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August 21, 2023

Public Utilities Commission
Attn: Patricia Van Gerpen, Executive Director
VIA E-MAIL ONLY: patty.vangerpen@state.sd.us

RE: HP22-002
MAGT File: 0515

Dear Ms. Van Gerpen:

Navigator, in this docket, has moved the Commission for findings and orders preempting county ordinances in two counties which are designed to prohibit the construction and operation of pipelines in those two counties. SCS Carbon Transport supports Navigator's position. The actions of the counties in passing ordinances to prohibit pipelines cannot be allowed to stand.

The county commissions in Minnehaha and Moody counties, along with Brown, McPherson, and Spink (which are not on Navigator's route) have decided that they are now going to have primary siting authority for hazardous liquid pipelines. The county commissioners, through their ordinances, have established setback requirements (*i.e.*, siting restrictions), applications, hearings, and fee structures that grant to themselves primary siting authority for these installations. Doing so effectively prohibits the construction and operation of pipelines in their counties, and they have done so without legislative authority and well after SCS and Navigator have determined and proposed their routes and applied to the PUC for permits to construct and operate.

So, this is not a docket in which the Commission is evaluating whether the cost of a particular ordinance is too high or whether the regulation's prohibitions are too onerous. This, instead, is a situation in which these counties have assumed authority and effectively banned pipelines. In its motion to preempt county ordinances under SDCL § 49-41B-28, Navigator states that the Commission's decision whether to preempt local ordinances is "necessarily a fact-based inquiry". (Navigator Motion ¶ 7). SCS Carbon Transport agrees that § 49-41B-28 is focused on whether a local ordinance is unreasonably restrictive "as applied to the proposed route", but these are not the typical county zoning ordinances. They are designed to and effectively work to prohibit construction and operation of pipelines.

While a motion under SDCL § 49-41B-28 would generally seem to set up a factual inquiry, in this case, it appears to SCS instead that the question is a legal and policy-driven one: Is the Commission to hold and use primary siting authority for South Dakota, or is that role now with each and every individual county? The answer, based on legislative policy at the national and state levels and practical construction, is clearly the former, which means the Commission must necessarily preempt the challenged county ordinances if Navigator has satisfied all other statutory requirements.

This Commission has the legislative authority granted in § 28 on pipeline and other projects because the Legislature knows that its Commissioners and Staff have the expertise, experience, and resources to hold hearings, evaluate the evidence, and make decisions based on the rule of law and not upon a political agenda or personal whims. That is how it should be, and that is what the citizens of South Dakota and the rest of the nation have come to expect.

SCS supports Navigator's motion under SDCL § 49-41B-28 and in further support, attaches its own motion that was filed in Docket Number HP22-001.

Very truly yours,

MAY, ADAM, GERDES & THOMPSON LLP

Brett Koenecke

BRETT KOENECKE
BK | jrw

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE APPLICATION BY SCS CARBON TRANSPORT, LLC FOR A PERMIT TO CONSTRUCT A CARBON DIOXIDE PIPELINE	**HP22-001** **MOTION FOR ORDER PREEMPTING COUNTY ORDINANCES**

Introduction

Local zoning and land-use regulations have their place, but when it comes to routing interstate pipeline projects—those that stretch across multiple counties or even the entire state—the South Dakota Legislature has given siting permit authority to this Commission. Under South Dakota law, the Legislature has granted to this Commission the authority to supersede or preempt county regulations that, "as applied to the proposed route, are unreasonably restrictive in view of existing technology, factors of cost, or economics, or needs of parties where located in or out of the county." SDCL § 49-41B-28.

Placing that responsibility in this Commission makes practical sense. Interstate projects, including this one, bolster economic development throughout the entire state, so decisions about siting and permitting should come from a body that represents the entire state. It also makes sense to give this Commission the option to have final say on pipeline projects because its members and staff have the expertise, experience, and resources to evaluate the evidence and make a decision based on evidence and the rule of law, and not on political reasons or purposes, or to meet a personal agenda. That is how it should be, and that is what the citizens of South Dakota have come to expect.

To that end, SCS Carbon Transport asks that the Commission supersede and preempt ordinances in Brown, Minnehaha, Spink, and McPherson counties.

Brown, Minnehaha, Spink, and McPherson counties have each enacted an ordinance that, among other things, establishes "setback" requirements banning SCS's proposed route. And those counties enacted their ordinances more than a year after SCS submitted its route and application to this Commission, engaged and made commitments to landowners and other participants in South Dakota's leading economic sector and spent millions of dollars acquiring right-of-away and preparing for its permit hearing based on preexisting county regulations. McPherson County also enacted a temporary moratorium on pipelines while the county commission purported to decide how and whether to regulate hazardous liquid pipelines. But that "temporary" moratorium appears to be a permanent one because the McPherson County Commission continues to extend that outright ban into perpetuity.

