



pennsylvania
OFFICE OF OPEN RECORDS

September 5, 2019

HAND DELIVERED

Michael Krimmel, Esq.
Prothonotary
Commonwealth Court of Pennsylvania
Pennsylvania Judicial Center
601 Commonwealth Avenue, Suite 2100
Harrisburg, PA 17106-2575

RE: Submission of Record in:

***Pennsylvania Public Utility Commission v. Eric Friedman*, No. 980 CD 2019 and
Energy Transfer v. Eric Friedman, No. 982 CD 2019, Consolidated as 980 CD
2019.**

Dear Mr. Krimmel:

We hereby submit the record in the above-referenced matter. Section 1303 of the Right-to-Know Law, 65 P.S. §§ 67.101, *et seq.*, ("RTKL"), defines the Record on Appeal as "the record before a court shall consist of the request, the agency's response, the appeal filed under section 1101, the hearing transcript, if any, and the final written determination of the appeals officer." Pursuant to *Department of Transportation v. Office of Open Records*, 7 A.3d 329 (Pa. Commw. Ct. 2010), this record includes all "evidence and documents admitted into evidence by the appeals officer pursuant to Section 1102(a)(2)." The record in this matter consists of the following:

Office of Open Records Docket No. 2019-0502:

1. The appeal filed by Eric Friedman ("Requester") to the Office of Open Records ("OOR"), received April 1, 2019.
2. Official Notice of Appeal dated April 2, 2019, sent to both parties by the OOR, advising them of the docket number and identifying the appeals officer for the matter.
3. OOR's Order Notice of Filing Deficiency dated April 2, 2019.
4. Requester's email dated April 2, 2019, with attachment curing the appeal deficiency.

5. The Pennsylvania Public Utility Commission's ("PUC") email dated April 2, 2019, giving notice of the appeal in front of the OOR to Energy Transfer, a potential direct interest participant.
6. Email chain dated April 4, 2019 through April 5, 2019, wherein the PUC requests an extension to file an appeal response and the Requester objects to the extension requested.
7. OOR's email dated April 5, 2019, granting the PUC a three-day extension to file a response in the appeal.
8. Energy Transfer's Request to Participate and Position Statement submitted on April 11, 2019.
9. Requester's email dated April 12, 2019, objecting to Energy Transfer's Request to Participate with an attached Protective Order.
10. PUC's submission dated April 15, 2019.
11. Requester's submission dated April 15, 2019, in response to PUC's appeal submission.
12. Email chain dated April 17, 2019 through April 18, 2019 wherein the Requester grants OOR's extension request and the OOR confirms a revised Final Determination issue date.
13. Requester's submission dated April 21, 2019, and OOR's email forwarding the submission to all parties.
14. Email chain dated April 22, 2019 through April 23, 2019, wherein the PUC requests clarification on the submission deadlines in the appeal and the OOR provides a response.
15. Energy Transfer's submission dated April 23, 2019.
16. PUC's submission dated April 24, 2019.
17. OOR's email dated May 6, 2019, seeking an additional two-week extension to issue the Final Determination.

18. Email chain dated May 22, 2019, wherein the OOR seeks an additional two-week extension and the Requester grants it.
19. OOR's e-mail dated May 22, 2019, requesting additional information from PUC.
20. PUC's submission dated May 28, 2019 in response to OOR request for clarification.
21. Requester's submission dated May 31, 2019.
22. OOR's correspondence dated May 31, 2019, seeking further clarification from PUC and establishing a submission deadline.
23. PUC's email dated June 3, 2019, regarding delivery of documents for *in camera* review.
24. OOR's email dated June 5, 2019, confirming receipt of the documents and advising the PUC that the Requester needed to be provided copies of the documents or the OOR would return the documents without considering them as part of the record.
25. PUC's email dated June 6, 2019, noting the documents were being provided only to the OOR.
26. Requester's email dated June 6, 2019, regarding PUC's unwillingness to provide the documents to all parties.
27. OOR's email dated June 7, 2019, requesting an additional two-week extension to issue the Final Determination.
28. Email chain dated June 7, 2019, confirming the Requester's agreement to an extension to issue the Final Determination and noting the OOR would be responding separately to the Requester's RTKL Request.
29. The Final Determination dated June 26, 2019, issued by the OOR.

The OOR has discretion to hold a hearing on appeals filed but chose not to do so in this matter. Therefore, there is no transcript to transmit. Certification of the record in this case is attached to this letter. Please feel free to contact us for any reason in connection with this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'Charles Rees Brown', with a stylized flourish at the end.

Charles Rees Brown
Chief Counsel

Attachments

cc: Eric Friedman (Requester)
John E. Herzog, Esq. (PUC)
Steven K. Bainbridge, Esq. (PUC)
Kevin J. McKeon, Esq. (Energy Transfer Partners)
Thomas J Sniscak, Esq. (Energy Transfer Partners)
Whitney E. Snyder, Esq. (Energy Transfer Partners)
Melissa A Chapaska, Esq. (Energy Transfer Partners)

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I certify that this Notice of Non-Participation 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.

Also, my signature on this Certification of Record and on all other correspondence directed to the Commonwealth Court in connection with this matter may be electronic and not original. I hereby certify that this is my true and correct signature and that I have approved the use thereof for these purposes.



Erik Arneson, Executive Director
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234
Phone: (717) 346-9903
Fax: (717) 425-5343
E-mail: OpenRecords@pa.gov

Dated: September 5, 2019

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PENNSYLVANIA PUBLIC UTILITY
COMMISSION,

Petitioner,

v.

ERIC FRIEDMAN,
Respondent.

ENERGY TRANSFER,
Petitioner,

v.

ERIC FRIEDMAN,
Respondent.

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: 980 CD 2019
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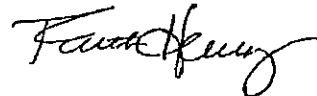
CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the Certified Record upon the following persons via email only:

John E. Herzog, Esquire
Steven K. Bainbridge, Esquire
Pennsylvania Public Utility Commission
PO Box 3265
Harrisburg, PA 17105
jherzog@pa.gov
sbainbridg@pa.gov

Eric Friedman
2 Fallbrook Lane
Glen Mills, PA 19342
Eric.law.friedman@gmail.com

Kevin J. McKeon, Esquire
Thomas J. Sniscak, Esquire
Whitney E. Snyder, Esquire
Melissa A. Chapaska, Esquire
Hawke McKeon & Sniscak, LLP
100 N. Tenth Street
Harrisburg, PA 17101
kjmckeon@hmslegal.com
wesnyder@hmslegal.com
machapaska@hmslegal.com
tjsniscak@hmslegal.com



Faith Henry, Administrative Officer
Office of Open Records -
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234
Phone: (717) 346-9903 Fax: (717) 425-5343
Email: fahenry@pa.gov

Dated September 5, 2019

September 5, 2019

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PENNSYLVANIA PUBLIC UTILITY	:	
COMMISSION,	:	
Petitioner,	:	
	:	
v.	:	980 CD 2019
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ERIC FRIEDMAN,	:	
Respondent.	:	
	:	
ENERGY TRANSFER,	:	
Petitioner,	:	
	:	
v.	:	982 CD 2019
	:	
ERIC FRIEDMAN,	:	
Respondent.	:	

TABLE OF CONTENTS RECORD

Eric Friedman v. Pennsylvania Public Utility Commission and Energy Transfer Partners,
OOR Dkt. AP 2019-0502

Office of Open Records Docket No. AP 2019-0502:

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29. The Final Determination dated June 26, 2019, issued by the OOR.

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Devenyi, Dylan

From: no-reply@openrecords.pa.gov
Sent: Monday, April 1, 2019 1:46 PM
To: eric.law.friedman@gmail.com
Subject: PA Office of Open Records - Appeal Confirmation



pennsylvania
OFFICE OF OPEN RECORDS

You have filed an appeal of an agency's response to a request for records under the Right-to-Know Law.

Name:	Eric Friedman
Address 1:	2 Fallbrook Lane
Address 2:	
City:	Glen Mills
State:	Pennsylvania
Zip:	19342
Phone:	
Fax:	
Email:	eric.law.friedman@gmail.com
Agency (list):	Pennsylvania Public Utility Commission
Agency Address 1:	400 North Street
Agency Address 2:	
Agency City:	Harrisburg
Agency State:	Pennsylvania
Agency Zip:	17120
Agency Phone:	717-787-8009
Agency Fax:	
Agency Email:	
Records Requested:	Please see attached files.
Request Submitted to Agency Via:	e-mail

RECEIVED

APR 01 2012

OFFICE OF THE CLERK

Request Date:	02/04/2019
Response Date:	03/11/2019
Deemed Denied:	No
Agency Open Records Officer:	Rosemary Chiavetta
Additional Reasons for Appeal:	
Attached a copy of my request for records:	Yes
Attached a copy of all responses from the Agency regarding my request:	Yes
Attached any letters or notices extending the Agency's time to respond to my request:	Yes
Agree to permit the OOR an additional 30 days to issue a final order:	No
Interested in resolving this issue through OOR mediation:	No
Attachments:	<ul style="list-style-type: none"> • 00 PUC2 RTK appeal.pdf • 01 PUC2 Request for records under Pennsylvania's Right-to-Know.pdf • 02 PUC2 RE_ [External] Request for records under Pennsylvania's.pdf • 03 PUC2 RTK Friedman Blast Radius HVL Pipeline documents Interi.pdf

I requested the listed records from the Agency named above. By submitting this form, I am appealing the Agency's denial, partial denial, or deemed denial because the requested records are public records in the possession, custody or control of the Agency; the records do not qualify for any exemptions under § 708 of the RTKL, are not protected by a privilege, and are not exempt under any Federal or State law or regulation; and the request was sufficiently specific.



Eric Friedman <eric.law.friedman@gmail.com>

Request for records under Pennsylvania's Right-to-Know statute

1 message

Eric Friedman <eric.law.friedman@gmail.com>

Mon, Feb 4, 2019 at 1:56 PM

To: rchiavetta@pa.gov

Background

On January 31, 2019, representatives of the Public Utility Commission appeared at a public meeting in East Goshen Township, Chester County. Event sponsor Rep. Carolyn Comitta provided an opportunity for the public to ask questions and receive PUC responses. During my opportunity at the microphone, I had the following exchange with PUC representative Paul Metro:

Q: You have an estimate of the blast radius that's associated with an accident on an HVL pipeline, yes?

A: We have reviewed the "buffer zone" calculation that's required by federal regulations.

Q: Do YOU have an estimate of what that distance looks like?

A: Pardon me, I couldn't hear the...

Q: Do you have an estimate of what that distance is?

A: Yes.

A video recording of this exchange is at <https://youtu.be/bpbj10JXQOk>

Request

Under Pennsylvania's Right-to-Know law, I respectfully request all records in the possession of Paul Metro, his superiors or subordinates, that relate to the calculation or estimation of the range at which thermal or overpressure events related to accidents on hazardous, highly volatile liquids (HVL) pipelines may be experienced. This request does not seek information provided by Sunoco if that information has been designated as confidential security information. Rather, it seeks records containing or related to calculations or estimates of blast radius (Sunoco's term) or "buffer zone" (PUC's term) regarding accidents or releases from HVL pipelines in the possession of the PUC, including (but not limited to) information that was produced for PUC by an external source or that was developed internally.

Records responsive to this request are requested in electronic format, if they exist in that format (e.g. PDF).

Thank you,

Eric Friedman
2 Fallbrook Lane
Glen Mills PA 19342

2 Fallbrook Lane
Glen Mills PA 19342
April 1, 2019

Commonwealth of Pennsylvania
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234

RE: Appeal of Denied Records Request—Pennsylvania Public Utility Commission

Dear Sir or Madam:

On February 4, 2019, under the provisions of Pennsylvania's Right-to-Know Law (RTKL), I requested records of the Pennsylvania Public Utility Commission (PUC). On February 8, 2019, I received a response from the PUC invoking a 30-day extension of time, and informing me that I may expect a further response "on or before Wednesday, March 13, 2019." On March 11, 2019, the PUC provided a "final response" to my request, denying it in its entirety. I respectfully appeal.

My request.

On February 4, 2019, I wrote to the PUC's Open Records Officer, Secretary Rosemary Chaivetta, via e-mail to rchiavetta@pa.gov, as follows:

Background

On January 31, 2019, representatives of the Public Utility Commission appeared at a public meeting in East Goshen Township, Chester County. Event sponsor Rep. Carolyn Comitta provided an opportunity for the public to ask questions and receive PUC responses. During my opportunity at the microphone, I had the following exchange with PUC representative Paul Metro:

Q: You have an estimate of the blast radius that's associated with an accident on an HVL pipeline, yes?

A: We have reviewed the "buffer zone" calculation that's required by federal regulations.

Q: Do YOU have an estimate of what that distance looks like?

A: Pardon me, I couldn't hear the...

Q: Do you have an estimate of what that distance is?

A: Yes.

A video recording of this exchange is at <https://youtu.be/bpbj10JXQOk>

Request

Under Pennsylvania's Right-to-Know law, I respectfully request all records in the possession of Paul Metro, his superiors or subordinates, that relate to the calculation or estimation of the range at which thermal or overpressure events related to accidents on hazardous, highly volatile liquids (HVL) pipelines may be experienced. This request does not seek information provided by Sunoco if that information has been designated as confidential security information. Rather, it seeks records containing or related to calculations or estimates of blast radius (Sunoco's term) or "buffer zone" (PUC's term) regarding accidents or releases from HVL pipelines in the possession of the PUC, including (but not limited to) information that was produced for PUC by an external source or that was developed internally.

Records responsive to this request are requested in electronic format, if they exist in that format (e.g. PDF).

On February 8, 2019, PUC invoked a 30-day extension of time to respond to my request. On March 11, 2019, the PUC provided a "final response" to my request, denying it in its entirety and advancing several theories to justify its denial. None of these theories appear to be valid justification to withhold the requested records.

As a threshold matter, I observe that PUC's representative, Fixed Utility Manager Paul Metro¹, acknowledged in a public setting, while accompanied by PUC counsel, that the PUC possesses one or more records responsive to my request. That is, the PUC possesses one or more internally-prepared estimate(s) of the blast radius associated with highly volatile liquids (HVL) pipeline accidents. These are the records sought by my request.

As a further threshold matter, the RTKL begins with a presumption of openness. A record in the possession or control of an agency is presumed open unless the agency can show by a preponderance of the evidence that it is exempt from release. Here, the PUC acknowledges possessing the requested records, but has not made even a token effort to explain why they are exempt from release. Instead, the agency has simply asserted various theories under which the records *might* be exempt, without providing any evidence, let alone a preponderance of it, that the requested records are actually covered under one of those theories.

Unfortunately, the PUC's own Open Records Officer appears to have an aversion to both the RTKL as well as the spirit and letter of its "openness" presumption. *See*, for example, [A Day at Pennsylvania Public Utility Commission](#), Fortnightly Magazine, February 2019. (Secretary Chiavetta: "They just want to fish a little bit, look at what Pennsylvania is doing...Some people are big conspiracy theorists. They're looking for the smoking gun...A lot of legal matters go past my desk every day, especially with the Right-to-Know part of the job. I had to become an expert on that, not because I wanted to, but because I had to...I met several Commissioners who were having the same problems. People on fishing expeditions want emails. At times, the amount of

¹ Mr. Metro occasionally accords himself other titles, but I refer to him by his official Present Class Title from his Commonwealth of Pennsylvania OAA-370 JOB DESCRIPTION form.

work involved is burdensome...For some reason, people outside the Commonwealth want to find out what's going on in Pennsylvania. And the cost of the Right-to-Know Law now, the legislature is looking at that...It's well to the half-million-dollar mark to gather and review documents each year. And then, you have appeals to your decisions and that takes more time and expense of the agency...More requesters are appealing to the Office of Open Records in an attempt to chip away at the exemptions provided in the Right-to-Know Law. They're constantly trying to look for little loopholes where protected information will be disclosed.")

Setting aside the apparent disdain of PUC Right-to-Know Officer for the RTKL, the PUC cites three theories about why the requested record(s) *might* be exempt. Tellingly, the PUC makes no attempt to show the requested record *is actually* exempt under any of these theories.

1. PUC claims the requested record is "Confidential Security Information" under the Public Utility Confidential Security Information Disclosure Protection Act, and its release might "compromise security against sabotage or criminal or terrorist acts and the non-disclosure of which is necessary for the protection of life, safety, public property or public utility facilities." First of all, it's clear that the requested record does not meet the definition of "Confidential Security Information." Beyond that, it's clear that the existence of a blast radius associated with PUC jurisdictional infrastructure might endanger the public safety—but it's not at all clear why the PUC's estimate of the size of that blast radius would do so in any way. *In fact, there is no secret to keep.* There are a number of publicly available studies that model blast and thermal impact radii under various scenarios. Release of the PUC's estimate would not reveal any new information, just another estimate.
2. The PUC claims that the disclosure of the requested record is exempt under the RTKL because it "would be reasonably likely to jeopardize or threaten public safety" or would "create[] a reasonable likelihood of endangering the safety or the physical security of a ... public utility, resource, infrastructure, [or] facility," including "infrastructure records that expose or create a vulnerability through disclosure." 65 P.S. § 67.708(b)(2) and (3)." But, as noted above, the PUC has not shown how disclosing its estimate of the size of the blast radius would endanger public safety, especially given that there are a number of credible estimates already publicly available. In fact, having additional information on the size of the blast radius would likely *increase* public safety, as it could further the public's understanding of who exactly needs to be prepared to take action in self-preservation.
3. The PUC claimed "Finally, the documents are exempt from disclosure pursuant to the noncriminal investigation provision of the RTKL (65 P.S. § 67.708(b)(17))." This appears to be an attempt to mischaracterize my request in order to try to find another reason to deny it. My request does not seek any investigative records whatsoever.

As noted above, the RTKL begins with the presumption that records of an agency are open. The agency bears the burden of showing otherwise, and PUC has failed to do so. PUC's dismissive denial of my request therefore appears contrary to both the spirit and the letter of the RTKL, and may demonstrate bad faith or inappropriate secrecy (or both) by the agency.

I respectfully request a review by the Office of Open Records (OOR) of PUC's unreasonably vague and excessively broad denial of my request. I respectfully that PUC be required to identify

each responsive record in each possession, followed by *in camera* review of each withheld record by the OOR. To the extent the OOR hearing officer believes a hearing would help to adjudicate my appeal I respectfully request one. I do not request mediation of my appeal, but am willing to consider mediation if requested by PUC.

Finally, my appeal is timely because I have submitted it to the OOR within fifteen (15) business days of the date of the PUC's denial of my request for records.

Sincerely,

/s/

Eric Friedman



Eric Friedman <eric.law.friedman@gmail.com>

RE: [External] Request for records under Pennsylvania's Right-to-Know statute

1 message

Chiavetta, Rosemary <rchiavetta@pa.gov>
To: Eric Friedman <eric.law.friedman@gmail.com>
Cc: "Trout, Doreen" <DOTROUT@pa.gov>

Mon, Feb 4, 2019 at 3:07 PM

Mr. Friedman:

We received your request and will process.

Thank you.

Rosemary Chiavetta, Esq.

Secretary

Pennsylvania Public Utility Commission

Commonwealth Keystone Building

400 North Street

Harrisburg, Pennsylvania 17120

rchiavetta@pa.gov

717-787-8009



From: Eric Friedman <eric.law.friedman@gmail.com>
Sent: Monday, February 04, 2019 1:57 PM
To: Chiavetta, Rosemary <rchiavetta@pa.gov>
Subject: [External] Request for records under Pennsylvania's Right-to-Know statute

ATTENTION: This email message is from an external sender. Do not open links or attachments from unknown sources. To report suspicious email, forward the message as an attachment to CWOPA_SPAM@pa.gov.

Background

On January 31, 2019, representatives of the Public Utility Commission appeared at a public meeting in East Goshen Township, Chester County. Event sponsor Rep. Carolyn Comitta provided an opportunity for the public to ask questions and receive PUC responses. During my opportunity at the microphone, I had the following exchange with PUC representative Paul Metro:

Q: You have an estimate of the blast radius that's associated with an accident on an HVL pipeline, yes?

A: We have reviewed the "buffer zone" calculation that's required by federal regulations.

Q: Do YOU have an estimate of what that distance looks like?

A: Pardon me, I couldn't hear the...

Q: Do you have an estimate of what that distance is?

A: Yes.

A video recording of this exchange is at <https://youtu.be/bpbj10JXQOk>

Request

Under Pennsylvania's Right-to-Know law, I respectfully request all records in the possession of Paul Metro, his superiors or subordinates, that relate to the calculation or estimation of the range at which thermal or overpressure events related to accidents on hazardous, highly volatile liquids (HVL) pipelines may be experienced. This request does not seek information provided by Sunoco if that information has been designated as confidential security information. Rather, it seeks records containing or related to calculations or estimates of blast radius (Sunoco's term) or "buffer zone" (PUC's term) regarding accidents or releases from HVL pipelines in the possession of the PUC, including (but not limited to) information that was produced for PUC by an external source or that was developed internally.

Records responsive to this request are requested in electronic format, if they exist in that format (e.g. PDF).

Thank you,

Eric Friedman

2 Fallbrook Lane

Glen Mills PA 19342



Eric Friedman <eric.law.friedman@gmail.com>

RTK Friedman Blast Radius HVL Pipeline documents Interim

1 message

Trout, Doreen <DOTROUT@pa.gov>

Fri, Feb 8, 2019 at 1:53 PM

To: "Eric.law.friedman@gmail.com" <Eric.law.friedman@gmail.com>

Cc: "Chiavetta, Rosemary" <rchiavetta@pa.gov>, "Bainbridge, Steven" <sbainbridg@pa.gov>

Good afternoon,

Attached is the Commission's Interim response to your Right to Know request.

Doreen

Doreen Trout

Office Administrator

Pa PUC

Secretary's Bureau



RTK Friedman Blast Radius HVL Pipeline documents Interim.pdf

98K



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

IN REPLY PLEASE
REFER TO OUR FILE

PUC RTK 2019-0007

February 8, 2019

Eric Friedman
2 Fallbrook Lane
Glen Mills, PA 19342

Interim response sent via Email only:
Eric.law.friedman@gmail.com

Dear Mr. Friedman:

We are in receipt of your Right to Know request, filed pursuant to the provisions of the Right to Know Law, 65 P.S. Section 67.101 et seq., *as amended*. In your email received on Monday, February 4, 2019, you stated:

"Background

On January 31, 2019, representatives of the Public Utility Commission appeared at a public meeting in East Goshen Township, Chester County. Event sponsor Rep. Carolyn Comitta provided an opportunity for the public to ask questions and receive PUC responses. During my opportunity at the microphone, I had the following exchange with PUC representative Paul Metro:

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A: Yes.

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Request

Under Pennsylvania's Right-to-Know law, I respectfully request all records in the possession of Paul Metro, his superiors or subordinates, that relate to the calculation or estimation of the range at which thermal or overpressure events related to accidents on hazardous, highly volatile liquids (HVL) pipelines may be experienced. This request does not seek information provided by Sunoco if that information has been designated as confidential security information. Rather, it seeks records containing or related to calculations or estimates of blast radius (Sunoco's term) or "buffer zone" (PUC's term) regarding accidents or releases from HVL pipelines in the possession of the PUC,

including (but not limited to) information that was produced for PUC by an external source or that was developed internally.

Records responsive to this request are requested in electronic format, if they exist in that format (e.g. PDF)."

Pursuant to Section 902(a)(4) of the Act, you are hereby advised that a legal review is necessary to determine whether the record is a record subject to access under this act. In addition, pursuant to Section 902(a)(7) of the Act, you are hereby advised that due to the nature and extent of the request, a response within the five (5) day statutorily required period is precluded.

A response is expected to be provided to you on or before Wednesday, March 13, 2019.

Sincerely,

A handwritten signature in cursive script, appearing to read "Rosemary Chiavetta".

Rosemary Chiavetta, Secretary
Right to Know Officer
Pa Public Utility Commission

cc: Steven Bainbridge, Assistant Counsel
PUC RTK Official File 2019-0007



April 2, 2019

Via Email Only:

Mr. Eric Friedman
2 Fallbrook Ln
Glen Mills, PA 19342
eric.law.friedman@gmail.com

Via Email Only:

Rosemary Chiavetta
Agency Open Records Officer
Pennsylvania Public Utility Commission
400 North Street
Harrisburg, PA 17120
RA-PUCRightToKnow@pa.gov
rchiavetta@pa.gov

RE: OFFICIAL NOTICE OF APPEAL-DOCKET #AP 2019-0502

Dear Parties:

Please review this information carefully as it affects your legal rights.

The Office of Open Records ("OOR") received this appeal under the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101, *et seq.* on **April 1, 2019**. This letter describes the appeal process. A binding Final Determination will be issued pursuant to the timeline required by the RTKL. In most cases, that means within 30 calendar days. The OOR's Final Determination is currently due on **May 1, 2019**.

OOR Mediation: This is a voluntary, informal process to help parties reach a mutually agreeable settlement on records disputes before the OOR. To participate in mediation, both parties must agree in writing. The Parties agreement to mediate stays the Final Determination Deadline. If mediation is unsuccessful, both parties will be able to make submissions to the OOR, and the OOR will have 30 calendar days from the conclusion of the mediation process to issue a Final Determination, unless the Requester agreed to an additional 30 calendar day extension on the appeal form.

Note to Parties: Statements of fact must be supported by an affidavit or attestation made under penalty of perjury by a person with actual knowledge. Any factual statements or allegations submitted without an affidavit will not be considered. The agency has the burden of proving that records are exempt from public access (*see* 65 P.S. § 67.708(a)(1)). **To meet this burden, the agency must provide evidence to the OOR.** The law requires the agency's position to be supported by sufficient facts *and* citation to all relevant sections of the RTKL, case law and OOR Final Determinations. An affidavit or attestation is required to show that records do not exist. Blank sample affidavits are available on the OOR's website.

Submissions to OOR: Both parties may submit information and legal argument to support their positions by 11:59:59 p.m. on April 11, 2019. The record closing date is seven (7) business days from the date of this letter unless the proceedings have been stayed for the parties to submit a completed mediation agreement form, then the record will remain open for seven (7) additional business days beyond the mediation agreement submission deadline. *Submissions sent*

via postal mail and received after 5:00 p.m. will be treated as having been received the next business day. The agency may assert exemptions on appeal even if it did not assert them when the request was denied (*Levy v. Senate of Pa.*, 65 A.3d 361 (Pa. 2013)).

Include the above docket number on all submissions related to this appeal. Also, any information you provide to the OOR must be provided to all parties involved in this appeal. Information shared with the OOR that is not also shared with all parties will not be considered.

Agency Must Notify Third Parties: If records affect a legal or security interest of an employee of the agency; contain confidential, proprietary or trademarked records of a person or business entity; or are held by a contractor or vendor, the agency must notify such parties of this appeal immediately and provide proof of that notice by the record closing date set forth above. Such notice must be made by: (1) providing a copy of all documents included with this letter; and (2) advising that interested persons may request to participate in this appeal (*see* 65 P.S. § 67.1101(c)).

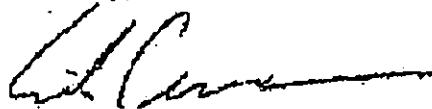
Commonwealth Court has held that "the burden [is] on third-party contractors ... to prove by a preponderance of the evidence that the [requested] records are exempt." (*Allegheny County Dep't of Admin. Servs. v. A Second Chance, Inc.*, 13 A.3d 1025, 1042 (Pa. Commw. Ct. 2011)). **Failure of a third-party contractor to participate in an appeal before the OOR may be construed as a waiver of objections regarding release of the requested records.**

Law Enforcement Records of Local Agencies: District Attorneys must appoint Appeals Officers to hear appeals regarding criminal investigative records in the possession of a local law enforcement agency. If access to records was denied in part on that basis, the Requester should consider filing a concurrent appeal with the District Attorney of the relevant county.

Public Record Notice: All dockets, filings and OOR orders and opinions in this appeal will be public records and subject to public access with limited exception. The OOR's Final Determination will generally include a summary of the case including the identity of the parties and the relevant factual background. Final Determinations are available on the OOR's website and searchable on-line.

If you have general questions about the appeal process, please contact the OOR at (717) 346-9903. If you have questions specific to your appeal, please email the assigned Appeals Officer (contact information is enclosed) - and be sure to provide a copy of any correspondence to all other parties involved in this appeal.

Sincerely,



Erik Arneson
Executive Director

Enc.: Assigned Appeals Officer contact information



pennsylvania

OFFICE OF OPEN RECORDS

APPEALS OFFICER:

Kelly Isenberg, Esq.

CONTACT INFORMATION:

Commonwealth of Pennsylvania
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234

FACSIMILE:

(717) 425-5343

EMAIL:

kisenberg@pa.gov

**Preferred method of contact and
submission of information:**

EMAIL

Please direct submissions and correspondence related to this appeal to the above Appeals Officer. Please include the case name and docket number on all submissions.

You must copy the other party on everything you submit to the OOR. The Appeals Officer cannot speak to parties individually without the participation of the other party.

The OOR website, <https://openrecords.pa.gov>, is searchable and both parties are encouraged to review prior final determinations involving similar records and fees that may impact this appeal.

The OOR website also provides sample forms that may be helpful during the appeals process. OOR staff are also available to provide general information about the appeals process by calling (717) 346-9903.

REQUEST TO PARTICIPATE BEFORE THE OOR

Please accept this as a Request to Participate in a currently pending appeal before the Office of Open Records. The statements made herein and in any attachments are true and correct to the best of my knowledge, information and belief. I understand this statement is made subject to the penalties of 18 Pa.C.S. § 4904, relating to unsworn falsifications to authorities.

NOTE: The requester filing the appeal with the OOR is a named party in the proceeding and is NOT required to complete this form.

OOR Docket No: _____

Today's date: _____

Name: _____

PUBLIC RECORD NOTICE: ALL FILINGS WITH THE OOR WILL BE PUBLIC RECORDS AND SUBJECT TO PUBLIC ACCESS WITH LIMITED EXCEPTION. IF YOU DO NOT WANT TO INCLUDE PERSONAL CONTACT INFORMATION IN A PUBLICLY ACCESSIBLE RECORD, PLEASE PROVIDE ALTERNATE CONTACT INFORMATION IN ORDER TO RECEIVE FUTURE CORRESPONDENCE RELATED TO THIS APPEAL.

Address/City/State/Zip: _____

E-mail: _____

Fax Number: _____

Name of Requester: _____

Address/City/State/Zip: _____

Telephone/Fax Number: _____ / _____

E-mail: _____

Name of Agency: _____

Address/City/State/Zip: _____

Telephone/Fax Number: _____ / _____

E-mail: _____

Record at issue: _____

I have a direct interest in the record(s) at issue as (check all that apply):

- ☐ An employee of the agency
- ☐ The owner of a record containing confidential or proprietary information or trademarked records
- ☐ A contractor or vendor
- ☐ Other: (attach additional pages if necessary) _____

I have attached a copy of all evidence and arguments I wish to submit in support of my position.

Respectfully submitted, _____ (must be signed)

Please submit this form to the Appeals Officer assigned to the appeal. Remember to copy all parties on this correspondence. The Office of Open Records will not consider direct interest filings submitted after a Final Determination has been issued in the appeal.



pennsylvania
OFFICE OF OPEN RECORDS

ORDER
NOTICE OF FILING DEFICIENCY

April 2, 2019

Mr. Eric Friedman
2 Fallbrook Ln
Glen Mills, PA 19342

Re: Friedman v. Pennsylvania Public Utility Commission
Docket No. 2019-0502

Dear Mr. Friedman:

The Office of Open Records has received correspondence from you indicating that you wish to file an appeal of an agency's denial of a Right-to-Know Law request. In order to review the agency's denial of your request for records, the record on appeal is required to include both the request and the agency's response. *See* 65 P.S. § 67.1303(b). A review of your correspondence reveals that the required item(s) indicated below was/were not included with your correspondence:

☐ Request

☒ Complete Agency Response

In order to cure this deficiency in the appeal, **you are required to file the above document(s) that were not included with the appeal by April 9, 2019**, within seven (7) calendar days of the date of the record opened in this appeal. In addition, you are required to serve a copy of the document(s) upon the agency from which you requested the records.

FAILURE TO FILE THE REQUIRED DOCUMENT(S) WILL RESULT IN YOUR APPEAL BEING DISMISSED.

Respectfully yours,

/s/ Kelly Isenberg

Kelly Isenberg, Esq.
Attorney

cc: Pennsylvania Public Utility Commission's Open Records Officer, Rosemary Chiavetta

Isenberg, Kelly

From: Eric Friedman <eric.law.friedman@gmail.com>
Sent: Tuesday, April 2, 2019 2:17 PM
To: DC, OpenRecords; Isenberg, Kelly
Cc: PC, PUCRightToKnow; Chiavetta, Rosemary
Subject: [External] Re: Friedman v. PA Public Utility Commission: AP 2019-0502
Attachments: 2019-0502_Friedman-PUC.pdf; 04 PUC2 RTK Friedman Blast Radius HVL Pipeline documents Final.pdf

ATTENTION: This email message is from an external sender. Do not open links or attachments from unknown sources. To report suspicious email, forward the message as an attachment to CWOPA_SPAM@pa.gov.

Good afternoon Ms. Isenberg,

I received the attached correspondence today from the Office of Open Records (OOR), regarding my appeal of a denied request for records from the Public Utility Commission (PUC).

The Order and Notice of Filing Deficiency indicated that I had not included a copy of the PUC's denial of my request. I've attached to this e-mail a copy of the final agency response.

Regards,
Eric

On Tue, Apr 2, 2019 at 12:47 PM DC, OpenRecords <RA-OpenRecords@pa.gov> wrote:

Dear Parties,

Please see the attached appeal that has been filed with the Office of Open Records and the associated deficiency notice. This matter has been assigned to an Appeals Officer (contact information can be found on page 4 of the attachment).

Please forward all future correspondence directly to the Appeals Officer and all other parties.

Sincerely,



Dylan Devenyi
Administrative Officer
Office of Open Records
333 Market Street, 16th Floor

Harrisburg, PA 17101-2234

(717) 346-9903 | Fax (717) 425-5343

<https://openrecords.pa.gov>

@OpenRecordsPA

Open Records in Pennsylvania Blog

Confidentiality Notice: This electronic communication is privileged and confidential and is intended only for the party to whom it is addressed. If received in error, please return to sender.



