

HOUSE BILL REPORT

E2SHB 1634

As Passed Legislature

Title: An act relating to underground utilities.

Brief Description: Concerning underground utilities.

Sponsors: House Committee on General Government Appropriations & Oversight (originally sponsored by Representatives Takko, Angel, Morris and Armstrong).

Brief History:

Committee Activity:

Technology, Energy & Communications: 2/8/11, 2/16/11 [DPS];

General Government Appropriations & Oversight: 2/18/11, 2/21/11 [DP2S(w/o sub TEC)].

Floor Activity:

Passed House: 3/4/11, 93-4.

Senate Amended.

Passed Senate: 4/6/11, 49-0.

House Concurred.

Passed House: 4/14/11, 97-0.

Passed Legislature.

Brief Summary of Engrossed Second Substitute Bill

- Specifies that failure by an underground facility operator to subscribe to a one-number locator service constitutes a willful intent to avoid compliance with underground utilities damage prevention law.
- Requires damage to underground utilities to be reported to the Utilities and Transportation Commission (UTC), and for the UTC to evaluate damage data.
- Establishes the Damage Prevention Account (Account), funded by penalties, and specifies that expenditures from the Account by the UTC must be used to educate excavators and operators to improve safety and compliance.
- Establishes a Safety Committee of stakeholder representatives to advise on underground utility safety and to review complaints of alleged underground utility violations.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

- Establishes enforcement procedures for the UTC to address violations involving UTC regulated entities and for the Attorney General to address violations by non-UTC regulated entities.
- Renames provisions in statute relating to underground utilities damage prevention as the Underground Utility Damage Prevention Act.

HOUSE COMMITTEE ON TECHNOLOGY, ENERGY & COMMUNICATIONS

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 19 members: Representatives McCoy, Chair; Crouse, Ranking Minority Member; Short, Assistant Ranking Minority Member; Anderson, Billig, Carlyle, Dahlquist, Eddy, Frockt, Haler, Harris, Hasegawa, Jacks, Kelley, Kristiansen, Liias, McCune, Morris and Nealey.

Staff: Scott Richards (786-7156).

HOUSE COMMITTEE ON GENERAL GOVERNMENT APPROPRIATIONS & OVERSIGHT

Majority Report: The second substitute bill be substituted therefor and the second substitute bill do pass and do not pass the substitute bill by Committee on Technology, Energy & Communications. Signed by 13 members: Representatives Hudgins, Chair; Miloscia, Vice Chair; McCune, Ranking Minority Member; Taylor, Assistant Ranking Minority Member; Ahern, Armstrong, Blake, Fitzgibbon, Ladenburg, Moscoso, Pedersen, Van De Wege and Wilcox.

Staff: Michael Bennion (786-7118).

Background:

Under current law, a single statewide telephone number exists for referring excavators to the appropriate one-number locator service. A one-number locator service is operated by nongovernmental entities and is a means by which a person can notify utilities of excavation and request field marking of underground facilities.

An underground facility means any item buried or placed below ground for use in connection with the storage or conveyance of water, sewage, electronic, telephonic or telegraphic communications, cablevision, electric energy, petroleum products, gas, gaseous vapors, hazardous liquids, or other substances and including, but not limited to, pipes, sewers, conduits, cables, valves, lines, wires, manholes, attachments, and those parts of poles or anchors below ground. An underground facility also includes gas or hazardous liquid pipelines, as well as distribution systems owned and operated for the sale, delivery, or distribution of natural gas at retail.

In general, a one-number locator service receives requests for the location of buried utility facilities and relays those requests to member utilities and governmental agencies.

All owners of underground facilities within a one-number locator service area are required to subscribe to one-number locator service. If no one-number locator service is available, notice of a proposed excavation must be provided to the owners of underground facilities known to or suspected of having underground facilities within the area of proposed excavation. The notice must be communicated to the owners of underground facilities not less than two business days but not more than 10 business days before the scheduled date for commencement of excavation, unless otherwise agreed by the parties.

