BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE APPLICATION OF NAVIGATOR HEARTLAND GREENWAY, LLC FOR A PERMIT TO CONSTRUCT THE HEARTLAND GREENWAY PIPELINE IN SOUTH DAKOTA	* * * * * * *	**STAFF'S INITIAL POST-HEARING BRIEF** **HP22-002**

Staff, by and through its attorney of record, hereby files this post-hearing brief in the above-captioned siting proceeding.

PRELIMINARY STATEMENT

For purposes of this brief, the South Dakota Public Utilities Commission is referred to as "Commission"; Commission Staff is referred to as "Staff"; Navigator Heartland Greenway, LLC is referred to as "Navigator" or "Applicant". Those Intervenors who are collectively represented by an attorney will be referred to as "Landowners" preceded by the name of their lead counsel. The Heartland Greenway Pipeline for which the Applicant is seeking an application will be referred to as "the Project".

Reference to the transcript of the Evidentiary Hearing will be "EH", followed by the appropriate page number. Prefiled testimony that was accepted into the record will be referred to by the exhibit number.

BACKGROUND

On September 27, 2022, Navigator filed with the Commission an Application for a Permit under the South Dakota Energy Conversion and Transmission Facilities Act to Construct the Heartland Greenway Pipeline in South Dakota from Navigator Heartland Greenway, LLC, a limited liability company owned by Navigator CO2 Ventures LLC (Navigator or Applicant).

Applicant proposes to construct and operate a carbon dioxide (CO2) transmission pipeline (Project). The Project is approximately 1,300 miles of pipelines for the transportation of CO2 from more than 21 ethanol and fertilizer plants across five states, including three ethanol plants in South Dakota, that will transport captured carbon dioxide for permanent and secure underground sequestration in Illinois and/or to off-take facilities for commercial/industrial use.

The Project consists of 111.9 miles of carbon dioxide pipeline in South Dakota that will cross the counties of Brookings, Moody, Minnehaha, Lincoln, and Turner. Pursuant to SDCL 49-41B-16, the Commission held public input meetings in Canton, Flandreau, and Sioux Falls. Party status has been granted to numerous individuals and entities, including Moody and Lincoln Counties. No timely-filed applications for party status were denied. A late-filed application for party status filed by Valero Renewable Fuels Company, LLC was denied on the grounds that it was filed significantly beyond the intervention deadline.

On June 26, 2023, Applicant filed a Motion to Preempt County Ordinances Under SDCL 49-41B-28. In response to this filing, Minnehaha County filed for and was granted limited intervention in this proceeding for the purpose of participating in this preemption issue.

An evidentiary hearing commenced on July 25, 2023. The county preemption issue was bifurcated for scheduling purposes. Throughout the twelve-day hearing, over sixty direct and rebuttal witnesses testified.

BURDEN OF PROOF

Applicant bears that burden of proof in this matter. The South Dakota Supreme Court has held that

> "[a]s an applicant seeking a siting permit from the [Commission] for construction of its Project, [the Applicant has] the burden of establishing by a preponderance of the evidence that:

> (1) The proposed facility will comply with all applicable laws and rules;
>
> (2) The facility will not pose a threat of serious injury to the environment nor to the social and economic condition of inhabitants or expected inhabitants in the siting area. …;
>
> (3) The facility will not substantially impair the health, safety or welfare of the inhabitants; and
>
> (4) The facility will not unduly interfere with the orderly development of the region with due consideration having been given the views of governing bodies of affected local units of government. ….

Christianson v. Crowned Ridge Wind, LLC, 2022 SD 45, ¶ 23, 978 NW2d 756, 762, *citing* SDCL 49-41B-22.

"Burden of proof" is, according to the South Dakota Supreme Court, a challenging term because it encompasses two distinct burdens: "'the burden of persuasion,' i.e., which party loses if the evidence is closely balanced, and the 'burden of production,' i.e., which party bears the obligation to come forward with the evidence at different points in the proceeding." *In re Estate of Duebendorfer*, 2006 SD 79, ¶ 42, 721 N.W.2d 438, 448 (Zinter, J., concurring). However, ARSD 20:10:01:15 and SDCL 49-41B-22 place both of those burdens squarely on Applicant. The administrative rules provide that the Applicant "has the burden of going forward with presentation of evidence" and that the Applicant "has the burden of proof as to factual allegations" which make up the basis of the application. ARSD 20:10:01:15.01.

When assessing whether the Applicant has satisfied its burden of proof, the general standard of proof for administrative hearings is by preponderance, or the greater weight of the evidence. *In re Setliff*, 2002 SD 58, ¶ 13, 645 NW2d 601, 605. Black's Law Dictionary defines preponderance of the evidence as:

> The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other. This is the burden of proof in most civil trials, in which the jury is instructed to find for the party that, on the whole, has the stronger evidence, however slight the edge may be.

Black's Law Dictionary (11th ed. 2019).

SDCL 49-41B-22 comprises the criteria of which the Commission may consider in its determination of whether to grant or deny a permit. If the Commission finds that the Applicant met its burden of proof under every subdivision of SDCL 49-41B-22, the Commission must grant the permit. If the Commission finds that the Applicant has not met the burden of proof as to any subdivision, the Commission must deny the permit.

ARGUMENT

Transmission facilities "may not be constructed or operated in this state without first obtaining a permit from the Public Utilities Commission." SDCL 49-41B-l. The Project is a transmission facility as defined in SDCL 49-41B-2.1(2).

As discussed above, the Applicant has the burden of proof to establish that four specific elements are met. Those elements are provided in SDCL 49-41B-22. Staff will address each element individually.

I. Analysis under SDCL 49-41B-22

1) SDCL 49-41B-22(1) - Compliance with all applicable laws and rules.

