



STATE OF WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

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Nov. 27, 2019

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Re: Dig Law Workgroup Report

As required by the 2019 Engrossed Substitute House Bill (ESHB) 1109, Section 144(6), the Utilities and Transportation Commission (UTC) entered into a contract with an independent consultant to facilitate stakeholder work group discussions and recommend improvements to RCW 19.22, the Washington Underground Utilities Damage Prevention Act. ESHB 1109 required a minimum of four workshops throughout the duration of the contract and a report with recommendations to the Legislature by Dec. 1, 2019.

The UTC entered into a contract with Dennis J. Moss on July 18, 2019. Moss worked with the commission to convene the first stakeholder workshop at the UTC headquarters building in Lacey, Washington, on July 31. Subsequent workshops were held at the UTC on Aug. 27, Sept. 24, and Oct. 18. Stakeholders representing the state's 811 service provider, cities, counties, public and private utility companies, Public Utility Districts, construction and excavator companies, water-sewer districts, and UTC pipeline safety personnel participated in the workshops in person and via teleconference.

It was evident during the workshops that the stakeholder participants were interested in continuous improvement of the Dig Law but recognize that it is a challenging task to achieve unanimous, or even consensus, support for specific proposals considering the diversity of interests that must be reconciled and the complexity of some of the issues that arise. Nevertheless, during the four workshops, a number of proposed improvements gained broad support. As reported here, the stakeholders met with a degree of success, agreeing to propose to the Legislature several amendments to RCW 19.122 that will improve the Dig Law.

If you have any questions about this report, please contact Jon Noski, Legislative Director, at jon.noski@utc.wa.gov or (360) 664-1209.

Sincerely,

A handwritten signature in blue ink, appearing to read "Mark Johnson". The signature is fluid and cursive, with the first name "Mark" and last name "Johnson" clearly distinguishable.

Mark Johnson, Executive Director and Secretary

Report on 2019
Stakeholder Work Group Discussions and
Recommended Improvements to the
Washington Underground Utilities Damage Prevention Act,
Chapter 19.122 RCW

As required under ESHB 1109, Section 144(6)

December 2019

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Executive Summary

The Washington Legislature, during its 2019 Regular Session, included in a Budget Proviso, ESHB 1109, Section 144, a General Fund State Appropriation for the Washington Utilities and Transportation Commission (UTC or Commission) for fiscal year 2020 requiring the Commission to convene a workgroup on preventing underground utility damage. Thus, the Legislature formally expressed its continuing interest in improving the state's Dig Law, codified as Chapter 19.122 RCW. Specifically, in ESHB 1109 the Legislature appropriated general funds to enable the UTC to enter into a contract with an independent facilitator who would convene a work group on preventing underground utility damage, meet with stakeholders a minimum of four times, and produce a report with recommendations ¹to the Governor and Legislature by Dec. 1, 2019.

The Commission entered into a contract with an independent facilitator on July 18, 2019. The facilitator arranged with the Commission to convene a first stakeholder workshop at the UTC headquarters building in Lacey, Washington, on July 31, 2019. Subsequent workshops were scheduled, and held at the UTC headquarters, on August 27, 2019, September 24, 2019, and October 18, 2019. The workshops were well attended in person and by teleconference line, and included stakeholders representing the state's 811 service provider, cities, counties, public and private utility companies, Public Utility Districts (PUDs), construction and excavator companies, water-sewer districts, and UTC pipeline safety personnel. UTC maintains a list of persons interested in the Dig Law, which is found at Attachment A to this Report. This functioned as an electronic mailing list for purposes of providing notice and distributing documents to the known stakeholder community throughout the workshop process. The participants in each workshop are identified in Attachment A.

It was evident during the workshops that the stakeholder participants focused significant effort and attention to the topics queued up for discussion on a rolling basis going forward from one workshop to the next. It also was evident very early in the process that the stakeholders are earnestly interested in continuous improvement of the Dig Law but recognize that it is a challenging task to achieve unanimous, or even consensus, support for specific proposals considering the diversity of interests that must be reconciled and the complexity of some of the issues that arise. Nevertheless, during the four workshops a number of proposed improvements were brought to the point of gaining broad support.

¹ This report does not reflect the views of the Utilities and Transportation Commission, but of the stakeholders in the Dig Law work group. UTC staff participated as a stakeholder in the work group and deliver this report to the Legislature on behalf of the work group and facilitator.

Specifically, this report identifies and discusses four proposed amendments to Chapter 19.122 that gained sufficient stakeholder support to warrant consideration by the Legislature and Governor in the near term, as follows:

1. Change the makeup of the safety committee by dropping the insurance seat and adding a seat to be occupied by a water/sewer representative. The total number of representatives on the Safety Committee thus would remain at 13.
 - This will make the committee more representative of the full range of utilities implicated by the law and will promote balance by adding a representative whose constituents are subject to the law while removing a representative not directly subject to the law.
2. Change the make-up of Complaint Review panels, which will continue to have three to five members, by requiring each panel to have at least one excavator representative and one facility owner/operator representative, and no mandate to have a pipeline representative and an insurance representative on each panel, recognizing the practical difficulty encountered over time in securing participation by a representative from the insurance industry.
 - This is meant to promote balance in the review panels and flexibility in their makeup by allowing the industries actually subject to a specific complaint to be taken into account when panel members are selected.
3. Add language to the definition of “marking” providing (*i.e.*, clarifying) that “locate marks do not require the depth of facilities to be indicated.”
 - This will improve the definition by bringing it more in line with longstanding practice and what can be realistically expected.
4. Add language requiring excavators to notify 911 if they damage an underground facility in addition to notifying 811, and making a reasonable attempt to notify the owner of the buried facility.
 - This will promote public safety.

