

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Judiciary Committee

BILL: CS/CS/SB 982

INTRODUCER: Judiciary Committee, Communications, Energy, and Public Utilities Committee, and Senator Bennett

SUBJECT: Underground Facility Damage Prevention and Safety

DATE: April 9, 2010

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Wiehle	Caldwell	CU	Fav/CS
2.	Howes	Yeatman	CA	Fav/2 amendments
3.	Maclure	Maclure	JU	Fav/CS
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

- | | | |
|------------------------------|--|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="checked" type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

This bill revises provisions of the Underground Facility Damage Prevention and Safety Act (act), which currently creates a system by which persons intending to engage in excavation or demolition activities can provide notice of this intent, to allow operators of underground facilities the opportunity to identify and locate their underground facilities. Among other changes, the bill:

- Prohibits local governments from enacting ordinances or rules that conflict with the act;
- Establishes a program through the Division of Administrative Hearings for evaluating allegations of damage caused to high-priority subsurface installations;
- Provides for low-impact marking of underground facilities;
- Increases the amount of the civil penalty that may be imposed for a noncriminal infraction to \$500 from the current level of \$250;
- Requires the clerk of court to report annually on infractions under the act; and
- Requires Sunshine State One-Call of Florida, Inc., to establish a voluntary alternative dispute resolution program to resolve disputes arising from excavation activities.

With respect to incidents involving high-priority subsurface installations, the bill provides:

- Definitions of the terms “high-priority subsurface installation” and “incident”;
- Notice responsibilities of both excavators and operators;
- Procedures for reporting an alleged incident;
- A hearing and determination process related to the allegations, to be conducted by the Division of Administrative Hearings pursuant to a contract between the system and the division;
- Penalties and procedures.

The bill substantially amends the following sections of the Florida Statutes: 556.101, 556.103, 556.105, 556.106, 556.107, 556.109, and 556.110. It also creates sections 556.114, 556.115, and 556.116, Florida Statutes.

II. Present Situation:

The Underground Facility Damage Prevention and Safety Act, codified in ch. 556, F.S., creates a system by which persons intending to engage in excavation or demolition activities can provide notice of this intent, to allow operators of underground facilities the opportunity to identify and locate their underground facilities, thereby preventing damage and injury.¹ The notification system is operated by a statutorily created not-for-profit corporation, Sunshine State One-Call of Florida, Inc. (One-Call). All operators of underground facilities within the state are members of One-Call and are required to use its system.

Section 556.105, F.S., sets out the procedures for the notification and marking system. An excavator is required to provide specified site-identification and excavation-related information through the system not less than two full business days before beginning any excavation or demolition. This information is valid for a 30-day period. The system “promptly” notifies all member operators that have facilities in the defined area of the proposed excavation or demolition, other than member operators with state-owned underground facilities located within the right-of-way of a state highway, which need not be notified of excavation or demolition activities and are under no obligation to mark or locate the facilities. The following provisions determine the marking processes required:

- When an excavation site cannot be described in the notice information with sufficient particularity to enable the member operator to ascertain the excavation site, and if the excavator and member operator have not mutually agreed otherwise, the excavator must premark the proposed area of the excavation before a member operator is required to identify the horizontal route of its underground facilities in the proximity of any excavation.
- If, except in the case of a facility beneath the waters of the state, 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, the member operator must, within two full business days after the excavator provides notice, identify the horizontal route by marking to within 24 inches from the outer edge of either side of the underground facility by the use of stakes, paint, flags, or other suitable means. If the member operator is

¹ Section 556.101(2), F.S.

unable to respond within such time, the member operator must communicate with the person making the request and negotiate a new schedule and time that is agreeable to, and should not unreasonably delay, the excavator.

- If an underground facility is located beneath the waters of the state and the member operator of that facility determines that a proposed excavation is in proximity to or in conflict with the underground facility, the member operator must identify the estimated horizontal route of the underground facility, within 10 business days, using marking buoys or other suitable devices, unless directed otherwise by an agency having jurisdiction over the waters of the state under which the member operator's underground facility is located.²

Section 556.106, F.S., provides for liability of excavators and member operators. In three different places – paragraph (2)(a), paragraph (2)(c), and subsection (3) – the statute provides that any liability of the state, its agencies and its subdivisions which arises out of this chapter is subject to the provisions of s. 768.28, F.S. Briefly stated, that statute limits the liability of the state, its agencies, and its subdivisions to \$100,000 to any one person, or a total of \$200,000 per incident.

