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Senate Bills 539 and 540 (as enacted)
Sponsor: Senator Mike Nofs
Senate Committee: Energy and Technology
House Committee: Energy and Technology

PUBLIC ACTS 173 & 174 of 2014

Date Completed: 1-26-15

CONTENT

Senate Bill 540 repealed Public Act 53 of 1974 (which governed the protection of public utility underground facilities), and created the "MISS DIG Underground Facility Damage Prevention and Safety Act" to do the following:

- Require owners and operators of utility underground facilities to continue to operate and be members of MISS DIG (the "notification system"), and pay any applicable fees.
- Require an excavator to provide a dig notice to the notification system before any blasting or excavation.
- Require an excavator to notify the notification system and request additional assistance, under certain circumstances.
- Require an excavator to notify the owner or operator immediately after damaging a facility, and take certain actions if the damage endangers life, health, or property.
- Require an excavator to notify the notification system promptly for any proposed excavation or blasting in an emergency.
- Require the notification system to receive dig notices and transmit tickets to facility owners and operators notifying them of the proposed activity.
- Require a facility owner or operator to respond to a ticket by marking the location of its facilities in the area before a proposed excavation or blasting.
- Require an owner or operator to respond to a request for additional assistance or an emergency notice within three hours, and dispatch personnel upon notice that a facility has been damaged.
- Require the notification system to establish procedures for notification to facility owners and operators of requests for project design or planning services during the planning and design stage of a construction or demolition project.
- Allow farm operation property owners to become nonvoting members of the notification system for free in order to receive notice of proposed excavation and blasting activities.
- Require the notification system to administer a positive response system and maintain records of its notification activity for six years.
- Require new facilities to be constructed in a manner that allows their detection when in use.
- Provide that the Act does not limit a person's right to seek legal relief and recovery of damages in a civil action.
- Provide immunity to the notification system and its officers, agents, or employees.
- Provide that an excavator or farmer who complies with the Act is not responsible for damage to facilities that are not marked as required or determined to be within a safe zone.
- Provide immunity to a farm owner who complies with the Act with regard to facilities damaged outside the public right-of-way, unless the owner intentionally damages the facility or acts with wanton disregard or recklessness.

- **Make it a misdemeanor to damage an underground facility and act to conceal the damage; or fail to notify the owner or operator or willfully remove or destroy the markings indicating the location of an underground facility.**
- **Authorize the Public Service Commission (PSC) to impose a civil fine of up to \$5,000 on a person who violates the Act.**
- **Authorize the PSC to impose a civil fine of up to \$15,000 on a governmental agency that violates the Act, and order that the agency's personnel undergo additional training.**
- **Require an individual engaged in a farming operation on a farm to comply with the Act beginning May 1, 2014.**
- **Require the PSC, by October 1, 2014, to establish requirements for reporting incidents involving damage to underground facilities.**
- **Require the PSC to make the reported information available on its website, beginning April 1, 2015.**

Senate Bill 539 amended the governmental immunity law to provide that immunity does not apply to a governmental agency acting under the MISS DIG Underground Facility Damage Prevention and Safety Act.

The bills took effect on April 1, 2014.

Senate Bill 540

Notification System

The bill requires facility owners and operators to continue to operate and be members of MISS DIG Systems, Inc., which has all the duties and must undertake the responsibilities of the notification system under the Act on and after its effective date. Those responsibilities and duties do not include the physical marking of facilities, which is the responsibility of a facility owner or operator upon notification, as described below.

(The Act defines "facility" or "underground facility" as an underground or submerged conductor, pipe, or structure, including a conduit, duct, line, pipe, wire, or other device and its appurtenances used to produce, store, transmit, or distribute a utility service, including communications, data, cable television, electricity, heat, natural or manufactured gas, oil, petroleum products, steam, sewage, video, water, and other similar substances, including environmental contaminants or hazardous waste.

"Notification system" means MISS DIG System, Inc., a Michigan nonprofit corporation formed and operated by each facility owner and operator to administer a one-call system for the location of facilities, or any successor to this corporation.)

