

**IN THE SEVENTH DISTRICT COURT OF APPEALS
HARRISON COUNTY, OHIO**

SUNOCO PIPELINE L.P.,)	
)	
Plaintiff/Appellee,)	CASE NO. 16 HA 0002 and 16 HA 0005
)	
vs.)	
)	
CAROL A. TETER, TRUSTEE, et al.,)	Trial Court Case No. CVH-2015-0058
)	
Defendant/Appellant.)	
)	

**BRIEF OF APPELLEE SUNOCO PIPELINE L.P. IN RESPONSE TO
BRIEF OF AMICI CURIAE OHIO FARM BUREAU FEDERATION
AND HARRISON COUNTY FARM BUREAU**

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APPELLANT'S ISSUES PRESENTED FOR REVIEW AND ARGUMENT

APPELLANT'S FIRST ISSUE PRESENTED FOR REVIEW AND ARGUMENT:

Does the undefined term “petroleum” found in R.C. 1723.01 include pure liquefied propane and/or pure liquefied butane?

APPELLANT'S SECOND ISSUE PRESENTED FOR REVIEW AND ARGUMENT:

Is Sunoco Pipeline L.P. a “common carrier” for purposes of the Ohio appropriation statutes (R.C. 163.01, *et seq.* and R. C. 1723.01, *et seq.*)

APPELLANT'S THIRD ISSUE PRESENTED FOR REVIEW AND ARGUMENT:

Is the Mariner East 2 Pipeline necessary and for a public use?

APPELLANT'S FOURTH ISSUE PRESENTED FOR REVIEW AND ARGUMENT:

Whether the trial court’s decision in this case, as applied through R.C. 163.01(H)(1)(a), R.C. 163.021(A), and R.C. 1723.01, violates Article I, Section 19 of the Ohio Constitution?

I. STATEMENT OF FACTS

In its Appellee Brief, Plaintiff-Appellee Sunoco Pipeline, L.P. (“Sunoco”) has submitted its statement of facts, which are incorporated herein by Sunoco.

II. LAW AND ARGUMENT

A. Introduction

On April 1, 2016, Ohio Farm Bureau and Harrison County Farm Bureau (OFB) filed a Brief of Amici Curiae in Support of Defendant-Appellant Carol A. Teter, Trustee *et al.* (“Brief of Amici”). In its Appellee Brief, Sunoco addresses the substance of OFB’s first and third arguments (titled “B” and “D”) and describes the numerous public uses that the Sunoco Pipeline (the “Mariner East 2 Pipeline”) will serve. Their arguments will not be repeated here.

Sunoco will address the second argument (titled “C”) advanced by OFB – the wholly incorrect assertion that the Mariner East 2 Pipeline has “no significant oversight” because the Ohio Power Siting Board (“OPSB”) and the Natural Gas Act (“NGA”) do not regulate it. *See* Brief of Amici p.14. While the OPSB and the NGA lack the *jurisdiction* to regulate aspects of the Mariner East 2 Pipeline, the Pipeline falls under the regulatory authority of numerous other federal, state, and local agencies. Therefore, the arguments advanced by OFB have no legal or factual basis.

B. The Mariner East 2 Pipeline is Heavily Regulated by Federal and State Agencies.

OFB asks this Court to ignore clear statutory, administrative and federal definitions, and alleges that the Sunoco Pipeline falls into a “regulatory vacuum” in which it has no significant oversight and is not directly and closely regulated. *See generally* Brief of Amici p. 10-15. OFB’s argument misconstrues and confuses federal, state, and local pipeline regulation. Pipelines may be regulated by several different authorities depending on its characteristics, including but not limited to the type of liquid it transports and its geographical presence intrastate and/or interstate. Here, the OPSB and the NGA do not have jurisdictional authority to regulate the Mariner East 2

Pipeline because it is an interstate petroleum pipeline. *See generally* Ohio Revised Code Ann. § 4906.01 *et seq.* and 15 U.S.C. § 717 *et seq.* OFB confuses the OPSB and the NGA’s lack of jurisdictional authority as a lack of pipeline regulations, which is simply not true.

