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IN THE SUPREME COURT OF PENNSYLVANIA – MIDDLE DISTRICT

No._____

THE DELAWARE RIVERKEEPER NETWORK, MAYA VAN ROSSUM, THE DELAWARE RIVERKEEPER, THOMAS CASEY, AND ERIC GROTE,

Petitioners/Appellants,

v.

SUNOCO PIPELINE, L.P.,

Defendant/Appellee.

PETITION FOR ALLOWANCE OF APPEAL

On Petition from Order of the Commonwealth Court, No. 952 C.D. 2017, dated February 20, 2018, which affirmed the orders of the Court of Common Pleas of Chester County, 2017-05040-MJ, dated June 15, 2017.

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I. OPINION DELIVERED IN THE COURTS BELOW

Petitioners file this Petition for Allowance of Appeal from the *En Banc* Order of the Commonwealth Court dated February 20, 2018, in accordance with Pennsylvania Rules of Appellate Procedure 1111-1122. The opinion below was entered in *Delaware Riverkeeper Network, et al. v. Sunoco Pipeline L.P.*, 952 CD 2017.

A copy of the Majority Opinion (Simpson, J.) and order is attached as Exhibit A and is referenced herein as the "Opinion." A copy of the concurring and dissenting Opinion (Brobson, K.) is attached as Exhibit B and is referenced herein as the "Concurrence and Dissent." A copy of the opinion from the Court of Common Pleas (Tunnell, M.) and order is attached as Exhibit C and is referenced herein as the "Common Pleas Opinion."

II. TEXT OF THE ORDER IN QUESTION

The Commonwealth Court entered the following order:

AND NOW, this 20th day of February, 2018, the orders of the Court of Common Pleas of Chester County are **AFFIRMED**.

Petitioners seek review by this Court of the Commonwealth Court's order.

The Court of Common Pleas entered the following order:

AND NOW, this 15th day of June, 2017, after consideration of the Preliminary Objections [footnote omitted] of Defendant Sunoco Pipeline L.P., the response of plaintiffs in opposition thereto, and following oral argument held on June 13, 2017, it is hereby ORDERED and DECREED that defendant's

preliminary objections are SUSTAINED IN PART and **OVERRULED IN PART** as follows:

1. Defendant's preliminary objection alleging a lack of standing (Pa.R.C.P. 1028(a)(4)) (Obj. II.A) is **OVERRULED** [footnote omitted];

2. Defendant's preliminary objections alleging a lack of subject matter jurisdiction (Pa.R.C.P. 1028(a)(1)) (Obj. I) and a lack of authority to regulate (Pa.R.C.P. 1028(a)(4)) (Obj. II.B.1) are **SUSTAINED** [footnote omitted];

3. Defendant's preliminary objection alleging a lack of authority to regulate (Pa.R.C.P. 1028(a)(4)) (Obj. II.B.2) is **SUSTAINED AS MOOT** [footnote omitted];
And

4. Defendant's preliminary objection alleging a failure to establish a claim based upon substantive due process (Pa.R.C.P. 1028(a)(4)) (Obj. II.C) is **SUSTAINED** [footnote omitted].

Plaintiffs' Complaint is hereby **DISMISSED WITH PREJUDICE**.

III. QUESTIONS PRESENTED FOR REVIEW

1) Whether the Commonwealth Court erred when it determined that West Goshen Township's authority to enforce its zoning provisions as applied to the Mariner East 2 pipeline project was pre-empted by Pennsylvania Public Utility Commission authority.

   Suggested Answer: YES

2) Whether the Commonwealth Court erred when it determined that Petitioners had failed to establish a claim based on substantive due process.

   Suggested Answer: YES

IV. CONCISE STATEMENT OF THE CASE

Mariner East 2

Sunoco Pipeline, L.P. ("SPLP") is constructing a set of pipelines referred to as the Mariner East 2 pipeline project ("ME2 pipeline"). Complaint, ¶ 6 (R. 15a). SPLP proposes to transport propane, butane, and ethane through the ME2 pipeline, all of which are "highly volatile liquids" or HVLs, a subset of "hazardous liquids," by subjecting them to high pressure. Exhibit I; 49 C.F.R. § 195.2. Federal pipeline safety regulations classify propane, butane, and ethane as "highly volatile liquids," which, once outside the pipeline, are heavier-than-air gases that are colorless, odorless, flammable, and explosive. Exhibit I. The Pennsylvania Public Utility Commission ("PUC") has no regulations on the siting of pipelines. Exhibit I. The pipeline is proposed to run across various Pennsylvania communities, including West Goshen Township, Chester County. Exhibit I. Specifically, the proposed route of the ME2 pipeline through West Goshen Township generally follows Boot Road and includes residential districts. Exhibit I.

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

Sunoco's HDD drilling practices have resulted in thousands of gallons of drilling fluid being released into waters of the Commonwealth, erupting through the ground, and contaminating various landowners' property. *See* "Sunoco Mariner East II - Pipeline Construction Inadvertent Returns - Waters of the Commonwealth," as revised January 26, 2018 by DEP, attached hereto as Exhibit D; *see also* DEP January 3, 2018 Administrative Order at ¶¶ T-UUU, attached hereto as Exhibit E. These spills have contaminated waterways, damaged ecosystems and property, and created hazardous conditions. *See* Exhibit E at ¶¶ T-UUU. These problems were so serious that the Pennsylvania Department of Environmental Protection issued an Administrative Order temporarily suspending all HDD drilling activities in the state. *See* Exhibit E.

Additionally, Sunoco's HDD drilling for the ME2 pipeline has caused large sinkholes to open up in a residential neighborhoods, threatening the integrity of the parallel Mariner East 1 pipeline and consequently leading the PUC to issue an Emergency Order suspending operations on Mariner East 1 to prevent "catastrophic results impacting the public." *See* Emergency Order dated March 7, 2018, attached as Exhibit F; *see also* Petition of the Bureau of Investigation and Enforcement of the Pennsylvania Public Utility Commission for the Issuance of an Ex Parte Emergency Order Regarding Sunoco Pipeline L.P. a/k/a Energy Transfer Partners, attached as Exhibit G. The PUC's emergency order further clarifies that

that this situation has resulted in "a clear and present danger to life or property." *See* Exhibit G. Additionally, HDD problems have resulted in impacts to drinking water wells, wherein bottled water was handed out to residents. *See* https://stateimpact.npr.org/pennsylvania/2017/07/10/chesco-residents-deal-with-tainted-water-after-sunoco-drills-into-aquifer/.

On March 13, 2018 at a hearing before District Court Judge Thomas Tartaglio, SPLP was found guilty of violating the East Goshen Township's Noise Ordinance on numerous occasions throughout October-December of 2017. *See Commonwealth of Pennsylvania v. Sunoco Pipeline, L.P.*, Magisterial District Court, 15-1-02, Docket No. MJ-15102-NT-0000249-2017 (March 13, 2018). SPLP was fined $1,000, plus costs, for each of seven separate violations for exceeding East Goshen Township's ordinances limiting noise levels to 60 dBA, between the hours of 7 a.m. and 10 p.m. *See* http://www.dailylocal.com/general-news/20180319/sunoco-pipeline-violated-noise-law-in-east-goshen.[1]

West Goshen Township, Chester County

In 2014, West Goshen Township enacted Ordinance No. 9-2014, an amendment to its zoning ordinance ("Ordinance") that addresses the proper location for gas and liquid pipeline facilities. Exhibit H.

[1] SPLP does not appear to have asserted a preemption-based defense regarding the noise violations of East Goshen's local ordinance.

West Goshen Township's Zoning Ordinance was enacted for the following purposes:

> A. To promote, protect and facilitate any or all of the following: the public health, safety, morals and the general welfare; coordinated and practical community development and proper density of population; emergency management preparedness and operations;... the provision of safe, reliable and adequate water supply for domestic, commercial, agricultural or industrial use and other public requirements; as well as preservation of the natural scenic and historic values in the environment and preservation of forests, wetlands, aquifers and floodplains.
>
> B. To prevent one or more of the following: overcrowding of land; blight; danger and congestion in travel and transportation; and loss of health, life or property from fire, flood, panic or other dangers.

West Goshen Township Code at § 84-2.1. *See* Exhibit I.

Under the Ordinance amendment, "gas and liquid pipeline facilities" are permitted by conditional use and only in the I-1, 1-2, I-2R, 1-3 and I-C districts. Exhibit H; West Goshen Township Code, § 84-56 B. Gas and liquid pipeline facilities are not permitted by right in residential districts. Exhibit I. This appeal concerns the location of gas and liquid pipeline facilities in residential districts.

Procedural History

On or about May 9, 2017, Petitioners, the Delaware Riverkeeper Network, Maya van Rossum, the Delaware Riverkeeper, Thomas Casey, and Eric Grote,

filed an action in the Chester County Court of Common Pleas seeking to enjoin SPLP from constructing the ME2 pipeline in West Goshen Township in a manner that violates the West Goshen Township Zoning Ordinance. Thereafter, Petitioners filed a petition for preliminary injunction and a petition for special injunction.

On or about May 31, 2017, SPLP filed preliminary objections to Petitioners' Complaint. Argument on SPLP's preliminary objections was held on June 13, 2017. On June 15, 2017, the lower court issued two orders. One order sustained SPLP's preliminary objections, concluding that: 1) the court lacked subject matter jurisdiction over Petitioners' claims; 2) the PUC's jurisdiction over public utilities and their facilities prevents application of West Goshen's Ordinance to Sunoco's construction of the ME2 pipeline; and 3) Petitioners had failed establish a claim based upon substantive due process. The other order denied Petitioners' petition for special and preliminary injunctive relief for the same reasons.

On July 13, 2017, Petitioners file their Notice of Appeal of the decision of the Court of Common Pleas. The Commonwealth Court held oral argument, *en banc*, on October 18, 2017. On February 20, 2018, the Commonwealth Court affirmed the dismissal of Petitioners' Complaint seeking to enjoin SPLP from locating the ME2 highly volatile liquids pipeline in residential districts of West Goshen Township. Petitioners now seek appeal to this Court.

Jurisdictional Statement

The Supreme Court has jurisdiction to allow review of final orders from appeals to the Commonwealth Court from the Court of Common Pleas under 42 Pa. C.A. §724; Pa. R.A.P. 1111-1122.

V. CONCISE STATEMENT OF REASONS RELIED ON FOR ALLOWANCE OF APPEAL

The Commonwealth Court's order affirming the dismissal of Petitioners' action seeking to enjoin SPLP from locating the ME2 highly volatile liquids pipeline in residential districts of West Goshen Township was erroneous. The Commonwealth Court's decision requires review because it is an issue of first impression that was wrongly decided by the Commonwealth Court. Pa.R.A.P. 1114(b)(3).

The Commonwealth mistakenly concluded that the authority of the Public Utility Commission, as codified in the Public Utility Code, preempts West Goshen's zoning ordinance as related to SPLP's ME2 pipeline. Specifically, the Commonwealth Court found that municipal authority to regulate a hazardous liquids pipeline is "field preempted" by the Public Utility Commission. The Commonwealth Court's Opinion represents a radical expansion of the field preemption doctrine in Pennsylvania, which had previously been strictly limited to three distinct areas: mining, alcoholic beverages, and banking. To the extent the Commonwealth Court's Opinion is left in place, all PUC jurisdictional pipelines

across the state of Pennsylvania will be free from any and all regulation by local municipalities, even in areas where the PUC does not regulate. Such a ruling would have severe consequences. For example, under this ruling a township would be preempted from enforcing a noise ordinance that would otherwise prevent construction activities from reaching unreasonable noise levels at 3am in the morning. In the case at bar, West Goshen has been preempted from enforcing its ordinance, which limits the by-right siting of industrial pipelines in residential districts, despite the fact that the Public Utility Commission exercises no authority over the siting of pipelines. At its heart, the Commonwealth Court's decision upends basic zoning standards, allowing PUC jurisdictional pipeline companies to select whatever location they desire for their right-of-way, regardless of the zoning district's character established in the community-wide scheme, and the uses and standards crafted to match that character. This is surely not what the General Assembly intended when crafting the Public Utility Code.

The construction of the ME2 pipeline has already resulted in the types of industrial scale harms that West Goshen's ordinance sought to ameliorate. Specifically, SPLP's construction methods have resulted in contamination to waterways, damaged ecosystems and property, created hazardous conditions, impacted drinking water supplies, and violated noise restrictions. Citizens of nearby ME2 construction activities have also been unable to consume the water

from their wells and asked to leave their homes due to fear for their safety. These are precisely the type of harms and impacts that West Goshen sought to avoid occurring in residential districts throughout the Township through its zoning ordinance.

Just as concerning, the Commonwealth Court's ruling leaves petitioners with no forum in which to seek redress. The Commonwealth Court directs petitioners to take up its complaints with the Public Utility Commission despite the fact that the Public Utility Commission, by its own admission, does not regulate the siting of pipelines and cannot provide petitioners with any relief.

The Commonwealth Court's Opinion failed to address, or even cite, the primary standard for finding field preemption and conflict preemption. Furthermore, the Commonwealth Court misinterpreted and misapplied the holdings of the Pennsylvania Supreme Court's rulings in several other cases to support its conclusions.

This Honorable Court's review is needed to address an issue of first impression. Pa.R.A.P. 1114(b)(3). This case also poses questions of substantial importance appropriate for this Court's review, particularly in the realm of local zoning authority and Section 27 rights, and would resolve conflicts between Commonwealth and Pennsylvania Supreme Court decisions. Pa.R.A.P. 1114(b)(2), (b)(4), (b)(7).

A. The Commonwealth Court Erred When It Determined That West Goshen Township's Power To Regulate The Location Of The ME2 Pipeline Is Preempted By PUC Authority

The Commonwealth Court erred in its preemption analysis. As recognized by the Commonwealth Court there are three types of preemption: (l) express or explicit preemption, where the statute includes a preemption clause, the language of which specifically bars local authorities from acting on a specific subject matter; (2) conflict preemption, where the local enactment irreconcilably conflicts with or stands as an obstacle to the execution of the full purposes of the statute; and (3) field preemption, where analysis of the entire statute reveals the General Assembly's implicit intent to occupy the field completely and to permit no local enactments. Opinion at 34-35 (citing *Hoffman Mining Co., Inc. v. Zoning Hearing Bd. of Adams Twp., Cambria Cnty.*, 32 A.3d 587, 593-94 (Pa. 2011)). There is no question that express preemption is not at issue in this matter; rather, the question is whether field preemption or conflict preemption applies to West Goshen's ordinance. Petitioners submit that the Commonwealth Court erred because neither field preemption, nor conflict preemption applies here.

1. West Goshen Township's Zoning Ordinance Is Not Subject To Field Preemption

The West Goshen Township ordinance is not preempted by the Public Utility Commission regulating in the field, whereby pervasive regulation at the state level in the field preempts local regulation. The Commonwealth Court's

holding that the PUC has occupied the field – and that all local zoning of PUC jurisdictional pipelines is therefore preempted – represents a radical, unprecedented, and misguided expansion of the types of field preemption recognized in the state of Pennsylvania. *See* Exhibit A. *See Pittsburgh v. Allegheny Valley Bank*, 412 A.2d 1366 (Pa. 1980) (in which members of this Court expressed strong reservations concerning the extension of the preemption doctrine to preclude local taxation in the banking and liquor areas).

Despite finding field preemption in this matter, and thereby vastly expanding the scope of field preemption in Pennsylvania, the Court never addresses the standard for governing field preemption. If it had, the Court would have had no choice but to find that there is no field preemption here.

As a general matter, "[a governing body] is not presumed to have preempted a field merely by legislating in it." *Council of Middletown Tp., Delaware County v. Benham*, 523 A.2d 311, 313 (Pa. 1987) (citing *United Tavern Owners of Philadelphia v. School Dist. of Philadelphia*, 272 A.2d 868, 871 (Pa. 1971)). Rather, "it must be shown that the General Assembly intended to preempt a field in which it has legislated." *Kightlinger v. Bradford Tp. Zoning Hearing Bd.*, 872 A.2d 234, 238 (Pa. Cmwlth., 2005). The test for field preemption in Pennsylvania is that either the statute must state on its face that local legislation is forbidden or indicate "an intention on the part of the legislature that it should not be supplemented by

municipal bodies." *Western Pennsylvania Rest. Ass'n v. City of Pittsburgh*, 77 A.2d 616, 620 (Pa. 1951).

This standard is further clarified in *United Tavern Owners of Philadelphia v. School Dist. of Philadelphia*. 272 A.2d at 871. The question there was whether the city of Philadelphia was field preempted from imposing a ten percent tax on retail sales of liquor, malt, and brewed beverages in city hotels, restaurants, taverns or clubs. *Id*. at 869. The Court specifically stated, "we will refrain from striking down the local ordinance unless the Commonwealth has explicitly claimed the authority itself, or unless there is such actual, material conflict between the state and local powers that only by striking down the local power can the power of the wider constituency be protected." *Id*. at 871.

The Court in *United Tavern* concluded that, "if we were to examine the proposed taxation ordinance only in the light of the Liquor Code, we could not conclude that the legislature had clearly indicated that its statewide regulation of liquor was intended to preempt the field." *Id*. at 871. The Court found that the state Liquor Code alone could not preempt the field because: 1) the proposed local taxation ordinance did not result in an "actual material conflict" with any provision of the Liquor Code, and 2) because the local tax would not would result in the holder of liquor licenses from being "prevented from operating." *Id*. at 871-872.

The Court only found preemption of the local liquor tax when the monopolistic regulation of liquor was examined in the context of two additional state taxes that specifically governed the taxation of retail liquor sales. *Id.* at 872. Specifically, the Court found conclusive that "because the sales of liquor are already subject to two state taxes, **the state has preempted the specific field of liquor sales for taxation purposes**." *Id*. at 872-873 (emphasis added). In other words, the fact of seemingly pervasive state regulation in the Liquor Code alone was insufficient to justify a finding of preemption; instead, the court relied on the existence of other regulations in the specific field of the taxation of liquor sales. *See United Tavern*, 272 A.2d 868. This analysis is further echoed in *Retail Master Bakers Ass'n of Western Pa. v. Allegheny County*, where the Court clarified that even where a "municipal ordinance imping[es] upon the province of a State system of control . . . the ordinance will not be stricken down unless it be clearly shown that the Legislature intended to pre-empt the field." *Retail Master Bakers Ass'n of Western Pa. v. Allegheny County*, 161 A.2d 36, 37–38 (Pa. 1960).

Here, there is no evidence that the local zoning ordinance conflicts with any provision in the Public Utility Code, nor is there an explicit statement from the legislature that the Public Utility Code was intended to preempt the field. Indeed, the Commonwealth Court never asserted as much in the Opinion. The Commonwealth Court recognized that nothing in the Public Utility Code, or the

Public Utility Commission's regulations, regulates the very activity at issue in this case and covered by the West Goshen Ordinance – the siting of a hazardous liquids pipeline. The Public Utility Code simply contains no provisions preempting the local zoning of pipelines, or includes any provision even addressing the siting of pipelines. *See* 66 P.S. § 1101 *et seq*. The West Goshen Ordinance therefore addresses an area the Public Utility Code does not.

This makes sense considering that the Public Utility Code is more squarely focused at the county level as opposed to the local municipal level. The General Assembly authorized the Commission to issue certificates of public convenience ("CPCs"), through which the Commission grants a public utility the right to offer a different service or to operate in a different county. *See* 66 P.S. § 1101 *et seq*. A CPC permits a public utility to offer either a different service or service in a different territory, certificated to the county level. 66 P.S. § 1102(a). A public utility may not "begin to offer, render, furnish or supply within this Commonwealth service of a different nature or to a different territory" without first obtaining a CPC for that county. 66 P.S. § 1102(a)(1). Nothing in the Code or the Commission's CPC for the ME2 looks beyond the county level. Therefore, a pipeline operator, such as SPLP, can and should comply with both West Goshen's ordinance and with the Commissions' statutory certification and service requirements. *See, e.g.*, *Council of Middletown Tp.*, 523 A.2d 311, 313–14 (finding

that a local regulation was not field preempted because of the absence of express legislative statement of an intent to preempt, and also because the Sewage Facilities Act could work in concert with the local regulation); *see also Smith, Kline & French v. Philadelphia*, 262 A.2d 135 (Pa. 1970) (upholding the imposition of the Philadelphia Mercantile License Tax against a business subject to state exactions because the payments to the state were intended as part of a regulatory schema and did not support the inference that the state intended to preempt local taxing jurisdiction).

The Commonwealth Court stated that, "we conclude that the General Assembly intended the PUC to occupy the field of public utility regulation, in the absence of an express grant of authority to the contrary." Opinion at 38. This broad conclusion was purportedly based on a "careful review of the Public Utility Code, and in particular the current iterations of the provisions cited by our Supreme Court." *Id*. (citing 66 Pa. C.S. §§ 309; 315; 331; 504; 505; 506; 701; 1501; 1504; 1505). However, as in *United Tavern*, an examination of these PUC provisions reveals that not a single one expressly enunciates an intent to preempt local zoning for pipelines, or even addresses pipeline siting. Indeed, the Commonwealth Court conspicuously fails to cite to any such provision of the Public Utility Code in the Opinion.

The PUC itself has averred that in the context of the current dispute, that it does not regulate the location of pipelines. *See, e.g.*, March 1, 2017 Testimony of the PUC before the Pennsylvania House of Representatives, https://www.youtube.com/watch?v=KbXpkxkT3Mo. PUC Chairman Gladys M. Brown specifically conceded during testimony before the Pennsylvania House of Representatives that "[w]e **don't have jurisdiction for siting**, that is clear." *Id*. at 5:30; *see also West Goshen Township v. Sunoco Pipeline, L.P.*, C-2017-2589346, Opinion and Order (December 21, 2017), p. 23 (noting the PUC's "authority" in the "siting" of facilities is "limited"); Chester County Association of Township Officials Guide to Pipelines for Chester County Municipalities, http://www.ccato.org/167/Guide-to-Pipelines-for-Chester-County-Mu, p. 6 ("Pennsylvania has no designated regulatory authority overseeing the siting of hazardous liquid pipelines"); Henderson, Patrick, *Report to the General Assembly On Pipeline Placement Of Natural Gas Lines* (December 11, 2012) ("The PA PUC does not have jurisdiction over the siting of natural gas gathering lines"). This fact is undisputed, and even explicitly recognized in the Opinion. *See* Opinion at 41 ("it may be true that the PUC has no regulations covering pipeline siting"); *see also* Opinion at 43 ("the PUC regulates the intrastate shipments of natural gas and petroleum products through pipelines, and **not the actual physical pipelines conveying those liquids**") (emphasis added).

Furthermore, there is no evidence in the record showing that the enforcement of the West Goshen Ordinance would prevent the ME2 pipeline from being constructed. Indeed, Sunoco never presented any evidence to the Court of Common Pleas or to the Commonwealth Court that the ME2 pipeline could not be constructed or operated if SPLP were forced to comply with West Goshen's Ordinance. Nor was there any evidence offered in either proceeding that by complying with local zoning provisions the public utility pipeline industry as a whole would be unduly burdened. Even if SPLP had presented evidence that it could not construct the ME2 as a result of the zoning ordinance – which it did not – SPLP could still avail itself to well-established legal mechanisms for addressing such a zoning issue (e.g., variance or substantive validity challenge). SPLP cannot, however, choose to ignore the zoning ordinance merely because it is not to its liking.

As such, the preemption standard as articulated in *United Tavern* and others dictates that there is no field preemption here because: 1) the proposed zoning ordinance does not, and cannot, conflict with any statutory authority of the PUC, 2) there is no express statement by the General Assembly demonstrating an intent to preempt the field of pipeline siting, and 3) the zoning ordinance would not would result in Sunoco being "prevented from operating" or otherwise constructing its pipeline.

Lastly, the fact that SPLP has been found guilty of violating noise regulations in East Goshen Township suggests that SPLP is not exempt from local zoning provisions. *See supra* at 5. The Commonwealth Court's decision would strip municipalities from any mode of reasonable oversight over intrusive construction methods for this type of industrial activity and must be reversed.

a. The Commonwealth Court Erred In Its Reliance On *Duquesne Light* For Finding Field Preemption

The Commonwealth Court's Opinion heavily relies on an inapposite sixty-year-old case for its holding that West Goshen Township's zoning ordinance is preempted. *See* Opinion at 35-37. Specifically, the Commonwealth Court cites *Duquense Light Co. v. Upper St. Clair Township*, for the proposition that "field preemption precluded the application of a township zoning ordinance to a public utility." Opinion at 35. However, a close examination of the case demonstrates that the Commonwealth Court's characterization of the holding is incorrect. In fact, the holding of the case supports Petitioners' position.

In *Duquesne Light*, the Supreme Court of Pennsylvania ruled that municipality's efforts to enforce permits to require electric transmission lines to be placed underground was preempted because the Commission had exercised its authority to regulate the lines. *Duquesne Light Co. v. Upper St. Clair Township*, 105 A.2d 287 (Pa. 1954). A critical point of distinction is that in *Duquesne Light*, the PUC already reviewed the proposed location and siting of electric transmission

lines through its regulations. *See* 52 Pa. Code Chapter 57; *see e.g.*, 57.72(c)(6)-(12) (requiring, among other things, reasonable alternative routes and identification of sensitive areas). Indeed, unlike pipelines, the PUC has promulgated extensive regulations relating to the location of electric line extensions, transmission lines, and underground electric service. *See* 52 Pa.Code §§ 57.19, 57.71–57.77, 57.81–57.88, 69.3101, 69.3107. This case can, therefore, be better understood as a conflict preemption case. The Court rightly found that the municipality's effort to enforce permits was preempted because the PUC had specific regulations regarding the location of electric wire lines. However, these facts are different from the instant matter wherein the PUC does not have any regulations governing the siting or locations of pipelines. *See supra* at 3,9.[2]

[2] The Court in *Duquesne Light* stated, perhaps imprecisely, that "the policy of the Commonwealth in entrusting to the Commission the regulation and supervision of public utilities has excluded townships from the same field." 105 A.2d at 334-335. However, even if the Court's preemption analysis here can be characterized as "field" preemption instead of "conflict" preemption it is still easily distinguishable. The term "field" in this context was used to mean the "field" of the placement of underground wiring districts, because that is the field in which the PUC had regulations. Indeed, the legal term "field preemption" does not appear anywhere in *Duquesne Light*. In other words, even if the PUC's regulations governing the location of the underground wires in *Duquesne Light* did not directly conflict with the ordinance, the Court could find preemption because the PUC's regulations occupied the field of governing the siting of underground wires. This factual scenario is absent in the instant matter. *Duquesne Light* therefore fits squarely within the framework of *United Tavern's* standard for field preemption. In *Duquesne Light* the PUC had "explicitly claimed the authority itself" of regulating the location of underground wires. *United Tavern*, 272 A.2d 868, 871. In the

Later, the Court in *Duquesne Light v. Borough of Monroeville* (hereinafter "*Duquesne Light II*"), found that implementation of the underground wiring districts "can only be achieved through Public Utility Commission action." 298 A.2d 252, 257 (Pa. 1972). "Initial jurisdiction over the instant controversy is vested in the PUC." *Id*. Significantly, this conclusion was premised on the Court's acceptance of the utility company's argument that the PUC had authority to regulate underground conduits. The Court found that "[h]ad the Borough chosen to do so, it could likely have used the **PUC procedural machinery** in an attempt to achieve the same goal, and the PUC would have been fully competent to determine the matter." *Id*. at 255 (emphasis added).

In the case at bar, Petitioners could not have used the "PUC Procedural Machinery," because as described above, the PUC has no regulations on the siting of pipelines, nor is it even clear that the PUC has the authority to do so. Without being able to avail ourselves to the courts, Petitioners would be left without a mechanism to vindicate our rights. The Commonwealth Court ignores the severe and perhaps unintended consequences of its conclusions.

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instant matter, that simply is not the case, as the PUC has no regulations regarding the siting of pipelines

b. The Commonwealth Court Erred In Its Reliance On *County of Chester* For Finding Field Preemption

The Commonwealth Court's reliance on the Supreme Court's ruling in *County of Chester v. Philadelphia Electric Co.*, 218 A.2d 331 (Pa. 1966), is similarly flawed. *See* Opinion at 36-37. In *County of Chester*, an electric company challenged a county ordinance that required the submission of pipeline "plans and specifications" and other information to the County Planning Commission. *County of Chester*, 218 A.2d 332.

The Supreme Court ruled that the county did not have the "authority" to enact the challenged ordinance. *Id* at 332. However, in so doing, the Court expressly distinguished the authority of the county compared to that of a municipality. The Court found that the "County, as a subdivision of the State, enjoys no sovereign power which would empower it to legislate on statewide matters. The county is merely a political subdivision of the Commonwealth; **not a municipal corporation**." *Id*. at 332 (emphasis added) (citation omitted). The Court's holding is therefore specifically based on the county lacking the authority to issue the ordinance, while in contrast West Goshen clearly retains this authority.

In a footnote the Commonwealth Court states that "[w]e view this distinction to be immaterial." Opinion at 38. The Commonwealth Court then justifies this statement by stating that the Supreme Court in *County of Chester* "cited numerous cases involving townships to support its decision." *Id*. However, the

Commonwealth Court's reasoning is flawed for several reasons. First, two of the three cases cited by the Supreme Court in *County of Chester* were conflict preemption cases, wherein the PUC had regulations involving the specific area in which the township proposed to act. *See, e.g.*, *Duquesne Light Co*, 105 A.2d 287 (underground wiring districts); *Einhorn v. Philadelphia Electric Company*, 190 A.2d 569 (Pa. 1963) (excessive charges). The other case was not even a preemption case, and instead involved an appeal of a decision of the PUC. Opinion at 38 (*Lower Chichester Tp. v. Pennsylvania Public Utility Commission*, 119 A.2d 674, 677 (Pa. Super 1956)). As such, none of the cases cited in *County of Chester* involving Townships supports the position that the lack of the "authority" of a county to issue a local ordinance applies with equal force to West Goshen Township.

Furthermore, the Court in *County of Chester* would not have specifically articulated a distinction between the powers of a county versus those of a municipality if it were not a meaningful distinction. Indeed, it has long been held that, unlike counties, municipalities have the zoning authority to regulate on matters of health, safety, and welfare, **even when the matter involves a public utility**. *See York Water Company v. York*, 95 A. 396, 396 (Pa. 1915) ("We do not mean to be understood as saying that cities of the third class, or of any other class for that matter, may not under their police powers prescribe reasonable regulations

as protection to the health, lives, property and safety of their inhabitants, even as applied to public service corporations"); *see also Swade v. Zoning Board of Adj. of Springfield Twp.*, 140 A.2d 597, 598 (Pa. 1958) ("very essence of [z]oning" is "the designation of certain areas for different use purposes . . ."); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387-92 (1926); *Robinson Twp. v. Corn.*, 52 A.2d 463, 481-82 (Pa. Cmwlth. 2012) ("Robinson Twp. I"). Courts will not "disturb a reasonable expression of a municipal council's discretionary power... unless there is an abuse of power detrimental to the citizenry." *City Council of City of Bethlehem v. Marcincin*, 515 A.2d 1320, 1325-26 (Pa. 1986) (internal citations omitted).

Most recently, and perhaps most importantly, the Pennsylvania Supreme Court has set forth the clear limitations on the General Assembly's authority "to remove a political subdivision's implicitly necessary authority to carry into effect its constitutional duties." *Robinson Township v. Commonwealth*, 83 A.3d 901, 977 (Pa. 2013) ("Robinson Twp. II"); *Pennsylvania Environmental Defense Foundation v. Commonwealth*, 161 A.3d 911, 931 (Pa. 2017) ("PEDF").

In *Robinson Twp. II*, a plurality of the Pennsylvania Supreme Court addressed the limitation on the General Assembly's authority to permit an industrial activity (i.e. natural gas drilling) "as a use 'of right' in every zoning district throughout the Commonwealth, including in residential, commercial and

agricultural districts" under Article I, Section 27 of the Pennsylvania Constitution. 83 A.3d at 979 (emphasis in original). The Court found that the General Assembly had overstepped its authority, and impinged upon fundamental rights reserved for the people, when it passed legislation that pre-empted the local governments' ability to limit the industrial use to certain districts, as local conditions dictated appropriate. In *PEDF*, a majority of the Supreme Court relied "upon the statement of basic principles thoughtfully developed" in *Robinson Twp. II*. 161 A.3d at 930. These basic principles, thoughtfully developed, apply equally to the case at bar.

In Pennsylvania, terrain and natural conditions frequently differ throughout a municipality and from municipality to municipality. *Id*. at 979. Accordingly, protection of environmental and community values "is a quintessential local issue and must be tailored to local conditions." *Id*. A "regulatory regime permitting industrial uses as a matter of right in every type of pre-existing zoning district is incapable of conserving or maintaining the constitutionally protected aspects of the public environment and of a certain quality of life." *Id*. When a local government is required to permit industrial uses in all zoning districts "some properties and communities will carry much heavier environmental habitability burdens than others . . . This disparate effect is irreconcilable with the express command that the trustee manage the corpus of the trust for the benefit of 'all the people.'" *Id*. at 980 (quoting Pa. Const., art I, § 27). Putting uses in zoning districts not designated for

those types of uses (i.e. "spot uses") disrupts the rational zoning scheme as a whole. *Robinson Twp. I*, 52 A.2d n. 21. "Whether you classify oil and gas operations as a 'pig in a parlor' or a 'rose in a wheat field,' it nonetheless constitutes an unconstitutional 'spot use.'" *Id*.

By finding that the Township's Ordinance regulating the location of highly volatile liquids pipelines in residential districts as pre-empted by PUC authority, the Commonwealth Court has done precisely what the Supreme Court has prohibited. It has allowed the General Assembly to remove the Township's ability to carry out its Constitutionally mandated, and quintessentially local, duties as a municipality and trustee under Section 27. It has allowed the General Assembly to transgress its delegated police powers, which are limited by Section 27. Specifically, it has allowed SPLP, under the guise of the PUC, to place an industrial use as a matter of right in every type of pre-existing zoning district – a scheme which is incapable of conserving or maintaining the Constitutionally protected aspects of the public environment and of a certain quality of life.

