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June 29, 2023

Via Hand-Delivery

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

Re: SCS Carbon Transport LLC
Midwest Carbon Express Project
Case No: PU-22-391

Dear Mr. Kahl:

Enclosed for filing in Case No. PU-22-391, please find *Bismarck Area Intervenors' Response in Opposition to SCS Carbon Transport LLC's Motion to Declare Emmons County and Burleigh County Ordinances Superseded and Preempted & Request for Oral Argument* and *Certificate of Service*, with seven copies of same.

Please do not hesitate to contact the undersigned if you have any questions about this filing.

Very Truly Yours,

Randall J. Bakke

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STATE OF NORTH DAKOTA

PUBLIC SERVICE COMMISSION

SCS Carbon Transport LLC
Midwest Carbon Express CO2 Pipeline Project
Siting Application

Case No: PU-22-391

OAH File No: 20230002

BISMARCK AREA INTERVENORS' RESPONSE IN OPPOSITION TO SCS CARBON TRANSPORT LLC'S MOTION TO DECLARE EMMONS COUNTY AND BURLEIGH COUNTY ORDINANCES SUPERSEDED AND PREEMPTED & REQUEST FOR ORAL ARGUMENT

The Commission should deny Summit Carbon's[1] request to supersede and preempt validly and lawfully enacted county ordinances that neither prevent carbon dioxide pipelines from being built or sited, nor impermissibly infringe on State or federal law that respectively govern pipeline siting and carbon dioxide pipeline safety standards. The ordinances should be upheld as valid expressions of the counties' legitimate authority to enact ordinances that are critical to planning, land use, and economics as well as to the health and safety of the citizenry. The arguments for preemption and supersession raised by Summit Carbon are seriously misleading, and are factually and legally incorrect. Neither North Dakota nor Federal law supersedes/preempts the county ordinances at issue here. Moreover, Summit Carbon's "maps" allegedly showing the impossibility of siting a pipeline that complies with the challenged ordinances is nothing more than sleight of hand by a multi-billion-dollar company that has access to the latest and greatest mapping technology (as well as lawyers from multiple states), and should therefore know better than to

[1] Intervenors John H. Warford, Jr. as Trustee of the John H. Warford, Jr. Revocable Trust ("Warford"), Chad Wachter, and Chad Moldenhauer (collectively, "Bismarck Area Intervenors"), by and through their attorneys, object to and oppose the *SCS Carbon Transport LLC's Motion to Declare Emmons County and Burleigh County Ordinances Superseded and Preempted* (doc. 282) dated June 1, 2023. "Summit" or "Summit Carbon" are used herein to refer to the Applicant in these proceedings.

attempt to deliberately mislead the Commission and the public. The assumptions Summit Carbon apparently applies to its maps actually totally conflict with the setbacks and definitions that apply to and are found in the challenged ordinances. For these reasons and as more fully set forth below, Summit's motion should be denied.

A. Summit Carbon's Maps Allegedly Showing No Pipeline Route Through Burleigh County Are Seriously False and Misleading.

Without explaining its methodology, Summit submits maps of Burleigh and Emmons counties, allegedly showing there is no pipeline route through either county, and thus the ordinances serve as *de facto* "bans" on any carbon dioxide pipeline in those counties. In creating its Burleigh County map, Summit contends it applied the set-backs contained in the Burleigh County Ordinance,[2] allegedly resulting in the Ordinance not allowing any CO2 pipeline to be built anywhere in the County at all (Summit states: "It is not an illusion; the entire county is gray."). However, Summit did not actually apply the definitions and set-backs contained in the actual Burleigh County Ordinance and did not factor in the Burleigh County townships that are not within Burleigh County's governing jurisdiction. Accounting for the actual setbacks and the townships where the challenged ordinance does not apply shows there is indeed substantial room and numerous locations to site a pipeline. It is clear that Summit applied its own definitions and assumptions to create the appearance of a total carbon dioxide pipeline ban in the County.

But the Burleigh County ordinances completely contradict Summit's wrongheaded interpretation, and Summit simply fails to consider the applicable provisions that are actually provided in the challenged Burleigh County Ordinance. According to Burleigh County, there are 47 townships in the County, with "34 townships being formally organized and electing a Board of

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[2] Summit's initial briefing (Docket #282) referred to the wrong ordinance, but it has since clarified it is challenging the April 17, 2023 Burleigh County Ordinance (Docket #313).

Supervisors." The County also states: "The Townships of Burnt Creek, Canfield, Florence Lake, Fort Rice, Lincoln, Lyman, Phoenix and Riverview are unorganized and governed by the Burleigh County Commission." *See* https://www.burleighco.com/townships/, last visited June 22, 2023.[3] In relation to Burleigh County's jurisdiction over the townships in the County, the following is taken directly out of its ordinances:

ARTICLE 5

GENERAL PROVISIONS AND GUIDELINES

Section 1. County Zoning Jurisdiction

Burleigh County has zoning jurisdiction for the following townships:

Burnt Creek	Glenview	Menoken
Crofte	Hay Creek	Phoenix
Fort Rice	Riverview	Lyman
Gibbs	Florence Lake	Canfield
Cromwell		

https://burleighco.com/uploads/resources/3569/official-copy-of-zoning-ordinance-2019.pdf, at page 27, last accessed on June 28, 2023. Although the chart of the Burleigh County Townships at the website has not been updated, Cromwell, Canfield, and Florence Lake are now under the zoning jurisdiction of Burleigh County, and Hay Creek is partially under Burleigh County jurisdiction. So, only 13 out of the 47 townships are townships where Burleigh County has zoning and land use jurisdiction for any Burleigh County ordinances. There are also 5 townships that have adopted zoning and land use ordinances similar to Burleigh County's zoning and land use ordinances (designated on the attached map discussed below as "similar ordinances"). When the Burleigh County map is considered without the 34 townships where the Ordinance has no

[3] Bismarck Area Intervenors have attached hereto as ***Exhibit A*** the relevant portions of Burleigh County's Zoning Ordinance, including all amendments through January 1, 2019 (publicly available on its website).

jurisdictional effect (and adding those 5 townships that have adopted similar ordinances), the story is quite different than the *de facto* ban Summit itself has created out of whole cloth. There are a total of 29 townships where the Burleigh County zoning and land use ordinances have no jurisdictional effect, and where those townships have not adopted similar ordinances of their own. The attached map, labeled as ***Exhibit B***, and created by Burleigh County, illustrates the very real possibilities of pipeline routes through the County notwithstanding the setbacks and other requirements in the townships where the challenged Ordinance applies.

Another example of the misleading nature of Summit's solid grey maps concerns the term "animal feeding operation or facility", which is one of the setbacks ("not less than 1 mile") contained in the Burleigh County Ordinance. Summit's solid grey map apparently considered all pasture land in the County to be an animal feeding operation or facility. However, the term "animal feeding operation/facility" is a defined term in Burleigh's County's ordinances that does not encompass simply grass and pasture land. It would appear Summit did not bother to check out the relevant definitions used by Burleigh County when creating its solid grey map. The following language is taken directly from Burleigh County's Ordinances (which are publicly available on its website). The Ordinance provides the definition of animal feeding operation or facility as follows:

> Animal Feeding Operation - A place where: 1) livestock have been, are, or will be confined, concentrated and fed for forty-five (45) or more days in any twelve (12) month period; 2) pasture, crops, or other vegetation are not normally managed or sustained for grazing during the normal growing season; and 3) animal waste or manure accumulates. All such operations containing one thousand (1,000) or more animal units shall be defined as an animal feeding operation. [. . . .]

Burleigh County Zoning Ordinance, Article 3, Definitions, at page 7. Burleigh County further sets out the types of farming and ranching activities that are *not* considered an animal feeding operation or facility, as follows:

All of the livestock related uses in the following list refer to activities that are not defined as animal feeding operations as specified in the Zoning Ordinance.

1. The following uses are declared to be in the General Farming Group:
a. Dairy farming
b. Fur animal farming
c. Livestock raising and feeding
d. Pig farrowing and feeding
e. Poultry hatchery
f. Poultry farming and feeding
g. Roadside stand for the sale of products grown on the premises
h. Field crop farming
i. Grain elevators
j. General animal husbandry
k. All customary farming and ranching activities and operations

Burleigh County Zoning Ordinance, Section 15. General Farming Group at page 43. Based on the applicable Burleigh County Ordinances, setting back the pipeline not less than 1 mile from pasture and grazing land (rather than from actual animal feeding operations) – as Summit has apparently done with its maps – is disingenuous.

