

STATE OF NORTH DAKOTA

DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

APH FARMS, ARDEN HAGEROTT,
JONATHAN HAGEROTT, JANEL
OLSON, VALERA HAYEN, KARI
CURRAN, SCOTT IRMEN, MARY JO
IRMEN, LEON MALLBERG, STAROBA
REVOCABLE LIVING TRUST, LOREN
STAROBA, DIANE STAROBA, JAMES
TIEGS,

Appellants,

v.

NORTH DAKOTA PUBLIC SERVICE
COMMISSION, SCS CARBON
TRANSPORT, LLC, JOHN H. WARFORD,
JR. REVOCABLE TRUST, CHAD
WACHTER, CHAD MOLDENHAUER,
CITY OF BISMARCK, LABORERS
DISTRICT COUNCIL OF MINNESOTA
AND NORTH DAKOTA, EMMONS
COUNTY, and BURLEIGH COUNTY,

Appellees.

**NOTICE OF APPEAL AND
SPECIFICATIONS OF ERROR**

Case No. _____

PLEASE TAKE NOTICE Appellants APH Farms, Arden Hagerott, Jonathan Hagerott, Janel Olson, Valera Hayen, Kari Curran, Scott Irmén, Mary Jo Irmén, Leon Mallberg, Staroba Revocable Living Trust, Loren Staroba, Diane Staroba, James Tiegs, by and through their attorneys of record KNOLL LEIBEL LLP (Steven J. Leibel, David M. Knoll) and DOMINA LAW GROUP (Brian Jorde), and respectfully

788 PU-22-391 Filed 12/13/2024 Pages: 41
APPEAL - Notice of Appeal and Specifications of Error

Knoll Leibel, LLP, on behalf of the Intervenor
Steven Leibel, Attorney

submits this Notice of Appeal and Specifications of Error. In support of this Notice, Appellants respectfully state:

1. Appellants hereby provides notice of appeal from the November 15, 2024 Findings of Fact, Conclusions of Law, and Order by the North Dakota Public Service Commission (the “PSC”) [PSC Doc. No. 778], the February 7, 2024 Order [PSC Doc. No. 440], and the August 4, 2023 Order on Protection of Information [PSC Doc. No. 364]. Copies of these filings are attached as Ex. 1, 2, and 3, respectively. Appellants understand that Emmons County previously appealed, *see Emmons Co. v. N.D. Public Serv. Comm’n*, Case No. 08-2024-CV-00624, and that Burleigh County has also filed a notice of appeal [PSC Doc. No. 786].

2. In the challenged February 7, 2024 Order, the PSC determined that N.D.C.C. § 49-22.1-13 automatically supersedes and preempts any local land use or zoning regulations for a gas or liquid transmission facility route permit. [PSC Doc. No. 440] In the challenged November 15, 2024 Findings of Fact, Conclusions of Law, and Order [PSC Doc. 778], the PSC additionally determined that because the Emmons County and Burleigh County ordinances require a setback that may exceed N.D.C.C. § 49-22.1-03, the ordinances are unreasonably restrictive because they conflict with state law.

3. The PSC’s decision on this issue is error for a number of reasons. [PSC Doc. No. 455] First, the PSC’s interpretation of N.D.C.C. § 49-22.1-13 is not consistent with either the plain language of the statute or the legislative history and unlawfully diminishes local control. Appellants previously raised this issue with the

PSC and opposed preemption. *See, e.g.* [PSC Doc. Nos. 345, 408, 448 (appellants' joinder in Burleigh County's reconsideration), 455 (appellants' response in support of reconsideration stating that appellants will appeal this issue making these same arguments)]. Second, the PSC's recent interpretation of N.D.C.C. § 49-22.1-03 concludes that N.D.C.C. § 49-22.1-03 prohibits any setbacks greater than 500 feet. This is not what the statute says.

4. In addition, the PSC's finding that the setbacks of Emmons County and Burleigh County are "unreasonably restrictive" is arbitrary and capricious. As a beginning point, the PSC based this finding upon its incorrect interpretation of N.D.C.C. § 49-22.1-03. *See* [PSC Doc. No. 778] However, even if this Court would *sua sponte* consider the record, with a few notable exceptions¹, the only people who have seen the SCS Carbon Transport LLC ("Summit") secret plume study that could shed light upon a safe setback distance were Summit, who proposed the project, and the PSC, who approved the project. Appellants and the public have never seen the plume study, never tested the conclusions of the plume study, and never questioned SCS about the plume study because it was kept hidden. *See, e.g.*, [PSC Doc. Nos. 364]; *see also* Ex. 1 (denying reconsideration). As a result, families who live near the pipeline and communities such as Bismarck with thousands of residents within a few miles of the pipeline do not know the safety risk is presented by this pipeline. For the PSC to decide this critical issue based upon secret information is capricious.

¹ As reflected in the record, SCS also shared its secret with third parties it deemed sufficiently important.

5. Finally, the PSC's decision to keep the plume modeling secret deprived Appellants of their statutory right to confront the evidence provided by Summit to the PSC in support of Summit's Application [PSC Doc. No. 203 (appellants' objection to Summit's motion to keep the plume study secret)]. The plume study is relevant not only on issues of preemption, but also on those other issues pertaining to the PSC's statutory obligation to consider those factors listed in N.D.C.C. § 49-22.1-09, including:

1. Available research and investigations relating to the effects of the location, construction, and operation of the proposed facility on public health and welfare, natural resources, and the environment.
2. The effects of new gas or liquid energy conversion and gas or liquid transmission technologies and systems designed to minimize adverse environmental effects.
3. The potential for beneficial uses of waste energy from a proposed gas or liquid energy conversion facility.
4. Adverse direct and indirect environmental effects that cannot be avoided should the proposed site or route be designated.
5. Alternatives to the proposed site, corridor, or route that are developed during the hearing process and which minimize adverse effects.
6. Irreversible and irretrievable commitments of natural resources should the proposed site, corridor, or route be designated.
7. The direct and indirect economic impacts of the proposed facility.
8. Existing plans of the state, local government, and private entities for other developments at or in the vicinity of the proposed site, corridor, or route.
9. The effect of the proposed site or route on existing scenic areas, historic sites and structures, and paleontological or archaeological sites.
10. The effect of the proposed site or route on areas that are unique because of biological wealth or because the site or route is a habitat for rare and endangered species.
11. Problems raised by federal agencies, other state agencies, and local entities.

See also N.D.A.C. § 69-06-08-02. As such, excluding landowners and the public from accessing critical evidence shared between Summit and the PSC (and some select businesspeople chosen by Summit), should be reversible error.

WHEREFORE, Appellant respectfully requests that this Court enter an order reversing the orders issued by the PSC and remanding to the PSC for further proceedings consistent with the Court's order, awarding costs and attorneys' fees to Appellant pursuant to N.D.C.C. § 28-32-50, and for such other and further relief deemed just and proper under the circumstances.

Dated this 13th day of December, 2024.



Steven Leibel (ID 07361)
David Knoll (ID 06167)
Knoll Leibel LLP
P.O. Box 858
1915 N. Kavaney Drive, Ste. 3
Bismarck, ND 58501
Ph: (701) 255-2010
steve@bismarck-attorneys.com
david@bismarck-attorneys.com

Landowner/Intervenor Lawyers

Brian E. Jorde
Pro Hac Vice to be filed
Domina Law Group
2425 S. 144th St.
Omaha, NE 68144
Ph: 402-493-4100
bjorde@dominalaw.com
NDCO2@dominalaw.com

Landowner/Intervenor Lawyers

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

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

Case No. PU-22-391

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

November 15, 2024

Appearances

Commissioners Randy Christmann, Sheri Haugen-Hoffart, and Substitute decisionmaker Timothy J. Dawson.

Lawrence Bender, Fredrikson & Byron, P.A., on behalf of Applicant SCS Carbon Transport LLC.

Randall J. Bakke, Bakke Grinolds Wiederholt, on behalf of Intervenor John H. Warford, Jr. Revocable Trust, Chad Wachter and Chad Moldenhauer.

Randall J. Bakke, Bakke Grinolds Wiederholt, on behalf of Intervenor Burleigh County.

Derrick Braaten, Braaten Law Firm, on behalf of Intervenor Emmons County.

Steven J. Leibel, Knoll Leibel LLP, and Brian Jorde, Domina Law Group PC, on behalf of Intervenor Dean Twardoski, et al.

Patrick T. Zomer, Moss & Barnett, P.A., on behalf of Intervenor City of Bismarck.

Kevin Pranis, on behalf of Intervenor Laborers District Council of Minnesota and North Dakota (LIUNA).

Preliminary Statement

On October 17, 2022, SCS Carbon Transport LLC (SCS) filed applications for a certificate of corridor compatibility and for a route permit concerning approximately 320 miles of carbon dioxide pipeline ranging from 4.5 to 24-inch diameter and associated facilities in Burleigh, Cass, Dickey, Emmons, Logan, McIntosh, Morton, Oliver, Richland and Sargent Counties, North Dakota (Application).

Exhibit 1

Also on October 17, 2022, SCS filed an application for waivers of procedures and time schedules established under North Dakota Century Code (NDCC) Sections 49-22.1-05, 49-22.1-08 and 49-22.1-10, and North Dakota Administrative Code (NDAC) Sections 69-06-01-02 and Chapter 69-06-06, requiring separate filings, time schedules, notices, hearings, and requirements on such applications.