We have seen the consequences of such a scheme already play out in the context of the construction of this pipeline. Indeed, drilling fluids have repeatedly spilled into numerous wetlands and waterways resulting in notices of violation and suspension orders from the Pennsylvania Department of Environmental Protection, sinkholes have developed near local residents houses, residents have been unable

to drink from their wells as a result of concerns over drinking water contamination, and SPLP has been held liable for repeated construction noise violations. *See supra* at 5. These are precisely the types of harms related to heavy industrial construction activities that West Goshen Township's ordinance was designed to prevent from occurring in residential zoning districts. As such, the Township's ability, and Constitutional obligation, as trustee to manage the corpus of the trust for the benefit of "all the people" has been fundamentally undermined because the Township will be forced to allow "spot uses" that disrupt its rational zoning scheme. Such a clear violation of Section 27 cannot stand. Ultimately, the Commonwealth Court in its analysis has mixed its apples with its oranges, and created a lemon.

2. West Goshen Township's Zoning Ordinance Is Not Subject To Conflict Preemption

The Commonwealth Court erred by concluding, "conflict preemption also supports the trial court's decision as to preemption by the Public Utility Code." Opinion at 39. Specifically, the Commonwealth Court relied on the position that "a local ordinance will be invalidated if it stands as an obstacle to the execution of the full purposes and objectives of a statutory enactment of the General Assembly. Opinion at 39 (citing *Hoffman Min. Co.*, 32 A.3d 587). Despite the fact that the activity regulated by the West Goshen Ordinance is not an activity regulated by the Public Utility Commission (i.e., the siting of pipelines) the Commonwealth Court

states that there is a "headlong conflict" between the West Goshen ordinance and the Public Utility Code. Opinion at 40 (citing *Duquesne Light Co.*, 105 A.2d at 293) (other citations omitted).

The Commonwealth Court did not identify the standard by which courts must evaluate conflict preemption. To determine whether a government entity has created an "obstacle" to the execution of the full purposes and objectives of a statutory enactment "we assess the effect of the challenged ordinance on the proper functioning and application of the state enactment." *Fross v. County of Allegheny*, 20 A.3d 1193, 1203 (Pa. 2011). Moreover, in examining statutory language to determine whether such a conflict exists, courts will not restrict a municipal ordinance "by implication" by "read[ing] the [statutory] language broader than the words of that section would require on its face. Such an interpretation would require a finding of an unstated, implicit qualification to the power granted under section 303(1) [of the third class city charter law]." *Marcincin*, 515 A.2d at 1323.

In *City Council of City of Bethlehem v. Marcincin*, the Supreme Court refused to imply a restriction on a municipality enacting an ordinance to impose term limits on its mayor, where a state statute providing for the "right to reelection" without mention of whether the right to reelection was unlimited. *Id*. at 1225-26. Finding, the statute did not expressly bar the municipality from imposing the term limits, and, in fact, did not address term limits at all. *Id*. at 1323. The

Pennsylvania Supreme Court concluded that the ordinance did not irreconcilably conflict with the statute and that statute did not preempt the ordinance. *Id*.

Similarly, the Public Utility Code does not bar a municipality from enacting ordinances providing for the zoning of pipelines. Like the statute in question in *Marcincin*, the Code does not address the siting of intrastate pipelines at all. In fact, the Public Utility Code and the ordinance actually have the same purpose: to provide reasonable public utilities service and facilities to the public. The purpose of the Public Utility Code is to provide "efficient, safe, and reasonable service and facilities." 66 Pa.C.S. § 1501. The West Goshen Ordinance has the same purpose, through limiting construction of a public utility that is a "gas and liquid pipeline" to non-residential zoning districts.

Additionally, there is no evidence in the record, or in the Commonwealth Court's Opinion, that SPLP would be unable to comply with West Goshen's Zoning Ordinance, or would otherwise be prevented from constructing its ME2 pipeline if it were forced to comply. *See supra* at 18. In fact, it is safe to assume the contrary. Pipeline companies have successfully constructed thousands of miles of natural gas gathering pipelines over the last ten years, despite the fact that these gathering pipelines are not exempt from local zoning under any interpretation of the law. Henderson, Patrick, *Report to the General Assembly On Pipeline Placement Of Natural Gas Lines* (December 11, 2012), 16 ("The PA PUC does not

have jurisdiction over the siting of natural gas gathering lines"). For example, DTE Energy alone constructed and operates the Bluestone Gathering pipeline system, which involved the creation of roughly 265 miles of gathering pipeline all across Pennsylvania. *See* https://dtemidstream.com/wp-content/uploads/2017/07/2017-Customer-Meeting-Presentation-071917-web-version.pdf, at 6. Indeed, the PUC itself has estimated that there exist roughly 12,000 miles of these pipelines – a number which has likely grown significantly over the last five years. *See* https://stateimpact.npr.org/pennsylvania/tag/pipelines/; *see also Report to the General Assembly On Pipeline Placement Of Natural Gas Lines* (December 11, 2012), at 16 (estimating 2,500 miles of gathering lines as of December 2012). These are but a few examples of the plethora of pipeline systems that operators have successfully completed in recent years that cross various municipal boundaries. These facts fundamentally undercut the Commonwealth Court's unfounded concern that local zoning would impede the operation of the Public Utility Code. If compliance with local zoning were a problem, Pennsylvania would not be experiencing the undeniable explosion of gathering pipeline growth that is currently underway. As such, the Commonwealth Court's stated fear that if it ruled in favor of Petitioners that the regulations would "become so twisted and knotted as to affect adversely the welfare of the entire state" is unfounded and meritless. Opinion at 40 (quoting *County of Chester*, 218 A.2d at 333).

The Commonwealth Court further stated that "[r]egardless of whether there are PUC regulations governing the location of pipelines, there are numerous PUC orders governing the ME2 pipeline." Opinion at 41. However, as described above, none of the ways in which the PUC regulates the ME2 pipeline specifically conflicts with West Goshen's Ordinance. The PUC does not regulate the siting of pipelines. The mere fact that the PUC regulates the ME2 in some ways is immaterial to whether there is an actual conflict worthy of striking down the local ordinance. Where the General Assembly enacts a law that regulates a particular activity, a local municipality can make additional regulations "in aid and in furtherance of the purpose of the general law as may seem appropriate to the necessities of the particular locality and which are not in themselves unreasonable." *Mars Emergency Medical Services, Inc. v. Township of Adams*, 740 A.2d 193, 195 (Pa. 1999); *see also Western Pa. Restaurant*, 77 A.2d 616, 620 (holding that "municipalities in the exercise of the police power may regulate certain occupations by imposing restrictions which are in addition to, and not in conflict with, statutory regulations"). West Goshen has done precisely that. West Goshen has enacted a reasonable ordinance in furtherance of public utility service, necessitated by the Commission's failure to address siting of pipelines.

B. The Commonwealth Court Erred When It Determined that the Public Utility Code's Provisions Afford Plaintiffs A Forum For Their rights

The Commonwealth Court asserts that "the Public Utility Code's provisions afford Plaintiffs a forum" for their complaint. Opinion at 42. However, with regard to adjudications specifically, the PUC does not have exclusive jurisdiction unless it has the power to award relief that will make a successful litigant whole. *Pettko v. Pennsylvania Am. Water Co.*, 39 A.3d 473, 483-84 (Pa. Cmwlth. 2012) (where the administrative remedies are not adequate and complete, the PUC's jurisdiction is not exclusive and an action for damages may be brought in a court of common pleas); *Elkin v. Bell Telephone Company*, 420 A.2d 371 (Pa. 1980) (Where a matter is "not one peculiarly within the agency's area of expertise, but is one which the courts or jury are equally well-suited to determine, the court must not abdicate its responsibility"); *see also* 66 Pa. C.S. § 103(c) ("nothing in this part shall abridge or alter existing rights of action or remedies in equity or under common or statutory law of this Commonwealth, and the provisions of this part shall be cumulative and in addition to such rights of actions and remedies").

Petitioners seek redress for the improper placement of the industrial scale ME2 pipeline in residential districts. As set forth above, the PUC does not regulate the location of any pipelines. In fact, no entity other than the municipal government has the authority to regulate the location of pipelines like the ME2. Accordingly, the PUC has no ability to provide relief for the alleged harms, nor does the PUC have any special expertise in determining SPLP's compliance with

West Goshen's Ordinance. *PPL Elec. Utilities Corp. v. City of Lancaster*, 125 A.3d 837, 858 (Pa. Cmwlth. 2015) (Leadbetter, B.) ("Squarely put, the PUC could not issue such an order because it has no jurisdiction to order a municipal entity to move the line").

C. The Commonwealth Court Erred When It Determined That Sunoco Did Not Violate Petitioners' Due Process Rights

Following the Supreme Court's and Commonwealth Court's decisions in *Robinson I*, ordinances that allow industrial development in non-industrial zoning districts are subject to substantive validity challenges for violating residents' due process rights. The Commonwealth Court stated that Petitioners' due process claims were an "illogical" extension "of a substantive due process analysis from applying to a legislative enactment to applying to non-governmental action." Opinion at 52. However, the Court never explains why Petitioners' reasoning is illogical.

Just as in *Robinson I*, the due process violation in this case stems from a legislative enactment of state-wide application, and the unconstitutional zoning regime that results therefrom. The Pennsylvania and United States Constitutions require that for any zoning to be constitutional it must promote the public health, safety, morals, or welfare and be substantially related to protecting or furthering that interest. *See In re Realen Valley Forge Greene Assocs.*, 838 A.2d 718, 729 (Pa. 2003); *C&M Developers, Inc. v. Bedminster Twp. Zoning Hearing Bd.*, 820

A.2d 143, 150 (Pa. 2002); *Boundary Drive Assocs. v. Shrewsbury Twp. Bd. of Supervisors*, 491 A.2d 86, 90 (Pa. 1985). "[L]awful zoning must be directed toward the community as a whole, concerned with the public interest generally, and justified by a balancing of community costs and benefits." *In re Realen Valley Forge Greenes Assocs.*, 838 A.2d at 729. In *Robinson Twp. I*, both the Commonwealth Court and Supreme Court struck down a state law that would have placed industrial activity in every zoning district in every municipality. The Commonwealth Court did so under Article I, Section 1, finding that the provisions violated substantive due process and resulted in irrational zoning. *Robinson Twp. I*, 52 A.3d at 484–85.

The very essence of zoning is the designation of certain areas for different use purposes. *Swade*, 140 A.2d at 598. Under its well-established authority, West Goshen limited the industrial pipeline activities that can take place in a residential district. SPLP is blatantly ignoring the residential zoning district limitations the Township determined were appropriate for hazardous liquid and/or gas pipelines, and is attempting to engage in such uses in all districts, including residential districts, and without any restrictions. Not only does such action fail to protect the reciprocal property rights of neighbors, it knowingly impedes on those rights.

It is irrational to have incompatible land uses in a zone that was established to achieve a non-industrial character and non-industrial development. *Robinson*

Twp. I, 52 A.2d at 484-85; *Robinson Twp. II*, 83 A.3d at 1005, 1007-08 (Baer, J., concurring). Such incompatible uses upset the established expectations of those who live there, such as investment decisions regarding businesses and homes made on the assurance that the zoning district would be developed only to allow compatible uses. *See Robinson Twp. II*, 83 A.3d at 979; *id*. at 1004-05, 1006-07 (Baer, J., concurring); *Robinson Twp. I*, 52 A.3d at 484-85. It exposes "otherwise protected areas to environmental and habitability costs associated with this particular industrial us." *Robinson Twp. II*, 83 A.3d at 979. The preemption of West Goshen's Ordinance and SPLP's placement of the pipelines in residential districts renders West Goshen Township's zoning districts irrational and unconstitutional.

The Commonwealth Court asserts that the fact that there is an existing pipeline under the right-of-way SPLP proposes to use for the new ME2 pipeline means the ordinance "at odds with Plaintiffs' general assertions of incompatible uses." Opinion at 52. However, there is no contention by any party that the zoning ordinance applies to the existing pipeline, indeed, just because an industry currently exists at a site and allowed to continue operations, that in no way means that a new one may be constructed.

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I. CONCLUSION

The extensive conflict between the decision below, the plain language of the Pennsylvania Constitution, and past precedent of this Court and the Commonwealth Court provide grounds for this Honorable Court's review under Pa.R.A.P. 1114(b)(2), (b)(4), and (b)(7). Further, the application of field preemption and conflict preemption to local zoning for PUC jurisdictional pipelines is an issue of first impression. Pa.R.A.P. 1114(b)(3). This question is particularly important here, where by the admission of the PUC itself, there is no conflict between the activities regulated by the local zoning ordinance and those by the PUC. Finally, the failure to address this erroneous decision will leave countless plaintiffs with no forum in which to address their rights.

Respectfully submitted this 26th day of March, 2018,

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CERTIFICATE OF COMPLIANCE

I, Aaron Stemplewicz, Esq., certify, based on the word count system used to prepare the foregoing Petition, that the foregoing Petition contains 8,224 words, exclusive of the cover page, the Table of Contents, the Table of Citations, the signature block, and the certifications.

Date: March 26, 2018

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CERTIFICATE OF SERVICE

I, the undersigned, certify that a true and correct copy of the foregoing was served on this date on the following individuals:

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CERTIFICATE OF PUBLIC ACCESS

I hereby certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

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IN THE SUPREME COURT OF PENNSYLVANIA – MIDDLE DISTRICT

No._____

THE DELAWARE RIVERKEEPER NETWORK, MAYA VAN ROSSUM, THE DELAWARE RIVERKEEPER, THOMAS CASEY, AND ERIC GROTE,

Petitioners/Appellants,

v.

SUNOCO PIPELINE, L.P.,

Defendant/Appellee.

EXHIBITS

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TABLE OF CONTENTS FOR EXHIBITS

Exhibit A

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

The Delaware Riverkeeper Network, Maya van Rossum, The Delaware Riverkeeper, Thomas Casey, and Eric Grote,	:	No. 952 C.D. 2017
Appellants	:	Argued: October 18, 2017
v.	:	
Sunoco Pipeline L.P.	:	

BEFORE: HONORABLE MARY HANNAH LEAVITT, President Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE ANNE E. COVEY, Judge
HONORABLE MICHAEL H. WOJCIK, Judge

OPINION
BY JUDGE SIMPSON **FILED: February 20, 2018**

In this appeal, the Delaware Riverkeeper Network, Maya van Rossum, the Delaware Riverkeeper, and residential landowners Thomas Casey and Eric Grote (collectively, Plaintiffs) challenge orders of the Court of Common Pleas of Chester County[1] (trial court) that dismissed their complaint and denied their petitions for injunctive relief. Through their complaint and requests for injunctive relief, Plaintiffs seek to prevent Sunoco Pipeline, L.P. (Sunoco) from constructing a new set of pipelines known as the Mariner East 2 pipeline (ME2) in West Goshen Township (Township) in a manner that violates the West Goshen Township Zoning Ordinance (zoning ordinance). Plaintiffs contend the trial court erred in determining that: (1) the Township's power to regulate the location of the ME2 pipeline was

[1] The Honorable Mark L. Tunnell presided.

preempted by the Pennsylvania Public Utility Commission's (PUC) authority; (2) the trial court lacked subject matter jurisdiction over Plaintiffs' claims; (3) Plaintiffs did not establish a claim based on substantive due process; (4) the ME2 pipeline is a public utility facility; and, (5) Plaintiffs were not entitled to injunctive relief. Upon review, we affirm.

I. Background

A. Sunoco I

Sunoco is regulated as a public utility by the PUC and is a public utility corporation. In re Sunoco Pipeline, L.P., 143 A.3d 1000 (Pa. Cmwlth.) (en banc), appeal denied, 164 A.3d 485 (Pa. 2016) (Sunoco I). The PUC regulates the intrastate movement of natural gas and petroleum products or service by Sunoco through pipelines, and not the actual physical pipelines conveying those liquids. Id. at 1004.

In Sunoco I, we set forth the following relevant factual background. Pursuant to the PUC's Orders, Sunoco has Certificates of Public Convenience (CPCs) that authorize it to transport, via its pipeline system, petroleum and refined petroleum products, including propane, from and to points within Pennsylvania. In 2012, Sunoco announced its intent to develop an integrated pipeline system for transporting petroleum products and natural gas liquids (NGLs) such as propane, ethane, and butane from the Marcellus and Utica Shales in Pennsylvania, West Virginia, and Ohio to the Marcus Hook Industrial Complex (MHIC) and points in between. Sunoco's various filings described the overall goal of the Mariner East Project as an integrated pipeline system to move NGLs from the Marcellus and Utica Shales through and within the Commonwealth, and to provide take away capacity for the Marcellus and Utica Shale plays and the flexibility to reach various

commercial markets, using pipeline and terminal infrastructure within the Commonwealth.

The Mariner East Project has two phases. The first phase, referred to as Mariner East 1 (ME1), was completed and utilized Sunoco's existing pipeline infrastructure, bolstered by a 51-mile extension from Houston, in Washington County, to Delmont, in Westmoreland County, to ship 70,000 barrels per day of NGLs from the Marcellus Shale basin to the MHIC.

Sunoco has begun work on the second phase of the Mariner East Project, known as ME2. Unlike ME1, which used both existing and new pipelines, ME2 requires construction of a new 351-mile pipeline largely tracing the ME1 pipeline route, with origin points in West Virginia, Ohio, and Pennsylvania. With the exception of some valves, ME2 will be below ground level.

Significant for further discussion, new ME2 construction will be parallel to and mostly within the existing right of way of the ME1 pipeline. Id. at 1008-09.

While ME1 was underway, Marcellus and Utica Shale producers and shippers advised Sunoco that there was a need for additional capacity to transport more than the 70,000 barrels of NGLs per day being transported by ME1. As a result, Sunoco undertook to expand Mariner East Project capacity and developed the ME2 pipeline.

This expansion of the ME1 service will enlarge capacity to allow movement of an additional 275,000 barrels per day of NGLs, thereby allowing shippers from the Marcellus and Utica Shales to transport more barrels of NGLs through the Commonwealth to destinations within the Commonwealth, as well as to the MHIC for storage, processing, and distribution to local, domestic, and international markets. It is intended to increase the take-away capacity of NGLs from the Marcellus and Utica Shales and to enable Sunoco to provide additional on-loading and off-loading points within Pennsylvania for both interstate and intrastate propane shipments and increase the amount of propane that would be available for delivery or use in Pennsylvania.

Sunoco sought and obtained PUC approval to provide intrastate service on the ME1 and ME2 pipelines. The PUC issued three final Orders in 2014 and two final Orders in 2015 confirming that Sunoco is a public utility corporation subject to PUC regulation as a public utility. The PUC also recognized that the service provided by both phases of the Mariner East Project is a public utility service.

As a result of the PUC's actions and through Sunoco's previously obtained CPCs, the PUC authorized Sunoco as a public utility to transport, as a public utility service, petroleum and refined petroleum products both east to west and west to east in the following Pennsylvania counties through which the Mariner East Project is located: Allegheny, Westmoreland, Indiana, Cambria, Blair, Huntingdon, Juniata, Perry, Cumberland, York, Dauphin, Lebanon, Lancaster, Berks, Chester, and Delaware. Sunoco's CPCs apply to both ME1 service and to ME2 service, as it is an authorized expansion of the same service. Sunoco I.

B. Current Litigation

As the trial court explained, in 2014, the Township enacted a zoning ordinance (2014 Ordinance) that regulates the location and setbacks for gas and liquid pipeline facilities. Section 84-56(B) of the zoning ordinance states: "Gas and liquid pipeline facilities" are only permitted in the I-1, I-2, I-2R, I-3 and I-C zoning districts by conditional use, subject to several enumerated standards. Gas and liquid pipeline facilities are not permitted in residential districts. Id. The conditional use standards include setback requirements for projects located in the I-1, 1-2, I-2R, 1-3 and I-C districts. Id.

In May 2017, Plaintiffs filed a complaint in the trial court, alleging that Sunoco's proposed ME2 pipeline, which is planned to run through the Township, violates the zoning ordinance (Count I).[2] They further averred that a violation of the zoning ordinance was a violation of Plaintiffs' substantive due process rights (Count II).[3]

In response, Sunoco filed preliminary objections, asserting: (1) the trial court lacked subject matter jurisdiction over Plaintiffs' claims because the PUC had

[2] See Section 617 of the Pennsylvania Municipalities Planning Code, Act of July 31, 1968, P.L. 805, as amended, 53 P.S. §10617 ("Causes of action").

[3] Around the same time, residents of Middletown Township filed suit in the Delaware County Court of Common Pleas attempting to enforce a local land use ordinance against Sunoco's construction of the Mariner East 2 pipelines in Middletown Township. See Flynn v. Sunoco Pipeline L.P., No. 2017-004148 (C.P. Delaware). Sunoco filed a motion to coordinate the actions under Pa. R.C.P. No. 213.1 in the Delaware County Court of Common Pleas based on the similarity of the issues involved in the two cases. The Delaware County Court of Common Pleas dismissed Sunoco's motion as moot because Sunoco filed preliminary objections to the plaintiffs' complaint in the Delaware County suit, and the Delaware County Court of Common Pleas dismissed the plaintiffs' complaint with prejudice before it addressed the motion to coordinate. The plaintiffs in Flynn filed an appeal to this Court, which is docketed at 942 C.D. 2017.

exclusive jurisdiction over the regulation of public utilities and public utility service; (2) Plaintiffs' alleged facts were legally insufficient to state a claim upon which relief could be granted because (a) Plaintiffs lacked standing, and (b) Plaintiffs' attempt to enforce the zoning ordinance was preempted by state and federal law.

On May 25, 2017, as Sunoco began mobilizing and engaging in pre-construction activity in surrounding townships, Plaintiffs filed a petition for special injunction and a petition for preliminary injunction to stop any mobilization in the Township. After a conference with the parties to discuss the petition for special and preliminary injunction, the parties agreed that (1) many of the relevant facts were likely to be undisputed, and (2) the legal issues raised by Sunoco in its preliminary objections would impact any decision on the outstanding requests for injunction. Therefore, the parties agreed that proceeding first with the presentation and disposition of those legal issues would be appropriate.

In June 2017, the trial court heard oral argument on the issues raised in Sunoco's preliminary objections. Shortly thereafter, the trial court issued an order that sustained in part and overruled in part Sunoco's preliminary objections. In particular, the trial court: overruled Sunoco's preliminary objection alleging Plaintiffs lacked standing; sustained Sunoco's preliminary objections alleging a lack of subject matter jurisdiction and a lack of authority to regulate; sustained as moot Sunoco's preliminary objection alleging a lack of authority to regulate based on federal law; and, sustained Sunoco's preliminary objection alleging that Plaintiffs failed to establish a claim based on substantive due process. As a result, the trial court dismissed Plaintiffs' complaint with prejudice.

C. Trial Court's Decision

In support of its order, the trial court offered the following analysis. As to Sunoco's jurisdictional challenges, the trial court explained, Sunoco raised two challenges to Plaintiffs' suit. First, Sunoco asserted that the trial court lacked subject matter jurisdiction over Plaintiffs' claims because the PUC had exclusive jurisdiction over the regulation of public utilities and public utility service and the courts lack jurisdiction over collateral attacks on the PUC's decision to authorize public utility service. Second, and relatedly, Sunoco argued the PUC's exclusive jurisdiction over public utilities and their facilities prevented application of the zoning ordinance to Sunoco's construction of the ME2 pipeline.

The trial court stated that, in order for it to properly analyze these issues, it first had to determine whether Sunoco was a public utility or was offering a public utility service such that it would fall within the PUC's jurisdiction. Through its preliminary objections and attached documents, Sunoco argued it was a public utility offering public utility services. Plaintiffs disputed that the ME2 pipeline was a public utility facility subject to the PUC's jurisdiction and suggested that the CPCs that Sunoco submitted with its preliminary objections did not address the ME2 pipeline.

In response, the trial court indicated that in numerous prior cases, Pennsylvania appellate courts confirmed what Sunoco now argues: that Sunoco is a public utility for purposes of the ME project (ME1 and ME2). To that end, the trial court stated, in Sunoco I and In re Sunoco Pipeline, L.P. (Pa. Cmwlth., No. 220 C.D. 2016, filed May 15, 2017), 2017 WL 2062219 (unreported), appeal denied, ___ A.3d ___ (Pa., No. 400 MAL 2017, filed January 22, 2018), this Court held that: (1)

Sunoco is a public utility; and, (2) Sunoco's CPCs applied to both ME1 and ME2 service because it is an authorized expansion of the same service. The trial court stated that Plaintiffs offered no reason, either factual or legal, why the trial court should disregard these opinions.

Further, the trial court explained, in Sunoco I, this Court reaffirmed what "has long been the statutory mandate": that the Public Utility Code[4] "charges [the] PUC with responsibility to determine which entities are public utilities and to regulate how public utilities provide public utility service." Sunoco I, 143 A.3d at 1016; see, e.g., Pottsville Union Traction Co. v. Pub. Serv. Comm'n, 67 Pa. Super. 301 (1917). This Court further held: "It is beyond purview that the General Assembly intended [the] PUC to have statewide jurisdiction over public utilities and to foreclose local public utility regulation." Sunoco I, 143 A.3d at 1017 (citing Duquesne Light Co. v. Monroeville Borough, 298 A.2d 252 (Pa. 1972)).

Nevertheless, the trial court explained, Plaintiffs argued that a municipality, such as the Township, was permitted to enforce local ordinances against public utilities if they do not involve specific activities that the PUC regulates. The trial court stated that, at the heart of Plaintiffs' argument in opposition to Sunoco's jurisdictional challenge was its contention that the PUC does not regulate the location of any hazardous liquid pipelines; therefore, Plaintiffs' request to have the zoning ordinance enforced was not a collateral attack on a PUC decision. Plaintiffs acknowledged there was no case law that directly supported that proposition. Ultimately, the trial court disagreed with Plaintiffs' assertions.

[4] 66 Pa. C.S. §§101-3316.

The trial court observed that, despite the fact that this case involves recent developments in the distribution of petroleum and refined petroleum products, Pennsylvania courts long ago addressed the legal principles at issue. Thus, the trial court explained, in Commonwealth v. Delaware and Hudson Railway Co., 339 A.2d 155 (Pa. Cmwlth. 1975), this Court addressed the same issues confronting the trial court here involving the interplay between a public utility and local zoning ordinances. In that case, the trial court stated, Lehigh Valley Railroad, a public utility, constructed a diagonal cross-over track in Dupont Borough without first applying for a building permit. As a result, Dupont Borough charged the railroad with a violation of its zoning ordinance. Relying on a long line of cases, this Court held Dupont Borough lacked authority to require a building permit.

The trial court explained that this Court in Hudson Railway began its analysis by reiterating the Pennsylvania Supreme Court's holding in Duquesne Light Co. v. Monroeville Borough that "public utilities are to be regulated exclusively by an agency of the Commonwealth with state-wide jurisdiction rather than by a myriad of local governments with different regulations." Hudson Railway, 339 A.2d at 157. Further, quoting the Supreme Court's decision in County of Chester v. Philadelphia Electric Co., 218 A.2d 331, 333 (Pa. 1966), the Court in Hudson Railway explained,

> [i]f each county were to pronounce its own regulation and control over electric wires, pipe lines and oil lines, the conveyors of power and fuel could become so twisted and knotted as to affect adversely the welfare of the entire state. It is for that reason that the Legislature has vested in the [PUC] exclusive authority over the complex and technical service and engineering questions arising in the location, construction and maintenance of all public utilities facilities. …

Id. at 157. This Court in Hudson Railway concluded that the above reasoning applied equally to the challenged activity of the railroad. Therefore, Dupont Borough lacked the authority to regulate the railroad's placement of its tracks.

The trial court reasoned that the present case was even more straightforward than Hudson Railway. Unlike in Hudson Railway, the trial court stated, it was not required to "extend" the reasoning behind the above principles to the facts before it. The trial court stated there is no dispute that what is involved here is a "pipeline" and the "location" of "all public utility facilities," which the Supreme Court directly addressed in County of Chester. Thus, the regulation at issue here was within the purview of the PUC, not the trial court.

In addition, the trial court explained, contrary to Plaintiffs' assertions Section 619 of the Pennsylvania Municipalities Planning Code (MPC) ("Exemptions") does not alter this analysis. That Section provides:

> This article shall not apply to any existing or proposed building, or extension thereof, used or to be used by a public utility corporation, if, upon petition of the corporation, the [PUC] shall, after a public hearing, decide that the present or proposed situation of the building in question is reasonably necessary for the convenience or welfare of the public. …

53 P.S. §10619.

Plaintiffs argued that "buildings" were the only structures that, if properly designated, were expressly exempted from local regulation. The trial court explained that the Court in Hudson Railway held otherwise. Indeed, in Hudson

Railway, this Court examined the impact of Section 619 of the MPC on a public utility and held,

> to the extent that Section 619 of the [MPC] gives any authority to local governments to regulate public utilities, that authority must be strictly limited to the express statutory language. The [MPC] itself states in Section 1202, 53 P.S. §11202 that it 'shall not repeal or modify any of the provisions of the Public Utility Law.'

Hudson Railway, 339 A.2d at 157. The Court in Hudson Railway concluded that because the express statutory language in Section 619 of the MPC (the word "building") did not include railroad tracks, the municipality lacked authority to enforce its zoning regulation.

Similarly, the trial court stated, in South Coventry Township v. Philadelphia Electric Company, 504 A.2d 368, 370 (Pa. Cmwlth. 1986), the township unsuccessfully argued that Section 619 acted as an "implied grant of authority" to zone a siren alert system proposed by the Philadelphia Electric Company. The township argued that "any 'structure' sought to be erected by a public utility is subject to the municipality's zoning regulations." Id. This Court disagreed, holding that the township's interpretation of Section 619 was discredited in Duquesne Light Co. v. Upper St. Clair Township, 105 A.2d 287 (Pa. 1954). In that case, a municipality raised precisely the same argument advanced by the township, that as buildings alone were to be exempted from possible application of zoning laws, a general zoning power was thereby granted to the township that would enable it to regulate public utility "uses and structures." Id. at 292. The Court in Duquesne Light v. Upper St. Clair Township expressly rejected this assertion, based on reasoning that the trial court deemed applicable here.

Further, in South Coventry Township, this Court concluded that Duquesne Light Co. v. Upper St. Clair Township establishes as an enduring principle that there is no power possessed by municipalities to zone with respect to utility structures other than buildings. The trial court determined that the same policy concern underlying the Duquesne Light Co. v. Upper St. Clair Township decision was present here. That policy, the trial court stated, which rejects the parochial concerns of local interests, was clearly articulated in Duquesne Light Co. v. Upper St. Clair Township.

In sum, the trial court observed, Pennsylvania courts consistently construe Section 619 narrowly and hold a township has no power to regulate a public utility by zoning ordinances with regard to uses and structures that are not buildings. See PECO Energy Co. v. Twp. of Upper Dublin, 922 A.2d 996, 1003, 1005 (Pa. Cmwlth. 2007) (holding that Supreme Court has found that the Public Utility Code gave the PUC "all-embracing regulatory jurisdiction over the operations of public utilities" and that the "legislature intended the Public Utility Code to preempt the field of public utility regulation"); see also Duquesne Light Co. v. Monroeville Borough (holding that policy of the Commonwealth in entrusting to the PUC the regulation and supervision of public utilities excluded townships from the field; no power in townships to enter that area can be read into statute by implication; unless legislature gives an express grant of power to townships, Commonwealth's own expressed policy on the subject is undiminished and supreme). Here, the trial court explained, both parties agreed that the proposed ME2 pipeline was not a building. Thus, the trial court stated, this ends the inquiry.

In addition, the trial court dismissed as moot Sunoco's preliminary objection alleging a lack of authority to regulate based on federal law. To that end, the trial court stated that, at oral argument, counsel for Plaintiffs advised the court that the only issue for Plaintiffs was the location of the pipeline in a residential district, instead of an industrial district, and that Plaintiffs were not raising a "safety issue." Tr. Ct. Order, 6/15/17, at 8.

As a final point, the trial court rejected Plaintiffs' due process argument. The trial court noted that Plaintiffs summarized their due process argument as follows: "Under its well established authority, [the] Township limited the industrial pipeline activities that can take place in a residential district. [Sunoco] is blatantly ignoring the residential zoning district limitations the Township determined were inappropriate …." Plaintiffs' Resp. to Prelim. Objs. at 17. Further, in paragraph 92 of their complaint, Plaintiffs alleged: "[Sunoco's] non-compliance with the [zoning ordinance] violates [Plaintiffs'] substantive due process rights." Responding to these assertions, the trial court stated, for the reasons set forth above, Sunoco did not violate or fail to comply with a zoning ordinance to which its activity was subject. Thus, the trial court rejected Plaintiffs' due process claim.

In addition, the trial court issued a separate order denying Plaintiffs' petitions for special and preliminary injunctive relief. Specifically, for the reasons stated above, the trial court determined that Plaintiffs did not show they were likely to prevail on the merits.

Plaintiffs appeal the trial court's orders dismissing their complaint and denying their petitions for injunctive relief to this Court.

II. Issues

On appeal,[5] Plaintiffs contend the trial court erred in determining: (1) the Township's power to regulate the location of the ME2 pipeline was preempted by the PUC's authority; (2) the trial court lacked subject matter jurisdiction over Plaintiffs' claims; (3) Plaintiffs did not establish a substantive due process claim; (4) the ME2 pipeline project is a public utility facility; and, (5) Plaintiffs were not entitled to injunctive relief. In the interests of clarity, we reorder some of these issues for discussion.

III. Discussion

A. Public Utility/Public Utility Facility

1. Contentions

Plaintiffs first argue that the trial court's decision is based entirely on its conclusion that the ME2 pipeline is a public utility facility. They assert that it is not. Therefore, Plaintiffs maintain, the trial court's order must be reversed.

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[5] We exercise *de novo* review of a lower tribunal's order sustaining preliminary objections in the nature of a demurrer. William Penn Sch. Dist. v. Dep't of Educ., 170 A.3d 414 (Pa. 2017). The scope of our review is plenary. Id. We must determine "whether, on the facts averred, the law says with certainty that no recovery is possible." Id. at 434. In conducting our review, "we accept as true all well-pleaded material facts set forth in the [complaint] and all inferences fairly deducible from those facts." Id. We will sustain preliminary objections "only when, based on the facts pleaded, it is clear and free from doubt that the complainant will be unable to prove facts legally sufficient to establish a right to relief." Id. at 434-35 (citation omitted).

