STATE OF WISCONSIN | CIRCUIT COURT BRANCH 17 | DANE COUNTY

ENBRIDGE ENERGY COMPANY, INC., and ENBRIDGE ENERGY, LIMITED PARTNERSHIP,

Petitioners,

v.

DANE COUNTY, DANE COUNTY BOARD OF SUPERVISORS, DANE COUNTY ZONING AND LAND REGULATION COMMITTEE, and ROGER LANE, in his official capacity as the Dane County Zoning Administrator,

Respondents.

Case No. 16-CV-0008
Case Code: 30955

ROBERT and HEIDI CAMPBELL, KEITH and TRISHA REOPELLE, JAMES and JAN HOLMES, and TIM JENSEN,

Plaintiffs,

v.

ENBRIDGE ENERGY COMPANY, INC., ENBRIDGE ENERGY, LIMITED PARTNERSHIP, and ENBRIDGE ENERGY, LIMITED PARTNERSHIP WISCONSIN,

Defendants.

Case No. 16-CV-0350
Case Code: 30704

PETITIONERS' REPLY BRIEF IN RESPONSE TO THE COUNTY RESPONDENTS' AND THE PLAINTIFFS' OPPOSITION BRIEFS

When Dane County decided on December 3, 2015 to uphold the April 21, 2015 Conditional Use Permit ("CUP") issued to Petitioners Enbridge Energy Company, Inc. and Enbridge Energy, Limited Partnership (collectively "Enbridge"), the Insurance Requirements imposed through the CUP were expressly prohibited by state law. Dane County had no authority

to impose or enforce the Insurance Requirements at that time. Yet, the County spends the majority of its Response Brief arguing that the state laws prohibiting the County from imposing or enforcing the Insurance Requirements are not "retroactive," thereby attempting to avoid the decisive fact that the County Board took final action approving the CUP and imposing the Insurance Requirements *after* the new laws were enacted. The individual Plaintiffs spend much of their Response Brief attempting to inject a completely new issue into the certiorari proceeding to which they are not parties by arguing the new state laws do not apply due to the type of insurance coverage Enbridge carries. That attempt fails because they have no standing to advance a position that has already been conceded by the County, which is the only Respondent in the certiorari proceeding. Moreover, the Plaintiffs conceded in previous filings in their injunctive action that the new laws do apply, and their argument to the contrary now is refuted by the undisputed evidence in the record provided by Enbridge and the County's own insurance expert. Accordingly, for the reasons set forth herein and in Enbridge's Initial Brief, the Court should declare the Insurance Requirements void and require Dane County to remove the Insurance Requirements from the CUP and reinstate the CUP without the unlawful Insurance Requirements.[1]

[1] On April 21, 2016, the Court consolidated Dane County Case Nos. 16-CV-0008 and 16-CV-0350. In this brief, Enbridge only addresses the issues applicable to the certiorari review. Enbridge's motion to dismiss the claim pleaded in Case No. 16-CV-0350 is pending and need not be addressed until the certiorari review has been decided. Additionally, both the County and the individual Plaintiffs claim Enbridge has waived any arguments related to federal preemption. That is incorrect. The federal preemption argument is not ripe for purposes of the certiorari action because the County is not seeking to enforce the Insurance Requirements, which, if enforceable under state law, would be preempted by federal law. Moreover, given the pending motion to dismiss Plaintiffs' action, Enbridge has not yet filed an answer. If the Court were to deny the motion to dismiss, Enbridge will file an answer and reserves the right to include affirmative defenses asserting federal preemption under the Supremacy Clause and for restraint of the Interstate Commerce Clause of the United States Constitution.

I. THE COUNTY TOOK FINAL ACTION ON THE CUP AFTER THE EFFECTIVE DATE OF THE NEW LAWS WHEN THE INSURANCE REQUIREMENTS WERE PROHIBITED BY STATE LAW.

