

INSIGHTS

Congress and DOJ Consider Existing Protections as Pipeline Sabotage Increases

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In response to [questions](#) from lawmakers on whether federal law adequately provides for the prosecution of “criminal activity against infrastructure,” the Department of Justice (DOJ) recently [committed](#) to “vigorously” prosecute those who damage “critical energy infrastructure in violation of federal law.” Historically, vandalism on oil or gas pipelines has been relatively uncommon, largely because most of the infrastructure is buried underground. Since 9/11 and in response to increased high profile pipeline construction projects, however, acts of vandalism—and more intentional attacks—have increased.

In just the past year, physical attacks on pipelines and related facilities have become more coordinated and more prevalent, posing a greater risk of accidents that could result in loss of life, significant environmental harm, and/or disruption to the reliability and continuity of the U.S. energy infrastructure. Meanwhile, individuals and organizations inside as well as outside of the U.S. continue to attempt to interrupt or damage pipeline systems through cyber attacks. These threats are significant and they are occurring with increasing frequency. Examples include coordinated attempts in October 2016 to shut down five major interstate oil pipelines in Washington, North Dakota, Minnesota, and Montana (including breaking fences and shutting off valves), reports of protesters in Iowa using blow torches to damage pipelines, incidents in Florida of protesters climbing in a pipe to stage a protest and gun shots taken at the pipeline, among others. Some instances of pipeline sabotage (whether physical or cyber attacks) are not yet public, as they present potential national security issues, but they are being investigated and coordinated confidentially with the FBI, DHS, and other agencies.

We were asked to brief Congressional Committees earlier this year on some of the recent acts and associated legal issues, and Congress has been considering whether and what it can do to help respond to these threats. Recently, a group of 84 Congressional representatives sent a letter to DOJ noting that “maintaining safe and reliable energy infrastructure is a matter of national security” and stating that “violence toward individuals and destruction of property are both illegal and potentially fatal.” The letter posed a series of questions to DOJ on acts of pipeline sabotage generally and specifically the October 2016 incidents, as follows:

(1) whether existing federal statutes, including the Patriot Act and Pipeline Safety Act (PSA), adequately arm DOJ to prosecute criminal activity against energy infrastructure at the federal level;

(2) whether DOJ has taken any prosecutorial or investigative action against those involved in the October 2016 attempted sabotage of four major crude oil pipelines and if not, the reasoning for not pursuing them in this case;

(3) whether DOJ intends to pursue federal prosecutorial or investigative action of any individuals who knowingly and willfully damage or destroy interstate or international pipeline infrastructure; and

(4) whether the attacks against the nation's energy infrastructure, which pose a threat to human life and appear to be intended to intimidate and coerce policy changes, fall within DOJ's understanding of the definition of domestic terrorism under the Patriot Act (18 U.S.C. § 2331(5)).

DOJ has not yet formally responded to these questions, issuing only a statement that it intends to prosecute these types of acts. Existing enforcement tools already available to DOJ under the PSA, as strengthened by the Patriot Act, make it a felony to "damage or destroy a pipeline facility," with sentences up to 20 years in prison or up to life in prison if a death is associated with any incident. 49 U.S.C. § 60123. These charges include "attempting or conspiring" to damage or destroy any pipeline facility. Unfortunately, these tools have not historically been used by federal prosecutors and there remains a need to prevent and deter further attempts or acts of damage to pipeline facilities. In addition, while we are not aware of anyone yet being prosecuted under the Patriot Act's definition of "domestic terrorism," attacks which are intended to sabotage critical energy infrastructure meet that definition (and may be subject to additional sentencing where provided under that law).

Charges against pipeline saboteurs, to the extent even initiated, have to date been brought under State criminal laws, which may be hard to prove and/or do not typically carry stringent sentences or penalties. While 9 activists were arrested in 4 states in connection with the October 2016 pipeline shutdown attempts, many of those charges have been dismissed or dropped. One of the primary perpetrators associated with the October 2016 attempt to shut down an oil pipeline in Washington was convicted of second degree burglary, but sentenced to only 2 days of time already served and 30 days of community service. Similarly, a Montana jury just last week **found** one of the activists guilty of criminal trespass and felony criminal mischief for playing his role in the attempted pipeline shutdown. Sentencing in that case is scheduled for January 2, 2018. Notably, the Montana court did not allow the activist to claim the necessity defense. In another case, a Minnesota judge has **allowed** three pipeline activists charged with felonies associated with the October 2016 incidents to assert the necessity defense. No charges have been brought to date under federal laws, including the PSA.

While DOJ's recent statement signals a commitment to prosecute those who damage critical energy infrastructure in violation of federal law, it has not formally responded to the letter from Congress and it remains unclear whether the Department will bring federal charges against the October 2016 saboteurs. Federal law already provides prosecutors with the means to charge perpetrators who attempt or conspire to commit acts of vandalism and sabotage on oil and gas pipelines. Several steps could be taken to further highlight the significance of these risks and the need to protect this critical infrastructure from such threats. These include: (1) education of State Attorneys General about existing federal laws; (2) coordination with the FBI, DHS, and local law enforcement in advance of threats and to support the investigation and prosecution of these threats; and (3) legislation or additional regulations to clarify and expand the protection of "sensitive security information" regarding energy infrastructure from public

disclosure (e.g., aboveground facilities, valve sites, sensitive information in oil spill response plans, and certain pipeline operator control room information). Meanwhile, the industry group Energy Builders established the [**Energy Builders Energy Infrastructure Incident Reporting \(EIIRC\)**](#), a new database to better track attacks and incidents involving energy infrastructure, which should serve to further educate DOJ and lawmakers about the serious safety and security risks that are presented by saboteurs' actions.