WEST VIRGINIA CODE CHAPTER 24C

WV Legislature

§24C-1-1. Purpose.

It is hereby declared to be the purpose and policy of the Legislature in enacting this article to enhance the safety of the citizens of this state and to provide increased protection to underground facilities from damage due to excavation or demolition by providing for the operation of a one-call system for use by operators of underground facilities and by persons engaged in excavation or demolition in the vicinity of underground facilities.

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§24C-1-2. Definitions.

As used in this article, unless the context clearly requires a different meaning:

"Board" or "Underground Facilities Damage Prevention Board" means the Underground Facilities Damage Prevention Board created in this article.

"Commission" or "Public Service Commission" means the Public Service Commission of West Virginia.

"Damage" means any impact or contact with or weakening of the support for, or the partial or complete destruction of, an underground facility, its appurtenances, protective casing, coating, or housing, which, according to the operation practices of the operator or state or federal regulation, requires repair or replacement.

"Demolish" or "demolition" means any operation by which a structure or mass of material is wrecked, razed, rendered, moved, or removed by means of any tools, equipment or discharge of explosives which could damage underground facilities: *Provided*, That "demolish", and "demolition" do not include earth-disturbing activities authorized pursuant to the provisions of §22-3-1 *et seq.* or §22A-2-1 *et seq.* of this code.

"Emergency" means:

(1) A condition constituting a clear and present danger to life, health, or property by reason of escaping toxic, corrosive, or explosive product, oil or oil-gas, or natural gas hydrocarbon product, exposed wires, or other breaks or defects in an underground facility; or

(2) A condition that requires immediate correction to assure continuity of service provided by or through an underground facility or to assure the safety of the general public or operator personnel.

"Equipment operator" means any individual in physical control of powered equipment or explosives when being used to perform excavation work or demolition work.

"Excavate" or "excavation" means any operation in which earth, rock, or other material in the ground is moved, removed, or otherwise displaced by means of any tools, equipment, or explosives, and includes, without limitation, boring, backfilling, grading, trenching, trenchless technology, digging, ditching, dredging, drilling, auguring, tunneling, moleing, scraping, cable or pipe plowing and driving, wrecking, razing, rendering, moving, or removing any structure or mass of material, but does not include underground or surface mining operations or related activities or the tilling of soil for agricultural purposes or for domestic gardening. Further, for purposes of this article, the terms "excavate", and "excavation" do not include routine maintenance of paved public roads or highways, where all work is confined to the traveled portion of the paved public way and does not exceed a depth greater than 12 inches measured from the top of the paved road surface.

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"Excavator" means any person intending to engage or engaged in excavation or demolition work.

"Fund" or "Underground Damage Prevention Fund" means the fund created in §24C-1-2b of this code.

"Member" means a member of the one-call system as authorized by this article.

"One-call system" means a communication system that receives notification from excavators of intended excavation work and prepares and transmits such notification to operators of underground facilities in accordance with this article.

"Operator" means any person who operates an underground facility.

"Person" means any individual, firm, joint venture, partnership, corporation, association, state agency, county, municipality, cooperative association, or joint stock association, and any trustee, receiver, assignee, agency, or personal representative thereof.

"Powered equipment" means any equipment energized by an engine, motor or hydraulic, pneumatic, or electrical device and used in excavation or demolition work.

"Underground facility" means any underground pipeline facility owned by a utility and regulated by the Public Service Commission, which is used in the transportation or distribution of gas, oil, or a hazardous liquid; any underground pipeline facility, owned by a company subject to the jurisdiction of the federal energy regulatory commission, which is used in the gathering, transportation, or distribution of gas, oil, or a hazardous liquid; any underground production or gathering pipeline for gas, oil, or any hazardous substance with a nominal inside diameter in excess of four inches and that is not otherwise subject to one-call reporting requirements under federal or state law; any underground facility used as a water main, storm sewer, sanitary sewer, or steam line; any underground facility used for electrical power transmission or distribution; any underground cable, conductor, waveguide, glass fiber, or facility used to transport telecommunications, optical, radio, telemetry, television, or other similar transmissions; and any facility used in connection with any of the foregoing facilities on a bridge, a pole or other span, or on the surface of the ground, any appurtenance, device, cathodic protection system, conduit, protective casing, or housing used in connection with any of the foregoing facilities: *Provided*, That "underground facility" does not include underground or surface coal mine operations.

