ENVIRONMENTAL LAW & POLICY CENTER
Protecting the Midwest's Environment and Natural Heritage

MEMORANDUM

TO: Sharon Corrigan, Dane County Board Chair
Committee Members, Dane County Zoning & Land Regulation Committee
David R. Gault, Dane County Assistant Corporation Counsel

FROM: Jennifer Tarr, Josh Zaharoff & Stephanie Chase, Environmental Law & Policy Center

RE: Imposing Insurance Requirements Under the Pipeline Safety Act

DATE: January 9, 2015

INTRODUCTION

The Environmental Law & Policy Center ("ELPC") appreciates the Dane County Zoning & Land Regulation Committee members' consideration of this memorandum explaining why the County has the legal authority to impose an additional insurance requirement in order to ensure that Enbridge has adequate coverage for potential pollution clean-up and injury pay-outs if there were to be a spill from its Line 61 pipeline. Enbridge is seeking a County permit that would allow increased horsepower for a pump station in advance of an increase in oil flow on Line 61. ELPC disagrees with Enbridge's argument that the County is somehow preempted by the federal Pipeline Safety Act, 49 U.S.C. § 60101 *et. seq*, from requiring adequate insurance in the event of a pipeline spill or other accident.

The federal Pipeline Safety Act ("PSA" or "Act") expressly preempts pipeline safety regulations, but does not preempt other economic and financial regulations, including insurance regulations. The PSA includes a list of minimum safety requirements that does not mention any financial or economic requirements like insurance regulations. *See* 49 U.S.C. § 60102(a)(2)(B).

Several courts have expressly held that insurance requirements are not safety regulations under the Act. *See Kinley Corp. v. Iowa Utils. Bd.*, 999 F.2d 354, 357 (8th Cir. 1993); *Olympic Pipe Line Co. v. City of Seattle*, 316 F. Supp. 2d 900, 907 (W.D. Wash. 2004). In addition, two recent United States Court of Appeals decisions have found that municipalities can adopt extensive regulations on pipelines and pipeline stations under the Act, including regulations that have incidental effects on safety. *See Washington Gas & Light Co. v. Prince George's City Council*, 711 F.3d 412 (4th Cir. 2013); *Texas Midstream Gas Servs., LLC v. City of Grand Prairie*, 608 F.3d 200 (5th Cir. 2010).

By contrast, Enbridge can point to only one unreported order in which the Western District of Texas found insurance requirements to be preempted by the Act, and even that non-precedential order is superseded by a more recent opinion from the Fifth Circuit that held the opposite in cases like this one. *See Texas Oil & Gas Ass'n v. City of Austin, Texas*, W.D. Tex., 2003-cv-00570 Order (Nov. 7, 2003).

Furthermore, in an analogous case, the United States Supreme Court held that a state statute regulating economic aspects of nuclear power plants was not preempted by the federal Atomic Energy Act. The Court noted that although the federal government had express control over safety issues pertaining to radiological safety, that did not prevent states from dealing with traditional state financial utility concerns. *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205 (1983). The same principle applies here.

The Dane County Board has legal authority, as explained in more detail below, to impose additional insurance requirements on Enbridge as reasonable economic regulation, especially in light of the several major Enbridge oil pipeline spills in the Midwest leading to substantial clean-up costs. Such regulations have been imposed on an Enbridge-owned pipeline in Washington

State to ensure that the company had adequate coverage for pollution clean-up and injury pay-outs – the City of Kirkland required $150 million in additional insurance for the Olympic line to run through the city. Surety bonds for interstate hazardous liquid pipelines are also imposed in Iowa, as discussed further in Part II below.

