

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA**

<b>IN THE MATTER OF THE APPLICATION OF )</b>	<b>FINAL DECISION AND</b>
<b>NAVIGATOR HEARTLAND GREENWAY, LLC )</b>	<b>ORDER DENYING PERMIT</b>
<b>FOR A PERMIT UNDER THE SOUTH DAKOTA )</b>	<b>TO CONSTRUCT FACILITY;</b>
<b>ENERGY CONVERSION AND TRANSMISSION )</b>	<b>NOTICE OF ENTRY</b>
<b>FACILITIES ACT TO CONSTRUCT THE )</b>	
<b>HEARTLAND GREENWAY PIPELINE IN )</b>	
<b>SOUTH DAKOTA )</b>	<b>HP22-002</b>

**APPEARANCES**

Commissioners Kristie Fiegen, Gary Hanson, and Chris Nelson.

James E. Moore and Melanie Carpenter, Woods, Fuller, Shultz and Smith, PC, PO Box 5027, Sioux Falls, South Dakota 57117, and Sarah Dempsey, appeared on behalf of Applicant, Navigator Heartland Greenway, LLC, a company owned by Navigator CO2 Ventures LLC.

Brian E. Jorde, Domina Law Group, 2425 S. 144<sup>th</sup> St., Omaha, Nebraska 68144, and Ryan Cwach, Birmingham & Cwach Law Office, PLLC, 202 W. 2<sup>nd</sup> St., Yankton, South Dakota 57078, appeared on behalf of private landowners.

Ellie Bailey, Riter Rogers, LLP, 319 S. Coteau; PO Box 280, Pierre, South Dakota 57501, appeared on behalf of South Dakota Rural Electric Association and South Dakota Association of Rural Water Systems.

Paul M. Lewis, 310 S. Wind St., Flandreau, South Dakota 57028, appeared on behalf of Moody County.

William Taylor, Taylor Law Firm, 4820 E. 57<sup>th</sup> St., Ste B, Sioux Falls, South Dakota 57108, appeared on behalf of United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, International Union of Operating Engineers Local 49; and Laborers International Union of North America.

Alex M. Hagen, Cadwell Sanford Deibert & Garry LLP, 200 E. 10<sup>th</sup> St., Ste. 200, Sioux Falls, South Dakota 57104, appeared on behalf of Minnehaha County.

Kristen N. Edwards and Amanda Reiss, 500 E. Capitol Ave., Pierre, South Dakota 57501, appeared on behalf of the South Dakota Public Utilities Commission Staff.

**PROCEDURAL HISTORY**

On September 27, 2022, the South Dakota Public Utilities Commission (Commission) received an Application for a Permit under the South Dakota Energy Conversion and Transmission Facilities Act to Construct the Heartland Greenway Pipeline in South Dakota (Application) from Navigator Heartland Greenway, LLC, a limited liability company owned by Navigator CO2 Ventures LLC (Navigator or Applicant). Applicant proposes to design, construct, operate, and maintain a carbon dioxide (CO2) transmission pipeline in South Dakota (Project). Navigator's proposed Project is approximately 1,300 miles of pipeline for the transportation of

CO2 from more than 21 ethanol and fertilizer plants across 5 states, including 3 ethanol plants in South Dakota, that will transport captured carbon dioxide for permanent and secure underground sequestration in Illinois and/or to take-off facilities for commercial/industrial use. Navigator's proposed project consists of 112.6 miles of carbon dioxide pipeline in South Dakota that will cross the counties of Brookings, Moody, Minnehaha, Lincoln, and Turner. Specifically, Navigator's proposed project consists of three segments; 1) the Aurora to Hartley lateral that will be approximately 63.6 miles of 8-inch diameter pipeline; 2) the POET Chancellor lateral that will be approximately 22.6 miles of 6-inch pipeline; and 3) the POET Hudson lateral that will be approximately 25.7 miles of 6-inch diameter pipeline. In addition, one inline inspection tool launcher/receiver site will be constructed in Lincoln County. No pump stations are proposed in South Dakota. Applicant estimates the total cost of the proposed Project in South Dakota to be \$154 million.

The proposed route of the Aurora to Hartley lateral enters South Dakota in southeast Minnehaha County at the Iowa/South Dakota border and extends in a north/northwesterly direction, through eastern Minnehaha County and central Moody County, before entering Brookings County and terminating at the Valero ethanol plant near Aurora, South Dakota.

The proposed route of the POET Chancellor lateral enters South Dakota in northeastern Lincoln County at the Iowa/South Dakota border, extending westward and terminating in Turner County at the POET ethanol plant near Chancellor, South Dakota.

The proposed route of the POET Hudson lateral would be entirely within Lincoln County, beginning at the POET ethanol plant southwest of Hudson, South Dakota, and proceeding northwest to connect with the POET Chancellor lateral approximately 2.5 miles south of Harrisburg, South Dakota.

On September 29, 2022, Applicant filed copies of the Application with the Brookings, Lincoln, Minnehaha, Moody, and Turner County Auditors pursuant to SDCL 49-41B-5.2. On September 30, 2022, the Commission issued an Amended Notice of Application; Order for and Notice of Public Input Meetings; Notice of Opportunity to Apply for Party Status. The notice provided that pursuant to SDCL 49-41B-17 and ARSD 20:10:22:40 the statutory parties to this proceeding are Applicant and the Staff. Additionally, each municipality, county, and governmental agency in the area where the facility is proposed to be sited; or any person residing in the area where the facility is proposed to be sited, or any directly interested person, may be granted party status in this proceeding by making timely written application to the Commission on or before 5:00 p.m. on November 28, 2022.

Pursuant to SDCL 49-41B-15 and 49-41B-16 and the Commission's September 30, 2022, Amended Order for and Notice of Public Input Meetings; Notice of Opportunity to Apply for Party Status, the Commission held public input meetings on the Application as follows: November 21, 2022, at the Canton Performing Arts Center, 800 N. Main, Canton, South Dakota; November 22, 2022, at the William J. Janklow Community Center, 800 W. Community Dr., Flandreau, South Dakota; and November 22, 2022, in the Washington Room at the Ramkota Conference Center, 3200 W. Maple Street, Sioux Falls, South Dakota. The purpose of the public input meetings was to hear public comments regarding the permit Application and the proposed Project. At the meetings, Applicant presented a brief description of the Project, after which interested persons appeared and presented their views, comments and questions regarding the Application and the Project.

At its regularly scheduled meetings on October 27, 2022, December 6, 2022, December

12, 2022, and January 27, 2023, the Commission considered the Applications for Party Status received from numerous parties after the filing of the Application. Hearing no objection to the requests for party status, the Commission found, pursuant to ARSD 20:10:22:40 that good cause existed to allow intervention for all applications for party status received through the January 27, 2023, commission meeting. In total, the Commission granted party status to 142 persons. On April 27, 2023, at its regularly scheduled meeting, the Commission considered an application for party status received from Valero Renewable Fuels Company LLC on April 18, 2023. Finding the request for party status was filed significantly beyond the intervention deadline without good cause for the delay and finding that granting party status would unduly prejudice the rights of other parties in the proceeding, the Commission denied Valero Renewable Fuels Company, LLC's late-filed request for party status. (Commissioner Fiegen dissenting). On March 2, 2023, April 17, 2023, and June 8, 2023, the Commission issued orders granting the following party's requests to withdraw their party status: Joyce Swanson, Irma Pick, Bruce Pick, Peggy Anderson, and Timothy Scherb.

