IN THE IOWA ADMINISTRATIVE HEARINGS DIVISION
CENTRAL PANEL BUREAU

In RE:	)	
	)	Docket No. HLP-2021-0001
SUMMIT CARBON SOLUTIONS, LLC	)	
	)	**ORDER CONCERNING SIERRA'S SECOND MOTION TO COMPEL**

Statement of the Case

On August 7, 2023 a telephone hearing was held concerning a second motion to compel production filed by Sierra Club Iowa Chapter ("Sierra Club"), seeking results of dispersion modeling from Summit Carbon Solutions, LLC ("Summit"). Iowa Farm Bureau Federation ("IFBF") filed a partial joinder to Sierra Club's second motion to compel. The Supervisors of the following counties filed a joinder to Sierra Club's second motion to compel: Shelby, Kossuth, Floyd, Emmet, Dickinson, Wright, and Woodbury (the "Counties"). Hardin County filed a joiner to Sierra Club's second motion to compel. Summit Carbon Solutions, LLC ("Summit") resists the motions. Post-hearing, on August 8, 2023, Summit filed a notice of supplemental authority supporting their resistance. On August 9, 2023, Sierra Club filed a response to Summit's notice of supplemental authority. The matter is considered fully submitted on August 9, 2023.

Appearing at the hearing:

Wallace Taylor, Attorney for Sierra Club, Iowa Chapter
Christina Gruenhagen and David Meyers, Attorneys for Iowa Farm Bureau
Tim Whipple, Attorney for the Counties
Brant Leonard and Jess Vilsack, Attorneys for Summit Carbon Solutions, LLC
Lanny Zieman, Attorney with the Office of Consumer Advocate
Mark Schulties, Attorney for ethanol plant intervenors
Tiffany Kruizenga of ISG appeared, but did not participate.

Background

This case involves a multi-state pipeline project proposed by Summit to capture CO2 emissions from ethanol plants in Iowa and transport the CO2 out of state for permanent sequestration.

On July 26, 2023, Sierra Club filed a second motion to compel discovery seeking an order compelling Summit to produce "dispersion modeling" and an "environmental report." At the hearing Sierra Club withdrew its request for the environmental report, based upon Summit's assertion in its Resistance that no separate document identified as an "environmental report" exists. (Summit's Resistance, p. 1). The IFBF in its partial joinder to Sierra Club's second motion to compel, seeks only production of the dispersion modeling. The Counties and Hardin County filed separate joinders to Sierra

Club's second motion to compel. Because Sierra Club withdrew its request for the environmental report at the hearing, the joinders of the Counties and Hardin County are now deemed limited to the production of Summit's dispersion modeling. Summit resists the motion.

Issue

The only issue presented for determination is whether Summit should be compelled to produce documents of the dispersion modeling.

Discussion

On May 24, 2023, Summit filed the direct testimony for its witnesses. (IFBF Partial Joinder, p. 2). Bryan Louque, or Loque (hereafter "Louque") of Audubon Field Solutions testified he has performed vapor dispersion modeling using both the CANARY and Flow-2D software. (Summit Resistance, p. 2)(IFBF Partial Joinder, p. 2). "The analyses of the two vapor dispersion models performed for Summit estimates the maximum extent to which the carbon dioxide could travel in the event of a release" from the proposed pipeline, "under real world conditions." (IFBF Partial Joinder, p. 1). "Carbon dioxide in abnormally high levels is an asphyxiant and is toxic" . . . CO_2 is heavier than air and "oxygen levels can fall to dangerously low levels" such that a person exposed to said conditions "is deprived of sufficient oxygen to support life." (Sierra Club's second motion to compel, p. 2, citing Sierra Club Dr. Schettler Testimony). Louque testified that these dispersion "models mimic, in virtual reality, how a vapor or gas cloud would act in the real world." (IFBF Partial Joinder, p. 3, citing Summit Louque Direct Testimony, p. 3). Louque further testified that:

> Audubon then created a virtual study area that extended far beyond the 2D modeling results, and a "critical valley" has been defined as any valley that could transport heavy vapor CO_2 to a highly populated area ("HPA") or other populated area ("OPA"). At each critical valley site, a heavy vapor CO_2 overland spread was modeled. The heavy vapor CO_2 component was then modeled with Flow-2D to create overland spread polygons of the release in reference to the digital elevation model. These overland spread polygons were then overlaid on the mapping to see if any of them intersected with HPAs or OPAs.