These are not ordinary county ordinances. Each one was enacted as a reaction and to expressly target (and likely stop) carbon dioxide (CO_2) pipelines. The several counties are now taking it upon themselves to set a Balkanized energy and transmission policy for the State, a task that has been, is supposed to be (and should be) left to this Commission. The question before this Commission is not whether local governments should have some limited role in enacting neutral ordinances that affect pipelines. The question seems to be whether this Commission or sets of county commissioners are really going to be the siting and routing authority for projects within and through the State.

The land-use and zoning restrictions in Brown, Minnehaha, Spink, and McPherson counties are clearly unreasonably restrictive as applied to the proposed route. They don't make the facility safer or more efficient; in fact, the reverse is true. For example, routing farther away from a property line can expose a pipeline to a greater risk of third-party damage or to slopes with a higher potential for erosion or a host of other factors which are routinely taken into account in the

routing process. SCS therefore respectfully requests that the Commission, as part of its order granting SCS's permit, supersede and preempt these and any other such ordinances. If section 49-41B-28 means anything, it means that these and perhaps other county ordinances if any more are adopted must be set aside for this Commission's state-wide siting decision.

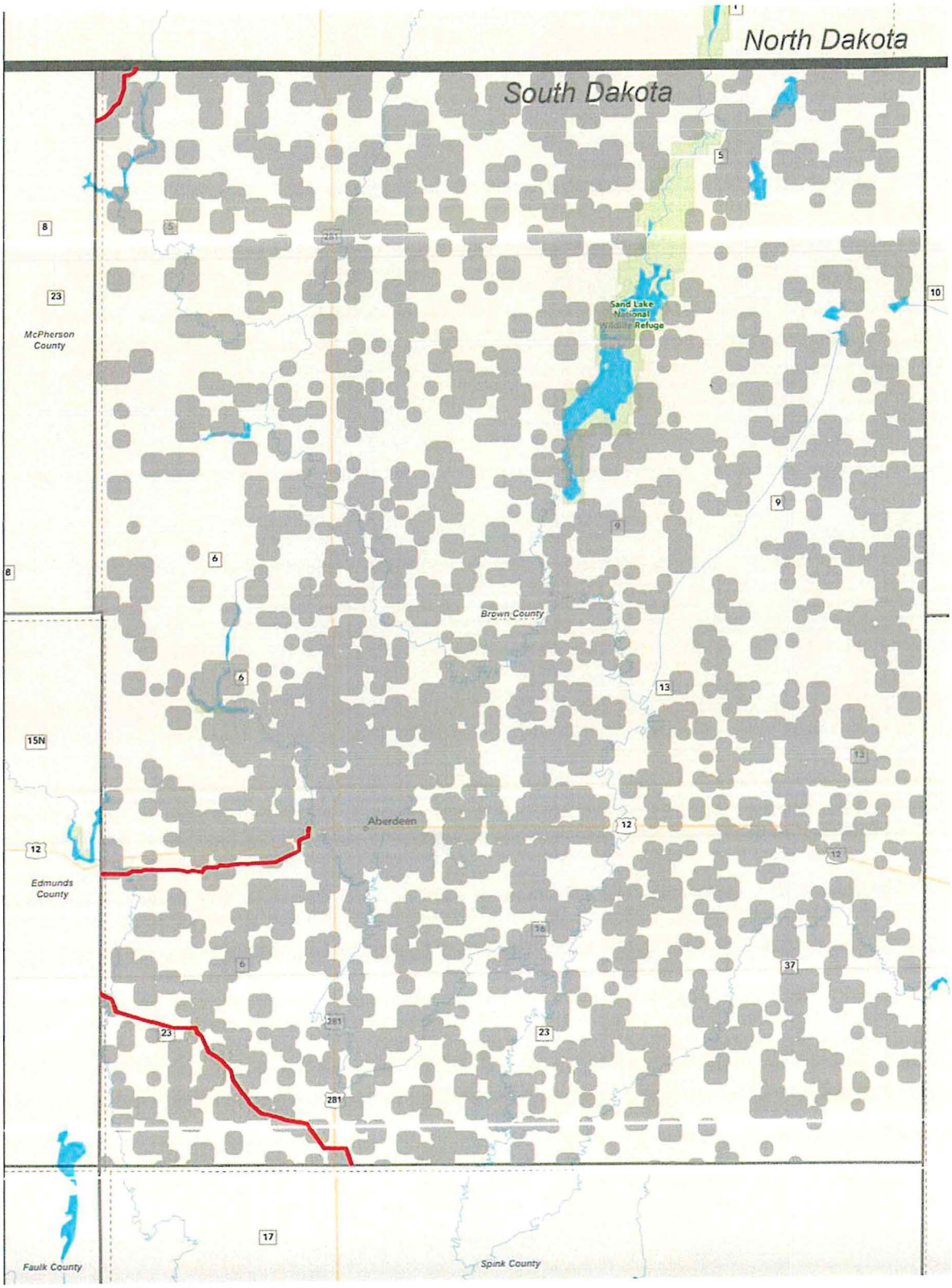
Background

Brown County Ordinance

On April 25, 2023—more than fourteen months after SCS filed its application for permit and formally announced its initial plant partners and route—the Brown County Commission enacted ordinance #243.[1] The ordinance requires that hazardous liquid pipelines, including pipelines that transport CO_2, be at least 1,500 feet from the property line of all "cautionary uses," which are defined as residential dwellings, any structure with a living quarters, schools, daycares, or churches.

The setback requirement blocks SCS's proposed mainline route through Brown County and two proposed trunklines, one of which connects the Glacial Lakes Energy plant in Aberdeen to the mainline. SCS's proposed route is shown in red in the map below; the gray areas are those within the ordinance's new setback areas.

[1] The ordinance is attached as Exhibit 1 to James Powell's rebuttal testimony filed on July 10, 2023. https://puc.sd.gov/commission/dockets/hydrocarbonpipeline/2022/hp22-001/testimony/summit/JPowellExh1.pdf


North Dakota
South Dakota
Sand Lake National Wildlife Refuge
McPherson County
Brown County
Aberdeen
Edmunds County
Faulk County
Spink County
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23
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281
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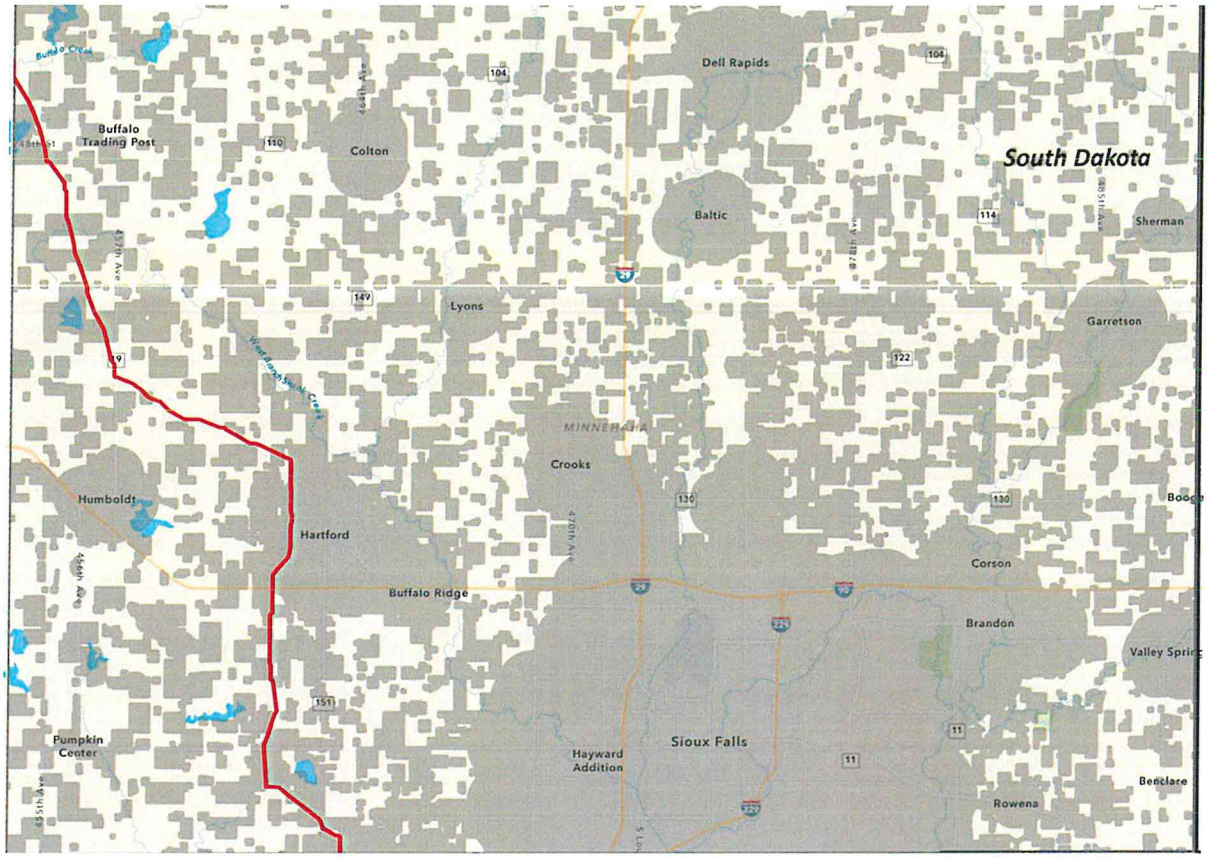
Minnehaha County Ordinance