On December 14, 2022, Timothy Dawson, Director of the North Dakota Office of Administrative Hearings, was appointed as substitute decisionmaker for Commissioner Julie Fedorchak resulting from her October 25, 2022, voluntary recusal.

On December 30, 2022, the Public Service Commission (Commission) provided notification of the Application to the townships with retained zoning authority, cities, and counties in which any part of the proposed pipeline corridor is located.

On February 1, 2023, the Commission deemed the Applications complete and issued a Notice of Filings and Public Hearings (Notice) scheduling four separate public hearings as follows:

1. March 14, 2023, at 8:30 a.m. Central Time, at the ND Heritage Center & State Museum, Russell Reid Auditorium, 612 E. Boulevard Avenue, Bismarck, ND 58505. This hearing will focus primarily on portions of the project in Oliver, Morton, and Burleigh Counties.
2. March 28, 2023, at 9:00 a.m. Central Time, at the North Sargent School Activity Center, 16 1st Street SW, Gwinner, ND 58040. This hearing will focus primarily on portions of the project in Dickey and Sargent Counties.
3. April 11, 2023, at 9:00 a.m. Central Time, at the Harry Stern and Ella Stern Cultural Center, ND State College of Science, 820 6th Street Oval, Wahpeton, ND 58075. This hearing will focus primarily on portions of the project in Cass and Richland Counties.
4. May 9, 2023, at 9:00 a.m. Central Time, at Emmons County Courthouse Auditorium, 100 4th Street NW, Linton, ND 58552. This hearing will focus primarily on portions of the project in Emmons, Logan, and McIntosh Counties.

The Notice identified the following issues to be considered in the application for waiver of procedures and time schedules:

1. Are the proposed facilities of such length, design, location, or purpose that they will produce minimal adverse effects and that adherence to applicable procedures, requirements, and time schedules may be waived?
2. Is it appropriate for the Commission to waive any procedures, requirements, and time schedules as requested in the application?

The issues to be considered in the applications for a certificate of corridor compatibility and a route permit are:

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?

The public hearings were held as provided in the February 1, 2023, Notice.

On February 7, 2023, the Ward Farms and Inchoate Marital Interests filed a Petition to Intervene. On February 17, 2023, the Ward Farms and Inchoate Marital Interests withdrew its Petition to Intervene.

On February 27, 2023, John H. Warford, Jr. as Trustee of the John H. Warford, Jr. Revocable Trust filed a Petition to Intervene (Warford Intervenors).

On February 28, 2023, Dean Twardoski, et. al. (Landowner Intervenors) filed a Petition to Intervene. The list of intervening affected landowners was updated as the proceeding continued.

On March 3, 2023, Laborers District Council of Minnesota and North Dakota (LIUNA) filed a Petition to Intervene.

On March 6, 2023, ALJ Hope Hogan issued orders granting intervention of John H. Warford, Jr., and the Landowner Intervenors.

On March 9, 2023, ALJ Hope Hogan issued an Order Granting Petition for Intervention of LIUNA.

On March 20, 2023, Rose and Benjamin Dotzenrod (Dotzenrods) filed a Petition to Intervene.

On March 24, 2023, ALJ Hope Hogan issued an Order Granting the Dotzenrod's Petition to Intervene.

On March 30, 2023, the Commission issued a Notice of Public Hearings, scheduling an additional hearing for June 2, 2023, at 8:30 a.m. Central Time, at the ND Heritage Center & State Museum, Russell Reid Auditorium, 612 E. Boulevard Avenue, Bismarck, ND 58505. This hearing will focus primarily on portions of the project in Oliver,

Morton, and Burleigh Counties. The additional hearing was added to ensure adequate opportunity for the public to participate.

On May 16, 2023, Chad Wachter and Chad Moldenhauer filed a Petition to Intervene.

On May 24, 2023, ALJ Hope Hogan issued orders granting Chad Wachter and Chad Moldenhauer's Petitions to Intervene.

On June 1, 2023, SCS filed a motion and brief in support of the motion to declare Emmons County and Burleigh County ordinances superseded and preempted.

On June 1, 2023, Warford Intervenors filed a petition to reopen the proceedings and schedule an additional public hearing.

On June 2, 2023, a public hearing was held as scheduled in Bismarck, North Dakota, focused on portions of the project in Oliver, Morton, and Burleigh Counties.

On June 12, 2023, SCS filed a response opposing the petition to reopen the proceedings and schedule an additional public hearing.

On June 6, 2023, the Commission issued a Notice of Hearing for June 27, 2023, at 8:30 a.m. Central Time, in the Commission Hearing Room, State Capitol, 12th Floor, Bismarck, ND 58505. The issue to be considered and argued is whether the application to protect information should be granted.

On June 27, 2023, the Commission held a hearing on protection of information as scheduled.

On July 24, 2023, Burleigh County Board of Commissioners filed a request that the Plume Modeling Information be made available to the public.

On July 17, 2023, Landowner Intervenors filed a post hearing brief.

On July 19, 2023, Warford Intervenors filed a post hearing brief.

On July 19, 2023, SCS filed a post hearing brief.

On July 31, 2023, Burleigh County Board of Commissioners filed a Petition to Intervene and Response in Opposition to Superseded and Preempted Motion.

On August 4, 2023, the Commission adopted the Order on Protection of Information. The Order granted the protection of the plume modeling information.

On August 4, 2023, the Commission issued its Findings of Fact, Conclusions of Law, and Order denying the Application for a Certificate of Corridor Compatibility and a Route Permit.

On August 18, 2023, SCS filed its Petition for Reconsideration, Notice of Route Adjustment and Request for Limited Rehearing.

On August 21, 2023, ALJ Hope Hogan issued an Order Denying Burleigh County's Petition for Intervention, an Order Denying Intervenor LIUNA's Renewed Motion to Compel Discovery, and an Order Denying Intervenor Warford's Petition for Reconsideration Requesting ALJ to Compel Discovery.

On August 29, 2023, ALJ Hope Hogan issued an Order Denying the Request for Extension to Respond to Petition for Reconsideration.

On August 30, 2023, Burleigh County Board of Commissioners filed a Petition to Intervene & Response in Opposition for Reconsideration, Notice of Route Adjustment & Request for Limited Rehearing.

On August 31, 2023, Landowner Intervenor and Warford Intervenor each filed a Response in Opposition to Petition for Reconsideration, Notice of Route Adjustment & Request for Limited Rehearing. On the same day, Intervenor Emmons County filed a Response in Opposition to Petition for Reconsideration. Intervenor LIUNA filed a Response to Petition for Reconsideration, Notice of Route Adjustment and Request for Limited Rehearing.

On September 6, 2023, ALJ Hope Hogan issued an Order Granting the Petition to Intervene of Burleigh County.

On September 7, 2023, SCS filed a Reply in Support of Petition for Reconsideration, Notice of Route Adjustment & Request for Limited Rehearing and Map of Proposed Bismarck Reroute.

On September 15, 2023, the Commission adopted the Order on Petition for Reconsideration. The Order granted the August 18, 2023, Petition for Reconsideration.

On September 29, 2023, SCS filed a Renewal of Motion to Declare Burleigh and Emmons County Ordinances Superseded and Preempted.

On October 5, 2023, Landowner Intervenor filed a Request for Hearing on the Motion to Declare Burleigh and Emmons County Ordinances Superseded and Preempted. Landowner Intervenor, Warford Intervenor, Emmons County, and LIUNA filed a response to the Motion.

On November 15, 2023, the City of Bismarck filed a Petition to Intervene.

On November 28, 2023, the Commission issued a Notice of Hearing on Motion, regarding the Renewal of the Motion of SCS to hold the Burleigh & Emmons County Ordinances Superseded and Preempted.

On November 30, 2023, ALJ Hope Hogan issued the Order Granting Petition to Intervene for the City of Bismarck.

On December 21, 2023, a hearing was held on the SCS Motion to Declare Burleigh and Emmons County Ordinances Superseded and Preempted.

On February 7, 2024, the Commission adopted an Order declaring a route permit for the construction of a gas or liquid transmission facility automatically supersedes and preempts any local land use or zoning regulations except for road use agreements.

On February 27, 2024, Intervenor Burleigh County filed a Petition for Reconsideration on the Commission's Order issued on February 7, 2024. Landowner Intervenor filed a Joinder to Intervenor Burleigh County's Petition for Reconsideration.

On March 8, 2024, Warford Intervenor withdrew from the proceeding.

On March 18, 2024, the Commission adopted its Order on the Petition for Reconsideration. The Order denied Intervenor Burleigh County's Petition for Reconsideration.

On March 21, 2024, the Commission issued a Notice of Public Hearing, scheduling three additional public hearings as follows:

1. April 22, 2024, at 9:00 a.m. Central Time, in the Ballroom at the Baymont Inn & Suites, 2611 Old Red Trail NW, Mandan, ND 58554. This hearing will focus primarily on adjustments in Oliver, Morton, and Burleigh Counties.
2. May 24, 2024, at 9:00 a.m. Central Time, at the Harry Stern and Ella Stern Cultural Center, ND State College of Science, 811 6th Street, Wahpeton, ND 58075. This hearing will focus primarily on adjustments in Dickey, Sargent, Cass, and Richland Counties.
3. June 4, 2024, at 9:00 a.m. Central Time, in the Our Club, 120 Cedar Avenue East, Linton, ND 58552. This hearing will focus primarily on adjustments in Emmons, Logan, and McIntosh Counties.