In addition, in reviewing a trial court's order denying a preliminary injunction, our review is highly deferential. We "examine the record only to determine 'if there were any apparently reasonable grounds for the action of the court below ....'" Reed v. Harrisburg City Council, 927 A.2d 698, 703 (Pa. Cmwlth. 2007) (citation omitted). Indeed, "[o]nly if it is plain that *no* grounds exist to support the decree, or that the rule of law relied upon was palpably erroneous or misapplied, will the decision be interfered with." Unionville-Chadds Ford Sch. Dist. v. Rotteveel, 487 A.2d 109, 111 (Pa. Cmwlth. 1985) (emphasis in original).

Plaintiffs contend that Sunoco has changed its position regarding the ME2 pipeline, arguing that the ME2 pipeline is intrastate, and Sunoco is a public utility, to suit its needs. To that end, Plaintiffs argue, only after Sunoco lost in a condemnation proceeding in York County, did it seek approval to provide intrastate service. Reproduced Record (R.R.) at 17a-18a; see Sunoco Pipeline, L.P. v. Loper, No. 2013-SU-4518-05 (C.P. York 2014) (reaffirmed March 25, 2014); see also Sunoco I (McCullough, J., dissenting).

Plaintiffs assert that in June 2014, Sunoco applied to the PUC for approval to construct a portion of the ME2 pipeline in Washington County to extend its service into that county, which is located on the West Virginia border. Plaintiffs argue that the PUC only ordered that a CPC should issue authorizing Sunoco to *offer petroleum products to the public in Washington County*. They contend Sunoco relies on this PUC order and CPCs issued decades ago to support its claim that the ME2 pipeline is a public utility facility. However, Plaintiffs assert, none of those CPCs address the ME2 pipeline.

Moreover, Plaintiffs argue, the Public Utility Code limits a "public utility" only to those corporations transporting "for the public for compensation." See 66 Pa. C.S. §102. Plaintiffs contend the ME2 pipeline will not provide service for the public.

Further, by dismissing Plaintiffs' complaint before affording them an opportunity to conduct discovery, Plaintiffs maintain, the trial court limited Plaintiffs' ability to develop the facts necessary to support their argument. They

argue they should have been permitted to develop a record on this issue.[6] Thus, Plaintiffs assert, the trial court's conclusion that Plaintiffs offered no factual basis as to why it should find that the ME2 pipeline is not a public utility facility, should be set aside. As the ME2 pipeline is not a public utility facility, Plaintiffs argue, the trial court's conclusion that the zoning ordinance was preempted by the PUC was erroneous.

Sunoco responds that the trial court correctly determined that Sunoco is a public utility and that the ME2 pipeline is part of its public utility facilities, based on this Court's controlling decision in Sunoco I and subsequent decisions. In Sunoco I, this Court examined the CPCs that the PUC issued to Sunoco, together with other orders and decisions the PUC rendered regarding Sunoco, and held: "Sunoco is regulated as a public utility by [the] PUC and is a public utility corporation, and Mariner East intrastate service is a public utility service rendered by Sunoco." Id. at 1020. Although this Court issued that decision in an eminent domain case, Sunoco argues, the holding regarding the scope of the PUC's regulation is not limited to that context. Rather, the holding that Sunoco is a public utility regulated by the PUC, and that the ME2 service is part of its PUC-certificated public utility service applies to all cases questioning Sunoco's public utility status in light of the CPCs and other PUC orders and decisions this Court examined in Sunoco I.

[6] See Clean Air Council v. Sunoco Pipeline, August Term, 2015, No. 03484 (C.P. Phila. May 25, 2017) (summary judgment not proper as record was still incomplete on, among other things, ME2 pipeline's status as a public utility facility); Clean Air Council v. Sunoco Pipeline, August Term, 2015, No. 03484 (C.P. Phila. March 1, 2017) (overruling Sunoco's preliminary objections asserting court lacked jurisdiction because of Sunoco's alleged public utility status).

In attempting to argue the ME2 pipeline is not a public utility facility, Sunoco contends, Plaintiffs do not allege the service Sunoco is providing in this case is any different from that at issue in Sunoco I. They also do not deny that the PUC issued Sunoco Pipeline the CPCs that this Court examined in Sunoco I, nor do they allege the PUC issued other orders or decisions calling Sunoco's public utility status into question. R.R. at 18a-19a, 25a, 200a-02a, 218a-240a, 278a-89a (recognizing the PUC issued Sunoco CPCs that this Court examined in Sunoco I).

Instead, Sunoco argues, Plaintiffs rely on the dissenting opinion in Sunoco I and a trial court opinion, which this Court distinguished in Sunoco I as irrelevant to the analysis of Sunoco's public utility status in light of its regulation by the PUC. See Sunoco I, 143 A.3d at 1014-15. Sunoco argues the *en banc* decision in Sunoco I is the law, and it establishes that the ME2 pipeline is part of Sunoco's public utility facilities, subject to the PUC's regulation. See In re Condemnation by Sunoco Pipeline L.P. (Katz) 165 A.3d 1044, 1053 (Pa. Cmwlth. 2017) (McCullough, J., concurring), appeal denied, ___ A.3d ___ (Pa., No. 507 MAL 2017, filed January 22, 2018).

2. Analysis

Based on our recent *en banc* decision in Sunoco I, we hold that Sunoco is regulated as a public utility by the PUC and is a public utility corporation. In addition, we hold that Sunoco is providing intrastate pipeline transportation services regulated by the PUC. We reject Plaintiffs' arguments to the contrary.

As a regulated public utility providing intrastate pipeline transportation services under the Public Utility Code, Sunoco is expressly required to furnish and maintain adequate, efficient, safe and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees and the public. 66 Pa. C.S §1501 (entitled "Character of service and facilities"). According to the PUC, if Sunoco concludes it is necessary to expand the previously certificated service, it is permitted to upgrade current facilities and expand existing capacity as needed. Sunoco I, 143 A.3d at 1006; see also Duquesne Light Co. v. Pa. Pub. Utility Comm'n, 63 A.2d 466 (Pa. Super. 1949) (Duquesne Light Co. v. PUC) (public utility company, in exercise of its managerial functions, may determine in first instance type and extent of its service to public within limits of adequacy and reasonableness, but service must conform to PUC regulations and orders). The PUC determined that the expansion proposed by Sunoco was necessary and proper for the service, accommodation, and convenience of the public. Sunoco I, 143 A.3d at 1007.

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

convenience of the public. 66 Pa. C.S. §1505(a) (entitled "Proper service and facilities established on complaint"); see also 66 Pa. C.S §701 (entitled "Complaints"). We acknowledge this express statutory remedy.

Plaintiffs argue that the ME2 pipeline is not properly located because parts of it are proposed for incompatible residential zones where permission for such use has recently been withdrawn. Plaintiffs' Compl. at ¶11 ("Under the [2014] Ordinance a public utility facility use is permitted by conditional use, and no longer permitted by right in residential districts."). Plaintiffs also refer to the "hazardous" nature of the petroleum products involved in the pipeline transportation services, e.g., Appellants' Br. at 4; Reply Br. of Appellants at 21, protection of public natural resources generally, recent damage to drinking water supplies in particular, Reply Br. of Appellants at 12, and detrimental impacts on health, safety, welfare and property values. Id. at 13. We view these assertions as implicating the reasonableness and safety of the pipeline transportation services or facilities, matters committed to the expertise of the PUC by express statutory language. 66 Pa. C.S. §1505.

B. Preemption by Public Utility Code

1. Contentions

Plaintiffs next assert the trial court held that the Township's ability to regulate the location of a "highly volatile liquid" (HVL) pipeline in a residential district was preempted by the PUC's authority, despite the fact that the PUC does not regulate the location of such pipelines. Appellants' Br. at 4, 10. In reaching its conclusion, Plaintiffs argue, the trial court relied on a line of cases, including Duquesne Light Co. v. Monroeville Borough, County of Chester, Duquesne Light

Co. v. Upper St. Clair Township, South Coventry Twp., and Delaware and Hudson Railway Co. However, Plaintiffs contend, a review of those cases makes clear that they do not support the broad preemption that the trial court found here.

Initially, Plaintiffs argue the zoning ordinance does not conflict with the PUC's authority. Plaintiffs contrast this case with the Supreme Court's decision in Duquesne Light Company v. Monroeville Borough,[7] asserting that the PUC here concedes it does not have regulatory authority over the location of HVL pipelines. See Krueger-Braneky: Questions Over Natural Gas Pipeline Safety, https://www.youtube.com/watch?v=KbXpkxkT3Mo (last visited January 22, 2018) (March 1, 2017 testimony before Pennsylvania House of Representatives); Chester County Association of Township Officials, *Guide to Pipelines for Chester County Municipalities* at 6 http://www.ccato.org/DocumentCenter/View/103 ("Pennsylvania has no designated regulatory authority overseeing the siting of hazardous liquid pipelines.") (last visited January 22, 2018). Thus, Plaintiffs maintain they could not have invoked the PUC's "procedural machinery" here. Appellants' Br. at 12. Without the ability to avail themselves to the trial court, Plaintiffs contend, they are left without a mechanism to vindicate their rights.

Plaintiffs further argue the Township has authority to establish zones in which HVL pipelines may and may not be located. While the trial court relied on the Supreme Court's decision in County of Chester in holding to the contrary, Plaintiffs contend, County of Chester is distinguishable. To that end, the Court in County of Chester specifically distinguished between the authority of a county and

[7] See also Pa. Power Co. v. Twp. of Pine, 926 A.2d 1241 (Pa. Cmwlth. 2007) (en banc).

a municipality. They assert that, in contrast to a county, it has long been held that municipalities have zoning authority to regulate as to matters of health, safety, and welfare, even when the matter involves a public utility. See York Water Co. v. York, 95 A. 396, 396 (Pa. 1915); see also Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Swade v. Zoning Bd. of Adjustment of Springfield Twp., 140 A.2d 597 (Pa. 1958); Robinson Twp. v. Commonwealth, 52 A.3d 463 (Pa. Cmwlth. 2012) (Robinson Twp. I), aff'd in part, rev'd in part, 83 A.3d 901 (Pa. 2013).

Most recently, and perhaps most importantly, Plaintiffs contend, the Pennsylvania Supreme Court set forth the clear limitations on the General Assembly's authority "to remove a political subdivision's implicitly necessary authority to carry into effect its constitutional duties." Robinson Twp. v. Commonwealth, 83 A.3d 901, 977 (Pa. 2013) (Robinson Twp. II); see also Pa. Envtl. Def. Found. v. Commonwealth, 161 A.3d 911, 931 (Pa. 2017) (PEDF).

Plaintiffs argue the General Assembly derives its power from Article III of the Pennsylvania Constitution, which grants broad and flexible police powers to enact laws to promote public health, safety, morals, and the general welfare. PEDF; Robinson Twp. II. These powers, however, are expressly limited by the fundamental rights reserved to the people in Article I of the Pennsylvania Constitution. PEDF; Robinson Twp. II. Among the rights in Article I are the rights set forth in Article I, Section 27 (referred to as the "Environmental Rights Amendment") (ERA), which provides:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural

> resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

PA. CONST. art I, § 27.

Significantly, Plaintiffs maintain, the trustee obligations set forth in the ERA are not vested exclusively in any single branch of Pennsylvania government. PEDF; Robinson Twp. II. Instead all Commonwealth agencies and entities have a fiduciary duty to act toward the corpus with prudence, loyalty and impartiality. PEDF; Robinson Twp. II. "This includes local governments." Robinson Twp. II, 83 A.3d at 956-57. Plaintiffs contend municipalities have those powers expressly granted to them by the Pennsylvania Constitution or by the General Assembly, and other authority implicitly necessary to carry into effect those express powers. Id. They assert that, while the General Assembly has the authority to alter or remove powers granted and obligations imposed on the municipality by statute, "constitutional commands regarding municipalities' obligations and duties to their citizens cannot be abrogated by statute." Id. at 977. Plaintiffs argue the General Assembly has no authority to remove a political subdivision's implicitly necessary authority to carry into effect its constitutional duties. Id.

Further, Plaintiffs maintain, as to the public trust provisions of the ERA Amendment, "the General Assembly can neither offer political subdivisions purported relief from obligations under the [ERA], nor can it remove necessary and reasonable authority from local governments to carry out these constitutional duties." Id. When the General Assembly commands municipalities to ignore their

obligations under the ERA and further directs them to take affirmative actions to undo existing protections of the environment in their localities, Plaintiffs argue, it "transgresses its delegated police powers which, while broad and flexible, are nevertheless limited by constitutional commands, including the [ERA]." Id. at 978.

Plaintiffs assert that, in Pennsylvania, protection of environmental values "is a quintessential local issue and must be tailored to local conditions." Id. at 979. "[A] new regulatory regime permitting industrial uses as a matter of right in every type of pre-existing zoning district is incapable of conserving or maintaining the constitutionally protected aspects of the public environment and of a certain quality of life." Id. Thus, when a local government is required to permit industrial uses in all zoning districts "some properties and communities will carry much heavier environmental habitability burdens than others …. This disparate effect is irreconcilable with the express command that the trustee manage the corpus of the trust for the benefit of 'all the people.'" Id. at 980 (quoting PA. CONST. art I, § 27). Plaintiffs argue that, placing uses in zoning districts not designated for those types of uses, *i.e.* "spot uses," disrupts the rational zoning scheme as a whole. Robinson Twp. I, 52 A.3d at 484 n.21.

Plaintiffs contend that, by finding that the zoning ordinance regulating the location of HVL pipelines in residential districts is preempted by the PUC's authority, the trial court did precisely what the Supreme Court prohibited in Robinson Township II. It allowed the General Assembly to remove the Township's ability to carry out its constitutionally mandated, and quintessentially local, duties as a trustee under the ERA. Plaintiffs argue this allowed the General Assembly to

transgress its delegated police powers, which are limited by the ERA. Further, it allowed Sunoco, under the guise of the PUC, to place an industrial use as a matter of right in every type of pre-existing zoning district, a scheme that is incapable of conserving or maintaining the constitutionally protected aspects of the public environment and of a certain quality of life. It also allowed some properties to carry a much heavier environmental habitability burden than others, undermining the Township's ability as trustee to manage the corpus of the trust for the benefit of "all the people." PA. CONST. art. I, §27. They argue such a clear violation of the ERA cannot stand.

Plaintiffs further argue Section 619 of the MPC does not preempt the zoning ordinance. In its order, Plaintiffs contend, the trial court relied on Section 619 for the proposition that a township has no power to regulate a public utility by zoning ordinance with respect to uses and structures that are not buildings. Significantly, Plaintiffs assert, the trial court derived this broad reading of Section 619 from a line of cases which state that Section 619 "must be strictly limited to the express statutory language." Hudson Railway, 339 A.2d at 157. In finding Section 619 so restricts the authority of municipalities, Plaintiffs maintain, the trial court failed to adhere to the "strict limitations" of Section 619 and instead found "implied" limitations on municipal authority that do not exist. Plaintiffs contend the trial court misconstrued cases interpreting this provision.

Sunoco responds that the trial court correctly decided that the PUC's exclusive jurisdiction over the regulation of public utilities preempts the zoning ordinance as applied to Sunoco's construction of the ME2 pipeline. It argues

longstanding Pennsylvania law provides that, because the PUC has exclusive jurisdiction over the regulation of public utilities and their facilities, local regulations that threaten to interfere with public utilities' construction or operation of facilities dedicated to public service are preempted. Duquesne Light Co. v. Monroeville Borough; Cnty. of Chester; Duquesne Light Co. v. Upper St. Clair Twp.; Twp. of Upper Dublin; Hudson Railway.

Sunoco contends preemption of zoning ordinances is well-established. See Duquesne Light Co. v. Monroeville Borough (zoning); County of Chester (land development plans); Duquesne Light Co. v. Upper St. Clair Twp. (zoning and building permits); see also S. Coventry Twp.; Newtown Twp. v. Phila. Elec. Co., 594 A.2d 834 (Pa. Cmwlth. 1991). It argues that preemption of local ordinances attempting to regulate public utilities is required because subjecting public utilities to "a myriad of local governments with different regulations[,]" Hudson Railway, 339 A.2d at 157, would "clearly burden and indeed disable [them] from successfully functioning as … utilit[ies]." S. Coventry Twp., 504 A.2d at 372.

Sunoco asserts the only public utility facilities that are potentially subject to local zoning regulations are buildings because the General Assembly expressly granted municipalities zoning power over buildings in Section 619 of the MPC. S. Coventry Twp., 504 A.2d at 370-71 (holding municipalities have no power to zone as to utility structures other than buildings); see also Duquesne Light Co. v. Upper St. Clair Twp. Sunoco maintains the MPC does not grant municipalities general zoning power over any other types of public utility facilities. Rather, "the policy of the Commonwealth in entrusting to the [PUC] the regulation and

supervision of public utilities has excluded townships from the same field" means that "no power in townships to enter that area can be read into the [MPC] by implication." Id. at 292. Indeed, Sunoco contends, the MPC emphasizes it does not intend to grant municipalities general power to regulate public utilities by stating it does not "repeal or modify any of the provisions of [the Public Utility Code]." Section 1202 of the MPC. Here, Sunoco asserts, the ME2 pipeline is not a building; it is a pipeline that crosses through numerous municipalities in Pennsylvania, and it is affected with a statewide concern. See Hudson Railway.

Moreover, Sunoco argues, in granting public utilities condemnation power, the General Assembly expressly imposed no limitations on the distance of a pipeline from a residence. See 15 Pa. C.S. §1511(b)(1) (providing that while no public utility corporation can condemn a dwelling house "for the purpose of constructing any street railway, trackless-trolley omnibus, petroleum or petroleum products transportation or aerial electric transmission, aerial telephone or aerial telegraph lines[,]" condemnations for "petroleum or petroleum products transportation lines" are not subject to the additional restriction imposed on the other types of lines that the condemnation cannot include "any part of the reasonable curtilage of a dwelling house within 100 meters therefrom"). Sunoco asserts this exception from a distance requirement on condemnation for petroleum products pipelines shows the General Assembly considered whether the location of pipelines in relation to dwellings should be limited, and it determined not to restrict the location of those pipelines.

Sunoco further contends, because the PUC's regulatory authority over public utilities is broad, municipalities may not regulate merely because the PUC has not issued a specific regulation. Contrary to Plaintiffs' claims, Sunoco argues, whether or not the PUC promulgated specific regulations covering the same area as Section 84-56(B) of the zoning ordinance is irrelevant to the preemption analysis because the PUC has exclusive jurisdiction over the regulation of public utilities and their facilities, and municipalities have no implied power to regulate public utilities under the MPC.

Sunoco maintains that, under the Public Utility Code, the PUC has broad regulatory authority over Sunoco's implementation of the ME2 pipeline and its provision of the ME2 service. See 66 Pa. C.S. §§501, 506, 701, 1501, 1504, 1508. Ignoring this authority, Sunoco argues, Plaintiffs focus on the fact that the current regulatory scheme does not provide a mechanism for the government to review the entire route of a petroleum product pipeline before a pipeline operator seeks permits and other approvals required in connection with constructing a pipeline. Nevertheless, Sunoco asserts, a lack of specific regulation over a pipeline's route does not leave room for local regulation, and it particularly does not leave room for the zoning ordinance, which does not address the route of the pipeline through Pennsylvania, but rather addresses Sunoco's implementation of its public utility facilities, which is within the PUC's jurisdiction.

Sunoco further contends the MPC does not grant the Township the power to regulate Sunoco's public utility facilities through the zoning ordinance. It asserts that "[e]ven where the state has granted [municipalities] powers to act in a

particular field … such powers do not exist if the Commonwealth preempts the field." Huntley & Huntley, Inc. v. Borough Council of Oakmont, 964 A.2d 855, 862 (Pa. 2009). As such, Sunoco argues, the Township has no power to regulate Sunoco's public utility facilities, and the zoning ordinance is preempted as applied to Sunoco's construction of the ME2 pipeline. Therefore, the trial court properly dismissed Plaintiffs' complaint.

Sunoco also maintains the ERA does not grant municipalities the authority to regulate public utilities. It asserts Plaintiffs now attempt to evade preemption by arguing that the ERA requires municipalities to regulate public utilities to preserve the environment, and that preemption violates the ERA.

Sunoco asserts that, despite Plaintiffs' contentions, the ERA does not grant regulatory power to municipalities where that power is preempted or otherwise prohibited. Instead, the ERA requires municipalities to make decisions and take actions they are already empowered to take, in a manner that satisfies their duty to act as trustee of Pennsylvania's public natural resources for the benefit of the people. PA. CONST. art. I, § 27; PEDF; Robinson Twp. II.

Sunoco maintains that, while municipalities are bound to adhere to their trustee duties under the ERA in making decisions that may affect the environment and in taking actions they are empowered to take, this duty does not grant them power to infringe on the PUC's exclusive jurisdiction to regulate public utilities. Cf. Robinson Township II, 83 A.3d at 901 (holding that a statute unconstitutionally limited municipal zoning power over "oil and gas operations" (*i.e.*, fracking-related

operations that are not related to public utility service and that do not implicate the provision of a statewide public utility service)).

Even assuming the ERA empowers the Township to regulate public utilities with regard to the environment in the face of PUC preemption, Sunoco argues, Plaintiffs fail to show how the zoning ordinance furthers the Township's ERA trustee duties.

Sunoco maintains Plaintiffs do not show how the zoning ordinance relates to conserving the public's natural resources. Sunoco asserts the zoning ordinance purports to prohibit pipelines from all zoning districts except certain industrial zones, subject to 18 standards. Section 84-56(b) of the zoning ordinance. But, in contrast to the fracking operations at issue in Robinson Township II, Sunoco contends, pipelines, which merely transport products from one point to another, do not inherently diminish the environment. Cf. Robinson II, 83 A.3d at 979-80 (fracking operations designed to actively exploit the natural gas found in the Marcellus Shale Formation cause "air, water, and soil pollution; persistent noise, lighting, and heavy vehicle traffic; and the building of facilities incongruous with the surrounding landscape"). Indeed, Sunoco argues, pipelines have co-existed alongside residential uses of property in Pennsylvania for over a century.

Sunoco argues here the route of the ME2 pipeline parallels an existing pipeline that has been in place for decades, which traverses all types of zoning districts, including residential districts. It asserts pipelines are not a new, invasive use that alter settled expectations about property, but rather are a well-established

part of Pennsylvania's landscape. See, e.g., Commonwealth v. Keystone Pipe Line Co., 24 Pa. D. & C. 400 (C.P. Dauphin 1934, Cmwlth. Dkt.) (discussing history of pipeline transportation in Pennsylvania).

In addition, Sunoco contends, to the extent Plaintiffs are arguing the Public Utility Code is unconstitutional in giving the PUC exclusive regulatory authority over public utilities, this is another argument Plaintiffs did not raise before the trial court. In any event, Sunoco argues, as a Commonwealth agency, the PUC is required to act as a trustee under the ERA. Here, Sunoco maintains, the PUC did consider the environmental effects of the Mariner East project when it reviewed Sunoco's CPC applications and authorized provision of the ME2 service.[8]

Sunoco also asserts the Department of Environmental Protection (DEP) exercised ERA duties over the ME2 pipeline by reviewing Sunoco's applications for environmental permits and considering the project's environmental effects before issuing permits.

Sunoco further maintains that, contrary to Plaintiffs' assertions, Plaintiffs have a remedy to address their dissatisfaction with Sunoco's construction of the ME2 pipeline, just not through this suit. Specifically, Sunoco argues, the Public Utility Code allows "any person … having an interest in the subject matter … [to] complain in writing, setting forth any act or thing done or omitted to be done

[8] For example, Sunoco contends, in its 2014 application to the PUC for a CPC for Washington County, Sunoco provided the PUC with information about the environmental effects of the ME2 pipeline project, stating that in selecting the route of the pipelines, it sought to minimize impacts to the natural and human environment, minimize route length and cost, avoid densely populated areas, maximize distance from residences, schools, cemeteries, historical resources, and recreation areas, and minimize impacts to wetlands and conservation areas.

by any public utility in violation, or claimed violation, of any law which the [PUC] has jurisdiction to administer, or of any regulation or order of the [PUC] .... " 66 Pa. C.S. § 701. Thus, Sunoco asserts, Plaintiffs could bring their grievances before the PUC, and the PUC would have the power to adjudicate those claims.

Sunoco argues Plaintiffs could also ask the General Assembly to amend the Public Utility Code to require the PUC to regulate pipelines in a particular way. See Cnty. of Chester. However, Sunoco maintains, Plaintiffs may not use the courts to infringe on the PUC's exclusive jurisdiction over the regulation of public utilities and impede the provision of a statewide public utility service that the PUC already determined will benefit the public.

In reply, Plaintiffs again assert that the PUC's authority does not preempt the zoning ordinance. Plaintiffs argue that Sunoco broadly contends the PUC has exclusive jurisdiction over the regulation of public utilities and their facilities. In support, Sunoco relies on cases involving electric transmission lines and other electric utility facilities. However, Plaintiffs argue, electric utilities and pipelines are regulated differently by the PUC. To that end, the PUC promulgated an array of regulations to address the siting of electric facilities. See, e.g., Pa. Code, Title 52, Chapter 57, Subchapter G ("[PUC] Review of Siting and Construction of Electric Transmission Lines").

In contrast, Plaintiffs argue, the PUC does not regulate the siting of HVL pipelines. Plaintiffs assert that, as Sunoco concedes, the PUC has not issued regulations covering the same subject that the zoning ordinance addresses. Plaintiffs

contend that, despite the PUC's and Sunoco's statements to the contrary, Sunoco attempts to argue that the PUC does, in fact, regulate the location of HVL pipelines based on 15 Pa. C.S. §1511(b)(1). Plaintiffs maintain this provision addresses setbacks for public utility eminent domain proceedings. They contend the instant case does not involve the exercise of eminent domain; thus, the cited provision does not apply to the issue presented here.

Plaintiffs further argue Sunoco also relies on multiple Public Utility Code provisions that it claims show the PUC has authority over the ME2 pipeline. However, Plaintiffs assert none of these provisions relate to the siting of a pipeline.

In addition, Plaintiffs acknowledge Sunoco's argument that, even if the PUC does not regulate the siting of the pipeline, other governmental entities reviewed and approved matters relating to siting concerns. Plaintiffs note that Sunoco identifies sections of applications it submitted to, among other entities, DEP, which identify the location of the pipeline. However, Plaintiffs argue, Sunoco does not indicate what the agencies did with this information nor does it identify any authority granting DEP or any other agency power over the siting of HVL pipelines. In fact, Plaintiffs assert, neither DEP nor any other agency has such authority.

Plaintiffs further maintain the PUC's authority does not preempt the MPC. To that end, Plaintiffs point out that Sunoco cites Section 1202 of the MPC, the statute's savings clause, for the erroneous proposition that the Public Utility Code preempts municipal authority under the MPC. Plaintiffs argue Section 1202 provides, among other things, that the MPC does not "repeal or modify any of the

provisions of 66 Pa.C.S. Pt. I (relating to public utility code) ….” 53 P.S. §11202. Thus, by its express terms, Plaintiffs assert, the MPC does not preempt the Public Utility Code.

Under the rules of statutory construction, Plaintiffs assert, to the extent the MPC and the Public Utility Code relate to the same things, *i.e.*, the location of a purported public utility HVL pipeline, they must be read *in pari materia*. See 1 Pa. C.S. §1932(a). Here, Plaintiffs argue, there is no conflict between the Public Utility Code and the MPC. Therefore, the MPC, and the Township's authority to regulate the location of HVL pipelines in residential districts under that statute, must be given effect.

Plaintiffs also point out that Sunoco claims the construction and operation of its pipeline does not implicate the rights protected by the ERA because pipelines, which merely transport products from one point to another, do not inherently diminish the environment. Plaintiffs argue it should be beyond dispute that installation of an underground pipeline 20 inches in diameter, which is subject to various state and federal environmental permits, to transport HVLs by subjecting them to high pressure, implicates the public natural resources protected by the ERA. Plaintiffs assert that, if there were any doubt of this prior to commencement of pipeline construction, recent damage to drinking water supplies in Uwchlan Township should resolve such doubt. See Bill Rettew Jr., *Uwchlan residents discuss Mariner East 2 pipeline, water problems*, delcotimes.com, http://www.delcotimes.com/article/DC/20170713/NEWS/170719873 (last visited January 22, 2018). Plaintiffs contend that, as alleged in their complaint, the pipeline

is an industrial use with known detrimental impacts on health, safety, welfare, property values, and public natural resources in residential areas. Compl. at ¶109.

Also, Plaintiffs argue acceptance of Sunoco's position would leave Plaintiffs without a forum in which to vindicate their rights. Having failed to even attempt to comply with the zoning ordinance, Plaintiffs assert, Sunoco now seeks to preclude Plaintiffs from challenging its actions in the only forum with jurisdiction, the trial court. Plaintiffs contend Sunoco claims that Plaintiffs could attempt to bring their grievances before the PUC. Contrary to this assertion, Plaintiffs argue, this case does not relate to a law that the PUC has jurisdiction to administer or a regulation or order of the PUC. Rather, the PUC has no statutory or regulatory authority governing the location of an HVL pipeline though which Plaintiffs can seek relief before the PUC.

2. Analysis

For the following reasons, we hold that the Township lacks authority to zone out a public utility pipeline service or pipeline facility regulated by the PUC.

There are three generally recognized forms of preemption: (1) express or explicit preemption, where the statute includes a preemption clause, the language of which specifically bars local authorities from acting on a specific subject matter; (2) conflict preemption, where the local enactment irreconcilably conflicts with or stands as an obstacle to the execution of the full purposes of the statute; and (3) field preemption, where analysis of the entire statute reveals the General Assembly's implicit intent to occupy the field completely and to permit no local enactments.

Hoffman Mining Co., Inc. v. Zoning Hearing Bd. of Adams Twp., Cambria Cnty., 32 A.3d 587, 593-94 (Pa. 2011) (citations omitted).

a. Field Preemption

If the General Assembly has preempted a field, the state has retained all regulatory and legislative power for itself, and no local legislation in that field is permitted. Id. Both field and conflict preemption require an analysis of whether preemption is implied in or implicit from the text of the whole statute, which may or may not include an express preemption clause. Id.

In Duquense Light Co. v. Upper St. Clair Township, our Supreme Court held that field preemption precluded the application of a township zoning ordinance to a public utility. The Court adopted the language of the chancellor examining numerous provisions of the former Public Service Company Law of 1913,[9] and its predecessors, and the 1931 First Class Township Law,[10] together with a 1949 amendment. The adopted language included the following:

> Thus, long before first class townships ever acquired any zoning powers, The General Assembly had clearly expressed the policy of the Commonwealth to commit the regulation to a commission of state-wide jurisdiction, and to impose a duty upon utilities to render adequate and efficient service and to make such changes in or extension of their facilities and service as might be necessary to accommodate or serve the public.

[9] Act of July 26, 1913, P.L. 1374, as amended, formerly 66 P.S. §§1-1009.

[10] Act of June 24, 1931, P.L. 1206, as amended, formerly 53 P.S. §§55101-58502.

Dusquesne Light Co. v. Upper St. Clair Twp., 105 A.2d at 291 (emphasis added). The Supreme Court also adopted language stating that:

> [T]he policy of the Commonwealth of entrusting to the Commission the regulation and supervision of public utilities has excluded townships from the same field, and that no power in townships to enter that area can be read into the First Class Township Law by *implication*. Unless the legislature has given an *express* grant of power to townships, the Commonwealth's own expressed policy on the subject is undiminished and supreme.

Id. at 292 (emphasis by underline added, emphasis by italics in original).

The Supreme Court added its own discussion on the policy driving its holding in favor of the public utility:

> Any other conclusion than that reached by the chancellor would render the [PUC] powerless to regulate the functioning of an electric service company if in so doing the [PUC] contravened any regulation or order of a local zoning authority. If the power of the municipality were held paramount, the [PUC] could not compel the utility to provide adequate service or in anywise control the expansion or extension of the utility's facilities if an order of the [PUC] conflicted with action taken by any political subdivision of the State. This would mean the complete negation of the powers of regulation and control specifically given as a matter of public policy to the [PUC] in the interest of state-wide public welfare.

Id. at 293 (emphasis added).

Our Supreme Court has repeated this result and reasoning on other occasions. E.g., Cnty. of Chester (county without authority to enact ordinance

prohibiting construction of gas pipeline without first submitting plans and specifications for construction; citing, inter alia, Duquesne Light Co. v. Upper St. Clair Township). More particularly, our Supreme Court in County of Chester adopted the reasoning of a prior Supreme Court decision which stated:

> [N]o principle has become more firmly established in Pennsylvania law than that the courts will not originally adjudicate matters within the jurisdiction of the PUC. Initial jurisdiction in matters concerning the relationship between public utilities and the public is in the PUC-not in the courts. It has been so held in matters involving rates, service, rules of service, extension and expansion, hazard to public safety due to use of utility facilities, location of utility facilities, installation of utility facilities, obtaining, alerting, dissolving, abandoning, selling, or transferring any right, power, privilege, service franchise or property and rights to serve a particular area.

Cnty. of Chester, 218 A.2d at 332-33 (quoting Landsdale Borough v. Phila. Elec. Co., 170 A.2d 565, 566-67 (Pa. 1961)) (footnotes omitted).

Further, in County of Chester the Supreme Court examined the entire 1937 Public Utility Law,[11] and concluded that Sections 401, 412, 413, 420, 507, 905, 906, 908, 1001, 1008, and 1009 (66 P.S. §§1171, 1182, 1183, 1190, 1217, 1345, 1346, 1348, 1391, 1398, and 1399), together with accompanying regulations of the PUC, have designed and developed the machinery which standardizes the construction, operation, and services of public utilities throughout Pennsylvania.

[11] Act of May 28, 1937, P.L. 1053, as amended, formerly 66 P.S. §§1101-1562.

