

Introduced by

1 A BILL for an Act to amend and reenact sections 49-23-01, 49-23-03, 49-23-04, and 49-23-06
2 of the North Dakota Century Code, relating to enforcement of one-call excavation notice system
3 provisions; and to provide a penalty.

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

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

7 **49-23-01. Definitions.** As used in this chapter, unless the context otherwise requires:

- 8 1. "Abandoned" means no longer in service and physically disconnected from a
9 portion of the facility or from any other facility that is in use or still carries services.
- 10 2. "Board" means the board of directors of the nonprofit corporation governing the
11 notification center under section 49-23-03.
- 12 3. "Careful and prudent manner" means excavating with hand tools or noninvasive
13 methods within a horizontal clearance of twenty-four inches [60.96 centimeters] of
14 the outer edges of an underground facility located manually and marked by the
15 owner or operator by stakes, paint, or other customary manner, and supporting and
16 protecting the uncovered facility.
- 17 4. "Commission" means the public service commission.
- 18 5. "Damage" means:
 - 19 a. Substantial weakening of structural or lateral support of an underground
20 facility;
 - 21 b. Penetration, impairment, or destruction of any underground protective coating,
22 housing, or other protective device; or
 - 23 c. Impact with or the partial or complete severance of an underground facility to
24 the extent that the facility operator determines that repairs are required.

- 1 5- 6. "Emergency" means a sudden, unexpected occurrence, involving a clear and
2 imminent danger, and demanding immediate action to prevent or mitigate loss of,
3 or damage to, life, health, property, or essential public services.
- 4 6- 7. "Emergency responder" means a fire department, a law enforcement officer, or
5 other emergency rescue service.
- 6 7- 8. "Excavation" means any operation in which earth, rock, or other materials in or
7 below the ground is moved or otherwise displaced by means of hand or power
8 tools, power equipment, or explosives and includes grading, trenching, digging,
9 ditching, drilling, augering, tunneling, boring, scraping, and cable or pipe plowing
10 and driving. The term does not include:
- 11 a. Opening a grave in a cemetery.
- 12 b. ~~Plowing, cultivating, planting, harvesting, and similar operations in connection~~
13 ~~with Tilling of soil for agricultural activities, unless any of these activities~~
14 ~~disturbs the soil~~ purposes to a depth of eighteen inches [45.72 centimeters] ~~or~~
15 ~~more.~~
- 16 c. Gardening and ~~landscaping unless it disturbs the soil~~ lawn maintenance to a
17 depth of twelve 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 8- 9. "Excavator" means a person who conducts excavation.
- 23 9- 10. "Holiday" means New Year's Day, Martin Luther King Day, Presidents' Day, Good
24 Friday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans'
25 Day, Thanksgiving Day, and Christmas Day. When a holiday falls on a Saturday, it
26 is observed on the preceding Friday as if the Friday were the holiday, and when a
27 holiday falls on a Sunday, it is observed on the following Monday as if the Monday
28 were the actual holiday.
- 29 10- 11. "Local governmental unit" means a county, township, or city.
- 30 11- 12. "Locate" means an operator's markings of an underground facility.
- 31 12- 13. "Nonprofit corporation" means a corporation established under chapter 10-33.

1 ~~13.~~ 14. "Notification center" means a center that receives notice from an excavator of
2 planned excavation or any other request for location and transmits this notice to a
3 participating operator.

4 ~~14.~~ 15. "Operator" means a person who owns or operates an underground facility,
5 including a master meter operator with underground facilities, or a state or local
6 governmental entity. The department of transportation is considered an operator
7 for the department's facilities buried on the department's rights of way. A person is
8 not considered an operator solely because the person is an owner or tenant of real
9 property where underground facilities are located if the underground facilities are
10 used exclusively to furnish services or commodities on that property.