(IFBF Partial Joinder, p. 4, citing Summit Louque Direct Testimony, p. 7).

The movant, **Sierra Club,** argues the results of the dispersion modeling "will document how far Summit's proposed pipeline must be located from people and property to avoid adverse impacts in the event of a leak or rupture in the pipe." (Sierra Club Second Motion to Compel, p. 1). Sierra Club claims the dispersion models are relevant to the IUB's determination of the **location and routing** of the pipeline, and do not relate to standards for safety for the pipeline itself, such as how thick the walls of the pipe must be whether leak warning devices should be attached to the pipe, etc. Sierra Club argues that because the dispersion models do not relate to safety issues concerning the pipeline itself, the consideration of such information is not federally

preempted by the Pipeline Safety Act or the regulations promulgated by the Pipeline and Hazardous Materials Safety Administration ("PHMSA").

Further, Sierra Club argues that to the extent the dispersion modeling information might be considered a safety matter, the IUB is "allowed to use a balancing test to determine if the pipeline promotes the public convenience and necessity," and "the IUB has authority to consider safety as a factor in the balancing test." (Sierra Club Second Motion to Compel, p. 4). Finally, Sierra Club argues that there is no basis for the protective agreement to be utilized if the dispersion modeling is compelled to be produced, noting that Summit has claimed no privilege and has not asked for any protective order. Rather, the dispersion models should simply be turned over to the requesting parties.

IFBF makes similar arguments as presented by Sierra Club, although IFBF does not object to production of the dispersion models under the terms of the protective agreement presently in place between the parties, provided IFBF may request that all or a portion of the information may be made publicly available during the evidentiary hearing, subject to the Board's determination. In addition, IFBF also argues that based on the February 10, 2023, "Order Addressing Motion for Reconsideration and Petition to Intervene," the IUB concluded the dispersion modeling information did not need to be included in Summit's Petition, but the Board did not determine whether safety issues related to the location and routing of the pipeline would be considered at the hearing on the merits. (Order p. 4). The board concluded:

> Discovery is the usual mechanism parties use to obtain this type of information, which, in turn, could assist parties in preparing their evidence. Issues regarding relevancy and preemption can then be made to the Board at the time the evidence is filed. In additional the Board does not consider it necessary or good procedure to try and address federal preemption in general prior to seeing the evidence that is presented.

(Id.).

IFBF also argues that Summit, through testimony of its own witnesses made safety a relevant issue for the evidentiary hearing, by presenting testimony on the issue of safety of the proposed pipeline. IFBF stated that 7 of Summit's 12 witnesses have testified about safety and going beyond PHMSA requirements claiming that that pipelines are safer than rail or truck. IFBF argues that it is reasonable and logical for the parties to be able to see the underlying data to verify or refute these claims as they relate to Summit's need to show the pipeline promotes public convenience and necessity.

Finally, IFBF argues that location and routing are not preempted by federal law, stating "[t]he list of federal regulations does not include the location or routing of the proposed pipeline." (IFBF Partial Joinder, p. 5).

The Counties, argued similarly to Sierra Club and IFBF at hearing, that the subject area of "location and routing" is separate and distinct from the "safety standards" related to the pipeline itself. This is highlighted by the fact that location and

routing is within the clear jurisdiction of IUB and safety standards related to the pipeline itself are within the jurisdiction of PHMSA in the administration of the Pipeline Safety Act. The Counties argued that the dispersion models contain information relevant to the issue of location and routing pertinent to the IUB and are not related to the safety standards for the pipeline itself. The Counties further argued that the chronology of case law and applicable statutes and rules, clarify this issue and place the dispersion models squarely in the realm of location and routing, not in safety and are therefore not federally preempted, and are relevant for discovery and the IUB's consideration.

Summit argues the dispersion modeling is first and foremost, not relevant to any issue the IUB will consider at the evidentiary hearing, because the Board is barred from considering safety concerns based on federal preemption by the Pipeline Safety Act and PHMSA. Summit notes the reason the dispersion modeling was conducted in the first place was to comply with PHMSA regulations, such as: whether the pipeline could affect a High Consequence Area (HCA); development of the required public awareness program; and, development of the emergency response program. (Summit Resistance, p. 2). Summit also argues that PHMSA regulations actually do contain setback distances from people and property, presumably making "location and routing" subject to preemption and that the United States District Court, Southern District, on or about July 10, 2023, in its Order on Motion for Preliminary Injunction, also found preemption applied to a county ordinance issued in Shelby County Iowa and argues the same should apply here.