County of Chester, 218 A.2d at 333. This Court is bound by these Supreme Court decisions.[12]

This Court has expressly followed our Supreme Court's Duquesne Light Co. v. Upper St. Clair Township preemption holding on numerous occasions. E.g., PPL Elec. Utils. Corp. v. City of Lancaster, 125 A.3d 837 (Pa. Cmwlth. 2015); Pa. Power Co. v. Twp. of Pine, 926 A.2d 1241 (Pa. Cmwlth. 2007) (en banc); Twp. of Upper Dublin; S. Coventry Twp.

Following our careful review of the Public Utility Code, and in particular the current iterations of the provisions cited by our Supreme Court in County of Chester, we conclude that the General Assembly intended the PUC to occupy the field of public utility regulation, in the absence of an express grant of authority to the contrary. See 66 Pa. C.S. §§ 309 (entitled "Oaths and subpoenas"), 315 (entitled "Burden of proof"), 331 (entitled "Powers of commission and administrative law judges"), 504 (entitled "Reports by public utilities"), 505 (entitled "Duty to furnish information to commission; cooperation in valuing property"), 506 (entitled "Inspection of facilities and records"), 701 (entitled "Complaints"), 1501 (entitled "Character of service and facilities"), 1504 (entitled "Standards of service and facilities"), 1505 (entitled "Proper service and facilities established on complaint; authority to order conservation and load management programs").

[12] Plaintiffs attempt to distinguish County of Chester v. Philadelphia Electric Co., 218 A.2d 331 (Pa. 1966), from the current case because it involved a county rather than a municipal corporation. Appellants' Br. at 13-14. We view this distinction to be immaterial. The Supreme Court viewed dimly any effort at public utility regulation other than that coming from the PUC. The Court cited to numerous cases involving townships to support its decision, including Duquesne Light Co. v. Upper St. Clair Township, 105 A.2d 287 (Pa. 1954). Cnty. of Chester, 218 A.2d at 332-33.

For these reasons we conclude that the concept of field preemption supports the trial court's decision here.

b. Conflict Preemption

Even assuming that our Supreme Court's language of exclusion "from the same field" in Duquesne Light Co. v. Upper St. Clair Township was imprecise, for the following reasons we conclude that conflict preemption also supports the trial court's decision as to preemption by the Public Utility Code.

As stated above, conflict preemption requires an analysis of whether preemption is implied in or implicit from the text of the whole statute. Hoffman Mining, 32 A.3d at 594. Conflict preemption is a formalization of the self-evident principle that a municipal ordinance cannot be sustained to the extent it is contradictory to, or inconsistent with, a state statute. Id. Conflict preemption is applicable when the conflict between a local ordinance and a state statute is irreconcilable, i.e., when simultaneous compliance with both the local ordinance and the state statute is impossible. Id. In addition, under the doctrine of conflict preemption, a local ordinance will be invalidated if it stands as an obstacle to the execution of the full purposes and objectives of a statutory enactment of the General Assembly. Id. We focus on this last concept, an obstacle to the execution of the full purpose of the state statute.

After extensively evaluating the statutory terms, our Supreme Court in Duquesne Light Co. v. Upper St. Clair Township, and later in County of Chester, identified an over-arching policy embedded in our public utilities statutes: to commit

the regulation of public utility facilities to a state-wide commission, the PUC, because the rendition of efficient service to the public transcends the legitimate objectives of any one of the political subdivisions of the Commonwealth. Duquense Light Co. v. Upper St. Clair Township, 105 A.2d at 293; accord Cnty. of Chester, 218 A.2d at 333 ("If each county was to pronounce its own regulation and control over electric wires, pipe lines and oil lines, the conveyors of power and fuel could become so twisted and knotted as to affect adversely the welfare of the entire state.") (emphasis added).

More fully expressing the conflict between the policy of state-wide regulation versus local regulation of public utility services and facilities, the Court in Duquesne Light Co. v. Upper St. Clair Township, 105 A.2d at 293, stated (with emphasis added):

> We believe that the General Assembly never intended to bestow a power upon first class townships which is in headlong conflict with the power already given to the [PUC]. We believe that the General Assembly never gave any one of the political subdivisions through which the proposed line will pass the power to determine whether the public in another locality shall be served with electric energy, or the means by which they will be served.

The "headlong conflict" discussed by the Supreme Court, involves an "obstacle to the execution of the full purpose" of the Public Utility Code. Id.; see Hoffman Mining, 32 A.3d at 594. Indeed, contrary to the strong, long-standing policy of statewide regulation of public utility services and facilities, Plaintiffs specifically advocate for local regulation of the location of pipeline facilities here.

See, e.g., Appellants' Br. at 19 (arguing protection of environmental values is a quintessentially local issue and must be tailored to local concerns).

The practical conflict is even more apparent with a careful review of the facts here. Plaintiffs concede that the proposed route of the ME2 pipeline through the Township "follows an existing [Sunoco] hazardous liquids pipeline …." Compl. ¶7. In Sunoco I, it was revealed that the ME2 pipeline will be "paralleling and mostly within the existing right of way of the [ME1] pipeline." Id. at 1008 (emphasis added). Thus, the 2014 Ordinance, zoning pipelines out of residential zones, conflicts with full use of a pre-existing pipeline right of way.

We reject Plaintiffs' arguments that there is no conflict between the 2014 Ordinance and the Public Utility Code: a) because the PUC does not have any regulations governing pipeline location; b) because the PUC concedes it lacks authority over the siting of hazardous liquid pipelines; and, c) because the PUC lacks procedural machinery to adjudicate their rights.

First, while it may be true that the PUC has no regulations covering pipeline siting, this is irrelevant. The PUC exercises its authority in several ways, including regulations and orders. Regardless of whether there are PUC regulations governing the location of pipelines, there are numerous PUC orders governing the ME2 pipeline, as discussed in such detail in Sunoco I that further review is unnecessary.

Second, Plaintiffs do not acknowledge the manner in which the PUC regulates the ME2 pipeline. As established in Sunoco I, the PUC regulates the intrastate shipments of natural gas and petroleum products through pipelines, and not the actual physical pipelines conveying those liquids. Sunoco I, 143 A.3d at 1004. The PUC regulates these movements as pipeline transportation services. Id. If Sunoco concludes it is necessary to expand the previously certificated service, it is permitted to upgrade current facilities and expand existing capacity as needed. Id. at 1006; see also Duquesne Light Co. v. PUC (public utility company, in exercise of its managerial functions, may determine in first instance, type and extent of its service to public). Sunoco's decisions are subject to review by the PUC to determine whether Sunoco's service and facilities "are unreasonable, unsafe, inadequate, insufficient, or unreasonable discriminatory, or otherwise in violation of the Public Utility Code …." 66 Pa. C.S. §1505(a). In this manner, Sunoco's decisions as to the location of its facilities are within the jurisdiction of the PUC. Cnty. of Chester.

Third, the Public Utility Code's provisions afford Plaintiffs a forum for their rights, and reasonable notice and hearing, on complaint that the location of Sunoco's utility facilities are unreasonable, unsafe, inadequate, insufficient, or unreasonably discriminatory, or otherwise in violation of the Public Utility Code. 66 Pa. C.S. §§701 (entitled "Complaints"), 1505(a) (entitled "Proper service and facilities established on complaint"); see Hudson Railway.

c. Ogontz and Statutory Interpretation

We reach the same conclusion by resorting to an analytical process our Supreme Court uses to determine which entity the legislature intended to have

preeminent powers over a given area of regulation. The conflict here is between the public utility regulatory authority of the PUC and the authority of the Township to enact zoning ordinances to promote the public health, safety, morals and general welfare.

The analytical process was originally set forth in Department of General Services v. Ogontz Area Neighbors Association, 483 A.2d 448 (Pa. 1984), and the process was recently applied again by the Court in City of Pittsburgh v. Fraternal Order of Police, Fort Pitt Lodge No. 1, 161 A.3d 160 (Pa. 2017), and in Southeastern Pennsylvania Transportation Authority v. City of Philadelphia, 101 A.3d 79 (Pa. 2014) (SEPTA). As the Supreme Court noted in SEPTA:

> In a series of cases beginning with our decision in *Ogontz, supra*, this Court has held that a Commonwealth agency's challenge to a municipality's exercise of authority over it does not represent 'a contest between superior and inferior governmental entities, but instead a contest between two instrumentalities of the state.' *See Ogontz, supra* at 452; *County of Venango v. Borough of Sugarcreek*, [626 A.2d 489, 490 (Pa. 1993)]; *Hazleton Area Sch. Dist. v. Zoning Hearing Bd.*, [778 A.2d 1205, 1210 (Pa. 2001)]. That is, because the legislature authorized the creation of both entities, and set the limits of each entity's authority, our task is to determine, through an examination of the relevant statutes, which entity the legislature intended to have preeminent powers. *Ogontz, supra* at 452. In short, '[t]he problem, essentially, is one of statutory interpretation.' *Id.* Our standard of review of such a question of statutory interpretation is de novo, and our scope of review is plenary. *Hazleton, supra* at 1213.
>
> As identified in *Hazleton*, our opinion in *Ogontz, supra* sets forth the analytical process a court is to follow to determine which entity the legislature intended to have preeminent powers over a given area of regulation.

> The first step requires the reviewing court to determine, through examination of the statutes, which governmental entity, if any, the General Assembly expressly intended to be preeminent. *Id.* In the event there is no such express legislative mandate, the second step requires the court 'to determine legislative intent as to which agency is to prevail…turn[ing] to the statutory construction rule that legislative intent may be determined by a consideration, *inter alia*, of the consequences of a particular interpretation.' *Hazleton*, *supra* at 1210, (quoting *Ogontz*, supra at 455 (citing in turn 1 Pa.C.S. § 1921 (c)(6)) (emphasis omitted).

SEPTA, 101 A.3d at 86.

There is no express preemption provision in either the Public Utility Code or in the MPC. Nevertheless, our prior discussion explains the long-standing public policy embedded in the Public Utility Code and its predecessor statutes: public utilities are to be regulated by an agency of the Commonwealth with state-wide jurisdiction rather than a myriad of local governments with different regulations.

In contrast, the General Assembly placed two provisions in the MPC which impact our analysis. The first, Section 619, entitled "Exemptions," provides (with emphasis added):

> This article shall not apply to any existing or proposed building, or extension thereof, used or to be used by a public utility corporation, if, upon petition of the corporation, the [PUC] shall, after a public hearing, decide that the present or proposed situation of the building in question is reasonably necessary for the convenience or

> welfare of the public. It shall be the responsibility of the [PUC] to ensure that both the corporation and the municipality in which the building or proposed building is located have notice of the hearing and are granted an opportunity to appear, present witnesses, cross-examine witnesses presented by other parties and otherwise exercise the rights of a party to the proceedings.

53 P.S. §10619. Our Supreme Court holds that this provision does not grant municipalities an implied right to zone with regard to public utility facilities other than described buildings. Duquesne Light Co. v. Upper St. Clair Township; see Hudson Railway.

The second provision, Section 1202 of the MPC, entitled "General Repeal," provides in pertinent part that "this act shall not repeal or modify any of the provisions of 66 Pa.C.S. Pt. I (relating to public utility code) …." A similar provision has existed since 1931 in the First Class Township Law addressed by the Supreme Court in Duquesne Light Co. v. Upper St. Clair Township. See also S. Coventry Twp.

These provisions of the MPC, viewed in contrast to the provisions of the Public Utility Code, support a determination that the General Assembly intended the PUC to be preeminent in regulation of public utilities when questions arise about local zoning, absent an express grant of authority to a local municipality. Duquesne Light Co. v. Monroeville Borough (where conflict between Public Utility Code and express grant of authority to a borough, the borough may define reasonable underground wiring district, but the PUC has ultimate authority to determine particulars of implementation); Cnty. of Chester; Duquesne Light Co. v. Upper St. Clair Township. Any other conclusion could prevent the PUC from compelling a

public utility to render adequate and efficient service, or in anywise control the expansion or extension of the utility's facilities. Duquesne Light Co. v. Upper St. Clair Township, 105 A.2d at 293.

d. Township's Authority to Regulate under MPC

Plaintiffs repeatedly state that they do not rely upon Section 619 of the MPC (referring to certain buildings used by a public utility corporation), for an implied grant of authority to zone out the ME2 pipeline. E.g., Appellants' Br. at 9, 23. Therefore, further discussion of this provision is not needed here.

e. Township's Constitutional Duty as Trustee under ERA

For the following reasons, we decline to embrace Plaintiffs' arguments based on the Township's constitutional duties to protect public natural resources, as embodied in the ERA and discussed recently by our Supreme Court in Robinson Township II and PEDF.

First and foremost, the cases relied upon by Plaintiffs do not deal with public utility services and facilities regulated by the PUC, and they are distinguishable for this important reason. We are not persuaded that the cases signify an intent to protect public natural resources trumps all other legal concerns raised by every type of party under all circumstances. Plaintiffs, however, offer no principled contours for their broad argument.

Second, Plaintiffs do not explain how the ERA, Article I, Section 27 of the Pennsylvania Constitution, adopted in 1971, impacts long-standing, pre-existing

law involving regulation of public utilities, without expressly referring to the topic. Similarly, Plaintiffs do not explain how the 2014 Ordinance impacts long-standing, pre-existing law involving regulation of public utilities. The cases Plaintiffs rely upon dealt with very recent General Assembly enactments, unlike the current situation involving state-wide public utility statutes dating to 1913. Thus, the cases are distinguishable for this additional important reason. Stated differently, Plaintiffs ignore the comparative timing of the onset of legal duties, although such timing is usually a matter of significance to legal analysis. See Duquesne Light Co. v. Monroeville Borough (evaluating which statutory enactment predates the other); Duquesne Light Co. v. Upper St. Clair Township, 105 A.2d at 291 ("long before first class townships ever acquired any zoning powers, the General Assembly had clearly expressed the policy of the Commonwealth to commit the regulation of public utilities to a commission of state-wide jurisdiction ….").

Third, Plaintiffs do not explain how the 2014 Ordinance furthers the Township's ERA trustee duties and relates to conserving public natural resources. This is especially true where, as here, the pipeline in question will be placed in or near a pre-existing pipeline right of way and parallel to a pre-existing pipeline.[13]

C. Substantive Due Process

1. Contentions

Plaintiffs further argue the trial court erred when it determined Plaintiffs did not establish a claim based on substantive due process. In dismissing

[13] The parties do not address whether the impact of the 2014 Ordinance on the pre-existing pipeline and its right of way works a compensable regulatory taking. See Muir v. Wisconsin, ___ U.S. ___, 137 S. Ct. 1933 (2017), 2017 WL 2694699. In the absence of a discussion by the parties, we will not address the issue on our own motion.

their substantive due process claim, Plaintiffs assert, the trial court relied on its conclusion that the PUC's authority purportedly preempts the Township's ability to regulate the location of HVL pipelines in residential districts. For the reasons set forth above, Plaintiffs contend, this Court should find Sunoco failed to comply with the zoning ordinance, to which its activities are subject. Plaintiffs argue this Court should find such non-compliance constitutes a violation of Plaintiffs' substantive due process rights.

Plaintiffs assert the very essence of zoning is the designation of certain areas for different use purposes. Swade. Under its well-established authority, Plaintiffs argue, the Township limited the industrial pipeline activities that can occur in a residential district. Plaintiffs contend Sunoco is blatantly ignoring the residential zoning district limitations that the Township determined were appropriate for HVL or gas pipelines, and engaging in such uses in all districts, including residential districts, without restriction. Plaintiffs assert not only does such action fail to protect the reciprocal property rights of neighbors, it knowingly impedes on those rights.

Plaintiffs argue it is irrational to have incompatible land uses in a zone that was established to achieve a non-industrial character and non-industrial development and conservation goals. Robinson Twp. I; see also Robinson Twp. II (Baer, J., concurring). Such incompatible uses upset the established expectations of those who live there, such as investment decisions regarding businesses and homes on the assurance that the zoning district will only be developed for compatible uses. See Robinson Twp. II (Baer, J., concurring). Plaintiffs assert that Sunoco's

placement of an HVL pipeline in residential districts renders the zoning districts irrational and unconstitutional.

Sunoco counters that the trial court correctly held that Plaintiffs failed to state a substantive due process claim. Sunoco asserts Plaintiffs' sole allegation in support of their claim for the purported violation of substantive due process is that recognizing Sunoco's exemption from the zoning ordinance would "create irrational zoning in [the Township]." R.R. at 29a-30a. However, Sunoco argues, preemption does not "create" zoning; rather, it merely prevents municipalities from applying their ordinances against public utilities. Sunoco contends the zoning ordinances that are preempted as applied to public utilities still exist and are applicable to other entities that are not public utilities.

Moreover, Sunoco argues, Plaintiffs' substantive due process claim appears to be based on the Township's failure to enjoin Sunoco's non-compliance with its zoning ordinance rather than on any action by Sunoco or any enacted legislation. R.R. at 31a.

Contrary to these assertions, Sunoco argues, Plaintiffs may not seek relief against the Township for failing to enforce the zoning ordinance against Sunoco under Section 617 of the MPC. See Buffalini ex rel. Buffalini v. Shrader, 535 A.2d 684, 68-887 (Pa. Cmwlth. 1987) (Section 617 allows a municipality "to enforce its ordinances under the conditions set out in the statute but its permissive language does not mandate that enforcement in all circumstances").

Sunoco maintains that, to the extent Plaintiffs base their substantive due process claim on a challenge to the longstanding law that the PUC's exclusive jurisdiction over public utilities preempts local zoning and land use ordinances, Plaintiffs still cannot succeed. By vesting the PUC with exclusive jurisdiction over public utilities and their facilities through the Public Utility Code, Sunoco argues, the General Assembly allowed the Commonwealth's citizens to benefit by having access to public utility services.

Sunoco asserts the Public Utility Code does not violate substantive due process by preempting local zoning and land use regulations; therefore, Plaintiffs fail to state a claim upon which relief can be granted based on substantive due process.

In reply, Plaintiffs argue that, contrary to Sunoco's contentions, a state law that permits industrial activity in every zoning district in every municipality, such as Sunoco's interpretation of the Public Utility Code, violates substantive due process because it results in irrational zoning. Robinson Twp. I; see also Robinson Twp. II (Baer, J., concurring).

Plaintiffs also dispute Sunoco's argument that Plaintiffs' substantive due process claim is based on the Township's failure to enjoin Sunoco's non-compliance with its zoning ordinance rather than on any action of Sunoco. Plaintiffs recognize that the Township need not enforce its zoning ordinance; therefore, Plaintiffs brought this action themselves under Section 617 of the MPC. Plaintiffs

maintain their claims are based on Sunoco's failure to conform to the zoning ordinance. See, e.g., Compl. at ¶¶92, 110.

2. Analysis

We begin our discussion by noting that Plaintiffs' substantive due process argument of irrational zoning based on the allowance of incompatible uses in residential zones relies almost entirely on this Court's superseded decision in Robinson Township I and Justice Baer's concurring opinion in Robinson Township II.

Nevertheless, Plaintiffs' incompatible-uses-in-residential-zones argument is flawed, for several reasons.

A substantive due process issue usually arises as a substantive validity challenge to a legislative enactment. See, e.g., Surrick v. Zoning Hearing Board of Upper Providence Twp., 382 A.2d 105 (Pa. 1977) (exclusionary zoning; zoning ordinance must bear a substantial relationship to the health, safety, welfare and general morals of the community). In the broadest sense, such challenges question the sufficiency of the relationship between the goals of the legislative enactment and the means used to achieve them. See Boundary Drive Assocs. v. Shrewsbury Twp., 491 A.2d 86 (Pa. 1985) (zoning goal of agricultural preservation; restrictions on number of dwellings per acre); Surrick; see also 1 Robert S. Ryan PENNSYLVANIA ZONING LAW AND PRACTICE §3.1.3 (2005) (validity issues bottomed on an appraisal of the result imposed by the zoning limitation as measured against the proper function and objectives of zoning itself). Similarly, in the Robinson Township

opinions on which Plaintiffs rely, a substantive validity issue arose with regard to a recent enactment of the General Assembly.

Here, however, Plaintiffs do not challenge a legislative enactment at all. Instead, they challenge Sunoco's decision not to comply with the 2014 Ordinance. E.g., Reply Br. of Appellants at 18-19. This is a novel, perhaps illogical, extension of a substantive due process analysis from applying to a legislative enactment to applying to non-governmental action. It is the proverbial square peg in the round hole. Because of this conceptual distortion, the Robinson Township opinions are distinguishable, and they do not support the Plaintiffs' claims here.

Moreover, there are factual problems. According to Plaintiffs' complaint, public utility facilities were until recently permitted by right in residential zones of the Township. See Compl. at ¶11 ("Under the [2014] Ordinance a public utility facility use is permitted by conditional use, and no longer permitted by right in residential districts."). In any event, there is a pre-existing pipeline in the Township. See Compl. at ¶7. As revealed in Sunoco I, most of the new ME2 pipeline will be parallel to and within the right-of-way of the pre-existing pipeline. Sunoco I, 143 A.3d at 1009. These facts are at odds with Plaintiffs' general assertions of incompatible uses.

Further, as to expectations of property owners, the onset of regulation by the 2014 Ordinance post-dates the expectations of the public utility when it acquired the right of way and constructed the pre-existing pipeline. Also, it is difficult to assess the "pipeline-free" expectations of homeowners in the residential

zones in light of the pre-existing pipeline and right of way. Although Plaintiffs argue about established expectations of those living in the residential zones, Appellants' Br. at 26, Plaintiffs Casey and Grote do not aver that they purchased their properties after enactment of the 2014 Ordinance, that they somehow relied upon the 2014 Ordinance, or that they expected no public utility facility in their residential zones. These factual circumstances raise questions of the viability of Plaintiffs' substantive due process claim.

Given the conceptual distortion and the factual problems, together with our prior conclusion that the Township lacked authority to zone out a public utility service and facility regulated by the PUC, we discern no error in the trial court's disposition of this issue.

D. Other Issues

The parties also argue about subject matter jurisdiction in the trial court, denial of injunctive relief, standing of the Plaintiffs, and application of the federal Pipeline Safety Act, 49 U.S.C. §60101-60137. In light of our prior holdings, these issues are moot, and no further discussion is necessary.

IV. Conclusion

We hold that the Plaintiffs cannot state a cause of action to have the 2014 Ordinance applied to Sunoco's ME2 pipeline, which is regulated by the PUC

as a public utility service and facility. Accordingly, we affirm the trial court's dismissal of Plaintiffs' suit and denial of requests for injunctive relief.

ROBERT SIMPSON, Judge

Judge McCullough dissents.

Judge Fizzano Cannon did not participate in the decision in this case.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

The Delaware Riverkeeper Network, Maya van Rossum, The Delaware Riverkeeper, Thomas Casey, and Eric Grote,	:	No. 952 C.D. 2017
Appellants	:	
v.	:	
Sunoco Pipeline L.P.	:	

O R D E R

AND NOW, this 20th day of February, 2018, the orders of the Court of Common Pleas of Chester County are **AFFIRMED**.

ROBERT SIMPSON, Judge

Exhibit B

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

The Delaware Riverkeeper Network, Maya van Rossum, The Delaware Riverkeeper, Thomas Casey, and Eric Grote,	:	
Appellants	:	
v.	:	No. 952 C.D. 2017
	:	Argued: October 18, 2017
Sunoco Pipeline L.P.	:	

BEFORE: HONORABLE MARY HANNAH LEAVITT, President Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE ANNE E. COVEY, Judge
HONORABLE MICHAEL H. WOJCIK, Judge

CONCURRING AND DISSENTING
OPINION BY JUDGE BROBSON **FILED: February 20, 2018**

The majority's analysis of the issues on appeal is thorough, cogent, and consistent with long-standing precedent. Despite my well-documented misgivings about whether Pennsylvanians are the primary and paramount beneficiaries of the Mariner East 2 (ME2) Pipeline,[1] I must concede that the issue, for now, has been settled in Sunoco Pipeline, L.P.'s favor. Accordingly, I join in the majority's decision with respect to the merits.

I am compelled, however, to disagree with the majority's decision to affirm the dismissal of the complaint. Appellants The Delaware Riverkeeper

[1] *In re Sunoco Pipeline, L.P.*, 143 A.3d 1000, 1020-28 (Pa. Cmwlth.) (Brobson, J., dissenting), *appeal denied*, 164 A.3d 485 (Pa. 2016).

Network, Maya van Rossum, The Delaware Riverkeeper, and landowners Thomas Casey and Eric Grote (collectively, Plaintiffs) commenced their action in the Court of Common Pleas of Chester County (common pleas), essentially challenging *the location* of the ME2 Pipeline within West Goshen Township. Rather than dismiss that challenge, I would order common pleas on remand to transfer the complaint to the Public Utility Commission (PUC) pursuant to Section 5103(a) of the Judicial Code, 42 Pa. C.S. § 5103(a) (relating to transfers of erroneously filed matters).[2] The PUC can then consider Plaintiffs' challenges in light of its authority under Section 1505(a) of the Public Utility Code, 66 Pa. C.S. § 1505(a).[3]

I confess that Plaintiffs have not asked for this relief. Nonetheless, I am moved by what appears to be an undisputed fact that no governmental entity has ever reviewed, let alone approved, the location of the ME2 Pipeline. There is no

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[2] Section 5103(a) of the Judicial Code provides:

> (a) General rule.--If an appeal or other matter is taken to or brought in a court or magisterial district of this Commonwealth which does not have jurisdiction of the appeal or other matter, the court or magisterial district judge *shall not quash such appeal or dismiss the matter, but shall transfer the record thereof to the proper tribunal of this Commonwealth*, where the appeal or other matter shall be treated as if originally filed in the transferee tribunal on the date when the appeal or other matter was first filed in a court or magisterial district of this Commonwealth.

(Emphasis added.)

[3] As the majority notes, Section 1505(a) of the Public Utility Code provides:

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

specific statute and regulation that limits, let alone guides, Sunoco Pipeline, L.P.'s discretion to choose the location of the ME2 Pipeline. This pipeline, however, is currently in construction. Here, the majority acknowledges that Plaintiffs have a remedy before the PUC with respect to their challenge to the location of the ME2 Pipeline. (Maj. Op. at 19.) In this case, where private property rights and interests are at stake, I would not exalt form over substance. Plaintiffs clearly have a right to be heard, and the PUC, as the statewide agency with jurisdiction, has a duty to address their challenges (indeed, any challenges) to the location of the ME2 Pipeline. Rather than dismiss, I would order a transfer of the matter to the PUC, where Plaintiffs can advance their challenge to the location of the ME2 Pipeline in West Goshen Township, and the PUC can either approve or disapprove the location under Section 1505(a) of the Public Utility Code. *See County of Erie v. Verizon N., Inc.*, 879 A.2d 357, 365 (Pa. Cmwlth. 2005) (holding remand for purposes of transfer was necessary because PUC had primary jurisdiction over county's claim against telephone service provider, and trial court erred under Section 5103(a) of Judicial Code in dismissing matter without prejudice rather than transferring it to PUC).

P. KEVIN BROBSON, Judge

Judge McCullough joins in this concurring and dissenting opinion.

Exhibit C

DELAWARE RIVERKEEPER NETWORK, ET AL.,

Plaintiffs,

v.

SUNOCO PIPELINE L.P.,

Defendant.

IN THE COURT OF COMMON PLEAS
CHESTER COUNTY, PENNSYLVANIA

NO. 2017-05040-MJ

CIVIL ACTION – LAW

Mark L. Freed, Esquire, Counsel for Plaintiffs
Robert L. Byer, Esquire, George Kroculick, Esquire, and George Zumbano, Esquire, Counsel for Defendant

ORDER

AND NOW, this 15th day of June, 2017, after consideration of the Preliminary Objections[1] of Defendant Sunoco Pipeline L.P., the response of plaintiffs in opposition thereto, and following oral argument held on June 13, 2017, it is hereby ORDERED and DECREED that defendant's preliminary objections are SUSTAINED IN PART and OVERRULED IN PART as follows:

1. Defendant's preliminary objection alleging a lack of standing (Pa.R.C.P. 1028(a)(4)) (Obj. II.A) is OVERRULED[2];

2. Defendant's preliminary objections alleging a lack of subject matter jurisdiction (Pa.R.C.P. 1028(a)(1)) (Obj. I) and a lack of authority to regulate (Pa.R.C.P. 1028(a)(4)) (Obj. II.B.1) are SUSTAINED[3];

3. Defendant's preliminary objection alleging a lack of authority to regulate (Pa.R.C.P. 1028(a)(4)) (Obj. II.B.2) is SUSTAINED AS MOOT[4]; and

4. Defendant's preliminary objection alleging a failure to establish a claim based upon substantive due process (Pa.R.C.P. 1028(a)(4)) (Obj. II.C) is SUSTAINED[5].

Plaintiffs' Complaint is hereby DISMISSED WITH PREJUDICE.

BY THE COURT:

M. Tunnell

Mark L. Tunnell, J.

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[1] Plaintiffs in this action seek to enjoin defendant, Sunoco Pipeline L.P. ("Sunoco"), from moving forward with its planned Mariner East 2 pipeline (ME2) in a residentially zoned section of West Goshen Township, Chester County. Plaintiffs are two individuals, Thomas Casey ("Casey") and Eric Grote ("Grote"), both of whom own properties in the designated residential district in West Goshen Township and a non-profit association, Delaware Riverkeeper Network ("DRN"), which was established to protect and restore the Delaware River, along with its Executive Director, Maya van Rossum ("van Rossum"). (Compl. at ¶¶1-4).

The long and complicated history of this project's development was recently summarized by the Commonwealth Court in *In re: Condemnation by Sonoco Pipeline, L.P.*, 143 A.3d 1000, 10002-1011 (2016)("Sunoco I"). The court sees no need to repeat it here.

Specific to this dispute is the enactment by West Goshen Township in 2014 of a zoning ordinance that regulates the location and setbacks for gas and liquid pipeline facilities. West Goshen Ordinance No. 9-2014 (the "Ordinance") provides that "gas and liquid pipeline facilities" are permitted by conditional use and only in the I-1, I-2, I-2R, I-3 and I-C districts. (West Goshen Twp. Code, § 84-56 B). Gas and liquid pipeline facilities are not permitted in residential districts. (*Id.*) The conditional use standards also include setback requirements for projects located in the I-1, I-2, I-2R, I-3 and I-C districts. (*Id.*)

In May, 2017, plaintiffs filed their complaint alleging that Sunoco's proposed ME2 pipeline, which is planned to run through West Goshen Twp., violates the Ordinance (Count I). Plaintiffs further allege that a violation of the Ordinance is itself a violation of plaintiffs' substantive due process rights (Count II).

Sunoco responded to the complaint by filing preliminary objections thereto which raised a number of legal challenges, including standing and jurisdictional arguments.

On May 25, 2017, as Sunoco began mobilizing and engaging in pre-construction activity in surrounding townships, plaintiffs filed a petition for special injunction and a petition for preliminary injunction to stop any mobilization in West Goshen Township.

Following an in-person conference with the parties to discuss the petition for special and preliminary injunction, the parties agreed that (1) many of the relevant facts were likely to be undisputed and (2) the legal issues raised by Sunoco in its preliminary objections would impact any decision on the outstanding requests for injunction. The parties therefore agreed that proceeding first with the presentation and disposition of those legal issues would be appropriate.

On June 13, 2017, the court heard argument on the issues raised in Sunoco's preliminary objections.

[2] Plaintiffs' claims are brought pursuant to Section 617 of the Pennsylvania Municipalities Planning Code ("MPC"), which provides as follows:

> [i]n case any building, structure, landscaping or land is, or is proposed to be, erected, constructed, reconstructed, altered, converted, maintained or used in violation of any ordinance enacted under this act . . . the governing body or, with the approval of the governing body, an officer of the municipality, or any aggrieved owner or tenant of real property who shows that his property or person will be substantially affected by the alleged violation, . . . may institute any appropriate action or proceeding to prevent, restrain, correct or abate such building, structure, landscaping or land, or to prevent, in or about such premises, any act, conduct, business or use constituting a violation.

53 P.S. §10617 (emphasis added).

Neither DRN nor van Rossum allege that they own or rent property in or near West Goshen Township that would be substantially affected by the alleged zoning violation. Thus, argues Sunoco, they lack standing to pursue this action. DRN and Ms. Van Rossum argue to the contrary and claim "associational standing" conferred upon them by their property owner members, plaintiffs Casey and Grote.

The court agrees that all of the named plaintiffs have standing to bring these claims.

In deciding preliminary objections, the standard remains as follows:

> Preliminary objections in the nature of a demurrer test the legal sufficiency of the complaint. When considering preliminary objections, all material facts set forth in the challenged pleadings are admitted as true, as well as all inferences reasonably deducible

therefrom. Preliminary objections which seek the dismissal of a cause of action should be sustained only in cases in which it is clear and free from doubt that the pleader will be unable to prove facts legally sufficient to establish the right to relief. If any doubt exists as to whether a demurrer should be sustained, it should be resolved in favor of overruling the preliminary objections.

Feingold v. Hendrzak, 15 A.3d 937, 941 (Pa. Super. 2011) (quotations and citations omitted).

As for plaintiffs Casey and Grote, the complaint alleges that each own property within West Goshen Township, and specifically the residential district where the proposed ME2 pipeline is prohibited by the Ordinance. Sunoco does not challenge that they are owners or tenants of real property as required by MPC §617. Sunoco does challenge, however, whether these plaintiffs have pled sufficient facts to support the claims that they are "aggrieved" persons who "will be substantially affected" by the development of the ME2 pipeline in their residential district. Upon review of the Complaint and the material facts alleged therein, the court finds that plaintiffs Casey and Grote have alleged sufficient facts to establish they have standing to assert these claims. (Compl. at ¶¶ 3-4, 7, 50, 51).

Turning to Sunoco's challenge to the standing of plaintiffs DRN and its Executive Director, van Rossum, counsel for Sunoco agreed during argument that party such as DRN may have "associational standing", but only if its members, of which plaintiffs Grote and Casey allege they are (Compl. at ¶¶3, 4), satisfy the statutory requirement of being (i) "aggrieved parties" who (ii) "will be affected" by the challenged conduct. *See Robinson Twp., et al. v. Commw. of Pa., et al.,* 623 Pa. 564 (2013)(finding that Delaware Riverkeeper Network and its Executive Director, Maya van Rossum, had associational standing to challenge the Pennsylvania Oil and Gas Act as a result of its members' standing). Having determined that plaintiffs Grote and Casey have standing to bring this action, the court likewise finds that DRN and its Executive Director, van Rossum, have standing.

