

**WISCONSIN SUPREME COURT**

**March 26, 2019**

**1:30 p.m.**

2016AP2503 & 2017AP13 Enbridge Energy Company, Inc. v. Dane County

*This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), that reversed and remanded a Dane County Circuit Court decision, Judge Peter Anderson presiding, that had granted summary judgment in favor of Enbridge Energy Company, Inc.*

Enbridge Energy operates an extensive crude oil pipeline that includes a 12-mile line in northeast Dane County. In 2014, Enbridge Energy sought a conditional use permit (CUP) from Dane County to allow it to expand the volume of oil pumped through this line.

The Dane County Zoning and Land Regulation Committee retained an insurance expert, asked Enbridge to “produce documentation regarding proof of insurance,” and considered the permit application. The expert report recommended, among other things, that any CUP should require Enbridge to “procure and maintain” two “liability insurance policies over the course of the permit duration,” essentially to ensure that Enbridge would have money available to pay for damages and clean-up if there were to be an oil spill. In April 2015, the zoning committee approved a CUP with 12 conditions, including the two insurance requirements.

Effective July 14, 2015, the state legislature passed legislation that precludes a county from requiring an operator of an interstate hazardous pipeline (like Enbridge) to obtain insurance “if the pipeline operating company carries comprehensive general liability insurance coverage that includes coverage for sudden and accidental pollution liability.” See 2015 Wis. Act 55, codified in relevant part at Wis. Stat. §§ 59.69(2)(bs) and 59.70(25).

Faced with this change to the law, the zoning committee elected to retain the two insurance conditions, but added language quoting the new law to signal that these conditions were unenforceable. The county board sustained the zoning committee’s decision.

In January 2016, Enbridge asked the circuit court to require the zoning committee and the county board to sever the two permit conditions from the CUP.

Meanwhile, in February 2016, several property owners who own land near this pipeline filed a separate lawsuit seeking an injunction to enforce the permit conditions. They asserted, among other things, that Enbridge had never actually demonstrated that it carried comprehensive general liability insurance coverage that includes coverage for sudden and accidental pollution liability.

The circuit court ruled that the two conditions are preempted by the Act 55 insurance limitation and ordered these conditions severed from the CUP. The circuit court also ruled that the landowners were not permitted to challenge whether Enbridge had demonstrated it carried comprehensive general liability insurance coverage. The county and the landowners both appealed. The Court of Appeals consolidated the appeals and reversed.

The Court of Appeals ruled that the landowners may challenge whether Enbridge adequately showed the zoning committee that it carries the insurance specified in the Act 55 insurance limitation. The Court of Appeals ruled that in order to trigger the Act 55 insurance limitation, Enbridge needed to show the zoning committee that it “carries” insurance that “includes” coverage “for sudden and accidental pollution liability.”

The Court of Appeals expressed concern that by simply severing these conditions from the CUP, the circuit court had eliminated certain detailed requirements related to insurance that had been incorporated by the county. The appellate court reasoned that the county may not have issued the CUP without an assurance of insurance coverage. The Court of Appeals concluded that the appropriate remedy was to remand the case to the circuit court with directions to return this matter to the zoning committee for its review.

Enbridge petitioned the Supreme Court for review, presenting the following issues:

1. Wisconsin law expressly preempts counties from imposing certain insurance requirements on pipeline operators as conditions in a conditional use permit. Can a county, while conceding that state law prevents it from enforcing a particular insurance requirement, nonetheless include that requirement as a condition in a CUP granted to a pipeline operator?
2. Wisconsin law permits property owners, under certain circumstances, to enforce county “zoning ordinances.” Under this law, (1) can a property owner bring a citizen suit to enforce a particular condition in a CUP issued by a county, and (2) if so, can a property owner bring a citizen suit to enforce that condition when the county concedes that the condition is unenforceable?
3. If the holder of an approved CUP successfully challenges a particular condition in that permit—but not the permit in its entirety—as unlawful, is striking the unlawful condition a proper remedy? Does this Court’s remedy jurisprudence under Adams v. [State] Livestock Facilit[ies] Siting Review Board[, 2012 WI 85, 342 Wis. 2d 444, 820 N.W.2d 404] apply to land-use permitting more generally?