



Ohio Legislative Service Commission

Bill Analysis

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S.B. 378

130th General Assembly
(As Introduced)

Sens. Coley, Peterson

BILL SUMMARY

- Gives the Public Utilities Commission of Ohio (PUCO) jurisdiction to enforce Ohio's underground-utility-damage-prevention law, in conjunction with a 17-member Underground Technical Committee (UTC).
- Permits an aggrieved person to file a complaint with the PUCO for a failure to comply with certain requirements of the underground-utility-damage-prevention law.
- Requires the PUCO to make inquiries of complaints and submit reports of those inquiries to the UTC.
- Requires the UTC to review each report and recommend a fine or penalty, consistent with certain guidelines, or dismiss the case.
- Requires the PUCO to impose the UTC's recommended fines and penalties, with some exceptions.
- Permits the UTC to find that a person is a persistent noncomplier, in which case the PUCO may impose a fine of up to \$10,000.
- Permits the UTC to request a hearing if the UTC believes that a person should be subject to heightened fines and penalties.

* Corrects the discussion of the bill's applicability to persons with a state or local government permit for excavation.

- Permits a complainant or a person responsible for a compliance failure to seek reconsideration with the PUCO if the complainant or person disagrees with a finding of the UTC.
- Requires utilities, excavators, developers, and designers who participate in the one-call notification system to register with the PUCO and pay a safety registration of up to \$50 annually, to provide funding for the new enforcement process.
- Requires the PUCO to adopt rules in coordination with the UTC.
- Creates an Underground Utility Damage Prevention Grant Program, funded by fines collected under the bill's provisions.

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CONTENT AND OPERATION

Overview

The bill creates an enforcement process for Ohio's underground-utility-damage-prevention law. Enforcement authority is given to the Public Utilities Commission of Ohio (PUCO). The bill also creates a committee called the Underground Technical



Committee (UTC) to review cases and recommend fines and penalties. The PUCO is required to impose the UTC's recommended fines and penalties, with some exceptions. Cases are initiated upon complaint of a person who has been aggrieved by a compliance failure. A "compliance failure" is defined as a failure to comply with certain requirements of Ohio's underground-utility-damage-prevention law. Below is a brief summary of the general requirements, which encompass both private excavations and public improvements. The list below does not address requirements for special circumstances or emergencies.

- Utilities that own or operate underground utility facilities must participate in and register the location of their underground utility facilities with a protection service.
- Protection services, utilities, commercial excavators, excavation equipment dealers, the PUCO, the Board of Building Standards, local law enforcement agencies, and fire departments should publicize the importance of locating underground utility facilities before excavating and the use of protection services to obtain that information.¹
- Developers and designers must notify a protection service of the location of a proposed excavation. Likewise, public authorities must contact a protection service and owners of underground utility facilities that are not protection service members for the existence and location of facilities in a construction area.
- The protection service must notify its members and participants that have underground utility facilities of the location of the proposed excavation.
- Utilities that have underground utility facilities on a proposed excavation site must notify the developer, designer, or public authority.
- The developer, designer, or public authority must indicate locations of underground utility facilities for the project plans.²
- The public authority must notify owners of underground utility facilities of the contractor to whom the contract for the public improvement was awarded.³

¹ R.C. 3781.26(A) and (B), not in the bill.

² R.C. 153.64(B) and 3781.27, not in the bill.

³ R.C. 153.64(B)(5), not in the bill.



- The contractor or subcontractor for a public improvement must notify a protection service and the owners of underground utility facilities who are not protection service members.⁴
- Excavators must notify a protection service of the location of an excavation site and the date that excavation will begin, and premark the location.
- The protection service must notify utilities with underground utility facilities of the proposed excavation.⁵
- Utilities must locate and mark their underground utility facilities at an excavation site or public improvement.⁶
- Excavators must comply with certain requirements, such as maintaining clearance between cutting equipment and utility facilities, acting in a careful, prudent, and nondestructive manner, reporting damage to the utility, and notifying a utility if markings are removed.⁷
- Contractors and subcontractors for a public improvement must report damage to underground utility facilities to the facilities' owners or operators.⁸
- Connections or tie-ins to utility services within a public right-of-way must comply with permit requirements.⁹

A "protection service" is defined under continuing law as a notification center, but not an owner of an individual utility, that exists for the purpose of receiving notice from persons that prepare plans and specifications for or that engage in excavation work, that distributes this information to its members and participants, and that has registered by March 14, 1989, with the Secretary of State and the PUCO.¹⁰

⁴ R.C. 153.64(C), not in the bill.

