

Introduced by

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~~ 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 is an agency of state government and funded by revenue generated by the notification center. The nonprofit corporation is an administrative agency for purposes of 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 to fifty thousand or more subscribers, one member representing rural water systems, one member representing rural electric cooperatives, one member

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

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

28 c. Members of the board and any of its agents are immune from any liability of
29 any kind based on any acts or omissions in the course of the performance of
30 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 rule adopted to implement 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~~ this chapter or any rule adopted to implement this chapter.

3. a. In addition to any other penalty provided by law, an excavator that violates or procures, aids, or abets in the violation of this chapter or any rule adopted to implement this chapter may be assessed a civil 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 the third and each subsequent violation that occurs within twenty-four months of the initial violation. The penalty must be construed as civil and not criminal in nature.

- b. In addition to any other penalty provided by law, an excavator who intentionally violates and intentionally procures, aids, or abets in the violation of this chapter or any rule adopted to implement this chapter may be assessed a civil 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 the third and each subsequent violation that occurs within twenty-four months of the initial violation. The penalty must be construed as civil and not criminal in nature.

- c. Each violation of this chapter or any rule adopted to implement 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 any rule adopted to implement this chapter may petition the board for resolution of the complaint. A complaint alleging a violation of this chapter, except a violation of subdivision c of subsection 1, or any rule adopted to implement this chapter, must be brought within ninety days of the alleged violation. A complaint alleging a violation of subdivision c of subsection 1 must be brought within one year of the discovery of the alleged violation. A complaint may not be

1 dismissed because of the absence of direct damage to the complainant or
2 petitioner. The form of the complaint must be a letter addressed to the board
3 and at a minimum must include:

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

9 b. Upon receipt of a complaint, the chairman of the board shall appoint a panel
10 consisting of three or five members of the board for the purpose of
11 determining whether there is probable cause to believe there has been a
12 violation of this chapter or any rule adopted to implement this chapter. A
13 determination of whether there is probable cause to believe there has been a
14 violation must be determined by majority vote of the panel. The panel then
15 shall recommend to the board that the complaint be dismissed for lack of
16 probable cause or recommend to the board that there is probable cause to
17 believe that there has been a violation and recommend what civil penalty, if
18 any, should be imposed pursuant to subsection 3.

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

24 d. Within the time fixed by the notice served upon the respondent, the
25 respondent shall satisfy the complaint or answer the complaint by filing the
26 original and two copies of the answer in the office of the board and serving a
27 copy on each complainant.

28 e. The amount of the recommended civil penalty must be determined by a
29 majority vote of the panel. Factors that may be considered in determining the
30 amount of the civil penalty include:

- (1) The amount, damage, degree of threat to the public safety, and inconvenience caused;
 - (2) The respondent's plans and procedures to ensure future compliance with this chapter or any rule adopted to implement this chapter;
 - (3) A history of previous violations; and
 - (4) Other matters as justice requires.
- f. The board shall accept the recommendation of the panel unless either party requests a hearing. The hearing must 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 civil penalty pursuant to subsection 3.
- g. The board shall deposit all civil penalties collected by the board in a special account in the state treasury. The funds in this account are subject to appropriation by the legislative assembly and may be used for educational programs, advertisements, penalty recovery expenses, and damage caused by excavators that are financially unable to pay for the damage caused by their excavation.
- h. A demand in writing for the assessed civil penalty must be made before an action for recovery of the civil penalty may be commenced. An action may not be brought until the expiration of thirty days after the written demand. If the civil penalty is not paid to the board, the board shall bring an action in the name of the state to recover the civil penalty. An action may not be commenced until after the time has expired for an appeal from the findings, conclusions, and order of the board.
- i. The board shall keep a record in which must be entered all matters coming before the board for determination, with the date of the filing of each paper and final action of the board in the matter. In connection with the record, there must be kept a carefully prepared index in which the names of the parties must be cross-indexed under the names of the plaintiff and of the defendant.

- 1 j. In an action or proceeding based upon a complaint that comes before the
2 board, the board shall keep a full, true, and verbatim record of all evidence
3 introduced at a hearing or trial and prepare and file as a part of its record in
4 the action or proceeding a true and correct transcript of the evidence, and
5 attach all exhibits introduced at the trial. A certificate from the recording
6 secretary to the effect that the transcript is a true and correct transcript of all
7 testimony introduced at the trial must be attached to the transcript.
- 8 k. Either party to the proceeding may request the removal of a board member
9 from the hearing based upon a conflict of interest.
- 10 l. An action or proceeding or order of the board is presumed valid. A person
11 claiming the order to be invalid has the burden to prove the facts establishing
12 the invalidity.
- 13 m. The district court for the county in which the property subject to the complaint
14 is located has jurisdiction over all proceedings brought pursuant to this
15 chapter. The prevailing party in any proceeding brought pursuant to this
16 chapter is entitled to recover court costs and attorney's fees.