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M E M O R A N D U M

TO: Zoning and Land Regulation Committee

FROM: David R. Gault, Assistant Corporation Counsel

DATE: December 4, 2014

RE: Enbridge Pipeline Pump Station CUP

On November 25, 2014 counsel for Enbridge provided legal analysis regarding several issues concerning the proposed CUP conditions on the pipeline pumping station. Enbridge asserts that a condition requiring financial responsibility bond is preempted by the Federal Pipeline Safety Act and would violate the Commerce Clause of the U.S. Constitution. They also assert that the county lacks authority to require the preparation of a environmental impact statement. In my opinion the law is not as "black and white" on any of these issues as Enbridge asserts. As to the Federal preemption, there are good faith arguments both supporting and opposing the county's authority to impose a condition requiring insurance or a bond. It remains my opinion, however, that such a requirement is legally defensible. Furthermore, such a requirement does not violate the Commerce Clause, and the county has authority to impose a condition requiring an environmental impact statement under its zoning authority.

FEDERAL PREEMPTION

On September 30, 2015 I wrote an opinion regarding Federal preemption. I stand by the conclusions in that opinion. Enbridge has submitted a Memo raising additional issues regarding federal preemption. I have reviewed the authority cited by Enbridge, and although there are arguments both pro and con, it remains my opinion that a CUP condition imposing a financial responsibility requirement is not preempted by federal law.

Enbridge cites *Kinley Corp. v. Iowa Utilities Bd.*, 999 F.2d 354, 357 (8th Cir., 1993) as standing for the proposition that "'financial responsibility provisions…to guarantee payment of property and environmental damages' were preempted." In fact what the court in *Kinley* stated was that the environmental and damage requirements were preempted because they were not severable under Iowa law from safety provisions contained in the statute. The court did not expressly address the substance of the environmental and damage remedies.

Likewise, Enbridge cites *Olympia Pipe Line Co. v. City of Seattle*, 437 F.3d 872, 874-75 (9th Cir. 2006) as standing for the proposition that "indemnification requirement preempted." However, the district court "did not consider Seattle's demand that Olympic provide liability insurance to be a safety demand preempted by federal law." *Id.*, at 877, n.10. That issue does not appear to have considered on appeal.

Enbridge correctly cites *Texas Oil & Gas Ass'n. v. City of Austin, TX*, No. 03-CV-570-SS (W.D. Tex., Nov. 7, 2003) as expressly holding that a financial responsibility requirement on a pipeline was preempted. Indeed, the court in that case held that it was not convinced that the requirement "is not about pipeline safety." Without specifically deciding that issue, the court found that the ordinance "conflicts and frustrates the purpose of the joint federal-state regulatory scheme." The court further held that the Austin ordinance "is exactly the type of piecemeal regulation" the federal law seeks to avoid with a consistent, across-the-board regulatory scheme." *Id.*, at 7. This is the only case I have been able to find that expressly held that a financial responsibility requirement was preempted by federal law.[1] It must be noted, however, that the cited Order was for a preliminary injunction. The case is not reported and was not appealed. It appears that the City of Austin chose to drop the requirement rather than continuing to litigate the issue. Although this case is persuasive authority, it is not precedent that would be binding on either a state or federal court in Wisconsin.

The decision in *Texas Oil & Gas Ass'n.* is based upon the doctrine of conflict preemption. The U.S. Supreme Court recently considered conflict preemption in *Arizona v. United States*, 132 S.Ct. 2492 (2012). That case considered whether statutes adopted by the State of Arizona regarding unlawful aliens was preempted by comprehensive federal regulation of immigration. The court recognized that conflict preemption applies in two instances: "where compliance with both federal and state regulations is a physical impossibility, and those instances where the challenged state [local] law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,..'" *Id.*, at 2501.

Clearly it is not physically impossible for Enbridge to comply with the federal Pipeline Safety Act and a local zoning condition requiring proof of financial responsibility. Therefore, Enbridge's only conflict argument would be that the local regulation "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." When applying this standard, the Supreme Court noted in *Arizona* that "[w]hat is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purposes and intended effects." The court further recognized that when applying preemption analysis it should be assumed that the "'historic police powers of the States' are not superseded 'unless that was the clear and manifest purpose of Congress.'"*Id.*[2]

Enbridge's conflict preemption claim must be analyzed by examining the applicable federal statutes and identifying Congresses intended purposes and effects. A judgment must

[1] The court also determined the financial responsibility requirement violated the Commerce Clause.