On June 6, 2023—sixteen months after SCS filed its application for permit and formally announced its route—the Minnehaha County Commission enacted ordinance MC16-179-23.[2] The ordinance sets the following "separation criteria" (i.e., setbacks): (1) 330 feet between the parcel boundary of any dwelling, church, or business, (2) 1,000 feet from the parcel boundary of any public park or school, (3) 5,280 feet (1 mile) from any municipality with a population of 5,000 or more, 3,960 feet (3/4 mile) from any municipality with a population between 500 and 5,000, and 2,640 feet (1/2 mile) from any municipality with a population of less than 500.

Those setback requirements also block SCS's proposed route through the county. The red lines on the map below represent SCS's proposed route; the gray areas are those that are within the setback areas. It's important to note that on all attached maps, the darkened areas denoting setbacks don't indicate that a pipeline can actually be routed and constructed and operated in the lighter areas. All of those areas continue to have other routing criteria which apply to them. In many, many cases, those areas have other reasons not depicted here which make routing there impractical or impossible. The darker areas are only one of those criteria; one imposed by county commissions acting outside their authority.

[2] The ordinance is attached as Exhibit 2 to James Powell's rebuttal testimony filed on July 10, 2023. https://puc.sd.gov/commission/dockets/hydrocarbonpipeline/2022/hp22-001/testimony/summit/JPowellExh2.pdf



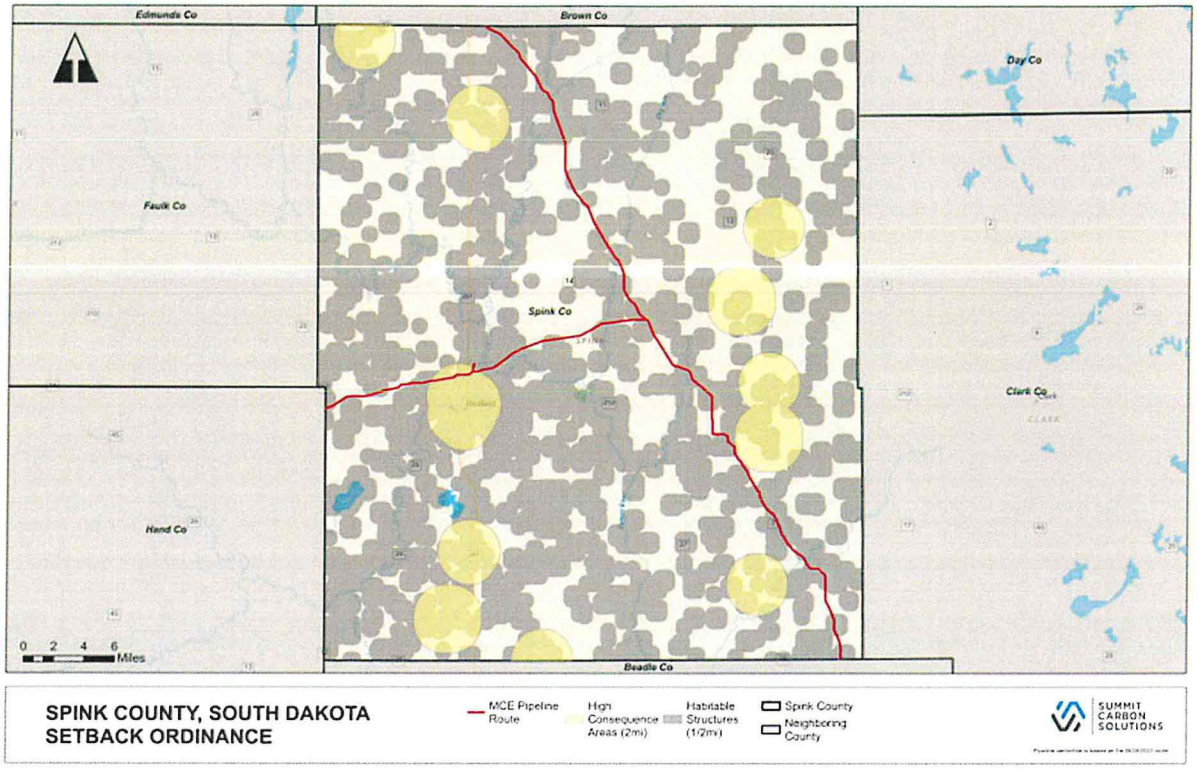
The Minnehaha Ordinance also establishes a county permitting scheme that is designed to potentially trump this Commission's permitting process. The ordinance requires, among other things, that an applicant submit detailed plans and specifications, an emergency response plan as required by PHMSA, and all other "required forms prescribed by the Planning Director." (Minnehaha Ordinance § 12.18(B)). The ordinance allows the Planning Director to make a county permit decision after the PUC grants a statewide permit, so applicants could receive approval from this Commission only to have their project shut down based on a single county's zoning official. The ordinance also establishes a $25,000 application fee and a tax of $300 per linear mile of pipeline, per year. (Minnehaha Ordinance § 24.05).

