

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 789 CS

Damage Prevention and Safety of Underground Facilities

SPONSOR(S): Murzin

TIED BILLS: None

IDEN./SIM. BILLS: CS/SB 1394

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Utilities & Telecommunications Committee	13 Y, 0 N, w/CS	Holt	Holt
2) Civil Justice Committee	7 Y, 0 N, w/CS	Blalock	Bond
3) Finance & Tax Committee	8 Y, 0 N, w/CS	Noriega	Diez-Arguelles
4) Commerce Council			
5)			

SUMMARY ANALYSIS

The Underground Facility Damage Prevention and Safety Act provides access for excavating contractors and the public to provide notification to the free-access notification system established by the creation of the Sunshine State One-Call of Florida, Inc., (SSOCOF) of their intent to engage in excavation or demolition.

This bill amends the Underground Facility Damage Prevention and Safety Act as follows:

- Reduces the number of days that an excavator must provide certain information before beginning any excavation or demolition, from "not less than 2 or more than 5" business days to "not less than 2" business days. This bill also provides an exception to this timing requirement for excavation beneath the waters of the state. This bill increases the number of days the information provided by the excavator is valid from 20 to 30 calendar days;
- Revises notification requirements for excavators;
- Provides procedures for when a member operator receives notification from the system that excavation or demolition is planned in an area in proximity to an underground facility;
- Provides that SSOCOF does not have a duty and is not permitted to locate or mark underground facilities, and exempts SSOCOF from liability for the failure of member operators to comply with the act;
- Revises the non-criminal infraction section to:
 - Provide that court cost be added to the civil penalty;
 - Provide that when a citation is issued by a local government entity, 80 percent of the penalty is to be directed to that local government entity; and
 - Provide that SSOCOF may retain legal representation regarding citations issued under this act; and
- Provides additional exemptions for certain pest control services for certain situations where mechanized equipment is not used.

This bill has an insignificant positive fiscal impact on local government revenues.

The bill has an effective date of October 1, 2006.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government -- This bill increases the regulation of procedures that member operators and excavators must follow when providing information to and receiving notification from the free-access notification system.

Promote personal responsibility -- This bill decreases personal accountability by providing that SSOCOF is not liable for failure of a member operator to comply with the requirements of the Underground Facility Damage Prevention and Safety Act.

B. EFFECT OF PROPOSED CHANGES:

Background

Chapter 93-240, L.O.F., created the "Underground Facility Damage Prevention and Safety Act" (act), and is codified at ch. 556, F.S. The purpose of this act is to:

- Aid the public by preventing injury to persons or property and the interruption of services resulting from damage to an underground facility caused by excavation or demolition operations;
- Create a not-for-profit corporation comprised of operators of underground facilities in Florida to administer the provisions of this act;
- Fund the cost of administration through contributions from the member operators for services provided to the member operators and from charges made to others for services requested and provided, such as record searches, education or training, and damage prevention activities;
- Reserve to the state the power to regulate any subject matter specifically addressed in this act; and
- Permit any local law enforcement officer or permitting agency inspector to enforce this act without the need to incorporate the provisions of this act into any local code or ordinance.

This act established the statewide free-access notification system, which is a single toll-free number provided for persons to give notification of and intent to engage in excavation or demolition. The act also created a not-for-profit corporation, Sunshine State One-Call of Florida, Inc. (SSOCOF), established pursuant to s. 556.101(3)(c), F.S., and is comprised of Florida underground facilities operators (member operators), which administer the chapter provisions and maintain the free-access notification system (system). The cost of the system is funded "entirely and exclusively" by assessed contributions from the member operators. The act requires operators of underground facilities in the state of Florida to be a member of SSOCOF and must use and participate in the system. Excavators planning to excavate or demolish are required to provide notice and information to the system so that they do not damage or destroy any underground facilities during the excavation or demolition. Once notice is given, member operators must follow certain procedures if the area being excavated or demolished is in conflict with an area where a member operator has an underground facility.

Effect of the Bill

Legislative Intent and Purpose of the Underground Facility Damage Prevention and Safety Act

Section 556.101, F.S., provides for the legislative intent and purpose of the Underground Facility Damage Prevention and Safety Act.

The bill amends s. 556.101(2), F.S., pertaining to the legislative intent, to clarify that the SSOCOF is only the system administrator and is not required or permitted to locate or mark any underground facilities.

