COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
COMMONWEALTH KEYSTONE BUILDING
400 NORTH STREET, HARRISBURG, PA 17120

BUREAU OF
INVESTIGATION
&
ENFORCEMENT

September 16, 2019

VIA ELECTRONIC FILING

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

Re: Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement v. Sunoco Pipeline, L.P. a/k/a Energy Transfer Partners
Docket No. C-2018-3006534
I&E Motion to Strike Portions of the Flynn Intervenors' Comment in Opposition to Proposed Settlement

Dear Secretary Chiavetta:

Enclosed for electronic filing please find the Bureau of Investigation and Enforcement's Motion to Strike Portions of the Flynn Intervenors' Comment in Opposition to Proposed Settlement in the above-referenced matter. Copies have been served on the parties of record in accordance with the Certificate of Service.

Sincerely,

Stephanie M. Wimer
Senior Prosecutor
PA Attorney I.D. No. 207522

Michael L. Swindler
Deputy Chief Prosecutor
PA Attorney I.D. No. 43319

SMW/ac
Enclosure

cc: Honorable Elizabeth H. Barnes
As per Certificate of Service

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement, Complainant,	:	
v.	:	Docket No. C-2018-3006534
Sunoco Pipeline, L.P. a/k/a Energy Transfer Partners, Respondent	:	

NOTICE TO PLEAD

TO THE FLYNN INTERVENORS:

The Bureau of Investigation and Enforcement ("I&E") of the Pennsylvania Public Utility Commission ("Commission") has filed a Motion to Strike Portions of the Flynn Intervenors' Comment in Opposition to Proposed Settlement in the above-captioned matter, pursuant to the Commission's regulations at 52 Pa. Code § 5.103. You are hereby notified that a written response is due within twenty (20) days of the service of the Motion, consistent with 52 Pa. Code §§ 5.61(a) and 5.103(c).

Stephanie M. Wimer
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PA Attorney I.D. No. 207522

Bureau of Investigation and Enforcement
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Dated: September 16, 2019

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement, Complainant,	: : : :	
v.	:	Docket No. C-2018-3006534
Sunoco Pipeline, L.P. a/k/a Energy Transfer Partners, Respondent	: : :	

MOTION OF THE BUREAU OF INVESTIGATION AND ENFORCEMENT TO STRIKE PORTIONS OF THE FLYNN INTERVENORS' COMMENT IN OPPOSITION TO PROPOSED SETTLEMENT

TO THE HONORABLE ELIZABETH H. BARNES:

The Bureau of Investigation and Enforcement ("I&E") of the Pennsylvania Public Utility Commission ("Commission"), by and through its prosecuting attorneys, pursuant to 52 Pa. Code § 5.103, files this Motion to Strike Portions of the Flynn Intervenors'[1] Comment in Opposition to Proposed Settlement ("Flynn Comment") as the Flynn Comment impermissibly includes extra-record evidence in direct violation of presiding Administrative Law Judge ("ALJ") Elizabeth H. Barnes' July 15, 2019 Order ("July 15, 2019 Order"), and deprives I&E of due process, such as the ability to cross-examine the experts who authored the extra-record report that is appended to the Flynn Comment or otherwise challenge the statements of hearsay contained in the Flynn Comment.

In support of its Motion, I&E avers as follows:

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[1] The "Flynn Intervenors" are a collective reference to Meghan Flynn, Rosemary Fuller, Michael Walsh, Nancy Harkins, Gerald McMullen, Caroline Hughes and Melissa Haines, who filed a Complaint against Sunoco Pipeline, L.P. ("SPLP," "Respondent," or "Company") at Docket No. C-2018-3006116, and concurrently filed a Petition for Interim Emergency Relief against SPLP at Docket No. P-2018-3006117 on November 19, 2018. These dockets have been consolidated. The Flynn Intervenors petitioned to intervene in the instant matter averring that they are individuals from Delaware or Chester Counties residing and/or working in close proximity to SPLP's Mariner East pipelines. The Flynn Intervenors are represented by counsel.

I. BACKGROUND

1. The instant proceeding was initiated by the filing of I&E's Complaint against Sunoco Pipeline, L.P. a/k/a Energy Transfer Partners ("SPLP" or "Company") on December 13, 2018, alleging violations of the United States Code, Code of Federal Regulations and Pennsylvania Code that I&E avers were discovered during an investigation of I&E's Safety Division of an ethane and propane leak that occurred on SPLP's Mariner East 1 ("ME1") pipeline on April 1, 2017, in Morgantown, Berks County, Pennsylvania. The leak did not result in a fire, explosion or cause any personal injury.

2. The I&E Safety Division determined that the leak was attributed to corrosion and this determination led the I&E Safety Division to examine SPLP's corrosion control program, including its cathodic protection practices.[2] In short, I&E alleged that SPLP's corrosion control program was deficient as it relates to ME1 under practices and procedures that were in effect during the time of the April 1, 2017 leak in Morgantown. Those practices and procedures have since been revised and the revised procedures have been implemented upon the acquisition of control of SPLP by Energy Transfer Company ("ETC") and the implementation of ETC protocols.

3. After receiving an extension of time, SPLP filed a timely Answer and raised New Matter to I&E's Complaint on January 31, 2019. By Secretarial Letter dated February 22, 2019, I&E was granted an extension of time until March 4, 2019 to file a

[2] Cathodic protection is a method of controlling corrosion on the surface of a metal pipeline by supplying electrical current.

Reply to SPLP's New Matter. I&E and SPLP actively engaged in extensive settlement negotiations during the first quarter of 2019 and on March 1, 2019, the Parties announced by letter that they had that day achieved a settlement-in-principle and requested to hold the matter in abeyance pending the filing of a settlement agreement. On April 3, 2019, I&E and SPLP filed a Joint Petition for Approval of Settlement resolving all issues between I&E and SPLP in the instant matter.

4. During the pendency of the settlement negotiations that ultimately culminated in the Joint Petition for Approval of Settlement, several persons and entities sought to intervene in this matter: Thomas Casey on December 21, 2018; West Goshen Township on January 18, 2019; Josh Maxwell on February 8, 2019; West Whiteland Township on February 11, 2019; Edgmont Township on March 19, 2019; and the Flynn Intervenors on June 11, 2019. I&E and SPLP recognized these interests by expressly including language in the Joint Petition for Settlement which provided an opportunity for any interested entity or person to file comments to the Settlement Agreement followed by a reply comment period for I&E and SPLP. The Joint Petition for Approval of Settlement was submitted to the Commission directly for its review and consideration of the outstanding Petitions to Intervene.

5. By Commission Order entered June 10, 2019, the matter was referred to the Office of Administrative Law Judge ("OALJ") for further proceedings.

6. On June 28, 2019, I&E and SPLP filed an Addendum to April 3, 2019 Joint Petition for Approval of Settlement to expand the time in which a party may elect to

withdraw from the Settlement Agreement should the Settlement Agreement be modified in any way.

7. The matter was assigned to presiding ALJ Elizabeth H. Barnes issued the July 15, 2019 Order that granted the Petitions to Intervene. While granting the Petitions to Intervene, including permitting the intervention of the Flynn Intervenors, ALJ Barnes provided the opportunity for all Intervenors to file Comments regarding the Joint Petition for Approval of Settlement filed by I&E and SPLP.

8. ALJ Barnes further held as follows:

> I&E and [SPLP] have entered into a Settlement in full resolving the Complaint in this proceeding and although intervention is granted, intervenors have no rights that survive discontinuance of this proceeding. Petitioners must take the case as it stands at the time of intervention and cannot raise issues substantially beyond the scope of the Complaint, particularly where, as here, this matter is settled.

Pa. Pub. Util. Comm'n, Bureau of Investigation and Enforcement v. Sunoco Pipeline, L.P., Docket No. C-2018-3006534 (July 15, 2019 Order) at 14-15.

9. Judge Barnes also stated that:

> In granting intervention, the Intervenors will be required to take the case as it currently stands seven months after the filing of the Complaint commencing this proceeding and following the submission of a settlement petition. The orderly progress of the case will be maintained, the issues will not be significantly broadened, and the burden of proof will not be shifted. **Intervenors will be precluded from introducing evidence into the record.**

Id. at 17 (emphasis added).

10. On August 12, 2019, the Flynn Intervenors filed their Comment in Opposition to Proposed Settlement.

11. Throughout the Flynn Comment, extra-record statements are made and extra-record exhibits are referenced or appended. For example, the Flynn Comment impermissibly appended the expert report of Matergenics Materials and Energy Solutions as an evidentiary exhibit. The Flynn Comment also references numerous newspaper articles and information from websites.

12. Additionally, the Flynn Comment raises issues substantially beyond the scope of I&E's Complaint and that are directly relevant to the Flynn Intervenors' proceeding at Docket No. C-2018-3006116. For example, only ME1 is involved in the instant matter while the Flynn Comment discusses all Mariner East pipelines. Flynn Comment at 4.

13. As the injection of extra-record material and issues beyond the scope of the I&E Complaint proceeding runs afoul of the July 15, 2019 Order and deprives I&E of due process, I&E moves to strike the offending portions of the Flynn Comment as identified below.

II. MOTION TO STRIKE

14. The Flynn Comment presents or mentions the following statements, documents, records and materials that have not been made part of the record:

a. The statement regarding the reported revenue of SPLP's parent company. (Flynn Comment at 2, footnote 1);

b. The statement that I&E lacked important safety information from SPLP after ME1 began to transport hazardous liquids. (Flynn Comment at 2, footnote 2);

c. The statement that a resident observed hazardous vapor hissing out of the ground. (Flynn Comment at 5);

d. The statement that closing valves at either end of a pipeline will not stop the release of hazardous liquids and did not stop such release in this accident. (Flynn Comment at 5);

e. The statement that the pipeline was purged with nitrogen "at some point" on April 2, 2017. (Flynn Comment at 6);

f. The entirety of Exhibit A of the Flynn Comment: Preliminary Comments on Proposed BI&E/Sunoco Morgantown Settlement by Matergenics Materials and Energy Solutions, as well as the description of the contents of Exhibit A. (Flynn Comment at 7 and 39-41);

g. The statement that ETC earned $54 billion in revenue in 2018 and hyperlink. (Flynn Comment at 10);

h. The reference to the Pennsylvania Department of Environmental Protection's ("DEP") News Release concerning the moratorium on clean water permit approvals and hyperlink. (Flynn Comment at 10);

i. The statement pertaining to fines issued by DEP. (Flynn Comment at 10);

j. The statements concerning SPLP's purported notification to residents regarding the April 1, 2017 leak. (Flynn Comment at 13);

k. The statements that SPLP concealed or destroyed a 75-foot section of pipeline as it was in poor condition and corroded. (Flynn Comment at 16);

l. The statement that SPLP engaged in "a coverup" with respected to a purported "missing" 75-foot section of pipe. (Flynn Comment at 17);

m. SPLP accident data and hyperlink. (Flynn Comment at 17-18);

n. SPLP's alleged violations of laws and regulations subject to DEP's jurisdiction and hyperlink. (Flynn Comment at 22);

o. The eleven examples of SPLP's alleged deceitful, dishonest and unlawful conduct and hyperlinks. (Flynn Comment at 23-33);

p. References made to a proceeding before the Environmental Hearing Board. (Flynn Comment at 34);

q. The statements concerning the analysis set forth in the Matergenics report. (Flynn Comment at 40-41);

r. The statements concerning the Quest risk assessment model. (Flynn Comment at 42);

s. The statements and picture of a 2015 liquid ethane pipeline accident that occurred in Follansbee, West Virginia. (Flynn Comment at 42);

t. The Fractracker map of Mariner East 2's proposed route and hyperlink. (Flynn Comment at 43);

u. The statements concerning prior expert testimony regarding the ability to evacuate and the Quest risk assessment model. (Flynn Comment at 44); and

v. The Fractracker maps of population density in Chester and Delaware Counties and hyperlink. (Flynn Comment at 44-45).

15. A copy of the Flynn Comment illustrating the portions in which I&E moves to strike has been appended as "Attachment A."

16. The Flynn Intervenors' attempt to introduce and rely upon the aforementioned extra-record evidence should be rejected. It is well settled that intervenors take the record as they find it at the time of intervention. *Pa. Pub. Util. Comm'n, Bureau of Investigation and Enforcement v. West Penn Power Co.*, Docket No. C-2012-2307244, Opinion and Order (entered Aug. 29, 2013) at 11, *citing*, *Final Rulemaking for the Revision of Chapters 1, 3 and 5 of Title 52 of the Pennsylvania Code Pertaining to Practice and Procedure Before the Commission*, Docket No. L-00020156 (Order entered Jan. 4, 2006). When the Flynn Intervenors' intervention was granted on July 15, 2019, the I&E Complaint proceeding was fully resolved and the Joint Settlement

Petition had been filed for approximately three-and-a-half months. Accordingly, the Flynn Intervenors should not be permitted to open a pandora's box of extra-record evidence at the eleventh hour and especially since I&E and SPLP fully resolved all issues raised by I&E in its investigation.

17. ALJ Barnes indeed recognized the settled procedural posture of the instant proceeding and instructed the Flynn Intervenors that they have no rights that survive the discontinuance of the case and are prohibited from introducing evidence into the proceeding. *Pa. Pub. Util. Comm'n, Bureau of Investigation and Enforcement v. Sunoco Pipeline, L.P.*, Docket No. C-2018-3006534 (July 15, 2019 Order) at 14-15 and 17.