The Pipeline is subject to federal, state, and local laws and regulations that set forth numerous requirements for which the construction and operation of the facility must comply with. It is, therefore, impossible for Staff to predict with any degree of certainty whether the company will comply with all applicable laws and rules. However, the ability to comply is a good indicator of whether the company *will* comply. The Applicant's ability to comply with all applicable laws and rules is demonstrated through the Applicant's awareness of the laws and rules it is subject to and through the Applicant's compliance with applicable laws and rules to date. Moreover, it is illogical to expect the Applicant to demonstrate that it is in compliance with laws and rules that take effect in the future, when we have no way of knowing what those laws might be.

The South Dakota Supreme Court has held that "the textual standard of SDCL 49-41B-22(1) … requires an applicant for a […] siting permit to establish that the project '*will* comply with all applicable laws and rules." *In re Ehlebracht*, 2022 SD 46, ¶ 29, 978 NW2d 741, 751. The Court went on to explain that the inquiry presented by this statute is forward looking. *Id*. at ¶ 30. However, past performance as an indicator of propensity for future compliance with all laws and regulations was upheld by the *Ehlebracht* Court. *Id*. at 32 (holding that the Commission appropriately considered whether the permit applicant had procured all local permits as a means to predict future compliance).

The *Ehlebracht* case reinforces the proposition that the Commission may make fact-specific inquiries into an applicant's history of compliance but may not litigate matters outside the jurisdiction of the PUC in order to reach a conclusion as to whether or not an applicant will comply with laws and regulations in the future. *Id*.

The only concern that Staff has with Navigator's ability to comply with all laws is the fact that Navigator was not always prompt, thorough, and immediately forthcoming in their responses to Staff throughout the discovery process in this docket. EH 2911:10-14. For example, Staff requested Navigator's emergency response plan (ERP) in discovery, [1] but did not receive the draft ERP until July 18, which was after the deadline to serve any addition discovery and did not provide Staff sufficient time to review the ERP. EH 2871:13-15. Based upon testimony throughout the evidentiary hearing, this draft ERP does not appear to have been shared with first responders and local units of government.

Staff witness Jon Thurber also mentioned in cross-examination from Commissioner Fiegen that data request responses were sometimes challenging due to the number of objections. EH 2911:10-14. While Staff understands and respects a party's right to object in order to preserve their objections, when important information is not timely provided, even subject to an objection, it causes concern about an applicant's ability to be forthcoming. To an extent, a company's history of establishing good working relationships and open dialogues with regulators and governmental units is indicative of future behavior.

On the other hand, there were also instances throughout this proceeding in which Applicant showed a tendency for good faith and a desire to form good working relationship and to be transparent with regulators. One example of this is Navigator's agreement early in this docket to pay a filing fee well in excess of what was required by statute in order to allow Staff the ability to fully vet the Application.[2] Another example is the fact that Navigator, upon

[1] ARSD 20:10:22:23 states in relevant part: "The applicant shall include an identification and analysis of the effects the construction, operation, and maintenance of the proposed facility will have on the affected area including the following: … (6) … The information shall include the applicant's plans to coordinate with the local and state office of disaster services in the event of accidental release of contaminants from the proposed facility."
[2] See Order Assessing Filing Fee; Order Authorizing Executive Director to Enter Into Consulting Contracts, https://puc.sd.gov/commission/dockets/HydrocarbonPipeline/2022/HP22-002/HP22-002FilingFee.pdf.

realizing its error in sending notices to landowners, promptly disclosed the error to the Commission.[3]

Ultimately, based upon these positive and negative examples, it would be Staff's hope that if a permit were granted, Navigator would work hard to cultivate better working relationships and open dialogue with all stakeholders. In order to comply with all laws and rules, it is important to have good communication such that a full understanding of those laws and rules can be fostered.

When the preponderance of the evidence standard is applied to this issue, Staff argues that the Applicant's awareness of the laws and rules and the steps it has taken to date to comply demonstrates its eventual ability to comply with all applicable laws and rules.

2) SDCL 49-41B-22(2) - Risk of serious injury to the environment or social and economic condition of inhabitants in the siting area

The South Dakota Supreme Court addressed this issue in its *Big Stone II* decision. *In re Otter Tail Power Co. ex rel. Big Stone II*, 2008 SD 5, ¶ 29, 744 N.W.2d 594, 603. In that case, the Court held that the competing interests of economic development and protection of the environment must be balanced. *Id*. at ¶ 35. The Court stated that "[n]othing in SDCL Chapter 49-41B so restricts the PUC as to require it to prohibit facilities posing any threat of injury to the environment. Rather, it is a question of the acceptability of a possible threat." *Id*.

SDCL 49-41B-22 does not provide a definition of "siting area" for transmission facilities. The lack of a clear definition is logical, because the siting area of a transmission facility would naturally vary depending on numerous factors including the type of project, size of the project, and population of the area. Logic dictates that the "siting area" for purposes of this issue is any

[3] See December 9, 2022, letter to the docket. https://puc.sd.gov/commission/dockets/HydrocarbonPipeline/2022/HP22-002/LTR120922.pdf.

area that would see a direct social or environmental affect from the construction or operation of the pipeline in South Dakota. Therefore, the risks that Staff will analyze under this issue are as applied to this understanding of the siting area.

Impact on the Environment due to Construction

The Energy Facility Siting Rules, as found in ARSD Chapter 20:10:22, require the Applicant to provide specific information on how the Project will impact the environment. Specifically, the Applicant was required to address the effects the project will have on the physical environment, terrestrial ecosystems, and aquatic ecosystems. Staff understands that the construction of pipeline could have an impact on the environment; however, the burden that the Applicant is required to meet is to prove that the project will not pose an unacceptable threat of serious injury to the environment.

