
**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 UNDER
THE SOUTH DAKOTA ENERGY
CONVERSION AND TRANSMISSION
FACILITIES ACT TO CONSTRUCT THE
HEARTLAND GREENWAY PIPELINE IN
SOUTH DAKOTA**

HP22-002

**INTERVENOR
JULIE BURKHART AND
BRUCE BURKHART
INITIAL PRE-FILED TESTIMONY
IN OPPOSITION TO NAVIGATOR'S
APPLICATION**

Q: Please state your name and whether or not you are a formal intervenor in these proceedings.

A: I am Julie Burkhardt and I am Bruce Burkhardt and we are formal intervenors in these proceedings.

Q: Do you either personally own or lease land or are you a fiduciary for any entity that owns or leases land or real property in South Dakota, that you believe would be negatively affected by the proposed Navigator hazardous CO2 pipeline (hereafter "proposed hazardous pipeline")?

A: Yes, we own land in Minnehaha County, the NE ¼ of 16-104-48.

Q: Have you depended on the income from your land to support your livelihood or the livelihood of your family?

A: Yes.

Q: Do you believe your land would be negatively affected should the PUC approve Navigator's Application?

A: If the PUC approves Navigator's proposed route, they therefore authorize Navigator's proposed easements near or potentially on our land as well as force upon us all the terms of Navigator's easement forever. These potential actions by the PUC would have a permanent – forever – negative effect and impact on our land as well as our financial future, and on the economy of our county and State.

I don't understand why Navigator will not publicly release its Plume Modeling and Buffer Zone analysis – what are they hiding? We are especially concerned with liability issue in light of many unanswered questions by Navigator. See the first two pages of **Attachment No. 12** – the risk of being uninsurable scares us.

Q: What is your understanding of the Public Utilities Commission's (PUC) role related to this proposed hazardous pipeline?

A: Based on information provided in a PUC document entitled “South Dakota Public Utilities Commission Information Guide to Siting Pipelines” which is included here as **Attachment No. 2**, and my participation in these matters, I understand the PUC has the power to approve or deny Navigator's Permit Application. If approved by the PUC, Navigator would be able to route and site its proposed hazardous pipeline on, under, through, over, and across my land in question here and conduct any pre-construction, construction, and post-construction activities they deem necessary at any time it wants without my permission. If the PUC were to approve the Application and the route approved crossed any portion of my land, I would then be subject to an easement agreement which restricts what I can do on my land and how I, my tenants, invited persons, and all future generations can conduct ourselves on the land – forever. An approval by the PUC is the trigger for Navigator to condemn my land using eminent domain powers to which I am opposed. So, the PUC has in its hands whether or not me and all future generations who seek to use, develop, and work the land in question as we see fit will be unwillingly subjected to unwanted and restrictive permanent easements preventing us from doing so and subjecting us to liability and risk. The PUC's actions, if approval of the Application, would also negatively impact our economic future forever. The PUC has my and this lands entire future in its hands.

Q: Have you heard or read claims that PUC has nothing to do with easements or condemnation or similar claims?

A: Yes, and that is logically and practically an incorrect assertion. Can you have a pipeline route without easements? The answer is no – a pipeline route is simply a

series of connected easements – that’s what a route is. If and only if the PUC approves this hazardous pipeline will my land and all future owners, tenants, and visitors to my land be affected by pipeline easements, access easements, work space easements, and all the limitations, restrictions, dangers, and risks associated with those easements and what this proposed hazardous pipeline company and its future owners can do on my land and prevent me from doing on my land. No PUC approval means no unwanted easements and no unwanted property right transfer from me to the hazardous pipeline company. You cannot separate what the PUC is doing in this proceeding with the taking of my property rights. PUC approval is a vote by this Commission that it is okay for my property rights to be taken and forever affected against my will and for the benefit of the proposed hazardous pipeline and its wealthy investors.

Q: And what about the condemnation piece – the PUC claims it has nothing to do with condemnation have you heard that?

A: I have heard that claim but again, same logic as above – no PUC approval means there is no project and no economic incentive to attempt to use eminent domain powers to condemn my land and my property rights. Only if the hazardous pipeline wanted to intimidate and scare me or send me a “message”, or if they were so confident that this process is a rubber stamp for them would they start condemnation actions before the PUC officially approved the route. But even if they would start condemnation prematurely, they would not go through the entire process and trial and the ultimate final taking of my rights unless the PUC approved their Application, so no PUC approval means no ultimate taking of my property rights and ability to use my land now and in the future as I see fit.

Q: What should the PUC consider when assessing how the proposed hazardous pipeline will directly affect your land and property rights?

A: You have to review their proposed Pipeline Right-of-Way and Easement Agreement (herein referred to as the “Easement Agreement”) with a fine-tooth comb. This is the document that is part and parcel of a PUC Application approval. A pipeline route

but a continuance link of easements. It is important to me that the PUC review this document in detail, understand the implications, and then consider all the implications relative to my land and property and how it is being used now and thinking into the future – forever – of how a PUC approval would therefore affect my land and my family. A true and accurate copy of an exemplar South Dakota Navigator “Pipeline Right-of-Way and Easement Agreement” is included here as **Attachment No. 3**. Navigator has not offered me terms different from those shown in Attachment No. 3.

Q: Please walk through the Easement Agreement and highlight your major concerns so the Commission can understand how their approval of Navigator’s Application would affect you forever.

A: Well, the first question and concern I have is the company that would have perpetual rights in my land is identified as Navigator Heartland Greenway, LLC, a Delaware limited liability company with its principal office in Dallas, Texas.¹ I have tried to determine who owns this LLC and what its assets are but I can’t figure it out and I am very concerned that the PUC could force this LLC upon me and no one knows who is behind the LLC curtain. If I am forced against my will to have a co-owner of my land in the way of a perpetual easement against my land to do as they see fit within the easement language, then I want to know exactly who I am dealing with and the PUC should require the LLC to reveal its owners and investors and if those owners and investors are also entities the PUC should require transparency at every level of ownership so we ultimately know the real people behind this private company. Also, this LLC is very new. When looking it up on the Delaware Secretary of State website it states the LLC was formed on August 13, 2021.

