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	: : :	HP 22-002 **APPLICANT'S RESPONSE BRIEF**

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Applicant Navigator Heartland Greenway LLC ("Navigator") submits this combined reply brief in response to the initial briefs filed by Staff, the Landowners, and the utilities that participated in the docket. This brief also addresses the Landowners' proposed findings of fact and conclusions of law.

Staff's Brief

1. Navigator's compliance with all applicable laws and regulations.

Navigator takes no issue with Staff's statement of the law with respect to the first factor in SDCL § 49-41B-22. Navigator appreciates Staff's concerns about good working relationships (Staff's Br. at 6-7) and agrees that it is essential for any applicant and operator to work cooperatively with Staff, the Commission, and all affected stakeholders.

With respect to timing and production of the emergency response plan (ERP), some additional context might be helpful. Based on testimony in this docket about the current Project schedule, the Pipeline will not be in service until late 2025 or early 2026. (Navigator's Proposed FF ¶ 39.) PHMSA exercises jurisdiction over emergency response planning requirements under

49 CFR § 195.402, which expressly provides that the manual of written procedures addressing emergencies (among other manuals) "shall be prepared before initial operations of a pipeline system commence, and appropriate parts shall be kept at locations where operations and maintenance activities are conducted." 49 CFR § 194.502. PHMSA does not require operators to have a completed ERP until shortly before project in-service, and for good reason. The identification of the detailed information required in an ERP (e.g., relevant local emergency responders, associated contact information, resources, equipment, and personnel) is not fully ascertainable until a pipeline is approved for construction. It is then that operators may complete an ERP.

The Commission has not previously required that a completed ERP be submitted as a required element of a siting application under SDCL Ch. 49-41B. Based on that expectation and in compliance with federal regulation, with which Navigator must comply, Navigator therefore focused its efforts on design, engineering, and permitting efforts that are essential at the front end of a project, and it did not have a draft or a completed ERP to produce in response to Staff's initial discovery request, which was served as part of Staff's third discovery requests and in response to which Navigator produced a draft ERP after it had been prepared on July 18, 2023. (Ex. N41.) As Vidal Rosa testified, developing and completing an ERP is an extensive and involved process that requires meetings and collaboration with local emergency responders; it will take months to complete the ERP, which will likely be 400-500 pages long. (Tr. at 1443:14-23.) In response to Staff's concern, Navigator accelerated its process and produced a draft ERP, which was done in good faith.

Navigator must complete its ERP. Local officials and emergency responders have a significant role in emergency response planning as provided in federal regulations with which

Navigator must comply. Operators must include provisions in their ERPs for coordinating with appropriate fire, police, and other public officials on pre-planned drills and actual responses to pipeline emergencies. Operators must also establish and liaise with emergency officials to understand their respective responsibilities and resources in planning for and responding to emergencies, which in application are required in all cities and counties where a pipeline is located.

PHMSA guidance reiterates the importance of such liaison activities and engagement, including providing local emergency responders with a copy of the ERP. PHMSA recommends providing such information through the operator's liaison and public awareness activities, including during joint emergency response drills. Further, PHMSA evaluates the extent to which operators provide local emergency responders with their emergency plans during its inspection and oversight activities. No PHMSA regulation, enforcement, or guidance, however, requires planning or engagement during the routing, siting, and permitting process of a pipeline.

In order to specify the relevant contacts, resources, and training in the event of an emergency, operators typically engage with local emergency responders closer in time to when a pipeline is placed in service and on an ongoing basis through regular liaison activities. Through sharing of relevant plans and ongoing communications, operators gain an understanding of the responsibilities and resources of each government organization that may respond to a pipeline emergency and local officials learn about an operator's abilities to respond to such emergencies and means of communication.[1] This information is not readily apparent or available two years before pipeline in-service.

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[1] *See* PHMSA Final Order, *In re: Premcor Refining Group, Inc.,* Final Order, CPF No. 3-2004-5008, 2006 WL 3825320 (Feb. 16, 2006) (finding a violation for failing to hold liaison activities

As a practical matter, sharing of the emergency plans, such as the ERP, may occur during construction activities close to when a pipeline is being placed into service, and an operator's coordination, training, and regular communications with local emergency responders and officials continue through the service life of the pipeline. It would be premature to require an operator to provide its ERP to local responders when the precise localities, resources, and other information is not yet clearly identified and is subject to change.

Navigator has already started the process of meeting with and training local responders, much earlier in the project development process than is traditionally done in the pipeline industry, and as that process continues, the ERP will be developed and completed. Local emergency responders need to be informed and trained about CO2 pipelines, the risks and potential consequences of a leak, and how to respond. They know little at this point, which is two years before Project in-service. It is Navigator's responsibility to inform and train them. When finished with that process and the development of the ERP, Navigator will be responsible to PHMSA for the content of the ERP, and William Byrd testified that PHMSA has experience and dedicated personnel who will review the ERP. (Navigator's Proposed FF ¶ 222.) Navigator recognizes that Jon Thurber's position on this issue is different than Byrd's, which is why Navigator accelerated the process and produced the initial draft ERP.

Staff suggests that there should be "different expectations than with oil pipelines as to what information is crucial in order to make an informed decision" about Navigator's pending application because CO2 is "an entirely different substance." (Staff's Initial Br. at 24.) While Navigator does not contest that CO2 is different than oil and presents different operational

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during 2002); PHMSA Final Order, *In re: Tampa Pipeline Corporation*, CPF No. 2-2008-6002 (Apr. 26, 2010).

considerations, PHMSA has long regulated both substances along with other hazardous liquid pipelines of various substances under the same federal requirements, including emergency response planning requirements, imposed at 49 C.F.R. Part 195. In fact, PHMSA first imposed regulations relevant to CO2 pipelines in 1991. Given that PHMSA occupies the field of regulation and has long-applied the same performance-based emergency response regulations to both oil and CO2 pipelines, the Commission should not impose a different standard for completion of the ERP in the case of CO2 pipelines.

