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*Bill Analysis*  
*Legislative Service Commission*

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(As Introduced)

**Sens. Blessing, Mumper, Wachtmann, Gardner, Latta, Kearns, Hagan,  
Brady, Latell**

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**BILL SUMMARY**

- Replaces the existing call-before-you-dig laws that apply to the protection of underground utility facilities during public and private improvement projects with a consolidated law that establishes a single statewide one-call notification system.
- Requires the establishment of a single, nonprofit corporation to own and operate the one-call notification system and requires the corporation to adopt policies necessary for the system's operation.
- Requires operators to participate in the one-call notification system and register the location of subsurface facilities with the computerized mapping system required to be established under the bill.
- Requires that: project owners and excavators notify the one-call notification system of the location of an excavation site and the intent to excavate, the system notify operators that have subsurface facilities at the excavation site, and operators notify project owners and excavators of the approximate location of subsurface facilities at the site and field mark the site.
- Establishes specific requirements for field marking subsurface facilities and making excavations.
- Establishes civil penalties for specific failures of operators or excavators to comply with the bill's requirements.

- Requires any person that is doing business in Ohio as an underground or subsurface facility notification service and that is not the corporation established under the bill to cease doing business in Ohio.

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## CONTENT AND OPERATION

### Overview

Currently, there are two "call-before-you-dig" laws pertaining to the protection of underground utility facilities from damage during excavations: the law pertaining to the protection of underground utility facilities during

construction of public improvements (Public Improvements Law, sec. 153.64), and the one-call utility protection service law for private improvement projects (Private Improvements Law, secs. 3781.25 to 3781.32). Both of these laws are repealed by the bill, which generally retains several of their provisions, but also establishes a *consolidated law* dealing with the protection of subsurface facilities during any type of project involving excavation. In some respects, the bill's proposed integration of existing laws results in new duties being imposed, primarily with regard to public, rather than private, improvement projects, although certain provisions of the Public Improvements Law that are unique to such projects are retained.

The bill also requires the creation of a *one-call notification system* in which all "operators" must participate, subject to civil penalties for failure to do so. The Public and Private Improvements Laws do not expressly contemplate a single protection service. The Private Improvements Law requires participation of facility owners in a protection service, but there is no penalty for failure to do so. Currently, there are two protection services operating in Ohio: the Ohio Utilities Protection Service and the Oil and Gas Producers Underground Protection Service.

### **Scope of subsurface facility protection**

(sec. 3781.35)

The bill seeks to protect a wide range of "subsurface facilities." By definition under the bill, a subsurface facility is any item wholly or partially located in this state that is buried or placed below ground or submerged under water for use in connection with the storage or conveyance of water or sewage; electronic, telephonic, or telegraphic communications; television signals; electricity; electric energy; crude oil; artificial or liquefied petroleum; petroleum products; manufactured, mixed, or natural gas; synthetic or liquefied natural gas; propane gas; coal; steam; hot water; or other substances. A "subsurface facility" includes, but is not limited to, any line, pipeline, conduit, duct, wire, cable, or other structure, but excludes a bridge, culvert, or visually identifiable drain pipe.

The call-before-you-dig laws now focus on "underground utility facilities." The Public Improvements Law defines that term in a similar manner as the bill, but does not cover as many facilities as the bill, such as television signals, crude oil, artificial or liquefied petroleum, coal, steam, or hot water. The Public Improvements Law excludes from "underground utility facilities" a private septic system in a single- or double-family dwelling utilized only for that dwelling and not connected to any other system (sec. 153.64(A)(3), repealed). The definition of "underground utility facility" in the Private Improvements Law more closely mirrors the definition of "subsurface facility" in the bill, but excludes private

septic systems in a one- or two-family dwelling not connected to any other system (sec. 3781.25(B), repealed).

