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ATTORNEYS AT LAW

June 12, 2024

**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 the following documents:

1. *Burleigh County's Reply to SCS Carbon Transport LLC's Response to Burleigh County's Motion for Reconsideration of Order on Protection of Information (Doc. 364), or In The Alternative, For Leave To Question Re: Dispersion Mode; and*
2. *Affidavit of Randall J. Bakke (with Exhibit B); and*
3. *Certificate of Service, with seven copies of same.*

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

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Reply to Reconsideration of Order on Protection of Info (Doc 364), or In The  
Alternative, For Leave To Question Re: Dispersion Mode; Affidavit of Bakke w/Exh B  
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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

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**BURLEIGH COUNTY’S REPLY TO SCS CARBON TRANSPORT LLC’S  
RESPONSE TO BURLEIGH COUNTY’S MOTION FOR  
RECONSIDERATION OF ORDER ON PROTECTION OF INFORMATION  
(DOC. 364), OR IN THE ALTERNATIVE, FOR LEAVE TO QUESTION RE:  
DISPERSION MODEL**

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Intervenor Burleigh County submits this reply to *SCS Carbon Transport LLC’s Response to Burleigh County’s Motion for Reconsideration of Order on Protection of Information (Doc. 364), or in the Alternative, for Leave to Question Re: Dispersion Model* (doc. 618). For the reasons explained in Burleigh County’s principal brief (doc. 582), in *Intervenor John H. Warford, Jr. as Trustee of the John H. Warford, Jr. Revocable Living Trust’s Objection to Application of SCS Carbon Transport LLC to Protect Information* (doc. 201) (“Warford Objection”), and exhibits referenced therein and below, and below, there simply is no legal authority under either state or federal law to support the Order preventing the disclosure to the parties and the public of SCS’ dispersion modeling (a/k/a plume study or plume modeling) (“Dispersion Model”) (filed under seal at doc. 195). Burleigh County requests the Dispersion Model be made available to the public at this time. To the extent the Commission concludes any portion of the Dispersion Model actually constitutes protectable information, such limited information should be redacted with the remainder of the Dispersion Model to be disclosed to the public. It is inappropriate for the PSC to

consider the Dispersion Model without affording the parties and the public an opportunity to challenge its reliability.

In the alternative, Burleigh County requests leave to question SCS and witnesses about the Dispersion Model results and criteria utilized in the Dispersion Model to assist the PSC and the public to gauge the reliability of the Dispersion Model results.

**I. Burleigh County's motion is timely**

Burleigh County's motion is timely. Burleigh County was not a party to this proceeding when the August 4, 2023 Order was entered, making it impossible for Burleigh County to have requested reconsideration thereof at that time. Burleigh County was granted leave to intervene on September 6, 2023 (doc 384). The undersigned counsel was not retained to represent Burleigh County in these proceedings until March 6, 2024. (Doc. 454.)

In addition, as discussed below, there have been changed circumstances since the August 4 Order was entered bearing upon the Commission's rationale for entering the Order. Further, Burleigh County has raised additional arguments not previously addressed by the Commission. Further, these proceedings are ongoing, and the Commission has the authority to revise any of its prior orders herein.

**II. The Commission Has Not Addressed Burleigh County's Arguments, and There Have Been Changed Circumstances Since the Order on Protection of Information was Entered**

SCS's argument the Commission has already considered and rejected Burleigh County's arguments is without merit. As discussed under paragraph III below, SCS's voluntary and selective disclosure of the Dispersion Model to private members of the public did not occur until January of 2024, well-after entry of the August 4 Order, and contrary to a stated basis upon which the Order was entered. In addition, as discussed in paragraph VI below, Burleigh County's arguments focus

upon the Commission's stated legal bases for entering the August 4, 2024 Order - bases not addressed in the Warford Objection. There simply is no legal basis to withhold those portions of the Dispersion Model from the public which do not constitute a security system plan which directly relates to the physical security of critical infrastructure.

### **III. The Dispersion Model Has Been Voluntarily And Selectively Disclosed To Private Members Of The Public**

SCS concedes that in January of 2024, the Dispersion Model, or at least portions thereof, were shared with former intervenor Chad Wachter, a private person who is and was neither a first responder nor government official. At the time of such disclosure to Mr. Wachter, Mr. Wachter was represented by the undersigned in this matter, yet the undersigned was not advised of such communications between SCS and Mr. Wachter until well after the fact, and then only by Mr. Wachter. This belies SCS's argument the disclosure of the Dispersion Model to Mr. Wachter constituted a Rule 408 protected communication allegedly aimed at settlement of a claim. Query what settlement could have even been possible with Mr. Wachter in the context of SCS' permitting application.