The Public Hearings were held as noticed.

On March 27, 2024, Intervenor Burleigh County filed a Motion for Continuance. On the same day, Landowner Intervenor filed a Joinder in Motion to Continue.

On April 9, 2024, the Commission issued an Order on Motion for Continuance denying the hearing continuance requests. The Order provided that if unavailable intervenors do not attend the April 22, 2024, public hearing, and timely file a request for technical hearing, the Commission will provide an opportunity to participate in a technical hearing.

On April 9, 2024, Intervenor Burleigh County filed a Request for a Technical Hearing.

On April 10, 2024, Landowner Intervenor also filed a Motion for Technical Evidentiary Hearing.

On April 25, 2024, the Commission issued a Notice of Technical Hearings, scheduling technical hearings at the State Capitol in Bismarck, ND on May 28, 2024, at 8:30 a.m. Central Time in the Brynhild Haugland Room, on May 29, 2024, at 8:30 a.m. Central Time in the Pioneer Room, on May 30, 2024, at 8:30 a.m. Central Time in the Pioneer Room, and on June 3, 2024, at 8:30 a.m. in the Pioneer Room.

The Technical Hearings were held as scheduled in the April 25, 2024, Notice of Technical Hearings.

On May 27, 2024, Intervenor Burleigh County filed a Motion for Reconsideration of Order on Protection of Information.

On June 3, 2024, Landowner Intervenor filed a Response to Burleigh County's Motion for Reconsideration of Order on Protection of Information.

On June 6, 2024, SCS filed a Response to Burleigh County's Motion for Reconsideration of Order on Protection of Information.

Having allowed all interested persons an opportunity to be heard, and having heard, reviewed, and considered all testimony and evidence presented, the Commission makes the following:

Findings of Fact

1. Applicant, SCS Carbon Transport LLC, is a Delaware limited liability company authorized to do business in the State of North Dakota.

Size, Type and Preferred Location of Facilities

2. SCS proposes to construct approximately 332 miles of Carbon Dioxide (CO₂) pipeline and associated facilities in Burleigh, Cass, Dickey, Emmons, Logan, McIntosh, Morton, Oliver, Richland and Sargent Counties, North Dakota (Project). The CO₂ is compressed into a supercritical or dense phase state and transported through an

interstate pipeline network that terminates northwest of Bismarck in Oliver and Mercer Counties where the CO₂ will be injected into pore space for permanent sequestration.

3. The Project will range in size from 4.5 to 24 inch outside diameter of carbon steel pipe with a wall thickness ranging from 0.189 inches to 0.750 inches. Pipe wall thickness categories will be calculated utilizing 49 CFR Part 195.106. The maximum operating pressure will be 2,183 pounds per square inch gauge. The maximum operating temperature will be 120 degrees Fahrenheit.

4. The Project will have a flow rate capacity of up to 962 million standard cubic feet per day. Shutoff valves will have a maximum spacing of 20 miles. The valve spacing will be spaced no more than every 15 miles in high-consequence areas consistent with rules set forth by the Pipeline and Hazardous Materials Safety Administration (PHMSA).

5. Thirty-two (32) aboveground facilities will be associated with the Project as specified and detailed on page 5 of the Application and updated in docket 435 table 2.1.2.

6. The proposed Project corridor is generally 200 feet in width as depicted as the "200-foot Siting Corridor" in Docket 435 – ND PSC Aerial Mapbook and identified precisely by the associated GIS map data.

7. The Application estimated the cost of the Project at \$4.5 billion. During the public hearing, James Powell testified that the estimated cost of the Project is \$5.5 billion. The North Dakota portion of the Project is estimated at \$898 million.

Study of Preferred Location

8. SCS initiated correspondence seeking comments from the following federal, state, and local agencies regarding the project:

- a. Federal: (1) Federal Aviation Administration; (2) U.S. Fish and Wildlife Service; (3) U.S. Army Corps of Engineers; (4) U.S. Department of Defense; (5) Federal Bureau of Land Management; (6) Grand Forks Air Force Base; (7) Minot Air Force Base; (8) Military Aviation and Installation Assurance Siting Clearinghouse; (9) Natural Resource Conservation Service; (10) Twentieth Air Force Ninety-first Missile Wing.
- b. State: (1) ND Attorney General; (2) ND Department of Agriculture; (3) ND Department of Career and Technical Education; (4) ND Department of Commerce; (5) ND Department of Environmental Quality; (6) ND Aeronautics Commission; (7) ND Department of Human Services; (8) ND Department of Labor and Human Rights; (9) ND Department of Transportation; (10) ND Department of Trust Lands; (11) ND Energy Infrastructure and Impact Office; (12) ND Game and Fish Department; (13) ND Office of the Governor; (14) ND Indian Affairs Commission; (15) ND Industrial Commission; (16) Job Service of

North Dakota; (17) ND Forest Service; (18) ND Geological Survey; (19) ND Pipeline Authority; (20) ND Transmission Authority; (21) ND Parks and Recreation Department; (22) ND Department of Health; (23) ND State Historical Society; (24) ND Department of Water Resources.

- c. Local: (1) Burleigh County Commission; (2) Cass County Commission; (3) Dickey County Commission; (4) Emmons County Commission; (5) Logan County Commission; (6) McIntosh County Commission; (7) Morton County Commission; (8) Oliver County Commission; (9) Richland County Commission; (10) Sargent County Commission.

9. SCS conducted a Class I cultural literature review and a desktop analysis for wetlands, waterbodies, and other sensitive environmental resources, across a one-mile-wide area centered on the Project route (Study Area).

10. SCS conducted several surveys across a generally 200-foot-wide area centered on the Project route as approximated as the "200-foot Siting Corridor" in Docket 435 – ND PSC Aerial Mapbook and identified precisely by the associated GIS map data (Survey Area). SCS conducted surveys for threatened and endangered species, critical habitats, wetlands, waterbodies, and trees/saplings/shrubs.

11. SCS conducted a Class III cultural resources inventory across a portion of the Survey Area. The Class III report was submitted to the State Historical Society of North Dakota, State Historic Preservation Office (SHPO). In a response dated July 17, 2024, SHPO advised that the report is acceptable. SHPO further indicated that this letter was in relation to Volume 2 and made references to potential future volumes 3 and 4. SHPO concurrence is commonly required by the Commission for the issuance of a site certificate or route permit. SCS is addressing SHPO's concerns as evidenced by SHPO's July 17, 2024, letter.

Issues Raised by Intervenors and Public Comment

12. The Commission received extensive public comments during the public hearings. The public comments expressed broad concerns regarding eminent domain, foreign ownership, unfair tactics in acquiring easements, safety, the policy of permanent CO₂ sequestration and storage, setback distances, irreparable harm to underground drain tile systems, impacts on property values, and the ability to obtain liability insurance due to the Project.

13. Having considered the public comments, the issues of eminent domain, foreign ownership, unfair tactics in acquiring easements, safety compliance with PHMSA construction and operation, and the policy of permanent sequestration and storage of CO₂, are outside the jurisdiction and consideration of the Commission.

14. Commenters asserted that greater setback distances and topography should be considered for a CO2 pipeline. NDCC Section 49-22.1-03 specifies that areas within 500 feet of an inhabited rural residence must be an avoidance area unless waived in writing by the owner of the inhabited rural residence. The company testified that it met this requirement by either avoiding the location or obtaining a waiver.

15. Several commenters expressed that the Project will cause irreparable harm to their underground drain tile systems. Additionally, the commenters expressed concerns that if repairs were not performed properly, it would result in sediment buildup and ultimately failure of the drain tile systems. Jeremy Ellingson with Ellingson Drainage testified that his company has been hired by SCS to repair or replace any drain tile systems damaged or modified because of the Project. Dr. Thomas F. Scherer, an Associate Professor in the Department of Agriculture and Biosystems Engineering at North Dakota State University, testified that drain tile repairs such as those described by Mr. Ellingson can be done successfully if completed using proper procedures for both topsoil and subsoil segregation and tile repair procedures. The Commission finds that proper drain tile system repair and/or replacement by SCS will produce minimal adverse effects to drain tile systems.

16. Commenters and intervenors asserted that the Project will cause significant adverse effects on the value of their property and residential development projects. Wade Becker (Owner of Boulder Appraisal) provided direct testimony in response to the assertions. He summarized the effect of existing natural gas and hazardous liquids pipelines upon the development and sale of current residential properties in Bismarck, North Dakota. Mr. Becker's summary asserted that potential buyers of residential property exhibit little to no preference in choosing between lots encumbered and non-encumbered by pipeline easements. Jeff Olson with LandVest also provided direct testimony that asserted that there is no significant difference in the selling price of similar parcels of property with and without pipeline easements. Additionally, Chad Wachter (Bismarck area developer) testified that he purchased property with the intention of creating a residential development with an existing natural gas pipeline easement on the property.

17. The weight these assertions are given by the Commission largely depends on proximity to the Project and the timeline of residential development. It also converges with concerns regarding expansive setback requirements. While there may be impacts, as can occur with pipelines, intervenors and developers have not sufficiently demonstrated that the Project would cause significant adverse impacts on future property values and development. Based upon the record, the Commission finds that the adverse effects have been adequately minimized for the welfare of the people and the environment of the state.

