IN THE IOWA DISTRICT COURT FOR POLK COUNTY

ENTERPRISE PRODUCTS OPERATING LLC, *Petitioner*, v. IOWA UTILITIES BOARD *Respondent*.	Case No. CVCV06780 **Enterprise's Brief in Support of Petition for Judicial Review**

This case challenges the Iowa Utilities Board's ("Board") unlawful, arbitrary, and capricious imposition of a $1.8 million fine for a harmless administrative oversight in contravention of its long-standing precedent and contrary to the Board's legal authority. On April 21, 2023, the Board assessed against Enterprise Products Operating LLC ("Enterprise") a $1.8 million penalty – the largest in reported Board history – for what amounts to administrative errors on both the parts of the Board and Enterprise and which was outside the Board's legal authority. *See In re Enterprise Products Operating,* Order Assessing Civil Penalties and Denying Confidentiality, Dkt. No. SPU-2023-0002, *LLC*, 2023 WL 3093945 ("Order"). The penalty assessed by the Board was **NINE TIMES** the penalty allowed by law, NINE TIMES the maximum penalty the Board put Enterprise on notice of being subject to, and far more than any penalty ever levied by the Board for a permitting error.

This is a classic example of abusive governmental action that threatens the balance of public and private interests in contravention of the law and blatantly violates Enterprise's due process rights. Due to the Board's prejudicial and disparate treatment, Enterprise was denied the opportunity to correct, which is offered to other utility operators in the state to correct the same type of violation without penalty or the imposition of unlawful financial penalties. The Board's Order must be reversed.

STATEMENT OF THE CASE

A. Enterprise has a long history of safely providing critical fuel to Iowa.

Enterprise operates a pipeline delivering propane products to end-user consumers for home heating, agricultural, and industrial purposes within Iowa. Iowans rely on Enterprise to provide this vital public service, as is recognized by the governor annually and supported and encouraged by public officials. *See*, *e.g.,* Gubernatorial Proclamation Regarding Easing Propane Transportation (Gov. Kim Reynolds, signed January 6, 2023).

The interstate pipeline at issue in this case, approximately 750 miles of which is in Iowa, is classified by the state as a hazardous liquid pipeline that is subject to regulation by the Board in addition to federal regulation as an interstate pipeline by the Pipeline and Hazardous Materials Safety Administration ("PHMSA") and the Federal Energy Regulatory Commission ("FERC"). The pipeline was primarily constructed and installed in the 1960s by predecessor owners unaffiliated with

Enterprise. *See* IUB Hr'g Transcript, at p. 8, ¶¶ 2-10 (March 22, 2023). In 1961, MAPCO, who owned the pipeline then, acquired the necessary permits under the then-governing Iowa Code § 479. The pipeline has continuously operated since its construction and supplies Iowans with propane. Iowans have come to rely on this pipeline to meet their heating and farming needs. As an interstate hazardous liquid pipeline, regulation of the safety and operation of the pipeline is exclusively vested in federal regulatory agencies. *See Kinley Corp. v. Iowa Utilities Board*, 999 F.2d 354, 358 (8th Cir. 1993). The HLPSA contains the following express preemption provision: "**No State agency** may adopt or continue in force any safety standards applicable to **interstate pipeline** facilities or the transportation of hazardous liquids associated with such facilities." 49 U.S.C.App. § 2002(d) (emphasis added) Congress has expressly stated its intent to preempt the states from regulating safety in connection with interstate hazardous liquid pipelines.

During most of the time MAPCO owned and operated the pipeline, the state regulated the construction and maintenance of hazardous liquid pipelines under the permitting scheme codified under Iowa Code § 479. In the 1990s, the Board's authority over such **interstate** pipelines was invalidated on federal preemption grounds. Iowa's previous pipeline safety regulations/rules and performance and enforcement programs over interstate lines were nullified. *See Kinley*, 999 F.2d at 360. Subsequently, the Iowa Legislature enacted the current version of Iowa Code §

479B on May 26, 1995. This legislation recognized the Board's limited authority over state regulation of **interstate** facilities. As a result of *Kinley*, the current permitting scheme outlined in Chapter 479B is narrowly limited to informational purposes and imposes no safety or inspection duties on permittees after construction, merely requiring permittees to submit routine maintenance and land restoration plans.

Soon after the state law was changed in 1997, MAPCO was purchased by Williams Natural Gas Liquids, Ltd., which held the pipeline as one of its subsidiaries, Mid-American Pipeline Company, LLC ("MAPL"). In July of 2002, Enterprise acquired MAPL, which made Enterprise the owner of this pipeline. When Enterprise acquired the pipeline, Williams and MAPL made representations and warranties to Enterprise that all proper and complete permits were in place for the operation of the pipeline. *See* IUB Hr'g Transcript, at pp. 19-20, ¶¶ 17-6 and pp. 7-8, ¶¶ 19-22 (March 22, 2023). Enterprise wholly and justifiably relied on the representation and warranties of Williams and MAPL that the proper permits were in place at the time of purchasing the pipeline. *See* IUB Hr'g Transcript, at pp. 19-20 ¶¶ 17-6 (March 22, 2023). And, until February of 2023, the Board did nothing to disavow Enterprise of that reliance.

B. The Board eschewed its usual practice and the law to arbitrarily and capriciously impose a punitive fine on Enterprise without due process.

On February 26, 2023, the Board issued its first notice to Enterprise of non-compliance with Iowa Code § 479B in the form of the Order Requiring Response and Setting Show Cause Hearing to Enterprise ("Show Cause Order"). *See In re Enterprise Products Operating, LLC*, Order Requiring Response and Setting Show Cause Hearing, Dkt. No. SPU-2023-0002, at p. 1 (Iowa U.B. February 6, 2023). Before this date, Enterprise was not aware, informed, or notified of a deficiency in its state permitting status as a hazardous liquid pipeline operating in Iowa. *See In re Enterprise Products Operating, LLC*, Dkt. No. SUP-2023-0002, 2023 WL 3093945 (Iowa U.B. April 21, 2023); *See also* IUB Hr'g Transcript, at p. 7, ¶¶ 2-13 and p. 9, ¶¶ 21-25 (March 22, 2023). Enterprise reasonably believed its interstate pipeline was subject only to federal regulation, as in the other twenty-seven states in which Enterprise has interstate assets.[1] Further, none of the previous pipeline owners were ever notified, informed, cited, or fined for violating the state's hazardous liquid pipeline permitting requirements. **In the more than 20 years Enterprise has owned and operated the pipeline, Enterprise has not been notified of any permit compliance issues for the pipeline until this action was commenced.** *See In re*

[1] Enterprise files a permit in Texas for its interstate assets but only as a courtesy filing since it is not required.