[3] Sunoco has asserted two jurisdictional challenges to the plaintiffs' action. First, Sunoco contends that this court lacks subject matter jurisdiction over plaintiffs' claims because "the Pennsylvania Public Utility Commission [(the "PUC")] has exclusive jurisdiction over the regulation of public utilities and public utility service and the courts lack jurisdiction over collateral attacks on the PUC's decision to authorize public utility service." (Obj. I) Second, and related thereto, is Sunoco's argument that the PUC's exclusive jurisdiction over public utilities and their facilities prevents application of West Goshen's Ordinance to Sunoco's construction of the ME2 pipeline. (Obj. II.B.1)

In order for the court to properly analyze these arguments raised by Sunoco, it must first determine whether or not Sunoco is a public utility or is offering a public utility service such that it would fall within the jurisdiction of the PUC. Sunoco's preliminary

objections, and the documents attached thereto, argue that it is a public utility offering public utility services. (Prel. Obj. at ¶¶1-23, Exs. A-C). Plaintiffs dispute that the ME2 pipeline is a public utility facility subject to PUC jurisdiction and suggest that the Certificates of Public Convenience ("CPCs") presented by Sunoco with its preliminary objections do not address the ME2 pipeline.

Sunoco is a public utility

In numerous cases preceding the present one, the Pennsylvania appellate courts have confirmed what Sunoco now argues to this court: Sunoco is a public utility for purposes of the ME project (ME I and ME2). The Commonwealth Court held in *Sunoco I* and *In re: Condemnation by Sonoco Pipeline, L.P.*, 2017 WL 2062219 (May, 2017)(Memorandum Opinion), that (1) Sunoco is a public utility and (2) Sunoco's CPCs apply to both Mariner East 1 and Mariner East 2 service because it is an authorized expansion of the same service. (*Sunoco I*, 143 A.3d at 1017; *Sunoco II*, 2017 WL 2062219, at *9, fn. 15). Plaintiffs have offered no reason, either factual or legal, why the court should disregard these appellate decisions.

The PUC has statewide jurisdiction over public utilities such as Sunoco.

In *Sunoco I*, the Commonwealth Court reaffirmed what "has long been the statutory mandate:" the Public Utility Code (the "Code") "charges PUC with responsibility to determine which entities are public utilities and to regulate how public utilities provide public utility service." *Sunoco I*, 143 A.3d at 1016; *see, e.g.*, *Pottsville Union Traction Co. v. Pennsylvania Public Serv. Comm'n*, 67 Pa. Super. 301 (1917). It further held, "[i]t is beyond purview that the General Assembly intended PUC to have statewide jurisdiction over public utilities and to foreclose local public utility regulation." *Id.* (citing *Duquesne Light Co. v. Monroeville Borough*, 449 Pa. 573, 298 A.2d 252 (1972)).

Although acknowledging the above principles, plaintiffs argue that a municipality, such as West Goshen Township, is "permitted to enforce local ordinances against public utilities if they do not involve specific activities that the PUC regulates." (Br. Opp. to Prelim. Obj., at 10.) At the heart of plaintiffs' argument in opposition to Sunoco's jurisdictional challenge is its contention that "the PUC does not regulate the location of any [hazardous liquid] pipelines" and therefore their request to have the Ordinance enforced is not a collateral attack on a PUC decision. Plaintiffs acknowledge that there is no case law which directly stands for that proposition. The court disagrees with plaintiffs' conclusions.

Even though this case involves recent developments in the distribution of petroleum and refined petroleum products, the legal principles at issue were long ago addressed by the Pennsylvania courts.

In *Commw. of Pa. v. Delaware and Hudson Railway Co.*, 19 Pa. Commw. 59, 339 A.2d 155 (1975), the Commonwealth Court addressed the same issues before this court:

the interplay between a public utility and local zoning ordinances. In *Hudson,* Lehigh Valley Railroad, a public utility, constructed a diagonal cross-over track in Dupont Borough without first applying for a building permit. *Id.* at 156, 60. Dupont Borough charged the railroad with a violation Section 9.210 of the DuPont Borough Zoning Ordinance. Relying on "a long line of cases", the court held that Dupont Borough "lacked the authority to require a building permit." *Id.* at 157, 62.

The *Hudson* court began it analysis by reiterating the Pennsylvania Supreme Court's holding in *Duquesne Light Co. v. Monroeville Borough*, 449 Pa. 573, 580, 298 A.2d 252, 256 (1972) "that public utilities are to be regulated exclusively by an agency of the Commonwealth with state-wide jurisdiction rather than by a myriad of local governments with different regulations." *Id.* at 157, 61. Citing the Supreme Court's decision in *County of Chester v. Philadelphia Electric Co.*, 420 Pa. 422, 425-26, 218 A.2d 331, 333 (1966), the *Hudson* court further explained

> [i]f each county were to pronounce its own regulation and control over electric wires, pipe lines and oil lines, the conveyors of power and fuel could become so twisted and knotted as to affect adversely the welfare of the entire state. It is for that reason that the Legislature has vested in the Public Utility Commission exclusive authority over the complex and technical service and engineering questions arising in the location, construction and maintenance of all public utilities facilities. . . .' (Citations omitted.)

Id. at 157, 61-62 (emphasis added).

The Commonwealth Court concluded that the reasoning articulated above was equally applicable to challenged activity of the railroad. Therefore, Dupont Borough lacked the authority to regulate the railroad's placement of its tracks. *Id.*

The present case is even more straight-forward. Unlike in *Hudson*, the court is not required to "extend" the reasoning behind the above principles to the facts before it. There is no dispute that what is involved here is a "pipe line" and the "location" of "all public utility facilities," which the Supreme Court directly addressed in its *County of Chester* decision. The regulation at issue here falls within the purview of the PUC and not this court.

Contrary to plaintiffs' assertions made Section 619 of the MPC - "Exemptions" - does not change the court's analysis.

Section 619 of the MPC provides:

> This article shall not apply to any existing or proposed building, or extension thereof, used or to be used by a public utility corporation, if, upon petition of the corporation, the Pennsylvania

> Public Utility Commission shall, after a public hearing, decide that the present or proposed situation of the building in question is reasonably necessary for the convenience or welfare of the public.

53 P.S. §10619.

Plaintiffs argue that 'buildings' are the only structures that "if properly designated, are expressly exempted from local regulation." (Br. Opp. to Prelim. Obj., at 12.) The *Hudson* court held otherwise.

In *Hudson,* the Commonwealth Court examined the impact of Section 619 of the MPC on a public utility and held as follows:

> to the extent that Section 619 of the Pennsylvania Municipalities Planning Code gives any authority to local governments to regulate public utilities, that authority must be strictly limited to the express statutory language. The Pennsylvania Municipalities Planning Code itself states in Section 1202, 53 P.S. s 11202 that it 'shall not repeal or modify any of the provisions of the 'Public Utility Law."

Hudson, at 157, 62.

The *Hudson* court concluded that because the express statutory language [the word 'building'] in Section 619 of the MPC did not include railroad tracks, the municipality lacked the authority to enforce its zoning regulation. *Id.*

Similarly, in *South Coventry Twp. v. PECO*, South Coventry Township argued unsuccessfully that Section 619 acted as an "implied grant of authority" to zone a siren alert system proposed by PECO. The Township argued that any 'structure "sought to be erected by a public utility is subject to the municipality's zoning regulations." 94 Pa. Commw. 289, 293, 504 A.2d 368, 370 (1986). The Commonwealth Court disagreed holding instead that the Township's

> interpretation of Section 619, was, however, discredited long ago in *Duquesne Light Co. v. Upper St. Clair Township,* 377 Pa. 323, 105 A.2d 287 (1954). . . In *Duquesne Light,* a municipality ... proposed precisely the same argument as advanced by the township here-that as buildings alone were to be exempted from possible application of zoning laws, a general zoning power had been thereby granted to the township, which would enable it to regulate public utility "uses and structures." 377 Pa. at 333, 105 A.2d at 292. The *Duquesne Light* court expressly rejected this notion, based upon reasoning we find applicable to the present case.

Id.

The court then concluded

> *Duquesne Light* establishes as an *enduring* principle that there is *no power* possessed by municipalities to zone with respect to utility structures other than buildings . . . the same policy concern which underlay the *Duquesne Light* decision is present under the facts in this case. That policy, which rejects the parochial concerns of local interests, was clearly articulated in *Duquesne Light.*

Id.

In sum, Pennsylvania courts have consistently construed Section 619 narrowly holding that a township has no power to regulate a public utility by zoning ordinances with respect to uses and structures that are not buildings. *See PECO Energy Co. v. Twp. of Upper Dublin*, 922 A.2d 996 (Pa. Commw. Ct. 2007)(holding Supreme Court has found Code gave PUC "all-embracing regulatory jurisdiction over the operations of public utilities" and that the "legislature intended Code to preempt the field of public utility regulation"); *see also Duquesne Light Co. v. Monroeville Borough*, 449 Pa. 573, 580, 298 A.2d 252, 256 (1972)(holding "the policy of the Commonwealth in entrusting to the [PU] Commission the regulation and supervision of public utilities has excluded townships from the same field, and that no power in townships to enter that area can be read into the First Class Township Law *by implication.* Unless the legislature has given an *express* grant of power to townships, the Commonwealth's own expressed policy on the subject is undiminished and supreme).

Both parties agree the proposed ME2 pipeline is not a building. (Prel. Obj. at ¶52, Resp. to Prel. Obj. at 12). The court's inquiry thus stops here.

[4] At oral argument, counsel for plaintiffs advised the court that the only issue for plaintiffs was the location of the pipeline in a residential district, instead of an industrial district, and that plaintiffs were not raising a "safety issue."

[5] Plaintiffs summarize their due process argument as follows:

> Under its well established authority, West Goshen Township limited the industrial pipeline activities that can take place in a residential district. SPLP is blatantly ignoring the residential zoning district limitations the Township determined were inappropriate . . .

(Resp. to Prel. Obj. at 17).

Further, plaintiffs' complaint at Paragraph 92 states:

> [Sunoco's] non-compliance with the West Goshen Ordinance violates the Plaintiff's substantive due process rights.

The court for the reasons set forth above has found that Sunoco has not violated or failed to comply with a zoning ordinance to which its activity is subject. Thus, plaintiffs' due process claim fails.

DELAWARE RIVERKEEPER NETWORK, ET AL., Plaintiffs, v. SUNOCO PIPELINE L.P., Defendant.	IN THE COURT OF COMMON PLEAS CHESTER COUNTY, PENNSYLVANIA NO. 2017-05040-MJ CIVIL ACTION – LAW

Mark L. Freed, Esquire, Counsel for Plaintiffs
Robert L. Byer, Esquire, George Kroculick, Esquire, and George Zumbano, Esquire, Counsel for Defendant

ORDER

AND NOW, this 15th day of June, 2017, after consideration of the Plaintiffs' Petition for Special Injunctive Relief and for Preliminary Injunction, the response of defendant in opposition thereto, it is hereby ORDERED and DECREED that plaintiffs' petitions are DENIED.[1]

BY THE COURT:

Mark L. Tunnell, J.

[1] In order to obtain preliminary injunctive relief, Pennsylvania law requires that plaintiffs show: (1) that the injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages; (2) that greater injury would result from refusing an injunction than from granting it, and, concomitantly, that issuance

of an injunction will not substantially harm other interested parties in the proceedings; (3) that a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct; (4) that the activity it seeks to restrain is actionable, that its right to relief is clear, and that the wrong is manifest, or, in other words, must show that it is likely to prevail on the merits; (5) that the injunction it seeks is reasonably suited to abate the offending activity; and, (6) that a preliminary injunction will not adversely affect the public interest. *Warehime v. Warehime*, 580 Pa. 201, 209-10, 860 A.2d 41, 46-47 (2004).

Plaintiffs have not demonstrated to the court that they are likely to prevail on the merits. *See* Order dtd. 6/15/17 (sustaining defendant's preliminary objections and dismissing plaintiffs' complaint).

DELAWARE RIVERKEEPER NETWORK, ET AL., Plaintiffs, v. SUNOCO PIPELINE L.P., Defendant.	IN THE COURT OF COMMON PLEAS CHESTER COUNTY, PENNSYLVANIA NO. 2017-05040-MJ CIVIL ACTION – LAW

Mark L. Freed, Esquire, Counsel for Plaintiffs
Robert L. Byer, Esquire, George Kroculick, Esquire, and George Zumbano, Esquire, Counsel for Defendant

OPINION
Pursuant to Pa. R.A.P. 1925(a)

Appellants, Delaware Riverkeeper Network, Maya van Rossum, Thomas Casey and Eric Grote, filed a timely appeal from the court's Order of June 15, 2017 sustaining, in part, the preliminary objections of Sunoco Pipeline, L.P and dismissing Appellants' complaint. On July 12, 2017, the court ordered Appellants to file a Concise Statement of the Errors Complained of on Appeal. They did so.

After review, the court believes that the appealed Order with footnote, adequately explains the court's reasoning for its decision and addresses the main errors identified in the Concise Statement filed by the Appellants.

BY THE COURT:

M. Tunnell

Mark L. Tunnell, J.

AD 12
AD073

Exhibit D

Sunoco Mariner East II - Pipeline Construction Inadvertent Returns - Waters of the Commonwealth				
Date	**County**	**Location**	**Description**	**Status**
		Southwest Region		
5/4/2017	Westmoreland	40.441, -79363	150 Gallons; UNT Boatyard Run (CWF) and W-P14; turbid Water ~600 feet in channel	NOV issued 7/28/2017
5/12/2017	Westmoreland	40.44213, -79.34305	300 gallons, 90'x50' area - Wetland W-045	NOV issued 7/28/2017
5/13/2017	Indiana	40 27'10.16"; -79 13'30.34"	130 gallons bentonite clay; 20 gallons to UNT Blacklick Creek, no deposition; 200'x5'in W J53 and 2'x300' plume in S-J58	NOV issued 7/28/2017
5/16/2017	Westmoreland	40 26' 17.48", -79 26' 16.11"	30 gallons 2' x 40' area none to lake	IR stopped
5/23/2017	Westmoreland	40 26' 17.48", -79 26' 16.11"	60 gallons: 30 gal, 20, gal, 10 gal to 3 upland areas (2' x 45', 2' x 30', 2'x 40'	IR stopped
5/23/2017	Westmoreland	40.289, -79.668	20,000 gallons drilling mud, 1,000 to stream and rest in upland or ephemeral channel; Ephemeral Stream (TSF), L Sewickley Creek S-229, 250' x 2' unknown depth	NOV issued 7/28/2017

Date	County	Location	Description	Status
5/23/2017	Westmoreland	40.289, -79.668	Part of 20,000 gallons above to a 60' x40' farm field, 4-10" deep	NOV issued 7/28/2017
5/23/2017	Westmoreland	40.289, -79.668	Part of 20,000 gallons above to a 100' x 20' farm field, 0.5 -3" deep	NOV issued 7/28/2017
5/24/2017	Westmoreland	40.44213, -79.34305	525 gallons; 300 Gallons to wetland W-045 75'x100', 225 gallons to Spruce Run S-061 600'x10'	NOV issued 7/28/2017
5/25/2017	Westmoreland	40.439, -79.437	25 gallons, 1 pint to Loyahanna Lake; Upland 7' x 50', lake 3' diameter circle	COA Executed December 15, 2017
5/26/2017	Allegheny	40.223140, -79.893688	50 gallons in a 15' x 30' upland area	IR stopped
5/26/2017	Westmoreland	40 26' 21.13", -79 26' 3.92"	50 Gallons drilling mud to lake, 5 gallons to upland; Loyalhanna Lake S-P27 2 locations ~8'x600', 1 upland 2'x25'	COA Executed December 15, 2017
5/28/2017	Westmoreland	40 26' 2.44", -79 26' 11.72"	50 gallons to upland area (25' x 50'), 20 gallons to Loyalhanna Lake (5' x25')	COA Executed December 15, 2017
5/31/2017	Westmoreland	40 26' 19.19", -79 26' 14.20"	8 Gallons to the Lake; Loyalhanna Lake-no flow path seen leading into the lake or a release point in the water, 20' x 12' area	COA Executed December 15, 2017

Date	County	Location	Description	Status
5/31/2017	Allegheny	40.223, -79.893	2000 gallons total, 1500 gallons into the creek and 500 gallons contained in upland; 2 stream (UNT Sunfish Run-WWF) within S-150 upstream of joining S-149; S-149 under travel lane bridge; 1 upland (east of S-150) 50'x20' area; deposits in stream isolated to areas where material was released, turbid water 0.3 miles south to Sunnyside Hollow Road	NOV issued 7/28/2017
6/1/2017	Westmoreland	40.26' 17.48", -79 26'16.11"	10 gal upland, 4 gallon near lake, <1 gallon into lake; upland and lake (multiple locations on the hillside)	COA Executed December 15, 2017
6/2/2017	Washington	40.231, -79.998	200 gallons to upland areas. 1500 gallons of diluted mixture of water and drilling fluid to stream. Turbid water for ~.25 miles.; 3 upland locations. The material from the third location flowed directly into a culvert and into an UNT of Froman Run.	NOV issued 7/28/2017
6/6/2017	Westmoreland		Pump ran out of fuel that was maintaining an IR, 25 gallons to creek; Small amount made it to the storm drain (<1 pint)	COA Executed December 15, 2017

Date	County	Location	Description	Status
6/6/2017	Washington	40.2352778, -80.103333	At start of HDD, noticed streambed material beginning to push up through two spring seeps, about 10' apart and at the toe of the bank of the stream at the NW edge. ~ 5 gallons in stream-no bentonite; S129 UNT Little Chartiers Creek (HQ-WWF), 100 sq. ft.	NOV issued 7/28/2017
6/6/2017	Westmoreland	40.441, -79.363	Unknown quantity bentonite mixture, drilling over, cleanup started, unsure if fish were impacted-about 350 gallons to stream; UNT Boatyard Run (CWF) S-P20 (350 gal); turbid water and mud deposits for ~800' within the channel	NOV issued 7/28/2017
6/8/2017	Washington	40.23055, -79.99622	20 gallons diluted drill water (minor amount made it to creek); Stream S27 (Froman Run)	NOV issued 7/28/2017
6/10/2017	Washington		40 gallons to upland	IR stopped
6/11/2017	Washington	40.23052, -79.99665	100 gallons to 125 sq ft upland area	NOV issued 7/28/2017
6/11/2017	Washington	40.23055, -79.99622	30 gallons of diluted drill mud and water; Stream S27 (Froman Run) about 400' for 3'-5' wide	NOV issued 7/28/2017
6/12/2017	Washington	40.2298, -79.97295	1000-1500 gallons in upland area ~858 sq ft	Investigation Ongoing.
6/23/2017	Washington		Bentonite into stream	NOV issued 7/28/2017

Date	County	Location	Description	Status
6/24/2017	Washington	40.235123, -80.102816	1000 gallons bentonite; 2 UNTs Little Chartiers Creek. Streams 280 and 129; 280 is about 10 feet from original IR and 129 IR came up in containment area; ~225' stream 280 impacted pump around and cleanup	NOV issued 7/28/2017
6/29/2017	Westmoreland	40.441, -79.363	410 Gallons Bentonite clay and Water; 60 gallons to upland and 350 to waterbody; UNT Boatyard Run for about 1200' 2 locations in the stream	NOV issued 7/28/2017
7/16/2017	Westmoreland	40°26' 16.22", -79° 26' 11.35"	320 gallons; 20 to Loyalhanna Lake (12' x 30'), 300 to upland	COA Executed December 15, 2017
7/17/2017	Westmoreland	40°26' 16.22", -79°26' 11.35"	800 gallons, 80 into Loyalhanna Lake (12' x 60'), 720 in upland	COA Executed December 15, 2017
7/18/2017	Washington		5000-60000 gallons to upland area 250' west of Monongahela River	IR Stopped
9/5/2017	Westmoreland	40.4172, -79.607	500-700 gallons bentoite clay and water to an UNT to Turtle Creek and Turtle Creek	NOV issued 9/26/2017
9/22/2017	Westmoreland	40°26'42.5", -79°18'03.9"	2700 gallons to Wetland W-N28, 30'x50' area	NOV issued 1/25/2018
9/27/2017	Indiana	40°27'03.3", -79°12'38.9"	Unknown quantities to UNT Weirs Run, Weirs Run, and at least 1000' of Blacklick Creek	NOV issued 1/25/2018

Date	County	Location	Description	Status
10/3/2017	Cambria	40.414, -78.567	less than 50 gallons drilling fluid to Wetland M-59	NOV issued 1/25/2018
10/10/2017	Cambria	40.414, -78.567	about 250 gallons into existing containment area	NOV issued 1/25/2018
10/11/2017	Cambria	40.414, -78.567	less than 50 gallons drilling fluid to Wetland M-59	NOV issued 1/25/2018
12/13/2017	Cambria	40.437155, -78.763529	2 Gallons into UNT Stewart Run	NOV issued 1/25/2018
Southcentral Region				
5/6/2017	Cumberland	40.228757, -77.132769	160,000 gallons.; wetland WL-130 (EV)	IR stopped. COA 6/27/17.
5/10/2017	Lancaster	40.280, -76.195	wetland J54 and stream J59	IR stopped. Remediation reported as complete.
5/13/2017	Lancaster	40.280833, -76.210278	25 to 30 gallons; west side of wetlands K-32	IR stopped.
5/19/2017	Cumberland	40.228703, -77.141032	50 gallons; wetland 32 (ER Call); wetland I32 (initial report); wetland W-I21 (interim report 1); wetland W-I32 (interim report 2)	IR stopped. COA 6/27/17.
5/26/2017	Lancaster	40.280, -76.195	30 to 50 gallons; stream J59	IR stopped. Remediation reported as complete.
5/31/2017	Berks	40.277, -76.020	500 gallons; Pond-B7 (retention pond)	IR stopped.

Date	County	Location	Description	Status
6/3/2017	Cumberland	40.228603, -77.140614	~150 gallons (initial) 450 gallons (total); WL-I32 (initial report)	IR stopped. COA 6/27/17.
6/9/2017	Lancaster	40.281, -76.209	~20 gallons on 6/9. ; wetland W-K32	IR stopped.
6/12/2017	Lancaster	40.280787, -76.210161	~25 gallons initial on 6/12--a total of 5500 recovered in total.; Wetland W-K32	IR stopped.
6/20/2017	Berks	40 16' 38" - 76 1'12"	~20 gallons in culvert, 10-20 gallons in pond B7	IR stopped.
6/23/2017	Lebanon	40 17' 7",-76 14' 17"	~300 gallons; Wetland H-13	IR stopped.
6/26/2017	Blair	40.34, -78.269	2,000 gallons; stream S-M33 (HQ-CWF)	IR stopped.
6/28/2017	Blair	40.409, -78.442	~100 gallons; Wetland M-79 (PFO)	IR stopped. NOV issued 10-26-2017
7/1/2017	Blair	2800 ft east of Mill Road Duncansville, Blair TWP. 40.409, -78.442	50 gal and then 250 gal ; PFO and possible WT trib	IR stopped.
7/6/2017	Huntingdon	40.342, -77.852	~300 gallons; Stream L28	IR stopped
7/11/2017	Cumberland	I-81 drill. 40.134352, -77.75766	none stated	IR stopped. COA 6/27/17.

Date	County	Location	Description	Status
7/13/2017	Cumberland	Newville	none stated; discharge of hydrotest water through an approved outlet, but at the 'wrong location'.	Additional information provided by SPLP indicates that discharge of hydrotest water occurred through a BMP in an upland area and that the quality of the water was in compliance with the requirements of the PAG-10.
7/19/2017	Lancaster	~1000 FT W of S Peartown Rd. 40.28250, -76.15806	250 gallons; Wetland A-56	IR stopped.
8/17/2017	Dauphin	Susquehanna River Drill. 40° 11' 57" N, 76° 47' 48"W	495 gallons; Susquehanna River	IR was not active at the time of discovery. It is suspected to have occurred on 7/19/2017--when approximately 1,000 gallons of mud was reportedly lost during drilling operations. Low visibility in the river reportedly prevented previous detection of IR.
8/24/2017	Dauphin	Susquehanna River Drill. 40° 11' 57" N, 76° 47' 48"W	50 gallons; Susquehanna River	IR stopped. NOV issued 8/30/2017. Clean-up completed. DEP approved HDD restart on 9/12/2017.

Date	County	Location	Description	Status
8/31/2017	Blair	40° 24' 33" N; 78° 26' 36" W	50-75 gallons into Wetland W-M79	IR stopped. Containment/clean-up in progress. NOV issued 10/26/2017.
8/31/2017	Lebanon	40.29063°, -76.428132°	50 gallons to Snitz Creek	IR stopped. Containment/clean-up completed. DEP approved HDD restart on 9/14/2017. NOV issued 10/27/2017.
9/5/2017	Blair	roadshoulder in the vicinity of 2156 Reservoir Road, Hollidaysburg	20-30 gallons to wetland BB58	IR stopped. Containment/clean-up in progress. NOV issued 10/26/2017.
9/8/2017	Dauphin	40° 15' 5" N, 76° 40' 6" W	250-300 gallons, impacting wetland C26	IR stopped. Containment/clean-up in progress. NOV issued 10/26/2017.
9/15/2017	Dauphin	Susquehanna River Drill. 40° 14' 55.7" N; 76° 47' 48" W	350 gallons to the Susquehanna River	IR stopped. Containment/clean-up in progress. NOV issued 9/18/2017.
9/20/2017	Lebanon	40.29063°, -76.428132°	~1 gallon to Snitz Creek	IR stopped. Containment/clean-up in progress. NOV issued 10/27/2017.

Date	County	Location	Description	Status
9/27/2017	Cumberland	40° 14' 41" N, 77° 19' 39" W	500 gallons to wetland J35	IR stopped. Containment/clean-up in progress. NOV issued 10/26/2017.
9/28/2017	Cumberland	I-81 drill. 40.134352, -77.75766	~2.5 gallons to wetland I30	COA 6/27/17
10/10/2017	Huntingdon	40.321145,-77.789497	5,000-10,000 to wetland K69	IR stopped. Containment/clean-up in progress. NOV issued 10/26/2017.
11/10/2017	Dauphin	40.205643, -76.769297	~300 gallons to wetland W118	IR Stopped. Containment/clean-up in progress. NOV issued 11/14/2017.
11/11/2017	Berks	40.1886, -75.891	unquantified release to UNT to Hay Creek (S-Q90)	IR Stopped. Containment/clean-up in progress. NOV issued 11/15/2017.
11/20/2017	Blair	40.441, -78.331	~10 gallon release to an UNT to Frankstown Branch Juniata River (S-BB92) and associated wetland (Wetland Q60)	IR Stopped. Containment/clean-up in progress. NOV issued 11/22/2017.
12/5/2017	Dauphin	40° 15' 5" N, 76° 40' 6" W	~200 gallon release into wetland C26 during the punch out of the pilot hole.	IR stopped. Containment/clean-up in progress.

Date	County	Location	Description	Status
12/20/2017	Lebanon	40.254, -76.592	~50 gallon release in an upland, which ran downslope into wetland A30.	IR stopped. Containment/clean-up in progress. NOV issued 12/22/2017
12/20/2017	Huntingdon	40.369, -78.066	25-30 gallons to an upland area, which ran downslope into Raystown Lake.	IR stopped. Containment/clean-up in progress. NOV issued 12/22/2017
12/29/2017	Lebanon	40.254, -76.592	~15 gallon release to wetland A30--within pre-existing containment (see 12/20/17 event at same location) and 3 gallon release to wetland A30 outside of existing containment.	IR stopped. Containment/clean-up in progress.
2/27/2018	Cumberland	40.2447, -77.3306	~100 gallon release to stream S-J41 (UNT to Locust Creek--WWF) and wetland J35	IR stopped. Containment/clean-up in progress.
3/15/2018	Lebanon	40.2904, -76.4278	~50 gallon release to stream S-A17 (Snitz Creek--TSF)	Drilling stopped. Containment/clean-up in progress.
3/15/20108	Blair	40.4433, -78.3254	~200 gallon release into wetlan L54	Drilling stopped. Containment/clean-up in progress.

Date	County	Location	Description	Status
			Southeast Region	
5/3/2017	Delaware	Brookhaven Borough, Delaware County – at edge of Chester Creek Rd. and onto sidewalk – IR went into storm drain and then Chester Creek	500 gallons of drilling fluid to Chester Creek; lost return of 20,000 gallons of drill fluid. IR identified 5.09 PM.	NOV issued 5/9/17.
5/4/2017	Delaware	Brookhaven Borough, Delaware County – upland lawn area of vacant lot	50 gallons release of drilling fluids into uplands; no fluids reached Chester Creek. IR identified 3.10 PM.	IR stopped.
5/10/2017	Delaware	Brookhaven Borough, Delaware County – within Chester Creek	75 gallons release of drilling fluids emerging in 3 locations in Creek (25 gallons in each location). IR identified at 12.15 PM.	IR stopped.
5/17/2017	Delaware	Brookhaven Borough, Delaware County – within Chester Creek	5 gallons total release of drilling fluids in 2 locations in Chester Creek. IR identified at 1.45 PM.	IR stopped.
5/18/2017	Delaware	Brookhaven Borough, Delaware County – within Chester Creek	25 gallons release of drilling fluids in 1 location in Chester Creek. IR identified at 12.40 PM.	IR stopped.
5/19/2017	Delaware	Brookhaven Borough, Delaware County – within Chester Creek	200 gallons total release of drilling fluids in 2 locations in Chester Creek. IR identified at 12.20 PM.	IR stopped.

Date	County	Location	Description	Status
5/27/2017	Delaware	Brookhaven Borough, Delaware County – within Chester Creek	25 gallons release of drilling fluids in 1 location in Chester Creek	IR stopped.
6/7/2017	Chester	East Goshen Township, Chester County UPLANDS ONLY	100 gallons of drilling solution in two locations. One emergence was outside of the LOD. The second was within no disturbance LOD.	IR stopped.
6/17/2017	Chester	Upper Uwchlan Township, Chester County, Hickory Park	5 gallons of drilling solution into tributary to Marsh Creek	IR stopped.
6/24/2017	Chester	Upper Uwchlan Township, Chester County	100 gallons of drilling solution into wetland and stream.	IR stopped.
7/17/2017	Delaware	Middletown Township, Delaware County	1500 gallons of drilling solution into UNT to Chester Creek	NOV issued 7/20/17.
8/29/2017	Chester	Upper Uwchlan	50 gallons of drilling solution into wetland and stream.	IR Stopped /Under investigation. NOV issued on 9/8/17.
9/2/2017	Delaware	Middletown Township, Delaware County	50 gallons of drilling solution into UNT of Chester Creek	IR Stopped/Under Investigation. NOV issued on 9/12/17.
9/8/2017	Chester	East Goshen Township, Chester County UPLANDS ONLY	40 gallons of drilling solution to upland area.	IR Stopped. Solution cleaned up

Date	County	Location	Description	Status
9/9/2017	Chester	Upper Uwchlan	.5 gallon of drilling solution to Marsh Creek	IR Stopped. Solution lost downstream.
10/5/2017	Chester	W.Whiteland Township, UPLANDS ONLY	50-75 gals to upland area	IR Stopped. Solution Cleaned up
10/5/2017	Chester	East Goshen Township, Chester County UPLANDS ONLY	500 gallons to uplands area	IR Stopped. Solution cleaned up
10/6/2017	Delaware	Middletown Township UPLANDS ONLY	50 gallons of drilling solution to upland areas	IR Stopped. Solution Cleaned up
10/7/2017	Chester	East Goshen Township, Chester County UPLANDS ONLY	600 gallons to upland area	IR Stopped. Solution Cleaned Up
10/10/2017	Chester	East Goshen Township, Chester County UPLANDS ONLY	50 gallons of drilling solution to upland areas	IR Stopped. Solution Cleaned Up
10/10/2017	Chester	East Goshen Township, Chester County UPLANDS ONLY	20 gallons of drilling solution to upland areas	IR Stopped. Solution Cleaned Up
10/13/2017	Delaware	Edgmont Township, UPLANDS ONLY	50 gallons of drilling solution to upland areas	IR Stopped. Solution Cleaned up

Date	County	Location	Description	Status
10/18/2017	Delaware	Edgmont Township, UPLANDS ONLY	1 gallons of drilling solution to upland areas	IR Stopped. Solution Cleaned up
10/20/2017	Delaware	Middletown Township UPLANDS ONLY	30 gallons of drilling solution to upland areas	IR Stopped. Solution Cleaned up DEP Inspected
10/24/2017	Delaware	Edgmont Township, UPLANDS ONLY	1 gallons of drilling solution to upland areas	IR Stopped. Solution Cleaned up
10/25/2017	Chester	East Goshen Township, Chester County	500 gallons in total, 490 gal to uplands, ~ < 10 gal to storm drain street inlet	IR Stopped. Solution Cleaned Up. DEP Inspected. NOV Issued 11/03/17.
10/25/2017	Delaware	Edgmont Township, Delware County UPLANDS ONLY	15 gallons to upland area	IR Stopped. Solution Cleaned Up
10/27/2017	Delaware	Middletown Township Delaware County	1 gallon of drilling soloution to Waters	IR stopped, solution cleaned up, DEP inspected, work suspended. NOV Issued 11/03/17, work suspended pending DEP approval
11/11/2017	Chester	West Whiteland Township, Chester County UPLANDS ONLY	Unknown amount to uplands area	IR stopped, Solution cleaned up, DEP inspected, work suspended pending DEP approval. No initial report, no verbal notice, NOV Issued 11/16/17

Date	County	Location	Description	Status
12/15/2017	Delaware	Middletown Township Delaware County	40 gallons of drilling solution to UNT of Chester Creek	Mud pump inoperable so solution overwhelmed containment area entering creek; DEP inspected and work suspended pending DEP approval; late initial report; NOV to be issued

Exhibit E

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

In the matter of:

Sunoco Pipeline, L.P. 535 Fritztown Road Sinking Springs, PA 19608	:	Violations of The Clean Streams Law and DEP Chapter 93, 102, and 105 of Title 25 of the Pennsylvania Code.
	:	
	:	PA Pipeline Project—Mariner East II
	:	E&S Permit Nos. ESG0300015002; ESG0500015001; ESG0100015001
	:	
	:	WO&E Permit Nos.; E02-1718; E06-701; E07-459; E11-352; E15-862; E21-449; E22-619; E23-524; E31-234; E32-508; E34-136; E36-945; E38-194; E50-258; E63-674; E65-973; E67-920
	:	

ADMINISTRATIVE ORDER

Now this 3rd day of January, 2018, the Commonwealth of Pennsylvania, Department of Environmental Protection ("Department"), has found and determined the following facts and findings and by this Administrative Order imposes the specified performance obligations upon Sunoco Pipeline, L.P. ("Sunoco").