Table One, below, summarizes these issues and the proposed resolution of each in terms of proposed amendments to relevant sections of RCW Chapter 19.122. Stakeholders representing a broad cross-section of the interests affected by the Dig Law and who participated in the workshops expressed support for these proposals. By the end of the facilitated workshops on October 18, 2019, no stakeholder expressed opposition to either the issue statements or the language of the proposed amendments.

TABLE ONE

ISSUE	PROPOSED RESOLUTION
<p>Change the makeup of the safety committee by dropping the insurance seat and adding a seat to be occupied by a water/sewer representative. The total number of representatives on the Safety Committee thus would remain at 13.</p>	<p>AMEND RCW 19.122.130 Commission to contract with nonprofit entity—Safety committee—Review of violations of chapter.</p> <p>* * *</p> <p>(3)(a) The safety committee will consist of thirteen members, who must be nominated by represented groups and appointed by the contracting entity to staggered three-year terms. The safety committee must include representatives of:</p> <ul style="list-style-type: none"> (i) Local governments; (ii) A natural gas utility subject to regulation under Titles 80 and 81 RCW; (iii) Contractors; (iv) Excavators; (v) An electric utility subject to regulation under Title 80 RCW; (vi) A consumer-owned utility, as defined in RCW 19.27A.140; (vii) A pipeline company; (viii) <u>The insurance industry; A water sewer district subject to regulation under Title 57 RCW;</u> (ix) The commission; and (x) A telecommunications company.
<p>Change the make-up of Complaint Review panels, which will continue to have three to five members, by requiring each panel to have at least one excavator representative and one facility owner/operator representative, and no mandate to have a pipeline representative and an insurance representative on each panel.</p>	<p>AMEND RCW 19.122.130 Commission to contract with nonprofit entity—Safety committee—Review of violations of chapter.</p> <p>* * *</p> <p>(6) To review complaints of alleged violations, the safety committee must appoint at least three and not more than five members as a review committee. The review committee must be a <u>balanced group including at least one excavator and one facility operator.</u> include the same number of members representing excavators and facility operators. One member representing facility operators must also be a representative of a pipeline company or a natural gas utility subject to regulation under Titles 80 and 81 RCW. The review committee must also include a member representing the insurance industry.</p>

<p>Add language to the definition of “marking” providing that “locate marks do not require the depth of facilities to be indicated.”</p>	<p>AMEND RCW 19.122.020 Definitions. * * *</p> <p>(17) “Marking” means the use of stakes, paint, or other clearly identifiable materials to show the field location of underground facilities, in accordance with the current color code standard of the American public works association. Markings shall include identification letters indicating the specific type of the underground facility. <u>Locate marks are not required to indicate the depth of the underground facility.</u></p>
<p>Add language requiring excavators to notify 911 if they damage an underground facility in addition to notifying 811, and making a reasonable attempt to notify the owner of the buried facility.</p>	<p>RCW 19.122.050</p> <p>Damage to underground facility—Notification by excavator—Repairs or relocation of facility.</p> <p>(1) An excavator who, in the course of excavation, contacts or damages an underground facility shall notify the facility operator and a one-number locator service, and report the damage as required under RCW 19.122.053. If the damage causes an emergency condition, the excavator causing the damage shall also <u>call 911 to alert the appropriate local public safety agencies,</u> and take all appropriate steps to ensure the public safety. No damaged underground facility may be buried until it is repaired or relocated.</p>

This report also identifies issues that were discussed in detail during the workshops but were determined to require further efforts by the stakeholders if specific proposed amendments to RCW Chapter 19.122 are to be brought to the Legislature in the future with broad support from the stakeholder community. These issues are:

1. Give the UTC discretion to refer violations of the Dig Law by any person, whether or not subject to the UTC's general jurisdiction, to the Attorney General without a complaint first being vetted by a Complaint Review panel, against any person that damages any buried facility while digging without giving notice of its intention to excavate to "Call Before You Dig" (*i.e.*, 811).
2. Adopt a "Tolerance Zone" standard.
3. Define "reasonable accuracy."
4. Define "non-invasive methods."
5. Define "soft digging."
6. "Large project" definition and process.

These issues were identified by the stakeholders, during the workshops, as the next in queue in terms of priorities for stakeholder attention and, perhaps, proposed legislation during 2021. Stakeholders participating in the fourth workshop agreed to general protocols and structure that will guide their approach to continuing efforts, including periodic (*e.g.*, monthly) moderated workshops in the future to discuss and develop additional proposals to improve the Dig Law.

It is encouraging that the stakeholders appear to be strongly committed to continuing work on these issues in the spirit and with the goal of continuous improvement to the difficult task of finding the most efficacious means to balance the demands of infrastructure development in a vibrant economy against the need to protect existing underground facilities that provide essential services to individuals, business and industry, government enterprises and services, public and private institutions and, indeed, everyone who lives in, does business in, or visits the State of Washington.