The bill is directed at protecting facilities during "excavations," as in the Private Improvements Law. Under the bill, "excavation" means the use of tools, powered equipment, or explosives to move earth, rock, or other material in order to penetrate, bore, or drill into the earth or to demolish a structure, regardless of whether it is intended that the demolition will disturb the earth. The bill expressly excludes agricultural operations that do not penetrate the earth to a depth of more than 12 inches, the use of probes or other similar devices used by an operator in the process of detecting leaks or locating its own subsurface facilities, and the replacement of traffic control devices in the same location. (Sec. 3781.35(D).) The bill's definition is similar to that under the Private Improvements Law, except that, under that law, "excavation" expressly includes such agricultural operations as installing drain tile, but excludes agricultural operations such as tilling that do not penetrate the earth to a depth of more than 12 inches, any activity by a governmental entity that does not penetrate the earth to a depth of more than 12 inches, and any underground mining operations that do not involve disturbance to the earth's surface. There is no provision in that law related to traffic control devices. (Sec. 3781.25(H), repealed.)

In contrast, the Public Improvements Law is directed at "public improvements involving digging, blasting, excavating, or other underground construction activities" and also "any public improvement which may involve underground utility facilities . . . within the construction area" (sec. 153.64(A)(4) and (B), repealed).

Under the bill, the parties involved in protecting subsurface facilities during excavations are operators, who must participate in the one-call notification system established by the bill and comply with registration and notification requirements, and project owners and excavators, who must comply with the bill's notification requirements. The bill identifies these parties as follows:

(1) "Excavator" means any person that conducts or intends to conduct an excavation.

(2) "Operator" means any person that owns or leases, and operates one or more subsurface facilities, but excludes an owner or occupant of real property on which one or more such facilities are located if the facilities are used exclusively to furnish services on that property and the facilities are under the operation and control of that owner or occupant. "Operator" includes an operator of a "master meter system," which is a pipeline system that distributes gas within a contiguous property for which the system operator purchases gas for resale to consumers, including tenants, who purchase the gas directly through a meter, or by paying rent. The term excludes a pipeline within a manufactured home, mobile home, or a building.

(3) "Project owner" means any person that causes or requests an excavation to occur and has the responsibility for any requisite design of the project requiring the excavation and any requisite preparation of project specifications.

### **Declaration of public policy**

(sec. 3781.36)

The bill stipulates that the General Assembly finds, and declares it to be the public policy of Ohio, that it is in the public interest to protect the health, safety, and welfare of the citizens of Ohio by preventing or minimizing damage to subsurface facilities as a result of excavations occurring in this state, including facilities of and excavations by a municipal corporation. The bill further stipulates that, analogous to the designation of 9-1-1 as the emergency telephone number in Ohio, the provision of a single, statewide telephone number and notification system for excavation reporting better serves the public interest in minimizing the confusion of the general public and ensuring compliance by excavators with an excavation notification requirement than did the operation of multiple facility protection services prior to the enactment of the bill. The bill specifies that the notification system's enhanced responsibilities for public education and for the use of appropriate technology to connect facility operators with excavators will protect the public health, safety, and welfare and will prevent harm to Ohio's economy that otherwise would result from needless damage to subsurface facilities as a result of excavations.

Under the bill, the General Assembly also declares that the operation of the one-call notification system by a single, private, nonprofit corporation, established by operators and having a governing structure representing varied interests, including public agencies and excavators, better serves the public interest in effectively and efficiently protecting facilities and the services those facilities render than would creation of a governmental agency to operate the one-call notification system, given that the parties involved in the establishment, governance, and operation of the corporation have experience in maintaining such a system, first-hand knowledge of field conditions and the requisites of facility protection, and the most direct incentive to protect facilities. The bill states that the establishment and operation of the private, nonprofit corporation is further justified considering that the one-call notification system is merely a means of interface between project owners, operators, and excavators and does not entail the exercise of any sovereign power.