This bill also amends s. 556.101(3), F.S., pertaining to the purpose of the act, by deleting the phrase "permitting agency inspector" in paragraph (e) of s. 556.101(3), F.S., and provides that at the local level any law enforcement officer, government code inspector, or code enforcement officer is permitted to enforce the provisions of the act without the need to incorporate these changes into any local code or ordinance. The bill also provides that the purpose of the act is to foster awareness of federal laws and regulations that promote safety with respect to underground facilities by requiring and facilitating the advance notice of activities by those who engage in excavation or demolition operations.

Small Municipality Exception

Section 556.102(8), F.S., provides that a member operator is any person who furnishes or transports materials or services by means of an underground facility, except a small municipality that has elected not to participate in the one call notification system.¹

Section 556.103(1), F.S., provides that each operator of an underground facility in Florida must be a member of SSOCOF, and must use and participate in the free-access notification system. There is an exception to this requirement for small cities, which may elect by January 1, 1998, not to participate in the system until January 1, 2003.

Section 556.104, F.S., provides that the free-access notification system is maintained by SSOCOF. Any person who furnishes or transports materials or services by means of an underground facility in this state must participate as a member operator of the system, "except that a small city may elect not to participate in the system."

The exception for small cities provided in ch. 556, F.S., expired January 1, 2003. This bill amends ss. 556.102(8), 556.103(1), and 556.104, F.S., to remove the exception for small municipalities from ch. 556, F.S.

Requirement that Developer Provide Information through the Free-Access Notification System

Section 556.105(1), F.S., provides that an excavator must provide certain information through the Free-Access Notification System (system) not less than 2 or more than 5 full business days before beginning any excavation or demolition. The excavator must provide the information by providing notification through the system. Under current law, the information provided by the excavator is valid for 20 calendar days after each date the information is provided to the system.

This bill amends s. 556.105(1), F.S., in the following ways:

- An excavator must provide the required information through the system not less than 2 full business days before beginning excavation or demolition;
- The excavator, along with the other information required by statute, must provide a valid electronic address, if available, to facilitate a positive response by the system;
- Provides an exception to this provision for excavation beneath the waters of the state; and
- Provides that the information provided by an excavator is valid for 30 calendar days after the date such information is provided to the system.

¹ S. 120.52(16), F.S., defines "small city" as any municipality that has an unincarcerated population of 10,000 or less according to the most recent decennial census.

Procedures of the System for When an Excavator Provides Notice

Section 556.105(3), F.S., provides that the system must provide persons who provided notification through the system with the names of the member operators who will be advised of the notification and a notification number that specifies the date and time of the notification.

This bill creates s. 556.105(4), F.S., to provide that the notification number provided to the excavator must be provided to any law enforcement officer, government code inspector, or code enforcement officer upon request.

This bill also provides that an excavator "may" instead of "shall" not demolish in an area described in the notice provided by an excavator, until all member operator underground facilities have been marked and located, or removed. This provision appears to give the excavator discretion to demolish or not demolish in areas not marked at the noticed site.

This bill also amends s. 556.105, F.S., by renumbering and correcting cross-references in ss. 556.105(4) through 556.105(11), F.S.

Required Procedures for Member Operators

Current law provides that after an excavator has provided information regarding excavation or demolition through the system, the system will provide notification to all member operators within the defined area of the proposed excavation or demolition. If a member operator determines that a proposed excavation or demolition is in proximity to or in conflict with an underground facility of the member operator, then the member operator must follow specified notice procedures.

This bill creates s. 556.105(9), F.S., to provide that after receiving notification from the system, a member operator must provide a positive response to the system within 2 full business days, or 10 full business days for an underwater excavation, indicating the status of operations to protect the facility.

This bill deletes s. 556.105(8), F.S., providing that a member operator which determines that the excavation or demolition is not near an existing underground facility of the member operator, notify the excavator within 2 full business days after the time of the notification to the system that the excavation or demolition area is clear. This bill also removes obsolete language in s. 556.105(8)(b), F.S., related to a positive response system being implemented by January 1, 2004.

Positive-Response Communication between Operators and Excavators

This bill creates s. 556.105(9)(b), F.S., to provide that the system must establish and maintain a process to facilitate a positive-response communication between member operators and excavators. This bill provides that the system is exempt from this requirement when an excavator does not provide a valid electronic address to facilitate a positive response by the system.

