



**COMMONWEALTH OF PENNSYLVANIA
BEFORE THE ENVIRONMENTAL HEARING BOARD**

CLEAN AIR COUNCIL; THE DELAWARE
RIVERKEEPER NETWORK; AND MOUNTAIN
WATERSHED ASSOCIATION, INC.

Appellants,

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION

Appellee,

and SUNOCO PIPELINE L.P.,
Permittee.

EHB Docket No. 2017-009-L

ELECTRONICALLY FILED

PETITION FOR PARTIAL SUPERSEDEAS

Appellants Clean Air Council, the Delaware Riverkeeper Network, and Mountain Watershed Association, Inc., by counsel, respectfully request that the Board supersede in part the three (3) Chapter 102 Permits and seventeen (17) Chapter 105 Permits (collectively, the “Permits”) that are the subject of this appeal to the extent that they authorize horizontal directional drilling.

The Board considered and denied a supersedeas petition Appellants filed in February of this year, in conjunction with their Notice of Appeal of the Permits (“February Petition”). The February Petition sought much broader relief than the instant petition and was filed when the harms to be forestalled were still largely in the future. Appellants had not intended to seek supersedeas a second time, but Sunoco’s escalating harm inflicted on the public now requires it.

Since the initial supersedeas hearing, Appellants have learned through discovery, news reports, and independent investigation that in its use of horizontal directional drilling as

authorized under the Permits, permittee Sunoco Pipeline L.P. (now a division of Texas corporation Energy Transfer) has spilled drilling fluid dozens of times into waters of the Commonwealth. The spills and drilling have polluted Exceptional Value wetlands, destroyed a pure drinking water aquifer in suburban Chester County, and contaminated or cut off the water supplies of many households. The Department knew that there was a strong possibility that these spills and contamination would occur--and initially requested that Sunoco take more protective measures--but recklessly permitted Sunoco to engage in these dangerous practices without requiring those protections.

With each passing day, Sunoco continues to endanger the health and private property of residents all over the state who are unfortunate enough to live near its horizontal directional drilling.

In just the past few weeks in Chester County, Sunoco's drilling has contaminated and depleted the private water wells of over a dozen households. As the finishing touches are being put on this petition, it is breaking news that Sunoco has breached two underground springs in Delaware County and may have impaired water supplies in that location as well. Several Pennsylvania legislators have called for Sunoco to halt the construction of Mariner East 2 while measures can be taken to ensure that no further harm will be done. Yet even as Appellants seek relief from this Board, drilling continues, impacted residents have no guarantees of protection from further harm, and the Department has taken no action.

Appellants seek an immediate partial supersedeas to protect Pennsylvania residents from further harm while the Board considers the legality of the Permits' authorization of horizontal directional drilling as planned and executed by Sunoco.

In support of this Petition, Appellants state as follows:

I. Factual and Procedural Background

1. In February 2017, permittee Sunoco Pipeline L.P., now Energy Transfer Partners, L.P., (“Sunoco”) began to dig and install a pair of pipelines as part of a project it calls Mariner East 2. This pipeline project consists of a 20-inch diameter and a 16-inch diameter line carrying highly volatile natural gas liquids, which would traverse hundreds of miles across 17 counties in Pennsylvania alone.
2. In order to build these pipelines, Sunoco is cutting through hundreds of streams and wetlands, and crossing many roads and developed areas.
3. On February 13, 2017, the Pennsylvania Department of Environmental Protection (the “Department”) approved Sunoco’s construction plans for Mariner East 2 as submitted in a series of applications, issuing three (3) individual Erosion and Sediment Control permits under 25 Pa. Code Chapter 102 (“Chapter 102 Permits”), and seventeen (17) Water Obstruction and Encroachment permits under 25 Pa. Code Chapter 105 (“Chapter 105 Permits”) (collectively, “Permits”).
4. During its technical review of the Permit applications, the Department issued several rounds of technical deficiency letters and emails, amassing long lists of problems with the applications. Some of these technical deficiency letters are available to view and download on a public website hosted by the Department at <http://www.dep.pa.gov/Business/ProgramIntegration/Pennsylvania-Pipeline-Portal/Pages/Mariner-East-II.aspx>.
5. Among the chief concerns of the Department before issuing the Permits was the safety of

Sunoco's horizontal directional drilling (sometimes called "HDD") plans. The risks the Department was concerned about included water supply contamination and spills of drilling fluids, sometimes known euphemistically as "inadvertent returns," or "IRs." Up through the very end of the review process, the Department was raising these concerns with Sunoco and seeking its resolution of them.

6. On February 6, 2017, exactly one week before the Department issued the permits, Sunoco responded to the then-latest round of technical deficiencies from the Department, in a letter addressed to Ann Roda, Director of Program Integration for the Department. *See* Feb. 6, 2017 letter to Ms. Roda, attached hereto as Exhibit A.
7. The Department raised the following deficiency with Sunoco, among many others:

Karst area near Exton and the East Whiteland compressor branch present additional risks of IRs during HDD. Provide a detailed assessment of measures to reduce the risk of drilling in these area. There are two areas are [sic] the most concerning, especially Exton. There are carbonate rocks, karst surface depressions; and identification of other public water supplies (groundwater or surface water) within one mile. The "water supply areas" geography used in the report [Sunoco submitted] is irrelevant to well locations. Locations assessed as medium risk to water wells should have more monitoring and response during the HDD process and for an extended time period after. Also risk categorization should include the distance from the HDD to the wells and the available categories indicating the amount of water and people supplied from the well. Groundwater impacts from an inadvertent return cannot be directly visually observed from the surface. Any loss of circulation is the only indicator of drilling fluid migrating out of the borehole into the groundwater.

Exhibit A at pp. 12-13.