18. A number of commenters provided that the Project will make them unable to purchase liability insurance due to the risk of a release. In the pre-filed testimony of Micah Rorie on June 1, 2023, SCS testified that it would hold the liability for a rupture of the Project unless the rupture was caused by a third-party line strike. Based upon this

testimony, the Commission finds that no additional requirements are needed to ensure the Project will have minimal adverse impacts on the liability insurance requirements of the landowners.

19. SCS requested the Commission find that a permit automatically supersedes and preempts zoning ordinances, and even if they do not, that the Emmons and Burleigh County ordinances are superseded and preempted because they are unreasonably restrictive and conflict with state and federal law. The request was opposed by Intervenor Burleigh County, Intervenor Emmons County, and Landowner Intervenor. The Commission issued an Order dated February 7, 2024, finding that, except for road use agreements, ordinances of both Emmons and Burleigh Counties are preempted and superseded. Further testimony and evidence on this issue was received by the Commission. Upon further review, the Commission finds the ordinances of Emmons County and Burleigh County contain setbacks that are more restrictive than state law setback requirements. Emmons County Ordinance number 23-01-01 subsection B(2)(b)(i) of Article VI mandates a setback distance of 7,920 feet from an established residence. Burleigh County Ordinance number 23-003 Section 27(VI)(4) mandates a setback distance of two miles (10,560 feet) from any occupied structure. The Commission finds the ordinances of Emmons County and Burleigh County are unreasonably restrictive on their face under NDCC 49-22.1-13(2)(c) and are in direct conflict with state law under NDCC Section 49-22.1-03.

20. LIUNA intervened in this proceeding and submitted testimony relating to the benefits of hiring a local labor force for transmission projects and the safety record of the contractors SCS intends to use to construct the Project. SCS's application indicated approximately 1,934 equivalent annual personnel, both skilled and unskilled, would be required for project construction and up to 34 full-time workers will be required during operations. Consistent with Commission precedent, the Commission finds that LIUNA's assertions in relation to SCS's plans are not applicable to selection of a corridor certificate and route permit in the current proceeding.

21. A number of commenters expressed concern about the electrical power needs of the pump stations for the Project. Based upon the relatively small electrical demand from the pump stations (maximum of 5.7 megawatts) and the lack of evidence demonstrating that the incumbent electrical service providers would not be able to sufficiently serve the needs, the Commission finds the impact to be at an acceptable minimum.

22. A number of commenters asserted that the Project should be required to be buried at least six to eight feet deep due to both modern farming practices and the freeze/thaw cycles. The Project will be constructed to the depth mandated by the Commission and agreed to by SCS for transmission construction depth. The testimony presented did not provide a sufficient basis to depart from the current burial depth requirement of four feet to the top of the pipeline.

23. A number of commenters asserted the Project's above ground valves and associated pipe will be susceptible to brittle fracture due to the extremely low temperatures experienced during North Dakota winters. SCS's testimony demonstrates modern pipeline steels are designed with enough toughness to resist fracture propagation, and it will be constructed in accordance with American Petroleum Institute specifications as required by federal regulations for CO2 pipelines. SCS committed to utilizing pipe for above-ground facilities tested to withstand a specified minimum design temperature of minus 50 degrees Fahrenheit, which is 30 degrees below the worst-case expected winter operating temperature of the Project.

Siting Criteria

24. The Commission has established criteria pursuant to NDCC Section 49-22.1-03 to guide the site, corridor, and route suitability evaluation and designation process. The criteria, as set forth in NDAC Section 69-06-08-02, are classified as Exclusion Areas, Avoidance Areas, Selection Criteria, and Policy Criteria. Exclusion and Avoidance areas may be located within a corridor, but at no given point may such an area or areas encompass more than fifty percent of the corridor width unless there is no reasonable alternative. SCS provided an evaluation of the Project for Exclusion Areas, Avoidance Areas, Selection Criteria, and Policy Criteria in its application.

25. An Exclusion Area is a geographic area that must be excluded in the consideration of a route for a transmission facility. A transmission facility route must not be sited within an exclusion area.

26. Areas critical to the life stages of threatened or endangered animal or plant species are designated as exclusion areas under NDAC Section 69-06-08-02(1)(d). SCS's studies and surveys identified that the Project crosses Piping Plover critical habitat at the Missouri River crossing. The Project will cross the Missouri River using Horizontal Directional Drilling (HDD). As the Piping Plover habitat is not beneath the Missouri River, a reasonable buffer zone exists for the protection of the Piping Plover's habitat, and there is no evidence of an adverse impact.

27. SCS studies and surveys did not record any other Exclusion Areas within the Survey Area. No other Exclusion Areas were presented by an intervenor, the public, or Commission staff during the pendency of the proceeding.

28. An Avoidance Area is a geographic area that may not be considered in the routing of a transmission facility unless the applicant shows that, under the circumstances, there is no reasonable alternative. In determining whether an Avoidance Area should be designated for a transmission facility, the Commission may consider, among other things, the proposed management of adverse impacts, the orderly siting of facilities, system reliability and integrity, the efficient use of resources, and alternative routes. Economic considerations alone will not justify the approval of Avoidance Areas.

29. National Wildlife Refuges are designated Avoidance Areas under NDAC Section 69-06-08-02(2)(a). SCS's studies and surveys identified the Dakota Lake National Wildlife Refuge (DLNWR) in Dickey County, North Dakota, is within the proposed corridor. The DLNWR does not encompass more than fifty percent of the corridor width and will not be crossed by the route. The Commission finds that the impact to the DLNWR is at an acceptable minimum.

30. Game Management Areas are designated Avoidance Areas under NDAC Section 69-06-08-02(2)(b). SCS's studies and surveys indicated that six waterfowl production areas are within the proposed corridor. The Richland County Waterfowl Production Area is directly crossed by the proposed corridor and route and encompasses greater than fifty percent of the corridor width in Section 16, Township 136N, Range 51W. The Sargent County Waterfowl Production Area is directly crossed by the proposed corridor and route and encompasses greater than fifty percent of the corridor width in Section 7, Township 131N, Range 55W. It is also within the proposed corridor, but does not encompass more than fifty percent of the corridor width and will not be crossed by the route in Section 8, Township 131N, Range 54W. The Dickey County Waterfowl Production Area is directly crossed by the proposed corridor and route and encompasses greater than fifty percent of the corridor width in Section 14, Township 129N, Range 61W; Section 28, Township 129N, Range 63W; and Section 29, Township 129N, Range 62W. The McIntosh County Waterfowl Production Area is within the proposed corridor, but does not encompass greater than fifty percent of the corridor width in Section 7, Township 129N, Range 70W. The Emmons County Waterfowl Production Area is directly crossed by the proposed corridor and route and encompasses greater than fifty percent of the corridor width in Section 16, Township 133N, Range 74W. The Burleigh County Waterfowl Production Area is within the proposed corridor, but does not encompass greater than fifty percent of the corridor width in Section 30, Township 138N, Range 78W; Section 19, Township 138N, Range 78W; and Section 7, Township 138N, Range 78W. Jon Schmidt (SCS Vice President of Environmental & Regulatory Services) testified that SCS will either completely avoid or HDD beneath waterfowl production areas, eliminating the impact to waterfowl production areas. The Commission finds that the impact to waterfowl production areas and game management areas is at an acceptable minimum.

31. Areas that are geologically unstable are Avoidance Areas under NDAC Section 69-06-08-02(2)(d). SCS's studies and surveys noted that the U.S. Geological Survey and Natural Resources Conservation Service soil data and topographical information were reviewed to identify areas of potential geologic instability. In a letter dated March 3, 2023, the North Dakota Geological Survey (NDGS) noted 14 areas of potential geologic instability within the Project corridor. On April 3, 2023, SCS submitted a letter to the Commission that was sent from SCS to the NDGS on March 31, 2023. On March 7, 2024, the NDGS filed a letter with the Commission indicating that SCS has demonstrated to them that they are appropriately addressing areas of geologic instability in North Dakota. The Commission finds that the impact to geologically unstable areas is at an acceptable minimum.

32. Areas within 500 feet of a residence, school or place of business are Avoidance Areas under NDAC Section 69-06-08-02(2)(e). This avoidance area may be waived by the owner. SCS's studies and surveys identified one residential structure within 500 feet of the Project. SCS has provided a waiver for the residence. SCS submitted that it will not construct within 500 feet of the remaining residences or businesses without obtaining and filing with the Commission signed waivers from the owner(s) of those structures.

33. SCS's studies and surveys did not record any other Avoidance Areas within the Survey Area. No other Avoidance Areas were presented by an intervenor, the public, or Commission staff during the pendency of the proceeding.

34. In accordance with the Commission's Selection Criteria set forth in NDAC Section 69-06-08-02(3), a transmission facility corridor or route shall be approved only if it is determined that any significant adverse effects that will result from the location, construction, and maintenance of the transmission facility will be at an acceptable minimum, or that those effects will be managed and maintained at an acceptable minimum. SCS provided an analysis of the impacts of the Project in relation to all relevant Selection Criteria.

