

OHIO SENATE BILL 250

DETECTING DEMOCRATIC PROTESTS BY MASSIVE CRIMINAL PENALTIES

Senate Bill (SB) 250 is a thinly veiled attempt by the fossil fuel lobbies in Ohio to deter citizen protests at new oil and gas facilities, especially pipelines. It was introduced on February 28, 2018, by Republican State Senator Frank Hoagland whose Senate District 30 covers southeastern Ohio where the majority of the state's fracking industry is concentrated. It is pending in the Senate Judiciary Committee and may be fast-tracked for passage yet this year during the brief "lame duck" session that follows the November 6 election.

The bill directly incorporates "model" legislation drafted by the Koch Brothers funded American Legislative Exchange Council ("ALEC") which calls this proposal "The Critical Infrastructure Protection Act."¹ The ALEC organization brings together corporate lobbyists and conservative state legislators to draft bills promoting a corporate agenda in statehouses nationwide. SB 250 is one of eight state bills introduced in 2018 based on the ALEC draft, with the others introduced in Oklahoma, Iowa, Pennsylvania, North Dakota, South Dakota, Colorado and Washington.

This fossil fuel industry effort appears aimed at stifling pipeline protests similar to those at the Dakota Access pipeline that caused widespread sympathy toward its largely Native American opponents who feared water contamination from pipeline spills. Three states in that pipeline's path have introduced their own versions of the ALEC bill (North and South Dakota and Iowa). The Dakota Access pipeline parent company is Energy Transfer Partners, which also owns the controversial Rover pipeline in Ohio that has contaminated many areas across the state during its construction and has generated widespread public resistance.

ALEC describes this bill as codifying "criminal penalties for a person convicted of willfully trespassing or entering property containing a critical infrastructure facility without permission by the owner of the property and holds a person liable for any damages to personal or real property while trespassing." However, that description is misleading because these acts have already been criminal in Ohio for a century or more. What the bill actually does is add a definition for "critical infrastructure" to these long-standing crimes and then significantly raises the imprisonment and fines above current law if such critical infrastructure is in any way involved. While industry proponents claim the bill addresses acts of terrorists, it does not amend Ohio laws defining terrorism² that already have high penalties. Instead it addresses common trespass and property damage offenses that may occur at some public protests.

A second goal of the bill is to intimidate large environmental groups who support pipeline protests by subjecting them to criminal penalties for "complicity" with trespassing

¹ See model bill on ALEC's web-site at: <https://www.alec.org/model-policy/critical-infrastructure-protection-act/>

²Found at Ohio Revised Code Sections 2909.21 to 2909.31, adopted in 2002 in response to the 9-11 attack.

individuals and makes them liable for greatly increased fines that are ten times larger than the already increased fines for individuals. Virtually all of the major national environmental groups were supportive of the protests against the Dakota Access pipeline and were instrumental in publicizing the protests. This provision is clearly intended to keep them on the sidelines in the future for fear of being found guilty of felonies and facing large criminal fines.

Here is how SB 250 will accomplish the fossil fuel industry's aims to deter protests.

EXPANDED CRIMINAL PENALTIES:

As introduced, the bill amends three existing statutes in Title 29 of the Ohio Revised Code where all of Ohio's criminal laws are located.

The criminal statutes amended are:

- Section 2909.07 governing "criminal mischief" which is the damaging of or tampering with the property of another.
- Section 2911.21 governing "criminal trespass" which is entering onto or remaining on the property of another. Since many protests involve entering a corporation's property, this is the main concern of deterring protests.
- Section 2911.211 governing "aggravated trespass" which is a trespass that includes causing physical harm to the property.

