

Claims Brief



October, 2010

Changes to the “Miss Utility” Law

Senate Bill 911 was signed into law on May 20, 2010 and became effective on October 1, 2010. The bill alters provisions of the state law which regulate the protection of underground facilities. Primarily, the bill establishes a Maryland Underground Facilities Damage Prevention Authority to hear complaints and assess civil penalties for violations of the state law that protect underground facilities. Local governments that own underground facilities must be both owner-members which must properly mark facilities and excavators that must avoid damaging underground facilities. Important changes to the law follow.



Underground Facilities Marking Procedures Changes

- The Maryland Department of Transportation (MDOT), its administrations, and the Maryland Transportation Authority (MDTA) shall now become members of the one-call system under a separate agreement.
- An owner-member of a facility must ensure that all contact information provided to the one-call system remains current.
- Notice to a one-call system of proposed excavation or demolition shall indicate –
 - The location of the proposed excavation.
 - The type of work to be performed in connection with the proposed excavation.
 - Whether the proposed excavation is within rights-of-way owned or controlled by the Department of Transportation, an administration of the MDOT or the Maryland Transportation Authority and, if so, the entity and the permit number or authorization number obtained from that entity.
- The one-call system must send ticket requests that are within such rights-of-way to MDOT or MDTA so that these facilities can be marked. MDOT or MDTA (as well as local governments) may charge up to \$35 for an initial marking and \$15 for a remarking.
- A one-call system ticket is valid for **12** (instead of 10) business days after the day on which the ticket is transmitted by the one-call system to an owner-member. “Business day” does not include Saturday, Sunday or legal holidays.
- Owner-members will have two (**2**) full business days to respond to a ticket request.
- Montgomery County will now follow all statewide marking requirements.

- If an owner-member is unable to mark the location of the proposed facility within the two (2) day time period because of the scope of the proposed excavation or demolition, the owner-member shall (1) promptly notify the underground facilities information exchange system AND the person that intends to perform the excavation; AND (2) work with the person that intends to perform the excavation to develop a mutually agreeable schedule for marking the underground facility.
- If an owner-member and person that intends to excavate cannot reach a mutually agreeable schedule for marking the location, the owner-member shall mark that portion of the site where excavation or demolition will first occur and the owner-member shall mark the remainder of the site within a reasonable time.
- If an owner-member is unable to mark the location of the proposed excavation for reasons other than the scope of the proposed excavation, the owner-member shall report to the information exchange that an extension is required.
- In connection with extensive or contiguous excavation or demolition projects, the person performing the excavation and the owner-member may establish a working agreement regarding the time periods for marking the underground facility.
- A person performing an emergency excavation to prevent danger to life, health, or property shall (1) take all reasonable precautions to protect underground facilities in and near the excavation area, and (2) immediately notify the one-call system serving the area where the emergency excavation is performed to inform the appropriate owner-members of the excavation area. A person that abuses the emergency excavation procedure shall be subject to penalties.
- A designer, which includes an architect, professional engineer, professional land surveyor, or licensed landscape architect, who prepares a project that may require excavation may initiate a “designer” ticket request. A designer may make only one ticket request for a single project and must indicate that the request is for design purposes only. A ticket used for design purposes MAY NOT be used for excavation. The owner-member must provide to a designer the type and approximate location of underground facilities through the use of field locates, maps, surveys, installation records, or other similar means. An owner-member CANNOT be held liable for inaccurate information provided to a designer.

Creation of a Damage Prevention Authority

In order to comply with requirements of the federal Pipeline Inspection, Protection, Enforcement, and Safety Act of 2006, this new law creates an Underground Damage Prevention Authority to hear complaints arising from violations of laws protecting underground facilities. The authority will have nine members which will be selected by the Governor from lists submitted by various industry participants, including MML and MACo. The authority may hire staff and maintain offices. Employees and officials of the authority are STATE personnel under the Maryland Tort Claims Act. The authority is authorized to conduct hearings, compel attendance of a witness and may assess a civil penalty or reach a settlement. The authority is authorized to establish reasonable complaint filing fees and administrative fees for complaints heard. It appears that the authority will not be funded by the state; it will be funded by fees and federal and state grants.

The bill increases the amount of a civil penalty that may be imposed for violating the requirement to provide notice prior to excavation or demolition from \$1,000 to **\$2000** for a first offense and **\$4000** for a subsequent offense. The civil penalties are assessed by the authority. Instead of or in addition to a civil penalty assessed the authority may require that a person (1) participate in damage prevention training, OR (2) implement procedures to mitigate the likelihood of damage to underground facilities; or (3) impose other measures.

A person who disputes a decision by the authority may request judicial review by the circuit court. Except under specified conditions, the cost of judicial review must be paid by the requesting party. If a proceeding has not been initiated before the authority, a proceeding may be brought by an owner of a damaged underground facility or the Attorney General in a court of competent jurisdiction. A court may still assess a civil penalty of up to 10 times the cost of repairs, as is currently provided by law. A party bringing an action may recover reasonable attorneys fees.

Under current law civil penalties assessed are minimal; however, it is likely that the creation of the authority may result in a significant increase in penalties. Penalties will be invested in a special fund and administered by the authority to conduct public education and outreach programs to prevent damage to underground facilities. The fund may be used to make grants to local governments or private entities consistent with the purposes of this fund.

Please be aware that although LGIT will still continue to cover tort claims brought against our members for damages to underground facilities caused by our members' negligence, **LGIT DOES NOT COVER CIVIL PENALTIES ASSESSED BY THE MARYLAND UNDERGROUND DAMAGE PREVENTION AUTHORITY** or a court. Civil penalties have been distinguished from civil remedies for damages: civil penalties are imposed as a punishment for certain activity and have the character of a sanction, while civil remedies seek to compensate for injuries or damages suffered.

What to Do When You Damage an Underground Facility

- If you do damage an underground facility **ALWAYS** document the occurrence. This will help you defend against damage claims as well as civil penalties.
- Take photographs of the locate marks with a measure showing the locate marks in proximity to the underground facility.
- Complete a supervisor's report of the event and identify all crew members at the location.
- Report the damaged facility to the owner. Record and document the name of any investigator for the facility that comes to the scene. Document all conversations with the facility owner or representative.

This bulletin is intended to be merely informational and is not intended to be used as the basis for any compliance with federal, state or local law, regulations or rules, nor is it intended to substitute for the advice of legal counsel.



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