[2] As will be discussed later in this opinion, zoning is a historic police power of the State.

then be made as to whether the financial responsibility requirement is an obstacle to those purposes and objectives. The Pipeline Safety Act deals with pipeline safety, design, construction, operation, maintenance and spill response planning provisions. It does not address pipeline spill clean up. Nothing in the PSA expresses a Congressional intent to preempt local requirements regarding spill clean up. But, the PSA is not the only federal statute that must be analyzed. The PSA must be read in conjunction with the Oil Pollution Act (OPA) 33 U.S.C. §2701, e*t seq.*, that wad specifically enacted by Congress to addresses oil spill clean up.

The OPA requires operators of pipelines to assume the burden of spill response, natural resource restoration, and compensation for damages caused by a spill up to liability limit of $350,000,000. The OPA also requires that the operator provide proof of financial liability, and created the Oil Spill Liability Trust Fund to cover costs for responding to oil spills that are above the responsible party's liability limits. Most importantly, the OPA specifically states that it does not preempt state and local liability requirements. The OPA, at 33 U.S.C.§ 2718(a)(1) states:

> (a) Nothing in this Act….shall:
> (1) Affect, or be construed or interpreted as preempting, the authority of any State or political subdivision thereof from imposing any additional liability or requirements with respect to –
> (A) the discharge of oil within such State; or
> (B) any removal activities in connection with such a discharge.

Section 2718(a)(1) specifically authorizes political subdivisions of states to impose additional liability requirements, including financial responsibility requirements, on pipelines. In short, when you look at the comprehensive scheme of federal legislation regarding pipeline regulation, local requirements for financial responsibility are NOT preempted.

Applying the test set forth by the Supreme Court in *Arizona v. United States* for conflict preemption, it is my conclusion that a financial responsibility condition is not preempted by federal law.. First, the Supreme Court has stated that a historic police power, like zoning, will not be superseded "unless that was the clear and manifest purpose of Congress." More importantly local regulations will only be preempted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Clearly that is not the case here as Congress has authorized such local requirements.

COMMERCE CLAUSE

Enbridge asserts that an insurance or surety bond requirement would impermissibly burden interstate commerce in violation of the Commerce Clause of the U.S. Constitution. The Supreme Court has held that local laws affecting commerce may be put into one of three categories. The first category involves laws that explicitly discriminate against interstate commerce. This category is referred to as disparate treatment, and such laws are per se unconstitutional. The second category is referred to as disparate impact and involves laws

that appear to be neutral among states but bear more heavily on interstate commerce than on local commerce. When the effect is powerful to the extent it acts as an embargo on interstate commerce the courts treats it as discrimination. The third category comprises laws that affect commerce but do not give local firms any competitive advantage over those located elsewhere. Such laws are only subjected to the normal rational-basis standard. *National Paint & Coatings Ass'n v. City of Chicago*, 45 F.3d 1124, 1131-32 (7th Cir. 1995), *cert. denied*, 515 U.S. 1143 (1995).

Enbridge asserts that an insurance or surety bond requirement falls into the first category and is per se invalid.[3] They cite no facts or authority for this proposition, and none exists. Such a requirement in no way favors any kind of commercial interest in Dane County or the State of Wisconsin.

Enbridge correctly states that if a law is not discriminatory, but has a incidental affect on interstate commerce and is directed to legitimate local concerns, a balancing test set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) is applied. The Seventh Circuit Court of Appeals has further refined the *Pike* test in *National Paint & Coatings Ass'n.*, rejecting the rote application of a balancing test as "broader all-weather, be reasonable vision of the Constitution…," and instead applied a rational-basis inquiry. *National Paint & Coatings Ass'n.*, 45 F.3d at 1130. The court held that in applying *Pike*, "the Court has looked for discrimination rather than for baleful effects. *Id.* The Seventh Circuit then applied *Pike* to Chicago's ban on the sale of all spray paint and held "the ordinance affects interstate shipments, but it does not discriminate against interstate commerce in either terms or effect. No disparate treatment, no disparate impact, no problem under the dormant commerce clause." *Id*, at 1132. [4]

In my opinion the proposed financial responsibility condition is neutral as to interstate commerce. It does not discriminate against interstate commerce as creates no local advantage. Clearly the proposed financial responsibility condition is a legitimate local interest. Therefore, it passes the rational basis test of *Pike*, as applied by *National Paint & Coatings Ass'n*, and does not violate the Commerce Clause.

