



# Ohio Legislative Service Commission

## Bill Analysis

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### **S.B. 354**

129th General Assembly  
(As Introduced)

**Sens.** Coley, LaRose, Seitz, Wagoner, Hite

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## **BILL SUMMARY**

- Applies certain provisions of the underground utility facility protection service law, known as the Call-Before-You-Dig Law, to public improvements conducted by a public authority that are currently addressed in a separate law and makes definitions between the two laws more uniform.
- Makes various other changes to the protection service law.
- Requires any utility that elects to participate in a protection service on a limited basis to fully participate in and register the location of its underground utility facilities with the appropriate protection service within four years of the bill's effective date.
- Requires each utility that is fully participating in a protection service to also participate in its affiliated positive response system.
- Requires the Director of Commerce, in conjunction with statewide organizations representing excavators, to establish a certification program for excavators using a positive response system and requires every excavator to have at least one employee that holds a current and valid certificate.
- Permits a certification program fee, not exceeding \$100 per individual, and specifies that fees received be divided equally among each protection service and statewide organization conducting the certification program.
- Specifies that certification fees received by a protection service be used for public outreach, public education, and the protection service's affiliated positive response system.

- Requires, beginning on July 1, 2013, each protection service to reasonably modify its affiliated positive response system in order to permit the reasonable identification of the location of a proposed excavation site in a manner in which the protection service may then notify any potentially affected limited basis participants.
- Requires excavators to define and premark the immediate area and perimeter of a proposed excavation site before notifying a protection service about the proposed excavation and makes modifications to notification requirements.
- Establishes requirements for excavators utilizing trenchless excavation methods and modifies requirements for excavators utilizing traditional excavation technologies.

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## CONTENT AND OPERATION

### Definition changes

#### Protection services and utilities

The bill changes the definitions of "protection service," and "underground utility facility" in the protection service law and the law governing public improvements protection service to make them more similar, but not exactly the same. The bill shortens the term "underground utility protection service" in the law governing public improvements protection service to "protection service" and changes it to match closely the definition in the protection service law in Chapter 3781. of the Revised Code. In addition, the definition of an "underground utility facility" in both the law governing public improvements protection service and the protection service law is altered by the

bill. The protection service law definition of those facilities is expanded to include: electric energy; manufactured and mixed natural gas; synthetic or liquefied natural gas; and propane gas. In addition, the bill specifies that a facility under the protection service law includes all operational underground pipes, sewers, tubing, conduits, cables, valves, lines, wires, worker access holes, and attachments, owned by any person, firm, or company. For the protection service law, the bill specifically excludes from the definition of an underground utility facility a private septic system in a one-family or multi-family dwelling utilized only for that dwelling and not connected to any other system. The only change in the bill's definition of underground utility facilities in the law governing public improvements protection service is to replace "double-family" dwelling with "multi-family" dwelling.<sup>1</sup>

The definition of a "utility" under current protection service law is "any owner of an underground utility facility, including any public authority that owns an underground utility facility." "Utility" does not include the owners of the following types of real property with respect to any underground utility facility on that property: (1) the owner of a single-family or two-, three-, or four-unit residential building, (2) the owner of an apartment complex, (3) the owner of a commercial or industrial building or complex of buildings, including factories and shopping centers, and (4) the owner of a farm. The bill expands the definition to include any "operator, or an agent of an owner or operator, of an underground utility facility, including any public authority that owns or operates an underground utility."<sup>2</sup>

### **Tolerance zones, working days, and multiple protection services**

Several changes in, and additions to, the terminology for the protection service law are repeated throughout the bill. Where the term "approximate location" appears, it is replaced with "tolerance zone." The term "working day" replaces "day" regarding the time as to when various actions must take place under the law. The bill also changes the reference from "twenty four hours" to "one full working day" regarding notice of excavation commencement to the utility after marking. "Working days" are defined to exclude Saturdays, Sundays, and legal holidays.

In addition, references to the protection service are amended or enacted to allow for more than one protection service. The bill refers to "each" protection service or to "any appropriate" protection service.<sup>3</sup>

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<sup>1</sup> R.C. 153.64(A) and 3781.25(B).

<sup>2</sup> R.C. 3781.25(C).

