

2019 SENATE ENERGY AND NATURAL RESOURCES

SB 2044

2019 SENATE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee Fort Lincoln Room, State Capitol

SB 2044
1/18/2019
Job Number 31033

- Subcommittee
 Conference Committee

Committee Clerk: Marne Johnson

Explanation or reason for introduction of bill/resolution:

A bill relating to tampering with or damaging a critical infrastructure facility or a public service; and to provide a penalty.

Minutes:

10 attachments

Chair Unruh: Attendance was taken; all members were present. The public hearing was opened.

Senator Myrdal, District 10; introduced the bill (0:33-9:16) This is a bill to strengthen North Dakota's century code as it relates to intentional destruction of infrastructure located throughout our state. We have several pipelines that go through our district; in 2016, two actors were flown in from out-of-state, with the intent to damage or destroy a pump station in Pembina County. They managed to do so to some degree. That is why I am here. Law enforcement at the time felt there was not enough deterrent in our current law to deal with that. These two actors got arrested; one got a 1-year sentence, they served six months or less. They have recently appealed that sentence, the North Dakota Supreme Court denied that appeal. I have had input from other states, Oklahoma, Kentucky, Wyoming, three state that have dealt with this issue. However, I want to reiterate, this is North Dakota legislation, drafted with the help of legislative council and a lot of outside council. It is not a copy of a bill from another state. There has been an increase in the nation in the past few years of trespassing on critical infrastructure with the intent to damage. We all depend on infrastructure for our daily lives. Examples include stopping the flow of a pipeline, which can cause pressure to build up, and increasing the risk of explosion; while peaceful protest is part of an American's rights, causing damage and putting people at risk is not a part of that right. Another example could be a hospital using electricity running incubators for newborn babies or a surgeon in the middle of surgery; our water supply depends on power to serve all of us. Damage to our infrastructure could be deadly.

There are also environmental concerns, in our state, we have these infrastructures in oil, gas and lignite, damage to these could cause environmental damage for decades. The list is exhaustive. SB 2044 is intended to preempt acts of intentional trespass or damage to our structures by strengthening our century code. Critical infrastructure facilities defined in our bill, specifically correspond uniquely to North Dakota, however it also corresponds to the Federal Homeland Security list of critical infrastructure categories, specifically called out to

be monitored for their unique and interrelated importance to America's national security and economic security. The Federal Department of Homeland Security, critical infrastructure facilities are considered so valuable to the US that their incapacitation or destruction, would have a debilitating effect on security, national and state economic security, national or state public health or safety or any combination thereof. North Dakota critical infrastructure facilities require unique and expanded measures to be protected. Let me assure you that the First Amendment rights are not affected by this bill in any way. Only intentional acts of unlawful trespass and or damage to critical infrastructure facilities are applicable under this statute. With input from legal counsel we have ensured that this does not affect or violate the First Amendment. If speech activity causes damage to or blocks lawfully protected access to a critically protected infrastructure, that activity has gone beyond the free speech protections of the First Amendment and the perpetrators can be held in violation of the law. This principal is widely accepted in First Amendment case law, and this bill does not change any established principles of law around the First Amendment.

As groups and or persons hiring actors to come to our state to intentionally do damage to our critical infrastructure needs to be deterred and addressed in law. If such conspirators are proven section 3 allows the prosecutor to assess this larger fine. As far as the fine, and the legal terms of what the judge will do, I'll refer that to experts. If they fine perpetrator \$5,000 and it is proven that they are hired by instate or out of state co-conspirators, this law says we can fine them ten times the fine. It is not freedom of speech to hire people to trespass and cause damage. Senate Bill 2044 clearly sets forth the consequences of doing so, so there will be no doubt as the prosecutions authority on this issue.

Why such a big fine? A strong deterrent needs to be sent to individuals and group who might consider this action in our state. This bill does not seek to criminally prosecute organizations who encourage people to peacefully protest. There is no potential for groups such as churches to be criminally processed under this legislation. It does not provide the potential for landowner who may accidently strike a pipeline, a power line or other infrastructure to be subject to criminal prosecution. This bill provides a useful tool for law enforcement to prosecute intentional acts of damage on critical infrastructure.

Presented an amendment. **(Please see attachment #1)** There are no substantive changes, just properly defining and renaming terms.

Bette Grande, The Heartland Institute (11:34) Testified in support, see attachment # 2.

Critical infrastructure faces many natural disasters over time, these cause shutdowns and damage and are very difficult for people in their everyday lives we can't control natural disasters but we can protect the critical infrastructure as best as possible from them. What we shouldn't have to do is worry about chosen damage to our critical infrastructure. Please do due diligence to this legislation, which has been worked through by many organizations and we feel the great importance that we set a precedent that when someone chooses to break our laws that they be held accountable for doing so. As we wouldn't want people to feel like its ok to vandalize your home, property rights are very important. In our modern day lives, we are dependent on these pieces of infrastructure, our daily activities and our lives shouldn't be put at risk because of someone else's dangerous actions. Passed American Chemistry Council testimony **(Please see attachment #3)**

Commissioner Julie Fedorchak, Public Service Commission (13:51) Testified in Support. Every national meeting, I attend, protection of critical infrastructure is a huge topic of conversation. We've seen it in North Dakota. As we come more dependent on energy and

all that it supplies us for our daily lives, everything we do depends on it. We have to have the systems; they have to be protectable. This is a law that strikes a good balance, between providing a strong deterrent, while also protecting people's rights to congregate and their free speech.

Shawn Kessel, Deputy Commissioner, Department of Commerce/EmPower (15:16-17:20) EmPower was established several decades ago to represent energy in North Dakota. We represent oil, gas, wind, coal, and all of the above in their energy strategy. This is important to all of these actors, I agree with Sen. Myrdal's testimony, primarily the issues regarding safety, both to the individuals and to those with downstream effects. We're an energy exporter, so not only are we affecting North Dakotans, but also affecting other states. I would be remiss if we didn't talk about the cost of reconstruction, as a secondary issue, and also the revenue loss to the state of North Dakota. If the damage is catastrophic, facilities could be down for weeks, maybe even months. That could have ancillary effects from a revenue perspective to our state.

Vice Chair Kreun: You mentioned economic aspect, what has been the repair costs?

Shawn Kessel: I don't have them off the top of my head, we can get them to you.

Jean Schafer, Senior Legislative Representative, Basin Electric (17:32-19:00) Testified in favor with suggested amendments, please see attachment # 4.

Justin Dever, MDU (19:25-20:21) Testified in favor, please see attachment #5.

David Crothers, Broadband Association of North Dakota (20:36-21:25) Testified in support, with amendments, please see attachment #6. Offered an amendment of the definition of telecommunications; it should be expanded upon for the landline companies.

Blair Thoreson, North Dakota Peace Officer Association (21:40) Testified in Support. We appreciate the efforts of the sponsor and others, to not only protect the critical infrastructure in the state of North Dakota, but also understand how this affects public safety. We have seen in the history of our state incidences where these types of actions had occurred. About 20 years ago in Fargo, telecommunications infrastructure was destroyed and it affected the lives of many people for many weeks. This is something that is broader than just protecting property, its protecting public lives, we appreciate the committee's look at this bill, and ask for a favorable recommendation.

Brady Pelton, North Dakota Petroleum Council (22:50-23:10) Testified in support, please see attachment #7.

Jason Boher, Lignite Energy Council (23:25-23:40) Testified in support. We support the concept of what you're accomplishing here, we agree with Jean, there are some needs for additional clarification amendments, but really the concept of what's trying to be accomplished needs to be done, and we support it.

Scott Skokos, Dakota Resource Council (24:15-28:) Testified in opposition, please see attachment #8.

Chair Unruh: Do you have a definition for the word conspirator?

Scott Skokos: I would prefer to provide examples to put into law to specifically define what a court has to go through to define when an organization is a conspirator; to make it very clear, because at this point depending on who's doing it, courts are not supposed to be politically motivated, but certain organizations might be more targeted. It leaves it up to a potential political situation.

Senator Schaible: You said our laws are sufficient. What we've seen in the last few years, obviously they're not a deterrent, we've had uptick in these kind of activities. Saying that what we have is sufficient is awfully subjective, especially when we've seen a lot more of that. Even with fines and penalties we have, seldom are the prosecuted to the full extent of the law, I don't feel they are sufficient.

Scott Skokos: There's jail time involved, if you are specifically referencing NoDAPL, the courts are blocked up with a bunch of people being charged on these things, people have the right a fair trial, and the right to go through the legal system. There are lots of subjective situations that could occur under this kind of situation.

Senator Schaible: That's the point, we've had a lot of people who were charged and prosecuted, but it doesn't seem to be much of a deterrent. It seems to me, whether they're paid to do it or not, a badge of honor to get arrested. Penalties are supposed to be two things, prevent people from further doing it, and to penalize the ones that have done it. I don't see that happening in either of the cases.

Chair Unruh: We do have a definition for a conspirator in our criminal code. If you'd like to take a look at that, and we can work with you as a committee to see if that's something we can address as we work on the bill.

Mary Wilson, North Dakota citizen (32:00-33:50) Testified in opposition. Is concerned that there aren't enough laws protecting the environment or natural resources; something she believes the people this bill is seeking to deter are trying to do.

Pat Ward, Attorney, American Civil Liberties Union (34:00-37:15) Testified in opposition, please see attachment #9.

Chair Unruh: Is there an alternative for the conspirator language that the ACLU would deem acceptable or is it just a sticking point.

Pat Ward: We believe that conspiracy is already defined in North Dakota, it is a crime it can be proven under the law, prosecutors know when and how to change and when and how to prosecute conspiracy. If this concern is such a great concern, because individuals are doing these things, we need to deter the individuals from doing these thing not from associating the organizations that have peaceful or legitimate motives. One way to do that would be to increase the penalty for the bad act for the person who actually does it, to a point where that person serves some real jail time. To punish an association because what they have organized, because some members go off and do violent or illegal things, is really a First

Amendment concern. We agree with objectives of preventing these kinds of damage to critical infrastructure, it puts everybody at risk.

Chair Unruh: If an individual was hired to do these things, I think that is mostly what was trying to be addressed, did that not get accomplished with the language that was here?

Pat Ward: I think that the language that is here is too vague and goes too far; I think that if a person is hired to go and do an illegal act, that's already a crime. The problem in some of these cases is that the prosecution didn't prove its case. That's what you need to be concerned about, the law on the books is adequate.

