

CHAPTER 170

LABOR AND INDUSTRY

SENATE BILL 00-184

BY SENATOR Evans;
also REPRESENTATIVES Lee and Coleman.

AN ACT

CONCERNING PREVENTION OF DAMAGE TO UNDERGROUND FACILITIES RESULTING FROM EXCAVATIONS.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. 9-1.5-102 (3) and (6), Colorado Revised Statutes, are amended to read:

9-1.5-102. Definitions. As used in this article, unless the context otherwise requires:

(3) "Excavation" means any operation in which earth is moved or removed by means of any tools, equipment, or explosives and includes augering, backfilling, BORING, ditching, drilling, grading, plowing-in, pulling-in, ripping, scraping, trenching, and tunneling.

(6) "Person" means any individual ACTING ON HIS OR HER OWN BEHALF, SOLE PROPRIETOR, partnership, association, corporation, or joint venture; the state, any political subdivision of the state, or any instrumentality or agency of either; or the legal representative of any of them.

SECTION 2. 9-1.5-103 (4) (a), (4) (c), (6), and (7), Colorado Revised Statutes, are amended, and the said 9-1.5-103 (4) is further amended BY THE ADDITION OF A NEW PARAGRAPH, to read:

9-1.5-103. Plans and specifications - notice of excavation - duties of excavators - duties of owners and operators. (4) (a) Any owner or operator receiving notice pursuant to subsection (3) of this section shall, AT NO COST TO THE EXCAVATOR, USE REASONABLE CARE TO advise the excavator of the location and size of any underground facilities in the proposed excavation area by marking the location

Capital letters indicate new material added to existing statutes; dashes through words indicate deletions from existing statutes and such material not part of act.

of the facilities with clearly identifiable markings within eighteen inches horizontally from the exterior sides of any such facilities. Such markings shall include the depth, if known, and shall be made pursuant to the uniform color code as approved by the utility location and coordinating council of the American public works association. In the event any person is involved in excavating across a preexisting underground facility, the owner of such facility shall, upon a predetermined agreement at the request of the excavator or the owner, provide on-site assistance. ANY OWNER OR OPERATOR RECEIVING NOTICE CONCERNING AN EXCAVATOR'S INTENT TO EXCAVATE SHALL USE REASONABLE CARE TO ADVISE THE EXCAVATOR OF THE ABSENCE OF ANY UNDERGROUND FACILITIES IN THE PROPOSED EXCAVATION AREA BY COMMUNICATING DIRECTLY WITH THE EXCAVATOR AND PROVIDING DOCUMENTATION THEREOF, IF REQUESTED, OR BY CLEARLY MARKING THAT NO UNDERGROUND FACILITIES EXIST IN THE PROPOSED EXCAVATION AREA. OWNERS AND OPERATORS SHALL, WITHIN THE TIME LIMITS SPECIFIED IN SUBSECTION (6) OF THIS SECTION, PROVIDE TO THE EXCAVATOR EVIDENCE, IF ANY, OF FACILITIES ABANDONED AFTER JANUARY 1, 2001, KNOWN TO THE OWNER OR OPERATOR TO BE IN THE PROPOSED EXCAVATION AREA.

(b.5) ANY PERSON WHO WILLFULLY OR MALICIOUSLY REMOVES A MARKING USED BY AN OWNER OR OPERATOR TO MARK THE LOCATION OF ANY UNDERGROUND FACILITY, EXCEPT IN THE ORDINARY COURSE OF EXCAVATION, IS GUILTY OF A CLASS 2 MISDEMEANOR, AND, UPON CONVICTION THEREOF, IN ADDITION TO ANY ORDER FOR RESTITUTION, SHALL BE PUNISHED BY A FINE OF NOT MORE THAN FIVE THOUSAND DOLLARS FOR EACH OFFENSE, BY IMPRISONMENT FOR NOT MORE THAN ONE YEAR, OR BY BOTH SUCH FINE AND IMPRISONMENT.