⁵ R.C. 3781.28 and 3781.29, not in the bill.

⁶ R.C. 153.64(C), 3781.28, and 3781.29, not in the bill.

⁷ R.C. 3781.30 and 3781.31, not in the bill.

⁸ R.C. 153.64(D), not in the bill.

⁹ R.C. 3781.32, not in the bill.

¹⁰ R.C. 3781.25(A), not in the bill (a similar definition applies to public improvements – R.C. 153.64(A)(4)).



Complaint process

Complaint filing, PUCO inquiry, and report

The bill permits any person who has been aggrieved because of a compliance failure to file a complaint with the PUCO to seek punitive action against the person responsible for the alleged compliance failure. The complaint must state with particularity the name of the person responsible, the date, nature, and location of the compliance failure, and any other information that the complainant considers relevant.

The PUCO must notify the person allegedly responsible for the compliance failure of the complaint within five business days. The person may respond to the complaint, providing any information that the person considers relevant, not later than 30 days after receiving the notice. The response may include an admission of the compliance failure.

The PUCO must conduct an inquiry of the complaint. The inquiry must be limited to whether there was a compliance failure. The PUCO must examine relevant facts regarding the alleged compliance failure. The PUCO may request records verification, informal meetings, teleconferences, photo documentation, and any other documentation or information relevant to the inquiry. Then the PUCO must make a report of the inquiry to the UTC. The report must contain any admission made by the responsible person. The bill explicitly prohibits the PUCO's report from containing a recommendation as to the imposition of a fine or penalty.¹¹

Review and recommendation by UTC

The UTC must review every report submitted by the PUCO. Not later than 90 days after receiving the report, the UTC must either dismiss the case or make a recommendation to the PUCO as to the imposition of a fine, penalty, or both. In either case (for a dismissal or for a recommendation), there must be a majority vote of the full committee, with at least one of the commercial-excavator members voting with the majority.

In determining a fine or penalty, the UTC must consider the following, as applicable:

- The person's demonstrated history of one-call, design, and excavation practices, including the number of locate requests received and responded to, the number of locates completed, the number of one-calls placed, the number of excavations completed, and the number of design or development projects;

¹¹ R.C. 4913.05, 4913.07, 4913.09, and 4913.13.

- The nature, circumstances, and gravity of the compliance failure, including the amount of damage involved, and whether it resulted in death, serious injury, dismemberment, or a significant threat to public safety;
- The organizational size of the responsible person;
- The prospective effect of a fine on the person's ability to pay business obligations and otherwise conduct business;
- The history or number of the person's compliance failures;
- The good faith effort on the person's part in attempting to achieve compliance after the compliance failure was identified.

The UTC may recommend a penalty of training, education, or another penalty, or a fine of up to \$2,500 (up to \$5,000 for subsequent compliance failures), or a combination of the fine and penalties. Penalties must be appropriately related to the underground-utility-damage-prevention law. The UTC may communicate with responsible persons as part of its review and to assist in making recommendations.

The PUCO must impose the UTC's recommended fine or penalty.¹²

If the UTC fails to act in 90 days

If the UTC fails to make a recommendation during the 90-day period, and has not dismissed the case, then the bill requires the PUCO to recommend a fine or penalty. The PUCO must amend its initial report and resubmit it to the UTC with the recommendation. Not later than 30 days after receiving the resubmitted report, the UTC has another opportunity to recommend a fine, penalty, or a combination (in accordance with the guidelines explained above), or dismiss the case. Again, there must be a majority vote of the full committee, with at least one of the commercial-excavator members voting with the majority, for the UTC to make a recommendation or dismiss the case. If the UTC recommends a fine or penalty, the PUCO must impose it. But if the UTC again fails to take action, the bill directs the PUCO, at its sole discretion, to impose a fine or penalty consistent with the guidelines specified above.¹³

Persistent noncompliers

The UTC may find, as part of a case review, that a person is a persistent noncomplier. This finding is to be made based on the number and type of compliance

¹² R.C. 4913.15, 4913.151, 4913.152, and 4913.21.

