

June 1, 2023

HAND DELIVERED

Mr. Steve Kahl
Executive Secretary Director
North Dakota Public Service Commission
600 E. Boulevard, Dept. 408
Bismarck, ND 58505-0480

**RE: SCS Carbon Transport LLC
Midwest Carbon Express Project
Case No. PU-22-391**

Dear Mr. Kahl:

Please find enclosed herewith for filing with the North Dakota Public Service Commission, an original and five (5) copies of the following:

1. SCS Carbon Transport LLC's Motion to Declare Emmons County and Burleigh County Ordinances Superseded and Preempted;
2. SCS Carbon Transport LLC's Brief in Support of Motion to Declare Emmons County and Burleigh County Ordinances Superseded and Preempted; and
3. Certificate of Service.

Also enclosed herewith, please find a Compact Disc (CD) containing this letter and the above-referenced documents in PDF format.

Should you have any questions, please advise.

Sincerely,



LAWRENCE BENDER

LB/me
Enclosures

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**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF NORTH DAKOTA**

IN THE MATTER OF THE APPLICATION
OF SCS CARBON TRANSPORT LLC FOR
A CERTIFICATE OF CORRIDOR
COMPATIBILITY AND ROUTE PERMIT
FOR THE MIDWEST CARBON EXPRESS
PROJECT IN BURLEIGH, CASS, DICKEY,
EMMONS, LOGAN, MCINTOSH,
MORTON, OLIVER, RICHLAND AND
SARGENT COUNTIES, NORTH DAKOTA

CASE NO. PU-22-391

**SCS Carbon Transport LLC's Motion to Declare Emmons County and Burleigh County
Ordinances Superseded and Preempted**

SCS Carbon Transport LLC ("SCS") respectfully requests that, as part of its final order, the North Dakota Public Service Commission (the "PSC") make the following findings of fact and legal conclusions:

1. The Emmons County Ordinance and the March 20 Burleigh County Ordinance are unreasonably restrictive in view of existing technology, factors of cost or economics, or needs of consumers regardless of their location.
2. The Emmons County Ordinance and the March 20 Burleigh County Ordinance conflict with state law, namely the State's policy of promoting carbon sequestration.
3. The Emmons County Ordinance and the March 6 and March 20 Burleigh County Ordinances conflict with federal law, namely Pipeline Safety Act (49 U.S.C. §§ 60101 *et seq.*).
4. The Emmons County Ordinance (*see* Dkt. No. 49) and the March 6 and March 20 Burleigh County Ordinances (*see* Dkt. No. 161) are superseded and preempted under N.D.C.C. § 49-22.1-13(2)(b).

Dated this 1st day of June 2023.

FREDRIKSON & BYRON, P.A.

By: 

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CASE NO. PU-22-391

**SCS Carbon Transport LLC's Brief in Support of Motion to Declare Emmons County
and Burleigh County Ordinances Superseded and Preempted**

Introduction

Emmons County and Burleigh County have both enacted zoning ordinances that effectively ban the construction of pipelines that carry carbon dioxide, and both counties have filed those ordinances in this case. Those ordinances, which contain setbacks and other safety-related measures, would frustrate if not outright halt investment in North Dakota's carbon-capture, utilization, and storage industry, which would undermine a key driver of the North Dakota economy and be inconsistent with the State's policy of "promot[ing] the geologic storage of carbon dioxide." N.D.C.C. § 38-22-01. The ordinances also conflict with federal law, specifically the Pipeline Safety Act. SCS Carbon Transport LLC ("SCS") requests that the Public Service Commission, as part of its decision on SCS's permit application, declare that these ordinances are superseded and preempted.