Closed public hearing.
Attachment #10 is testimony via email.

2019 SENATE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee Fort Lincoln Room, State Capitol

SB 2044
2/7/2019
Job Number 32366

- Subcommittee
 Conference Committee

Committee Clerk: Marne Johnson

Explanation or reason for introduction of bill/resolution:

A bill relating to tampering with or damaging a critical infrastructure facility or a public service; and to provide a penalty.

Minutes:

3 Attachments

Chair Unruh: Opened committee work. Attendance was taken, all members were present. We heard SB 2044 earlier, this has to do with critical infrastructure and the vandalization of it. We have received quite a few amendments when we heard the bill, those are being compiled into one document. They will potentially be added to the amendments that were handed out to you this morning, we have a Christmas tree version from Legislative Council **(please see attachment #1)** we also have the .02004 version **(please see attachment #2)** These were to address the concerns heard during the hearing about the penalties, and them potentially being unconstitutional. I wanted to make sure that if we're got penalties this harsh for these types of crimes, that we're doing it the right way. I looked into exactly how to do that, Christopher Joseph is here to explain to us exactly how those amendments work.

Christopher Joseph, Legislative Council (2:40) provided neutral testimony. I'd like to discuss two things brought to our attention in the last meeting; that first, under this bill there could potentially be some conflict with excavation, and those penalties found in chapter 49-23: regarding not calling 811. That would be incorrect, that is completely different penalty section, a different violation, there wouldn't be any conflict with that. Also, there was testimony provided that this bill could potentially violate the 1st amendment. Based on Supreme Court case law and North Dakota Supreme Court case law, that would not occur. You do not have a right to hinder or prevent lawful activity, do not have the right to trespass, to damage anybody's property, sub-section 4 of this bill addresses that by saying you can still peacefully assemble. You can dispute labor claims, still protest. That does not give you the right to damage anybody's property or hinder a lawful business.

Onto the amendments; regarding conspiracy, it's already addressed in Century Code, under 12.1-06-04, I brought a copy **(please see attachment #3)** which states that the penalty for a conspirator has to be the same as the main offense. For example, if me and three of my friends decided to commit a bank robbery, I'm the master organizer, I plan the entire event, but I don't participate in the actual robbery, my three friends get caught and charged with a B felony, even though I'm at home in my pajamas, I get charges with a B felony as if I was

actually committing the robbery as well. That what a conspirator is. There was no definition for conspirator, we just used the term conspirator. A court would say, what's a conspirator under 12.1-06-04, read that definition, and then say the penalties say it can't be higher than what's here. The organization can't be charged or penalized higher than that. So what we did is made an amendment to say that if an organization is charged, with hiring 10 individuals to go and damage a pipeline, each of those individuals get charged with a C felony, then the organization would be charged with a C felony per individual; which is in accord with 12.1-06-04. If they hire 20 people, and those 20 get charged, then the organization would be charged up to 10 individuals. The max an organization can be charged is \$100,000. Because the penalty for a C felony is a fine of \$10,000 or up to 5 years in prison.

Vice-Chair Kreun: Would this then pertain to a bank robbery as well?

Christopher Joseph: Conspirators? Yes. Any criminal offense in century code. If you are part of planning, facilitating, being the mastermind behind it, you will be charged as a conspirator under 12.1-06-04. And you cannot be charged any higher than what the actual actors were charged with.

Vice-Chair Kreun: In that case, during the bank robbery, you're sitting at home, you were the one that designed this, during the robbery, they killed two people. Are you subject to the murder charge?

Christopher Joseph: Yes, that is correct. That is addressed in 12.1-06-04, I believe that is subsection 2.

Vice-Chair Kreun: If they damage a valve and it explodes, and kills people, they can be charged with murder?

Christopher Joseph: In this case, they wouldn't be charged with prison time, they would get the fine equivalent. For example, if they get charged with an A felony, they would be fined up to \$20,000. They would get the monetary amount for it.

Vice-Chair Kreun: The conspirator who paid these individuals would be charged the same as the ones that committed the crime. It depends on the charge, they penalty changes.

Christopher Joseph: That is correct

Senator Piepkorn: It all plays out in the courts. Establishing a relationship and links to the organization, proving this organization put them up to it.

Christopher Joseph: That is correct. There are elements addressed in section 12.1-06-04 that have to be met the prosecution has to establish that there was some planning involved, that the conspirator knew what was going on, and what would happen. This would be a result of the intended action.

Chair Unruh: We'll set this bill aside. Closed committee work.

2019 SENATE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee Fort Lincoln Room, State Capitol

SB 2044
2/8/2019
Job Number 32469

- Subcommittee
 Conference Committee

Committee Clerk: Marne Johnson

Explanation or reason for introduction of bill/resolution:

A bill relating to tampering with or damaging a critical infrastructure facility or a public service; and to provide a penalty.

Minutes:

1 Attachment

Chair Unruh: Opened committee work. Yesterday Christopher Joseph came down to talk about the penalties and how they were adjusted. I did not hear any feedback from the amendments that were talked about yesterday; I think we've solved at least the largest parts of the concerns with the way the penalties were originally drafted. What you see in those amendments (**Please see attachment #1**) are comprehensive amendments that address both the penalty issue and also the requested amendments by the sponsor of the bill, as she presented it; and then requested amendments from the telecommunications folks. They had a couple to include in here. The utility working group had brought forth some concerns, I worked through all of those with legislative council, they were either included in the sponsor's amendments or included in the telecommunications amendments or unnecessary; concerns that were addressed in other areas of the code.

Senator Cook: I move to adopt the amendment ending in 02005.

Vice-Chair Kreun: I second.

A voice vote was taken.
Motion carries.

Senator Schaible: I moved a Do Pass As Amended.

Vice-Chair Kreun: I second.

A roll call vote was taken.
Motion passes 6-0-0.

Chair Unruh will carry.

SK
18/1

PROPOSED AMENDMENTS TO SENATE BILL NO. 2044

Page 2, line 1, replace "If an" with "An"

Page 2, line 1, replace "is found to be a conspirator" with "that has pled guilty or been convicted of a violation under section 12.1-06-04 for conspiring"

Page 2, line 1, replace "found to have violated" with "who has pled guilty or been convicted under"

Page 2, line 2, replace ", the court shall assess on the conspiring organization" with "must be assessed"

Page 2, line 2, remove "ten times the"

Page 2, line 3, replace "amount of the fine" with "equivalent to the penalty"

Page 2, line 3, after "2" insert "for each individual who has pled guilty or been convicted under subsection 1, not to exceed one hundred thousand dollars"

Page 2, line 12, after the third underscored comma insert "ground water monitoring well, water well,"

Page 2, line 16, replace "A telecommunications central switching office" with "Wireline telecommunications and internet infrastructure, including central offices, fiber optic lines, cable lines, and all additional equipment associated with the provision of broadband or telecommunication services"

Page 2, line 28, after "gas" insert "transmission or"

Page 2, line 29, after the second underscored comma insert "below or"

Page 3, line 4, after "Any" insert "below or"

Page 3, line 5, remove "and"

Page 3, line 6, after "r." insert "An oil and gas production site; and
s."

Renumber accordingly

Date: 2/8
Roll Call Vote #: 1

**2019 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 2044**

Senate Energy and Natural Resources Committee

Subcommittee

Amendment LC# or Description: 19.0124.02005

Recommendation: Adopt Amendment
 Do Pass Do Not Pass Without Committee Recommendation
 As Amended Rerefer to Appropriations
 Place on Consent Calendar
Other Actions: Reconsider _____

Motion Made By Sen. Cook Seconded By Sen. Kroen

Senators	Yes	No	Senators	Yes	No
Senator Jessica Unruh			Senator Merrill Piepkorn		
Senator Curt Kreun					
Senator Donald Schaible					
Senator Dwight Cook					
Senator Jim Roers					

Total (Yes) _____ No _____

Absent _____

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

Voice Vote
Motion Carries

Date: 2/19
 Roll Call Vote #: 2

**2019 SENATE STANDING COMMITTEE
 ROLL CALL VOTES
 BILL/RESOLUTION NO. 2044**

Senate Energy and Natural Resources Committee

Subcommittee

Amendment LC# or Description: 19.0124.02005

Recommendation: Adopt Amendment
 Do Pass Do Not Pass Without Committee Recommendation
 As Amended Rerefer to Appropriations
 Place on Consent Calendar
 Other Actions: Reconsider _____

Motion Made By Sen. Schaible Seconded By Sen. Kreun

Senators	Yes	No	Senators	Yes	No
Senator Jessica Unruh	X		Senator Merrill Piepkorn	X	
Senator Curt Kreun	X				
Senator Donald Schaible	X				
Senator Dwight Cook	X				
Senator Jim Roers	X				

Total (Yes) 6 No 0

Absent 0

Floor Assignment Sen. Unruh

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

SB 2044: Energy and Natural Resources Committee (Sen. Unruh, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2044 was placed on the Sixth order on the calendar.

Page 2, line 1, replace "If an" with "An"

Page 2, line 1, replace "is found to be a conspirator" with "that has pled guilty or been convicted of a violation under section 12.1-06-04 for conspiring"

Page 2, line 1, replace "found to have violated" with "who has pled guilty or been convicted under"

Page 2, line 2, replace ", the court shall assess on the conspiring organization" with "must be assessed"

Page 2, line 2, remove "ten times the"

Page 2, line 3, replace "amount of the fine" with "equivalent to the penalty"

Page 2, line 3, after "2" insert "for each individual who has pled guilty or been convicted under subsection 1, not to exceed one hundred thousand dollars"

Page 2, line 12, after the third underscored comma insert "ground water monitoring well, water well,"

Page 2, line 16, replace "A telecommunications central switching office" with "Wireline telecommunications and internet infrastructure, including central offices, fiber optic lines, cable lines, and all additional equipment associated with the provision of broadband or telecommunication services"

Page 2, line 28, after "gas" insert "transmission or"

Page 2, line 29, after the second underscored comma insert "below or"

Page 3, line 4, after "Any" insert "below or"

Page 3, line 5, remove "and"

Page 3, line 6, after "r." insert "An oil and gas production site; and

s."

