



June 30, 2023

**VIA HAND DELIVERY & E-MAIL:** [ndpsc@nd.gov](mailto:ndpsc@nd.gov)

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

**Re: In the Matter of the Application of SCS Carbon Transport LLC for  
Certificate of Corridor Compatibility and Route Permit for the Midwest  
Carbon Express  
Case No.: PU-22-391**

Dear Mr. Kahl:

Enclosed for filing please find the following original documents:

1. Petition to Intervene dated June 30, 2023 (and seven copies);
2. Emmons County's Response in Opposition to SCS Carbon Transport LLC's Motion to Declare Emmons County and Burleigh County Ordinances Superseded and Preempted; and
3. Certificate of Service.

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

Sincerely,



Derrick Braaten

350 PU-22-391 Filed 06/30/2023 Pages: 18  
Petition to Intervene and Response in Opposition to Superseded and Preempted Motion  
Intervenors Emmons County Board of County Commissioners  
Derrick Braaten, Braaten Law Firm

**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

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**PETITION TO INTERVENE**

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Pursuant to N.D.A.C. § 69-02-02-05, Emmons County, by and through its Board of County Commissioners, hereby petitions to intervene in the above-captioned proceedings. In support of this petition, Emmons County states and alleges as follows:

[¶1] On June 1, 2023, SCS Carbon Transport LLC filed a Motion (“Motion”) in this proceeding asking the PSC to declare Emmons County Ordinance No. 23-01-01 superseded and preempted. Docket No. 282.

[¶2] For reasons unknown, SCS Carbon Transport LLC (“SCS”) filed its motion specifically targeting only Emmons County and Burleigh County of all the local zoning authorities which have filed ordinances in this proceeding. Contrary to SCS’s arguments in its Motion, all of these ordinances must be given legal effect by the Public Service Commission because 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.” N.D.C.C. § 42-22.1-13(2)(a). That is precisely why the local governments filed the ordinances in this proceeding. *See* Docket Nos. 31, 32, 33, 42, 49, 62, 71, 87, 161, 206, 221.

- [¶3] The Motion filed by SCS regarding the Emmons County Ordinance mischaracterizes the legislative history of the pertinent law at N.D.C.C. § 42-22.1-13. *See* Docket. No. 282. Typically it would not be necessary for a local government to intervene in a proceeding such as this because once the local governments file their pertinent requirements, it is presumed that the PSC will not issue a permit that would locate a corridor in violation of the local law. Emmons County reasonably presumed this would be true but apparently SCS has singled out two of the local zoning authorities and is attacking their authority.
- [¶4] There is no question that the legal rights, privileges, and other legal interests of Emmons County and its citizens will be substantially affected by the ND Public Service Commission's findings and conclusions in this proceeding as they relate to the Motion. The Motion literally attempts to invalidate and preempt the duly-passed law of Emmons County. It would call into question the validity of any permit issued if the PSC were to deny Emmons County the right to intervene and respond and be heard on this attack on its authority. Emmons County files this petition for the purpose of responding in opposition to the Motion and ensuring enforcement of duly passed local ordinances as required by N.D.C.C. 49-22.1-13.
- [¶5] Emmons County is not adequately represented by existing parties, and its intervention would not unduly broaden the issues or delay the proceedings. Indeed, Emmons County is merely asking to respond to the issues raised by SCS itself in its Motion. Emmons County is not requesting any additional public hearings. Pursuant to N.D.A.C. § 62-02-02-05, a “petition to intervene in any proceeding must be filed at least ten days prior to the hearing, but not after except for good cause shown.” Here, there is good cause. First, SCS failed to so much as mail a courtesy copy of its motion to Emmon County, despite the fact that it is

attempting to attack and invalidate the County's ordinance. Second, SCS's Motion was filed after all but one public hearing and Emmons County's response is timely given the timing of SCS's Motion.

[¶6] More importantly, it is critical that the laws passed by Emmons County be enforced by the Public Service Commission. The Legislative Assembly conferred this responsibility on the Commission in N.D.C.C. § 49-22.1-13. As is explained in detail in the attached Response from Emmons County, there is no basis on the record before the Commission, factual or legal, for a finding that the Emmons County Ordinance has been superseded or preempted, SCS's motion is improper and violates separate of powers, and the Emmons County Ordinance does not conflict with federal safety regulations or state law.

