

Dane County Zoning and Land Regulation Committee #CUP 2291
PETITION BY 350-MADISON REQUESTING RECONSIDERATION AND RECISSION
OF THE PERMIT AND, THEREUPON, IMPOSITION OF A TRUST FUND
REQUIREMENT IN SUBSTITUTION FOR THE INSURANCE REQUIREMENT
REGARDING ENBRIDGE'S WATERLOO PUMP STATION

Petition

If §59.70(25), Stats., is retroactive in its effect, 350-Madison petitions the Zoning and Land Regulation (ZLR) Committee, pursuant to §10.255(2) (h), DCCO, to reconsider, and upon reconsideration, to rescind the Conditional Use Permit (CUP) in this proceeding that was issued to Enbridge on April 21, 2015. Thereupon, in place of the CUP Condition No. 7, which presently requires \$25 million of Environmental Impairment Liability (EIL) Insurance, 350-Madison requests the ZLR to substitute a new requirement for a \$25 million trust fund in order to ensure that there are funds to clean up future oil spills. A copy of the existing and proposed substitute language is attached as Attachment A.

Further, in order to protect the status quo while this Petition is considered, 350-Madison also requests that appropriate actions be taken to ensure that construction on the Waterloo Pump Station not commence or proceed pending completion of ZLR's final action on the Petition.

Legal Grounds for Petition

The ZLR's April decision found that it could not allow the non-conforming pump station on prime agriculture farm land unless it was conditioned in several particulars, including Condition No. 7 that required \$25 million in EIL insurance.

Subsequent to the issuance of the CUP this past April, the Legislature's Joint Finance Committee adopted Assembly Substitute Amendment 1 to Assembly Bill 21, the 2015 State Budget Bill which was passed in its Senate form on the floor and signed into law on July 13th as Wisconsin Act 55.

One of the budget's extraneous riders, SECTION 1923e to the Substitute Amendment, created §59.70(25), Stats., which sought to bar county's from requiring EIL insurance for oil pipelines, but which no legislator admitted to have authored on whose behalf.

Nonetheless, the ZLR relied upon the protections provided by EIL insurance, which the subsequent budget amendment sought to bar, in order to issue the CUP and determine that the non-conforming use would not endanger the public health, safety, comfort and general welfare. §10.255(2)(h), DCCO, states:

“(h) Standards. No application for a conditional use shall be granted by the town board or zoning committee unless such body shall find that all of the following conditions are present:

1. That the establishment, maintenance or operation of the conditional use will not be detrimental to or endanger the public health, safety, comfort or general welfare.
2. That the uses, values and enjoyment of other property in the neighborhood for purposes already permitted shall be in no foreseeable manner substantially impaired or diminished by establishment, maintenance or operation of the conditional use;
3. That the establishment of the conditional use will not impede the normal and orderly development and improvement of the surrounding property for uses permitted in the district ...”

An inadequately remediated oil spill in Medina would obviously endanger public health and safety, reduce the enjoyment of adjoining property, and impede orderly development.

If §59.70 (25), Stats., is retroactive in its effect on enforcement of this CUP, the Committee has grounds to reconsider its original conditional approval, because, due to a subsequent event to the issuance of the CUP, subd. (h) would no longer be met.

Therefore, the Committee should reconsider its original conditional approval, upon reconsideration, rescind that approval, and then, after letting all parties be heard, proceed to replace Condition No. 7 with a new mechanism that achieves the same result of ensuring funds for a clean up as the original requirement for EIL That is a trust fund set in the same amount as before, namely \$25 million.

The Wisconsin Court of Appeals has said that full reversal of a permit may be the appropriate if a condition is preempted by state law and if the local government would have imposed other conditions had it known a given condition would be invalid:

“We...agree with the Town that there may be situations where it is appropriate to reverse an entire decision because of faulty conditions. This might be true, for example, where, had the municipality known that a critical condition was defective, it could have imposed an alternative proper condition.”. *Adams v. State Livestock Facilities*, 327 Wis. 2d 676, 787 N.W.2d 941.

