STATE OF IOWA
DEPARTMENT OF COMMERCE
BEFORE THE IOWA UTILITIES BOARD

IN RE:	)	
	)	Docket No. HLP-2021-0001
SUMMIT CARBON SOLUTIONS LLC	)	

SIERRA CLUB'S BRIEF REGARDING PREEMPTION

Comes now Sierra Club Iowa Chapter and hereby submits its Brief Regarding Preemption:

INTRODUCTION

On April 14, 2022, the Office of Consumer Advocate (OCA) filed a motion asking the Board to require Summit Carbon Solutions (Summit) to file additional information prior to further proceedings for a pipeline permit. The Board entered an Order on July 14, 2022, granting the OCA's motion in part. The Board ordered Summit to submit a risk assessment and modeling information, Summit's emergency response plan, information pertaining to Summit's evaluation of alternative routes, and information regarding communications with landowners for surveys.

In response to the Board's Order, Summit filed a Motion to Reconsider on August 3, 2022. Summit's primary argument was that requiring the information regarding a risk assessment and modeling information and Summit's emergency response plan is beyond the Board's authority because that information allegedly involves safety issues that are preempted by federal law. Summit's preemption argument is premised on the alleged exclusive jurisdiction of the Pipeline and Hazardous Materials Safety Administration (PHMSA) over pipeline safety.

In response to Summit's Motion to Reconsider, the Board scheduled a status conference, after which the Board decided to hold a hearing on the issue of federal preemption and for the parties to submit briefs prior to the hearing.

FEDERAL LAW REGARDING PIPELINE SAFETY

The Pipeline Safety Act, 49 U.S.C. §§ 60101 et seq., is intended to "provide adequate protection against risks of life and property posed by pipeline transportation and pipeline facilities." 49 U.S.C. § 60101(a)(1). The Act intends to accomplish this goal by "presrib[ing] minimum safety standards for pipeline transportation and for pipeline facilities. 49 U.S.C. § 60101(2). The standards "apply to any or all of the owners or operators of pipeline facilities" and "apply to the design, installation, inspection, emergency plans and procedures, testing, construction, extension, operation, replacement, and maintenance of pipeline facilities." 49 U.S.C. § 60101(a)(2). Under the doctrine of *expression unius est exclusio alterius,* when a statute enumerates specific terms or conditions covered by the statute, all others are excluded. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955 (2007); *Staff Mgmt. & New Hampshire Ins. Co. v. Jimenez*, 839 N.W.2d 640 (Iowa 2013). Thus, it is clear that PHMSA preemption applies only to the standards enumerated in § 60101(a)(2) and only to owners and operators of pipelines. State and local decisions as to location and routing of pipelines made by entities not owners or operators of a pipeline, even if safety is a consideration in those decisions, are not preempted. Put another way, only standards related to the pipeline itself are preempted, not requirements or conditions related to other considerations, even if those are based to some extent on safety.

Following this same theme, it is important to consider that the Pipeline Safety Act does not authorize PHMSA to promulgate route or location selection standards for hazardous liquid pipelines. So the PHMSA regulations in 49 C.F.R. Part 195 cannot and do not contain route selection standards.

PHMSA is tasked with adopting rules and enforcing the provisions of the Pipeline Safety Act. The PHMSA regulations, at 49 C.F.R. Part 195, cover the following areas: accident and safety-related condition reporting, design requirements, construction, pressure testing, operation and maintenance, qualifications of pipeline personnel, and corrosion control. All of these regulations relate to the construction and operation of the pipeline itself and impose obligations on the pipeline owner and operator. None of these regulations cover the location or siting of the pipeline or actions by entities other than the owner or operator of a pipeline.

In fact, the Pipeline Safety Act, 49 U.S.C. § 60104(e) specifically states, "This chapter does not authorize the Secretary of Transportation [through PHMSA] to prescribe the location or routing of a pipeline facility." The only preemption created by the Pipeline Safety Act states that "a State authority may not adopt or continue in force safety standards for interstate pipeline facilities or interstate pipeline transportation. 49 U.S.C. § 60104(c). Obviously, location and routing of a pipeline does not relate to safety standards, even if the location and routing decision is based to some extent on safety considerations.

THE FEDERAL PREEMPTION DOCTRINE

Federal law can preempt state law or regulation because Article VI of the United States Constitution states that any federal law or act pursuant to federal law is the "supreme law of the land." Preemption exists under the Supremacy Clause where:

● Congress expressly intended to preempt state law, see *Jones v. Rath Packing Co.*, 430 U.S. 519, 97 S.Ct. 1305 (1977);

● there is actual conflict between federal and state law, see *Free v. Bland*, 369 U.S. 663, 82 S.Ct. 1089 (1962);

● compliance with both federal and state law is impossible, see *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 83 S.Ct. 1210 (1963);

● there is implicit in federal law a barrier to state regulation, see *Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85, 103 S.Ct. 2890 (1983);

● Congress has "occupied the field" of the regulation, leaving no room for a state to supplement the federal law, see *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 67 S.Ct. 1146 (1947); or

● the state statute forms an obstacle to the realization of Congressional objectives, see *Hines v. Davidowitz*, 312 U.S. 52, 61 S.Ct. 399 (1941).

Several rules of interpretation inform this analysis.

First, although there is a presumption against federal preemption when Congress legislates in a field traditionally occupied by the states, the presumption is inapplicable in fields where the federal government has had a longstanding regulatory presence. See, *United Parcel Service, Inc. v. Flores-Galarza,* 318 F.3d 323 (1st Cir. 2003).

Second, "[a] preemption question requires an examination of congressional intent." *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299, 108 S.Ct. 1145 (1988). The best indication of intent is the text of the statute itself. *South Port Marine, LLC v. Gulf Oil Ltd. P'ship*, 234 F.3d 58, 65 (1st Cir. 2000). Congress explicitly may define the extent to which its enactments preempt state law. See, *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95-96,

103 S.Ct. 2890, 2898-2900 (1983). In the absence of explicit statutory language, however, Congress implicitly may indicate an intent to occupy a given field to the exclusion of state law. Field preemption may be inferred where the pervasiveness of the federal regulation precludes supplementation by the States, where the federal interest in the field is sufficiently dominant, or where "the object sought to be obtained by the federal law and the character of the obligations imposed by it . . . reveal the same purpose." *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230, 67 S.Ct. 1146 (1947). To determine intent, the Court must consider the statute itself and any federal regulations implementing and explaining it. See, *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699, 104 S.Ct. 2694 (1984).

Third, where Congress has not entirely displaced state regulation in a particular field, state law is preempted when it actually conflicts with federal law. A conflict will be found when it is impossible to comply with both state and federal law, *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143, 83 S.Ct. 1210 (1963), or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress, *Hines v. Davidowitz*, 312 U.S. 52, 61 S.Ct. 399 (1941). See also, *California Coastal Comm. v. Granite Rock Co.*, 480 U.S. 572, 581, 107 S.Ct. 1419 (1987).

COURT DECISIONS ON PIPELINE SAFETY ACT PREEMPTION

In its Motion to Reconsider, raising the preemption issue, Summit relied on three cases from the United States Court of Appeals for the Eighth Circuit: *ANR Pipeline Co. v. Ia. State Commerce Comm.*, 828 F.2d 465 (8th Cir. 1987); *Kinley Corp. v. IUB*, 999 F.2d 354 (8th Cir. 1993); and *Northern Natural Gas Co. v. IUB*, 377 F.3d 817 (8th Cir. 2004). However, none of these cases support Summit's argument for preemption.

Summit also relied on a case from the Illinois Court of Appeals, *Save Our Illinois Land (SOIL) v. Illinois Commerce Commission*, 2022 Il. App. (4th), 210008 (Jan. 12, 2022). That decision does not provide any support for Summit, either.

A. The *ANR* Decision Is Not Controlling Precedent Because It Did Not Analyze State Jurisdiction to Consider Safety in Routing or State Jurisdiction Over Emergency Response Planning.

The *ANR* decision can readily be distinguished because its preemption analysis considered a remarkably comprehensive and direct conflict between state and federal law. The state statute at issue, Iowa Code Chapter 479, incorporated by reference and sought to enforce the entire body of federal pipeline safety standards. The extensive nature of the conflict between federal and state law meant that the court had no need to evaluate the jurisdictional boundaries of the field of pipeline safety. In particular, the *ANR* court did not consider the scope of state jurisdiction over routing or emergency response to pipeline ruptures, both of which are preserved to states by the plain language of the Pipeline Safety Act itself. As such, the *ANR* decision offers no substantial guidance here and is not controlling precedent.

The ANR Pipeline Company sought to construct an interstate natural gas pipeline subject to federal jurisdiction under the Natural Gas Pipeline Safety Act (the precursor to the Pipeline Safety Act) and the Natural Gas Act, 15 U.S.C. § 717 et seq., which grants the Federal Energy Regulatory Commission (FERC) authority to route interstate natural gas pipelines. *ANR*, 828 F.2d at 466. FERC authorized construction and the company began to construct the pipeline 10 days before the Commerce Commission's permit hearing. So the Commission fined ANR for beginning construction before obtaining a state permit, based on state regulations. In response, ANR sought a declaratory judgment in federal court.