Findings

Parties

A. The Department is the agency with the duty and authority to administer and enforce The Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1-691.1001 ("Clean Streams Law"); the Dam Safety and Encroachment Act, the Act of November 26, 1978 P.L. 1375, as amended, 32 P.S. §§ 693.1 et seq. ("Dam Safety and Encroachment Act"); Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S.

§ 510-17 ("Administrative Code"); and the rules and regulations promulgated thereunder ("rules and regulations").

B. Sunoco Pipeline, L.P. ("Sunoco") is a foreign limited partnership doing business in Pennsylvania and maintains a mailing address of 535 Fritztown Road, Sinking Springs, PA 19608. Sunoco Logistics Partners Operations GP LLC is the general partner of Sunoco Pipeline, L.P. Joseph Colella is Executive Vice President for Sunoco Logistics Partners Operations GP LLC. Mr. Colella has been granted authority by Sunoco Logistics Partners Operations GP LLC to sign documents for Sunoco on behalf of the General Partner.

C. Sunoco owns and operates numerous pipelines in Pennsylvania used to transport petroleum and natural gas products. Sunoco has undertaken an effort to expand existing transportation systems for natural gas liquids in Pennsylvania, which is collectively referred to as the Pennsylvania Pipeline Project – Mariner East II ("PPP-ME2"). As part of PPP-ME2, Sunoco is conducting pipeline installation activities in seventeen counties in Pennsylvania, including Berks, Blair, Cumberland, Dauphin, Huntingdon, Perry, and Washington Counties.

Permits

D. To construct PPP-ME2 through Pennsylvania, Sunoco obtained the following permits from the Department:

a. Three (3) Erosion and Sediment Control Permits under 25 Pa. Code Chapter 102, Permit Numbers ESG0300015002, ESG0500015001, and ESG0100015001 (Chapter 102 Permits) and;

b. Seventeen (17) Water Obstructions and Encroachment ("WOE") Permits under 25 Pa. Code Chapter 105, Permit Numbers E02-1718, E06-701, E07-459, E11-352, E15-862, E21-449, E22-619, E23-524, E31-234, E32-508, E34-136, E36-

945, E38-194, E50-258, E63-674, E65-973, and E67-920 (Chapter 105 Permits). Sunoco obtained one Chapter 105 Permit for each of the seventeen (17) counties where the Department permitted PPP-ME2 activities to occur.

E. Sunoco obtained Erosion and Sediment Control Permit, Permit Number ESG0300015002, and Water Obstructions and Encroachment Permit, Permit Number E06-701 to construct PPP-ME2 through Berks County.

F. Sunoco obtained Erosion and Sediment Control Permit, Permit Number ESG0300015002, and Water Obstruction and Encroachment Permit, Permit Number E07-459 to construct PPP-ME2 through Blair County.

G. Sunoco obtained Erosion and Sediment Control Permit, Permit Number ESG0300015002, and Water Obstruction and Encroachment Permit, Permit Number E21-449 to construct PPP-ME2 through Cumberland County.

H. Sunoco obtained Erosion and Sediment Control Permit, Permit Number ESG0300015002, and Water Obstruction and Encroachment Permit, Permit Number E22-619 to construct PPP-ME2 through Dauphin County.

I. Sunoco obtained Erosion and Sediment Control Permit, Permit Number ESG0300015002, and Water Obstruction and Encroachment Permit, Permit Number E31-234 to construct PPP-ME2 through Huntingdon County.

J. Sunoco obtained Erosion and Sediment Control Permit, Permit Number ESG0300015002, and Water Obstruction and Encroachment Permit, Permit Number E50-258 to construct PPP-ME2 through Perry County.

K. Sunoco obtained Erosion and Sediment Control Permit, Permit Number ESG0500015001, and Water Obstruction and Encroachment Permit, Permit Number E63-674 to construct PPP-ME2 through Washington County.

L. Horizontal Directional Drilling ("HDD") shall be defined within, as any steerable trenchless technology that controls the direction and deviation to a predetermined underground target or location.

Sites

M. The work area for PPP-ME2 in Berks County, Pennsylvania includes the crossing of an unnamed tributary ("UNT") to Hay Creek (S-Q90) in New Morgan Borough, Berks County ("Berks HDD Site 1"), the crossing of an unnamed tributary ("UNT") to Cacoosing Creek (S-C33) in Spring Township, Berks County ("Berks HDD Site 2"), the crossing of an UNT to Allegheny Creek (S-B30) in Brecknock Township, Berks County ("Berks HDD Site 3"), and a crossing of Wetland W35 in New Morgan Borough and Caernarvon Township, Berks County ("Berks HDD Site 4"). Berks HDD Site 1, Berks HDD Site 2, Berks HDD Site 3, and Berks HDD Site 4 are collectively referred to herein as ("Berks HDD Sites 1-4").

N. The work area for PPP-ME2 in Blair County, Pennsylvania includes the crossing of Clover Creek (S-L58) and Wetland M23 in Woodbury Township, Blair County ("Blair HDD Site").

O. The work area for PPP-ME2 in Cumberland County, Pennsylvania includes an upland area east of North Locust Point Road in Silver Spring Township, Cumberland County ("Cumberland HDD Site").

P. The work area for PPP-ME2 in Dauphin County, Pennsylvania includes the crossing of Wetland C28 in Lower Swatara Township, Dauphin County ("Dauphin HDD Site").

Q. The work area for PPP-ME2 in Huntingdon County, Pennsylvania includes HDD No. PA-HU-0110.0000-SR-16, located east of Shade Valley Road (State Route 35) in Tell Township, Huntingdon County ("Huntingdon HDD Site").

R. The work area for PPP-ME2 in Perry County, Pennsylvania includes the crossing of Shaeffer Run in Toboyne Township, Perry County ("Perry Bridge Site").

S. The work area for PPP-ME2 in Washington County, Pennsylvania includes the crossing of an UNT to Mingo Creek (S140) in Nottingham Township, Washington County ("Washington HDD Site").

T. On November 11, 2017, the Department received notice of a release of sediment to the UNT to Hay Creek (S-Q90) at Berks HDD Site 1.

U. On November 13 and 14, 2017, the Berks County Conservation District ("BCCD") conducted inspections of the Berks HDD Site 1 and documented that an inadvertent return ("IR") of drilling fluids had occurred within an UNT to Hay Creek (S-Q90), a water of the Commonwealth, as a result of HDD activities at this location. Neither Erosion and Sediment Control Permit, Permit Number ESG0300015002, nor Water Obstructions and Encroachment Permit, Permit Number E06-701 authorized Sunoco to conduct HDD activities at this site.

V. The designated use for the segment of Hay Creek referenced in this Order is listed in 25 Pa. Code § 93.9f as Exceptional Value Waters ("EV"), Migratory Fishes ("MF").

W. Hay Creek is classified as a Class A wild trout water by the Fish and Boat Commission. 25 Pa. Code § 93.1. *See* http://www.fishandboat.com/Fish/PennsylvaniaFishes/Trout/Documents/classa.pdf

X. On November 15 and 16, 2017, the Department issued Sunoco a notice of violation ("NOV"), DEP file number NOV 06 17 102, for Berks HDD Site 1.

Y. On November 22, 2017, Sunoco submitted a response to the NOV referenced in Paragraph X.., above, containing the following information associated with Berks HDD Site 1:

a. Pipeline installation activities were in operation between November 4 and November 11, 2017;

b. The pipeline installation activities experienced losses of circulation of drilling fluid on November 8, 9, and 10, 2017;

c. A pollution event to an UNT Hay Creek, referenced in Paragraph R., above, had occurred on November 10, 2017;

d. The cleanup of the pollution event within the UNT to Hay Creek was completed on November 18, 2017; and

e. Sunoco provided landowner notification (titled Mariner East 2-Pennsylvania Pipeline Project Horizontal Directional Drilling Construction Notification and Private Water Supply/Well Sampling Offer) via certified mail dated August 24, 2017 to five (5) landowners within 450' of the HDD alignment.

Z. On November 17, 2017, the BCCD conducted an inspection of pipeline construction activities in the location of a UNT to Cacoosing Creek (S-C33) at Berks HDD Site 2.

AA. During the inspection referenced in Paragraph Z., BCCD documented that pipeline installation activities were underway at the Berks HDD Site 2 utilizing HDD construction methods. Neither Erosion and Sediment Control Permit, Permit Number ESG0300015002, nor Water Obstructions and Encroachment Permit, Permit Number E06-701 authorized Sunoco to conduct HDD activities at this site.

BB. The receiving waters for discharges from the Berks HDD Site 2 is a UNT to Cacoosing Creek (S-C33). The designated use for the segment of Cacoosing Creek referenced in this Order is listed in 25 Pa. Code § 93.9f as Cold Water Fishes ("CWF"), Migratory Fishes ("MF").

CC. Cacoosing Creek is classified as a Class A wild trout water by the Fish and Boat Commission. 25 Pa. Code § 93.1. *See* http://www.fishandboat.com/Fish/PennsylvaniaFishes/Trout/Documents/classa.pdf.

DD. The Department subsequently learned that pipeline installation activities at the Berks HDD Site 2 were in operation between September 25, 2017 and November 14, 2017. Prior to initiating construction, Sunoco provided landowner notification (titled Mariner East 2-Pennsylvania Pipeline Project Horizontal Directional Drilling Construction Notification and Private Water Supply/Well Sampling Offer) via certified mail dated August 23, 2017, to ten (10) landowners within 450' of the unauthorized HDD alignment.

EE. On November 21, 2017, the Department issued Sunoco a NOV, DEP file number NOV 06 17 103, for Berks HDD Site 2.

FF. On November 28, 2017, Sunoco submitted a written response to the DEP File No. NOV 06 17 103. Within this response, Sunoco identified seven locations where pipeline crossings of waters of the Commonwealth were permitted to be open cuts but were field changed to a trenchless construction method without first obtaining a permit modification or any other authorization from the Department. The seven locations Sunoco described in its response included the Berks HDD Sites 1-4, the Blair HDD Site, the Dauphin HDD Site, and the Washington HDD Site.

GG. The receiving waters for discharges from the Berks HDD Site 3 is an UNT to Allegheny Creek (S-B30). The designated use for the segment of Allegheny Creek referenced in this Order is listed in 25 Pa. Code § 93.9f as CWF. Neither Erosion and Sediment Control Permit, Permit Number ESG0300015002, nor Water Obstructions and Encroachment Permit, Permit Number E06-701 authorized Sunoco to conduct HDD activities at this site.

HH. Allegheny Creek is classified as a wild trout (natural reproduction) water by the Fish and Boat Commission. See http://www.fishandboat.com/Fish/PennsylvaniaFishes/Trout/Documents/trout_repro.pdf

II. Sunoco conducted its unauthorized pipeline installation activities at Berks HDD Site 3 between September 20, 2017 and November 11, 2017.

JJ. The receiving water for discharges from the Berks HDD Site 4 is wetland W35 in New Morgan Borough and Caernarvon Township, Berks County. Neither Erosion and Sediment Control Permit, Permit Number ESG0300015002, nor Water Obstructions and Encroachment Permit, Permit Number E06-701 authorized Sunoco to conduct HDD activities at this site.

KK. Sunoco conducted its unauthorized pipeline installation activities at Berks HDD Site 4 between June 28, 2017 and July 8, 2017.

LL. The receiving waters for discharges from the Blair HDD Site is Clover Creek (S-L58). The designated use for the segment of Clover Creek referenced in this Order is listed in 25 Pa. Code § 93.9n as High-Quality Waters ("HQ"), MF. Neither Erosion and Sediment Control Permit, Permit Number ESG0300015002, nor Water Obstruction and Encroachment Permit, Permit Number E07-459 authorized Sunoco to conduct HDD activities at this site.

MM. Clover Creek is classified as a Class A wild trout water by the Fish and Boat Commission. See http://www.fishandboat.com/Fish/PennsylvaniaFishes/Trout/Documents/classa.pdf.

NN. Sunoco conducted its unauthorized pipeline installation activities at the Blair HDD Site between June 4, 2017 and October 3, 2017.

OO. The receiving waters for discharges from the Washington HDD Site is an UNT to Mingo Creek. The designated use for the segment of Mingo Creek referenced in this Order is listed in 25 Pa. Code § 93.9v as HQ, Trout Stocking ("TSF"). Neither Erosion and Sediment Control Permit, Permit Number ESG0500015001, nor Water Obstruction and Encroachment Permit, Permit Number E63-674 authorized Sunoco to conduct HDD activities at this site.

PP. Sunoco conducted its unauthorized pipeline installation activities at the Washington HDD Site between July 7, 2017 and July 15, 2017.

QQ. The receiving water for discharges from the Dauphin HDD Site is wetland C28 in Lower Swatara Township, Dauphin County. Neither Erosion and Sediment Control Permit, Permit Number ESG0300015002, nor Water Obstruction and Encroachment Permit, Permit Number E22-619 authorized Sunoco to conduct HDD activities at this site.

RR. Sunoco conducted its unauthorized pipeline installation activities at the Dauphin HDD Site between November 8, 2017 and November 20, 2017.

SS. On December 5, 2017, the Department responded to a complaint that a stream crossing was installed at Perry Bridge Site in Toboyne Township, Perry County without a permit. During the inspection, the Department found that an "air bridge" was installed over an existing bridge that had previously been deemed unsafe by county inspectors. The Department later

identified that Sunoco's contractor (Michels Corporation) had installed the bridge on October 28, 2017 without first obtaining a Chapter 105 permit from the Department.

TT. The receiving waters for discharges from the Perry Bridge Site is Shaeffer Creek. The designated use for the segment of Shaeffer Creek referenced in this Order is listed in 25 Pa. Code § 93.9n as HQ, CWF.

UU. Shaeffer Creek is classified as a Class A wild trout water by the Fish and Boat Commission. See http://www.fishandboat.com/Fish/PennsylvaniaFishes/Trout/Documents/classa.pdf.

VV. On December 6, 2017, Sunoco and the Department met to further discuss Sunoco's November 28, 2017 written response to the DEP File No. NOV 06 17 103. During this meeting Sunoco stated that they were unaware of any other pipeline crossings of a water of the Commonwealth along the entire Mariner East II Project where construction had been completed and/or initiated using a crossing methodology other than what was authorized by the initial permit approval or amendment thereto, outside of those described in their November 28, 2017 written response.

WW. On December 18, 2017, the Cumberland County Conservation District ("CCCD") conducted an inspection of pipeline construction activities in the location of an upland area east of North Locust Point Road at the Cumberland HDD Site. Pipeline installation activities at Cumberland HDD Site were permitted to occur using open-cut methodology. Neither Erosion and Sediment Control Permit, Permit Number ESG0300015002, nor Water Obstruction and Encroachment Permit, Permit Number E21-449 authorized Sunoco to conduct HDD activities at this site.

XX. On December 18, 2017, Sunoco notified the Department that it had received complaints from two separate private water supply owners in the vicinity of the Cumberland HDD Site that they were experiencing cloudy water—the first complaint was filed on December 15, 2017, and the second complaint was filed on December 18, 2017.

YY. During the inspection referenced in Paragraph WW., CCCD documented that pipeline installation activities were underway at the Cumberland HDD Site utilizing HDD construction methods. The Department later determined that Sunoco field changed pipeline installation activities at the Cumberland HDD Site from open-cut to a trenchless construction method without first obtaining a permit modification or any other authorization from the Department.

ZZ. On December 7, 2017, the Huntingdon County Conservation District ("HCCD") conducted an inspection of pipeline construction activities at the Huntingdon HDD Site. During the inspection, HCCD documented an IR in an upland area near the exit pit of the 20-inch pipe. This IR was never reported to the Department, nor was an initial written report submitted to the Department as noted within Section 6.5 of the revised August 8, 2017 HDD Inadvertent Return Assessment, Preparedness, Prevention and Contingency Plan ("HDD IR PPC Plan").

AAA. On December 29, 2017, Sunoco submitted their December 2017 Monthly HDD Report to the Department. Within this report, it noted that the 20-inch pipe reference in Paragraph ZZ., above, had been completed and that the pilot hole for the 16-inch pipe was underway. Sunoco did not perform a re-evaluation of the 16-inch pipe HDD as a result of the IR that occurred during the installation of the 20-inch pipe, as required by Paragraph 3 of the August 10, 2017 Corrected Stipulated Order ("Stipulated Order") entered into by Sunoco, the Department, and the Appellants at EHB Docket No. 2017-009-L.

BBB. Pursuant to Special Condition 20.xx., of Permit E06-701 (Berks County), no work shall be done in the stream channel of a Class A wild trout fishery, between October 1 and April 1 without the prior written approval of the Pennsylvania Fish & Boat Commission's Division of Environmental Services, 450 Robinson Lane, Bellefonte, PA 16823-9620; telephone 814.359.5147.

CCC. Pursuant to Special Condition 20.ww., of Permit E50-258 (Perry County), no work shall be done in the stream channel of a Class A wild trout fishery, between October 1 and April 1 without the prior written approval of the Pennsylvania Fish & Boat Commission's Division of Environmental Services, 450 Robinson Lane, Bellefonte, PA 16823-9620; telephone 814.359.5147.

DDD. Pursuant to Special Condition 20.yy., of Permit E06-701 (Berks County), no work shall be done in the stream channel of a wild trout fishery, between October 1 and December 31 without the prior written approval of the Pennsylvania Fish & Boat Commission's Division of Environmental Services, 450 Robinson Lane, Bellefonte, PA 16823-9620; telephone 814.359.5147.

EEE. Sunoco did not obtain prior written approval from the Pennsylvania Fish & Boat Commission's Division of Environmental Services to conduct any work in the stream channel of either the UNT to Hay Creek (S-Q90) or the UNT to Cacoosing Creek (S-C33) between October 1 and April 1.

FFF. Sunoco did not obtain prior written approval from the Pennsylvania Fish & Boat Commission's Division of Environmental Services to conduct any work in the stream channel of the UNT to Allegheny Creek (S-B30) between October 1 and December 31.

Violations

GGG. The drilling fluids that comprised the IR at Berks HDD Site 1 constitute Industrial Waste. Sunoco's discharge of Industrial Waste to waters of the Commonwealth without a permit is a violation of 25 Pa. Code § 92a.1(b) and Section 301 of the Clean Streams Law, 35 P.S. § 691.301, a nuisance under Section 401 of the Clean Streams Law, 35 P.S. § 691.401, and unlawful conduct under Sections 402 and 611 of the Clean Streams Law, 35 P.S. §§ 691.402 and 691.611.

HHH. The Department did not authorize any HDDs, other trenchless technologies, or IRs at either Berks HDD Sites 1-4, Blair HDD Site, Cumberland HDD Site, Dauphin HDD Site and Washington HDD Site by permit or other authorization.

III. Sunoco's failure to obtain permit authorization prior to conducting HDD activities at Berks HDD Sites 1-4, Blair HDD Site, Dauphin HDD Site and Washington HDD Site violates Section 6(a) of the Dam Safety and Encroachments Act, 32 P.S. § 693.6(a) and 25 Pa. Code § 105.11(a), and constitutes unlawful conduct under Section 18 of the Dam Safety and Encroachments Act, 32 P.S. § 693.18 and Sections 402 and 611 of the Clean Streams Law, 35 P.S. §§ 691.402 and 691.611.

JJJ. Sunoco's failure to obtain permit authorization prior to conducting HDD activities at the Cumberland HDD Site violates Sections 402 and 611 of the Clean Streams Law, 35 P.S. §§ 691.402 and 691.611.

KKK. The Chapter 105 Permits, Chapter 102 Permits, and Paragraph 15 of the Stipulated Order entered by the Environmental Hearing Board on August 10, 2017 in the matter of *Clean Air Council, Mountain Watershed Association, and Delaware Riverkeeper Network, Inc. v. Department of Environmental Protection and Sunoco Pipeline, L.P.*, (Docket No. 2017-009-L),

require permittee(s) to follow their HDD IR PPC Plan that is part of the approved plans in the aforementioned permits to reduce, minimize, or eliminate a pollution event.

LLL. The HDD IR PPC Plan in the Chapter 102 Permits and the Chapter 105 Permits, and referenced in the Stipulated Order, contains the following requirements:

a. Immediately notify the pertinent Department Regional Office 24-hour Emergency Response Line of an IR. For the Southcentral Office, the number is 866.825.0208.

b. Notify the Department at least 24 hours prior to the beginning of each HDD, including conventional boring under waters of the Commonwealth.

c. Submit an initial report of the IR to the Department using Attachment B of the HDD IR PPC Plan.

d. Obtain an amendment to the applicable Chapter 105 and/or Chapter 102 Permit prior to deviating from the construction methodology or project design that is shown on the approved drawings.

MMM. The approved method of pipeline installation at Berks HDD Sites 1-4, Blair HDD Site, Cumberland HDD Site, Dauphin HDD Site, and Washington HDD Site was open cut. Sunoco did not obtain a permit amendment or any other authorization prior to altering the construction methodology to an HDD.

NNN. Sunoco did not immediately notify the Department to report the IR that occurred at the Huntingdon HDD Site.

OOO. Sunoco did not notify the Department at least 24 hours prior to beginning the HDD for Berks HDD Sites 1-4, Blair HDD Site, Cumberland HDD Site, Dauphin HDD Site, the Huntingdon HDD Site (16 inch line) and Washington HDD Site.

PPP. Sunoco did not submit an initial report of the IR at Berks HDD Site 1 and Huntingdon HDD Site to the Department using Attachment B of the HDD IR PPC Plan.

QQQ. Sunoco's failure to obtain permit authorization prior to installing an air bridge over Shaeffer Run at the Perry Bridge Site violates Section 6(a) of the Dam Safety and Encroachments Act, 32 P.S. § 693.6(a) and 25 Pa. Code § 105.11(a), and constitutes unlawful conduct under Section 18 of the Dam Safety and Encroachments Act, 32 P.S. § 693.18 and Sections 402 and 611 of the Clean Streams Law, 35 P.S. §§ 691.402 and 691.611.

RRR. With respect to Berks HDD Sites, 1-4, the Blair HDD Site, the Dauphin HDD Site, the Huntingdon HDD Site, and the Washington HDD Site, Sunoco's failure to comply with permit requirements listed in Paragraph NNN., OOO., and PPP., above, constitutes a violation of Section 6(a) of the Dam Safety and Encroachments Act, 32 P.S. § 693.6(a), and 25 Pa. Code § 105.11(a), and constitutes unlawful conduct under Section 18 of the Dam Safety and Encroachments Act, 32 P.S. § 693.18 and Section 611 of the Clean Streams Law, 35 P.S. § 691.611.

SSS. With respect to the Cumberland HDD Site, Sunoco's failure to comply with the requirements of Erosion and Sediment Control Permit, Permit Number ESG0300015002 constitutes unlawful conduct under Section 611 of the Clean Streams Law, 35 P.S. § 691.611.

TTT. Sunoco's conduct allowing the unauthorized discharge of Industrial Waste to waters of the Commonwealth, failing to obtain a Chapter 105 permit, failing to acknowledge permit conditions, and failing to perform work according to permit specifications, constitutes a violation of Section 301 of the Clean Streams Law, 35 P.S. § 691.301 and constitutes unlawful conduct under Section 611 of the Clean Streams Law, 35 P.S. § 691.611 and Section 18 of the Dam Safety and Encroachments Act, 32 P.S. § 693.18.

UUU. Throughout the installation of the ME II pipeline, Sunoco has produced IRs in uplands which have created a potential for pollution to waters of the Commonwealth pursuant to Section 402 of the Clean Streams Law, 35 P.S. § 691.402.

VVV. The violations described in Paragraphs GGG. through UUU., above, constitute unlawful conduct under Sections 401, 402, and 611 of the Clean Streams Law, 35 P.S. §§ 691.401, 691.402, and 691.611; a statutory nuisance under Sections 401 and 601 of the Clean Streams Law, 35 P.S. §§ 691.401 and 691.601; and subject Sunoco to civil penalty liability under Section 605 of the Clean Streams Law, § 691.605. The violations in Paragraphs III., KKK., LLL., MMM., QQQ., RRR., and TTT. constitute unlawful conduct under Section 18 of the Dam Safety and Encroachments Act, 32 P.S. § 693.18, subject Sunoco to an order under Section 20 of the Dam Safety and Encroachments Act, 32 P.S. § 693.20, and subject Sunoco to a claim of civil penalty under Section 21 of the Dam Safety and Encroachments Act, 32 P.S. § 693.21.

WWW. Sunoco's unlawful conduct set forth in Paragraphs T. through FFF., above, demonstrates a lack of ability or intention on the part of Sunoco to comply with the Clean Streams Law, the Dam Safety and Encroachments Act, and the permits issued thereunder. Suspension of the permits described in Paragraph D, above, is necessary to correct the egregious and willful violations described herein. Other enforcement procedures, penalties and remedies available to the Department under the Clean Streams Law and the Dam Safety and Encroachments Act would not be adequate to effect prompt or effective correction of the conditions or violations demonstrated by Sunoco's lack of ability or intention to comply.

NOW, THEREFORE, pursuant to Section 20 of the Dam Safety and Encroachments Act, 32 P.S. § 693.20; Sections 5, 402, and 610 of The Clean Streams Law, 35 P.S. § 691.5, 691.402,

and 691.610; and Section 1917-A of the Administrative Code, 71 P.S. § 510-17, the Department hereby ORDERS the following:

1. Except as specified herein, Sunoco shall immediately suspend all work authorized by the permits described in Paragraph D, above, until the Department provides written authorization to resume work. In no event shall Sunoco undertake any pipeline installation activities unless expressly authorized by the Department in writing.

2. Within 30 days of the effective date of this Order, Sunoco shall submit a detailed description of any method of trenchless pipeline construction techniques that have been used or will be proposed for use in the completion of PPP-ME2, other than (dry) conventional auger bore and HDD, as those methods are defined in the *'Trenchless Construction Feasibility Analysis'*, dated December 2016, that was approved as part of the Chapter 105 Permits.

3. Within 30 days of the effective date of this Order, Sunoco shall submit to the Department full documentation of each crossing of a wild trout stream, stocked and wild trout fishery, stocked trout fishery and Class A trout fishery. The documentation shall include the date(s) of the installation of the pipeline, which pipeline was installed (20 inch, 16 inch, or both), the municipality and county, the stream number, latitude and longitude, and photographic documentation of the crossing including all before, during and after photographs of the installation. Sunoco shall submit this documentation to the Department on the forms attached hereto as Exhibit 1.

4. Within 30 days of the effective date of this Order, Sunoco shall submit a report to the Department documenting any other unpermitted changes made to the method for installation of the pipeline. Permitted methods of pipeline construction are limited to open trench/open cut, and two trenchless installation methods, (dry) conventional auger bore and HDD, as those methods

are defined in the *'Trenchless Construction Feasibility Analysis'* dated December 2016 and approved as part of the Chapter 105 Permits. Such changes include, but are not limited to, a change from conventional auger bore to HDD (including, but not limited to, "flex bore"), a change from open cut to conventional auger bore or HDD (including, but not limited to, "flex bore")", and a change from HDD (including, but not limited to, "flex bore") or conventional auger bore to an open cut. The report shall document all steps taken by Sunoco to determine if unpermitted changes have occurred. The information regarding the altered crossing methodology shall be provided on the forms attached hereto as Exhibit 2.

5. Within 30 days of the effective date of this Order, Sunoco shall submit a list to the Department that documents the legal name of all drilling contractors and subcontractors who have worked, or will be working, on the PPP-ME2. The list shall include the contact information for each contractor and subcontractor including the name of the business contact person, contact telephone numbers and email addresses, the HDD number for each HDD that the contractor or subcontractor has worked on, or will be working on, the municipality and county for each HDD, and the latitudes and longitudes for each location.

6. Within 30 days of the effective date of this Order, Sunoco shall submit a report to the Department that fully explains the failures that led to the violations described in this Order and the steps Sunoco proposes to implement to ensure that those violations will not re-occur.

7. The permittee shall address all alleged impacts to private water wells in Silver Spring Township, Cumberland County, as described in Paragraph XX. to the satisfaction of the private well owners, to include replacement or restoration of the water supply and reimbursement of any costs of displacement during the period when the water supply is adversely impacted.

8. In order to demonstrate the ability and intention to comply with the Chapter 102 Permits and Chapter 105 Permits, within 30 days of the date of this Order, the permittee shall submit a comprehensive list of all pending earth disturbance and water obstruction and encroachment related activities currently authorized by the Chapter 102 Permits and Chapter 105 Permits that have yet to be completed or commenced. This list shall include for each project activity identified:

a. the specific Chapter 105 Permit and/or Chapter 102 Permit under which each of these activities are authorized;

b. the location (county, municipality, latitude and longitude) where each activity will occur;

c. the pipe installation methodology authorized by the Chapter 105 Permit and/or Chapter 102 Permit (i.e., HDD, open cut, conventional auger bore) at each location;

d. if the activity is an HDD, the associated drill identification number;

e. the specific name and contact information for the on-site contractor representative who is responsible for permit and regulatory compliance at each location;

f. the specific name and contact information for the corporate representative from Sunoco who is responsible for permit and regulatory compliance at each location;

g. the specific name and contact information for the corporate representative from Sunoco who is responsible for supervision and direction of contractors at each location;

h. the specific name and contact information for the corporate Executive Officer from Sunoco who is responsible for environmental compliance in the Commonwealth of Pennsylvania and for the installation of the Mariner II project, if such Executive Officers are different.

9. Within 30 days of the date of this Order, the permittee shall submit a detailed Operations Plan setting forth the additional measures and controls which the permittee and its contractors shall implement to ensure that all permit conditions will be followed at all times. The Department shall review the Operations Plan and will approve it only when it deems it to be sufficient and satisfactory. The Operations Plan shall also include the additional measures and controls which the permittee and its contractors shall implement to minimize inadvertent return incidents and water supply impacts to the maximum extent possible.

10. Within 10 days of the effective date of this Order, Sunoco shall backfill all areas of trench excavation, unless sufficient justification for an extension of time is provided to and approved by the Department in writing.

11. Within 10 days of the effective date of this Order, Sunoco shall remove the drill bits, reamers, and/or strings for any unpermitted HDD activities, unless Sunoco provides the Department with justification and receives Department approval in writing to leave the bit, reamer, and/or string in place for a specific PPP-ME2 HDD site.

12. Within 10 days of the effective date of this Order, Sunoco shall properly abandon all pilot holes created by the activities in Paragraph 11, unless Sunoco provides the Department with justification and receives Department approval in writing to leave a pilot hole open.

13. Within 10 days of the effective date of the Order, Sunoco shall pull the drill bit and string from the 16-inch line at the Huntingdon HDD Site and properly abandon the pilot hole.

14. Prior to conducting any further HDD activity at the Huntingdon HDD Site, Sunoco shall submit a reevaluation of the 16-inch line as required by Paragraph 3 Stipulated Order and receive Department approval of that reevalution.

15. Within 30 days of the effective date of this Order, Sunoco shall submit as-built drawings, sealed by a Professional Engineer, and a Hydrologic and Hydraulic ("H&H") analysis using the Hydrologic Engineering Center's River Analysis System ("HEC-RAS"), sealed by the licensed Professional Engineer who prepared the analysis, for the air bridge at the Perry Bridge Site. The H&H analysis shall show the calculations performed to determine the design and 100-year frequency flood discharges at the Perry Bridge Site. The H&H analysis must clearly demonstrate the difference in hydraulic capacity, stability and flood water surface elevations prior to the placement of the air bridge and with the air bridge in place and include a backwater analysis of both conditions.

a. If the H&H analysis demonstrates that the air bridge fails to adequately protect the health, safety, welfare and property of the people, natural resources and the environment, then within ten (10) days of receipt of such a determination by the Department in writing, Sunoco shall either remove the air bridge, or submit an application to the Department for issuance of an Emergency Permit for modification of the obstruction/air bridge to immediately address the inadequacies determined through the Department's review of the H&H analysis.

b. If Sunoco elects to submit an application for issuance of an Emergency Permit, within 15 days of the Department's issuance of the Emergency Permit, Sunoco shall complete all modifications to the air bridge in a manner consistent with the proposal contained in its application for the Emergency Permit.

16. Within 60 days of the effective date of this Order, Sunoco shall submit a complete Water Obstruction and Encroachment Permit application that complies with the requirements of the Dam Safety and Encroachment Act, the Clean Streams Law, 25 Pa. Code, Chapter 105 and all other applicable statutory and regulatory requirements for the air bridge at the Perry Bridge Site.

a. Sunoco shall submit the complete Water Obstruction and Encroachment Permit application in the name of and on behalf of Toboyne Township, Perry County, who is the owner of the bridge

b. Sunoco shall provide the necessary information, including any bridge design changes determined to be necessary by the Department to meet the applicable requirements, on behalf of Toboyne Township.

c. If any design changes to the air bridge occur during the permitting process that result in required field work or other modifications including but not limited to the air bridge, approaches, or scour protection, Sunoco shall implement any work or other modifications required by the Water Obstruction and Encroachment Permit within thirty (30) days of the Department approving or acknowledging the use of a Water Obstruction and Encroachment permit for the air bridge at Perry Bridge Site.

17. In the event the Department determines that additional information, revisions, modifications or amendments are necessary to any permit, plan, any other submission, or restoration work required by this Order, then within ten (10) days after receipt of written notice from the Department, Sunoco shall submit to the Department such information, revisions, amendments or modifications, and/or complete the modified work, unless an alternative timeframe is approved by the Department in writing.