Q: What is your next concern?

A: Navigator claims in their Easement that the location of their desired easement on my land is a “location of which has been agreed to”² by Navigator and me as

¹ See page 1 of the Easement

² *Id.*

landowner, but that is not true and they have not indicated a final location so even if I wanted to agree to this, which I do not, I could not. The PUC should require Navigator to identify the final location of their desired easement.

Q: What is your next concern?

A: Navigator states in their Easement that the “Permitted Uses” they can put my land to without my say so include their ability to unilaterally “construct, install, maintain, operate, replace, abandon in place, inspect, patrol, protect, test, repair, reconstruct, alter, relocate, remove, and any and all related uses thereto...”³ It appears this includes about everything and there are no time limitations, restrictions, or notice requirements as to any of these activities. Should the PUC approve this hazardous pipeline, which it should not, it should require reasonable limitations as to when these activities can be performed, for how long, and should be required to notify landowner well in advance of any such activity or entry onto landowner’s land. Further, Navigator’s desired right to “abandon in place” their hazardous pipeline on my land must not be allowed. Should the PUC approve this hazardous pipeline, which it should not, it should require Navigator, at landowner’s sole request, to remove the pipeline. If a landowner does not request this or if Navigator and a particular landowner reach agreement and financial terms allowing the hazardous pipeline to remain, that should be up to each landowner. There is no provision for Landowner compensation for such abandonment nor any right for the Landowner to demand removal. Such unilateral powers would negatively affect Landowners property and are not conducive to the protection of property rights or economic interest.

Q: What is your next concern?

A: If the PUC were to approve this Application, which it should not, in addition to locating a hazardous pipeline on my land, Navigator reserves the sole right to also locate “one (1) or more fiber optic cables”⁴ on my land. The PUC should limit this

³ *Id.*

⁴ *Id.*

and limit the use to which such fiber optic cables can be utilized for, and to the extent possible allow landowners to benefit from such fiber optic cables.

Q: What is your next concern?

A: If the PUC were to approve this Application, which it should not, in addition to locating a hazardous pipeline on my land Navigator reserves the sole right to also locate upon my land any amount of “incident facilities, equipment and appurtenances including but not limited to above or below, test stations, power and communication equipment, markers, signage, and cathodic protection devices, and other necessary appurtenances to transport, measure, and control the flow of carbon dioxide and associated substances...”⁵ This is far too vague and wide ranging, again no limitations and these roving rights Navigator would claim subject me and my property to significant restrictions as their rights dominate mine; this will prevent me and future owners and users of my land from improving and developing the land in the ordinary course. These restrictions have negative economic impacts now and into the future. I will not be able to increase the value and usable features on my land and will not do so in fear of having to remove any such desired improvements or be subject to Navigator’s claims my desires interfere with their Easement rights. The less I can improve my land, the less valuable it is, the less real property and personal property tax is generated, and the more South Dakota is harmed. Additionally, what does “and associated substances” mean? I thought this was a CO2 pipeline only. If the PUC were to approve this Application, which it should not, it must limit what can be transported in this hazardous pipeline.

Q: What is your next concern?

A: If the PUC were to approve this Application, which it should not, in addition to locating a hazardous pipeline on my land Navigator reserves the sole right to also locate upon my land and use temporary construction areas and additional temporary workspaces areas. There is no limitation on how large these can be and there is no

⁵ *Id.*

limitation on what “temporary”⁶ means. How long is temporary? How long would Navigator be able to argue “temporary” is all the while prohibiting me from using my land how I see fit. I am also forced to spend more time and money away from what I want to be doing in order to prove and document to Navigator’s sole satisfaction evidence and “documented damages” they caused. This is another negative factor and further burden of this unwanted hazardous pipeline.

Q: What is your next concern?

A: If the PUC were to approve this Application, which it should not, Navigator further infringes on my rights forever as they seize from me all “rights and benefits necessary or convenient for the full enjoyment or use of the rights [of Navigator] herein granted, including but without limiting the same, the free, non-exclusive right of ingress and egress over, across, and within the Easement, together with a free, non-exclusive right of ingress and egress to and from said Easement upon and over the Property, including private roads.”⁷ One of the many problems with this is that they define “Property” as my entire parcel – not just their desired easement area. So, if the PUC approves their Application, which it should not, Navigator would take a forever right to travel anywhere it desires on my entire Property – not just within the Easement area. This ability to have free reign on a landowners’ entire property reduces the value of the property and chills my desire to economically improve my property which again is a detriment not only to me but to the entire State in lost tax revenue.

Q: What is your next concern?

A: If the PUC were to approve this Application, which it should not, Navigator further infringes on my rights forever as they have the right whenever they so choose at their “sole discretion, to cut all trees and undergrowth and remove other

⁶ See paragraph #1 of the Easement

⁷ See paragraph #2 of the Easement

obstructions”⁸ that in any way they deem to interfere with any of the many Permitted Uses they have as discussed previously above.

Q: What is your next concern?

A: If the PUC were to approve this Application, which it should not, Navigator further infringes on my rights forever as they have the right to remove any improvements, whether above or below ground, installed by me on the Easement after the date that Navigator acquires possession of the Easement. So, again directly negatively affecting my ability to use my land as I see fit and chilling any motivation I would have to further develop my land and install improvements. This hurts the tax base and value of my land and hurts the State’s economy.

Q: What is your next concern?

