BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE APPLICATION BY 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	**DOCKET HP 22-002** **LANDOWNER INTERVENORS' POST-HEARING BRIEF**

Landowner Intervenors by and through their undersigned counsel submit this post-hearing brief opposing Navigator's Application.

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OVERVIEW

Navigator Heartland Greenway, LLC ("Navigator") seeks permission to build approximately 1,350 miles of hazardous CO_2 pipeline of which approximately 112 miles are desired in South Dakota. Navigator's proposal to capture CO_2 waste from three corporate owned ethanol plants and transport it over 1,200 miles south to Illinois has been opposed by South Dakota farmers, ranchers, grandmothers, first responders, county commissions, school boards, realtors, surveyors, real estate developers, state legislators and county elected officials, professional groups, construction contractors, and others. The percentage of persons objecting to this Application is the overwhelming majority of comments to the docket. To date, Navigator has secured approximately 30% of the easements it needs to construct a pipeline upon the route proposed. The project is backed by venture capitalists and middle eastern money. South Dakotans who prefer combines and cattle pens to boardrooms stand in the way of Navigators' investors' multi-billion dollar taxpayer funded payday.

The South Dakota Public Utility Commission ("Commission") retains siting jurisdiction and can either approve or deny Navigator's Application based upon the laws found in chapter 49-41B of South Dakota Codified Laws and specifically analyzes the Navigator application based upon the 49-41B-22 factors.

No one—including Navigator—has ever done anything remotely similar on scale to the CO_2 pipeline proposed in the Application. It is as if Orville and Wilbur Wright had decided, for their inaugural flight, to construct the 1903 model of a 747, complete with a pilot in a bowler hat, 224' muslin wings, and a propeller powered by a gas engine and pulleys. While this kind of bold scientific innovation is fundamentally American, the only people at risk at Kitty Hawk were the Wright brothers.

Here, the risk is not borne by Navigator's venture capitalists and the United Arab Emirates. It is borne by South Dakotans. Because Navigator is comfortable with the risk to South Dakota, it asks the PUC to utilize the force of law to march everyone else into Navigator's experiment based upon naked assurances, and to do so before federal regulators have completed their study and rule-making specific to CO_2 pipelines

prompted in response to the Satartia, Mississippi rupture and before the failure rates are known, before the effective life cycle is understood, and before insurance companies are willing to insure the liability risk to landowners who unwillingly could be the forced host forever to such hazardous pipeline. Further, plume studies and dispersion risk analysis confidentially provided by Navigator to the Commission have still not been shared publicly, have not been made available to first responders, and do not model worst-case scenarios. The Commission should not force this experiment onto South Dakotans based on the existing record.

FACTS

Navigator is a Delaware Limited Liability Company. Transcript 117:4-13 (hereinafter "T" for Transcript). The controlling shareholder of Navigator is BlackRock's third fund of Global and Energy Power Infrastructure Fund (GEPIF III). T 119:16-120:1. GEPIF III represents approximately 84% of the equity investment in Navigator. T 120:9-11. 14.6% of the fund is owned by MIC CCS One, LLC, which while a "US Taxpayer," is actually based in the United Arab Emirates in the middle east. The United Arab Emirates and other middle eastern influences dominate this investment fund. T 124:8-18. Middle eastern sovereign wealth funds are also involved in the investment in some form. T 124:20-25.

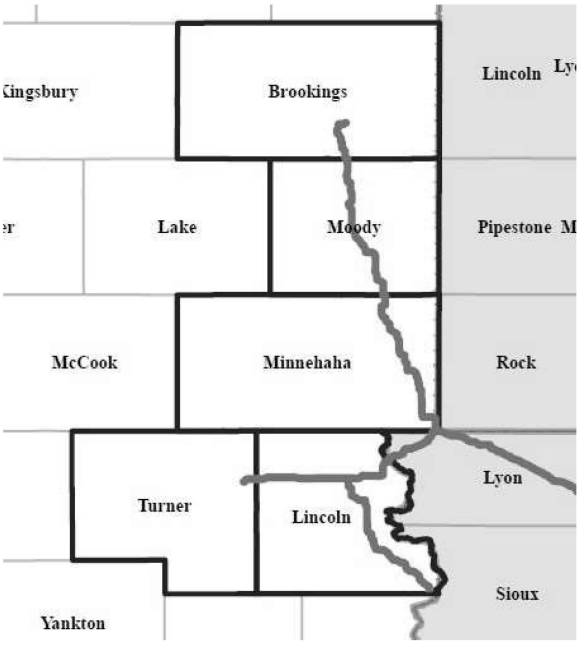
Navigator started this process by filing an Application for a permit on September 27, 2022. The South Dakota Public Utilities Commission held three public input hearings along the site on November 21st and 22nd. Shortly afterwards, Navigator informed the Commission that Navigator failed to notify 204 landowners along the route. *See* Woods & Fuller December 09, 2022 Letter, HP 22-002 (available at https://puc.sd.gov/commission/dockets/HydrocarbonPipeline/2022/HP22-002/LTR120922.pdf; last accessed on August 23, 2023).

The purpose of the notice is to inform the affected members of the public about the public input meetings. SDCL § 49-41B-5.2. Unbeknownst to Navigator, the Commission expected another meeting. Commission staff identified about 10 dates in January for a subsequent public input hearing. T 3313:16-3314:16. Instead of organizing an additional

public input meeting for the non-noticed landowners, Navigator sent a letter to them between Christmas and New Year's Day. This letter basically told these affected landowners to go to one of two websites - the Commission's website to find the docket or Navigator's own website to read Navigator's rosy story about the Project. *See* Ex. A to Navigator Heartland Greenway, LLC's Proof of Notice to Landowners, HP 22-002 (available at https://puc.sd.gov/commission/dockets/HydrocarbonPipeline/2022/HP22-002/ExALandownernoticeltr.pdf; last accessed on August 23, 2023).

Every Navigator employee who testified in favor of Navigator's proposed hazardous pipeline stands to profit from it via an ownership interest, with one exception, Brandi Naughton, who acknowledged that her investment was only her time as an employee. T 123:7-12; T 2141:17-24. The other Navigator employees who testified in favor of the application, the management team, currently hold $12,400,000 in equity in the project. T 124:5-7.

Navigator's proposed 8-inch diameter pipeline would be located across and through 112 miles of South Dakota including the most populated and fastest growing areas of South Dakota in Minnehaha and Lincoln counties. The proposed pipeline enters South Dakota in two locations, south eastern Minnehaha and north eastern Lincoln:



Ex. LO102 at 1.

The entirety of the proposed route through Minnehaha County, 28.93 miles, Moody County, 26.78 miles, and Brookings County, 7.98 miles, a total of 63.69 miles, is for the sole purpose of providing CO_2 transportation services to the Valero Aurora ethanol plant. Ex. LO102 at 2, 3, and 5; Ex. N20 at 12. This portion of the proposed route in Minnehaha County dissects the rapidly growing region between Brandon and Valley Springs. Twenty years ago, Brandon was a small town several miles away from Sioux Falls. Now, it is a rapidly growing community. If you are at the Dawley Farms development, Brandon was just several cornfields to the east a decade ago. Now, residential developments are beginning to connect the two communities. Brandon also continues to move eastward towards Valley Springs and is already within a section or two of the proposed pipeline.

The entirety of the proposed route through Lincoln and Turner counties, a total of 48.23 miles of hazardous pipeline, is for the sole purpose of CO_2 transportation for the POET Chancellor and POET Hudson ethanol plants. Ex. LO102, at 4 and 6; Ex. N20 at 12. The Lincoln and Turner County portions of the proposed route crosses the Big Sioux River from Lyon County, Iowa, then traverses westward within miles of Harrisburg, Canton, Worthing, and Lennox. Each of these communities, and in particular, Harrisburg, are growing fast. According to Census data, the population of Harrisburg in 2000 was 960 people. U.S. Census Bureau: South Dakota: 2000 Summary Social, Economic, and Housing Characteristics, Table 1, Pg. 10 (May 2003) (available at: https://www2.census.gov/library/publications/2003/dec/phc-2-43.pdf; last visited on August 25, 2023). By 2022, the Census estimates the population is 8,451 people. U.S. Census Bureau: QuickFacts https://www.census.gov/quickfacts/harrisburgcitysouthdakota This is a 880% increase in population in just 20 years.

Navigator has obtained approximately 30% of the easements required for its desired route. T 176:14-22. Navigator has not obtained the necessary pore space in Illinois to even sequester the carbon dioxide in Illinois. T 219:10-220:2.