At its regularly scheduled meeting on January 5, 2023, the Commission considered Staff's Motion for Discovery Response Deadline; Motion to Require Prefiled Testimony; and Request for Prehearing Scheduling Conference. After providing opportunity for all interested parties to provide input, the Commission unanimously voted to establish a discovery response deadline of ten business days, to require parties who intend to present evidence in the case to file pre-filed testimony, and that a virtual prehearing scheduling conference be held by the Commission Counsel. On January 10, 2023, Commission Counsel sent an email to all parties regarding a prehearing conference. A prehearing conference to discuss procedural issues and draft a procedural schedule was held on January 13, 2023. The Commission considered the draft procedural schedule presented by Commission Counsel at its regularly scheduled meeting on January 17, 2023. After hearing argument from the parties, the Commission issued an Order Setting Procedural Schedule. On February 28, 2023, at its regularly scheduled meeting, the Commission considered and granted Staff's Motion to Amend Procedural Schedule, setting revised dates for Intervenor and Staff Testimony, Applicant Supplemental Testimony, Rebuttal Testimony, Final Discovery, Surrebuttal, Filing of Witness and Exhibit Lists, and establishing Evidentiary Hearing dates of July 25-August 3, 2023.

On February 16, 2023, Applicant filed a Motion for Protective Order, requesting the Commission enter Applicant's proposed protective order for use by the parties in the proceeding in order to protect confidential information while allowing discovery to proceed in an orderly and expeditious way. The Commission considered this Motion at its regularly scheduled meeting on February 28, 2023. After hearing argument from the parties and revising the Applicant's proposed protective Order, the Commission voted unanimously to grant the Motion for Protective Order.

On June 26, 2023, Applicant filed a Motion to Preempt County Ordinances Under SDCL 49-41B-28. On July 21, 2023, Minnehaha County filed a Motion to Intervene for Limited Purpose, to Hold in Abeyance Applicant's Motion to Preempt County Ordinances Under SDCL 49-41B-28, and for Scheduling Order. On July 24, 2023, Navigator and Staff filed responses to Minnehaha County's Motion for Intervention for Limited Purpose. The Commission considered these motions on July 25, 2023, immediately prior to the beginning of the evidentiary hearing. After hearing no objection from the parties, the Commission unanimously granted Minnehaha County's Motion to Intervene for Limited Purpose. After hearing arguments of the parties, the Commission voted unanimously to deny Minnehaha County's Motion to Hold in Abeyance Applicant's Motion to Preempt County Ordinances. During the evidentiary hearing, the Commission considered whether to set a specific date to hear evidence on the issue of preemption of county ordinances. The Commission voted unanimously to hear this issue on August 24 and 25, 2023.

On July 24, 2023, Moody County filed a Motion For an Order Allowing Moody County Witnesses Carla Bruning and Kendra Eng to Appear on a Date and Time Certain to Provide Testimony and Submit to Cross Examination. Moody County Commission applied for and was granted party status by the Commission in its December 7, 2022, Order Granting Party Status. Moody County did not file pre-filed testimony in accordance with the original Procedural Schedule, but Moody County sought to introduce testimony concerning Applicant's Motion to Preempt County Ordinances under SDCL 49-41B-28. Moody County submitted pre-filed testimony on August 22, 2023, and participated fully in August 24-25, 2023, portion of the evidentiary hearing.

In accordance with the procedural scheduling orders in this case, Applicant, Staff, and certain intervenors filed pre-filed testimony. The formal Evidentiary Hearing was held July 25 through August 5, 2023, at the Casey Tibbs South Dakota Rodeo Center at 210 Verendrye Drive, Fort Pierre, South Dakota 57532. The hearing was extended into August 8, 2023, and to August 24 through 25, 2023, in Room 414 of the State Capitol Building, 500 E. Capitol Ave., Pierre, South Dakota 57501. At the conclusion of the hearing and after hearing from the parties, the Commission established a briefing schedule and established September 6, 2023, as the date for the Commission to make its final decision.

On August 28, 29 and 30, 2023, initial briefs were filed by Applicant, Staff, South Dakota Rural Water Systems, South Dakota Rural Electric Association and Landowner Intervenors. On September 1-5, 2023, Response Briefs and Briefs on the Motion to Preempt County Ordinances were filed by Staff, Applicant, Minnehaha County, Moody County and Landowner Intervenors.

Proposed findings of Fact and Conclusions of Law were filed by Applicant, Landowner Intervenors<sup>1</sup> and Minnehaha County respectively on August 29, 2023, August 30, 2023, and September 4, 2023.

On September 6, 2023, at its regularly scheduled meeting, the parties made oral arguments. After questions of the parties by the Commissioners and public discussion among the Commissioners, the Commission voted unanimously to deny Navigator's Application for a Permit to Construct Facility.

Having considered the evidence of record, applicable law and the arguments of the parties, the Commission makes the following Findings of Fact, Conclusions of Law and Decision. Citations to the transcript of the evidentiary hearing will be abbreviated "EH" followed by the appropriate page number.

## **FINDINGS OF FACT**

### **I. Parties**

1. The Applicant is Navigator Heartland Greenway LLC, a Delaware limited liability company in good standing and registered with the South Dakota Secretary of State to transact business in South Dakota. Exhibit N2 at p. 3. Navigator is a wholly owned subsidiary of Navigator CO2 Ventures LLC (NCO2V), a midstream infrastructure company focused on providing industrial customers in the Midwest with carbon capture and storage solutions. *Id.* Navigator has its

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<sup>1</sup> See Finding of Fact #4 for list of Landowner Intervenors.

corporate headquarters in Omaha, Nebraska, and maintains offices in Dallas and Houston, Texas. *Id.* at 1, EH 193:5-24.

2. On October 28, 2022, December 7, 2022, December 8, 2022, and January 30, 2023, the Commission granted party status to several counties, three labor unions, the South Dakota Telecommunications Association, the South Dakota Association of Rural Water Systems, the South Dakota Rural Electric Association, and multiple individuals.

3. The proposed right-of-way for the Project crosses five counties. Brookings County, Lincoln County, and Moody County intervened. Turner County did not intervene. Minnehaha County intervened for the limited purpose of responding to Navigator's motion that under SDCL 49-41B-28 the Commission preempt a zoning ordinance that Minnehaha County adopted on June 13, 2023. The Commission entered an order granting Minnehaha County's motion to intervene on July 28, 2023.