Eric Friedman <eric.law.friedman@gmail.com>

RTK Friedman Blast Radius HVL Pipeline documents Final denied

1 message

Trout, Doreen <DOTROUT@pa.gov>

Mon, Mar 11, 2019 at 2:14 PM

To: "Eric.law.friedman@gmail.com" <Eric.law.friedman@gmail.com>

Cc: "Chiavetta, Rosemary" <rchiavetta@pa.gov>, "Bainbridge, Steven" <sbainbridg@pa.gov>

Good afternoon Mr. Friedman,

Attached is the Commission's Final response to your Right to Know request.

Doreen

Doreen Trout

Office Administrator

Pa PUC

Secretary's Bureau



RTK Friedman Blast Radius HVL Pipeline documents Final denied.pdf

122K



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

IN REPLY PLEASE
REFER TO OUR FILE

PUC RTK 2019-0007

March 11, 2019

Eric Friedman
2 Fallbrook Lane
Glen Mills, PA 19342

Final response sent via Email only:
Eric.law.friedman@gmail.com

Dear Mr. Friedman:

By this letter, the Pennsylvania Public Utility Commission (Commission or PUC) responds to your Right to Know request filed pursuant to the provisions of Pennsylvania's Right to Know Law (RTKL), 65 P.S. §§ 67.101 et seq., *as amended*. In your request received Monday, February 4, 2019, you stated:

"Background

On January 31, 2019, representatives of the Public Utility Commission appeared at a public meeting in East Goshen Township, Chester County. Event sponsor Rep. Carolyn Comitta provided an opportunity for the public to ask questions and receive PUC responses. During my opportunity at the microphone, I had the following exchange with PUC representative Paul Metro:

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A: Yes.

A video recording of this exchange is at <https://youtu.be/bpbj10JXQOk>

Request

Under Pennsylvania's Right-to-Know law, I respectfully request all records in the possession of Paul Metro, his superiors or subordinates, that relate to the calculation or estimation of the range at which thermal or overpressure events related to accidents on hazardous, highly volatile liquids (HVL) pipelines may be experienced. This request does not seek information provided by Sunoco if that information has been designated as confidential security information. Rather, it seeks records containing or related to calculations or estimates of blast radius (Sunoco's term) or

"buffer zone" (PUC's term) regarding accidents or releases from HVL pipelines in the possession of the PUC, including (but not limited to) information that was produced for PUC by an external source or that was developed internally.

Records responsive to this request are requested in electronic format, if they exist in that format (e.g. PDF)."

Your request is denied.

The documents responsive to your request have been designated as confidential security information (CSI), and therefore, as your request indicated, you are not seeking such documents. To the extent that your request does seek such documents, the Commission must deny your request, since the documents are designated CSI. Additionally, the documents are part of a noncriminal investigation and therefore are exempt from disclosure under the RTKL.

The Public Utility Confidential Security Information Disclosure Protection Act (PUCSIDPA) (35 P.S. §§ 2141.1 – 2141.8) prohibits disclosure of "Confidential Security Information" (CSI). 35 P.S. § 2141.2 (Definitions). CSI is "information contained within a record maintained by an agency in any form, the disclosure of which would compromise security against sabotage or criminal or terrorist acts and the non-disclosure of which is necessary for the protection of life, safety, public property or public utility facilities." 35 P.S. § 2141.2. The documents requested were designated as CSI and are not disclosable.

In addition, the RTKL provides for exemptions for CSI. The RTKL prohibits disclosure of records that "would be reasonably likely to jeopardize or threaten public safety" or "which creates a reasonable likelihood of endangering the safety or the physical security of a ... public utility, resource, infrastructure, [or] facility," including "infrastructure records that expose or create a vulnerability through disclosure." 65 P.S. § 67.708(b)(2) and (3). Therefore, the documents requested are not disclosable under the RTKL.

Finally, the documents are exempt from disclosure pursuant to the noncriminal investigation provision of the RTKL (65 P.S. § 67.708(b)(17)), which exempts from disclosure "records of an agency relating to a noncriminal investigation," including "investigative materials, notes, correspondence and reports," and records that would "reveal the institution, progress or result of an agency investigation." 65 P.S. § 67.708(b)(17).

For all of the reasons stated, the records requested are exempt from disclosure.

This response constitutes the final response of the Commission to your RTK Law Request.

NOTICE OF RIGHT TO APPEAL

If you believe the PUC has wrongfully denied any part of your request, you may appeal within 15 business days from the date of this letter to:

Office of Open Records
16th Floor
333 Market Street
Harrisburg, PA 17126-0333

If you choose to file an appeal, you must do so within 15 business days of the mailing date of the agency's response. 65 P.S. § 67.1101. Please note that a copy of your original Right-to-Know request and this denial letter must be included when filing an appeal. The law also requires that you state the reasons why the record is a public record and address the reasons the Agency denied your request. Visit the Office of Open Records website at <http://openrecords.pa.gov> for further information on filing an appeal.

Please be advised that this correspondence will serve to close this record with our office as permitted by law.

Sincerely,

A handwritten signature in black ink, appearing to read "Rosemary Chiavetta". The signature is fluid and cursive, with the first name "Rosemary" written in a larger, more prominent script than the last name "Chiavetta".

Rosemary Chiavetta
Secretary and Right to Know Officer
Pa Public Utility Commission

cc: Steven Bainbridge, PUC Assistant Counsel
Right to Know File PUC RTK 2019-0007

Isenberg, Kelly

From: Bainbridge, Steven
Sent: Tuesday, April 2, 2019 4:29 PM
To: 'Curtis.stambaugh@energytransfer.com'
Cc: Isenberg, Kelly; 'Eric.law.friedman@gmail.com'
Subject: OOR Appeal 2019-0502 -- Notice to Interested Third Party of Appeal and Ability to Request to Participate

Follow Up Flag: Flag for follow up
Flag Status: Flagged



04 PUC2 RTK 2019-0502_Fried... LTR Stambaugh
Friedman Blast R... Energy Transfer ...

Hello Mr. Stambaugh,

Attached please find a letter providing notice of the Office of Open Records (OOR) Appeal by Mr. Friedman docketed at OOR AP 2019-0502 of the Commission's denial of Mr. Friedman's Right-to-Know Request dated March 11, 2019 at PUC RTK 2019-0007, along with the Appeal Packet.

Mr. Friedman cured the filing deficiency, which is also attached hereto (the PUC's Final Response).

This letter is intended to provide notice of the Appeal, as well as the right of interested third parties to participate upon request to OOR.

This letter is also being sent by first class mail (cc's are by email only).

Sincerely,

Steve Bainbridge
Assistant Counsel
Pennsylvania Public Utility Commission



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

April 2, 2019

OOB Appeal 2019-0502

Curtis N. Stambaugh, Esq.
Assistant General Counsel
Energy Transfer Partners
212 N. Third St., Suite 201
Harrisburg PA 17101
Curtis.stambaugh@energytransfer.com (By First Class Mail and Email)

Re: Notification of Office of Open Records Appeal 2019-0502 and advising
that interested persons may participate

Dear Mr. Stambaugh:

Attached please find a copy of the Office of Open Records (OOR) Appeal Packet
for the OOR Appeal 2019-0502 by Mr. Eric Friedman of the Commission's denial of Mr.
Friedman's Right-to-Know Request dated March 11, 2019 (PUC RTK 2019-0007).

As indicated on page two of the Appeal Packet, the Commission is hereby
notifying you of this matter and advising you that interested persons may request to
participate in this appeal (see 65 P.S. § 67.1101(c)).

Sincerely,

Steven K. Bainbridge
Assistant Counsel

Enclosure: OOR Appeal Packet 2019-0502

Cc: (By email only)

Eric Friedman
2 Fallbrook Ln
Glenn Mills PA 19342
Eric.law.friedman@gmail.com

Kelly Isenberg, Esq.
Appeals Officer
Office of Open Records
333 Market St., 16th Fl.
Harrisburg PA 17101-2234
kisenberg@pa.gov

Isenberg, Kelly

From: Eric Friedman <eric.law.friedman@gmail.com>
Sent: Friday, April 5, 2019 11:22 AM
To: Chiavetta, Rosemary
Cc: Isenberg, Kelly; DC, OpenRecords; Trout, Doreen; Bainbridge, Steven; Pankiw, Bohdan; Herzog, John
Subject: Re: [External] Re: Friedman-v. PA Public Utility Commission: AP 2019-0502

Ms. Isenberg,

The deficiency in my appeal was that I inadvertently omitted to attach a copy of the PUC's denial of my request for records. This is a document the PUC obviously had all along, since it generated it.

Moreover, when notified of the missing document, I rectified the omission within about 90 minutes of the sending of the notification.

This is a de minimis matter which causes no hardship to the PUC. And the underlying request for records (which the PUC acknowledges possessing) is a simple, straightforward matter. I respectfully request that the PUC's effort to unnecessarily complicate and delay this matter be denied.

Sincerely,
Eric Friedman

Sent from my iPhone

On Apr 5, 2019, at 11:02, Chiavetta, Rosemary <rchiavetta@pa.gov> wrote:

Good morning Ms. Isenberg:

On April 2, 2019, the Commission received an appeal served by the Office of Open Records that was deemed deficient. The deficiency was subsequently cured by the requestor. However, the Office of Open Records states that the Commission should still be held to the seven (7) business day deadline and answer the appeal on April 11, 2019, unless a request for extension was requested and granted.

As a result of the Office of Open Records decision not to re-serve the cured appeal, the Commission has now lost almost three (3) business days in preparing its appeal response. In addition, this appeal affects a third party's confidential information and that party must be notified and given an opportunity to defend its due process rights. The OOR Statement of Policy, Section V. D. 3., states that: "In the discretion of the Appeals officer, the deadline for submissions may be extended."

The Commission submits that under the circumstances present in this matter, that is, the requestor's submission of a defective appeal and the need to timely notify affected Third Parties, it would be reasonable and just to extent the Commission's response time in this matter. Accordingly, the Commission requests an extension to file its appeal response by the close of business on Monday, April 15, 2019.

*Secretary Rosemary Chiavetta, Esq.
Pennsylvania Public Utility Commission
Commonwealth Keystone Building*

400 North Street
Harrisburg, Pennsylvania 17120
rchiavetta@pa.gov
717-787-8009
<image002.jpg>

From: Isenberg, Kelly <kisenberg@pa.gov>
Sent: Friday, April 05, 2019 9:51 AM
To: Chiavetta, Rosemary <rchiavetta@pa.gov>; Eric Friedman <eric.law.friedman@gmail.com>; DC, OpenRecords <RA-OpenRecords@pa.gov>
Cc: Trout, Doreen <DOTROUT@pa.gov>; Bainbridge, Steven <sbainbridg@pa.gov>; Pankiw, Bohdan <BPANKIW@pa.gov>; Herzog, John <JHERZOG@pa.gov>
Subject: RE: [External] Re: Friedman v. PA Public Utility Commission: AP 2019-0502

Ms. Chiavetta:

Thank you for your correspondence. The appeal will not be "re-served" on the Commission. Accordingly, the deadlines set forth in the OOR's notice of appeal will remain the same. However, we will entertain a request for an extension of time to make a submission on appeal, if one is made.

Sincerely,
Kelly Isenberg

<image001.jpg> **Kelly C. Isenberg**
Appeals Officer
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234
Phone: (717) 346-9903
Fax: (717) 425-5343
[@OpenRecordsPA](https://www.openrecords.pa.gov)

Confidentiality Notice: This electronic communication is privileged and confidential and is intended only for the party to whom it is addressed. If received in error, please return to the sender.

From: Chiavetta, Rosemary
Sent: Thursday, April 4, 2019 4:10 PM
To: Eric Friedman <eric.law.friedman@gmail.com>; DC, OpenRecords <RA-OpenRecords@pa.gov>; Isenberg, Kelly <kisenberg@pa.gov>
Cc: Trout, Doreen <DOTROUT@pa.gov>; Bainbridge, Steven <sbainbridg@pa.gov>; Pankiw, Bohdan <BPANKIW@pa.gov>; Herzog, John <JHERZOG@pa.gov>
Subject: RE: [External] Re: Friedman v. PA Public Utility Commission: AP 2019-0502

Good afternoon Ms. Isenberg:

Since Mr. Friedman has cured the deficiency of his appeal, will the Commission be re-served and a date established as the deadline for our response? The RTK Law provides the agency seven (7) business days from the time of service by the Office of Open Records to file its response to the appeal.

Isenberg, Kelly

From: Isenberg, Kelly
Sent: Friday, April 5, 2019 12:32 PM
To: 'Eric Friedman'; Chiavetta, Rosemary
Cc: DC, OpenRecords; Trout, Doreen; Bainbridge, Steven; Pankiw, Bohdan; Herzog, John
Subject: RE: [External] Re: Friedman v. PA Public Utility Commission: AP 2019-0502

Dear Ms. Chiavetta and Mr. Friedman:

Mr. Friedman's objection to the Commission's request for an extension of time to make a submission for the record has been noted.

In this instance, the Commission's request for 3 additional business days to submit its legal position and notify interested third parties of the appeal is granted. The parties may make submissions on appeal until April 15, 2019. Please note that if the Commission requests any further extensions, it will be required to seek the Requester's agreement to a corresponding extension of time for the OOR to issue a Final Determination.

Thank you for your attention to this matter.

Sincerely,
Kelly Isenberg



Kelly C. Isenberg
Appeals Officer
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234
Phone: (717) 346-9903
Fax: (717) 425-5343
<https://www.openrecords.pa.gov>
@OpenRecordsPA

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From: Eric Friedman <eric.law.friedman@gmail.com>
Sent: Friday, April 5, 2019 11:22 AM
To: Chiavetta, Rosemary <rchiavetta@pa.gov>
Cc: Isenberg, Kelly <kisenberg@pa.gov>; DC, OpenRecords <RA-OpenRecords@pa.gov>; Trout, Doreen <DOTROUT@pa.gov>; Bainbridge, Steven <sbainbridg@pa.gov>; Pankiw, Bohdan <BPANKIW@pa.gov>; Herzog, John <JHERZOG@pa.gov>
Subject: Re: [External] Re: Friedman v. PA Public Utility Commission: AP 2019-0502

Ms. Isenberg,

The deficiency in my appeal was that I inadvertently omitted to attach a copy of the PUC's denial of my request for records. This is a document the PUC obviously had all along, since it generated it.

Isenberg, Kelly

From: Whitney Snyder <WESnyder@hmslegal.com>
Sent: Thursday, April 11, 2019 4:01 PM
To: Isenberg, Kelly
Cc: eric.law.friedman@gmail.com; Bainbridge, Steven
Subject: [External] Energy Transfer Request to Participate; OOR Docket No. 2019-0502
Attachments: SPLP ET Position Stmt.pdf; Affidavit.pdf; ET Request to Participate.pdf

Follow Up Flag: Flag for follow up
Flag Status: Flagged

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Ms. Isenberg,

Attached please find Energy Transfer's Request to Participate, Position Statement, and a supporting Affidavit in this matter.

Best,

Whitney E. Snyder

Hawke McKeon & Sniscak LLP
www.hmslegal.com
100 N. Tenth Street
Harrisburg, PA 17101
717-236-1300
wesnyder@hmslegal.com

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REQUEST TO PARTICIPATE BEFORE THE OOR

Please accept this as a Request to Participate in a currently pending appeal before the Office of Open Records. The statements made herein and in any attachments are true and correct to the best of my knowledge, information and belief. I understand this statement is made subject to the penalties of 18 Pa.C.S. § 4904, relating to unsworn falsifications to authorities.

NOTE: The requester filing the appeal with the OOR is a named party in the proceeding and is NOT required to complete this form.

OOR Docket No: 2019-0502

Today's date: 04/11/2019

Name: Energy Transfer Partners

PUBLIC RECORD NOTICE: ALL FILINGS WITH THE OOR WILL BE PUBLIC RECORDS AND SUBJECT TO PUBLIC ACCESS WITH LIMITED EXCEPTION. IF YOU DO NOT WANT TO INCLUDE PERSONAL CONTACT INFORMATION IN A PUBLICLY ACCESSIBLE RECORD, PLEASE PROVIDE ALTERNATE CONTACT INFORMATION IN ORDER TO RECEIVE FUTURE CORRESPONDENCE RELATED TO THIS APPEAL.

Address/City/State/Zip Hawke McKeon & Sniscak, 100 N. 10th Street, Harrisburg, PA 17101

E-mail wesnyder@hmslegal.com

Fax Number: 717-236-4841

Name of Requester: Eric Friedman

Address/City/State/Zip 2 Fallbrook Lane, Glen Mills, PA 19342

Telephone/Fax Number: N/A

E-mail eric.law.friedman@gmail.com

Name of Agency: Pennsylvania Public Utility Commission

Address/City/State/Zip 400 N. Street, 2nd Floor, Harrisburg, PA 17105

Telephone/Fax Number: 717-772-7777

E-mail RA-PUCRightToKnow@pa.gov

Record at issue: Records in possession of PUC BIE pertaining to HVL pipelines

I have a direct interest in the record(s) at issue as (check all that apply):

- ☐ An employee of the agency
- ☒ The owner of a record containing confidential or proprietary information or trademarked records
- ☐ A contractor or vendor
- ☐ Other: (attach additional pages if necessary) _____

I have attached a copy of all evidence and arguments I wish to submit in support of my position.

Respectfully submitted, [Signature] (must be signed)

Please submit this form to the Appeals Officer assigned to the appeal. Remember to copy all parties on this correspondence. The Office of Open Records will not consider direct interest filings submitted after a Final Determination has been issued in the appeal.

was produced for PUC by an external source or that was developed internally.

(PUC RTK 2019-0007)

ET owns Sunoco Pipeline L.P. (SPLP), which operates HVL pipelines implicated by this request.¹ On April 2, 2019, the PUC notified ET that this request may implicate records provided by ET containing confidential security information related to the operation of ET's ME1 pipeline (hereinafter referred to as Requested Records). As the request concerns records provided by and concerning ET, it has a direct and substantial interest in the outcome of this appeal and is entitled to advance any and all exemptions implicated by the request "as a matter of fundamental due process and notice." *Allegheny Cty. Dep't of Admin. Servs. v. Parsons*, 61 A.3d 336, 347 (Pa. Cmwlth. 2013).

II. The Requested records are exempt from disclosure pursuant to The Public Utility Confidential Security Information Disclosure Protection Act and Right to Know Law

A. ET Requested Records are exempt from Disclosure pursuant to Section 708(b)(17) of the RTKL as records relating to a noncriminal investigation

As indicated in PUC's denial letter to Requester, to the extent records sought by the request are in the possession of the PUC, they are exempt from disclosure pursuant to Section 708(b)(17) of the RTKL as agency records possessed pursuant to its noncriminal investigatory authority.

In sum, this request seeks those records provided to and/or prepared by I&E pursuant to its investigatory authority over HVL pipelines. See, e.g., *Pa. Pub. Utility Comm'n v. Gilbert*, 40 A.3d 755, 760 (Pa. Cmwlth. 2012) (recognized the PUC's broad

¹ It is unclear whether Mr. Friedman's request implicates other HVL pipelines not owned by ET.

authority to conduct noncriminal investigations “to determine ... if utilities are in compliance with the Public Utility Code, ... the [United States Department of Transportation Pipeline and Hazardous Materials Safety Administration] and other applicable state and federal regulations.”).

Commonwealth Court has consistently held that such records provided in accordance with and/or resulting from the agency’s investigatory authority, which would reveal the institution, progress or result of an investigation, are exempt from public disclosure. *See, e.g., Dep’t of Envtl. Prot. v. Delaware Riverkeeper Network*, 113 A.3d 869 (Pa. Cmwlth. 2015) (RTKL noncriminal investigation exemption exempts sampling data in DEP possession by way of its authority “monitor, control and regulate radiation sources on an ongoing basis” pursuant to the Radiation Protection Act.); *Pennsylvania Public Utility Commission v. Gilbert*, 40 A.3d 755 (Pa. Cmwlth. 2012) (finding strong public policy considerations support PUC nondisclosure of materials related to underground natural gas pipeline investigation.).

B. ET’s Requested Records are exempt from disclosure pursuant to The Public Utility Confidential Security Information Disclosure Protection Act

To the extent the PUC is in possession of records responsive to the request, these records contain confidential security information pursuant to the Public Utility Confidential Security Information Disclosure Protection Act (35 P.S. §§ 2141.1 to 2141.6) (CSI Act) and/or the RTKL.

The CSI Act provides “[p]ublic utility records or portions thereof which contain confidential security information, in accordance with the provisions of this act, shall not be subject to the provisions of the act of June 21, 1957 (P.L. 390, No. 212), referred to as the

Right-to-Know Law.” *Cf.* 65 P.S. § 67.102 (exempting from disclosure any record “exempt from being disclosed under any other Federal or State law or regulation or judicial order or decree.”) . As defined by the CSI Act, confidential security information is “information contained within a record maintained by an agency in any form, the disclosure of which would compromise security against sabotage or criminal or terrorist acts and the non-disclosure of which is necessary for the protection of life, safety, public property or public utility facilities.” 35 P.S. § 2141.2. To the extent ET has provided the Requested Records to the PUC, these records were identified, marked and submitted as containing confidential security information as supported by the Affidavit of ET Senior Vice President – Project Services Engineering and Construction, Joseph Perez and confirmed by the PUC in its March 11, 2019 denial. 52 Pa. Code § 102.3(c) (requiring identification of records as containing confidential security information.). Moreover, even if the records requested were not subject to the CSI Act, the RTKL would nonetheless prohibit disclosure of the calculations “would be reasonably likely to jeopardize or threaten public safety” or “which creates a reasonable likelihood of endangering the safety or the physical security of a ... public utility, resource, infrastructure, [or] facility,” including “infrastructure records that expose or create a vulnerability through disclosure.” 65 P.S. § 67.708(b)(2) and (3). Therefore, the documents requested are not disclosable under the RTKL.

As established by the affidavit of ET Senior Vice President – Project Services Engineering and Construction, Joseph Pere, the request implicates confidential security information regarding the operation and integrity of ET’s HVL pipeline, the release of which would jeopardize the security of ET and its employees. Release of the Requested Records would increase the possibility for security breaches of ET’s facilities through

exposure of confidential vulnerability assessments, operational data, and quality controls related to the operation of heavily regulated HVL pipelines. Specifically, providing an individual or group of individuals with the detailed calculations sought here would give someone with malicious intent knowledge necessary to breach, damage or destroy the pipelines. Affidavit at 6.

C. ET Requested Records are exempt from Disclosure pursuant to Section 708(b)(16) of the RTKL as records relating to a criminal investigation

To the extent records sought by the request are in the possession of the PUC, they are likewise exempt from disclosure pursuant to Section 708(b)(17) of the RTKL as “a record of an agency relating to or resulting in a criminal investigation,” including, *inter alia*:

(ii) Investigative materials, notes, correspondence, videos and reports.

[...]

(vi) A record that, if disclosed, would do any of the following:

- (A) Reveal the institution, progress or result of a criminal investigation, except the filing of criminal charges.
- (B) Deprive a person of the right to a fair trial or an impartial adjudication.
- (C) Impair the ability to locate a defendant or codefendant.
- (D) Hinder an agency’s ability to secure an arrest, prosecution or conviction.
- (E) Endanger the life or physical safety of an individual.

On March 11, 2019, Delaware County District Attorney’s Office and the Office of the Pennsylvania Attorney General, announced the commencement of a joint investigation

of alleged misconduct by ET, Sunoco Logistics Partners, and related corporate entities. See Delaware County District Attorney, *Delaware County District Attorney and the Pennsylvania Attorney General investigate the Mariner East Pipeline* (March 11, 2019) (<https://www.delcopa.gov/publicrelations/releases/2019/marinereastpipeline2.html>). The scope of this ongoing criminal investigation includes “pipeline construction and related activities for Mariner East 1, 2, and 2X pipelines,” which necessarily implicates the Requested Records. *Id.* Public release of such potential evidence and information pertaining to the institution of the Attorney Generals’ joint-investigation prior to its conclusion would violate ET’s due process rights by depriving it of the right to a fair and impartial judicial process.

D. The Requested Records are Protected by the Deliberative Process, Attorney-Client and/or Work Product Privileges

By definition, a “public record” subject to the RTKL “is not protected by a privilege.” 65 P.S. § 67.102. The Requested Records are not “public records” pursuant to the RTKL based on the following applicable privileges:

The Requested Records are subject to the deliberative process privilege. In particular, release of the Requested Records would expose confidential deliberations of law reflecting opinions, recommendations and advice related to I&E’s prosecutorial and investigatory determinations.

The Requested Records are likewise subject to the attorney-client and work product privileges. In particular, the request seeks privileged calculations prepared for and/or provided to I&E prosecutors for the purposes of providing professional legal advice

concerning SPLP's compliance with federal and state laws and regulations and to evaluate the need for prosecution. Thus, the Requested Records are not subject to disclosure. *Heavens v. Dept. Environmental Prot.*, 65 A.3d 1069 (Pa. Cmwlth. 2013) (affirming OOR's denial of request for DEP records containing "communications made to and by DEP counsel for the purpose of providing professional legal advice concerning legal issues arising out of DEP's investigation ... of the well site fire.").

III. Conclusion

To the extent the request implicates ET Requested Records, these records are exempt from disclosure under the Right to Know Law. For the reasons stated above, as supported by the affidavit of Joseph Perez, the decision of the PUC denying the request for access to ET's Requested Records should be upheld.

Respectfully submitted,

/s/ Whitney E. Snyder

Thomas J. Sniscak, Esq. (PA ID No. 33891)
Kevin J. McKeon, Esq. (PA ID No. 30428)
Whitney E. Snyder, Esq. (PA ID No. 316625)

Hawke, McKeon & Sniscak LLP
100 North Tenth Street
Harrisburg, PA 17101
Tel: (717) 236-1300
tjsniscak@hmslegal.com
kjmckeon@hmslegal.com
wesnyder@hmslegal.com

Attorneys for Energy Transfer Partners

Dated: April 11, 2019

CERTIFICATE OF SERVICE

- I hereby certify that I have this day served a true copy of the forgoing document upon the parties and in the manner listed below.

VIA ELECTRONIC MAIL

Steven Bainbridge, Esq.
Assistant Counsel
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17120
sbainbridg@pa.gov

Kelly Isenberg, Esq.
Appeals Officer
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kisenberg@pa.gov

Eric Friedman
2 Fallbrook Lane
Glen Mills, PA 19342
eric.law.friedman@gmail.com

/s/ *Whitney E. Snyder*

Thomas J. Sniscak, Esq. (PA ID No. 33891)
Kevin J. McKeon, Esq. (PA ID No. 30428)
Whitney E. Snyder, Esq. (PA ID No. 316625)

Dated: April 11, 2019

**BEFORE THE
PENNSYLVANIA OFFICE OF OPEN RECORDS**

IN THE MATTER OF:

ERIC FRIEDMAN,

Requester,

vs.

PENNSYLVANIA PUBLIC UTILITY
COMMISSION,

Respondent.

Docket No. 2019-0502

**DECLARATION IN SUPPORT OF DIRECT INTEREST PARTY
ENERGY TRANSFER**

1. I, Joseph Perez, am the Senior Vice President – Project Services Engineering and Construction of Energy Transfer (ET).
2. ET owns Sunoco Pipeline L.P. (SPLP), which operates Highly Volatile Liquid (HVL) pipelines in Pennsylvania.
3. Part of my job responsibilities require me to ensure the protection and safety of ET assets, including ET and/or SPLP's records and other documents.
4. I have knowledge of records submitted to the Pennsylvania Public Utility Commission and possibly implicated by the February 4, 2019 request for “all records in the possession of Paul Metro, his superiors or subordinates, that relate to the calculation or estimation of the range at which thermal or overpressure events related to accidents on hazardous, highly

volatile liquids (HVL) pipelines may be experienced." (hereinafter referred to as the "Requested Records").

5. To the extent the Requested Records exist, ET and SPLP treat this material as confidential security information in accordance with the provisions and procedures specified by the Public Utility Confidential Security Information Disclosure Protection Act (35 P.S. §§2141.1 to 2141.6) and the PUC's regulations implementing the Act at 52 Pa. Code §§102.1 -102.4.

6. While certain observations concerning the characteristics of ET's HVL pipelines – such as their general path or the location of the above-ground valves – can be seen at the surface level, the Requested Records seek far more detailed information than anything that could be obtained through surface-level observation. The release of this information would create a much more significant risk to the security and integrity of the Pipelines than anything that could be obtained through surface-level observation. Specifically, providing an individual or group of individuals with the detailed calculations sought here would give someone with malicious intent knowledge necessary to breach, damage or destroy the pipelines.

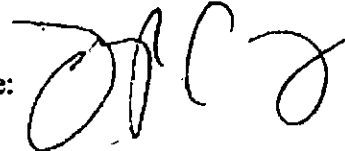
7. Based upon my review of the Requested Records in possession of ET as submitted to I&E, I believe that the Requested Records are of sufficient detail that, if disclosed, could be used to facilitate damage or disruption to ET's HVL pipelines.

8. In line with the confidential nature of the Requested Records, ET and SPLP maintain strict access control of these documents with disclosure limited to authorized, essential personnel and government agencies with the jurisdiction to require disclosure of such documents.

I, Joseph Perez, hereby state that the facts above set forth are true and correct (or are true and correct to the best of my knowledge, information and belief) and that I expect to be able to prove the same at a 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: April 11, 2019

Signature:

A handwritten signature in black ink, appearing to be 'JP', written over a horizontal line.

Isenberg, Kelly

From: Eric Friedman <eric.law.friedman@gmail.com>
Sent: Friday, April 12, 2019 3:30 PM
To: Isenberg, Kelly
Cc: Bainbridge, Steven
Subject: [External] Re: Energy Transfer Request to Participate; OOR Docket No. 2019-0502
Attachments: petrol_22.pdf; 2017-05-16 Protective Order Filed.pdf

ATTENTION: This email message is from an external sender. Do not open links or attachments from unknown sources. To report suspicious email, forward the message as an attachment to CWOPA_SPAM@pa.gov.

Good afternoon Ms. Isenberg,

I write to respectfully object to Sunoco's "request to participate" in my right-to-know request for records of the PUC. My records request speaks for itself, but if I may quote from it: "I respectfully request all records in the possession of Paul Metro, his superiors or subordinates, that relate to the calculation or estimation of the range at which thermal or overpressure events related to accidents on hazardous, highly volatile liquids (HVL) pipelines may be experienced. This request does not seek information provided by Sunoco if that information has been designated as confidential security information. Rather, it seeks records containing or related to calculations or estimates of blast radius (Sunoco's term) or "buffer zone" (PUC's term) regarding accidents or releases from HVL pipelines in the possession of the PUC, including (but not limited to) information that was produced for PUC by an external source or that was developed internally."

Sunoco appears to want to complicate and confuse what is really a very simple matter. Just to address one point (at the risk of repeating something I've already put in the record): it's absurd to allege that there is any real secret to keep. There are a variety of models of HVL blast radii already in the public domain. I've attached one example, produced by TRC, a Sunoco contractor, for your consideration (see slides 18 and 24 for specific details). Others include the Citizens Risk Assessment and the Delaware County Council risk assessment of the proposed Mariner East HVL pipeline. All of these reports are publicly available.

In addition, I wish to respectfully inform you that I am covered under a Protective Order issued by Commonwealth Court for good cause. Sunoco's attorneys writing to me, as they have done here, is apparently in violation of that Protective Order. I've attached a copy of the Order for your convenience.

For the foregoing reasons, including specifically my records request which shows Sunoco has no standing to attempt to block the release of the records I've requested, I respectfully ask that Sunoco's request to participate in this simple and straightforward matter should be denied.

Sincerely,
Eric Friedman

On Thu, Apr 11, 2019 at 4:01 PM Whitney Snyder <WESnyder@hmslegal.com> wrote:

Ms. Isenberg,

Attached please find Energy Transfer's Request to Participate, Position Statement, and a supporting Affidavit in this matter.

Best,

Whitney E. Snyder

Hawke McKeon & Sniscak LLP

www.hmslegal.com

100 N. Tenth Street
Harrisburg, PA 17101
717-236-1300
wesnyder@hmslegal.com

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: Condemnation by Sunoco	:
Pipeline L.P. of Permanent and	:
Temporary Rights of Way and	:
Easements for the Transportation	:
Of Ethane, Propane, Liquid Petroleum	:
Gas, and other Petroleum Products in	: No. 1780 C.D. 2016
Thornbury Township, Delaware	:
County, Pennsylvania, Over the Lands	:
of Traymore Investment Partners, L.P.	:
	:
Appeal of: Andover Homeowners'	:
Association Inc.	:

PROTECTIVE ORDER

AND NOW, this 16th day of May, 2017, in response to Andover Homeowners' Association, Inc.'s Application for Relief, a Protective Order is hereby entered:

It is ordered that Sunoco Pipeline L.P., its agents, servants, workmen, and or employees, including but not limited to the following: Bart L. Mitchell, Percheron Field Services, and Wood Group Mustang, Inc. may not contact, in writing, telephonically, or in person any member of Andover Homeowners' Association, Inc., without the prior written consent of Andover Homeowners' Association, Inc.'s counsel of record.

This Order is meant to be prospective only and not retrospective. Further, no sanctions shall be imposed for any conduct of the parties prior to the date of this Order.

~~not a part of the~~ Robert Byer, Esquire, attorney for Sunoco Pipeline L.P. shall notify Curtis M. Stambaugh, Esquire, Assistant General Counsel for Sunoco Pipeline

~~not a part of the~~

—)

L.P., Wood Group Mustang, Inc., and Bart L. Mitchell, as an employee of Wood Group Mustang, Inc., of this Order.



JAMES GARDNER COLINS, Senior Judge

Certified from the Record

MAY 16 2017

And Order Entered



RPS



Risk Assessments for Releases from Highly Volatile Liquid Pipelines

Jeremy Fontenault

RPS ASA

Sr. GIS Specialist

Faye Cradit

TRC

Sr. Integrity Engineer

rpsgroup.com

<http://www.trcsolutions.com/>

Secure & Stable

ADDING VALUE



Introduction

Pipeline operators are required by code (49 CFR Part 195.452) to have a process in place for identifying pipeline segments that could affect a high consequence area (HCA).

