



**Legislative
Council Staff**

Nonpartisan Services for Colorado's Legislature

SB 18-167

**FINAL
FISCAL NOTE**

Drafting Number:	LLS 18-0331	Date:	September 18, 2018
Prime Sponsors:	Sen. Scott; Donovan Rep. Winter; Saine	Bill Status:	Signed into Law
		Fiscal Analyst:	Erin Reynolds 303-866-4146 Erin.Reynolds@state.co.us

Bill Topic: ENFORCE REQUIREMENTS 811 LOCATE UNDERGROUND FACILITIES

Summary of Fiscal Impact:

<input checked="" type="checkbox"/> State Revenue	<input checked="" type="checkbox"/> TABOR Refund
<input checked="" type="checkbox"/> State Expenditure	<input checked="" type="checkbox"/> Local Government
<input type="checkbox"/> State Transfer	<input checked="" type="checkbox"/> Statutory Public Entity

This bill creates the Underground Damage Prevention Safety Commission in the Department of Labor and Employment; creates two cash funds to support the work of the commission and increased safety education; and makes a variety of changes to the state's excavation laws for the purpose of improving enforcement. It will increase state revenue and expenditures on an ongoing basis. It will also create new expenditure impacts for local government entities, special districts, and the statutory public entity Colorado 811.

Appropriation Summary: In FY 2018-19, the bill includes an appropriation of \$81,841 to the Department of Labor and Employment.

Fiscal Note Status: This fiscal note reflects the enacted bill.

**Table 1
State Fiscal Impacts Under SB 18-167**

		FY 2018-19	FY 2019-20
Revenue	Safety Commission Fund	-	potential increase
	Damage Prevention Fund	-	at least \$5,000
	Total	-	at least \$5,000
Expenditures	General Fund	\$81,841	\$138,072
	State Highway Fund	\$480,000	\$960,000
	Centrally Appropriated	\$15,607	\$34,656
	Total	\$577,448	\$1,132,728
	Total FTE	0.9 FTE	2.1 FTE
Transfers		-	-
TABOR Refund		-	at least \$5,000

Summary of Legislation

This bill makes changes to the state's utility notification system in order to support increased enforcement related to the excavation of underground facilities.

Colorado 811. Under current law, a statutory public entity, the Utility Notification Center of Colorado (Colorado 811), supports utility notification in the state. Anyone conducting an excavation is required to contact Colorado 811 to be informed of underground facilities within the excavation area, which owners and operators of those underground facilities are required to mark. Violations of these laws are currently enforced through civil actions.

The bill requires Colorado 811 to enter into a memorandum of understanding with the newly created Underground Damage Prevention Safety Commission (commission) to outline each agency's role and responsibility related to enforcement and notification. Colorado 811 must also provide the commission with administrative support and submit an annual report to the commission with data related to location requests specific to each owner or operator of an underground facility.

Colorado 811 membership changes. Owners and operators of underground facilities comprise the membership of Colorado 811. Under current law, there are two primary membership levels for owners and operators of underground facilities, with different rights and responsibilities. When an excavator calls Colorado 811 to provide notification of an intended excavation, Tier 1 members receive notice directly from Colorado 811 to arrange for the marking of their underground facilities. For Tier 2 members, Colorado 811 notifies the excavator that a Tier 2 member's facility may be impacted by the excavation, but it is the responsibility of the excavator to notify the Tier 2 member directly to arrange for the marking of their underground facilities.

Between January 1, 2019, and January 1, 2021, the bill requires Colorado 811 to provide any member who was not a Tier 1 member as of January 1, 2019, with electronic notifications of intended excavations at no cost. As a result, these members will be required to perform related locates of their underground facilities at this time. Effective January 1, 2021, all underground facility owners and operators are Tier 1 members of Colorado 811 with full costs and benefits and excavators will no longer be required to contact former Tier 2 owners or operators directly to arrange for the marking of their underground facilities.

Colorado 811 must submit a report on or before March 1, 2020 to the Transportation Committees of the General Assembly about its effort to prepare Tier 2 members for Tier 1 membership.

Underground Damage Prevention Safety Commission and review committee. The Underground Damage Prevention Safety Commission will advise stakeholders on best practices and safety-enhancement policies, and review complaints alleging violations of the state's excavation laws. The commission is created as a Type 2 agency in the Colorado Department of Labor and Employment (CDLE). Colorado 811 and CDLE are required to provide administrative support to the commission.