The definition for "critical infrastructure" facility is added in a new paragraph to the statute governing "criminal trespass." By placing it in this section, it tips the drafter's hand that they are focused on using the crime of trespass to deter protests. The new definition includes the following facilities used by the fossil fuel industries if they are enclosed by a fence or surrounded by signs giving notice that entry is prohibited:

- An interstate or instate natural gas pipeline including all related facilities such as compressor stations, valves, meters
- A gas processing plant
- A petroleum refinery
- An oil or refined oil storage or distribution facility
- A natural gas company facility
- A chemical, polymer or rubber manufacturing facility

The drafters of SB 250 were smart enough to include facilities not associated with fossil fuels both to obtain additional industry supporters and to make the bill appear broader than just opposing Dakota Access type protests. These additional facilities are usually favored by the public which would want them heavily protected. None of them have been the object of protests or damage in Ohio but the industry's strategy is clear that they will highlight protecting these facilities to pass the rest of the bill for the fossil fuel industry. These additional facilities include:

- A telecommunications facility, including towers and telephone poles, switching offices, radio and television transmission, video service networks and broadband infrastructure

- A water treatment facility and its structures
- Dams
- A port, trucking terminal, railroad property or other transportation facility
- An aluminum refinery
- An electric generating facility, substation, switching station and electric transmission lines

The criminal statutes are then amended to refer to the critical infrastructure definition and new paragraphs are added providing new and enhanced penalties³ for offenses involving those facilities as follows:

Criminal Mischief, 2909.07

<u>Current penalty and punishment</u>	<u>New penalty involving critical infrastructure</u>
3 rd degree misdemeanor if no risk of physical harm, punishable by up to 60 days in jail and up to a \$500 fine	1 st degree felony ⁴ punishable by up to eleven years in prison and a fine of up to \$20,000
1 st degree misdemeanor if a risk of physical harm present punishable by up to 180 days of jail and up to a \$1,000 fine	

Criminal Trespass, 2911.21

<u>Current penalty and punishment</u>	<u>New penalty involving critical infrastructure</u>
4 th degree misdemeanor punishable by up to 30 days in jail and up to a \$250 fine	1 st degree misdemeanor punishable by up to 180 days of jail and a \$1,000 fine.

Aggravated Criminal Trespass 2911.211

<u>Current penalty and punishment</u>	<u>New penalty involving critical infrastructure</u>
1 st degree misdemeanor punishable by up to 180 days of jail and a \$1,000 fine.	3 rd degree felony punishable by up to three years in prison and a fine of up to \$10,000

³ Ohio criminal penalties for felonies are found in Section 2929.14 for imprisonment and in Section 2929.18 for fines. Penalties for misdemeanors are found in Section 2929.24 for imprisonment and in Section 2929.28 for fines.

⁴ For comparison, the crimes of voluntary manslaughter, rape, kidnapping, and aggravated robbery are also a felony of the first degree.

NEW CRIMES FOR IMPEDING OPERATIONS OR USING DRONES:

In addition to these very severe criminal penalties to deter protests or act of civil disobedience, the existing crimes are also expanded in two ways that clearly appear to be designed to deter protests.

First, the crimes of criminal mischief and aggravated criminal trespass traditionally have required actual physical harm to property. Both crimes are radically expanded at critical infrastructure facilities to be violated merely if a person “impedes” or “impairs” a facility’s operation in the absence of any actual damage. Accordingly, barring a facility’s entryway to prevent truck egress which was previously a 4th degree misdemeanor for criminal trespass will now be a very serious first-degree felony punishable by up to 11 years in prison even though no property damage occurs. As the terms “impair” and “impede” are extremely vague and are not defined in the bill, their existence will likely deter citizens from constitutionally protected acts of protest out of a justified fear of doing years of hard time in prison for violating these broad terms.

Second, the statute criminalizes the flying of a drone over one of these facilities either as a criminal trespass for merely crossing its fence or property boundary signs or as an aggravated criminal trespass if flying the drone is for the purpose of damaging the property or to “impede or inhibit the facility’s operation.” Historically much of the most dramatic evidence of the environmental harm done at these facilities or during their construction has come from videos taken by drones flying overhead. This industry bill will now criminalize obtaining this embarrassing information.

ORGANIZATIONAL PENALTIES

Any organization found guilty of “complicity” in any of the criminal offenses discussed above is also to be punished by a fine that is ten times the fine assessed against an individual. Accordingly, for the new first-degree felony of criminal mischief at a critical infrastructure facility, an organization can be fined \$200,000. Complicity is defined in Section 2929.23 to include:

- (1) Solicit or procure another to commit the offense;
- (2) Aid or abet another in committing the offense;
- (3) Conspire with another to commit the offense.