[¶7] It is not the burden of Emmons County to show this, but by filing its motion as it did, SCS has forced Emmons County to intervene in order to protect its duly passed laws. To deny it that right given SCS's attack would justify reversal under N.D.C.C. § 28-32-46(4).

[¶8] For these reasons Emmons County petitions for leave to intervene in this proceeding for the purpose of responding to SCS's Motion and participating in any oral argument or hearings on the motion and to the extent anything other than enforcement is anticipated for final findings, conclusions, and order, the right to be heard on the final determination as it relates to the Emmons County Ordinance.

**BRAATEN LAW FIRM**

*/s/ Derrick Braaten*

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**STATE OF NORTH DAKOTA**  
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**Emmons County's Response to SCS Carbon Transport LLC's Motion to Declare  
Emmons County and Burleigh County Ordinances Superseded and Preempted**

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**BRAATEN LAW FIRM**

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## **INTRODUCTION**

[¶1] Under the authority of N.D.C.C. ch. 11-33, Emmons County approved zoning ordinance No. 23-01-01 on February 7th, 2023 by a unanimous vote of the County Commission. On February 17, 2023, Emmons County filed its zoning ordinance with the Public Service Commission in PU-22-391 pursuant to N.D.C.C. § 49-22.1-13. Docket No. 49.

[¶2] On June 1, 2023, SCS Carbon Transport LLC (“SCS”) filed a Motion (“Motion”) in this proceeding asking the PSC to declare Emmons County Ordinance No. 23-01-01 superseded and preempted. Docket No. 282.

[¶3] SCS mischaracterizes the legislative history of N.D.C.C. § 49-22.1-13 and its legal interpretation of that section is incorrect, the findings of fact that SCS asks the PSC to make in its Motion are not supported by evidence, the Public Service Commission does not have jurisdiction to order or declare with any legal effect that local ordinances conflict with state or federal law, or are “superseded and preempted under N.D.C.C. § 49-22.1-13(2)(b),” and the Emmons County Ordinance does not conflict with any state or federal law and is not preempted or superseded.

## **ARGUMENT**

### **I. N.D.C.C. § 49-22.1-13 prohibits the corridor designation from superseding or preempting local land use laws.**

[¶4] N.D.C.C. § 49-22.1-13(2)(c) states in part: “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.” This reference to “permit” is to the “route permit” and it “means the permit for the construction of a gas or liquid transmission facility within a designated corridor issued under this chapter.” N.D.C.C. § 49-22.1-01(8), 49-22.1-13 (emphasis added). “‘Route’

means the location of a gas or liquid transmission facility within a designated corridor.” N.D.C.C. § 49-22.1-01(11) (emphasis added). “‘Certificate’ means the ... certificate of corridor compatibility issued under this chapter.” N.D.C.C. § 49-22.1-01(1). “‘Corridor’ means the area of land where a designated route may be established for a gas or liquid transmission facility.” N.D.C.C. § 49-22.1-01(4).

[¶5] Having defined the relevant terms, the first two section of N.D.C.C. § 48-22.1-13 have a clear meaning based on their plain language:

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.

[¶6] What SCS glosses over and literally leaves out of its selective quotes of the pertinent law is that while the route permit will supersede and preempt local land use laws, that is only true *after* the PSC provides a certificate of corridor compatibility, and that route permit is for a route contained *wholly within* that corridor. And that certificate of corridor compatibility, issued before and which forms the basis for the route permit, “may not supersede or preempt” the Emmons County Ordinance. SCS makes its argument by conflating the route permit with the corridor certificate.

[¶7] Indeed, had Emmons County failed to timely file its ordinance with the Commission as it did, *then* its ordinance would have been superseded. Pursuant to N.D.C.C. § 49-22.1-13(d): “The [local government’s] requirements must be filed at least ten days before the hearing or the requirements are superseded and preempted.” But this provision cannot be reconciled with the interpretation SCS has contrived because if all these ordinances are automatically and by default



preempted and superseded, then this requirement to file at least ten days before the hearing or have the ordinance superseded would be superfluous, meaningless verbiage. This cannot be. “A statute should be construed to give effect to each word and phrase.” *Ali v. North Dakota Workers Compensation Bureau*, 1998 ND 146, ¶12 (citing *Medcenter One, Inc. v. North Dakota State Board of Pharmacy*, 1997 ND 54, ¶13, 561 N.W.2d 634). “All parts of a statute must be construed to have meaning because the law neither does nor requires idle acts” *Id.*

[¶8] On the other hand, if the local ordinances are enforced by default unless there is a finding to the contrary, it would make perfect sense to include a requirement that the local governments file their ordinances or they will be superseded if not filed. The entire point is that the PSC can only enforce the local ordinances of which it is made aware, and this provision recognizes that and *only* supersedes these ordinances if they are never filed, or alternatively if the PSC makes specific findings on the evidence.