Enterprise Products Operating, LLC, Dkt. No. SPU-2023-0002, 2023 WL 3093945 at *1 (Iowa U.B. June 9, 2023).

In contravention of its usual practice of giving pipeline and utility owners multiple notifications and opportunities to achieve compliance with Iowa Code § 479B, the Board issued only the Show Cause Order, giving Enterprise less time and less notice than it gave similar companies for egregious, knowing violations of the same statute. Although the Board has been less than forthcoming about the genesis of the Show Cause Order, it seems that at some point in 2023, the Board began an investigation of pipelines located in Iowa. Then, for the first time since 1995, it determined approximately 750 miles of hazardous liquid pipeline in Iowa were owned and operated by Enterprise and required to be permitted under Iowa Code § 479B.[2]

[2] The Board was aware of the existence of the entirety of Enterprise's pipeline asset at issue and the related permits obtained by its predecessor in Docket Nos. P-0453, P-0454, P-0477, P-0502, P-0527, P-0531, P-0572, P-0610, and P-0735. MAPCO acquired the requisite permits to construct, maintain, and operate under Iowa Code § 479's permitting scheme. Since 1961, the Board issued initial permits and permit renewals to MAPCO over a period of years and across those agency dockets. *See* the Board's Answer to Enterprise's Petition for Judicial Review (summarizing its permitting history of permits issued to MAPCO). The Board's Order Assessing Civil Penalties and Denying Confidentiality states that MAPCO's renewal permits were in effect under the prior statute for a period of twenty-five years and were not set to expire until March 1, 2011, March 16, 2011, June 22, 2011, June 22, 2012, June 24, 2013, June 28, 2013, July 12, 2015, July 1, 2016, and June 28, 1998. *See In re Enterprise Products Operating, LLC*, Dkt. No. SPU-2023-0002, 2023 WL 3093945 (Iowa U.B. Apr. 21, 2023).

Enterprise's predecessor, MAPCO, followed Iowa's codes until the state changed the state agency's jurisdiction over pipelines. MAPCO met all permitting requirements under Iowa Code § 479 but did not re-apply after the Eighth Circuit's decision to strike down the statute and Iowa's adoption of the new code chapter, Iowa Code § 479B. *See Kinley Corp. v. Iowa Utilities Board*, 999 F.2d 354, 358 (8th Cir. 1993). **The Board did not attempt to bring MAPCO into compliance**.

The Board stated in the Show Cause Order that such resulted from the Board's research into identifying the pipeline as noncompliant with the Iowa pipeline permitting requirements. The Board's Show Cause Order set forth the entirety of its communications with Enterprise regarding permitting issues with hazardous liquid pipelines allegedly owned and operated by Enterprise in Iowa:

- **Letter** dated February 14, 2022, addressed to Quantum Pipeline Company regarding the renewal of Quantum's Permit No. N0029, which was set to expire on May 19, 2023. **This letter did not mention the subject pipeline, its predecessor owners MAPL, Williams, or MAPCO, the pipeline's current owner Enterprise, or the relevant Iowa permitting statute.** Enterprise's internal records searches indicate Enterprise never received the said letter, and even if Enterprise did, it would have been facially irrelevant to Enterprise because it

appears to make no mention of the Enterprise pipeline, its predecessor owners, or the Iowa permitting statute.

- **Notice** dated October 5, 2022, received by Enterprise's regulatory compliance group through the Board's Record Center's Notice of Electronic Filing No. HLP-1997-0002 showing a filing was uploaded into the Board's docket. The filing was labeled a "Second Renewal Notification Letter" dated October 4, 2022, and addressed to **Ronald H. Yocum, President of Quantum Pipeline Company.** This Second Renewal Notification Letter described the need to renew Permit No. N0029. A Pipeline Compliance Specialist at Enterprise questioned why Enterprise was copied on the Record Center's email as it was not a docket number with which Enterprise was familiar. The letter was addressed to Quantum Pipeline Company, **not Enterprise**, regarding a pipeline **not owned by Enterprise**. As a result, Enterprise had no reason to interpret the Notice of Electronic Filing as putting Enterprise on notice of any compliance irregularities for its Iowa assets.
- **Email** correspondence to Enterprise on October 10, 2022, from the Board with a "corrected letter" attached regarding the impending expiration of Quantum Pipeline Company's Permit No. N0029. The only "correction" to the Board's letter was a replacement of who the

letter was addressed to; in other words, a switch in the company name from Quantum Pipeline Company to Enterprise. The remainder of the letter's content remained the same. Like the February 14, 2022, letter and the October 5, 2022, letter, the October 10, 2022, letter **did not refer to the Enterprise pipeline, its predecessor owners, nor the Iowa permitting statute.**

- **Letter** dated November 28, 2022, from Enterprise to the Board indicating **Enterprise did not own, had never owned, nor had any affiliation with the pipeline** permitted by Permit No. N0029 — the pipeline associated with Quantum Pipeline Company.

None of the 2022 communications from the Board mentioned the Enterprise pipeline or the permitting statute. None of the 2022 communications suggested any Enterprise assets violated any permitting statute, nor did they describe the statute or the requirements for putting Enterprise on notice of its non-compliance. **Enterprise received no other communications from the Board until it received the Show Cause Order regarding the pipeline.** The Show Cause Order states the 2022 communications were the extent of the Board's communication with Enterprise regarding pipeline permitting before the issuance of the Show Cause Order and states the Show Cause Order was the first notice regarding the Enterprise pipeline. *See In re Enterprise Products Operating, LLC*, Order Requiring Response and Setting

Show Cause Hearing, Dkt. No. SPU-2023-0002, at p. 1 (Iowa U.B. February 6, 2023).