Section 556.107, F.S., provides for penalties for violations of the chapter. It provides that violations of the chapter are noncriminal infractions, subject to a civil penalty of \$250 plus court costs. Any excavator or member operator who commits a noncriminal infraction may be issued a citation by any local or state law enforcement officer, government code inspector, or code enforcement officer. A person receiving a citation may either post a bond in an amount equal to the applicable civil penalty plus court costs or sign a citation indicating a promise to appear before the county court. Unless required to appear before the county court, the person may either pay the civil penalty plus court costs in lieu of appearance or forfeit bond, if a bond has been posted, by not appearing at the designated time and location. Any person who either elects to appear before the county court or who is required to appear is deemed to have waived the limitations on the civil penalty, and, if an infraction has been proven, the court may impose a civil penalty not to exceed \$5,000 plus court costs.

Section 556.109, F.S., provides that the chapter's requirements do not apply to making an excavation or demolition during an emergency, provided the system or the member operator was notified at the earliest opportunity and all reasonable precautions had been taken to protect any underground facility. For these purposes, "emergency" means any condition constituting a clear and present danger to life or property; a situation caused by the escape of any substance transported by means of an underground facility; any interruption of vital public service or communication caused by any break or defect in a member operator's underground facility; or, in the case of the State Highway System or streets or roads maintained by a political subdivision or underground facilities owned, operated, or maintained by a political subdivision, if the use of such highways, streets, roads, or underground facilities is, in the sole judgment of the Department of Highway Safety and Motor Vehicles, the Department of Transportation, or such political subdivision, impaired by an unforeseen occurrence which necessitates repair beginning immediately after such occurrence.³

² Section 556.105(5), F.S.

³ Section 556.109, F.S.

III. Effect of Proposed Changes:

This bill substantially revises provisions of the Underground Facility Damage Prevention and Safety Act (act), ch. 556, F.S. Among other changes, the bill:

- Prohibits local governments from enacting ordinances or rules that conflict with the act;
- Establishes a program through the Division of Administrative Hearings for evaluating allegations of damage caused to high-priority subsurface installations;
- Provides for low-impact marking of underground facilities;
- Increases the amount of the civil penalty that may be imposed for a noncriminal infraction to \$500 from the current level of \$250;
- Requires the clerk of court to report annually on infractions under the act; and
- Requires Sunshine State One-Call of Florida, Inc., to establish a voluntary alternative dispute resolution program to resolve disputes arising from excavation activities.

Section 1 amends s. 556.101, F.S., to prohibit any type of local government from adopting ordinances or rules that conflict with ch. 556, F.S., which is the Underground Facility Damage Prevention and Safety Act, or that:

- Require operators of underground facilities to obtain local permits in order to identify underground facilities;
- Require premarking or marking;
- Specify the types of paint or other marking devices used to identify underground facilities; or
- Require removal of marks.

Section 2 amends s. 556.103, F.S., to require that annual reports submitted by the board of governors of One-Call include a summary of reports to the system from the clerks of court. (Section 5 of the bill creates a requirement that each clerk of court submit an annual report to One-Call.)

Section 3 amends s. 556.105, F.S., relating to procedures for the notification and marking system, to:

- Require notice of an anticipated excavation or demolition that is beneath state waters not less than 10 full business days before beginning the excavation or demolition;
- Restrict member operators' use of system information solely to the purposes of ch. 5556, F.S., and to prohibit use for marketing or sales purposes;
- Delete language requiring a study and report be done on or before February 1, 2007;
- Delete existing provisions for premarking of an excavation site that cannot be described in the notice information with sufficient particularity to enable the member operator to ascertain the excavation site;
- Provides that if, either before or during excavation or demolition, the horizontal route of an underwater facility is "inadequately documented," the excavator must stop excavation or demolition activities in the vicinity of the facility and notify the system to have the route adequately documented; and

- Make conforming changes.

