

**STATE OF IOWA
DEPARTMENT OF COMMERCE
IOWA UTILITIES BOARD**

IN RE:

SUMMIT CARBON SOLUTIONS, LLC

DOCKET NO. HLP-2021-0001

**COUNTIES' RESPONSE TO
SUMMIT'S NOTICE OF APPEAL**

COME NOW the Counties and, in support of this Response to Summit's Notice of Appeal, respond to arguments raised in Summit's Notice of Appeal of the Order Concerning Sierra's Second Motion to Compel:

1. The Counties agree that Sierra Club issued a data request seeking dispersion modeling results, and that Summit objected. The Counties deny that the dispersion modeling results are not relevant and that they constitute highly sensitive security information about critical infrastructure. To the contrary, the dispersion modeling results are highly relevant to the IUB's consideration of location and routing of the proposed pipeline and there is no authority supporting Summit's argument that dispersion modeling results are confidential.

2. Undisputed.

3. Undisputed.

4. Undisputed.

5. Undisputed

6. Undisputed.

7. Undisputed for purposes of the instant Response.

8. Undisputed.

9. Undisputed.

10. The Presiding Officer did not err in determining that the dispersion modeling results are discoverable. The Presiding Officer correctly found that the dispersion modeling results are relevant to the questions of location and routing of the proposed pipeline, matters which the IUB is statutorily authorized to consider. Furthermore, the Presiding Officer was correct in rejecting Summit's preemption arguments. Nothing in federal law preempts the ability of the IUB to consider tangential matters of public safety when considering the location and route of a proposed pipeline.

11. Undisputed that the quoted language appears in the cited filings. However, the Counties note that Summit has cherry-picked various portions of the filings and removed all context from those submissions.

12. Summit's argument that all of the articulated bases for obtaining the dispersion modeling is based on pipeline safety and preempted by federal law fails. The authority cited by Summit does not stand for the proposition that the IUB cannot consider matters of public safety in determining the location and routing of a pipeline. Nothing in the dispersion modeling results would implicate safety standards, which are federally preempted. Instead, the dispersion modeling results would simply provide *already existing* information to the IUB that bears on where a pipeline should be located and routed. Summit's argument that pipeline safety standards preclude this information from being disclosed, let alone utilized, is baseless.

13. The Presiding Officer did not err in finding that the dispersion modeling results are relevant to the pipeline's location, routing, and siting, and that those considerations are not preempted by federal law. To the contrary, Summit has failed to provide any applicable authority demonstrating that consideration of dispersion modeling results constitutes "actual regulation of pipeline safety in contravention of federal authority." Notice of Appeal ¶ 13. No such authority

exists. The IUB is well within its rights to consider dispersion modeling results in evaluating the appropriate location and route for pipelines.

The Pipeline Safety Act requires the Secretary of Transportation to “prescribe minimum *safety standards* for pipeline transportation and for pipeline facilities,” which “may apply 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)(2). The Pipeline Safety Act contains an express preemption provision, providing 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) (emphasis added). However, the express statutory language preempts only the adoption or continuation of “safety standards.” 49 U.S.C. § 60104(c). For example, state and local authorities are expressly preempted from adopting standards relating to pipeline seams, pipe wall thickness, leak detection equipment, or qualifications of welders. *See* 49 C.F.R. §§ 195.214, 195.106, 195.444, and 195.222. In these areas, the “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.*, 999 F.2d at 359. However, Congress also included in the Pipeline Safety Act a provision expressly *limiting* the scope of preemption. The Pipeline Safety Act states that “[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). While it is clear that Congress intended to give the Secretary of Transportation exclusive authority over pipeline safety standards, it is equally clear that Congress intended to allow state and local governments to determine the location and routing of pipelines. Both of these expressions of Congressional intent must be given effect.

By the plain terms of the statute, the only issue delegated exclusively to federal jurisdiction are “safety standards” designated in the statute. Nowhere in the statute does it provide that the entire general concept of safety must be ignored by state and local authorities when considering a pipeline route. It would be absurd to claim, as Summit does, that state and local authorities are prohibited from any consideration of public safety and welfare when analyzing the location or routing of a pipeline simply because “safety standards” are set at the federal level. PHMSA itself has unequivocally affirmed that “[d]espite Federal preemption of pipeline safety regulation, the role and powers of local authorities to affect pipeline safety is critical.” *See* May 28, 2014 PHMSA Letter to TransCanada Corporation on the Role of U.S. Local Governments in Pipeline Safety, *available at* <https://pstrust.org/wp-content/uploads/2014/05/PHMSA-Letter-to-TransCanada-on-Role-of-Local-Governments-in-Pipeline-Safety.pdf>.

14. The Presiding Officer did not “fail[] to recognize the acute security sensitivity surrounding the dispersion modeling results.” Notice at ¶ 14. Summit did not provide the Presiding Officer with any facts supporting its conclusory assertions that the results contain such sensitive information. Furthermore, it remains unclear how the dispersion modeling results would constitute a “security system plan...for critical infrastructure.” *Id.* The dispersion modeling results will shed light onto questions of what happens if there is a rupture of the pipeline. The results will not, presumably, contain information related to the vulnerabilities of the pipeline or security system information. Summit’s argument is further weakened by the fact that the Board’s decision-making process is largely public. There is a significant amount of information available about the proposed pipeline, including its proposed location and route. The only possible effect that disclosure of the dispersion modeling results would have is to strengthen the Board and public’s understanding of how best to situate the proposed pipeline with all the relevant information.

