

HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Chapter 556, F.S., is the "Underground Facility Damage Prevention and Safety Act" (Act). The goal of the Act is to identify and locate underground facilities¹ prior to an excavation or demolition to prevent injury to persons or property or interruption of services resulting from damage to those facilities.² To accomplish this, the Act creates a not-for-profit corporation to administer a free-access notification system whereby a person intending to conduct excavation or demolition activities can give prior notice to the system of the person's intended activities, allowing operators of underground facilities the opportunity to identify and locate their nearby facilities.³ All operators of underground facilities in the state are required to be members of the corporation ("member operators") and are required to use and participate in the system.⁴ The Act specifies that one of its purposes is to reserve to the state the power to regulate any subject matter specifically addressed in Chapter 556, F.S.

The not-for-profit corporation is Sunshine State One-Call of Florida, Inc. (SSOCOF), which exercises its powers through a board of directors.⁵ The system is required to provide a single toll-free telephone number within Florida which excavators can use to notify member operators of planned excavation or demolition activities.⁶ The person intending to conduct excavation or demolition must notify the system not less than two full business days before beginning the operations.⁷ The person must also provide

¹ Section 556.102(13), F.S., defines "underground facility" as "any public or private personal property which is buried, placed below ground, or submerged on any member operator's right-of-way, easement, or permitted use which is being used or will be used in connection with the storage or conveyance of water; sewage; electronic, telephonic, or telegraphic communication; electric energy; oil; petroleum products; natural gas; optical signals; or other substances, and includes, but is not limited to, pipelines, pipes, sewers, conduits, cables, valves, and lines. For purposes of this act, a liquefied petroleum gas line regulated under chapter 527 is not an underground facility unless such line is subject to the requirements of Title 49 C.F.R. adopted by the Department of Agriculture and Consumer Services, provided there is no encroachment on any member operator's right-of-way, easement, or permitted use. Petroleum storage systems subject to regulation pursuant to chapter 376 are not considered underground facilities for the purposes of this act unless the storage system is located on a member operator's right-of-way or easement. Storm drainage systems are not considered underground facilities."

² Section 556.101(3), F.S.

³ Section 556.101(2), F.S.

⁴ Section 556.103(1), F.S.

⁵ Section 556.103, F.S.

⁶ Section 556.104, F.S.

⁷ Section 556.105(1)(a), F.S. The law provides an exception to this requirement for excavation beneath state waters, but does not specify a time frame for notifying the system of such an excavation.

specified identification, location, and operational information which remain valid for 30 calendar days.⁸ Upon receipt of this notice, the system provides to the person a list of names of the member operators who will be advised of the notification and a notification number which specifies the date and time of the notification.⁹

The system operator in turn notifies the potentially affected member operators of the planned excavation or demolition activities.¹⁰ Within two full business days after the time the notification is received by the system (or 10 days if the proposed excavation is in proximity to facilities beneath state waters), potentially affected member operators must determine the location of their underground facilities in relation to the proposed excavation or demolition. If this cannot be done in this time period, the member operator must contact the person giving notice and negotiate a new schedule and time that is agreeable and does not unreasonably delay the excavator. If a member operator determines that a proposed excavation or demolition is in proximity to or conflicts with an underground facility, the member operator must identify the horizontal route of the facility in a specified manner.¹¹

An excavator is required to delay excavations until the first of the following events occurs: (1) each member operator's underground facilities have been marked and located; (2) the excavator has been notified that no member operator has underground facilities in the area described in the notice; or (3) expiration of the time allowed for markings. If a member operator has not located and marked its underground facilities within the time allowed for marking, the excavator may proceed with the excavation, provided the excavator does so with reasonable care, and provided, further, that detection equipment or other acceptable means to locate underground facilities are used. An excavator may not demolish until all member operators' underground facilities have been marked and located or removed.¹²

The Act establishes civil liability for violations of certain provisions.¹³ The Act provides that any liability of the state, its agencies, or its subdivisions which arises out Chapter 556, F.S., is subject to the provisions of s. 768.28, F.S.¹⁴ The Act also establishes violations of certain provisions as noncriminal infractions that are enforceable by citations which may be issued by any local or state law enforcement officer, government code inspector, or code enforcement officer. The Act establishes a civil penalty of \$250, plus court costs, for such infractions.¹⁵ The Act provides that it is a misdemeanor in the second degree for any person to knowingly and willfully remove or otherwise destroy valid stakes or other valid physical markings.¹⁶

The Act does not apply to an excavation or demolition made during an emergency provided that the system is notified at the earliest opportunity and all reasonable precautions have been taken to protect any underground facility.¹⁷

⁸ Section 556.105(1), F.S.