In addition, as established by Mr. Wachter's testimony on May 30, 2024 (doc. 627), North Dakota Petroleum Council ("NDPC") President Ron Ness invited Mr. Wachter to the January 2024 meeting, and Mr. Ness was also present during the January 2024 meeting during which portions of the Dispersion Model were disclosed to Mr. Wachter and Mr. Ness. The NDPC is a trade association of private oil and gas companies— not a governmental entity. Like Mr. Wachter, Mr. Ness is and was a private citizen. While Mr. Ness has testified that it was important for him to see the Dispersion Model because he is in the oil industry, query why one group of private individuals is granted special access to the information over other private citizens whose health and safety could be directly impacted by the dispersion of CO2 from the pipeline.

These voluntary selective disclosures to private individuals occurred after entry of the August 4, 2023 Order, and have not previously been addressed by the Commission. Such disclosures constitute a waiver of any alleged protected status of any information disclosed. *See Sanders v. Gravel Prod., Inc.*, 2008 ND 161, ¶ 10, 755 N.W.2d 826, 831 (“Waiver is a voluntary and intentional relinquishment or abandonment of a known advantage, benefit, claim, privilege, or right.”) quoting *Hanson v. Cincinnati Life Ins. Co.*, 1997 ND 230, ¶ 13, 571 N.W.2d 363.

#### **IV. The Content Of The Dispersion Model Is Relevant To The Issues Before The Commission**

SCS’s argument that the contents of the Dispersion Model are allegedly not relevant to any issue before the Commission is also not accurate. The Commission’s Notice of Public Hearing filed March 21, 2024 pertaining to the April 22, 2024 hearing held in Mandan expressly listed the following issues for consideration by the Commission:

1. Will construction, operation, and maintenance of the facility at the proposed location produce minimal adverse effects on the environment and upon the welfare of the citizens of North Dakota?
2. Is the proposed facility compatible with environmental preservation and the efficient use of resources?
3. Will construction, operation, and maintenance of the facility at the proposed location minimize adverse human and environmental impact while ensuring continuing system reliability and integrity and ensuring that energy needs are met and fulfilled in an orderly and timely fashion?

(Doc. 465.) All three of the above issues being considered by the Commission involve the impacts of the proposed pipeline upon the welfare (i.e. health and safety) of the citizens of North Dakota and the environment (logically inclusive of wildlife). Obviously, concerns about the dangers associated with a leak from or rupture of the proposed highly pressurized CO<sub>2</sub> pipeline fall squarely within the issues being considered by the Commission (and logically should be considered by the Commission).

V. **A Technical Hearing Should Be Granted In The Event Burleigh County's Motion Is Granted**

In the event Burleigh County's motion is granted and the Dispersion Model is made publicly available, either in whole or in part, or should questioning be permitted in relation to the Dispersion Model in any respect (i.e. as to the underlying criteria considered, procedures utilized, etc.), Burleigh County's request for a technical hearing should be granted to permit discovery into those matters, and to educate the Commission and the public as to the safety risks involved with the proposed pipeline. This is a matter of considerable public safety concern. Provided as Exhibit B to the Affidavit of Randall J. Bakke dated June 12, 2024 is a copy of a recent June 8, 2024 Bismarck Tribune editorial entitled "Summit should make dispersion model public", calling for the public release of the Dispersion Model.

Highlighting the necessity for public scrutiny of the Dispersion Model was the recent June 3, 2024 testimony of SCS's staff who prepared the Dispersion Model – Alex Lange and David Daum. While Burleigh County was prevented from questioning these individuals about the Dispersion Model directly, it was revealed that this was the only time either of those individuals had ever conducted a Dispersion Model involving a CO2 pipeline. It was also revealed that they failed to conduct an overland spread analysis using computational fluid dynamics (CFD) modeling, which they admitted was the industry best practice where topography and elevation changes may cause the dispersion plume to travel further than what could be determined using only the traditional atmospheric dispersion analysis. *See Carbon Dioxide (CO2) Emergency Response Tactical Guidance Document [BC119] at p. 10 (discussing dispersion modeling best practices).* CFD modeling would have been the best practice in this matter as the proposed CO2 pipeline is located at a higher elevation than the City of Bismarck likely resulting in the CO2 plume traveling farther than estimated using the atmospheric dispersion analysis only.