ANALYSIS

I. Courts Presume that State Law Has Not Been Preempted Unless Congress Expresses a Clear Intent To The Contrary.

When looking at questions of preemption, courts begin by presuming that state law has not been preempted. *See Patriotic Veterans, Inc. v. State of Indiana*, 736 F.3d 1041, 1046 (7th Cir. 2013). "[G]iven the historic police powers of the states, a court must assume that Congress did not intend to supersede those powers unless the language of the statute expresses a clear and manifest purpose otherwise." *Id.* Therefore, when the text of a preemption clause is "susceptible to more than one plausible reading," courts generally "accept the reading that disfavors preemption." *Id.* (internal quotations and citations omitted). *See also, e.g.*, *Bell v. Cheswick Generating Station*, 734 F.3d 188, 198 (3d Cir. 2013) ("In all pre-emption cases . . . we start with the assumption that the . . . powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.") (*quoting Medtronic, Inc., v. Lohr*, 518 U.S. 470, 485 (1996)).

In light of the clear presumption against preemption, an insurance requirement should be upheld by a court unless the PSA includes statutory language expressing "a clear and manifest" intent to the contrary. As discussed in Part B below, the PSA does not include any language expressing intent to preempt financial requirements like insurance requirements.

A. The Pipeline Safety Act Expressly Preempts Safety Standards, But Does Not Define Insurance Requirements to be Part of Those Standards.

The Pipeline Safety Act sets forth its requirements and limitations on preemption with respect to interstate pipelines in Section 60104(c): "A state authority may not adopt or continue in force safety standards for interstate pipeline facilities or interstate pipeline transportation." *See* 49 U.S.C. § 60104(c). Because Congress expressly defined the preempted area to be "safety standards," preemption doctrine holds that no other area is implicitly preempted by the Act. *See, e.g., Cipollone v Liggett Group, Inc.*, 505 U.S. 504, 516 (1992); *Texas Midstream Gas Servs., LLC v. City of Grand Prairie*, 608 F.3d 200, 210 (5th Cir. 2010).

The PSA does not define safety standards in its definitions section. However, Section 60102(a)(2) sets forth a requirement that the Secretary of Transportation prescribe minimum safety standards, and notes that these standards "may apply to the design, installation, inspection, emergency plans and procedures, testing, construction, extension, operation, replacement, and maintenance of pipeline facilities" and must include a requirement that "all individuals who operate and maintain pipeline facilities" be "qualified to operate and maintain the pipeline facilities." *See* 49 U.S.C. §§ 60102(a)(2)(B), (C). Insurance requirements are not included in the minimum safety standards prescribed by the PSA.

If the minimum safety standards are taken as an indication of what the PSA considers to be pipeline safety, then the presumption against preemption counsels that by leaving insurance requirements out of the list of minimum standards, insurance requirements are not a safety requirement and therefore are not preempted by the PSA. Dane County would therefore be free to impose insurance requirements on Enbridge as a condition of permit renewal.

B. The Seventh Circuit Has Applied The Presumption Against Preemption in Numerous Cases.

Since Dane County, Wisconsin falls within the Seventh Circuit, case law from the Seventh Circuit on preemption under the PSA would control. We did not find a case in the Seventh Circuit that directly addresses the issue of preemption under the PSA. Nonetheless, Seventh Circuit law is very clear that courts should follow the presumption against finding preemption of state statutes. *See, e.g.*, *Patriotic Veterans Inc. v. State of Indiana*, 736 F.3d 1041, 1046, 1048 (7th Cir. 2013) ("The plain language of the text reinforced by the presumption against preemption prevents this court from looking any further—odd result or not."); *Planned Parenthood of Ind., Inc. v. Comm'r of the Ind. State Dep't of Health*, 699 F.32 962, 984 (7th Cir. 2012); *Frank Bros. v. Wis. DOT*, 409 F.3d 880 (7th Cir. 2005).

Moreover, current Seventh Circuit Judge David Hamilton wrote an opinion that briefly touches on preemption under the PSA while he was still a district court judge in the Southern District of Indiana. It demonstrates a reluctance to make a preemption finding.