(c) (I) WHEN A PERSON EXCAVATES WITHIN EIGHTEEN INCHES HORIZONTALLY FROM THE EXTERIOR SIDES OF ANY UNDERGROUND FACILITY, SUCH PERSON SHALL EXERCISE SUCH REASONABLE CARE AS NECESSARY TO PROTECT ANY UNDERGROUND FACILITY IN OR NEAR THE EXCAVATION AREA. It shall be the responsibility of the excavator to maintain adequate and accurate ~~information~~ DOCUMENTATION, INCLUDING BUT NOT LIMITED TO PHOTOGRAPHS, VIDEO, OR SKETCHES, AT THE EXCAVATION SITE on the location AND IDENTIFICATION of any underground facility throughout the excavation period.

(II) (A) If the ~~information~~ DOCUMENTATION maintained pursuant to subparagraph (I) of this paragraph (c) becomes lost or invalid, the excavator shall notify the NOTIFICATION association or the affected owner or operator and request an immediate reverification of the location of any underground facility. Upon receipt of such notification, such affected owner or operator shall respond as quickly as is practicable. The excavator shall cease excavation activities at the affected location until the location of any underground facilities has been reverified.

(B) If the ~~information~~ DOCUMENTATION maintained pursuant to subparagraph (I) of this paragraph (c) is determined to be inaccurate, the excavator shall immediately notify the affected owner or operator and shall request an immediate reverification of the location of any underground facility. Upon receipt of such notification, such affected owner or operator shall respond as quickly as practicable. The excavator may continue excavation activity if such excavator exercises due caution and care to prevent damaging any underground facility.

(6) If ~~information~~ DOCUMENTATION requested and needed by an excavator

pursuant to subsection (4) of this section is not provided by the owner or operator pursuant thereto within two business days, not including the day of actual notice, or such later time as agreed upon by the excavator and the owner or operator or if the ~~information~~ DOCUMENTATION provided fails to identify the location of the underground facilities, the excavator shall immediately give notice to the NOTIFICATION association or the owner or operator and may proceed and shall not be liable for such damage except upon proof of such excavator's ~~negligence~~ LACK OF REASONABLE CARE.

(7) (a) In the event of damage to an underground facility, the excavator, owner, and operator shall cooperate to mitigate damages to the extent reasonably possible, including the provision of in-kind work by the excavator where technical or specialty skills are not required by the nature of the underground facility. ~~which~~ SUCH in-kind work may be under the supervision and pursuant to the specifications of the owner or operator.

(b) IF DAMAGE TO AN UNDERGROUND FACILITY MEETS OR EXCEEDS THE REPORTING THRESHOLD AS ESTABLISHED BY THE NOTIFICATION ASSOCIATION PURSUANT TO PARAGRAPH (c) OF THIS SUBSECTION (7), THE OWNER OR OPERATOR OF THE DAMAGED UNDERGROUND FACILITY SHALL PROVIDE THE INFORMATION LISTED IN SUBPARAGRAPHS (I) TO (VII) OF PARAGRAPH (c) OF THIS SUBSECTION (7) TO THE NOTIFICATION ASSOCIATION WITHIN NINETY DAYS AFTER SERVICE HAS BEEN RESTORED.

(c) THE NOTIFICATION ASSOCIATION SHALL CREATE AND PUBLICIZE TO ITS MEMBERS A REPORTING PROCESS, INCLUDING THE AVAILABILITY OF ELECTRONIC REPORTING AND A THRESHOLD AT WHICH REPORTING IS REQUIRED, TO COMPILE THE FOLLOWING INFORMATION:

(I) THE TYPE OF UNDERGROUND FACILITY THAT WAS DAMAGED;

(II) WHETHER NOTICE OF THE INTENTION TO EXCAVATE WAS PROVIDED TO THE NOTIFICATION ASSOCIATION;

(III) WHETHER THE UNDERGROUND FACILITY HAD BEEN VALIDLY MARKED PRIOR TO BEING DAMAGED;

(IV) THE TYPE OF SERVICE THAT WAS INTERRUPTED;

(V) THE NUMBER OF PERSONS WHOSE SERVICE MAY HAVE BEEN INTERRUPTED;

(VI) THE DURATION OF THE INTERRUPTION; AND

(VII) THE LOCATION OF THE AREA WHERE THE UNDERGROUND FACILITY WAS DAMAGED.

