

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: CS/SB 446

INTRODUCER: Environmental Preservation and Conservation Committee and Senator Passidomo

SUBJECT: Underground Facilities

DATE: March 27, 2017

REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|-----------------|-----------------|------------|------------------|
| 1. | <u>Mitchell</u> | <u>Rogers</u> | <u>EP</u> | Fav/CS |
| 2. | <u>Caldwell</u> | <u>Caldwell</u> | <u>CU</u> | Favorable |
| 3. | _____ | _____ | <u>ACJ</u> | _____ |
| 4. | _____ | _____ | <u>AP</u> | _____ |

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 446 amends ch. 556, F.S., the “Underground Facility Damage Prevention and Safety Act” by:

- Requiring an excavator that causes contact with or damage to any pipe or other underground facility to immediately report the contact or damage by calling 911 if any natural gas or other hazardous substance or hazardous material regulated by the Pipeline and Hazardous Materials Safety Administration (PHMSA) of the U.S. Department of Transportation (USDOT) has escaped;
- Requiring a member operator to file a report with the Sunshine State One-Call of Florida (SSOCF) system of all events it has received notice of through the system which have resulted in damages to its underground facilities. The report must be submitted at least on an annual basis or more frequently at the option and sole discretion of the member operator and must include, if known, the cause, nature, and location of the damage;
- Providing that if a citation is issued by a state law enforcement officer, 80 percent of the civil penalty collected by the clerk of the court for the citation will be distributed to the governmental entity whose employee issued it; and
- Requiring the SSOCF board of director’s annual progress report to the Legislature and the Governor on the participation by municipalities and counties in the one-call notification system, to include a summary of the damage reporting data received by the system for the preceding year and any analysis of the data by the board.

II. Present Situation:

Florida Underground Facility Damage Prevention and Safety Act

Chapter 556, F.S., is the “Underground Facility Damage Prevention and Safety Act” (Act). The purpose 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 through the system of the person’s intended activities. Prior notifications provide 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 not-for-profit corporation created under the Act is Sunshine State One-Call of Florida, Inc. (SSOCF), which exercises its powers through a board of directors.⁵ The system provides a single toll-free telephone number within Florida which excavators use to notify member operators of planned excavation or demolition activities.⁶ An excavator must notify the system not less than two full business days before beginning the operations.⁷ The excavator must also provide 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

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 ch. 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 ch. 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 statute 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.

⁸ Section 556.105(1)(c), 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.

beneath state waters), potentially affected member operators must determine the location of their underground facilities in relation to the proposed excavation or demolition. 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 If this cannot be done within two business days after notification is received, 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. An excavator is required to delay excavations until one of the following events occurs:

- All affected member operator's underground facilities have 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 time allowed for markings has expired.

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 uses detection equipment or other acceptable means to locate underground facilities. An excavator may not conduct demolition in an area until all member operators' underground facilities have been marked and located or removed.¹²

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 \$500, plus court costs, for such infractions.¹³ If a citation is issued by a local law enforcement officer, a local government code inspector, or a code enforcement officer, 80 percent of the civil penalty collected by the clerk of the court will be distributed to the governmental entity whose employee issued the citation, with 20 percent of the penalty retained by the clerk of the court to cover administrative costs.¹⁴ If a citation is issued by a state law enforcement officer, the civil penalty collected by the clerk of the court is retained by the clerk for deposit into the fine and forfeiture fund established pursuant to s. 142.01, F.S.¹⁵ The fine and forfeiture fund is established by the clerk of the circuit court in each county of this state and functions as a separate fund for use by the clerk of the circuit court in performing court-related functions.

By March 31 of each year, each clerk of court must submit a report to SSOFC listing each violation notice written under s. 556.107(1)(a), F.S., which has been filed in that county during the preceding calendar year.¹⁶ 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.¹⁷ The Florida Court Clerks and Comptrollers reported that a total of 23 citations were issued statewide under the Act in 2015, and a total of 19 citations were issued

¹¹ Section 556.105(5), F.S.

¹² Section 556.105(6), F.S.

¹³ Section 556.107(1), F.S.

¹⁴ Section 556.107(1)(c), F.S.

¹⁵ *Id.*

¹⁶ Section 556.107(2), F.S.