Navigator did not do an adequate analysis of the impact of the proposed hazardous liquid pipeline on High Consequence Areas ("HCAs") using any sort of modeling, whether ALOHA, PHAST, or CFD. T 1795:6-1797:16. Navigator has not even informed the Commission of what HCAs exist beyond a nearly unreadable single map, Ex. N33, that purportedly shows the federal government's understanding of HCAs which only update every ten years. T 1857:21-1859:5. As described by Staff Expert Matthew Frazell, this type of analysis should be done as follows:

> "An operator would literally have to look at the locations along this pipeline to go, well, if I had a worst-case discharge at this point on the pipeline, where would it go and would it affect this navigable water, this drinking water, this populated area? Move 100 feet down the pipeline. If I had a *worst-case discharge* at that location, where would it go? Move 100 feet down the pipeline, do it again. Okay. So all along the pipeline you're asking the same question: If I had a worst-case discharge right here, would it affect any of these high consequence areas? So the question isn't where are the high constant areas. We kind of know that. The question is, if I had a worst-case discharge at this point on my pipeline, would it affect it?"

T 1796:6-20. (emphasis added).

The consequences of various leak or rupture scenarios on these HCAs is an unknown fact. Navigator provided no plume modeling showing the impact on identified HCAs. After Navigator's motion to reopen its case, Navigator presented Ex. N68, but as the Commissioners noted, this map does not accurately reflect the worst case scenario or include the necessary modeling for HCAs. THe underlying data for N68 is from N47A and assumes a guillotine rupture on flatland, however, the actual terrain concerned in many locations is not flat and different topographical situations exist. As Intervening Landowner Tony Ventura described, his land has a heavy slope and grade in certain areas that are prone to erosion. T 2675:1-21.

Both Intervening Landowners' expert witness Dr. Abrahams and Staff expert witness Matthew Frazell further testified that the value of Navigator's plume modeling is

minimal to nonexistent because the modeling does not show the impact on HCAs. T850:3-6, 1954:7-1956:19. This limits the effectiveness of Navigator's Emergency Response Plan ("ERP") since the ERP has no underlying foundational information to develop plans for South Dakota's HCAs. These HCAs are not abstract locations on paper. They represent locations containing individuals and families, moms and dads, children, brothers and sisters, all of whom have no information to plan for an odorless, invisible plume that could one day change their lives forever.

Navigator has a 59-page draft ERP at this time. Ex. N45. Up until Vidal Rosa's testimony, the ERP was confidential and had not been shared with any South Dakota first responders. Mr. Rosa testified that it needed to be confidential because it contained sensitive information about the emergency response plan that was constantly changing day-by-day. T 1359:22-1362:1. At the same time, in fact, on the same day as his testimony, Mr. Rosa disclosed that he had previously shared the 59-page draft ERP with first responders in Illinois. Id. It was only the following day, after a night to discuss with its counsel, that Navigator realized it should probably not treat South Dakotans worse than Illinoisians and agreed to remove the confidentiality restrictions on the ERP. T 1491:12-14.

Now, the South Dakota public knows what Navigator knew - the ERP is incomplete, inadequate, and unable to protect South Dakotans from an emergency from the proposed hazardous liquid pipeline. According to one landowner, the Valley Springs fire chief indicated they would not even respond to a rupture until a HAZMAT team arrived first. T 1630:3-11. Mr. Rosa testified the draft ERP will eventually be over 500 pages. T 1360:2-5. Mr. Rosa provided very little insight on the exact contents of the remaining 440+ pages of ERP. In response to questions regarding what was left to be completed, Mr. Rosa deferred, deflected, and avoided any sort of commitment to future contents.

The ERP also was delivered to Commission Staff only seven days before the start of the hearing even though it was requested several months before. Mr. Thurber testified

that the late production prevented Staff from adequately reviewing the draft ERP. T2872:9-12.

Intervening Landowners do not want the hazardous liquid pipeline through their property. Landowner State Representative Karla Lems testified that the proposed project would pose a serious injury to her social and economic condition and substantially impair her health, safety, and welfare. Specifically, Representative Lems testified that the project would limit future livestock operations of her family and impact the value of her housing eligibilities in Minnehaha County. T 1520:10-23. In the fall, Representative Lems had an advertised public auction for one of her properties that ended in a no-sale. Representative Lems argues that the disclosure of the existence of the potential pipeline on the property effectively eliminated the market. T 1529:23-1530:23. This is consistent with several other landowner's opinions, who testified that their land would be devalued and they would either not buy land with a hazardous liquid pipeline or would pay significantly less for it. *See e.g.* T 1695:23-1696:2; T 1670:1-10; T 1679:13-25; T 1711:5-14; T 1721:12-15; T 1744:1-11; T 2366:1-5; T 2317:1-12; T 2286:7-16.

Other landowners testified too about the economic concerns surrounding the project. As Tony Ventura testified, housing eligibilities cannot just be placed anywhere on a property due to unique topography and features unique to his property. T 2676:1-2677:11; T 2685:25-2686:4 and 2701:12-2702:2. This proposed project has already stopped him from placing a house on his property for his son despite having a permit and the house. T 2678:22-2679:7; LO63. Mr. Ventura's situation is one example of something that will happen to hundreds of other landowners as Minnehaha and Lincoln metro areas continue to grow into the country.

Gerald Haak and his adult son Gary Haak told the story of South Dakota. Gerald testified about the lifelong improvements he has made to his farmland, testifying that his tiling system helped to double his farm's productivity. T 2359:3-2368:20. He shared his deep understanding of the unique characteristics of his land, warning that the hazardous liquid pipeline ventures too close to wetlands, which he has found in his history of working and preserving his land, are highly erodible. Id. Son Gary is the second part of

this story, and along with his brothers, his part of the story is to improve on what his father and mother built for the most important shareholders in this proceeding - Gerald's grandchildren. However, Gary testified that the threat of the hazardous CO2 pipeline coursing through their property has essentially brought the farm to a standstill. T 2369:4-2377:16. He and his brothers cannot do any future planning because they do not fully know the impact of the project on their land and their farm. Id.

In addition to the loss to land values and impact on available housing eligibilties, Landowners also presented evidence that the Project will either expose them to an uninsured liability or increased insurance costs. Landowner Tony Ventura learned that he could only get necessary coverage at increased cost. T 2679:8-24. Landowner Brian Teal testified that the project will be an uninsured liability or alternatively an increased insurance cost to him and his family. T 2404:1-2404:17; Exs. LO28 and LO29. This could not only impact his farm, but his wife's business in Sioux Falls. Id. Mr. Teal further testified that his insurance agent actively encourages him against filing claims even when there is coverage to avoid increased premiums or being dropped from coverage. T 2412:4-18. Navigator's response to Mr. Teal was not to show that it could meet its burden to do no harm. Instead, Navigator suggested that Mr. Teal should go out and look for pollution coverage or other insurance. T 2408:2-7. When asked by Staff if Navigator has offered to compensate him for increased insurance costs, the answer should not surprise. Navigator has not. T 2409:3-6.

Dan Janssen is a model young farmer outside of Dell Rapids. He expressed several concerns. T 2320:13-2345:8. Dan's particular economic concerns were the damage of construction to his alfalfa fields, which he includes in his crop rotation as part of his stewardship of his land. Id. Navigator's easement compensation is based solely on corn and soybean prices. Ex. N60. He highlighted the fallacy of Navigator's "research" predicting the price of corn, noting how variable the price can be and how it is driven by a number of factors. Id. He shared many of the same concerns as Representative Lem. Id.

Mr. Janssen also is a volunteer first responder for the communities in his region. Id. As a volunteer first responder, he testified that he does not receive the same level of

training as a paid first responder in a community with a paid fire department or emergency medical services. Id. He also shared his observation that it is presently difficult to recruit volunteer first responders in the area, and the presence of CO2 pipelines and the unique training involved will only make it harder to recruit. Id.

Mark Labern is a retired volunteer firefighter from the same area as Mr. Janssen. He has 22 immediate family members and 1,800 head of cattle living within 1.5 miles of the hazardous CO2 pipeline. T 2345:13-2358:23. Mr. Labern confirmed Mr. Janssen's opinion about the difficult time recruiting volunteers. Id. He informed the Commission that Egan disbanded its volunteer firefighter department for lack of members. Id. He expressed his opinion that this is based on the overall increased modern life demands but also on the increased training requirements, which this project would exacerbate. Id. As volunteer firefighter rosters dwindle, the length of time to respond to emergencies grows, he further testified. Id.

Kay Burkahrdt testified that the increased burden of hazardous liquid pipelines extends to our rural hospitals. In her opinion, Navigator's claim that leaks are low is immaterial. T 2384:16-2385:5. As a longtime nurse in a rural hospital, she highlighted her practical experience that "the reasons we prepare is because we understand that there will be [a leak]. That's why we prepare. We prepare for somebody to have a heart attack because we understand there will be one that comes into the emergency room. Even though we were a very small hospital, it didn't happen very often, we still prepared because there will be one." Id.

Dan and Jillian Paulson live on 160 acres in Lincoln County with their three young children. T 2542:2-2561:5. Jillian homeschools her children. Id. They open their home up to travelers as part of the Christian Hospitality Network. Id. While the Paulsons share the concern for the economic impact, particularly to their concrete drain tile and housing eligibility, the primary concern was for the safety of their family and their guests since the Paulsons live on the same piece of ground Navigator proposes to invade. Id.