In light of §59.70 (25), Stats., the ZLR would no longer be permitted to attach an insurance condition to the new CUP if there is already a general liability policy (even though the overwhelming facts show that general liability policies are not adequate).¹ But other assurance mechanisms, which would could comply with §10.255(2) (h), DCCO, are not barred by the statute. One other widely recognized assurance mechanism, which is distinct from insurance, is a trust fund. For a description, see, e.g. 40 CFR 258.74(a)-(e), the seminal Resource Conservation Recovery Act’s list of the five distinct types of financial assurance mechanisms that it allows.

In a trust fund, which is like a real estate escrow account, a qualified independent third party fiduciary takes possession of and holds in trust the funds needed to provide assurance that, in accordance with the trust agreement, the funds will be available to complete the action if the entity establishing the trust fails to do so.

This kind of mechanism is appropriate to ensure that there are funds to remediate an oil spill at the Station, as §10.255(2)(h) requires ZLR to ensure is done, and which the Committee has previously determined to be an amount of \$25 million. Unfortunately, had some unnamed interest not lobbied to enact §59.70 (25), Enbridge could have met the Committee’s concerns with insurance for less than 5% of the cost of a trust fund. For, unlike insurance that takes probabilities into account, a trust must be fully funded as it cannot spread risk over a larger pool.

Since, due to that untoward lobbying, the Committee now no longer has available the lower cost insurance mechanism it was willing to use, trust funds are the only reliable assurance mechanism that is left to the Committee if it is to comply with its legal obligations under §10.255(2)(h) and to the taxpayers of Dane County and the State of Wisconsin.

Persuasive recent events

Of note, recent events have only magnified the prescience of the Committee’s earlier investigation and determination, which concluded that third party warrantees were essential to ensure the availability of clean up funds over the long term that the CUP needs to extend.

¹ To recapitulate, as explained in the Dybdahl Report, the general liability policies that §59.70 (25) implies guarantee funds for environmental cleanup actually specifically excludes coverage of pollution events. Depending upon how such words as “pollution” and “sudden” are interpreted by a local judge, some types of abrupt leaks may be covered, but others will not, and an adverse court case to plaintiffs on insurance issues half way around the world, if that is where the insurer is domiciled, could unexpectedly exclude whole other events from coverage. Hence, it is unknowable at the outset whether a specific event will subsequently be covered by general liability policies, or litigated for, literally, decades, with no way to be assured in advance of the final denouement. Also, the most recent major pipeline spill of 1,323,000 million gallons of tar sands oil in Alberta took over two weeks to be detected, which suggests it may not qualify as “sudden and accidental.” It provides another graphic example of how ill-equipped these policies are to ensure the availability of cleanup funds. Rebecca Plenty, “Cnooc Oil-Sands Spill Worsens Outlook for Canada Pipeline Plans,” *Bloomberg* (July 28, 2015). See Attachment B.

In view of the intervening time since the matter was last considered, the expert analysis from the Dybdahl Report is worth repeating. It explained why Enbridge's present net worth and purported willingness to self finance cleanups is irrelevant to the County's need to manage the risks that the pump station imposes on it.

Again, that is because the pipeline system will have more than a 50-year life. Over that decades long time frame, Enbridge will continue piping oil across Dane County. At the same time, the unfurling constraints on the burning of fossil fuels in a climate constrained world, by analogy like the new EPA Clean Power Plan, 40 CFR Part 60 Subpart UUUU, will erode the company's financial viability, including its capacity to self-finance expensive remediation efforts. Also during that extended time frame, that financial deterioration will make it more probable that maintenance will be compromised and the frequency and severity of accidents will increase, as it stated—

“However, this ability to pay for an oil spill through these resources could deteriorate over the life of the proposed conditional use. Profits and access to insurance vary year to year. Spill funds are subject to politics and may not endure over time. For example, the state of Wisconsin is in the process of dismantling its government-sponsored spill program for fertilizer spills in the state. Over a longer time horizon, even federal funds from oil spills may be dismantled. Although access to insurance is not guaranteed over time, insurance does and should play a role in the overall risk management strategy of the stakeholders. The inability to procure insurance is, in itself, a risk management tool. Access to insurance operates as the canary in the coal mine to provide early warning of unusually risky and therefore uninsurable endeavors in commerce to stakeholders in those endeavors.

