

Sixty-first
Legislative Assembly
of North Dakota

Introduced by

Legislative Council

Natural Resources Committee

1 A BILL for an Act to amend and reenact subsection 7 of section 49-23-01, and sections
2 49-23-03 and 49-23-06 of the North Dakota Century Code, relating to enforcement of one-call
3 excavation notice system provisions; and to provide a penalty.

4 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

5 **SECTION 1. AMENDMENT.** Subsection 7 of section 49-23-01 of the North Dakota
6 Century Code is amended and reenacted as follows:

- 7 7. "Excavation" means any operation in which earth, rock, or other materials in or
8 below the ground is moved or otherwise displaced by means of hand or power
9 tools, power equipment, or explosives and includes grading, trenching, digging,
10 ditching, drilling, augering, tunneling, boring, scraping, and cable or pipe plowing
11 and driving. The term does not include:
- 12 a. Opening a grave in a cemetery.
 - 13 b. Plowing, cultivating, planting, harvesting, and similar operations in connection
14 with agricultural activities, ~~unless any of these activities disturbs the soil to a~~
15 ~~depth of eighteen inches [45.72 centimeters] or more.~~
 - 16 c. Gardening and landscaping unless it disturbs the soil to a depth of twelve
17 inches [30.48 centimeters] or more.
 - 18 d. Normal maintenance of roads and streets if the maintenance does not change
19 the original grade and does not involve the road ditch.
 - 20 e. Normal repair and maintenance of track and track bed by a railroad on its own
21 right of way.

22 **SECTION 2. AMENDMENT.** Section 49-23-03 of the North Dakota Century Code is
23 amended and reenacted as follows:

24 **49-23-03. Notification center - Participation - Establishment - Rules.**

1. An operator shall participate in and share in the costs of the statewide notification center operated by a vendor selected under this section.
2. An excavator licensed under this chapter shall participate in and share in the costs of a statewide notification center on a per-call basis. An operator, installing the operator's own facilities, may not be charged as an excavator.
3. An operator shall participate in and share the costs of the one-call excavation notice system by:
 - a. Submitting the information required by the notification center to allow the center to notify the operator of excavation activity;
 - b. Updating the information provided to the notification center on a timely basis;
 - c. Installing and paying for equipment reasonably requested by the notification center to facilitate receipt of notice of excavation from the center;
 - d. Paying the costs charged by the notification center on a timely basis; and
 - e. Receiving and responding to excavation notices, including emergency notices.
4. A nonprofit corporation shall govern the notification center. The nonprofit corporation established to govern the statewide notification center is an agency of state government and _____ by the public service commission and funded by revenue generated by the statewide notification center. The nonprofit corporation is an administrative agency subject to the hearing and appeal provisions contained in chapter 28-32. The initial incorporators of the corporation may solicit bids for any services provided for the operation of the center. The corporation shall provide advance notice of the first organizational meeting by publication in qualified legal newspapers and in appropriate trade journals and by written notice to all appropriate trade associations.
 - a. The nonprofit corporation must be incorporated by seventeen initial incorporators, with one member representing the house of representatives and one member representing the senate appointed by the legislative council, one member representing telecommunications companies offering local exchange service to fewer than fifty thousand subscribers, one member representing telecommunications companies offering local exchange service

1 to fifty thousand or more subscribers, one member representing rural water
2 systems, one member representing rural electric cooperatives, one member
3 representing investor-owned electric utilities, one member representing
4 investor-owned natural gas utilities, one member representing cable television
5 systems, one member representing cities with a population of fewer than five
6 thousand, one member representing cities with a population of at least five
7 thousand, one member representing counties, one member representing
8 underground interstate carriers of gas, one member representing interstate
9 carriers of petroleum, one member representing interstate carriers of
10 telecommunications services, one member representing contractors who
11 perform excavation services, and one member representing the production
12 sector of the American petroleum institute. The initial incorporators must
13 represent and be designated by operators, excavators, and other persons
14 eligible to participate in the center. The legislative members are entitled to the
15 same compensation and expenses as provided for members of committees of
16 the legislative council. The legislative council shall pay the compensation for
17 the legislative members.