Prior to final action by the County on Enbridge's appeal of the ZLR Committee's issuance of the April 21, 2015 CUP with the Insurance Requirements, the Wisconsin State Legislature passed 2015 Wisconsin Act 55, which created Wis. Stat. § 59.70(25) that provides: "A county may not require an operator of an interstate hazardous liquid pipeline to obtain insurance if the pipeline operating company carries comprehensive general liability insurance coverage that includes coverage for sudden and accidental pollution liability." The Act also created Wis. Stat. § 59.69(2)(bs), which provides: "As part of its approval process for granting a conditional use permit under this section, a county may not impose on a permit applicant a requirement that is expressly preempted by federal or state law." Act 55 took effect on July 14, 2015. Months later, on December 3, 2015, the County Board held a hearing on Enbridge's still pending May 4, 2015 appeal of the April 21, 2015 CUP, which it had not previously decided based on mootness grounds, and on Enbridge's October 19, 2015 appeal of the October 9, 2015 CUP. Immediately following the hearing, the County Board on behalf of the County imposed the Insurance Requirements and took final action to issue the CUP with the unlawful Insurance Requirements.[2]

Enbridge's appeal of the imposition of the Insurance Requirements in the April and October CUPs within the 20-day period specified in Dane County Ord. § 10.255(2)(j) prevented

---

[2] The County claims that "Petitioners' entire case before the County Board dealt with the ZLR's action on September 29th, rather than the initial issuance of the CUP on April 14, 2015." (Cty. Br. at 9.) However, the record is clear that the County Board issued its final action on Enbridge's appeals of both the April CUP and the October CUP following the December 3, 2015 County Board hearing. The County Board Chair stated at the outset of the hearing "those appeals are both before us" and the County Board "is considering both of those appeals." (R.-Dec. 3, 2015 Hr'g Tr. 5:10-25.) Indeed, Attorney Gault confirmed during the hearing that both appeals were being heard by the County Board. (R.-Dec. 3, 2015 Hr'g Tr. 10:18-11:11.) In fact, a motion to limit the hearing to only the appeal of the October CUP failed. (R.-Dec. 3, 2015 Hr'g Tr. 20:7-10.) Therefore, the County Board took final action on the original April 21, 2015 CUP during the December hearing.

the County's action on the CUP from being final. When the County Board considers a CUP appeal, it does not just review the ZLR Committee's decision—it receives new evidence, which includes but is not limited to the evidence before the ZLR Committee, and conducts a *de novo* review of the CUP on behalf of the County. In this case, that included reaching a decision as to whether the Insurance Requirements should be imposed on Enbridge.

Indeed, Dane County Ord. § 10.255(2)(j) empowers the County Board to reverse or modify the ZLR Committee's action if the County Board finds the action was not just and reasonable, thereby giving the County Board the final say on a CUP issued by the County. Further, Dane County Ord. § 7.68 empowers the County Board not just to independently review the record before the ZLR Committee but also to take additional evidence that was not in the record before the ZLR Committee in making its decision on the merits of the CUP and taking final action. By denying the appeal, the County took final action to impose the Insurance Requirements; however, by that time the new laws were already in place, and they prohibited the County from imposing or enforcing the Insurance Requirements. Therefore, the County's final action imposing the Insurance Requirements through the CUP occurred after the new laws took effect, at a time when imposition or enforcement of the requirements was prohibited as a matter of law. Thus, the Court can and should find the Insurance Requirements invalid, as a matter of law, without even reaching the retroactivity issue.

II. THE COUNTY BOARD WAS REQUIRED TO APPLY THE LAW IN EFFECT AT THE TIME THE BOARD TOOK ACTION ON ENBRIDGE'S APPEAL.

Even if the County Board's role in the CUP process is viewed as being similar to a court reviewing a final administrative or court decision rather than as a step in the process leading to final County action, the County Board was still bound to apply the law in effect at the time it rendered its decision on Enbridge's appeal. A new law passed while the time for an appeal is

still pending applies to the pending action. *Salzman v. State of Wis. Dep't of Nat. Res.*, 168 Wis. 2d 523, 530, 484 N.W.2d 337 (Ct. App. 1992) ("The [County] has no vested right to its judgment until the time for appeal has expired."); *Trinity Petroleum, Inc. v. Scott Oil Co.*, 2007 WI 88, ¶ 48, 302 Wis. 2d 299, 735 N.W.2d 1 (concluding that a new law applied where the court had not yet issued a final decision). *See also Landgraf v. USI Film Prods.*, 511 U.S. 244, 274 (1994) ("intervening statutes … ousting jurisdiction [apply on appeal] whether or not jurisdiction lay when the underlying conduct occurred or when the [appeal] was filed."). The County Board had not yet taken action on Enbridge's appeal of the imposition of the Insurance Requirements in the April 21, 2015 CUP at the time the new laws were passed. Therefore, the new laws applied to the pending administrative appeal and the County Board was required to apply the new laws when issuing its decision on the appeal and to remove the unlawful Insurance Requirements from the CUP.