The state law at issue, Iowa Code Chapter 479, purported to give the state supervisory authority over construction, operation, inspection, and maintenance of intrastate and interstate gas pipelines. Section 479.4 authorized the Commission to:

> inspect and examine the construction, maintenance and the condition of said pipelines . . . and whenever said board shall determine that any pipeline . . . or any apparatus, device or equipment used in connection therewith is unsafe and dangerous . . . it shall immediately in writing notify said pipeline company, constructing or operating said pipeline . . . , device, apparatus or other equipment to repair or replace any defective or unsafe part or portion of said pipeline . . . .

Section 479.5 required that pipeline companies obtain a permit to "construct, maintain and operate" a pipeline. Pursuant to § 479.17, the Commission "adopted as its own regulations the construction, operation, maintenance, and safety standards promulgated by the U.S. Department of Transportation . . . ." *ANR*, 828 F.2d at 467, 469. Section 479.12 authorized the state to issue a permit "upon such terms, conditions and restrictions **as to safety requirements and as to location and route** as may be determined by it to be just and proper." (emphasis added). Section 479.28 authorized the state to "commence an equitable action . . . where said defective, unsafe, or dangerous portion of said pipeline, device, apparatus or equipment is located to compel compliance . . . ." Thus, Iowa had adopted the full scope of federal pipeline safety standards into state law and claimed jurisdiction to enforce those standards. The statute also asserted state jurisdiction over routing of interstate natural gas pipelines, which is preempted by the Natural Gas Act and the authority assigned to FERC, but that issue was not raised in the *ANR* case. Due to the incorporation by reference of express federal safety standards, a more direct and comprehensive conflict with federal authority cannot be imagined.

Due to the direct and comprehensive conflict between federal and state law, the *ANR* court preempted Chapter 479 in its entirety, including both its safety-related and non-safety

provisions as the court ruled that these could not be severed. The nature of the conflict was such that the court had no need to consider the precise boundary between safety and non-safety regulation. Instead, the court acknowledged that the issue of state regulation of non-safety matters was not before it and that state regulation of pipelines might be allowed "as long as the state regulations do not conflict with existing federal standards." *ANR*, 828 F.2d at 473.

The pipeline at issue in the *ANR* decision was an interstate natural gas pipeline, such that it was subject to FERC routing jurisdiction under the Natural Gas Act, 15 U.S.C. § 717f. Therefore, the court had no occasion to analyze the scope of state routing authority over hazardous liquid pipelines recognized in the Pipeline Safety Act, 49 U.S.C. § 60104(e).

The *ANR Pipeline* decision, as an interstate natural gas pipeline case, could not and did not consider the impact of § 60104(e) and its precursor language on the scope of federal preemption under the Pipeline Safety Act. Since Congress first enacted pipeline safety legislation in 1968 as the Natural Gas Pipeline Safety Act, it has made clear that the Pipeline Safety Act is not a routing statute. The 1968 Act defined the term "pipeline facilities" to include:

> without limitation, new and existing pipe rights-of-way and any equipment facility, or building used in the transportation of gas or the treatment of gas during the course of transportation **but "rights of way" as used in this chapter does not authorize the Secretary to prescribe the location or routing of any pipeline facility**.

49 U.S.C. § 1671(4) (1968)(since transferred to the Pipeline Safety Act) (emphasis added). Since the only use of the term "rights-of-way" in the 1968 law is in this jurisdictional definition, it should be understood to mean that while federal pipeline safety law applied within new rights-of-way for "pipeline facilities," it left decisions on the choice of "location

or routing" for such rights-of-way to other entities, which for interstate natural gas pipelines was then the Federal Power Commission (now FERC), and for petroleum pipelines was the states. This language was subsequently adopted into the Hazardous Liquid Pipeline Safety Act of 1979, Pub. L. No. 96-129, 98 Stat. 989, 1003-16, the first application of federal pipeline safety law to hazardous liquid pipelines, and codified at 49 U.S.C. § 2001(4) (1979). In its 1994 re-authorization of the Pipeline Safety Act, Congress moved the "location and routing" savings clause from this definition, and instead adopted 49 U.S.C. § 60104(e), which more broadly states:

> This chapter does not authorize the Secretary of Transportation to prescribe the location or routing of a pipeline facility.

Both the earlier and current versions of the savings clause make clear that the Pipeline Safety Act does not grant the federal government jurisdiction over routing decisions, nor do these provisions contain any express limitations on state routing discretion, with regard to the policy factors that a state may consider when choosing a route or for any other reason. Therefore, the Pipeline Safety Act recognizes that states retain jurisdiction and unlimited discretion over the field of hazardous liquid pipeline routing. Further, Pipeline Safety Act safety standards "apply . . . exclusively to owners and operators of pipeline facilities," 49 U.S.C. § 60102(a)(1)(A), such that the Department of Transportation has no jurisdiction to impose routing safety standards on state or local governments. Thus, the Pipeline Safety Act recognizes that states retain their full original jurisdiction to route interstate hazardous liquid pipelines based on any policy factors they deem relevant.

The *ANR Pipeline* decision can be distinguished from the present situation because the court did not discuss or analyze the impact of the Pipeline Safety Act's "location or routing" savings clause on the scope of state routing discretion. This being said, the court

recognized that a state may regulate within a "field" preserved for state regulation by Congress. *ANR,* 828 F.2d at 471, *citing Cardiff Acquisitions, Inc. v. Hatch*, 751 F.2d 906, 913–16 (8th Cir. 1984). Since the field of pipeline routing is retained within state jurisdiction, a finding that states may consider safety as a policy factor in their routing decisions is consistent with the *ANR* decision.

The issue of state jurisdiction over emergency response was not before the court, because Iowa Code Chapter 479 did not authorize or otherwise regulate state emergency response to pipeline ruptures, and because the direct and comprehensive conflict between Chapter 479 and the Pipeline Safety Act meant that the *ANR Pipeline* decision had no need to analyze the precise boundaries of the field of "pipeline safety."

Therefore, the *ANR Pipeline* decision can be distinguished from the situation here, because the court considered a clear-cut case of conflict preemption and did not analyze the boundary between federal and state jurisdiction on routing; regulation of entities other than pipeline owners and operators on safety matters; or regulation of pipeline owners and operators on non-safety matters. Thus, the ANR Pipeline decision is neither controlling nor does it provide substantial guidance on the scope of state jurisdiction to regulate pipelines not subject to Pipeline Safety Act preemption.

B. The *Kinley* Decision Is Not Controlling Because It Did Not Analyze State Jurisdiction To Consider Safety In Routing Or State Jurisdiction Over Emergency Response Planning.

The *Kinley* decision contains no binding precedent because it merely extended the holding of the *ANR* decision to hazardous liquid pipelines and did not consider the scope of state jurisdiction over routing or emergency response. The court restated federal preemption law, briefly discussed the Pipeline Safety Act's legislative history, noted that

the version of Chapter 479 at issue was "virtually identical" to that analyzed by the *ANR* court, and therefore found the *ANR* decision to be controlling. Kinley, 999 F.2d at 359-60 and n. 4. Consequently, the *Kinley* decision contains far less analysis than the *ANR* decision. Iowa argued that its enforcement action was allowed because it was based solely on a non-safety financial responsibility requirement, but the court rejected this argument because: (1) of evidence in a letter from the state that it was concerned for safety; (2) of the timing of enforcement; and (3) it found, as did the *ANR* court, that the non-safety provisions were not severable from the preempted portions of the statute. *Id*. at 359.

Summit has cited the *Kinley* decision for the proposition that mere consideration by a state of safety concerns may taint a state action. Such interpretation is excessively broad. While the court acknowledged that the state was concerned about safety, this fact was not necessary to or an element in the court's holding, which states:

> We agree with the district court that this issue was resolved by the *ANR* decision. In *ANR* we held that the hearing, permit and inspection provisions of Chapter 479 as it existed in 1987, which are essentially identical to the hearing, permit and inspection provisions in the current Chapter 479 were preempted by the NGPSA, . . . Because the former Chapter 479, which was at issue in ANR, is virtually identical to the current Chapter 479, we 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 the HLPSA with respect to interstate hazardous liquid pipelines. We also hold that the environmental and damage remedies provisions are not severable from the preempted hearing, permit and inspection provisions and thus are preempted as well.

Id. at 360. While the federal courts may take evidence of the purpose of a state action into account, federal preemption law focuses on the effect of state regulation, not its purpose. *See Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248 (1963) ("The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced

without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives."); see also, *United States v. Board of County Commissioners of County of Otero*, 843 F.3d 1208, 1214-15 (10th Cir. 2016). As the *ANR* decision before it, the *Kinley* decision is based on a direct and comprehensive conflict between federal and state law, and the *Kinley* decision also did not analyze the scope of state jurisdiction over pipeline routing or emergency response.

C. The *Northern Natural Gas* Decision Is Not Controlling Precedent Because, Like the *ANR* Decision, It Was Based On the Natural Gas Act.

The *Northern Natural Gas* decision, like the *ANR* decision, was based on the Natural Gas Act and FERC's authority under the Act to make the decision on location and routing of natural gas pipelines, and FERC's regulations carrying out that authority. The Pipeline Safety Act was not even mentioned in the opinion. So, just as in the prior cases, the preemption by federal law was clear, but irrelevant to carbon dioxide pipelines.

Northern Natural Gas sought to upgrade its pipeline near DeWitt, Iowa. The company was authorized to do this by a "blanket certificate" that was issued by FERC. This authorization also required Northern Natural Gas to abide by FERC's environmental standards. But the IUB also had regulations on land restoration, so Northern Natural Gas asked the Board to waive those requirements because the company had to abide by the FERC rules. The Board refused to grant a waiver. The company then filed suit in federal court for a declaratory judgment.