Because the Mariner East 2 Pipeline is an interstate petroleum pipeline, it is governed by numerous Federal and State authorities, including the Federal Energy Regulatory Commission (“FERC”), the Interstate Commerce Act (“ICA”), the U.S. Department of Transportation (“USDOT”), the Pipeline and Hazardous Materials Safety Administration, the Army Corps of Engineers, the U.S. Environmental Protection Agency, Ohio Environmental Protection Agency, the Public Utilities Commission of Ohio, the U.S. Department of Fish and Wildlife, and the Ohio Historic Preservation Office. As a result, from planning to production, the Mariner East 2 Pipeline is heavily regulated. *See generally* 18 C.F.R. § 340 *et seq.*, 49 U.S.C. § 60102(a)(2), 49 C.F.R. § 190 *et seq.*, 33 U.S.C. § 1., 33 U.S.C. § 1251 *et seq.*, 33 U.S.C. § 1341, and 33 C.F.R. § 320 *et seq.*

1. FERC Regulates Mariner East 2 Pipeline’s Business Practices

The ICA provides FERC with the authority to regulate rates and practices, establish equal service conditions to provide shippers with equal access to the pipeline, and establish reasonable rates for transporting petroleum by pipeline. *See generally* 18 C.F.R. § 340 *et seq.* The ICA is the same act that has governed and regulated railroads, telegraph companies, and oil companies that have laid the framework for our nation. Sunoco’s Vice President of Business Development, Hank Alexander, testified that FERC has recognized Sunoco as a “common carrier.” Hearing Tr., 37:10-13, Oct. 22, 2015. As a result of its common carrier status, the Mariner East 2 Pipeline is regulated by FERC through the power granted in the ICA as a petroleum pipeline.

An interstate common carrier pipeline must apply to FERC in order to set the approved shipper rates and tariffs. Sunoco applied for its rate approval and FERC entered a Declaratory

Order approving the rate and tariff structure for the Mariner East 2 Pipeline. *Sunoco Pipeline, L.P.*, FERC Docket No. OR14-40-000, 149 FERC 61,191. The shippers will be charged the committed rate approved by FERC. *Id.* at p. 1. As a result of FERC’s regulation, the Sunoco Pipeline will operate much like a toll road – anyone that wants to use the pipeline to transport their petroleum need only pay the FERC authorized toll to use the pipeline.

Further, to ensure that the general public has an opportunity to transport petroleum on petroleum pipelines, pipeline companies are federally mandated by FERC to keep ten-percent (10%) of its capacity available for “walk-up” shippers. In fact, Sunoco held a public Open Season from December 4, 2013, to May 30, 2014, where any interested shippers had the opportunity to commit to using the Mariner East 2 Pipeline to transport their petroleum products. *Id.* at p. 3. In the event a walk-up public shipper did not reserve any capacity during the Open Season, the walk-up shipper cannot be discriminated against at a later time because Sunoco is federally mandated to keep a minimum of ten-percent (10%) of Mariner East 2 Pipeline’s capacity open for just these types of shippers.

FERC establishes the rates, service conditions, and ensures equal access for Sunoco’s shippers on the Mariner East 2 Pipeline. As such, FERC is instrumental in regulating the Mariner East 2 Pipeline’s business practices.

2. USDOT Regulates Mariner East 2 Pipeline’s Safety, Design, Construction, Operation, and Maintenance

Congress has instructed the USDOT to enforce “minimum safety standards for pipeline transportation and for pipeline facilities.” 49 U.S.C. § 60102(a)(2). The standards apply to the “design, installation, inspection, emergency plans and procedures, testing, construction, extension, operation, replacement, and maintenance of pipeline facilities.” 49 U.S.C. § 60102(a)(2)(B). Further, the USDOT must include a “requirement that all individuals who operate and maintain

pipeline facilities shall be qualified to operate and maintain the pipeline facilities.” 49 U.S.C. § 60102(a)(2)(C). USDOT has promulgated comprehensive safety regulations in 49 C.F.R. § 190 *et seq.* governing interstate pipeline operations, which pipeline “operators” are obligated to comply with. 49 U.S.C. § 60102(a)(2)(A).

The U.S. Department of Transportation’s Pipeline and Hazardous Materials Safety Administration (“PHMSA”) issues pipeline safety regulations addressing construction, operation, maintenance, inspections, and violations of pipeline safety laws. 49 C.F.R. §§ 190-199. PHMSA regulates interstate and intrastate hazardous liquids transmission pipelines, including crude oil, petroleum products, and liquefied petroleum gases. 49 C.F.R. § 172.01. The Mariner East 2 Pipeline is an interstate pipeline carrying petroleum products and liquefied petroleum gases. *See* Judgment Entry, dated December 14, 2015, p. 4-6. As a result, Sunoco’s Mariner East 2 Pipeline must comply with federal PHMSA’s pipeline safety regulations.

