

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

<p>SUMMIT CARBON SOLUTIONS, LLC,  Petitioner,  v.  IOWA UTILITIES BOARD, STATE OF IOWA,  Respondent.</p>	<p>Case No.  <b>PETITION FOR TEMPORARY AND PERMANENT INJUNCTIVE RELIEF</b></p>
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Summit Carbon Solutions, LLC (“Summit”), for its Petition for Temporary and Permanent Injunctive Relief, states:

**PARTIES AND JURISDICTION**

1. Summit is a Delaware limited liability company with its principal place of business in Iowa.
2. The Iowa Utilities Board (the “Board”) is an administrative agency of the State of Iowa created and governed by Iowa Code chapter 474.
3. The Board is a government body within the meaning of Iowa Code chapter 22, Iowa’s Open Records Act.
4. This Court has subject-matter jurisdiction of this action.

**BACKGROUND**

5. Summit has proposed a carbon capture and storage project operating in five states that would partner with ethanol plants, including at least 13 in Iowa, to capture the carbon dioxide (“CO2”) from their fermentation process and transport it to unique geologic formations more than a mile underground in North Dakota for permanent storage.

6. The project would capture and store up to 12 million tons of CO<sub>2</sub> per year, the equivalent of removing the CO<sub>2</sub> emissions from 2.6 million automobiles.

7. The project will provide new capital investments, tax revenues, payments to landowners, thousands of construction jobs, and hundreds of good permanent jobs.

8. The project will also reduce the carbon intensity score of Iowa-produced ethanol by 30 points, making it much more competitive in growing low-carbon fuel markets – extending and increasing the market for Iowa’s ethanol, and for corn grown by tens of thousands of farmers across Iowa.

9. The project requires approval of the Board pursuant to Iowa Code chapter 479B and Board rules at 199 Iowa Administrative Code chapter 13, a process which is nearly completed in Board docket HLP-2021-0001 – the hearing and post-hearing briefing are done; all that remains is for the Board to issue a final order on Summit’s application for a permit.

10. Iowa Code chapter 479B provides the Board authority over the existence of the pipeline, its route, and whether to authorize use of eminent domain. Iowa Code §§ 479B.1, .9. The Board has no jurisdiction over safety, which is subject to the exclusive jurisdiction of the federal Pipeline and Hazardous Materials Safety Administration (“PHMSA”). See 49 U.S.C. § 60104(c) (expressly preempting state authority); *Couser v. Story County*, No. 4:22-cv-00383, Dkt. 55, at 33 (S.D. Iowa Dec. 4, 2023) (preempting county efforts to regulate pipeline in case related to the present proceeding); *ANR Pipeline Co. v. Iowa State Com. Comm’n*, 828 F.2d 465 (8th Cir. 1987) (preempting Iowa statute and regulations pertaining to safety for natural gas lines); *Kinley Corp. v. Iowa Utils. Bd.*, 999 F.2d 354 (8th Cir. 1993) (preempting Iowa financial security requirement for hazardous liquids pipeline as being proxy for safety).

11. PHMSA requires pipeline operators to create and maintain an Emergency Response Plan (“ERP”). The creation of the ERP requires modeling what an unintended release of product

would do and how it would behave. The air dispersion modeling, however, is never made public as part of the PHMSA process. There is no Iowa law requiring the creation of, much less the disclosure of, such dispersion modeling. (Nor could there be, as pipeline safety is subject to exclusive federal jurisdiction which preempts state regulation in that area.)

12. The dispersion modeling engaged in by Summit in information concerning physical infrastructure/critical infrastructure, developed for the purpose of emergency preparedness and for protection of life or property. It involves a detailed map of the pipeline route that has been proposed for approval in HLP-2021-0001, showing overlays of results of computer models of releases of CO<sub>2</sub> caused by damage to the pipeline. The models show CO<sub>2</sub> concentrations in the air in parts per million at various distances as a result of different kinds of damage, and also models those few locations where overland or gravity-induced flow may be possible under specific conditions, and it shows how the dispersion of the CO<sub>2</sub> relates to existing features. The modeling documentation also describes the models' sensitivity to changes in certain variables like weather conditions, surrounding terrain or vegetation, angle of release, and others, all of which would be useful information for someone seeking to do harm through an attack on the pipeline.