"Workday" means any day except Saturday, Sunday, or a federal or state legal holiday.

"Work site" means the location of excavation or demolition work as described by an excavator, operator, or person or persons performing the work.

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§24C-1-2a. Underground Facilities Damage Prevention Board.

(a) There is hereby created an Underground Facilities Damage Prevention Board for the purpose of enforcing this article.

(b) It is the intent of the Legislature that the board and its enforcement activities shall not be funded by appropriations from the state budget. All civil penalties imposed and collected by the board shall not revert to the General Fund but shall be retained for the exclusive use of the board pursuant to this article.

(c) The board shall have the power and authority to investigate damage to underground facilities caused by an excavator, make findings, assess penalties and require training in accordance with §24C-1-9 of this code, and to obtain liens on the real and personal property of those persons who have failed to pay penalties assessed by the board. The board may consult with the Public Service Commission as needed regarding investigation of damages to underground facilities under its jurisdiction. The commission shall collect from the board any expenses incurred during the consultation. The board shall furnish to the commission at least annually electronic copies of all reports of investigations and enforcement activities conducted by or on behalf of the board.

(d) The board shall be composed of 10 voting members who shall be appointed by the Governor to serve four-year terms in accordance with West Virginia law. The board shall be empowered to establish one or more subcommittees in performing its tasks. Appointments to the board shall be made as follows:

(1) The President of Miss Utility of West Virginia or the president’s designee;

(2) One representative of the excavation, utility, or site construction industry;

(3) One representative of the natural resource extraction industry;

(4) The Executive Director of the West Virginia Municipal League or its designee;

(5) The Executive Director of the West Virginia Rural Water Association or its designee;

(6) One representative of the natural gas transmission or distribution or hazardous liquid industry;

(7) One representative of the electric, cable, or communications industry;

(8) One representative of the privately owned water and/or wastewater services industry;

(9) One representative from the general public; and

(10) The Chairman of the Public Service Commission or the chairman’s designee.

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(e) The board shall meet not less than twice per year, with a date and time to be set by its chairman upon at least five days' notice provided by United States mail, electronic mail, or personal delivery to every board member. The board may hold meetings and vote by telephone, video connection, computer, or other electronic means.

(f) Six members of the board shall constitute a quorum, and a majority vote of those present and voting at any one meeting shall be necessary to transact business.

(g) In the absence of willful misconduct, the members of the board shall be immune, individually and jointly, from civil liability for any act or omission done or made in the performance of their duties while serving as members of the board.

(h) Members of the board shall serve without compensation and without reimbursement for expenses. Nothing contained in this section shall be construed to prevent any sponsoring organization for compensating its representative on the board for salary, expenses, or other compensation considered as a condition for their employment.

(i) Every two years, the board shall elect a chair and other officers from among its members as the board deems necessary.

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§24C-1-2b. Underground Damage Prevention Fund.

(a) There is hereby created an Underground Damage Prevention Fund to be administered and used by the Underground Damage Facilities Prevention Board for the purpose of carrying out its duties under this article. All sources of funds collected by the board under this article, including, but not limited to, grants, assessments, and civil penalties collected pursuant to this article, shall be deposited into the fund. Any moneys remaining in the fund at the end of the fiscal year shall not revert to the General Fund, but shall remain in the fund for the exclusive use of the board. The expenditure of moneys in the fund shall be at the discretion of the board to carry out its duties under this article. Excess funds shall be used for purposes related to damage prevention, including, but not limited to, public awareness programs, training, and educational programs for excavators, operators, line locators, and persons to reduce the number and severity of violations of this article.