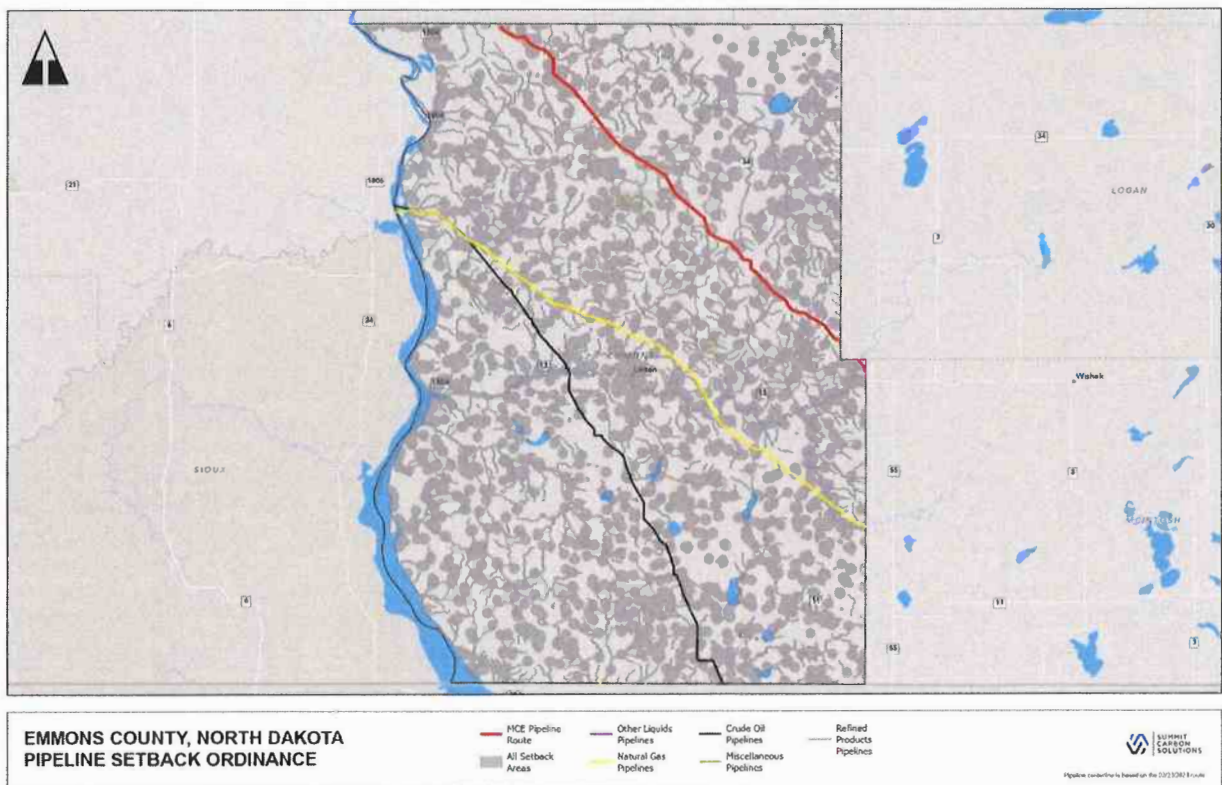
Background

Emmons County

On February 7, 2023, the Emmons County Commission adopted a zoning ordinance (the "Emmons County Ordinance"). The ordinance requires any person applying for a conditional use permit for a carbon dioxide pipeline from the Emmons County Commission to provide "[a] map

of the pipeline route which clearly indicates that the pipeline right-of-way does not pass within two miles (10,560') of the corporate boundaries of any organized city, a mile-and-a-half (7,920') of an established residence, within five hundred feet (500') of any other building or surface water body and is not within one hundred (100) feet of highway right-of-way or section line unless perpendicular to said right-of-way or line.”

Emmons County filed the ordinance in this case on February 17, 2023. (Dkt. No. 49). The ordinance would not only prohibit SCS's pipeline route; it would preclude any CO₂, oil, or gas pipeline from running through Emmons County, because there is no route through the county that would satisfy the setback requirements. The red line in the map below is SCS's proposed route; the gray areas are those that are within the setback areas of the Emmons County Ordinance.



