HOUSE RESEARCH ORGANIZATION • TEXAS HOUSE OF REPRESENTATIVES
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HOUSE RESEARCH ORGANIZATION

daily floor report

Friday, April 17, 2015
84th Legislature, Number 52
The House convenes at 9 a.m.

Six bills are on the daily calendar for second-reading consideration today:

HB 1076 by Thompson	Allowing some emergency protective orders to ban all communications	1
HB 593 by Collier	Requiring canine encounter training for peace officers	4
HB 612 by Davis	Creating specialty license plates for female veterans with disabilities	8
HB 789 by Miller	Specialty license plates for retired military regardless of service time	10
HB 40 by Darby	Expressly preempting certain local oil and gas regulations	12
HB 910 by Phillips	Open carry for concealed handgun license holders	23

Alma Allen
Chairman
84(R) - 52

SUBJECT: Allowing some emergency protective orders to ban all communications

COMMITTEE: Criminal Jurisprudence — committee substitute recommended

VOTE: 6 ayes — Herrero, Moody, Canales, Hunter, Shaheen, Simpson

0 nays

1 absent — Leach

WITNESSES: For — (*Registered, but did not testify:* Justin Wood, Harris County District Attorney's Office; Chris Kaiser, Texas Association Against Sexual Assault; Aaron Setliff, The Texas Council on Family Violence; Lon Craft, TMPA; Jeffrey Knoll; Katherine McAnally; Heather Ross)

Against — None

On — Patricia Cummings, Texas Criminal Defense Lawyers Association

BACKGROUND: Code of Criminal Procedure, art. 17.292 allows magistrates to issue emergency protective orders after an arrest under certain circumstances. Orders can be issued for offenses involving family violence and for sexual assault, aggravated sexual assault, or stalking. The order may be issued on the magistrate's own motion or on the request of victims, victims' guardians, peace officers, or prosecutors.

Art. 17.292(c) lists actions that the orders can prohibit the arrested person from doing, including communicating directly in a threatening or harassing manner with the person under the order or a member of their family or household.

DIGEST: CSHB 1076 would add communicating in any manner to the list of actions that could be prohibited by a magistrate through an emergency protective order issued for family violence offenses or for sexual assault, aggravated sexual assault, or stalking. Specifically, the magistrate, with good cause, could prohibit an arrested person from communicating in any manner with a person protected under the order or with a member of the family or

household of the protected person. Communication would be allowed through an attorney or a person appointed by the court.

This bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2015.

SUPPORTERS SAY:

CSHB 1076 is needed to give victims of family violence, sexual assault, and stalking the safety and stability necessary to recover immediately after an incident. While current law allows for emergency protective orders to be issued in these cases, the orders can restrict the accused only from communicating directly with victims and their families or households in a threatening or harassing manner. In some cases, any contact with the perpetrator can be harmful to victims, exacerbate their trauma, and increase the risk of long-term injury, including physical or mental health problems.

The bill would address this situation by allowing emergency protective orders in certain cases to prohibit communicating in any manner with victims or their families or households. This would allow a cooling-off period in which there was no communication between the alleged offender and the victim and their family and household. Victims could feel safe, take stock of their situation, and get any necessary help.

The ability to issue these orders would be limited to appropriate cases. The orders could be issued only in cases involving family violence and for sexual assault, aggravated sexual assault, or stalking. Magistrates would continue to have discretion over issuing the orders and would evaluate each circumstance individually. Given the seriousness of the offenses included in the bill and the need for swift action to protect victims, the bill would require the appropriate threshold that good cause be shown. These orders are issued for a short period, and other issues could be considered if standard protective orders are pursued. Any necessary communications could occur through the parties' lawyers.

CSHB 1076 would parallel Code of Criminal Procedure, art. 7A provisions for protective orders for victims of sexual assault or abuse, stalking, or trafficking that allow orders to be issued prohibiting

individuals from communicating in any manner with victims or their families or households.

OPPONENTS SAY:

CSHB 1076 should contain an additional threshold or test to ensure that sweeping emergency protective orders cutting off all communication would be issued only when appropriate, especially in cases involving parents and children. In these cases, it might be best to require a finding that an order issued under the bill would be in the best interest of the child, similar to findings required in some family court situations.

NOTES:

CSHB 1076 differs from the bill as filed in that the caption of the substitute indicates that the bill would amend provisions subject to a criminal penalty.

The Senate companion bill, SB 112 by V. Taylor, was passed by the Senate on April 13.

SUBJECT: Requiring canine encounter training for peace officers

COMMITTEE: Homeland Security and Public Safety — committee substitute recommended

VOTE: 7 ayes — Phillips, Nevárez, Burns, Dale, Johnson, Moody, M. White

1 nay — Metcalf

1 absent — Wray

WITNESSES: For — Amy Knoll, City of Cleburne Police Department; Melinda Smith, the Combined Law Enforcement Associations of Texas (CLEAT); Renata Simmons, Prevention Against Canine Killings (PACK); Cindy Boling; Cole Middleton; Cherie Scholz; (*Registered, but did not testify*: Victor Cornell, American Civil Liberties Union of Texas; Susan Ross, Best Friends Animal Society; TJ Patterson, City of Fort Worth; Carlos Lopez, Justices of the Peace and Constables Association of Texas; Alan Spence, Texas Animal Control Academy; Elizabeth Choate, Texas Veterinary Medical Association; Katie Jarl, Humane Society of the United States; James Simmons, Gregory Boren, Goebel Bowling, and Valerie Bowling, Prevention Against Canine Killings (PACK); Cile Holloway, Lisa Stevens, and Stacy Sutton Kerby, Texas Humane Legislation Network; Lon Craft, Texas Municipal Police Association; and 16 individuals)

Against — None

On — (*Registered, but did not testify*: Alan Spence, Texas Academy of Animal Control; Kim Vickers, Texas Commission on Law Enforcement)

DIGEST: CSHB 593 would require that the Texas Commission on Law Enforcement establish a statewide comprehensive training program on canine encounters and canine behavior by January 1, 2016.

