

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 Infrastructure and Security

BILL: SB 1464

INTRODUCER: Senator Flores

SUBJECT: Underground Facility Damage Prevention and Safety

DATE: January 24, 2020 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Price	Miller	IS	Pre-meeting
2.			BI	
3.			RC	

I. Summary:

SB 1464 amends provisions of law relating to the Underground Facility Damage Prevention and Safety Act, which is intended to identify and locate underground facilities prior to an excavation or demolition to prevent injury to persons or property or interruption of services resulting from damages to those facilities. Specifically, the bill:

- Expands the list of entities that may issue citations for violations of ch. 556, F.S., to include the State Fire Marshal and local fire chiefs.
- Increases the maximum civil penalty (up to \$2,500 plus 5 percent, in addition to any other court costs) for certain violations of ch. 556, F.S., that involve an underground pipe or facility transporting hazardous materials regulated by the U.S.D.O.T. Pipeline and Hazardous Material Safety Administration (PHMSA). One hundred percent of the civil penalty will be distributed to the entity that issued the citation.
- Require each clerk of court to submit an annual report to the State Fire Marshal listing each violation notice written under ch. 556, F.S., which was filed in that county during the preceding calendar year.
- Requires the Sunshine State One-Call of Florida, Inc., to transmit reports of incidents that involve high-priority subsurface installations (HPSI) for investigation by one of the following authorities, who may issue a citation and impose a civil penalty for a violation of ch. 556, F.S., that was a proximate cause of the incident: the State Fire Marshal, the fire chief of the county in which the incident occurred, a local or state law enforcement officer, a government code inspector, or a code enforcement officer. Ninety-five percent of the civil penalty will be distributed to the investigating authority that issued the citation, with the remaining 5 percent retained by the clerk of court for administrative costs.
- Create an “underground facility damage prevention review panel” (review panel) under the State Fire Marshal for the purpose of reviewing complaints of alleged violations of ch. 556, F.S., and identifying issues or potential issues related to damage prevention and enforcement.

The bill may have an indeterminate positive impact on state and local revenues. See the Fiscal Impact Statement for additional details.

The bill takes effect on July 1, 2020.

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 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”⁴) and are required to use and participate in the system.⁵

The not-for-profit corporation created under the Act is Sunshine State One-Call of Florida, Inc., which operates under the name “Sunshine 811” and exercises its powers through a board of directors.⁶ The system is required to provide a single toll-free telephone number (811) within Florida which excavators can use to notify member operators of planned excavation or demolition activities.⁷ The person intending to conduct excavation or demolition must notify the system not less than two full business days before beginning the operations.⁸ The person must also provide specified identification, location, and operational information which remain valid for 30 calendar days.⁹ 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.¹⁰

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 Defined in s. 556.102(8), F.S., to mean “any person who furnishes or transports materials or services by means of an underground facility.”

⁵ Section 556.103(1), F.S.

⁶ Section 556.103, F.S.

⁷ Section 556.104, F.S.

⁸ 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.

⁹ Section 556.105(1)(c), F.S.

¹⁰ Section 556.105(5), F.S.

The system operator in turn notifies the potentially affected member operators of the planned excavation or demolition activities.¹¹ 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.¹²

An excavator is required to delay excavations until the first of the following events occurs:

- Each 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
- 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 that the excavator does so with reasonable care and that detection equipment or other acceptable means to locate underground facilities are used. An excavator may not conduct demolition in an area until all member operators' underground facilities have been marked and located or removed.¹³

Violations of certain provisions are noncriminal infractions enforceable by citations which may be issued by any local or state law enforcement officer, government code inspector, or code enforcement officer. The law establishes a civil penalty of \$500, plus court costs, for such infractions.¹⁴ Eighty percent of the civil penalty collected by the clerk of the court will be distributed to the government entity whose employee issued the citation, with 20 percent of the penalty retained by the clerk of the court to cover administrative costs.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.

In 2010, the Legislature established a special process to address damages to any facility identified as a "high-priority subsurface installation."¹⁶ These facilities are defined 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" that the pipeline's operator has identified as critical.¹⁷ If an alleged violation of a required

¹¹ 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.

¹² Section 556.105(5), F.S.

¹³ Section 556.105(6), F.S.

¹⁴ Section 556.107(1), F.S.

¹⁵ Section 556.107(1)(c), F.S.

¹⁶ Ch. 2010-100, L.O.F., s. 10.