Impacts to the physical environment as a result of the Project include, though are not limited to, vegetation loss, soil compaction, damage to drain tiles, and erosion. In response to these foreseen impacts, Navigator has created mitigation plans in order to minimize the impacts.

As discussed by Staff witness Alissa Ingham, Navigator completed an agriculture protection plan, environmental construction guidance, as well as a weed management plan. EH 1924:1-4, Exhibit N1 (Exhibits C and D), and Exhibit N19. Ms. Ingham testified that she reviewed the plans and associated mitigation measures, which alleviated concerns raised in her prefiled testimony. EH 1924:5-8.

Within the sphere of environmental aspects, Staff also analyzed effects on wildlife and geology. For these areas, Staff relied on the expertise of the South Dakota Department of Game, Fish, and Parks (GF&P) and the South Dakota Department of Agriculture and Natural Resources (DANR), calling as witnesses Hilary Morey of GF&P and Tim Cowman and Terry Florentz of

DANR. Staff is exceptionally grateful to these and other agency witnesses, including those who did not ultimately testify at the evidentiary hearing, for the time they put into this matter.

WILDLIFE

Ms. Morey testified that the Project would cross certain areas with important habitat types, "some of which are [waterbodies] known to be occupied by the federally endangered Topeka Shiner, areas of native prairie and potentially suitable habitat for the state endangered lined snake." In her prefiled testimony, Ms. Morey outlined various recommendations for avoidance and mitigation measures related to protecting endangered species, preserving grasslands, and coordinating notice of closure of walk-in hunting areas. *See* Exhibit S4. At the evidentiary hearing, Ms. Morey noted that Navigator has addressed all of her concerns. EH 2826:8-11. Therefore, Staff will incorporate her suggested conditions in its list of recommendations, rather than detail them here.

GEOLOGY AND EFFECTS ON THE PHYSICAL ENVIRONMENT

South Dakota's State Geologist Tim Cowman testified as a Staff witness. In his prefiled testimony, Mr. Cowman stated that the Project does not cross any geographic formations that would pose a risk to the stability of the pipeline. Exhibit S5, 2:32-33. He also noted that the pipeline would cross the Big Sioux Aquifer, which is the source of drinking water for many people. Exhibit S5, 3:11-12. Therefore, proper construction and operation is essential to minimize risk to that aquifer. Exhibit S5, 3:13-14.

At the evidentiary hearing, Mr. Cowman testified that he is not aware of any unstable geologic formations that the pipeline would cross. EH 1913:4-5. On cross-examination, Mr. Cowman further stated that he is "not aware of any other geologic formations that would be a threat to the safety of the pipeline if [Navigator] shifted the route slightly." EH 1921:22-24.

Another Staff witness that opined on issues involving geology was Brian Sterner. Mr. Sterner mentioned in his oral testimony that he had concerns with the timing of geotechnical surveys. EH 2160:13-15. He stated that the results of the Phase 2 geotechnical surveys would be important to know in order to determine what is necessary to stabilize the soils and anchor the pipeline in place. EH 2160-2161. Mr. Sterner specifically noted that it would be important to know the surface geology at locations there will be a horizonal directional drilling (HDD) or boring. EH 2165:8-12. Staff argues that Mr. Sterner's opinion is not without merit as ARSD 20:10:22:14(8) requires the applicant to provide "[a]n analysis of any constraints that may be imposed by geological characteristics on the design, construction, or operation of the proposed facility and a description of plans to offset such constraints."

The status of the Phase 2 geotechnical studies was brought up many times throughout the hearing. Navigator has not completed the Phase 2 study. Steven Lee testified that the Phase 2 activities are planned for later in 2023 and will not be available prior to the decision deadline in this docket. Exhibit N5, 12; EH 2190:21-25. In some areas, surveys have not been completed because Navigator opted not to survey on land where they did not receive landowner consent after 2022. EH 3171-3172. Should the Commission find that the evidence in the record on geologic impacts satisfies the applicant's burden of proof, Staff recommends that the Commission include a condition requiring Navigator's Phase 2 geologic studies be filed with the Commission once completed.

Impact on the Social and Economic Condition of Inhabitants

In order to apply the preponderance of the evidence standard, one must weigh the positive economic impacts against the negative impacts. There was much speculation as to negative impacts that could occur if a permit is granted and the pipeline is constructed. Some of

the concerns raised included litigation costs related to use of eminent domain, effects on property value, loss of housing eligibilities, and effects on crop yields. There was no testimony or evidence specifically quantifying these concerns. Staff will address each below.

Throughout the evidentiary hearing and in Landowners' prefiled testimony, there was a significant amount of discussion about costs landowners could incur as a result of being forced to fight eminent domain in court. The issue of eminent domain is entirely within the jurisdiction of the circuit court, and the Commission has always been cognizant of the fact that it does not play a role in eminent domain. However, because it has been argued that litigation costs negatively affect the economic condition of landowners, Staff will nonetheless address it here.

Whether or not eminent domain is ultimately a tool available to Navigator is a question for the court. For the purposes of the discussion in this brief, Staff considered whether a landowner would suffer substantial economic loss in defending against eminent domain such that the loss would outweigh the economic benefits of the Project.

Because of the protections inherent in South Dakota's condemnation laws, Staff asserts that there is not a threat of such a severe economic burden upon the landowner. The South Dakota Constitution does not merely require one taking property by condemnation to pay for the value of the property taken, it requires *just compensation*. Article VI, § 13 of the South Dakota Constitution provides that "[p]rivate property shall not be taken for public use, or damaged, without just compensation…." The South Dakota Supreme Court has held that just compensation may include attorney fees and expert witness fees. *State ex rel. Dep't. of Transp. v. Clark*, 2011 SD 20, 798 N.W.2d 160.

