Midwest Environmental Advocates

Memorandum

To: Stop the Felony Trespass Bill Coalition
From: Rob Lee, Staff Attorney
Date: November 3, 2019
Re: AB426/SB386—Actions Subject to Felony Prosecution

QUESTION PRESENTED

What actions are subject to felony prosecution under the trespassing portion of AB426/SB386?

SHORT ANSWER

A person is subject to felony prosecution under the trespassing portion of AB426/SB386 if that person enters property knowing it is owned, leased, or operated by an energy provider, and may be convicted unless that person had both lawful authority and permission from the energy provider to be on the property. This could lead to the prosecution of a landowner for being on their own land, a tribal member for being on a reservation or exercising off reservation treaty rights, or even a member of the general public for being on public land. As such, under AB426/SB386, people may now be subject to felony prosecution for previously acceptable activities that do not endanger the integrity or operation of energy infrastructure.

STATEMENT OF FACTS

AB426/SB386 amends Chapter 943 of the Wisconsin Statutes to expand the definitions of "energy provider" and "energy provider property" and thus the instances where a person may be subject to prosecution for intentionally entering energy provider property without lawful authority and without the consent of the energy provider.[1] The penalty for this crime is a Class H felony, which carries a prison sentence of up to six years and a fine of up to $10,000.[2] Whenever a person is convicted of a felony, they also lose the right to vote.[3]

Under existing law, "energy provider" is defined as:

1. A public utility under Section 196.01(5)(a) of the Wisconsin Statutes that is engaged in the production, transmission, delivery, or furnishing of heat, power, or light, or the transmission or deliver of natural gas;
2. A transmission company under Section 196.485(1)(ge) of the Wisconsin Statutes;

[1] All citations are to the Senate version of the bill, 2019 Wis. Sen. B. 386.
[2] Wis. Stat. § 939.50(3)(h).
[3] Wis. Stat. § 6.03(1)(b).

3. A cooperative association organized under Chapter 185 of the Wisconsin Statutes for the purpose of producing or furnishing heat, light or power for its members;
4. A wholesale merchant plant under Section 196.491(1)(w) of the Wisconsin Statutes, except that "wholesale merchant plant" includes an electric generating facility or an improvement to an electric generating facility that is subject to a lease generation contract, as defined in Section 196.52(a)(3) of the Wisconsin Statutes;
5. A decommissioned nuclear power plant.[4]

The bill would expand the definition of "energy provider" to include companies "that operate[] a gas, oil, petroleum, refined petroleum product, renewable fuel, water, or chemical generation storage, transportation, or deliver system."[5] In addition, water would be added to the services provided by public utilities and cooperative associations.[6]

Existing law defines "energy provider property" as "property that is part of an electric generation, distribution, or transmission system or part of a natural gas distribution system and that is owned, leased, or operated by an energy provider."[7] AB426/SB386 would expand this definition to include "property that is part of an electric, oil, petroleum, refined petroleum product, renewable fuel, water, or chemical generation, transmission, or distribution system and that is owned, leased, or operated by an energy provider."[8]

AB426 passed the Wisconsin Assembly on October 10, 2019 via a voice vote.[9] The Senate Committee on Judiciary and Public Safety held a public hearing on SB386 on October 22, 2019.[10] In response to testimony from a member of the public during that hearing drawing attention to the application of the bill in an urban setting, and after briefly conferring with Legislative Council, Committee Chair Senator Van Waangard suggested that the person testifying was talking about easements and then stated that the bill did not apply to easements. The Committee on Judiciary and Public Safety went into executive session on October 29, 2019 and passed SB386 out of committee by a vote of 4 to 1.[11] AB426/SB386 will be read for a second time on the Senate Floor on November 5, 2019 and will likely be vote on by the full Senate.[12]

DISCUSSION

Categories of Energy Provider Property

Under AB426/SB386, "energy provider property" means "property that is part of an electric, oil, petroleum, refined petroleum product, renewable fuel, water, or chemical generation,

[4] Wis. Stat. § 943.143(1)(a).
[5] 2019 Wis. Sen. B. 386, § 7.
[6] 2019 Wis. Sen. B. 386, §§ 5, 6.
[7] Wis. Stat. § 943.143(1)(b).
[8] 2019 Wis. Sen. B. 386, § 8.
[9] https://docs.legis.wisconsin.gov/2019/related/journals/assembly/20191010/_372.
[10] https://docs.legis.wisconsin.gov/2019/proposals/sb386.
[11] *Id.*
[12] http://insession.legis.wisconsin.gov/senate.

transmission, or distribution system and that is owned, leased, or operated by an energy provider."[13] Well-established principles of statutory interpretation require statutes to be "read where possible to give reasonable effect to every word, in order to avoid surplusage."[14] As such, energy provider property that is "owned, leased, or operated" must be treated as three distinct categories.

Whether an energy provider "owns" or "leases" property can be determined based on the plain language of the statute, and thus the inquiry into the meaning of those two terms ends there.[15] However, whether an energy provider "operates" property is ambiguous. "[A] statute is ambiguous if it is capable of being understood by reasonably well-informed persons in two or more senses."[16] Based on the brief exchange between Senator Waangard and Legislative Council during the public hearing on SB386, reasonably well-informed persons may clearly interpret the proposed bill as not applying to easements.