¹⁷ Section 556.116, F.S.

procedure involves damage to a high-priority subsurface installation and the damage results in death or serious bodily injury or results in property damage, including service-restoration costs, of more than \$50,000 or interruption of service to at least 2,500 customers, the incident must be reported to Sunshine 811 by the excavator or member operator within 24 hours.¹⁸ Sunshine 811 must then transmit an incident report to the Division of Administrative Hearings (DOAH) for a hearing to determine whether a violation of required procedure was a proximate cause of the incident. If DOAH finds that a violation was a proximate cause of the incident, it may impose a fine not to exceed \$50,000 (or \$10,000 if a state agency or political subdivision caused the incident).¹⁹ Funds collected from a fine issued by DOAH are paid to Sunshine 811 to cover its costs to engage DOAH's services, and any remaining funds may be used only for damage-prevention education.²⁰

In 2017, the Legislature established additional reporting requirements. First, an excavator must immediately call 911 to report any contact with or damage to an underground facility that results in the escape of natural gas or other hazardous substance or material regulated by the U.S. Department of Transportation (DOT) Pipeline and Hazardous Material Safety Administration (PHMSA). Second, if an event damages any pipe, cable, or other underground facility, the member operator must file a report with Sunshine 811.²¹

By March 31 of each year, each clerk of court must submit a report to Sunshine 811 listing each violation notice written under s. 556.107(1)(a), F.S., which was filed in that county during the preceding calendar year.²² 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.²³ The Sunshine 811 board must submit an annual progress report to the President of the Senate, the Speaker of the House of Representative, and the Governor, no later than 60 days before the convening of each regular session of the Legislature.²⁴ This report must include a summary of the reports provided by the clerks of court, a summary of damage data reported to the system for the prior year, and any analysis of this data by the board.²⁵

In its most recent Annual Report, Sunshine 811 indicates that 16,576 damage incidents were reported in 2018, while 13 citations were issued by entities authorized to enforce the Act.²⁶ These citations resulted in \$6,602.50 of fines being levied. Further, the Annual Report identifies one case referred to DOAH involving damage to a natural gas distribution main. In that case, DOAH found that the excavator's failure to notify Sunshine 811 prior to excavation was the proximate cause of the incident and imposed a \$5,000 fine.²⁷

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ Ch. 2017-102, L.O.F.

²² S. 556.107(2), F.S.

²³ *Id.*

²⁴ Section 556.103(5), F.S.

²⁵ *Id.*

²⁶ Sunshine 811, *2018-19 Annual Report*, available at

https://static1.squarespace.com/static/533db0bde4b0d9f7ba7f1ee7/t/5dcf0cd17b2a3459bd9a81d6/1573850332734/2018-19_annualrpt.pdf (last visited January 22, 2020).

²⁷ *Id.*

U.S.D.O.T. Pipeline and Hazardous Material Safety Administration – Pipeline Damage Prevention Programs

The U.S.D.O.T. 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.²⁸

On July 13, 2015, the Pipeline and Hazardous Material Safety Administration (PHMSA) announced the issuance of a final rule to establish the process for evaluating state excavation damage prevention law enforcement programs and enforcing minimum Federal damage prevention standards in states where damage prevention law enforcement is deemed inadequate or does not exist.²⁹

Under its rule, 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?
- At a minimum, do the state's excavation damage prevention requirements include the following:
 - 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 in disregard of 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 and 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?

²⁸ 49 U.S.C. § 60114.

²⁹ Department of Transportation, Pipeline and Hazardous Materials Safety Administration, 80 Fed. Reg. 43,868 (July 23, 2015) (codified at 49 C.F.R. Parts 196 and 198).

- 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.³⁰

PHMSA will enforce federal requirements and may take immediate enforcement against excavators in states where a state pipeline excavation damage prevention law enforcement program is not determined to be adequate by the criteria and procedures used by PHMSA.³¹ States that fail to establish an adequate enforcement program within five years of the date of a finding of inadequacy may be subject to up to a 4 percent reduction in base state pipeline safety grant funding.³²

State Fire Marshal

Florida's Chief Financial Officer is designated by law as the State Fire Marshal.³³ The State Fire Marshal is responsible for minimizing the loss of life and property in the state due to fire.³⁴ It is also charged with enforcing laws related to: the prevention of fire and explosion through the regulation of conditions which could lead to fire and explosion; installation and maintenance of fire alarm systems and fire protection systems; the maintenance of fire cause and loss records; and suppression of arson and the investigation of the cause, origin, and circumstances of fire.³⁵

The State Fire Marshal operates as a division of the Department of Financial Services. It operates through an Office of the Director and two bureaus: the Bureau of Fire Prevention and the Bureau of Firefighter Standards and Training.³⁶ The Bureau of Firefighter Standards and Training approves firefighter training curricula, offers fire service training at the Florida State Fire College, and certifies fire service members that meet standards. The Bureau of Fire Prevention conducts fire/life safety inspections and reviews construction plans for all state-owned buildings, regulates the fireworks and fire sprinkler industries, inspects and licenses boilers, and certifies fire suppression industry workers. It has six field offices and three satellite offices around the state.³⁷

Florida law provides investigatory authority for the State Fire Marshal. Upon request, the State Fire Marshall must investigate the cause, origin, and circumstances of fires and explosions where property has been damaged or destroyed and there is probable cause to believe that the fire or explosion was the result of carelessness or design. If the fire or explosion occurs in a municipality, county, or special district with an organized fire department, the local fire official must provide for an initial investigation before requesting an investigation by the State Fire Marshal. In an investigation, the State Fire Marshal may require testimony under oath from persons believed to be aware of any facts related to matters under investigation.³⁸

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ Section 633.104(1), F.S.