Moreover, the Legislature has imposed a duty of good faith upon a company seeking to use eminent domain. When a monetary offer is made to a landowner, the amount of

compensation offered must be made in good faith, or the party making the offer will be penalized. SDCL 21-35-23 provides that

> If the *amount of compensation awarded to the defendant by final judgment* in proceedings pursuant to this chapter is twenty percent greater than the plaintiff's final offer which shall be filed with the court having jurisdiction over the action at the time trial is commenced, and if that total award exceeds seven hundred dollars, the court *shall,* in addition to such taxable costs as are allowed by law, allow reasonable attorney fees and compensation for not more than two expert witnesses, all as determined by the court.

Id. at ¶ 7 (quoting SDCL 21-35-23). Therefore, in the event that Applicant utilized eminent domain and did not act in good faith when making an offer, attorney fees, while allowable in any condemnation case, become nondiscretionary. Due to these protections afforded by the Constitution and in statute, it is not reasonable to assume that use of eminent domain will cause the Project will pose a threat of serious injury to the economic condition of the inhabitants in the siting area.

In a similar vein, there was discussion during the evidentiary hearing about the potential for economic damage to neighboring properties. There is nothing in the record to directly support or quantify economic damage to a property adjacent to the pipeline route. However, if we assume for the sake of argument that such a damage would occur, Staff suggests this would create an inverse condemnation which, again, falls within the jurisdiction of a state or federal court of competent jurisdiction, and the burdened property owner would be entitled to just compensation from the owner of the pipeline.

The Court has held that "where no part of an owner's land is taken, but because of the taking and use of other property so located as to cause damage to an owner's land, such damage is compensable." *Rupert v. City of Rapid City*, 2013 SD 13, ¶ 9, 827 N.W.2d 55, 60 (quoting *Krier v. Dell Rapids Twp.*, 2006 SD 10, ¶ 21, 709 N.W.2d 841, 846). However, unlike when a

case stems from use of eminent domain, a party in an inverse condemnation proceeding is not necessarily entitled to attorney fees. *Rupert*, 2013 SD 13, ¶ 36, 827 N.W.2d at 68. This is not to say that a landowner in an inverse condemnation case could not argue that they are entitled to fees as part of the just compensation calculation, but there is precedent to suggest that if the action is brought in state court, attorney fees and costs will not be awarded. "The South Dakota Supreme Court has concluded under South Dakota law, attorney's fees and costs for successful inverse condemnation claims are permissive rather than mandatory." *Long v. South Dakota Dep't. of Transp.*, Civ. No. 18-4081, 2018 WL 6807390, at *4 (D.S.D. Dec. 27, 2018).

Ultimately, the record simply does not contain sufficient evidence from which to conclude that an inverse condemnation will happen and that a significant unremedied economic harm will result.

The next item related to the economic condition of the inhabitants of the siting area is property value. Here, it is important to note that the statute requires the Commission to look at the threat of serious injury to the inhabitants, plural, of the siting area. The statute does not say that the Commission must consider the threat of economic injury to each individual inhabitant and make situation-specific determinations. Rather, under a plain reading of the statute, one must weigh the cumulative impact of the Project as a whole on the inhabitants of the siting area. This interpretation is reasonable, as case-by-case, property-specific economic determinations fall within the jurisdiction of the court when just compensation is determined.

Pursuant to ARSD 20:10:22:23(1), the Applicant is required to provide information on the Project's impacts on land value. This information is necessary in order to evaluate the potential for injury to the economic condition of inhabitants in the siting area.

Navigator did not present testimony from an appraiser. Navigator witness Monica Howard testified at the evidentiary hearing that in her experience "there's no conclusive evidence that the presence or absence of a pipeline [has a] material direct effect on that property value." EH 3169:13-15. Several landowners, on the other hand, testified that they would not purchase land on which there was a carbon dioxide pipeline.

Notably, no testimony or evidence provided included studies or experience with carbon dioxide pipelines. Ms. Howard acknowledged that her experience does not include carbon dioxide pipelines. EH 3257:3-5.

Inherent in the property value consideration are considerations beyond the mere existence of a pipeline on a parcel of land. Also germane to the property value issue are matters related to future use and productivity of the land. However, crop yields are discussed beginning on page sixteen of this brief and not repeated here in order to avoid redundancy.

Several mitigating considerations must be considered and applied to the concerns voiced at the hearing. If the Company is required to compensate the landowner for any crop loss and loss of insurance coverage resulting from the construction and operation of the Pipeline, lower crop yields will not result in an economic loss. Furthermore, because compensation is paid for the easement, the amount of compensation should offset any loss that could theoretically be realized at the time of sale of the property. The difference being that the land remains with the seller and retains value to the seller when the Pipeline buys an easement. No expert testimony was presented to establish that pipeline easements will adversely impact property values, or that easements have been shown in the past to adversely impact property values.

The next item of consideration related to SDCL 49-41B-22(2) is economic loss due to loss of housing eligibilities. Throughout the evidentiary hearing, many Landowners testified that

they were concerned about losing building eligibilities on their land.[4] For example, Landowner Dan Nelson testified that he has three building eligibilities on his land and that it would be his intent to one day sell those eligibilities. EH 2291:11-17. In response to a question from Commissioner Nelson, Dan Nelson testified that housing eligibilities are his biggest concern with respect to impairment of his welfare, stating that he believed the pipeline would devalue the housing eligibilities on his land. EH 2316-2317.