Background and Introduction

The Washington Legislature, in 1984, enacted the Underground Utilities Damage Prevention Act, commonly known as the “call before you dig” law or simply the “Dig Law.” The Act, as amended, is codified at RCW Chapter 19.122.

The Dig Law’s goal is to protect underground facilities (pipes, conduits, cables, wires, and sewers) from damage, and assign responsibilities for locating facilities and marking them prior to any excavation, as part of a comprehensive damage prevention program. The Dig Law requires that anyone excavating in Washington must call the 811 one-number locator service before digging begins so that all underground utilities can be located and marked.²

With the passage of time after 1984, it became clear that the Dig Law lacked clarity with regard to oversight, enforcement, and penalties for violators. Recognizing the need for improvement, stakeholders including legislators, the Commission, public and private utilities, contractors, local governments, citizen organizations, and others began meeting in 2010 to address possible improvements to the law.

Based on the work of these stakeholders, the Legislature amended the Dig Law in 2011 by passing Engrossed Second Substitute House Bill (E2SHB) 1634.³ This legislation took effect on January 1, 2013, and implemented the following eight improvements:

- Required facility owners and operators to subscribe to a one-call locator service (*i.e.*, 811);
- Clarified the responsibilities of facility operators and excavators, including how “un-locatable” facilities and service laterals must be identified;⁴
- Clarified the exemptions from the requirement to notify a one-number service before excavating;

² The law provides for limited exemptions.

³ Chapter 263, Laws of 2011. Among other improvements, the 2011 amendments authorized the Commission to take enforcement action for violations of the Dig Law. *See* RCW 19.122.130(8); 19.122.140; 19.122.150. The Act also established a Safety Committee made up of 13 members, of whom 10 must come from specific stakeholder groups. This multi-party stakeholder committee receives and reviews complaints, makes penalty recommendations to the Commission, and helps to develop better excavation and utility locating practices through education and training. Commission enforcement may include referrals to the Washington Attorney General. *See* RCW 19.122.140(2) and (3); 19.122.150(5).

⁴ The definition of “un-locatable” facilities included, but was not limited to, service laterals, storm drains, and nonconductive and nonmetallic underground facilities that do not contain trace wires.

- Strengthened notice requirements for excavation near underground pipeline facilities and identified responsibilities when damage occurs to those pipelines;
- Increased penalties for violations;
- Authorized the UTC and the Attorney General’s Office to enforce violations by assessing penalties and/or requiring other remedial actions;
- Required facility operators and excavators to report damage events to the facility operator, one-call number service, and the UTC; and
- Created a 13-member Safety Committee to promote safe excavation practices and review complaints of alleged violations.

As part of the bill, the Legislature directed the UTC to report by December 1, 2015, on the effectiveness of the damage prevention program.⁵ The report assessed the effectiveness of the program, including analysis of damage data. The report also described the 2011 changes to the Dig Law and discussed preliminary results of the improvements, including analysis of data received from January 1, 2013, to July 31, 2015. Significantly, the report included 14 recommendations for further improvements to the Act.⁶

The UTC’s 2015 report was followed by several legislative initiatives:

2017 – Request Legislation by the UTC

The UTC led stakeholder outreach throughout 2016 with the intent of running legislation that would further improve the Dig Law consistent with the recommendations in the 2015 Report. After the first stakeholder meeting, however, it became clear that stakeholders were not unified on necessary changes to the law, other than removing the expiration date. Thus, HB 1064,⁷ sponsored by Representatives Morris, Smith, Doglio, and Hudgins, focused on removing expiration dates, obsolete dates, and outdated statutory references from the enforcement provisions of the Dig Law. The Bill was signed into law by the Governor on April 17, 2017, with an effective date of July 23, 2017.

⁵ Section 26, E2SHB 1634 (2011).

⁶ In developing its 2015 report, the UTC held two meetings involving more than 60 stakeholders, and distributed a survey that received more than 500 stakeholder responses. Using information gathered from the meetings and survey responses, in addition to input from the Safety Committee, the UTC found that the Act was working well overall, but could be amended further to improve understanding, communication, and effectiveness.

⁷ There was a companion bill introduced to the Senate, SB 5091, but HB 1064 was the moving vehicle.

2018 – Legislation Introduced by the Dig Law Safety Committee

HB 2979, sponsored by Representative Appleton at the Safety Committee’s request, focused on adopting new requirements for locating underground facilities, including “positive response,” minimum marking standards, adopting a new process for coordinating large projects, and requiring new and replacement facilities to be locatable. The bill was referred to the Technology & Economic Development Committee. Expressions of concern about the proposed bill from members of the broader Dig Law stakeholder community came to the attention of legislators generally and members of the Committee specifically. The bill was not heard and remained in Committee at the session’s end.

After the 2017-19 biennium, proponents of HB 2979 in consultation with UTC legislative staff were concerned that unresolved broader stakeholder issues were significant enough to prevent the bill from going forward. The UTC legislative staff convened several workgroup meetings to broaden participation in discussions and to address specifically the concerns within the stakeholder community that emerged shortly after the introduction of HB 2979 and proved to be barriers to its advancement beyond the Committee to which it had been referred.