The training program would be a requirement for peace officers licensed after January 1, 2016, who would have to take the training either during basic training or within two years of being licensed. The training also

would be a requirement for current officers seeking to receive intermediate and advanced proficiency certificates beginning January 1, 2016.

The program would include at least four hours of classroom instruction and practical training that addresses:

- handling canine-related calls, anticipating unplanned encounters with canines, and using humane methods and tools in handling canine encounters;
- recognizing and understanding canine behavior;
- state laws related to canines;
- canine conflict avoidance and de-escalation;
- use of force continuum principles in relation to canines;
- using nonlethal methods, tools, and resources to avoid and defend against a canine attack; and
- a general overview of encounters with other animals.

Under the bill, the commission would be required to review and update the content of the training program at least once every four years. An officer who has already completed at least four hours of a canine encounter training program would not be required to retake the program.

The bill would take effect on September 1, 2015.

SUPPORTERS SAY:

CSHB 593 would protect law enforcement officers while reducing the number of dogs that are unnecessarily killed in encounters with law enforcement officers. Law enforcement officers frequently come across dogs in the line of duty, and lack of training can lead to dangerous interactions between dogs and officers. In many police departments, the majority of shooting incidents involve animals, most frequently dogs, and a recent Department of Justice study found that the number of dog fatalities by law enforcement is increasing. Both the Department of Justice and canine behavioral experts have found that, in most situations, it is rarely necessary to shoot a dog, and that step should always be the option of last resort.

The Department of Justice study found that lack of training was the primary reason so many dogs are killed by law enforcement officers. In Texas, the vast majority of law enforcement officers have no training on canine encounters before entering the field. Dog shootings are usually high-profile incidents and can erode reduce community trust in law enforcement.

Providing adequate training to officers could significantly reduce the number of canine encounters that lead to gunshots and dog fatalities. Every time an officer discharges his or her weapon in the line of duty, it increases the risk that an innocent bystander inadvertently could be injured or killed. The training also could save police departments money by reducing the number of times officers discharge their weapons. Every time a police officer fires a service weapon, the incident must be investigated, which consumes valuable time and money that could be put to better use protecting the public.

The training would not be a burden on current officers because they already are required to complete 40 hours of continuing education every two years. The subject matter of those continuing education hours is largely elective, so this bill simply would add canine encounter training to the list of elective courses.

Although this bill does add a training requirement that could limit some department discretion, this modest requirement is worthwhile because it could reduce the number of dangerous and disruptive canine shooting incidents that police encounter.

OPPONENTS SAY:

CSHB 593 is unnecessary because many law enforcement agencies across the state already have begun to implement similar training. Although the canine encounter program would be a useful addition to the curriculum, the ever-increasing training requirements could become a burden on officers and departments.

NOTES:

The committee substitute differs from the filed version in several ways, including that CSHB 593 would:

- replace all references to “animal” with “canine”;

- apply the required training only to officers licensed on or after January 1, 2016, and to officers seeking advanced proficiency certificates, in addition to intermediate certificates;
- reduce the length of training required from eight hours to four hours;
- require that the training program be developed and approved by the Texas Commission on Law Enforcement;
- remove the restriction barring online training courses;
- accept canine encounter training completed during basic training;
- make training a one-time requirement instead of a requirement once every four years; and
- include canine conflict avoidance and de-escalation, use of force continuum principles in relation to canines, and a general overview of encounters with other animals in subjects covered by the training course.

SUBJECT: Creating specialty license plates for female veterans with disabilities

COMMITTEE: Defense and Veterans' Affairs — committee substitute recommended

VOTE: 7 ayes — S. King, Frank, Aycock, Blanco, Farias, Schaefer, Shaheen

0 nays

WITNESSES: For — LaShonda Johnson; (*Registered, but did not testify*: Jim Brennan, Texas Coalition of Veterans Organizations)

Against — None

On — Edith Disler, Texas Veterans Commission; (*Registered, but did not testify*: Tim Thompson, Texas Department of Motor Vehicles)

BACKGROUND: Transportation Code, sec. 504.202 entitles certain veterans with disabilities resulting from military service to register for specialty license plates. A person eligible for a license plate under this section may register for personal use one vehicle without paying any fee, other than the fee for the specialty plates.

DIGEST: CSHB 612 would require the Texas Department of Motor Vehicles to design and make available a specialty license plate for distribution to eligible female veterans of the armed forces with disabilities. This specialty plate could include the words "Woman Disabled Veteran" and "U.S. Armed Forces" or "Disabled Veteran" and "U.S. Armed Forces" at the bottom of each license plate.

This bill would take effect September 1, 2015.

SUPPORTERS SAY: CSHB 612 would give female veterans who were disabled as a result of military service the recognition they deserve. About 177,000 female veterans live in Texas, and more than 28,000 are disabled. While the Texas Department of Motor Vehicles offers 25 license plates for disabled service people, no license plate specifically recognizes the service of disabled female veterans.

This growing and under-recognized segment of the veteran population deserves to know that the state of Texas honors their service and sacrifices. These specialty license plates and associated benefits appropriately would convey that appreciation. These benefits include the ability to park in spaces reserved for people with disabilities and an exemption from certain parking meter fees.

OPPONENTS SAY:

No apparent opposition.

NOTES:

Unlike the committee substitute, HB 612 as introduced would have allowed the inclusion of the letters “WDV” on the license plates. The introduced bill also would have allowed a license plate with the letters “WDV” to be personalized with up to three characters.