The notification system and its procedures must be governed by its board of directors and in accordance with its articles of incorporation and bylaws as of the Act's effective date, with any future changes made in accordance with the Nonprofit Corporation Act and the notification system's articles, bylaws, and board procedures. The notification system must request input regarding its policies from all interested people, including facility owners and operators, excavators, marking service providers, and governmental agencies.

The notification system must establish funding for operations, including through fees based on a reasonable assessment of operating costs among facility owners and operators. A facility owner or operator may not charge a fee to excavators for marking facilities.

Facility owners and operators must be members of and participate in the notification system and pay the fees levied by it. This obligation and the Act's requirements for owners and operators do not apply to a person who owns or operates a facility located on real property the person owns or occupies if the facility is operated solely for that person's benefit.

("Person" means an individual, firm, joint venture, partnership, corporation, association, governmental body, department or agency, utility cooperative, or joint stock association, including any trustee, receiver, assignee, or personal representative of the individual or entity.)

An owner of real property on which there is a farm operation as defined in the Michigan Right to Farm Act may become a nonvoting member of the notification system, known as a farm member, upon providing the system with the information necessary to send the farm member a ticket for purposes of notification of proposed excavation and blasting activities (as described below). A farm member is not subject to any fees levied by the system.

(Under the Right to Farm Act, "farm operation" means the operation and management of a farm or a condition or activity that occurs at any time as necessary on a farm in connection with the commercial production, harvesting, and storage of farm products.)

The system is exempt from taxes collected under the General Property Tax Act.

Dig Notice

An excavator must give the notification system a dig notice at least 72 hours, but not more than 14 calendar days, before the start of any blasting or excavation. The 72-hour period must be measured as described in the Act, depending on the time of day notice is given and whether it is given on a business or nonbusiness day. If there are multiple excavators on the same site, each one must provide its own dig notice.

At a minimum, a dig notice must contain all of the following information:

- The name, address, and telephone number of the excavator.
- A description of the proposed area of blasting or excavation, including the street address and a property description.
- The specific type of work to be performed.
- The start date and time of blasting or excavation.
- Whether the proposed blasting or excavation will be completed within 21 days after the start date.

An excavator must comply with the notification system procedures and all requirements of the Act.

"Excavator" means any person performing excavation or blasting. "Excavation" means moving, removing, or otherwise displacing earth, rock, or other material below existing surface grade with power tools or power equipment; and wrecking, razing, rending, moving, or removing a structure or mass of material. Excavation also excludes replacing a fence post, sign post, or guardrail in its existing location; and any excavation performed at a grave site in a cemetery or within a landfill unit during its active life or postclosure period. The term also excludes any of the following activities performed in the course of farming operations, if they are not performed within six feet of any aboveground structure that is part of a facility:

- Any farming operation performed in the public right-of-way to a maximum depth of 12 inches below the existing surface grade.
- Any farming operation performed outside a public right-of-way and within 25 yards of an existing petroleum or natural gas pipeline to a maximum depth of 18 inches below the existing surface grade.
- Any farming operation performed outside a public right-of-way and not within 25 yards of an existing petroleum or natural gas pipeline.

"Farming operations" means plowing, cultivating, planting, harvesting, and similar operations routine to most farms and that are performed on a farm. The term does not include installation of drainage tile or underground irrigation lines, or the drilling of a well.

Additionally, "excavation" excludes any of the following activities conducted by railroad employees or contractors that are carried out with reasonable care to protect any installed facilities placed in the railroad right-of-way by agreement with the railroad:

- Any routine railroad maintenance activities performed in the public right-of-way as described below.
- Any routine railroad maintenance activities performed to a maximum depth of 18 inches below the flow line of a ditch or the ground surface in the railroad right-of-way, excluding the public right-of-way, if the activity is not performed within six feet of any aboveground structure that is part of a facility that is not owned or operated by that railroad.
- Routine or preventative maintenance as those terms are defined in Public Act 51 of 1951, the Michigan Transportation Fund law, to a maximum depth of 12 inches below the roadway and any shoulder of a street, county road, or highway.

"Blasting" means changing the level or grade of land or rendering, tearing, demolishing, moving, or removing earth, rock, buildings, structures, or other masses or materials by the detonation of dynamite or any other explosive agent.