⁹ Section 556.105(3), F.S.

¹⁰ Section 556.105(5), F.S. The statute also provides that member operators with state-owned underground facilities located within the right-of-way of a state highway need not be notified of excavation or demolition activities and are under no obligation to mark or locate facilities.

¹¹ Section 556.105(5), F.S.

¹² Section 556.105(6), F.S.

¹³ Section 556.106, F.S.

¹⁴ Section 768.28, F.S., establishes limits on the liability of the state, its agencies, and its subdivisions for damages in tort arising from injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of the employee's office or employment under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant, in accordance with the general laws of this state.

¹⁵ Section 556.107(1), F.S.

¹⁶ Section 556.107(2), F.S.

¹⁷ Section 556.109, F.S. An "emergency" is defined in the Act as "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."

SSOCOF is funded through monthly assessments made to each member operator for a proportional share of system operating costs. If a member operator receives fewer than 10 notifications in a month, it is not assessed for that month.¹⁸

Effect of Proposed Changes

State Power to Regulate

The bill amends s. 556.101(3)(d), F.S., which reserves to the state the power to regulate matters addressed in Chapter 556, F.S. The bill specifies that municipalities, counties, districts, or other local governments may not adopt or enforce ordinances or rules that conflict with Chapter 556 or do any of the following: (1) require operators to obtain permits to identify underground facilities; (2) require premarking or marking; (3) specify the types of paint or other marking devices used to identify underground facilities; or (4) require removal of marks.

Some municipalities have adopted ordinances related to the type of paint that excavators and member operators may use when marking underground facilities within the municipality.¹⁹ The bill, as discussed in greater detail below, establishes new provisions related to the means used to mark underground facilities. Thus, the bill will likely render these ordinances unenforceable. In addition, the Town of Davie's ordinances include provisions that appear to modify the time frames established in Chapter 556, F.S., for marking and excavation.²⁰ While these types of ordinance provisions may already be prohibited by Chapter 556, F.S., the bill more clearly states that any existing ordinances in conflict with the chapter are unenforceable.

Low-Impact Marking Practices

The bill creates s. 556.114, F.S., to establish "low-impact" marking practices. The bill requires that an excavator, when notifying the system, must identify only the area that will be excavated during the 30-day period in which the information provided by the excavator is considered valid under s. 556.105(1)(c), F.S. If excavation is not complete within this time period, the excavator must provide subsequent notice to the system, identifying only the remaining area to be excavated, before continuing the excavation. In addition, the bill requires member operators and excavators to use temporary, nonpermanent paint or other industry-accepted low-impact marking practices when marking the horizontal route of underground facilities or premarking excavation sites. The bill provides that any horizontal route-identification marker must be in a color identified in the Uniform Color Code for Utilities.

These provisions of the bill, taken together, may reduce the amount of markings that member operators are required to provide and the total amount of time that markings are visible. In addition, these provisions should provide a uniform, statewide system of marking. The bill requires SSOCOF to establish an educational program to inform excavators and member operators about these marking practices.

Alternative Dispute Resolution

The bill creates s. 556.115, F.S., which requires SSOCOF to create a voluntary alternative dispute resolution program available to all member operators, excavators, and other stakeholders to help resolve disputes arising from excavation activities, exclusive of penalties imposed under other provisions of Chapter 556, F.S. The bill provides that the program must include mediation, arbitration,

¹⁸ Section 556.110, F.S.

¹⁹ For example, the City of Sunny Isles Beach, by Ordinance No. 2009-329, requires that any markings made pursuant to Chapter 556, F.S., must be made using chalk-based paint on any surface other than earth or vegetation surfaces. The City of Coral Gables and the City of Orlando (Title II, Section 13.19, Orlando Code of Ordinances) have adopted similar ordinances requiring the use of chalk-based paint. The Town of Davie, through Part II, Section 25-35, of its Code of Ordinances, requires that any marking made by an excavator or member operator pursuant to Section 556, Florida Statutes, must be made using water-based paint.

²⁰ Part II, Sections 25-35 and 25-37, Town of Davie Code of Ordinances.

or “other appropriate processes,”²¹ including the use of services of the Division of Administrative Hearings (DOAH). The bill provides that voluntary users of the program shall choose the form of alternative dispute resolution to be used and shall be responsible for the costs of using the program.

