



- Potential increase in expenditures for counties in instances where a county prosecuting attorney chooses to bring civil action in a court of common pleas against any subsurface facility operator, project owner, excavator, or any other person failing to comply with the bill.
- The bill directs the clerk of court where such civil action takes place to deposit any civil penalties collected into the county treasury if the county prosecuting attorney brought forth such action. Any penalties collected may offset the expenses incurred by taking civil action.
- The bill includes underground facilities operated by local governments. Membership dues are applicable and any failure to comply with the bill results in assessment of civil penalties for noncompliance. There is reasonable cause to believe that these provisions will likely pose an impact on local governments that exceed the minimal cost threshold.

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## ***Detailed Fiscal Analysis***

### ***Introduction***

The bill provides for the establishment and operation of a single, statewide, one-call notification system to provide a method of warning operators throughout the state of excavations in proximity to their subsurface facilities. The system is to be established by the operators of subsurface facilities and operated as a nonprofit corporation. The bill requires all subsurface facilities operators to participate in the system and establishes civil penalties for those entities that fail to comply with the provisions of the bill. The bill also enumerates civil penalties for a project owner, excavator, or an operator's agent that does not comply with the notification, disclosure, field marking, and other applicable protection requirements.

### ***History***

There are between 1200 and 1500 subsurface facility operators throughout the state. The bill would require all to participate in a one-call notification system, which includes state, local and private subsurface facility operators. Examples of state facility owners include the Ohio Department of Transportation and the Ohio Department of Natural Resources. Local governments own and operate electric, gas, water, and sewer subsurface facilities. Private service providers offer numerous services through various underground means.

Currently, there exist in Ohio two organizations that function as notification centers for persons to call before engaging in excavation activities. The first is a nonprofit corporation called Ohio Oil and Gas Producers Underground Protection Service (OGPUPS). The other, Ohio Utilities Protection Service (OUPS), operates as a nonprofit corporation as well.

OGPUPS provides underground oil and gas pipeline protection services. Operated by the Ohio Oil & Gas Association, the cost to participate is \$100 per year for Association members and \$225 per year for non-members. Persons and/or companies enrolled in OGPUPS are termed Limited Basis Members and are not entitled to receive notification from the protection service. Rather, the protection service will provide the developer or excavator with the names of Limited Basis Members within a requested location. The developer or excavator is responsible for contacting those members and informing them of the excavation activity in the respected area.

OUPS takes information from persons engaging in excavation activities and distributes this information to utility members who have registered underground facilities in the project area. Thus, OUPS contacts affected underground facility owners and informs them that excavation will take place and for those owners to mark where their facilities lie underground.

OUPS charges governmental members on a fee scale graduated by the number of notification it receives. In 1998, the Village of Bettsville (Seneca County) was charged \$50 for the one (1) notification of excavation it received from OUPS. However, the Village of New Waterford (Columbiana County) received 84 notifications and was also charged \$50. The City of Cincinnati received 128,370 notifications in 1998 and was charged \$4,800. The notification cost was highest for the Village of Bettsville with one notification for \$50. The Village of New Waterford paid 60¢ per notification and the City of Cincinnati paid the least at 3.7¢ per notification.

### ***Effect of the Bill***

The bill states that should a nonprofit corporation currently exist that meets all the provisions of the bill, nothing prevents it from being established as the sole provider of the one-call notification system. To date, the two nonprofit corporations listed above are the ones known to exist in the state. The bill also requires that only one such service provider be located in the state. Any other must cease such operations. This effectively legislates the existence of a monopoly<sup>1</sup>, albeit a nonprofit corporation. The bill allows the non-profit corporation to set its own fees, which must be paid by the users of the service. The establishment of a governing board of trustees, as required by the bill, made up of both public and private underground utility owners, may mitigate the tendency to raise fees without limits.