18. The Flynn Comment brazenly ignores this clear directive and includes a kitchen sink-full of extra-record evidence in a thinly veiled attempt to break apart the I&E and SPLP Settlement Agreement and force the litigation of a settled matter. I&E asserts that it is the strategy of the Flynn Intervenors to utilize the investigative work product and engineering expertise of I&E, as well as conduct discovery in the instant matter, in order to support their own pending Complaint proceeding at Docket No. C-2018-3006116. *See* Flynn Comment at 46-48.

19. Furthermore, any consideration of the Flynn Intervenors' extra-record evidence would violate I&E's due process. "The Commission, as an administrative body, is bound by the due process provisions of constitutional law and by the principles of common fairness." *Hess v. Pa. Pub. Util. Comm'n*, 107 A.3d 246, 266 (Pa. Cmwlth. 2014); *Bridgewater Borough v. Pa. Pub. Util. Commission,* 124 A.2d 165 (Pa. Super. 1956); *McCormick v. Pa. Pub. Util. Commission,* 30 A.2d 327 (Pa. Super. 1943).

"Among the requirements of due process are notice and an opportunity to be heard on the issues, to be apprised of the evidence submitted, to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal." *Hess v. Pa. Pub. Util. Comm'n*, 107 A.3d 246, 266 (Pa. Cmwlth. 2014); *Davidson v. Unemployment Compensation Bd. of Review,* 151 A.2d 870 (Pa. Super. 1959); *In re. Shenandoah Suburban Bus Lines, Inc.,* 46 A.2d 26 (Pa. Super. 1946). I&E is simply deprived of any attempt to question the experts at Matergenics Materials and Energy Solutions or otherwise challenge the relevancy or truthfulness of the multitude of hearsay statements set forth in the Flynn Comment absent an evidentiary hearing. However, no evidentiary hearing can or should be held at this juncture since the matter has been fully resolved.

20. In the event that I&E's Motion to Strike is denied, I&E requests an opportunity to file a written response to Exhibit A of the Flynn Comment - Preliminary Comments on Proposed BI&E/Sunoco Morgantown Settlement by Matergenics Materials and Energy Solutions – as well as the extra-record statements and references that are identified in Paragraph 14, *supra*.

21. Based on the foregoing, the extra-record evidence set forth in the Flynn Comment and as highlighted above and attached hereto should be stricken and disregarded by the presiding ALJ.

III. CONCLUSION

WHEREFORE, the Bureau of Investigation and Enforcement respectfully requests that Administrative Law Judge Elizabeth H. Barnes grant its Motion to Strike the extra-record evidence in the Flynn Comment in Opposition to Proposed Settlement and disregard said portions of the Flynn Comment in the disposition of the above-captioned matter.

Respectfully submitted,

Stephanie M. Wimer
Senior Prosecutor
PA Attorney I.D. No. 207522

Michael L. Swindler
Deputy Chief Prosecutor
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Dated: September 16, 2019

Attachment A

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REPLY TO:
Center City

August 12, 2019

Via Electronic Filing

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

Re: BI&E v. Sunoco Pipeline L.P., Docket No. C-2018-3006534
FLYNN INTERVENORS' COMMENT IN OPPOSITION TO JOINT PETITION OF BI&E AND SUNOCO FOR APPROVAL OF SETTLEMENT

Dear Secretary Chiavetta:

Attached for electronic filing with the Commission is Flynn Intervenors' Comment in Opposition to the Joint Petition of BI&E and Sunoco for Approval of Settlement in above-captioned proceeding.

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

Very truly yours,

MICHAEL S. BOMSTEIN, ESQ.

MSB:mik

cc: Judge Barnes (Via email and First Class Mail)
Per Certificate of Service

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement	:	
	:	C-2018-3006534
v.	:	
Sunoco Pipeline L.P.	:	

FLYNN INTERVENORS' COMMENT IN OPPOSITION TO PROPOSED SETTLEMENT

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I. Introduction

The PUC Bureau of Investigation and Enforcement ("I&E") launched an investigation into Sunoco Pipeline L.P.'s ("Sunoco" or "SPLP") pipeline integrity practices following an accident involving a release of hazardous, highly volatile liquids ("HVLs") from the Mariner East 1 ("ME1") pipeline in Morgantown, PA that was discovered by a landowner on April 1, 2017.[1] Ten months later, in February 2018, I&E sought detailed information from Sunoco regarding the hazards associated with ME1, including the population within its immediate and delayed ignition impact zones.[2] Twenty months later, obviously dissatisfied with Sunoco's response to the investigation, I&E filed its Complaint in the instant proceeding.

The I&E Complaint asserts that data furnished by Sunoco demonstrates the leak was caused by corrosion, and that the corrosion was brought on by ignoring both federal regulations and standard (NACE) engineering practices.

Sunoco denies the allegations, but notably fails to explain the cause of the corrosion or the cause of the leak. The company even goes so far as to suggest, implausibly, that the absence of metal does not imply the presence of corrosion.

The parties (I&E and Sunoco) on April 3, 2019 jointly filed a petition for approval of a proposed settlement. While the Complaint explicitly expresses concern that the entire ME1 pipeline might be corroded, the proposed settlement appears to be geographically limited to one

[1] Sunoco is a unit of Energy Transfer ("ET"), a company that also has other pipeline subsidiaries. ET reported $54 billion in revenue in 2018.

[2] It bears noting that I&E lacked this important safety information more than three years after ME1 began to transport HVLs in 2014.

small segment of the pipeline.[3] Moreover, even though the equally ancient 12-inch "Point Breeze to Montello" workaround pipeline is in the same right of way as ME1, and is now being used by Sunoco to transport hazardous, highly volatile liquids, it is not part of the proposed settlement.

I&E and Sunoco now seek Commission approval of the proposed settlement in its entirety. They ask that the entire settlement be rejected if any part of it is rejected.

52 Pa. Code § 69.1201 sets forth standards for evaluation of a proposed settlement. The Commission is given ten factors to consider in its evaluation. In addition, ALJ Barnes has invited all intervenors to comment on the issues they would raise if the settlement were rejected and to explain how their interests would be affected if the settlement were accepted.

Flynn Intervenors ("*Flynn* Intervenors" or "the Intervenors") also contend that the Commission's decision on the proposed settlement must factor in the effect it may have on the pending *Flynn* case.

Below, Intervenors address all of the issues noted above and argue that the proposed settlement must be rejected.

II. The History of the Case

Meghan Flynn, Rosemary Fuller, Michael Walsh, Nancy Harkins, Gerald McMullen, Caroline Hughes and Melissa Haines hereby adopt by reference the history of this proceeding detailed in the Commission's Opinion and Order and entered June 10, 2019, and as further set forth in the ALJ's July 15, 2019 Order granting Petitions to Intervene ("the Order"). The Order

[3] The I&E Complaint states that the ME1 pipeline has five segments. (¶ 14). Segment 11190 runs from Twin Oaks to Montello. (¶ 18). An Inline Inspection ("ILI") run was conducted on Segment 11190 in 2017. (¶ 36). The proposed settlement calls for development of an ME1 corrosion growth rate based on that most recent ILI run; *i.e.*, data gleaned from the limited 2017 ILI run for Segment 11190. That suggests either that (a) the parties will be limiting the scope of the Remaining Life Study to Segment 11190—which does not include Chester County or Delaware County—or (b) the parties plan to draw inferences regarding system-wide corrosion growth rate based on data from only one of the five segments, without performing an ILI run for the remaining four.

granted petitions to intervene of the *Flynn* Intervenors as well as West Goshen Township, West Whiteland Township, Upper Uwchlan Township, Edgmont Township, Josh Maxwell, and Thomas Casey. The Order further permitted all intervenors not agreeing to the proposed settlement to (1) state the reasons why; (2) delineate the issues they would raise if the settlement were rejected; and (3) outline how their interests would be affected if the settlement were accepted.

Flynn Intervenors are the Complainants in the proceeding docketed in the Commission at C-2018-3006116 and P-2018-3006117. Their complaint raises public safety concerns over the construction and operation of the Mariner East pipelines in Delaware and Chester Counties. More particularly, *Flynn* Intervenors complain *inter alia* that Sunoco's "public awareness program" is inadequate; the siting of pipelines in their vicinity is reckless and dangerous; and the existing ME1 and 12-inch workaround pipelines are not being maintained safely.[4]

Flynn Intervenors' request for relief in their Second Amended Formal Complaint includes relief with respect to the condition of the ancient 8-inch and 12-inch pipelines. The request is very similar in some respects to I&E's prayer for relief in the instant proceeding. For all the reasons set forth below, *Flynn* Intervenors request that the proposed settlement be rejected.

III. Factual Background

a. The Morgantown Accident

On April 1, 2017, at 3:57 p.m., the ME1 pipeline segment identified as the 8-inch Twin Oaks to Montello (identification number 11190) was discovered by a resident to have experienced a leak at station 2449+12 at 5530 Morgantown Road, Morgantown, Berks

[4] Intervenors' brief description above is not a substitute for or modification of their Second Amended Formal Complaint, which pleading speaks for itself.

County, Pennsylvania. The pipeline was transporting an ethane/propane mixture at the time the accident was discovered.

~~The resident first noticed the leak by observing hazardous vapor "hissing" out of the ground.~~ The resident informed Sunoco, which dispatched a technician to the site shortly thereafter. The technician arrived at 5:04 PM on April 1, 2017, and confirmed the leak.

At no time on April 1st did Sunoco notify neighborhood residents that ME1 was leaking combustible gas.

Pursuant to 49 CFR § 195.50(b) of the federal pipeline safety regulations (relating to reporting accidents in which there is a release of five (5) gallons or more of hazardous liquids), SPLP filed an accident report with PHMSA that reported a release of twenty (20) barrels (840 gallons).[5]

The leak occurred between the Beckersville pump station and the Elverson block valve – a distance of approximately seven (7) miles –and was isolated by shutting down the pump station and block valve. ~~Importantly for the public safety concerns noted herein, the act of closing valves at either end of a failed HVL pipeline will not stop the release of these materials, as it did not do in this case.~~

b. ***The Morgantown Investigation***

On April 1, 2017 at approximately 6:30 PM, SPLP notified I&E's Safety Division of the leak by making a telephone call to the manager of the Safety Division. On April 2, 2017, an I&E pipeline inspector visited the accident site, but was unable to inspect the facility

[5] Neither Sunoco, PHMSA, nor the PUC has publicly clarified whether this represents the total amount released, or, more probably, just the amount that was released between the time Sunoco learned of the accident and the time it stopped the release, which was apparently sometime the next day, April 2, 2017. Sunoco has not provided an estimate of how long ME1 had been leaking because Sunoco did not detect the accident; it may in fact not know how long the accident had been underway before discovery by the resident, nor the total amount of HVLs released.

because, as noted above, the pipeline was still releasing combustible vapor. ~~At some point on April 2nd the line was purged with nitrogen.~~

On April 3, 2017, I&E pipeline inspectors visited the site again to examine the affected pipeline. SPLP crews excavated and exposed the pipeline, which was then cleaned.

Visual examination of the pipe demonstrated localized corrosion at the bottom of the pipe in the six o'clock position. SPLP cut out a portion of the pipe and an eight-foot section of this portion was sent to a laboratory for analysis. Laboratory analysis of this section of the pipeline attributed the failure to corrosion, and this cause is also reflected in Sunoco's report of the accident to PHMSA. To date, the extent of corrosion in the eight-foot section has not been disclosed publicly.

As alleged in the I&E Complaint, Sunoco repaired the pipeline by welding an eighty-three-foot section into it. Neither Sunoco nor I&E has explained how and why an eighty-three-foot piece of pipe was placed in spot from which an eight-foot section was removed.

Based on the laboratory findings as well as other data accumulated prior to the filing of the Complaint on December 13, 2018, I&E averred in its Complaint against Sunoco that it had reason to believe that *the entire ME1 pipeline* suffered from the same problems disclosed in the Morgantown incident. Specifically, ¶ 39 of the I&E Complaint alleges:

> While the data reviewed was largely specific to the site of the leak, SPLP's procedures and overall application of corrosion control and cathodic protection practices are relevant to all of ME1 and, thus, I&E alleges that there is a **statewide concern** with SPLP's corrosion control program and the soundness of SPLP's engineering practices with respect to cathodic protection.
> (Emphasis added).

"Statewide concern" necessarily includes Chester County as well as Delaware County.

~~Intervenors' consulting expert, Dr. Mehrooz Zamanzadeh ("Dr. Zee"), has reviewed the I&E Complaint and concluded, assuming the accuracy of the other allegations in the Complaint, that paragraph 39 of the Complaint is correct. Dr. Zee's condensed bio and Verified Statement with Preliminary Report in support hereof is attached as Ex. "A."~~

c. Material Allegations of the I&E Complaint

I&E filed its Complaint against Sunoco on December 13, 2018, more than twenty months after the Morgantown accident was discovered. The Complaint made numerous allegations of improper pipeline maintenance on ME1.

