

MISS DIG UNDERGROUND FACILITY DAMAGE PREVENTION AND SAFETY ACT

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Senate Bill 539 without amendment

Senate Bill 540 (Substitute H-1)

Sponsor: Sen. Mike Nofs

House Committee: Energy and Technology

Senate Committee: Energy and Technology

Complete to 11-5-13

A SUMMARY OF SENATE BILLS 539 AND 540 AS REPORTED BY COMMITTEE 10-29-13

Senate Bill 539 would amend the Governmental Immunity Act (MCL 691.1407) to specify that the immunity provided to state and local governmental units does not apply to the liability of a governmental agency under the Miss Dig Underground Facility Damage Prevention and Safety Act. The bill is tie-barred to Senate Bill 540, which would create that new act. (Generally speaking, the Governmental Immunity Act provides governmental agencies immunity from tort liability if they are engaged in the exercise or discharge of a governmental function.)

Senate Bill 540 would repeal the current "Miss Dig Act"—Protection of Underground Facilities, Public Act 53 of 1974—and replace it with the Miss Dig Underground Facility Damage Prevention and Safety Act. The bill is tie-barred to Senate Bill 539 and would take effect 90 days after enactment into law. However, an individual engaged in a farming operation on a farm would not have to comply with the act until May 1, 2014.

The new act would add many new definitions; adopt a formal "ticket" system for dig requests; impose civil penalties on governmental agencies for violations; charge the Michigan Public Service Commission with enforcement of the act, including authority to levy fines; adopt the ANSI utility color code to mark underground facilities; and expand exemptions to the act.

Briefly, the bill would, among other things:

- Require utility underground facility owners and operators to continue to operate and be a part of Miss Dig Systems, Inc.
- Require an excavator to provide a dig notice to the notification system at least 72 hours, but not more than 14 days, before the start of any blasting or excavation. All hours of nonbusiness days would be excluded in counting the 72-hour period.
- Establish funding for the notification system operations through fees assessed on facility owners and operators.
- Prescribe the information to be on a dig notice.

- Require excavators to comply with the notification system procedures and all requirements of the act.
- Require an excavator to provide additional notice to the Miss Dig System and stop excavation if there is reason to suspect the presence of an unmarked facility.
- Require an excavator to provide immediate notice to the facility owner or operator if a facility is contacted or damaged.
- Require the excavator to call 9-1-1 if a facility is damaged resulting in the escape of flammable, toxic, or corrosive gas or liquid, or endangering life, health, or property, and to provide notice to the facility owner or operator.
- Require an excavator to provide prompt emergency notice to the notification system for proposed excavation or blasting in an emergency. Emergency notices would have to be expedited by the notification system.
- Allow an excavator to conduct excavation in a safe zone with power equipment without establishing the location of any facilities.
- Require the notification system to promptly transmit a ticket to facility owners or operators in the area of the proposed activity.
- Require the notification system to be available 24 hours a day, seven days per week.
- Require the notification system to keep adequate records of its notification activity for six years after the date of a notice, including voice recordings of calls. Copies would have to be provided to interested parties upon written request and payment of a reasonable charge for reproduction and handling costs.
- Require the facility owner or operator to mark the location of each facility with paint, stakes, flags, or other customary methods using the color code of the American National Standards Institute.
- Specify the act would not affect local permitting laws or ordinances for activity in public streets or to construct or demolish buildings on private property. A permit would not relieve a person from complying with the act's provisions.
- Require the Michigan Public Service Commission to develop forms and promulgate administrative rules for processing complaints under the bill.
- Require the PSC to establish requirements for reporting incidents involving damages to underground facilities no later than October 1, 2014.

Definitions

The bill would define many new terms, including the following:

- "Approximate location" -- a strip of land at least 36 inches wide, but not wider than the width of the marked facility plus 18 inches on either side of the facility marks.
- "Caution zone" -- the area within 48 inches of either side of the facility marks provided by a facility owner or facility operator.
- "Damage" -- any impact upon or exposure of an underground facility requiring its repair or replacement due to weakening, partial destruction, or complete destruction.
- "Design ticket" -- a communication to the notification system in which a request for information regarding underground facilities for predesign, design, or advance

planning purposes, but not marking for excavation or blasting, is made under procedures described in Section 6a of the bill.