These are but a few of the deceptive means Summit apparently utilized in its maps in order to serve its false narrative the Burleigh County Ordinance bans all Carbon Dioxide pipelines, and thus should be superseded by State statute. There are likely other similar instances of Summit intentionally misconstruing the Burleigh County Ordinance as well, but since Summit has not described its map-making methodology or the analysis that went into the maps, it is impossible for the Bismarck Area Intervenors to point out those other flaws to the Commission. Suffice it to say, Summit's maps and argument that the entirety of Burleigh County is a "no-build" area for carbon dioxide pipelines is demonstrably false.

B. Summit has Not Complied with the Requirements; Has Not Applied for A Special Use Permit with the County; Nor Has it Communicated with the County About its Proposed Pipeline Route.

In addition to the foregoing, Summit has never even made an attempt to communicate with the County to determine the County's position on its proposed pipeline route or other potential

routes through the County. Had Summit done so, it would have learned most of the County's townships are not subject to the challenged Ordinance; it would have learned what the County intended and meant by its use of animal feeding operation setbacks and other setbacks; and it would have learned there are special use and variance procedures available where there may be an apparent conflict with one or more of the setback requirements in the Ordinance. Nevertheless Summit has not even attempted such communications with the County, but now contends in these proceedings that the County will not allow the pipeline in the County. This is another completely misleading argument by Summit crafted to support its supersession/preemption motion.

Burleigh County's Ordinances indeed provide for special use permits. Burleigh County Ordinance, **Article 8, Special Uses**, pages 46-48. Appeals are provided for by the County as well. *Id.* at **Article 27, Appeal Procedure**, page 166. Finally, Burleigh County allows for variances from any of the requirements of its Ordinances. *Id.*, **Article 28, Variances**, page 167. "Variance" is defined by Burleigh County as "[a] grant of relief from the literal provisions of this Ordinance in situations where strict adherence would cause practical difficulty or unnecessary hardship because of circumstances unique to the property." *Id.* at page 22. In addition to the special use, appeal, and variance procedures are generally available to persons such as Summit Carbon, the challenged Ordinance itself provides for appeals and variances, stating:

> X. Appeals and Variances
> A Pipeline Company or a Property Owner may appeal an adverse determination on a Special Use Permit, or may seek a special exception or variance from the Board of County Commissioner, as provided in Article 1 Section 7 and Article 26 Section 1 of this Zoning Ordinance.

Burleigh County Ordinance, at Article X.[4]

[4] The courts are required to construe ordinances in the same manner they construe statutes. *Arnegard v. Arnegard Twp.*, 2018 ND 80, ¶ 14, 908 N.W.2d 737, 746. The applicable standard for statutory interpretation is set forth below at page 13.

Not only does the challenged Burleigh County Ordinance not serve as a *de facto* ban of Summit Carbon's carbon dioxide pipeline through the County, but also Summit Carbon has not bothered even to apply for a special use permit or a variance, and has not bothered to communicate with the County about the route or some other route. All of this proves the falsity of Summit Carbon's arguments that the Burleigh County Ordinance conflicts with North Dakota's pipeline siting statutes applicable to the PSC. Neither the Ordinance itself nor the County have done anything to alter or prevent Summit Carbon's proposed pipeline.

C. North Dakota Law Does not Automatically Supersede / Preempt the Challenged County Ordinances.

Citing a former North Dakota statute, amended and reenacted in 2019, Summit Carbon argues the statute "automatically preempts" the ordinances at issue. It argues in the alternative, that if the challenged county ordinances are not automatically preempted, they are nevertheless preempted because they are unreasonably restrictive essentially because Summit's ethanol plant customers want to inject their carbon dioxide into North Dakota so they can become carbon neutral. None of Summit's arguments are accurate. In fact, Summit badly misconstrues the plain meaning of the Statute and its argument about what ethanol facilities out of State may want would turn on its head the intent of the Legislature in enacting a Statute that was meant to protect North Dakota "consumers".

The referenced statute provides as follows:

> 1. The issuance of a certificate of site compatibility or a route permit is, subject to subdivisions 2 and 3, the sole site or route approval required to be obtained by the utility.
> 2. a. **A certificate of site compatibility for a gas or liquid energy conversion facility may not supersede or preempt any local land use; zoning; or building rules, regulations, or ordinances, and a site may not be designated which violates local land use; zoning; or building rules, regulations, or ordinances.**

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.**
d. When an application for a certificate for a gas or liquid transmission facility is filed, the commission shall notify the townships with retained zoning authority, cities, and counties in which any part of the proposed corridor is located. The commission may not schedule a public hearing sooner than forty-five days from the date notification is sent by mail or electronic mail. Upon notification, a political subdivision shall provide a listing to the commission of all local requirements identified under this subdivision. The requirements must be filed at least ten days before the hearing or the requirements are superseded and preempted.
e. **An applicant shall comply with all local requirements provided to the commission pursuant to subdivision d, which are not otherwise superseded by the commission.**
[. . . .]

N.D.C.C. § 49-22.1-13 (emphasis added).

The crux of the question presented to the Commission in this motion relates to the interplay and proper interpretation of *all* of the subdivisions of N.D.C.C. § 49-22-16; in other words, the entirety of the Statute. For its part Summit argues subdivisions 2a, c, d, and e can be disregarded out of hand and the Commission should simply apply subdivision 2b, which it argues automatically supersedes and preempts Burleigh County's Ordinance, precisely because it is a zoning/land use ordinance. Summit argues no further statutory analysis is required as approved pipeline corridors always and everywhere negate county zoning and land use ordinances of every kind pursuant to subdivision 2b. It also contends that the entirety of the Statute applies to two types of local ordinances: (1) zoning and land use – automatically preempted; and (2) county requirements / road use agreements – not automatically preempted, but potentially preempted. Summit even argues

that failing to interpret and apply subdivision 2b of the Statute as it suggests would nullify and cause subdivision 2b to become extraneous, which the rules of statutory interpretation do not allow.

But such an interpretation as Summit argues here actually conflicts with common sense, conflicts with the plain language of subdivision 2b, and conflicts with the rest of the Statute. In relation to common sense, no one would believe for example that land zoned Agricultural within a pipeline corridor would suddenly lose the ability to have crops grown there or cattle grazing there because the zoning had been automatically superseded by subdivision 2b. That would be both counterintuitive and would conflict with all of Summit Carbon's testimony to date that the pipeline will not interfere with such uses. In fact, Summit has touted and continues to tout all of the easements obtained from North Dakota's landowners, which expressly preserve those owners' ability to keep doing their usual farming or ranching operations after the pipeline has been installed.

Moreover, that very subdivision – subdivision 2b – contains an introductory clause stating, "Except as provided in this section. . ." demonstrating exceptions elsewhere in the Statute indeed apply to the supersession/preemption discussed in subdivision 2b. This express exception includes the provision in the very first subdivision of the Statute, subdivision 2a, which provides that a "certificate of site compatibility **may not** supersede or preempt any local land use; zoning; or building . . . ordinances[.]" (emphasis added). The exception clause in subdivision 2b also includes the last subdivision, subdivision 2e, which requires that the "applicant shall comply with all local requirements provided to the commission pursuant to subdivision d[.]" Summit's interpretation

totally contradicts or at the very least ignores all of this extremely important statutory language included in the Statute by the Legislature.[5]

Additionally, subdivision 2b by its plain language applies to a "permit for the construction of a [pipeline or transmission facility] within a designated corridor" and such permit supersedes or preempts local regulation. The subdivision is limited to a "permit for construction" superseding local ordinances. The better and more logical reading of subdivision 2b is that it applies only to supersede and preempt any county, township, or city *building permitting* process for the pipeline or pipeline facilities that will be built within the pipeline corridor approved by the Commission. This is the more logical reading of subdivision 2b (as well as the Statute as a whole) precisely because it is the PSC's permitting process that controls over local building permitting for construction work within the corridor. This interpretation of Section 2b allows all of the Statute's subdivisions to have effect and none of them to become extraneous. The challenged Burleigh County Ordinance does not require building permitting at all, but rather relates to special use / land use permitting. Therefore, subdivision 2b does not apply here by its plain language.

On the other hand, Summit's interpretation of subdivision 2b is badly flawed, ignores the plain language of the statutory subdivision it requests the Commission apply against the duly enacted ordinances of North Dakota counties, and ignores other statutory language in the same Statute that directly conflicts with its interpretation – including express statutory language (subdivision 2a) requiring the Commission and Summit Carbon to comply with local zoning and land use ordinances. Summit's argument that the entire Statute refers to and relates to only two

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[5] The most recent 2019 amendment to this Statute (attached hereto as ***Exhibit C***) and the legislative history discussed by the other Intervenors demonstrates Summit's argument about legislative intent to provide that a site permit always automatically supersedes and preempts any and all local zoning and land use ordinances is false. No such intention can be gleaned from the amendment or the legislative history.

kinds of local regulations – (1) zoning and land use, and (2) road use agreements – finds no support in the Statute itself or in North Dakota law.