Summit did not argue in its resistance or at the hearing that the dispersion modeling was entitled to protection from public release, but did post-hearing, file notice of additional authority. Included therewith was a recently issued Public Service Commission Order from North Dakota, in which dispersion modeling information was provided by Summit, but was done so subject to a protective order, preventing release to the intervenors and general public in the North Dakota Public Service Commission proceeding. It is noted that this order was based entirely on North Dakota statutes, not present in this case. Summit did not make any argument in its post-hearing filing that dispersion models, if ordered to be produced, should be protected from public disclosure in Iowa.

Law and Analysis

This is a discovery matter requesting documents. Considering the scope of discovery:

> parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action
> . . .
> [i]t is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Iowa R. Civ. P. 1.503(1). In this case, Summit does not argue the dispersion modeling is subject to any privilege. Instead, Summit argues the dispersion modeling data, which

were completed to comply with PHMSA regulations, are not relevant because the IUB is preempted by federal law from considering issues of safety at the evidentiary hearing.

The movant, and the parties joined to the motion, argue the dispersion modeling data relate to "location and routing" concerns, which are distinct from "safety" regulation, and that "location and routing" are within the jurisdiction of the IUB. Further, Sierra Club argues the IUB may consider safety in a balancing test to determine if the pipeline is a "public convenience and necessity." (Sierra Club Second Motion to Compel, p. 4).

Sierra Club relies on *Puntenney v. IUB,* 928 N.W.2d 829 (Iowa 2019), for the proposition that the IUB may employ a balancing test when determining whether the pipeline is a "public convenience and necessity." *Id.* In *Puntenney*, The Court approved of the IUB's weighing of "the public benefits of the proposed project against the public and private costs or other detriments." *Puntenney v. IUB,* 928 N.W.2d at 833. The Court, found:

> IUB's balancing approach to public convenience and necessity should be upheld because it is not 'irrational, illogical, or wholly unjustifiable.' *Iowa Code §* 17A.19(10)(l). The approach is consistent with our prior caselaw and is supported by legal authority elsewhere.

Id. at 842. Sierra club then argues that safety considerations may be included in this balancing test. The Court, after approving the Board's use of the balancing test went on to note the IUB's consideration of the safety of oil transportation via pipeline versus rail, stating "[v]arious data were presented to the IUB on this issue. However, the IUB found, and the data support, that on a volume-distance basis (i.e., per barrel-mile), pipeline transportation of oil is safer than rail transportation of oil." (Id.). But, it should be noted that in *Puntenney* the primary question related to the application of eminent domain concerning the construction of the Dakota Access pipeline and it does not appear either the IUB or the Court were presented with the question of whether "safety regulation" or "location and routing" of the pipeline were federally preempted. Therefore, the IUB's consideration of safety as a component in a balancing test for the determination of public convenience and necessity, was not addressed in the same manner in *Puntenney* as is presented in the case at bar.

Summit in its resistance relies on *ANR Pipeline Co. v. Iowa State Commerce Comm.*, 828 F.2d 465 (8th Cir. 1987). In this case, the Eight Circuit discussed federal preemption in the context of the PSA's predecessor statute, the Natural Gas Pipeline Safety Act (NGPSA). The Iowa State Commerce Commission (now the IUB), relying on Iowa Code section 479, sought to require ANR to submit to extensive permitting requirements for construction of underground pipelines in which the Commission "adopted as its own regulations the construction, operation, maintenance, and safety standards promulgated by the U.S. Department of Transportation under the NGPSA." *ANR Pipeline Co. v. Iowa State Commerce Comm.*, 828 F.2d at 467. In addition, to the "safety requirements," the Board had requirements as to "location and route." *Id.* The court found that "Under the NGPSA, the authority to regulate *the safety of* construction and operation of interstate gas pipelines is given solely to the Secretary of Transportation, and Iowa is not free to regulate in this area, even if it adopts standards

identical to the federal standards." *Id.* at 472. *emphasis added.* In its opinion, the court deal directly with the issue of safety requirements and found the same to be preempted. However, despite separately identifying the issue of "location and route" the court did not specifically address whether "location and route" were also preempted.