(d) THE NOTIFICATION ASSOCIATION SHALL INCLUDE A STATISTICAL SUMMARY OF THE INFORMATION PROVIDED TO IT UNDER THIS SUBSECTION (7) IN THE ANNUAL REPORT REQUIRED UNDER SECTION 9-1.5-105 (2.6).

SECTION 3. Article 1.5 of title 9, Colorado Revised Statutes, is amended BY

THE ADDITION OF A NEW SECTION to read:

9-1.5-104.3. Alternative dispute resolution. THE NOTIFICATION ASSOCIATION SHALL CREATE A VOLUNTARY ALTERNATIVE DISPUTE RESOLUTION PROGRAM IN CONSULTATION WITH ITS MEMBERS AND ALL AFFECTED PARTIES. THE ALTERNATIVE DISPUTE RESOLUTION PROGRAM SHALL BE AVAILABLE TO ALL OWNERS OR OPERATORS, EXCAVATORS, AND OTHER INTERESTED PARTIES REGARDING DISPUTES ARISING FROM DAMAGE TO UNDERGROUND FACILITIES, INCLUDING, BUT NOT LIMITED TO, ANY COST OR DAMAGE INCURRED BY THE OWNER OR OPERATOR OR THE EXCAVATOR AS A RESULT OF ANY DELAY IN THE EXCAVATION PROJECT WHILE THE UNDERGROUND FACILITY IS RESTORED, REPAIRED, OR REPLACED, EXCLUSIVE OF CIVIL PENALTIES SET FORTH IN SECTION 9-1.5-104.5, THAT CANNOT BE RESOLVED THROUGH CONSULTATION AND NEGOTIATION. THE ALTERNATIVE DISPUTE RESOLUTION PROGRAM SHALL INCLUDE MEDIATION, ARBITRATION, OR OTHER APPROPRIATE PROCESSES OF DISPUTE RESOLUTION. THE ISSUE OF LIABILITY AND AMOUNT OF DAMAGES UNDER COLORADO LAW MAY BE DECIDED BY AN APPOINTED ARBITRATOR OR BY THE PARTIES IN MEDIATION. NOTHING IN THIS SECTION SHALL BE CONSTRUED TO CHANGE THE BASIS FOR CIVIL LIABILITY FOR DAMAGES.

SECTION 4. 9-1.5-104.5, Colorado Revised Statutes, is REPEALED AND REENACTED, WITH AMENDMENTS, to read:

9-1.5-104.5. Civil penalties - applicability. (1) (a) EVERY OWNER OR OPERATOR OF AN UNDERGROUND FACILITY IN THIS STATE SHALL JOIN THE NOTIFICATION ASSOCIATION PURSUANT TO SECTION 9-1.5-105.

(b) ANY OWNER OR OPERATOR OF AN UNDERGROUND FACILITY WHO DOES NOT JOIN THE NOTIFICATION ASSOCIATION IN ACCORDANCE WITH PARAGRAPH (a) OF THIS SUBSECTION (1) SHALL BE LIABLE FOR A CIVIL PENALTY OF TWO HUNDRED DOLLARS.

(c) (I) IF ANY UNDERGROUND FACILITY LOCATED IN THE SERVICE AREA OF AN OWNER OR OPERATOR IS DAMAGED AS A RESULT OF SUCH OWNER OR OPERATOR'S FAILURE TO COMPLY WITH PARAGRAPH (a) OF THIS SUBSECTION (1), THE COURT SHALL IMPOSE UPON SUCH OWNER OR OPERATOR A CIVIL PENALTY IN THE AMOUNT OF FIVE THOUSAND DOLLARS FOR THE FIRST OFFENSE AND UP TO TWENTY-FIVE THOUSAND DOLLARS FOR EACH SUBSEQUENT OFFENSE WITHIN A TWELVE-MONTH PERIOD AFTER THE FIRST OFFENSE. UPON A FIRST OFFENSE, THE OWNER OR OPERATOR SHALL BE REQUIRED BY THE COURT TO COMPLETE AN EXCAVATION SAFETY TRAINING PROGRAM WITH THE NOTIFICATION ASSOCIATION.

