STATE OF IOWA
DEPARTMENT OF COMMERCE
IOWA UTILITIES BOARD

IN RE: **SUMMIT CARBON SOLUTIONS LLC**	**DOCKET NO. HLP-2021-0001**

MOTION TO RECONSIDER, IN PART, JULY 14 ORDER REQUIRING ADDITIONAL EXHIBITS

On April 19, 2022, the Office of Consumer Advocate filed a motion asking the Board to require Summit Carbon Solutions to file additional information prior to the further processing of Summit Carbon's application for a pipeline permit. Summit Carbon resisted the motion, arguing that it had provided all of the information required by statute, rule, prescribed form or Board precedent to be in its Petition. Further, the kind of information requested has been, in numerous other linear infrastructure dockets, precisely what was developed in testimony and exhibits or the kind of materials available to OCA through discovery processes.

On July 14, 2022, the Board issued an order denying in part the OCA request, but also granting the request in part. Of relevance to this motion, the Board created a requirement for two new petition exhibits – L1 and L2 – to be filed within 30 days. These exhibits both pertain to pipeline safety information: a risk assessment and discharge plume modeling, and an Emergency Response Plan (ERP). Summit Carbon respectfully request that the Board reconsider its order with respect to L1 and L2.

ARGUMENT

In its motion, OCA argued that a carbon dioxide (CO2) pipeline is different from what the Board and parties are used to, and therefore OCA needs more notice of certain information to guide its decisions on retaining consultants and experts. This argument, however, should have

been rejected by the Board both legally and factually. As a legal matter, CO2 pipelines are no different from any other products under Iowa Code chapter 479B. The legislature chose to group carbon dioxide -- expressly by name – with oil, ammonia, and other products covered by the statute. There are no special or different provisions. It is not up to the OCA or the Board to decide whether to treat CO2 differently when the decision as to how to regulate it has already been made by the Iowa Legislature.

Factually, the argument does not hold water, either. The OCA, and any other interested parties, already know what will be carried in the pipeline and the basic framework of the project, including the extensive information the statute and rules require as part of the application, and the information presented at the public information meetings. It does not require having all of the details to be able to start locating and working with consultants if there is a desire to have additional input. Even in the most complex litigation, expert reports do not have to be filed at the outset of a case. Even in large cases like Dakota Access, the kind of information OCA is seeking was provided at the earliest in conjunction with direct testimony, where an expert can explain the development of and relevance of the information, and the purpose for which it is being used in the case. There is no reason to believe now, months in advance, there will not be ample time for OCA (or anyone else) to prepare responsive testimony to such testimony and exhibits.

The biggest reason the Board should reconsider its decision regarding L1 and L2, however, is that any plausible reason for requiring the information would be preempted. Both L1 and L2 obviously, on their face, deal with pipeline safety. Safety of interstate hazardous liquids pipelines is within the exclusive jurisdiction of the federal Pipeline and Hazardous Materials Safety Administration (PHMSA). *See* 49 U.S.C. §60104(c) (“A State authority may

not adopt or continue in force safety standards for interstate pipeline facilities or interstate pipeline transportation" for hazardous liquids subject to federal regulation.) The Eight Circuit has repeatedly found that attempts by the Board to regulate interstate pipeline safety are preempted. *See ANR Pipeline Co. v. Iowa State Commerce Commn.*, 828 F.2d 465 (8th Cir. 1987), *Kinley Corp. v. Iowa Utils. Bd.*, 999 F.2d 354 (8th Cir. 1993), and *Northern Natural Gas Co. v. Iowa Utils. Bd.*, 377 F.3d 817 (8th Cir. 2004).

In the current case, the Board's July 14 Order pertaining to L1 and L2 would surely be preempted as well. The Pipeline Safety Act expressly preempts state requirements relating to safety. With an exception for one-call programs, the Act dictates: "A State authority may not adopt or continue in force safety standards for interstate pipeline facilities or interstate pipeline transportation." *See* 49 U.S.C. § 60104(c); *see also Kinley*, 999 F.2d at 358 (relying on nearly identical language in Hazardous Liquids Pipeline Safety Act (HLPSA) to preempt Iowa's safety regulations); *Olympic Pipe Line Co. v. City of Seattle*, 437 F.3d 872, 877-80 (9th Cir. 2006).