Renumber accordingly

2019 HOUSE ENERGY AND NATURAL RESOURCES

SB 2044

2019 HOUSE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee Coteau A Room, State Capitol

SB 2044
3/7/2019
33395

- Subcommittee
 Conference Committee

Committee Clerk, Kathleen Davis by Marjorie Conley

Explanation or reason for introduction of bill/resolution:

Relating to tampering with or damaging a critical infrastructure facility or a public service; and to provide a penalty.

Minutes:

Attachment 1, 2, 3, 4, 5, 6, 7, 8, 9, 10

Chairman Porter: opened the hearing on SB 2044.

Sen. Myrdal, Dist.10: presented Attachments 1,2,3

10:00

Bette Grande, Heartland Institute: presented Attachment #4

Shawn Kessel, deputy commission at Dept. of Commerce: presented Attachment 5

Eric Volk, Executive Director, ND Rural Water Systems Association, presented Attachment 6.

Rep. Keiser: Everyone of these different items has a laundry list of things you miss and next session you'll be back. Why don't we just say water structure?

Mr. Volk: I didn't write the bill. The way it is right now it will miss items on the water side.

Blair Thorson, ND Peace Officers Association: this is another tool to protect infrastructure and our citizens. We support this bill.

Jonathan Fortner, Government Relations Director for the Lignite Energy Council presented Attachment 7.

Justin Dever, MDU Resources Group presented Attachment 8

22:00

Freddy Pelton, ND Petroleum Council: in support.

Chairman Porter: questions? Further support? Opposition?

Scott Skokos, executive director, Dakota Resource Council: presented Attachment 9.
In opposition to SB 2044.

30:00

Rep. Keiser: you made the statement we already have on the books. Trespass going on to one of these properties is different. Should there be higher standards for punishment?

Mr. Skokos: I am referring to the legislation being very vague.

Vice Chairman Damschen: I'm wondering how you feel that our current laws aren't deterrent enough to prevent this from happening. They had this happen in District 10 a couple of years ago. Current penalties aren't enough when it didn't deter people in Pembina County on the pipeline. Page 2 Subsection 4 line 6 through 8. We need to offer some stronger deterrent method.

Mr. Skokos: the first question, the person that did that said it wouldn't have mattered what the penalties were. He would have taken 20 years in prison. I would say that's up to interpretation to question #2. I would say that there are lawyers that would say that this was unconstitutional.

Rep. Damschen: But you don't think that is testing your constitutional right to protest these.

Mr. Skokos: I think that there are some activities because of the big language in this bill That could be construed as in violation of the law. If this law would pass.

Chairman Porter: it seems the acts of the individual are covered under existing law, what about the acts of an organization or group that hires someone to be their martyr.

Mr. Skokos: there's already laws about conspiracy in the criminal code in ND. It could be possibly be someone under conspiracy and that organization. Trumping up the penalties is unconstitutional based on what I've seen.

Chairman Porter: You're ok going after an organization? You just don't like the penalty being high?

36:00

Mr. Skokos: The penalty being high is actually a violation of the United States Constitution. If you ask attorneys about raising fines for things that were cumulative like that for specific classes of people or organizations that would be in violation of parts of the Constitution.

Chairman Porter: Further questions? Further testimony in opposition for SB 2044?

Dennis Pathroff, Zuger, Kirmis, & Smith law firm representing the ACLU: presented #10

39:00

Rep. Keiser: the fines sound terrible but the risk associated with one of these projects. Why would it just let it go if it is related to the impact of the action. If a million dollars worth of damage was done to a project, what is wrong with a one hundred thousand dollar fine? It sounds large, but the risk on one of these projects is why?

Mr. Pathroff: If you look at subsection 2, it says class B felony, so if you are looking at a class B felony, you are talking of five years and ten thousand dollars. In sub 3, the organization can be fined whatever each individual that committed the act.

Chairman Porter: We aren't setting the floor. Isn't the judicial branch still responsible for making sure that it fits because it says not to exceed, it doesn't say not to be less than?

Mr. Pathroff: We are taking some discretion away from the judiciary.

Chairman Porter: I don't see it that way.

Mr. Pathroff: That's the argument.

Chairman Porter: Everything is opened up to an argument.

42:00

Nichole Donaghy, ND Native Vote: I do stand in agreement with the past two gentlemen. Our organization works on the wellbeing of tribal communities here in ND. We started in response to bad decisions made by the decision makers in our state. I believe this language is a continuation of the protest at Standing Rock. I believe that it was very non sense to add language into Century Code in response to protest and using language such as ecoterrorism and making broad unverified statements. Somebody paid actors to come into ND to protest.

Closed the hearing.

2019 HOUSE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee Coteau A Room, State Capitol

SB 2044
3/15/2019
33819

- Subcommittee
 Conference Committee

Committee Clerk, Kathleen Davis

Explanation or reason for introduction of bill/resolution:

Relating to tampering with or damaging a critical infrastructure facility or a public service; and to provide a penalty.

Minutes:

Attachment 1, 2

Chairman Porter: opened the hearing on SB 2044.

Vice Chairman Damschen: When we hear this bill, some of us had concerns that when we miss one of the issues, then it's assumed by someone at some time the ones not listed are not prohibited. I talked to Christopher Joseph at Legislative Council about that. On the second page it defines critical infrastructure. I was thinking we could put includes but is not limited to. He said the way it's worded now implies that, doesn't limit it to what's listed there. I thought we could do the same on the front page after visiting with Rep. Keiser. Legislative Council said we have to be specific, we can't generalize breaking the law or committee an offense. I don't know that the water Rep. Ruby presented is a problem.

Rep. Ruby: I took it from Eric Volk's testimony. These are terms used in industry. I didn't talk to Chris.

Chairman Porter: They're just expanding on the definition on Page 2 Line 14. We have Attachment 1, the proposed unnumbered amendment from Rep. Ruby, dealing with the water intake structure and Attachment 2, Sen Myrdal's amendment 19.0124.04001 amendment that adds the language that this criminal act does not apply to employees or contractors.

Rep. Zubke: I move the Sen. Myrdal 19.0124.04001 amendment and the proposed water amendment.

Rep. Anderson: second.

Chairman Porter: We have a motion and a second to adopt the 04001 Sen. Myrdal amendment and the unnumbered amendment handed out by Rep. Ruby. Discussion? Voice vote. Motion carried.

Rep. Anderson: I move a Do Pass as Amended.

Rep. Ruby: second.

House Energy and Natural Resources Committee

HB 2044

3/15/19

Page 2

Chairman Porter: Discussion? Roll call vote. 10 yes, 1 No, 3 absent. Motion carried. Vice Chairman Damschen is carrier. Closed the hearing.

DE 3/15/19

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2044

Page 2, line 1, after the "3." insert "This section does not apply to an employee or contractor acting within the scope of the employee's or contractor's employment. As used in this subsection, "employee or contractor" means any person hired or under contract to provide services to a critical infrastructure facility or public service.

4."

Page 2, line 6, replace "4." with "5."

Page 2, line 9, replace "5." with "6."

Page 2, line 14, remove "A water intake structure, water treatment facility, wastewater treatment plant,"

Page 2, line 15, replace "ground water monitoring well, water well, or pump station" with "A drinking water source, water transmission line, water treatment plant, water distribution system, ground water monitoring well, waste water treatment plant, or waste water collection system"

Re-number accordingly

Date: 3-15-19
Roll Call Vote #: 1

2019 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 2044

House Energy and Natural Resources Committee

Subcommittee

Amendment LC# or Description: 19.0124.04001 and unnumbered proposed amendment

Recommendation: Adopt Amendment
 Do Pass Do Not Pass Without Committee Recommendation
 As Amended Rerefer to Appropriations
 Place on Consent Calendar
Other Actions: Reconsider _____

Motion Made By Zubke Seconded By Anderson

Representatives	Yes	No	Representatives	Yes	No
Chairman Porter			Rep. Lefor		
Vice Chairman Damschen			Rep. Marschall		
Rep. Anderson			Rep. Roers Jones		
Rep. Bosch			Rep. Ruby		
Rep. Devlin			Rep. Zubke		
Rep. Heinert					
Rep. Keiser			Rep. Mitskog		
			Rep. Eidson		

Total (Yes) _____ No _____

Absent _____

Floor Assignment Voice vote. Motion carried.

If the vote is on an amendment, briefly indicate intent:

Date: 3-15-19
 Roll Call Vote #: 2

**2019 HOUSE STANDING COMMITTEE
 ROLL CALL VOTES
 BILL/RESOLUTION NO. 2044**

House Energy and Natural Resources Committee

Subcommittee

Amendment LC# or Description: 19.0124.04002

Recommendation: Adopt Amendment
 Do Pass Do Not Pass Without Committee Recommendation
 As Amended Rerefer to Appropriations
 Place on Consent Calendar
 Other Actions: Reconsider _____

Motion Made By Anderson Seconded By Ruby

Representatives	Yes	No	Representatives	Yes	No
Chairman Porter	✓		Rep. Lefor	✓	
Vice Chairman Damschen	✓		Rep. Marschall	✓	
Rep. Anderson	✓		Rep. Roers Jones	✓	
Rep. Bosch	AB		Rep. Ruby	✓	
Rep. Devlin	✓		Rep. Zubke	✓	
Rep. Heinert	✓				
Rep. Keiser	AB		Rep. Mitskog	AB	
			Rep. Eidson		✓

Total (Yes) 10 No 1

Absent 3

Floor Assignment Damschen

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

SB 2044, as engrossed: Energy and Natural Resources Committee (Rep. Porter, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (10 YEAS, 1 NAYS, 3 ABSENT AND NOT VOTING). Engrossed SB 2044 was placed on the Sixth order on the calendar.

Page 2, line 1, after the "3." insert "This section does not apply to an employee or contractor acting within the scope of the employee's or contractor's employment. As used in this subsection, "employee or contractor" means any person hired or under contract to provide services to a critical infrastructure facility or public service.

4."

Page 2, line 6, replace "4." with "5."

Page 2, line 9, replace "5." with "6."

Page 2, line 14, remove "A water intake structure, water treatment facility, wastewater treatment plant,"

Page 2, line 15, replace "ground water monitoring well, water well, or pump station" with "A drinking water source, water transmission line, water treatment plant, water distribution system, ground water monitoring well, waste water treatment plant, or waste water collection system"

Renumber accordingly

2019 TESTIMONY

SB 2044

19.0124.02003
Title.

Prepared by the Legislative Council staff for
Senator Myrdal

January 10, 2019

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PROPOSED AMENDMENTS TO SENATE BILL NO. 2044

Page 2, line 12, after the third underscored comma insert "ground water monitoring well, water well,"

Page 2, line 16, after "telecommunications" insert "infrastructure"

Page 2, line 28, after "gas" insert "transmission or"

Page 2, line 29, after the second underscored comma insert "below or"

Page 3, line 4, after "Any" insert "below or"

Page 3, line 5, remove "and"

Page 3, line 6, after "r." insert: "An oil production site; and

s."

