



Senate Fiscal Agency
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BILL



ANALYSIS

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Senate Bills 539 and 540 (as introduced 9-24-13)
Sponsor: Senator Mike Nofs
Committee: Energy and Technology

Date Completed: 9-30-13

CONTENT

Senate Bill 540 would repeal Public Act 53 of 1974 (which governs the protection of public utility underground facilities), and create 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 endangered 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 had 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 becoming 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 allowed their detection when in use.
- Provide that the proposed Act would 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 complied with the Act would not be responsible for damage to facilities that were not marked as required or determined to be within a safe zone.
- Provide immunity to a farm owner who complied with the Act with regard to facilities damaged outside the public right-of-way, unless the owner intentionally damaged the facility or acted 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 violated the Act.
- Authorize the PSC to impose a civil fine of up to \$15,000 on a governmental agency that violated 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.

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

The bills are tie-barred to each other.

Senate Bill 540

Notification System

Facility owners and operators would be required to continue to operate and be members of MISS DIG Systems, Inc., a Michigan nonprofit corporation, which would have all the duties and have to undertake the responsibilities of the notification system under the proposed Act on and after its effective date. Those responsibilities and duties would not include the physical marking of facilities; that would be the responsibility of a facility owner or operator upon notification, as described below.

("Facility" or "underground facility" would mean 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" would mean 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 would have to be governed by its board of directors and in accordance with its current articles of incorporation and bylaws as of the proposed 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 would have to request input regarding its policies from all interested people, including facility owners and operators, excavators, marking service providers, and governmental agencies.

The notification system would have to 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 could not charge a fee to excavators for marking facilities.

Facility owners and operators would have to 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 would not apply to a person who owned or operated a facility located on real property the person owned or occupied if the facility were operated solely for that person's benefit.

("Person" would mean 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 was a farm operation as defined in the Michigan Right to Farm Act could 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 would not be 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 would be exempt from taxes collected under the General Property Tax Act.

Dig Notice

An excavator would have to 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 would have to be measured as described in the proposed Act, depending on the time of day notice was given and whether it was given on a business or nonbusiness day. If there were multiple excavators on the same site, each one would have to provide its own dig notice.

At a minimum, a dig notice would have to 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 would be completed within 21 days after the start date.

An excavator would have to comply with the notification system procedures and all requirements of the Act.

"Excavator" would mean any person performing excavation or blasting. "Excavation" would mean 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. The term would not include "surface maintenance", which would mean the repairing or patching of road potholes and cracks,

reshaping a road surface, graveling and repositioning loose stone, railroad rail and tie replacement, and reshaping and repair of the railroad grade. Surface maintenance would not include any work below the depth of the existing road surface material or 12 inches, whichever was less. Excavation also would exclude 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 an active or retired cell at a solid waste disposal site that has planned for underground facilities. The term also would exclude any of the following activities performed in the course of normal 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" would mean plowing, cultivating, planting, harvesting, and similar operations routine to most farms. The term would not include installation of drainage tile or underground irrigation lines, or the drilling of a well.

"Blasting" would mean 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 would have to expose all marked facilities in the zone by soft excavation. If conditions made complete exposure of the facility impractical, an excavator would have to 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 would have to use soft excavation at intervals as often as reasonably necessary to establish the facility's precise location. An excavator could use power tools and power equipment in a caution zone only after the facilities were exposed or their precise location was established.

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

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

"Ticket" would mean 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" would mean 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" would mean 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 would have to provide support or bracing of facilities or excavation walls in an excavation or blasting area that were reasonably necessary for protection of the facilities.

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

An excavator would have to notify the notification system requesting additional assistance if the location of a marked facility within the approximate location could not be determined. ("Approximate location" would mean 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 would have to provide immediate additional notice to the notification system and stop excavation in the immediate vicinity if the excavator had 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 contacted or damaged a facility, the excavator immediately would have to notify the facility owner or operator. If the damage resulted in the escape of any flammable, toxic, or corrosive gas or liquid, or endangered life, health, or property, the excavator would have to call 9-1-1 and provide immediate notice to the facility owner or operator. The excavator also would have to 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, arrived and took control of the site.

An excavator would have to 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 could be performed as reasonably required, subject to the Act's provisions for emergency notice and marking facilities in response to such a notice.

("Emergency" would mean 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" would mean 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 could not be described sufficiently to enable the facility owner or operator to ascertain the precise tract or parcel involved, an excavator would have to 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" would mean 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 would constitute 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 could conduct excavation in a safe zone using power equipment without establishing the precise location of any facilities. ("Safe zone" would mean 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 would have to 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 would be 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 indicated that the proposed excavation or blasting would not be completed within 21 days.

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

The notification system would have to administer a positive response system to allow excavators to determine whether all of the facility owners or operators in the area had responded to a ticket and whether a particular owner or operator did not have facilities in the area of a proposed excavation or blasting. ("Positive response" would mean the procedure administered by the notification system to allow excavators to determine whether all facility owners or operators contacted under a ticket had responded in accordance with the Act.)

The notification system would have to maintain adequate records of its notification activity for six years after the date of the notice, including voice recordings of calls. The system would have to 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 would have to expedite the processing of any emergency notice it received.

Design Tickets

The notification system would have to receive design tickets under the procedures described below and transmit them to facility owners and operators. "Design ticket" would mean 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, was made under the procedures prescribed in the proposed Act.

