



Energy Transfer Partners: ETP's corporate playbook for suppressing assembly rights

In developing the controversial North Dakota Access Pipeline oil company Energy Transfer Partners violated the rights of indigenous communities and used violent security firms and Strategic Litigations against Public Participation (SLAPP) to squash dissent.

Problem Analysis

This case shows that companies fail to take responsibility for negative human rights and environmental impacts resulting from their business operations, and that corporations, often supported by state institutions, are increasingly using legal means in an attempt to criminalise and shut down protest and advocacy groups defending human rights. Energy Transfer Partners (ETP) violated the right of the indigenous communities to free, prior and informed consent (FPIC), relied on an inadequate environmental assessment, and used violent security firms and Strategic Litigations Against Public Participation (SLAPPs) to squash dissent. No anti-SLAPP laws are available in North Dakota to protect advocacy groups. The legal tactics used by ETP, in particular the use of the US Racketeer Influenced and Corrupt Organizations Act (RICO), are increasingly being recognised as a growing threat to free speech. The US Government fails to provide impartial and timely support for communities and advocacy groups subject to human rights and/or environmental violations.

Company

Main Company: Energy Transfer Partners LP (ETP)

Headquarters: United States¹

Subsidiary: Dakota Access, LLC²

Company background

Publicly owned

5 top institutional shareholders: Harvest Fund Advisors LLC, Alps Advisory Inc, Oppenheimerfunds, Inc., Goldman Sachs Group Inc., Toroise Capital Advisors, LLC.³

CEO: Kelcy Warren (salary 2016: \$5,978)⁴ ("net worth": \$4.3B)⁵

President & Director: Matthew S. Ramsey (salary 2016: \$4,990,939)⁶

Operating income 2016: \$1.8 billion⁷

Total revenues 2016: \$21.8 billion⁸

Presence: United States of America

Number of employees: 8,482 persons, 1,428 of which are represented by labor unions⁹

Company activity

ETP is active in the natural gas and oil sector, focusing on pipeline construction and operation.

Country and location in which the violation occurred

United States, Sacred Stone Camp.

Summary of the case

1. Dakota pipeline and related violations

In June 2016, ETP's subsidiary Dakota Access, LLC, initiated the construction of the Dakota Access pipeline (DAPL) or Bakken Pipeline. This US\$ 3.2 billion underground oil pipeline is built under the traditional and cultural lands of indigenous populations, specifically the Standing Rock Sioux Tribe, and threatens the community's water source. The UN Permanent Forum on Indigenous Issues reported in 2016 that 380 cultural and sacred sites had been destroyed by work associated with the right of way clearing for the pipeline.¹⁰ In her 2017 report UN Special Rapporteur on Indigenous Rights, Victoria Tauli-Corpuz, reported that the lack of consultation violated the right of the indigenous communities in question to free, prior and informed consent (FPIC) and that the tribe's interests have not been recognised.^{11,12}

Members of the Standing Rock Sioux Tribe have opposed construction of the pipeline since its inception in 2014. Over 200 Native American tribes and thousands of supporters have joined the protests at rallies and primary encampments. These gatherings of pipeline opponents have been violently suppressed by ETP, as well as state and federal authorities. In the month of December 2016 alone, more than 400 protesters were arrested and subjected to highly questionable charges.¹³

All this is in the context of a broader corporate clampdown on assembly rights, in which ETP has been a market leader. ETP and the authorities' response to the DAPL protests was so controversial as to lead both Amnesty International and the UN Permanent Forum on Indigenous Issues to send experts to review conditions on the ground.¹⁴ A wide range of human rights violations were documented by these experts and others: Maina Kiai, the UN Special Rapporteur on the right to freedom of peaceful assembly and association, labelled the treatment of protesters (including "marking people with numbers and detaining them in overcrowded cages") as "inhumane and degrading". This statement was endorsed by six other UN special experts.¹⁵

Kiai also pointed to the excessive use of force to suppress protest or other acts of dissent as being contrary to the UN Guiding Principles on Business and Human Rights. In particular, security firms employed by ETP have been accused of using automatic rifles, sound cannons, concussion grenades, and water cannons in subfreezing weather.^{16,17,18,19}

2. SLAPP

In May 2016 Resolute Forest Products filed a CAD\$300 million lawsuit under the Racketeer Influenced and Corrupt Organizations Act (RICO) in the United States District Court for Southern Georgia, against Greenpeace International, Greenpeace, Inc., Greenpeace Fund, Inc., STAND.earth (formerly ForestEthics), and five individual staff members of these independent organizations.²⁰ Over 100 advocacy groups warned at the time that Resolute Forest Products' abusive application of the RICO Act – a law designed to tackle Mafia activity – would set a dangerous precedent and embolden others. In August 2017, a \$900 million RICO lawsuit was filed by Energy Transfer Partners (ETP).²¹