A complicit entity is also guilty of the same underlying offense as the individual doing the actual act violating the statute. Since the concept of what giving “aid” is to an individual that commits one of these expanded crimes might cover a wide range of activities, environmental groups are clearly being pushed hard by this bill to avoid any interaction with individual protesters who may commit acts of civil disobedience. It becomes possible that merely publicizing protest events by larger groups could be deemed “aid” and expose them to serious criminal penalty of up to a first-degree felony. Existing law in Section 2909.22 criminalizes “Soliciting or providing support for terrorism” as a third-degree felony for the behavior that this bill seeks to create against environmental groups showing how extreme its proposed penalties are.

CIVIL LIABILITY

The statute on civil lawsuits being amended is Section 2307.61 governing civil actions to recover damages for willful acts or theft. Historically any person “willfully,” i.e., with clear intent, destroying or stealing the property had to recompense the property owner for the lost value. That standard is changed in SB 250 to cover any property damaged during any trespass on a critical infrastructure facility thus making the trespasser liable if they had no intent to do so and even if the damage may have been caused by the agents of the protested facility itself.

A SUBSTITUTE BILL TO BE PASSED IN 2018?

SB 250 as introduced has received a great deal of criticism for how severe it sanctions activities that are protected by the First Amendment as proper acts of civil protest. In response, a “substitute” bill is being circulated at the Statehouse that has been drafted by the bill’s sponsors to mute that criticism. A substitute bill wholly replaces an earlier version with a single vote and can therefore be quickly adopted with far less discussion than a bill receiving individual amendments. This new draft is a mixed bag of positive and negative changes but does not alter the bill’s overall intent to deter lawful protest. Statehouse insiders believe there will be a strong effort to pass this substitute, called the “-4” (dash 4) version, during the “lame duck session” after the November election but before the new legislature is seated in January when many bills move quickly with less opportunity for the public to be involved.

On the positive side, if the substitute bill is adopted, it would:

- drop the clearly excessive first-degree felony offense for criminal mischief to a critical infrastructure facility to a third-degree felony
- require that damage be “willingly” intended to create the bill’s special civil and criminal liability
- merely flying a drone across the facility boundary is no longer criminal trespass.

On the negative side, the substitute bill would:

- give the same increased penalty approach to Section 2917.21 governing “telecommunications harassment” by increasing the “organizational penalty” by increasing the fine by a factor of ten for the making of intimidating or harassing phone or other electronic messages
- similarly increases the penalty in Section 2917.32 governing “making false alarms” of a “report” or “warning” of impending fire, explosion, or other catastrophe at a critical infrastructure facility knowing it to be false by increasing the “organizational penalty” fine by a factor of ten. Since this literally criminalizes a “report warning of an alleged catastrophe,” an environmental group circulating a written technical report warning of the dangers of fossil fuel spills or other harm could potentially be cited for this crime under this poorly written provision with stark harm to the First Amendment.
- include five new categories in the “critical infrastructure facility” definition, of which four are related to fossil fuels and pipelines: fracking production wells, “laydown” areas where pipe is stored for use in a pipeline, any above-ground portion of an oil or

gas pipeline or storage facility, and the extremely broad “facilities associated with a natural gas company facility or interstate natural gas pipeline.” These many new pipeline and fracking related additions underscore how the bill overwhelmingly addresses the goals of the fossil fuel industries.

- the crime of “criminal mischief” is changed to include any “improper” tampering of property at a critical infrastructure facility without defining that term, thus creating a broad ability to charge protesters.

In short, while the initial bill’s most obvious excesses are scaled back in the substitute, the overall breadth of conduct criminalized is significantly increased and its ability to stifle lawful protest extended. Both versions of SB 250 are terrible legislation that demonstrates how rash the fossil fuel industry and its legislative supporters have become in their eagerness to suppress constitutionally protected protest activities around their most indefensible facilities, even to the point of subjecting moral Americans to cruel physical confinement for grossly excessive periods of time.

For more information on SB 250, please contact: