

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 Committee on Communications, Energy, and Public Utilities

BILL: SB 288

INTRODUCER: Senator Richter

SUBJECT: Underground Facility Damage Prevention and Safety

DATE: January 9, 2014

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Wiehle	Caldwell	CU	Pre-meeting
2.			EP	

I. Summary:

SB 288 deletes existing exemptions from The Underground Facility Damage Prevention and Safety Act, which should help avoid the potential for federal fines for enforcement issues. It also expands existing provisions on high-priority subsurface installations to better protect high-priority underground facilities from damage and to resolve cases involving damage to such facilities quicker.

II. Present Situation:

The Underground Facility Damage Prevention and Safety Act

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 operators of underground facilities, allowing these operators 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).² All operators of underground facilities within the state are required to be members of One-Call and to use its system.³

An excavator⁴ is required to provide specified site-identification and excavation-related information to One-Call's notification system not less than two full business days before beginning any excavation or demolition.⁵ The system "promptly" notifies all member operators that have facilities in the defined area of the proposed excavation or demolition, other than

¹ Section 556.101(2), F.S.

² Section 556.103, F.S.

³ *Id.*

⁴ The term "excavator" is defined to mean any person performing excavation or demolition operations. Section 556.102(7), F.S.

⁵ Section 556.105(1), F.S. This information remains valid for a 30-day period.

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.⁶ 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, the member operator must, within 2 full business days after the time the notification is received, 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.⁷ If the member operator is 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 that should not unreasonably delay, the excavator.⁸ The excavator is required to avoid excavation in the area described in the notice until the earlier of: each member operator underground facility having been marked and located; the excavator has been notified that no member operator has underground facilities in the area described in the notice; or the expiration of the two-day marking period.⁹ If a member operator has not located and marked its underground facilities within this two-day period, the excavator may proceed with the excavation, if the excavator does so with reasonable care and if detection equipment or other acceptable means to locate underground facilities are used.¹⁰ Before or during excavation, if the marking of the horizontal route of any facility is removed or is no longer visible, the excavator must cease excavation activities in the vicinity of the facility and notify the system to have the route remarked or adequately documented by a member operator or in a manner approved by the member operator.¹¹ If any contact with or damage to any underground facility occurs, the excavator causing the contact or damage must immediately notify the member operator.¹² Upon receiving notice, the member operator must send personnel to the location as soon as possible to effect temporary or permanent repair of the contact or damage, and until the damage has been repaired, the excavator must cease excavation activities that may cause further damage to the underground facility.¹³

The notification requirements of this process do not apply to the following types of excavations:

- any excavation or demolition performed by the owner of a single-family residential property or for such owner by a member operator or an agent of a member operator when the excavation is made entirely on that land, and only up to a depth of 10 inches, provided due care is used and there is no encroachment on any member operator's right-of-way, easement, or permitted use;
- any excavation or demolition associated with normal agricultural or railroad activities, provided such activities are not performed on any operator's marked right-of-way, easement, or permitted use;
- any excavation or demolition that occurs as the result of normal industrial activities, provided such activities are confined to the immediate secured property of the facility and the activities are not performed on any operator's marked right-of-way, easement, or permitted use;

⁶ Section 556.105(5), F.S.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ Section 556.105(11), F.S.

¹² Section 556.105(12), F.S.

¹³ *Id.*

- any excavation of 18 inches or less for:
 - surveying public or private property by surveyors or mappers and services performed by a pest control licensee, excluding marked rights-of-way, marked easements, or permitted uses where marked, if mechanized equipment is not used in the process of such surveying or pest control services and the surveying or pest control services are performed in accordance with the practice rules established under s. 472.027 or s. 482.051, respectively;
 - maintenance activities performed by a state agency and its employees when such activities are within the right-of-way of a public road; however, if a member operator has permanently marked facilities on such right-of-way, mechanized equipment may not be used without first providing notification; or
 - locating, repairing, connecting, adjusting, or routine maintenance of a private or public underground utility 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; or
- any excavation with hand tools by a member operator or an agent of a member operator that is limited to excavations to a depth of 30 inches if the right-of-way has permanently marked facilities of a company other than the member operator or its agents performing the excavation and if the excavation is for:
 - locating, repairing, connecting, or protecting, or routine maintenance of, the member operator's underground facilities; or
 - the extension of a member operator's underground facilities onto the property of a person to be served by such facilities.¹⁴