The notification system would have to 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 could charge the person making the request separate fees for the services.

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

The response to a design ticket would be to provide general information regarding the location of underground facilities, not to mark any facilities. If an owner or operator, however, did not have drawings or records showing a facility's location, the owner or

operator would have to mark it under the procedures described below. A design ticket or information provided in response to one would 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 would have to be a member of and participate in the notification system, including the positive response system, and pay any applicable fees. An owner or operator could not charge a fee to excavators for locating and marking facilities as required.

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

An owner or operator also would have to comply with the requirements described below; the requirements, however, would 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 would have to 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 permitted the excavator to employ soft excavation to establish the facilities' precise location. An owner or operator would have to 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 would have to 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 would have to mark the approximate location of a facility within 24 hours, excluding all hours on nonbusiness days.

If a facility owner or operator received a request from an excavator regarding the location of a marked facility or the presence of an unmarked facility, the owner or operator would have to provide additional assistance to the excavator within three hours of a request made during business hours. An excavator and an owner or operator could agree to an extension of this time period. If a request were made when additional assistance could not be provided during normal business hours, or assistance were required at a remote rural location, the response time would have to 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 received notice that a facility had been damaged, the owner or operator promptly would have to dispatch personnel to the area.

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

New facilities built after the effective date of the proposed Act would have to be constructed in a manner that allowed their detection when in use.

Civil Action & Immunity

The proposed Act would 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 would not determine the level of damages or injunctive relief in a civil action. These provisions would 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 was a party.

The notification system and its officers, agents, or employees would not be 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 would not be responsible for assuring performance by a facility owner or operator of its obligation to participate in the system.

Notwithstanding any of the Act's other provisions, an excavator or farmer engaged in farming operations who complied with the Act would not be responsible for damage that occurred to a facility that was improperly marked, not marked, or determined to be within the safe zone.

A farm owner who complied with the Act would not be 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" would include a family member, employee, or tenant of the owner.

Local Permit Requirements

The proposed Act would 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 would not relieve a person from the responsibility of complying with the Act. The failure of any person who was granted a permit to comply with the Act would not impose any liability upon the governmental agency issuing the permit.

Criminal Penalty

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

- Knowingly damaged an underground facility and failed to promptly notify the owner or operator.
- Knowingly damaged an underground facility and backfilled the excavation or otherwise acted to conceal the damage.
- Willfully removed or otherwise destroyed stakes or other physical markings used to mark the approximate location of underground facilities, unless the removal or destruction occurred after the excavation or blasting was 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 violated any of the Act's provisions could be ordered to pay a maximum civil

fine of \$5,000 for each violation. In addition to or instead of a fine, the PSC could require the person to obtain reasonable training to assure future compliance with the Act. In determining the amount of a fine, the PSC would have to 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 would have to 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 could not be used against a party in any action or proceeding before any court. A complaint would 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 could develop forms with instructions and promulgate administrative rules for processing complaints under the Act.

Governmental Agency. Except as otherwise provided, the proposed Act would 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 could 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 could order the following, as applicable:

- A civil fine of up to \$5,000, if the Commission had not issued an order against the governmental agency within the preceding 12 months.
- If the Commission had 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 would have to consider the same factors it would have to consider in determining a civil fine against any other violator. Any Commission-ordered training would have to be provided at the governmental agency's expense.

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

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

Other Provisions. Each day that a violation occurred would be a separate offense.

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

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

Repealed Statute

The bill would repeal Public Act 53 of 1974. Public Act 53 requires 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 must participate in and receive the services furnished by MISS DIG and pay its share of the costs and services, but does not have to become a MISS DIG member.

Public Act 53 requires 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 does the following:

- Requires a public utility having underground facilities to file with the county clerk a list of those facilities and their locations within the county.
- Requires a person or public agency to notify MISS DIG at least three full working days before commencing excavation, blasting, or demolition.
- Requires 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 allows the person or public agency to establish their precise location.
- Requires the utility to provide further assistance to the person or public agency within one working day, if the precise location cannot be established.
- Requires a utility to be given reasonable time to remove or protect its facilities before demolition of a building.
- Requires immediate notification of a public utility when any contact with or damage to an underground facility occurs, and requires the utility to dispatch personnel to the location to effect temporary or permanent repair.
- Requires the person or public agency responsible for the operations causing the damage to evacuate the area while awaiting the arrival of the public utility personnel, if a serious electrical short is occurring or if dangerous fluids or gases are escaping from a broken line.
- Allows for excavation, maintenance, or repairs, or the discharge of explosives, outside of the notice requirements in an emergency.

The Act also includes 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 damages 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 may 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 may prescribe a penalty of up to \$5,000 per violation. Also, a person who willfully removes or destroys the stakes or other physical markings used by a utility to mark its facilities is 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 would not apply to liability of a governmental agency under the proposed 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)

Legislative Analyst: Julie Cassidy

FISCAL IMPACT

Senate Bill 540

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

Senate Bill 539

The bill would have little or no impact on State finances.

On the local level, the bill would expose a municipality to liability for any damage to underground facilities caused by the municipality. 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 would be negative to the extent that the potential liabilities of municipalities increased.

Fiscal Analyst: Dan O'Connor
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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.