<sup>3</sup> R.C. 3781.25, 3781.27, 3781.28, 3781.29, 3781.30, and 3781.31.

## Changes to general protection service law

### Phase-out of limited basis participation

The bill establishes a four-year phase-out for the provision in current law allowing utilities that own or operate underground utility facilities to participate in protection service on a limited basis. Any utility that elects to participate on a limited basis must change its status and fully participate in and register the location of its underground utility facilities with the appropriate protection service within four years of the effective date of the bill. For those participating on a limited basis before this period elapses, the bill specifies that they must identify not only the municipal corporation and townships by county in which they have facilities (as required under current law) but also, where applicable, the immediate geographic area in which they have facilities.<sup>4</sup>

### Commercial excavators

The bill defines a "commercial excavator" as any excavator excluding a utility, that (1) for compensation, performs, directs, supervises, or is responsible for the excavation, construction, improvement, renovation, repair, or maintenance on a construction project and holds out or represents oneself as qualified or permitted to act as such and (2) employs tradespersons who actually perform excavation construction, improvement, renovation, repair, or maintenance on a construction project.<sup>5</sup> The bill defines "improvement" as 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, and all other structures or works of any nature.<sup>6</sup> In addition, the bill adds commercial excavators to those who, under existing law, should publicize the importance of ascertaining the location of underground utility facilities before excavating and the use of protection services to ascertain that information.<sup>7</sup>

### Notice for clearance under 12 inches

The bill requires *written* notice for certain narrow-clearance situations. Under continuing law, if a project includes the installation of new underground utility facilities, the developer must attempt to design their installation so that there is at least a 12-inch clearance between the new and existing facilities. No facility may be installed

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<sup>4</sup> R.C. 3781.26(A).

<sup>5</sup> R.C. 3781.25(N).

<sup>6</sup> R.C. 3781.25(S).

<sup>7</sup> R.C. 3781.26(B).

with clearance of less than 12 inches unless the owners of the existing facilities are notified prior to the installation of new facilities. The bill requires that this notification be in writing.<sup>8</sup>

### **Positive response system**

Under the bill, each utility that is fully participating in a protection service must also participate in its affiliated positive response system.<sup>9</sup> "Positive response system" is defined as an automated system facilitated by a protection service allowing a utility to communicate to an excavator the presence or absence of any conflict between the existing underground facilities and the proposed excavation site.<sup>10</sup> The bill expressly requires each utility participating on a limited basis to directly communicate with an excavator in the same manner as described in that definition.<sup>11</sup>

The term "excavator" under current law is changed to mean "person or persons responsible for making actual excavation" instead of "contractor or other person who is responsible for making the excavation."<sup>12</sup> In addition, the term "excavation," as changed by the bill, specifies that it means the use of "hand" tools rather than merely "tools."<sup>13</sup>

### **Positive response system modification – limited basis participants**

The bill specifies that beginning on July 1, 2013, each protection service must reasonably modify its affiliated positive response system in order to permit the reasonable identification of the location of a proposed excavation site in a manner in which the protection service may then notify any potentially affected limited basis participants.<sup>14</sup> Current law requires the protection service to notify the developer of the name of each limited basis participant with underground utility facilities within the municipal corporation or township and county of the proposed excavation site, and the developer must then contact the utility.<sup>15</sup>

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<sup>8</sup> R.C. 3781.27(E)(4).

<sup>9</sup> R.C. 3781.26(D).

<sup>10</sup> R.C. 3781.25(P).

<sup>11</sup> R.C. 3781.26(D).

<sup>12</sup> R.C. 3781.25(J).

<sup>13</sup> R.C. 3781.25(H).

<sup>14</sup> R.C. 3781.271.

<sup>15</sup> R.C. 3781.27(B).