Section 4 amends s. 556.106, F.S., which provides for liability of excavators and member operators. Currently the statute provides in three different places – paragraph (2)(a), paragraph (2)(c), and subsection (3) – that any liability of the state and its agencies and its subdivisions which arises out of this chapter is subject to the provisions of s. 768.28, F.S., which, briefly stated, limits the liability of the state and its agencies and subdivisions to \$100,000 to any one person or a total of \$200,000 per incident. The bill removes these provisions and creates a new subsection (8) with a similar provision.

Section 5 amends s. 556.107, F.S., which provides for penalties for violations of the chapter. First, the section creates two new noncriminal infractions: 1) for falsely notifying the system of an emergency situation or condition (prohibited in section 6 of the bill) and 2) for failure to follow low-impact marking requirements (created in section 8 of the bill). Second, the bill increases the amount of the civil penalty that may be imposed for a noncriminal infraction to \$500 from the current level of \$250. Third, the bill requires that any person cited for an infraction post a bond, eliminating the option of signing a citation indicating a promise to appear before the county court. Fourth, the bill creates a requirement that by March 31 of each year each clerk of court must submit a report to One-Call listing each violation notice that has been filed in that county during the preceding calendar year. The report must state the name and address of the member or excavator who committed each infraction and indicate whether or not the civil penalty for the infraction was paid.

Section 6 amends s. 556.109, F.S., which provides an exemption from the requirements of the chapter for excavations done during an emergency, as defined in the statute. The bill provides that an excavator shall not notify the system that there is an emergency unless the excavator reasonably believes that the intended excavation or demolition is due to a situation or condition as set forth in the definition of “emergency” in subsection (1).

Section 7 amends s. 556.110, F.S., which provides that member operators are to share proportionately in the cost of operating the system through monthly assessments, but exempts any member that receives fewer than 10 notifications in any month from that month’s assessments. The bill deletes the exemption.

Section 8 creates s. 556.114, F.S., to provide for low-impact marking of underground facilities. In a notice of proposed excavation, an excavator is to identify only the area that will be excavated during the 30-calendar-day period that the information in the notice is considered valid under s. 556.105(1)(c), F.S. When an excavator has not completed the noticed excavation within that time, the excavator must provide a subsequent notice to continue with the excavation, and the subsequent notice is to identify only the remaining area to be excavated. When an excavation site cannot be described in the notice information with sufficient particularity to enable the member operator to ascertain the excavation site, and if the excavator and member operator have not mutually agreed otherwise, the excavator must premark the proposed area of the excavation before a member operator is required to identify the horizontal route of its underground facilities in the proximity of any excavation. Premarking is to be done using flags or stakes or temporary, non-permanent paint or other industry-accepted low-impact marking. However, premarking is not required when the premarking could reasonably interfere with traffic

or pedestrian control. Member operators must identify the horizontal route of underground facilities as set forth in s. 556.105(1), F.S. Any horizontal-route identification marker must be in a color identified in the Uniform Color Code for Utilities. One-Call must establish an educational program for the purpose of informing excavators and member operators about low-impact marking practices.

Section 9 creates s. 556.115, F.S., to require One-Call to create a voluntary alternative dispute resolution program. The program must be available to all member operators, excavators, and other stakeholders, such as locators, utility service users, and governmental or quasi-governmental entities, for purposes of resolving disputes arising from excavation activities, including, but not limited to, loss of services, down time, delays, loss of use of facilities during restoration or replacement, and similar economic disruptions, exclusive of penalties imposed under other provisions of this act. The program must include mediation, arbitration, or other appropriate processes, including the use of the services of the Division of Administrative Hearings. The costs of using the program are to be borne by the voluntary users, and the voluntary users are to choose the form of alternative dispute resolution to be used. If arbitration is used, the users shall decide whether the arbitration will be binding. Unless binding arbitration is the chosen method of alternative dispute resolution, the users or any one of such users may end the process at any time and exercise the right to proceed in a court of competent jurisdiction or before the Division of Administrative Hearings. This section does not change the basis for civil liability for damages.