The I&E Complaint alleged that Sunoco illegally:

(a) failed to achieve a standard *greater* than a negative cathodic potential of -850 mV;

(b) failed to monitor external corrosion adequately;

(c) performed side drain measurements that ignored the fact that current had been flowing away from the pipeline;

(d) conducted close interval potential surveys ("CIPS") of ME1 that showed that only "on" potentials were measured, leading to incomplete data;

(e) failed to correct an identified deficiency in corrosion control despite obvious metal loss;

(f) failed to maintain sufficient records to demonstrate adequate corrosion control;

(g) failed to perform in-line inspection ("ILI") testing frequently enough;

(h) failed to explain how CIPS metrics would be obtained, evaluated and accomplished;

(i) failed to identify certain features, such as rectifiers, areas with parallel pipelines and overhead power lines, despite the fact that such information is critical in the determination of the validity and accuracy of the test results;

(j) conducted an inspection using an ILI tool to detect anomalies in the pipeline and measure corrosion but that the tool failed and Sunoco improperly waited another year to conduct the ILI inspection; and

(k) despite that the fact that the 2017 ILI inspection indicated metal loss, Sunoco failed to note or mention corrosion anywhere in its reports on the 2017 ILI inspection.

IV. The Proposed Settlement

I&E's Complaint raises a number of critical public safety concerns related to the Mariner East pipelines. The proposed settlement of the Complaint does not fully address those concerns and does not provide for the future safe, adequate and reasonable operation of the Mariner East pipelines.

In general, the proposed settlement leaves Sunoco with far too much discretion to proceed in whatever way best serves its own interests and provides too little oversight. The terms of the proposed settlement provide largely illusory or non-existent relief to the public.

The relief that the proposed settlement might provide is inadequate to ensure that Sunoco's pipelines will be operated and maintained safely. The proposed settlement relies on a number of Sunoco's unsupported claims. It is unreasonable to base a settlement on such assertions without transparency in regard to supporting documents and evidence.

Given Sunoco's repeated violation of agency orders as well as recent settlement agreements, relying on Sunoco to fulfill its obligations under the proposed settlement is

unreasonable. Moreover, the proposed settlement fares poorly under an analysis of the standards and mandatory factors listed under 52 Pa. Code § 69.1201.

a. The Proposed Settlement Terms are Largely Illusory and/or Contain No Additional Relief Beyond the Status Quo

For the settlement to be in the public interest, it must provide significant relief that is beneficial to the public and commensurate with the alleged conduct. While there is some beneficial substance contained in the proposed settlement terms, much of it is illusory, and much of the rest does not impose relief beyond the status quo.

As a whole, the proposed terms do not provide relief commensurate with the alleged conduct. In all pertinent respects the proposed settlement leaves the perpetrator of alleged violations of statute and regulation in charge of all significant decisions relating to pipeline maintenance and remediation.

The terms of the proposed settlement are broken into lettered paragraphs as follows: (A) Civil Penalty; (B) Remaining Life Study; (C) In-Line Inspection and Close Interval Survey Frequency of ME1; (D) Revision of Procedures; (E) Implementation of Revised Procedures; and (F) Pipe Replacement as It Relates to Corrosion. Of these, the latter three (D, E, and F) in fact lack any relief whatsoever.

Specifically, (D) merely claims that before I&E filed its Complaint, Sunoco had already taken action that purportedly "addressed" part of the Complaint's concerns. Because (D) reflects changes that Sunoco made before and independent of the Complaint—let alone the settlement—it provides no new relief. (E) is precisely the same.

(F) is a mere clarification of the terms in favor of Sunoco, and agreement that Sunoco will do what it is already required to do, namely, comply with "applicable Federal regulations," and its own policies. Again, (F) provides no relief.

The civil penalty (A) provides no meaningful relief because it imposes no credible deterrent on Sunoco. Sunoco is a unit of Energy Transfer, a company with $54 billion in revenue in 2018. *See,* https://www.sec.gov/Archives/edgar/data/1161154/000116115419000013/eto12-31x201810k.htm#s742AEF7A63FA53DEBA5F77DA15FB3C46.

Sunoco has already been fined over $12,000,000 by the Pennsylvania Department of Environmental Protection as of the fall of 2018, yet that did not prove deterrent enough to make Energy Transfer comply with state law after issuance of a compliance order in response to an explosion on one of its pipelines in Pennsylvania. *See* Pennsylvania DEP, "Department of Environmental Protection Issues Hold on All Energy Transfer Clean Water Permit Approvals and Modifications Due to Non-Compliance," February 8, 2019, available at www.ahs.dep.pa.gov/NewsRoomPublic/articleviewer.aspx?id=21634&typeid=1. If that much larger payment did not deter future noncompliance, this proposed penalty cannot be expected to do so either.

The relief provided by the Remaining Life Study (B) is largely illusory. Under the terms of the proposed settlement, Sunoco will identify three experts, one of whom I&E will select to conduct the Study.

This perfunctory process leaves most of the decision to Sunoco with no articulated standards for I&E oversight. Foxes and henhouses come readily to mind. Transparently, Sunoco will choose friendly options. It is unclear how Sunoco managed to extract this concession from I&E, but it casts significant doubt over the entire proposed Study.

When suggesting the pool of self-selected experts, the proposed settlement requires Sunoco to disclose whether the individual has worked on ME1, but not other Sunoco or Energy

Transfer pipelines, or even the various other Mariner East pipelines. Any such work presents a conflict of interest.

In describing the selection process, I&E and Sunoco use the term "independent" to characterize a choice made by a party whose misconduct has been called into question in this proceeding. Sunoco has a significant stake in the outcome of this case. Giving Sunoco control over the process and calling that "independent" is an abuse of the English language. In all pertinent respects the proposed settlement leaves the alleged perpetrator of violations of statute and regulation in charge of all significant decisions relating to pipeline maintenance and remediation.

It is entirely beside the point that Sunoco must identify three possible experts. Sunoco has no business doing the initial choosing. I&E can easily select an expert and Sunoco can disclose its prior relationships.[6]

Even if the "independent" expert were to conduct a legitimate study, the expert has no enforcement authority to ensure necessary action is taken to repair or retire unsafe sections of pipe, and the Joint Settlement Proposal creates no process for I&E to verify, validate, or direct improvements based on the study. The proposed settlement would leave all of that in Sunoco's hands. Similarly, the proposed annual updates to the study do not set forth any requirements for ongoing evaluation, but merely require Sunoco to report the evaluation process it is using.

In addition to these flawed provisions, the Remaining Life Study is not additional relief above and beyond what Sunoco was already going to have to do independent of this proposed settlement. Governor Wolf, in coordination with DEP, already has caused the Commonwealth to stop issuing additional permit approvals to Energy Transfer entities such as Sunoco due to "a

[6] Intervenors' own expert, Dr. Zee, can also identify other experts if I&E is interested. Alternatively, I&E can identify a disinterested party to make the selection.

failure by Energy Transfer and its subsidiaries to respect our laws and our communities." The Governor also called upon the PUC to require a remaining life study of ME1 and thoroughly evaluate the safety of ME1. *See* press release, "Governor Wolf Issues Statement on DEP Pipeline Permit Bar, February 8, 2019, available at www.governor.pa.gov/governor-wolf-issues-statement-dep-pipeline-permit-bar.

Under the proposed settlement, Sunoco's only post-Study obligation is to (a) prepare an annual report setting out its plans for the next year; (b) conduct a Close Interval Survey of ME1; and (c) seek to collaborate with I&E to agree upon a mutually acceptable ILI interval period. *See* Section (C) of the proposed settlement.

No provision is made for resolution of disagreements with I&E on these limited obligations. If Sunoco and I&E do not reach "a mutually acceptable ILI interval period" pursuant to Section C.a. of the proposed settlement, there is nothing barring Sunoco from simply choosing to never do an ILI run again. In other words, the second paragraph of Section C.a. of the proposed settlement provides only illusory relief.

In fact, given that Sunoco argues on page 7 of SPLP's Statement that In-Line "inspections on an annual basis would not provide meaningful information in terms of corrosion control," it is foreseeable at the outset that Sunoco and I&E will not agree on an ILI interval period, and Sunoco will simply do what it would have in the absence of this settlement. The substance of Section C is therefore largely illusory as well.

Remarkably, Sunoco itself disparages the terms of the settlement in its Statement. At pages 6 and 7 of the Statement, Sunoco writes, "Regarding the remaining life study…the concept is wholly inconsistent with the federal safety regulations…"

At page 7 of its Statement, Sunoco writes that annual ILI "would not provide meaningful information in terms of corrosion control." The proposed settlement terms call for two ILI runs at an 18-month interval, scarcely different than the annual inspections Sunoco disparaged.

~~In the Morgantown accident, Sunoco's notification to residents in the vicinity (a high consequence area) consisted of sending an agent the next day to knock on the doors of some, but not all, nearby occupied structures. Sunoco's actual practice in connection with the Morgantown leak makes a mockery of its one-size-fits-all "public awareness program" ("What should I do if I suspect a leak? Leave the area immediately on foot..."). One does not leave an area immediately when one does not even hear about a leak until the next day or, in the case of those who were never notified, one does not leave the area at all.~~

Looking at the terms of the proposed settlement, there is very little meaningful content for the benefit of the public. The substance consists mostly of a trivial fine, a *pro forma* study by an expert selected by Sunoco, and a few more inspections. The settlement fails to provide an analysis of the public safety risk of Mariner East or how that risk would be mitigated by application of the proposed settlement terms. Quite simply, the proposed settlement has no "teeth" through which to require fixes to identified problems in order to make the public safer.

b. Any Relief Provided is too Narrow to Ensure Sunoco's Pipelines Will Be Operated and Maintained Safely

To the extent any relief provided in the complaint is not wholly illusory, it is clearly inadequate. The I&E Complaint seeks a remaining life study on ME1 due to a corrosion-caused leak on an 8-foot segment of a 300-mile-long 87-year-old pipeline. It also requests annual ILI runs for all "SPLP bare steel and poorly coated pipelines in Pennsylvania."

While the proposed settlement touches on each of these requests, it does not satisfy them. I&E's Complaint at ¶ 39 alleged:

> While the data reviewed was largely specific to the site of the leak, SPLP's procedures and overall application of corrosion control and cathodic protection practices are relevant to all of ME1 and, thus, I&E alleges that **there is a statewide concern** with SPLP's corrosion control program and the soundness of SPLP's engineering practices with respect to cathode protection. (Emphasis added).

While I&E has expressed a "statewide concern," it is unclear from the proposed settlement whether the focus of the proposed ILI runs is limited to Segment 11190 or the entire ME1 pipeline. Nothing in the Joint Petition suggests that the remainder of the ME1 pipeline is going to be examined or replaced if necessary, as part of the ILI process.

The ILI program in the proposed settlement appears to be carefully designed to keep Sunoco from being responsible for detecting corrosion. It provides no assurance that the entire pipeline will be examined to develop a baseline corrosion measurement. Moreover, the decision as to whether to replace pipe (or not) is left in Sunoco's hands, much as it always has been, and the settlement changes nothing in that regard.

The proposed settlement also ignores the fact that Sunoco has failed to detect anomalies in previous ILI runs. As I&E reported in ¶ 36 of its Complaint, in 2016 Sunoco conducted an ILI but "the tool failed and no data was available from the 2016 inspection." Further, an inspection was done in 2017—just prior to the discovery of the leak—in which metal loss was found but "corrosion is not noted or mentioned anywhere in SPLP's reports regarding the 2017 ILI inspection."

Thus, in one instance the tool failed completely and in the next the tool worked but Sunoco did not pay attention to what it found. More important for present purposes is Sunoco's evasive answer to I&E's straightforward allegation that loss of metal near the leak in Morgantown demonstrates corrosion. Instead of admitting the loss of metal demonstrates

corrosion, the company responds that metal loss only shows inadequate protection at that one point. The obvious existence of corrosion was of great concern to I&E and the agency suggested it might mean a system-wide problem. *The fact that I&E asserted (a) there obviously was corrosion and (b) Sunoco never mentioned it in its report, is never addressed.*

This kind of evasive parsing of language underscores why Sunoco cannot be trusted. Moreover, if the 2016 ILI failed completely, and the 2017 run produced results Sunoco chose to ignore, there is no reason to believe that ILI inspection can be relied upon to resolve I&E's very real concerns. For any ILI program to be successful going forward, the proposed settlement must address why it was not successful in the past. The proposed settlement fails to address this critical issue.

Regarding the remaining life study, the obvious rationale for this request in the Complaint is that problems related to age could well pervade the entire 300 miles length of the pipeline. The 12-inch pipeline that now has become part of the workaround pipeline also went into service in the 1930s. The 12-inch workaround pipeline has also experienced hazardous liquids accidents in both Chester and Delaware Counties, as recently as June 2018. There is no reason to believe that the 12-inch workaround pipeline is in any better condition than ME1.

The Commission is not required to wait for I&E to file a new petition for the 12-inch workaround pipeline; it has plenary authority to initiate its own investigation and take such other action as may be needed to assure safe, adequate and reasonable service. *See,* 66 Pa.C.S. §§ 501 and 1501. Nothing prohibits the Commission from imposing operating requirements above and beyond minimum state and federal regulatory standards.

