STATE OF NORTH DAKOTA | IN DISTRICT COURT

COUNTY OF BURLEIGH | SOUTH CENTRAL JUDICIAL DISTRICT

APH Farms, Arden Hagerott, Jonathan Hagerott, Janel Olson, Valera Hayen, Kari Curran, Scott Irmen, Mary Jo Irmen, Leon Mallberg, Staroba Revocable Living Trust, Loren Staroba, Diane Staroba, James Tiegs, Appellants, vs. North Dakota Public Service Commission, SCS Carbon Transport LLC, John H. Warford, Jr. Revocable Trust, Chad Wachter, Chad Moldenhauer, City of Bismarck, Laborers District Council of Minnesota and North Dakota, Emmons County, and Burleigh County, Appellees.	Case No. 08-2024-CV-03622 (Consolidated Case)

And

Burleigh County, Appellant, vs. North Dakota Public Service Commission and SCS Carbon Transport LLC, Appellees.	Case No. 08-2024-CV-03614 (Merged into Consolidated Case)

BRIEF OF APPELLEE NORTH DAKOTA PUBLIC SERVICE COMMISSION

INTRODUCTION

[¶1] The North Dakota Public Service Commission ("Commission"), under the authority of N.D.C.C. ch. 49-22.1, issued its Findings of Fact, Conclusions of Law, and Order on a pipeline siting application of SCS Carbon Transport LLC ("SCS"). (Index. No. 908). The Commission issued a Certificate of Corridor Compatibility and Route Permit to SCS for the construction, operation, and maintenance of approximately 320 miles of carbon dioxide pipeline in Burleigh, Cass, Dickey, Emmons, Logan, McIntosh, Morton, Oliver, Richland, and Sargent Counties. *Id.* Multiple intervenors appealed; the appeals were consolidated. The appeal is taken to the district court pursuant to North Dakota Administrative Agencies Practices Act. N.D.C.C. § 28-32-42.

ISSUES

[¶2] The Commission is the constitutional agency that reviews applications from public utilities for the construction, maintenance, and operation of pipelines in North Dakota. N.D.C.C. Ch. 49-22.1. The Commission determines whether to issue a certificate of site compatibility and route permit in what is generally referred to as a siting case. The Commission has authority granted to it by the Legislative Assembly, including the ability to adopt administrative rules, to consider whether to issue the certificate and route permit. N.D.C.C. § 49-22.1-06, 07, 09, & 17; N.D.A.C. §§ 69-06-05-01, 69-06-08-02. SCS sought a certificate and route permit to construct the pipeline. The pipeline is part of a regional pipeline to move carbon dioxide produced by ethanol plants in

North Dakota, Minnesota, South Dakota, Nebraska, and Iowa and inject the carbon dioxide into subsurface pore space in Oliver County.[1]

[¶3] The Commission published notices of hearings and considered the following as to the application for waiver of procedures and time schedules:

1. Are the proposed facilities of such length, design, location, or purpose that they will produce minimal adverse effects and that adherence to applicable procedures, requirements, and time schedules may be waived?

2. Is it appropriate for the Commission to waive any procedures, requirements, and time schedules as requested in the application?

The Commission published notices of hearings and considered the following as to the application for a certificate of corridor compatibility and a route permit:

1. Will construction, operating, and maintenance of the facility at the proposed location produce minimal adverse effects on the environment and upon the welfare of the citizens of North Dakota?

2. Is the proposed facility compatible with environmental preservation and the efficient use of resources?

3. Will construction, operation, and maintenance of the facility at the proposed location minimize adverse human and environmental impact while ensuring continuing system reliability and integrity and ensuring that energy needs are met and fulfilled in an orderly and timely fashion?

(Index Nos. 315, 605).

[¶4] The Commission initially denied the application of SCS, but later reconsidered the denial and issued SCS a certificate and route permit. (Index Nos. 528, 549, 908). Appellants seek reversal of the Commission's decision. The primary issue for the Court is to determine whether

[1] The Commission has regulatory authority only over the siting of the proposed pipeline in North Dakota. The North Dakota Industrial Commission has separate regulatory jurisdiction over the injection of carbon dioxide into pore space. This appeal pertains only to the siting of the pipeline.

the Commission's November 15, 2024, Findings of Fact, Conclusions of Law, and Order issuing SCS a certificate and route permit was supported by the evidence presented. Within this primary issue are several sub-issues that Appellants have raised on appeal that will be addressed: 1) whether the Commission's jurisdiction concerning safety, and specifically related to a dispersion model study, is preempted by federal law; 2) whether the Commission's decision to grant reconsideration of its initial denial of the certificate and route permit was proper; 3) whether the Commission properly determined local zoning ordinances were preempted and unreasonably restrictive.