8. Sunoco's response only addressed coordination with the local public water supplier, not the risks of inadvertent returns generally, or protection of private water supplies. *Id.*

9. The Department had raised other concerns, including ensuring Sunoco had identified “All water wells within 400 ft. of HDD.” Exhibit A at 24. Sunoco had not. Testimony from the supersedeas hearing in March of this year--after construction had begun and drilling had been expedited--revealed that Sunoco still had not identified all private wells within even 150 feet of horizontal directional drilling. This identification effort was required by the approved Water Supply Assessment Preparedness, Prevention, and Contingency Plan. *See* transcript of Supersedeas Hearing in this appeal, attached hereto as Exhibit B, at pp. 828-830; Water Supply Plan, attached hereto as Exhibit C, at Section 6.1.
10. Besides identifying the Exton location as particularly worrisome, the Department had also identified a location in Fairview Township, York County, as a place where drilling would pose a high risk to water wells. *See* Exhibit A at 24; *see also* Para. 31, *infra*, detailing later spill.
11. Additional related Department comments can be seen in Exhibit A under the heading “Misc. Comments on Water Supply, PPC, IR, & Karst Aspects of Chapter 105 Applications.”
12. The Department knew of significant problems with Sunoco’s horizontal directional drilling for the earlier Mariner East 1 pipeline and, as revealed in documents recently obtained through discovery, also knew that contamination of wells by Mariner East 2 “has the potential to really blow up.” *See* January 17, 2017 email from Southeast Regional Office Waterways and Wetlands Program Manager, attached hereto as Exhibit D.
13. Rather than resolving these risks before issuing the permits, the Department approved Sunoco’s inadequate plans and merely incorporated a few “special conditions” into the permits to paper over the public endangerment.

14. The water supply special conditions do not actually prevent or limit risks to water supplies and did not alter how Sunoco would conduct its horizontal directional drilling or make it safer. They are by and large notice requirements. *See, e.g.,* Chester County Chapter 105 Permit, attached to Notice of Appeal, pp. 4-5. That notice does not go far, as Sunoco has failed to even identify most at-risk water wells.
15. Appellants submitted an affidavit from Dr. James A. Schmid with their February Petition and presented his testimony at the supersedeas hearing in March, 2017.
16. In his affidavit, Dr. Schmid explained that “trenchless pipeline construction,” which includes horizontal directional drilling, “still poses a risk of inadvertent return of drilling fluids, which have damaged a number of Pennsylvania streams.” Schmid Aff. at ¶ 52.
17. The Department recognizes that sedimentation of streams, such as from drilling fluids, causes numerous problems for the health of the stream ecology. *See, e.g.,* “Minimizing Accelerated Soil Erosion and Preventing Sediment Pollution,” Pennsylvania Department of Environmental Protection Fact Sheet, June 2015, available at <http://www.cumberlandcd.com/esc/3150-FS-DEP1841.pdf>.
18. Dr. Schmid also weighed in on the risks of the project to private water supplies and springs. Schmid Aff. at ¶¶ 53-58.
19. Dr. Schmid noted that “Sunoco’s primary resource for locating private wells ... is demonstrably and grossly inaccurate for purposes of assessing the impacts of this project.” Schmid Aff. at ¶ 55. “The Department’s deficiency letters ... specifically note that long-term impacts on wells can occur as far as 0.5 mile from pipelines, and short-term impacts can occur within 400 feet. There are hundreds of nearby wells along the proposed pipelines.

Yet the applicant has not shown the location of wells or springs on drawings, thus precluding public review of private water supplies at risk. Unknown wells can receive no consideration during pipeline construction.” *Id.* at ¶ 57.

20. “Pipeline construction and operation are expected by the applicant to be most likely to impact private water supplies in areas where horizontal directional drilling (HDD) is utilized,” explained Dr. Schmid, “because the pressurized slurry mixture of bentonite, water, and additives can escape a drill hole and enter aquifers as well as streambeds and wetlands through faults, cracks, and unstable geological materials.” *Id.* at ¶ 56.
21. Not only is contamination a risk, but also water supply, due to the dewatering necessary for drilling. *Id.*
22. Had they remained in effect, the Erosion and Sediment Control Plans (the “E&S Plans”) that the Department approved as part of the Permits at the time of issuance might have helped to make up for Sunoco’s initial failure to identify private wells.
23. The approved E&S Plans required landowners be invited to pre-construction meetings. Those meetings would have been an opportunity for Sunoco to talk to landowners about their wells and whether their neighbors have wells that might be at risk from construction. It is thus especially unsettling that after the Permits were issued, as recently revealed through discovery, Sunoco submitted revised E&S Plans to the Department, specifically removing landowners from pre-construction meetings. *See e.g.*, first pages of Revised Washington County E&S Plans, May 04, 2017, attached hereto as Exhibit E, at p. 4 (see modifications in red).
24. Unbeknownst at first to the public, the Department has started receiving reports from

Sunoco of drilling fluids spilled into the waters of the Commonwealth. Appellants have compiled documents obtained from the Department on the spills as a composite exhibit, with a demonstrative summary at the front of the exhibit for clarity. *See generally* Exhibit F.¹

25. Spill reports dating between late April and mid-June that Appellants have recently obtained reveal at least 61 drilling fluid spills in just that period of less than two months. These spills span the breadth of the state, from westernmost Washington County to easternmost Delaware County.
26. The total number of spills to-date is likely far greater. Construction has been underway for over five months, and rather than demanding safer practices from Sunoco to avoid further spills, or putting a halt to the drilling, the Department appears to have backed off of issuing notices of violation altogether.
27. Appellants have seen no evidence of a notice of violation having been issued for any spills occurring after May 17, 2017, despite some of those spills amounting to hundreds, thousands, and in one case, tens of thousands of gallons of drilling fluid.
28. Drilling fluid has been spilled into Exceptional Value wetlands, trout streams, ponds, groundwater, and uplands. The ultimate destination of much of the lost drilling fluid, though, remains unknown. *See discussion below.*
29. Most spills are in clusters, indicating that Sunoco failed to fix the problems that caused the first spill and continued to drill despite methods and locations that may be unsuitable. There have also been locations where Sunoco has been notified that its activities threaten to pollute

¹ Due to its size being greater than the electronic filing size limit, Appellants have split Exhibit F into two files, Exhibit F (Section I) and Exhibit F (Sections II & III).

waterways and Sunoco has later spilled at those very places.