Navigator's position on when the ERP should be completed is practical, consistent with prior experience, and consistent with federal regulation. Navigator does not see the timeline for its process to develop an ERP as an example of it being difficult to work with or unresponsive. (Staff Br. at 6.) Nor is the timing of the development of the ERP evidence relevant to compliance with SDCL § 49-41B-22(3). (Staff Br. at 21-22.) What is important is that an effective ERP be completed and implemented for operations. The evidence supports a conclusion that will happen.

With respect to sharing plume modeling information, Staff will likely agree that this issue required the parties to venture into new territory. Navigator met early with Staff, before discovery, to share an overview of its plume modeling. When served with formal discovery, Navigator shared what was introduced as Exhibit 62 as a confidential document. Navigator understood that its response was sufficient. Staff inadvertently served on Navigator a discovery request for additional plume modeling information intended for Summit. Navigator asked if the request was misdirected and received an affirmative reply, which suggested to Navigator's counsel that no additional information was required from Navigator. Staff did not serve another request for more detailed plume-modeling information until later. Navigator responded by

providing the information marked as Exhibit N47A. That information was provided to Staff on June 28, 2023, the due date for discovery and exhibit and witness lists for the hearing (Ex. N46), so Navigator cannot speak to why Matt Frazell did not receive it until the night before the hearing. But the important point is that the information was shared, it was reviewed by experts, it was discussed extensively during the hearing, and it is available to inform the Commission's permitting decision. The process was not perfect, but there is no question that Navigator responsibly conducted its plume modeling and the record contains extensive evidence about that process and the results.

Finally, while Staff does not suggest that any litigation-related conduct, like making objections in discovery, should be the basis for a permitting decision, litigation conduct is not relevant evidence with respect to the merits of the dispute being litigated. Objections to discovery under SDCL § 15-6-33 are made by counsel, not signed by a party, because they are based on evidentiary rules and legal principles that lawyers rely on to develop an evidentiary record and preserve arguments. In general, "[d]iscovery objections are irrelevant and inadmissible in trials." *Jackson v. East St. Louis Bd. of Educ.*, 2021 WL 6340163, *1 (S.D. Ill. Nov. 29, 2021). When and whether counsel makes objections is litigation conduct that is not relevant to the merits. *See Harvieux v. Progressive Northern Ins. Co.*, 2018 S.D. 52, ¶ 22, 915 N.W.2d 697, 703 (litigation conduct by insurer is not relevant to proof of bad faith). While Navigator's discovery responses include some objections stated by counsel, in almost every case in which Navigator stated an objection to a discovery response, it also provided a response subject to the objection. (*See* Exhibits N34-N41, N44, N46, N48, N49, N55, N59, N61.) Staff did not file any motions to compel, a procedural remedy available under the rules of discovery,

and when Staff communicated to Navigator what it needed, especially with respect to the ERP and plume-modeling information, it was provided.

Navigator hopes that its overall conduct in South Dakota provides assurance of its bona-fides as a responsible operator. While the proposed Pipeline is a greenfield project, Navigator currently operates a crude-oil system in Texas and Oklahoma. There was no evidence offered at the hearing that Navigator is a problem operator. Navigator's senior management team has over 200 years of combined experience in the design, construction, and operation of pipelines transporting various commodities. (Ex. N2, ¶15, as adopted in Ex. N9, ¶5.) Navigator is and has been meeting quarterly with PHMSA and has engaged numerous outside consultants based on their expertise, including DNV, a preeminent authority worldwide in the design of CO2 pipelines. (Navigator's Proposed FF ¶¶ 64, 80-83.) Navigator ultimately answered all of Staff's discovery requests. Despite the Legislature providing a right to survey access, Navigator has not used any legal process to challenge landowners who have refused survey access, which includes almost all of the landowners represented by Brian Jorde, and Navigator has tried to negotiate with them to obtain survey access. (Tr. at 127:20 to 128:2.) Navigator has not filed any eminent-domain cases and has pledged to continue its efforts to acquire easements voluntarily and to use eminent-domain as a last resort. Navigator's witnesses at the hearing were subject to hours, and in some cases, days, of cross examination and questions, some of which from the Landowners' counsel were sarcastic and inappropriate, and they responded professionally, appropriately, and without argument. Their knowledge and expertise were readily apparent. As Staff points out, Navigator promptly notified the Commission of the administrative error regarding landowner notice under SDCL § 49-41B-5.2 and asked that an additional public-input meeting be held. Navigator agreed to a filing fee in excess of the statutory limit. Navigator

agreed to an extension of the discovery schedule and the hearing dates that were initially set in this docket to allow everyone more time. And Navigator's overall Project plans show a commitment to innovation (e.g., the use of plume modeling in the initial routing process; the use of fiber-optic cable for leak detection; the development of the NAV911 notification system; the collaborative research with Penn State to develop an odorant; and the use of warning tape) and to exceeding federal requirements and industry standards, especially with respect to depth of cover, the pipe specification, and pipe-wall thickness. (Navigator's Proposed FF ¶¶ 199, 200, 203, 205.) All of this is persuasive evidence that Navigator will be a responsible operator and has been and will be responsive to the Commission.