BACKGROUND FACTS

A. Procedural Background

[¶5] The Commission's Findings of Fact, Conclusions of Law, and Order contains a detailed recitation of the procedural background (Index No. 908), a general summation of that is included here. On October 17, 2022, SCS filed applications for a certificate of corridor compatibility and route permit for an approximately 320-mile carbon dioxide pipeline ranging from 4.5 to 24-inch diameter and associated facilities in the following North Dakota counties: Burleigh, Cass, Dickey, Emmons, Logan, McIntosh, Morton, Oliver, Richland, and Sargent Counties. SCS also filed an application for waivers of procedures and time schedules under N.D.C.C. §§ 49-22.1-05, 08, and 10, and N.D.A.C. §§ 69-06-01-02 and Ch. 69-06-06. (SCS Application, Index. Nos. 132-135, 143-146, 149-156, 243-245).[2] The applications were deemed complete by the Commission on February 1, 2023, and initially four public hearings were noticed and held in: Bismarck (March 14, 2023), Gwinner (March 28, 2023), Wahpeton (April 11, 2023), and Linton (May 9, 2023). (Index No. 168). An additional public hearing was noticed and was

[2] Why is the administrative record so fragmented? Odyssey.

held on June 2, 2023, in Bismarck. (Index No. 315). The Commission denied the application in its Order dated August 4, 2023. (Index No. 528).

[¶6] SCS timely petitioned the Commission for reconsideration pursuant to N.D.A.C. § 69-02-06-02 and N.D.C.C. § 28-32-40 on August 18, 2023. (Index. No. 531). The Commission granted the reconsideration petition on September 15, 2023. (Index. No. 549). SCS moved the Commission to declare local zoning ordinances superseded on September 9, 2023. (Index. No. 552). The Commission issued an Order dated February 7, 2024, that local zoning ordinances were preempted. (Index. No. 586). A Notice of Public Hearing was issued by the Commission on March 21, 2024, that noticed public hearings related to issues identified in the Commission's Order granting SCS's petition for reconsideration, for Mandan (April 22, 2024), Wahpeton (May 24, 2024), and Linton (June 4, 2024). (Index No. 605). A Notice of Technical Hearings was issued by the Commission on April 25, 2024, that noticed a technical hearing to address issues identified in the Commission's Order on SCS's reconsideration petition, for Bismarck on May 28-30, 2024, and June 3, 2024. (Index. No. 659).

[¶7] The Commission issued its Findings of Fact, Conclusions of Law, and Order on November 15, 2024. (Index No. 908). Notices of appeal and specifications of error were served.

C. The Proposed Pipeline

[¶8] SCS seeks a certificate and route permit to construct approximately 320 miles of carbon dioxide pipeline ranging from 4 to 24 inches and associated pipeline facilities originating at 1) the North Dakota and Minnesota border south of Wahpeton, 2) North Dakota and South Dakota border southwest of Ashley, and 3) the Tharaldson ethanol plant in Cass County. The terminus of the pipeline would be located at a pump station in Oliver County, where the storage

facilities would fall under the authority of the North Dakota Industrial Commission. (Index No. 132, at Introduction).

[¶9] Testimony and evidence related to the proposed pipeline was received by the Commission at the hearings listed above. Examination of witnesses, including cross-examination by intervenors and Commission staff, occurred. Post-hearing briefs were submitted to the Commission by SCS and the intervenors.

STANDARD OF REVIEW

[¶10] Courts exercise limited review in appeals from administrative agency decisions under the Administrative Agencies Practice Act, and the agency's decision is accorded great deference. *Berger v. N.D. Dep't of Transp.*, 2011 ND 55, ¶ 5, 785 N.W.2d 707. This Court will not reverse an agency decision unless:

1. The order is not in accordance with the law.

2. The order is in violation of the constitutional rights of the appellant.

3. The provisions of this chapter have not been complied with in the proceedings before the agency.

4. The rules or procedure of the agency have not afforded the appellant a fair hearing.

5. The findings of fact made by the agency are not supported by a preponderance of the evidence.

6. The conclusions of law and order of the agency are not supported by its findings of fact.

7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.