Before conducting any excavation, excluding agricultural tilling less than 12 inches in depth, a person must notify pipeline companies of the scheduled excavation through the one-number locator service. Notification must occur in a window of not less than two business days but not more than 10 business days before beginning the excavation. If a transmission pipeline company is notified that excavation work will occur near a pipeline, a representative of the company must consult with the excavator on-site prior to excavation.

A civil penalty of not more than \$1,000 for each violation applies when a person fails to notify the one-number locator service and causes damage to underground facilities. Some civil penalties collected are deposited into the State General Fund and other penalties are paid into the Pipeline Safety Account. Any excavator who willfully or maliciously damages a field marked underground facility is liable for treble the costs incurred in repairing or relocating the facility. Any excavator who fails to notify the one-number locator service and causes damage to a hazardous liquid or gas pipeline is subject to a civil penalty of not more than \$10,000 for each violation. Any excavator who excavates, without a valid excavation confirmation code, within 35 feet of a transmission pipeline is guilty of a misdemeanor.

Utilities and Transportation Commission.

The Utilities and Transportation Commission (UTC) regulates utilities and transportation services in the state to ensure fair pricing, availability, reliability, and safety. The UTC currently regulates intrastate pipelines, while the federal Pipeline and Hazardous Materials Safety Administration (PHMSA) regulates interstate pipelines. Since 2003 the UTC has been the lead inspector of all interstate pipelines in the state, certified by the PHMSA to make inspections based on federal regulations.

Washington Utilities Coordinating Council.

The Washington Utilities Coordinating Council is a statewide organization of utilities, governmental agencies, contractors, excavators, and other interested organizations and individuals established to promote cooperation in order to reduce damages to subsurface structures as well as above ground facilities, and achieve the orderly planning and installation of underground facilities.

Summary of Engrossed Second Substitute Bill:

One-number Locator Service.

All facility operators within a one-number locator service area must subscribe to the service. Failure to subscribe to a one-number locator service constitutes willful intent to avoid compliance with the Underground Utilities Damage Prevention Act (Damage Prevention Act).

Marking of Excavation Boundaries by Excavator.

Before commencing any excavation, excavator must mark the boundary of the excavation area with white paint applied to the ground of the worksite and then provide notice of the scheduled commencement of excavation to all facility operators through a one-number locator service. If boundary marking is infeasible, an excavator must communicate directly with affected facility operators to ensure that the boundary of the excavation area is accurately identified. If an excavator intends to work at multiple sites or at a large project, the excavator must take reasonable steps to confer with facility operators to enable them to locate underground facilities reasonably in advance of the start of excavation for each phase of the work.

Responsibility to Mark Underground Utilities by Facility Operator.

Upon receipt of the notice, a facility operator must, with respect to the facility operator's locatable underground facilities, provide the excavator with reasonably accurate information by marking their location. If a facility operator's underground utilities are unlocatable or identified but unlocatable, the facility operator must provide the excavator with available information as to their location.

If an underground facility involves service laterals, the facility operator is required to designate service laterals, if the service laterals: (1) connect end users to the facility operator's main utility line; and (2) are within a public right-of-way or utility easement and the boundary of the excavation area. The service lateral facility operator may comply with the requirement to mark service laterals through several methods, including placing marks indicating the presence of underground facilities, arranging to meet excavators at worksites to provide available information, or by providing copies of the best reasonably available records. A facility operator's good faith attempt to comply constitutes full compliance, and no person may be found liable for damages or injuries resulting from such compliance, apart from liability for arranging for repairs or relocation of underground facilities.

If the underground facility involves service laterals conveying only water, a facility operator is not required to mark these service laterals if their presence can be determined from other visible water facilities, such as water meters, water valve covers, and junction boxes in or adjacent to the boundary of an excavation area.

Responsibility to Maintain Markings by Excavator.

Once marked by a facility operator, an excavator is responsible for maintaining the accuracy of the facility operator's markings of underground facilities for the lesser of: (1) 45 calendar days from the date that the excavator provided notice to a one-number locator service; or (2) the duration of the project. An excavator that makes repeated requests for location of underground facilities due to its failure to maintain the accuracy of a facility operator's markings may be charged by the facility operator for services provided.