2019 – Legislation Reintroduced from 2018 Session

Later during 2018, prior to resolution within the stakeholder community of concerns that had emerged with respect to HB 2979, a proponent of the original bill arranged for the introduction of HB 1006.⁸ This bill, again sponsored by Representative Appleton, was identical in all material respects to HB 2979. During the legislative session, HB 1006 first was referred to the Environment & Energy committee but it was moved to the Local Government Committee with no consideration by the Environment & Energy committee. Early in 2019, HB 1006 was amended to become Substitute House Bill (SHB) 1006, which eliminated all of the original bill provisions and would have required the UTC to convene a workgroup to develop recommendations and possible legislation for updating the Dig Law. SHB 1006 was referred to the Appropriations Committee but failed to advance.

2019 – Budget Proviso Compromise

With ESHB 1109, an appropriations bill, the Legislature formally expressed its continuing interest in improving the Dig Law. Specifically, the Legislature included provisions in ESHB 1109 providing funds to enable, and requiring, the UTC to enter into a contract with an independent facilitator who would convene a work group on preventing underground utility

⁸ Pre-filed for introduction on December 4, 2018, first read and referred to the Environment & Energy Committee on January 14, 2019. The Environment & Energy Committee was relieved of further consideration and the bill was referred to the Local Government Committee.

damage, meet with stakeholders a minimum of four times, and produce a report with recommendations to the Governor's Office and Legislature by December 1, 2019.

According to ESHB 1109, the independent facilitator would move this process forward by:

- Clearly identifying issues;
- Moderating meetings;
- Providing objective facilitation and negotiation among work group members;
- Ensuring participants receive information and guidance so that they respond in a timely manner; and
- Synthesizing agreements and points under negotiation into a report to the Legislature.

ESHB 1109 provided that the work group would discuss:

- How facility operators and excavators schedule meeting times and places;
- New requirements for marking locatable underground facilities;
- A definition of "noninvasive methods;"
- The procedures that must take place when an excavator discovers (and may or may not damage) an underground facility;
- Positive response procedures;
- Utility identification procedures for newly constructed and replacement underground facilities;
- Membership composition of the dig law safety committee;
- Liability for damage occurring from an excavation when either the excavator or the facility operator fails to comply with the statutory requirements relating to notice requirements or utility marking requirements; and
- Ensuring consistency with the pipeline and hazardous materials safety administration (PHMSA) towards a uniform national standard.

Each of these issues was at least touched on during the four facilitated stakeholder workshops and some were discussed in depth. The more detailed discussions resulted in the stakeholders' recommendations for amendments to RCW Chapter 19.122 included in this Report, allowed for meaningful exchanges of ideas concerning other issues, and led to the stakeholders' determination to continue these discussions, including in workshops, with the goal of finalizing proposals for additional improvements to the Dig Law during the 2021 Regular Session.

ESHB 1109 also provided that the work group would include, without limitation, members representing cities, counties, public and private utility companies, construction and excavator communities, water-sewer districts, and other government entities with underground facilities. This was accomplished by relying on a list of stakeholders maintained by the UTC. As demonstrated in Attachment A to this Report, the stakeholder group consulted is widely representative in terms of the types of businesses and organizations identified in ESHB 1109.

Finally, as mentioned above, ESHB 1109 required the facilitator to convene a minimum of four meetings for facilitated discussions among the workgroup participants and to produce a report with recommendations to the Governor and Legislature by December 1, 2019. The meetings were convened as provided. This Report was drafted by the facilitator and delivered to the UTC on October 25, 2019, for subsequent distribution to the stakeholders prior to delivery to the Governor's office and the Legislature by the prescribed due date.

WORKSHOPS

First workshop

The Commission hosted the first of the four required workshops on July 31, 2019. Twenty-six stakeholders representing the state's 811 service provider, cities, counties, public and private utility companies, Public Utility Districts, construction and excavator companies, water-sewer districts, UTC, and other government entities with underground facilities attended in person.⁹ An additional eight stakeholders participated using teleconference facilities.¹⁰ The facilitator provided participants with a written agenda and two handouts as points of reference for their discussions.¹¹

The stakeholders who participated in the workshop on July 31, 2019, confirmed that their goal was to develop a set of proposed amendments to the Dig Law that could be presented to the Legislature during the upcoming (*i.e.*, 2020) Regular Session.¹² Recognizing, however, the

⁹ See Attachment A to this Report for a list of all participants and their affiliations.

¹⁰ Technical difficulties with the teleconference equipment unfortunately may have affected participation by these stakeholders. These difficulties were resolved and did not recur in subsequent workshops.

¹¹ The first handout listed the 14 recommendations included in UTC's 2015 Report to the Legislature, indicated the rank (*i.e.*, High, Medium, or Low) of each, and discussed how, if at all, these were addressed in stakeholder mark-ups of HB 2979 during 2018 and 2019, including marginal notes relating specific stakeholder comments and annotations by the facilitator. The second handout summarized the latest version of the stakeholders' proposed amendments to Chapter 19.122 and tied them to the issues identified in ESHB 1109. This handout also included marginal notes relaying stakeholder comments concerning the amendments as considered in late 2018 and early 2019.