The commission consists of 15 Governor-appointed members, including members of local governments, energy producers, contractors, excavators, engineers, investor-owned utilities, rural electric cooperatives, pipeline companies, telecommunications and broadband companies, water utilities, transportation, and farming and ranching. Appointments must be made by January 1, 2019, and the commission must adopt its bylaws by July 1, 2019.

Complaint process, fines, and exceptions. The commission must meet at least four times per year to hear complaints. A review committee, consisting of three to five commission members, will make an initial determination on alleged violations and recommend remedial action where appropriate. Remedial action may include a fine ranging from \$250 to \$75,000, as outlined in the State Revenue section and Table 2.

Ranchers and farmers are not subject to any excavation-related fine unless the excavation is for a nonagricultural purpose, and homeowners, ranchers, and farmers are not subject to any notification failure-related fine for working on their own property. The review committee may only recommend remedial action or a fine against a homeowner, rancher, or farmer if the committee finds that a violation of the law has occurred.

The full commission determines the final action regarding alleged violations, and fines must be approved unanimously. Commission decisions represent final agency action subject to district court review.

Fines are credited to the Damage Prevention Fund, proceeds from which will fund the commission's development of educational programming designed to improve worker and public safety relating to excavation and underground facilities.

Safety Commission Fund and Damage Prevention Fund. The bill creates two new funds which are both subject to annual appropriation by the General Assembly.

Safety Commission Fund. Any court settlements resulting from the bill are credited to the Safety Commission Fund. This fund supports the work of the commission.

Damage Prevention Fund. Fines levied on violators are credited to the Damage Prevention Fund to support educational programming related to excavation and underground facilities.

Owners and operators of underground facilities. The bill requires all new underground facilities installed on or after August 8, 2018, to have electronic location technology. Owners and operators of underground facilities are not liable for damages or injuries related to information they provide related to the location of underground facilities.

Engineers designing government subsurface utility engineering projects. The bill requires a licensed professional engineer designing a government "subsurface utility engineering-required project" primarily involving horizontal construction to submit a location request to Colorado 811 during the design phase. The bill sets deadlines and protocols for these requests. Engineers must also ensure that those project plans meet certain standards developed by the American Society of Civil Engineers for defining the accuracy of an underground facility location.

Excavators. The bill requires excavators to keep all underground facility location documents on the job site. Excavators are also required to notify the owner or operator of the underground facility and call 911 for any incident involving natural gas, other gas, or hazardous liquid. Under the bill, excavation is defined to exclude certain agricultural activities, such as cultivation, land clearing that does not involve deep digging, or routine maintenance of existing irrigation facilities or fence lines.

The bill allows an excavation notice related to annual road maintenance conducted by a government agency that does not exceed six inches in depth to be valid for an extended period.

Local governments and special districts. Local government and special district entities are required to adhere to the notification requirements outlined in the bill. An exception to the bill's notification process is provided for annual road maintenance conducted by a local government that does not exceed six inches in depth, which allows markings for those projects to be considered valid for up to 180 days.

Home rule local governments are not subject to the commission's enforcement authority, but the governing body of a home rule local government must take official action to adopt a similar enforceable damage prevention safety program on its own or waive its exemption and delegate its damage prevention enforcement authority to the commission.

Colorado Department of Transportation. The bill repeals the Colorado Department of Transportation's (CDOT's) exemption from membership in Colorado 811.

Colorado Open Records Act. Information regarding the location of underground facilities is exempt from the Colorado Open Records Act (CORA), pursuant to the existing exemption for specialized details of critical infrastructure.

Repeal and sunset review. The commission repeals on September 1, 2028, pending a sunset review.

Background

Colorado 811. The Utility Notification Center of Colorado, or Colorado 811, is a statutory public entity authorized under Title 9, Article 1.5, C.R.S., to operate as the statewide, one-call system for locating underground facilities. The organization also promotes statewide public safety awareness, damage prevention programs, and other educational services. Its 2017 capital and operating budget was about \$6.8 million and 63 FTE, funded primarily through fees paid by owners and operators of underground facilities each time one of their facilities is affected by an excavation. There are currently about 1,100 Tier 1 members, and about 650 Tier 2 members of the organization. In 2017, Colorado 811 received about 850,000 incoming notifications related to pending excavations and made about 5.1 million outgoing notifications to owners and operators of underground facilities. The outgoing notification fee is currently \$1.45 per transmission. All members pay a one-time membership fee of \$25.

