

EARTHWORKS

November 14, 2019

**SB 250 Testimony of Earthworks
Senate Judiciary Committee
Columbus, OH**

Position: Opposed

Dear Chairman Bacon and Members of the Committee,

Thank you for the opportunity to submit written testimony in opposition to SB 250. Please accept this letter on behalf of Earthworks. We are a national nonprofit organization dedicated to protecting communities and the environment from the impacts of energy development, while seeking a managed decline from fossil fuels and a just transition toward sustainable solutions.

SB 250's purpose is to intimidate individuals, communities, and organizations lawfully exercising their First Amendment and other fundamental rights. This bill, among other things, amends Ohio's criminal trespass and criminal mischief statutes by extending potential liability to innocent landowners, passersby, peaceful protestors, and community organizations advocating for stronger safeguards for public health and the environment.

Under SB 250, trespassers on so-called critical infrastructure facilities become subjected to greater punishment than similarly situated defendants. [1]

We oppose this bill for the following reasons:

SB 250 is susceptible to legal challenge under the Due Process Clause of the 14th Amendments to the Ohio and United States Constitutions.

The Ohio Supreme Court established the void for vagueness doctrine to guard against laws that fail to provide defendants fair warning or adequate notice, invite arbitrary enforcement, or inhibit protected freedoms. [2]

On the fair warning prong, SB 250's language fails to inform ordinary persons what conduct the State prohibits. Without adequate notice and fair warning as to the standard of conduct required, this bill may become vulnerable to challenge. The sheer breadth of this bill's "critical infrastructure facility" definition creates confusion stemming from its blanket list of broad categories of places, objects, or general areas, which trespassers must avoid. [3]

The problem is, notwithstanding any posted signage, much of this bill's critical infrastructure facilities travel underground or converge physically with public spaces. Therefore, the very existence, location, boundaries, or ownership of critical infrastructure facilities is not known to the average person and leaves Ohioans without adequate notice nor fair warning that they may commit trespass in violation of SB 250. The bill includes the following types of equipment that a reasonably prudent person cannot avoid, because they are often concealed:

(iv) ...sewage piping

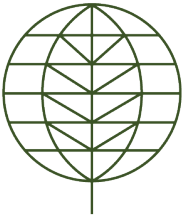
Dedicated to protecting communities and the environment from the adverse impacts of mineral and energy development while promoting sustainable solutions.

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(v) ...any other part of a natural gas storage facility involved in the gathering, storage, transmission, or distribution of gas

(xiv) ...valve sites, pipeline interconnections, pump station, metering station, *below- or above-ground pipeline*, or piping and truck loading or off-loading facility (emphasis added)

Even above-ground critical infrastructure facilities could increase risks that the state will attach criminal liability to passersby, even when signs are posted or defendants are exercising reasonable diligence. Earthworks' staff routinely visit Ohio's critical infrastructure facilities and observe the inconsistencies--commonplace in areas of oil & gas development--that make this bill highly vulnerable to legal challenge. A new area we visited in October was so replete with pipeline construction and various disjointed pads and stations, we and ten-year residents of the neighborhood honestly could not distinguish among small dirt roads or construction vehicle parking lots designed to support critical infrastructure facilities. SB 250 broadly declares access roads, construction sites, and even unconnected pipes as critical infrastructure.

(xvii) Any above-ground portion of a well, well pad, or production operation; [4]

(xviii) A laydown area or construction site for pipe and other equipment

Trespassers can therefore knowingly enter an access road, without knowing the access road connects to a critical infrastructure facility subjecting the trespasser to more punitive fines and criminal liability. As a practical matter, construction site access roads to critical infrastructure facilities often are indistinguishable from other access roads, township roads, farm roads, or even residential driveways.

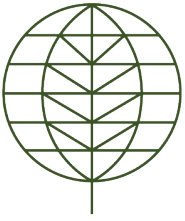
Critical Infrastructure Facilities Sited on Private Property Seized Through Eminent Domain

Under both Federal and Ohio law, pipeline companies may seize private property through the exercise of eminent domain. [5] This has resulted in arrangements where residential property owners share their land with a critical infrastructure facility. Sometimes, those arrangements go sour, particularly where the oil and gas lessee fails to behave as a good neighbor. If SB 250 becomes law, disputes between homeowners and pipeline companies could easily devolve into potentially subjecting Ohioans to criminal and civil liability for trespasses on their own land.