Upon receiving the Show Cause Order, Enterprise took diligent and good-faith steps to submit the paperwork to correct the permit issue. *See* IUB Hr'g Transcript, at pp. 21-22, ¶¶ 15-1 (March 22, 2023). Despite Enterprise's prompt, diligent, and costly efforts to comply with the state permitting rules, the Board elected to impose what it described as the "maximum civil penalty against Enterprise." *In re Enterprise Products Operating, LLC*, 2023 WL 3093945, at *6. The Board elected to impose the maximum civil penalty against Enterprise nine times for a single permit violation. *See id*. The Board claimed the penalty could be imposed on Enterprise nine times because, before 1995, the singular pipeline had previously been permitted in nine separate dockets. However, when Enterprise applied to the Board for a permit on March 17, 2023, the day of the show cause hearing, Enterprise submitted approval for one permit, not nine permits, as the pipeline is operated as a single asset in Enterprise's system.

During the proceedings held at the administrative level, Enterprise contested the civil penalty through a Motion for Rehearing and Reconsider Order Assessing Civil Penalties and Denying Confidentiality ("Motion to Reconsider"). That motion was timely filed on May 11, 2023, as required by Iowa Code § 17A.16(2). Enterprise

has exhausted its administrative remedies. *See* Iowa Code § 17A.19(1). Enterprise now requests judicial review under Iowa Code § 17A.19(3).

SUMMARY OF THE ARGUMENT

This case is about the unfair, inconsistent, unconstitutional, unreasonable, arbitrary, and capricious decision by the Board to impose a $1.8 million fine on Enterprise for a benign administrative oversight Enterprise has been diligently correcting since the Board notified it of its non-compliance. The penalty imposed by the Board was an abuse of the Board's discretion given the circumstances of the violation and is disproportionate to the public interest.[3] The Board failed to consider the facts and issued a ruling in contravention of the regulations it is charged with implementing, which is inconsistent with the Board's application of the same regulations to similar companies for similar violations. There are no facts or evidence supporting the fine imposed by the Board. The circumstances of the Enterprise violation do not support a maximum fine and certainly do not expand the Board's authority to rewrite the statute to impose nine times the statutory maximum.

Further, the Board's rogue action against Enterprise violates its Due Process and Equal Protection rights under the Iowa Constitution. Enterprise's compliance violation resulted from what some may consider a perfect storm – the Board's

[3] As described above, the Iowa permit has nothing to do with the safety or regulation of hazardous materials.

inaccurate record keeping combined with inaccurate representations and warranties of Enterprise's predecessor owner. Due to the Board's prejudicial and disparate treatment, Enterprise was denied the opportunity offered to other utility operators in the state to correct the same type of violation before the imposition of unlawfully excessive financial penalties. The opportunity to develop the factual record was denied in this case. The Iowa Constitution demands equal treatment by the officials wielding the power to impose financial hardship on the utility providers to Iowans.

Enterprise is entitled to temporary and permanent injunctive relief concerning the infliction of an unlawful civil penalty assessed by the Board. This civil penalty will irreparably harm Enterprise, and it will be unable to recover any of its funds in the likely situation where Enterprise is successful in this challenge. In contrast, neither the Board nor the public will be harmed by an injunction because nothing about their position will change. Enterprise has been operating its pipeline safely and in compliance with all federal regulatory requirements and will continue to operate the line safely while finalizing and maintaining state permitting compliance.

The Board's assessment of a civil penalty of $1.8 million – 9 times the statutory cap – violates the Board's authority. Furthermore, the Board incorrectly interpreted the relevant statute to increase the fine amount drastically. Compellingly, the **fine far exceeded** the amount of any penalty ever assessed by the Board against any similarly situated companies in similar circumstances. Moreover, Enterprise's

Due Process Rights and Equal Protection Rights have been violated by the Board through its failure to give equal notice and opportunity to correct the violation and be heard that it gave other pipeline companies, as well as its discriminatory treatment of Enterprise in comparison to other companies who have been subject to statutory penalties.

ARGUMENT

This action is brought under the Iowa Administrative Procedures Act. The district court functions in an appellate capacity to correct legal errors by the agency. *See* Iowa Code § 17A.19(10); *Kohlhaas v. Hog Slat, Inc*., 777 N.W.2d 387, 390 (Iowa 2009). The district court shall reverse, modify, or grant other appropriate relief from an agency decision if it determines the substantial rights of the entity seeking judicial relief have been prejudiced under Iowa Code §§ 17A.19(10)
(a)-(m) (listing grounds under which a party's substantial rights may be prejudiced).

Enterprise seeks temporary and permanent injunctive relief concerning the infliction of a **colossal** civil penalty by the Board. This court has the power to grant an injunction as an independent action or as an auxiliary remedy in any action. *See* Iowa Rule Civ. P. 1.1501. The court may grant the injunction as part of the judgment or at any prior stage of the proceedings as a temporary injunction. *See id*. A temporary injunction is proper when the petition or affidavit demonstrates the plaintiff's entitlement to relief from an act greatly injuring the plaintiff. *See* Iowa

Rule Civ. P. 1.1502(1). Imposing an impermissible and likely unrecoverable civil penalty causes great injury to Enterprise and any other entity subject to such unlawful exaction.

The Board ordered Enterprise to pay an unlawful civil penalty of $1.8 million within 30 days of the date of its Order. *See In re Enterprise Products Operating,* Order Assessing Civil Penalties and Denying Confidentiality, Dkt. No. SPU-2023-0002, *LLC*, 2023 WL 3093945, at *6. *See also In re Enterprise Products Operating, LLC*, Order Denying Motion for Rehearing and Reconsideration, Dkt. No. SPU-2023-0002, at p. 11 (Iowa U.B. Jun. 9, 2023). If collected by the Board, these funds will be distributed to the Iowa Department of Human Rights for a low-income home energy assistance program and the weatherization assistance program. *See* Iowa Code § 479B.21(1). The funds will be gone once they have been paid to the department. Those funds will have been fully distributed, and Enterprise will have no other legal remedy. Injunctive relief is necessary and serves as the only remedy for Enterprise. Impermissible exaction and financial loss constitute irreparable harm with no other remedy or recourse.