Further, PHMSA can approve some state agencies to exercise interstate inspection authority and/or intrastate inspection and enforcement authority, as is the case in Ohio. The state of Ohio has adopted the federal regulations and the Public Utilities Commission of Ohio (“PUCO”) enforces the regulations through a cooperative agreement with the federal government. *See* Ohio Revised Code Ann. § 4905 *et seq.* and Ohio Admin. Code Ann. § 4901:1-16 *et seq.* PUCO investigators inspect each pipeline system in the state at least once every two years and review records and procedures implemented by utilities. *See generally* 49 C.F.R. § 190.203. When violations are detected, PUCO orders corrective action and may assess fines and other penalties to ensure that Ohio’s pipeline systems continue the safe transportation of energy and other materials that are essential to our daily lives. 49 C.F.R. § 190.205. A pipeline may not begin operations

until a line, or line segment, has been certified safe by the USDOT. *See generally* 49 C.F.R. § 190 *et seq.*

The Mariner East 2 Pipeline must comply with the USDOT’s regulations regarding pipeline design, construction, pressure testing, operation, maintenance, personnel qualifications, recordkeeping, and corrosion control. *See generally* 49 C.F.R. §§ 195.0 – 195.589. As a result, the Mariner East 2 Pipeline will be closely regulated by USDOT and PUCO.

3. US EPA and USACE Regulate Environmental, Historical, and Cultural Concerns

Congress has authorized the Secretary of the Army to prescribe “regulations for the use, administration, and navigation of the navigable waters of the United States [...]” 33 U.S.C. § 1. The Clean Water Act, administered by the United States Environmental Protection Agency (“US EPA”) and implemented by the United States Army Corps of Engineers (“USACE”), regulates the chemical, physical, and biological integrity of the navigable waterways of the United States. 33 U.S.C. § 1251 *et seq.*

The Clean Water Act prohibits the discharge of “any pollutant” into waters of the United States unless it is authorized by a permit. 33 U.S.C. § 1344. Section 404 of the Clean Water Act requires a 404 permit before dredged or fill material may be discharged into waters of the US. *See generally* 33 U.S.C. § 1344. Permits are reviewed by the USACE, which evaluates applications under a public interest review, as well as the environmental criteria set forth in the Clean Water Act Section 404(b)(1) guidelines, regulations promulgated by the US EPA. *See generally* 33 U.S.C. § 1344.

Further, Section 401 of the Clean Water Act requires individual states to review and certify that the regulated activity authorized under Section 404 would not violate state water quality standards. *See* 33 U.S.C. § 1341. As a result, the Ohio Environmental Protection Agency (“Ohio

EPA”) must approve a Section 401 permit certifying that the activity does not violate its state water quality standards. *See generally* 33 U.S.C. § 1341.

As part of its due diligence to abide by federal, state and local regulations and to obtain proper permitting, Sunoco has conducted numerous surveys for the properties along the proposed pipeline route. Civil surveys, natural resource surveys, and cultural resource surveys have been performed to comply with its obligations to obtain Section 401 Ohio EPA permits and Section 404 federal permits.

In addition to the federal and state agencies that oversee the environmental aspect of the project, the USACE has a responsibility as a part of its permitting process to perform a “public interest review” by considering effects on natural resources with the Ohio Department of Natural Resources, threatened or endangered species in consultation with the U.S. Department of Fish and Wildlife, as well as potential effects on cultural or historic resources in consultation with the Ohio Historic Preservation Office. 33 C.F.R. § 320 *et seq.* For this reason, Sunoco has sought experts in their fields to conduct surveys on the natural resources and provide feedback on the cultural and historical significance of the properties.


Numerous federal agencies and state agencies have jurisdiction over the project, including the USACE, the US EPA, the Ohio EPA, the U.S. Department of Fish and Wildlife, the Ohio Department of Natural Resources, and the Ohio Historic Preservation Office. As a result, the Mariner East 2 Pipeline is obligated to comply with comprehensive environmental, historical, and cultural regulations.

III. CONCLUSION

The Mariner East 2 Pipeline is heavily regulated by numerous federal, state, and local agencies in all aspects from planning through production. OFB’s argument that the Mariner East

2 Pipeline will have no significant oversight is unavailing and should not be considered by this Court for the reasons stated herein.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Brief of Appellee Sunoco Pipeline L.P. In Response to Brief of Amici Curiae Ohio Farm Bureau Federation and Harrison County Farm Bureau In Support of Appellant*, was served via electronic mail on the 13th day of May 2016, upon the following:

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