UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PROTECT OUR LAND AND RIGHTS DEFENSE FUND,

Plaintiff,

Case No. 2:12-cv-14161

-vs-

Hon. Robert H. Cleland

ENBRIDGE ENERGY, LIMITED PARTNERSHIP,

Defendant.

---


William D. Tomblin (P40540)
Attorney for Plaintiff
P. O. Box 4782
East Lansing, MI 48826
Telephone: 517-349-8000

Gary L. Field (P37270)
Field Law Group, PLC
Attorneys for Plainti8ff
3493 Woods Edge Drive, Suite 100
Okemos, Michigan 48864
Telephone: 517-913-5100
Email: gfield@fieldlawgroup.com

John H. Bauckham (P10544)
Bauckham, Sparks, Lohrstorfer, Thall & Seeber, P.C.
Attorney for Amicus Curiae Michigan Townships Association
458 W. South Street
Kalamazoo, MI 49007
Telephone: 269-382-4500
Email: ritchie@michigantownshiplaw.com

Michael S. Ashton (P40474)
Thaddeus E. Morgan (P47934)
Fraser Trebilcock
Attorneys for Defendants
124 W. Allegan, Suite 1000
Lansing, MI 48933
Telephone: 517-482-5800
Email: mashton@fraserlawfirm.com
tmorg@fraserlawfirm.com

Edward H. Pappas (P23224)
Phillip J. DeRosier (P55595)
Kathleen A. Lang (P34695)
Dickinson Wright PLLC
Co-counsel for Defendant
500 Woodward Ave., Suite 4000
Detroit, MI 48226
Telephone: 313-223-3500


**BRIEF AMICUS CURIAE OF MICHIGAN TOWNSHIPS ASSOCIATION**

TABLE OF CONTENTS

**PAGE**

## INDEX OF AUTHORITIES

**PAGE**

**CASES**



**MICHIGAN COMPILED LAWS**

**PAGE**

**OTHER**

## INTRODUCTION

Plaintiff Protect Our Land And Rights Defense Fund ("POLAR") is a Michigan non-profit corporation whose members, according to its Complaint in the within matter, consist of landowners in the counties of Livingston, Oakland, Cass, Berrien, Ingham, St. Joseph, Jackson, St. Claire and Kalamazoo in the State of Michigan. Plaintiff has brought the within suit asking in pertinent part that Defendant Enbridge Energy, Limited Partnership be enjoined from commencing or continuing its pipeline construction within the aforementioned counties until it has obtained ". . . all necessary and non-appealable approvals for the project, including MPSC and environmental approvals, and the appeal of any such approvals, and including county, township and municipality consents." (Emphasis added)

The Michigan Townships Association ("MTA") is a Michigan non-profit corporation whose members include over 1,235 Michigan townships. MTA recognizes that the issues of standing in this case as identified in the Defendant's pleadings will likely make it unnecessary for this Court to address the substantive issues raised in Plaintiff's Complaint. However, should this Court reach the substantive issues raised by Plaintiff, there is one such issue that is of great significance to Michigan townships. MTA will focus in this brief on that issue, which is whether the Defendant is required to obtain a township's consent pursuant to Article 7, Section 29 of the 1963 Michigan Constitution and MCL 247.183 prior to constructing its crude oil and petroleum pipeline within or across a public road right-of-way within that township. Should this court reach this substantive issue, MTA believes that it must be properly concluded that (with the limited exceptions discussed herein) such township consent is required.

## ARGUMENT

### I. DEFENDANT IS REQUIRED TO OBTAIN A TOWNSHIP'S CONSENT PURSUANT TO ARTICLE 7, SECTION 29 OF THE 1963 MICHIGAN CONSTITUTION AND MCL 247.183 PRIOR TO CONSTRUCTING ITS PIPELINE WITHIN OR ACROSS A PUBLIC ROAD RIGHT-OF-WAY WITHIN THAT TOWNSHIP.

#### A. Overview of Federal and State Pipeline Regulatory Scheme

##### 1. Federal Regulatory Authority

The Pipeline Safety Act ("PSA") (49 USC 60101 et seq) in essence combined two prior acts, the Hazardous Liquid Pipeline Safety Act ("HLPSA") (previously 49 USC 2001 et seq) and the Natural Gas Pipeline Safety Act ("NGPSA") (previously 49 USC 1671 et seq). The PSA describes its purpose as being " . . . to provide adequate protection against risks to life and property posed by pipeline transportation and pipeline facilities by improving the regulatory and enforcement authority of the Secretary of Transportation". (Emphasis added) 49 USC 60102(a)(1). The PSA by its terms applies ". . . to the design, installation, inspection, emergency plans and procedures, testing, construction, extension, operation, replacement, and maintenance of pipeline facilities". 49 USC 60102(a)(2)(B).