4. The following individuals were granted party status and are represented by Brian Jorde and Ryan Cwach (collectively the "Jorde Landowners" or "Landowner Intervenors"):

Dwayne Pederson Land Co. (Karla Lems); Dakota Aeration (Karla Lems); Pederson Ag (Karla Lems); Sherwood Beek; Kristi Devick Beek; Kevin Alberts; Merle Alberts; Merle Alberts Living Trust; Denis Andersen; Janet Andersen; Paula Bell; Connie Beyer; Rick Bonander; Dale Bonnema; Bonnema Family Trust; Dana Bosma, Burggraff Farms; Frank Burggraff; Glenn Burggraff; Jackie Burggraff; Lynda Burggraff; Wayne Burggraff; Joanne Jackson Burke; Bruce Burkhart; Julie Burkhart; Kay Burkhart; Ann Cowart; Don Cowart; DeJa View Family Farm LLC; Linda Dawley; Todd Dawley; Todd and Linda Dawley Living Trust; Jessica Deering; Patrick Deering; Arnold Erickson; Tamara Ford; Gary Haak; Gerald Haak; Mike Hoffman; Carol Hoines; Warren Jackson; Spencer Jacobson; Todd Jacobson; Mary Ann Janssen; Dennis Jarabek; Janelle Jarabek; Jarabek Special Spousal Living Trust; Daniel Janssen; Robert Janssen; Ethan Javers; Mark Javers; Michelle Jensen; Chuva Johnson; David Johnson; David Johnson Living Trust; Bud Johnston; Knutson Grandchildren Trust; Lisa Knutson; Merlin Knutson; Miles Lacey; Richard Lacey; Dave Larson; Helen Le Brun; Mark Le Brun; Ray Luze; Rick Luze; Bonnie Myrlie; Keith Myrlie; Nelson Living Trust; Beverly Nelson; Daniel Nelson; Daryl Nelson; Diana Nelson; Joan Nelson; Scott Nelson; Marilyn Olson; Overseth-Ruesink Legacy Trust; Crystal Page; Dan Paulson; Jill Paulson; Tab Pepper; Becky Poss; Clayton Rentschler; Art Richert; Beverly Richert; Richert Family Trust; Berton Risty; Joyce Risty; Jenae Ruesink; Evelyn Schuer Living Trust; Schwebach Family Trust; Marilyn Schwebach; Rosemary Schwebach; Tom Schwebach; Glenn Scott; Brad Severson; LuAnn Severson; Lonna Smeenck; Merlyn Smeenck; Merlyn and Lonna Smeenck Living Trust; Ryon Smeenck; Maryls Stensaas; Angela Teal; Brian Teal; Ronald Teal; Ronald and Angela Teal Rev. Trust; Walter Theis; Roger Van Dyke; Robyn Ventura; Tony Ventura; Verlyn and Anna Legacy Trust; Galen Ver Steeg; David Vinzant; RoSchell Vinzant; Wright Brothers Partnership; RJ Wright; Leroy Zorr; and Paulette Zorr.

5. Party status was also granted to the following individuals not represented by Brian Jorde and Ryan Cwach: Mr. William G. Haugen, Jr.; Eric H. Bogue; Leslie Downer; Cathy Lu Miller; Lesley Pedde; David Reker; Gwen Reker; Kathy Jo Serck POA for Lois Jean Rollings; Alfred Slaathaug; and Ricky A. Veldkamp.

6. Commission Staff (Staff) is a party pursuant to SDCL 49-41B-17 and fully participated in the docket.

7. The following parties participated in the evidentiary hearing: Navigator; Staff; the Jorde Landowners; the South Dakota Rural Electric Association and the South Dakota Association of Rural Water Systems; and the Great Plains Laborers' District Council and International Union of Operating Engineers, Local 49, the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO, and the Laborers International Union of North America. Moody County appeared through its State's Attorney on July 25, 27, and August 24-25, 2023, and Minnehaha County appeared through counsel of record on July 27, and August 24-25, 2023.

## **II. Procedural Findings**

8. The Procedural History set forth above is hereby incorporated by reference in its entirety in these Procedural Findings. The procedural findings set forth in the Procedural History are a substantially complete and accurate description of the material documents filed in this docket and the proceedings conducted and decisions rendered by the Commission in this matter.

9. At the evidentiary hearing, Navigator called as part of its case-in-chief Jeff Allen (who adopted in part the testimony of David Giles), Elizabeth Burns-Thompson, Brian Brinkman, Jon Muller, Jared McEntaffer, Mark Hereth, Steve Lee (who also adopted in part the testimony of David Giles), John Godfrey, Vidal Rosa, and Brandi Naughton. In rebuttal, Navigator called Steve Lee, Michael Harrison, Jeff Pray, Steve Brandenburg, Laura McGlothlin, and Monica Howard.

10. At the evidentiary hearing, Staff called William Byrd, Tim Cowman, Alissa Ingham, Matt Frazell, Hilary Morey, Jenna Carlson-Dietmeier, and Jon Thurber. Staff did not call any rebuttal witnesses.

11. The Jorde Landowners as part of their case-in-chief called Dr. John Abraham, Karla Lems, Rick Bonander, R.J. Wright, Todd Dawley, Glen Scott, Miles Lacey, Connie Beyer-Lalonde, Keith Myrlie, Dana Bosma, Dan Nelson, Dan Jannsen, Mark LeBrun, Gerald Haak, Guy Haak, Julie Burkhardt, Brian Teal, Richard McKean, Dan Paulson, Jill Paulson, Bruce Burkhardt, Terry Florence, Arnie Erickson, Dennis Anderson, Bev Nelson, Clayton Rentschler, Roger VanDyke, Tony Ventura, Janet Anderson, and Patricia Deering. The Jorde Landowners did not call any rebuttal witnesses.

12. The three Unions called Mike Mikich, Nate Runke, and Randy Harris. The Unions did not offer rebuttal testimony.

13. The South Dakota Rural Electric Association called Ted Smith, and the South Dakota Association of Rural Water Systems called Clint Koehn. These entities did not offer rebuttal testimony.

## **III. Project Description**

14. The Application is for a permit under SDCL Ch. 49-41B to construct and operate a pipeline to transport carbon dioxide. The Application was admitted into evidence as Exhibit N20. EH 3162-3163.

15. The entire Heartland Greenway Pipeline System would consist of approximately 1,300 miles of pipe located in South Dakota, Nebraska, Minnesota, Iowa, and Illinois. Navigator currently has contracts to transport CO<sub>2</sub> from 21 facilities, including three facilities in South Dakota. Exhibit N20.

16. In South Dakota, the pipeline would be approximately 112.6 miles of new pipe located in Brookings, Moody, Minnehaha, Lincoln, and Turner Counties. Exhibit N1 at p. 32. The pipeline would serve Valero's ethanol plant in Aurora; the POET Biorefining plant in Chancellor; and the POET Biorefining plant in Hudson. The line from Aurora to Hartley is 63.8 miles of 8-inch pipe. The lateral line to Chancellor is 22.6 miles of 6-inch pipe, and the lateral line to Hudson is 26.1 miles of 6-inch pipe. Exhibit N1 at p. 32. Maps attached to Exhibit N1 show the proposed route of the pipeline in South Dakota as of May 25, 2023. Exhibit N1 at pp. 79-96. Table 2.1-1 in the Application shows the number of miles in each affected county. Exhibit N1 at p. 32.

17. The initial design capacity of the entire proposed pipeline system, which is not expected to be utilized by the 21 facilities at the outset, is to transport 10 million metric tons (MMT) of CO<sub>2</sub> per year, with capacity up to 15 MMT per year by adding booster stations and laterals for new customer locations. Exhibit N2 at p. 6.

18. No booster facilities were proposed in South Dakota. The proposed Project included one launcher/receiver site installed in Lincoln County at the junction of the POET Hudson and Chancellor laterals. Exhibit N2 at p. 6. The site would be used for pigging facilities for in-line inspection during operations. The site would be approximately two to four acres and would be fenced. Exhibit N20 at p. 3, 9.

19. There would be 18 mainline valves in South Dakota, with each valve location being approximately 30-feet wide by 70-feet long and located within the permanent right-of-way. Exhibit N20 at p. 9. No other above-ground facilities associated with the pipeline were proposed to be located in South Dakota.