35. The Commission finds that the Project's impact upon the criteria listed in NDAC Section 69-06-08-02(3) will be at an acceptable minimum.

36. SCS analyzed the relevant Policy Criteria set forth in NDAC Section 69-06-08-02(4). There is no need for the Commission to give preference to the applicant in this proceeding.

Additional Measures to Minimize Impact

37. SCS has agreed to a number of steps to mitigate the impact of the Project, as indicated by the executed Certification Relating to Order Provisions – Transmission Facility Siting, with accompanying Tree and Shrub Mitigation Specifications.

38. SCS has developed an Unanticipated Discovery Plan, an Emergency Response Plan, a Noxious Weed Management Plan and a Dust Control Plan (as amended), which are included with the Application.

39. The Project will be designed, constructed and operated in accordance with PHMSA regulations utilizing industry standards.

40. SCS testified that it will have an operations control center in Ames, Iowa, that will be monitored 24 hours per day. The Project will include a supervisory control and data acquisition (SCADA) system that will communicate with all field sites and provide real-time information of the systems operations. The operations control center will have the capability to remotely shut down pump stations and isolate pipeline segments in the event abnormal operating conditions are observed. SCS modeled a valve closure time of 2

minutes, although the timing of the closure is capable of closure much quicker than 2 minutes.

41. SCS is subject to PHMSA requirements and enforcement including Part 195.452, providing preventative and mitigative measures for high consequence areas; Part 195.402, requiring a procedural manual for operations, maintenance, and emergencies to assess coverage of vapor cloud and determine the hazardous areas, actions taken in the event of an operational failure causing a hazardous condition or an accidental release, and procedures for notification of events that need immediate response to emergency coordinating agencies; and Part 195.403, which requires conducting a continuing procedure to instruct emergency response personnel. PHMSA regulates safety and enforcement of this interstate transmission pipeline and has authority to mitigate imminent risks to the public.

42. SCS noted in its application that meetings have occurred with the emergency management directors of all counties crossed by the Project. The emergency management directors were asked to provide a list of equipment needs in order to respond to potential incidents. SCS has committed to providing CO2 monitors, a \$50,000 grant, and \$1,000 per mile of pipe to each county the Project traverses.

43. SCS requested a 300 foot corridor width in its Application. During the hearing, SCS testified that SCS would not object to the Commission issuing a narrower corridor designation of 200 feet in width. The Commission finds that the narrower designation of 200 feet is appropriate.

44. SCS testified that if winter construction were necessary, that it would follow the Interstate Natural Gas Association of America Foundation guidelines for pipeline construction during frozen conditions.

45. The Commissioners requested responses to SCS on a number of issues, including steps to address landowner concerns, confirmation of setback waivers, follow-up with the ND Geological Survey, BNI coal permit status, SHPO concurrence status, and an analysis of the south Bismarck alternative route. SCS adequately addressed the specified Commission requests, including the south Bismarck route impacts, updated agency consultations, and measures taken to address all landowners' concerns to minimize the impacts of the transmission line.

46. SCS testified that 100% of all girth welds will be non-destructively tested.

47. SCS asserted that it will have not less than \$100 million of liability insurance for the Project and that it will have not less than an additional \$25 million of general liability insurance for the North Dakota portion of the Project.

48. Unless otherwise permitted in law, SCS is required to construct, operate, and maintain the pipeline as provided in its filings, findings, and orders of the Commission.

From the foregoing Findings of Fact, the Commission makes the following:

Conclusions of Law

1. The Commission has jurisdiction over the applicant, SCS Carbon Transport LLC, and the subject matter of the Application under NDCC Chapter 49-22.1.
2. SCS is a utility as defined in NDCC Section 49-22.1-01(13).
3. The Project is a gas or liquid transmission facility as defined in NDCC Section 49-22.1-01(7).
4. Based on the above Findings of Fact, and its February 7, 2024, Order in this proceeding, the Commission concludes that NDCC Section 49-22.1-13 automatically supersedes and preempts any local land use or zoning regulations for a gas or liquid transmission facility route permit except for road use agreements. The Commission further concludes that the Ordinances of Burleigh County and Emmons County are unreasonably restrictive on their face under NDCC Section 49-22.1-13(2)(c).
5. Based on the above Findings of Fact, the Commission concludes that the proposed facilities are of such length, design, location, or purpose that they will produce minimal adverse effects and that adherence to applicable procedures, requirements, and time schedules should be waived.
6. Based on the above Findings of Fact, the Commission concludes that it is appropriate for the Commission to waive those certain procedures and time schedules as requested in the application.
7. Based on the above Findings of Fact, the Commission concludes the location, construction, operation, and maintenance of the Project will produce minimal adverse effects on the environment and upon the welfare of the citizens of North Dakota.
8. Based on the above Findings of Fact, the Commission concludes the Project will 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.
9. Based on the above Findings of Fact, the Commission concludes the location, construction, and operation of the Project are compatible with environmental preservation and efficient use of resources.

From the foregoing Findings of Fact and Conclusions of Law, the Commission now makes the following:

Order

The Commission Orders:

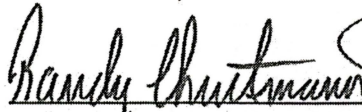
1. SCS Carbon Transport LLC's Application for a waiver of procedures and time schedules is granted.
2. Certificate of Corridor Compatibility No. 235 is issued to SCS Carbon Transport LLC, designating a corridor for the construction, operation, and maintenance of approximately 332 miles of 4.5 to 24-inch diameter CO2 pipeline and associated facilities in Burleigh, Cass, Dickey, Emmons, Logan, McIntosh, Morton, Oliver, Richland and Sargent Counties, North Dakota. The corridor is 200-feet in width as depicted as the "200-foot Siting Corridor" in Docket 435 – ND PSC Aerial Mapbook and identified precisely by the associated GIS map data.
3. Route Permit No. 246 is issued to SCS Carbon Transport LLC, designating a route for the construction, operation, and maintenance of approximately 332 miles of 4.5 to 24-inch diameter CO2 pipeline and associated facilities in Burleigh, Cass, Dickey, Emmons, Logan, McIntosh, Morton, Oliver, Richland, and Sargent Counties, North Dakota. The designated route for this purpose is depicted as the "Proposed Route" in Docket 435 – ND PSC Aerial Mapbook and identified precisely by the associated GIS map data. The designated route includes a route construction buffer of 20 feet on each side of the designated route, contingent upon not impacting an Avoidance Area unless SCS receives written authorization from the Commission prior to conducting any associated construction activities. Construction activities must not impact an Exclusion Area.
4. The March 29, 2023, Certification Relating to Order Provisions – Transmission Facility Siting (Certification), with accompanying Tree and Shrub Mitigation Specifications, is incorporated by reference and attached to this Order.
5. To the extent that there are any conflicts or inconsistencies between SCS's applications in this proceeding and the Certification, the Certification provisions control.
6. SCS shall file with the Commission documentation from SHPO indicating concurrence that no historic properties or sites will be affected prior to beginning construction on any portion of the Project where SHPO concurrence has not yet been received.
7. SCS shall comply with all rules and regulations of all agencies having jurisdiction over any phase of the Project and shall obtain and file with the Commission prior to beginning construction all necessary licenses and permits for construction of any portion of the Project for which the license or permit is required.


8. The May 27, 2024, Motion for Reconsideration of Order on Protection of Information is denied.

9. Any outstanding procedural motions are denied.

PUBLIC SERVICE COMMISSION


Sheri Haugen-Hoffart
Commissioner


Randy Christmann
Chair


Timothy J. Dawson
Substitute decisionmaker

PUBLIC SERVICE COMMISSION
STATE OF NORTH DAKOTA

Certificate of Corridor Compatibility Number 235

This is to certify that the Commission has designated a transmission facility corridor for SCS Carbon Transport LLC designating a corridor 200-feet-wide for the construction, operation, and maintenance of approximately 332 miles of 4.5 to 24-inch diameter CO2 pipeline and associated facilities in Burleigh, Cass, Dickey, Emmons, Logan, McIntosh, Morton, Oliver, Richland and Sargent Counties, North Dakota.

This certificate is issued in accordance with the Order of the Commission dated November 15, 2024, in Case No. PU-22-391 and is subject to the conditions and limitations noted in the Order.

Bismarck, North Dakota, November 15, 2024.

ATTEST:

PUBLIC SERVICE COMMISSION


Executive Secretary


Commissioner

PUBLIC SERVICE COMMISSION
STATE OF NORTH DAKOTA

Route Permit Number 246

This is to certify that the Commission has designated a transmission facility route for SCS Carbon Transport LLC for the construction, operation, and maintenance of approximately 332 miles of 4.5 to 24-inch diameter CO2 pipeline and associated facilities in Burleigh, Cass, Dickey, Emmons, Logan, McIntosh, Morton, Oliver, Richland and Sargent Counties, North Dakota.

This permit is issued in accordance with the Order of this Commission dated November 15, 2024, in Case No. PU-22-391 and is subject to the conditions and limitations noted in the Order.

Bismarck, North Dakota, November 15, 2024.