**VI. Not All Information Contained In the Dispersion Model Constitutes A Security System Plan Pertaining To Critical Infrastructure.**

Notably, SCS fails to address Burleigh County's arguments that the Dispersion Model does not constitute a "security system plan" protected under state or federal law. It has not been established that the results of the Dispersion Model, including criteria considered, could not be disclosed while still protecting (through redaction or otherwise) any valid "security system plan" which "directly relate[s] to the physical . . . security of . . . critical infrastructure." N.D.C.C. § 44-04-24(2)(b), as explained in Burleigh County's principal brief. The variables considered in, and the results of the Dispersion Model do not directly relate to the physical security of the proposed pipeline. SCS also does not address Burleigh County's arguments as to why the federal laws relied upon by SCS (i.e. FOIA and TSA-related regulations) do not prevent the disclosure of the Dispersion Model, thereby conceding they have no application.

**VII. Conclusion**

For the foregoing reasons, Burleigh County requests the Commission reconsider its *Order on Protection of Information* (doc. 364) and unseal and make publicly available the SCS Dispersion Model (doc. 195). The State and federal open records statutes, and other federal law applicable to "critical infrastructure" relied upon by SCS are not applicable, and preventing the public disclosure of the Dispersion Model, to the extent it is in the possession of any public entity, violates North Dakota's open records laws. Burleigh County requests the Dispersion Model be made publicly available at this time, at least to the extent the Dispersion Model includes information is unrelated to securing the physical safety of the pipeline (i.e. by revealing physical vulnerable points and security measures to be implemented to secure it physically). In the alternative, Burleigh County requests leave to question SCS and witnesses about the Dispersion

Model results and criteria considered and utilized in the Dispersion Model to assist the PSC and the public to gauge the reliability of the undisclosed Dispersion Model results.

Dated this 12th day of June, 2024.

BAKKE GRINOLDS WIEDERHOLT

By: /s/ Randall J. Bakke

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[https://bismarcktribune.com/opinion/editorial/tribune-editorial-summit-should-make-dispersion-model-public/article\\_410ca6e4-240d-11ef-a724-1fc66da781f2.html](https://bismarcktribune.com/opinion/editorial/tribune-editorial-summit-should-make-dispersion-model-public/article_410ca6e4-240d-11ef-a724-1fc66da781f2.html)

## Tribune editorial: Summit should make dispersion model public

Jun 8, 2024

**S**ome landowners and others have accused Summit Carbon Solutions of being insensitive to their concerns. In testimony at Public Service Commission hearings across the state, time after time witnesses have told of the lack of communication by Summit.

Summit counters that it has reached agreements with the majority of landowners along the planned route of its controversial carbon dioxide pipeline -- demonstrating widespread support for the project.

It's hard to measure whether landowners with concerns are indicative of widespread opposition or are instead a vocal minority, but that doesn't diminish the need for Summit to seriously address the concerns. Pipeline opponents are worried about their land being disrupted by a pipeline or losing value, and about potential safety issues.

So Summit hasn't done itself any favors with its handling of the pipeline dispersion model. The model shows how concentrated amounts of CO<sub>2</sub> can spread if a pipeline leak occurs. The PSC placed the model under a protective order at the request of Summit, which cited security concerns.

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Summit has shown the model to local government officials. The company refuses to release it to the general public.

But when it comes to influential citizens, it seems to be a different matter.

Bismarck developer Chad Wachter, whose development Silver Ranch would be near the pipeline, was invited to two meetings with Summit executives this year. Wachter told the PSC that in one of the meetings he was shown the dispersion model, as was North Dakota Petroleum Council President Ron Ness and others.

Wachter testified the pipeline's current planned location near Bismarck will "cause problems" and said the model should be released to the public. Ness defended being allowed to see the model because in his position he's expected to be knowledgeable about pipelines. He called himself "uniquely qualified," much like "an emergency manager."


## Exhibit B


But Summit executives have said there are no plans to use the CO<sub>2</sub> in the oilfields any time soon. It doesn't seem right that Summit is picking and choosing who gets to see the dispersion model, when so many others would like the information because it could personally affect them. There's also the fact that the dispersion model is public information in Minnesota through an environmental study, though the extent to which information from that can be applied elsewhere is limited due to the nature of how CO<sub>2</sub> spreads.

The Tribune Editorial Board doesn't oppose the pipeline, but we believe Summit has shown a lack of respect for the general public, especially the landowners who have questions and concerns.

If some select members of the public are privy to the dispersion model, all should be.


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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 12, 2024;*
2. *Burleigh County's Reply to SCS Carbon Transport LLC's Response to Burleigh County's Motion for Reconsideration of Order on Protection of Information (Doc. 364), or In The Alternative, For Leave To Question Re: Dispersion Mode; and*
3. *Affidavit of Randall J. Bakke (with Exhibit B).*

were on June 12, 2024, filed with the North Dakota Public Service Commission and served electronically to the following:

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Dated this 12<sup>th</sup> day of June, 2024.

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