20. The Project would have a maximum operating pressure of 2,200 pounds per square inch gauge (psig), with a normal operational range between 1,300 and 2,100 psig. Exhibit N20 at p. 8.

21. During normal operations, the CO<sub>2</sub> entering the pipeline would be in a supercritical phase, which means the CO<sub>2</sub> will be at temperatures above 88 degrees Fahrenheit and at a pressure of above 1,070 psig. EH 1049: 5-17. The operating temperature range for the inlet of the pipeline is between 90 degrees Fahrenheit and 120 degrees Fahrenheit. EH 2969:18-22. As the CO<sub>2</sub> travels through the pipeline it normalizes to ground temperature. *Id.* The distance for that to occur is usually between five to ten miles downstream of a compression site or a pump site. EH at 2991:1-6.

22. The pipeline would be buried with at least five feet of cover which exceeds PHMSA requirements and industry standards. Exhibit N20 at p. 10; EH 226:4.

23. The estimated cost of the project in South Dakota is \$154 million. Exhibit N2 at p. 9.

24. Construction of the pipeline would typically require a temporary right-of-way for construction 100 feet wide in uplands and agricultural areas and 75 feet through sensitive areas, including most waterbodies, wetlands, and forested areas. Exhibit N20 at p. 10. Where additional

temporary workspace is necessary, it would typically be 50 feet wide by 150 feet long. *Id.* The permanent right-of-way for operations and maintenance is 50 feet wide. *Id.*

25. Based on the route shown in Exhibit N1, the closest distance from the pipeline to municipal borders is as follows: Aurora, 1,050 feet; Egan, 1,130 feet; Canton, 2,850 feet; Valley Springs, 4,310 feet; and Brandon, 9,420 feet. Exhibit S1 at 14:19-27.

26. PHMSA regulates CO<sub>2</sub> that is transported in a supercritical state, and its regulation extends fully to any pipeline that transports CO<sub>2</sub> in a supercritical state even though the CO<sub>2</sub> may not remain in a supercritical state throughout the entire pipeline. Exhibit N11 at ¶ 15; EH 592:15; *id.* at 593:6-9.

27. Navigator has designed the Pipeline to comply with the recommended industry practices identified in DNV-RP-F104, Design and Operations of CO<sub>2</sub> Pipelines (Sept. 2021), which is a design standard promulgated by Det Norske Veritas (DNV). Exhibit N5, Direct at ¶ 12. DNV is an international standards body based in Norway that has promulgated standards for offshore pipelines, on-shore pipelines, and CO<sub>2</sub> pipelines. EH 1255:25 to 1256:21. DNV also certifies whether pipelines comply with its standards. EH 1262:20 to 1263:6.

#### **IV. Demand for the Project**

28. California, Oregon, Washington, and Canada each have Low Carbon Fuel Standard programs, which offer ethanol and other fuel producers marketable credits as incentives for meeting low carbon standards. Exhibit N13 at ¶ 8; EH 2737:1-4. South Dakota has not established carbon reduction policies nor a Low Carbon Fuel Standard. EH 1622:23 to 1623:4.

29. As a result of the open season, Navigator obtained one signed contract and continued conversations with other interested parties, resulting in another signed contract. As of the hearing, Navigator has signed shipper contracts in South Dakota with two companies, Valero and POET, each for a term of 12 years. EH 3099:5 to 3100:7; Exhibit N63.

#### **V. Applicable Statutes and Regulations for a Transmission Facility Permit**

30. The following South Dakota statutes are applicable: SDCL 49-41B-1, 49-41B-2, 49-41B-2.1, 49-41B-4, 49-41B-5.2, 49-41B-11 through 49-41B-19.1, 49-41B-22, 49-41B-24, 49-41B-26, 49-41B-28, 49-41B-35, 49-41B-36, and applicable provisions of SDCL Chapters 1-26 and 15-6.

31. The following South Dakota administrative rules are applicable: ARSD Chapters 20:10:01 and 20:10:22.

32. Pursuant to SDCL 49-41B-22, Applicant has the burden of proof to establish by a preponderance of the evidence that:

- 1) The proposed facility will comply with all applicable laws and rules;
- 2) The facility will not pose a threat of serious injury to the environment nor to the social and economic condition of inhabitants or expected inhabitants in the siting area. An applicant for an electric transmission line, a solar energy



facility, or a wind energy facility that holds a conditional use permit from the applicable local units of government is determined not to threaten the social and economic condition of inhabitants or expected inhabitants in the siting area;

- 3) The facility will not substantially impair the health, safety or welfare of the inhabitants; and
- 4) The facility will not unduly interfere with the orderly development of the region with due consideration having been given the views of governing bodies of affected local units of government. An applicant for an electric transmission line, a solar energy facility, or a wind energy facility that holds a conditional use permit from the applicable local units of government is in compliance with this subdivision.

## **VI. Requirements for the Issuance of a Transmission Facility Permit**

### **A. SDCL 49-41B-22(1) – Compliance with all applicable laws and rules.**

33. The ability to comply with all laws and rules is demonstrated, in part, through the Applicant's awareness of the laws and rules to which it is subject.

34. Past performance and efforts taken by Applicant to comply with laws and regulations is an indicator of the likelihood that Applicant will endeavor for the Project to comply with all applicable laws and rules.

35. Applicant failed to send the landowner notification to a significant number of landowners located within the notice corridor as required by SDCL 49-41B-5.2. EH 318-319.

36. Applicant's failure to comply with the landowner notification requirement pursuant to SDCL 49-41B-5.2 causes the Commission to doubt Applicant's ability to be thorough and diligent in its duty to comply with legal requirements.

37. On June 6, 2023, Minnehaha County approved Ordinance MC16-179-23. The Ordinance requires that any person who has filed an application with the Commission must give notice to the County within thirty days of filing with the Commission, must provide the County with routing information, a map and list of all affected property owners, a set of plans and specifications of the pipeline, and copies of the emergency response and hazard mitigation plans required by PHMSA. If the application with the Commission was filed prior to the effective date of the County's ordinance, then notice to the County was required within 30 days of the effective date of the ordinance. The ordinance establishes separation criteria, including 330 feet from dwellings, churches, and businesses measured "from the center line of the proposed pipeline to the closest parcel boundary of a use." The ordinance provides that a property owner may grant a waiver of the minimum setback distance. If the County in its discretion requires the applicant to seek a conditional use permit, the applicant must submit a fee of \$25,000. If a conditional use is granted, the applicant must pay an annual fee to the county of \$300 per linear mile of pipeline within the county. Exhibit M5a; Exhibit D to Exhibit N15.

38. Moody County adopted an ordinance on June 26, 2023, that would regulate the Project. This ordinance amended an existing ordinance. The ordinance would require any pipeline facility that must obtain a siting permit from the Commission under SDCL Ch. 49-41B to obtain a conditional use permit from Moody County. A conditional use permit cannot be granted unless the pipeline meets a number of standards, including a minimum setback of 1,500 feet from cautionary uses, including schools, daycares, churches, dwellings, and manufactured homes. Affected property owners may grant a waiver, which allows, but does not require, the County Board of Adjustment to allow the separation distances to be less than that established by the Ordinance; the matter is discretionary. The Ordinance also requires that an applicant obtain all required easements from landowners before applying for a conditional use permit for the express purpose of ensuring that landowners voluntarily agree with the easement. Exhibit M2; Exhibit E to Exhibit N15.

