

Staff summary of CUP 2291

In late August 2014, Enbridge submitted an application for a conditional use permit to allow expansion of the "Waterloo" pumping station for Enbridge's "Line 61" petroleum pipeline. The A-1EX (Exclusive Agriculture) zoned property is owned by Wisconsin Electric Power Company and located at 5635 Cherry Lane in section 14 of the town of Medina. The subject property is located in an agricultural preservation area, as defined in the town of Medina and Dane County comprehensive plans. Petition #2291 was first heard by the Zoning and Land Regulation Committee at a public hearing on October 28th, 2014. The petition appeared on the committee's agenda several times following the original public hearing (11/11/14; 1/27/15; 2/10/15; 3/11/15; 4/14/15).

Conditional Use Permits require both Town and County Zoning & Land Regulation Committee approval as detailed in section 10.255(2) of the county code. To be approved, the town board and zoning committee must make findings of fact that the proposed conditional use permit satisfies the standards specified in section 10.255(2)(h), and for CUPs in the A-1EX (Exclusive Agriculture) district, the additional standards in section 10.123(5). The proposal also must be reviewed for consistency with the adopted town and county comprehensive plans.

During the zoning committee public hearing and subsequent deliberations, concerns were expressed by the public and members of the committee about the increased potential for a spill event resulting from the pumping station upgrade which would increase the volume and pressure on transported tar sands "dilbit" in line 61. Committee discussions centered on the applicant's ability to pay for clean up and remediation in the event of a catastrophic spill at the pumping station at some point in the future.

In response to a request by the zoning administrator regarding the county's ability to require conditions of approval imposing a financial responsibility requirement, Dane County corporation counsel issued a written opinion in September 2014 indicating that such requirements are not preempted by federal law. Dane County corporation counsel issued a second written opinion in December 2014 indicating that it would be legally defensible for the county to require financial assurance, and that the county could also require an environmental impact statement pursuant to its zoning authority. The opinion indicated that these requirements would not be in violation of federal or state law under the Pipeline Safety Act, Interstate Commerce Clause of the US Constitution, or the Wisconsin Environmental Protection Act.

At the ZLR committee meeting on January 27th, Enbridge presented summary information about its existing liability insurance. The applicant also submitted an offer to indemnify the county and to list the county as an additional insured on \$100 million of its general commercial liability policy. Due to the complexity of the insurance issues under consideration, the committee directed staff to investigate the possibility of hiring an insurance expert for the purposes of determining the insurance needs of the proposal. The county contracted with Mr. David Dybdahl of American Risk Management Resources Network for those services. Mr.

Dybdahl is a recognized expert in the field of environmental insurance and risk management. Mr. Dybdahl's report was issued on April 8th, and he is here this evening to respond to questions the board may have.

At its meeting on April 14, 2015, the ZLR Committee approved CUP #2291. Pursuant to its authority under section 10.255(2)(i) – *Conditions and Guarantees* – the committee imposed a total of 12 conditions on the permit, including the two conditions required by the town of Medina.

On May 4, 2015, Enbridge submitted an appeal of the town and ZLR committee approval of CUP #2291. Specifically, Enbridge objected to conditions #7 and #8 of the permit pertaining to the required Environmental Impairment Liability (EIL) insurance and technical specifications regarding General Commercial Liability insurance. In the appeal, Enbridge requests that the board find that the insurance requirements are preempted by the Pipeline Safety Act, violate the Interstate Commerce Clause of the US Constitution, and that the county applied incorrect theories of law and acted arbitrarily and unreasonably by imposing the insurance requirements.

In the appeal, Enbridge further requested that the board reverse the ZLR Committee and town's decision to impose the insurance requirements, and to modify the CUP by removing the insurance requirements, on the grounds that the committee and town did not: 1) act within a "reasonable time" on Enbridge's CUP application; 2) keep within their jurisdiction; 3) applied incorrect rules of law; 4) acted arbitrarily and unreasonably.

The CUP appeal was scheduled to be heard by the Board at its meeting on July 16, 2015. However, the appeal was deemed moot and subsequently removed from the board agenda following state enactment of Wisconsin Act 55, the state's biennial budget bill, on July 14, 2015 which included a provision prohibiting counties from imposing insurance requirements on operators of interstate hazardous liquid pipelines. Section 1923e of the budget bill created section 59.70(25) of statutes entitled "Interstate Hazardous Liquid Pipeline" which states:

"A county may not require an operator of an interstate hazardous liquid pipeline to obtain insurance if the pipeline operating company carries comprehensive general liability insurance coverage that includes coverage for sudden and accidental pollution liability."

In a letter dated July 17, 2015, county Corporation Counsel informed Zoning Administrator Lane of the change in state law, indicating that the action rendered the insurance requirements in conditions #7 and #8 of CUP 2291 unenforceable.

In correspondence dated July 24, 2015, Zoning Administrator Lane provided a copy of the Corporation Counsel letter to Enbridge's representative, as well as a revised copy of CUP 2291 with the insurance requirements from conditions #7 and #8 removed from the permit.