The PSA and the administrative regulations adopted thereunder establish a broad regulatory scheme for the construction and operation of interstate pipelines, which is administered through the Pipeline and Hazardous Materials Safety Administration ("PHMSA") of the U.S. Department of Transportation. This scheme of regulation does not, however, encompass regulatory authority as to the location and routing of crude oil and petroleum pipelines[1]. The PSA at 49 USC 60104(e) provides:

[1] This stands in contrast to the situation with respect to interstate natural gas pipelines. Under Section 7(c) of the Natural Gas Act [15 USC 717(c)], parties seeking to construct, acquire or operate an interstate natural gas pipeline must obtain a "certificate of public convenience and necessity" from FERC, which includes FERC review and

> "(e) Location and routing of facilities. – this chapter does not authorize the Secretary of Transportation to prescribe the location or routing of a pipeline facility."

The PSA further provides in relevant part:

> 'Preemption. – A State authority that has submitted a current certification under section 60105(a) of this title may adopt additional or more stringent safety standards for intrastate pipeline facilities and intrastate pipeline transportation only if those standards are compatible with the minimum standards prescribed under this chapter. A state authority may not adopt or continue in force safety standards for interstate pipeline facilities or interstate pipeline transportation." (Emphasis added) [49 USC 60104(c)]

Courts reviewing the question have accordingly afforded broad preemptive effect to this federal framework of interstate pipeline regulation as it relates to safety concerns. The following cases are offered as illustrative, non-exhaustive examples of this.

In Olympic Pipeline Company v City of Seattle, 437 F3d 872 (9th Cir 2006), the court held that the City of Seattle's attempt to impose additional safety conditions through the local ordinance upon the operation of a hazardous liquid (e.g., petroleum products) pipeline[2] was preempted by the PSA. The court found that ". . . the PSA expressly preempts Seattle's efforts to impose pipeline safety regulations". 437 F3d at 880.

In Kinley Corp. v Iowa Utilities Board, 999 F3d 354 (8th Cir. 1993), the court held that the HLPSA expressly preempted an Iowa state statute that established a state program to supervise interstate hazardous liquid pipelines.

In Williams Pipeline Co. v City of Mounds View, 651 F Supp 551 (D. Minn. 1987), the court held that the HLPSA expressly preempted city and county efforts to regulate hazardous

---

approval of natural gas pipeline siting. There is no comparable federal oversight with respect to the siting of crude oil and petroleum pipelines.

[2] The term "hazardous liquid" includes "petroleum or a petroleum product (e.g., crude oil)". 49 USC 60101(a)(4)(A).

liquid pipeline safety because the Act ". . . clearly expresses Congressional intent to preempt state efforts to establish safety standards for hazardous liquid pipelines." 561 F Supp at 566.

In Natural Gas Pipeline Co. of Am. v R.R. Comm'n, 679 F2d 51 (5th Cir. 1982), the court held that the NGPSA expressly preempted the application to interstate gas pipelines of a Texas Railroad Commission rule requiring natural gas companies to provide procedures and safeguards to protect the public from accidental releases of gases from their facilities.

While the courts have accordingly recognized that the federal law has created a framework of pipeline safety regulation that has broad preemptive effect, the courts have also acknowledged that this preemptive effect is not all-encompassing as to pipeline regulation.

In Schneidewind v ANR Pipeline, 485 US 293 at 306, 108 S.Ct. 1145, 99 L.Ed. 2d 316 (1988), the U.S. Supreme Court stated:

> "Of course, every state statute that has some indirect effect on rates and facilities of natural gas companies is not preempted. Cf Metropolitan Life Ins. Co. v Massachusetts, 471 US 724, 753-756, 105 S.Ct. 2380, 2396-2398, 85 L.Ed. 2d 728 (1985)". 485 US at 308.