SUBJECT: Specialty license plates for retired military regardless of service time

COMMITTEE: Defense and Veterans' Affairs — favorable, without amendment

VOTE: 7 ayes — S. King, Frank, Aycock, Blanco, Farias, Schaefer, Shaheen

0 nays

WITNESSES: For — (*Registered, but did not testify*: Morgan Little and Jim Brennan, Texas Coalition of Veterans Organizations)

Against — None

On — (*Registered, but did not testify*: Jeremiah Kuntz, Texas Department of Motor Vehicles)

BACKGROUND: Transportation Code, sec. 504.303 requires the Texas Department of Motor Vehicles to issue specialty license plates for former members of the United States armed forces. Retired members who have completed 20 or more years of satisfactory federal service are eligible to receive specialty plates that designate the appropriate military branch and include the word "Retired."

Retired members of the Texas National Guard and Texas State Guard who have completed 20 or more years of satisfactory federal service also are eligible to receive specialty plates that include the words "Texas Guard."

A letter from any military branch under the U.S. Department of Defense or Department of Homeland Security confirming that the retired member of the armed forces has completed at least 20 years of satisfactory federal service is sufficient to establish eligibility. A similar letter from the U.S. Department of Defense, Department of the Army, or Department of the Air Force is sufficient to establish a retired guard member's eligibility.

DIGEST: HB 789 would require the Texas Department of Motor Vehicles to issue specialty license plates for retired members of the United States armed forces, Texas National Guard, and Texas State Guard regardless of how

long they had served.

A retired armed forces member could establish eligibility by producing an identification card indicating that the member was retired and issued by any military branch under the U.S. Department of Defense or Department of Homeland Security. A retired member of the Texas National Guard or the Texas State Guard also could establish eligibility by producing an identification card indicating that the member was retired and issued by the Department of Defense, Department of the Army, or Department of the Air Force.

This bill would take effect September 1, 2015.

SUPPORTERS SAY:

HB 789 would honor all those who served this country in uniform but were unable give the 20 years of service necessary to receive retired military license plates. Requirements in current law overlook a large number of veterans whose time in the armed forces was shortened due to injury or other issues. Some of these men and women intended to serve long military careers, and this bill would honor their status as retired members of the armed forces, regardless of when they retired from the military.

OPPONENTS SAY:

No apparent opposition.

SUBJECT: Expressly preempting certain local oil and gas regulations

COMMITTEE: Energy Resources — committee substitute recommended

VOTE: *After recommitted:*
7 ayes — Darby, Paddie, Craddick, Keffer, P. King, Landgraf, Meyer

6 absent — Anchia, Canales, Dale, Herrero, Riddle, Wu

WITNESSES: *March 23 public hearing:*
For — Frank Macchiarola, America's Natural Gas Alliance; Don Tymrak, City of Karnes City; Ed Smith, City of Marshall; Jeanette Winn, Karnes City ISD; J. Ross Lacy, Midland City Council; Candice Brewer, National Association of Royalty Owners; Ben Shepperd, Permian Basin Petroleum Association; Josiah Neeley, R Street Institute; Bill Stevens, Texas Alliance of Energy Producers; Carlton Schwab, Texas Economic Development Council; Ed Longanecker and Raymond Welder, Texas Independent Producers and Royalty Owners; Todd Staples, Texas Oil and Gas Association; Jess Fields and Leigh Thompson, Texas Public Policy Foundation; Tricia Davis and Kent Sullivan, Texas Royalty Council; and 10 individuals; (*Registered, but did not testify*: John Fainter, Association of Electric Companies of Texas; Nelson Nease, America's Natural Gas Alliance; Peggy Venable, Americans for Prosperity-Texas; Adrian Acevedo, Anadarko Petroleum Corp; Matthew Thompson, Apache Corporation; Dan Hinkle, Association of Energy Service Companies, BP, EOG Resources, EP Energy, EnerVest; Charles Yarbrough, Atmos Energy; Robert Flores, Breitling Energy; Jeff Bonham, CenterPoint Energy, Inc.; Christie Goodman, Richard Lawson, Ben Sebree, Julie Williams, and Steve Perry, Chevron; Stan Casey, Concho Resources Inc.; JD Adkins, ConocoPhillips; Martin Allday, Consumer Energy Alliance-Texas, Enbridge Energy; Shayne Woodard, DCP Midstream; Teddy Carter, Devon Energy; Grant Ruckel, Energy Transfer; Marida Favia del Core Borromeo, Exotic Wildlife Association; Samantha Omey, ExxonMobil; Kelly McBeth, Gas Processors Association; Royce Poinsett, Halliburton; Bill Oswald, Koch Companies; Chris Hosek, BASA Resources, Exco Resources, Linn Energy, Newfield Exploration, QEP Resources, R360, Range Resources, Select Energy, SM Energy; Hugo

Gutierrez and Amy Maxwell, Marathon Oil Corporation; Lindsay Sander, Markwest Energy; Julie Moore, Occidental Petroleum Corporation; Anne Billingsley, ONEOK; David Holt, Permian Basin Petroleum Association; Mark Gipson, Pioneer Natural Resources; Kinnan Golemon, Shell Oil Company; Patty Errico and Cade Campbell, SM Energy; Jim Tramuto, Southwestern Energy Company; Stephanie Simpson, Texas Association of Manufacturers; Steven Garza and Daniel Gonzalez, Texas Association of Realtors; Stephen Minick, Texas Association of Business; Hector Rivero, Texas Chemical Council; Lisa Kaufman, Texas Civil Justice League; Laura Buchanan, Texas Land and Mineral Owners Association; Thure Cannon, Texas Pipeline Association; Julie Klumpyan, Valero; Jim Rudd, West Texas Gas; Greg Macksood)