2. The risk of serious injury to the environment or the social and economic condition of inhabitants in the siting area.

Staff refers to the testimony of its witness Brian Sterner with respect to the impact of operating temperatures on soil temperatures and concludes that while Steve Lee's testimony and evidence that the temperature impact of soil cooling or heating is limited to a zone of less than one foot around the pipeline, Mr. Sterner was unable to vet that conclusion since it was offered in rebuttal. (Staff Br. at 17.) That, however, is the nature of rebuttal testimony, and if Mr. Sterner had contrary evidence of a negative effect of pipeline operating temperatures on soils and crop yields, he could have testified to it as part of his direct testimony. Or he could have been offered as a surrebuttal witness. As the record stands, Lee's testimony is undisputed, and it is not inconsistent with Sterner's testimony, since he testified that he did not know what effects, good or bad, higher temperatures might have on the surrounding soils. (Navigator's Proposed FF ¶ 187.)

Staff addresses the testimony related to housing eligibilities and suggests that while these are an individual concern to be handled through easement negotiations or in court, it is

appropriate for the Commission to consider the overall impact on the siting area if there is a loss of housing eligibilities. (Staff Br. at 15.) Staff also suggests that Navigator should account for the value added to a property from a housing eligibility when negotiating easement payments. (Id.) Navigator offered evidence at the hearing that it has done and will do this. (Navigator's Proposed FF ¶ 248.) With respect to the impact to the siting area if there is a loss of housing eligibilities, Navigator addressed that issue in its opening brief (Navigator Br. at 41-42), and also provides the following overview for greater context with respect either to this factor or the orderly development factor under SDCL § 49-41B-22(4).

The starting point is recognizing that the primary land use in all five counties affected by the Pipeline is agricultural, and that housing eligibilities are meant to preserve agricultural property uses and restrict residential growth in rural areas. All five counties, Brookings, Moody, Minnehaha, Lincoln and Turner, tightly restrict construction of residences in areas that are zoned agricultural. Brookings County controls residential growth in agricultural areas by restricting rural residential lots to a minimum of 35 acres. The other four counties impose restrictions on rural residential developments by limiting construction to one residence per forty acres, requiring all contiguous properties to remain agricultural, and prohibiting clusters of residences agricultural areas with stringent subdivision requirements, ranging from sewer and water to road access.

"Building eligibilities" or "housing eligibilities" is a short form expression of zoning restrictions on construction of residences on agricultural property. Building eligibilities are, essentially, the right to construct residences in areas that are zoned for agricultural uses. The zoning ordinance grants the titled owner of each 40 acres tract of agricultural property the right to identify one parcel of not less than one acre on which a rural residence can be constructed.

Before the parcel becomes an officially recognized residential site, the landowner must obtain a conditional use permit and the county must approve road access to the site.

Testimony from landowners demonstrates that not all building eligibilities are equal. Building eligibilities are more desirable if they have access to hard surface roads, are surrounded by trees, and have desirable visual features like creeks, valleys, overlooks, and grasslands.

While some landowners testified to their concern that the Pipeline would damage existing eligibilities on their property, they did not testify to specific plans for constructing in a certain location, that they had obtained a conditional use permit for an eligibility, or that the Pipeline route, as opposed to its presence somewhere on the parcel, would damage the eligibility. Despite this, Monica Howard testified that Navigator has considered and will continue to consider evidence that the route affects a housing eligibility and therefore the value of the landowner's property. (Navigator's Proposed FF ¶ 248.)

Howard's testimony is consistent with South Dakota law, which requires Navigator to consider the impact on building eligibilities. Since the turn of the twentieth century, the South Dakota Supreme Court has required that damages for condemnation include not only compensation for the value of the property taken, but also compensation for the reduction in value of the entire parcel. *See State ex rel. Dep. of Transp. v. Miller*, 2016 S.D. 88, 889 N.W.2d 141. "A party whose land is taken under condemnation proceeding is entitled to recover, not only for the value of the land actually taken, but for the damage the remaining land sustains by reason of such taking, and that the true measure of damages in such case is the difference between the value of the farm or tract of land before the portion is taken and its value after the same is taken." *State Highway Commission v. Fortune*, 91 N.W.2d 675, 686 (S.D. 1958)

(internal citations omitted). This has long been the standard valuation measure in eminent-domain cases.

South Dakota law has robust protections for a landowner whose property a company with condemning authority wants to acquire. First, the company seeking condemnation of an easement must proceed in good faith. SDCL § 21-35-4. The landowner can challenge the company's right to proceed if he believes the company is not proceeding in good faith or that there is no necessity for the taking. SDCL § 21-35-10.1. As Staff argues, if the landowner wins the challenge the landowner is entitled to recover all his expenses and his attorney fees. The same is true if the company decides to reroute and dismisses the condemnation proceeding. SDCL § 21-35-22. To ensure that real and legitimate offers are made by the company, if the jury awards damages 20% higher than the company's last offer, the company must pay the landowner's court costs, appraisal fees and attorney fees. SDCL § 21-35-23.

Finally, Staff has provided a list of recommended conditions with its reply brief. Navigator generally agrees with all of the conditions imposed by Staff, subject to the opportunity if a permit is granted to confirm with Staff about specific language that might be necessary to clarify with respect to any condition the obligations imposed by the condition.

3. The health, safety, and welfare of inhabitants under SDCL § 49-41B-22(3).

Staff discusses the risk the Project presents to the health and safety of inhabitants of the siting area in case of a leak. (Staff Br. at 20-22.) Staff notes that the probability of a leak is low, and that Navigator's plume modeling was appropriately done. (*Id.*) With respect to public disclosure, through Exhibit N68 Navigator has publicly disclosed mapping showing the effects of a guillotine rupture with respect to a concentration of CO2 of 40,000 parts per million. As noted in the disclaimer, which is an explanation of the data depicted in the mapping, the maps show the buffer based on the worst-case potential distance from 9 results from Navigator's

modeling. (Ex. N68.) The maps show the maximum distance for which a CO2 concentration could reach 40,000 ppm based on a guillotine rupture and Navigator's nine plume modeling results. (*Id.*) As provided in the Hazard Level 2 definition, exposure is immediately dangerous to life or health only after 30 minutes of exposure. (*Id.*) The information provided in the disclaimer is necessary to explain what is not otherwise obvious, and it is accurate. Staff does not cite to evidence that a lack of public disclosure has any detrimental effect on public safety or welfare, but with respect to the mapping that has been released publicly, the issue is moot.

