I. CUP Conditions That Require Enbridge To Add Dane County As An Additional Insured To Its Insurance Policy Or To Post A Security Bond Are Preempted By The Federal Pipeline Safety Act ("PSA"), 49 U.S.C. § 60101, et. seq.

- All State and local safety regulation of interstate liquid pipelines regulated by the Pipeline Hazardous Materials Safety Administration ("PHMSA"), pursuant to the PSA, are preempted. *Kinley Corp. v. Iowa Utilities Bd.*, 999 F.2d 354, 358 (8th Cir. 1993).

- The PSA was amended in 2006 "to provide for enhanced safety and environmental protection in pipeline transportation...." PL-109-468, 120 Stat. 3486.

- "The safety standards to protect the environment" included under the PSA "expands...federal regulation of interstate hazardous liquid pipelines and thus is consistent with federal preemption." *Kinley Corp.*, 999 F.2d at 360; *see also id.* at 357 ("financial responsibility provisions...to guarantee payment of property and environmental damages" were preempted).

- An insurance requirement to "ensure that people will be compensated in the event one of the pipelines running through Austin causes damages to private property or the environment or injures City residents...is...about hazardous liquid pipeline safety." *Tex. Oil & Gas Ass'n. v. City of Austin, Tex.*, No. 03-CV-570-SS (W.D. Tex.), order, p. 7, Nov. 7, 2003, ECF No. 25. *See also Olympia Pipe Line Co. v. City of Seattle*, 437 F.3d 872, 874-75 (9th Cir. 2006) (indemnification requirement preempted).

- Dane County Zoning Ordinance 10.255(2)(h), on which the ZIR Committee relies for authority to impose the financial assurance requirements is a safety and/or environmental protection standard ("the conditional use will not be detrimental to or endanger the public health, safety, comfort or welfare"). It and the CUP conditions are, thus, preempted by the PSA and PHMSA.

II. The CUP Conditions Would Violate The Interstate Commerce Clause

A. Commerce Clause Analysis

- The Commerce Clause provides that Congress shall have "Power...to regulate Commerce...among the several States." U.S. Const., Art. I, § 8, cl. 3. The Commerce Clause has historically been interpreted "not only as an authorization

for congressional action, but also, even in the absence of a conflicting federal statute, as a restriction on permissible state regulation." *Hughes v. Oklahoma*, 441 U.S. 322, 326 (1979).

- The Commerce Clause inquiry is whether a county's action "regulates evenhandedly with only 'incidental' effects on interstate commerce, or discriminates against interstate commerce." *Or. Waste Sys. Inc. v. Dep't of Envtl. Quality of the State of Or.*, 511 U.S. 93, 99 (1994). "Discrimination" means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. *Id.* If a restriction on commerce is discriminatory, it is virtually *per se* invalid. *Id.; see also Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

- Nondiscriminatory regulations that have only incidental effects on interstate commerce are invalid if "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

B. The Additional Insured or Surety Bond Requirement is Discriminatory And Per Se Invalid

- Discriminatory laws are subject to a "virtually *per se* rule of invalidity." *Philadelphia*, 437 U.S. at 624. This can only be overcome by a showing that the state or municipality has no other means to advance a legitimate local purpose. *Maine v. Taylor*, 477 U.S. 131, 138 (1986).

- Justifications for discriminatory restrictions on commerce must pass the "strictest scrutiny." *Hughes*, 441 U.S. at 337. This burden of justification is so heavy that "facial discrimination by itself may be a fatal defect." *Id.; see also Westinghouse Elec. Corp. v. Tully,* 466 U.S. 388, 406-07 (1984); *Maryland v. Louisiana,* 451 U.S. 725, 759-60 (1981).

C. The Burden on Interstate Commerce Is Excessive In Relation To A Legitimate Local Benefit

- If a law is not discriminatory, but rather affects interstate commerce only incidentally and is directed to legitimate local concerns, the law is properly analyzed under the balancing test set forth in *Pike*, 397 U.S. at 142; *Philadelphia*, 437 U.S. at 624.

- Under the *Pike* test, a nondiscriminatory statute is invalid if "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local

benefits." *Pike*, 397 U.S. at 142; *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kan.*, 489 U.S. 493, 525-526 (1989).