The Court in Algonquin LGN v Loqa, et al, 79 FSupp 2d 49 (D. Rhode Island 2000) stated:

> "Finally, it should be noted that interstate gas facilities are not entirely insulated from local regulation. State and local laws that have only an indirect effect on interstate gas facilities are not preempted. See Schneidewind, 485 US at 308, 108 SCt 1145; ANR Pipeline, 828 F2d at 474. Moreover, local regulation with respect to matters or activities that are separate and distinct from subjects of federal regulation may be permissible if they do not impede or prevent the accomplishment of a legitimate federal objective." 79 F Supp 2d at 52-53.

### 2. State Regulatory Authority

While federal law does not assert regulatory authority as to the location and routing of crude oil and petroleum pipelines, the State of Michigan has for many years chosen to exercise such authority. Under Act 16 of 1929 (MCL 483.1 et seq), the Michigan Public Service Commission ("MPSC")[3] was given broad regulatory authority with respect to the route, location and capacity of crude oil and petroleum pipelines and their appurtenant structures. Under Act 16 and the administrative rules promulgated thereunder, pipeline companies wishing to construct a pipeline must file with the MPSC ". . . the route along which the trunk line or trunk lines are proposed to be constructed, the intended size and capacity thereof, and the location and capacity of all pumping stations, gate valves, check valves and connections and appliances of all kinds used, or to be used, on said trunk line or lines" and obtain MPSC approval of the same. (MCL 483.6; See also Mich Ad R 460.17601).

## B. With Limited Exception, Township Consent is Required to Place Pipelines in or Across Public Road Right-of-ways Within the Township.

Article 7, Section 29 of the 1963 Michigan Constitution provides:

> "No person, partnership, association or corporation, public or private, operating a public utility shall have the right to the use of the highways, streets, alleys or other public places of any county, township, city or village for wires, poles, pipes, tracks, conduits or other utility facilities, without the consent of the duly constituted authority of the county, township, city or village; or to transact local business therein without first obtaining a franchise from the township, city or village. Except as otherwise provided in this constitution, the right of all counties, townships, cities and villages to the reasonable control of their highways, streets, alleys and public places is hereby reserved to such local units of government."

MCL 247.183 provides in pertinent part:

> "(1) Except as otherwise provided under subsection (2), telegraph, telephone, power, and other public utility companies, cable television companies, and

[3] Act 16 refers to a Public Utilities Commission. The Public Utilities Commission was subsequently abolished and the powers and the duties of that body were transferred to the Public Service Commission pursuant to MCL 460.4.

> municipalities may enter upon, construct, and maintain telegraph, telephone, or power lines, pipe lines, wires, cables, poles, conduits, sewers or similar structures upon, over, across, or under any public road, bridge, street, or public place, including, longitudinally within limited access highway rights-of-way, and across or under any of the waters in this state, with all necessary erections and fixtures for that purpose. A telegraph, telephone, power, and other public utility company, cable television company, and municipality, before any of this work is commenced, shall first obtain the consent of the governing body of the city, village, or township through or along which these lines and poles are to be constructed and maintained.
>
> (2) A utility as defined in 23 CFR 645.105(m)[4] may enter upon, construct, and maintain utility lines and structures, including pipe lines, longitudinally within limited access highway rights-of-way and under any public road, street, or other subsurface that intersects any limited access highway at a different grade, in accordance with standards approved by the state transportation commission and the Michigan public service commission that conform to governing federal laws and regulations and is not required to obtain the consent of the governing body of the city, village, or township as required under subsection (1). . .".

In Mayor of the City of Lansing v Michigan Public Service Commission, 470 Mich 154 (2004), the Michigan Supreme Court considered the claim of Wolverine Pipeline Co. that MCL 247.183 (which at that time contained no language expressly excluding limited access highways from the municipal consent requirement contained therein) should be interpreted as not applying to Wolverine's proposed interstate liquid petroleum pipeline to be located within an interstate highway right-of-way passing in part through the City of Lansing. The City of Lansing was conversely claiming that not only was city consent required, but that such consent must be obtained prior to Wolverine Pipeline Co. applying to the MPSC for approval of its pipeline. The Michigan Supreme Court did not agree in full with either parties' position, ruling instead:

[4] 23 CFR 645.105 defines "utility" as " . . . a privately, publicly, or cooperatively owned line, facility or system for producing, transmitting, or distributing communications, cable television, power, electricity, light, heat, gas, oil, crude products, water, steam, waste, storm water not connected with highway drainage, or any other similar commodity, including any fire or police signal system or street lighting system which directly or indirectly serves the public. The term utility shall also mean the utility company inclusive of any wholly owned or controlled subsidiary." (Emphasis added)

> "We conclude that the plain language of MCL §247.183 requires Wolverine to obtain local consent before beginning construction of its project. However, local consent is not required at the time of application to the PSC." 470 Mich at 173.

