

STATE OF IOWA  
DEPARTMENT OF COMMERCE  
IOWA UTILITIES BOARD

IN RE:  SUMMIT CARBON SOLUTIONS, LLC	DOCKET NO. HLP-2021-0001
NUSTAR PIPELINE OPERATING PARTNERSHIP L.P.	DOCKET NO. HLP-2021-0002
NAVIGATOR HEARTLAND GREENWAY LLC	DOCKET NO. HLP-2021-0003

**RESPONSE TO MOTION FOR CLARIFICATION**

**COMES NOW** Navigator Heartland Greenway, LLC (Navigator), and for its Response to the “Motion for Clarification” (Motion) filed by the Office of Consumer Advocate (OCA), a division of the Iowa Department of Justice, on December 28, 2021, states as follows:

1. On December 16, 2021, the Utilities Board (Board) issued an “Order Regarding Filing Requirements and Addressing Survey Timing” (Order), declaring that a hazardous liquids pipeline company may not contact landowners for the purpose of obtaining survey permission prior to the conclusion of the informational meeting in the landowner’s county. Order at p. 4. The Order further provides that the pipeline company may not conduct any survey in a county until the informational meeting has been held, even if survey permission had been granted. Order at pp. 2-3. The Order relied on Iowa Code § 479B.4(6), which prohibits a pipeline company from negotiating or purchasing an easement prior to the informational meeting, and the Board’s newly enacted rule that defines “negotiating” to mean any “contact between a pipeline company and a person with authority to negotiate an easement or interest in land that involves the location,

damages, compensation, or other matter that is restricted by Iowa Code section § 479B.4(6).” 199 Iowa Admin. Code 13.1. The Order further broadened the Board’s definition of negotiating to include any request to survey a parcel of land in the future, because it “will thereby necessarily involve discussion of the proposed project” which, if done before the end of the county informational meeting, will constitute prohibited negotiation. Order at p. 3.

2. Regardless, as stated in numerous public informational meetings, Navigator has not conducted any surveys to date but now, having completed over 30 informational meetings, it will begin sending survey notice letters pursuant to Iowa Code § 479B.15 within the next week to ten days.

3. OCA seeks to disrupt this process under the guise of seeking clarification of the Order. However, rather than seeking to clarify an Order OCA’s request is for the Board to declare that Iowa Code § 479B.15 requires: (1) that a pipeline company must provide ten days’ written notice to all landowners before entering for survey work even if a landowner has already agreed to allow survey access and (2) that the ten-day notice must provide a specific date on which the survey will take place. These requests are not clarifications of the Order; rather, they request a declaration from the Board as to the meaning of a statute.

4. Not only is the procedure requested by OCA inappropriate, but the relief requested is inconsistent with the statute as well as being impractical and unnecessary. The Board should deny the OCA’s Motion.

5. Iowa Code § 479B.15 provides:

After the informational meeting or after the filing of a petition if no informational meeting is required, a pipeline company may enter upon private land for the purpose of surveying and examining the land to determine direction or depth of pipelines by giving ten days’ written notice by restricted certified mail to the landowner as defined in section 479B.4 and to any person residing on or in possession of the land. The entry for

land surveys shall not be deemed a trespass and may be aided by injunction. The pipeline company shall pay the actual damages caused by the entry, survey, and examination.

OCA's Motion rejects the plain language of the statute and, instead, urges the Board to insert a requirement that the notice must include the specific date of survey and further, it follows, that the statute's grant of authority to enter land without a trespass only applies to the date specified in the notice. OCA's request is contrary to Iowa law and the legislature's intent.

6. Iowa courts have been clear on how to discern the legislature's intent through the language of the statute:

[L]egislative intent is expressed by what the legislature has said, not by what it could or might have said. When a statute's language is clear, we look no further for meaning than its express terms. Intent may be expressed by the omission, as well as the inclusion, of statutory terms. Put another way, the express mention of one thing implies the exclusion of other things not specifically mentioned.

*State v. Beach*, 630 NW2d 598, 600 (Iowa 2001) (internal citations omitted).