As well as again trying to use RICO to treat advocacy activity as inherently criminal in nature, the 187 page complaint again demands exorbitant damages – here at least \$300 million, trebled under RICO to \$900 million. One of the most striking things about the lawsuit, however, is how peripheral the stated role of Greenpeace is in the so-called "criminal enterprise". Despite the criminal activity being said in the complaint to follow the "Greenpeace Model", the role of Greenpeace is only discussed in 23 of the complaint's 187 pages. It therefore appears that the lawsuit represents part of a coordinated attempt to shut Greenpeace down or severely cripple the NGO's campaigning capacity. In recent interviews with CNBC²² and Valley News Live²³, ETP CEO Kelcy Warren said he was "absolutely" trying to cease funding for Greenpeace, and that his "primary objective" in

suing Greenpeace entities was not to recover damages but to "send a message" to the NGO that they "can't do this in the US". This has to be seen in the light of a trend where corporates like ETP are limiting assembly rights and similar rights.²⁴

The prospect of crippling high legal fees, public vilification, and ruinous awards for damages is enough to chill the speech of many campaigners. ETP's lawsuit names 10 other advocacy groups and 8 individuals as members of the "criminal enterprise", leaving the chilling prospect that others will be sued. The lawsuit conflates peaceful protest and advocacy with violent acts by claiming them to be part of the same "Greenpeace model", which "directed and incited acts of ecoterrorism"; should this be successful, it would set a devastating precedent against assembly rights in the US.

ETP has used every repressive tool in the corporate playbook to clamp down on protest. Indeed, this is not even the first time it has filed aggressive lawsuits against opponents of the pipeline. In August 2016 Dakota Access filed a \$75,000 lawsuit (also asking for a permanent injunction) against Standing Rock Sioux Tribe Chairman Dave Archambault II, Councilman Dana Yellowfat, and a number of protesters.²⁵ The SLAPP suit meant to prevent water protectors from protesting near the pipeline and make them pay damages for past protests. The case was dismissed.

The company filed these lawsuits in North Dakota, which doesn't have a law that provides a direct redress against SLAPPs. As with all cases, there is the possibility of filing a separate lawsuit for malicious prosecution. This option will only become available, however, if and after the lawsuits are disposed of in the defendants' favour. It will also require filing a separate lawsuit, with all the associated time and costs involved.

Two lawsuits against ETP have been filed, but so far the outcome has been disappointing. The first of these lawsuits, filed by EarthJustice in 2016²⁶, pointed to the Standing Rock Sioux Tribe's treaty rights and a flawed environment assessment to argue that the pipeline's permit was issued illegally. Judge James Boasberg ruled in 2017 that the federal permits authorizing the pipeline to cross the Missouri River just upstream of the Standing Rock Sioux reservation violated the law. However, the pipeline does not have to be shut down while a new environmental review is conducted. The second lawsuit related to the use of excessive force on protesters on the construction site of the pipeline. *Dundon v.*

Kirchmeier concluded with the federal district court, finding law enforcement's use of force to be appropriate.²⁷ The plaintiffs appealed in May 2017 and the proceedings are still ongoing.²⁸

With Donald Trump in office, the defence of environmental, economic and cultural needs of affected communities seems unlikely. During the presidential campaign, Trump's close financial ties to ETP were exposed in his financial disclosure forms. This showed Trump had invested between \$500,000 and \$1m in ETP, with a further \$500,000 to \$1m holding in Phillips 66, which will have a 25% stake in the project once completed. The disclosures further showed that ETP's CEO Kelcy Warren had given \$103,000 to elect Trump.²⁹ One of Donald Trump's first executive actions was to advance approval for the Dakota Access pipeline.

This is not Trump's only connection with the lawsuit, however: one of his personal lawyers in the Russia investigation is Michael Bowe³⁰, the lead lawyer in the Resolute and ETP lawsuits. Bowe's law firm, Kasowitz Benson Torres LLP, is Trump's go-to law firm for SLAPPs and SLAPP tactics; Marc Kasowitz, for example, has issued legal threats against James Comey³¹ and the New York Times³² for its report on the sexual harassment allegations made against Trump.

Most worrying was the apparent collusion between private security firms employed by ETP and police forces. Democracy Now! captured footage of private security guards brutally attacking demonstrators; days later, the North Dakota Bureau of Criminal Investigation issued an arrest warrant for Amy Goodman, host of Democracy Now!, on charges of engaging in a riot³³. Such an arbitrary arrest was sadly not an isolated incident. Open Democracy reported that in the month of December 2016 alone, more than 400 protesters were arrested and subjected to highly questionable charges including engaging in riots and conspiracy to endanger by fire and explosion.³⁴

Endnotes

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