A: If the PUC were to approve this Application, which it should not, I am prohibited from using my land for agricultural and pasturage purposes if they are in anyway “inconsistent with the [Navigator’s] purposes set forth in this Pipeline Right-of-Way and Easement Agreement”⁹ and will not “interfere with the use of the Easement...” What does this mean? If Navigator were to bury its proposed hazardous pipeline only five (5) feet below the surface, then I can’t use any equipment with tires five (5) feet in diameter or larger in my operations for fear if I would sink, the tires could come in contact with the pipeline. Preventing my ability to stay competitive and utilize larger equipment to work my land negatively impacts me by not allowing me to be as efficient as possible and reduces my profitability. There is no reason for me to keep buying the newest and latest equipment which hurts local businesses. All of this has a negative impact on the State’s economy.

Q: What is your next concern?

A: If the PUC were to approve this Application, which it should not, I am prohibited from and cannot do any of the following activities anywhere in the Easement area at any time and forever: “impound water upon the Easement, change the

⁸ *Id.*

⁹ See paragraph #3 of the Easement

ground elevation or grade of the Easement, or construct or permit to be constructed any well, building, structure, improvement or obstruction, or plant any trees or shrubs that grow higher than 15 feet tall or have trunks larger than 3 inches in diameter at five feet upon the Easement or remove soil or change the grade or slope”¹⁰ which would in any way interfere with Navigator’s rights. These prohibitions make my land less usable, less versatile, and less valuable. This has a negative impact on me and the entire State.

Q: What is your next concern?

A: If the PUC were to approve this Application, which it should not, I can only construct, reconstruct, and maintain roads or drives only at a forty-five (45) degree angle to the Pipeline but not along nor within the Easement and I can only do this if Navigator lets me – which they don’t have to do.¹¹ This represents further restrictions negatively affecting how I can and will choose to use my land and limits the uses and development and therefore value of my land and hurts me economically and the entire State.

Q: What is your next concern?

A: If the PUC were to approve this Application, which it should not, I can only construct and/or install “water, sewer, gas, electric, cable TV, telephone or other utility lines over and across (but not along and within) the Easement at any angle of not less than forty-five (45) degrees and no more than one hundred thirty-five (135) degrees to the Pipeline” if Navigator allows me to – which they don’t have to – and only if in Navigator’s “protective requirements are met” by me at my sole expense and time investment. This represents further restrictions negatively affecting how I can and will choose to use my land and limits the uses and development and therefore value of my land and hurts me economically and the entire State.

Q: What is your next concern?

¹⁰ *Id.*

¹¹ See paragraph #4 of the Easement

A: If the PUC were to approve this Application, which it should not, Navigator has the sole ability to force me to cure or fix any issue that they in their sole capacity deem a breach of any of the restrictions and handcuffs they seek to place on me – and worse yet, I have to “promptly cure such breach at GRANTOR’s [my] expense”¹² unless Navigator already cured the breach in which case it can force me to pay for the cost of everything they did. This type of unilateral power and unilateral cost shifting to me the landowner, is a detrimental economic effect to me and thereby the entire State.

Q: What is your next concern?

A: If the PUC were to approve this Application, which it should not, Navigator has the sole and “absolute right to assign, sell, lease, mortgage or otherwise transfer this Agreement in whole or in part...”¹³ If Navigator exercises any of these rights and some unknown and unwanted party becomes the owner of the Easement on and pipeline and equipment on my land, not only do I have no say-so, Navigator “shall have no liability or obligation as to events occurring after the date of a permitted assignment, with all such potential liability or obligation for future events terminating...” If the PUC were to approve this Application, which it should not, it must require any new entity that would become owner or operator of this hazardous pipeline to first apply for and be granted permission to take this project over from Navigator. Assignment to any unknown person, company, or government could have terrible impacts upon all of South Dakota depending upon who may buy it and I don’t know of any safeguards in place for us or the State to veto or have any say so in who may own, operate, or be responsible for this pipeline in the future. This concerns me because it would allow my easement to be transferred or sold to someone or some company or country or who knows what that I don’t know and who we may not want to do business with.

Q: What is the next concern you have with the Easement language?

¹² See paragraph #2 of the Easement

¹³ See paragraph #6 of the Easement

A: Undefined terms leave a lot of room for confusion. What does the phrase “where rock is encountered”¹⁴ mean and why does Navigator solely get to determine whether or not this phrase is triggered. This phrase could be used to justify installing the pipeline less than sixty (60) inches beneath the surface. The ability to use this provision to locate the pipeline at a depth that could negatively affect Landowners property are not conducive to the protection of property rights. A shallow pipeline is much more likely to become a danger and liability in the future given farming operations and buried irrigation lines and other factors common to the current typical agricultural uses of the land in question impacted by Navigator’s proposed pipeline route.

Q: What is your next concern?

A: If the PUC were to approve this Application, which it should not, then I will not be able to recover for any damages caused by Navigator during its clearing of “any trees, undergrowth, brush and other obstructions”¹⁵ because Navigator has determined in advance it will “not be liable for the damages caused by the clearing for the same from the easement(s)...” This is a negative economic impact on me and my land. I have no recourse for damage caused by Navigator in these instances. My time and money spent addressing such damages is time I can’t get back and money that I would not spend elsewhere in South Dakota’s economy.

Q: What is your next concern?

A: If the PUC were to approve this Application, which it should not, then I have no liability protection and am directly exposed to liability as Navigator offers no indemnification or hold harmless protections to me for what damages or injury occur on my Property outside of the specific Easement areas.¹⁶ This is true because, as discussed above, if the PUC approves this Application, then Navigator has a blanket right to access my entire Property and is not limited to the Easements. Also,

¹⁴ See paragraph #9 of the Easement

¹⁵ See paragraph #11 of the Easement

¹⁶ See paragraph #12 of the Easement

Navigator can allege either I or any person whom is on my property is negligent or partially negligent and I could be subjected to damages claims that would bankrupt me. Navigator also shifts potential liability to me for any of my negligent acts that may occur in the Easement areas.