**Formation of the one-call notification system and establishment of a non-profit corporation**

(sec. 3781.37)

To carry out the legislative findings and public policy set forth above, the bill requires that, not later than 60 days after its effective date, there be established and operated a single, statewide one-call notification system to provide a method of warning operators throughout Ohio of excavations in proximity to their subsurface facilities. The bill requires that a *single, nonprofit corporation* be established by one or more operators, the principal purpose of the corporation

being to establish, own, and operate the one-call notification system. Upon its establishment, the corporation must register with the Secretary of State as the corporation created for that purpose and also must certify that it complies with the bill's requirements.<sup>1</sup>

Nothing in the bill prohibits an underground or subsurface facility protection service that exists immediately prior to the bill's effective date from being the corporation established to operate the one-call notification system, provided that the service complies with all the bill's requirements. If such an existing service becomes the corporation, all of its assets and liabilities, including all obligations incurred by law or contract, must be assumed by the corporation.

### **Governance of the corporation**

(sec. 3781.38(A) to (D))

The corporation that is required to be established under the bill must be governed and operated in accordance with the bill's requirements and consistent with the Nonprofit Corporation Law (Chapter 1702.). The bill requires the corporation's members to adopt bylaws to govern its affairs, including bylaws specifying the qualifications for membership; establishing a reasonable dues structure; requiring governance by a board of trustees; providing a dispute resolution process; and providing other standard and ordinary governing provisions. Pursuant to these bylaws, the corporation's members must elect a board of trustees from among themselves to oversee the governance and operation of the corporation in accordance with the bill's requirements and perform the duties imposed on the board under the bill and the Nonprofit Corporation Law.

The bill requires the corporation to employ an executive director for the administration of the one-call notification system. The executive director must carry out the policies of the board of trustees in accordance with the bill and the corporation's operating policies (see "**Operating policies**," below) and must report to the corporation's membership and its board. The board of trustees is required to procure and maintain liability and errors and omissions insurance adequate to cover the performance of duties imposed by the bill on the one-call notification system.

### **Operating policies**

(sec. 3781.38(E))

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<sup>1</sup> *It is possible that more than one such corporation could be established and register with the Secretary of State within the required time period. The bill contains no provision for determining which of the qualified corporations would serve as the "single" corporation for the state, if more than one corporation is so established and so registered.*

Under the bill, the board of trustees must adopt operating policies for the one-call notification system that carry out the bill's purposes. The policies, at a minimum, must do all of the following:

(1) Set forth the methods by which information pertaining to the location of excavation sites submitted by project owners and information required to be reported by excavators is to be received, recorded, and promptly transmitted by the one-call notification system. The corporation has no duty to verify the accuracy of that information.

(2) Establish a statewide, *computer graphical mapping system*, based on latitude and longitude, that allows members to select service areas by United States Geological Service quad quarter or polygon, and a process to update the system with new streets, roads, and highways;

(3) Provide for the maintenance of a computerized record of each item of information provided by project owners, excavators, and operators for six years after the date on which the item was so provided. Any such record must be available for inspection or copying by a project owner, an excavator, or any member operator during normal working hours and according to guidelines that are established in the operating policies. The corporation is required to make an audio recording of each voice notification transaction and retain it for a period of at least six years from the date of the recording.

(4) Provide that the corporation must make copies of its operating policies available, without charge, to any person upon request.

**Requirements for the one-call notification system**

(sec. 3781.38(F) to (K))

The bill requires the corporation to establish a single, nationally accessible, *toll-free telephone number* for the one-call notification system. It is also required to develop and implement a *public awareness program* to educate the general public in Ohio and, in particular, project owners, excavators, and operators about the one-call notification system and the bill's provisions. The bill further requires the corporation to provide the services required by the bill 24 hours per day, seven days per week, including weekends and holidays.<sup>2</sup> The corporation must provide that the operations center for the system be located in Ohio and must provide a

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<sup>2</sup> For other purposes in the bill, "days" is defined to exclude Saturdays, Sundays, and legal holidays (sec. 3781.35(B)). "Hours" excludes hours on Saturdays, Sundays, and legal holidays (sec. 3781.35(G)).

*disaster recovery program* and the necessary facilities to respond to any loss to the system of electric power or other vital services. The program must include emergency plans for the staffing of the system.