The fact, therefore, that no regulation specifically requires remaining life studies on ancient pipelines should not prevent the Commission from taking whatever steps are reasonably

required to mitigate the probability that Sunoco HVL pipeline failures will continue to occur. This proposed settlement falls short of taking those necessary steps.

c. The Proposed Settlement Lacks Transparency Regarding Key Public Safety Issues

How an eight-foot section came to be replaced by a new 83-foot section is not even hinted at in the I&E complaint, and is certainly not resolved through the proposed settlement.

It is unclear from the I&E complaint whether Sunoco (a) initially removed 83 feet of pipe and sent only 8 feet to the laboratory, or (b) initially removed only 8 feet but later removed an additional 75 feet. In either event, the condition of the other 75 feet is not described in the Complaint and the whereabouts of that additional 75-foot portion of pipe is not disclosed either.

~~Intervenors believe and therefore aver that Sunoco either has concealed or destroyed the missing 75-foot section of pipeline. Intervenors believe and therefore aver that the true condition of the 75-foot pipe segment at the time it was removed was poor, corroded, and constituted proof of violation of state and federal laws and regulations.~~

~~Intervenors believe and therefore aver that the missing or destroyed 75-foot section of pipeline was concealed or destroyed in order to prevent officials from examining the pipeline and learning its true condition. The condition of the 75-foot segment was material evidence that Sunoco has prevented the Commission from considering in the instant enforcement proceeding.~~

~~Intervenors also believe that, if Sunoco destroyed the remaining 75 feet of ME1 pipeline under the circumstances described in the Complaint, it would have violated generally accepted (NACE) engineering practices.~~

Intervenors believe and therefore aver that at all pertinent times Sunoco was aware that the entire 83-foot section that was removed could be the subject of Commission action based

upon Sunoco's violation of the aforesaid statutes and regulations. ~~Intervenors believe and therefore aver that if the Commission had become aware of the true condition of the 75-foot segment that it may have shut the pipeline down indefinitely.~~

~~Sunoco's conduct with respect to the missing 75-foot pipe section is nothing less than a coverup and an important reason not to approve the proposed settlement.~~

An additional reason for concern based on lack of transparency is that both I&E and Sunoco seem anxious not to address the condition of ME1 beyond either the 8-foot section. Moreover, the condition of the 12-inch pipeline has not been addressed in the proposed settlement, even though that line is almost as old as the 8-inch line and it is in the same right-of-way.

Sometime between the date of the detection of the Morgantown leak on April 1, 2017 and December 13, 2018, when the I&E Complaint was filed, Sunoco allegedly revised certain unspecified practices which, presumably, were associated with development of the leak and/or the corrosion that was examined in the lab.

The Joint Petition, however, makes a point of not being more specific as to what Sunoco practices were problematic; why it was necessary to revamp those practices; and whether the practices also involved the remaining 1,500,000 feet of ME1.

The Joint Petition also fails to disclose how much of the 300 miles of line previously was replaced. Even in the unlikely event it was as much as half, that implies that over 750,000 feet of pipeline could still experience corrosion due to age, poor cathodic protection or contact with soil.

~~PHMSA's web site also contains data about accidents on Sunoco pipelines, as self-reported by Sunoco to PHMSA. During the period January 2005 through June 2019, Sunoco reported 322 hazardous liquids pipeline accidents.~~

~~Sunoco reported that corrosion was the cause of 135 of these accidents, or 42%. Corrosion, incorrect operation, and material/weld/equipment failure (all things within Sunoco's control) collectively accounted for the cause of 286 of the accidents, or 89%--again, according to Sunoco itself. These accidents collectively (yet again, according to Sunoco) spilled more than 1,823,000 gallons of hazardous liquids and caused more than $74 million dollars in property damage.~~[7]

In Appendix B of the Joint Petition, Sunoco claims that PHMSA in 2010 and 2013 found that ME1 passed muster and that PHMSA endorsed Sunoco practices that the I&E Complaint unreasonably called into question. It should be noted, however, that HVLs were not flowing through ME1 until 2014.

Sunoco has consistently lacked transparency with the public, local governments, and agencies overseeing the Mariner East project. The large information gaps in the proposed settlement would pave the way for that dangerous practice to continue.

d. Under the Factors and Standards for Evaluating Litigated and Settled Proceedings, the Settlement should not be Approved

(1) Overview

The core aspect of the proposed settlement is that the facts of the Morgantown accident need not be determined and that, going forward, Sunoco can be trusted to select a contractor to make recommendations as to the future of ME1 and the 12-inch workaround pipeline. Section 69.1201 of the Public Utility Code sets forth factors and standards that must be considered by the

[7] ~~PHMSA web site accessed August 5, 2019. To access the dynamic source for these data, visit https://opsweb.phmsa.dot.gov/primis_pdm/pub_op_dashboard.asp?val1=18718; then click "Continue to PDM Reports;" then click the "Incidents" tab at the top of the page.~~

Commission in evaluating a proposed settlement. Though the application of these standards and factors is not as strict in a settlement as in a litigated proceeding, 52 Pa. Code § 69.1201(b), in both types of proceedings, the Commission still *must* consider the listed factors, 52 Pa. Code § 69.1201(a) and (c).

Sunoco and I&E have not provided enough information for the Commission to apply these mandatory factors. For that reason alone, the Commission may not approve this settlement. Intervenors further submit that I&E's statement in Appendix A of the Joint Petition for Approval Petition contains important factual misstatements.

First, while the Terms of Settlement provide in Section B that "SPLP shall provide I&E with a list of three (3) proposed independent experts…I&E will select one (1) expert from the list," I&E misleadingly states in Appendix A only that "SPLP has agreed to retain an independent expert, selected by I&E." (Appendix A at12). I&E has agreed to select only from a list provided to it by Sunoco. Thus, the process is controlled by the party whose misconduct is at the heart of the case.

Second, I&E states in Appendix A that "prior to the initiation of the instant I&E enforcement proceeding, SPLP had already revised its procedures pertaining to corrosion control and cathodic protection. Such revisions occurred in 2017 and SPLP fully implemented the revised procedures by the second quarter of 2018." (Appendix A at 11-12).

While the I&E Complaint does state "SPLP's procedures have since been revised." (Complaint, ¶ 28), it also states that, "[w]hile **the data reviewed was largely specific to the site of the leak**, SPLP's procedures and overall application of corrosion control and cathodic protection practices are relevant to all of ME1 and, thus, I&E alleges that there is a statewide concern with

SPLP's corrosion control program and the soundness of SPLP's engineering practices with respect to cathodic protection." (Emphasis added).

The "site of the leak" that was evaluated was an eight-foot piece of corroded pipe, or perhaps a segment a little longer than that. The revision of procedures touted by I&E, therefore, related to procedures along that small segment only. The condition of the rest of the pipelines and Sunoco's practices remain unknown more than two years following the Morgantown accident. Below, *Flynn* Intervenors look closely at the fourth, fifth, sixth and seventh factors and argue that those factors alone militate strongly against approval of the proposed settlement.

(2) The Fourth Factor

The fourth factor relates to Sunoco's "efforts to change its practices and procedures to prevent similar conduct in the future." (Appendix A at 11). Regarding this factor, I&E's claim is a red herring. I&E focuses on whether or not it could have won an order requiring Sunoco to conduct a "remaining life study."

I&E's own Complaint makes clear that it has *no idea* what Sunoco's practices have been or what the present conditions are of the two ancient pipelines other than on the eight (8) foot Morgantown segment. Determining the *present* condition of the two ancient pipelines, however, does *not* require a remaining life study. An order directing that an independent contractor simply determine the present condition of the two ancient pipelines does not go beyond the relief that I&E could have expected if it elected to continue prosecution of the case against Sunoco.

At page 12 of SPLP's Statement, it writes that "SPLP voluntarily revised these procedures [complained of in the Complaint] prior to the Complaint being filed in this matter, demonstrating good faith and cooperation with I&E concerning pipeline safety." According to I&E itself, this statement is untrue.

On page 10 of I&E's Statement in Support of the Joint Petition for Approval of Settlement ("I&E's Statement"), it explains that SPLP adopted the unidentified "improved" procedures due to its purchase by Energy Transfer—not due to a change of heart or effort to mend its ways. Nonetheless, both I&E (at pages 11-12 of I&E's Statement) and Sunoco (at page 12 of SPLP's Statement) assert this change in an attempt to show, pursuant to the fourth factor, Sunoco "made efforts to modify internal practices and procedures to address the conduct at issue and prevent similar conduct in the future." 52 Pa. Code § 69.1201(c)(4).

Because this change in practice was not undertaken "to address the conduct at issue and prevent similar conduct in the future," it cannot weigh in favor of approval of the settlement.

(3) The Fifth Factor

The fifth factor is "[t]he number of customers affected and the duration of the violation." I&E's Statement at page 13 remarks that "The April 1, 2017 leak led to a brief shut-down of ME1, which impaired the ability of SPLP's customers to ship product using the pipeline."

Nowhere does either party state the "number of customers affected," however. Without this information, the Commission cannot evaluate the proposed settlement.

(3) The Sixth Factor

a. *Overview*

Sunoco's compliance history is the sixth factor identified by I&E in Appendix A. I&E inexplicably suggests that Sunoco is a good citizen. It writes, "[t]o I&E's knowledge, the Commission has not expressly found SPLP in violation of any law or regulation, or directed SPLP to pay a civil penalty in connection with a violation." (Appendix A at 14).

In fact, both the Commission and other Commonwealth agencies have found Sunoco to be a regular, repeat violator. The big picture is one of a scofflaw company which considers fines and regulatory enforcement merely a cost of doing business.

In the *Dinniman* case, Judge Barnes noted on page 21 of her Interim Emergency Order and Certification of Material Question of May 21, 2018 in Docket Nos. P-2018-3001453 and C-2018-3001451 ("Interim Emergency Order"), "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."

ALJ Barnes in her Interim Emergency Order found that PHMSA had issued Sunoco a notice of probable violation. ~~Significantly, she noted that DEP had assessed $12,300,000 in penalties for "inadvertent returns" and the ME2 pipeline construction was shut down for more than a month.[8] The Environmental Hearing Board ("EHB") also separately shut down horizontal directional drilling to build ME2 for violations. (Interim Emergency Order at 11–12).~~

~~Since the date of Judge Barnes' May 18, 2018 Interim Emergency Order, the DEP on May 14, 2019 found that Energy Transfer, in connection with construction of the Revolution Pipeline, had eliminated at least twenty-three (23) streams, changed the length of at least one hundred and twenty (120) streams and eliminated at least seventeen (17) and altered seventy (70) wetland areas in violation of The Clean Streams Law, the Dam Safety Act and the Oil and Gas Act. http://files.dep.state.pa.us/ProgramIntegration/PA%20Pipeline%20Portal/RevolutionPipeline/Compliance%20and%20Enforcement%20Information/May_14_2019_Stream_and_Wetland_Order.pdf[9]~~

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[8] ~~DEP order may be found at http://files.dep.state.pa.us/ProgramIntegration/PA%20Pipeline%20Portal/MarinerEastII/Summary_of_Order/Sunoco%20Pipeline%20LP.%20Consent%20Order%20and%20Agreement%20-%20February%208,%202018.pdf~~

[9] ~~Sunoco has taken an appeal to the EHB and the case is now pending.~~

ALJ Barnes was not alone in her pronouncement. In February of this year, the Governor himself wrote that "There has been a failure by Energy Transfer and its subsidiaries to respect our laws and our communities. This is not how we strive to do business in Pennsylvania, and it will not be tolerated." *See* press release, "Governor Wolf Issues Statement on DEP Pipeline Permit Bar, February 8, 2019, available at www.governor.pa.gov/governor-wolf-issues-statement-dep-pipeline-permit-bar.

The proposed settlement entrusts Sunoco to abide by law and contract when it has a demonstrated history of flouting the law, making settlement agreements, and then violating the agreements. Indeed, the allegations made by I&E in the instant proceeding, if grounded in data, also strongly suggest the company has habitually failed to abide by law and regulations designed to protect the residents of the Commonwealth.

Below, Intervenors briefly identify eleven examples of Sunoco's deceitful, dishonest and unlawful conduct.

~~b. *Eleven Examples of Sunoco's Deceitful, Dishonest and Unlawful Conduct*~~

~~*First Example: Violation of Settlement Agreement and Order*~~

~~Sunoco deliberately and deceitfully violated a previous settlement agreement and judicial order through a side agreement made in contravention of the settlement and judicial order.~~

~~On or about February 13, 2017, Clean Air Council, Delaware Riverkeeper Network, and Mountain Watershed Association initiated a proceeding in the Environmental Hearing Board ("EHB" and "the EHB Case") against Sunoco and the Department of Environmental Protection ("DEP"). The Notice of Appeal docketed at No. 2017-009-L alleged that, because of numerous deficiencies in Sunoco's applications, the permits DEP issued for water crossings and erosion and sediment control were unlawful.~~

Through negotiations, an agreement was entered into among all parties and approved as a stipulated order by EHB judge Bernard A. Labuskes, Jr. A copy of the Corrected Stipulated Order filed August 10, 2017 ("the EHB Order") is attached hereto and marked as Ex. "B."

In ¶ 15 of the EHB Order, the parties agreed to certain plan revisions related to HDD inadvertent returns; water supply issues; and void mitigation for karst terrain and underground mining ("the Plans"). A copy of the Plans is attached to the EHB Order.