8. The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge.

N.D.C.C. § 28-32-46; *Voigt v. N.D. Public Serv. Comm'n*, 2017 ND 76, ¶ 8, 892 N.W.2d 149. When determining this issue, the Court must "look to the law and its application to the facts." *Plante v. N.D. Workers Comp. Bureau,* 455 N.W.2d 195, 197 (N.D. 1990). In reviewing an agency's findings of fact, the Court does not substitute its judgment for that of the agency or make independent findings. *Capital Elec. Coop. v. City of Bismarck*, 2007 ND 128, ¶ 31, 736 N.W.2d 788. Rather, in reviewing the Commission's findings of fact, the Court determines "only whether a reasoning mind could have determined that the factual conclusions reached were proved by the weight of the evidence from the entire record." *Id.*; *see also Power Fuels, Inc. v. Elkin*, 283 N.W.2d 214, 220 (N.D. 1979); *North Central Elec. Coop. v. N.D. Pub. Serv. Comm'n*, 2013 ND 158, ¶ 7, 837 N.W.2d 138. The Court does "not reweigh or reevaluate the evidence . . . [or] function as a super board and second guess the PSC's findings." *Capital Elec. Coop.*, 2007 ND 128 at ¶31. Additionally, the subject matter here is of a "highly technical nature," the Commission's "expertise" is "entitled to appreciable deference." *Montana-Dakota Utilities Co. v. N.D. Pub. Serv. Comm'n,* 413 N.W.2d 308, 312 (N.D. 1987).

LAW AND ARGUMENT

[¶11] The Commission's Findings of Fact, Conclusions of Law, and Order, dated November 14, 2024, should be affirmed. After the culmination of dozens of hours of testimony from witnesses of SCS and intervenors, as well as members of the public, and consideration of thousands of pages of exhibits, the Commission's Order is founded upon North Dakota law and is entitled to the deference afforded the Commission under the law. The first section below details the siting criteria the Commission must consider, the evidence presented to the Commission, and that the conclusions reached by the Commission are supported by the facts and law. The second section below addresses the law as it applies to the Commission (and this Court) relating to

interstate hazardous pipelines that are regulated by the United States Department of Transportation's Pipeline and Hazardous Materials Safety Administration (PHMSA) (setbacks and dispersion model study). The third section below details the proper basis of the Commission in granting a reconsideration motion by SCS after initially denying the certificate and route permit. And the final section below explains why the local zoning ordinances instituted after SCS filed its application to the Commission are preempted by N.D.C.C. § 49-22.1-13 and are unreasonably restrictive. The Court should affirm the Commission's Order issuing SCS a certificate and route permit for its pipeline.

I. The Commission's Order is supported by the weight of the evidence.

[¶12] The district court must review the appeal "based only on the record" and must affirm the agency order unless one of the grounds in N.D.C.C. § 28-32-46 is present, including that the findings of fact are not supported by a preponderance of the evidence. N.D.C.C. § 28-32-46. In evaluating whether findings are supported by the required evidentiary weight, the reviewing court does not make independent findings; it asks whether a "reasoning mind reasonably could have determined the findings were proven by the weight of the evidence from the entire record." *Lechner v. N.D. Workforce Safety & Ins.*, 2018 ND 270, at ¶9, 920 N.W.2d 288 (quotation omitted).

[¶13] The Commission has jurisdiction to consider the SCS application under N.D.C.C. ch. 49-22.1. SCS is a public utility under the chapter. The project is a gas transmission facility placing the application of SCS within the siting criteria our Legislative Assembly and the Commission have established. The Commission further found it established criteria under N.D.C.C. § 49-22.1-03 and applied the criteria as set forth in N.D.A.C. § 69-06-08-02, including Exclusion Areas, Avoidance Areas, Selection Criteria, and Policy Criteria. The findings are

detailed in the Findings of Fact, Conclusions of Law, and Order. The bases for these findings were established at the numerous hearings and voluminous records that were submitted as evidence in this proceeding. These findings demonstrate the Commission properly reviewed and analyzed the evidence and made a decision based on the facts presented to it and applied the siting criteria (the law) to these facts.

[¶14] The Commission is a regulatory body that is bound to stay within the criteria limitations that are established by the Legislative Assembly and the Commission's own regulations that are enacted pursuant to statutory authority. It does not decide policy. It does not decide setbacks. It does not decide what safety factors are regulated. It does not decide eminent domain. It does not decide what "green energy" policies are established. It does not decide whether 45Q credits are appropriate. It does not decide whether private agreements entered into between pipeline companies and landowners are "fair." What the Commission determines, on every pipeline siting case it considers, is whether the requirements it must utilize to review an application, that is the criteria established by regulations and statute, are met by the applicant. That the Appellants wish to argue policy considerations and aspects that are outside of the Commission's jurisdiction is why they lose when the analysis of the project is constrained to the limitations placed on the Commission by the Legislative Assembly.

[¶15] The Commission found that under N.D.A.C. § 69-06-08-02(3), a corridor or route shall be approved only if significant adverse effects will be at an acceptable minimum or will be managed and maintained at an acceptable minimum. The impossibility standard Appellants ask the Court to adopt has no place in law or reality. The analysis is not whether a pipeline will never cause damage. If that were the standard, nothing would ever be constructed. The Commission found SCS provided an analysis of impacts in relation to all relevant criteria and that the project's

impact upon the criteria listed in N.D.A.C. § 69-06-08-02(3) and N.D.C.C. Ch. 49-22.1 would be at an acceptable minimum. The SCS application met these standards. The Commission's Order also contains multiple record-based findings supporting that "acceptable minimum" conclusion. These findings are not conclusory and they are supported by the evidence presented so that a reasoning mind could weigh as supporting the Commission's determination.