Burleigh County

The Burleigh County Commission has enacted two zoning ordinances that purport to regulate hazardous liquid pipelines, including CO₂ pipelines. The Commission adopted the first

ordinance on March 6, 2023 (the “March 6 Ordinance”) and the second ordinance on March 20, 2023 (the “March 20 Ordinance”).

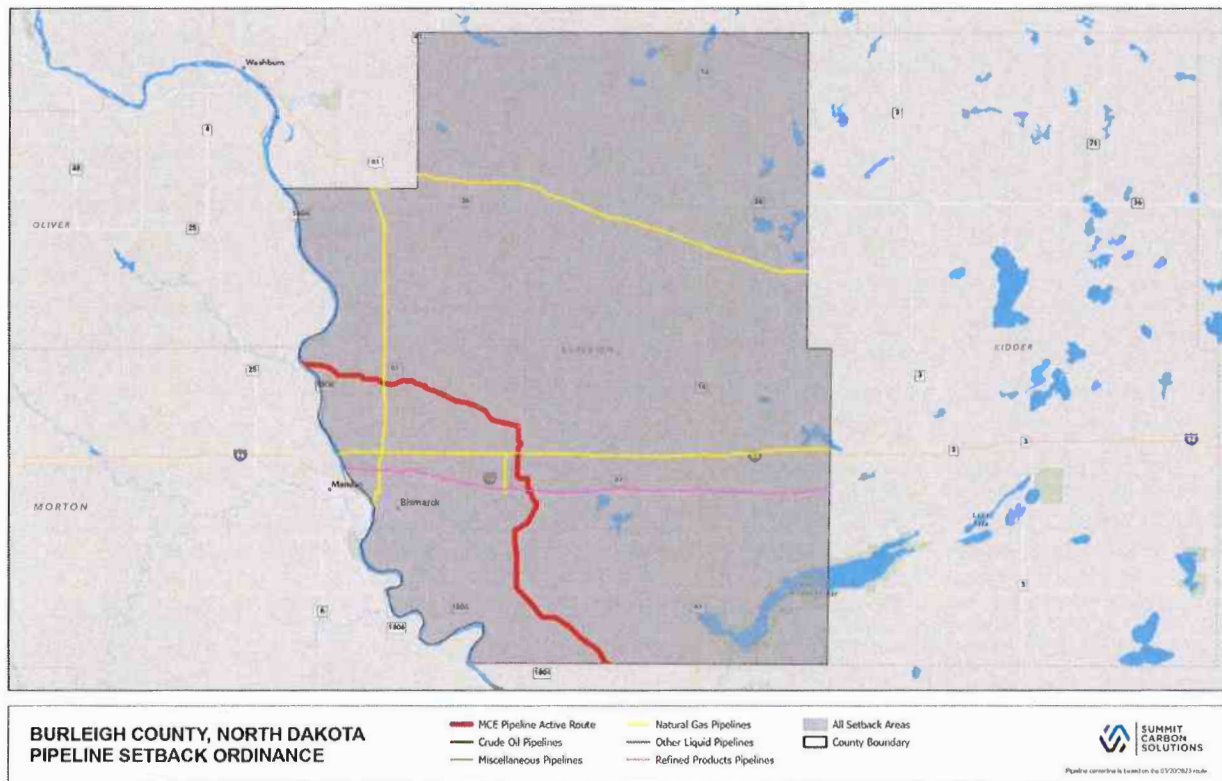
The March 6 Ordinance is titled “A Burleigh County Ordinance for Safety Regulations when Transporting Hazardous Liquid Through a Hazardous Liquid Pipeline.” It contains four substantive provisions. First, it requires a pipeline company to provide its safety procedures and protocols to landowners within the pipeline’s site boundaries and to any other interested persons. Second, it requires a pipeline company to provide a copy of its emergency action plan to Burleigh County Emergency Management. Third, if the Pipeline and Hazardous Materials Safety Administration of the United States Department of Transportation (“PHMSA”) has adopted regulations specifically related to emergency preparedness, emergency response, or hazard mitigation planning for hazard liquid pipelines, then the ordinance requires pipeline companies to submit a copy of its emergency response and hazard mitigation plan to Burleigh County Emergency Management. Finally, if PHMSA has not adopted regulations specifically related to emergency preparedness, emergency response, or hazard mitigation planning for hazard liquid pipelines, then the March 6th Ordinance requires pipeline companies to submit a copy of any emergency response and hazard mitigation plan required under local zoning ordinances to Burleigh County Emergency Management.