As part of its alternative argument, Summit further argues the evidentiary process, factors, and burden of proof contained in subdivision 2c applies only to road use agreements. But that interpretation is also fatally flawed as the evidentiary process and burden apply by that subdivision's plain language to "the requirements of a political subdivision" and to "the regulations or ordinances" of a political subdivision. The referenced requirements, regulations, or ordinances are broad enough to refer to land use / zoning ordinances like the ones Summit challenges. Moreover, subdivisions 2c, d, and e, all refer to "local requirements" (which is not a defined term in Chapter 49-22.1), but it is clear those subdivisions do not refer only to "road use agreements" as Summit contends. This is another argument that conflicts with the plain meaning of the entire Statute.

Subdivision 2c indeed sets out the factors Summit must prove by a preponderance of the evidence in order to have county ordinances declared superseded or preempted. However, Summit has never taken any steps to meet its evidentiary burden as set forth in subdivision 2c, and in fact refused at the June 2nd hearing to provide any witnesses at all. As set forth above, Summit has not shown the Burleigh County Ordinance is "unreasonably restrictive". Nor has it shown (as discussed above and herein below) that the Ordinance is in direct conflict with State or federal law. Additionally, Summit's emphasis on to its customers' needs – almost all out-of-State ethanol plants – to dump their carbon dioxide in North Dakota has nothing whatsoever to do with the term "consumers" as used in subdivision 2c. Logically speaking, "needs of consumers" as used in subdivision 2c of the Statute does not and cannot refer to out-of-State ethanol plants. By Summit's admission, the supercritical state carbon dioxide it plans to transport across North Dakota and to

inject underground "for permanent storage" literally cannot have a "consumer". Summit simply has not begun to meet the evidentiary burden set forth in subdivision 2c and has apparently given up trying to meet that burden. The legal arguments of Summit's attorneys are not evidence of the factors that apply to the required analysis in relation to subdivision 2c and the Commission should therefore reject Summit's alternative argument.

Summit cites the Dakota Supreme Court in *Schulke v. Panos,* 2020 ND 53, ¶ 13, 940 N.W.2d 303, 307, for the proposition the Commission "must reconcile the two statutory provisions in a manner that gives effect to both provisions." Summit Motion at 10. Bismarck Area Intervenors agree the Commission must reconcile *all* of the statutory provisions to give effect to the entirety of the Statute when considering Summit's motion, but does not agree the Commission should buy in to Summit's false dichotomy or patently incorrect interpretation. By applying Summit's faulty interpretation to the Statute, it would have the Commission wholly ignore the plain meaning of subdivision 2b, as well as the remaining subdivisions[6] of the Statute as if they were not critical components and integral parts of the entire Statute. Such a narrow interpretation

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[6] As shown above, subdivision 2d requires North Dakota counties to file their "local requirements" with the Commission prior to a public hearing, and to the extent those local requirements are not timely filed, the local requirements are automatically "superseded and preempted." Both ordinances were timely filed with the Commission and are therefore not superseded as set forth in subdivision 2d. Summit concedes and the record confirms an earlier version of Burleigh County's Ordinance was offered and admitted as an exhibit during the March 14, 2023 hearing (Docket # 114). The proposed April 17, 2023 version of the Ordinance (not yet adopted at the time of the March 14, 2023 hearing) was filed on May 5, 2023 by Mitch Flanagan, Burleigh County Building, Planning & Zoning Department (Docket # 206). The Bismarck Area Intervenors also offered the April 17, 2023 adopted Ordinance at the June 2, 2023 PSC hearing, which was admitted into the record (Docket # 313). The enacted March 20 Ordinance was filed on March 30, 2023 by Mitch Flanagan. (Docket # 161). The challenged Emmons County Ordinance was filed on February 17, 2023 (Docket # 49) by Marlys Ohlauser, Emmons County Auditor/Treasurer; and presented to the Commission during the March 14, 2023 PSC hearing by Intervenor John H. Warford. (Docket # 107). It is the April 17, 2023 amended Burleigh County Ordinance that is at issue in this motion.

flies in the face of the Statute's plain language and legislative intent, as well conflicts with North Dakota law on statutory interpretation, which requires:

> "Statutory interpretation is a question of law, which is fully reviewable on appeal. The primary purpose of statutory interpretation is to determine the intention of the legislation. Words in a statute are given their plain, ordinary, and commonly understood meaning, unless defined by statute or unless a contrary intention plainly appears. N.D.C.C. § 1-02-02. If the language of a statute is clear and unambiguous, 'the letter of [the statute] is not to be disregarded under the pretext of pursuing its spirit.'"

Arnegard v. Arnegard Twp., 2018 ND 80, ¶ 11, 908 N.W.2d 737, 745 (quoting *Zajac v. Traill Cty. Water Res. Dist.*, 2016 ND 134, ¶ 6, 881 N.W.2d 666 (citations omitted)). The Commission should apply North Dakota's legal standard in construing N.D.C.C. § 49-22.1-13 with respect to the challenged county ordinances and should reject Summit Carbon's artificial and self-serving approach that finds no support in the Statute itself or in North Dakota law.

D. PHMSA and PSA Regulations Do Not Preempt the Challenged County Ordinances.

Summit's final argument is that the Burleigh County Ordinance conflicts with PHMSA's and the Pipeline Safety Administration's (PSA) exclusive jurisdiction over pipeline safety, and thus the Ordinance is preempted. This is another false argument that finds no basis in the law or the facts. The following legal standard provides that only those laws directly conflicting with or those that frustrate the purposes of a federal regulation ("federal statute or action") are preempted:

> A state statute which either frustrates the purpose of federal legislation or impedes the operation of the federal agency charged with superintending a preempted field cannot stand. *Nash v. Florida Industrial Commission*, 389 U.S. 235, 88 S.Ct. 362, 19 L.Ed.2d 438 (1967). Even though a federal statute does not specifically exclude state legislation, it nevertheless overrides those state laws with which it conflicts. *Chicago-Midwest Meat Association v. City of Evanston*, 589 F.2d 278 (7 Cir. 1978), cert. den. 442 U.S. 946, 99 S.Ct. 2895, 61 L.Ed.2d 318. Federal preemption of state law or action under the Supremacy Clause of the United States Constitution may come about in two ways: First, preemption may occur because of a direct conflict between authorized federal and state action, and, Second, preemption may occur if

> a state statute or action stands as an obstacle to the accomplishment and execution of the federal statute or action. See: *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941), and *Perez v. Campbell*, 402 U.S. 637, 650-51, 91 S.Ct. 1704, 1711-12, 29 L.Ed.2d 223 (1971). And, federal statutes which regulate a multi-state activity which cannot be regulated effectively or realistically by competing states preempts state statutes. *Cloverleaf v. Patterson*, 315 U.S. 148, 167, 62 S.Ct. 491, 501, 86 L.Ed. 754 (1942).

FERC v. Pub. Serv. Comm'n, 513 F. Supp. 653, 656 (D.N.D. 1981). The *FERC v. Public Service Commission* case analyzed federal preemption in relation to competing State and federal pipeline siting laws concerning a national pipeline starting in Alaska that was planned to traverse part of North Dakota. As discussed in that case: "the North Dakota Public Service Commission approved a pipeline corridor different than that previously selected by the President and certificated by the FERC." *Id.* at 655. Because of this, the federal Court held: the Congressionally enacted Alaska Natural Gas Transportation Act (ANGTA) preempted the directly conflicting North Dakota Public Service Commission pipeline routing decision. *Id.* at 656 (holding: "I conclude that the challenged North Dakota statutes, insofar as they conflict with the federal scheme for the routing and construction of the pipeline to be built pursuant to ANGTA, 15 U.S.C. s 719 et seq., stand as an obstacle to the accomplishment and execution of valid purposes and objectives of Congress. For that reason, and to that extent, they must yield to overriding federal law.").

