**IN THE IOWA DISTRICT COURT FOR POLK COUNTY**

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| ENTERPRISE PRODUCTS OPERATING, LLC,<br><br>Petitioner,<br><br>v.<br><br>IOWA UTILITIES BOARD,<br><br>Respondent. | CASE NO. CVCV065780<br><br>**IOWA UTILITIES BOARD'S BRIEF IN RESISTANCE TO PETITION FOR JUDICIAL REVIEW** |

**COMES NOW** Respondent Iowa Utilities Board (Board), by and through its undersigned counsel, and hereby submits the above-captioned Respondent's Brief in Resistance to Petition for Judicial Review.

## I. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

A. Standard of review

Iowa Code § 17A.19(10)
*Schoenfeld v. FDL Foods, Inc.*, 560 N.W.2d 595, 598 (Iowa 1997)
*Burton v. Hilltop Care Center*, 813 N.W.2d 250, 256 (Iowa 2012)
*Sioux City Cmty. School Dist. v. Iowa Dep't of Educ.*, 659 N.W.2d 563, 566 (Iowa 1996).
Munson v. Iowa Dep't of Transp., 513 N.W.2d 722, 723 (Iowa 1994)

B. The Iowa Utilities Board was acting within its authority and the clear language of Iowa Code § 479.21 in imposing nine $200,000 penalties to Enterprise Products Operating LLC.

*Sherwin-Williams Co. V. Iowa Dep't of Revenue*, 789 N.W.2d 417, 432 (Iowa 2010)

C. The Iowa Utilities Board's application of Iowa Code § 479B.21 to the facts of this case is supported by the evidence and the law and is not arbitrary or capricious.

*Dico, Inc. v. Iowa Employment Appeal Bd*, 576 N.W.2d 352, 355 (Iowa 1998)

D. The Iowa Utilities Board's assessment of civil penalties is compliant with the due process clause of the Iowa Constitution.

*Silva v. Employment Appeals Board*, 547 N.W.2d 862, 867 (Iowa Ct. App. 1985)
*In re R.K*, 649 N.W.2d 18, 20 (Iowa Ct. App. 2002)
*Morrisey v. Brewer,* 408 U.S. 471, 481 (1972)
Iowa Code § 17A.4

E. The Iowa Utilities Board's assessment of civil penalties is compliant with the equal protection clause of the Iowa Constitution and consistent with prior remedial actions of the Board.

*McQuisition v. City of Clinton*, 872 N.W.2d 817, 830 (Iowa 2015)
NextEra Energy Res. LLC v. Iowa Utilities Bd., 815 N.W.2d 30, 44-45 (Iowa 2012).

## II. STATEMENT OF THE CASE.

### A. Nature of the Case and Parties in the Agency Proceeding.

This judicial review arises from final agency action taken by the Iowa Utilities Board ("Board") in a contested case proceeding. The underlying agency action was initiated through the issuance of an Order Requiring Response and Setting Show Cause Hearing issued to Enterprise Products Operating, LLC on February 6, 2023 in Board docket No. SPU-2023-0002 and resulted ultimately in an Order Denying Motion for Rehearing and Reconsideration issued on June 9, 2023. The Order Denying Motion for Rehearing upheld the assessment of a civil penalty in the amount of $200,000 for each of nine previously permitted facilities for which a hazardous liquid pipeline permit had not been obtained by Enterprise. Those penalties were established by Order Assessing Civil Penalties and Denying Confidentiality issued by the Board on April 21, 2023 (Order Assessing Civil Penalties).

**B. Statement of Facts**

The facts of this case are undisputed. Iowa Code § 479B.3 provides that a "pipeline company shall not construct, maintain, or operate a pipeline of underground storage facility" without first obtaining a permit issued by the Board. Enterprise violated this statute by owning, maintaining, and operating 750 miles of hazardous liquid pipelines and two underground storage facilities in Iowa since July 31, 2002 without obtaining Board-issued permits, and, as of the date of the filing of this brief, Enterprise has still not obtained Board-issued permits for this infrastructure. Iowa Code § 479B.21(1) provides that a pipeline company that violates this provision "shall be subject to a civil penalty levied by the board . . ." The sole issue presented in this appeal concerns the amount of the civil penalty.

The pipeline facilities owned by Enterprise were previously permitted by the Board in Dockets P-0453, P-0454, P-0477, P-0502, P-0527, P-0531, P-0572, P-0610, and P-0735. These permits apply to approximately 750 miles of pipelines and two underground storage facilities. Each permit had a unique issuance date, a unique expiration date, and covered specific facilities. These permits were invalidated by the decision of the United States 8th Circuit in *Kinley Corp. v. Iowa Utilities Board*, 999 F.2d 354, 368 (8th Circuit. 1993).