In at least one case, a landowner invited protestors to his own property to fight a pipeline company claiming an easement for construction. Ultimately, the landowner succeeded in enjoining the pipeline, but these kind of land disputes are ripe for subjecting lawful, peacefully landowners--who have full property rights to invite whomever they wish onto their land--to increased criminal penalties arising from conflicts with oil and gas companies seizing private property.

SB 250 Fails to Preclude Arbitrary, Capricious, and Discriminatory Enforcement

Last year, the state of Louisiana passed a similar anti-protest law applied to criminal trespass at oil and gas infrastructure facilities. [6] Law enforcement officials have since arrested at least sixteen defendants, yet not a single Parish prosecutor has brought charges against any of them pursuant to this law. This apparent unwillingness to prosecute defendants charged with this brand-new law illustrates its questionable constitutionality.



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In the neighboring Commonwealth of Pennsylvania, Ellen Gerhart, a retired school teacher and grandmother, faced criminal charges for peacefully protesting a pipeline on her own property that the pipeline company had seized by eminent domain. On a Friday evening, in July 2018, law enforcement officers arbitrarily choose to execute a warrant, arrested Ellen, and incarcerated her for nearly sixty days and nights. The Commonwealth charged Ellen with violating an injunction to prevent trespass on a company easement that was also part of Ellen's own property.

Rather than preclude arbitrary law enforcement, these types of anti-protest laws tend to empower discriminatory use of police powers and violate the property rights of private landowners.

SB 250 Unreasonably Impinges on Constitutionally Protected Freedoms

The spread of oil and gas infrastructure across Ohio has fueled considerable controversy. Landowners have become increasingly concerned about the government exercise of eminent domain to seize private property for critical infrastructure facilities. Communities suffering from adverse air and water quality impacts have organized throughout the state to protest oil and gas pollution.

SB 250's clear purpose is to silence that dissent. It does so not only by increasing fines and punishments, but also by drastically expanding liability to those who merely associate with peaceful and lawful protesters. This Committee should strictly scrutinize SB 250 in light of its apparent intent to quell freedom of speech and association.

Thank you again for considering our testimony. For the above reasons, we respectfully urge opposition to SB 250.

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[1] criminal trespass (Sec. 2911.21)- “knowingly enter or remain on a critical infrastructure facility” (lines 233 and 234) becomes a misdemeanor of the first degree.

[2] State v. Tanner Supreme Court of Ohio Dec 06, 1984 15 Ohio St. 3d 1

[3] See Critical infrastructure facility definition 2911.21(A)(5)(F)(5)(a)(v) and (xiv) (xvii) and(xviii)

[4] “Well” means any borehole, whether drilled or bored, within the state for production, extraction, or injection of any gas or liquid mineral... 1509.01(a)applying to all Ohio’s operating, standby, abandoned, plugged, or reclaimed oil or gas wells.

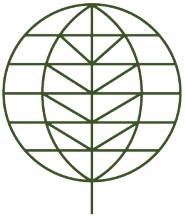
“Production operation” **(AA)** “Production operation” means all operations and activities and all related equipment, facilities, and other structures that may be used in or associated with the exploration and production of oil, gas, or other mineral resources...including operations and activities associated with site preparation, site construction, access road construction, well drilling, well completion, well stimulation, well site activities, reclamation, and plugging. “Production operation” also includes all of the following:

(1) The piping, equipment, and facilities used for the production and preparation of hydrocarbon gas or liquids for transportation or delivery;

(2) The processes of extraction and recovery, lifting, stabilization, treatment, separation, production processing, storage, waste disposal, and measurement of hydrocarbon gas and liquids, including related equipment and facilities;

(3) The processes and related equipment and facilities associated with production compression, gas lift, gas injection, fuel gas supply, well drilling, well stimulation, and well completion activities, including dikes, pits, and earthen and other impoundments used for the temporary storage of fluids and waste substances associated with well drilling, well stimulation, and well completion activities;

(4) Equipment and facilities at a wellpad or other location that are used for the transportation, handling, recycling, temporary storage, management, processing, or treatment of any equipment, material, and by-products or other substances from an operation at a wellpad that may be used or



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reused at the same or another operation at a wellpad or that will be disposed of in accordance with applicable laws and rules adopted under them.
[5] Please see *Kinder Morgan Utopia LLC vs. PDB Farms of Wood County* Case No. 2016CV0220, Court of Common Pleas, Wood County, OH
[6] See HB 727 <https://www.legis.la.gov/legis/ViewDocument.aspx?d=1086173>

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