[¶16] Even where the record contains competing views, this Court's task is limited to whether a reasoning mind could reach the Commission's findings from the weight of the evidence in the entire record. *Lechner*, 2018 ND 270 at ¶9. The Commission's findings on Exclusion Areas, Avoidance Areas, and Selection Criteria are based on identified studies, agency correspondence, and testimony, and are coupled with specific mitigation commitments and conditions. Because the Commission applied the required siting criteria framework and made evidence-based findings addressing siting criteria, as stated in the Commission's Order, the decision is factually and legally supported under N.D.C.C. ch. 49-22.1 and N.D.A.C. §§ 69-06-05-01 and 69-06-08-02. Pursuant to N.D.C.C. § 28-32-46 and the "reasoning mind" standard, this Court should affirm the Commission's Order.

II. The Commission, and this Court, must abide by exclusive federal safety preemption.

[¶17] Appellants continually asked the Commission, and ask this Court, to consider the safety of the proposed carbon dioxide pipeline. First, the Commission has confirmed that SCS will comply with PHMSA regulations. This includes a dispersion model study that will be reviewed by PHMSA as part of the required process SCS must submit to for a multi-state, interstate, hazardous pipeline. Second, the Commission does not have jurisdiction to consider whether the details of the dispersion model study satisfy requirements. Indeed, doing so is explicitly outside of the confines of the Commission's jurisdiction. Moreover, it is outside of the

jurisdiction of any state court in the nation. While it can be said on a base level that safety is a consideration of the Commission, that consideration is confined to ensuring SCS will comply with its obligations to PHMSA. That confirmation has been accomplished. And because it has been accomplished, the inquiry by the Commission stops. Not necessarily because the Commission does not value safety, it does. But it stops because doing so is outside of the Commission's legal jurisdiction. Should this be public policy? This is a question neither this Court nor the Commission have authority to decide.

[¶18] The Commission, just as this Court, must act within the boundaries of the law and its jurisdiction. The Commission reviews the siting of a proposed pipeline pursuant to North Dakota law and within the confines courts have defined. Here, Appellants take issue with the fact a dispersion modeling study that SCS conducted for adherence to federal safety requirements was not made public. Appellants further take issue that they were unable to question SCS on the modeling study as to the potential safety impact a release of carbon dioxide would have. First, the Commission properly held the modeling study was protected information. Second, even if the Commission incorrectly determined the plume modeling study was protected information, other than the fact the study was completed to comply with federal safety requirements, the Commission lacks jurisdiction to consider the safety impacts of the proposed pipeline because such analysis is outside of the legal jurisdiction of the Commission.

[¶19] Federal law, principally the Pipeline Safety Act (PSA) administered by the Pipeline and Hazardous Materials Safety Administration (PHMSA) preempts the Commission's siting authority (and political subdivisions participating in that siting process) from imposing, adjudicating, or conditioning approval on "safety considerations" for an interstate hazardous

pipeline, including risk-based setbacks, dispersion modeling demands, and emergency-response-related conditions.

[¶20] Federal preemption arises through (1) express preemption (Congress explicitly bars state regulation), (2) field preemption (Congress occupies a regulatory field), and (3) conflict preemption (state requirements frustrate federal purposes or make compliance with both regimes impossible). *Mo. Bd. of Exam'rs for Hearing Instr. Specialists v. Hearing Help Express, Inc.*, 447 F.3d 1033, 1035-36 (8th Cir. 2006). Where Congress includes an express preemption clause, courts focus on the clause's plain text as the best evidence of congressional intent, and there is no need to infer intent from other statutory provisions. *Winred, Inc. v. Ellison*, 59 F.4th 934, 941-42 (8th Cir. 2023); *Kinley Corp. v. Iowa Utils. Bd.*, 999 F.2d 354, 358-59 (8th Cir. 1993).

[¶21] Although a presumption against preemption may apply in fields traditionally occupied by the States, that presumption yields where Congress has clearly spoken or created a scheme leaving no room for state supplementation. *Winred*, 59 F.4th at 941 (reminding us what the U.S. Constitution says: "[t]he Supremacy Clause designates federal law as 'the supreme Law of the Land'"); *Mo. Bd. of Exam'rs*, 447 F.3d at 1035 (explaining congressional intent must be "clear").