30. For example, in Middlesex Township, Cumberland County, Sunoco had separate spills into two forested Exceptional Value wetlands (labeled I30 and I32) associated with High Quality, Cold Water Fishery, LeTort Spring Run. One of those spills was reported as totaling 1500-2000 gallons of drilling fluid. Exhibit F at Section I, pages SCRO 003597 through SCRO 003601. There have been several spills in that watershed. *See* transcript of the deposition of Ann Roda, July 14, 2017, attached hereto as Exhibit G, Tr. 185:16-21.
31. In Fairview Township, York County, Department inspectors warned that operations posed a potential for pollution of the Susquehanna, Marsh Run, and Yellow Breeches Creek. *See* Exhibit F at Section II, pages SCRO 003747 through SCRO 003748; *see also supra* at Para. 10 (pre-permit issuance warning). Less than ten days later, a spill of 500 gallons into Yellow Breeches Creek was reported. Exhibit F at Section I, page SCRO 003830.
32. There appear to have been ten or more spills in and around Loyalhanna Lake alone, a reservoir and recreational destination in the Laurel Highlands of Westmoreland County. Exhibit F at Section I, pages SWOCC 001316 through SWOCC 001321.
33. Sunoco also contaminated a residential water well on the shore of Loyalhanna Lake. *Id.*
34. A series of spills in Chester Creek, Delaware County starting in May, 2017 are, upon information and belief, the only drilling fluid spills so far made public. These spills came to light due to actions of impacted residents rather than Sunoco or the Department. While Sunoco claims those spills are in the hundreds of gallons of drilling fluid, the Department noted that “they lost 20,000 gallons of fluid over the past few days so who knows where that went.” *See* DEP May 4, 2017 email and incident report, attached as Exhibit H.

35. On or about July 16, 2017, Sunoco spilled drilling fluids in Chester Creek yet again. *See* “Leak at Sunoco Pipeline Site in Delaware County Causes Mud to Flow Into Creek,” NBC10, July 18, 2017, attached as Exhibit I.
36. Based on the latest available information, Sunoco’s drilling hit two springs on the east side of Chester Creek in Middletown Township. Sunoco pumped cloudy water up the hill and into a straw bale containment pond on the pipeline right-of-way the size of a swimming pool. As of July 18, 2017, that containment pond was overflowing into the woods while contractors were building a second straw bale structure. *See* Affidavit of Faith Zerbe attached hereto; *see also* Exhibit I.
37. Upon information and belief, a water well in that area is now being tested to determine whether it too has been impaired by Sunoco’s drilling.
38. As of July 18, 2017, Delaware County State Representative Chris Quinn is calling for Sunoco to halt activities on the Mariner East 2 pipelines in Delaware County until proper safeguards can be put in place. NBC10 reported Rep. Quinn as declaring, “What is occurring here is unacceptable.” *See* Exhibit I.
39. Despite the significant impacts of these spill on water resources, the Department and Sunoco have not alerted local residents about the spills. *See* Exhibit G, Tr. 190:9-11.
40. Sunoco, now Energy Transfer, has assured residents that the drilling fluid is non-toxic, harmless bentonite clay. Energy Transfer provided that same assurance to the Federal Energy Regulatory Commission for its horizontal directional drilling of the Rover pipeline in Ohio. After Energy Transfer spilled two million gallons of drilling fluid into an Ohio wetland, the Commission ordered Energy Transfer to halt new horizontal directional

- drilling. *See* May 10, 2017 FERC Order, attached hereto as Exhibit J.
41. Within a month, diesel fuel was discovered in the spilt drilling fluid, contrary to Energy Transfer’s representations to regulators as to the contents of the drilling fluid. *See* June 1, 2017 FERC Letter, attached hereto as Exhibit K.
 42. Perhaps more troubling than Sunoco’s drilling fluid spills is the damage to water supplies and wells across the Commonwealth.
 43. Appellants have just learned that each of the three Department regional offices monitoring construction under the Permits has received reports of water supply problems in the vicinity of the construction. Reports have come in from Westmoreland County, outside of Pittsburgh; Blair County, outside of Altoona; and Chester County, in the Philadelphia area. *See* Exhibit G, Tr. 190:12-17, 193:19-25, 194:1-8.
 44. Only the dire events in the suburbs of Philadelphia have come to light in the public eye.
 45. The Schoen Road horizontal directional drilling site in the Exton area of Chester County was one of the first sites where Sunoco began setting up drilling operations, in early March, 2017. *See* Affidavit of Matthew L. Gordon, attached as Exhibit A to Appellants’ Emergency Motion for Expedited Hearing and for Reconsideration of the Denial of Temporary Supersedeas, at ¶ 31.
 46. On June 22, 2017, Sunoco drilled into the spring that fed the wells of perhaps fifteen households in the Exton area, straddling West Whiteland and Uwchlan Townships. *See* July 14, 2017 *StateImpact* article, “Sunoco halts drilling in Chester County where pipeline construction damaged drinking water wells,” attached hereto as Exhibit L.
 47. David Mano’s household was among those impacted. On July 5, 2017, Mr. Mano, of 158

Valleyview Road, learned that the well pumps of some neighbors were not working.