18 b. The initial incorporators shall establish, before August 1, 1996, a board of
19 directors of the nonprofit corporation which consists of eight members
20 representing the participants in the center. The board shall establish a
21 competitive bidding procedure to select a vendor to provide the notification
22 service, establish a procedure by which members of the center share the
23 costs of the center on a fair, reasonable, and nondiscriminatory basis, and do
24 all other things necessary to implement the purpose of the center. Any
25 agreement between the center and a vendor for the notification service may
26 be modified from time to time by the board, and any agreement shall be
27 reviewed by the board at least once every three years, with an opportunity to
28 receive new bids, if desired, by the board. An operator may submit a bid and
29 be selected to contract to provide the notification center service.

30 c. Members of the board and any of its agents are immune from any liability of
31 any kind based on any acts or omissions in the course of the performance of

responsibilities in an official capacity except for bodily injury arising out of accidents caused by or contributed to by the negligence of the board member or agent.

d. The board shall aid the state's attorneys of the various counties in the enforcement of this chapter and the prosecution of any violations. The board may institute a civil action for an injunction to enjoin violations of this chapter without proof that anyone suffered actual damages.

e. The notification center must be in operation by March 1, 1998.

SECTION 3. AMENDMENT. Section 49-23-06 of the North Dakota Century Code is amended and reenacted as follows:

49-23-06. Damage to facilities - Penalty.

1. a. If any damage occurs to an underground facility or its protective covering, the excavator shall notify the operator as soon as reasonably possible. When the operator receives a damage notice, the operator shall dispatch, as soon as reasonably possible, personnel to the damage area to investigate. If the damage endangers life, health, or property, the excavator responsible for the work shall take immediate action to protect the public and property and to minimize the hazard until arrival of the operator's personnel or until emergency responders have arrived and taken charge of the damaged area.
- b. An excavator shall delay backfilling in the immediate area of the damaged underground facilities until the damage has been investigated by the operator, unless the operator authorizes otherwise. The repair of damage must be performed by the operator or by qualified personnel authorized by the operator.
- c. An excavator who knowingly damages an underground facility and who does not notify the operator as soon as reasonably possible or who backfills in violation of subdivision b is guilty of a class A misdemeanor.
2. a. If an excavator fails to comply with this chapter ~~or~~ and damages an underground facility, the excavator is liable for all damages caused by the failure to comply with this chapter ~~and for all damages to the facilities or any rules adopted pursuant to this chapter~~ and must reimburse the operator for

the cost of repair and restoration, loss of product, and interruption of service occurring because of the damage or injury to the facilities, together with reasonable costs and expenses of suit, including reasonable attorney's fees.

b. Reimbursement to the operator under this subsection is not required if the damage to the underground facility was caused by the sole negligence of the operator or the operator failed to comply with ~~sections 49-23-03 and 49-23-04~~ any provision of this chapter or any rule adopted pursuant to this chapter.

3. a. In addition to any other penalty provided by law, an excavator who violates or who procure, aides, or abets in the violation of any provision of this chapter or any rule adopted pursuant to this chapter may be assessed a penalty of up to five hundred dollars for the first violation, up to one thousand dollars for the second violation, and up to five thousand dollars for each subsequent violation that occurs within twenty-four months of the initial violation.

b. In addition to any other penalty provided by law, an excavator who intentionally violates and intentionally procures, aides, or abets of a provision of this chapter or a rule adopted pursuant to this chapter may be assessed a penalty of up to one-thousand dollars for the first violation, up to five thousand dollars for the second violation, and up to ten thousand dollars for each subsequent violation that occurs within twenty-four months of the initial violation.

c. Each violation of provision of this chapter or a rule adopted pursuant to this chapter constitutes a separate offense. In the case of a continuing violation, each day the violation continues constitutes a separate violation.

4. a. A person alleging a violation of this chapter or a rule adopted pursuant to this chapter may petition the board for resolution of the complaint. A complaint alleging a violation of this chapter, except subdivision c of subsection 1 of section 49-23-06, or a rule adopted pursuant to this chapter must be brought within ninety-days of the alleged violation. A complaint alleging a violation of subdivision c of subsection 1 of section 49-23-06 must be _____ in one-year of the discover of the alleged violation. A complaint may not be dismissed because of the absence of the direct damage to the complainant or

petitioner. The form of a complaint must be a letter addressed to the board and must, at a minimum, include:

- (1) The name and address of the person submitting the complaint;
- (2) The name and address of the person alleged to be in violation;
- (3) The date, detailed circumstances, location, and nature of the alleged violation; and
- (4) The estimated cost of actual damages to the underground facilities.