13. Despite safety being preempted, various parties in HLP-2021-0001 repeatedly attempted to make safety a litigated issue in the permit proceeding. As a result, the Board issued several rulings on access to such information.

a. Initially, the Office of Consumer Advocate ("OCA") requested that the Board require production of the ERP and any risk assessments to be required as exhibits to the petition for Summit's permit. On July 14, 2022, the Board granted that request. *In re Summit Carbon Solutions, LLC*, Docket No. HLP-2021-0001, "Order Addressing Motion to Require Exhibits" (IUB, July 14, 2022).

b. Summit moved to reconsider based on preemption and the Board backtracked on a split vote with two Board members agreeing to revisit the decision and setting forth a schedule for additional briefing and oral argument, and the third determining that no further process was necessary – that he would reverse the order on the ERP and risk assessment based on federal preemption. *In re Summit Carbon Solutions, LLC*, Docket No. HLP-2021-0001, “Order Addressing August 3, 2022 Motion for Reconsideration and Scheduling Status Conference” (IUB, Sept. 2, 2022).

c. After the additional briefing and oral argument on preemption, the Board fully reconsidered and reversed its earlier decision, vacating the requirement to produce the safety information as exhibits to the petition, but leaving open the possibility for the issue to be revisited further later in the case. *In re Summit Carbon Solutions, LLC*, Docket No. HLP-2021-0001, “Order Addressing Motion for Reconsideration and Petitions to Intervene” (IUB, Feb. 10, 2023) at 4-5. In that Order that Board recognized “that it is preempted from setting safety standards that are clearly under the jurisdiction of the United States Department of Transportation” and held that “the information . . . is not necessary as part of the petition filed by Summit Carbon.”

d. Opponents served discovery requests seeking Summit’s dispersion modeling. Summit objected, and Sierra Club moved to compel. An Administrative Law Judge, in an order ruling on the motion to compel, acknowledged that the North Dakota Public Service Commission had considered this same issue and had entered an Order of Protection of Information that “prohibited disclosure of the dispersion modeling information to the intervenors and general public in the North Dakota Public Service Commission proceeding.” Nonetheless, citing the Board’s February 10 Order, the ALJ found the material was discoverable, and withheld judgment on whether it would later be

admissible. *In re Summit Carbon Solutions, LLC*, Docket No. HLP-2021-0001, “Order Concerning Sierra Club's Second Motion to Compel” (IUB ALJ, Aug. 14, 2023).

e. Summit appealed to the full Board, who ruled that the modeling was discoverable, but reiterated

The Board agrees that this information is highly sensitive. For that reason, the Board will allow the dispersion modeling data to be released as “Highly Confidential – Attorneys’ Eyes Only” as defined in the protective agreement to only the parties subject to this discovery dispute.

*In re Summit Carbon Solutions, LLC*, Docket No. HLP-2021-0001, “Order Addressing Second Motion to Compel” (IUB, Sept. 6, 2023) at 8.

14. Because opponents continued to raise issues regarding dispersion modeling, and because they would now have the materials to use in potential cross-examination, Summit determined it would be better for the Board to have the actual facts as opposed to the project opponents’ spin on the facts. On September 7, 2023, Summit chose to voluntarily file the dispersion models in the docket designated Confidential-Attorneys’ Eyes Only consistent with the Board’s prior determination of their status.

15. The filing of the materials was not required by any Iowa statute or rule, by any order of the Board (which explicitly required them to be provided only to opposing parties who had entered a protective agreement), or by any contract, or procedure.

16. On information and belief, Summit alleges that on January 4, 2024, Sioux Lawton of Garner, Iowa (who is a landowner on the route and who was automatically considered by the Board to be a party because her property was subject to an eminent domain request, but who chose to not intervene or otherwise actively participate in the Board docket regarding Summit’s permit) made an open records request to the Board.