## **Excavator certification program – positive response system**

The bill requires the Director of Commerce to establish a certification program for excavators that use a positive response service. By rule, the Director must establish the program, in conjunction with statewide organizations that represent excavators in Ohio. The statewide organizations are to conduct the program, which must measure competency in understanding the requirements of the Protection Service Law.<sup>16</sup>

Every excavator that uses a positive response system is required to have at least one employee holding a current and valid certificate under the program. Certificates are valid for a three-year period.<sup>17</sup>

### **Certification program fee**

The bill permits a certification program fee to be imposed and specifies that it not exceed \$100 for each individual. The amount received from fees must be divided equally among each protection service and organization conducting the program. The amount received by a protection service must be used for public outreach, public education, and the protection service's affiliated positive response system.<sup>18</sup>

## **Notification requirements**

### **Planning**

For developers, other than a utility, current law requires the developer of proposed excavation projects to provide project plans to the excavator before excavation begins. The bill changes this provision to require the developer to provide the plans to the commercial excavator prior to entering into a contract that involves such excavation. If the developer does not prepare written plans or does not have any written plans prepared, the developer must otherwise provide the tolerance zones, identifying information on the utilities, information on required adjustments, and any special notification requirements to the excavator before excavation begins. The bill specifies that this information be provided to the commercial excavator.<sup>19</sup>

### **General notice requirement**

Current law requires excavators to notify "the" protection service of the location of an excavation site at least 48 hours, but not more than "ten days" before commencing

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<sup>16</sup> R.C. 3781.261(A).

<sup>17</sup> R.C. 3781.261(B) and (C).

<sup>18</sup> R.C. 3781.261(D).

<sup>19</sup> R.C. 3781.27(E)(2)(a).

excavation. Under the bill, the notice period is changed to be at least 48 hours, but not more than ten working days. The notice is to be given to "each" protection service. The same changes are made regarding the required notice to limited basis participants in the protection service.<sup>20</sup>

### **Large areas**

Different notice requirements apply to excavations that cover a large area and progress from one area to the next over a period of time. In this case, the bill adds a new requirement that the notice of excavation that the excavator provides to each protection service or limited basis participant be written. This written notice must include projected timelines for segments of the excavation as it progresses thus allowing the coordination of the marking of tolerance zones with actual excavation schedules. The bill further provides that under such circumstances, the utility and excavator must determine a mutually agreed upon marking schedule based on the project schedule. Once the schedule is established, the regular marking and notification requirements do not apply (see "**Excavation site marking**" below).<sup>21</sup>

### **Excavator owners of certain buildings or farms**

Under current law, if the excavator is the owner of a single-family or two-, three-, or four-unit residential dwelling; the owner of an apartment complex; the owner of a commercial or industrial building or complex of buildings, including factories and shopping centers; or the owner of a farm, the notice requirements of the protection service law described above do not apply unless the excavation is planned for an area where a utility easement is located or a public right-of-way. Under the bill, the notice provisions also apply to these owners when excavation is planned where utility facilities are known to serve the property.<sup>22</sup>

### **Emergencies**

The bill requires an excavator to make every effort to notify each protection service of an emergency excavation before beginning the excavation, or as soon as possible thereafter. In providing this notification under the bill, the excavator must provide at a minimum: (1) the name of the individual notifying the protection service, (2) the name, address, any electronic mail address, and any telephone and facsimile numbers of the excavator, (3) the specific location of the excavation site, and (4) a description of the excavation.

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<sup>20</sup> R.C. 3781.28(A) and (B).

<sup>21</sup> R.C. 3781.28(E).

<sup>22</sup> R.C. 3781.28(F)(2)(a).

When the protection service receives the notification of an emergency excavation, the protection service must provide the excavator with a reference number and a list of utilities that the protection service intends to notify. The protection service must immediately notify each utility that has facilities located within the designated area of the emergency excavation according to the registration information for the facilities received by the protection service. The bill permits any utility notified of an emergency excavation to inspect all of its underground utility facilities located at the emergency excavation site and to take any otherwise lawful action it considers necessary to prevent disturbance to or interference with its facilities during excavation.<sup>23</sup>

"Emergency" is defined as an unexpected occurrence causing a disruption or damage to an underground utility facility that requires immediate repair or a situation that creates a clear and imminent danger that demands immediate action to prevent or mitigate loss of or damage to life, health, property, or essential public services.<sup>24</sup>

### **Excavation site marking**

The bill requires utilities to review the status of their facilities within an excavation site, in addition to locating and marking the facilities' tolerance zones, within 48 hours of receiving notice from the excavator or protection service. In addition, the bill requires that the facilities be marked in such a manner as to indicate their course and that the utility report the appropriate information to the protection service for its positive response system. Current law requires utilities to locate and mark the approximate location of their underground utility facilities at the excavation site within 48 hours of receiving notice of a proposed excavation.