Subsequent to the Michigan Supreme Court's above ruling, the Michigan legislature amended MCL 247.183 to its current form so as to eliminate the local consent requirement for pipeline construction (1) within or across a limited access highway or (2) that portion of a public road right-of-way that intersects a limited access highway at a different elevation (essentially overpasses and underpasses).[5] In City of Lansing v State of Michigan, 275 Mich App 423 (2007), leave to appeal denied at 480 Mich 1104 (2008), the Michigan Court of Appeals upheld the constitutionality of this partial elimination of the local consent requirement.

Accordingly, under MCL 247.183 as interpreted by the Michigan Court of Appeals in the aforementioned 2007 City of Lansing opinion, township consent is not required to place a pipeline within or across a limited access highway or that portion of a public road right-of-way that intersects a limited access highway at a different elevation.

However, if the public road is not a limited access highway or a portion of a public road right-of-way that intersects a limited access highway at a different elevation, then Article 7, Section 29 of the 1963 Michigan Constitution and MCL 247.183 would require township consent prior to construction of a pipeline within or across the public road right-of-way. As the Michigan Supreme Court ruled in its 2004 Mayor of the City of Lansing decision, such local consent is, however, only required prior to construction of the pipeline; it is not required prior to application to the MPSC for its approval of the pipeline.

[5] "Limited access highway" is defined at Section 26 of the Michigan Motor Vehicle Code (MCL 257.26) as meaning " . . . every highway, street, or roadway in respect to which owners or occupants of abutting lands and other persons have no legal right of access to or from the same except at such points only, and in such manner as may be determined by the public authority have such jurisdiction over such highway, street or roadway."

Defendant argues beginning at page 15 of its COMBINED MOTION AND BRIEF TO DISMISS PLAINTIFF'S COMPLAINT that since Defendant holds the private easement from the owners of the lands over which its pipeline will cross, the Defendant does not need the local municipality's consent to cross a public road right-of-way so long as it does not interfere with the use of the road and obtains county road commission approval for the crossing. Amicus curiae must respectfully disagree. There is nothing in MCL 247.183 that would recognize such an exception from the local consent requirement contained therein. It is further noted that, as recognized by the Michigan Supreme Court in Eyde Brothers Development Co. v Eaton County Drain Commissioner, 427 Mich 271 (1986), the public's easement rights in a highway are not limited to surface travel (the primary concern and focus of county road commissions) but also include those subsurface uses "contemplated to be in the public interest and for the public benefit" (e.g., sewers, water lines) 427 Mich at 286. There is accordingly a very real substantive justification for township review and approval of a proposed pipeline to assure that such existing or possible future public subsurface uses (which typically are not the focus of county road commissions) are not impaired by the proposed pipeline. Finally, it is noted that the suggestion that county road commission consent for placement of its pipeline in the public road right-of-way is sufficient conflicts with the Michigan Supreme Court's decision in Union Township v Mt. Pleasant, 381 Mich 182 (1968) (cited in Defendant's counsel's letter) in which the Court rejected the Defendant city's contention that it was only required to obtain the county road commission's consent for the placement of its water pipeline in the public road right-of-way running through the township and instead held that under Article 7, Section 29 of the 1963 Michigan Constitution and MCL 247.183 the consent of both the township and the county road commission was required. Referring to the statutory authority for its conclusion, the Court described to it as ". . .

manifesting the Legislature's intent that townships, for example, retain their right of reasonable control over utility use of public roads passing through their territory, considering the inconvenience to township residents and businesses that generally results from construction within the right-of-way of public roads." Supra at 89-90.

Beginning at page 16 of its COMBINED MOTION AND BRIEF TO DISMISS PLAINTIFF'S COMPLAINT, Defendant cites language in Section 2 of Act 16 of 1929 (MCL 483.2) giving such companies "use of the highways in this state" as negating the need for obtaining township consent. Here, too, amicus curiae must disagree. It is a basic principle of Michigan common law governing statutory construction that different statutes relating to the same subject matter should, whenever their language reasonably permits, be interpreted in a manner that gives effect to both. Travelers Ins. v U-Haul of Michigan, Inc., 235 Mich App 273 (1999). The right to "use of highways" language in Act 16 must accordingly be interpreted in the context of the obligation imposed under MCL 247.183 to obtain local municipal consent and to submit to reasonable conditions attached to that consent. However, even if one was to conclude that Act 16's "use of highways" language and the local consent requirement of MCL 247.183 cannot be so reconciled and are in direct conflict with one another, the local consent requirement of MCL 247.183 would prevail as the more recent legislative enactment. Metropolitan Life ins. Co. v Stoll, 276 Mich 637 (1936); People v Ellis, 224 Mich App 752 (1997).