11 ~~15.~~ 16. "Underground facility" means an underground line, facility, system, and its
12 appurtenances used to produce, store, convey, transmit, or distribute
13 communications, data, electricity, power, television signals, heat, gas, oil,
14 petroleum products, water, steam, sewage, hazardous liquids, and other similar
15 substances. Privately owned and operated underground facilities which do not
16 extend beyond the boundary of the private property are excluded.

17 ~~16.~~ 17. "Unexpected occurrence" includes a fire, flood, earthquake or other soil or geologic
18 movement, riot, accident, damage to a subsurface installation requiring immediate
19 repair, or sabotage.

20 ~~17.~~ 18. "Water" includes potable water, wastewater, and storm water.

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

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

- 24 1. An operator shall participate in and share in the costs of the statewide notification
25 center operated by a vendor selected under this section.
- 26 2. An excavator licensed under this chapter shall participate in and share in the costs
27 of a statewide notification center on a ~~per-call~~ per call basis. An operator, installing
28 the operator's own facilities, may not be charged as an excavator.
- 29 3. An operator shall participate in and share the costs of the one-call excavation
30 notice system by:

- a. Submitting the information required by the ~~notification center board~~ notification center to allow the notification 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 board~~ notification center to facilitate receipt of notice of excavation from the notification 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 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 representing investor-owned electric utilities, one member representing investor-owned natural gas utilities, one member representing cable television systems, one member representing cities with a population of fewer than five thousand, one member representing cities with a population of at least five thousand, one member representing counties, one member representing underground interstate carriers of gas, one member representing interstate carriers of petroleum, one member representing interstate carriers of telecommunications services, one member representing contractors who perform excavation services, and one member representing the production

sector of the American petroleum institute. The initial incorporators must represent and be designated by operators, excavators, and other persons eligible to participate in the center. The legislative members are entitled to the same compensation and expenses as provided for members of committees of the legislative council. The legislative council shall pay the compensation for the legislative members.

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

c. Members of the board and any of its agents are immune from any liability of 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 49-23-04 of the North Dakota Century Code is amended and reenacted as follows:

49-23-04. Excavation.

- 1 1. Except in an emergency, an excavator shall contact the notification center and
2 provide an excavation or location notice at least forty-eight hours before beginning
3 any excavation, excluding Saturdays, Sundays, and holidays, unless otherwise
4 agreed to between the excavator and operator. If an operator determines more
5 time is necessary for location, the operator may request a twenty-four-hour
6 extension of the excavation or location notice by notifying the notification center.
7 The notification center shall notify the excavator of the extension. An excavation
8 begins the first time excavation occurs in an area that was not previously identified
9 by the excavator in an excavation notice. The notice must contain:
10 a. The name, address, and telephone number of the person making the
11 notification;
12 b. The name, address, and telephone number of the excavator;
13 c. The date and time when excavation is scheduled to begin;
14 d. The depth of planned excavation;
15 e. The type and extent of excavation being planned, including whether the
16 excavation involves tunneling or horizontal boring;
17 f. Whether the use of explosives is anticipated and any other information as
18 may be required by the notification center; and
19 g. The location of the excavation by any one or more of the following means:
20 (1) A specific street address;
21 (2) A reference to a platted lot number of record; or
22 (3) A specific quarter section by section number, range, township, and
23 county. In this case, the location shall be further described by
24 coordinates measured in feet from the nearest one-fourth corner or
25 section corner.
26 2. The notification center shall:
27 a. Provide a toll-free telephone number and assign an inquiry identification
28 number to each excavation notice and retain a record of all excavation notices
29 received for at least six years.

- b. Immediately transmit the information contained in an excavation notice to every operator that has an underground facility in the area of the proposed excavation.
- c. Inform the persons giving notice of an intent to engage in an excavation activity the names of participating operators of underground facilities to whom the notice will be given.
- d. ~~Establish procedures for assuring~~ Assure positive response from the affected operator in all emergency excavation notices.