In *Panhandle Eastern Pipe Line Co. v. Madison County Drainage Board*, a pipeline company sued to prevent a county drainage board from widening and deepening a drainage ditch in ways that would either damage the company's pipelines or force the company to pay to bury the lines deeper in the ground. *See* 898 F. Supp. 1302, 1304 (S.D. Ind. 1995). The company alleged that the PSA preempted Indiana's drainage statutes to the extent that they could be used to expose the lines to the open air, remove supports where they cross the drain, or reduce the amount of cover over the pipelines. Judge Hamilton found that there was no conflict between the state and federal law, and therefore no preemption, because it was possible to comply with both by simply burying the lines more deeply near the drain. *See id.* at 1315.

In addition, multiple appellate and district courts in other circuits have directly examined the question of whether financial requirements are preempted under the PSA and found that such requirements are not safety standards, as discussed below. Following the strong presumption against preemption adopted by the Supreme Court and the Seventh Circuit, an insurance requirement should be upheld by a court within the Seventh Circuit.

II. Multiple Courts Have Expressly Held That Financial Requirements Are Not Safety Standards Within the Context of the PSA.

Multiple courts have examined financial requirements within the context of the PSA and found that they are not safety requirements. For example, in *Olympic Pipe Line Co. v. City of Seattle*, the Ninth Circuit invalidated the City of Seattle's attempts to regulate hazardous liquid pipelines because the court found that the regulations were preempted by the PSA. After a section of Olympic's hazardous liquid pipeline exploded in Washington, Seattle decided not to renew Olympic's franchise for the section of the line within city limits unless the company complied with a list of pipeline safety demands. These demands included the completion of a hydrostatic test. *See* 437 F.3d at 874. As noted in the PSA's minimum safety standards, testing clearly falls within the realm of safety contemplated by the PSA regulations and was properly preempted. *See* 49 U.S.C. § 60102(a)(2)(B).

Contrary to Enbridge's assertions, it does not automatically follow from *Olympic Pipe Line Co.* that states and municipalities cannot enforce insurance bonds on pipeline companies. *Olympic Pipe Line Co.* offered a clear case where the municipality attempted to regulate in an area that the PSA plainly deemed to be a safety requirement. To the contrary, the PSA's minimum safety requirements do not mention insurance bonds nor any other type of financial instrument. 49 U.S.C. § 60102(a)(2)(B). A strong argument can therefore be made that

insurance requirements do not fall within the realm of safety regulations that are preempted by the PSA.

Indeed, the district court that originally invalidated the City of Seattle's attempts to regulate Olympic did not consider state or local enforcement of liability insurance to be a safety requirement preempted by the PSA. In fact, the court noted that its determination did not preclude the City of Seattle from taking other actions that could affect Olympic's continued operation of the pipeline, and noted that "Seattle's demand that Olympic provide liability insurance coverage for loss from the pipeline . . . would not likely be considered safety regulation that is preempted by federal law." *See Olympic Pipe Line Co. v. City of Seattle*, 316 F. Supp. 2d 900, 907 (W.D. Wash. 2004). The Ninth Circuit noted that the district court did not consider liability insurance to be preempted and did not comment on it, noting in a footnote that those issues were not appealed. *See Olympic Pipe Line Co.*, 437 F.3d at 876–77, n.10.

Despite Enbridge's assertions, the Eighth Circuit's decision in *Kinley Corp. v. Iowa Utils. Bd.* also supports the argument that the imposition of an insurance requirement on a hazardous liquid pipeline is acceptable under the PSA. The case makes clear that financial requirements on hazardous liquid pipelines are not safety provisions under the Act. *See* 999 F.2d 354 (8th Cir. 1993).

In *Kinley Corp.*, the Eighth Circuit overturned Iowa's state statute that regulated hazardous liquid pipelines because the *safety provisions* of the statute were expressly preempted by the Hazardous Liquid Pipeline Safety Act of 1979. The court held that the non-safety provisions of the statute were not severable from the safety provisions as written and had to be overturned *for that reason. See id.* at 356.