The Board will suffer no harm if injunctive relief is granted. The Board will gain no funds regardless of whether Enterprise pays the fine, pays the fine later, or pays no fine. The Board will be in the same position regardless of whether injunctive relief is granted. Further, these funds, being punitive, are not expected or included

in any public budget. They are merely extra funds. The absence of unexpected funds from the coffers of the state cannot cause harm to any state entity.

Similarly, the public will not be harmed if an injunction is granted. While proper permits are essential for a pipeline company, no injury has resulted from the lapse. Enterprise has maintained and continues to maintain all necessary permits from PHMSA and FERC, which govern the operation of this interstate line. Further, Enterprise immediately took steps to remedy the permitting oversight upon being put on notice by this action. The risk to the public will not increase or decrease if an injunction is granted, nor will it increase or decrease if the fine is collected against Enterprise. Accordingly, injunctive relief is appropriate and warranted in this case.

I. The Iowa Utilities Board was Acting Beyond its Authority When it Imposed a $1.8 Million Fine on Enterprise Products Operating LLC, as the Statutory Maximum is $200,000.

The court shall reverse, modify, or grant other appropriate relief from an agency action if the action is beyond the authority delegated to the agency. *See* Iowa Code § 17A.19(10)(b). The maximum civil penalty the Board may levy is $200,000 for any related violations. Iowa Code § 479B.21(1) states that:

> A person who violates this chapter or any rule or Order issued pursuant to this chapter shall be subject to a civil penalty levied by the board in an amount not to exceed one thousand dollars per each violation. Each day that the violation continues shall constitute a separate offense. However, the maximum civil penalty shall not exceed two hundred thousand dollars for any related series of violations.

The Board may issue a civil penalty of up to $1,000 per day per violation, not to exceed $200,000. *See id.* The Board has no authority to issue a penalty of nine times the statutory maximum for one ongoing violation of the permitting laws. *See id*. That interpretation is contrary to the wording of the statute. *See id*. Through its predecessors, Enterprise unintentionally failed to secure one permit for **one** pipeline. There is no basis to fine Enterprise nine times what the statute allows.

The Board's strategy for multiplying the maximum lawful penalty by nine was that the pipeline was previously permitted as nine separate dockets. That is not now the case. Further, the code explicitly limits the total maximum civil penalty to $200,000 for "any related series of violations." *See id*. Even if the Board were to successfully claim nine separate violations by this single pipeline, the statutory language is clear: the penalty cannot exceed $200,000 for the related violations. *See, e.g., Wendling Quarries, Inc. v. Prop. Assessment Appeals Bd.,* 865 N.W.2d 635,641 (Iowa Ct. App. 2015) (plain meaning of words in a statute govern interpretation). The Board is outside the statute's scope and is acting well beyond its authority in issuing an unlawful, unsupported, and punitive penalty for one violation that was essentially a communication and paperwork error resulting in no harm to anyone or anything. Therefore, the decision of the Board should be reversed.

II. The Iowa Utilities Board's Interpretation of Iowa Code § 479B.21(1) is an Erroneous Interpretation not Supported by the Language of the Statute.

The court shall reverse, modify, or grant other appropriate relief from an agency's action if the action is based on an erroneous interpretation of a provision of law. *See* Iowa Code § 17A.19(10)(c). The Board's contention the pipeline should be subject to a fine of nine times the statutory maximum, is contrary to the statute on its face. The Board is attempting to subvert the clear wording of the statute and impose sanctions beyond the maximum allowed by law. The Board's interpretation of Iowa Code § 479B.21 cannot stand based on the language in the statute and should be reversed.

The maximum civil penalty the Board may levy is $200,000 for any related series of violations. *See* Iowa Code § 479B.21 (emphasis added). Courts have previously held a series to mean "a group of (usually) three or more things or events standing or succeeding in order and having a like relationship to each other." *See State v. Amsden*, 300 N.W.2d 882, 885 (Iowa 1981) (citing and quoting Webster's Third New Int'l Dictionary 2073 (1976)). Even if this court were to agree with the Board's mistaken contention there were nine separate violations, the statute still would not allow the multiplication of maximum penalty to be imposed on Enterprise for the related series of violations. Even if the court determined Enterprise committed multiple violations, the violations would be a distinctly related series, subject to a maximum penalty of $200,000.

The Board is not within the scope of its authority to create nine separate violations based on the singular failure of Enterprise's predecessors to secure one permit for its one pipeline system. Additionally, Iowa Code §§ 17A.19(11)(a)-(b) states,

> In making determinations, the court shall not give any deference to the view of the agency with respect to whether particular matters have been vested by a provision of law in the discretion of the agency…. [and] [s]hall not give any deference to the view of the agency with respect to particular matters that have not been vested by a provision of law in the discretion of the agency.

The Board is not afforded any deference for interpreting its administrative rules. *See id*; *See, e.g.*, *S.Z. Enterprise, LLC v. I.A. Utils. Bd*., 850 N.W.2d 441, 450-51 (Iowa 2014); *NextEra Energy Resources, LLC v. I.A. Utils. Bd.*, 815 N.W.2d 30, 37-28 (Iowa 2012). The Board has incorrectly applied the law based on an interpretation contrary to the applicable statutory language. Therefore, the court must reverse the agency's action.

III. The Iowa Utilities Board's Ruling was Arbitrary and Capricious.

The court shall reverse, modify, or grant other appropriate relief from an agency action if the decision was unreasonable, arbitrary, capricious, or an abuse of discretion. *See* Iowa Code § 17A.19(10)(n). An agency's action is "arbitrary" or "capricious" when the agency acts "without regard to the law or facts of the case." *Dico, Inc. v. Iowa Employment Appeal Bd.*, 576 N.W.2d 352, 355 (Iowa 1998)

(citation omitted). "An agency action is 'unreasonable' when it is 'clearly against reason and evidence.'" *Soo Line R.R. v. Iowa Dep't of Transp.*, 521 N.W.2d 685, 688-89 (Iowa 1994) (quoting *Frank v. Iowa Dep't of Transp.*, 386 N.W.2d 86, 87 (Iowa 1986)). "An abuse of discretion occurs when the agency action 'rests on grounds or reasons clearly untenable or unreasonable.'" *Dico*, 576 N.W.2d at 355 (quoting *Schoenfeld v. FDL Foods, Inc.*, 560 N.W.2d 595, 598 (Iowa 1997)). Abuse of discretion is synonymous with unreasonableness, involving a lack of rationality and focusing on whether the agency has decided against reason and evidence. *Id.* Concerning agency actions, "[a]n agency's failure to conform to its prior decisions, or furnish sufficient reasoning from which to distinguish them, may give rise to a reversal under [Chapter 17A]." *Anthon-OTO Comm. Sch. Dist. v. Pub. Empl. Relations Bd.*, 404 N.W.2d 140, 143 (Iowa 1987). There is no more egregious failure to conform to prior decisions or furnish sufficient reasoning to distinguish them than the case at hand.