The March 20 Ordinance, in contrast, states that “no land or property interest in [Burleigh] County . . . shall be used for purposes of a Hazardous Liquid Pipeline except in conformity with [the March 20 Ordinance].” The ordinance has considerable zoning setbacks, prohibiting any carbon-dioxide pipeline from being constructed within 10 miles of an electric power generating facility, an electric transmission line, an electric transmission substation, a public drinking water treatment plant, a public wastewater treatment plant, or the extra-territorial line of an incorporated city; within four miles of a church, school, nursing home, long-term care facility, or hospital; within two miles of a public park, recreation area, occupied structure, or animal feeding facility;

and within one mile of a confined feeding facility or the ordinary high-water mark of the Missouri River.

The March 20 Ordinance would require all hazardous liquid pipeline companies to apply to the Burleigh County Planning and Zoning Department for a special-use permit to construct a pipeline in the county and would require applicants to provide an emergency response plan to Burleigh County Emergency Management.

Burleigh County filed both ordinances in this case on March 30, 2023. (Dkt. No. 161). The March 20 Ordinance would not only prohibit SCS's pipeline route; it would preclude any CO2, oil, or gas pipeline from running through Burleigh County, because there is no route through the county that would satisfy the setback requirements. The red line in the map below is SCS's proposed route; the gray areas are those that are within the setback areas of the March 20 Ordinance. (It is not an illusion; the entire county is gray.)



ARGUMENT

I. The Emmons County and Burleigh County Ordinances will be automatically preempted by the issuance of the permit.

Before 2017, North Dakota law provided that “[a] permit for the construction of a transmission facility within a designated corridor *may* supersede and preempt any local land use, zoning, or building rules, regulations, or ordinances upon a finding by the commission that such rules, regulations, or ordinances, as applied to the proposed route, are unreasonably restrictive in view of existing technology, factors of cost or economics, or needs of consumers regardless of their location.” N.D.C.C. § 49-22-16(2) (2016) (emphasis added).

That changed in 2017, when legislature amended the Code to differentiate zoning ordinances generally (which are now automatically preempted) from ordinances that regulate road-use agreements of the political subdivisions, which are still not preempted *unless* the PSC finds that they are unreasonably restrictive or the ordinances conflict with state or federal law.¹

Specifically, paragraph 2 of section 49-22.1-13, which is where this language was recodified in 2019,² now states in relevant part:

2. ...

b. Except as provided in this section, a permit for the construction of a gas or liquid transmission facility within a designated corridor supersedes and preempts any local land use or zoning regulations.

c. Before a gas or liquid transmission facility is approved, the commission shall require the applicant to comply with the road use agreements of the impacted political subdivision. A permit may supersede and preempt the requirements of a political subdivision if the applicant shows by a preponderance of the evidence the regulations or ordinances are unreasonably restrictive in view of existing technology, factors of cost or economics, or needs of consumers regardless of their location, or are in direct conflict with state or federal laws or rules.

¹ See 2017 Senate Bill No. 2286 and 2017 House Bill No. 1144, available at https://ndlegis.gov/files/committees/65-2017/19_5025_03000appendixh.pdf.

² The preemption language was originally codified at N.D.C.C. § 49-22-16 but moved when the legislature separated the electric transmission chapter from the pipeline transmission chapter.

