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

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**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**

**HLP22-002**

**MOTION TO RETURN  
APPLICATION**

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Movants, affected Landowners, listed on attached Exhibit “A”, collectively state and move as follows:

**I. Introduction**

1. Landowners are respectfully request that the commission return this application pursuant to SDCL 49-41B-13(2) with instruction to comply with the requirements of SDCL § 49-41B-5.2.

2. Applicant Navigator Heartland Greenway, LLC (hereafter “Navigator”) has failed to comply with the requirements of SDCL 49-41B-5.2. Navigator admittedly failed to “notify, in writing, the owner of record of any land that is located within one-half mile of the proposed site where the facility is to be constructed” “within thirty days following the filing of an application.” *SDCL § 49-41B-5.2.*

3. Navigator filed an application for a permit to construct a hazardous pipeline facility in South Dakota on September 27, 2022.

4. On September 29, 2022, Navigator mailed notices of the project and upcoming public input meetings to some landowners within one-half mile of the pipeline route pursuant to SDCL § 49-41B-5.2. Another set of landowner notices were mailed on October 18, 2022.

5. Public input hearings were held on November 21, 2022 in Canton and November 22, 2022 in Flandreau and Sioux Falls pursuant to SDCL § 49-41B-16.

6. At the regularly scheduled December 6, 2022 Commission meeting, Navigator brought to the Commission's attention that it had failed to provide notice pursuant to SDCL § 49-41B-5.2 to approximately 204 landowners.

7. Navigator followed this disclosure with a letter to Patricia Van Gerpen dated December 9, 2022 explaining the failure to comply with SDCL § 49-41B-22.

8. At the regularly scheduled December 20, 2022 Commission meeting, the Commission discussed the late notices pursuant to SDCL § 49-41B-5.2. It was decided that the notice requirements of SDCL § 49-41B-5.2 are the responsibility of the applicant and it was Navigator's responsibility to unwind the mess that they might be in and decide how to fix its mistake. The Commission took no action to correct Navigator's failures.

9. On December 28, 2022, over 90 days from the filing of the initial application, Navigator claims it mailed letters to the approximately 204 landowners who were not provided with timely notice. The letters failed to notify landowners of the "date, time, and location of the public input meeting" because these meetings had already passed.

10. On January 19, 2023, the Commission entered a procedural Order setting the final hearing on this matter for June 7-16, 2023.

11. Pursuant to SDCL 49-41B-24, the Commission, under certain circumstances, must reach a final decision on the application within twelve months of filing the initial application. Only the Applicant is statutorily authorized to request an extension. *SDCL § 49-41B-24.1.*

12. Because Navigator has not requested an extension of time which would afford a procedural schedule that could accommodate those who have received late notice, the only appropriate course is for the Commission to return the application pursuant to SDCL § 49-41B-13(2).

## **II. Argument**

### **a. The Commission should return Navigator's application pursuant to SDCL § 49-41B-13(2).**

13. The Commission has the discretion to return Navigators' application for "failure to file an application generally in the form and content required by this chapter and the rules promulgated thereunder" with instruction to comply with SDCL § 49-41B-5.2 on re-application. *SDCL § 49-41B-13(2)*. Navigator has violated the plain letter of SDCL § 49-41B-5.2 by failing to notify all landowners within one-half mile of the proposed pipeline within 30 days of filing its application. SDCL § 49-41B-5.2 is not permissive. An applicant **shall** notify by certified mail all owners within one-half mile within 30 days of submitting its application. The notice must contain a description of the nature and location of the proposed facility as well as the date, time, and location of the public input meeting. Notification of the application and public input hearings is paramount to the public permitting process.

14. SDCL 49-41B-5.2 is specific for a reason. If a property is located within one-half mile of the project, there is a good chance the owner will have questions regarding safety, land acquisition, construction and maintenance of the line, etc. Through 49-41B-5.2, the legislature guaranteed landowners within that radius notice within 30 days and prior to the public input meetings. The notice requirements are an obligation upon an applicant requesting a permit in South Dakota. Navigator failed to meet that obligation to 204 South Dakota landowners. The 204

landowners who received written notice over 90 days after the application was filed have been deprived the protection afforded by SDCL § 49-41B-5.2.

15. The notice is what triggers landowners' ability to properly inform themselves on the project and how it may impact their properties and their lives. Late notice severely impacts South Dakota property owners' ability to meaningfully consider the application and project. The Commission cannot be sure that all affected South Dakotans have had an opportunity to understand this project and be heard unless the statutory notice requirements are met, which is why Navigator's failure to provide that notice must be fatal to its application.

