

SENATE BILL REPORT

E2SHB 1634

As Reported by Senate Committee On:
Environment, Water & Energy, March 23, 2011

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: Passed House: 3/04/11, 93-4.

Committee Activity: Environment, Water & Energy: 3/15/11, 3/23/11 [DPA, DNP].

Brief Summary of Engrossed Second Substitute Bill (As Amended by Senate)

- Requires underground utility operators to meet duties currently applying to underground utility owners. The broader term operator includes underground utility owners or persons in the business of supplying utility service for compensation.
- Sets stricter requirements for operators to mark underground utilities or provide available information.
- Requires damage to be reported to Utilities and Transportation Commission (UTC), and UTC to evaluate damage data.
- Establishes Damage Prevention Account, funded by penalties, with expenditures by UTC to educate excavators and operators to improve safety and compliance.
- Establishes Safety Committee of stakeholder representatives to advise on safety and to review complaints of alleged violations.
- Establishes enforcement scheme by UTC for violations involving UTC-regulated entities and Attorney General for other violations.

SENATE COMMITTEE ON ENVIRONMENT, WATER & ENERGY

Majority Report: Do pass as amended.

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.

Signed by Senators Rockefeller, Chair; Nelson, Vice Chair; Chase, Delvin, Fraser, Morton and Ranker.

Minority Report: Do not pass.

Signed by Senator Honeyford, Ranking Minority Member.

Staff: Sam Thompson (786-7413)

Background: Dig Law. Legislation enacted in 1984, sometimes colloquially referred to as Washington's dig law, generally requires excavators to notify owners of underground facilities, defined to include most underground utilities, at least two business days before excavating. Excavators may provide notice to owners by contacting an owner-maintained one-number locator service called Washington 811 (locator service). The locator service provides an excavator with a confirmation code and the owner with notice of the impending excavation. Upon receipt of notice, an owner must generally respond within two business days. With respect to locatable underground facilities, owners must provide excavators with reasonably accurate information by surface marking the location of lines. With respect to identifiable but unlocatable underground facilities, owners must provide excavators with best available information. An owner is not required to indicate the presence of service laterals or appurtenances if their presence can be determined from other visible facilities, such as buildings, manholes, or meter and junction boxes.

Owners use color-coded surface markings to indicate different types of locatable utility lines, e.g., yellow to indicate gas, oil, and petroleum lines, and orange to indicate telephone and cable TV lines.

Liability. Excavators may receive compensation from owners for costs incurred if owners do not locate underground facilities in accordance with requirements. Owners may receive compensation for costs incurred in responding to excavation notices given less than two business days prior to excavation from the excavator. If an excavator discovers underground facilities that were not identified, the excavator must cease excavating in the vicinity of the facilities and immediately notify the owner or operator of the facilities, or the locator service.

Penalties. A person who violates requirements, resulting in damage to underground facilities, is subject to a civil penalty of \$1,000 for each violation. An excavator may be subject to treble damages for an owner's repair or relocation costs if the excavator failed to notify owners or the locator service prior to excavating, or if the excavator willfully or maliciously damaged a field-marked underground facility. An excavator who failed to notify the locator service and caused damage to a hazardous liquid or gas pipeline is subject to a civil penalty of \$10,000 for each violation. An excavator who excavates within 35 feet of a transmission pipeline without a valid confirmation code from the locator service is guilty of a misdemeanor, and may also be subject to a civil penalty of \$10,000 for each violation. Civil penalties imposed for damage to hazardous liquid or gas pipelines are deposited in a pipeline safety account. Other penalties are deposited in the general fund.

The Utilities and Transportation Commission (UTC) and federal Pipeline and Hazardous Materials Safety Administration (PHMSA). UTC regulates intrastate pipelines and PHMSA

regulates interstate pipelines. UTC is the lead inspector of interstate pipelines in the state, certified by PHMSA to make inspections based on federal regulations.

Pursuant to the Federal Pipeline Inspection, Protection, Enforcement, and Safety (PIPES) Act of 2006, PHMSA awards grants to state damage prevention programs. Grants are intended to promote effective state damage prevention programs, which include the following elements: (1) participation by stakeholders in establishing effective communications; (2) fostering of support and partnership of all stakeholders; (3) reviewing of operator's use of performance measures for locator services; (4) encouraging of effective employee training programs; (5) fostering of public education for damage prevention; (6) a dispute resolution process defining the state authority's role; (7) enforcement of state damage prevention laws; (8) promotion of use of technology to improve the locating process; and (9) a process for reviewing and analyzing elements and implementing improvements.