It is appropriate for the Commission to consider the overall impact on the siting area if there is a loss of housing eligibilities. Potential impacts for consideration include loss of economic development and loss of opportunities for population growth. However, individual economic impacts to landowners must be weighed by the court when it determines just compensation for that parcel of land. In the event that a landowner willingly enters into an easement agreement with Navigator, the value of the housing eligibilities is something that Navigator should account for when paying for the easement. Should the Commission feel it is appropriate, the Commission could order a permit condition that requires Navigator to consider the value of housing eligibilities when entering into easement agreements. The value of any easements acquired through eminent domain is within the jurisdiction of the court.

Nonetheless, the court is unlikely to consider impairment to the social condition of inhabitants when compensating a landowner in a condemnation proceeding. Serious injury to the social condition of the inhabitants of the siting area is within the purview of this condition and may be considered in this context.

[4] EH 1523:20-24 (testimony of Karla Lems); EH 1626:14-17 (testimony of Rick Bonander); EH 1659:3-4, 1668:9-14 (testimony of RJ Wright); EH 1676:3-10 (testimony of Todd Dawley); EH 1745-1746 (testimony of Keith Myrlie); EH 2548-2549 (testimony of Dan Paulson); EH 2564:1-9 (testimony of Bruce Burkhart); EH 2603-2604 (testimony of Arnie Erickson); EH 2675-2677 (testimony of Tony Ventura).

Another factor in determining substantial impairment to the economic condition of inhabitants is loss of crop yields. Impacts to crop yields was a significant concern of many of the Landowner witnesses who testified at the evidentiary hearing. One such witness was Daniel Janssen, a farmer from Dell Rapids, who testified to his concern that crop yields could be harmed if worms are pushed away by the Project. EH 2344:14-23.

Staff's witness on this subject was Brian Sterner of Environmental Resources Management, Inc., who adopted the prefiled testimony of his colleague Herbert Pirela. In the prefiled testimony, admitted as Exhibit S7, the witness stated that an agriculture mitigation plan must be filed prior to the Commission making its decision in this docket and that "[t]he Agriculture Mitigation Plan should include a monitoring plan that describes measures that will be implemented to monitor crop yields. The Plan, at a minimum, should specifically address if there is a measurable yield loss along the right-of-way and provide ample measures to determine if successful crop yields are impacted and obtained." Exhibit S7, 4:130-134.

As noted in prefiled testimony, at the time prefiled testimony was submitted, Applicant did not have an Agriculture Mitigation Plan. Exhibit S7, 4:115. At the evidentiary hearing, staff witness Alissa Ingham testified that she had since received and reviewed the Agriculture Mitigation Plan. EH 1923-1924; Ms. Ingham testified that the Agriculture Mitigation Plan and weed management plan alleviated her concerns. EH 1923-1924.

In response to questioning from Commissioner Nelson, Mr. Sterner discussed how industry best management could minimize ongoing crop yield loss. EH 2215-2216. Mr. Sterner suggested that use of a third-party environmental inspector would help to ensure that Navigator follows through on their revegetation commitments. *Id.* at 2216:9-20.

Ultimately, it was the opinion of Staff's expert witnesses that the Agriculture Mitigation Plan and weed management plans were sufficient, and that proper conditions and monitoring are key to preventing long-term yield loss. However, Mr. Sterner noted that there was no analysis completed on the Project's impacts to soil temperatures from hydrostatic discharge water and the pipeline's operating temperature near above ground facilities. EH 2152-2155 and EH 2203-2206.

Navigator partially addressed Mr. Sterner's concern related to hydrostatic discharge water by stating that the water will be left in the pipeline for 12 hours to cool off before being discharged; however, he questioned how the company knew 12 hours was the right duration to let the water reach ambient temperature. *Id.* Therefore, if permitted, it is important that Applicant have a sufficient plan to ensure that hydrostatic discharge water is sufficiently cooled before being released.

In response to Mr. Sterner's concerns relating to the pipeline's operating temperature, Navigator provided evidence indicating that the "[t]emperature impact of soil cooling or heating is limited to zone [sic] of less than a foot around the pipeline." Exhibit N24. While this information was partially responsive to Mr. Sterner's concerns, Staff notes that Mr. Sterner did not have the ability to vet that conclusion, nor the analysis completed to produce that conclusion, due to Exhibit N24 being filed by Navigator during rebuttal.

Impact on Cultural Resources

The Applicant's burden of proof regarding SDCL 49-41B-22(1)[5] and (2)[6] involves a determination of the Project's impact on cultural resources in South Dakota. Several segments of the Project require permits from a federal agency; therefore, both federal and state laws

[5] "The proposed facility will comply with all applicable laws and rules[.]" SDCL 49-41B-22(1).
[6] "The facility will not pose a threat of serious injury to the environment…." SDCL 49-41B-22(2).

govern the protection of archaeological and historical resources potentially affected by the Project. Broadly speaking, Section 106 of the National Historic Preservation Act of 1966 requires federal agencies to take into account the effects of their undertakings on historic properties. SDCL 1-19A-11.1 also states that

> [t]he state or any political subdivision of the state, or any instrumentality thereof, may not undertake any project which will encroach upon, damage or destroy any historic property included in the national register of historic places or the state register of historic places until the South Dakota Historical Society has been given notice and an opportunity to investigate and comment on the proposed project.

Further, ARSD 20:10:22:23 requires the Applicant to include "an identification and analysis of the effects the construction, operation, and maintenance of the proposed facility will have on the anticipated affected area including . . . a forecast of the impact on landmarks and cultural resources of historic, religious, archaeological, scenic, natural, or other cultural significance."