Q: What is your next concern?

A: If the PUC were to approve this Application, which it should not, then I am exposed for significant personal liability for any damages due to the existence of and potential release or rupture or spill from the hazardous pipeline.¹⁷ I have reviewed my insurance policies and coverage for my property and obtained information from my insurance company. I have learned that my insurance policies have what is known as a “pollution exclusion” and that I would have no insurance coverage should any damage or injury be caused by a carbon dioxide release from the hazardous pipeline as carbon dioxide is considered a “pollutant” under my policy. I have considered this scenario: “If a hazardous pipeline transporting carbon dioxide is placed upon my land, and either I or someone I have invited onto my land is determined to be responsible for some damage to the pipeline or responsible for an event that caused some damage to the pipeline, and then CO2 escapes and injures a person, or livestock, or property either on my own property or on my neighbors – do any of my insurance policies I have provide me a lawyer for a defense AND provide me insurance coverage to pay for the damage/injuries?” In considering these questions I have determined not only does my policy not afford me a lawyer and not afford me a legal defense that I also have no coverage for such a scenario, nor can I purchase coverage or an insurance rider. I would be completely unprotected and exposed to liability, and I would have to pay for my defense out of my own pocket and personally pay for and damages ultimately attributed to me. This is unacceptable. The PUC must deny this project for these reasons alone. The PUC cannot put landowners out in the cold to defend ourselves without any assistance. I

¹⁷ See paragraph #12 and #13 of the Easement

should never have these kinds of risks due to the presence of a hazardous pipeline I do not want. If the PUC were to approve this Application, which it should not, it must require Navigator to be solely responsible for any injuries or damages of any kind either directly or indirectly caused by any release of CO2 from their pipeline other than those caused by criminal acts of the landowners. The PUC must also require Navigator to add each and every landowner and their tenants as additional insureds on all Navigator liability insurance policies.

Q: Do you have any other concerns about this liability issues?

A: When evaluating the impact on property rights implicated by Navigator's Indemnity provision, you must consider the potentially extremely expensive fight a Landowner would have over this question of whether or not damage was an act of negligence. Putting this kind of potential liability upon the Landowner is incredibly problematic and is detrimental to the protection of property rights. I don't think this unilateral power which I can't do anything about as the landowner is in the best economic interest of the land in question or the State of South Dakota for landowners to be treated that way.

Q: Is there any specific event or example you are aware of that makes this concern more real for you?

A: Yes, one need not look further than a November 3, 2015, lawsuit filed against Nemaha County, Nebraska landowner farmers who accidentally/negligently struck two Magellan Midstream Partners, LP pipelines, one used to transport a mixture of gasoline and jet fuel and a second used to transport diesel fuel. Magellan alleged **negligence** and sued the Nebraska farmer for \$4,151,148.69. A true and accurate copy of the Federal Court Complaint is here as **Attachment No. 4**. The ability of a large company like Navigator, or whoever buys their pipeline once they cash out to be able to sue me or place blame on me because they choose to put something on my land against my will is in no way in the public interest and is a reason this Application must be denied.

Q: What is your next concern?

A: If the PUC were to approve this Application, which it should not, then Navigator has “the right to discharge or redeem for GRANTOR [landowner], in whole or in part, any mortgage, tax or other lien on said Property...”¹⁸ if I were to default on my mortgage. Navigator should not have this right, and the PUC should reject their Application on this basis alone. Navigator should have no right to get involved in my financial affairs or those between myself and my bank or lender.

Q: What is your next concern?

A: If the PUC were to approve this Application, which it should not, then Navigator forces landowner to deal directly with its tenant regarding any compensation landowner negotiates for any Easement or any damages landowner receives in terms of allocating any such payments between landowner and tenant. This guarantees that landowner will never be made whole by Navigator for such damages as landowner and tenant have different interests and should each independently be compensated by Navigator for such damages. Landowner should not be made to be the agent of Navigator to deal separately with claims its tenant may be entitled to bring for compensation.¹⁹

Q: What is your next concern?

A: If the PUC were to approve this Application, which it should not, then Navigator forces landowner relinquish and waive any “claims, now and in the future, which challenges the validity of the Easement or this Agreement or that seek additional compensation relating to the grant of the Easement.”²⁰ So, even if the Easement or any portion of it is deemed unlawful, I can take any action and am not entitled to any further compensation regarding the Easement.

Q: What is your next concern?

A: If the PUC were to approve this Application, which it should not, it is essentially approving a roving right for Navigator to locate its hazardous pipeline anywhere on

¹⁸ See paragraph #16 of the Easement

¹⁹ See paragraph #17 of the Easement

²⁰ See paragraph #18 of the Easement

my land. On Exhibit A of the Easement²¹ it talks about “proposed length” “proposed acreage” and states the Exhibit A is “[F]or informational purposes only.” It is not a plat or a survey. So, I am in the dark – as is the PUC – of what it would be approving given there is no “final” route to approve. The PUC should deny the Application on this basis alone. It is not fair for Navigator to have a roving right across my entire property or any length, size, and location of easements on my land it desires.

Q: What is your understanding of the significance of the Easement as proposed by Navigator?

A: My understanding is that this is the document that will govern all of the rights and obligations and duties as well as the limitations of what I can and cannot do and how I and any future landowner and any person I invite to come onto my property must behave as well as what Navigator is and is not responsible for and how they can use my land forever. This is why the PUC cannot pretend the Easement is anything other front and center in these proceedings. No court no judge no jury can change the terms of the Easement, only the PUC now can consider what Navigator wants to force upon all of the land at issue in these proceedings and consider those effects in terms of the factors the PUC is to consider when evaluating Navigator’s Application.

Q: You have discussed a number of concerns of how you would be negatively impacted by the terms and restrictions in the Easement alone should the PUC grant Navigator’s Application, do you think those negative effects go beyond just you as directly affected landowner?