III. THE NEW LAWS REMOVE COUNTY JURISDICTION AND, THEREFORE, APPLY RETROACTIVELY.

Even if the relevant County decision under review in this certiorari action was the ZLR Committee's imposition of the unlawful Insurance Requirements through the April 21, 2015 CUP, the Court must apply the new laws retroactively to invalidate that decision. In responding to the retroactivity issue, the County argues without support that the new laws are substantive rather than procedural because the laws "limit[] the ability of a county to require such insurance" and "place[] a specific prohibition on the actions of the county." (Cty. Br. at 14.) The County argues that is "clearly substantive." To the contrary, the County has in fact admitted that the

laws oust the County's jurisdiction to impose the Insurance Requirements, making them procedural rather than substantive.[3]

In *Rock Tenn Co. v. Labor & Indus. Review Comm'n*, 2011 WI App 93, 334 Wis. 2d 750, 799 N.W.2d 904, the court stated a law is "substantive" only where it creates or regulates rights or obligations; on the other hand, a law is "procedural" where it affords a remedy or facilitates remedies already existing for the enforcement of rights or redress of injuries. "[I]ntervening procedural and jurisdictional provisions are regularly applied to pending cases" because "application of a new jurisdictional rule usually takes away no substantive right" and instead speaks to "the power of the [County] rather than to the rights or obligations of the parties." *Turkhan v. Perryman*, 188 F.3d 814, 826 (7th Cir. 1999). By conceding the law limits county authority and prohibits county action related to the enforcement of existing rights, the County concedes the law is procedural and jurisdictional, and therefore should be applied retroactively. The County does not argue the law imposes any new obligations or removes any rights of the County, and therefore the law cannot be substantive. Indeed, *City of Madison v. Town of Madison*, 127 Wis. 2d 96, 377 N.W.2d 221 (Ct. App. 1985) makes clear the County has no "right" to any authority granted by the legislature, such as the authority to regulate land uses. The County simply had no substantive "right" to the ZLR Committee's imposition of the

---

[3] The County also claims there is nothing in Wis. Stat. § 59.70(25) from which the Court can determine that the legislature intended that the new laws should apply retroactively, disputing Enbridge's reliance on *Overlook Farms Home Ass'n, Inc. v. Alternative Living Servs.*, 143 Wis. 2d 485, 422 N.W.2d 131 (Ct. App. 1988). (Cty. Br. at 12-13.) However, the County selectively quotes the portion of the *Overlook Farms* decision where the court discussed the express language in the statute in that case that required retroactive application. The language quoted by the County has no bearing on the determination of whether retroactive application can be implied from the purpose of a law, which is the principle for which Enbridge cited that decision. *Id.* at 494. ("The necessary implication of the statute also reveals the legislative intent to make the statute retroactive.") Additionally, *Overlook Farms* only addressed one avenue for applying a law retroactively—whether the law must be applied retroactively by express language or necessary implication. *Overlook Farms* did not address the second, independent determinant as to whether a law should be applied retroactively—whether the law is procedural or remedial rather than substantive.

Insurance Requirements because appeal of that decision had not run its course. *See Salzman*, 168 Wis. 2d at 530.

Additionally, the County did not even address *Landgraf*, 511 U.S. at 274, which held that a law conferring or ousting jurisdiction is procedural and applies retroactively. Wis. Stat. § 59.69(2)(bm) and Dane County Ord. § 7.68(1) expressly state that a county zoning committee and the County Board are acting in a "quasi-judicial" capacity when considering a conditional use permit. As indicated, *supra*, the County Board hears new evidence and decides the CUP issues *de novo* as the final County action under Dane County Ord. § 7.68(1). Therefore, the removal of the county zoning committee's authority to impose the Insurance Requirements is a law ousting jurisdiction of the committee. Given that Dane County's authority to impose the Insurance Requirements is a jurisdictional issue, the new state laws apply retroactively and make the ZLR Committee's imposition of the Insurance Requirements unlawful when they were added to the April 21, 2015 CUP even though the new laws limiting the County's jurisdiction had not yet been enacted. *Landgraf*, 511 U.S. at 274. Accordingly, because Wis. Stat. §§ 59.69(2)(bs) and 59.70(25) divest the County of the jurisdiction to impose the Insurance Requirements on hazardous liquid pipeline companies, they apply retroactively to invalidate the ZLR Committee's imposition of the Insurance Requirements in the April 21, 2015 CUP.