Excavator Duties

Except as otherwise provided, before blasting or excavating in a caution zone, an excavator must expose all marked facilities in the zone by soft excavation. If conditions make complete exposure of the facility impractical, an excavator must consult with the owner or operator to reach agreement on how to protect the facility. For excavations in a caution zone parallel to a facility, an excavator must use soft excavation at intervals as often as reasonably necessary to establish the facility's precise location. An excavator may use power tools and power equipment in a caution zone only after the facilities are exposed or their precise location is established.

("Caution zone" means the area within 60 inches of either side of the facility marks provided by a facility owner or operator.

"Mark", "marks", or "marking" means the temporary identification on the surface grade of the location of a facility in response to a ticket as required under the Act.

"Ticket" means 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.

"Soft excavation" means a method and technique designed to prevent contact damage to underground facilities, including hand-digging, cautious digging with nonmechanical tools, vacuum excavation methods, or use of pneumatic hand tools.

"Damage" means any impact upon or exposure of an underground facility requiring its repair or replacement due to weakening, partial destruction, or complete destruction of the facility, including the protective coating, lateral support, cathodic protection, or housing of the facility.)

An excavator must provide support or bracing of facilities or excavation walls in an excavation or blasting area that are reasonably necessary for protection of the facilities.

An excavator also must notify the notification system if facility markings are destroyed or covered by excavation or blasting activities, or if a ticket expires before excavation begins. If a ticket expires before excavation begins, an excavator must provide a new dig notice to the notification system in compliance with the Act's prescribed time frames.

An excavator must notify the notification system requesting additional assistance if the location of a marked facility within the approximate location cannot be determined. ("Approximate location" means 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.)

In addition, an excavator must provide immediate additional notice to the notification system and stop excavation in the immediate vicinity if the excavator has reason to suspect the presence of an unmarked facility due to any of the following:

- Visible evidence of a facility with no marks visible.
- Lack of a positive response to a ticket.
- A positive response from a facility owner or operator indicating the presence of a facility with no marks visible.

If an excavator contacts or damages a facility, the excavator immediately must notify the facility owner or operator. If the damage results in the escape of any flammable, toxic, or corrosive gas or liquid, or endangers life, health, or property, the excavator must call 9-1-1 and provide immediate notice to the facility owner or operator. The excavator also must take reasonable measures to protect the excavator, those in immediate danger, the general public, and the environment, until the owner or operator, or emergency first responders, arrive and take control of the site.

An excavator must give prompt emergency notice to the notification system for any proposed excavation or blasting in an emergency. Blasting or excavation required to address the conditions of the emergency may be performed as reasonably required, subject to the Act's provisions for emergency notice and marking facilities in response to such a notice.

("Emergency" means a sudden or unforeseen occurrence, including a government-declared emergency, involving a clear and imminent danger to health, life, the environment, or property, that requires immediate correction in order to restore or to prevent the interruption of essential governmental or utility services or blockage of public transportation that requires immediate excavation or blasting. "Emergency notice" means a communication to the notification system to alert the facility owners or operators of the urgent need for marking the location of a facility due to an emergency.)

If the location of a proposed excavation or blasting cannot be described sufficiently to enable the facility owner or operator to ascertain the precise tract or parcel involved, an excavator must provide white lining before submitting a ticket or additional assistance to the owner or operator on reasonable request to identify the area of the proposed excavation or blasting. ("White lining" means the 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.)

Notice to the notification system constitutes notice to all facility owners or operators regarding facilities located in the area of the proposed excavation or blasting.

Except as otherwise provided, an excavator may conduct excavation in a safe zone using power equipment without establishing the precise location of any facilities. ("Safe zone" means an area at least 48 inches from either side of the facility marks provided by a facility owner or operator.)

Notification System Duties

The notification system must receive dig notice of proposed excavation and blasting activities and promptly transmit a ticket to owners or operators of facilities in the area of the proposed excavation or blasting. A ticket is valid for 21 days from the start date of the excavation or blasting as identified by the excavator, or for 180 days from the start date if the dig notice indicates that the proposed excavation or blasting will not be completed within 21 days.