The bill stipulates that the one-call notification system, the corporation, its board of trustees, or any employee or member of the corporation or its board of trustees is not an agency, instrumentality, officer, or employee of Ohio for any purpose whatsoever. No liability or obligation of the system or the corporation is a liability or obligation of this state. The bill also stipulates that nothing in it, and no act or failure to act by the system, the corporation or its board of trustees, or an employee or member of the corporation or its board of trustees, imposes any liability or responsibility upon this state or any of its officials.

**Participation and registration requirements for operators**

(sec. 3781.39)

The bill requires an *operator* to participate in the one-call notification system and register with the computerized mapping system the location of the service areas in which it owns or operates subsurface facilities. An operator is required to participate in the system and register with the mapping system not later than 60 days after the date the operator first qualifies as an operator if the person becomes an operator after the bill's effective date, and not later than six months after the bill's effective date if the operator is an operator on that date. An operator must update the registration information as necessary to reflect any changes in the location of its subsurface facilities, any new installations of subsurface facilities it owns or operates, and any removal of its subsurface facilities that would affect its current registered information.

The corporation established under the bill has no duty to verify the accuracy of any information provided by an operator. Upon the entry into the computerized mapping system of the information initially provided by an operator and the verification by the corporation of the accuracy of the entry of that information (see **COMMENT 2**), the operator is a member and eligible to participate in the management of the corporation for the purposes of the bill. Each member of the corporation remains a member for as long as the member is an operator. The failure of an operator to comply with these requirements does not affect the authority of the one-call notification system or the corporation to carry out its respective purposes under the bill.

**Notification requirements for project owners, the system, and operators**

**Project owner notice to the system; system notice to operator**

(sec. 3781.40(A) and (B))

For the purpose of providing information to an excavator, and only if written design specifications are required or being provided for a project, the bill requires the *project owner* to inform the one-call notification system of the location of an excavation site. Upon receipt of the information from the project owner and in accordance with the system's operating policies, the system promptly must provide notice of the excavation to each operator that, according to the registration information provided under the bill, has a subsurface facility at the excavation site.

**Operator notice to project owner**

(secs. 3781.35(P) and 3781.40(C) and (D))

The bill specifies that an *operator* that receives notification of an excavation from the system, and only that operator, is required to notify the project owner that provided the excavation information of the approximate location and a description of each of the operator's subsurface facilities located at the excavation site or the fact that the operator has no subsurface facilities at the site.<sup>3</sup> At the operator's request, the project owner must provide to the operator all pertinent specifications, including drawings. The operator must provide the notification not later than ten days after the date of the operator's receipt of the notification from the one-call notification system or by a later date mutually agreed to by the project owner and the operator. If the operator does not make the notification within the prescribed or agreed-upon time, the operator is deemed to have given notice that it has no subsurface facilities at the site. An operator that provides the required notification also must provide to the project owner, within the prescribed or agreed upon time, written notice of any special notification requirements for notice to an owner of an interstate gas pipeline facility or interstate hazardous liquid pipeline facility that must be made, before commencing excavation, pursuant to the owner's public safety program adopted under federal law (see **COMMENT 1**).

The bill requires each *operator* that receives notification from the one-call notification system to determine whether any relocation, support, or removal action or any protective action beyond what is required for excavators under the

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<sup>3</sup> *A lesser disclosure can be substituted if the project owner requires that disclosure during preliminary design activities.*

bill (see "*Notification requirements for excavators and operators*," below) is required to prevent disturbance or interference with the operator's subsurface facilities during excavation. The operator must determine whether it will permit the project owner or the excavator to make those additional adjustments or, if the adjustments are to be made by the operator, a reasonable amount of time necessary to make the adjustments.

***Project owner notice to excavator***

(sec. 3781.40(E))

Based on the notification provided by the operator, the *project owner must provide to the excavator*, in writing before excavation begins, all of the following information:

(1) The information pertaining to the location of the operator's subsurface facilities provided to the project owner by the operator for each subsurface facility located at the excavation site;

(2) The names, addresses, and telephone and facsimile numbers of the operator of each of the facilities;

(3) Any required relocation, support, removal, or protective actions, including, as applicable, the reasonable time determined necessary for the operator to make those adjustments;

(4) Any special notification requirements.