18. Upon the Department's written approval of all submissions required by Paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, and 15a above, the suspension imposed by this Order shall be terminated and Sunoco may resume the work authorized by the permits described in Paragraph D, above, unless otherwise restricted due to other Department enforcement actions or the Stipulated Order.

19. Effective immediately, Sunoco shall temporarily stabilize all disturbed areas in accordance with the approved E&S Plans and in compliance with 25 Pa. Code § 102.22(b). During the period of the permit suspension, Sunoco shall continue to complete installation of permitted best management practices (BMPs) for PPP-ME2, including perimeter BMPs, in accordance with approved plans and the permit in areas where Sunoco or its contractors have commenced earth disturbance activities. Sunoco shall continue routine monitoring of the installed BMPs and shall perform all necessary ongoing operation and maintenance activities to ensure the BMPs continue to perform as designed, in accordance with the approved E&S Plans and permits.

20. With regard to any in-process and permitted HDD operation (as the HDD installation method is defined in the *'Trenchless Construction Feasibility Analysis'* dated December 2016 and approved as part of the Chapter 105 Permits), the permittee shall be permitted to periodically rotate the downhole drill bits or reamers and move them back and forth within the drill holes without advancing the drill hole or conducting additional drilling, to safeguard the integrity of the downhole equipment.

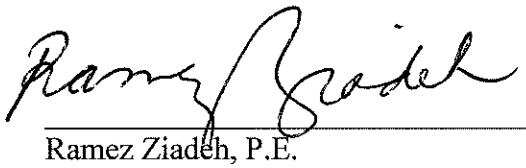
21. Sunoco shall immediately begin implementing the December 15, 2017 revisions to the *'HDD Inadvertent Return Assessment, Preparedness, Prevention and Contingency Plan'*, attached to this Order as Exhibit 3.

Any person aggrieved by this action may appeal, pursuant to Section 4 of the Environmental Hearing Board Act, 35 P.S. Section 7514, and the Administrative Agency Law, 2 Pa.C.S. Chapter 5A, to the Environmental Hearing Board, Second Floor, Rachel Carson State Office Building, 400 Market Street, P.O. Box 8457, Harrisburg, PA 17105-8457, 717-787-3483. TDD users may contact the Board through the Pennsylvania Relay Service, 800-654-5984. Appeals must be filed with the Environmental Hearing Board within 30 days of receipt of written notice of this action unless the appropriate statute provides a different time period. Copies of the appeal form and the Board's rules of practice and procedure may be obtained from the Board. The appeal form and the Board's rules of practice and procedure are also available in braille or on audiotape from the Secretary to the Board at 717-787-3483. This paragraph does not, in and of itself, create any right of appeal beyond that permitted by applicable statutes and decisional law.

IF YOU WANT TO CHALLENGE THIS ACTION, YOUR APPEAL MUST REACH THE BOARD WITHIN 30 DAYS. YOU DO NOT NEED A LAWYER TO FILE AN APPEAL WITH THE BOARD.

IMPORTANT LEGAL RIGHTS ARE AT STAKE, HOWEVER, SO YOU SHOULD SHOW THIS DOCUMENT TO A LAWYER AT ONCE. IF YOU CANNOT AFFORD A LAWYER, YOU MAY QUALIFY FOR FREE PRO BONO REPRESENTATION. CALL THE SECRETARY TO THE BOARD (717-787-3483) FOR MORE INFORMATION.

FOR THE COMMONWEALTH OF
PENNSYLVANIA, DEPARTMENT OF
ENVIRONMENTAL PROTECTION:



Ramez Ziadeh, P.E.
Acting Executive Deputy Secretary

Exhibit F

PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105-3265

In re: Sunoco Pipeline L.P. a/k/a
Energy Transfer Partners

Petition of the Bureau of Investigation	:	Docket No. P-2018-3000281
And Enforcement of the Pennsylvania	:	
Public Utility Commission For the	:	
Issuance of an Ex Parte Emergency	:	
Order	:	

EMERGENCY ORDER

On March 7, 2018 the Bureau of Investigation and Enforcement of the Pennsylvania Public Utility Commission (BIE) filed the above captioned Petition for Issuance of an Ex Parte Emergency Order (*BIE Petition*) with the Pennsylvania Public Utility Commission (Commission or PUC). BIE requests the Commission issue an emergency order against Sunoco Pipeline L.P. (Sunoco) pursuant to the Commission's regulations at 52 Pa.Code §§3.1-3.4.

Pursuant to the Commission's regulations governing emergency relief, an *ex parte* Emergency Order will be issued only when there exists a clear and present danger to life or property or when the relief requested is uncontested and action is required prior to the next scheduled public meeting. 52 Pa. Code §3.1. Additionally, Commission regulations at 52 Pa. Code §3.2 provide that in addition to the existence of an emergency, a petitioner must establish the following:

(1) The petitioner's right to relief is clear.

(2) The need for relief is immediate.

(3) The injury would be irreparable if relief is not granted.

(4) The relief requested is not injurious to the public interest.

Upon review of the *BIE Petition*, I find that it meets these standards. In particular I agree with BIE that permitting the continued flow of hazardous liquids through the ME1 pipeline without the proper steps to ensure the integrity of the pipeline could have catastrophic results impacting the public. To the extent that the relief requested may be injurious to members of the public who are shippers on the Mariner East 1 Pipeline, the risks to the general public outweigh the risks to the shippers.

The Law Bureau conducted two conference calls with counsel for BIE and counsel for Sunoco on March 8, 2018. The calls provided valuable technical information to the Commission to assist it in crafting the emergency relief being provided through this Emergency Order. The Commission appreciates the cooperation and professionalism of the parties.

THEREFORE, IT IS ORDERED:

1. The *BIE Petition* is granted as set forth in this Emergency Order with the following relief:
    a. Within 24 hours of the entry of this Order Sunoco shall run at least one in line inspection tool through the Mariner East 1 Pipeline, inspecting the pipeline from a point at least 1 mile upstream from the Lisa Drive location to a point at least 1 mile downstream from Lisa Drive.[1]
    b. Within 12 hours of completing the inspection tool run Sunoco will suspend hazardous liquids transportation service on its

[1] Sunoco maintains, and BIE concurs, that a pipeline must be pressurized in order to run an in line inspection tool.

Mariner East 1 pipeline for a period of time, presently estimated by BIE and Sunoco to be of 10-14 days duration (the "Study Period"), in order for Sunoco to perform the following:

i. Conduct geophysical testing and analyses (including at least the following: resistivity[2], seismic and gravity) in the HDD area described in the BIE Petition; and

ii. Share all findings of the inspection tool run and geophysical testing with BIE/Pipeline Safety staff; and

iii. Meet and discuss the findings with BIE/Pipeline Safety staff, such discussions shall include, but not be limited to Sunoco's addition of strain gauges to Mariner East 1 in the study area.

iv. During the Study Period, Sunoco shall maintain sufficient minimum pressure in Mariner East 1 to avoid gasification of NGLs. Such pressures are estimated to be in the range between 475 and 650 psig, however, the NGLs shall not be flowing during such period .

c. Sunoco will not reinstate hazardous liquids transportation service on Mariner East 1 until the earlier of the following:

i. Completion of (a) and (b)(i)-(iv), with any corrective actions taken, or planned to be taken, to the satisfaction of BIE/Pipeline Safety coupled with BIE/Pipeline Safety's concurrence with reinstatement of transportation service on Mariner East 1, subject to Commission review and approval.

ii. If BIE/Pipeline Safety does not concur with Sunoco's request to resume service on ME1, Sunoco may file an

Answer to the BIE Petition within 3 business days following notice of BIE's nonconcurrence.

1. The Petition and Answer will be assigned for expedited hearing(s) before the Office of Administrative Law Judge;
2. Sunoco may not resume hazardous liquids transportation service on Mariner East 1 without prior Commission approval.

2. As the party against whom an emergency order has been entered, Sunoco may petition for an expedited hearing pursuant to 52 Pa.Code §3.4.
3. That this Emergency Order shall be placed on the Agenda of the March 15, 2018 Public Meeting.
4. That the Secretary shall serve a copy of this Emergency Order on BIE, Sunoco and the other persons and entities listed of the Certificate of Service attached to the *BIE Petition*.

Dated: March 7, 2018
Entered: March 7, 2018

Gladys M. Brown, Chair

[2] BIE and Sunoco shall meet and discuss whether resistivity testing is appropriate at the bore site. Following such discussions BIE, at its discretion, may waive this Order's requirement for resistivity testing. If so, BIE shall provide written notice of the waiver to Sunoco and file same at this docket.

Exhibit G

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265

IN REPLY PLEASE
REFER TO OUR FILE

March 7, 2018

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

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

Dear Secretary Chiavetta:

Enclosed please find the Petition of the Bureau of Investigation and Enforcement of the Pennsylvania Public Utility Commission for the Issuance of an *Ex Parte* Emergency Order Regarding Sunoco Pipeline L.P. a/k/a Energy Transfer Partners.

Should you have any questions, please feel free to contact me.

Sincerely,

Michael L. Swindler
Deputy Chief Prosecutor
PA Attorney ID No. 43319

cc: As per Certificate of Service

AD122

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

PETITION OF THE BUREAU OF INVESTIGATION AND ENFORCEMENT OF THE PENNSYLVANIA PUBLIC UTILITY COMMISSION FOR THE ISSUANCE OF AN *EX PARTE* EMERGENCY ORDER

AND NOW, comes the Bureau of Investigation and Enforcement ("I&E") of the Pennsylvania Public Utility Commission ("Commission" or "PUC"), pursuant to 52 Pa. Code § 3.2, and petitions the Commission for the issuance of an *ex parte* emergency order: 1) requiring Sunoco Pipeline L.P. a/k/a Energy Transfer Partners ("Sunoco" or "Company") to immediately suspend operations of its Mariner East 1 pipeline ("ME1") due to safety concerns regarding the integrity of said pipeline as being potentially hazardous to life, property and/or the environment. In support of this Petition, I&E avers as follows:

I. INTRODUCTION

1. On or about On March 3, 2018, the PUC was notified through email communications from a local resident regarding the formation of sinkholes near and/or

above Sunoco's ME1 pipeline facility near 491 Lisa Drive, West Whiteland Township, West Chester, Chester County, Pennsylvania.[1] The sinkholes occurred at three locations within 550 feet along the path of the ME1 pipeline.

2. ME1 is an eight-inch diameter (8") Natural Gas Liquids ("NGL") pipeline with a Maximum Operating Pressure ("MOP") of 1,440 PSI. ME1 is an active pipeline that has been in operation since approximately 1931. ME1 currently operates in a west to east direction pursuant to its intrastate transportation tariffs filed with the Commission and transports liquid propane, butane and ethane at the MOP allowed.

3. Sunoco is installing a new sixteen-inch diameter (16") pipeline in the common right-of-way ("ROW") through a twenty-four inch diameter (24") horizontal directional drill bore ("HDD") in a high consequence area ("HCA"). This new pipeline is referred to as Mariner East 2X (ME2X). Sunoco is also installing a pipeline called Mariner East 2 ("ME2") in the same ROW across the Commonwealth and is twenty (20) inches in diameter.

4. In December 2017, the first sinkhole ("Sinkhole No. 1") was discovered near station 12+00 (HDD station), just south of railroad tracks used by Amtrak. The size of this sinkhole was approximately 8 feet wide and 3 feet deep. On March 1, 2018, the new ME2X was pulled back.[2] During post drilling, Sunoco workers noticed the second sinkhole ("Sinkhole No. 2") near station 13+00, measuring 8 feet wide by 15 feet deep.

---

[1] "Sinkhole" refers to a form of soil collapse.

Sinkhole No. 2 is located 300 feet from Amtrak's facilities. The third sinkhole ("Sinkhole No. 3") was discovered on Saturday, March 3, 2018 at approximately 8:30 a.m. at 491 Lisa Drive, near station 9+00, approximately 10 feet from the house's foundation wall. Sinkhole No. 3 measured approximately 15 feet wide and 20 feet deep and partially exposed the buried ME1 pipeline.

5. Sinkhole Nos. 1 and 2 were located over ME2X and near ME1. Sinkhole No. 3 was located within the path of ME1. ME1 is believed to be approximately 4 to 8 feet deep in the areas of HDD. ME2X varies in depth from 50 feet to 115 feet. The lateral separation between the two pipelines is 10 to 15 feet. ME2X crossed under ME1 in the vicinity of Sinkhole No. 3.

6. On March 3, 2018, Sunoco's Operations Group conducted an inspection of the sinkhole sites and directed that flowable fill (specialty concrete) be introduced into the three known sinkhole areas.

7. Sunoco did not provide any notification to the PUC or PHMSA of these sinkholes. In fact, Sunoco's Compliance Group was also unaware of these events until March 3, 2018.

8. On March 5, 2018, PUC Safety Engineers accompanied by the PUC Safety Division Manager visited Lisa Drive in West Chester, Pennsylvania, at the site of Sunoco's ME1 and ME2X pipelines that are the subject of the above-referenced events.

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[2] The term "pulled back" refers to a pipeline procedure whereby a welded segment of pipeline is pulled through the pre-bored shaft.

Additionally, an engineer from the federal Pipeline and Hazardous Materials Safety Administration ("PHMSA") joined the inspection.

9. All three sinkholes were filled on March 3, 2018 and construction work had ceased at the time of the PUC Engineers' inspection on March 5, 2018, although Sunoco continued to perform surveys and other geological testing at the site.

10. During their on-site inspection on March 5, 2018, PUC Safety Engineers also discovered that additional sinkholes were developing south of 491 Lisa Drive, also in the path of ME1 and/or in the path of the under construction ME2X.

11. Due to, *inter alia*, the concern for the safety of the public given the unknown effects on the nature of the geological instability of the area and the sinkhole events referenced herein which correspond to the construction of the ME2X pipeline, the close proximity of the ME2X construction to the existing and active ME1 pipeline as well as the close proximity of residential single-family dwellings, apartment buildings, Route 100 and Amtrak lines to the site of ME1 and ME2X, I&E is compelled to bring this Petition for Issuance of *Ex Parte* Emergency Order and requests that the Commission direct: 1) that Sunoco shall immediately suspend operations of its Mariner East 1 pipeline and shall not reinstate transportation service on ME1 until the completion of repairs to I&E's satisfaction at which time Sunoco may then file with the Commission a petition for reinstatement of service; 2) Sunoco shall perform the necessary geo-physical tests and analyses, including but not limited to, i) Resistivity, ii) Seismic, iii) Gravity on the HDD project at the Lisa Drive site from the bore beginning to end; 3) Sunoco shall perform a

drawdown/purge of the hazardous liquid products between the first valve upstream and downstream at the Lisa Drive site within 72 hours of the entry of the Commission's Emergency Order; and 4) upon conclusion of the drawdown/purge, Sunoco shall immediately run an in-line inspection ("ILI") tool at the Lisa Drive site and report the findings to PHMSA and I&E.

II. PARTIES

12. The Pennsylvania Public Utility Commission, with a mailing address of P.O. Box 3265, Harrisburg, PA 17105-3265, is a duly constituted agency of the Commonwealth of Pennsylvania empowered to regulate public utilities within the Commonwealth pursuant to the Public Utility Code, 66 Pa.C.S. §§ 101, *et seq.*

13. Petitioner is the Commission's Bureau of Investigation and Enforcement and is the entity established to initiate proceedings that are prosecutory in nature for violations of the Public Utility Code and Commission regulations. *See Delegation of Prosecutory Authority to Bureaus with Enforcement Responsibilities*, Docket No. M-00940593 (Order entered September 2, 1994), as amended by Act 129 of 2008, 66 Pa.C.S. § 308.2(a)(11).

14. Respondent is Sunoco Pipeline L.P., Utility Code A-14001, a certificated public utility in the Commonwealth of Pennsylvania, with a place of business at 4041 Market Street, Ashton, Pennsylvania, 19014, and a common carrier transporter of hazardous liquids.

III. JURISDICTION

15. The Commission has jurisdiction over this matter pursuant to 66 Pa.C.S. § 501, which provides in pertinent part: "In addition to any powers expressly enumerated in this part, the commission shall have full power and authority, **and it shall be its duty to enforce,** execute and carry out, by its regulations, orders, or otherwise, **all and singular, the provisions of this part, and the full intent thereof** . . ." (emphasis added).

16. Section 1501 of the Public Utility Code states that every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities and that such service shall be reasonably continuous and without unreasonable interruptions or delay. 66 Pa.C.S § 1501. *See also*, 66 Pa.C.S § 1505.

17. Moreover, 52 Pa. Code § 59.33 reads:

> (a) Each public utility shall at all times use every reasonable effort to properly warn and protect the public from danger, and shall exercise reasonable care to reduce the hazards to which employees, customers and others may be subjected to by reason of its equipment and facilities.
>
> (b) *Safety code.* The minimum safety standards for all natural gas and hazardous liquid public utilities in this Commonwealth shall be those issued under the pipeline safety laws as found in 49 U.S.C.A. § § 60101—60503 and as implemented at 49 CFR Parts 191—193, 195 and 199, including all subsequent amendments thereto. Future Federal amendments to 49 CFR Parts 191—193, 195 and 199, as amended or modified by the Federal government, shall have the effect of amending or modifying the Commission's regulations with regard to the minimum safety standards for all natural gas and hazardous liquid public utilities. The amendment or modification shall take effect 60 days after the effective date of the Federal amendment or modification, unless the Commission publishes

a notice in the *Pennsylvania Bulletin* stating that the amendment or modification may not take effect.

(c) *Definition.* For the purposes of this section, "hazardous liquid public utility" means a person or corporation now or hereafter owning or operating in this Commonwealth equipment or facilities for transporting or conveying crude oil, gasoline, petroleum or petroleum products, by pipeline or conduit, for the public for compensation.

(d) *Enforcement.* Each public utility shall be subject to inspections as may be necessary to assure compliance with this section. The facilities, books and records of each public utility shall be accessible to the Commission and its staff for the inspections. Each public utility shall provide the Commission or its staff the reports, supplemental data and information as it shall from time to time request in the administration and enforcement of this section.

IV. STANDARD FOR ISSUANCE OF AN EMERGENCY ORDER

18. Section 3.2 of the Commission's regulations, 52 Pa. Code § 3.2, permits a petition to the Commission for the issuance of an *ex parte* emergency order where supported by a verified statement of facts which establishes the existence of an emergency. The petition must establish facts to demonstrate that:

1. The Petitioner's right to relief is clear.
2. The need for relief is immediate.
3. The injury would be irreparable if relief is not granted.
4. The relief requested is not injurious to the public interest.

52 Pa. Code § 3.2(b).

19. "Emergency" is defined in the Commission's regulations as "[a] situation which **presents a clear and present danger to life or property** or which is uncontested

and requires action prior to the next scheduled meeting." 52 Pa. Code § 3.1 (emphasis added).

20. The person or entity seeking emergency relief bears the burden of proving that the facts and circumstances meet all four of the above requirements. 66 Pa.C.S. § 332; 52 Pa. Code § 3.2(b). The burden of proof must be carried by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. PUC,* 578 A.2d 600 (Pa. Cmwlth. 1990). The petitioner's evidence must be more convincing, by even the smallest amount, than that presented by the other party. *Se-Ling Hosiery v. Margulies,* 70 A.2d 854 (1950).

21. The Chairperson, a Commissioner, the Commission's Director of Operations and the Commission's Secretary have the authority to issue an emergency order. 52 Pa. Code § 3.3(a). An emergency order will be issued in writing. 52 Pa. Code § 3.3(b). An emergency order will be ratified, modified or rescinded by the Commission at the next scheduled public meeting after issuance of the order. 52 Pa. Code § 3.3(c). An emergency order will be served by the Secretary as expeditiously as practicable upon the persons directly affected by the decision with copies to the Commissioners and the Director of Operations. 52 Pa. Code § 3.3(d).

22. A person against whom an emergency order is issued ***may*** file a petition for an expedited hearing to be held before a presiding officer within 10 days of receipt of the petition by the Secretary. 52 Pa. Code § 3.4.

A. I&E's Right To Relief Is Clear

23. As a certificated public utility, Sunoco is subject to the jurisdiction of the Commission. Pursuant to 52 Pa. Code § 59.33, there are specific safety standards that must be met by a hazardous liquid public utility, such as Sunoco. Under Section 59.33, the Commission has adopted the federal pipeline safety laws as set forth at 49 CFR Parts 191, *et seq.* Such safety provisions are enforced by the Commission's Bureau of Investigation and Enforcement, Safety Division. It is not necessary to determine the merits of the controversy or dispute in order to find that a petitioner has satisfied the first prong of Section 3.2(b) of the Commission's regulations, 52 Pa. Code 3.2(b), by showing that the right to relief is clear. Rather, the Commission has found that if a petitioner raises "substantial legal questions," then a petitioner has established that its right to relief is clear. *Core Communications, Inc. v. Verizon Pennsylvania, Inc. and Verizon North LLC*, Docket No. P-2011-2253650 (Order entered September 23, 2011); *Level 3 Communications, LLC v. Marianna & Scenery Hill Telephone Company*, Docket No. C-20028114 (Order entered August 8, 2002); *T.W. Phillips Gas and Oil Company v. The Peoples Natural Gas Company*, 492 A.2d 776 (Pa. Cmwlth. 1985).

24. I&E serves as the Commission's prosecutory bureau and enforces compliance with the Public Utility Code and Commission regulations. *Implementation of Act 129 of 2008; Organization of Bureaus and Offices*, Docket No. M-2008-2071852 (Order entered August 11, 2011), p. 5.

25. Section 1501 of the Public Utility Code states, in pertinent part, as follows:

> Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in, or to such service and facilities as shall be necessary or proper for the accommodation, convenience and safety of its patrons, employees and the public. Such service also shall be reasonably continuous and without unreasonable interruptions or delay.

66 Pa.C.S § 1501.

26. The construction of ME2 and ME2X at or near the location of the active ME1 pipeline, and the resulting sinkhole events that are occurring concomitant to the boring of the ME2X pipeline compromise the safety of the public.

27. Based on its investigation to date, I&E is not able to conclude that Sunoco has met its required threshold of safety pursuant to 66 Pa.C.S. § 1501 and 52 Pa. Code § 59.33 without Sunoco first conducting the necessary and appropriate elements of an integrity management plan and affording an opportunity for I&E to review the results of those integrity management efforts in order to ascertain that the continued operation of ME1 is viable and safe under the circumstances described herein.

28. Permitting the continued flow of hazardous liquid through the ME1 pipeline without the proper steps to ensure the integrity of the pipeline could have catastrophic results impacting the public near or adjacent to the paths of ME1, ME2 and ME2X.

B. The Need For Relief Is Immediate

29. I&E's need for relief is immediate. The very recent sinkhole events witnessed by I&E Safety Engineers establish that the integrity of the ME1 pipeline may

be compromised by these or other similar but yet to-be-discovered sinkholes. It is Sunoco's obligation, pursuant to Section 315(c) of the Public Utility Code, 66 Pa.C.S. § 315, to establish that their pipeline is adequate, safe and reasonable and not a safety hazard to the public.

30. Should Sunoco not immediately suspend operation of ME1 while integrity management steps are taken and then reviewed by I&E to confirm the safety of the pipeline, and should ME1 in fact be compromised by these or other sinkholes while permitting the continued flow of hazardous liquids, the resulting event would have an immediate adverse impact on the operation of ME1, the continued construction of ME2 and ME2X and, most importantly, the health and welfare of the public, property and surrounding environment.

C. The Injury From Respondents' Actions Will Be Irreparable If Relief Is Not Granted

31. By failing to immediately suspend operations of ME1 pending review of integrity steps conducted by Sunoco, the safety of the public would be jeopardized. The pipeline in question transports hazardous liquids in densely populated areas defined by PHMSA as High Consequence Areas. Needless to say, any compromise or failure of the pipeline would have dire results, and the injuries resulting therefrom would most certainly be irreparable.

D. The Relief Requested Is Not Injurious To The Public Interest

32. The relief that I&E requests is certainly not injurious to the public interest. To the contrary, it is clear that it will be injurious to the public interest if the relief requested is ***not*** granted.

V. PRAYER FOR RELIEF

WHEREFORE, the Bureau of Investigation and Enforcement, Petitioner herein, respectfully requests that the Commission enter an Emergency Order that directs that:

1) Sunoco shall immediately suspend operations of its Mariner East 1 pipeline and shall not reinstate transportation service on ME1 until the completion of repairs to I&E's satisfaction at which time Sunoco may then file with the Commission a petition for reinstatement of service;

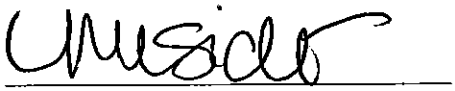
2) Sunoco shall perform the necessary geo-physical tests and analyses, including but not limited to, i) Resistivity, ii) Seismic, iii) Gravity on the HDD project at the Lisa Drive site from the bore beginning to end;

3) Sunoco shall perform a drawdown/purge of the hazardous liquid products between the first valve upstream and downstream at the Lisa Drive site within 72 hours of the entry of the Commission's Emergency Order;

4) Upon conclusion of the drawdown/purge, Sunoco shall immediately run an in-line inspection ("ILI") tool at the Lisa Drive site and report the findings to PHMSA and I&E; and

5) Any other such relief that the Commission deems appropriate.

Respectfully submitted,



Michael L. Swindler
Deputy Chief Prosecutor
PA Attorney ID No. 43319

Pennsylvania Public Utility Commission
Bureau of Investigation and Enforcement
P.O. Box 3265
Harrisburg, PA 17105-3265
(717) 783-6369

Date: March 7, 2018

VERIFICATION

I, Paul J. Metro, Fixed Utility Valuation Manager, Safety Division, hereby state that the facts above set forth are true and correct to the best of my knowledge, information and belief and that I expect that the Bureau will be able to prove same at any hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.

Date: March 7, 2018

Paul J. Metro
Fixed Utility Valuation Manager,
Bureau of Investigation and Enforcement
Safety Division

Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement, Petitioner	:	
v.	:	
	:	Docket No. P-2018-
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).

Service by First Class Mail:

Curtis N. Stambaugh
Assistant General Counsel
Sunoco Logistics Partners L.P.
212 N. Third Street
Suite 201
Harrisburg, PA 17101

Nels J. Taber
Senior Litigation Counsel
Department of Environmental Protection
Office of Chief Counsel
400 Market Street, 9th Floor
Harrisburg, PA 17101

Robert Burroughs
PHMSA Eastern Region
820 Bear Tavern Road, Suite 103
West Trenton, NJ 08628

Office of Consumer Advocate
555 Walnut Street
5th Floor, Forum Place
Harrisburg, PA 17101-1923

Office of Small Business Advocate
300 North Second Street, Suite 1102
Harrisburg, PA 17101

Michael L. Swindler
Deputy Chief Prosecutor
PA Attorney ID No. 43319

Pennsylvania Public Utility Commission
Bureau of Investigation and Enforcement
P.O. Box 3265
Harrisburg, PA 17105-3265
(717) 783-6369
mswindler@pa.gov

Dated: March 7, 2018

Exhibit H

WEST GOSHEN TOWNSHIP

CHESTER COUNTY, PENNSYLVANIA

ORDINANCE NO. 1 - 2014

AN ORDINANCE OF THE TOWNSHIP OF WEST GOSHEN, CHESTER COUNTY, PENNSYLVANIA, AMENDING CHAPTER 84 OF THE WEST GOSHEN TOWNSHIP CODE, TITLED "ZONING", SPECIFICALLY SECTION 84-8 TO ADD DEFINITIONS FOR "COMMUNITY UTILITY", "GAS AND LIQUID PIPELINE FACILITY", "GOVERNMENTAL UTILITY", "HAZARDOUS LIQUID AND/OR GAS PIPELINE", "HAZARDOUS LIQUID AND/OR GASES", AND "PIPELINE IMPACT RADIUS", AND TO DELETE THE EXISTING DEFINITION FOR "PUBLIC UTILITY FACILITY" AND REPLACE IT WITH A NEW DEFINITION FOR "PUBLIC UTILITY FACILITY"; TO AMEND THE USE REGULATIONS FOR THE R-2, R-3, R-3A AND R-4 DISTRICTS TO DELETE PUBLIC UTILITY FACILITY AS A USE WHICH IS PERMITTED BY SPECIAL EXCEPTION; TO AMEND THE USE REGULATIONS FOR THE I-1, I-2, 1-3, I-2R AND I-C DISTRICTS TO DELETE PUBLIC UTILITY USES AS USES PERMITTED BY RIGHT AND TO ADD PUBLIC UTILITY FACILITY AND GAS AND LIQUID PIPELINE FACILITY AS USES PERMITTED BY CONDITIONAL USE; AND TO ADD A NEW SECTION 84-56 TO ALLOW ESSENTIAL UTILITIES, GOVERNMENTAL UTILITIES AND COMMUNITY UTILITIES BY RIGHT IN ALL ZONING DISTRICTS AND PUBLIC UTILITY FACILITIES AND GAS AND LIQUID PIPELINE FACILITIES BY CONDITIONAL USE IN ALL INDUSTRIAL ZONING DISTRICTS SUBJECT TO STANDARDS SPECIFIED THEREIN.

BE IT ENACTED AND ORDAINED by the Board of Supervisors of West Goshen Township that Chapter 84 of the West Goshen Code, titled, "Zoning", shall be amended as follows:

SECTION 1. Section 84-8 shall be amended to add the following definitions in alphabetical order:

COMMUNITY UTILITY - A utility which is owned, operated or maintained by a homeowners association or community association for the purpose of providing sanitary sewage disposal, stormwater control, water supply, energy, telephone or

other utility services within a defined service area solely within the Township or adjacent municipality.

GAS AND LIQUID PIPELINE FACILITY- Includes a pipeline and all associated equipment and buildings used or intended to be used for the transportation or distribution of gases and liquids, including but not limited to, anhydrous ammonia, petroleum, or petroleum products such as propane, butane, ethane, natural gas, natural gas liquids, benzene, gasoline, jet fuel, diesel fuel, fuel oil and kerosene, and any hazardous liquids under pressure in a gaseous state or any and all liquids or gases that are defined as hazardous liquids or gases by federal or state environmental or safety statutes and implementing regulations, including but not limited to the Hazardous Liquid Pipeline Safety Act, 49 U.S.C. § 60101 et seq., as the same may be amended from time to time."

GOVERNMENTAL UTILITY - A utility which is owned, operated or maintained by the Township, Municipal Authority or other agency or authority of the Township or Municipal Authority for the purpose of providing sanitary sewage disposal, stormwater control, water supply, energy, telephone or other utility services within a defined service area solely within the Township or adjacent municipality.

HAZARDOUS LIQUID AND/OR GAS PIPELINE - Any transmission pipeline for liquids and/or gases including within a storage field and any pipeline used for the transmission of materials such as, but not limited to, anhydrous ammonia, petroleum or petroleum products such as propane, ethane, butane, natural gas, natural gas liquids, benzene, gasoline, jet fuel, diesel fuel, fuel oil and kerosene, and any hazardous liquids under pressure in a gaseous state or any and all liquids or gases that are defined as hazardous liquids or gases by federal or state environmental or safety statutes and implementing regulations, including but not limited to the Hazardous Liquid Pipeline Safety Act, 49 U.S.C. § 60101 et seq., as the same may be amended from time to time.

HAZARDOUS LIQUID AND/OR GASES - Any liquid or gas of any kind, including but not limited to anhydrous ammonia, petroleum, or petroleum products such as propane, ethane, butane, natural gas, natural gas liquids, benzene, gasoline, jet fuel, diesel fuel, fuel oil and kerosene, any hazardous liquid under pressure in a gaseous state and any and all hazardous liquids that are defined as hazardous by federal or state environmental or safety statutes and implementing regulations, including but not limited to the Hazardous Liquid Pipeline Safety Act, 49 U.S.C. § 60101 et seq., as the same may be amended from time to time.

PIPELINE IMPACT RADIUS - The distance within which the potential failure of a hazardous liquid pipeline and/or gas pipeline could have significant impact to people or property, including but not limited to noise, environmental, visual and other impacts which may be detrimental to the health, safety and welfare of the community. The pipeline impact radius for a hazardous liquid and/or gas pipeline shall be calculated in the same manner as the potential impact radius defined by

federal or state laws, including, but not limited to Title 49 of the Code of Federal Regulations, as the same may from time to time be amended.

SECTION 2. The definition of "Public Utility Facility" in Section 84-8 shall be deleted in its entirety and replaced with the following new definition:

"**PUBLIC UTILITY FACILITY-** A facility owned and operated by a public utility as defined in this Ordinance."

SECTION 3. Section 84-9.E(2) shall be deleted and the section number reserved for future use.

SECTION 4. Section 84-12.E(3) shall be deleted and the section number reserved for future use.

SECTION 5. Section 84-14.1.E(2) shall be deleted and the section number reserved for future use.

SECTION 6. Section 84-15.E(4) shall be deleted and the section number reserved for future use.

SECTION 7. Section 84-37.A(3) shall be deleted in its entirety and the section number reserved for future use.

SECTION 8. Section 84-37.A(15) shall be amended by adding a new subparagraph (c) which shall provide as follows:

"(c) Public Utility Facility and Gas and Liquid Pipeline Facility subject to the standards in Section 84-56."

SECTION 9. Section 84-38.A(3) shall be deleted in its entirety and replaced with the following section:

"(3) Municipal, county, state and federal uses including fire, police and ambulance facilities."

SECTION 10. Section 84-38.A(17) shall be amended by adding a new subparagraph (b) which shall provide as follows:

"(b) Public Utility Facility and Gas and Liquid Pipeline Facility subject to the standards in Section 84-56."

SECTION 11. Section 84-39.A(3) shall be deleted in its entirety and replaced with the following section:

"(3) Municipal, county, state and federal uses including fire, police and ambulance facilities."

SECTION 12. Section 84-39.A(18) shall be amended by adding a new subparagraph (b) which shall provide as follows:

"(b) Public Utility Facility and Gas and Liquid Pipeline Facility subject to the standards in Section 84-56."

SECTION 13. Section 84-40.A(3) shall be deleted in its entirety and replaced with the following section:

"(3) Municipal, county, state and federal uses including fire, police and ambulance facilities."

