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OPPOSE HB 16: Issues and Technical Analysis

Existing law created the crime of “criminal trespass upon key infrastructure assets,” which was defined as unauthorized drone overflights of certain businesses and infrastructure with an intent to cause harm or to surveil from the air without permission. Proponents contend SB 16 simply adding to this list, trying to prevent drone overflights of food manufacturing plants and large animal feeding operations.

In actuality, the bill does so much more, **making it a crime** for a worker or state inspector to document workplace violations, for a neighboring landowner to take a photo or video of one of these operations from their own property, and even for the unauthorized taking of family photos at an animal feeding operation – which includes any zoo, pumpkin patch, racetrack, or other venue where even one pig, horse, duck, or chicken is kept for 45 days a year.

By criminalizing the use of a recording device **on a property** containing an animal feeding operation or commercial food manufacturing or processing facility (CFMPF), or recording of **any part, procedure, or action** of one of these operations, SB 16 greatly expands criminal liability beyond the use of drones. For example, it would criminalize:

- A worker in a food manufacturing plant taking of a photograph of a safety violation
- A state or local food, safety, or environmental inspector taking a photograph or making an “record” (undefined) without the owner’s consent during a routine or emergency inspection of a food plant or an animal feedlot operation
- Taking of a photograph or air or water sample by a neighbor on his or her own property, of a suspected violation from an industrial hog farm or CFMPF
- Using a cell phone to take a picture without the owner’s permission at a zoo, stable, racetrack, or other “animal feeding operation”
- Recording the license plate of truck driving erratically, carrying animals from a feedlot

By including actions “on or above” rather than limiting the changes in the law to unmanned aerial overflights without permission, and adding prohibitions to recording “any part, procedure, or action” of these operations, the bill unintentionally make criminals out of workers, inspectors, neighbors, and even visitors to Churchill Downs.

The solution? Simply add “food manufacturing and processing plants” and “concentrated animal feeding operations” to the list of existing key infrastructure assets and remove all of the other language that creates so many unintended consequences. Or even better, just shelve SB 16 because existing law already makes intentional trespass unlawful.

SENATE BILL 16: MAJOR PROBLEMS

- The definitions are overly broad and the bill criminalizes conduct that does not apply to the other entities listed as key infrastructure assets.
 - o “Commercial food manufacturing or processing facility” (CFMPF):
 - References KRS 217.015, which defines “food” to mean food or drink, making this relevant to visitors at bourbon distillery
 - o “Animal feeding operation”:
 - Means any stable or confinement with any number of animals more than 45 days per year, this could make it relevant to Churchill Downs or Keeneland
- Vague standards for the two categories of criminalized activity:
 - o Mens rea: “knowingly”
 - o Actus reus: Separated by “or,” separately triggering criminal liability
 - (2)(c)(1): “operating” certain items, *i.e.*, “video recording device, audio recording device, or photographic equipment”
 - (2)(c)(2): “recording or distributing [...] any part, procedure, or action” of a CFMPF, CAFO, or AFO.
 - o To engage in criminal activity, all one must do is **know** they are **operating** one of the devices or **recording** one of the entities, even if there is no intent to harm.
- Criminal provisions are overly broad and vague:
 - o Section 2(c)(1):
 - The subsection criminalizes an individual “operating” certain items *i.e.*, “video recording device, audio recording device, or photographic equipment” **on or above** the land without the landowners’ consent.
 - Because a smart phone has the capacity to be these items and “operating” is a vague action and it doesn’t specify that an individual must be using it as a video recording device, for example. Therefore, this bill could criminalize making a phone call on this property without consent.
 - o Section 2(c)(2):
 - Unlike subsection 2(c)(1), this subsection is not key infrastructure property specific, so it broadly criminalizes the act of “recording or distributing [...] any part, procedure, or action” of a CFMPF, CAFO, or AFO.
 - This would criminalize activities like a landowner taking a picture while on his or her **own property** any activity or part of an AFO like, Keeneland or Churchill Downs. It could criminalize a parent taking a picture of his or her child at a petting zoo.
 - There is no distinction between recording and deleting the photo or recording and distributing it, both are criminalized activities under this subsection.
- Pre-existing exemptions in the statute, KRS 511.100, won’t apply or apply inconsistently:
 - o Exemptions largely relate to unmanned aircraft systems, but not video or audio recording devices or photography equipment.
 - o Government employees are not specifically exempted (other than the aircraft exemption), including the Department of Environmental Protection who has enforcement authority to be on this land and take pictures without landowner consent pursuant to federal law.