Patrick Deering is a young civil engineer who lives on a dream acreage between Brandon and Valley Springs. T 2709:24-2710:4; T 2710:25-2711:10. The hazardous

liquid pipeline would run right by his house, which he recently rebuilt, and his horse pastureland. T 2710:25-2711:22. He designs rural water pipelines for a living. T 2710:5-18. Based on his experience and personal knowledge, he testified that rural water pipelines place valves every two miles in rural areas and as close as 300 feet in more densely populated areas for safety concerns. T 2713:25-2714:15. In comparison, Navigator's shutoff valves will be every 7 to 15 miles. Id. This amount of distance is too far to find a leak within PHMSA's 30 minute time frame based on the due diligence that a pipeline company has to do in order to find the leak, and more importantly provides no safety comfort to those who are living nearby the pipeline. T 2715:3-2716:22.

Dan Nelson shared a beautiful photo of his property where he lets children fish to enjoy the property and give them something to do. T 2288:10-2320:3. He had hoped to build his retirement home on this property, a property he said was hard to put a price on, but he will not do it if the proposed hazardous liquid pipeline runs through it. Id. He also raised the important issue of tourism. Dan's property borders the planned expansion of the Palisades State Park. Id. If approved, the hazardous CO2 pipeline would run right by one the pre-eminent state parks in eastern South Dakota, exposing those campers to a danger of a leak or rupture. Id. His property shares the same quartzite formations as the Palisades State Park. Id. Dan questioned the feasibility and certainly the practicality of drilling any sort of pipeline through this type of solid rock. Id.

STATEMENT OF APPLICABLE LAW

The Commission "is not bound by stare decisis, and therefore it can redefine its views to reflect its current view of public policy regarding the utility industry." In re Admin. Appeal of Ehlebracht, 2022 S.D. 19, ¶ 29, 972 N.W.2d 477, 487 (SD 2022). To fulfill its first obligation to the public, Navigator must notify affected landowners. SDCL § 49-41B-5.2. However, neither construction nor operation of a CO_2 pipeline can occur without first obtaining a permit from the Commission. As applicant, Navigator has the sole and only burden of proof to establish by the 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…;

(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…

SDCL 49-41B-22; Ex. LO 2. Therefore, these are factors the Commission evaluates. Interestingly, factors 2, 3, and 4 are framed in the negative and describe what effects approving an application cannot occur. These are akin to the mantra – do no harm. Unless and until Navigator has proven each of the four forgoing factors, it shall not be granted siting approval.

ARGUMENT

1. Navigator Did Not Provide Sufficient Notice To All Affected Landowners

A. Public Notice in Commission Hearings is not Discretionary

The Commission is a quasi-judicial body governed by Title 49 of South Dakota Codified Laws. Within Chapter 49-41B, the Commission and an applicant have responsibilities to the public and neighboring landowners. When an application is filed, the Commission must schedule a public input meeting within 30 days, notify the applicant of the date of the public input hearing, and notify the governing bodies of the counties affected by the facility. SDCL § 49-41B-15. The Commission must hold the public input hearing in a location along the proposed facility and provide notice in newspapers. SDCL § 49-41B-16.

After the Commission sets the hearing, the applicant bears the responsibility to provide notice of the proposed project and of the public input hearing to all landowners located within one-half mile of the proposed facility. SDCL § 49-41B-5.2 (*specifically stating, "Any notification required by this section shall state the date, time, and location of the public input hearing.")*. At the hearing, counsel for Navigator contended that there

has been no harm because no one was prevented from intervening even with the late notice. T 2249:12-22. In other words, even though the landowner did not get notice of the public input hearing, the landowner could (1) find a lawyer, (2) hire a lawyer, (3) engage in litigious discovery where Navigator objects to the majority of requests, and (4) present the landowner's evidence to the Commission during a multi-week hearing in Pierre, South Dakota right before harvest season begins. To be fair, many landowners are so concerned about this project that they did choose to do this, most of them, however, chose to do it *after* have an opportunity to learn more about the project. *See e.g.* T 2332:15-2333:1, T 2712:1-10. Alternatively, the one landowner could intervene on their own and try to take on Navigator's team of lawyers. But this misses the point of the notice. An attorney can rationalize that any of these 204 landowners could have intervened in the proceeding as an interested party and been unaffected by insufficient notice of a public meeting, but can a publicly elected official?

The purpose of the notice is not like a lawsuit, warning a landowner that the landowner has effectively been sued. The purpose of this notice is to let the public interact, ask questions, and make comments to the publicly elected officials responsible for the approval or denial of the proposed facility. In other words, the public input meeting is actually for the benefit of the Commissioners, not the landowners. As Commissioner Fiegen succinctly pointed out, "the Commissioners, especially me, wanted to make sure that public input from landowners or nearby landowners were given the opportunity to ask questions of the Applicant face to face or virtually, but the Commissioners could hear the questions so we could take notes and et cetera." T 2914:15-20.

Navigator misses this point. The law affords the Commissioners the opportunity to hear and interact with the public at the public input meeting and not just at the final hearing, which frankly is for Navigator to show it met the burden of proof and for Intervenors and Staff to test it. The Commissioners should not and do not expect every landowner to wait until the end to get their questions asked and answered in a quasi-judicial proceeding.

B. Notice To All Affected Is A Fundamental. If All Affected Did Not Receive Proper Legal Notice, The Application Must Be Rejected.

Navigator will argue that it substantially complied with the notice requirements by directing individuals to some websites and letting them know they could intervene. Navigator contends that the fact that 3 of the 204 did intervene shows that no foul was committed. T 2249:12-22. However, if this was a court proceeding, the lack of proper notice would be enough to dismiss the application. It is a well-recognized legal principle that "if service is insufficient and unauthorized by law, the court does not acquire jurisdiction." Am.Jur. 2d. Process § 112.

The Commission is bound by law. Here, the requirement of a public input hearing is mandatory. The Commission must host one. There are no exceptions. The requirement that the Applicant provide notice to every landowner within half a mile of the project is mandatory.The meaning of "shall" versus "may" is well-settled in South Dakota jurisprudence. In statutory construction, the South Dakota Supreme Court finds across multiple different types of actions that the use of the word may, shall or must "*is the single most important textual consideration determining whether a statute is mandatory or directory*." In re Estate of Flaws, 2012 SD 3, 811 N.W.2d 749, (2012) (citing Matter of Groseth Intern, Inc., 442 N.W.2d 229, 232 n.3 (SD 1989). When this jurisprudence is combined with the legal maxim that insufficient service devoids a tribunal of jurisdiction, the only appropriate conclusion is to dismiss the application.

The only way the Commission cannot dismiss the Application is to speculate like Navigator speculates. The Commission must speculate that these 204 landowners understood the December 28, 2022 letter and that it had legal meaning. The Commission must speculate that the presence of only three of the 204 landowners intervened means the 201 did not care enough to have their opinions heard. The Commission must speculate that the late notice was sufficient even though it does not provide notice of a public input meeting or even a direct link to the recordings. The Commission must speculate that not a single one of these 204 landowners would have asked a thoughtful

question or provided an informed comment that could have helped the Commissioners evaluate the Application, whether to approve, deny, or set conditions.

It is this last call for speculation that goes too far. The hearing demonstrated that Intervening Landowners are thoughtful, concerned citizens. Certainly, members of the 204 would have also been thoughtful, concerned citizens that provided important information for the Commissioners to weigh. The Commission should set a bright line standard: a failure to provide notice of a public input hearing defeats an application for insufficient service. Applicants should go above and beyond to provide the Commissioners an opportunity to hear from affected persons and the public.

2. Navigator Failed To Prove The 49-41B-22 Factors.

A. Factor One: Navigator has not proved the proposed project will comply with all applicable laws and rules.

Navigator must prove that it will comply with "all applicable laws and rules." SDCL § 49-41B-22(1). Notably, this requirement is not limited to just South Dakota's laws and rules. The burden of proof extends to federal law and to other state's laws and rules as well. This interpretation is consistent with past Commission decisions. For example, the Commission found that the applicant for the Dakota Access Pipeline met its burden of proof by showing it could comply with federal law and regulations concerning those particular pipelines. Because this is a multi-state hazardous liquid pipeline, the ability to comply with Iowa, Minnesota, Nebraska, and Illinois' applicable laws and rules is relevant too. If the Applicant cannot establish that it will comply with those states' specific requirements, it makes little sense for this Commission to authorize the Project. In fact, that could have a catastrophic effect if it is built here but not finished in Illinois.

Common sense suggests that since in Illinois, as the sequestration state for the entire proposed project footprint, is essential for project viability and given South Dakota is the extreme end of the proposed footprint and represents only 112/1300 miles, or 8.6% of the project, perhaps it is prudent for Navigator first to have complied with all laws and rules of Illinois, or at least, present evidence that it will be able to comply.

However, the evidence shows that Navigator has not and has no plan to comply with applicable laws in Illinois. In particular, the Illinois Commerce Commission ("ICC") rejected Navigator's initial application in Illinois because it failed to comply with Illinois' application laws and regulations. ICC analyst Mark Maples recommended that the application be rejected in Illinois due to safety concerns and specifically that the ICC should not approve until PHMSA has completed its rulemaking process for carbon dioxide pipelines. T 1188:2-24. He further found that Navigator's application does not meet the requirements of Illinois law. T 1188:25-1189:24.

