

HOUSE BILL REPORT

E2SHB 1634

As Amended by the Senate

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.

Brief Summary of Engrossed Second Substitute Bill

- Requires all underground facility operators to subscribe to a one-number locator service.
- Requires that every event where damage occurs to an underground facility be reported to Utilities and Transportation Commission's Damage Information Reporting Tool.
- Establishes a dispute resolution process for violations relating to underground utilities.
- Establishes the Damage Prevention Account.
- Creates state and local governments notification requirements when permitting structures or excavation within 100 feet of a transmission pipeline right-of-way.

HOUSE COMMITTEE ON TECHNOLOGY, ENERGY & COMMUNICATIONS

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.

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 the one-number locator service constitutes willful intent to avoid compliance with the underground utilities statutes.

Marking of Excavation Boundaries.

Before providing notice to the one-number locator service, the excavator must mark the boundary of the area in white paint on the ground where the excavation will be performed at the excavation site. If it is unfeasible to mark the boundary in white paint, the excavator is required to communicate directly with the affected facility operator or operators to ensure the area of excavation has been accurately identified.

Maintenance of Underground Facility Markings.

Once underground facilities have been marked by the facility operator, the excavator is responsible for maintaining the accuracy of the original markings for 45 calendar days from the date notice was provided to the one-number locator service or the life of the project.

Underground facility markings expire 45 calendar days from the date notice was provided to the one-number locator service. After 45 calendar days, a second notice must be provided to the one-number locator service. Excavators that make repeated calls to relocate the underground facilities because of their failure to maintain the marks may be charged for additional marking services.

Marking of Service, Water and Sewer Laterals.

To assist in designating service, water, or sewer laterals, the facility operator or sewer system owner or operator must designate a proposed excavation location by: (1) marking the location of service, water, or sewer laterals in accordance with the procedures established for the marking of underground facilities; or (2) if a service, water, or sewer lateral is unlocatable, marking within the proposed excavation area that there is an unlocatable service, water, or sewer lateral.

Damage Information Reporting Tool.

Facility operators and excavators who observe or cause damage to an underground facility must report the event to the Utilities and Transportation Commission (UTC). A non-pipeline facility operator acting as their own excavator or the facility operator's subcontractor who hits its own facilities is not required to report that damage event. Reports must be made to the UTC's Office of Pipeline Safety within 45 days of the event, or sooner if required by law using the UTC's virtual private Damage Information Reporting Tool (DIRT) report form or other similar form. If a facility operator or excavator reports damage using a form other than the UTC's DIRT report form, certain information must be provided including but not limited to a description of the damage, whether the damage caused an interruption of service, whether the excavator experienced downtime, and whether underground facilities were marked correctly.

Penalties.

Any person who violates any provision under the underground utilities statute, that does not relate to a violation of hazardous liquid or gas pipeline provisions, 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 into the Damage Prevention Account (Account) and be used for education and training of excavators and facility operators regarding best practices and compliance with the underground utilities statute.

Damage to a Permanent Marking.

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.

Damage Prevention Account.

The Account is created in the custody of the State Treasurer. All receipts from those moneys directed under the underground utilities statute or directed by the UTC must be deposited in the Account. Expenditures from the Account may be used only for the purposes of: (1) developing and disseminating educational programming designed to improve worker and public safety as it relates to excavation and underground facilities; and (2) providing grants to persons who have developed educational programming that the UTC and the Safety Committee deem to be appropriate for the purpose of improving worker and public safety as it relates to excavation and underground facilities. Only the UTC may authorize expenditures from the Account.

Dispute Resolution Process.

The UTC is directed to contract with a statewide, nonprofit entity whose purpose is to reduce damages to underground facilities as well as above ground facilities through cooperation, coordination, and by promoting safe excavation practices. The contracting entity is directed to create a Safety Committee.

The purpose of the Safety Committee is to advise the UTC and other state agencies, the Legislature, and local government agencies and officials on matters relating to best practices and training to prevent damage to underground utilities; and policies to enhance worker and public safety and protection of underground facilities. Additionally, the Safety Committee is responsible for resolving disputes involving practices related to underground facilities and possible violations. Any party may bring a complaint to the Safety Committee regarding a violation of underground utilities damage prevention laws.