A new obligation to permit these facilities arose from the adoption of Iowa Code Chapter 479B which became effective July 1, 1995. No permits authorized pursuant to Iowa Code Chapter 479B have ever been issued for the hazardous liquid pipeline or storage facilities previously permitted by the Board and now owned by Enterprise. Enterprise emphasizes in their pleadings that there are not

currently nine permits. That is correct. There are none. There were no Iowa Code Chapter 479B hazardous liquid pipeline permits obtained by Enterprise in the 7,535 days, or more than 20 years, between acquisition of the facilities and the filing of a Petition for Permit on March 17, 2023, none were obtained by prior owners of the facilities, and none have been obtained since. That was the basis for this Board's action in this case.

As noted in the Petitioner's Brief, the Board undertook a systematic exercise to notify holders of HLP permits of the pending expiration and renewal requirement including notice letters, reminders, and permitting workshops. As a part of this process Quantum Pipeline Company was notified in regard to Permit No. N0029. When a reasonable belief arose that Enterprise was the owner of that permitted pipeline, notice was provided to Enterprise. The Enterprise response to the notification of the need to renew an Iowa HLP permit was a November 28, 2022 letter indicating that Enterprise did not own that specific pipeline. No information was provided to the Board in regard to HLP pipelines that Enterprise did own.

## III. STANDARD OF REVIEW

This Court's review of the Board's decision is governed by the standards set forth in Iowa Code § 17A.19. *See* Iowa Code § 17A.19(8) (stating that "in suits for judicial review of agency action . . . [t]he validity of agency action must be determined in accordance with the standards of review provided in this §, as applied to the agency action at the time that action was taken"). When reviewing an agency's interpretation of law, the level of deference afforded to the agency's decision depends "on whether the authority to interpret that law has 'clearly been

vested by a provision of law in the discretion of the agency.'" *Burton v. Hilltop Care Center*, 813 N.W.2d 250, 256 (Iowa 2012) (*quoting* Iowa Code § 17A.19(10)(c), (l)). If an agency has not been clearly vested with such authority, then the reviewing court must reverse the agency's interpretation if it is clearly erroneous. *Id.* (*citing* Iowa Code § 17A.19(10)(c)). Conversely, if the agency has been clearly vested with such authority, a reviewing court may only disturb the agency's interpretation if it is "irrational, illogical, or wholly unjustifiable." *Id.* (*citing* Iowa Code § 17A.19(10)(l)).

The initial issue before the Court is whether the Board has been clearly vested with authority to determine the appropriate civil penalty to be issued pursuant to Iowa Code § 479B.21 and the standard of review of such determination. This matter does not turn on questions of whether a permit was required, whether a permit was obtained, or how many days Enterprise operated the subject pipelines without a permit. Iowa Code § 479B.21(1) clearly provides the authority for the Board's issuance of civil penalties by mandating as follows: "[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 for each violation." (emphasis added) The issue here is simply what penalty is appropriate to the established facts. Iowa Code section 479.21(2) provides certain factors to be considered in the Board's determination:

2. A civil penalty may be compromised by the board. <u>In determining the amount of the penalty, or the amount agreed upon in compromise, 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, shall be considered.</u> The amount of the penalty, when finally determined, or the amount agreed upon in compromise, may be deducted

from any sums owed by the state to the person charged, or may be recovered in a civil action. (emphasis added)

Thus, for purposes of standard of review, the issue is not whether the Board has the statutory authority to impose a penalty but rather whether the penalty itself is so untenable or unreasonable as to constitute an abuse of discretion. *Schoenfeld v. FDL Foods, Inc.*, 560 N.W.2d 595, 598 (Iowa 1997). Clearly the Board is tasked by statute with making a subjective determination of the appropriateness and amount of a civil penalty amount based upon a weighing of the factors set forth in the statute. This assignment of responsibility for the consideration of such factors constitutes the vesting of discretion. The Board conducted such analysis as set forth in the Order Assessing Civil Penalties. Factors considered included an uncapped civil penalty amount of $67.815 million, a market capitalization of $55.9 billion, and 21 years of violation. The Board found that alleged lack of knowledge of the permit requirement was not a defense of non-compliance.