[¶9] The attempt by SCS to read ambiguity into the statute is inappropriate and misleading. “When the wording of a statute is clear and free of all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.” N.D.C.C. § 1-02-05. SCS makes an argument about the meaning of N.D.C.C. § 49-22.1-13 that begins with the legislative history rather than the plain language of the statute. This is the proverbial tail wagging the dog. The legislative history is only resorted to if the statute is ambiguous on its face, and even then it is only one of seven sources to consult when interpreting an ambiguous statute. *See* N.D.C.C. § 1-02-39 (“Aids in construction of ambiguous statutes”).

[¶10] Even if the statute were ambiguous and resort to interpretive aids were required, the legislative history cited by SCS makes it clear that the local government ordinances are by default enforced, not preempted. The legislative history<sup>1</sup> is replete with support:

Sen. Schaible: ...to make sure we do not impede any authority that was given to counties. It was added to insure we do not take power away.

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Rep. Keiser: On line 19, the engrossed bill, we're making a big change here from may to must. Are we taking away local authority?

Sen. Schaible: The hope is not to. The hope is we would streamline the process and they would work together and that the PSC would not overstep the authority of our local entities. It's the idea of trying to do it together, at one time rather than multiple hearings and then trying to determine the overlap. It's the idea to combine it and get it together and get it that way. **The hope is not to intercede on the political subdivisions.**

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Todd Kranda (ND Petroleum Council): ... We do and what we anticipate happening, those local political subdivisions putting together that checklist and saying, here's all the things we need to have complied with in our county, in our jurisdiction, our city, our township, give that to the PSC. If you look at my handout is a certification by the PSC, deals with the DAPL corridor findings and certification letter. The certification letter says, and the PSC has this for each applicant, says, "company agrees to comply with all rules and regulations of other agencies having jurisdiction, including all city, township and county zoning regulations." **So the PSC is the one telling us you MUST comply and the locals aren't losing any control. We're not trying to take away from what they do and what we have to comply with. We're saying it's all done at the PSC level and this one order will define everybody complying with that.**

[¶11] As is apparent from only a few quotes, the characterization of this legislative history by SCS is misleading. Far from taking away local authority, even the industry representatives agree "the locals aren't losing any control."

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<sup>1</sup> 2017 Senate Bill 2286 Legislative History, pp. 9, 15, 16 (emphasis added) available at <https://ndlegis.gov/files/resource/65-2017/library/sb2286.pdf>.

**II. The findings of fact that SCS asks the PSC to make in its Motion are not supported by competent evidence.**

[¶12] “The admissibility of evidence in any adjudicative proceeding before an administrative agency shall be determined in accordance with the North Dakota Rules of Evidence.” N.D.C.C. § 28-32-24. SCS asks the Commission to make findings of fact that the Emmons County Ordinance is “unreasonably restrictive in view of existing technology, factors of cost or economics, or needs of consumers regardless of their location.” Docket No. 282. Such findings would require significant evidence to sustain. *See* N.D.C.C. § 28-32-46 (court shall reverse agency decision if the “findings of fact made by the agency are not supported by a preponderance of the evidence.”).

[¶13] SCS has pointed to no evidence in support of its assertion that the Emmons County Ordinance is “unreasonably restrictive in view of existing technology, factors of cost or economics, or needs of consumers regardless of their location.” It incorporates a map into page two of its brief, but this map is inadmissible. *See, e.g.*, N.D.C.C. § 28-32-25 (limiting use of evidence not presented at hearing). Emmons County also hereby objects to the map and commentary on the map contained in the SCS brief and moves that it be excluded from the record. N.D.C.C. § 28-32-24(3) (“Upon proper objection, evidence that is irrelevant, immaterial, unduly repetitious, or excludable on constitutional or statutory grounds, or on the basis of evidentiary privilege recognized in the courts of this state, may be excluded”).