Staff's witness Dr. Jenna Carlson Dietmeier, the Review and Compliance Coordinator for the South Dakota State Historic Preservation Office ("SHPO"), testified that, to the best of her knowledge, the Applicant has complied with SDCL 1-19A-11.1 "as there are no properties listed in the State or National Registers of Historic Places within one mile of the Heartland Greenway Pipeline System." Exhibit S6, 5:29-31. Dr. Carlson Dietmeier further testified that, to the best of her knowledge, "[Applicant] is in the process of identifying cultural resources and how they will be impacted by the project, pursuant to ARSD 20:10:22:23." *Id.* Whether the Applicant has complied with Section 106 is determined by the federal agency overseeing those segments of the Project which are subject to the federal agency's authority. In that process, the U.S. Army Corps of Engineers will consult with the South Dakota State Historic Preservation Office. As of the

date of Dr. Carlson Dietmeier's testimony, the U.S. Army Corps of Engineers had not yet completed their assessment. EH 2850:2-7.

Dr. Carlson Dietmeier's pre-filed testimony indicated that there were eleven newly recorded archaeological sites which will be affected by the Project. Exhibit S6, 6:4-6. Of these eleven, eight will not require permitting from the United States Army Corps of Engineers as they were declared not eligible for listing in the National Register of Historic Places. *Id.* at 6:31-38. The remaining affected sites have been adequately addressed by avoidance measures, directional drilling, and horizontal and vertical buffers according to the testimony of Dr. Carlson Dietmeier. EH 2850-2851.

Consultation and collaboration with affected Indian tribes are vital aspects of the pipeline siting process in South Dakota. In Dr. Carlson Dietmeier's pre-filed testimony, she stated that Tribes were given an opportunity to review the projected route and provide comments, requests, and/or concerns, but no other information was given to SHPO regarding Applicant's efforts to engage with Tribes about the identification of cultural resources. Exhibit S6, 6:8-12. In rebuttal to the testimony of Dr. Carlson Dietmeier, Monica Howard[7] stated:

> Navigator has made and is continuing to make efforts to meaningfully engage with interested tribes, which to date has included offers for tribal participation in surveys (or performing independent surveys), including a Tribal workforce development plan in our agreement with the unions, hosting monthly project status update meetings, providing the draft 2022 cultural resource survey reports for review and comment, and communicating sensitive sites identified during survey for their review and feedback on avoidance measures.

Exhibit N15, 13.

[7] Vice President of Environmental and Regulatory, Navigator CO2 Ventures, LLC.

Dr. Carlson Dietmeier stated that SHPO has not been able to review certain portions of the federal cultural resource surveys to perform an overall assessment on cultural resources in South Dakota. She testified on August 5th that the surveys were 68.1 percent complete as of the February 2023 report, and additional surveys may have been conducted since then. EH 2851:20-25. The remaining surveys are incomplete due to refusal of survey access by landowners. *Id.* at 2851:13-17.

3) SDCL 49-41B-22(3) - Health, safety, and welfare of inhabitants

The health, safety, and welfare of those living near the pipeline route was the prevailing concern throughout the evidentiary hearing. SDCL 49-41B-22(3) requires Applicant to prove by a preponderance of the evidence that the Project "will not substantially impair the health, safety, or welfare of the inhabitants" of the siting area. For this discussion, Staff will focus on two key areas – project risk and emergency response.

Project Risk

Project risk is best understood as the likelihood of an incident considered in the context of the consequences. Stated another way, Risk = Probability x Consequences. In that equation, consequences are represented as the worst-case scenario identified by the plume modeling.

In response to a Staff Data Request, Navigator stated that "the probability of a failure with a carbon dioxide release from the proposed pipeline is 0.0011 incidents/mi/year based on information from PHMSA." Exhibit N40, 6. Navigator witness Steven Lee testified at the evidentiary hearing that Navigator utilized the 0.0011 incident per mile per year as the probability of an incident. EH 1008:2-3.

Mr. Lee also explained that there are two different types of risk assessments – qualitative and quantitative. EH 1005:13-17. The qualitative gives a simple yes or no answer as to whether

there could be a leak, and the quantitative analysis explains what the consequences of a leak could be, meaning how often and how severe. *See id.* at 1005:14-17. It is the quantitative assessment that relies on the formula Risk = Probability x Consequence.

Staff witness Matthew Frazell testified that "[i]t is imperative to perform various types of risk modeling in order to mitigate risk associated with the operation of the pipeline." Exhibit S13, 3:62-63. Mr. Frazell reviewed the dispersion modeling (also referred to as plume modeling) completed by Navigator. In his prefiled testimony, Mr. Frazell raised concerns about insufficient modeling information provided by Navigator. Exhibit S13, 5. At the evidentiary hearing, he noted that further information had been received, which addressed some, though not all, of his concerns. EH 1947:5-13.

Mr. Frazell's outstanding concerns regarding plume modeling are that the information he received did not indicate what pressure[8] was assumed for the modeling and that the analysis failed to take into consideration high consequence areas (HCAs). EH 1953-1955. The pressure question was resolved during cross-examination. EH 1994:14-15. Regarding the HCAs with relation to the plume modeling, the concern is the modeling does not depict which HCAs are impacted or to what extent they are impacted. EH 1956:13-19. It is unclear from the record how, based upon the modeling, an HCA could be affected.

Mr. Frazell testified that he does not have concerns with Navigator relying on the ALOHA and PHAST models for dispersion modeling. EH 1951:11-16. It is his opinion that those models are industry-best practices. EH 1951:16.

In summary, the testimony at the evidentiary hearing, indicates that the models that Navigator used are sufficient and consistent with industry best practices. Therefore, for purposes

[8] EH 1962-1963.

of issuing a final decision in this docket, Staff does not advocate for utilizing a different model. The results of the modeling and risk analysis indicate that the probability of a CO2 release is 0.0011 leaks per mile per year (a leak being anything from a pinhole to a guillotine failure), and the worst-case scenario is guillotine break at maximum pressure on an eight inch line at a parts per million level that would be immediately dangerous to life and health (IDLH).