Since the application of facts to law falls within the discretionary construct of the statute, the Board's action is entitled to deference and subject to review only to determine whether such application is "the product of reasoning that is so illogical as to render it wholly irrational."" Iowa Code § 17A.19(10)(i). The reviewing court looks only to whether a reasonable person could have found sufficient evidence to come to the same conclusion as reached by the agency. *Sioux City Cmty. School Dist. v. Iowa Dep't of Educ*., 659 N.W.2d 563, 566 (Iowa 1996). Evidence is not rendered insubstantial merely because a different conclusion could have been reached; rather the question is whether the evidence supports the

conclusion actually made. *Munson v. Iowa Dep't of Transp*., 513 N.W.2d 722, 723 (Iowa 1994). Because the penalty imposed in this case was based on substantial evidence, no abuse of discretion occurred and it should be upheld.

## IV. ARGUMENT

### A. The Iowa Utilities Board was acting within its authority and the clear language of § 479B.21 in imposing nine $200,000 penalties to Enterprise Products Operating LLC.

Iowa Code § 479B.21 authorizes the issuance of civil penalties by the Board. Subsection 1 of the statute states, in part: "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."

Pursuant to the Board's discretionary authority set forth in 479B.21(2) the Board considered the size of the company, (market capitalization of $55.9 billion) the amount of the penalty that had accrued ($67.815 million), the number of prior permits (9 rather than the 20 facilities identified by Enterprise), the length of time the violations had occurred (7,535 days), and the efforts of the company to come into compliance (penalty calculation terminated upon filing of application for permit). In addition, the Board found that ignorance of the law did not warrant additional reduction below the statutory cap of $200,000 per series of violations.

The Petitioner asserts that the violations which gave rise to the penalties issued by the Board constitute a single series of related violations. There were multiple methods by which the Board could have calculated the penalties to be assessed. The method the Board chose was to relate back to the last permits for these facilities. *See Order Assessing Civil Penalties*

There were nine permits that covered the facilities. Each permit covered specific facilities, had a specific issuance date, and had a specific expiration date. But for the intervening decision in *Kinley*, each set of facilities would have been subject to the accrual of civil penalties for the lack of a permit upon expiration of the applicable permit and the remaining facilities would not be so subject due to their individual, ongoing permits. Through the enactment of Iowa Code Chapter 479B, the facilities once again became subject to permitting requirements but likely subject to differential penalty calculations due to the differing mileages, facility types, expiration dates of the former permits, and other relevant factors.

Due to ensuing ownership changes, some circumstances of the unpermitted facilities became more uniform, such as the number of days of violation, but the underlying treatment as separately and distinctly permitted facilities remained. The decision to impose penalties based upon the categorization of the former permitting regime is not irrational, illogical, or wholly unjustifiable.

In response to the Board's demand that Enterprise provide "a response detailing the location, length, diameter, product it is transporting in its pipelines…" in its order of February 6, 2023, Enterprise filed Exhibit A on March 6, 2023. In Exhibit A, Enterprise identified 20 separate facilities it is operating in Iowa. The alternative methodology of assessing 20 separate civil penalties would have been a rational, logical, and justifiable methodology for the Board to follow based upon Enterprise's own admission.

Enterprise conflates the violation type with the determination of a related series. A continuing series should apply to a facility remaining unpermitted, or could be

premised upon other continuing specific violations such as the failure to repair a damaged safety valve on one of their pipelines. Failing to repair nine separate and distinct safety valves that failed at different times in different locations cannot be a related series of violations. The question therefore to be determined is the number of facilities in continuous violation.

There are multiple methodologies that could be utilized to determine the number of facilities in violation. One method is to use the number of permits previously granted, nine. Another method would be to base the calculation on the number of facilities identified by Enterprise, 20. A third would be to identify the number of permits which will now be granted to Enterprise for these facilities. As of the drafting of this brief, that number is unknown because no permits have been issued. The Board chose the methodology of basing the civil penalties imposed on the number of permits previously issued to the specific facilities at issue and provided a rational, logical, and justifiable explanation of its methodology in its Order Assessing Civil Penalties of April 21, 2023.

Such application of the law to the facts of this case cannot be deemed "irrational, illogical, or wholly unjustifiable" pursuant to Iowa Code § 17A.19(10)(m). "A decision is irrational when it is not governed by or according to reason. A decision is illogical when it is contrary to or devoid of logic. A decision is unjustifiable when it has no foundation in fact or reason". *Sherwin-Williams Co. V. Iowa Dep't of Revenue*, 789 N.W.2d 417, 432 (Iowa 2010) (internal quotations omitted) The Board's Order Assessing Civil Penalties sets forth a clear, logical,

and rational basis for the civil penalty assessed to Enterprise and should be upheld.