¹⁷ *Id.*

in 2016. None of these citations were issued by state law enforcement officers.¹⁸ Additionally, the SSOFC board must submit an annual progress report, including a summary of the reports to the system from the clerks of court, to the Governor, no later than 60 days before the convening of each regular session of the Legislature.¹⁹ The SSOFC board must also submit to the President of the Senate, the Speaker of the House of Representatives, and the Governor, no later than 60 days before the convening of each regular session of the Legislature, an annual progress report on the participation by municipalities and counties in the one-call notification system, including a summary of the reports to the system from the clerks of court.²⁰

U.S. Department of Transportation Pipeline and Hazardous Material Safety Administration - Pipeline Damage Prevention Programs

The U.S. Department of Transportation (USDOT) has back-stop authority to conduct administrative civil enforcement proceedings against excavators who damage hazardous liquid and natural gas pipelines in a state that has failed to adequately enforce its excavation damage prevention or one-call laws.²¹

On July 13, 2015, the USDOT Pipeline and Hazardous Materials Safety Administration (PHMSA) announced the issuance of a final rule to establish the process for evaluating state excavation damage prevention law enforcement programs and enforce minimum Federal damage prevention standards in states where damage prevention law enforcement is deemed inadequate or does not exist.²²

Under its rule,²³ PHMSA uses the following criteria in evaluating the effectiveness of a state damage prevention program:

- Does the state have the authority to enforce its state excavation damage prevention law using civil penalties and other appropriate sanctions for violations?
- Has the state designated a state agency or other body as the authority responsible for enforcement of the state excavation damage prevention law?
- Is the state assessing civil penalties and other appropriate sanctions for violations at levels sufficient to deter noncompliance and is the state making publicly available information that demonstrates the effectiveness of the state's enforcement program?
- Does the enforcement authority (if one exists) have a reliable mechanism (e.g., mandatory reporting, complaint driven reporting) for learning about excavation damage to underground facilities?
- Does the state employ excavation damage investigation practices that are adequate to determine the responsible party or parties when excavation damage to underground facilities occurs?

¹⁸ Email message dated March 7, 2017, from Christopher J. Campbell, Director, Legislative and Government Affairs, Florida Court Clerks and Comptrollers (on file with Senate Environmental Preservation and Conservation Committee).

¹⁹ Section 556.103(4), F.S.

²⁰ Section 556.103(5), F.S.

²¹ 49 U.S.C. s, 60114.

²² U.S. Department of Transportation, Pipeline and Hazardous Materials Safety Administration, *About Excavation Enforcement Final Rule*, <http://phmsa.dot.gov/pipeline/safety-awareness-and-outreach/excavator-enforcement> (last visited March 20, 2017).

²³ U.S. Department of Transportation, Pipeline and Hazardous Materials Safety Administration, *Pipeline Safety: Pipeline Damage Prevention Programs*, 80 Fed. Reg. 43,836 (July 23, 2015) (codified at 49 C.F.R. Pts. 196 and 198).

- At a minimum, does the state’s excavation damage prevention program include the following requirements?:
 - Excavators may not engage in excavation activity without first using an available one-call notification system to establish the location of underground facilities in the excavation area.
 - Excavators may not engage in excavation activity without regard to the marked location of a pipeline facility as established by a pipeline operator.
 - An excavator who causes damage to a pipeline facility:
 - Must report the damage to the operator of the facility at the earliest practical moment following discovery of the damage; and
 - If the damage results in the escape of any PHMSA regulated natural or other gas or hazardous liquid, must promptly report to other appropriate authorities by calling the 911 emergency telephone number or another emergency telephone number.
- Does the state limit exemptions for excavators from its excavation damage prevention law?
 - A state must provide to PHMSA a written justification for any exemptions for excavators from state damage prevention requirements.
 - PHMSA will make the written justifications available to the public.²⁴

Hazardous substances regulated by PHMSA include a host of chemical and radionuclides found in appendix A of Title 49, C.F.R., s. 172.101,²⁵ but do not include petroleum or crude oil, or natural gas in various states or mixtures.²⁶ Petroleum, crude oil, and natural gas are hazardous materials, regulated by PHMSA in Title 49, C.F.R., s. 172.101.²⁷ The SSOFC has identified proposals that will enhance the effectiveness of the Act according to the criteria adopted by PHMSA. They are reflected in the provisions of this bill.

III. Effect of Proposed Changes:

Procedures for Contact or Damage

If an excavator’s contact with or damage to an underground pipe or any other underground facility results in the escape of any natural gas or other hazardous substance or hazardous material regulated by the PHMSA, the excavator must immediately report the contact or damage by calling the 911 emergency telephone number.