Nevertheless, when the bill is examined "in the context in which it is used,"[17] interpreting it as applying easements is also reasonable. The definition of "energy provider property" in the proposed bill includes "generation, transmission, or distribution" systems.[18] Easements are ubiquitous, particularly because they are so useful when it comes to transmitting or distributing different types of energy, including electricity, natural gas, oil, and petroleum. Thus, energy providers "operate" property where energy is transmitted or distributed through an easement.

In addition, the bill can be interpreted as applying to property where an energy provider has an expired lease but continues to operate, which is the case with Enbridge's Line 5 oil pipeline on the Bad River Reservation in northern Wisconsin.[19] The bill can also be interpreted as applying to public property where an energy provider has an expired permit but continues to operate, which is the case in the Chequamegon National Forest.[20] Simply because an energy provider no longer "leases" the property or has an expired operating permit does not mean that it no longer "operates" that property. Therefore, "energy provider property" may reasonably be interpreted as applying even to property that an energy provider does not own, lease, or have an easement on.

Intentionally Entering Energy Provider Property

To be convicted under Section 943.143 of the Wisconsin Statutes, a person must "intentionally enter[] an energy provider property without lawful authority and without the consent of the

[13] 2019 Wis. Sen. B. 386, § 8.
[14] *Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 46 (citations omitted).
[15] *Kalal*, 2004 WI 58, ¶ 45 (citations omitted).
[16] *Kalal*, 2005 WI 58, ¶ 47 (citations omitted).
[17] *Id.* ¶ 46 ("[S]tatutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonably results.") (citations omitted).
[18] 2019 Wis. Sen. B. 386, § 8.
[19] https://www.wpr.org/enbridge-offers-bad-river-tribe-24m-settle-pipeline-lawsuit.
[20] https://www.fs.usda.gov/project/?project=44889&exp=overview.

energy provider that owns, leases, or operates the property."[21] This language can be broken up into two major parts, which can then be divided into subparts or elements. The first part of the statute is the crime itself—intentionally entering an energy provider property. Subparts of the crime include (1) the mens rea element, intentionally; and (2) the actus reus element, entering an energy provider property. The second part of the criminal statute is the exception to the crime, which requires the actor to have both (1) the lawful authority to enter the energy provider property; and (2) the consent of the energy provider to enter that property.

The mens rea element is defined in statutory law:

> "Intentionally" means that the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result. In addition . . . the actor must have knowledge of those facts which are necessary to make his or her conduct criminal and which are set forth after the word "intentionally."[22]

Importantly, a person does not need to intend to commit a crime.[23] In other words, to have the requisite intent, a person only has know they are engaging in the actus reus, or conduct, that constitutes the crime. Here, that means entering property knowing that it is owned, leased, or operated by an energy provider.[24] That person is then subject to felony prosecution even if they qualify for the exception to the crime, which requires the person to have both lawful authority to be on the property and permission from the energy provider.[25]

Take, for example, a landowner whose land is encumbered by an easement for energy infrastructure. That landowner presumably knows there is an easement and thus knows that portion of their property is operated by an energy provider. If the landowner entered that portion of their property, they intentionally entered energy provider property and have committed the underlying crime. The question then becomes whether the landowner qualifies for the exception. The landowner likely has the lawful authority to enter any portion of their property. What is less clear is whether the landowner has permission from the energy provider. To be sure, agreements between pipeline companies and landowners for a lease or an easement could provide this permission, but there is no guarantee, particularly because two such agreements are rarely the same.

Another example involves energy infrastructure that travels through or near tribal reservations. Local and state law enforcement officers in Wisconsin have the authority to enter reservations and charge tribal members with crimes under state law.[26] Thus, if a tribal member enters property on a reservation and knows it is leased or operated by an energy provider, that tribal

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[21] Wis. Stat. § 943.143(2).
[22] Wis. Stat. § 939.23(3).
[23] Wis. Stat. § 939.23(5).
[24] This is much different than the property damage portion of the crime, where a person is subject to prosecution for a Class H felony if they cause physical damage to energy provider property with the intent to interrupt the service or good provided by an energy provider. *See* Wis. Stat. § 943.01(2k)(b).
[25] Wis. Stat. § 943.143(2).
[26] *See* Pub. L. No. 83-280 (codified at 18 U.S.C. § 1162, 25 U.S.C. §§1321-1326, 28 U.S.C. § 1360).

member may be prosecuted. In addition, tribes often have treaty rights to engage in activities such as hunting and gathering off reservation. These treaty rights provide tribal members with lawful authority to be present on the property, but permission from the energy provider is still necessary to qualify for the exception and avoid being convicted.

Finally, easements for energy infrastructure abound on public land. That means a member of the general public could be prosecuted for entering public land if they know that it is operated by an energy provider. Many easements, particularly in urban settings, are not marked, and thus it would be difficult for a prosecutor to prove the intent element. But other easements are marked or are obvious. Overhead transmission lines are an example of an obvious easement. Natural gas lines and oil pipelines are also often marked even though the lines themselves are underground. Proving the intent element for entering these types of energy provider property would be much less difficult.

CONCLUSION

AB426/SB386 expands the definition of “energy provider” and “energy provider property” to the extent that people may now be subject to felony prosecution for previously acceptable activities that do not endanger the integrity or operation of energy infrastructure. If this bill becomes law, it could lead to the prosecution of a landowner for being on their own land, a tribal member for being on a reservation or exercising off reservation treaty rights, or even a member of the general public for being on public land.