If the project owner has prepared written specifications including drawings for a project, the project owner must provide on or with those specifications the above information and the name and telephone numbers of the one-call notification system.

***Project owner's design of project***

(secs. 3781.35(A) and 3781.40(F) and (G))

In order to prevent, as much as practicable, disturbance or interference with any subsurface facility, the bill requires a project owner to design the project taking into account the approximate location of each subsurface facility (meaning a strip of land not more than 18 inches on each side of the exterior surface of the facility) of which the project owner is notified by an operator. The project owner also must make a reasonable effort to design the installation of a subsurface facility so that there is at least a 12-inch clearance between the facility being installed and all existing subsurface facilities. The bill specifies that no design

may permit the installation of a new facility with less than a 12-inch clearance between the new facility and an existing facility without first expressly notifying the operator of the existing facility prior to installation. This provision is not to be construed to permit lesser clearance than otherwise permitted or required by law.

### **Miscellaneous**

(sec. 3781.40(H))

The notification requirements discussed above do not apply with respect to a project undertaken by an individual owner of residential real property on that property.

### **Notification requirements for excavators and operators**

#### **Excavator notice to system**

(sec. 3781.41(A))

The bill provides that, except for an excavator that is an operator making an emergency repair to any of the operator's subsurface facilities (see "**Requirements when an operator is making emergency repairs**," below), each excavator, at least 48 hours, but not more than ten days, before commencing an excavation, must notify the one-call notification system of the excavator's intent to excavate by providing the system, at a minimum, with (1) the name of the individual notifying the system, (2) the contact name, address, and telephone and facsimile numbers of the excavator, (3) the specific location of the excavation site and, (4) the starting time and date of the excavation and a description of work to be performed. If an excavation progresses from one area to the next over time, the excavator must provide the information for each segment of the excavation as it progresses.

#### **System information to excavator and operators**

(sec. 3781.41(B) and (C))

Upon receipt of information provided by an excavator and in accordance with the system's operating policies, the one-call notification system must provide the excavator with a reference number and a list of operators that the system intends to notify, and must promptly provide the information received from the excavator to each operator that has a subsurface facility located at the site or to the operator's agent. Upon a reasonable request by an operator, an excavator must identify the boundaries of the excavation site with white markings.

### **Operator subsequent responsibilities**

(sec. 3781.41(D) and (G))

The bill requires an operator or its agent that receives intent to excavate information from the one-call notification system to do either of the following:

(1) Field mark (see "**Field marking requirements**," below) the ownership and approximate location of each of the operator's subsurface facilities located at the excavation site in accordance with the bill's requirements pertaining to field marking or with any applicable industry standards;

(2) Notify the excavator that provided information that the operator does not have any subsurface facilities at the site.

The operator or agent must perform the field marking or provide the notification to the excavator that the operator does not have any subsurface facilities at the site not later than 48 hours after the one-call notification system's receipt of the notification from the excavator or before the indicated start of the excavation, whichever is later, or by a later date mutually agreed to by the excavator and the operator or agent. If the operator or agent does not so mark the subsurface facilities or provide the notification to the excavator within the prescribed or agreed upon time, the operator is deemed to have given notice that it does not have any subsurface facilities at the excavation site. If the operator or agent cannot accurately mark the approximate location of a subsurface facility located at the excavation site, the operator or agent must (1) mark the approximate location to the best of its ability, (2) notify the excavator that the marking may not be accurate, and (3) provide any necessary assistance to the excavator in locating the facility during the excavation.

The bill also provides that when an operator or agent marks the approximate location of its subsurface facilities (see "**Field marking requirements**," below), the operator or agent may request that the excavator provide prior notice to the operator or agent of the actual commencement of the excavation. An excavator that receives such a request must provide the notice to the operator or agent at least 24 hours prior to the commencement of the excavation. The excavator may make the notice by telephone or facsimile machine.