(b) The Public Service Commission or the board, or both, may apply for available grants, including those awarded by the United States Department of Transportation's Pipeline and Hazardous Materials and Safety Administration. The board shall comply with any restrictions placed on any grant received from a government agency. Grants may be used to fund the cost of services associated with this article or for the purposes stated in each grant.

(c) In the event that the annual cost of services associated with this article exceed the funds available in the fund, the annual operating costs shall be apportioned in a proportional manner and collected by the one-call system from the operators in an amount equal to the amount necessary to offset the cost of investigative and administrative services. Under no circumstances shall any operating costs or liabilities of the board be ultimately deducted or paid from Public Service Commission special revenue funds.

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§24C-1-3. Duties and responsibilities of operators of underground facilities; failure of operator to comply.

(a) Each operator of an underground facility in this state shall be a member of a one-call system for the area in which the underground facility is located.

(b) Each member shall provide the following information to the one-call system on forms developed and provided for that purpose by the one-call system:

(1) The name of the member;

(2) The geographic location of the member's underground facilities as prescribed by the one-call system; and

(3) The member's office address and telephone number to which inquiries may be directed as to the locations of the operator's underground facilities.

(c) Each member shall revise in writing the information required by §24C-1-3(b) of this code as soon as reasonably practicable, but not to exceed 180 days, after any change.

(d) After the one-call system receives notification from an excavator of a specific area where excavation or demolition will be performed, the one-call system shall notify the operators of underground facilities who shall do the following within 48 hours, excluding Saturdays, Sundays, and legal federal or state holidays (such 48 hour period beginning at 12:00 a.m. of the day following receipt of the notification by the one call system):

(1) Respond to such notification by providing to the excavator the approximate location, within two feet horizontally from the outside walls of such facilities, and type of underground facilities at the site, using;

The color code prescribed in §24C-1-6 of this code when providing temporary marking of the approximate location of underground facilities; or

(2) Notify the excavator that the operator did not leave a temporary marking of the location of underground facilities because there are no lines in the area of the proposed excavation or demolition.

(3) Notwithstanding the provisions of §24C-1-3(d) of this code, the 48-hour period for required action may be waived if the excavator and operator mutually agree to an extended response time, which mutual agreement shall be confirmed in writing or by electronic record.

(e) Failure of an operator who is required to be a member to comply with the provisions of this article may not prevent the excavator from proceeding but shall bar the operator from recovery of any costs associated with damage to its underground facilities resulting from such failure, except for damage caused by the willful or intentional act of the excavator.

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(f) Notwithstanding the provisions of §24C-1-3(e) of this code, a member is not barred from recovery under §24C-1-3(e) of this code for failure to comply with §24C-1-3(d)(1) of this code, but shall have his or her right to recover, if any, determined by common law, if the operator responded to one-call notification in a timely manner, but was unable to accurately locate lines because such lines were nonmetallic and had no locating wire or other marker.

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§24C-1-4. Qualifications for certification and responsibilities of a one-call system.

(a) In order to qualify for certification as a one-call system under the provisions of this article, a one-call system shall be operated on a not-for-profit basis but may be operated by any one or more of the following:

(1) A person who operates underground facilities;

(2) A private contractor;

(3) A state or local government agency; or

(4) A person who is otherwise eligible under state or federal law to operate a one-call system.

(b) A one-call system which complies with the requirements set forth in subsection (a) of this section shall be certified by the Public Service Commission for the area in which it will conduct operations prior to commencing such operations: Provided, That any one-call system in operation prior to January 1, 1996, may not be required to be so certified. The Public Service Commission shall certify a one-call system where the public interest so requires and when such system complies with the provisions of this article.

(c) A one-call system operating under the provisions of this article shall:

(1) Receive and record information from excavators about intended excavation or demolition activities;

(2) Promptly transmit to its affected members the information received from excavators about intended excavation or demolition;

(3) Maintain a record of each notice of intent to engage in excavation or demolition, provided pursuant to the requirements of section five of this article;

(4) Upon receipt of notification of intended excavation or demolition from an excavator, inform the person making such notification of the names of all members having underground facilities in the vicinity of the intended work site; and

(5) Assign a serial number for each notification received from an excavator and provide that serial number to both the excavator and affected members.