Renumber accordingly

Testimony for SB 204

Senator Unruh and Members of the Senate Energy and Natural Resources committee.

My name is Bette Grande and I am here today in support of SB 2044. I am a research fellow for the Heartland Institute, a national non-profit organization dedicated to discovering, developing, and promoting free market solutions to economic and social problems.

SB 2044 is presented today to establish the need to protect the critical infrastructure needed to maintain our daily lives. Infrastructure necessary for the water supply to flow safely to our homes and businesses, power to cool and heat our homes and businesses, communication lines for personal, business and emergency use, and transportation of goods and supplies and personal uses.

Interference with these areas disrupt our free market and economy, costing everyone precious time and resources. Safety for the citizens in our communities can be in jeopardy when vandals interfere with these critical infrastructures.

The uninterrupted flow of commerce is important to the everyday lives of the citizen of this state and country and no one has the right to interrupt, destroy, damage or vandalize others property. The welfare of the people and businesses must be protected for the safety of all.

Thank you for allowing me to testify today on this important legislation, and I encourage a do pass on SB 2044.

Bette Grande
Research Fellow, Energy Policy
The Heartland Institute



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January 16, 2019

Senator Janne Myrdal
Coauthors: Rep. Chuck Damschen and Rep. James E Schmidt
Coauthors: Senator Jessica K. Unruh and Senator Dave Oehlke
State Capitol 600 East Blvd
Bismarck, ND 58505-0360

RE: SB 2044 (Critical Infrastructure) - SUPPORT

Dear Senator Myrdal and coauthors of SB 2044:

On behalf of the American Chemistry Council (ACC), I am writing to express our support for SB 2044, which seeks to establish new penalties for causing a substantial impairment of a critical infrastructure facility by damaging equipment or preventing the construction or repair of a critical infrastructure facility, which includes chemical manufacturing facilities.

ACC represents companies engaged in the business of chemistry—an innovative, \$768 billion enterprise that is helping solve the biggest challenges facing our nation and the world. In North Dakota, the business of chemistry provides nearly 358 direct jobs and 718 related jobs, generating approximately \$3 million in state and local taxes.

ACC and its member companies are dedicated to safeguarding our employees, our contractors and the people who live and work around our operations. This commitment is demonstrated through ACC's Responsible Care® program and our industry's performance to continually enhance safety and security. Over the past decade, ACC members have invested more than \$17 billion to enhance security measures.

Chemical manufacturers across the country transform raw materials into products that are critical to the everyday health and welfare of our nation. Chemical security is a top priority for ACC and its members because of the industry's critical role in the U.S. economy, and our responsibility to our employees and our communities.

SB 2044 seeks to establish criminal penalties for damaging or interfering with the operation of a designated critical infrastructure facility, including a chemical manufacturing facility. ACC believes this legislation is necessary to help ensure the safety of this important part of our country's critical infrastructure. The bill will impose penalties for violation of this law -- a class C felony if the actor engages in the conduct intentionally, a class A misdemeanor if the actor engages in the conduct knowingly or recklessly, or otherwise a class B misdemeanor.

Added protection for critical infrastructure facilities is an important public policy objective. The interference with or destruction of these facilities can potentially have a debilitating effect on the nation's safety and security. Thank you for the opportunity to comment on this important piece of legislation. Should you have any questions or concerns, please do not hesitate to contact me at (515) 471-1960 or by email at Marcus.Branstad@americanchemistry.com.

Sincerely,

Marcus Branstad
Senior Director, State Affairs



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**Testimony
SB 2044**

January 18, 2019

On behalf of North Dakota Utilities:

**Basin Electric, Great River Energy, Minnkota Power and ND Electric Co-ops
MDU, Otter Tail Power, Xcel Energy and Utility Shareholders of ND**

Madam Chair Unruh and members of the Senate Energy and Natural Resources Committee:

My name is Jean Schafer, Sr. Legislative Representative with Basin Electric, and I'm here today to provide testimony on behalf of not just Basin Electric, but my fellow utility colleagues in North Dakota.

Following the 2017 session we started a utilities working group with the load serving entities in the state:

- 3 Generation and Transmission co-ops - Basin, Great River and Minnkota Power
- 3 Investor Owned Utilities - MDU, Otter Tail and Xcel Energy
- And the appropriate trade associations - ND Association of Rural Electric Cooperatives and the Utility Shareholders of ND

This group has worked through several positions on areas where we agree and positions where we disagree and today I represent the group on an area where we agree - the identification and protection of our utility-based infrastructure as Critical Infrastructure.

We jointly stand in support of this bill and we worked as a group to review the pre-filed bill to provide some input on some possible additions to the bill as introduced.

We have not seen the amendments that were presented today, and some of our concerns may have already been addressed in the amended bill.

We did however want to provide the committee with our list of our suggested additions from the utility perspective for your consideration, and we would be happy to work with the committee or Legislative council on addressing our concerns.

Thank you.

We understand there is a bill drafted for ND, and we see a few areas for improvement.

- There should be an exemption for landowners performing usual and customary activities on their own land, or as otherwise approved by the infrastructure owner.
- There should be an exemption for authorized people performing authorized activities who inadvertently cause damage.
- There should be an enhancement to trespass to critical infrastructure as defined in 12.1-22-03, as pertains to conspirators.
- Cyber-crimes should be included, rather than just physical threats. Cyber crimes or cyber trespass might need to be defined in NDCC.
- ND should consider including transportation structures as critical infrastructure.
- Page 2, line 9, include provision referencing one-call and clarifying that a one-call violation would not rise to the level of criminal trespass or criminal damage to critical infrastructure.
- Remove all "aboveground" or "below" references in order to protect all critical infrastructure which exists both above and below ground.
- Page 2, line 12, include associated distribution (equipment) system (pipelines).
- Page 2, line 23, broaden to all telecommunication.

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TESTIMONY IN SUPPORT OF SB 2044
SENATE ENERGY & NATURAL RESOURCES COMMITTEE
JANUARY 18, 2018

Good morning, Madam Chair and members of the committee. My name is Justin Dever and I am here to testify before you today on behalf of MDU Resources Group. MDU Resources Group's presence in North Dakota includes Montana-Dakota Utilities Co., WBI Energy, Knife River Corporation, and MDU Construction Service Group.

MDU joins the other electric and natural gas utilities in the state in supporting SB 2044. Our customers expect and deserve safe and reliable power, which requires adequate infrastructure. SB 2044 will help protect critical infrastructure facilities by discouraging individuals from targeting existing infrastructure or impeding the construction of new critical infrastructure.

As Jean Schafer mentioned, the utilities are suggesting amendments to further improve SB 2044. It is important that the definition of "critical infrastructure facility" be complete, to protect all critical infrastructure.

I would encourage your favorable consideration of SB 2044, along with the amendments suggested by the utilities.

Thank you.

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PROPOSED AMENDMENT TO SENATE BILL 2044

Page 2, line 16, remove "A telecommunications central switching office"

And

Page 2, line 16, replace with "Wireline telecommunications and internet infrastructure, including central offices, fiber optic lines, cable lines and all additional equipment associated with the provision of broadband or telecom services".

Renumber accordingly.

David Crothers
Broadband Association of North Dakota
701-471-3838

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NORTH DAKOTA
PETROLEUM
C O U N C I L

100 West Broadway, Ste. 200 | P.O. Box 1395 | Bismarck, ND 58501-1395
701.223.6380 | ndpc@ndoil.org | www.NDOil.org

Senate Bill 2044
Testimony of Brady Pelton
Senate Energy and Natural Resources Committee
January 18, 2019

Chairman Unruh and members of the Senate Energy and Natural Resources Committee, my name is Brady Pelton, government affairs director of the North Dakota Petroleum Council. The North Dakota Petroleum Council represents more than 500 companies involved in all aspects of the oil and gas industry, including oil and gas production, refining, pipeline, transportation, mineral leasing, consulting, legal work, and oilfield service activities in North Dakota. I appear before you today in support of Senate Bill 2044.

North Dakota is fortunate to hold an abundance of oil and natural gas resources within its borders. The development, extraction, and utilization of those resources has required significant investment in necessary infrastructure in the state, including investments in oil and gas production facilities, pumping units, oil and gas storage facilities, gas gathering pipelines, gas processing plants, gas compression stations, and oil and gas transmission pipelines, just to name a few. Without these key investments, the financial health our state has come to enjoy would certainly not be in the condition it is today.

The protection of infrastructure necessary to the oil and gas sector is critical. Producing nearly 1.38 million barrels of oil and over 2.5 billion MCF of natural gas per day in November 2018, North Dakota is helping to fuel the nation and is bolstering the national energy security of our country in the process. Senate Bill 2044 recognizes the importance of all types of infrastructure critical to the wellbeing of our country and raises them to the level of protection required of such integral systems.

In conclusion, NDPC urges your support of **Senate Bill 2044** and respectfully requests a **Do Pass** recommendation. Thank you, and I would be happy to try to answer any questions.

1 Dakota Resource Council (DRC) opposes Senate Bill 2044. Dakota Resource Council is a
2 grassroots organization founded by North Dakotans to promote sustainable use of North
3 Dakota's natural resources and family-owned and operated agriculture.

4 Prior to explaining DRC's opposition to this bill, it is important to note that Dakota Resource
5 Council in no way condones the damaging or tampering with infrastructure. In fact, in 2003
6 DRC members unanimously resolved against using violence to achieve any organizational goals,
7 this would include the tampering with or damaging infrastructure (and including potentially
8 dangerous activities like valve turning). It should also be noted that DRC does though support
9 peaceful protest.