ATTEST:

PUBLIC SERVICE COMMISSION


Executive Secretary


Commissioner

**STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION**

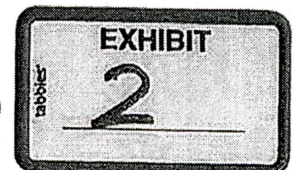
**SCS Carbon Transport LLC
Midwest Carbon Express CO2 Pipeline Project
Siting Application**

Case No. PU-22-391

**CERTIFICATION RELATING TO ORDER PROVISIONS
TRANSMISSION FACILITY SITING**

I am James Powell, a representative of SCS Carbon Transport LLC ("Company") with authority to bind the Company to requirements to be set forth by the Commission in its Order and I certify the following:

1. Company understands and agrees that any Certificate of Corridor Compatibility or Route Permit issued by the Commission will be subject to the conditions and criteria set forth in Chapter 49-22.1 of the North Dakota Century Code and Chapter 69-06-08 of the North Dakota Administrative Code, and that Company shall be responsible for compliance with this order and conditions and criteria set forth in the applicable laws and rules.
2. Company agrees to comply with the rules and regulations of all other agencies having jurisdiction over any phase of the transmission facility including all city, township, and county zoning regulations.
3. Company understands and agrees that it shall obtain all other necessary licenses and permits, and shall provide copies of all licenses and permits to the Commission prior to construction activity associated with the transmission facility that requires said license or permit.
4. Company understands and agrees that any Certificate of Corridor Compatibility or Route Permit issued by the Commission is subject to suspension or revocation and may, in an appropriate and proper case, be suspended or revoked for failure to comply with the Commission's order, the conditions and criteria of the certificate or subsequent modification, or failure to comply with the applicable statutes, rules, regulations, standards, and permits of other state or federal agencies.
5. Company agrees to maintain records that will demonstrate that it has complied with the requirements of the Commission's order issuing a Certificate of Corridor Compatibility or Route Permit, and that it will preserve these records for Commission inspection at any reasonable time upon reasonable notice.
6. Company understands and agrees that the authorizations granted by any Certificate of Corridor Compatibility or Route Permit issued by the Commission for the



transmission facility are subject to modification by order of the Commission if deemed necessary to protect further the public or the environment.

Construction:

7. Company agrees to hold a preconstruction conference prior to commencement of any construction, which must include a Company representative, its construction supervisor, and a representative of Commission Staff, to ensure that Company fully understands the conditions set forth in the Commission's order.
8. Company understands and agrees that all cultural resource mitigation plans must be submitted to the North Dakota State Historic Preservation Office and approved prior to the start of any fieldwork and construction activity in the affected area.
9. Company understands and agrees that topsoil removal will begin when the Commission's third-party construction inspector is present at the Project site to observe that topsoil is properly removed and kept segregated from subsoil until replacement occurs. Company shall establish the date and time for the Commission's third-party construction inspector's topsoil removal oversight in the preconstruction conference.
10. Company agrees to inform the Commission and the Commission's third-party construction inspector of its intent to start construction on the transmission facility prior to the commencement of construction. Once construction has started, Company shall keep the Commission and the Commission's third-party construction inspector updated on construction activities on a monthly basis.
11. Company understands and agrees that the pipeline will be buried to a minimum depth from the ground surface to the top of the pipe of 48 inches in range land, 48 inches for cultivated land, 48 inches at the bottom of the ditch for road crossings, and 72 inches across undeveloped section lines.
12. Company understands and agrees that all topsoil, up to 12 inches, or topsoil to the depth of cultivation, whichever is greater, over and along trench areas where cuts will be made, must be carefully stripped and segregated from the subsoil. Any area on which excavated subsoil will be placed must also be stripped of topsoil. The stripped topsoil must not be stockpiled in natural drainages, and must be protected from water erosion. Care must be taken to protect topsoil from unnecessary compaction by heavy machinery. Unless otherwise approved by the Commission, topsoil must be removed before topsoil freezes in the late fall/ early winter to the point that frost inhibits proper soil segregation. After backfilling with subsoil is completed, any excess subsoil must be placed over the excavation area, blending the grade into existing topography. Topsoil must be replaced over areas from which it was stripped only after the subsoil is replaced.

13. Company understands and agrees that all buried facility crossings of graded roads must be bored unless the responsible governing agency specifically permits Company to open cut the road.
14. Company understands and agrees that staging areas or equipment shall not be located on land owned by a person other than Company unless otherwise negotiated with landowners.
15. Company understands and agrees that if any cultural resource, paleontological site, archeological site, historical site, or grave site is discovered during construction, it must be marked, preserved and protected from further disturbances until a professional examination can be made and a report of such examination is filed with the Commission and the State Historical Society.
16. Company understands and agrees that construction must be suspended when weather conditions are such that construction activities will cause irreparable damage to roads or land, unless adequate protection measures are taken by Company.
17. Company understands and agrees that the Commission has authority to stop Project construction activities in the event of a probable violation of the siting laws, siting rules, or applicable Commission Orders if, in the opinion of the Commission, construction activities are likely to result in irreparable or significant harm.

Restoration and Maintenance:

18. Company understands and agrees that it shall, as soon as practicable upon the completion of the construction of the transmission facility, restore the area affected by the activities to as near as is practicable to the condition as it existed prior to the beginning of construction.
19. Company understands and agrees that all pre-existing township and county roads and lanes used during construction must be repaired or restored to a condition that is equal to or better than the condition prior to the construction of the transmission facility and that will accommodate their previous use, and that areas used as temporary roads or working areas during construction must be restored to their original condition.
20. Company understands and agrees that reclamation, fertilization, and reseeding is to be done according to the Natural Resources Conservation Service recommendations, unless otherwise specified by the landowner and approved by the Commission.

21. Company will fulfill its obligation for reclamation and maintenance of the approved transmission facility right-of-way, transmission facility, and associated facilities continuing throughout the life of the transmission facility.
22. Company will repair all fences and gates removed or damaged during all phases of construction and operation of the transmission facility.
23. Company will repair or replace all drainage tile broken or damaged as a result of construction and operation of the transmission facility.
24. Company agrees to comply with the Tree and Shrub Mitigation Specifications, attached.
25. Company understands and agrees that it shall remove all waste that is a product of construction and operation, restoration, and maintenance of the site, and properly dispose of it on a regular basis.
26. Company understands and agrees that it shall provide any necessary safety measures for traffic control or to restrict public access to the transmission facility.

Communication with Landowners and PSC:

27. Company understands and agrees that, prior to beginning construction of the transmission facility at a location, it shall send a letter to each landowner with whom an easement was executed for that location specifying the name and phone number of the company representative who is responsible for receiving and resolving landowner issues for the life of the easement.
28. Company understands and agrees that it will file with the commission the name and phone number of the current company representative who is responsible for receiving and resolving landowner issues for the transmission facility. The company will update this information whenever there is a change to the current company representative for the life of all easements for the transmission facility.
29. Upon request, Company agrees to provide the Commission with engineering design drawings of the transmission facility prior to construction.
30. Company understands and agrees that it shall advise the Commission as soon as reasonably possible of any extraordinary events which take place at the site of the transmission facility, including injuries to any person.
31. Company agrees to report to the Commission, as soon as reasonably possible, the presence in the permit area of any critical habitat or threatened or endangered species of which Company becomes aware and which were not previously reported to the Commission.

32. Company understands and agrees that it shall inform the Commission in writing of any plans to modify the transmission facility or of any plans to modify the site plan for the transmission facility.
33. Company agrees to provide the Commission with both an electronic and a paper copy of the corridor approved by the Commission and the facility design specifications for the construction of the transmission facility showing the location of the transmission facility as built, and will provide this information within 3 months of the completion of the construction. Company also agrees to provide an electronic version of the corridor approved by the Commission and the facility design specifications for the construction of the transmission facility showing the location of the transmission facility as built that can be imported into ESRI GIS mapping software within 3 months of the completion of the construction. This electronic map data must be referenced to the North Dakota coordinate system of 1983, North and/or South zones US Survey feet (NAD 83) UTM Zone 13N or 14N feet (NAD 83), or geographic coordinate system (WGS 84) feet. The vertical data must be in the appropriate vertical datum for the coordinate system used. All submissions must specify the datum in which the data was developed.
34. Company shall notify the Commission as soon as reasonably possible if any damage, as defined by North Dakota Century Code Chapter 49-23, occurs to underground facilities during construction conducted under the certificate or permit issued in this proceeding. In the event of any damage to underground facilities, Company shall suspend construction in the vicinity of the damage until compliance with One-Call Excavation Notice System requirements under North Dakota Century Code Chapter 49-23 has been determined.

Route Adjustments Before or During Construction:

35. Company agrees to utilize the following procedures if Company seeks a route adjustment before or during construction of the pipeline, pursuant under N.D.C.C. §49-22.1-15.
36. Company will specifically identify which subsection of NDCC 49-22.1-15 it is requesting the adjustment under. Company will file the name and contact information for a key contact person for the purposes of notice and communication during the adjustment application.
37. **ROUTE ADJUSTMENT WITHIN DESIGNATED CORRIDOR, NO AVOIDANCE AREA AFFECTED:** Before conducting any construction activities for any adjustment to the designated route within the designated corridor under NDCC 49-22.1-15(1), the Company will file:

- a. Certification and supporting documentation affirming that construction activities will be within the designated corridor, will not affect any known exclusion or avoidance areas within the designated corridor;
- b. Certification and supporting documentation, including a map meeting the requirements of N.D. Admin. Code § 69-06-04-01(2)(n) identifying the designated corridor, route and the route adjustment;
- c. Certification that Company will comply with the Commission's order, law and rules designating the corridor and route.