The Eighth Circuit held that the Iowa statutes and IUB regulations regulated a field that was occupied by federal law. The court cited a then-recent U.S. Supreme Court case, *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 108 S.Ct. 1145 (1988), as controlling authority. In *Schneidewind* the state required the pipeline company to obtain state approval

to issue securities to finance the project. The *Schneidewind* court held that FERC had authority to determine the financial requirements for a pipeline permit and had therefore occupied the field. State regulation was therefore preempted.

The *Northern Natural Gas* court summed up as follows:

> We believe it follows from *Schneidewind* that the Iowa provisions regulate in an occupied field, and are thus preempted by the Natural Gas Act. The NGA confers on the FERC authority over the issues addressed by the Iowa statutory and regulatory provisions. The NGA specifically provides that the FERC will oversee the construction and maintenance of natural gas pipelines through the issuance of certificates of public convenience and necessity. See, 15 U.S.C. § 717f(c). The FERC has authority to regulate the construction, extension, operation, and acquisition of natural gas facilities, see *id.* § 717f(e)(1)(A), and does so through its extensive and detailed regulations concerning applications for certificates. See generally 18 C.F.R. Part 157, Subpart A.
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> Many of the FERC's regulations relate to environmental concerns.
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> We think it is undeniable that Congress delegated authority to the FERC to regulate a wide range of environmental issues relating to pipeline facilities, and we agree with the conclusion of the Second Circuit that "[b]ecause FERC has authority to consider environmental issues, states may not engage in concurrent site-specific environmental review."

So the *Northern Natural Gas* case involved a natural gas pipeline that was governed by the Natural Gas Act which gave FERC broad authority over permitting and regulating all aspects of the pipeline. So preemption was clear. None of those factors are present in this case.

D. The *SOIL* Decision Is Not Controlling Precedent Because It Considered a Clear Safety Standard Related to the Pipeline, Not to a Location or Routing Decision.

The *SOIL* decision highlights the fact that the Pipeline Safety Act imposes safety standards on the pipeline operator for the construction and operation of the pipeline itself.

The Act does not regulate location and routing decisions, even if safety is a consideration in the location and routing decision.

Dakota Access sought to increase the volume of crude oil that would flow through its existing pipeline in Illinois. Citizens who opposed the increased volume on the pipeline were concerned about the leak detection system on the pipeline. The Illinois court noted that the Pipeline Safety Act provides that "[a] State authority may not adopt or continue in force safety standards for interstate pipeline facilities or interstate pipeline transportation," citing 49 U.S.C. § 60104(c). *SOIL* at ¶ 88. The court held that a leak detection system is a safety standard, so the issue raised by the citizens was preempted by federal regulation. Location and routing decisions were not at issue in this case.

The majority opinion of the Board in its September 2, 2022, Order rejecting Summit's Motion to Reconsider did not mention the *SOIL* decision, so the majority apparently understood that the *SOIL* decision was irrelevant. Board Member Byrnes, in his dissenting opinion in that Order, relied exclusively on the *SOIL* decision. The dissenting opinion failed to consider that the Board's July 14, 2022 Order was not imposing any safety standards. As shown in previous sections of this brief, federal preemption extends only to safety standards. By requiring Summit to submit a risk assessment and modeling information and an emergency response plan, the Board was not attempting to control what was in the information. The Board simply wants the information to better inform its decision as to whether to grant the petition for a permit. The Board can certainly use that information as a consideration in its permitting decision. See, *Puntenney v. IUB*, 928 N.W.2d 829 (Iowa 2019).

E. Other Court Decisions Recognizing That the Pipeline Safety Act Does Not Regulate the Field of Pipeline Routing or Prohibit Consideration of Safety in Local Government Interstate Hazardous Liquid Pipeline and Liquified Natural Gas Terminal Siting.

1. *Texas Midstream Gas Services LLC v. City of Grand Prairie*

It is important to distinguish what constitutes a safety standard as referred to in the Pipeline Safety Act. This point was discussed in some detail in *Texas Midstream Gas Services LLC v. City of Grand Prairie*, 608 F.3d 200 (5th Cir. 2010). In that case the pipeline company proposed to construct a natural gas pipeline and compressor station in the City of Grand Prairie. The City then amended its local ordinance to impose a setback distance for the compressor station. The pipeline company argued that the City's action was preempted by federal law.

The *Grand Prairie* court began its analysis by noting that the Pipeline Safety Act was passed in 1994 to consolidate the provisions of the Natural Gas Pipeline Safety Act and the Hazardous Liquids Pipeline Safety Act. The court noted that the Pipeline Safety Act is intended to "provide adequate protection against risks to life and property posed by pipeline transportation and pipeline facilities," citing 49 U.S.C. § 60102(a)(1). The court went on to state that the Act expressly preempts state "safety standards for interstate pipeline facilities or interstate pipeline transportation," citing 49 U.S.C. § 60104(c). Finally, the Court explained that the Act requires PHMSA to set minimum safety standards for pipeline installation, operation, and maintenance. One of those PHMSA safety standards dealt specifically with compressor stations. 49 C.F.R. § 192.163(a), including a requirement that the compressor building must be far enough away from adjacent property to minimize the spread of fire and to allow space for fire-fighting equipment.

The court forcefully held that the setback requirement was not a safety standard. The court said:

> A local rule may incidentally affect safety, so long as the effect is not "direct and substantial," [citing *Schneidewind v. Paul*].
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> However, the PSA [Pipeline Safety Act] itself only preempts *safety* standards. Section 192.163, and administrative regulation, touches on compressor station location as a means of effectuating this legislative directive. . . . But TMGS has not shown that the setback requirement hinders Congress's intent by reducing safety, nor that it is "physically impossible" to comply with Section 10 and § 192.163(a). . . . TMGS raises the prospect that an operator of a compressor station may have to acquire more land to comply with both requirements. This may cost TMGS money, but it does not thwart "the full purposes and objectives of Congress."

So it is clear that location and routing decisions by state or local authorities are not safety standards that are preempted by federal law.

2. *Washington Gas Light C. v. Prince George's County Council*

The *Washington Gas Light* case, 711 F.3d 412 (4th Cir. 2013), affirming *Washington Gas Light C. v. Prince George's County Council,* 2012 WL 832756 (D. Md.), involved the denial of a county zoning permit to site a proposed intrastate liquified natural gas ("LNG") facility at an existing natural gas terminal. The project developer argued that the county zoning action was preempted by both the Natural Gas Act, 15 U.S.C. § 717 *et seq*. ("NGA") and the Pipeline Safety Act. The court held that the proposed LNG terminal was an intrastate facility subject to state and local siting rules, such that the NGA did not apply. As such, both the district court and court of appeals considered whether the county land use decision was preempted by the Pipeline Safety Act.

The first Pipeline Safety Act issue considered was whether the proposed terminal's status as an intrastate facility allowed the county to avoid preemption. The district court

recognized that Section 60104(c) does not preempt state safety standards for intrastate pipelines, provided they are no less stringent than federal standards, 49 U.S.C. § 60104(c), and therefore held that express preemption did not apply. However, the court then analyzed whether field and conflict preemption nonetheless barred the county permit denial as an interference with minimum federal safety standards, such that the issue of Pipeline Safety Act preemption need be addressed.

The case was also complicated by the fact that the facility at issue was a LNG terminal, subject to the Pipeline Safety Act LNG-specific location and safety standards in § 60103(a), (b), and (d) and 49 C.F.R. Part 193, and by the fact that PHMSA had delegated pipeline safety authority over intrastate pipelines to the State of Maryland pursuant to Section 60105(a). Pursuant to this authority, Maryland adopted the federal Pipeline Safety Act LNG location and safety standards in their entirety by reference as minimum safety standards. This included the location standards authorized by 49 U.S.C. § 60103(a) and promulgated in 49 C.F.R. §§ 193.2057, 193.2059, 193.2067, 193.2155(b), and 193.2187. Maryland assigned responsibility for implementation of these federal safety and location standards to the Maryland Public Service Commission ("MDPSC"), which stepped into PHMSA's shoes in accordance with 49 U.S.C. § 60105(a). Therefore, federal pipeline safety and location standards applied in Maryland to intrastate natural gas facilities to the same extent as they applied to interstate facilities. Further, the county that denied a siting permit had no authority to implement or enforce the Pipeline Safety Act. Therefore, the issue of whether a county zoning decision based in part on safety interfered with application of federal pipeline safety standards was squarely before the court.

The district court held, "to the extent the MDPSC stands in place of the Secretary of Transportation under the PSA, the Secretary too lacks authority to make siting or locating decisions for storage facilities," thus recognizing that the Pipeline Safety Act granted neither the MDPSC nor the U.S. Secretary of Transportation authority to regulate routing. *Washington Gas Light*, 1012 WL 832756 at 6.

Since state law did not grant the MDPSC authority to make location or siting decisions for intrastate natural gas facilities, jurisdiction to determine the location of the proposed LNG facility was a matter of local land use regulation. In considering whether the Pipeline Safety Act's LNG "location standards" preempted consideration of other factors, the district court held, "it is not accurate to characterize the PSA's treatment of [LNG facility] location as comprehensive. To the contrary, the PSA and its accompanying federal and state regulations address location and land use only as one of many factors to consider when adopting safety standards." *Id.* at 8.