10 DRC's opposition to this bill is for the following reasons:

- 11 1. The current penalties are sufficient: This legislation is seeking to solve a problem that does
12 not exist. North Dakota's current penalties in the Century Code serve as a sufficient
13 deterrent to prevent people from damaging or tampering with infrastructure.
- 14 2. Language in the bill is vague and up for interpretation: Specifically language on line 18 is
15 very vague. "Impeding" and "inhibiting" are both terms that are up for interpretation. For
16 example, one company could sue under this statute claiming that public opposition in the
17 form of peaceful protest to be an act, which impedes the construction of an infrastructure
18 project. DRC members are often called the "impeders of progress" for our stances on various
19 piece of infrastructure that impact our members rural way of life (i.e pipelines, oil wells,
20 power lines, etc.). In this sense, a judge could also define free speech (i.e the swaying of
21 public opinion through facts) as something that impedes a piece of infrastructure. We would
22 strongly suggest clarifying the language and provide specific examples of activities that you
23 think should be punishable, rather than using such vague language.
- 24 3. The bill does not sufficiently define intent: By removing the term "negligence" the
25 legislation does not force the courts to determine if there was intent with any action that
26 impacts the construction or operation of infrastructure. In our view, someone could
27 accidentally damage infrastructure and still be charged, if this legislation is made law. For
28 example, a farmer that accidentally digs into a pipeline, or a drone operator that accidentally

29 runs their drone into a power line due to wind conditions could potentially be charged if the
30 language in this bill is not clarified.

31 4. The bill potentially violates the first amendment: By adding the provision in the bill making
32 organizations deemed as “conspirators” liable for the actions of individuals impermissibly
33 puts a burden on the rights of political association that are protected by the First
34 Amendment. Additionally, the bill does not define what makes an organization a
35 “conspirator”. Theoretically an organization providing direct services to individuals (i.e.
36 housing, food assistance, transportation etc.) could be held liable for helping a person that
37 was involved in tampering with infrastructure, even though the organization did not
38 explicitly support or know the individual was going to commit the crime.

39 5. This legislation is model legislation being pushed by special interest in several states to
40 protect specific types of infrastructure and to chill protest: Almost identical legislation is
41 being pushed by the American Legislative Exchange Council, whose membership includes
42 many corporate interests, including the interests that are further protected under this type of
43 legislation. For example, the link below on ALEC’s website shows legislation almost
44 identical to the legislation we at hearing for today. The legislation is specifically called
45 model policy: critical infrastructure protection act. Link: [https://www.alec.org/model-](https://www.alec.org/model-policy/critical-infrastructure-protection-act/)
46 [policy/critical-infrastructure-protection-act/](https://www.alec.org/model-policy/critical-infrastructure-protection-act/)



Senate Bill 2044 Testimony

The ACLU of North Dakota opposes Senate Bill 2044, a bill that would increase the legal penalties for tampering with or damaging a critical infrastructure facility or public service.

North Dakota law already prohibits trespass under section 12.1-22-03 and tampering with or damaging a public service under section 12.1-21-06 and conspiracies to commit the same under section 12.1-06-04. There's simply no need for additional law.

Additionally, there are constitutional issues with the bill. Senate Bill 2044 punishes association, in violation of the freedom of assembly under the U.S. Constitution.

The bill would fine organizations "found to be a conspirator" with those individuals found to be in violation of the new prohibitions ten times over. The provision does not make clear how an organization might be "found to be a conspirator" with an individual in violation of the substantive prohibitions or about what they must be conspiring. For that reason, we worry that provision is aimed at punishing associational activities. Rendering an organization criminally liable for all damage would impermissibly burden the rights of political association that are protected by the First Amendment – the literal embodiment of guilt by association. For example, if a person is participating in a lawful and peaceful protest organized by a group but breaks away from the group on their own accord and decides to tamper with critical infrastructure, then liability for the individual's actions should rest solely with them and criminal liability should not attach to the group or organization which was not responsible for the actual conduct.

In *Long Beach Lesbian & Gay Pride, Inc. v. City of Long Beach*, 14 Cal. App. 4th 312, 337 (1993) the court held that city could not recoup costs for cleaning up graffiti from plaintiff—an organization—who had not created the graffiti.

In *N. A. A. C. P. v. Claiborne Hardware Co.*, 458 U.S. 886, 931 (1982) the court held that, "the First Amendment restricts the ability of the State to impose liability on an individual solely because of his association with another. ... For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims." Pp. 458 U. S. 918-920.

North Dakota law already prohibits conspiracies generally, including conspiracies to trespass or and tampering with or damaging a public service (including gas).

Additionally, Senate Bill 2044 would criminalize activity far beyond the intentional causing of property damage, extending penalties to activity such as 'interfering with' or 'inhibiting' the operations of critical infrastructure, terms so vague as to be nearly meaningless. Furthermore, under this bill it would be a class A misdemeanor to knowingly and recklessly damage critical infrastructure and a class B misdemeanor under and an even lower mental state standard.

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Tampering with critical infrastructure is already a crime at North Dakota law—as it should be—but this bill's focus on critical infrastructure facilities belies its neutral purpose – as do its excessive fines.

We encourage the committee to vote NO, on Senate Bill 2044.

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NDLA, S NAT - Johnson, Marne

From: Unruh, Jessica K.
Sent: Thursday, January 17, 2019 5:49 PM
To: NDLA, S NAT - Johnson, Marne
Subject: FW: SB 2044 and Rural Water

From: Eric Volk <ericvolk@ndrw.org>
Sent: Thursday, January 17, 2019 3:40 PM
To: Unruh, Jessica K. <jkunruh@nd.gov>; Kreun, Curt E. <ckreun@nd.gov>; Cook, Dwight C. <dcook@nd.gov>; Piepkorn, Merrill <mpiepkorn@nd.gov>; Roers, Jim <jroers@nd.gov>; Schaible, Donald G. <dgschaible@nd.gov>
Subject: SB 2044 and Rural Water

Chairman Unruh and members of the Senate Energy and Natural Resources Committee,

My name is Eric Volk and I am the executive director of the North Dakota Rural Water Systems Association (NDRWSA). I am unable to testify in person on SB 2044. Just wanted to pass along our thoughts on the bill.

We support Senate Bill 2044 with the below amendment.

Page 2, Section 1, 5.d.

- Replace, A water intake structure, water treatment facility, wastewater treatment plant, or pump station;
- With, **A drinking water source, water treatment plant, water distribution system, wastewater treatment plant, or wastewater collection system;**

These terms are commonly used in the water and wastewater industries. This change would ensure all key components of our water and wastewater systems are covered as a critical infrastructure facility.

I urge you to give SB 2044 a do pass recommendation with the included amendment. Thank you for your time and please email me with any questions, ericvolk@ndrw.org . EV

Eric Volk, Executive Director
ND Rural Water
701-258-9249
www.ndrw.org

Vision: All of North Dakota has access to affordable, ample, and quality water.

Mission: To educate, promote, support, and lead North Dakota's water industry in providing quality service to their customers.

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19.0124.02005

Sixty-sixth
Legislative Assembly
of North Dakota

SENATE BILL NO. 2044

Introduced by

Senators Myrdal, Unruh, Oehlke

Representatives Schmidt, Damschen

1 A BILL for an Act to amend and reenact section 12.1-21-06 of the North Dakota Century Code,
2 relating to tampering with or damaging a critical infrastructure facility or a public service; and to
3 provide a penalty.

4 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

5 **SECTION 1. AMENDMENT.** Section 12.1-21-06 of the North Dakota Century Code is
6 amended and reenacted as follows:

7 **12.1-21-06. Tampering with or damaging a critical infrastructure facility or a public**
8 **service - Penalty.**

- 9 1. ~~A person is guilty of an offense if he causes~~An individual may not cause a substantial
10 interruption or impairment of a ~~public communication, transportation, supply of water,~~
11 ~~gas, power, or other~~critical infrastructure facility or a public service by:
 - 12 a. Tampering with or damaging the tangible property of another;
 - 13 b. Incapacitating an operator of ~~such a~~a critical infrastructure facility or a public
14 service; or
 - 15 c. ~~Negligently damaging the tangible property of another by fire, explosive, or other~~
16 ~~dangerous means.~~Damaging, destroying, vandalizing, defacing, or tampering
17 with equipment in a critical infrastructure facility;
 - 18 d. Damaging, destroying, vandalizing, defacing, impeding, inhibiting, or tampering
19 with the operations of a critical infrastructure facility; or
 - 20 e. Interfering, inhibiting, impeding, or preventing the construction or repair of a
21 critical infrastructure facility.
- 22 2. ~~The offense~~A violation of this section is a class C felony if the actor engages in the
23 conduct intentionally and a class A misdemeanor if the actor engages in the conduct
24 knowingly or recklessly. Otherwise it is a class B misdemeanor.

- 1 3. ~~If an~~ An organization is found to be a conspirator that has pled guilty or been convicted
2 of a violation under section 12.1-06-04 for conspiring with an individual found to have
3 violated who has pled guilty or been convicted under subsection 1, the court shall
4 assess on the conspiring organization must be assessed a fine ten times the amount
5 of the fine equivalent to the penalty authorized by subsection 2 for each individual who
6 has pled guilty or been convicted under subsection 1, not to exceed one hundred
7 thousand dollars.
- 8 4. This section may not be construed to prevent or prohibit lawful assembly and peaceful
9 and orderly petition for the redress of grievances, including a labor dispute between an
10 employer and its employee.
- 11 5. As used in this section, "critical infrastructure facility" includes:
- 12 a. A petroleum or alumina refinery;
- 13 b. An electrical power generating facility, substation, switching station, electrical
14 control center, or electric power line and associated equipment infrastructure;
- 15 c. A chemical, polymer, or rubber manufacturing facility;
- 16 d. A water intake structure, water treatment facility, wastewater treatment plant,
17 ground water monitoring well, water well, or pump station;
- 18 e. A natural gas compressor station;
- 19 f. A liquid natural gas terminal or storage facility;
- 20 g. ~~A telecommunications central switching office~~ Wireline telecommunications and
21 internet infrastructure, including central offices, fiber optic lines, cable lines, and
22 all additional equipment associated with the provision of broadband or
23 telecommunication services;
- 24 h. Wireless telecommunications infrastructure, including a cell tower, telephone pole
25 or line, including a fiber optic line;
- 26 i. A port, railroad switching yard, railroad track, trucking terminal, or other freight
27 transportation facility;
- 28 j. A gas processing plant, including a plant used in the processing, treatment, or
29 fractionation of natural gas or a natural gas liquid;
- 30 k. A transmission facility used by a federally licensed radio or television station;
- 31 l. A steel-making facility using an electric arc furnace to make steel;

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Sixty-sixth
Legislative Assembly

- 1 m. A facility identified and regulated by the United States department of homeland
2 security chemical facility anti-terrorism standards program;
- 3 n. A dam regulated by the state or federal government;
- 4 o. A natural gas **transmission or** distribution utility facility, including a pipeline
5 interconnection, a city gate or town border station, a metering station, **below or**
6 aboveground piping, a regulator station, and a natural gas storage facility;
- 7 p. A crude oil or refined product storage and distribution facility, including a valve
8 site, pipeline interconnection, pump station, metering station, below or
9 aboveground pipeline or piping, and a truck loading or offloading facility;
- 10 q. Any **below or** aboveground portion of an oil, gas, hazardous liquid, or chemical
11 pipeline, tank, railroad facility, or other storage facility; ~~and~~
- 12 r. **An oil and gas production site; and**
- 13 s. A site or location designated or approved for the construction of a facility
14 described in this subsection.