Another's well water was brown. *See* Affidavit of David A. Mano, attached hereto, at ¶¶ 6, 10-11.

48. Mr. Mano and his fiancée drew their water from a spring-fed well for all the years they have lived on Valleyview Road. It had been pristine. Mano Aff. at ¶¶ 3-4.

49. When Mr. Mano checked the unfiltered water in his well tank, after learning of his neighbor's problems, he discovered it was chocolate brown with a lot of sediment. Mano Aff. at ¶ 8.

50. The neighbors did not know at the time, but suspected that Sunoco's drilling down the street was the cause of their collective water well problems. Mano Aff. at ¶ 12.

51. Sunoco alerted Mr. Mano that the water was not safe to drink, but that he could shower with it. Sunoco provided him bottles of water. Mano Aff. at ¶¶ 14-15, 22.

52. Mr. Mano is concerned about the water from his well that he and his fiancée had been drinking before they discovered their well was contaminated, and is upset about the damage that Sunoco's drilling did to his well and the communal aquifer. Mano Aff. at ¶¶ 23, 25.

53. As it turns out, the Department had anticipated water supply problems *especially in the Exton area*. *See* Exhibit A at pp. 12-13. In its rush to get the permits issued, the Department neglected to do what was needed to protect residents. *See* Exhibit G, Tr. 41:18-42:10; 76:7-93:5 (discussing condensed timeframe for issuing the Permits); 100:11-102:4 (Conservation District concerned about "unreasonably short timetable").

54. Only after Mr. Mano broke the news to the press about the water contamination in Chester County did Sunoco do anything in response. Mano Aff. at ¶¶ 20-21.

55. State elected officials representing Chester County have called for Sunoco to halt all construction on Mariner East 2 until safety can be assured. *See* July 15, 2017 *Daily Local News* article, “Dinniman calls for halt to all Mariner East 2 pipeline construction,” attached hereto as Exhibit M; *see also* July 9, 2017 *WCHE* 1520 AM article, “Dinniman, Comitta Calling for Halt on Construction of Mariner II Pipeline,” attached hereto as Exhibit N.
56. On July 13, 2017, Sunoco agreed to a temporary pause of drilling, of uncertain duration, at the Schoen Road location. *See* Exhibit L.
57. Because the Department has not taken action in response to these contamination incidents, there are likely to be more as drilling continues. *See* Exhibit G, Tr. 195:15-19.
58. The horizontal directional drilling authorized by the Permits, as Appellants warned and as foretold by the concerns the Department communicated to Sunoco, has caused widespread and grave harm to the public and the environment.
59. This did not have to happen. Department officials initially sought from Sunoco further protections from drilling fluid spills and water supply problems before issuing the Permits. Sensitive areas such as the Exceptional Value wetlands in the LeTort Spring Run watershed into which Sunoco spilled drilling fluids could have been routed around. Extra precautions could have been taken to protect water supplies in dense neighborhoods relying on well water. Particularly vulnerable geologies such as the karst in Exton could have been routed around as well.
60. Instead, Sunoco continues drilling and the Department stepped aside.
61. The horizontal directional drilling will likely continue for months, and--based on the newly uncovered information summarized here--there is every reason to believe that more and

more damage to residents, their property, and the environment will take place in that time without timely action by the Board. *See* Exhibit B, Tr. 492:20-22; 493:6-9 (testimony of Matthew L. Gordon on length of drilling).

62. For these reasons, and as explained in more detail below, Appellants respectfully request that the Board grant this Petition for Partial Supersedeas.

II. Standard of Review

63. The Board reviews Departmental actions *de novo*. *Warren Sand & Gravel Company v. DER*, 341 A.2d 556, 565 (Pa. Commw. Ct. 1975); *Consol Pa. Coal Co. v. DEP*, 2011 EHB 571, 573; *Smedley v. DEP*, 2001 EHB 131.

64. This *de novo* review by the Board extends to the issue of whether a continuation of the permitted activity is appropriate based upon up-to-date information. *Solebury School v. DEP*, 2014 EHB 482, 526; *Tinicum Township v. DEP*, 2002 EHB 822, 835

65. Where the Board finds that the Department has abused its discretion, the Board may substitute its own discretion for that of the Department. *Pequea Township v. Herr*, 716 A.2d 678 (Pa. Commw. Ct. 1998).

66. A supersedeas is an extraordinary remedy that will not be granted absent a clear demonstration of appropriate need. *Hopewell Township v. DEP*, 2011 EHB 732, 733.

67. The grant or denial of a supersedeas is guided by statutory and regulatory criteria, relevant judicial precedent, and the Board's own precedent. 35 P.S. § 7514(d)(1); 25 Pa. Code § 1021.63(a).

68. Among the factors that the Board considers are: (1) the likelihood of the petitioner prevailing on the merits; (2) irreparable harm to the petitioner; and (3) the likelihood of

injury to the public or other parties. 35 P.S. § 7514(d); 25 Pa. Code § 1021.63(a)(1)-(3); *Hudson v. DEP*, 2015 EHB 719, 725-26; *Hopewell Township v. DEP*, 2011 EHB 732, 733; *Neubert v. DEP*, 2005 EHB 598, 601; *Westmoreland Land, LLC v. DEP*, 2011 EHB 700, 702; *Kennedy v. DEP*, 2008 EHB 423, 424.