- "Ticket" -- a communication from the notification system to a facility owner or operator requesting the marking of underground facilities, based on information provided by an excavator in a dig notice.
- "Dig notice" -- a communication to the notification system by an excavator providing notice of intended excavation or blasting activity as required by the bill.
- "Excavation" -- moving, removing, or otherwise displacing earth, rock, or other material below existing surface grade with power tools or equipment. The term would include grading, trenching, tiling, digging, drilling, boring, tunneling, cable or pipe plowing, and pile driving, and also razing, moving, or removing a structure of mass of materials.

The term "excavation" would not include certain activities performed in the course of farming; replacing a fence post, sign post, or guardrail in its existing location; excavating at a grave site in a cemetery; excavation performed within a landfill during its active life or postclosure period; certain activities conducted by railroad employees or railroad contractors that are carried out with reasonable care so to protect any installed facilities placed in the railroad right-of-way such as certain maintenance activities; and routine maintenance or preventative maintenance (as defined in the State Trunk Line Highway System Act) to a depth of not more than 12 inches below the roadway and any shoulder of a street, county road, or highway.

- "Person" -- an individual, firm, joint venture, partnership, corporation, utility cooperative, or joint stock association, including any trustee, receiver, assignee, or personal representative thereof.
- "Public right-of-way" -- the area on, below, or above a public roadway, highway, street, alley, easement, or waterway.
- "Safe zone" -- an area 48 inches or more from either side of the facility marks provided by a facility owner or facility operator.
- "White lining" marking by an excavator of the area of a proposed excavation or blasting, with white paint and/or flags, before giving notice to the notification system.

Exemptions

The bill would:

- Provide exemption from certain provisions to the Michigan Department of Transportation and to markings of a county or intercounty drain by a county drain commissioner's office or drainage board.
- Exempt facility owners and operators who own or operate a facility located on their own property from the act's requirements if the facility operates solely for their own benefit.
- Exempt the notification system and its officers, agents, or employees from liability for any damages caused by its acts or omissions in carrying out the provisions of the act. The notification system would not be responsible for

assuring performance by a facility owner or operator of its obligation to participate in the notification system and pay fees levied by the notification system to support the notification system operations.

- Exempt an excavator or farmer engaged in farming operations that complies with the act from responsibility for damages that occur to a facility that is improperly marked, not marked, or determined to be within the safe zone. "Farming operations" would mean plowing, cultivating, planting, harvesting, and similar operations but would not include installing drainage tiles, underground irrigation lines, or the drilling of a well.
- Exempt an owner of a farm who complies with the act from liability for damages to a facility if the damage occurred in the course of farming operations. Intentional acts or wanton disregard or reckless acts that damaged the facility would not be exempted.
- Prohibit a governmental agency issuing a permit for various construction projects from imposing liability upon the agency.
- With some exceptions, specify the act would not affect the liability of a governmental agency for damages for tort or the application of the Governmental Immunity Act.

Criminal penalties and civil actions.

The bill would:

- Specify that the act does not limit the right of an excavator, or a facility owner or operator, to seek legal relief and recovery of actual damages and equitable relief in a civil action arising out of a violation of the requirements of the act, or to enforce the provisions of the act. The act would not determine the level of damages or injunctive relief in any such civil action.
- Specify that certain prohibited conduct, such as knowingly damaging an underground facility and failing to properly notify the facility owner or operator, would be a misdemeanor punishable by imprisonment for not more than one year and/or a fine of \$5,000.
- Allow the Michigan Public Service Commission to, after a complaint was filed and a hearing conducted, order a person other than a governmental agency who violated any provisions of the act to pay a civil fine of not more than \$5,000 for each violation. The PSC could also order, in addition to or in lieu of a fine, reasonable training to assure future compliance with the act.
- Require a person to attempt to settle a dispute with another party prior to filing a complaint.
- Specify the criteria for the PSC to use in determining the amount of a fine.
- Allow a facility owner or operator to file a complaint with the PSC seeking a civil fine and damages from a *governmental agency* for any violation of the act. A civil fine imposed on a governmental agency would be capped at \$5,000 for a sole offense within 12 months. A fine not to exceed \$10,000 could be imposed for a second offense if a first offense had been committed within the preceding 12 months. A third or subsequent violation when the most recent offense had been committed in the previous 12 months would subject the agency to a fine of not

more than \$15,000 and the cost to repair the facilities. This provision would not apply if the violation was a result of action taken in response to an emergency. A civil fine ordered under this provision would be paid to the PSC and used for underground facilities safety education and training. Each day upon which a violation occurs is a separate offense.