The notification system must provide alternative means of access and notification to the system. Except for shutdowns caused by acts of nature, war, or terrorism, the system must be available 24 hours per day, seven days per week.

The notification system must administer a positive response system to allow excavators to determine whether all of the facility owners or operators in the area have responded to a ticket and whether a particular owner or operator does not have facilities in the area of a proposed

excavation or blasting. ("Positive response" means the procedure administered by the notification system to allow excavators to determine whether all facility owners or operators contacted under a ticket have responded in accordance with the Act.)

The notification system must maintain adequate records of its notification activity for six years after the date of the notice, including voice recordings of calls. The system must provide copies of the records to any interested person upon written request and payment of a reasonable charge for reproduction and handling as determined by the system.

The notification system also must expedite the processing of any emergency notice it receives.

Design Tickets

The notification system must receive design tickets under the procedures described below and transmit them to facility owners and operators. "Design ticket" means 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 the procedures prescribed in the Act.

The notification system must establish reasonable procedures, including marking response times, for design ticket notification to facility owners or operators of requests for project design or planning services to determine the type, size, and general location of facilities during the planning and design stage of a construction or demolition project. Owners or operators may charge the person making the request separate fees for the services.

The procedures do not affect or alter the obligation of excavators to give notice of blasting or excavation.

The response to a design ticket is to provide general information regarding the location of underground facilities, not to mark any facilities. If an owner or operator, however, does not have drawings or records showing a facility's location, the owner or operator must mark it under the procedures described below. A design ticket or information provided in response to one does not satisfy the Act's requirement for excavation or blasting notice to the system or marking the approximate location of facilities for blasting or excavation.

Facility Owner/Operator Duties

A facility owner or operator must be a member of and participate in the notification system, including the positive response system, and pay any applicable fees. An owner or operator may not charge a fee to excavators for locating and marking facilities as required.

A facility owner or operator must comply with the notification system procedures and the Act's other requirements.

An owner or operator also must comply with the requirements described below; the requirements, however, do not apply to the Michigan Department of Transportation or to the marking of a county or intercounty drain by a county drain commissioner's office or drainage board.

A facility owner or operator must respond to a ticket by the start date and time for the excavation and blasting by marking the approximate location of its facilities in the affected area in a manner that permits the excavator to employ soft excavation to establish the facilities' precise location. An owner or operator must mark the approximate location of each facility with paint, stakes, flags, or other customary methods using the uniform color code of the American National Standards Institute, as prescribed in the Act.

A facility owner or operator must provide notice to the notification system using positive response.

Upon receiving a notification during business hours from an excavator through the notification system that previous marks were covered or destroyed, an owner or operator must mark the approximate location of a facility within 24 hours, excluding all hours on nonbusiness days.

If a facility owner or operator receives a request from an excavator regarding the location of a marked facility or the presence of an unmarked facility, the owner or operator must provide additional assistance to the excavator within three hours of a request made during business hours. An excavator and an owner or operator may agree to an extension of this time period. If a request is made when additional assistance cannot be provided during normal business hours, or assistance is required at a remote rural location, the response time must be within three hours after the start of the next business day or a time based on mutual agreement.

If a facility owner or operator receives notice that a facility has been damaged, the owner or operator promptly must dispatch personnel to the area.

An owner or operator must respond to an emergency notice within three hours, or, if the start day and time is more than three hours from the time of notice, before that start day and time.

New facilities built after the effective date of the Act must be constructed in a manner that allows their detection when in use.

Civil Action & Immunity

The Act does not limit the right of an excavator or facility owner or operator to seek legal relief and recovery of actual damages incurred and equitable relief in a civil action arising out of a violation of the Act's requirements, or to enforce the Act's provisions. In addition, the Act does not determine the level of damages or injunctive relief in a civil action. These provisions do not affect or limit the availability of any contractual or legal remedy available to an excavator or facility owner or operator arising under any contract to which that person may be a party.

The notification system and its officers, agents, or employees are not liable for any damages, including damages for injuries or death to people or damage to property, caused by its acts or omissions in carrying out the Act's provisions. The notification system is not responsible for assuring performance by a facility owner or operator of its obligation to participate in the system.