The Eighth Circuit was specific in its description of financial responsibility provisions

designed (1) to protect Iowa farmland and topsoil from damage and (2) to guarantee the payment of property and environmental damages as "non-safety provisions." *See Kinley Corp.*, 999 F.2d at 357. Iowa rewrote its hazardous liquid pipeline statute following the *Kinley Corp.* case in order to remove the offending safety-related sections. *See* Iowa Code § 479B. Iowa Code § 479B.13 currently requires a surety bond of $250,000 or property valued in excess of $250,000 in the state of Iowa subject to execution in the event of damages from construction or operation of a pipeline or gas storage in the state. *See id.* No challenges have been made to the new provision. The fact that Iowa rewrote its hazardous liquid pipeline statute to include a surety bond further implies that such a provision is acceptable under circumstances where it is not otherwise linked to preempted safety provisions.

In light of the Eighth Circuit's clear statement that financial responsibility requirements are not safety provisions, Enbridge's argument that the PSA "leaves nothing to the states in terms of substantive safety regulation of interstate pipelines," *see* Enbridge Madsen Letter at 5 (quoting 828 F.2d at 470), is irrelevant. Economic regulations are not safety regulations, and therefore they would not be preempted.

The only case law Enbridge can cite that found insurance requirements to be preempted by the PSA is an unreported order that consequently has no precedential value. *See Texas Oil & Gas Ass'n v. City of Austin, Texas*, W.D. Tex., 2003-cv-00570 Order (Nov. 7, 2003). Moreover, the case was decided several years before the Fifth Circuit decided *Texas Midstream Gas Servs., LLC v. City of Grand Prairie*, which held that local governments can regulate pipelines, even in ways that incidentally affect pipeline safety, as long as the effect is not direct and substantial. *See*

Texas Midstream, 608 F.3d 200 (5th Cir. 2010). The decision would likely have bound the district court in the other direction, eliminating even this weak piece of Enbridge's argument.[1]

III. Recent PSA Preemption Cases Support Local Non-Safety Pipeline Regulations.

The argument that the imposition of insurance requirements is not preempted by the PSA is bolstered by two recent appellate cases on federal preemption of gas pipeline regulations.

In *Texas Midstream Gas Servs., LLC v. City of Grand Prairie*, Texas Midstream Gas Services sued the City of Grand Prairie after the city council adopted an ordinance requiring that all compressor stations (1) comply with setback requirements, (2) have an eight foot security fence, (3) enclose equipment and sound attenuation structures within a building, (4) meet certain aesthetic standards, (5) "pave means of vehicular access in response to the company's plans to build a pipeline and compressor station," and (6) not emit noise in excess of predevelopment ambient levels. 608 F.3d at 203-04. Texas Midstream alleged that the requirements were

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[1] Enbridge cites language from the Western District of Texas in its letter to Dane County which notes that the insurance requirements "conflict with and frustrate the purpose of the joint federal-state regulatory scheme." W.D. Tex., 2003-cv-00570 Order (Nov. 7, 2003) at *7. According to the court, because pipelines cannot be installed, operated, or relocated unless they comply with the ordinance, the city could limit the operations of the pipeline in several other cities as well, creating the "type of piecemeal regulation that the PPA [sic] and state regulations seek to avoid with the establishment of a consistent, across-the-board regulatory scheme." *Id.* Enbridge parrots this claim in the concluding paragraphs of the insurance section of its letter to Dane County. *See* Enbridge Madsen Letter at 6.