“A reduction in demand for fossil fuels to address the threat of climate change would change the fundamental business of Enbridge. The core business of Enbridge is essentially to transport fossil fuels through pipelines to processing facilities and markets.

“The precipitous decline of the coal industry in the US is a prime example that illustrates this point. Despite the fact that coal has remained unchanged for centuries and powered the industrial revolution for over 100 years, the coal industry has seen over 70% of its valuation evaporate in just 5 years, driven to a great extent over environmental concerns. All fossil fuel based companies will be subject to the same economic pressures over time if society moves to reduce the green house foot print of energy sources. This trend is already under way as evidenced by the coal industry. Ultimately, that means burning less fossil fuels, which would logically negatively impact the business of crude oil pipeline companies and their future profits.

“These factors could adversely change the overall risk picture of a Pumping Station on Line 61 over the course of time;

- A reduction in the amount of oil products shipped through Enbridge pipelines would reduce cash flow and impair the firm's ability to pay for uninsured spill expenses out of profits;

- Reduced profitability would limit the firm’s ability to maintain robust safety levels that Enbridge prides its self upon today;
- A reduction in the amount of crude oil which is taxed to fund the Federal oil spill response program would reduce the funding levels for these fail safe contingency plans to pay for oil spill clean ups;
- Changes in the global insurance market place and/or the claims experience of Enbridge in particular could impair the firm’s ability to purchase liability insurance to pay for the costs associated with a spill in the future;
- The current and renewal GL insurance policies purchased by Enbridge have the same wording that one of their former insurance companies in the 2010 policy year is using to deny a \$103,000,000 claim made by Enbridge for pollution clean-up costs arising from Line 6B spill in 2010. This insurance coverage dispute is currently being litigated. Lawsuits involving Pollution Exclusions can take decades to resolve. An adverse judgment in this case pertaining to how General Liability insurance policies respond to pollution losses could significantly impair the usefulness of the Enbridge General Liability insurance for future spill events.
- A judge in Alberta, London or New York ruling in insurance coverage litigation over contamination events and pollution exclusions, in a case totally unrelated to Enbridge or even to pipelines specifically, could significantly reduce the insurance available to Enbridge simply by establishing case law precedence that certain environmental damages are not insured by GL policies.

“All of these risk factors have the ability to dramatically alter the ability of Enbridge to pay for an oil spill over the extended duration of the proposed conditional use.

“As a partial hedge to these changing factors I recommend that the Conditional Use Permit contain insurance requirements for General Liability Insurance and Environmental Impairment Insurance on the pumping station.” David J. Dybdahl, *An Insurance and Risk Management Report on the Proposed Enbridge Pumping Station, Report to the Dane County Zoning and Land Regulation Committee* (April 8, 2015) at pp. 7 to 9.

This past week, the largest U.S. coal producer, Alpha Natural Resources, became the third coal company to declare bankruptcy, and it did so in a unique way that is ominous for Dane County. Bankruptcy was precipitated by the decision of the Wyoming Department of Environmental Quality to disallow Alpha’s past use of naked corporate assurances in lieu of a performance bond to reclaim its Wyoming coal mines when they close. Declining demand for coal had eroded the firm’s key liabilities-to-net worth ratio to the point that Alpha not longer could be allowed to meet bonding requirement with IOUs, which also significantly increased the cost of securing a bond. By declaring bankruptcy, Alpha stated it was hoping to force Wyoming to back off its demand for a performance reclamation bond. It threatened that otherwise the bankruptcy judge would void the bond reclamation requirement and leave the state with no protection.

