in the public interest." 52 Pa. Code § 5.72(3).

The Commission has wide discretion to allow intervention in its proceedings. *Penn. Nat. Gas Ass'n v. T.W. Phillips Gas and Oil Co.*, 75 Pa. PUC 598 (Pa. PUC 1991). A Commission proceeding is an administrative law proceeding which generally operates with less formalities than are utilized in Pennsylvania civil practice. Generally, Pennsylvania courts and the Commission have held that a person or entity has standing when the person or entity has a direct, immediate and substantial interest in the instant subject matter. *Application of Artesian Water Pennsylvania, Inc.*, Docket No. A-2014-2451241; *Joint Application of Pennsylvania-American Water Co. and Evansburg Water Co. for Approval of the transfer, by sale, of the water works property and rights of Evansburg Water Co. to Pennsylvania-American Water Co.*, A-212285F0046/47 and A-21087F01 (Opinion and Order entered on July 9, 1988); *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 464 Pa. 168, 195-197, 346 A.2d 269, 282-84 (Pa. 1975); *Waddington v. Pa. Pub. Util. Comm'n*, 670 A.2d 199, 202 (Pa. Commw. 1995); *Landlord Service Bureau, Inc. v. Equitable Gas Co.*, 79 Pa. PUC 342 (Pa. Pub. Util. Comm'n. 1993).

Nothing in the record supports Sunoco's right to assert its claimed rigid standard for intervention. The case law record actually supports the opposite conclusion, that the PUC may grant intervention to represent interests beyond the current participants. As established

above, the Association, host of above-ground Sunoco facilities that would likely be involved in any safety issue upon any part of the Mariner East pipeline in Southeast Pennsylvania, would directly impact the Association and its Members.

WHEREFORE, the Association respectfully requests that the Commission grant the Association's Petition to Intervene and grant such other relief as the Commission finds to be just and appropriate.

Dated: June 18, 2018

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Rich Raiders", is written over a horizontal line.

Rich Raiders, Esq.
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606 North 5th Street
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VERIFICATION

I hereby verify that I am the President of the Andover Homeowners' Association, Inc., and that in that role I have the authority to execute this verification on behalf of the Association. I further verify that the facts set forth in the foregoing Preliminary Objections are true and correct to the best of my knowledge, information and belief. This statement is made subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.

Date: 6/18, 2018



Eric L. Friedman

EXHIBIT "A"

Delaware Riverkeeper v. Sunoco

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

DELAWARE RIVERKEEPER)
NETWORK, and THE DELAWARE)
RIVERKEEPER, MAYA VAN ROSSUM)
)
Plaintiffs,)
)
v.)
)
SUNOCO PIPELINE L.P.)
)
Defendant.)

Civil Docket No. _____

COMPLAINT

I. INTRODUCTION

During construction of an industrial scale natural-gas liquids pipeline, Defendant Sunoco Pipeline LLC (hereinafter “Sunoco”) illegally discharged, and continues to discharge, pollution in the form of sediment-laden stormwater to Pennsylvania’s waters on multiple occasions, causing or contributing to violations of water quality standards on numerous occasions and in various counties across the state of Pennsylvania. Additionally, Sunoco’s activities harmed pristine wetlands and waterways in that require the highest and most strict level of environmental protection. Sunoco also illegally discharged, and continues to discharge, thousands of gallons of drilling fluids into Pennsylvania’s waters because of their construction activities.

Sunoco failed to secure the appropriate water pollution permits designed to control these discharges. Whether Sunoco's actions (and failures to act) stem from a series of calculated business decisions or complete indifference to Pennsylvania's regulatory efforts, Sunoco has endangered the environment and violated state laws, federal laws, rules, and permits designed to protect the quality of Pennsylvania's waters. Specifically, Sunoco has violated various provisions of both the federal Clean Water Act ("CWA"), and Pennsylvania's Clean Streams Law ("CSL").

Plaintiffs, Delaware Riverkeeper Network and the Delaware Riverkeeper, Maya van Rossum (hereinafter "Plaintiffs"), by and through the undersigned counsel hereby institute this action against Defendant Sunoco, for: injunctive relief, declaratory relief, the assessment of civil penalties, attorney's fees, and any other relief that the Court deems just and equitable. Specifically, the Plaintiffs allege as follows:

II. PARTIES

A. Plaintiffs

1) The Delaware Riverkeeper Network ("DRN" or Plaintiff) is a non-profit organization established in 1988 to protect and restore the Delaware River, its associated watershed, tributaries, and habitats.

- 2) This area includes 13,539 square miles, draining parts of New Jersey, New York, Pennsylvania and Delaware, and it is within this region that a portion of the Project's construction activity are proposed to take place.
- 3) The Upper Delaware River is a federally designated "Scenic and Recreational River" administered by the National Park Service. The National Wild and Scenic Rivers System also includes large portions of the Lower Delaware and the Delaware Water Gap.
- 4) The Lower, Middle, and Upper Delaware River have high water quality and are subject to Delaware River Basin Commission Special Protection Waters Designation.
- 5) The Basin and River are home to a number of federal and state listed endangered and threatened species including, but not limited to, the dwarf wedgemussel, Indiana bat, bog turtle, Atlantic sturgeon, shortnose sturgeon, loggerhead and Kemp's ridley sea turtles, and Northeastern bulrush.
- 6) Over 200 species of migratory birds have been identified within the drainage area of the Upper Delaware River, including the largest wintering population of bald eagles within the Northeastern United States.
- 7) The federally endangered shortnose and Atlantic sturgeon are present in the Delaware River.

8) The ecologically, recreationally, and economically important American Shad population migrates up through the nontidal portions of the Delaware River to spawn. American Shad populations in the Delaware River are currently at depressed numbers.

9) The Delaware River and Delaware Bay are also home to dozens of species of commercially and recreationally important fish and shellfish species.

10) In its efforts to protect and restore the watershed, DRN organizes and implements stream, wetland, and habitat restorations; a volunteer monitoring program; educational programs; environmental advocacy initiatives; recreational activities; and environmental law enforcement efforts throughout the entire Delaware River Basin and the basin states.

11) DRN is a membership organization headquartered in Bristol, Pennsylvania, with more than 19,000 members with interests in the health and welfare of the Delaware River and its watershed.

12) DRN began its advocacy efforts to protect the Basin from the adverse impacts of natural gas and pipeline infrastructure development in March of 2008.