A: Yes, while myself, my family, future generations, and my land would all be directly and negatively impacted it doesn’t stop there. Just like Navigator wants to claim there is a multiplier effect economically by the spending during construction and increased consumption by the workers or others in South Dakota, the flip side is that the negative impacts on my and my land are forever – the easement is forever and

²¹ See Attachment No. 1 - Exhibit A of the Easement

therefore any restrictions or limits or outright bans on my and any future landowners' ability to use their land as they see fit, and to improve or develop their land is a direct and ongoing negative economic impact locally on small businesses that are not getting contracted to do work or certain projects, I believe the value of my land decreases should this hazardous pipeline and associated Easement terms cast a cloud over my land forever, and I intend to protest my valuations and seek a reduction in property tax which will negatively affect that State – and Navigator is not making this up. They will pay no real property taxes on any of the Easements obtained. My state also suffers due to the ripple effect of less development, expansion, and property improvement. This project has no net benefits – it is a net negative on the State.

Q. Do you have additional concerns how you would be negatively affected should the PUC approve this Application?

A: Yes, I didn't mention the compensation piece. Navigator proposes to pay me one time only for the Easements. They do not propose recurring annual or quarterly payments. They make my land a liability when it was previously an asset. If this was forced upon us we should be paid a royalty of some percentage of the annual profits and value generated by Navigator and its investors. They can't earn dollar number one without my land and the land of others and we should be compensated much differently than they propose. It is not fair to the landowner, the county, or the State. It is not fair to the landowner because they want to have my land forever for use as they see fit so they can make a daily profit from their customers. If I was to lease ground from my neighbor I would typically pay twice a year every year as long as they granted me the rights to use their land. That only makes sense – that is fair. If I was going to rent a house in town I would typically pay monthly, every month until I gave up my right to use that house. By Navigator getting out on the cheap and paying once in today's dollars that is monthly, bi-annual, or at least an annual loss in tax revenue collection on the money I would be paid and then pay taxes on and contribute to this state and this country. It is money I would be putting

back into my local community both spending and stimulating the local economy and generating more economic activity right here. Instead Navigator's shareholders keep all that money and it never finds its way to South Dakota.

Q: Do you think it is in the public interest of South Dakota to not be one-hundred percent clear on exactly who could become the owner of over hundreds of miles of South Dakota land?

A: No.

Q: Do you think it is in the public interest of South Dakota to not be one-hundred percent clear on exactly who will be operating and responsible for hundreds of miles of hazardous pipeline underneath and through South Dakota land?

A: No.

Q: Do you think that type of uncertainty and lack of control over a major piece of infrastructure crossing South Dakota is in the public interest?

A: No, certainly not, in fact, just the opposite.

Q: Does it makes sense to you that PUC approval of the Application would lead to a perpetual Easement affecting you and your land?

A: I am unaware of any data proving there is a perpetual supply of carbon dioxide and the irony is we are supposed to produce less carbon dioxide and curb those activities more each year so one of the purposes of this project renders it by definition very limited in time and not something that a permanent easement should be available. Nowhere in Navigator's application does it even attempt to argue let alone prove there is a perpetual necessity for this hazardous pipeline or to transport CO₂ to Illinois. My understanding of energy infrastructure like wind towers is they have a decommission plan and actually take the towers down when they become obsolete or no longer needed. Nothing manmade lasts forever. My land however will, and I want my family or future South Dakota families to have that land as undisturbed as possible and it is not in my interest or the public interest of South Dakota to be forced to give up perpetual and permanent rights in the land for this specific kind of

pipeline project. It is also not prudent to authorize a forever interference on my property so Navigator can chase twelve (12) years of tax credits.

Q: Do you have any other concerns about the Easement language that you can think of that is important for the PUC to know at this time?

A: Generally such unilateral restrictions and limitations on my rights is not conducive to the protection of property rights or my economic interest. I reserve the right to discuss any additional concerns that I think of at the time of live testimony during the Hearing.

Q: Based upon what you have shared with the Commission above regarding Navigator's proposed Easement terms and agreement, do you believe those to be reasonable or just, under the circumstances of the pipeline's impact upon you and your land?

A: No, I do not believe those terms to be reasonable or just for the reasons that we discussed previously.

Q: As the owner of the land in question and as the person who knows it better than anyone else, do you believe that Navigator offered you just, or fair, compensation for all of what they proposed to take from you so that their hazardous pipeline could be located across your property?

A: No, I do not. Not at any time has Navigator, in my opinion, made a fair or just offer for all the potential impacts and effects and the rights that I'm giving up, and what we will be prevented from doing in the future and how their pipeline would impact my property forever and ever.

Q: Has Navigator ever contacted you and specifically asked you if you thought their proposed location of their proposed pipeline across your land was in your best interest?

A: No, they have not.

Q: Has Navigator ever contacted you and specifically asked you if you thought their proposed location of their proposed pipeline across your land was in the public interest of the State of South Dakota or for public use?

A: No, they have not.

Q: Are you familiar with the Fifth Amendment to the U.S. Constitution and the Takings Clause and the corollary in the South Dakota Constitution?

A: Yes, I am.

Q: What is your understanding as those relate to taking of an American citizens property?

A: My understanding is that, according to the United States Constitution and South Dakota's Constitution, that if the government is going to take land for public use, then in that case, or by taking for public use, it can only occur if the private landowner is compensated justly, or fairly.

Q: What is your understanding of the PUC's framework for decision making relative to this proposed hazardous pipeline?