“The company had been given until August 24 by the Wyoming Department of Environmental Quality to come up with an alternative bonding mechanism for more than \$400 million in self-bonding guarantees in the state.

“Alpha had challenged that decision and *with the bankruptcy filing hopes to obtain a temporary block to that order*. Otherwise, the state could technically revoke the company's mining permits and licenses at its Wyoming mines, the company said.” Jeffery McDonald, “US coal miner Alpha Natural Resources files for bankruptcy,” *McGraw Hill-Platts* (August 3, 2015) (emphasis added). A copy of the complete news article is attached as Attachment C.

Graphically demonstrated by the Alpha case is this. If government does not set in place independent, third-party clean up guarantees *before* the company’s financial fortunes deteriorate, the taxpayer will be forced to pay for the inevitable remediation. This is precisely what we can see happening in real time because Wyoming waited to act until Alpha’s decline had already become manifest. In any event, the Takings Clause would make it constitutionally impermissible in a zoning proceeding for the committee to delay seeking assurances until, long after the permit had been granted, the pipeline company’s financial predicament became inescapable.

Now is the only time that the County can impose the assurances needed for the risks that the Waterloo Pump Station creates. If that can no longer be done with insurance, then it is important for ZLR to give consideration to imposition of a trust fund requirement in its place.



For the foregoing reasons, we respectfully request the Committee to grant the requested relief substituting a trust fund for EIL insurance, and, pending the completion of the Committee’s consideration of this Petition, to temporarily preserve the status quo by delaying construction of the Pump Station site at 5635 Cherry Lane in the Town of Medina.

350-MADISON
Climate Action Team

By Peter Anderson, Chair
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August 7, 2015

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ATTACHMENT A

Existing CUP Condition #7:

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.

Substitute for existing Condition No. 7 the following new condition:

7. Trust fund required. Enbridge shall establish a trust fund in the amount for 2015 of \$25,000,000 in order to ensure that funds are available to remediate an oil spill from the Waterloo Pumping Station. Each year, the owner of the Station shall also provide sufficient funds for the fees for the trustee's services and any associated supervisory regulatory fees in that year. The required amount for each succeeding year shall be adjusted to reflect current costs by the US Gross National Product Implicit Price Deflator Index.

(a) Trustee qualifications. The trustee shall be an entity that has the authority to act as a trustee and whose trust operations are regulated and examined by a Federal or State agency. A current copy of the complete trust agreement shall be provided by certified mail return receipt requested to Dane County, directed to the attention of the Zoning Administrator. The trust agreement shall stipulate that the Dane County Zoning Administrator, or his or her designee, shall be authorized to undertake a full accounting of the fund at any reasonable time.

(b) Funds required before construction. The required payment under this section shall be made into the trust fund prior to commencement of construction on the Waterloo Pump Station, and prior to the restoration of operation of the Station under subd. (c)(ii).

(c) Procedure for fund disbursements. The trustee may not authorize disbursements from the fund until either:

(i) Requested to do so in writing by Dane County in order provide funds for remediation of an oil spill at the Waterloo Pump Station to the appropriate entity in charge of or supervising remediation when the owner of the Station has failed to provide adequate funds to do so.

(ii) Requested to do so in writing by the owner of the Waterloo Pump Station if the owner has terminated all use of the Station and certified it will not restore operation of the Station until it has first returned to the trust fund the amounts indicated under sub. (a).

(d) Replenishment of spent fund. If the trustee has authorized disbursements under sub. (c)(i), the Station owner shall replace those disbursed funds within 60 days of the withdrawal. If the owner does not do so in full by that time, the Conditional Use Permit for the Station shall terminate, the Station may no longer be operated, and the County may take such other action required to meet the objectives of §10.255(2)(h), DCCO.