IV. THE COUNTY ACTED CONTRARY TO ITS LAWFUL AUTHORITY IN IMPOSING THE INSURANCE REQUIREMENTS.

Even if the ZLR Committee was not prohibited from imposing the Insurance Requirements in the April 21, 2015 CUP, the County thereafter acted contrary to its lawful authority.[4] The action of the Zoning Administrator in revoking the April 21, 2015 CUP and

[4] The ZLR Committee and County Board also acted contrary to the substantial evidence in the record. Enbridge demonstrated adequate CGL coverage of $700 million at the time of the CUP application, which has since increased to $860 million. An additional EIL insurance requirement of $25 million adds no further protection to

issuing a new CUP on July 24, 2015 without the Insurance Requirements was a permissible ministerial act under the Zoning Administrator's broad administrative authority to implement the zoning ordinance. The ZLR Committee approved the issuance of the CUP with the Insurance Requirements, which were thereafter invalidated by the newly enacted laws. Accordingly, the reissuance of the CUP by the Zoning Administrator without the Insurance Requirements was a ministerial act because it was mandated by the new Wisconsin law "with such certainty that nothing remain[ed] for judgment or discretion." *See Pries v. McMillon*, 2010 WI 63, ¶ 22, 326 Wis. 2d 37, 784 N.W.2d 648. Ironically, the County and the Plaintiffs argue that the Zoning Administrator had the authority to revoke the original Zoning Permit issued to Enbridge in April 2014 (Cty. Br. at 2) thereby conceding that he had the administrative ministerial authority to revoke zoning permits, which include CUPs that do not conform to Wisconsin law. Therefore, the County's and Plaintiffs' arguments in asserting the Zoning Administrator did not have similar authority to revoke the April 21, 2015 CUP with the unlawful Insurance Requirements and reissue the July 24, 2015 CUP without them is disingenuous.[5]

The County did not respond to, and has thereby conceded, the argument that Enbridge had vested rights in the July CUP and took action in reliance on it, and the County does not dispute that the ZLR Committee never made the requisite findings under Dane County Ord. § 10.255(2)(m) that Enbridge was not complying with the conditions in the July CUP before revoking it in September and reissuing yet a third CUP on October 9, 2015 with the Insurance

---

Dane County residents. The Oil Pollution Trust Fund provides even further, ample protection, eliminating the need for the Insurance Requirements. Moreover, Enbridge's history of fully funding any inadvertent releases and thereafter seeking insurance indemnification for the costs it incurred demonstrates the lack of need for the Insurance Requirements.

[5] The Plaintiffs also spend considerable time discussing "tar sands" oil and risks associated with pipeline releases, none of which has any relevance to the issues on certiorari review. It is undisputed that Enbridge carries $860 million of Comprehensive General Liability coverage for any release and has always funded cleanup efforts from any inadvertent release. *See* footnote 4, *supra.*

Requirements reinserted. (Cty. Br. at 19.) *See Fouts v. Breezy Point Condo. Ass'n,* 2014 WI App 77, ¶ 29, 355 Wis. 2d 487, 851 N.W.2d 845 (Arguments not specifically refuted are deemed conceded.). Under the vested rights doctrine, where a property owner obtains a permit and incurs expenses in reliance on that permit, the property owner has substantial vested rights under the permit and the political subdivision cannot prevent construction pursuant to that permit. *See Lake Bluff Hous. Partners v. City of S. Milwaukee*, 197 Wis. 2d 157, 171-72, 540 N.W.2d 189 (1995).