There are separate provisions for a “high-priority subsurface installation.”¹⁵ The term is defined to mean either an underground gas transmission or gas distribution pipeline or 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 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.¹⁶ When an excavator 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 by the operator of the facility, in addition to timely identifying the horizontal route of its facility the operator must notify the excavator that the facility is a high-priority subsurface installation.¹⁷ If the member operator provides such timely notice of the existence of a high-priority subsurface installation, an excavator must notify the operator of the planned excavation start date and time before beginning excavation.¹⁸ If the member operator does not provide timely notice, the excavator may proceed, after waiting the prescribed time period, to excavate without notifying the member operator of the excavation start date and time.¹⁹

¹⁴ Section 556.108, F.S.

¹⁵ Section 556.116, F.S.

¹⁶ Section 556.116(1)(b), F.S.

¹⁷ Section 556.116(2), F.S.

¹⁸ *Id.*

¹⁹ *Id.*

Most violations of Chapter 556, F.S., are noncriminal infractions.²⁰ However, any person who knowingly and willfully removes or otherwise 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, punishable as provided in s. 775.082 or s. 775.083. For purposes of this subsection, stakes or other nonpermanent physical markings are considered valid for 30 calendar days after notice of an intended excavation is provided to the system.²¹ As these violations are either noncriminal infractions or misdemeanors, they are enforceable by local law enforcement.

Violations involving a high-priority subsurface installation are treated differently. An alleged commission of a violation of chapter 556 other than removal of flags or other marking of the horizontal route of an underground facility 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.²² Upon receipt of an allegation that an incident has occurred, the system is to transmit an incident report to the Division of Administrative Hearings (division) and contract with the division so that the division may conduct a hearing to determine whether an incident has occurred, and, if so, whether a violation was a proximate cause of the incident.²³ The division has jurisdiction in a proceeding under this section to determine the facts and law concerning an alleged incident.²⁴ The division 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 \$10,000.²⁵ A fine against an excavator or a member operator imposed under this subsection is to be paid to the system, which is to use the collected fines to satisfy the costs incurred by the system for any proceedings.²⁶ To the extent there are any funds remaining, the system may use the funds exclusively for damage-prevention education.²⁷ This section does not change the basis for civil liability.²⁸ The findings and results of a hearing under this section may not be used as evidence of liability in any civil action.²⁹

Federal Law

Representatives of One-Call provided committee staff with a copy of correspondence between a representative of the Pipeline and Hazardous Materials Safety Administration within the U.S. Department of Transportation (PHMSA) and Governor Rick Scott and the Florida Department of Transportation. According to this correspondence, the Federal Pipeline, Safety, Regulatory Certainty, and Job Creation Act of 2011 mandates that for a state to qualify for State Damage Prevention and One Call grants, the state's laws may not exempt state agencies, municipalities, or their contractors from the One Call system. Further, the PHMSA's analysis of chapter 556, F.S., indicates that it is in violation of this mandate and renders Florida ineligible to receive these

²⁰ Section 556.107(1), F.S.

²¹ Section 556.107(3), F.S.

²² Section 556.116(3), F.S.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

grants beginning on January 3, 2014. The correspondence identified subparagraph 556.108(4)(b), F.S., as the problematic exemption. This subparagraph exempts maintenance activities performed by a state agency within the right-of-way of a public road from the notification requirements of Chapter 556, F.S.

Additionally, the PHMSA is in the process of developing rules and will be examining each state for enforcement issues. It considers exemptions from One-Call statutes to be an enforcement issue. It can levy a fine for each enforcement issue it finds, beginning at \$2.5 million for each issue.