SECTION 14. Section 84-40.A(17) shall be amended by adding a new subparagraph (d) which shall provide as follows:

"(d) Public Utility Facility and Gas and Liquid Pipeline Facility subject to the standards in Section 84-56."

SECTION 15. Section 84-41.A(4) shall be deleted and the section number reserved for future use.

SECTION 16. Section 84-41.A(14) shall be amended by adding a new subparagraph (k) which shall provide as follows:

"(k) Public Utility Facility and Gas and Liquid Pipeline Facility subject to the standards in Section 84-56."

SECTION 17. A new Section 84-56 shall be added which shall provide as follows:

"**§84-56. Utility Uses.**

A. Essential Utilities, Community Utilities and Governmental Utilities, as defined in Section 84-8, shall be uses permitted by right in all zoning districts, subject to the following regulations:

(1) No such use shall include an office open to the general public, trucking or repair facilities or housing of work crews.

(2) The portion of any such use not located within a building shall be enclosed or adequately screened in such a manner as to not be visible across property lines.

(3) No advertising shall be affixed to any structure.

B. A Public Utility Facility and a Gas and Liquid Pipeline Facility, as defined in Section 84-8, shall be permitted by conditional use of the Board of Supervisors in the I-1, I-2, I-2R, I-3 and I-C Districts subject to the performance standards in this section. Gas and Liquid Pipeline Facilities and Hazardous Liquid and/or Gas Pipelines are only permitted in the I-1, I-2, I-2R, I-3 and –I-C districts by conditional use and subject to compliance with the following standards:

(1) No obnoxious, toxic or corrosive fumes or gases shall be emitted as a result of the use.

(2) No use shall emit offensive odors which are perceptible at lot lines.

(3) No use shall discharge into the air dust or other particulate matter in a manner or quantity which does not conform to all applicable federal and state laws and implementing regulations.

(4) No use shall emit smoke from operations.

(5) No use shall produce any heat perceptible at or beyond the lot boundaries.

(6) No use shall utilize lighting in a manner which does not conform with the lighting standards in this Chapter.

(7) No use shall permit physical vibrations perceptible at or beyond the lot boundaries.

(8) No use shall emit potentially harmful radiation.

(9) No use shall engage in the production or storage of any material designed for use as an explosive.

(10) No use shall engage in the storage of waste materials on the lot for any period beyond 5 days. Such waste material storage shall be located behind the front building line of the primary building and no closer than 50 feet to any rear or side lot line and shall be completely screened from the view of any street or adjoining property.

(11) No use shall discharge any objectionable and/or potentially dangerous effluent from plant operations.

(12) No industrial lagoons for chemicals or other liquid waste shall be permitted.

(13) The portion of any such use not located within a building shall be enclosed or adequately screened in such a manner as to not be visible across property lines.

(14) All uses shall be conducted in compliance with applicable governmental regulations, including the noise and lighting regulations in this Chapter.

(15) No retail activity shall be permitted.

(16) The owner of the Public Utility Facility and Gas and Liquid Pipeline Facility shall provide the Township with an emergency liaison that may be reached 24 hours a day, 7 days a week in the event of an emergency.

(17) The Public Utility Facility and Gas and Liquid Pipeline Facility shall prepare and file with the Township an emergency response plan which shall be followed in the event of an emergency at the facility.

(18) A Public Utility Facility and Gas and Liquid Pipeline Facility that involve hazardous liquid and/or gas pipelines shall be set back from all occupied structures a minimum distance equal to the Pipeline Impact Radius."

SECTION 18. Severability. If any sentence, clause, section, or part of this Ordinance is for any reason found to be unconstitutional, illegal or invalid, such unconstitutionality, illegality or invalidity shall not affect or impair any of the remaining provisions, sentences, clauses, sections, or parts hereof. It is hereby declared as the intent of the Board of Supervisors that this Ordinance would have been adopted had such unconstitutional, illegal or invalid sentence, clause, section or part thereof not been included herein.

SECTION 19. Repealer. Ordinance No. 3-2014 adopted by the Board of Supervisors of West Goshen Township on September 2, 2014 shall be repealed and replaced in its entirety with this Ordinance. All Ordinances or parts of Ordinances conflicting with any provisions of this Ordinance are hereby repealed insofar as the same affects this Ordinance.

SECTION 20. Effective Date. This Ordinance shall be effective five days following enactment as by law provided.

ENACTED AND ORDAINED this 8th day of October, 2014.

ATTEST:

Casey LaLonde, Secretary

BOARD OF SUPERVISORS
WEST GOSHEN TOWNSHIP

BY:

Patricia B. McIlvaine, Chairman

Phillip J. Corvo, Jr., Vice Chairman

Raymond H. Halvorsen, Member

Theodore J. Murphy, Esquire, Member

Edward G. Meakim, Jr., Member

Exhibit I

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THE DELAWARE RIVERKEEPER NETWORK, 925 Canal Street Bristol, PA 19007 MAYA van ROSSUM, THE DELAWARE RIVERKEEPER, 925 Canal Street Bristol, PA 19007 THOMAS CASEY, 1113 Windsor Drive West Chester, PA 19380 and ERIC GROTE 1243 Morstein Road West Chester, PA 19380, Plaintiffs, vs. SUNOCO PIPELINE L.P. c/o Corporation Service Company 2595 Interstate Drive, Suite 103	:	IN THE COURT OF COMMON PLEAS OF CHESTER COUNTY, PENNSYLVANIA CIVIL ACTION No.:

Harrisburg, PA 17110 :
:
Defendant. :
:

COMPLAINT

PLAINTIFFS THE DELAWARE RIVERKEEPER NETWORK, MAYA van ROSSUM, The Delaware Riverkeeper, THOMAS CASEY, and ERIC GROTE (hereinafter, "Plaintiffs"), by and through their undersigned counsel, hereby requests that this Honorable Court enjoin Sunoco Pipeline L.P., (hereinafter, "Defendant" or "SPLP") from constructing any portion of the Mariner East 2 Pipeline in West Goshen Township, Chester County (hereinafter "the Township") in violation of a Section 84-56 of the West Goshen Township Zoning Ordinance, and in support hereof Plaintiffs state as follows:

1. Plaintiff the Delaware Riverkeeper Network ("DRN") is a non-profit organization established in 1988 to protect and restore the Delaware River, its associated watershed, tributaries, and habitats. This area includes 13,539 square miles, draining parts of New Jersey, New York, Pennsylvania and Delaware, and it is within this region that a portion of the Project's construction activity are proposed to take place. In its efforts to protect and restore the watershed, DRN organizes and implements stream, wetland, and habitat restorations; a volunteer monitoring program; educational programs; environmental advocacy initiatives; recreational activities; and environmental law enforcement efforts throughout the entire Delaware River Basin and the basin states. DRN is a membership organization headquartered in Bristol, Pennsylvania, with more than 19,000 members with interests in the health and welfare of the Delaware River and its watershed. DRN began its advocacy efforts to protect the Basin from the adverse impacts of natural gas and pipeline infrastructure development in March of 2008. DRN has actively worked since that time to bring the environmental impacts of natural gas and

pipeline infrastructure development to the public's attention through action alerts, press outreach, public appearances, public statements, and editorials. DRN has also advocated for and has funded expert scientific studies on the impact of natural gas and pipeline infrastructure development. DRN participates in this action on behalf of the organization as part of the pursuit of its organizational mission, and on behalf its impacted members, the board, and staff.

2. Plaintiff Maya van Rossum, the Delaware Riverkeeper , came to work for DRN as the organization's Executive Director in 1994. In 1996, she was appointed Delaware Riverkeeper and leader of DRN. Ms. van Rossum is also a member of DRN and supportive financial donor. Maya van Rossum as the Delaware Riverkeeper regularly visits the Delaware River and Delaware Estuary, including the areas affected by pipelines and has taken family, friends, DRN members, and other interested people onto the Delaware River and its tributaries to educate them and to share with them the aesthetic beauty of the river. DRN's members live, own property, recreate, and work throughout the watershed, which includes areas affected by Commission-jurisdiction pipeline projects, and have had their aesthetic, recreational, and property interests harmed as a result of construction and operational activity. DRN and its members value the aesthetic qualities of their property and public parks; enjoying the scenery, wildlife, recreation opportunities, and undeveloped nature.

3. Plaintiff Thomas Casey, owns certain real property at 1113 Windsor Drive, West Chester PA 19380 ("Casey Property"), which is located in the R 3 Zoning District, West Goshen Township, a Second Class Township located in Chester County. Mr. Casey is currently a member of DRN.

4. Plaintiff Eric Grote, owns certain real property at 1243 Morstein Road, West Chester PA 19380 ("Grote Property"), which is located in the R 3 Zoning District, West Goshen

Township, a Second Class Township located in Chester County. Mr. Grote is currently a member of DRN.

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

6. Defendant proposes to construct a Hazardous Liquid Pipeline for highly volatile liquids referred to as Mariner East 2 ("ME2") Pipeline. *Application of Sunoco Pipeline L.P.*, A-2013-2371789 and P-2013-2371775, Order entered August 29, 2013 (request to suspend intrastate service along a portion of pipeline and abandon service on other portions); *Petition of Sunoco Pipeline, L.P. for Amendment of the Order Entered on August 29, 2013*, P-2014-2422583, Opinion and Order entered on July 24, 2014 at 7 ("Sunoco 2014 Petition")(request to transport propane and ethane on expanded Mariner East Pipeline); *Amended Petition of Sunoco Pipeline, L.P. for finding that the Situation of Structures to Shelter Pump Stations and Valve Control Stations Is Reasonably necessary for the convenience or welfare of the public*, P-2014-2411966, at Exhibit A.

7. The proposed route through West Goshen Township follows an existing SPLP hazardous liquids pipeline, and generally follows Boot Road in the area of the Casey and Grote Properties.

8. Effective October 13, 2014, West Goshen Township enacted Ordinance No. 9-2014, an amendment to its zoning ordinance that deals with gas and liquid pipeline facilities and where those uses are permitted by conditional use ("Ordinance"). The relevant portions of the ordinance are attached hereto. (See Exhibit A hereto).

9. The ordinance creates categories of utilities, includes definitions of "community utility," "governmental utility," "gas and liquid pipeline facility," "hazardous liquid and/or gas pipeline," "hazardous liquid and/or gas," and "pipeline impact radius."

10. The Ordinance changed the definition of "public utility facility" to be "as that term is defined in the Pennsylvania Public Utility Code, 66 Pa.C.S.A. § 101 *et seq.*"

11. Under the Ordinance a public utility facility use is permitted by conditional use, and no longer permitted by right in residential districts.

12. Only "essential utilities" are permitted by right in all zoning districts.

13. The Ordinance provides that "gas and liquid pipeline facilities" are permitted by conditional use only in the I-1, I-2, I-2R, I-3 and I-C districts.

14. The conditional use standards include setback requirements for the Pipeline Impact Radius, in Section § 84-56, amending Utility Uses, (18) stating that:

> A Public Utility Facility and Gas and Liquid Pipeline Facility that involves hazardous liquid and/or gas pipelines shall be setback from all occupied structures a minimum distance equal to the Pipeline Impact Radius.

(See Exhibit A) Ord. No. 9-2014, § 84-56 B(18).

15. The Pipeline Impact Radius is defined as:

> The distance within which the potential failure of a hazardous liquid pipeline and/or gas pipeline could have significant impact to people or property, including but not limited to noise, environmental, visual and other impacts which may be detrimental to the health, safety and welfare of the community. The pipeline impact radius for a hazardous liquid and/or gas pipeline shall be calculated in the same manner as the potential impact radius defined by federal or state laws, including, but not limited to Title 49 of the Code of Federal Regulations, as the same may from time to time be amended.

Ord. No. 9-2014, § 84-8.

16. SPLP will transport propane, butane and ethane, all of which are highly volatile liquids ("HVLs") by subjecting them to high pressure in the ME2 Pipeline.

17. ME2 Pipeline will be a 20 inch diameter pipeline "along much of the same route" as ME1, an existing 8 inch pipeline. *See Pa. P.U.C. Order, Application of Sunoco Pipeline L.P., for Approval of the Right to Offer, Render, Furnish or Supply Intrastate Petroleum and Refined Petroleum Products Pipeline Service to the Public in Washington County*, Pennsylvania, Pa. P.U.C. Docket No. A-2014-2425633, *2 (August 21, 2104) (Hereinafter, "August 21, 2014 Washington County Order")

18. Federal pipeline safety regulations classify propane, butane, and ethane as "highly volatile liquids,"[1] which, once outside the pipeline, are heavier-than-air gases that are colorless, odorless, flammable, and explosive.

19. The Pennsylvania Public Utility Commission ("Commission") has no regulations on the siting of HVL pipelines.

20. In an attempt to exploit the Commission's lack of regulation on siting and eminent domain authority, SPLP has changed its position about the ME2 Pipeline, arguing that ME2 is *intrastate* and that SPLP is a "public utility" to suit its needs.

21. Only after SPLP lost in condemnation proceeding in York County, did SPLP seek approval to provide *intrastate* service. *See Sunoco Pipeline, L.P., v. Loper*, No. 2013-SU-4518-05 (Ct. Com. Pleas (York) 2014).

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[1] Highly volatile liquids "are hazardous liquids which will form a vapor cloud when related to the atmosphere and which has a vapor pressure exceeding 276 kPa (40psia) at 37.8 which will form a vapor cloud when related to the atmosphere and which has a vapor pressure exceeding 276 kPa (40psia) at 37.8° C (100° F)." 49 C.F.R. 195.2. Hazardous liquids are defined as "petroleum, petroleum products, or anhydrous ammonia." 49 C.F.R. §195.2.

22. SPLP has not sought zoning approval from West Goshen for construction of its ME2 Pipeline, relying on the contention that local ordinances are preempted by SPLP's alleged "public utility status" before the Pennsylvania Public Utility Commission. *See, e.g., In re Sunoco Pipeline, L.P.,* 143 A.3d 1000 (Pa. Commw. Ct. 2016) (hereinafter "*Martin*").

23. The Public Utility Code authorizes the Commission to issue Certificates of Public Convenience ("CPCs") upon application to a "public utility" to "offer, furnish, or supply service within this Commonwealth." 66 P.S. § 1101.

24. SPLP engaged in a "dizzying array of procedural moves and reversal of course as to its business plan in Pennsylvania in the aftermath of the *Loper* decision" *Martin*, 143 A.3d at 1029 (Dissent of J. McCollough).

25. In *Loper*, SPLP argued that the ME2 Pipeline was for the interstate shipments of HVLs and that it was regulated by FERC as a public utility. *Id.* at 1009.

26. Only after this loss in *Loper* did SPLP seek public utility status from the Commission in Pennsylvania for the ME2 as an *intrastate* HVL pipeline. *Id.*

27. SPLP manipulated its application, first seeking to suspend service and later seeking reconsideration and clarification of its proposed service, filing with the Commission on May 21, 2014 for "clarification" on a 2013 application for suspension of east to west shipment of petroleum products, suggesting that reconsideration of the suspension was due to increased demand for propane after a harsh winter in 2013-2014. *Id.* at 1010; August 21, 2104 Washington County Order.

28. SPLP applied in June 2014 for approval to construct a portion of ME2 in Washington County, Pennsylvania to extend its service into Washington County, Pennsylvania on the West Virginia border. August 21, 2104 Washington County Order.

29. The Commission ordered that a CPC "should issue authorizing" to SPLP to offer "petroleum products" "to the public in Washington County". *Id.*

30. SPLP has relied on the Commission Order from 2014 in condemnation proceedings and certificates of public convenience issued decades ago with respect to other counties as proof that it is a "public utility corporation". *Martin*, 143 A.3d at 1010; *see also*, Order, August 21, 2014 Washington County Order.

COUNT I
VIOLATION OF MUNICIPAL ZONING ORDINANCE

31. Plaintiffs incorporate the above paragraphs as if set forth here at length.

32. Under the Pennsylvania Municipalities Planning Code, 53 P.S. § 10101, *et.seq.* and Section 84-56 of the West Goshen Township Zoning Ordinance, Plaintiffs are authorized

> [i]n case any building, structure, landscaping or land is, or is proposed to be, erected, constructed, reconstructed, altered, converted, maintained or used in violation of any ordinance enacted under this act or prior enabling laws, the governing body or, ...an aggrieved owner or tenant of real property who shows that his property or person will be substantially affected by the alleged violation, in addition to other remedies, may institute any appropriate action or proceeding to prevent, restrain, correct or abate such building, structure, landscaping or land, or to prevent, in or about such premises, any act, conduct, business or use constituting a violation...When such action is instituted by a landowner or tenant, notice of that action shall be served upon the municipality at least 30 days prior to the time the action is begun by serving a copy of the complaint on the governing body of the municipality.

53 P.S. § 10617; West Goshen Township Zoning Ordinance, Section 84-56. (See Exhibit A).

33. Notice of this action was served upon the West Goshen Township on or about February 10, 2017 by serving a copy of the complaint on the governing body of the Township in accordance with 53. P.S. § 10617.

34. West Goshen Township has not sought to enforce the Ordinance against SPLP, and 30-day notice period has passed.

35. In accordance with the West Goshen Township Zoning Ordinance and the Municipalities Planning Code, "gas and liquid pipeline facilities" are permitted by conditional use only in the I-1, I-2, I-2R, I-3 and I-C districts.

36. SPLP has not sought or obtained the necessary approvals required under the Zoning Ordinance.

37. "[A] municipality need only prove a violation of its zoning ordinance to establish its entitlement to an injunction; irreparable harm need not be demonstrated." Township of Upper St. Clair v. N.R. Porter and Associates, 127 Pa. Commw. 313, 316, 561 A.2d 851, 852 (1989).

38. The issuance of the requested relief will be in the public's best interest as it will ensure the consistent, uniform, and valid administration of the Zoning Ordinance in West Goshen Township.

39. SPLP's proposed ME2 is contrary to the Plaintiffs' and the public's interests and to the public health, safety, and welfare in West Goshen Township and represent a *per se* violation of the Zoning Ordinance, which must be enjoined.

40. First, the placement of the ME2 Pipeline is not permitted in the R3 district.

41. Second, even if the ME2 Pipeline use were permitted in the zoning district, it is subject to conditional use approval, and to the setback requirements of Section 84.56B(18) of the Ordinance.

42. SPLP's ME2 Pipeline will be a "hazardous liquid and/or gas pipeline" under the Ordinance.

43. Under West Goshen Code §84-8, "essential utilities" are defined as follows: "[i]ncludes sewerage, water, gas and electric lines and related appurtenances used to serve development within the Township, but not including cross-county or cross-country transmission lines or other utilities not required to serve the Township." West Goshen Township Zoning Ordinance, §84-8.

44. Essential utilities are permitted by right in all zoning districts, under § 84-56(A).

45. SPLP's ME2 Pipeline will not qualify as an essential utility under the Ordinance because it is a "cross-county or cross country transmission line not required to serve the Township."

46. SPLP has not made a conditional use application to the Township for the ME2 Pipeline.

47. The Pipeline Impact Radius ("PIR") as defined by Section 54-8 contains both a calculable distance component, based on the federal formula the Code references, and an effects-based component not based on formula, for "significant impact to people or property, including but not limited to noise, environmental, visual and other impacts which may be detrimental to the health, safety and welfare of the community." West Goshen Township Zoning Ordinance, § 54-8.

48. The federal formula involves diameter of the pipe, the pressure of the pipeline, as multiplied by a coefficient factor of 0.69, which presumes a immediate ignition of natural gas, and any formula calculated the PIR for the ME2 would adjust the coefficient upward to reflect the greater energy density of HVLs and delayed ignition. *See* 49 C.F.R. § 192.903.

49. Upon information and belief, the PIR for the ME2 pipeline is at least 125 feet, and likely greater than 1,000 feet.

50. Further, a leak or explosion of highly volatile liquids in ME2 would cause the Casey and Grote Properties to experience "noise, environmental, visual and other impacts" that are "detrimental to the health, safety and welfare of the community."

51. The Casey and Grote Properties is within the PIR setback prescribed in the conditional use standards.

The Public Utility Code Does Not Preempt West Goshen's Ordinance

52. The Public Utility Code does not preempt West Goshen's Ordinance.

53. SPLP's ME2 Pipeline is not a "building" subject to the MPC exception.

54. MPC provides in relevant part, as follows:

> This article shall not apply to any existing or proposed building, or extension thereof, used or to be used by a public utility corporation, if upon petition of the corporation, the Pennsylvania Public Utility Commission shall, after public hearing, decide that the present or proposed situation of the building in question is reasonably necessary for the convenience or welfare of the public.

53 P.S. § 10619.

55. SPLP's ME2 Pipeline is not a building to be used by a public utility corporation, which could be subject to hearing Commission determination that it is "reasonably necessary for the public convenience or welfare" of the Township.

56. The Public Utility Code contains no affirmative express statutory language preempting local zoning.

57. The Municipalities Planning Code ("MPC"), contains only a repealer clause, that repeals all laws inconsistent with the MPC, but with a provision specifically saving the Public Utilities Code from repeal. 53 P.S. § 11202: "All other act and parts of acts are repealed in so far as they are inconsistent herewith, but this act shall not repeal or modify any of the provisions of 66 Pa.C.S. Pt. I (relating to the public utilities code)..."

58. As such, the Code's preemption of local zoning is limited by statutory construction to those entities and services specifically regulated by the Commission.

59. The Commission can only preempt local zoning with respect to a "building" where it has made a determination, after a public hearing, that the building is a "reasonably necessary for the convenience or welfare of the public."

60. The ME2 Pipeline is not a building, and therefore the limited PUC authority to preempt local zoning after conducting a hearing and making a finding that the building is reasonably necessary does not apply. *Commonwealth of Pa. v. Delaware & H. Ry. Co.*, 339 A.2d 155,157 (Pa. Commw. Ct. 1975) (holding that railroad tracks are not "buildings," nor are transmission lines of power companies).

61. A municipality has the authority to zone public utility facilities that are not buildings, based on statutory construction principles and the existence of the MPC buildings exemption under the MPC. *Pennsylvania Power Co. v. Township of Pine*, 926 A.2d 1241,1251 (Pa. 2007) (prior public utility cases "simply reconciled two conflicting statutes and reaffirmed the long line of decisions in this Commonwealth establishing that a municipality may not, through ordinance or otherwise, compel the underground installation of electric facilities.").

62. The West Goshen Township ordinance is not preempted by the Public Utility Commission regulating in the field of pipeline public utilities. *Hoffman Mining Co., Inc. v. Zoning Hg. Bd. Of Adams Tp.*, 32 A.3d 587, 610 (Pa 2011)(field preemption recognized only in three areas: mining, alcoholic beverages and banking).

63. Regulation of HVL pipelines as public utilities is not so pervasive as to preempt zoning.

64. West Goshen's conditional use standards and Pipeline Impact Radius setback ordinance is not preempted by regulation of pipelines as public utilities.

65. Courts only recognize preemption of local ordinances for public utilities where the Commission has promulgated regulations concerning the specific act regulated by ordinance. *PPL Elec. Util. Corp. v. City of Lancaster,* 125 A.3d 837, 851 (Pa. Commw. Ct. 2015).

66. The West Goshen Township Ordinance zones the placement of "gas and liquids pipeline facilities" and, as part of a conditional use in an industrial area, requires a setback.

67. The West Goshen Township Ordinance is not preempted because the Commission does not already regulate the location of any HVL pipelines such as ME2.

68. The repealer clause in the MPC, repealing all laws inconsistent with the MPC except the Public Utility Code, has no effect on the MPC zoning authority because there is no inconsistency. Pennsylvania has no designated regulatory authority overseeing the siting of hazardous liquid pipelines, and no designated regulatory authority overseeing the siting of intrastate pipelines carrying highly volatile liquids.

69. A local ordinance is preempted only where it is inconsistent with a state statute. *Mars Emergency Med. Servs., Inc. v. Township of Adams*, 740 A.2d 193 195 (Pa. 1999); *see also Hoffman Min. Co. v. Zoning Hearing Bd. of Adams Tp., Cambria Cty.*, 32 A.3d 587, 602 (Pa. 2011)(holding that conflict preemption analysis is required regardless of the existence of any other preemption).

70. A local ordinance is only inconsistent with a state statute where it either: 1) irreconcilably conflicts with the statute; or 2) stands as an obstacle to the execution of the full purposes of the statute. *Hoffman*, 32 A.3d at 594.

71. The West Goshen Township Pipeline Impact Radius ("PIR") setback does not irreconcilably conflict with the Commission certification provisions, or any other provisions, nor does the setback stand as an obstacle to the purpose of the Code.

72. An ordinance irreconcilably conflicts with a state statute where simultaneous compliance with both the ordinance and the state statute is impossible. *Id.* at 610.

73. Here, the West Goshen Township Ordinance addresses the local conditions in siting the pipeline, an area the Code does not address, so SPLP, can and should comply with West Goshen's siting provisions required by the PIR setback, and the Commissions' statutory certification and service requirements.

74. Where the General Assembly enacts a law that regulates a particular activity, a local municipality can make additional regulations "in aid and in furtherance of the purpose of the general law as may seem appropriate to the necessities of the particular locality and which are not in themselves unreasonable." *Mars Emergency Medical Services, Inc. v. Township of Adams,* 740 A.2d 193, 195 (Pa. 1999).

75. West Goshen Township has enacted an ordinance in furtherance of public utility service, necessitated by the Commission's failure to address siting of HVL lines.

76. Even assuming that SPLP's CPCs authorizes its intended service on ME2 in West Goshen Township (which we contest), such authorization by the Commission does not conflict with zoning regulations "appropriate to the necessities of the particular locality" that are in furtherance of offering that public utility service. *Mars Emergency Medical Services, Inc.,* 740 A.2d at 195.

77. Because neither the Commission nor FERC regulate the siting of interstate or intrastate HVL pipelines, local zoning is the only regulation that considers placement of HVL pipelines in a particular locality.

78. The West Goshen Township setback requirement for HVL pipelines is in aid and furtherance of the Public Utility Code, and in no way preempted by it because it addresses the "necessities of the particular locality" through "reasonable" zoning, not addressed by any other statute.

79. Nothing in the Commission's CPC requirements (or anywhere else in the Code) indicates that a certificate authorizing a public utility to supply different service or service in a different territory is exempt from local zoning.

80. Courts will not "disturb a reasonable expression of a municipal council's discretionary power...unless there is an abuse of power detrimental to the citizenry." *City Council of City of Bethlehem v. Marcincin*, 515 A.2d 1320, 1325–26 (Pa. 1986) (internal citations omitted).

81. The PIR setback requirement of West Goshen Township does not irreconcilably conflict with the Code.

82. Nothing impedes SPLP from complying with the HVL PIR setback while still providing the intrastate HVL pipeline service to customers it claims to serve.

83. In addition, the West Goshen Township setback provision is not an obstacle to the fulfillment of any purpose of the Code. *See, e.g., Holt's Cigar Co. Inc. v. City of Philadelphia*, 10 AQ.3d 902, 913 (Pa. 2011).

84. Ensuring that occupied structures in non-industrial zones are set back from the PIR does not cause an irreconcilable conflict with the Code. *City Council of the City of*

Bethlehem v. Marcincin, 515 A.2d 1320, 1326 (Pa. 1986) (an ordinance limiting a mayor to two consecutive terms was not irreconcilable with a statute providing that a mayor shall be eligible for reelection).

The Pipeline Act Does Not Preempt West Goshen Township's Ordinance

85. The Pennsylvania Pipeline Act does not expressly preempt West Goshen Township's Ordinance. 58 P.S. § 801 *et seq.*

86. Like the Public Utility Code, nothing in the Pipeline Act expressly bars a local municipality from enacting a zoning ordinance providing reasonably necessary and locally appropriate zoning.

87. The Pipeline Act does not preempt the field of regulation, because courts have not recognized pipelines as an area of field preemption. *Hoffman,* 32 A.3d at 594.

88. In addition, the Pipeline Act does not preempt the Ordinance by conflicting with it: simultaneous compliance with the Pipeline Act and the West Goshen Township setback requirement is possible.

89. Therefore, the West Goshen Township Ordinance and the Pipeline Act do not irreconcilably conflict, and the Pipeline Act does not preempt the Ordinance.

90. Likewise, the West Goshen Township Ordinance setback requirements as applied to ME2 is not an obstacle to the fulfillment of the purpose of the Pipeline Act.

WHEREFORE, Plaintiffs respectfully request that the Court enter judgment in their favor and against Defendant and that the Court grant all appropriate relief including enjoining Defendant from maintaining, placing, or operating a "hazardous liquid and/or gas pipeline" or other prohibited use on the Casey and Grote Properties that is not permitted under Zoning Ordinance Section 84-56 and for which no conditional use application has been filed or granted.

COUNT II
VIOLATION OF SUBSTANTIVE DUE PROCESS

91. Plaintiffs incorporate the above paragraphs as if set forth here at length.

92. SPLP's non-compliance with the West Goshen Ordinance violates the Plaintiffs' substantive due process rights.

93. Ordinances that allow industrial development in non-industrial zoning districts violate residents' due process rights. *Robinson Township et al. v. Commonwealth of Pennsylvania,* 52 A.3d 463 (Pa. Commw. Ct. 2012), *aff'd in part and rev'd in part sub nom.*, 83 A.3d 901 (Pa. 2013)(hereinafter "*Robinson Twp. I*"); *Robinson Twp. et al. v. Commonwealth*, 83 A.3d 901 (Pa. 2013) (hereinafter "*Robinson Twp. II*").

94. The Pennsylvania and United States Constitutions require that for any zoning to be constitutional it must promote the public health, safety, morals, or welfare, and be substantially related to protecting or furthering that interest. *In re Realen Valley Forge Greene Assocs.*, 838 A.2d 718, 729 (Pa. 2003); *C&M Developers, Inc. v. Bedminster Twp. Zoning Hearing Bd.*, 820 A.2d 143, 150 (Pa. 2002); *Boundary Drive Assocs. v. Shrewsbury Twp. Bd. of Supervisors*, 491 A.2d 86, 90 (Pa. 1985).

95. "[L]awful zoning must be directed toward the community as a whole, concerned with the public interest generally, and justified by a balancing of community costs and benefits." *In re Realen Valley Forge Greene Assocs.*, 838 A.2d 718, 729 (Pa. 2003).

96. A state law that permits industrial activity in every zoning district in every municipality violates substantive due process because it results in irrational zoning. *Robinson Twp. I*, 52 A.3d at 484–85. (Commonwealth Court holding Act 13 violated substantive due process under Article I, Section 1).

97. Any conclusion that the Public Utility Code preempts the West Goshen Township Ordinance would result in irrational and unconstitutional zoning.

98. Commission certification as a "public utility"[2] does not exempt SPLP from complying with a municipality's comprehensive zoning plan.

99. SPLP is not exempt from West Goshen Township zoning ordinances.

100. SPLP proposes to engage in hazardous liquid and/or gas pipelines uses in district where such use is prohibited, and without application for conditional approval.

101. The West Goshen Township Zoning Ordinance, was enacted for the purpose:

> A. To promote, protect and facilitate any or all of the following: the public health, safety, morals and the general welfare; coordinated and practical community development and proper density of population; emergency management preparedness and operations;...the provision of safe, reliable and adequate water supply for domestic, commercial, agricultural or industrial use and other public requirements; as well as preservation of the natural scenic and historic values in the environment and preservation of forests, wetlands, aquifers and floodplains.
>
> B. To prevent one or more of the following: overcrowding of land; blight; danger and congestion in travel and transportation; and loss of health, life or property from fire, flood, panic or other dangers.

West Goshen Township Code at § 84-2.1.

102. SPLP's ME2 Pipeline as proposed violates the West Goshen Township Zoning Ordinance, and creates irrational zoning in West Goshen, by allowing HVL pipelines in all zones, without any standards for approval.

103. West Goshen Township already determined what districts are appropriate for hazardous liquid and/or gas pipelines.

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[2] Plaintiff does not concede that SPLP has certification for West Goshen Township for the purposes of providing the proposed service ME2 Pipeline.

104. Plaintiffs Casey and Grote's Properties are located in the R3 District, where no hazardous liquid and/or gas pipelines are permitted.

105. Even in those districts where the ME2 Pipeline is permitted, failure to comply with West Goshen's conditional use approval process violates the reciprocal property rights of neighbors.

106. The Township has determined, through its Zoning Ordinance, that a project such as ME2 impedes on Plaintiffs because it is incompatible in residential areas.

107. SPLP's ME2 would violate the uses permitted in R3 district.

108. SPLP's ME2 would violate the setback for potential impact radius with respect to Plaintiffs Casey and Grote's Properties.

109. SPLP proposes a dangerous, industrial use with known detrimental impacts on health, safety, welfare, property values, and public natural resources in a residential areas.

110. SPLP's failure to comply with the Township's zoning ordinance, results in irrational and therefore, unconstitutional, zoning districts.

111. It is irrational to allow an incompatible land use in a zone that was established to achieve a non-industrial character and non-industrial development and conservation goals. *Robinson Twp. I*, 52 A.3d at 484–85; *Robinson Twp. II*, 83 A.3d at 1005, 1007–08 (Baer, J., concurring).

112. SPLP cannot construct ME2, a hazardous liquid and/or gas pipeline, in a manner inconsistent with the West Goshen Township ordinance because the use is incompatible with the purpose of the residential zone.

113. Plaintiffs Casey and Grote's residence falls within the PIR of the proposed ME2 pipeline and SPLP's construction of ME2 would violate existing setback requirements and

expose Plaintiffs' residence to dangers not compatible with residential uses.

114. Failure to enjoin SPLP's non-compliance with West Goshen's zoning requirements for ME2 allows arbitrary and irrational zoning classifications by irrationally allowing an HVL pipeline in the same district with Plaintiffs' residential use without any standards or setback protection for the residential use.

WHEREFORE, Plaintiffs respectfully request that the Court enter judgment in their favor and against Defendant and that the Court grant all appropriate relief including enjoining Defendant from maintaining, constructing, placing, or operating a "hazardous liquid and/or gas pipeline" or other prohibited use that is not permitted under Zoning Ordinance Section 84-56, and for which no conditional use application has been filed or granted.

Respectfully submitted,

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By:_____

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