The bill mandates that a member operator file with the SSOFC system a report of all events it has received notice of through the system that have resulted in damages to any pipe, cable or the cable’s protective covering, or other underground facility. Member operators must submit these reports at least annually to the system, no later than March 31, for all such events that occurred in

²⁴ *Id.*

²⁵ U.S. Department of Transportation, Pipeline and Hazardous Materials Safety Administration, *Subchapter C - Hazardous Materials Regulations*, 49 C.F.R. s. 172.101, available at <https://www.gpo.gov/fdsys/pkg/CFR-2016-title49-vol2/xml/CFR-2016-title49-vol2-sec172-101.xml> (last visited March 20, 2017).

²⁶ See 49 C.F.R. s. 171.8 for definitions of “hazardous material” and “hazardous substance,” available at <https://www.gpo.gov/fdsys/pkg/CFR-2016-title49-vol2/xml/CFR-2016-title49-vol2-sec171-8.xml>. (last visited March 20, 2017).

²⁷ U.S. Department of Transportation, Pipeline and Hazardous Materials Safety Administration, *Subchapter C - Hazardous Materials Regulations*, 49 C.F.R. s. 172.101, available at <https://www.gpo.gov/fdsys/pkg/CFR-2016-title49-vol2/xml/CFR-2016-title49-vol2-sec172-101.xml>.

the prior calendar year. Member operators may, at their option and sole discretion, submit the reports to the system on a more frequent basis. These member operator reports are required to include, if known, the cause, nature, and location of the damage. The bill also requires the system to establish and maintain a process to facilitate submission of reports by member operators.

These reporting requirements enhance the Underground Facility Damage Prevention and Safety Act (Act) and may provide the procedures necessary to meet the requirements of the 2015 rule that contains the criteria used by the PHMSA in its evaluation of the effectiveness of Florida's damage prevention enforcement program.

Civil Penalty Citations

The bill removes the provision that directs civil penalties collected by clerks of court from citations issued by state law enforcement officers to be retained by the clerk for deposit into the fine and forfeiture fund. Under the bill, 80 percent of the penalty resulting from a citation issued by a state law enforcement officer will be distributed to the state, and 20 percent of the penalty will be retained by the clerk of the court to cover administrative costs, in addition to other court costs. Eighty percent of the penalty resulting from a citation issued by a local government entity will continue to go to the local government that issues the citation.

Annual Progress Report on Participation by Municipalities and Counties

The bill requires the SSOFC board of director's annual progress report to the President of the Senate, the Speaker of the House of Representatives, and the Governor on the participation by municipalities and counties in the one-call notification system to include:

- A summary of the damage reporting data received by the system for the preceding year regarding events that damage underground facilities, including information from member operator reports and from notifications member operators receive from excavators that have made contact with or damaged underground facilities, including information regarding temporary or permanent repairs to the facilities resulting from any contact or damage and 911 calls made as a result of the escape of substances from underground facilities that have been impacted; and
- Any analysis of the data by the board.

This expansion of information provided in an annual progress report may provide the data necessary to meet the requirements of PHMSA in its evaluation of the effectiveness of Florida's damage prevention enforcement program.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Not applicable. This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate as such authority existed on February 1, 1989; or reduce the percentage of state tax shared with counties or municipalities.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

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

The bill may have an insignificant, positive impact on state government revenues.

B. Private Sector Impact:

The requirement that a member operator file an annual report with the SSOCF if an excavation or demolition event damages any of its pipes, cables, or other underground facilities does not appear to be a significant economic impact on the private sector.

C. Government Sector Impact:

By entitling a state law enforcement entity that issues a citation to receive 80 percent of the resulting civil penalties collected by the clerk of court, the bill may result in a slight increase in revenues to the state. The Florida Court Clerks and Comptrollers reported that a total of 23 citations were issued statewide under the Act in 2015, and a total of 19 citations were issued in 2016. However, in recent years no citations have been issued by state law enforcement.²⁸

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 556.103, 556.105, and 556.107.

²⁸ Email message dated March 7, 2017, from Christopher J. Campbell, Director, Legislative and Government Affairs, Florida Court Clerks and Comptrollers (on file with Senate Environmental Preservation and Conservation Committee).

IX. Additional Information:

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

CS by Environmental Preservation and Conservation on March 14, 2017:

Includes hazardous materials with any natural gas or other hazardous substances as contents requiring an excavator to call 911 should any of them escape from an underground pipe or other underground facility as a result of contact or damage to the pipe or facility by the excavator.

- B. **Amendments:**

None.

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