15. Iowa Code § 22.7(50) is inapplicable to the discoverability of Summit's dispersion modeling results. The Code provides only that a public entity *may* choose to keep confidential:

Information and records concerning physical infrastructure, cyber security, critical infrastructure, security procedures, or emergency preparedness developed, maintained, or held by a government body for the protection of life or property, if disclosure could reasonably be expected to jeopardize such life or property.

a. Such information and records include but are not limited to information directly related to vulnerability assessments; information contained in records relating to security measures such as security and response plans, security codes and combinations, passwords, restricted area passes, keys, and security or response procedures; emergency response protocols; and information contained in records that if disclosed would significantly increase the vulnerability of critical physical systems or infrastructures to attack.

Iowa Code § 22.7(50). Summit does not explain why it believes dispersion modeling results even fit within this definition. Additionally, Summit has failed to produce any facts that the disclosure of dispersion modeling results “could reasonably be expected to jeopardize ... life or property.”

Id. The pipeline does not yet exist, so Summit's arguments regarding bad actors targeting the pipeline for vandalism are pure speculation. Conversely, the disclosure of dispersion modeling results is more likely to protect life or property, as the information can shed light onto the question of where the pipeline should be located to best protect the public and ensure the common good.

Summit's invocation of Iowa Code § 22.7(50) fails for additional reasons. For one, the dispersion modeling results cannot “significantly increase the vulnerability of critical physical systems or infrastructures to attack” where no physical pipeline even exists and the location may still be altered. Additionally, the route approval process is public by nature. The recording of easements and the public nature of eminent domain processes virtually ensure that the route will not be secret. Nothing about the dispersion modeling results will heighten any risk, and certainly not the type of risks contemplated by Iowa Code § 22.7(50).

Finally, even assuming for the sake of argument that the dispersion modeling results constitute “critical infrastructure” information, Summit’s arguments ignore two critical facts: (1) The Presiding Officer’s ruling addresses a motion to compel discovery and not a public information request under Iowa’s Open Records law; and (2) Local governments, including the Counties, have an obligation under Iowa Code chapter 29C to engage in emergency response preparedness. Furthermore, Summit, as a pipeline “operator,” has an obligation under PHMSA’s regulations to inform the Counties “about the operator's ability to respond to the pipeline emergency and means of communication during emergencies.” *See* 49 C.F.R. § 195.402(c)(12).

16. Summit’s arguments that federal law strongly favors protection are unsupported by its citations. Nothing in the cited authority provides that dispersion modeling results are confidential pursuant to federal law. But again, the fact that Summit intends to “seek protections” from PHMSA regarding the Freedom of Information Act at some point in the future is irrelevant to a discovery dispute arising during the siting and routing of the pipeline.

17. Summit does not explain how dispersion modeling results are equivalent to “essentially a map that someone with ill intentions could use to create severe disruptions.” This is simple conjecture, unsupported by any actual facts. Summit also relies on North Dakota’s PSC order and the need to protect that information but fails to mention that North Dakota recently denied Summit’s permit application. Therefore, there is no basis to protect that information as the pipeline may not presently be constructed in North Dakota. Additionally, Summit’s hypothetical concern about “someone with ill intentions” creating a “severe disruption” ignores the very real need to raise public awareness about the risks posed by the pipeline, thereby grotesquely contorting a statute meant to *protect* public welfare into one that undermines it.

18. Summit's claim that an inadvertent public filing, which was promptly corrected, and alleged "noncompliance with Board orders" prevents even disclosure pursuant to a protective order is inapposite. Courts routinely issue protective orders to ensure the confidentiality of various materials and there are remedies if a party intentionally fails to comply with such orders. There is no reason to believe that, if the Board deems it necessary, a protective order could not serve the same purpose in this action. However, in the event the Board orders disclosure pursuant to a protective order, interested parties in the proceedings should have access to the materials. Only by accessing the dispersion modeling results can the parties adequately evaluate the information and present their positions fully to the Board in the pipeline permitting process.

STATEMENT OF REQUESTED RELIEF

19. The Counties request that the Board affirm the Presiding Officer's ruling ordering disclosure of the dispersion modeling results.

STATEMENT AS TO BRIEFING AND ORAL ARGUMENT

20. The Counties do not seek further briefing or oral argument.

21. The Counties resist Summit's application for a stay. The Presiding Officer's decision should be upheld and given immediate effect, including the requirement that Summit produce the dispersion modeling results within two days of the order. The hearing in this matter has already started, making time of the essence. The parties are entitled to the information that Summit has delayed producing for months. Further delay is not warranted.

WHEREFORE, the Counties request the Board deny Summit's appeal, affirm the Presiding Officer's decision in full and order Summit to promptly produce the requested documents.

Respectfully submitted,

By: /s/ Timothy J. Whipple

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