The bill provides that if the users of the program choose to use arbitration, the users shall decide whether the arbitration will be binding. Unless binding arbitration is chosen, the users or any one of the users of the program may end the process at any time and exercise the right to proceed in court or before DOAH. The bill specifies that this new section does not change the basis for civil liability for damages.

Procedures for “High-Priority Subsurface Installations”

The bill creates procedures concerning excavations proposed within 15 feet of a “high-priority subsurface installation.” The bill defines a “high-priority subsurface installation” as “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 [the Act] 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.”

The bill provides that if an excavation is proposed within 15 feet of such an installation, as identified by the operator, the operator shall notify the excavator of the existence of the installation and shall mark its location in the time frame provided by s. 556.105, F.S. After receiving this notice, the excavator must provide notice to the operator of the planned excavation start date and time. If the member operator does not provide timely notice, the excavator may proceed to excavate without notifying the member operator of the excavation start date and time.

The bill provides that an alleged commission of any noncriminal infraction listed in s. 556.107(1), F.S., which results in an “incident” must be reported to the system by the excavator or member operator within 24 hours after learning of the alleged occurrence of an incident. The bill defines an “incident” as “an event that involves damage to a high-priority subsurface installation that has been identified as such by the operator” according to the required notification procedures 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.”

Once a report of an alleged incident is provided to the SSOCOF system, the bill provides that the system must transmit the report to DOAH and contract with DOAH to conduct a hearing to determine whether an incident has occurred and whether any noncriminal infraction was the proximate cause of the incident.²² The bill provides that the contract must include provisions for the system to reimburse DOAH for costs incurred to conduct the hearing.²³ The bill provides detailed procedures under which DOAH will conduct the hearing. The hearing must be conducted within 60 days after DOAH receives a request from the system, and the administrative law judge (ALJ) assigned to the case must issue a final order within 30 days of the hearing transcript being filed. The bill provides that the final order of the ALJ constitutes final agency action subject to judicial review under s. 120.68, F.S.

The bill provides DOAH with jurisdiction to determine the facts and law concerning an alleged incident and to impose a fine no greater than \$50,000 against any person who commits a noncriminal infraction that was a proximate cause of the incident. If a state agency or political subdivision caused the incident, the maximum fine is limited to \$10,000. Any fine imposed by DOAH must be in addition to any

²¹ It is not clear what other processes may be “appropriate” and how this will be determined.

²² “Proximate cause” is defined in Black’s Law Dictionary (8th Edition, 2004) as: “1. A cause that is legally sufficient to result in liability; an act or omission that is considered in law to result in a consequence, so that liability can be imposed on the actor. 2. A cause that directly produces an event and without which the event would not have occurred.”

²³ The bill identifies these costs as those incurred by DOAH for court reporters, transcript preparation, travel, facility rental, and other customary hearing costs.

amount payable as a result of a citation relating to the incident and must be paid to the system. The system must use the proceeds of the fines to satisfy the costs of the proceeding and may use any remaining funds exclusively for damage prevention education. The bill provides that this process does not change the basis for civil liability and specifies that the findings and results of a hearing under this process may not be used as evidence of liability in a civil action.

General Procedures

The bill provides a specific time frame for excavators to notify the SSOCOF system before beginning any excavation or demolition beneath state waters. The bill requires that excavators notify the system at least 10 full business days before beginning such work. This provision is consistent with the existing requirement of s. 556.105(5)(c), F.S., that member operators identify the route of such facilities within 10 business days. In addition, the bill provides that an excavator must stop excavation or demolition activities around an underwater facility if the horizontal route of the facility is “inadequately documented” and must then notify the system to have the route adequately documented.²⁴

The bill also prohibits member operators from using information provided to the system by other member operators for marketing purposes or for any other purposes not stated in Chapter 556, F.S. This provision may remove a disincentive for member operators who provide services in competitive markets, such as telephone, broadband, or cable services, to provide full information to the system for fear that the information will be used by competitors to target the member operator’s customers with marketing efforts.

The bill also deletes an obsolete provision that required the system to conduct a study and report the results to the Legislature by February 1, 2007.