A: **Attachment No. 2** includes four (4) main elements of proof that Navigator has the sole burden to prove as summarized here: a) that Navigator will comply with all applicable laws and rules; b) that no aspect of Navigator's proposed hazardous pipeline will pose a threat of serious injury to: the environment, or to the social condition of current inhabitants or expected inhabitants in the siting area, or to the economic condition of current inhabitants or expected inhabitants in the siting area; c) that no aspect of Navigator's proposed hazardous pipeline will substantially impair the health, safety, or welfare of the inhabitants; and d) that no aspect of Navigator's proposed hazardous pipeline will unduly interfere with the orderly development of the region – with special consideration given to the views and positions of the governing bodies of affected local units of government.

Q: What is your testimony regarding whether or not Navigator will comply with all applicable laws and rules?

A: That is impossible for the PUC to know and therefore it can't find in Navigator's favor on that element. This type of analysis can only be based on what Navigator claims it will do and given they have already admitted to failing to follow the law regarding their failure to timely and sufficiently notify all required persons affected

by their Application and proposed route, the evidence available weighs against this element being able to be satisfied. Further, South Dakota counties have passed moratoria, ordinances, and regulations related to hazardous pipeline setbacks and other issues and Navigator has not yet committed to following those applicable laws and rules and until they do, the PUC must deny their Application for failure to meet their burden of proof as to this element.

Q: Do you believe any aspect of Navigator’s proposed hazardous pipeline will pose a threat of serious injury to the environment?

A: Yes, I do. There are many aspects of the proposed hazardous pipeline that pose threat of serious injury to the environment. I adopt and incorporate here all such concerns of all other witnesses. There are many such environmental concerns and I also adopt and share those as incorporated here and found in Attachment No. 5, It’s Time to End Carbon Capture of Climate Policy; Attachment No. 6. The facts, opinions, and arguments referenced here by no means include all such threats posed but highlight some of the many.

Q: Do you believe any aspect of Navigator’s proposed hazardous pipeline will pose a threat of serious injury to the social condition of current inhabitants or expected inhabitants in the siting area, if yes, why?

A: Yes. The proposed Navigator pipeline will pose a threat of serious injury to current future and social conditions, for the following reasons.

The proposed project’s finances and commercial foundation are dependent for ongoing commercial viability on the federal 26 U.S.C. § 45Q carbon capture tax credit program, which I will refer to as the 45Q Program. This dependency creates a risk to South Dakota’s social conditions. The purpose of the 45Q program is to reduce carbon emissions as a means to mitigate climate change. It was originally established by Congress in 2008 with a maximum tax credit benefit of \$20 per metric ton of carbon captured and sequestered. In 2018, Congress increased this value to \$50 per metric ton. In 2022, Congress further increased the value to up to \$85 per metric ton as part of the Inflation Reduction Act. The 45Q Program tax

credits are available for the first twelve years of a capture facility's operation, but the program has no limit on the total amount of tax credit claims by taxpayers or the tons of carbon dioxide sequestered. Thus, the 45Q program does not limit the number of capture, transportation, and sequestration projects it may support. Further, these tax credits are essentially transferrable and the Inflation Reduction Act allows certain entities to claim them as a cash benefit paid by the U.S. Treasury, in certain circumstances converting this tax credit into a federal grant.

The Navigator Project was proposed in 2021 when the 45Q tax credit for sequestered carbon stood at \$50 per metric ton. Then, in 2022, the tax credit was increased to \$85 per metric ton. At a tax credit rate of \$85 per metric ton, and given the Navigator pipeline system's ultimate capacity of 15 million metric tons per year, the emitters of carbon dioxide that are contracted with Navigator could receive up to \$1.275 billion in federal tax credits per year, or \$15.3 billion over twelve years. This federal tax benefit would provide essentially all of the revenue needed to pay for construction of the proposed project as well as Navigator's ongoing transportation and sequestration services. That is, the proposed Navigator Project is financially entirely dependent on the ongoing existence of the federal 45Q Program.

The Navigator Project does not appear to have any other current government subsidies or market-based support sufficient to support its financial viability. Navigator claims that its contracted ethanol plants may benefit from the low carbon fuel credits currently available in California, as well as possible similar programs that may be established in other states. However, the value of these low carbon credits is highly variable and dependent on supply of and demand for such credits. The more entities that lower their carbon score, the less valuable the credits become. The carbon dioxide emitters that are connected to the Navigator system may be able to benefit from low carbon fuel credits to some degree, but by themselves such credits would likely not support the construction and ongoing

operation of the proposed project. Low carbon fuel credits existed before Congress increased the value of the 45Q tax credits to levels that made the proposed project financially viable, indicating that the low carbon fuel credits by themselves were not sufficient to support development of regional carbon capture pipelines systems. Thus, low carbon fuel standard programs, now and in the future, are unlikely to provide sufficient financial benefits to justify the construction and ongoing operation of Navigator's proposed pipelines.

Another possible commercial foundation for the Navigator system is use of captured carbon dioxide in enhanced oil recovery operations. For example, carbon dioxide has been captured at the Arkalon and Bonanza ethanol plants in Kansas, since 2009 and 2013, respectively and transported to enhanced oil recovery operations 15 miles to Oklahoma and 90 miles to Texas, respectively. However, these existing ethanol carbon capture and enhanced oil recovery projects have always been dependent on the 45Q Program and are much smaller scale projects. Moreover, enhanced oil using supercritical carbon dioxide has existed since the 1970s, but has not generated sufficient revenue by itself to support the cost of constructing carbon capture facilities and transporting anthropogenic carbon dioxide long distances to enhanced oil recovery operations. If enhanced oil recovery had been sufficiently profitable without federal subsidies to support anthropogenic carbon capture, then the carbon capture industry would have grown without the need for federal tax credits. Therefore, it is very unlikely that use of the captured carbon dioxide for enhanced oil recovery would by itself support the costs of constructing and operating the proposed project.

In addition, there is a commercial market for limited amounts of carbon dioxide for use in industrial and retail settings, but the total demand of such commercial markets is very small relative to the capacity of the Navigator Project, and existing demand is met via existing carbon dioxide production facilities. Commercial demand for carbon dioxide is simply too small to support infrastructure on the scale of the proposed project.