69. The issuance of a supersedeas is committed to the Board’s discretion based upon a balancing of the three aforementioned factors. *Hudson v. DEP*, 719 EHB 726; *UMCO Energy, Inc.*, 2004 EHB 797, 802; *Global Eco-Logical Services, supra*; *Svonavec, Inc. v. DEP*, 1998 EHB 417, 420.
70. The Board’s rules prioritize the prevention of pollution or injury to the public health, safety, or welfare. 25 Pa. Code § 1021.63(b).
71. Where the Department has taken an action which permits pollution and environmental injury, the Board may issue a supersedeas to prevent those harms during the pendency of an appeal. *See generally Center for Coalfield Justice v. DEP*, EHB Docket No. 2016-155-B (February 1, 2017).
72. In order for the Board to grant a supersedeas, a petitioner must make a credible showing as to irreparable harm and the likelihood of injury to the public or other parties and must make a strong showing that it is likely to succeed on the merits of its appeal. *Hudson v. DEP*, 2015 EHB 719, 726; *Carter v. DEP and Cabot Oil & Gas Co.*, 2011 EHB 845, 852.

III. The Board Should Supersede the Permits Because They Clearly Violate Pennsylvania Law and Threaten Irreparable Harm.

73. Appellants are likely to prevail on the merits and can identify clear violations of law, including of 25 Pa. Code §§ 105.14, 105.15, and 105.18a, as well as Article I, Section 27 of the Pennsylvania Constitution.

74. Appellants support their arguments with affidavits (attached hereto and to the February Petition) from members of the public who have been harmed by the Department's actions and other exhibits demonstrating that irreparable harm is ongoing and will continue unabated unless the Board supersedes the Permits in part to the extent they allow horizontal directional drilling.
75. Appellants establish herein that the horizontal directional drilling has caused and will cause impairment and destruction of water supplies and widespread pollution into waters of the Commonwealth.
76. Appellants seek to preserve the status quo while the Board has a chance to hear this Appeal. Failure to preserve the status quo would result in continued pollution into streams, lakes, and wetlands, and continued destruction and/or contamination of water supplies.
77. In this case, harm to the public and harm to Appellants are aligned, as Appellants seek to further the public interest, and establish harm to the Appellants based in part on harms to individual members of the public.
78. Appellants demonstrate that, while Sunoco will likely claim economic damage and harm to the public, those claims are due to its own actions, do not outweigh the harm to the public, and are mitigated by the limited scope of the requested supersedeas.
79. Finally, Appellants request that a bond not be required of Appellant public interest groups here. To do so would be unprecedented and contrary to a proper weighing of the equities.
80. All told, Appellants have more than met the requirements for the issuance of a supersedeas. Appellants urge the Board to grant their request in the interest of justice.

IV. Likelihood of Success on the Merits

A. Standard for Establishing Likelihood of Success on the Merits

81. To establish the likelihood of success on the merits, a petitioner must make a showing sufficient to establish a reasonable probability of success on the merits. *Achenbach v. DEP*, 2005 EHB 536, 539.
82. A petitioner need not establish the claim absolutely, but the petitioner’s chance of success on the merits must be more than speculative. *Id.*
83. To prevail in an appeal of a permit decision, third-party appellants bear the burden of proving by a preponderance of the evidence that the Department’s decision to issue the permit was arbitrary, capricious, or contrary to law. 25 Pa. Code § 1021.101(a); *Blose v. DEP*, 2000 EHB 189.
84. Where the Department “does not review an application as required by the statutes and regulations, it abuses its discretion.” *Oley Township v. DEP*, 1996 EHB 1098, 1119.
85. Where an agency ignores or fails to apply its own regulations properly in reviewing a permit application, and issues the permit, the agency acts contrary to law. *Zlomsowitch v. DEP*, 2004 EHB 756; *see also Teledyne Columbia-Summerhill Carnegie v. Unemployment Compensation Board of Review*, 634 A.2d 665, 668 (Pa. Commw. Ct. 1993) (“A duly promulgated regulation has the force and effect of law and it is improper for the [agency] to ignore or fail to apply its own regulation.”).

B. Appellants Are Likely to Succeed on the Merits

86. There are two principal harms which this petition addresses: (1) destruction and contamination of water supplies; and (2) spills of drilling fluids from horizontal directional

drilling.

87. The Department knew that each posed a great danger, but nevertheless permitted the Mariner East 2 as planned.

88. Prevention of these harms falls squarely within the Department's purview under Chapter 105.

89. 25 Pa. Code § 105.14(b)(3), together with Section 105.15(a)(1), requires the Department, in considering the impact of an encroachment (in this case the pipelines installed using horizontal directional drilling), to evaluate the effect on "the property or riparian rights of owners upstream, downstream or adjacent to the project." *See Lyons v. DEP*, 2011 EHB 169, 183-184 (Labuskes, J.) (applying Section 105.14(b)).

90. Water wells along the pipeline route are property, and the impact of Mariner East 2 drilling on the rights of the wells' owners is a factor Section 105.14(b)(3) required the Department to weigh. *See, e.g., Angela Cres Trust of June 25, 1998 v. DEP*, 2009 EHB 342, 369 (effects on fish hatchery must be given consideration under Chapter 105).

91. Spills of drilling fluid on properties along the route, and into waters which nearby residents use, injure adjacent and downstream owners as well.

92. Likewise, the Department must consider "other significant environmental factors" under Section 105.14(b)(4), which would include the effects of contamination and sedimentation of waters from spills as well as contamination of water supplies.

93. Under Sections 105.18a(a)(5) and (b)(5), the Department may not permit a project crossing an Exceptional Value or other wetland (such as this project) unless the applicant demonstrates that the project will not "cause or contribute to pollution of groundwater or

surface water resources or diminution of resources sufficient to interfere with their uses.”

See also 35 P.S. § 691.1 (defining pollution broadly).