### **Field marking requirements**

(sec. 3781.41(E) and (F))

The bill requires an operator or its agent that field marks a subsurface facility to make the field markings in conformance with applicable standards of the American Public Works Association ULCC uniform color code using American National Standard Institute (ANSI) standard Z535.1, as follows:

- (1) Safety red for electric power lines, cables, conduit, and lighting cables;
- (2) Safety yellow for gas, oil, steam, petroleum, or gaseous materials;
- (3) Safety alert orange for communications, alarm, or signal lines and for cables or conduits;
- (4) Safety precaution blue for water, irrigation, and slurry lines;
- (5) Safety green for sewer and drain lines;
- (6) Safety pink for temporary survey markings;
- (7) White for proposed excavation.

If, at any time during an excavation for which there is a valid reference number provided by the one-call notification system, field markings are no longer reasonably visible, the excavator must inform the system. In accordance with its operating policies, the system must notify each operator that has a subsurface facility at the excavation site according to the registration information provided by the operator or each operator's agent. Not later than 48 hours after receipt of notification, the operator or agent, in conformance with the bill's field marking requirements, must remark, or relocate and remark, those subsurface facilities that may be affected by the excavation to the extent the operator or agent considers necessary.

**Requirements when an operator makes emergency repairs**

(sec. 3781.42)

The bill requires an excavator that is an operator making an emergency repair to any of the operator's subsurface facilities, including a public agency making an underground emergency repair to its traffic control devices, to make every reasonable effort to inform the one-call notification system of the excavation before commencing it or as soon as possible after the excavation begins.<sup>4</sup> For this

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<sup>4</sup> *The bill defines an "emergency" as an unexpected occurrence that causes damage to a subsurface facility requiring immediate repair or that involves a clear and imminent danger demanding immediate action to prevent or mitigate loss of or damage to life, health, property, or essential public services. A "public agency" is the state or any*

purpose, the excavator, at a minimum, must provide the system with all of the following: (1) the name of the individual notifying the system, (2) the contact name, address, and telephone and facsimile numbers of the excavator, (3) the specific location of the excavation site, and (4) a description of the excavation.

Upon receipt of this information and in accordance with the system's operating policies, the system must provide the excavator with a reference number and a list of operators that the system intends to notify. The system also must provide immediate notification of the excavation to each operator that, according to the registration information provided under the bill, has a subsurface facility located at the site. An operator, upon being so notified by the system, may inspect all of the operator's subsurface facilities located at the excavation site of the emergency repair and may take action that the operator considers necessary to prevent disturbance or interference with the operator's subsurface facilities during the excavation.

**Excavation requirements for excavators**

(secs. 3781.43 and 3781.44)

When making excavations, the bill requires an excavator to do all of the following:

(1) Comply with any special notification requirements provided to the excavator by the operator or its agent;

(2) Maintain reasonable clearance between any marked subsurface facility and the cutting edge or point of powered equipment;

(3) Protect and preserve the markings of approximate locations of subsurface facilities until those markings no longer are required for proper and safe excavations;

(4) When approaching marked subsurface facilities while excavating with powered equipment, require an individual other than the equipment operator to look for any sign of the subsurface facility;

(5) Conduct the excavation in the vicinity of the marked subsurface facility in a careful and prudent manner and, if necessary, excavate by hand, to determine the precise location of the subsurface facility to prevent damage or injury;

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*political subdivision of it or any agency, authority, board, commission, or instrumentality of Ohio or a political subdivision of the state.*

(6) If contact is made with any existing subsurface facility or any damage is discovered, including gouges, dents, or breaks in coatings, cable sheathes, and cathodic protection anodes or wiring, immediately report the type and location of the contact or damage to the operator and permit the operator a reasonable amount of time to make necessary repairs;

(7) Immediately report to the operator and, if necessary, to the appropriate law enforcement agencies and fire departments, any damage to a subsurface facility that results in escaping flammable, corrosive, explosive, or toxic liquids or gas, and take reasonable appropriate actions needed to protect persons and property and to minimize safety hazards until those agencies and departments and the operator arrive at the scene.

The bill stipulates that a permit to excavate issued by a public agency does not relieve an excavator of any duty imposed on the excavator under the bill.

