



EARTHWORKS

April 3, 2019

**SB 33 Testimony of Earthworks
Senate Judiciary Committee
Columbus, OH**

Position: Opposed

Dear Chairman Eklund and Members of the Committee,

Thank you for the opportunity to submit written testimony in opposition to SB 33. 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.

SB 33's purpose is to intimidate individuals, communities, and organizations lawfully exercising their First Amendment and other fundamental rights. This bill, among other things, amends Ohio's criminal trespass and criminal mischief statutes by extending potential liability to innocent landowners, passersby, peaceful protestors, and community organizations advocating for stronger safeguards for public health and the environment.

Under SB 33, 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:

SB 33 is susceptible to legal challenge under the Due Process Clause of the 14th Amendments to the Ohio and United States Constitutions.

The Ohio Supreme Court established the void for vagueness doctrine to guard against laws that fail to provide defendants fair warning or adequate notice, invite arbitrary enforcement, or inhibit protected freedoms.[2]

On the fair warning factor of this doctrine, SB 33's language fails to inform ordinary persons what conduct the State prohibits. Without adequate notice and fair warning as to the standard of conduct required, this bill may become vulnerable to challenge. 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, the vagueness problem stems from how much of this bill's critical infrastructure facilities travel underground or converge physically above

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Washington, DC 20006
202.887.1872

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ground within public spaces. Therefore, the very existence, location, boundaries, or ownership of critical infrastructure facilities is not known to the average person and leaves Ohioans without adequate notice nor fair warning that they may violate SB 33. The bill includes the following types of equipment that a reasonably prudent person cannot avoid, because they are often concealed or not clearly labeled:

(iv) ...sewage piping

(v)...any other part of a natural gas storage facility involved in the gathering, storage, transmission, or distribution of gas

(xiv) ...valve sites, pipeline interconnections, pump station, metering station, ***below- or above-ground pipeline***... (emphasis added)

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. Earthworks' staff routinely visit Ohio's infrastructure facilities and observe the inconsistencies--commonplace in areas of oil and gas development--where operations span across both public and private property, emerging above ground in some areas only to submerge again somewhere nearby.

SB 33 broadly declares access roads, construction sites, and even unconnected pipes as critical infrastructure.

(xvii) Any above-ground portion of a well, well pad, or production operation;^[4]

(xviii) A laydown area or construction site for pipe and other equipment

An area we visited in Clarington, Ohio in October 2018 was so replete with pipeline construction and various disjointed pads and stations, we and eleven-year residents of the neighborhood honestly could not distinguish among small dirt roads or construction vehicle parking lots designed to support critical infrastructure facilities from those designed for other purposes.

A compressor station near Barnesville, Ohio we visited in March 2019 had no clearly visible signage at the unpaved entry road nor at a gravel parking area outside the facility. We asked workers on-site whether we were on operator-owned property and were told we were on a public roadway. Neither our staff, nor some operators, nor the general public have available accurate information on land ownership. Making matters worse, some oil and gas infrastructure follows rights-of-way for public roads. This risks one might cross upon so-called critical infrastructure and potentially become subjected to SB 33 civil and criminal liability.

Also in March 2019, we attempted to film emissions at an injection well in Cambridge, Ohio from a paved road running between numerous retail stores and restaurants clustered in an adjacent shopping complex. When a worker from the facility saw us filming, he told us we could not film from that road nor any other in the complex, nor from the parking



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lots of any of the businesses in the complex, since the company owned all 80 acres on which the businesses were sited.

Conceivably, patrons of these businesses who knowingly enter and remain somewhere on this property could potentially find themselves subject to SB 33's civil and criminal liability. This bill's overbreadth could result in turning Ohio shoppers in to criminal defendants forced to litigate fact questions about their intent, land title ownership, posted signage, or whether a particular device connects to a "critical" infrastructure facility.

Trespassers and innocent passersby can also knowingly enter an access road without knowing the access road connects to a "critical" infrastructure facility, subjecting them to more punitive fines and criminal liability. As a practical matter, construction site access roads to infrastructure facilities often are indistinguishable from other access roads, township roads, farm roads, or even residential driveways. In some cases, operators purchase roads or other property that were previously open to public use, to use in association with oil and gas production.

The vast network of oil and gas development and its associated infrastructure travel across, above, and below Ohioans' public and private lands. Some of those private lands pipeline operators have seized through eminent domain. Ohio landowners, thus, could potentially find themselves subject to increased civil and criminal penalties for alleged SB 33 violations on their own property.