13) DRN has actively worked since that time to bring the environmental impacts of natural gas and pipeline infrastructure development to the public's attention through action alerts, press outreach, public appearances, public statements, and editorials.

14) DRN has also advocated for and has funded expert scientific studies on the impact of natural gas and pipeline infrastructure development.

15) In 2014, DRN successfully litigated a case against the Federal Energy Regulatory Commission where the United States Court of Appeals for the District of Columbia found that the Commission violated the National Environmental Policy Act (“NEPA”) with regard to its issuance of a series of Certificates of Convenience and Public Necessity for several interconnected and interdependent natural gas pipeline projects. *See Delaware Riverkeeper Network, et al. v. Fed. Energy Regulatory Comm’n*, 753 F.3d 1304 (D.C. Cir. 2014).

16) DRN is therefore familiar with the impacts to human health, the environment, and property rights as a result of pipeline construction activity.

17) DRN brings this action on behalf of the organization as part of the pursuit of its organizational mission, and on behalf its impacted members, the board, and staff.

18) Maya K. van Rossum came to work for the Delaware Riverkeeper Network as the organization’s Executive Director in 1994.

19) In 1996, she was appointed Delaware Riverkeeper and leader of the Delaware Riverkeeper Network.

20) Ms. van Rossum is also a member of the Delaware Riverkeeper Network and supportive financial donor.

21) Maya van Rossum as the Delaware Riverkeeper regularly visits the Delaware River and Delaware Estuary, including the areas affected by pipelines and has taken family, friends, DRN members, and other interested people onto the Delaware River and its tributaries to educate them and to share with them the aesthetic beauty of the river.

22) DRN's members live, own property, recreate, and work throughout the watershed, which includes areas affected by Sunoco's Mariner East II pipeline Project, and have had their aesthetic, recreational, and property interests harmed as a result of construction and operational activity.

23) DRN and its members value the aesthetic qualities of their property and public parks; enjoying the scenery, wildlife, recreation opportunities, and undeveloped nature.

24) DRN's members own property that has been, and/or in the future will be, adversely impacted by Sunoco's pipeline construction and operational activities.

25) DRN's members recreate in areas that have been adversely impacted, and will be adversely impacted in the future, as a result of environmental degradation of aesthetic and recreational values by Sunoco's pipeline construction and operational activities.

26) The legal violations alleged in this complaint therefore have caused, and continue to cause, direct injury to the aesthetic, conservation, economic,

recreational, scientific, educational, wildlife preservation, and property interests of the organization and its members.

27) DRN and its members' aesthetic, conservation, economic, recreational, scientific, educational, wildlife preservation, and property interests have been, are being, and will continue to be, adversely and irreparably injured by Sunoco's actions (or lack of action) unless the relief sought here is granted.

28) These actual injuries are traceable to Sunoco's actions (or lack of action) and would be redressed by the requested relief.

B. Defendant

29) Defendant Sunoco Pipeline L.P., is a Texas limited partnership, with a registered corporate address of c/o Corporation Service Company 2595 Interstate Drive, Suite 103 Harrisburg, PA 17110.

30) Sunoco also has Pennsylvania offices at 3807 West Chester Pike, Newtown Square PA 19073.

31) Sunoco is a wholly owned subsidiary of Sunoco Logistics Partners L.P., a Delaware limited partnership doing business in the Commonwealth and elsewhere.

32) Sunoco owns and operates several pipelines in Pennsylvania used to transport petroleum and natural gas products. Sunoco has undertaken an effort to expand existing transportation systems for natural gas liquids in Pennsylvania, which is collectively referred to as the Mariner East II Pipeline Project ("Project").

As part of the Project, Sunoco is conducting pipeline installation activities across Pennsylvania, including, but not limited to: Allegheny, Berks, Blair, Cambria, Chester, Cumberland, Dauphin, Huntingdon, Indiana, Lancaster, Perry, Washington, Westmoreland, and York Counties.

III. JURISDICTION AND VENUE

33) This lawsuit is brought pursuant to the CWA, 33 U.S.C §§ 1251 *et seq.* This Court has subject matter jurisdiction over the claims for relief set forth herein pursuant to 33 U.S.C. § 1365(a) (citizen suits to enforce effluent standards or limitations under the CWA), 28 U.S.C. § 1331 (actions arising under the laws of the United States), and 28 U.S.C. §§ 2201-02 (power to issue declaratory judgments in cases of actual controversy).

34) On April 10, 2018, Plaintiffs gave written notice of the violations set forth in this complaint, and of their intent to file suit on these CWA claims, to Defendant Sunoco, the Pennsylvania Department of Environmental Protection, Environmental Protection Agency (“EPA”) Headquarters, EPA Region III. 33 U.S.C. § 1365(b)(1)(A).

35) More than sixty days has elapsed since service of Plaintiffs’ notice of intent to sue, as required by the CWA. *Id.* § 1365(b)(1)(A). Neither the Department nor EPA has commenced or is diligently prosecuting a civil or criminal action in a court of the United States or a State to require Sunoco to obtain an NPDES permit

and otherwise address the violations alleged by plaintiffs in this complaint. *Id.* § 1365(b)(1)(B).

36) Venue properly lies in this judicial district by virtue of CWA section 505(c)(1), *id.* § 1365(c)(1), because the source of the violations at issue is located within this judicial district.

37) Defendant has failed to obtain or otherwise comply with the terms of a NPDES permit for the discharges of sediment-laden water and other pollutants from the Project into waters of the Commonwealth, and these CWA violations will persist on a continuous basis until defendant obtains an NPDES permit and complies with permit limits designed to be protective of the waters of the United States and Commonwealth.

38) Upon information and belief, Defendant's discharges began in 2017 during construction of the Project and have continued to occur until the present time. Furthermore, there is a continuing likelihood of a recurrence of any intermittent or sporadic unlawful discharges. Lastly, Sunoco remains in a state of continuing violation, even absent the discharges, as a matter of law because of its failure to obtain a NPDES permit prior to construction activity and the discharge of pollutants.

IV. STATEMENT OF THE FACTS

A. Citizen Suit Authority Under the Clean Water Act

39) The CWA’s Citizen Suit provision provides a cause of action for DRN to file suit against a pipeline company for discharging pollutants without a NPDES permit where the CWA and Environmental Protection Agency (“EPA”) regulations thereunder provide a basis for a claim that a NPDES permit is required for the discharge.