Under subsection b, zoning ordinances are automatically preempted if the PSC grants a permit approving a designated pipeline corridor, *except* as stated in paragraph c, which provides that “the commission shall require the applicant to comply with the road use agreements of the impacted political subdivision but further provides that “a permit *may* supersede and preempt the *requirements of a political subdivision* if the applicant shows by a preponderance of the evidence the regulations or ordinances are unreasonably restrictive in view of existing technology, factors of cost or economics, or needs of consumers regardless of their location, or are in direct conflict with state or federal laws or rules.” N.D.C.C. § 49-22.1-13(2)(c) (emphasis added).

At first glance, it might seem that the law is the same now as it was pre-2017, which is to say that local ordinances are not superseded and preempted unless the PSC makes specific findings about the ordinance’s effect or the ordinance conflicts with state and federal law. But, when viewed in the broader context of the statutory provision, it’s clear that is not what the Code says. The reference to the “requirements of a political subdivision” in subsection c refers not to zoning ordinances generally but to the “road use agreements of the impacted political subdivision” that are referenced in the previous sentence. In other words, zoning ordinances are automatically preempted, except those that govern road-use requirements; the applicants must follow those “requirements” *unless* the PSC makes a finding that they are unreasonably restrictive, or they conflict with state or federal law.

If the opposite were true—that is, if the PSC had to make a specific finding as to whether *every* zoning ordinance is unreasonably restrictive, there would have been no reason to amend the code in 2017. That was already the law pre-2017. Indeed, if that were the law now, then subsection b would have no purpose. That is, there would be no reason for the legislature to state that a permit to construct a pipeline in a “designated corridor supersedes and preempts any local

land use or zoning regulations” if PSC, per subsection c, was required to exercise its discretion to find that the ordinance is unreasonable.

Because statutes cannot be interpreted such that one provision has no purpose, the PSC “must reconcile the two statutory provisions in a manner that gives effect to both provisions.” *Schulke v. Panos*, 2020 ND 53, ¶ 13, 940 N.W.2d 303, 307. That means a permit automatically preempts any zoning ordinance that would apply to a permitted route, except those that govern road use. As to those requirements (i.e., those that govern road use) the PSC “may” preempt them if it finds that they are unreasonably restrictive or conflict with state or federal law. N.D.C.C. 49-22.1-13(2)

The Emmons and Burleigh ordinances do not govern road use; instead, they go to the very heart of what the PSC is uniquely and exclusively authorized to do: be the “sole site or route approval required to be obtained” by a pipeline company. *Id.* As a result, if the PSC grants the permit, these zoning ordinances will be preempted in their entirety by operation of law under N.D.C.C. § 49-22.1-13(2)(b). SCS respectfully requests that the PSC make that clear in its decision.

II. The Emmons County and Burleigh County Ordinances are unreasonably restrictive and conflict with state and federal law.

Even if the Emmons and Burleigh ordinances were not automatically preempted under subsection b of section 49-22.1-13(2)—which is to say, even if subsection b is meaningless—the ordinances are preempted because they are unreasonably restrictive (indeed, they effectively ban CO2 pipelines) and conflict with both state and federal law. As a result, and out of an abundance of caution, SCS respectfully requests that PSC declare that the ordinances are superseded and preempted under section 49-22.1-13(2)(c).

A. Because the county ordinances ban hazardous liquid pipelines in Emmons and Burleigh counties, they are by definition unreasonably restrictive and conflict with North Dakota law.