- Local laws that regulate interstate pipelines impose a burden on interstate commerce. *ANR Pipeline Co. v. Schneiderwind,* 801 F.2d 228, 238 (6th Cir. 1986), aff'd, 485 U.S. 293 (1988) (the potential of requiring multiple approvals from multiple local entities "would be unjustifiably expensive, time consuming and burdensome, and could create delay which would directly impair [interstate commerce]."); *Tenneco, Inc. v. Sutton*, 530 F. Supp. 411, 440 (M.D. La. 1981) ("State [cannot] prefer the welfare of its own citizens to the economic well-being of the nation.") *See also Healy v. Beer Inst.,* 491 U.S. 324, 336 (1989) ("[T]he practical effect of the statute must be evaluated not only by considering the consequence of the statute itself, but also by considering...what effect would arise if not one, but many or every, State adopted similar legislation.").

- The Conditions Are Not Necessary To Provide a Legitimate Local Benefit

  - Wisconsin Spills Law, Wis. Stat. § 292.11(3) (6) and (7), guarantees clean up either by Enbridge or, if Enbridge is insolvent, by the DNR from a continuing state general purposes revenue appropriation fund established for cleanup purposes.

  - The Oil Pollution Act ("OPA"), 33 U.S.C. §§ 2701, *et seq.*, was enacted in 1990 to provide guaranteed compensation to local governments, private individuals and other claimants for costs and damages that have been incurred as a result of a crude oil pipeline release. OPA established a federal fund, the "Oil Spill Liability Trust Fund") ("Trust Fund"), which is administered by the U.S. Coast Guard and used to provide compensation to claimants for removal costs or damages resulting from a spill. *See* 33 C.F.R. §§ 136.201-237.

    - Compensation is available any time there is an oil spill into or near waters, or a spill that threatens waters. Under OPA, the term "waters" is defined broadly to include all wetlands, intermittent streams, ditches, creeks shorelines, tributaries, etc. which may eventually connect or have an effect on a navigable water. For purposes of recovery, oil is not required to come into contact with the water—rather, it must only *threaten* waters of shorelines.

    - There is no cap on recoverable damages and the Trust Fund is subject to continuing appropriations. All costs and damages associated with the following may be recovered from the Trust Fund:

      - Removal costs
      - Real or personal property damages
      - Loss of profits and/or income

- Loss of subsistence
- Lost government revenue
- Increased public services
- Natural resources damages.

See 33 C.F.R. §§ 136.201-237.

- The Wisconsin Direct Action Statute, Wis. Stat. §803.04(2), allows landowners to sue Enbridge's insurer directly for damages not eliminated by clean up by Enbridge, the DNR or via the Trust Fund even if Enbridge is insolvent.

- Thus, financial assurance already exists such that the County's local interests are already fully protected. The CUP conditions are unnecessary and their putative local benefits are outweighed by the burden on interstate commerce.

III. The County Lacks Authority To Require Preparation Of An Environmental Impact Statement ("EIS") As A Condition To The CUP.

- A "county is totally a creature of the legislature, and its powers must be exercised within the scope of authority ceded to it by the state...." *State ex rel Conway v. Elvod,* 70 Wis. 2d 448, 450, 234 N.W.2d 354 (1975). "A county's home rule power [pursuant to Wis. Stat. § 59.03(1)] is more limited than the home rule power that is afforded to cities;...' Contrary to the direct and expansive delegation of powers to municipalities under Wis. Const. art. XI, sec. 3, the authority of county boards is limited.'" *Jackson Cnty. v. State Dep't of Natural Res.,* 2006 WI 96, ¶ 17, 293 Wis. 2d 497, 717 N.W.2d 713.

- "When exercising home rule power, a county must be cognizant of the limitation imposed if the matter has been addressed in a statute that uniformly affects every county as such legislation shows the matter is of statewide concern." *Jackson Cnty.,* 2006 WI 96, ¶ 19. If any of the following four factors are met, a county lacks home rule authority and any county action is "without legal effect."

  - Whether the legislature has expressly withdrawn the power of municipalities to act;

  - Whether the ordinance logically conflicts with the state legislation;

  - Whether the ordinance defeats the purpose of the state legislation; or

  - Whether the ordinance goes against the spirit of the state legislation.