b. Upon receipt of a complaint, the chairman of the board shall appoint a panel consisting of three or five members of the board for the purpose of determining of whether there is probable cause to believe there has been a violation of any provision of this chapter or rules adopted pursuant to this chapter. A determination of whether is probable cause to believe there has been a violation must be determined by majority vote of the panel. The panel shall then recommend to the board that the complaint be dismissed for lack of probable cause, or recommend to the board that there is probable cause to believe that there has been a violation and recommend what penalty, if any, should be imposed pursuant to the provisions of subsection 3.

c. Upon receipt of a complaint in the appointment of a panel, the panel shall forward to the respondent a statement of the complaint and a notice requiring the respondent to satisfy the complaint or answer the complaint in writing within twenty days from the date of service of the notice or within such further time as may be specified by the board.

d. The respondent shall, within the timed fixed by the notice served upon it, satisfy the complaint or answer the complaint by filing the original and two copies of the answer in the office of the board and serving a copy on each complainant.

e. A determination of probable cause must be made by the panel solely on these submissions and pertinent records obtained through the statewide notification center pursuant to the complaint and no other evidence may be considered.

- 1 f. The amount of the recommended penalty must be determined by the majority
2 vote of the panel. The factors that may be considered in determining the
3 amount the penalty are:
- 4 (1) The amount, damage, degree of threat to the public safety, and
5 inconvenience cost;
- 6 (2) The respondents plans and procedures to ensure future compliance
7 with this chapter or any rules adopted pursuant to this chapter;
- 8 (3) A history of previous violations;
- 9 (4) Other matters as justice requires.
- 10 g. The board shall accept the recommendations of the panel unless either party
11 requests a hearing. The hearing must be conducted before the board at a
12 time and place indicated in a hearing notice delivered to all parties by the
13 board. Following the hearing, the board shall render a decision dismissing the
14 complaint for insufficient evidence or shall impose a penalty pursuant to
15 subsection 3.
- 16 h. The proceeds of any penalty collected by the board must be deposited in a
17 special account in the state treasury. This account is subject to appropriation
18 by the Legislative Assembly and may be used for educational programs,
19 advertisements, penalty recovery expenses, and damages caused by
20 excavators who are financially unable to pay for the damage caused by their
21 excavation.
- 22 i. If the amount of the penalty is not paid to the board, the public service
23 commission, at the request of the board, shall bring an action in the name of
24 the state to recover to recover the penalty. A demand in writing on the
25 respondent must be made for the assessed penalty before a civil action may
26 be commenced for the recovery of the penalty. A civil action may be be
27 brought until the expiration of thirty days of the written demand. An action
28 may not be commenced until after the time has expired for an appeal from the
29 findings, conclusions, and order of the board. The board shall pay any costs
30 and expenses incurred by the public service commission in collecting the
31 penalty.

- 1 k. The board shall keep a docket in which must be entered all matter coming
2 before it for determination, with the date of the filing of each paper and final
3 action of the board in the matter. In connection with the docket, there must be
4 kept a carefully prepared index in which the names of the parties must be
5 cross-indexed under the names of both the plaintiff and defendant.
- 6 l. In an action or proceeding based upon a complaint that comes before the
7 board, the board shall keep a full, true, and verbatim record of all evidence
8 introduced at a hearing or trial and prepare and file as a part of its record in
9 the action or proceeding a true and correct transcript of the evidence, and
10 attach all exhibits introduced at the trial. A certificate from the recording
11 secretary to the effect that the transcript is a true and correct transcript of all
12 testimony introduced at the trial must be attached to the transcript.
- 13 m. Either party to the proceeding may request the removal of a board member of
14 the hearing based upon a conflict of interest.
- 15 n. An action of proceeding or order of the board raises a presumption of validity.
16 The burden is upon the person claiming the order to be invalid to plead and
17 prove the facts establishing the invalidity.
- 18 o. The district court for the county in which the property subject to the complaint
19 is located as jurisdiction over all proceedings brought pursuant to this chapter.
20 The prevailing party _____ any proceeding brought pursuant to this
21 chapter is entitled to recover any court costs and any attorney fees.
- 22 p. The record of complaints and civil penalties assessed by the board is a public
23 record and must be made available to any person requesting such information
24 in the same manner as other public records are made available.

25 **SECTION 4. PENALTY.**