Liability

The bill removes redundant provisions in ss. 556.106(2)(a), (2)(c), and (3), F.S., related to the liability of government entities arising out of Chapter 556, F.S. These provisions provide that any liability of the state, its agencies, and its subdivisions (including governmental member operators) that arises out of Chapter 556, F.S., is subject to the provisions of s. 768.28, F.S. The bill replaces these redundant provisions with a single liability provision, identical to the one in s. 556.106(2)(c), in new subsection (8) of s. 556.106, F.S.

In addition, the bill provides that a member operator who performs excavation with hand tools is liable for any damage to another operator’s underground facilities damaged during the excavation. This expands the liability from excavators only to excavators and member operators.

Emergency Excavations

The bill creates s. 556.109(2), F.S., which provides that an excavator shall not notify the system of an emergency unless the excavator reasonably believes that the intended excavation or demolition is due to an emergency situation or condition as defined in the Act.²⁵

Violations

The bill provides that violations of two of the provisions added by the bill will be classified as noncriminal infractions. First, the bill provides that a violation of s. 556.109(2), F.S., related to falsely notifying the system of an emergency situation or condition, is a noncriminal infraction. Second, the bill provides that a violation of s. 556.114(1), (2), (3), or (4), relating to failure to follow low-impact marking practices, is a noncriminal infraction.

²⁴ It is not clear what type of documentation the bill is referring to. Section 556.105, F.S., requires that member operators identify the estimated horizontal route of facilities beneath state waters using marking buoys or other suitable devices. Chapter 556 does not indicate what, if any, type of documentation is required for such facilities.

²⁵ See footnote 17 for the definition of an emergency under the Act.

The bill increases the civil penalty for noncriminal infractions from \$250 plus court costs to \$500 plus court costs. The bill also eliminates the power of an enforcing authority that cites a person for a noncriminal infraction to require the person to appear before a county court. The bill modifies other provisions of Chapter 556, F.S., to conform to this change. The bill retains the ability of a person charged with a noncriminal infraction to elect to appear before the county court.

Reports from Clerks of Court

The bill requires each clerk of court, by March 1 of each year, to submit a report to SSOCOF listing each citation written for a noncriminal infraction that was filed in the county during the preceding calendar year. The report must provide the name and address of the excavator or member operator who committed each infraction and indicate whether the civil penalty imposed for the infraction was paid. The bill provides that SSOCOF's annual progress report on the operation of the system, submitted to the Legislature, must include a summary of the reports provided by the clerks of court. The bill also provides that SSOCOF's annual progress report on participation by municipalities and counties in the one-call notification system, submitted to the President of the Senate, the Speaker of the House of Representatives, and the Governor, must include a summary of the reports provided by the clerks of court.

Assessment of System Costs

Currently, any member operator that receives fewer than 10 notifications through the SSOCOF system in any month is not assessed that month for a share of the system's operating costs. The bill removes this exemption, thus requiring that all member operators are assessed a proportionate share of system operating costs through monthly assessments.

B. SECTION DIRECTORY:

Section 1. Amends s. 556.101, F.S., relating to legislative intent.

Section 2. Amends s. 556.103, F.S., relating to annual reports of the board of directors of Sunshine State One-Call of Florida, Inc.

Section 3. Amends s. 556.105, F.S., relating to procedures for notification of intended excavation plans and identification and marking of underground facilities.

Section 4. Amends s. 556.106, F.S., relating to liability of member operators, excavators, and the system.

Section 5. Amends s. 556.107, F.S., relating to violations of certain provisions of Chapter 556, F.S.

Section 6. Amends s. 556.109, F.S., relating to emergency excavations or demolitions.

Section 7. Amends s. 556.110, F.S., relating to assessment of system costs among member operators.

Section 8. Creates s. 556.114, F.S., establishing low-impact marking practices.

Section 9. Creates s. 556.115, F.S., requiring creation of a voluntary alternative dispute resolution program.

Section 10. Creates s. 556.116, F.S., establishing special procedures related to incidents involving damage to high-priority subsurface installations.

Section 11. Provides an effective date of October 1, 2010.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have a significant impact on state government revenues.

The bill provides that SSOCOF, when it receives an allegation that an incident has occurred, must contract with DOAH to conduct a hearing to determine whether any noncriminal infraction was the proximate cause of the incident. The bill requires that the contract provide for reimbursement of the costs incurred by DOAH to conduct the hearing.

The bill also provides that DOAH's services may be used as part of a voluntary alternative dispute resolution program created by SSOCOF. The bill provides that users of this program will bear the costs of the program. Thus, DOAH will likely receive revenues for services provided under the program either directly from users or under contract with SSOCOF, but only to the extent necessary to cover its costs.