Section 10 creates s. 556.116, F.S. to provide for excavations near high-priority subsurface installations and to provide for resolving incidents involving these installations. The bill provides the following definitions:

- “High-priority subsurface installation” means an underground gas transmission or gas distribution pipeline, an underground pipeline used to transport gasoline, jet fuel, or any other refined petroleum product or hazardous or highly volatile liquid, such as anhydrous ammonia or carbon dioxide, if the pipeline is deemed to be critical by the operator of the pipeline and is identified as a high-priority subsurface installation to an excavator who has provided a notice of intent to excavate pursuant to s. 556.105(1), F.S., or would have been identified as a high-priority subsurface installation except for the excavator's failure to give proper notice of intent to excavate.
- “Incident” means an event that involves damage to a high-priority subsurface installation that has been identified as such by the operator according to the notification procedures set forth in subsection (2), and that:
 - Results in death or serious bodily injury requiring inpatient hospitalization, or
 - Results in property damage, including service-restoration costs, in an amount in excess of \$50,000 or interruption of service to 2,500 or more customers.

When an operator proposes to excavate or demolish within 15 feet of the horizontal route of an underground facility that has been identified as a high-priority subsurface installation, the operator of the facility must mark the horizontal route of the facility in the usual manner and also must, within two full business days, or 10 such days for an underwater excavation, notify the excavator that the facility is a high-priority subsurface installation. If the member operator provides such timely notice, the excavator must notify the operator of the planned excavation

start date and time before beginning excavation. If the member operator does not provide timely notice, the excavator may proceed without this additional notice to the operator. The exemptions stated in s. 556.108, F.S., apply to the notification requirements in this subsection.

An alleged commission of an infraction listed in s. 556.107(1), F.S., which results in an incident must be reported to the system by a member operator or an excavator within 24 hours after learning of the alleged occurrence of an incident. Upon receipt of an allegation that an incident has occurred, the system must transmit an incident report to the Division of Administrative Hearings (the division) and contract with the division to conduct a hearing to determine whether an incident has occurred, and, if so, whether a violation constituting an infraction was a proximate cause of the incident. The contract must include provisions for the system to reimburse the division for any costs incurred by the division for court reporters, transcript preparation, travel, facility rental, and other customary hearing costs, in the manner set forth in s. 120.65(11), F.S.

The division has jurisdiction to determine the facts and law concerning an alleged incident and may impose a fine against a violator in an amount not to exceed \$50,000 if the violation was a proximate cause of the incident. However, if a state agency or political subdivision caused the incident, the state agency or political subdivision may not be fined in an amount in excess of \$10,000. A fine imposed by the division is in addition to any amount payable as a result of a citation relating to the violation.

A fine against an excavator or a member operator imposed under this subsection is to be paid to the system, which must use the collected fines to satisfy the costs incurred by the system for any proceedings under this section. To the extent there are any funds remaining, the system may use the funds exclusively for damage-prevention education.

This section does not change the basis for civil liability, and the findings and results of a hearing under this section may not be used as evidence of liability in any civil action.

The section also provides procedural requirements. The division must issue and serve on all original parties an initial order that assigns the case to a specific administrative law judge and requests information regarding scheduling the final hearing within five business days after the division receives a petition or request for hearing. The original parties in the proceeding include all excavators and member operators identified by the system as being involved in the alleged incident. The final hearing must be conducted within 60 days after the date the petition or the request for a hearing is filed with the division.

Unless the parties agree otherwise, venue for the hearing is to be in the county in which the underground facility is located.

An intervenor in the proceeding must file a petition to intervene no later than 15 days before the final hearing. A person who has a substantial interest in the proceeding may intervene.

Motions are limited to a motion in opposition to the petition, motions requesting discovery, and a motion for continuance of the final hearing date.

All parties must attend a prehearing conference for the purpose of identifying the legal and factual issues to be considered, witnesses who may be called to testify, documentary evidence that will be offered, the range of penalties that may be imposed, and any other matter that would expedite resolution of the proceeding. The prehearing conference may be held by telephone conference call.

Not later than five days before the final hearing the parties must furnish to each other copies of documentary evidence and lists of witnesses who may testify at the final hearing.

All parties must have an opportunity to respond, to present evidence and argument on all issues involved, to conduct cross-examination and submit rebuttal evidence, and to be represented by counsel other qualified representative.

The bill specifies what is to be included in the record of the hearing. It requires that the division accurately and completely preserve all testimony in the proceeding and make a full or partial transcript available at no more than actual cost upon request by any party.

The administrative law judge must issue a final order within 30 days after the final hearing or the filing of the transcript thereof, whichever is later. The bill specifies what the final order must include. It provides that the final order constitutes final agency action subject to judicial review pursuant to s. 120.68, F.S.