DEP subsequently cited Sunoco for dozens of "egregious and willful" violations of the Clean Streams Law and other environmental laws ("the DEP Proceeding"). Negotiations ensued in the DEP Proceeding, but neither appellants nor the EHB judge were included.

Dealing only with DEP, Sunoco entered into a Consent Order and Agreement with DEP ("COA") related to HDD frac-outs ("inadvertent returns" in DEP parlance); water supply issues; and void mitigation for karst terrain and underground mining. The new plan, however, rolled back Sunoco's obligations, significantly reducing environmental protections guaranteed by the Plans in the EHB case.

The New Plan was an obvious circumvention of the EHB Order and a breach of Sunoco's contractual commitment. A redlined document showing the differences between the approved Plans and the New Plan can be found at the following URL link:

http://ehb.courtapps.com/efile/documentViewer.php?documentID=41643

The EHB Appellants subsequently challenged the New Plan before the Commonwealth Court. During argument, Judge Brobson stated as follows:

> JUDGE BROBSON: I'm struggling to understand how you can be in litigation in front of the Environmental Hearing Board dealing with the HDD plan and having separate side agreements to modify it. I don't understand. Maybe it's something unique to the Environmental Hearing Board, Mr. Byer; but I've been around long enough to know that you try not to did (sic) that kind of stuff.

(Oral Argument before Hon. Kevin Brobson, March 19, 2018, in *Clean Air Council, et al. v. Sunoco Pipeline L.P., et al.*, 101 MDA 2018 at 34-35).

Judge Brobson understood quite well that what Sunoco had done was dishonest.

Second Example: Scheme to Circumvent the Law at Marcus Hook

In 2016, Clean Air Council challenged DEP's approval of a permit issued to Sunoco for construction of an apparent stand-alone project that the Council alleged was actually part of a larger project subject to more stringent environmental regulatory requirements.

The EHB in its adjudication opinion at No. 2016-073-L agreed with Clean Air Council and concluded that the "nominally separate projects are actually parts of a larger project whose emissions should be aggregated for applicability purposes." (Excerpt from Opinion of Judge L. Labuskes, Jr., 1-9-19 at 61, hereinafter "EHB Opinion," copy attached as Ex. "C").

Citing to three separate "open season" announcements that referred to a plan for single, large project, Judge Labuskes also concluded there was evidence to support the conclusion that Sunoco's scheme was designed to illegally circumvent the law. (Opinion at 61 - 63).

In particular, the judge wrote: "We are unable to credit the suggestion that Sunoco planned anything less than a facility designed to store, fractionate, and export multiple components of NGLs. Although Sunoco began by permitting two tanks for ethane and propane (Project 1), we cannot credit the notion that Sunoco ever thought that would be the end of site development…" (Opinion at 61).

Clearly, Sunoco repeatedly misled the DEP about its intentions in order to circumvent environmental regulations designed to protect against excess air pollution.

Third Example: Coverup of Improper Welding Practices

On April 28, 2016, PHMSA served Sunoco a Notice of Probable Violation and Proposed Compliance Order in connection with the company's use of unqualified welders and unqualified welding procedures on its Permian Express II ("PEX II") pipeline in Texas. "Welders made approximately 3,000 welds on the PEX II project before it was discovered that the welder qualification testing was not conducted to the requirements [of] Part 195 and API Standard 1104. Sunoco welder qualification records showed that the welders had not followed the qualified welding procedure, WPS No.: SP-332Sc-6G, but were still shown as passing the welder qualification tests. When this errant practice was discovered, Sunoco attempted to back-qualify welders through the retesting of welders to welding procedure WPS No.: SP-332Sc-6G, of which several of the welders, who were retested, failed to qualify with multiple retesting attempts. These same failed welders had each participated in the welding of numerous production welds prior to attempting requalification."

https://primis.phmsa.dot.gov/comm/reports/enforce/documents/420165011/420165011_NOPV%20PCP%20PCO_04282016_text.pdf at 7.

"Not only did Sunoco fail to properly qualify welders before allowing [them] to weld on the PEX II project, as required by Part 195, but [it] made multiple attempts to qualify welders after they had already made welds on the PEX II pipeline project in violation of Part 195 and Sunoco's specifications…By allowing welders who were not properly qualified according to the requirements of API 1104 to weld on the PEX II project and then having a small select sample of welds made by these welders fail destructive testing, all of the welds on Spread 24-3 of the PEX II project are suspect as to whether they meet the required strength and mechanical properties as required by the design of this pipeline." *Ibid.* PHMSA issued Sunoco a proposed civil penalty of

$1,278,100 for these alleged violations, but, astonishingly, did not take action to prevent Sunoco from placing PEX II in service.

Unsurprisingly, PEX II failed just four months later near Sweetwater, Texas. Shortly after the accident, on September 14, 2016, PHMSA issued fresh enforcement action to Sunoco, this time a Corrective Action Order[10], in which it noted "While the Failure is not in a high consequence area (HCA), the area is considered a "could affect" area with regard to the Drinking Water Unusually Sensitive Areas (USAs) criteria. Continued operation of the pipeline poses potential risks to municipal drinking water intakes along the pipeline route…The Permian Express II line runs 279.5 total miles, 93.2 miles of which are in an HCA."[11]

Sunoco failed to confirm the PEX II accident was underway *for eleven days* after the Sunoco Control Center noted initial indications of a problem. The release was initially reported by Sunoco as 33,600 gallons of hazardous liquids (crude oil); this figure was subsequently revised by an order of magnitude to more than 361,000 gallons. (Just as in the Morgantown accident, the fact that Sunoco failed to detect the accident was occurring means that its reported quantity of hazardous liquids released is suspect).

The Corrective Action Order drily noted that PHMSA had previously "identified issues regarding the welding of the pipe, and there is an open NOPV, issued by the Southwest Region, related to this construction project (CPF No. 4-2016-5011). While a visual examination of the pipe has not been completed, the initial observation appears to show the leak site is in the vicinity of a girth weld." *Ibid.*

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[10] "A [PHMSA] Corrective Action Order finds that a pipeline facility is or would be hazardous to life, property, or the environment, and specifies corrective measures that must be taken." *See* www.phmsa.dot.gov/sites/phmsa.dot.gov/files/docs/regulatory-compliance/pipeline/enforcement/69421/section-3-selection-administrative-enforcement-actions-april-27-2018.pdf at 6.

[11] *See* https://primis-stage.phmsa.dot.gov/comm/reports/enforce/documents/420165030H/420165030H_Corrective%20Action%20Order_09142016_text.pdf

Fourth Example: Fine for Failure to Test Pipeline Coatings properly

Sunoco failed to follow its own procedures for testing pipeline coatings applied in the field. An inspection in 2016 by PHMSA found that Sunoco was failing to use the proper voltages when testing field-applied pipeline coatings for voids. The procedures in Sunoco's own maintenance manuals were not being followed, resulting in insufficient voltages being used to check for voids. Sunoco did not contest the charges and was fined $25,900. https://primis.phmsa.dot.gov/Comm/reports/enforce/documents/120175016/120175016_Final%20Order_09152017.pdf

The pipeline involved was the 12-inch Point Breeze-Montello line—the same pipeline that has been pressed into service as the workaround pipeline to transport hazardous, highly volatile "natural gas liquids" around sections of ME2 that Sunoco has found itself unable to complete.

Fifth Example: Failure to Report a Serious Accident Involving Hazardous Liquids Release, Ignition, and Injuries

On August 12, 2016, Sunoco experienced a serious accident at its terminal facility in Nederland, TX. "The accident involved a release of crude oil, ignition of the crude oil, and seven injuries, four of which required in-patient hospitalization."[12] PHMSA on April 6, 2017, issued Sunoco a Notice of Probable Violation and Proposed Compliance Order which alleged that Sunoco violated 49 CFR § 195.50 Reporting accidents; § 195.52 Immediate notice of certain accidents; and § 195.54 Accident reports. Sunoco did not respond to PHMSA's docket of this matter, and on June 15, 2018, PHMSA issued to ETP on behalf of Sunoco a Final Order which noted "Sunoco is a subsidiary of Energy Transfer Partners, LP…The [accident] investigation

[12] *See* https://primis.phmsa.dot.gov/Comm/Reports/enforce/documents/420175011/420175011_NOPV%20PCO_04062017_text.pdf

revealed that Sunoco and its contractors were performing pipeline modifications at the [Nederland] Terminal, when a release and ignition of crude oil occurred and seven people were injured…As a result of the investigation, the Director, Southwest Region, OPS (Director), issued to Respondent [Sunoco], by letter dated April 6, 2017, a Notice of Probable Violation and Proposed Compliance Order (Notice)." The Final Order goes on to make Findings of Violation, and that "In its Response, Sunoco did not contest the allegations in the Notice that it violated 49 C.F.R. Part 195…"[13]

Sixth Example: 2014 PHMSA Proposed Safety Order

Following only one of numerous ETP accidents, PHMSA in 2014 issued a notice of Proposed Safety Order relative to ETP's Panhandle Eastern Pipe Line Company. PHMSA wrote that "PHMSA and/or State Pipeline Safety partners have repeatedly addressed concerns with ETP/PEPL on various pipelines within the ETP/PEPL pipeline system associated with corrosion, coupling failures, inadequate procedures, and controls. To remedy these issues, PHMSA has engaged in a number of inspections and has even issued Corrective Action Orders to ETP/PEPL. However, significant improvements associated with corrosion, coupling failures, inadequate procedures, and controls have not occurred."
https://primis.phmsa.dot.gov/Comm/reports/enforce/documents/320141008S/320141008S_Notice%20of%20Proposed%20Safety%20Order_12242014.pdf

PHMSA went on to cite seventeen separate violations, some of which were repeated from earlier federal enforcement actions issued to ETP/PEPL. Six of the violations involved corrosion. (Copy of violation list attached hereto as Ex. "D.").

[13] *See* https://primis.phmsa.dot.gov/Comm/Reports/enforce/documents/420175011/420175011_Final%20Order_06152018_text.pdf

Seventh Example: Installation of Damaged Pipe

Sunoco was caught in the act of installing damaged pipe by a PHMSA inspector during the week of March 27-31, 2017. This incident involved Mariner East 2 construction near Hopedale, in eastern Ohio. PHMSA served a Notice of Probable Violation and Proposed Compliance Order on Sunoco on January 11, 2018. https://primis.phmsa.dot.gov/comm/reports/enforce/documents/120185002/120185002_NOPV%20PCO_01112018_text.pdf. The NOPV stated "During the inspection, the PHMSA inspector observed pipe being installed in a trench near the Markwest Hopedale Cryogenic Plant off Jewett Hopedale Road near Hopedale, Ohio. Upon inspecting the pipe that was strung out, the PHMSA inspector observed numerous coating scrapes on at least 5 segments of pipe. Several segments of pipe had severe coating damage, and at least one joint of pipe had a gouge that extended into the wall of the pipe. Markings on the pipe identified the segments as having been subjected to field bending." Sunoco provided PHMSA a report by the Sunoco field inspector, who had somewhat remarkably noted no defects in field bent pipe.

Eighth Example: Repeated Violations of DEP Permits

In January 2018, the DEP provided Sunoco a long list of Sunoco violations of DEP permits and state law. In taking enforcement action against Sunoco, DEP wrote that "Sunoco's unlawful conduct …demonstrates a lack of ability or intention on the part of Sunoco to comply….Suspension of the permits…is necessary to correct the egregious and willful violations described herein." January 3, 2018 Administrative Order at page 16, available at http://files.dep.state.pa.us/ProgramIntegration/PA%20Pipeline%20Portal/MarinerEastII/OrderSuspendingConstructionActivities010318.pdf.

Ninth Example: Undisclosed Changes in Operating Pressures

When "2100 psi" started showing up in some of Sunoco's planning documents for Mariner East, a Sunoco spokesperson claimed that ME2X was always intended to operate at 2100 psi. https://stateimpact.npr.org/pennsylvania/2019/03/21/sunoco-mariner-east-pipeline-safety/

Design documents signed by engineer and Project Manager Matt Gordon, however, clearly show that 1480 psi, a much lower pressure, was originally planned.

gas release volumes from the equipment.