¹² The facilitator raised for discussion whether the UTC should be provided with additional rulemaking authority to implement RCW 19.122, which was one of the 14 recommendations discussed in the Commission's 2015 Report. This was presented as a possible alternative that would avoid the need for

challenges that caused such efforts to falter during 2017, 2018, and early 2019, they suggested proposed amendments could be presented in two sets, first addressing a small number of more straightforward issues during the upcoming legislative session and, second, addressing a set of more challenging issues during the 2021 Regular Session.

Reflecting the continuing nature of this process, the stakeholders reported that they had been working prior to the first workshop on restated or reformulated versions of amendments previously presented to the Legislature in proposed HB 2979. Their efforts during the first half of 2019 were directed to the goal of meeting stakeholder concerns that had proven to be barriers to that bill going forward. In light of their recent efforts, the stakeholders agreed their initial focus in the ESHB 1109 workshops should be on five changes to the Dig Law, identified initially as follows:

1. Change the makeup of the safety committee by dropping the insurance seat and adding a seat to be occupied by a water/sewer representative. The total number of representatives on the Safety Committee thus would remain at 13.
2. Change Complaint Review panels as proposed previously. That is, panels would continue to have three to five members with an equal number of excavators and facility members, and no mandate to have a pipeline representative and an insurance representative on each panel.
3. Give the UTC authority to bring enforcement directly, without a complaint first being vetted by a Complaint Review panel, against any person that damages any buried facility while digging without giving notice of its intention to excavate to “Call Before You Dig” (*i.e.*, 811).
4. Add language to the definition of “marking” providing (*i.e.*, clarifying) that “locate marks do not require the depth of facilities to be indicated.”
5. Add language requiring excavators to notify 911 if they damage an underground facility in addition to notifying 811, and making a reasonable attempt to notify the owner of the buried facility.¹³

effecting improvements to the Program only by means of legislative amendments. Participants expressed that this proposal would raise serious concerns for stakeholders that are not within the UTC’s direct jurisdiction (*e.g.*, PUDs, municipalities, and certain water and wastewater companies). Participants also expressed that the workshops should focus on completing the legislative initiatives previously brought forward by stakeholders during 2017-19, particularly in HB 2979, discussed above.

¹³ Early discussions included the idea that the call 911 requirement would be limited to damage causing a life-threatening condition but this later was deemed unnecessary given the language in 19.122.050 limiting the requirement to circumstances when “the damage causes an emergency condition.”

These issues were discussed at length, in considerable detail, consuming most of the time scheduled for the first workshop. The stakeholders agreed that specific language refined during the time between the final legislative efforts during the first part of 2019 (*i.e.*, after SHB 1006 failed to advance) and the start of the ESHB 1109 workshops should be circulated among the stakeholders prior to the second workshop. During the second workshop, the earlier proposals would be discussed further with the goal of finalizing bill language that would have strong consensus, if not unanimous, stakeholder support going forward.

During the first workshop, the facilitator and participants also identified additional substantive issues that could be prioritized for consideration once the first five issues were vetted thoroughly. Stakeholders were told that they would be asked to rank and prioritize these issues for further evaluation during the second workshop.

Second Workshop

The UTC hosted the second workshop on August 27, 2019. Thirty-four stakeholders participated in person (22) and by teleconference (12). The first order of business identified in the Agenda for the second workshop was to discuss language stakeholders had circulated following the first workshop with respect to the five priority issues identified earlier, and to take a measure of support, or lack thereof, with respect to each issue.

This language had been circulated with a request for written comments from stakeholders. However, UTC staff supporting the workshop process received few written responses.¹⁴ Most stakeholders elected to wait for the workshop to express their views. In part, this was due to the need of the stakeholder participants to vet the draft language proposals within their respective organizations. Discussion of the draft bill language addressing each of the five priority issues accordingly consumed most of the time allotted for the second workshop.

By the end of the workshop there was a strong consensus among the stakeholders supporting, and no opposition expressed concerning, the preferred means to resolve four of the five initial issues. The final issue resolution statements and the specific bill language the stakeholders agreed should be proposed to amend various sections of RCW Chapter 19.122, are included below in the Recommendations section of this Report.¹⁵ As detailed there, the stakeholders propose to:

- Amend RCW 19.122.130 to change the makeup of the Safety Committee by dropping the insurance seat and adding a seat to be occupied by a water/sewer

¹⁴ UTC support staff agreed to act as a single point of contact for purposes of communications among the stakeholders and with the facilitator.

¹⁵ These also are set out in Table One in the Executive Summary to this Report.

representative, leaving the total number of representatives on the Safety Committee at 13.

- Amend RCW 19.122.130 providing that Complaint Review panels will continue to have three to five members with at least one excavator member and one facility owner member, and removing the mandate to have a pipeline representative and an insurance representative on each panel.
- Amend RCW 19.122.020(17) by adding language to the definition of “marking” providing that “locate marks do not require the depth of facilities to be indicated.”
- Amend RCW 19.122.050 by adding language and clarifying grammar so as to require excavators to notify 911 if they damage an underground facility in addition to notifying 811, and making a reasonable attempt to notify the owner of the buried facility.