The Safety Committee of the contracting entity consists of 13 members appointed in consultation with the UTC to staggered three-year terms and must consist of representatives of: (1) local governments; (2) owners and operators of hazardous liquid and gas pipelines; (3) contractors; (4) excavators; (5) an electric utility regulated by the UTC; (6) a consumer-owned utility; (7) a pipeline transportation company; (8) the UTC; and (9) a telecommunications company.

The Safety Committee may mediate disagreements among parties involving practices related to underground facilities and possible violations. For the purposes of mediation, the Safety Committee must appoint at least three and no more than five members as mediators. The mediators must represent a balance of excavators, facility operators, and the insurance industry, and must include at least one representative of a pipeline company or natural gas distribution company.

Enforcement of Civil Penalties.

The UTC may enforce the civil penalties when a document is filed with the UTC by the Safety Committee indicating that an underground facilities violation has likely occurred. After notice and an opportunity for a hearing, the UTC may impose the penalties on persons who committed the violation with respect to underground facilities of persons within its jurisdiction. Before imposing a penalty, the UTC must seek and consider the recommendation of the Safety Committee. Any person aggrieved by any penalty imposed may seek judicial review as allowed under the Administrative Procedures Act. If a penalty imposed by the UTC is not paid, the Attorney General must, on behalf of the UTC, file a civil action in superior court to collect the penalty.

Construction or Excavation within 100 Feet of a Transmission Pipeline.

The state or any of its political subdivisions undertaking or permitting construction or excavation activity that is permitted under the state's building code statute and is within 100 feet, or greater distance if defined by local ordinance, of a right-of-way or easement that contains a transmission pipeline must:

- notify the transmission pipeline company of the proposed construction activity before a permit is approved; or
- require consultation between the person proposing the construction activity and the transmission pipeline company as a condition of receiving the permit.

Emergency Excavations.

For emergency excavations using emergency bar holing 12 or more inches in depth, reasonable measures must be taken to eliminate electrical arc hazards.

Road Maintenance.

Road maintenance is exempted from the definition of excavation if the road maintenance undertaken does not involve excavation below the original road grade and ditch maintenance that does not involve excavation below the original ditch flow line or alter the original ditch horizontal alignment.

Large Projects.

If an excavator intends to perform work at multiple sites or the project is a large project, the excavator must take reasonable steps to work with facility operators so that facility operators can locate their facilities at a time reasonably in advance of the actual start of excavation for each phase of the work. A "large project" is defined as a project that exceeds 700 linear feet.

Definitions.

"Bar hole" means a hole made in the soil or pavement with a bar for the specific purpose of testing the subsurface atmosphere with a combustible gas indicator.

"End user" means any utility customer, including any public, commercial, or private consumer of facility operator underground facilities.

"Equipment operator" means the individual conducting the excavation.

"Facility operator" means any person with control over underground facilities, and includes any person having the legal right to place underground facilities in a public right-of-way or in any utility easement. A person or entity is not considered a facility operator of an independently owned underground facility operated within the person's or entity's right-of-way or utility easement.

"Service lateral" means an underground facility, including water service, that originates at the connection of a facility operator's system and terminates at or on the end user's property line. A service lateral may be owned by the end user or facility operator.

"Sewer lateral" means a facility operator's end user service line that transports wastewater from one or more building units or commercial facilities on the end user's property line to the

point of connection to a facility operator sewer system. A sewer lateral may be owned by the end user or facility operator.

"Sewer system owner or operator" means the owner or operator of a sewer system. Sewer systems are considered to the end user's property line for locating purposes only.

"Unlocatable underground facility" means an underground facility that cannot be field-marked with reasonable accuracy using best available information to designate the location of underground facilities. "Unlocatable underground facility" includes, but is not limited to, sewer laterals, storm drains, and nonconductive and nonmetallic underground facilities that do not contain trace wires.

"Utility coordinating council" means a statewide, nonprofit entity incorporated to reduce damages to underground facilities as well as above ground facilities through cooperation, coordination, and by promoting safe excavation practices.

EFFECT OF SENATE AMENDMENT(S):

Several technical corrections and clarifications are included, in addition to the following changes.

Intent.

The intent section is clarified, and provides that the chapter is the "Underground Utility Damage Prevention Act."

Definitions.