  Jackson Cnty., 2006 WI 96, ¶ 20.

- The Wisconsin Environmental Protection Act ("WEPA"), Wis. Stat. § 1.11, provides exclusive authority for "agencies of the state" to regulate the environmental impact of proposed projects, particularly those projects of statewide reach. Counties are not agencies of the state and not provided the authority to conduct an EIS analysis under WEPA. *Robinson v. Kunach,* 76 Wis. 2d 436, 444-48, 251 N.W.2d 449 (1977). This is particularly true where the DNR has previously conducted the environmental impact analysis required by WEPA.

- The DNR and the U.S. Army Corps of Engineers prepared an Environmental Assessment ("EA") for the original Southern Access (Line 61) pipeline project. The DNR determined that the EA process met the requirement of Ch. NR 150 Wis. Admin. Code and Wis. Stat. § 1.11 for the Southern Access project. *See* DNR Findings of Fact, Conclusions of Law and Determination Regarding [WEPA] Compliance for Enbridge Energy Co., Permit 13-DCF-129, ¶ 12, June 11, 2014 (attached hereto as Exhibit A).

- As part of the EA analysis for the Southern Access project, Enbridge disclosed to the DNR before the EA was issued: "long range forecasts show that as soon as 2010, additional capacity beyond the 400,000 barrels per day ("bpd") will be required. Enbridge will be able to meet as much as 800,000 bpd of additional pipeline capacity demand growth in the future *through installation of additional pumping stations along the 42-inch pipeline without the installation of additional pipelines.*" Thus, DNR took into consideration the additional pumping station work that is subject to the pending CUP application. *See DNR Comments on Enbridge Wetland and Waterway Application,* ¶ C.2.

- DNR's decision not to prepare an EIS but instead to proceed with an EA was challenged by the Wisconsin Wetlands Association, Inc. Dane County Circuit Court Judge Richard Niess ruled that the DNR properly exercised is discretion when it decided to prepare an EA rather than an EIS. *Wis. Wetlands Ass'n., Inc. v. DNR*, Dane County Case No. 06-CV-4339 (June 14, 2007) (see attached as Exhibit B).

- Thus, by enacting WEPA and not including counties as "agencies of the state," the "legislature has expressly withdrawn the power of [Dane County] to act" by requiring the preparation of an EIS as a condition to the CUP. *Jackson Cnty.,* 2006 WI 96, ¶ 20. Such a requirement would "logically conflict[] with [WEPA]," would "defeat[] the purpose of [WEPA]" and would go "against the spirit of [WEPA]." *Id.* As a result, the county lacks home rule authority to impose such a condition to the CUP.

- Moreover, because the DNR and the U.S. Army Corps of Engineers imposed the cost of preparation of an EA on Enbridge for the Southern Access project, pursuant to state and federal authority to do so, the County lacks home rule authority to impose the cost of preparation of an EIS on Enbridge. Even if the County had home rule authority to require preparation of an EIS as a condition to the CUP, it would have to pay all costs associated with such preparation.

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DETERMINATION REGARDING WISCONSIN ENVIRONMENTAL POLICY ACT COMPLIANCE FOR ENBRIDGE ENERGY CO. PERMIT 13-DCF-129

FINDINGS OF FACT

The Department of Natural Resources (Department) finds that:

1. In August 2013, the Department received an application for an air pollution control construction permit from Enbridge Energy Co., to construct three new large (24.5 million gallons each) crude oil storage tanks, be authorized additional tank landing events in tanks T41 – T42, be authorized tank cleaning emissions from tanks T35 – T45, construct and modify associated fugitive piping components associated with Line 61, and construct a new diesel emergency generator, at the pipeline terminal facility in Douglas County, Wisconsin.

2. The Department determined that the application was complete on April 14, 2014.

3. A permit and hearing notice was published in the Wisconsin State Journal and on the Department's web page on April 18, 2014.

4. A public hearing was held at the request of the applicant on May 5, 2014. The hearing was held in the Superior Public Library at 15030 Tower Ave., Superior, WI.