The number Staff relies upon for IDLH was testified to by Jon Thurber. Mr. Thurber explained that his best recommendation is to rely on 40,000 parts per million. EH 2953-2954. Therefore, Staff asserts that the worst-case scenario leak IDLH distance is the highlighted number found in the Hazard Level 2 column on page eighteen of confidential Exhibit N47A.

This worst-case scenario is the best means for understanding the potential consequence on a community and the greatest quantifiable threat of an event for the purposes of articulating risks and for emergency response planning.

There is no precedent upon which to rely to determine whether the risks described above constitute a threat of substantial impairment to health and safety. Therefore, Staff defers to the Commission as to what constitutes an unacceptable level of risk.

It should be noted that Staff experienced some difficulty in obtaining plume modeling information from Navigator, as was mentioned by Mr. Thurber in his testimony and also noted by Mr. Frazell in his prefiled testimony. As Mr. Thurber noted in his prefiled testimony, it was unclear to Staff whether the modeling would be shared with owners of occupied residences within Navigator's proposed setbacks. Exhibit S1, 7:25-28. Navigator witnesses testified at the evidentiary hearing that, in fact, the information was not shared. Staff appreciates Navigator ultimately filing Exhibit N68 publicly.

Navigator's refusal to provide plume modeling information—information that a Staff witness describes as imperative to making siting decisions[9]—is disappointing. Many landowners testified that they feel that they will be living in fear if the pipeline is built. In response to questioning from Commissioner Nelson, Mr. Frazell stated that while the entire modeling may not be necessary, landowners could find the outputs useful and that if he were a landowner, he would want to see the outputs to determine how it might affect his home. EH 1980-1981.

By refusing to provide the plume modeling information, Navigator seems to dismiss Landowners' fears and do nothing to alleviate those fears. It could certainly be argued that this has a detrimental effect on welfare of the inhabitants. Navigator seems to rely on PHMSA's jurisdiction to support its refusal to disclose the modeling. Exhibit S1, 8:25-28. However, while PHMSA may be charged with regulating safety, it is this Commission that must consider the broader concept of welfare.

Emergency Response Plan

Staff considers the emergency response plan an important factor in evaluating the Project's effect on the health, safety, and welfare of area inhabitants. It has been noted that the Commission received many comments about the Project's impacts on local emergency services and first responders. Exhibit S1, 9:17-24. To follow up on concerns raised at the public input meetings, Staff requested the ERP in a data request to Applicant. However, the ERP was not provided until July 18, less than ten days before the evidentiary hearing. EH 2871:13-15. Staff would have liked to have seen the ERP provided publicly much earlier, not only so that Staff's experts could review it, but so that local first responders could review it and have an opportunity to weigh in as to the impacts on their community resources.

[9] Exhibit S13, 3:60-67.

There was testimony throughout the evidentiary hearing regarding the rural nature of the siting area and the limited resources of volunteer fire departments. While it may be true that PHMSA has ultimate jurisdiction over the ERP, that does not negate the fact that the ERP is a crucial tool for evaluating the Project's impacts on the community and whether the communities have the resources to accommodate this pipeline while still providing for the every-day needs of their citizens. In response to questions from Commissioner Hanson, Jon Thurber explained that Staff would have liked to have received the draft ERP in time to get feedback from local communities. EH 2926:1-3. Due to the timing of when the ERP was provided, Staff simply did not have the ability to make such a determination.

While it is true that past pipeline permits have been granted conditioned upon an ERP which was not available at the time the permit was granted,[10] what Navigator's pipeline would transport is an entirely different substance. This Commission has never before had an application for a carbon dioxide pipeline nor does one currently exist in this state. Therefore, it is logical for Staff, landowners, and first responders to have different expectations than with oil pipelines as to what information is crucial in order to make an informed decision.

4) SDCL 49-41B-22(4) - Interference with orderly development of the region

Pursuant to SDCL 49-41B-22(4), Navigator must prove that Project "will not unduly interfere with the orderly development of the region with due consideration having been given the views of governing bodies of affected local units of government." SDCL 49-41B-22(4).

Throughout the evidentiary hearing, one of the issues that garnered much attention was the proximity of the Project to quickly developing and expanding areas in the Sioux

[10] EH 2882:2-3.

Falls region, specifically, whether the Project would interfere with the orderly development of the area.

The Project's effects on orderly development of the region must, in part, be weighed in light of other considerations previously discussed in other sections of this brief, such as safety, potential effects on resources of first responders, and property value concerns. Those will not be restated in detail here.

Another facet of SDCL 49-41B-22(4) is the requirement that the Commission give due consideration to "the views of governing bodies of affected local units of government." "Due consideration" is defined as "[t]he degree of attention properly paid to something, as the circumstances merit." BLACK'S LAW DICTIONARY (10th ed. 2014). Local units of government are not specifically defined in SDCL Chapter 49-41B, however, elsewhere in the Code, a local government entity is defined as "the State of South Dakota, county, municipality, or special governmental district authorized by the laws of South Dakota or any of the states that border South Dakota". SDCL 6-17-1(2). The same statute defines the "governing body" of the local unit of government as "the board of commissioners, the common council, the executive board, or other name by which a local government entity is controlled, concerned, or affected." SDCL 6-17-7(1).

The Project would traverse six counties, specifically Brookings, Moody, Minnehaha, Lincoln, and Turner. SDCL 1-26-23 provides that the basis for findings in a contested case is limited to the evidence in the record. Minnehaha County and Moody County provided witness testimony and evidence in the record.