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§24C-1-5. Duties and responsibilities of excavators; failure of excavator to comply; civil penalties.

(a) Except as provided in section seven of this article, any person who intends to perform excavation or demolition work shall:

(1) Not less than forty-eight hours, excluding Saturdays, Sundays and federal or state legal holidays, nor more than ten work days prior to the beginning of such work, notify the one-call system of the intended excavation or demolition and provide the following information:

(A) Name of the individual making the notification;

(B) Company name;

(C) Telephone number;

(D) Company address;

(E) Work site location; including county, nearest city or town, street location, nearest cross street and landmarks or other location information;

(F) Work to be performed;

(G) Whether or not use of explosives is planned;

(H) Name and telephone number of individual to contact; and

(I) Starting date and time;

(2) Notify the one-call system not less than twenty-four hours, excluding Saturdays, Sundays and federal or state legal holidays, in advance of any change in the starting date or time of the intended work; and

(3) Instruct each equipment operator involved in the intended work:

(A) To perform all excavation or demolition work in such a manner as to avoid damage to underground facilities in the vicinity of the intended work site, including hand digging, when necessary;

(B) To report immediately any break or leak in underground facilities, or any dent, gouge, groove or other damage to such facilities, made or discovered in the course of the excavation or demolition and to allow the operator a reasonable time to accomplish necessary repairs before continuing the excavation or demolition in the immediate area of such facilities;

(C) To immediately alert the public at or near the work site as to any emergency created or discovered at or near such work site;

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(D) (i) To report immediately to the appropriate medical, law-enforcement and fire prevention authorities any break or leak in underground facilities, or any dent, gouge, groove or other damage to such facilities, made or in the course of the excavation or demolition which creates an "emergency' as defined in subdivision (1), subsection (c), section two of this article. For purposes of this subdivision, an excavator calling the "911" emergency telephone number satisfies this requirement; or

(ii) To notify the one-call system, within twenty-four hours, of any break or leak in underground facilities, or any dent, gouge, groove or other damage to such facilities, made or in the course of the excavation or demolition which does not create an "emergency" as defined in subdivision (1), subsection (c), section two of this article.

(E) To maintain a clearance between each underground facility and the cutting edge or point of any powered equipment, taking into account the known limit of control of such cutting edge or point, as may be reasonably necessary for the protection of such facility;

(F) To protect and preserve markers, stakes and other designations identifying the location of underground facilities at the work site; and

(G) To provide such support for underground facilities in the location of the work site, including during backfilling operations, as may be reasonably necessary for the protection of such facilities. Temporary support and backfill shall provide support for such facilities at least equivalent to the previously existing support.

(b) If any underground facility is damaged by a person who has failed to comply with any provision of this section, that person is liable to the operator of the underground facility for the total cost to repair the damage in an amount equal to that as is normally computed by the operator, provided that the operator:

(1) Is a member of the one-call system covering the area in which the damage to the facility takes place; and

(2) Upon receiving the proper notice in accordance with this article, has complied with the provisions of section three of this article: Provided, That a member is not barred from recovering costs solely for his or her own failure to comply with subdivision (1), subsection (d) of said section, but shall have his or her right to recover, if any, determined by common law, if the conditions of subsection (f) of said section are met.

The liability of such person for such damage is not limited by reason of this article.

(c) If any excavation or demolition causes damage to any underground facilities owned by an operator who is not required to be a member of a one-call system and who is not a member of such a system at the time of damage, the liability of the person causing damage shall be determined solely by applicable principles of common law.

(d) If any excavation or demolition causes damage to any other person or property, the

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liability of the person causing damage shall be determined solely by applicable principles of common law.

(e) Any person who fails to notify the one-call system prior to performing any excavation or demolition, or fails to follow the reporting provisions of this section, or who violates any other provision of this section, shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $5,000.

(f) Nothing in this chapter may be construed to restrict or expand the rights, duties and liabilities provided in common law or by other provisions of this code of an operator who is not required to be a member of a one-call system and who is not a member of such a system.