Navigator attempted to make a big deal that it would comply with all federal regulations, specifically PHMSA regulations. On several occasions, Navigator testified that PHMSA regulations actually overrule or supersede state law and regulations concerning pipeline, specifically regarding safety and construction. Navigator's attempt to shift the burden of this review to the federal government was misguided as the Commissioners themselves pointed out. As Navigator admitted, the federal government is a passive regulator that does not actually pre-approve any design or construction of the project. In reality, Navigator certified compliance, and the federal government may, *or may not*, do anything with the certification.

This is concerning. The federal government is presently in the process of revising its rules and regulations specifically for carbon pipelines in recognition, after the Satartia rupture, that carbon pipelines have higher pressures and pose different types of threats than oil or natural gas pipelines. T 571:24-572:2. The testimony suggested Navigator's project would be "grandfathered in" if construction started before these new regulations are produced. T 584:16-585:4. These regulations could change the project after permit approval, or alternatively, South Dakotans may be forced to accept a pipeline that does not comply with the pipeline regulations of the future simply so Navigator can cash in today.

Navigator did not present evidence that it would comply with the existing federal regulations, particularly subpart F of 45 CFR 195 concerning operation, emergency response, and maintenance of the pipeline. To be fair, Navigator has 59 pages of paper

that it has combined to call a draft ERP. Ex. N45. This document is wholly inadequate when compared to the federal regulations. Navigator acknowledged that the ERP is incomplete and when Navigator is done assembling it, whenever that will actually be, the ERP will be over 500 pages. Let's use common sense. Ten percent of a plan concerning a never-done-before hazardous pipeline in South Dakota with the unique risk profile as learned throughout the hearing is simply not enough to comply with federal law - but more importantly, is not enough to calm the anxieties of South Dakotans.

49 CFR § 195.402(d) is a comprehensive rule for abnormal operation. Here it is in the entirety:

> "(d) Abnormal operation. The manual required by paragraph (a) of this section must include procedures for the following to provide safety when operating design limits have been exceeded:
>
> (1) Responding to, investigating, and correcting the cause of:
>
> (i) Unintended closure of valves or shutdowns;
>
> (ii) Increase or decrease in pressure or flow rate outside normal operating limits;
>
> (iii) Loss of communications;
>
> (iv) Operation of any safety device;
>
> (v) Any other malfunction of a component, deviation from normal operation, or personnel error which could cause a hazard to persons or property.
>
> (2) Checking variations from normal operation after abnormal operation has ended at sufficient critical locations in the system to determine continued integrity and safe operation.
>
> (3) Correcting variations from normal operation of pressure and flow equipment and controls.
>
> (4) Notifying responsible operator personnel when notice of an abnormal operation is received.

(5) Periodically reviewing the response of operator personnel to determine the effectiveness of the procedures controlling abnormal operation and taking corrective action where deficiencies are found."

Here is Navigator's Abnormal Pressure Conditions section of the ERP:

"One of the most serious conditions that can be encountered on a pipeline is an over-pressured system. Normally this would be caused by a malfunctioning pressure relief device or erroneous valve operations. The Company uses [insert description of Control Room Management procedure and O&M procedure here.]." N45 at 29.

It should go without saying that "Insert description here" does not meet the federal PHMSA regulations, and frankly, Mr. Rosa's testimony certainly is a promise, but the evidence is so scarce that there is no certainty that the promise can be kept.

Similarly, 45 CFR § 195.403(a) requires a pipeline operator to have a continuing training program. Here is the federal rule:

"(a) Each operator shall establish and conduct a continuing training program to instruct emergency response personnel to:

(1) Carry out the emergency procedures established under 195.402 that relate to their assignments;

(2) Know the characteristics and hazards of the hazardous liquids or carbon dioxide transported, including, in case of flammable HVL, flammability of mixtures with air, odorless vapors, and water reactions;

(3) Recognize conditions that are likely to cause emergencies, predict the consequences of facility malfunctions or failures and hazardous liquids or carbon dioxide spills, and take appropriate corrective action;

(4) Take steps necessary to control any accidental release of hazardous liquid or carbon dioxide and to minimize the potential for fire, explosion, toxicity, or environmental damage; and

(5) Learn the potential causes, types, sizes, and consequences of fire and the appropriate use of portable fire extinguishers and other on-site fire control equipment, involving, where feasible, a simulated pipeline emergency condition."

Navigator's continuing training program is the equivalent of one 8.5' x 11" page of type. Here it is:

"The Company has established and will conduct a continuing training program to instruct emergency response personnel to:

Carry out the emergency procedures established under § 195.402 that relate to their assignments;

Know the characteristics and hazards of carbon dioxide being transported (including in case of flammable HVL, flammability of mixtures with air, odorless vapors, and water reactions);

Recognize conditions that are likely to cause emergencies, predict the consequences of facility malfunctions or failures and hazardous liquids or carbon dioxide spills, and take appropriate corrective action;

Take steps necessary to control any accidental release of hazardous liquid or carbon dioxide and to minimize the potential for fire, explosion, toxicity, or environmental damage; and

Learn the potential causes, types, sizes, and consequences of fire and the appropriate use of portable fire extinguishers and other on-site fire control equipment, including, where feasible, a simulated pipeline emergency condition." N45 at 33.

The purported "training" is just a regurgitation of the federal rule, which is not a training program at all. At time of application, because the application, particularly the ERP, is so incomplete, admittedly a "draft" only, the Applicant has not met its burden of proof. These are just two examples. This document alone is rife with more as it is only ten percent

complete. To simply impose a condition that Navigator must have a fully completed ERP before construction or operation would completely defeat the purpose of even having a burden of proof to show compliance with all applicable laws and rules. SDCL § 49-41B-22(1). The Application must be rejected.

B. Factor Two: Navigator must prove the proposed project will not pose a threat of serious injury to the environment nor to the social or economic condition of the inhabitants or expected inhabitants in the siting area

i. Social and Economic

The Legislature is presumed to have thoughtfully and carefully selected the words and phrases within the laws it creates.US W. Commc'ns v. Pub. Utils. Comm'n, 505 N.W.2d 115, 123 (S.D. 1993) (*stating the presumption is that the legislature did not intend an absurd or unreasonable result.)*. Factor two does not ask if the project will cause a serious injury to the environment or social or economic condition but rather requires the proposed project not pose a threat of such injury. Based upon the evidentiary record, the project, as proposed, does pose such threats to the environmental, social, or economic condition to existing inhabitants and expected inhabitants.

Navigator's efforts on factor two predominately consisted of claims there would likely be economic benefits of the Project generally but did not specifically focus on the absence of economic injury to current and future South Dakotans. Navigator wants the Commission to focus on a hypothetical elevated demand for corn at ethanol plants. This is only relevant if the Commission employs a utilitarian cost-benefit analysis. This is not what the statute requires though. Navigator must show that it will not pose a threat of injury to social and economic conditions, not that it will be a net positive to South Dakota because of alleged increased demands. Navigator largely ignores the Intervening Landowner's evidence about injury to property values, housing eligibilities, increased cost of insurance or inability to obtain coverage, and tile damage. This evidence was clear and largely uncontroverted, and the only conclusion is that the Project does pose a threat on those issues.

The overwhelming testimony was that the Project could pose a threat to property values and housing eligibilities. As discussed above, this is already happening. Representative Karla Lems experienced a no-sale on her property because the pipeline is proposed to run through it. Other landowners from Minnehaha and Lincoln County also raised concerns about their property values. Commissioner Fiegen specifically asked nearly every landowner about their housing eligibilities. Each testified that this would negatively impact both their ability to site potential housing and alternatively would decrease the value of their property due to the potential loss of housing eligibilities or the increased cost to work around the pipeline. Navigator presented no evidence that the housing eligibilities in Minnehaha and Lincoln Counties would not be negatively impacted or that the social condition of the inhabitants would stay static.

Navigator presented natural gas industry sponsored case studies of several communities indicating that the presence of a natural gas pipeline does not conclusively have an impact on land values, but nothing specific to hazardous carbon dioxide pipelines, which is entirely different. This finding regarding natural gas is not necessarily inconsistent with landowner's sentiment. Landowner Representative Lem testified that she found value in a natural gas pipeline because it provides a needed resource to her and the surrounding communities. T 1583:1-12.

Numerous landowners raised concern about their ability to be insured. In particular, Intervening Landowners Bruce and Kay Burkhardt presented evidence that their present insurance company would not cover damage from the release of a pollutant. Ex. LO12 at 1. Navigator's Rebuttal Witness Steve Pray testified that this type of pollution exclusion is a common exclusion in insurance policies. T 2450:14-16. This exclusion gets commonly implicated in South Dakota in construction situations and usually a contract requirement in those situations is a requirement that additional coverage is obtained to address pollution liability. T 2451:22-1452:19. Mr. Pray testified that a landowner could possibly get this coverage for an additional cost, but he did not know how much that would cost. T 2448:6-16.