39. Navigator did not attempt to comply with the Minnehaha and Moody County ordinances, instead Applicant requested the Commission preempt both ordinances under SDCL 49-41B-28 as unreasonably restrictive as to its proposed route before the Commission. EH 3492-3494; EH 3499-3501.

40. By Order dated September 13, 2023, the Commission unanimously denied Applicant's request to preempt the Minnehaha and Moody County ordinances.

41. Navigator witness Monica Howard admitted that Navigator could not comply with the Minnehaha and Moody County ordinances. Therefore, Applicant has, by its own admission, affirmed that it cannot satisfy its burden with respect to SDCL 49-41B-22(1). Exhibit N15 at ¶¶ 32, 35; EH 3504:13-19; EH 3519:11-15; 3529:5-6, 17-22; EH 3557:4-10; EH 3576:6-10; EH 3578:16-18.

42. Navigator was not always prompt, thorough, and immediately forthcoming in their responses to Staff throughout the discovery process in this docket. EH 2911:10-14. For example, Staff requested Navigator's emergency response plan (ERP) in its third round of discovery in March of 2023, but did not receive the draft ERP until July 18, which was after the deadline to serve any additional discovery and did not provide Staff sufficient time to review the ERP. S1 at p. 196; EH 2871:13-15.

43. Applicant's failure to be prompt and thorough with Staff leads to a concern that Applicant will not establish open and candid relationships with regulators.

**B. SDCL 49-41B-22(2) – Project will not pose a threat of serious injury to the environment nor to the social and economic condition of inhabitants or expected inhabitants.**

Property Value Impacts

44. Navigator is required to include an analysis on the effects the Project will have on property values. ARSD 20:10:22:23(1).

45. Several intervening landowners testified regarding concerns that the Project may have adverse impacts on their property values and the value of their housing eligibilities. EH1677-1680; EH 1688; EH 1696; EH1709-1711; EH 1744; EH 2564-2565; EH 2655-2656. Navigator submitted a map that shows that property owned within 1,825 ft. from the 8" pipeline and 1,240 ft. from the 6" pipeline may be impacted if there is a CO2 release on the pipeline system. Exhibit

N68. The threat of a CO2 release may have an adverse impact on property values near the pipeline and, therefore, it was Navigator's burden to prove the Project will not adversely impact property values.

46. The analysis provided by Navigator studied the impact of oil and natural gas pipelines on property values but did not consider the impact of CO2 pipelines on property values. EH 3205:2-8. Navigator witness Monica Howard testified on property valuation. Monica Howard is not a certified or licensed appraiser and does not possess the credentials to provide testimony as a valuation expert. Exhibit N15 at p. 29; EH 3167:16 – 3170:13.

47. The Commission finds that the studies and testimony do not adequately assess the potential impact to the value of properties in the vicinity of the Navigator pipeline.

#### Other Economic Impacts

48. The testimony of Navigator's witness Jeffrey Pray was not sufficient to establish that landowners could not face negative financial impacts to their insurance coverage. Mr. Pray testified that damages to landowners cause by release of pollutants are not covered by the landowners' insurance policy. EH 2450:8-16. If a landowner wished to obtain coverage for pollution liability, the landowner could obtain it but would have to obtain a pollution liability policy. Exhibit N12 at ¶ 9. Therefore, Navigator failed to establish that a landowner could not suffer economic harm due to an occurrence such as loss of life or loss of livestock due to the release of carbon dioxide.

49. The Commission finds that Navigator failed to establish that the Project would not pose an unacceptable level of threat of economic harm to the inhabitants or expectant inhabitants of the siting area.

#### Geohazard Analysis

50. Navigator is required to provide an analysis of any constraints that may be imposed by geological characteristics on the design, construction, or operation of the proposed facility and description of plans to offset such constraints. ARSD 20:10:22:14(8).

51. Navigator witness Stephen Lee stated karst terrain occurs in approximately 15.58 miles of the Project right-of-way in South Dakota and this terrain is more susceptible to subsidence. Exhibit N5 at p. 22. Lee also stated Pierre Shale is crossed by approximately 8.32 miles of the Project right-of-way in South Dakota and this geologic formation is susceptible to landslides. Exhibit N5 at p. 22. Navigator committed to implement additional mitigation measures in regard to karst and landslides to protect the system throughout its existence. Exhibit N5 at p. 22. Navigator expected to complete the Geohazard Analysis by the end of Q1 2023. Exhibit S1 at p. 33.

52. Staff witness Brian Sterner, having adopted the prefiled testimony of his colleague Sara Thronson, recommended that Navigator identify in its Geohazard Analysis where geological hazards may be encountered by the proposed route. Exhibit S11 at p. 3. Sterner also recommended that the Commission review the mitigation measures recommended in the Geohazard Analysis and make additional recommendations as needed. Exhibit S11 at p. 4. Sterner recommended that the Commission review the results prior to making its determination on the permit. Exhibit S11 at p. 4.

53. In rebuttal testimony, Navigator witness Stephen Lee stated the Phase II Geohazard Analysis had been delayed and the work would not be completed until Q1 of 2024. Exhibit N5 at p. 30. Lee further stated that if landslide prone areas are identified during the Phase II study, mitigation measures could include an avoidance of an area. Exhibit N5 at pp. 30-31. The Commission finds that Navigator failed to prove that an avoidance of an area will not cause a major reroute of the proposed pipeline. The Commission also finds that an analysis of any constraints that may be imposed by geological characteristics and a description of plans to offset such constraints was not completed by the Applicant.

54. The Commission finds that Navigator failed to meet its burden of proof under SDCL 49-41B-22(2).

**C. SDCL 49-41B-22(3) – Project will not substantially impair the health, safety or welfare of the inhabitants.**

Health/Safety

55. Carbon dioxide is an asphyxiant and intoxicant that is colorless, odorless, and heavier than air. It can concentrate in lower elevation areas and along ground level under certain conditions. Human exposure levels to CO<sub>2</sub> concentrations above 20,000 parts per million (ppm) and up to 30,000 ppm can cause headaches, dyspnea, and sweating for exposure times over 1 hour. Human exposure levels to CO<sub>2</sub> concentrated above 30,000 ppm and up to 100,000 ppm pose serious health risks within minutes, including headache, increased heart rate, dyspnea, shortness of breath, dizziness, sweating, and rapid breathing. Further, CO<sub>2</sub> concentrations greater than 100,000 ppm can lead to unconsciousness within minutes and concentrations greater than 170,000 ppm can lead to death in less than 1 minute. EH 724-736; Exhibit N6 at pp. 18-25; N47A.

56. ACGIH TLV, NIOSH REL, and OSHA PEL 1989 occupational short-term exposure limits for carbon dioxide are 30,000 ppm at 15 minutes of exposure. Exhibit N6 at p. 22. Rural emergency response times could exceed 15 minutes, depending upon the circumstances of the release. EH 2338-2339. NIOSH has established a CO<sub>2</sub> concentration of 40,000 ppm as immediately dangerous to life and health. Exhibit N47A.

57. In order to determine if the proposed facility will substantially impair the health, safety, or welfare of the inhabitants the Commission finds it necessary to review plume dispersion modeling for a worst-case release scenario. EH 603-604; Exhibit S1 at p. 8-9; Exhibit S13 at p. 2-3. The results of the worst-case modeling depends on the model used, the type of inputs, and the values used for the inputs. EH 972-973; EH 1962:1-17; EH 1963-1965.