Neither the low carbon fuel credits, enhanced oil recovery, nor other existing commercial uses of carbon dioxide are likely to provide sufficient revenue to support development of carbon capture systems on a scale of the Navigator Project. Thus, the Navigator Project's current and future financial viability is entirely dependent on the continuation of the 45Q Program.

This dependency creates substantial long-term risks to the financial security of South Dakota's ethanol and corn industries. First, unlike other federal agricultural programs that subsidize South Dakota's otherwise market-based agricultural economy, the market for captured carbon dioxide is based for all practical purposes entirely based on the 45Q Program. The 45Q Program does not subsidize an existing market-based industry; it creates an entirely new industry, namely the carbon dioxide sequestration industry, which collects a pollutant and disposes of it. The 45Q Program converts a liability (carbon dioxide) into an asset. Absent the 45Q program, the carbon dioxide sequestration industry would not exist to the extent necessary to support construction and operation of Navigator Project. While it is true that construction of the Navigator Project would create a new revenue stream in the form of tax credits for ethanol plant investors, it is also true that this revenue stream would be entirely dependent on the continued existence of the 45Q Program, that in turn would depend on the financial health of the federal government and ongoing political support for the 45Q Program. As federal budget deficits increase, political pressure to limit federal expenditures will likely also increase, putting at risk funding programs deemed unnecessary or politically vulnerable, such as the 45Q Program.

Navigator's application states that, "[t]he Heartland Greenway System will facilitate significant CO₂ emissions reductions that will allow industry and governments in the project footprint to meet their carbon reduction goals." Navigator, however, does not identify any provision in South Dakota state law or local ordinances that mention or even recognize the existence of climate change, much less impose carbon reduction goals. Thus, the policy purpose for the Navigator Project, which

is climate change mitigation, is not in accordance with South Dakota law and does not advance state policy objectives. South Dakota's governments do not agree that climate change exists and have not adopted policies to mitigate it. Yet, Navigator seeks South Dakota government approval for its project, the sole purpose of which is to mitigate climate change. Approval of the Navigator Project advances a policy objective with which the State of South Dakota does not agree.

Moreover, there are no federal mandates that South Dakota must approve the Navigator Project or any other carbon capture climate change mitigation project. Federal law does not require South Dakota to support carbon capture and storage. It is possible that future federal air quality regulations may make carbon capture one option for addressing carbon dioxide emissions, but the promulgation of such possible rule is at best years in the future, subject to litigation, subject to rejection by future federal administrations aligned with South Dakota's position on climate change policy, and therefore entirely speculative. The Commission cannot approve the proposed project based on a claim that federal mandates require approval of the proposed project, because such mandates do not currently exist and may never exist. While the federal government currently has climate change policy objectives, it has not required development of carbon capture projects, but rather created tax credits that encourage but do not mandate such development. Participation in the 45Q Program is voluntary. Therefore, the federal government has left decisions on the merits of carbon capture projects to the judgment of state governments, which are free to support or reject any particular project or the carbon capture industry as a whole.

Given the State of South Dakota's rejection of the need for climate change mitigation and its freedom to accept or reject carbon capture development, a Commission approval of Navigator's proposed project would likely be seen by many South Dakotans as an extreme example of hypocritical government action. As such, Commission approval of the Navigator Project would result in substantial reputational damage to and a loss of citizen trust and faith in the Commission and

South Dakota's state government in general. Since faith in government institutions is part of the bedrock of American society, such damage would constitute "a threat of serious injury . . . to the social . . . condition of inhabitants or expected inhabitants in the siting area," as well as within all of South Dakota.

The Navigator Project also creates a threat of serious injury to the social conditions in South Dakota due to excessive state and local dependency on a politically unstable federal funding program. The threat of anthropogenic climate change is the subject of considerable political controversy within the United States and South Dakota. The future commercial viability of the 45Q Program and the Navigator Project is entirely dependent on ongoing federal political support for climate change mitigation in general and the 45Q Program in particular. A change in federal leadership that agrees with the State of South Dakota's position on climate change could result in future congressional and administrative actions to reduce or even eliminate the 45Q Program. Further, the ongoing viability of the 45Q Program is dependent on the financial health of the federal government, including the fiscal impacts of the ever-growing federal budget deficit. Given that the 45Q Program includes no cap on federal financial outlays, it will increase the federal deficit potentially by tens or even hundreds of billions of dollars annually, depending on how fast it grows. In the event of a severe economic downturn or a federal government default on its loans, Congress could reduce or entirely eliminate the 45Q Program, prior statutory commitments notwithstanding. Thus, the commercial foundation for the Navigator Project is built on a political foundation that is too unstable to justify making South Dakota's corn and ethanol industries dependent on it.

In the event that the 45Q Program falls out of favor, the commercial foundation for the Navigator Project could disappear quickly, causing it to precipitously cease operation, in which case South Dakota's corn and ethanol industries would face a potentially existential financial shock that could significantly disrupt South Dakota's agricultural industries, many rural communities, and the state's overall

economic wellbeing. Further, landowners would be saddled with paying for the cost of abandoned pipeline mitigation. It is one thing for South Dakota to accept federal subsidies for production of agricultural commodities for which there will always be demand. It is an entirely different thing to base a substantial part of South Dakota's farm economy on an entirely new federally created non-market-based industry that captures a waste product for which there will never be significant commercial demand. There is a risk to tying South Dakota's market-based agricultural economy to politically and fiscally unstable federal largess. Construction of the Navigator Project would make its contracted ethanol producers and the farmers that provide them with corn overly dependent on a politically unstable federally created artificial market for carbon dioxide. A demise of this market, for either political or fiscal reasons, would severely damage the State's agricultural economy and disrupt rural communities throughout South Dakota. Such community disruption would constitute "a threat of serious injury . . . to the social . . . condition of inhabitants or expected inhabitants in the siting area," as well as within all of South Dakota.