The issue of insurance is amplified when combined with Navigator's easement terms. As part of its form Easement Agreement (hereinafter "Easement"), Navigator requires the landowner to make Navigator whole in the event the Landowner causes "claims, liabilities, or damages as may be due to or caused by the negligence or willful acts of Grantor, or its servants, agents or invitees." Ex. N60 at 5. Testimony indicated that a landowner or a contractor for the landowner who hits the pipeline could be liable under this term. This fact, combined with the subrogation requirements could result in Navigator's insurance company suing the landowner, who has no insurance coverage to defend him in the event of a leak, for such damage. T 2450:8-12.

Lastly, many Intervening Landowners raised concerns about the damage to their tiling systems on their land. Intervening Landowner witness Richard McKean testified about the troubles of locating and repairing tile in the prairie pothole region, which contain more "mucky" soils. T 2493:13-20. The first primary issue is usually a failure to locate tile, and even utilizing ground piercing radar is not always effective to find the actual tile in this region. T 2496:22-2497:11. Even if the tile is mapped, the maps can often be 50 to 75 feet off from the actual physical location. T 2526:19-25. Finding the location is critical to minimize damage.

Navigator's plan to mitigate damage to drain tiles and to the fields potentially is also lacking. In cross-examination from Navigator, Mr. McKean noted, in review of Navigator's Agricultural Protection Plan ("APP") that the plan does not take into consideration the impact of water in the drain tile during construction. T 2507:23-2508:2. In certain scenarios, this could flood the entire tile trench. T 2508:3-5. Navigator's APP to dewater the trench calls for dumping soupy, muddy water over the landowner's field, and causing significant problems for the farmer. T 2509:3-7. The construction of the pipeline and the interruption to drain tile will negatively impact soil productivity. T 2523:20-24. Ultimately promises to repair tile is easy to do on paper but hard to do in practice. T 2508:21-23. Every situation is different. Some will be easy to repair and others will be more costly.

As Commissioner Fiegen observed though, "farmers want to make sure the contractors that come out to fix their tile that they can trust." T 2530:10-11. Mr. McKean's concerns are valid and largely undisputed. Navigator's rebuttal witness Steve Brandenburg does not dispute him; but instead, simply testifies that his company could do the job. N14. This may also be true. The problem though is that while Navigator has a plan to repair tile on a piece of paper, Navigator has no company retained to do it. The Commission cannot actually verify that Navigator has selected the right person or company to actually fix destroyed tile after the pipeline is installed. Navigator promises that they will pick the right person or company, but the Commission will only know after the fact and other parties would have no opportunity to make sure it is someone they can trust. This is the definition of speculation. This should not be "solved" with a condition. Navigator has not met its burden of proof because it has not shown by the preponderance of the evidence that the plan on paper will be able to be implemented. Like nearly every other piece of Navigator's application, Navigator promises to deliver without showing it can actually do so.

Navigator has not shown that the hazardous liquid pipeline will not pose a threat of serious injury to the social or economic condition of inhabitants. Property values, housing eligibilities, insurance risks and damages relating to tile are more likely than not to occur.

ii. Environment

Navigator's Application fails to show that the project will not pose a threat of serious injury to the environment. Navigator used the wrong ecological map. T 2178:5-2179:4. As Staff Expert Witness Sterner testified, Navigator has no plan for when migratory animals get stuck in the construction area. T 2151:12-21. The Application also fails to provide sufficient hydrology information to actually evaluate the impacts on water sources throughout the project. T 2151:22-2152:6. *See Also* T 2175:15-2176:11. The Application did not adequately address the impact on soil temperatures. T 2152:19-2153:12. Knowing specific information about wetlands and geological deposits is particularly important for horizontal directional drilling. T 2165:13-2166:25. The plan

for revegetation was lacking. T 2156:21-22. Like the concerns of family farmers the Haaks, Mr. Sterner also noted that the lack of information regarding wetlands and glacial deposit impacts was concerning. T 2156:22-25; T 2158:13-2159:10.

Critically, Navigator failed to provide a geological geohazard study for phase 2 of the project. The lack of a phase 2 geohazard study highlights the main theme of this hearing summarized by Mr. Sterner: "I see the commitment to use the information provided in the Phase 2 geohazards assessment. Again, the primary concern is that information isn't going to be available to the Commission to make a decision." T 2191:19-22; T 2198:6-2199:15 (*Sterner stating, in summary, that Navigator has failed to provide necessary information for the Commission to make a decision*).

When it comes to the environment of South Dakota, Navigator cannot make promises. Navigator has a burden of proof. Based on the evidence presented, there are too many unanswered questions regarding phase two, wetlands, geological deposits, wildlife, and soil temperatures. The Application should be denied because Navigator has not been able to show by the preponderance of evidence that the hazardous liquids pipeline will not pose a threat of serious injury to South Dakota's environment. The necessary due diligence, as exemplified by Mr. Sterner, is not there.

C. Factor Three: Navigator must prove the proposed project will not substantially impair the health, safety, or welfare of the inhabitants

i. Health and Safety

Navigator has provided no reliable evidence or testimony that the proposed hazardous liquid pipeline will not substantially impair the health and safety of inhabitants. Most importantly, Navigator failed to even identify HCAs, and further to show how a potential worst case scenario would impact the respective HCAs using appropriate modeling. Navigator's air dispersion result based on PHAST is highly compromised. Critically, as Staff Expert Frazell noted, the model did not include a critical input of the release pressure. T 1952:20-1953:18. The release pressure can differ from the stated pipeline pressure. "So there's the pipeline operating pressure and then there's the release pressure. The pipeline can operate anywhere, from my understanding,

between 1,300 psig to 2,200 or 2,100 psig. Ideally, the release pressure would be somewhere in that range, but it could be lower than that. It could be higher than that. I don't know because I haven't seen that in [the] record. It could be at the burst pressure of the pipe. It could be at the burst pressure of the welds. I don't know. So that is a useful piece of information, and it governs the dispersion distances." T 1963:1-11. Based on this alone, the Commission can conclude that the burden is not met because there is simply no reliable evidence to conclude that the proposed project will not substantially impair the health and safety of inhabitants. The dataset presented is incomplete.

In addition to being incomplete, Navigator was not willing to timely provide the underlying data for verification. Intervening Landowners or Staff Witnesses were not able to actually review and challenge the underlying data. For Commission Staff, this is unusual. As Staff Analyst Thurber testified:

> "The primary issue we had, at least from my opinion, is we're accustomed -- Commission Staff's accustomed to reviewing models. We often get a summary of the modeling and results and we certainly review that. But in order to really form an opinion, you need to get the inputs, assumptions, and outputs. I don't believe if Mr. Frazell looked at the five-page summary and gave a thumbs up, I don't think the Commission would be happy with the thoroughness of his review. So we're accustomed to getting a large data dump when we say we want all associated documentation, you know, and then we'll work back and forth with the company. And it took a long time from when we first started to where -- you know, when we got it. I think we'd gotten some. It's up to Mr. Frazell to determine if we had enough. But the discovery process was more challenging than we're accustomed to when we ask for modeling and also some documentation."

T 2917:11-2918:3. This lack of forthrightness further calls Navigator's modeling and credibility into question.

PHAST modeling is also not reliable in situations with unique topography, weather conditions, or obstructions such as buildings. The modeling is only for flatland

without obstructions and less accurate than CFD modeling. T. 850:3-6. PHAST is unable to handle the wide variety of topography and weather conditions that define South Dakota. T 846:18-847:3. Both Intervening Landowner Expert Witness Dr. John Abraham and Staff Witness Matthew Frazell testified that CFD modeling does not need to be done everywhere, but in areas with greater complexity, CFD modeling will be more accurate and reliable. *See* T 854:10; T 1976:18-1977:3. Navigator claimed that CFD is too expensive and time consuming to complete, but Dr. Abraham testified that, at most, in modeling near a city, it would cost a couple thousand dollars, and in any event, he could do it for free for Navigator. T 844:17-845:17.

Even with the incomplete modeling, the Commission must weigh the potential environmental hazard of a hazardous liquid CO2 pipeline. Navigator's proposed pipeline differs greatly from an ordinary petroleum or natural gas pipeline people are more familiar with. The proposed pipeline would transport supercritical CO2 in a highly pressurized state (1,300 psig to 2,100 psig) with a maximum operating pressure of 2,200 pounds per square inch. Ex. N20 at 8. Carbon dioxide dispersion results for an 8-inch pipeline, depicts hazard level distances based on levels of CO2 exposure ranging on the low end of 30,000 parts per million (ppm) up to 105,000-ppm. Ex. N47A at 18. According to Navigator's air dispersion results the actual hazard level distances are much greater than what Navigator selected for its initial routing buffer. *Compare* Ex. N47A pg. 18 *with* Ex. N62 pg 3.