**B. The Iowa Utilities Board's application of Iowa Code § 479B.21 to the facts of this case is supported by the evidence and the law and is not arbitrary or capricious.**

Enterprise asserts that the Board's imposition of civil penalties was arbitrary and capricious. 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) In fact, the Board set forth a logical and rational calculation for the penalties assessed in detailed consideration of the factors set forth in Iowa Code § 479B.21(2) including the size of the company, the number of days of violation, the number of prior permits, the filing of a petition for a permit, the number of miles of pipeline and the size of the penalty which had accrued.

In support of its assertion that the Board's penalty assessments are unreasonable, Enterprise puts forth several arguments that lack legal merit. First, Enterprise denigrates the permit requirements of Iowa Code chapter 479B by referring to them as a "paperwork error." *Petitioner's Brief at p.21.* Iowa Code § 479B.21(1) provides for the assessment of civil penalties to "A person who violates any rule or order issued pursuant to this chapter." The Board is tasked by Iowa Code § 479B.21(2) with the discretion to consider multiple factors in determining the amount of the penalty, including the gravity of the violation. In doing so the Board's determination that a failure to obtain permits for decades constitutes more than a mere "paperwork error" and the grounding of that determination in the

specific facts of the case and the factors set forth in Iowa Code § 479B.21(2) cannot be viewed as arbitrary or capricious.

The second argument asserted is that the Board has not issued similar penalty amounts. Enterprise sets forth a listing of penalties issued under different statutory authorities, for different types of violations, with much shorter periods of violation, often to different types of entities, or to entities that had voluntarily come forward and initiated permitting processes. None of those circumstances apply to Enterprise. Enterprise did not voluntarily come forward or disclose the ongoing violations. Enterprise had not previously obtained permits and was not proceeding through the permitting process. Enterprise's argument that it has somehow been treated differently or unfairly not only lacks legal merit but is factually unsound.

The first response received from Enterprise by the Board was in Docket No. HLP-1997-0002, in regard to a notification of a need to renew HLP permit No. N0029. Clearly the notification of the general need to obtain and renew hazardous liquid pipeline permits in Iowa arises from such correspondence, even if not applicable to the pipeline covered by HLP permit No. NOO29. Enterprise responded stating "Our records indicate that Enterprise does not own or operate a pipeline that matches the description outlined in Permit No. N0029." *See IUB Docket No. HLP-1997-0002* No notification of the 20 facilities that Enterprise does own and operate in Iowa was offered at that time. Next, Enterprise was provided service of notice in that docket of a technical conference covering the hazardous liquid permitting requirements, attended the technical conference on December 1, 2022, and was provided service of the materials from the technical conference that

walk through the permitting requirements and renewal process. *See IUB Docket No. HLP-1997-0002.* None of these steps led to disclosure of the Iowa facilities prior to the filing of Exhibit A, identifying 20 Enterprise facilities on March 6, 2023. *See Confidential Certified Record*, p.1-2

There is only one proceeding in which the nature of the violation is directly comparable to the facts of this case. As noted in Enterprise' Brief, on the same date that civil penalties were issued to Enterprise, the Board issued the maximum civil penalty of $200,000 to Sinclair Transportation Co. in Docket No. SPU-2023-0003. *See In re Sinclair Transp. Co., Docket No. SPU-2023-0003*. Similar to Enterprise, Sinclair had not obtained a permit for a hazardous liquid pipeline and had not come forward and disclosed the violation. That case involves an 11.8-mile pipeline (compared to approximately 750 miles of pipelines and two underground storage facilities), purchased in March of 2022 (as opposed to July 31, 2002 for Enterprise). Despite involving less than 2% of the pipeline miles, less than 5% of the days of violation, and only one prior permit; Sinclair was fined the maximum amount authorized by Iowa Code § 479B.21. This is the one similarly situated actor for which comparison is appropriate and which wholly contradicts Enterprise's allegations that it has somehow been treated differently or unfairly.

In both cases, the Board properly and logically applied the considerations set forth in Iowa Code § 479B.21(2) in assessing a civil penalty that is authorized by law. The rational basis set forth in the Order Assessing Civil penalties and the Order on Rehearing cannot be deemed "arbitrary" or "capricious" as defined by

law. Furthermore, the penalties assessed are not irrational, illogical, or wholly unjustifiable. Therefore, the penalties must be upheld.

### C. The Iowa Utilities Board's assessment of civil penalties is compliant with the due process clause of the Iowa Constitution.