Unlike that 1981 federal case, the Burleigh County Ordinance Summit challenges neither directly conflicts with nor does it frustrate the purposes of PHMSA or the PSA. Citing irrelevant and distinguishable Eighth Circuit case law,[7] Summit argues county ordinances that attempt to

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[7] For example, in *Kinley Corp. v. Iowa Utilities Bd., Utilities Div., Dep't of Com.*, 999 F.2d 354, 357 (8th Cir. 1993), the State of Iowa issued a cease and desist order and assessed civil penalties to the owner of an interstate aviation gas pipeline that had not previously applied for a state permit under Iowa law, which included supposed "gap filling" hearings, permitting and inspections of the pipeline itself, including for the pipeline's operations, construction standards, and physical integrity. The *Kinley* Court held such gap filling measures were expressly preempted by the

"impose their own safety standards on federally regulated pipelines" are preempted by the federal Pipeline Safety Act (PSA). The Burleigh County Ordinance does not "impose safety standards" on this pipeline. Other than to argue its carbon dioxide pipeline route has been made impossible in Emmons and Burleigh counties (a categorically false statement as shown above) and that the title of a portion of the Burleigh County Ordinance has the word "safety" in it, Summit does not provide concrete examples of how the challenged Ordinance directly conflicts with or frustrates the purpose of the PSA or PHMSA. In reality, a review of the Burleigh County Ordinance shows it to be highly deferential and complimentary to PHMSA, and only requires essentially what PHMSA already requires. In fact it states outright that its purpose is not to conflict with the PSA or other federal law:

> The purposes of this ordinance are:
> [. . . .]
> To implement Section 27 in a manner that is not inconsistent with federal or state law, including the United States Constitution, the federal Pipeline Safety Act in 49 U.S.C. § 60101 et seq., NDCC Chapters 38-22, 49-02. 49-19 and 49-22.1-13 or applicable provisions within NDCC.

See Ordinance at Section II(3). Contrary to Summit's arguments, the Ordinance is deferential to State law, federal law and to State and federal regulations.[8]

All of the objectionable Ordinance "safety" provisions referenced by Summit in its motion (Summit Motion at pages 10-11) relate to issues already required in the federal regulations, including the requirement Summit make the public and appropriate local governments aware of

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Hazardous Liquid Pipeline Safety Act of 1979 (HLPSA). *Id.* at 359. Another case cited by Summit from the Ninth Circuit, *Olympic Pipe Line Co. v. City of Seattle*, 437 F.3d 872, 880 (9th Cir. 2006), held the City of Seattle's attempt to conduct "safety oversight" of an interstate pipeline was preempted, which the Burleigh County Ordinance does not attempt to do.

[8] Summit cites *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 307-09 (1988) for the proposition a "law's purpose is relevant in determining whether the law is preempted". Applying this standard, it is clear the Burleigh County Ordinance's purpose is not to preempt federal regulations.

carbon dioxide pipeline hazards specific to this pipeline and how to react to those hazards. The same federal regulations Summit has cited in an attempt to keep its plume modeling sealed from the public, also requires Summit to communicate with first responders and local governments about its emergency preparedness response and emergency action planning. How can Burleigh County's Ordinance that simply requires information sharing already required by federal regulations be in direct conflict with those federal regulations? And how can it be fairly said the Burleigh County Ordinance frustrates the purpose of those federal regulations that require the same information sharing? Conversely, if PHMSA or another federal agency had not promulgated regulations dealing with education of the public on the hazards of this pipeline and dealing with local emergency and first responders, how could Burleigh County's Ordinance be said to conflict with what has *not* been promulgated? Either way, there is no conflict and thus no need for preemption.

As indicated sharing of emergency preparedness and emergency action information is already a requirement in the federal regulations. *See e.g.*, 49 C.F.R. § 195.402(e)(1), (6) & (7) (requiring pipeline operators to "prepare and follow a manual of written procedures" including for "abnormal operations and emergencies" and requiring operators to "share planned responses" in emergency events with local emergency responders); 49 C.F.R. § 195.408 (requiring operators to have open "communication[s] with fire, police, and other appropriate public officials during emergency conditions, including a natural disaster."). So too is educating the public on hazards already contained in and required by federal regulation. In this regard, Summit must "develop and implement a written continuing public education program", which includes educating "the public [and] appropriate government organizations" with respect to the following emergency situations: "(2) Possible hazards associated with unintended releases from a hazardous liquid or carbon

dioxide pipeline facility; (3) Physical indications that such a release may have occurred; [and] (4) Steps that should be taken for public safety in the event of a hazardous liquid or carbon dioxide pipeline release[.]" 49 C.F.R. § 195.440. How would Summit fulfill those regulatory obligations if it continues to keep secret its emergency action planning from the very local authorities and first responders that have the most need of that information, and who are duty bound to protect the public? It is difficult to fathom how the County's Ordinance simply requiring of Summit what it is already required to do by federal regulation directly conflicts with the federal regulation or frustrates its purpose. In actuality, there is no conflict and there is no frustration of purpose. The Commission should reject Summit's federal preemption argument.

Summit also argues the setbacks in the Burleigh County Ordinance are impermissible infringements on the PSA's own setback requirements contained in 49 C.F.R. § 195.210. But those are minimum "dwelling place" requirements that do not conflict with Burleigh County's Ordinance, and more importantly Summit has conceded since the beginning of this case that the State's own statutory "exclusion and avoidance areas" – including those specified in N.D.C.C. § 49-22.1-03 – are valid and must be followed by Summit and by the Commission. Summit does not explain why it believes the State's setbacks are not preempted but Burleigh County's setbacks suddenly are. Indeed, Summit fully concedes Chapter 49-22.1 must be applied by the Commission in making its determination on Summit's application. *See e.g.*, *Summit's Application* (Docket # 1-3) at pdf page 17, stating, "Information provided herein is in accordance with Chapter 49-22.1 of the North Dakota Century Code (NDCC)"; *SCS Carbon Transport LLC's Response to Intervenor John Warford's Motion to Compel* (docket # 275) at pages 13-14 (citing the factors the Commission must apply in N.D.C.C. § 49-22.1-02, including with respect to the "location, construction, and operation" of the pipeline and its "affects [on the] environment and the welfare

of the citizens of this state." It is disingenuous for Summit to argue the State's own avoidance and siting statutes are not preempted by a federal regulation but Burleigh County's and Emmons County's ordinances are. This is yet another example of Summit seeking to mislead the Commission.

E. Conclusion

For the reasons discussed above, Bismarck Area Intervenors respectfully request the Commission deny the *SCS Carbon Transport LLC's Motion to Declare Emmons County and Burleigh County Ordinances Superseded and Preempted* (doc. 282). Summit Carbon has continued by this latest motion to game the system without regard to the legitimate interests of the counties, the citizens of this State, or anyone else's interests but its own. Summit Carbon's motion should be denied.

Dated this 29th day of June, 2023.

BAKKE GRINOLDS WIEDERHOLT

By: _____

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BURLEIGH COUNTY

ZONING ORDINANCE

Includes all amendments through January 1, 2019

Exhibit A

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Specified sexual activities:

1. Human genitals in a state of sexual stimulation or arousal;

2. Acts of human masturbation, sexual intercourse or sodomy;

3. Fondling of human genitals, pubic region, buttock or female breast.)

Agriculture District - Shall include any lands or areas so designated A-Agricultural by the Board of County Commissioners under authority of this Ordinance.

Alley - (Article 30): A strip of land, dedicated to public use, primarily to provide vehicular service access to the side or rear of properties otherwise abutting on a street.

Animal Clinic - See "Veterinary".

Animal Feeding Operation - A place where: 1) livestock have been, are, or will be confined, concentrated and fed for forty-five (45) or more days in any twelve (12) month period; 2) pasture, crops, or other vegetation are not normally managed or sustained for grazing during the normal growing season; and 3) animal waste or manure accumulates. All such operations containing one thousand (1,000) or more animal units shall be defined as an animal feeding operation. This term does not include an animal wintering operation. Adjoining animal feeding operations under common ownership are considered to be one animal feeding operation if they use common areas or systems for manure handling. An animal feeding operation in place and operating on the date this ordinance is effective September 5, 2001 shall be considered an existing animal feeding operation and shall not be subject to the requirements of this Ordinance unless it expands by any number of animal units.

Animal Feeding Operation Operator - An individual or group of individuals, a partnership, a corporation, a joint venture, or any other entity owning or controlling one or more animal feeding operations or animal wintering operations.

Animal Hospital - See "Veterinary".

Animal Wintering Operation - The confinement of cattle or sheep used or kept for breeding purposes in a feedlot or sheltered area at any time between October 15 and May 15 of each production cycle under circumstances in which these animals do not obtain a majority of their feed and nutrients from grazing. The term includes the weaned offspring of cattle and sheep, but it does not include: 1) breeding operations of more than one thousand (1,000) animal units or 2) weaned offspring which are kept longer than one hundred-twenty (120) days and

of a dwelling as a tourist home shall not be considered an accessory use nor a customary home occupation.

Trailer - Any vehicle or structure, including but not limited to an automobile trailer and trailer coach, mounted on wheels for use on highways and streets; propelled or drawn by its own or other motor power; and designed and constructed to provide for living or sleeping quarters for one (1) or more persons or for the conduct of a business, profession, trade or occupation, or use as a selling or advertising device. If wheels of a trailer are removed, except for repair it is deemed to be a building subject to all the regulations therefore.

Trailer Camp - A tract of land, together with open spaces required by this or any other regulation, used, designed, maintained, or held out to accommodate ten (10) or more trailers, including all buildings, structures, tents, vehicles, accessories, appurtenances used or intended as equipment for such trailer camp, whether or not a charge is made for the use of the camp or its facilities. A trailer camp does not include automobile or trailer sales lots on which unoccupied trailers are parked for inspection or sale.