[¶22] The PSA draws a sharp line between intrastate and interstate pipeline safety regulation: a certified state authority may adopt additional or more stringent safety standards for intrastate pipeline facilities if compatible with federal minimum standards, but "may not adopt or continue in force safety standards for interstate pipeline facilities or interstate pipeline transportation," subject only to a limited one-call enforcement carveout. 49 USCS § 60104. This "clear" and express prohibition is the most direct and controlling preemption rule for "safety considerations" that operate as safety standards in an interstate pipeline siting proceeding. *Id.*

[¶23] The key question is functional: whether the state or local requirement, as applied, is a "safety standard" governing the design, construction, operation, maintenance, integrity management, or emergency response of an interstate pipeline facility. *Id.* Federal case law describes Congress's intent as expressly preempting state regulation "in the area of safety" for interstate hazardous liquid pipelines and as leaving "no regulatory room" for states to establish or supplement federal safety standards. *Couser v. Shelby Cnty.*, 139 F.4th 664, 669-70 (8th Cir. 2025); *Kinley*, 999 F.2d at 358-59. Accordingly, when a county or state siting authority urges (or imposes) setbacks calibrated to potential pipeline rupture consequences, demands particular dispersion modeling methodologies or outputs as a condition of approval, or requires emergency-response measures beyond (or different from) PHMSA's regime, those measures are properly characterized as "safety standards" and are expressly preempted. 49 USCS § 60104, *Couser*, 139 F.4th at 669-73.

[¶24] Even apart from the PSA's express bar, Congress's grant of authority as exclusive in the safety domain for interstate hazardous liquid pipelines, precludes state decision-making "in any manner whatsoever" with respect to safety of interstate transmission facilities. *Couser*, 139 F.4th at 673 (quoting *ANR Pipeline Co. v. Iowa State Com. Comm'n* , 828 F.2d 465, 470 (8th Cir. 1987) ("Congress intended to preclude states from regulating *in any manner whatsoever* with respect to the safety of interstate transmission facilities." (emphasis added)). Here, the Commission found the project will be designed, constructed, and operated in accordance with PHMSA regulations and identified specific PHMSA Part 195 requirements governing high consequence area measures, operations/maintenance/emergency procedures, and emergency response instruction. Indeed, *even if* the Commission did not find SCS has to comply with PHMSA

requirements, SCS *must* comply with PHMSA regulations. Going beyond that finding, is not within the jurisdiction of the Commission.

[¶25] Allowing each county or the Commission itself to litigate and impose its own safety-driven setback distances, dispersion modeling assumptions, or emergency-response prerequisites would re-create the exclusive patchwork Congress eliminated by prohibiting state safety standards for interstate facilities. 49 USCS § 60104, *Couser*, 139 F.4th at 669-676. This conflict is not hypothetical in the present record: the Commission found the project's valve spacing and other safety-related design features are to be set consistent with rules set forth by PHMSA and it treated safety compliance with PHMSA construction and operation as outside its jurisdiction. (Index 908, at pp. 8-9, 14-15). A state process that conditioned route approval on additional safety showings (or denies approval based on disagreement with PHMSA-governed safety judgments) is contrary to the federal allocation of authority the Commission itself recognized. 49 USCS § 60104.

[¶26] Here, the county setbacks at issue are framed in the record as protective buffers from hazardous pipeline risks (either two miles from any occupied structure or 7,920 feet from an established residence). Testimony from an Emmons County Commissioner confirmed safety was a consideration when the county amended their 1982 ordinances in 2023; Testimony from a Burleigh County Commissioner confirmed safety was a consideration when the county enacted new zoning ordinances for pipelines in 2023. (Index 751 (June 4, 2024, Tr. of Hearing at Linton, Testimony of Emmons County Commissioner Erin Magrum) at pp. 13, 33-35, 48-51); (Index 494 (June 2, 2023, Tr. of Hearing at Bismarck, Testimony of Burleigh County Commissioner Brian Bitner) at pp. 284-85, 287-88, 314-15, 316-20, 323-25, 327-31, 333-37, 346-49, 352-53, 357-58); (Index No. 744 (May 29, 2024, Tr. of Hearing at Bismarck, Testimony of Burleigh County Commissioner Brian Bitner) at pp. 175, 183-84; 210-211). When a setback is justified by potential

rupture consequences, dispersion behavior, or "public safety" hazard zones, it is not merely a land-use aesthetic or density control, it is a de facto safety standard regulating how close an interstate hazardous pipeline may be to people and structures. 49 USCS § 60104, *Couser*, 139 F.4th at 669-676. Likewise, dispersion modeling is described in the record as central to assessing the consequences of a potential carbon dioxide release and to emergency response and integrity management topics associated with PHMSA requirements. A state requirement to perform, disclose, or defend dispersion modeling when used to determine whether the pipeline is "safe enough" to site near populated areas, or to set risk-based separation distances, operates as a safety standard and is preempted for an interstate facility. *Id.*

[¶27] Federal law provides that the PSA "does not authorize the Secretary of Transportation to prescribe the location or routing of a pipeline facility." 49 USCS § 60104. That routing carveout confirms the proper division of labor: states may decide *where* within their siting framework a route may go (subject to state law), but they may not regulate *how safe* the interstate pipeline must be through state safety standards. 49 USCS § 60104. The Commission's findings reflect this allocation by treating PHMSA safety compliance as outside its jurisdiction while still conducting a siting review under state criteria. (Index 908, at pp. 8-9, 14-15).