North Dakota has not just been a leader when it comes to capture and sequestration of carbon dioxide; it has been *the* leader. Over a decade ago, the legislature declared that “it is in the public interest to promote the geologic storage of carbon dioxide” because “[d]oing so will benefit the state and the global environment by reducing greenhouse gas emissions,” “will help ensure the viability of the state’s coal and power industries, to the economic benefit of North Dakota and its citizens,” and will “allow for [CO₂’s] ready availability if needed for commercial, industrial, or other uses, including enhanced recovery of oil, gas, and other minerals.” N.D.C.C § 38-22-01. That legislative pronouncement has been more than rhetoric. North Dakota was the first state to seek and obtain primacy over Class VI wells from the EPA. And over the last decade, the legislature has also financially supported its stated policy. Among other things, the legislature appropriated funds to the Carbon Dioxide Storage Facility Administrative Fund in 2011, exempted carbon-capture equipment from sales tax in 2015, exempted CO₂ for geologic storage from property and sales taxes in 2019 (HB1439), created the Clean Sustainable Energy in 2021 and, that same year, appropriated \$25 million in grant opportunities and \$250 million in commercialization loan programs.

These policies have, as intended, created a national customer base for carbon sequestration in North Dakota, which is why SCS’s application is now before the PSC—customers along the five-state route want to sequester the CO₂ they produce in North Dakota. But the Emmons County and Burleigh County ordinances are unreasonably restricting those efforts. Indeed, they are not only “unreasonably restrictive in view of” cost or economics or the needs of customers (inside and outside of North Dakota), the ordinances are completely prohibitive. Or as this body said several years ago when it preempted several township ordinances in Burleigh County that restricted the location of transmission lines: “These ordinances are not only restrictive, they are exclusionary.” See North Dakota Public Service Commission Case No. 9370, Order, ¶ 118.

As the maps above show, the setback requirements of both the Emmons County Ordinance and March 20 Burleigh County Ordinance make it impossible for any CO2 pipeline to run through the counties. If these ordinances are not “unreasonably restrictive” in their application to a CO2 pipeline, then no ordinance is, and section 49-22.1-13 is meaningless. So too are North Dakota’s policies favoring carbon sequestration. If every county has a veto right over a pipeline’s path, then the PSC is not the true routing authority, and the work that North Dakota has done to promote and encourage this important industry will have been for naught. The State cannot have a policy that “promote[s] geologic storage of carbon dioxide” (N.D.C.C. § 38-22-1) if the CO2 cannot be transported to storage sites. But that is what the Emmons County and Burleigh County ordinances prevent.³

Because an ordinance that effectively bans CO2 (and all other hazardous liquid pipelines) is by definition unreasonably restrictive and conflicts with North Dakota’s policy for promoting carbon sequestration, SCS respectfully requests that the PSC declare that the Emmons County Ordinance and the March 20 Burleigh County ordinances are superseded and preempted.

B. Because the county ordinances are based on safety concerns, they conflict with federal law.

The Eighth Circuit, which has jurisdiction over North Dakota, has repeatedly held that the federal Pipeline Safety Act (PSA), 49 U.S.C. §§ 60101 *et seq.*, preempts state and local government efforts to impose their own safety standards on federally regulated pipelines. The

³ The PSC should not—and indeed, North Dakota law does not—allow any county to effectively ban the routing of CO2 pipelines through their borders, but the ordinances in this case are particularly egregious because they were enacted months after SCS’s project was announced and millions of dollars invested in right-of-way. Before Emmons County enacted its ordinance, SCS had already purchased about 22 miles of right-of-way, which is about 60% of the pipeline route through Emmons County. And before Burleigh County enacted its first ordinance on March 6, SCS had already purchased about 23 miles of right away, which is about 55% of the pipeline route through Burleigh County.

PSA preempts both the Emmons and Burleigh County ordinances. *See ANR Pipeline Co. v. Iowa State Com. Comm’n*, 828 F.2d 465 (8th Cir. 1987); *Kinley Corp. v. Iowa Utils. Bd.*, 999 F.2d 354 (8th Cir. 1993); *cf. N. Nat. Gas Co. v. Iowa Utils. Bd.*, 377 F.3d 817 (8th Cir. 2004).