- 3. a. An operator, within forty-eight hours, or any extension of that period, after receiving an excavation notice from the center, excluding Saturdays, Sundays, and holidays, unless otherwise agreed to between the excavator and operator, shall locate and mark or otherwise provide the approximate horizontal location of the underground facilities of the operator.
- b. For purposes of this section, the approximate horizontal location of the underground facilities is a strip of land two feet [60.96 centimeters] on either side of the underground facilities. This subdivision does not apply to an underground facility to convey water.
- c. When an operator cannot establish the exact location of the underground facility to convey water, the operator shall mark the location as accurately as possible and the excavator may proceed with caution. When excavation operations approach the estimated location of the underground facility to convey water, the exact location of the facility must be determined by safe and acceptable means. The uncovered facility must be supported and protected to prevent damage.
- d. Markers used to designate the approximate location of underground facilities must follow the current color code standard used by the American public works association.
- e. If the operator cannot complete marking of the excavation area before the excavation commencement time stated in the excavation notice, the operator shall promptly contact the ~~excavator~~ notification center to request a twenty-four-hour extension.

- 1 f. After facilities are located by an operator, an excavator shall notify the
2 notification center if:
- 3 (1) The excavator postpones the excavation commencement time stated in
4 the excavation notice by more than forty-eight hours, or any extension
5 of that period, or cancels the excavation;
- 6 (2) The markings have been obliterated or obscured;
- 7 (3) Weather conditions have impeded visibility of the markings;
- 8 (4) The site shows evidence of recent excavation; or
- 9 (5) The excavator has other reason to believe the markings are incorrect or
10 missing.
- 11 g. An excavator may not use a location more than ten days, or any extension of
12 that period, after the planned excavation date unless the excavator has made
13 previous arrangements with the operators affected.
- 14 h. If in the course of excavation the excavator is unable to locate the
15 underground facility or discovers that the operator of the underground facility
16 has incorrectly located the underground facility, the excavator shall promptly
17 notify the operator or, if unknown, the one-call notification center.
- 18 i. A facility owner, excavator, or other person may not present or presume that
19 an underground facility is abandoned, or treat an underground facility as
20 abandoned, unless the facility has been verified as abandoned by reference
21 to installation records or by testing. The notification center shall establish a
22 method of providing personnel from a facility owner qualified to safely inspect
23 and verify whether a facility is abandoned or inactive if necessary. An inactive
24 facility must be considered active for purposes of this section.
- 25 4. If an excavation is being made in a time of emergency, all reasonable precautions
26 must be taken to protect the underground facilities. In an emergency, the
27 excavator shall give notification in compliance with this chapter, as soon as
28 practical, that an emergency exists. As soon as practical, each operator shall
29 provide all location information that is reasonably available to the excavator.

30 **SECTION 4. AMENDMENT.** Section 49-23-06 of the North Dakota Century Code is
31 amended and reenacted as follows:

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

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 damages an underground facility, the excavator is liable for all damages caused by the failure to comply with this chapter or any rule adopted to implement this chapter and for all damages to the facilities 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, a person 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, a person that intentionally violates or 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 commission 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 dismissed because of the absence of direct damage to the complainant or petitioner. The form of the complaint must be a letter addressed to the commission and at a minimum must 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 facility.

b. Upon receipt of a complaint, the commission shall forward to the respondent a statement of the complaint and a notice requiring the respondent to satisfy the

1 complaint or answer the complaint in writing within twenty days from the date
2 of service of the notice or within such further time as may be specified by the
3 commission.

4 c. Within the time fixed by the notice served upon the respondent, the
5 respondent shall satisfy the complaint or answer the complaint by filing the
6 original and two copies of the answer with the commission and serving a copy
7 on each complainant.

8 d. Upon receipt of a respondent's answer or expiration of the time fixed by the
9 notice served upon the respondent, the commission shall forward to the board
10 all submissions pursuant to the complaint for the purpose of peer review and
11 to obtain testimony from the board as evidence in any further action.