With respect to what constitutes an appropriate level of risk, on which Staff takes no position (Staff Br. at 22), the Commission should recognize that such a determination cannot be made based solely on a statistical probability times consequences. Rather, determining what constitutes an appropriate level of risk must account for other relevant facts, including: (1) 5,000 miles of CO2 pipelines have been operating in the United States for decades and they have a better safety record than other hazard liquid pipelines, with no fatalities and only one injury (Navigator's Proposed FF ¶ 59); (2) the Pipeline is appropriately and conservatively routed, with most occupied structures being well outside Navigator's initial routing buffer and even its operations and maintenance buffer (*id.* ¶ 77); (3) the Pipeline will be located in predominantly agricultural areas with, in many cases, substantial distances between the Pipeline and occupied structures, while many existing pipelines, including CO2 pipelines that are included in PHMSA's statistical databased, are located within metropolitan areas (Tr. at 608:11-23); (4) the Pipeline is designed with state-of-the-art features, including enhanced pipe specifications and thicker-walled pipe based on an enhanced design factor (id. ¶¶ 79, 86); (5) based on these factors, the probability of a leak or spill is overstated (Tr. at 1080:8 to 1081:17; *id.* at 1101:16 to 1102:8); (6) the modeling is based on a guillotine rupture, while the statistical probability is based on an

average release that is much smaller than from a guillotine rupture (*id.* ¶¶ 132, 148); (7) the IDLH effects occur after 30 minutes of exposure, which may or may not occur depending on a variety of factors, including topography, atmospheric conditions, and wind (Ex. N47A); (8) Navigator will do site-specific CFD modeling at specific locations that will further inform appropriate additional mitigation measures with respect to "could affect" HCAs (Navigator's Proposed FF ¶ 204); and (9) Navigator has proposed multiple innovative operations measures to enhance leak detection (fiber-optic cable and the use of an odorant), minimize the chances of a leak (warning tape located above the pipeline), or enhance emergency response (NAV911) (*id.* ¶¶ 199, 200, 203, 205). Based on all of these factors, the risk of significant adverse effects to individual health and safety is acceptably low.

4. Interference with orderly development of the region.

Navigator addressed this issue at length in its brief and Staff's initial observations do not differ significantly. Notably, the only affected units of local government that have actively participated in the docket are Moody County and Minnehaha County, and both have done so only with respect to defending the validity of their recent ordinances. Otherwise, the three remaining affected counties have not publicly opposed the Project and have presented no evidence that the general route corridor or siting area is inappropriate, and neither has any municipality within the siting area. To the extent that Staff appropriately defers further discussion of this issue to its preemption brief, Navigator relies on its preemption brief as well.

5. Other considerations.

Navigator appreciates and agrees with Staff's discussion of the landowner-notice issue (Staff Br. at 26-28), which is largely consistent with Navigator's earlier arguments in response to the Landowner's motion to dismiss or return Navigator's Application, and consistent with Navigator's additional comments below in response to the Landowners' brief.

Landowners' Brief and Proposed Findings of Fact and Conclusions of Law

1. The proposed findings of fact are argumentative and unsupported with citations to the record.

Although ARSD 20:10:01:25 does not specify that proposed findings of fact must contain citations to the record, it is common practice to support findings with record citations; they are of little assistance otherwise and usually devolve into argument. Because the Landowners' proposed findings are largely argumentative, Navigator will not respond to them separately, but address them as appropriate in connection with the reply to the Landowners' brief.

2. The first two pages of the Landowners' brief are full of misplaced xenophobia and references to corporate greed.

In the overview to the brief, the Landowners state that the Project is backed by "venture capitalists and middle eastern money" (Landowner Br. at 3); that one of the investment funds providing capital for the Project "is actually based in the United Arab Emirates in the middle east" (*id*. at 4); that "the United Arab Emirates and other middle eastern influences dominate this investment fund" (*id*.); and that "Middle eastern sovereign wealth funds are also involved in the investment in some form." (*Id*.) In the proposed findings, the Landowners refer to "unknown middle eastern sheiks and strongmen." (Proposed Findings ¶ 3.) One wonders whether this brief would have been submitted to a court, because it is wildly inappropriate. The United Arab Emirates, an economic powerhouse, is an ally of the United States. Derogatory and demonizing

references to “the middle east,” “sheiks,” and “strongmen” denigrate an area that is home to over 500 million people. The repeated references to venture capitalists and corporate boardrooms forget that the United States was founded by immigrants and based on capitalism and free enterprise, which in South Dakota have never been dirty words. The brief may try to pit venture capitalists and Middle Easterners against South Dakota farmers and ranchers, but the derogatory references and invective are unworthy of the Landowners in whose names they were submitted.