Enbridge has substantial vested rights in the July CUP, which was obtained through a valid permit application and issued in compliance with the zoning regulations in effect at the time of its issuance, including Wis. Stat. §§ 59.69(2)(bs) and 59.70(25). Further, it is undisputed that Enbridge has taken action and incurred substantial expenses in reliance on the July CUP and the Zoning Permit issued by the County on August 4, 2015, including the completion of site survey work and construction activities such as site preparation and excavation. Accordingly, the County lacked authority to violate Enbridge's vested rights in the July 24, 2015 CUP by revoking it and reissuing the October 9, 2015 CUP with the unlawful Insurance Requirements reinserted.

The attempted distinction by the individual Plaintiffs between a building permit and a CUP in the vested rights doctrine analysis is a distinction without a difference. (Pls.' Br. at 15.) Neither *Lake Bluff Hous. Partners, supra,* nor the *Building Height Cases*, 181 Wis. 519, 195 N.W. 544 (1923), limit the applicability of the vested rights doctrine only to building permits. The Supreme Court has defined the vested rights doctrine as a "zoning vested rights" doctrine. *Lake Bluff Hous. Partners*, 197 Wis. 2d at 171. Indeed, in *Rosenberg v. Vill. of Whitefish Bay*, 199 Wis. 214, 225 N.W. 838 (1929), the Court rejected the argument that a building permit was

required to invoke the vested rights doctrine and instead held that incurring expenses and preparing plans based simply on existing zoning regulations invoked the vested rights doctrine when the municipality passed a new zoning ordinance after the builder had incurred the expenses. However, even if the doctrine was limited to expenses incurred following issuance of a building permit, the County issued a Zoning Permit to Enbridge on August 4, 2015, before Enbridge incurred its expenses and commenced construction activities and well before the County re-imposed the unlawful Insurance Requirements in the October 9, 2015 CUP after the new laws had been enacted. A Zoning Permit is issued by the County to authorize construction activities instead of a building permit. *See* Dane County Ord. §§ 10.25(2)(a), (f) and (i).

V. THE PLAINTIFFS ARE BARRED FROM ARGUING THAT ENBRIDGE DOES NOT HAVE INSURANCE COVERAGE FOR SUDDEN AND ACCIDENTAL POLLUTION LIABILITY.

A. The Plaintiffs Are Not Parties To The Certiorari Action And Have No Authority To Raise New Issues In This Certiorari Action.

The individual Plaintiffs claim for the first time in their Response Brief that Enbridge does not carry CGL insurance coverage with sudden and accidental pollution liability coverage and, therefore, that Wis. Stat. § 59.70(25) does not apply. The Plaintiffs are barred from raising that argument because the County conceded the applicability of Wis. Stat. § 59.70(25) before both the ZLR Committee and the County Board. Certiorari review is limited to the record and cannot be expanded to include new issues raised on review, such as whether Wis. Stat. § 59.70(25) applies to Enbridge. There is no such thing as *de novo* review in a certiorari proceeding. *State ex rel. Brookside Poultry Farms, Inc. v. Jefferson Cty. Bd. of Adjustment*, 131 Wis. 2d 101, 121, 388 N.W.2d 593 (1986).

The individual Plaintiffs are not parties to the certiorari proceeding and have no standing to raise new issues in the certiorari proceeding. Consolidation of the two proceedings does not

merge the cases; parties in consolidated cases have the same relationship they occupied prior to consolidation in the separate cases. *Freuen v. Brenner*, 16 Wis. 2d 445, 454, 114 N.W.2d 782 (1962). There is a distinction between two cases being *consolidated into one action* and two cases being *consolidated for trial*. *Keplin v. Hardware Mut. Cas. Co.*, 24 Wis. 2d 319, 330, 129 N.W.2d 321 (1964). Cases consolidated for trial are not merged together in one case but are only tried together "each keeping its own distinctive characteristic and its own separate judgment." *August Schmidt Co. v. Hardware Dealers Mut. Fire Ins. Co.*, 26 Wis. 2d 517, 523, 133 N.W.2d 352 (1965); *Wisconsin Brick & Block Corp. v. Vogel,* 54 Wis. 2d 321, 325, 195 N.W.2d 664 (1972) (concluding that because the case was consolidated under Wis. Stat. § 269.59 (now Wis. Stat. § 805.05(1)(b)) not Wis. Stat. § 269.05 (now Wis. Stat. § 805.05(1)(a)), the actions were consolidated for trial not consolidated into one action). As in *Wisconsin Brick*, the present cases were consolidated pursuant to Wis. Stat. § 805.05(1)(b), and, therefore, the actions were not consolidated into one action but instead were solely consolidated for purposes of pre-trial proceedings and for trial. The individual Plaintiffs are not parties to the certiorari action. Contrary to the caption on their answer, the individual Plaintiffs are not "intervenor-respondents" in the certiorari action. The individual Plaintiffs are parties only to the injunction action, notwithstanding the Court's discretionary authority to allow the Plaintiffs to file a brief in the certiorari action. The Plaintiffs simply have no ability to raise any new issue in the certiorari action, particularly where they are attempting to take a contrary position on an issue that the County conceded in the certiorari action and that they have in fact conceded in their injunctive action. *See* Part V.B., *infra*.

