

March 2, 2009

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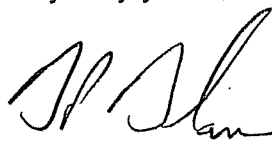
Hon. Harris T. Bock  
Hearing Officer  
Dispute Resolution Institute  
660 Two Logan Square  
18th and Arch Streets  
Philadelphia, PA 19103

Re: In the Matter of the Philadelphia Water Department's Proposed Increase in Rates for Water, Sewer and Wastewater Utility Services (Phase II).  
FY 2009-2012  
Sunoco Reply Brief

Dear Hearing Officer Bock:

Enclosed please find a copy of the Post-Hearing Reply Brief of Sunoco, Inc. (R&M). As indicated on the enclosed Certificate of Service, all parties in this matter have been served with a copy of this document.

Very truly yours,



Dan Delaney  
Counsel for Sunoco, Inc. (R&M)

cc: Service List 

**BEFORE THE CITY OF PHILADELPHIA WATER DEPARTMENT  
HEARING OFFICER HARRIS T. BOCK PRESIDING**

In the Matter of the Philadelphia :  
Water Department's Proposed :  
Increase in Rates for Water, Sewer :                   FY2009-2012 Rates  
and Stormwater Rates and Charges :  
(Phase II). :

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**CERTIFICATE OF SERVICE**

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I hereby certify that I have this day served a true and correct copy of the foregoing document upon the individuals listed, in the manner identified;

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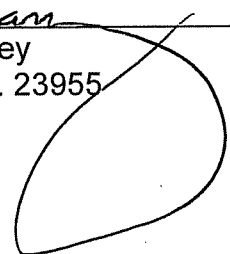
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## **INTRODUCTION**

Sunoco, Inc., R&M, ("Sunoco") replies in this brief to the arguments raised in the Initial Brief of the Philadelphia Water Department ("PWD or Department") with regards to the Department's Stormwater Management Service charges ("SWMS") proposed in its Regulations 304.0 et. seq. Sunoco's Initial Brief set forth in detail why the disproportional impact the proposed regulations will impose on Sunoco is unlawful and unjust, based on applicable law, and has no rational relationship to any actual service PWD provides to Sunoco in the three main areas of the Philadelphia Refinery, based on the relevant evidence. There is nothing in PWD's brief that would challenge Sunoco's conclusion on the law or facts.

Based on estimates provided by PWD, the Stormwater Management Service ("SWMS") charges proposed in PWD's Regulations are expected to increase Sunoco's stormwater bill by approximately 2300%, the single largest dollar increase of any non-residential property in the City. As stated in Sunoco's Initial Brief, PWD lacks legal authority under any state statute, the City's Home Rule Charter ("Charter") or ordinances adopted by the City Council to assess and collect a SWMS charge. The proposed SWMS charges are not just, reasonable and nondiscriminatory or equitably apportioned as to Sunoco, because stormwater from the majority of the Philadelphia Refinery discharges directly to the Schuylkill River under valid NPDES permits, without utilizing in any way the city's sewer or wastewater system.

## REPLY ARGUMENT

- I. **PWD'S BRIEF FAILS TO IDENTIFY ANY VALID LEGAL AUTHORITY FOR IMPOSING STORMWATER MANAGEMENT SERVICE CHARGES UPON THOSE PROPERTIES OR PORTIONS OF PROPERTIES WHICH DO NOT PRODUCE STORMWATER THAT DIRECTLY OR INDIRECTLY FLOWS INTO AND THROUGH THE CITY'S SEWAGE SYSTEM.**

In its Initial Brief (pages 19 to 46), Sunoco set forth the fundamental problem with PWD's regulations – that is, the lack of any legal authority (derived from the Philadelphia Charter, duly-enacted City ordinances, or state statutes) to adopt and impose "stormwater management service charges" as to properties which do not produce stormwater that flows into and through the City's sewage system. Although PWD's Initial Brief broadly extols the virtues of stormwater management and the benefits it may provide, PWD's brief falls woefully short in terms of identifying and explaining the legal authority for imposing charges for "stormwater management services."

