

Dane County Zoning and Land Regulation Committee #CUP 2291
SUPPLEMENTAL TESTIMONY BY 350-MADISON REGARDING THE NEED
FOR INSURANCE AS A CONDITION FOR ANY PERMIT FOR
ENBRIDGE'S WATERLOO PUMPING STATION

350-MADISON would like to supplement its earlier comments dated November 10, 2014, relating to the need for insurance to assure the availability of funds to clean up after any future spill in a conditional use permit (CUP) for the Enbridge Energy Partners' Waterloo Pumping Station.

Since our prior testimony to the Committee, we have had the opportunity to do further research on the subject of the need for environmental impairment insurance in which Dane County is a named insured.

Appended is Enbridge's Form-6 to the Federal Energy Regulatory Commission (FERC) for 2013 (Annual Report). Among the matters of significant concern that are raised by the partnership's Annual Report are the following:

1. ***Limited Partnership.*** The parent company is Enbridge Energy, LP, a limited partnership. The particular subsidiary that has undertaken the Alberta Clipper expansion, which appears to include Line 61, is Series AC. Form-6, at p. 123.1.

In a partnership, the entity to which liability ultimately attaches is not the partnership itself, because there is no corporation as a single entity with an independent existence, in the legal sense. Nor is there any legal liability for the limited partners of Series AC, who provide most of the capital, but are insulated by law from responsibility.

Typically, the aggregation of the firm's general partners, with widely varying assets, should bear the liability for spills from the pipelines it owns. However, a partnership's amorphous form makes the task of assigning responsibility substantially more challenging than were the applicant a single large publicly traded corporation, with its published audited financials and substantial assets. Indeed, as the long 19-year journey through the courts of the [Exxon Valdez case](#) teaches, assurances are needed in all cases when environmental damages and third party losses from industrial activity may be significant, just more so with partnerships.

Of great concern, notwithstanding Enbridge lobbyist's oral, but legally non-binding, assurances, the Report also indicates that the general partners would strongly resist any assignment of liability for a spill on Line 61. It states the general partners *only accept liability for cleanup costs prior to 1991*, and thus, inferentially, would resist accepting liability for subsequent costs not covered by insurance or other responsible parties. Here is the actual reference:

“To the extent that we are unable to recover environmental liabilities through insurance or other potentially responsible parties, we [the limited partners] will be responsible for payment of liabilities arising from environmental incidents associated with the operating activities of our crude oil business. Our General Partner has agreed to indemnify us from and against any costs relating to environmental liabilities associated with our system assets prior to the transfer of these assets to us in 1991. This excludes any liabilities resulting from a change in laws after such transfer. We continue to voluntarily investigate past leak sites on our systems for the purpose of assessing whether any remediation is required in light of current regulations.” Form-6, p. 123.8 (emphasis added).

This reference does claim that, although the General Partners would not agree to indemnify the post-1991 Series AC Limited Partners, those limited partners would be responsible to pay for any cleanup. However, under the statutes that authorize partnerships, the limited partners, as individuals, [would not have any legal obligation](#) to pay for a cleanup beyond the incidental amounts of cash retained by the Series AC partnership left over from their investment.

Furthermore, even if the limited partners were legally liable, no information is provided about how they collectively could voluntarily finance any large non-revenue generating expenditure. As discussed next, Enbridge retains no cash beyond that needed for its normal operations and construction obligations. Also, per that discussion, any assets sales, assuming that they could be forced, would be complicated and uncertain.

As for the general partners, Dane County has no information on who they are, nor their financial assets, including other potential claimants on them. A partnership is designed to maximize after-tax profits to its investors, but also offload the societal risks attendant to its operations on the taxpayer – unless regulators intervene to interrupt such an untoward outcome. That is why comprehensive insurance for the County, and its taxpayers, is essential.

2. ***Master Limited Partnership.*** According to its website, Enbridge Energy Partners is a [Master Limited Partnership](#) (MLP) which is a specific type of partnership for natural resources intended to minimize tax liabilities. They are structured so the company pays no taxes, but instead taxes are due from the individual partners when dividends are paid out. If Enbridge’s partner agreements follow the usual practice, all of the partnership’s income is distributed to its partners.

That means no cash balance is left to facilitate the immediate commencement of major unexpected cleanup activities in the event the federal Oil Spill Liability Trust Fund was also short of cash because of other large competing obligations. According to the Congressional Reference Service's 2011 report, [*Liability and Compensation Issues Raised by the 2010 Gulf Oil Spill*](#) that is often the case:

“Although evidence indicates that the levels of current framework may be sufficient to address the more common mix of spills that have historically occurred, the current combination of liability limits and \$1 billion per-incident OSLTF cap is not sufficient to withstand a spill with damages/costs that exceed a responsible party's liability limit by \$1 billion.”

Enbridge's year-end 2013 financial report indicates that, after accounting for its internally funded capital needs, it had no cash on hand. See Form-6, at p. 121.