In addition to having the HCAs identified, pipeline operators must take special measures to protect these areas and mitigate the associated risks.

Depending on the type of product being transported, a product release could result in liquid plumes, vapor dispersion, or a combination of both; which the operators need to account for in their processes.

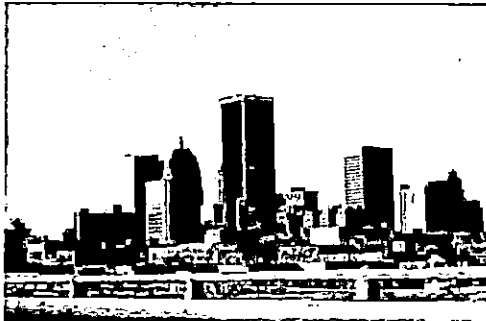


Overview

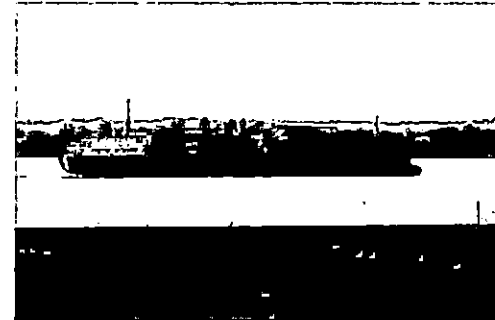
- What is a High Consequence Area?
- What are Highly Volatile Liquids (HVLs)?
- Modeling of Releases of HVLs
- HCA Analysis for HVL Pipelines
- Mitigating Risk through Emergency Flow Restriction Device (EFRD) Analysis

What is a High Consequence Area?

- High Consequence Areas (HCAs) include:



High
Population
Areas



Commercially
Navigable
Waterways



Other
Populated
Areas

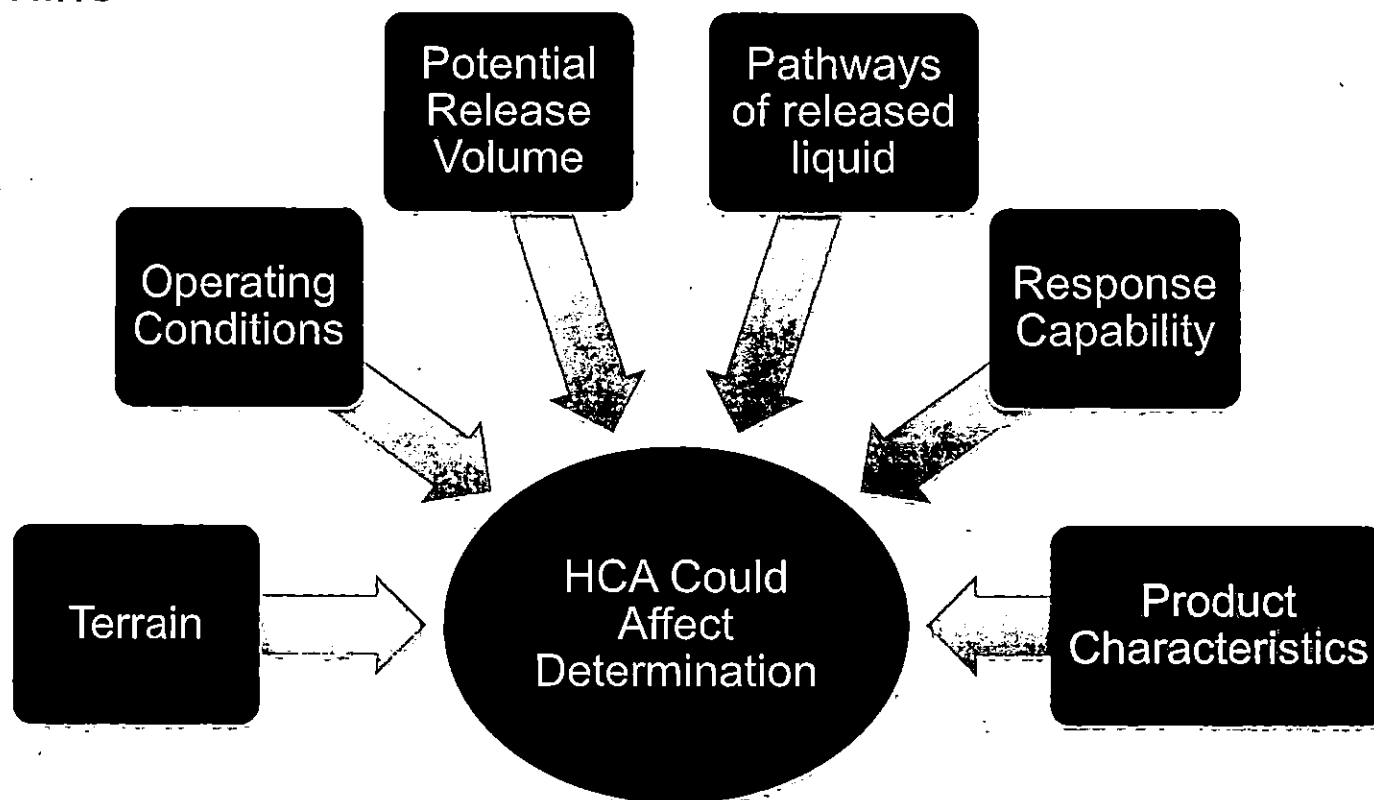


Unusually
Sensitive
Areas

- Two types of High Consequence Areas (HCAs)
 - Direct
 - Indirect

HCA Could Affect Criteria

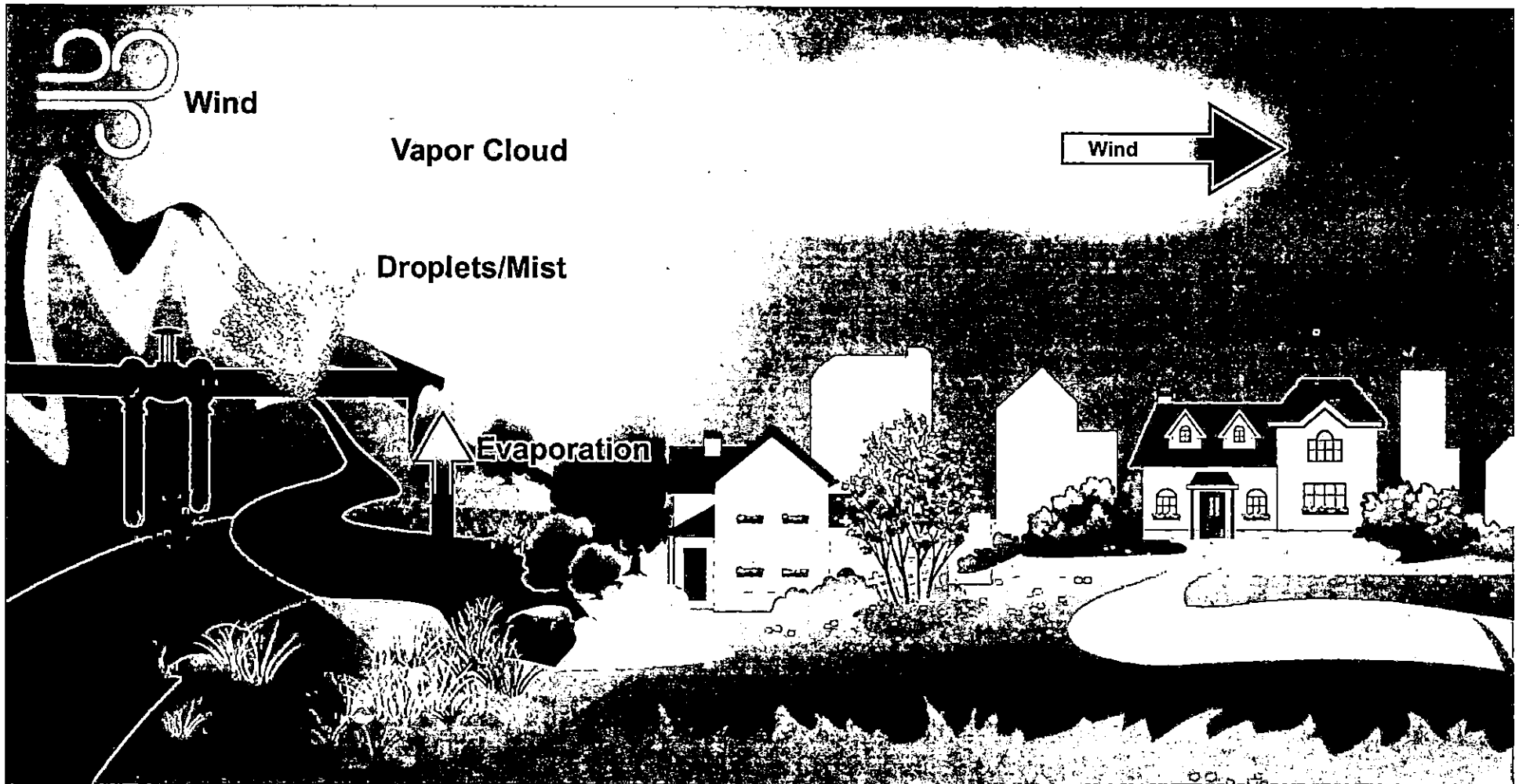
- Factors that contribute to creating indirect HCA segments on a pipeline



What are Highly Volatile Liquids (HVLs)

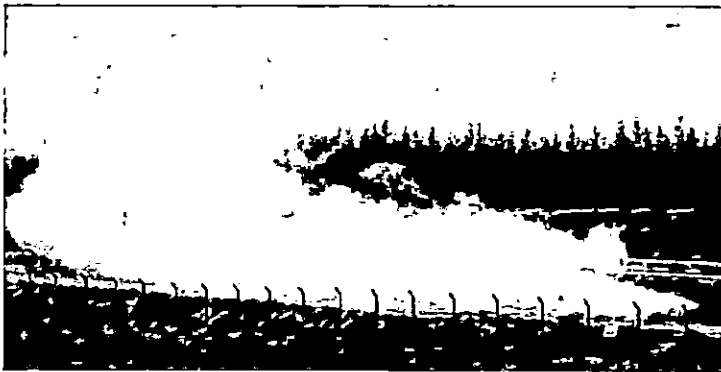
- Liquids when stored at a certain temperature or pressure
- Can quickly vaporize when released to atmospheric conditions
- Common HVLs transported in pipelines include:
 - Natural Gas Liquids
 - Ethane, propane, butane, Isobutane, Pentanes
 - Ethylene
 - Propylene
 - Anhydrous ammonia

HVL Releases



HVL Implications for HCA Analysis

- Requires determining impacted HCAs by considering:
 - Vapor cloud dispersion and concentrations
 - Liquid pooling and potential plume pathway
 - Evaporation from liquid plume
- How is this determined?
 - Atmospheric dispersion modeling
 - Liquid spill plume modeling





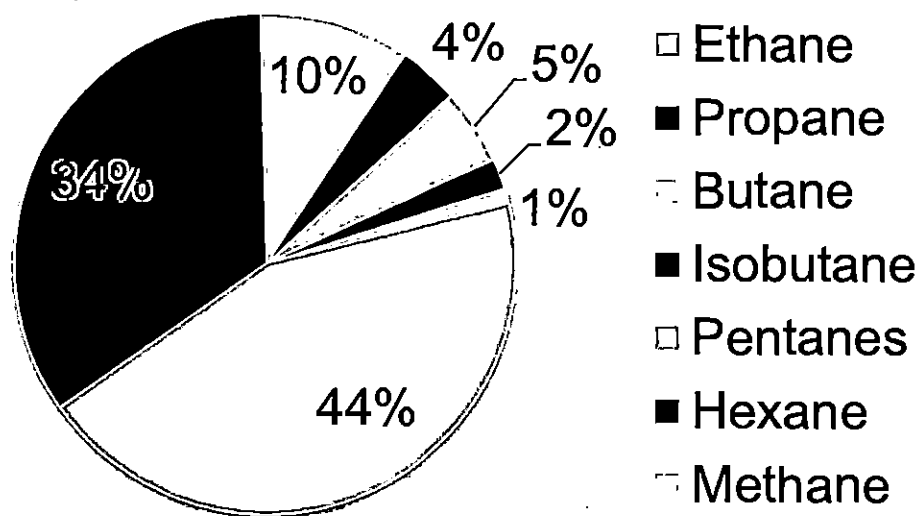
Modeling of Releases of HVLs

- **Step 1 – Analysis of HVL Composition**
- Step 2 – Release Calculation
- Step 3 – Atmospheric dispersion modeling
- Step 4 – Liquid plume modeling
- Step 5 – Evaporation from liquid plumes

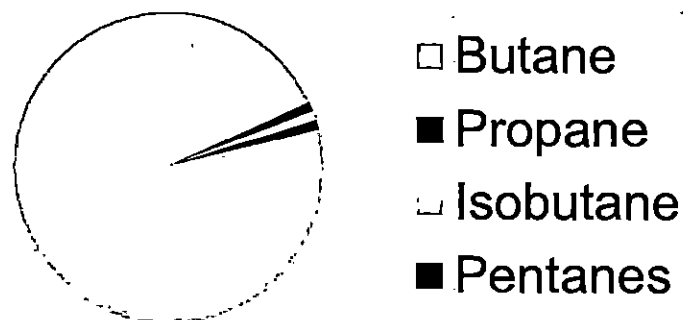
Analysis of HVL Composition

Most HVL products are composed of multiple chemicals, in varying quantities.

Y-Grade NGL



Butane



Ethane





Analysis of HVL Composition

- Each chemical has different physical properties and will behave differently in the event of a release
- Most models don't handle these mixtures
- The conservative approach is to model each chemical individually:
 - Perform release calculations on each chemical individually
 - Scale release calculations by overall composition
 - Simulate releases of each chemical individually



Modeling of Releases of HVLs

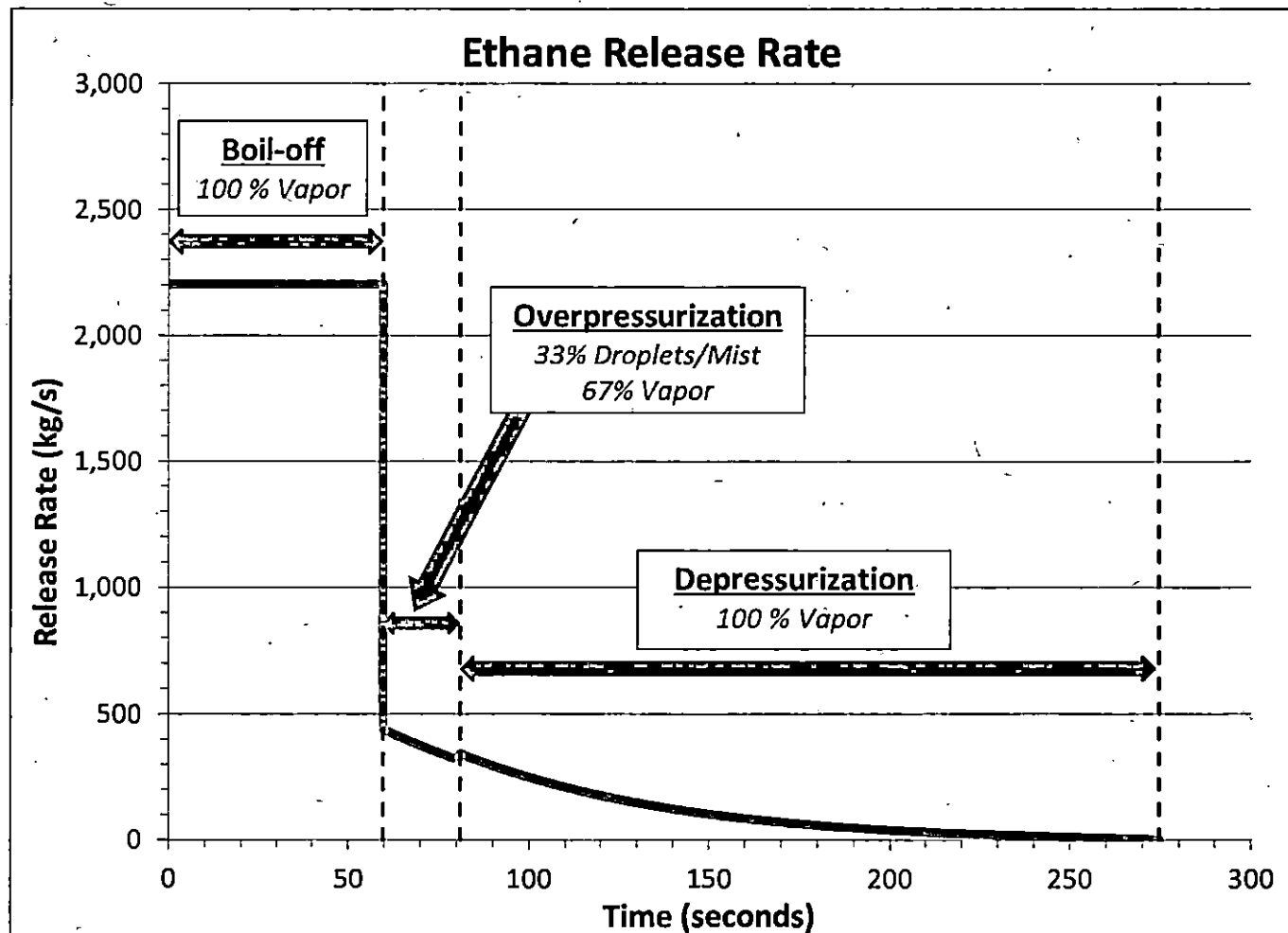
- Step 1 – Analysis of HVL Composition
- Step 2 – Release Calculation
- Step 3 – Atmospheric dispersion modeling
- Step 4 – Liquid plume modeling
- Step 5 – Evaporation from liquid plumes



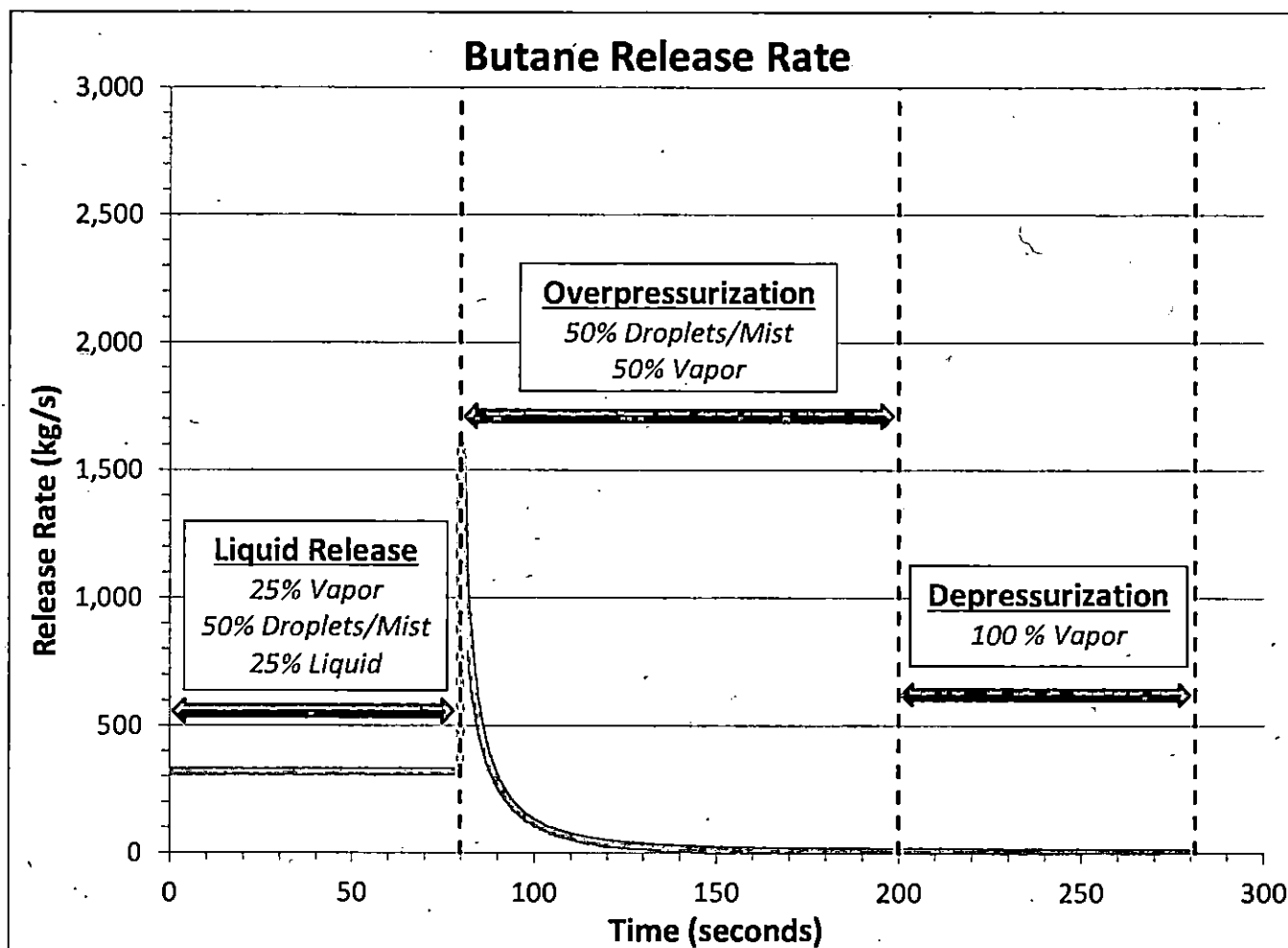
Release Calculation

- Releases can pass through multiple stages:
 - Liquid release, Boil-off, Over pressurization, Depressurization
- At each phase the released chemical can exist in one or many states:
 - Liquid, vapor, droplets/mist
- Release rates will vary over time, and through different stages of the release
- Release rate tapers off to zero once pipeline reaches atmospheric pressure.

Release Calculation



Release Calculation





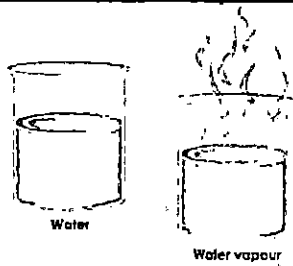
Modeling of Releases of HVLs

- Step 1 – Analysis of HVL Composition
- Step 2 – Release Calculation
- **Step 3 – Atmospheric dispersion modeling**
- Step 4 – Liquid plume modeling
- Step 5 – Evaporation from liquid plumes

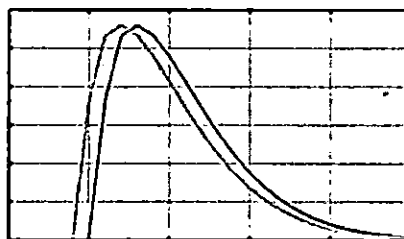
Atmospheric Dispersion Modeling

- Used to determine the spatial extent of the vapor cloud and vapor concentrations from the ruptured pipeline
- Inputs to the modeling:

Chemical Properties



Release Rate and Duration



Environmental Conditions



- Outputs from the modeling:
 - Vapor plume dimensions (width, height)
 - Instantaneous & Time Averaged Concentrations
 - Maximum distance to specific concentration threshold

Thresholds of Concern

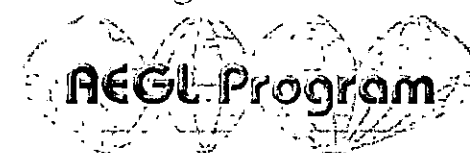
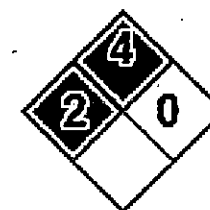
■ Lower Explosive Limit (LEL)

- Concentration threshold at which the vapor could catch fire if there were an ignition source



■ Health Risk Thresholds

- Concentrations exceeding these for a defined time period can cause toxic effects
 - Level 1 – reversible effects (discomfort, irritation, etc.)
 - Level 2 – irreversible effects, long-lasting effects, impaired ability to escape
 - Level 3 – life-threatening effects or death
- Sources of thresholds
 - Acute Exposure Guideline Levels (AEGLs) - EPA
 - Temporary Emergency Exposure Limit (TEEL) - DOE





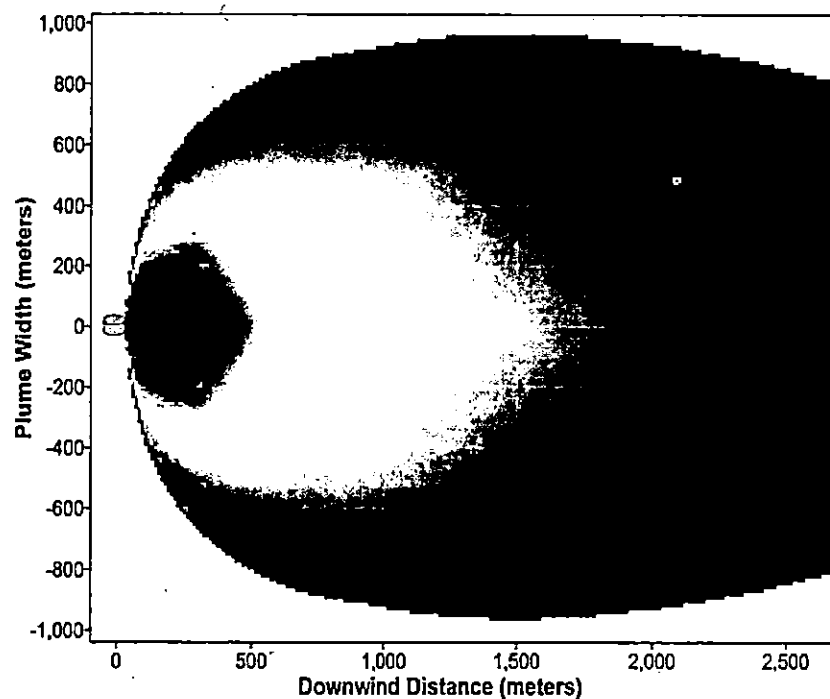
Concentration Thresholds (ppm)

Threshold	LEL	Level-1	Level-2	Level-3
Time Period	Instantaneous	60 minutes		
Methane	50,000	65,000	230,000	400,000
Ethane	29,000	65,000	230,000	400,000
Propane	21,000	5,500	17,000	33,000
n-Butane	19,000	5,500	17,000	53,000
IsoButane	18,000	5,500	17,000	53,000
n-Pentane	15,000	3,000	33,000	200,000
IsoPentane	14,000	3,000	33,000	200,000
Hexanes	12,000	260	2,900	8,600