94. Sunoco’s reckless horizontal directional drilling for Mariner East 2 has caused both pollution and diminution of groundwater sufficient to interfere with its use.
95. The Department unreasonably issued the Permits, approving Sunoco’s drilling plans, despite knowing the likely damage that would be done from spills and to water supplies. It expressed those concerns to Sunoco on numerous occasions but ultimately issued permits allowing the damage to occur. *See, e.g.,* Exhibit A (acknowledgment of concerns in technical deficiencies) and Exhibit D (acknowledgment of water well impairment concern).
96. Since the issuance of those Permits, it has become clear that the Department has no intention of doing anything meaningful to protect the public or the environment from Sunoco’s reckless horizontal directional drilling. The Department appears to have stopped issuing violations to Sunoco for spills and has admitted that it has not taken action despite several separate water supply incidents. Exhibit G, Tr. 195:15-19.
97. The gravity of the foreseen harms which have occurred and which continue to occur should have led the Department to refrain from issuing the Permits until Sunoco responded meaningfully to its technical deficiencies addressing water supply and inadvertent return risks. The Department’s failure to do so renders the issuance of the Permits arbitrary, capricious, and contrary to law in light of 25 Pa. Code Sections 105.14(b)(3), 105.14(b)(4), and 105.15(a)(1).
98. The Department’s decision to issue the Permits was also barred by Section 105.18a. While Sections 105.18a(a)(5) and (b)(5) do not define what constitutes “pollution” of groundwater

or surface water resources, rendering such drinking water undrinkable, as has happened in Chester County, certainly counts.

99. The dozens of spills of drilling fluid also constitute significant pollution of groundwater or surface water resources. The main component of drilling fluid besides water--bentonite--smothers aquatic life where it settles in water bodies. *See* May 15, 2017 *StateImpact* article, “Sunoco’s pipeline construction releases drilling mud into Delco Creek,” attached hereto as Exhibit O.
100. Sunoco has not disclosed all of the components of its drilling fluids, which may include more toxic elements. *See, e.g.,* Exhibit K (“On May 26, 2017, the Ohio Environmental Protection Agency (Ohio EPA) notified FERC staff and Rover of the presence of petroleum hydrocarbon constituents, commonly found in diesel fuel, in samples of drilling fluid from various locations near the HDD of the Tuscarawas River.
101. While some of the spills Sunoco has reported as small amounts, e.g. Exhibit F at Section II, pages SERO 001325 through SERO 001328, others involve thousands of gallons, e.g. Exhibit F at Section II, pages SCRO 003643 through SERO 003646, and for at least one, tens of thousands of gallons of drilling fluid was lost and could be seeping into water resources. Exhibit H (May 2017 Chester Creek DEP email).
102. Much drilling has yet to be done, and Energy Transfer three months ago on another pipeline project just one state over proved that its horizontal directional drilling has the potential to cause a catastrophic release of millions of gallons of drilling fluid. *See* Exhibit J.
103. The Department let Sunoco ignore concerns about drilling fluid spills and water supply impairment, knowing the significant risk of such damaging problems. In doing so, the

Department violated Appellants' substantive rights to clean water under Article I, Section 27 of the Pennsylvania Constitution, and acted unreasonably as a trustee of the Commonwealth's natural resources. *See Pennsylvania Environmental Defense Foundation v. Commonwealth of Pennsylvania, et al.*, No. 10 MAP 2015, 2017 Pa. LEXIS 1393, *36-37 (June 20, 2017); Pa. Const. art. I, § 27.

104. The Department's act of permitting Sunoco's plans for horizontal directional drilling thus violated Article I, Section 27 as well.

105. For these reasons, Appellants are likely to succeed on the merits of their claims with respect to Sunoco's horizontal directional drilling.

V. **Appellants Will Suffer Continued Irreparable Harm if Partial Supersedeas Is Not Granted.**

106. The central purpose of a supersedeas is to prevent an appellant from suffering irreparable harm while the Board considers the appeal. *Center for Coalfield Justice v. DEP*, EHB Docket No. 2016-155-B, slip op. at 18 (February 1, 2017).

107. Sunoco's continued and expanded use of horizontal directional drilling will almost certainly result in continued and additional spills of drilling fluids into waters of the Commonwealth, and contaminate and/or destroy additional water supplies. Precedent from the Board and Pennsylvania appellate courts is very clear that harms of this nature are to be considered irreparable. *Commonwealth v. Kennedy*, 87 A. 605, 606 (Pa. 1913) (pollution of a stream constitutes irreparable harm warranting an injunction); *Tinicum Township v. DEP*, 2002 EHB 822, 832 (damage to a hydrologic regime constitutes irreparable harm *per se*, and the violation of statutes prohibiting water losses and pollution constitutes irreparable harm *per se*); *Indian Lake Borough v. DEP*, 1996 EHB 1372, 1373-74 (dewatering of lake, if

shown, would have constituted irreparable harm).

108. The irreparable harm that this Project will continue to inflict if the Permits are not partially superseded while the Appeal progresses will happen not just to the natural environment itself, but to many individuals along and downstream of the pipeline route. Appellants have attached a statement from one of these individuals, and refer back to affidavits attached to the February Petition.

109. As explained more fully in the February Petition and the affidavits attached thereto, a number of Appellants' members live on or alongside horizontal directional drilling locations. Those include:

- Dawn Law (Law Aff. at ¶ 19)
- Ellen Gerhart (Gerhart Aff. at ¶¶ 14, 17-19)
- William Poteau (Poteau Aff. at ¶¶ 11, 15-20)
- Eric Friedman (Friedman Aff. at ¶ 14)
- Robert and Terri Joran (Joran Aff. at ¶¶ 9, 12)

110. The Jorans live in Exton very close to the site of the contamination discovered in Chester County, and about thirty yards from a horizontal directional drilling site. Joran Aff., attached to February Petition, at ¶¶ 3, 9. They are at risk of injury from the drilling.

111. Mr. Poteau described in detail his concerns about contamination of his water well from the horizontal directional drilling that is currently slated to take place next door to his house. As he explained in his affidavit, his water table is at the same level as the drilling would be. Poteau Aff., attached to February Petition, at ¶¶ 11, 15-20. His household is at risk too.