Further, the district court rejected the argument that the Pipeline Safety Act considers location a safety standard, because:

> The PSA recognizes that safety considerations should affect location decisions for LNG facilities and provides that the safety standards established pursuant to the PSA should guide the relevant decision-maker as he makes siting decisions. The PSA does not conflate the two. Moreover, the language of the PSA indicates that some entity other than the Secretary of Transportation (or the MDPSC when it stands in the secretary's place) shall make decisions regarding siting and location of facilities. **When the same statute simultaneously authorizes one entity to set safety standards and does not authorize that entity to make siting decisions, the only logical interpretation is that location is not a safety standard.** It is also noteworthy that for interstate gas facilities, the PSA operates alongside the NGA, and under the NGA, FERC makes siting decisions for interstate LNG facilities. This is further evidence that the PSA does not govern the location of LNG facilities.

Id. (emphasis added). Thus, the district court recognized that siting decisions and safety standards are distinct fields of law, such that "location is not a safety standard." *Id*.

The district court also rejected the argument that, "the structure of the applicable federal and state laws allows the utility to choose the location for a natural gas facility in the first instance and then requires that federal (or certified state) authorities approve or disapprove that location on safety and other grounds," meaning under Pipeline Safety Act jurisdiction. *Id*. The court rejected this argument because:

> PSA approval is not the only approval that is applicable to an LNG facility and that the PSA's structure does not foreclose the applicability of local land use laws. For interstate facilities subject to FERC jurisdiction, FERC takes local land use laws into consideration when issuing its certificates for convenience and necessity and often directs utilities to work with state and local governments to obtain other applicable permits. Where FERC does not have jurisdiction, it follows that state or local entities apply their own land use laws directly.

Id. Since the Pipeline Safety Act expressly withholds jurisdiction to determine the location or route of a LNG facility, state or local governments may "apply their own land use laws directly." *Id*.

Finally, the district court reasoned that, "the only plausible way in which Prince George's County's land use laws could be preempted by the PSA is if the land use regulations could be properly classified as safety standards." *Id*. at 9. The court reviewed the purpose of the county ordinance and found that "[c]ertainly safety considerations play a role in all zoning decisions, but in this case they clearly were not the primary motivator for the County in establishing the [local land use plan]. In sum, the [local land use plan] is not a safety standard." *Id*. While it could be argued that the incidental nature of consideration of safety by the county preserved its ordinance, this is not the case, because

the court also found that the local zoning action did not in practical effect conflict with the Pipeline Safety Act:

> There is also no conflict between the [land use plan] and the PSA. Washington Gas can comply with both statutes simultaneously because adhering to the local land use requirements will not force Washington Gas to place its LNG storage facility in a location deemed unsafe according to the [LNG location] safety standards in place pursuant to the PSA.

Id. at 10. Therefore, even though the Pipeline Safety Act expressly authorizes PHMSA to issue "location standards" for LNG facilities as part of its pipeline safety jurisdiction, the existence of these "location standards" does not preempt county siting jurisdiction where there is no direct conflict between the Pipeline Safety Act and a county ordinance. *Id*. That is, if a facility operator can fully comply with both the Pipeline Safety Act and a county siting ordinance, there is no federal preemption.

It follows that for hazardous liquid pipelines, for which there are no Pipeline Safety Act "location standards," that a hazardous liquid pipeline operator can always comply with both the Pipeline Safety Act and a state or county siting law, because there are no PHMSA "location standards" with which a state or county law could conflict.

In upholding the district court, the circuit court also evaluated the county's right to control local land use in light of § 60104(c) and § 60104(e). 711 F.3d at 422; *see also* 784 F.Supp.2d at 576. The Court of Appeals held that, "the PSA does not preempt the County Zoning Plans because the PSA only preempts safety regulations and the County Zoning Plans are not safety regulations . . . ." *Id*. at 414. More specifically, it stated:

> Even if we were to find that the PSA has preemptive effect beyond the express preemption provision discussed in 49 U.S.C. § 60104(c), we would not conclude that Congress intended the PSA to occupy the field of natural gas facility siting. Specifically, the PSA expressly circumscribes the Secretary of Transportation's role in this area, indicating, "[t]his chapter does not authorize the Secretary of

> Transportation to prescribe the location or routing of a pipeline facility." 49 U.S.C. § 60104(e) (2006).

Id. at 422. Thus, § 60104(e) draws a bright line between the field of facility siting and the field of pipeline safety. *Id*. at 422.

The LNG company also argued that the zoning plan was "safety regulations in disguise" because the City denied the permit based on safety grounds. *Id*. at 421. The court rejected this argument, saying:

> At their core, the County Zoning Plans are local land use provisions designed to foster residential and recreational development. Even assuming safety concerns played some part in the enactment of the County Zoning Plans, those concerns would have been merely incidental to the overall purpose of the County Zoning Plans.

Id. at 421-22. Because the County Zoning Plan was not an attempt to impact application of Pipeline Safety Act safety standards, it was not a safety standard even if safety considerations played some role in the adoption of the plan.

In considering whether the County Zoning Plan was subject to conflict preemption, the court held:

> the County Zoning Plans do not stand as an obstacle to the accomplishment of the full purposes of Congress, because, as noted above, Congress' purpose in enacting the PSA was to create federal minimum safety standards on all natural gas pipeline facilities. See 49 U.S.C. § 60102(a). Because the County Zoning Plans are not safety standards, they do not stand as an obstacle to the accomplishment of this purpose.

Id. at 422. Although the Court of Appeals did not expressly consider whether safety may be considered as part of a state siting decision, it nonetheless rejected the proposition that zoning decisions are "safety standards" within the meaning of the Pipeline Safety Act. It also made clear that mere consideration of safety issues in a local land use decision does not convert such decision into a Pipeline Safety Act safety standard.

3. Portland Pipe Line Corp. v. City of South Portland

In the *Portland Pipe Line* case, 288 F.Supp.3d 321 (D. Me. 2017), a pipeline developer proposed to construct a new crude oil loading terminal in South Portland, Maine. This terminal would be supplied with crude oil via reversal of the Portland-Montreal Pipe Line ("PMPL"), an interstate hazardous liquid pipeline facility subject to the Pipeline Safety Act. In response, the city enacted an ordinance prohibiting new crude oil loading infrastructure including modifications to the PMPL necessary for such loading. The city based its decision in part on the increased risk of oil spills that would result from such modification.

In response, the pipeline company sued the city on a number of grounds, including whether the facility siting ordinance was preempted by the Pipeline Safety Act. The company presented three arguments:

- "the true purpose of the Ordinance is actually to stop the transportation of crude oil into the United States through the Harbor because the City 'deemed Canadian 'tar sands' an unsafe product . . . ;'" *id*. at 408;
- the ordinance was preempted "because of the "impact on pipeline operations and related safety measures . . . ;" *id*. at 408-09; and
- the goal of uniform regulatory standards will be obstructed if a locality may "dictat[e] in which direction oil may flow, based on its own conclusions as to what regulation makes sense to it for an international pipeline . . .;" *id*. at 409.

The court provided a detailed review of the scope of safety standards authorized in the Pipeline Safety Act, as well as the hazardous liquid safety standards promulgated in 49

C.F.R. Part 195. It concluded that the city ordinance is not a preempted "safety standard" for the following reasons.

First, the court found that a "prohibition" is not a "standard" as these words are defined by Black's Law Dictionary. 288 F.Supp.3d at 429-30.

Second, it found that it was not impossible for the pipeline company to comply with the ordinance, because the ordinance regulated an activity at one end of the pipeline but did not set any additional safety requirements for modification or operation of the pipeline itself. 288 F.Supp.3d at 430. It reasoned that the pipeline company could operate the pipeline in compliance with both the Pipeline Safety Act and the ordinance, in that no provision in the Pipeline Safety Act required the pipeline operator to load crude oil or to transport oil in any particular direction. *Id*. That is, the Pipeline Safety Act regulates how a pipeline is operated; it does not require that it operate in a particular direction or at all.

Third, the court found that "[a] ban on one form of subsequent transportation at the end of the pipeline is not in conflict with the goal of promoting the safety of pipelines and preventing spills . . ." and "does not set competing levels, quantities, or technical specifications that make complying with both the Pipeline Safety Act and the Ordinance more difficult." *Id*. The Pipeline Safety Act regulates how a pipeline is operated; it does not regulate what happens to a product transported after it leaves a pipeline.

Fourth, the court found that, "perhaps most importantly, the preemptive scope of the PSA, as expressed in § 60104(c), is explicitly limited by § 60104(e). Congress did not intend the PSA to preempt state and local authority 'to prescribe the location or routing of a pipeline facility.'" *Id*. *citing* 49 U.S.C. § 60104(e). The court reasoned that under their police powers state and local governments retain authority to prohibit pipelines altogether,

and this authority can be displaced only by clear congressional intent, yet § 60104(e) demonstrates an explicit intent that this power is retained by the states. *Id*. Congress enacted safety standards that apply whenever a pipeline is permitted, but the issue of whether and where a pipeline should operate is left entirely to state and local discretion.

The *Portland Pipe Line* court discussed the *Washington Gas Light* decision, and while it cited with approval the Fourth Circuit Court of Appeals finding that the county zoning plan there was not a safety regulation, it rejected the utility of investigating the motivation behind a state or local law based on First Circuit precedent:

> The purpose or intent of the local law may be relevant in some limited circumstances where the federal statutes themselves appear particularly focused on local legislative purpose, like nuclear power and occupational health and safety. But in general, preemption doctrine and First Circuit precedent focus on the intent of the federal law and the effect of the local law on that federal law's goals.