The bill increases the civil penalty for noncriminal infractions from \$250 plus court costs to \$500 plus court costs. If the citation for the infraction was issued by a state law enforcement officer, the penalty collected by the clerk of the court must be deposited into the fine and forfeiture fund established in s. 142.01, F.S.²⁶ All revenues received in this fund are considered state funds and must be remitted monthly to the Department of Revenue for deposit into the Clerks of the Court Trust Fund within the Justice Administrative Commission. Because revenues deposited into this fund are considered state funds, the increased civil penalty established in the bill may lead to an increase in state revenues. The significance of this increase, however, will depend entirely on compliance with and enforcement of Chapter 556, F.S.

2. Expenditures:

The bill does not appear to have a significant impact on state government expenditures.

The bill provides that SSOCOF, when it receives an allegation that an incident has occurred, must contract with DOAH to conduct a hearing to determine whether any noncriminal infraction was the proximate cause of the incident. DOAH likely will incur costs to conduct such hearings, but the bill requires that the contract provide for reimbursement of these costs.

The bill also provides that DOAH's services may be used as part of a voluntary alternative dispute resolution program created by SSOCOF. The bill provides that users of this program will bear the costs of the program. Thus, DOAH may incur costs for services it provides under the program, but these costs will likely be covered by revenues received either directly from the program's users or under contract with SSOCOF.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill will have an indeterminate positive fiscal impact on local government revenues because it increases monetary penalties for noncriminal infractions from \$250 to \$500. If the citation for a noncriminal infraction is issued by a local law enforcement officer, local government code inspector, or a code enforcement officer, 80 percent of the penalty collected will be distributed to the local governmental entity whose employee issued the citation and the remaining 20 percent will be retained by the clerk of the court to cover administrative costs. The significance of this increase, however, will depend entirely on compliance with and enforcement of Chapter 556, F.S.

²⁶ Section 566.107(1)(c), F.S.

2. Expenditures:

The bill does not appear to have a significant impact on local government expenditures. The creation of an alternative dispute resolution program may reduce potential litigation costs for governmental entities that are member operators and excavators.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The creation of uniform, low-impact marking practices may create efficiencies for private member operators. The creation of an alternative dispute resolution program may reduce potential litigation costs for private member operators, excavators, and other private stakeholders. Excavators and private member operators will become subject to higher fines for noncriminal infractions (increased from \$250 to \$500) and potential new fines of up to \$50,000 for noncriminal infractions that are determined by DOAH to be the proximate cause of an incident.

D. FISCAL COMMENTS:

Currently, any member operator that receives fewer than 10 notifications through the SSOCOF system in any month is not assessed that month for a share of the system's operating costs. The bill removes this exemption, thus requiring that all member operators are assessed a proportionate share of system operating costs through monthly assessments.

According to SSOCOF, it is moving to a billing system under which each member's assessed share of the budget is calculated based on the total number of tickets received through the system in the preceding year. SSOCOF states that the new methodology will allow each member to know how much each monthly assessment will be for an entire year. In addition, according to data provided by SSOCOF, in February 2010, 93 member operators were exempt from monthly assessments and were not billed an aggregate total of \$428.69. Assuming that the data for that month is not extraordinary, the potential fiscal impact on member operators resulting from removal of the assessment exemption appears to be insignificant.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to: require counties or municipalities to spend funds or take an action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill requires that SSOCOF establish an alternative dispute resolution program that must include mediation, arbitration, or "other appropriate processes." The bill could be clarified as to what other processes may be "appropriate" and how this will be determined.

The bill provides that an excavator must stop excavation or demolition activities around an underwater facility if it the horizontal route of the facility is "inadequately documented" and must then notify the system to have the route adequately documented. Chapter 556 does not indicate what, if any, type of

documentation is required for such facilities. Thus, it is not clear what type of documentation the bill is referring to.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

At the March 3, 2010, meeting of the Energy & Utilities Policy Committee, the committee adopted a strike-all amendment to the bill, with one amendment to the amendment, and incorporated these amendments into a committee substitute for the bill. These amendments:

- Identify specific limits on local governments' power to adopt and enforce ordinances or rules that conflict with Chapter 556, F.S.; and
- Consolidate into a new statutory section various provisions of the original bill that establish procedures related to incidents involving damage to high-priority subsurface installations, and establish procedures for hearings at the Division of Administrative Hearings regarding such incidents.