



EARTHWORKS

February 26, 2020

**HB 4615 Testimony of Earthworks  
Senate Judiciary Committee  
Charleston, WV**

**Position: Opposed**

Dear Chairman Trump and Members of the Committee,

Thank you for the opportunity to submit written testimony in opposition to HB 4615, the West Virginia Critical Infrastructure Protection Act. 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.

HB 4615's purpose is to intimidate individuals, communities, and organizations lawfully exercising their First Amendment and other fundamental rights. This bill would amend West Virginia's Code Charter 61, Article 10 by extending potential liability to innocent landowners, passersby, peaceful protestors, and community organizations advocating for stronger safeguards for public health and the environment.

Under HB 4615, 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:

**HB 4615 is susceptible to legal challenge under the Due Process Clauses of the West Virginia and United States Constitutions.**

The West Virginia Supreme Court of Appeals established its void for vagueness doctrine, requiring that criminal statutes must be set out with "significant definiteness to give a person of ordinary intelligence fair notice that his [or her] contemplated conduct is prohibited by statute." [2] Fair notice is necessary to satisfy due process.

Yet, HB 4615's language fails to inform ordinary persons what conduct the State prohibits. 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]

Notwithstanding any posted signage, vagueness here arises from this bill's covered facilities that travel underground or converge physically above ground within public spaces and on private land. Their very existence, location, boundaries, or ownership often is not known to the average person and leaves West Virginians without adequate notice nor fair warning that they may violate HB 4615. The bill includes the following types of equipment

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that a reasonably prudent person cannot avoid, because they are often concealed or not clearly labeled:

(14) A natural gas distribution facility including... below- or above-ground pipeline or piping...

(15) A crude oil or refined products storage and distribution facility including... below- or above-ground pipeline or piping...

Even above-ground infrastructure facilities could increase risks that the state will attach criminal liability to passersby, regardless of whether signs are posted, or defendants are exercising reasonable diligence. This is especially true of construction sites. HB 4615 broadly declares as critical infrastructure:

(b) ...systems or assets... under any state of construction.

Earthworks' staff and members near West Virginia's oil, gas, and petrochemical facilities observe the inconsistencies—commonplace in areas of energy infrastructure development—where operations span across both public and private property, emerging above ground in some areas only to submerge again somewhere nearby. In some cases, operators purchase roads or other property previously open to public use, to use in association with pipelines or related infrastructure. These roads often are indistinguishable from other access roads, township roads, farm roads, or even residential driveways.

The vast network of oil and gas development and its associated infrastructure travel across, above, and below West Virginians' public and private lands. Some of those private lands pipeline operators have seized through eminent domain. West Virginia landowners, thus, could potentially find themselves subject to increased civil and criminal penalties for alleged HB 4615 violations on their own property.

### **HB 4615 Inflames Eminent Domain Disputes Between Private Landowners and the Infrastructure Facilities That Have Been Built on Seized Private Property**

Under both Federal and West Virginia law, pipeline companies may seize private property through the exercise of eminent domain.[4] 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 fail to behave as a good neighbor. If HB 4615 becomes law, disputes between homeowners and pipeline companies could devolve, potentially subjecting West Virginians to criminal and civil liability for trespasses on their own land.

While landowners can lawfully enjoin a pipeline,[5] these kind of land disputes are ripe for subjecting lawful, peaceful landowners to increased criminal penalties arising from conflicts with oil and gas companies who have seized private property.



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## **HB 4651 Unreasonably Impinges on Constitutionally Protected Freedoms**

The spread of oil and gas infrastructure across West Virginia has fueled considerable controversy. Not only have landowners become increasingly concerned about the government exercise of eminent domain to seize private property for infrastructure facilities, but communities suffering from adverse air and water quality impacts have organized throughout the state to protest oil and gas pollution, and more recently, to protest the encroachment of heavily-polluting petrochemical and plastics factories.

It is essential that the freedom of speech, as guaranteed by the Constitution, embrace the liberty to discuss both publicly and truthfully all matters of public concern without previous restraint or the fear of subsequent punishment.[6]

The West Virginia Supreme Court of Appeals has recognized this liberty, holding that “Statutes governing potential First Amendment and similarly sensitive constitutional rights will be strictly tested for certainty by interpreting their meaning from the face of the statutes.”[7] Thus, a reviewing court will likely apply a strict and narrowly tailored standard of review of this bill’s facial vagueness.[8]

Further, HB 4615’s clear purpose is to silence dissent. The bill 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. The right to protest falls squarely within the rights protected by the First Amendment, as no laws shall be made “abridging the freedom... or the right of the people peaceable to assemble, and to petition the government for a redress of grievances.[9]

In West Virginia’s neighboring Commonwealth of Pennsylvania, Ellen Gerhart, a retired schoolteacher 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 executing a warrant arrested Ms. Gerhart, and incarcerated her for nearly sixty days and nights. The Commonwealth charged Ms. Gerhart with violating a trespass injunction on a company easement that was also part of her own property.

If HB 4615 becomes law, ordinary landowners, bystanders, and those protesting oil and gas development in West Virginia may similarly become criminal defendants. We therefore respectfully urge this Committee to oppose HB 4615 considering its intent to quell the constitutional freedom of speech and its vulnerability to constitutional challenge.

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[1] Sec. 61-10-34(c)(1) – “Any person who willfully and knowingly... enters a property containing a critical infrastructure facility without permission by the owner...is guilty of a misdemeanor and shall be...confined in jail not less than 30 days...” (lines 41 and 44). A mandatory minimum 30-day jail sentence exceeds West Virginia’s existing punishments for “trespass in structure or conveyance” (See W. Va. Code § 61-3B-2) which imposes a maximum fine of \$100 and no jail time.

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- [2] *West Virginia v. Flinn*, 158 W.Va. 111, 117 (1974).
- [3] See Critical infrastructure facility definition Sec. 61-10-34(b)(1)-(16).
- [4] See W. Va. Code Ann. § 54-1-1; See also *Mountain Valley Pipeline, LLC v. McCurdy*, 238 W. Va. 200, 205 (2016) (“A company is invested with the power of eminent domain only when: (1) it is organized under the laws of, or is authorized to transact business in, West Virginia; and (2) the purpose for which said company desires to appropriate land is *for a public use* as authorized by W. Va. Code § 54-1-2.”).
- [5] See *McCurdy*, 238 W. Va. at 211.
- [6] *Thornhill v. State of Alabama*, 310 U.S. 88, 101-102 (1940).
- [7] *Flinn*, 158 W.Va. at 118-19.
- [8] *Id.* at 120.
- [9] U.S. Cont. amend. I.

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