BACKGROUND INFORMATION:

The bills are similar to Senate Bills 1083 and 1084 of the 2011-2012 legislative session. Those bills passed the Senate near the end of the two-year legislative cycle and so did not see House action.

According to the Miss Dig System website, "One toll free call to 800-482-7171 or 811 reaches the MISS DIG System. The MISS DIG System processes calls from individuals planning to dig and notifies its member utilities about these excavations. The member utilities then mark the dig site, indicating the approximate location of their underground public utility lines (MISS DIG does not mark). The MISS DIG System promotes safety on the job site and assists the utilities in providing safe and efficient service to millions of customers, thus helping to preserve the environment and ensuring the quality of life for all Michigan residents."

FISCAL IMPACT:

Senate Bill 540 would have an indeterminate, yet likely but nominally negative, fiscal impact on the Michigan Public Service Commission (PSC) to the extent that it would engender administrative costs for the PSC to develop appropriate forms and instructions, establish requirements for reporting incidents, promulgate rules for processing complaints, notify interested parties of complaints, administer Commission hearings and issue orders, and determine and collect civil fines. These administrative costs would be supported by annual assessments on public utilities under the Costs of Regulating Public Utilities Act of 1972; assessments are equivalent to the annual appropriation attributable to the regulation of public utilities, derived from a statutory formula. The revenue generated by civil fines ordered under SB 540 would be restricted to supporting expenditures pertaining to underground facilities safety education and training.

Senate Bill 540 would have an indeterminate fiscal impact on local units of government regarding criminal violations. Information is not available on the number of persons that might be convicted of the proposed misdemeanor. Misdemeanor convictions would increase costs related to county jails and/or local misdemeanor probation supervision. The costs of local incarceration in a county jail and local misdemeanor probation supervision vary by jurisdiction. Penal fine revenue of up to \$5,000 per violation would benefit local libraries, which are the constitutionally-designated recipients of those revenues.

Senate Bills 539 and 540 would have indeterminate, but negative, fiscal impact on government agencies. The provisions of the bills would expose a government agency to

liability for any violations of the proposed act. The overall fiscal impact to any government agency would depend on the number and extent of the violations committed. No statewide data exists on the number and type of violations committed by government agencies, therefore a monetary impact cannot be estimated.

The fiscal impact of Senate Bill 539 on local units of government is indeterminate. Under the bill, municipalities would be held liable for damages caused to underground facilities. Information is not available on how often municipalities cause damages to underground facilities, or what the costs to the municipalities are.

POSITIONS:

A representative of the County Road Association of Michigan testified in support of the bills. (10-29-13)

The following indicated support for the bills on 10-29-13:

Michigan Electric Cooperative Association
Michigan Farm Bureau
Semco Energy
Consumers Energy
DTE Energy
Miss Dig System, Inc.

The City of Detroit Water and Sewerage Department submitted written testimony expressing several concerns with the bills, in particular terminating governmental immunity and imposing new penalties upon local governments in excess of fines levied against others for violations of the act. (10-29-13)

The following testified in support or indicated support for the bills on 10-22-13:

Michigan Infrastructure Transportation Association
Michigan Damage Prevention Board
Century Link
Paradigm Liaison Services

Michigan Townships Association indicated a position of neutrality. (10-22-13)

TransCanada submitted written testimony in opposition to Senate Bill 540, in particular the definition of "approximate location" as continuing to expose pipeline facilities to risk of strikes. TransCanada urges the adoption of a requirement for a call to 8-1-1 whenever excavation would occur over 18 inches in depth. (10-22-13)

The following testified in support or indicated support for the bills on 10-15-13:

AT&T
Detroit Regional Chamber
Michigan Soybean Association
Frontier Communications

Michigan Electric & Gas Association

The Michigan Municipal Electric Association and the Michigan Railroads Association indicated a neutral position. (10-15-13)

Legislative Analyst: Susan Stutzky
Fiscal Analyst: Paul Holland
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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.