3. The facts section of the brief, like the proposed findings of fact, is mostly argument.

There are almost no plain statements of fact in the brief. Almost every sentence includes argument, opinion, and misstatements. Argument is appropriate in a brief, but an inability to accurately state the facts from the record is not helpful. For instance, with respect to the landowner-notice issue: “Unbeknownst to Navigator, the Commission expected another meeting. Commission staff identified about 10 dates in January for a subsequent public input meeting.” (Landowners’ Br. at 4.) While it is accurate that the availability of dates for a public-input meeting was unknown to Navigator, the transcript cites are to comments made by Commissioner Fiegen that she asked for dates, which does not establish that “the Commission expected another meeting.” (Tr. at 3313:16-20.) If the Commission expected another meeting, it could have granted Navigator’s request to schedule one. In fact, as stated in the letter counsel sent to the Commission dated December 9, 2022, Navigator requested that the Commission host another public input meeting. (Navigator’s Proposed FF ¶ 10.) At the meeting on December 20, the Commission noticed the issue for discussion, but took no action despite Navigator’s request and Commissioner Hanson’s statement of support for another meeting. (*Id.* ¶ 11.) As stated by Kristen Edwards at the hearing, Navigator’s counsel asked her for dates for a public-input meeting. (Tr. at 3333:3-5.) It is undisputed that Navigator asked for another meeting. It is

undisputed that the Commission took no action on the request. It is undisputed that Navigator cannot host a public-input meeting before the Commission without the Commission's consent. This is not an issue of Navigator's disregard or acting in bad faith. Nor is it a basis on which the Commission should dismiss the Application, as discussed below.[2]

The statement that Navigator's management team currently hold $12,400,000 in equity in the Project (Landowners' Br. at 5) is a mischaracterization of the evidence and worth commenting on for that reason; the Landowners' argumentative treatment of the evidence is not reliable. The number of Navigator employees who have invested capital in the Project is more than the members of the management team who testified (Landowners' Br. at 5) (Tr. at 121:25 to 122:8), and the amount is the capital they both invested and committed to invest, which is different than the amount of equity they hold in the Project.

The Landowners' description of Brandon twenty years ago and its geographic proximity to Dawley Farms is not cited to the record and is not consistent with reality, which out-of-state counsel for Landowners may not know. (Landowners' Br. at 6.) The statement that Navigator has not obtained necessary pore space in Illinois to sequester carbon dioxide is inaccurate and irrelevant for the reason Commissioner Nelson established with Jeff Allen—if there is no sequestration space in Illinois for whatever reason, the Pipeline will not be constructed. (Tr. at 221:13 to 222:17.) The problem with these sorts of alleged factual statements, ultimately, is that the Landowners' view of Navigator's Project has not been informed or changed based on the evidence presented during the hearing—their arguments are unsupported by the facts.

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[2] The Landowners' statement that "Navigator sent a letter to them between Christmas and New Year's Day" (Landowners' Br. at 5) is another example of argument at any cost. Is there something wrong with using the U.S. postal system between Christmas and New Year's Day?

The statements on page 6 that the entirety of each stated segment of the route is to serve particular ethanol plants is incorrect. (Landowners' Br. at 6.) Navigator is a common carrier for the detailed and specific reasons explained by Laura McGlothlin in her testimony. As a common-carrier, Navigator will transport CO2 for any walk-up shipper who meets the tariff specifications and is willing to pay the transportation fee. The Landowners can challenge Navigator's status as a common carrier in court someday if they like, but that status is not an issue directly relevant to Navigator's burden of proof, and the factual statements found in the brief related to it are inaccurate.

The statement on page 6 that "Navigator has not obtained the necessary pore space in Illinois to even sequester the carbon dioxide in Illinois" is not accurate. The pages of the transcript that are cited (Tr. 219:10 to 220:2) prove otherwise. Jeff Allen testified that Navigator has "enough for this phase of the project to inject for, you know 12 to 15 years, call it that time horizon." (Tr. at 219:17-19.) He also testified that "we have enough capacity currently under contract to be able to operate several injection wells and sequester for, you know, the time frame that we're discussing." (Tr. at 220:4-7.) So not only is the factual statement incorrect based on the record, but, again, the Landowners are advancing a story line that is unaffected by the evidence introduced at the hearing.

The statements that "Navigator did not do an adequate analysis of the impact of the proposed hazardous liquid pipeline on High Consequence Areas" and "Navigator has not even informed the Commission of what HCAs exist beyond a nearly unreadable single map" (Landowners' Br. at 7) are not statements of fact, but argument. Exhibit N33 in fact shows the existence of HCAs and the effect a Pipeline leak may have on HCAs; as Steve Lee described, the information is the sort of mapping Matt Frazell requested on that subject, but shown in an

inverse format. (Tr. at 2964:24 to 2965:12.) The Landowners' counsel had every opportunity to cross-examine Steve Lee on this subject. As shown in Exhibit 33, the percentage of the Pipeline that could affect HCAs is much lower than the number that William Byrd testified to (Tr. at 1797:4-9) and the could-affect analysis is an ongoing obligation. (Tr. at 1853:18 to 1854:5; Navigator's Initial Br. at 8.) It is undisputed that Navigator will do additional site-specific CFD modeling as part of its overland flow analysis. (Navigator's Proposed FF ¶ 204.) The Landowners' argument, stated as fact, is contradicted by the evidence at the hearing.

The Landowners state as fact that Ex. N68 "does not accurately reflect the worst-case scenario or include the necessary modeling for HCAs." (Landowners' Br. at 7.) The disclaimer in Exhibit N68 is factually accurate and does not state that the maps reflect a "worst-case scenario"—the mapping is based on the worst-case potential distance from 9 results from Navigator's modeling; it is based on a guillotine rupture; and it is based on a release occurring at the maximum operating pressure of the pipeline. (Ex. N68.) The exhibit reflects the worst case from the modeling that was done. Again, all plume modeling is subjective to some extent, and had the Landowners or their expert wanted to challenge Navigator's plume modeling with alternative modeling, they could have done so. To the extent that the Landowners complain that the data does not account for terrain other than flat land, Navigator will do additional site-specific CFD modeling at appropriate locations. (Navigator's Proposed FF ¶ 204.)