On August 10, 2015 members of the environmental group, 350-Madison, submitted a petition to the Zoning & Land Regulation Committee requesting that CUP 2291 be rescinded and that a trust fund requirement be imposed to serve as financial assurance in lieu of environmental impairment liability insurance. On August 24, 2015 Corporation Counsel issued an opinion indicated that the County could not revoke CUP 2291 and that the county would likely lose a court challenge to a \$25 million trust fund, or other similar financial assurance condition. The ZLR Committee took no action on the request.

At its meeting on September 29, 2015, the ZLR Committee acknowledged that the Zoning Administrator did not have the authority to revise the permit to remove the insurance conditions. The committee approved a motion indicating that the permit should reflect the exact conditions of approval as approved by the committee on April 14, 2015 and further that a note be added to the CUP which, "...identifies that the County's ability to enforce conditions 7 & 8 are affected by the State Budget Bill, 2015 Wisconsin Act 55, that was enacted on July 12, 2015..." The Zoning Administrator notified Enbridge representatives that the original permit conditions would remain, with the notation as directed by the ZLR Committee in correspondence dated October 9, 2015.

Following the ZLR committee's re-affirmation of the original CUP 2291 permit conditions, Enbridge filed a subsequent appeal on October 19, 2015. The appeal requests that the Board; 1) find that the ZLR Committee did not: a) keep within its jurisdiction; b) applied incorrect rules of law; and c) acted arbitrarily and capriciously by revoking the 7/24/15 CUP permit as revised by the Zoning Administrator. Enbridge further requests that the Board reverse the ZLR Committee's decision to impose the insurance requirements and also to void the insurance requirements and have them removed from CUP 2291.

Conditions of Approval of CUP #2291

1. The pumping station shall be located and constructed as depicted in the presented plans.
2. Enbridge shall be responsible for obtaining a road use agreement with the Town of Medina prior to the construction of the pumping station to ensure repairs for any damage to local roadways.
3. A spill containment basin shall be constructed around the pumping station to handle a minimum of a 60 minute flow prior to the operation of the pumping station.
4. The pumping station shall be designed and constructed to limit the operating noise to a maximum of 50 decibels dba as measured at property lines.
5. Exterior lighting shall be down-shrouded to limit light pollution onto adjoining property.
6. Enbridge shall agree to indemnify and hold harmless Dane County for pollution losses Per the terms as detailed in Enbridge's proposal titled "CONDITIONAL USE PERMIT ("CUP") CONDITIONS", submitted and entered into the public record on January 27, 2015, which is incorporated herein by reference.
7. Enbridge shall procure and maintain liability insurance as follows: \$100,000,000 limits in General Liability insurance with a time element exception to the pollution exclusion (currently in place), and \$25,000,000 of Environmental Impairment Liability insurance. Enbridge shall list Dane County as an Additional Insured on the total \$125,000,000 of combined liability insurance.
8. The required General Liability Insurance and Environmental Impairment Liability insurances shall meet the technical insurance specifications listed in Appendix A of the insurance consultant's report, which is incorporated herein by reference.
9. Applicant shall maintain an Emergency Response Plan that is in compliance with the applicable requirements of local, state and federal agencies with jurisdiction. A copy of the Emergency Response Plan shall be made available to the Dane County Department of Emergency Management Hazardous Materials Planner within 30 days of permit approval.
10. The applicant warrants that it will at all times have available, on the county and/or regional level, sufficient emergency response staff, equipment, and materials to immediately and fully respond to any spill, leak, rupture or other release of Petroleum Products or Hazardous Substances from applicant's facilities.
11. On a biennial basis, the applicant shall conduct training exercises for first responders in coordination with the Fire Chiefs in the Waterloo and Marshall area. The first such exercise shall be conducted within 30 days of completion of the pumping station, with future exercises scheduled in consultation with the Fire Chiefs. The applicant shall provide advance notice of the scheduled training exercises to the Dane County Hazardous Materials Planner and invite his/her participation and involvement at the exercises.
12. These emergency response conditions do not relieve the applicant of any applicable regulatory responsibilities related to safety and emergency response planning.

Background (if needed) – conditional use

The pumping station will consist of a new 10,000+ sqft utility building housing four 6,000 horse power electric pumps. The pumps would expand the capacity of Line 61 to 1.2 million barrels per day from an existing capacity of around 550,000 barrels per day. Station facilities would be secured and fenced. The pump station would operate 24 hours year round, with 1-2 employees monitoring operations at the site.

Background (if needed) – insurance report

As specified in the scope of services agreement, Mr. Dybdahl's report includes:

- an evaluation of Enbridge's existing insurance program, including a review of issues associated with Commercial General Liability insurance policies and a determination of the suitability of such policies to cover costs associated with a spill event;
- an analysis of Enbridge's offer of indemnity and insurance to Dane County;
- a summary comparing Enbridge's current liability insurance policy with the policy forms being litigated over the 2010 spill on line 6B in Michigan;
- a summary of government sponsored oil spill funds; and,
- recommendations on the appropriate types and amounts of insurance necessary to cover the costs of response, clean up, and environmental remediation associated with a catastrophic spill event.