ATTACHMENT B

BLOOMBERG

Cnooc Oil-Sands Spill Worsens Outlook for Canada Pipeline Plans

by [Rebecca Penty](#)[Robert Tuttle](#)

July 28, 2015 — 12:01 AM EDT



Crews clean an oil spill at Nexen Energy's Long Lake facility near Fort McMurray on July 22, 2015. Photographer: Jeff McIntosh/The Canadian Press via AP

It's becoming increasingly difficult to get oil-sands pipeline projects off the ground, and Alberta's worst spill since 1980 will probably make it tougher.

A rupture in a line operated by Nexen, a unit of China's Cnooc Ltd., spewed 31,500 barrels of bitumen, waste water and sand into the bog-like muskeg of the province's north this month, igniting outrage from communities along pipeline routes. The crude in the slurry would be enough to make gasoline to fill up about 15,000 cars.

The leak is bolstering opposition that has stalled every major crude export project from Canada in recent years and may lead to more stringent regulations. The delays to multibillion-dollar pipelines such as TransCanada Corp.'s Keystone XL are threatening output growth and have led producers to turn to costlier trains for transport.

“Every high profile incident and spill, especially those that involve operator malfeasance, gets major play and adds to the call to stop new pipelines,” said Michal Moore, a University of Calgary economist and former California energy regulator. There’s “no question” this one will lead to more scrutiny, he said.

Alberta Premier Rachel Notley said the leak will shake public confidence and called for an investigation that “can produce clear, meaningful recommendations to ensure that it doesn’t happen again.”

Among aboriginal leaders expressing concern is Byron Bates, a councilor from a Fort McMurray band that has lands as close as 10 kilometers (6 miles) from the spill.

“It’s still two big football fields of black goo,” Bates told reporters on July 24 after a visit to the site.

Aboriginal Backing

Support from communities is an important consideration in pipeline investment decisions in Canada. Indigenous groups across the country have said leaks may harm lands where they fish and hunt.

Enbridge Inc. has put off a firm timeline for its Northern Gateway line to the Pacific Coast as it tries to win aboriginal backing.

“The Nexen spill is going to be brought into the larger conversation of why we don’t need tar-sands pipelines,” said Kendall Mackey, the national tar-sands campaign manager with Energy Action Coalition in Washington.

On July 15, a worker identified the leak from the eight-month-old line used to deliver crude to a processing facility. The spill may have begun as early as June 29, when it was restarted after maintenance, Ron Bailey, senior vice-president of operations at Nexen, said at the site on July 22. It will take months to investigate the cause, he said.

‘Root Causes’

“Our focus today is really the safety, the environment and the root causes,” Nexen Chief Executive Officer Fang Zhi said at the site.

It’s too early to know whether rules will change, Colin Woods, manager of enforcement and surveillance at the Alberta Energy Regulator, said while touring the site.

Requirements the regulator could consider include scheduled and random inspections of pipelines during construction and while in operation, as well as better spill detection technology, University of Calgary’s Moore said.

In the meantime, the spill is getting bad press in Canadian newspapers every day.

“An incident in the oil sands reinforces this general negativity that’s playing into the challenge to get pipelines built,” said Steven Paget, an analyst at FirstEnergy Capital Corp. in Calgary.

ATTACHMENT C

PLATTS - MCGRAW HILL

US coal miner Alpha Natural Resources files for bankruptcy

Houston (Platts)--3 Aug 2015 518 pm EDT/2118 GMT

In a move that had been expected for weeks, Alpha Natural Resources became the third and largest major US coal producer to file for Chapter 11 bankruptcy protection Monday in the US Bankruptcy Court for the Eastern District of Virginia amid strong economic headwinds and \$4.2 billion in debt.