40) Section 505 of the Clean Water Act states that “any citizen may commence a civil action on his own behalf . . . against any person . . . who is alleged to be in violation of . . . an effluent standard or limitation [.]” 33 U.S.C. § 1365(a)(1).

41) The definition of an “effluent standard or limitation” for the purposes of section 505 includes, *inter alia*, an unlawful act under section 301(a) [33 U.S.C § 1311(a)]. 33 U.S.C. § 1365(f). Section 301(a) states:

Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act [33 USCS §§ 1312, 1316, 1317, 1328, 1342, 1344], the discharge of any pollutant by any person shall be unlawful.

33 U.S.C. § 1311(a).

42) Thus, a party alleging that the discharge of a pollutant is unlawful because the discharger has failed to obtain a permit required under Section 402 of the CWA may bring suit because the failure to obtain a permit for the discharge constitutes a violation of 33 U.S.C. § 1311(a). *Association to Protect Hammersley, Eld, and Totten Inlets v. Taylor Resources, Inc.*, 299 F.3d 1007, 1012-1013, 1012 n.4 (9th Cir. 2002) (stating “nothing in the Act limits citizen suits to only those claims

where the alleged polluter has obtained an NPDES permit and violated its terms. Suit may also be brought where a party proceeds to discharge pollutants from a point source without a required permit” in finding jurisdiction under 505 for citizen suit claiming that discharge required NPDES permit even where state agency asserted that no NPDES permit was required for the discharge); *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co. Inc.*, 73 F.3d 546, 559 (5th Cir.1996) (“it is clear that a citizen may bring an action under the CWA against any person who is allegedly discharging a pollutant without a NPDES permit”); *West Virginia Highlands Conservancy, Inc. v. Huffman*, 651 F.Supp.2d 512, 518, 528-530 (S.D.W.Va. 2009) (recognizing cause of action under section 505 for citizens to stop the discharge of pollutants without a NPDES permit and concluding the federal district court has jurisdiction to hear the challenge even where the state holds delegated authority to issue or deny the permits in question); *Conservation Law Foundation v. Hannaford Bros. Co.*, 327 F.Supp.2d 325, 329 (D. Vt. 2004) (finding jurisdiction under section 505 where plaintiff alleged that defendant violated 1311(a) by failing to get a NPDES permit for the discharge in question); *see also Decker v. Northwest Environmental Defense Center*, 133 S.Ct. 1326, 1334 (2013) (affirming that district court had jurisdiction to hear citizen suit alleging that defendants had discharged without a NPDES permit where reading of ambiguous EPA regulation could support claim that NPDES permit was required

for the discharge in question); *U.S. Pub. Interest Research Group v. Atl. Salmon of Me., LLC*, 339 F.3d 23, 29, 31, 35 (1st Cir.2003) (upholding district court’s grant of injunction in citizen suit to address discharges made without NPDES permit against jurisdictional challenge even where state granted general permit authorization for the discharge after the injunction issued, and terms of state permit where more lenient than requirements of district court’s injunction); *Proffitt v. Rohm & Haas*, 850 F.2d 1007, 1014 n.11 (3d Cir. 1988) (noting that the court made no decision on whether citizen suits could be brought only to enforce terms of an existing NPDES permit because neither party raised the question, and discussing in dictum that other courts recognized federal district court’s jurisdiction to hear citizen suits challenging discharges made without permits).

B. History of the Sunoco Mariner East II Project

43) Sunoco is constructing a set of pipelines referred to as the Mariner East 2 Pipeline Project (“Project”).

44) Sunoco proposes to transport propane, butane, and ethane through the Project, all of which are “highly volatile liquids” or HVLs, a subset of “hazardous liquids,” by subjecting them to high pressure. 49 C.F.R. § 195.2.

45) Federal pipeline safety regulations classify propane, butane, and ethane as “highly volatile liquids,” which, once outside the pipeline, are heavier-than-air gases that are colorless, odorless, flammable, and explosive.

46) The Project's pipelines would cross the state of Pennsylvania and carry highly volatile hazardous liquids at very high pressure to the Marcus Hook Industrial Complex straddling Delaware County, Pennsylvania and New Castle County, Delaware, where such compounds would be stored and shipped overseas.

47) Sunoco's construction plans call for the extensive use of a construction method known as "horizontal directional drilling," or "HDD." HDD is an alternative to lowering a pipe into a shallow trench at the surface, and involves drilling a borehole deep underground, digging entry and exit pits for the drilling apparatus, and lubricating the drill with pressurized, recirculating drilling fluid.

48) This Project has a notorious and well-documented history plagued with technical, environmental, and legal problems since the beginning of construction in February 2017.

49) Last summer, construction was temporarily halted by the Pennsylvania Environmental Hearing Board after multiple spills of drilling fluid into waterways and private land along the 350-mile route across southern Pennsylvania.

50) As a result of these spills, private well owners experienced cloudy water and some lost supply of their water. In recognition of this problem, replacement water was necessary and provided to residents, and some were relocated to hotels.

51) Throughout the summer of 2017 and continuing through the present, Sunoco's HDD drilling practices resulted in thousands of gallons of drilling fluid

being released into waters of the Commonwealth, erupting through the ground, and contaminating various landowners' property.

52) These spills have contaminated waterways, damaged ecosystems and property, and created hazardous conditions.

53) As a result of these serious and continuing problems the Department issued an Administrative Order temporarily suspending all HDD drilling activities in the state.

54) Sunoco entered into two Consent Agreements with the Department relating to some of these spills, which has resulted in Sunoco being subject to civil penalties.

55) Sunoco's construction activities have also caused large sinkholes to open up in a residential neighborhoods, threatening the integrity of the parallel Mariner East 1 pipeline and consequently leading the Pennsylvania Public Utility Commission ("PUC") to issue an Emergency Order again temporarily suspending Sunoco's operations to prevent "catastrophic results impacting the public."

56) The PUC's emergency order further clarified that this situation resulted in "a clear and present danger to life or property."

57) Sunoco's problems also extend to violations of noise ordinances. For example, on March 13, 2018 at a hearing before District Court Judge Thomas Tartaglio, Sunoco was found guilty of violating the East Goshen Township's Noise

Ordinance on numerous occasions throughout October-December of 2017.

58) Sunoco was fined \$1,000, plus costs, for each of seven separate violations for exceeding East Goshen Township's ordinances limiting noise levels to 60 dBA, between the hours of 7 a.m. and 10 p.m.