Pipeline and Hazardous Materials Safety Administration. In 2016, the U.S. Department of Transportation's Pipeline and Hazardous Materials Safety Administration (PHMSA) conducted an adequacy evaluation of Colorado's excavation damage prevention law enforcement and determined that the state's excavation-related enforcement is inadequate. Based on this finding, the state was issued a deadline of 2021 to upgrade its 811 enforcement, or have its federal pipeline safety grant reduced in 2022. PHMSA grant funding is issued to the Public Utilities Commission in the Department of Regulatory Agencies (DORA) and primarily funds distribution pipeline inspectors who conduct safety analyses and failure reviews. DORA is expected to receive about \$700,000 of federal funding from this source in 2018. In addition, owners and operators of underground facilities are subject to significant federal penalties if they cause damage to a PHMSA-regulated pipeline, of \$200,000 per day and a maximum of \$2 million per occurrence.

Colorado Underground Damage Prevention Legislative Study. As a result of the PHMSA determination, stakeholders created a legislative task force which resulted in the publication of the Colorado Underground Damage Prevention Legislative Study, which is available online at: <http://colorado811.org/legislative-study>.

Data and Assumptions

Cost savings related to underground facility location. According to a study commissioned by the U.S. Department of Transportation's Federal Highway Administration and conducted by Purdue University in 2002, which used a sample of 71 projects in four states (North Carolina, Ohio, Texas, and Virginia), performing comprehensive mapping of underground facilities creates the potential to save project dollars by avoiding utility relocations, reducing project delays, improving overall safety, and reducing contractor risk. These offsets to the upfront costs for state departments are not accounted for in this fiscal note.

Memorandum of understanding between Safety Commission and Colorado 811. It is assumed that the memorandum of understanding put in place between Colorado 811 and the commission will provide further codification of administrative responsibilities and seek to avoid duplicative efforts.

Commission and review committee meeting schedule. This fiscal note assumes the commission will meet four times a year and its review committee will meet monthly.

Tier 2 facility locations. The study noted in the Background section found that Tier 2 members currently receive about 25 percent of the total referrals that are provided to the excavator by Colorado 811. As a result, the fiscal note assumes that the migration to Tier 1 membership will create an increase in workload and expenditures for any state or local government entity that owns or operates underground facilities as a Tier 2 member currently to accomplish the increase in location requests.

Subsurface utility engineering — CDOT. CDOT is currently implementing subsurface utility engineering requirements similar to the bill, estimated to cost \$1.65 million per year on average, but will vary from year to year depending on CDOT's construction budget and project complexity. Since this policy was initiated internally by CDOT and is not a result of this bill, these costs have not been included in the fiscal note.

State Revenue

Beginning in FY 2019-20, the bill is expected to increase state revenue to the Damage Prevention Fund from fines by at least \$5,000 per year. The bill may also increase state revenue to the Safety Commission Fund from legal settlements. It creates no net change in filing fee revenue to the Judicial Department. These impacts are discussed below.

Fines issued by the commission. As shown in Table 2, fines assessed by the commission under the bill may range from \$250 to \$75,000, credited to the Damage Prevention Fund. Any fine amount must be approved unanimously by the full commission. While the fiscal note generally assumes that professionals will comply with state laws, fines are expected to increase by at least \$5,000 initially in FY 2019-20.

Table 2
Fine Structure Under SB 18-167
per number of violations in a 12-month period

	One Violation	Two Violations	Three Violations	Four Violations
Minor	\$250	\$500	\$1,000	\$5,000
Moderate	\$1,000	\$2,500	\$5,000	\$25,000
Major	\$5,000	\$25,000	\$50,000	\$75,000

Legal settlement funds. Legal settlement amounts have not been estimated for this fiscal note, but will be deposited into the Safety Commission Fund.

Court fees. By creating a new enforcement mechanism, the bill may reduce state cash fund revenue from civil filing fees by less than \$5,000 per year, which are currently credited primarily to the Judicial Stabilization Fund in the Judicial Department. However, the bill also permits civil actions in trial courts and for district courts to review safety commission action, which may increase filing fees by up to \$5,000 per year. Therefore the bill is expected to have no net impact on court fees.

TABOR Refund

The bill will increase state revenue subject to TABOR beginning in FY 2019-20. State revenue is not currently expected to exceed the TABOR limit in FY 2019-20 and no refund is required. Refunds in future years when the state next collects a TABOR surplus will be increased.