### **Public improvement contracts**

(secs. 3781.35(O) and 3781.45)

Under the bill, a contractor to which a contract for a public improvement project is awarded is entitled to *adjustment in the contract price* for any additional work and time required for the project if (1) the project owner fails to notify the one-call notification system of an excavation site or to provide to the excavator for the project (before excavation begins) the information required by the bill and (2) the excavator for the project notifies the system of the excavator's intent to excavate as required under the bill and encounters subsurface facilities at the excavation site that would have been disclosed had the project owner complied with the bill's notification requirements. A "public improvement" is any construction, reconstruction, improvement, enlargement, alteration, or repair of a building, highway, drainage system, water system, road, street, alley, sewer, ditch, sewage disposal plant, water works, or any other structure or work of any nature by a public agency.

In the event of a dispute as to the application of this provision of the bill, procedures may be commenced under the applicable terms of the project contract or, if the contract contains no provisions for final resolution of the dispute, pursuant to the procedures for arbitration under the Arbitration Law.

The bill further provides that any provision of a construction contract, agreement, understanding, or specification or other document that is part of the construction contract, agreement, or understanding between the project owner and the excavator for a public improvement project that *waives* any of the rights conferred by the bill is *void and unenforceable as against public policy*. Likewise,

any provision of a subcontract entered into pursuant to such a contract, agreement, or understanding that waives any of the rights conferred by the bill is void and unenforceable as against public policy. These aspects of the bill do not apply to a contract, agreement, understanding, specification, or other document, or subcontract for subsurface engineering or exploratory work.

**Civil liability provisions**

(sec. 3781.46)

The bill provides that any of the following persons who fails to comply with the described provisions is liable for compensatory damages caused by the failure to comply:<sup>5</sup>

(1) An operator that does not participate in the one-call notification system or register with the computerized mapping system (sec. 3781.39(A)(1));

(2) An operator that does not update registration information (sec. 3781.39(A)(2));

(3) An operator that does not participate and register within the time frames required by the bill (sec. 3781.39(B));

(4) An operator that does not remain a member of the corporation (sec. 3781.39(C));

(5) A project owner, excavator, operator, or operator's agent that does not comply with the notification, disclosure, field marking, or other applicable protection requirements of the bill as described above.

The bill also provides that, if a project owner or an excavator (1) visually identifies an *unmarked* subsurface facility at an excavation site and (2) causes damage to the facility through *total disregard* of it, the *project owner or excavator*

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<sup>5</sup> Under the bill, "person" is defined (as provided in current law--sec. 1.59) to include an individual, corporation, business trust, estate, trust, partnership, and association. The bill also specifies that a "person" includes a public agency. (Sec. 3781.35(L).)

*Traditionally, in Ohio statutes, civil liability statutes refer to liability "in a civil action in" compensatory damages for "harm" (or injury, death, or loss to person or property) arising from or caused by some action or commission. The bill's language mixes the concepts of the monetary recovery (compensatory damages) with the underlying harm resulting in that recovery.*

is liable to the operator of that facility if the operator or its agent complied with the field marking or alternative notification requirements of the bill.

An excavator that is an operator making an *emergency repair* to any of its subsurface facilities under the bill is liable in compensatory damages to the operator of another subsurface facility located at the excavation site if the emergency repair results in damage to that other facility, notwithstanding that the excavator complied with the bill's one-call notification system notification requirement applicable to emergency repairs.

The bill's civil liability provisions do not diminish or otherwise affect any other right, or affect any other civil remedy, provided by law, equity, or contract for injury, death, or loss to persons or property.

### **Enforcement actions and civil penalties**

#### **Injunctive relief--enforcement actions**

(sec. 3781.47(A) and (C))

The bill authorizes the Attorney General, the prosecuting attorney of the county in which an excavation site is located, or any person directly affected by a failure to comply with the bill's requirements that also trigger the bill's civil liability provisions to bring an action in the court of common pleas of the county in which the site is located for the enforcement of any such requirement. The Attorney General, prosecuting attorney of the county, or any person directly affected by an *imminent or threatened failure* to comply with any of those requirements may bring an action for appropriate relief, including a temporary restraining order or a preliminary or permanent injunction, to enforce the requirement, if there is cause to believe that the failure to comply with the requirement could result in immediate or irreparable damage, injury, or loss to persons or property. The action must be brought in the court of common pleas of the county in which the excavation site is located.