58. Navigator used two types of models for determining the worst-case release distances for its Project, ALOHA and PHAST. Exhibit N47A. Inputs used in the models include outer diameter, wall thickness, pipeline length, fluid type, modeling method, soil type, release calculation method, release direction, CO<sub>2</sub> release rate, atmospheric temperature, atmospheric stability class, wind speed, pipeline pressure, and leak type. *Id.* Selection of models and inputs are subjective. EH 972-973; EH 1092:13-19. Navigator had the burden to demonstrate why the selected inputs were appropriate.

59. Staff requested a summary of the plume modeling completed by Navigator in Staff's Data Request 1-7. Navigator responded on February 13, 2023, that the summary would be provided once a protective order was entered by the Commission. Confidential Exhibit S1 at p. 26 of 447. On March 10, 2023, Navigator supplemented its response to DR 1-7 and produced the summary

report title “Heartland Greenway System – Plume Modeling and Buffer Overview.” Confidential Exhibit S1 at p. 65 of 447. After reviewing the summary report, Staff served Data Request 5-10 and requested Navigator produce “technical studies and supporting documentation” for the conclusions in the summary report. Navigator responded on April 24, 2023, by directing Staff back to the company’s response to DR 1-7. Confidential Exhibit S1 at p. 434 of 447.

60. In Staff’s prefiled testimony filed on May 25, 2023, Staff’s expert witness Matt Frazell opined that technical support for Navigator’s plume modeling was lacking. Specifically, Frazell testified that “information regarding the details of all analyses such as technical approach, input data, output data, maps, figures, and conclusions should be provided for all dispersion and risk modeling that was performed by the Applicant.” Exhibit S13 at pp. 6-7.

61. Through the rebuttal testimony of Stephen Lee, filed on June 26, 2023, Navigator provided a second document titled “Heartland Greenway System: CO2 Air Dispersion Guidance.” Exhibit N5 at p. 46 of 52. This document was provided to Staff on June 27, 2023, through a supplemental response to Staff Data Request 5-10. Exhibit S14 at p. 19 of 993; Exhibit S14 at pp. 51-69 of 993. The deadline for final discovery was July 3, 2023.<sup>2</sup> This afforded Staff only seven days to vet the information produced by Navigator.

62. Staff’s expert, Matt Frazell, testified that he received some information on plume modeling prior to the evidentiary hearing, however his review would have been more in-depth if all the information Navigator had was provided timely through the discovery process. EH 1975-1976.

63. The Commission finds that modeling CO2 plume dispersion distances for a worst-case release from a pipeline has some level of subjectivity. As such, the Commission finds that Navigator should have produced the plume models and supporting information in a timely manner to afford the parties a chance to review the reasonableness of the modeling completed. The Commission notes that Navigator provided information that was responsive to Staff’s Data Requests four months after the initial request for such information was made and through rebuttal testimony. This resulted in Staff only having seven days to review and issue discovery on the substance of the plume modeling. It is clear to the Commission that Navigator’s dilatoriness in production prejudiced other parties’ review of information critical to the applicant’s burden of proof.

64. The Commission also notes that Navigator did not provide justification for why certain values were used for each model input nor was there a demonstration as to why the group of inputs selected to represent the worst-case release can be considered as such. EH 1089:3 – 1095:12.

65. Navigator did not utilize a computational fluid dynamics (CFD) model as part of its dispersion analysis. Rather, Navigator witness Stephen Lee testified that Navigator intends to run CFD models in the future. EH 1067:3-7. Therefore, the results of the CFD models were not available prior to the deadline for the Commission’s decision in this docket. EH 1068-1069.

66. Staff witness Matt Frazell testified that CFD modeling would provide the greatest benefit in high consequence areas (HCA) and unusually sensitive areas (USA) and that the CFD model would provide more detail about where the plume would travel, how far, and what areas could be

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<sup>2</sup> See Order Granting Request to Withdraw Party Status; Order Amending Procedural Schedule; Order Granting Motion for Protective Order issued on March 2, 2023.

affected. EH 1980:10-12, 20-24. HCAs and USA are terms defined within the federal regulations. Exhibit S2 7:6-8:9.

67. The Commission finds that the evidence supports a conclusion that Navigator should perform CFD modeling for, at the least, HCAs and USAs and include the results of CFD modeling on a route map.

68. Navigator further failed to provide sufficient evidence to demonstrate that the Project would not negatively impact the Big Sioux Aquifer.

69. PHMSA has initiated a rulemaking to review its regulation related to carbon dioxide pipelines. Exhibit N11 at p. 9. The rulemaking process is currently ongoing. EH 581:21-24.

70. Therefore, based on the above findings, the Commission concludes that Navigator failed to meet its burden of proof to demonstrate that the Project will not substantially impair the health or safety of the inhabitants.

### Welfare

71. The Commission heard testimony from several landowners that the proposed Project adversely impacts their welfare. Adverse impacts voiced to the Commission include anxiety, safety fears, the loss of property rights, and one-sided easements that may expose the landowner to future financial liability. EH 1517-1519; EH 1625-1627; EH 1630-1631; LO 13; LO 22; LO 27; LO 28; LO 31; LO 34; LO 42; LO 43; LO 44; LO 46; LO 48; LO 58; LO 62; LO 73; LO 74; LO 78; LO 80; LO 82; LO 85; LO 131; LO 132; LO 133. The Commission also heard testimony from landowners regarding fears on how the Project will impact the safety of their family and future generations. EH 2548:1-18; EH 2705:16-22.

72. Landowners' safety concerns stem from the different characteristics CO<sub>2</sub> has from existing oil and natural gas pipelines. EH 1583-1584; EH 1672-1673. The characteristics of CO<sub>2</sub> were noted in paragraph 55 of this order. In addition, a recent CO<sub>2</sub> pipeline rupture in Satartia, Mississippi furthered the fears and anxieties of affected landowners. LO 111A; EH 1701:8-25; EH 2394:1-16; EH 2666-2667. Navigator did not release the plume modeling to the counties or public. EH 331: 20-24; EH 969-970. This has led to anxiety amongst affected landowners, including Mr. Rick Bonander and Mr. Roger Van Dyke. EH 1631:12-19; EH 2671-2672; EH 2712-2713.

73. Navigator's goal is to obtain voluntary easements. EH 3720:14-20. However, Navigator has only obtained approximately 30 percent of the easements necessary for the total route in South Dakota. EH 176-177. Out of the total number of easements needed for the project, Navigator has only obtained 70 percent of the easements in Brookings County, amounting to 5.5 miles; 26 percent of the easements in Lincoln County, amounting to 11.6 miles; 47 percent of the easements in Minnehaha County, amounting to 12.9 miles; 15.4 percent of the easements in Moody County, amounting to 4.6 miles; and 50 percent of the easements in Turner County, amounting to 0.5 miles. EH 3722: 6-17. Ms. Karla Lems testified that an expensive and lengthy eminent domain proceeding would be a substantial impairment to her welfare. EH 1607:5-17.

74. The Commission finds that Navigator has not met its burden of proof to demonstrate that the Project will not substantially impair the welfare of the inhabitants. Navigator has failed to assuage the safety fears, anxieties, and liability concerns of the inhabitants within the Project area. Further, 70 percent of the affected landowners have not entered voluntary easements which

is an indicator to the Commission that the project has not properly addressed the welfare concerns of the inhabitants.