Exemptions from Standard One-Number Locator Service Requirements.

Under certain conditions, the following excavation activities are exempt from standard one-number locator service requirements:

- an emergency excavation;
- an excavation of less than 12 inches in depth on private noncommercial property;

- the tilling of soil for agricultural purposes less than 12 inches in depth within a utility easement, and 20 inches in depth outside of a utility easement;
- the replacement of an official traffic sign installed before January 1, 2013;
- road maintenance activities involving excavation less than six inches in depth below the original road grade and ditch maintenance activities involving excavation less than six inches in depth;
- the creation of bar holes less than 12 inches in depth, or of any depth during emergency leak investigations; or
- construction, operation, or maintenance activities by an irrigation district on rights-of-way, easements, or facilities owned by the Federal Bureau of Reclamation in federal reclamation projects.

If an excavator in the course of performing an exempted excavation contacts or damages an underground facility, the excavator must still notify the facility operator and a one-number locator service, and report the damage the UTC's damage information reporting tool (DIRT).

Bar hole is defined as a hole made in the soil or pavement with a hand-operated bar for the specific purpose of testing the subsurface atmosphere with a combustible gas indicator.

Reporting of Damage to Underground Utilities.

Facility operators and excavators who observe or cause damage to an underground facility must report the damage to the UTC within 45 days, or sooner if required by law, using the UTC's virtual private DIRT report form, or other similar form. The UTC must use reported data to evaluate the effectiveness of the Damage Prevention Program.

A non-pipeline facility operator conducting an excavation, or a subcontractor conducting an excavation on the facility operator's behalf, that strikes the facility operator's own underground facility is not required to report that damage to the UTC.

Construction or Excavation within 100 Feet of a Transmission Pipeline.

When planning construction or excavation within 100 feet, or greater distance if required by local ordinance, of a right-of-way or utility easement containing a transmission pipeline, the state and any unit of local government must notify the pipeline company of the scheduled commencement of work.

Any unit of local government that issues permits under the State Building Code Act must, when permitting construction or excavation within 100 feet, or greater distance if required by local ordinance, of a right-of-way or utility easement containing a transmission pipeline: (1) notify the pipeline company of the permitted activity when it issues the permit; or (2) require the applicant consult with the pipeline company as a condition of issuing the permit.

The UTC is directed to assist local governments in obtaining hazardous liquid and gas pipeline location information and maps.

Damage Prevention Account.

The Damage Prevention Account (Account) is created in the custody of the State Treasurer. All receipts from moneys directed by law or the UTC must be deposited to the Account. Only the UTC or a designee of the UTC may authorize expenditures from the Account.

Expenditures from the Account may be used only for educational programming designed to improve worker and public safety relating to excavation and underground facilities and for grants to persons who have developed educational programming for improving worker and public safety relating to excavation and underground facilities.

Safety Committee.

The UTC is directed to contract with a statewide, nonprofit entity whose purpose is to reduce damages to underground and above ground facilities, promote safe excavation practices, and review complaints of alleged violations of the Damage Prevention Act. The purpose of the contract is to create a 13-member Safety Committee to: (1) advise the UTC and other state agencies, the Legislature, and local governments on best practices and training to prevent damage to underground utilities, and policies to enhance worker and public safety; and (2) review complaints alleging violations involving practices related to underground facilities. The Safety Committee must consist of members who represent a broad range of underground utility stakeholders.

In reviewing complaints of alleged violations, the Safety Committee must appoint at least three and not more than five members as a Review Committee. The Review Committee must include the same number of members representing excavators and facility operators. One member representing facility operators must also be a representative of a pipeline company or a natural gas utility and include a member representing the insurance industry.

Any person may bring a complaint to the Safety Committee regarding an alleged violation. Before reviewing a complaint alleging an underground utilities violation, the Review Committee must notify the person making the complaint and the alleged violator of its review and of the opportunity to participate in the review process.

The Safety Committee may provide written notification to the UTC, with supporting documentation, that a person has likely committed a violation of the Damage Prevention Act, and recommend remedial action that may include a penalty amount, training, or education.