State Expenditures

The bill will increase state expenditures in CDLE by \$97,448 and 0.9 FTE in FY 2018-19, and \$172,728 and 2.1 FTE in FY 2019-20, paid from the General Fund, as shown in Table 3. It will also increase costs in CDOT by at least \$480,000 in FY 2018-19, at least \$960,000 in FY 2019-20, and at least \$1.26 million in FY 2020-21, paid from the State Highway Fund. DORA is expected to secure its expenditures of federal PHMSA grant funding in future years under the bill, as discussed in the Background section. Other departments that perform excavations, in particular the Department of Public Health and Environment (CDPHE) and the Department of Natural Resources (DNR), will have indeterminate expenditure increases beginning in FY 2018-19. The Judicial Department and the Department of Personnel and Administration (DPA) will have workload impacts related to the adjudication processes outlined in the bill beginning in FY 2019-20.

**Table 3
CDLE Expenditures Under SB 18-167**

Cost Components	FY 2018-19	FY 2019-20
Department of Labor and Employment		
Personal Services	\$46,309	\$111,140
Operating Expenses and Capital Outlay Costs	\$10,166	\$1,900
Legal Services	\$12,787	\$10,656
Board Reimbursement	\$12,579	\$14,376
Centrally Appropriated Costs*	\$15,607	\$34,656
FTE – Personal Services	0.8 FTE	2.0 FTE
FTE – Legal Services	0.1 FTE	0.1 FTE
CDLE Subtotal	\$97,448	\$172,728

* Centrally appropriated costs are not included in the bill's appropriation.

Colorado Department of Labor and Employment. Beginning January 1, 2019, the CDLE will add 1.0 FTE Program Manager, 0.5 FTE Accounting Technician, and 0.5 FTE Administrative Assistant to support the work of the commission. These positions have been prorated for a half-year impact and to account for the General Fund pay date shift in FY 2018-19. The program manager and assistant, in coordination with Colorado 811, will review complaints, prepare documentation for review committee and commission hearings, assist in development of fact-finding reports, participate in educational programming activities, and prepare reports. The accounting technician will process and manage financials for the Safety Commission Fund and the Damage Prevention Fund. Standard operating and capital outlay costs are included.

Legal services. Legal services are required for initial rulemaking and commission support, estimated at 120 hours and 0.1 FTE in FY 2018-19, and 100 hours and 0.1 FTE in FY 2019-20 and ongoing, at the hourly rate of \$106.56. The bill allows for the commission, represented by the Attorney General's office, to bring a court action if a person does not comply with the commission's decision, for which additional resources may be requested through the annual budget process.

Board reimbursement. The fiscal note assumes that at least six board members will require travel reimbursement for commission meetings, for four meetings per year, and that at least two review committee members will require travel reimbursement for review committee meetings, for twelve meetings per year. Lodging and meals have been estimated at \$128 per eligible member, assuming one overnight. Mileage reimbursement has been estimated at 350 miles per eligible member at the rate of \$0.49 per mile.

Colorado Department of Transportation. CDOT will have two primary expenditures under the bill — Colorado 811 notification fees and utility location costs — estimated to cost at least \$480,000 in FY 2018-19, at least \$960,000 in FY 2019-20, and at least \$1.26 million in FY 2020-21. These costs will be paid out of the State Highway Fund, which is continuously appropriated to CDOT and allocated at the discretion of the Transportation Commission.

811 notification costs. CDOT has fiber, signal and electrical in the right-of-way throughout the state. While CDOT is not a formal Tier 1 member, its Engineering Regions 1, 4, and 5, which have a high number of utility locates, have opted into Tier 1 membership. Based on the number of notifications transmitted annually, it is estimated that the notification costs for Engineering Regions 2 and 3 will be approximately \$300,000 per year beginning January 1, 2021.

Utility location. If the location and sharing of utility facilities falls on CDOT staff, it is estimated to cost at least \$960,000 annually beginning January 1, 2019. These costs have been prorated for a half-year impact in FY 2018-19. This amount may be higher if location services work is contracted out.

Department of Regulatory Agencies. As discussed in the Background section, the bill is expected to secure federal PHMSA grant funding that supports pipeline inspectors in the Public Utilities Commission. Additionally, the State Board of Licensure for Architects, Professional Engineers, and Professional Land Surveyors Engineering will perform outreach to inform engineers of the Colorado 811 notifications under the bill in the course of its normal business.

Departments of Natural Resources and Public Health and Environment. Departments that are involved in excavation projects — particularly DNR and CDPHE — will have increased costs to locate and include underground facilities in engineering plans. These amounts have not been determined and will be addressed during the annual budget process.

