

INSIGHTS

Invoking the ‘Necessity Defense’ in Pipeline Sabotage Prosecutions

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Opposition to new pipeline construction has grown in recent years, moving from public comment to litigation to physical protest and vandalism. In 2016 alone, several coordinated actions led to trespass and vandalism of pipelines and pipeline facilities in multiple states, some of which were prosecuted as felony criminal acts. The defendants in several of these cases have raised a “necessity defense” to their actions, and two courts have now allowed that defense to proceed.

The necessity defense derives from old common law (i.e., not established by statute, although many states have now codified the defense by statute). A necessity defense is not often invoked, in part because the initial element of the defense is to admit that a crime was committed. A defendant must then persuade the court that the otherwise criminal act was required to prevent a greater harm. The requisite showing is typically that (1) there was a significant threat of imminent hazard; (2) there was an immediate need to act; (3) no other alternative was available to prevent the harm; and (4) no greater harm was caused by the prohibited act(s). Examples of successful invocations of the necessity defense include commandeering a private car to carry victims to a hospital, taking food to keep a child from starving, escaping jail because it was on fire, etc. In order to use the defense successfully, the defendant bears a heavy burden to show that no practical alternative to the criminal act was available, and that the criminal act did not create a greater harm.

In a Minnesota case, four individuals were criminally charged for turning valves on a crude oil pipeline, in an attempt to stop the flow of crude oil. The defendants admitted that their acts violated state law, but then claimed the necessity defense. The trial court allowed the defendants to assert the defense and present evidence at trial of the ‘greater harm’ presented by oil pipelines, in the form of climate change. Prosecutors appealed that ruling, and on April 23, 2018, the Minnesota Court of Appeals in a split decision rejected the prosecution’s challenge and agreed that the defendants should be allowed to present the defense. *Minnesota v. Klapstein*, No. A17-1649 (Minn. Ct. App. Apr. 23, 2018). The dissenting judge stated that ‘there is no direct, causal connection between defendants’ criminal trespass and global warming.’ A court in Massachusetts has similarly allowed defendants who trespassed and/or vandalized pipeline property to present a necessity defense. Other courts in Montana, North Dakota and Washington have rejected the defense. See, e.g., *Montana v. Higgins*, DC-16-18 (Mont. Dist. Ct. Nov. 22, 2017).

Allowing defendants to present evidence in support of a necessity defense does not mean the defendants have been excused from criminal conduct; they are simply allowed to make that argument at trial. No case has yet accepted the necessity defense to exonerate criminal acts involving pipelines, although some cases have been downgraded to civil fines and resolved after a necessity defense was presented. The burden on the defense remains high, not only to show that no other practical alternative existed, but also to establish a causal connection between a specific pipeline and global climate change. The same week that the Minnesota Court of Appeals allowed a necessity defense to proceed, API and AOPL released their “[2018 Annual Liquids Pipeline Report](#)”, documenting the continuing reduction in number and scope of incidents releasing oil to the environment. Similarly, as natural gas pipelines continue to replace coal for electric generation, the amount of greenhouse gas emissions has gone down.

Pipeline opponents have turned to direct acts of vandalism targeting pipelines in the past few years, although those actions present the risk of causing an incident and may result in criminal convictions. Federal law enforcement agencies are monitoring these activities under laws related to Homeland Security and terrorism, beyond state laws for criminal trespass [see prior [Pipelaws.com post on November 27, 2017](#)]. In furtherance of that approach, the same week that Minnesota allowed pipeline activists to proceed with a necessity defense, the adjacent State of Iowa signed into law a more strict felony provision applicable to interference with pipelines and other ‘critical energy infrastructure.’ The new law is called the ‘[Critical Infrastructure Sabotage](#)’ act, and carries potential penalties of up to 25 years in prison and fines of \$100,000.

Sabotage or vandalism of pipelines presents a significant risk of causing substantial harm that could result in killing or injuring people or damaging the environment. Admitting to a crime – particularly a felony criminal act – is a steep price to pay for a defense to those acts. The stakes are high, as are the consequences.