16. The public input hearing is a legal proceeding. South Dakota law requires the hearings and publication of the notice thereof pursuant to specific instruction. *SDCL § 49-41B-16*. The hearing is conducted by the Commission and allows those in attendance to learn about the project, appear, and present their views, comments, and questions regarding the Application and the Project. These meetings are incredibly important. Not only do the meetings facilitate learning and discussion, but they also are where many landowners can engage directly with the applicant, listen to answers face to face, and follow-up if needed. These in person interactions are where many decide whether to participate in the docket or not. That experience cannot be replicated by a recording or a handout. Due process matters.

17. The PUC complied with the requirements of SDCL § 49-41B-16 in HP 22-002 by holding public input meetings and publishing notice. It is Navigator's job to notify landowners within one-half mile of those meetings so they can attend and be heard if they choose. *SDCL § 49-41B-5.2*. Navigator did not meet its statutory obligation, and it admits the same. Failure to notify the proper landowners of the public input hearing cannot be remedied by letters mailed months after the public meeting took place.

18. The only appropriate action here is to return the application. The Commission has made clear that it believes it is bound by the twelve-month decision requirement of SDCL § 49-41B-24. However, the twelve-month deadline works hand in hand with the notice requirements and public meetings to ensure an orderly and fair progression of the proceeding. The twelve-month decision deadline contemplates that all other statutory timelines are met – and they were not. The PUC cannot hold itself to a legislative mandate while allowing Navigator to plainly violate one. Doing so at the expense of South Dakota landowners would severely taint the fairness of this proceeding.

19. The twelve-month rule is not workable in this docket given the number of parties, complexity and novelty of the subject matter, and the fact that permitting this type of pipeline is a matter of first impression. However, Landowners understand the PUC will follow the law. Additionally, the legislature has not authorized a non-party applicant or the Commission to seek a reasonable extension of the proceeding, even when the circumstances may require it. At the hearing on January 17, 2022, both the Staff and Commissioners expressed concerns with the rushed procedural schedule in this matter, especially given the notice deficiencies.

20. When considering Landowners Motion to Dismiss Summit Carbon Solutions' Application in HP 22-001, the Commission focused its decision to deny the Motion on there being adequate time for those who received late notice to participate the final hearing scheduled for September. The Commissions' Order Denying Renewed Motion to Dismiss and Return Application on January 19, 2022 stated "the current procedural schedule provided adequate time to accommodate those receiving late notice." The present matter is scheduled for a final hearing in just over four months with the first procedural deadline, January 30, approaching rapidly. Navigator mailed its late notices on December 28, 2022, therefore some landowners will have

had notice for less than one month when the first deadline lapses. This is simply not enough time for a landowner to learn about the process and their legal rights, let alone determine whether they want to make the financial and time commitment to intervene in the process and either obtain counsel or prepare written discovery.

21. While the PUC may not have discretion to order reasonable extension of these proceeding on its own accord, it does have the discretion to return the application, which is what it should do under these circumstances. At least 204 landowners within one-half mile of the proposed hazardous pipeline did not receive notice in the time required by statute. Those owners have been deprived the opportunity to attend public input meetings which are required by statute. There is no way to fairly remedy Navigator's error in the time allotted. Rushing this highly complex matter to a final decision will not help anyone – including Navigator. The PUC has the legal authority to return the application pursuant to SDCL 49-41B-13(2). Doing so is the only way this matter will proceed in a way that is legal and fair to all affected.

**b. Navigator has not substantially complied with SDCL § 49-41B-5.2.**

22. Landowners anticipate that Navigator may argue it substantially complied with SDCL § 49-41B-5.2 because Navigator timely notified 1,052 of the required 1,256 landowners and provided late notice to the additional 204 landowners. As Commissioner Nelson correctly pointed out at the Commission Meeting on January 17, substantial compliance may be argued to an appellate court but is not an argument for the Commission to consider. Landowners agree with that course. And while it may not be in the Commission's purview to consider substantial compliance, Landowners pre-emptively assert that Navigator has not substantially complied with SDCL § 49-41B-5.2.

23. The South Dakota Supreme Court has never held that substantial compliance is sufficient to satisfy the requirements of SDCL § 49-41B-5.2. In considering whether substantial compliance was sufficient to satisfy another notice requirement (SDCL § 3-21-2), the Supreme Court instructed that “substantial compliance means actual compliance in respect to the substance essential to every reasonable objective of the statute...Substantial compliance with a statute is not shown unless it is made to appear that the purpose of the statute is shown to have been served.” *Myears v. Charles Mix County* 566 N.W.2d 470 (SD 1997).

24. It is irrelevant that most landowners (1,052 out of 1,256) were timely served. That does nothing for the 204 which were not. It is an undisputed fact that Navigator 100% failed to provide requisite notice to 204 landowners which received written notice over 90 days after the application was filed have not received the protection afforded by SDCL § 49-41B-5.2. They were deprived from participating in the public input hearings. They likely received their notice less than 150 days before the final hearing. That is hardly enough time to determine whether they want to intervene and build an effective case opposing the application or otherwise exercise their legal rights. The legislature has determined that the 204 effected landowners were required by law to receive notice within 30 days of an application so they could participate in the proceeding in a meaningful way. That objective has not been and cannot be served by Navigator’s delayed attempt to correct its plain error. The law does not allow for “close enough” when it comes to these legal rights.