Whatever Enbridge's ostensible capacity is, in succeeding years, to levy true-up charges on its pipeline customers to pay for the uninsured part of the cost of a spill, Form-6, at p. 123.13, that procedure has serious limitations. From the perspective of the injured parties, the confidence that the cleanup will proceed competently and with dispatch is less than if the spill had been committed by a major corporation with significant liquid assets, all other things being equal.

For the ability of Enbridge to true up its remediation costs through higher tariffs in the following year may not always produce funds sufficient to pay the full amounts needed. It would be unusual for the shippers who purchase the service in a cost-plus contract to pay for all of the damages caused by negligence of the pipeline operator – and especially not for gross negligence. In the Kalamazoo oil spill case, where Enbridge's [*succession of errors*](#) would be considered grossly negligent, the total cleanup costs are estimated by Enbridge to be \$1.122 billion, which compares to the company's total 2012 revenues of \$1.084 billion. Form-6, p. 114. Even though part of the costs may be recovered from the firm's insurers, the true-up of the remainder nonetheless represents a substantial rate increase that is likely to elicit a less than enthusiastic response from shippers.

In the case where the cleanup costs are very significant, the shippers could in a future case consider that bankruptcy will best protect their dual interests in maintaining shipping capacity without paying enormous bailouts. For, even if the current pipeline owner is forced into bankruptcy, the liabilities from the spill could possibly be [*abandoned as burdensome*](#) for the restructured firm or for the new acquiring company that reemerges from Chapter 11 and keeps the line operating at rates that have been shorn of the cleanup costs.

Asset sales of other parts of Enbridge's pipeline system to pay for a major cleanup, if that is posited in reply, may also be legally challenging, even if Enbridge voluntarily pursued that option, which cannot be relied upon. Enbridge has certainly not legally pledged any of its assets as collateral to Dane County for unremediated damages, and is almost certain to refuse to do so. Such a sale would reduce the present value of the firm's future income, and its stock price. Indeed, just collateralizing the system as surrogate insurance for spills, even if asset sales never took place, would make it impossible to finance the company's planned expansions on attractive terms.

3. ***Insurance Adequacy.*** Enbridge states the 2010 [Kalamazoo spill](#) from Line 6B will cost it \$1.122 billion to remediate, exclusive of fines, penalties and lost revenues (upped to \$1.157 billion in its 2014Q2 report). It had an insurance policy with total limits of liability of \$650 million. The fact that its coverage was just 56% of this spill's cost is only one matter of concern. The other and more important matter is that it turned out to be the wrong kind of policy. Form-6, p. 123.12.

The Report's language on that page is intended to suggest that it had coverage "for pollution liability" intended for oil spills. That is deliberately and grossly misleading. Instead – to translate the Report's obfuscatory wording – Enbridge actually had a substantially less expensive, and less comprehensive, General Liability policy. These general policies contain a broad pollution *exclusion* (other than for "sudden and accidental" events).

The most litigated words in the history of the insurance business are lawsuits where the insurance companies and insureds argue over what "sudden and accidental" pollution is and what should be excepted from the pollution exclusion in General Liability insurance policies (as an example, can an oil spill that, like Kalamazoo, that lasted 17 hours be called "sudden," or is "sudden" limited to the initial release?). These cases [can extend for more than twenty years](#) to resolve.

Because that phrase has no predictable meaning in case law, it simply cannot be relied upon for environmental clean ups, and, as should have been anticipated, Enbridge has had to sue its insurers for payment. If it does not prevail for the first \$145 million now in litigation, Enbridge disclosed that many of its other insurers will refuse payment as well. Form-6, at pp. 123.9 to 123.11.

Obtaining coverage payouts for sudden and accidental pollution events on a General Liability policy that otherwise absolutely excludes claims from all sources of pollution is a singularly unreliable policy for timely environmental cleanups. The type of coverage that unambiguously does cover cleanups that any company, and especially one so prone to accidents as Enbridge, should have purchased is Environmental Impairment Liability (EIL) insurance

4. **Insurability.** In addition to Kalamazoo, there was a second Enbridge pipe line spill in 2010 in Illinois on Line 6A that caused further damages of \$48 million exclusive of fines, penalties and lost revenues. The damages for the second spill were also at least partially insured because the Annual Report refers to the renewal of the Enbridge liability insurance policy. In 2012, there was a third spill at Grand Marsh, Wisconsin, costing \$10.5 million, before fines, penalties and lost revenues. Form-6, at p. 123.10 to 123.13. Enbridge's continuing claims are costing its insurers far more in payouts than the \$7 million it reports paying each year in premiums. That is not sustainable.

Five lessons can be drawn from this discussion about the need for and shape of insurance:

First, Enbridge's structure as a master limited partnership is intended to maximize after-tax returns to investors, but that advantage comes at the price of significantly elevating the risks to Dane County. That compels the County to insist upon comprehensive EIL insurance in order to protect the public from the exposure to the enormous risks that Enbridge's structure and record creates.

