

## Review of Proposed House Bill 44

Tom FitzGerald, Director  
Kentucky Resources Council  
January 30, 2020

House Bill 44 would amend existing law in two places and would create a new section of the Kentucky Revised Statutes. Captioned as “AN Act relating to key infrastructure asset,” the bill would significantly broaden criminal liability associated with “key infrastructure assets” in ways that would I am sure unintentionally but certainly chill protected speech and assembly, and would broaden the category of what are considered “key infrastructure assets” in ways that are ill-defined.

By way of background, existing law at 511.100, defined a “key infrastructure asset” and created a misdemeanor offense for “the offense of trespass upon key infrastructure assets” if he or she

(a) “knowingly enters or remains unlawfully in or upon real property on which key infrastructure assets are located” or, with certain exceptions

(b) “knowingly uses, or retains or authorizes a person to use, an unmanned aircraft system to fly above real property on which key infrastructure assets are located with the intent to cause harm or damage to or conduct surveillance of the key infrastructure asset without the prior consent of the owner, tenant, or lessee of the real property.”

Existing law at KRS 512.020 creates the crime of criminal mischief in the first degree, defining it as intentionally or wantonly, and without a right or reasonable ground to believe that he or she has such a right, defaces, destroys, or damages any property causing a pecuniary loss of over \$1,000. It is a Class D Felony.

**HB 44** would do several things:

First, it would further define “above-ground pipelines” on p. 1 line 12 to be those transporting natural gas or petroleum and would add steelmaking facilities using electric arc furnaces, cable television headends, and facilities “identified and regulated by the Department of Homeland Security’s Chemical Facility Anti-Terrorism Standards program.

The term “cable television headends” is nowhere defined, but I assume it is intended to refer to a master facility for receiving signals for processing and distribution over a cable television system.

Much more significant and problematic, however, is the inclusion of facilities “identified and regulated” under the Department of Homeland Security Chemical Facility Anti-Terrorism Standards program. That program requires thousands of facilities across the country, from chemical manufacturing, storage and distribution, energy and utilities, agriculture and food, explosives, mining, electronics, plastics, universities and laboratories, paint and coatings, healthcare and pharmaceuticals, to report the use or intent to use one of 300 covered chemicals, and to undergo an assessment to determine whether the facility is considered to be a high-risk facility, in which case it must undertake a site security plan. For obvious reasons, it is not possible when looking at a facility, or looking at the Homeland Security website, to find facilities that have gone through the process and been deemed high risk.

Charging an individual with criminal trespass for entering **or** remaining on real property where a key infrastructure asset is located, when there is no way that a person could reasonably know that such a key infrastructure asset is located on that property, is problematic, since **knowingly** acting in the wrong is essential to imputation of criminal liability.

Second, and perhaps more problematic, is that the bill amends existing law defining “criminal mischief,” to significantly expand the definition to include anyone who “tampers with, impedes, or inhibits operations of a key infrastructure asset.” This amendment at p. 3 lines 25 and 26 of the bill, doesn’t require destruction, defacement, or damage to property. Instead, vague and undefined terms such as “tamper,” “impede” and “inhibit” are inserted as being sufficient to impose a Class D felony conviction.

It is this amendment that is perhaps the most problematic, since whether intended or not, the lack of precision in defining the elements of the offense, will chill legitimate exercise of protected speech. For example,

- Are striking workers exercising their rights to seek collective bargaining at a “key infrastructure asset” now guilty of “criminal mischief” if their picketing causes a reduction in production at the facility?
- Are miners blocking a coal train in protest over their treatment by a bankrupt coal company, to be charged with criminal mischief because the power plant that had contracted for the coal may have to reduce power production in the absence of that coal?
- Is a student engaged in civil protest on a college campus now to be criminally charged if the student protest prevents a researcher from working in a lab on campus that is subject to the Homeland Security program because it uses certain chemicals?
- Are landowners who banded together and whom I represented in successfully challenging the claim of a private pipeline company that it had the power to condemn their lands guilty of “impeding” or “inhibiting” the operation of the pipeline by causing the company to have to bargain for rights it sought to condemn?
- Are farmers opposing the NUCOR facility in Meade County because of adverse effects on their ability to ship grain, guilty of criminal activity if their litigation over the grain issue, causes a delay in the construction and thus the operation of that facility?

I **know**, Mr. Chairman, that no one on the Committee has more sympathy than you for the plight of those coal miners, and that such an outcome is **not** what is intended by this bill. But the creation of such a broad and undefined criminal liability to be imposed not for intentional and wanton property damage, but for such ill-defined actions as “impeding” and “inhibiting,” is unwise and unfair.

It is particularly where we as a Commonwealth legislate in areas that may affect legitimate protest, that we must be most careful. There are few times when significant progress in the advancement of human and civil rights has not been accompanied by **civil** disobedience – from the Woolworth’s counters of Nashville and Greensboro to a Montgomery bus, from Dr. King to Mohandas Gandhi. I am concerned with criminalizing legitimate protest that heretofore might have been a civil matter.

The final concern is with the imputation of civil liability, including punitive damages and attorney's fees, against any person that knowingly compensates or remunerates a person to violate Section 2 of this Act and the compensated person is convicted of criminal mischief in the first degree. This section expands the vagaries of the amended definition of "criminal mischief" to impose liability vicariously upon an employer where an employee has been found to "inhibit" or "impede" operations of a key infrastructure asset.

I urge your careful consideration of this bill and would suggest that it be amended to clearly define prohibited conduct while disclaiming any intent to chill or criminalize protected speech.