Department of Natural Resources. DNR owns a considerable amount of underground facilities inside Colorado Parks and Wildlife properties, such as water, sewer, and electric lines. Costs will increase in DNR to meet the engineering planning requirements under the bill.

Department of Public Health and Environment. CDPHE's Brownfields and Superfund programs have projects that involve excavation. Under the bill, Brownfields-related clean-ups of illegal dumps, defunct waste facilities, or large waste tire pits may result in increased planning and design costs ranging from \$5,000 to \$20,000, while larger Superfund-related clean-ups may result in increased planning and design costs ranging from \$100,000 to \$500,000. CDPHE is generally involved in three to four clean-up projects per year, funded through cash funds, federal funds, or a combination of both.

Department of Personnel and Administration. The Office of Administrative Courts is responsible for hearing appeals of commission decisions, which are expected to vary annually. To the extent additional resources are required, DPA will make a request through the annual budget process.

Judicial Department. The bill will have a minimal impact on trial courts in the Judicial Department. By creating an administrative process for violations, civil filings may be reduced. However, the bill also allows for review of final commission actions by the courts. While it is unknown how frequently excavation claims are currently adjudicated in the trial courts, the fiscal note assumes that no change in appropriations is required.

Centrally appropriated costs. Pursuant to a Joint Budget Committee policy, certain costs associated with this bill are addressed through the annual budget process and centrally appropriated in the Long Bill or supplemental appropriations bills, rather than in this bill. These costs, which include employee insurance and supplemental employee retirement payments, are estimated to be \$15,607 in FY 2018-19 and \$34,656 in FY 2019-20.

Local Government and Special District Impact

Similar to state agencies, local governments and special districts will have a variety of impacts under the bill.

Engineering projects for government entities. Engineering plans designed for a local government or special district involving underground facilities will require additional processes in the design phase, which will increase design costs and may necessitate the hiring of additional engineering and surveying staff in some entities.

Underground facility notification and locates. Local governments and special districts that own or operate underground facilities and that were Tier 2 members prior to the bill will have significantly increased costs beginning in FY 2018-19 to perform locations of their underground facilities as Tier 1 members. In addition, after two years of free access to Colorado 811 notifications, these entities will have significantly increased costs beginning January 1, 2021, to pay Colorado 811's per notification fee. Local government entities conducting road maintenance have an exception under the bill to use facility locates for up to 180 days, which will offset 811-related expenditures specific to road maintenance.

Excavation penalties. Local governments involved in excavation work that violate safety rules are subject to new penalties. The fiscal note assumes these entities will comply with state law and this increase in expenditures to pay penalties will be minimal.

Electronic locatability of underground facilities. Local governments and special districts will be required to install electronic tracking technology on all underground facilities installed on or after August 8, 2018, which will increase costs. RTD estimates an additional cost of \$5 per linear foot for its new underground facilities.

Home rule local governments. If home rule local governments waive their exemption from the commission's enforcement authority, their workload will increase to adopt a similar enforceable damage prevention safety program within their jurisdiction.

Denver County Court. The bill allows for the commission, represented by the Attorney General's office, to bring a court action in Denver County Court if a person does not comply with the commission's decision. This will result in a workload increase for the Denver County Court, managed and funded by the City and County of Denver.

Local government representatives. Three members of local governments will serve on the commission, which will increase workload for those local government members.

Statutory Public Entity Impact

Colorado 811 will incorporate the workload required under the bill within its existing resources. This includes providing administrative support to and serving as members of the commission; modifying the Colorado 811 fee structure by rule; administering an enhanced notification system, which codifies its current practice; storing electronic records of the state's underground infrastructure; providing free Tier 1 services to Tier 2 members for two calendar years from 2019 to 2021; and reporting annually to the commission.

Effective Date

The bill was signed into law by the Governor on May 25, 2018, and took effect August 8, 2018. It applies to conduct occurring on or after the effective date.

State Appropriations

For FY 2018-19, the bill requires and includes a General Fund appropriation of \$81,841 and 0.9 FTE to the Colorado Department of Labor and Employment. Of this amount, \$12,787 and 0.1 FTE is reappropriated to the Department of Law.

State and Local Government Contacts

Agriculture	Corrections	Counties
Information Technology	Labor	Law
Local Affairs	Military Affairs	Municipalities
Natural Resources	Personnel	Public Health and Environment
Public Safety	RTD	Regulatory Agencies
Special Districts	Transportation	