59) Most recently, the PUC ordered a second shutdown of construction activity in West Whiteland Township resulting from various construction problems with the Project.

60) Of note in that decision, Judge Elizabeth Barnes of the PUC stated that, "Sunoco has made deliberate managerial decisions to proceed in what appears to be a rushed manner in an apparent **prioritization of profit over the best engineering practices available** in our time that might best ensure public safety."

61) Sunoco has also been subject to numerous Notices of Violation and Inspection Reports that document repeated instances of sediment-laden water being illegally discharged off the construction site and into the navigable waters of the Commonwealth of Pennsylvania.

62) These discharges have contributed to, and continue to contribute to, violations (exceedances) of Pennsylvania's water quality standards.

63) Specifically, these events have impacted pristine "high quality" and "exceptional value" designated waterways, damaged ecosystems and property, and created hazardous conditions.

64) Sunoco does not have a NPDES permit for the construction or operation of the Project as issued by either the Environmental Protection Agency (“EPA”) or a state equivalent permit from the Department.

65) Construction and operation of the Project has, and continues to, result in numerous unlawful discharges of sediment-laden water and other pollutants into waters of the United States in violation of the CWA and CSL.

C. Sunoco Discharged Pollutants Pursuant to The CWA and CSL

66) Section 402 of the CWA establishes the NPDES program, which allows EPA and states acting under delegated authority to issue NPDES permits for the discharge of pollutants from a point source. 33 U.S.C. § 1342. Any person who discharges a pollutant must apply for a NPDES permit unless they are exempt under the statute or the EPA regulations implementing it. 40 C.F.R. § 122.21(a).

67) If a state administers its own NPDES permitting program under the auspices of the EPA, applicants must seek an NPDES permit from the state agency. *See* 33 U.S.C. § 1342(c)(1); *Gwaltney v. Chesapeake Bay Foundation*, 484 U.S. 49, 108 S.Ct. 376, 98 L.Ed.2d 306 (1987).

68) Pennsylvania was delegated the authority to administer to the NPDES program in 1978.

69) Discharges of sediment pollution in stormwater runoff from pipeline construction absent a NPDES permit violates the CWA where there has been a

reportable release of oil/hazardous material, or a contribution to a violation (exceedance) of water quality standards resulting in whole or in part from the runoff.

See 40 C.F.R. § 122.26(c)(1)(iii).¹

70) In essence, if an oil or gas operation discharges, or controls, authorizes, directs, or has responsibility over a discharge of storm water that exceeds any of Pennsylvania's water quality standards, that operation must submit an application for a Pennsylvania NPDES storm water permit.

71) The Third Circuit has held that “a discharge that is not in compliance with a permit is the archetypal Clean Water Act violation, and subjects the discharger to strict liability.” *United States v. Pozsgai*, 999 F.2d 719, 725 (3d Cir.1993); *see also United States v. Allegheny Ludlum Corp.*, 366 F.3d 164, 175 (3d Cir. 2004); *Natural Resources Defense Council, Inc. v. Loewengart & Co.*, 776 F.Supp. 996, 998 (M.D.Pa.1991); *Public Interest Research Group v. Powell Duffryn Terminals Inc.*, 913 F.2d at 68, 73 n. 10 (3d Cir. 1990) (“the Clean Water Act imposes strict liability. All the plaintiff need do is establish that the defendant violated the terms of its

¹ 40 CFR 122.26(a)(2)(ii) states that “[d]ischarges of sediment from construction activities associated with oil and gas exploration, processing, or treatment operations or transmission facilities are not subject to the provisions of paragraph (c)(1)(iii)(C) of this section.” However, the Ninth Circuit Court of Appeals vacated this subsection of the rule in *NRDC v. EPA*, 526 F.3d 591, 608 (9th Cir. 2008). As a result, storm water discharges composed entirely of sediment trigger the requirement to obtain a storm water permit for an oil and gas operation if sediment contributes to a violation (exceedance) of a water quality standard.

NPDES permit”); *Am. Canoe Assoc., Inc. v. Murphy Farms Inc.*, 412 F.3d 536, 539-40 (4th Cir. 2005) (declining to “graft an exemption onto the jurisdictional requirements of section 505(a) to shield from suit those past violators who have undertaken good-faith remedial efforts at the time of the complaint” and noting that “it is plainly possible for those undertaking good-faith remediation ... nevertheless ‘to be in violation’ of the Act within the meaning of section 505(a), because the CWA creates a regime of strict liability for violations of its standards”) (citation omitted) 33 U.S.C. § 1319(d) (“Any person who violates ... any permit condition ... shall be subject to a civil penalty”).

72) Pursuant to this strict liability regime, neither the CWA nor its implementing regulations contain an exception for “de minimis” violations. *See Alabama Power Co. v. Costle*, 636 F.2d 323, 360 (D.C. Cir. 1979) (noting EPA’s authority to grant exemptions for de minimis circumstances where doing so would be a reasonable interpretation of the CWA); *Hawaii’s Thousand Friends v. City & Cty of Honolulu*, 821 F. Supp. 1368, 1392 (D. Haw. 1993) (noting that the CWA does not excuse de minimis violations).

73) To establish liability for a discharge made without a NPDES permit, plaintiffs must show that the defendant (1) discharged or added (2) a pollutant (3) to waters of the United States (4) from a point source (5) without a required NPDES permit. *West Virginia Highlands Conservancy, Inc. v. Huffman*, 651 F.Supp.2d 512, 518

(S.D.W.Va. 2009); *see also* 33 U.S.C. §§ 1311(a), 1342, 1362(12); *Committee to Save the Mokelumne River v. East Bay Municipal Utility Dist.*, 13 F.3d 305, 308 (9th Cir. 1993); *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982).

74) The CWA prohibits the “discharge of any pollutant” except in compliance with the CWA’s provisions. 33 U.S.C. § 1311(a).

75) The “discharge of a pollutant” is defined as “any addition of any pollutant to navigable waters from any point source.” 33 U.S.C. § 1362(12). An “addition” of a pollutant includes human activities that cause sediments from a streambed to be re-suspended in the water column. *Rybachek v. EPA*, 904 F.2d 1276 (9th Cir. 1990).

76) The statute defines the term “pollutant” as “dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.” 33 U.S.C. § 1362(6); 40 C.F.R. 122.2.