12 e. Upon receipt of board testimony, the commission shall forward to an
13 administrative law judge all submissions, board testimony, and pertinent
14 records obtained through the notification center pursuant to the complaint for
15 the purpose of determining whether there is probable cause to believe there
16 has been a violation of this chapter or any rule adopted to implement this
17 chapter. A determination of whether there is probable cause to believe there
18 has been a violation must be determined solely on these submissions, board
19 testimony, and pertinent records obtained through the notification center
20 pursuant to the complaint and no other evidence may be considered. An
21 administrative law judge shall then recommend to the commission that the
22 complaint be dismissed for lack of probable cause or recommend to the
23 commission that there is probable cause to believe that there has been a
24 violation and recommend what civil penalty, if any, should be imposed
25 pursuant to subsection 3.

26 f. The amount of the recommended civil penalty must be determined by an
27 administrative law judge. Factors that may be considered in determining the
28 amount of the civil penalty include:

29 (1) The amount of damage, degree of threat to the public safety, and
30 inconvenience caused;

(2) The respondent's plans and procedures to ensure future compliance with this chapter or any rules adopted to implement this chapter;

(3) A history of previous violation; and

(4) Other matters as justice requires.

g. The commission shall accept the recommendation of the administrative law judge unless either party requests a hearing. A party requests a hearing by rejecting the administrative law judge's recommendation within twenty days from the date of service of the notice. However, the commission may extend the time period for requesting a hearing. Failure to request a hearing is considered acceptance of the administrative law judge's recommendation. If a hearing is held, the hearing must be conducted before the commission at a time and place indicated in a hearing notice delivered to all parties by the commission. Following the hearing, the commission shall render a decision dismissing the complaint for insufficient evidence or shall impose a civil penalty pursuant to subsection 3.

h. After deducting any expenses relating to the violation, the commission shall deposit all civil penalties collected by the commission as a result of violations of this chapter or any rule adopted to implement this chapter in a special account in the state treasury. The funds in this account are subject to continuing appropriation by the legislative assembly and may be used for educational programs, promotion of damage prevention, and operation of the one-call center.

i. 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 commission, the commission 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 commission.

j. In the trial of an action, the evidence introduced in the proceedings before the commission constitutes the record and evidence. No additional evidence

- 1 other than that introduced before the commission may be introduced at trial.
- 2 The report and order of the commission are prima facie evidence of the facts
- 3 stated.
- 4 k. The commission shall keep a record in which must be entered all matters
- 5 coming before the commission for determination, with the date of the filing of
- 6 each paper and final action of the commission in the matter. In connection
- 7 with the record, there must be kept a carefully prepared index in which the
- 8 names of the parties must be cross-indexed under the names of the plaintiff
- 9 and of the defendant.
- 10 l. In an action or proceeding based upon a complaint that comes before the
- 11 commission, the commission shall keep a full, true, and verbatim record of all
- 12 evidence introduced at a hearing or trial and prepare and file as a part of its
- 13 record in the action or proceeding a true and correct transcript of the
- 14 evidence, and attach all exhibits introduced at the trial. A certificate from the
- 15 recording secretary to the effect that the transcript is a true and correct
- 16 transcript of all testimony introduced at the trial must be attached to the
- 17 transcript.
- 18 m. An action or proceeding or order of the commission is presumed valid. A
- 19 person claiming the order to be invalid has the burden to prove the facts
- 20 establishing the invalidity.
- 21 n. The district court for the county in which the alleged violation occurred has
- 22 jurisdiction over all proceedings brought pursuant to this chapter. The
- 23 prevailing party in any proceeding before district court or a hearing before the
- 24 commission brought pursuant to this chapter is entitled to recover court costs
- 25 and attorney's fees.
- 26 5. The commission may adopt rules to implement this chapter.