Summit also relies on *Kinley Corp. v. IUB,* 999 F.2d 354 (8th Cir. 1993) for the argument that the entirety of Iowa Code § 479B is preempted by federal law. In *Kinley*, the court found controlling the holding of *ANR* and the plain language of the statute that "[n]o state agency may adopt or continue in force any *safety standards* applicable to interstate pipeline facilities or transportation of hazardous liquids associated with such facilities or the transportation of hazardous liquids associated with such facilities." 49 U.S.C. § 60104 (c). *emphasis added.* From this, the court concluded that:

> Congress granted exclusive authority to regulate the *safety of construction and operation* of interstate hazardous liquid pipelines to the Secretary of the Department of Transportation. This Congressional grant of exclusive federal regulatory authority precludes state decision-making in this area altogether and leaves no regulatory room for the state to either establish its own safety standards or supplement the federal safety standards.

Kinley Corp. v. IUB, 999 F.2d at 359. e*mphasis added.* The undersigned again notes that despite the sweeping preemption language in the opinion related to "safety," the issue of "location and routing" concerns the IUB may have, are not specifically addressed.

In addition to the above, Summit points to the recent Order on Motion for Preliminary Injunction issued by the United States District Court, Southern District, on or about July 10, 2023, which states:

> Federal statutes and regulations govern nearly every part of the construction and operation of hazardous liquid pipelines. In 1994, Congress enacted the Pipeline Safety Act ("PSA") in an attempt to provide uniformity to the federal laws governing the construction of various types of pipelines. Under the PSA, the United States Department of Transportation, through the Secretary of Transportation, "shall prescribe minimum safety standards for pipeline transportation and for pipeline facilities." 49 U.S.C. § 60102(a)(2). Authority given to the Secretary of Transportation is, in turn, vested with PHMSA. 49 U.S.C. § 108. The PHMSA promulgates regulations on "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).
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> In addition to regulations, the statute provides a "[s]tate authority may not adopt or continue in force safety standards for interstate pipeline facilities or interstate pipeline transportation." 49 U.S.C. § 60104(c). This language is understood to preclude "state decision-making in this area altogether." *Kinley Corp. [v. Iowa Utils. Bd.,]*, 999 F.2d [354] at 359. "[It] leaves no

> regulatory room for the state to either establish its own safety standards or supplement the federal safety standards." Id. (citing ANR Pipeline Co. v. Iowa State Com. Comm'n, 828 F.2d 465, 472 (8th Cir. 1987)). Put simply, the PSA is a sweeping exercise of express preemption.

(Summit Resistance, p. 7, citing Order on Motion for Preliminary Injunction at 13 – 14).

Summit notes the Courts additional statement supporting its determination that Shelby County was preempted by federal law when it said:

> The statute provides the Secretary of Transportation with the authority to enact emergency response and hazard mitigation plans. 49 U.S.C. § 60102(a)(2)(B). This authority is limited solely by the statute, which provides a framework for the regulations. 49 U.S.C. § 60102(r). Courts have understood the statute to provide the Secretary with "exclusive authority to regulate the safety . . . of interstate hazardous liquid pipelines." Kinley Corp., 999 F.2d at 359. This language precludes states and municipalities "from regulating in any manner whatsoever with respect to the safety of . . . facilities." ANR Pipeline Co., 828 F.2d at 470. In light of this, the Court concludes that express preemption invalidates the Ordinance's emergency response and hazard mitigation provisions. Therefore, Art. 8.11 of the Ordinance may not be enforced.

(Summit Resistance, p. 8, citing Order on Motion for Preliminary Injunction at 29).

Summit argues that the Order from the Federal District Court is further support that federal preemption applies here, and specifically to Summit's project. (Summit Resistance, p. 7). However, the undersigned notes that the Federal District Court order applies very specifically to a Shelby County Ordinance and not Iowa Code. In fact, Summit argued in that case that "the *distance* and permitting components [of the Shelby county ordinance] are unenforceable because Iowa Code § 479B delegates exclusive authority to IUB. (Order on Motion for Preliminary Injunction at 21)(emphasis added). The court found the county ordinance requirements related to "[d]istance and [s]iting requirements" are implicitly preempted by Iowa Code § 479B, based on the "[c]ommon sense" conclusion that "these restrictions would eliminate all or almost all land in Shelby County on which an IUB approved pipeline could be built," thus prohibiting "an act permitted by statute." (Id. at 23).