Section 11 provides that the bill takes effect October 1, 2010.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

This bill initially falls under subsection (a) of section 18 of article VII of the Florida Constitution. Subsection (a) provides that counties and municipalities are not bound by general laws that require them to spend funds or to take action that requires the expenditure of funds unless certain exemptions or exceptions are met. The clerk of the court will incur costs in connection with preparing and submitting the annual report on violations required by the bill. However, the costs to be borne by the counties as a result of this legislation are not expected to exceed \$1.9 million; thus, this bill appears to be exempt from the requirements of section 18(a) of article VII.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

Disputes involving the Underground Facility Damage Prevention and Safety Act may be resolved more quickly and less expensively under the alternative dispute resolution program to be created under the bill.

The bill requires One-Call to create the voluntary alternative dispute resolution program. Although the costs of using the program, once established, will be borne by the voluntary users of the program, One-Call may experience costs related to developing and establishing the program.

The bill establishes a process through the Division of Administrative Hearings for resolving allegations of damage caused to a high-priority subsurface installation. A violator may be subject to a fine in an amount not to exceed \$50,000 if the violation was a proximate cause of the damage incident. A fine imposed by the division is in addition to any amount payable as a result of a citation relating to the violation. Fine revenues are to be paid to the system, which must use the collected fines to satisfy the costs incurred by the system for any proceedings. Funds remaining may be used exclusively for damage-prevention education.

The bill increases the amount of the civil penalty that may be imposed on excavators and operators for a noncriminal infraction to \$500 from the current level of \$250.

Current law provides that member operators are to share proportionately in the cost of operating the system through monthly assessments, but exempts any member that receives fewer than 10 notifications in any month from that month's assessments. The bill deletes the exemption.

C. Government Sector Impact:

Clerks of court will incur costs in connection with preparing and submitting the annual report on violations. The Florida Association of Court Clerks and Comptrollers reports that it is feasible to provide Sunshine State One-Call of Florida, Inc., with access to the Comprehensive Case Information System (CCIS), developed and implemented by the Florida clerks of the court, which is a secured Internet portal providing a single point of search for statewide court case information. Violations of the Underground Facility Damage Prevention and Safety Act currently are delineated in the system.⁴ Providing access to CCIS for One-Call may be a way to eliminate the need for, or reduce workload

⁴ The association reports that statewide 86 cases under the Underground Facility Damage Prevention and Safety Act were filed in 2009 and accounted for in CCIS. Conversation with staff of the Florida Association of Court Clerks and Comptrollers (Apr. 7, 2010).

and costs associated with, the proposed annual report to be prepared by the clerks under the bill.

The bill provides for the Division of Administrative Hearings to contract with the One Call system to make determinations related to allegations of damage to high-priority subsurface installations. The division may experience an increase in workload to the extent damage incidents occur and are referred to the division. The bill specifies that the contract must provide for reimbursement of certain costs incurred by the division in conducting the hearing.

The state or local governments may experience an increase in revenue related to the bill's increase in the amount of the civil penalty that may be imposed on excavators and member operators for a noncriminal infraction to \$500 from the current level of \$250. Any excavator or member operator who commits a noncriminal infraction may be issued a citation by any local or state law enforcement officer, government code inspector, or code enforcement officer.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS/CS by Judiciary on April 7, 2010:

The committee substitute:

- Revises language in the prior version of the bill providing that governmental liability under the Underground Facility Damage Prevention and Safety Act is subject to the state's limited waiver of sovereign immunity under s. 768.28, F.S. The committee substitute revises the language to specifically apply it to "the state, its agencies, or its subdivisions."
- Corrects statutory cross-references.

CS by Communications, Energy, and Public Utilities on March 4, 2010:

The committee substitute (CS) for SB 982 gathers together all the newly created provisions on incidents involving high-priority subsurface installations into one new statute, s. 556.116, F.S. It requires a contract between the system and the Division of Administrative Hearings (division) for conduct of hearings on alleged incidents. The CS provides for procedural matters and time frames for the proceedings.

The CS also deletes the prohibition on local government adopting any ordinance or regulation relating to the subject matter of this chapter and instead prohibits adoption of conflicting laws.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