112. Appellants, through their members including these individuals, will suffer irreparable

harm if the Permits are not superseded to the extent they authorize horizontal directional drilling.

113. Appellants will also suffer irreparable harm through the damage done to the environment by horizontal directional drilling for the project that sets back the work they fight for in support of their missions of environmental protection.

114. Horizontal directional drilling of the Mariner East 2 pipelines threatens continued grave and irreparable harm to the environment and to Pennsylvanians if it continues under the flawed and unlawful Permits the Department issued.

VI. Harm to Appellants and the Public Outweighs Any Potential Harm to Others

115. Besides considering likelihood of success on the merits and irreparable harm, “injury to the public and other parties” is among the key factors the Board considers and balances in determining whether to grant a supersedeas. *UMCO Energy, Inc. v. DEP*, 2004 EHB 797; *Global Eco-Logical Services, Inc. v. DEP*, 2000 EHB 829; *see also Harriman Coal Corp. v. DEP*, 2001 EHB 234.

116. In the case at hand, harm to the public aligns very closely with irreparable harm to Appellants.

117. As with all relevant factors, injury to the public and other parties should be considered in light of the purpose of supersedeas, which is to “preserve the lawful status quo while the appeal is proceeding to final disposition.” *Solomon v. DEP*, 1996 EHB 989.

118. Here, the harm the public would suffer if partial supersedeas is not granted far outweighs any harm Sunoco might claim, and granting partial supersedeas would preserve the legal status quo.

A. Denial of supersedeas would pose significant harm to the public.

119. The environmental degradation and damage to public health and property that will result from the spills and water supply damage caused by horizontal directional drilling for the Mariner East 2 pipeline project is harm to the public.

120. As stated *supra*, Sunoco's construction has and will continue to damage aquifers that feed the water supplies of residents located in the path of the construction. If anything, such damage appears to be accelerating. The resulting irreparable harm to those residents and their inability to access clean water constitutes harm to the public.

121. Aside from Appellants' own members, certain individuals have come forth with their own stories of the damage this drilling, as permitted, would inflict.

122. Michael Di Domenico executed an affidavit attached to the February Petition.

123. Mr. Di Domenico is the Chairman of the Westtown Township Board of Supervisors, in Chester County. Di Domenico Aff., attached to February Petition, at ¶¶ 2-3. Mr. Di Domenico gets the drinking water at his house from a water well on his property that lies less than 250 feet from the route the Department has permitted for Mariner East 2. Di Domenico Aff. at ¶ 5. That segment of the pipelines would be bored underground using horizontal directional drilling, at depths between 70 and 180 feet according to Sunoco. Di Domenico Aff. at ¶¶ 5-6.

124. Concerned about his well water quality, Mr. Di Domenico has spoken with two hydrogeologists and three well drillers to understand the risks of the boring to his well water. Based on his conversations with those professionals, it is Mr. Di Domenico's understanding that there is a very good chance the boring will negatively impact the aquifer and his well water. Di Domenico Aff. at ¶ 9.

125. If the boring takes place by his house and his well water is contaminated or depleted, Mr.

Di Domenico will not be able to connect to public water due to the mismatch between the piping used in his home and the water pressure used by the municipal water supplier, and will have no water supply at his home. Di Domenico Aff. at ¶¶ 12.

126. Mr. Di Domenico is not alone in being at risk of having his water supply contaminated.

Many houses along that segment of horizontal directional drilling get their water from wells, and in fact most Westtown Township water towers store groundwater from wells. Di Domenico Aff. at ¶¶ 8 and 13.

127. As explained above, David Mano and his neighbors have already had their water

contaminated. *See generally* Mano Aff. The drilling at that site is not yet complete and

further damage may result from the continued risky drilling in the same location. *See*

Exhibit A at pp. 11-12 (DEP acknowledging danger of drilling in areas with previous spills, asking Sunoco questions such “How the previous occurrence of an IR at this location was accounted for in the design of the proposed crossing”).

128. These public harms are already mounting, and cannot be offset by any alleged utility of the Mariner East 2 pipeline project.

129. In sum, the harm the Project would continue to inflict if the Permits are not partially

superseded to the extent they authorize horizontal directional drilling would be enormous, and not outweighed by any speculative benefits.

B. Grant of partial supersedeas would not significantly harm Sunoco.

130. Any harm that Sunoco claims will result from an order suspending its ability to continue

one discrete portion of the construction activities of Mariner East 2 is purely economic and a

consequence of its own reckless disregard of pollution prevention and the rights of residents along the pipeline route.

131. The harm to Sunoco is outweighed by the harm to the public. The Federal Energy Regulatory Commission implicitly found as much in parallel circumstances when it ordered a halt to new horizontal directional drilling on the even larger Energy Transfer pipeline in Ohio, Rover. The same is true of State Senator Andy Dinniman and State Representative Carolyn Comitta of Chester County, who have called for a halt on activity on the pipeline project after the revelation of water well contamination in their districts, and State Representative Chris Quinn, who has joined their calls. *See* Exhibits I, J, M, and N.

132. With respect to past costs, courts have recognized that oil and gas companies are on notice that their permits can be revoked or suspended through court challenges, and should take precautions to protect their interests at their own expense. *Harrison v. Cabot Oil & Gas Corp.*, 110 A.3d 178, 186 (Pa. 2015) (recognizing “that oil-and-gas-producing companies are free to proceed according to their own devices to negotiate express tolling provisions for inclusion in their lease” and, therefore, can protect their investments without help from the courts).

133. Any past costs incurred by Sunoco prior to the issuance of a permit should not be considered in deciding whether to grant supersedeas relief. *See Center for Coalfield Justice v. DEP*, slip op. 1, 22 (February 1, 2017) (“we conclude that the harm asserted by Consol is less than it claims and is at least in part the result of operational choices that Consol made on its own,” because the alleged need to revise the company’s plans was “directly the result of Consol proceeding with the planning and development of the 3L panel as if it had Permit

Revision No. 204 in hand even though it did not”).

