

## ONE-CALL EXCAVATION NOTICE SYSTEM - CIVIL PENALTY - BACKGROUND MEMORANDUM

House Concurrent Resolution No. 3026 (attached as [Appendix A](#)) directs the Legislative Council to study the feasibility and desirability of establishing legislation for the enforcement and assessment of civil penalties for violation of the one-call excavation notice system. The Legislative Council assigned this study to the Natural Resources Committee.

Proponents of House Concurrent Resolution No. 3026 noted that the provisions of the North Dakota one-call excavation notice system do not include a civil process for the enforcement of the one-call excavation notice system or for any civil penalty assessed with the violation of the system. Proponents of the study noted that stakeholders had been working on a bill to provide for a civil process for enforcement and provisions for the assessment of a civil penalty to present to the 60<sup>th</sup> Legislative Assembly. However, complications arose from not being able to determine how to carry out a penalty phase and what entity would be responsible for administering a penalty provision. Representatives of North Dakota One Call testified that it has been studying penalties and enforcement provisions specific to the one-call excavation notice system because the Public Service Commission has encouraged North Dakota One Call to initiate enforcement legislation and the Public Service Commission suffers federal grant fund reductions due to the absence of state one-call enforcement provisions; Northern Border Pipeline and Alliance Pipeline have requested such legislation in response to "near miss" excavations adjacent to their buried facilities; and recently enacted federal legislation includes language encouraging state one-call systems to provide enforcement of their statutes to protect pipelines and other utilities.

### NORTH DAKOTA ONE-CALL EXCAVATION NOTICE SYSTEM

The North Dakota one-call excavation notice system is governed by North Dakota Century Code (NDCC) Chapter 49-23. The notification center is governed by a nonprofit corporation. Section 49-23-04 provides that except in an emergency, an excavator must contact the notification center and provide an excavation or location notice at least 48 hours before beginning any excavation, excluding Saturdays, Sundays, and holidays, unless otherwise agreed to between the excavator and operator. The notification center is required to provide a toll-free telephone number and assign an inquiry identification number to each excavation notice and retain a record of all excavation notices received for at least six years. The notification center is required to immediately transmit the information contained in an excavation notice to every operator that has an

underground facility in the area of the proposed excavation. The notification center is required to inform 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 and to establish procedures for assuring positive response from the affected operator and all emergency excavation notices. An operator, within 48 hours, or any extension of that period, after receiving excavation notice from the center, excluding Saturdays, Sundays, and holidays, unless otherwise agreed to between the excavator and operator, is required to locate and mark or otherwise provide the approximate horizontal location of the underground facilities of the operator.

As used in NDCC Chapter 49-23 "excavator" means a person who conducts excavation and "operator" means a person who owns or operates an underground facility, including a master meter operator with underground facilities, or a state or local governmental entity. An underground facility is defined to mean an underground line, facility, system, and its appurtenances used to produce, store, convey, transmit, or distribute communications, data, electricity, power, television signals, heat, gas, oil, petroleum products, water, steam, sewage, hazardous liquids, and other similar substances. Privately owned and operated underground facilities that do not extend beyond the boundary of the private property are excluded from the definition of underground facility.

North Dakota Century Code Section 49-23-06 contains a penalty for damage to facilities. This section provides that 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 is required to 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 must 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. This section requires the excavator to 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. Repair of damage must be performed by the operator or by qualified personnel authorized by the operator. 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 this section is guilty of a Class A misdemeanor. If an excavator fails to comply with NDCC Chapter 49-23 or damages an

underground facility, the excavator is liable for all damages caused by the failure to comply with the 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. Reimbursement to the operator 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 the relevant provisions of Chapter 49-23.

### **ONE-CALL EXCAVATION NOTICE SYSTEMS IN SURROUNDING STATES**

#### **South Dakota**

The South Dakota Statewide One-Call Notification Board is an agency of state government administered by the South Dakota Public Utilities Commission and funded solely by revenue generated by the one-call notification center. Sections 49-7A-18 and 49-7A-19 of the South Dakota Codified Laws contain penalties for violating the relevant provisions of the South Dakota one-call excavation notice system. Section 49-7A-18 provides that except for penalties for intentional violations under Section 49-7A-19 and in addition to all other penalties provided by law, a person who violates or who procures, aids, or abets in the violation of the relevant sections of the South Dakota one-call excavation notice system or any rules adopted pursuant to these sections may be assessed a penalty of up to \$1,000 for the first violation and up to \$5,000 for a subsequent violation that occurs within 12 months of the initial violation. Section 49-7A-19 contains a penalty of up to \$5,000 for the first violation and up to \$10,000 for each subsequent violation that occurs within 12 months of the initial violation for intentional violations. Section 49-7A-28 provides that if the penalty is not paid to the One-Call Notification Board the Public Utilities Commission, at the request of the board, is required to bring an action in the name of the state to recover the penalty.