- A. **PWD's brief concedes that the sole legal basis for imposing fees arises from Charter §5-801, but this Charter Section only authorizes setting rates and collecting charges for "supplying sewage disposal services," not stormwater management services.**

It appears that PWD and Sunoco agree on one essential point – PWD's legal authority for imposing charges, if and to the extent it exists, must be found in Section 5-801 of the Charter. In fact, the *only* purported legal authority for imposing charges that was cited in PWD's brief is Charter § 5-801, and those provisions of the Philadelphia Code §13-201, which implement Charter § 5-801. (See PWD Initial Brief at 3-4).

As quoted in PWD's Initial Brief (and also in Sunoco's Initial Brief), Charter § 5-801 is explicitly limited by its clear language. Section 5-801 allows PWD, in accordance

with standards established by City Council, to fix rates and charges for “supplying **sewage disposal services**,” with such rates to be set in an amount sufficient to cover (i) operating expenses, (ii) interest, and (iii) sinking fund charges on debt incurred “for ... **sewage disposal** purposes.” (Emphasis added). Likewise, Philadelphia Code § 13-201, quoted by PWD, makes clear that PWD may only fix and regulate “rates and charges for supplying **sewage disposal services**” (emphasis added) that are equitably apportioned among various classes of “consumers” and that are “just, reasonable, and nondiscriminatory . . . .”

Where PWD’s logic falls short, however, is by skipping the next critical question: to what extent does “stormwater” qualify as “sewage” in the context of “sewage disposal services”? While **some** stormwater may mix with sewage in the City’s system – particularly in the approximately sixty (60%) percent of the City served by combined sewers (see PWD Initial Brief at pg. 5) – that most certainly does not mean that **all** stormwater is defined as “sewage.” Likewise, it does not follow that all activities undertaken which could conceivably relate to stormwater constitute a “sewage disposal service.” As noted in Sunoco’s Initial Brief at pg. 24, Philadelphia Code §13-603(2)(i) contains a definition of “sewage” referencing “waste products or excrement or other discharge from bodies of human beings or animals” and “noxious or deleterious substances” harmful or inimical to health or constituting “pollution” as defined under federal or state law. Under this definition, stormwater *per se*, which has not mixed with sewage, does not constitute “sewage.”

PWD’s interpretation of its authority also fails in defining what constitutes “services” in “sewage disposal services.” It is absolutely clear that stormwater which

does not enter into any City sewers cannot conceivably be obtaining “sewage disposal **services**” from PWD. As for PWD’s charges to Sunoco, the concept of “sewage disposal services” cannot rationally extend to stormwater that is collected, managed and discharged in accordance with lawful NPDES permits, which never directly or indirectly flows into or through the City’s sewer system.

**B. PWD’s impact and benefit arguments belie the point that the “stormwater management service fee” is in fact not for supplying “sewage disposal services,” but rather an unauthorized tax to defray the costs of various environmental programs undertaken by PWD.**

The testimony submitted on Sunoco’s behalf is undisputed that the Point Breeze, Girard Point and West Yard properties discharge all of their collected and treated stormwater to rivers of the Commonwealth pursuant to PADEP-administered NPDES permits, and do not utilize in any way the City’s sewer system. (See Sunoco Initial Brief at pgs. 6-10) Instead of addressing this critical issue head-on, PWD switches to an “impact” and “benefit” rationale, stating:

In asserting its position, Sunoco misses the point that the impact of stormwater discharges to the rivers and streams is the same whether it comes through a privately owned or municipally owned stormwater system. It bears reiteration that stormwater management essentially relates to controlling the “impact” of stormwater flows whether it is simply the runoff that causes erosion or the pollutants carried with the runoff that affects stream health and quality. Unless properly managed, stormwater runoff can harm the streams, creeks and rivers and tributaries that run throughout Philadelphia. That is why stormwater management is so important to the City. ...

All that PWD is proposing to do here is to fairly allocate the costs of its stormwater management program ... based upon the aforesaid “impact.” Sunoco benefits from this program, as do all parcel owners in the City.”

PWD Initial Brief at pg. 22. PWD's analysis ignores the plain wording of the Charter and Code – namely, these are not charges associated with “sewage disposal services” – and suggests that a benefit to all “parcel owners in the City” from stormwater management is sufficient basis to set rates. To the extent there is no relation to a parcel owner's actual use of PWD services, this rate amounts to a new form of tax – a new type of impact fee hypothecated by PWD.

