

SUBJECT: Liability for construction affecting pipeline easements and rights-of-way

COMMITTEE: Energy Resources — committee substitute recommended

VOTE: 6 ayes — West, Farabee, Crownover, Corte, Gonzalez Toureilles, Howard
0 nays
1 absent — Crabb

WITNESSES: For — James Mann, Texas Pipeline Association; Ben Sebree, Texas Oil and Gas Association; (*Registered but did not testify:* Debbie Beaver, Williams Energy; David Garrett, Duke Energy Field Services, L.P.; Patrick Nugent, Texas Pipeline Association; Shayne Woodard, Duke Energy Field Services; Scott Norman, Texas Association of Builders).

Against — None

On — Scott Norman, Texas Association of Builders

BACKGROUND: The 78th Legislature in 2003 enacted HB 1834 by West, which added subch. G to ch. 756 of the Health and Safety Code to regulate activities involving construction on, over, or under pipelines and pipeline routes.

Health and Safety Code, sec. 756.103, prohibits the building, repair, replacement, or maintenance of construction on, across, over, or under the easement or right-of-way for a pipeline facility unless notice of the construction is given to the operator of the pipeline facility and:

- the operator of the pipeline facility determines that the construction will not increase a risk to the public or increase a risk of a break, leak, rupture, or other damage to the pipeline facility;
- if the operator determines that the construction will increase risk to the public or the pipeline facility, the constructor pays the cost of the additional fortifications, barriers, or other changes or improvements necessary to protect the public or pipeline facility from the risk before proceeding with the construction;
- a written agreement exists concerning the building, repair, replacement, or maintenance; or

- the building, repair, replacement, or maintenance is required to be done promptly by a regulated utility company because of the effects of a natural disaster.

Health and Safety Code, sec. 756.123, contains the same provisions as sec. 756.103.

Under current law, a pipeline facility operator has no defined right to prevent the construction, and there is no penalty or liability to a constructor that violates the provisions of the Health and Safety Code.

DIGEST:

CSHB 951 would make a constructor who violates current law regulating construction affecting pipeline easements or rights-of-way civilly liable to the pipeline facility operator or owner and would provide the operator or owner injunctive relief against the constructor.

A constructor violating the statute would be liable to the owner or operator of a pipeline facility for damages to the facility proximately caused by the violation, including any liability the owner or operator would incur as a result of the violation. Liability would attach only if violation of the statute caused the damage.

CSHB 951 would provide for a suit for injunctive relief to prevent or abate the violation. It could be brought by the owner or operator, the attorney general, or the county attorney for the county in which the pipeline facility was located. The court with jurisdiction over the suit would have the authority to grant any prohibitory or mandatory injunction the facts warranted, including a temporary restraining order, temporary injunction, or permanent injunction.

Also, the bill would require a constructor to pay the "reasonable, necessary and documented cost," rather than "the cost," of changes or improvements necessary to protect the public or pipeline facility if the operator found that construction would result in risk.

The bill would amend sections 756.103, Subchapter G, and 756.123, Subchapter H, and add sections 756.104, 756.105, 756.124 and 756.125, in exactly the same manner, depending on enactment of legislation making nonsubstantive additions and corrections to eliminate the duplicate language in current law.

The 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, 2005, and would apply only to conduct that occurs on or after the effective date.

**SUPPORTERS
SAY:**

CSHB 951 would help prevent constructors from injuring themselves, others, or the pipeline facilities. Construction around pipelines is very dangerous, with more than 75 percent of accidents involving pipelines attributed to third parties generally not complying with the safety requirements of current law. HB 1834 enacted last session to regulate construction near pipelines has no enforcement mechanisms, which this bill would provide. The mechanisms provided in the bill are similar to those in ch. 752 of the Health and Safety Code concerning activities around high-voltage power lines.

It is difficult for pipeline operators to maintain safety and regulation of pipelines if construction has occurred over the easement or right-of-way. The bill would help operators stop any dangerous construction that may be occurring and would allow them to hold the constructor civilly liable for any damages resulting from the construction.

Also, by requiring constructors to pay only "reasonable, necessary, and documented" costs, rather than any costs, from improvements or fortifications required to protect the pipeline and the public, the bill would prevent possible unwarranted financial burden on constructors, as well potential abuse by the operators.

Extensive requirements about posting notices and safety markers around pipeline easements and rights-of-way are in place, so constructors should be well notified of the pipelines.

**OPPONENTS
SAY:**

The bill should include an intent element. If a constructor took necessary means to check for the presence of a pipeline easement or right-of-way, or had no notice that such were in place, that constructor should not be subject to the same penalties as someone with the intent not to notify the operator.

The notification system in place is not very effective and needs significant improvement. In many cases, constructors have no way of knowing if they are constructing on a pipeline easement or right-of-way.

Current law does not clearly define what types of construction would or would not require notification to pipeline facility operators. If something as small as a deer blind would be prevented from being constructed without notification, the bill would go too far.

NOTES:

The committee substitute revised the original bill by removing a criminal offense provision. It also would require a constructor to pay reasonable, necessary and documented costs to the operator of the pipeline facility if it were determined that construction would increase risk.