Id. at 433-44. It found that the inquiry should focus objectively on whether a state or local law is "facially proper under state and local police power." *Id*. at 434. Accordingly, the court held that "any overlapping concern about "safety" that the City Council may have had when it enacted the Ordinance is not sufficient to convert a ban on loading crude oil into a competing "safety standard" preempted under the PSA." *Id*.

Although the *Portland Pipe Line* decision did not consider the scope of state and local discretion over the policy factors used to determine where a pipeline should be constructed, it did find that state and local agencies have discretion to determine whether or not a pipeline should operate at all or in a particular direction. Moreover, it rejected the proposition that a concern about "safety" is sufficient to turn an action within state and local jurisdiction into a "safety standard" preempted by the Pipeline Safety Act.

3. Bad River Band of the Lake Superior Tribe of Chippewa Indians v. Enbridge Energy Co., Inc.

The *Bad River* case, 2022 WL 4094073 (W. D. Wisc. 2022), involved a decision by the Bad River Band of the Lake Superior Tribe of Chippewa Indians to not renew a right-of-way agreement, thereby forcing a re-route of Enbridge Energy Company's ("Enbridge") Line 5 pipeline. The Band based its decision on a finding that "an oil spill on the Reservation 'would be catastrophic' and would 'nullify our long years of effort to preserve our health, subsistence, culture and ecosystems.'" *Id*. at 3. In response, Enbridge refused to remove its pipeline, and the Band filed suit. Enbridge defended its refusal on a number of grounds, including that the Band's trespass claim was barred by the Pipeline Safety Act. Specifically, it argued that "because the Band is withholding its consent to renewed easements on the allotment parcels based on safety concerns, the Band's actions are preempted by the Act." *Id*. at 11. Essentially, Enbridge argued that a siting decision based on safety is preempted.

The court rejected Enbridge's preemption argument, stating:

> The glaring problem with this argument is that while the Band's refusal to consent to easements may be based in part on safety concerns (at least environmental in nature), it is **not** based on any imposition of safety **standards**. Nor has Enbridge been able to cite **any** legal authority supporting its argument that the Pipeline Safety Act would **require** a tribe (or any other landowner for that matter) to grant or renew an easement for a pipeline across its land simply because it has concerns about the safety of doing so.

Id. (emphasis in original). Although the *Bad River* court relied on a somewhat different analysis than the *South Portland* court in finding that a refusal to site a facility is not a safety standard, the result was the same: both courts found that siting decisions based on safety are not safety standards.

Enbridge also argued that Congress via the Pipeline Safety Act intended to displace the Band's siting decision based on safety grounds. *Id*. at 20. According to the court, "[t]he

doctrine of displacement rests on the premise that federal common law is subject to the paramount authority of Congress," and that "it is primarily the office of Congress, not the federal courts, to prescribe national policy in areas of special federal interest." *Id*. That is, where "Congress has provided a sufficient legislative solution," it displaces federal common law. *Id*.

According to the court, Enbridge argued "the very purpose of the Pipeline Safety Act is to protect against risks of damage posed by interstate pipelines" using safety standards, such that the Band's safety-related siting decision is displaced by the Pipeline Safety Act. *Id*. at 20. Essentially, Enbridge argued that the Band had no authority to not renew the right-of-way based on safety concerns because the Pipeline Safety Act provided sufficient protection against safety risks. The court rejected this argument on three grounds, two of which are relevant here.

First, it found that "the Band is not seeking an injunction that would impose safety regulations addressed already by the Pipeline Safety Act or federal regulation." *Id*. at 21. That is, it found that the Pipeline Safety Act's generally applicable safety standards did not address the Band's route-related safety concerns, and that the Pipeline Safety Act's safety standards were related to non-route matters. *Id*. Given that the Pipeline Safety Act does not authorize route-related safety remedies, it did not and could not address the Band's route-related concerns.

Second, the court found that § 60104(c) preempts only state law safety standards, and that the Band's ejectment claim "is not seeking to impose specific pipeline safety standards on Enbridge," such that the Pipeline Safety Act did not displace the Band's action.

Id. That is, the court again found that a decision on siting is not a safety standard under the Pipeline Safety Act.

Thus, the *Bad River* decision joined with the *Washington Gas Light* and *South Portland* decisions in rejecting the proposition that consideration of safety in a siting decision for a facility subject to Pipeline Safety Act jurisdiction is preempted by action of § 60104(c). All three courts found that a rejection of a facility location application for safety reasons is not a "safety standard" under the Pipeline Safety Act. The *Washington Gas Light* court provided the most detailed analysis and found that the field of facility siting is distinct from the field of pipeline safety, such that state routing decisions are not subject to regulation under the Pipeline Safety Act and are not pipeline safety standards even if partially based on safety concerns.

APPLICATION OF FEDERAL PREEMPTION TO STATE AND LOCAL AUTHORITY IN IOWA

A. State Consideration of Safety in Routing Is Not Preempted by the Pipeline Safety Act, Because the Act Does Not Extend Federal Jurisdiction to the Field of Pipeline Routing

The Pipeline Safety Act states that it provides no jurisdiction to PHMSA to determine the location or route of a pipeline facility. 49 U.S.C. § 60104(e). Accordingly, the Pipeline Safety Act itself establishes no federal route permitting process for hazardous liquid pipelines, nor does it contain any standards for routing hazardous liquid pipelines, safety-related or otherwise. Accordingly, PHMSA has no jurisdiction to determine route, and it has not promulgated route permitting regulations or safety standards applicable to routing. *See* 49 C.F.R. Parts 192 (natural gas Pipeline Safety Act regulations) and 195 (hazardous liquid regulations). Since Congress has not extended federal jurisdiction to

routing hazardous liquid pipelines, under the Tenth Amendment to the U.S. Constitution, such authority remains with the states or the people. U.S. Const. Amend. X.

This prohibition on federal routing of hazardous liquid pipelines is consistent with the scope of safety standards defined by the Pipeline Safety Act. Section 60102(a)(2)(B) limits the scope of safety standards to regulation of "owners or operators" of pipeline facilities with regard to the "design, installation, inspection, emergency plans and procedures, testing, construction, extension, operation, replacement, and maintenance of pipeline facilities." Safety standards related to location and route are not listed as a matter within this scope, which is consistent with Section 60104(e).

The plain language of the Pipeline Safety Act does not define the term "safety standard" to include every conceivable governmental action that touches on safety. Instead, "safety standards" are limited to the regulation of owners and operators with regard to the specific list of activities contained in § 60102(a)(2)(B). Under this plain language, PHMSA has no jurisdiction to direct pipeline safety actions by state or local governments or parties that do not own or operate pipelines. The Pipeline Safety Act does not authorize PHMSA to issue regulations mandating state or local government action on routing or for any other reasons, and it also does not grant PHMSA jurisdiction over landowners adjacent to a hazardous liquid pipeline right-of-way to prohibit activities that could endanger a pipeline. All of PHMSA's safety standards are directed exclusively at pipeline owners and operators.

If Congress had wanted to prescribe standards for hazardous liquid route selection, it could have done so, but it did not. In comparison, in § 60103(a) Congress expressly authorized PHMSA to prescribe "location standards" for liquified natural gas ("LNG") pipelines. These LNG location standards are **in addition to** the LNG pipeline safety

standards in Section 60103(b) for "designing, installing, constructing, initially inspecting, and initially testing" and in Section 60103(d) for operation and maintenance The fact that Congress expressly authorized PHMSA to prescribe "location standards" for LNG pipelines but has not authorized them for hazardous liquid and CO_2 pipelines is a clear indication that it does not want to limit or condition state and local discretion over pipeline routing.

The fields of pipeline routing and pipeline safety are distinct. The pipeline route selection process is a complex, multifaceted regulatory effort that may consider a wide variety of potential economic, environmental, and community welfare impacts that would result from different alternative routes. State routing decisions may impact landowners subject to easements, adjacent landowners, business owners, and public and private natural resources, may direct action by the pipeline developer as well as state agency staff, and may provide mitigation benefits to a wide variety of impacted entities. Many states, including Iowa, Minnesota, Illinois, and North Dakota, have enacted hazardous liquid pipeline route legislation that authorize consideration of a wide variety of policy factors. Iowa Code § 479B.9; *Puntenney v. IUB*, 928 N.W.2d 829 (Iowa 2019). The Pipeline Safety Act is written to respect state control over the field of pipeline routing and to apply fully to any selected route, regardless of the policy factors used to select it.

In contrast, the field of pipeline safety is circumscribed to regulate pipeline owners and operators with regard to the "design, installation, inspection, emergency plans and procedures, testing, construction, extension, operation, replacement, and maintenance" of their pipelines, **and nothing else**. 49 U.S.C. § 60102(a)(2)(B). This includes matters such as pump and compressor design, pipe steel strength, corrosion control, maintenance

standards, etc., all of which are within the direct control of pipeline owners and operators. The field of pipeline safety is legally and practically distinct from the field of pipeline routing.