Use - The term referring to:

1. Any purpose for which buildings, other structures or land may be arranged, designed, intended, maintained or occupied; and

2. Any occupation, business activity or operation carried on (or intended to be carried on) in a building or other structure or on land; or

3. A name of a building, or structure or tract of land which indicated the purpose for which it is arranged, designed, intended, maintained or occupied.

Used - Designed, intended or arranged to be used.

Use Group - Two (2) or more uses similar in physical characteristics, traffic generation, location, utility, governmental service requirements, or generally compatible with other uses in a use group. Members the several use groups herein established are specifically listed in Article 7.

Uses Permitted - Any use permitted by the regulations of this Ordinance. The term "permitted use" or its equivalent shall not be deemed to include any non-conforming use.

Variance - A grant of relief from the literal provisions of this Ordinance in situations where strict adherence would cause practical difficulty or unnecessary hardship because of circumstances unique to the property.

a. Flower growing, commercial
b. Fruit growing
c. Tree, shrub, plant nursery
d. Truck gardening
e. Greenhouse, commercial

Section 15. General Farming Group

A use in the General Farming Group is one which is customarily carried on in non-urban areas. It is the intent of this article to permit as an integral part of any particular use in the General Farming Group all customary accessory buildings for breeding and rearing poultry and livestock and for the storage of feed and farm crops. All of the livestock related uses in the following list refer to activities that are not defined as animal feeding operations as specified in the Zoning Ordinance.

1. The following uses are declared to be in the General Farming Group:

    a. Dairy farming
    b. Fur animal farming
    c. Livestock raising and feeding
    d. Pig farrowing and feeding
    e. Poultry hatchery
    f. Poultry farming and feeding
    g. Roadside stand for the sale of products grown on the premises
    h. Field crop farming
    i. Grain elevators
    j. General animal husbandry
    k. All customary farming and ranching activities and operations

Section 16. Manufacturing Group

A use in the Manufacturing Group is one involving the manufacturing or the storage and sale of heavy building materials or equipment, and which conforms to the following requirements:

1. There is no unusual fire, explosion or safety hazard.

2. There is no production of noise at any boundary of this district in which such use is located in excess of the average intensity of street and traffic noise at this point.

3. There is no emission of smoke.

4. There is no emission of dust, dirt, or toxic or offensive odors or gas.

ARTICLE 8

SPECIAL USES

In order to carry out the purposes of this Article, the Board of County Commissioners finds it necessary to require that certain uses, because of unusual size, safety hazards, infrequent occurrence, effect on surrounding area, or other reasons, be reviewed by the County Planning and Zoning Commission and the Board of County Commissioners prior to the granting of a building permit or certificate of occupancy therefore; and that the Planning and Zoning Commission and the Board of County Commissioners be, and are hereby given limited discretionary powers relating to the granting of such permit or certificate.

Section 1. General Provisions

1. The uses listed in this section are designated as special uses and no building permit or certificate of occupancy shall be issued by the County Building Official until the application for such permit or certificate has been reviewed by the Planning and Zoning Commission and authorized by the Board of County Commissioners.

2. Special use permit applications shall be submitted to the Planning Department at least twenty-one (21) days prior to a meeting of the County Planning and Zoning Commission. The following items shall accompany the special use permit application:

    a. A fee in accordance with Article 25 of the Zoning Ordinance.
    b. Three (3) copies of a scaled site plan containing all items required by the Zoning Ordinance for each particular special use, as specified by the County Planner.
    c. A photographic reduction or digital copy of the site plan described above as specified by the County Planner.

3. Following submission of a special use permit application, the Planning Department shall set a time and place for a public hearing before the County Planning and Zoning Commission. Notice of the time and place of such public hearing shall be published in a newspaper of general circulation in the County of Burleigh once each week for two (two) consecutive weeks prior to the date of the hearing. Not less than ten (10) days prior to the scheduled public hearing all known adjacent property owners within 1,320 feet shall be notified by letter of the hearing. The Planning and Zoning Commission may approve, deny or table the application for further consideration and study.

4. Following the public hearing, the Planning Department shall forward the

proposed special use to the Board of County Commissioners together with the Planning and Zoning Commission's recommendation and a report fully setting forth the reasons for such recommendation.

5. Upon receipt of the Planning and Zoning Commission's recommendation and report, the Board of County Commissioners shall consider the proposed special use and shall take final action on the request. The Board of County Commissioners may approve, deny or table the request for further consideration and study.

6. Before approving the issuance of a building permit or certificate of occupancy for a special use, the Board of County Commissioners shall find:

    a. The proposed use in harmony with the purpose of this regulation and of portions of the Master Plan of the County of Burleigh for the district.
    b. The proposed use will not adversely affect the health and safety of the public and the workers and residents, or farmers in the area, and will not be detrimental to the use or development of adjacent properties or of the general neighborhood.
    c. The proposed use will comply with all appropriate regulations for the district in which it will be located.
    d. The proposed use will comply with all special regulations established by this section and all special conditions necessary for the sanitation, safety, and general welfare of the public.

7. The Board of County Commissioners is authorized to impose any conditions on the granting of a building permit or certificate of occupancy for a special use that it deems necessary for the protection of the neighborhood and the general welfare of the public.

8. The Board of County Commissioners shall not authorize the location of a special use in any district from which it is prohibited.

9. The Board of County Commissioners shall refuse to authorize the issuance of a building permit or certificate of occupancy for any special use if the Board finds that such special use would fail to comply with any of the requirements of this Ordinance.

10. The Board of County Commissioners shall require the applicant for authorization of a special use to furnish any engineering drawings or specification, site plans, operating plans or any other data the Board finds necessary to appraise the need for or effect of such special use.

11. A special use granted under this article must be put into use within twenty-

four (24) months or it shall lapse and the land owner must re-apply.

12. Failure to comply with any condition set forth as part of a special use permit shall be a violation of this Ordinance and is subject to the enforcement process. Continued non-compliance shall be grounds for revocation of the special use permit, as determined by the Board of County Commissioners following a public hearing on the issue.

13. When a special use has been established and is discontinued for any reason for a period of two (2) years or longer, the special use permitted shall be considered abandoned.

Section 1A. General Provisions – Animal Feeding Operations

1. The operator of a new livestock facility, or an existing livestock facility which meets the definition of an animal feeding operation and which meets the following criteria shall be considered an animal feeding operation subject to the conditions specified in this section:

    a. A new animal feeding operation that would be capable of handling one thousand (1,000) or more animal units.
    b. An existing animal feeding operation that expands to handle one thousand (1,000) or more animal units.
    c. An existing animal feeding operation with one thousand (1,000) or more animal units that expands by any number of animal units.

2. Special use permit applications shall be submitted to the Planning Department at least thirty (30) days prior to a meeting of the Planning Commission. The following items shall accompany the special use permit application:
    a. A fee in accordance with Article 25 of the Zoning Ordinance.
    b. Three (3) copies of a scaled site plan including the total acreage of the site:
        i. existing and proposed roads and access ways within and adjacent to the site; topographic contours with a minimum interval of five (5) feet; surface water, streams, drainage areas and one-hundred (100) year floodplain and floodway elevations; existing and proposed building locations; waste system locations; surrounding land uses, zoning and ownership; and locations of existing wells. Such site plans shall be prepared by a registered land surveyor, a civil engineer or other person having comparable experience or qualifications.
    c. A description of the operation, including the proposed number of animal units; the proposed waste and nutrient management system; and any aquifers, sources of drinking water and wells.

ARTICLE 27

APPEAL PROCEDURE

Section 1. Who May Take Action

An appeal to the Board of Appeals may be taken by any person, firm, or corporation aggrieved by any order, requirement, determination or final decision made by an administrative official of the County involving the interpretation of any provision of this Ordinance, or any amendments thereto.

Section 2. Petition

The aggrieved party may petition for a hearing before the Board of Appeals. The petition shall be in writing and shall specify in detail the grounds for the objection or objections. The petition shall be filed with the County Auditor.

Section 3. Hearing

A hearing shall be held by the Board of Appeals no sooner than ten (10) days, nor longer than forty (40) days, after the filing of the petition with the County Auditor, who shall notify the petitioner of the time and place of the hearing. At this hearing the Board of County Commissioners shall consider the matter complained of and shall notify the petitioner, by registered mail, what action, if any, it proposes to take thereon.

Section 4. Rights and Powers

The provisions of this section shall not operate to curtail or exclude the exercise of any rights or powers of the Board of County Commissioners, county officials, or any citizen.