5. The public review period ended on May 19, 2014.

6. The Department received 235 comments at the hearing and during the comment period.

7. The Department prepared a summary of comments and the Department's responses.

8. Since the potential emissions from the proposed project would be less than 100 tons per year, this project was classified as a Type III action under the previous version (prior to 04/01/2014) of Chapter NR 150, Wis. Adm. Code, and did not require preparation of an environmental analysis.

9. Effective April 1, 2014, ch. NR 150, Wis. Adm. Code, was repealed and recreated.

10. Under s. NR 150.20 (2) (a) 4, Wis. Adm. Code, effective April 1, 2014, issuance of permit 13-DCF-129 is an equivalent analysis action.

11. Under ss. NR 150.20 (3) (b), and NR 150.35, Wis. Adm. Code, effective April 1, 2014, the Department may also determine that there is prior compliance for any departmental action.

12. Prior to the construction of the Enbridge's original Southern Access (Line 61) pipeline project, the Department and US Army Corps of Engineers prepared an environmental assessment (EA) in the fall of 2006. The Department held three public informational hearings regarding the Southern Access project in September 2006 in Hayward, Marshfield and Portage, Wisconsin. The Department received and responded to several comments, issuing an amended EA in November 2006. This included a determination that the EA process met the requirements of ch. NR 150, Wis. Adm. Code and s. 1.11 Wis. Stats., for the Southern Access project.

Exhibit A

13. In 2008 – 2009, the Department prepared an EA for Enbridge's Alberta Clipper pipeline project which included 13 miles of pipeline in Douglas County, Wisconsin, and improvements to the Superior Terminal. The U.S. State Department also prepared a federal environmental impact statement on the Alberta Clipper pipeline project. The Department received and responded to a number of comments, and determined that the EA process met the requirements of ch. NR 150, Wis. Adm. Code and s. 1.11 Stats., for the Alberta Clipper project

CONCLUSIONS OF LAW

The Department concludes that:

1. The Department's EAs prepared for the Southern Access and Alberta Clipper projects provide prior compliance for analysis under the Wisconsin Environmental Policy Act, s. 1.11, Stats., and ch. NR 150, Wis. Adm. Code, for issuance of permit 13-DCR-129.

DETERMINATION

The Department has determined that there is prior compliance for the issuance of permit 13-DCF-129 under ss. NR 150.20 (3) (b), and NR 150.35, Wis. Adm. Code.

Kristin Hart, Chief
Air Permits and Stationary Source Modeling Section
Air Management Program

06/11/2014
Date

James Pardee, Wisconsin Environmental Policy Act Coordinator
Bureau of Energy, Transportation and Environmental Analysis

06/11/2014
Date

STATE OF WISCONSIN | CIRCUIT COURT BRANCH 9 | DANE COUNTY

WISCONSIN WETLANDS ASSOCIATION, INC., RIVER ALLIANCE OF WISCONSIN, LORI GRANT, FRIENDS OF ST. CROIX HEADWATERS, AND SCOTT PETERSON,

Petitioners,

v. Case No. 06 CV 4339

STATE OF WISCONSIN DEPARTMENT OF NATURAL RESOURCES

Respondent.

DECISION AND ORDER

STATEMENT OF THE CASE

In this §227.52, Stats., judicial review, petitioners challenge the November 27, 2006 decision by respondent State of Wisconsin Department of Natural Resources ("DNR") that an Environmental Impact Statement ("EIS") is not required by Wisconsin's Environmental Policy Act ("WEPA") §1.11 and Wis.. Admin. Code § NR 150.01 *et seq.* in reasonably considering and evaluating the environmental effects of Endbridge Energy LP's project constructing two petroleum-related pipelines in an existing right-of-way extending diagonally across Wisconsin for 321 miles from Superior to near Whitewater. Petitioners seek an order reversing that decision, and remanding this case to the DNR with an order to either prepare an EIS or a new Environmental Assessment ("EA") that meets the requirements of WEPA. Petitioners additionally request the court to vacate the Chapter 30 permit and water quality certifications that have been issued to Endbridge Energy, LP based upon the DNR's allegedly deficient WEPA analysis, and award attorney's fees.

The certified administrative record has been provided, the issues have been fully briefed, and no party has requested oral argument. Accordingly, the petition is ripe for decision. The court has reviewed the administrative record, the

briefs and other submissions of the parties, and the applicable case law. Based upon that review, and for reasons more fully set forth below, the petition is denied.