77) It is well-established that Courts and the EPA have both determined that sediment discharged in stormwater run-off is a pollutant. *See, e.g., City of Harrisburg v. Commonwealth of Pennsylvania*, 1996 EHB 709, 751 (1996) (“we conclude that sediment does, indeed, constitute a “pollutant” within the scope of the Clean Water Act”); *Driscoll v. Adams*, 181 F.3d 1285, 1291 (11th Cir. 1999) (sediment composed primarily of sand and silt constitutes a “pollutant.”); *Hughey v.*

JMS Development Corp., 78 F.3d 1523, 1525 n. 1. (11th Cir.1996) (rainwater flowing over land disturbed by grading and clearing falls within the Act's definition of "pollutant"); *see also NRDC v. EPA*, 526 F.3d 591, 597 (9th Cir. 2008) (discussing EPA determination that sediment discharges in runoff from construction sites cause serious water quality impacts, justifying regulation of stormwater from such sites).

78) Congress knew, when it passed the Energy Policy Act of 2005, that sediment-laden discharge qualified as contaminated discharge under Section 402(l)(2) if it contributed to a violation of a water quality standard. 40 C.F.R. § 122.26(c)(l)(iii)(C)(1990).

79) It is irrefutable that under Pennsylvania state law sediment-laden runoff constitutes "pollution." *See, e.g., Community College of Delaware County v. Fox*, 342 A.2d 468, 479 (Pa. Cmwlth. 1975) (pollution includes siltation during the construction process); *Leeward Construction Inc., v. Commonwealth of Pennsylvania*, 821 A.2d 145, 147-149 (Pa. Cmwlth. 2003) (discharge of sediment laden water violated NPDES permit); *Power Operating Company, Inc. v. DEP*, 1997 EHB 1186, 1193 (1997) (sediment laden water constitutes pollution); *DEP v. Carbro Construction Corp.*, 1997 EHB 1204, 1229 (1997) (same); *DEP v. Silberstein*, 1996 EHB 619, 635-36 (1996) (same); *Furnley H. Frish v. DER*, 1994 EHB 1226, 1238 (1994) (same).

80) The term “navigable waters” means “waters of the United States.” 33 U.S.C. § 1362(7). Waters of the United States has been defined by EPA and United States Army Corps of Engineers (“USACE”) to include wetlands adjacent to waters of the United States, other than waters that are themselves wetlands. 33 C.F.R. § 328.3(a).

81) Wetlands are also “waters of the United States” if there is a significant nexus with a navigable water, meaning the wetlands has a significant effect on the chemical, physical, or biological integrity of a navigable water, or if the wetlands is connected to the navigable water by a relatively permanent or at least seasonally flowing waterbody. *See Rapanos v. U.S.*, 547 U.S. 715, 732, 739, 759, 780 (2006).²

82) A “point source” is “any discernable, confined and discrete conveyance, including but not limited to any pipe, ditch, channel . . . from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14). The term includes surface runoff collected and channeled by human effort. 40 C.F.R. § 122.2. Bulldozers, backhoes, and earthmoving equipment constitute point sources. *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993 (11th Cir. 2004); *U.S. v. Weisman*, 489 F.Supp. 1331 (M.D. Fla. 1980).

² See EPA & U.S. Army Corps of Engineers, *Clean Water Act Jurisdiction following the U.S. Supreme Court’s Decision in Rapanos v. United States & Carbell v. United States* (2008), http://www.asce.army.mil/CECW/Documents/cecqo/reg/cwa_guide/cwa_juris_2dec08.pdf (stating that it is EPA and USACE position that satisfying either tests demonstrates jurisdiction).

83) Section 93.6 of the Pennsylvania Code is the one of the water quality standards that applies to sediment pollution. This provision provides that “[w]ater may not contain substances attributable to point or nonpoint source discharges in concentration or amounts sufficient to be **inimical or harmful** to the water uses to be protected or to human, animal, plant or aquatic life.” 25 Pa.Code 93.6(a) (General Water Quality Criteria) (emphasis added). “[S]pecific substances to be controlled include, but are not limited to, floating materials, oil, grease, scum and substances that produce color, tastes, odors, **turbidity** or settle to form deposits.” *Id.* at 96.3(b) (emphasis added).

84) Because the list of specific water quality criteria “does not include all possible substances that could cause pollution . . . [f]or substances not listed, the general criterion that these substances may not be inimical or injurious to the existing or designated water uses applies.” *Id.* at 93.7(c).

85) Pennsylvania defines “pollution” as:

contamination of any waters of the Commonwealth such as will create or is likely to create a nuisance or to **render such waters harmful, detrimental or injurious** to public health, safety or welfare, or to domestic, municipal, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses, or to livestock, wild animals, birds, fish or other aquatic life, including but not limited to such contamination by alteration of the physical, chemical or biological properties of such waters, or change in temperature, taste, color or odor thereof, or the discharge of any liquid, gaseous, radioactive, solid or other substances into such waters. The department shall determine when a discharge constitutes pollution, as herein defined, and shall establish standards whereby and wherefrom it can be ascertained and

determined whether any such discharge does or does not constitute pollution as herein defined.

35 P.S. § 601.1.

86) Because Pennsylvania Courts have determined that sediment-laden water constitutes pollution, such discharges therefore violate Section 93.6(a) because the discharges are, by definition, inimical or injurious to the existing or designated use of the water receiving the discharge. *See O'Reilly v. DEP*, 2001 EHB 19, 33 (2001) (“When disturbed earthen materials are exposed to the elements without the protection normally afforded by vegetative cover or pavement, they are prone to wash away, or erode, at a much greater rate than they would when protected. Unless precautions are taken, these eroded earthen materials can then end up as sediment in the waters of the Commonwealth. This excess sedimentation has a **deleterious effect on Pennsylvania’s streams**”) (emphasis added).

87) Additionally, for water designated as Exceptional Value (“EV”) or High Quality (“HQ”), which are subject to strict anti-degradation requirements, this means that the discharge cannot cause any alteration in the turbidity of the water body. *See* 25 Pa.Code 93.4a(c-d) (“the existing quality. . . shall be maintained and protected”).

88) Here, Sunoco’s construction and operation activities have resulted in numerous discharges of sediment-laden water and other pollutants into waters of the United States that have contributed to a violation (exceedance) of Pennsylvania’s water quality standards as identified above.

89) Sunoco has done so without a NPDES permit. As such, Sunoco is liable under the CWA and the CSL.