³⁴ Section 633.104(2), F.S.

³⁵ *Id.*

³⁶ Chief Financial Officer, *Division of State Fire Marshal*, <https://www.myfloridacfo.com/Division/SFM/> (last visited January 22, 2020).

³⁷ *Id.*

³⁸ Section 633.112, F.S.

If the State Fire Marshal believes that there is sufficient evidence to charge a person with an offense, he or she must cause the person to be arrested and must provide the appropriate prosecuting office with all pertinent information collected. The State Fire Marshal may compel the testimony of witnesses and the production of pertinent documents and may seize personal property to be held for evidence. The State Fire Marshal may designate an agent for the purpose of conducting an investigation, and the agent may hold hearings, sign and issue subpoenas, administer oaths, examine witnesses, receive evidence, and require the attendance and testimony of witnesses and the production of documents or other evidence material to the investigation. The State Fire Marshal must keep a record of all fires and explosions investigated under its authority.³⁹

III. Effect of Proposed Changes:

Section 1 of the bill amends s. 556.107, F.S., relating to noncriminal infractions for violations of certain provisions of the Act.

Expanded Enforcement Authority

The bill expands the list of entities that may issue citations for violations of ch. 556, F.S. In addition to the existing authorized citation issuers, the bill authorizes the State Fire Marshal and the fire chief of the county in which an infraction happened to issue such citations.

Enhanced Civil Penalties for Certain Violations

The bill provides for civil penalties of up to \$2,500 (plus 5 percent, in addition to any other court costs) for certain violations of Ch. 556, F.S., that involve an underground pipe or other underground facility transporting hazardous materials regulated by PHMSA. Specifically, the following violations are subject to this enhanced civil penalty:

- Failure by an excavator to comply with s. 556.105(1), F.S., which requires an excavator to provide notice and certain information to the Sunshine 811 system within specified timeframes prior to beginning excavation of demolition work.
- Failure by an excavator to comply with s. 556.105(5)(c), F.S., which requires an excavator to use increased caution when working within a tolerance zone,⁴⁰ such as hand digging, pot holing, soft digging, vacuum methods, or other similar procedures.
- Failure by an excavator to comply with s. 556.105(6), F.S., which requires an excavator to avoid excavation in an area until whichever of the following occurs first: each member operator's underground facilities have been located and marked; the excavator has been notified that no member operator has underground facilities in the area; or the time allowed for markings has expired.
- Failure by an excavator to comply with s. 556.106(11), F.S., which requires an excavator to stop excavation and demolition activities in the vicinity of an underground facility and notify the Sunshine 811 system if the marking for the facility is removed or no longer visible.

³⁹ *Id.*

⁴⁰ "Tolerance zone" means "24 inches from the outer edge of either side of the exterior surface of a marked underground facility." Section 556.102(12), F.S.

- Failure by an excavator to comply with s. 556.105(12), F.S., which requires an excavator to immediately notify the appropriate member operator if the excavator causes contact with or damage to a pipe and to immediately call 911 to report contact or damage that causes the escape of any natural gas or other hazardous substance or material regulated by PHMSA.

If the clerk of court collects a civil penalty for one of these violations, the bill provides that 100 percent of the civil penalty will be distributed to the entity that issued the citation. The additional five percent, plus any additional court costs, is retained by the clerk to cover administrative costs. The bill provides that a person who fails to properly respond to a citation issued for one of these violations will be charged with the offense of failing to respond to the citation and, if convicted, commits a misdemeanor of the second degree, punishable by a term of imprisonment not exceeding 60 days and up to a \$500 fine.⁴¹ The bill provides that a written warning to this effect must be provided at the time the citation is issued.⁴²

Reporting Requirements

The bill requires each clerk of court, by March 31 of each year, to submit a report to the State Fire Marshal 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. 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. This is the same information currently reported by the clerks of court to Sunshine 811.

Section 2 of the bill amends s. 556.116, F.S., relating to high-priority subsurface installations.

