

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA

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HP22-002

IN THE MATTER OF THE APPLICATION OF NAVIGATOR HEARTLAND GREENWAY, LLC, FOR A PERMIT UNDER THE SOUTH DAKOTA ENERGY CONVERSION AND TRANSMISSION FACILITIES ACT TO CONSTRUCT THE HEARTLAND GREENWAY PIPELINE IN SOUTH DAKOTA	: : : : : :	MOODY COUNTY'S POST-HEARING RESPONSE TO APPLICANT'S MOTION TO PREEMPT COUNTY ORDINANCES UNDER SDCL 49-41B-28
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Comes now Moody County, South Dakota, by and through Paul M. Lewis, Moody County State's Attorney, and hereby submits its brief and arguments opposing Applicant's Motion to Preempt County Ordinance under SDCL 49-41B-28.

**ISSUE**

- I. IS MOODY COUNTY ZONING ORDINANCE 2023-01 UNREASONABLY RESTRICTIVE IN VIEW OF EXISTING TECHNOLOGY, OR ECONOMICS, OR NEEDS OF PARTIES WHERE LOCATED IN OR OUT OF THE COUNTY?

**STATEMENT OF FACTS**

On June 26, 2023, Navigator filed a Motion to Preempt County Ordinances under SDCL §49-41B-28, alleging that Zoning Ordinance 2023-01 is unreasonably restrictive insofar as (1) the 1,500 foot separation distance would make it impossible for Navigator to route a pipeline through Moody County; (2) Navigator would be required to provide Moody County with some of the same information provided to the Public Utilities Commission; (3) Navigator would be required to show Moody County that the necessary easements have been obtained for the land through which the pipeline would traverse; (4) Navigator would be required to bore under

existing tile lines or utility lines it crosses; and (5) Navigator would be required to abandon the pipeline in place<sup>1</sup>.

## ARGUMENT

### **I. Moody County's Zoning Ordinance 2023-01 is not unreasonably restrictive in view of existing technology, or economics, or needs of parties where located in or out of the County.**

#### **A. Moody County's Zoning Ordinance 2023-01 has a rational basis.**

In 2002, Moody County enacted a Comprehensive Plan that established Agricultural Preservation policies. EH 3854:17 - 3855:14. Foremost among those policies is the protection of agricultural lands and rural areas from uses which interfere with, or are not compatible with, general farming practices. EH 3856:6-8. As a companion to the Comprehensive Plan, Moody County enacted a Zoning Ordinance in 2013 (amended on November 5, 2020) that also protects and promotes certain land uses. EH 3856:16 - 3857:17. Furthermore, for ease of understanding, the Zoning Ordinance identifies land within Moody County as falling into various zoning districts. EH 3857:24 - 3858:2. The largest district in geographic size, and most important in economic activity being the "A" Agricultural District.

Within Chapter 2.04, "A" Agricultural District, Moody County carefully created a series of permitted, permitted accessory, special permitted, and conditional uses, all under an overarching goal of promoting farming, and related activities, in an environment which is generally free from other land use activities. EH 3858:14 – 3859:4. While constituting a veritable laundry list of land uses, the most relevant conditional use under immediate consideration covers pipelines. EH 3859:9-12. From 2013 to July of 2023, Moody County ordained that "any pipeline requiring South Dakota Public Utilities Commission approval shall

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<sup>1</sup> See Applicant's Motion to Preempt County Ordinances under SDCL §49-41B-28, pages 5-6.

also require a conditional use permit.” EH 3860:9-11. Although Moody County Ordinance 2023-01 still treats those pipelines requiring a South Dakota PUC permit as needing a conditional use from the Moody County Board of Adjustment, Ordinance 2023-01 creates a series of performance expectations in similar fashion to ordinances covering land uses outside of Moody County (Brown County’s pipeline ordinance for example), and land uses within Moody County (concentrated animal feeding operations and wind energy systems).