Here, the Board was charged with evaluating violations of Iowa Code § 479B based on certain enumerated factors. Iowa Code 479B.21(2). Applying these factors differently to Enterprise than the many other companies that have violated the statute renders the Board's action unreasonable, arbitrary, capricious, and abused discretion. Violations of Iowa Code § 479B.21 do not mandate financial penalties. Iowa Code § 479B.21(2). The Board may use its discretion to decline to impose fines, as it

frequently does. When determining the amount of a penalty to impose, the Board shall consider "the appropriateness of the penalty to the size of the pipeline company charged, the gravity of the violation, and the good faith of the person charged in attempting to achieve compliance, after notification of a violation…." Iowa Code 479B.21(2). The Board failed to apply these factors to Enterprise in the same manner it has applied them to other similarly situated entities.

Enterprise does not dispute the permit(s) in question were out of date. *See In re Enterprise Products Operating, LLC*, 2023 WL 3093945, at *5. But when weighing the "gravity of the violation" under Iowa Code § 479B.21(2), the Board failed to consider the following:

a) There is no evidence in the record Enterprise did not obtain a permit out of deliberate indifference to the authority of the State of Iowa, with any intent to evade the law for operational or financial reasons, or Enterprise inappropriately gained undue benefit from not being adequately permitted during the time in question.

b) When the permit was not in place, Enterprise was still subject to federal-level inspections and regulations, and upon information and belief, Enterprise never took any operational measures resulting in damage or undue risk to life or property in its service areas. *See* IUB Hr'g Transcript, at p. 13, ¶¶ 15-20 (March 22, 2023). The "violation" in question was not rooted in

corporate misconduct. Enterprise had no financial benefit from not having the permit. In other words, Enterprise did not avoid permit or registration fees, as there were none. Enterprise justifiably relied on the representations and warranties of the previous owner of the pipeline that all permits were appropriately in place and would continue to be so. *See* IUB Hr'g Transcript, pp. 19-20, ¶¶ 20-6 (March 22, 2023). This fact negates any reasonable inference of possible deliberate wrongdoing on the part of Enterprise that would warrant the imposition of a statutory maximum penalty.

The civil penalty imposed on Enterprise for a paperwork error was grossly disproportionate to the alleged offense, considering the Board's treatment of similar violations by other entities. In the Annual Reports from the Iowa Utilities Board from 1981 through the present, the most significant penalty assessed to an entity was only $350,000 or 1/5th the amount levied against Enterprise. *See OCA v. Ultimate Medium*, Dkt. No. FCU-07-05 (Iowa U.B. Sep. 4, 2007). In that matter, a telecommunications company was penalized significantly less for illegally charging consumers for services that were not ordered, authorized, or received, or changing a customer's service without permission, an unlawful scheme known as slamming and cramming. *See id*. The $1.8 million civil penalty levied against Enterprise appears to be the largest ever imposed by the Board against a regulated entity.

Comparable entities have not been fined the statutory maximum and certainly not a multiple of the statutory maximum for similar offenses. *See*, *e.g., In re Ames Municipal Elec. Sys.*, Dkt. Nos. E-22515 and E-22516 (Iowa U.B. April 26, 2023) (assessing a singular $7,000 civil penalty against the regulated utility for its failure to renew a permit for eight years, despite the fact the penalty could be higher than imposed); *In re City of Kimballton*, Dkt. Nos. E-22511 and E-225-12 (April 21, 2023) (assessing only a $1,224 civil penalty across two independent dockets for six-year permit violations); *In re Algona Municipal Utils.*, Dkt. No. E-22527 (Iowa U.B. April 13, 2023) (assessing only a $6,000 penalty for a permit violation lasting six years); *In re ITC Midwest, LLC,* Dkt. E-21261 (Iowa U.B. February 3, 2019) (assessing a civil penalty of $1,000); *In re Interstate Power & Light Co.*, Dkt. No. E-21686 (Iowa U.B. February 1, 2022) (cancelling show cause hearing and assessing a civil penalty of $1,000.00); *In re Black Hills/Iowa Gas Utility Co.*, *LLC*, Dkt. No. P-0872 (Iowa U.B. August 9, 2010) (assessing a penalty of only $500.00); *In re Corn Belt Power Cooperative*, Dkt. No. E-21519 (Iowa U.B. August 29, 2003) (cancelling a show cause hearing for alleged regulatory violations and assessing a civil penalty of only $300.00); *In re Corn Belt Power Cooperative*, Dkt No. E-21570 (Iowa U.B. February 1. 2002) (cancelling a show cause hearing for alleged regulatory violations and assessing a civil penalty of only $600.00).

Perhaps most stark is the Magellan renewal proceeding. In the docket for *In re Magellan Midstream Partners, L.P.*, Dkt. Nos. HLP-1996-0002 through HLP-1996-0013 (Iowa U.B. November 10, 2022), a comparable hazardous liquid pipeline subject to the Board's regulatory authority was granted an extension of time to provide updated petitions and petition exhibits, was given a reprieve for being delinquent and unresponsive on providing documents after being notified by Board staff of deficiencies in their paperwork filings, and given the chance to hold a status conference — as opposed to a show cause hearing — for failing to respond to Board staff requests and filing sufficient information for renewal of required permits in ***13 separate dockets***. Further, the Board did not issue civil penalties against Magellan. *See In re Magellan Midstream Partners, L.P.*, 2022 WL 16963734, at *1 (Iowa U.B. November 10, 2022).

