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Sent: Thursday, January 29, 2015 5:29 PM
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Cc: 'Lane, Roger'; 'Violante, Todd'; David Gault; Melissa Malott
Subject: **ZLR - CUP #2291 - Enbridge Waterloo Pump Station Conditional Use Permit—
Additional Comments by Madison-350 on EIL Insurance and Gradual Leaks**

Dear Chairman Miles and members of the Zoning & Land Regulation Committee—

There was some confusion at the last meeting on January 27th that ensued after Supervisor Kolar introduced her motion to add as a condition, among several other items, a requirement for Environmental Impairment Liability (EIL) insurance. Enbridge rebutted that EIL insurance is only for gradual leaks and seeps and not for pipe bursts, and that [1] the only coverage the County needs is just for pipe bursts, which, he contended, [2] is just General Liability (GL) coverage.

With respect, please let me take another moment of your time to explain the reason why this rebuttal is wrong on both counts, and why Supervisor Kolar's original insistence on EIL coverage was exactly what is needed for coverage to fully protect the County.

[1] First, the 17-hour Kalamazoo accident demonstrates that leaks from pipelines can extend for longer periods than many "sudden and accidental" provisions cover -- a fact that is attested to by some Enbridge insurers who are refusing to pay out for the accident. Because pipeline spills can be either gradual or slow to be detected, as well as be sudden events, the County needs to have coverage that extends to both types of occurrences, not just for one.

[2] Second, in addition to needing coverage for both sudden and gradual pollution events, any suggestion that EIL only covers gradual leaks reflects a serious misunderstanding of what these policies cover and how insurance purchasing works. In fact, EIL's normally provide coverage for pollution releases without any reference to how fast the pollution event needs to take place, fast or slow. This is different from GL insurance which initially excludes all losses related to pollution and then gives back coverage for pollution events that take place within a specified period of time usually measured in hours or in days.

The only reason why, in application, EIL is referred to in some cases as coverage for gradual leaks is not because its coverage is limited. Rather that reference is because of the way companies, who transport dangerous substances, layer on different types of policies and overlap them in a way to minimize their total premium. This is because insurers selling a policy can reduce the premiums they charge if the insured has other overlapping policies that pays out first-dollar coverage.

To understand this complicated insurance issue with an example that relates to our own lives, think about how health coverage works for people who are over 65 and have government provided Medicare coverage, which, having past that point is something I know about too well. When, because Medicare has many gaps in its coverage, a retiree purchases additional Medigap coverage from a private insurer, the insurer providing that additional layer of coverage discounts the premium for Medigap coverage I buy because, for any claim, Medicare will first pay for everything that they cover, and Medigap will only be obligated to pay for whatever is left over. When layered in this way, even though Medicare coverage insures that the policy holder will

have coverage for all his or her health costs, the Medigap policy only actually pays out for those medical expenses that Medicare does not pay.

Returning to the case of pipelines, like any other firm, pipeline companies purchase general liability coverage as the run-of-the-mill cost of doing business. Because of the historical antecedents to these policies over time, GL policies offered to pipeline companies often do include, among many other standard risks, pipe burst type of accidents (although the term of art “sudden and accidental” is no longer used because, being undefined in the policy itself, the legal outcome in court on sudden and accidental pollution coverage give-backs is unpredictable – the correct technical term for the coverage give-backs in GL insurance now is “time element pollution coverage ,” which will only cover a pollution release that extends for a defined number of hours and is reported in a specified number of days).

In practice, pipelines can purchase EIL insurance on an excess basis. If there is already a GL policy in place with some pollution coverage, EIL’s will cover above the amounts paid by the time-element-pollution coverage (if any) in the GL insurance policy, or pay on a primary basis if the GL policy does not respond to the pollution claims for some reason, again, just as happened in Kalamazoo.* A gradual pollution event would be the most common cause of the EIL policy paying first dollar instead of the General Liability insurance policy.

I do apologize for the length of this reply, but we felt it necessary to do so because of the confusion that has been spawned at your last meeting. The take away that we present for you is that you need to have comprehensive insurance coverage for all pollution events regardless of their timing, and that is a commercial EIL policy. To the extent that Enbridge chooses to layer an EIL policy as excess coverage on top of a first-dollar GL policy, that is absolutely fine. But, none of that in any way suggests that EIL coverage is legally limited to only gradual leaks, any more than it indicates that you can protect the County by limiting its coverage to sudden accidents that occur over a pre-set number of hours.

There is one other take-away of vital importance. That is the Committee needs to have and examine a certified copy of all of the actual insurance policies Enbridge carries and are in effect, including any related legal documents that interpret or otherwise bear on their terms. As to confidentiality issues, there is no need to show the premiums or rating information on the policy and, if valid confidential grounds are shown, the committee’s insurance expert could sign a nondisclosure agreement to keep the exact details of the Enbridge insurance policy confidential. There are too many major shortcomings that can exist in coverage that will not be detected from what Enbridge chooses to include in its description of what it claims to carry. All of the environmental insurance coverage in the Enbridge insurance program needs to be verified in an objective review of the policy forms themselves.

If you have any other questions, please do not hesitate to ask. In any event, by deciding to retain the services of a qualified environmental risk management insurance expert, you will soon have this expertise at your side in the future.

Thank you, again, for your time, attention, and care with which you consider Dane County’s fundamental interests in this matter.

Peter Anderson
for Madison-350.org

* On a separate matter, when we stated that Enbridge’s claim that a putative “sudden and accidental” provision is too uncertain for the County to rely on as shown by the fact that the insurance payouts involving the Kalamazoo accident were in litigation, Enbridge claimed that only one of its insurers refused. If the company’s own annual report to FERC is to be believed, all of its insurers have reserved the right to dispute their obligations to pay out anything in the event Enbridge loses its lawsuit against the lead objecting insurer. Here is the exact quote from the company’s own report:

“In March 2013, we and Enbridge filed a lawsuit against the insurers of our remaining \$145.0 million coverage, as one particular insurer is disputing our recovery eligibility for costs related to our claim on the Line 6B crude oil release and the other remaining insurers assert that their payment is predicated on the outcome of our recovery with that insurer.” Enbridge Annual Report for 2013 to FERC, at p. 123.12 (emphasis added).

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