This bill also creates s. 556.105(9)(c), F.S., to provide that an excavator must verify the system's positive responses before beginning excavation. If an excavator knows that an existing underground facility of a member operator is in the area, the excavator must contact the member operator if the facility is not marked and a positive response has not been received by the system.

Uniform Color Code for Utilities

This bill amends s. 556.105(10), F.S., to provide that a member operator must use the "Uniform Color Code for Utilities" of the American Public Works Association when marking the horizontal route of any underground facility of the operator.

Liability of the Member Operator, Excavator, and System

Section 556.106, F.S., provides for the liability of the member operator, excavator, and system. Section 556.106(2), F.S., provides that if a person violates s. 556.105, F.S., and performs an excavation or demolition that damages an underground facility of a member operator, there is a rebuttable presumption that the person was negligent. If found liable, the person is liable for the total sum of the losses to all member operators involved. Any damages for loss of revenue and loss of use "shall" not exceed \$500,000 per affected underground facility, except that revenues lost by a governmental member operator whose revenues are used to support payments on principal and interest on bonds "shall" not be limited. If the excavator is found liable for breach of duty, any damage for loss of revenue and loss of use "shall" not exceed \$500,000 per affected underground facility, except that revenues lost by a governmental member operator whose revenues are used to support payments on bonds "shall" not be limited. Section 556.106(7), F.S., also provides that an excavator who performs any excavation with hand tools under s. 556.108(5), F.S.,² is liable for any damage to any operator's underground facilities damaged during such excavation.

The bill deletes the term "shall" throughout both s. 556.106(2), F.S., and replaces it with "may." The bill also deletes paragraph (e) of s. 556.106(2), F.S., to remove obsolete language related to non-member small cities. The bill adds subsection (6) to provide that SSOCOF does not have a duty to mark or locate underground facilities, and a right of recovery does not exist against the SSOCOF for failing to do so. This bill clarifies that SSOCOF is not liable for the failure of a member operator to comply with the requirements of this chapter. This bill also amends s. 556.106(7), F.S., to provide that an excavator using hand tools under s. 556.108(4)(c), F.S.,³ or s. 556.108(5), F.S., is liable for any damage to any operator's underground facilities damaged during such excavation.

Non-criminal Violations of the Act

Section 556.107, F.S., pertains to violations of the act.

The bill amends s. 556.107, F.S., to correct cross references. It further deletes the term "permitting agency inspector" and replaces it with "government code inspector" and "code enforcement officer." These two new terms, along with the current language "local or state law enforcement officer," specify the enforcement for this chapter.

Civil Penalties

Section 556.107(1)(b), F.S., provides that citations may be issued to any employee of the excavator or member operator who is directly involved in the noncriminal infraction. Section 556.107(1)(c), F.S., provides that any excavator or member operator who commits a noncriminal infraction provided under this section may be required to appear before the county court. The civil penalty for any such infraction is \$250, except as otherwise provided in this section.

This bill amends s. 556.107(1)(b), F.S., to provide that citations "shall" be "hand-delivered" to any employee of the excavator or member operator who is involved in the noncriminal infraction. This bill also provides that the citation shall be issued in the name of the excavator or member operator, whichever is applicable. This bill also amends s. 556.107(1)(c), F.S., to add court costs to the civil penalty. The bill also provides that if a local law enforcement officer, local government code inspector, or code enforcement officer issues the citation, an 80/20 split of the collected penalty occurs. This bill takes 80 percent of the \$250 fine that would go into the fine and forfeiture fund, and authorizes the clerk to distribute it to the local government entity whose employee issued the citation. The remaining

² Section 556.108(5), F.S., provides an exemption to the notification requirements pursuant to the Act, however an excavator is still liable for damage caused.

³ Section 556.108(4)(c), F.S., is created by this bill and is an exemption for any excavation of 18 inches or less for locating, repairing, connecting, adjusting, or routine maintenance of a private or public underground facility by an excavator, if the excavator is performing such work for the current owner or future owner of the underground facility and if mechanized equipment is not used.