134. When considering potential harm to a permittee, the Board appropriately considers whether harms related to project delay are a result of the permittee’s own decisions and conduct. *See UMCO v. DEP*, 2004 EHB at 818-822.

135. Here, Sunoco has not only had ample consultation with the Department and was several times formally notified of numerous, egregious deficiencies in its Chapter 102 and 105 permit applications, but has nevertheless recklessly endangered the public living near its horizontal directional drilling operations. Therefore, any harm to Sunoco associated with the delay in drilling would be attributable to its own recklessness, not the grant of a partial supersedeas.

136. Similarly, any harm to Sunoco done by granting the partial supersedeas sought here would be mitigated by its limited scope, which would allow Sunoco to continue other work authorized under the Permits.

137. The public has already suffered greatly from this preventable harm. Sunoco has within its power the ability to stop future harm from occurring. Any cost to Sunoco in going to that trouble is dwarfed by the costs of inaction.

VII. The Grant of Supersedeas Should Not Be Subject to a Bond Requirement

138. While the Board has authority under 25 Pa. Code § 1021.63(c) to require a bond when granting a petition for supersedeas, there does not appear to be any precedent for the Board imposing such a condition on the public or public interest groups.

139. Section 1021.63(c) states: “In granting a supersedeas, the Board may impose such conditions as are warranted by circumstances including, where appropriate, the filing of a

bond or other security.” 25 Pa. Code § 1021.63(c). The rules do not further address bond requirements. *See* 25 Pa. Code §§ 1021.61-1021.64.

140. Historically, the Board has required a bond under Section 1021.63(c) only as a tool to protect the public interest and to guard against environmental harm. *See Tire Jockey Services, Inc. v. DEP*, 2001 EHB 1141, 1163 (finding that issuing a bond against Tire Jockey Services was “necessary to protect, at least to some degree, the interests of the public.”); *Global Eco-Logical Services, Inc. v. DEP*, 1999 EHB 649, 653 (where “likelihood of injury to the public or of pollution occurring during a supersedeas [was] low,” the granting of petition for supersedeas was conditioned, pursuant to § 1021.63(c), on additional requirements, and not just on waste demolition facility’s compliance with its permit); *UMCO Energy, Inc., v. DEP*, 2004 EHB 797, 822-823 (declining to grant energy company’s petition for supersedeas, even with a bond that would address potential long-term natural resource damage, where irreparable damage to the environment was predicted).

141. Here, requiring a bond would not serve to protect the public interest or protect against environmental harm. On the contrary, Appellants seek the partial supersedeas itself specifically in order to prevent further harm to the public and the environment.

142. The balance of the equities weighs in favor of protecting the public interest that Appellants pursue in their appeal, and thus the imposition of a bond would be detrimental to the public interest.

VIII. The Nature of the Relief

143. Appellants seek a partial supersedeas of the Permits to the extent they permit Sunoco to conduct horizontal directional drilling.

144. The reason Appellants request this remedy in particular is that the most dire illegal conduct of which Appellants are aware has been caused by Sunoco's horizontal directional drilling.

145. Appellants are not aware of a principle by which the Board could logically limit this remedy and still prevent the most serious harms. The problems of which Appellants are aware have occurred all across Pennsylvania.

146. However, Appellants recognize that a supersedeas, even partial, is a rare and serious remedy. If the Board does not grant a supersedeas as to all horizontal directional drilling, Appellants alternatively request that the Board use its discretion to grant a supersedeas that addresses the concerns raised in this Petition to the extent possible.

IX. Conclusion

147. When the public's water supplies are being destroyed, when Exceptional Value wetlands are being filled with drilling fluids, when dozens of spills dot the landscape, and when these harms are escalating, it is time to step in and act.

148. The harms now being inflicted on the public and on Pennsylvania's natural environment were foreseen by the Department and by Appellants, and are preventable. The Department had the right idea in pushing Sunoco to improve its plans for horizontal directional drilling, but it backed off and permitted the plans anyway. The result is the current unspooling disaster.

149. The Department's permitting of Sunoco's horizontal directional drilling plans violates Chapter 105 and Article I, Section 27 of the Pennsylvania Constitution. Appellants and the public have been and will further be harmed if Sunoco is allowed to continue drilling under

the Permits while this Appeal is heard. Any harm to Sunoco in partially superseding the Permits is minor compared to the harm to the public, is mitigated by the partial scope of the supersedeas, and is of Sunoco's own doing.

WHEREFORE, for the foregoing reasons, Appellants respectfully request that the Board grant this Petition for Partial Supersedeas and suspend the Chapter 102 and Chapter 105 permits at issue in this matter to the extent they authorize horizontal directional drilling until such time as the Board can reach a final decision on this appeal.

Respectfully submitted this 19th day of July, 2017.



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**COMMONWEALTH OF PENNSYLVANIA
BEFORE THE ENVIRONMENTAL HEARING BOARD**

CLEAN AIR COUNCIL; THE DELAWARE
RIVERKEEPER NETWORK; AND MOUNTAIN
WATERSHED ASSOCIATION, INC.

Appellants,

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION

Appellee,

and SUNOCO PIPELINE L.P.,
Permittee.

EHB Docket No. 2017-009-L

ELECTRONICALLY FILED

CERTIFICATE OF SERVICE

I, the undersigned, certify that a true and correct copy of the foregoing Petition for Partial Supersedeas was filed with the Pennsylvania Environmental Hearing Board and was served on all counsel of record on July 19, 2017.

s/Alexander G. Bomstein
Alexander G. Bomstein, Esq.