### C. There Are Important Concerns that a Township Can Properly Address Through its Consent Authority Under Article 7, Section 29 of the 1963 Michigan Constitution and MCL 247.183.

A township's discretion in exercising its consent authority under MCL 247.183 is not unfettered. The Michigan Supreme Court has held that a township may not arbitrarily or

unreasonably withhold its consent to a request to place a pipeline within a public road right-of-way. Union Township v Mt. Pleasant, supra at 90. In identifying important local concerns that a township may properly address through its consent authority, it is appropriate to first acknowledge certain concerns that may not be so addressed.

As the earlier discussion of federal regulatory authority over interstate pipelines indicated, the federal government has established a broad statutory and regulatory framework over interstate crude oil and petroleum pipelines addressing on a uniform basis safety concerns regarding the "design, installation, emergency plans and procedures, testing, construction, extension, operation, replacement and maintenance of pipeline facilities". 49 USC 60102(a)(2)(B). As noted in that discussion, the courts have repeatedly found state and local attempts to impose a higher safety standard to be invalid as preempted by federal law. Accordingly, it must be acknowledged that a township is legally preempted from withholding its consent based upon safety concerns pertaining to the construction, operation or maintenance of the proposed pipeline or from attempting to impose a condition that would establish a higher safety protection standard than that established under federal law.

With this said, there still remain a number of legitimate local concerns that a township can lawfully address in exercising its consent authority. The following is provided by way of example:

- Such minor adjustments in the location of the pipeline in the public road right-of-way as are reasonably necessary to assure that the pipeline does not impair existing or foreseeable future use of the public right-of-way for sewer, water or other utilities.

- Restoration of the surface of the public road right-of-way to its original condition.

- Provision to the township of final as-built plans and specifications showing the location of the pipeline in the public road right-of-way.

- Coordination to the extent reasonably practical of the pipeline construction program with any township or county road commission program for a public utility (e.g., sewer, water) or street construction, rebuilding and/or repair.

- Indemnification of the township, its officers and employees for any claims, losses, liabilities, etc. incurred by the township arising out of the actions of the pipeline company or its officers, employees or agents in using, constructing or maintaining its pipeline within the public road right-of-way.

Neither amicus curiae nor this Court are required in the context of this litigation to identify each and every non-preempted local concern that a township may properly address through its consent authority under MCL 247.183. The key point is that such non-preempted concerns do exist and that Defendant is obligated to obtain a township's consent to place its pipeline within the public road right-of-way in order to have these concerns addressed to the extent the township reasonably sees fit.[6]

[6] If an individual township attempts to impose one or more conditions to its consent that are beyond the scope of the township's legal authority, Defendant will of course be free to seek appropriate legal redress as to that township.

## CONCLUSION

For the reasons set forth above, amicus curiae Michigan Townships Association submits that if this Court reaches the substantive question of whether the Defendant is required to obtain a township's consent pursuant to Article 7, Section 29 of the 1963 Michigan Constitution and MCL 247.183 prior to constructing its pipeline within or across a public road right-of-way within that township, this question should be answered in the affirmative (with the limited exceptions discussed above pertaining to limited access highways). It is respectfully submitted that to conclude otherwise would be to ignore established case law and deprive Michigan townships of the opportunity to address legitimate, non-preempted concerns.

Respectfully submitted:

Dated: October 11, 2012

s/John H. Bauckham
Bauckham, Sparks, Lohrstorfer, Thall
& Seeber, P.C.
458 W. South Street
Kalamazoo, Michigan 49007-4621
ritchie@michigantownshiplaw.com
P10544

CERTIFICATE OF SERVICE

I hereby certify that on October 11, 2012, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to the following: Michael S. Ashton, Phillip J. DeRosier, Gary L. Field, Kathleen A. Lang, Thaddeus E. Morgan and Edward H. Pappas, and I hereby certify that I have mailed by United States Postal Service the paper to the following non-ECF participant: William D. Tomblin, P. O. Box 4783, East Lansing, MI 48826-4783.

s/John H. Bauckham
P10544