COUNTY'S AUTHORITY TO REQUIRE AN ENVIRONMENTAL IMPACT STATEMENT

Enbridge desires to build a pumping station on its pipeline located on land zoned A-1 Exclusive Agriculture [A-1(EX)] in the Town of Medina. A pipeline pumping station is a conditional use in the A-1(EX) district. Enbridge asserts that the county lacks authority to require preparation of an environmental impact statement (EIS) as a condition of a CUP. Enbridge's position is based upon two erroneous premises. First, it argues that the county has no authority to require a EIS under its limited home rule authority. But, counties do not zone pursuant to home rule. Rather, a counties' zoning authority is a specific statutory police power granted by the Legislature. Second, Enbridge asserts that the Wisconsin Environmental Protection Act (WEPA), Wis. Stat §1.11, provides the exclusive authority for

[3] Enbridge cites *ANR Pipeline Co. v. Schneiderwind*, 801 F.2d 228 (6th Cir 1986) for the proposition that "local laws that regulate interstate pipelines impose a burden on interstate commerce." This case did not involve local regulation of a pipeline, but rather local regulation of securities issued by a natural gas company.

[4] The Seventh Circuits opinion in *National Paint & Coatings Ass'n* is the controlling precedent in Wisconsin.

"agencies of the state" to require an EIS. However, the County does not propose act as an agency of the state, but rather under its specific zoning authority.

Enbridge is correct regarding the limitation on a county's administrative home rule authority. But zoning ordinances are enacted pursuant to local government's police powers. *Zwiefelhofer v. Town of Cooks Valley,* 338 Wis.2d 488, 494 (2012). Wisconsin was the first state in the union to grant counties comprehensive zoning powers. A county zoning ordinance is a valid exercise of police powers. In the exercise of those powers a county may impose restrictions upon the use of property in the interests of public health, morals, safety, public welfare, convenience and general prosperity. *Jefferson County v. Timmel*, 261 Wis. 51, 59 (1952), *see also, State ex rel. Carter v. Harper*, 182 Wis. 148, 154-55 (1923). . Generally, courts will not interfere with the exercise of police powers by a municipality unless it is clearly illegal. *Kmiec v. Town of Spider Lake*, 60 Wis.2d 640, 652 (1973). In an unpublished opinion the Wisconsin Court of Appeals held that the County acted appropriately when it approved conditions of a CUP to protect the environment. *Payne & Dolan v. Dane County*, 234 Wis. 526 (Table), 2000 WL 233116 (Wis. Ct. App. 2000).

The Legislature has expressly granted counties zoning authority in Wis. Stat. §59.69. The purpose of that authority as set forth in sub (1) is "to promote the public health, safety, convenience and general welfare;…to protect property values and the property tax base;…to encourage the protection of groundwater resources; to preserve wetlands; to conserve soil, water and forest resources; to protect the beauty and amenities of landscape…" Conditional uses are not found in the zoning enabling legislation, yet they are in common use in every jurisdiction. Section 59.69(6) authorizes the county to adopt any procedures in addition to those prescribed in Section 59.69 not in conflict therewith. Dane County (and most other Wisconsin counties) has specifically adopted a procedure for considering conditional uses.

Nothing in the WEPA prohibits counties from requiring an EIS as part of the zoning process. Enbridge is correct that the WEPA only applies to "agencies of the state," and the Supreme Court has held that counties are not agencies of the state for purposes of the WEPA. But nothing in the WEPA or in *Robinson v. Kunach*, 76 Wis.2d 436 (1977) prohibits a county from requiring an EIS under its independent zoning authority. Enbridge's argument against county authority is based exclusively upon a lack of home rule authority. They ignore that the County has independent authority pursuant to its police powers expressly granted by the Legislature in Wis. Stat. §59.69. Exercise of that authority does not conflict with the WEPA.

CONCLUSION

The proposed financial responsibility condition is legally defensible. Because Congress expressly stated in the Oil Pollution Act that a state or local liability requirement on pipelines is not preempted, it logically follows that it is not preempted by the Pipeline Safety Act. It also would not violate the Commerce Clause. Although it may affect the interstate shipment of oil, it has no disparate treatment or disparate impact. It is also my conclusion that the County has the authority to require an EIS as a condition of a CUP. The WEPA does not apply to counties. But, counties have independent zoning authority expressly granted by the legislature which does not conflict with the WEPA.

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September 30, 2014

Mr. Roger Lane
Dane County Zoning Administrator
Room 116, City-County Building
Madison, WI 53703

RE: Enbridge Pumping Station Conditional Use Permit

Dear Mr. Lane:

You have requested an opinion regarding the county's authority to impose safety conditions upon the Enbridge Pumping Station as part of a conditional use permit. The pumping station is part of an interstate pipeline facility and is subject to the Pipeline Safety Act, 49 USC §§60101, et seq. (PSA) As a general rule, the PSA does not preempt local zoning and land use regulations, but does expressly preempt any local regulation of pipeline safety. Therefore, the answer to your question lies in whether the county is trying to regulate pipeline safety, or other legitimate concerns subject to the county's police powers.