#### **Civil penalties**

(sec. 3781.47(A) and (B))

Any operator who fails to comply with the bill's requirements referred to in items 1 to 4 under "**Civil liability provisions**," above, within 30 days of receiving notice of an injunctive relief enforcement action described above is subject to a civil penalty of not less than \$100, but not more than \$500, for each day of the failure to comply. Any excavator who knowingly fails to comply with the bill's general excavator-related notification requirements is subject to a civil penalty of

up to \$10,000 for each failure. Any *operator* or its agent who knowingly fails to comply with the bill's field marking or alternative notification requirements is subject to a civil penalty of up to \$10,000 for each failure, and the amount of the penalty must reflect the degree of the risk created by the failure to comply.<sup>6</sup>

Civil penalties collected by the clerk of a court of common pleas in an injunctive relief enforcement action must be deposited into the existing Attorney General Reimbursement Fund if the action was brought by the Attorney General or into the county treasury if the action was brought by the county's prosecuting attorney.<sup>7</sup>

### **Uncodified law**

(Section 3)

The bill stipulates that, to protect the health, safety, and welfare of Ohio citizens and to provide for the establishment and operation of a single, statewide notification system under the bill, any person that is *not the corporation established pursuant to the bill's provisions* must take all reasonable steps necessary to cease doing business in this state as an underground or subsurface facility notification service and must wind up its affairs. Nothing in the bill prohibits the corporation and such person, or the corporation and any member or client of any such notification service, from entering into contracts or arrangements that are appropriate or necessary to provide for compliance with the bill, the cessation of operation of the notification service, or the equitable and orderly transition to the one-call notification system required by the bill.

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## **COMMENT**

1. Federal law defines "interstate gas pipeline facility" as a gas pipeline facility used to transport gas and subject to the jurisdiction of the Federal Energy Regulatory Commission under the Natural Gas Act, but does not include a gas pipeline facility transporting gas from an interstate gas pipeline in a state to a

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<sup>6</sup> *The bill implies that civil penalties would be imposed by the court of common pleas in which an injunctive relief enforcement action is commenced--but this "jurisdiction" needs to be clarified throughout section 3781.47.*

<sup>7</sup> *The bill does not specify into what account civil penalties are to be paid if the action is brought by a person directly affected by a failure to comply with the bill. Conceivably, the intent is that that person will be awarded the civil penalties, or the intent may be that civil penalties are not awardable when that person commences the injunctive relief enforcement action.*

direct sales customer in that state buying gas for its own consumption. "Interstate hazardous liquid pipeline facility" means a hazardous liquid pipeline facility used to transport hazardous liquid in interstate or foreign commerce. "Intrastate gas pipeline facility" means a gas pipeline facility and transportation of gas within a state not subject to the jurisdiction of the Commission under the Natural Gas Act, and a gas pipeline facility transporting gas from an interstate gas pipeline in a state to a direct sales customer in that state buying gas for its own consumption. "Intrastate hazardous liquid pipeline facility" means a hazardous liquid pipeline facility that is not an interstate hazardous liquid pipeline facility. (49 U.S.C. 60101(a)(6), (7), (9), and (10).)

2. Under the bill's first sentence of division (A)(3) of section 3781.39, the corporation has no duty to verify the accuracy of any information provided by an operator. In the subsequent sentence in the division, the bill refers to the "verification by the corporation of the accuracy of the entry of that information." Although these provisions may appear to conflict, a more careful reading suggests that they do not. It appears that the intent of the provisions is to specify that, although the corporation has no duty to verify the accuracy of the information provided by an operator, it does have an obligation to verify that the information entered by the corporation into the computerized mapping system is consistent with the information provided by the operator.

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**HISTORY**

ACTION	DATE	JOURNAL ENTRY
Introduced	10-12-99	pp. 1049-1050

S0193-I.123/jc