SB 1993: Overkill and an end to peaceful protests?

Sierra Club is opposed to SB 1993, which would create substantial criminal and civil liability for individuals and organizations for conduct around critical infrastructure, and is so broadly written that it is likely to chill anti-infrastructure demonstrations and protests, including even those on a property owners’ own land in which a pipeline is proposed.

SB 1993 creates two new, broadly-defined criminal offenses: “damage to critical infrastructure,” and “intent to damage critical infrastructure.” Importantly, the bill expands the definition of “critical infrastructure” to include a “facility that is being constructed and all of the equipment and appurtenances used during that construction” (Sec. 424.001). This broadens the reach of the bill beyond protests and demonstrations at existing pipelines and other infrastructure, which is broadly defined, and includes locations where infrastructure is under construction.

The bill defines “damage to critical infrastructure” as either a) intentionally or knowingly damaging, destroying, vandalizing, defacing or tampering with critical infrastructure, or b) intentionally or knowingly impeding, inhibiting, or interfering with the operation of a critical infrastructure facility (Sec. 424.002). This is significant in the context of pipeline protests, many of which have aimed to peacefully hinder access to pipelines or pipeline construction projects. The latter part of the definition could be read to include, e.g., a peaceful protest or demonstration that “impedes” construction of a pipeline or other facility, or that “interferes” with access to a facility by blocking a road. Under the bill, “damage to critical infrastructure” is a second degree felony, punishable by up to 20 years in prison and a $10,000 fine.

The bill defines “intent to damage critical infrastructure” as entering onto or remaining on or in a critical infrastructure facility with the intent to commit “damage to critical infrastructure,” as defined above (Sec. 424.003). In other words, entering onto a critical infrastructure facility or construction site with the intent to impede, inhibit, or interfere with the facility or its construction could be charged under the bill. The provisions could thus capture peaceful protests and demonstrations that take place on or in a critical infrastructure site regardless of whether they actually impede, inhibit, or interfere with a facility or its construction. It is worth noting that the offense does not contain a requirement that an individual have knowledge that their entry onto the critical infrastructure site is prohibited, or that they do not have the property owner’s consent. The offense of “intent to damage critical infrastructure” is a state jail felony according to the bill, punishable by up to two years in jail and a $10,000 fine.
Additionally troubling, the bill creates harsh criminal penalties for organizations. Under the bill, an organization that is found guilty of damage to or intent to damage critical infrastructure is subject to a fine “equal to the maximum possible amount of the applicable fine multiplied by 100”—i.e., $1,000,000 (Secs. 424.002(d) and 424.003(d)). Individuals and organizations may face additional criminal penalties for the offenses:

- Under Section 424.002(e), if a defendant is convicted of either damage or intent to damage critical infrastructure, and property damage results, a court may order the defendant to pay restitution to the property owner. Indeed, an organization that is found guilty of damage to or intent to damage critical infrastructure is subject to a fine “equal to the maximum possible amount of the applicable fine multiplied by 100.” This is an egregious fine and could be a problem legally.

- An organization could be penalized even they may have no knowledge of what their employee has done. An organization that has compensated (in any way) a person who then goes and breaks the law could be held vicariously liable under this provision. Perhaps a group hired someone to organize a peaceful assembly and they do something not authorized, that employer would be held liable. Would employers be forced to prove their innocence in these cases?

The bill creates new civil and vicarious liability for individuals and organizations related to the criminal offenses, as well. A defendant who engages in either damage or intent to damage critical infrastructure is civilly liable to the property owner under Section 424.004. An organization “that compensates a person for engaging in” damage or intent to damage critical infrastructure is likewise civilly liable to the property owner under Section 424.005. Notably, there is no knowledge element—i.e., it does not say “that knowingly compensates a person” as such, an organization that has compensated (in any way) a person who then goes and breaks the law could be held vicariously liable under this provision. For both individuals and organizations, the property owner may sue for and claim actual damages, court costs, reasonable attorney’s fees, and potentially exemplary damages (Sec. 424.006). This could amount to an extraordinary sum and is likely to further inhibit individuals’ and organizations’ willingness to engage in First Amendment activity around infrastructure sites.

Two provisions in the bill create some confusion about how prosecutors might apply the law: Sec. 424.002(c) and Sec. 424.003(c) provide that an actor prosecuted for either damage to or intent to damage critical infrastructure may be additionally prosecuted under any other law that criminalizes their conduct: “If conduct constituting an offense under this section also constitutes an offense under another law, the actor may be prosecuted under this section, the other law, or both.” In the case of SB 1993, for instance, an individual charged with “damage critical infrastructure” could additionally be charged with property damage.

These are the most concerning aspects of SB 1993. The extremely high criminal and civil penalties involved, breadth of the offenses as defined, and reach of the locations to include construction sites are likely to have a chilling effect on protest activity near existing or planned pipelines or other infrastructure.

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