SB 33 Inflames Eminent Domain Disputes Between Private Landowners and the Infrastructure Facilities That Have Been Built on Seized Private Property

Under both Federal and Ohio law, pipeline companies may seize private property through the exercise of eminent domain.[5] 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 fails to behave as a good neighbor. If SB 33 becomes law, disputes between homeowners and pipeline companies could devolve into potentially subjecting Ohioans to criminal and civil liability for trespasses on their own land.

In one case, an Ohio landowner invited protestors to his own property to fight a pipeline company claiming an easement for construction. Ultimately, the landowner succeeded in enjoining the pipeline, but these kind of land disputes are ripe for subjecting lawful, peaceful landowners--who have full property rights to invite whomever they wish onto their land--to increased criminal penalties arising from conflicts with oil and gas companies who have seized private property.

SB 33 Fails to Preclude Arbitrary, Capricious, and Discriminatory Enforcement

In 2017, Louisiana enacted a similar anti-protest criminal trespass law applied to oil and gas infrastructure facilities.[6] Law enforcement officials have since arrested at least

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sixteen defendants, yet, as of this date, not a single Parish prosecutor has brought charges against any of them pursuant to this law. This apparent unwillingness to prosecute defendants charged with this brand-new law illustrates its questionable constitutionality.

In Ohio's neighboring Commonwealth of Pennsylvania, Ellen Gerhart, a retired school teacher 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 arbitrarily choose to execute a warrant, arrested Ellen, and incarcerated her for nearly sixty days and nights. The Commonwealth charged Ellen with violating an injunction to prevent trespass on a company easement that was also part of Ellen's own property.

Rather than preclude arbitrary law enforcement, these types of anti-protest laws tend to empower discriminatory use of police powers and violate the property rights of private landowners.

SB 33 Unreasonably Impinges on Constitutionally Protected Freedoms

The spread of oil and gas infrastructure across Ohio has fueled considerable controversy. Landowners have become increasingly concerned about the government exercise of eminent domain to seize private property for infrastructure facilities. 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.

SB 33's clear purpose is to silence that dissent. It 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. This Committee should strictly scrutinize SB 33 in light of its apparent intent to quell freedom of speech and association.

Thank you again for considering our testimony. For the above reasons, we respectfully urge opposition to SB 33.

[1] criminal trespass (Sec. 2911.21)- "knowingly enter or remain on a critical infrastructure facility" (lines 233 and 234) becomes a misdemeanor of the first degree.

[2] State v. Tanner Supreme Court of Ohio Dec 06, 1984 15 Ohio St. 3d 1

[3] See Critical infrastructure facility definition 2911.21(A)(5)(F)(5)(a)(v) and (xiv) (xvii) and(xviii)

[4] "Well" means any borehole, whether drilled or bored, within the state for production, extraction, or injection of any gas or liquid mineral... 1509.01(a)applying to all Ohio's operating, standby, abandoned, plugged, or reclaimed oil or gas wells.



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“Production operation” (**AA**) “Production operation” means all operations and activities and all related equipment, facilities, and other structures that may be used in or associated with the exploration and production of oil, gas, or other mineral resources...including operations and activities associated with site preparation, site construction, access road construction, well drilling, well completion, well stimulation, well site activities, reclamation, and plugging. “Production operation” also includes all of the following:

- (1) The piping, equipment, and facilities used for the production and preparation of hydrocarbon gas or liquids for transportation or delivery;
- (2) The processes of extraction and recovery, lifting, stabilization, treatment, separation, production processing, storage, waste disposal, and measurement of hydrocarbon gas and liquids, including related equipment and facilities;
- (3) The processes and related equipment and facilities associated with production compression, gas lift, gas injection, fuel gas supply, well drilling, well stimulation, and well completion activities, including dikes, pits, and earthen and other impoundments used for the temporary storage of fluids and waste substances associated with well drilling, well stimulation, and well completion activities;
- (4) Equipment and facilities at a wellpad or other location that are used for the transportation, handling, recycling, temporary storage, management, processing, or treatment of any equipment, material, and by-products or other substances from an operation at a wellpad that may be used or reused at the same or another operation at a wellpad or that will be disposed of in accordance with applicable laws and rules adopted under them.

[5] Please see *Kinder Morgan Utopia LLC vs. PDB Farms of Wood County* Case No. 2016CV0220, Court of Common Pleas, Wood County, OH

[6] See HB 727 <https://www.legis.la.gov/legis/ViewDocument.aspx?d=1086173>

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