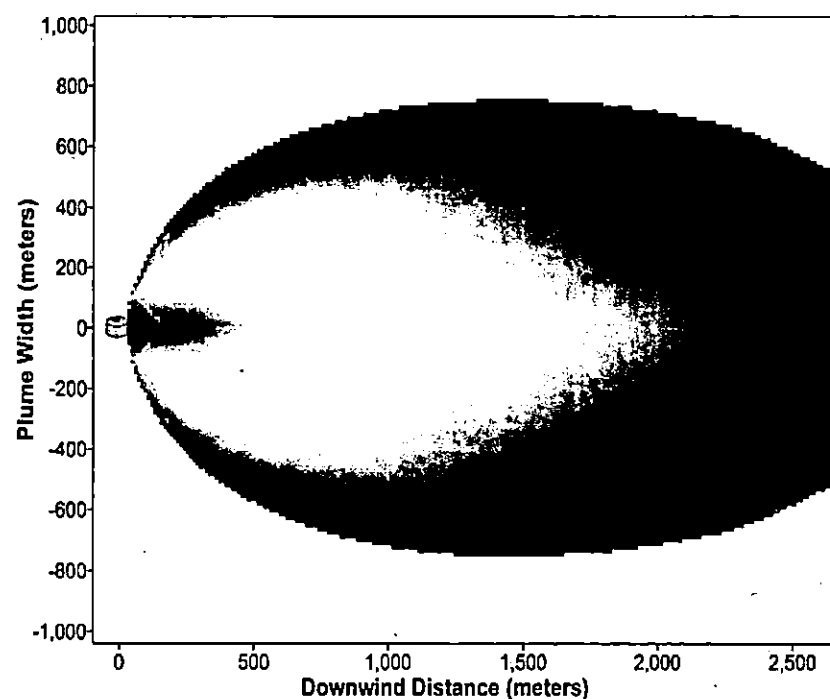
<https://cameochemicals.noaa.gov>

Plume Cross Section Concentration

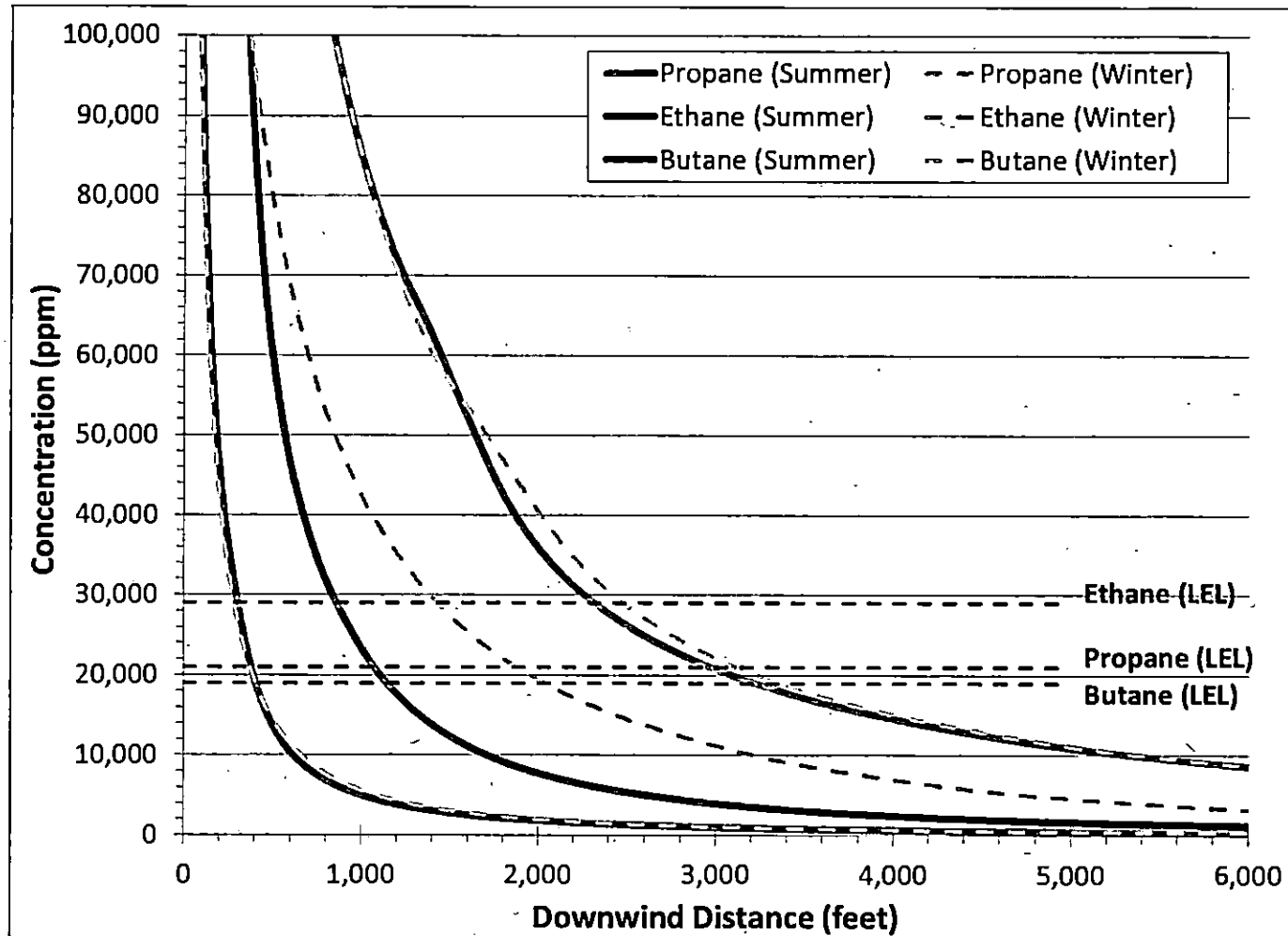
Ground Level



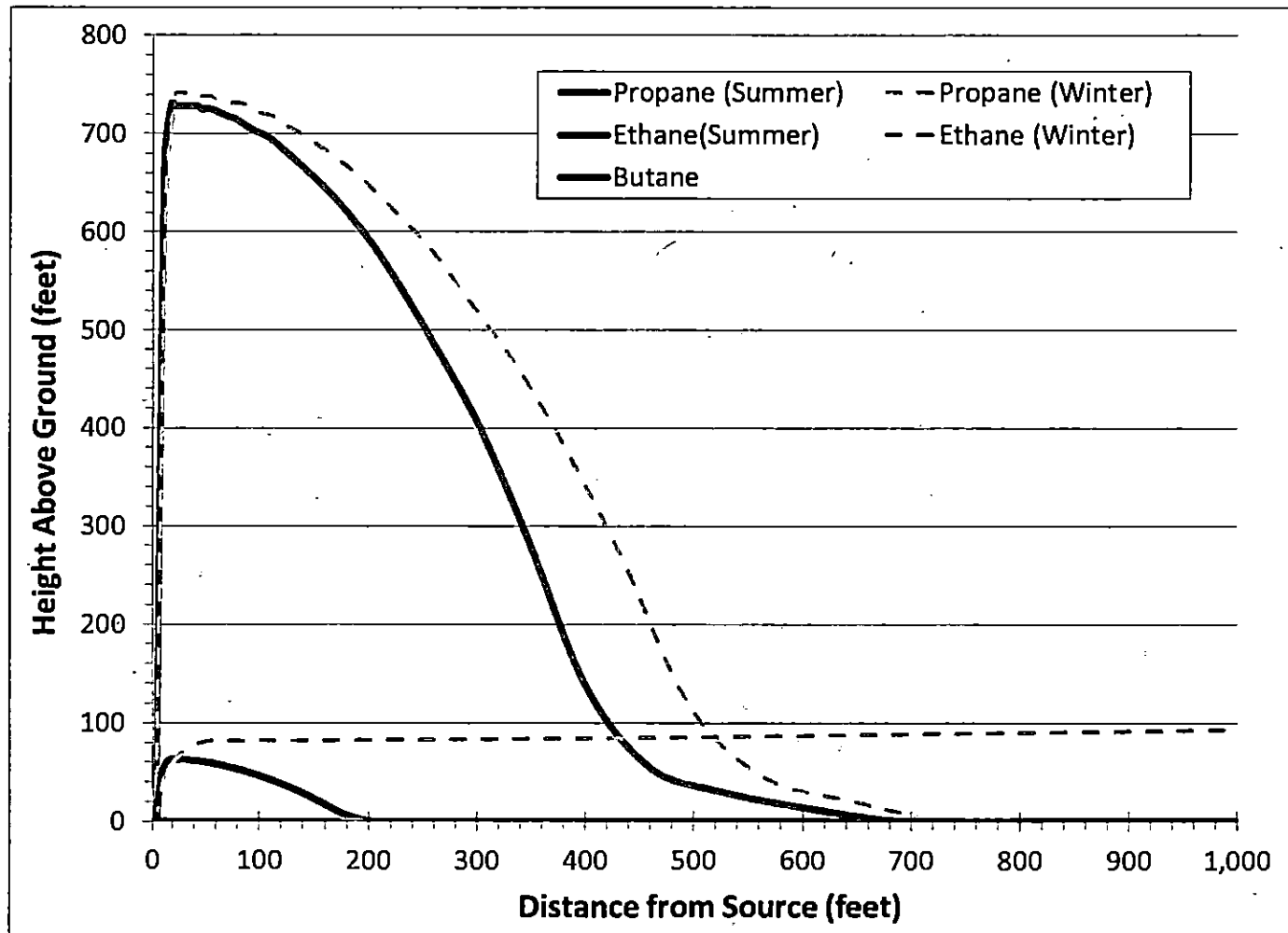
5 Meters Above the Ground



Plume Centerline Concentration



Plume Height of Max Concentration

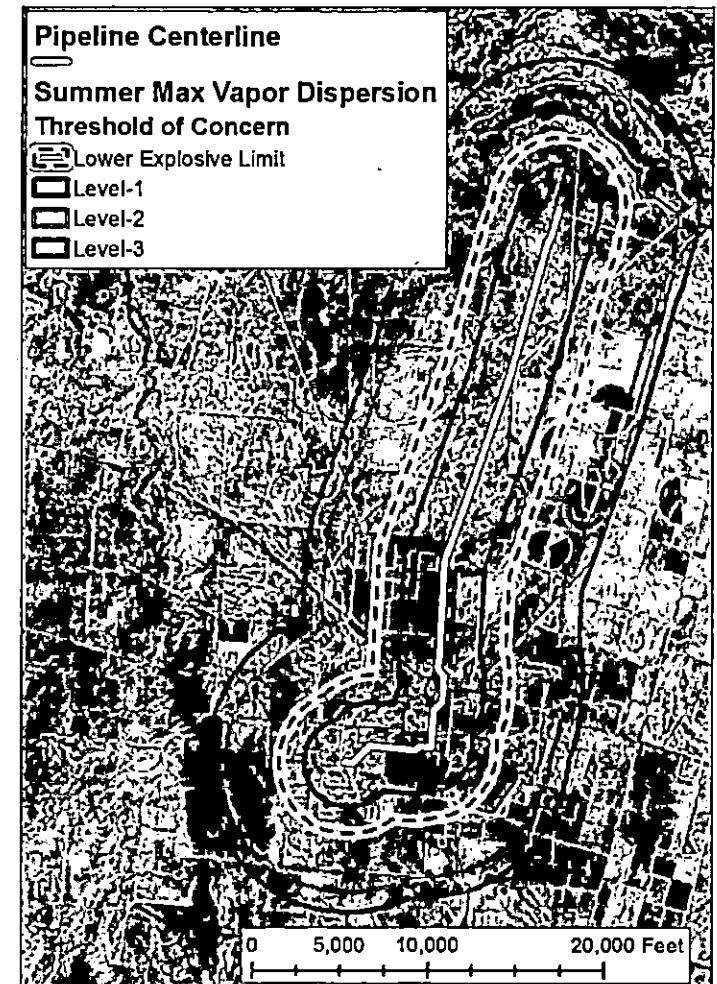
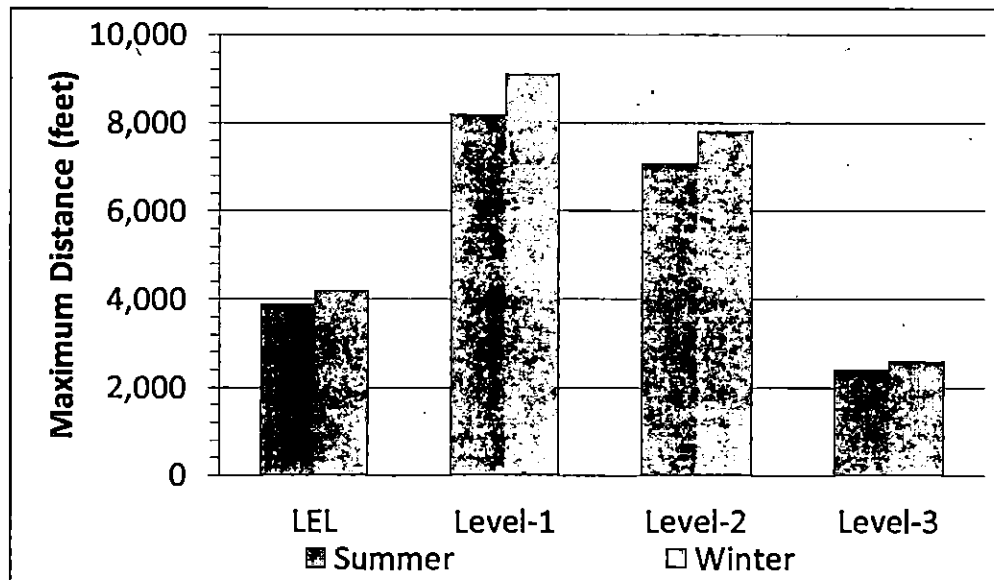


Applying Results for the Whole Pipeline



Overall Max Distance by Season/Threshold

Threshold Of Concern	Distance (feet)	
	Summer	Winter
Lower Explosive Limit	3,900	4,200
Level-1	8,200	9,100
Level-2	7,100	7,800
Level-3	2,400	2,600



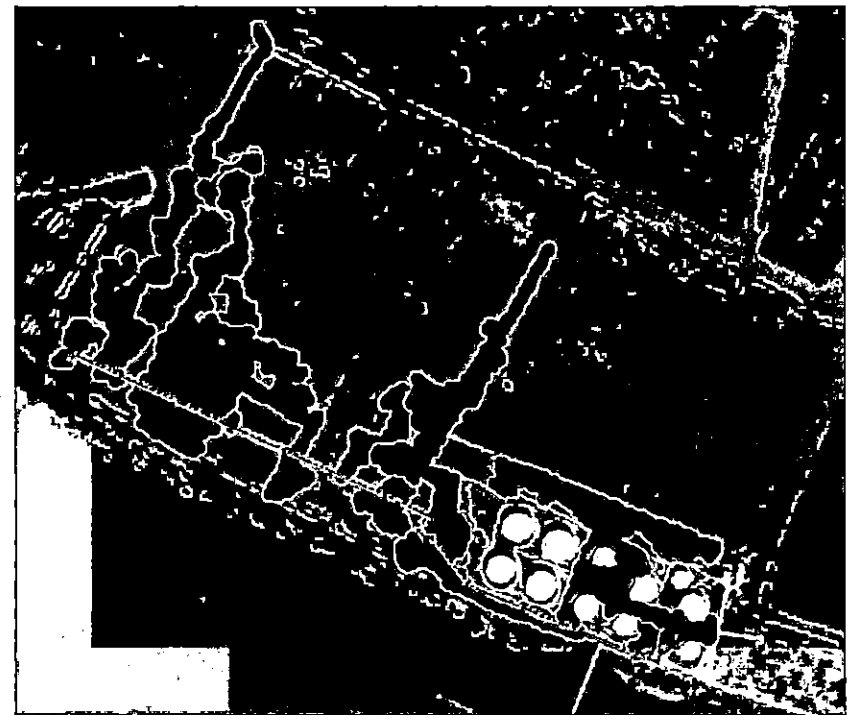


Modeling of Releases of HVLs

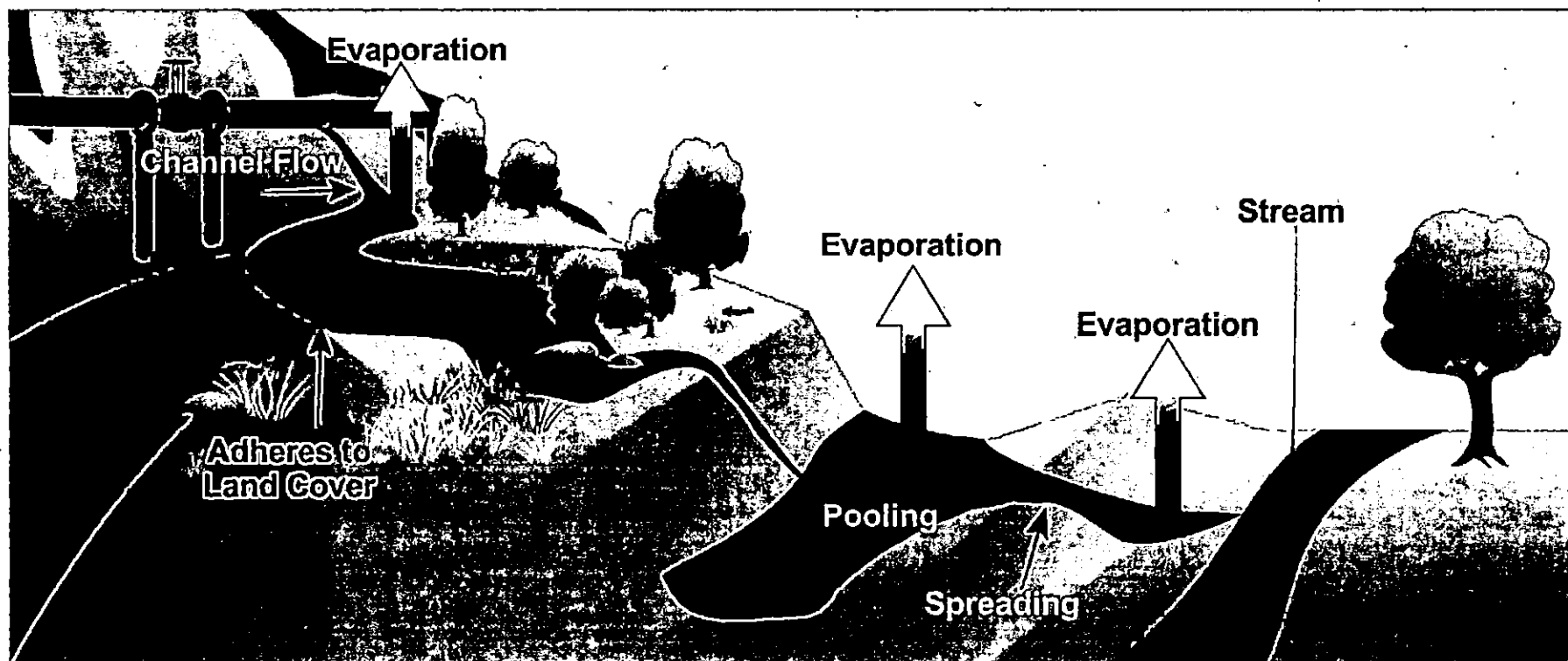
- Step 1 – Analysis of HVL Composition
- Step 2 – Release Calculation
- Step 3 – Atmospheric dispersion modeling
- Step 4 – Liquid plume modeling
- Step 5 – Evaporation from liquid plumes

Liquid Plume Modeling

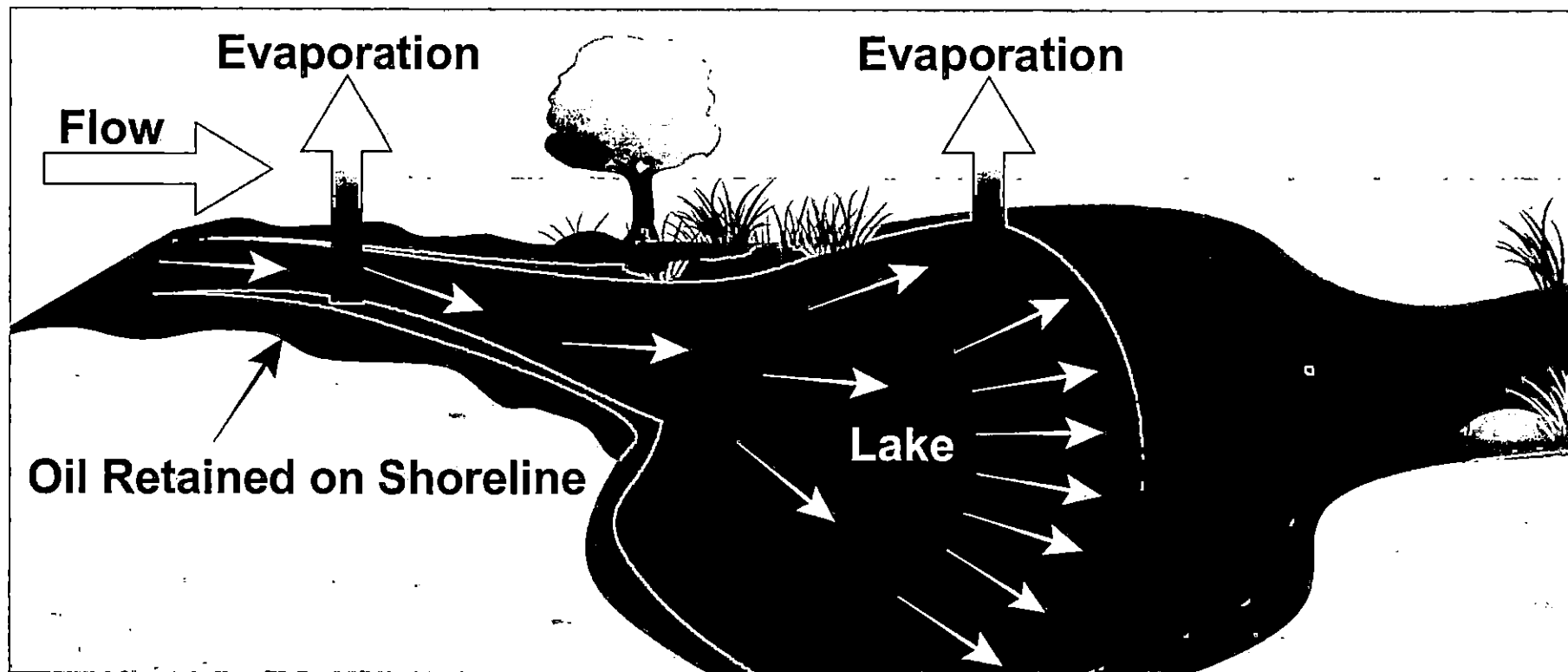
- OILMAP Land™ ArcGIS Extension
- Total liquid pool volume simulated at interval along pipeline
- Determines trajectory of spill over land, in streams, and spreading over lake surface



Overland Transport Model

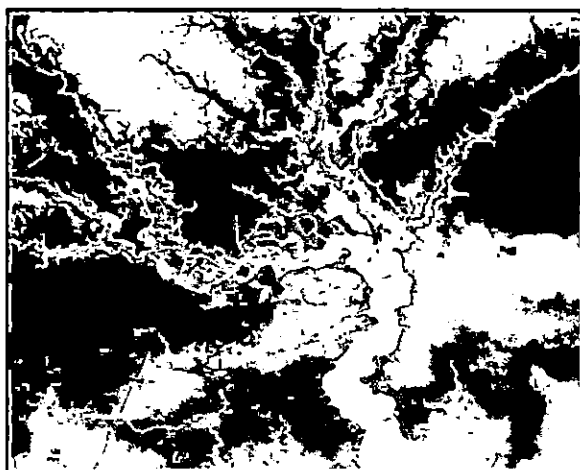


Surface Water Transport Model

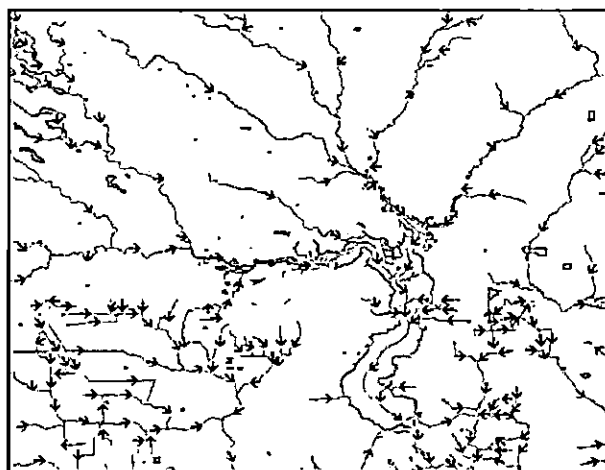


Liquid Plume Model Inputs

Elevation



Surface Water Network

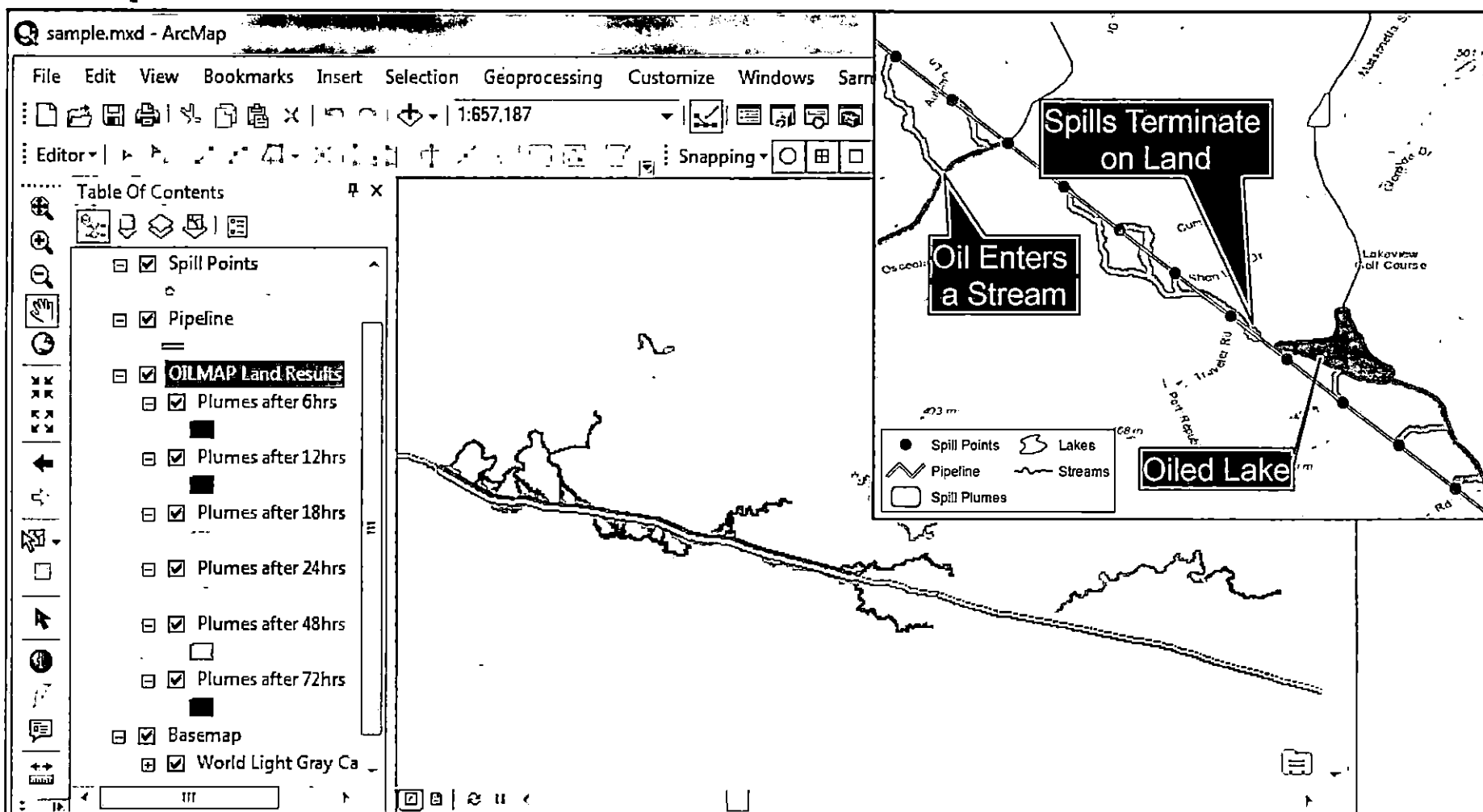


Land Cover



- Environmental Data – air temperature, wind speed
- Oil Characteristics – physical, chemical properties

Liquid Plume Model Outputs





Modeling of Releases of HVLs

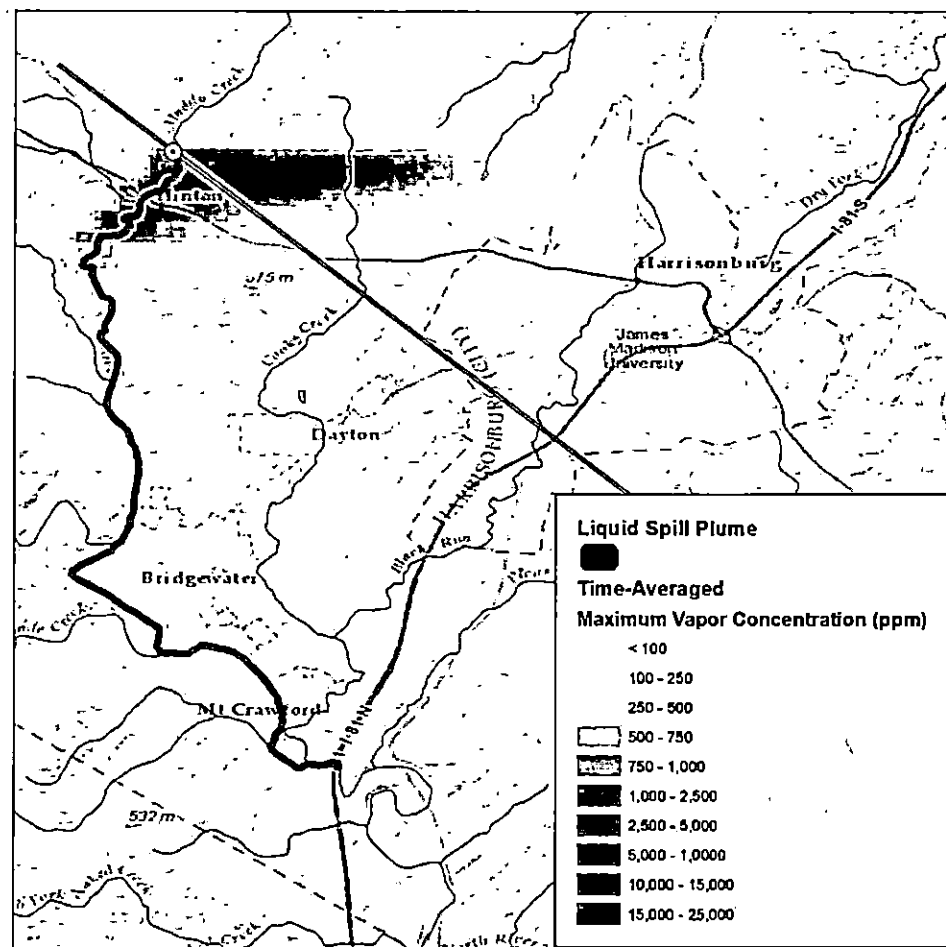
- Step 1 – Analysis of HVL Composition
- Step 2 – Release Calculation
- Step 3 – Atmospheric dispersion modeling
- Step 4 – Liquid plume modeling
- **Step 5 – Evaporation from liquid plumes**

Evaporation from Liquid Plumes

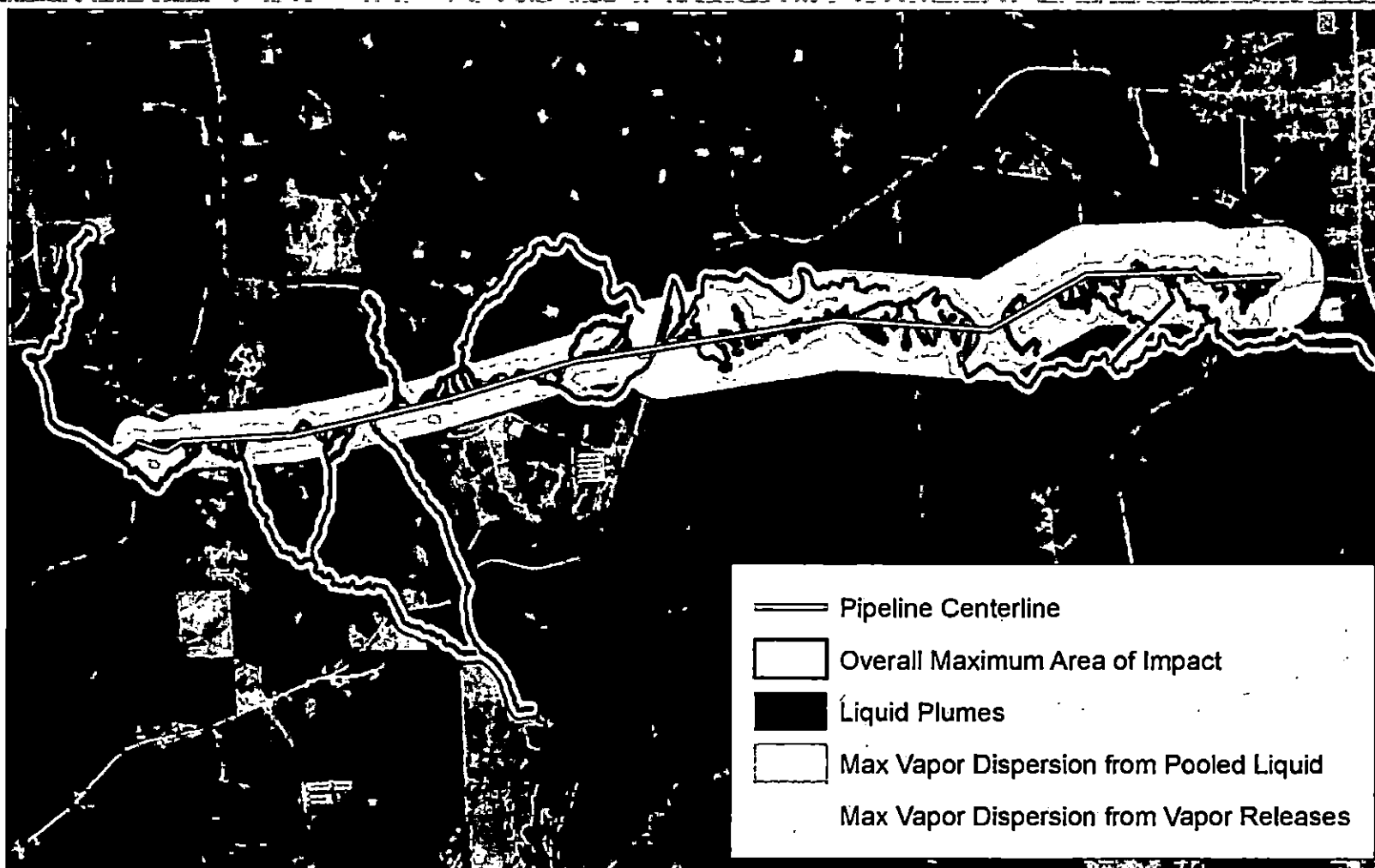
- Repeat the atmospheric dispersion modeling based on an evaporating pool
- Updated inputs:
 - Volume of pooled liquid
 - Surface area of the liquid pool (from liquid pool modeling)
 - Seasonal variability (temperature and wind)
 - Duration of the liquid pool

Evaporation from Liquid Plumes

- Rate of vaporization much lower than initial vapor release.
- Vapor concentrations drop below thresholds after a short distance and might not ever exceed thresholds

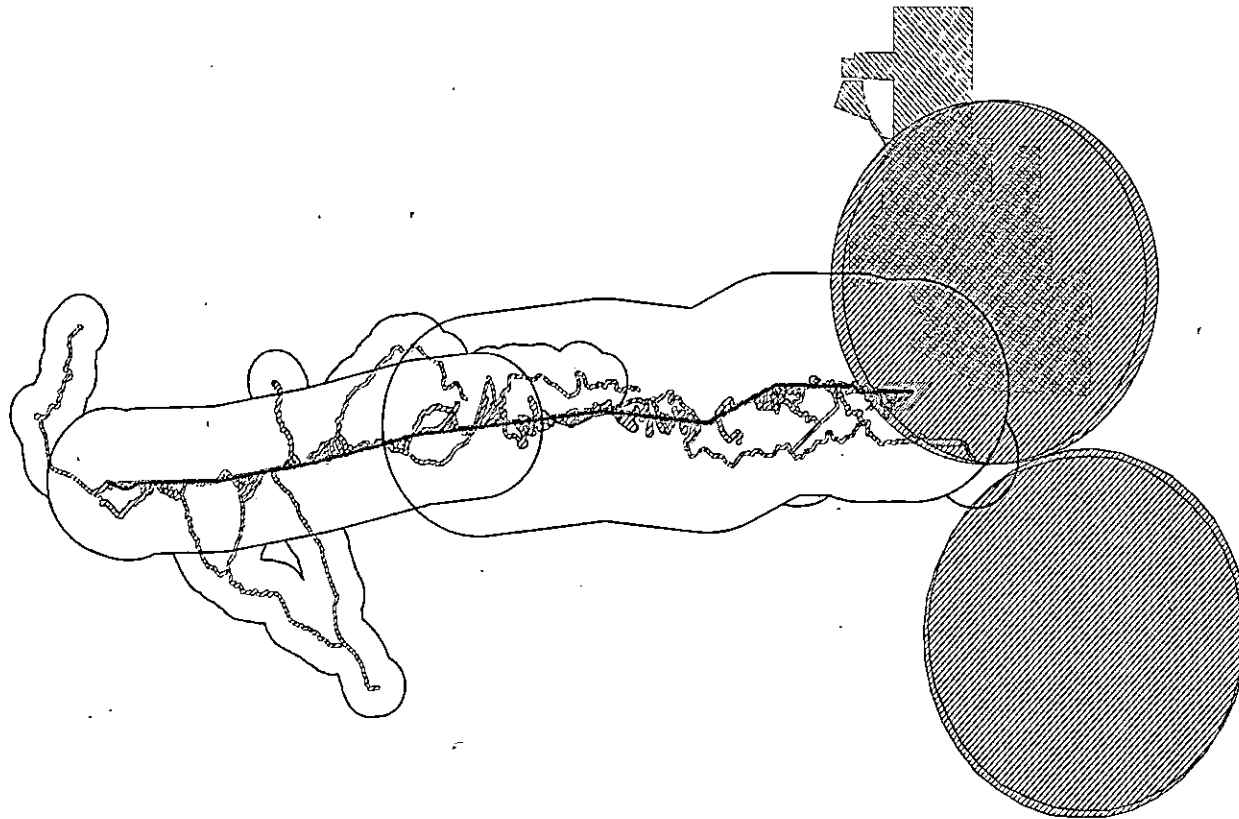


Overall Results





From Modeling Results to HCA Segments



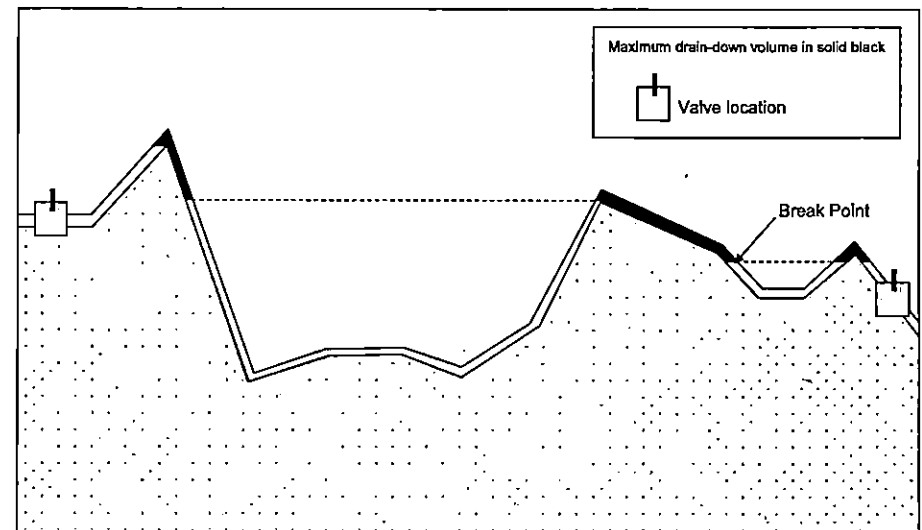
From HCA Segments to the EFRD Study

What is an EFRD?

- Remote Operated Valve (ROV) or a Check Valve
- Protect high consequence areas (HCAs)

Why is an EFRD so important to a pipeline?