#### **Minnesota**

The Minnesota one-call excavation notice system is governed by Minnesota Statutes Chapter 216D. The Minnesota Notification Center is governed by a nonprofit corporation approved in writing by the Commission of Public Safety. Section 216D.08 provides a civil penalty for violation of the chapter. This section provides that a person who is engaged in excavation for remuneration or an operator who violates the relevant sections of Chapter 216D is subject to a civil penalty to be imposed by the Commissioner of Public Safety not to exceed \$1,000 for each violation per day of violation. The commissioner may negotiate a compromise settlement of a civil penalty. In determining the amount of the penalty, or the amount of the

compromise settlement, the commissioner is required to consider the appropriateness of the penalty to the size of the business of the person charged, the gravity of the violation, and the good faith of the person charged in attempting to achieve compliance after notification of a violation. The penalty is subject to judicial review. Penalties collected are deposited in the state treasury and credited to the pipeline safety account to be applied to the reduction of expenses or costs assessed by the commissioner against persons regulated under the system. Penalties collected are annually appropriated to the Commissioner of Public Safety.

The Commissioner of Public Safety is authorized to adopt rules establishing reasonable guidelines for imposing penalties. The rules must provide for notice that a penalty is assessed and may exempt activities from penalties unless the excavator or operator has evidenced a course of action in disregard of the chapter. State district courts have jurisdiction to restrain violations of Chapter 216D on petition by the Attorney General on behalf of the state of Minnesota.

The Commissioner of Public Safety has adopted rules for the assessment of civil penalties and maximum penalties. Subpart 3 of Section 7560.0800 of the Minnesota Code of Agency Rules provides that in assessing a civil penalty the Office of Pipeline Safety of the Minnesota Department of Public Safety must consider the nature, circumstances, and gravity of the violation; the degree of the person's culpability; the person's history of previous offenses; the person's ability to pay; good faith on the part of the person in attempting to remedy the cause of the violation; the effect of the penalty on the person's ability to continue in business; and past reports of damage to an underground facility by a person. Concerning maximum penalties, penalties imposed against excavators may not exceed \$1,000 for each violation per day of violation. However, penalties imposed against an operator who engages in the transportation of gas or hazardous liquids or who owns or operates a gas or hazardous liquid pipeline facility may not exceed \$10,000 for each violation for each day that the violation persists, except that the maximum civil penalty may not exceed \$500,000 for a related series of violations.

#### **Montana**

Excavations near underground facilities in Montana are governed by Section 69-4-501 et seq. of the Montana Code Annotated. Section 69-4-505 provides that if an underground facility is damaged by an excavator who has failed to obtain information as to its location, the excavator is liable to the owner of the underground facility for the entire cost of the repair of the facility. This section provides further that the excavator is also liable to the underground facility owner that is a member of a one-call notification center for a damage fee. This section provides that the damage fee is 25 percent of the total cost of repairing the underground facility not to exceed \$125

for the first incident; 50 percent of the total cost of repairing the underground facility not to exceed \$500 for the second incident; and \$1,000 for the third and any subsequent incident. An underground facility owner may levy only one fee for each incident. If there is more than one underground facility affected by an incident, then each underground facility owner that is a member of a one-call notification center may levy one damage fee for that incident. The underground facility owner may enforce collection in a court of competent jurisdiction. Section 69-4-512 provides that an excavator subject to repair charges and damage fees may have those costs reviewed by a court of competent jurisdiction.

### **POSSIBLE STUDY APPROACH**

In conducting its study of the feasibility and desirability of establishing legislation for the enforcement and assessment of civil penalties for a violation of the one-call excavation notice system, the committee could solicit testimony from a number of sources. These include North Dakota One Call, the Public Service Commission, and the stakeholders utilizing the one-call excavation notice system.

ATTACH:1