The United States Congress enacted the PSA to regulate *all safety aspects* of interstate CO2 pipelines, including SCS’s pipeline project. *See* 49 U.S.C. §60104(c) (“A State authority may not adopt or continue in force safety standards for interstate pipeline facilities or interstate pipeline transportation.”). Courts have uniformly held that “Congress has expressly stated its intent to preempt the states from regulating in the area of safety in connection with interstate hazardous liquid pipelines. For that reason, the state cannot regulate in this area[.]” *Kinley*, 999 F.2d at 359; *see also ANR Pipeline Co.*, 828 F.2d at 470 (“Congress intended to preclude states from regulating in any manner whatsoever with respect to the safety of interstate transmission facilities” and left “nothing to the states in terms of substantive safety”); *Exxon Corp. v. U.S. Sec’y of Transp.*, 978 F. Supp. 946, 950 (E.D. Wash. 1997); 49 C.F.R. § 195, App. A (“The [Act] leaves to exclusive Federal regulation and enforcement the ‘interstate pipeline facilities,’ those used for the pipeline transportation of hazardous liquids in interstate or foreign commerce.”).

The Burleigh County ordinance enacted on March 6, 2023 seeks to regulate pipeline safety—as set forth in the title of the Ordinance: “A Burleigh County Ordinance for *Safety Regulations* when Transporting Hazardous Liquid Through a Hazardous Liquid Pipeline.” *see also Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 307–09 (1988) (explaining that a state law’s purpose is relevant in determining whether the law is preempted). And the focus on pipeline safety extends throughout the Ordinance, with each of its four provisions all purporting to regulate pipeline safety: (1) it requires SCS to provide its safety procedures and protocols to any landowners within the pipeline’s site boundaries and to any other interested persons; (2) it requires SCS to provide a copy of its emergency action plan to Burleigh County Emergency Management; (3) if the Pipeline and Hazardous Materials Safety Administration of the U.S. Department of

Transportation (PHMSA) has adopted regulations specifically related to emergency preparedness, emergency response, or hazard mitigation planning for hazardous liquid pipelines, then it requires SCS to submit a copy of the emergency response and hazard mitigation plan to Burleigh County Emergency Management; and (4) if PHMSA has *not* adopted regulations specifically related to emergency preparedness, emergency response, or hazard mitigation planning for hazard liquid pipelines, then it requires SCS to submit a copy of any emergency response and hazard mitigation plan required under local zoning ordinances to Burleigh County Emergency Management.

The PHMSA reference highlights that the March 6 Ordinance infringes on the DOT's authority. Although the County concedes that PHMSA has the authority to prescribe pipeline safety standards for liquid pipelines, it ignores the PSA's express preemption provision, under which "[a] State authority may not adopt or continue in force safety standards for interstate pipeline facilities or interstate pipeline transportation." 49 U.S.C. § 60104(c). That provision preempts the March 6 Ordinance, which contemplates that a pipeline company may be required to submit an "emergency response and hazard mitigation plan" that differs from the PHMSA requirements. March 6 Ordinance at p. 2. The PSA's regulations set forth specific requirements for emergency preparedness: 49 C.F.R. § 195.402(e) requires hazardous liquid pipelines to prepare and follow a manual that includes "procedures . . . [for] when an emergency condition occurs," including "receiving, identifying, and classifying notices of events that need immediate response," "having personnel, equipment, instruments, tools, and material available as need at the scene of an emergency," and "assisting with evacuation of residents." Emergency response and preparedness is exactly the type of safety issue that the PSA and its regulations expressly preempt. *See Nat. Gas Pipeline Co. of Am. v. R.R. Comm'n*, 679 F.2d 51, 52 (5th Cir. 1982) (finding that a Texas Railroad Commission rule requiring natural gas companies "to provide specified procedures and safeguards to warn and protect the general public against the accidental release of hydrogen sulfide from their facilities" was preempted by the Natural Gas Pipeline Safety Act).