(II) IF ANY OWNER OR OPERATOR FAILS TO COMPLY WITH PARAGRAPH (a) OF THIS SUBSECTION (1) ON MORE THAN THREE SEPARATE OCCASIONS WITHIN A TWELVE-MONTH PERIOD FROM THE DATE OF THE FIRST FAILURE TO COMPLY WITH PARAGRAPH (a) OF THIS SUBSECTION (1), THEN THE CIVIL PENALTY SHALL BE UP TO SEVENTY-FIVE THOUSAND DOLLARS.

(d) IF ANY UNDERGROUND FACILITY IS DAMAGED AS A RESULT OF THE OWNER OR OPERATOR'S FAILURE TO COMPLY WITH PARAGRAPH (a) OF THIS SUBSECTION (1) OR FAILURE TO USE REASONABLE CARE IN THE MARKING OF THE DAMAGED UNDERGROUND FACILITY, SUCH OWNER OR OPERATOR SHALL BE PRESUMABLY LIABLE FOR:

(I) ANY COST OR DAMAGE INCURRED BY THE EXCAVATOR AS A RESULT OF ANY DELAY IN THE EXCAVATION PROJECT WHILE THE UNDERGROUND FACILITY IS RESTORED, REPAIRED, OR REPLACED, TOGETHER WITH REASONABLE COSTS AND EXPENSES OF SUIT, INCLUDING REASONABLE ATTORNEY FEES; AND

(II) ANY INJURY OR DAMAGE TO PERSONS OR PROPERTY RESULTING FROM THE DAMAGE TO THE UNDERGROUND FACILITY. ANY SUCH OWNER OR OPERATOR SHALL ALSO INDEMNIFY AND DEFEND THE AFFECTED EXCAVATOR AGAINST ANY AND ALL CLAIMS OR ACTIONS, IF ANY, FOR PERSONAL INJURY, DEATH, PROPERTY DAMAGE, OR SERVICE INTERRUPTION RESULTING FROM THE DAMAGE TO THE UNDERGROUND FACILITY.

(2) (a) ANY PERSON WHO INTENDS TO EXCAVATE SHALL NOTIFY THE NOTIFICATION ASSOCIATION PURSUANT TO SECTION 9-1.5-103 PRIOR TO COMMENCING ANY EXCAVATION ACTIVITY. FOR PURPOSES OF THIS PARAGRAPH (a), EXCAVATION SHALL NOT INCLUDE AN EXCAVATION BY A RANCHER OR A FARMER, AS DEFINED IN SECTION 42-20-108.5, C.R.S., OCCURRING ON A RANCH OR FARM UNLESS SUCH EXCAVATION IS FOR A NONAGRICULTURAL PURPOSE.

(b) ANY PERSON, OTHER THAN A HOMEOWNER, RANCHER, OR FARMER, AS DEFINED IN SECTION 42-20-108.5, C.R.S., WORKING ON SUCH HOMEOWNER'S, RANCHER'S, OR FARMER'S PROPERTY, WHO FAILS TO NOTIFY THE NOTIFICATION ASSOCIATION OR THE AFFECTED OWNER OR OPERATOR PURSUANT TO PARAGRAPH (a) OF THIS SUBSECTION (2) SHALL BE LIABLE FOR A CIVIL PENALTY IN THE AMOUNT OF TWO HUNDRED DOLLARS.

