



# Kentucky Resources Council

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## **KRC TESTIMONY IN OPPOSITION TO SENATE BILL 16**

Mr. Chairman and members of the Committee, good morning to you all- my name is Audrey Ernstberger, a staff attorney and lobbyist for Kentucky Resources Council. For those of you who aren't familiar, Kentucky Resources Council is a non-profit and nonpartisan group of lawyers, policy experts, and advocates working for environmental quality, justice, and health across the Commonwealth. I appreciate this opportunity to appear before you this morning, to ask that you reject SB 16 and the proposed committee substitute.

**We have a multitude of concerns regarding this bill and the committee sub, chief among them include its overbreadth, vagueness, and inconsistencies with the provision of the statute it would amend.** Both the original bill and the substitute criminalize innocent behavior and lack the sort of clarity we expect from a statute making certain behaviors and actions into criminal acts.

Key definitions were missing in the original bill. What is an "audio, video, or photographic device," and does the mere presence of a person on the premises of a farm containing a CAFO or a food manufacturing plant that might sell product in bulk with an active cell phone make one guilty of criminal trespass? What if the drone is operated by a nearby landowner or business and strays into the airspace with no intent?

**The committee substitute presents numerous additional problems with lack of definition and lack of intent to harm, reaching conduct that could include taking a picture of your child while at a petting zoo, or using your cell phone at a riding stable open to the public.**

The proposed committee substitute for SB 16 incorporates aspects of the original bill into KRS 511.100, a statute that criminalizes trespass upon key infrastructure assets and flying drones over such key infrastructure assets without permission. The proposed committee sub adds to the list of key infrastructure assets, "commercial food manufacturing or processing facilities in which food is manufactured, processed, or packaged commercially," along with concentrated animal feeding operations (CAFOs) – these are animal feedlot operations that have a minimum number of animals. It also includes "animal feeding operations" – a term that includes any stable or confinement with any number of horses, sheep, ducks, chickens, or pigs kept over 45 days in a year. The definition of animal feeding operations referenced in this bill is so broad that it would apply to racetracks such as Churchill Downs in Louisville, Keeneland, and other operations that stable horses more than 45 days per year. And by including animal

feeding operations a “key infrastructure assets,” the idea of an enhanced criminal protection for certain key assets is lost when a horse in a stable or a handful of ducks or sheep are elevated to such a status, much as we may appreciate raising such animals.

Beyond the overbroad sweep of the law, it criminalizes behavior that is likely not the intent of the bill’s sponsors.

Under subsection 2(c)(1), a person commits criminal trespass by operating an unmanned aircraft system, video recording device, audio recording device, or photographic equipment on or above property containing a CAFO, animal feeding operation or food manufacturing or processing facility. This makes the mere presence of a person on property on which there is one of these operations, while carrying a working smart phone, criminal trespass.

Subsection (2)(c)(2) makes it a crime to “Record or distribute, photographically, electronically, or otherwise, any part, procedure, or action of a commercial food manufacturing, processing, or packaging facility, or any part, procedure, or action of a CAFOs or any animal feeding operation.” This part of the bill, which references the broad definitions of commercial food facilities and animal feeding operations, may effectively criminalize taking a photo or video at a distillery or rickhouse – since KRS 217.015 defines “food” as both food and drink - or taking a video of your child while on a hayride at a you-pick pumpkin patch, if the farm also had a barn with one or more horses, ducks, sheep, or other animals.

By attaching criminal liability to the recording **of any part, procedure, or action** of the animal feeding operation or commercial food manufacturing or processing facility, this bill goes much further than simply keeping cameras or videos out from inside a private facility. It would also make it illegal for a landowner, while on his or her own property, to record, through photographs, videos, hand-written notes, or otherwise, any activity or part of an animal feeding operation. It would cover recording **from one’s own property** excess noise levels at night, traffic to and from the facility, illegal discharges of substances from one of these operations onto the person’s private property, and more.

A person taking aerial video by drone above their own property which happened to capture the image of the food or animal operation, would also be guilty because they knowingly took the video, or if a photo was captured from a public highway that included part of a farm with an AFO. The law makes no distinction between a photo, audio, or other record that is taken and then deleted, from one taken and distributed.

This bill may also prevent the reporting of dangerous conditions at commercial food manufacturing and packaging facilities that threaten worker or public safety. Workers or visitors to these facilities would be criminally liable for recording or reporting proof of an illegally and potentially dangerous source of food, defective equipment, or a spill or release of a hazardous materials, or transmitting documents to a government agency.

Because laws like the bill before you would have the effect of “gagging” whistleblowers and those working in dangerous conditions in food factories or on factory farms by making them potential criminals for recording footage inside- even when laws are being broken- it would jeopardize food safety, workers’ and public health. For these reasons, the parts of this bill that make the taking of recordings and photographs in food plants and animal feedlot operations by workers a criminal act, have been struck down as violating the First Amendment protections. This bill, if enacted, will likely also fail to withstand constitutional muster.

Finally, and very troubling, the exceptions in current law for government employees, including the Food Safety Branch of the Department for Public Health, or the Department for Environmental Protection from the provision criminalizing the use of unmanned aircraft, **don’t apply** to the other acts that the committee substitute makes criminal. Section 1(4) contains the exemptions, but they all exempt only operation of unmanned aircraft by government agencies and a list of others.

**Those exemptions don’t apply to video recording devices audio recording devices, photography equipment, odor sensing equipment, or other recording devices either carried by or used by that list of exempted persons and agencies.**

**Under the amended bill, since it includes actions above and on CAFOs, AFOs, and food manufacturing plants,** a governmental official taking photographs or otherwise recording conditions in a manufacturing plant, or a regulated animal feedlot, would be guilty of criminal trespass. As would any of the other entities listed in the exemptions, since the exemptions apply only to operating a drone and not to the other listed recording activities on the property.

**Finally, the bill** makes the mere overflying of a property where a CFMPF, CAFO, or AFO is located a crime without the requirement that it be done with the intent to cause harm, damage, or to conduct surveillance. Under existing law, for all of the other key infrastructure assets listed in the law, the act of flying an unmanned aircraft system above property on which a key infrastructure asset is located is **only** an offense if there is “intent to cause harm or damage or to conduct surveillance” without prior consent. Section 1(2)(b). There is no rational basis for the distinction, and it constitutes special legislation that disparately creates enhanced punishment for actions based not on the nature or gravity of the action but because the facility is a food manufacturer or concentrated animal feeding operation. Under the original intent of Section 59 as reflected in the *Calloway* decision, such disparate punishment is not constitutionally permissible.

In sum, Chairman and members of the Committee, we ask that the bill be passed over until a much more clearly defined and limited bill is drafted that does not criminalize government documentation of compliance inspections, does not seek to criminalize citizens taking air samples or photos from their own property of potential air or water violations occurring on a neighboring property, and which limits the enhanced criminal penalties under the existing law to actions with intent to cause harm.