WOODBURY COUNTY BOARD OF SUPERVISORS AGENDA ITEM(S) REQUEST FORM

Date: 5/15/2024 Weekly Agenda Date: 5/21/2024

ELECTED OFFICIAL / DEPARTMENT HEAD / CITIZEN: Chairman Matthew Ung

WORDING FOR AGENDA ITEM:

Information updating the public on Woodbury County's filed legal brief with the Iowa Utilities Board, concluding that Summit's hazardous pipeline does not promote the public convenience and necessity

ACTION REQUIRED:

Approve Ordinance ☐ Approve Resolution ☐ Approve Motion ☐

Public Hearing ☐ Other: Informational ☑ Attachments ☑

EXECUTIVE SUMMARY:

Woodbury County, Shelby County, Kossuth County, Floyd County, Emmet County, Dickinson County, and Wright County have filed a 91-page brief with the Iowa Utilities Board ("IUB").

BACKGROUND:

At the May 14 meeting, Doyle Turner brought up a potential Bremer County resolution. I contacted our legal counsel, and found the language is almost identical to a Franklin County objection filed last year with the IUB (also written by our attorney). Doyle and I agreed that the substance of those documents is replicated (and more) in Woodbury County's already-filed brief, which should be shared.

FINANCIAL IMPACT:

The attached 91-page brief filed with the IUB shows what Woodbury County is doing at the state level through our legal counsel, Mr. Timothy Whipple with Ahlers & Cooney, P.C. in Des Moines.

IF THERE IS A CONTRACT INVOLVED IN THE AGENDA ITEM, HAS THE CONTRACT BEEN SUBMITTED AT LEAST ONE WEEK PRIOR AND ANSWERED WITH A REVIEW BY THE COUNTY ATTORNEY'S OFFICE?

Yes ☐ **No** ☐

RECOMMENDATION:

I encourage the media and public to share the attached 91-page "Initial Post-Hearing Brief of the Counties" previously filed by Woodbury County along with six other counties at the IUB. This is a public document, but I found most people don't know where to find it. Woodbury County's efforts at the IUB are a direct attempt to affect the grant of a permit and any invalid use of eminent domain.

ACTION REQUIRED / PROPOSED MOTION:

n/a

Approved by Board of Supervisors April 5, 2016.

PUBLIC VERSION

STATE OF IOWA
DEPARTMENT OF COMMERCE
IOWA UTILITIES BOARD

IN RE: SUMMIT CARBON SOLUTIONS, LLC PETITION FOR HAZARDOUS LIQUID PIPELINE PERMIT	DOCKET NO. HLP-2021-0001 INITIAL POST-HEARING BRIEF OF THE COUNTIES

COME NOW, the Supervisors of Shelby County, Kossuth County, Floyd County, Emmet County, Dickinson County, Wright County, and Woodbury County ("the Counties") by and through the undersigned counsel and submit the following:

INITIAL POST-HEARING BRIEF OF THE COUNTIES

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I. BACKGROUND

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On January 28, 2022, after holding the required informational meetings, Summit filed a petition for a hazardous liquid pipeline permit with the Iowa Utilities Board ("Board") to construct, operate, and maintain approximately 687 miles of 6- to 24-inch diameter pipeline for the transportation of liquefied carbon dioxide within the state of Iowa. On May 25, 2023, Summit filed the direct testimony of its witnesses.

On June 16, 2023, the Board issued an order setting the procedural schedule for the remainder of the docket. Board Staff filed a Report (not including Exhibit H) on June 26, 2023, and an Exhibit H report on July 10, 2023. Summit filed its Petition Staff Report Testimony on July 10, 2023.

Parties were required to intervene on or before July 10, 2023, and the Counties timely filed their petitions to intervene. Intervenor direct testimony was required to be filed by July 24, 2023, and dozens of parties filed testimony prior to and after that date. Summit filed rebuttal testimony on August 21, 2023.

The evidentiary hearing in this matter began on August 22, 2023, with non-intervening Exhibit H landowners providing testimony first, followed by testimony from Summit and then from the intervening parties. On November 8, 2023, the evidentiary record was closed and the hearing concluded.

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In this initial post-hearing brief, the Counties resist both Summit's petition for a permit and any grant of eminent domain authority allowing Summit to acquire the easements it seeks for the project. In the event the Board determines to grant a permit, then in the alternative, the Counties seek modifications to the proposed route, as well as restrictions and conditions on the hazardous pipeline that are protective of landowners and the public interest.

II. INTRODUCTION

Summit proposes to build a hazardous pipeline to capture carbon dioxide at more than 30 participating ethanol plants in Iowa, South Dakota, North Dakota, Minnesota, and Nebraska, transport it in a supercritical state to North Dakota, and bury it deep underground. The company claims this boondoggle will sustain the ethanol industry, improve corn prices, and mitigate climate change. Even if these speculative benefits materialize, they will not be enough to justify the burdens placed on public safety and private property rights.

When stripped of all the politics – of ethanol, of climate change, and of eminent domain – Summit's hazardous pipeline is really just an economic development project. As an economic development project, the primary beneficiaries are its owners. It offers only trickle-down benefits to the public. On the other hand, it poses grave risks to public safety and will ultimately *increase* costs to the public by contributing to higher food prices, higher total fuel costs, and greater tax expenditures by the government.

To complete construction of this hazardous pipeline, Summit, a private entity, wants to take the private property of others through an exercise of the sovereign power of eminent domain. The taking of private property for hazardous pipelines is a hot-button issue in Iowa, with nearly

80% of Iowans opposing the use of eminent domain for such pipelines.[1] Public opposition to hazardous pipelines is understandable because they pose significant economic and safety risks to the residents of Iowa and because they create present and future land use conflicts for property owners.

With respect to the economic risks, future development will be stifled, altered, restricted or even halted in areas in and near the pipeline corridor. Thus, locating a pipeline too close to existing structures or to areas where landowners or local officials have planned for future growth and development will have a detrimental effect on future economic growth, property values, and, ultimately, local tax revenues.

With respect to health risks, on February 22, 2020, a carbon dioxide pipeline operated by Denbury Gulf Coast Pipelines ruptured in close proximity to the community of Satartia, Mississippi. Carbon dioxide is considered minimally toxic and is classified as an asphyxiant. Exposure to carbon dioxide can cause headaches, drowsiness, rapid breathing, confusion, increased cardiac output, elevated blood pressure, increased arrhythmias, and, in extreme cases, death by asphyxiation. Two hundred residents of Satartia who surrounded the rupture were evacuated, and 45 were taken to the hospital. Local emergency responders were not informed of the rupture or the unique nature of the safety risks posed by the pipeline, and had to guess the nature of the risk. In short, the communities through which this hazardous pipeline will pass are generally not adequately prepared to confront the risks it poses and Summit has done little to address that.

[1] https://www.desmoinesregister.com/story/news/politics/iowa-poll/2023/03/14/iowa-carbon-capture-pipeline-use-eminent-domain-opposed-majority-iowa-poll/69982590007/.

PUBLIC VERSION

Given the economic and health risks associated with Summit's hazardous pipeline, it comes as no surprise that thousands of members of the public and dozens of local governments and other municipalities have filed objections or comments in this proceeding opposing Summit's project. Below is a table summarizing the objections of such municipalities.

DATE	ENTITY	LINKED DOCUMENT
11-17-21	Wright County Board of Supervisors	link
12-7-21	Iowa County Board of Supervisors	link
12-8-21	Kossuth County Board of Supervisors	link
12-17-21	Story County Board of Supervisors	link
12-27-21	Hancock County Board of Supervisors	link
12-27-21	O'Brien County Board of Supervisors	link
12-28-21	Dickinson County Board of Supervisors	link
1-7-22	Plymouth County Board of Supervisors	link
1-7-22	Franklin County Board of Supervisors	link
1-13-22	Linn County Board of Supervisors	link
1-14-22	Crawford County Board of Supervisors	link
1-14-22	Lyon County Board of Supervisors	link
1-20-22	Woodbury County Board of Supervisors	link
1-21-22	Shelby County Board of Supervisors	link
1-24-22	Sioux County Board of Supervisors	link
2-2-22	Palo Alto County Board of Supervisors	link
2-23-22	Clay County Board of Supervisors	link
2-25-23	Cerro Gordo County Board of Supervisors	link
4-4-22	City of Earling	link
4-5-22	Montgomery County Board of Supervisors	link
4-13-22	Greene County Board of Supervisors	link
4-26-22	Plymouth County Board of Supervisors	link
5-3-22	Fremont County Board of Supervisors	link
5-5-22	Webster County Board of Supervisors	link
5-9-22	Page County Board of Supervisors	link
5-17-22	City of Rockford	link
6-29-22	Graettinger-Terril CSD	link
7-14-22	Johnson County Board of Supervisors	link
8-30-22	Pottawattamie County Board of Supervisors	link
8-30-22	City of Terril	link
9-9-22	Emmet County Board of Supervisors	link
9-20-22	Palo Alto County Board of Supervisors	link
9-20-22	City of Readlyn	link

DATE	ENTITY	LINKED DOCUMENT
9-27-22	Floyd County Board of Supervisors	link
11-1-22	Charles City Area Development Corp. Board	link
1-18-23	City of Armstrong	link
2-28-23	City of Gruver	link
4-7-23	Indian Creek Township, Mills County	link
4-13-23	Arlington Township, Woodbury County	link
4-19-23	Springfield Township, Cedar County	link
5-2-23	City of Wallingford	link
5-9-23	City of Dows	link
6-15-23	Rudd Rockford Marble Rock CSD	link
8-15-23	Franklin County Board of Supervisors	link
8-16-23	Emmet County Board of Supervisors	link
8-16-23	Sioux County Board of Supervisors	link
8-17-23	Cherokee County Rural Water District No. 1, et al. (other rural water entities in other counties)	link
11-9-23	City of Sioux City	link

Like the Board, these municipalities, many of whom are themselves vested with the power of eminent domain, are also charged with acting in the public interest. Unlike the Board, however, these municipalities will have to permanently live with and manage the risks of a hazardous pipeline if a permit is granted. They do not believe that the indirect, trickle-down benefits of this "economic development" project will outweigh the detrimental impact to property values, peace of mind, and economic prosperity in their communities.

For all of these reasons and more, the Counties argue that nothing about this hazardous pipeline is convenient, let alone necessary.

III. APPLICABLE LAW

The hazardous pipeline Summit proposes to build involves a complicated and interconnected framework of legal requirements at the federal, state, and local levels that all apply

or potentially apply to the project. As it considers whether to issue a permit, whether to grant eminent domain, and whether to approve the proposed route, the Board should do so within this framework.

A. Both the Federal Constitution and the Iowa Constitution Restrict the Use of Eminent Domain.

Both the federal Constitution and the Iowa Constitution contain important protections for intervenors and landowners in this proceeding.

1. The Federal Constitution provides a flexible federal "baseline."

The fifth amendment to the United States Constitutions sets the federal baseline for the protection of private property through the Takings clause: "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. An important issue in this proceeding is whether Summit's project meets the requirements of a "public use" for purposes of the Takings clause.

In the landmark case of *Kelo v. City of New London, Conn.*, 545 U.S. 469, 125 S. Ct. 2655, 162 L.Ed.2d 439 (2005), the United States Supreme Court addressed the question of "whether a city's decision to take property for the purpose of economic development satisfies the 'public use' requirement of the Fifth Amendment." In finding that a city's economic development plan served a public purpose, the Court explained, "For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power." *Kelo v. City of New London, Conn.*, 545 U.S. 469, 483 (2005).

However, even as it endorsed this flexible federal "baseline," the Court also emphasized that "nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose 'public use' requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter of state constitutional law, while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised." *Kelo v. City of New London, Conn.*, 545 U.S. 469, 489 (2005).

2. The Iowa Constitution is more restrictive than the federal baseline.

Iowa has both statutory and state Constitutional restrictions on the scope of "public use" that are more rigorous than the federal baseline established in *Kelo*. See generally *Puntenney v. Iowa Utilities Bd.*, 928 N.W.2d 829 (Iowa 2019).

Like the federal Constitution, the Iowa Constitution contains a public use requirement: "Private property shall not be taken for public use without just compensation first being made..." Iowa Const. art. I, § 18. The Iowa Supreme Court considers federal cases interpreting the Takings clause to be "persuasive" when interpreting the Iowa Constitution, but "not binding." See e.g. *Puntenney v. Iowa Utilities Bd.*, 928 N.W.2d 829, 844 (Iowa 2019). See also *Kingsway Cathedral v. Iowa Dept. of Transp.*, 711 N.W.2d 6, 9 (Iowa 2006) and *Harms v. City of Sibley*, 702 N.W.2d 91, 97 (Iowa 2005).

Despite considering the federal Takings cases persuasive, in *Puntenney*, the Iowa Supreme Court expressly adopted a more restrictive interpretation of the Iowa Takings clause, instead of the "flexible" approach of the *Kelo* majority. The approach favored by the Iowa Supreme Court was the same approach described in Justice O'Connor's dissent in *Kelo*. The Iowa Supreme Court

summarized O'Connor's dissent in *Puntenney*, noting that "[O'Connor] characterized the [*Kelo*] majority as holding:

> that the sovereign may take private property currently put to ordinary private use, and give it over for new, ordinary private use, so long as the new use is predicted to generate some secondary benefit for the public—such as increased tax revenue, more jobs, maybe even esthetic pleasure.

See *Puntenney v. Iowa Utilities Bd.*, 928 N.W.2d 829, 845 (Iowa 2019) quote *Kelo* at 501. By adopting the O'Connor dissent in *Kelo*, the Iowa Supreme Court expressly *rejected* the idea that eminent domain may be used to transfer property from one private entity to another private entity where the only justifications for the taking are the "secondary benefits" of economic development such as "increased tax revenue" or "more jobs."

In following the O'Connor dissent, the Court also reviewed and cited approvingly to decisions of state supreme courts in Illinois, Michigan, Ohio, and Oklahoma which have also held "that public use must mean something more than indirect economic benefits." See *Puntenney v. Iowa Utilities Bd., 928 N.W.2d 829, 845-846* (Iowa 2019) citing to *Sw. Ill. Dev. Auth. v. Nat'l City Envtl., L.L.C.*, 199 Ill.2d 225, 263 Ill.Dec. 241, 768 N.E.2d 1, 10–11 (2002); *County of Wayne v. Hathcock*, 471 Mich. 445, 684 N.W.2d 765, 783 (2004); *City of Norwood v. Horney*, 110 Ohio St.3d 353, 853 N.E.2d 1115, 1123 (2006); *Bd. of Cty. Comm'rs of Muskogee Cty. v. Lowery*, 136 P.3d 639, 647 (Okla. 2006).

In a striking passage in the *Puntenney* opinion, the Iowa Supreme Court offered an extreme example of a taking that could be justified by economic development under the *Kelo* majority's holding:

> Like our colleagues in Illinois, Michigan, Ohio, and Oklahoma, we find that Justice O'Connor's dissent provides a more sound interpretation of the public-use requirement. If

> economic development alone were a valid public use, then instead of building a pipeline, Dakota Access could constitutionally condemn Iowa farmland to build a palatial mansion, which could be defended as a valid public use so long as 3100 workers were needed to build it, it employed twelve servants, and it accounted for $ 27 million in property taxes.

Puntenney v. Iowa Utilities Bd., 928 N.W.2d 829, 848 (Iowa 2019). The *Puntenney* court also bluntly characterized economic development benefits as "trickle-down benefits," explaining that:

> In sum, because we do not follow the *Kelo* majority under the Iowa Constitution, we find that trickle-down benefits of economic development are not enough to constitute a public use. To the extent that Dakota Access is relying on the alleged economic development benefits of building and operating the pipeline, we are unmoved.

Puntenney v. Iowa Utilities Bd., 928 N.W.2d 829, 849 (Iowa 2019).

In summary, the Iowa Supreme Court is unequivocal in the position that under the Iowa Constitution, economic development alone does not justify the use of eminent domain. See generally *Puntenney v. Iowa Utilities Bd.*, 928 N.W.2d 829, 845 (Iowa 2019).

3. Common Carriers are a valid public use, but the "benefits" are not presumed.

Even as they criticized the use of indirect benefits from economic development as a justification for the use of eminent domain, both the O'Connor dissent in *Kelo* and the Iowa Supreme Court in *Puntenney* recognized that "a common carrier akin to a railroad or a public utility" is a "traditionally valid" public use. See *Puntenney v. Iowa Utilities Bd.*, 928 N.W.2d 829, 848 (Iowa 2019). In *Puntenney*, this finding was critical to the outcome. The Board argued, and the Iowa Supreme Court agreed, that the Dakota Access pipeline was "a common carrier with the potential to benefit all consumers of petroleum products." *Id.*

Additionally, the *Puntenney* Court's analysis of common carriers as a public use was tightly focused on benefits *to the public*. It was not a "formalistic" approach focused on the structure of commercial relationships. See *Puntenney* at 849 ("The Lamb petitioners assert that even these benefits are not enough, because no Iowa business or consumer will actually use the pipeline to deliver or receive crude oil. This approach is too formalistic."). In rejecting the "formalistic approach" argued by the pipeline opponents, the Iowa Supreme Court adopted, with approval, the reasoning of the Illinois Supreme Court in *Enbridge Energy (Illinois) L.L.C. v. Kuerth*, 421 Ill.Dec. 210, 99 N.E.3d 210, 218 (Ill. App. Ct. 2018), which found, "'The fundamental flaw of landowners' argument is that they focus entirely upon who *uses* the pipeline rather than who *benefits* from it.'" See *Puntenney v. Iowa Utilities Bd.*, 928 N.W.2d 829, 849 (Iowa 2019).