III. Effect of Proposed Changes:

PHMSA Issues

The bill addresses the issue raised by the PHMSA of an exemption for governmental entities from One-Call provisions, which should make Florida eligible to obtain State Damage Prevention and One Call grant money from the federal government. These changes also may help avoid fines for enforcement issues. **Section 5** of the bill deletes current subparagraph 556.108(4)(b), F.S., which exempts maintenance activities performed by a state agency within the right-of-way of a public road from the notification requirements of Chapter 556, F.S. This is the provision identified by PHMSA as being problematic under federal law. This section also deletes an exemption for excavation that occurs as the result of normal industrial activities. **Section 2** of the bill deletes language from current subsection 556.105(5), F.S., that exempts member operators with state-owned underground facilities located within the right-of-way of a state highway from the requirement that the system promptly notify all member operators within a defined proposed excavation area of that proposed excavation.

High-priority Subsurface Installations

The bill also makes significant changes to the provisions on high-priority subsurface installations. **Section 7** amends the definition of that term to include any underground pipeline or facility that is deemed to be critical by the operator. The section further provides that a member operator may deem any underground pipeline or facility owned or operated by such member operator to be a high-priority subsurface installation and may identify it as such to an excavator. This will have the effect of shifting more cases involving alleged violations which cause damage to underground facilities to the Division of Administrative Hearings, not local law enforcement.

The section adds provisions relating to settlement, creating the authority for the person alleged to have caused the occurrence of an incident to offer to settle the matter by payment of a fine at any time after the system has transmitted an incident report to the division. The division may approve a settlement in lieu of conducting a full hearing concerning an alleged incident if the settlement is within the parameters established in this existing statute. Any fine resulting from a settlement approved under is to be used to satisfy costs incurred by the system for any proceedings, with any remaining funds used exclusively for damage-prevention education.

Section 7 also:

- provides that a decision by a member operator not to identify a pipeline or facility as a high-priority subsurface installation does not constitute a basis for recovery against the member operator;
- requires that an excavator who has received notice of the existence of a high-priority subsurface installation must provide the operator current and accurate contact information before beginning excavation;
- clarifies language existing language relating to an alleged commission of an infraction to make it better describe the actual situation at that point in the process; and
- provides that it does not change the basis for civil liability that may result from damage to a high-priority subsurface installation and that the findings and results of a hearing under this section may not be used as evidence of liability in any civil action.

Section 4 amends section 556.017, F.S., on violations, to add a provision making it a noncriminal infraction for an excavator to violate subparagraph 556.116(2)(b), F.S., by failing to notify a member operator of the start date and time for a planned excavation that is within the vicinity of a high-priority subsurface installation when the excavator has been timely notified by the member operator, either directly or through the system, of the existence of a high-priority subsurface installation.

Additional Changes

Section 1 amends subsection 556.102(11), F.S., to amend the definition of the term “premark” to add to the acceptable methods of marking the general scope of an excavation electronic markings or any other industry-accepted methods.

Section 3 amends section 556.106, F.S., to make conforming changes.

Section 5, in addition to the changes discussed above, amends section 556.108, F.S., to delete the exclusion from the notice requirements for an intended excavator the exclusion for any excavation occurring as the result of normal industrial activities.

Section 6 amends subsection 556.114, F.S., to provide that premarking done by an excavator is to be done as provided in the revised definition of the term “premark” as discussed above in relation to section 1 of the bill.

Section 8 amends section 337.401, F.S., to make conforming cross-reference changes and technical changes.

Effective Date

Section 9 provides that the bill takes effect July 1, 2014.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

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:

The provisions relating to high-priority subsurface installations will shift more cases involving alleged violations which cause damage to underground facilities to the Division of Administrative Hearings instead of local law enforcement and the courts. This should resolve these cases quicker and result in savings to the parties.

C. Government Sector Impact:

According to a One-Call representative, the federal grant money is approximately \$100,000 per year. One-Call has applied for only one grant and did not receive any grant money. As such, the potential ineligibility for grant money is insignificant. However, existing exemptions from the Underground Facility Damage Prevention and Safety Act create the potential for federal fines starting at \$2.5 million per violation for what the PHMSA deems to be an enforcement issue. The bill will help avoid the potential for these fines.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 556.102, 556.105, 556.106, 556.107, 556.108, 556.114, 556.116, and 337.401.

IX. Additional Information:**A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

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