The remaining, unresolved priority issue -- whether to give the UTC discretion to bring enforcement directly by amending RCW 19.122.055 and RCW 19.122.150¹⁶ -- proved to be contentious for two reasons. First, excavators expressed that “fairness”¹⁷ required that if there was to be bill language presented to the Legislature to allow the UTC to investigate and impose civil penalties against excavators for failures to call before digging without referral of a complaint from the Safety Committee, it would be necessary also to propose language allowing UTC to investigate and impose civil penalties without referral of a complaint from the Safety Committee when a facility owner fails to complete a requested locate expeditiously, as required under RCW 19.122.030(3) and (4).¹⁸ Indeed, at least one excavator stakeholder initially indicated it would not support, or would even oppose, legislation that proposed an amendment to give the UTC authority to bring enforcement and impose civil penalties directly against excavators that failed to call 811 before digging, absent a proposal for an amendment conferring

¹⁶ The UTC already has such authority with respect to pipelines. *See* RCW 19.122.150(1).

¹⁷ Stakeholders commenting on this concern also referred to “balance” or “parity” as measures of “fairness.”

¹⁸ Note in this connection that RCW 19.122.030(7) and (8) provide such “fairness,” or “balance,” with respect to responsibility for costs that may be incurred by excavators or facility owners in the case of failure by either to meet the requirements imposed under RCW 19.122.030, as follows:

RCW 19.122.030(7) An excavator has the right to receive reasonable compensation from a facility operator for costs incurred by the excavator if the facility operator does not locate its underground facilities in accordance with the requirements specified in this section.

RCW 19.122.030(8) A facility operator has the right to receive reasonable compensation from an excavator for costs incurred by the facility operator if the excavator does not comply with the requirements specified in this section.

corresponding authority allowing UTC to bring enforcement and impose civil penalties directly against facility owners that failed to complete requested locates efficaciously.

The second reason this issue proved to be contentious was a concern expressed by some PUD stakeholders that the proposed change represents a potential “expansion of UTC involvement in our business.” The PUD stakeholders that expressed concerns explained they needed more time to vet this proposal and asked that PUDs and municipals that support it contact them outside of the workshop process for discussions concerning the bases for their support. At least some PUD and municipal stakeholder representatives committed to doing so. Under these circumstance, the workgroup generally agreed that this issue could be revisited during the third workshop, as discussed below.

Having resolved four of the five priority issues to the point of being able to report that consensus had been achieved and bill language acceptable to participating stakeholders had been developed to resolve each issue, the stakeholders discussed what additional issues might be taken up in the third and fourth workshops. Following stakeholder recommendations, UTC staff supporting the workshop process agreed to circulate a matrix showing stakeholder rankings of 19 additional issues identified as High, Medium, or Low priority.¹⁹ Based on the matrix, potential topics were identified for consideration prior to the third workshop by three individual subsets of stakeholders. These are as set out below in Table One. Stakeholders were asked to indicate in which of the small workgroups they would be willing to participate both prior to, and during, the third workshop.

TABLE ONE
SMALL WORKGROUP ISSUES

Small Group 1	Small Group 2	Small Group 3
Adopt a “Tolerance Zone” standard	Require a positive response	Large project definition and process
Definition of “reasonable accuracy”		
Definition of “non-invasive methods”		
Definition of “soft digging”		

¹⁹ The matrix is included as Attachment B to this Report.

Third Workshop

The UTC hosted the third workshop on September 24, 2019. The 23 stakeholder participants present or on the teleconference line during the third workshop agreed their goal should be to develop proposed bill language to effect specific results with respect to Small Group 1 issues and the Small Group 3 issue. They agreed to defer making any proposals with respect to the Small Group 2 issue (*i.e.*, Positive Response) until the 2021 Regular Session of the Legislature considering its complexity and challenges that were evident from prior discussions.²⁰ Most of time available for the workshop was devoted to discussion and development of a consensus direction to provide guidance to stakeholder volunteers who agreed to draft and provide specific bill language for the workshop participants with respect to the Small Group 1 and Small Group 3 issues.

However, at the suggestion of PUD stakeholders, the issue of UTC direct enforcement authority also was revisited during the third workshop. These stakeholders brought forward the idea that amending RCW 19.122.140 might provide an alternative to amendment of RCW 19.122.055 and 19.122.150, as had been considered during the second workshop. RCW 19.122.140 provides for referral to, and enforcement by, the Washington Attorney General.

The PUD stakeholders suggested that instead of allowing for direct UTC enforcement, as earlier recommended, RCW 19.122.140 could be amended to allow for direct referral by UTC to the Attorney General of any failure to abide by the requirements of Chapter 19.122 RCW without the need for a prior referral from the Safety Committee that a violation of this chapter had likely been committed by a person, without regard to whether the person is subject to regulation by the Commission. There was general agreement among the stakeholders, and no opposition, to the suggestion that this idea would require further discussion.

This was confirmed again early during the fourth workshop when excavator stakeholders made clear that they had not abandoned their position that fairness would require that any changes to the UTC's direct enforcement authority would need to apply not just to failures by excavators to call before digging, but also to failures by facility operators to meet their obligations under RCW 19.122.030(3) and (4). This led to the issue being effectively tabled for purposes of the facilitated workshops, but reserved for future discussion.

²⁰ State law prohibits excavation until all utilities have been located, which is not always clear to the excavator, particularly if there are multiple utilities involved. Positive Response requires communication among the facility operator, excavator, and locator service that closes the circle of information on a locate request. This requires the facility owner or locator to report when locates are completed or not needed. Excavators can determine the status of a requested locate on a positive response system thus clarifying when work can begin.