By focusing on the benefit to "all consumers," including to Iowans, it is clear that two factual considerations were important to the Iowa Supreme Court in its analysis in *Puntenney*: (1) that the pipeline would *reduce* prices for consumers ("the public is served" when they can "obtain service at a lower cost." *Id.* at 849) ("The record indicates that the Dakota Access pipeline will lead to 'longer-term, reduced prices on refined products and goods and service dependent on crude oil and refined products.'" *Id.* at 850); and (2) that transportation by pipeline would be *safer* than existing transportation by rail or truck ("As we have previously noted, the Dakota Access pipeline is intended to replace transportation of crude oil through Iowa by rail."). *Puntenney v. Iowa Utilities Bd.*, 928 N.W.2d 829, 849 (Iowa 2019).

In other words, the Iowa Constitution demands that even a common carrier be examined to determine whether it will provide *a benefit to the public*, such as through *reduced prices to consumers* or *safer transportation of a commodity* than existing methods of transport currently in

use. A formalistic approach that looks only at who "uses" the pipeline, rather than who "benefits" from it will not be enough. In *Puntenney*, it was important that the pipeline was both *cheaper* and *safer* for consumers than the status quo absent the pipeline.

B. Federal Law Regulates Pipeline Safety Standards but Leaves Routing and Land Use Decisions to State and Local Governments.

The federal Pipeline Safety Act requires the United States 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). This authority has been delegated to the Pipeline Hazardous Materials Safety Administration ("PHMSA"), which is the agency within the United States Department of Transportation charged with regulating hazardous liquid pipelines. See 49 C.F.R. Parts 190-199.

In accordance with the Pipeline Safety Act, PHMSA enacted required safety *standards* for the design, construction, operation, and maintenance of hazardous liquid pipelines. *See* 49 C.F.R. Part 195. These safety standards relate to such things as 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.

State and county governments are expressly preempted from regulating "safety standards." See e.g. *Kinley Corp. v. Iowa Utilities Bd., Utilities Div., Dept. of Com.*, 999 F.2d 354, 359 (8th Cir. 1993). However, the field of "safety standards" is distinct from the field of location and routing of pipelines, which is expressly exempt from the Pipeline Safety Act and not subject to

federal regulation. 49 U.S.C. § 60104(e). ("This chapter **does not authorize** the Secretary of Transportation to prescribe **the location or routing** of a pipeline facility."). [2]

On September 15, 2023, PHMSA issued a letter to Summit ("the PHMSA Letter")[3] explaining the agency's view of the role of state and local governments in the siting and routing process.[4] In the letter, PHMSA reiterates its view of the scope of the Pipeline Safety Act within a federal system:

> While the Federal Energy Regulatory Commission has exclusive authority to regulate the siting of interstate gas transmission pipelines, **there is no equivalent federal agency that determines siting of all other pipelines**, such as carbon dioxide pipelines. Therefore, the responsibility for siting new carbon dioxide pipelines rests largely **with the individual states and counties** through which the pipelines will operate and is governed by **state and local law**.

See PHMSA Letter at page 1 (emphasis added). The PHMSA letter goes on to explain the agency's role and the role of state and local governments in further detail:

> **PHMSA cannot prescribe the location or routing of a pipeline** and cannot prohibit the construction of non-pipeline buildings in proximity to a pipeline. Local governments have traditionally exercised **broad powers** to regulate land use, **including setback distances** and property development that includes development in the vicinity of pipelines. **Nothing in the federal pipeline safety law** impinges on these traditional prerogatives of local—or state— government, so long as officials do not attempt to regulate the field of pipeline safety preempted by federal law.

See PHMSA Letter at page 3 (emphasis added).

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[2] The Board asked the parties to brief the issue of federal preemption earlier in this docket. The Counties refer the Board to the arguments made earlier in the docket and hereby incorporate the arguments offered in the November 10, 2022 Joint Brief of Shelby County and Hardin County available at https://wcc.efs.iowa.gov/cs/idcplg?IdcService=GET_FILE&allowInterrupt=1&RevisionSelectionMethod=latest&dDocName=2106739&noSaveAs=1.

[3] The letter itself is available online: https://www.phmsa.dot.gov/news/phmsa-issues-letters-wolf-carbon-summit-and-navigator-clarifying-federal-state-and-local.

[4] On September 21, 2023, the Iowa Farm Bureau Federation ("the Farm Bureau") filed a motion asking the Board to take official notice of this letter and the Board granted it. See Hearing Transcript Vol. 25, pp. 7474-7475.

Because this docket deals with the questions of whether a permit should be issued and whether to approve the proposed route of the hazardous pipeline, PHMSA's regulations do not limit the Board's consideration of safety in this docket. Indeed, in the Dakota Access case, the Board found, and the Iowa Supreme Court affirmed, that safety should be a part of the "balancing test" used in the determination of "public convenience and necessity." See *Puntenney v. Iowa Utilities Bd.*, 928 N.W.2d 829, 841 (Iowa 2019). ("In our view, the IUB's balancing approach to public convenience and necessity should be upheld because it is not 'irrational, illogical, or wholly unjustifiable.'"). In sum, not only can the Board consider safety in this docket, it has done so in the past and should do so again.

C. Iowa Statutes Restrict the Use of Eminent Domain.

To the extent eminent domain is available to Summit through this proceeding, its grant is subject to certain restrictions and limitations imposed by Iowa statutes.

1. Chapter 479B authorizes the grant of eminent domain only to the extent necessary.

Iowa Code chapter 479B authorizes the Board to grant eminent domain for the pipeline, but only *to the extent necessary*. The Iowa Legislature set forth its purpose in the statute that grants permitting authority to the Board:

> It is the purpose of the general assembly in enacting this law to grant the utilities board the authority to implement certain controls over hazardous liquid pipelines to protect landowners and tenants from environmental or economic damages which may result from the construction, operation, or maintenance of a hazardous liquid pipeline or underground storage facility within the state, to approve the location and route of hazardous liquid pipelines, and **to grant rights of eminent domain where necessary**.

See Iowa Code § 479B.1 (emphasis added).

The requirement of necessity is repeated again in the section of the statute that provides for the grant of eminent domain: "A pipeline company granted a pipeline permit shall be vested with the right of eminent domain, *to the extent necessary* and as *prescribed and approved* by the board…" See Iowa Code § 479B.16. This necessity requirement is distinct from the use of the same word in the term "public convenience and necessity" and refers to the scope of the taking rather than the need for the permit. Eminent domain allows private property to be taken for public use, but, to the extent the public doesn't use or benefit from the taking, eminent domain is not necessary and should not be granted.

The exercise of eminent domain in the utility context has long been limited only to the rights that are necessary *for the uses proposed*. See e.g. *SMB Investments v. Iowa-Illinois Gas and Elec. Co.*, 329 N.W.2d 635, 640 (Iowa 1983) ("The use of the land by the utility is limited, however, to such interest in the land as is necessary directly or indirectly for the purpose of erecting and maintaining its line. *Draker v. Iowa Electric Co.*, 191 Iowa 1376, 1382, 182 N.W. 896, 899 (1921). **A taking beyond this purpose is not the taking of private property for public use, but a taking for private use**.") (emphasis added). See also *Vittetoe v. Iowa S. Utilities Co.*, 123 N.W.2d 878, 881 (Iowa 1963). ("But we think that the constitution impliedly **forbids the taking for public use of what is not necessary for such use** and, therefore, though the constitution and statute are silent on the subject of necessity, that the power to take is, in every case, **limited to such and so much property as is necessary for the public use in question**."). The necessity requirements imposed in Chapter 479B are to be interpreted and applied in conformance with these other utility condemnation cases.

By requiring that the taking be only "to the extent necessary," the legislature has attempted to ensure that the grant of eminent domain is enough to benefit the public but *no more*. For these reasons, the scope, terms, and conditions of a grant of eminent domain are subject to the Board's regulatory authority. The Board can (and should) "implement certain controls over hazardous liquid pipelines to protect landowners and tenants from environmental or economic damages" resulting from hazardous pipelines. Iowa Code § 479B.1.

The authority to grant eminent domain is closely related to the purposes for which it is authorized, so the Board must use its authority to *narrowly tailor* any grant of eminent domain to ensure that the purposes of the statute are fulfilled and that the taking of the private property is *limited* only to what is enough to secure the public benefits that are justifying the taking. To the extent that certain "controls" on the grant of eminent domain will protect landowners or secure the proposed public benefits, the legislature clearly intended that the Board should implement them.

2. Iowa Code Chapter 6A restricts the use of eminent domain.

Iowa law limits the exercise of eminent domain over agricultural land by defining public use or benefit narrowly:

> "Public use" or "public purpose" or "public improvement" **does not include** the authority to condemn agricultural land for private development purposes unless the owner of the agricultural land consents to the condemnation.

See Iowa Code § 6A.21(1)(d) (emphasis added). However, this limitation "does not apply to utilities, persons, companies, or corporations under the jurisdiction of the Iowa utilities board in the department of commerce or to any other utility conferred the right by statute to condemn private property…" Iowa Code § 6A.21(2). The Iowa Supreme Court has held that a pipeline company

under Chapter 479B is a "company under the jurisdiction" of the Board. See *Puntenney v. Iowa Utilities Bd.*, 928 N.W.2d 829, 843 (Iowa 2019).

Additional limitations on the exercise of eminent domain are provided in Iowa Code § 6A.22, which further defines "public use, public purpose, or public improvement." The definition includes "Private use that is **incidental** to the public use of the property, **provided that no property shall be condemned solely for the purpose of facilitating such incidental private use**." Iowa Code § 6A.22(2)(a)(3) (emphasis added). The clear intent of the legislature is that condemnation solely for private use is not lawful.

The legislature also clearly intended to prohibit the exercise of condemnation for economic development purposes:

> b. Except as specifically included in the definition in paragraph "a", "public use" or "public purpose" or "public improvement" **does not mean economic development activities resulting in increased tax revenues, increased employment opportunities**, privately owned or privately funded housing and residential development, **privately owned or privately funded commercial or industrial development**, or the lease of publicly owned property to a private party.

Iowa Code § 6A.22(2)(b) (emphasis added).

In other words, unless an exercise of eminent domain falls under one of the limited exceptions in paragraph "a" of Iowa Code § 6A.22(2), it is not a public use or public purpose and, therefore, restricted. In accord with *Kelo*, the list of exceptions includes "any interest in property…necessary to the function of a *common carrier*…" See Iowa Code § 6A.22(2)(a)(2).

The term "common carrier" is not defined anywhere in chapter 6A or 6B of the Iowa Code. The Iowa Supreme Court in *Puntenney* considered the issue of whether privately owned pipelines may qualify as a common carrier and concluded that under Iowa law "a common carrier need not serve all the public all the time." See *Puntenney v. Iowa Utilities Bd.*, 928 N.W.2d 829, 843 (Iowa

2019) quoting *Wright v. Midwest Old Settlers & Threshers Ass'n*, 556 N.W.2d 808, 810 (Iowa 1996). In *Puntenney*, it was persuasive to the court that the Federal Energy Regulatory Commission ("FERC"), the federal agency with jurisdiction over oil pipelines, required a reservation of 10% for walkup shippers. *Puntenney v. Iowa Utilities Bd.*, 928 N.W.2d 829, 843 (Iowa 2019). However, the Court also indicated that the result would be different if the pipeline were wholly dedicated to private use: "Significantly, Dakota Access does not involve a situation where service 'has been *limited* to those under contract.'" *Puntenney v. Iowa Utilities Bd.*, 928 N.W.2d 829, 843 (Iowa 2019) (emphasis in original).

In determining that Dakota Access was a common carrier, the court in *Puntenney* engaged in a discussion of its own common carrier precedents. See *Puntenney v. Iowa Utilities Bd.*, 928 N.W.2d 829, 843-44 (Iowa 2019). One of those precedents is *State ex rel. Bd. of R.R. Com'rs v. Carlson*, 251 N.W. 160, 161 (Iowa 1933). In *Carlson*, the Iowa Supreme Court considered whether the owner and operator of a transportation company was "a common carrier of goods." *State ex rel. Bd. of R.R. Com'rs v. Carlson*, 251 N.W. 160, 160 (Iowa 1933). The *Carlson* court summarized the test for a common carrier as follows:

> [T]he vital consideration is whether the appellee has so provided and used his facilities as to give to others, than those under contract with him, the right to command the use of his transportation services. If under all facts and circumstances the situation is such that others have the right to use appellee's transportation facilities, he is a common carrier. If, on the other hand, appellee is under no duty to perform his services, except for those with whom he elects to contract, then he is not a common carrier of goods.

State ex rel. Bd. of R.R. Com'rs v. Carlson, 251 N.W. 160, 161 (Iowa 1933).

Another precedent discussed in *Puntenney* was *Mid-Am. Pipeline Co. v. Iowa State Com. Comm'n*, 114 N.W.2d 622 (Iowa 1962). In distinguishing the factual record before it from the facts in *Mid-Am. Pipeline Co.*, the *Puntenney* court acknowledged that a pipeline which "intends to

handle only its own products" is "not a common carrier of such products." In a footnote, the *Puntenney* court explained its holding in *Mid-Am. Pipeline Co.*: "[W]e said that a grant of eminent domain authority to a private company to construct a pipeline exclusively for its own use was 'for a strictly private purpose' and 'beyond legislative authority.'" *Puntenney v. Iowa Utilities Bd.*, 928 N.W.2d 829, 843 (Iowa 2019). In the context of electric transmission line condemnations, the Iowa Supreme Court has also reaffirmed the holding in *Mid-Am Pipeline Co.*. See also *Vittetoe v. Iowa S. Utilities Co.*, 123 N.W.2d 878, 882 (Iowa 1963) ("Of course private property may not be taken for private use.").

In summary, Iowa Code § 6A.22 prohibits the exercise of eminent domain solely for private use. The statute is in accord with both *Puntenney* and *Mid-Am. Pipeline Co.* A common carrier may acquire an interest in property by eminent domain "where necessary," but under *Mid-Am. Pipeline Co.*, a pipeline that does not ship the products of others is "strictly for a private use" and thus not a common carrier.

D. The Iowa Administrative Procedure Act Includes Procedural and Evidentiary Requirements for this Proceeding.

As the Board considers the record in this proceeding and evaluates whether to issue a permit to Summit for its hazardous pipeline, it must do so according to principles of administrative law, including the Iowa Administrative Procedure Act ("Chapter 17A").

Iowa Code Chapter 17A "is intended to provide a minimum procedural code for the operation of all state agencies when they take action affecting the rights and duties of the public." Iowa Code § 17A.1(2). Chapter 17A "is meant to apply to all rulemaking and contested case proceedings and all suits for the judicial review of agency action that are not specifically excluded"

from the chapter. Iowa Code § 17A.1(2). One of the purposes of Chapter 17A is "to increase the fairness of agencies in their conduct of contested case proceedings." Iowa Code § 17A.1(3). For purposes of Chapter 17A, "contested case" means "a proceeding including but not restricted to ratemaking, price fixing, and licensing in which the legal rights, duties or privileges of a party are required by Constitution or statute to be determined by an agency after an opportunity for an evidentiary hearing." Iowa Code § 17A.2(5).

This proceeding will determine the legal rights, duties or privileges of numerous parties, and the Board is required by due process clauses in the federal and state constitutions and by Iowa Code chapter 479B to provide an opportunity for an evidentiary hearing. Thus, this proceeding is a contested case for purposes of Chapter 17A.

When a proceeding is a contested case, certain requirements apply. "Opportunity shall be afforded all parties to respond and present evidence and argument on all issues involved and to be represented by counsel at their own expense." Iowa Code § 17A.12(4). "Findings of fact shall be based solely on the evidence in the record and on matters officially noticed in the record." Iowa Code § 17A.12(8). A finding in a contested case "shall be based upon the kind of evidence on which reasonably prudent persons are accustomed to rely for the conduct of their serious affairs, and may be based upon such evidence even if it would be inadmissible in a jury trial." Iowa Code § 17A.14(1).

"When the agency presides at the reception of the evidence in a contested case, the decision of the agency is a final decision." Iowa Code § 17A.15(1). "Findings of fact shall be prepared by the officer presiding at the reception of the evidence in a contested case unless the officer becomes unavailable to the agency." Iowa Code § 17A.15(2). "A proposed or final decision or order in a

contested case shall be in writing or stated in the record. A proposed or final decision shall include findings of fact and conclusions of law, **separately stated**." Iowa Code § 17A.16(1) (emphasis supplied). The final decision of an agency in a contested case "shall include an explanation of why the relevant evidence in the record supports each material finding of fact." Iowa Code § 17A.16(1).

Judicial review of the final decision in a contested case may be had in district court, but the record made in a contested case is important because, unless an exception is made, a court reviewing the final decision of the agency "shall not itself hear any further evidence with respect to those issues of fact whose determination was entrusted by the Constitution or a statute to the agency in that contested case proceeding." Iowa Code § 17A.19(7).

A court may "reverse, modify, or grant other appropriate relief from agency action, equitable or legal and including declaratory relief, if it determines that substantial rights of the person seeking judicial relief have been prejudiced" by agency action that meets any of the grounds enumerated in Iowa Code § 17A.19(10). Among the grounds for reversal by a court are actions that are unconstitutional, beyond the authority delegated to the agency, based on an erroneous interpretation of law, or based upon a determination of fact not supported by "substantial evidence" in the record "when that record is viewed as a whole." Iowa Code § 17A.19(10).

"Substantial evidence" means "the quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance." Iowa Code § 17A.19(10). "When that record is viewed as a whole" means that "the adequacy of the evidence in the record before the court to support a particular finding of fact must be judged in light of all the relevant evidence in the record cited by any party that detracts from

that finding as well as all of the relevant evidence in the record cited by any party that supports it." Iowa Code § 17A.19(10).