Enterprise asserts that the Board's procedure and ultimate issuance of the Order Assessing Civil Penalties violated the due process requirements of the State Constitution. 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 862, 867 (Iowa Ct. App. 1985). Generally, the process that is due is flexible and requires only the "procedural protections as the particular situation demands." *In re R.K*, 649 N.W.2d 18, 20 (Iowa Ct. Appl. 2002), *citing Morrisey v. Brewer,* 408 U.S. 471, 481 (1972)

In this case, there were no adjudicative facts to be determined. As set forth in the Board's Order Requiring Response and Setting Show Cause Hearing, Enterprise owns and operates approximately 750 miles of hazardous liquid pipelines in Iowa and two underground storage facilities. Enterprise has no permits for these facilities. Iowa Code § 479B.21 authorizes civil penalties for such activities. At no time from initial filing in the underlying docket through the filing of Enterprise's Brief has there been a dispute of the underlying facts upon which the Order Assessing Civil Penalties is based. A contested case hearing is not necessary where no adjudicative facts are in dispute. *See Iowa Code § 17A.4*

Nonetheless, the Board did in fact provide Enterprise with multiple opportunities to provide an explanation of its conduct prior to the issuance of the civil penalties. Enterprise was provided the opportunity to file a written explanation prior to the

March 17, 2023 show cause hearing. Enterprise was provided notice of the authority of the Board granted by Iowa Code § 479B.21. The show cause hearing provided an additional opportunity to provide explanatory or exculpatory information. No tendered evidence was excluded and no request to testify under oath was asserted by counsel for Enterprise. Ignorance of the law was the only defense stated. Despite this, the Board considered the filing of a petition for a permit to be a good faith effort in regard to all of the Enterprise facilities in Iowa and terminated the penalty calculation on the date of such filing.

The central elements of due process are notice and an opportunity to defend. *Silva*. 547 N.W.2d *at* 234-235. It is unclear what additional process in this case was required, much less what it would have added to the record. The underlying violations, and the facts establishing those violations, are admitted. All that remained was for the Board to exercise its discretionary function of determining an appropriate penalty amount pursuant to Iowa Code § 479B.21(2). Enterprise has now raised legal arguments challenging the appropriateness of the penalty determination but no additional information has been proffered that was unavailable to the Board at the time of its assessment of penalties. No “long-ago filed historical paper records” (Enterprise Brief at p.32) have surfaced to dispute the factual findings of the Board. The issue before this Court is only whether such assessment was irrational, illogical, or wholly unjustifiable.

Enterprise was notified of the alleged violations and afforded multiple opportunities to be heard. The process provided to Enterprise, particularly in light

of the undisputed factual record, satisfied the standards of the Iowa Constitution. Since due process was not violated, the penalties should be upheld.

**D. The Iowa Utilities Board's assessment of civil penalties is compliant with the equal protection clause of the Iowa Constitution and consistent with prior remedial actions of the Board.**

Enterprise asserts that the Board's imposition of civil penalties violates the Equal Protection Clause of the Iowa Constitution. 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). 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.

As noted above, there are only two similarly situated entities that are truly comparable, Enterprise and Sinclair Transportation Co. The two companies were both in violation of Iowa Code § 479B.21, both did not come forward until prompted by show cause hearings, and both were fined the maximum civil penalty authorized by law. Any differences that can be identified argue against Enterprise. Sinclair had far fewer facility miles and far fewer days of violation. The pipeline at issue for Sinclair had been permitted as one permit in Docket No. P-0070. Sinclair now has a permit for its hazardous liquid pipeline. *See Board Docket No. HLP-2023-0001, Order Granting Permit issued 2/7.2024*

In each case, the Board set forth its rationale for the civil penalty determination in a similar manner. Enterprise relies upon examples which involve violations of other laws, by differently-situated entities such as municipal utilities or

entities that had come forward and engaged in the Board's permitting processes. Enterprise cannot establish that these entities were similarly situated, except Sinclair Transportation Co., or that there has been disparate treatment between any truly similarly situated parties. Enterprise's equal protection claim fails on this basis alone. See NextEra Energy Res. LLC v. Iowa Utilities Bd., 815 N.W.2d 30, 44-45 (Iowa 2012). The Board's assessment of civil penalties to Enterprise cannot be shown to violate the equal protection clause of the Iowa Constitution and should be upheld.

## V. CONCLUSION

As set forth above, Enterprise has failed to establish a factual or legal basis for its assertions in the Petition for Judicial Review. The Board's Order Assessing Civil Penalties and Order Denying Motion for Rehearing and Reconsideration set forth a transparent basis for the determination of the civil penalty amount which is rational, logical and justifiable in all aspects.

**WHEREFORE**, the Iowa Utilities Board respectfully requests the Court affirm the agency order under review and tax the costs of the proceeding to the Petitioner Enterprise Products Operating, LLC.

Respectfully submitted,

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