Spink County

Just last week, on August 8, 2023, the Spink County Commissioners enacted Ordinance Title 17.29, which regulates hazardous liquid pipelines.[3] The ordinance, which acknowledges that its standards may be "more stringent" than those set by this Commission, establishes a half-mile (2,640-foot) setback from the property line of "schools, daycares, churches, residential dwelling, livestock facilities, or any structure that has residential living quarters within." The Spink Ordinance also establishes a setback of two miles for "High Consequences Areas," which are "structures containing 10 or more persons with limited mobility, such as nursing homes and hospitals, and for structures with permitted occupancies of 100 or more persons, such as schools, churches, shipping, and entertainment facilities."

The red lines on the map below represent SCS's proposed routes; the gray areas are those that are within the Spink County setback areas.

[3] The Spink County ordinance is attached as Exhibit 1.



Like the Minnehaha County Ordinance, the Spink County Ordinance also establishes a new county permitting scheme for hazardous liquid pipelines, giving the County Zoning Administrator the ability to deny a county permit, even if this Commission has granted one.

McPherson County

On Tuesday, August 15, 2023, McPherson County commissioners enacted Ordinance 23-1, which purports to regulate hazardous liquid pipelines. Ordinance 23-1, the most onerous South Dakota ordinance passed to date, includes—among other unreasonably burdensome requirements—the following setbacks: one mile from any occupied dwelling, mobile home, or manufactured home; 500 feet from any adjoining property line of a non-participating landowner; and 1,000 feet from a water well that is documented and/or mapped with the South Dakota Department of Natural Resources Water Well Completion Reports. In practice, those setback

requirements effect an outright ban on hazardous liquid pipelines.[4] The ordinance also establishes a new permitting scheme for hazardous liquid pipelines (and an application fee, to be established by resolution). Under the ordinance, after the applicant submits an extraordinary amount of required information, McPherson County would hold its own public hearings, and the Board of Adjustment has the authority to approve, deny, or modify the permit application.

Also on August 15, McPherson County enacted Ordinance 23-2, which purports to set a new "level of cultivation" in McPherson County. The new level of cultivation in McPherson County under the ordinance is, "[n]ot less than two (2) feet below all tile lines and drainage pipes and equipment on any cultivated agricultural land; [n]ot less than six (6) feet below the surface of all cultivated and non-cultivated agricultural land and the lowest point of any ditch in a public right of way; [and] [n]ot less than six (8) feet below the surface of any right of way of any public drainage facility and any maintained or non-maintained drivable surface of any county, town or municipal street/highway and/or right of way." The ordinance also places restrictions on an easement grantor's ability to waive the level of cultivation requirements.

Argument

The Brown, Minnehaha, Spink, and McPherson ordinances are unreasonably restrictive as applied to SCS's proposed route (or any route, for that matter). That is already apparent from pre-filed testimony and will be borne out further by evidence at the hearing, but it is also clear from the face of the ordinances. These counties have established setback requirements and permitting schemes that make the counties, not this Commission, the primary siting authority for the State of

[4] The McPherson County ordinances, which were passed just days ago, are attached as Exhibits 2 and 3. SCS will supplement the record with maps showing the setback requirements against the pipeline route and provide additional evidence at the hearing.