75. South Dakota's rural volunteer first responder departments are shrinking membership and already overburden based on present demands. The Egan volunteer fire department has disbanded. Increased training demands is one of the reasons volunteer departments have a difficult time recruiting new volunteer members. The presence of the Project will increase training demands upon already strained volunteer first responder departments. EH 2349-2350.

76. PHMSA has requirements for emergency preparedness and response plans and training of emergency response personnel. N11 at p. 6-7. Navigator has met with local emergency first responders to discuss training and equipment needs. N6 at p. 14-15. Further, Navigator plans to do annual trainings twice per year for first responders and continued training as needed. EH 348; EH 1443-1444; EH 1452-1458.

77. The Commission finds that Navigator failed to demonstrate how increased training requirements for rural, volunteer emergency response organizations will not adversely impact those organizations. As such, the Commission finds that Navigator failed to meet its burden to prove the project will not substantially impair the welfare of the inhabitants.

#### Emergency Response Plan

78. Navigator is required to provide its plans to coordinate with the local and state office of disaster services in the event of accidental release of contaminants from its proposed facility. ARSD 20:10:22:23(6).

79. Navigator did not provide an emergency response plan in the initial Application, and stated the plan was being prepared and would be in place prior to commercial operation. Exhibit N20 at p. 71.

80. Emergency response in the event of a release was a primary concern of citizens based on public comments. Emergency services in rural areas of South Dakota are largely staffed by volunteers, and concerns were raised that departments do not have the appropriate equipment to effectively respond to a release. Exhibit S1 at p. 11:17-24.

81. Staff requested Navigator provide its emergency response plan through discovery on March 31, 2023, and Navigator reiterated its position that the plan would be completed before the facility is placed in service, which was the third quarter of 2024. Exhibit S1 at p. 197.

82. Staff witness Jon Thurber submitted prefiled direct testimony on May 25, 2023, indicating that Navigator did not intend to provide an emergency response plan prior to the Commission issuing a decision on this permit. Staff testified that the emergency response plan was required by administrative rule. Exhibit S1 at p. 13.

83. Navigator submitted a draft emergency response plan on July 18, 2023, with a confidential designation. EH 2871:13-15. This submittal happened less than 10 days before the evidentiary hearing, and after the deadline to issue discovery on July 3, 2023. Navigator testified that the draft emergency response plan provided is approximately 59 pages long, and the final emergency response plan will be approximately 500 pages when complete. EH 1442-1443.

84. Navigator rescinded its confidential designation of the emergency response plan on August 1 during the evidentiary hearing. EH 1491:6-12, EH 1493:4-8. The timing of this retraction did not provide the public an opportunity to review the plan and provide comment to the Commission. EH 1630-1631.

85. Staff testified that it is important to know the content of the emergency response plan to determine the impact on the community. EH 2883:7-23. Staff was not afforded adequate time to have its experts review the emergency response plan and receive feedback from local communities. EH 2894:8-25; EH 2926-2927.

86. The Commission finds that it is responsible for assessing the community impact of the proposed facility on local and state office of disaster services. The Commission further finds that the late submission of the emergency response plan prejudiced all parties and adversely impacted all parties' ability to review and determine the community impact associated with Navigator's emergency response plan.

**D. SDCL 49-41B-22(4) – Project will not unduly interfere with the orderly development of the region with due consideration given to the views of governing bodies of affected local units of government.**

87. The testimony of Minnehaha County witness Scott Anderson stated that the Minnehaha County Commission “determined that the proposed establishment of transmission pipelines would constitute a new land use that will significantly impact future development of the County’s land-use planning vision.” Exhibit M5 at p. 4.

88. The Commission finds that the testimony of witnesses Joseph Kippley and Scott Anderson was compelling.

89. Navigator failed to provide convincing evidence that the Project would not overextend the resources of rural fire departments and other emergency responders.

90. Minnehaha County developed an ordinance for the purposes of protecting land use and development within the county. In particular, Minnehaha County considered “future growth, land use, [and] suitability for certain land use adjacent to other types of land use.” Exhibit M4 at p. 6.

91. Minnehaha County, as the local unit of government, is in the best position to understand and consider development within the county, therefore, Ordinance MC 16-179-23 is compelling evidence as to how the Project will or will not interfere with the orderly development within Minnehaha County.

92. The record demonstrates that the Project route does not comply with the setbacks established by Minnehaha County Ordinance MC 16-179-23.

93. The Commission finds that by failing to include compliance with county ordinances in its route analysis, Navigator failed to meet its burden of proof under SDCL 49-41B-22(4).

Alternative Route

94. Navigator is required to present information related to its selection of the proposed transmission site, including an evaluation of alternative sites considered by Navigator for the facility and an evaluation of the advantages of the proposed transmission site over the other



alternative sites. ARSD 20:10:22:12(2)-(3). Several landowners questioned why the proposed route traverses the most populated county in South Dakota, Minnehaha County, and near some of the fastest growing cities in South Dakota, including Brandon, SD. EH 1625-1626, 2381, 2392. Navigator did not identify a set of distinct potential routes as part of its routing analysis. Exhibit S1 at p. 35. Navigator did not submit the micro routing decisions it made between Brandon, SD, and Valley Springs, SD, on the proposed route in this proceeding for Commission consideration. EH3748-3749. The Commission finds that Navigator failed to provide an evaluation of alternative routes and the advantages of the proposed route over the other alternative routes.

## **VII. General**

95. An application may be denied, returned, or amended, at the discretion of the Commission, for failure to file an application generally in the form and content required by SDCL chapter 49-41B and ARSD chapter 20:10:22. SDCL 49-41B-13(2).

96. An application may be denied, returned, or amended, at the discretion of the Commission, if there are any deliberate misstatements of material facts in the application or in accompanying statements or studies. SDCL 49-41B-13(1). The Commission finds that the application and its accompanying statements and studies did not contain any deliberate misstatements of material facts.

97. The Commission finds it was not proven by a preponderance of the evidence that the Project, if constructed, will comply with all applicable laws and rules, including all requirements of SDCL chapter 49-41B and chapter ARSD 20:10:22.

98. The Commission finds that it was not proven by a preponderance of the evidence that the Project, if constructed, will not pose an unacceptable threat of serious injury to the environment nor to the economic conditions of inhabitants or expected inhabitants in the siting area.

99. The Commission finds that it was not proven by a preponderance of the evidence that the Project, if constructed, will not substantially impair the health and safety of the inhabitants in the siting area.

100. The Commission finds that it was not proven by a preponderance of the evidence that the Project, if constructed, will not substantially impair the welfare of the inhabitants in the siting area.

101. The Commission finds that it was not proven by a preponderance of the evidence that the Project, if constructed, will not unduly interfere with the orderly development of the region with due consideration having been given the views of governing bodies of affected local units of government.

102. The Commission finds that a permit to construct the Project should be denied.

103. To the extent that any Conclusion of Law set forth below is more appropriately a finding of fact, that Conclusion of Law is incorporated by reference as a Finding of Fact.

Based on the foregoing Findings of Fact, the Commission hereby makes the following:

### **CONCLUSIONS OF LAW**

1. The Commission has jurisdiction over the subject matter and parties to this proceeding under SDCL Ch. 49-41B and ARSD Ch. 20:10:22. Based on the findings made on the four elements of Navigator's burden of proof under SDCL 49-41B-22, the Commission has authority to grant, deny, or grant upon reasonable terms, conditions or modifications, a permit for the construction, operation, and maintenance of the Navigator Heartland Greenway Pipeline in South Dakota.