[¶28] An argument that PHMSA sets minimum standards and that states can impose additional protections through siting conditions does not pass muster. It fails for interstate facilities because the PSA expressly allows additional or more stringent standards only for intrastate facilities (and only if compatible), while categorically barring state safety standards for interstate pipeline facilities. 49 USCS § 60104.

[¶29] Burleigh County argues the Commission erred by refusing to consider public health and welfare and other considerations not preempted by PHMSA. The correct reconciliation is that

the Commission may consider welfare impacts that are not safety standards (*e.g.*, non-safety land impacts, environmental preservation, resource use), but it cannot adjudicate or impose substantive safety requirements for an interstate facility because Congress reserved that domain to PHMSA. 49 USCS § 60104, *Couser*, 139 F.4th at 669-676. The Commission's determination that "safety compliance with PHMSA construction and operation" is outside its jurisdiction is consistent with the PSA's express preemption of state safety standards for interstate facilities. (Index No. 908 at p. 9). Further, the Commission addressed the areas it retains statutory and regulatory authority over for purposes of determining the siting of a pipeline. Finally, the Commission determined SCS has to adhere to PHMSA requirements. (Index. No. 908 at pp. 8-16)

[¶30] Appellants argue the Commission relied on protected dispersion modeling while prohibiting questioning, depriving parties of a fair hearing. Even if that procedural claim has merit, it does not expand state substantive authority into a federally preempted field. A due-process remedy would address how the Commission uses evidence within its lawful jurisdiction, but it cannot authorize the Commission to impose or litigate safety standards that federal law forbids states to adopt for interstate facilities. 49 USCS § 60104, *Couser*, 139 F.4th at 669-76.

[¶31] The Commission's decision that the dispersion modeling information was protected pursuant to N.D.A.C. § 69-02-09-01 was properly made. SCS applied to the Commission to protect from disclosure confidential information that included the dispersion modeling study. (Index No. 340). The Commission issued an order on August 4, 2023, that detailed the Commission's basis for granting SCS's application. (Index No. 526). The reasoning of the Commission should not be second guessed by reviewing courts. A reasoning mind could reach the Commission's findings from the weight of the evidence in the record on this decision. *Lechner*, 2018 ND 270, at ¶9. Confirmation that the study was done satisfies the Commission's inquiry.

Again, the Commission does not have authority to second-guess the modeling when PHMSA has exclusive safety jurisdiction to confirm the interstate pipeline is compliant.

[¶32] The PSA expressly prohibits states from adopting, or maintaining, safety standards for interstate pipeline facilities. The cited authority recognizes Congress's intent to grant exclusive federal authority over interstate hazardous liquid pipeline safety. 49 USCS § 60104, *Couser*, 139 F.4th at 669-76. As a matter of law, in a North Dakota siting proceeding for an interstate hazardous pipeline, "safety considerations" are preempted to the extent they function as safety standards, such as risk-based setbacks calibrated to potential rupture consequences, dispersion modeling requirements used to set safety zones, or emergency-response conditions that supplement PHMSA's regime-while traditional routing and non-safety land-use impacts remain within the state's siting role. The Commission's decision to stay within its jurisdiction should be affirmed.

III. Reconsideration was properly reviewed and the Commission decision granting it should be affirmed.

[¶33] North Dakota Century Code § 28-32-40 expressly authorizes "[a]ny party before an administrative agency who is aggrieved by the final order of the agency" to file a petition for reconsideration within the statutory time period. N.D.C.C. § 28-32-40. The statute requires the petition to include "a statement of the specific grounds upon which relief is requested or a statement of any further showing to be made," and to state whether a rehearing is requested. *Id.* It continues that the agency "may deny" or "may grant" the petition "on such terms as it may prescribe," and if a rehearing is granted the agency may allow a new hearing or limit the hearing as appropriate, and may "dissolve or amend the final order and set the matter for further hearing." *Id.* This is permissive, discretionary language, not mandatory language requiring reconsideration upon satisfaction of a judicially created threshold. Nothing in the statute imposes a required

showing of fraud, mistake, surprise, or newly discovered evidence as a prerequisite to the Commission's authority to grant reconsideration. N.D.C.C. § 28-32-40.