- Topography or elevation profile
- Swiftness of shutdown
- Reduce drain down volumes



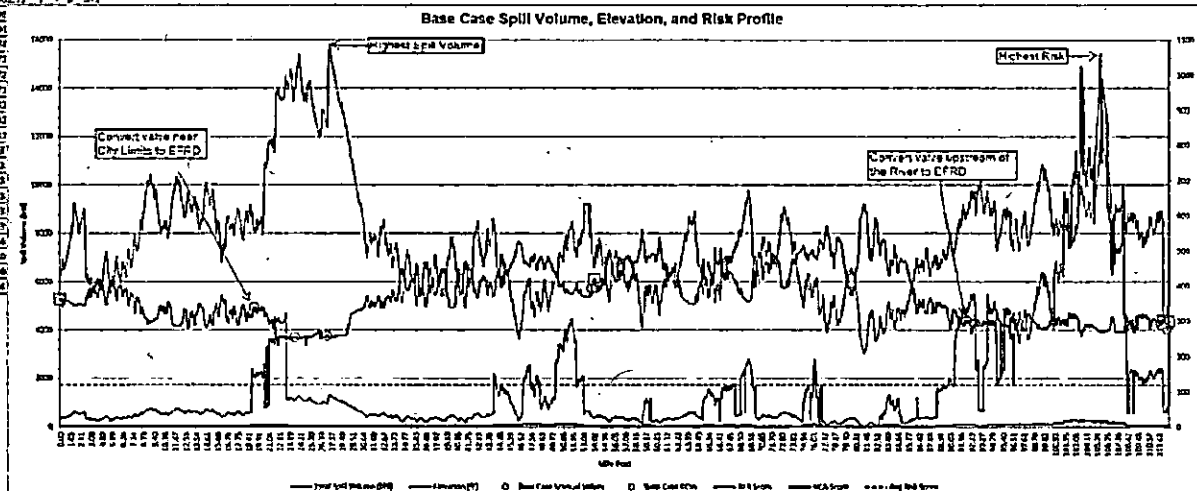


From HCA Segments to the EFRD Study

Station	MP	Val_Mile	Elev_Ft	GPS Coordinate	Total Rating	Risk Ranking
10+39	0.20	6795.612	360.77	39.070801, -94.590733	28.57	1
12+48	0.26	6728.158	345.63	39.070801, -94.590733	27.69	1
12+72	0.28	6767.544	340.27	39.070801, -94.590733	22.78	1
14+57	0.29	6825.929	340.43	39.070801, -94.590733	26.79	1
15+06	0.32	6868.720	351.12	39.070801, -94.590733	318.70	3
15+23	0.35	6870.948	361.53	39.070801, -94.590733	626.59	3
20+78	0.39	6434.353	353.63	39.070801, -94.590733	149.31	2
21+84	0.41	6516.386	361.58	39.070801, -94.590733	163.84	2
24+90	0.47	6542.299	363.27	39.070801, -94.590733	608.91	3
26+96	0.53	6674.512	350.58	39.070801, -94.590733	637.77	3
29+02	0.55	6742.685	360.33	39.070801, -94.590733	633.54	3
31+09	0.58	6870.801	359.97	39.070801, -94.590733	788.15	3
33+14	0.63	6887.971	358.44	39.070801, -94.590733	706.32	3
35+20	0.67	6998.073	358.85	39.070801, -94.590733	761.79	3
37+25	0.71	7043.636	358.41	39.070801, -94.590733	598.40	3
39+31	0.74	7129.327	357.25	39.070801, -94.590733	549.02	3
41+37	0.78	7211.506	357.21	39.070801, -94.590733	593.35	3
43+43	0.82	7275.825	356.81	39.070801, -94.590733	713.43	3
45+49	0.86	7376.104	356.5	39.070801, -94.590733	716.81	3
47+55	0.90	7451.787	356.25	39.070801, -94.590733	995.29	3
49+61	0.94	7511.168	355.97	39.070801, -94.590733	1000.31	3
51+67	0.98	7614.737	355.46	39.070801, -94.590733	1074.79	3
53+75	1.02	7699.423	354.21	39.070801, -94.590733	1092.60	3
54+79	1.03	7778.903	353.99	39.070801, -94.590733	753.71	3
55+79	1.06	7770.911	353.21	39.070801, -94.590733	735.92	3
57+84	1.10	7851.192	353.01	39.070801, -94.590733	726.17	3
59+90	1.13	7930.158	351.48	39.070801, -94.590733	962.77	3
61+96	1.17	8033.932	351.08	39.070801, -94.590733	91	3
64+02	1.21	8130.138	350.79	39.070801, -94.590733	91	3
66+08	1.25	8287.112	350.16	39.070801, -94.590733	71	3
68+14	1.29	8381.677	349.63	39.070801, -94.590733	71	3
70+20	1.33	8570.320	347.3	39.070801, -94.590733	72	3
72+26	1.37	9076.134	340.30	39.070801, -94.590733	71	3
74+32	1.41	9243.748	346.71	39.070801, -94.590733	83	3
76+38	1.45	9390.616	346.11	39.070801, -94.590733	51	3
78+43	1.49	9114.875	348.18	39.070801, -94.590733	13	3
80+49	1.53	8996.477	348.48	39.070801, -94.590733	21	3
82+55	1.56	8877.258	346.72	39.070801, -94.590733	2	3
84+61	1.60	8811.585	346.85	39.070801, -94.590733	31	3
86+67	1.64	8743.83	346.8	39.070801, -94.590733	3	3
88+73	1.68	8791.727	346.83	39.070801, -94.590733	31	3
90+79	1.72	8644.182	346.9	39.070801, -94.590733	3	3
92+85	1.76	8578.075	347.12	39.070801, -94.590733	2	3
94+91	1.79	8477.847	346.81	39.070801, -94.590733	2	3
96+97	1.83	8350.678	346.83	39.070801, -94.590733	4	3
98+03	1.86	8275.764	343.17	39.070801, -94.590733	41	3

Factors Considered:

- Swiftiness of leak detection and pipeline shutdown capabilities
- Type of commodity carried
- Rate of potential leakage
- Volume that can be released
- Topography or pipeline profile
- Location of nearest response personnel
- Benefits expected by reducing the spill size





Summary

- Releases from HVL pipelines can result in dangerous vapor clouds and possibly liquid spill plumes.
- Identifying HCA “could affect” segments may require both atmospheric dispersion modeling and liquid plume modeling.
- Risk from HVL releases can be reduced through strategic placement of EFRDs



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

April 15, 2019

OOB Docket# AP 2019-0502

Kelly Isenberg, Esquire
Appeals Officer
Commonwealth of Pennsylvania
Office of Open Records
333 Market St., 16th Floor
Harrisburg PA 17101-2234

Via Email (kisenberg@pa.gov)

Re: Pa PUC Response – OOB Appeal Docket #AP 2019-0502

To the Honorable Appeals Officer Isenberg:

I. Procedural History

On Monday, February 4, 2019, Mr. Friedman (Requestor) submitted the following Right-to-Know Law (RTKL) (65 P.S. §§ 67.101 *et seq.*) request (Request) to the Pennsylvania Public Utility Commission (PUC or Commission):

Background

On January 31, 2019, representatives of the Public Utility Commission appeared at a public meeting in East Goshen Township, Chester County. Event sponsor Rep. Carolyn Comitta provided an opportunity for the public to ask questions and receive PUC responses. During my opportunity at the microphone, I had the following exchange with PUC representative Paul Metro:

Q: You have an estimate of the blast radius that's associated with an accident on an HVL pipeline, yes?

A: We have reviewed the "buffer zone" calculation that's required by federal regulations.

Q: Do YOU have an estimate of what that distance looks like?

A: Pardon me, I couldn't hear the...

Q: Do you have an estimate of what that distance is?

A: Yes.

A video recording of this exchange is at <https://youtu.be/bpbj10JXQOk>

Request

Under Pennsylvania's Right-to-Know law, I respectfully request all records in the possession of Paul Metro, his superiors or subordinates, that relate to the calculation or estimation of the range at which thermal or overpressure events related to accidents on hazardous, highly volatile liquids (HVL) pipelines may be experienced. This request does not seek information provided by Sunoco if that information has been designated as confidential security information. Rather, it seeks records containing or related to calculations or estimates of blast radius (Sunoco's term) or "buffer zone" (PUC's term) regarding accidents or releases from HVL pipelines in the possession of the PUC, including (but not limited to) information that was produced for PUC by an external source or that was developed internally.

Records responsive to this request are requested in electronic format, if they exist in that format (e.g. PDF)."

On Monday, March 11, 2019, the Commission denied Mr. Friedman's RTKL Request (PUC RTKL 2019-0007).

On Monday, April 1, 2019, the Requestor filed this Appeal (Appeal) to the Office of Open Records (OOR). The Appeal was defective because it did not include a copy of the Commission's Final Response. Requestor cured the defect on April 2, 2019.

On Tuesday, April 2, 2019, OOR notified the PUC of the Appeal, providing the PUC with seven business days to file a response to the Appeal, or until Thursday, April 11, 2019.

Due to the defective Appeal, the PUC requested an extension to file its response, and on Friday, April 5, 2019, OOR granted the PUC's request for three additional days to respond, or until Monday, April 15, 2019.

II. Argument

A. The Responsive Records

The PUC conducted a thorough search for all responsive records. Chiavetta Affidavit ¶ 2. The responsive records consist of three Reports: Hazard Assessment for ME1; Hazard Assessment for ME2 Pipeline; and Hazard Assessment for Re-route of ME2 near Chester & Delaware County, as well as Commission Inspection Reports of these pipelines in which there are references and reviews of these Hazard Assessments. Metro Affidavit ¶¶ 4, 5. The three Reports were all submitted by Sunoco marked as confidential. Metro Affidavit ¶ 4. These responsive records are part of active and ongoing Commission investigation of these pipelines. Metro Affidavit ¶¶ 2, 3. The Commission does not have any requested records other than records that are part of these Commission's investigations. Metro Affidavit ¶ 6; Chiavetta Affidavit ¶ 4.

B. RTKL Exemptions for Safety of the Public and Public Utility Facilities

The RTKL prohibits disclosure of records that “would be reasonably likely to jeopardize or threaten public safety” or “which creates a reasonable likelihood of endangering the safety or the physical security of a ... public utility, resource, infrastructure, [or] facility,” including “infrastructure records that expose or create a vulnerability through disclosure.” 65 P.S. § 67.708(b)(2) and (3). (Underlining added for emphasis.)

Mr. Metro, the Manager of the Office of the Safety Division, Pipeline Safety Section of the Commission, states that in his professional opinion, disclosure of the Report, designated as CSI, would compromise security against sabotage or criminal or terrorist acts, and non-disclosure is necessary for the protection of life, safety, public property or public utility facilities. Metro Affidavit ¶¶ 7, 8.

Specifically, Mr. Metro, in his professional opinion, reasonably believes that release of the Reports, designated as CSI, would compromise security against sabotage or criminal or terroristic acts regarding pipeline facilities by illustrating the extent of the impact zone, including casualty and damage assessments at various ranges, regarding an accident (or sabotage event) on a pipeline. The reports explicitly provides how such an assessment can be made (as well as the assessment for these particular pipelines); information which could clearly be used by a terrorist to plan an attack a pipeline (and particularly on the Sunoco pipelines, as it contains the specific operating parameters of the pipeline) to cause the greatest possible harm and mass destruction to the public living near such facilities. Metro Affidavit ¶ 9. In addition, Mr. Metro believes that release of the Reports would allow for awareness of the potential effectiveness of a sabotage act on a pipeline to harm the public and create mass destruction, thereby potentially inciting such acts and creating a great risk to public safety. Metro Affidavit ¶ 10. Finally, Mr. Metro notes that he arrived at his professional opinion in consultation with numerous other technical gas safety staff at the Commission, all of which agree with his professional assessment. Metro Affidavit ¶ 11.

Based on the foregoing, the requested records are exempt from disclosure as CSI pursuant to these exemptions of the RTKL. The Commission notes that the Requestor specifically limited his request: “This request does not seek information provided by Sunoco if that information has been designated as confidential security information.” Request.

C. Public Utility Confidential Security Information Disclosure Protection Act

The Public Utility Confidential Security Information Disclosure Protection Act (PUCSIDPA) (Also referred to as Act 156 of 2006) (35 P.S. §§ 2141.1 – 2141.8) prohibits disclosure of “Confidential Security Information” (CSI). 35 P.S. § 2141.5(a). CSI is “information contained within a record maintained by an agency in any form, the disclosure of which would compromise security against sabotage or criminal or terrorist acts and the non-disclosure of which is necessary for the protection of life, safety, public property or public utility facilities.” 35 P.S. § 2141.2. (Underlining added for emphasis.)

The public utility is responsible for determining whether a record or portion thereof contains confidential security information. When a public utility identifies a record as containing confidential security information, it must clearly state in its transmittal letter, upon submission to an agency, that the record contains confidential security information . . . 35 P.S. § 2141.3(a).

Section 2141.3(c)(4) of PUCSIDPA provides:

(4) Agency review of the public utility's designation or request to examine records containing confidential security information shall be based on consistency with the definition of confidential security information contained in this act or when there are reasonable grounds to believe disclosure may result in a safety risk, including the risk of harm to any person, or mass destruction.

35 P.S. § 2141.3(c)(4). (Underlining and italics added for emphasis.)

PUCSIDPA defines a number of key terms in these sections:

“Terrorist act.” Any act or acts constituting a violent offense intended to:

- (1) intimidate or coerce a civilian population;
- (2) influence the policy of a government by intimidation or coercion; or
- (3) affect the conduct of a government.

“Violent offense.” An offense under 18 Pa.C.S. Pt. II (relating to definition of specific offenses), including an attempt, conspiracy or solicitation to commit any such offense, which is punishable by imprisonment of more than one year and involves an act dangerous to human life or property.

“Dangerous to human life or property.” A violent act or an act which is intended to or likely to cause death, serious bodily injury or mass destruction.

“Mass destruction.” An act which is intended to or likely to destroy or cause serious damage to facilities, public or private buildings, places of public accommodation or public works under circumstances evincing depraved indifference to human life or property.

35 P.S. § 2141.2. (Definitions.) (Underlining added for emphasis.)

The PUC has issued regulations to effectuate PUCSIDPA at 52 Pa. Code §§ 102.1 – 102.4. Section 102.4(b) of the 52 Pa. Code provides:

§ 102.4. Challenge procedures to confidentiality designation. . . .

(b) Relevant factors to be considered for requests to review.

. . . If the Commission determines that there are reasonable grounds to believe disclosure may result in a safety risk, including the risk of harm to any person, or mass destruction, the Commission will deny the request.

. . .

52 Pa. Code § 102.4. (Underlining added for emphasis.)

The PUC conducted a thorough search for all responsive records. Chiavetta affidavit ¶ 2. The responsive records consist of three Reports: Hazard Assessment for ME1; Hazard Assessment for ME2 Pipeline; and Hazard Assessment for Re-route of ME2 near Chester & Delaware County, as well as Commission Inspection Reports of these pipelines in which there are references and reviews of these Hazard Assessments. Metro Affidavit ¶¶ 4, 5. The three Reports were all submitted by Sunoco marked as confidential. Metro Affidavit ¶ 4. These responsive records are part of active and ongoing Commission investigation of these pipelines. Metro Affidavit ¶¶ 2, 3. The Commission does not have any requested records other than records that are part of these Commission's investigations. Metro Affidavit ¶ 6; Chiavetta Affidavit ¶ 4.

Based on the standards for nondisclosure set forth in PUCSIDPA, the Reports and Inspection Reports are exempt from disclosure. The Report and Inspection Reports are "Confidential Security Information" within the meaning of The Public Utility Confidential Security Information Disclosure Protection Act (PUCSIDPA) (35 P.S. §§ 2141.1 – 2141.8). Mr. Metro, the Manager of the Office of the Safety Division, Pipeline Safety Section of the Commission, states that in his professional opinion, disclosure of the Reports and the Inspection Reports would compromise security against sabotage or criminal or terrorist acts, and non-disclosure is necessary for the protection of life, safety, public property or public utility facilities. Metro Affidavit ¶ 7. He based his opinion on consistency with the definition of Confidential Security Information contained in PUCSIDPA and on that there are reasonable grounds to believe disclosure may result in a safety risk, including the risk of harm to any person, or mass destruction. Metro Affidavit ¶ 8.

Specifically, Mr. Metro, in his professional opinion, reasonably believes that release of the Reports and Inspection Reports would compromise security against sabotage or criminal or terroristic acts regarding pipeline facilities by illustrating the extent of the impact zone, including casualty and damage assessments at various ranges, regarding an accident (or sabotage event) on a pipeline. The Reports and Inspection Reports explicitly provide how such an assessment can be made (as well as the assessment for this particular pipeline); information which could clearly be used by a terrorist to plan an attack a pipeline (and particularly on the Sunoco pipelines, as it contains the specific operating parameters of the pipelines) to cause the greatest possible harm and mass destruction to the public living near such facilities. Metro Affidavit ¶ 9. In addition, Mr. Metro believes that release of the Reports and Inspection Reports would allow for awareness of the potential effectiveness of a sabotage act on a pipeline to harm the public and create mass destruction, thereby potentially inciting such acts and creating a great risk to public safety. Metro Affidavit ¶ 10. Finally, Mr. Metro notes that he arrived at my professional opinion that

the Report is Confidential Security Information in consultation with numerous other technical gas safety staff at the Commission, all of which agree with his professional assessment. Metro Affidavit ¶ 11.

Based on the foregoing, the requested records are exempt from disclosure as CSI pursuant to PUCSIDPA. Additionally, the RTKL only requires disclosure of “public records.” Since PUCSIDPA prohibits disclosure, the Reports, by definition are not a public records and cannot be disclosed. 65 P.S. § 67.102 and 301(a). The Commission notes that the Requestor specifically limited his request: “This request does not seek information provided by Sunoco if that information has been designated as confidential security information.” Request.

Note that “A public official or public employee who acquires a public utility record or portions thereof which contain confidential security information or any reproduction of a public utility record or portion thereof which contains confidential security information and who knowingly or recklessly releases, publishes or otherwise discloses a public utility record or portion thereof which contains confidential security information or any reproduction of a public utility record or portion thereof which contains confidential security information commits a misdemeanor of the second degree subject to prosecution by the Attorney General and shall, upon conviction, be sentenced to pay a fine of not more than \$5,000 plus costs of prosecution or to a term of imprisonment not to exceed one year, or both, and shall be removed from office or agency employment.” 35 P.S. § 2141.6. (Underlining added.)

D. Noncriminal Investigation Exemption

The noncriminal investigation exemption of the RTKL (65 P.S. § 67.708(b)(17)) exempts from disclosure “a record of an agency relating to a noncriminal investigation,” including “investigative materials, notes, correspondence and reports,” and records that would, if disclosed, “reveal the institution, progress or result of an agency investigation.” 65 P.S. § 67.708(b)(17) and (b)(17)(iv)(A). This exemption is quite broad by the language of the exemption, as it covers records relating to a noncriminal investigation, or that would reveal “the institution, progress, or result of” an agency investigation. Webster’s Third New International Dictionary (Unabridged) (1971) defines “relating” as “present participle of relate – to show or establish a logical or causal connection between,” and “reveal” as “to make (something secret or hidden) publicly known: to open up to view.” Use of these broad terms indicates the breadth of this exemption, as it exempts from disclosure records logically or casually connected with the investigation, or records that would make publicly known the institution of the investigation, the progress of the investigation, or the result of the investigation.¹

To successfully assert the noncriminal investigative records exemption, the agency must demonstrate that “a systematic or searching inquiry, a detailed examination, or an official probe” was conducted regarding a noncriminal matter. Pa. Dep’t of Health v. Office of Open Records, 4 A.3d 803, 810-11 (Pa.Cwlth. 2010). Further, the inquiry, examination or

¹ The noncriminal investigation exemption does have an exception to the exemption regarding disclosability of some possible outcomes of the investigation; however, the investigation is active and ongoing and therefore these exceptions are not applicable. Metro Affidavit ¶¶ 2, 3.

probe must be “conducted as part of an agency’s official duties.” *Id.* at 814.

The Commission’s statutory authority to investigate pipeline matters as part of the PUC’s official duties is provided by the Public Utility Code (66 Pa.C.S. §§ 101 *et. seq.*). The Public Utility Code provides: “Public Utility: (1) Any person or corporations now or hereafter owning or operating in the Commonwealth equipment or facilities for: (v) Transporting or conveying natural or artificial gas, crude oil, gasoline, or petroleum products, materials for refrigeration, or oxygen or nitrogen, or other fluid substances, by pipeline or conduit, for the public for compensation.” 66 Pa.C.S. § 102. “The commission shall have general administrative power and authority to supervise and regulate all public utilities doing business within this Commonwealth.” 66 Pa.C.S. § 501(b). “Every public utility . . . affected by or subject to any regulations or orders of the commission . . . shall observe, obey, and comply with such regulations or orders, and the terms and conditions thereof.” 66 Pa.C.S. § 501(c). Finally, “[w]henever the commission shall be of opinion that any person or corporation . . . is violating, or is about to violate, any provisions of this part . . . then in every such case the commission may institute injunction, mandamus or other appropriate legal proceedings, to restrain such violations of the provisions of this part, or of the regulations, or orders of the commission, and to enforce obedience thereto.” 66 Pa.C.S. § 502.

To effectuate this authority, the Commission created the Bureau of Investigation and Enforcement (BIE) in 2011 to perform the prosecutory functions of the Commission. *Implementation of Act 129 of 2008; Organization of Bureaus and Offices*, Docket No. M-2008-2071852 (Commission Order entered August 11, 2011). BIE is charged with, *inter alia*, representing the public interest “in enforcing compliance with the state and federal . . . gas safety laws and regulations.” *Id.* at 5; *See also* 66 Pa.C.S. § 308.2(a)(11) (Statutory section explicitly creating BIE). As shown by this broad statutory grant of powers, it is part of the Commission’s official duties to investigate pipeline matters such as Sunoco’s ME1, ME2, and ME2-Bypass pipelines.

The Commonwealth Court has recognized the PUC’s broad authority to conduct noncriminal investigations “to determine . . . if utilities are in compliance with the Public Utility Code, . . . the [United States Department of Transportation Pipeline and Hazardous Materials Safety Administration] and other applicable state and federal regulations.” *Pa. Pub. Utility Comm’n v. Gilbert*, 40 A.3d 755, 760 (Pa.Cmwlt. 2012).

The Commission conducted (and is still conducting) “a systematic or searching inquiry, a detailed examination, or an official probe” of Sunoco’s ME1, ME2, and ME2-Bypass pipelines. *Metro Affidavit* ¶¶ 2,3. (Please take Judicial Notice that Sunoco Pipeline, L.P. is a jurisdictional “public utility,” having received a Certificate of Public Convenience at A-140111, that is engaged in, *inter alia*, the intrastate transportation of hazardous liquids.) Paul Metro, Manager of the Office of the Safety Division, Pipeline Safety Section of the Commission, oversees the investigation of these matters. *Metro Affidavit* ¶¶ 1, 2, 3. These investigations began on or about April 1, 2017, and has been active and ongoing since that time. *Metro Affidavit* ¶¶ 2, 3. On December 13, 2018, Mr. Metro directed the Commission’s Bureau of Investigation and Enforcement (BIE) to file a Formal Complaint at C-2018-3006534 against

Sunoco Pipeline L.P. a/k/a Energy Transfer Partners regarding ME1. This proceeding is active and ongoing. Metro Affidavit ¶ 2.

As shown above, the Commission is carrying out official investigations conducted as part of its official duties. The Commission does not have any requested records other than records that are part of these Commission's investigations. Chiavetta Affidavit ¶ 4; Metro Affidavit ¶ 6. Consequently, the noncriminal investigation exemption of the RTKL exempts from disclosure all of the Commission's records within the scope of the Request.

E. Additional Reason Why the Requested Records are Exempt from Disclosure

For the reasons stated above, the Commission asserts that PUCSIDPA and the CSI and noncriminal investigation exemption of the RTKL exempts from disclosure all of the Commission's records that are responsive to the Request. However, in order to preserve the Commission's rights, the Commission will assert all applicable reasons why the requested records cannot be disclosed.

1. Deliberative Process Privilege

In Commonwealth Acting ex rel. Unified Judicial Sys. v. Vartan, 733 A.2d 1258 (Pa. 1999), the Pennsylvania Supreme Court held that the deliberative process privilege "covers documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." The RTKL defines privilege to include "[t]he attorney-work product doctrine, the attorney-client privilege, the doctor-patient privilege, the speech and debate privilege or other privilege recognized by a court interpreting the laws of this Commonwealth." 65 P.S. § 67.102. (Underlining added.)

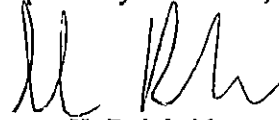
Similarly, "[t]he internal, predecisional deliberations of an agency, its members, employees or officials . . . including predecisional deliberations relating to a . . . contemplated or proposed policy or course of action or any research, memos or other documents used in the predecisional deliberations" are exempt from disclosure under the RTKL. 65 P.S. § 67.708(b)(10)(i)(A). Some of the requested records reflect deliberations by BIE staff regarding the contemplated strategies for the investigations as well as the decision to file a formal complaint, and therefore are not disclosable pursuant to this common law legal privilege and this exemption of the RTKL. Also, pursuant to Section 102 of the RTKL, such records subject to a legal privilege are not "public records" and are therefore not subject to the RTKL's requirement to provide public records. 65 P.S. § 67.102 and 301(a).

III. Conclusion

The Commission timely answered the Request, and properly denied the Request because all requested records are exempt from disclosure pursuant to PUCSIDPA, and the CSI and noncriminal investigation exemptions of the Right-to-Know Law. The Commission respectfully requests that the Office of Open Records find that the Commission complied with the Right-to-Know Law and properly denied the Request, and mark the matter closed.

If the Supporting Affidavits are deemed insufficient, the PUC demands, consistent with minimum due process standards given the extremely limited seven-day response time, *in camera* review of all the responsive records. In addition, the PUC reserves the right to supplement this response to support the assertion of the additional reasons for nondisclosure if the OOR rejects application of PUCSIDPA and the Right-to-Know Law's CSI and noncriminal investigation exemptions.

Respectfully submitted,



Steven K. Bainbridge
Assistant Counsel
Pa. Atty. I.D. 91018

Enclosures

Chiavetta Affidavit with attachments
Metro Affidavit

Service (Via Email Only)

Mr. Eric Friedman
2 Fallbrook Ln
Glen Mills PA 19342
Eric.law.friedman@gmail.com

COMMONWEALTH OF PENNSYLVANIA
OFFICE OF OPEN RECORDS

Eric Friedman

v.

Pennsylvania Public Utility Commission

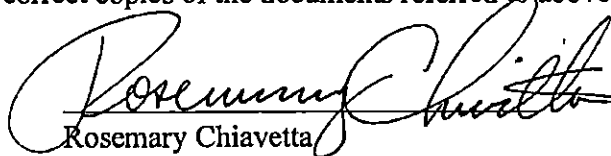
00R AP 2019-0502

AFFIDAVIT OF
ROSEMARY CHIAVETTA, SECRETARY
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Before me, the undersigned notary public, this day, April 15, 2019, personally appeared Rosemary Chiavetta, Secretary of the Pennsylvania Public Utility Commission, to me known, who being duly sworn according to law, deposes the following:

I, **Rosemary Chiavetta**, say that I am authorized to make this affidavit on behalf of the Pennsylvania Public Utility Commission (Commission or PUC), being an employee of the Commission as Secretary, and having the duty as records custodian for the Commission of maintaining all records for the Commission, and having knowledge of the facts relevant to the present matter, the facts set forth are true and correct to the best of my knowledge, information and belief, and I expect to be able to prove the same at any hearing hereof, attest as follows:

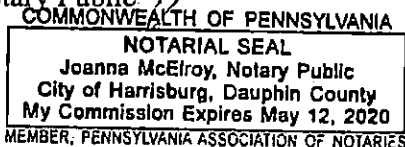
- 1) In my capacity as Open Records Officer (ORO) of the Commission, on Monday, February 4, 2019, I received Mr. Friedman's Right-to-Know Law (RTKL) request by email, which was docketed as PUC RTK 2019-0007. The Request is attached hereto.
- 2) Following a thorough search for all responsive records, on March 11, 2019, I sent the Commission's Response to the Requestor. The Commission's Response is attached hereto.
- 3) The Commission's Bureau of Investigation and Enforcement (BIE) has initiated various investigations against Sunoco Pipeline L.P. a/k/a Energy Transfer Partners. These investigations are active and ongoing.
- 4) The Commission does not have any responsive records other than those that are part of these Commission investigations.
- 5) The attached documents are true and correct copies of the documents referred to above.



Rosemary Chiavetta
Secretary
Pennsylvania Public Utility Commission

Subscribed and sworn to before me this
April 15, 2019.

Notary Public



Trout, Doreen

From: Eric Friedman <eric.law.friedman@gmail.com>
Sent: Monday, February 04, 2019 1:57 PM
To: Chiavetta, Rosemary
Subject: [External] Request for records under Pennsylvania's Right-to-Know statute

ATTENTION: This email message is from an external sender. Do not open links or attachments from unknown sources. To report suspicious email, forward the message as an attachment to CWOPA_SPAM@pa.gov.

Background

On January 31, 2019, representatives of the Public Utility Commission appeared at a public meeting in East Goshen Township, Chester County. Event sponsor Rep. Carolyn Comitta provided an opportunity for the public to ask questions and receive PUC responses. During my opportunity at the microphone, I had the following exchange with PUC representative Paul Metro:

Q: You have an estimate of the blast radius that's associated with an accident on an HVL pipeline, yes?

A: We have reviewed the "buffer zone" calculation that's required by federal regulations.

Q: Do YOU have an estimate of what that distance looks like?

A: Pardon me, I couldn't hear the...

Q: Do you have an estimate of what that distance is?

A: Yes.

A video recording of this exchange is at <https://youtu.be/bpbj10JXQQk>

Request

Under Pennsylvania's Right-to-Know law, I respectfully request all records in the possession of Paul Metro, his superiors or subordinates, that relate to the calculation or estimation of the range at which thermal or overpressure events related to accidents on hazardous, highly volatile liquids (HVL) pipelines may be experienced. This request does not seek information provided by Sunoco if that information has been designated as confidential security information. Rather, it seeks records containing or related to calculations or estimates of blast radius (Sunoco's term) or "buffer zone" (PUC's term) regarding accidents or releases from HVL pipelines in the possession of the PUC, including (but not limited to) information that was produced for PUC by an external source or that was developed internally.

Records responsive to this request are requested in electronic format, if they exist in that format (e.g. PDF).

Thank you,

Eric Friedman
2 Fallbrook Lane
Glen Mills PA 19342



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

IN REPLY PLEASE
REFER TO OUR FILE

PUC RTK 2019-0007

March 11, 2019

Eric Friedman
2 Fallbrook Lane
Glen Mills, PA 19342

Final response sent via Email only:
Eric.law.friedman@gmail.com

Dear Mr. Friedman:

By this letter, the Pennsylvania Public Utility Commission (Commission or PUC) responds to your Right to Know request filed pursuant to the provisions of Pennsylvania's Right to Know Law (RTKL), 65 P.S. §§ 67.101 et seq., *as amended*. In your request received Monday, February 4, 2019, you stated:

"Background

On January 31, 2019, representatives of the Public Utility Commission appeared at a public meeting in East Goshen Township, Chester County. Event sponsor Rep. Carolyn Comitta provided an opportunity for the public to ask questions and receive PUC responses. During my opportunity at the microphone, I had the following exchange with PUC representative Paul Metro:

Q: You have an estimate of the blast radius that's associated with an accident on an HVL pipeline, yes?

A: We have reviewed the "buffer zone" calculation that's required by federal regulations.

Q: Do YOU have an estimate of what that distance looks like?

A: Pardon me, I couldn't hear the...

Q: Do you have an estimate of what that distance is?

A: Yes.

A video recording of this exchange is at <https://youtu.be/bpbj10JXOOk>

Request

Under Pennsylvania's Right-to-Know law, I respectfully request all records in the possession of Paul Metro, his superiors or subordinates, that relate to the calculation or estimation of the range at which thermal or overpressure events related to accidents on hazardous, highly volatile liquids (HVL) pipelines may be experienced. This request does not seek information provided by Sunoco if that information has been designated as confidential security information. Rather, it seeks records containing or related to calculations or estimates of blast radius (Sunoco's term) or

"buffer zone" (PUC's term) regarding accidents or releases from HVL pipelines in the possession of the PUC, including (but not limited to) information that was produced for PUC by an external source or that was developed internally.

Records responsive to this request are requested in electronic format, if they exist in that format (e.g. PDF)."

Your request is denied.

The documents responsive to your request have been designated as confidential security information (CSI), and therefore, as your request indicated, you are not seeking such documents. To the extent that your request does seek such documents, the Commission must deny your request, since the documents are designated CSI. Additionally, the documents are part of a noncriminal investigation and therefore are exempt from disclosure under the RTKL.

The Public Utility Confidential Security Information Disclosure Protection Act (PUCSIDPA) (35 P.S. §§ 2141.1 – 2141.8) prohibits disclosure of "Confidential Security Information" (CSI). 35 P.S. § 2141.2 (Definitions). CSI is "information contained within a record maintained by an agency in any form, the disclosure of which would compromise security against sabotage or criminal or terrorist acts and the non-disclosure of which is necessary for the protection of life, safety, public property or public utility facilities." 35 P.S. § 2141.2. The documents requested were designated as CSI and are not disclosable.

In addition, the RTKL provides for exemptions for CSI. The RTKL prohibits disclosure of records that "would be reasonably likely to jeopardize or threaten public safety" or "which creates a reasonable likelihood of endangering the safety or the physical security of a ... public utility, resource, infrastructure, [or] facility," including "infrastructure records that expose or create a vulnerability through disclosure." 65 P.S. § 67.708(b)(2) and (3). Therefore, the documents requested are not disclosable under the RTKL.

Finally, the documents are exempt from disclosure pursuant to the noncriminal investigation provision of the RTKL (65 P.S. § 67.708(b)(17)), which exempts from disclosure "records of an agency relating to a noncriminal investigation," including "investigative materials, notes, correspondence and reports," and records that would "reveal the institution, progress or result of an agency investigation." 65 P.S. § 67.708(b)(17).

For all of the reasons stated, the records requested are exempt from disclosure.

This response constitutes the final response of the Commission to your RTK Law Request.

NOTICE OF RIGHT TO APPEAL

If you believe the PUC has wrongfully denied any part of your request, you may appeal within 15 business days from the date of this letter to:

Office of Open Records
16th Floor
333 Market Street
Harrisburg, PA 17126-0333

If you choose to file an appeal, you must do so within 15 business days of the mailing date of the agency's response. 65 P.S. § 67.1101. Please note that a copy of your original Right-to-Know request and this denial letter must be included when filing an appeal. The law also requires that you state the reasons why the record is a public record and address the reasons the Agency denied your request. Visit the Office of Open Records website at <http://openrecords.pa.gov> for further information on filing an appeal.

