Enbridge Energy, Limited Partnership
26 East Superior Street, Suite 309
Duluth, MN 55802

October 14, 2014

Mr. David Gault
Dane County Assistant Corporation Counsel
215 Martin Luther King, Jr. Blvd, Room 419
City County Building
Madison, WI 53703-3345

Re: Enbridge Energy, Limited Partnership Conditional Use Permit

Dear Mr. Gault:

Enbridge Energy, Limited Partnership (Enbridge) has submitted a Conditional Use Permit Application to the Town of Medina and Dane County, requesting authorization to install an additional pump station on an existing pump station site in the town. The additional pump station is part of an expansion project by Enbridge to increase the capacity of an existing interstate pipeline to avoid the need to construct a new pipeline.

As part of the approval process, the town has proposed to require Enbridge to provide a bond throughout the life of the project. As discussed in this letter, any regulation of an interstate pipeline such as the Enbridge line by the town through the requirement of a bond or otherwise is preempted by federal law and therefore is not a permissible condition of approval.

I. Federal Law Applicable to Pipeline Facilities and Operators.

The federal Pipeline Safety Act, 49 U.S.C. § 60101, *et seq.*, governs the "design, installation, inspection, emergency plans and procedures, testing, construction, extension, operation, replacement, and maintenance of pipeline facilities." 49 U.S.C. § 60102(a)(2)(B). The Act imposes specific inspection, maintenance, and emergency response requirements on pipeline operators. *See* 49 C.F.R. Part 195, subparts A and F.

Pipeline operators are required to prepare and follow "a manual of written procedures for conducting normal operations and maintenance activities and handling abnormal operations and emergencies." 49 C.F.R. § 195.402(a). The manual must include written procedures to provide safety during maintenance and operations, including written procedures for operating, maintaining and repairing the pipeline system in accordance with the requirements of federal law.

Pursuant to 49 U.S.C. § 60117, the federal Pipeline and Hazardous Materials Safety Administration may conduct investigations and order a pipeline operator to take any necessary corrective action. Pipeline operators are legally obligated to comply with established written procedures. Failure to do so subjects the operator to the risk of civil and criminal penalties pursuant to 49 U.S.C. §§ 60122 and 60123.

II. Preemption of State and Local Laws Applicable to Pipeline Facilities and Operators.

The Supremacy Clause of Article VI of the Unites States Constitution grants Congress the power to preempt state or local law. In the absence of explicit statutory language, Congress implicitly may indicate intent to occupy a given field to the exclusion of state and local law. Further, state law is preempted when it actually conflicts with federal law. Such a conflict will be found when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress. *See Schneidewind v. ANR Pipeline Co,* 485 U.S. 293, 299-300 (1988); *Kinley Corp. v. Iowa Utilities Bd.,* 999 F.2d 354, 357 (8th Cir. 1993); *Algonquin LNG v. Loqa,* 79 F. Supp. 2d 49, 51 (D.R.I. 2000); *Nat'l Fuel Gas Supply Corp. v. Public Serv. Comm'n of the State of New York,* 894 F.2d 571, 576 (2nd Cir. 1990).

Congress expressly preempted all state and local regulation of interstate pipeline safety when it enacted the Pipeline Safety Act. *Kinley Corp.,* 999 F.2d at 358. The Act preempts all state regulation of the safety standards for interstate pipeline facilities. *See* 49 U.S.C. § 60104(c) ("A State authority may not adopt or continue in force safety standards for interstate pipeline facilities or interstate pipeline transportation."). The Act "leaves nothing to the states in terms of substantive safety regulation of interstate pipelines, regardless of whether the local regulation is more restrictive, less restrictive, or identical to the federal standards." *ANR Pipeline Co. v. Iowa State Commerce Comm'n,* 828 F.2d 465, 470 (8th Cir. 1987).

For example, in *Kinley Corp.,* the court determined that financial responsibility provisions under state law were preempted by the Act, where the provisions were "designed to protect the state's farmland and topsoil from damage due to construction, operation and maintenance of pipelines and to guarantee payment of property and environmental damages." *Id.* at 356-57. The court found that the financial responsibility provisions were "so related to federal safety regulation that they are preempted…." *Id.* at 360.

Similarly, in *Olympic Pipe Line Co. v. City of Seattle,* 437 F.3d 872, 874-75 (9th Cir. 2006), the court determined that a municipality was preempted under the Act from requiring pipeline operators to enter into a franchise agreement that required indemnification of the municipality for the operation of the pipeline within the municipality.

In *Texas Oil & Gas Ass'n v. City of Austin Texas,* United States District Court for the Western District of Texas, Case No. A-03-CA-570-SS, Order (November 7, 2003), the Texas Oil & Gas Association initiated a lawsuit against the City of Austin after it enacted an ordinance requiring all hazardous liquid pipeline companies to provide the City with certificates of insurance proving that they maintain certain required levels of insurance. *Id.* at *1-2. On a motion for preliminary injunction, the district court found that Texas Oil & Gas Association had a likelihood of success of proving that the Austin ordinance was preempted by the PSA finding that the ordinance conflicted with the PSA:

> But the City of Austin maintains that the Ordinance is not related to safety, only to the financial responsibility of the operator…. [T]he argument does not address the fact that whether or not it is about safety specifically, it conflicts with and frustrates the purpose of the joint federal-state regulatory scheme. The City does not require the pipeline operator merely to submit documentary evidence of their insurance coverage; instead, the language of the Ordinance states the insurance requirement is a prerequisite to the installation, operation or relocation of pipelines. In other words, pipelines in the City cannot be operated unless the operators comply with the Ordinance. Therefore, under the express terms of the Ordinance, the City could shut down the operations of a pipeline that runs not only through its limits but the limits of several other cities as well. This is exactly the type of piecemeal regulation that the [PSA] … seek[s] to avoid with the establishment of a consistent, across-the-board regulatory scheme.

Id. at *7 (internal citations omitted).

Accordingly, the requirement of a bond conflicts with and frustrates the purpose of the Act by imposing additional safety and financial requirements on an interstate pipeline operator. If every municipality along the Enbridge line conditioned approval upon payment of a bond, the "Congressional goal of a national standard for hazardous liquid pipeline safety would be thwarted." *See Olympic Pipe Line Co.,* 437 F.3d at 883. Where, as here, the "local regulation stands as an obstacle to fully achieving the federal objective," the local regulation is preempted and must yield to federal policy. *Algonquin LNG*, 79 F. Supp. 2d at 51.

Sincerely,

Amy Back
Senior Legal Counsel