Fourth Workshop

Draft proposed language addressing the issues identified as “Tolerance Zone,” and “Large Project” was circulated to the stakeholders at the beginning of the fourth workshop on October 18, 2019. The first topic for discussion was to develop a definition for the term “Tolerance Zone” that could be added to RCW 19.122.020. Generally, the stakeholders agreed to use parameters that match the parameters that define “Reasonable Accuracy” found in RCW 19.122.020(23).²¹ That is, they agreed the Tolerance Zone should be defined to include the area delineated by the width of the underground facility (*e.g.*, pipe diameter) plus 24 inches on either side.

Because the Tolerance Zone is meant to define where an excavator is required to use reasonable care to avoid damaging underground facilities, it also requires a depth criterion when used in connection with the requirement to determine the precise location of underground facilities. This would be, for example, in situations where an excavator uses acceptable methods to dig to the depth of a project’s specifications for planned depth without encountering underground facilities marked at the surface. The Tolerance Zone depth criterion would determine, or help determine, how much deeper the excavator would be required to “explore” without encountering the marked facilities before possibly being relieved of further obligations to locate them precisely, which typically requires uncovering at least portions of the underground facilities. The depth criterion, however, proved to be elusive because variables such as the nature of the material being excavated (*e.g.*, sand and clay versus basalt) and the nature of the underground facility (*e.g.*, steel pipe versus vitrified clay pipe) must be considered, as must the method(s) and tools being used to conduct the exploratory digging.²² Moreover, the implications a failure to discover visually underground facilities in a designated Tolerance Zone might have in terms of an excavator’s duty under current law to determine the precise location of underground facilities was not fully resolved.

“Large Projects” present similarly ramified issues such that it is difficult to define a “one size fits all” solution to resolve the challenges excavators, facility owners, and location services encounter when such a project is planned and a locate, or set of locates, is requested. In general, providing an accurate description of a large project in a locate request together with providing clear locate instructions can reduce uncertainty and provide clarity to utility operators and

²¹ Reasonable Accuracy is a term that describes a requirement for marking facilities on the surface.

²² Non-invasive methods that might be used to discover the precise location of underground facilities, considering geomorphic conditions and other factors, include hand digging when practical (pot holing), soft digging, vacuum excavation methods, pneumatic hand tools, other mechanical methods with the approval of the facility owner/operator, or other technical methods that may be developed. The stakeholders agree that these methods need to be defined in more detail either in the statute or in “best practices” guidelines that can be consulted in the field.

locators. The goal is to prevent unnecessary locator effort and allow adequate time to locate and mark the affected underground facilities considering the size and scope of the project taking into account the time frame and marking requirements of the Dig Law.

As a general observation, it appears that addressing the issues of excavator obligations within a Tolerance Zone, and the issues associated with Large Projects have ramifications both numerous and somewhat contentious within the large and diverse stakeholder community. Improved communication requirements among excavators, facility owners, and locate services that could be put in place either in statute or as more or less obligatory “best practices” appear to have promise as a means to address these challenges.²³ In any event, the stakeholders agreed that these issues will require considerably more discussion than could be had in a single session before proposals could be developed to resolve the overriding issues to which they pertain. Yet further discussion would then be required to draft bill language that could be broadly accepted by the stakeholder community and brought to the Legislature. In the final analysis, the stakeholders agreed to treat these as priority issues for the 2021 Regular Session.

They also agreed, however, to take advantage of the momentum gained during the four facilitated workshops by continuing the workshop process on their own. In an effort to lock this agreement in place, the UTC coordinator for the facilitated workshops agreed to continue in her role in arranging meeting times and places, and being a single point of contact for the stakeholder community. The Executive Administrator of Washington811, who participated in all four workshops, volunteered to serve as moderator/facilitator going forward. The stakeholders agreed that he should serve in that capacity and would be a capable person for the job.

RECOMMENDATIONS

Based on discussions during four facilitated workshops held during the second half of 2019, involving 58 stakeholders representing the state’s 811 service provider, cities, counties, public and private utility companies, Public Utility Districts, construction and excavator companies, water-sewer districts, and UTC personnel, the recommendations in this Report reflect proposals by the stakeholders to improve the Dig Law in the areas of safety, enforcement, and administration. These recommendations are made with the understanding that the stakeholders participating in this process recognized from the beginning that not all issues identified in the 2015 Report on the Effectiveness of the Damage Prevention Program or previously brought forward in HB 2979 and other legislative initiatives could be addressed fully in the time available for these workshops.

In the interest of making as much progress as possible in time for a bill proposal to be introduced during the upcoming Regular Session of the Legislature, the stakeholders focused their attention

²³ Establishing more effective communication protocols also is central to the issue of Positive Response.

on identifying issues and drafting proposed bill language that could gain at least strong consensus support. As reported here, the stakeholders met with a degree of success, agreeing to propose to the Legislature several amendments to RCW Chapter 19.122 that will improve the Dig Law. The stakeholders are committed to participate in further collegial efforts to address additional more challenging and complex issues that are identified in this Report. They agreed, in fact, to a definite plan for holding additional workshops that will be mediated by a respected member of the stakeholder community who can bring balanced leadership to this diverse group. As reported above, they already have identified and prioritized specific issues for further discussion in addition to the ones they agreed to propose for resolution at the end of this facilitated workshop process.