90) “[A] citizen plaintiff may prove ongoing violations ‘either (1) by proving violations that continue on or after the date the complaint is filed, or (2) by adducing evidence from which a reasonable trier of fact could find a continuing likelihood of a recurrence in intermittent or sporadic violations.’” *Sierra Club v. Union Oil Co. of Cal.*, 853 F.2d 667, 671 (9th Cir. 1988) (quoting *Chesapeake Bay Foundation v. Gwaltney*, 844 F.2d 170, 171–72 (4th Cir. 1998).

91) “Intermittent or sporadic violations do not cease to be ongoing until the date when there is no real likelihood of repetition.” *Id.* (quoting *Gwaltney*, 844 F.2d at 172 (also phrasing the question as “whether the risk of defendant’s continued violation had been completely eradicated when citizen-plaintiffs filed suit”)).

92) However, “[w]here, as here, a discharger has failed to obtain a NPDES permit in the first instance (as opposed to having violated the terms of an existing permit), that discharger ‘remains in a state of violation’ as a matter of law.” *See Carr v. Alta Verde Industries, Inc.*, 931 F.2d 1055, 1062 (5th Cir.1991).

93) “Operating without a permit is a present, not a past violation.” *Molokai Chamber of Commerce v. Kukui (Molokai), Inc.*, 891 F.Supp. 1389, 1400 (D.Hawaii, 1995); *see also San Francisco Baykeeper, Inc. v. Moore*, 180 F.Supp.2d 1116, 1122 (E.D. Cal., 2001).

94) Because Sunoco unlawfully discharged sediment-laden water without a permit, it remains in continuous violation even if the initial discharges stopped.

95) Furthermore, because Sunoco has not deployed the appropriate best management practices and construction methods as required by a NPDES permit, it is likely that that any sporadic or intermittent discharges are occurring now or will occur in the future.

96) The discharge of wastewater from any waters of the United States is unlawful unless authorized by a NPDES permit, as defined by Section 402 of the Clean Water Act, or authorized by a “state pollutant discharge elimination system” permit issued as the equivalent of a NPDES permit.

97) Currently Sunoco has three Erosion and Sediment Control permits. Erosion and Sediment Control permits are not NPDES permits, nor do they purport to be.

98) They do not meet, and were not designed to meet, the requirements of Section 402 of the CWA; they are not federal NPDES permits, or state issued NPDES permits issued as the equivalent of federal NPDES permits.

99) Sunoco’s permits do not contain conditions adequate to authorize discharge to state waters that are “waters of the United States” within the meaning of the CWA.

100) These Erosion and Sediment Control permits are not designed to authorize discharge to waters of the United States in compliance with the Clean Water Act’s

section 402 obligations, and do not impose conditions on your discharge that are necessary to protect waters of the United States and conform to federal law.

101) Since the Erosion and Sediment Control permits were not designed as federally-delegated permits to meet federal standards, they cannot authorize Sunoco to discharge pollutants to waters of the United States.

102) The interests of the Delaware Riverkeeper Network and its members have been, are being, and unless the relief prayed herein is granted, will be, adversely affected by the failure of Sunoco to obtain and comply with the appropriate NPDES permit for its pipeline project.

D. Examples of Sunoco's Unlawful Discharges

103) Below is a description of Sunoco's known unlawful discharges of sediment-laden water and other pollutants into waters of the United States that contributed to a violation (exceedance) of Pennsylvania's water quality standards during the construction and/or operation of the Project. Any one of these examples would be sufficient to provide grounds for liability under the CWA and CSL.

104) Upon information and belief, on at least the following dates, and at the following locations, Defendant Sunoco caused point source discharges of sediment-laden stormwater or other pollutants to waters of the state from its construction activities that violated (exceeded) water quality standards.

105) The discharges fall into two general categories, first are discharges of sediment-sediment laden water as a result of stormwater discharges.

106) The second class of discharges are those resulting from inadvertent returns (“IR”) of drilling fluids related to Sunoco’s hydraulic directional drilling construction efforts.

107) As a result of Sunoco’s demonstrated inability or unwillingness to prevent intermittent and ongoing unlawful discharges from its construction and operational activities, the discharges of pollutants into the commonwealth will continue.³

108) At least as early as April 10, 2018, DRN notified Defendant Sunoco that its storm water discharges contributed to violations of Pennsylvania’s water quality standards, and as a result, the storm water permit exemption for oil and gas operations no longer applied. Consequently, Defendant Rover was required to obtain coverage under a Pennsylvania NPDES permit to regulate its storm water discharges.

1. Sediment-Laden Stormwater Discharges

109) On or before May 9, 2017 and continuing until a date to be determined, the Department documented sediment laden water discharging out of the ground into a basin partially located on the right of way for the Project, and water running down

³ It is likely that additional unlawful discharges occurred and will continue to occur during construction of the Project that have not yet been identified by Plaintiffs.

the right of way on the other side of the road and into Clover Creek. The location of this discharge was off Fairview Road in Woodbury Township, Blair County.

110) On or before June 24, 2017 and continuing until a date to be determined, a Sunoco Compliance Report documented sediment-laden water depositions into an area over approximately 200 feet of stream channel. Sediment was also deposited within off right-of-way upland areas. The location of this discharge was east of N. Union Street, downslope from future Swatara Creek location, Dauphine County.

111) On or before June 28, 2017 and continuing until a date to be determined, the Department documented sediment pollution into Doubling Gap Creek and a downstream pond. The pond is located on the north side of the pipeline in Lower Mifflin Township, Cumberland County.

112) On or before June 28, 2017 and continuing until a date to be determined, the Department documented a discharge of sediment-laden water into tributaries of Swatara Creek located East of N. Union Street in Swatara Township & Middletown Borough, Dauphin County.

113) On or before July 5, 2017 and continuing until a date to be determined, the Department documented sediment discharges into a pond and other waterbodies. The receiving waters of the discharge was Opossum Creek, in in Lower Frankford Township, Cumberland County.

114) On or before July 14, 2017 and continuing until a date to be determined, the Department documented stormwater flows that deposited sediment into vegetated areas and flows and deposits that reached the stream bank and into a waterbody resulting in silt depositions at that location. The general location of the discharge was between station number 10785+73 and 10785+00, Cumberland County.

115) On or before July 27, 2017 and continuing until a date to be determined, the Department documented sediment discharges into a number of different streams and wetlands. These waters are located in Lower Swatara Township and Middletown Borough, Dauphin County.