Against — Don Crowson and James Parajon, City of Arlington; Nelda Martinez, City of Corpus Christi and Texas Municipal League; Philip Kingston, City of Dallas; Chris Watts, City of Denton; Sarah Fullenwider, Jungus Jordan, and Danny Scarth, City of Fort Worth; Don Postell, City of Grand Prairie; Clayton Chandler, Bill Lane, and Peter Phillis, City of Mansfield; Bryn Meredith, City of Mansfield, City of Southlake, City of Flower Mound; Ken Baker, City of Southlake; Adam Briggle and Cathy McMullen, Denton Drilling Awareness Group; Sharon Wilson, Earthworks; Luke Metzger, Environment Texas; Scott Anderson, Environmental Defense Fund; Calvin Tillman, League of Independent Voters of Texas; Susybelle Gosslee, League of Women Voters of Texas; Lon Burnam, Public Citizen; Elizabeth Riebschlaeger, Sisters of Charity of the Incarnate Word of San Antonio; Robin Schneider and Zac Trahan, Texas Campaign for the Environment; Bennett Sandlin, Texas Municipal League; David M. Smith, Texas Neighborhoods Together; Snapper Carr, Texas Coalition of Cities for Utility Issues; and 18 individuals; (*Registered, but did not testify*: David Crow, Arlington Professional Fire Fighters; Jesus Garcia, City of Alice; Jennifer Rodriguez, City of College Station; Tom Tagliabue, City of Corpus Christi; Brie Franco, City of El Paso; Lindsay Lanagan, City of Houston; Jon Weist, City of Irving; Sam Fugate, City of Kingsville; Frank Sturzl, City of North Richland Hills; David Foster, Clean Water Action; Ellen Friedman, CommonSpark; Doug Dickerson, Dallas Fire Fighters Association; Shelby Dupnik, Karnes County; Linda Curtis, League of Independent Voters of Texas; Cyrus Reed, Lone Star Chapter Sierra Club; Jill Hinckley, National Nurses

United; Jon Andreyo, Andrew Dobbs, and Anne Robertson, Texas Campaign for the Environment; Chance Sparks, American Planning Association-Texas Chapter; David Weinberg, Texas League of Conservation Voters; Shanna Igo, Texas Municipal League; Julian Muñoz Villarreal, Texas Neighborhoods Together; Paula Littles, Texas National Nurses Organizing Committee; Trish O'Day, Texas Physicians for Social Responsibility; Ric Holmes, Texas Municipal League Region 9; William Sciscoe, Town of DISH; Conrad John, Travis County Commissioners Court; Gwendolyn Agbatekwe, Texas National Nurses Organizing Committee, National Nurses United; and 42 individuals)

On — Alan Day, Brazos Valley Groundwater Conservation District; Steve Lindsey, City of Mansfield; Jim Allison, County Judges and Commissioners Association of Texas; Jon Olson, Department of Petroleum and Geosystems Engineering at the University of Texas at Austin; C.E. Williams, Panhandle Groundwater Conservation District; John Love, Texas Municipal League, City of Midland; (*Registered, but did not testify*: Diane Goss and Keith Sheedy, Texas Commission on Environmental Quality)

BACKGROUND: Land ownership in Texas is divided into two estates: the surface estate and the mineral estate. It is common for the mineral estate and the surface estate to be owned by different people or entities. Current interpretation of Texas law provides that the owner of a mineral estate has certain rights to surface use, including, but not limited to, constructing roads, pipelines, wells, storage tanks, and canals.

DIGEST: **Definitions.** CSHB 40 would define "commercially reasonable" as "a condition that would allow a reasonably prudent operator to fully, effectively, and economically exploit, develop, produce, process, and transport oil and gas." The bill would specify that this would be determined based on the objective standard of a reasonably prudent operator and not an individualized assessment of an actual operator's capacity to act.

The bill would define "oil and gas operation" as "an activity associated with the exploration, development, production, processing, and transportation of oil and gas." The bill would specifically include

"hydraulic fracture stimulation, completion, maintenance, reworking, recompletion, disposal, plugging and abandonment, secondary and tertiary recovery, and remediation activities" in this definition.

Preemption. This bill expressly would preempt ordinances and regulations enacted by a political subdivision of the state that ban, limit, or otherwise regulate an oil and gas operation, unless the regulation:

- regulated only aboveground activity;
- was "commercially reasonable";
- did not effectively prohibit an oil and gas operation conducted by a reasonably prudent operator; and
- was not otherwise preempted by state or federal law.

An ordinance would be considered commercially reasonable if it had been in effect for at least five years and had allowed the oil and gas operations at issue to continue during that period.

The preamble to the bill includes a statement noting that the regulation of oil and gas operations by municipalities and other political subdivisions is "impliedly preempted" by statutes already in effect.

CSHB 40 would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2015.

SUPPORTERS SAY:

CSHB 40 would affirm the preemptive nature of state regulations on oil and gas production over local ordinances and would ensure consistent, fair application of rules across the state. It would create a clear four-prong test for preemption that would both reduce litigation and ensure that owners of mineral estates were not effectively stripped of their property rights.

State vs. local regulation. The state historically has been responsible for the majority of oil and gas regulations. State agencies, therefore, are the most experienced regulatory bodies and have highly specialized subdivisions equipped to handle highly specialized issues. Local governments have less expertise and less of an ability to draft regulations that reflect engineering reality.

Additionally, this bill would incentivize cooperation and agreements between municipalities and operators because municipalities no longer would be able to regulate without considering the property rights of mineral owners. This would create a better balance between property rights and reasonable restrictions on oil and gas operations than is achieved by the current patchwork of municipal regulations.

Some opponents suggest that the distance between affected individuals and state agencies will cause state regulators to be less responsive to concerns than municipal regulators. However, this is not unique to state agencies. Municipalities can be heavily influenced by operators, even more so if the municipality is small and the operator is influential. The state agency is in a better position to understand the effects of any given oil and gas operation than is a municipality.