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§24C-1-6. Standard color code for temporary markings.

Temporary marking provided by operators and excavators to indicate the approximate location of underground facilities and work site boundaries shall utilize the following color code per facility type:

(1) WHITE: Proposed excavation.

(2) PINK: Temporary survey markings.

(3) RED: Electric power lines, cables, conduit, and lighting cables.

(4) YELLOW: Gas, oil, steam, petroleum, or gaseous materials.

(5) ORANGE: Communication, alarm or signal lines, cables, or conduit.

(6) BLUE: Potable water.

(7) PURPLE: Reclaimed water, irrigation, or slurry lines.

(8) GREEN: Sewer or drain lines.

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§24C-1-7. Exceptions during emergencies.

(a) Compliance with the notification requirements of §24C-1-5 of this code is not required of any person engaging in excavation or demolition in the event of an emergency: Provided, That the person gives oral notification of the emergency work as soon as reasonably practicable to the one-call system.

(b) During any emergency, excavation or demolition may begin immediately: Provided, That reasonable precautions are taken to protect underground facilities: Provided, however, That such precautions may not serve to relieve the excavator from liability for damage to underground facilities. The one-call system shall accept all emergency notifications and shall provide immediate notice to the affected members and indicate the emergency nature of the notice.

(c) Repair or replacement of an existing traffic control device at the existing location and existing depth shall be considered an emergency, and compliance with the notice requirements of this section shall not be required of any local or state government responding to the emergency repair or replacement of a traffic control device.

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§24C-1-8. Construction; sovereign immunity.

(a) This article shall be liberally construed so as to effectuate the public policy set forth in section one of this article.

(b) Nothing in this article may be construed as imposing liability upon a state agency from which the agency is otherwise immune.

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§24C-1-9. Civil enforcement.

(a) Any person who violates this article by failure to notify the one-call system, or who violates the rules proposed or promulgated under this article, shall be subject to civil penalty as follows:

(1) For a first violation, the violator shall complete a course of training concerning compliance with this article as determined by the board;

(2) For a second violation occurring within a five-year period, the violator shall complete a course of training concerning compliance with this article as determined by the board or pay a civil penalty in an amount set by the board, not to exceed $500 per incident, or both;

(3) For a third or subsequent violation occurring within a five-year period, the violator shall pay a civil penalty in an amount set by the board, not to exceed $2,500 per incident; and

(4) Notwithstanding this section, if any violation was the result of gross negligence or willful or wanton misconduct as determined by the board, the board shall require the violator to complete a course of training concerning compliance with this article as determined by the board and pay a civil penalty not to exceed $5,000 per incident.

(b) Any person who is required to complete a course of training under this section shall be responsible for the cost of the training. As used in this section, "course of training" means training developed by or under the direction of the board.

(c) Any excavator who violates this article by failing to notify the one-call system of the intended excavation or demolition may be required to cease work on any excavation, or not start a proposed excavation, until the excavator complies with this article.

(d) Nothing in this article shall limit any person’s right to pursue any additional civil remedy otherwise allowed by law.

(e)(1) If the person to whom the citation is issued under this section does not pay the citation or submit to training as ordered or both, within 30 days, the board shall appoint a hearing officer to conduct a hearing and issue an initial order pursuant to the State Administrative Procedures Act. The hearing shall be held at the time and place set forth in the citation notice of hearing in the county where excavation referenced in the citation occurred unless otherwise agreed to by the person to whom the citation was issued.

(2) A person aggrieved by the final order may, within 30 days, file a petition for judicial review by the intermediate court of appeals pursuant to §29A-1-1 *et seq.* of this code.

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§24C-1-10. Scope of authority.

Nothing in this article shall restrict or expand the jurisdiction of the Public Service Commission.

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§24C-1-11. Underground utilities to be locatable.

All underground facilities owned by an operator that are installed on or after July 1, 2018, shall be installed in a manner that will make those underground facilities locatable using a generally accepted locating method.

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