¹³ R.C. 4913.15(C), 4913.16, and 4913.21.

failures committed by a person. Again, there must be a majority vote of the full committee, with at least one of the commercial-excavator members voting with the majority, for the UTC to make this finding. The UTC must report the finding to the PUCO. The PUCO may, at its sole discretion, impose a fine on the person of up to \$10,000. The PUCO may also, but is not required to, impose a penalty that was recommended by the UTC.¹⁴ (See **COMMENT 1**.)

Heightened fines and penalties

The UTC may request a hearing with the PUCO if the UTC believes that a person should be subject to a fine or penalty exceeding the guidelines described above. Again, there must be a majority vote of the full committee, with at least one of the commercial-excavator members voting with the majority, for the UTC to request this hearing. (See **COMMENT 2**.)

The bill requires the PUCO, as a result of the hearing, to impose a fine or penalty, at its discretion.¹⁵

Notice of the case outcome

The bill requires the PUCO to notify the complainant and the person responsible for the compliance failure of any fine or penalty imposed or of a case dismissal. The notice must include all of the following, "as applicable" (see **COMMENT 3**):

- The date of the compliance failure;
- The citation to the statute that was not complied with;
- A brief description of the compliance failure;
- The fine or penalty to be imposed, if any;
- Instructions on how to remit payment of a fine or to comply with a penalty;
- Instructions on how the person may file for reconsideration and how to make a timely filing;
- A statement that failure to file for reconsideration will make any findings final and enforceable.¹⁶

¹⁴ R.C. 4913.17 and 4913.171.

¹⁵ R.C. 4913.19.

¹⁶ R.C. 4913.23.



Reconsideration with the PUCO

Not later than 30 days after receiving notice of the case outcome, the complainant or the person responsible for the compliance failure may apply to the PUCO for reconsideration of a "finding" made by the UTC under certain provisions of the bill (see **COMMENT 4**). The application for reconsideration must state with particularity the grounds for reconsideration.

Upon the filing of an application for reconsideration, the bill requires the PUCO to review the UTC's "finding." The PUCO may hold a hearing on the application at the PUCO's sole discretion.

The PUCO must affirm, reject, or modify the UTC's "finding." The PUCO must also, at its sole discretion, impose any fine or penalty authorized under the bill (see **COMMENT 5**).¹⁷

Paying fines and complying with penalties

A person subject to a fine imposed under any of the bill's provisions must pay the fine not later than 60 days after the fine is imposed. A person subject to a penalty imposed under any of the bill's provisions must begin compliance not later than 30 days after the penalty is imposed.¹⁸

Hearing procedure

All hearings brought under the bill must be conducted in a manner consistent with continuing law governing PUCO hearings.¹⁹

Underground Technical Committee

Members

The UTC is composed of the following 17 members, appointed by the Governor with the consent of the Senate:

- Four members from the commercial excavator industry;
- One member from each of the following stakeholder groups:
 - The natural gas transmission pipeline industry;

¹⁷ R.C. 4913.25.

¹⁸ R.C. 4913.22 and 4913.25(D).

¹⁹ R.C. 4913.27(A).

- The natural gas distribution industry;
- Electric utilities;
- Electric cooperatives;
- Oil and gas producers;
- The telephone industry;
- Cable service providers;
- Locators of underground utility facilities;
- Municipal corporations;
- The Department of Transportation;
- The general public;
- The hazardous liquids pipeline industry;
- Designers, developers, or surveyors.

The governor must appoint an alternate for each member. If a vacancy occurs during a member's term, the alternate must serve for the rest of that term. If a vacancy occurs during the term of an alternate, the Governor must appoint a new alternate in the same manner as an original appointment.