The bill requires the utility to use the positive response system in notifying an excavator, as required under continuing law, that markings may not be accurate.<sup>25</sup>

### **Excavation site remarking**

If the tolerance zone markup are destroyed or removed before excavation is complete, the bill requires the excavator to notify the utility through the protection service and the utility must remark them in accordance with the excavation site marking requirements described above. Current law requires the excavator to directly notify the utility. The utility must then remark.<sup>26</sup>

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<sup>23</sup> R.C. 3781.29(E).

<sup>24</sup> R.C. 3781.25(T).

<sup>25</sup> R.C. 3781.29(A)(1).

<sup>26</sup> R.C. 3781.31(B).

## **Premarking the excavation site**

The bill adds the requirement that excavators define and premark the immediate area and perimeter of the proposed excavation site before notifying a protection service about the proposed excavation. The markings must be made in white as required in current law for proposed construction or excavation markings. The bill adds that the white marking must be through the use of an industry-recognized method such as chalk-based paint, flags, stakes, or other method applicable to the specific site. The bill requires that when possible, the markings must indicate the excavator's identity by name, abbreviation, or initial.

Premarking is not required under the following circumstances specified in the bill:

- The utility can determine the precise location, direction, size, and length of the proposed excavation site by referring to the notification provided by the protection service.
- The excavator and the affected utility have had an on-site, pre-construction meeting for the purpose of pre-marking the excavation site.
- The excavation involves replacing a pole that is within five feet of an existing pole.
- Premarking by the excavator would clearly interfere with pedestrian or vehicular traffic control.<sup>27</sup>

## **Excavation requirements**

The bill maintains current excavation requirements but specifies that these and other requirements changed by the bill (described below) apply to both traditional and trenchless technologies. Included among the current excavation requirements are requirements to maintain reasonable clearance between an underground utility facility and the cutting edge or point of powered equipment, to protect and preserve markings of underground utility facilities until they are no longer required, and to report to the utility any damage to its facilities as soon as it is discovered and allow the utility a reasonable amount of time to make necessary repairs.

Current law requires an that individual other than the equipment operator look for any sign of the underground utility facility while excavating with powered equipment. The bill changes the requirement to read as follows: "When approaching and excavating within the tolerance zone of underground utility facilities with powered

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<sup>27</sup> R.C. 3781.29(D) and (F).

equipment, require an individual other than the equipment operator, to visually monitor the excavation activity for any indication of the underground utility facility."

Current law also requires excavators to conduct the excavation in the vicinity of the underground utility facility in a careful and prudent manner, excavating by-hand, if necessary, to determine the precise location of the facility and to prevent damage. The bill changes this provision to require excavators to conduct the excavation within the tolerance zone "in a careful, prudent, and nondestructive manner, when necessary, to determine and expose the precise location of the facility and to prevent damage."<sup>28</sup> The bill defines "nondestructive manner" to mean using low-impact, low-risk technologies such as hand tools, or hydro or air vacuum excavation equipment.<sup>29</sup>

Under current law, the excavator must also immediately report to the utility and, if necessary, to the appropriate law enforcement agencies and fire departments, any damage to an underground 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 utility arrive at the scene. Under the bill, the excavator must also report such damage to the protection service and if necessary, report to the appropriate law enforcement agencies or fire departments by calling 9-1-1.

The bill includes additional requirements for an excavator utilizing trenchless excavation methods that must be met in a manner consistent with the requirements listed above for both traditional and trenchless technologies. Those requirements require the excavator to do the following:

(1) Expose and confirm all underground utility facilities at each crossing point by the proposed excavation in a nondestructive manner;

(2) Expose all parallel underground utility facilities in a nondestructive manner at the beginning and end of each trenchless excavation. Any parallel underground utility facility that is within 5 feet of the proposed alignment must also be exposed every 100 feet. Any parallel underground utility facility that is within 3 feet of the proposed alignment must be exposed every 50 feet.