The contract must not obligate funding by the UTC for activities performed by the nonprofit entity or the Safety Committee. The UTC authorization to contract with the nonprofit entities expires December 31, 2020.

The UTC Enforcement of Safety Committee's Review of Violation.

The UTC may enforce civil penalties when it receives written notification from the Safety Committee indicating that a violation of Damage Prevention Act has likely been committed by a person subject to regulation by the UTC, or involving the underground facilities of such a person.

If the UTC receives written notification from the Safety Committee that a violation has likely been committed by a person who is not subject to regulation by the UTC, and in which the underground facility involved is also not subject to regulation by the UTC, the UTC may refer the matter to the Attorney General for enforcement of a civil penalty. The UTC must provide funding for such enforcement. The court may award the state all costs of investigation and trial, including a reasonable attorney's fee. Any costs and fees recovered by

the Attorney General must be deposited by the UTC in the fund that paid for such enforcement.

The UTC Enforcement of Pipeline Facilities.

The UTC may investigate and enforce violations relating to pipeline facilities without initial referral to the Safety Committee. Also, the UTC may impose penalties and require training, education and any combination thereof, if the UTC's investigation relating to a Safety Committee review of an allegation violation. The UTC must consider any recommendation by the Safety Committee regarding enforcement and remedial actions involving an alleged violation relating to pipeline facilities.

Civil Penalties.

Any person who violates any provision of the Damage Prevention Act that does not involve a hazardous liquid or gas underground facility is subject to a civil penalty of not more than \$1,000 for an initial violation, and not more than \$5,000 for each subsequent violation within a three-year period.

Any person who willfully damages or removes a permanent marking used to identify an underground facility or pipeline, or a temporary marking prior to its intended use, is subject to a civil penalty of not more than \$1,000 for an initial violation, and not more than \$5,000 for each subsequent violation within a three-year period.

All penalties recovered in such actions must be deposited in the Account.

The UTC Reporting Requirements.

By December 1, 2015, the UTC must report to the Legislature on the effectiveness of the Damage Prevention Program and include an analysis of damage data reported as required by the act.

Authority of the UTC over Consumer-owned Utilities.

Nothing in this act may be construed to classify a consumer-owned utility to be under the authority of the UTC.

Underground Utility Damage Prevention Act.

A provision is added providing that the act may be known and cited as the Underground Utility Damage Prevention Act.

Effective Date.

The Underground Utilities Damage Prevention Act takes effect January 1, 2013.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill takes effect on January 1, 2013.

Staff Summary of Public Testimony (Technology, Energy & Communications):

(In support) The issues in the bill have been worked on for the last year by a broad group of stakeholders and it is very close to a finished bill. Underground utilities are important. We cannot have people digging into other's underground facilities. It is expensive and it is dangerous. This bill begins to bring the program in the line with federal requirements. Transmission pipeline operators need to know about excavation projects. The data collection provision in the bill is extremely important. The first step for safety is simply knowing about digging activities and collecting data about activities. Currently, there is no state agency responsible for this program. This bill seeks to emulate the success in Oregon with the creation of the Underground Damage Prevention Authority (Authority). If you get away from the big issues that remain in negotiating this bill, there are a number of small changes in the bill that have a big impact in the field and protecting public safety.

(In support with concerns) While Washington's Pipeline Safety Program has a very good reputation nationally, our third party damage prevention program does not meet similar high standards for public safety. There are a number of inadequacies in the damage prevention program and because of these inadequacies we are at risk of losing of federal funds. The Authority does not enhance the Utilities and Transportation Commission's (UTC's) enforcement capacity. The creation of the Authority represents the paranoia by public utilities of their rates being regulated by the UTC. The public should expect the UTC to be involved in these safety issues. We need to focus on the safety of our system.

(With concerns) Please keep the bill alive and moving through the legislative process. The language regarding the commencement of construction or excavation activities needs to be replaced with language that would speak to the timing of an approval of a subdivision or a building permit. It links up more specifically the notice with the risk. There are parts of the bill that have dramatic language and we think it needs to be tightened up with more technical language.