PWD's fundamental legal premise seems to be that because stormwater management is a worthwhile program, PWD has the power to impose what are equivalent to taxes to support that program. That is simply not the case. PWD does not possess the power to adopt or formulate rates beyond those authorities specifically provided in the Charter and implementing ordinances adopted by City Council. See Sunoco Initial Brief at pgs. 19-21, and cases cited therein. As held by the Pennsylvania Supreme Court in *Hamilton's Appeal*, 340 Pa. 17, 22-4, 16 A.2d 32, 35 (1940)<sup>1</sup>, equitable apportionment requires that sewer rates and charges “apply solely” to “actual user[s] of the sewer system,” and must be “reasonably proportional to the value of the service rendered, and not in excess of it.” Where rates or charges are “imposed without any regard whatever to the extent or value of the use made of the sewer facilities, or whether any use is made,” such rates and charges constitute “a tax, and the obligation to pay it [can] be created only by the City's exercise of its general taxing power.” *Id.* Efforts to impose such fees, if applied in the form of sewer rates or charges “is palpably violative of our constitutional provision requiring uniformity of taxation.” *Id.* (For further

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<sup>1</sup> Also cited as *In re Petition of City of Philadelphia*.

discussion on this key point, see Sunoco Initial Brief at pgs. 29-33, and cases cited therein.)

Although PWD's brief lacks some clarity in this regard, PWD's arguments blur the lines between stormwater management, sewage disposal services, flood protection activities and water quality impacts of stormwater on major waterways, in concluding that it has authority to impose SWMS charges on properties that do not discharge stormwater into PWD's sewer system. Under PWD's leap of legal logic, anyone who "impacts" water in any stream flowing through the City is receiving a "benefit" from PWD's stormwater program, and should be required to pay SWMS charges. Following that line of thinking, PWD could impose charges on every property owner in the Wissahickon Creek watershed in upstream Montgomery County – or for that matter, all of the property owners in the entire Delaware River and Schuylkill River watersheds that lie upgradient of the City – based on the rationale that water that flows through the City at one point fell on such properties. All of those properties would also be receiving "sewage disposal services" under PWD's theory that "impacts" and "benefits" equal "sewage disposal services." The arguments proffered in PWD's brief for this theory are simply unsupported by either law or record evidence.

First, PWD in its brief on pp. 23-4 tries to cast aspersions that there have been "a number of NPDES violations at the Sunoco treatment facilities" – somehow using this as a justification for stormwater management fees. PWD made two requests at the hearing to obtain a summary of NPDES violations at the Sunoco wastewater treatment plant over the past five years (Tr. p. 1125: 2-14, and 1153: 15-22). The Hearing Officer twice sustained Sunoco's objections that the requests were not relevant to the issues in

this proceeding (Tr. p. 1136: 19-20, 1156: 15-19). As recognized by the Hearing Officer, any discussion of possible NPDES violations by Sunoco is irrelevant to the issues in this proceeding and PWD's arguments on this issue should be ignored.

The issue of whether or not Sunoco has complied with its NPDES permits is a matter to be addressed by and through PADEP, because PADEP administers the NPDES permit program, and has primary and pervasive enforcement authority over Sunoco's discharges pursuant to the Pennsylvania Clean Streams Law and the Federal Clean Water Act. In his cross-examination, Deputy Commissioner Katz admitted that PWD does not have authority to monitor and enforce the terms and conditions contained in the Sunoco NPDES permits. (Tr. p. 1032: 6-11). Mr. Katz also agreed that PWD had not filed any comments concerning Sunoco's NPDES permits when they were published for public comment in the Pennsylvania Bulletin. (Tr. p. 1033: 3-10).

PWD had previously taken no active interest in Sunoco's NPDES permits. PWD now seeks to question the effectiveness of these permits in these proceedings when it has not done so in the permit process. But ultimately, whether there has ever been an exceedance of a permit limit has absolutely no relevance to PWD's authority to charge fees for stormwater that is not actually managed by PWD. Any disposition of this issue would not provide PWD with legal powers it does not otherwise possess to formulate new charges and taxes, or to impose purported "impact fees," without explicit legal authority in properly adopted state statutes, Charter provisions or ordinances enacted by City Council. PWD simply does not have authority to charge everyone and anyone who has any perceived impact, directly or indirectly, on the quantity or quality of water flowing in Commonwealth streams.