In 2009 a stakeholder group began to meet to consider changes to the Washington's dig law, partly in response to PIPES Act. The group eventually developed recommended legislation.

Summary of Bill (Recommended Amendments): Generally. Washington's dig law is substantially revised and given a title: the Underground Utilities Damage Prevention Act. Many duties regarding owners are recast to apply to underground facility operators (operators), defined as any person who owns underground facilities or is in the business of supplying any utility service or commodity for compensation. Much of current law is maintained, with changes and clarifications described below.

Definition of Excavation and Excavate. A clarification to the definition of excavation and excavate provides that installation of signs is included. However, installation of official traffic control signs is excepted, and thus exempted from requirements applying to excavation and excavators covered by the law.

Excavator and Operator Duties. Before excavating, an excavator must mark the boundary of the excavation area with white paint, then provide notice to a locator service. If boundary marking is infeasible, an excavator must communicate with affected operators to ensure that boundaries are accurately identified. If an excavator intends to work at multiple sites or at a large project (exceeding 700 linear feet), the excavator must confer with operators to enable them to locate underground facilities reasonably in advance of excavation for each work phase.

Upon receipt of notice, an operator must, with respect to:

- its locatable underground facilities, provide the excavator with reasonably accurate information by surface-marking their location;
- its unlocatable or identified but unlocatable underground facilities (facilities that cannot be field-marked with reasonable accuracy using best available information), provide the excavator with available information as to their location; and
- service laterals (facilities connecting an operator's facility with an end-user's building or property), designate their presence or location, if they connect end users to the operator's main utility line, and are within a public right-of-way or utility easement and the boundary of the identified excavation area.

An operator must provide information to an excavator no later than two business days after receipt of notice or before excavation, at the operator's option, unless otherwise agreed by the parties. An operator may comply with information requirements by:

- placing in a proposed excavation area a triangular green mark at the main utility line pointing at an address, indicating an unlocatable or identified but unlocatable underground facility, including a service lateral;
- arranging to meet an excavator at a worksite to provide available information about location of service laterals; or
- providing available information through other means if agreeable to both the excavator and operator.

An operator's good faith attempt to designate the presence or location of service laterals using available information is deemed to comply with requirements and does not constitute any assertion of ownership or operation of service laterals by the operator. An end user is responsible for locating service laterals on their property or service laterals that they own.

Once marked by an operator, an excavator is responsible for maintaining markings for the lesser of 45 days from the date the excavator provided notice to the locator service or the duration of the project. An excavator making repeated requests for locating underground utilities due to its failure to maintain markings may be charged for services provided. An operator's markings expire 45 days from the date the excavator provided notice to the locator service. For excavation after that date, an excavator must provide additional notice to the locator service.

If an excavator discovers identified but unlocatable underground facilities during excavation, the excavator must notify the operator. Upon notification, an operator must allow for location of the uncovered portion of an underground facility identified by the excavator, and may accept location information from the excavator for marking.

A provision commonly called the appurtenance clause, providing that a utility owner is not required to indicate the presence of service laterals or appurtenances if their presence can be determined from other visible facilities (such as buildings, manholes, or meter and junction boxes), is deleted.

Excavator Duty Exemptions. Exemptions from excavator duties are consolidated in a new section. Existing exemptions for (1) tilling of soil for agricultural purposes is changed from less than 12 inches in depth to less than 20 inches in depth; and (2) 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. Exemptions are added for (1) creation of bar holes with hand-operated equipment during emergency leak investigations, or bar holes less than 12 inches in depth; and (2) certain activities by irrigation districts on right-of-ways, easements, or facilities owned by the federal bureau of reclamation in federal reclamation projects. Activity exempt from excavator duties in this section is nonetheless subject to a requirement that excavators report damage they cause to underground facilities.

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 the new section.

Construction or Excavation Near Transmission Pipeline. State or local government agencies undertaking or permitting construction or excavation activity within 100 feet, or greater distance if defined by local ordinance, of a right-of-way or easement containing a transmission pipeline must notify the transmission pipeline company of the proposed activity before a permit is approved or require consultation between the person proposing the activity and the transmission pipeline company as a condition of receiving the permit.