Similarly, in Board Docket No. HLP-1996-0015, B.P. Pipeline was given notice on December 7, 2021, that its hazardous liquid pipeline permit would expire on March 19, 2022, and it needed to re-apply no later than that date. *See* Renewal Notification Letter, *In re B.P. Pipelines (North America) Inc.*, Dkt. No. HLP-1996-0015 (Iowa U.B. Dec. 7, 2021). Then, again, on October 6, 2022, B.P. Pipeline was notified it had not responded to the notice or submitted its application for renewal of its expired permit, and it may be subject to penalties if it did not achieve compliance. *See* Notice Letter, *In re B.P. Pipelines (North America) Inc.*, Dkt. No. HLP-1996-

0015 (Iowa U.B. October 6, 2022). B.P. Pipeline again did not respond to the Board's letter. On January 24, 2023, the Board again notified B.P. Pipeline that the Board still had not received an application for a renewal permit and that B.P. Pipeline would be subject to penalties if it did not comply. *See* Second Notification Letter, *In re B.P. Pipelines (North America) Inc.*, Dkt. No. HLP-1996-0015 (Iowa U.B. Ja. 23, 2023) and Order Requiring Filings, *In re B.P. Pipelines (North America) Inc.*, Dkt. No. HLP-1996-0015 (Iowa U.B. Jan. 24, 2023). Again, B.P. Pipeline did not respond to the notification. It was not until August 15, 2023, after three notification letters, the Board issued to B.P. Pipeline an Order Requiring Response and Setting Show Cause Hearing, two years after the company first received notice and setting the hearing for October 26, 2023, two and a half months after issuance of the Order. *See* Order Requiring Response and Setting Show Cause Hearing, *In re B.P. Pipelines (North America) Inc.*, Dkt. No. HLP-1996-0015 (Iowa U.B. August 15, 2023). The Board held the hearing as scheduled on October 26, 2023, at which time counsel for B.P. Pipeline stated he did not know why the company failed to respond and asked for more time to comply. *See* Appearance, *In re B.P. Pipelines (North America) Inc.*, Dkt. No. HLP-1996-0015 (Iowa U.B. October 26, 2023). The Board responded by giving B.P. Pipeline another 30 days to get its application filed. *See* Transcripts and Exhibits from Hearing Held October 26, 2023, *In re B.P. Pipelines (North America) Inc.*, p. 7, ln. 17 - p. 8 ln. 2, Dkt. No. HLP-1996-0015 (Iowa U.B. October 26, 2023).

The Board issued no penalties despite B.P. Pipeline ignoring multiple notifications about its lack of compliance.

In addition, on the same day Enterprise was issued a $1.8 million civil penalty for a single violation, a different pipeline company was fined $200,000 for a similar violation under the same statute even though it knowingly violated the regulation for almost a year. *See In re Sinclair Transp. Co.*, Dkt. No. SPU-2023-003, 2023 WL 3093966 at *4-5 (Iowa U.B. Apr. 21, 2023). The Board's history of assessing no or nominal civil penalties for knowing and long-lasting violations of the same statute involved in this case renders the multiplied penalty assessed against Enterprise for an unintentional and unknowing administrative oversight unreasonable, arbitrary, capricious, and an abuse of discretion. The court should reverse this civil penalty or modify the civil penalty imposed by the Board as required by law.

For another example, in the matter of *In re NuStar Pipeline Operating Partnership, L.P.*, Dkt. Nos. HLP-1996-0020 and HLP-1996-0021, 2012 WL 3889161, at *1-2 (Iowa U.B. August 5, 2015), the Board admonished a hazardous liquid pipeline company for not timely notifying the Board about a corporate name change for six years. While the Board found a violation of the governing statute and issued a stern warning to the pipeline company, it did not assess a civil penalty; instead, it stated that only any future violations "***may*** result in the assessment of civil penalties pursuant to Iowa Code § 479B.21." *Id*. at *2 (emphasis added). The Board

has opted not to impose civil penalties on utilities out of compliance in other situations. *See, e.g.*, *In re N.E. Missouri Elec. Power Cooperative*, Dkt. E-21922 (Iowa U.B. January 15, 2009) (terminating inquiry without penalty); *In re Dairyland Power Cooperative*, Dkt. No. E-21906 (Iowa U.B. April 7, 2009) (closing inquiry on alleged violations with no penalty).

Concerning weighing the size-of-the-pipeline-company-charged element of the Iowa Code § 479B.21 analysis, this should be given light consideration. Enterprise is indeed a company of considerable value, but such is the reality of any company that operates a pipeline. Pipeline companies are not mom-and-pop start-ups — they require significant investor stakeholders and capital to operate. In other words, when considering the size of the pipeline company subject to potential civil penalties, it must be understood ***every single pipeline company will be significant***. Low-capitalized entities cannot competitively or profitably engage in the pipeline market in Iowa or elsewhere. Put simply, every pipeline company in active operation will be of considerable financial "size."

The Board, in its Order, unnecessarily made a point to describe Enterprise as a "multi-billion-dollar company." *See In re Enterprise Products Operating, LLC*, 2023 WL 3093945, at *6. That may be so, but despite what Iowa Code § 479B.21(2) says, subjecting a party to a civil penalty based on income is unwise, prejudicial, and potentially unconstitutional. *See, e.g., Williams v. Illinois*, 399 U.S. 235, 236 (1970)

(imposing a governmental penalty based upon one's ability to pay violates equal protection and potentially due process). Not to mention, it is inconsistent with the Board's treatment of other large, well-capitalized companies. As a result, this factor should be given little, if any, weight upon assessing any penalty.

Concerning "good faith…in attempting to achieve compliance" under Iowa Code § 479B.21(2), Enterprise meets this criterion. Again, although Enterprise admittedly was out of compliance with the regulatory framework, once Enterprise was on notice to take prudent steps to come into compliance, it did so as soon as practicable, given the need to review years of records and documentation related to the pipeline. The Board acknowledged this "expeditious" action in its Order. *See In re Enterprise Products Operating, LLC*, 2023 WL 3093945, at *6. Further, Enterprise continues to cooperate with the Board in responding to the Board's requests for revisions to its submissions. Enterprise personnel have spent approximately 950 employee hours responding to the permitting process. The Board asserted in its Answer to the Petition for Judicial Review that "Enterprise remains in violation of the law as its petition is still awaiting Enterprise's further filing of exhibits and required documentation nine months later." *See* Iowa Utilities Board's Answer to Petition for Judicial Review, at p. 7, ¶40. The Board failed to include the permit renewal process, which regularly takes years because of the Board's demanding requirements and rejections of submissions multiple times before any

permit is issued. *See* Dkt. No. HLP-2022-0001 (Buckeye filed its renewal application on March 2, 2022, and no renewal permit has been issued as of this date); *see* Dkt. No. HLP-1998-0009 (OneOK filed its petition for renewal on December 13, 2022, but was not able to satisfy the Board until April 9, 2024, when the renewal permit was issued after almost two years of responding to the Board's rejections of the submitted documentation).