116) On or before August 2, 2017 and continuing until a date to be determined, the Department documented an environmental cleanup underway of contaminated soils in the area near Vinemont road, with waters leaving the soil pit. The receiving water was the Cacoosing Creek, located in South Heidelberg, Berks County.

117) On or before August 15, 2017 and continuing until a date to be determined, the Department documented an open cut to Bachman Run that was receiving a discharge of sediment laden water as a result of multiple spring seeps. The discharge ran downslope into Bachman Run. The location of the discharge was west of Mt. Wilson Road South Annville Township, Lebanon County. The Department documented plumes of sediment miles downstream from the discharge. Department Personnel also observed potential impacts at a trout

hatchery down slope. The Department issued a Notice of Violation for this active release of sediment into Bachman Run.

118) On or before August 18, 2017 and continuing until a date to be determined, the Department documented sediment laden water that turned a pond cloudy. The inspection occurred at the cross over at Rock Run, which flows into Conodoguinet Creek. The location of this discharge is in Upper Frankford and North Middleton, Cumberland County. The sediment laden water followed a private access road until it hit a water bar and flowed down slope through a wooded area and into Rock Run at a point 30 feet south. Sediment deposition was observed in the floodway at the point the flow entered Rock Run and in the stream bed between the point of entry and downstream pond 700 feet to the south.

119) On or before August 21 and continuing until a date to be determined, Department personnel arrived on site to multiple complaints of sediment-laden water being discharged into the East Branch of the Conestoga River in the area of Joanna Road. A video showed heavy flows of sediment-laden water coming off Joanna Road. The impacted area was located in South Heidelberg Township, Berks County.

120) On or before September 11, 2017 and continuing until a date to be determined, the Department documented an open cut to Hammer Creek and associated wetland with a heavy sediment discharge in and near the wetland. The

open trench was completely filled with water. The location was a tributary to Hammer Creek in Heidelberg Township, Lebanon County.

121) On or before September 11, 2017 and continuing until a date to be determined, the Department documented an open cut to Bachman Run where there was standing water in the access road and north of the access road adjacent to the stream. There was 1-5 inches of accumulated sediment in the stream. The location of this discharge was in South Annville Township, Lebanon County.

122) On or before September 12, 2017 and continuing until a date to be determined, the Department documented upland soils had been deposited within a wetland. The sediment also traveled downslope and deposited into a streambed. The incident occurred in Spring Township, Berks County and the water affected was an unidentified tributary to Cacoosing Creek.

123) On or before September 14, 2017 and continuing until a date to be determined, the Department documented discharges of turbid water into a wetland in addition to discharges upslope of the wetland. The waters affected were wetlands and tributaries of Little Cocalico Creek located immediately east of Swamp Church road in West Cocalico Township, Lancaster County.

124) On or before September 18, 2017 and continuing until a date to be determined, the Department documented a pollution event of a wetland. One cubic yard of soil and rock had fallen into the wetland. The location of the discharge was

North Middleton, Cumberland County. The water affected was an unidentified tributary into Meetinghouse Run.

125) On or before, September 20, 2017 and continuing until a date to be determined, the Department documented sediment laden water discharging into a wetland and waterbody. The receiving water was Meetinghouse Run, a tributary of Conodoguinet located in North Middleton, Cumberland County.

126) On or before October 31, 2017 and continuing until a date to be determined, the Department documented a discharge of sediment-laden water into an unnamed tributary to Killinger Creek. The creek is located in South Londonderry Township, Lebanon County.

2. Inadvertent Return Discharges

127) On or before February 27, 2018 and continuing until a date to be determined, the Department received notice from Sunoco of an IR of 100 gallons of drilling fluids into an unnamed tributary to Locust Creek and associated wetland in Lower Frankford Township, Cumberland County.

128) On or before March 15, 2018 and continuing until a date to be determined, the Department received notice from Sunoco that an inadvertent return of approximately 200 gallons of drilling fluids within a wetland in Frankstown Township, Blair County.

129) On or before March 15, 2018 and continuing until a date to be determined, the Department received notice from Sunoco of an IR of drilling fluids in Snitz Creek located in West Cornwall Township, Lebanon County.

130) On or before March 19, 2018 and continuing until a date to be determined, the Department received notice from Sunoco that a drill pit in Frankstown Township, Blair County was overflowing, resulting in the discharge of drilling fluids into the adjacent Frankstown Branch Juniata River. The discharge was visible for 1.5 miles downstream. Sunoco reported that groundwater was being released into the pit at a rate of 500 gallons a minute.

131) On or before March 26, 2018 and continuing until a date to be determined, the Department received notice from Sunoco of an IR of less than one gallon of drilling fluids within a wetlands located in Shirley Township, Huntingdon County.

132) On or before March 29, 2018 and continuing until a date to be determined, the Department received notice from Sunoco of an IR of less than one gallon of drilling fluids within a wetlands in Toboyne Township, Perry County.

E. Discharges After Plaintiffs' Sixty-Day Notice Letter

133) Following the submission of Plaintiffs' sixty-day notice letter, Sunoco continued to engage in construction activities without a permit and continued to discharge sediment-laden storm water and other pollutants to waters of the Commonwealth.

134) On or before April 10, 2018 and continuing until a date to be determined, the Department received notice from Sunoco of an IR of approximately 500 gallons of drilling fluids within a wetlands located in Blair Township, Blair County.

135) On or before April 20, 2018 and continuing until a date to be determined, the Department received notice from Sunoco of an IR of approximately 20 gallons of drilling fluids into Snitz Creek located in West Cornwall Township, Lebanon County.

136) On or before May 15, 2018 and continuing until a date to be determined, the Department received notice of an IR of an unknown quantity of drilling fluids into an unnamed tributary of Hinckston Run located in Jackson Township, Cambria County.

137) On or before June 1, 2018 and continuing until a date to be determined, the Department received notice of an IR of a small quantity of drilling fluids into Snitz Creek located in West Cornwall Township, Lebanon County.

F. Allegations Are Incorporated In All Counts

138) The allegations contained in Paragraphs 1 through 137 of this Complaint are incorporated into each and every Count of this Complaint as if fully restated therein.