PRELIMINARY MATTERS

At the outset, two issues are raised by respondent DNR and Endbridge Energy, LP. Respondent DNR avers that this court lacks jurisdiction over any challenge to the Chapter 30 permit and water certifications, because petitioners have failed to file a petition for judicial review under Chapter 227 of the Wisconsin statutes specifically directed at and identifying the permit and water certifications. This issue is mooted by the court's decision here rejecting petitioners' essential premise for invalidating the permit and certifications, i.e. noncompliance with WEPA, and is accordingly not decided.

Endbridge Energy, LP moves to strike certain exhibits to the Affidavit of Brent Denzin, on the grounds that they improperly introduce evidentiary matters outside the administrative record. That motion is denied. To be sure, §227.57 (1), Stats., limits this Court's review of the DNR's decision in this case to the record developed at the administrative level. That said, some of the exhibits sought to be stricken are in fact contained in the administrative record. Those that are not are simply not relied upon by the Court in this decision.

APPLICABLE LEGAL STANDARDS CONTROLLING THIS JUDICIAL REVIEW

The "separation of powers" doctrine requires that the courts' participation in establishing environmental policy in Wisconsin be nonexistent. On the other hand, the courts' role in enforcing environmental laws adopted by the appropriate policymaking bodies in this state (the legislative and executive branches) is an important one, albeit quite limited. *Cf. Clean Wisconsin, Inc. v. Public Service Commission,* 282 Wis. 2d 250, 306, 700 N.W.2d 768 (2005). Our Supreme Court provides a succinct but comprehensive statement of that role in *State ex rel. Boehm v. DNR,* 174 Wis. 2d 657, 665-667, 497 N.W. 2d 445 (1993):

> [1] [2] The purpose of WEPA is to insure that agencies consider environmental impacts during decision making. *Wisconsin's Environmental Decade, Inc. v. Public Service Commission,* 79 Wis.2d 409, 416, 256 N.W.2d 149 (1977) (*WED III*); *City of New Richmond v. Wisconsin Dept. of Natural Resources,* 145 Wis.2d 535, 542, 428 N.W.2d 279 (Ct.App.1988). WEPA is procedural in nature and does not control agency decision making. Rather, it requires that agencies consider and evaluate the environmental consequences of alternatives available to them and undertake that consideration in the framework provided by sec. 1.11, Stats. *WED III,* 79 Wis.2d at 416, 256 N.W.2d 149; *New Richmond,* 145 Wis.2d at 542, 428 N.W.2d 279.

[3] WEPA requires that all state agencies prepare an EIS for "every recommendation or report on proposals for legislation and other major actions significantly affecting the quality of the human environment...." Section 1.11(2)(c), Stats. Thus, only if it is a major action significantly affecting the quality of the human environment is an EIS to be conducted. *Wisconsin's Environmental Decade, Inc. v. Wisconsin Dept. of Natural Resources*, 115 Wis.2d 381, 394, 340 N.W.2d 722 (1983). In the instant case, the DNR concluded that an EIS was not required because the landfill proposal was not a major action which would significantly affect the quality of the human environment.

[4] We must first determine the appropriate standard of review for a negative EIS determination by a state ***666*** agency. The test as to whether an EIS should be conducted is one of reasonableness and good faith. *Wisconsin's Environmental Decade, Inc. v. Dept. of Industry, Labor & Human Relations*, 104 Wis.2d 640, 644, 312 N.W.2d 749 (1981); *WED III*, 79 Wis.2d at 423, 256 N.W.2d 149. The often repeated two-part test of this reasonableness and good faith standard is as follows:

First, has the agency developed a reviewable record reflecting a preliminary factual investigation covering the relevant areas of environmental concern in sufficient depth to permit a reasonably informed preliminary judgment of the environmental consequences of the action proposed; second, giving due regard to the agency's expertise where it appears actually to have been applied, does the agency's determination that the action is not a major action significantly affecting the quality of the human environment follow from the results of the agency's investigation in a manner consistent with the exercise of reasonable judgment by an agency committed to compliance with WEPA's obligations?