Damage Reporting. Operators and excavators who observe or cause damage to a underground facilities must report the event to UTC. A non-pipeline operator conducting excavation or a subcontractor excavating on the operator's behalf who strike the operator's own facilities are not required to report that damage to UTC. Reports must be made to UTC's Office of Pipeline Safety within 45 days of the event, or sooner if required by law, using UTC's Damage Information Reporting Tool (DIRT) report form or other similar form. If a form other than DIRT report form is used, it must report specified information. UTC must use reported data to evaluate the effectiveness of the damage prevention program.

Penalties. A person who violates provisions not relating to hazardous liquid or gas pipelines is subject to a civil penalty of \$5,000 for subsequent violations, after an initial violation, within a three-year period. Penalties must be deposited into the Damage Prevention Account and used for education and training of excavators and facility operators regarding best practices and compliance.

Damage Prevention Account. The Damage Prevention Account is created in the custody of the State Treasurer. Expenditures may be used only for educational programming to improve worker and public safety relating to excavation and underground utilities and for grants to persons who have developed educational programming that UTC and the Safety Committee (Committee) deem appropriate. Only UTC may authorize expenditures. Civil penalties on excavators damaging hazardous liquid or gas pipelines will be deposited in the damage prevention account, rather than the existing pipeline safety account.

Safety Committee. UTC must contract with a statewide nonprofit entity whose purpose is to reduce damage to utility lines, promote safe excavation practices, and review complaints of violations. The contract does not obligate UTC funding, and is therefore exempt from competitive contracting requirements. The contracting entity must create a Committee to advise UTC and other state agencies, the Legislature, and local governments on best practices and training to prevent damage to underground utilities, worker and public safety, and protection of underground facilities, and to review complaints alleging violations.

The Committee will consist of 13 members nominated by stakeholder groups and appointed by the contracting entity to staggered three-year terms, and will include representatives of diverse stakeholder groups.

The Committee must meet at least once every three months, and may review complaints of alleged violations. Any person may bring a complaint to the Committee regarding an alleged

violation. To review complaints, the Committee must appoint a review committee of between three to five members representing diverse stakeholder groups. Before reviewing a complaint, the review committee must notify the complainant and alleged violator of its review and the opportunity to participate.

The Committee may provide notice to UTC that a person has likely committed a violation, and recommend remedial action. Provisions regarding the Committee expire December 31, 2020.

Enforcement. UTC may enforce civil penalties when it receives notice from the Committee indicating that a violation has likely been committed by a person subject to UTC regulation or involving the underground facilities of such a person. If UTC receives notice from the Committee that a violation has likely been committed by a person not subject to UTC regulation, and in which the underground facility involved is also not subject to UTC regulation UTC may refer the matter to the Attorney General (AG) for enforcement of a civil penalty. UTC must provide funding for such enforcement. However, any costs and fees recovered by the AG as court-awarded costs, included attorneys' fees, must be deposited by UTC in the fund that paid those costs and fees. This provision expires December 31, 2020.

UTC Investigation and Enforcement Relating to Pipeline Facilities. UTC may investigate and enforce violations relating to pipeline facilities without initial referral to the Committee. If UTC investigation substantiates violations, UTC may impose penalties and require remedies. With respect to referrals from the Committee, UTC must consider its recommendations. In UTC action to impose penalties, the penalty is due and payable when the person incurring the penalty receives notice from UTC. The person incurring the penalty has 15 days from the date it receives notice to file a request for mitigation or hearing. After receiving a timely request, UTC must suspend collection of the penalty until it issues a final order. A person aggrieved by UTC final order may seek judicial review. If a penalty is not paid, the AG may file a civil action to collect the penalty. This provision expires December 31, 2020.

UTC 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 UTC.

EFFECT OF CHANGES MADE BY ENVIRONMENT, WATER & ENERGY COMMITTEE (Recommended Amendments): Several technical corrections and clarifications are included, in addition to the following changes.

Intent (Section 1). The intent section is clarified, and provides that the chapter is the underground utility damage prevention act, as further specified in Section 25.

Definitions (Section 2). The definition of excavation and excavate is revised to provide that installation of official traffic signs is excluded. Other existing and proposed new exceptions to the definition of excavation and excavate are transferred to a new section consolidating exemptions from excavator requirements (Section 5). An obsolete definition of identified facility is deleted. A definition of easement or utility easement is added. Proposed definitions of 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.

Duties of Excavators and Facility Operators (Section 4). Facility operator duties are revised to provide that facility operators (1) must provide 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 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 information, or by providing information through other means agreeable to both excavators and utility operators.