V. CLAIMS FOR RELIEF

Count 1: Sunoco Failed To Obtain A NPDES Permit For Its Storm Water Discharges

139) 35 P.S. § 691.301 and 33 U.S.C. § 1311(a) prohibit any person from placing or causing to be placed any industrial wastes or other wastes, in a location where they cause pollution of any waters of the state without a valid, unexpired permit. *See* 35 P.S. § 691.301; 35 P.S. § 691.611; 33 U.S.C. § 1311(a); *see also* 25 Pa. Code Chapters 92a, and 96.

140) 25 Pa. Code § 92a.1(b) and 33 U.S.C. § 1342, prohibit any person from discharging any pollutant or causing, permitting, or allowing a discharge of any pollutant from a point source without applying for and obtaining a general or individual NPDES permit. *See* 25 Pa. Code § 92a.1(b); 33 U.S.C. § 1342.

141) At least as early as April 10, 2018, Plaintiffs notified Defendant Sunoco that its previous storm water discharges contributed to violations (exceedances) of Pennsylvania's water quality standards including, but not limited to, 25 Pa.Code 93.6(a) and 25 Pa.Code 93.4a(c-d), and as a result, the storm water permit exemption for oil and gas operations is no longer applied.

142) Consequently, Defendant Sunoco was required to obtain coverage under a Pennsylvania NPDES permit to regulate its storm water discharges.

143) From April 10, 2018 to present, Sunoco has failed to obtain the appropriate coverage under Pennsylvania's NPDES permitting program.

144) The acts or omissions alleged in this Count constitute violations of the CWA and the CSL, for which Defendant Sunoco is liable and subject to injunctive relief,

and for which Defendant Sunoco is liable to pay a civil penalty of up thirty seven thousand five hundred dollars (\$37,500.00) for each day of each violation. *See* 33 U.S.C. §§ 1311(a), 1319(d); *see also* 35 P.S. § 691.605.

Count 2: Sunoco Discharged Pollutants To Waters Of The Commonwealth of Pennsylvania Without Point Source NPDES Permits

145) 35 P.S. § 691.301 and 33 U.S.C. § 1311(a) prohibit any person from causing or placing or causing to be placed any industrial wastes or other wastes, in a location where they cause pollution of any waters of the state without a valid, unexpired permit. *See* 35 P.S. § 691.301; 35 P.S. § 691.611; 33 U.S.C. § 1311(a); *see also* 25 Pa. Code Chapters 92a, and 96.

146) Any such discharge is also a nuisance. *See* 35 P.S. § 691.402.

147) As alleged above, Sunoco unlawfully discharged, and continues to discharge, sediment-laden water and other pollutants into waters of the Commonwealth without the appropriate NPDES permit.

148) The acts or omissions alleged in this Count constitute violations of the CWA and the CSL, for which Defendant Sunoco is liable and subject to injunctive relief, and for which Defendant Sunoco is liable to pay a civil penalty of up thirty seven thousand five hundred dollars (\$37,500.00) for each day of each violation. *See* 33 U.S.C. §§ 1311(a), 1319(d); *see also* 35 P.S. § 691.605.

Count 3: Sunoco Violated Pennsylvania's General Water Quality Standards

149) Pennsylvania's water quality standards require, *inter alia*, that "[w]ater may not contain substances attributable to point or nonpoint source discharges in concentration or amounts sufficient to be inimical or harmful to the water uses to be protected or to human, animal, plant or aquatic life." 25 Pa.Code § 93.6(a); *see also* 25 Pa. Code Chapters 92a, 96, 105.18a (containing other water quality standards).

150) Upon information and belief, each of Defendant Sunoco's unpermitted storm water discharges into waters of the state were severe enough to violate Pennsylvania's general water quality standards.

151) The acts or omissions alleged in this Count constitute violations of the CWA and the CSL, for which Defendant Sunoco is liable and subject to injunctive relief, and for which Defendant Sunoco is liable to pay a civil penalty of up thirty seven thousand five hundred dollars (\$37,500.00) for each day of each violation. *See* 33 U.S.C. §§ 1311(a), 1319(d); *see also* 35 P.S. § 691.605.

Count 4: Sunoco Violated Pennsylvania's Wetland Water Quality Standards

152) Pennsylvania's water quality standards clearly contemplate a strict level of protection for the "functions" and "values" of wetlands. Specifically, Section 25 Pa. Code § 96.3(g) states that "[f]unctions and values of wetlands shall be protected pursuant to Chapters 93 and 105 (relating to water quality standards; and dam safety and waterway management)." 25 Pa. Code § 96.3(g). Section 96.3(g)

makes clear that Chapter 93's stringent antidegradation requirements also specifically apply to the "functions" and "values" of all the wetlands impacted by the Project. *Id.*

153) Section 96.3(g) therefore requires the Department to ensure that wetland functions and values will be "protected" from injury, damage or being destroyed, regardless of the significance of the proposed impact.

154) Sunoco is also prohibited by 25 Pa. Code § 105.18a(a)(1) from undertaking activities that result in an "adverse impact" to wetlands classified as "Exceptional Value." *See* 25 Pa. Code § 105.18a(a)(1); *see also* 25 Pa Code § 105.14.

155) Upon information and belief, several of Defendant Sunoco's unpermitted storm water discharges into wetlands,⁴ were severe enough to violate Pennsylvania's general water quality standards with regard to wetlands.

156) The acts or omissions alleged in this Count constitute violations of the CWA and the CSL, for which Defendant Sunoco is liable and subject to injunctive relief, and for which Defendant Sunoco is liable to pay a civil penalty of up thirty seven thousand five hundred dollars (\$37,500.00) for each day of each violation including each day subsequent to filing this Complaint, on a strict liability basis. *See, e.g.*, 1319(d); *see also* 35 P.S. § 691.605.

VI. REQUEST FOR RELIEF

⁴ Some of which are designated by the Department as "Exceptional Value" or "High Quality" wetlands. *See* 25 Pa. Code § 105.17.

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

In re: Amended Formal Complaint and :
Amended Petition for Interim Emergency : Docket No. C-2018-3001451
Relief of Pennsylvania State Senator : and P-2018-3001453
Andrew Dinniman, :
Petitioner :
v. :
Sunoco Pipeline L.P., a/k/a Energy :
Transfer Partners, :
Respondent :

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of the foregoing Preliminary Objections upon the parties of record in this proceeding in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant), upon the persons listed below by first class mail:

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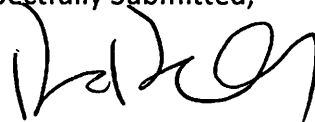
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Respectfully Submitted,



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Dated: June 13, 2018

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