

**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 REPLY BRIEF**

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

OVERVIEW

After a year of public outcry and four weeks of testimony calling into question the safety, need, and purpose of Navigator's proposed hazardous carbon dioxide pipeline through the most populous and fastest growing region of South Dakota, Navigator is asking one question: Why is everyone picking on Navigator? Navigator's brief is well-written and well-argued, but Navigator is still wrapped up in this question, most notably on issues relating to the economic impacts and orderly development of the Greater Sioux Falls region. Navigator's failure to re-focus on South Dakota is indicative of why this Project must be rejected.

Navigator wants to be treated like a natural gas or oil pipeline, but it is not. Transcript 3705:14-16 (Transcript hereinafter denoted as "T"). Natural gas provides immediate direct, not theoretical derivative, economic benefits to the residents and businesses of South Dakota. Natural gas has an odor, which natural gas companies, partnering with our education system, teach our children to recognize at very young ages. Do you smell rotten eggs? Natural gas contains different molecules that cause a different, less dangerous dispersion. Carbon dioxide leaks and ruptures will be odorless and invisible. A cow in the field will not understand why the ground is frozen. A person will not smell anything before they pass out.

For the time being, Americans need oil. Carbon dioxide, on the other hand, is a by-product of fossil fuel consumption. An economic externality that could be addressed in a myriad of ways that do not involve an unwanted pipeline and a giant corporate welfare federal tax subsidy for middle eastern investors. Moreover, an oil plume has never existed. An oil pipeline leak is its own disaster but the effects are limited to the immediate vicinities of the leak and can be remediated. You can see and appreciate the hazard.

Carbon dioxide is different. This fact and many other reasons specific to this Applicant and how they have gone about presenting their business idea is why so many affected landowners and other South Dakotans oppose this pipeline.

1. NAVIGATOR CANNOT COMPLY WITH ALL APPLICABLE LAWS AND REGULATIONS.

Navigator makes a big admission on page five of its brief that Navigator cannot comply with the existing ordinances of Minnehaha and Moody Counties. The only way Navigator can get around this fact is if the Commission takes the unprecedented extreme action to pre-empt local ordinances constructed with Navigator's participation and the participation of those most affected by the pipeline conducted through a public, democratic process. T 3422:2-10. *See Also* T 3509:3-6.

Navigator complains that the counties rushed these ordinances through, after the fact of a submitted application, again, to pick on Navigator and carbon pipelines. T 3422:16-3423:2. The reality is that the counties' quick response after the submission of the Application is actually evidence of Navigator's failure to work through issues with local governments before coming to the Commission. If Navigator believes the ordinances were developed too quickly, Navigator can only blame itself. Navigator's refusal to waive the one year requirement is the major reason these problems exist along with their business decision to not present plume dispersion modeling or emergency response plans with local governments and those entities supporting emergency response services. South Dakota's local governments should not be penalized for Navigator's rush to cash in on a federal tax subsidy. Navigator should not be allowed to benefit from the time crunch it solely created. Navigator chose to force the Commission's hand and that tactic should not be rewarded.

The Commission should not preempt the local ordinances. Minnehaha County and Moody County ordinances should stand as is, and this permit should be denied for failure to comply with all local laws.

2. THE SAFETY AND HEALTH RISKS OF A CARBON DIOXIDE LEAK OR RUPTURE ARE TOO GREAT.

Navigator attempts to deflect from its burden on page 9 of its brief. First, Navigator admits that this pipeline is going to leak, once a year in some amount somewhere along the pipeline. This is an unsurprising admission, but Navigator instead asks the Commission to weigh the risk exposure of a leak or rupture to South Dakotans near the pipeline with the alleged economic benefits of the Project for Navigator. This utilitarian philosophy and analysis is dangerous and is a red-herring to justify bad consequences.

The Commission can employ a common hypothetical to see why. A train full of gold is barreling down the tracks towards its destination in Texas but a group of people are tied to the tracks in the path of the train. If the train does not reach its destination on time, the gold will disappear. Should the train stop? Human history is rife with examples of humans putting other humans in danger or posing threat of injury to others for money, and while everyone would likely claim that they would stop the train, one could rationalize that the train should not stop, for example, since those people should not have put themselves in a position to get tied to the tracks.

The purpose of the above hypothetical is not to ask the Commission what it would do with the train coming down the tracks, but to highlight the danger and fallacy of utilitarian risk-benefit analysis. Let us not forget that the status quo is no hazardous carbon dioxide pipeline exists anywhere in South Dakota let alone in unintelligent areas.