Please be advised that this correspondence will serve to close this record with our office as permitted by law.

Sincerely,

A handwritten signature in cursive script, appearing to read "Rosemary Chiavetta".

Rosemary Chiavetta
Secretary and Right to Know Officer
Pa Public Utility Commission

cc: Steven Bainbridge, PUC Assistant Counsel
Right to Know File PUC RTK 2019-0007

**COMMONWEALTH OF PENNSYLVANIA
OFFICE OF OPEN RECORDS**

Eric Friedman

v.

Pennsylvania Public Utility Commission

:
:
:

00R AP 2019-0502

**AFFIDAVIT OF
PAUL J. METRO, MANAGER
OFFICE OF THE SAFETY DIVISION, PIPELINE SAFETY SECTION
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Before me, the undersigned notary public, this day, April 15, 2019, personally appeared Paul J. Metro, Manager of the Safety Division, Pipeline Safety Section of the Pennsylvania Public Utility Commission, to me known, who being duly sworn according to law, deposes the following:

I, **Paul J. Metro**, say that I am authorized to make this affidavit on behalf of the Pennsylvania Public Utility Commission (Commission or PUC), being an employee of the Commission as Manager of the Safety Division, Pipeline Safety Section, and having the responsibility for investigating, analyzing, and responding to pipeline safety issues in Pennsylvania, and having knowledge of the facts relevant to the present matter, the facts set forth are true and correct to the best of my knowledge, information and belief, and I expect to be able to prove the same at any hearing hereof, attest as follows:

- 1) In my capacity as Manager of the Safety Division, Pipeline Safety Section of the Commission, I oversee Commission investigations of gas and hazardous volatile liquid pipelines.
- 2) On or about April 1, 2017, the Commission commenced an official investigation of the "Mariner East 1" (ME1) pipeline under my oversight. The investigation is active and has been ongoing since that time. On December 13, 2018, the Commission's Bureau of Investigation and Enforcement (BIE) filed a Formal Complaint C-2018-3006534 against Sunoco Pipeline L.P. a/k/a Energy Transfer Partners (Sunoco) to continue this investigation. This proceeding is active and ongoing.
- 3) The Commission also has these additional investigations of Sunoco pipelines: March 2018 Investigation of ME1 ("Lisa Drive" Investigation of ME1); Investigation of "Mariner East 2" (ME2); and July 2018 Investigation of "Mariner East 2 - Bypass" (ME2-bypass). All of these investigations are active and ongoing.
- 4) The Commission records that "relate to the calculation or estimation of the range at which thermal or overpressure events related to accidents on hazardous, highly volatile liquids (HVL) pipelines may be experienced," (also described as "containing or related to calculations or estimates of blast radius (Sunoco's term) or "buffer zone" (PUC's term) regarding accidents or releases from HVL pipelines in the possession of the PUC, including (but not limited to)

information that was produced for PUC by an external source or that was developed internally”) (that is, the requested records), consist of the following, all filed with the Commission by Sunoco Pipeline L.P. a/k/a Energy Transfer Partners (and marked as Confidential by Sunoco). These records are part of the active and ongoing investigations of these pipelines. These records were produced to the Commission by Sunoco and are marked as confidential.

Hazard Assessment for ME1

Date: 12-17-2013

Pages: 56

Hazard Assessment for proposed ME2 Pipeline

Date 3-27-2017

Pages: 67

Hazard Assessment for Re-route of ME2 near Chester & Delaware County

Date: 10-5-2018

Pages: 33

5) In addition to the three reports indicated in paragraph four, the Commission has requested records in the form of Inspection Reports created by Commission Safety Staff in which there are references and reviews of these Hazard Assessments. These Inspection Reports are part of the active and ongoing investigations indicated above.

6) The Commission does not have any requested records other than records that are part of these Commission’s investigations.

7) The requested records are “Confidential Security Information” within the meaning of The Public Utility Confidential Security Information Disclosure Protection Act (PUCSIDPA) (35 P.S. §§ 2141.1 – 2141.8). In my professional opinion, disclosure of the requested records would compromise security against sabotage or criminal or terrorist acts, and non-disclosure is necessary for the protection of life, safety, public property or public utility facilities.

8) I based my opinion on the definition of “confidential security information” contained in PUCSIDPA and on that there are reasonable grounds to believe disclosure may result in a safety risk, including the risk of harm to any person, or mass destruction.

9) In my professional opinion, release of the requested records would compromise security against sabotage or criminal or terroristic acts regarding pipeline facilities by illustrating the extent of the impact zone, including casualty and damage assessments at various ranges, regarding an accident (or sabotage event) on a pipeline. These Reports and Inspection Reports explicitly provides how such an assessment can be made (as well as the assessment for this particular pipeline); information which could clearly be used by a terrorist to plan an attack a pipeline (and particularly on these Sunoco pipelines, as they contains the specific operating parameters of the pipelines) to cause the greatest possible harm and mass destruction to the public living near such facilities.

10) In my professional opinion, release of the requested records would allow for awareness of the potential effectiveness of a sabotage act on a pipeline (and in particular on these pipelines) to

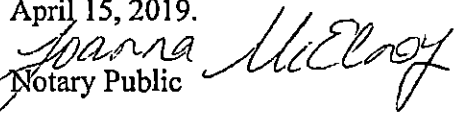
harm the public and create mass destruction, thereby potentially inciting such acts and creating a great risk to public safety.

11) I arrived at my professional opinion that the requested records are Confidential Security Information in consultation with numerous other technical gas safety staff at the Commission, all of which agree with my professional assessment.

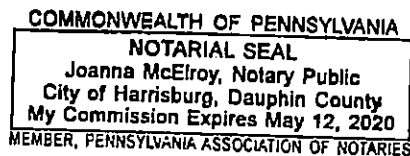


Paul J. Metro
Manager of the Safety Division
Pipeline Safety Section
Pennsylvania Public Utility Commission

Subscribed and sworn to before me this
April 15, 2019.



Notary Public



Isenberg, Kelly

From: Trout, Doreen
Sent: Monday, April 15, 2019 3:30 PM
To: Isenberg, Kelly
Cc: Chiavetta, Rosemary; Bainbridge, Steven; Herzog, John; Pankiw, Bohdan; Eric.law.friedman@gmail.com
Subject: Commission response to Friedman Appeal AP 2019-0502
Attachments: Commission response to Friedman OOR Appeal AP 2019-0502.pdf

Good afternoon,

Attached is the Commission's response to the Friedman Appeal AP 2019-0502, along with attachments.

Doreen

*Doreen Trout
Office Administrator
Pa PUC
Secretary's Bureau*

Confidentiality Notice: This electronic communication is privileged and confidential and is intended only for the party to whom it is addressed. If received in error, please return to the sender.

From: Eric Friedman <eric.law.friedman@gmail.com>
Sent: Monday, April 15, 2019 11:29 PM
To: Isenberg, Kelly <kisenberg@pa.gov>
Cc: Chiavetta, Rosemary <rchiavetta@pa.gov>
Subject: [External] Friedman Appeal AP 2019-0502

ATTENTION: This email message is from an external sender. Do not open links or attachments from unknown sources. To report suspicious email, forward the message as an attachment to CWOPA_SPAM@pa.gov.

Good evening Ms. Isenberg,

The PUC's Response dated April 15, 2019 is riddled with inaccurate assertions, including in the affidavits sworn by Secretary Chiavetta and Fixed Utility Manager Metro. I will address some of these below, but do not admit any of the assertions in the PUC's Response or its affidavits. As documented in the record of this matter, the PUC's agency open records officer appears to have an aversion to the Pennsylvania Right-to-Know statute. Nevertheless, that statute turns on a principal of openness and public access. The PUC has identified three specific records in its possession that are responsive to my request, along with apparently innumerable other records which it does not identify specifically. (These are "Commission Inspection Reports of these pipelines in which there are references and reviews of these Hazard Assessments." Response page 2. PUC does not further identify or provide a count of how many records exist in this category).

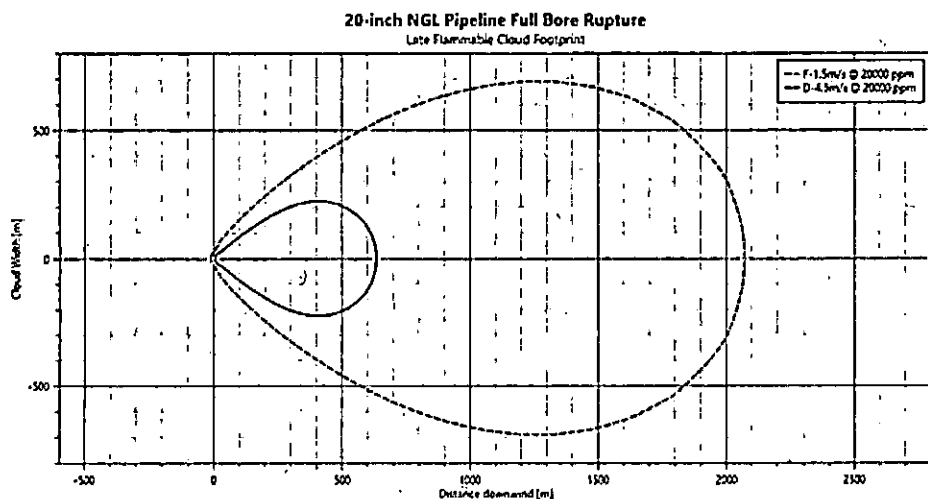
I respectfully request a determination that PUC should release all records responsive to my request. If you cannot immediately direct this, I respectfully continue to request OOR *in camera* review of all responsive records in possession of the PUC in order that there can be an independent review of the PUC's claims that these records are exempt from release, bearing in mind that it is the burden of the PUC to prove its case.

From its Response, it is abundantly clear that PUC acknowledges that the hazardous, highly volatile liquids proposed to be transported in Mariner East have the capability, if released for any reason, to cause mass destruction and loss of life. (The phrase "mass destruction" appears no fewer than twelve times in PUC's Response). This mass destruction potential is a function of the infrastructure that PUC has permitted to be constructed in areas of concentrated, vulnerable populations and valuable property, despite the fact that the proposed project is unsupported by any credible plan to protect the public from continued releases of these materials, as required by federal regulation which

PUC has both responsibility and authority to enforce. (See Title 49 of the Code of Federal Regulations section 195.440). **This hazard is caused by the infrastructure itself, not knowledge of any particular aspect of it.**

Moreover, as noted previously in the record of this matter, there are no secrets to keep. In the case of accidents involving hazardous, highly volatile liquids (HVL), the potential for mass destruction is indeed enormous. There are in the public domain many HVL accident reports that illustrate that potential. (For example: the 1992 Brenham, TX accident, which killed three people in a sparsely populated area and damaged or destroyed every structure within three square miles; the 2014 accident in Kaohsiung, Taiwan, which killed 32 people and injured an additional 321 others; or the January 2015 ATEX ethane pipeline explosion in Follansbee, WV, which damaged buildings 2,000 feet from the rupture location). There are also numerous estimates in the public domain of what can happen in HVL accidents. I have already submitted to the record of this matter the TRC model of an HVL pipeline accident. ("Life-threatening effects or death" to about 2,500 feet, without ignition; "lower explosive limit" extending to about 4,000 feet).

There are other publicly available models of HVL accidents. For example, in November 2018, Delaware County Council publicly released its study of the Mariner East HVL overpressure and thermal impact radius. Its report concluded that in a rupture of Mariner East 2, with ignition, the fatal thermal impact zone could extend to about 6,800 feet.



This diagram from the Delaware County risk assessment titled "Late Flammable Cloud Footprint" illustrates the thermal impact resulting from a rupture of a 20-inch highly volatile liquids pipeline with ignition delayed for several minutes. The two loops show the area where the gas concentration would be in the flammable range. The inner one shows the area affected under turbulent atmospheric conditions, and the outer one shows the area affected under stable, low-wind conditions, such as often occur at night. The outer area extends 2,075 meters from the leak (about 6,800 feet, more than a mile and a quarter). According to the risk assessment, people outdoors and within this area will be fatally burned.

Moreover, that Chester and Delaware Counties are densely populated is hardly classified information. Population data are readily available from the US Census to any person with an internet connection. In fact, Chester County's Department of Emergency Services has provided to the public an estimate of the numbers of people within one-half mile of the proposed ME2 across Chester County, broken down by municipality:

MuniName	Sum POPULATION EST
East Nantmeal	146
West Nantmeal	413
Wallace	789
Elverson	1032
Upper Uwchlan	2153
West Goshen	2410
Westtown	3157
Uwchlan	8139
East Goshen	8955
West Whiteland	11282

These numbers are readily available to anyone with malicious intent, just as they are to anyone who simply wants to understand the degree of risk being imposed upon her community. Again, the hazard (of "mass destruction," in PUC's terminology) is because of the infrastructure itself, not the availability of any records of the PUC. Finally, there is no mystery about where the infrastructure is located. Lightly secured, above ground HVL valve sites are readily visible across Chester and Delaware Counties from heavily trafficked roadways, schools, and residential subdivisions. As one example, in Delaware County, patrons of a sports bar along SR 352 can view a Sunoco HVL valve site at close range from the uncurtained picture window in the bar area. If these patrons step outside and into the bar's smoking area, they can look down from above into the valve site approximately ten feet away while enjoying their smoke.



I noted above that there were numerous inaccuracies in PUC's assertions, including in its sworn affidavits. As one example, in paragraph 4 of her affidavit, Ms. Chiavetta states "The Commission does not have any responsive records other than those that are part of these Commission investigations." This sworn statement directly contradicts the PUC's statement at page 2 of its Response: "The responsive records consist of three Reports: Hazard Assessment for ME1; Hazard Assessment for ME2 Pipeline; and Hazard Assessment for Re-route of ME2 near Chester & Delaware County, as well as Commission Inspection Reports of these pipelines in which there are references and reviews of these Hazard Assessments."

I respectfully request that OOR direct the release of all of the records identified in highlight above. To the extent that PUC claims that any record was designated by Sunoco as confidential, I respectfully request *in camera* review to specifically determine the means and method of that designation (if it exists) and what part of the record is covered by it. Any part of the record not covered by the designation should be released. If the designation is vague, nonspecific, or does not apply to the requested record, then all of it can be released. Likewise with any record the PUC claims is exempt from release because it is part of an investigation; I request *in camera* review to determine the accuracy of the assertion, and the release of all nonexempt portions of records under the RTKL's "openness" doctrine.

Respectfully submitted,

Eric Friedman

On Mon, Apr 15, 2019 at 3:29 PM Trout, Doreen <DOTROUT@pa.gov> wrote:

Good afternoon,

Attached is the Commission's response to the Friedman Appeal AP 2019-0502, along with attachments.

Doreen

Doreen Trout

Office Administrator

Pa PUC

Secretary's Bureau

Isenberg, Kelly

From: Isenberg, Kelly
Sent: Thursday, April 18, 2019 8:44 AM
To: Eric Friedman
Cc: Chiavetta, Rosemary; Bainbridge, Steven; WESnyder@hmslegal.com
Subject: RE: [External] Friedman Appeal AP 2019-0502

Tracking:	Recipient	Delivery
	Eric Friedman	
	Chiavetta, Rosemary	Delivered: 4/18/2019 8:45 AM
	Bainbridge, Steven	Delivered: 4/18/2019 8:45 AM
	WESnyder@hmslegal.com	

Mr. Friedman,

Thank you for your prompt response and agreement to extend the Final Determination deadline.

This email will confirm that the Requester has granted the OOR an extension to issue the Final Determination in this matter until **May 15, 2019**.

Sincerely,
Kelly Isenberg



Kelly C. Isenberg
Appeals Officer
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234
Phone: (717) 346-9903
Fax: (717) 425-5343
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From: Eric Friedman <eric.law.friedman@gmail.com>
Sent: Wednesday, April 17, 2019 10:09 PM
To: Isenberg, Kelly <kisenberg@pa.gov>
Cc: Chiavetta, Rosemary <rchiavetta@pa.gov>
Subject: Re: [External] Friedman Appeal AP 2019-0502

Good evening Ms. Isenberg,

I do not object to an extension of time until May 15, 2019 for OOR to issue a Final Determination in this matter. Should you require a further extension in order to perform an *in camera* review of responsive records by OOR, please let me know.

With respect to Sunoco/Energy Transfer's request to participate in my RTKL appeal: I respectfully reiterate my view that it is without standing to do so, and that PUC's invitation to it was inappropriate and, possibly, a bad-faith attempt to complicate what is really a very simple records request. I also reiterate that I am covered by a Commonwealth Court Protective Order, issued for good cause, which it appears Sunoco/Energy Transfer has already violated once in this proceeding.

Sincerely,
Eric Friedman

On Wed, Apr 17, 2019 at 11:36 AM Isenberg, Kelly <kisenberg@pa.gov> wrote:

Dear Mr. Friedman,

I am writing to seek a two-week extension of time to issue a Final Determination in the above-referenced matter. We are seeking the extension to ensure sufficient time to fully consider Energy Transfer's Request to Participate, the submissions made by the PUC and yourself, your request that the OOR conduct *in camera* review, and to conduct the necessary research and analysis to adjudicate this appeal, while also complying with internal drafting and editing deadlines.

If we do not receive an objection to the request for an extension by the close of business tomorrow, April 18, 2019 (11:59:59 p.m.), the new deadline for the issuance of a Final Determination will be **May 15, 2019**. In addition, should the OOR determine that it is necessary to perform an *in camera* review of records, additional time will be needed.

Thank you in advance for your anticipated cooperation in this regard.

Sincerely,

Kelly Isenberg



Kelly C. Isenberg
Appeals Officer

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Harrisburg, PA 17101-2234

Phone: (717) 346-9903

Fax: (717) 425-5343
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Isenberg, Kelly

From: Isenberg, Kelly
Sent: Monday, April 22, 2019 8:03 AM
To: Eric Friedman
Cc: Chiavetta, Rosemary; Metro, Paul; Bainbridge, Steven
Subject: RE: [External] Mariner East vulnerability models

Mr. Friedman,

Mr. Bainbridge is the attorney representing the PUC in this matter. Please be mindful of including him on communications with the OOR. I am copying him on this email.

Thank you for your attention to this matter.

Sincerely,
Kelly Isenberg

Kelly C. Isenberg
Appeals Officer
Office of Open Records
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-----Original Message-----

From: Eric Friedman <eric.law.friedman@gmail.com>
Sent: Sunday, April 21, 2019 9:31 PM
To: Isenberg, Kelly <kisenberg@pa.gov>
Cc: Chiavetta, Rosemary <rchiavetta@pa.gov>; Metro, Paul <PMETRO@pa.gov>
Subject: [External] Mariner East vulnerability models

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At the bottom of the following post there is a list of nine (9) locations with dense, vulnerable populations that have been modeled using publicly available information:

<https://gcc01.safelinks.protection.outlook.com/?url=https%3A%2F%2Fdragonpipediary.com%2F2018%2F12%2F07%2Fhow-i-model-a-local-pipeline-accident%2F&data=02%7C01%7Ckisenberg%40pa.gov%7C98befe8520dc43f1736008d6c6c22640%7C418e2841012>

84dd59b6c47fc5a9a1bde%7C1%7C0%7C636914934501059272&data=oq1RldQBst2lOwcyFUGVMKPoTb%2FJy%2Bxw20AKXs5xpBk%3D&reserved=0

The locations are:

- Glenwood Elementary School (Delaware County). Rupture of 12-inch "bypass" pipeline.
- Wellington at Hershey's Mill (Senior care, Chester County). Rupture of 20-inch pipeline.
- Shamona Creek Elementary School (Chester County). Rupture of 12-inch "bypass" pipeline.
- Pennell Elementary School (Delaware County). Rupture of 8-inch ME1 pipeline.
- Glenwood Elementary and the Granite Run Mall area (Delaware County). Rupture of 20-inch pipeline.
- Twin Valley High School and Middle School. Rupture of 20-inch pipeline.
- Middletown-area (Dauphin County) High School and Middle School and Reid Elementary. Rupture of 20-inch pipeline.
- East Goshen Elementary (and other schools in the West Chester Area School District). Rupture of 20-inch pipeline.
- Mechanicsburg, including schools. Rupture of 20-inch pipeline.

In addition, the following post demonstrates how the proposed Mariner East route goes through the center of the most densely populated parts of southeast Pennsylvania:

<https://gcc01.safelinks.protection.outlook.com/?url=https%3A%2F%2Fdragonpipediary.com%2F2018%2F06%2F29%2Fpopulation-density-maps-lessons-on-where-not-to-put-a-pipeline%2F&data=02%7C01%7Ckisenberg%40pa.gov%7C98befe8520dc43f1736008d6c6c22640%7C418e284101284dd59b6c47fc5a9a1bde%7C1%7C0%7C636914934501059272&data=Kra13gl0hRQTU1LJaSgBn3A9psfl5oNE3tNI9SM60G0%3D&reserved=0>

Isenberg, Kelly

From: Isenberg, Kelly
Sent: Tuesday, April 23, 2019 8:17 AM
To: Bainbridge, Steven; 'Eric Friedman'
Subject: RE: OOR Appeal 2019-0502 -- PUC request for clarification

Follow Up Flag: Follow up
Flag Status: Flagged

Tracking:	Recipient	Delivery
	Bainbridge, Steven	Delivered: 4/23/2019 8:17 AM
	'Eric Friedman'	

Mr. Bainbridge,

The record in this matter closed on April 15, 2018. At this juncture, I have not received have not made a determination on whether to accept Mr. Friedman's April 21, 2019 submission into the record.

As you are aware, the determination of whether the submission is relevant, probative and non-cumulative and should be admitted to the record for consideration is left to the Appeals Officer's discretion. See 65 P.S. §1102(b)(3) (stating that "the appeals officer shall rule on procedural matters on the basis of justice, fairness, and the expeditious resolution of the dispute"). However, since we have not determined if any submissions made beyond the record closing date are relevant, probative and non-cumulative and warrant admission into the record, if the Commission wishes to submit a reply, the OOR will grant 2 business days to do so until April 25, 2019.

Any additional submissions will require a request to reopen the record and additional time granted to make supplemental submissions would be contingent upon a corresponding deadline extension for the OOR to issue a final determination.

I believe that I have responded to your inquiry. Should you have additional questions, please advise.

Sincerely,
Kelly Isenberg



Kelly C. Isenberg
Appeals Officer
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From: Bainbridge, Steven

Sent: Monday, April 22, 2019 4:01 PM

To: Isenberg, Kelly <kisenberg@pa.gov>; 'Eric Friedman' <eric.law.friedman@gmail.com>

Subject: OOR Appeal 2019-0502 -- PUC request for clarification

Dear Appeals Officer Isenberg,

Pursuant to your Official Notice Letter dated April 2, 2019 in OOR Appeal 2019-0502, you notified the parties, inter alia, that

"Both parties may submit information and legal argument to support their positions by 11:59:59 p.m. on April 11, 2019. The record closing date is seven (7) business days from the date of this letter . . ." The submission deadline was then extended to April 15, 2019 by OOR decision.

The Pennsylvania Public Utility Commission requests guidance regarding this OOR directive. Specifically, is the record closed as this point or is the OOR allowing continuing submissions? To the extent the OOR is not enforcing its directive, are both parties permitted to file additional submissions?

Thank you for your anticipated response.

Sincerely,

Steve Bainbridge

Assistant Counsel

Pennsylvania Public Utility Commission

Isenberg, Kelly

From: Whitney Snyder <WESnyder@hmslegal.com>
Sent: Tuesday, April 23, 2019 5:17 PM
To: Isenberg, Kelly; Eric Friedman
Cc: Chiavetta, Rosemary; Bainbridge, Steven
Subject: RE: [External] Friedman Appeal AP 2019-0502
Attachments: 19-04-23 ET Response Opposing In Camera Review.pdf

Follow Up Flag: Flag for follow up
Flag Status: Flagged

Ms. Isenberg,

Attached please find Energy Transfer's Response to Requester's April 15, 2019 request for in camera review.

Best,

Whitney E. Snyder

Hawke McKeon & Sniscak LLP
www.hmslegal.com
100 N. Tenth Street
Harrisburg, PA 17101
717-236-1300
wesnyder@hmslegal.com

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From: Isenberg, Kelly <kisenberg@pa.gov>
Sent: Thursday, April 18, 2019 8:44 AM
To: Eric Friedman <eric.law.friedman@gmail.com>
Cc: Chiavetta, Rosemary <rchiavetta@pa.gov>; Bainbridge, Steven <sbainbridg@pa.gov>; Whitney Snyder <WESnyder@hmslegal.com>
Subject: RE: [External] Friedman Appeal AP 2019-0502

Mr. Friedman,

Thank you for your prompt response and agreement to extend the Final Determination deadline.

This email will confirm that the Requester has granted the OOR an extension to issue the Final Determination in this matter until **May 15, 2019**.

Sincerely,
Kelly Isenberg



ATTORNEYS AT LAW

100 North 10th Street, Harrisburg, Pennsylvania 17101 | (717) 236-1300 | www.hmslegal.com

April 23, 2019

VIA ELECTRONIC MAIL

Kelly Isenberg, Esq.
Appeals Officer
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234
kisenberg@pa.gov

**Re: Energy Transfer's Response in Opposition to *In Camera* Review
OOR Appeal Docket #AP 2019-0502**

Energy Transfer (ET) submits this response in opposition to in camera review in the above-captioned matter for two reasons. First, as the PUC's affidavits and position statement clearly show, these records are exempt from disclosure under the non-criminal investigatory exemption and in camera review serves no purpose to establish that fact. Second, ET and the PUC's position statements and affidavits sufficiently establish that these records have been designated and are Confidential Security Information not subject to disclosure under the Right-To-Know law and that determination lies exclusively with the PUC.

First, there is nothing inconsistent about the PUC's statements that these records were obtained as part of a non-criminal investigation and are thus exempt from disclosure. Requester's April 15, 2019 email attempts to cherry pick and mischaracterize the PUC's position statement, which lists three reports and then mentions "Commission Inspection Reports." Those statements are not inconsistent with the PUC's statements that these records were obtained or created during a non-criminal investigation. ET submitted these documents to PUC as part of an investigation. In camera review to determine why the documents were obtained by PUC would serve no purpose especially where, as here, that fact is sufficiently established through supporting affidavits.

Second, the records implicated by this request contain Confidential Security Information identified and submitted pursuant to The Public Utility Confidential Security Information Disclosure Protection Act (35 P.S. §§ 2141.1 – 2141.8). Contrary to the unsubstantiated and

unsupported speculation advanced in Requester's April 15, 2019 e-mail submission, the affidavits submitted by PUC and ET are sufficient to establish that the records are confidential within the meaning the CSI Act. *See* PUC Position Statement at 3-6 and supporting affidavits; *see also*, ET Position Statement at 3-5 with supporting affidavit. Such records are not subject to the provisions of the RTKL. 35 P.S. § 2141.4 ("Public utility records or portions thereof which contain confidential security information, in accordance with the provisions of this act, shall not be subject to the provisions of ... the Right-to-Know Law.").

Moreover, a challenge to the confidential status of records submitted pursuant to the CSI Act rests exclusively with the Pennsylvania PUC, not the Office of Open Records. 35 P.S. § 2141.3(c) (providing agency to which information was submitted with exclusive authority to review and consider challenges of confidential designation); 52 Pa. Code § 102.4 (setting forth PUC's procedures for challenges to confidential information). In sum, in camera review by OOR of the records at issue is not only unnecessary, it is statutorily prohibited. Therefore, Requester's request for in camera review must be denied.

Respectfully submitted,

/s/ Whitney E. Snyder

Thomas J. Sniscak, Esq. (PA ID No. 33891)

Kevin J. McKeon, Esq. (PA ID No. 30428)

Whitney E. Snyder, Esq. (PA ID No. 316625)

Hawke, McKeon & Sniscak LLP

100 North Tenth Street

Harrisburg, PA 17101

Tel: (717) 236-1300

tjsniscak@hmslegal.com

kjmckeon@hmslegal.com

wesnyder@hmslegal.com

Attorneys for Energy Transfer

Isenberg, Kelly

From: Bainbridge, Steven
Sent: Wednesday, April 24, 2019 11:38 AM
To: Isenberg, Kelly; 'Eric Friedman'
Cc: Chiavetta, Rosemary; Trout, Doreen
Subject: OOR Appeal 2019-0502 -- PUC Response to Requestor Mr. Friedman email responses to the Commission's Appeal Response

OOR Appeal 2019-0502

Dear Appeals Officer Isenberg,

The Commission supports Energy Transfer's April 23, 2019 Response in Opposition to In-camera review.

The Commission also responds to three issues raised by Requestor Mr. Friedman in his late-filed email responses to the Commission's Appeal Response.

First, the Office of Open Records (OOR) should not accept Mr. Friedman's late-filed factual materials. Beyond being late-filed, these allegations are not supported by affidavit in direct violation of OOR's April 2, 2019 directive. ("Note to Parties: Statements of fact must be supported by an affidavit or attestation made under penalty of perjury by a person with actual knowledge. Any factual statements or allegations submitted without an affidavit will not be considered.") (emphasis in original).

Second, the Commission has filed supporting affidavits regarding the designation of the requested records as Confidential Security Information (CSI). Under the RTKL, a sworn affidavit or statement made under the penalty of perjury may serve as sufficient evidentiary support. See Sherry v. Radnor Twp. Sch. Dist., 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); Moore v. Office of Open Records, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). In the absence of any evidence that the Agency has acted in bad faith, "the averments in [the affidavits] should be accepted as true." McGowan v. Pa. Dep't of Env'tl. Prot., 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing Office of the Governor v. Scolforo, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)). There is no evidence that the PUC has acted in bad faith. Therefore the affidavits should be accepted as true and the records should be accepted as CSI. In camera review is not appropriate since the records are properly designated CSI.

Third, Mr. Friedman asserts that he is covered by a Protective Order which would allow him access to the requested documents. The Commission is not aware of any such Order nor is the Commission convinced that such an order, if it exists, would allow access to protected CSI.

Respectfully submitted,

Steve Bainbridge
Assistant Counsel
Pennsylvania Public Utility Commission

Isenberg, Kelly

From: Isenberg, Kelly
Sent: Monday, May 6, 2019 8:42 AM
To: 'Eric Friedman'
Cc: Bainbridge, Steven; Chiavetta, Rosemary; WESnyder@hmslegal.com
Subject: Friedman v. PUC - OOR Dkt. AP 2019-0502

Importance: High

Tracking:	Recipient	Delivery
	'Eric Friedman'	
	Bainbridge, Steven	Delivered: 5/6/2019 8:42 AM
	Chiavetta, Rosemary	Delivered: 5/6/2019 8:42 AM
	WESnyder@hmslegal.com	

Dear Mr. Friedman:

I am writing to seek an additional two-week extension of time to issue a Final Determination in the above-referenced matter. While I have made considerable progress in the analysis and drafting of the Final Determination, further research and consideration of certain legal issues presented by the appeal is necessary to complete the adjudication.

If we do not receive an objection to the request for an extension by the close of business tomorrow, May 7, 2019 (11:59:59 p.m.), the new deadline for the issuance of a Final Determination will be May 29, 2019.

Thank you in advance for your anticipated cooperation in this regard.

Respectfully,
Kelly Isenberg



Kelly C. Isenberg
Appeals Officer
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Isenberg, Kelly

From: Isenberg, Kelly
Sent: Wednesday, May 22, 2019 10:24 AM
To: Eric Friedman
Cc: Bainbridge, Steven; Chiavetta, Rosemary; WESnyder@hmslegal.com
Subject: RE: [External] Re: Friedman v. Pa. Public Util. Commission - AP 2019-0502

Mr. Friedman,

Thank you for your prompt response and your agreement to a two-extension of time to issue a final determination until **June 12, 2019**.

Regarding what additional information and clarification the OOR will be seeking, that will be sent under separate cover. The briefing schedule for all parties will also be included in the email to follow.

Your position regarding contact with the attorneys for Energy Transfer Partners has been noted for the record.

Sincerely,
Kelly Isenberg



Kelly C. Isenberg
Appeals Officer
Office of Open Records
333 Market Street, 16th Floor
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Fax: (717) 425-5343
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From: Eric Friedman <eric.law.friedman@gmail.com>
Sent: Wednesday, May 22, 2019 10:16 AM
To: Isenberg, Kelly <kisenberg@pa.gov>
Cc: Bainbridge, Steven <sbainbridg@pa.gov>; Chiavetta, Rosemary <rchiavetta@pa.gov>
Subject: [External] Re: Friedman v. Pa. Public Util. Commission - AP 2019-0502

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Good morning Ms. Isenberg,

I do not object to the further two-week extension of time requested by OOR.

I understand from your message that you are requesting something additional from PUC, though it's not entirely clear to

me what you're asking them for. Regardless, if PUC submits something further for the record, I would appreciate the chance (and reasonable time) to respond to it.

I'm not replying to counsel for Sunoco as it has not been admitted as a party to this matter (and I have submitted detailed reasons why it should not be). In addition, as I've pointed out previously, I am covered by a Commonwealth Court-issued protective order with respect to unwanted contact from Sunoco and its agents (copy attached).

Regards,
Eric

On Wed, May 22, 2019 at 9:47 AM Isenberg, Kelly <kisenberg@pa.gov> wrote:

Dear Mr. Friedman:

Upon further review of the submissions in this matter, we have determined that it is necessary to further develop the record. To this end, we are requesting an additional two-week extension of time to issue a Final Determination for the purpose of seeking clarification on certain issues from the PUC in the form of a supplemental submission. In addition to more fully developing the record, the additional submission would aid in the determination of whether *in camera* review of the records is necessary to adjudicate this appeal. If you wish, the OOR would provide you the opportunity to submit a reply limited to the issues as framed by the OOR.

Kindly provide a reply to this request as soon as practicable, or by noon tomorrow, May 23, 2019.

Thank you in advance for your anticipated cooperation in this regard.