South Dakota. And they've done that by effectively banning hazardous liquid pipelines. That is unreasonably restrictive. And it goes against the policy set by the Legislature.

The Legislature has found that "energy development in South Dakota and the Northern Great Plains significantly affects the welfare of the population, the environmental quality, the location and growth of industry, and the use of the natural resources of the state." SDCL § 49-41B-1. To that end, the Legislature has given this Commission the full authority to be the sole permitting body for this project and, in doing so, has declared that "the state must also ensure that these facilities are constructed in an orderly and timely manner." *Id.*

There is nothing "orderly" about what these county commissions have done. SCS filed its application with the PUC over eighteen months ago, on February 7, 2022. The Brown County Commission passed its ordinance fourteen months later; Minnehaha's Commission waited sixteen months to pass its ordinance; and the Spink and McPherson Commissions didn't act until eighteen months after SCS file its application. Over that time, and based upon existing county zoning rules, SCS made commitments to South Dakota ethanol plants and landowners and has expended more than $100 million to meet landowner expectations and acquire ROW in South Dakota. Just a few county-specific statistics:

- In the fourteen months before Brown County enacted its ordinance, SCS paid $1.5 million to landowners for ROW and expended an additional $3.5 million for engineering, surveys, and other ROW services related to the tracts along the proposed routes in Brown County. 7/10/23 Powell Rebuttal Testimony.
- In the sixteen months before Minnehaha County enacted its ordinance, SCS paid over $3.8 million to landowners for ROW and expended an additional $8 million for

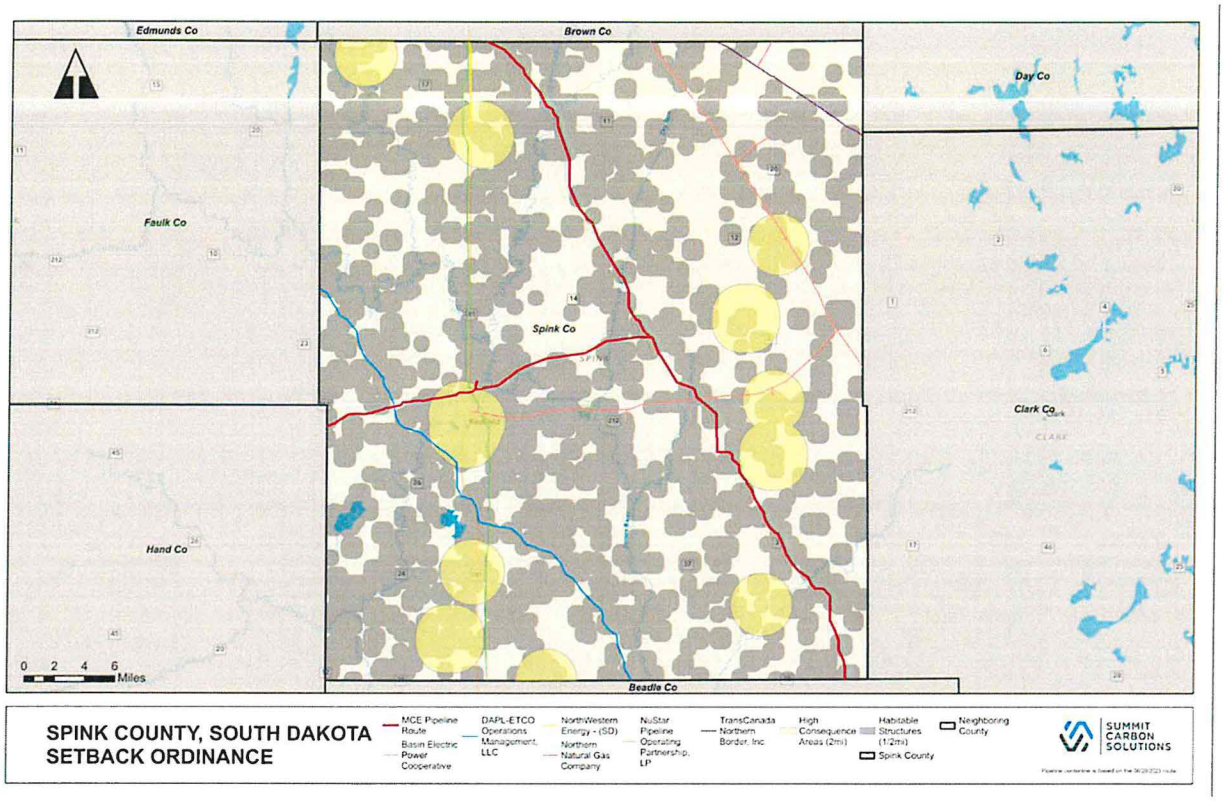
engineering, surveys, and other ROW services related to the tracts along the proposed routes in Minnehaha County. *Id.*

