

Draft of Enforcement Bill (Amendment to Section 49-23-06)

A Bill for an Act to amend and reenact Section 49-23-06 of the North Dakota Century Code, relating to damage to facilities and penalties.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA

SECTION 1. 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 or any rules promulgated pursuant to any provision of this statute ~~and for all damages to the facilities~~ and must reimburse the operator for the cost of repair and restorations, 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 statute or any rules promulgated pursuant to any provision of this statute.
3. a. In addition to all other penalties provided by law, any person who violates or who procures, aids, or abets in the violation of any provision of this statute or any rules promulgated pursuant to any provision of this statute 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 all other penalties provided by law, any person who intentionally violates or who intentionally procures, aids, or abets in the violation of any provision of this statute or any rules promulgated pursuant to any provision of this statute 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 any provision of this statute or any rules promulgated pursuant to any provision of this statute constitutes a separate offense. In the case of a continuing violation, each day that the violation continues constitutes a separate violation.
4. a. Any person with a complaint against a person who violates or with a complaint against a person who procures, aids, or abets in the violation of any provision of this statute or any rules promulgated pursuant to any provision of this statute, may petition the board for resolution. A complaint alleging a violation of any provision of this statute; except section 49-23-06.1.c.; or any rules promulgated pursuant to any provision of this statute shall be brought within ninety days of the alleged violation. Any complaint alleging a violation of section 49-23-06.1.c. shall be brought within one year of discovery of the alleged violation. No complaint may be dismissed because of the absence of direct damage to the complainant or petitioner. The form for complaints shall be letter addressed to the North Dakota One Call Board of Directors and shall at a minimum include the following specific information:
- (1) Name and address of the person submitting the complaint
 - (2) Name and address of the person in violation
 - (3) The date, detailed circumstances, location, and nature of the violation
 - (4) Estimated cost of actual damages to underground facilities if any occurred
- b. Upon board receipt of a complaint, a panel of three or five members of the North Dakota One Call board shall be appointed by the chair for the purpose of determining whether there is probable cause to believe there has been a violation of any provision of this statute or any rules promulgated pursuant to any provision of this statute. A determination of whether there is probable cause to believe there has been a violation shall be determined by a 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 sections 49-23-06.3.a. or 49-23-06.3.b.
- c. Upon receipt of a complaint and 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 time fixed by the notice served upon it, satisfy the complaint or by filing the written 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 shall be made by the panel solely on these submissions and pertinent records obtained through the Notification Center pursuant to the complaint and no other evidence shall be considered.
- f. The amount of recommended penalty shall be determined by majority vote of the panel. Factors to be considered in determining the amount of penalty shall be:
 - (1) The amount damage, degree of threat to the public safety, and inconvenience caused;
 - (2) The respondent's plans and procedures to insure future compliance with statute or any rules promulgated pursuant to any provision of this statute;
 - (3) Any history of pervious violations;
 - (4) Other matters as justice requires.
- g. The board shall accept the recommendations of the panel unless either party requests a hearing. The hearing shall be conducted before the board at a time and place indicated in a hearing notice delivered to all parties by the board. Following the hearing, the board shall render a decision dismissing the complaint for insufficient evidence or shall impose a penalty pursuant to the provisions of sections 49-23-06.3.a. or 49-23-06.3.b.
- h. Funds from the collected penalty imposed, shall be deposited to the account of the North Dakota One Call board to be used for educational programs, advertisements and penalty recovery expenses.
- i. A demand in writing on the person shall be made for the assessed penalty before suit is brought for recovery. No suit may be brought until the expiration of thirty days after the written demand.
- j. If the amount of the penalty is not paid to the board, the Public Service Commission, at the request of the board, shall bring an action in the name of the State of North Dakota to recover the penalty. No action may be commenced until after the time has expired for an appeal from the findings, conclusions, and order of the board. The costs and expenses on the part of the Public Service Commission shall be paid by the board.
- k. In the trial of an action, the evidence introduced in the proceedings before the board shall constitute the record and evidence on the trial of the case in court. No additional evidence other than that introduced before the board may be introduced at court trial. The report and order of the board shall be taken and held to be prima facie evidence of the facts stated.

- l. The board shall keep a docket in which shall be entered all matters coming before in for determination, with the date of the filing of each paper and the final action of the board in the matter. In connection with such docket, there shall be kept a carefully prepared index in which the names of the parties shall be cross-indexed under the names of both the plaintiff and defendant.
- m. In any action or proceeding based upon a complaint which comes before the board, the board shall keep a full, true, and verbatim record of all evidence introduced at any hearing or trial and prepare and file as a part of its record in the action or proceeding a true and correct transcript of the evidence, and attach all exhibits introduced at the trial. There shall be attached to the transcript a certificate from the recording secretary to the effect that it is a true and correct transcript of all testimony introduced at the trial.
- n. Either person may request the removal of a board member from any hearing based on a conflict of interest.
- o. Any action or proceeding or order of the North Dakota One Call board raises a presumption of validity. The burden is upon the person claiming the order to be invalid to plead and prove the facts establishing the invalidity.