This type of analysis further removes the Commission from its standard of review. The Commission must not weigh the health risk vs. the economic benefit. Instead, it must find that the Project “will not substantially impair the health, safety, or welfare of the inhabitants.” SDCL § 49-41B-22(3). Navigator admits that it could but instead of meeting its burden to show that it is not serious, asks the Commission to look at the alleged economic benefits to do away with the impairment, which the Commission cannot do.

3. NAVIGATOR GREATLY INFLATES THE ECONOMIC BENEFITS OF THIS PROJECT.

Those economic benefits are very speculative as well. Navigator relies on Dr. Jared McEntaffer's testimony based on his non-differentiated study presuming approval of both the Navigator and Summit Applications. T 514:3-8. The report does not delineate between the specific impact of each carbon pipeline, so the Commission is left to guess about the true impact on ethanol and corn prices of this specific Project. *See* Ex. A at 12 to Ex. N8. *See Also* 512:12-20. Dr. McEntaffer agreed his projections and findings were "educated guess[es] based on a lot of factors and assumptions." T 514:23- 515:3. There is no reliable concrete data in the record for exactly how long this potential price bump, if any, could last. In fact, the analysis ends right after the "shock." T 501:19-23.

But even if the Commission accepts all of these assumptions, the simple fact remains that South Dakota is not producing more land, and any increase in acres to meet increased corn demand means that other products and markets suffer. *See e.g.* T 536:23 - 541:9. There is no analysis showing the full economic impact of this Project, such as the shock to the cost of livestock feed or the increased cost to graze cattle and the increased competition for available land should there be this rush to grow corn, even though Dr. McEntaffer acknowledged that this could happen. T 510:7-9. Economics 101 concludes that if a carbon pipeline built only to capture a federal tax subsidy will increase the price of corn, the cost of ethanol, food, cattle feed, and corn by-products will increase as well. This will be true until supply catches up with demand, which in this instance, can only be done by planting less acres for soybeans, sunflowers, and other South Dakota agricultural products, or plowing up pasture or marginal land, typically used to graze cattle. The less South Dakota produces other important agricultural products, the more the cost of those goods will increase as well. Economics 101 would call this an inelasticity of supply, but Landowners would use the more common sense truism: no one is making any more land, so we have to be stewards of the land we got.

Ultimately you cannot just look at one event, alleged increased corn payments, and focus only on the money that may be paid to those corn sellers without considering the ripple effect that could have negative implications for production agriculture in South Dakota. As an example, and contrary to Valero's belief, you do not just start feeding your cattle whatever is available – corn is a critical component of cattle feed ratio. T 2806:12-2807:11. There are cause and effect

relationships and it is not reasonable to only look at the presumed positive results without considering the negative results.

Navigator also called Johnathon Muller. Mr. Muller prepared a study that was received into evidence over objection that uses a model which “enables shocking either employment or investment/spending variables.” Ex. N4 at 13. In Mr. Muller’s “shock” model he estimated Navigator would employ 10 permanent persons to handle the operation and maintenance of the South Dakota portion of the pipeline, but he did not conclude that these 10 employees would necessarily live or reside in South Dakota. Ex. N4 at 3. However, Mr. Muller was unable to provide the confidence interval associated with the model chosen. T 438:15-440:5. Landowners suggest the only “shock” will be to Landowners health, safety, welfare, and economic condition.

Ethanol also does not need this pipeline to be vibrant. Even if there was such proof that Valero’s economic condition may suffer absent Application approval, Commissioner Nelson asked Michael Harrison the key question on this line of inquiry, restated here, which of the four factors does Valero’s profits or economic gain fall under? T 2810:17-22. The answer is: none.

Navigator should be frank with the Commission. Pipelines are not big job creators but even if they were, that fact also does not fit into the four factors considered. The pipeline crews will come through. Regional hotels and eateries may notice an uptick in sales during that time, but it will be temporary. Construction is quick. Afterwards, 10 people from somewhere, maybe South Dakota, will be employed for the operation and maintenance of the pipeline in South Dakota while BlackRock and middle eastern investors reap massive profits in federal tax subsidies, and the rest of us pay more for everything corn-related.