E. Iowa Code Chapter 479B and the Board's Administrative Rules Provide the Requirements for the Issuance of a Permit, the Grant of Eminent Domain, and the Approval of a Route for a Hazardous Liquid Pipeline in Iowa.

While state and federal constitutional law and state and federal statutes provide important constraints on the permitting and construction of hazardous liquid pipelines, the main substantive and procedural requirements are set forth in Iowa Code Chapter 479B[5] and the Board's administrative rules at 199 Iowa Administrative Code chapters 9 and 13.

The purpose of 199 Iowa Administrative Code chapter 13 is "to implement the requirements of Iowa Code chapter 479B to establish procedures and filing requirements for a permit to construct, maintain, and operate an interstate hazardous liquid pipeline…" 199 IAC rule 13.1(1). "A hazardous liquid pipeline permit shall be required for any hazardous liquid pipeline to be constructed in Iowa, regardless of length or operating pressure of the pipeline." 199 IAC rule 13.1(2). "A petition for a permit shall be filed with the board upon the form prescribed and **shall include all required exhibits**." 199 IAC rule 13.3(1) (emphasis added). The required exhibits are set forth in 199 IAC rule 13.3(1).

[5] On June 21, 2023, George Cummins filed a Motion to Dismiss that asked the Board to "reject the Petition for a hazardous liquid pipeline" filed by Summit Carbon Solutions, LLC ("Summit") in this proceeding "as non-compliant with applicable laws and to dismiss its Petition for lack of jurisdiction at Summit's cost." The Motion to Dismiss raised jurisdictional issues based on the facts alleged in, and the law applicable to, Summit's petition, especially with regard to whether the pipeline transports carbon dioxide in a supercritical state or in a liquid state. The Counties filed a joinder to Cummins' motion. While the Board rejected Cummins' motion and proceeded to hold a hearing on Summit's project under Chapter 479B, the Counties do not concede that the denial was proper and do not concede that Summit's project meets all the requirements of subject matter jurisdiction under Chapter 479B.

1. Purpose and authority are closely linked.

The Board's authority to grant a permit is inextricable from the legislature's purposes in delegating that authority, and the legislature was clear about what the Boad should use it for:

> It is the purpose of the general assembly in enacting this law to grant the utilities board the authority **to implement certain controls** over hazardous liquid pipelines **to protect landowners** and tenants from environmental or economic **damages** which may result from the construction, operation, or maintenance of a hazardous liquid pipeline or underground storage facility within the state, to approve the location and route of hazardous liquid pipelines, and to grant rights of eminent domain where necessary.

See Iowa Code § 479B.1 (emphasis added).

2. A pipeline company must comply with the requirements of Chapter 479B.

"A pipeline company shall not construct, maintain, or operate a pipeline or underground storage facility under, along, over, or across any public or private highways, grounds, waters, or streams of any kind in this state except in accordance with" Chapter 479B. Iowa Code § 479B.3. "A pipeline company doing business in this state shall file a verified petition with the board asking for a permit to construct, maintain, and operate a new pipeline along, over, or across the public or private highways, grounds, waters, and streams of any kind in this state." Iowa Code § 479B.4.

A petition for a permit must state all of the following:

> 1. The name of the individual, firm, corporation, company, or association applying for the permit.
> 2. The applicant's principal office and place of business.
> 3. A legal description of the route of the proposed pipeline and a map of the route.
> 4. A general description of the public or private highways, grounds, waters, streams, and private lands of any kind along, over, or across which the proposed pipeline will pass.
> 5. If permission is sought to construct, maintain, and operate facilities for the underground storage of hazardous liquids the petition shall include the following additional information:

a. A description and a map of the public or private highways, grounds, waters, streams, and private lands of any kind under which the storage is proposed.
b. Maps showing the location of proposed machinery, appliances, fixtures, wells, and stations necessary for the construction, maintenance, and operation of the hazardous liquid storage facilities.
6. The possible use of alternative routes.
7. The relationship of the proposed project to the present and future land use and zoning ordinances.
8. The inconvenience or undue injury which may result to property owners as a result of the proposed project.
9. An affidavit attesting to the fact that informational meetings were held in each county affected by the proposed project and the time and place of each meeting.

Iowa Code § 479B.5.

3. A pipeline must promote the public convenience and necessity in order to receive a permit.

"A permit **shall not be granted** to a pipeline company **unless** the board determines that the proposed services will promote the public convenience and necessity." Iowa Code § 479B.9 (emphasis added). The Iowa Supreme Court has held that the legislature has clearly vested the Board with the authority to interpret the meaning of "public convenience and necessity." *Puntenney v. Iowa Utilities Bd.*, 928 N.W.2d 829, 836 (Iowa 2019).

The Board, with the approval of the Iowa Supreme Court, has "concluded that the public convenience and necessity test should be treated as a balancing test, **weighing the public benefits of the proposed project against the public and private costs or other detriments** as established by the evidence in the record." See *Puntenney v. Iowa Utilities Bd.*, 928 N.W.2d 829, 833 (Iowa 2019) (emphasis added).

4. The Board has broad authority to impose permit terms and conditions and to regulate the location and route of the pipeline.

The Board has broad authority to impose controls, conditions, restrictions, and route changes as appropriate. See Iowa Code §§ 479B.1 and 479B.9. "The board may grant a permit in whole or in part upon terms, conditions, and restrictions as to location and route as it determines to be just and proper." Iowa Code § 479B.9. In the Dakota Access case, the Board imposed a number of conditions and restrictions on the permit. See Docket No. HLP-2014-0001, Final Decision and Order issued March 10, 2016 and available at: https://wcc.efs.iowa.gov/cs/idcplg?IdcService=GET_FILE&allowInterrupt=1&RevisionSelectionMethod=latest&dDocName=1508021&noSaveAs=1.

As the Iowa Supreme Court noted in *Puntenney*, the Board may – and in the Dakota Access case did – use this authority to sustain objections to individual uses of eminent domain, to require the relocation of the pipeline from the route initially proposed, to preserve habitat for threatened species, and to require construction conditions such as boring underneath tiling systems. See *Puntenney v. Iowa Utilities Bd.*, 928 N.W.2d 829, 835 (Iowa 2019). The legislature's objective in delegating this authority is "to protect landowners and tenants" from "environmental and economic damages." Iowa Code § 479B.1. The means to be used in service of that objective are such controls, conditions, restrictions or route changes as the Board "determines to be just and proper." Iowa Code § 479B.9.

The primary restraints on the Board's authority to impose controls on hazardous pipelines, as discussed above, are: (1) the federal and state constitutions; (2) federal preemption in the field

of "safety standards," as that term is defined in federal law; and (3) the procedural and evidentiary requirements imposed under Iowa Code chapter 17A.

IV. SUMMIT HAS NOT PROVEN THAT THE PROJECT PROMOTES THE PUBLIC CONVENIENCE AND NECESSITY AND A PERMIT SHOULD NOT BE GRANTED.

As discussed above, "A permit shall not be granted to a pipeline company unless the board determines that the proposed services will promote the public convenience and necessity." Iowa Code § 479B.9. "[T]he legislature clearly vested the IUB with the authority to interpret 'public convenience and necessity.'" *Puntenney v. Iowa Utilities Bd.*, 928 N.W.2d 829, 836 (Iowa 2019). The term "public convenience and necessity" is a term of art within the expertise of the Board. *Puntenney v. Iowa Utilities Bd.*, 928 N.W.2d 829, 836 (Iowa 2019). The Board treats the public convenience and necessity test "as a balancing test, weighing the public benefits of the proposed project against the public and private costs or other detriments as established by the evidence in the record." *Puntenney v. Iowa Utilities Bd.*, 928 N.W.2d 829, 833 (Iowa 2019).

Summit's application for a permit should be denied because the evidence presented in this contested case proceeding, when the record is considered as a whole, does not support a finding that the proposed hazardous pipeline will promote the public convenience and necessity.

A. The Petition Contains Material Deficiencies That Must Be Weighed Against Summit in the Balancing Process.

"A pipeline company doing business in this state shall file a verified petition with the board asking for a permit to construct, maintain, and operate a new pipeline along, over, or across the

public or private highways, grounds, waters, and streams of any kind in this state." Iowa Code § 479B.4(1). Iowa Code § 479B.5 requires a petition for a permit to make statements regarding an enumerated list of items.

The Board has adopted rules setting forth additional requirements for a petition. See 199 IAC rule 13.3(1). The petition requirements serve to set the baseline information the Board needs to properly consider whether to issue a permit. As such, the petition is a critical part of the evidence a pipeline company introduces into the record.

In its November 9, 2022, Order Granting Petitions to Intervene and Addressing Motion to Require a Revised Petition ("the November 9 Order"), the Board denied the Counties' motion to require Summit to revise the petition, instead explaining that the Board "agrees with OCA that Summit Carbon bears the burden of proof in this case, and **meeting the statutory and administrative rule requirements will be one of the numerous factors** the Board will use to determine whether Summit Carbon's proposed hazardous liquid pipeline promotes the public convenience and necessity." The Board further noted that issues with the sufficiency of the evidence in the petition should be raised in testimony and during hearing.

The statutory petition requirements include: (1) the "possible use of alternative routes"; (2) the "relationship of the proposed project to the present and future land use and zoning ordinances"; and (3) the "inconvenience or undue injury which may result to property owners as a result of the proposed project." These three requirements are clearly meant to make a pipeline company introduce and discuss aspects of the proposed pipeline that are likely to be problematic for the company. Obviously, it is easier to obtain approval for a project if there is no specific discussion of alternative routes, local zoning restrictions, or negative impacts on landowners. However,

because the rights of others are involved, the Board must have this information and the petition must include it. The evidence in the record, when considered as a whole, clearly shows that Summit's petition and evidence are inadequate with respect to the above three requirements, and the Board has said this will be considered in the balancing processes.

1. The statement regarding the possible use of alternative routes is inadequate and omits material information about possible alternative routes.

In Exhibit F of its petition, Summit includes two brief paragraphs titled, "consideration of alternative routes", in which it simply states that it "performed extensive analyses utilizing Geographic Information System ("GIS") programs to determine a preferred pipeline route based on multiple datasets. See Petition Exhibit F at p. 8. That may be the case, but it isn't very useful to the Board or to the public in determining whether the pipeline promotes the public convenience and necessity or even whether the proposed route is appropriate.

A more useful general statement would have discussed issues such as why the proposed route includes a trunk line that travels hundreds of miles from Ida County to Fremont County to connect to a single ethanol plant instead of simply terminating in Ida County. Or why the proposed route enters or comes very close to incorporated cities such as Charles City, Earling or Sioux City when there is no ethanol plant partner in those cities. None of those things is addressed.

Perhaps the most important issue that should have been more fully addressed is why the project's sequestration terminus is in North Dakota, rather than in Iowa. In the petition, Summit simply states, "the Applicant's 12 partner ethanol plants in Iowa would lack a viable option to capture and permanently store their CO2 emissions because Iowa does not have proven subsurface

geologic formations capable of storing the volume of CO2 the plants produce." Petition Exhibit F at p. 1. However, the evidence in the record clearly shows that these ethanol plants do have a viable option to capture and permanently store CO2 emissions in Iowa. Isenhart Witness Ryan Clark, a professional geologist with the Iowa Geological Survey ("IGS") who has studied the potential for carbon sequestration in Iowa, testified that he disagrees with Summit's statements about the viability of sequestration in Iowa. See Isenhart Witness Clark Direct Testimony at page 8, line 4.

In fact, Clark sponsored two exhibits on Iowa's potential for carbon capture utilization and storage (one of which was a presentation delivered as committee testimony to the Iowa House of Representatives). See Clark Exhibits 7 and 8. More importantly, Clark sponsored as an exhibit a copy of a 78-page study titled, "Potential for Geologic Sequestration of CO2 in Iowa." See Isenhart Additional Direct Exhibit 3. Summit was clearly aware of this study because it is cited in Summit's response to Data Request 21 from Representative Isenhart. See Isenhart Additional Direct Exhibit 2 at p. 26.

In addition, Clark testified in both his pre-filed testimony and at the hearing that he and Dr. Keith Schilling of the IGS gave a presentation to Summit Agricultural Group on July 10, 2020, in which Iowa's potential for geologic carbon sequestration was discussed. See Clark Direct Testimony at p. 5, line 18. Clark testified that he believes there is sufficient capacity in Iowa to sequester the carbon from *all* of Iowa's ethanol plants in geologic formations in Iowa, an amount totaling 12.8 million metric tons of CO2 from 4.5 billion gallons of ethanol per year. See Transcript Volume 14, p. 3818.

Clark also testified that, while some additional investigation of sequestration options in Iowa is necessary, such additional research could be accomplished in as little as two years. See

Hearing Transcript Volume 14, pp. 3814-15. Clark also testified that the funding necessary for such research would be on the order of "three to five million dollars." See Hearing Transcript Volume 14, pp. 3814-15. Research costing $3M to $5M is clearly within Summit's financial ability to fund and a two-year time frame for the research is clearly reasonable, given the delays Summit's project faces from permit denials in North and South Dakota.

Perhaps most significantly, Clark also testified that it would be possible to "characterize" multiple sites at once. See Clark Direct Testimony at p. 10, line 11. Under questioning from counsel for the Landowners at the hearing, Clark explained that large-scale sequestration at a single site is not the only way that carbon dioxide from ethanol production could be sequestered. See Hearing Transcript Volume 14, p. 3821. Instead, Clark believes it is possible to "do smaller, more distributed carbon sequestration where perhaps there is just a single ethanol plant that is able to store its own emissions" and that such an option "should be investigated." See Hearing Transcript Volume 14, p. 3821.

During the hearing on September 6, 2023, and before Clark's testimony, Summit Witness Pirolli was asked by Board Chair Helland whether "any other entity examined Iowa to determine if there are sequestration opportunities in Iowa?" Pirolli did not mention the studies performed by the IGS and did not mention the fact that Summit representatives had met with IGS to discuss those studies. Hearing Transcript Volume 8 at p. 1997.

The significance of Clark's testimony is obvious. Summit has claimed that Iowa is not a feasible option for sequestration. However, if large-scale sequestration at a site in Iowa is possible, then the pipeline route to such a site would clearly look different than the one Summit proposes to use to sequester in North Dakota. Perhaps such a route would impact fewer landowners and

damage less crop land. Similarly, if, as IGS believes, small-scale, distributed sequestration in Iowa is feasible, then a pipeline to transport the carbon dioxide to North Dakota is not needed at all.

These other options should at least have been stated and discussed in the petition under the "possible use of alternative routes" section of the petition, if only to explain why such alternatives were not being pursued. While it is not necessary to submit all 78 pages of the geologic study in the petition, a "general statement" about sequestration in Iowa, including distributed sequestration options should have been made in the petition. This information is fundamental to the question of public convenience and necessity and of routing. Summit had this information and didn't present it. The Board should factor this omission into the balancing process.

2. The statement of the relationship to land use and zoning ordinances in the petition is inadequate and Summit's evidence on zoning is inaccurate.

Iowa Code § 479B.5(7) requires that Summit's petition must state the "relationship of the proposed project to the present and future land use and zoning ordinances." In Iowa, counties describe their present land use, and plan for their future land use, according to comprehensive plans, as required by Iowa Code chapter 335. See generally the Direct Testimony of Hamilton.

Summit's petition does not mention the comprehensive plan of any county. The petition also does not mention zoning ordinances, let alone attempt to describe what such ordinances require. In Petition Exhibit F, p. 8, in the section titled, "Present and Future Land Use," Summit simply states, "No significant impacts are anticipated as a result of the construction and operation of the Project and associated facilities, and **the Project can be constructed and operated consistent with present and future land uses**." This statement is all Summit's Exhibit F states

as to "present and future land use and zoning ordinance." However, as the Direct Testimony of Hamilton demonstrates, industrial uses such as pipelines can't be built in agricultural zones and still be "consistent with" county zoning ordinances. The brief and inaccurate statement in Exhibit F should be compared to Summit's South Dakota application, in which Summit included a "Local Land Use Controls" section with a table tracking all of the local land use control permits required by each county. See Hamilton Direct Exhibit 2 at p. 97. Exhibit F clearly contains an inadequate statement of the relationship of the project to county comprehensive plans and zoning ordinances.

In its August 22, 2022, Motion to Require a Revised Petition, Shelby County noted the glaring absence of zoning information in Summit's petition and moved the Board to require Summit to revise the petition. In its November 9 Order, the Board declined to require Summit to revise the petition, instead explaining that the Board "agrees with OCA that Summit Carbon bears the burden of proof in this case, and meeting the statutory and administrative rule requirements will be one of the numerous factors the Board will use to determine whether Summit Carbon's proposed hazardous liquid pipeline promotes the public convenience and necessity." See the November 9 Order at p. 9. At that time, the Board stated that it was "reviewing the Petition for compliance with Chapter 479B and Board Rules."

On June 26, 2023, after completing this review, Board staff filed a Petition Staff Report (Excluding Exhibit H) ("the Staff Report"). The Staff Report found that the information Summit filed in its petition "regarding 199 IAC 13.3(1)(f)(2)(3) does not appear to address the future land use and zoning ordinances." The Staff Report directed Summit to provide additional information. See Petition Staff Report (Excluding Exhibit H) at pp. 8 and 12.

On July 10, 2023, Summit filed Petition Staff Report Testimony of Eric Schovanec. At p. 4, Schovanec responded to the Staff Report stating, "Summit Carbon reviewed the land uses, and reviewed the county ordinances in place during the time the Petition was being prepared. All of these reviews indicated that the land uses were appropriate for a pipeline." Yet at no point in the Petition Staff Report Testimony does Schovanec discuss a comprehensive plan or a zoning ordinance in effect in any of the counties through which the pipeline passes.