Navigator witness Stephen Lee admitted that exposure levels of 40,000 ppm pose an immediate danger to life and health, and that lesser ppms can result in danger to life and health for exposure times that are as short as 15 to 30 minutes, including headaches, dizziness, exhaustion, disorientation, unconscious, and death. T 732:7-736:10. Commission Staff Analyst Thurber confirmed that Staff Expert Matthew Frazell, the only witness for any party to actually work on a carbon dioxide pipeline, opined that distances associated with the 40,000-ppm hazard level would indicate appropriate buffer or setback distances, as measured from the centerline of the proposed pipeline route. T 2938:14-25. For nearly a year, Navigator fought all attempts to release its confidential claim as to data

found in Ex. N47, N47A and Ex. N62. But for the strong suggestion Navigator needed to provide an overlay map of the worst-case scenario release it was not until August 24, 2023 when Ex. N68 was provided by Navigator and this sole exhibit, with a single data point, 1,855 feet, was finally made public with Navigator's reluctant acquiescence. But even Ex. N68 does not depict the hazard distance of a true worst-case scenario.What it does show are numerous South Dakota residents who live within the Hazard Level II area. If Navigator's Application were approved, every time these folks have a headache they will be left wondering if it is just a headache or potentially foreshadowing of something more ominous and life threatening.

The route as proposed is simply not an intelligent one considering the totality of the information available and actual and likely future development and expansion. Navigator has not met its burden of proof because the single data point modeling that was provided to the Commission is incomplete and does not reflect the worst-case scenario. Based upon the evidence in the record, Navigator has failed to prove its proposed hazardous pipeline will not substantially impair the health and safety of persons located near the proposed route.

ii. Welfare - the state of doing well especially in respect to good fortune, happiness, well-being, or prosperity[1]

a. The Easement

Landowners argue a pipeline route is simply a series of connected easements. Easements can be obtained "voluntarily" with the underlying threat of eminent domain or "involuntarily" through a condemnation lawsuit directly exercising the power of eminent domain. But for the PUC's approval of Navigator's Application, there is no practical reason why any South Dakotan's land would be legally encumbered by the Easement. So, the contents and rights and restrictions determined by the Easement are crucial to analyzing whether the proposed hazardous pipeline will not substantially impair the welfare of the inhabitants.

[1] https://www.merriam-webster.com/dictionary/welfare

Ex. N60 is Navigator's proposed Easement. A review of the fine print is prudent. Evidence adduced during the hearing proves the following facts related to the Easement:

- Navigator Heartland Greenway, LLC, (Navigator) is a recently formed Delaware limited liability company with its principal office in Dallas, Texas. Ex. N60.
- Navigator's assets are the easements it has presently obtained. T. 133:20-24.
- While there is equity pledged to Navigator, that equity or dollars would need to be called and contributed into the company. T. 183:1-15.
- The "Permitted Uses" Navigator can put any targeted land to include the ability to unilaterally "construct, install, maintain, operate, replace, abandon in place, inspect, patrol, protect, test, repair, reconstruct, alter, relocate, remove, and any and all related uses thereto…" There are no time limitations, restrictions, or notice requirements as to any of these activities. Ex. N60; Landowners' Prefiled Testimony.
- Navigator's Easement has no end date and neither does its negative impact upon the targeted land. N60; Landowners' Prefiled Testimony.
- Navigator reserves the sole right to also locate upon Landowner's property any amount of "incident facilities, equipment and appurtenances including but not limited to above or below, test stations, power and communication equipment, markers, signage, and cathodic protection devices, and other necessary appurtenances to transport, measure, and control the flow of carbon dioxide and associated substances…" This is far too vague and wide ranging, with no limitations, and Navigator's roving rights subject the property to significant restrictions because Navigator's rights dominate. This will prevent owners and users of the land from improving and developing the land in the ordinary course. These restrictions have substantial negative economic impacts now and into the future. Ex. N60; Landowners' Prefiled Testimony.

- Navigator further infringes on landowners' legal rights forever as they seize all "rights and benefits necessary or convenient for the full enjoyment or use of the rights [of Navigator] herein granted, including but without limiting the same, the free, non-exclusive right of ingress and egress over, across, and within the Easement, together with a free, non-exclusive right of ingress and egress to and from said Easement upon and over the Property, including private roads." "Property" is defined as the entire parcel and not limited to the fifty-foot permanent Easement. Ex. N60 at 1; Landowners' Prefiled Testimony.
- Navigator further infringes on the targeted parcel forever as they have the right whenever they so choose at their "sole discretion, to cut all trees and undergrowth and remove other obstructions" that in any way they deem to interfere with any of the many Permitted Uses they have as discussed previously above. Ex. N60 para 2; Landowners' Prefiled Testimony.
- Navigator reserves the right to remove any improvements, whether above or below ground, installed by landowner on the Easement. This substantially negatively affects landowners' ability to use their land as they see fit and chills or eliminates motivation to further develop the land and install improvements. This hurts the tax base and value of the land and hurts the State's economy. N60; Landowners' Prefiled Testimony.
- Navigator's Easement prohibits landowners from using their land for agricultural and pasturage purposes if they are in any way deemed "inconsistent with the [Navigator's] purposes set forth in this [Easement]" and if such landowner rights are deemed to "interfere with the use of the Easement…" This presents a deterrent to continuing on in the ordinary course of production agriculture. This language affects decisions of operating heavy and large equipment back and forth across the easement with the proposed pipeline to be buried only five (5) feet below the surface. This will discourage the purchase and use of the most efficient farm

equipment. Mr. Lee confirmed that 5-feet of cover "supports up to 80,000 pound" machinery. Ex. N60; Landowners' Prefiled Testimony; T 2998:7-19.

- Landowners can only construct, reconstruct, and maintain roads or drives only at a forty-five (45) degree angle to the Pipeline but not along nor within the Easement and they can only do this if Navigator lets them, which Navigator does not have to do. This represents further restrictions negatively affecting how landowners can use their land. Ex. N60 para 4; Landowners' Prefiled Testimony.
- Landowner can only construct and/or install "water, sewer, gas, electric, cable TV, telephone or other utility lines over and across (but not along and not within) the Easement at any angle of not less than forty-five (45) degrees and no more than one hundred thirty-five (135) degrees to the Pipeline" if Navigator allows, which it does not have to do, and only if Navigator deems its "protective requirements are met" by Landowner at Landowners' sole expense and time investment. Ex. N60 para 5; Landowners' Prefiled Testimony.
- Navigator has the sole and "absolute right to assign, sell, lease, mortgage or otherwise transfer this [Easement] Agreement in whole or in part…" If Navigator exercises any of these rights and some unknown and unwanted party becomes the owner of the Easement on and pipeline and equipment on landowners' land, not only does Landowner not have any say-so, Navigator "shall have no liability or obligation as to events occurring after the date of a permitted assignment, with all such potential liability or obligation for future events terminating…" Ex. N60 para 6. Landowners' Prefiled Testimony. This is *the* red-herring. Navigator, and its venture capital and Arab money, are flipping this Project for federal tax credits.
- Navigator proposes to bury the proposed pipeline at a minimum of sixty (60) inches "except at those locations where rock is encountered, the

Pipeline may be buried at a lesser depth." The phrase "where rock is encountered" is not defined or quantified and this provision could be used to justify locating the hazardous liquid pipeline closer to the surface on any given property. Ex. N60 para 9; Landowners' Prefiled Testimony.

- Landowner would not be able to recover for any damages caused by Navigator during its clearing of "any trees, undergrowth, brush and other obstructions" because Navigator has determined in advance it will "not be liable for the damages caused by the clearing for the same from the easement(s)…" This is a negative economic impact on the Landowner as there is no recourse for damage caused by Navigator in these instances. Ex. N60 para 11; Landowners' Prefiled Testimony.
- Navigator's Easement gives it a roving right for Navigator to locate its hazardous liquid pipeline anywhere on Landowners' land. On Exhibit A of the Easement, the aerial map, it talks about "proposed length" "proposed acreage" and states Exhibit A is "[F]or informational purposes only." It is not a plat or a survey. So, we are in the dark – as is the Commission – of what it would be approving given there is no "final" route to approve, and Navigator is instead asking for the right to locate its proposed hazardous liquid pipeline anywhere and in any configuration on, under, across and through Landowners' property. Landowners' Prefiled Testimony Attachment No. 1; Ex. N60.
- Should the proposed hazardous pipeline be located upon a Landowner's property they have no liability protection and are directly exposed to liability as Navigator offers no indemnification or hold harmless protections for what damages or injury occur on Landowners' Property outside of the specific Easement areas. This is specifically concerning because CO2 will travel well outside the fifty (50) easement area during an unintended release event potentially causing damages to person, property, or livestock upon

Landowner's or neighboring land. Ex. N60 para12; *See Also* Ex. N62 at 18 and N68; Landowners' Prefiled Testimony.