Second, PWD purports to argue that “there is not stormwater management at the West Yard” and that, therefore, Sunoco is attempting to “have it both ways” in arguing that the West Yard, as well as Point Breeze and Girard Point, qualify for a total exclusion from charges since they do not utilize in any way the City's sewer or wastewater treatment facilities. (PWD Initial Brief at pg. 23). But, the West Yard, like the Point Breeze and Girard Point properties, receives no “sewage disposal services” with respect to stormwater runoff from those areas, and hence must be excluded from any such charges that purport to be imposed pursuant to the authority of Charter §5-801. As clearly described in Sunoco's Brief at pgs. 6, 8-9, the West Yard is currently undeveloped, but that does not mean it lacks stormwater management. Stormwater generated from precipitation falling in the West Yard area is collected in Sunoco's West Yard Retention Basin. In turn, the PADEP-issued and administered NPDES Permit No. PA0012629 A1 authorizes the West Yard Retention Basin to discharge directly to the Schuylkill River via permitted Outfall 003 during heavy rainfall events. (Sunoco Stmt. at 10; NPDES Permit No. PA0012629 A1 (Sunoco Ex. F) at pg. 5). Further, the NPDES Permit imposes specific effluent limitations on such stormwater discharges for constituents of concern, including pH, total organic carbon, and oil and grease. (Sunoco Ex. F at pg. 5) The NPDES Permit also prohibits any film, sheen or discoloration from this stormwater as discharged to the Schuylkill River. (NPDES Permit Part C, Condition I.3, Sunoco Ex. F at pg. 18).

Third, PWD claims that Sunoco failed “to clearly establish in the record that all stormwater flows on the Sunoco parcels with onsite treatment facilities are actually treated before being discharged to the river.” (PWD Initial Brief at pg. 22, footnote 27).

Contrary to PWD's assertion, although not entered as an Exhibit in the rate case, at PWD's request Sunoco in fact provided PWD with drainage maps of its properties after the January 13 technical hearing and before PWD filed its Initial Brief. At the technical hearing, Sunoco stated that it had agreed to provide the maps to PWD but had to finalize a confidentiality agreement because of the sensitivity of the information on the maps. (Tr. p. 1137-8). Off the record, counsel agreed to provide the non-disclosure agreement and informally provide the maps to the Department. PWD had ample opportunity, if there were any questions, to clarify any points through cross-examination if it so wished. However, PWD never raised any such questions, and the testimony of Sunoco's witnesses remains uncontroverted – Point Breeze, Girard Point and West Yard do not contribute stormwater to the City's sewers, and receive no "sewage disposal services" from the City's facilities.

Fourth, PWD's claim that all stormwater must flow through treatment facilities to avoid charges is misplaced. All of the stormwater in question with respect to the Point Breeze, Girard Point or West Yard is collected, flows through, and discharges from facilities that are *regulated and controlled by NPDES permits issued by PADEP*. All of that stormwater must achieve compliance with best management practices and effluent limitations imposed by PADEP. All of that stormwater is monitored in accordance with sampling, analytic and reporting conditions directed by PADEP. The subject stormwater meets the standards imposed by the Commonwealth's duly-authorized environmental agency – standards designed to protect the water quality of the receiving stream (that is, the Schuylkill River). Treatment may or may not be necessary to meet those standards and effluent limits. Where necessary, treatment is applied; however, where

the stormwater meets discharge limits without physical or chemical treatment, the NPDES permit requirements are still satisfied.

**C. The existence of credits for stormwater management practices under the regulations does not provide an adequate remedy to Sunoco, as these credits are only relevant to properties that currently use PWD's sewer system.**