(c) (I) IF ANY PERSON, OTHER THAN A HOMEOWNER, RANCHER, OR FARMER, AS DEFINED IN SECTION 42-20-108.5, C.R.S., WORKING ON SUCH HOMEOWNER'S, RANCHER'S, OR FARMER'S PROPERTY, FAILS TO COMPLY WITH PARAGRAPH (a) OF THIS SUBSECTION (2) AND DAMAGES AN UNDERGROUND FACILITY DURING EXCAVATION, SUCH PERSON SHALL BE LIABLE FOR A CIVIL PENALTY IN THE AMOUNT OF FIVE THOUSAND DOLLARS FOR THE FIRST OFFENSE AND UP TO TWENTY-FIVE THOUSAND DOLLARS FOR EACH SUBSEQUENT OFFENSE WITHIN A TWELVE-MONTH PERIOD AFTER THE FIRST OFFENSE. UPON A FIRST OFFENSE, SUCH PERSON SHALL BE REQUIRED TO COMPLETE AN EXCAVATION SAFETY TRAINING PROGRAM WITH THE NOTIFICATION ASSOCIATION.

(II) IF ANY PERSON FAILS TO COMPLY WITH PARAGRAPH (a) OF THIS SUBSECTION (2) ON MORE THAN THREE SEPARATE OCCASIONS WITHIN A TWELVE-MONTH PERIOD FROM THE DATE OF THE FIRST FAILURE TO COMPLY WITH PARAGRAPH (a) OF THIS SUBSECTION (2), THEN THE CIVIL PENALTY SHALL BE UP TO SEVENTY-FIVE THOUSAND DOLLARS.

(d) IF ANY PERSON, OTHER THAN A HOMEOWNER, RANCHER, OR FARMER, AS DEFINED IN SECTION 42-20-108.5, C.R.S., WORKING ON SUCH HOMEOWNER'S, RANCHER'S, OR FARMER'S PROPERTY, FAILS TO COMPLY WITH PARAGRAPH (a) OF THIS SUBSECTION (2) OR FAILS TO EXERCISE REASONABLE CARE IN EXCAVATING AND DAMAGES AN UNDERGROUND FACILITY DURING AN EXCAVATION, SUCH PERSON SHALL BE PRESUMABLY LIABLE FOR:

(I) ANY COST OR DAMAGE INCURRED BY THE OWNER OR OPERATOR IN RESTORING,

REPAIRING, OR REPLACING ITS DAMAGED UNDERGROUND FACILITY, TOGETHER WITH REASONABLE COSTS AND EXPENSES OF SUIT, INCLUDING REASONABLE ATTORNEY FEES; AND

(II) ANY INJURY OR DAMAGE TO PERSONS OR PROPERTY RESULTING FROM THE DAMAGE TO THE UNDERGROUND FACILITY. ANY SUCH PERSON SHALL ALSO INDEMNIFY AND DEFEND THE AFFECTED OWNER OR OPERATOR AGAINST ANY AND ALL CLAIMS OR ACTIONS, IF ANY, FOR PERSONAL INJURY, DEATH, PROPERTY DAMAGE, OR SERVICE INTERRUPTION RESULTING FROM THE DAMAGE TO THE UNDERGROUND FACILITY.

(e) PARAGRAPH (d) OF THIS SUBSECTION (2) SHALL NOT APPLY TO A PERSON WHO COMMENCES EXCAVATION AFFECTING AN UNDERGROUND FACILITY IF THE OWNER OR OPERATOR OF THE UNDERGROUND FACILITY HAS FAILED TO COMPLY WITH PARAGRAPH (a) OF SUBSECTION (1) OF THIS SECTION OR HAS FAILED TO USE REASONABLE CARE IN THE MARKING OF THE AFFECTED UNDERGROUND FACILITY.

(3) (a) AN ACTION TO RECOVER A CIVIL PENALTY UNDER THIS SECTION MAY BE BROUGHT BY AN OWNER OR OPERATOR, EXCAVATOR, AGGRIEVED PARTY, DISTRICT ATTORNEY, OR THE ATTORNEY GENERAL. VENUE FOR SUCH AN ACTION SHALL BE PROPER IN THE DISTRICT COURT FOR THE COUNTY IN WHICH THE OWNER OR OPERATOR, EXCAVATOR, OR AGGRIEVED PARTY RESIDES OR MAINTAINS A PRINCIPAL PLACE OF BUSINESS IN THIS STATE OR IN THE COUNTY IN WHICH THE CONDUCT GIVING RISE TO A CIVIL PENALTY OCCURRED.