**c. Intervenor landowners are also affected by the error.**

25. It has been suggested that Landowner’s who have already intervened shouldn’t be concerned with Navigator’s failures. That couldn’t be further from true. First, Landowners have a vested interest in ensuring that this process is fair and complete. They have invested their time

and resources in appearing and participating in this proceeding. Allowing Navigator to proceed to a final adjudication with a glaring and admitted application deficiency calls the entire proceeding into question.

26. Should the parties and the commission proceed to a rushed adjudication of this matter, there is significant potential a late-notified landowner to appear at a delayed point in the case or after the proceeding entirely. This creates a strong likelihood of delay or re-trial that could cost the Landowners significant time and resources. That possibility could be avoided entirely if Navigator simply met its obligations under the law.

27. Worse than a landowner appearing late is a landowner who doesn't appear at all. Not hearing from a landowner who otherwise would have participated because of the late notification of course harms that owner, but it also harms the presently intervening landowners. Strength is in numbers. If a late-notified landowner does not participate because of late notification, presently intervening landowners are deprived of the insights, questions, concerns, and solidarity of another South Dakota landowner involved in the docket.

28. Late notice is as good as no notice in this instance. The 204 landowners received written notice in January 2023 (they were apparently mailed out December 28). There are no additional public input hearings, and the trial is now less than five months away. One could easily see how a landowner who would have otherwise participated could find the process too daunting at this juncture and simply not participate. Unfortunately, there is no way to know whether these landowners are out there other than returning the application and requiring Navigator to comply with the law on re-application and proceed as required by law.

**d. Navigator has voluntarily dismissed its Permit Application in Illinois due to Application failures**



29. Navigator Heartland Greenway, LLC filed a Motion with the Illinois Commerce Commission on January 20, 2023 to withdraw its Application to construct the pipeline. A true and correct copy of Navigator Heartland Greenway LLC's Motion to Withdraw Application and for Order Voluntarily Dismissing Application without Prejudice and Concluding this Proceeding is attached as **Exhibit "A"**.

30. Intervenors and commission staff alleged deficiencies in Navigator's Illinois application, namely that it had failed to secure an easement necessary for the intended sequestration site. That site is the destination of the CO2 coming from South Dakota. Navigator's withdrawal in Illinois is relevant to Landowners present Motion to Return Application. First, if Navigator hasn't even secured the final location for the CO2 in Illinois, then there should be no rush to permit the pipeline project headed that direction. There would be nowhere for the CO2 to go. Second, if Navigator intends to start the permitting process over in Illinois, it will not be prejudiced if the South Dakota PUC holds them accountable and requires them to start over in compliance with South Dakota law.

**e. The South Dakota Constitution demands fairness in scheduling.**

31. Navigator's unilateral request to establish hearing dates and associated deadlines as well as Navigator's unilateral power to request scheduling extension pursuant to SDCL § 49-41B-24.1 is unconstitutional and violates Landowners' due process rights pursuant to S.D. Constitution, Art. VI, § 2, and equal privileges and immunities pursuant to S.D. Constitution, Art. VI, § 18.

32. This matter is akin to a judicial proceeding yet only one party to it has any procedural right to request an extension of time. Further, the Commission acting in a judicial capacity lacks the discretion to extend *unless* a request is made by the applicant. Landowner

parties should have a right to request an extension equal to the corporation Applicant pursuant to the South Dakota Constitution.

33. While the Commission cannot fix the unconstitutionality of SDCL § 49-41B-24.1, it can return Navigator's application, which will alleviate some of the prejudice caused by the glaring scheduling inequities.

### **III. Conclusion**

34. If the Commission is going to hold itself to the plain letter of SDCL § 21-35-24, then it should hold Navigator to the plain language of SDCL § 49-41B-5.2. The Commission is within its discretion to return Navigator's application pursuant to SDCL § 49-41B-13(2). Doing so will ensure that all proper parties receive the requisite notice and will set this matter on a course to a final adjudication within twelve months of the re-filing. Landowners respectfully urge the Commission return Navigator's application with instruction to comply with SDCL § 49-41B-5.2.

By: /s/ Brian E. Jorde

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**CERTIFICATE OF SERVICE**

Brian Jorde of Domina Law Group PC LLO hereby certifies that on January 24, 2023, he filed and served via the South Dakota Public Utilities Commission website and electronic mail a true and correct copy of the foregoing in the above-captioned matter to the e-mail service list.

/s/ Brian E. Jorde  
Brian E. Jorde