[¶14] Regardless, the map proves nothing. SCS has clearly utilized its own self-serving subjective interpretation of the Emmons County Ordinance to create a scenario that supports its present motion. It provides no discussion of any attempts to obtain setback waivers, and its map is misleading and does not accurately represent the multitudinous routes available to it through Emmons County. To the extent the Commission relies on any factual assertions in the SCS brief it will result in a failure to provide a fair hearing. N.D.C.C. § 28-32-46(4). Outside of the brief, no

evidence is in the record to support the motion. To the extent SCS attempts to further supplement the record it is out of time and has missed its opportunity.

**III. The Public Service Commission does not have jurisdiction to order or declare with any legal effect that local ordinances conflict with state or federal law.**

[¶15] Pursuant to N.D.C.C. § 49-22.1-13(2)(c), “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.” While Emmons County recognizes that this provision is the law in North Dakota, it must be noted that any determination on this issue by the Public Service Commission is not binding on any court.

[¶16] “It is the legislature’s duty to make laws, and [a] court’s duty to interpret the laws as written.” *State v. Riggin*, 2021 ND 87, ¶23 (citing *Bruner v. Hager*, 547 N.W.2d 551, 552, n.1.). The delegation of adjudicative power to the Commission to determine whether local ordinances “are in direct conflict with state or federal laws or rules” is an unconstitutional usurpation of the judicial function and the Commission’s determinations in this regard cannot have any binding effect on the judiciary. *Id.*

**IV. The Emmons County Ordinance is not a safety regulation and does not conflict with state or federal law.**

[¶17] SCS misleadingly sweeps the Emmons County Ordinance up in its discussions of the Burleigh County Ordinance. The Emmons County Ordinance no more conflicts with federal law than the PSC’s routing and siting authority in this very proceeding conflicts with federal law. The Emmons County Ordinance pertinent here is contained within Article VI of its zoning ordinance, which is titled Conditional Use Requirements. It is a general title in the ordinance and explains: “Conditional uses are uses which may be permitted in a district, but because of their specific needs

or because there may be a potential for conflict with other, permitted uses, special requirements may need to be met to alleviate any concerns that the specific conditional use will not conflict with the intent of the district.” Emmons County Zoning Ordinance.<sup>2</sup> Subsection A deals with “Commercial recreational parks, tourist and trailer camps.” *Id.* Section B deals with “Electric transmission facilities and water, gas, oil or coal slurry transmission pipelines.” *Id.* Section C deals with “Salvage and junkyards.” *Id.* Section D deals with “Subsurface mining and surface extraction.” *Id.* SCS presents the Emmons County Ordinance to the Commission as an attack on its industry, but that ignores reality. SCS is in truth taking issue with one provision among many in the Emmons County Ordinance, and it is obviously not one targeted at SCS as is apparent from a cursory glance at the Table of Contents:

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<sup>2</sup><https://nebula.wsimg.com/612f1a35bd45e23160690687ac187dde?AccessKeyId=8AE7F8E9EAF19685FDD3&disposition=0&alloworigin=1>

[¶18] Within Section B of Article VI and with respect to “Electric transmission facilities and water, gas, oil or coal slurry transmission pipelines,” the language now clarifies that gas pipelines include CO2 pipelines: “Electric transmission facilities and non-potable water, gas, oil, coal slurry, CO2, or any other substance deemed to be hazardous by PHMSA, transmission pipelines.” With respect to these pipelines, as it has always done, the County asks the applicant to submit documents from the PSC siting and routing proceeding. *Id.* For an *above-ground* transmission facility, the “applicant must demonstrate that all reasonable attempts were made to avoid routing the corridor through areas shown to have a large amount of prime soils, particularly, but also soils of statewide or local importance.” *Id.* For these above-ground facilities, the County requires the lines to follow “quarter or section lines unless otherwise permitted by the landowner, or unless the applicant can show that because of unusual circumstances” it is unreasonable to do so. *Id.* With respect to *below-ground* pipeline facilities,

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 a highway right-of-way or section line unless perpendicular to said right-of-way or line.

Docket No. 49. A variance to the setback to an established residence may be obtained if the applicant obtains setback waivers. *Id.*

[¶19] These provisions of the Emmons County Ordinance are classic zoning and land use regulation, and this is no more preempted by N.D.C.C. § 38-22-01 or 49 U.S.C. §§ 60101 *et seq.* (“PSA”) than the PSC siting proceeding in which this very Motion is being argued.