Notably, in *Kinley*, the scope of the preemption was broad in two respects. First, the Board argued that it wasn't actually regulating safety; the *Kinley* permit was denied based on a financial responsibility requirement. The 8th Circuit found that was merely a proxy for safety based on timing and language in the letter the Board had sent to *Kinley*. *Id*. at 359. Similarly here, there is no basis for the Board to require the filing of safety risk assessments and emergency response plans *other* than safety. As in *Kinley*, the Board appears to argue that it isn't really trying to regulate safety, but rather that safety information is required to approve a route. But if the route proposed would be compliant with all PHMSA regulations, a state determination that the route should be amended based on the risk assessment or emergency response plan would, as in *Kinley*, be at best a proxy and at worst actual regulation of pipeline

safety in contravention of federal authority. The July 14 Order seeks information, analysis and plans relating to the safe operation of pipelines - risks of a potential product release, nature of a potential release, response to a potential release – all of which are subject to ***exclusive*** federal pipeline safety oversight by PHMSA. That jurisdiction encompasses the safe construction, operation, and maintenance of interstate CO2 pipelines. While the Board's concern for safety is understandable, it is also precisely what is preempted and addressed exclusively by federal regulators.

The Illinois Appellate Court faced a similar argument regarding the Dakota Access and ETCO pipelines. In that case, where objectors had appealed the Illinois Commerce Commission's approval of additional pumps to increase the throughput of the pipeline, the court described the objectors argument in this way:

> The objectors acknowledge this preemption provision but maintain that it poses no obstacle to their case. They point out that they are not asking the Commission to impose safety standards for the carriers' pipelines "by, for example, requiring thicker pipe walls or lower operating pressures." Instead, the objectors argue, they are asking the Commission to enforce section 15-601 of the Act (220 ILCS 5/15-601 (West 2020)), which, to quote from that Illinois statute, requires "[e]ach common carrier by pipeline" to "construct, maintain, and operate all of its pipelines, related facilities, and equipment in this State in a manner that imposes no undue risk to *** the public."

Save Our Illinois Land (SOIL) v. Illinois Commerce Commission, 2022 IL App (4th) 210008 (Jan, 12, 2022) at *15-16. That is, the objectors, like the Board here, argue the requested action wouldn't really be regulating safety, just using safety information to carry out the broad purpose of the state statute. The Illinois Appellate Court rejected this attempt to evade the preemptive effect of federal law:

> The federal government has completely occupied the field of oil-pipeline safety. As the Commission rightly perceived, therefore, it would be federally preempted from denying the carriers' petition on the ground that the pipeline, with the

> addition of the pumping stations, would not be safe enough. *See* 49 U.S.C. § 60104(c) (2018); *Pacific Gas*, 461 U.S. at 212-13, 103 S.Ct. 1713.

SOIL, 2022 IL App (4th) 210008 at *16.

The second way that the preemption in *Kinley* was broad is that it preempted any state *process*:

> [The Board] further argue[s] that because HLPSA does not establish a comprehensive federal permit scheme for hazardous liquid pipelines, the state hearing, permit, and inspection provisions, as well as the environmental protection and damage remedies provisions, are not preempted. We disagree. . . . [W]e think ANR is controlling here. Accordingly, we hold that the hearing, permit, and inspection provisions of Chapter 479 are so related to federal safety regulations that they are preempted by HLPSA with respect to interstate hazardous liquids pipelines.

Id. at 359-60. *Cf. NE Hub Partners L.P. v. CNG Transmission Corp.*, 239 F.3d 333, 348 (3d. Cir. 2001) ("We therefore hold that state regulatory process may be preempted by conflict with federal law as well as by field occupation.") As a result, the process of preparing or submitting safety-related materials to the Board and at the request of another state agency, the OCA, as part of permitting analysis is preempted just the same as an express regulation on a safety-related issue.

In interpretive guidance issued under HLSPA, the U.S. Department of Transportation addressed the question of jurisdiction of the federal and state governments. In Appendix A to 49 C.F.R. Part 195, the Department states bluntly that "HLPSA leaves to exclusive Federal regulation and enforcement the 'interstate pipeline facilities,' those used for the pipeline transportation of hazardous liquids in interstate or foreign commerce." That is, no authority has been delegated to states regarding operational aspects of interstate liquids pipelines unless the state is certified by PHMSA to perform inspections and implement PHMSA regulations. (Even in those situations, the state is only an agent of the federal government enforcing federal

regulations, it is not and cannot act on its own jurisdictional authority. In any event, Iowa is not certified for *intrastate* hazardous liquids pipelines, and it is expressly preempted from regulating *interstate* pipeline safety for hazardous liquids.) While Appendix A predates the Pipeline Safety Act of 1992, as the court in *Kinley* discussed, the 1992 Act actually "expands, rather than restricts, federal regulation of interstate hazardous liquid pipelines. . ." *Id*. at 360. That is, the force and scope of the federal preemption has only gotten larger since Appendix A was issued.