The record, when considered as a whole, clearly shows Summit's statement in the petition that the project is "consistent" with County land use plans and zoning ordinances, and Schovanec's statement in the Staff Report Testimony that the use of land for a pipeline is "appropriate" under the applicable county zoning ordinances are not accurate statements. The Direct Testimony of Hamilton thoroughly reviews the history, purpose, structure, and implementation of zoning and accurately describes the specific zoning information of the seven intervening counties. As Hamilton's testimony establishes, an industrial use such as a pipeline requires a permit, variance or special exception before land can be used for such purposes in an agricultural zone. This is simply how zoning works, as Schovanec admitted during hearing. See Hearing Transcript Volume 8 at pp. 2044-2051.

Additionally, Summit's sweeping generalizations about land use, and the failure to specifically address comprehensive plans and zoning ordinances, are clearly attempts to avoid discussing the specific requirements of these plans and ordinances. For example, the zoning ordinances in Shelby, Kossuth, Emmet, Floyd, Dickinson, Wright, Woodbury, and Hardin counties *all* require a permit in order to use agricultural land for purposes of an industrial use, including a pipeline, and all did so at the time Summit filed its petition. Some of the requirements are general

in nature and some are specific to pipelines. See the Direct Testimony of Hamilton at pp. 22-44. This testimony demonstrates the inaccuracy of Summit's general statements about county zoning ordinances and what they require.

The Woodbury County and Hardin County zoning ordinances have regulations that specifically require pipelines to get conditional use permits, and these requirements were in place before Summit filed its petition. See Direct Testimony of Hamilton at pp. 40 and 42. Summit did not include this information in its petition or in the testimony of its witnesses. On February 15, 2023, Taylor Roll, the Hardin County Engineer, informed representatives of Summit that utility permits for the project were being denied because it had not complied with zoning permit requirements. See Hamilton Direct Exhibit 4 at p. 2. Nonetheless, when Summit Witness Schovanec filed his Petition Staff Report on July 10, 2023, he stated that the project was "appropriate" under county zoning ordinances. Schovanec's Petition Staff Report testimony should have disclosed to the Board that Hardin county clearly did not agree that the proposed land use was "appropriate" under its zoning ordinance.

Similarly, Shelby County's comprehensive plan, adopted in 1998, has a goal to preserve the area up to two miles outside of incorporated cities for future development, and Shelby County's recent zoning ordinance changes require pipelines to be at least two miles from city limits in order to implement this goal. See Direct Testimony of Hamilton at p. 23. See also Shelby County's August 22, 2022, Motion to Require a Revised Petition. Shelby County's concerns include that the proposed route comes much closer than two miles to the cities of Earling and Westphalia in Shelby County. See Direct Testimony of Hamilton at p. 25. See also the discussion regarding Earling during the hearing testimony of James Powell at Hearing Transcript Volume 7, p. 1737. The

proposed route through Shelby County has never been "consistent with" or "appropriate" for the land use goals and regulations in Shelby County, yet Summit attempts to convince the Board otherwise in this proceeding, both in the statements made in the petition and in the Petition Staff Report testimony of Schovanec.

Additionally, in Floyd County, the proposed pipeline route enters the city limits of Charles City and bisects the Avenue of the Saints Development Park, a blatantly unnecessary route choice that threatens the future economic development plans of the community. With respect to the Avenue of the Saints Development Park, the Board is directed to the hearing testimony of Timothy Scott Fox at Volume 2 pp. 227-270. Mr. Fox, who is the Chief Executive Officer of the Charles City Area Development Corporation ("CCADC"), which owns the park, testified that the City of Charles City used more than $2 million in taxpayer funds under its Tax Increment Financing ("TIF") authority to acquire the park. The CCADC's goal is to recruit new employers to locate in the park by marketing the property to businesses through the Iowa Economic Development Authority's Certified Sites program. Fox is concerned that the pipeline will destroy the ability to market the site, which would potentially strand the City's TIF funds invested in the property. The City of Charles City does not have other viable options for another site that is marketable through the Certified Sites Program. Fox testified unequivocally that Summit's pipeline will harm the future land use planned for the site. The record, when considered as a whole, demonstrates clearly that the proposed route through the Avenue of the Saints Development Park is not "consistent with" or "appropriate" for the land use goals of Floyd County, and the County is very concerned about the impact on the industrial park. See Hamilton Direct Testimony at p. 33.

Finally, the proposed route in Woodbury County also interferes with the future use of land in the area. See e.g. the hearing testimony of landowner Mark Oehlerking describing the City of Sioux City's plans for developing a 1,000 to 2,000 acre "megasite" at the Southbridge Business Park, including recent annexations by the City in the vicinity of the proposed hazardous pipeline. Hearing Transcript Volume 3, pp. 775-789, 803. See also the hearing testimony of Lawrence Christensen on behalf of the Orville J. and Jeanne M. Davis Joint Revocable Trust at pp. 7081-7083, 7091-7096, where Mr. Christensen discusses the future development of Sioux City and the City's adoption of a resolution opposing the project. On November 9, 2023, the City of Sioux City filed an Objection in the docket, which includes the resolution about which Mr. Christensen testified. The resolution is titled, "Resolution Opposing the Construction and Operation of Hazardous CO2 Pipelines In or Near the City of Sioux City." The reasons the City of Sioux City opposes the project include: (1) that the proposed route is "dangerously close" to residences, businesses, the local airport, and the nearby cities of Sergeant Bluff and Lawton; (2) that the project "would restrict the expansion and development of Sioux City."; and (3) that the project would "devalue property."

The foregoing examples are noteworthy, but they are only a sample of all the land use and economic development concerns in the record. They demonstrate clearly that Summit's proposed hazardous pipeline is not "consistent with" or "appropriate" under county land use plans and zoning ordinances. Summit clearly was aware that many Counties did not agree with the way the project's relation to local land use was being characterized in the petition.

As Board staff found in the Petition Staff Report, and as the evidence in the record, when considered as a whole, clearly demonstrates, Summit's petition and evidence in support of the

project's "relationship to present and future land use and zoning ordinances" are inadequate and inaccurate. The Board should weigh all of this evidence in the balancing process, as contemplated in the November 9 Order. Clearly, the evidence in the record, when considered as a whole, tilts *heavily* against Summit on the statutory requirement to "state the relationship to present and future land use and zoning ordinances."

3. The statement of the inconvenience or undue injury which may result to property owners is inadequate.

Iowa Code § 479B.5(8) requires that Summit's petition must state the "inconvenience or undue injury which **may** result to property owners as a result of the proposed project." In Petition Exhibit F at p. 11, Summit states, "Much of the inconvenience that may be related to the Project is routine, and is anticipated for pipeline and other Board-permitted infrastructure projects…" and that "On a long-term basis, once the pipeline is buried and land restoration occurs, normal operation of the Project will create minimal inconvenience." This statement clearly reflects Summit's rosy view of what is "inconvenient" to landowners.

The construction and future operation of this project both pose numerous inconveniences to property owners. Despite the attempt by Summit to minimize any inconveniences, there is nothing "routine" about constructing hundreds of miles of a supercritical carbon dioxide pipeline that will be up to 24 inches in diameter and cross 30 counties in this state. As the record in this proceeding demonstrates, property owners identified a host of inconveniences that may result to them, including but not limited to inconveniences to: human health and safety, present and future property values, present and future economic development, crop losses, livestock health and safety, disruption of farming practices, soil loss and compaction, violations of CRP agreement

terms, interference with tile and other drainage infrastructure, and compatibility with existing utility infrastructure. That list of inconveniences does not account for the inconveniences that property owners have already endured, such as the time, stress, and legal costs related to this proceeding and to protecting their property from potential condemnation.

The evidence in the record is voluminous about the inconveniences that landowners fear they may suffer. Below is a list of the witnesses who offered testimony, sometimes extensive, regarding potential impacts to their safety and property values:

DATE	WITNESS NAME	TRANSCRIPT VOLUME
8-22-23	Jessica Marson	Hearing Transcript, Vol. 1
8-22-23	Marcia Langner	Hearing Transcript, Vol. 1
8-22-23	Nelva Huitink	Hearing Transcript, Vol. 1
8-23-23	Timothy Scott Fox	Hearing Transcript, Vol. 2
8-23-23	Glen Alden	Hearing Transcript, Vol. 2
8-23-23	Hollis Oelmann	Hearing Transcript, Vol. 2
8-23-23	Tamera Snyder	Hearing Transcript, Vol. 2
8-23-23	David Wildin	Hearing Transcript, Vol. 2
8-23-23	Kent Engel	Hearing Transcript, Vol. 2
8-23-23	James Fehr	Hearing Transcript, Vol. 2
8-23-23	John Rosman	Hearing Transcript, Vol. 2
8-24-23	Ronald Beymer	Hearing Transcript, Vol. 3
8-24-23	Kathryn Byars	Hearing Transcript, Vol. 3
8-24-23	Amiee Krogh	Hearing Transcript, Vol. 3
8-24-23	Mark Oehlerking	Hearing Transcript, Vol. 3
8-24-23	Tom Konz	Hearing Transcript, Vol. 3
8-24-23	Ladonna Hoffmann	Hearing Transcript, Vol. 3
8-29-23	Richard Davis	Hearing Transcript, Vol. 4
8-29-23	Merle Shay	Hearing Transcript, Vol. 4
8-29-23	Elizabeth Ellis	Hearing Transcript, Vol. 4
8-29-23	Verle Tate	Hearing Transcript, Vol. 4
8-29-23	Robert Ritter	Hearing Transcript, Vol. 4
8-30-23	John Pattee	Hearing Transcript, Vol. 5
8-30-23	Jeffrey Reinkemeyer	Hearing Transcript, Vol. 5
8-30-23	Daniel Fehr	Hearing Transcript, Vol. 5
8-30-23	Jill Williamson	Hearing Transcript, Vol. 5
8-30-23	Paul Wacker	Hearing Transcript, Vol. 5

DATE	WITNESS NAME	TRANSCRIPT VOLUME
8-30-23	David Reinig	Hearing Transcript, Vol. 5
8-30-23	John Hemminger	Hearing Transcript, Vol. 5
8-30-23	Doug Phillips	Hearing Transcript, Vol. 5
8-31-23	Joan Wirtz	Hearing Transcript, Vol. 6
8-31-23	Linda Frideres	Hearing Transcript, Vol. 6
8-31-23	Christopher Wittkopf	Hearing Transcript, Vol. 6
8-31-23	Mark Utesch	Hearing Transcript, Vol. 6
9-19-23	David Skilling	Hearing Transcript, Vol. 14
9-19-23	Gregory Kracht	Hearing Transcript, Vol. 14
9-19-23	Jamie Moser	Hearing Transcript, Vol. 14
9-19-23	Carmen Moser	Hearing Transcript, Vol. 14
9-20-23	Julie Kaufmann	Hearing Transcript, Vol. 15
9-20-23	Lisa Stuck	Hearing Transcript, Vol. 15
9-20-23	Wendell King	Hearing Transcript, Vol. 15
9-20-23	Marvin Leaders	Hearing Transcript, Vol. 15
9-20-23	Allen Hayek	Hearing Transcript, Vol. 15
9-20-23	Kerry Hirth	Hearing Transcript, Vol. 15
9-20-23	Jean Kohles	Hearing Transcript, Vol. 15
9-20-23	Rick Chipman	Hearing Transcript, Vol. 15
9-20-23	Randy Bobolz	Hearing Transcript, Vol. 15
9-20-23	John Banwart	Hearing Transcript, Vol. 15
9-20-23	Jearl Wallace	Hearing Transcript, Vol. 15
9-21-23	Julie Glade	Hearing Transcript, Vol. 16
9-21-23	Barbara Harre	Hearing Transcript, Vol. 16
9-21-23	Dennis King	Hearing Transcript, Vol. 16
9-21-23	Debra LaValle	Hearing Transcript, Vol. 16
9-21-23	Jason Howard	Hearing Transcript, Vol. 16
9-21-23	Brenda Barr	Hearing Transcript, Vol. 16
9-21-23	Timothy Baughman	Hearing Transcript, Vol. 17
9-26-23	Marta Burkgren	Hearing Transcript, Vol. 17
9-26-23	Robert Van Diest	Hearing Transcript, Vol. 17
9-26-23	Henry Schnakenberg	Hearing Transcript, Vol. 17
9-26-23	Franklin Mett	Hearing Transcript, Vol. 17
9-26-23	Dawn Thompson	Hearing Transcript, Vol. 17
9-26-23	Teresa Thoms	Hearing Transcript, Vol. 17
9-26-23	Jann Reinig	Hearing Transcript, Vol. 17
9-26-23	Dennis Jackson	Hearing Transcript, Vol. 17
9-27-23	Lori Goth	Hearing Transcript, Vol. 18
9-27-23	Martin Maher	Hearing Transcript, Vol. 18
9-27-23	Thomas McDonald	Hearing Transcript, Vol. 18
9-27-23	Bonnie Ewoldt	Hearing Transcript, Vol. 18

DATE	WITNESS NAME	TRANSCRIPT VOLUME
9-27-23	Joan Gaul	Hearing Transcript, Vol. 18
9-27-23	Cornelius Schelling	Hearing Transcript, Vol. 18
9-27-23	Nancy Erickson	Hearing Transcript, Vol. 18
9-27-23	David Gerber	Hearing Transcript, Vol. 18
9-27-23	Casey Schomaker	Hearing Transcript, Vol. 18
9-28-23	Joan Mersch	Hearing Transcript, Vol. 19
9-28-23	Kathy Carter	Hearing Transcript, Vol. 19
9-28-23	Anne Gray	Hearing Transcript, Vol. 19
9-28-23	Dana Arndorfer	Hearing Transcript, Vol. 19
9-28-23	Dillon Baines	Hearing Transcript, Vol. 19
9-28-23	Delmar Baines	Hearing Transcript, Vol. 19
9-28-23	Todd Hocraffer	Hearing Transcript, Vol. 19
9-28-23	Kent Kasischke	Hearing Transcript, Vol. 19
9-28-23	Caila Corcoran	Hearing Transcript, Vol. 19
9-28-23	Sandra Laubenthal	Hearing Transcript, Vol. 19
9-28-23	John Hargens	Hearing Transcript, Vol. 19
9-28-23	Paul Berge	Hearing Transcript, Vol. 19
9-28-23	Gail Todd	Hearing Transcript, Vol. 19
9-28-23	Patricia Beyer	Hearing Transcript, Vol. 19
10-3-23	Margaret Thomson	Hearing Transcript, Vol. 20
10-3-23	Donald Johannsen	Hearing Transcript, Vol. 20
10-3-23	Craig Woodward	Hearing Transcript, Vol. 20
10-3-23	Jody Wilson	Hearing Transcript, Vol. 20
10-3-23	Jeffrey Colvin	Hearing Transcript, Vol. 20
10-3-23	Kathleen Hunt	Hearing Transcript, Vol. 20
10-3-23	Dennis Graham	Hearing Transcript, Vol. 20
10-3-23	Marjorie Swan	Hearing Transcript, Vol. 20
10-3-23	Vicki Koeppe	Hearing Transcript, Vol. 20
10-3-23	George Cummins	Hearing Transcript, Vol. 20
10-3-23	Katherine Stockdale	Hearing Transcript, Vol. 20
10-3-23	Cynthia Kruthoff	Hearing Transcript, Vol. 20
10-4-23	David Weber	Hearing Transcript, Vol. 21
10-4-23	Daniel Tronchetti	Hearing Transcript, Vol. 21
10-4-23	Sherri Webb	Hearing Transcript, Vol. 21
10-4-23	Cynthia Hansen	Hearing Transcript, Vol. 21
10-4-23	James Fetrow	Hearing Transcript, Vol. 21
10-4-23	Bonnie Peters	Hearing Transcript, Vol. 21
10-4-23	Dan Wahl	Hearing Transcript, Vol. 21
10-4-23	Sheila Eller	Hearing Transcript, Vol. 21
10-4-23	Meghan Kennedy	Hearing Transcript, Vol. 21
10-4-23	Chen Beverly Chow	Hearing Transcript, Vol. 21

DATE	WITNESS NAME	TRANSCRIPT VOLUME
10-4-23	Winston Gadsby	Hearing Transcript, Vol. 21
10-4-23	Mark Gunion	Hearing Transcript, Vol. 21
10-4-23	Elizabeth Tribble	Hearing Transcript, Vol. 21
10-5-23	Alan Laubenthal	Hearing Transcript, Vol. 22
10-5-23	Craig Huntoon	Hearing Transcript, Vol. 22
10-5-23	Joan Centlivre	Hearing Transcript, Vol. 22
10-5-23	Lance Kleckner	Hearing Transcript, Vol. 22
11-6-23	Sue Carter	Hearing Transcript, Vol. 23
11-6-23	Nancy Miller	Hearing Transcript, Vol. 23
11-6-23	Mark Lundy	Hearing Transcript, Vol. 23
11-6-23	Dwight Doughan	Hearing Transcript, Vol. 23
11-7-23	Craig Byer	Hearing Transcript, Vol. 24
11-7-23	Bradley Franken	Hearing Transcript, Vol. 24
11-7-23	Alvin Sandbulte	Hearing Transcript, Vol. 24
11-7-23	Calvin Sandbulte	Hearing Transcript, Vol. 24
11-7-23	Vicki Sonne	Hearing Transcript, Vol. 24
11-7-23	Mary Powell	Hearing Transcript, Vol. 24
11-7-23	Nancy Johnson	Hearing Transcript, Vol. 24
11-7-23	Della Curtis	Hearing Transcript, Vol. 24
11-7-23	Denise Tindall	Hearing Transcript, Vol. 24
11-8-23	Larry Christensen	Hearing Transcript, Vol. 25
11-8-23	Neil Dahlquist	Hearing Transcript, Vol. 25
11-8-23	Maureen Bechard	Hearing Transcript, Vol. 25
11-8-23	Eric Sidner	Hearing Transcript, Vol. 25
11-8-23	Alan Boeck	Hearing Transcript, Vol. 25
11-8-23	Brenda Jairell	Hearing Transcript, Vol. 25
11-8-23	Marie Larson	Hearing Transcript, Vol. 25
11-8-23	Matthew Valen	Hearing Transcript, Vol. 25
11-8-23	Robert Watts	Hearing Transcript, Vol. 25
11-8-23	Eric Palmquist	Hearing Transcript, Vol. 25
11-8-23	Dennis Valen	Hearing Transcript, Vol. 25

The dichotomy between the testimony in the record and the statements in Summit's petition is striking. At a minimum, the statement of "inconvenience or undue injury to property owners" in the petition should have identified the types of issues described above, so that the Board would be better able to implement appropriate controls, conditions, or restrictions designed "to protect

landowners and tenants from environmental or economic damages that may result from the construction, operation, or maintenance of" Summit's project.