- Many testifying Landowners' insurance policies do not or may not provide coverage for damages caused by CO2 exposure. This insurance exclusion is often referred to as a pollution exclusion and while other hazardous pipelines may or may not transport substances that could also be considered a pollutant, the ability for CO2 to quickly travel and spread while maintaining its toxicity makes it a unique risk when compared to natural gas or crude oil pipelines. *Id.*; Ex. LO12 at 1. Navigator's witness, Mr. Jeffrey Pray testified there are many exclusions in insurance policies and each scenario is fact specific and you must apply those facts to the policy language. T 2439:3-20. Mr. Pray testified that if a release of CO2 occurred on a given landowners land, that landowner could be sued by the pipeline company, the pipeline company's insurer, or by their neighbor and coverage may or may not be provided. T 2440:2-2441:13. Mr. Pray agreed that regardless if a landowner who has been sued is ultimately found to not be liable, that process can take years, be expensive, and be frustrating. T 2442:2-10. Mr. Pray agreed that in the instance where a pipeline company's insurer pays out insurance proceeds to the pipeline company for a claim, the pipeline company's insurer could then sue the landowner exercising its subrogation interests in an attempt to recover the insurance proceeds it paid out to the pipeline company. T 2449:12-2450:12, 2483:18-2484:10. Mr. Pray agreed that damages caused by the release of pollutants are not a covered loss. T 2450:14-16.

At best for Navigator the risk of a landowner not being insured in the instance of a CO2 release would expose the landowner to potentially years of litigation, expense and frustration. At worst, a landowners entire net worth could be at risk should insurance coverage not be available or a claim exceeding policy limits. The existence of this type of hazardous pipeline substantially impairs the welfare of landowners leaving them to either

wonder if they are covered should CO2 escape outside of the easement area and cause damages and/or forces them to seek out new insurance coverage to hopefully cover the new risks confronting them all at their expense. The existence of a CO2 pipeline turns the land that was an asset into a liability.

b. 45Q Tax Credits

The hearing proved educational on 45Q tax credits, a congressional creation designed to provide tax incentives to those engaged in the business of sequestering CO2. These tax credits, under the Biden administration, were increased in value by 65% from $50/metric ton to the current rate of $85/metric ton. The tax credits started at $20/metric ton under the Bush administration. T 285:17-287:22. Navigator's proposed pipeline system could transport as much as 15 MMT, or 15 million metric tons of CO2 per year. N20 pg. 13. 15,000,000 metric tons per year x $85/metric ton = $1,275,000,000 per year in tax credits that could be captured. There is certainly a large incentive from the project promoters to get these hazardous pipelines up and running quickly. Perhaps this massive profit potential for Navigator has sidetracked them from further advancing and completing necessary steps such as more robust risk analysis and computational fluid dynamic plume modeling, level II geohazard surveys, emergency response plans, and other deficiencies as discussed throughout this brief.

For those not on the receiving end, directly or indirectly, of the 45Q tax credits, the reality of how we as a country pay for this is an unanswered question. In fact, Navigator's economists witness, Mr. Jonathon Muller, did not analyze the effects of 45Q tax credits on the federal debt, and landowners therefore argue, Navigator has failed to prove approval of its Application will not substantially harm the economic interests or welfare of the inhabitants. T 431:9-432:6.

Landowners further suggest the desire to capture 45Q tax credits, a free pass to not contribute to the tax revenue necessary for America's national security and infrastructure and therefore, made up on the backs of Landowners and persons like them in either higher taxes or passing the debt onto their grandchildren, also does not fit into the four factors. If, and only if, these projects exist then the ability to receive the tax credits can be

claimed by participating entities – however, we need not aid and abet in this federal policy. Based on the evidence, the Application must be denied due to a failure of proof on factor three.

D. Factor Four: Navigator must prove the proposed project will not unduly interfere with the orderly development of the region with due consideration having been given to the views of the governing bodies of affected local units of government

South Dakota is growing, and nowhere is this more true than in the greater Sioux Falls metro area in Minnehaha and Lincoln counties. The present development is orderly and positive. The Navigator project will unduly interfere with this orderly development. As mentioned above, the town of Harrisburg has grown 880% in the past twenty years. Commissioner Kipley testified that the growth of Sioux Falls metro area will grow in all directions and spill over into rural small towns of Minnehaha County. He further testified that the growth will reach the pipeline in some way at some time. T 316:20-317:18 (August 24, 2023), T 144:3-9 (August 25, 2023).

Navigator's only evidence to suggest that the proposed hazardous liquid pipeline coursing through South Dakota will not impact orderly development is several dated natural gas studies. As Commissioner Hanson pointed out on August 25, 2023 hearing, there are dangers to blindly following statistics and marketing. T 38:19-23. Navigator's studies are not relevant to carbon dioxide pipelines, and there is no evidence that what is true for natural gas pipelines, which allows residents and businesses to power their properties, will be true for carbon dioxide pipelines. Navigator wants to infer that Witness Howard's observations in other areas will be true in this area. As the Landowner's testimony made clear, odorless, colorless hazardous liquid pipelines are different and pose a different threat and provide no direct benefit to those surrounding it.

Prior to Navigator and Summit Carbon Solutions' applications, no county affected had passed any sort of ordinance to welcome or provide for the orderly development of carbon dioxide pipelines. This was not a part of any community or county's future plans

as evidenced by the lack of any ordinance regulating transmission pipelines prior to these proceedings.

Minnehaha County adopted its Envision 2035 plan in 2015. Ex. M5b. The purpose of this plan is to offer "a vision for the preservation and development of Minnehaha County for the next twenty years." Ex. M5b at 2. Minnehaha anticipates that Sioux Falls "will continue to drive commercial and industrial development both within the incorporated area as well as in close proximity to major nodes along specific business corridors such as Interstate 29, I-90, South Dakota Highway 42, 38, 11, & 17." Ex. M5b at 12. Split Rock Township is the fastest growing township in Minnehaha County. Ex. M5b at 18. Navigator is within the region of Highways 11 and 42, and the growth of Split Rock Township will naturally extend into Valley Springs township, and frankly, already has.

At some unknown but certain point in the future, the greater Sioux Falls metro area will grow into the pipeline area. Navigator wants the Commission to assume that this development will orderly continue around the pipeline, but simply presents no direct evidence to support this assertion. The claim is also contradicted by the evidence. Navigator's pipeline cannot exist without its easement rights. Ex. N60 places serious limitations on development over the easement area. The easement prohibits or limits trees, undergrowth, improvements, fencing. See Ex. N60 at 2. Streets, roads, drives, and utility infrastructure are prohibited unless Navigator, or its successor, whoever that may be, agrees to such development. Ex. N60 at 3. Navigator requests a permit to build a pipeline underground, but the reality is that this permit will create a perpetual 50 foot strip of bare undeveloped ground with a pipeline that could rupture at any time right through the fastest growing part of our state. The owner of the Property "may continue to use the surface of the Easement for agricultural, pasturage, open space, set-back, density, or other purposes [...] that are not inconsistent with the purposes set forth in [the Easement Agreement]." Ex. N60 at 2.

This limitation extends beyond the easement area because the Easement requires unfettered access *to* the Easement Area. Ex. N60. If a business or housing development

occurs on the parcel that includes the Easement, those businesses and developers will have to accommodate Navigator's access rights under the Easement. If Navigator does not like the design or proposed project because of access issues, Navigator can stop it, even if the proposed development would hypothetically create 1,000 jobs or 100 new houses.

No government law, ordinance, or mandate can change the Easement. No economic force can change this fact. If the Application is granted, this will still be true 100 years from now whether the pipeline is in service or not. While Navigator can shut down the pipeline at any time for any reason, the landowners, residents of the affected counties, and their elected leaders, will have to deal with this fifty foot restrictive easement so long as it is "useful" to Navigator or its then successors or assigns. Ex. N60 at 8.

Navigator's burden of proof is not limited to Moody and Minnehaha counties. It includes all governing bodies of local government units in the region. SDCL § 49-41B922(4). The purpose of this factor is for the Commission to focus on regional development. Under the statute, local communities do not have the burden to show that the project will interfere with orderly development. Navigator has the burden of proof to show that it did not.

The proposed pipeline runs by and near several regional communities, townships and school districts. Navigator presented no evidence that it will not unduly interfere with the comprehensive plans of Sioux Falls, Harrisburg, Lennox, Brandon, Valley Springs, Garettson, Egan, Trent, or Aurora or any of the townships or school districts that it runs through. As Minnehaha County notes, communities have their own comprehensive and development plans that can extend one to three miles beyond the city limits. Ex. M5b at 13. Navigator, without submitting any evidence, asks this Commission to presume that the hazardous liquid pipeline will not interfere with the orderly development of these communities. There is no evidence to support this finding.

The Commission is limited to the facts and law before it. There are no facts about the communities referenced in the previous paragraphs. For Minnehaha and Moody

County, this hazardous liquid pipeline threatens the orderly development of their region. Based on the evidence, the Application must be denied due to a failure of proof on factor four.