20 percent is retained by the clerk of court for administrative costs, in addition to other court costs, and shall be distributed into the fine and forfeiture fund as required by s. 142.01, F.S.⁴ In addition, if a state law enforcement officer issues the citation, the amount collected by the clerk shall be retained by the clerk for deposit into the fine and forfeiture fund.

The bill amends ss. 556.107(d), (e), and (f), F.S., to add court costs to the civil penalty provided under this section.

This bill amends s. 556.107(e), F.S., to provide that payment of the civil penalty and court costs are due within 30 days instead of 10 days.

The bill creates paragraph (i) in s. 556.107(1), F.S., to provide that the SSOCOF may, at its own cost, retain legal representation as assistance in county court proceedings pertaining to citations issued under this section. SSOCOF may also appear in infraction cases appealed to the circuit court, and the appellant in such appeals shall timely notify SSOCOF of appeals under this section.

Misdemeanors

Section 556.107(2), F.S., provides that any person who knowingly and willfully removes or destroys the valid stakes or other valid physical markings used to mark the horizontal route of an underground facility commits a misdemeanor of the second degree. For purposes of this section, the stakes and markings are valid for 20 calendar days.

This bill amends s. 556.107(2), F.S., to extend the validity of stakes and markings from 20 days to 30 days.

Exemptions

Section 556.108, F.S., provides several exemptions to the notification requirements under the act. Section 556.108(1), F.S., provides an exemption for any excavation or demolition performed by the owner of single-family residential property. Section 556.108(4), F.S., provides an exemption for any excavation of 18 inches or less for surveying on public or private land by surveyors or mappers and certain maintenance activities performed by a state agency.

This bill amends s. 556.108(1), F.S., to provide an exception to the exemption for owners of a single-family residential property. This bill provides that the exemption will not apply to "property that is subdivided or is to be subdivided into more than one single-family residential property." The bill amends s. 556.108(4)(a), F.S., to provide that pest control services are included in the exemption for any excavation of 18 inches or less. This bill creates s. 556.108(4)(c), F.S., to provide another exemption under that subsection for "locating, repairing, connecting, adjusting, or routine maintenance of a private or public underground facility by an excavator, if the excavator is performing such work for the current owner or future owner of the underground facility, and if mechanized equipment is not used."

Applicability to Existing Law

Section 556.111(3), F.S., provides that the act does not preempt a governmental member operator from reasonable regulation of its right-of-way.

This bill amends s. 556.111(3), F.S., to clarify that the provisions of this subsection do not relieve governmental entities from other provisions of the act, specifically the responsibility to provide notice of

⁴ 142.01 Fine and forfeiture fund; clerk of the circuit court.—There shall be established by the clerk of the circuit court in each county of this state a separate fund to be known as the fine and forfeiture fund for use by the clerk of the circuit court in performing court-related functions.

excavation, mark underground facilities, or comply with other specific requirements of the statutory scheme to prevent damage to underground facilities.

C. SECTION DIRECTORY:

- Section 1. Amends s. 556.101, F.S., pertaining to legislative intent and the purpose of the act.
- Section 2. Amends s. 556.102(8), F.S., which addresses the definition of “member operator,” by removing language pertaining to small municipalities.
- Section 3. Amends s. 556.103(1), F.S., to remove language pertaining to small cities being able to opt out of using and participating in the free-access notification system. Removes obsolete language providing that the not-for-profit corporation be formed by June 1, 1993.
- Section 4. Amends s. 556.104, F.S., to remove language pertaining to small cities being able to opt out of using and participating in the free-access notification system.
- Section 5. Amends s. 556.105, F.S., to revise procedures for an excavator who is providing information to the system before beginning any excavation or demolition, and procedures for member operators when they receive notification from the system.
- Section 6. Amends s. 556.106, F.S., relating to the liability of the member operator, excavator, and system, and removes obsolete language pertaining to non-member small cities.
- Section 7. Amends s. 556.107, F.S., relating to violations under the act.
- Section 8. Amends s. 556.108, F.S., relating to exemptions to the notification requirements.
- Section 9. Amends s. 556.111(3), F.S., relating to applicability to existing law.
- Section 10. Amends s. 337.401(3), F.S., correcting a cross-reference relating to use of right-of-way for utilities subject to regulation, permit, and fees.
- Section 11. Provides an effective date of October 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:
None.
2. Expenditures:
None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:
This bill will have an insignificant positive fiscal impact on local government revenues from the addition of court costs to the fines imposed under s. 556.107, F.S. SEE FISCAL COMMENTS.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

This bill will have an indeterminate impact on local governments due to the provisions of the bill that transfer 80 percent of fine revenues from the clerk's fine and forfeiture trust fund to the local government that employs the person issuing the citation.