Congress has preempted the field of pipeline safety standards, but it has not preempted the field of pipeline routing, which for hazardous liquid pipelines remains within state and local jurisdiction. Within this exclusive jurisdiction, state and local governments have complete discretion to consider safety and any other routing policy factor. Once a state or local government chooses a route, regardless of the reasons for the choice, the Pipeline Safety Act safety standards defined in Section 60102(a)(2) can apply fully to that route. As such, state consideration of safety as a "location standard" does not interfere with full expression of federal pipeline "safety standards," such that state and local consideration of safety in routing decisions is not preempted by the Pipeline Safety Act.

B. State Consideration of Safety in Routing Is Not Preempted by the Pipeline Safety Act, Because Congress Has Not Clearly Mandated that States May Not Consider Safety in Routing Determinations or Otherwise Limited State Discretion in Pipeline Routing

Nothing in the Pipeline Safety Act expressly or impliedly limits the scope of policy factors that a state or local government may consider in routing, safety or otherwise. The Pipeline Safety Act entirely leaves responsibility for routing pipelines entirely to state jurisdiction and discretion. Absent a clear congressional mandate, either express or implied, to limit state jurisdiction and discretion, the federal courts will not give a federal statute preemptive effect. *Head v. New Mexico Bd. of Examiners in Optometry*, 374 U.S. 424, 83 S.Ct. 1759, 10 L.Ed.2d 983 (1963). Here, Congress has not expressly stated that states may not consider safety issues in routing determinations. If it wanted to limit state discretion over routing, it certainly could have included language in § 60104(e) limiting state authority,

but it did not. Therefore, a federal prohibition on state consideration of safety in routing can only arise by clear implication. Yet, nothing in the Pipeline Safety Act indicates such congressional intent. The Pipeline Safety Act is otherwise silent on the routing of hazardous liquid pipelines.

While it could be argued that the overall structure and purpose of the Pipeline Safety Act indicates that Congress intended the Act to be the only means to improve pipeline safety, such argument does not rise to the level of a clear mandate. Instead, the plain language of the Pipeline Safety Act leaves the entire field of pipeline routing to the states without reservation. Therefore, any limitation on state discretion in routing determinations would be disfavored by the courts, and the Pipeline Safety Act would not have preemptive effect over state routing decisions.

It could also be argued that Congress intended to preempt all state action that has as its purpose improving pipeline safety, but "[w]hether or not federal legislation preempts state and local regulation rests on the effect rather than the stated purposes of the legislation." *Northern Border Pipeline Co. v. Jackson County, Minn.*, 512 F. Supp. 1261 (1981); *citing Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248 (1963). As stated in *United States v. Board of County Commissioners of County of Otero*, 843 F.3d 1208, 1215 (10th Cir. 2016):

> the purpose of the laws, whether parallel or divergent, is not relevant to the preemption inquiry." Dist. Ct. Op. at 46. As the Supreme Court said in *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963), it "has, on the one hand, sustained state statutes having objectives virtually identical to those of federal regulations and has, on the other hand, struck down state statutes where the respective purposes were quite dissimilar," *id*. at 142, 83 S.Ct. 1210 (citations omitted). "The test," it said, "of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal

> superintendence of the field, not whether they are aimed at similar or different objectives." Id.

Thus, a state objective to improve pipeline safety by consideration of safety risks in routing is not dispositive of preemption. Instead, preemption is based on whether such consideration would conflict with the full application of federal pipeline safety standards. Since such standards can apply fully to any route, a state purpose to improve safety via route selection does not provide grounds for preemption.

No language in the Pipeline Safety Act expressly states or implies that compliance with PHMSA standards reduces safety risks to the point that a state or local government may not consider such remaining risk in pipeline routing decisions. The long history in the U.S. of catastrophic pipeline ruptures that kill citizens and devastate environments demonstrates that the Pipeline Safety Act's safety standards have not and cannot eliminate the serious risks posed by hazardous liquid pipelines. There is no indication in the Pipeline Safety Act or its legislative history that Congress intended for state and local governments to have no power during their routing decisions to consider the risk of pipelines ruptures to vulnerable populations in facilities such as schools, nursing homes, and hospitals, or to vulnerable environments including drinking water supplies, lakes and rivers, wildlife sanctuaries, or public parks, and then choose routes that avoid them. Since Congress has not expressly restricted the scope of discretion remaining with state and local government in their routing decisions, they may consider safety in routing.

C. State Consideration of Safety in Routing Decisions Does Not Conflict with Federal Safety Standards, Because No "Hazardous Liquid Pipeline Facility" Exists Under Federal Law Until After State Route Approval

Federal pipeline safety standards apply only to "pipeline transportation" and "pipeline facilities." 49 U.S.C. § 60102(a)(2). In turn, the Pipeline Safety Act §

60101(a)(18) defines "pipeline facility" to mean, "gas pipeline facility and a hazardous liquid pipeline facility," and defines "hazardous liquid pipeline facility" to "include[] a pipeline, a right of way, a facility, a building, or equipment used or intended to be used in transporting hazardous liquid." Thus, federal pipeline safety standards apply only to pipelines that physically exist or that are intended to exist.

Until a state approves construction of a hazardous liquid pipeline and determines its route, a company proposal to construct a pipeline is not a "hazardous liquid pipeline facility." Before state approval of construction and route, no hazardous liquid pipeline facility physically exists. While at the time of a construction and route permit application a pipeline proposer intends to construct a pipeline, a state may nullify these intentions, voiding such intentions and making application of federal pipeline safety standards unnecessary. Federal pipeline safety jurisdiction does not extend over a mere proposal that may be rejected by a state. Since Pipeline Safety Act jurisdiction does not begin until after state approval of construction and route, state decisions on routing cannot conflict with the Act.

D. State Consideration of Safety in Routing Decisions Cannot Conflict with Federal Safety Standards, Because Such Standards Cannot Be Conclusively Applied Until After State Route Approval

A state route selection must be completed before final application of PHMSA safety standards, which apply exclusively to post-routing activities, including the "design, installation, inspection, emergency plans and procedures, testing, construction, extension, operation, replacement, and maintenance of pipeline facilities." 49 U.S.C. § 60102(a)(2)(B). The only element of the foregoing list of activities that may occur before approval of construction and a route is pipeline design, but conclusive application of design standards

is dependent on approval of a construction permit and route. A state could deny a construction permit application, making application of federal design standards irrelevant, or reject a proposed route and select one that is tens or even hundreds of miles longer in an entirely different geographic location, thereby requiring a redesign of the entire pipeline. States such as Iowa may approve pipelines with a smaller or larger capacity, and such determination also could impact pipeline design, including potentially pipe diameter, pipe wall thickness, pump capacity, etc. Until a pipeline and its route are approved by a state, it is impossible to conclusively apply federal pipeline safety design standards, much less operational and maintenance standards, to it. Consideration of safety as a policy factor in routing cannot logically conflict with federal safety standards applicable to phases of pipeline development that must follow the route selection process. Once a route is determined, federal safety standards can apply fully to such route.

While a pipeline proposer is certainly free to prepare a preliminary design based on its intentions and apply federal safety standards to its preliminary work, it bears the risk that its intentions will be changed or even voided by the state. To the extent that a pipeline proposer could design some pipeline components without knowing a route, the reasons for route selection would have no impact on the design of such components. The fact that a pipeline developer may conduct preliminary design efforts in compliance with pipeline safety standards does not mean that federal safety standards apply to mere proposals.

E. State Consideration of Safety in Routing Does Not Conflict With the Pipeline Safety Act Because Federal Pipeline Safety Standards May Apply Fully to Any Route Chosen by a State, Regardless of the Policy Reasons Used in Routing

Pipeline route decisions have incidental effects on design, construction, operation, and maintenance of pipelines, but this is true regardless of the policy factors used by a state

to select a route. A state could select a route based entirely on non-safety factors, such as economics, or it could select the exact same route based on consideration of safety, and in either case the Pipeline Safety Act safety standards would apply in **exactly** the same way. Since the routes would be physically identical, application of the Pipeline Safety Act safety standards would also be identical. For example, the high consequence areas along the route would be the same, the length of the pipeline would be the same, and the pump station and valve locations and designs would be the same. Congress intended for the Pipeline Safety Act safety standards to apply to any route chosen by a state or local government, regardless of the factors used to select the route. The policy factors used to select a route do not restrict or prevent the full application of PHMSA's safety standards to such route.

F. State Consideration of Safety in Routing Is Not Preempted by the Pipeline Safety Act, Because the Pipeline Safety Act and its Hazardous Liquid Pipeline Regulations Contain No Route Safety Standards with which State Law Could Conflict

Since the Pipeline Safety Act does not authorize PHMSA to promulgate route or location selection standards for hazardous liquid pipelines, its hazardous liquid pipeline safety regulations in 49 C.F.R. Part 195 also cannot and do not contain route selection standards. The only PHMSA regulation that appears to regulate route selection, 49 C.F.R. § 195.210, which states in full:

> **§ 195.210 Pipeline location**.
>
> (a) Pipeline right-of-way must be selected to avoid, as far as practicable, areas containing private dwellings, industrial buildings, and places of public assembly.
>
> (b) No pipeline may be located within 50 feet (15 meters) of any private dwelling, or any industrial building or place of public assembly in which persons work, congregate, or assemble, unless it is provided with at least 12 inches (305 millimeters) of cover in addition to that prescribed in § 195.248.