Terms of office are initially staggered at two, three, and four years and generally determined by lot. After the staggering, terms are four years. Members and alternates may be reappointed an unlimited number of times.²⁰

Conflicts of interest

A member of the UTC who has a conflict of interest in a particular case must declare the conflict to the UTC and recuse himself or herself from committee discussions and voting regarding that case.

²⁰ R.C. 3781.34.

If a nonalternate member is a party to a case being reviewed by the UTC or if the member has recused himself or herself, the alternate must serve temporarily in the member's place.²¹

Meetings

The UTC may conduct meetings in person, by telephone, or by video conference.²² The committee must meet as necessary to carry out its duties and meet the time-period requirements of the bill, but not less than once every three months. A majority of committee members constitutes a quorum.²³

Specified duties

In addition to what the UTC is required to do under the bill, the bill creates a list of duties of the UTC:

- Coordinate with the PUCO in carrying out its duties under the bill;
- Provide subject matter expertise when requested during cases;
- Review reports of the PUCO in accordance with the bill;
- Make recommendations under the bill;
- Coordinate with the PUCO in establishing the PUCO's rules regarding guidelines for consistent application of fines and penalties and tracking compliance of persons on whom fines or penalties have been imposed;
- Perform any additional duties as may be required under the bill.²⁴

PUCO rulemaking

The bill requires the PUCO to, in coordination with the UTC, adopt rules regarding all of the following:

- Guidelines for consistent application of fines and penalties;
- Tracking compliance of persons on whom fines or penalties have been imposed;

²¹ R.C. 3784.341.

²² R.C. 3781.342.

²³ R.C. 3781.36(B).

²⁴ R.C. 3781.36(A) and 4913.45(A)(1) and (2).

- The required contents of the Underground Utility Damage Prevention Grant Program, created by the bill;
- The gathering, review, and acceptance of applications for grants;
- The dispensation and tracking of money from the Underground Utility Damage Prevention Fund;
- The UTC's duties, including rules that establish the UTC's operation, meeting schedule, and voting procedures.

The bill *permits* the PUCO to adopt rules establishing (1) procedures for conducting inquiries of complaints or (2) any other duties for the UTC.²⁵

Registration amount required – used for enforcement funding

The bill requires each utility, excavator, developer, and designer who participates in the one-call notification system to register with the PUCO and pay a safety registration of up to \$50 annually, which the PUCO may lower. These amounts are to fund the operation of the UTC and the PUCO in the performance of duties under the bill.

The PUCO must administer and oversee the registration process. The bill states that failure to register results in a fine of up to \$2,500.²⁶

Underground Utility Damage Prevention Grant Program

The PUCO must deposit all fines collected under the bill into the Underground Facilities Protection Fund, which the bill creates. The fund retains its interest and is to be used solely to fund Underground Utility Damage Prevention grants, which are for any of the following purposes:

- Public awareness programs established by a protection service;
- Training and education programs for excavators, operators, designers, persons who locate underground utility facilities, or other persons;
- Programs providing incentives for excavators, operators, persons who locate underground utility facilities, or other persons to reduce the number and severity of compliance failures.

²⁵ R.C. 4913.45.

²⁶ R.C. 4913.03.

The bill permits the PUCO to administer the grant program and to provide the grants. The PUCO is to determine the appropriate amounts of grants.²⁷

The bill does not affect civil liability

The bill states that it does not give the PUCO or the UTC the authority to determine the civil liability of any person for any compliance failure.²⁸ In a separate provision, it similarly states that no finding, determination, or recommendation of the UTC and no decision of the PUCO is determinative of civil liability. The bill also states that no proceeding under the bill, or fine or penalty imposed under the bill, prevents or preempts any party from obtaining civil damages for personal injury or property damage in a private cause of action.²⁹

No fine in the case of a federal fine

The bill prohibits a person from being subject to a fine under the bill and a fine under federal law for the same compliance failure. In this situation, the federal fine – and not the fine under the bill – would apply.³⁰

Public Utilities Commission's jurisdiction

The bill states that the PUCO has exclusive jurisdiction to enforce, in accordance with the bill, the requirements of the underground-utility-damage-prevention law described in the "**Overview**," in reference to the definition of a compliance failure.