January 29, 2019

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PROPOSED AMENDMENTS TO SENATE BILL NO. 2044

Page 2, line 1, replace "If an" with "An"

Page 2, line 1, replace "is found to be a conspirator" with "that has pled guilty or been convicted of a violation under section 12.1-06-04 for conspiring"

Page 2, line 1, replace "found to have violated" with "who has pled guilty or been convicted under"

Page 2, line 2, replace ", the court shall assess on the conspiring organization" with "must be assessed"

Page 2, line 2, remove "ten times the"

Page 2, line 3, replace "amount of the fine" with "equivalent to the penalty"

Page 2, line 3, after "2" insert "for each individual who has pled guilty or been convicted under subsection 1, not to exceed one hundred thousand dollars"

Renumber accordingly

12.1-06-04. Criminal conspiracy.

1. A person commits conspiracy if he agrees with one or more persons to engage in or cause conduct which, in fact, constitutes an offense or offenses, and any one or more of such persons does an overt act to effect an objective of the conspiracy. The agreement need not be explicit but may be implicit in the fact of collaboration or existence of other circumstances.
2. If a person knows or could expect that one with whom he agrees has agreed or will agree with another to effect the same objective, he shall be deemed to have agreed with the other, whether or not he knows the other's identity.
3. A conspiracy shall be deemed to continue until its objectives are accomplished, frustrated, or abandoned. "Objectives" includes escape from the scene of the crime, distribution of booty, and measures, other than silence, for concealing the crime or obstructing justice in relation to it. A conspiracy shall be deemed abandoned if no overt act to effect its objectives has been committed by any conspirator during the applicable period of limitations.
4. It is no defense to a prosecution under this section that the person with whom such person is alleged to have conspired has been acquitted, has not been prosecuted or convicted, has been convicted of a different offense, is immune from prosecution, or is otherwise not subject to justice.
5. Accomplice liability for offenses committed in furtherance of the conspiracy is to be determined as provided in section 12.1-03-01.
6. Conspiracy is an offense of the same class as the crime which was the objective of the conspiracy.

12.1-06-05. General provisions.

1. The definition of an offense in sections 12.1-06-01 to 12.1-06-04 does not apply to another offense also defined in sections 12.1-06-01 to 12.1-06-04.
2. Whenever "attempt" or "conspiracy" is made an offense outside this chapter, it means attempt or conspiracy, as the case may be, as defined in this chapter.
3.
 - a. Other than as provided in subsection 4, in a prosecution under section 12.1-06-01, it is an affirmative defense that, under circumstances manifesting a voluntary and complete renunciation of criminal intent, the defendant avoided the commission of the crime attempted by abandoning any criminal effort and, if mere abandonment was insufficient to accomplish such avoidance, by taking further and affirmative steps which prevented the commission thereof.
 - b. Other than as provided in subsection 4, in a prosecution under section 12.1-06-03 or 12.1-06-04, it is an affirmative defense that, under circumstances manifesting a voluntary and complete renunciation of criminal intent, the defendant prevented the commission of the crime solicited or of the crime or crimes contemplated by the conspiracy.
 - c. A renunciation is not "voluntary and complete" within the meaning of this section if it is motivated in whole or in part by (1) a belief that a circumstance exists which increases the probability of detection or apprehension of the defendant or another participant in the criminal operation, or which makes more difficult the consummation of the crime, or (2) a decision to postpone the criminal conduct until another time or to substitute another victim, or another but similar objective.
4. An individual is immune from prosecution under this chapter if:
 - a. The individual voluntarily and completely renounced the individual's criminal intent;
 - b. The individual is a student enrolled in an elementary school, middle school, or a high school in this state or is enrolled at an institution of higher education in this state;
 - c. The offense would have resulted in:
 - (1) Harm to another student enrolled in an elementary school, middle school, or a high school in this state;

February 7, 2019

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PROPOSED AMENDMENTS TO SENATE BILL NO. 2044

Page 2, line 1, replace "If an" with "An"

Page 2, line 1, replace "is found to be a conspirator" with "that has pled guilty or been convicted of a violation under section 12.1-06-04 for conspiring"

Page 2, line 1, replace "found to have violated" with "who has pled guilty or been convicted under"

Page 2, line 2, replace ", the court shall assess on the conspiring organization" with "must be assessed"

Page 2, line 2, remove "ten times the"

Page 2, line 3, replace "amount of the fine" with "equivalent to the penalty"

Page 2, line 3, after "2" insert "for each individual who has pled guilty or been convicted under subsection 1, not to exceed one hundred thousand dollars"

Page 2, line 12, after the third underscored comma insert "ground water monitoring well, water well,"

Page 2, line 16, replace "A telecommunications central switching office" with "Wireline telecommunications and internet infrastructure, including central offices, fiber optic lines, cable lines, and all additional equipment associated with the provision of broadband or telecommunication services"

Page 2, line 28, after "gas" insert "transmission or"

Page 2, line 29, after the second underscored comma insert "below or"

Page 3, line 4, after "Any" insert "below or"

Page 3, line 5, remove "and"

Page 3, line 6, after "r." insert "An oil and gas production site; and

s."

Renumber accordingly



March 6, 2019

Members of the House Committee on Energy and Natural Resources
State Capitol 600 East Blvd
Bismarck, ND 58505-0360

RE: SB 2044 (Critical Infrastructure) - SUPPORT

Dear Chairman Porter and Members of the House Committee on Energy and Natural Resources:

On behalf of the American Chemistry Council (ACC), I am writing to express our support for SB 2044, which seeks to establish new penalties for causing a substantial impairment of a critical infrastructure facility by damaging equipment or preventing the construction or repair of a critical infrastructure facility, which includes chemical manufacturing facilities.

ACC represents companies engaged in the business of chemistry—an innovative \$768 billion enterprise that is helping to solve the biggest challenges facing our nation and the world. In North Dakota, the business of chemistry provides nearly 358 direct jobs and 718 related jobs, generating approximately \$3 million in state and local taxes.

ACC and its member companies are dedicated to safeguarding our employees, our contractors and the people who live and work around our operations. This commitment is demonstrated through ACC's Responsible Care® program and our industry's performance to continually enhance safety and security. Over the past decade, ACC members have invested more than \$17 billion to enhance security measures.

Chemical manufacturers across the country transform raw materials into products that are critical to the everyday health and welfare of our nation. Chemical security is a top priority for ACC and its members because of the industry's critical role in the U.S. economy, and our responsibility to our employees and our communities.

SB 2044 seeks to establish criminal penalties for damaging or interfering with the operation of a designated critical infrastructure facility, including a chemical manufacturing facility. ACC believes this legislation is necessary to help ensure the safety of this important part of our country's critical infrastructure. The bill will impose penalties for violation of this law -- a class C felony if the actor engages in the conduct intentionally, a class A misdemeanor if the actor engages in the conduct knowingly or recklessly, or otherwise a class B misdemeanor.

Added protection for critical infrastructure facilities is an important public policy objective. The interference with or destruction of these facilities can potentially have a debilitating effect on the nation's safety and security. Thank you for the opportunity to comment on this important piece of legislation. Should you have any questions or concerns, please do not hesitate to contact me at (515) 471-1960 or by email at Marcus_Branstad@americanchemistry.com.

Sincerely,

A handwritten signature in cursive script, appearing to read "Marcus Branstad".

Marcus Branstad
Senior Director, State Affairs
American Chemistry Council



19.0124.04001
Title.

Prepared by the Legislative Council staff for
Senator Myrdal

March 6, 2019

SB 2044
3.7.19
Attachment 2

pg 1

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2044

Page 2, line 1, after the "3." insert "This section does not apply to an employee or contractor acting within the scope of the employee's or contractor's employment. As used in this subsection, "employee or contractor" means any person hired or under contract to provide services to a critical infrastructure facility or public service.

4."

Page 2, line 6, replace "4." with "5."

Page 2, line 9, replace "5." with "6."

Renumber accordingly

Sixty-sixth
Legislative Assembly
of North Dakota

ENGROSSED SENATE BILL NO. 2044

Introduced by

Senators Myrdal, Unruh, Oehlke

Representatives Schmidt, Damschen

1 A BILL for an Act to amend and reenact section 12.1-21-06 of the North Dakota Century Code,
2 relating to tampering with or damaging a critical infrastructure facility or a public service; and to
3 provide a penalty.

4 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

5 **SECTION 1. AMENDMENT.** Section 12.1-21-06 of the North Dakota Century Code is
6 amended and reenacted as follows:

7 **12.1-21-06. Tampering with or damaging a critical infrastructure facility or a public**
8 **service - Penalty.**

9 1. ~~A person is guilty of an offense if he causes~~An individual may not cause a substantial
10 interruption or impairment of a ~~public communication, transportation, supply of water,~~
11 ~~gas, power, or other~~critical infrastructure facility or a public service by:

- 12 a. Tampering with or damaging the tangible property of another;
- 13 b. Incapacitating an operator of ~~such a~~critical infrastructure facility or a public
14 service; or
- 15 c. ~~Negligently damaging the tangible property of another by fire, explosive, or other~~
16 ~~dangerous means.~~Damaging, destroying, vandalizing, defacing, or tampering
17 with equipment in a critical infrastructure facility;
- 18 d. Damaging, destroying, vandalizing, defacing, impeding, inhibiting, or tampering
19 with the operations of a critical infrastructure facility; or
- 20 e. Interfering, inhibiting, impeding, or preventing the construction or repair of a
21 critical infrastructure facility.

22 2. ~~The offense~~A violation of this section is a class C felony if the actor engages in the
23 conduct intentionally and a class A misdemeanor if the actor engages in the conduct
24 knowingly or recklessly. Otherwise it is a class B misdemeanor.