Clearly, the process of implementing controls is intended to begin with the petition. If issues are not properly identified, they cannot be explored in the hearing process or appropriately addressed by the Board in the permit. For that reason, identifying the potential inconveniences and injuries to landowners is indispensable to the purpose of the statute that delegates pipeline permitting authority to the Board. See Iowa Code § 479B.1. Summit's petition instead attempts to downplay the impacts of a hugely consequential private infrastructure project.

As with the petition's statements on alternative routes and zoning ordinances, the required statement of inconveniences and undue injury that may result to landowners is inadequate. The statutory requirement is clearly intended to make the applicant discuss the foreseeable problems so they can be anticipated and addressed in the hearing process. The evidence in the record, when considered as a whole, tilts *heavily* against Summit on this requirement, and the Board should consider these deficiencies in the balancing process.

B. The Evidence in the Record Fails to Show a Public Benefit from the Pipeline.

Pursuant to 199 IAC rule 13.3(1)(f), Summit has provided a "statement of the purpose of the project and a description of how the services rendered by the pipeline will promote the public convenience and necessity" in Exhibit F of the petition. Listed below are a few of the statements made in Exhibit F that attempt to justify the project:

1. The project "greatly improves ethanol's environmental impact and improves its ability to compete in low carbon fuel markets" and "As the Applicant's 12 Iowa ethanol partners earn more for producing low-carbon renewable fuel, it strengthens the

economic prosperity and long-term viability of ethanol, and as a result, benefits Iowa's family farms, and ultimately the entire state."

2. "Without the Project, the Applicant's 12 partner ethanol plants in Iowa would lack a viable option to capture and permanently store their CO2 emissions because Iowa does not have proven subsurface geologic formations capable of storing the volume of CO2 the plants produce."; and without the project "Iowa's ethanol plants would be at a significant long-term disadvantage to ethanol plants in states like North Dakota and Illinois, which contain proven subsurface geologic storage formations."
3. The project "will provide economic benefits in Iowa and in the five-state region."
4. The project will "result in significant tax revenue" to state and to local governments.
5. The project "will also play an important role in reducing greenhouse gas emissions in the effort to combat climate change."
6. "The Project also represents the safest mode for transporting CO2."

Because the above statements are the primary justifications for the project, they should serve as the starting point for evaluating whether the evidence supports a determination that the project promotes the public convenience and necessity. Below, the Counties address each of these justifications in turn and review the evidence in the record that relates to each one.

1. Greater profits to the ethanol industry and increased prices to consumers are not "Public Benefits."

Summit's first justification is that the project is critical to the future of the ethanol industry. This is clearly the primary driver of the project and has been the focus of much of Summit's evidence. Summit claims in Exhibit F that the project "greatly improves ethanol's environmental

impact and improves its ability to compete in low carbon fuel markets" and also claims that "As the Applicant's 12 Iowa ethanol partners earn more for producing low-carbon renewable fuel, it strengthens the economic prosperity and long-term viability of ethanol, and as a result, benefits Iowa's family farms, and ultimately the entire state."

Summit Witness Powell addressed this justification in his direct testimony:

> Sequestering carbon dioxide from these participating ethanol plants significantly lowers the ethanol plants' carbon intensity ("CI") scores providing access to **higher margin markets, and ultimately improves the economic return to the ethanol plants**. By doing so, the project secures ethanol's place in the agricultural markets in the upper Midwest and **sustains the demand for corn**, which secures corn prices and land values. The Project represents a significant opportunity for existing ethanol plants to remain competitive, **share value with their shareholders**, and benefit their communities through employment, **tax contributions**, etc.

Summit Powell Direct Testimony at p. 5 (emphasis added). Powell also mentioned the "additional rural jobs" and the "incremental increase in the rural tax base." Summit Powell Direct Testimony at p. 6.

However, as the Iowa Supreme Court put it in *Puntenney*, to the extent Summit is "relying on the alleged economic development benefits of building and operating the pipeline, we are unmoved." *Puntenney v. Iowa Utilities Bd.*, 928 N.W.2d 829, 849 (Iowa 2019). What was important to the court in *Puntenney* was not that the pipeline generated "profits to its owners" but that "the record indicates that it also provides public benefits in the form of **cheaper** and **safer** transportation of oil, which in a competitive marketplace results in **lower prices** for petroleum products." *Puntenney v. Iowa Utilities Bd.*, 928 N.W.2d 829, 849 (Iowa 2019). The key words are "cheaper," "safer," and "lower prices." Without those benefits to the public, the *Puntenney* court said, the "trickle-down benefits of economic development are not enough to constitute a public use." *Puntenney v. Iowa Utilities Bd.*, 928 N.W.2d 829, 849 (Iowa 2019).

PUBLIC VERSION

The importance of lower costs and prices as a public benefit was also important to the determination of public convenience and necessity in *Puntenney*. In upholding the Board's findings, the court explained, "Given that petroleum products are commodities sold in a competitive market, lower costs for crude oil transportation tend to keep prices of crude oil derivatives lower than they otherwise would be." *Puntenney v. Iowa Utilities Bd.*, 928 N.W.2d 829, 841 (Iowa 2019). The Court further explained:

> "The record indicates that the Dakota Access pipeline will lead to '**longer-term, reduced prices** on refined products and goods and service dependent on crude oil and refined products.' **We agree with the IUB that these are public benefits**, even though the pipeline also provides benefits to the shippers of crude oil. *See S.E. Iowa Coop. Elec.*, 633 N.W.2d at 820 (stating that "cost savings are a legitimate consideration").

Puntenney v. Iowa Utilities Bd., 928 N.W.2d 829, 841 (Iowa 2019) (emphasis added).

In stark contrast to the pipeline project in *Puntenney*, Summit is not claiming that its project will lower prices for consumers. For example, Summit Witness Broghammer testified, "The ethanol industry has created considerably more demand for corn and therefore **pushed the price of corn to higher levels**." Broghammer Direct at p. 3. In his deposition, Broghammer also testified that the pipeline will increase corn prices. See Broghammer Deposition at pp. 19, 73.

Similarly, Summit Witness Pirolli testified that "lower carbon energy has a **higher** value" and that in Summit's case, "**a premium** is obtained by selling ethanol" into certain "compliance markets." Pirolli Direct at p. 8. Pirolli also testified about obtaining premium prices for ethanol at various points in his deposition and, in his rebuttal testimony, estimated that ethanol would be 10 to 35 cents a gallon "**more valuable**" to participating ethanol plants. See e.g. Pirolli Deposition at pp. 82-83; Pirolli Rebuttal Testimony at pp. 2-4.

Pirolli also testified in his deposition that ethanol increases corn prices. See Pirolli Deposition at p. 81. Consistent with that testimony, Pirolli sponsored Summit Pirolli Reply Exhibit 1, a study titled, "Comparative Economics of Carbon Sequestration for Iowa Ethanol Plants", and prepared by Decision Innovation Solutions for the Iowa Renewable Fuels Association ("IRFA"). The IRFA study was not prepared by Summit for this proceeding, and it speculates about the economic impacts of multiple pipeline projects, not just Summit's, including the now defunct Navigator pipeline, the Trailblazer pipeline, and the Wolf Carbon pipeline. See Hearing Transcript Volume 8 at pp. 1934-1939.

Pirolli admitted that the study does not isolate the impact of the Summit project or even the direct impact of the ethanol plants partnering with Summit, and that a great deal of the report covers the economic impact of 45Z tax credits, which go to the producers of ethanol. See Hearing Transcript Volume 8 at pp. 1939-1942. As such, the report is not very useful for purposes of identifying the specific benefits stemming from Summit's pipeline sequestration project. To the extent the report is even relevant to this proceeding, all it really shows is that the production of ethanol increases corn prices and that claiming tax credits from the sequestration of carbon increases profits to the ethanol industry. However, under *Puntenney*, those are not "public benefits," and they do not "promote the public convenience and necessity."

Moreover, the evidence in the record does not indicate that the project will reduce pressure on prices by increasing the supply of ethanol. Summit Witness Broghammer testified that current ethanol production at his plant is at maximum capacity, that it will not change if the pipeline is built, and that the plant will not buy more corn than it already purchases. Broghammer Deposition

at pp. 25-29, 86. Broghammer also refused to commit to expanding the capacity of the plant if the pipeline is built. Broghammer Deposition at p. 86.

With respect to ethanol production, Broghammer's testimony is partly in accord with Sierra Club Witness Secchi, though Secchi disagreed that the industry would expand in other states if the pipeline is not built. Secchi testified:

> The ethanol industry has been arguing that ethanol plants outside Iowa will expand if Iowa plants do not have access to the pipelines and Iowa will be at a disadvantage. **This is not supported by any evidence**. The Energy Information Administration data (Secchi Ex. 1) indicates that **ethanol production has peaked**, and electric vehicles sales are growing faster than previously forecast. **The ethanol industry is a mature sector**. This is why ethanol producers pushed for year-round E15 sales: **to maintain production levels**. The fact is that the ethanol market is shrinking and the pipelines are a way to keep it profitable (together with changes to the mandate to keep it viable). **It is my professional judgment that if the pipelines are not built in Iowa, there will not be any new construction of ethanol plants elsewhere**. The main effect of not building the pipelines in Iowa would be to make Iowa ethanol plants less profitable. The Environmental Protection Agency is **maintaining the ethanol mandate**, so Iowa's ethanol will still have a guaranteed market – **just not one as profitable as the one in California**, which pays premium for lower Carbon Intensity products. This means that constructing this massive pipeline infrastructure in Iowa and in the rest of the Midwest will only result in short-lived benefits to the ethanol industry while costs will be long term and be borne by landowners and rural communities.

Secchi Direct Testimony at pp. 7-8 (emphasis added). The point is that without expanded ethanol production levels, the supply will not increase and therefore consumers will not see lower prices.

With respect to corn prices, the testimony of Sierra Club Witness Jacobson is also partly in accord with Summit's evidence. Jacobson testified about the results of recent studies on the renewable fuels standard from 2008-2016 that found "the RFS increased corn prices by 30% and the prices of other crops by 20%." Jacobson Direct Testimony at p. 13.

In *Puntenney*, the Board determined that, in addition to the benefits to Iowa, it could consider "public benefits outside of Iowa." *Puntenney v. Iowa Utilities Bd.*, 928 N.W.2d 829, 834

(Iowa 2019). But in this case, Summit's project offers no benefits outside of Iowa if it raises the price of food and fuel for all consumers. Any food production business that uses corn as an input would see increased costs. Trucking companies would pay more for fuel. All these industries would be forced to pass their higher input costs on, further increasing consumer prices. Even as Iowa corn growers and ethanol producers would receive higher prices, the residents and industries in other states would have to pay them. So would Iowans, even those who produce ethanol or grow corn.

If, as Summit's own evidence tends to show, the project will increase the prices consumers pay for fuel and food, it should not be considered a "public benefit" like the *lower* consumer prices that were considered a benefit in the *Puntenney* case. Even if the Board is convinced the record shows a benefit to some industry sectors from higher corn prices and higher ethanol prices, at a minimum that must be weighed against increased prices and costs in other industry sectors and other states. Once the downsides of higher prices are fully considered, the benefit to the ethanol industry does not tip the scales as convincingly as Summit claims. Higher consumer prices are not overall a "Public Benefit."

2. Carbon sequestration in Iowa is viable, so a pipeline to North Dakota is not necessary.

Summit also claims in the petition, "Without the Project, the Applicant's 12 partner ethanol plants in Iowa would lack a viable option to capture and permanently store their CO2 emissions because Iowa does not have proven subsurface geologic formations capable of storing the volume of CO2 the plants produce." Petition Exhibit F at p. 1. Summit also claims in Exhibit F that without the project "Iowa's ethanol plants would be at a significant long-term disadvantage to ethanol

plants in states like North Dakota and Illinois, which contain proven subsurface geologic storage formations." Summit Witness Pirolli repeats a similar claim, stating, "Given the lack of appropriate geological formations in much of the Midwest, the CO2 must be transported to a sequestration site outside of the state of Iowa." Pirolli Direct Testimony at p. 7. Pirolli is not a geologist and offered no meaningful support for these claims.

However, as discussed above in the section on alternative routes, Isenhart Witness Clark, a geologist with the IGS who has studied carbon sequestration potential in Iowa, testified that sequestration is viable here. See the above section on alternative routes for a more complete summary of Clark's evidence. In both pre-filed testimony and during the hearing, Clark explained that he advised Summit that sequestration at a single site was viable and that distributed sequestration at individual ethanol plants is also viable. Summit's evidence does not meaningfully discuss sequestration in Iowa, let alone explain why it is not feasible. The evidence in the record, when considered as a whole, clearly shows that carbon sequestration in Iowa is viable.

3. The economic benefits of the project are indirect and overstated.

Summit also claims in Exhibit F that the project "will provide economic benefits in Iowa and in the five-state region." The primary evidence Summit offers in support of this justification is the testimony of Andrew Phillips and the study he sponsored entitled, "Economic Contributions of Summit Carbon Solutions", and prepared by Ernst & Young ("the EY Study"). The economic benefits calculated by EY are *by design* precisely the type of "trickle-down" effects of economic development that *Puntenney* disfavors and, in any case, the benefits are overstated because the EY Study does not take into account any of the project's costs.

As the Iowa Supreme Court put it, "trickle-down benefits of economic development are not enough to constitute a public use." *Puntenney v. Iowa Utilities Bd.*, 928 N.W.2d 829, 849 (Iowa 2019). Nevertheless, it is not improper for the Board to consider "trickle-down" benefits in the balancing process when determining whether a project promotes the public convenience and necessity. See *Puntenney v. Iowa Utilities Bd.*, 928 N.W.2d 829, 842 (Iowa 2019). For the reasons discussed below, such benefits are entitled to very little weight in the balancing process.

As Phillips testified, at the core of the EY Study is an analysis calculated by a software package called "IMPLAN." Phillips Direct Testimony at pp. 4-7. The IMPLAN model develops an *estimated* impact that includes "indirect effects" and "induced effects." Phillips Direct Testimony at p. 6. "The IMPLAN study looks at **secondary** and **tertiary** flows that multiply the impact of an injection of capital for a particular purpose into a particular geography." Phillips Rebuttal Testimony at p. 5 (emphasis added). See also the section of EY Study titled, "economic impact methodology", in Phillips Direct Exhibit 1 at p. 16. The IMPLAN model and the EY Study are also discussed at length in the Counties' cross-examination of Phillips. See generally Hearing Transcript Volume 9 at pp. 2370-2390.

The cross-examination of Phillips revealed several drawbacks with the design of the IMPLAN model and the EY Study that should make the Board wary of placing too much weight on the results. First, IMPLAN is a standardized software package that would show similar "ripple effects" from any large capital expenditure. Hearing Transcript Volume 9 at p. 2370. For that reason, it does not provide much insight when trying to differentiate this pipeline's specific benefits from any other large industrial development. The Board is a utility regulator, not an

economic development agency, and so it should scrutinize this pipeline for more than its "ripple effects."

With that in mind, another drawback is that the amount of *direct* benefits is a very small portion of the total amount of benefits calculated by the IMPLAN model. According to the description of "direct economic contributions" in the EY Study, "Direct effects include Summit employees and wages paid to them." See p. 16 of Phillips Direct Exhibit 1. The other amounts of "economic impact" that Summit claims for the project are related to the activities of suppliers and other businesses. They are not attributable *directly* to Summit. At hearing, Phillips testified that the "indirect effects" attributable to this pipeline accounted for "at least half" of the total economic impact the study touted, a figure that Phillips characterized as "a very significant portion." See Hearing Transcript Volume 9 at p. 2372. Similarly, Phillips estimated that the amount of "induced effects" attributable to the project amounted to "probably about a third." See Hearing Transcript Volume 9 at p. 2372. Leaving no more than "10 to 15, maybe 20 percent" attributable to the project's *direct* effects. These "secondary and tertiary flows" as Phillips calls them are certainly the kind of "trickle down" economic activity the *Puntenney* court said was not sufficient to constitute "public use." It is not improper to consider them, but they should not be given much weight in the balancing process.