11. Propane physical properties:.

Density at pipe pressure (ρ_{pipe}):	33.74 pounds per cubic feet (lb/ft^3) at 40°F and	1,480 psig
Density at atmospheric conditions ($\rho_{standard}$):	0.12 pounds per standard cubic feet (lb/scf) at 60°F and 1 atm	
Density at Booster Pump Inlet (ρ_{pump})	0.12 lb/ft^3 at 60°F at 1 atm	
Density at Booster Pump Outlet (ρ_{pump})	0.00	

Source:

a. The density of propane at atmospheric conditions taken from the National Institute of Standards and Technology website of isothermal properties for propane.

b. The higher heating value (HHV) of Butane based on 40 CFR Part 98 Subpart C, Table C-1:

12. There are no hazardous air pollutants in butane, propane, or ethane.

13. Flare designed capacity (C_{flare}) 10 MMBtu/hr

1.4 Certification of Truth, Accuracy and Completeness

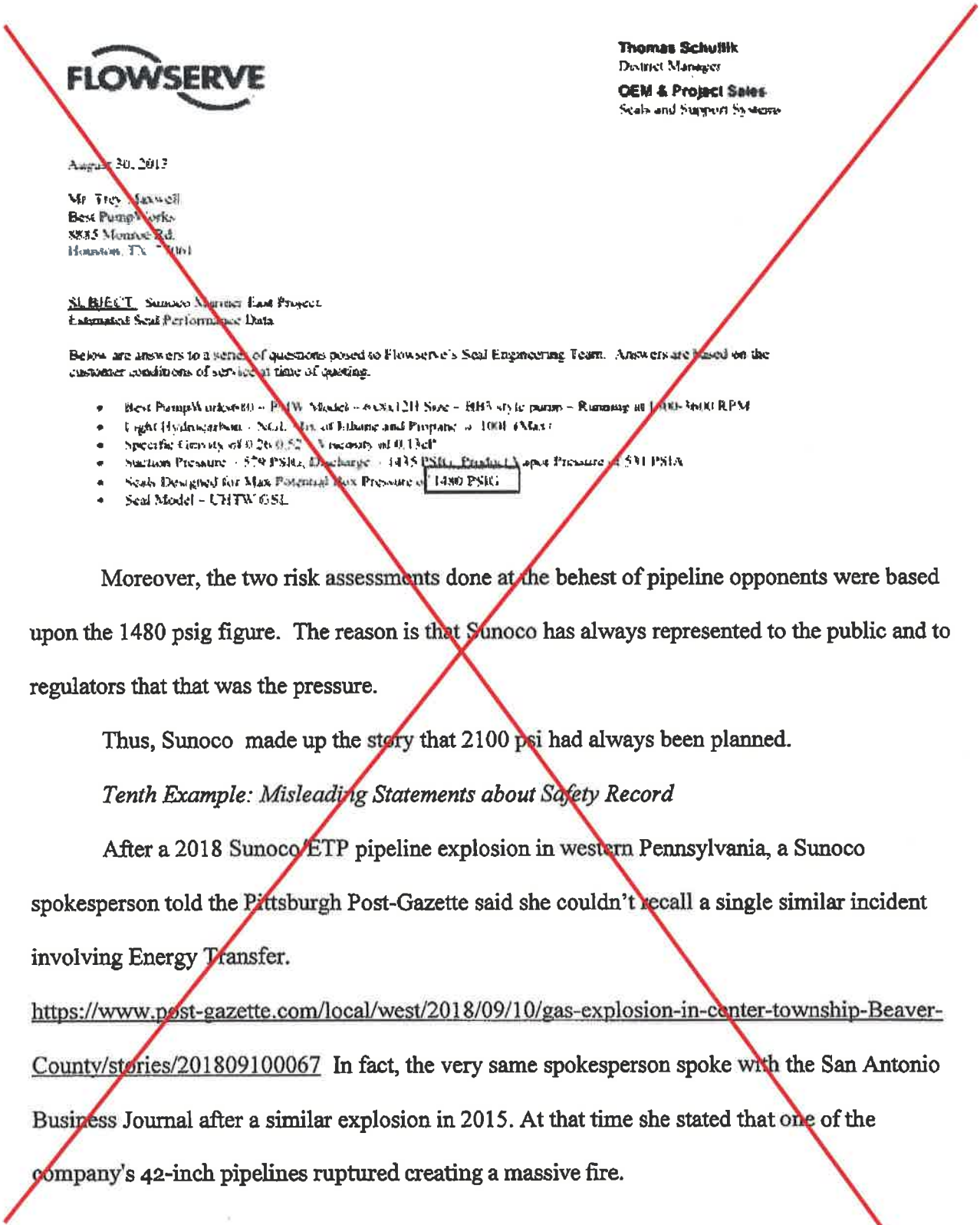
Note: This certification must be signed by a responsible official. Applications without a signed certification will be returned as incomplete.

I certify under penalty of law that, based on information and belief formed after reasonable inquiry, the statements and information contained in this application are true, accurate, and complete.

(Signed) _____ Date: 6/29/2016

Name (Typed): Matt Gordon Title: Project Manager

Similarly, the seals used in Dragonpipe pumping stations are designed for a maximum pressure of 1480 psi. Here is an example of the specifications from the seal manufacturer, provided as part of a Sunoco submission:



FLOWSERVE

Thomas Schulik
District Manager
OEM & Project Sales
Seals and Support Systems

August 30, 2017

Mr. Trey Maxwell
Best PumpWorks
8885 Monroe Rd.
Houston, TX 77061

SUBJECT: Sunoco Mariner East Project
Estimated Seal Performance Data

Below are answers to a series of questions posed to Flowserve's Seal Engineering Team. Answers are based on the customer conditions of service at time of quoting.

- Best PumpWorks 80 – PAW Model – 6x8x12H Size – BB3 style pump – Running at 1000-3600 RPM
- Light Hydrocarbon – NGL – Mix of Ethane and Propane – 1000 cMax
- Specific Gravity of 0.26-0.52 – Viscosity of 0.13cP
- Suction Pressure – 579 PSIG, Discharge – 1435 PSIG, Product Vapor Pressure at 591 PSIA
- Seals Designed for Max Potential Box Pressure of 1480 PSIG
- Seal Model – CHTW 6SL

Moreover, the two risk assessments done at the behest of pipeline opponents were based upon the 1480 psig figure. The reason is that Sunoco has always represented to the public and to regulators that that was the pressure.

Thus, Sunoco made up the story that 2100 psi had always been planned.

Tenth Example: Misleading Statements about Safety Record

After a 2018 Sunoco/ETP pipeline explosion in western Pennsylvania, a Sunoco spokesperson told the Pittsburgh Post-Gazette said she couldn't recall a single similar incident involving Energy Transfer.

https://www.post-gazette.com/local/west/2018/09/10/gas-explosion-in-center-township-Beaver-County/stories/201809100067 In fact, the very same spokesperson spoke with the San Antonio Business Journal after a similar explosion in 2015. At that time she stated that one of the company's 42-inch pipelines ruptured creating a massive fire.

nhttps://www.bizjournals.com/sanantonio/blog/eagle-ford-shale-insight/2015/06/pipeline-explosion-in-cuero-has-residents-rattled.html

Eleventh Example: Untrue Statement About Use of Methane for Power Generation

In 2017 a Sunoco spokesperson claimed that Sunoco was providing *ethane* to power the Fairview Energy Center, a gas-powered generation facility currently under construction. If true, it would suggest that some of the fracked liquids were not being sent overseas and, in turn, support Sunoco's contention that the Mariner pipelines were intrastate in nature (a matter in dispute at the time). The ethane claim has since been repeated in other contexts. In fact, the Fairview Energy Center is not yet in operation and, according to its website, it will run on *methane* (which the Mariner system does not transport), and not on ethane. http://www.epv.com/our-projects/epv-fairview/about/

In light of the foregoing examples, I&E's assertion that the sixth factor, compliance history, militates in Sunoco's favor is utter nonsense.

(4) The Seventh Factor

The seventh factor also militates in favor of a stronger settlement than that proposed by the parties. The seventh factor is "[w]hether the regulated entity cooperated with the Commission's investigation. Facts establishing bad faith, active concealment of violations, or attempts to interfere with Commission investigations may result in a higher penalty." 52 Pa. Code § 69.1201(c)(7).

The settlement, by Sunoco's own analysis, was achieved in bad faith. Sunoco writes on page 11 of SPLP's Statement: "…SPLP has agreed to take steps above and beyond statutory and regulatory requirements that SPLP believes ***the Commission could not unilaterally order SPLP to undertake involuntarily if this Complaint had been fully litigated.***" (Emphasis added). But

Sunoco elsewhere has claimed that settlements which achieve results that could not be reached through adjudication of a lawsuit are by definition pursued and made in bad faith.

In the appeal of Mariner-related environmental permits docketed as No. 2017-009-L before the Pennsylvania Environmental Hearing Board, Sunoco sought attorneys' fees and costs from the appellants on the grounds that the appeal was purportedly pursued in bad faith.

There, Sunoco justified its outrageous inclusion of these confidential settlement materials by stating that Sunoco "is using these settlement communications to demonstrate Appellants' ***bad faith and abuse of process*** by continuing to pursue their appeal to seek relief that Appellants did not seek and ***could not obtain in the appeal***." Sunoco Memorandum, November 28, 2018, at 1—2) (emphasis added).

Sunoco goes on to refer to the settlement approach in that case, which resulted in relief that could not have been granted through a hearing in front of the Environmental Hearing Board, as an "**ulterior purpose**" and "**improper goal**, from the outset of the appeal." *Id.* at 7.

Since the proposed settlement is based on what Sunoco describes in its own words as "bad faith," an "abuse of process," an "ulterior purpose," and an "improper goal," a "higher penalty" is required under the seventh factor than what the proposed settlement offers.

This example further supports Intervenors' contention that any proposed settlement or resolution of this proceeding needs to be focused on actions that are not left in Sunoco's hands. The instant proposed settlement is largely based on trust in Sunoco's actions. That trust is unwarranted, and so the proposed settlement is not in the public interest.

V. Issues that *Flynn* Intervenors would raise if the Proposed Settlement were rejected.

A. Relationship of I&E Case to the *Flynn* Complaint Proceedings

The Second Amended Formal Complaint ("the *Flynn* Complaint") alleges that Complainants and their immediate families are persons in Chester and Delaware Counties who have been and will be adversely affected by Sunoco's Mariner East project.

As noted in the June 6, 2019 Procedural Order in the *Flynn* case, the *Flynn* Complaint raises six central issues, among which are (1) the safety and integrity of ME1, ME2, ME2X, and the 12-inch workaround pipeline, and (5) SPLP's integrity management protocols. (June 6, 2019 Procedural Order at 4). These issues also are at the heart of the Complaint filed in the instant I&E proceedings ("the I&E Complaint").

After reviewing the I&E Complaint, *Flynn* Complainants sought leave to file a Second Amended Formal Complaint that would use I&E's analysis of Sunoco's defective safety and integrity practices but limit its claims to Chester and Delaware Counties. (*Flynn* Complaint at ¶¶ 70-93).

In her June 6, 2018 Reconsideration Order, however, the ALJ ruled that Petitioners' adoption of the I&E claims would not be allowed even though they were limited to Chester and Delaware Counties, because the *Flynn* Complainants do not have standing to assert a statewide claim and it would be unfair to require Sunoco to have to defend against the same claims in two separate proceedings. (Reconsideration Order at 6)

In her discovery rulings of the same date, the ALJ also ruled that Sunoco should not have to answer the *Flynn* Complainants' Interrogatories Nos. 14-103 and 197-205, some (but not all of which) stemmed from the allegations in the I&E Complaint in this proceeding.

The Order of June 15, 2019 in this case, however, has granted intervenor status to the seven *Flynn* Complainants. The Order further delineates the scope of permissible intervention.

All of the practices challenged by I&E in its Complaint against Sunoco are challenged by *Flynn* Complainants in their Complaint, quite apart from the specific averments relating to the Morgantown accident which were stricken by the ALJ.

Count IV of the *Flynn* Complaint, *e.g.*, goes into great detail setting out how Sunoco's integrity management program has failed and is causing danger to the public. Paragraphs 137-144 allege Sunoco's violation of state and federal regulations that require Sunoco to protect the public from danger and reduce hazards from its equipment and facilities.

The *Flynn* Complaint also cites 49 CFR § 195.452(b) of the PHMSA regulations, enforceable by the Commission, which require a pipeline operator to take measures to prevent and mitigate the consequences of a pipeline failure that could affect a high consequence area, including:

> conducting a risk analysis of the pipeline segment to identify additional actions to enhance public safety or environmental protection. Such actions may include, but are not limited to, implementing damage prevention best practices, better monitoring of cathodic protection where corrosion is a concern, establishing shorter inspection intervals, installing EFRDs on the pipeline segment, modifying the systems that monitor pressure and detect leaks, providing additional training to personnel on response
>
> procedures, conducting drills with local emergency responders and adopting other management controls.
> 49 C.F.R. § 195.452(i).

Under this regulation, after completing a baseline integrity assessment, an operator must continue to assess the pipeline at specified intervals and periodically evaluate the integrity of each pipeline segment that could affect a high consequence area. 49 CFR § 195.452(j).

The *Flynn* Complaint asserts that Sunoco has failed and continues to fail (a) to use every reasonable effort to properly protect the public from danger and take reasonable care to reduce the hazards to which employees, customers and others may be subjected by reason of its equipment and facilities; (b) to develop a written integrity management program that addresses the risks on each segment of pipeline, and which includes a baseline assessment plan (49 CFR § 195.452(c)); and (c) to take measures to prevent and mitigate the consequences of a pipeline failure that could affect a high consequence area, such as the area where all Complainants reside.

The *Flynn* Complaint goes on to aver that ME1 as well as the 12-inch segment of the workaround pipeline must be evaluated more closely, but Complainants do not believe that Sunoco can be entrusted with the responsibility to evaluate its own pipelines. Only an independent contractor can possibly be trusted to conduct a remaining life study of these 1930s-era pipelines.

Flynn Complainants allege that this integrity management obligation applies just as much to Chester and Delaware Counties as it does to Morgantown and everywhere else in the Commonwealth. It is an obligation that may be enforced by *Flynn* Complainants in their own PUC proceeding independently of I&E's enforcement proceeding in the Morgantown accident.