17. On January 29, 2024, the Board send a letter to Summit providing notice of the request and, pursuant to Board Rules 1.9(5) and 1.9(8)<sup>1</sup>, providing 14 days for Summit to seek an injunction protecting the confidential records.<sup>2</sup>

## COUNT I

### TEMPORARY AND PERMANENT INJUNCTION

18. Summit repleads and realleges the preceding allegations.

19. The Iowa Open Records Act, including its exceptions, may be enforced by injunction.

20. Summit requests a temporary and permanent injunction prohibiting the Board from releasing the dispersion modeling Summit voluntarily provided and for which Summit sought confidential treatment because they are excluded from disclosure under Iowa law.

21. Summit would be aggrieved or adversely affected by the disclosure of its dispersion modeling.

22. Under Iowa Rule Code § 22.8(1) and Iowa Rule of Civil Procedure 1.1502(1), Summit's request for a temporary and permanent injunction is supported by the Declaration of David Daum attached as **Exhibit 1**.

23. The Iowa Open Records Act, Iowa Code chapter 22, includes scores of enumerated exceptions under which records are protected from disclosure.

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<sup>1</sup> 199 Iowa Admin. Code 1.9(5) and 1.9(8)

<sup>2</sup> While Summit has the Board's summary of the records request in its letter, Summit has never seen the actual records request. Summit also notes that it did not receive the notice letter until February 1, 2024, and while it believes it is prejudicial to its ability to fully address the relevant issue, Summit is filing this motion on February 12 in an abundance of caution.

24. Relevant to this case, the Act includes a specific exemption for information relating to the safety of infrastructure, Iowa Code § 22.7(50). That provision clearly applies here by its express terms, which exempt from disclosure

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

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

25. Further, the Act exempts from disclosure certain information which is provided to a government agency voluntarily, and which is not required by “law, rule, procedure, or contract” and which would be less likely to be provided voluntarily in the future if the information is disclosed. *See* Iowa Code § 22.7(18). That exemption protects from disclosure

Communications not required by law, rule, procedure, or contract that are made to a government body or to any of its employees by identified persons outside of government, to the extent that the government body receiving those communications from such persons outside of government could reasonably believe that those persons would be discouraged from making them to that government body if they were available for general public examination. As used in this subsection, “persons outside of government” does not include persons or employees of persons who are communicating with respect to a consulting or contractual relationship with a government body or who are communicating with a government body with whom an arrangement for compensation exists. Notwithstanding this provision:

a. The communication is a public record to the extent that the person outside of government making that communication consents to its treatment as a public record.

b. Information contained in the communication is a public record to the extent that it can be disclosed without directly or indirectly

indicating the identity of the person outside of government making it or enabling others to ascertain the identity of that person.<sup>3</sup>

Iowa Code § 22.7(18).

26. As more fully set forth in the Daum Declaration, the dispersion modeling is information about physical infrastructure, and its release would implicate public safety and security of life and property, entitling Summit to an injunction prohibit the release of the dispersion modeling.

27. Further, as shown in the facts asserted above, no law, rule, procedure or contract required Summit to provide the information to the Board, and Summit's repeated efforts to ensure the confidentiality of the information is such that the Board could reasonably believe Summit and similarly situated entities would be discouraged from voluntarily providing such information if the information is made available for general public examination.

28. Summit is likely to succeed on the merits of its claims and the balance of harms favors issuing a temporary injunction.

29. No petition for the same relief of part of it has previously been presented to and refused by any court or justice.

30. Summit requests a hearing on this matter and that the Court, as permitted by Iowa Code § 22.8(2), waive any bond requirement for an injunction.

Summit requests that the Court entering a temporary and permanent injunction prohibiting the Board from releasing the dispersion Summit voluntarily provided and for which Summit sought confidential treatment (and which the Board, as the expert agency, found to be sensitive and requiring an "attorneys' eyes only" designation) and for such other relief as the Court deems appropriate.

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<sup>3</sup> Subparagraph (c) pertains to criminal investigations and has been omitted here.



Filed this 12th day of February, 2024.

*/s/ Bret A. Dublinske*

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