The voluntary restructuring comes amid numerous challenges for the debt-strapped company and its 150 subsidiaries, which listed \$1.96 billion in secured debt, \$2.1 billion in unsecured debt and a \$109 million convertible note that had been due the first business day after August 1.

"A confluence of numerous external factors, including historically depressed coal markets and impending financial obligations ... made it apparent that action had to be taken," Bristol, Virginia-based Alpha said in a note to its retirees. "We chose to be proactive in addressing the viability of the company rather than waiting until liquidity was no longer available."

Mining operations, coal sales, and customer shipments are expected to continue without interruption, Alpha said in a statement.

Alpha secured \$692 million debtor-in-possession financing package for 18 months arranged by Citigroup.

"The DIP financing package demonstrates the support of [Alpha's] secured creditors and provides the company with significant operational flexibility to successfully reorganize," it said.

The company joins Walter Energy, which filed for Chapter 11 protection in July and earlier this year, Patriot Coal. Its assets and liabilities total \$10.1 billion and \$7.1 billion, respectively, Alpha said. The company has slightly less than 8,000 employees and 2014 revenues of \$4.3 billion.

The company posted a net loss of \$875 million in 2014 as the collapse in coal demand and prices resulted in "steadily contracting cash flow from operations."

The company, which started with seven employees in 2002, recorded roughly a decade of growth fed by the \$2 billion purchase of Foundation Coal in 2009 and the acquisition of Upper Big Branch operator Massey Energy in 2011.

Alpha, which has about 2.4 billion st of proven coal reserves and another 1.2 billion st of probable reserves, is the largest coking coal exporter in the US. Met coal exports have been hit extremely hard by both global oversupply and falling prices.

Since 2011, the company's coal sales and revenues had dropped to roughly 85 million st and \$4.3 billion from 1.1 billion st and \$7.1 billion, respectively, it said Monday.

The company had been scheduled to make a payment on a \$109 million convertible note due to Massey, which originated in the company's \$7.1 billion purchase of Massey's assets in 2011.

Alpha mined 13.8 million st of coal in the second quarter of 2015, compared with 15.6 million st in the first quarter of 2015 and 14.6 million st in Q2 2014, according to Mine Safety and Health Administration data. Its quarterly production peaked at more than 25 million st in Q1 2007.

Alpha has cut its Central Appalachian and Powder River Basin production by idling or closing more than 80 mines since July 2011 and reduced its workforce to less than 8,000 employees from 14,500 employees.

The company had roughly \$1 billion outstanding surety bonds as of June 30 and asked the court to be allowed to continue paying those bonds.

Additionally, Alpha has about 200 open coal sales contracts. The company requested an order confirming its ability to enter into and perform contracts.

Alpha also hopes filing for protection will give it time to "develop and implement" a business plan that will "deleverage" its balance sheet and reorganize in a way that "maximizes value for stakeholders."

The company had been given until August 24 by the Wyoming Department of Environmental Quality to come up with an alternative bonding mechanism for more than \$400 million in self-bonding guarantees in the state.

Alpha had challenged that decision and with the bankruptcy filing hopes to obtain a temporary block to that order. Otherwise, the state could technically revoke the company's mining permits and licenses at its Wyoming mines, the company said.

State regulators in West Virginia also are working with Alpha to create an alternative to self-bonding, the company said.

Alpha Chairman and CEO Kevin Crutchfield said the Chapter 11 filing will enable the company to restructure its debt and protect operations.

"The US coal industry is in an unprecedented period of distress, with increased competition from natural gas, an oversupply in the global coal market, historically low prices due to weaker international and domestic economies," Crutchfield said.

Crutchfield added that increasing government regulation was pushing electric utilities to transition away from coal-fired power plants to natural gas and other sources. The US coal industry will likely get smaller, he added.

Alpha affiliates operate more than 50 underground and surface mines and more than 20 coal preparation facilities in Virginia, Kentucky, West Virginia, Pennsylvania and Wyoming, the company said.

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