Examined as a whole, or within its individual components, Moody County Zoning Ordinance 2023-01 is anything but arbitrary, capricious, or irrationally ordained. The 1,500 foot setback from the wall line of a cautionary use, for example, does appear to emulate Brown County’s Ordinances, but a setback of 1,500 feet is also consistent with Moody County’s setback on wind energy systems. EH 3865:19-21. Furthermore, like CAFOs, Navigator can reduce the 1,500 foot setback to a far smaller distance by obtaining waivers from the property owners in the setback area. EH 3885:24 – 3886:14. Finally, while Moody County is cognizant of the fact that the Pipeline Hazardous Materials Safety Administration (PHMSA) generally estops county governments from regulating pipeline safety, Moody County would be remiss if it totally ignored the possibility that its setbacks could result in human lives and livestock being saved should Navigator’s pipeline erupt. As Kendra Eng, Moody County Zoning Administrator, testified:

A. Because Moody County is very much ag county, and we have a lot of multimillion dollar CAFO facilities in our county.

Q. So the concern that if there was an eruption in the pipe, that those dairy cows would die?

A. Just as important, yes.

EH 3885:18-23

**B. Moody County's Zoning Ordinance 2023-01 does not irrationally restrict Navigator.**

On August 24, 2023, Monica Howard, witness for Navigator, engaged in the following testimonial dialogue with James Moore:

Q. And in that you state that, based on the 1,500 foot separation distances created by Moody County's zoning ordinance, you did not think a feasible route exists through Moody County. Is that still your testimony?

A. That's my testimony in regard to the notice corridor, assuming that there would be ability to relocate our line within that. ***So you can thread the needle through Moody County with a 1,500-foot setback***, but it would necessarily bring on landowners that were never noticed and assumes that the environmental ground, geological conditions are similar enough to where we are such that it wouldn't preclude locating it there.

EH 3462:1-13. (Italics and bold added for emphasis)

At this point I would ask the reader to stop and take note of two critical things said by Ms. Howard: 1) Navigator does not want to explore alternate routes on the grounds that additional people would need to be given important notice, and 2) it is possible to put a pipeline through Moody County with a 1,500 foot setback. As it relates to Ms. Howard's first observation, the County would simply assert that Navigator appears to be attempting to shove through a pipeline permit application that has not been fully vetted on a timeline of its own control and making. As it relates to Ms. Howard's second observation, Moody County's 1,500 foot setback does not appear to be much of a restriction.

In her testimonial dialogue with Moody County State's Attorney Paul Lewis, Ms. Howard engaged in the following conversation:

Q. As part of your inputs into the creation of N74 that you instructed your staff, did you instruct them to set a firm buffer of 1,500 feet from cautionary uses?

A. Yes.

Q. Did you make any allowances in regards to waivers or reductions of that setback space?

A. I think our current route does that. All of the information we have relative to our current route accounts for that.

Q. However, your testimony earlier today was that you still could thread your pipeline through Moody County with setbacks, is that right?

A. *A pipeline could be routed through Moody County.*

Q. *And that's with a solid 1,500-foot setback?*

A. *Yes.*

EH 3527:8-22 (Bold and italics added for emphasis)

Not to belabor the point, but a setback of 1,500 feet from the wall line of a cautionary use does not appear to pose any sort of restriction that would prevent Navigator from routing a pipeline through Moody County. Yet, if Navigator was unable to build a pipeline through Moody County because of the county's setback requirement, Navigator could still obtain distance waivers under ordinance 2023-01. However, Navigator has not committed any resources to obtaining setback waivers, but instead motions the South Dakota Public Utilities Commission to simply preempt away local zoning ordinance. EH 3529:15-22.

In bringing this section of the brief to a close, Moody County would conclude by asserting that Navigator's request for preemption under SDCL 49-41B-28 is, by and large, based upon utter speculation. Throughout her testimony, Ms. Howard supposes that a conditional use permit might not be obtained in Moody County, when, in fact, Navigator has not even made an application for a permit with the county. EH 3942:3-6. Respectfully, Moody County finds it irrational to be accused of being unreasonably restrictive before any action has begun.

### **CONCLUSION**

For the foregoing reasons, Moody County asks the South Dakota Public Utilities Commission to quash the Applicant's Motion to preempt under SDCL 49-41B-28.

Respectfully submitted this 3rd day of September, 2023.

MOODY COUNTY STATE'S ATTORNEY

A handwritten signature in black ink, appearing to read "Paul M. Lewis", is written over a horizontal line.

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