The preemption is especially evident with respect to L2, the ERP. As the Board acknowledges in its July 14 Order, the ERP is a creation of PHMSA regulations – it is part of a manual required to comply with rules 49 C.F.R. 195.402(e). Each and every provision of that subsection clearly pertains to safety. Section 402 provides that the manual described does not have to be completed until the time "initial operations of a pipeline system commence." 49 C.F.R. 195.402(a).[1] For the Board to have more stringent requirements than PHMSA – to see drafts, to require the ERP earlier than federal rules require – conflicts with PHMSA's regulations and is preempted.

There are two additional problems with requiring L1 and L2 to be filed that should also cause the Board to reconsider. First, L1 is effectively a guidebook for those who would seek to cause harm or destruction. This is not a hypothetical issue: objectors, seeking to show Dakota Access would leak by attempting to use sabotage to cause just such an event, used acetylene torches to damage above-ground valves.[2] Accordingly, this is the kind of information that at the very least would be given confidential – and likely even attorneys-eyes-only – protection. But

[1] The Board's July 14 Order notes that Summit Carbon said in its resistance to OCA's motion that it did not have to have the ERP prepared until 60-days prior to operation. While technically the rule does not require it in advance, as a practical matter it will need to be finalized with some amount of lead time prior to commencing operations to ensure compliance. Summit Carbon estimated that lead time at 60 days.

[2] *See* https://www.desmoinesregister.com/story/news/crime-and-courts/2021/06/30/iowa-activist-jessica-reznicek-sentenced-dakota-access-pipeline-sabotage-catholic-workers/7808907002/

the continuing dispute over Summit Carbon's initial mailing lists demonstrates the challenges in ensuring such information remains adequately confidential absent a clear and express exception to the Open Records Act.[3] Second, it is notable that in Dakota Access the Board did not require the full Facilities Response Plan, a document similar to the ERP but specific to oil spill response, to be provided until after the Permit was issued as part of the post-approval compliance process and even then it was not provided to other parties – the Board was alerted it could obtain it from PHMSA.[4] A shell without detail of an FRP was provided, subject to confidential treatment, much closer to the hearing – and it did not include the discharge modeling that would be analogous to L1. *See In re Dakota Access LLC*, HLP-2014-0001, Transcript Vol III at p. 648. (Todd Stamm indicating to Mr. Taylor that the discharge model had not been required to be produced at time of hearing.) There is simply no reason why the Board would treat the Summit Carbon information so differently. *See* Iowa Code 17A.19(10)(h) (allowing reverse of action "other than a rule that is inconsistent with the agency's prior practice or precedents, unless the agency has justified that inconsistency by stating credible reasons sufficient to indicate a fair and rational basis for the inconsistency.")

In summary, there is no use for the information requested as L1 and L2 that the Board could make that would not be preempted. Using it to make routing decisions if the route proposed is already compliant with all PHMSA safety regulations would in fact be imposing a more stringent standard and would be preempted. Requiring more safety information or requiring it sooner than PHMSA would, or in draft form, would also be a more stringent form of

[3] At the very least the Board should stay its July 14 Order until the outcome of the records injunction case in state court is known, as the Board and Summit may have additional information as to the Board's ability to ensure appropriate protection for sensitive information.

[4] It is clear from the transcripts of the hearing that the Board allowed a result where much of the safety information discussed was never filed in the docket. *See In re Dakota Access LLC*, HLP-2014-0001, Transcript Vol XI at pp. 3492-3493 (confirming maps with high consequence areas and valves would only be provided to Board and OCA).

regulation that would be preempted. Ultimately, however, there is also no need for the information, particularly not this early in the case. OCA has ample information to determine whether to seek out consultants to assist with their case. And historically on similar projects applicants have addressed safety in their testimony and exhibits filed at the appropriate time. Even then, the Board has not required release modeling or response plans to be provided until much later in the process in prior cases, and required them to be provided only subject to confidentiality protections that are now in question.

For all of the above reasons, the Board should reconsider and vacate the requirement in its July 14 Order to file the information identified as L1 and L2.

Respectfully submitted this 3rd day of August, 2022.

By: */s/ Bret A. Dublinske*

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ATTORNEYS FOR SUMMIT CARBON SOLUTIONS LLC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 3rd day of August, 2022, he had the foregoing documents electronically filed with the Iowa Utilities Board using the EFS system which will send notifications of such filing (electronically) to the appropriate persons.

/s/ Bret A. Dublinske
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