38. **ROUTE ADJUSTMENT WITHIN DESIGNATED CORRIDOR, AVOIDANCE AREA AFFECTED:** Before adjusting the route of a gas or liquid transmission line under NDCC 49-22.1-15(2), within the designated corridor that may affect an avoidance area, and before conducting any construction activities for any adjustment to the designated route within the designated corridor, the Company will file:

- a. A specific description of the avoidance area expected to be impacted, including a map meeting the requirements of N.D. Admin. Code § 69-06-04-01(2)(n) identifying:
 - i. the designated corridor, route and the route adjustment;
 - ii. all exclusion and avoidance areas within the portion of the designated corridor containing the route adjustment
- b. Certification and supporting documentation affirming:
 - i. That construction activities will be within the designated corridor
 - ii. That construction activities will not affect any known exclusion area
- c. All field studies performed on the portion of the designated corridor containing the route adjustment;
- d. Specific information about any mitigation measures Company will take within the adjustment area;
- e. Certification that each owner of real property on which the adjustment is to be located and any applicable governmental entity with an interest in the same adjustment area do not oppose the adjustment;
- f. Certification that unless the Commission previously authorized the impact to the same avoidance area, that the utility has good cause and a specific reason to impact the avoidance area and a reasonable alternative does not exist;
- g. Certification that Company will comply with the Commission's order, law and rules designating the corridor and route.

Company acknowledges and agrees that:

- 1. Written authorization from the Commission for impacting the avoidance area is necessary prior to commencement of construction activity unless the Commission fails to act within ten working days of receipt of filing a complete adjustment application, in which case the adjustment is deemed approved.
- 2. The initiation of the ten working days begins upon receipt of a complete filing, to include Company's certifications, supporting documentation and maps.

However, Commission may extend the ten working day provision if Company, in the person of the key contact referenced above, is informed of the reason additional time is necessary for extension and has no objection to an extension.

39. **ROUTE ADJUSTMENT OUTSIDE DESIGNATED CORRIDOR, NO AVOIDANCE AREA AFFECTED:** Before adjusting the route of a gas or liquid transmission line under NDCC 49-22.1-15(3), outside the designated corridor and not affecting any exclusion and avoidance area, before conducting any construction activities for any adjustment to the designated route outside the designated corridor, the Company will file:

- a. Certification and supporting documentation affirming that construction activities will not affect any known exclusion or avoidance areas,
- b. Certification and supporting documents stating the length of the proposed route outside of the corridor and a map meeting the requirements of N.D. Admin. Code § 69-06-04-01(2)(n) identifying the designated corridor, corridor adjustment, designated route and the route adjustment;
- c. Certification that each owner of real property on which the adjustment is to be located and any applicable governmental entity with an interest in the same adjustment area do not oppose the adjustment; and
- d. Detailed field studies indicating exclusion and avoidance areas for the proposed adjustment area; and
- e. Certification that Company will comply with the Commission's order, law and rules designating the corridor and route.

40. **ROUTE ADJUSTMENT OUTSIDE DESIGNATED CORRIDOR, AVOIDANCE AREA AFFECTED:** Before adjusting the route of a gas or liquid transmission line under NDCC 49-22.1-15(4), outside the designated corridor that may affect an avoidance area, and before conducting any construction activities for any adjustment to the designated route outside the designated corridor, the Company will file:

- a. A specific description of the avoidance area expected to be impacted, including a map meeting the requirements of N.D. Admin. Code § 69-06-04-01(2)(n) identifying:
 - i. the designated corridor, corridor adjustment, route and the route adjustment;
 - ii. all exclusion and avoidance areas within the adjustment area
- b. Certification that construction activities will not affect any known exclusion area;
- c. Certification that the utility has good cause and a specific reason to impact the avoidance area and a reasonable alternative does not exist within the designated corridor and route;


- d. Certification that each owner of real property on which the adjustment is to be located and any applicable governmental entity with an interest in the same adjustment area do not oppose the adjustment;
- e. Provide specific information about any mitigation measures Company will take within the adjustment area;
- f. Detailed field studies indicating exclusion and avoidance areas for the proposed adjustment area; and
- g. Certification that Company will comply with the Commission's order, law and rules designating the corridor and route.

Company acknowledges and agrees that:

- 1. Written authorization from the Commission for impacting the avoidance area is necessary prior to commencement of construction activity unless the Commission fails to act within ten working days of receipt of filing a complete adjustment application, in which case the adjustment is deemed approved.
 - 2. The initiation of the ten working days begins upon receipt of a complete filing, to include Company's certifications, supporting documentation and maps. However, Commission may extend the ten working day provision if Company, in the person of the key contact referenced above, is informed of the reason additional time is necessary for extension and has no objection to an extension.
41. When applicable, Company may submit the field studies from the original application for the corridor and route provided they cover the adjustment area.
42. Company acknowledges and agrees that written authorization from the Commission for impacting the avoidance area is necessary prior to commencement of construction activity.

Dated this 13th day of March, 2023.

SCS CARBON TRANSPORT LLC

By: 
James Powell

Its: Chief Operating Officer

**STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION**

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

Case No. PU-22-391

Tree and Shrub Mitigation Specifications

Inventory

Prior to cutting or clearing trees or shrubs for construction:

- All trees one-inch or greater in diameter at breast height must be inventoried to record the location, number, and species.
- All shrubs and all coniferous trees of any diameter must be inventoried to record the location, number, and species.

Clearing

The maximum width of tree and shrub removal is 50 feet, unless otherwise approved by the Commission.

Replacement

1. Landowners must be given the option to have trees and shrubs that are removed from their property replaced on their property. The landowner may waive this option in writing. If the landowner waives this option, the company shall plant replacement trees and shrubs in an alternate location in the same region, if practical.
2. Trees and shrubs must be replaced on a minimum two-to-one basis. The company shall develop a Tree and Shrub Mitigation Plan (Plan) in consultation with landowners who are seeking replacement trees and shrubs and in accordance with USDA-NRCS-North Dakota Field Office Technical Guide: Windbreak and Woodland Tree Care and Management. The guidelines outlined in the Technical Guide shall be followed until filing of the Plan summary outlined in number 5 below.
3. The purpose of the company's Tree and Shrub Mitigation Plan is to create sustainable plantings, appropriate for the local soil and growing conditions that will provide long-term benefit to landowners, farmers and ranchers, the community, wildlife and the environment.
4. The Plan, including the proposed number, variety, type, location, and approximate date for plantings, shall be filed with and approved by the Commission.
5. Two years after completion of the plan, the company must file a summary documenting how the plan achieved the purpose outlined in number 3 above. The summary must also report the number of surviving replacement trees and shrubs.
6. The Commission will consider, on a limited basis as conditions warrant, mitigation plans that provide long-term wildlife habitat and conservation benefits but do not involve the replanting of trees and shrubs.

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

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

Case No. PU-22-391

ORDER

February 7, 2024

Preliminary Statement

On November 28, 2023, the Commission issued a Notice of Hearing on Motion, scheduling a hearing for December 21, 2023, at 2:00 p.m. central time in the Pioneer Room, State Capitol Judicial Wing, Ground Floor, Bismarck, North Dakota 58505 (Hearing). The Notice identified the issue to be considered and argued is the application of North Dakota Century Code Section 49-22.1-13 to local land use or zoning regulations.

On December 21, 2023, the Hearing was held as scheduled. SCS Carbon Transport LLC (SCS), Emmons County, Burleigh County, Bismarck Area Intervenor (BAI), Landowner Intervenor, and the Laborers District Council Minnesota and North Dakota (Laborers) provided oral argument.

Discussion

On October 17, 2022, SCS filed applications for a certificate of corridor compatibility and for a route permit concerning approximately 320 miles of carbon dioxide pipeline ranging from 4.5 to 24-inch diameter and associated facilities in Burleigh, Cass, Dickey, Emmons, Logan, McIntosh, Morton, Oliver, Richland and Sargent Counties, North Dakota (Application). During the proceeding, SCS filed a motion requesting the Commission to declare Emmons County and Burleigh County ordinances superseded and preempted pursuant to N.D.C.C. § 49-22.1-13(2)(b). On August 4, 2023, due to the Commission's denial of the applications, the issue of superseding and preemption was declared moot.

On August 18, 2023, SCS filed a petition for reconsideration, requesting an opportunity to present relevant evidence at a hearing to address deficiencies noted in the Commission's August 4, 2023, Order. On September 15, 2023, the Commission issued an Order granting the SCS petition for reconsideration. On September 29, 2023, SCS renewed its motion to declare Burleigh and Emmons County ordinances superseded and preempted, specifically requesting the Commission determine whether N.D.C.C. § 49-22.1-13(2)(b) automatically preempts all local ordinances.

SCS argued that a permit from the Commission automatically preempts local land use or zoning regulations under N.D.C.C. § 49-22.1-13(2)(b). During oral argument, SCS suggested that subdivisions a, b, and c of N.D.C.C. §49-22.1-13(2) provide substantive categories and distinctions in treatment as never, always, and sometimes preempted. SCS further discussed that subdivisions d and e are implementation rather than substantive categories. SCS submitted that the plain language of N.D.C.C. § 49-22.1-13(2)(b) is clear that automatic preemption is applied to local land use or zoning regulations. SCS argued that having a determination will help steer the hearing and evidentiary issues to be considered upon reconsideration.