Flynn Intervenors believe and aver that that the allegations set forth in the I&E Complaint are accurate with respect to Morgantown and apply equally to Chester and Delaware Counties.

Indeed, in her June 15, 2019 Order in this case, the ALJ wrote, "I am not persuaded to find that an individual must sustain personal injury or property damage or be a resident of the town where the incident occurred prompting the investigation, Morgantown, Berks County, in order to have an immediate, direct and substantial interest in this I&E complaint proceeding seeking to improve a pipeline operator's pipeline integrity practices across the Commonwealth." (Order at 13).

In the I&E proceeding, it has been and remains Sunoco's contention that the I&E Complaint incorrectly interprets the company's regulatory obligations and seeks to hold the company to a higher standard than legally required.

In fact, the ALJ has suggested in the June 15, 2019 Order that *because* Sunoco is proposing to do more than it is legally required to do, including a remaining life study and corrective action, hearings will not be scheduled *at this time.* (Order at 14, Italics added)).

While the Joint Petition dwells on the remaining life study, the actual I&E Complaint also seeks other relief: (a) revision of Sunoco's corrosion control practices; (b) development of procedures to determine adequacy of cathodic protection; (c) implementation of new and revised cathodic protections; and (d) such other remedy as the Commission may deem appropriate.

With respect to integrity management, the *Flynn* Complaint seeks appointment of an independent contractor paid for by Sunoco to do a remaining life study and the granting of other appropriate relief. The Complaint in Count IV also suggests that there must be a baseline assessment of the 8-inch and 12-inch pipelines, development of a proper integrity management program, and actions under 49 C.F.R. § 195.452(i) including "a risk analysis of the pipeline segment to identify additional actions to enhance public safety or environmental protection. Such actions may include, but are not limited to, implementing damage prevention best practices, better monitoring of cathodic protection where corrosion is a concern, establishing shorter inspection intervals, installing EFRDs on the pipeline segment, modifying the systems that monitor pressure and detect leaks, providing additional training to personnel on response procedures, conducting drills with local emergency responders and adopting other management controls."

b. Issues that Intervenors Would Raise if the Settlement were Rejected

The pleadings apparently have closed. If the proposed settlement is rejected, either the I&E case moves forward or it does not. Should I&E withdraw the proceeding, intervenors would have no right to move ahead in this enforcement proceeding.

In the event I&E elects to move ahead, the ALJ already has ruled that the record has been closed. Without the ability to seek evidence and introduce evidence, *Flynn* Intervenors can send up flares and warning signals but their role as intervenors would not be much more than symbolic. Even if they are permitted to present "comment," comment holds no evidentiary value and on appeal it means nothing.

The deficiencies in the proposed settlement have been laid out above. If the settlement is rejected, the first thing to address would be the parties' Orwellian use of the term "independent" in conjunction with the selection of an expert and the necessary remedial actions.

~~Dr. Zee already has written a preliminary report outlining what needs to be done. (Copy attached hereto as Ex. "A." The preliminary report lays out clearly what issues need to be addressed. Dr. Zee, for example, lists twelve additional factors that an independent expert would have to address.~~

~~The statement also goes into great detail as to the proper scope of a pipeline investigation. Pages 12-15 describe necessary on-site, non-destructive testing. Pages 15-20 describe a protocol for destructive laboratory testing.~~

The I&E Complaint states plainly that its findings in Morgantown have implications for the entire 8-inch ME1 pipeline. The equally ancient 12-inch line runs in the same right-of-way. Why is I&E seeking relief only with respect to the 8-inch pipeline?

A baseline assessment for both 8-inch and 12-inch pipelines is critical. Without that baseline, there can be no meaningful determination of what remains to be done with the ancient pipelines. The notion of "going forward" noted in the Joint Petition is meaningless without such a determination.

I&E asserts that Sunoco has revised its questionable procedures. The portion of the 8-inch line on which Sunoco has supposedly altered its practices, however, is not actually identified clearly. Running a "smart pig" in one segment is not the same as modifying all of the questionable practices.

The remaining life study is only one of several pieces of relief requested in the I&E Complaint. The Complaint seeks an Order directing Sunoco to:

(a) If not already completed, revise SPLP's corrosion control procedures to include separate provisions for determining the adequacy of coated steel pipelines and bare steel pipelines. The revised procedures should be consistent with NACE SP0169-2007;

(b) If not already performed, develop procedures to determine the adequacy of cathodic protection through testing and performance methods. The new procedures should include establishing a baseline of IR free potentials using CIPS. The new procedures should also include the operation and maintenance of rectifiers and rectifier ground beds; and

(c) Implement the new and revised cathodic protection procedures and perform all cathodic protection measurements within one (1) year. If the results of the cathodic protection measurements indicate low IR free potentials or inadequate depolarization, then SPLP shall replace the impacted sections of bare or inadequately coated steel pipe on ME1.

Flynn Intervenors believe that these issues are important for the ALJ to consider. Of course, I&E also is seeking such other remedy as the Commission may deem to be appropriate.

~~Because Dr. Zee's report was limited to an analysis of the proposed settlement of the Morgantown accident, it did not provide any details for evaluating the remaining portions of the~~

~~8-inch ME1 or the 12-inch workaround pipeline~~. An independent expert would be needed to do that and at a minimum inform the Commission what the baseline actually is.

In the event the Commission concludes the 8-inch ME1 and 12-inch workaround pipelines are no longer fit for service, the pipelines would have to be ordered shut down. In the event the pipelines can be repaired, the expert's recommendations for inspection, repair and subsequent maintenance would have to be implemented.

VII. How Intervenors would be affected if the Proposed Settlement were accepted.

The proposed settlement does not purport to develop a baseline assessment of the 8-inch ME1 or the 12-inch workaround pipeline in Chester or Delaware Counties. ~~The proposed settlement leaves out significant metrics that Dr. Zee states are critical to a proper pipeline evaluation.~~

The proposed settlement leaves open the very real possibility that corroded pipelines will leak or rupture in Chester and Delaware Counties with disastrous consequences. Such consequences have occurred on other corroded Energy Transfer pipelines many times in the past, as shown above in Section IV.

Flynn Intervenors lie in the path of a Mariner East pipeline disaster. Some of them live only feet from the Mariner East right-of-way. Gerald McMullen, Michael Walsh, and Rosemary Fuller all reside within a few hundred feet of ME1 and the workaround pipeline that Sunoco is already using to transport HVLs. Meghan Flynn and Caroline Hughes have children who attend schools that are within a few hundred feet of ME1, the workaround pipeline, or both. Caroline Hughes has a place of work that is within a few hundred feet of ME1, the workaround pipeline, or both.

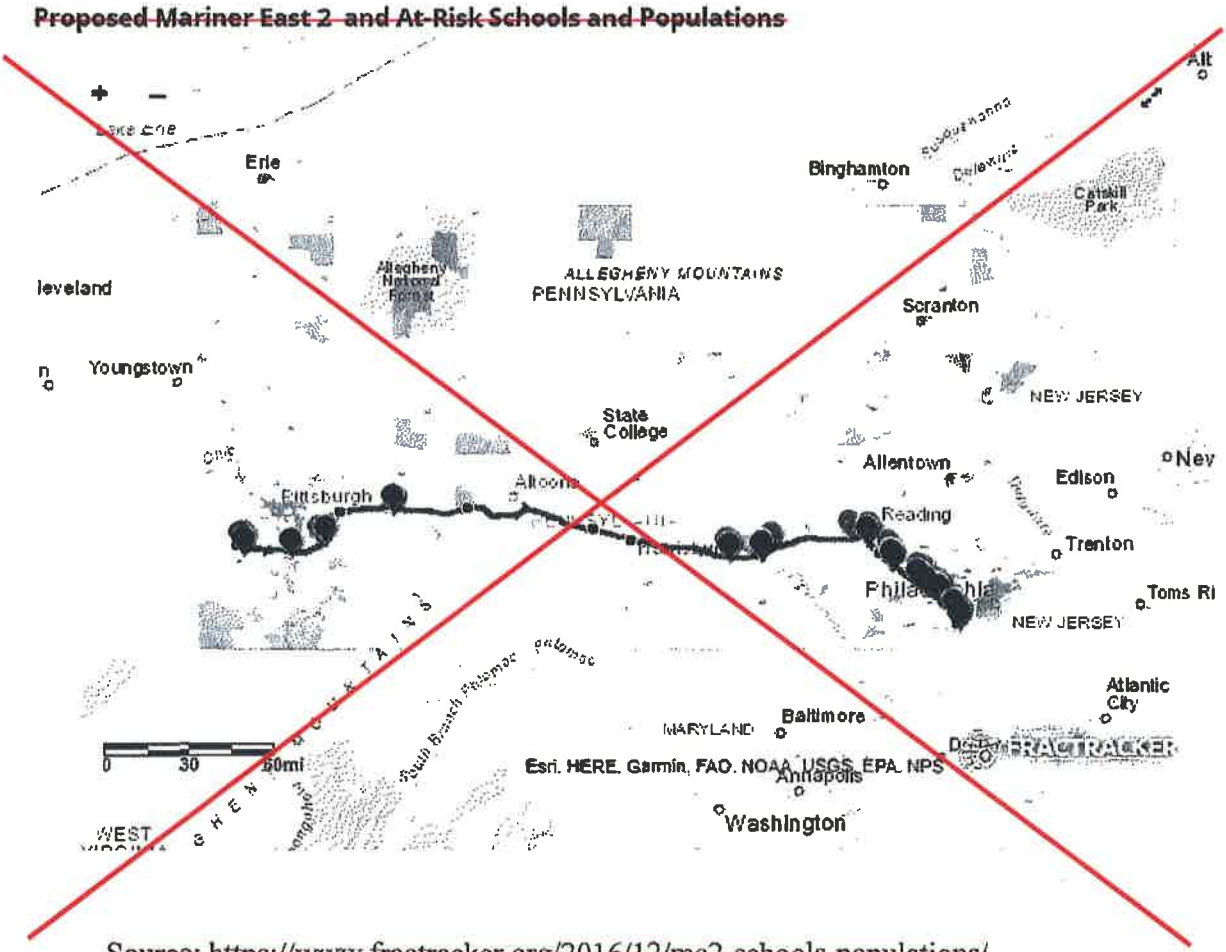
Intervenors' expert Jeffrey Marx of Quest Consultants testified on short notice in the preliminary injunction hearing that was held in November, 2018. Prior to that hearing he prepared a risk assessment that modeled, *inter alia*, the outcomes in a range of scenarios. The results of that model ranged from a 120-foot cloud of flammable gas vapor from a quarter-inch hole in the pipeline; to a two-inch leak with a 1090 foot cloud; to a 2,130-foot combustible vapor cloud from a complete rupture. Accidental releases of pipeline materials can also result in "jet fires" that can burn as far as 1,000 feet, depending on the size of the rupture.

One does not have to rely upon estimates or speculation to understand the impact of HVL explosions. Below is a scene from the 2015 Follansbee, West Virginia liquid ethane pipeline accident, which caused damage in an area that extended 2000 feet from the site of the explosion.

Source: https://www.fractracker.org/2016/12/me2-schools-populations/

The organization Fractracker has used a highly-detailed GIS shapefile supplied by the DEP and identified a 0.5 mile radius "buffer" from Mariner East 2's proposed route. The map shows all public and private schools, environmental justice census tracts, and estimated number of people who live within this buffer zone. It found that 23 public schools and 17 private schools were in the 0.5 mile impact zone. One school was found to be only 7 feet away from the pipeline's intended path.