WED III, 79 Wis.2d at 425, 256 N.W.2d 149.[FN2]

FN2. Other cases which have quoted and applied this two-part test include: *New Richmond*, 145 Wis.2d at 542-43, 428 N.W.2d 279; *Town of Centerville v. Dept. of Natural Resources*, 142 Wis.2d 240, 246-47, 417 N.W.2d 901 (Ct.App.1987); *Wisconsin's Environmental Decade, Inc. v. Dept. of Natural Resources*, 115 Wis.2d 381, 391, 340 N.W.2d 722 (1983); *Wisconsin's Environmental Decade, Inc. v. Dept. of Natural Resources*, 94 Wis.2d 263, 268-69, 288 N.W.2d 168 (Ct.App.1979).

[5] Accordingly, we first review the adequacy of the record developed by the DNR. We examine the record to see whether the DNR considered relevant areas of environmental concern and whether the DNR conducted a preliminary factual investigation of sufficient depth to ***667*** permit a reasonably informed preliminary judgment of the environmental consequences of the proposed action. *WED III*, 79 Wis.2d at 425, 256 N.W.2d 149. We conclude that the record in this case reflects a sufficient preliminary investigation into the relevant areas of environmental concern to permit a reasonably informed preliminary judgment as to the environmental consequences of the proposed landfill. The record exceeds that which was envisioned by *WED III*.

[6] [7] The record produced by the agency need not follow any particular form. *WED III*, 79 Wis.2d at 425 n. 15, 256 N.W.2d 149. All it must do is "reveal in a ***450** form susceptible of meaningful evaluation by a court the nature and results of the agency's investigation and the reasoning and basis of it conclusion." *Id.* The record need not contain a primary document supporting each conclusion.

While this court's mandate on judicial review of an EIS denial by DNR under WEPA mirrors that of the Court of Appeals, the appellate courts owe no deference to the trial court's conclusions. Rather, appellate review examines the record independently to determine whether (1) the DNR has adequately developed a reviewable record reflecting a sufficient preliminary investigation of relevant areas of environmental concern and (2) the DNR's denial followed from the results of the DNRs investigation in a manner consistent with the exercise of reasonable judgment, given a deferential standard of review. *City of New Richmond v. DNR*, 145 Wis. 2d 535, 543 and 548, 428 N.W. 2d 279 (Ct.App. 1988). Because the Court of Appeals is essentially uninterested in whether this court is right or wrong in this case, *see Stafford Trucking Inc. v. DILHR*, 102 Wis. 2d 256, 260, 306 N.W. 2d 79, 82 (Ct.App. 1981), the Court's discussion here will be abbreviated, especially given petitioners' presumed preference for speed over prolixity at the trial court level.

ADEQUACY OF THE RECORD

There can be little doubt as to the adequacy of the record in this case under the test set forth above in *Wisconsin's Environmental Decade* and *Boehm*, even granting petitioners' argument that there is some duplication of documents in the approximately 7300-plus pages (not to mention compact discs) that constitute the official record. The precise manner in which a reviewable record is assembled is a matter for the sound discretion of the DNR. *Wisconsin's Environmental Decade, supra*, at 442. Here, the record contains photographs, maps, public comments, responses to public comments, diagrams, discussion by the various agencies involved and their employees, and descriptions/evaluations of soil conditions, flora, fauna, endangered species, threatened species, interests of private landowners, forest lands, tribal interests, rivers, streams, surveys, mitigation plans, protocols for all stages of construction, and more.

The administrative record in this case also includes an Environmental Assessment (EA) prepared by the DNR in conjunction with the United States Army Corps of Engineers under Wis. Admin Code § NR 150.02(9), which requires the assessment to identify the proposed actions's effect on the environment, consider alternatives, and provide evidence as to whether the proposed action is a major action requiring preparation of an EIS.

As in *City of New Richmond, supra* at 546-547, the extent of the DNR's investigation here is in sharp contrast to the actions of the PSC found to be inadequate in *Wisconsin's Environmental Decade* and the record assembled by

the DNR exceeds that envisioned by the *Wisconsin's Environmental Decade* court.

The DNR's decision eschewing an EIS thus satisfies the first prong of *Wisconsin's Environmental Decade's* test. If this type of record is inadequate in the eyes of petitioners, their recourse is political, not legal, because this record easily satisfies the current law as interpreted by a higher courts.