Concerns that state agency subsurface regulations are insufficient and lack enforcement do not justify turning to a patchwork set of municipal ordinances. Instead, the Legislature should fully fund the Railroad Commission and focus on improving state policies and regulations instead of offloading that task to municipalities.

This bill would not impede performance of statutory obligations because there are few (if any) statutory obligations that would implicitly require municipal regulation of oil and gas operations. The bill is also unlikely to affect many local ordinances that are not related to oil and gas operations like fire codes and traffic ordinances because these regulations likely would pass the four-prong test.

The ordinances that would be preempted by this bill are predominantly duplicative with state agency regulations, so this bill would not harm public health or public safety.

Property rights. Mineral rights are just as important to protect as surface rights, but municipal regulations that effectively ban attempts to exploit resources deprive mineral rights owners of their property. This bill is needed to protect property rights and the dominance of the mineral estate as it has been recognized by Texas law for centuries.

Current protections against uncompensated regulatory takings are not sufficient, and litigation currently in progress could result in the erosion of property rights due to this deficiency. This bill unambiguously would secure the right of mineral rights owners to access and exploit their property.

Any impact that oil and gas operations have on property values is both temporary (drilling rigs are only operational for less than 30 days) and mitigated by aboveground regulations such as setbacks, fencing, and landscaping requirements (which would pass the four-prong test). In fact, the data is ambiguous as to whether there is any negative, long-term impact on property values for land near oil and gas wells.

Regulatory certainty. By creating a simple and straightforward test for preemption, this bill would reduce the need for litigation to determine whether or not an ordinance was preempted. Operators choose not to commence operations in certain circumstances where regulatory uncertainty risks eventually shutting down a prospective drilling operation entirely, so this bill would increase the number of oil and gas operations and thus increase economic activity in the state, boosting tax revenues.

Additionally, if municipalities and political subdivisions continued to be allowed to regulate subsurface activity, an operator that horizontally drilled across multiple jurisdictions could be subject to multiple sets of potentially contradictory regulations. This bill would resolve this otherwise intractable quagmire of regulation.

The Railroad Commission already has 15 separate districts to accommodate local concerns with region-specific approaches, and a patchwork approach to regulation in different parts of the state would be inappropriate.

Preamble. This is a statement of intent by the Legislature, and it is the Legislature's belief that current law does impliedly preempt the regulation of oil and gas operations by municipalities and other political subdivisions.

Scope. The term "reasonably prudent operator" is well established and

clearly understood by litigators and the industry. The fact that it originated from another area of law is inconsequential. "Political subdivision" is also a frequently used term throughout statute and by litigators, and it is not unclear or ambiguous.

Likewise, the possibility that the phrase "an oil and gas operation" could lead to an overly broad effect on ordinances would be limited by the reasonably prudent operator standard. For instance, an operator could not argue that it should be allowed to drill in the middle of Main Street for any number of reasons, but primarily because a reasonably prudent operator would not locate a well site in the middle of a major road. This bill would not effectively eliminate all aboveground ordinances.

CSHB 40 effectively would balance the property rights of mineral owners with public safety by clarifying that the most effective entity would have purview to regulate.

OPPONENTS SAY:

CSHB 40 is overly optimistic about the efficacy of state regulation and is overbroad, effectively prohibiting even basic ordinances intended to ensure public safety and public health. The bill would upend the balance between protecting property rights and environmental protection in favor of the oil and gas industry, disregarding legitimate public health concerns brought by affected individuals.

State vs. local regulation. Effects of oil and gas operations are necessarily felt most acutely at the local level. Although state agencies may have more expertise surrounding oil and gas operations, municipalities are better equipped to understand the effects of the operations on their communities and would be under more pressure to respond to local resident concerns. This bill would remove much of the power the average individual has to influence regulatory changes on oil and gas operations and place more power into the hands of organized interest groups such as the oil and gas industry.

State agencies may not have political will to enforce the regulations necessary to protect public health and the environment. Municipalities are more accessible and responsive to individual complaints than a state agency, which can be beholden to industry interests and disconnected

from the citizenry. It would be a mistake to rely only on state agencies. Municipal regulations are necessary only because state regulation is perceived to be inadequate.

Even if state agencies adequately enforced existing regulations, gaps in state subsurface rules and regulations currently are filled by local ordinances. None would remain in effect because each would fail one of the four prongs of the test in this bill. A few examples of local ordinances that could be preempted include those requiring operators to bury saltwater pipelines at sufficient depth to protect city infrastructure, that thumper trucks rather than explosives be used to conduct seismic surveys, and that pipelines crossing roads be bored or tunneled to prevent damage.

In Texas, state regulations on oil and gas operations are notoriously weak. Fines for certain violations, for instance, are 30 years old, have not kept up with inflation, and are no longer adequate disincentives. Leak detection and repair programs, the standard in other states, are not required of the oil and gas industry. The state should not categorically preempt municipal regulations without first ensuring state regulations are actually complete.

Municipalities might have certain statutory obligations that could not be performed without limiting subsurface activity. As the bill is currently written, it is not clear what would happen if a regulation necessary to fulfill a statutory obligation violated one of the four prongs of the test.

Ordinances preempted by this bill would not be specific to oil and gas operations — they could be part of the fire code or traffic or explosives ordinances, for example. Reasonable ordinances could be preempted if they somehow were construed to limit commercially reasonable oil and gas operations.

Property rights. Property rights should be protected, but current law is sufficient. Regulatory takings are not inherently bad when the regulation protects a public interest and property owners are compensated. Regulations that serve as effective bans on resource extraction would likely be ruled inverse condemnations under current law and mineral owners given compensation for the regulatory taking.

An erosion in property rights is worthwhile if municipal regulations are needed to protect neighborhoods from environmental degradation and harmful public health consequences. Municipalities should be able to enact regulations to save lives even if it effectively prohibits an oil and gas operation by making it uneconomical.