Exemptions from Excavator Duties (Section 5). Exemptions from excavator duties are consolidated in a new section. Existing exemptions for (1) tilling of soil for agricultural purposes is changed from less than 12 inches in depth to less than 20 inches in depth; and (2) 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. An exemption is added for certain activities by an irrigation district on rights-of-way, easements, or facilities owned by the federal bureau of reclamation in federal reclamation projects. Activity exempt from excavator duties in this section is nonetheless subject to a requirement that excavators report damage they cause to underground facilities.

Damage Prevention Account (Section 10). 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 (Section 18). Language is added providing that UTC's contract with a nonprofit entity creating the Committee does not obligate UTC funding, and therefore is exempt from competitive contracting requirements. The process for selecting members is clarified. The 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 Committee must notify the complainant and alleged violator of its review and the opportunity to participate. The Committee may provide written notification to UTC that a person has likely committed a violation, and recommend remedial action.

Enforcement Authority (Sections 19 and 21). Provisions for enforcement of alleged violations not involving UTC-regulated persons or facilities are added; the AG will provide such enforcement. UTC's authority to enforce violations involving damage to UTC-regulated pipelines is clarified.

Repeal of Exemption (Section 23). 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 Section 5.

UTC Jurisdiction (Section 24). 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 (Section 25). A provision is added providing that the act may be known and cited as the underground utility damage prevention act.

Appropriation: None.

Fiscal Note: Available. New fiscal note requested on March 25, 2011.

Committee/Commission/Task Force Created: No.

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

Staff Summary of Public Testimony on Engrossed Second Substitute House Bill: PRO: This bill is really about safety. Stakeholders did not agree on terms when they began meeting to discuss proposed legislation in 2009, but most stakeholders now support this measure. The UTC's Pipeline Safety Program is recognized as one of the nation's best, but the UTC's Damage Prevention Program needs better enforcement provisions and reporting requirements, which the bill is intended to provide. The bill is important to the UTC to enhance safety and to maintain federal funding, which provides much of the program's operating budget. The bill will align Washington law with new requirements under federal law. Stakeholders have made great progress in negotiating terms. The bill establishes stricter marking requirements, a stakeholder-driven complaint review process, better enforcement provisions, and enhanced data collection. A provision requiring notice to pipeline companies for work within 100 feet of a pipeline is also important. Requirements for identification of laterals simply require that utility operators provide information; if necessary, they may indicate that laterals are unlocatable.

CON: Seattle Public Utilities strongly oppose this bill's imposition of a duty to locate sewer laterals owned by property owners, not the utility. This duty will impose higher costs to cities with no real benefits. While Tacoma public utilities support some provisions of the bill, the bill's definition of facility operator is too inclusive, and requirements to provide information regarding unlocatable lines not owned by the city will have a huge fiscal impact. While the Association of Washington Cities supports many provisions of the bill, it remains opposed to new duties imposed on facility operators. The bill should be amended to clarify that consumer-owned utilities are not subject to UTC regulation.

OTHER: The bill creates difficult duties for consumer-owned utilities regarding location of laterals that are not owned by the utilities. The duty to locate laterals will be expensive for sewer and water districts, particularly smaller districts. The bill should be amended to exempt certain excavation in federal reclamation projects from excavator duties. New excavator notice duties for placement of signs along roadways relating to roadwork will cause delays; in addition, an exemption from notice duties should be provided for excavation involving routine roadwork up to 12 inches below the original road grade. The bill should be amended to clarify that consumer-owned utilities are not subject to UTC regulation. Public utility districts share concerns with other utility operators regarding marking duties.

Persons Testifying: PRO: Representative Takko, prime sponsor; Jeffrey Goltz, UTC; Ron Schmitt, Citizens Committee on Pipeline Safety; Don Evans, Washington 811; Dan Kirschner, NW Gas Association; Brad Tower, Olympic Pipeline Company; Nancy Atwood, Puget Sound Energy; Van Collins, Associated General Contractors.

CON: Bob Hennessey, Seattle Public Utilities; Bob Mack, City of Tacoma; Ashley Probart, Association of Washington Cities; Kent Lopez, Washington Rural Electric Cooperative Association.

OTHER: Jeff Johnson, Water Cooperative of Pierce County; Joe Daniels, Washington Association of Water & Sewer Districts; Mike Schwisow, Washington State Water Resources Association; Gary Rowe, Washington State Association of County Engineers; Bill Clarke, Washington Public Utility District Association.