While the argument related to development of the ERP has been addressed separately, the statement that "[i]t 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"(Landowners' Br. at 8) has no basis in fact. The scheduling and timing of emergency response training with local responders was not

determined or based on events occurring at the hearing in this docket; rather, as Vidal Rosa testified, the schedule of such training was developed so that it occurred from east to west as a matter of logistics. (Tr. at 1445:14 to 1446:15.) The Landowners find nefarious purpose even in that.

4. The Commission should not dismiss the Application based on landowner notice.

The Landowners again argue that Navigator's Application should be dismissed based on inadequate notice under SDCL § 49-41B-5.2. (Landowners' Br. at 13-16.) Navigator relies on its previous briefing, and the Commission's previous decision, on this issue. As already stated here, the Landowners have the facts wrong. The Commission previously entered an order that it lacked jurisdiction to dismiss the Application based on this issue. (Navigator's Proposed FF ¶ 13.) If it were appropriate and within the Commission's discretion to dismiss the Application for this reason, it should have happened in January 2023, not after the parties completed months of discovery and an eleven-day evidentiary hearing. Finally, the standard for proving reversible error in a matter under SDCL Ch. 1-26 requires proof that substantial rights of the parties have been affected. SDCL § 1-26-36 ("The court shall give great weight to the findings made and inferences drawn by an agency on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced . . ."). As previously argued, the administrative error does not rise to that level given the opportunity that affected landowners had to participate in the docket.

5. The Landowners have misstated the burden of proof.

The Landowners argue that the Commission is not bound by stare decisis and that the burden of proof under SDCL § 49-41B-22 is akin to "do no harm." (Landowners' Br. at 13.)

Neither argument supports the Landowners' position. In *Ehlebracht v. Crowned Ridge wind II, LLC,* 2002 S.D. 19, ¶ 29, 972 N.W.2d 477, 487, the South Dakota Supreme Court rejected an argument that it was unfair for the commission to impose regulatory limits on a case-by-case basis. The Supreme Court recognized that "conducting a studied, individualized determination reflects the very nature of a contested case hearing and is precisely what administrative tribunals possessing expertise, like the PUC, are designed to do." *Id.* Navigator has not asked anything else of the Commission in this docket. As for "do no harm," the factors stated in SDCL § 49-41B-22 state the burden of proof, and the characterization, which is not based on any legal citation, is not consistent with the statute or the South Dakota Supreme Court's previous caselaw discussing application of the factors, as reflected in Staff's initial brief.

6. Navigator will comply with all laws and regulations.

The Landowners argue that Navigator must prove that it will comply with the laws and regulations of every state where the Project will be permitted (Landowners' Br. at 16), which is not correct. The Commission lacks jurisdiction outside South Dakota and its permitting decision needs to be based on the construction and operation of the Pipeline in South Dakota, not North Dakota, Illinois, Iowa, Nebraska, or Minnesota. The argument about Illinois is not about whether Navigator will comply with the law there, but whether it will get a permit there, which is a different issue and not one of concern here given the fact that if Navigator is unable to sequester CO2 in Illinois, the Project will not be constructed in South Dakota, as already established in this brief. Moreover, the Landowners have misrepresented what has occurred in Illinois. Mark Maple did not testify in this docket and was not subject to cross-examination, and no prefiled testimony from him was admitted as evidence in this docket. The testimony referred to is from November 2022 and was filed in a now-inactive docket that has been superseded by a

new docket and new testimony from Mr. Maple, which is different than what the Landowners represent. The argument is inappropriate and incorrect. In particular, the statement that "the Illinois Commerce commission ("ICC") rejected Navigator's initial application in Illinois because it failed to comply with Illinois application laws and regulations" (Landowners' Br. at 17) is not cited to any evidence at it is incorrect, which the Commission can determine if it chooses by looking at the ICC docket. A hearing is scheduled two months from now on Navigator's application in Illinois; the suggestion that the Commission in South Dakota should prejudge the evidence and argument and decision in that case before the ICC hears the evidence and makes a decision is ridiculous.

The argument that Navigator admitted "the federal government is a passive regulator that does not actually pre-approve any design or construction of the project" (Landowners' Br. at 17) is not cited to the record and is not consistent with the evidence. Navigator presented evidence, in particular through Staff's witness William Byrd and its own expert, Mark Hereth, that PHMSA is an effective regulator, that its audits and inspections are thorough and intrusive, and that Navigator has asked PHMSA to conduct a review of its design for the Pipeline, for which Navigator will bear the expense. (Navigator's Proposed FF 58-68, 84.)

The statement that Navigator "did not present evidence that it would comply with the existing federal regulations, particularly subpart F of 49 CFR 195 concerning operation, emergency response, and maintenance of the pipeline" (Landowners' Br. at 17) is again not cited to the record and entirely inconsistent with the evidence. The Landowners barely challenged Navigator's evidence related to operations, pipeline design, and engineering, including the PHMSA exceedance table in evidence as Exhibit N22. The discussion of Navigator's draft ERP at pages 18-20 has already been addressed in this brief, and does not provide a factual basis for

the Commission to find or conclude that the construction and operation of the Pipeline will not comply with 49 CFR Part 195.

7. The Project will not pose a threat of serious injury.

The starting point is that the Landowners misstate this statutory factor: “Navigator must show that it will not pose a threat of injury to social and economic conditions.” (Landowners’ Br. at 21.) And again: “Navigator largely ignores the Intervening Landowners’ evidence about injury to property values, housing eligibilities, increased cost of insurance or inability to obtain coverage, and tile damage.” (*Id.*) As stated otherwise in the brief, the statute refers to a threat of serious injury, which is obviously different. With respect to property values, housing eligibilities, insurance, and tile damage, Navigator has not ignored, let alone “largely ignored,” any of those issues. They are addressed in detail in Navigator’s initial brief, in its proposed findings of fact, and further in this brief in response to Staff. The evidence on these issues does not establish a threat of serious injury to the environment or to the social and economic condition of inhabitants of the siting area. The fact that there is affirmative evidence of economic benefits to inhabitants from the Project does not somehow negate Navigator’s evidence with respect to this factor, but enhances it.