The Western District's finding of conflict preemption would be unlikely to be upheld in the wake of *Texas Midstream*. County zoning requirements like the City of Grand Prairie's setback requirements place restrictions on the construction and relocation of pipelines and stations, and the noise requirements that were also upheld in *Texas Midstream* could place restrictions on their operation as well. Yet the Fifth Circuit found that such restrictions *were not* preempted by the PSA's safety standard preemption clause. It is therefore unlikely that the court's conflict preemption argument would still be upheld.

preempted by the PSA. The district court found that the security fence was preempted by the PSA, but that all other requirements were lawful and severable. *See id.*

The Fifth Circuit affirmed the district court. It found that the ordinance requirements were not preempted by the PSA because they "primarily ensure[] that bulky, unsightly, noisy compressor stations do not mar neighborhood aesthetics." *See Texas Midstream*, 608 F.3d at 211. The fact that local rules incidentally affect safety has no bearing on preemption as long as the effect is not "direct and substantial." *See id.* (*quoting English v. Gen. Elec. Co.*, 496 U.S. 72, 85 (1990)). Although the setback requirements could incidentally affect fire safety by requiring a greater distance between the compressor station and adjacent buildings, this "incidental salutary effect on fire safety does not undermine Congress's intent in promulgating the PSA." *Id.*

In *Washington Gas & Light Co. v. Prince George's City Council*, the Fourth Circuit held that the PSA does not preempt county zoning plans that aim to promote transit-oriented land development, given that such zoning plans are not safety regulations. 711 F.3d 412, 416, 421 (4th Cir. 2013). The court found that in light of the goals of the county to promote development consistent with "neighborhood character areas," make development pedestrian-oriented, and "restore, protect, and enhance the environment by protecting environmentally sensitive areas, minimizing the impacts of development, and expanding recreational opportunities," it is clear that the goal of the county was primarily "local land use regulations as opposed to safety regulations." *See id.* at 421. It also found that even assuming that safety regulations played some role in the enactment of the zoning plans, those concerns would have been incidental to the overall purpose of the plans. *See id.* at 421–22.

A court would likely view insurance requirements in the same vein as the setback requirements of *Texas Midstream* or zoning plan requirements of *Washington Gas & Light* –

even if they have the effect of making operators act in a safer manner so as not to trigger the insurance policy, such effects are incidental and salutary, and therefore not preempted by the PSA.

The cases also provide strong counter-arguments to Enbridge's claim that the imposition of insurance requirements by every county along a line would thwart a Congressional scheme on safety. For starters, insurance requirements have nothing to do with safety. Second, both the Fourth Circuit and the Fifth Circuit approved the imposition of aesthetic requirements, which are significantly more intensive than an insurance requirement as they dictate setbacks and times for operation, among other things. Moreover, the Fourth Circuit soundly rejected the reasoning that allowing states and counties to adopt non-safety regulations for pipelines would contravene the federal regulatory scheme, noting that:

> County Zoning Plans do not stand as an obstacle to the accomplishment of the full purposes of Congress, because, as noted above, Congress' purpose in enacting the PSA was to create federal minimum safety standards on all natural gas pipeline facilities. *See 49 U.S.C. § 60102(a)*. Because the County Zoning Plans are not safety standards, they do not stand as an obstacle to the accomplishment of this purpose.

Washington Gas & Light Co., 711 F.3d at 422.

It is conceivable that Enbridge could use the "goals of the county" reasoning in *Washington Gas & Light* to argue that the goal of Dane County is to make Enbridge's pipelines safer, and that such a regulation would therefore fall within the scope of the preempted section of the PSA. However, based on the reasoning in the case, Dane County should be fine as long as it simply makes clear that its goals are to ensure that Enbridge has enough money to cover the cost of clean-up in the event of a spill.

CONCLUSION

The PSA expressly preempts safety standards, but no other form of state regulation. Given that the PSA does not include insurance requirements in its list of minimum safety

requirements, the clear case law holding that financial requirements are not safety requirements, and the fact that insurance requirements do not come into play until after a spill occurs, it is not likely that a court would deem insurance minimums to be a safety requirement for the purposes of the PSA. Such requirements are economic requirements, and well-justified ones in light of Enbridge's track record of costly spills in the Midwest. Consequently, a court is not likely to find that insurance requirements are preempted by the Act.