4. LANDOWNERS TESTIMONY ABOUT THE ECONOMIC IMPACT OF THIS PROJECT ON THEIR LIVELIHOODS IS UNCONTROVERTED.

Once again, Navigator ignores its burden to show that the Project “will not pose a threat of serious injury [...] to the social and economic condition on inhabitants or expected inhabitants in the siting area,” and instead chooses to attack landowners’ credibility and ability to testify about the very thing that the Commission must consider. In contravention of the statutory language of SDCL § 49-41B-22(2) cited in the preceding sentence, Navigator boldly suggests on page 37 of its brief that Landowners must show evidence that the Project will reduce property values *on a county-wide basis*. Landowners are not surprised that Navigator would want to

deflect the Commission's focus to areas of Minnehaha, Lincoln, and Moody that will not be impacted by the pipeline to suggest that those directly impacted by the pipeline do not matter.

Navigator attempts to extend a holding in *State v. Henriksen* to delegitimize Landowner's opinions about the impact of the pipeline on their own land. *State v. Henriksen* is an eminent domain case that has nothing to do with the four factors of SDCL § 49-41B-22. It has no probative value to this proceeding. The holding is limited to the necessary standards and determination of damages in an eminent domain case. The Commission must decide whether the Project will pose a threat of serious injury to the social and economic condition, and as part of that consideration, the Commission can give the appropriate weight and credibility of numerous landowners and additional public comments that demonstrate the market is concerned about the impact of this pipeline on land values, housing eligibilities, and future growth in the siting area.

Navigator does not dispute this evidence. Again, Navigator wants its odorless, colorless hazardous carbon dioxide pipeline to be treated like a natural gas pipeline. For reasons stated above, it is different, and the economic impact will be different. Navigator then suggests on page 36 of its brief that Navigator's compensation for the easement and crop loss makes Landowners whole, whether through a voluntary easement or eminent domain, but Landowner testimony overwhelmingly showed that this is not true or relevant even if it was true. *See e.g.* T 1609:14-1623:12. Navigator again uses this argument to shift the burden on landowners suggesting that the landowner can simply go to court in the future, after the Commission's determination in this proceeding, and show a judge that the land value is diminished, and Navigator will simply just write a check to make the issue go away. What Navigator fails to mention is no judge and no jury is allowed to rewrite the forever easement and forever restrictions and risks unwillingly placed upon landowners but it is not important given none of Navigator's attempts to make points on this topic are in evidence.

Navigator submitted no evidence to show how easement payments were calculated including whether the easement payment included payment for a diminution in long term value of the land. They aduced no evidence on how a condemnation proceeding would go or the time and stress and cost that process would cause Landowners to incur in hopes but without guarantee of bening made "whole" such that is even possible in this instance.

5. NAVIGATOR WILL NEGATIVELY IMPACT THE ORDERLY DEVELOPMENT OF MINNEHAHA AND LINCOLN COUNTIES.

The big picture of this proceeding is that the hazardous carbon dioxide pipeline runs through the fastest growing and most densely populated area of this state. Both Commissioner Kippley and longtime Minnehaha County Planning and Zoning Director Scott Anderson testified that the growth will run into this pipeline corridor based on present trends. T 3679:16-3680:14. *See Also* T 3839:11-3840:8.

As part of the Commission's analysis on this issue, the Commission must give due consideration to the view of the governing bodies. SDCL § 49-41B-22(4). With regards to Minnehaha and Moody Counties, the Commission could determine such views from the adopted ordinances, which clearly call for appropriate land use regulation to minimize the impact on orderly development. T 3687:8-15. As previously briefed, silence cannot be interpreted as proof of support. The fact that numerous communities, townships, school districts did not participate can be construed as many things. Navigator suggests complicit support. Landowners would suggest that it more likely reflects time and budgetary constraints as much as anything else. Instead of taking either suggestion, the Commission should construe the lack of evidence on this issue as simply a lack of evidence, and without such evidence, make the reasonable determination that the Commission cannot be more certain than not that this Project will not unduly interfere with orderly development of the affected region.

The Commission should further consider the testimony of numerous Landowners on this issue. Representative Lems testified that her family acquired land generations ago with the foresight that the growth of the greater Sioux Falls area would some day make the parcel appropriate for future development. T 1519:21-1520:3. One Landowner testified that he is in the process of putting a house on his affected property, but has stopped because of the uncertainty of this pipeline. T 2678:20-2679:7. Lifelong resident landowners near and in the area noted that growth in the region has been tremendous, and this Project will unduly burden it. *See e.g.* T 1531:12-1532:2. Many expressed their frustration that the Project would affect the continued agricultural development next to the Project. *See e.g.* T 1695:10-22. *See Also* T 1674:14-15. Todd Dawley of Dawley Farms testified without reservation that this project in the areas of Minnehaha discussed would hinder orderly development. T 1677:18-1679:1. *See Also* T 1680:1-8; T 1686:21-1687:3.