With respect to drain tile, the Landowners argue for the first time that the Commission should approve Navigator’s selection of a contractor to do the work. (Landowners’ Br. at 24.) As with the Emergency Response Plan, the Landowners offer no evidence or authority why a tile contractor should be selected months in advance of construction and before a siting permit allowing construction is secured. The same would be true of a general contractor or any other subcontractors for the Project. Navigator is unaware of a docket in which the Commission has required an applicant to identify its contractors as a condition of granting a permit.

The studies that Navigator submitted with respect to the effect of transmission lines are not limited to natural gas lines. (Landowners' Br. at 22.) They include crude oil lines, refined products lines, and other hazardous transmission lines. (Ex. S14 at pp. 424-841.) While the substances transported in these lines differ, they all pose threats to persons, property, and the environment. The Commission knows from previous crude-oil dockets that intervenors in those dockets seriously challenged those pipelines with evidence of threats to drinking water, wildlife, and people. Natural gas is combustible. (Tr. at 1306:6-8.) The same is true of refined products lines. Regardless of the gas or hazardous liquid being transported, the studies show that they do not adversely affect property values. County Commissioner Jean Bender stated her agreement with this view in supporting Minnehaha County's proposed ordinance. (Ex. M4A at 26.) It is not an unreasonable view, and absent affirmative evidence that existing hazardous liquid transmission lines have affected property values, there is no evidentiary basis to conclude that Navigator's pipeline will adversely affect property values. Moreover, as Staff argued in its initial brief, the effect on property values should be considered on a macro level, not with respect to individual property owners, any damage to whom can be compensated with money. (Staff's Initial Br. at 13-14.)

The Landowners' argument on insurance refers to Navigator's easement and argues that it requires a landowner to make Navigator whole if the Landowner causes damage through negligence or willful misconduct. (Landowners' Br. at 8.) This statement grossly mischaracterizes the easement provision, which is an exception to Navigator's obligation to indemnify the landowner. (Ex. N60, ¶ 12.) An exception to Navigator's obligation does not create an affirmative obligation on the landowner. Moreover, Navigator agreed at the hearing to a condition that would modify the terms of the easement by indemnifying landowners from any

liability for damage to the pipeline except that caused by their gross negligence or willful misconduct. (Navigator's Proposed FF ¶ 223.) Navigator also agreed to ask its insurer for a waiver of subrogation against any landowner. (*Id.* ¶ 225.)

With respect to threats to the environment, the Landowners argue that migratory animals may get stuck in the trench (Landowners' Br. at 24), which ignores Steve Lee's testimony on this issue, including the narrow width of the trench, 24 inches, and the procedures employed if an animal is caught in the trench. (Tr. at 2976:20 to 2977:1; *id.* at 2977:4 to 2978:8.) Navigator addressed the issues of soil temperatures and the Phase 2 geohazard study in response to Staff's brief.

8. The Project will not substantially impair health, safety, or welfare.

The Landowners argue that Matt Frazell's testimony establishes that Navigator's plume modeling is "highly compromised" because it did not show the release pressure. (Landowners' Br. at 25-26.) Again, the brief ignores the rest of the testimony. Frazell agreed on cross examination that Ex. N47A shows that the release pressure was assumed to be the maximum operating pressure of the Pipeline. (Tr. at 1994:10-16.) When referred to the note in Ex. 47A stating that, he testified "that's adequate for the modeling. And the distances associated with that seem reasonable." (Tr. at 1993:1 to 1994:16. The Landowners' argument misrepresents the complete record.

The Landowners argue that PHAST modeling is inferior to CFD modeling and Navigator's modeling is incomplete without modeling based on topography. (Landowners' Br. at 26-27.) Navigator addressed this issue in depth in its initial brief (Navigator's Initial Br. at 10-14) and in its proposed findings of fact (Navigator's Proposed FF ¶¶ 132-55, 204) and relies on those facts and that argument here.

The Landowners devote six pages of their brief to complaints about Navigator's standard easement. (Landowners' Br. at 28-34.) The easement is a standard document and similar to other pipeline easements used in the industry. It has already been voluntarily signed by over 30% of South Dakota landowners. Its terms are an issue of contract law and not directly relevant to this proceeding. And Navigator has negotiated its terms with willing landowners, and will continue to do so. So far, none of the Landowners who testified in this case have been willing to negotiate easement terms with Navigator, and their counsel has proposed no changes to Navigator, so the issue is pointless. The Landowners' complaints do not establish that it is unreasonable or that its use affects anyone's welfare. And some of the statements contained in the argument are mischaracterizations, like "Navigator, and its venture capital and Arab money, are flipping this Project for federal tax credits." (Landowners' Br. at 31.) Navigator offered testimony to the contrary, that it has no plans to construct the Pipeline and then sell it. (Tr. at 134:17-20.) The Landowners also state that because of the easement terms, "a landowner's entire net worth could be at risk should insurance coverage not be available or a claim exceeding policy limits." (Landowners' Br. at 33.) This statement is unsupported by any facts in the record, is contradicted by the permit conditions on financial responsibility that Navigator is willing to accept (these are simply ignored by the Landowners), and was addressed in detail by Jeff Pray's testimony.