Another drawback is that the IMPLAN model is a "static" model and provides no good way to compare the estimated or modeled results with what happens in the real world. For example, when asked what the "magnitude of error" of IMPLAN is, Phillips testified that the model has "no published known error." Hearing Transcript Volume 9 at pp. 2372-2374. Which is not to say that IMPLAN is a perfectly accurate tool, but that there's no way to compare the model's estimates to

what actually happens in the real world. Phillips testified that it would be possible to "go back and look ex post at an impact and try to untangle, for instance the effect of a given project…" Hearing Transcript Volume 9 at p. 2373. However, the IMPLAN tool does not do that and Summit is not proposing to do it either. If the project is actually built, no one will ever know how accurate the estimates included in the EY Study were. Even if it is impractical to do an after the fact analysis of Summit's estimates, it is not impractical for Summit to have provided multiple economic impact analyses by other consulting firms and using other models. For example, in addition to IMPLAN, Summit could have estimated the economic impacts using REMI or a dynamic "CGE model." See e.g. Hearing Transcript Volume 9 at p. 2374. At least with multiple studies, from multiple firms, the Board would be able to compare their assumptions and results, which would increase the level of confidence in the figures Summit claims for the project.

Another drawback is that all of the results in the EY Study are "based to some degree on data provided by Summit, which has not been independently audited or validated by EY." Phillips Direct Exhibit 1 at p. 17. See also Hearing Transcript Volume 9 at p. 2376. Phillips explained at hearing that the reason for this caveat in the study is "because we're not engineers or construction cost consultants, we had no kind of role in validating the construction cost data." Hearing Transcript Volume 9 at p. 2377. The Board should view the cost estimates in the EY Study with the same skeptical eye it uses to scrutinize rate-regulated public utilities in general rate cases to determine whether these estimates are reasonable. While this case is not a rate case, the determination of "public convenience and necessity" here carries a degree of public importance that is similar to the regulation of public utilities. The determination of public benefit will be made

using these estimates, yet EY has not "audited or validated" them. The Board should therefore scrutinize these estimates closely.

Another drawback is that the model is unable to accurately estimate the real job gains from the project. The EY Study notes that "employment figures presented in this report are not necessarily net new jobs" and that "the net change in employment will likely be smaller than the gross employment impacts shown in this report." Phillips Direct Exhibit 1 at p. 17. However, at hearing, Phillips admitted that even though "net new jobs" are what people actually care about, EY does not have estimates of the "net new jobs." Hearing Transcript Volume 9 at p. 2377. This means if an Iowa-based construction worker leaves his current job to work on the pipeline, the EY Study counted it as a "new job" and no adjustment was made, even though total employment would not have changed. This is why the EY Study is careful to note that the *actual change* in employment "may be smaller than the number of people actually employed to build the pipeline." Hearing Transcript Volume 9 at pp. 2377-2378.

The final drawback is that the IMPLAN model "double counts" the economic output data. The EY Study itself notes that the "Economic output reported in this report includes double counting. Input-output modeling can include double counting in its indirect and induced estimates, especially while estimating gross economic output." See Phillips Direct Exhibit 1 at p. 18. The EY Study further cautions, "The gross economic output should not be interpreted as gross domestic product or value-added." See Phillips Direct Exhibit 1 at p. 18. At hearing, Phillips explained that "total value-added" is essentially the same as "gross domestic product." See Hearing Transcript Volume 9 at pp. 2378-2379. Phillips also explained at hearing that the EY Study includes "value-added" estimates in addition to the "total gross economic output" estimates. Hearing Transcript

Volume 9 at pp. 2378-2379. The distinction between "value-added" and "gross economic output" is important. As Phillips explained during hearing, total gross economic output includes the "double counting" whereas "value-added, by contrast, does not. And that's the distinction between gross economic output and value-added." Hearing Transcript Volume 9 at p. 2378. Summit is obviously touting the larger figures related to "total economic output," but in the balancing process, the Board should give little weight to any figures that include "double counting" related to the "indirect" and "induced" effects of the project.

In addition to "double counting" the "indirect" and "induced" effects of economic activity, Summit also overstates economic benefits by failing to consider the costs of the project. Sierra Club Witness Secchi and Witness Jacobson both discussed some of the costs that the EY Study failed to consider. See Secchi Direct Testimony at pp. 3-8; Jacobson Direct Testimony at pp. 7-17; and Jacobson Direct Exhibit 1. Jacobson's testimony, in particular, provides a convincing analysis that, from the standpoint of the public interest more broadly, "spending $5.6 billion on pipes and carbon capture from ethanol refineries to power flex-fuel vehicles, is a significant opportunity cost." Jacobson Direct Testimony at p. 7.

According to Jacobson, the project "substantially increases consumer costs and carbon dioxide and air pollution emissions in the five states at issue (Iowa, Nebraska, South Dakota, Minnesota, and North Dakota) relative to a viable alternative." Jacobson Direct Testimony at p. 7. Jacobson compares the costs of E85 vehicles and the costs of electric vehicles, concluding that "drivers in the five states will likely save $75.9-$126 billion over 30 years on fuel costs alone." Jacobson Direct Testimony at pp. 7-8. These savings to consumers are "14-23 times the cost of the Summit project." Jacobson Direct Testimony at p. 17.

In addition to omitting both environmental costs and opportunity costs, Phillips admitted during hearing that the EY Study also omits cost estimates for crop damage and the costs to state and local government for permitting and compliance, even though such estimates are "independent facts" that could have been included in the EY Study. See Hearing Transcript Volume 9 at p. 2382. Also during hearing, Secchi noted that cost items such as reduced property values and crop yield losses should have been included in a cost-benefit analysis, but were left out of the EY Study. See Hearing Transcript Volume 14 at p. 3672. During the hearing, Phillips admitted he was not even provided with any cost estimates. See Hearing Transcript Volume 9 at p. 2383. In other words, the EY Study is not a cost-benefit analysis. It is simply an attempt by Summit to catalog every possible benefit without mentioning or quantifying any of the offsetting costs. The Board, however, must consider such costs in the balancing process.

In response to Secchi's criticism about omitting costs, Phillips' Rebuttal Testimony simply states, "EY's analysis didn't analyze environmental cost or credit environmental benefits of the pipeline project. While one could do a study of the alleged environmental costs, for which Secchi presents no evidence, and environmental benefits, such analysis is **not the purpose of an IMPLAN study**." Phillips Rebuttal Testimony at p. 5. However, Secchi's whole point is that to properly conduct the balancing process, the Board needs to weigh all of the relevant and significant benefits *and* costs. The statute does not confine the balancing test to consideration of an IMPLAN model. The statute requires the Board to determine "public convenience and necessity," which certainly includes considering whether the benefits of the project are *greater* than the costs.

In the end, the burden is Summit's to carry. The intervenors in this proceeding do not have to prove the project has *no* benefits. Summit has to prove that this project offers net benefits for

the public. Clearly it is *not* a benefit for the public if, as Jacobson contends, the pipeline "substantially increases consumer costs and carbon dioxide and air pollution emissions" relative to a viable alternative. If, as Phillips testified, it was possible for Summit to "analyze environmental cost or credit environmental benefits," then it should have done so. Indeed, an opportunity cost analysis is exactly the kind of approach that should inform public policy decision-making. For that reason, the Board should put significant weight on the "opportunity cost" as it engages in the balancing process for determining the "public convenience and necessity" of this project.

4. The tax costs substantially outweigh any tax benefits from the project.

In Exhibit F, Summit also claims the project will "result in significant tax revenue" to state and to local governments. If the tax contributions of the project are going to be considered in the balancing process, then the tax costs of the project must also be considered and, on the whole, the tax *costs* substantially outweigh the tax benefits. In addition, as with the economic benefits of the project, the primary evidence Summit offers in support of the tax contribution justification is the testimony of Andrew Phillips and the EY Study. For reasons similar to those explained in the above discussion of the overstated economic benefits, the EY Study also overstates the net amount of tax contributions from the project. See generally Hearing Transcript Volume 9 at pp. 2384-2390.

In fact, the EY Study states that "Project construction and operations generate substantial tax revenues for federal, state, and local governments." Phillips Direct Exhibit 1 at p. 17. The EY Study further states, "Major taxes include individual and corporate income taxes (related to suppliers), sales taxes, property taxes, and excise taxes." Phillips Direct Exhibit 1 at p. 17. However, the EY Study's description of the federal income tax contributions related to the project

is not as clear as Phillips testimony during hearing in which he admitted that both the "$9 million" in federal income taxes related to capital expenditures and the "$4 million" related to operations would be from the *individual* income taxes paid by employees. See Hearing Transcript Volume 9 at pp. 2384-2387. The corporate income tax paid by Summit will be "zero." Hearing Transcript Volume 9 at p. 2384.

Most importantly, as the EY Study itself notes, "The analysis **does not include tax impacts derived from Section 45Q**, which provides an annual federal tax credit for the sequestration of carbon dioxide. Summit estimates that **the value of such credits will be $414 million in 2025**." Phillips Direct Exhibit 1 at p. 17. During hearing, Phillips admitted that, after claiming $414 million per year for 12 years, Summit will be receiving *far more* in direct federal tax benefits than it is contributing. See Hearing Transcript Volume 9 at p. 2388.

The reason the federal tax credits aren't included in the EY analysis is that, if they were, they would have to be counted as *cost to the public* and not a benefit. A tax benefit to a *taxpayer*, such as the 45Q tax credits, is considered a cost for purposes of preparing government budgets, as state legislators from both parties confirmed during hearing. See e.g. the testimony of Representative Charles Isenhart. Hearing Transcript Volume 14 at p. 3801 ("It's a cost to the taxpayer for sure."). See also the testimony of Senator Sandy Salmon. Hearing Transcript Volume 14 at pp. 3852-3853 ("Well, I'm in the legislature. And we appropriate funding. And tax credits are always considered a cost."). Just like the legislature does when putting together the state budget, the Board must consider the $414 million *per year* in federal tax expenditures to be a *cost to the public* and weigh it against the amount of tax contributions claimed for the project during the balancing process.

5. The environmental benefits are overstated and an inefficient use of resources.

In Exhibit F, Summit claims the project "will also play an important role in reducing greenhouse gas emissions in the effort to combat climate change." However, the evidence in the record shows that most of the claimed benefits are indirect and overstated.

Summit Witness Pirolli, the company's Chief *Commercial* Officer, testified that the project will "benefit the environment by removing CO2 from the atmosphere." Pirolli Direct Testimony at p. 3. When asked to expand on the environmental benefits, Pirolli stated "The five-state project is capable of capturing, transporting, and permanently storing up to 18 million metric tons of CO2 every year, which is the equivalent of removing the emissions from approximately 3.9 million cars." However, that figure is misleading because, as Summit Witness Powell testified, the project's "34 ethanol plants" only have in the aggregate "approximately 9.5 MMTPA of CO2", which is the amount the project is currently proposed to transport annually. See Powell Direct Testimony at pp. 4-5.

On the other hand, Sierra Club Witness Jacobson provides a more thorough analysis of the environmental considerations related to the project. First, Jacobson explained that the 9.5 MMTPA of carbon reductions Powell claimed should be offset by 15.2% to reflect the amount of increased carbon emissions from all of the electricity "needed to dehydrate, compress, and heat the carbon dioxide so that it can enter a supercritical state." Jacobson Direct Testimony at p. 6.

Jacobson also compared the results expected from Summit's project to the results that could be obtained by spending the same amount on a more effective emissions reduction solution. He testified that "using the same funds to instead produce wind electricity for BEVs will likely reduce

2.5-4.2 the carbon dioxide emissions as will capturing carbon from ethanol refineries…" Jacobson Direct Testimony at pp. 8-17. As part of this analysis, Jacobson pointed out several compelling considerations:

- The *net* CO2 captured is 8.06 MMTPA rather than the 9.5 MMTP to which Powell testified. Jacobson Direct Testimony at pp. 9 and 11.
- Spending the same amount of funds to build new wind generation would produce 3.0-4.97 GW of nameplate capacity. Jacobson Direct Testimony at p. 9.
- The CO2 savings due to wind replacing coal would be 12.6 – 20.8 MMTPA. Jacobson Direct Testimony at p. 11.
- The tailpipe CO2 savings from converting to wind powered BEVs would be 8.42 – 14.0 MMTPA. Jacobson Direct Testimony at pp. 11-12.
- The tailpipe emission reduction alone due to BEVs is already greater than the CO2 avoided by the Summit project because transitioning to BEVs eliminates entirely the tailpipe emissions from FFVs without reducing the carbon uptake by vegetation. Jacobson Direct Testimony at p. 12.
- The "carbon intensity of corn ethanol produced under the RFS is no less than gasoline and likely at least 24% higher…" Jacobson Direct Testimony at p. 13.
- The overall upstream air pollution emissions of ethanol are greater than are those of gasoline, whereas BEVs eliminate 100% of air pollutants from the tailpipes of FFVs. Jacobson Direct Testimony at p. 16.
- Summit's proposed CO2e emissions avoided are only 24-40% of those that could be avoided by investing in wind and BEVs instead. Jacobson Direct Testimony at p. 18.

It is clear, however, that the primary purpose of transporting "9.5 MMTPA" of carbon is not for the climate change benefits. Neither Powell, Pirolli, Broghammer or any other Summit witness testifies about any specific climate outcome or pollution reduction or public health benefits associated with transporting "9.5 MMTPA" of carbon. Instead, the testimony relates to the benefits of selling ethanol at a premium because of the lower carbon intensity scores. For example, Broghammer testified that ethanol is already being sold into low carbon fuel markets today. See Broghammer Direct Testimony at p. 2; and Broghammer Deposition at p. 12. Thus, Broghammer's focus on the "recently passed Inflation Reduction Act" and an incentive that amounts to "2 cents per gallon for each carbon intensity score below 50" and a total benefit of "0.60/gallon" to the ethanol industry. Broghammer Direct Testimony at p. 2.

Summit Witness Powell's testimony about the purpose of the pipeline underscored the testimony of Broghammer. During the hearing, when asked if one of the purposes of the project is to help with global warming and climate change, Powell answered, "**Summit doesn't take a position on climate change**. Our **primary drivers** are to help the ethanol plants reduce their carbon intensity and help them be competitive in low-carbon fuel markets. Which, in turn, as you just said, drives demand for corn and keeps land values high." Hearing Transcript Volume 7 at p. 1624. Sierra Club Witness Secchi confirmed the testimony of both Powell and Broghammer, reiterating that, because of the ethanol mandate, the real goal of the pipeline is simply to increase the profitability of the ethanol industry. Secchi Direct Testimony at pp. 7 and 8.

That is not the kind of testimony that is meant to establish the public benefits of reduced carbon emissions. It's the kind of testimony that underscores the mostly *private* benefits of this project.

In addition, Broghammer also confirmed that ethanol plants have other options for reducing their carbon intensity, including "combined heat and power" projects and multiple projects to reduce the amount of natural gas used in the production process. See Broghammer deposition at pp. 40-42. As discussed above, Isenhart Witness Clark testified to the feasibility of local sequestration at individual ethanol plants, meaning that a plant like Broghammer's has yet another option available besides a pipeline.

Finally, Sierra Club Witness Jacobson cast significant doubt on the likelihood that Summit will achieve one of its "primary drivers" and take advantage of the low-carbon fuel markets in California when he pointed out that the California Air Resources Board has set new regulations that will likely preclude the use of any combustion fuel, including E85, that produces tailpipe emissions. Jacobson Direct Testimony at p. 19.

In summary, Summit's evidence in support of any environmental benefits is light and, therefore, of little value in determining public convenience and necessity. It is certainly insufficient to meet the comparatively higher bar required of a "public use."

6. The claim that a carbon pipeline is safer than truck or rail transportation is a red herring.

In Exhibit F, Summit claims, "As compared to rail and truck transportation, pipelines are the safest and most efficient means to transport hazardous liquids…" and confidently asserts that "Time and time again, pipelines have proven to be the safest and most reliable form of transporting hazardous liquids." Summit Witness Powell repeats the claim, "As compared to rail and truck transportation, pipelines are the safest and most efficient means to transport hazardous liquids, according to statistics compiled by the United States Department of Transportation." Powell Direct

Testimony at p. 7. However, those statistics were not provided. Similar testimony is offered by Summit Witness McCown. See McCown Rebuttal Testimony at pp. 6-7. Again, no statistics were offered.

The absence of such data is critical because in *Puntenney* the court noted, "Various data were presented to the IUB" on the issue of comparative safety of the different types of transportation. *Puntenney v. Iowa Utilities Bd.*, 928 N.W.2d 829, 842 (Iowa 2019). Summit has not offered the kind of specific data in this case that was important to the court in *Puntenney*. For example, data comparing both forms of transportation "on a volume distance basis (i.e. per barrel-mile)."

In contrast, the evidence in the record related to the potential dangers to human health is voluminous and compelling. For example, Landowners Witness Curtis Jundt testified to the unique dangers of supercritical CO2 as compared to natural gas. Jundt Direct Testimony at pp. 3-5. Sierra Club Witness Schettler testified to the impact of carbon dioxide on the human body and the health risks from carbon dioxide pipelines. Landowners Witness Dan Zegart, an investigative reporter, testified to coverage of the events in Satartia, Mississippi when the Denbury pipeline there suffered a catastrophic failure. See Zegart Direct Testimony Attachment No. 2 titled, "The Gassing of Satartia." Landowners Witness Gerald Briggs and Counties Witness Jack Willingham were on-site for the emergency response to the Satartia incident. See Briggs Direct Testimony. See also Willingham Direct Testimony and Hearing Transcript Volume 13 at p. 3554, et. seq.

Counties Witness Willingham also sponsored four exhibits: (1) the PHMSA Failure Investigation Report of the Satartia incident; (2) the Shelby County Board of Health's findings on the risk factors associated with CO2 exposure from pipelines; (3) the letter submitted by the City

of Earling explaining that local fire and EMS are ill-prepared to respond to an incident; and (4) the affidavit of the Emmet County EMS coordinator attesting to a lack of meaningful preparation from Summit Witness Rod Dillon. See Willingham Direct Exhibits 1-4. See also, the deposition testimony of Rod Dillon, particularly pp. 19-38, in which Dillon is unwilling or unable to answer even basic questions about efforts to prepare counties for an emergency response.