- In the eighteen months before Spink County enacted its ordinance, SCS paid over $14.5 million to landowners for ROW and expended an additional $6 million for engineering, surveys, and other ROW services related to the tracts along the proposed routes in Spink County. *Id.*
- In the eighteen months before McPherson County enacted its ordinances, SCS spent $5.2 million on easements and $5 million on, among other services, ROW services, surveys, and engineering efforts.

That is only an estimate of what SCS has spent in those counties, which is a small fraction of the total lost investment if the Commission does not preempt these ordinances. The practical effect of the ordinances is that, if any one of them is allowed to stand, SCS's project would necessarily fail because it cannot comply with the unnecessary setbacks. That would represent incalculable losses to South Dakota's ethanol industry, not to mention a loss of $77.5 million in ROW purchased in South Dakota, over $35 million on other ROW services in the State, and millions more spent across the pipeline's footprint in Iowa, Minnesota, Nebraska, and North Dakota. That means hundreds of millions of dollars in sunk costs, without any meaningful justification from the counties for these setback requirements.

In Spink County, for example, there are already 154 miles of PHMSA-regulated hazardous liquid pipelines that would violate the county's new setback requirements if those pipelines were constructed today. Yet in the past 25 years, there have only been two incidents involving those pipelines, neither of which caused any injuries. Below is a map of Spink County, showing the new

setback requirements, SCS's proposed route in red, and the other PHMSA-regulated pipelines that already flow through the county.



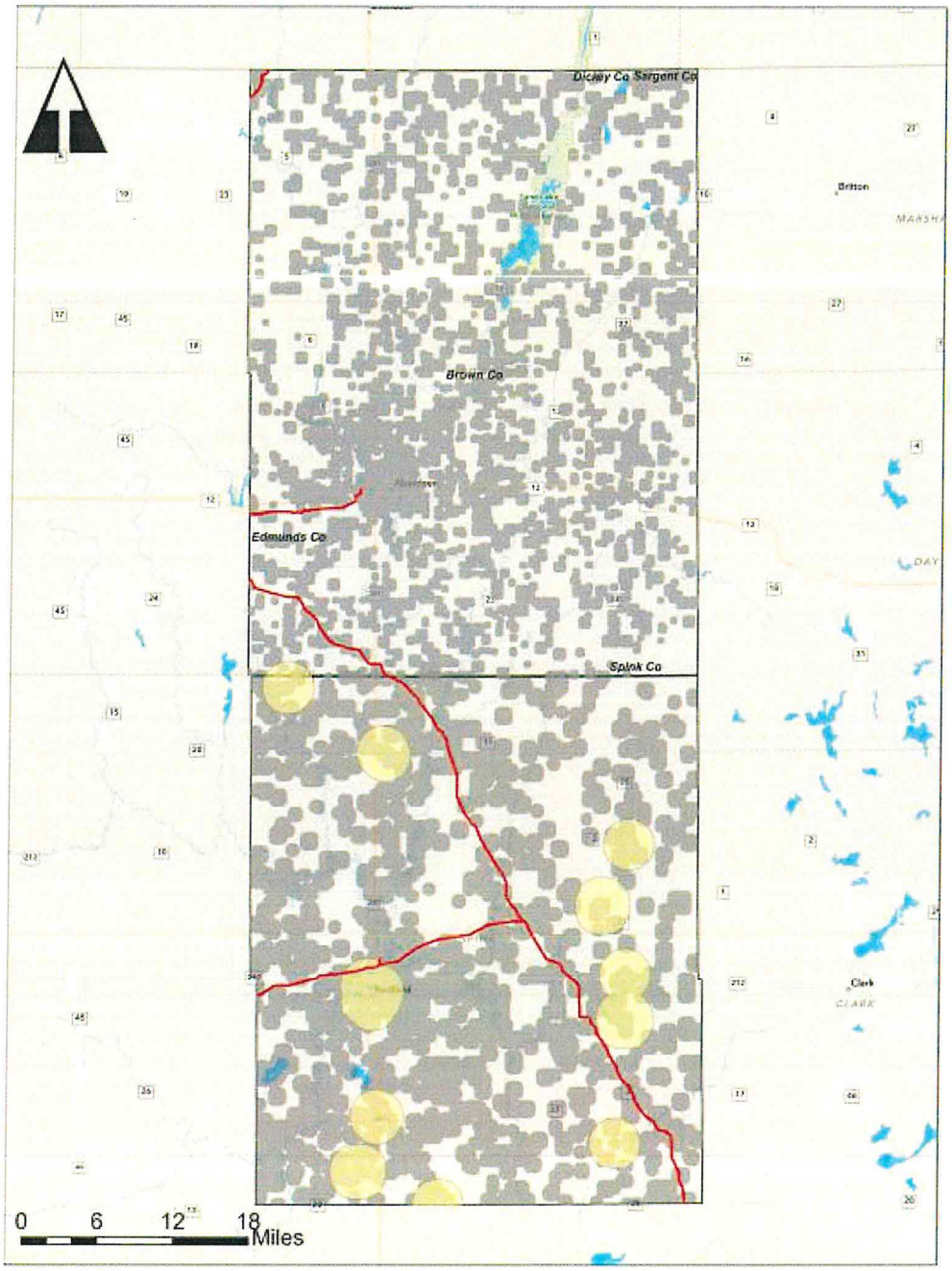
As SCS will show at the hearing, SCS's proposed route meets all the requirements of South Dakota law. So the cost of these ordinances—which prohibit the project—is clearly unreasonable.