PWD has argued in its brief that Sunoco's quarrel with the Department devolves to an administrative issue concerning whether the stormwater credits available for the Sunoco Refinery property will adequately reduce the proposed stormwater cost allocation. (PWD Brief at p. 24-5). However, the credits for stormwater management practices under Section 304.5 of PWD's proposed regulations do not provide an adequate remedy to Sunoco as these credits are only relevant to the SRTF parcel of Sunoco's Refinery property, which is the only parcel that currently uses PWD's sewer system to discharge stormwater. As explained in Sunoco's Initial Brief, 87% of the SWMS charge proposed by PWD for the Refinery property is related to the Point Breeze, Girard Point and West Yard parcels. PWD has no authority to impose SWMS charges on the Point Breeze, Girard Point and West Yard parcels of Sunoco's Refinery property since those parcels discharge stormwater into the Schuylkill River pursuant to valid NPDES permits, and PWD provides no "sewage disposal services" with respect to such stormwater. Sunoco's discussions with PWD concerning the IA and GA areas of its property are only relevant to the SRTF parcel, which discharges stormwater into PWD's sewer system. The credits are not an adequate remedy to resolve the jurisdictional issues concerning the other parcels of Sunoco's property which do not discharge stormwater into PWD's sewer system.

Even if the stormwater credits could be extended to include the Point Breeze, Girard Point and West Yard parcels, they would still not provide an adequate remedy for those properties. The credits would be subject to the limitations proposed in Regulation 304.5(d) & (e) in that the credits would expire after four years and must be renewed by the Department upon application at that time. Moreover, the Department retains the authority to review approved credits and to terminate them. For these reasons, the availability of credits does not provide a remedy for the properties that discharge stormwater pursuant to valid NPDES permits. As explained in Sunoco's initial brief and this reply brief, the Department proposes in its revised stormwater regulations to increase the Refinery property's stormwater charges by 2,300% after full implementation of the regulations.<sup>2</sup> The Hearing Officer should determine that the SWMS charges should not be imposed on the Point Breeze, Girard Point and West Yard parcels of Sunoco's Refinery property.

## **II. SEVERAL OF PWD'S PROPOSED FINDINGS OF FACT DO NOT ACCURATELY REFLECT THE RECORD EVIDENCE**

PWD has proposed 21 Findings of Fact concerning Sunoco's evidence and positions in this proceeding which are contained on pages 11-13 of the Appendix to PWD's Initial Brief. Many of these proposed Findings of Fact actually state legal

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<sup>2</sup> In its Initial Brief, PWD requested the Hearing Officer to take administrative notice of Sunoco Inc.'s 2007 and 2008 operating revenues in consideration of the financial impact of the Department's proposal (see page 24, footnote 28). However, the revenues appear to reflect Sunoco's parent company rather than Sunoco, Inc. (R&M) or the Philadelphia Refinery itself. Moreover, Sunoco questions the relevance of this corporate financial information in justifying a discriminatory and inequitable rate increase, particularly since PWD's focus on corporate revenues fails to account for the taxes, interest and enormous operating costs that ultimately determine profitability. PWD's unreasonable rates would significantly increase those operating costs.

arguments presented by PWD in its Initial Brief. Sunoco believes that these findings are adequately addressed in this Reply Brief and in the Initial Brief filed by Sunoco. Several of the findings, however, are inconsistent with the record evidence and should be rejected by the Hearing Officer. As explained above, the Department's Proposed Finding's Nos. 91-99 misstate Sunoco's existing stormwater management practices, particularly concerning the West Yard parcel. As explained in the prior argument of this Reply Brief, stormwater discharges from the West Yard parcel are authorized by the NPDES permits for the Sunoco property. NPDES Permit No. PA 0012629 A1 (Sunoco Exhibit F) authorizes discharges from the West Yard portion of the refinery property. The permit identifies effluent limitations, monitoring, recordkeeping and reporting requirements and permits discharges through outfalls into the Schuylkill River of stormwater from the West Yard parcel. Since these proposed Findings of Fact of PWD are unsupported by the record evidence, Sunoco respectfully requests the Hearing Officer not to adopt them. Sunoco also disagrees with the Legal Conclusions contained in many of the other Department proposed findings and also requests that the Hearing Officer not adopt these proposed findings.

#### **ORAL ARGUMENT**

Sunoco requests oral argument in this matter. The oral argument would allow the parties an opportunity to explain their legal positions and answer any questions that the Hearing Officer may have on issues in the case. Sunoco believes oral argument will assist the Presiding Officer in producing his Recommended Decision in a timely manner.

## CONCLUSION

For the foregoing reasons, Sunoco reiterates its prayer for relief, as set forth on pages 62-64 of Sunoco's Initial Brief.

Respectfully submitted,



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