More important even than the lack of data from Summit and the harrowing stories about Satartia is the fact that Summit's hazardous pipeline is *not safer than the status quo* because, unlike with oil, the status quo is not the transportation by truck or rail of supercritical carbon dioxide. In *Puntenney*, the court focused on the safety of pipeline transportation of oil "as compared to **existing** rail transportation of **that oil**." *Puntenney v. Iowa Utilities Bd.*, 928 N.W.2d 829, 834 (Iowa 2019) (emphasis added). In a footnote, the court also noted, "As we have previously noted, the Dakota Access pipeline is intended to **replace transportation of crude oil through Iowa by rail**." *Puntenney v. Iowa Utilities Bd.*, 928 N.W.2d 829, 849 (Iowa 2019).

Yet, Summit has not introduced any evidence showing that rail or truck transportation of supercritical carbon dioxide is common today or expected to become so in the future. In fact, Summit Witness Pirolli in his deposition testified that Summit is not currently designing "truck receiving capability" into the proposed pipeline. Pirolli deposition at p. 56. Similarly, in response to testimony by CAPCO2 CEO Witness Bonar about transporting large quantities of "green methanol" by rail, Summit Witness McCown testified, "For economic and efficiency reasons, it is highly unlikely that such quantities would be possible via freight railroads." During the hearing, OCA Witness Bents testified that OCA is not aware of anyone in Iowa proposing to transport 9.5 million metric tons of CO2 by rail or truck." Hearing Transcript Volume 12 at p. 3313. Thus, the

record evidence tends to show that transportation of large quantities of CO2 by rail or truck will not be feasible, either now or in the future.

On this basis, the Dakota Access pipeline in *Puntenney* is clearly distinguishable from Summit's project. From the standpoint of whether the public will benefit *from the project*, the right comparison is not between pipelines and rail as forms of transportation. The right comparison is between the risk to public safety before the project and the risk to public safety afterwards. If transportation of CO2 by rail or truck isn't happening today and is not likely to happen in the future, then comparing it to transportation by pipeline is a spurious comparison. The evidence is clear that no matter how well constructed Summit's pipeline is, it will never be *safer* than simply not engaging in the transportation of supercritical carbon dioxide.

For these reasons, all consideration of safety should be weighed against Summit in the balancing process.

7. Summary of the evidence on public benefits.

In summary, even before weighing the detriments, Summit's evidence, when the record is considered as a whole, is very weak in terms of the public benefits claimed for the project. *Puntenney* is clear that two factual considerations are important when considering the public benefits: (1) that the pipeline will *reduce* prices for consumers; and (2) that transportation by pipeline should be *safer* than existing transportation by rail or truck. The evidence offered by Summit in this case fails both of these tests. The evidence tends to show that Summit's goals are premium prices for ethanol and higher corn prices, both of which tend to increase prices for consumers. The evidence also fails to show that the public will be safer if the pipeline is built than

if it is not built because it isn't replacing *existing*, less safe methods of transportation. Thus, on both tests, the project fails to show that it promotes the public convenience and necessity.

In addition to those two considerations, the evidence also clearly shows: (1) that there is no pressing need to build a pipeline to North Dakota because geologic sequestration in Iowa is feasible; (2) that the economic benefits of the project are overstated because they omit all costs and include double-counting of secondary and tertiary economic transactions; (3) that the $414 million in annual federal tax costs related to the 45Q tax credits significantly outweigh the tax contributions to government budgets; and (4) the environmental benefits are overstated and less efficient when compared to other carbon reduction strategies.

C. The Detriments of the Hazardous Pipeline Clearly Outweigh the Benefits.

As discussed above, when determining whether a hazardous pipeline promotes the public convenience and necessity, the Board weighs "the public benefits of the proposed project against the public and private costs or other detriments." *Puntenney v. Iowa Utilities Bd.*, 928 N.W.2d 829, 833 (Iowa 2019). The public benefits and the relatively light evidence supporting them are reviewed above. They certainly do not outweigh the public and private costs or other detriments.

1. The fiscal burden on government budgets is disproportionate to the tax contributions.

As discussed above in the section reviewing Summit's evidence regarding the tax contributions of the project, tax expenditures like the 45Q tax credits are a fiscal cost to public budgets. In this case, even assuming the speculative benefits of the indirect and induced transactions are correct, Summit will receive far more in federal tax credits than the project is

expected to generate in tax contributions to all levels of government. See generally Phillips Direct Exhibit 1. Thus, the project is a net fiscal negative to the taxpayer.

2. The burden on landowners is disproportionate to the public benefits.

The evidence in the record on the inconvenience to landowners is varied and voluminous. In general, this evidence is reviewed above in the section discussing Summit's petition deficiencies related to the statement of "inconvenience or undue injury" to landowners. In exchange for a one-time payment, landowners must live with a permanent risk to their health and safety that provides them no retail services and that they will not be able to use to transport products to market, a crucial distinction from a public utility or a public road. In fact, because landowners are also purchasers of food and fuel, they can expect to pay higher prices along with all other consumers.

3. The burden on economic development is disproportionate to the public benefits.

Public roads, public utilities, and common carriers such as airlines or railroads all facilitate and encourage economic growth. They are necessary prerequisites for other forms of commerce. As discussed above in the section on petition deficiencies related to zoning, this project will limit or constrain the growth of cities rather than encourage it. As discussed in the section on inconvenience to landowners, it is likely to reduce property values and limit future building and construction plans within the pipeline's easement corridor. With public utilities and public roads, these burdens, if any, are clearly outweighed by their benefits. However, in this case, the public benefits discussed above are insufficient to outweigh the public and private economic development costs.

4. The burden on public safety is disproportionate to the public benefits.

As discussed above in the section related to the relative safety of the hazardous pipeline and the evidence in the record, this project presents a risk to public safety that the State of Iowa has not encountered before and is not currently prepared for. Any project that poses a risk like that should have substantial benefits in the form of enhanced economic development, increased commerce, and the provision of basic services. Here, however, the public benefits are slight and the burden on public safety and emergency response services is heavy.

5. Summary of the public and private costs or other detriments.

When the burdens are weighed against the benefits, it is clear that the burdens are heavier. The fiscal costs will be more than the projected fiscal benefits. Landowners are severely inconvenienced, but receive no public service or common carrier services in compensation. The project restricts both public and private land use and economic development, and the burden on public safety is out of proportion to the slight public benefits. The results of the balancing test are not close. The project does not promote the public convenience and necessity and no permit should be issued.

V. SUMMIT IS NOT A COMMON CARRIER AND THE BOARD SHOULD REFUSE TO GRANT EMINENT DOMAIN RIGHTS.

The Counties maintain that once all the costs and benefits have been properly weighed in the balancing process, the Board should determine that Summit's hazardous pipeline does not promote the public convenience and necessity. However, in the event that the Board determines otherwise, the Counties argue that the right of eminent should not be granted.

PUBLIC VERSION

As explained in more detail above, Iowa Code § 6A.22 prohibits the exercise of eminent domain solely for private use: "the authority of an acquiring agency to condemn any private property through eminent domain may only be exercised for **a public purpose, public use, or public improvement**." Iowa Code § 6A.22(1). ""Public use", "public purpose", or "public improvement" means… the acquisition of any interest in property necessary to the function of a common carrier…" Iowa Code § 6A.22(2)(a)(2). However, as the court held in *Mid-Am. Pipeline Co.*, and not reversed in *Puntenney*, a pipeline that "intends to handle only its own products" is "not a common carrier of such products." *Mid-Am. Pipeline Co. v. Iowa State Com. Comm'n,* 114 N.W.2d 622, 624 (Iowa 1962). See also *State ex rel. Bd. of R.R. Com'rs v. Carlson*, 251 N.W. 160, 160 (Iowa 1933) ("the vital consideration is whether the [carrier] has so provided and used his facilities as to give others, than those under contract with him, the right to command the use of his transportation services."). In terms of the language of Iowa Code § 6A.22, a pipeline that does not ship the products *of others* is "strictly for a private use" and, thus, not a common carrier.

REDACTED

VI. THE BOARD SHOULD WITHHOLD APPROVAL OF THE ROUTE UNTIL SUMMIT COMPLIES WITH CERTAIN ROUTING REQUIREMENTS.

The Counties maintain that once all the costs and benefits have been properly weighed in the balancing process, the Board should determine that Summit's hazardous pipeline does not promote the public convenience and necessity. However, in the event that the Board determines otherwise, the Counties argue that the Board should use its statutory authority "to implement certain controls over hazardous liquid pipelines to protect landowners and tenants from environmental or economic damages which may result from the construction, operation, or maintenance of" the hazardous pipeline. Iowa Code § 479B.1. Additionally, "The board may grant a permit in whole or in part upon terms, conditions, and restrictions **as to location and route** as it determines to be **just and proper**." Iowa Code § 479B.9 (emphasis added). Therefore, to the extent that Summit has proposed a route that the Board does not consider "just and proper," the Board should withhold approval of the route or impose controls or restrictions related to the location and route, as a condition of receiving a permit for the hazardous pipeline.

A. The Trunk Line Segment from Ida County to Fremont County Should be Denied.

While Summit has applied for approval of the project in its entirety, the Board may grant a permit in whole *or in part*. Iowa Code § 479B.9. To the extent the Board determines that the benefits to the ethanol industry from this project "promote the public convenience and necessity," it is not required to find that *every individual trunk line* promotes the public convenience and

necessity. If some portions of the line promote the public convenience and necessity and others do not, the Board should not approve those segments of the proposed route.

Among Summit's ethanol plant partners, there is one plant in Ida County and another plant in Fremont County. See IFBF Johnson Direct Exhibit 12. The proposed route between these two ethanol plants extends more than 100 miles without connecting to *any other ethanol plants* or to any lateral lines that do.

During hearing, Summit Witness Powell admitted that the percentage of ethanol produced at each ethanol plant represents a proportion of the project's total volume. Hearing Transcript Voume 7 at p. 1719. Therefore, it stands to reason that the benefits of any one plant are also in proportion to the total benefits of the project. If the purposes of the project are to maximize the production of ethanol at a premium price and to maximize the sequestration the carbon dioxide from that production, then the production of *less* ethanol and the sequestration of *less* carbon at the end of any given trunk line, then the *fewer* the public benefits there are to constructing that segment of the line.

On the other hand, the burdens to most of the landowners along the trunk line between the Ida County plant and the Fremont County plant are the same regardless of how many plants are at the end of the line. The "inconvenience and undue injury" to landowners along this line clearly are not justified by whatever fractional proportion of the overall "public benefits" are generated by *a single ethanol plant* in Fremont County. Denying a permit for this portion of the line would greatly lessen the burdens on landowners along more than 100 miles of the route, while foregoing only the relatively small portion of the benefits contributed by the Fremont County plant. Therefore,

the Board should deny the segment of the proposed route that extends south of the Ida County plant to the Fremont County plant.

B. The Board Should Require the Route to Be No Less Than Two Miles from Incorporated Cities Unless Necessary to Connect to an Ethanol Plant.

As discussed above in the section on petition deficiencies, the Counties have established that Summit is deficient in its evidence discussing the project's relationship to present and future land use and zoning ordinances, and this should clearly be held against Summit in the balancing process. However, it should also be considered in the siting and routing of the pipeline.

As discussed above, Shelby County has had a publicly available comprehensive plan in effect since 1998 that seeks to preserve a "buffer zone" of two miles around incorporated cities for future growth and development, particularly of new housing. This buffer zone distance is in accord with both the two-mile distance of extra-territorial zoning authority afforded cities and the two-mile water service territory boundary between cities and rural water associations. See Iowa Code § 414.23 and Iowa Code § 357A.2. The public policy in Iowa is clearly to reserve this two-mile area for city development and city services, and Shelby County's comprehensive plan is in accord with both state law and state policy. Summit's route is contrary to the orderly development of these cities.

Summit is aware of cities' desire to preserve development and is actively changing its proposed route in other states to accommodate the growth of cities. In response to OCA Data Request 30, which the Counties offered as Hamilton Direct Exhibit 1, Summit stated:

> **SCS has reviewed zoning ordinances and comprehensive plans**, where they exist, for the 30 Iowa counties where the Project's pipelines and aboveground facilities have been proposed. Additionally, SCS has initiated engagement with local agencies to ensure the

> construction and operation of **the Project will adhere to applicable local and county land use and zoning restrictions**.

In its application to the South Dakota Public Utilities Commission, which the Counties offered as Hamilton Direct Exhibit 2, Summit included a local zoning permit tracker. See Hamilton Direct Exhibit 2 at p. 97. Finally, Summit Witness Powell stated in his rebuttal testimony and at hearing that Summit was moving the route in North Dakota to accommodate concerns about its proximity to the City of Bismarck. See Powell Rebuttal Testimony at p. 6; See also Hearing Transcript Volume 7 at p. 1689. Yet, despite tracking zoning permits in South Dakota and despite moving the pipeline route around Bismarck, during the hearing, Powell pointedly refused to change the route around the Iowa cities of Charles City and Earling. See Hearing Transcript Volume 7 at pp. 1734 to 1740. Powell was also unable or unwilling to explain why the company is willing route around Bismarck, but not around Earling, other than to characterize Earling as "not a high-consequence" area.

Powell's justification for routing within two miles of Iowa cities, and into the city limits of Charles City, is simply unacceptable. The Board should require Summit to respect the two-mile buffer zone around Iowa cities in order to preserve their future economic development just like the company is already doing in North Dakota for the City of Bismarck. The Counties argue that the Board should impose a routing condition that establishes *a two-mile economic development buffer zone around all Iowa cities* where Summit does not need to connect to a partner ethanol plant. However, at a minimum, the Board should withhold approval of the route segments currently proposed near the cities of Sioux City, Earling, Westphalia, Rockford, and Charles City until alternative routes are proposed. It is clearly not a hardship to require Summit to afford cities in Iowa the same consideration as it is giving to Bismarck, and administrative procedures exist to

accommodate route changes. For example, routing changes were required in the Final Decision and Order in the Dakota Access case and, even after approval, a pipeline company can make expedited route changes pursuant the Board's administrative rules at 199 Iowa Administrative Code rule 13.7(2).

C. The Board Should Require the Pipeline to Be Located at Least One Thousand Feet from Occupied Structures.

Dr. John Abraham offered surrebuttal testimony in support of the landowner intervenors in the South Dakota Public Utilities Commission ("SDPUC") hearing on Summit's permit application there. Abraham is a professor mechanical engineering at the University of St. Thomas in Minnesota. The purpose of Abraham's testimony was to support the use of risk modeling when making pipeline siting decisions. Abraham's testimony was admitted during hearing in this case as Landowners Exhibit 641.

In that testimony, Abraham offers his opinions about the likely distance that human CO2 exposure could occur at a hazard level of 30,000 ppm and at a hazard level of 40,000 ppm for pipelines of 8.625 inches and 20 inches in diameter, under certain assumed input variables. See Landowners Hearing Exhibit 641 at pp. 71-74. In his opinion, under the assumptions he made for an 8.625-inch pipeline, "human exposure at 30,000 ppm of CO2 would more likely than not occur at a distance greater than 2,600 feet from the site of the release of CO2 and that human exposure at 40,000 ppm of CO2 would more likely than not occur at a distances greater than 1,850 feet from the site of the release of CO2." Landowners Hearing Exhibit 641 at pp. 71-74. For a 20-inch pipeline under similar assumptions, "human exposure at 30,000 ppm of CO2 would more likely than not occur at a distance of 4,000 feet from the site of the release of CO2 and that human

exposure at 40,000 ppm of CO2 would more likely than not occur at a distance of 2,800 feet from the site of the release of CO2." Landowners Hearing Exhibit 641 at pp. 71-74.

In other words, Abraham's testimony suggests that separation distances of as large as 4,000 feet from occupied structures would not be unreasonable, depending on the assumptions used in the risk modeling and atmospheric conditions present during a rupture. Counties Witness Willingham testified that the Satartia rupture "adversely impacted an area approximately 2-3 miles away from where the rupture occurred." Willingham Direct Testimony at p. 6. Willingham also testified that first responders under his direction "encountered numerous individuals with symptoms of CO2 exposure who were much further away from the rupture than 1,000 feet." Willingham Direct Testimony at p. 6. For these reasons, the Counties offered evidence recommending that a *minimum* separation of 1,000 feet should be maintained for the protection of human health. See Willingham Direct Exhibit 2 containing the recommendations of the Shelby County Board of Health.

Summit, however, has proposed a route that brings the pipeline much closer than that to hundreds of structures of all kinds across the state. See e.g., the direct testimony and exhibits of IFBF Witness Johnson. See also IFBF Hearing Exhibit 4. Summit Witness Schovanec explained in his deposition testimony that Summit's "initial preliminary routes" used "a 400-foot setback as a kind of a baseline to start" the routing process. This initial 400-foot distance was emphatically *not* chosen based the results of Summit's dispersion modeling, as Summit Witness Louque confirmed in both his deposition testimony and in cross examination during hearing. See e.g., Louque Deposition at p. 26 where he confirms that dispersion modeling does not inform the route selection and that Summit "would typically have the route nailed down or close to nailed down

when we start work." Instead, as Summit Witness Schovanec testified, the 400-foot setback was used because it was the distance used by Dakota Access when that company selected a route for its *oil* pipeline. See Schovanec Deposition testimony at pp. 29-30.

IFBF Witness Johnson thoroughly documents the proposed location of the pipeline relative to occupied structures and populated areas along the entirety of the route. See generally, Johnson Direct Testimony. Johnson Direct Exhibit 10 is "a map showing the location of the structures that are within 400 feet of the pipeline." As Johnson explains, Summit had identified 495 structures that were within 400 feet of the proposed route in response to Data Request 19 from the Counties. See also IFBF Hearing Exhibit 4. These 495 structures included "112 houses, 4 trailers, 7 businesses, 18 industrial buildings, 36 animal feeding operations, 119 barns, 131 sheds, 3 greenhouses, 19 garages, 13 abandoned structures and 33 ethanol plant buildings." Johnson Direct Exhibit 10 at pp. 9-10.