Subpart (a) directs pipeline operators to avoid certain facilities, but since PHMSA has no jurisdiction to determine route or route selection process, this regulation is non-enforceable and must be viewed as advisory and not prescriptive. To the extent this regulation conflicts with 49 U.S.C. § 60104(e), it would be in violation of law and so must be interpreted in accordance with § 60104(e).

Subpart (b) has no practical impact on route, because it allows construction within 50 feet or further away from facilities, the difference being that pipelines closer than 50 feet must be provided with an additional foot of cover, making this a depth of cover requirement and not a location requirement. Thus, in accordance with section 60104(e), Part 195 contains no regulations prescribing route or location.

Otherwise, the Pipeline Safety Act regulation contain no route selection process in which federal location standards could apply, no alternative route selection process, and no standards, safety or otherwise, for route selection. Thus, no federal safety standards exist with which state consideration of safety in routing could conflict.

IOWA AND THE FEDERAL GOVERNMENT SHARE AND COORDINATE JURISDICTION OVER EMERGENCY RESPONSE PLANNING FOR CO_2 PIPELINE RUPTURES, SUCH THAT STATE AND COUNTY EMERGENCY RESPONSE AGENCIES HAVE JURISDICTION TO REQUIRE DISCLOSURE OF SAFETY INFORMATION

A. Iowa Emergency Response Planning Jurisdiction

As an initial observation, it should be noted that emergency response is a core function of state and local governments. See, Iowa Code Chapter 29C. To accomplish this function, the Iowa legislature has authorized state and local jurisdictions to establish law enforcement, firefighting, and emergency medical service agencies. Throughout the U.S.,

emergency response is based on shared federal and state jurisdiction through a network of cooperating agencies. Pipeline emergency response exists within this network.

In Iowa, emergency response planning is mandated by Iowa Code Chapter 29C, a fundamental purpose of which is to coordinate state and local agency efforts. It creates a structure in which state and county agencies share responsibility for emergency planning, preparation, and response based on agency mission and geographic jurisdiction. Iowa Code §§ 29C.5, 29C.8, 29C.9. It requires that agencies prepare for and respond to "disasters" which are defined, in relevant part, as "man-made and natural occurrences, such as fire, flood, drought, earthquake, tornado, windstorm, hazardous substance or nuclear power plant accident or incident, which threaten the public peace, health, and safety of the people or which damage and destroy public or private property." Iowa Code § 29C.2(4). To support disaster planning, Chapter 29C provides a number of planning tools, including but not limited to:

- preparation of "studies and surveys of the industries, resources, and facilities in this state as may be necessary to ascertain . . . the capabilities of the state for disaster recovery, disaster planning and operations, and emergency resource management, and to plan for the most efficient emergency use thereof;" Iowa Code § 29C.8(3)(b); and

- state provision of technical assistance, planning assistance, and training for emergency response teams. Iowa Code § 29C(3)(c), (d).

Since most disasters are not state-wide but rather are confined to one or possibly a few counties, Chapter 29C delegates local emergency response duties to local "emergency management commissions" comprised of county supervisors, the Sheriff, and City mayors.

These local commissions are responsible for "delivery of the emergency management services of planning, administration, coordination, training, and support for local governments and their departments," and coordination of emergency services in the event of a disaster. Iowa Code § 29C.9(2), (6). Each local commission is required to "develop, adopt, and submit for approval by local governments within the commission's jurisdiction, a comprehensive emergency plan . . . ." Iowa Code § 29C.9(8).

Iowa law recognizes that emergency response is a cooperative and coordinated effort among federal, state, and local agencies. Chapter 29C includes a number of provisions that require state and local agency coordination with federal emergency response agencies. It requires:

- state agency cooperation with "other appropriate federal officers and agencies . . . in matters pertaining to emergency management of the state . . . ; Iowa Code § 29C.6(9);
- integration of Iowa's emergency response plan and program "into and coordinated with the homeland security and emergency plans of the federal government . . . to the fullest possible extent;" Iowa Code § 29C.3(a);
- local emergency planning commission cooperation with "other appropriate federal . . . officers and agencies . . . in matters pertaining to comprehensive emergency management for political subdivisions comprising the commission; Iowa Code § 29C.10(3); and
- adoption of an interstate emergency management assistance compact that requires "frequent consultation between state officials . . . and the United States

government, with free exchange of information, plans, and resource records relating to emergency capabilities. Iowa Code § 29C.21(3)(c).

Such state-federal cooperation is necessary, because the federal government's emergency response efforts do not nationalize local emergency response, much less the actions of local police, firefighters, and emergency medical personnel. Instead, in the event of a disaster, federal emergency planning policy recognizes that state and local agencies retain control over their own personnel. It anticipates that state and local agencies will develop and implement their own emergency response plans.

B. The Rupture of a Large Carbon Dioxide Pipeline Would Be a Disaster as Defined by Chapter 29C, such that State and County Agencies Have Jurisdiction to Prepare Emergency Response Plans for Carbon Dioxide Pipeline Ruptures and to Conduct Investigations Reasonably Necessary for Such Planning

Since a rupture of a large carbon dioxide pipeline could significantly threaten public health and safety and damage and destroy public or private property, it would be a "disaster," as defined by Iowa Code § 29C.2(4). Therefore, Iowa's state and local agencies have jurisdiction to plan and prepare for them. Moreover, carbon dioxide pipeline ruptures represent a novel threat about which relatively little is known, such that there is an acute need for investigation pursuant to Iowa Code § 29C.8(3)(b), and for state support for local emergency response teams under Iowa Code § 29C(3)(c), (d). Fortunately, Iowa law grants state and local agencies jurisdiction to prepare emergency response plans for carbon dioxide pipelines and to conduct such investigations as deemed necessary to support this planning effort. State law provides the investigation tools needed to ensure that first responders do not walk into dangerous pipeline ruptures blind.

C. The IUB Has Jurisdiction to Investigate the Safety Risks Created by Carbon Dioxide Pipelines and Mitigation of these Risks Through Emergency Response Planning and Preparation

The IUB is charged with "protect[ing] landowners and tenants from environmental or economic damages which may result from the construction, operation, or maintenance of a hazardous liquid pipeline . . . ." Iowa Code § 479B.1. Further, the IUB may not grant a permit "unless the board determines that the proposed services will promote the public convenience and necessity." Iowa Code § 479B.9. Since the rupture of a carbon dioxide pipeline would be a "disaster" under Iowa Code § 29C.2(4), carbon dioxide pipelines pose both a statutorily defined environmental and economic threat to landowners and tenants resulting from operation and an inconvenience to the public. Therefore, under Iowa law the Board has jurisdiction to consider pipeline risk and emergency response information.

In addition, the IUB is charged with considering present and future county land use and zoning ordinances. Iowa Code § 479B.5. One of the fundamental purposes of county land use regulation is to protect the safety and wellbeing of county residents, including from potentially dangerous land uses, such as hazardous industrial activities. Iowa Code § 335.5 (County land use regulations shall be designed to "secure the safety from fire, flood, panic, and other dangers" and to "protect health and general welfare."). Although county emergency response planning authority vests under Chapter 29C, the information provided by such emergency planning is nonetheless critical to effective implementation of county efforts to ensure citizen safety by land use and zoning regulation. Therefore, the Board may investigate and consider the safety impacts of pipeline projects on county land use and zoning efforts.

A number of Iowa's county governments, individual Iowans, nonprofit organizations, and the OCA have presented comments to the IUB containing substantial evidence indicating that carbon dioxide pipeline ruptures may create a risk of harm and

death to both humans, livestock, and other private and public property. Therefore, the risks and impacts of carbon dioxide pipeline ruptures are before the IUB and within its jurisdiction, such that it has the legal right and policy justification to reasonably investigate these safety risks and resulting emergency response planning needs.

D. Federal Pipeline Safety Act Jurisdiction Over Pipeline Emergency Planning and Response Is Limited to Regulation of Pipeline Owners and Operators and Does Not Extend to Federal Regulation of State and Local Emergency Response Agencies

Congress has granted PHMSA jurisdiction over "minimum safety standards for pipeline transportation and for pipeline facilities." 49 U.S.C. § 60102(a)(2). These standards are not plenary, but rather are limited to those which:

> (A) apply to any or all of the owners or operators of pipeline facilities;
>
> (B) may apply to the design, installation, inspection, emergency plans and procedures, testing, construction, extension, operation, replacement, and maintenance of pipeline facilities; and
>
> (C) shall include a requirement that all individuals who operate and maintain pipeline facilities shall be qualified to operate and maintain the pipeline facilities.

49 U.S.C. § 60102(a)(2). Thus, the Pipeline Safety Act regulates only pipeline "owners and operators" with regard to the "design, installation, inspection, emergency plans and procedures, testing, construction, extension, operation, replacement, and maintenance of pipeline facilities." 49 U.S.C. § 60102(a). The Pipeline Safety Act does not say that it regulates all safety matters related to pipelines. It regulates only the actions of owners and operators of pipelines with regard to their implementation of safety standards.

An example of a pipeline safety matter that PHMSA clearly cannot regulate is imposing restrictions on land development by non-pipeline owners and operators (third-parties) for facilities such as nursing homes, schools, and hospitals, on properties adjacent to existing hazardous liquid pipelines for the purpose of preventing possible future disasters.