That is all that matters, because SDCL § 49-41B-28 provides the Commission can preempt local ordinances if they are unreasonably restrictive "*as applied to the proposed route*." But even if the Commission were to evaluate whether these county ordinances allow for some other theoretical route, the new regulations would still be unreasonably restrictive. For starters, there is no theoretical route in Spink County that could comply with the new half-mile setback requirements. All pipelines—not just SCS's—have been zoned out of Spink County altogether.

There would be a theoretical route through Brown County, but, if possible, it would be impractical. A theorical mainline route for SCS's pipeline would increase the route by an additional 2.6 miles in the county, affecting 33 additional landowners and requiring 9,000-foot 24" horizontal directional drill to avoid protected conservation easements. *See* 7/10/23 Powell Rebuttal Testimony at 12. That is likely impossible. There is also no theoretical route that SCS could use to connect the Glacial Lakes Energy Plant in Aberdeen, and a new route through Brown County to connect the Tharaldson ethanol plant would be similarly impractical. 7/10/23 Powell Rebuttal Testimony at 11–12.

The same goes for Minnehaha. There is a theoretical route that could snake through the county in compliance with the new setback requirements. But the route is impractical, would increase the route by 5.55 miles in the county, and would affect 90 landowners in Minnehaha County.

These are just a few examples of the in-county effects of these new ordinances. But even more problematic is the reality that these county ordinances would also cause downstream and up-stream effects to neighboring counties. The restrictive setback requirements in Minnehaha County, for example, would require SCS to reroute and lengthen its pipeline in Turner County, meaning that Turner County landowners would be affected by the political decisions of Minnehaha County Commissioners. The same is true for Brown County's ordinance: It would theoretically change any future route for any proposed hazardous liquid pipeline in neighboring Hand County, affecting landowners there. These ordinances are problematic by themselves, but the cumulative effect is even worse. The following map, showing the setback requirements of Brown and Spink counties, demonstrates what happens when county-by-county siting becomes the rule. It creates a patchwork of zones through which no pipeline can flow through South Dakota.



These inter-county effects are one of the many reasons the Legislature has placed siting authority within this Commission, and one of the many reasons that the Commission should

supersede these ordinances. Indeed, if the Commission does not do so, then maps like these will be the norm, NIMBYism will reign in South Dakota, and South Dakotans will be locked out of markets—because no one can construct a pipeline in South Dakota under ordinances like these. And development of any type of energy infrastructure project which crosses the state and more than one county within it, if counties can pull the rug out from under them at the last minute through their own zoning ordinances.

These local laws are unreasonably restrictive and should be preempted.

Conclusion

Under South Dakota law, this Commission cannot designate a route that "violates local land-use zoning, or building rules, or regulations, or ordinances" *unless* the Commission preempts those laws in issuing a permit. If the Commission finds that SCS has complied with all other statutory requirements, then as a matter of law and logic it should preempt these ordinances. Doing otherwise would devastate investment and development, and cede this Commission's siting authority to the counties, which is clearly what the Legislature foresaw and sought to avoid by enacting SDCL § 49-41B-28.

Dated this 21 day of August, 2023.

MAY, ADAM, GERDES & THOMPSON LLP

BY: _____

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