On pages 34-34, the Landowners openly invite the Commission to substitute its judgment for that of the United States Congress with respect to the wisdom of the 45Q tax credits. "[W]e need not aid and abet in this federal policy." (Landowners' Br. at 34-35.) This brazen request for the Commission to ignore the law is fundamentally inconsistent with the Commission's place in our democratic form of government, for the separation of powers, and for federalism. It is no

different than if the Landowners openly argued that although the South Dakota Legislature did not enact any of the proposed bills in 2023 that would have curtailed or defeated Navigator's Project, the Commission should exercise its independent policy-making judgment to circumvent the will of the Legislature by denying the permit. Navigator's permit application must be decided based on the evidence and its burden of proof under SDCL § 49-41B-22. Period. Personal politics have no place here.

9. The orderly development of the region and the views of local governments.

The effect of the Pipeline on future development has been extensively addressed in Navigator's initial brief, in response to Staff's initial brief, and in Navigator's preemption brief, so Navigator will not repeat those arguments here because the Landowners' brief offers nothing new. But one fact stands out. The evidence establishes that local governments have not opposed the Project. The Landowners are correct that "Navigator's burden of proof is not limited to Moody and Minnehaha counties." (Landowners' Br. at 37.) Brookings County, Turner County, and Lincoln County did not participate in the docket and have not opposed the Project. The testimony submitted on August 24-25 by Minnehaha County and Moody County establishes that those counties have not taken a position by adopting their ordinances that the Project should not be permitted by the Commission or that they are opposed to CO2 pipelines. Moreover, no municipality within the siting area has opposed the Project. This lack of opposition by local governments is striking.

10. Preemption under SDCL § 49-41B-28.

Navigator has separately briefed the issue of preemption, but several legal arguments made by the Landowners in their brief merit a response.

First, Navigator's motion is not a request that the Commission "obliterate and literally 'suppress' common sense ordinances of Minnehaha and Moody Counties." (Landowners' Br. at 38.) Navigator has asked that the ordinances be preempted as applied to its proposed route, which would leave them on the books even if Navigator's motion is granted.

Second, they argue that the Commission should simply exercise its discretion not to preempt because motions under SDCL § 49-41B-28 are rare and "abhorrent" and therefore the Commission has no legal duty "to act on" the motion. (Landowners' Br. at 38.) This is an extraordinary argument, not only because it has already been rejected by the South Dakota Supreme Court in a very matter-of-fact way. *In re Nebraska Public Power Dist.*, 354 N.W.2d 713, 720 (S.D. 1984). The Supreme Court's ruling directly contradicts the statement that Navigator's "invocation of SDCL § 49-41B-28 and request the Commission usurp that local authority is quite literally unprecedented in the Commission's history." (Landowners' Br. at 38.) The request is not unprecedented, it is based on a statute passed by the Legislature, and the Commission has the legal authority to grant the motion. The Landowners' argument is not only wrong and contrary to controlling precedent, but it is also extraordinary because it openly invites the Commission to simply deny the motion regardless of its merits. The Legislature's enactment of SDCL § 49-41B-22 is itself a sufficient response to the argument that "the counties are best suited to determine what types of infrastructure should be located where." (Landowners' Br. at 39.) In this context, the Legislature has said that may not be true in every case.

Third, the argument that the ordinances are entitled to a strong presumption of legitimacy and that Navigator's motion must be denied if they are fairly debatable is misplaced. (Landowners' Br. at 40.) Again, Navigator has not made a motion in court that the ordinances are unconstitutional, but that the Commission should preempt them under SDCL § 49-41B-28.

The statute itself sets the standard, which is whether the ordinances are unreasonably restrictive based on the factors cited in the statute. The case the Landowners cite, *Schrank v. Pennington County Bd. of Comm'rs*, 610 N.W.2d 90 (S.D. 2000), was not decided under SDCL § 49-41B-28 and the Landowners' citation to it is an invitation to legal error.

The Utilities' Briefs

The South Dakota Association of Rural Water Systems asks in its brief that the Commission include a permit condition requiring that the separation distance for vertical crossings between SDARWS water lines and Navigator's Pipeline be a minimum of 48 inches. (SDARWS Br. at 2.) While Navigator does not object to a permit condition that it enter into appropriate crossing agreements before construction, and while 48 inches may be appropriate in most cases, the terms of those agreements should be left to the parties to negotiate. The evidence established that it is standard industry practice to enter into crossing agreements before construction, and Clint Koehn saw no reason that the SDARWS and Navigator would not be able to work out agreements. (Tr. at 1228:1-5.)

The same is true for the South Dakota Rural Electric Association. Ted Smith testified that there is ample time before construction to reach an agreement on crossings. (Tr. at 1765:9-19.) Thus, the details of crossing agreements, which are site-specific, should be left to the parties to negotiate.

Navigator anticipates no reason that it cannot reach agreement with the Utilities on the terms of crossing agreements. The Utilities did not propose terms to Navigator for purposes of negotiation in advance of the hearing. Navigator respectfully requests that any permit conditions not preclude the parties from agreeing to appropriate terms for each site.

Conclusion

The briefs of Staff and the Landowners could not be more different, in style, content, or conclusion. Navigator respectfully requests that the Commission decide this case based on the evidence found in the record, and not on the hyperbolic and unsupported arguments made by the Landowners.

Dated this 4th day of September, 2023.

WOODS, FULLER, SHULTZ & SMITH P.C.

By /s/ James E. Moore

James E. Moore
Melanie L. Carpenter
P.O. Box 5027
300 South Phillips Avenue, Suite 300
Sioux Falls, SD 57117-5027
Phone (605) 336-3890
Fax (605) 339-3357
James.Moore@woodsfuller.com
Melanie.Carpenter@woodsfuller.com
Attorney for Navigator Heartland Greenway