An excavator or farmer engaged in farming operations who complies with the Act is not responsible for damage that occurs to a facility that is improperly marked, not marked, or determined to be within the safe zone.

A farm owner who complies with the Act is not liable for any damage to a facility that occurred in the course of farming operations, except on land within the public right-of-way, unless the owner intentionally damaged the underground facility or acted with wanton disregard or recklessness in damaging it. For the purposes of this provision, "owner" includes a family member, employee, or tenant of the owner.

Local Permit Requirements

The Act does not authorize, affect, or impair local ordinances, charters, or other provisions of law requiring permits to be obtained before excavating or tunneling in a public street or highway or to construct or demolish buildings or other structures on private property. A permit issued by a governmental agency does not relieve a person from the responsibility of complying with the Act. The failure of any person who is granted a permit to comply with the Act does not impose any liability upon the governmental agency issuing the permit.

Criminal Penalty

A person who does any of the following is guilty of a misdemeanor punishable by imprisonment for up to one year and/or a maximum fine of \$5,000:

- Knowingly damages an underground facility and fails to promptly notify the owner or operator.
- Knowingly damages an underground facility and backfills the excavation or otherwise acts to conceal the damage.
- Willfully removes or otherwise destroys stakes or other physical markings used to mark the approximate location of underground facilities, unless the removal or destruction occurs after the excavation or blasting is completed or as an expected consequence of an excavation or blasting activity.

Administrative Sanctions

Nongovernment Violator. Upon complaint filed with the Public Service Commission or upon the PSC's own motion, following notice and hearing, a person, other than a governmental agency, who violates any of the Act's provisions may be ordered to pay a maximum civil fine of \$5,000 for each violation. In addition to or instead of a fine, the PSC may require the person to obtain reasonable training to assure future compliance with the Act. In determining the amount of a fine, the PSC must consider all of the following:

- The ability of the person charged to pay or continue in business.
- The nature, circumstances, and gravity of the violation.
- Good-faith efforts by the person charged to comply with the Act.
- The degree of culpability of the person charged and of the complainant.
- The history of previous violations of the person charged.

Before filing a complaint, a person must attempt to settle the dispute with the adverse party or parties using any reasonable means of attempted resolution acceptable to the involved parties.

A PSC determination may not be used against a party in any action or proceeding before any court. A complaint does not limit a person's right to bring a civil action to recover damages the person incurred arising out of a violation of the Act's requirements.

The PSC must develop forms with instructions and promulgate administrative rules for processing complaints under the Act.

Governmental Agency. Except as otherwise provided, the Act does not affect the liability of a governmental agency for damages for tort or the application of the governmental immunity law. A facility owner or operator may file a complaint with the PSC seeking a civil fine and, if applicable, damages from a governmental agency for any violation of the Act.

After notice and a hearing on a complaint against a governmental agency, the PSC may order the following, as applicable:

- A civil fine of up to \$5,000, if the Commission has not issued an order against the governmental agency within the preceding 12 months.
- If the Commission has issued an order against the governmental agency within the preceding 12 months, a maximum civil fine of \$10,000 and that the agency provide underground facility safety training to all its personnel involved in underground utility work or excavating.
- For an order issued by the PSC within 12 months after the second one, a maximum civil fine of \$15,000 and, if the governmental agency's violation damaged the owner's or operator's facilities, that the agency pay the owner or operator the cost of repair.

In determining the amount of a fine, the PSC must consider the same factors it must consider in determining a civil fine against any other violator. Any Commission-ordered training must be provided at the governmental agency's expense.

A finding by the PSC is not admissible in any other proceeding or action.

These provisions do not apply if the violation is a result of action taken in response to an emergency.

Other Provisions. Each day that a violation occurs is separate offense.

A civil fine must be paid to the PSC and used for underground facilities safety education and training.

A party to a complaint may appeal a PSC order to the Ingham County Circuit Court.

Reports of Damage

The Act required the PSC, by October 1, 2014, to establish requirements for reporting incidents involving damage to underground facilities. Beginning April 1, 2015, the PSC must maintain reported information on damaged facilities, including any damage that occurs during excavation, digging, or blasting, that is excluded from the definition of excavation. The Commission must make the information publicly available on its website.