Oil and gas operations infringe upon the property rights of surface owners near the mineral rights by reducing their property values. The traffic, noise, light and air pollution, and general unsightliness drives down property values, particularly if the operation is in a residential area. Homeowners should be free from such nuisances, and this bill would eliminate tools municipalities have to reduce the negative impact of oil and gas operations.

Regulatory certainty. A certain level of variation is necessary in regulations due to operational environments differing throughout the state. This bill would create a flat set of regulations that ignore the need for some local subsurface regulations. For instance, coastal areas subject to hurricane activity require subsurface shut-off valves that can be activated to prevent catastrophic oil spills. In other cases where the municipality holds some subsurface rights, the municipality requires the operator to hold insurance to pay for any potential damage to the municipality's subsurface rights. This bill could preempt these regulations and expose the regions to safety or fiscal risks.

Preamble. The preamble in this bill is not merely a statement of intent but could significantly change the outcome of litigation. Courts have routinely held that local regulations on oil and gas operations are not currently "impliedly preempted."

Scope. The bill includes ambiguous terms that could create litigation and potentially expand an already broad provision such that courts would have to decide what the terms meant in their new context. The term "reasonably prudent operator," similar to the reasonable person standard, is common in tort law but not municipal law or preemption law. Stripped of its context in tort law, the reasonably prudent operator standard becomes ambiguous even though it is commonly used. The bill should clarify that the standard involves a certain level of due regard to surface rights.

With the term "political subdivision," it is not immediately clear if the bill would preempt important groundwater conservation district regulations for spacing, water withdrawal, and reporting by oil and gas operators.

A third term that could increase the scope of the bill is "an oil and gas operation." As currently worded, the bill could invalidate even ordinances regulating only aboveground activity. For instance, setbacks prohibit an oil and gas operation within a certain distance around a building. A setback ordinance could fail the third prong since it effectively (or, in this case, actually) "prohibits an oil and gas operation" within that distance from the building. Under this reading, virtually all ordinances could be preempted, even those meeting the other prongs of the test.

This phrase makes the bill less about ensuring property rights and more about oil and gas operations being able to drill anywhere. The bill should use verbiage not about oil and gas operations but about whether or not an operator can actually access leased minerals.

If municipalities exceed their authority under current law, the situation should be resolved by the courts on a case-by-case basis. This bill would be an overreach, endangering environmental quality and public health.

NOTES:

The Legislative Budget Board's fiscal note indicates that there could be an indeterminate fiscal impact to the state, depending on the number of political subdivisions affected by the bill.

The committee substitute differs from the introduced version in that CSHB 40 would include in the basis of determining a "commercially reasonable" measure the objective standard of a reasonably prudent operator and not an individualized assessment of a specific operator's capacity to act.

CSHB 40 specifies that political subdivisions could impose regulations on aboveground activities under certain circumstances.

CSHB 40 also differs from the original bill in providing that an ordinance would be considered commercially reasonable if the ordinance had been in effect for at least five years and had allowed the oil and gas operation at

issue to continue during that period.

The Senate companion bill, SB 1165 by Fraser, et al., was reported favorably by the Senate Natural Resources and Economic Development Committee on March 25.

CSHB 40 was placed on the General State Calendar on April 14 and was recommitted to the Energy Resources committee. The bill was again reported favorably on April 14.

SUBJECT: Open carry for concealed handgun license holders

COMMITTEE: Homeland Security and Public Safety — committee substitute recommended

VOTE: *After recommitted:*
7 ayes — Phillips, Burns, Dale, Metcalf, Moody, M. White, Wray

1 nay — Johnson

1 absent — Nevárez

WITNESSES: *March 17 public hearing:*
For — Tara Mica, National Rifle Association; Richard Briscoe, CJ Grisham, and Christopher Martin, Open Carry Texas; Amy Clark, Republican Party of Texas; Tov Henderson, Terry Holcomb, Texas Carry; Alice Tripp, Texas State Rifle Association; Richard Morgan, Texas Young Republican Federation; and 17 individuals; (*Registered, but did not testify:* Cara Bonin, Katy Libertea, Katy Tea Party, Katy NORML; Charles (Chuck) Ballweg and Paul Frueh, North Texas Citizens Lobby; Gina Holcomb, Texas Carry; AJ Louderback, Sheriffs' Association of Texas; Matthew Walbeck, State Republican Executive Committee; Aaron Mitchell, Texas A&M Student Senate; Cathy Dewitt, Texas Association of Business; MerryLynn Gerstenschlager, Texas Eagle Forum; and 10 individuals)

Against — Troy Gay, Austin Police Department; Donald McKinney, Houston Police Department; Grace Chimene, League of Women Voters of Texas; Alexandra Chasse, Norri Leder, Angela Turner, and Nobie White, Moms Demand Action for Gun Sense in America; Ted Melina Raab, Texas American Federation of Teachers; Frances Schenkkan, Texas Gun Sense; Kristen Katz, The Campaign to Keep Guns Off Campus; and five individuals; (*Registered, but did not testify:* Margie Medrano, Jamie Ford, Anna Kehde, Rosalie Oliveri, Donna Schmidt, Bonnie Tompsett, Kelly Tagle, Susan Pintchovski, Nicole Golden, and Richard Martine, Moms Demand Action for Gun Sense in America; Andrea Brauer, Anne Musial, Jonathan Panzer, and Kimberly Taylor, Texas Gun Sense; and eight

individuals)

On — Pablo Frias, "We The People"; Justin Delosh, Lone Star Gun Rights; William Brown, Republic of Texas TV; Jeremy Blosser, Tarrant County Republican Party; Rachel Malone, Texas Firearms Freedom; Jacob Cordova; and five individuals; (*Registered, but did not testify:* Sherrie Zgabay, Texas Department of Public Safety; Joshua Houston, Texas Impact; Wade Olson)

BACKGROUND: Government Code, ch. 411, subch. H establishes the eligibility requirements for concealed handgun licenses. The requirements include:

- being a legal resident of Texas or otherwise eligible for a nonresident license;
- being at least 21 years old unless the person is an honorably discharged member of the military who meets all other requirements;
- generally not having been convicted of or charged with criminal activity;
- being capable of exercising sound judgment for handgun use and storage and passing a mental health check;
- submitting fingerprints, paying a license fee, and passing a criminal history background check; and
- showing evidence of handgun use proficiency.