2. The South Dakota Legislature recognized, in the adoption of the Energy Conversion and Transmission Facilities Chapter as stated in SDCL 49-41B-1, that it is important to ensure that facilities are constructed in an orderly and timely manner so that the energy requirements of the people of the state are fulfilled by those seeking a permit. Therefore, it is necessary to ensure that the location, construction, and operation of facilities will produce minimal adverse effects on the environment and upon the citizens of this state by providing that a facility may not be constructed or operated in this state without first obtaining a permit from the commission. SDCL 49-41B-1.

3. Under SDCL 49-41B-2.1, a transmission facility includes a gas or liquid transmission line and associated facilities for the transportation of carbon dioxide. The Navigator Heartland Greenway Pipeline is a transmission facility based on this definition.

4. The carbon-capture facilities at each plant are not within the definition of a transmission line under SDCL 49-41B-2.1 and are therefore outside the Commission's siting jurisdiction under SDCL Ch. 49-41B.

5. The standard of proof is by a preponderance of the evidence. Navigator has failed to satisfy its burden of proof under SDCL 49-41B-22 and is not entitled to a permit as provided in SDCL 49-41B-24.

6. Pursuant to ARSD 20:10:01:15.01, Applicant has the burden of proof as to factual allegations which form the basis of the Application.

7. The Commission finds that there was no showing that there are any deliberate misstatements of material facts in the Application.

8. Pursuant to SDCL 49-41B-13(2) an Application must be filed generally in the form and content required by SDCL Chapter 49-41B and ARSD 20:10:22. The Commission finds that the Application did not address certain sections of ARSD 20:10:22 as identified in the Findings of Fact.

9. PHMSA is delegated exclusive authority over the establishment and enforcement of safety-oriented design and operational standards for hazardous materials pipelines, including the Navigator Heartland Greenway Pipeline. 49 U.S.C. § 60101, et seq. However, neither PHMSA nor any federal agency has siting or permitting authority over carbon dioxide pipelines.

10. Based on SDCL 49-41B-36, the Commission lacks the authority to route a transmission facility.

11. The Commission does not have jurisdiction over matters involving eminent domain.
12. Navigator failed to provide adequate disclosures to Staff to evaluate the merits of the Application and supporting documentation. Timely disclosure is a fundamental and necessary part of the process for the Commission to evaluate the application.
13. The credibility of a witness, the import to be accorded their testimony, and the weight of the evidence has been determined by its opportunity to observe the witness and examine the evidence. *Hubbard v. City of Pierre*, 2010 SD 55; 784 NW2d 499.
14. The record is substantial, and the Project has been well vetted and is the basis upon which the Commission has made its decision.
15. The term "siting area" is not specifically defined in SDCL Chapter 49-41B and is subjective depending on the facility at issue.
16. The siting area includes any area that would see a direct social or environmental affect from the construction or operation of the pipeline.
17. Applicant failed to prove by a preponderance of the evidence that the proposed facility will comply with all applicable laws and rules.
18. Applicant failed to prove by a preponderance of the evidence that the Project will not pose a threat of serious injury to the environment.
19. Applicant failed to prove by a preponderance of the evidence that the Project will not pose a threat of serious injury to the social and economic condition of the inhabitants of the siting area,
20. Applicant failed to prove by a preponderance of the evidence that the Project will not substantially impair the health and safety of the inhabitants of the siting area.
21. Applicant failed to prove by a preponderance of the evidence that the Project will not substantially impair the welfare of the inhabitants of the siting area.
22. Applicant failed to prove by a preponderance of the evidence that the Project will not unduly interfere with the orderly development of the region.
23. The Commission is required by SDCL 49-41B-22(4) to afford due consideration to the views of governing bodies of affected local units of government when determining whether the Project will unduly interfere with the orderly development of the region.
24. Local units of government include any county, municipality, or special governmental district authorized by the laws of South Dakota or any of the states that border South Dakota.
25. Local units of government affected by the Project include but are not limited to Brookings, Lincoln, Minnehaha, Moody, and Turner counties.
26. Applicant was required to provide notification within thirty days of the filing of the Application to the owner of record of any land that is located within one-half mile of the proposed route. Applicant failed to comply with this requirement.

**FINAL DECISION**

Based upon the foregoing Findings of Fact and Conclusions of Law, the Commission hereby denies the Application of Navigator Heartland Greenway, LLC. The Commission unanimously finds that the Applicant failed to satisfy its burden of proof with respect to compliance with all laws and rules pursuant to SDCL 49-41B-22(1) and that the Applicant failed to satisfy its burden of proof with respect to the requirement that the Project will not substantially impair the welfare of the inhabitants of the siting area pursuant to SDCL 49-41B-22(3). With Commissioner Nelson dissenting, the Commission finds that the Applicant failed to prove that the Project will not pose a threat of serious injury to the environment or to the economic condition of the inhabitants or expected inhabitants of the siting area; that the Applicant failed to prove that the Project will not substantially impair the health and safety of the inhabitants of the area; and that the Applicant failed to prove that the Project will not unduly interfere with the orderly development of the region.

It is therefore

ORDERED, that the Application is denied.

**NOTICE OF ENTRY AND OF RIGHT TO APPEAL**

PLEASE TAKE NOTICE that this Final Decision and Order was duly issued and entered on the 26th day of September 2023. Pursuant to SDCL 1-26-32, this Final Decision and Order will take effect 10 days after the date of receipt or failure to accept delivery of the decision by the parties. Pursuant to ARSD 20:10:01:30.01, an application for a rehearing or reconsideration may be made by filing a written petition with the Commission within 30 days from the date of issuance of this Final Decision and Order; Notice of Entry. Pursuant to SDCL 1-26-31, the parties have the right to appeal this Final Decision and Order to the appropriate Circuit Court by serving notice of appeal of this decision to the circuit court within thirty (30) days after the date of service of this Notice of Decision.

<b>CERTIFICATE OF SERVICE</b>
The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, electronically.
By: <u><i>Kristie Fiegen</i></u>
Date: <u><i>26 September 2023</i></u>
(OFFICIAL SEAL)

BY ORDER OF THE COMMISSION:

*Kristie Fiegen*

KRISTIE FIEGEN, Chairperson

*Gary Hanson*

GARY HANSON, Commissioner

*Chris Nelson*

CHRIS NELSON, Commissioner  
(concurring in part, dissenting in part)

COMMISSIONER CHRIS NELSON

CONCURS IN RESULT AND PARTIALLY DISSENTS ON FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

HP22-002 – IN THE MATTER OF THE APPLICATION OF NAVIGATOR HEARTLAND  
GREENWAY, LLC FOR A PERMIT UNDER THE SOUTH DAKOTA ENERGY  
CONVERSION AND TRANSMISSION FACILITIES ACT TO CONSTRUCT THE  
HEARTLAND GREENWAY PIPELINE IN SOUTH DAKOTA

I concur in the denial of a facility permit but I respectfully dissent on Findings of Fact 36, 43, 48, 49, 54, 68, 70, 98, and 99 and Conclusions of Law 18, 19, 20, and 22 as was explained in my oral discussion on the motion to deny the permit.



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Chris Nelson