(3) Ensure that the final product installation maintains the proper 12-inch or other agreed upon clearance of existing underground utility facilities (see "**Notice for clearance under 12 inches**," above).<sup>30</sup>

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<sup>28</sup> R.C. 3781.30.

<sup>29</sup> R.C. 3781.25(U).

<sup>30</sup> R.C. 3781.30.

## Changes to public improvements protection service law

### Notification and marking requirements

The bill replaces current requirements governing public improvements for notification of protection services and marking by requiring the general protection service law, as amended by the bill, to govern public improvements to the extent that the protection service law is applicable. In an apparent attempt to ensure that public-improvements provisions do not conflict, the bill deletes the provision in the protection service law exempting its application to public improvements.<sup>31</sup> (See **COMMENT**.)

The following chart summarizes the requirements for public improvements that are clearly *removed* by the bill, and the analogous requirements that remain in the protection service law.

Current requirement removed for public improvements	Analogous requirement in protection service law
Contractor or subcontractor must, at least two working days (excluding Saturdays, Sundays, and legal holidays) prior to commencing construction operations, notify the registered protection service and the owners of underground utility facilities shown on the plans and specifications who are not protection-service members in writing, by phone, or in person. <sup>32</sup>	Excavator must, at least 48 hours, but not more than ten working days before commencing excavation, notify each protection service and limited basis participant of the location and date of excavation. <sup>33</sup> As mentioned above, "working days" is defined to exclude Saturdays, Sundays, and legal holidays. <sup>34</sup>
Owner of the underground utility facilities must, within 48 hours (excluding Saturdays, Sundays, and legal holidays) after notice is received, stake, mark, or otherwise designate the facilities' location and indicate their course together with the approximate depth at which they were installed. <sup>35</sup>	Utility must, within 48 hours of receiving notice, review the status of its facilities within the excavation site and locate and mark the tolerance zone of the facilities at the site as to indicate their course and report the appropriate information to the protection service for its positive response system. <sup>36</sup>

<sup>31</sup> R.C. 153.64(C) and 3781.27.

<sup>32</sup> R.C. 153.64(C).

<sup>33</sup> R.C. 3781.28(A) and (B).

<sup>34</sup> R.C. 3781.25(E).

<sup>35</sup> R.C. 153.64(C).

<sup>36</sup> R.C. 3781.29(A)(1).

Current requirement removed for public improvements	Analogous requirement in protection service law
Marking or locating must be coordinated to stay approximately two days ahead of planned construction. <sup>37</sup>	No provision.

### Registration requirement for telephone, pipeline, and cable companies

The bill removes a provision from the law governing public improvements protection service that currently exempts certain telephone companies, owners of pipelines that conduct petroleum products, and cable television companies from the requirement to register with an underground utility protection service.<sup>38</sup>

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## COMMENT

By incorporating "to the extent they are applicable" the provisions of the protection service law regarding notification and marking of underground utility facilities into the law governing public improvements protection service, the bill may raise questions because both laws contain provisions that address temporary relocation of underground utility facilities,<sup>39</sup> liability for damage to unmarked facilities,<sup>40</sup> contractor/excavator duties when an emergency is caused by excavation of the facilities,<sup>41</sup> and reporting damage to the facilities.<sup>42</sup> Although the provisions may not be in conflict, they contain differences that may make the incorporation to the extent of applicability uncertain. The bill also defines "person" for purposes of the protection service law to include a "public authority" as defined in the law governing public improvements protection service and then utilizes the term "person" in defining "excavator" and "developer" under the protection service law.<sup>43</sup> That change, viewed in conjunction with the change removing the exemption from the protection service law for public improvements, could add uncertainty regarding the relationship between the protection service law and the law governing public improvements protection service.

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<sup>37</sup> R.C. 153.64(C).

<sup>38</sup> R.C. 153.64(A)(5).

<sup>39</sup> R.C. 153.64(B), 3781.27(D), and 3781.28(D).

<sup>40</sup> R.C. 153.64(D) and 3781.29(A)(1).

<sup>41</sup> R.C. 153.64(D) and 3781.30(A)(6).

<sup>42</sup> R.C. 153.64(D) and 3781.30(A)(5).

<sup>43</sup> R.C. 3781.25(G), (J), and (O).

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## HISTORY

ACTION

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