The bill states that the PUCO's enforcement authority is limited to actions specifically authorized by the bill upon the filing of a complaint.³¹

Applicability to permits

The bill states that a person with a permit for excavation from the state or a local governmental unit is subject to the bill.

²⁷ R.C. 4913.27(B), 4913.29, and 4913.31.

²⁸ R.C. 4905.041(C).

²⁹ R.C. 4913.50.

³⁰ R.C. 4913.47.

³¹ R.C. 4905.041(A) and (B).

It also states that its provisions do not affect or impair local ordinances, charters, or other provisions of law requiring permits to be obtained before excavating.³²

Exemption for domestic wells

The bill exempts owners of certain domestic wells from any requirements of "utilities" under the underground-utility-damage-prevention law. For instance, the bill exempts an owner of a domestic well from the requirement to register the well's location with a protection service.³³

COMMENT

1. It is not clear how the persistent-noncomplier finding will affect a person over time. The bill provides for a person to be designated as a persistent noncomplier, but does not specify a time limit on how long a person retains that status. It is unclear whether a persistent noncomplier could be subject to multiple \$10,000 fines while that status applies. The bill also does not clarify whether a persistent noncomplier could be subject to a \$10,000 fine in addition to a fine as the result of a hearing requested by the UTC.³⁴

2. It is not clear whether the UTC's request for a heightened-fine-or-penalty hearing is *in lieu* of the UTC recommending a fine or penalty. The bill also states that the provisions governing this hearing are an exception to the requirement that the PUCO must impose every recommendation of the UTC. If it is an exception, then it appears that the UTC must make a recommendation *along with* a request for a hearing. But if the hearing is requested in lieu of a recommendation, the exception should be removed.³⁵

3. The bill requires the notice of a case outcome to state certain items, "as applicable." But it is not clear what would be required in each notice, depending on the case outcome. For example, the bill requires the notice to include "[a] brief description of the compliance failure." It is not clear what this would mean for a notice of a case dismissal – whether the notice must give a description of the *alleged* compliance failure, even if it was determined that none was committed.³⁶

³² R.C. 4913.52.

³³ R.C. 3781.25(C)(5); R.C. 3781.26(A), not in the bill.

³⁴ R.C. 4913.17, 4913.171, and 4913.19.

³⁵ R.C. 4913.19 and 4913.21.

³⁶ R.C. 4913.23.

4. The bill permits a complainant or a person responsible for a compliance failure to seek reconsideration of a "finding" made by the UTC under certain provisions of the bill. Specifically, the bill refers to the provisions under which the UTC recommends fines or penalties or dismisses cases.³⁷ Therefore, the implication is that none of the following are eligible for the bill's reconsideration process:

- A finding by the UTC that a person is a persistent noncomplier;³⁸
- A fine of up to \$10,000, imposed by the PUCO on a persistent noncomplier;³⁹
- A fine or penalty imposed by the PUCO as a result of a hearing requested by the UTC;⁴⁰
- A fine or penalty imposed by the PUCO after the UTC fails to take action during the additional 30-day period.⁴¹

It is not clear whether a penalty imposed by the PUCO on a persistent noncomplier is eligible for the bill's reconsideration process.⁴² Finally, it is not clear what *is* eligible for reconsideration under the bill. This is because the bill allows for reconsideration of a "finding" of the UTC under certain provisions, but those provisions do not use the term "finding." Rather, the UTC makes *recommendations* under those provisions.

5. The bill appears to preclude the PUCO from dismissing a case as a result of the bill's reconsideration process. This is because the bill *requires* the PUCO to impose any fine or penalty authorized under the bill.⁴³

³⁷ R.C. 4913.15, 4913.16, and 4913.25.

³⁸ R.C. 4913.17.

³⁹ R.C. 4913.171.

⁴⁰ R.C. 4913.19.

⁴¹ R.C. 4913.16(C).

⁴² R.C. 4913.171.

⁴³ R.C. 4913.25.

HISTORY

ACTION

DATE

Introduced

10-28-14

S0378-I-CORRECTED-130.docx/ejs