Your request poses two distinct questions. First, can the committee impose a condition that requires a surety bond that will guarantee clean up of a potential spill? Second, can they make a condition of additional monitoring of the pumping station or lines? As I stated previously, any local regulation of a pipeline that is directly related to safety is preempted by the PSA. Clearly, a monitoring requirement is directly related to safety and is, in my opinion, preempted by federal law. The surety bond issue is a closer call. Most courts that have considered PSA preemption have strictly construed Congress's preemption language. In my opinion, a surety bond requirement is not directly related to the operation or safety of the pipeline and likely would not be preempted by the PCA.

Federal courts have recently considered PSA preemption of local zoning regulations. In *Texas Midstream Gas Services, LLC v. City of Grand Prairie*, 608 F.3d 200 (5th Cir 2010), the court was asked to determine whether a local ordinance requiring a set back from a road, and a requirement of a security fence were preempted by the PSA. It noted that the U.S. Supreme Court has held "courts presume that 'the historic police powers of the States'(like zoning) are not to be curtailed by federal law unless Congress indicates a 'clear and manifest purpose' to do so." *Id.*, at 210, *quoting*, *Cipollone v. Liggett Group, Inc.* 505 U.S. 504, 516 (1992). Furthermore, "Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not preempted." *Id.* The Court of Appeals therefore held that since

"Congress has expressly identified the preempted area (pipeline safety), so we will not ask if others are implicitly covered." *Id.* The court stated that "Pre-emption fundamentally is a question of congressional intent, and when Congress has made its intent known through explicit statutory language, the court's task is an easy one." *Id. at 210-211.*

The court in *Texas Midstream Gas Services* determined that the PSA's preemption was limited to local regulation that has a "direct and substantial" affect on safety. They held that "a local rule can incidentally affect safety, so long as the effect is not 'direct and substantial.'" *Id.* at 211. Therefore, they held that although the setback requirement might incidentally affect fire safety, it was not direct and substantial and was not preempted by the PSA. *Id.* The court did find that the requirement of a security fence was preempted.

More recently, in *Washington Gas Light Co. v. Prince George's County Council*, 711 F.3d 412 (4th Cir., 2013) the Fourth Circuit adopted the rationale of the Fifth Circuit in *Texas Midstream Gas Services*, and held that "the PSA's preemptive effect is limited to the field of pipeline safety…" and that a zoning requirement is not preempted. *Id.* at 421. The court rejected an argument that the challenged zoning regulations were "safety regulations in disguise," and found that they were valid "local land use provisions designed to foster residential and recreational development." *Id.*

The relevant issue regarding the questions you posed is what is directly and substantially related to pipeline safety. The express language of the PSA states that safety standards apply to "the design, installation, inspection, emergency plans and procedures, testing, construction, extension, operation, replacement, and maintenance of pipeline facilities." 49 USC §60111(2)(B). Clearly a local monitoring requirement is directly and substantially related to safety and is preempted. The answer regarding a surety bond is less clear. Does a surety bond have a direct and substantial effect upon pipeline safety? Applying the rationale of the Courts of Appeal in *Texas Midstream Gas Services* and *Washington Gas Light Co.*, it does not. A surety bond would not come into play until after there was a spill and would assure adequate resources for clean up. It would not be directly and substantially related to pipeline safety and the prevention of a spill. If a surety bond is a safety standard it would be the proverbial closing the barn door after the horse has bolted. Therefore, in my opinion, a surety bond condition is not preempted by the PSA.

It should also be noted that a surety bond does not intrude upon the federal regulatory scheme. Congress has expressly provided that the Secretary of Transportation may require a specific amount of financial responsibility for a liquefied natural gas facility. 49 U.S.C. §60111. I can find no similar provision regarding a oil or petroleum pipeline facility.

In your request for opinion you also posed the question as to what are the ramifications if the Zoning Committee imposes safety conditions as part of a conditional use permit. As I have stated local regulation of a pipeline that imposes a safety standard is preempted by the PSA. In that situation, it is likely that Enbridge would seek a judgment in Federal court declaring that the local regulation is preempted by the PSA and an injunction preventing the county from enforcing such a provision.

Please contact me if I can provide additional assistance regarding this matter.

Sincerely,

David R. Gault
Assistant Corporation Counsel