Section 5. Appeals to District Court

Any person or persons jointly or severally aggrieved by a decision of the Board of County Commissioners acting as the Board of Appeals under the provisions of this Ordinance, may appeal to the District Court in the manner provided in the North Dakota Century Code.

ARTICLE 28

VARIANCES

Section 1. Who May Take Action

An application for a variance may be made by any person, firm, or corporation with a legal interest in the property for which the variance is being sought. Applications shall be submitted to the Planning and Zoning Department at least twenty-one (21) days prior to a meeting of the County Planning and Zoning Commission.

Section 2. Hearing

Following submission of a variance application, the Planning and Zoning Department shall set a time and place for a public hearing before the Planning and Zoning Commission. Notice of the time and place of such public hearing shall be published in a newspaper of general circulation in the County of Burleigh once each week for two (2) consecutive weeks prior to the date of the hearing. Not less than ten (10) days prior to the scheduled public hearing, all known adjacent property owners within 1,320 feet shall be notified by letter of the hearing. Following the public hearing, the Planning and Zoning Department shall forward the request to the Board of County Commissioners (sitting as the Board of Appeals) together with the Planning and Zoning Commission's recommendation and a report fully setting forth the reasons for such recommendation.

Section 3. Required Findings

The Board of County Commissioners may vary or adjust the strict application of any of the requirements of this Ordinance in the case of an exceptionally irregular, narrow, shallow, or steep lot, or other exceptional physical or topographical condition, by reason of which the strict application of the provisions of the Ordinance would result in unnecessary hardship that would deprive the owner of a reasonable use of the land or building involved. It is not the intent of this article to allow a variance for a land use that is not permitted within the particular zoning district.

No adjustment in the strict application of any provisions of this Ordinance shall be granted by the Board of County Commissioners unless it finds:

1. That there are special circumstances or conditions, fully described in the findings of the Board, applying to the land or buildings for which the variance is sought, which circumstances or conditions are peculiar to such

land or building, and do not apply generally to land or buildings in the neighborhood, and have not resulted from any act of the applicant taken subsequent to the adoption of this article, whether in violation of the provisions of the Ordinance, or not.

2. That, for reasons fully set forth in the findings of the Board, the circumstances or conditions so found are such that the strict application of the provisions of this Ordinance would deprive the applicant of the reasonable use of said land or building, and the granting of the variances necessary for the reasonable use of the land or building and that the variance as granted by the Board is the minimum variance that would accomplish the relief sought by the applicant.

3. That the grant of the variance will be in harmony with the general purposes and intent of this Ordinance and will not be injurious to the neighborhood or otherwise detrimental to the public welfare.

4. In no case shall any variance be more than a minimum easing of the requirements; in no case shall it have the effect of reducing the traffic capacity of any major or secondary street; in no case shall it be in conflict with existing zoning regulations.

5. In granting variances, the Board of County Commissioners may require such conditions as will, in its judgment, secure substantially the objectives of the standards and regulations so affected.

6. A variance granted under this article must be put into use within twenty-four (24) months of the granting of the variance or it shall lapse and the land owner must reapply.

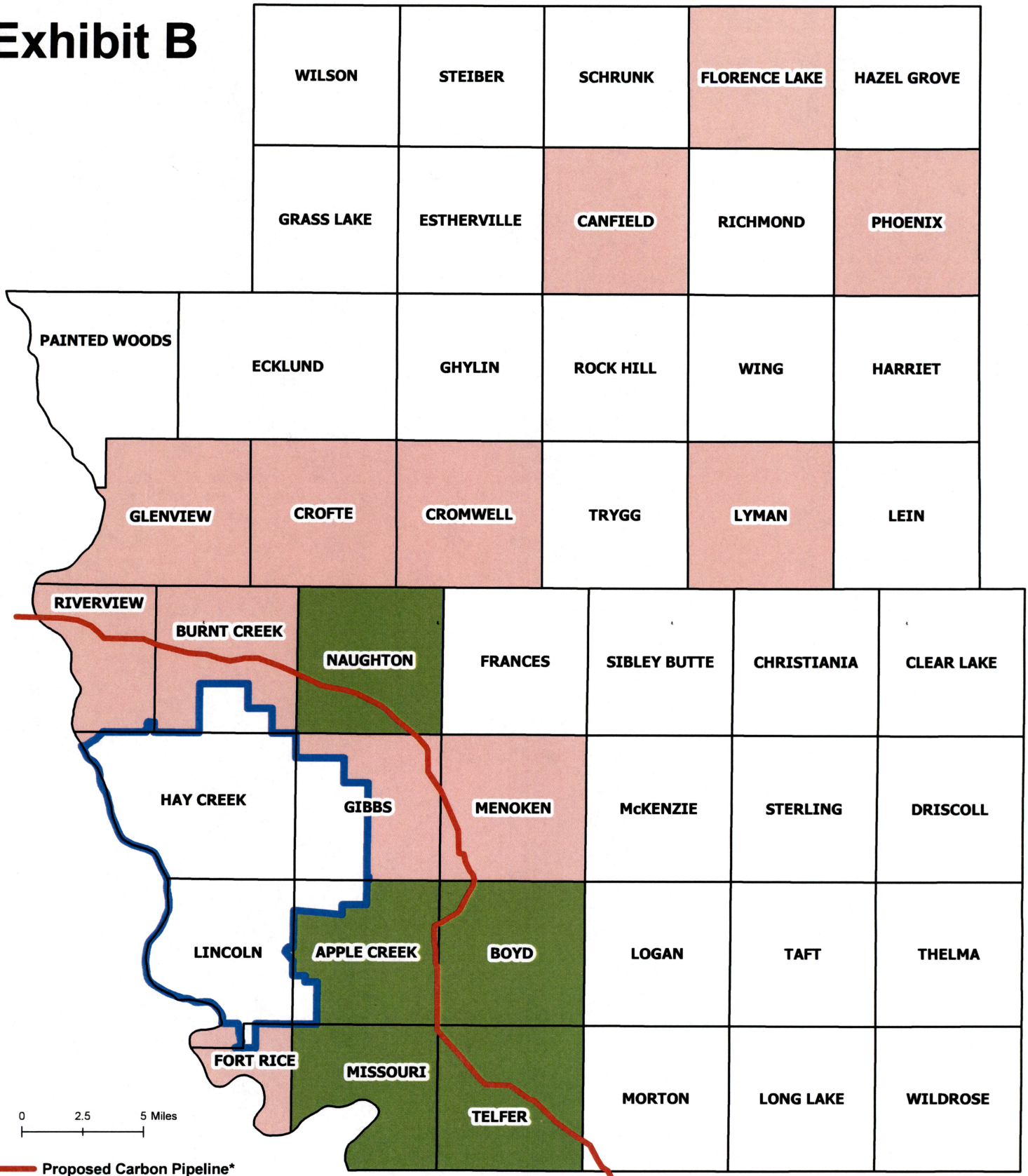
BURLEIGH COUNTY, NORTH DAKOTA

TOWNSHIPS WITH ORDINANCES RELATED TO PROPOSED PIPELINE

N

06/23/2023

Exhibit B



- Proposed Carbon Pipeline*
- Burleigh County Zoning Jurisdiction
- Townships With Similar Ordinances to Burleigh County**
- City of Bismarck ETA
- Civil Townships

* The proposed carbon pipeline route was digitized off of a pdf map from Summit Carbon Solutions. The map was titled "40.28 Miles of Anticipated Pipeline Burleigh County North Dakota". The pdf map also listed that the "Pipeline centerline is based on the 05/31/2022 route." Due to the map scale used on the pdf map there could be up to a half mile location error in the drawn pipeline route on this map from the actual proposed location.

** Township list obtained from the Burleigh County Building/Planning/Zoning Department.

2019 North Dakota Laws Ch. 389 (S.B. 2038)

NORTH DAKOTA 2019 SESSION LAW SERVICE

REGULAR SESSION OF THE 66TH LEGISLATIVE ASSEMBLY

Additions are indicated by **Text**; deletions by ~~Text~~.
Vetoes are indicated by ~~Text~~;
stricken material by ~~Text~~.

Ch. 389 (S.B. No. 2038)

West's No. 47
PUBLIC UTILITIES—ENERGY CONVERSION FACILITIES

AN ACT to amend and reenact sections 49–22–03, 49–22–14.1, 49–22–16, 49–22.1–01, 49–22.1–12, and subsection 2 of section 49–22.1–13 of the North Dakota Century Code, relating to energy conversion and transmission facility siting, gas and liquid energy conversion, and gas and liquid transmission facility siting.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 49–22–03 of the North Dakota Century Code is amended and reenacted as follows:

<< ND ST 49–22–03 >>

§ 49–22–03. Definitions

In this chapter, unless the context or subject matter otherwise requires:

1. "Certificate" means the certificate of site compatibility or the certificate of corridor compatibility issued under this chapter.