SCS also argued that even if the Commission is required to apply the unreasonably restrictive factors, the conflict with federal law and unreasonableness is clear on the face of the ordinances. For example, SCS pointed to excessive setbacks in Emmons and Burleigh counties, arguing that they create a cumulative impact blocking out extensive areas, especially considering they were adopted after the project started.

Emmons County disputed SCS's interpretation of N.D.C.C. § 49-22.1-13(2). Emmons County argued that a permit supersedes and preempts local land use or zoning regulations, except as provided in 49-22.1-13(2), requiring further examination of the section. Emmons County argued that "requirements" under subdivision c are synonymous with zoning ordinances and regulations. As a result, Emmons County argues that SCS must demonstrate by the preponderance of the evidence that the local land use or zoning regulations are unreasonably restrictive.

Burleigh County argued that N.D.C.C. § 49-22.1-13(2)(b) specifies the permit to construct supersedes and preempts local land use or zoning regulations, but that a permit to construct is not in front of the Commission. BAI joined this argument, emphasizing that SCS has applied for a certificate of site compatibility — not a permit to construct. BAI argued that SCS must first apply for a special use permit from Burleigh County with a first right of appeal to the Public Service Commission, and that a reading otherwise contradicts N.D.C.C. § 11-33-01.

The Landowner Intervenor briefed that siting is a two-step process of first granting a certificate of site compatibility which may not supersede and preempt local land use or zoning regulations, and then the permit for construction. Landowner Intervenor argued that only the route permit automatically supersedes and preempts local land use or zoning regulations, and N.D.C.C. § 49-22.1-13(2)(d) applies to a certificate of corridor compatibility.

Laborers argued that local government does not have authority to establish requirements inconsistent with state law, rules, and Commission orders. They emphasized that routing infrastructure through a "regulatory patchwork" will hinder orderly development.

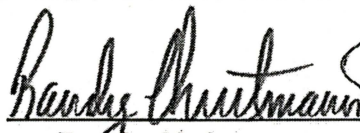
The issue before the Commission is not whether it may preempt local land use or zoning regulations, but whether preemption is automatic. N.D.C.C. § 49-22.1-08 provides that a utility may combine an application for a certificate or permit. SCS's Application is a consolidated application for a certificate of corridor compatibility and for a route permit. The Commission concludes that, based on the plain language of N.D.C.C. § 49-22.1-13, the approval of a route permit for a gas or liquid transmission facility automatically supersedes and preempts local land use or zoning regulations, except for road use agreements, even though local ordinances may be filed for Commission review and consideration. By function of the consolidated application, local land use and zoning regulations are automatically superseded and preempted in the present case.


Order

The Commission Orders North Dakota Century Code Section 49-22.1-13 automatically supersedes and preempts any local land use or zoning regulations for a gas or liquid transmission facility route permit.

PUBLIC SERVICE COMMISSION


Sheri Haugen-Hoffert
Commissioner


Randy Christmann
Chair


Timothy J. Dawson
Substitute decisionmaker

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

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

Case No. PU-22-391

ORDER ON PROTECTION OF INFORMATION

August 4, 2023

Preliminary Statement

On April 21, 2023, SCS Carbon Transport LLC (SCS) filed an Application for Protection of Information to protect certain information in the captioned case.

On May 1, 2023, John H. Warford Jr. (Warford) filed an objection to the Application for Protection of Information, and also a Request for Hearing. Counsel for Knoll and Leibel filed a Joinder Objection on behalf of the Intervenor represented by their law firm.

On May 5, 2023, SCS filed a response to Intervenor's Objections and Request for Hearing.

On May 12, 2023, a Response to Application of SCS Carbon Transport LLC to Protect information was filed by Advisory Counsel for the North Dakota Public Service Commission (PSC).

On June 6, 2023, a Notice of Hearing was Issued for June 27, 2023.

On June 27, 2023, a hearing was held in the Pioneer Room at the State Capitol.

Findings of Fact

1. The information for which SCS seeks protection is related to dispersion modeling in the event of a release of carbon dioxide from the pipeline (Dispersion Model). In its application, SCS discusses that the information was related to the preparation of an emergency response plan and integrity management plan in accordance with Pipeline and Hazardous Materials Safety Administration (PHMSA). Given the sensitive nature of the information, SCS stated that it will request that PHMSA protect these materials from public release and is requesting the Public Service Commission protect the information from public disclosure pursuant to North Dakota Century Code (NDCC) Section 44-04-24 as a security system plan of critical infrastructure.
2. During the hearing, SCS provided an explanation of vapor dispersion modeling and requirements of PHMSA for integrity management plans and risk assessments in reference to PHMSA guidance and enforcement. SCS argued that under state and

federal laws, the information should be protected. It argued that PHMSA has previously determined similar information such as spill modeling information should be protected to prevent its use by bad actors. SCS has also stated that this determination has been affirmed by the courts. SCS provided examples demonstrating that the risk of the use of this information by bad actors is not hypothetical.

3. Counsel for the Intervenor both acknowledged that some information likely should be subject to protection but argued that all information being protected cannot be correct. Counsel argued that the information should be publicly available to permit the public and businesses to provide their own risk assessment based on the data. They also argued that this information should be available to emergency personnel for the purpose of emergency planning and training. Mr. Bakke argued that the intervenors and PSC had not had the opportunity to scrutinize the information. Both intervenors disputed the federal protection cited as it relates to the information (See 49 CFR Part 1520). They also provided that the past-sited projects provided similar information without protection.

4. The purpose of the hearing was to determine whether the application to protect the information from public disclosure should be granted. A security system plan for critical infrastructure may be exempt from public disclosure.

5. A security system plan is defined broadly and includes: Records, photographs, schematic diagrams, surveys, recommendations, communications, or consultations relating directly to the physical or electronic security of the critical infrastructure. It also includes vulnerability and capability assessments, threat response plans, and emergency evacuation plans. See NDCC Section 44-04-24(2)(b). Security plans according to SCS include "records, information, photographs, audio and visual presentations, schematic Diagrams, surveys, recommendations, communications or consultations" relating to critical infrastructure. NDCC Section 44-04-24(2)(a) defines critical infrastructure as:

[P]ublic buildings, systems, including telecommunication centers and computers, power generation plans, dams, bridges, and similar key resources, and systems related to utility services, fuel supply, energy, hazardous liquid, natural gas, or coal, whether physical or virtual, so vital to the state that the incapacity or destruction of these systems would have a debilitating impact on security, state economic security, state public health or safety, or any combination of those matters.

6. Refrigerated CO₂ is defined by PHMSA as a hazardous material in the Hazardous Materials Table. See 49 C.F.R. 172.101. SCS's pipeline is an infrastructure designed to transport Refrigerated CO₂. The Commission finds that the SCS pipeline meets the definition of critical infrastructure under NDCC Section 44-04-24(2)(a).

7. The disclosure of plume modeling could provide information on where damaging or vandalizing the pipeline by a bad actor would have a debilitating impact on security

and state public health and safety. Prevention of receipt of the information by bad actors necessitates the PSC limiting access to the information.

8. The intervenors argue that they have been unable to scrutinize the information due to an inability to access the information. They further argue that emergency personnel must have access to the information for planning purposes and organizing response plans. If SCS does not provide the information to the entities or the intervenors, per North Dakota Administrative Code (NDAC) Section 69-02-09-07(2) the Commission may authorize receipt of the protected information upon a showing of good cause for why the information is needed and require the execution of a protection agreement.

9. The Commission finds the argument that entities previously filed similar information, including plume studies, without requesting protection unpersuasive. The PSC acknowledges that there has been growing vigilance for the protection of data and information related to the operations and locations of critical infrastructure. This is reflected in the legislative history from the 66th Legislative Assembly, SB 2209 broadening the language of NDCC Section 44-04-24.

10. The confidentiality of this information has been maintained by SCS. No party has demonstrated that the information has been disclosed to the public or to persons other than employees or authorized agents who need to know the information to fulfill their responsibilities in connection with the subject matter of the information.

11. NDAC Section 69-02-09-03 provides "the commission staff shall examine the information and application, and file and serve a response that includes a recommendation on whether the information qualifies for protection." Staff response provided its opinion that the application satisfies the requirements of the law.

From the foregoing Findings of Fact, the Commission makes the following:

Conclusions of Law

12. The Commission concludes that the information is a security system plan for critical infrastructure that may be exempt from public disclosure.

13. The Commission concludes that SCS's application satisfies the requirements of the North Dakota Century Code for protection of information.

From the foregoing Findings of Fact and Conclusions of Law, the Commission makes the following:

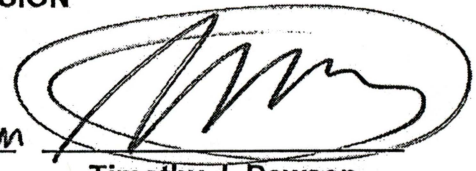
Order

The Commission orders the April 21, 2023, application of SCS Carbon Transport LLC for protection of information is GRANTED.

PUBLIC SERVICE COMMISSION


Sheri Haugen-Hoffart
Commissioner


Randy Christmann
Chair


Timothy J. Dawson
Substitute decisionmaker