7. Had the legislature wanted to require that a specific date of entry be listed in the notice, and that the right of entry be limited to the date specified, it would have done so. For example, Iowa Code § 354.4A requires seven days' written notice via regular mail and requires that the notice include the dates, time, location, and timetable of entry, the estimated completion date of the survey, and the estimated number of entries that will be required. *See* Iowa Code § 354.4A(4). Thus, the legislature chose to require specificity of the date of entry for a survey in section 354.4A, but it did not do so in section 479B.15.<sup>1</sup> The legislature's omission of any requirement regarding the date of entry for surveys after the informational meeting must be respected rather than disregarded. The Board should deny OCA's request to declare that the notice

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<sup>1</sup> Nor has the legislature required a specific date of entry in Iowa Code § 479.30, which also provides that a survey after the ten days' notice is not a trespass.

sent under Iowa Code § 479B.15 requires a specific date of entry and that, as a result, only the specific date of entry on the notice is an entry without trespass.

8. Next, OCA requests the Board declare that, to avoid a trespass when surveying after the informational meeting, the ten-day notices must be sent to all landowners, including those who have granted voluntary access to the company. OCA's request is puzzling. Trespass generally means "[e]ntering upon or in property without the express permission of the owner, lessee, or person in lawful possession". Iowa Code § 716.7(2)(a)(1). Survey access is either voluntary or involuntary. Involuntary access could otherwise be considered a trespass, but the statute makes clear that involuntary access is not a trespass if proper notice is provided. Voluntary access typically cannot be considered a trespass, meaning no ten-day notice is required to secure legal access. The Board should deny OCA's request to declare that written notice of entry is required to avoid a trespass when permission to enter has been granted.

9. Further, OCA's requested relief is both impractical and unnecessary. OCA expresses concern that the ten-day notice might give pipeline companies unfettered perpetual survey access. As a practical matter, that will not happen. Board Rule 13.2(2) provides that the petition for pipeline permit must be filed within two years of the informational meeting. In light of the time required to survey all of the parcels, prepare maps and legal descriptions, and otherwise prepare the petition for filing, the reality is that the survey will be completed well before the petition is filed, putting an outer limit of two years on the involuntary survey access provided for in Iowa Code § 479B.15, unless additional informational meetings are held.

10. OCA's request that a specific date be included in the ten-day notice would serve to impede company-landowner negotiations by causing delay and confusion. For example, under the OCA's proposal, if a landowner requests that the survey occur earlier than the date in the notice,

the landowner's preference would be disregarded. In addition, OCA's proposed requirement runs counter to the realities of surveying and would unnecessarily extend the survey process and confuse landowners with no discernible benefit. Pipeline companies, on projects of this scale, cannot realistically set and maintain a strict schedule of survey activity; Iowa weather, the land conditions encountered, landowner preferences, equipment problems, possible litigation with the landowner over access to the property, and many other factors will affect the company's ability to set and meet a specific survey date for each of the thousands of parcels potentially affected by the project. OCA states that its proposed relief is designed to avoid any 'he said/she said' situations. But under the OCA's proposal, landowners will receive multiple notices with multiple dates for the survey of their property if there is a rainstorm, or a delay in completing the prior surveys, or if there is an illness, etc. Increasing the number of landowner notices with dates that cannot ultimately be met due to the realities of survey work and Iowa weather will not avoid the issue the OCA has raised. The Board should deny OCA's request to declare that Iowa Code 479B.15 requires the ten-day notice to include a specific date of survey.

11. Finally, Navigator's resistance to OCA's Motion should not be interpreted as a position that landowner communication is not important. To the contrary, Navigator believes it is of the utmost importance, and its planned survey communications demonstrate that. Specifically, for initial constructability survey activity, Navigator's letters state that the activities are expected to commence within 10 to 30 days from the date of the notice and that if landowners desire a more specific near-term window, they can provide Navigator with their preferred method of contact – e-mail, phone or text – and Navigator's land agents will provide approximately 24 to 72 hours' notice of each actual survey activity. Finally, Navigator will send notice letters to all landowners, including those who have granted voluntary survey access.

12. Having constructed numerous pipelines, Navigator considers these steps to be best practices in landowner communications for surveys. That does not mean, however, that these practices are, or should be, required by Iowa Code § 479B.15.

**WHEREFORE**, Navigator respectfully requests that the Board deny OCA's motion for expansion of the Board's December 16, 2021, Order.

Dated: January 11, 2022

Respectfully submitted,

/s/ Samantha C. Norris  
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ATTORNEYS FOR NAVIGATOR  
HEARTLAND GREENWAY LLC

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this 11th day of January, 2022, the foregoing document was electronically filed with the Iowa Utilities Board using the EFS system which will send notifications of such filing (electronically) to the appropriate persons.

/s/ Samantha C. Norris  
Samantha C. Norris