Lastly, Landowners note that Navigator's evidence was particularly poor on this factor, and if it had not been for multiple breaks in the proceeding, Navigator likely would not have submitted any evidence at all. It was only in the preemption portion of this proceeding, on Navigator's second attempt, that Navigator was really able to submit any evidence on this factor with Ex. N71. While admitted on a second effort, Ex. N71 suffered from the same evidentiary issues of previous attempts described below. It is still a misleading map and does not really wrestle with the issue of future development in the region, which has outpaced government predictions nor does this exhibit displace the overwhelming evidence weighing against Navigator on this factor.

During the first portion of the proceeding, Navigator had no evidence to show it met its burden on this factor. Navigator witness Monica Howard attempted to meet this burden on August 8th, a date not originally scheduled, by presenting an adaptation of a Minnehaha future development map (Ex. N25) that was made up over the weekend break; however, it turned out that this map was altered from the actual map that was readily available on Minnehaha County's website. T 3178:12-3180:12. So rather than simply agreeing a more intelligent route could have been selected, Navigator doubled and tripled down as if all of the evidence and questions on this factor fell on deaf ears. Navigator did not carefully plan its route to minimize the impact on the orderly development of the region. Navigator realized this fact, which should have been obvious to it long before, had they done more than desktop routing from Texas prior to concluding they had found an appropriate route for a first of its kind Project at this proposed scale and volume.

CONCLUSION

Landowner Intervenors would like to thank the Commission and its staff for its work and conduct during this hearing. We would like to specifically acknowledge Hearing Examiner De Hueck for presiding over a contentious, complicated, and well-debated proceeding. While we do not support the Application and believe a reasonable review of the existing record must result in a denial, we take a moment to acknowledge Navigator's counsel and Union counsel for their cordiality and professionalism through this proceeding.

/s/ Brian E. Jorde

Brian E. Jorde

DOMINALAW Group

2425 S. 144th St.

Omaha, NE 68144
Phone: 402 493-4100
bjorde@dominalaw.com

/s/ Ryan D. Cwach
Ryan D. Cwach, Esq., 4245
Birmingham & Cwach Law
Offices, PLLC
202 W. 2nd St.
Yankton, SD 57078
Phone: 605 260 4747
ryan@birmcwachlaw.com

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that the foregoing was served on those listed on Exhibit A attached hereto on September 5, 2023.

/s/ Ryan D. Cwach

EXHIBIT A

Ms. Patricia Van Gerpen
Executive Director
South Dakota Public Utilities Commission
500 E. Capitol Ave.
Pierre, SD 57501
patty.vangerpen@state.sd.us
(605) 773-3201

Ms. Kristen Edwards
Staff Attorney
South Dakota Public Utilities Commission
500 E. Capitol Ave.
Pierre, SD 57501
Kristen.edwards@state.sd.us
(605) 773-3201

Mr. Darren Kearney
Staff Analyst
South Dakota Public Utilities Commission
500 E. Capitol Ave.
Pierre, SD 57501
darren.kearney@state.sd.us
(605) 773-3201

Mr. Jon Thurber
Staff Analyst
South Dakota Public Utilities Commission
500 E. Capitol Ave.
Pierre, SD 57501
jon.thurber@state.sd.us
(605) 773-3201

Mr. James E. Moore - Representing: Navigator CO2 Ventures LLC
Attorney
Woods, Fuller, Shultz & Smith PC
PO Box 5027
Sioux Falls, SD 57117
james.moore@woodsfuller.com
(605) 336-3890

Mr. Kevin Strehlow
Executive VP & General Counsel
Navigator Energy Services

2626 Cole Ave, Suite 900
Dallas, TX 75204
kstrehlow@nesmidstream.com
(214) 880-6000

Ms. Sarah Dempsey
Assistant General Counsel
Navigator CO2
13333 California St., Ste 202
Omaha, NE 68154
sdempsey@navco2.com
(402) 702-1912

Ms. Kara Semmler
General Counsel
South Dakota Telecommunications Association
320 E. Capitol Ave.
Pierre, SD 57501
karasemmler@sdaonline.com
(605) 224-7629

Mr. Robert W. Hill
Brookings County Commission
520 3rd St., Ste. 210
Brookings, SD 57006
rhill@brookingscountysd.gov
(605) 696-8350

Mr. Thomas H. Frieberg – representing City of Canton
Frieberg, Nelson & Ask LLP
115 N. Third St., PO Box 511
Beresford, SD 57004
tfrieberg@frieberlaw.com
(605) 763-2107