The PSA also preempts the Burleigh County Ordinance enacted March 20, 2023 and the Emmons County Ordinance enacted February 7, 2023—both of which impose burdensome separation or setback requirements that are intended as safety standards. The separation standards constitute an attempt to regulate pipeline safety. *See* March 20 Ordinance at p. 4 (stating that the ordinance is designed to “(1) to secure safety from fire, flood, panic, and other dangers; (2) to protect health and the general welfare . . .”); Emmons County Ordinance at p.1 (requiring setback from cities, residences, buildings, surface water bodies, and highway rights-of-way). But that conflicts with the PSA, which already addresses setback requirements. *See* 49 C.F.R. § 195.210(a) (“Pipeline right-of-way must be selected to avoid, as far as practicable, areas containing private dwellings, industrial buildings, and places of public assembly.”); *id.* § 195.210(b) (“No pipeline may be located within 50 feet (15 meters) of any private dwelling, or any industrial building or place of public assembly in which persons work, congregate, or assemble, unless it is provided with at least 12 inches (305 millimeters) of cover in addition to that prescribed in § 195.248.”).⁴

The purpose of each ordinance is to address safety aspects of hazardous liquid pipelines. But under the PSA, the DOT (not county governments) prescribes what hazardous liquids may flow through an interstate pipeline, applying adequate, practicable, and uniform regulations. *See, e.g.,* 49 C.F.R. §§ 195.100 through 195.446. The ordinances purport to implement “safety standards for interstate pipeline facilities or interstate pipeline transportation” and are therefore void under the doctrines of express and field preemption as a matter of federal law. 49 U.S.C. § 60104(c); *see also Olympic Pipe Line Co. v. City of Seattle*, 437 F.3d 872, 880 (9th Cir. 2006) (explaining that the PSA “preempts” any local government’s “attempt to impose safety regulations” on interstate pipeline projects).

⁴ Like the March 6 Ordinance, the Emmons County Ordinance references PHMSA, which highlights that the ordinance is treading on preempted ground.

CONCLUSION

The legislature has made it State policy to promote and encourage carbon-dioxide sequestration, and it has given the PSC the exclusive authority to route and site the pipelines that transport that CO₂ to sequestration sites. Indeed, that is the very purpose of North Dakota Century Code section 49-22.1-13(2). Because the Emmons County and Burleigh County ordinances attempt to dictate the path of CO₂ pipelines and unreasonably restrict (indeed, ban) their construction, SCS respectfully requests that, as part of its final order, the PSC make the following legal conclusions and findings of fact:

1. The Emmons County Ordinance and the March 20 Burleigh County Ordinance are unreasonably restrictive in view of existing technology, factors of cost or economics, or needs of consumers regardless of their location.
2. The Emmons County Ordinance and the March 20 Burleigh County Ordinance conflict with state law, namely the State's policy of promoting carbon sequestration.
3. The Emmons County Ordinance, the March 6 Burleigh County Ordinance, and the March 20 Burleigh County Ordinance conflict with federal law, namely Pipeline Safety Act.
4. The Emmons County Ordinance, the March 6 Burleigh County Ordinance, and the March 20 Burleigh County Ordinance are superseded and preempted under N.D.C.C. § 49-22.1-13(2)(b).

Dated this 1st day of June 2023.

FREDRIKSON & BYRON, P.A.

By: 

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**STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION**

**SCS Carbon Transport LLC
Midwest Carbon Express CO2 Project
Sitting Application**

CASE NO. PU-22-391

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a true and correct copy of the following:

1. Letter to S. Kahl forwarding documents for filing;
2. SCS Carbon Transport LLC's Motion to Declare Emmons County and Burleigh County Ordinances Superseded and Preempted; and
3. SCS Carbon Transport LLC's Brief in Support of Motion to Declare Emmons County and Burleigh County Ordinances Superseded and Preempted

were, on June 1, 2023, filed with the North Dakota Public Service Commission and served electronically to the following:

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Dated this 1st day of June, 2023.

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