[¶20] First, to argue that N.D.C.C. § 38-22-01 has the specificity or force of law to effectuate any kind of preemption is frivolous. If such policy statements were sufficient to preempt or trigger a

conflict of law analysis the entire legal system would grind to a halt. It appears the argument was not seriously made, however, so much as used as a foil to laud the industry SCS claims to represent.

[¶21] Moving on to the actual preemption argument, it is not true that the PSA preempts the Emmons County Ordinance. The ordinance is by its own terms regulating location and routing, just as the PSC does through N.D.C.C. ch. 49-22.1. And just as the PSC’s authority is not preempted by the PSA when it is considering siting and routing concerns, neither is the authority of Emmons County preempted.

[¶22] The PSA recognizes this explicitly: “(e) Location and routing of facilities. This chapter [49 USCS §§ 60101 et seq.] does not authorize the Secretary of Transportation to prescribe the location or routing of a pipeline facility.” 49 USCS § 60104.

[¶23] SCS mischaracterizes the Emmons County Ordinance when it states in its footnote that like the Burleigh County Ordinance, “the Emmons County Ordinance references PHMSA, which highlights that the ordinance is treading on preempted ground.” SCS treads on thin ice with this disingenuous characterization of the Emmons County Ordinance. The reference to PHMSA is in the section heading for Section B and is used merely as a point of reference to classify transmission facilities based on the substances transported, and includes the catch-all language “or any other substance deemed to be hazardous by PHMSA....” Emmons County Ordinance, Docket No. 49. Significantly, this is not even the part of the provision that applies to SCS. The heading refers explicitly to “gas [and] CO2...transmission pipelines.” The provision SCS uses to argue that Emmons County is regulating safety is not even a provision that applies to SCS.

[¶24] The federal Secretary of Transportation has no authority to prescribe the “location or routing of a pipeline facility” and the laws of Emmons County applicable to the location or routing of the SCS pipeline cannot therefore be preempted by the PSA. SCS attempts to sweep the

Emmons County Ordinance up with its voluminous descriptions of the Burleigh County Ordinance, but this is misleading and the Emmons County Ordinance must be assessed based on its own language and long history. Contrary to the misleading characterizations made by SCS, the language of the ordinance itself shows that it is precisely the type of local land use regulation that is explicitly excluded from federal authority. Just as the PSC has jurisdiction to conduct the proceeding at hand, it has jurisdiction to enforce the local land use law of Emmons County. Pursuant to N.D.C.C. § 49-22.1-13(a), the PSC must enforce the Emmons County Ordinance and may not certify any corridor in violation of it or its decision will be contrary to law.

### **CONCLUSION**

[¶25] SCS is misleading the Commission with its Motion. It had an opportunity to present factual evidence in support of its claims related to the Emmons County Ordinance and it did not. It may not gin up maps post-hearing and submit them as evidence. It is also wrong on the law. Granting any of the relief requested in its Motion would require the Commission to act without substantial justification. For these reasons Emmons County respectfully requests that the Commission enforce its ordinance as required by N.D.C.C. § 49-22.1-13 and deny SCS's Motion.

Dated this 30<sup>th</sup> day of June, 2023.

#### **BRAATEN LAW FIRM**

/s/ Derrick Braaten

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**PUBLIC SERVICE COMMISSION**

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**CERTIFICATE OF SERVICE**

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[¶1] The undersigned hereby certifies that the following documents:

- 1) Filing Letter to Steve Kahl from Derrick Braaten dated June 30, 2023;
- 2) Emmons County's Petition to Intervene;
- 3) Emmons County's Response in Opposition to SCS Carbon Transport LLC's Motion to Declare Emmons County and Burleigh County Ordinances Superseded and Preempted; and
- 4) Declaration of Service

were, on June 30, 2023, filed with the North Dakota Public Service Commission by hand delivering the originals and seven copies of the Petition to Intervene and by e-mailing copies of the same to:

Steve Kahl  
Executive Secretary  
North Dakota Public Service Commission  
State Capitol  
600 E Boulevard Ave, Dept 408  
Bismarck, ND 58505-0480  
[ndpsc@nd.gov](mailto:ndpsc@nd.gov)

[¶2] I further certify that true and correct copies of the following documents:

- 1) Emmons County's Petition to Intervene;
- 2) Emmons County's Response in Opposition to SCS Carbon Transport LLC's Motion to Declare Emmons County and Burleigh County Ordinances Superseded and Preempted; and
- 3) Declaration of Service

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