2. "Commission" means the North Dakota public service commission.

3. "Construction" includes ~~any~~**a** clearing of land, excavation, or other action ~~that would affect~~**affecting** the environment of the site after April 9, 1975, but does not include activities:

a. Conducted wholly within the geographic location for which a utility has previously obtained a certificate or permit under this chapter, or on which a facility was constructed before April 9, 1975, if:

(1) The activities are for the construction of the same type of facility as the existing type of facility as identified in a subdivision of subsections 5 or 12 of this section and the activities are:

(a) Within the geographic boundaries of a previously issued certificate or permit;

(b) For an electric energy conversion facility constructed before April 9, 1975, within the geographic location on which the facility was built; or

Exhibit C

(c) For an electric transmission facility constructed before April 9, 1975, within a width of three hundred fifty feet [106.68 meters] on either side of the centerline;

(2) Except as provided in subdivision b, the activities do not affect any known exclusion or avoidance area;

(3) The activities are for the construction:

(a) Of a new electric energy conversion facility;

(b) Of a new electric transmission facility;

(c) To improve the existing electric energy conversion facility or electric transmission facility; or

(d) To increase or decrease the capacity of the existing electric energy conversion facility or electric transmission facility; and

(4) Before conducting any activities, the utility certifies in writing to the commission that:

(a) The activities will not affect ~~any~~a known exclusion or avoidance area;

(b) The activities are for the construction:

[1] Of a new electric energy conversion facility;

[2] Of a new electric transmission facility;

[3] To improve the existing electric energy conversion or electric transmission facility; or

[4] To increase or decrease the capacity of the existing electric energy conversion facility or electric transmission facility; and

(c) The utility will comply with all applicable conditions and protections in siting laws and rules and commission orders previously issued for any part of the facility.

b. Otherwise qualifying for exclusion under subdivision a, except that the activities are expected to affect a known avoidance area and the utility before conducting any activities:

(1) Certifies in writing to the commission that:

(a) The activities will not affect ~~any~~a known exclusion area;

(b) The activities are for the construction:

[1] Of a new electric energy conversion facility;

[2] Of a new electric transmission facility;

[3] To improve the existing electric energy conversion facility or electric transmission facility; or

[4] To increase or decrease the capacity of the existing electric energy conversion facility or electric transmission facility; and

(c) The utility will comply with all applicable conditions and protections in siting laws and rules and commission orders previously issued for any part of the facility;

(2) Notifies the commission in writing that the activities are expected to impact an avoidance area and

provides information on the specific avoidance area expected to be impacted and the reasons why impact cannot be avoided; and

(3) Receives the commission's written approval for the impact to the avoidance area, based on a determination that there is no reasonable alternative to the expected impact. If the commission does not approve impacting the avoidance area, the utility must obtain siting authority under this chapter for the affected portion of the site or route. If the commission fails to act on the notification required by this subdivision within thirty days of the utility's filing the notification, the impact to the avoidance area is deemed approved.

c. Incident to preliminary engineering or environmental studies.

4. "Corridor" means the area of land ~~in which~~**where** a designated route may be established for an electric transmission facility.

5. "Electric energy conversion facility" means ~~any~~**a** plant, addition, or combination of plant and addition, designed for or capable of:

a. Generation by wind energy conversion exceeding one-half megawatt of electricity; or

b. Generation by any means other than wind energy conversion exceeding fifty megawatts of electricity.

6. "Electric transmission facility" means an electric transmission line and associated facilities with a design in excess of one hundred fifteen kilovolts. "Electric transmission facility" does not include:

a. A temporary electric transmission line loop that is:

(1) Connected and adjacent to an existing electric transmission facility that was sited under this chapter;

(2) Within the corridor of the sited facility and does not cross known exclusion or avoidance areas; and

(3) In place for less than one year; or

b. An electric transmission line that is less than one mile [1.61 kilometers] long.

7. "Facility" means an electric energy conversion facility, electric transmission facility, or both.

8. "Permit" means the permit for the construction of an electric transmission facility within a designated corridor issued under this chapter.

9. "Person" includes ~~any~~**an** individual, firm, association, partnership, cooperative, corporation, limited liability company, or any department, agency, or instrumentality of a state or of the federal government, or any subdivision thereof.

10. "Power emergency" means an electric transmission line and associated facilities that have been damaged or destroyed by natural or manmade causes resulting in a loss of power supply to consumers of the power.

11. ~~"Road use agreement" means permits required for extraordinary road use, road access points, approach or road crossings, public right-of-way setbacks, building rules, physical addressing, dust control measures, or road maintenance and any repair mitigation plans.~~

~~12.~~ "Route" means the location of an electric transmission facility within a designated corridor.

~~13.~~**12.** "Site" means the location of an electric energy conversion facility.

~~14.~~**13.** "Utility" means ~~any~~**a** person engaged in and controlling the electric generation, the transmission of electric energy, or the transmission of water from or to any electric energy conversion facility.

SECTION 2. AMENDMENT. Section 49–22–14.1 of the North Dakota Century Code is amended and reenacted as follows:

<< ND ST 49–22–14.1 >>

§ 49–22–14.1. Cooperation with state and federal agencies ~~and political subdivisions~~

The commission may, and is encouraged to, cooperate with and receive and exchange technical information and assistance from and with any department, agency, or officer of any state or of the federal government to eliminate duplication of effort, to establish a common database, or for any other purpose relating to the provisions of this chapter and in furtherance of the statement of policy contained herein. ~~The commission shall cooperate and exchange technical information with directly impacted political subdivisions as outlined in subsection 2 of section 49–22–16.~~

SECTION 3. AMENDMENT. Section 49–22–16 of the North Dakota Century Code is amended and reenacted as follows:

<< ND ST 49–22–16 >>

§ 49–22–16. Effect of issuance of certificate or permit—Local land use, zoning, or building rules, regulations, or ordinances—State agency rules

1. The issuance of a certificate of site compatibility or a route permit shall, subject to subsections 2 and 3, be the sole site or route approval required to be obtained by the utility.

2. ~~a.~~ A certificate of site compatibility for an electric energy conversion facility may not supersede or preempt any local land use, zoning, or building rules, regulations, or ordinances and ~~no~~a site may **not** be designated which violates local land use, zoning, or building rules, regulations, or ordinances.

~~b. Except as provided in this section, a~~**A** permit for the construction of ~~a gas or liquid or~~**an** electric transmission facility within a designated corridor supersedes and preempts ~~any~~**a** local land use ~~or~~, zoning ~~regulations~~, **or building rule, regulation, or ordinance, upon a finding by the commission that the rule, regulation, or ordinance, as applied to the proposed route, is unreasonably restrictive in view of existing technology, factors of cost or economics, or needs of consumers regardless of location. Without such a finding by the commission, a route may not be designated which violates a local land use, zoning, or building rule, regulation, or ordinance**.

~~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.~~

~~d. When an application for a certificate for a gas or liquid transmission facility is filed, the commission shall notify the townships with retained zoning authority, cities, and counties in which any part of the proposed corridor is located. The commission may not schedule a public hearing sooner than forty-five days from the date notification is sent by mail or electronic mail. Upon notification, a political subdivision shall provide a listing to the commission of all local requirements identified under this subsection. The requirements must be filed at least ten days before the hearing or the requirements are superseded and preempted.~~

~~e. An applicant shall comply with all local requirements provided to the commission pursuant to subdivision d, which are not otherwise superseded by the commission.~~

3. Utilities subject to this chapter shall obtain state permits that may be required to construct and operate electric energy conversion facilities and electric transmission facilities. A state agency in processing a utility's facility permit application shall be bound to the decisions of the commission with respect to the site designation for the electric energy conversion

facility or the corridor or route designation for the electric transmission facility and with respect to other matters for which authority has been granted to the commission by this chapter.

4. ~~No~~**A** site or route ~~shall~~**may not** be designated which violates the rules of ~~any~~**a** state agency. A state agency with jurisdiction over any aspect of a proposed facility shall present the position of the agency at the public hearing on an application for a certificate, a permit, or a waiver, which position ~~shall~~**must** clearly state whether the site, corridor, or route being considered for designation will be in compliance with such agency's rules. For purposes of this chapter it ~~shall be~~**is** presumed ~~that~~ a proposed facility will be in compliance with a state agency's rules if ~~such~~**the** agency fails to present its position on the proposed site, corridor, or route at the appropriate public hearing.

SECTION 4. AMENDMENT. Section 49–22.1–01 of the North Dakota Century Code is amended and reenacted as follows:

<< ND ST 49–22.1–01 >>

§ 49–22.1–01. Definitions

In this chapter, unless the context or subject matter otherwise requires:

1. "Certificate" means the certificate of site compatibility or the certificate of corridor compatibility issued under this chapter.