Respectfully,

Kelly Isenberg



Kelly C. Isenberg
Appeals Officer

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Isenberg, Kelly

From: Isenberg, Kelly
Sent: Wednesday, May 22, 2019 4:22 PM
To: Eric Friedman
Cc: Bainbridge, Steven; Chiavetta, Rosemary; WESnyder@hmslegal.com
Subject: RE: [External] Re: Friedman v. Pa. Public Util. Commission - AP 2019-0502

Tracking:	Recipient	Delivery
	Eric Friedman	
	Bainbridge, Steven	Delivered: 5/22/2019 4:22 PM
	Chiavetta, Rosemary	Delivered: 5/22/2019 4:22 PM
	WESnyder@hmslegal.com	

Mr. Bainbridge:

The OOR writes seeking clarification in the above-referenced appeal. The Commission asserts, among other things, that the responsive records are exempt from disclosure under 65 P.S. § 67.708(b)(17) because they relate to a noncriminal investigation being conducted by the Commission's Bureau of Investigation and Enforcement (BIE). Mr. Metro attests that four investigations were commenced by the Commission and are active and ongoing. Mr. Metro also attests that the investigations include the investigation of the "Mariner East 1" (ME1) pipeline that was commenced on or about April 1, 2017. Mr. Metro further attests that with respect to the ME1 investigation, on December 13, 2018, "the Commission's [BIE] filed a Formal Complaint C-2018-3006534 against Sunoco Pipeline L.P. a/k/a Energy Transfer Partners...to continue this investigation." With regard to the records that relate to the investigation of ME1, please address the application of 66 Pa.C.S. § 335, especially in light of the Commission's citation to *Pa. Pub. Utility Comm'n v. Gilbert*, 40 A.3d 755 (Pa. Commw. 2012) in its position statement in support of the Commission's argument pursuant to Sec. 708(b)(17) of the RTKL.

Please keep in mind that all statement of facts must be supported by a sworn affidavit, signed under the penalty of perjury or signed subject to the penalties of 18 Pa.C.S. §4904, to be accepted as evidence before the OOR.

A response to this request for clarification is due by the close of business (11:59:59 pm) on Tuesday May 28, 2019. In addition, should Mr. Friedman wish to submit a reply, limited to the issues addressed by the Commission's supplemental submission, it must be made by the close of business on Friday May 31, 2019.

Thank you for your attention to this matter.

Sincerely
Kelly Isenberg



Kelly C. Isenberg
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Isenberg, Kelly

From: Bainbridge, Steven
Sent: Tuesday, May 28, 2019 11:28 AM
To: Isenberg, Kelly
Cc: 'Eric Friedman'; Chiavetta, Rosemary; Herzog, John; Trout, Doreen; wesnyder@hmslegal.com
Subject: PUC Response to OOR Request for Clarification --- Friedman v. Pa. Public Util. Commission - OOR AP 2019-0502

Dear Appeal Officer Isenberg:

In your email, you request :

The OOR writes seeking clarification in the above-referenced appeal. The Commission asserts, among other things, that the responsive records are exempt from disclosure under 65 P.S. § 67.708(b)(17) because they relate to a noncriminal investigation being conducted by the Commission's Bureau of Investigation and Enforcement (BIE). Mr. Metro attests that four investigations were commenced by the Commission and are active and ongoing. Mr. Metro also attests that the investigations include the investigation of the "Mariner East 1" (ME1) pipeline that was commenced on or about April 1, 2017. Mr. Metro further attests that with respect to the ME1 investigation, on December 13, 2018, "the Commission's [BIE] filed a Formal Complaint C-2018-3006534 against Sunoco Pipeline L.P. a/k/a Energy Transfer Partners...to continue this investigation." With regard to the records that relate to the investigation of ME1, please address the application of 66 Pa.C.S. § 335, especially in light of the Commission's citation to *Pa. Pub. Utility Comm'n v. Gilbert*, 40 A.3d 755 (Pa. Commw. 2012) in its position statement in support of the Commission's argument pursuant to Sec. 708(b)(17) of the RTKL.

Background:

The RTK Request at issue:

Under Pennsylvania's Right-to-Know law, I respectfully request all records in the possession of Paul Metro, his superiors or subordinates, that relate to the calculation or estimation of the range at which thermal or overpressure events related to accidents on hazardous, highly volatile liquids (HVL) pipelines may be experienced. **This request does not seek information provided by Sunoco if that information has been designated as confidential security information.** Rather, it seeks records containing or related to calculations or estimates of blast radius (Sunoco's term) or "buffer zone" (PUC's term) regarding accidents or releases from HVL pipelines in the possession of the PUC, including (but not limited to) information that was produced for PUC by an external source or that was developed internally. (Emphasis added)

The Commission's Response to the Requestor

The Commission Denied the Request. The Commission stated, in part:

The documents responsive to your request have been designated as confidential security information (CSI), and therefore, as your request indicated, you are not seeking such documents. To the extent that your request does seek such documents, the Commission

must deny your request, since the documents are designated CSI. Additionally, the documents are part of a noncriminal investigation and therefore are exempt from disclosure under the RTKL.

The Commission explained the legal foundations for the CSI exemptions, as well as the noncriminal investigation exemption, in its response. It cannot be overly stressed that:

- 1) There were **no responsive records** since **all documents were designated as CSI**; and
- 2) To the extent that the request asked for CSI documents, those documents cannot be provided under the Public Utility Confidential Security Information Disclosure Protection Act (PUCSIDPA) (35 P.S. §§ 2141.1 – 2141.8) as well as the RTKL 65 P.S. § 67.708(b)(2) and (3). ***It is only after these two primary reasons for denial that the noncriminal investigation exemption was proffered.***

Argument:

First, Mr. Friedman specifically indicated in his Request: "This request does not seek information provided by Sunoco if that information has been designated as confidential security information." As indicated in the Commission's Response to the Request, **there are no responsive documents**, as the responsive documents are designated confidential security information (CSI). Therefore, this matter should be resolved on this basis alone.

Second, CSI is prohibited from disclosure pursuant to the Public Utility Confidential Security Information Disclosure Protection Act (PUCSIDPA) (Also referred to as Act 156 of 2006) (35 P.S. §§ 2141.1 – 2141.8). Even if the Requestor had not specifically excluded CSI documents from his Request, disclosure would be prohibited from disclosure under PUCSIDPA. Additionally, the Right-to-Know Law also recognizes exemptions for CSI. See 65 P.S. 67.708(b)(2) and (3), prohibiting disclosure of these documents. Therefore, this matter should be resolved on this basis.

Third, the noncriminal investigation exemption of the RTKL (65 P.S. § 67.708(b)(17)) exempts from disclosure "a record of an agency relating to a noncriminal investigation," including "investigative materials, notes, correspondence and reports," and records that would, if disclosed, "reveal the institution, progress or result of an agency investigation." 65 P.S. § 67.708(b)(17) and (b)(17)(iv)(A). The requested documents are part of multiple Commission investigations and as such are exempt from disclosure.

The Public Utility Code, 66 Pa.C.S. § 335(d)

To address your specific point, the Public Utility Code, 66 Pa.C.S. § 335(d), provides in pertinent part:

In addition to any other requirements imposed by law, ... whenever the commission conducts an investigation of an act or practice of a public utility and makes a decision, enters into a settlement with a public utility or takes any other official action, as defined in the Sunshine Act, with respect to its investigation, it shall make part of the public record and release publicly any documents relied upon by the commission in reaching its determination, ... other than documents protected by legal privilege; provided, however, that if a document contains ... information which, if disclosed to the public, could be used for criminal or terroristic purposes, the identifying information may be expurgated from the copy of the document made part of the public record. ...

66 Pa.C.S. Section 335(d).

The Commission's position is that the investigations of ME1 are open investigations and no decision, settlement, or other official action has been made so far in regard to these investigations. Therefore the disclosure requirements of Section 335(d) of the Public Utility Code (66 Pa.C.S. Section 335(d)) are not yet applicable to materials related to these investigations, including the materials requested by Mr. Friedman in his Right-to-Know Law Request.

With regard to the Commonwealth Court's *Gilbert* decision, the Commonwealth Court held in *Gilbert* that the noncriminal investigation exemption of the Right-to-Know Law exempts from disclosure the Commission's pipeline investigation materials. To specifically address the *Gilbert* Court's discussion of 335(d), the Court determined that Section 335(d) of the Public Utility Code was not applicable to the facts raised in the *Gilbert* case. *Gilbert* at 760. The Court reasoned that Section 335(d) would not even be considered for possible application "until after the PUC's investigative materials are presented as part of a formal complaint, presented at a formal hearing, or presented as part of a settlement agreement . . ." *Id.* Since the Court reasoned that 335(d) was not applicable because the Right-to-Know Law Request in *Gilbert* was not for materials that were presented as part of a formal complaint, presented at a formal hearing, or presented as part of a settlement agreement, the Court never addressed the further question of when disclosure under 335(d) would be triggered for materials that would be subject to 335(d).

Regardless of the mention in *Gilbert* of the lack of a "formal complaint" in that matter, the statute is clear that Section 335(d) is triggered, if at all, only after the Commission "makes a decision, enters into a settlement with a public utility or takes any other official action, as defined in the Sunshine Act . . ." There has been no decision or settlement by the Commission regarding these pending investigations and neither the initiation of an investigation nor the filing of a formal complaint before the Commission qualifies as "official action" under the Sunshine Act (SEE BELOW).

Finally, Section 335(d) contains an explicit CSI disclosure exemption (terroristic purposes), which would be applicable here if 335(d) were properly before OOR, which it is NOT. As noted earlier, this case should be resolved on the "no responsive documents" basis, obviating the need to go any further. It is questionable if OOR even has the authority to *sua sponte* engage in an unnecessary 335(d) analysis.

Sunshine Act

"Official action."

- (1) Recommendations made by an agency pursuant to statute, ordinance or executive order.
- (2) The establishment of policy by an agency.
- (3) The decisions on agency business made by an agency.
- (4) The vote taken by any agency on any motion, proposal, resolution, rule, regulation, ordinance, report or order.

"Agency business." "The framing, preparation, making or enactment of laws, policy or regulations, the creation of liability by contract or otherwise or the adjudication of rights, duties and responsibilities, but not including administrative action."

65 Pa.C.S. Section 703 (Sunshine Act Definitions.)

Respectfully submitted,

Steven K. Bainbridge
Assistant Counsel
Pennsylvania Public Utility Commission

From: Isenberg, Kelly <kisenberg@pa.gov>

Sent: Wednesday, May 22, 2019 4:22 PM

To: Eric Friedman <eric.law.friedman@gmail.com>

Cc: Bainbridge, Steven <sbainbridg@pa.gov>; Chiavetta, Rosemary <rchiavetta@pa.gov>; WESnyder@hmslegal.com

Subject: RE: [External] Re: Friedman v. Pa. Public Util. Commission - AP 2019-0502

Mr. Bainbridge:

The OOR writes seeking clarification in the above-referenced appeal. The Commission asserts, among other things, that the responsive records are exempt from disclosure under 65 P.S. § 67.708(b)(17) because they relate to a noncriminal investigation being conducted by the Commission's Bureau of Investigation and Enforcement (BIE). Mr. Metro attests that four investigations were commenced by the Commission and are active and ongoing. Mr. Metro also attests that the investigations include the investigation of the "Mariner East 1" (ME1) pipeline that was commenced on or about April 1, 2017. Mr. Metro further attests that with respect to the ME1 investigation, on December 13, 2018, "the Commission's [BIE] filed a Formal Complaint C-2018-3006534 against Sunoco Pipeline L.P. a/k/a Energy Transfer Partners...to continue this investigation." With regard to the records that relate to the investigation of ME1, please address the application of 66 Pa.C.S. § 335, especially in light of the Commission's citation to *Pa. Pub. Utility Comm'n v. Gilbert*, 40 A.3d 755 (Pa. Commw. 2012) in its position statement in support of the Commission's argument pursuant to Sec. 708(b)(17) of the RTKL.

Please keep in mind that all statement of facts must be supported by a sworn affidavit, signed under the penalty of perjury or signed subject to the penalties of 18 Pa.C.S. §4904, to be accepted as evidence before the OOR.

A response to this request for clarification is due by the close of business (11:59:59 pm) on Tuesday May 28, 2019. In addition, should Mr. Friedman wish to submit a reply, limited to the issues addressed by the Commission's supplemental submission, it must be made by the close of business on Friday May 31, 2019.

Thank you for your attention to this matter.

Sincerely

Kelly Isenberg



Kelly C. Isenberg
Appeals Officer
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234
Phone: (717) 346-9903
Fax: (717) 425-5343
<https://www.openrecords.pa.gov>
[@OpenRecordsPA](https://twitter.com/OpenRecordsPA)

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From: Eric Friedman <eric.law.friedman@gmail.com>

Sent: Wednesday, May 22, 2019 10:16 AM

To: Isenberg, Kelly <kisenberg@pa.gov>

Cc: Bainbridge, Steven <sbainbridg@pa.gov>; Chiavetta, Rosemary <rchiavetta@pa.gov>

Subject: [External] Re: Friedman v. Pa. Public Util. Commission - AP 2019-0502

ATTENTION: This email message is from an external sender. Do not open links or attachments from unknown sources. To report suspicious email, forward the message as an attachment to CWOPA_SPAM@pa.gov.

Good morning Ms. Isenberg,

I do not object to the further two-week extension of time requested by OOR.

I understand from your message that you are requesting something additional from PUC, though it's not entirely clear to me what you're asking them for. Regardless, if PUC submits something further for the record, I would appreciate the chance (and reasonable time) to respond to it.

I'm not replying to counsel for Sunoco as it has not been admitted as a party to this matter (and I have submitted detailed reasons why it should not be). In addition, as I've pointed out previously, I am covered by a Commonwealth Court-issued protective order with respect to unwanted contact from Sunoco and its agents (copy attached).

Regards,
Eric

On Wed, May 22, 2019 at 9:47 AM Isenberg, Kelly <kisenberg@pa.gov> wrote:

Dear Mr. Friedman:

Upon further review of the submissions in this matter, we have determined that it is necessary to further develop the record. To this end, we are requesting an additional two-week extension of time to issue a Final Determination for the purpose of seeking clarification on certain issues from the PUC in the form of a supplemental submission. In addition to more fully developing the record, the additional submission would aid in the determination of whether *in camera* review of the records is necessary to adjudicate this appeal. If you wish, the OOR would provide you the opportunity to submit a reply limited to the issues as framed by the OOR.

Kindly provide a reply to this request as soon as practicable, or by noon tomorrow, May 23, 2019.

Thank you in advance for your anticipated cooperation in this regard.

Respectfully,

Kelly Isenberg



Kelly C. Isenberg
Appeals Officer

Office of Open Records
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Phone: (717) 346-9903

Fax: (717) 425-5343

<https://www.openrecords.pa.gov>

[@OpenRecordsPA](#)

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Isenberg, Kelly

From: Eric Friedman <eric.law.friedman@gmail.com>
Sent: Friday, May 31, 2019 1:19 PM
To: Isenberg, Kelly
Cc: Chiavetta, Rosemary; Herzog, John; Trout, Doreen; Bainbridge, Steven
Subject: [External] Re: PUC Response to OOR Request for Clarification --- Friedman v. Pa. Public Util. Commission - OOR AP 2019-0502

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Ms. Isenberg,

The PUC continues to both contradict itself and to mischaracterize my request.

Notwithstanding its most recent response ("There were **no responsive records...**"), PUC has already acknowledged possessing records that are responsive to my request. During a recorded public meeting, and with PUC counsel sitting next to him, Fixed Utility Manager Metro acknowledged having his own estimate of the range at which lethal effects of continued accidents on Sunoco pipelines may be experienced. In fact, Mr. Metro's admission that the PUC had such records formed the basis for my request. See www.youtube.com/watch?v=bpbj10JXQOk

In fact, in an affidavit dated April 15, 2019, Mr. Metro lists a number of responsive records, along with his "opinion that the requested records are Confidential Security information." The means and method of marking of the records is critical to this determination. For example, Mr. Metro acknowledges having records provided by Sunoco "marked as Confidential." But simply marking something "Confidential" isn't enough. If the records were not designated as Confidential Security Information in accordance with the statutory requirements *at the time they were submitted*, then I assert the PUC cannot retroactively do so simply for the purpose of shielding them from release. As I have done throughout this appeal, I again respectfully ask the Office of Open Records to independently determine the accuracy or inaccuracy of Mr. Metro's "opinion" by performing its own *in camera* review of the requested and responsive records.

Sincerely,
Eric Friedman

On Tue, May 28, 2019 at 11:27 AM Bainbridge, Steven <sbainbridg@pa.gov> wrote:

Dear Appeal Officer Isenberg:

In your email, you request :

The OOR writes seeking clarification in the above-referenced appeal. The Commission asserts, among other things, that the responsive records are exempt from disclosure under 65 P.S. § 67.708(b)(17) because they relate to a noncriminal investigation being conducted by the Commission's Bureau of Investigation and Enforcement (BIE). Mr. Metro attests that four investigations were commenced by the Commission and are active and ongoing. Mr. Metro also attests that the investigations include the investigation of the "Mariner East 1" (ME1) pipeline that was commenced on or about April 1, 2017. Mr. Metro further attests that with respect to the ME1 investigation, on December 13, 2018, "the Commission's [BIE] filed a Formal Complaint C-2018-3006534 against Sunoco Pipeline L.P. a/k/a Energy Transfer Partners...to continue this investigation." With regard to the records that relate to the investigation of ME1, please address the application of 66 Pa.C.S. § 335, especially in light of the Commission's citation to *Pa. Pub. Utility Comm'n v.*

Isenberg, Kelly

From: Isenberg, Kelly
Sent: Friday, May 31, 2019 2:52 PM
To: Bainbridge, Steven
Cc: Eric Friedman; Chiavetta, Rosemary; Trout, Doreen; WESnyder@hmslegal.com
Subject: Fridman v. Pa. Public Util. Commission - OOR Dkt. AP 2019-0502

Mr. Bainbridge:

Based upon a review of the Commission's May 28, 2019 submission and the Requester's May 31, 2019 reply thereto, it is necessary to seek additional clarification in this matter. Please provide the transmittal letters for the records submitted by ET/SPLP for the records that the Commission has identified as responsive to the Request -- Hazard Assessment for ME1, Hazard Assessment for proposed ME2 and Hazard Assessment for Re-route of ME2 -- and that it asserts as being confidential security information under the PUCSIDPA, 35 P.S. §§ 2141.1 -2141.8. As indicated in 35 P.S. § 2141.3(a), a public utility is required to complete such a transmittal letter under the procedures for submission of confidential security information. In the regulations implementing the PUCSIDPA provide that the transmittal letter will be treated as a public record. See 52 Pa. Code § 102.3(b)(1).

Kindly provide the requested information by the close of business (11:59:59 pm) on Monday, June 3, 2019.

Thank you for your attention to this matter.

Sincerely,
Kelly Isenberg



Kelly C. Isenberg
Appeals Officer
Office of Open Records
333 Market Street, 16th Floor
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[@OpenRecordsPA](#)

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Isenberg, Kelly

From: Bainbridge, Steven
Sent: Monday, June 3, 2019 4:50 PM
To: Isenberg, Kelly
Cc: Chiavetta, Rosemary; Herzog, John; Trout, Doreen; 'Eric.law.friedman@gmail.com'; wesnyder@hmslegal.com
Subject: Friedman v. Pa. Public Util. Commission - OOR Dkt. AP 2019-0502 -- Transmittal Letters

Dear Appeals Officer Isenberg,

Per your request, the Commission will tomorrow morning hand deliver to your office the transmittal letters for the records submitted by ET/SPLP for the records that the Commission has identified as responsive to the Request -- Hazard Assessment for ME1, Hazard Assessment for proposed ME2 and Hazard Assessment for Re-route of ME2. The April 6, 2018 transmittal letter was for the Hazard Assessment for ME1. The November 2, 2018 transmittal letter was for Hazard Assessment for proposed ME2 and Hazard Assessment for Re-route of ME2.

The redactions in the transmittal letters are to redact nonresponsive materials contained within the transmittal letters. These redacted materials include confidential security information (PUCSIDPA, 35 P.S. Section 2141.1-2141.6) and/or fall within the noncriminal investigation exemption of the Right-to-Know Law (65 P.S. Section 67.708(b)(17)). The unredacted portions of the letters indicated the transmittal for the three above-referenced reports, as you requested.

With regards to the public record status of the transmittal letters in reference to 52 Pa. Code Section 102.3(b)(1), the Commission asserts that the noncriminal investigation exemption of the Right-to-Know Law (65 P.S. Section 67.708(b)(17)) as well as the Public Utility Confidential Security Information Disclosure Protection Act (PUCSIDPA) (35 P.S. Section 2141.1-2141.6) exempts these redacted letters from public disclosure. This is the case notwithstanding 52 Pa. Code Section 102.3(b)(1) designation of the transmittal letters as 'public records'. The Commission asserts that that designation is not binding on any particular transmittal letter, and the Commission is authorized to waive its own regulations. Here, these letters go beyond the single item identified and addressed at 52 Pa. Code Section 102.3(b)(1). Rather, these transmittal letters are also part of a noncriminal investigation and therefore 52 Pa. Code Section 102.3(b)(1) is not controlling regarding whether the records should be disclosed.

Based on the foregoing, the transmittal letters are submitted for *in camera* review only.

Due to the sensitive nature of the documents, the documents will be hand delivered to your office tomorrow morning.

Respectfully submitted,

Steven Bainbridge
Assistant Counsel
Pennsylvania Public Utility Commission

From: Isenberg, Kelly <kisenberg@pa.gov>
Sent: Friday, May 31, 2019 2:52 PM
To: Bainbridge, Steven <sbainbridg@pa.gov>
Cc: Eric Friedman <eric.law.friedman@gmail.com>; Chiavetta, Rosemary <rchiavetta@pa.gov>; Trout, Doreen <DOTROUT@pa.gov>; WESnyder@hmslegal.com
Subject: Friedman v. Pa. Public Util. Commission - OOR Dkt. AP 2019-0502

Mr. Bainbridge:

Based upon a review of the Commission's May 28, 2019 submission and the Requester's May 31, 2019 reply thereto, it is necessary to seek additional clarification in this matter. Please provide the transmittal letters for the records submitted by ET/SPLP for the records that the Commission has identified as responsive to the Request -- Hazard Assessment for ME1, Hazard Assessment for proposed ME2 and Hazard Assessment for Re-route of ME2 -- and that it asserts as being confidential security information under the PUCSIDPA, 35 P.S. §§ 2141.1 -2141.8. As indicated in 35 P.S. § 2141.3(a), a public utility is required to complete such a transmittal letter under the procedures for submission of confidential security information. In the regulations implementing the PUCSIDPA provide that the transmittal letter will be treated as a public record. See 52 Pa. Code § 102.3(b)(1).

Kindly provide the requested information by the close of business (11:59:59 pm) on Monday, June 3, 2019.

Thank you for your attention to this matter.

Sincerely,
Kelly Isenberg



Kelly C. Isenberg
Appeals Officer
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234
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Isenberg, Kelly

From: Isenberg, Kelly
Sent: Wednesday, June 5, 2019 12:12 PM
To: Bainbridge, Steven
Cc: Chiavetta, Rosemary; Herzog, John; Trout, Doreen; 'Eric.law.friedman@gmail.com'; wesnyder@hmslegal.com
Subject: RE: Friedman v. Pa. Public Util. Commission - OOR Dkt. AP 2019-0502 -- Transmittal Letters

Tracking:	Recipient	Delivery
	Bainbridge, Steven	Delivered: 6/5/2019 12:12 PM
	Chiavetta, Rosemary	Delivered: 6/5/2019 12:12 PM
	Herzog, John	Delivered: 6/5/2019 12:12 PM
	Trout, Doreen	Delivered: 6/5/2019 12:12 PM
	'Eric.law.friedman@gmail.com'	
	wesnyder@hmslegal.com	

Dear Attorney Bainbridge,

We are confirming receipt of the requested transmittal letters, which the Commission indicates have been redacted. At this juncture, the envelope has not been opened and the OOR has not ordered *in camera* review of any records in this matter. We note that the Requester, Mr. Friedman, has not been provided with a copy of the documents delivered to the OOR; therefore, in order for your submission to be entered into the record, the Requester must also be provided with a copy. Please see the official OOR Appeal Notice that states, in pertinent part, "...any information you provide to the OOR must be provided to all parties involved in this appeal. Information shared with the OOR that is not also shared with all parties will not be considered."

If the Commission does not wish to send a copy to the Requester and have the documents entered into the record, please notify the OOR of its decision and the documents will be returned unopened. Kindly, provide notice of how the Commission intends to proceed by 5:00 p.m., tomorrow, June 6, 2019.

Thank you for your attention to this matter.

Sincerely,
Kelly Isenberg



Kelly C. Isenberg
Appeals Officer
Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234
Phone: (717) 346-9903
Fax: (717) 425-5343
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@OpenRecordsPA

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Isenberg, Kelly

From: Bainbridge, Steven
Sent: Thursday, June 6, 2019 4:03 PM
To: Isenberg, Kelly
Cc: Chiavetta, Rosemary; Herzog, John; Trout, Doreen; 'Eric.law.friedman@gmail.com'; wesnyder@hmslegal.com
Subject: RE: Friedman v. Pa. Public Util. Commission - OOR Dkt. AP 2019-0502 -- Transmittal Letters

Dear Appeals Officer Isenberg,

Inasmuch as the transmittal letters relate to the institution and progress of an agency investigation, the Commission asserts that the letters are within the scope the noncriminal investigation exemption of the Right-to-Know Law (65 P.S. Section 67.708(b)(17)). Therefore, the Commission will not voluntarily provide a copy of the transmittal letters to the Requestor, Mr. Friedman. The Commission provided the redacted transmittal letters to you in response to your request for them, to aid in the Office of Open Records' analysis in this matter.

Respectfully Submitted,

Steve Bainbridge
Assistant Counsel
Pennsylvania Public Utility Commission

From: Isenberg, Kelly <kisenberg@pa.gov>
Sent: Wednesday, June 05, 2019 12:12 PM
To: Bainbridge, Steven <sbainbridg@pa.gov>
Cc: Chiavetta, Rosemary <rchiavetta@pa.gov>; Herzog, John <JHERZOG@pa.gov>; Trout, Doreen <DOTROUT@pa.gov>; 'Eric.law.friedman@gmail.com' <Eric.law.friedman@gmail.com>; wesnyder@hmslegal.com
Subject: RE: Friedman v. Pa. Public Util. Commission - OOR Dkt. AP 2019-0502 -- Transmittal Letters

Dear Attorney Bainbridge,

We are confirming receipt of the requested transmittal letters, which the Commission indicates have been redacted. At this juncture, the envelope has not been opened and the OOR has not ordered *in camera* review of any records in this matter. We note that the Requester, Mr. Friedman, has not been provided with a copy of the documents delivered to the OOR; therefore, in order for your submission to be entered into the record, the Requester must also be provided with a copy. Please see the official OOR Appeal Notice that states, in pertinent part, "...any information you provide to the OOR must be provided to all parties involved in this appeal. Information shared with the OOR that is not also shared with all parties will not be considered."

If the Commission does not wish to send a copy to the Requester and have the documents entered into the record, please notify the OOR of its decision and the documents will be returned unopened. Kindly, provide notice of how the Commission intends to proceed by 5:00 p.m., tomorrow, June 6, 2019.

Thank you for your attention to this matter.

Sincerely,

Bainbridge, Steven <sbainbridg@pa.gov>

Subject: Re: [External] Re: Friedman v. Pa. Public Util. Commission - OOR Dkt. AP 2019-0502 -- Transmittal Letters

Ms. Isenberg,

I agree to the extension of time you've requested until June 26, 2019. However, I observe that the records I've requested (and which PUC has acknowledged having) bear on the PUC's assessment of the dimensions of what Sunoco calls the "blast radius" associated with its current and proposed hazardous, highly volatile liquids export pipelines. Detailed information about the size of this blast radius is available from numerous publicly available sources, but the information in the possession of the PUC is obviously also of great public interest. Not least of all to those Pennsylvanians who through action of the PUC have had this blast radius imposed on them while they occupy their homes, schools, businesses, places of worship, and so on.

While I agree to an extension of time for processing this request, I am not providing an extension at the present time for the processing of my separate RTKL request, submitted yesterday, for the records now in the possession of the OOR.

Sincerely,
Eric Friedman

On Fri, Jun 7, 2019 at 9:00 AM Isenberg, Kelly <kisenberg@pa.gov> wrote:

Mr. Friedman,

The arguments presented by the parties in the most recent communications have raised several novel issues that require further review, research and consideration by the OOR. To that end, we are requesting an additional two week extension to issue the Final Determination in this matter until June 26, 2019.

Kindly reply to this request as soon as practicable, or by the close of business today, June 7, 2019.

Thank you in advance for your anticipated cooperation in this regard.

Sincerely,

Kelly Isenberg



Kelly C. Isenberg
Appeals Officer

Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234

Isenberg, Kelly

From: Eric Friedman <eric.law.friedman@gmail.com>
Sent: Thursday, June 6, 2019 11:33 PM
To: Isenberg, Kelly
Cc: Chiavetta, Rosemary; Herzog, John; Trout, Doreen; Bainbridge, Steven
Subject: [External] Re: Friedman v. Pa. Public Util. Commission - OOR Dkt. AP 2019-0502 -- Transmittal Letters

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Ms. Isenberg,

Transmittal letters that accompany information that an operator wishes to designate as confidential security information are, by definition, public records. PUC counsel cannot arbitrarily and capriciously "waive [the Commission's] own regulations" *post hoc* for the express purpose of withholding these public records from release.

Moreover, PUC counsel has engaged in inappropriate *ex parte* communication with the Office of Open Records (OOR) by providing the transmittal letters only to OOR. The simple and obvious cure for this *ex parte* communication is for OOR to provide them to me, which I ask that you do.

Finally, because these letters are in the possession of OOR, I believe they are now records of OOR that are themselves subject to the Right-to-Know Law (RTKL). I hereby make a request under the RTKL **to OOR** for these records. I'm informing you of this RTKL request so that you are aware of it, but will also make a formal request for these records using the OOR RTKL request process. I respectfully request that you retain custody of the records while OOR processes my request for them.

If you agree that these records in the possession of OOR should be released as a cure of the *ex parte* communications or, alternatively, that they are releasable under the RTKL statute, I will be happy to come to OOR to pick them up at a time that is most convenient for you.

Sincerely,
Eric Friedman

On Thu, Jun 6, 2019 at 4:03 PM Bainbridge, Steven <sbainbridg@pa.gov> wrote:

Dear Appeals Officer Isenberg,

Inasmuch as the transmittal letters relate to the institution and progress of an agency investigation, the Commission asserts that the letters are within the scope the noncriminal investigation exemption of the Right-to-Know Law (65 P.S. Section 67.708(b)(17)). Therefore, the Commission will not voluntarily provide a copy of the transmittal letters to the Requestor, Mr. Friedman. The Commission provided the redacted transmittal letters to you in response to your request for them, to aid in the Office of Open Records' analysis in this matter.

Respectfully Submitted,

Isenberg, Kelly

From: Isenberg, Kelly
Sent: Friday, June 7, 2019 9:00 AM
To: Eric Friedman
Cc: Chiavetta, Rosemary; Herzog, John; Trout, Doreen; Bainbridge, Steven; wesnyder@hmslegal.com
Subject: RE: [External] Re: Friedman v. Pa. Public Util. Commission - OOR Dkt. AP 2019-0502 -- Transmittal Letters

Importance: High

Tracking:	Recipient	Delivery	Read
	Eric Friedman		
	Chiavetta, Rosemary	Delivered: 6/7/2019 9:00 AM	
	Herzog, John	Delivered: 6/7/2019 9:00 AM	Read: 6/7/2019 12:11 PM
	Trout, Doreen	Delivered: 6/7/2019 9:00 AM	
	Bainbridge, Steven	Delivered: 6/7/2019 9:00 AM	Read: 6/7/2019 2:04 PM
	wesnyder@hmslegal.com		

Mr. Friedman,

The arguments presented by the parties in the most recent communications have raised several novel issues that require further review, research and consideration by the OOR. To that end, we are requesting an additional two week extension to issue the Final Determination in this matter until June 26, 2019.

Kindly reply to this request as soon as practicable, or by the close of business today, June 7, 2019.

Thank you in advance for your anticipated cooperation in this regard.

Sincerely,
Kelly Isenberg



Kelly C. Isenberg
Appeals Officer
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From: Eric Friedman <eric.law.friedman@gmail.com>
Sent: Thursday, June 6, 2019 11:33 PM

Isenberg, Kelly

From: Isenberg, Kelly
Sent: Friday, June 7, 2019 10:58 AM
To: Eric Friedman
Cc: Chiavetta, Rosemary; Herzog, John; Trout, Doreen; Bainbridge, Steven; wesnyder@hmslegal.com
Subject: RE: [External] Re: Friedman v. Pa. Public Util. Commission - OOR Dkt. AP 2019-0502 -- Transmittal Letters

Tracking:	Recipient	Delivery
	Eric Friedman	
	Chiavetta, Rosemary	Delivered: 6/7/2019 10:58 AM
	Herzog, John	Delivered: 6/7/2019 10:58 AM
	Trout, Doreen	Delivered: 6/7/2019 10:58 AM
	Bainbridge, Steven	Delivered: 6/7/2019 10:58 AM
	wesnyder@hmslegal.com	

Mr. Friedman,

Thank you for your prompt response and agreement to an extension. This correspondence will confirm that the Final Determination in this matter is now due on or before **June 26, 2019**.

Regarding the processing of your separate RTKL request, I will be forwarding your communication to the OOR's Open Records Officer, George Spiess. As an appeals officer, my role is wholly separate from the processing of RTKL requests submitted to the OOR; therefore, all future communications relating to your new, separate request should be directed to Mr. Spiess and I should not be included.

Sincerely,
Kelly Isenberg



Kelly C. Isenberg
Appeals Officer
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Harrisburg, PA 17101-2234
Phone: (717) 346-9903
Fax: (717) 425-5343
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From: Eric Friedman <eric.law.friedman@gmail.com>
Sent: Friday, June 7, 2019 10:39 AM
To: Isenberg, Kelly <kisenberg@pa.gov>
Cc: Chiavetta, Rosemary <rchiavetta@pa.gov>; Herzog, John <JHERZOG@pa.gov>; Trout, Doreen <DOTROUT@pa.gov>;

Bainbridge, Steven <sbainbridg@pa.gov>

Subject: Re: [External] Re: Friedman v. Pa. Public Util. Commission - OOR Dkt. AP 2019-0502 -- Transmittal Letters

Ms. Isenberg,

I agree to the extension of time you've requested until June 26, 2019. However, I observe that the records I've requested (and which PUC has acknowledged having) bear on the PUC's assessment of the dimensions of what Sunoco calls the "blast radius" associated with its current and proposed hazardous, highly volatile liquids export pipelines. Detailed information about the size of this blast radius is available from numerous publicly available sources, but the information in the possession of the PUC is obviously also of great public interest. Not least of all to those Pennsylvanians who through action of the PUC have had this blast radius imposed on them while they occupy their homes, schools, businesses, places of worship, and so on.