There is no record Enterprise sought to intentionally obstruct the Board's review of its permitting status. Yes, there were requests for the continuance of filing deadlines and a hearing, *see* Dkt. No. SPU-2023-0002 (filings of February 17, 2023, and March 9, 2023), but those requests for continuances or extensions of time were made in good faith as part of Enterprise's efforts to gather adequate documentation to provide accurate information to the Board. For other entities, the Board regularly grants such extensions. These continuance requests were not frustration tactics; they were targeted to provide the Board with accurate and complete information concerning the requested materials and information. Further, when the Board denied the request to continue the hearing on this matter, legal counsel and a representative for Enterprise fully complied and cooperatively participated in the scheduled hearing. *See* IUB Hr'g Transcript, at p. 5, 20-23 (March 22, 2023).

Moreover, Enterprise has been working with the Board and federal regulators for decades. *See* Aff. of Morton. For example, the Board has had Board regulators

inspect its **intrastate** natural gas facilities for the past fifteen years. PHMSA has inspected the interstate hazardous liquid pipeline in question for over twenty years. *See* Aff. of Morton. The history of Enterprise's cooperation with the Board and its regulators is clear.

Further, Iowa is an outlier as one of the few states in the Nation regulating **interstate** pipelines where Enterprise operates. *See* Aff. of Morton. As an operator of multiple pipelines in multiple states that follow the majority rule of non-regulation of such pipelines, Enterprise had no reason to believe it needed to obtain a state-level permit for the interstate pipeline from the Board during the period at issue. *See* Aff. of Morton. This bolsters Enterprise's position that if any violation was committed, it was done unintentionally, and subsequent compliance is done in good faith. This should have been a substantial mitigating factor examined by the Board in determining the civil penalty to impose. *See* Iowa Code § 479B.21(2).

IV. The Iowa Utilities Board's Decision Violated the Due Process Clause of the Iowa Constitution.

The court shall reverse, modify, or grant other appropriate relief from an agency's action if the decision was unconstitutional on its face or as applied. *See* Iowa Code § 17A.19(10)(a). Due process prevents the government from interfering with rights implicit in the concept of ordered liberty, and any government action resulting in the deprivation of a liberty interest must be implemented fairly. *See State v. Hernandez-Lopez*, 639 N.W.2d 226, 237 (Iowa 2002). The three factors of

a due process claim include: "(1) the private interest that will be affected by the government action; (2) the risk of the erroneous deprivation of the interest, and the probable value of additional procedures; and (3) the government interest in the regulation, including the burdens imposed by additional procedures." *See id* at 240 (citing *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976).

Enterprise's private interest in the pipeline unquestionably will be impacted by the agency's action of imposing an unlawful financial exaction on its ongoing business. The imposition of an excessive fine, nine times the statutory limit, threatens and puts Enterprise's private interest at risk. In contrast, the government's interest as weighed against the potential harm to Enterprise is not comparable. Enterprise and its predecessors have operated the pipeline without any adverse or dangerous incidents in Iowa for over sixty years. Enterprise has started the application process to rectify its lapsed permit. These factors drastically outweigh any harm sustained by the State of Iowa.

Concerning due process, it should also be noted a show cause hearing before an administrative agency is not — and cannot be — a final determination of the rights and potential penalties against a respondent. *See, e.g., Habash v. City of Salisbury*, 618 F.Supp.2d 434, 440 (D. Md. 2009) ("A show cause hearing is not a prosecution."); *Housing Auth. of City of Pasco & Franklin Cnty v. Pleasant*, 109 P.3d 422, 428 (Wash. Ct. App. 2005) ("a show cause hearing is not the final

determination of the rights of the parties…"); *Mann v. Superior Ct. of Maricopa Cnty*., 905 P.2d 595, 597-98 (Ariz. Ct. App. 1995) (holding a show cause hearing is not the same as a trial).

While an in-person hearing was held before the Board on March 17, 2023, with a representative of Enterprise present, there was no genuine full opportunity to prepare for, nor put on, evidence. Enterprise and its counsel did not anticipate the show cause hearing in March 2023 to be a dispositive proceeding – it was supposed to be a pre-dispositional proceeding only. *See* Aff. of Morton.

No sworn testimony was provided at the March 17, 2023, show cause hearing. The Board affirmatively chose not to put the Enterprise representative under oath on its own accord. *See* IUB Hr'g Transcript, at pp. 7-8, 21-1 (March 22, 2023) (Board Chairperson Huser stating that she was "not going to put [Enterprise's representative] under oath"). No proceeding schedule was issued ahead of time other than pedestrian scheduling orders. No briefing was solicited nor submitted.

A person subject to potential legal or administrative penalties is entitled to due process under the State Constitution. *See* Iowa Const., art. I, § 9. "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Silva v. Employment Appeals Board,* 547 N. W.2d 232, 234 (Iowa Ct. App. 1996) (citing *Hodges v. I.A. Dept. of Job Servs.,* 368 N.W.2d 862, 867 (Iowa Ct. App. 1985). "The central elements of due process are notice and

an opportunity to defend." *Silva*, 547 N.W.2d at 234-35 (citing *Carr v. I.A. Employment Security Comm'n*, 256 N.W.2d 211, 214 (Iowa 1977)).

In this case, the Show Cause Order did not provide adequate notice to Enterprise of the penalties to which it may be subjected. The Show Cause Order stated: "The Board may issue a civil penalty of up to $1,000 per day per violation, not to exceed $200,000." This language is wholly insufficient to put Enterprise on notice that the Board intended to levy $1.8 million in penalties and, as such, violates Enterprise's right to notice. That alone requires reversal.

