



OFFICE OF THE CORPORATION COUNSEL

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

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“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.

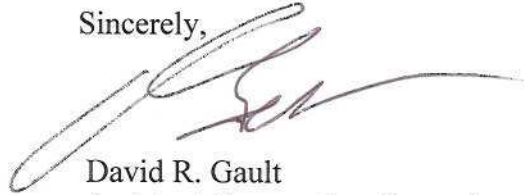
It should also be noted that a surety bond does not intrude upon the federal regulatory scheme. Congress has expressly provided that the Secretary of Transportation may require a specific amount of financial responsibility for a liquefied natural gas facility. 49 U.S.C. §60111. I can find no similar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

Mr. Roger Lane
September 30, 2014

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

Sincerely,

A handwritten signature in dark ink, appearing to read "D. Gault", with a long horizontal flourish extending to the right.

David R. Gault
Assistant Corporation Counsel