DIGEST: **Concealed carry to open carry**. CSHB 910 would expand the scope of a concealed handgun license to authorize an individual possessing the license to carry a handgun, whether or not it was concealed. The license holder would be entitled to carry a handgun in plain view in a public place if the handgun was carried in a shoulder or belt holster.

It also would make most statutory provisions that regulate concealed handgun license holders and carrying a concealed handgun apply to carrying a handgun, whether or not it was concealed. Conforming changes would amend the Alcoholic Beverage Code, Government Code, Penal Code, Code of Criminal Procedure, Education Code, Election Code, Family Code, Health and Safety Code, Labor Code, Local Government

Code, Occupations Code, and Parks and Wildlife Code.

Trespass by license holder. The bill would add Penal Code, sec. 30.07 to establish a new offense that would parallel the current offense of trespass by a concealed handgun license holder (Penal Code, sec. 30.06). The new offense would cover trespassing with an openly carried handgun if a license holder entered another's property without effective consent and:

- had notice that the entry was forbidden; or
- received notice that remaining on the property was forbidden and failed to depart.

A license holder would receive notice if an owner or someone with apparent authority to act on the owner's behalf provided notice by oral or written communication. A written communication would be defined as a card or document with language required by Penal Code, sec. 30.07 or a sign posted on the property. The sign would be required to:

- include Penal Code, sec. 30.07 language in both English and Spanish;
- have contrasting colors with block letters at least one inch in height; and
- be conspicuously displayed and clearly visible at each entrance to the property.

The bill also would create an exception to the trespass offense if the property was owned or leased by a governmental entity and was not a place where license holders were prohibited from carrying guns.

The bill would not allow a defense to prosecution for carrying the handgun in a shoulder or belt holster. An offense under this section would be a class A misdemeanor (up to one year in jail and/or a maximum fine of $4,000).

Unlawful carrying by a license holder. The bill would prohibit a licensed holder from openly carrying and intentionally displaying a handgun on the premises of an institution of higher education, including any public or private driveway, street, sidewalk or walkway, or parking

area. Such offense would be a class A misdemeanor. It would be a defense to prosecution if the actor brought the handgun in plain view under circumstances in which the actor would have been justified in the use of force or deadly force.

The bill would extend to open carry the current law on places where license holders cannot carry handguns.

Criminal trespass. The bill would extend the defense to prosecution for the current criminal trespass offense that deals with concealed carry to include open carry.

Personal protection officers. The bill would specify that an individual acting as a personal protection officer who was not wearing a security officer's uniform would have to conceal any firearm the protection officer was carrying, regardless of whether the person was authorized to openly carry the firearm under any other law.

Unlawful carrying of weapons. The bill would permit the carrying of handguns in plain view in a motor vehicle or watercraft owned by the person if the person was licensed to carry a handgun and the handgun was carried in a shoulder or belt holster.

License instruction. The bill would require instructors to include instruction on the use of restraint holsters and methods of securely carrying a handgun openly in the handgun proficiency course that is required to receive a license to carry a handgun.

Repealing concealed handgun definition. The bill would repeal Government Code, sec. 411.171(3), which defines a concealed handgun.

Application. The changes in the bill would apply to the carrying of a handgun on or after the effective date of the bill by any person who holds a license to carry a concealed handgun or any person who applies for a license, regardless of whether the license was issued or the application was made before, on, or after the effective date of the bill.

The penalties created in the bill would apply only to an offense committed

on or after the effective date of the bill.

Conforming changes to language in Local Government Code, sec. 118.011(b) regarding a county fee for a mental health background check required for a license to carry would take effect September 1, 2015. Otherwise, the bill would take effect January 1, 2016.

SUPPORTERS SAY:

CSHB 910 would protect law-abiding Texans' Second Amendment rights under the U.S. Constitution by allowing them to openly carry handguns. Texas' prohibition on open carry, even for individuals who have received training and are licensed to carry concealed handguns, is an unreasonable restriction of those constitutional rights. This bill simply would extend existing requirements for licensed concealed carry of handguns to open carrying.

Forty-four U.S. states already allow open carry of handguns, and this bill would bring Texas in line with the majority of the country. Many of the same safety concerns raised about open carry also were raised about concealed carry before it was enacted in Texas in 1995, and those worries have proved unfounded, as have concerns about open carry in other states.

Allowing licensed individuals to openly carry handguns under the bill would not pose a danger to the community. The background check and licensing process to obtain a handgun license is extremely thorough and prevents people who have committed serious crimes from acquiring licenses. Moreover, concealed handgun license holders are much less likely than civilians who do not hold the license to commit a crime. The Texas Department of Public Safety reported in 2013 that less than half of 1 percent of total criminal convictions were of concealed handgun license holders. If a handgun license holder who was openly carrying did commit a crime, existing laws would be enforced against that individual, as this bill would not change those laws.

Far from creating a public safety risk, this bill might in fact help reduce criminal activity. Crime rates have dropped significantly since the establishment of the concealed handgun licensing system in Texas, and other states also have seen a drop in crime after enacting similar licensing laws. After a handgun licensing system was instituted in Illinois, the crime

rate dropped to its lowest rate in more than 50 years. Oklahoma instituted open carry laws in 2012, and in 2013 the state showed a drop in overall crime, a 7.3 percent drop in violent crimes, and a significant drop in the number of murders committed.