B. The Plaintiffs Are Barred By Prior Admissions By The County And The Plaintiffs' Prior Arguments That Wis. Stat. § 59.70(25) Applies.

Both the County and the individual Plaintiffs have taken the position that Wis. Stat. § 59.70(25) applies to prohibit the County from imposing or enforcing the Insurance Requirements on Enbridge. The County expressly acknowledged: "There is no dispute that Wis. Stat. § 59.70(25) applies to Petitioners' Line 61 and renders the insurance conditions imposed on CUP 2291 unenforceable by Dane County." (Cty. Br. at 7.) Therefore, the County has conceded that Enbridge carries sudden and accidental pollution liability coverage. Since the County is the only party adverse to Enbridge in the certiorari action, and since the Plaintiffs are barred from interjecting a position contrary to the County's concession, that should end the Court's inquiry on certiorari review.

The Plaintiffs did not assert in opposition to Enbridge's motion to dismiss their injunction action that Wis. Stat. § 59.70(25) is inapplicable. To the contrary, in their answer, the Plaintiffs "admit that Enbridge notified the ZLR Committee that it carried $700 million of General Liability Insurance, including a Sudden and Accidental exception to the pollution exclusion." (Pls.' Answer at 16.) The Plaintiffs also acknowledge that "Dane County Corporation Counsel issued an opinion letter to the Zoning Administrator, dated July 17, 2015, that concluded: 'By the express language of the statute, effective July 14, 2015 the county is prohibited from requiring the Insurance Requirements.'" (Pls.' Answer at 19.) Likewise in the injunction action, the Plaintiffs have taken the position that Wis. Stat. § 59.70(25) applies to Enbridge: "Because the statute was not made retroactive, the Insurance Condition in the previously adopted Conditional Use Permit remained in effect, but prospectively the county was unable to enforce the provision." (Compl. at 33.) Obviously, if Wis. Stat. § 59.70(25) was inapplicable, the County

could have enforced the Insurance Requirements prospectively; thus, Plaintiffs have conceded that the statute is applicable.

The Plaintiffs cannot take one position in the injunction proceeding—arguing that Wis. Stat. § 59.70(25) applies to prevent the County from imposing or enforcing the Insurance Requirements—and take the opposite position in the certiorari proceeding—arguing that Wis. Stat. § 59.70(25) *does not* apply to Enbridge and *does not* prohibit the County from imposing or enforcing the Insurance Requirements. *See Olson v. Darlington Mut. Ins. Co.*, 2006 WI App 204, ¶ 4, 296 Wis. 2d 716, 723 N.W.2d 713 ("Judicial estoppel is properly invoked to prevent a party from adopting inconsistent positions in legal proceedings."). Accordingly, the Plaintiffs are barred from asserting that Wis. Stat. § 59.70(25) does not apply to Enbridge, where they have already taken the opposite position in the injunction proceeding.

C. The Plaintiffs' Argument That Enbridge Does Not Carry Sudden And Accidental Pollution Liability Coverage Is Directly Contradicted By The Record, Including The Dybdahl Insurance Report Cited By The Plaintiffs.

The Plaintiffs erroneously assert that the insurance consultant retained by the County, David Dybdahl, "specifically testified that Petitioners did not have sudden and accidental coverage, because insurance companies no longer offer this provision" and that so-called "time element" coverage is different than "sudden and accidental" coverage and therefore outside the scope of Wis. Stat. § 59.70(25). (Pls.' Br. at 11-12.) Those allegations are directly contradicted by the Dybdahl report.