Proposed Mariner East 2 and At-Risk Schools and Populations

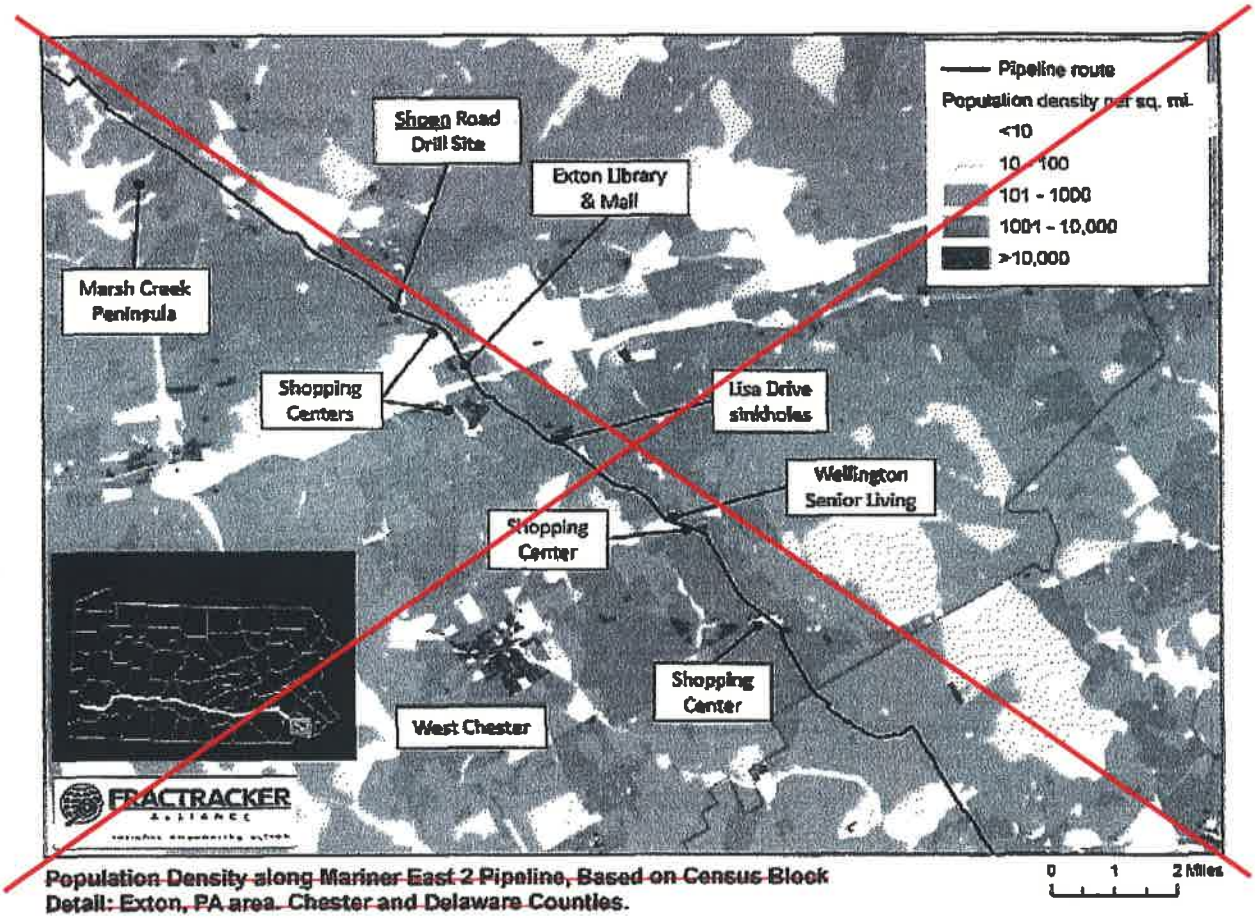


Source: https://www.fractracker.org/2016/12/me2-schools-populations/

Sunoco's pipeline expert is John Zurcher. He testified in this proceeding last November and in the *Dinniman* case previously. In *Dinniman* he was asked about the ability of everyone to evacuate a leak site by foot. He conceded that "kids in a day care center or kids in high school or people in prison . . . may not be able to move away . . ." (Emerg. Relief Hearing, Tr. 579-80).

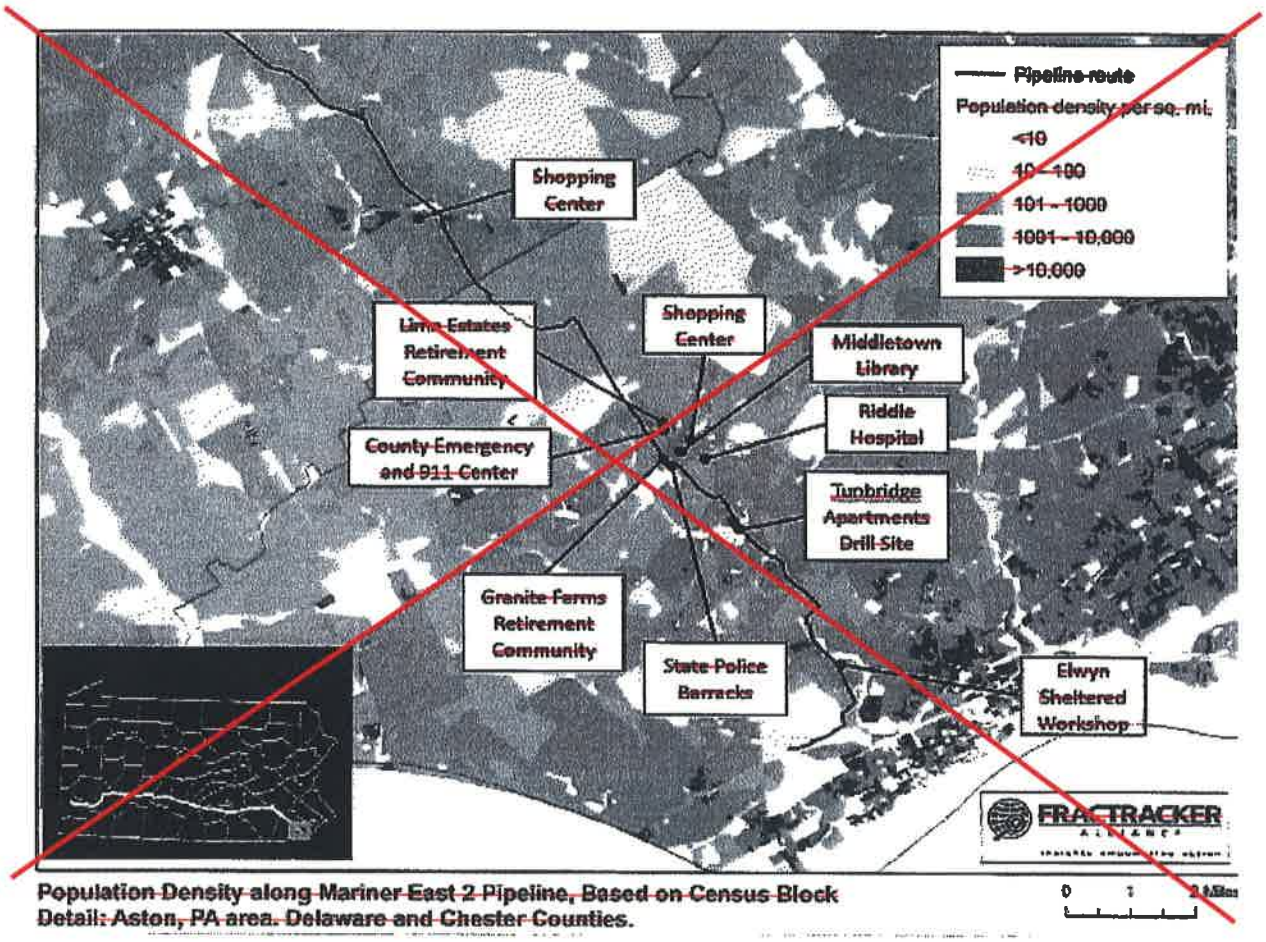
Using the Quest model, a two-inch leak could cause a cloud of flammable HVL vapor engulfing the properties or school or work facilities of Fuller, Walsh, Hughes, Flynn and McMullen. A full blown rupture could kill all of the Intervenors and their families, as shown in composite maps of the population density of Chester and Delaware Counties.

Chester County



Population Density along Mariner East 2 Pipeline, Based on Census Block Detail: Exton, PA area. Chester and Delaware Counties.

Delaware County



Population Density along Mariner East 2 Pipeline, Based on Census Block Detail: Aston, PA area. Delaware and Chester Counties.

VIII. Effect of I&E Decision on the *Flynn* Case

The parties in the instant proceeding are seeking appointment of a pipeline expert and other relief. In the *Flynn* case, the Complainants seek approval of a pipeline expert and other relief, such as, *inter alia*, the provision of a plausible "public awareness program." 49 CFR § 195.440.

The relief granted in the *Flynn* case will of course depend on the evidence presented during the course of hearings held in October 2019 and July 2020. The relief provided in the

instant proceeding, however, may be based solely upon (a) the parties' pleadings; (b) the parties' joint petition; and (c) non-evidentiary public comment.

In the event the Commission in this case enters an order approving the proposed settlement, the obvious question arises as to what effect that would have on the *Flynn* case. Would it operate to preclude *Flynn* Complainants from obtaining and presenting evidence in their case relating to the condition of ME1 and the 12-inch workaround pipelines? Would the approval order in this case be deemed to dispose of the relief requested in the *Flynn* case?

Flynn Intervenors respectfully submit that the principles of *collateral estoppel* and *res judicata* would not apply because both doctrines are entirely dependent on the existence of an evidentiary record. *See, e.g., Shaffer v. Smith*, 543 Pa. 526, 673 A.2d 872, 874 (1996), in which our Supreme Court observed that one of the four elements of the *collateral estoppel* doctrine is proof that "the party against whom it is asserted has had a full and fair opportunity to litigate the issue in question in a prior action."

Likewise, regarding *res judicata,* application of the doctrine "requires the concurrence of four elements. They are: (1) identity of the thing sued for; (2) identity of the cause of action; (3) identity of persons and parties to the action; (4) identity of the quality in the persons for or against whom the claim is made. *Schubach v. Silver,* 461 Pa. 366, 336 A.2d 328 (1975). *Res judicata*, however, "subsumes the more modern doctrine of issue preclusion which forecloses re-litigation in a later action, of an issue of fact or law which was actually litigated and which was necessary to the original judgment." *Clark v. Troutman,* 509 Pa. 336, 340, 502 A.2d 137, 139 (1985).

Thus, in either case, the party against whom the doctrine is asserted must have had a full and fair opportunity to litigate the issue in question in a prior action. In the instant matter,

Intervenors are not parties and they will not be given the opportunity in either case to obtain and produce evidence in support of their contention that I&E's Morgantown findings have a bearing on the condition of the Mariner pipelines in Chester and Delaware Counties.[14]

This does not mean, however, that in an ordinary case the Commission is required to take evidence. In the ordinary case, the interests of third party intervenors are not an issue. In that case, both sides have agreed on relief and the original complainant is satisfied and the proposed settlement is not obviously adverse to the public interest. In such a case, there would appear to be no reason to develop an evidentiary record.

In the present case, *Flynn* Intervenors allege that the 52 Pa. Code § 69.1201 standards have not been met. That means there are material factual disputes that the Commission must resolve by taking evidence. Not to do so would blatantly offend due process. Moreover, if, under the circumstances of this case, evidence is not taken, no one could reasonably conclude that the approval of the settlement would be any kind of bar in the *Flynn* proceedings.

Intervenors suggest a further concern: the relationship between the ALJ's discovery rulings in both cases related to the I&E Complaint's allegations. The Order of July 15, 2019 at page 17 states "**Intervenors will be precluded from introducing evidence into the record.**" (Emphasis in original). Intervenors assume that, as a corollary, they will not be permitted to obtain discovery either. In the *Flynn* case, the ALJ also has ruled that *Flynn* Complainants may not obtain any discovery stemming from the I&E Complaint's allegations.

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[14] 52 Pa. Code § 5.321 provides in pertinent part that, "[s]ubject to this subchapter, a party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action..." It is indisputable that the condition of the pipeline involved in the Morgantown accident is relevant to claims regarding the rest of the pipeline. That being the case, information concerning the Morgantown accident is discoverable.

Not being able to obtain discovery related to the I&E allegations in either case is problematic and furnishes an additional reason to reject the settlement. ¶ 39 of the I&E Complaint states:

> While the data reviewed was largely specific to the site of the leak, SPLP's procedures and overall application of corrosion control and cathodic protection practices are relevant to all of ME1 and, thus, I&E alleges that there is a statewide concern with SPLP's corrosion control program and the soundness of SPLP's engineering practices with respect to cathodic protection.

"Statewide concern" most certainly encompasses Chester and Delaware Counties. The ALJ recognized as much in her July 15, 2019 Order, where she ruled at page 13 that, "[t]he Complaint and subsequent Settlement address issues beyond just that section of the pipe removed in Berks County."

I&E asserts that what it learned through discovery in this case causes it to believe that Sunoco's corrosion control and cathodic protection practices throughout the state may be questionable. I&E says that the information it obtained through investigation is relevant. Thus, the ALJ's discovery rulings have the effect of preventing any discovery of this very relevant evidence.

It also must be pointed out that in the *Flynn* case Sunoco objected to having to respond to the I&E allegations and to I&E-related discovery requests on the ground that "it would be unfair to require Sunoco to defend itself against the same claims in two concurrent proceedings." (July 15, 2019 Order at 13). While that argument works in the *Flynn* case, it nonetheless presupposes that there will be discovery in the I&E case.

If the proposed settlement is approved, Sunoco will effectively have foreclosed discovery of important evidence relevant to the condition of Mariner East pipelines in Chester and Delaware Counties. For this additional reason, the proposed settlement must be denied.

VIII. CONCLUSION

The Joint Petition seeks approval without modification. For the reasons set forth above, substantial modification would be needed for the proposed settlement to be safe, reasonable, and adequate. The request for approval without modification, therefore, must be denied.

Respectfully submitted,

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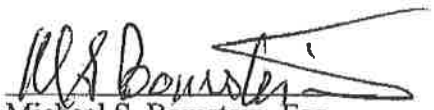
CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon the persons listed below as per the requirements of § 1.54 (relating to service by a party). The document also has been filed electronically on the Commission's electronic filing system.

See attached service list.



Michael S. Bomstein, Esq.

Dated: August 13, 2019

C-2018-3006534-PENNSYLVANIA PUBLIC UTILITY COMMISSION BUREAU OF INVESTIGATION AND ENFORCEMENT v. SUNOCO PIPELINE, LP a/k/a ENERGY TRANSFER PARTNERS

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement, Complainant,	:	
v.	:	Docket No. C-2018-3006534
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 copy of the foregoing document upon the parties, listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

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