The presence of well trained civilians visibly carrying handguns on their person could provide a valuable deterrent to would-be criminals. By openly carrying a weapon, civilians who found themselves targeted by criminals would have faster, easier access to their weapons to defend themselves than would a person with a concealed handgun. In addition, the bill's requirements that a person use a shoulder or belt holster would help ensure that the handgun was secured to the person's body.

While police officers might receive some emergency calls involving people openly carrying handguns, other states with open carry have not found the number of these calls to be overly burdensome on law enforcement. In practice, most licensed handgun owners in other states have preferred to keep their weapons concealed, which likely would be the case in Texas as well. Because a majority of people would not carry openly, there would not be an increased burden on officers to check licenses of those openly carrying.

The bill would not infringe on personal property rights because individuals and businesses still would have the right to prohibit handguns on their property by posting the proper notice. The requirement to display more than one sign would not be overly burdensome for business owners.

The bill would not remove a licensed individual's right to carry a concealed handgun nor allow a larger number of people to be able to carry guns, but merely would give license holders an option to open carry. Any individual who wanted to openly carry a handgun under the bill still would need to fulfill all requirements to obtain a license to carry a handgun, which would ensure that the individual was properly trained. This bill would not change the way reciprocity is granted. The governor and attorney general still would be required to make a finding that another state's laws met the eligibility requirements of Texas statutes for carrying a handgun.

OPPONENTS SAY:

The changes proposed in CSHB 910 are unnecessary and inappropriate because nothing is wrong with the current concealed handgun system in Texas, and the bill would not address any real safety concerns. In a February 2015 survey conducted by the University of Texas at Austin and the Texas Tribune, only 22 percent of respondents believed Texans with handgun licenses should be allowed to open carry. There is no evidence open carry would deter crime or reduce violence, and openly carrying handguns could create an environment of fear, intimidation, and unnecessary provocation.

Although many states have open carry laws, the states that do not are some of the largest, including California, Florida, and New York. Additionally, many states' open carry laws have more stringent requirements than would be enacted through this bill. For example, North Dakota requires openly carried guns to be unloaded.

There is no evidence that open carry has been the cause of reduced crime rates in other states. In fact, individuals who openly carry their weapons could be at greater risk of being harmed by their own guns due to theft. Highly trained police officers who openly carry handguns have lost their lives after being attacked with their own guns by criminals.

The bill also would place additional burdens on police officers. In a February 2015 survey of 192 police chiefs conducted by the Texas Police Chiefs Association, about 74 percent opposed open carry. When police officers respond to an emergency call involving handguns, the presence of many people carrying openly could cause confusion and divert police attention away from the criminals. Police officers might not immediately be able to distinguish the law-abiding civilians from the criminals in an emergency, which could lead to a greater risk of harming innocent people. Law enforcement personnel responding to emergency calls also might have to spend valuable time and manpower checking the licenses of people who were openly carrying handguns.

Private property owners should have the right to make decisions about whether to allow open carrying of handguns on their property without being burdened by additional requirements. The bill would make notice requirements onerous by requiring a business to display separate signs

prohibiting concealed and openly carried weapons. This especially would impact smaller businesses.

CSHB 910 would not include enough requirements for new training and education for handgun license holders. Currently licensed individuals suddenly would have many new rights under the bill, and they would need additional training on the new information. According to the survey of police chiefs in February, about 76 percent believed that a person carrying a handgun should receive retention training.

The bill could allow individuals from other states to openly carry handguns in Texas under a separate reciprocity agreement. Many other states do not have the same strict licensing requirements the state of Texas mandates, and no additional training for the nonresidents would be required under the bill.

At the very least, the bill should be amended to restrict open carry to rural areas only. Open carry in rural areas would pose less of a threat to public safety, while open carrying of handguns in highly populated urban areas could cause unnecessary alarm and confusion in chaotic situations.

OTHER OPPONENTS SAY:

CSHB 910 would not go far enough in protecting the freedom of Texans to openly carry a weapon as they chose. Individuals with licenses to carry handguns should be able to choose whether to carry their gun in a holster. Holsters can be costly, and the bill should not require that they be used.

This bill inappropriately would restrict the rights Texans have under the U.S. Constitution to carry handguns. The requirements of obtaining a license and taking a class to be able to openly carry a handgun would infringe upon the Second Amendment right to bear arms. Individuals should not have to obtain a license as required by the bill to carry a handgun. Thirty-one states already allow open carrying of handguns without a permit.

NOTES:

CSHB 910 differs from the original bill in that it would:

- add requirements to the Government Code for additional instruction by qualified handgun instructors on use of restraint

holsters and methods to ensure safe open carrying;

- add a class A misdemeanor offense for a person openly carrying and intentionally displaying a handgun in plain view on the premises of an institution of higher education, or on a driveway, street, sidewalk, or parking area of an institution of higher education;
- preserve and extend a defense to prosecution when the use of deadly force is justified;
- preserve the exemption provided under current law on openly carrying a handgun for certain historical reenactments;
- add a reference to definitions for an institution of higher education and private or independent institution of higher education; and
- extend the general effective date to January 1, 2016.

Unlike HB 910 as introduced, the committee substitute removed language that would have changed current law to require a school district's board of trustees to adopt regulations allowing a school marshal to openly carry a handgun.

A companion bill, SB 17 by Estes, was approved by the Senate on March 17. Another companion, SB 346 by Estes, was referred to the Senate State Affairs Committee on February 2.

CSHB 910 was reported favorably by the House Committee on Homeland Security and Public Safety on March 26, placed on the General State Calendar for April 14, recommitted on a point of order and again reported favorably on April 14.