Summit then argued in the Shelby County case, that only the "hazard and safety plan requirements" and "abandonment and discontinuance provisions" of the county ordinance are federally preempted by the PSA. (Id. at 28). Summit does not appear to have made any argument, nor did the Federal District Court conclude that location, routing, or siting, of the pipeline are preempted by federal law.

Finally, Summit argues in response to the argument stated by IFBF, that "federal regulations [do] not include the location or routing of the proposed pipeline," (IFBF Partial Joinder, p. 5), that 49 C.F.R. §195.210, provides that:

> (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.

The referenced regulation, 49 C.F.R. § 195.248, prescribes that, unless exempted, all pipe must be buried below the level of cultivation, and provides minimum depths at which the pipe must be buried. Although Summit argues these regulations are for purposes of set-back and therefore address and preempt IUB jurisdiction over location, routing, and siting, it appears to the undersigned that the purpose of 49 C.F.R. § 195. 210 and § 195.248, are to prescribe the depth at which the pipe must be buried. Therefore, relating to "installation" and not location, routing or siting. The only argument that these regulations concern location, routing or siting is that installation should try to avoid places where people live, work and assemble and should be no closer than 50 feet from said buildings or places of assembly. However, the rule of 50 feet is immediately swallowed by an exception allowing placement within 50 feet, provided the pipeline is buried 12 inches deeper than prescribed in § 195.248.

Considering all the above although perhaps not necessary to say, the undersigned concludes that federal preemption likely applies related to safety regulation of the pipeline itself. None of the parties in this matter make any significant argument otherwise. However, the issue of location, routing and siting, has been distinguished by the courts and not specifically addressed. The courts have regularly identified this category separately from the category of safety regulation of the pipeline itself, and there is no clear authority stating whether the same is federally preempted as Summit suggests. Therefore, without clear federal preemption on the issue of location, routing, and siting, such that the IUB is unable to consider relevant information related to this issue, at the hearing, I cannot say, as Summit urges, that the dispersion modeling data is irrelevant. Also, because this matter is merely a discovery matter, the undersigned does not reach a final conclusion whether the information is admissible at an evidentiary hearing, only that it appears to the undersigned that there is sufficient likelihood that the same may be admissible to make the dispersion modeling data subject to discovery.

The undersigned concurs with the prior conclusion of the Board that:

> Discovery is the usual mechanism parties use to obtain this type of information, which, in turn, could assist parties in preparing their evidence. Issues regarding relevancy and preemption can then be made to the Board at the time the evidence is filed. In additional the Board does not consider it necessary or good procedure to try and address federal preemption in general prior to seeing the evidence that is presented.

(Order Addressing Motion for Reconsideration and Petition to Intervene, February 10, 2023, p. 4). It will ultimately be the Board's determination at hearing whether the dispersion modeling information is federally preempted. This ruling relates only to the question of whether it is discoverable.

Summit filed a Notice of Supplemental Authority post-hearing, and included a copy of the Order of Protection of Information issued by the North Dakota Public Service Commission on August 4, 2023. The Order prohibits disclosure of the dispersion modeling information to the intervenors and general public in the North Dakota Public Service Commission proceeding. Summit does not ask that a similar order of protection be issued in this case, and the undersigned notes the North Dakota Order was issued pursuant to specific North Dakota statutes, not present here. Summit has not asked for an order of protection for the Iowa dispersion modeling data in this case, and Summit has not claimed any privilege that would prevent ordinary disclosure to the parties and their counsel. Presumably Summit filed the North Dakota Order in this Iowa case, as a reminder to any parties in the Iowa case who are also parties in the North Dakota case, of their duties and obligations under the North Dakota Order.

Conclusion

I conclude motion to compel the discovery of the dispersion modeling documents and data should be granted.

IT IS THEREFORE ORDERED:

The motion is GRANTED. Summit shall provide the requested documents and data to the movant and joined parties within 2 business days of this order.

Dated this 14th day of August, 2023.

Toby J. Gordon
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