The total applicable court costs for the violations addressed in this bill are \$5 per violation. Section 938.01, F.S., requires every person convicted for violation of a state penal or criminal statute or convicted for violation of a municipal or county ordinance to pay \$3 as a court cost. This amount is deposited into the Additional Court Cost Clearing Trust Fund.

Also, s. 938.15, F.S., states that in addition to the costs provided for in s. 938.01, F.S., municipalities and counties may assess an additional \$2 for expenditures for criminal justice education degree programs and training courses for local funding.

SSOCOF officials have indicated that their enforcement responsibilities are fulfilled by off-duty personnel in 16 Florida counties. Since January 2005, 27 citations have been issued by the SSOCOF resulting in total fines of less than \$7,000. However, SSOCOF officials also indicate that the number of citations may increase because there is money in their budget to allow for the hiring of additional off-duty personnel to enforce the provisions of chapter 556, F.S.

In addition, SSOCOF officials have stated that a number of Florida counties have hired their own full-time personnel for enforcement purposes. Notably, approximately 215 citations have been issued in Palm Beach County during the past two years, resulting in a fiscal impact of less than \$50,000.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds. The bill does not reduce the percentage of a state tax shared with counties or municipalities. This bill does not reduce the authority that municipalities have to raise revenue.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On February 21, 2006, the Committee on Utilities and Telecommunications adopted two amendments. The amendments made the following revisions to the bill:

- Provided that the civil penalty collected from citations issued by a state law enforcement officer shall be retained by the clerk of court and deposited into the fine and forfeiture fund established pursuant to s. 142.01, F.S.;
- For any person charged with a noncriminal infraction under paragraph (a) of s. 556.107(1), F.S., unless required to appear before the county court, the amendment increased the timeframe for payment from 10 days to 30 days;
- Created a notification exemption for services performed by a pest control licensee under chapter 482, F.S., for excavation of 18 inches or less if mechanized equipment is not used; and
- Created a notification exemption for any excavation or related maintenance activity by a water control district created pursuant to chapter 298, F.S., or special act, provided specific criteria are met.

The bill was then reported favorably with a committee substitute.

On March 15, 2006, the Civil Justice Committee adopted six amendments to this bill. The amendments made the following revisions to the bill:

- Provided that the purpose of the Underground Facility Damage Prevention and Safety Act is to foster the awareness of federal laws and regulations that promote safety with respect to underground facilities by requiring advance notice of activities by those who engage in excavation or demolition operations;
- Provided that an excavator who performs any excavation with hand tools under s. 556.1108(4)(c), F.S., is liable for any damage to any operator's underground facilities damaged during such excavation;
- Required that citations must be hand-delivered to any employee of the excavator or member operator who is involved in the non-criminal infraction. Also, requires that the citation must be issued in the name of the excavator or member operator;
- Removed the "fees" from the civil penalty for any infraction under s. 556.107(a), F.S.;
- Provided that the exemption for excavations performed for owners of single-family residences does not apply to excavations in connection with subdivisions involving multiple single-family residences;
- Provided that the exemption to the notification requirements will not apply if the excavation is 18 inches or less and for locating, repairing, connecting, adjusting, or routine maintenance of a private or public underground facility, "if the excavator performing such work for the current owner or future owner of the underground facility." Also, replaces "public utility facility" with "public underground facility"; and
- Removed the exemption for any excavation or related maintenance activity by a water control district created under ch. 298, F.S., or by special act if certain conditions are met.

The bill was then reported favorably with a committee substitute.

On March 31, 2006, the Finance and Tax Committee adopted one amendment to the bill. This amendment clarified that authority over right-of-way does not relieve local governmental member operators of the requirements of chapter 556, F.S., specifically the responsibility to provide notice of excavation, mark underground facilities, or comply with other specific requirements of the statutory scheme to prevent damage to underground facilities.

The bill was then reported favorably with a committee substitute, and this analysis reflects the changes contained in the amendment adopted by the Finance and Tax Committee.