

West Virginia's House Bill 4615 and Implications for Peaceful Assembly

HB 4615 ("The West Virginia Critical Infrastructure Protection Act") would create new criminal and civil penalties for conduct around gas and oil pipelines that could be applied to individuals and organizations involved in peaceful protests.

Broad definition of "critical infrastructure facility." HB 4615 newly and expansively defines "critical infrastructure facility" in Section 61-10-34(b) to include among many other things oil and gas pipelines, refineries, airports, bus terminals, cell phone towers, and railroad tracks. Encompassed facilities and properties are not limited to areas that are fenced off, but also areas where signs are posted that are reasonably likely to be seen and indicate that entry is forbidden without authorization. The broad reach of the definition will likely create uncertainty over which areas are included and where certain acts may be proscribed—uncertainty that is likely to heighten fear of civil and criminal liability and discourage protest activity, as discussed below.

New criminal penalties for trespass onto land with oil and gas pipelines could apply to peaceful protesters. The bill would create heightened penalties for trespass onto property containing a critical infrastructure facility without permission (61-10-34(c)(1)). Under the bill, the offense would be a misdemeanor punishable by up to one year in jail and a \$500 fine.

New felony offense could cover disruptive protests against pipelines and other infrastructure. The bill creates a new felony offense for trespass onto critical infrastructure with "intent... to willfully damage, destroy, vandalize, deface, tamper with equipment, or impede or inhibit operations" of the critical infrastructure facility (61-10-34(c)(1)). The offense is punishable by three years in prison and a \$1,000 fine. If a person actually, willfully "damages, destroys, vandalizes, defaces or tampers with equipment," it is a felony punishable by up to five years in prison and a \$2,000 fine (61-10-34(c)(2)).

The terms used to define this offense are overbroad and vague, such that they could capture peaceful protest activity near oil and gas pipelines that does no actual harm to the pipelines. A protester who used graffiti on a pipeline, for instance, could be charged with a felony. The bill also does not define terms like "tamper," "impede" or "inhibit," such that it is unclear what kind of conduct might be included. Would blocking the access road to a pipeline be considered "impeding"? What about an individual protester who chains herself to a pipeline in a way that does no damage, but interrupts the work of a repair crew? The absence of a clearly-defined offense means that individuals will not know what conduct is prohibited, and allows law enforcement to apply the law selectively.

Defendants may be held civilly liable. The bill provides that a person convicted of any of the criminal offenses described above is also civilly liable to the state and third parties for personal or property damage (61-10-34(d)(1)). Importantly, a person's liability is not limited to the personal or property damages caused by their own conduct, but "damages to personal or real property while trespassing." In other words, if a large group of protesters are convicted for "impeding" access to a pipeline, any one of the individuals in that group may be liable for damages caused by the whole group or individuals in the group who went rogue. Such liability

creates another costly and therefore chilling consequence that is likely to discourage protest activity.

Individuals and organizations may be liable for others' conduct during protests. HB 4615 creates new criminal liability for a person or organization that “conspires” to commit trespass onto a critical infrastructure facility (a \$5,000 fine) or to “damage, destroy, vandalize, deface or tamper with equipment” (a \$10,000 fine) (61-10-34(c)(3)). Criminal conspiracy in West Virginia, notably, does not require that a criminal offense was actually committed, but that there was an agreement to commit the offense and an “overt act” that furthers the offense. Accordingly, an organization that hosts a planning meeting for a peaceful protest on pipeline property and, e.g., distributes maps of the area, could potentially be fined for conspiracy to trespass.

The bill also provides that any entity that “compensates, provides consideration to or remunerates a person” for trespassing is also civilly liable for any personal or property damage (61-10-34(d)(2)). As with the individual civil liability described above, the scope of civil liability is likely to chill organizations’ willingness to provide any funding or other support for protests around pipelines and other infrastructure.