(b) ANY CIVIL PENALTY IMPOSED PURSUANT TO THIS SECTION, INCLUDING REASONABLE ATTORNEY FEES, SHALL BE PAID TO THE PREVAILING PARTY.

(c) THE PENALTIES PROVIDED IN THIS ARTICLE ARE IN ADDITION TO ANY OTHER REMEDY AT LAW OR EQUITY AVAILABLE TO AN EXCAVATOR OR TO THE OWNER OR OPERATOR OF A DAMAGED UNDERGROUND FACILITY.

(d) NO CIVIL PENALTY SHALL BE IMPOSED UNDER THIS SECTION AGAINST AN EXCAVATOR OR OWNER OR OPERATOR WHO VIOLATES ANY OF THE PROVISIONS OF THIS SECTION IF THE VIOLATION OCCURRED WHILE THE EXCAVATOR OR OWNER OR OPERATOR WAS RESPONDING TO A SERVICE OUTAGE OR OTHER EMERGENCY; EXCEPT THAT SUCH PENALTY SHALL BE IMPOSED IF SUCH VIOLATION WAS WILLFUL OR MALICIOUS.

(4) NOTHING IN THIS ARTICLE SHALL BE CONSTRUED TO IMPOSE AN INDEMNIFICATION OBLIGATION ON ANY PUBLIC ENTITY OR TO ALTER THE LIABILITY OF PUBLIC ENTITIES AS PROVIDED IN ARTICLE 10 OF TITLE 24, C.R.S.

(5) IN DETERMINING THE LIABILITY FOR OR THE AMOUNT OF ANY DAMAGES OR CIVIL PENALTY PURSUANT TO THIS ARTICLE, A COURT OR ARBITRATOR SHALL CONSIDER THE NATURE, CIRCUMSTANCES, AND GRAVITY OF THE ALLEGED VIOLATION AND THE ALLEGED VIOLATOR'S DEGREE OF CULPABILITY, HISTORY OF PRIOR VIOLATIONS, AND LEVEL OF COOPERATION WITH THE REQUIREMENTS OF THIS ARTICLE.

SECTION 5. The introductory portion to 9-1.5-105 (2), Colorado Revised Statutes, is amended to read:

9-1.5-105. Notification association - structure and funding requirements - duties of owners and operators. (2) All underground facility owners and operators EXCEPT THE COLORADO DEPARTMENT OF TRANSPORTATION shall be members of the notification association which shall be organized as follows:

SECTION 6. 9-1.5-105 (2.6), Colorado Revised Statutes, is REPEALED AND REENACTED, WITH AMENDMENTS, to read:

9-1.5-105. Notification association - structure and funding requirements - duties of owners and operators - report. (2.6) (a) THE NOTIFICATION ASSOCIATION SHALL PREPARE ANNUAL REPORTS ON ITS ACTIVITIES, AS FOLLOWS:

(I) A STATISTICAL SUMMARY OF THE INFORMATION REPORTED TO IT PURSUANT TO SECTION 9-1.5-103 (7) (b); AND

(II) AN ANNUAL, INDEPENDENT FINANCIAL AUDIT OF ITS OPERATIONS.

(b) THE NOTIFICATION ASSOCIATION SHALL PROVIDE A COPY OF BOTH REPORTS CREATED UNDER PARAGRAPH (a) OF THIS SUBSECTION (2.6) TO ITS MEMBERS AND SHALL PROVIDE THE REPORT CREATED UNDER SUBPARAGRAPH (I) OF PARAGRAPH (a) OF THIS SUBSECTION (2.6) TO THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO.

SECTION 7. Safety clause. The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

Approved: May 23, 2000