While the promised financial benefits of the Navigator Project appear to be tempting, their acceptance would come at a cost and create a threat of serious injury to the political and social fabric of the State of South Dakota.

Further, I adopt and incorporate the opinions found in **Attachment No. 7** and those found in **Attachment No. 8**.

Q: Do you believe any aspect of Navigator's proposed hazardous pipeline will pose a threat of serious injury to the economic condition of current inhabitants or expected inhabitants in the siting area, if yes why?

A: In addition to those already discussed, based upon my experience and all the information obtained throughout this process and simple common sense the answer is yes – this hazardous pipeline does pose a threat of serious injury in this way. There are many such economic concerns. If the PUC approves this Application I will likely not invest in and develop my property as I would have without the affects of such a hazardous pipeline. The fact I can't purchase insurance to cover me and

my property against certain claims and allegations and the fact whether or not I am alleged to be liable for or to have contributed to a leak or rupture event rests in the hands of Navigator's insurance defense attorneys should they seek to spread their risk of liability on to me, it is likely I and others will not use the easement area and surrounding areas to their highest and best use given the less activity in that area means the less likely we could be blamed for something relative to the pipeline or supporting equipment.

I share the concerns of Marvin Lugert and Loren Staroba about future fertility of the land and compaction and yield loss and loss in productivity not just in years one through three post-construction, but forever. As discussed by Mr. Lugert and Mr. Staroba, they have experienced continual yield loss for 20 to 45 years post-pipeline construction. All the claims and glossy brochures about how great the unknown contractors and workers who have the responsibility of screening the topsoil and other important aspects is just talk.

I adopt and share those as incorporated here and found in **Attachment No. 9**, related to soil compaction and reduced yields – and that was a study funded by a major pipeline player. I also incorporate the conclusions and findings in **Attachment No. 10**.

The facts, opinions, and arguments referenced here by no means include all such economic threats posed but highlight some of the many. The overall chill on development, expansion and freedom to do as you choose on and with your land are all significant economic detriments that occur only if the PUC approves this Application.

Q: Do you believe any aspect of Navigator's proposed hazardous pipeline will substantially impair the health, the safety, or the welfare of the inhabitants, if yes why?

A: In addition to what we have already discussed, yes, this proposed hazardous pipeline would substantially impair the health and the safety and the welfare of inhabitants. There are many such substantial impairment concerns and I adopt and share those

as incorporated here and found in **Attachment No. 11**. The facts, opinions, and arguments referenced here by no means include all such threats posed but highlight some of the many. I further adopt the testimony of Dr. Schettler and Carolyn Raffensperger.

Q: Do you believe any aspect of Navigator’s proposed hazardous pipeline will unduly interfere with the orderly development of the region, if yes, why?

A: Yes, I incorporate my answers above here. Adding a hazardous and dangerous pipeline to the region and taking peoples rights away while telling them what they can and can’t do is a direct undue interference with the orderly development of each affected parcel, the surrounding parcels, and thereby the region.

Q: What is your understanding regarding the views and positions of the governing bodies of affected local units of government in and around the proposed siting and corridor area?

A: I am aware of many local boards who continue to exercise their rightful local power to enact intelligent land use restrictions in ordinances and through setback requirements. Many counties are not in favor of this project. Others have enacted Moratoria pending further advances in federal law and guidance on the subject and pending further study. It would be irresponsible for the PUC to approve this Application until all counties have weighed in and complete their local ordinances related to CO2 pipelines.

Q: What is it that you are requesting the PUC Commissioners do in regards to Navigator’s Application for its proposed hazardous pipeline across South Dakota?

A: I am respectfully and humbly requesting that the Commissioners think far beyond a temporary job spike that this project may bring to a few counties and beyond the relatively small amount of taxes this proposed foreign pipeline would possibly generate. Instead think about the perpetual and forever impacts of this pipeline as it would have on the landowners specifically, first and foremost, but also thereby upon the entire state of South Dakota. This project is not in the best interest for the

state of South Dakota. When you look at all the negative effects that will be in place forever versus limited benefits if any, this proposed hazardous pipeline should not be approved.

Q: Does Attachment No. 12 here contain other documents you are competent to speak about that you wish to be part of your testimony that you can discuss in more detail as needed at the Hearing?

A: Yes.

Q: Do you believe the PUC should approve Navigator's Application to locate its proposed hazardous CO2 pipeline, on, under, across, over, and through the land in question?

A: No. they should not for all of the reasons expressed herein. However, if the PUC was to approve the Application then it should force Navigator to move the route along property boundaries and away from structures and any sensitive land features. Navigator hasn't constructed an inch of this pipeline and they can and should re-route if approved.

Q: Are all of your statements in your testimony provided above true and accurate as of the date you signed this document to the best of your knowledge?

A: Yes, they are.

Q: Have you fully expressed each and every opinion, concern, or fact you would like the PUC Commissioners to consider in their review of Navigator's Application?

A: No, I have not. I have shared that which I can think of as of the date I signed this document below, but other things may come to me or my memory may be refreshed and I will add and address those things at the time of the Hearing and address any additional items at that time as is necessary. Additionally, I have not had an adequate amount of time to receive and review all of Navigator's answers to our discovery and the discovery of others, so it was impossible to competently and completely react to that in my testimony here and I reserve the right to also address anything related to discovery that has not yet concluded as of the date I signed this document

below. Lastly, certain documents requested have not yet been produced by Navigator and therefore I may have additional thoughts on those I will also share at the hearing as needed.

Q: Thank you, I have no further questions at this time and reserve the right to ask you additional questions at time of the Hearing in this matter.

/s/ JULIE BURKHART AND BRUCE BURKHART

Julie Burkhart and Bruce Burkhart