(Neutral) This bill represents good compromises. The bill needs some rework, so the UTC does not become an enforcement entity to public utilities.

(Opposed) While this bill represents a lot of progress, sewer and water laterals need to be addressed. Our concern is that this bill requires changes to how the cities operates and results in significant costs to the cities. As the bill is drafted it makes cities liable for assets that they do not own. This bill represents thousands of additional work hours. Existing law is adequate and this bill represents an unfunded mandate.

Staff Summary of Public Testimony (General Government Appropriations & Oversight):

(In support) This is one of the primary needs in the dig law in Washington right now. There is a need for improvement in underground safety for citizens and personnel in the field. This bill provides a forum to do enforcement in a collaborative and educational manner to improve safety for Washington citizens. There are good requirements and strong civil penalties for not following the law but there is no ability to enforce them. Transmission pipelines carry natural gas or hazardous liquid at certain stresses or pressures. It would be the municipalities that would need to either notify the transmission pipeline company before issuing a building permit or build into the permit process a requirement that the applicant be in contact with the line. It is not a restriction on any activity within that zone, as there is no

veto authority on that part of the line. It is simply an informational piece to enable better communication.

The current bill requires contracting with a private entity that is responsible for managing the marking and safety for underground utilities, and providing a way to have dispute resolution between parties. Funding for the Safety Committee could be similar to that which supports the one call system in general—by those who are subscribers to the one-call system through a nonprofit independent entity. The enforcement mechanism must be handled by a state agency such as the Utilities and Transportation Commission (UTC) or the Office of the Attorney General (AGO). Any costs not covered by the cash receipts can be absorbed by the UTC's budget. The notion of the costs to the local jurisdictions brings about the question of who is most appropriately responsible. Many stakeholders involved believe there is already an obligation on the part of those facility operators just like on the part of private operators to mark those facilities regardless of the ownership within the right-of-way. It is not a new responsibility being put on them, but perhaps a clarification of existing responsibility.

(Opposed) Many older cities have sewer and water lateral lines that go inside of a right-a-way and that hook up to the main line that were permitted years ago. These sewer and water lines are not necessarily owned by the cities nor is it always known exactly where they are. There is a concern by some of the older cities that this results in a cost shift for them in terms of the responsibility for locating lines. The additional language in the proposed amendment may ameliorate this impact on cities, but there is additional language clarification needed.

(Information only) The original bill had the AGO as an entity that received complaints for certain types and possibly all potential violations. That role belongs to the UTC, and the AGO takes legal action upon referral from the UTC.

Persons Testifying (Technology, Energy & Communications): (In support) Representative Takko, prime sponsor; Brad Tower, Olympic Pipeline Company; Gary Hyatt, Northwest Natural Gas; Helge Ferchert, Puget Sound Energy; and Don Evans, Utilities Underground Location Center Washington 811.

(In support with concerns) Jeff Goltz, Washington Utilities Transportation Commission; Bill Clarke, Washington Public Utilities District Association; and Dave Ducharme, Utility Contractors Association of Washington.

(With concerns) Steve Lindstrom, Sno-King Water District Coalition.

(Neutral) Kim Adamson, Beacon Hill Water and Sewer District.

(Opposed) Ashley Probart, Association of Washington Cities; Terry Kakida and Lin Ruchty, Seattle Public Utilities; and Betty Buckley, Washington Independent Telecommunications Association.

Persons Testifying (General Government Appropriations & Oversight): (In support) Brad Tower, Olympic Pipeline Company; Ann Rendahl, Utilities and Transportation Commission; Nancy Atwood, Puget Sound Energy; Don Evans, Washington 811; and Charlie Brown, Cascade Natural Gas Company.

(Opposed) Ashley Probart, Association of Washington Cities.

(Information only) Christina Beusch, Office of the Attorney General.

Persons Signed In To Testify But Not Testifying (Technology, Energy & Communications):
None.

Persons Signed In To Testify But Not Testifying (General Government Appropriations & Oversight): (With concerns) Randy Loomans, International Union of Operating Engineers Local 302; and Bob Abbott, Washington and North Idaho District Council of Laborers.