Repealed Statute

The bill repealed Public Act 53 of 1974, which required public utilities having underground facilities to form and operate an association (MISS DIG) providing for the mutual receipt of notification of construction activities. A utility owned by a public agency had to participate in and receive the services furnished by MISS DIG and pay its share of the costs and services, but did not have to become a MISS DIG member.

Public Act 53 required a person or public agency to ascertain the location of a public utility's underground facilities before conducting certain blasting, excavation, and demolition activities. In addition, the Act did the following:

- Required a public utility having underground facilities to file with the county clerk a list of those facilities and their locations within the county.
- Required a person or public agency to notify MISS DIG at least three full working days before commencing excavation, blasting, or demolition.
- Required a public utility, within one business day before proposed construction, to notify a person or public agency performing excavation, blasting, or demolition of the approximate location of the utility's underground facilities, in a manner that allowed the person or public agency to establish their precise location.
- Required immediate notification of a public utility when any contact with or damage to an underground facility occurred, and required the utility to dispatch personnel to the location to effect temporary or permanent repair.
- Allowed for excavation, maintenance, or repairs, or the discharge of explosives, outside of the notice requirements in an emergency.

The Act also included language pertaining to local permit requirements for excavation, blasting, and demolition activities, and liability for damages in a civil action.

In addition, under Public Act 53, a person who damaged a public utility's facilities on more than three occasions on any one construction location because of the person's failure to comply with the statute could be enjoined from engaging in further activities except under terms and conditions prescribed by the court to ensure public safety. For violation of the injunctive order, a court could prescribe a penalty of up to \$5,000 per violation. Also, a person who willfully removed or destroyed the stakes or other physical markings used by a utility to mark its facilities was guilty of a misdemeanor punishable by up to one year in prison and/or a maximum fine of \$5,000 for each offense.

Senate Bill 539

The governmental immunity law specifies that, except as otherwise provided, a governmental agency is immune from tort liability if it is engaged in the exercise or discharge of a governmental function. The bill provides that immunity under the law does not apply to liability

of a governmental agency under the MISS DIG Underground Facility Damage Prevention and Safety Act.

(The law defines "governmental agency" as the State or a political subdivision. "Political subdivision" means a municipal corporation, county, county road commission, school district, community college district, port district, metropolitan district, or transportation authority, or at least two of these when acting jointly; a district or authority authorized by law or formed by at least one political subdivision; or an agency, department, court, board, or council of a political subdivision. "Municipal corporation" means a city, village, or township, or a combination of at least two of those when acting jointly. "Governmental function" means an activity that is expressly or impliedly mandated by constitution, statute, local charter or ordinance, or other law.)

MCL 691.1407 (S.B. 539)
460.721-460.733 (S.B. 540)

Legislative Analyst: Julie Cassidy

FISCAL IMPACT

Senate Bill 540

The new misdemeanor will apply more broadly than the misdemeanor under former Public Act 53 of 1974, which the bill repealed, although the penalty is the same. There are no data to indicate how many people will be convicted of the new misdemeanor. To the extent that people are charged and convicted, local units of government will see increased incarceration costs and/or increased costs of community supervision. Penal fine revenue of up to \$5,000 per violation will benefit public libraries.

The bill also will result in additional costs and revenue for the Public Service Commission, which must develop forms, rules for processing complaints, and requirements for reporting incidents, and is responsible for processing and investigating complaints made under the bill. These additional responsibilities will result in indeterminate costs for the PSC, which will be borne by existing resources. New revenue will come from civil fines levied against those found to be in violation of the bill. These fines will range from \$5,000 to \$15,000 and be paid to the PSC and used for underground facility safety education and training. It is unknown how much the PSC will collect in fines each year, or how much the new requirements will cost to implement, so the fiscal impact on the PSC is indeterminate.

Senate Bill 539

The bill will have little or no impact on State finances. On the local level, the bill will expose a municipality to liability for any damage to underground facilities it causes. It is not known how many instances of a municipality damaging underground facilities occur during a year, or what the average cost of each instance is. For these reasons, the fiscal impact of the bill on local governments is indeterminate, but will be negative to the extent that the potential liabilities of municipalities increase.

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.