Although PHMSA has long recognized that new uses adjacent to existing pipelines can create safety risks, it cannot regulate these uses because the Pipeline Safety Act does not grant it authority over third-party landowners. More generally, Congress has not extended federal pipeline safety jurisdiction to regulate local land use and planning activities. Since PHMSA cannot directly control such risks, it has instead voluntarily encouraged appropriate land use regulation of adjacent land use by local land use authorities. See, https://pstrust.org/trust-initiatives-programs/planning-near-pipelines/pipa-page/?doing_wp_cron=1666897250.0030241012573242187500 and https://pstrust.org/wp-content/uploads/2014/05/PHMSA-Letter-to-TransCanada-on-Role-of-Local-Governments-in-Pipeline-Safety.pdf.

Another example of pipeline safety activities not subject to Pipeline Safety Act regulation is development of state and local agency emergency response plans for use by agency personnel who are tasked with responding to pipeline ruptures. State and local agency emergency plans for pipeline ruptures that exclusively direct action by agency personnel and do not attempt to control pipeline operators are not preempted by the Pipeline Safety Act. The Pipeline Safety Act grants PHMSA jurisdiction only over pipeline operator emergency response plans and operator response to emergencies; it does not grant PHMSA jurisdiction to regulate state or local emergency response plans or agency response to emergencies. Accordingly, the Pipeline Safety Act regulations do not contain any provisions regulating state and local emergency response plan development or response activities. The Pipeline Safety Act does not federalize state and local emergency response to pipeline ruptures, much less attempt to regulate how local police and firefighters respond to pipeline emergencies.

Instead, the Pipeline Safety Act regulations dictate how pipeline owners and operators handle emergencies. For example, with regard to emergency response training, 49 C.F.R. § 195.403(b) requires that operators at least once each year review the performance of their personnel in meeting training objectives, and 49 C.F.R. § 195.403(c) requires that an operator's "supervisors maintain a thorough knowledge of that portion of the emergency response procedures established under 195.402 for which they are responsible to ensure compliance." The Pipeline Safety Act regulations exclusively regulate operator emergency response activities.

Even though state and local emergency response clearly falls within the general rubric of pipeline safety, nowhere does the Pipeline Safety Act extend federal jurisdiction over state and local governments with regard to emergency response. Instead, the following Pipeline Safety Act provisions expressly recognize that state, county, and local governments have an independent role in emergency response:

- 49 U.S.C. § 60102(d)(5)(B) requires that pipeline operator emergency response plans must include "liaison procedures with State and local authorities for emergency response;"
- 49 U.S.C. § 60102((h)(3) requires pipeline operators to submit safety reports to "any relevant emergency response or planning entity," upon request of a governor; and
- 49 U.S.C. § 60125(b)(1) authorizes the Pipeline and Hazardous Materials Safety Administration ("PHMSA") to make grants to state, county, and local governments for emergency management matters.

None of the foregoing statutory provisions would be necessary if the Pipeline Safety Act preempted state, county, and local emergency response activities.

PHMSA's Pipeline Safety Act regulations also require pipeline operator cooperation with state and local emergency response agencies. Specifically, 49 C.F.R. § 195.402(c)(12) requires operators to includes procedures in their procedural manuals:

> establishing and maintaining liaison with fire, police, and other appropriate public officials to learn the responsibility and resources of each government organization that may respond to a hazardous liquid or carbon dioxide pipeline emergency and acquaint the officials with the operator's ability in responding to a hazardous liquid or carbon dioxide pipeline emergency and means of communication.

Similarly, 49 C.F.R. § 195.402(e)(7) requires that operators include procedures for:

> notifying fire, police, and other appropriate public officials of hazardous liquid or carbon dioxide pipeline emergencies and coordinating with them preplanned and actual responses during an emergency, including additional precautions necessary for an emergency involving a pipeline system transporting a highly volatile liquid.

With regard to communications, 49 C.F.R. § 195.408(b)(4) requires that pipeline operators have a system:

> providing communication with fire, police, and other appropriate public officials during emergency conditions, including a natural disaster.

None of the foregoing regulations would be necessary if the Pipeline Safety Act preempted local emergency response. Thus, the Act and its regulations expressly recognize state and local jurisdiction over emergency planning and response for their own agencies and personnel.

E. Emergency Planning, Preparation, and Response for Carbon Dioxide Pipeline Ruptures Is Subject to Joint and Coordinated Federal, State, and Local Jurisdiction

The foregoing state and federal statutes and regulations make clear that our federal, state, and local governments share jurisdiction over pipeline emergency response. Federal law regulates **operator** emergency response, but does not regulate state and local planning,

preparation, and response. State law regulates agency emergency response, but does not regulate operator response. In recognition of this shared jurisdiction, both federal and state law require interagency coordination. Federal law recognizes state and local jurisdiction, and therefore does not restrict or limit the scope of state and county authority, except to preempt agency regulation of an operator's internal emergency response, planning, and preparation. Since the federal government does not regulate state emergency response, the fact that PHMSA allows a pipeline company to finalize its Emergency Response Plan at the time "initial operations of a pipeline system commence," 49 C.F.R. 195.402(a), does not restrict the timing of state and county emergency response plan completion.

Accordingly, the State of Iowa may not specify the contents of Summit's Pipeline Safety Act-required emergency response plan, regulate the finalization date of its Emergency Response Plan, or direct how Summit's personnel and contractors respond. However, the state has plenary jurisdiction to develop its own response plans for a rupture of a Summit pipeline, including county-level plans, for use by state and local emergency personnel. This jurisdiction includes the authority to conduct investigations necessary for state and local emergency response planning, including via requirements that Summit disclose safety-related information needed for such planning. Such requirement does not violate federal law, because mere disclosure of information does not impose standards on the contents of Summit's Emergency Response Plan or direct how Summit responds. Summit's discretion to comply with federal Emergency Response Plan requirements is not impacted by a requirement to disclose critical safety information to state and local emergency response agencies.

This division of jurisdiction is consistent with the scope of federal preemption related to emergency response "safety standards," because the Pipeline Safety Act makes clear that it regulates pipeline safety only with regard to the actions of the "owners and operators of pipeline facilities," and not with regard to all matters that could conceivably fall within the realm of pipeline safety.

With regard to the OCA's request for Summit's Emergency Response Plan, merely requiring a draft Emergency Response Plan would not dictate the contents of Summit's plan, direct any internal actions by Summit or its personnel in preparation for or during an emergency, or require that Summit have a federal Emergency Response Plan in place before required by federal law. Instead of or in addition to requiring disclosure of Summit's Emergency Response Plan, the IUB could require that Summit include as a part of the application a variety of specific emergency response related information, such as worst-case discharge estimates for each pipeline segment, plume dispersion modeling, hazard zone estimation, recommended emergency response procedures for local emergency response personnel, recommended communication protocols, recommended training materials, material safety data sheets for anticipated products, etc. Such information requirements fall well within the jurisdiction of the State of Iowa and are in accordance with federal recognition of independent state and local jurisdiction related to emergency response.

F. The Carbon Dioxide Pipeline Rupture Near Satartia, Mississippi, Dramatically Demonstrates the Need for Proactive State and Local Planning and Risk Investigation for Carbon Dioxide Pipeline Ruptures, Particularly with Regard to the Safety of Agency Personnel

On February 22, 2020, a 24-inch diameter carbon dioxide pipeline ruptured one mile from the town of Satartia, Mississippi, sending 48 persons to the hospital and requiring

the evacuation of at least 200 more. PHMSA describes this incident in its May 26, 2022, report entitled, "Failure Investigation Report - Denbury Gulf Coast Pipelines, LLC – Pipeline Rupture/ Natural Force Damage," found at www.phmsa.dot.gov/sites/phmsa.dot/files/2022-05. One of the "key points" identified on page 2 of this report states:

> Local emergency responders were not informed by Denbury of the rupture and the nature of the unique safety risks of the CO2 pipeline. As a result, responders had to guess the nature of the risk, in part making assumptions based on reports of a "green gas" and "rotten egg smell" and had to contemplate appropriate mitigative actions.

Page 5 of the report found that even though local county first responders had trained for a railroad accident, Denbury did not participate in this drill, nor had it conducted any drills with local responders because its plume dispersion modeling was deficient and had not identified that Satartia could be impacted by a rupture of its pipeline. In other words, the pipeline operator underestimated the danger of its pipeline and therefore failed to coordinate with emergency response personnel.

What the PHMSA report does not discuss is the fact that the first police officer on the scene drove into the toxic plume and was nearly overcome by it while attempting to rescue victims. The personal accounts of the first responders to this incident were reported in the press. Ultimately, state and local agencies have a duty to protect their first responders and may require disclosure of information necessary to do so.

This rupture demonstrates the need for proactive emergency response planning by state and local emergency response agencies. While the agencies should coordinate with Summit, they should not blindly trust that Summit will correctly estimate the risk of its

carbon dioxide pipelines to first responders, citizens, and animals. It is in Summit's interest to downplay the risk of its pipelines and minimize its emergency response costs.

CONCLUSION

It is clear from the foregoing that Summit's claim of preemption has no basis in statute or regulation or case law. Federal authority over pipeline safety is restricted to pipeline owners and operators and covers only safety standards for the pipeline itself. State and local actions that do not impose safety standards on pipelines are not preempted, even if those actions may be related to safety.

With respect to Summit's Motion to Reconsider, which triggered this discussion of preemption, OCA's request that Summit file certain information does not ask the Board to impose any safety standards on Summit regarding the pipeline itself. OCA only requests that Summit submit information to better inform the Board, intervening parties, and the public as to the safety implications of the pipeline project. That is clearly not preempted by federal law.

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