PREEMPTION

Navigator requests the Commission obliterate and literally "suppress" common sense ordinances of Minnehaha and Moody Counties. The invocation of SDCL § 49-41B-28 and request the Commission usurp that local authority is quite literally unprecedented in the Commission's history. In our research of the annual reports, only one applicant in the entire history of the Commission has invoked this statute. In the early 1980s, as part of the MANDAN project to run an electrical transmission line through South Dakota, Nebraska Public Power District asked the Commission to invalidate local zoning rules. The Commission, recognizing the abhorrent nature of the request, flat out refused to consider it, and denied having such authority. While recognizing the statute and authority exists, the Commission should reject Navigator's request outright.

A. S.D. Codified Laws § 49-41b-28 Is A Permissive Statute. The Commission Should Choose Not To Exercise This Discretion.

S.D. Codified Laws § 49-41B-28 does not force the Commission to rule on local land use regulations. The statute specifically states that the "A permit for the construction of a transmission facility within a designated area *may* supersede or preempt any county or municipal land use, zoning, or building rules, regulations or ordinances." Further, S.D. Admin. R. § 20:10:22:19 requires an applicant to provide a detailed explanation of the reasons why the proposed facility should preempt local controls." This administrative rule mandates the applicant to provide such information but does not require the Commission to act on it. The Commission has no legal obligation to make the finding under law or rule, even if such evidence is presented. The Commission should choose, as a matter of principle, that it will not make such a finding.

S.D. Codified Law § 49-41B-28 has only been judicially interpreted one time because the MANDAN application discussed above was litigated after the Commissions' decision to deny the application. The Supreme Court, however, never wrestled with the

construction of the statute, finding that the Commission did have authority to invalidate local ordinances and remanding the matter to the Commission to address that and other issues. In re Nebraska Pub. Power Dist., et., 354 N.W.2d 713 (S.D. 1984). Nebraska Pub. Power Dist. however pulled the application after appeal, and the application became moot. The Commission should exercise restraint in use of this discretionary authority.

The 10th Amendment to our U.S. Constitution provides that those powers not specifically delegated to the federal government are reserved for the States. Within each State, powers are further delegated and the concept of local control is personified at the county and municipality levels. This theory of government is founded on the notion that those most close to and directly affected by that which confronts them are best suited to pass ordinances and regulations they deem appropriate for their communities. This is precisely what both Minnehaha and Moody counties did over months of thoughtful and public deliberation.

Local governments should have the opportunity to consider and determine how best to engage in intelligent land use decisions within their jurisdictions. Here the counties are best suited to determine what types of infrastructure should be located where. Deference should be afforded to how they want to zone and and protect the natural and orderly development of their communities.

B. "Unreasonably Restrictive" Is A High Burden of Proof That Navigator Did Not Meet.

The Commission may only supersede or preempt a local land use control upon a finding that the local land use control is "unreasonably restrictive in view of existing technology, factors of cost, or economics, or needs of parties where located in or out of the county or municipality." This subpart will deal with the legal standard of review of the phrase "unreasonably restrictive." This phrase is uncommon in South Dakota jurisprudence and in fact in the larger American jurisprudence related to zoning. Black's Law Dictionary defines "unreasonable" as being irrational or capricious, and defines "restriction" as a limitation or qualification, commonly such as when placed on the use or

enjoyment of property. Utilizing these two definitions, the Applicant must first show that there is a restriction on the use or enjoyment of the property.

Second, the Applicant must show that the restriction is irrational or capricious. South Dakota jurisprudence has a strong presumption of legitimacy to properly enact zoning ordinances. Schrank v. Pennington County Bd. Of Comm'rs, 610 N.W.2d 90 (SD 2000). "A zoning law is a legislative act representing a legislative determination and judgment, and like all legislative enactments a zoning law is presumed to be reasonable, valid and constitutional." Id. at 92. As part of making a determination on whether a restriction is irrational or capricious, South Dakota has adopted the fairly debatable standard. Id. at 92. The fairly debatable standard is best summarized below:

> "It is axiomatic and needs no citation that a legislative decision on rezoning is presumed to be valid and that the burden of removing that presumption is on the party challenging it. The burden is to demonstrate that the action on rezoning is clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare. Municipal governing bodies are better qualified, because of their knowledge of the situation, to act upon these matters than are the courts. . . . The legislative, not the judicial, authority is charged with the duty of determining the wisdom of zoning regulations, and the judicial judgment is not to be substituted for the legislative judgment in any case in which the issue or matter is fairly debatable." G.E.T. Co., vs. City, NO. C-800229, 1981 Ohio App. LEXIS 13824, at *2-3 (Ct. App. Apr. 8, 1981). (Internal citations omitted).

Therefore, the Commission must have no reasonable doubt that the attacked ordinances are irrational in order to preempt and suppress them. If the ordinances can be debated at all, the ordinance must be upheld. This does not mean that the ordinance necessarily produces the best result or a clear winner or loser, but the restrictions are within the realm of a reasonable democratic debate.

Here, Moody and Minnehaha County adopted their ordinances after several public hearings with testimony solicited from proponents and opponents. The relationship of carbon pipelines to orderly land development is a new debate, at least for midwestern states, which have no significant carbon pipelines. Absent other evidence that each county imposed these conditions without accepting testimony, evidence, or information of Navigator, the county's decisions should be respected as such ordinances are fairly debatable.

Moody County's requirement for a conditional use permit is not unreasonable to ensure that the pipeline does not interfere with existing and planned land uses. A 1,500 set back from certain uses, like daycares, schools, and churches, is also fairly debatable. Navigator may argue that this setback is too far, and did get the opportunity to do so in Moody. The County has a right to dictate and review the location of pipelines near other important land uses. Further, the ordinance allows for the local governing body to waive this setback requirement, therefore, allowing Navigator to shorten it upon a good showing. It is also fair and reasonable that Navigator show proof that it has obtained the necessary easements to construct in the county. This shows the viability of the project. We would not expect a county to issue a permit to an applicant for a retail store on a building that the applicant neither owned or leased.

Most importantly, the 1,500 setback from sensitive uses is the only part of the Moody County ordinance that is actually a restriction. Notice requirements, plan requirements, pipeline boring requirements, etc. are not restrictions. They do not limit the pipeline in any way. Importantly the boring requirement was based upon economic interests the county has in maintaining all existing tile lines and the appropriate drainage effects.

Similarly Minnehaha County's ordinance has a setback of 330 feet from sensitive uses. Minnehaha County Commissioner Kippley stated that the 330 feet setback was chosen because the Pipeline and Hazardous Materials Safety Administration's evacuation guidelines requires evacuation of all buildings and areas within 330 feet of hazardous material pipelines when necessary. Rae Yost & Tom Hanson, 330-FOOT SETBACKS FOR

PIPELINES IN MINNEHAHA COUNTY APPROVED BY COMMISSION, Keloland, (June 06, 2023, last accessed on July 19, 2023 at https://www.keloland.com/keloland-com-original/330-foot-setbacks-for-pipelines-in-minnehaha-county-approved-by-commission/). Commissioner Kippley testified that this was the result of a compromise after vigorous debate. Not everyone got what they wanted, but in the end, all could see that this was at least a step toward some form of control over the present and future development of land use in Minnehaha County.

The other portions of the Minnehaha ordinance complained about in Navigator's motion are not restrictions. Again, filing fees, notice requirements, permit requirements, the providing of information, and emergency response plans are not restrictions. It is not unreasonable for a local government to want to know about emergency response and hazard mitigation plans that undoubtedly involved their frontline first responder employees. The ordinance may constitute a regulatory hurdle, but are not restrictions and are clearly fairly debatable. Each ordinance has paths available for Navigator to get to where it wants to go - but Navigator has not even attempted to comply, therefore, it cannot say such ordinance are unreasonably restrictive and Navigator's claims are not ripe for adjudication.

C. Technology, Cost, Economics, Or Needs Are The Only Considerations For Determining If An Ordinance Is Unreasonably Restrictive.

S.D. Codified Laws § 49-41B-28 limits the Commission's preemption of local ordinances upon a finding that the ordinance, *combined with* either existing technology, cost, economics, or needs of the parties is unreasonably restrictive. The only arguable restrictions raised in Navigator's motion are the setbacks of Moody and Minnehaha counties. The motion, and the application, fails to show how the setback creates a technological burden. The use of both the terms cost and economics indicates that the legislature instructs the Commission to consider the cost, meaning the ordinance produces some sort of exorbitant net cost to one party, or economics, meaning the

ordinance creates some sort of production or distribution issue that is unreasonably restrictive.

Ordinances by their nature are restrictive. They establish what can and cannot be located in certain areas. Both Minnehaha and Moody Counties produced reasonable ordinances after thoughtful debate and each have multiple paths for Navigator to get to yes. Navigator has failed to prove how these ordinances are unreasonably restrictive.

CONCLUSION

Perhaps there will be a time and a place for hazardous CO_2 pipeline made possible by 45Q tax credits and owned by middle eastern interests to be located through Brookings, Turner, Moody, Lincoln, and Minnehaha counties, but that time is not now, and the place is not the route Navigator requests. There are simply too many unanswered questions and too many unsatisfactorily answered questions. As the North Dakota Public Service Commission ruled on a similar proposal and what Illinois Commerce Commission staff recommended regarding Navigator's proposal in Illinois, this Application should be denied.

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