Second, Enbridge appears to either seriously underestimate the amount of coverage it needs if it is to assure that there are the resources to complete the cleanups from the types of accidents it has caused, or it has been unwilling to pay higher premiums that would be required to secure excess coverage. Therefore, the County needs to mandate the amount of coverage its staff determines may be needed to restore the land and water crossed by Line 61 to its original condition after a spill, rather than have coverage limits be established by how much the partners decide that they want to pay in premiums. Stripped to its essentials, deference to the Enbridge partners' whims perpetuates their preferred practice to shift major pollution risks to the taxpayer.

Third, not only is the amount of coverage grossly inadequate, but also, in an apparent effort to reduce its premiums, Enbridge failed to secure the type of coverage for environmental impairment that it needs if there are to reliably be the necessary funds for the cleanup. A private profit-making entity should be expected to exert its best efforts to externalize costs, and the County needs to respond accordingly by insisting that the correct type of insurance policy for environmental impairment is purchased to place the pollution risk where it belongs – on the party who receives the profits from the pipeline's operations. Internalization of external costs is essential to correctly price goods and services so that the free market can function to optimize social welfare.

Fourth, any insured company that files claims that far exceed its insurance premiums will, over time, have difficulty renewing its insurance, nonetheless adequate coverage for a reasonably priced premium. Due to its past losses, the ability for Enbridge to purchase environmental impairment insurance at any price, and in any amount, is not certain. The company may be uninsurable for bonafide pollution coverage. But, if Enbridge cannot secure the insurance to which the citizens' of Dane County are entitled, the remedy ought not be to dumb down the

necessary insurance requirements in order to accommodate the company's self-inflicted infirmities. Instead, the marketplace should be allowed to sort out a new, competent management for those assets. Dane County needs to ascertain the details of what is happening with Enbridge's insurers if it is to protect its interests. The vague allusions and claims of confidentiality by the Enbridge's lobbyist should be firmly rejected. As a condition for continuing to process the CUP, full disclosure should be demanded of its relationship with insurers, beginning with a full and complete copy of all of its current insurance policies, and any current drafts of policies for renewals in 2015. Any valid confidentiality concerns, as determined by Corporation Counsel, can be dealt with by non-disclosure agreements.

Fifth, the disclosures here may lead Enbridge to offer self-insurance or fronted insurance – neither of which is actually insurance. If either of the two is proposed, that sort of ersatz insurance should be summarily rejected. For one thing, self insurance fails to offer any assurance that is provided by third parties with verified assets that are adequate. For another, because Enbridge has no significant cash on hand, a master limited partnership cannot even make the invalid riposte that it has a strong balance sheet adequate to cover the risks (for adequate assets does not assure willingness to perform). Similar, fronted insurance is only the shell of insurance because the nominally insured party commits to remitting any claims back to the insurance company. As such, they are not risk-rated and are erected on a house of cards to create the appearance, but not the substance, of true insurance.

For all of these reasons, Dane County should include a requirement to be a named insured party on comprehensive EIL insurance as one of the conditions for any zoning permit it issues for CUP 2291 for the Waterloo Pumping Station. See Attachment A for insurance specifications.

The very risk-based context of insurance, and the way its premiums are calculated, by their very nature, refute all of the defenses that Enbridge has raised. For if, as its avers, the risks of major accidents, of the company having inadequate resources to remediate, or of its being unwilling to apply whatever resources it possess to clean up the land and waters of Dane County to their original condition, are *de minimus*, then the premiums will be *de minimus*. Only if professional actuaries, who are the free market's experts in evaluating risk, assess the situation contrary to Enbridge's bald representations – claims that are belied by its past conduct – will premiums be costly.

Peter Anderson
Chair, 350-Madison Insurance Task Force

Attachment A
RECOMMENDED INSURANCE PROVISIONS

1. **Type.** The type of insurance that should be purchased is Environmental Impairment Liability (EIL) insurance.
2. **Quality.** The EIL insurance policy should be written by a A M Best rated A or better insurance company.
3. **Provisions.** The EIL insurance policy shall have these coverage provisions:
 - a. Clean up expenses
 - b. Bodily injury liability
 - c. Property damage liability
 - d. Natural resource damage
4. **Named insured.** Dane County should be named as an additional insured.
5. **Primary.** The EIL policy should be Primary and non-contributory.
6. **Occurrence.** The policy should be occurrence and not claims made based.
7. **Coverage.** The limit of liability on the insurance policy coverage for property damage, bodily injury, clean up expenses and natural resource damage from Line 61 in Dane County should be the amount estimated by the County Planning Department to restore the land and water to its original condition in the case of a worst case accident of the magnitude that Enbridge has previously shown itself capable of causing.