

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           1.    An operator shall participate in and share in the costs of the statewide notification  
2                   center operated by a vendor selected under this section.
- 3           2.    An excavator licensed under this chapter shall participate in and share in the costs  
4                   of a statewide notification center on a per-call basis. An operator, installing the  
5                   operator's own facilities, may not be charged as an excavator.
- 6           3.    An operator shall participate in and share the costs of the one-call excavation  
7                   notice system by:
  - 8                   a.    Submitting the information required by the notification center to allow the  
9                           center to notify the operator of excavation activity;
  - 10                   b.   Updating the information provided to the notification center on a timely basis;
  - 11                   c.   Installing and paying for equipment reasonably requested by the notification  
12                           center to facilitate receipt of notice of excavation from the center;
  - 13                   d.   Paying the costs charged by the notification center on a timely basis; and
  - 14                   e.   Receiving and responding to excavation notices, including emergency  
15                           notices.
- 16           4.    A nonprofit corporation shall govern the notification center. The nonprofit  
17                   corporation established to govern the statewide notification center is an agency of  
18                   state government and \_\_\_\_\_ by the public service commission and  
19                   funded by revenue generated by the statewide notification center. The nonprofit  
20                   corporation is an administrative agency subject to the hearing and appeal  
21                   provisions contained in chapter 28-32. The initial incorporators of the corporation  
22                   may solicit bids for any services provided for the operation of the center. The  
23                   corporation shall provide advance notice of the first organizational meeting by  
24                   publication in qualified legal newspapers and in appropriate trade journals and by  
25                   written notice to all appropriate trade associations.
  - 26                   a.    The nonprofit corporation must be incorporated by seventeen initial  
27                           incorporators, with one member representing the house of representatives  
28                           and one member representing the senate appointed by the legislative council,  
29                           one member representing telecommunications companies offering local  
30                           exchange service to fewer than fifty thousand subscribers, one member  
31                           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

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

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

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

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

11 **49-23-06. Damage to facilities - Penalty.**

12 1. a. If any damage occurs to an underground facility or its protective covering, the  
13 excavator shall notify the operator as soon as reasonably possible. When the  
14 operator receives a damage notice, the operator shall dispatch, as soon as  
15 reasonably possible, personnel to the damage area to investigate. If the  
16 damage endangers life, health, or property, the excavator responsible for the  
17 work shall take immediate action to protect the public and property and to  
18 minimize the hazard until arrival of the operator's personnel or until  
19 emergency responders have arrived and taken charge of the damaged area.

20 b. An excavator shall delay backfilling in the immediate area of the damaged  
21 underground facilities until the damage has been investigated by the operator,  
22 unless the operator authorizes otherwise. The repair of damage must be  
23 performed by the operator or by qualified personnel authorized by the  
24 operator.

25 c. An excavator who knowingly damages an underground facility and who does  
26 not notify the operator as soon as reasonably possible or who backfills in  
27 violation of subdivision b is guilty of a class A misdemeanor.

28 2. a. If an excavator fails to comply with this chapter ~~or~~ and damages an  
29 underground facility, the excavator is liable for all damages caused by the  
30 failure to comply with this chapter ~~and for all damages to the facilities~~ or any  
31 rules adopted pursuant to this chapter and must reimburse the operator for

- 1 the cost of repair and restoration, loss of product, and interruption of service  
2 occurring because of the damage or injury to the facilities, together with  
3 reasonable costs and expenses of suit, including reasonable attorney's fees.
- 4 b. Reimbursement to the operator under this subsection is not required if the  
5 damage to the underground facility was caused by the sole negligence of the  
6 operator or the operator failed to comply with ~~sections 49-23-03 and 49-23-04~~  
7 any provision of this chapter or any rule adopted pursuant to this chapter.
- 8 3. a. In addition to any other penalty provided by law, an excavator who violates or  
9 who procure, aides, or abets in the violation of any provision of this chapter or  
10 any rule adopted pursuant to this chapter may be assessed a penalty of up to  
11 five hundred dollars for the first violation, up to one thousand dollars for the  
12 second violation, and up to five thousand dollars for each subsequent  
13 violation that occurs within twenty-four months of the initial violation.
- 14 b. In addition to any other penalty provided by law, an excavator who  
15 intentionally violates and intentionally procures, aides, or abets of a provision  
16 of this chapter or a rule adopted pursuant to this chapter may be assessed a  
17 penalty of up to one-thousand dollars for the first violation, up to five thousand  
18 dollars for the second violation, and up to ten thousand dollars for each  
19 subsequent violation that occurs within twenty-four months of the initial  
20 violation.
- 21 c. Each violation of provision of this chapter or a rule adopted pursuant to this  
22 chapter constitutes a separate offense. In the case of a continuing violation,  
23 each day the violation continues constitutes a separate violation.
- 24 4. a. A person alleging a violation of this chapter or a rule adopted pursuant to this  
25 chapter may petition the board for resolution of the complaint. A complaint  
26 alleging a violation of this chapter, except subdivision c of subsection 1 of  
27 section 49-23-06, or a rule adopted pursuant to this chapter must be brought  
28 within ninety-days of the alleged violation. A complaint alleging a violation of  
29 subdivision c of subsection 1 of section 49-23-06 must be \_\_\_\_\_ in  
30 one-year of the discover of the alleged violation. A complaint may not be  
31 dismissed because of the absence of the direct damage to the complainant or

- 1                    petitioner. The form of a complaint must be a letter addressed to the board  
2                    and must, at a minimum, include:
- 3                    (1) The name and address of the person submitting the complaint;  
4                    (2) The name and address of the person alleged to be in violation;  
5                    (3) The date, detailed circumstances, location, and nature of the alleged  
6                    violation; and  
7                    (4) The estimated cost of actual damages to the underground facilities.
- 8                    b. Upon receipt of a complaint, the chairman of the board shall appoint a panel  
9                    consisting of three or five members of the board for the purpose of  
10                    determining of whether there is probable cause to believe there has been a  
11                    violation of any provision of this chapter or rules adopted pursuant to this  
12                    chapter. A determination of whether is probable cause to believe there has  
13                    been a violation must be determined by majority vote of the panel. The panel  
14                    shall then recommend to the board that the complaint be dismissed for lack of  
15                    probable cause, or recommend to the board that there is probable cause to  
16                    believe that there has been a violation and recommend what penalty, if any,  
17                    should be imposed pursuant to the provisions of subsection 3.
- 18                    c. Upon receipt of a complaint in the appointment of a panel, the panel shall  
19                    forward to the respondent a statement of the complaint and a notice requiring  
20                    the respondent to satisfy the complaint or answer the complaint in writing  
21                    within twenty days from the date of service of the notice or within such further  
22                    time as may be specified by the board.
- 23                    d. The respondent shall, within the timed fixed by the notice served upon it,  
24                    satisfy the complaint or answer the complaint by filing the original and two  
25                    copies of the answer in the office of the board and serving a copy on each  
26                    complainant.
- 27                    e. A determination of probable cause must be made by the panel solely on these  
28                    submissions and pertinent records obtained through the statewide notification  
29                    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.**