2. "Commission" means the North Dakota public service commission.

3. "Construction" includes ~~any~~**a** clearing of land, excavation, or other action ~~that would affect~~**affecting** the environment of the site after April 9, 1975, but does not include activities:

a. Conducted wholly within the geographic location for which a utility has previously obtained a certificate or permit under this chapter, or on which a facility was constructed before April 9, 1975, if:

(1) The activities are for the construction of the same type of facility as the existing type of facility as identified in subsection 5 or 12 and the activities are:

(a) Within the geographic boundaries of a previously issued certificate or permit;

(b) For a gas or liquid energy conversion facility constructed before April 9, 1975, within the geographic location on which the facility was built; or

(c) For a gas or liquid transmission facility constructed before April 9, 1975, within a width of three hundred fifty feet [106.68 meters] on either side of the centerline;

(2) Except as provided in subdivision b, the activities do not affect any known exclusion or avoidance area;

(3) The activities are for the construction:

(a) Of a new gas or liquid energy conversion facility;

(b) Of a new gas or liquid transmission facility;

(c) To improve the existing gas or liquid energy conversion facility, or gas or liquid, transmission facility; or

(d) To increase or decrease the capacity of the existing gas or liquid energy conversion facility or gas or liquid transmission facility; and

(4) Before conducting any activities, the utility certifies in writing to the commission that:

(a) The activities will not affect ~~any~~**a** known exclusion or avoidance area;

(b) The activities are for the construction:

[1] Of a new gas or liquid energy conversion facility;

[2] Of a new gas or liquid transmission facility;

[3] To improve the existing gas or liquid energy conversion or gas or liquid transmission facility; or

[4] To increase or decrease the capacity of the existing gas or liquid energy conversion facility or gas or liquid transmission facility; and

(c) The utility will comply with all applicable conditions and protections in siting laws and rules and commission orders previously issued for any part of the facility.

b. Otherwise qualifying for exclusion under subdivision a, except that the activities are expected to affect a known avoidance area and the utility before conducting any activities:

(1) Certifies in writing to the commission:

(a) The activities will not affect any known exclusion area;

(b) The activities are for the construction:

[1] Of a new gas or liquid energy conversion facility;

[2] Of a new gas or liquid transmission facility;

[3] To improve the existing gas or liquid energy conversion facility or gas or liquid facility; or

[4] To increase or decrease the capacity of the existing gas or liquid energy conversion facility or gas or liquid transmission facility; and

(c) The utility will comply with all applicable conditions and protections in siting laws and rules and commission orders previously issued for any part of the facility;

(2) Notifies the commission in writing that the activities are expected to impact an avoidance area and provides information on the specific avoidance area expected to be impacted and the reasons why impact cannot be avoided; and

(3) Receives the commission's written approval for the impact to the avoidance area, based on a determination that there is no reasonable alternative to the expected impact. If the commission does not approve impacting the avoidance area, the utility must obtain siting authority under this chapter for the affected portion of the site or route. If the commission fails to act on the notification required by this subdivision within thirty days of the utility's filing the notification, the impact to the avoidance area is deemed approved.

c. Incident to preliminary engineering or environmental studies.

4. "Corridor" means the area of land ~~in which~~**where** a designated route may be established for a gas or liquid transmission facility.

5. "Facility" means a gas or liquid energy conversion facility, gas or liquid transmission facility, or both.

6. "Gas or liquid energy conversion facility" means any plant, addition, or combination of plant and addition, designed for or capable of:

a. Manufacture or refinement of one hundred million cubic feet [2831684.66 cubic meters] or more of gas per day, regardless of the end use of the gas;

b. Manufacture or refinement of fifty thousand barrels [7949.36 cubic meters] or more of liquid hydrocarbon products per day; or

c. Enrichment of uranium minerals.

7. "Gas or liquid transmission facility" means any of the following:

a. A gas or liquid transmission line and associated facilities designed for or capable of transporting coal, gas, liquid hydrocarbons, liquid hydrocarbon products, or carbon dioxide. This subdivision does not apply to:

(1) An oil or gas pipeline gathering system;

(2) A pipeline with an outside diameter of four and one-half inches [11.43 centimeters] or less which will not be trenched and will be plowed in with a power mechanism having a vertical knife or horizontally directionally drilled, and its associated facilities; or

(3) A pipeline that is less than one mile [1.61 kilometers] long. For purposes of this chapter, a gathering system includes the pipelines and associated facilities used to collect oil from the lease site to the first pipeline storage site where pressure is increased for further transport, or pipelines and associated facilities used to collect gas from the well to the gas processing facility at which end-use consumer-quality gas is produced, with or without the addition of odorant.

b. A liquid transmission line and associated facilities designed for or capable of transporting water from or to an energy conversion facility.

8. "Permit" means the permit for the construction of a gas or liquid transmission facility within a designated corridor issued under this chapter.

9. "Person" includes ~~any~~**an** individual, firm, association, partnership, cooperative, corporation, limited liability company, or any department, agency, or instrumentality of a state or of the federal government, or any subdivision thereof.

10. **"Road use agreement" means permits required for extraordinary road use, road access points, approach or road crossings, public right-of-way setbacks, building rules, physical addressing, dust control measures, or road maintenance and any repair mitigation plans.**

11. "Route" means the location of a gas or liquid transmission facility within a designated corridor.

~~11.~~**12.** "Site" means the location of a gas or liquid energy conversion facility.

~~12.~~**13.** "Utility" means ~~any~~**a** person engaged in and controlling the generation, manufacture, refinement, or transmission of gas, liquid hydrocarbons, or liquid hydrocarbon products, including coal gasification, coal liquefaction, petroleum refinement, uranium enrichment, and the transmission of coal, gas, liquid hydrocarbons, or liquid hydrocarbon products, or the transmission of water from or to any gas or liquid energy conversion facility.

SECTION 5. AMENDMENT. Section 49–22.1–12 of the North Dakota Century Code is amended and reenacted as follows:

<< ND ST 49–22.1–12 >>

§ 49–22.1–12. Cooperation with state and federal agencies and political subdivisions

The commission may, and is encouraged to, cooperate with and receive and exchange technical information and assistance from and with any department, agency, or officer of any state or of the federal government to eliminate duplication of effort, to establish a common database, or for any other purpose relating to the provisions of this chapter. **The commission shall cooperate and exchange technical information with directly impacted political subdivisions as outlined in subsection 2 of section 49–22.1–13.**

SECTION 6. AMENDMENT. Subsection 2 of section 49–22.1–13 of the North Dakota Century Code is amended and reenacted as follows:

<< ND ST 49–22.1–13 >>

2. **a.** A certificate of site compatibility for ~~an~~**a gas or liquid** energy conversion facility ~~does~~**may** not supersede or preempt any local land use; zoning; or building rules, regulations, or ordinances, and a site may not be designated which violates local land use; zoning; or building rules, regulations, or ordinances. ~~A~~

b. Except as provided in this section, a permit for the construction of a gas or liquid transmission facility within a designated corridor ~~may supersedes~~**supersedes** and ~~preempt~~**preempts** any local land use~~;~~ **or** zoning~~; or building rules,~~ regulations~~, or ordinances, upon a finding by the commission that the rules, regulations, or ordinances, as applied to the proposed route,~~**.**

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~~. Without that finding by the commission, a route may not be designated which violates local land use; zoning; or building rules, regulations, or ordinances~~**, or are in direct conflict with state or federal laws or rules**.

d. When an application for a certificate for a gas or liquid transmission facility is filed, the commission shall notify the townships with retained zoning authority, cities, and counties in which any part of the proposed corridor is located. The commission may not schedule a public hearing sooner than forty-five days from the date notification is sent by mail or electronic mail. Upon notification, a political subdivision shall provide a listing to the commission of all local requirements identified under this subsection. The requirements must be filed at least ten days before the hearing or the requirements are superseded and preempted.

e. An applicant shall comply with all local requirements provided to the commission pursuant to subdivision d, which are not otherwise superseded by the commission.

Approved March 6, 2019. Filed March 7, 2019.

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STATE OF NORTH DAKOTA

PUBLIC SERVICE COMMISSION

SCS Carbon Transport LLC
Midwest Carbon Express CO2 Pipeline Project
Siting Application

Case No: PU-22-391

OAH File No: 20230002

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the following documents:

1. *Filing Letter to Steve Kahl from Randall Bakke dated June 29, 2023; and*
2. *Bismarck Area Intervenors' Response in Opposition to SCS Carbon Transport LLC's Motion to Declare Emmons County and Burleigh County Ordinances Superseded and Preempted & Request for Oral Argument*

were on June 29, 2023, filed with the North Dakota Public Service Commission and served electronically to the following:

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Dated this 29th day of June, 2023.

BAKKE GRINOLDS WIEDERHOLT

By: _____

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