The proposals tabulated below (previously set out in Table One in this Report's executive summary) were widely supported by the stakeholders. Some stakeholders reported being neutral with respect to one or more issues. Significantly, no stakeholder expressed affirmative opposition to the recommendations outlined here. We note in this regard that all stakeholders identified on the list maintained by the UTC received all notices of workshops, workshop agendas, workshop recapitulation memos, and other communications concerning the workshops.²⁴ They also were informed about and had access to the web pages created by the UTC, which included a host of background and support materials pertinent to the subject matter under discussion.

²⁴ This includes the 91 stakeholders identified in Attachment A to this Report and new stakeholders who identified themselves to the UTC during the course of the workshop process. While the new stakeholders had access to all written materials they may not have had advance notice of events that preceded their being added to the distribution list maintained by the UTC.

ISSUE	RECOMMENDED RESOLUTION
<p>Change the makeup of the safety committee by dropping the insurance seat and adding a seat to be occupied by a water/sewer representative, leaving the total membership of the Safety Committee at 13.</p>	<p>AMEND RCW 19.122.130 Commission to contract with nonprofit entity—Safety committee—Review of violations of chapter.</p> <p>* * *</p> <p>(3)(a) The safety committee will consist of thirteen members, who must be nominated by represented groups and appointed by the contracting entity to staggered three-year terms. The safety committee must include representatives of:</p> <ul style="list-style-type: none"> (i) Local governments; (ii) A natural gas utility subject to regulation under Titles 80 and 81 RCW; (iii) Contractors; (iv) Excavators; (v) An electric utility subject to regulation under Title 80 RCW; (vi) A consumer-owned utility, as defined in RCW 19.27A.140; (vii) A pipeline company; (viii) The insurance industry; <u>A water sewer district subject to regulation under Title 57 RCW;</u> (ix) The commission; and (x) A telecommunications company.
<p>Change the make-up of Complaint Review panels, which will continue to have three to five members, by requiring each panel to have at least one excavator representative and one facility owner/operator representative, and no mandate to have a pipeline representative and an insurance representative on each panel.</p>	<p>AMEND RCW 19.122.130 Commission to contract with nonprofit entity—Safety committee—Review of violations of chapter.</p> <p>* * *</p> <p>(6) To review complaints of alleged violations, the safety committee must appoint at least three and not more than five members as a review committee. The review committee must <u>be a balanced group including at least one excavator and one facility operator.</u> include the same number of members representing excavators and facility operators. One member representing facility operators must also be a representative of a pipeline company or a natural gas utility subject to regulation under Titles 80 and 81 RCW. The review committee must also include a member representing the insurance industry.</p>

<p>Add language to the definition of “marking” providing that “locate marks do not require the depth of facilities to be indicated.”</p>	<p>AMEND RCW 19.122.020 Definitions. * * * (17) “Marking” means the use of stakes, paint, or other clearly identifiable materials to show the field location of underground facilities, in accordance with the current color code standard of the American public works association. Markings shall include identification letters indicating the specific type of the underground facility. <u>Locate marks are not required to indicate the depth of the underground facility.</u></p>
<p>Add language requiring excavators to notify 911 if they damage an underground facility in addition to notifying 811, and making a reasonable attempt to notify the owner of the buried facility.</p>	<p>RCW 19.122.050 Damage to underground facility—Notification by excavator—Repairs or relocation of facility. (1) An excavator who, in the course of excavation, contacts or damages an underground facility shall notify the facility operator and a one-number locator service, and report the damage as required under RCW 19.122.053. If the damage causes an emergency condition, the excavator causing the damage shall also <u>call 911 to alert the appropriate local public safety agencies,</u> and take all appropriate steps to ensure the public safety. No damaged underground facility may be buried until it is repaired or relocated.</p>

ATTACHMENT A
STAKEHOLDER COMMUNITY

STAKEHOLDER	REPRESENTATIVE	CONTACT INFORMATION	WORKSHOP PARTICIPATION
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ATTACHMENT B²⁵

STAKEHOLDER PRIORITIZATION OF 19 ISSUES

HIGH PRIORITY		MEDIUM PRIORITY		LOW PRIORITY	
ISSUE	RANK W/IN PRIORITY	ISSUE	RANK W/IN PRIORITY	ISSUE	RANK W/IN PRIORITY
Require new underground facilities to be locatable	1	Require mapping of previously un-locatable underground facilities discovered during excavation	1	Adopt American Public Works Association (APWA) national marking standards	1
Require a positive response	2	Adopt mandatory training or certification for persons who perform utility locates	2	Definition of "locatable/unlocatable"	2
Adopt a "Tolerance Zone" standard	tied at: 3	Expand the commission's direct enforcement authority to include telecommunications facilities	3	Require inspection prior to reburial of exposed facilities	3
Definition of "reasonable care"		Report cause of damage to underground facility	4	Require or allow design locates	4
Definition of "reasonable accuracy"		Reimbursement for the cost of locating un-locatable facilities	5	Provide the Commission with additional rulemaking authority to implement RCW 19.122	5
Definition of "non-invasive methods"					
Definition of "soft digging"					
Clarify use of emergency locates	tied at:				
Definition of "large project"	4				

²⁵ Stakeholders' responses when asked to rank issues by priority, then ranked within each priority, in a questionnaire issued via email on August 21.