### **The State**

Section 3781.38(K) of the bill specifies that the one-call notification system, in its entirety, is not an instrumentality of the state. Therefore, all the expense and liability of running such a corporation is borne by the corporation and not the state.

The bill authorizes the Attorney General, if inclined to do so, to bring an action in a court of common pleas of the county where a subsurface facility is located against a project owner, excavator, subsurface facility operator, or an operator's agent for violating the provisions of the bill. The bill directs the clerk of a court of common pleas where the Attorney General's enforcement action takes place to deposit any collected fines into the Attorney General Reimbursement Fund.

An operator of a subsurface facility is subject to a civil penalty of not less than \$100, but no more than \$500, for each day of failing to meet the bill's participation and registration requirements. 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. Finally, any operator or agent of an operator 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

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<sup>1</sup> Webster's New World Dictionary, Second College Edition (1984), defines monopoly as: **1.** exclusive control of a commodity or service in a given market, or control that makes possible the fixing of prices and the virtual elimination of free competition **2.** an exclusive privilege of engaging in a particular business or providing a service, granted by a ruler of the state **3.** exclusive possession or control of something.

each failure. These penalties are applicable to the state as well as local governments and private subsurface facility operators. Other possible enforcement actions include issuance of a temporary restraining order or a preliminary or permanent injunction on any work in progress or subsurface facility operation.

Section 3781.38(B) of the bill outlines the responsibility of the corporation's members to include "establishing a reasonable dues structure." Reasonable dues could be similar to those imposed by the two notification centers currently operating in the state ("History" section above). In 1998, the Ohio Department of Transportation (ODOT), as a member of OUPS, received 16,493 notifications of excavation and was charged \$1,200. The bill authorizes the corporation established as the state's one-call notification system to charge what it deems as "reasonable" which could include future increases in membership dues or impose other fees for services rendered.

### **Local Governments**

The bill extends to the prosecuting attorney of a county where a subsurface facility is located the same authority to bring action against any project owner, excavator, subsurface facility operator, or an operator's agent for violating the provisions of the bill. The same fines and other civil penalties are also applicable. When civil action is brought before a court of common pleas by the county prosecuting attorney, the bill directs the clerk of court to deposit collected fines into the county treasury. The fines collected may offset expenditures in an enforcement action.

Any political subdivision that operates a subsurface facility is obligated to comply with the bill like all others. Local governments are subject to civil penalties for noncompliance as well as permitted to engage in civil action against other persons that violate the bill. They are also subject to the fee schedule established by the one-call notification corporation. The "Yes" local impact determination is based upon the possible civil fines and the fact that the dues structure is not enumerated in the bill.

### **Enforcement Actions Brought By Non-Government Interests**

The bill permits any person who is directly affected by an entity's failure to comply with the bill to take the same civil actions as those granted to the Attorney General and county prosecuting attorneys. However, the bill does not specify into what account civil penalties are to be paid if awarded. Conceivably, a person could be awarded the civil penalties, or alternatively civil penalties may not awarded. A "person" means any interest, including the nonprofit corporation established as the one-call notification system.

### **Conclusion**

The effects of the bill upon the state and local governments are easily identifiable. Potentially, the state and county governments could incur an increase in expenditures for pursuing civil action against those who do not comply with the bill. The possibility of being awarded monetary civil penalties from taking such action may serve no more than to cover the expense in engaging in civil proceedings. Additionally, membership dues, which are not

enumerated in the bill, that participating state agencies and local governments will be required to pay, pose an additional expense.

The establishment of a nonprofit corporation in the state as the sole provider of the one-call notification system serves to legislate a monopoly on such services. Since the bill does not specify the disposition of civil fines in cases where civil action is taken by nongovernmental interests, it is difficult to predict what legal means might be used by the non-profit corporation to expand its membership base. It is possible that the corporation established by the bill could sue in a court of common pleas to further promulgate the notification system and pass the cost of such action on to its members through increased membership dues or other fees.

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