- 1 3. This section does not apply to an employee or contractor acting within the scope of the
2 employee's or contractor's employment. As used in this subsection, "employee or
3 contractor" means any person hired or under contract to provide services to a critical
4 infrastructure facility or public service.
- 5 4. An organization that has pled guilty or been convicted of a violation under section
6 12.1-06-04 for conspiring with an individual who has pled guilty or been convicted
7 under subsection 1 must be assessed a fine equivalent to the penalty authorized by
8 subsection 2 for each individual who has pled guilty or been convicted under
9 subsection 1, not to exceed one hundred thousand dollars.
- 10 4.5. This section may not be construed to prevent or prohibit lawful assembly and peaceful
11 and orderly petition for the redress of grievances, including a labor dispute between an
12 employer and its employee.
- 13 5.6. As used in this section, "critical infrastructure facility" includes:
- 14 a. A petroleum or alumina refinery;
- 15 b. An electrical power generating facility, substation, switching station, electrical
16 control center, or electric power line and associated equipment infrastructure;
- 17 c. A chemical, polymer, or rubber manufacturing facility;
- 18 d. A water intake structure, water treatment facility, wastewater treatment plant,
19 ground water monitoring well, water well, or pump station;
- 20 e. A natural gas compressor station;
- 21 f. A liquid natural gas terminal or storage facility;
- 22 g. Wireline telecommunications and internet infrastructure, including central offices,
23 fiber optic lines, cable lines, and all additional equipment associated with the
24 provision of broadband or telecommunication services;
- 25 h. Wireless telecommunications infrastructure, including a cell tower, telephone pole
26 or line, including a fiber optic line;
- 27 i. A port, railroad switching yard, railroad track, trucking terminal, or other freight
28 transportation facility;
- 29 j. A gas processing plant, including a plant used in the processing, treatment, or
30 fractionation of natural gas or a natural gas liquid;
- 31 k. A transmission facility used by a federally licensed radio or television station;

- 1 l. A steel-making facility using an electric arc furnace to make steel;
- 2 m. A facility identified and regulated by the United States department of homeland
- 3 security chemical facility anti-terrorism standards program;
- 4 n. A dam regulated by the state or federal government;
- 5 o. A natural gas transmission or distribution utility facility, including a pipeline
- 6 interconnection, a city gate or town border station, a metering station, below or
- 7 aboveground piping, a regulator station, and a natural gas storage facility;
- 8 p. A crude oil or refined product storage and distribution facility, including a valve
- 9 site, pipeline interconnection, pump station, metering station, below or
- 10 aboveground pipeline or piping, and a truck loading or offloading facility;
- 11 q. Any below or aboveground portion of an oil, gas, hazardous liquid, or chemical
- 12 pipeline, tank, railroad facility, or other storage facility;
- 13 r. An oil and gas production site; and
- 14 s. A site or location designated or approved for the construction of a facility
- 15 described in this subsection.



THE HEARTLAND INSTITUTE
FREEDOM RISING

Testimony before the North Dakota House Energy & Natural Resources Committee
Bette Grande, Research Fellow
The Heartland Institute
March 7, 2019

Chairman Porter and Members of the Energy and Natural Resources committee.

My name is Bette Grande and I am here today in support of SB 2044. I am a research fellow for the Heartland Institute, The Heartland Institute is a 34-year-old independent, national, nonprofit organization whose mission is to discover, develop, and promote free-market solutions to social and economic problems. Heartland is headquartered in Illinois and focuses on providing national, state, and local elected officials with reliable and timely research and analyses on important policy issues. Heartland would like to submit the following testimony.

SB 2044 is presented today to establish the protection the critical infrastructure needed to maintain our daily lives. Infrastructure necessary for the water supply to flow safely to our homes and businesses, power to cool and heat our homes and businesses, communication lines for personal, business and emergency use, and transportation of goods and supplies and personal uses.

Interference with the infrastructure will cause disrupt to our free market and economy, costing everyone precious time and resources. Safety for the citizens in our communities can be in jeopardy when vandals interfere with these critical infrastructures.

The uninterrupted flow of commerce is important to the everyday lives of the citizen of this state and country and no one has the **right** to interrupt, destroy, damage or vandalize others property. The welfare of the people and businesses must be protected for the safety of all.

Thank you for allowing me to testify today on this important legislation, and I encourage a do pass on SB 2044.

Bette Grande
Research Fellow
Heartland Institute

For more information about The Heartland Institute's work, please visit our website at www.heartland.org, or contact Bette Grande by phone at 701/388-7451 or by email at bette@bettegrande.com

DEPARTMENT OF COMMERCE TESTIMONY REPRESENTING THE EMPOWER COMMISSION
MARCH 7, 2019, 10:30 A.M.
SUPPORT OF SB 2044
HOUSE ENERGY & NATURAL RESOURCES COMMITTEE
REPRESENTATIVE TODD PORTER, CHAIRMAN

SHAWN KESSEL - DEPUTY COMMISSIONER, ND DEPARTMENT OF COMMERCE

Good morning, Mr. Chairman and members of the committee, my name is Shawn Kessel and I serve as the Deputy Commissioner for the North Dakota Department of Commerce and I am here today speaking on behalf of the EmPower North Dakota Commission (EmPower).

EmPower North Dakota Commission was established by the 2007 legislative assembly and made permanent by the 2009 legislative assembly. It is an industry lead effort that allows our energy industries, both renewable and traditional, to have a voice into the state's energy policy.

During 2017-2018, the EmPower North Dakota Commission focused on three key areas for continuing to grow energy production and new energy-related industries:

1. **Infrastructure** – Up-to-date infrastructure is the foundation for continuing existing development and expanding into new areas.
2. **Research and Development** – Research and development serves as the bridge for industry to move from ideas to new development and commercialization.
3. **Public Policy** – In any society, governmental entities enact laws, make policies, and allocate resources.

The infrastructure identified in this bill serves as the backbone of power generation and transportation relied upon by hundreds of thousands of people inside and outside of North Dakota. This bill may serve as a deterrent to the willful damage and/or destruction of this ever-important infrastructure and therefore the avoidance of costly repairs to the owners, inconvenience to power users, the waste of law enforcement resources, the health risks of power loss and the impacts to industry the loss of power creates.

EmPower stands in support of SB 2044 and asks for a Do Pass recommendation.

Mr. Chairman and members of the Energy & Natural Resources Committee, that concludes my testimony and I am happy to entertain any questions.

Testimony of Eric Volk, Executive Director

ND Rural Water Systems Association

Senate Bill 2044

House Energy and Natural Resources Committee – March 7, 2019

Chairman Porter and members of the House Energy and Natural Resources Committee, my name is Eric Volk and I am the executive director of the North Dakota Rural Water Systems Association (NDRWSA). Our vision is to ensure all of North Dakota has access to affordable, ample, and quality water. Today I am submitting testimony in support of Senate Bill 2044 with the below amendment.

Page 2, Section 1, 5.d.

- Replace, A water intake structure, water treatment facility, wastewater treatment plant, ground water monitoring well, water well, or pump station;
- With, **A drinking water source, water transmission line, water treatment plant, water distribution system, ground water monitoring well, wastewater treatment plant, or wastewater collection system;**

These terms are commonly used in the water and wastewater industries. This change would ensure all key components of our water and wastewater systems are covered as a critical infrastructure facility.

With that said, I urge you to give SB 2044 a do pass recommendation with the included amendment. Thank you for your time and please email me with any questions, ericvolk@ndrw.org . EV

March 7, 2019
Testimony in Support of Senate Bill 2044
Submitted on Behalf of the Lignite Energy Council
House Energy and Natural Resources Committee

Chairman Porter and Committee Members,

My name is Jonathan Fortner, the Government Relations Director for the Lignite Energy Council. The Lignite Energy Council is a regional trade association that represents over 260 members that include mining companies, lignite electricity producers and businesses that provide goods and services to the lignite industry.

The Lignite Energy Council supports Senate Bill 2044 because we believe that it will help prevent illegal activity by a group or individual who willfully tampers with or damages energy industry infrastructure, which could result in a major economic, social and environmental catastrophe potentially affecting large numbers of citizens across this state. We appreciate that the language in the bill amends current state law to provide specific definitions in a comprehensive list of energy industry facilities that would now qualify as “critical infrastructure facilities” under the Century Code.

We are also in favor of a proposed amendment that would further clarify that section 12.1-21-06 (Tampering with or damaging a public service) does not apply to an employee or contractor working on the critical infrastructure facility. Currently, the bill language states that “**An individual may not cause** a substantial interruption or impairment of a critical infrastructure facility or a public service by:...” We consider this to be too broad and we would like to tighten the language to be more specific and focused.

The amendment language would modify that the reference to an “individual” would include “other than an employee or contractor acting within the scope of the employee’s or contractor’s employment.” We believe that this language would rightfully protect energy industry employees from prosecution under this proposal.

For these reasons, the Lignite Energy Council supports Senate Bill 2044 and we request the committee’s favorable consideration. Thank you for the opportunity to speak with you today and I am happy to answer any questions that you may have.

Jonathan Fortner MBA, MPA
Director of Government Relations

TESTIMONY IN SUPPORT OF SB 2044
HOUSE ENERGY & NATURAL RESOURCES COMMITTEE
MARCH 7, 2019

Good morning, Mr. Chairman and members of the committee. My name is Justin Dever and I am here to testify before you today on behalf of MDU Resources Group. MDU Resources Group's presence in North Dakota includes Montana-Dakota Utilities Co., WBI Energy, Knife River Corporation, and MDU Construction Service Group.

MDU joins the other electric and natural gas utilities in the state in supporting SB 2044. Our customers expect and deserve safe and reliable power, which requires adequate infrastructure. SB 2044 would help protect critical infrastructure facilities by discouraging individuals from targeting existing infrastructure or impeding the construction of new critical infrastructure.

We are also supportive of Senator Myrdal's amendment to clarify that this law would not apply to an employee or contractor working on the critical infrastructure facility.

I would encourage your favorable consideration of Engrossed Senate Bill 2044, along with the suggested amendment.

Thank you.

pg 1

1 Chairman Porter and members of the House Energy and Natural Resources Committee. My
2 name is Scott Skokos, and I am the Executive Director of Dakota Resource Council.