[¶34] Further, the Commission's own regulations allow it to reconsider decisions. N.D.A.C. § 69-02-06-02. The administrative code provision allows a petition for reconsideration to be made within fifteen days after notice of the decision. *Id.* SCS filed a timely reconsideration petition with the Commission. (Index No. 531). The Commission considered the petition and granted it. (Index No. 549).

[¶35] The Siting Act provides that an aggrieved party may request a rehearing by the Commission and that the hearing must be conducted pursuant to Chapter 28-32. N.D.C.C. § 49-22-19. Thus, in siting matters, our Legislative Assembly expressly contemplated rehearing practice and tied it to the Administrative Agencies Practice Act procedures, rather than prohibiting reconsideration after a final order. The Commission also adopted this in its administrative code. N.D.A.C. § 69-02-06-02.

[¶36] Emmons County's claim that SCS's petition was an amendment, and therefore illegal, attempts to circumvent N.D.C.C. § 28-32-40 and the administrative code. Section 28-32-40(3) expressly contemplates that the petition may include "a statement of any further showing to be made," and § 28-32-40(4) authorizes the agency to grant rehearing and to amend the final order. Accordingly, even if SCS's petition included route adjustments and other changes, the legal question is not whether the petition resembles an "amendment," but whether it fits within the statute's authorized mechanism for "further showing" and rehearing leading to an amended order. The Legislative Assembly answered that question by authorizing reconsideration precisely to allow an agency to revisit and potentially amend its final order after additional proceedings.

[¶37] The Commission's September 15, 2023, order granting reconsideration stated that a "just, speedy, and inexpensive determination of the issues presented" necessitated granting the petition. Emmons County's argument that the Commission did not articulate a fraud/mistake/new-evidence standard fails because § 28-32-40 does not impose that standard as a condition of authority. Moreover, the Administrative Agencies Practice Act contemplates judicial review of "final orders" of agencies. *Henry v. Sec. Comm'r*, 2003 ND 62, ¶6, 659 N.W.2d 869. An order granting reconsideration, which is statutorily permitted, is a procedural step toward further agency proceedings and a later final order. Where the Legislative Assembly has committed the grant/denial decision to agency discretion ("may grant"), the Court's role is limited to ensuring the agency acted within statutory authority, -which it did here. N.D.C.C. § 28-32-40.

[¶38] Emmons County argues that unconstrained discretion could raise separation-of-powers concerns. But N.D.C.C. § 28-32-40 is not an unbounded common-law power: it is a legislative enactment that (1) limits who may petition (aggrieved parties), (2) imposes deadlines, (3) requires specified petition contents (grounds or further showing and rehearing request), and (4) prescribes procedural consequences (rehearing, amended order, deemed denial after 30 days if not disposed). N.D.C.C. § 28-32-40. Those statutory constraints supply the governing framework and defeat the premise that the Commission acted without legislative guidance. Indeed, taking Emmons County's argument to the extreme, all that it would accomplish is the re-filing and re-hearing all of what has already been received in the present record—only to have to create a completely new record because of a claimed procedural defect that is not supported in law. What Emmons County argues for is the very definition the phrase form over substance. *See* N.D.C.C. § 31-11-05(19) (reminding us "[t]he law respects form less than substance.").

[¶39] Because N.D.C.C. § 28-32-40 and N.D.A.C. § 69-02-06-02 expressly authorize the Commission to grant reconsideration of a final order, within a prescribed period of time, to allow a rehearing and for the Commission to amend *its* final order on such terms as the Commission prescribes, and because the Siting Act recognizes rehearing practice conducted pursuant to Chapter 28-32, the Commission acted within its statutory authority when it granted reconsideration.

IV. The Commission's decision preempting local zoning ordinances was correct.

[¶40] North Dakota law directs that statutory words are to be understood in their ordinary sense unless a contrary intention plainly appears. N.D.C.C. § 1-02-02. When statutory wording is clear and free of ambiguity, the plain meaning of the statute must be applied and may not be disregarded under the pretext of pursuing its spirit. N.D.C.C. § 1-02-05. Our case law treats statutory interpretation as a question of law, holding legislative intent is first sought in the statutory text, given its plain, ordinary, and commonly understood meaning. *Wheeler v. Gardner*, 2006 ND 24, ¶10, 708 N.W.2d 908. When the provision at issue is unambiguous, the North Dakota Supreme Court looks only to the statute's plain language to ascertain meaning and does not examine legislative history. *State v. Felan*, 2021 ND 97, ¶13, 960 N.W.2d 805. A statute is ambiguous when it is susceptible to differing but rational meanings, and only then may courts consult extrinsic aids such as legislative history. *State v. Long*, 2020 ND 216, ¶6, 950 N.W.2d 178