Mr. William H. Golden
Lincoln County
104 N. Main St., Ste 200
Canton, SD 57013
wgolden@lincolncountysd.org
(605) 764-5732

Ms. Carla Bruning
Moody County Commission

101 E. Pipestone Ave., Ste. D
Flandreau, SD 57028
doe-zoning@moodycounty.net
(605) 997-3101

Mr. Hunter Winklepleck
Bethany Home Brandon
3012 E. Aspen Blvd.
Brandon, SD 57005
hwinklepleck@bethanylutheranhome.com
(605) 582-5200

Dr. Jarod Larson
Brandon Valley School District
300 S. Splitrock Blvd.
Brandon, SD 57005
Jarod.larson@k12.sd.us
(605) 582-2049

Mr. William G. Haugen, Jr.
DEH III, LLC
PO Box 90442
Sioux Falls, SD 57109
Wh401889@hotmail.com
(605) 359-9081

Mr. Tony Penn & Mr. Nathaniel Runke
Great Plains Laborers' District Council and International Union of Operating Engineers, Local
49
4208 W. Partridge Way, Unit 2
Peoria, IL 61615
gpldc@aol.com - Penn
nrunke@local49.org - Runke
(309) 692-8750

Ms. Anna Friedlander
Attorney
United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of
the United States and Canada, AFL-CIO
3 Park Place
Annapolis, MD 21401
afriedlander@odonoghuelaw.com
(202) 362-0041

Mr. William Taylor - representing United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada

Attorney

Taylor Law Firm

4820 E. 57th St., Ste. B

Sioux Falls, SD 57108

Bill.taylor@taylorlawsd.com

(605) 782-5304

Mr. John Taylor - representing United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada

Attorney

Taylor Law Firm

4820 E. 57th St., Ste. B

Sioux Falls, SD 57108

John.taylor@taylorlawsd.com

(605) 782-5304

Mr. Jeremy Duff - representing United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada

Attorney

Taylor Law Firm

4820 E. 57th St., Ste. B

Jeremy.duff@taylorlawsd.com

Sioux Falls, SD 57108

Mr. Eric H. Bogue

47832 U.S. Hwy 18

Canton, SD 57013

ehbogue@gmail.com

(605) 515-3193

Mr. Leslie Downer, via mail

1935 3rd St.

Brookings, SD 57006

NO EMAIL ADDRESS PROVIDED

(605) 690-2866

Ms. Cathy Lu Miller

1214 Rockbend Parkway

Saint Peter, MN 56082

catm981@hotmail.com

(507) 931-9311

Ms. Lesley Pedde

132 Springtree Bend

Cibolo, TX 78108-3261
lesley@pedde.com
(210) 325-7837

Mr. David Reker
47975 239th St.
Trent, SD 57065
dcreker@proton.me
(605) 413-7998

Ms. Gwen Reker
47975 239th St.
Trent, SD 57065
gwenreker@proton.me
(605) 351-3412

Ms. Kathy Jo Serck POA for Lois Jean Rollings
619 Hubbard St., PO Box 416
Hudson, SD 57034
kjs@alliancecom.net
(605) 984-2414

Mr. Alfred Slaathaug
48198 Kim Cir.
Brandon, SD 57005
Al_evie@outlook.com
(605) 360-5325

Mr. Ricky A. Veldkamp
48014 240th St.
Trent, SD 57065
rgveld@goldenwest.net
(605) 212-9340

Mr. John P. Peterson
Peterson Law Office
6201 E. Silver Maple Circle, Ste. 102
Sioux Falls, SD 57110
peterstonlaw@midconetwork.com
(605) 331-1031
Representing: Sherwood Beek, Kristi Devick Beek, Dwayne Pederson Land Co. (Karla Lems),
Dakota Aeration (Karla Lems), Pederson Ag (Karla Lems)

Ms. Darla Pollman Rogers – representing South Dakota Association of Rural Water Systems
(SDARWS), South Dakota Rural Electric Association (SDREA)
Attorney

Riter Rogers, LLP
319 S. Coteau; PO Box 280
Pierre, SD 57501
dprogers@riterlaw.com
(605) 224-5825

Ms. Ellie Bailey – representing South Dakota Association of Rural Water Systems (SDARWS),
South Dakota Rural Electric Association (SDREA)
Attorney
Riter Rogers, LLP
319 S. Coteau; PO Box 280
Pierre, SD 57501
e.bailey@riterlaw.com
(605) 224-5825