REASONABLENESS OF THE DNR'S DECISION

The second prong, i.e. the reasonableness of the DNR's determination that the 321 mile petroleum pipeline project bisecting Wisconsin is not a major action significantly affecting the environment, presents a closer question, especially when, at first blush, the natural reaction of the casual observer is "How can that be?" However, once again, when analyzed under the controlling case law, the DNR's decision must stand.

We begin with the higher courts' directive:

> "In determining the reasonableness of the DNR's decision that an EIS is not required, we defer to the technical expertise of the department. [Citation omitted] This is particularly appropriate here because the DNR is the state agency possessing staff, resources, and expertise in environmental matters. [Citation omitted] Courts are ill-equipped, for example, to determine whether a given level of dioxin introduced into the food chain represents a significant environmental issue. It is possible that any change in our environment may be viewed as a "major action" by the public. Nonetheless, the language in WEPA sec. 1.11 maintains a distinction between major actions requiring an EIS and non-major matters that do not. We must rely on the department for its expertise in making such technical scientific determinations as long as it acts reasonably based on an adequately developed record."

City of New Richmond, 145 Wis. 2d at 548. *See also Boehm,* 174 Wis. 2d at 666. Moreover, if the DNR's determination was reasonable and made in good faith, it is immaterial that this court might have reached a different conclusion from the same record.

> "Once an agency has made its fully informed and well-considered decision, a reviewing court may not interfere with [the] agency decision not to prepare an EIS."

Larsen v. Munz Corp. 167 Wis. 2d 583, 606-07, 482 N.W. 2d 332 (1992).

> "The test is not whether this court ... would have ordered an EIS for this project; rather, the test is whether the ... decision not to prepare an EIS was reasonable under the circumstances."

Id. at 608.

The DNR regulations promulgated under WEPA define "major action" as "an action of such magnitude and complexity that the action will have significant effects upon the quality of the human environment...." Wis. Admin. Code §NR 150.02(16). "Significant effects", in turn, are defined as "considerable and important impacts of major state actions on the quality of the human environment." *Id.* at §NR 150.02 (25). The defense briefs substantially highlight the determination by the DNR that the pipeline project is not a "major action", and thus exempt from the EIS requirement, demonstrating how this conclusion follows from the assembled record. See "Responding Brief of Respondent Wisconsin Department of Natural Resources" ("DNR brief"), pages 14, 19-23, and "Endbridge Energy Limited Partnership's Response to Initial Brief for Petitioner" ("Endbridge Brief"), 19-40. Those arguments will not be repeated here, but suffice it to say that the court agrees that they show a reasonable and good faith conclusion flowing from the developed record. To pass muster on judicial review, the DNR's determination need not be the only reasonable conclusion, or even the most reasonable conclusion. If it is but one reasonable conclusion among several, the court must sustain it.

Petitioners repeatedly attack the substantive adequacy of the DNR's Environmental Assessment (EA) in their challenge to the DNR's determination that no EIS is required. However, as Endbridge Energy points out, these are two separate issues, the latter being properly before the court and the former not, since it was not pleaded in the Petition for Review. (Endbridge brief, page 19-20, n. 7) It is not this court's role to evaluate the adequacy of the EA's contents here, but only the reasonableness of the DNR's conclusion that an EA is all that WEPA requires for this pipeline project. *Clean Wisconsin Inc., supra,* at 376; *see also Larsen v. Munz Corp.,* 167 Wis. 2d 583, 482 N.W.2d 332 (1992). Even so, the defense briefs largely dispense with petitioners' substantive objections to the EA, such that this court would be hard-pressed to find the EA deficient under WEPA, even conceding petitioners' argument that the document is far from perfect.

CONCLUSION

The petition for review is denied. Under the test first articulated in *Wisconsin's Environmental Decade, Inc. v. Public Service Commission*, 79 Wis. 2d 409, 256 N.W. 2d 149 (1977) and subsequently reaffirmed in multiple cases, the record prepared by the DNR is adequate and its decision not to prepare an EIS was reasonable.

Dated this 14th day of June, 2007.

BY THE COURT:

Richard G. Niess
Circuit Judge

CC: Attorney Brent Denzin
Attorney Thomas M. Pyper
Assistant Attorney General Philip Peterson