[¶41] The Commission's February 7, 2024, Order framed the question as whether preemption is "automatic," and concluded that "based on the plain language of N.D.C.C. § 49-22.1-13, the approval of a route permit for a gas or liquid transmission facility automatically supersedes and preempts local land use or zoning regulations, except for road use agreements." (Index No. 586). That conclusion is consistent with the Commission's Order. (Index. No. 908)

[¶42] Appellants argue the phrase except as provided in this section necessarily converts subsection (b) into conditional preemption requiring additional findings under subsections (c)-(e). But the Commission's reading gives effect to the phrase by recognizing that the statute itself contains an express exception. In other words, the Commission did not read except as provided out of the statute, it applied it by holding that preemption is automatic except for the category the Commission identified as not preempted-road use agreements. This construction is reinforced by the Commission's later conclusion of law that preemption is automatic except for road use agreements.

[¶43] Appellants argued that N.D.C.C. § 49-22.1-13(2)(b) refers to a permit to construct and that such a permit was not before the Commission. But the Commission's order issued a route permit expressly designating a route "for the construction, operation, and maintenance" of the pipeline and associated facilities. The Commission's preemption ruling is not advisory: it is tied to the route permit the Commission issued.

[¶44] In its November 2024 findings, the Commission found the Emmons and Burleigh ordinances impose setbacks of 7,920 feet and two miles (10,560 feet), respectively, and concluded these ordinances are "unreasonably restrictive on their face" under N.D.C.C. § 49-22.1-13(2)(c) and "in direct conflict with state law" under N.D.C.C. § 49-22.1-03. The Commission then incorporated that determination into its conclusions of law. (Index No. 908 at p. 16).

[¶45] Thus, even if the district court were to disagree with the Commission's legal conclusion that preemption is automatic, the Commission's final order contains an additional, independent basis for preemption. Evidence was received at the hearings that the ordinances were unreasonably restrictive. (Index 751 (June 4, 2024, Tr. of Hearing at Linton, Testimony of Emmons County Commissioner Erin Magrum) at pp. 13, 33-35, 48-51); (Index 494 (June 2, 2023,

Tr. of Hearing at Bismarck, Testimony of Burleigh County Commissioner Brian Bitner) at pp. 284-85, 287-88, 314-15, 316-20, 323-25, 327-31, 333-37, 346-49, 352-53, 357-58); (Index No. 744 (May 29, 2024, Tr. of Hearing at Bismarck, Testimony of Burleigh County Commissioner Brian Bitner) at pp. 175, 183-84; 210-211).

[¶46] Appellants claim the Commission lacked competent evidence to make this determination. But the Commission's alternative finding is explicitly "on [the ordinances'] face," and it identifies the specific setback distances mandated by each ordinance. Those facial requirements are the evidence supporting the Commission's determination that the ordinances are unreasonably restrictive and conflicting. Given the setback set by the Legislative Assembly for proximity of inhabited structures is 500 feet from a pipeline, this determination is supported. N.D.C.C. § 49-22.1-03. If our laws are to mean anything, they ought to actually mean what they say. A setback of 500 feet was accepted by SCS and it relied on this setback for siting its proposed pipeline. An ordinance prohibiting a pipeline more than this amount is unreasonably restrictive.

[¶47] Under the deferential standard for fact review, this Court does not reweigh the Commission's judgment about the restrictive effect of those setbacks either. The Court asks whether a reasoning mind could reach the Commission's conclusion based on the record. *Bleick v. N.D. Dep't of Human Servs.*, 2015 ND 63, ¶11, 861 N.W.2d 138. The Commission's identification of multi-thousand-foot and multi-mile setbacks provides an evidentiary basis for its facial unreasonableness finding. Quite frankly, such setbacks are unreasonable on their face. And, to the extent they are not, the PSA preempts any such setbacks.

[¶48] The Commission determined the county setbacks are "in direct conflict with state law under N.D.C.C. Section 49-22.1-03." Appellants contend § 49-22.1-03 is only a minimum avoidance criterion and cannot be treated as a ceiling. The Commission's order, however, reflects

its view that the counties' setbacks are "more restrictive than state law setback requirements" and therefore conflict with the state siting framework the Commission is charged to apply.

[¶49] Because statutory construction is reviewed de novo, this Court will decide whether the Commission's direct conflict conclusion is correct as a matter of law. *Koenig v. N.D. DOT*, 2012 ND 18, ¶4, 810 N.W.2d 333. The Commission's conclusion is supported because of the Commission's express comparison between the state's statutory 500-foot setback requirements and the counties' far greater setbacks – which are, by the way, also premised on safety (which as discussed above, is preempted by federal law).

CONCLUSION

[¶50] The Commission's Order (Index No. 908) should be affirmed.

Respectfully submitted this 20th day of March, 2026.

/s/ Zachary E. Pelham
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