While I agree to an extension of time for processing this request, I am not providing an extension at the present time for the processing of my separate RTKL request, submitted yesterday, for the records now in the possession of the OOR.

Sincerely,
Eric Friedman

On Fri, Jun 7, 2019 at 9:00 AM Isenberg, Kelly <kisenberg@pa.gov> wrote:

Mr. Friedman,

The arguments presented by the parties in the most recent communications have raised several novel issues that require further review, research and consideration by the OOR. To that end, we are requesting an additional two week extension to issue the Final Determination in this matter until June 26, 2019.

Kindly reply to this request as soon as practicable, or by the close of business today, June 7, 2019.

Thank you in advance for your anticipated cooperation in this regard.

Sincerely,

Kelly Isenberg



Kelly C. Isenberg
Appeals Officer

Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234

FACTUAL BACKGROUND

On February 4, 2019, the Request was filed, seeking:

... all records in the possession of Paul Metro, his superiors or subordinates, that relate to the calculation or estimation of the range at which thermal or overpressure events related to accidents on hazardous ... (HVL) pipelines may be experienced. This request does not seek information provided by Sunoco if that information has been designated as confidential security information. Rather, it seeks records containing or related to calculations or estimates of blast radius (Sunoco's term) or "buffer zone" ([Commission]'s term) regarding accidents or releases from HVL pipelines in the possession of the [Commission], including (but not limited to) information that was produced for [the Commission] by an external source or that was developed internally.¹

On February 8, 2019 the Commission invoked a thirty-day extension to respond to the Request. 65 P.S. § 67.902(b). On March 11, 2019, the Commission denied the Request, arguing that the requested information is confidential security information ("CSI") under the Public Utility Confidential Security Information Disclosure Protection Act ("Act"), 35 P.S. §§ 2141.1-2141.8. The Commission also argued that release of the records would jeopardize public safety, 65 P.S. § 67.708(b)(2), endanger the safety or physical security of a public utility, 65 P.S. § 67.708(b)(3), and that the records relate to a noncriminal investigation, 65 P.S. § 708(b)(17).

On April 1, 2019, the Requester appealed to the OOR, challenging the denial and stating grounds for disclosure.² The OOR invited both parties to supplement the record and directed the Commission to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

¹ The Request included an introductory passage containing background information that was admitted to the record and considered for purposes of adjudication.

² On April 2, 2019, the OOR issued an Interim Order notifying the Requester that the appeal was deficient because it failed to include a complete copy of the Commission's final response. The OOR informed the Requester of the requirement to cure the deficiency and directed him to file a complete copy of the Request pursuant to 65 P.S. § 67.1303(b). That same day, the Requester cured the deficiency by providing a complete copy of the Commission's response. Additionally, the Requester granted the OOR and extension of time to issue a Final Determination until June 26, 2019. See 65 P.S. § 67.1101(b)(1).

On April 2, 2019, the Commission notified Energy Transfer Partners (“ETP”) regarding the pending appeal. On April 11, 2019, ETP, owners of the Sunoco Pipeline, L.P. (“SPLP”), the operator of the HVL pipelines that are the subject of the Request, requested to participate in this appeal pursuant to 65 P.S. § 67.1101(c). Also, on April 11, 2019, ETP/SPLP submitted a position statement arguing that the requested records are CSI, and among other things, that the records relate to a noncriminal investigation, 65 P.S. § 708(b)(17)(ii). ETP/SPLP’s submission included the sworn declaration, made under the penalty of perjury, of Joseph Perez, ETP/SPLP’s Senior Vice President for Project Engineering and Construction. ETP/SPLP’s request to participate is granted and, as a result, the argument and evidence submitted by ETP/SPLP has been made part of the record.

On April 12, 2019, the Requester submitted a position statement objecting to ETP/SPLP’s request to participate, disputing that the requested information is confidential and asserting that based on a Protective Order issued by the Pennsylvania Commonwealth Court, attorneys for ETP/SPLP are not permitted to contact him. The Requester attached copies of documents he asserts are examples of “models of HVL blast radii” found in the public domain and a May 16, 2017 Commonwealth Court Order he believes prohibits ETP/SPLP from contacting him.

On April 15, 2019,³ the Commission submitted a position statement reiterating its grounds for denial and also claiming that the records reflect internal, predecisional deliberations, 65 P.S. § 708(b)(10)(i)(A). In support of its position, the Commission submitted the affidavits, made under penalty of perjury, of Rosemary Chiavetta, the Secretary of the Commission and Paul Metro, the Commission’s Manager of the Safety Division, Pipeline Safety Section.

³ The OOR granted the Commission’s request to keep the record open until April 15, 2019. *See* 65 P.S. § 1102(b)(3) (stating that “the appeals officer shall rule on procedural matters on the basis of justice, fairness, and the expeditious resolution of the dispute”).

On April 15 and April 21, 2019,⁴ the Requester submitted position statements disputing the accuracy of the factual assertions in the Commission's position statement and challenging the credibility of Ms. Chiavetta's and Mr. Metro's affidavits. The Requester also disputes the confidential nature of the records and the secure nature of the pipeline infrastructure. The Requester requested that the OOR conduct an *in camera* review of the responsive records.

On April 23 and 24, 2019, ETP/SPLP and the Commission objected to the Requester's request for *in camera* review.

On May 28, 2019, the Commission submitted a supplemental position statement in response to the OOR's request for clarification regarding the application of Section 335 of the Public Utility Code ("Code"), 66 Pa.C.S. § 335, to the responsive records.

On May 31, 2019, the Requester submitted a reply to the Commission's supplemental position statement.

On June 3, 2019, in response to the OOR's request for additional evidence, the Commission submitted, under seal, redacted transmittal letters, which were purportedly provided by ETP/SPLP in connection with a pipeline incident investigation pursuant to Section 2141.3 of the Act and 52 Pa. Code § 102.3(b). The Requester was not provided with a copy of the redacted transmittal letters. While the OOR did not order the Commission to provide the records for *in camera* review, the unopened submission was secured in the same manner used to secure records submitted for *in camera* review.⁵ As explained below, the transmittal letters were not reviewed by the OOR or considered as evidence in this appeal.

⁴ The Requester's April 21, 2019 submission was received after the record closed; however, to develop the record, the submission was considered. See 65 P.S. § 1102(b)(3) (stating that "the appeals officer shall rule on procedural matters on the basis of justice, fairness, and the expeditious resolution of the dispute").

⁵ See Section V(E)(11) of the OOR Procedural Guidelines. Further, the records have been retained because the Requester submitted a separate RTKL request for the records submitted by the Commission in connection with the instant appeal. See *Uniontown Newspapers, Inc. v. Pa. Dep't of Corr.*, 185 A.3d 1161 (Pa. Commw. Ct. 2018) (an

LEGAL ANALYSIS

“The objective of the Right to Know Law ... is to empower citizens by affording them access to information concerning the activities of their government.” *SWB Yankees L.L.C. v. Wintermantel*, 45 A.3d 1029, 1041 (Pa. 2012). Further, this important open-government law is “designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials and make public officials accountable for their actions.” *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *aff’d* 75 A.3d 453 (Pa. 2013).

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). An appeals officer is required “to review all information filed relating to the request” and may consider testimony, evidence and documents that are reasonably probative and relevant to the matter at issue. 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The law also states that an appeals officer may admit into evidence testimony, evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute. *Id.* The decision to hold a hearing is discretionary and non-appealable. *Id.*; *Giurintano v. Pa. Dep’t of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Commw. Ct. 2011). Here, the Requester requested *in camera* review; however, the OOR has the necessary information and evidence before it to properly adjudicate the matter.

The Commission is a Commonwealth agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.301. Records in possession of a Commonwealth agency are presumed public unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. Upon receipt of a request, an agency is required to assess

agency has the duty to take reasonable steps to prevent the automatic destruction of records pursuant to a retention schedule when the agency knows the records to be responsive to a RTKL request).

whether a record requested is within its possession, custody or control and respond within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemptions. *See* 65 P.S. § 67.708(b).

Section 708 of the RTKL places the burden of proof on the public body to demonstrate that a record is exempt. In pertinent part, Section 708(a) states: “(1) The burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the Commonwealth agency or local agency receiving a request by a preponderance of the evidence.” 65 P.S. § 67.708(a)(1). Preponderance of the evidence has been defined as “such proof as leads the fact-finder ... to find that the existence of a contested fact is more probable than its nonexistence.” *Pa. State Troopers Ass’n v. Scolforo*, 18 A.3d 435, 439 (Pa. Commw. Ct. 2011) (quoting *Pa. Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

1. The Commission did not prove that the records are confidential security information

The Commission and ETP/SPLP argue that because the responsive records consist of CSI material in accordance with Sections 2141.3(c)(4) and 2141.5 of the Act, they are exempt from disclosure under the RTKL. The Commission, through Mr. Metro’s affidavit, identifies the following records as responsive to the Request:

Hazard Assessment for ME1
Date: 12-17-2013
Pages: 56

Hazard Assessment for proposed ME2 Pipeline
Date: 3-27-2017
Pages: 67

Hazard Assessment for Re-route of ME2 near Chester & Delaware County
Date: 10-5-2018
Pages: 33.

In addition, the Commission states that the responsive records include Commission Inspection Reports of the subject pipelines in which the three Hazard Assessment reports were referenced and reviewed.

The Act provides, in pertinent part, the following:

(a) GENERAL RULE.— The public utility is responsible for determining whether a record or portion thereof contains confidential security information. When a public utility identifies a record as containing confidential security information, it must clearly state in its transmittal letter, upon submission to an agency, that the record contains confidential security information and explain why the information should be treated as such.

(b) SUBMISSION OF CONFIDENTIAL SECURITY INFORMATION.— An agency shall develop filing protocols and procedures for public utilities to follow when submitting records, including protocols and procedures for submitting records containing confidential security information. Such protocols and procedures shall instruct public utilities who submit records to an agency to separate their information into at least two categories: (1) PUBLIC.— Records or portions thereof subject to the provisions of the act of June 21, 1957 (P.L. 390, No. 212), referred to as the Right-to-Know Law. (2) CONFIDENTIAL.— Records or portions thereof requested to be treated as containing confidential security information and not subject to the Right-to-Know Law.

35 Pa.C.S. §§ 2141.3(a), (b).

When a public utility is directed to submit records to the Commission that contain CSI, it is required to do the following:

(1) Clearly state in its transmittal letter to the Commission that the record contains confidential security information and explain why the information should be treated as confidential. *The transmittal letter will be treated as a public record and may not contain any confidential security information.*

(2) Separate the information being filed into at least two categories:

(i) Records that are public in nature and subject to the Right-to-Know Law.

(ii) Records that are to be treated as containing confidential security information and not subject to the Right-to-Know Law.

(3) Stamp or label each page of the record containing confidential security information with the words "Confidential Security Information" and place all pages labeled as containing confidential security information in a separate envelope marked "Confidential Security Information."

(4) Redact the portion of the record that contains confidential security information for purposes of including the redacted version of the record in the public file.

52 Pa. Code § 102.3(b)(emphasis added).

Mr. Metro attests that the three identified Hazard Assessment reports "were produced to the Commission by [SPLP] and are marked as confidential." More specifically, Mr. Metro attests that that the records filed with the Commission were "marked as Confidential by Sunoco[]" and that "the requested records are [CSI] within the meaning of the [Act]." On behalf of ETP/SPLP, Mr. Perez attests that he has "knowledge of records submitted to the ... Commission and possibly implicated in the [Request]..." Mr. Perez further attests that "to the extent the [r]equested [r]ecords exist, ET and SPLP treat this material as confidential security information in accordance with the provisions and procedures of the [Act]...and the [Commission's] regulations implementing the Act...."

Regarding the material contained in the records, Mr. Metro attests the following:

The requested records are [CSI] within the meaning of the [Act]. In my professional opinion, disclosure of the requested records would compromise security against sabotage or criminal or terrorist acts, and non-disclosure is necessary for the protection of life, safety, public property or public utility facilities.

I base my opinion on the definition of [CSI] contained in the [Act] and on that there are reasonable grounds to believe disclosure may result in a safety risk, including the risk of harm to any person, or mass destruction.

Under the RTKL, a statement made under penalty of perjury is competent evidence to sustain an agency's burden of proof. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010).

To develop the record in this matter, the OOR directed the Commission to submit copies of the transmittal letters which, if ETP/SPLP had followed the mandatory procedure under the Act and its regulations, would have been included with the records produced to the Commission. Instead of submitting the transmittal letters that are expressly deemed public records under 53 Pa. Code § 102.3, the Commission hand-delivered redacted transmittal letters in a sealed envelope to the OOR. The OOR instructed the Commission that, in order to have the transmittal letters admitted as evidence of record, the Commission must provide a copy to the Requester. The Commission asserted that the letters had been properly redacted and that the OOR should review the records *in camera*, and it declined to provide the Requester with a copy of the letters. Accordingly, the sealed, redacted transmittal letters were not admitted into evidence. *See* 65 P.S. § 67.1102(b)(2) (the RTKL authorizes appeals officer to “admit testimony, evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute”).

Here, the Commission and ETP/SPLP argue that the requested records consist of CSI and that the Requester expressly excluded “information provided by Sunoco if that information has been designated as [CSI]” from the Request; therefore, they argue the Act prohibits the disclosure of the records and the records are not responsive to the Request. Mr. Metro and Mr. Perez attest that the records provided to the Commission are CSI; however, Section 2141.3 of the Act requires agencies to develop protocols for the submission and public challenge of information sought to be classified as “confidential security information,” and such protocols are found in the Commission’s regulations at 52 Pa. Code §§ 102.1 – 102.4. The only evidence provided by the Commission and ETP/SPLP regarding the designation of the responsive records as CSI consists of conclusory statements from Mr. Metro, who states that ETP/SPLP marked the records as confidential, that the

requested records are “[CSI] within the meaning of the [Act],” and that he arrived at his professional opinion that the records are CSI “in consultation with numerous other technical gas safety staff,” and from Mr. Perez, who states “[t]o the extent that the [r]equested [r]ecords exist, ET[P] and Sunoco treat this material as [CSI] in accordance with the provisions and procedures specified by the [Act] and [regulations].” Under the RTKL a sworn attestation may serve as sufficient evidentiary support; however, “a generic determination or conclusory statements are not sufficient to justify the exemption of public records.” *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013) (*en banc*); *see also Bagwell*, 155 A.3d at 1130 (“Relevant and credible testimonial affidavits may provide sufficient evidence in support of a claimed exemption; however, conclusory affidavits, standing alone, will not satisfy the burden of proof an agency must sustain to show that a requester may be denied access to records under the RTKL”) (citations omitted); *Pa. Dep’t of Educ. v. Bagwell*, 131 A.3d at 659 (“Affidavits that are conclusory or merely parrot the exemption do not suffice”) (citing *Scolforo*); *West Chester Univ. of Pa. v. Schackner et al.*, 124 A.3d 382, 393 (Pa. Commw. Ct. 2015) (“The evidence must be specific enough to permit this Court to ascertain how disclosure of the entries would reflect that the records sought fall within the proffered exemptions”) (citing *Carey v. Pa. Dep’t of Corr.*, 61 A.3d 367, 375-79 (Pa. Commw. Ct. 2013)).

While it is not incumbent upon the OOR to request additional evidence when developing the record, *Highmark, Inc. v. Voltz*, 163 A.3d 485, 491 (Pa. Commw. Ct. 2017), the OOR attempted to develop the record by requesting copies of the transmittal letters. In response to the OOR’s request, the Commission provided copies of the redacted transmittal letters asserting that the redacted material consists of CSI and the letters relate to a noncriminal investigation; however, 52 Pa. Code §102.3(b)(1) clearly states that a transmittal letter “may not contain any confidential

security information.” The Commission further asserts that, despite the express language in 52 Pa. Code & 102.3(b)(1), “the designation is not binding on any particular transmittal letter, and the Commission is authorized to waive its own regulations,” but fails to cite its authority to waive its own regulations that it was required to develop in order to implement “filing protocols and procedures for public utilities to follow when submitting records, *including protocols and procedures for submitting records containing [CSI]*,” under the Act. *See* 35 P.S. § 2141.3(b) (emphasis added). Because the Commission declined to provide a copy of the transmittal letters to the Requester, no evidence has been admitted into the record to demonstrate that the ETP/SPLP and the Commission have complied with the mandated procedures to designate the responsive records as CSI. In addition, as the Commission has failed to prove why it is not required to comply with the protocols, as ETP/SPLP’s and the Commission’s compliance with “[p]rocedures for submitting ... and protecting confidential security information” set forth in § 2141.3 is a condition precedent for nondisclosure. ETP/SPLP and the Commission are, therefore, not entitled to the statutory protection of the Act. *See Schmitz and The Pittsburgh Post-Gazette v. Pennsylvania Emergency Management Agency et al.*, OOR Dkt. AP 2014-1055, 2014 PA O.O.R.D. LEXIS 1094, *22-23 (finding that because the evidence did not demonstrate that PEMA developed the compliance procedures by which records could be designated as confidential security information, the Act did not apply) (citing *Schumacher v. City of Scranton*, OOR Dkt. 2009-0280, 2009 PA O.O.R.D. LEXIS 153 (holding that the City could not avail itself of the protections under the Act when the City did not prove its compliance with the necessary requirements to designate records as confidential security information))).

2. The Commission has demonstrated that certain records are exempt under Section 708(b)(3) of the RTKL

The Commission and ETP/SPLP also argue that the disclosure of the records would endanger public safety and compromise the physical security of the pipelines against sabotage, criminal or terroristic acts. Section 708(b)(3) of the RTKL exempts from disclosure “[a] record, the disclosure of which creates a reasonable likelihood of endangering the safety or the physical security of a building, *public utility*, infrastructure, facility or information storage system.” 65 P.S. § 67.708(b)(3) (emphasis added); *see Crockett v. Southeastern Pa. Transp. Auth.*, OOR Dkt. AP 2011-0543, 2011 PA O.O.R.D. LEXIS 268 (holding that rail car inspection and repair records were not exempt under this exemption); *Moss v. Londonderry Twp.*, OOR Dkt. AP 2009-0995, 2009 PA O.O.R.D 724 (holding that records related to the Three Mile Island nuclear power plant were not subject to public access). In order for this exemption to apply, “the disclosure of” the records – rather than the records themselves – must create a reasonable likelihood of endangerment to the safety or physical security of certain structures or other entities, including infrastructure. *See* 65 P.S. § 67.708(b)(3); *see also Pa. State Police v. ACLU of Pa.*, 189 A.3d 37 (Pa. Commw. Ct. 2018) (holding that when an affidavit is legally sufficient to prove that the disclosure of a record at issue would likely cause the alleged harm under Section 708(b)(3) of the RTKL, *in camera* review of the records is unnecessary). The Commonwealth Court has held that “[a]n agency must offer more than speculation or conjecture to establish the security-related exemptions....” *California Borough v. Rothey*, 185 A.3d 456, 468 (Pa. Commw. Ct. 2018) (internal citations omitted); *see also Mission Pa., LLC v. McKelvey*, ___ A.3d ___, 2019 Pa. Commw. LEXIS 528 (Pa. Commw. Ct. June 4, 2019).

Mr. Metro, who is the Commission’s Manager of the Safety Division, Pipeline Safety Section, oversees Commission investigations of gas and HVL pipelines. In support of the Commission’s position, Mr. Metro attests it is his opinion, based on the definition of CSI in the

Act, that “there are reasonable grounds to believe disclosure may result in a safety risk, including the risk of harm to any person, or mass destruction.” Mr. Metro further attests the following:

In my professional opinion, release of the requested records would compromise security against sabotage or criminal or terroristic acts regarding pipeline facilities by illustrating the extent of the impact zone, including casualty and damage assessments at various ranges, regarding an accident (or sabotage event) on a pipeline. These Reports and Inspection Reports explicitly provide[] how such an assessment can be made (as well as the assessment for this particular pipeline); information which could be clearly be used by a terrorist to plan an attack [on] a pipeline (and particularly on these Sunoco pipelines, as they contain[] the specific operating parameters of the pipelines) to cause the greatest possible harm and mass destruction to the public living near the facilities.

In my professional opinion, release of the requested records would allow for awareness of the potential effectiveness of a sabotage act on a pipeline (and in particular on these pipelines) to harm the public and create mass destruction, thereby potentially inciting such acts and creating a great risk to public safety.

I arrived at my professional opinion that the requested records are [CSI] in consultation with numerous other technical gas safety staff at the Commission, all of which agree with my professional assessment.

Additionally, regarding the nature of the CSI that ETP/SPLP purportedly provided to the Commission, Mr. Perez attests the following:

While certain observations concerning the characteristics of ET’s HVL pipelines – such as their general path or the location of the above-ground valves – can be seen at the surface level, the [r]equested [r]ecords seek far more detailed information than anything that could be obtained through surface-level observation. The release of this information would create a much more significant risk to the security and integrity of the Pipelines than anything that could be obtained through surface-level observation. Specifically, providing an individual or group of individuals with the detailed calculations sought here would give someone with malicious intent knowledge necessary to breach, damage or destroy the pipelines.

Based upon my review of the [r]equested [r]ecords in possession of ET as submitted to [the Commission’s Bureau of Investigation and Enforcement], I believe that the [r]equested [r]ecords are of sufficient detail that, if disclosed, could be used to facilitate damage or disruption of ET’s HVL pipelines.

Here, the Request expressly seeks “calculations or estimates of *blast radius* (Sunoco’s term) or “buffer zone” ([Commission’s] term) *regarding accidents or releases* from HVL

pipelines.” It is undisputed that portions of the identified responsive records, the Hazard Assessment Reports, were produced by ETP/SPLP and submitted to the Commission’s Bureau of Investigation and Enforcement (“BIE”) in connection with four ongoing Commission pipeline investigations – ME1, ME1-Lisa Drive, ME2 and ME2-Bypass – from which one may reasonably infer the existence of safety concerns with the public utility structures. Considering these facts along with the sworn attestations of Mr. Metro, the individual supervising the investigations, and Mr. Perez, the corporate representative who provided the reports, leads to a determination that the disclosure of how to calculate the extent of damage that may occur due to an accident at or release from one the pipelines would facilitate the formulation of a plan by a person with malicious intent to cause such an event.

The Requester argues that the safety hazards alleged by the Commission lie with the infrastructure itself, not the knowledge of any particular aspect of the pipelines. The Requester further argues that blast radii modeling formulas are available in the public domain and that certain pipeline valves are already visible on the land surface in populated areas. The Requester has also provided electronic links to and a copy of blast radii models to support his argument that the responsive records should not be withheld because the information is already in the public domain. However, a review of the sample models and references to blast radii models shows that they have been conducted by various private and community entities and as attested to by Mr. Perez, they do not include the detailed calculations that are specific to these particular pipelines. In the absence of any evidence that the Commission has acted in bad faith, “the averments in [the sworn statements] should be accepted as true.” *McGowan v. Pa. Dep’t of Env’tl. Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)). Accordingly, the Commission has demonstrated that the disclosure of

the three responsive Hazard Assessment Reports produced by ETP/SPLP and the security related content would endanger the safety and security of the pipelines and that the Hazard Assessment Reports were properly withheld under Section 708(b)(3) of the RTKL. *See* 65 P.S. § 708(a); *Mission Pa., LLC*, 2019 Pa. Commw. LEXIS 528, *22-26 (finding the affidavit made by an individual who had extensive industry knowledge and experience sufficient to detail the security related concerns in support of redactions made pursuant Section 708(b)(3) of the RTKL).

3. The Commission has demonstrated that some records relate to a noncriminal investigation.

The Commission and ETP/SPLP also argue that the records are part of four noncriminal investigations the Commission commenced, respectively, in April 2017, March 2018 and July 2018. Section 708(b)(17) of the RTKL exempts from disclosure records of an agency “relating to a noncriminal investigation, including ... [i]nvestigative materials, notes, correspondence and reports.” 65 P.S. §§ 67.708(b)(17)(ii). In order for this exemption to apply, an agency must demonstrate that “a systematic or searching inquiry, a detailed examination, or an official probe” was conducted regarding a noncriminal matter. *See Pa. Dep’t of Health v. Office of Open Records*, 4 A.3d 803, 810-11 (Pa. Commw. Ct. 2010). Further, the inquiry, examination, or probe must be “conducted as part of an agency’s official duties.” *Id.* at 814; *see also Johnson v. Pa. Convention Ctr. Auth.*, 49 A.3d 920 (Pa. Commw. Ct. 2012). An official probe only applies to noncriminal investigations conducted by agencies acting within their legislatively granted fact-finding and investigative powers. *Pa. Dep’t of Pub. Welf. v. Chawaga*, 91 A.3d 257 (Pa. Commw. Ct. 2014). To hold otherwise would “craft a gaping exemption under which any governmental information-gathering could be shielded from disclosure.” *Id.* at 259.

The Commonwealth Court has recognized the Commission’s broad authority to conduct noncriminal investigations “to determine ... if utilities are in compliance with the Public Utility

Code, ... the [United States Department of Transportation Pipeline and Hazardous Materials Safety Administration] and other applicable state and federal regulations.” *Pa. Pub. Utility Comm’n v. Gilbert*, 40 A.3d 755, 760 (Pa. Commw. Ct. 2012).

Mr. Metro, Manager of the Office of Pipeline Safety, Gas Safety, attests that he oversees the investigation of ME1 on April 1, 2017, of ME1 on “Lisa Drive” and ME2 in March 2018, and of ME2-Bypass in July 2018. He attests that the investigations are active and have been ongoing. Mr. Metro further attests that, in addition to the Hazard Assessment Reports, “the Commission has requested records in the form of Inspection Reports created by Commission Safety Staff in which there are references and reviews of [the] Hazard Assessments. These Inspection Reports are part of the active and ongoing [Commission] investigations.” Mr. Perez corroborates that ETP/SPLP submitted the requested records to the Commission’s BIE. Ms. Chiavetta attests that the investigations are active and ongoing and that the Commission does not have any responsive records other than those that are part of the Commission’s investigation of the pipeline incident. In the absence of any evidence that the Commission has acted in bad faith, “the averments in [the affidavits] should be accepted as true.” *McGowan*, 103 A.3d at 82-83. Therefore, because the Commission may conduct noncriminal investigations and is doing so in this instance, the Commission’s Safety Staff Inspection Reports are related to the Commission’s ongoing noncriminal investigation of ME1, ME2 and ME2-Bypass pipelines and are exempt from disclosure under Section 708(b)(17) of the RTKL.

Although we have determined that the Hazard Assessment Reports are exempt from disclosure under the RTKL, as indicated above, Mr. Metro attests that the Inspection Reports are part of the ME1, ME2 and ME2-Bypass investigations and they reference and review the Hazard Assessment Reports.

While not raised by the Requester, Section 3101.1 of the RTKL provides that the provisions of the RTKL do not apply if they are in conflict with any other federal or state law. *See* 65 P.S. § 3101.1. Section 335(d) of the Public Utility Code, provides, in pertinent part:

whenever the commission conducts an investigation of an act or practice of a public utility and makes a decision, enters into a settlement with a public utility or takes any other official action, as defined in the Sunshine Act, with respect to its investigation, it shall make part of the public record and release publicly any documents relied upon by the commission in reaching its determination, whether prepared by consultants or commission employees, other than documents protected by legal privilege...

66 Pa.C.S. § 335(d). Applying Section 335(d) of the Code, the Pennsylvania Supreme Court has held that, in certain circumstances, investigatory materials may be publicly available under the Code. *See Pa. Pub. Utility Comm'n v. Seder*, 139 A.3d 165 (Pa. 2016). In *Seder*, the Supreme Court held that Section 335(d) of the Code required disclosure of a tip letter and an investigative file associated with a settlement agreement. There, the settlement agreement was entered into by a utility corporation and the Commission's BIE after an investigation was conducted by BIE regarding a violation of the Public Utility Code.

Here, it is undisputed that the Commission commenced four investigations related to the pipelines addressed in the records identified as responsive to the Request. It is also undisputed that ETP/SPLP is a public utility as the Commission, in its position statement, requests the OOR to take judicial notice of the fact that it received a "Certificate of Public Convenience at A-140111" deeming it a "jurisdictional public utility" and the Commonwealth Court has concluded that ETP/SPLP operates as a public utility. *See In re Condemnation by Sunoco Pipeline, L.P.*, 143 A.3d 1000, 1016-20 (Pa. Commw. Ct. 2016). Further, Mr. Metro attests that the Commission's BIE filed a Formal Complaint in the ME1 investigation, which has been docketed to C-2018-3006534.⁶

⁶ *See* <http://www.puc.state.pa.us/pcdocs/1598230.pdf> (last accessed June 20, 2019).

Accordingly, we must determine whether the investigative records underlying the Formal Complaint filed in connection with ME1 should be disclosed under Section 335(d) of the Code.

In response to the OOR's request for the Commission's position on the application of Section 335(d) of the Code to this matter, the Commission submitted a position statement arguing the ME1 investigation is still open and that the Commission has not made a decision, settlement or other official action in that matter to trigger the disclosure requirements under Section 335(d). However, in the case of *Gilbert*, the Commonwealth Court considered the application of Section 335(d) to records of, among other things, gas pipeline violation and incident reports, along with communications received by the Commission required by the Pipeline Safety Improvement Act of 2002, which the Court determined would include investigative materials gathered by safety inspectors. In *Gilbert*, the Court concluded that noncriminal investigation exemption found at Section 708(b)(17) of the RTKL prohibited disclosure of the requested records because "[i]t is not until after the PUC's investigative materials are presented as part of a formal complaint, presented at a formal hearing, or presented as part of a settlement agreement that the materials are made public" and that none of the triggering events of Section 335(d) of the Code had occurred. 40 A.3d 755, 760; *see also Dep't of Env'tl. Prot. v. Del. Riverkeeper Network*, 113 A.3d 869, 876-877 (Pa. Commw. Ct. 2015) (quoting *Gilbert*).

Here, in the investigatory matter involving ME1, the Commission made the "decision" to file a Formal Complaint and, pursuant to Section 335(d) of the Code, the "the documents relied upon by the commission in reaching its determination [to file a Formal Complaint as a result of the investigation of an incident at ME1], whether prepared by consultants or commission employees" should be made public. 66 P.S. § 335(d). As stated by the Supreme Court in *Seder*:

... the clear and unambiguous language of Subsection 335(d) demonstrates that the General Assembly intended the PUC to make part of the public record and release

publicly the documents sought by Appellants. This interpretation of the statute is consistent with the overall intent of the Legislature in enacting Subsection 335(d). More specifically, Subsection 335(d) is a public disclosure law that evinces the General Assembly's desire to effectuate transparency, above and beyond that which is required by the RTKL, in the government's dealings with public utilities.

Seder, 139 A.3d 165 at 174. Therefore, as in *Seder*, the Commission made a "decision" and the records related to the investigation of ME1 that formed the basis of the BIE's decision to file a Formal Complaint in connection with the pipeline safety incident must be disclosed under Section 335(d) of the Code.

However, Section 335(d) further states, in pertinent part:

provided, however, that if a document contains...information which, if disclosed to the public, could be used for criminal or terroristic purposes, the identifying information may be expurgated from the copy of the document made part of the public record.

66 Pa.C.S. § 335(d). As we have already determined that the Hazard Assessment Reports are exempt from disclosure under Section 708(b)(3) of the RTKL because the records are of the type which, if they were disclosed, could endanger the safety or physical security of a public utility, any references to or information from the ME1 Hazard Assessment report may be "expurgated from the document made part of the public record" pursuant to Section 335(d).⁷

CONCLUSION

For the foregoing reasons, the appeal is **granted in part** and **denied in part**, and the Commission is required to provide the redacted ME1 investigative records, as provided by this Final Determination, to the Requester within thirty days. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal

⁷ In its position statement, the Commission also asserted that some of the records reflect deliberations by BIE regarding the contemplated strategies and, therefore, are exempt pursuant to 65 P.S. § 67.708(b)(10)(i)(A); however, the Commission has not provided any evidence to support the asserted exemption. *See* 65 P.S. § 67.708(a)(1). In addition, because we have determined that the records are exempt pursuant to 65 P.S. §§ 708(b)(3) and (b)(17), we need not address the Commission's argument based on 65 P.S. § 708(b)(2).

to the Commonwealth Court. 65 P.S. § 67.1301(a). All parties must be served with notice of the appeal. The OOR also shall be served notice and have an opportunity to respond as per Section 1303 of the RTKL. 65 P.S. § 67.1303. However, as the quasi-judicial tribunal adjudicating this matter, the OOR is not a proper party to any appeal and should not be named as a party.⁸ This Final Determination shall be placed on the OOR website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: June 26, 2019

/s/ Kelly C. Isenberg

APPEALS OFFICER
KELLY C. ISENBERG, ESQ.

Sent to: Eric Friedman (via email only);
Steven Bainbridge, Esq. (via email only);
Whitney Snyder, Esq. (via email only);
Rosemary Chiavetta, AORO (via email only);
Doreen Trout (via email only)

⁸ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

Isenberg, Kelly

From: Isenberg, Kelly
Sent: Wednesday, June 26, 2019 10:09 AM
To: Eric Friedman; Bainbridge, Steven; wesnyder@hmslegal.com
Cc: Chiavetta, Rosemary; Trout, Doreen
Subject: FINAL DETERMINATION - Friedman v. Pa. Public Utility Comm'n - OOR Dkt. AP 2019-0502
Attachments: 2019-0502_Friedman_PUC_FD.pdf

Dear parties,

Attached please find the final determination in the above-captioned appeal.

Thank you for your attention to this matter.

Sincerely,
Kelly Isenberg



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Appeals Officer
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Harrisburg, PA 17101-2234
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