3 Dakota Resource Council (DRC) opposes Senate Bill 2044. DRC is a grassroots organization
4 founded by North Dakotans to promote sustainable use of North Dakota's natural resources and
5 family-owned and operated agriculture.

6 Prior to explaining DRC's opposition to this bill, it is important to note that DRC in no way
7 condones the damaging or tampering with infrastructure. In fact, in 2003 DRC members
8 unanimously resolved against using violence to achieve any organizational goals, this would
9 include the tampering with or damaging infrastructure (and including potentially dangerous
10 activities like valve turning). DRC does support peaceful protest.

11 DRC's opposes SB 2044 for the following reasons:

- 12 1. The current penalties in the ND Century Code are sufficient: This legislation is seeking to
13 solve a problem that does not exist. North Dakota's current penalties in the Century Code
14 (specifically the criminal code) serve as a sufficient deterrent to prevent people from
15 damaging or tampering with infrastructure¹.
- 16 2. Language in the bill is vague, up for interpretation, and likely unconstitutional: The broad
17 provisions in this proposed law create liability for protesters and protest organizers in a
18 way that can frequently violate the First Amendment, criminalize forms of peaceful
19 protest and may be unconstitutionally vague. The vague provisions in this bill could also
20 create confusion for prosecutors and law enforcement, potentially leading them to take
21 unconstitutional actions, opening up state and local authorities to being sued by protesters
22 who have had their constitutional rights violated. These bills could lead to unnecessary
23 lawsuits that cost taxpayers money to defend a law that in our view clearly violates the
24 First Amendment of the Constitution. In 2018, Republican Wyoming Governor Matt
25 Meade vetoed a similar bill that went through the 2018 Wyoming legislature due to
26 concerns over constitutionality and the broad language used in the bill.²

¹ <https://www.legis.nd.gov/cencode/t12-1.html>

² <https://www.wyofile.com/mead-vetoes-controversial-critical-infrastructure-bill/>

27 Specifically, words like “impeding” and “inhibiting” are terms that are up for
28 interpretation. For example, charges could be levied claiming that public opposition in
29 the form of peaceful protest to be an act, which impedes the construction of an
30 infrastructure project. DRC members are often called the “impeders of progress” for our
31 stances on various piece of infrastructure that impact our members rural way of life (i.e
32 pipelines, oil wells, power lines, etc.). In this sense, a judge could also define free speech
33 (i.e the swaying of public opinion through facts or persuasion) as something that impedes
34 or inhibits a piece of infrastructure. We would strongly suggest clarifying the language
35 and provide specific examples of activities that you think should be punishable, rather
36 than using vague language.

37 3. The bill does not sufficiently define intent: By removing the term “negligence” the
38 legislation does not force the courts to determine if there was intent with any action that
39 impacts the construction or operation of infrastructure. In our view, someone could
40 accidentally damage infrastructure and still be charged, if this legislation is made law.
41 For example, a farmer that accidentally digs into a pipeline, or a drone operator that
42 accidentally runs their drone into a power line due to wind conditions could potentially be
43 charged if the language in this bill is not clarified.

44 4. The bill raises concerns regarding eminent domain and landowner rights: Threats of
45 felony charges will hang heavy over landowners’ heads should this bill pass, making
46 eminent domain condemnation much easier for industry. No landowner wants to risk
47 becoming a felon just by saying “no” to a project that is slated for his or her property.

48 5. Why not include other types of infrastructure critical to life and commerce (i.e. water,
49 land, and air): To be able to properly function as a society we need clean air, clean and
50 navigable water, and clean land and good soil. According to the United Nations three out
51 of every four jobs worldwide depend heavily or moderately on water, so protecting water
52 is paramount to job creation and ensuring people have jobs in the first place.³

53 Consequently, we would like to urge that this bill is amended to include critical
54 infrastructure to life and commerce like rivers, groundwater, land, and air. People and
55 companies who intentionally or unintentionally damage, destroy, vandalize, impede,

³ <https://en.unesco.org/news/water-drives-job-creation-and-economic-growth-says-new-report>

56 inhibit, or tamper with rivers, groundwater, land, and air should be subject to the same
57 penalties as those who seek to do the same to the critical infrastructure listed in this
58 legislation.

59 6. This legislation is model legislation being pushed by special interest in several states to
60 protect specific types of infrastructure and to chill protest. Almost identical legislation is
61 being pushed by the American Legislative Exchange Council, whose membership
62 includes many corporate interests, including the interests that are further protected under
63 this type of legislation. Similar bills have been introduced in numerous states in the past
64 two years. For example, the link below on ALEC's website shows legislation almost
65 identical to the legislation we at hearing for today. The legislation is specifically called
66 model policy: critical infrastructure protection act. Link: [https://www.alec.org/model-](https://www.alec.org/model-policy/critical-infrastructure-protection-act/)
67 [policy/critical-infrastructure-protection-act/](https://www.alec.org/model-policy/critical-infrastructure-protection-act/)

TESTIMONY OF DENNIS PATHROFF ON ENGROSSED SB 2044

Good morning Chairman Porter and members of the committee. My name is Dennis Pathroff. I'm an attorney with the Zuger, Kirmis & Smith law firm in Bismarck. I'm here today representing the ACLU of North Dakota.

The ACLU opposes Engrossed Senate Bill 2044, a bill that would increase the legal penalties for tampering with or damaging a critical infrastructure facility or public service.

We believe the bill is duplicative and raises potential constitutional issues.

North Dakota law already prohibits (1) trespass under section 12.1-22-03, (2) tampering with or damaging a public service under section 12.1-21-06, and (3) conspiracies to commit the same under section 12.1-06-04. Accordingly, we believe there's simply no need for this additional law.

The bill would criminalize activity far beyond the intentional causing of property damage, extending penalties to behavior such as 'interfering with' or 'inhibiting' the operations of critical infrastructure, terms so vague as to be nearly meaningless.

The fine for an organization as contained in subsection 3 is likely excessive and therefore may not be able to withstand a constitutional challenge. The courts can already impose fines and restitution costs for expenses associated with a specific offense. This bill takes discretion away from the capable judiciary by mandating that organizations be fined the same amount as individuals. The mandate deprives judicial officers of the ability to use their experience and wisdom to consider the facts unique to each defendant.

Furthermore, despite the changes that were made on the Senate side, we feel the conspiracy portion of the bill may impermissibly burden the First Amendment right of political association. I've included with my testimony additional testimony from the ACLU, which highlights some case law pertinent to this bill.

In summary, North Dakota already has laws on the books to protect critical infrastructure, and this bill raises potential constitutional issues. Therefore, we ask you to vote "do not pass" on Engrossed SB 2044

Thank you Chairman Porter and committee members.



Senate Bill 2044 Testimony

The ACLU of North Dakota opposes Senate Bill 2044, a bill that would increase the legal penalties for tampering with or damaging a critical infrastructure facility or public service.

North Dakota law already prohibits trespass under section 12.1-22-03 and tampering with or damaging a public service under section 12.1-21-06 and conspiracies to commit the same under section 12.1-06-04. There's simply no need for additional law.

During the Senate hearing we brought up several constitutional issues with the bill and unfortunately, our concerns were not remedied in the amendments. Senate Bill 2044 continues to punish association, in violation of the freedom of assembly under the U.S. Constitution.

The bill would criminalize activity far beyond the intentional causing of property damage, extending penalties to behavior such as 'interfering with' or 'inhibiting' the operations of critical infrastructure, terms so vague as to be nearly meaningless. Furthermore, under this bill it would be a class A misdemeanor to knowingly and recklessly damage critical infrastructure and a class B misdemeanor otherwise, allowing the state to impose criminal sanctions on those who might violate this law negligently or accidentally.

A fine of multiples as contained in Section 3 is excessive and might not be able to withstand constitutional challenge. Rendering an organization criminally liable for all damages would impermissibly burden the rights of political association that are protected by the First Amendment – the literal embodiment of guilt by association. For example, if a person is participating in a lawful and peaceful protest organized by a group but breaks away from the group on their own accord and decides to tamper with critical infrastructure, then liability for the individual's actions should rest solely with them and criminal liability should not attach to the group or organization which was not responsible for the actual conduct. The courts can already impose fines and restitution costs for expenses associated with a specific offense. This bill takes discretion away from the capable judiciary by mandating that organizations be fined the same amount as individuals; depriving judicial officers of the ability to use their experience and wisdom to consider the facts unique to each defendant.

In *Long Beach Lesbian & Gay Pride, Inc. v. City of Long Beach*, 14 Cal. App. 4th 312, 337 (1993) the court held that the city could not recoup costs for cleaning up graffiti from plaintiff—an organization—who had not created the graffiti.

In *N. A. A. C. P. v. Claiborne Hardware Co.*, 458 U.S. 886, 931 (1982) the court held that, "the First Amendment restricts the ability of the State to impose liability on an individual solely because of his association with another. ... For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals

and that the individual held a specific intent to further those illegal aims.” Pp. 458 U. S. 918-920. Pg 3

Using fines for a political motive or to suppress dissenting points of view violates the Excessive Fines Clause of the U.S. Constitution. In *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989) the court held that the language of the Excessive Fines Clause and the nature of our constitutional framework make it clear that the Eighth Amendment places limits on the steps a government may take against an individual. Using fines for a political motive or to suppress dissenting points of view is unconstitutional.

In summary, North Dakota already has laws on the books to protect critical infrastructure; Senate Bill 2044 is duplicative and unnecessary. This bill’s focus on critical infrastructure facilities belies its neutral purpose – as do its excessive fines.

We encourage the committee to vote NO, on Senate Bill 2044.

PROPOSED AMENDMENTS TO HOUSE BILL NO. 2044

Page 2, line 14 and 15, replace "A water intake structure, water treatment facility, wastewater treatment plant, ground water monitoring well, water well, or pump station" with "A drinking water source, water transmission line, water treatment plant, water distribution system, ground water monitoring well, waste water treatment plant, or waste water collection system;"

Renumber accordingly

19.0124.04001
Title.

Prepared by the Legislative Council staff for
Senator Myrdal
March 6, 2019

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2044

Page 2, line 1, after the "3." insert "This section does not apply to an employee or contractor acting within the scope of the employee's or contractor's employment. As used in this subsection, "employee or contractor" means any person hired or under contract to provide services to a critical infrastructure facility or public service.

4."

Page 2, line 6, replace "4." with "5."

Page 2, line 9, replace "5." with "6."

Renumber accordingly