There was no review or approval by PHMSA of the "manual review" process used by Summit when it chose to route the pipeline so close to these existing structures and, as Summit admits, no review or approval is required under PHMSA regulations. See IFBF Hearing Exhibit 4. Therefore, the Board must review these routing decisions and determine whether they are "just and proper" within the meaning of Iowa Code § 479B.9. It is certainly not "just and proper" to use the same initial screening distance for a supercritical carbon dioxide pipeline as was used for an oil pipeline. The engineering considerations, chemical profile, and physical properties of oil are vastly different than supercritical carbon dioxide. When an oil pipeline ruptures as a liquid, it will disperse in close proximity to the pipeline. It will not travel thousands of feet through the atmosphere as carbon dioxide will when it disperses.

The Counties argue that, based on the evidence in the record, when considered as a whole, and especially based on the opinions of Dr. Abraham, the testimony of Mr. Willingham, and the recommendation of the Shelby County Board of health, it is "just and proper" for the Board to require a *minimum* separation distance of 1,000 feet from existing structures, unless such a distance is functionally impossible, such as when connecting to an ethanol plant.

VII. THE PERMIT SHOULD CONTAIN CERTAIN CONDITIONS AND RESTRICTIONS PROTECTIVE OF LANDOWNERS AND PUBLIC SAFETY.

The Counties maintain that once all the costs and benefits have been properly weighed in the balancing process, the Board should determine that Summit's hazardous pipeline does not promote the public convenience and necessity. However, in the event that the Board determines otherwise (and in addition to the routing conditions discussed above), the Counties argue that the Board should use its broad statutory authority under chapter 479B to impose several other controls and conditions that are protective of landowners and public safety. See Iowa Code §§ 479B.1 and 479B.9.

The Counties urge the Board to impose the following specific conditions for the reasons discussed below.

A. The Board Should Impose a Condition Requiring Summit to Obtain and Comply with All Other Applicable Permits Before Construction May Commence.

The Board has a prior practice and precedent of expressly conditioning its permit on the obtaining of other necessary permits. In the Dakota Access Final Decision and Order, the Board said:

> The proposed pipeline will require a variety of permits before it can be built and operated. Many of those permit proceedings have at least some potential to interact; for example, many have the potential to require re-routing of the project, which could affect other permit proceedings in a substantial way. Still, if every agency reviewing the project for a particular permit were to refuse to act until all of the other agencies had acted, then no permit would ever be issued and infrastructure that may be necessary to serve the public benefit would never be built.
>
> The Board has avoided this Catch-22 in the past by issuing a permit that is based upon the record made before the agency, including the petitioner's representations that it will obtain all necessary and required permits and authorizations prior to construction and operation of the proposed project. If those permits or authorizations are not obtained, then the Board's permit is void because a necessary precondition of the permit has not been satisfied. The Board will use this same mechanism here; **the permit, if one is issued, will be conditioned upon receipt of all other required permits and authorizations.** Moreover, Dakota Access will be required to file a petition for an amended permit if, in the process of obtaining some other authorization, the route of the proposed pipeline (or any other major aspect of the proposed pipeline) is significantly changed.

See IUB Docket No. HLP-2014-0001, Final Decision and Order, at pp. 72-73 (emphasis added).

Counties Witness Neil Hamilton testified that Summit is required to obtain many other permits, including county permits, that it is feasible for Summit to obtain those permits, including zoning permits, and that Summit is tracking and obtaining those permits in other states, including South Dakota. See Hamilton Direct Testimony at pp. 19-21. See also Hamilton Direct Exhibits 1 and 2.

Summit's factual evidence, including the testimony of Schovanec, does not assert otherwise. In response to OCA data request 30, Summit stated, "SCS has initiated engagement with local agencies to ensure the construction and operation of the Project **will adhere to applicable local and county land use and zoning restrictions**… As the final design and routing is completed for the Project, SCS will continue to coordinate with each county to address regulations and ordinances that may apply to the Project, **and if so, obtain the required authorizations prior to construction in that county**." See Hamilton Direct Exhibit 1 (emphasis added).

During hearing, Summit Witness Powell confirmed that Summit is required to obtain many other permits and stated that construction in Iowa would not begin if those approvals are not obtained. See Hearing Transcript Volume 7 at pp. 1716-1717. Consequently, Powell stated that Summit was willing to accept (1) a condition requiring approval in North and South Dakota; and (2) "a condition requiring approval of all necessary local permits," including injection permits for sequestration in Mercer and Oliver counties in North Dakota. See Hearing Transcript Volume 7 at pp. 1717-1718.

In short, other permits are required, the Board has a prior practice and precedent of conditioning its pipeline permit on obtaining and complying with those other permits, and Summit has agreed to accept such conditions. The Counties urge the Board to follow its prior practice and impose these conditions.

B. The Board Should Impose a Condition Requiring Final Resolution of All Litigation with Counties Over Zoning Ordinances Before Construction May Commence.

Rather than offer evidence and testimony that county comprehensive plans contain different present and future land use goals or that county zoning ordinances do not restrict industrial development in agricultural areas without obtaining a permit, Summit has instead simply asserted that those ordinances are pre-empted by state and federal law, citing to a ruling from federal court in the Southern District of Iowa. See e.g., Schovanec Rebuttal Testimony at pp. 6-7.

The Counties dispute Summit's legal position. It is a matter of public record that there are several lawsuits currently being litigated by Summit against Iowa counties in both the Northern District and the Southern District and that at least two of those cases are being appealed to the 8th Circuit Court of Appeals. If those counties prevail, then zoning permits will be applicable to the project and necessary to be obtained. Therefore, a permit issued by the Board should expressly condition the commencement of construction upon the resolution of all pending zoning litigation in order to preserve the jurisdictional interest of counties in local zoning permits.

C. The Board Should Impose Several Conditions Restricting the Grant of Eminent Domain in Order to Protect Landowners from Damages.

As discussed above, the Counties maintain that the restrictions in the Iowa Constitution and in Iowa Code chapter 6A prevent the grant of eminent domain to Summit in this case. However, in the event the Board determines otherwise, the Counties urge the Board to use its broad general authority to impose controls and restrictions on any grant of such rights.

As discussed in more detail above in the section on the statutory restrictions on the grant of eminent domain, "A pipeline company granted a pipeline permit shall be vested with the right of eminent domain, *to the extent necessary* and as *prescribed and approved* by the board…" Iowa Code § 479B.16. In addition, Iowa Code § 479B.1 also imposes a necessity requirement on the grant of eminent domain and empowers the Board to protect landowners from damages. There are also several Iowa eminent domain cases in the utility context that limit the grant of eminent domain rights only to those rights that are necessary *for the uses proposed*. See e.g., *Draker v. Iowa Electric Co.*, 191 Iowa 1376, 1382, 182 N.W. 896, 899 (1921); *Vittetoe v. Iowa S. Utilities Co.*, 123 N.W.2d 878, 881 (Iowa 1963). *SMB Investments v. Iowa-Illinois Gas and Elec. Co.*, 329 N.W.2d 635, 640 (Iowa 1983). These cases establish that a taking beyond the uses proposed is unlawful.

In this case, Summit does not justify the project based on actual use by the public such as a road or on the provision of a public service such as electricity or natural gas. Instead, as succinctly stated by Summit Witness Pirolli in his direct testimony, regarding the "purpose and need" for the project:

> Once operational, the Project will (1) support the longevity and competitiveness of the ethanol and agricultural industries; (2) create and preserve jobs and economic productivity; and (3) benefit the environment by removing CO2 from the atmosphere. These three aspects present a clear purpose and need for the Project to support key industries, jobs, and the climate.

Pirolli Direct Testimony at p. 3.

If the Board determines that these benefits "promote the public convenience and necessity," then the Board should also determine that the project must *continue* to deliver these benefits, otherwise there is clearly no longer a "need" for the project. If Summit changes the project in such a manner that it is no longer delivering the benefits that originally justified the project, or if the

circumstances of public policy or the operation of the regulatory or economic markets for ethanol change such that the benefits can no longer be delivered, then the requirement of necessity is no longer being met. At that point, the permit should expire and any rights of eminent domain that have been granted should revert back to the landowners. If other exigent circumstances exist upon such an expiration and reversion, then Summit (or any successor in interest) should have to seek another permit and prove that the project still "promotes the public convenience and necessity."

Because of the Constitutional and statutory requirements to grant eminent domain *only to the extent necessary* and because of the related statutory obligation to protect landowners, the Board should prescribe several specific controls and restrictions regarding the grant and use of eminent domain that will ensure the project *continues* to deliver the benefits claimed in this case. For all these reasons, the Counties urge the Board to impose the following controls and restrictions.

1. The Board should impose a condition requiring all necessary permits to be obtained before condemnation rights may be exercised.

If the Board conditions the state permit on obtaining all other necessary permits and Summit has not obtained those permits, then landowners should not be subject to the exercise of eminent domain until the permits have been obtained.

2. The Board should impose a condition requiring expiration and reversion if the regulatory markets for low carbon fuels are no longer accessible to ethanol.

To the extent Summit argues that premium prices in low carbon fuel markets constitute a public benefit, if those markets are no longer accessible to the ethanol industry, then the proposed

public benefits are no longer being provided and necessity no longer exists. Therefore, the permit should expire, and the condemned rights should revert to landowners.

3. The Board should impose a condition requiring expiration and reversion if the sequestration of carbon dioxide is no longer eligible for the 45Q or 45Z tax credits.

To the extent Summit argues that the enhanced competitiveness of the ethanol industry through greater profits from these federal tax credits constitutes a public benefit, if those tax benefits are no longer accessible to the ethanol industry, then the proposed public benefits are no longer being provided and necessity no longer exists. Therefore, the permit should expire and the condemned rights should revert to landowners.

4. The Board should impose a condition requiring expiration and reversion if the pipeline owner or operator ever proposes to convert it to another use or to carry another commodity.

To the extent Summit argues that the enhanced competitiveness of the ethanol industry and the environmental benefits of sequestration constitute public benefits, if those benefits are no longer being delivered by the project, then necessity no longer exists. Therefore, the permit should expire and the condemned rights should revert to landowners.

5. The Board should impose a condition requiring the sequestration of all carbon dioxide transported by the project, prohibiting any offtake of the carbon dioxide prior to the sequestration site, and requiring expiration and reversion if these conditions are violated.

To the extent Summit argues that the environmental and climate change benefits attendant to the sequestration of carbon dioxide constitute public benefits, if those benefits are no longer being delivered by the project, then necessity no longer exists. Therefore, the permit should expire and the condemned rights should revert to landowners. This expiration and reversion should be triggered by any failure to sequester all of the transported carbon and by the allowance of any offtake of the carbon prior to sequestration.

6. The Board should impose a condition prohibiting the use of any of the transported carbon dioxide for enhanced oil recovery.

To the extent Summit argues that the environmental benefits attendant to the sequestration of carbon dioxide constitutes public benefits, if those benefits are no longer being delivered by the project, then necessity no longer exists. Therefore, the permit should expire and the condemned rights should revert to landowners. This expiration and reversion should be triggered by any use of the carbon dioxide for enhanced oil recovery because such a use would destroy the climate change and other benefits claimed for the project.

D. The Board Should Impose Several Conditions to Protect Public Safety Before Construction May Commence.

The testimony of Briggs and Willingham about the need to prepare county and other local officials for emergency response and the testimony of numerous landowners about the volunteer nature of most rural fire and EMS personnel clearly establish the need that exists for greater readiness. In addition, the deposition testimony of Summit Witness Dillon clearly demonstrates the anemic efforts Summit has taken to date to improve that readiness. For these reasons, the Board should impose a number of conditions designed to require greater readiness and improved public safety.

1. The Board should impose a condition that delays the commencement of construction until PHMSA completes or terminates the announced rulemaking on new CO2 pipeline standards.

On May 26, 2022, PHMSA announced it was initiating a rulemaking to update standards for CO2 pipelines, including requirements related to emergency preparedness, and response. See press release available here: https://www.phmsa.dot.gov/news/phmsa-announces-new-safety-measures-protect-americans-carbon-dioxide-pipeline-failures. The Board should delay the commencement of construction until the completion of this rulemaking.

2. The Board should impose a condition requiring Summit to provide dispersion modeling, updated emergency response plans, necessary equipment, and appropriate training to every city, county, or emergency management agency in the pipeline footprint before construction may commence.

Summit has refused to provide even basic information and training to counties prior to the construction phase of the project. See the deposition testimony of Dillon. The Board should require Summit to provide the dispersion modeling and all necessary equipment and training to counties prior to the construction phase.

E. The Board Should Impose a Condition that Allows County Inspectors to Halt Construction When Wet Conditions Exist and that Creates a Clear Test for Determining when Such Conditions Exist.

During the hearing, Counties Witness Kruizenga described based on firsthand experience the serious issues he encountered as an inspector during the construction of the Dakota Access pipeline. In particular, Kruizenga described construction issues that caused crushed tile and soil compaction resulting from construction activities during "wet conditions." The testimony of many landowners supports Kruizenga's testimony about construction in wet conditions, tile damage, and soil compaction.

Kruizenga's greatest concern was "that determining whether 'wet conditions' exist is often a point of dispute between county inspectors and the pipeline company." Kruizenga Direct Testimony at p. 5. In Kruizenga's opinion, the definition of "wet conditions" in the Board's

administrative rules is inadequate because "it does not contain an objective or quantitative standard that both the county inspectors and the pipeline company can agree has been met." Kruizenga Direct Testimony at p. 5. In Kruizenga's opinion a "clearer, less subjective standard would better prevent disputes during the construction and inspection process." Kruizenga Direct Testimony at p. 5. Kruizenga argues, "If such a standard was set correctly, it would also prevent unnecessary damage to the land and the tile, which should be the primary goal."

To prevent unnecessary damage to tile and soil compaction caused by working in wet conditions, Kruizenga recommended the adoption of two criteria for determining the existence of wet conditions. Kruizenga Direct Testimony at p. 6. The first criterion is any visible standing water in the field. The second criterion is the use of the "ball test" proposed by Counties Witness Matt Liebman to determine whether "the local soils are at or above their plastic limit." Kruizenga Direct Testimony at p. 6. If the plastic limit is reached, then "wet conditions" should be presumed to exist. Kruizenga Direct Testimony at p. 6. If either of these two criteria are met, "wet conditions" would be presumed to exist, allowing the county inspector to halt construction based on objective criteria and without disagreements about the existence of wet conditions. Even Summit Witness DeJoia admitted that having county inspectors stop construction "provides a lot of value." Hearing Transcript Volume 10 at p. 2545.

The simple "ball test" recommended by Kruizenga, and the research bases for it are described in detail in the direct testimony of Liebman, the surrebuttal testimony of Liebman, and in his testimony during hearing. See Hearing Transcript Volume 13 at p. 3489. The "ball test" is objective, repeatable in all conditions, and can be performed quickly. Liebman also testified to the impacts on soil and crop yields from compaction by heavy machinery and construction during wet

conditions, lending further credibility to the testimony of Kruizenga. See Liebman Direct Testimony at pp. 7-10. It is more protective of the soil, Summit Witness DeJoia's "30% test", and less susceptible to human error than estimating what percentage of the right-of-way is filled with ponded water. Additionally, Liebman's research summary and recommendations are further supported by the affidavit of Iowa State University Prof. Mehari Tekeste, who served as principal investigator on a technical evaluation project between ISU and the Iowa Association of Counties ("ISAC") entitled, "Procedure for Determining Soil Wetness During Construction of Underground Utilities to Minimize Excessive Soil Compaction." See OCA Hearing Exhibit 5.

For all these reasons, the Board should impose a condition that clearly allows county inspectors to halt construction when wet conditions exist and that creates a clear test, such as Liebman's "ball test," for determining when such conditions exist.

VIII. CONCLUSION

This project is a textbook example of a boondoggle. A "boondoggle" is "a wasteful and worthless project undertaken for political, corporate, or personal gain, typically a government project funded by taxpayers." See https://www.dictionary.com/browse/boondoggle. This hazardous pipeline project proposes to take the private property rights of hundreds of landowners through the sovereign power of eminent domain and give them to a private company for private profit; rip open a trench across thousands of miles of the most productive farmland in the world, damaging crop yields for years into the future; construct a highly dangerous supercritical carbon dioxide pipeline up to 24 inches in diameter within four hundred feet of hundreds of occupied structures; and restrict economic development in 30 Iowa counties, only to bury the carbon dioxide in a hole in North Dakota unnecessarily, all the while asking taxpayers to spend billions to

subsidize it, and raising food and fuel prices for consumers across the county. Meanwhile, the true beneficiaries of the project are Summit's investors and their ethanol plant partners. If that is not a boondoggle, then nothing is.

Accordingly, the Board should find that Summit's hazardous pipeline does not promote the public convenience and necessity. However, in the event the Board determines otherwise, it should at least require modifications to the proposed route to protect cities and impose conditions through the permit to protect landowners and public safety.

Respectfully submitted,

By: /s/ *Timothy J. Whipple*

Timothy J. Whipple, AT0009263
Ahlers & Cooney, P.C.
100 Court Avenue, Suite 600
Des Moines, IA 50309-2231
Telephone: (515) 246-0379
Email: twhipple@ahlerslaw.com

ATTORNEY FOR SHELBY, KOSSUTH, FLOYD, EMMET, DICKINSON, WRIGHT, AND WOODBURY COUNTIES

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