Existing and proposed new exceptions to the definition of "excavation" and "excavate" are transferred to a new section consolidating exemptions from excavator requirements. An obsolete definition of "identified facility" is deleted. Proposed definitions of "bar hole," "end user," "facility operator," "service lateral," and "unlocatable underground facility" are revised. Proposed definitions of "sewer lateral," "sewer system owner or operator," and "utility coordinating council" are deleted. A definition of "utility easement" is added.

Duties of Excavators and Facility Operators.

Facility operator duties are revised to provide that facility operators: (1) must provide "available information" rather than "best available information" regarding location of their facilities if they are unlocatable or identified but unlocatable; (2) must designate service laterals only if they connect end users to facility operators' main utility lines and are within a right-of-way or utility easement and the boundary of an identified excavation area; and (3) may comply with the foregoing requirements 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 with the foregoing requirements 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. Liability of: (1) facility operators is clarified to provide that excavators may receive "reasonable" compensation for their costs if an operator does not locate facilities in accordance with requirements; and (2) excavators is revised to provide that

facility operators may receive reasonable compensation for their costs if an excavator does not comply with all requirements for excavators (not just costs incurred in responding to excavation notices given less than two days prior to excavation). A facility operator is not required to provide available information or designate service laterals conveying only water 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 identified excavation area. An exemption from notice requirements for emergency excavations is transferred to a new section.

Exemptions from Excavator Duties.

Exemptions from excavator duties are consolidated in a new section. Existing exemptions for: (1) emergency excavations is clarified; (2) tilling of soil for agricultural purposes is changed from less than 12 inches in depth to less than 12 inches in depth within a utility easement and less than 20 inches in depth outside of a utility easement; and (3) road and ditch maintenance activities not involving excavation below original road grade or original ditch flowline or alteration of original ditch horizontal alignment are changed to allow excavation up to 6 inches. Proposed exemptions are added for: (1) replacement of an official traffic sign installed prior to January 1, 2013 (effective date of the act), no deeper than the depth at which it was installed; and (2) certain activities by an irrigation district on rights-of-way, easements, or facilities owned by the federal Bureau of Reclamation in federal reclamation projects. Proposed exemptions for creation of bar holes are consolidated and clarified. Activity exempted from excavator duties in this section is nonetheless subject to a requirement that excavators report damage they cause to underground facilities.

Construction or Excavation near Hazardous Liquid and Gas Pipelines.

Provisions are clarified. Duties of local governments regarding permitting of construction or excavation near pipelines are changed to relate to issuance, rather than approval, of permits. A reference is provided to existing law requiring the Utilities and Transportation Commission (UTC) to assist local governments in obtaining pipeline location information and maps.

Damage Prevention Account.

Civil penalties on excavators damaging hazardous liquid or gas pipelines will be deposited in the new Damage Prevention Account created by the legislation, rather than the existing Pipeline Safety Account.

Safety Committee.

Language is added providing that the UTC's contract with a nonprofit entity creating the Safety Committee must not obligate UTC funding, and is therefore exempt from competitive contracting requirements. The process for selecting members is clarified. The Safety Committee will include representatives of investor-owned natural gas utilities and insurance industry, in addition to other stakeholders. Before reviewing a complaint, a review committee appointed by the Safety Committee must notify the complainant and alleged violator of its review and the opportunity to participate. Membership of a review committee is clarified. The Safety Committee may provide written notification to the UTC that a person has likely committed a violation, and recommend remedial action.

Enforcement Authority.

Provisions for enforcement of alleged violations not involving UTC-regulated persons or facilities are added; the Attorney General will provide such enforcement. The UTC's authority to enforce violations involving damage to UTC-regulated pipelines is clarified.

Repeal of Exemption.

A provision exempting excavation less than 12 inches deep on private noncommercial property from excavator duties if performed by the property owner or occupier, or an employee, is repealed, and the exemption is incorporated in a new section that consolidates exemptions.

Utilities and Transportation Commission Jurisdiction.

A provision is added clarifying that nothing in the act may be construed to classify a consumer-owned utility to be under the authority of the UTC.

Short Title.

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

Report to Legislature.

A provision is added requiring the UTC to report to the Legislature by December 1, 2015, on the effectiveness of the damage prevention program, with analysis of reported damage data.

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.