Incidents Involving High-Priority Subsurface Installations

For incidents involving high-priority subsurface installations, the bill requires Sunshine 811 to transmit the incident report to one of the following enforcement authorities:

- The State Fire Marshal,
- The fire chief of the county in which the incident happened,
- A local or state law enforcement officer,
- A government code inspector, or
- A code enforcement officer.

The authority to whom the incident report is transmitted must conduct an investigation to determine whether an incident has occurred and, if so, whether a violation of s. 556.107(1)(a), F.S., was a proximate cause of the incident. The investigating authority may issue a citation and impose a civil penalty of up to 50,000⁴³ if it finds that a violation occurred and was a proximate cause of the incident. Upon collection of the civil penalty, the clerk of court must distribute 95 percent of the penalty to the investigating authority that issued the citation. The remaining five percent is retained by the clerk to cover administrative costs.

⁴¹ Sections 775.082 and 775.083, F.S.

⁴² Currently, if a person is found to have committed an infraction by a judge or hearing official, the person may appeal that finding to the circuit court. The bill also authorizes appeal to the circuit court of the amount of the civil penalties imposed.

⁴³ As noted, the penalty under current law is \$50,000, except that if a state agency or political subdivision caused the incident, the penalty may not exceed \$10,000.

These provisions replace the requirement in current law that the DOAH conduct investigations of incidents involving high-priority subsurface installations. The bill removes all provisions of current law that establish the procedural requirements for DOAH review of such incidents.

Section 3 of the bill creates s. 556.117, relating to the underground facility damage prevention review panel.

Underground Facility Damage Prevention Review Panel (The Review Panel)

The bill creates the panel under the State Fire Marshal. The Review Panel is responsible for reviewing complaints of alleged violations of ch. 556, F.S., and identifying issues or potential issues related to damage prevention and enforcement. The review panel must identify areas where additional education is needed and create solutions to issues it has identified. The review panel also must review current practices for locating underground pipes or other underground facilities that transport materials regulated by PHMSA and determine whether statutory changes are needed to make these pipes or facilities more resilient and safer for communities. The bill requires the review panel to operate consistent with s. 20.052, F.S., which governs advisory bodies created by statute as adjuncts to an executive agency.

The Review Panel must consist of nine members appointed by the board of directors of Sunshine State One-Call of Florida, Inc, and must include the following:

- One member representing the electric utility industry;
- One member representing the telecommunications industry;
- One member licensed as an underground utility and excavation contractor under ch. 489, F.S., and engaged in work within road or highway rights-of-way;
- One member representing the natural gas industry;
- One member representing the utility locator industry;
- One member representing county or municipal water and sewer service providers;
- One member representing excavators performing work unrelated to construction in road or highways rights-of-way, including landscaping, fencing, or plumbing contractors;
- One member licensed as an underground utility and excavation contractor under ch. 489, F.S., and engaged in work for public utilities; and
- One member representing the public at large.

The bill requires the Sunshine State One-Call board of directors to establish a process for receiving applications for appointment to the Review Panel. The bill provides for staggered two-year terms for each seat on the Review Panel and requires the Review Panel to elect a chair and vice chair from its membership. The review panel must meet quarterly in conjunction with the meeting of the Sunshine One-Call board or at the call of the chair.

The bill requires the State Fire Marshal to provide staff support and meeting space to the Review Panel.

Section 4 provides the bill takes effect July 1, 2020.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill may encourage increased enforcement of ch. 556, F.S. Increased enforcement will result in additional fines imposed on persons who violate certain provisions of ch. 556, F.S. As a result, increased enforcement may deter behaviors that cause damages to property, utility service outages, and serious bodily injury.

C. Government Sector Impact:

The bill may have an indeterminate positive impact on local government revenues, as it authorizes fire chiefs to issue citations for the specified violations. The bill also increases the maximum fine that may be imposed as a civil penalty for violations related to an underground pipe or other underground facility transporting hazardous materials regulated by PHMSA. Because fire chiefs that issue such citations will receive between 80 and 100 percent of the resulting civil penalties collected by the clerk of court, the bill may encourage greater enforcement efforts by fire chiefs, leading to additional revenues. The extent of any increase in revenues, however, is indeterminate, as the result will depend on compliance with ch. 556, F.S., and the enforcement efforts of fire chiefs.

The bill may require the expenditure of resources by a fire chief, local law enforcement authority, or local code inspection or enforcement authority to whom an alleged high-

priority subsurface installation incident is referred for investigation. These expenditures may be offset in whole or in part by the portion of any civil penalties collected and distributed to these entities through their enforcement of ch, 556, F.S. Again, however, the extent of any increase is indeterminate.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill amends the following sections of the Florida Statutes: 556.107 and 556.116.

This bill creates the following sections of the Florida Statutes: 556.117.

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.