Here, the hearing was set on such short notice – uncharacteristically short for the Board -- that, at the hearing, Enterprise was scrambling to locate and obtain long-ago filed historical paper records to comply with the Board's Show Cause Order. The requested documentation was not publicly available in the Board's online filing system, nor were such historical records transferred to Enterprise when Enterprise acquired the pipeline. *See* Aff. of Morton. Enterprise sought a continuance to allow time to uncover and comprehend the volumes of paperwork required by the Board for the Show Cause Order and the new permit, which, although ordinarily granted by the Board, was denied in this case. *See* Aff. of Morton. These circumstances establish Enterprise was not afforded adequate due process under the Iowa State Constitution in the proceedings of the underlying agency action. *See, e.g., Irvin v. I.A. Dist. Ct. for Jones Cnty.,* 888 N.W.2d 655, 675 (Iowa 2016) (describing due

process rights in the context of being "afforded notice of the evidence against him and an opportunity to present evidence in his own behalf…"). As such, the court should reverse the civil penalty imposed by the Board and remand for further proceedings. *See* Iowa Const., art I, § 6.

V. The Iowa Utilities Board's decision violated the Equal Protection Clause of the Iowa Constitution and was inconsistent with prior remedial actions taken by the Board.

The court shall reverse, modify, or grant other appropriate relief from an agency's action if the decision was unconstitutional on its face or as applied. *See* Iowa Code § 17A.19(10)(a). Equal protection demands laws treat all people who are similarly situated with respect to the legitimate purpose of the law. *See McQuisition v. City of Clinton*, 872 N.W.2d 817, 830 (Iowa 2015) (citing *Varnum v. Brien*, 763 N.W.2d 1, 7 (Iowa 2004). "To prove an equal protection claim, the claimant must first establish disparate treatment and then the policy reasons for the classification are scrutinized. *Id* at 879-80. Equal protection claims require an allegation of disparate treatment, not just disparate impact. *See King v. State*, 818 N.W.2d 1, 24 (Iowa 2012).

Through this brief, Enterprise has shown how other similarly situated companies have received no or significantly less harsh financial penalties under similar circumstances. *See supra* pp. 22-26. Specifically, the same regulatory authority penalized two similar utility companies for similar violations on the same

day; however, the penalties were drastically different. *Compare In re Enterprise Products Operating, LLC*, Dkt. No. SPU-2023-0002, 2023 WL 3093945 (Iowa U.B. April 21, 2023), *with, In re Sinclair Transp. Co*., Dkt. no. SPU-2023-003, 2023, WL (Iowa U.B. Apr. 21, 2023).

There is no reason why the Board arbitrarily punished Enterprise more harshly than any other utility company for a similar offense. The Board has offered no explanation or rationale for their uncharacteristic sanction against Enterprise. As such, the court should reverse or modify the civil penalty imposed by the Board and remand for further proceedings. *See* Iowa Const., art I, § 9.

CONCLUSION

An injunction is warranted and appropriate to protect Enterprise's interests during this litigation. Once Enterprise pays the funds, the funds will be gone. An injunction would not harm the Board in any way. The Board will not lose any funds or be prejudiced in any way. Additionally, the Board acted outside its authority's scope when assessing a penalty of nine times the statutory limit against Enterprise. That decision directly contradicted the language of Iowa Code § 479B.21 and was an erroneous interpretation of the statute.

Based on the review of Annual Reports from the Iowa Utilities Board and previous decisions of the Board, this statutory fine was arbitrary and capricious. No

fines of a similar size have ever been imposed on a similar entity. Additionally, the Board issued a similar ruling for a separate entity capped at the statutory $200,000 maximum on the same day.

Enterprise is entitled to Due Process and Equal Protection under the law; however, the Board has violated Enterprise's Constitutional rights by subjecting it to disparate treatment compared to its counterparts. Enterprise is entitled to notice and to be heard on this matter. The Show Cause Hearing was not adequate to satisfy Due Process. Additionally, Enterprise has shown multiple examples of unequal treatment under the law by the Board. For these reasons, Enterprise requests this court to reverse or modify the civil penalty imposed by the Board and remand for further proceedings.

WHEREFORE, Petitioner prays for judgment and relief against Respondent as follows:

a. An order granting a temporary and permanent injunction regarding the $1.8 million civil penalty imposed by the Board against Enterprise.
b. An order according to Iowa Code § 17A.19(10)(b) reversing the imposition of the $1.8 million civil penalty as being incongruent with the Board's administrative powers and exceeding the statutory penalty cap set by Iowa Code §479B.21(1).

c. An order under Iowa Code § 17A.19(10(c) and/or Iowa Code §17A.19(10)(n) voiding the imposition of the $1.8 million civil penalty as being unreasonable, arbitrary, capricious, and an abuse of the Board's discretion under the circumstances.

d. An order granting a temporary and permanent injunction against the Board restraining the Board from enforcing its imposition of the $1.8 million civil penalty against Enterprise under the Due Process Clause of the Iowa State Constitution. *See* Iowa Const., art. I, § 9.

e. An order granting a temporary and permanent injunction against the Board restraining the Board from enforcing its imposition of the $1.8 million civil penalty against Enterprise under the Equal Protection Clause of the Iowa State Constitution. *See* Iowa Const., art. I, §§ 1 and 6.

f. A waiver of any bond related to any request for temporary or permanent injunctive relief sought in this action that may otherwise be required. *See* Iowa R. Civ. P. 1.1508. *See also Stockslager v. Carroll Elec. Co-op Corp*. 528 F.2d 949, 951 (8th Cir. 1976) (determining injunction bonds rest within the trial court's sound discretion. *Accord Barahona-Gomez v. Reno*, 167 F.3d 1228, 1237 (9th Cir. 1999) (injunction bonds are not mandatory despite the language of the rules of procedure; *Moltan Co. v. Eagle-Picher Indus. Inc.*, 55 F.3d 1171, 1176 (6th Cir. 1995) (a rule of civil procedure

requiring an injunction bond does not divest a court from discretionary jurisdiction to waive it in certain circumstances); *Doctor's Associates, Inc. v. Stuart*, 85 F.3d 975, 985 (2d Cir. 1996) (same).

g. Other further relief that may be required or allowed by the law, equity, and the nature of this case.

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Respectfully Submitted,

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