In recent years, this Commission has afforded due consideration to local units of government by considering county ordinances affecting such things as sound level and

shadow flicker from wind farms. Specific to the present matter before the Commission, Minnehaha and Moody counties passed ordinances that affect the location of the Project. Those ordinances represent the official view of those two counties. No other county put their official view into the evidentiary record. Because the views of Minnehaha and Moody counties are inextricably linked to the issue of preemption pursuant to SDCL 49-41B-28, which will be briefed separately, Staff will reserve further discussion of this issue for its Reply Brief.

II. Other Issues for Consideration

A. Notification Pursuant to SDCL 49-41B-5.2

Over the past several months and at the evidentiary hearing, it has been discussed that Navigator failed to send notification to a number of landowners pursuant to SDCL 49-41B-5.2 which provides that

> [w]ithin thirty days following the filing of an application for permit, the applicant shall 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. For purposes of this section, the owner of record is limited to the owner designated to receive the property tax bill sent by the county treasurer. The notice shall be mailed by certified mail. The notice shall contain a description of the nature and location of the facility. Any notification required by this section shall state the date, time, and location of the public input meeting. The applicant shall also file a copy of the application with the auditor of each county in which the proposed facility will be located.

It is undisputed that Navigator failed to send this notification to landowners whose land is within a quarter mile of the pipeline route but not directly on the route. It is also undisputed that the omission was not intentional, and that Navigator did not try to conceal the omission. Due to the number of affected landowners who may have owned additional parcels of land for which

they did receive the notification, it is unclear how many landowners received no notification.[11]

There is a significant difference between a service of process that is required to be served in accordance with SDCL 15-6-4 and a notification such as that required by SDCL 49-41B-5.2. The former applies to service of process when a legal action has been initiated. Notably, such a notice is not, pursuant to the statute, served by certified mail as is the landowner notice. Rather, service of process must be personally served by the sheriff or eligible process server. *See* SDCL 15-6-4(c).

By distinguishing the notification required by SDCL 49-41B-5.2 from a legal notice in the context of service of process, Staff does not intend to diminish the importance of the landowner notification. While the landowner notification is not jurisdictional, it is nonetheless a requirement and is significant to the permitting process. However, the key difference between a notice that must be served pursuant to SDCL 15-6-4 and the notification to landowners pursuant to SDCL 49-41B-5.2 is the remedy for failure to comply with the statute.

Failure to comply with SDCL 15-6-4 deprives the court of personal jurisdiction over the party who was not properly served. *Bradley v. Deloria*, 1998 SD 129, ¶ 4, 587 N.W.2d 591, 592 (Court holding that statutorily defective service of process deprives the court of personal jurisdiction). The remedy for such a failure is that the action may be dismissed.

SDCL 49-41B-5.2, on the other hand, is not a statute that confers personal jurisdiction, nor does it specify a specific remedy for an applicant's failure to strictly comply. Nothing in SDCL Chapter 49-41B provides for dismissal of an application as a remedy for failure to send notification to all landowners. That does not mean that the Commission is entirely without the ability to consider the matter. A common sense reading of the Chapter would place such an

[11] Staff notes that this information can be discerned from confidential filings in the docket, but not from the evidentiary record.

analysis under SDCL 49-41B-22(1), which directs the Commission to consider an applicant's ability to comply with all laws and rules.

As discussed above in the relevant section of this brief, whether Applicant will comply with all laws and rules is a subjective, fact-specific inquiry. As applied to the notification issue, the threshold question is two-fold: 1) did Applicant comply, and 2) if not, does Applicant's failure to comply lead one to believe that Applicant would not comply with laws and rules going forward?

It is undisputed that Applicant did not strictly comply with SDCL 49-41B-5.2. However, the second question requires more consideration. Staff suggests that the determining factor in whether or not the failure weighs negatively on Applicant's ability to comply with laws and rules is how Applicant responded to the failure.

Because Applicant informed the Commission promptly upon discovering the error, made no effort to cover up or deflect from the error, and made a good faith attempt to remedy the error by sending letters to all landowners who had not received the required notification, as well as offering to extend the intervention deadline, and no impacted landowners came forward and raised concerns of prejudice, Staff does not believe that this issue weighs against Applicant's ability to comply with all laws and rules. Rather, Navigator's swift efforts could be viewed to weigh in Applicant's favor.

III. Conclusion

Over a period of twelve days, the Commission heard an incredible amount of testimony and evidence. Ultimately, the Commission's decision must be based upon the evidence in the record before it. To quote the famous philosopher, Aristotle, "the law is reason, unaffected by [emotion]."

Each issue must be weighed using the preponderance of evidence standard. Is it more likely than not that Navigator has satisfied each requirement of SDCL 49-41B-22? Ultimately, this is a case of first impression, and Staff will not insert our judgment for that of the Commission in making this determination.

Pursuant to SDCL 49-41B-24, the Commission may deny, approve, or approve the application with conditions. Should the Commission vote to deny the Application, Applicant has the opportunity to reapply with the issues narrowed to those criteria upon which the permit was denied. SDCL 49-41B-22.1 provides in relevant part

> [u]pon the first such reapplication, the applicant shall have the burden of proof to establish only those criteria upon which the original permit was denied, provided that nothing in the reapplication materially changes the information presented in the original application regarding those criteria upon which the original permit was not denied.

Therefore, while Staff does not opine on the ultimate issue in this brief, Staff nonetheless offers a number of conditions such that those conditions may either be attached to a permit if granted or, if the permit is not granted, utilized to narrow the issues for any future reapplication.

Respectfully submitted this 29th day of August 2023.

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