Mr. Dybdahl expressly stated that his report addressed the "sudden and accidental pollution liability coverage **that Enbridge has today**...." (R.-Dybdahl Report, Apr. 8, 2015, p. 12. (Emphasis added.))[6] "The Enbridge General Liability insurance coverage is the type most

[6] "R.-" indicates that the document cited is part of the record. Unfortunately, the documents included in the record are not numbered or tabbed individually, nor are the pages numbered.

commonly used [by] large companies involved in the oil and gas business" and the policy "follows the usual and customary liability and insurance coverage purchased by large companies in the energy sector." (R.-Dybdahl Report, pp. 10-11.) "For unknown reasons, the terminology Sudden and Accidental Pollution Liability **is still used to describe the remnant liability insurance** created by the time element exception to the Pollution Exclusion in the General Liability insurance policies commonly purchased by oil and gas companies." (R.-Dybdahl Report, p. 15. (Emphasis added.))

Mr. Dybdahl concluded: "'Sudden and accidental pollution liability' is what Enbridge shows for insurance coverage in their (*sic*) financial statements today." (R.-Dybdahl Report, p. 12.) "Enbridge is not alone in its use of the term sudden and accidental pollution liability coverage, **it is commonly used in the oil and gas business to describe a [General Liability] policy with an exception to the pollution exclusion for contamination events happening within certain time frames."** (R.-Dybdahl Report, p. 13. (Emphasis added.)) While Mr. Dybdahl coined his own phrase "Time Element" pollution coverage to describe the types of occurrences covered by "Sudden and Accidental Pollution Liability Coverage," he confirmed that the term of art in the industry remains "sudden and accidental" liability coverage to describe the type of coverage carried by Enbridge. (R.-Dybdahl Report, pp. 13, 15.)

Additionally, the Plaintiffs' contention that "Time Element" coverage is somehow more limited than "Sudden and Accidental" coverage is directly contradicted by the Dybdahl report. Mr. Dybdahl's analysis concluded that the current iteration of "Sudden and Accidental" coverage is more expansive than prior versions because it extends coverage for a longer 30-day discovery period rather than merely "sudden" events. (R.-Dybdahl Report, p.12.) Indeed, "the pollution exclusion exemption in the Enbridge policy is not limited to sudden and quick events. A

Property Damage or Bodily Injury claim arising from a pollution event that begins and is discovered in 30 days and is reported to the insurance company within 90 days is not excluded by the Pollution Exclusion in the primary Enbridge General Liability insurance policy." (R.-Dybdahl Report, p. 12.) Accordingly, there is no basis for the Plaintiffs' argument that Enbridge does not carry "sudden and accidental" insurance coverage as contemplated by Wis. Stat. § 59.70(25). Instead, Mr. Dybdahl confirmed that Enbridge does carry such coverage. Enbridge therefore falls within the protections of Wis. Stat. § 59.70(25), as the County has conceded for purposes of this certiorari review proceeding and as Plaintiffs conceded in their response to Enbridge's motion to dismiss. The County is prohibited from imposing the Insurance Requirements on Enbridge.

CONCLUSION

For the reasons set forth above and in Enbridge's Initial Brief, the County had no authority to impose the Insurance Requirements in the April 21, 2015 CUP, to revoke or amend the July 24, 2015 CUP, to issue a third CUP on October 9, 2015 with the unlawful Insurance Requirements reinserted, or to take final action to impose the Insurance Requirements on December 3, 2015 following the hearing on Enbridge's appeals of the April 21, 2015 and October 9, 2015 CUPs. Therefore, Enbridge respectfully requests that the Court declare void the Insurance Requirements and require Dane County to remove the Insurance Requirements from the CUP and reinstate the CUP without the unlawful Insurance Requirements.

Dated this 8th day of June, 2016.

Thomas M. Pyper
State Bar No. 1019380
Jeffrey L. Vercauteren
State Bar No. 1070905
WHYTE HIRSCHBOECK DUDEK S.C.
P.O. Box 1379
Madison, Wisconsin 53701-1379
Telephone: 608-255-4440
Fax: 608-258-7138
Email: tpyper@whdlaw.com
Email: jvercauteren@whdlaw.com